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An Equal Protection Analysis of Public and Private All-Male Military Schools

Marcia Bermant†

Single-sex education has been a widely debated topic for decades: educators, students, alumni, and policymakers have disagreed on the virtues and the harms of single-sex education and have questioned the constitutionality of all-male and all-female schools. Today, many once single-sex schools at the college and secondary levels are coeducational, including several former all-male military schools. However, a substantial number of all-male military schools remain, and no all-female military schools have been established. This Comment addresses whether the exclusion of women from some of the nation's most elite military schools unconstitutionally denies women the military educational experience available to men.

Recently, United States v Commonwealth of Virginia upheld the constitutionality of all-male military schools. In that case, the United States Department of Justice alleged that the Virginia Military Institute's ("VMI's") all-male admissions policy violated the Equal Protection Clause of the Fourteenth Amendment. On the grounds that VMI contributes to the diversity of Virginia's educational system, the court allowed the school to maintain its admissions policy barring women.

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\* This development resulted largely from a federal mandate requiring U.S. Service Academies to admit women. See 10 USC §§ 2009 and 4342 (1988).

\* There are two all-male military colleges and at least 23 all-male military secondary schools. See 1989 Member Roster, Association of Military Colleges and Schools of the United States. In addition, several all-male high schools and colleges, not designated as military schools, offer ROTC programs on the schools' premises; 24 Army ROTC high school programs are operated at all-male schools. Paul Kotakis (Army ROTC Cadet Command), telephone conversation with Commentator (Jan 8, 1991) (notes available on file in the Legal Forum office).

Commonwealth of Virginia ("the VMI case") coincides with an involvement of women in the military that has reached an all-time high in degree and intensity, as well as with women succeeding in traditionally male occupations more than ever before. Although these changes may make schools like VMI seem anachronistic, supporters of all-male military schools are steadfastly clinging to their all-male traditions.

This Comment argues that the Fourteenth Amendment requires all-male military schools, both public and private, to admit women. Part I briefly discusses the VMI case. Part II analyzes the single-sex admissions policies of state supported military schools under the Equal Protection Clause and concludes that they are unconstitutional. Part III argues that even privately funded military schools should be regarded as state actors because of their relationship to the federal government and their role in public defense. Therefore, private military schools, like all state actors, must comply with Equal Protection mandates that prohibit them from excluding women on the basis of gender.

I. THE VMI CASE

The VMI case arose when a female student from northern Virginia complained that the school rejected her application for admission due to her gender. After VMI refused to respond to a Justice Department order that the school admit women, the Department filed suit, claiming that the all-male admissions policy of VMI violated the Equal Protection Clause of the Fourteenth Amendment.4

VMI's defense to the discrimination charge was that the all-male military school enhanced the diversity of the state's higher education system, and was therefore constitutional.5 The court accepted VMI's argument, emphasizing the benefits students derive from single-sex education and the adverse effects of forcing VMI to admit women. The court concluded that diversity was a sufficiently important governmental objective to justify single-sex schools and that VMI's all-male policy advanced the diversity goal.6

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5 Commonwealth of Virginia, 1991 WL at 102904.
6 Id at 102907.
II. PUBLIC ALL-MALE MILITARY SCHOOLS VIOLATE THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall... deny to any person within its jurisdiction the equal protection of the laws." Therefore, all state-supported schools must comply with the Equal Protection Clause. The Supreme Court has evaluated gender classifications under "intermediate scrutiny." In order to withstand constitutional challenge under the Equal Protection Clause, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."

An admissions policy that denies women consideration because they are women constitutes a classification based on gender. Therefore, under the Court's existing equal protection doctrine, such a policy is reviewable under intermediate scrutiny. This part applies intermediate scrutiny to the gender-based admissions policies of all-male military schools and concludes that VMI's gender classification is unconstitutional.

A. Step One: An Important Governmental Goal

In the VMI case, Virginia claimed that the goal of VMI's all-male admissions policy is to provide diverse educational choices to Virginia students. According to the diversity argument, offering students a choice between various educational environments, including single-sex institutions, is an important governmental aim. The VMI court relied on evidence indicating the value of single-sex education in general. The court then concluded that because significant benefits flow from an all-male educational environment, the maintenance of such an environment is legitimate. In addition,

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1 US Const, Amend XIV, § 1.
2 Mississippi Univ. for Women v Hogan, 458 US 718, 723 (1982) (Court required Mississippi University for Women to admit men to its nursing school).
3 Craig v Boren, 429 US 190, 197 (1976) (Court invalidated state statute prohibiting the sale of beer to males under the age of 21 and to females under the age of eighteen).
4 The diversity argument succeeded in several gender discrimination cases decided before the Court began applying intermediate scrutiny to gender classifications. See, for example, Williams v McNair, 316 F Supp 134, 138 (D SC 1970) (statute limiting regular admission to Winthrop College to women, one of eight state-supported colleges, upheld as having a rational justification and therefore not in violation of Equal Protection Clause); Heaton v Bristol, 317 SW2d 86, 98-99 (Tex App 1958) (Agricultural and Mechanical College of Texas not required to admit women).
5 Commonwealth of Virginia, 1991 WL at 102905.
the court found that the uniqueness of the military program at VMI further promotes diversity and justifies its existence as an all-male school.\textsuperscript{13}

The court's analysis of VMI's diversity argument is predicated on an erroneous analogy to the diversity goal supporting affirmative action programs. The court cites \textit{Regents of the Univ. of California v Bakke}\textsuperscript{18} for the propositions that the achievement of a diverse student body is a constitutionally permissible goal for a higher education institution, and that the principle of academic freedom supports judicial deference to university decisionmaking.\textsuperscript{14} While \textit{Bakke} does stand for these propositions, the \textit{Bakke} Court's reasoning was that a diverse student body promotes informal learning among classmates.\textsuperscript{18} This rationale, however, does not support the kind of diversity sought by the Virginia educators: Virginia seeks to provide diverse educational options. Single-sex colleges, regardless of their benefits, have the effect of segregating men and women, thereby inhibiting informal learning among students of different sexes. Therefore, the purposes behind the diversity goal condoned by the \textit{Bakke} Court are not the same as the purposes behind the diversity to which VMI supposedly contributes.\textsuperscript{18}

The VMI court's reliance on diversity as a legitimate goal for education programs is also inappropriate because the diversity goal typically advantages discriminated against or underrepresented groups, whereas VMI's program benefits men, who have always enjoyed access to military training. Therefore, the harm to those individual students denied admission in furtherance of \textit{Bakke}-type diversity is offset by the positive result for society: the integration of minority groups and the sexes at the college level. Conversely, VMI-type diversity harms the women excluded from VMI without a comparable net gain for society. VMI's all-male policy perpetuates outdated notions about men and women's military capabilities by denying women consideration for admission based on a strict

\textsuperscript{13} Id at 102906-07.
\textsuperscript{14} 438 US 265, 312 (1978).
\textsuperscript{18} \textit{Bakke}, 438 US at 312-13, n 48.
\textsuperscript{18} Aside from \textit{Bakke}, the only relevant case that the VMI court cites to support its conclusion that the promotion of diverse educational options within a state system is an important governmental goal is \textit{Williams}, 516 F Supp 134 (per curiam), a gender discrimination case decided under rational basis review rather than intermediate scrutiny. \textit{Williams} also predates the Court's affirmative action decisions.
gender classification. Despite VMI's lauded egalitarian ideal, its all-male policy in effect teaches its students that individuals are to be judged on the basis of gender rather than merit.

No court applying intermediate scrutiny has held that the provision of a diverse educational system constitutes a governmental goal sufficiently important to justify public support of single-sex education. The VMI court's clever attempt to manipulate Bakke-type diversity to support such a holding cannot withstand close scrutiny.

B. Step Two: Gender Classification Must Bear a Substantial Relationship to Achieving the Important Governmental Goal

Even if the diversity goal is a sufficiently important governmental interest, a court must also find that the single-sex policy used to implement the goal is substantially related to the goal in order to uphold the gender classification under intermediate scrutiny. In other words, the analysis demands a fairly tight fit between the means and the ends of the classification.\(^1\)

In the education context, two cases prior to the VMI case applied intermediate scrutiny to sex-segregated school admissions policies.\(^1\) In *Mississippi Univ. for Women v Hogan*, the Supreme Court's analysis in *Stanton v Stanton*, 421 US 7 (1975), is instructive on the application of both prongs of intermediate scrutiny. At issue in *Stanton* was the constitutionality of a Utah statute providing that the period of minority for males extended to age 21 and for females to age eighteen. This statute affected the period during which a divorced parent was responsible for supporting his or her children. The Court found that the state's interest in defining parents' obligation to support children during their minority was a legitimate and important one. Nonetheless, the Court determined that the claimed relationship between this objective and the sex-based classification was rooted in the antiquated notions "that it is the man's primary responsibility to provide a home and that it is salutary for him to have education and training before he assumes that responsibility; that girls tend to mature earlier than boys; and that females tend to marry earlier than males." *Id* at 14. The Court could not sanction a statute based on old notions and stereotypes of gender roles that had become inconsistent with the reality that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Id* at 14-15.

Similarly, in *Kirchberg v Feenstra*, 450 US 455 (1981), the Court agreed that the state had an interest in the management of community property, but found that the state failed to show why the mandatory designation of the husband as manager of the property was necessary to further that interest. As such, the Court concluded that the gender-based classification violated the Equal Protection Clause. *Id* at 461.

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Court held that the University ("MUW") failed to show that the policy of excluding men from MUW's nursing school was substantially related to its purported objective of compensating women for past discrimination and educational disadvantages. The Court explained that MUW's policy of permitting men to audit classes fatally undermined its claim that women are adversely affected by the presence of men in the classroom. Thus, MUW's professed educational goals could not be achieved by excluding men from enrolling for credit in the School of Nursing since men were already present in class as auditors.

Prior to Hogan, the Third Circuit, in Vorchheimer v School Dist. of Philadelphia, upheld the constitutionality of an all-male public high school. However, Hogan did not overrule Vorchheimer for two reasons: (1) Vorchheimer involved secondary education rather than higher education, and (2) the school district in Vorchheimer did not claim a compensatory purpose. The Third Circuit recognized single-sex high schools as a valid means of achieving the legitimate goal of providing a quality education:

The primary aim of any school system must be to furnish an education of as high a quality as is feasible. Measures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance. Thus, given the objective of a quality education and a controverted, but respected theory that adolescents may study more effectively in single-sex schools, the policy of the school board here does bear a substantial relationship.

VMI argued that its gender-based admissions policy is substantially related to the diversity goal because the uniqueness of the school is dependent on the exclusion of women. The court agreed:

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19 458 US at 730. Although Justice O'Connor, writing for the Court in Hogan, decided that the challenged admissions policy failed the important governmental objective prong of intermediate scrutiny, she proceeded to analyze the policy under the second prong of intermediate scrutiny and found the policy deficient under the substantial relationship test as well. Id.

20 Id at 731.

21 Id. This argument can be applied to VMI, which, like Mississippi University for Women, does not admit women into the regular cadet day program but allows women to attend night and summer courses. Commonwealth of Virginia, 1991 WL at 102905.

22 532 F2d at 880 (female student seeking admission to an all-male high school unsuccessfully challenged the school's single-sex policy).

23 Id at 888.
Virginia also met the second prong of the Hogan test by proving that the objective of diversity of education is met by providing single-gender education. Obviously, the only means of attaining this goal is to exclude women from the all-male institution—VMI.\textsuperscript{24}

The court believed that VMI would necessarily be fundamentally transformed by the introduction of women to the student body, and that avoiding such a change justified VMI’s all-male admissions policy.\textsuperscript{25}

it would be impossible for a female to participate in the “VMI experience.” Even if the female could physically and psychologically undergo the rigors of the life of a male cadet, her introduction into the process would change it.\textsuperscript{26}

In drawing this conclusion, the court seems to have been persuaded more by extensive speculation as to how VMI would change for the worse if women were admitted, rather than by the evidence in the record about the actual integration of women into schools such as West Point and the Naval Academy. This evidence established that, while some alterations were necessary, the overall effect of the admission of women was positive.\textsuperscript{27} The court did not

\begin{itemize}
\item \textsuperscript{24} \textit{United States v Commonwealth of Virginia}, 1991 WL 102903, 102909 (W D Va 1991).
\item \textsuperscript{25} Id at 102906-07.
\item \textsuperscript{26} Id at 102908.
\item \textsuperscript{27} Id at 102923-25. The U.S. Service Academies were directed by Congress to admit women in 1975. The debate over opening the U.S. Service Academies to women centered on the utility of training women for the military in light of the combat exclusion. Opponents of the legislation requiring the Army, Navy, and Air Force to admit women into their academies claimed that since the Service Academies are in the business of training servicemen for combat roles, and women are barred from filling combat positions, using academy resources to develop women officers would be economically unwise. Maj. Gen. Jeanne Holm (USAF, Ret.), \textit{Women in the Military} 307 (Presidio Press, 1982). Opponents also argued that the introduction of women would inevitably erode the academies’ Spartan atmosphere, described as crucial to producing fit combat leaders. Id at 307-08 (quoting Air Force Academy Superintendent Lt. Gen. Albert P. Clark and Army Secretary Howard H. Callaway).

Proponents of the bill argued that the Service Academies did not exist for the exclusive purpose of producing leaders for combat. The bill’s supporters framed the issue as one of equity—since academy men received preferential treatment such as faster promotions and command assignments, “by being denied admittance to the academies, women were being denied equal opportunity for successful careers commensurate with other officers.” Id at 309. Eventually the bill directing that women be admitted to all three Academies became law. 10 USC § 4342 (1988). The first women cadets graduated in June 1980. In 1989, a female cadet graduated at the top of her class at West Point, achieving the rank of commander of the corps of 4,400 cadets. Leigh Behrens, \textit{Women Warriors: Should Military Combat Service be Restricted by Gender?}, Chicago Tribune Tempowoman-4 (Jan 21, 1990).\end{itemize}
even consider the possibility that VMI could be strengthened by admitting women.\textsuperscript{28}

Although ostensibly supported by "expert" testimony, the court's critical conclusion that VMI would be dramatically changed by the admission of women is in fact based on stereotypes and not on women's proven ability to perform militarily. The radical changes which the court believed were inevitable included abandonment of the school's adversative system\textsuperscript{29} because "the adversative model of education is simply inappropriate for the vast majority of women";\textsuperscript{30} accommodations for women's needs for personal privacy; and adjustments in physical education requirements. On a more intangible level, supporters of VMI's all-male policy feared that the admission of women would destroy the ethos of VMI and damage the spirit of the Corps.\textsuperscript{31} The VMI opinion also hinted that women would be uncomfortable in VMI's "stark and unattractive" barracks\textsuperscript{32} and that women require a more nurturing and supportive educational environment than is provided at VMI.\textsuperscript{33}

The court erred, however, by failing to realize that the women who apply to VMI will want the VMI experience, as is. These will be women who seek the whole VMI challenge, not a relaxed, special program. If they are admitted to the school, they will presumably be capable of succeeding there. Thus, in determining the effects of coeducation at VMI, the court erroneously assessed the needs and abilities of the average college-bound woman rather than those of the average woman who applies and is admitted to VMI.

The actual performance of women in the military and at military schools, including the federal academies, contradicts the court's predictions about the ability of women to succeed at VMI. Federal statutes requiring admission of women to the service academies,\textsuperscript{34} other congressional enactments and pronouncements supporting and expanding the role of women in the military,\textsuperscript{35} the

\textsuperscript{28} See \textit{Commonwealth of Virginia}, 1991 WL at 102923-25 (documenting favorable impact of admitting women at West Point, the Naval Academy, Washington & Lee University, and the University of Virginia).

\textsuperscript{29} The adversative model uses the creation of doubt about a student's past beliefs and experiences to shape the student's values. Id at 102915.

\textsuperscript{30} Id at 102906, relying on testimony of a sociology professor at Harvard University.

\textsuperscript{31} See, for example, id at 102925.

\textsuperscript{32} \textit{Commonwealth of Virginia}, 1991 WL at 102918.

\textsuperscript{33} Id at 102906.

\textsuperscript{34} See note 1.

\textsuperscript{35} For examples of recent congressional statements supporting women in the military, see \textit{Introduction of Sense-of-Congress Resolution Recognizing Members of Armed Forces},
heightened presence of women in all branches of the military, and technological changes in warfare and modern medicine—all defeat the proposition that military schools must remain all-male bastions in the interest of national security.

Almost a quarter of a million women are currently members of the military on active duty, and nearly eleven percent of the U.S. armed forces are women. Significant numbers of women have been among America's fighting forces in several conflict situations. For instance, 170 women served in the invasion of Grenada in 1983, 600 women were among the fighting forces in the invasion of Panama in 1989, Army women served with the Sinai Peacekeeping Force and in military exercises in Honduras, and Air Force women participated in air strikes against Libya. Thirty-two thousand women served in the Gulf War, comprising six percent of the U.S. forces deployed. The participation of women in the Gulf War was extensive: they flew planes and helicopters, loaded bombs, and worked on Patriot missiles. Three


* With the increased access to training, technological changes in warfare and modern medicine have helped to tear down the barriers to women in the military. The technological revolution in warfare has minimized the physical strength required of soldiers and maximized the precision and technological ability needed. With the advent of sophisticated birth control techniques, the physiological problem caused by pregnancy has also been substantially reduced since women can now effectively control their fertility. See Mariclaire Hale and Leo Kanowitz, *Women and the Draft: A Response to Critics of the Equal Rights Amendment*, 23 Hastings L J 199, 202-04 (1971).

* The breakdown by service of women as a percentage of active-duty military personnel is as follows: Army (11.1 percent), Navy (9.7 percent), Marines (5.0 percent), and Air Force (13.3 percent). Joseph Kruzel, ed, *American Defense Annual* 155 table 9-1 (Lexington Books, 1990).


* Behrens, Chicago Tribune Tempowoman-4 (cited in note 27).


* Id.


* Id.
women were taken as POWs, and thirteen women were killed—six by hostile fire." The Gulf War illustrated that women are integrated into the services on such a large scale that it would be difficult for the United States to go to war without them. At the state level, women have performed with distinction on police forces, fire fighting forces, and other public protection organizations. For this reason, VMI's goal of developing "citizen soldiers" fails to relate substantially to the school's all-male admissions policy.

The reality is that women have proven themselves invaluable members of the military and other protective forces in virtually every respect. Therefore, an admissions policy that excludes women because of their sex is overinclusive; such a policy wrongly excludes qualified women.

One outgrowth of the performance of women in the Gulf War has been a reevaluation of the role of women in the military and in war. Specifically, Congress is once again debating the combat exclusion, this time with a clearer understanding of women's actual performance in war. The proposition that VMI must remain all-male in order to remain effective must be seriously questioned in light of recent events. VMI contributes to Virginia's diverse educational system because it is an elite, adversative, military school, not because it is an all-male institution that would decline in prestige and effectiveness if it admitted women.

C. Intermediate Scrutiny and Its Pitfalls

The outcome of the VMI case illustrates the inadequacy of the intermediate scrutiny standard for reviewing gender classifications under the Equal Protection Clause. In this case, the court was able, under intermediate scrutiny, to uphold the exclusion of women from VMI without considering the harmful impact of the classification on women. The VMI record established that the VMI experience is unique. The combination of the adversative model of education, its egalitarian ideal of absolute equality of treatment, the intense physical program, the absence of privacy, and the strict regulation of behavior makes the VMI experience one that ROTC programs at coeducational schools or at other military schools cannot duplicate.

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The living quarters at VMI alone distinguish it from ROTC programs: all cadets are required to live in the Barracks, which is the focal point for the VMI experience. Along with the Barracks, VMI's "rat" system is a key element for disciplining new cadets and is noticeably absent from ROTC programs. VMI also enjoys a prestigious reputation and a well-placed alumni network. Women are effectively precluded from receiving the unique military, educational, and developmental experience VMI provides because no equivalent Virginia institution admits women.

The VMI court, faced with a gender classification, applied intermediate scrutiny, found a sufficiently important governmental goal in diversity, agreed with Virginia that VMI's uniqueness was inextricably linked to its all-male enrollment, and concluded that the all-male policy was constitutional. The court acknowledged that VMI's all-male status was maintained at the expense of female Virginians seeking the VMI experience, but understood this issue to be outside the scope of the VMI case:

[I]t seems to me that the criticism which might be directed toward Virginia's higher educational policy is not that it maintains VMI as an all-male institution, but rather that it fails to maintain at least one all-female institution. But this issue is not before the Court. The relief that the United States seeks in this suit is to require VMI to open its doors to women— not to force Virginia to establish an all-female, state-supported college.

Consequently, the court simply deferred to Virginia's decision that "providing a distinctive, single-sex educational opportunity is more important than providing an education equally available to all." Thus, intermediate scrutiny allowed this court to focus ex-

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44 Id at 102918-19.
45 The rat system subjects new cadets ("rats") to discipline, instruction and sanction by the upper classmen. See id at 102916-17.
46 See id at 102915.
47 Commonwealth of Virginia 1991 WL at 102908. The court then compared this aspect of the case to Hogan, finding the cases similar in that "Hogan did not mount a constitutional challenge because there was no corresponding all-male counterpart to the MUW Nursing School but only sought admission to the MUW program. The Court was careful to tailor its decision to the relief sought." Id. However, the VMI court's comparison is flawed because the Hogan Court reached the opposite result. In Hogan, the Supreme Court corrected the discriminatory effect which the nursing school's all-female admissions policy had on the plaintiff by ordering his admission; the Court did not deny the relief sought on the grounds that the constitutionality of the nonexistence of an all-male nursing school was not before the Court.
48 Id at 102906.
clusively on the beneficiaries of VMI's all-male policy and overlook the policy's detrimental effect on women.

Of course, Virginian women's educational options are not broadened by the existence of an all-male VMI; they are constricted.\(^5\) VMI's admissions policy imposes both direct and indirect costs on women. Direct costs include limiting women's access to officer training; preventing young women from developing the discipline, confidence, and self-reliance that military schools pride themselves on instilling,\(^6\) and discouraging women from taking advantage of the service's economic benefits, such as three square meals, a place to live, medical care, the opportunity for travel and contact with the world, educational benefits, job training, and self-defense training. Women who are excluded from male military schools are effectively denied full access to these opportunities.

Furthermore, all-male military schools indirectly deprive women as a group of the spillover benefits associated with involvement in the high ranks of the military. Specifically, the participation of a disadvantaged group in military service results in increased acceptance and social betterment for the group in the civilian world.\(^7\) The fact that fewer women participate in the military than men and the fact that those women who do participate generally hold lower ranks than their male counterparts—both perpetuate the stereotypes that women are less concerned with global affairs than men and that women need to be protected by men. Moreover, women's limited participation in the military may hinder their pursuit of political office because of the common belief

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\(^5\) Justice O'Connor recognized this weakness in the diversity argument in her opinion for the Hogan Court:

> Justice Powell's dissent suggests that a second objective is served by the gender-based classification in that Mississippi has elected to provide women a choice of educational environments . . . . Since any gender-based classification provides one class a benefit or choice not available to the other class, however, that argument begs the question. The issue is not whether the benefitted class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.


Although the VMI court relies heavily on Hogan, and in fact cites this particular passage, the decision in fact turns on the benefits of single-sex education and the allegedly harmful effect that an order forcing VMI to open its doors to women would have on VMI's beneficiaries. *Commonwealth of Virginia*, 1991 WL at 102903-04.

\(^6\) See *Lead the Way Yourself! America's Military Schools and Colleges Give You the Chance!*, Association of Military Colleges and Schools of the United States.

\(^7\) See Hale & Kanowitz, 23 Hastings L J at 207 (cited in note 36) (discussing the spillover effects of the competent and heroic service of black Americans in the military).
that men who have fought for their country have a special qualification or right to exercise political power and hold office. Thus, such discrimination denies women the rights of full citizenship that the Fourteenth Amendment guarantees.

Requiring courts to incorporate these concerns in evaluating the importance of alleged governmental goals is compatible with the application of intermediate scrutiny. However, courts applying intermediate scrutiny have not rigorously analyzed the government's goals, nor have they embraced a cost-benefit approach. The Supreme Court's designation of goals as sufficiently or insufficiently important has not been based on any articulated standard. As presently applied, intermediate scrutiny fails to take into account the harmful impact of a gender classification on the disadvantaged group.

III. Application of Equal Protection Analysis to Private All-Male Military Schools

Although all of the nation's military schools receive financial assistance from federal and state governments in some form and amount, several all-male military schools are still considered private institutions. The application of equal protection analysis to these private, all-male military schools requires an additional jurisdictional inquiry. Because the Fourteenth Amendment guarantees an individual's right to equal protection of the law only as regards

64 See Comment, Women and the Draft: the Constitutionality of All-Male Registration, 94 Harv L Rev 406, 424 n 120 (1980). Further, the belief that military service enhances a political candidate's appeal is illustrated by the use of military service as a political asset by many candidates, such as George Bush (1988 Presidential campaign) and John F. Kennedy (1960 Presidential campaign). Conversely, a candidate's failure to serve on active duty is often considered a weakness, as evidenced by the controversy that arose in the 1988 Presidential campaign over Dan Quayle's service in the National Guard during the Vietnam War. See Vietnam Vets Critical of Quayle, UPI (Aug 21, 1988); Norman D. Sandler, UPI (Aug 18, 1988).


Courts have held as not sufficiently important to pass intermediate scrutiny the goal of facilitating administrative convenience, Reed v Reed, 404 US 71 (1971); Frontiero v Richardson, 411 US 677 (1973); goals reflecting gender stereotypes, Hogan, 458 US at 725; and misplaced governmental goals, United States v Massachusetts Maritime Academy, 762 F2d 142, 153 (1st Cir 1985).
actions that "may fairly be said to be that of the States," a court must first determine whether the single-sex admissions policy at private military schools constitutes state action before applying the Equal Protection Clause. The state action requirement permits private conduct to abridge individual rights unless "to some significant extent the State in any of its manifestations has been found to have become involved in it."

If state action beyond mere financial assistance is found, then intermediate scrutiny applies to private all-male military schools, and they, like public military schools, must open their doors to women. Accordingly, a public military school cannot simply escape the mandates of the Equal Protection Clause by ceasing to accept public funds.

A. State Action Doctrine

Over the years, the Supreme Court has had numerous occasions to decide whether the actions of ostensibly private parties constitute state action. However, because of the breadth and imprecision of the Equal Protection Clause, the Court has acknowledged the impossibility of applying a formula to recognize state responsibility under the Equal Protection Clause. Rather, the Court has repeatedly stated that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Accordingly, no precise test or single dispositive factor exists for finding state action; the cases serve merely as guidelines for evaluating new fact situations.

Three lines of state action doctrine have emerged, however, and a finding of state action can be supported by any one of them. The first line finds state action on the grounds of a "symbiotic relationship" between the state and the private party. The second line is based on the performance by the private party of a "public function." The final line of cases looks for a nexus between the state and the challenged activity of the private party.

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Shelley v Kraemer, 334 US 1, 13 (1948). See also The Civil Rights Cases, 109 US 3, 11-12 (1883).

As used in the context of the Fourteenth Amendment, the phrase "state action" encompasses action by any level of government, from local to national.


Id at 722.

Id.
To find a symbiotic relationship, the state must have "so far insinuated itself into a position of interdependence with [a private entity] that it must be recognized as a joint participant in the challenged activity . . . ."61 In Burton v Wilmington Parking Authority, the Court found state action in the refusal of a privately owned and operated restaurant to serve black customers. The restaurant had a lease in a parking facility that was owned and managed by an agency of the state of Delaware. The Court found that the relationship between the Parking Authority and the restaurant was one of interdependence, based on several factors: the public ownership and maintenance of the land and building, the public use to which the building was dedicated, the public funds used to defray the costs of the facility, and the mutual benefits conferred on both parties from the relationship.62 Burton is significant because the Court found state action even though the state played no part in the restaurant’s policy against serving blacks.63 Thus, Burton refutes the notion that the state must be affirmatively involved in the challenged activity in order for a court to find state action.64

The Court’s subsequent treatment of the symbiotic relationship theory has been inconsistent. In 1981, a unanimous Court applied the Burton rationale in Little v Streater, holding that Connecticut was obligated to pay for blood tests requested by an indigent defendant in a paternity suit because of the state’s "considerable and manifest" involvement in the suit.65 But in two cases decided the following year, the Court distanced itself from Burton by not finding state action where the private party was a nursing home66 and where the private party was a special school for problem students.67 In both of these cases, the institutions received

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61 Id at 725.
63 Id at 725 ("It is of no consolation to the individual denied the equal protection of the laws that it was done in good faith.").
64 Compare Powe v Miles, 407 F2d 73, 81 (2d Cir 1968) (no state action); Sanford v Howard Univ., 415 F Supp 23 (D DC 1976).
65 Little v Streater, 452 US 1, 9 (1981). The Court pointed to the following factors in finding state involvement: the plaintiff mother was compelled by Connecticut’s welfare laws to bring suit against the father of her illegitimate child if she wished to receive benefits; the state attorney general was a party to the action and had the power to disapprove any settlement; the plaintiff’s lawyer was paid by the state; and any support payments awarded by the court were to be paid directly to the state. Id.
66 Blum v Yaretsky, 457 US 981 (1982) (Medicaid patients challenged nursing home decisions to discharge or transfer patients without notice or an opportunity for a hearing).
67 Rendell-Baker v Kohn, 457 US 880 (1982) (school employees, discharged after disagreeing with certain school policies, challenged discharges as violative of their constitutional rights to free speech and procedural due process).
most of their funding from the government and were heavily regulated by the state, but the Court found the relationships between the state and each institution to be weaker than in Burton. More recently, the Court declined to apply Burton, finding no state action in a case challenging the United States Olympic Committee's decision to deny organizers of a gay athletic event license to use the word "Olympic." 88

Under the public function line of state action cases, courts find state action where the actions of seemingly private actors are inherently governmental.89 Thus, if a private party assumes traditionally governmental powers,70 or the state delegates such powers to it,71 the party must obey the Constitution.

The third line of state action doctrine requires a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."72 This "nexus" test inquires as to how heavily private enterprises are regulated by the state. Since courts here are looking for a connection between the state and the private entity, this test tends to overlap with the symbiotic relationship test. However, the two tests differ in that the nexus standard requires affirmative government involvement in the challenged activity. Of the three tests, the nexus test is the most difficult to satisfy. Accordingly, the Fifth Circuit has suggested73 that the nexus test should be resorted to only when the other theories fail to support a finding of state action.

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70 See, for example, Robinson v Price, 553 F2d 918 (5th Cir 1977) (assumption of welfare related programs by a private, non-profit corporation receiving federal funds held state action); Smith v Young Men's Christian Ass'n of Montgomery, Inc., 462 F2d 634 (5th Cir 1972) (conduct of city recreational programs by a non-profit civic organization enjoying tax-exempt status and income from the city held state action).
71 See, for example, West v Atkins, 487 US 42 (1988) (provision of medical services to state prison inmates by a doctor contracting with the state to fulfill the state's obligation, held state action); Medina v O'Neill, 589 F Supp 1028 (S D Tex 1984) (alien immigration and detention activities by private security company, at the request of the Immigration Naturalization Service, held state action).
72 Metropolitan Edison Co., 419 US at 351.
73 Dobyns v E-Systems, Inc., 667 F2d 1219, 1223 (5th Cir 1982), citing Golden v Biscayne Bay Yacht Club, 530 F2d 16 (5th Cir 1976).
B. Private Military Schools Should Be Considered State Actors

Applying the lines of state action doctrine to private military schools, a court could find state action based on both the symbiotic relationship test and the public function test.

All-male military schools have a substantial military presence and purpose. Thus, the government and the schools have an interdependent relationship sufficient to establish state action. The military presence at private military schools varies a great deal, but tends to be greater at the college level than at the secondary school level. All of the military colleges, junior colleges, and secondary schools, public and private, have ROTC programs on campus. These ROTC programs are maintained by the U.S. Department of Defense and may lead to a commission in a branch of the services. A Lieutenant Colonel is assigned to each school, military personnel are present on campus to run the program, ROTC scholarship funds are available to participants, and the ROTC program often has departmental status within the administration of the schools.

There are no differences between the operations of the programs at private versus public schools. Whether there is a symbiosis with the government sufficient to find state action on the part

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74 The issue of state action on the part of a military school has not been litigated. However, the Fifth Circuit found a symbiotic relationship to exist, thus establishing state action, where the private entity was a private company which had contracted with the United States to provide personnel, materials, and services for the U.S. Sinai Field Mission. E-Systems, Inc., 667 F2d at 1219.

Occasionally, courts have found private universities to be state actors under the symbiotic relationship line of analysis. See Guillory v Administrators of Tulane Univ., 203 F Supp 855 (E D La 1962). In a case alleging racial discrimination in Tulane's admissions policies, the court based its finding of state action on Tulane's special legislative franchise, its state tax exempt status, the revenues Tulane received from lands owned by the state, and the participation by three public officials on Tulane's governing board. See also Hammond v University of Tampa, 344 F2d 951 (5th Cir 1965) (court found state action based on the school's use of a surplus city building and other land).

76 ROTC programs are also present at non-military colleges. These are colleges that are not designated as military schools, but maintain a federal military presence through the ROTC program. ROTC programs are active at a total of 1,380 colleges and universities. ROTC Protest, Gannett News Service (Dec 3, 1990).

This Comment is primarily concerned with all-male colleges, junior colleges, and secondary schools with a significant enough military association such that they are designated military schools. However, the Comment is relevant to those non-military schools with exceptionally large ROTC enrollments.

77 The fact that U.S. Defense Department personnel are present on the campuses running the ROTC programs is a significant connection to the state that was not present in Burton.

78 Paul Kotakis, telephone conversation with Commentator.
of a specific school will depend on the size and intensity of that school's military program and the extent to which the public associates the school with the provision of military training.79

The interrelated dual functions performed by military schools—educating students and providing them with military training—are traditionally governmental functions, and as such, provide a second basis for finding that private military schools are state actors. Education alone is not usually deemed sufficient to establish state action since courts do not consider it to be an exclusive government function.80 However, some courts have applied a less onerous standard in cases charging private schools with racial discrimination.81 The theory is that class-based discrimination is so repugnant to fundamental principles of equality that “in race discrimination cases courts have been particularly vigilant in requiring the states to avoid support of otherwise private discrimination . . . .”82 Some have argued that courts should extend this relaxed standard to sex discrimination claims made against private schools.83

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79 Burton v Wilmington Parking Authority, 365 US 715, 720 (1961) (the fact that the restaurant was located in a clearly designated public parking facility served as evidence that the restaurant and the public parking authority were linked in the public’s eye). See also, San Francisco Arts & Athletics v U.S.O.C., 483 US 522, 557-58 (1987) (Brennan dissenting): in the eye of the public, both national and international, the connection between the decisions of the United States Government and those of the United States Olympic Committee is profound. The President of the United States has served as the Honorary President of the USOC. The national flag flies both literally and figuratively over the central product of the USOC, the United States Olympic Team.

80 See, for example, Blackburn v Fisk Univ., 443 F2d 121, 124 (6th Cir 1971); Powe v Miles, 407 F2d 73, 80 (2d Cir 1968); Cohen v Illinois Institute of Technology, 524 F2d 818, 826 n 24 (7th Cir 1975).

81 See Hammond, 344 F2d 951; Guillory, 203 F Supp at 858-59 (court required private university to open doors to qualified black applicants: “No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution. . . . Clearly, the administrators of a private college are performing a public function.”).

82 Weise v Syracuse Univ., 522 F2d 397, 406 (2d Cir 1975).

83 In a line of state action cases involving private universities, the Second Circuit has recognized the existence of a “double standard” in state action, “one, a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims,” Jackson v Statler Foundation, 496 F2d 623, 629 (2d Cir 1974) (citations omitted). For indications that findings of no state action might be different if the cases involved discriminatory admissions policies, see Grafton v Brooklyn Law School, 478 F2d 1137, 1142 (2d Cir 1973); Powe, 407 F2d at 81. Urged to put sex discrimination in the same category of offensiveness
The private schools' provision of both education and military training should qualify them as state actors. Training individuals to protect America domestically and abroad is one of the government's most important and essential functions. Although courts have not considered whether military training is a public function, courts have found the private performance of military and public protection functions to be state action. Therefore, private military schools which provide military training are performing a public function.

Once a court finds state action, it should then apply the same equal protection analysis as described in part II of this Comment. Just as public all-male military schools fail to survive intermediate scrutiny, so too should private all-male military schools.

CONCLUSION

The all-male admissions policy of public military schools cannot withstand constitutional scrutiny under the Supreme Court's equal protection analysis for gender-based classifications. A serious inquiry into the primary goal professed to justify all-male military schools—the achievement of a diverse educational system—shows that this goal is not sufficiently important to survive intermediate scrutiny. Furthermore, the single-sex admissions policy does not

as race discrimination for purposes of state action doctrine, the court in Syracuse Univ., 522 F2d at 406 noted:

the conduct here alleged—invidious class-based discrimination on account of sex—would appear, under the rationale articulated in Power and Grafton, to be more offensive than the disciplinary steps taken in the prior cases, and that judicial resolution of this dispute will not entail interference with matters unsuited for review by a court. The court in Stewart v New York Univ., 430 F Supp 1305 (S D NY 1976), also applied a less onerous standard in a case involving alleged race and sex discrimination.

See the preamble to the Constitution:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

US Const (emphasis added).

Dobyns v E-Systems, Inc, 667 F2d 1219, 1225 (5th Cir 1982) (holding that a private company acting as "peacekeeper" in the Sinai performed a function traditionally reserved to the government; the court found state action under both the public function and symbiosis theories).

Henderson v Fisher, 631 F2d 1115 (3d Cir 1980) (private university police officers held state actors because state delegated government function of police powers to campus police); Januseaitis v Middlebury Volunteer Fire Dept., 607 F2d 17 (2d Cir 1979) (fire fighting held governmental function).
bear a substantial relationship to the diversity goal. A policy excluding women from admission to military schools is flatly inconsistent with the prevailing national conscience regarding women in society and with the actual distinguished service of women in the military today.

Private military schools which exclude women similarly violate the Equal Protection Clause of the Fourteenth Amendment. Schools cannot claim immunity from Equal Protection strictures simply because they are not officially designated "public institutions." Rather, the doctrine of state action applies and places private military schools within the scope of the Constitution's protections.