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# SEX-BASED DRESS CODES AND EQUAL PROTECTION IN PUBLIC SCHOOLS

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## I. INTRODUCTION

Imagine the following: Middleton Middle School, a public school in a small, rural community, faces falling test scores, rising dropout rates, and distressing increases in gang activity. In response, Principal Patricia and Superintendent Steve institute a “professional dress” code, requiring all students to dress in attire “fit for young men and women in a professional workplace.” Boys must wear ties and jackets, and girls must wear work-appropriate dresses or women’s pantsuits. The program has two goals: to prepare students in the standards of dress and grooming expected in the workplace, and to reinforce values of discipline and hard work by encouraging students to think of education as their job. A uniform subsidy provides for children already receiving free school lunches and the school sets aside additional funds for other children whose parents request assistance to purchase clothes.

Timothy Truant, emulating the fashion-sense of his favorite rock-and-roll band, The Troublemakers, comes to school in a shirt, tie, and knee-length skirt. Timothy knows that the dress code prohibits his outfit, but decides not to follow the rules because “that’s rock and roll.”

At school, Teacher Ted pulls Timothy aside and asks him why he is dressed inappropriately. “Because this is what looks cool,” Timothy replies. Teacher Ted sends him to Principal Patricia’s office, where she tells him to change or go home. Timothy Truant asks why it is okay for girls to dress a certain way but not boys. Principal Patricia replies, “Because that is the way young men and women are expected to dress in a professional setting, and we want you to have a professional attitude toward your education.”

Timothy Truant refuses to change his clothes and Principal Patricia calls his parents to her office. She explains that Timothy will not be permitted to attend school until he conforms to the dress code. Timothy refuses and vows to fight the decision. Soon after, Principal Patricia and

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Teacher Ted are served with a copy of the complaint in *Timothy Truant v. Middleton Middle School*. The complaint alleges that the school's dress code violates Timothy's rights under the Equal Protection Clause by treating him, and every other boy student at Middleton Middle, differently than the girls at the same school and in the same grade.

Cases like this play out in local communities across the nation, and schools are increasingly forced to back down from sensible restrictions on student appearance because of political pressure and the lack of clear precedent.<sup>1</sup> For decades, schools have faced legal challenges to dress codes, launched by children, their parents, or well-meaning advocacy-rights groups.<sup>2</sup> These legal challenges strain state and local resources and distract educators from their primary mission: educating children.

The threat of a lawsuit is especially chilling because teachers and administrators may be named as individual defendants for upholding a dress code challenged as unconstitutional.<sup>3</sup> Not only could Teacher Ted or Principal Patricia become responsible for damages if the dress code is held unconstitutional,<sup>4</sup> but in many cases they would also be well-advised to seek their own legal counsel. This is a daunting expense on a teacher's salary. Instead of preparing boys and girls to dress and groom themselves in the manner expected of young men and women in their community, the threat of litigation forces teachers and administrators to develop sex-neutral dress codes.<sup>5</sup>

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1. See e.g. Mary Julia Kuhn, *Student Dress Codes in the Public Schools*, 25 J. L. & Educ. 83, 97 (1996) (explaining the story of Jake Ricketts, a male student with numerous piercings and jewelry who, when told his attire was inappropriate, changed into a suit and met with the principal. The principal, upon learning that Jake's parents had hired a lawyer, planned to sue, and courted the support of "people who counted," allowed Jake to dress as he pleased. Although Jake certainly learned a real-world lesson in politics, he also learned a lesson in privilege. No rules were changed as a result of Jake's confrontation with the principal; they were simply not applied to him.).

2. See e.g. *Hines v. Caston Sch. Corp.*, 651 N.E.2d 330 (Ind. App. 1995) (lawsuit challenging a school policy against earrings on boys, but not girls, on equal protection grounds); Joe Carlson, *District Rebuts Lawsuit From Transgender Student*, [http://www.nwtimes.com/news/local/district-rebutts-lawsuit-from-transgender-student/article\\_ce6c53b3-fb19-5b5c-8052-dbf603d2fe3e.html](http://www.nwtimes.com/news/local/district-rebutts-lawsuit-from-transgender-student/article_ce6c53b3-fb19-5b5c-8052-dbf603d2fe3e.html) (Feb. 20, 2008) (explaining a recent example of a boy alleging a right to wear a dress, Ragen Hatcher, attorney for the district, wrote, "Logan has failed to identify how a male student has a constitutionally protected right to wear a dress to a prom.").

3. 42 U.S.C.A. § 1983 (2006).

4. See *id.*; see also *Wood v. Strickland*, 420 U.S. 308, 322 (1975) ("[I]n the specific context of school discipline, we hold that a school board member is not immune from liability for damages under [§] 1983 if he [or she] knew or should have known that the action he [or she] took . . . would violate the constitutional rights of the student affected.").

5. David L. Hudson, Jr., *Clothing, Dress Codes & Uniforms*, First Amend.Center [http://archive.firstamendmentcenter.org/speech/studentexpression/topic.aspx?topic=clothing\\_dress\\_codes\\_uniforms](http://archive.firstamendmentcenter.org/speech/studentexpression/topic.aspx?topic=clothing_dress_codes_uniforms) (last updated Jan. 4, 2011); Linda Lumsden, *Uniforms and Dress-Code*

Why do schools and teachers face this problem?<sup>6</sup> Since the Supreme Court decided in 1979 that the Equal Protection Clause forbids invidious government discrimination based on sex,<sup>7</sup> schools have faced an unclear legal landscape. Is every instance of differential treatment of the sexes, including dress codes and separate locker rooms, considered discrimination requiring an “exceedingly persuasive justification”? Alternatively, should courts address a threshold question of whether *differential* treatment rises to the level of *discriminatory* treatment?

This Article proposes that courts should apply precisely such a threshold question in the form of the “unequal burden” test that courts already use to review sex-based dress codes challenged under the Civil Rights Act. As this Article will demonstrate, the Supreme Court has acknowledged that treating the sexes equally does not require treating them identically.<sup>8</sup> Yet current law imposes a heavy burden on schools to justify any rule that dares to differentiate between boys and girls.<sup>9</sup> Litigation against dress codes for acknowledging that boys are boys and girls are girls is a triumph of syllogism over sense and conflicts with established law as applied to adults.<sup>10</sup> Because local self-government is an essential element of liberty, especially in the determination of what traditions and mores will pass from one generation to the next, it should be as free as possible from federal judicial interference. A limiting test is necessary—one that will reduce the scrutiny that federal courts bring to equal protection claims against school dress

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*Policies*, Educ. Resource Info. Center, U.S. Dept. of Educ., [http://www.education.com/reference/article/Ref\\_Uniforms\\_Dress/](http://www.education.com/reference/article/Ref_Uniforms_Dress/) (accessed Feb. 8, 2013).

6. Constitutional challenges to school dress codes are problems that are not constrained to the Equal Protection Clause. In our example, Timothy Truant might also have claimed violations of his First Amendment right to free expression, or his Fourteenth Amendment right to substantive due process. Those causes of action have given us a plethora of case law that merits examination in other notes and articles. However, this Article will focus exclusively on challenges based on claims of sex-based discrimination under the Equal Protection Clause.

7. See generally *Personnel Adminstr. of Mass. v. Feeney*, 442 U.S. 256 (1979).

8. See *infra* nn. 31-33 and accompanying text.

9. A caveat is warranted here: this Article assumes *arguendo* that human beings may be placed in one of two, readily identifiable categories: male or female. This should not be interpreted as a stance for or against the legitimacy of multisexual or transsexual persons. The unequal burden analysis proposed is simply inapplicable to those cases, because the issue in those cases is whether the law will recognize a person’s chosen sexual identity, not whether the law treats individuals unequally because of their sex. For example, if Timothy Truant wore a dress because he saw himself as Tina Truant, and wanted the law to recognize him as a female, his equal protection claim would not be that he was discriminated against *as a boy*, but *as a girl in a boy’s body*. Thus, Tina Truant would be in a third category, that of a girl in a boy’s body, claiming a right to be treated equally with other girls. In such a case, whether a dress code unequally burdens multisexual or transsexual persons is unlikely to be at issue. For an example of case law on point, see *infra* n. 96.

10. See *infra* pt. IV.

codes. By applying the unequal burden test to school dress codes, courts can determine whether the treatment of the sexes is discriminatory, and thus requiring justification, or merely different, and thus, non-justiciable.<sup>11</sup>

Part II of this Article will review the current state of the law as applied to sex-based dress codes in public schools. Part III will examine the Supreme Court's current interpretation of the Equal Protection Clause as it applies to the sexes and the implications for sex-based dress codes. Part IV will examine the treatment of dress and grooming codes applied to adults in the workplace. Part V will propose applying the unequal burden test already applied to adults in the workplace to sex discrimination claims under the Equal Protection Clause. Part VI will examine critiques and challenges to this approach.

## II. SEX-BASED DRESS CODES IN PUBLIC SCHOOLS

The term "sex-based dress code" includes limitations on dress, both proscriptive—such as forbidding boys, but not girls, from wearing skirts—and prescriptive—such as requiring boys, but not girls, to wear neckties. Because these dress codes involve different treatment based on sex, they must face some degree of scrutiny under the Equal Protection Clause.<sup>12</sup> Sometimes, the challenges involve transgender students, but more frequently, they involve students who simply have a different fashion sense from that of school administrators.<sup>13</sup> Their desire to express individuality through choice of clothing necessarily conflicts with the schools' desire to enforce a level of uniformity through a dress code. These Equal Protection Clause challenges reflect a rejection of the idea that societal mores and traditions have a place in public education. The American Civil Liberties Union (ACLU) called a young man who wore a skirt to school "courageous" for "defying societal norms."<sup>14</sup> But there is substantial debate amongst educators (and parents) about whether the purpose of a school should be to teach some societal norms and mores.<sup>15</sup> Elected school board members, rather than judges, should decide this debate. If students who defy school policies are told they are courageous and entitled, schools can-

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11. See William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 138 (1988) ("A theory that the state should treat all people equally cannot mean that the state may never treat two people differently, for such a theory would mean the end of all law.").

12. Jennifer L. Greenblatt, *Using the Equal Protection Clause Post-VMI to Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. Davis J. Juv. L. & Pol'y 281, 287 (2009).

13. See *supra* nn. 1-2; see *infra* nn. 14-24 and accompanying text.

14. ACLU, *ACLU of New Jersey Helps Protesting Student 'Skirt' School's No-Shorts Policy*, <http://www.aclu.org/free-speech/aclu-new-jersey-helps-protesting-student-skirt-schools-no-shorts-policy> (Jan. 25, 2006) [hereinafter *ACLU*].

15. See e.g. Stacy A. Teicher, *'Social Norms' Strategy Aims to Tame Bullying*, <http://www.csmonitor.com/2206/0817/p15s02-legn.html> (Aug. 17, 2006).

not function as a means to instruct girls and boys in the manners expected of ladies and gentlemen.

Examples of frivolous challenges to reasonable dress codes abound, usually brought by incensed students and well-meaning civil rights groups. In a letter threatening a lawsuit against a school and its administrators, the ACLU told a Florida school that requiring girls to wear dresses to a formal ceremony violated the Constitution: “Differential treatment based upon sex is constitutional only if supported by [a] compelling governmental interest, and there is certainly no compelling governmental interest in forcing girls to wear dresses.”<sup>16</sup> Fearing legal action, the school backed down and allowed girls to wear pants or slacks despite a longstanding tradition.<sup>17</sup> In another case, a New Jersey school stopped enforcing a dress code that said boys could not wear skirts or dresses after the ACLU threatened a lawsuit.<sup>18</sup> In a letter addressed to the New Jersey School, the ACLU stated: “[B]ecause the policy allows students to wear skirts, all students – not just girls – should be able to wear skirts.”<sup>19</sup> When schools refuse to back down, they face uncertain results in federal courts.<sup>20</sup> One federal judge in Indiana upheld a school’s boys-only ban on earrings;<sup>21</sup> yet another federal judge in the same state ordered a school to allow a boy to attend his prom in a dress.<sup>22</sup> In Virginia, a federal judge ordered a school to allow a girl to attend her high school graduation in a suit.<sup>23</sup>

These challenges are successful because of the lack of clear precedent regarding the applicability of the Equal Protection Clause to school dress codes, as federal appellate courts have offered little help in determining whether a sex-based dress code constitutes a form of discrimination. Yet, the ACLU did not pluck the “compelling governmental interest” requirement out of the ether.<sup>24</sup> It is unclear whether the Equal Protection Clause protects the right to cross-dress, or whether a dress code constitutes discrimination, but the Supreme Court has laid out a clear test for when schools may discriminate based upon sex.<sup>25</sup>

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16. ACLU, *At ACLU Urging, FL High School Ends Discriminatory Graduation Dress Code*, <http://www.aclu.org/free-speech/aclu-urging-fl-high-school-ends-discriminatory-graduation-dress-code> (May 23, 2002) [hereinafter *Graduation Dress Code*].

17. *Id.*

18. ACLU, *supra* n. 14.

19. *Id.*

20. ACLU, *Judge OKs Teen’s Prom Outfit* [http://www.aclu.org/free-speech\\_lgbt-rights/judge-oks-teens-prom-outfit](http://www.aclu.org/free-speech_lgbt-rights/judge-oks-teens-prom-outfit) (May 7, 2009) [hereinafter *Prom Outfit*].

21. *Hines v. Caston Sch. Corp.*, 651 N.E.2d 330, 335 (Ind. App. 1995) (upholding a school policy against earrings on boys, but not girls, on equal protection grounds).

22. *Prom Outfit*, *supra* n. 20.

23. *Id.*

24. *Graduation Dress Code*, *supra* n. 16.

25. *U.S. v. Va.*, 518 U.S. 515, 532-34 (1996).

## III. SEX DISCRIMINATION IN THE SUPREME COURT

Initially, challenges to sex-based discrimination under the Equal Protection Clause triggered only rational-basis review.<sup>26</sup> It was not until 1979, in *Personnel Administr. of Mass. v. Feeney*,<sup>27</sup> that the Court hinted at a heightened standard of review for discrimination based on an individual's sex.<sup>28</sup> In *Feeney*, the Supreme Court used the phrase, "exceedingly persuasive justification," to describe the state's burden under the Equal Protection Clause when seeking to uphold "any state law overtly or covertly designed to prefer males over females."<sup>29</sup> Because the Court held in that case that the challenged law did not prefer males to females, the Court did not define what constituted an "exceedingly persuasive justification."<sup>30</sup> But the Court's language in *Feeney* hinted at a new meaning to the Equal Protection Clause, one that reflected the inherent equality of women and men, and kept pace with evolving societal beliefs.<sup>31</sup>

Interpreting the Constitution to accord with evolving societal standards—what is sometimes called the "living Constitution," has drawn the ire of originalists, who argue for fidelity to the Constitution's original meaning.<sup>32</sup> But societal beliefs are the only thing to change since passage of the Fourteenth Amendment—the law itself has changed to recognize gender equality; for instance, consider the passage of the Nineteenth Amendment and the subsequent hard-earned social, political, and economic gains women enjoyed during the twentieth century.<sup>33</sup> This has led a leading proponent of originalism to proclaim that "the Fourteenth Amendment no-caste rule, as modified by the implications that should be drawn from the Nineteenth Amendment, lead to the conclusion and doctrinal test that Justice Ginsburg argued for in *VMI*."<sup>34</sup>

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26. See *Reed v. Reed*, 404 U.S. 71, 76 (1971).

27. 442 U.S. 256.

28. *Id.* at 274.

29. *Id.* at 273.

30. See *id.*

31. *Id.* at 273.

32. See generally Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 319 (2012) (though Scalia and Garner refer to themselves as "textualists," they advocate interpreting terms according to their plain meaning at the time of adoption, one strain of "originalism").

33. U.S. Senate, *Is it True that Women in the United States Were Not Guaranteed the Right to Vote Until 1920?* [http://www.senate.gov/reference/common/faq/Women\\_Right\\_to\\_Vote.shtml](http://www.senate.gov/reference/common/faq/Women_Right_to_Vote.shtml) (accessed February 8, 2012); Kimberly M. Radek, *Women in the Twentieth Century and Beyond*, Ill. Valley Community College, [http://www2.ivcc.edu/gen2002/twentieth\\_century.htm](http://www2.ivcc.edu/gen2002/twentieth_century.htm) (last updated May 30, 2006).

34. Steven G. Calabresi and Julia T. Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1, 96 (2011).

In *United States v. Virginia (VMI)*,<sup>35</sup> the Supreme Court, in an opinion by Justice Ginsburg, elaborated upon what constituted an “exceedingly persuasive justification” for sex-based state discrimination.<sup>36</sup> The United States sued Virginia because the admission policy of the state-sponsored Virginia Military Institute (Institute) denied admission to women, regardless of their qualifications.<sup>37</sup> State-offered alternatives for women, the Court concluded, were “a ‘pale shadow’ of [the Institute] in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence.”<sup>38</sup> The Institute was a unique educational opportunity amongst those offered by the state and was an opportunity closed to women. Thus, the Court held that Virginia’s admission policy denied equal protection to women applicants.<sup>39</sup>

In so holding, the Court explained that it applied the “exceedingly persuasive justification” test.<sup>40</sup> The test has two principle components: (1) the classification must serve “important governmental objectives” and (2) the discrimination must be “substantially related to the achievement of those objectives.”<sup>41</sup> The requirement of an exceedingly persuasive justification, also termed “intermediate scrutiny,” burdens the state more heavily than the rational-basis test applied to unprotected classes.<sup>42</sup> The rational-basis test requires only that the government objective be *legitimate* and its relation to the discriminatory means be merely *rational*.<sup>43</sup> When applying the intermediate scrutiny test to schools, as it was in *VMI*, school administrators must demonstrate that their policies, rather than being arbitrary decisions, serve valid and important purposes.<sup>44</sup> In clear cases of discrimination, as in *VMI*, oversight of school codes and policies by the courts is essential to maintaining equality of the sexes under law.

The Court was concerned with the equality of legal, social, and economic opportunity.<sup>45</sup> But importantly, it did not subject all differences in

35. 518 U.S. 515 (1996).

36. *Id.* at 524.

37. *Id.* at 516.

38. *Id.* at 553.

39. *Id.* at 558.

40. *Id.* at 531; The test was also applied in *Miss. U. Women v. Hogan*, 458 U.S. 718 (1982), in which the Court held that a male applying to nursing school could not be denied admission based on his sex. *VMI*, however, remains the seminal case on the rights of men and women to equal treatment under the Equal Protection Clause.

41. *VMI*, 518 U.S. at 524 (emphasis added).

42. *Id.* at 570 (Scalia, A., dissenting).

43. *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

44. *U.S. v. Va.*, 518 U.S. at 570-71.

45. *Id.* at 534 (“[S]uch classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.”). As others have explored at length, this passage expresses a resounding rejection of sex-based castes. See generally Calabresi and Rickert, *supra* n. 34.

treatment based on sex to heightened review.<sup>46</sup> In fact, the Court took pains to emphasize that government may rationally and reasonably treat men and women differently.<sup>47</sup> “The heightened review standard our precedent establishes does not make sex a proscribed classification. . . . Physical differences between men and women, however, are enduring: ‘[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.’”<sup>48</sup>

In *VMI*, the Court dealt with a case of clearly substantive discrimination—the complete exclusion of women from a unique educational opportunity.<sup>49</sup> Although the Court clearly held that the Equal Protection Clause placed a heavy presumption against discrimination to the detriment of either sex, it provided schools with little guidance about when differential treatment crossed the line into a denial of equal protection.<sup>50</sup> Is wearing a dress or a necktie a legal, social, or economic right? If so, then every sex-based dress code<sup>51</sup> would constitute discrimination and require an “exceedingly persuasive justification.” If not, dress codes could still serve as pretextual discrimination—forcing girls to meet burdensome standards of dress that do not apply to boys, for instance, as a pretext to discourage their enrollment in certain schools or classes. Without clear guidance, lower courts have been hard-pressed to draw a meaningful line between rationally differential treatment and discrimination. Fortunately, existing case law on employment and sex discrimination provides a model judicial test.<sup>52</sup>

#### IV. SEX DISCRIMINATION AND EMPLOYMENT

In *Frank v. United Airlines, Inc.*,<sup>53</sup> the Ninth Circuit Court of Appeals considered a weight policy for airline stewards, which differed based on age, height, and sex.<sup>54</sup> Leslie Frank and several other airline stewardesses challenged United Airlines’ standard under Title VII of the Civil Rights Act of 1964 (Title VII).<sup>55</sup> The Ninth Circuit agreed with Frank’s argu-

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46. *Id.* at 533.

47. *Id.*

48. *Id.*

49. *Id.* at 553 (explaining the Institute was unique in its “range of curricular choices and faculty stature, funding, prestige, alumni support and influence.”).

50. *Id.* at 559.

51. And, as discussed in Part V, every public restroom!

52. See *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000); see *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, (9th Cir. 2006); see *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385 (11th Cir. 1998).

53. 216 F.3d 845 (9th Cir. 2000).

54. *Id.* at 847 (emphasis added).

55. *Id.* (explaining Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006), which provides, in relevant part: “It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to

ment that the airline's weight policy was far more stringent for women than for men.<sup>56</sup> Although biological differences between men and women might rationally lead to different weight policies, the court held that the weight policy used by United Airlines was substantially more stringent for stewardesses than for stewards.<sup>57</sup>

Had the weight policies differed in a rational manner, such as based on biological averages between men and women, the Ninth Circuit would not have struck it down. "[A]n appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment."<sup>58</sup> To distinguish between treatment that is merely different from that which is disparate, the Ninth Circuit looked to the burden placed on both men and women by the weight requirements.<sup>59</sup> The United Airlines standard allowed men to weigh as much as a large-framed man, whether large-framed or not; however, women could generally weigh no more than medium-framed woman.<sup>60</sup> Because the weight requirements were facially less favorable to women than to men, the court ruled that United Airlines' policy was a form of employment discrimination under Title VII.<sup>61</sup>

Instead of focusing on whether treatment of the sexes is literally identical, this unequal burden test looks to whether there is a substantial and unequal burden created by the different treatment of the sexes. The Ninth Circuit held that treatment that is ostensibly different, but not disparate, does not offend Title VII.<sup>62</sup> The panel based its conclusion on Congress' expressed intent to ensure equality of economic opportunity through Title VII.<sup>63</sup> But "[a] sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment *that must be justified*."<sup>64</sup>

The Ninth Circuit was not alone in holding that not every difference in appearance standards based on sex constituted discrimination.<sup>65</sup> Other

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discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

56. *Id.* at 847-48.

57. *Id.* at 854.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 855.

63. *Id.* at 855-56.

64. *Id.* at 855 (emphasis added).

65. See *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385 (11th Cir. App. 1998).

circuits have long applied the same unequal burden test.<sup>66</sup> In *Harper v. Blockbuster Entertainment Corp.*,<sup>67</sup> the Eleventh Circuit held that different grooming and hair standards in an employer's dress code, even when based solely on sex, are not discrimination for purposes of Title VII.<sup>68</sup> The court noted that *every other circuit* addressing whether sex-based dress and grooming standards constituted per se discrimination, made the same decision: absent an unequal burden, such standards did not constitute per se discrimination.<sup>69</sup> In employment cases, courts wisely limit findings of discrimination to situations where there is some form of the actual harm contemplated by Congress. This judicial restraint stands in stark contrast to school-dress-code cases, where courts have yet to adopt the unequal burden standard and apply it to equal protection analysis as a prerequisite to any requirement for an "exceedingly persuasive justification."

In *Jespersen v. Harrah's Operating Co.*,<sup>70</sup> the Ninth Circuit once again applied the unequal burden test to a claim of sex-based discrimination, this time at a Harrah's casino, which required female bartenders—but not male bartenders—to wear makeup.<sup>71</sup> The court's language was unequivocal and took note of the agreement amongst the circuit courts on the issue: "We have long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits."<sup>72</sup> With overwhelming unanimity,<sup>73</sup> the circuit courts of appeals have concluded that sex-based dress codes do not constitute discrimination under Title VII for reasons strikingly similar to those expressed in the Supreme Court's language in *VMI*. The *Jespersen* Court recognized that various courts held Title VII only forbade denying women and men equal eco-

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66. *Id.*

67. *Id.*

68. *Id.* at 1387.

69. *Id.* at 1388.

70. 444 F.3d 1104 (9th Cir. 2006).

71. *Id.* at 1105-06.

72. *Id.* at 1110; see also e.g. *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir. 1977); *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977); *Earwood v. Conl. S.E. Lines, Inc.*, 539 F.2d 1349, 1350 (4th Cir. 1976); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976) (per curiam); *Knott v. Missouri P. R.R. Co.*, 527 F.2d 1249, 1249 (8th Cir. 1975); *Willingham v. Macon Telegraph Publg. Co.*, 507 F.2d 1084, 1088 (5th Cir. 1975) (en banc); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896 (9th Cir. 1974); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1335-36 (D.C. Cir. 1973).

73. It should be noted that while the circuit courts have, indeed, been consistent in applying the unequal burden test, the decision in *Jespersen* was not unanimous, and many commentators continue to strongly object to its reasoning. *Jespersen*, 444 F.3d 1104, 1118 (Kozinski, J., dissenting) (noting that the choice between wearing makeup or losing one's job was not a choice faced by men at Harrah's); see also Deborah Zalesne, *Lessons From Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 Duke J. Gender L. & Policy 535, 541-43 (2007) (criticizing *Jespersen*). Thus, I do not mean to imply that there is unanimity among jurists or commentators, only a consistent majority.

conomic opportunities, while the *VMI* Court held the Equal Protection Clause forbade denial to women of an economic, social, and legal opportunity once reserved for men.<sup>74</sup>

The *Jespersen* Court went on to apply the unequal burden test, and it found that merely requiring women, and not men, to wear makeup did not constitute discrimination under Title VII.<sup>75</sup> Both sexes were required to look their “personal best,” and to meet traditional, sex-based grooming standards (for example, men were required to groom or shave their facial hair).<sup>76</sup> This unequal burden test was meant only to determine whether any discrimination occurred at all, and if so, employers could still offer a justification—just as schools may offer an “exceedingly persuasive justification” upon a finding of sex discrimination against students. As this Article will argue in Part V, it is logically consistent to apply this same threshold question to equal protection claims in schools before requiring schools to meet the “exceedingly persuasive justification” test.

#### V. A SOLUTION: APPLY THE UNEQUAL BURDEN TEST TO SCHOOLS

We have seen that schools face uncertainty under federal law due to a lack of clear guidelines for treating boys and girls differently under the Equal Protection Clause. By contrast, employers have a finite, simple test, which allows them to continue acknowledging real and traditional differences in men’s and women’s grooming and dress. This Article proposes a solution to the uncertainty faced by schools: application of a modified unequal burden test to all equal protection cases involving dress and grooming standards, including those at school.<sup>77</sup>

As applied to the Equal Protection Clause, the unequal burden test is modified to determine the level of constitutional scrutiny a court will apply, rather than ending the inquiry altogether. Courts would first use the unequal burden test to determine whether a dress code imposed an unequal burden on an economic, social, or legal opportunity. In the vast majority of cases, innocuous sex-based dress codes will not present an unequal burden, and courts will then apply only a rational-basis review. In rare instances where a sex-based dress code imposes an unequal burden—for example, requiring a student to wear a uniform that precludes her from

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74. *VMI*, 518 U.S. at 534.

75. *Jespersen*, 444 F.3d at 1110.

76. *Id.*

77. Some have suggested that the unequal burden test, designed to protect economic opportunities, might not protect social and legal opportunities. Because employment discrimination encompasses not only economic but also social opportunities, such as promotions and job assignments, the unequal burden test is equally applicable to protecting social opportunities. A legal opportunity is the ability to bring a claim, and I cannot conceive of a school dress code that could prevent someone from bringing an otherwise cognizable claim.

joining an activity—courts will apply intermediate scrutiny, and schools may prevail only if they assert an “exceedingly persuasive justification.” This ensures that truly invidious dress codes will be rendered invalid, while benign and rational sex-based dress codes will be upheld. Furthermore, by applying a more favorable test to sex-based dress codes that do not rise to a substantive level of discrimination, schools, administrators, and teachers can be confident they will prevail in such cases.

Although differences between statutes and constitutions make it counterintuitive to apply the same test to both Title VII and the Equal Protection Clause, under both laws the only relevant question is how the state treats those similarly situated. In fact, in sex-discrimination and sexual-harassment claims, courts *already* apply the same analysis to both Title VII and the Equal Protection Clause when state employees allege discrimination by government employers. In *Morris v. Oldham*,<sup>78</sup> the Sixth Circuit dismissed an employee’s equal protection claim for employment discrimination by a state government because the court had rejected her Title VII claim.<sup>79</sup> The court held that “[t]he showing a plaintiff must make to recover on an employment discrimination claim under Title VII mirrors that which must be made to recover on an equal protection claim under *section 1983*.”<sup>80</sup> This was not an isolated holding; the Sixth Circuit had long held that the standards overlap, and that when Section 1983 and the Equal Protection Clause “are used as parallel causes of action with Title VII, they require the same proof to show liability.”<sup>81</sup> In 2006, the Tenth Circuit agreed, holding that “the elements of a plaintiff’s case are the same” in disparate-treatment discrimination suits, whether brought under the Equal Protection Clause or Title VII.<sup>82</sup> Although these cases did not involve dress codes, they support the general proposition that courts may apply the same analysis to equal protection claims already applied to Title VII claims, as both protect the same substantive rights.<sup>83</sup>

Yet when Equal Protection Clause and Title VII causes of action are divorced, the courts disregard the unequal burden analysis.<sup>84</sup> Perhaps because schoolchildren have no cause of action under Title VII, courts have never used the unequal burden test to review sex-based school dress

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78. 201 F.3d 784 (6th Cir. 2000).

79. *Id.* at 794.

80. *Id.* (emphasis added).

81. *Risinger v. Ohio Bureau of Workers’ Compen.*, 883 F.2d 475, 483 (6th Cir. 1989) (quoting *Hamilton v. Rodgers*, 791 F.2d 439, 442 (5th Cir. 1986)). A note on the bracketed reference to the Equal Protection Clause: the court’s precise language referred to §§ 1981 and 1983, which are the statutes authorizing constitutional claims against the states and the federal government, the claims at issue were based on the Equal Protection Clause.

82. *Maldonado v. City of Altus*, 433 F.3d 1294, 1307 (10th Cir. 2006).

83. Title VII is intended to prevent discrimination by private employers, and the Equal Protection Clause is intended to prevent the same discrimination by government.

84. See *supra* nn. 81-86 and accompanying text.

codes, notwithstanding that in other cases, the showing required for both equal protection claims and Title VII claims *is the same*.<sup>85</sup> Since the essential elements of the claims are identical, it follows that the behavior Congress intended to forbid employers from engaging in under Title VII is the same as the governmental behavior that the Supreme Court forbids under the Equal Protection Clause, namely “clos[ing] a door or den[ying] an opportunity to women (or to men).”<sup>86</sup> For instance, every circuit court of appeals to consider this issue found that it is not a Title VII violation to require short hair on men but not women.<sup>87</sup> Since a plaintiff’s required showing is the same under Title VII as under the Equal Protection Clause in sex-discrimination cases generally, it follows that it should be the same when challenging dress codes, whether in the school or in the workplace. When schools restrict the hairstyles of students or require certain standards of dress according to sex, such actions should not violate equal protection. Nonetheless, courts still have yet to apply the unequal burden test to sex-based challenges of school dress codes.

As this Article discussed in Part III, the *VMI* Court was concerned with the equality of economic, social, and legal opportunity for women.<sup>88</sup> The language of the opinion makes clear that *VMI*’s holding should not apply absent a denial of one of these substantive rights: “Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has *carefully inspected official action that closes a door or denies opportunity to women* (or to men).”<sup>89</sup> The Court did not hold that any form of different treatment is inherently suspect or illegal, only treatment that denies women an equal opportunity. The Court further emphasized that the issue is one of substance and not form: “[S]uch classifications may not be used, as they once were *to create or perpetuate the legal, social, and economic inferiority of women*.”<sup>90</sup> The Court’s language strongly implies that where differing sex-based treatment does not impact a legal, social, or economic interest, it should not trigger intermediate scrutiny.<sup>91</sup> Donning a dress or a necktie does not affect a legal,

85. *Id.*

86. *VMI*, 518 U.S. at 532.

87. See *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908 (2d Cir. 1996) (“[R]equiring short hair on men and not on women does not violate Title VII. . . . Every court of appeals that has considered this issue has agreed.” See *Barker*, 549 F.2d at 401; *Eanwood*, 539 F.2d at 1351; *Knott*, 527 F.2d at 1252; *Willingham*, 507 F.2d at 1092; *Baker*, 507 F.2d at 898, *cert. denied*, 422 U.S. 1046, 45 L. Ed. 2d 699, 95 S. Ct. 2664 (1975); *Dodge*, 488 F.2d at 1337.

88. See *supra* nn. 35-51 and accompanying text.

89. *VMI*, 518 U.S. at 532 (emphasis added).

90. *Id.* at 534 (emphasis added) (quotations and citations omitted).

91. This analysis is applicable only to sex-based discrimination. If a school required whites to wear skirts and all other races to wear pants, such a dress code would be subject to strict scrutiny (and would surely be invalidated). Just as segregated restrooms for men and

social, or economic interest; therefore, a dress code that requires only members of one sex to don a dress or necktie does not, alone, constitute discrimination under Title VII per the unequal burden test. In line with the Court's reasoning in *VMI*, these actions should not trigger the heightened scrutiny applied to sex-based discrimination cases under the Equal Protection Clause. Instead, dress and grooming standards should be subject only to rational basis review to prevent arbitrary and capricious application.

Returning to the original hypothetical, we see that the school has forbidden Timothy Truant from wearing a skirt. Timothy has not been restricted from attending school or participating in any activities, so long as he dresses appropriately. The ability to wear a skirt, in and of itself, is not an economic, social, or legal interest, nor does the inability to wear a skirt while at school unequally burden Timothy when compared to the girls at his school. Applying the unequal burden test—the same test that already applies to Teacher Tim and Principal Patricia, and will apply to Timothy Truant when he enters the workforce—Timothy would be unable to show that the dress code saddles him with an unequal burden. Because the school has a rational basis for imposing the dress code—preparing students in the standards of dress and grooming expected in the workplace—the court should rule for the school on summary judgment.

Of course, not every school dress code will be truly innocuous. For instance, if eight-year-old Tina Truant were required to wear a skirt, she might be told that modesty forbids her from playing on the monkey bars at recess. Although trivial to adults, monkey bars clearly represent an important educational<sup>92</sup> and social opportunity to an eight-year-old. Even if she was permitted to play on the monkey bars, wearing a skirt could make a reasonable eight-year-old<sup>93</sup> too uncomfortable to play on the monkey bars. The dress code therefore imposes an unequal burden on Tina Truant's ability to participate in an educational and social opportunity. Because the requirement to wear a skirt prohibited Tina from an educational and social opportunity, the school would then be required to proffer an "exceedingly persuasive justification" or else alter the dress code to be sex-neutral.<sup>94</sup> The constitutional protection afforded by the "exceedingly persuasive jus-

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women are upheld on the same justification for which racially segregated restrooms were struck down—the "discomfort" of one group with sharing a restroom with the other—so too, sex-based dress codes may and should be upheld. *Infra* n. 96 and accompanying text.

92. And because of the link between education and income, every primary educational opportunity is ultimately an *economic* opportunity.

93. Those readers with children will doubtless chuckle at the idea of a "reasonable" eight-year-old.

94. Unfortunately, the school could also remove the monkey bars and keep the dress code, though there is some question under current jurisprudence about the permissibility of equalizing down. See *Palmer v. Thompson*, 403 U.S. 217, 221–22 (1971) (upholding the closing of all public pools following desegregation order); but see *De La Cruz v. Tormey*, 582

tification” requirement is left undisturbed when dress codes cross the line into substantive discrimination.

Application of the unequal burden test to sex-based equal protection challenges takes the burden off the school and places it upon the student to show a substantive harm arising from the dress code.<sup>95</sup> In most cases, the difficulty in showing an undue burden when challenging an innocuous dress code will result in application of rational basis review and the grant of a motion for summary judgment in favor of the school. With an increased pleading standard for plaintiffs comes a decreased risk for defendant schools, faster judicial resolution, and lower costs for schools steadfast enough to endure such challenges. These schools will be able to resume teaching children about traditional, local standards of dress and grooming expected of young men and women in their community.

Such a rule recognizes that for the sexes, unlike other protected classes, equal treatment does not require identical treatment. Rules establishing sex-segregated restrooms have survived challenges for no greater justification aside from the fact that men using women’s restrooms made women feel uncomfortable.<sup>96</sup> Such a justification, applied to any other form of legal discrimination, for example race or creed, would not survive even a rational basis review. But it is because the sexes are different that “gender specific restrooms are universally accepted in our society.”<sup>97</sup>

Likewise, gender-specific clothing is universally accepted and commonplace, from workplace dress codes to codes for shopping at department stores. To prepare boys and girls to become productive young men and women, schools ought to be able to require their pupils to dress according to community—not federal—standards. Forcing schools to provide an “exceedingly persuasive justification” for every acknowledgement of the differences between boys and girls is too heavy a burden on local governments with scant resources. Instead, limiting the application of the

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F.2d 45, 55-56 (9th Cir. 1978) (interpreting *Palmer* as expressly limited to the question of whether motives, alone, may violate equal protection).

95. A second caveat is warranted here: Many inane constitutional challenges await schoolteachers and administrators pursuant to the First and Fourteenth Amendments. See *supra* n. 6.

96. *Etsitty v. Utah Transp. Auth.*, 2005 U.S. Dist. LEXIS 12634 at \*18 (D. Utah, 2005), *aff’d*, 502 F.3d 1215 (10th Cir. 2007) (noting females would likely feel “upset, embarrassed, and even concerned for their safety” if a male used the same restroom). One orthogonal but interesting issue, discussed *supra* n. 9, was the plaintiff’s sex. *Etsitty* was a preoperative transsexual with male genitalia, living his life as a female. The Court did not address directly the legal question of into which category, male or female, to place *Etsitty* for purposes of equal protection analysis, but the language of the court’s decision bears an implicit contradiction. The district court refers to *Etsitty* as “she” and “her” throughout the opinion, but the logic of its holding rests on the assumption that *Etsitty was not female*. Whether transsexuals such as *Etsitty* are legally male or belong to a third category, however, remains unclear.

97. *Etsitty*, 2005 U.S. Dist. LEXIS 12634 at \*18.

“exceedingly persuasive justification” test to those cases where a student has shown that a dress code places an unequal burden on one sex, rationally limits judicial review to cases of real, substantive discrimination.

## VI. CRITIQUES AND RESPONSES

Certainly, those who oppose all sex-based school dress codes will find this proposal abhorrent. As recently as 2009, one commentator seeking to invalidate sex-based dress codes argued that Title VII forbids “grooming requirements based on impermissible stereotypes about women.”<sup>98</sup> Such a definition of Title VII’s actual application is overbroad and ignores the extensive case law upholding sex-based differences in appearance and grooming standards, including makeup, which are justified by nothing more than social norms.<sup>99</sup> Those who dislike those norms may refer to them as “stereotypes,” and they would not be wrong, but unless those stereotypes negatively affect the economic opportunities afforded to either sex, every circuit court to consider the issue has held that Title VII does not forbid them.

Some commentators have argued that any requirement that men and women dress according to their sex inherently reinforces the subjugation of women.<sup>100</sup> But equality does not require men and women to wear gender-neutral sack cloth; contemporary history demonstrates that women need not reject feminine dress to be powerful.<sup>101</sup> The advances by American women in redefining their roles in marriage, child-rearing, politics, and business coexist with widespread recognition by our society that men and women are different in their tastes, interests, and desires—from sex-specific departments in clothing stores to cable television channels.<sup>102</sup> These differences have never denied either men or women a substantive right or interest. Sex-based dress codes merely reflect harmless differences in the expected dress for young boys and girls that already exist in society.

Perhaps the most obvious critique of the proposed approach, applying the unequal burden standard in cases involving the constitutionality of school dress codes, is that work and school are different. They involve a different power relationship. Workers arrive at their jobs voluntarily,

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98. Jennifer L. Greenblatt, *Using the Equal Protection Clause Post-VMI to Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. Davis J. Juv. L. & Policy 281, 285 (2009).

99. *Supra* nn. 53-75 and accompanying text.

100. Zalesne, *supra* n. 73 at 535-37.

101. For example, Golda Meir and Margaret Thatcher led nations in skirts and pearls. Brenda Barnes, Angela Brady, and Meg Whitman became CEOs of Fortune 500™ companies without dressing in drag.

102. At perhaps the apex of sex, television, power, and sartorial standards, two of the three network news shows have been anchored by women, a job long reserved for men, and yet neither Katie Couric nor Diane Sawyer has found it necessary to don a necktie.

exchanging their labor for paychecks. Students arrive at school because if they do not attend, they are truant and risk arrest. Therefore, others may argue that the compulsory nature of school should require additional protections.

Such criticism fails because the alleged difference is a mirage that vanishes upon inspection. Functions such as graduation<sup>103</sup> and prom<sup>104</sup> are voluntary in the same way that employment is voluntary. Of course choosing between a dress code and attendance may be a burden, but no greater than the burden on an employee who must choose between adhering to a dress code and unemployment. Furthermore, many students reach the age of majority before graduation, permitting them to drop out should they find a dress code unconscionable. This is not an easy choice, but it is essentially the same one faced by state employees.

More importantly, even if criticism is limited to dress codes that affect students actually compelled to attend school, that compulsion is irrelevant. It is certainly true that workers have a different relationship with their employers (even when that employer is the state) than students have with their school administrators. But that difference is relevant only to rights, such as the First Amendment, which governs the relationship between the government and an individual. The Equal Protection Clause, by contrast, governs the relationship between the government and an individual *relative to those similarly situated*. The same test may not be applied to restrictions on employee expression by state employers that we would apply to restrictions on student expression because of the aforementioned difference in the relationship (voluntary vs. compulsory). However, applying the same test in an equal protection context makes sense because the protections afforded one worker relative to a coworker should be equal to the same degree that protections afforded one student relative to other students should be equal. Students and workers might rationally receive different protection under the law because they are not similarly situated. Yet the unequal burden test does not compare students to workers; it compares workers to workers and students to students, within the same job and the same school, respectively. Because the relevant question in an equal protection analysis is how the law treats those similarly situated, the differences between students and workers are irrelevant. The same test may—and should—apply to both.

In addition, it is incongruous to grant students greater constitutional protection than their teachers. Under current law, Principal Patricia and Teacher Ted cannot decide to flout their employer's dress code.<sup>105</sup> What

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103. *Graduation Dress Code*, *supra* n. 16.

104. *Supra* n. 2.

105. See e.g. *Tardiff v. Quinn*, 545 F.2d 761, 764 (1st Cir. 1976) (upholding decisions to fire teacher for skirt that was too short); *E. Hartford Educ. Assn. v. Bd. Educ.*, 562 F.2d 838, 855 (2d Cir. 1976) (upholding a decision to fire teacher for failing to wear a tie).

educational message does it send to say that while Timothy Truant's teacher must obey a rule, Timothy may break it?

## VII. CONCLUSION

Young boys and girls like Timothy and Tina Truant need educators who will instruct them not only in reading, writing, and arithmetic, but also in the basic social mores required to function in a civil society. While the occasional cartoon rock-star outfit may have to wait for the weekend, students will be better equipped for their adult lives if public schools instruct them on social graces, including proper dress for young ladies and gentlemen. But without a clear and consistent judicial test to determine when basic standards of dress and grooming cross the line into substantive discrimination, schools will continue to be forced to argue the merits of such commonsensical rules as requiring girls, but not boys, to wear tops while swimming in the school pool, or requiring boys, but not girls, to wear ties at formal events. Application of the same unequal burden test used in the workplace makes good sense for public schools, and it would provide teachers and administrators with a shield against frivolous lawsuits. And limiting those lawsuits would free the courts to attend to the law, rather than playing the role of school principal of last resort.