Introduction

From our hairstyles to our shoes, constitutional considerations both constrain and confirm our daily choices. In turn, our attire and appearance provide multilayered perspectives on the United States Constitution and its interpretations. Dress raises a plethora of constitutional concerns. In addition to the First Amendment issues of expressive speech or religion that come most immediately to mind, our apparel prompts problems of equal protection based on classifications of sex/gender and race. Moreover, our habiliments and the profits to be made from their production, trade, and consumption have motivated important constitutional revisions of both doctrine and text. The intertwining of our clothes and our Constitution raise fundamental questions of hierarchy, sexuality, and democracy.

While we most often do not think our wardrobe selections are of constitutional magnitude, the legal regulation of dress is ubiquitous. The most obvious regulations are direct ones: laws criminalizing indecent exposure; laws prescribing and proscribing military uniforms; or regulations detailing the attire of government employees, prisoners, or public school students. Less obvious are the more indirect ways in which the law constrains our apparel. Our daily choices of how to look and what to wear are circumscribed by legal doctrines that fail to protect women from sexual violence, or limit antidiscrimination laws, or allow law enforcement officers and judges wide discretion to consider our appearance. Additionally, our available options of apparel in the marketplace are the product of legal forces. All of these provoke constitutional issues.

The interaction of constitutions with all types of regulation of dress generally falls into the two major categories of constitutional concerns: rights and structures. Under the United States Constitution, the rights that are most often interposed against regulations of dress are the First Amendment guarantees of freedom of speech (expression) and freedom of religion. Regulations of dress may also raise issues of equal protection, introduced into the Constitution by the Fourteenth Amendment passed after the Civil War. The Due Process Clause in the Fourteenth Amendment and

Fifth Amendment both guarantee "liberty" – at least to the extent that the state and federal governments cannot deprive it without due process of law – a concept that would seem to encompass one's choice of what to wear. But these rights have not only been asserted by individuals; they have also been advanced by private parties such as employers seeking to enforce their dress codes or labor policies. There are also important criminal procedure protections in the Constitution – including search and seizure, the right to confront witnesses, and the Eighth Amendment's cruel and unusual punishment that are relevant to restrictions on dress in criminal and prison contexts.

In addition to rights, constitutions are concerned with the structures of government. In the United States Constitution, this is a rather complicated affair, of both separation of powers of the branches of the federal government and federalism as the relationship between the federal government and the fifty states. In the constitutions of individual states, there are also issues of separation of powers among the state branches of government, at times including an administrative branch, as well as issues regarding divisions of power between a state and its subdivisions, such as counties or cities. Additionally, the United States includes territories, both as a historical and present matter, with complex relationships and questions of authority. These issues of horizontal and vertical power distribution raise questions about whether the government entity regulating dress has the constitutional authority to do so. Moreover, in the United States, the doctrine of state action embodies the notion that the Constitution is concerned only with the actions of the government. With the notable exception of the Thirteenth Amendment – important in the production of apparel – actions by individuals, corporations, or other "private" entities that might infringe the constitutional rights of others are not cognizable.

The themes of hierarchy, sexuality, and democracy animate the constitutional concerns surrounding attire and appearance. While hierarchy is not usually acknowledged as central to constitutionalism, the constitution itself is a document that allocates power in hierarchal, or even anti-hierarchal balancing, fashions. Additionally, concepts of rights essentially invoke matters of hierarchy, whether it is the hierarchy between the state and the individual or group, or between individuals or groups with differing claims to rights. The doctrines that develop to elaborate constitutional rights are hierarchal ones: rights of political expression are valued more highly than rights of sexual expression. Moreover, and more controversially, constitutional interpretation often involves a choice between maintaining hierarchy or dismantling hierarchy.

Sexuality itself is a controversial candidate for being central to constitutionalism. Yet constitutional quarrels in recent decades have highlighted issues of sexuality, sexual freedom, bodily autonomy, sex, and gender. In the realm of attire and appearance, sexuality undergirds much of the constitutional reasoning, even when it is not explicit.

Democracy is most readily recognizable as a concept at the heart of our constitution, although it does not appear in the text of the document. Nevertheless, democracy remains problematical whenever there is judicial review of acts passed pursuant to democratic processes. It is also disputable whenever the democratic franchise is partial, as before the Fifteenth Amendment (for black men), the Nineteenth Amendment (for all women), and presently for noncitizens as well as citizen inhabitants of territories.

Other themes emerge from the exploration of constitutionalism from the perspective of dress. First, this examination uncovers the importance of clothing to the constitutional text itself. The Eleventh Amendment and the Reconstruction Amendments are traceable to controversies surrounding cloth. The Commerce Clause contemplated a lively trade in textiles, while the slavery "compromises" in the Constitution failed to contemplate the importance of cotton. The inclusion of the Patent Clause, despite objections to monopolies, would influence the cotton gin and sewing machine. A proposed sumptuary power for the federal government did not survive the Constitutional Convention but would have empowered Congress to legislate a national dress code. Arguments against inclusion of a freedom of assembly provision in the First Amendment were debated, and seemingly defeated, by reference to William Penn's hat. Additionally, textiles were not only important to the Civil War, but also to the Revolutionary War's creation of the nation.

Second, doctrinal incoherence, isolationism, and blurring make understanding and litigating constitutional issues of dress challenging. While these problems are not unique to matters of attire and appearance, doctrinal incoherence seems especially prominent in First Amendment disputes, whether they involve free expression or the religion clauses. The conjoined problems of doctrinal isolationism and doctrinal blurring confuse matters further. For example, courts often note that a challenge to a dress code might be raised as a First Amendment challenge or an Equal Protection Clause challenge but then proceed as if only one is implicated, at least until a stray concept from the excluded doctrine makes its appearance. Similarly, courts determining a criminal defendant's objection to attending trial in jail attire struggle with Sixth Amendment fair trial principles, due process fair trial principles, and even First Amendment concerns. Relatedly, there is often doctrinal asymmetry, again especially pronounced in the First Amendment area. In such instances, the government requires a certain appearance, while courts place a burden on persons resisting that mandate to prove that their deviation has a specific message other than deviation.

Third, the "common sense" of judicial and legislative actors permeates the issues, leading to an interpretative slovenliness. Perhaps because matters of dress and appearance seem so commonplace, judges quickly resort to their own understandings, despite the fact that the litigation itself demonstrates that there is not universal

consensus. For example, judges have opined that a cornrow hairstyle is not indicative of African Americans (taking judicial notice of Bo Derek); that moustaches are not cultural symbols for African American men, but that goatees are; and that veils are cultural rather than religious. At times, the slovenliness of the reasoning is palpable, as when a judge opined that the high school graduation cap and gown is a "universally recognized symbol" while the significance of traditional Lakota clothing is less easily understood, even when 90 percent of the graduating class is Lakota. At other times, the slovenliness approaches the cavalier, as when a federal appellate court stated that the difference between female and male breasts, supporting mandated covering of the former but not the latter, was one of those "self-evident truths about the human condition – such as water is wet." Courts do accept evidence regarding social facts, including "expert" testimony about the indicia of gang membership including clothing and tattoos, or the link between dancers wearing pasties and g-strings and the prevention of criminal activity like loan-sharking. Yet this evidence seems to confirm stereotypes and biases rather than providing rigorous proof.

Fourth, the mirrored themes of trivialization and fetishization loom large in many disputes. The condescension and trivialization by many courts when youth are involved is especially pronounced, from the plethora of male student hair-length cases of the 1970s to the increasing number of student gender appropriate attire cases in the courts at present. Even when a judge might ultimately find in favor of a litigant, there can be trivializing language: a judge described an argument that an ordinance criminalizing cross-dressing was unconstitutional as based on the premise that the law prevented the person "from 'doing his own thing' in the vernacular of the 'pepsi generation.'" The concomitant fetishization of dress and grooming is evident in many of the regulations subject to constitutional challenge. Such regulations prohibit display of the "female breast below a point immediately above the top of the areola"; or sideburns from extending below the lowest part of the exterior ear opening; or skirts three inches above the knee (with the measurement to be taken when the woman is "seated with feet flat on the floor and at the highest point of the skirt; e.g., if the skirt has a slit, then the measurement would be taken at the top of the slit," and if "the slit is in the front or side of the skirt, the measurement would be taken while seated; if the slit is in the back of the skirt, the measurement may be taken" while she is standing). Perhaps in an attempt to be objective, such regulations echo the Tudor sumptuary laws proscribing the attire for persons occupying different statuses in the hierarchal social structure, including the famous Knights of the Garter.

Fifth, and last, constitutional issues endemic to sartorial and grooming matters are steeped in history. Separation of powers and nascent rights recognition developing in Tudor constitutionalism are intertwined with the sumptuary laws. Constitutional challenges to contemporary statutes criminalizing the wearing of masks are infused

by complicated legislative histories considering carnival, land disputes, and the KKK. The production of clothes is imbued with constitutional conflicts over slavery, laissez-faire, and the treaty power. The historical discourse is often superficial, inaccurate, or opportunistic. Even a matter as simple as an attorney's being mandated to wear a "tie" in court can become fraught: the attorney's bandanna tied above the collar was not a tie according to the judge who held him contempt, despite a reference book on nineteenth-century western wear and a dictionary to support the claim.

These themes infuse the seven chapters of *Dressing Constitutionally*. Briefly, the first chapter, "Dressing Historically," begins with the Magna Carta juxtaposed with the Tudor sumptuary laws, and then considers the structural and rights issues in the English "constitution" raised by the regulation of attire and the economic interests expressed in regulations regarding wool and foreign cloth. It also examines how regulations of habiliments, hairstyles, and plaid contributed to sovereignty and nation building. The colonizers of what would become the United States brought a penchant for the regulation of apparel, including as a mark of a crime, as in *The Scarlet Letter*, as well as other means of badging, scarring, and marking criminals, the morally deviant, poor persons, and slaves. The relationship of the colonies to the wool-exporting and calico-trading mother country was an important aspect of the Revolutionary ethos. The Constitution itself was deeply affected by the trade in textiles, although the proposed sumptuary power for Congress was not included.

"Dressing Barely" begins with Thomas Paine's observation that government, like clothes, is a necessary evil. The chapter pairs two contradictory aspects of government approaches to a lack of clothes and the constitutional ramifications of each. Forced nudity, as in strip searches or other criminal contexts, raises Fourth Amendment and Due Process Clause claims, usually unsuccessfully even if the government action was ill-founded. Chosen nudity or partial nudity, criminalized by indecent exposure statutes, raises First Amendment, as well as Due Process Clause and at times Equal Protection Clause claims. The First Amendment doctrine of obscenity is applied to nudity, even as doctrinal exceptions for regulated media, funding schemes, and secondary effects ultimately extinguish distinctions between obscenity and nudity. The Equal Protection Clause and its limited interpretations provides little protection for nudists and for bare-breasted women.

Chapter 3, "Dressing Sexily," centers the constitutionality of government's major weapon in the control of sexuality: the policing of attire. This policing focuses not only on the lack of clothes, but also on the styles of clothes and other aspects of appearance such as hair, jewelry, cosmetics, shoes, and bodily enhancements or markings. One aspect of this policing is directed at the boundary between the two recognized sexes, female and male. Dressing sexily in this instance means dressing in gender appropriate ways. So-called cross-dressing – wearing clothes of a member

of the "opposite" sex – may subject one to criminal sanctions, to discrimination, to interference with familial and educational relationships, and to private violence. The other aspect of this policing seeks to control sexuality, especially but not only female sexuality. Dressing sexily in this sense means dressing in a sexy, erotic, or not sufficiently unsexy manner. So-called dressing provocatively may subject one to discrimination as well as to private violence with government acquiescence, at times in service of a criminal defendant's constitutional rights.

"Dressing Professionally," Chapter 4, begins by examining the federal protections for dress and grooming in the private sphere, protections that are under attack for their lack of constitutional grounding. These statutory protections are uneven and incoherent, especially as they seem to exempt corporate "look policies" that seek to "brand" employees. Government branding of its employees, exemplified by the uniform, is prominent in military and paramilitary contexts. This robe may be another type of uniform, or as some would have it a "cult," but both its use and its absence pose constitutional problems in courtrooms, as well as in academic settings.

Classrooms and protests birthed the First Amendment standard of disruption central to Chapter 5, "Dressing Disruptively." The notion that attire is capable of disruption presupposes not only a normative style of dress but also a normative community that is capable of being disturbed merely by a person's apparel or grooming. In schools, Confederate flag clothing and anti-gay T-shirts have prompted extended litigation about students' First Amendment rights. The disruption standard also has relevance in the courtroom, specifically when litigants including criminal defendants as famous as William Penn refuse to doff their hats. When criminal defendants disrupt the proceedings by appearing in judicial attire, or refuse to be silent and are shackled, gagged, and bound – both of which occurred at the infamous Chicago Eight Conspiracy Trial – questions of courtroom decorum are evaluated in light of the constitutional right to a fair trial. A disruption of the wider social fabric was claimed in the case centering on the most famous outerwear in First Amendment jurisprudence: Cohen's "Fuck the Draft" jacket. The jacket's words made the First Amendment claim more discernible than claims by those wearing saggy pants, or even those wearing masks.

Chapter 6, "Dressing Religiously," examines "religious garb" and implicates one of the most contentious issues of constitutional adjudication. Perhaps because religion has been so historically divisive and continues to be so, the doctrines and theories governing religion are themselves subject to marked divisions, including divides between the Free Exercise Clause and the Establishment Clause, belief and practice, doctrinal and legislative interpretations of the standard of constitutional scrutiny to be applied, and divisions between majority religions and minority religions, as well as between religion and nonbelief. The practice of tattooing and the Church of Body Modification raise constitutional issues and disparate results. The

accommodation of religious attire and grooming standards in prisons under both the First Amendment and various statutes has led to anomalous results. Women's religious dress, including Catholic habits and Muslim niqab and hijab, prompts divisiveness and little constitutional resolution.

Last, Chapter 7, "Dressing Economically," focuses on the constitutional issues raised by the labor necessary to produce apparel. The entwinement of slavery and cotton, the laissez-faire *Lochner*-era struggles in sweatshops and textile mills, and the contemporary reign of international free trade have challenged and changed the constitutional contours of our attire. There are intransient constitutional problems not merely with what one wears but with how those items are produced. Just as Tudor sumptuary laws sought to regulate sartorial options to maximize economic profits, so too has United States constitutional doctrine reckoned with cotton, cloth, and clothes as imperative to capitalist success.

Thus, while we may casually assume that the Constitution affords us freedom to dress as we please, the Constitution cabins, channels, and constrains these choices. Moreover, our attire reflects the Constitution, including its text and controversial doctrines.

1

Dressing Historically

The first laws regulating dress in the English realm appeared well after the creation of the foundational documents of democracy. The most famous instrument, the Magna Carta of 1215, still resonates as a quasi-constitution that allocates power and recognizes individual liberties. It also contained a specific provision regulating textiles: "There shall also be a standard width of dyed cloth, russett, and haberject, namely two ells within the selvedges."[1] It did not, however, impede the creation of laws regulating dress.

The sole law passed by the English Parliament in the year 1337 was devoted to matters of wool, cloth, and fur.[2] Although there were certainly ancient Greek, Roman, and Asian laws as well as medieval European and Asian laws governing attire, this law promulgated by Parliament in the eleventh year of the reign of Edward III is the first recorded statute addressing attire in the English realm. The statute forbade the exportation of wool and the importation of foreign cloth; it also governed the "Cloth-workers of strange Lands," who would be welcome in the realm and granted franchises. Taken together, these provisions evince a government concerned with the economy: the statute banned exports and imports but encouraged foreign entrepreneurs to relocate within the realm. The remaining two sections of the statute, however, expressed slightly different concerns. They banned the wearing of imported cloth and the wearing of fur and they included exemptions to these bans.

I. TUDOR REGULATION OF APPEARANCE

Provisions banning the wearing of imported cloth and furs, presumably more costly and rare than domestic items, may be viewed as sumptuary laws. Sumptuary laws target sumptuousness: they are intended to restrain luxury, which was considered a sin in medieval Christianity, as well as to prevent over-consumption, which could be detrimental to society. The 1337 statute can be considered an extension of the

earliest known English sumptuary law, passed the year before and aimed at curbing the consumption not of clothing but of food, limiting meals to two courses except on feast days when "three courses at the utmost" were permitted.[3] The 1336 food law recognized the harms caused by "excessive and over-many sorts of costly Meats," even as it stated that these harms affected different classes of persons differently: "the great men, by these excesses, have been sore grieved, and the lesser People, who only endeavor to imitate the great ones in such sort of Meats, are much impoverished." It was not only the hierarchal structure but also its purpose that was made explicit in the law: the impoverishment of the "lesser People" was troubling because they were "not able to aid themselves or their liege Lord in time of need, as they ought." Nevertheless, the law cited a concern with "Souls" and applied to men with a democratic impulse: "no man, of whatever estate or condition soever he be, shall cause himself to be served" more than two courses.

The provisions of the 1337 law of attire were even more hierarchal. The statute of attire was not concerned with articulating different harms but with promulgating different rules for the different estates. The distinctions were articulated by means of exceptions to the general rules of prohibition. The proscription against wearing imported cloth contained an exception for "the King, Queen, and their Children." The banning of wearing fur contained a more extensive exception for "the King, Queen, and their Children, the Prelates, Earls, Barons, Knights, and Ladies" as well as "People of Holy Church" who had benefices worth a hundred pounds per year. There was no mention of souls.

Edward III's Parliament would substantially expand on these laws in A Statute Concerning Diet and Apparel promulgated twenty-six years later.[4] The 1363 statute begins with a confirmation of the Magna Carta. After addressing other matters including the price of poultry and gilting in silver, the statute prescribes the dress of various classes: servants; people of handicraft and yeomen; esquires and gentlemen; merchants, citizens, and burgesses; knights; clerks; clergy; and ploughmen and oxherds. The classes are defined in the statute not only by occupation but also by their net worth. The "Wives, Daughters, and Children" were generally subject to the same conditions as the men, but specific attire for women such as veils, or what might now be called kerchiefs or headscarves, were mentioned. The clothes were defined by their cost as well as their attributes, with attempts at specificity, such as "no higher price for their Vesture or Hosing, than within Forty Shillings the whole Cloth, by way or buying, or otherwise," and "no Manner of Furr, nor of Budge, but only Lamb, Cony, Cat, and Fox."[5] The penalty for violation was forfeiture of the offending clothes, a rather hefty economic penalty in an era when clothes were not only expensive but also scarce. The statute exhorted "Makers of Cloths within the Realm" and the Drapers to maintain the law, although they were to be "constrained by any Manner way that best shall seem to the King and his Council."

English lawmakers spent considerable energy over the next several centuries regulating dress in accordance with social hierarchies. The laws were generally comprehensive statutory schemes, such as those passed during the reign of Edward IV in 1463 and 1482.[6] There were also occasional laws such as during the reign of Henry V, limiting silver for use in knights' spurs or all the apparel for barons or higher estates.[7] The statutory schemes reached their apex during the long reign of Henry VIII. During Henry VIII's first year as king, 1510, Parliament passed "An Act against wearing of costly Apparrell."[8] Repealing earlier statutes of apparel, the 1510 Act portrayed a complexly hierarchal society. The statute prohibited purple "cloth of gold" and silk except for those in the royal family, prohibited sables to those under the degree of earl, prohibited blue or crimson velvet to those under the degree of Knight of the Garter, prohibited foreign furs to those under the degree of Gentleman, and prohibited foreign wool to those under the degree of Lord or Knight of the Garter. As in earlier statutes, the punishment was generally forfeiture, although servants of laborers who wore hose above the price of "x d. the yerde" did so "uppon payne of imprisonament in the Stokkys by thre days." Subsequent acts addressing apparel from Henry VII's Parliament were passed in 1514, 1515, and 1533.[9] Each of these acts reserved certain types of attire to people of a certain status, prohibiting appropriation by persons of lesser rank. In her multifaceted study of clothing during the reign of Henry VIII, scholar Maria Hayward provides an excellent comparison, in table form, of the extensive and shifting details in the four acts of apparel, the first three which are separated by only five years.[10] Despite the minutia, the stated rationale in the statutes was not the maintenance of hierarchy but the prevention of poverty and crime. As the 1510 statute explained, and the next two statutes repeated, "the greate and costly array and apparrell used wythin this Realme contrary to good Statute therof made hathe be the Occasion of grete impovisshing of divers of the Kinge Sugieft and evoked meny of them to robbe and to doo extorcon and other unlawfull Dedes to maynteyne therby ther costeley arrey."

After Henry VIII's death in 1547, royal leadership was in disarray: Henry VIII's only son, Edward VI, a minor, ruled 1547–1553, and Henry VIII's daughter, Mary ("Bloody Mary") ruled 1553–1558. It would be Henry VIII's other daughter, Elizabeth (whose mother was the executed Anne Boleyn), who would reign the longest, from 1558 until 1603. Under all of these monarchs, statutes of apparel continued to be passed.[11]

These statutes – with their hierarchy of social classes and their reservations of purple and ermine – are recognizable as paradigmatic sumptuary statutes. Under the guise of preventing crime and forestalling excess consumption, the laws regulate societal status. Yet the laws portray a society as much in flux as its sovereigns. The laws rely not only on title or "estate," such as Knight of the Garter, but also economic worth, such as possessing lands and annuities to the value of £100 a year.