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CONSTITUTIONAL CHALLENGES TO GENDER-RESTRICTIVE SCHOOL DRESS CODES IN THE NINTH CIRCUIT

By: Patrick Eoghan Murray[1]

This Article examines three potential constitutional challenges to a school dress code that mandates traditional gender norms. The analysis focuses on the Ninth Circuit to illustrate the various hurdles potential student litigants face from case law that is not explicitly overruled. It is likely that despite these challenges, a student litigant will be able to successfully advance a constitutional claim against such a dress code in the Ninth Circuit.

I. Introduction

On February 9, 2012, the School Board in Suffolk, Virginia proposed a dress code provision (DCP) that prohibited any "clothing worn by a student that is not in keeping with a student's gender and causes a disruption and/or distracts others from the educational process or poses a health or safety concern."[2]

Although no court ruled on the constitutionality of this particular dress code, [3] its proposal raised the question: What options do student litigants have if they are prevented from wearing clothing that allows them to expresses gender non-conformity? This Article analyzes potential constitutional claims that a student could bring against an identical provision and ultimately concludes that the Ninth Circuit would find it to be unconstitutional.[4]

By limiting the analysis to the Ninth Circuit, this Article illustrates the various hurdles left behind from older precedent that conflict with more recent U.S. Supreme Court decisions.

II. Fourteenth Amendment Equal Protection Challenge

The DCP expressly identifies gender as a basis for school administrators to regulate student dress. Its discriminatory nature is evident in the requirement that students conform to gender stereotypes: Girls cannot dress like boys, and boys cannot dress like girls. As such, the DCP arguably violates the Equal Protection Clause of the Fourteenth Amendment.

The validity of the DCP would largely turn on whether intermediate scrutiny or rational basis review is applied. A law that makes gender-based classifications must survive intermediate scrutiny in order to be constitutional.[5] Under intermediate scrutiny, a gender-based classification is unconstitutional unless it "serve[s] important governmental objectives and . . . [is] substantially related to achievement of those objectives."[6] This is a difficult standard to meet because the justification for the classification must be "exceedingly persuasive" to survive constitutional review.[7]

However, when a law does not make gender-based classifications and is instead gender neutral on its face, the plaintiff must prove both a discriminatory purpose behind the law as well as a discriminatory impact in order to trigger intermediate scrutiny.[8] Absent proof of discriminatory intent, a gender-neutral law will be subjected to rational basis review, the most lenient standard of constitutional review. If a court deems the DCP to be gender neutral and hence subject to rational basis review, it will be extremely difficult to establish an equal protection violation.[9]

In the Ninth Circuit a prospective plaintiff would have to overcome the obstacle of contrary Circuit precedent. Simply put, the Ninth Circuit has held that student dress codes that are gender explicit are nevertheless constitutional. The leading case is *King v. Saddleback Junior College District* ,[10] which involved an equal protection challenge to a public school dress code requirement that "[a] boy's hair shall not fall below the eyes in front and shall not cover the ears, and it shall not extend below the collar in back."[11] Under the code, "[g]irls could have long hair and boys could not."[12] The Ninth Circuit in *King* rejected the equal protection claim, however, stating that neither the "difference in treatment [n]or classification . . . creat[ed] a substantial constitutional question."[13]

However, *King* is at odds with four decades worth of subsequent Supreme Court precedent that has cast substantial constitutional doubt on gender-based classifications that rest on assumptions about how females and males should look, act, or conduct themselves.[14] Indeed, the Ninth Circuit has not relied on *King* since the mid 1970s. Given these developments, it is unlikely that the Ninth Circuit would continue to adhere to *King* today, and instead, would apply intermediate scrutiny to the DCP.[15]

Under intermediate scrutiny, the analysis begins with the asserted government objective. The Supreme Court has warned parties who try to prove a substantial relationship between gender-based and an important governmental interest that "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."[16] Here, the language of the DCP recites the interest: in protecting the health and safety of students in the school environment and in providing an effective learning environment free of disruptions and distractions. These were the same reasons the Suffolk School Board specified at the time it considered this type of dress code provision.[17] Maintaining the health and safety of public school students is unquestionably an important governmental interest.[18]

However, to merely state that the DCP's purpose is to protect students and promote a positive learning environment does not end the inquiry.[19] If the DCP rests on "fixed notions concerning the roles and abilities of males and females [that] reflects archaic and stereotypic notions," then its purpose is not legitimate.[20] Put another way, if the assumption of the DCP is that school order and the students' learning environment will be impaired if boys dress like girls and girls dress like boys, then the basis for the DCP may be constitutionally suspect. That said, a court is likely to accept as important a public school's asserted interest in promoting order and a stable learning environment and not declare that purpose invalid even though it may rest on stereotypes that would not be acceptable outside the public school setting.[21]

The DCP may be more constitutionally vulnerable at the second step of the analysis—whether it is substantially related to the interest in school safety and a positive learning environment. In determining whether a gender-based classification is substantially related to the important goals, a court will scrutinize the classification to determine if it is necessary to achieve those goals.[22]

In *King*, where a male student challenged the constitutionality of a hair-length requirement for men, the Ninth Circuit was persuaded by the opinions of teachers and school administrators who believed that the school dress code prevented behavior that "interfere[d] with the educational process.".[23] Eleven teachers and administrators submitted affidavits to support this position.[24] The Ninth Circuit found that "none of the affidavits is so inherently improbable that it is lacking in value as evidence."[25]

A proponent of the DCP, by contrast, would be unlikely to find similar support among school administrators to legitimize the regulation. At least in Suffolk, there seemed to be scant evidence of either danger to students or distraction in the classroom, and the School Board member who proposed the provision cited only vague and anonymous complaints.[26] The principals of the schools in the Suffolk City Public Schools stated that "they hadn't seen [teen boys wearing wigs, dresses, and make-up to class]," and the superintendent had received no complaints and had seen only one instance of a gender-nonconforming student.[27] Even the school board member who initially proposed the restriction on gender-nonconforming clothes admitted she had not received any complaints during the school year before the dress code provision was proposed.[28]

Furthermore, the argument that the DCP is substantially related to preventing distractions in

school is weak because of its over- and underinclusive nature.[29] The DCP is over-inclusive because it likely implicates more students than just those who would be distracting or who would be the target of bullying.[30] The DCP is underinclusive because it ignores other forms of clothing that conforms to gender stereotypes but is nonetheless distracting and dangerous or could make students the targets of bullies.

A gender-neutral dress code provision addressing distracting clothing seems much better suited to fulfilling the important governmental interests of maintaining student safety and an effective learning environment. Under such a provision, teachers would have the ability to restrict all distracting and provocative clothing and would not have to single out gender-nonconforming students. This is ultimately the type of dress code provision that the Suffolk School Board adopted when faced with the prospect of litigation.[31]

In short, the DCP is both over- and underinclusive with respect to the stated goals of ensuring safety and preventing distractions, and thus it is likely to be found unconstitutional at the second step of intermediate scrutiny review.

III. First Amendment Challenge

A. Clothing Choice Can Constitute Expression for Purposes of the First Amendment

If a student is sanctioned under the DCP for wearing clothing that contains writing or a symbol—for example, a shirt with the inscription "I am a girl" or a gender symbol—the expression on the clothing will likely be considered pure speech, and the student will have a cognizable First Amendment challenge to the DCP. [32] That type of pure speech, however, is probably not what the DCP's drafters had in mind, and a school administrator may not even find it distracting enough to require removal.

The First Amendment protects not only verbal speech but also nonverbal speech, which the Supreme Court describes as "expressive conduct."[33] Because an "apparently limitless variety of conduct can be labeled speech," however, the Supreme Court has held that only conduct that is "sufficiently imbued with elements of communication" will be protected by the First Amendment.[34]

While the First Amendment's protection of expressive conduct does not require that the particularized message be "succinctly articulable,"[35] the actor must have "[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood [must be] great that the message would be understood by those who viewed it."[36]

The Supreme Court has not yet ruled on whether clothing choice implicates student speech. While some circuits have considered choice of clothing to potentially constitute expressive conduct, others have not.[37]

The Ninth Circuit has also not yet ruled on whether a student's choice of clothing can be expressive conduct that triggers a First Amendment analysis. In *Jacobs v. Clark County School District*, the Ninth Circuit addressed several challenges to a public school district's uniform policy that mandated "solid khaki colored bottoms and solid-colored polo, tee, or button-down shirts (blue, red or white) with or without [the school's] logos."[38] The Ninth Circuit did not decide whether a student challenger's refusal to wear the required uniform as a symbol of his opposition to conformity constituted expressive conduct.[39] However, it presumed for the purpose of its analysis that the student had stated a First Amendment claim for "deprivation of . . . First Amendment rights to engage in expressive conduct via . . . choice of clothing and to be free from compelled speech"[40]

In the case of the DCP, students may be able to demonstrate that their gender-nonconforming clothes constitute expressive conduct if they can demonstrate both an intent to convey a particularized message and a great likelihood that the message would be understood by those who viewed it. The students' ability to do so would depend on the context in which the clothing was worn. If a student states that he or she did not have a purpose for wearing a certain kind of clothing, the First Amendment would not be implicated. However, if the student states that he or she sought to communicate a message via clothing, he or she would have a much better chance of sustaining a First Amendment claim.[41]

The Supreme Court has long held that students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[42] "They cannot

be punished merely for expressing their personal views on the school premises . . . unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'"[43]

In *Tinker v. Des Moines*, a group of students organized a silent protest of the United States' involvement in the Vietnam War by wearing black armbands with a peace symbol.[44] In anticipation of the protest, and in fear that it would cause a disturbance, the Des Moines Independent School District changed school policy to forbid students from wearing such armbands.[45] After they were suspended for wearing their armbands, the students sued for violation of their right to free speech under the First Amendment.[46] In finding in favor of the students, the Supreme Court concluded that "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[47]

The Ninth Circuit has used *Tinker* as a guide in its analysis for all student-speech cases for expression that is not "vulgar, lewd, obscene, and plainly offensive speech . . . [or] school-sponsored speech."[48] However, the Ninth Circuit has limited the application of the heightened form of scrutiny articulated in *Tinker* to regulations that restrict a particular viewpoint or particular content.[49] In *Jacobs*, the court distinguished the uniform policy at issue there from the armband restriction in *Tinker*.[50] The Ninth Circuit reasoned that while *Tinker* involved a restriction on viewpoint warranting a higher level of scrutiny, the uniform policy in *Jacobs* was viewpoint- and content-neutral and thus deserved intermediate scrutiny.[51] The court made this determination by examining both the purpose of the dress code and by considering how the uniform policy would work in practice.[52] The court found both the text-based viewpoint-neutral purpose of the uniform policy and the viewpoint-neutral reasons the school board considered when it adopted the uniform policy to be reasons in favor of applying intermediate scrutiny.[53] Both the text of the rule in *Jacobs* and the records of the proceedings leading to its adoption emphasized the educational value of the rule rather than any effort to limit a particular viewpoint. The court considered claims that the policy restricted a particular viewpoint in practice, but ultimately ruled that "allowing students' otherwise solid-colored clothing to contain a school logo-an item expressing little, if any, genuine communicative message-does not convert a content-neutral school uniform policy into a content-based one."[54]

The DCP is likely to be found viewpoint and content-neutral because of its stated purpose. Just as in *Jacobs,* in which the stated purpose was to further an educational goal, the DCP states that the gender nonconforming clothing should be restricted to prevent "a disruption and/or [a distraction for] others from the educational process or poses a health or safety concern."[55] Additionally, if the adoption of the DCP in a Ninth Circuit school district resembles the proceedings in the Suffolk Virginia School Board, there will be evidence that the purpose was to prevent bullying and distractions, not the expression of gender non-conformity. Such a record would then be similar to the record in *Jacobs,* in which the court noted a desire to prevent distractions and reduce tensions between students.

An argument could be made that the DCP is viewpoint-restrictive because it favors one viewpoint over another: Gender-conforming viewpoints are protected, while gender-nonconforming viewpoints are restricted. However, even if students convincingly argue that gender non-conformity is a particular viewpoint, the restriction is minimal; students are only restricted from wearing clothes in school, and have the ability to express themselves outside of school. Additionally, the DCP does not prevent all opportunities to wear gender-nonconforming clothes—only gender-nonconforming clothes that cause distractions or danger to students.

B. It is Likely That the DCP Would Withstand First Amendment Intermediate Scrutiny

The Ninth Circuit has articulated a three-part test for whether a school dress code passes intermediate scrutiny. The provision will be sustained if "(1) 'it furthers an important or substantial government interest'; (2) 'the governmental interest is unrelated to the suppression of free expression'; and (3) 'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'"[56]

1. The Ninth Circuit Would Likely Find That the DCP Furthers an Important Governmental Interest

In order to prove that the DCP furthers an important governmental interest, the proponent of the DCP must first prove that its "'stated goals qualify as important or substantial'" and that "the government's evidence 'demonstrate[s] that the recited harms are real, not merely conjectural and that the regulation will in fact alleviate these harms in a direct and material way.'"[57] In *Jacobs*, the Ninth Circuit held that "the interest in fostering conducive learning environments for our nation's children" was unquestionably an important interest.[58] The school district in *Jacobs* was able to show that the uniform code furthered these goals by providing affidavits from the school administrators stating that the policy was working, and one report from the Department of Education acknowledging the benefits of school uniforms.[59] The Ninth Circuit was also persuaded by the plaintiff's failure to produce any evidence that the policy had been a failure.[60]

In order to satisfy this prong of the analysis, the proponent of the DCP would not need to show any empirical evidence that the DCP had been effective in preventing disruptions, distractions, or health and safety concerns. All that would be needed is affidavits from the teachers demonstrating that the DCP had been effective, and evidence that students had been singled out by bullies for wearing gender-nonconforming clothing. The Suffolk School Board would have had difficulty satisfying this prong, since the only reports of distractions or bullying had been anonymous, but this could easily have been remedied had the teachers come forward before a case went to trial. [61]

2. The Ninth Circuit Would Likely Find the DCP Unrelated to the Suppression of Free Expression

The proponent of the DCP must prove that the DCP is "'unrelated to the suppression of free expression,'"[62] In holding that this standard was satisfied in *Jacobs*, the Ninth Circuit determined that the stated purpose of the law was not aimed at preventing students from expressing their views on particular subjects.[63] The court also found persuasive the absence of "evidence suggesting that the District's stated goals were mere pretexts for its *true* purpose of preventing students from expressing their views on particular subjects."[64]

Since the stated goals of the DCP are to prevent disruptions, distractions, and to protect the health and safety of students, assuming no evidence of pretext emerges in a particular case, it is unlikely that the proponent of the DCP will have difficulty in satisfying this element.

3. The Ninth Circuit Would Likely Find Any Incidental Restrictions Imposed on Students' First Amendment Freedoms Are No Greater Than is Essential to the Furtherance of the Goals of the DCP

The proponent of the DCP must prove that its restrictions on First Amendment freedoms are no greater than necessary by demonstrating that the regulation "'leave[s] open ample alternative channels' for student communication."[65] In *Jacobs*, the uniform policy was found to be narrowly tailored to achieve the school district's objective because it only "limit[ed] students' abilities to express themselves via their clothing choices," and allowed students to "have verbal conversations with other students, publish articles in school newspapers, and join student clubs."[66] Also, the court in *Jacobs* was persuaded that even the choices in clothing was not "*completely* curtailed," since students could still wear what they pleased "after school, on weekends, and at non-school functions."[67] While the court stated that the uniform policy satisfied this prong because its limitation was "during the narrowest possible window consistent with the District's goals of creating a productive, distraction-free educational environment for its students," the court did not consider any other less restrictive alternatives (more relaxed uniform policies) that could have achieved the same goal.[68]

Under *Jacobs*, the Ninth Circuit would likely hold the DCP to be narrowly tailored. To be sure, clothing choice may sometimes be the only way a student can express his or her gender identity. [69] On the other hand, the DCP is limited in its scope: It applies only when students are in school, and even then, only when the clothes are disruptive, distracting, or dangerous. Students would still have the ability

to express their gender-nonconforming views in conversations with other students and to publish articles in school newspapers. They would also have the ability to wear gender-nonconforming clothing outside of school hours.

IV. Vagueness Challenge

The DCP is vulnerable to a "void-for-vagueness" challenge. This is because the DCP arguably does not give students adequate notice about the type of clothing that is banned, and because the term "gender" leaves room for discriminatory enforcement. However, courts generally have taken a deferential stance when it comes to public school regulations of students and accordingly rejected void-for-vagueness challenges. That line of precedent will be difficult to overcome for plaintiffs seeking to challenge the DCP.

A law can be found to be vague for "two independent reasons."[70] First, the doctrine of vagueness "incorporates notions of fair notice or warning,"[71] and a regulation violates due process of law by failing to provide adequate notice of prohibited conduct.[72] In short, a regulation is void for vagueness if it "forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application."[73] Second, the void-for-vagueness doctrine prohibits rules that permit "arbitrary and discriminatory enforcement."[74] "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . ."[75] "[P]erhaps the most meaningful aspect of the vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement."[76]

A. The DCP's Use of the Term "Gender" is Arguably Vague

The DCP's use of the term "gender" raises two possible vagueness problems. The first is how the students' gender should be defined. The second is how school officials (including teachers) or students would determine what clothes are "in keeping with a student's gender."

1. How Should a Student's "Gender" Be Defined?

The Merriam-Webster dictionary defines "gender" as applied to people in two ways: "a) sex and b) the behavioral, cultural, or psychological traits typically associated with one sex."[77]

"Sex" is the more straightforward of the two definitions, but still leaves plenty of room for interpretation (and confusion). Sex refers to "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures."[78] The distinction can be drawn in different ways: the structure and function of an individual's genitalia, the production of various hormones in an individual, or the structure of the chromosomes found within each cell of the individual's body (XY chromosomes for males and XX for females).[79] Even these biological distinctions do not necessarily lead to a binary division. About 1.7 percent of the population is born "intersex"—a condition in which an individual is born with the physical characteristics of both sexes—and defies categorization into either group.[80] Courts have not agreed on what physical traits should be determinative of an individual's sex.[81]

The second definition of gender is nebulous. It describes gender as a combination of how society defines an individual and how the individual defines him or herself.[82] In western society, gender has evolved to be considered a binary concept—so that it is associated with the two main sexes.[83] However, what society views as "masculine" or "feminine" varies dramatically across generations, has changed over time, and continues to change.[84] Also, individuals may be transgender and have a different gender identity from either their biological sex or societal expectations.[85]

By failing to define how school officials should determine a student's gender, the DCP provides inadequate notice of what clothing is permissible to intersex students or transgender students. Intersex students will not fall neatly into either of the categories of male or female, and transgender students may adopt a different gender identity from the label that society places on them. The language of the DCP does not provide guidance for these students.

Additionally, because the statute does not provide a definition of gender, teachers have vast discretion to apply their own conception of gender to students. This opens the door to discrimination against intersex and transgender students by teachers.[86]

2. What is Clothing That is "In Keeping With a Student's Gender"?

If defining a student's gender is difficult, determining what clothing is "in keeping with a student's gender" is even more difficult. Clothing is inanimate and does not have biological indicators to guide how it should be categorized, so the gender of an article of clothing is entirely based upon societal and cultural views.[87] These views have changed over time and continue to change. [88] Androgynous fashion is moving from the cutting edge of the fashion world to the global mainstream.[89] Many students have adopted gender-nonconforming clothing in their personal style and have different views from their teachers as to what clothing is in keeping with their gender.[90]

By failing to define what clothing is "in keeping with a student's gender," the DCP arguably provides inadequate notice to students making clothing choices. Depending on how regressive a school official's views on fashion are, the official could conceivably enforce the DCP against any girl who, for example, wears pants, a baseball cap, or a short hairstyle. Similarly, an official could conceivably enforce the DCP against any boy who wears the color pink, has long hair, or wears earrings.

B. A Certain Level of Vagueness is Permitted in the Public School Context

These potential vagueness problems with the DCP are probably insufficient to overcome the deference that courts typically afford public school administrators. Simply put, in the public school context, the vagueness doctrine is relaxed significantly. In particular, courts give teachers and school administrators flexibility to protect the safety of students and maintain order within schools, which is, of course, the premise of the DCP.

In *Bethel v. Fraser*, for example, the student plaintiff was suspended for giving an innuendo-laden speech to a school assembly.[91] The student argued that the suspension was a violation of due process.[92] The student claimed that because the school disciplinary rule proscribing "obscene" language did not provide adequate notice, "he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions."[93] The Supreme Court rejected this argument, emphasizing the need for deference to public school administrators in their efforts to provide for a safe learning environment. The Court stated: "We have recognized that 'maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.'"[94]

The Ninth Circuit has not addressed a void for vagueness challenge to a school dress code provision. However, in *Dariano v. Morgan Hill Unified School District,* a district court in the Ninth Circuit rejected a challenge to a school dress code provision on vagueness grounds.[95] The provision at issue in that case allowed school officials to prohibit apparel that would cause a disruption to school activities.[96] The court emphasized the same goals of maintaining order in school that were articulated in *Fraser*, and concluded that the dress code at issue provided just as much guidance as the school regulation in *Fraser*.[97] The court added that the "[p]laintiffs d[id] not cite to a single instance, in this circuit or any other, of a school dress code's ban on disruptive conduct or apparel being held overly vague, and the Court is aware of none."[98]

By contrast, in *Stephenson v. Davenport Community School District*, the Eighth Circuit struck down on vagueness grounds a school disciplinary provision that stated that "gang related activities such as display of 'colors,' symbols, signals, signs, etc., will not be tolerated on school grounds" without providing a definition of the term "gang."[99] The Eighth Circuit counterbalanced the need in *Fraser* to provide flexibility with the fact that the school provision infringed upon First Amendment rights.[100] The court held that the disciplinary provision was facially void for vagueness for failing to define "gang," the "pivotal term."[101] The court based this reasoning on the fact that failing to define the term "gang" would not place students on notice of what type of behavior was prohibited, and on the fact that the provision "allow[ed] school administrators and local police unfettered discretion to decide what represents a gang symbol."[102] The court suggested that the schools

should provide describe specifically the "gang related activities it wishes to avoid" because "[g]ang symbols . . . take many forms and are constantly changing," or otherwise those who enforce the provision will not have "meaningful guidance."[103]

It is difficult to determine which of these approaches the Ninth Circuit would adopt if it were faced with a vagueness challenge to the DCP. On the one hand, the DCP is similar to the provision in *Stephenson* because it is premised on a pivotal term—gender—which directs the school administrator's enforcement without providing a definition. Like the term "gang," "gender" is a term that is constantly changing and is open to a wide range of interpretations. It also leaves teachers with nearly all of the discretion as to how the term DCP would be enforced.

On the other hand, the DCP has a caveat directing teachers to enforce this provision only for gender non-conforming clothes that "[cause] a disruption and/or distracts others from the educational process or poses a health or safety concern."[104] This provides a limitation on the vague term of "gender" that did not exist in *Stephenson*, and seems to bring it closer to the restriction at issue in *Dariano*. Thus, the DCP probably would not be invalidated on vagueness grounds.

V. Conclusion

A gender-nonconforming student litigant in the Ninth Circuit will be faced with numerous obstacles in trying to prove that a gender-restrictive dress code provision is unconstitutional. However, given the existence of three plausible constitutional challenges, it is highly likely that a dress code provision similar to that recently enacted by the Suffolk Virginia School Board would be found to be unconstitutional.

(Endnotes)

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[2] Throughout this article, I will refer to an identical hypothetical version of this dress code provision as "the DCP." *Virginia school district drops proposed cross-dressing ban*, NBCNEWS.COM (Mar. 6, 2012, 12:39PM), http://usnews.nbcnews.com/_news/2012/03/06/10591090-virginia-school-district-drops-proposed-cross-dressing-ban?lite.

[3] After receiving a letter threatening litigation from the ACLU of Virginia, the School Board amended the policy to remove the explicit reference to gender. Press Release, ACLU of Virginia, *Under Pressure, Suffolk School Board Backs Off Discriminatory Gender-Based Dress Code Policy* (Mar. 5, 2012), *available at* http://www.aclu.org/free-speech/under-pressure-suffolk-school-board-backs-discriminatory-gender-based-dress-code-policy ("The newly proposed policy makes no mention of gender, but bans all clothes that cause a 'substantial disruption and/or distraction.'").

[4] For a useful collection of scholarly works on student dress codes in public schools, see Joan Pedzich, *Student Dress Codes in Public Schools: A Selective Annotated Bibliography*, 94 LAW LIBR.. J. 41 (2002).

[5] Jason M. Skaggs, *Justifying Gender-Based Affirmative Action under* United States v. Virginia's *"Exceedingly Persuasive Justification" Standard*, 86 CALIF. L. REV. 1169, 1170 (1998).

[6] Craig v. Boren, 429 U.S. 190, 197 (1976); *accord* Lehr v. Robertson, 463 U.S. 248, 266 (1983).

[7] United States v. Virginia, 518 U.S. 515, 531 (1996).

[8] Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979); *see also* Washington v. Davis, 426 U.S. 229, 239 (1976).

[9] *See* 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. OF JUV. L & POL'Y 281, 287 (2009) (explaining that "*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)").

[10] King v. Saddleback Junior Coll. Dist., 445 F.2d 932 (9th Cir. 1971).

[11] *Id.* at 934-35

[12] *Id.* at 939.

[13] *Id.*

[14] *See e.g.,* United States v. Virginia, 518 U.S. 515 (1996); *see also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Frontiero v. Richardson, 411 U.S. 677 (1973).

[15] It is potentially relevant that the Ninth Circuit has exhibited a reluctance to recognize the burden of gender-explicit dress codes in the analogous Title VII context. *See*

Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1113 (9th Cir. 2006) (holding that a dress code requiring female bartenders to wear makeup and style their hair in a certain way did not constitute unlawful sexual discrimination in employment under Title VII of the 1964 Civil Rights Act without more evidence of unequal burdens between male and female bartenders.).

[16] *Virginia*, 518 U.S. at 533.

[17] Hattie Brown Garrow, *Suffolk Weighs Ban on Cross-Gender Clothing for Students*, The Virginian-Pilot, February 9, 2012, *available at* http://hamptonroads.com/2012/02/suffolk-weighs-ban-crossgender-clothing-students (explaining that "Board Vice Chairwoman Thelma Hinton, who initiated the dress code discussion, said Wednesday that she's pleased with the superintendent's proposal. 'You can be whatever you want to be,' she said, 'but as long as I'm on the board, I'm about safety.' . . . when Hinton first raised a concern, she said . . . [t]eachers considered [gender non-conforming clothes] a distraction."); ACLU of Virginia Press Release, *Under Pressure, Suffolk School Board Backs Off Discriminatory Gender-Based Dress Code Policy*, March 5, 2012 (reporting that "[t]he school board claimed that it was necessary to protect students from being bullied or harassed for wearing gender nonconforming clothes").

[18] *See, e.g.,* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995) (holding that deterring drug use by schoolchildren is an "important . . . perhaps compelling" state interest).

[19] *Virginia*, 518 U.S. at 535-36 ("our precedent instructs that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.")

[20] Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982).

[21] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.").

[22] *See e.g., Miss. Univ. for Women*, 458 U.S. at 730 (holding that even assuming that the objective of refusing male applicants from attending Mississippi University for women was an important government goal, the prohibition of male students was not substantially related to achieving this goal because men could still attend class as auditors).

[23] King v. Saddleback Junior Coll. Dist., 445 F.2d 932, 939 (9th Cir. 1971).

[24] *Id.*

[25] *Id.*

[26] Garrow, *supra* note 17.

[27] *Id.*

[28] *Id.*

[29] Over- and under-inclusiveness are indicators used to determine whether racial classifications are properly (narrowly) tailored to their objective. *See, e.g.,* Grutter v. Bollinger, 539 U.S. 306, 333 (2003). While some under- and over-inclusiveness is not fatal with respect to gender classifications, it undermines the proponent's argument that the DCP is substantially related to the important government goals.

[30] Those who would be tasked with predicting the level of disruption or likelihood of bullying would be forced to project their own views and biases onto students who wore gender-nonconforming clothes. Since older generations have been measurably more intolerant to gay rights than younger generations, it is not improbable that teachers will restrict more instances of gender-nonconforming clothing than is necessary to prevent distractions and bullying. *See* Andrew Kohut, *The Electorate Changes, and Politics Follow,* N.Y. Times, April 16, 2012 *available at* http://www.nytimes.com/roomfordebate/2012/04/16/is-support-for-gay-rights-still-controversial/the-electorate-changes-and-politics-follow?scp=4&sq=kohut%20marriage&st=cse ("Much of the growing support for gay marriage is generational. Majorities of the millennial generation, who were a very small share of the electorate in 2004 when the gay marriage issue rallied the conservative base, have grown in number and have consistently favored [gay marriage].").

[31] *ACLU of Virginia, Press Release, Under Pressure, Suffolk School Board Backs Off Discriminatory Gender-Based Dress Code Policy,* March 5 2012 ("The newly proposed policy makes no mention of gender, but bans all clothes that cause a 'substantial disruption and/or distraction.'").

[32] *See* Cohen v. California, 403 U.S. 15, 18 (1971) (holding that a statute that punished the plaintiff for wearing a t-shirt with the inscription "Fuck the Draft" was a restriction on speech); Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 426 (9th Cir. 2008), (holding that the plaintiff had stated a claim for "deprivation of her First Amendment right to communicate a particular written message on her clothing-that was caused by [a public school's] mandatory uniform policy" (internal quotations omitted)).

[33] R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992).

[34] Texas v. Johnson, 491 U.S. 397, 404 (1989).

[35] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995).

[36] Spence v. Washington, 418 U.S. 405, 410-11 (1974).

[37] *Compare* Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 441 n. 3 (5th Cir. 2001) ("[C]ertain choices of clothing may have sufficient communicative content to qualify as First Amendment activity.") *with* Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 389 (6th Cir. 2005) (a student who desired to wear clothes that she "[felt] good in" had not demonstrated expressive conduct in her clothing choice).

[38] Jacobs v. Clark Cnty, Sch. Dist.,526 F.3d 419, 423 (9th Cir. 2008).

[39] *Id*. at 426.

[40] *Id*.

[41] *See e.g.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *4 (Mass. Super. Oct. 11, 2000) *aff'd sub nom.* Doe v. Brockton Sch. Comm., 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) (holding that the transgender plaintiff had intended to convey a particularized message to other students about her gender identity and "[t]he school's vehement response and some students' hostile reactions are proof of the fact that the plaintiff's message clearly has been received.").

[42] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[43] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 509).

[44] *Tinker,* 393 U.S. at 504.

[45] *Id*.

[46] *Id.*.

[47] *Id.* at 509.

[48] Jacobs v. Clark Cnty. Sch. Dist. 526 F.3d 419, 429 (9th Cir. 2008) (citing Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992) for the proposition that "vulgar" free speech claims be evaluated under the standard in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), and "school sponsored speech" be evaluated under the standard of *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

[49] *Jacobs*, 526 F.3d at 431-32.

[50] *Id.* at 434.

[51] *Id*.

[52] *Id*. at 432.

[53] *Id.* ("[W]hile evidence of a viewpoint- and content-neutral purpose strongly suggests that a regulation is, in fact, content-neutral, mere assertion of a benign purpose is insufficient to *conclusively establish* a regulation's content-neutrality.") (citing Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 642 (1994)).

[54] *Id*. at 433; *see also* Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 441-44 (5th Cir. 2001) (determining that intermediate scrutiny is the standard for a viewpoint neutral school dress code); Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 391-93 (6th Cir. 2005) (same).

[55] NBCNEWS.COM, *supra* note 2.

[56] *Jacobs*, 526 F.3d at 434 (quoting Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 661-62 (1994), and citing United States v. O'Brien, 391 U.S. 367, 376-77 (1968)).

[57] *Id.* at 435 (quoting *Turner Broadcasting System*, 512 U.S. at 664).

[58] *Id.* at 435-36.

[59] *Id.* at 436.

[60] *Id*.

[61] Some commentators have criticized the trend of deferring to conclusory affidavits from school officials in satisfying the "furthering government interest" prong for school dress codes. *See e.g. Constitutional Law - Free Speech Clause - Fifth Circuit Upholds Texas School District's Dress Code Under Intermediate Scrutiny.* - Palmer ex rel. Palmer v. Waxahachie Independent School District, *579 F.3d 502 (5th Cir. 2009)*, 123 HARV. L. REV. 2088, 2094 (2010).

[62] *Jacobs*, 526 F.3d at 436 (quoting *Turner Broadcasting System*, 512 U.S. at 662 and citing *O'Brien*, 391 U.S. at 377).

[63] *Id*.

[64] *Id*.

[65] *Id.* at 437 (quoting Colacurcio v. City of Kent, 163 F.3d 545, 551 (9th Cir.1998)).

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *See* Zenobia V. Harris, *Breaking the Dress Code: Protecting Transgender Students, Their Identities and Their Rights,* 13 SCHOLAR 149, 155-56 (2010) ("[B]ecause transgender youth cannot legally consent to gender reassignment surgery or hormone therapy without their parents' permission, a transgender youth's external appearance often becomes the primary expression of his or her gender identity. As a school's dress code can be used to enforce gender norms and prescribe gender conformity these rules become a means by which transgender youths' identities are suppressed and they are further marginalized and silenced.").

[70] City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

[71] Smith v. Goguen, 415 U.S. 566, 572 (1974)

[72] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (citations omitted).

[73] *Id*.

[74] *Goguen*, 415 U.S. at 573.

[75] Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

[76] *Goguen*, 415 U.S. at 574.

[77] Merriam-Webster's Collegiate Dictionary 520 (11th ed. 2007).

[78] *Id.* at 1140.

[79] For a more comprehensive discussion of the biological difference between the sexes see Daniel D. Federman, *The Biology of Human Sex Differences*, 354 N. Engl. J. Med. 1507 (2006).

[80] The 1.7% figure "should be taken as an order-of-magnitude estimate rather than a precise count." Anne Fausto-Sterling, Sexing the body: Gender Politics and the Construction of Sexuality 51-54 (1st ed. 2000) ("Such insistence [that people are either naturally male or female] occurs even though intersexual births occur with remarkably high frequency and may be on the increase.").

[81] The definition of an individual's sex depends on state law, which usually regards an individual's sex as that defined at birth. *See* John Parsi, *The (Mis)categorization of Sex in Anglo-American Cases of Transsexual Marriage*, 108 Mich. L. Rev. 1497, 1505 (2010).

[82] *See also, Gender & Gender Identity*, PlannedParenthood.org, *available at* http://www.plannedparenthood.org/health-topics/sexual-orientation-gender/gender-gender-identity-26530.htm (last accessed on January 7, 2013).

[83] Michelle Dietert & Dianne Dentice, *Growing Up Trans: Socialization and the Gender Binary*, 9 Journal of GLBT Family Studies, 24, 25-29, (2013).

[84] Clem Brooks and Catherine Bolzendahl, *The Transformation of US Gender Role Attitudes: Cohort Replacement, Social-Structural Change, and Ideological Learning,* 33 Social Science Research 106, 107-109 (2004) (discussing the liberalization of attitudes toward gender roles in the US).

[85] Constantina Papoulias, *Transgender*, 23 Theory Culture Soc'y 231, 232 (2006).

[86] *See also* Jaime M. Grant et al, *Injustice at Every Turn: A Report of National Transgender Discrimination Survey*, National Transgender Discrimination Survey, at 38 (2011) *available at* http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf (documenting mistreatment of transgender students by teachers and staff in K-12 schools).

[87] PlannedParenthood.org, *supra* note 82.

[88] Erica Jones, ACLU Warns Against Dress Code Ban, Fox43tv.com (Feb. 10, 2012) *available at* http://www.fox43tv.com/dpps/news/local/suffolk/board-wont-back-down-in-dress-code-ban_4067778 (pointing out that "some girls have been wearing neckties since the film *Annie Hall*, but some teachers may view it as a 'male' garment").

[89] *See* Diana Lee, *Androgyny Becoming Global?*, UniOrb.com (March 2005), available at http://uniorb.com/RCHECK/RAndrogyny.htm.

[90] Jan Hoffman, *Can a Boy Wear a Skirt to School?*, N.Y Times, (Nov. 6, 2009) *available at* http://www.nytimes.com/2009/11/08/fashion/08cross.html?pagewanted=all (discussing the generational divide between teachers and students on the issue of gender and clothing choice.).

[91] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677-678 (1986).

[92] *Id.* at 679.

[93] *Id*. at 686.

[94] *Id*. (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)).

[95] 822 F. Supp. 2d 1037, 1046-47 (N.D. Cal. 2011).

[96] *Id*.

[97] *Id*. at 1047.

[98] *Id*.

[99] 110 F.3d 1303, 1308 (8th Cir. 1997).

[100] *Id.* at 1308-1309.

[101] *Id.* at 1310.

[102] *Id*.

[103] *Id*.

[104] NBCnews.com, *supra* note 2.