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Using the Equal Protection Clause Post-  
VMI to Keep Gender Stereotypes Out of the  
Public School Dress Code Equation

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*Clothes make the man*—Mark Twain

*Take this pink ribbon off my eyes/I'm exposed/And it's no  
big surprise/Don't you think I know/Exactly where I  
stand/This world is forcing me/To hold your hand—No  
Doubt*

## Introduction

Gone are the days when the government could constitutionally regulate appearance without rhyme or reason. A series of cases involving hair length requirements first ushered appearance regulations into the forefront of constitutional litigation. First Amendment free speech and Fourteenth Amendment due process challenges now flourish in the arena of government-imposed appearance rules. Notably less prevalent in case law and legal literature, however, is an extensive dialogue on the extent to which illegal gender-based classifications may still lurk in public school dress codes in violation of the Fourteenth Amendment Equal Protection Clause.<sup>1</sup> This Article seeks to provide a historical backdrop and analytic framework that education administrators may use in crafting dress code rules<sup>2</sup> that are free from illicit gender-based classifications.<sup>3</sup> Part I lays out the history of constitutional and statutory claims involving gender

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<sup>1</sup> All references herein are to the Equal Protection Clause of the *Federal* Constitution. State constitutions and state laws are beyond the scope of this Article. The effect of omitting discussions of state law is negligible: dress code policies are almost always set at the district or school level, although 28 states and the District of Columbia have enacted laws on the subject. ERIC CLEARINGHOUSE ON EDUC. MGMT., DRESS CODES AND SCHOOL-UNIFORM POLICIES, STATE BY STATE 13-14 (2002). For the most part, these state laws merely delegate the power to proscribe either dress code or uniform policies to local school boards. *See id.*

<sup>2</sup> This Article focuses on constitutional rules applicable to public school *students*; dress codes imposed on *teachers* may also be subject to Title VII regulations in addition to invoking different policy rationales. *See* cases and sources cited *infra* notes 8-10 and accompanying text. Private schools are generally not deemed state actors so they are not directly subject to the constraints of the Equal Protection Clause.

<sup>3</sup> "Gender" and "sex" based classifications are used interchangeably to refer to any classification based on either biological or socially-constructed differences between males and females.

discrimination in appearance regulations (both in public schools and in the workforce). Part II discusses the equal protection framework established by *United States v. Virginia* (VMI) and its progeny, which place substantial burdens on the government to justify invoking gender-based distinctions. Part III discusses the rationales deemed illegitimate under the Equal Protection Clause by VMI and its predecessors as well as the ensuing impact these cases should have on policymakers drafting public school dress codes. Part IV gives an example of an actual public school dress code and considers, using the guidelines discussed in Parts II and III, whether the rules contained therein would pass constitutional muster if challenged on equal protection grounds.

### **I. Setting the Stage for Appearance Litigation: Hippies, Hair, and Federal Equality Statutes**

Administrators are not writing on a clean slate when it comes to designing dress codes that comply with the gender-based classification strictures of the Equal Protection Clause. The bulk of cases dealing with student appearance have concerned hair length restrictions. Between 1968 and 1977 there were over 150 reported cases involving hair style ordinances with nine appeals made to the United States Supreme Court from circuit court cases addressing hair limitations.<sup>4</sup> While firmly reserving a place for appearance-

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<sup>4</sup> Mary Julia Kuhn, *Student Dress Codes in the Public Schools: Multiple Perspectives in the Courts and Schools on the Same Issues*, 25 J.L. & EDUC. 83, 94 (1996). One court seemed to find the predicament of a female student subject to a hair length regulation particularly amusing, remarking "[s]ince time immemorial attempts to impose standards of appearance upon the fairer sex have been fraught with peril. . . . Against this delicate social milieu . . . this Court undertakes to comb the tangled roots of this hairy issue." *Sims v. Colfax Cmty. Sch. Dist.*, 307 F. Supp. 485, 486 (S.D. Iowa 1970). There is a circuit split on the constitutionality of hair length restrictions and on which constitutional provision public school dress code challenges arise under. Amy Mitchell Wilson, *Public School Dress Codes: The Constitutional Debate*, 1998 B.Y.U. EDUC. & L.J. 147, 156-57 (1998). The Supreme Court has never granted certiorari for a hair length case so a plaintiff's chances of success varies significantly based on the circuit forum:

based claims, “only one case directly challenged a school [hair] code on the basis of impermissible sex discrimination under the [F]ourteenth [A]mendment, and that challenge prevailed.”<sup>5</sup> Aside from cases dealing with First Amendment-style student expression, the Supreme Court has refused to weigh in on the school dress code debate.<sup>6</sup>

Perhaps the most extensive discussion of gender discrimination in appearance rules has stemmed from cases alleging violations of Title VII, which forbids *employers* from “discriminat[ing] against any individual with respect to his<sup>7</sup> compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex” (among other protected groups).<sup>8</sup> While Title VII does not normally apply to students, courts may draw on relevant Title VII case law principles in appropriate instances for determining what the Equal

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The Fifth, Sixth, Tenth, and Eleventh Circuits have generally held that school officials have the authority to impose reasonable grooming requirements, and that review of hair length regulations is not properly within the scope of review of the federal judiciary. However the First, Fourth, Seventh, and Eighth Circuits have held that hair length regulations are unconstitutional.

*Id.* at 156-57, 159. In more recent cases, challenges to the regulation of obscene clothing, gang-related clothing, and the imposition of uniform requirements have become prevalent, with most focusing on First Amendment freedom of speech issues. *See id.* at 160-65, 169-71.

<sup>5</sup> Carolyn Ellis Staton, *Sex Discrimination in Public Education*, 58 MISS. L.J. 323, 334 (1998) (citing *Crews v. Cloncs*, 432 F.2d 1259, 1266 (7th Cir. 1970)).

<sup>6</sup> ERIC CLEARINGHOUSE ON EDUC. MGMT., DRESS CODES AND CASE LAW 11 (2002).

<sup>7</sup> It is worth noting that Congress chose to use gendered language in Title VII.

<sup>8</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (West 2009); *see also* Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Code*, 14 DUKE J. GENDER L. & POL’Y 535, 539 (2007) (noting that a disproportionate number of cases concerning dress and appearance issues are litigated under Title VII).

Protection Clause forbids vis-à-vis dress codes.<sup>9</sup> In general, “Title VII renders unlawful two types of employer appearance regulation: grooming requirements applied to one sex that are not imposed on the other or that impose a greater burden on one sex than the other, *and grooming requirements based on impermissible stereotypes about women.*”<sup>10</sup> As the discussion below of the VMI line of cases suggests, the anti-stereotyping component of Title VII is likely to have the most analytical overlap with equal protection claims involving dress codes.<sup>11</sup>

Federal regulations under Title IX—legislation barring public and private educational institutions receiving federal funds from discriminating on the basis of sex<sup>12</sup>—originally contained a provision prohibiting discrimination on the basis

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<sup>9</sup> See Carolyn Ellis Staton, *supra* note 5, at 333-34.

<sup>10</sup> Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1415-16 (1992) (emphasis added). Dressing in certain “feminine” ways can be an impediment to succeeding in employment sectors traditionally dominated by men. When asked what facilitated the success of a woman serving as chairman of a preeminent law firm, the CEO of a large financial group opined “She took a corner office, she got a big desk, *and she didn’t dress in pastels.*” Meredith Render, *The Man, the State, and You: The Role of the State in Regulating Gender Hierarchies*, 14 AM. U.J. GENDER SOC. POL’Y & L. 73, 87 (2006) (emphasis added). In another reference to clothing attire in a gendered workforce, Meredith Render comments that “An even playing field is meaningless if when you get there, you find that someone has to be the cheerleader and, nothing personal, but you are the only one who fits the uniform.” *Id.* at 98.

<sup>11</sup> Compare *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) (“It is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females.”), with *United States v. Virginia (VMI)*, 518 U.S. 515, 532-33 (1996) (finding that under the Equal Protection Clause, gender classifications “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females”), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) (stating equal protection principles as applied to gender classifications prohibit overbroad generalizations and “require[ ] that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination”).

<sup>12</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (West 2009).

of sex in the application of appearance requirements.<sup>13</sup> While once seen as a forceful tool for achieving dress code gender equality, the Reagan Administration's Secretary of Education revoked the appearance provision citing the need to allocate resources to "more serious allegations of sex discrimination" and a desire to leave the "[d]evelopment and enforcement of appearance codes . . . for local determination."<sup>14</sup> *Trent v. Perritt*, the only case decided under the now defunct appearance regulation, narrowly interpreted the gender discrimination ban thereby upholding a dress code forbidding only boys from wearing long hair.<sup>15</sup> The legacy of the dress code regulation may live on despite its formal administrative revocation: the school district in the recent case of *B.W.A. v. Farmington R-7 School District* had a dress code containing a provision<sup>16</sup> stating "[n]o [dress code] procedure will impose dress and grooming rules based on gender in violation of Title IX."<sup>17</sup> Professor Staton issues a word of caution: "Although some commentators believe that a challenge under Title IX might still be viable, Title IX has been rendered largely ineffective as a method of challenging dress codes."<sup>18</sup> The Equal Protection Clause is likely the last bastion of hope for federal protection against gender discrimination lingering in school dress codes.<sup>19</sup>

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<sup>13</sup> 34 C.F.R. § 106.31(b)(5) (1974) prohibited schools receiving federal funds (with some exceptions) from "[d]iscriminat[ing] against any person in the application of any rules of appearance" on the basis of sex.

<sup>14</sup> Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 47 Fed. Reg. 32,526 (July 28, 1982); see also BARBARA FLICKER, JUSTICE AND SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION 145 (1990); Carolyn Ellis Staton, *supra* note 5, at 333-34.

<sup>15</sup> 391 F. Supp. 171, 173 (S.D. Miss. 1975); see also Carolyn Ellis Staton, *supra* note 5, at 333.

<sup>16</sup> The provision was not a contested issue in the case.

<sup>17</sup> 508 F. Supp. 2d 740, 743 (E.D. Mo. 2007).

<sup>18</sup> Carolyn Ellis Staton, *supra* note 5, at 334. On the bright side, if Title IX does make a resurgence in dress code discrimination litigation, the resulting precedent will apply to public schools as well as private schools accepting federal funds alike.

<sup>19</sup> See *id.* The availability of damages for such equal protection lawsuits was recently confirmed as the Supreme Court held that Title IX does not

## II. VMI & Company: The Heightened Scrutiny Framework for Gender-Specific Dress Codes

Inserting explicitly-gendered classifications into an otherwise neutral dress code greatly increases the chance of a court finding an equal protection violation. The Supreme Court's decision in *Personnel Administrator of Massachusetts v. Feeney* provides a veritable equal protection safe haven for dress codes lacking gender-based classifications requiring *proof of purposeful* sex discrimination (which is a logistical nightmare): *Feeney* allows the law to stand if it is rationally related to a legitimate government purpose (read: the school will win).<sup>20</sup> In contrast, when dress codes explicitly classify on the basis of sex, a school bears a heavy burden to avoid being found in violation of the Equal Protection Clause. Creating a

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preempt remedial relief sought under 42 U.S.C. § 1983 for school-based gender discrimination in violation of the Equal Protection Clause. *Fitzgerald v. Barnstable Sch. Comm.*, No. 07-1125, slip op. at 10-11 (U.S. Jan. 21, 2009).

<sup>20</sup> 442 U.S. 256, 274-75 (1979) (analogizing race-based cases to find that a law having a disparate impact on a historically disadvantaged gender group did not violate the constitution absent a showing of *purposeful* discrimination). As Professor Case points out:

It is no accident that we now refer to the law of sex discrimination rather than say, of sex equality. The Court has notoriously failed to consider anything that is not a sex-respecting rule to violate the constitutional norm against the denial of equal protection on grounds of sex. What it has required is not that the protection be equal, but that the rule be the same. Not only has it failed to ever find disparate impact by sex to rise to the level of unconstitutional discrimination, it has occasionally been blind even to the disparity of the impact. . . .

Mary Anne Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law As a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1474 (2000); see also *Long v. Bd. of Educ. of Jefferson County*, 121 F. Supp. 2d 621, 627-28 (W.D. Ky. 2000) (subjecting the school's imposition of a sex-neutral, uniform-type dress code to the least stringent equal protection test under *Feeney* finding the code was rationally related to the legitimate purpose of ensuring student safety and fostering school order).



so-called "intermediate scrutiny" equal protection standard, *Craig v. Boren* proclaimed that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>21</sup> The presumption of constitutionality that would normally apply disappears when a school adopts a dress code targeting pupils on the basis of their gender. In those situations, the school will be forced to show that its dress code not only aims to serve an important goal, but that it actually accomplishes that goal.<sup>22</sup> With respect to dress code policies in particular, policy analysts Elizabeth Garcia and Max Madrid suggest schools should take pro-active measures by "gather[ing] empirical evidence such as a reduction in violent incidents and student-discipline reports to establish the effectiveness of a dress code or a uniform policy."<sup>23</sup>

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<sup>21</sup> 429 U.S. 190, 197 (1976). See generally *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (discussing regulations containing gender-based classifications).

<sup>22</sup> See James A. Maloney, Comment, *Constitutional Problems Surrounding the Implementation of "Anti-Gang" Regulations in the Public Schools*, 75 MARQ. L. REV. 179, 188 (1991); see also *United States v. Virginia (VMI)*, 518 U.S. 515, 533 (1996) ("The burden of justification is demanding and it rests entirely on the State." (emphasis added)); *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459, 1461-62 (C.D. Cal. 1993) (applying heightened scrutiny in a First Amendment freedom of speech case finding the school district failed to meet its burden to justify a ban on clothing displaying insignia of college or professional sports teams when it proffered no evidence of a gang presence or of actual or threatened school disruption); *Jones v. W.T. Henning Elementary Sch.*, 721 So.2d 530, 532 (La. Ct. App. 1998) (reviewing a school's rule that "earrings on boys are prohibited" under heightened equal protection scrutiny stating "the burden is on the proponent of the classification to establish that the classification furthers an appropriate governmental objective" (emphasis added)); ERIC CLEARINGHOUSE ON EDUC. MGMT., WHY DRESS CODES AND WHY NOW? 5 (2002) (distilling the perceived basic benefits of dress codes and uniform policies to a list of four: "1. Enhanced school safety[;] 2. Improved learning climate[;] 3. Higher self-esteem for students[;] and] 4. Less stress on the family").

<sup>23</sup> ERIC CLEARINGHOUSE ON EDUC. MGMT., GUIDING PRINCIPLES WHEN CRAFTING A DRESS-CODE POLICY 18 (2002). Professor Kuhn suggests legal challenges to dress codes may be unavoidable, opining that the outcome often depends on the following factors, listed in descending order of significance: "(1) how the issue is characterized, (2) what particular

While the heightened scrutiny framework provides a general litigation structure, much of the case law guidance for school policymakers writing dress codes comes from the Supreme Court's explication regarding impermissible justifications for sex-based classifications.<sup>24</sup> *United States v. Virginia (VMI)*—the Supreme Court's most recent foray into gender-based equal protection claims—held that the Equal Protection Clause barred Virginia from “reserving exclusively to men the unique educational opportunities” Virginia Military Institute afforded.<sup>25</sup> Aside from declaring that “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action,”<sup>26</sup> *VMI* provides a wealth of instructive language as to the kinds of justifications that can *never* validate sex-based distinctions contained in government regulations.

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words are used in the code, (3) the geographic area of the conflict, (4) the level of the Supreme Court, the political/social climate of the country, and (5) judicial inactivism of the court.” Mary Julia Kuhn, *supra* note 4, at 83.

<sup>24</sup> See Mary Anne Case, *supra* note 20, at 1449 (arguing that the Court's rhetoric banning overgeneralizations and stereotyped distinctions, as opposed to its articulation of the intermediate scrutiny standard, has done most of the work in sex discrimination cases). Granted, an individual is likely to deem the interest in being allowed admission to a public university to be more important than the interest in being free from gender-discriminatory dress code regulations; however, the constitutional violation occurs whenever illegitimate classifications are imposed irrespective of the importance of the interest at stake to the individual. See, e.g., *Craig v. Boren*, 429 U.S. 190, 210 (1976) (holding a law barring sales of 3.2% beer to men under 21 and women under 18 “constitutes a denial of the equal protection of the laws to males aged 18-20”). Therefore the principles of *United States v. Virginia* should equally apply to public school dress codes that make forbidden classifications on the basis of gender.

<sup>25</sup> 518 U.S. 515, 519 (1996). Professor Vojdik argues the entire masculinity-based structure of VMI is an unconstitutional form of stereotyping suggesting the Court should have ordered a remedy dismantling the gendered parts of the educational system rather than forcing women to assimilate to the status quo. Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 93-96, 112-13 (2002).

<sup>26</sup> *VMI*, 518 U.S. at 531.

### III. VMI's Forbidden Rationales: Policy Implications for Gender-Distinguishing Dress Codes

In creating dress codes that impose differential rules on men and women, schools must ensure they comply with the following Equal Protection Clause mandates expounded in *VMI*: First, "[t]he justification [for gender classifications] must be genuine, not hypothesized or invented *post hoc* in response to litigation."<sup>27</sup> Policymakers would be well advised to put their reasons for applying different rules to men than women down in writing.<sup>28</sup> Second, justifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."<sup>29</sup> For instance, schools should allow female students the option of choosing to wear pants rather than forcing them to wear skirts or dresses. There is likely no rationale that does not rely on the constitutionally-illegitimate "fixed notions concerning the roles . . . of males and females"<sup>30</sup> for prohibiting girls (but not boys) from wearing pants today.<sup>31</sup> Finally, whereas "'inherent

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<sup>27</sup> *Id.* at 533.

<sup>28</sup> Policy expert Christopher Gilbert states that at the very least "[a]dministrators must be able to clearly explain why the dress-code policy was implemented and what prompted the specifics of the code." ERIC CLEARINGHOUSE ON EDUC. MGMT., *supra* note 23, at 15.

<sup>29</sup> *VMI*, 518 U.S. at 533; *see also* *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic [and therefore unconstitutional] notions.").

<sup>30</sup> *VMI*, 518 U.S. at 541 (quoting *Hogan*, 458 U.S. at 725); *see also* James A. Maloney, *supra* note 22, at 190 (arguing a ban on wearing slacks that only applies to girls could not pass rational basis—much less heightened scrutiny—review).

<sup>31</sup> *See* ERIC CLEARINGHOUSE ON EDUC. MGMT., *supra* note 23, at 18 (suggesting that females should be given gender-neutral clothing options). *But see* *Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353, 1356 (S.D. Ohio 1987) (upholding a school's "gender neutral" dress code requiring students to "dress in conformity with the accepted standards of the community" against an equal protection challenge on behalf of students wishing to attend prom wearing clothing traditionally associated with the opposite sex). Perhaps *Harper* provides an exception to a ban on schools enforcing gender norms so long as community standards are incorporated and schools do not impose their own interpretation of what those standards

differences' between men and women . . . remain cause for celebration," VMI cautions that gender classifications "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."<sup>32</sup> Taking a cue from Title VII case law, a rule forcing girls to wear school uniforms while allowing boys to choose their apparel would likely be found to unconstitutionally perpetuate demeaning sexual stereotypes (for instance, that girls are incapable of selecting school-appropriate attire).<sup>33</sup>

Scholars have advocated for several different theoretical approaches for implementing VMI's anti-stereotyping rhetoric. Professor Case argues that there are but two questions one must ask to determine whether a law

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should be vis-à-vis school policy. *See id.* Similar analogies can be found in the Title VII realm. In *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1213-17 (8th Cir. 1985), the Court insinuated that a news station could permissibly demote a female anchor because she failed to live up to *society's* notion (as reflected in market surveys) of how a woman should look. Title VII, the *Craft* Court found, did not forbid public employers from relying on society's stereotypical beliefs of female appearance even when the employer could not impose such standards of its own volition. *See also* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2542-43, 2556-59 (1994) (arguing that some of the ineffectiveness of Title VII in prohibiting gender discrimination lies in courts' unnecessary willingness to defer to community norms in determining the statute's scope); Sandra L. Snaden, Note, *Baring It All at the Workplace: Who Bears the Responsibility?*, 28 CONN. L. REV. 1225, 1243 (1996). Even in work sectors particularly hostile to gender-based stereotyping, old habits die hard in some parts of the county. In light of Oklahoma's history of resistance to recognizing gender issues, one commentator points out that "it is not surprising that the Oklahoma Federal District Courts are the only federal district courts in the United States with gender biased dress codes." Bethanne Walz Mcnamara, Comment, *All Dressed Up with No Place To Go: Gender Bias in Oklahoma Federal Court Dress Codes*, 30 TULSA L.J. 395, 413-14 (1994).

<sup>32</sup> VMI, 518 U.S. at 533-34 (internal citation omitted).

<sup>33</sup> *See, e.g., O'Donnell v. Burlington Coat Factory Warehouse*, 656 F. Supp. 263, 266 (S.D. Ohio 1987) (finding retail store violated Title VII prohibition on sex discrimination in employment by forcing women to wear a "smock" while allowing men to wear "professional business attire").

imposes unconstitutional sex discrimination: “(1) Is the rule or practice at issue sex-respecting, that is to say, does it distinguish on its face between males and females? and (2) Does the sex-respecting rule rely on a stereotype?”<sup>34</sup> Proscribing sex-based stereotyping, according to Professor Case, is synonymous with requiring a perfect proxy; if a generalization forming the basis for a gender-based distinction does not hold true for even a single woman or man, then it is constitutionally prohibited.<sup>35</sup> Professor Cruz argues for a slightly different theory of gender equality, conceptualizing gender along the same lines as religion. Like religion, “[w]hile private individuals and groups should largely remain free to believe what they will about the sexual division of humankind, under the Constitution, government must give up its roles in reinforcing gender ideologies and social divisions based on sex and gender.”<sup>36</sup> Professor Hellman, meanwhile, advocates interpreting the Equal Protection Clause to forbid government expressions of the unequal worth of groups irrespective of any concrete harm caused to a member of that group: in other words, the government must refrain from signaling that one group is superior to another.<sup>37</sup> None of these rationales have been explicitly adopted by the courts, but that does not mean policymakers cannot choose to adhere to a theory that, while not currently legally mandated, they themselves find persuasive.

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<sup>34</sup> Mary Anne Case, *supra* note 20, at 1449.

<sup>35</sup> *Id.* at 1449-50, 1452-61.

<sup>36</sup> David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 999-1010 (2002).

<sup>37</sup> Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2, 10, 13-26 (2000). Professor Hellman gives the example of the anti-miscegenation statute at issue in *Loving v. Virginia* as the archetypical case of expressive discrimination because it suggested that white people must be protected from intermingling with other races because they are superior. *Id.* at 15. In contrast, Professor Hellman points to single-sex bathrooms in public buildings as posing no equal protection conundrum because the meaning of single-sex bathrooms is innocuous—it simply does not “imply less regard for one sex or the other.” *Id.*

#### **IV. Analyzing Needville School District's Dress Code: *VMI* in Practice**

A real-life example serves to illustrate how equal protection principles may collide with dress codes already in place. Needville Public School District's secondary dress code<sup>38</sup> (applicable to Needville Middle School for the 2007-2008 school year), which unequivocally makes gender-based classifications, will be examined to decide whether it could withstand an equal protection lawsuit brought on behalf of one of its students. To that end, two questions are explored: (1) what level of judicial scrutiny each of the dress code provisions must survive; and (2) whether there is any rationale the school could proffer that would provide the kind of "exceedingly persuasive justification" required by *VMI* to sustain the provision.

The Needville School District dress code contains the following:<sup>39</sup>

##### **Hair**

1. Hair shall be clean, well-groomed, and out of the eyes.
2. Boys must be clean shaven daily with NO facial hair visible.
3. Highlights/Lowlights must be BLONDE in color for GIRLS.
4. Highlights/Lowlights are NOT allowed for boys.

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<sup>38</sup> Needville Middle School Webpage, Needville Secondary Dress Code, [http://classroom.needvilleisd.com/webs/nms/dress\\_code.htm](http://classroom.needvilleisd.com/webs/nms/dress_code.htm) (last visited Nov. 8, 2007).

<sup>39</sup> The dress code has been excerpted to foster the Equal Protection Clause discussion. The author urges those interested in engaging in equal protection inquiries of their own to visit the website referenced *supra* note 38 as there are plenty of gender-classifying rules not discussed here that are ripe for analysis (and lawsuits). Numbers have been added for ease of reference (bullets were used to demarcate separate rules in the original version of the school's dress code). Otherwise, none of the language quoted has been altered in any fashion (no pun intended).

### Pants

5. Girls may wear Capri pants that extend beyond the bottom of the knee in a sitting position.
6. Boys are NOT allowed to wear Capri pants, Knickers, or the like.

### Miscellaneous

7. The wearing of any type of pierced jewelry anywhere on the body is NOT allowed except for girls wearing earrings in their ears.

Beginning with the 'Hair' section of the dress code, Rule 1 appears to be gender neutral so under *Feeney* the school needs to only identify a legitimate interest and show that the Rule is rationally related to that interest in order to survive an equal protection challenge.<sup>40</sup> The school has a legitimate interest in promoting the health and safety of its students and imposing grooming rules of this nature arguably (which under rational basis rule is enough) serves these interests. Absent some hidden (and provable) gender animus, Rule 1 does not violate the Equal Protection Clause.

Rule 2 applies to boys and not to girls and would most likely trigger heightened scrutiny as a result. In response, the school could assert that facial hair in middle school would be disruptive to the learning environment given the age and immaturity of middle school students.<sup>41</sup> Alternatively, if the school has problems with gang activity and facial hair is known to be a gang symbol that too would meet the test.<sup>42</sup>

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<sup>40</sup> See discussion *supra* Part II and note 20 and accompanying text.

<sup>41</sup> See *Fenceroy v. Morehouse Parish Sch. Bd.*, No. Civ.A. 05-0480, 2006 WL 39255, at \*4 (W.D. La. Jan. 6, 2006) (suggesting a school's adoption of a "clean shaven" policy would not be in violation of the Equal Protection Clause because it would promote "discipline, . . . disruptions and distractions in classrooms, . . . respect for authority, and . . . conformation to community standards").

<sup>42</sup> See *Olesen v. Bd. of Educ. of Sch. Dist. No. 228*, 676 F. Supp. 820, 823 (N.D. Ill. 1987) (banning only boys from wearing earrings did not offend the Equal Protection Clause when earrings connoted gang membership for boys but not for girls); accord *Zalewska v. County of Sullivan*, 316 F.3d 314, 323 (2d Cir. 2003) ("Concededly, the county's policy of disallowing

Substantial relation is not negated by the girls' exemption from the Rule given that girls are incapable of growing noticeable facial hair (at least as a general rule). Such biological realities do not have to be ignored.<sup>43</sup>

However, Rules 3 and 4 would likely be invalidated in response to an Equal Protection Clause claim. Requiring blonde (as opposed to say, brunette) highlights relies on stereotypical notions of female preferences forbidden by *VMI* and does not seem to serve any legitimate goal whatsoever.<sup>44</sup> A desire to restrict boys from adopting 'girly' hairstyles is almost certainly the impetus behind Rule 4 and is likewise unconstitutional.<sup>45</sup>

Looking at the 'Pants' section, Rule 5 is likely to be found in compliance with Equal Protection Clause mandates while Rule 6 is at risk of flunking the gender equality litmus test. Courts are likely to defer to school administrator's claims about the disruptiveness of certain styles of clothing, especially with respect to overly-suggestive attire. However, *VMI* and its associated cases do *not* permit school

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skirts will affect women more than men because women will be prohibited from wearing an article of clothing they might choose to wear while men will not. But such incidental burden alone does not trigger a heightened level of scrutiny where, as here, the policy itself is gender-neutral.") See generally *supra* notes 21-23.

<sup>43</sup> See, e.g., *Tuan Anh Nguyen*, 533 U.S. 53, 72-73 (2001) (imposing a greater burden to prove citizenship for those making claims based on paternal rather than maternal ties); *Rostker v. Goldberg*, 453 U.S. 57, 76-79 (1981) (compelling men but not women to register for the military draft); *M. v. Superior Court*, 450 U.S. 464, 472-73 (1981) (holding men but not women criminally liable under a statutory rape law designed to prevent underage pregnancy).

<sup>44</sup> The personal dislikes of school officials, without more, does not rise to the level of an important state interest. See *Crews v. Cloncs*, 432 F.2d 1259, 1265-66 (7th Cir. 1970) (finding animosity toward fashion styles that fall outside society's norm could not justify a hair length rule that only applied to men). See generally *supra* Part III.

<sup>45</sup> It is of no moment that the rule discriminates against boys who have traditionally not been a target of discrimination. See, e.g., *Craig v. Boren*, 429 U.S. 190, 210 (1976) (finding a law imposing greater restrictions on men's versus women's behavior based on stereotypical notions of gendered conduct unconstitutional under the Equal Protection Clause).



administrators to impose their views about properly-gendered clothing absent some indication that allowing both genders to wear said clothing would be in direct conflict with the school's educational purpose.<sup>46</sup> Empowering girls but not boys to wear more revealing clothing<sup>47</sup> further gives rise to the concern that administrators are promoting social inferiority of women by suggesting that they, unlike men, are mere sexual objects.<sup>48</sup> If administrators feel strongly enough that boys should not wear Capri pants, then *both* girls and boys should be prohibited from wearing them.<sup>49</sup>

Finally, Rule 7 in the 'Miscellaneous' section illustrates the importance of having a genuine justification: so long as administrators made a conscious decision to ban only boys from wearing earrings in order to promote some important education-related goal, the Rule should be impervious to a lawsuit claiming an Equal Protection Clause violation.<sup>50</sup> Nevertheless, as a gender-classifying provision, the school will bear the burden of showing the regulation was passed to serve an actual important mission and that the regulation in fact serves that mission.<sup>51</sup> Furthermore, the assertion that boys wearing earrings would be disruptive (a

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<sup>46</sup> See discussion *supra* Part III and notes 29-31.

<sup>47</sup> Under Needville's dress code, no one may wear shorts and boys are prohibited from wearing skirts or dresses. See source cited *supra* note 38. Therefore, women alone may wear clothing (skirts, dresses, or Capri pants) that show their legs. *Id.* While administrators may rightly point out that boys wearing skirts or dresses would disrupt the learning environment because of its stark contrast with social norms (particularly middle school norms), see *Harper v. Edgewood Bd. of Educ.* 655 F. Supp. 1353, 1356 (S.D. Ohio 1987), cropped pants would likely cause no such disruption.

<sup>48</sup> See *supra* notes 32-33 and accompanying text.

<sup>49</sup> See *Branch v. Franklin*, No. 1:06-CV-1853, 2006 WL 3335133, at \*2-\*3 (N.D. Ga. Nov. 15, 2006) (rejecting the argument that a dress code banning short pants on a gender-neutral basis violated the Equal Protection Clause because women were allowed to wear skirts and dresses and the ban on short pants meant men did not have the option to wear comparably revealing clothing).

<sup>50</sup> See *supra* note 27 and accompanying text. See also *Jones v. W.T. Henning Elementary Sch.*, 721 So.2d 530, 532 (La. Ct. App. 1998) (upholding a male-only earring prohibition).

<sup>51</sup> See sources cited *supra* note 50 and discussion *supra* Part III.

common justification) is likely to be less persuasive for older students than for younger students. Similarly, at least with respect to rationales alluding to maintaining order or conforming to community norms, the evolution of fashion may eventually redefine the scope of permissible dress code restrictions.<sup>52</sup>

### Conclusion

Public school dress codes have been the subject of an array of statutory and constitutional challenges since the debut of appearance regulation litigation in the early 1970s. The landmark case of *United States v. Virginia (VMI)* confirmed the Supreme Court's commitment to weeding out harmful gender stereotyping in laws containing sex-based classifications. The equality principles espoused in *VMI* and cases like it should be carefully considered by education policymakers drafting dress code policies which distinguish on the basis of gender. Aside from the policy reasons for jealously guarding against the use of out-dated generalizations about gender in deciding dress code prescriptions, the Equal Protection Clause demands it. School officials adopting policies with the kinds of flaws inherent in the Needville Middle School dress code examined above may soon find themselves on the losing side of an equal protection lawsuit.

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<sup>52</sup> See cases cited *supra* note 47.

