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DRESSING TO IMPRESS?
A LEGAL EXAMINATION OF DRESS CODES IN PUBLIC SCHOOLS

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I want to extend my eternal gratitude to the entire editorial team of Volume 57. I also want to acknowledge my wonderful parents, Laura and Steven Siner, for all their support and love.

I dedicate this article to every girl growing up in California public schools. I hope you that you never let anything stand in the way of getting your education and making your mark on the world.

INTRODUCTION

School is a place where students are expected to learn and become prepared to enter the outside world. It is not a cocoon for young people to be protected from the realities they will inevitably face. It is in this spirit that dress codes, especially as they relate to young girls in public schools, should be reexamined by the courts.

Toward the beginning and end of the school year in the United States, the weather is often quite hot. Many schools require students to sit outside during lunch or spend time outdoors for physical education.[1] As a result, boys and girls alike often choose to wear clothing that will keep them cool. Most will not don apparel considered inappropriate by reasonable standards; most students wear clothing purchased for them by their parents and are likely not allowed to leave their homes for school if their parents disapprove of their clothing choice.[2] Within this reality, public school dress codes often seek to create another layer of protection for students, encouraging appropriate dress in order to keep students focused on education and not what others are wearing. But, lurking within this very noble goal lies the very real threat of suppressing students' basic rights of expression and, even more frequently, a perpetuation of archaic sexist standards.

As the law currently stands, both in California and at the federal level, a female student challenging sexist dress code practices stands little to no chance of success in court. When a fourteen-year-old girl is taken out of class and told to change her clothes because her shoulders are exposed or that five inches of her leg above the knee is exposed instead of the acceptable four, she deserves to have the opportunity to challenge it. This practice is all too common throughout the nation[3],

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1. This author attended a public high school in California where temperatures in September and May were regularly over ninety degrees, and all students were required to sit outside during lunchtime, where shade from trees or buildings was scarce.

2. This certainly is not true for all public school students, but hopefully serves to illustrate a typical case.

3. *E.g.* Brenda Álvarez *Girls Fight Back Against Gender Bias in School Dress Codes*, NEA TODAY, January 6, 2016, http://neatoday.org/2016/01/06/school-dress-codes-gender-bias/; Li Zhou, *The Sexism of School Dress Codes*, THE ATLANTIC, October 20, 2015, http://www.theatlantic.com/education/archive/2015/10/school-dress-codes-are-problematic/410962/; Gabrielle Sorto *Student Protests Growing Over Gender-Equal Dress Codes*, CNN, February 25, 2016, http://www.cnn.com/2016/02/25/living/dress-code-protests-irpt/; Soraya Chemaly, *Every Reason Your School's Gendered Dress Code is Probably a Sexist Mess*, THE HUFFINGTON POST, September 25, 2016, http://www.huffingtonpost.com/soraya-chemaly/every-reason-your-schools_b_8147266.html; Jessica Valenti, *Are Prudish School Dress Codes Targeting Girls in Violation of Discrimination Laws?*, ALTERNET, September 17, 2014, http://www.alternet.org/gender/are-prudish-school-dress-codes-targeting-girls-violation-

and even in California, where gender discrimination is given stronger treatment than at the federal level. The law should be an equalizer, yet it cannot accomplish that task when precedent dictates that a court will not even reach the merits in a case such as this.

This paper will outline the evolution of dress code challenges through freedom of expression since the 1960s, as well as the development of gender discrimination challenges, showing how these two overlapping issues here deserve different treatment by the courts. This history will be shown through federal law, as well as controlling law specific to California, due to the difference between California and federal standards. This paper will then present a proposed presumption of discrimination for courts to use in cases such as this in order to allow the greatest efficacy in the legal system. This will allow courts to review discrimination challenges to dress codes to be reviewed on their merits, rather than hindered by the current framework of judicial review.

I. BACKGROUND

Sexism in dress codes involves two interrelated constitutional issues: freedom of expression under the First Amendment,[4] and equal protection. Equal protection is treated under both the Fourteenth Amendment[5] and the California constitution.[6] The development of the law in each of these areas will be discussed in turn.

A. Freedom of Expression

When clothing choice becomes an issue, the first concern most people would have involves freedom of expression; free speech through the First and Fourteenth Amendments protects the right to express yourself in whatever way you choose.[7] But this right is not absolute. The Supreme Court has put a number of limits on what speech qualifies as protected.[8] The Court has not specifically addressed dress codes in schools since the 1969 in the landmark case *Tinker v.*

discrimination-laws.

4. U.S. Const. amend. I.

5. U.S. Const. amend. XIV.

6. Cal. Const. art. I §§ 11, 21.

7. The First Amendment has been applied to the states through the Fourteenth Amendment, requiring the state governments, which regulate public schools in each state, to comply with First Amendment protections. *See* Gitlow v. New York, 268 U.S. 652 (1925).

8. For example, hate speech and obscenity are not protected by the First Amendment. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (regarding the permissible punishment of 'fighting words' under the First Amendment); *see also* Roth v. United States, 354 U.S. 476 (1957) (detailing the test of what constitutes 'obscene material' unprotected by the First Amendment).

Des Moines County Independent School District.[9]

In December of 1965, John Tinker and a few of his friends planned to wear black armbands to school in protest of the Vietnam War.[10] The administrators of the school told them that if they indeed did as they planned, they would be asked to leave school until they returned without the armbands.[11] Tinker sued the school district for violating his First Amendment right to free speech.[12] The Supreme Court found that the armbands they were wearing in order to protest the war were akin to "pure speech" in that they were symbolic of the message they sought to convey, therefore falling under the protection of the First Amendment.[13]

Further, because neither students nor teachers shed their Constitutional rights upon entering a school, the protection of the First Amendment still applies in the school setting.[14] This setting, however, presents particular concerns for safety and the educational mission, and therefore presents a conflict between school rules and Constitutional guarantees.[15] The school district argued that their rule was valid because it properly prevented disruption and disturbance to the learning environment and protected against discord grown from divisive viewpoints.[16] The Court held that this "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[17] The school must show facts that would lead them to forecast substantial disruption and interference with school activities.[18] Short of that, the school is impermissibly suppressing free expression in order to avoid the discomfort of unpopular opinions.[19]

The *Tinker* court specifically stated that its holding does not relate to regulating "the length of skirts or type of clothing, to hair style or deportment."[20] The *Tinker* test only applies to symbolic speech in schools where the wearer intends a particular message to be conveyed by their vestments.[21] The average student's clothing usually only reflects the wearer's preference, and others would probably view the

9. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
10. *Id.* at 504.
11. *Id.*
12. *See id.*
13. *Id.* at 505–06.
14. *Id.* at 506.
15. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).
16. *Id.* at 508.
17. *Id.*
18. *Id.* at 514.
19. *Id.* at 509.
20. *Id.* at 507–08.
21. *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

clothing as conveying just that.[22] The Ninth Circuit took exactly this view.[23]

While generic clothing cannot be construed as symbolic speech, a number of circuit courts have addressed protection of other aspects of appearance. In the late 1960s and early 1970s, a huge number of cases were brought by boys challenging school rules regarding hair length.[24] It was the style at the time for boys to wear their hair long, and schools, in an effort to keep their students clean-cut and presentable, instituted provisions in their dress code mandating how long boys were allowed to wear their hair.[25] Many courts during this time agreed that there was a Constitutional right to govern one's own appearance.[26] Absent the symbolic speech discussed in *Tinker*, these courts agree that the First Amendment's freedom of speech did not protect choice of hairstyle because there is no intended message to be conveyed.[27]

These courts have sought to find another source for the right to choose one's appearance. The Ninth Amendment protects the rights of the people not otherwise enumerated with specific protection in the Bill of Rights.[28] The right to one's appearance has been viewed as fitting within this vein.[29] Others have found the right as one of liberty in the Fourteenth Amendment[30] or within the penumbra of privacy described by the Supreme Court as being found generally within the Bill of Rights.[31] Regardless of where this right comes from, it has been recognized by a number of Circuit courts, and state courts and has never been contradicted by the Supreme Court.[32]

Under this view, courts have found that students do have a right to control their own appearance and wear their hair how they wanted.[33] Schools, however, do have the right to promulgate rules that protect

22. King v. Saddleback Jr. Coll. Dist., 445 F.2d 932, 937 (9th Cir. 1971) (finding that the regulation for hair length was not intended to curtail speech rights, and the students in violation did not have any intention of using their hair as a symbol for any kind of speech).

23. *See id.*

24. *See* Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) DOC9; Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972).

25. *Richards*, 424 F.2d at 1286; *Breen*, 419 F.2d at 1035.

26. *See Bishop*, 450 F.2d at 1075*; Breen*, 419 F.2d at 1036*; Richards*, 424 F.2d at 1285.

27. *E.g. Bishop*, 450 F.2d at 1074–75.

28. U.S. Const. amend. IX.

29. *Bishop*, 450 F.2d at 1075.

30. *Richards*, 424 F.2d at 1284.

31. Crews v. Cloncs, 432 F.2d 1259, 1263–64 (7th Cir. 1970).

32. The right to one's appearance has been found to fall under the "liberty umbrella" of the Fourteenth Amendment as well as the California Constitution by California courts. Montalvo v. Madera Unified Sch. Dist. Bd. of Educ., 21 Cal. App. 3d 323, 334 (1971).

33. *Richards*, 424 F.2d at 1286.

student safety and further the educational mission.[34] Rules that infringe on students' rights, therefore, must be tailored to further permissible goals.[35] In the aforementioned cases, hair length regulations were defended as promoting hygiene and preventing distraction.[36] Courts have come out both ways on this issue, some finding that schools could permissibly regulate hair length,[37] and others finding that the regulations were unrelated to the suggested justifications.[38]

Just as *Tinker* did not extend its holding to regulations on "the length of skirts" or other non-symbolic clothing choices,[39] some of these hair length cases have similarly excluded clothing from their holdings.[40] As justification for this, the First Circuit stated that clothing can be changed depending on the setting—that clothing one wears to school can be easily changed from what could be worn elsewhere—while hair is a more permanent part of one's own appearance, not as easily adjusted for different circumstances.[41] Similarly, justification for "skirt length" regulations in schools would be easier to find than one for hair length.[42] Courts have not addressed hair length or other appearance-related cases in this vein since the 1970s, as changes in cultural views of appearance led to looser school rules, prompting fewer challenges.[43]

There are plenty of very worthy dress code provisions at schools all around the country that do not infringe upon free expression, allowing the schools to achieve their educational goals in a safe environment. California's Education Code, for example, even has specific provisions for dress code regulations as it relates to safety.[44] Students in California public schools have the right to be safe and secure in their person while at school.[45] To this end, the California

34. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–10 (1969).

35. *Id.*

36. "Once the personal liberty is shown, the countervailing interest must either be self-evident or be affirmatively shown. We see no inherent reason why decency, decorum, or good conduct requires a boy to wear his hair short." *Richards*, 424 F.2d at 1286; *but see* Bishop v. Colaw, 450 F.2d 1069, 1076 (8th Cir. 1971) (finding that long hair might affect sanitation of the pool or distract others from strong academic performance).

37. *See* Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972).

38. *See Richards*, 424 F.2d at 1286.

39. *Tinker*, 393 U.S. at 507–08.

40. *See Richards*, 424 F.2d at 1285.

41. *Id.* at 1285.

42. *Id.*

43. Rather than attacking individual aspects of dress codes, following this string of 1970s cases (and their overall lack of success in challenging these provisions), plaintiffs have instead attacked public school uniform requirements, which became popular in the early 21st Century. *See infra* note 57.

44. Cal. Educ. Code § 35183(a).

45. Cal. Educ. Code § 35183(a)(1).

Education Code allows for schools to institute dress codes and even uniform policies to prevent gang-related apparel from disrupting the school environment.[46] Similarly, schools may prohibit clothing that can conceal, or even be used as, weapons in order to protect the safety of everyone on the school campus.[47] In areas where gang affiliation is a concern, clothing becomes an issue to the extent that it indicates gang-related association or threats, distracting students from school and instead diverting their attention to their own personal safety.[48]

Individual rights, such as free expression, that are not subject to a specified heightened scrutiny are reviewed by courts under the rational basis test.[49] Under this test, any conceivable and legitimate government interest will suffice to justify the governmental regulation at issue, so long as they are rationally related to the means utilized.[50] This almost certainly ensures that the government will overcome any challenge.[51] There is precedent for finding that dress codes may be arbitrary, overbroad, or unrelated to the educational mission so as to be found invalid.[52] A length requirement for girls' shorts, for example, is an arbitrary choice of four inches above the knee.[53] Preventing garments from being too short does further the valid purpose of preventing indecency, but four inches is an arbitrary length; four inches above the knee looks different on a girl who is five feet tall versus a girl who is nearly six feet tall.[54] To that end, a court may find the provision to be arbitrary and therefore invalid and unenforceable, as was done by the Arkansas court in *Wallace v. Ford*.[55] Similarly, the defendant school must show that there is a rational relationship between any type of banned clothing and furthering its educational mission, which cannot be found if the rule is arbitrary.[56]

More recently, there has been a renewed interest in free

46. *Id*.

47. Cal. Educ. Code § 35183(a)(2)–(4)

48. Cal. Educ. Code § 35183(a)(5)–(6)

49. The liberty interest here of dressing as one chooses, because it has not been specifically addressed by the Supreme Court, is not a fundamental right subject to strict scrutiny.

50. *See* United States v. Carolene Products Co., 304 U.S. 144, n.4 (1938).

51. If the government can give a conceivable rationale of a legitimate use of legislative or executive power in enacting a law or rule which may consequently infringe on some rights, the court will allow the law or rule to stand as a show of respect for the political branches and preserving the separation of powers.

52. *See* Wallace v. Ford, 346 F. Supp. 156, n.4 (E.D. Ark. 1972).

53. *Id.* at 163–64. *See infra* Part IV.

54. *Id.*

55. *Id.* at 164. Dress code provisions that are "arbitrary" do not satisfy the constitutional requirement that any rule that infringes on students' rights must be rationally related to the legitimate goal of the school.

56. *Id.*

expression claims in dress codes due to a trend toward mandatory uniforms for public schools.[57] The Ninth Circuit addressed a mandatory uniform in a Nevada public school as having the potential to invade First Amendment rights, though found that the particular dress code in that case did not infringe on constitutionally protected rights.[58] Under the Ninth Circuit's analysis in *Jacobs v. Clark County School District*, speech rights in public schools fall into one of three categories: "(1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of these categories."[59] Dress codes fall into neither of the first two categories.[60] The third category of all other types of speech, according to the Ninth Circuit, is to be viewed with "*Tinker* scrutiny."[61] The Supreme Court, however, limited *Tinker*'s test of "substantial interference" to "pure speech" that conveys a particularized message.[62] The Ninth Circuit has confirmed *Tinker*'s limitations.[63] Because *Tinker* cannot be applied to all speech rights outside offensive speech and school-sponsored speech, the Ninth Circuit has utilized a different approach.[64]

Content- and viewpoint-neutral dress codes that have an incidental impact on students' rights of free expression must survive intermediate scrutiny in order to be found constitutional.[65] A law or regulation is content-neutral if it does not limit speech based on particular subject-matters.[66] Viewpoint-neutrality is satisfied when the regulation does not differentiate based on various opinions within a certain subject-matter.[67]

Intermediate scrutiny in First Amendment claims have a specific

57. *E.g.*, Tamar Lewin, *Dress for Success: Public School Uniforms*, N.Y. TIMES, Sept. 25, 1997, http://www.nytimes.com/1997/09/25/us/dress-for-success-public-school-uniforms.html.

58. Jacobs v. Clark Cty. Sch. Dist., 526 F.3d 419, 426, 437–38 (9th Cir. 2008) (finding that mandatory uniform policies do not infringe on students' *constitutionally protected right* to "expressive conduct") (emphasis added).

59. *Id.* at 429 (quoting Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992).

60. *Id.*

61. *Id.*

62. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507–08, 511 (1969) (stating that the Court's holding does not pertain to "the length of skirts or type of clothing, to hair style or deportment").

63. King v. Saddleback Jr. Coll. Dist., 445 F.2d 932, 937 (9th Cir. 1971) (finding that the regulation for hair length was not intended to curtail speech rights, and the students in violation did not have any intention of using their hair as a symbol for any kind of speech).

64. *Jacobs*, 526 F.3d at 434.

65. *Id.*

66. Turner Broadcasting System, Inc. v. F.C.C., 512 U.S, 622, 643 (1994).

67. Boos v. Barry, 485 U.S. 312, 319 (1988).

test.[68] The law subject to this level of scrutiny will be upheld as constitutional 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."[69] The first prong of this test has two parts, namely that the government interest must be important or substantial, and the rule furthers that interest.[70] The test as described by the Supreme Court and applied to school dress codes by the Ninth Circuit is silent on how close the relationship between the school's rule and its purpose must be in this context. The governmental interest must be unrelated to suppressing free expression and the suppression that does occur must be as minimal as possible.[71] The nature of dress codes inherently does suppress expression in and of itself, but courts have found that a regulation is permissible if the government entity's stated intention is not directed at speech or expression.[72] The Ninth Circuit found that the uniform policy only limited one form of student expression while keeping open many other channels for expression.[73]

In summation, the Ninth Circuit currently uses intermediate scrutiny for content- and viewpoint-neutral laws that infringe upon free expression.[74] The three-prong test requires that the rule further an important government interest, has a purpose unrelated to suppressing expression, and is the most minimally oppressive alternative available to further the government's interest.[75] Content-based or viewpoint-based rules for appearance and dress are evaluated using the *Tinker* test.[76] As of yet, however, courts have not examined the most recent dress code issues, dealing with "school dress codes only target[ing] girls."[77]

B. Gender Discrimination

California courts treat gender discrimination differently than those at the federal level. These differences in development and treatment

68. *Jacobs*, 526 F.3d at 434.
69. *Id.* (quoting *Turner*, 512 U.S. at 661–62).
70. *Id.*
71. *Id.*
72. *See id.* at 434–35.
73. *Id.* at 437.
74. *See generally* Jacobs v. Clark Cty. Sch. Dist., 526 F.3d 419 (9th Cir. 2008).
75. *Id.* at 434.
76. *See* Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992).
77. Lilian Min, *This school just punished at least 25 girls (and zero boys) for dress code violations during a massive heatwave*, HELLO GIGGLES, June 17, 2015, http://hellogiggles.com/only-girls-punished-dress-code.

will be discussed separately below, first at the California state level, followed by the federal level.

1. California Equal Protection

The California Constitution states that "a person may not be . . . denied equal protection of the laws."[78] Under equal protection law, some discrimination is permitted for effective legislation and enforcement of laws, but certain categories are protected more stringently than others.[79] The highest level of protection is given to those within suspect classes.[80] In California, gender has been treated as a suspect class since 1971.[81]

In *Sail'er Inn, Inc. v. Kirby*, bar owners sought a writ of mandate to prevent the Department of Alcoholic Beverage Control from revoking their licenses because they had hired female bartenders.[82] The department at that time could have acceptably revoked such licenses because the Business and Professions Code included a provision that prohibited women from being bartenders, unless they were wives or direct family members of the holder of the liquor license.[83] This rule was challenged as a violation of the equal protection of the law as guaranteed in the California Constitution.[84] The California Supreme Court invalidated the rule[85] and established sex as a suspect class under California law, subjecting all laws making distinctions based on gender to strict scrutiny.[86] The court found that sex is an immutable trait that "frequently bears no relation to ability to perform or contribute to society," similar to race or lineage.[87] Women were traditionally prohibited from full participation in American society as a protective measure, resulting from outdated stereotypes about women and their "proper" role.[88] Gender is therefore treated as a suspect class in California to prevent the continued use of sexual stereotypes in

78. Cal. Const. art. I § 7.
79. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 16 (1971).
80. *Id.*
81. *See id.* at 17.
82. *Id.* at 6.
83. *Id.* (citing Cal. Bus. and Prof. Code § 25656).
84. *Id.* at 15. The relevant sections of the California Constitution at the time the case was decided was art. I §§ 11, 21 but these numbers have since changed.
85. Petitioners in this case also challenged on the basis of a different section of the California Constitution (Cal. Const. art. XX § 18 (since renumbered to Cal. Const. art. I § 8)) as well as under the 1964 Civil Rights Act and the Fourteenth Amendment of the federal Constitution. *Sail'er Inn*, 5 Cal. 3d at 6 (1971).
86. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 18 (1971).
87. *Id.* Immutable characteristics such as these are typically treated as suspect classes.
88. *Id.*

invidious practices.[89] California public policy thus mandates equal treatment of men and women.[90]

Because gender is a suspect class in California, laws that make distinctions based on gender are subject to strict scrutiny.[91] Under this level of review, such laws may be upheld only if they are shown to be necessary to further a compelling state interest, using the least restrictive means available.[92] The challenger always bears the burden of showing unconstitutionality but pointing out express gender classifications within a statutory scheme meets this burden in California.[93] Essentially, when gender classifications are unnecessary and gender-neutral alternatives are available, the law in question is unconstitutional.[94]

Equal protection jurisprudence differentiates between facially neutral and facially discriminatory classifications.[95] Facially discriminatory classifications involve blatant disparate treatment between men and women on the face of the government rule, while facially neutral rules are silent on their classification but have a disparate impact one gender over the other.[96]

For facially discriminatory laws, the key consideration for the court is whether the gender distinctions are necessary to further a compelling state interest and whether gender-neutral alternatives are available.[97] The school rule must also be necessary to further the compelling interest; the means to the ends must be narrowly tailored.[98] Strict scrutiny also requires that no gender-neutral alternatives are available.[99] No law that makes direct gender distinctions can survive if gender-neutral alternatives are available and not implemented in place of the gender-conscious distinction.[100]

Strict scrutiny is only automatically applied when, as previously stated, the rule differentiates between the sexes on its face.[101] In order to show gender discrimination through a neutral law, the plaintiff must also show that the law was created with a discriminatory intent;

89. *Id.* at 18–20.
90. Koire v. Metro Car Wash, 40 Cal. 3d 24, 37 (1985).
91. *See id.*; *See also Sail'er Inn*, 5 Cal. 3d 1, 20.
92. Woods v. Horton, 167 Cal. App. 4th 658, 674 (2008) (citing Connerly v. State Pers. Bd., 92 Cal. App. 4th 16, 33 (2001)).
93. *Id.*
94. *Woods*, 167 Cal. App. 4th at 674.
95. *See* Hardy v. Stumpf, 21 Cal. 3d 1 (1978).
96. *Id.*
97. *See Woods*, 167 Cal. App. 4th at 674.
98. *Id.* at 674–75.
99. *Id.* (citing Connerly v. State Pers. Bd., 92 Cal. App. 4th 16, 36 (2001)).
100. *Id.*
101. *Hardy*, 21 Cal. 3d 1 at 7.

discriminatory effect is not enough to elicit strict scrutiny.[102] Discriminatory intent is shown through the state selecting a course of action because of the adverse effects it will create on a particular group, not simply in spite of these effect.[103] This intent element is subjective—in that the state must have purposefully intended for the law to discriminate—rather than objective—wherein the state's actions, by their nature, would lead to a discriminatory effect.[104] Without discriminatory intent, discrimination based on gender cannot be found.[105] Without such purposeful discrimination against a suspect class, the court cannot utilize strict scrutiny against the law.[106] Instead, the court will apply the rational basis test. In such a case, the state action must bear some rational relationship to a legitimate governmental purpose in order to be found constitutional.[107]

2. Federal Equal Protection

The Fourteenth Amendment of the United States Constitution states that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[108] Just as under the California Constitution, federal jurisprudence reviews any law burdening a suspect class under strict scrutiny.[109] But unlike in California, gender is not a suspect class under federal law and therefore does not receive strict scrutiny.[110] In 1976, the Supreme Court developed a new level of scrutiny in *Craig v. Boren*.[111] Based on previous cases that invalidated gender discrimination, the Court evaluated an Oklahoma law using what would be termed intermediate scrutiny.[112] The law allowed women to purchase low alcohol content beer at age eighteen, but required men to be twenty-one for such a purchase.[113] The Court found that the Equal Protection Clause requires that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[114] The Oklahoma law did not meet this level of scrutiny and was found

102. *See* Baluyut v. Superior Court, 12 Cal. 4th 826, 837 (1996).
103. *Id.* at 36–37 (citing Wayte v. United States, 470 U.S. 598 (1985)).
104. *See id.* at 37.
105. *See Hardy*, 21 Cal. 3d at 7.
106. *Id.*
107. *Id.*
108. U.S. Const. amend. XIV § 1.
109. *See generally* Loving v. Virginia, 388 U.S. 1 (1967).
110. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).
111. *Id.*
112. *Id.*
113. *Id.* at 192.
114. *Id.*at 197.

unconstitutional.[115]

For gender classifications, the Supreme Court has been adamant about what governmental objectives will be found sufficiently important to survive intermediate scrutiny.[116] Most recently, the Court has expressed these considerations in *United States v. Virginia*, wherein the Virginia Military Institute was found in violation of the Fourteenth Amendment when it refused admission to women.[117] The Court articulated that the governmental body defending such a gender-based classification must demonstrate an "exceedingly persuasive justification."[118] Such a justification must be demonstrably genuine and not merely created as a response to litigation.[119] Overbroad generalizations about differences between males and females relating to their talents, capacities or preferences are impermissible.[120] Utilizing sex as a proxy for furthering "traditional" gender roles that bear no relation to desired qualities would be found similarly lacking as an "exceedingly persuasive justification."[121] The Supreme Court jurisprudence requires that the justification for such a classification be genuine and not merely concocted in response to an equal protection challenge against it.[122] Virginia Military Institute's objectives in refusing to admit women were not backed by the required "exceedingly persuasive justification" and the school was ordered to allow admission to women.[123]

Once a court does find an important purpose or "exceedingly persuasive justification," the court then looks to find a substantial relationship between the gender classification and the important purpose.[124] This substantial relationship is very fact-specific, and the Supreme Court has found that a gender-related classification does not require that the rule under consideration must, in every instance, be capable of achieving its ultimate objective.[125] To require such a strong relationship would entail a higher level of review than intermediate scrutiny. Cases have been decided both ways on whether such a substantial relationship exists between the means and ends in gender

115. *Id.* at 210.
116. *See generally* United States v. Virginia, 518 U.S. 515 (1996).
117. *Id.* at 558.
118. *Id.* at 531.
119. *Id.* at 533.
120. *Id.*
121. *See* Craig v. Boren, 429 U.S. 190, 199 (1976); *see also* United States v. Virginia, 518 U.S. at 534.
122. United States v. Virginia, 518 U.S. at 533.
123. *Id.* at 534.
124. *Craig*, 429 U.S. at 197.
125. Tuan Anh Nguyen v. INS, 533 U.S. 53, 70 (2001).

discrimination cases.[126]

Just as in California, federal equal protection differentiates between facially neutral and facially discriminatory laws.[127] In order for a gender-neutral law to receive intermediate scrutiny for gender-based discrimination, the Supreme Court has laid out a two-part test.[128] First, the classification in question must be truly neutral and not gender-based in a covert manner.[129] If not, the court looks to find a discriminatory purpose behind the gender-neutral law.[130] Only disparate impact as a result of invidious gender discrimination will suffice to receive intermediate scrutiny.[131] In that second inquiry, the evidence of disparate impact is a starting point, but must be the result of purposeful discrimination in order to be found unconstitutional.[132] Such purposeful discrimination must be proved, just as under California law.[133] The California courts borrowed analysis under the Fourteenth Amendment to apply to equal protection under the California Constitution.[134] As such, the same intent element is required under federal law, wherein the subjective intent of the governmental body in enacting the gender-neutral provision was to unequally burden one gender.[135] Without proof of intentional invidious discrimination, courts will not invalidate a law, neutral on its face and serving otherwise legitimate ends, that happens to have a greater effect on one group than on another.[136]

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126. *See generally Nguyen* 533 U.S. at 73 (finding a substantial relationship between stricter requirements for proving paternity than for maternity and the government's goal of preventing fraud in naturalization claims); *see also* Craig v. Boren, 429 U.S. 190, 204 (1976); (finding a substantial relationship lacking between the important purpose of preventing drunk driving and imposing separate age requirements for men and women purchasing alcohol).

127. *See supra* Parts I.B.1–2.

128. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979).

129. *Id.* In this case, the State of Massachusetts gave preferential hiring in government jobs to veterans. This practice had the effect of denying Ms. Feeney from government positions and promotions, as women were denied opportunities in the armed forces until very recently. The classification was one of veterans versus non-veterans, but because nearly all veterans were men at that time, women were effectively excluded from this favored group. The Court found, however, that because men were in both categories of veterans and non-veterans, the classification was not covertly gender-based.

130. *Id.* at 274.

131. *See id.* at 278–80.

132. *Id.* at 274.

133. *See supra* Part I.B.1.

134. Baluyut v. Superior Court, 12 Cal. 4th 826, 837 (1996) (citing Washington v. Davis, 426 U.S. 229 (1976)).

135. *See Davis*, 426 U.S. at 242.

136. *Id.*

II. ISSUE

Gender discrimination in public school dress codes is a two-tiered issue: essentially, free expression rights for students to choose their clothing are burdened more heavily for girls than for boys; the free expression issue is embedded within a gender discrimination issue. This duality of constitutional concerns is denied full review on the merits due to current jurisprudence. Both in California and at the federal level, absent a facially discriminatory law, a plaintiff must prove purposeful discrimination in order to receive any kind of heightened scrutiny.[137] Showing proof of purposeful discrimination is a very high bar to meet, and plaintiffs rarely, if ever, succeed in showing that a neutral law is promulgated with discriminatory intent.[138] When this discriminatory intent, even if it does exist, cannot be shown, the plaintiff cannot receive heightened scrutiny, and a court will not reach the proper merits of the discrimination claim. For girls receiving dress code violations at a higher rate than boys, this means that their discrimination claim will receive only rational basis review, wherein the court will almost certainly find in favor of the school. The only other alternative is to challenge the dress code purely on freedom of expression grounds under the First Amendment,[139] even though the real issue is that it is girls whose free expression rights are being unduly restricted, while boys are not likewise burdened. Additionally, schools today rarely create dress codes that would violate free expression on their face, due to over four decades of state and federal litigation on the subject.[140]

III. ANALYSIS

To illustrate this issue, let us consider this fact pattern:

Emma is a fourteen-year-old freshman at a California public high school. On a hot day, she decided to wear a pair of shorts and a tank top to school. The shorts reached down to her mid-thigh and the straps on her tank top sufficiently covered her undergarments, cleavage, and midriff, exposing only her shoulders and her neck. She went through the morning at school without comment from any of her friends or teachers in regards to her appearance. At lunchtime, however, she walked across the quad and was stopped by Vice Principal Smith, who told Emma to accompany her to the administrative office. On their

137. *See supra* Parts I.B.1. –2.

138. *See Davis*, 426 U.S. at 241–42; *see also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 276–79 (1979); *see also* McCleskey v. Kemp, 481 U.S. 279, 292–93 (1987).

139. *See supra* Part I.A.

140. *See supra* Parts I.A. & I.B.1.

way, they walked by a group of boys wearing shorts and tank tops who complained about the heat. In the office, Vice Principal Smith took a ruler and put it beside Emma's knees. She informed Emma that her shorts were five inches above her knees, rather than the acceptable four inches, and her tank top was a prohibited item in the dress code. She would have to wait in the office for her parents to bring her a change of clothes before she would be allowed to go back to class. Emma ended up missing a math quiz while she was waiting, and was unable to make it up due to missing class for disciplinary reasons. Emma left that day feeling embarrassed at being told to change, annoyed for being singled out when boys were wearing similar clothing, and worried about her math grade. Emma's mother came to talk to Vice Principal Smith about the incident and was told that the dress code is a way of preventing disruption and distraction in school and keeping students focused on education rather than what others are wearing. Emma's mother was given a copy of the school's dress code policy,[141] which shows that Emma was in violation. Emma and her parents feel that this is a violation of her rights and wish to challenge it.

The remainder of this section will go through an analysis of this fictitious case using current state and federal law on the issue.[142] As described above, current laws do not allow for a case such as Emma's to have a chance of prevailing.

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141. The dress code of Emma's high school is as follows:

(1) Clothes, apparel or attire must be sufficient to conceal undergarments at all times. Clothing, apparel or attire that fails to provide adequate coverage of the body, including but not limited to, see-through or fishnet fabrics, bare midriffs, tank tops, spaghetti strap tops, off-the-shoulder or low-cut tops are prohibited.

(2) Clothing, grooming, accessories, and jewelry shall be free of writing, pictures, symbols or any other insignia which are crude, vulgar, profane, obscene, libelous, slanderous, or sexually suggestive. Clothing, grooming, accessories or jewelry that degrade any cultural, religious or ethnic values or which advocate racial, ethnic, or religious prejudice or discrimination, or which promote gang-affiliation, sex, the use of tobacco, drugs, or alcohol or any unlawful acts, are prohibited.

(3) Female-specific prohibited items include: tube tops, low-cut tops that expose cleavage, tops that expose most or all of the back (such as halter tops), skirts or shorts which are shorter than four inches above the knee (even when walking), and yoga pants or leggings worn without an outer garment that does not reach four inches above the knee.

(4) Male-specific prohibited items include: sagging pants, and bandanas

Modified based on the dress code of Foothill High School in Pleasanton, CA, found at: http://www.foothillfalcons.org/apps/pages/index.jsp?uREC_ID=45194&type=d&pREC_ID=57384*;*

and the dress code of Vista Murrieta High School in Murrieta, CA, found at: http://www.murrieta.k12.ca.us/cms/lib5/CA01000508/Centricity/Domain/1685/Student%20Handbook%2015-16-Editable.pdf.

142. *See infra* Part III.

A. Free Expression

Current law regarding to free expression claims against public school dress codes are subject to intermediate scrutiny.[143] Here, Emma's claim could potentially succeed in proving the dress code provisions cannot survive intermediate scrutiny. The stated intention of the school in promulgating the dress code is to "prevent distraction and disruption of its students."[144] Given the rampant potential for distraction in public schools, this goal is certainly an important one; schools have a duty to educate students, and disruption frustrates this purpose. The problem the school faces here is in the second part of this first prong of the intermediate scrutiny test: the dress code must further the school's interest. The test as described by the Supreme Court and applied to school dress codes by the Ninth Circuit is silent on how close the relationship between the rule and the purpose must be in this context.[145] A court could take a very loose approach and find that because a dress code *could* conceivably serve to prevent distraction and disruption in school, this prong of the test is satisfied. But a court could just as realistically require a closer relationship. In that instance, the school would need to show that tank tops—on both boys and girls—and girls' shorts shorter than four inches above the knee are in fact distracting or disruptive to the educational process. Barring visible undergarments or inappropriate parts of the body showing, those items of clothing are not distracting.[146] If the school cannot show that the dress code, as applied to Emma, in fact does further the school's goals, the first prong of the intermediate scrutiny test must fail.

Assuming, *arguendo*, that a court hearing Emma's claim chose to apply a looser interpretation and finds the first prong satisfied, the court would then move on to the second and third prongs. The governmental interest must be unrelated to suppressing free expression, and the suppression that does occur must be as minimal as possible.[147] The school's stated intention in this case is preventing distraction and disruption, which on its face is unrelated to prohibiting expression. The nature of dress codes inherently does suppress expression in and of itself, but courts have found that a regulation is permissible if the

143. *See* Jacobs v. Clark Cty. Sch. Dist., 526 F.3d 419, 434–35 (9th Cir. 2008).

144. *See infra* Part III.

145. *See Jacobs*, 526 F.3d at 434 *(citing* Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 661–62 (1994).

146. If a fourteen-year-old girl's shoulders are in fact distracting to education—especially when boys wearing clothing that exposes their shoulders is not found to be equally distracting, despite the gender-neutral ban on tank tops—then this bespeaks a far greater problem than just the First Amendment implications of this dress code.

147. *See Jacobs*, 526 F.3d at 434–35.

government entity's stated intention is not directed at speech or expression.[148] A court in this case would likely find the intention of Emma's school to be permissible.

As for the third prong, requiring, essentially, for no less onerous alternatives to the suppression of expression, the issue is much closer. In a case regarding a free expression challenge to a mandatory uniform policy, the Ninth Circuit found that the uniform policy only limited one form of student expression, while keeping open many other channels for expression.[149] A court in this case could apply the same rationale and find that, because the dress code at Emma's school is less limiting than a mandatory uniform, there is far less suppression of expression. Alternatively, because Emma's school has decided against a uniform policy and has instead carved out exceptions and complex rules regarding dress, it has created a *more* onerous alternative than a full uniform. This is due to the arguably arbitrary nature of the rules promulgated as well as their selective enforcement.[150] Overly complex rules can do more harm than simple, sweeping ones.[151] In choosing to institute a uniform policy, the school would probably have more success in furthering its objectives, rather than a complicated set of provisions left open to interpretation by the students who are subject to them and the school staff enforcing them. When applied as they were against Emma, enforcing these rules causes more distraction and disruption than they perhaps prevent. If a court accepts this reasoning, the third prong of the intermediate scrutiny test has failed. This argument, however, is something of a stretch. A court would more than likely find the dress code at Emma's school to be a valid, constitutionally permissible exercise of school authority, upholding this and other dress codes around the country.

B. Gender Discrimination

Gender discrimination is the main thrust of this paper's interest, and the main problem with the current state of the law. Here, Emma has two separate but related equal protection claims under both California and federal law.

148. *Id.* at 436.

149. *See Jacobs.*

150. According to Section 1 of the dress code, tank tops are prohibited as 'overly revealing' clothing, a rule that applies equally to both boys and girls. Yet boys wearing tank tops were ignored as Emma was disciplined for her tank top. Additionally, Sections 3 and 4 of the dress code are directed specifically to girls and to boys, respectively. The gender disparity is discussed below.

151. *See, e.g.* Wallace v. Ford, 346 F. Supp. 156 (E.D. Ark. 1972).

1. California Equal Protection

Emma's first claim is the ban on tank tops in Section 1[152] of the dress code as applied to Emma and not to the boys wearing tank tops against whom the dress code was not enforced. The second is the female-only ban on shorts shorter than four inches above the knee stated in Section 3 of the dress code.[153] Emma would argue that the former is a gender-neutral rule with a disparate impact on girls, while the second is a facially discriminatory provision that cannot survive strict scrutiny.

The facially discriminatory provision will be discussed first, as it would have the greatest likelihood of success. Section 3 of the dress code lists a specific list of clothing items that are prohibited for female students.[154] Section 4 has a far shorter list of items that are prohibited for male students.[155] While the school will surely argue that these differences were made out of practicality—boys wearing the female-prohibited items are not a problem, and vice versa—under California law, this is somewhat irrelevant. The key consideration for the court is whether the gender distinctions are necessary to further a compelling state interest, and whether gender-neutral alternatives are available.[156] Sections 3 and 4 of the school dress code likely would not survive this strict scrutiny test.

First, while the school's stated purpose of preventing distraction and disruption is arguably compelling,[157] the school likely would not be able to show that Sections 3 and 4, as written, are necessary in furthering this purpose. The way the gender-conscious provisions are written, a girl wearing a bandana or a boy wearing a tube top, for example, would not be in violation of the dress code. If the bandana prohibition for males is in relation to the gang-related safety concerns addressed in Section 2 of the dress code,[158] then the harm of girls

152. *See supra* note 142.

153. *Id.*

154. *Id.*

155. *Id.*

156. Woods v. Horton, 167 Cal. App. 4th 658, 674 (2008).

157. This purpose was found to be important/substantial in the Ninth Circuit federal court when school dress codes were examined under federal free expression intermediate scrutiny, as discussed above, *supra* Part III.A, but California courts have not yet examined school dress codes using strict scrutiny for gender discrimination. Until a California court has determined what compelling purposes are under California law, the disposition for such a claim is unclear. Due to lack of California jurisprudence on the matter, this paper fills in gaps using federal precedent on the issue. Federal courts have not refuted schools for having a stated purpose of preventing distraction and disruption in school. (*See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

158. A provision banning bandanas due to safety concerns with gangs is a common and permissible exercise of school authority in promulgating a dress code. Safety concerns such

wearing bandanas as a showing of gang affiliation would be just as harmful as boys doing so. As for the regulation on length of shorts for girls, while it may be more common for girls to wear shorter shorts than boys, shorts shorter than four inches above the knee made for males are not unheard of.[159] Just as with the bandana provision, if a male student were to wear shorts shorter than four inches above his knees, he would not be found in violation of the dress code as Emma was for her shorts. These examples show that the gender discrepancies in the banned items of clothing in Sections 3 and 4 are not necessary in preventing distraction and disruption in school. In order to be necessary to further a compelling interest, the means to that end must be narrowly tailored.[160] If these provisions were narrowly tailored, the interests of the school should still be furthered, or at least not at issue, when the provisions are applied cross-gender.

Additionally, strict scrutiny requires that no gender-neutral alternatives are available.[161] No law that makes direct gender distinctions can survive if gender-neutral alternatives are available and not implemented in place of the gender-conscious distinction.[162] As pointed out above, the gender-based prohibitions of clothing would likely not be found necessary to accomplish the intent of Emma's school. The same goals can be attained by eliminating the gender distinctions altogether. This is an alternative available to the school, and it creates a gender-neutral rule. Because this alternative is available and was not utilized by the school, Sections 3 and 4 of the dress code would likely be found to fail the strict scrutiny test in California courts.

Emma's other equal protection claim is much trickier. Strict scrutiny is only automatically applied when, as in the previous section, the rule differentiates between the sexes on its face.[163] Section 1 of the dress code at Emma's school is a gender neutral provision, prohibiting tank tops worn by any student, regardless of gender.[164] As applied, according to the facts above and more than likely based on evidence

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as these also create distraction and disruption, so the safety provisions also contribute to the goal of preventing such distraction and disruption. See Cal. Educ. Code § 35183(a).

159. Shorter shorts on men are currently in fashion and sold at stores popular with boys of high school age. *See*, for example, these popular shorts sold by Chubbies: https://www.chubbiesshorts.com/.

160. *Woods*, 167 Cal. App. 4th at 674–75.

161. *Id.* at 674.

162. *Woods*, 167 Cal. App. 4th at 675 (citing Connerly v. State Pers. Bd., 92 Cal. App. 4th 16, 36 (2001)).

163. Hardy v. Stumpf, 21 Cal. 3d 1, 7 (1978).

164. *See supra* note 142.

collected in discovery,[165] girls receive disciplinary action as a result of wearing tank tops far more often than boys, despite both genders wearing tank tops in violation of the dress code. This serves to show a disparate impact, unequally burdening girls.[166] In order to succeed in an equal protection claim, Emma would need to show that this gender-neutral provision was enacted with an intent to discriminate against girls.[167]

In Emma's case, it is highly unlikely that such a discriminatory intent could be shown. The gender-neutral tank top ban, like the rest of the dress code, was created to prevent distraction and disruption to the educational process. Such an intent is unrelated to any gender differences. The only way there could be a discriminatory intent would be if, in deciding to include tank tops in clothing that "fails to provide adequate coverage of the body,"[168] the school knew that only girls wearing tank tops would fall under this description and intended to only enforce this provision against girls. Failing this, as one likely would, one cannot sufficiently prove discriminatory intent.

If Emma cannot show that the school intended to discriminate with the tank top ban in Section 1 of the dress code, the court will not apply strict scrutiny to her claim. This is because without discriminatory intent, discrimination based on gender cannot be found.[169] Without such purposeful discrimination against a suspect class, the court cannot utilize strict scrutiny against the law.[170] Instead, the court will apply the rational basis test,[171] and Emma realistically cannot win her challenge to the dress code. The school's goal of preventing distraction and disruption is certainly a legitimate state

165. Schools, typically keep disciplinary records of students, and a survey of such records would more than likely turn up evidence that the tank top ban yields disciplinary action against girls far more often than boys. And by talking to students and teachers and others at the school, evidence could be gathered to show that boys as well as girls wear tank tops—therein showing that girls are not the only ones who wear them and therefore are the only ones disciplined for doing so. In short, it would not be a stretch to assume that this policy at this and many other schools is enforced overwhelmingly against girls, creating the disparate impact complained of here.

166. This would be consistent with news stories and studies at high schools across the country. For example, in a 2014 survey conducted at Menlo-Atherton High School in California, 64% of the 118 girls interviewed had been given some sort of disciplinary warning about their appearance violating the dress code, compared with only 12% of the 111 boys interviewed. http://www.mabearnews.org/news/2014/01/13/feminist-club-releases-dress-code-survey-feedback-with-alarming-results/

167. *See supra* Part I.B.1.

168. *See supra* note 142.

169. *See* Hardy v. Stumpf, 21 Cal. 3d 1, 7–8 (1978).

170. *Id.*

171. *Id.*

interest,[172] and a dress code is a rational way to achieve such a goal. Therefore, if Emma cannot show that the tank top ban was enacted with the purpose of unequally burdening girls, she will not succeed on this claim.

2. Federal Equal Protection

If Emma were not in California, which provides stronger protection against gender discrimination,[173] the default position would be to use the Fourteenth Amendment and federal equal protection jurisprudence.[174] Just as under California law, Emma has a claim against the facially discriminatory provisions in Sections 3 and 4, and a claim against the gender neutral provision in Section 1.

For the claim against the facially discriminatory provisions, the first consideration is the school's purpose.[175] While the dress code was viewed as a whole under intermediate scrutiny with regards to free expression, equal protection claims require not just that the purpose of the dress code be important, but that the justification for utilizing a sex-based classification be important as well.[176] Here, the school's purpose in enacting the dress code was to prevent distraction and disruption to the educational process. As discussed above, a court would almost certainly find this to be an important purpose.[177] But this purpose does not describe the specific use of gender-based distinctions for banned clothing items in Sections 3 and 4. The Supreme Court jurisprudence requires that the justification for such a classification be genuine and not merely concocted in response to an equal protection challenge against it.[178] Therefore, Emma's school must have evidence of the need for such sex-based clothing prohibitions when the dress code was promulgated, an issue that would be explored during discovery in the litigation process.

A court would then have to determine if this is an "exceedingly persuasive justification" for such a classification.[179] Emma would argue that the school's purpose does not meet this standard. An assumption that boys and girls wear different types of clothing is an

172. If such a goal would be found to be important or substantial under intermediate scrutiny, a higher level to meet, it will definitely found to be a legitimate state interest under rational basis. *See* King v. Saddleback Junior Coll. Dist., 445 F.2d 932, 939–40 (9th Cir. 1971).

173. *See* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 16–17 (1971); *See supra* Part I.B.1.

174. *See* U.S. Const. amend. XIV § 1; *Supra* Part I.B.2.

175. *See supra* Part I.B.2.

176. *See* United States v. Virginia, 518 U.S. 515 (1996); *See supra* Part I.B.2.

177. *See King*, 445 F.2d at 939–40.

178. United States v. Virginia, 518 U.S. at 533.

179. *Id.* at 531.

assumption based on the preferences of males and females. It also is becoming an outdated view of youth culture in the United States.[180] Because perceived preferences between the sexes do not constitute an 'important' purpose for a gender-based classification or an "exceedingly persuasive justification,"[181] the school's purpose here fails to meet its required threshold under intermediate scrutiny. Additionally, this purpose is based not only on preferences, but it seeks to perpetuate traditional gender roles and stereotypes, which is similarly unacceptable.[182] The exact length specification is an arbitrary requirement designed to impose traditional ideas of modesty onto young girls.[183] This preservation of gender roles that impose patriarchal protectionist views of girls is unacceptable under intermediate scrutiny, as it fails to be an "exceedingly persuasive justification."[184] Therefore, if the court accepts this line of argument, the school would not meet its burden of having an important governmental interest in imposing a gender-based classification.

Realistically, a court could very well find that the school's purpose was sufficiently important, so the next consideration would be the fit between the means and ends of the dress code.[185] In this case, assuming that boys and girls wearing different clothing and thereby prohibiting different items of clothing for each is an important justification, the relationship between the gender classification and the school's goal would likely be sufficiently substantial, and Sections 3 and 4 would be upheld under intermediate scrutiny, defeating Emma's claim.

Emma's second equal protection claim is against the gender-neutral ban on tank tops. Just as under California law, Emma would first have to show that the tank top ban is, at its root, a gender-based

180. Emerging issues regarding gender fluidity and transgender individuals are beyond the scope of this paper and will therefore not be discussed at length. These changes in gender roles and gender norms, as well as the very idea of gender itself, are very much real in American society today. Such concepts are also more prevalent in younger people, many of whom are students at public schools.

181. *See* United States v. Virginia, 518 U.S. at 533.

182. *Id.* at 533–34.

183. Even back in the 1970s, when traditional gender roles were still in full force, one district court found a length requirement for skirts to be arbitrary because a certain number of inches in length look different on a girl who is five feet tall versus a girl who is nearly six feet tall. Even if preserving female modesty was an acceptably 'important' goal for the school to have, a requisite length for skirts was not an effective way to accomplish it. *See* Wallace v. Ford, 346 F. Supp. 156, 164 (1972).

184. *See* Craig v. Boren, 429 U.S. 190, 199 (1976); *see also* United States v. Virginia, 518 U.S. at 534.

185. *See supra* Part I.B.2.

provision.[186] If an intent to apply this provision only to female students can be found, a court can find that this gender-neutral provision is in fact gender-biased, thereby receiving intermediate scrutiny just as any facial classification based on gender would receive.[187] If Emma fails to show that the gender-neutral provision is overtly gender-based, she must instead show purposeful discrimination.[188] Without proof of intentional invidious discrimination, courts will not invalidate a law, neutral on its face and serving otherwise legitimate ends, that happens to have a greater effect on one group than on another.[189] Just as under California equal protection, it is unlikely that Emma could prevail here.[190] Intent to discriminate likely cannot be sufficiently proved in order for the court to apply intermediate scrutiny. Without any kind of heightened scrutiny, a court would not be able to fully examine the full picture of a claim such as this, leaving Emma and plaintiffs like her with no chance at having a valid challenge, let alone winning a case like this and seeking a fair remedy.

IV. PROPOSAL

Because a case such as Emma's cannot, under current state and federal law, even pass the threshold of any heightened scrutiny, courts should take a different approach for gender discrimination in regards to public school dress codes. Rather than requiring the plaintiff to prove discriminatory intent, courts should employ a burden-shifting rebuttable presumption. Using this method, a plaintiff would need to show only the disparate impact of dress code provisions that unequally burden girls in order to have a court apply the requisite heightened scrutiny. The defendant school would be able to overcome the presumption of gender-based action through contrary evidence in defense of its dress codes; not every instance of a dress code violation is direct evidence of gender discrimination. This way, the plaintiffs can present their full case for discrimination and unduly burdened rights of free expression in a manner more equitable than is currently available.

To illustrate how this presumption would function in practice, let us return to Emma's discrimination claims. Under California law, Emma would need to present evidence showing that the tank top ban in Section 1 of her dress code[191] is enforced against female students and

186. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 275–79 (1979).
187. *Id.*
188. *Id.*
189. Wash. v. Davis, 426 U.S. 229, 242 (1976).
190. *See supra* Part III.B.1.
191. *See supra* note 142.

not against male students. This would satisfy the presumption of intent. From there, the court could go on to apply strict scrutiny. Even though strict scrutiny is often viewed as fatal to any law to which it is applied,[192] the school would still have avenues available to it to defeat a plaintiff's challenge. Emma's argument would be that her free expression rights are violated by the uneven enforcement of a neutrally written dress code provision.[193] Even if the court does apply strict scrutiny to evaluate the gender discrimination, Emma would still need to show that her free expression rights were violated. This is still a difficult case to make, and it is unclear how a court would come down on this issue until it is actually challenged in practice.

Under federal law, the same challenges would still apply, even with this proposed presumption. The presumption would allow Emma to receive intermediate scrutiny under the Fourteenth Amendment. The school may be able to show that its purposes are sufficiently important or show an "exceedingly persuasive justification" and that the ban on tank tops is substantially related to such a purpose. The school may also succeed in showing that despite any disparate treatment between the genders, female students like Emma did not actually experience any impermissible violation of their free expression rights.

This presumption does go against settled jurisprudence for equal protection cases,[194] but the unique nature of these dress code claims justifies deviation. The Supreme Court has recognized that overlapping constitutional issues may allow for a different treatment.[195] Employing the presumption described here would more adequately allow these challenges to receive a full review from the courts, rather than relegating a complex case such as this to rational basis review, where it would more than likely die on impact.

This presumption, while helpful to reach a heightened level of scrutiny, will not guarantee a plaintiff's victory. It will, however, allow courts to examine the full discrimination claim against schools enforcing dress codes unevenly against girls. The hope, in the end, is not to win case after case, but to push for change to dress codes and

192. *See* Woods v. Horton, 167 Cal. App. 4th 658 (2008); *supra* Part I.B.1.

193. For the facially discriminatory claim against Sections 3 and 4 of the dress code, strict scrutiny would already be applied, precluding a need for the presumption here. When strict scrutiny is applied to these provisions, it would serve to eliminate the gender distinctions in the dress code, leaving Emma to fall back to her free expression claim in this challenge, as described.

194. *See supra* Parts I.B.1–2.

195. *See* Loving v. Virginia, 388 U.S. 1 (1967) (finding an unequal burden on interracial couples on the fundamental right to marriage); *see also* Emp't Div. v. Smith, 494 U.S. 872, 882 (1990) (leaving open the possibility of heightened scrutiny for "hybrid" claims of free exercise of religion and another constitutional claim).

their enforcement. If schools do not have such an easy time defeating challenges to their dress codes, they would be more likely to change their practices to avoid costly law suits. In making litigation more difficult through the use of this presumption and encouraging a change in school dress codes, the need for the presumption—and indeed, cases like this in general—can hopefully be eliminated. Just as challenges to hair length regulations in the 1960s and 1970s have become a thing of the past thanks to a change in social norms, this presumption can be a tool through which similar change can occur.

CONCLUSION

The purpose of public schools is to educate. Part of that educational process involves preparing students for the outside world. Stifling expression and individuality, and imposing rigid discipline does more harm than good. Young people will not always have a school to look out for them and protect them from things that are different or distracting. It is better to use such distractions as an opportunity for growth and tolerance. This is especially true in the case of gender. The body of a young girl is distracting when it is sexualized—visible shoulders or one more inch of bare leg should not be viewed as distracting in any way. By calling Emma's appearance distracting, the school imposes protectionist views on her and perpetuates to the rest of the student body that her shoulders and legs are distracting and should be viewed as such.

It is the sincere hope of this author that more progressive views of equality and tolerance take hold in the federal and California courts, paving the way for the elimination of antiquated and sexist views of female students. School is a place to grow and learn, and students should not be penalized because of the way society has historically chosen to treat the clothing they choose to wear. This author hopes that this examination of the current state of gender discrimination in dress codes will serve to inspire the much-needed change in the American public school system.