

NOTES

THE LINK BETWEEN PRIVATE AND PUBLIC SINGLE-SEX COLLEGES: WILL WELLESLEY STAND OR FALL WITH THE CITADEL?

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INTRODUCTION

In the fall of 1992, high school senior Shannon Faulkner submitted an application for admission to the Citadel, a state-funded, all-male, military college in Charleston, South Carolina. Founded in 1842, the Citadel is a prestigious college, with a long and proud history. Novelist Pat Conroy, a Citadel alumnus, has described it as "Charleston's shrine to Southern masculinity."¹ However, because of the intense physical and mental challenges which cadets are subjected to as part of their education, the Citadel has also earned the reputation of "the big bad macho school . . ."² Freshmen, called "knobs" because their heads are shaved to resemble doorknobs, must follow upperclassmen's orders, and may utter only three responses when spoken to: "Sir, yes, sir," "Sir, no, sir," and "Sir, no excuse, sir."³ Like many other ambitious South Carolina teenagers, Shannon dreamed of rising to the challenges of a Citadel education, bonding with fellow Citadel cadets, and becoming part of the powerful Citadel alumni network, which includes many prominent Southerners, most notably General William C. Westmoreland (Class of 1935), Senator Ernest F. Hollings (1942) and the Mayor of Charleston, Joseph P. Riley, Jr. (1964).⁴

Faulkner was indeed an impressive candidate, having maintained a 3.48 grade-point average while also playing varsity softball for four years and editing the yearbook.⁵ In the spring of 1993, the college sent Shannon a letter of acceptance addressed to "Mr. Shannon Faulkner." The Citadel was, of course, shocked to learn that Shannon Faulkner was a young woman, and immediately retracted its offer of admission. Faulkner had convinced

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1. Pat Wingert, *Oh, to Be a Knob!*, NEWSWEEK, Aug. 22, 1994, at 22, 22.

2. Susan Faludi, *The Naked Citadel*, THE NEW YORKER, Sept. 5, 1994, at 62, 62.

3. Wingert, *supra* note 1, at 22.

4. Catherine S. Manegold, 'Save the Males' Becomes Battle Cry in Citadel's Defense Against Woman, N.Y. TIMES, Sept. 11, 1994, at A10. Interestingly, one Citadel alumnus and spokesman, Major Rick Mill, has said, "I don't know how she thinks she is going to benefit from all this alumni networking when right now that group is collecting money to keep her out." *Id.*

5. Faludi, *supra* note 2, at 74.

a high school guidance counselor to delete all references to her gender on her high school records, and she simply filled out the application, which asked no questions about gender. After the Citadel retracted her offer of admission, Faulkner filed suit against the Citadel, claiming that its single-sex admissions policy violated her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment.⁶ The District Court ordered the Citadel to admit Faulkner to the Corps of Cadets immediately, and required the Citadel to formulate and implement an admissions policy that would conform with the Equal Protection Clause in time for the 1995-1996 school year.⁷ The Fourth Circuit Court of Appeals affirmed this decision in April of 1995.⁸

This Note examines the *Faulkner* case and its relation to the admissions policies of women's colleges. Part I of this Note will explain the legal arguments involved in the *Faulkner* case and in a recent case against the all-male, publicly supported Virginia Military Institute (VMI),⁹ which dealt with many of the same issues. Part II will briefly examine the feminist arguments in support of single-sex education for women, the attempt to reconcile that position with Shannon Faulkner's cause, and the link between private women's colleges, the Citadel and VMI. Parts III, IV and V will focus on three legal theories which could be used to challenge the legality of the admissions policies of private women's colleges: The Equal Protection Clause, the tax-exempt status of private colleges, and the Commerce Clause.

I. THE CITADEL AND VMI CASES

The Equal Protection Clause 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."¹⁰ Faulkner's case was heard by the Fourth Circuit Court of Appeals, which had previously decided a very similar case, *United States v. Virginia*.¹¹ The *Virginia* case involved the federal government's challenge to the single-sex admissions policy of the Virginia Military Institute. Like the Citadel, VMI is a public all-male military college that uses an "'adversative' educational model [that] emphasizes physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values."¹²

In the VMI case, the court explained that "all persons are in many important respects different and . . . were created with differences, and it is not the goal of the Equal

6. *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993), *on remand*, 858 F. Supp. 552 (S.D.S.C. 1994), *aff'd, modified, remanded*, 51 F.3d 440 (4th Cir. 1995), *mot. denied*, 66 F.3d 661 (4th Cir. 1995), *cert. denied*, 1995 U.S. LEXIS 7113 (1995).

7. *Faulkner*, 858 F. Supp. at 569.

8. *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995).

9. *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993), *on remand, mot. granted*, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *cert. granted*, 116 S. Ct. 281 (1995). The Supreme Court's decision in this case, which is expected in early 1996, may resolve some or all of the issues which were argued in the *Citadel* case as well.

10. U.S. CONST. amend. XIV, § 1.

11. 976 F.2d 890 (4th Cir. 1992).

12. *Id.* at 893.

Protection Clause to make them the same.”¹³ Thus, the Equal Protection Clause does *not* require that “all laws apply to all persons without regard to actual differences.”¹⁴ The court stated that “when a state regulation employs classifications, the defining criteria must have a ‘fair and substantial relation’ to the objective of the regulation.”¹⁵ Therefore, in order for VMI’s admissions policy to be found constitutional, it had to satisfy the court’s two-part test: (1) the class of persons to which a state regulation applies must be defined in a manner that fairly and substantially relates the class to the purpose of the regulation, and (2) the regulation must serve an adequate government purpose.¹⁶

Regarding the test’s first prong, VMI argued that its egalitarian environment was necessary to fulfill its main purpose, to create “citizen soldiers.”¹⁷ The court agreed that several aspects of the VMI experience would be “materially affected by coeducation.” The physical differences between men and women would require two levels of physical training, the two sexes would be entitled to some degree of privacy from each other, and interaction between men and women in the adversative program would “introduce[] additional elements of stress and distraction which are not accommodated by VMI’s methodology.”¹⁸ The court used a paradoxical phrase from a popular novel to explain the problem: “The Catch-22 is that women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity.”¹⁹

While VMI satisfied part one of the court’s test, it failed part two. VMI claimed that the governmental purpose behind its discriminatory admissions policy was to offer educational “diversity.”²⁰ The court, dissatisfied with this reasoning, noted that “the Commonwealth of Virginia has not revealed a policy that explains why it offers the unique benefit of VMI’s type of education and training to men and not to women.”²¹

Interestingly, the court’s conclusion that VMI’s admission policy violated The Equal Protection Clause did not lead the court to require that women be admitted to the college. The admission of women was only one option the court suggested along with others, such as establishing parallel all-female programs, or becoming a private institution.²²

Since that decision, the State of Virginia has provided a similar program for women at Mary Baldwin College, a private all-women’s college not far from VMI. At Mary Baldwin, students perform physical drills and focus upon developing leadership skills, but there is no hazing or humiliation. The court’s approval of this “separate but equal” program for women has inevitably led to comparison between the VMI case and the infamous case which allowed (until it was overruled in 1954) “separate but equal”

13. *Id.* at 895.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 896.

18. *Id.* at 896-97.

19. *Id.* at 897.

20. *Id.* at 898.

21. *Id.*

22. *Id.* at 900.

education for blacks and whites, *Plessy v. Ferguson*.²³ The constitutionality of the Mary Baldwin alternative program was recently argued before the Court of Appeals, and the court affirmed its previous decision, finding the remedy constitutional.²⁴

The similarities to the VMI case were clearly recognized by the Faulkner Court of Appeals. In its decision granting Faulkner a preliminary injunction to attend Citadel day classes while a decision on the merits was pending, the court stated that "we can perceive no reason why our holding in VMI would not apply in this case."²⁵

Unlike Virginia, however, the state of South Carolina had articulated a policy which attempted to justify the absence of an all-female military program in South Carolina. In May of 1993, two months after Shannon Faulkner filed suit against the Citadel, the following resolution was passed in the South Carolina General Assembly:

South Carolina has historically supported and continues to support single-gender educational institutions as a matter of public policy based on legitimate state interests where sufficient demand has existed for particular single-gender programs thereby justifying the expenditure of public funds to support such programs.²⁶

In support of the Citadel's admissions policy, the State of South Carolina argued that "single-sex educational opportunities are not available to women in South Carolina's public system of higher education because there is insufficient demand for them."²⁷ To support this claim of insufficient demand, the state presented evidence that due to the decline in female student enrollment at Winthrop College, an all-women's state-supported South Carolina college, the school had become coeducational more than twenty years prior to the Citadel controversy.²⁸ Also, the chairman of the South Carolina Commission on Higher Education testified that the Commission had received no requests for an all-female educational program since Winthrop began to admit men.²⁹

In its April 1995 decision on the merits, the Court of Appeals upheld the district court's ruling that this evidence was insufficient to show a current absence of demand for women's single-sex education in South Carolina.³⁰ Interestingly, the court suggested that the absence of demand by members of one gender, if proven, may justify a state's failure to offer single-sex education to that gender, but it chose not to resolve this "difficult legal

23. 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954). For discussions of the "separate but equal" controversy, see Bennett L. Safenstein, Note, *Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637 (1993), and William A. Devan, Note, *Toward a New Standard in Gender Discrimination: The Case of the Virginia Military Institute*, 33 WM. & MARY L. REV. 489 (1992).

24. *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995).

25. *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1994).

26. *Id.* at 229.

27. *Faulkner v. Jones*, 51 F.3d 440, 444 (4th Cir. 1995) (quoting *Faulkner v. Jones*, 858 F. Supp 552, 564 (S.D.S.C. 1994)).

28. *Id.* at 445.

29. *Id.* at 445-46.

30. *Id.* at 445.

issue" in the Citadel case.³¹

Ultimately, the court found that, like Virginia, the State of South Carolina had failed to justify its failure to provide women with single-sex educational opportunities. Therefore, the Citadel's admission policy was found to be in violation of the Equal Protection Clause, and the court ordered the Citadel to allow Faulkner to enter the Corps of Cadets in August of 1995, unless it could develop and implement a court approved alternative program for women in South Carolina.³²

After the Court of Appeals' ruling, the Citadel and the state of South Carolina contributed ten million dollars to Converse College, a private all-women's college in Spartanburg, to create the South Carolina Institute of Leadership for Women.³³ Although the program began on August 30, 1995, with an enrollment of 22 women, the court has not yet approved this program as an "equal" alternative to the Citadel.³⁴ A United States district court judge was not expected to rule upon this issue until November of 1995.³⁵

Because the Converse College program had not yet been ruled upon by the court, the Citadel was required to admit Shannon Faulkner to the Corps of Cadets in late August of 1995. During her first day of rigorous military training, Faulkner fell ill and was admitted to the college infirmary.³⁶ By the end of cadet initiation week, often referred to as "hell week," Faulkner, citing severe emotional stress, resigned.³⁷

Many cadets rejoiced at the news of Faulkner quitting, but the lawyers who represented Faulkner promised that the case against the Citadel would go on without her.³⁸ In fact, representatives of the plaintiffs and of the defendants have petitioned the Supreme Court to review the case.³⁹ The Supreme Court, however, refused to grant certiorari. Nonetheless, the facts surrounding the *Faulkner* case will likely have far-reaching effects because of the growing experimentation throughout the country with single-sex education at all educational levels.

For example, in 1994, one public high school in Ventura, California, added an all-girls algebra class to its curriculum.⁴⁰ In addition to teaching math, the teacher spends time helping the girls to develop self-confidence in this male-dominated subject.⁴¹ Apparently, the program is already working; the number of girls enrolling in advanced math classes has almost doubled, and many girls who had previously received bad grades in math are now earning A's and B's.⁴²

31. *Id.*

32. *Id.* at 450.

33. *22 Women Show up at Alternative to the Citadel*, N.Y. TIMES, August 31, 1995, at A13.

34. *Id.*

35. *Id.*

36. Catherine S. Mangeold, *Female Cadet Quits the Citadel Citing Stress of Her legal Battle*, N.Y. TIMES, August 19, 1995, § 1, at 1.

37. *Id.*

38. *Id.*

39. *Id.*

40. Susan Estrich, *For Girls' Schools And Women's Colleges, Separate Is Better*, N.Y. TIMES, May 22, 1994, § 6 (Magazine), at 38, 39.

41. *Id.*

42. Jon Glass, *Separated, Boys and Girls May Learn Better; Controversial Approach Limits*

At Bowling Park Elementary School in Norfolk, Virginia, all the academic subjects are taught in single-sex classrooms; only art and music classes are coeducational.⁴³ The children enjoy school more, are less inhibited in the classroom, and are less distracted by the opposite sex.⁴⁴ The school has never been challenged, but because of its public status school officials are aware that their program is likely to be found unconstitutional if the issue is taken to court.⁴⁵

At least two public programs which offered classes for African-American males have been terminated in recent years for legal reasons. In 1989, a Dade County, Florida public elementary school created kindergarten and first grade classes exclusively for African-American boys.⁴⁶ In its first year, the program showed progress; attendance rates increased six percent, test scores improved six to nine percent and there was a "noticeable decrease in hostility" among the boys.⁴⁷ But after only one year, the United States Department of Education ended the program, having concluded that it violated civil rights laws.⁴⁸ Also, in 1991, the Detroit school district planned to open three all-boys schools in the inner city. Parents and civil rights groups filed suit and won, forcing the school district to abandon their plan.⁴⁹

Although Shannon Faulkner did not attain her goal of becoming a Citadel graduate, her case, and the discussion it has fueled, will likely lead to changes in the law surrounding single-sex education for all ages and levels. Acknowledging the significance of her struggle, Faulkner has said, "I've tried to open the door. My knock isn't that big a sound. But it is like the knock in 'The Wizard of Oz.' It set up this echo through the halls until it was heard by everyone."⁵⁰

II. TENSION WITHIN THE FEMINIST MOVEMENT

Although Faulkner "prefers to call herself 'an individualist' and seems almost indifferent to feminist affairs,"⁵¹ she has become somewhat of a heroine in the women's rights movement as a result of her legal battle against the Citadel. Many feminists feel that her admission to the Citadel Corps of Cadets broke "the 152-year-old seal on a bastion of undiluted masculinity."⁵² It seems that the logic of this feminist position conflicts, however, with another position within the movement—the support of women's colleges. Many women, including Shannon Faulkner, may not realize that their fight to enter the Citadel could lead to the demise of private women's colleges as well.⁵³ Some

Intimidation, Classroom Distractions, VIRGINIAN-PILOT, Jan. 4, 1995, at A1.

43. *Id.*

44. *Id.*

45. *Id.*

46. Susan Tift, *Fighting the Failure Syndrome*, TIME, May 21, 1990, at 83, 83.

47. *Id.* at 84.

48. *Id.*

49. Estrich, *supra* note 40, at 39.

50. Manegold, *supra* note 36, at 59.

51. Faludi, *supra* note 2, at 74.

52. Manegold, *supra* note 4, at A10.

53. Currently, there are two public women's colleges in the United States, Texas Woman's University

argue that most women's colleges are safe from constitutional challenges because they are private.⁵⁴ However, on average, private women's colleges receive approximately twenty percent of their operating costs from the government.⁵⁵ They receive the financial benefits of tax exemption, as well as various government grants. Many of the students who attend women's colleges receive government loans. Undoubtedly, these facts blur the distinction between private and public status and suggest that courts may treat all single-sex colleges similarly at some time in the future.

Many feminists believe that a single-sex education benefits girls and women. This opinion was brought to mainstream attention in 1982 by Carol Gilligan in her famous book, *In A Different Voice*, in which she argues that the moral development of girls significantly differs from that of boys.⁵⁶ The past decade has produced countless books about the differences between girls and boys and men and women.⁵⁷ In 1992, the American Association of University Women presented a controversial study, *How Schools Shortchange Girls*,⁵⁸ which included some disturbing findings. The study found that girls receive less attention and praise and fewer constructive comments from their teachers than do boys; teachers listen to boys, even when they call out an answer, but girls are instructed to raise their hands; sexual harassment reports are increasing in schools; and textbook descriptions of girls and women are usually sex-role stereotyped.⁵⁹ Further, a correlation has been shown between attending a women's college and achieving success. At least one study has shown that women's college graduates earn higher test scores, are more likely to attend graduate school, and receive higher salaries than female graduates of coed colleges.⁶⁰ More specifically, thirteen of the fifty-four female members of the 103rd Congress and one third of the women board members of the 1992 Fortune 1000 companies were graduates of women's colleges.⁶¹ These are impressive numbers,

in Denton, Texas, and Douglass College in New Brunswick, New Jersey. It is unclear how Mississippi University for Women should be categorized; it is a public college which currently limits its male students to twenty percent of the total student body, and its curriculum is focused upon women's issues. It is often referred to as the third remaining public women's college in the country. Sarah C. Campbell, *Its Life in Limbo, MUW still looks the survivor to ambitious women*, COMMERCIAL APPEAL, Sept. 25, 1994, at 1B. Clearly, the outcomes of the VMI and Citadel cases, which deal specifically with the issue of the constitutionality of public single-sex colleges, will directly affect the future of public women's colleges. However, this note will focus upon the effect which these decisions may have upon the eighty-one private women's colleges which remain in the United States.

54. See, e.g., Ellen Goodman, *Schools Should Forgo Tax Dollars If They Wish to Discriminate*, CHI. TRIB., May 31, 1994, at 17.

55. Brian S. Yablonski, Note, *Marching to the Beat of a Different Drummer: The Case of the Virginia Military Institute*, 47 UNIV. MIAMI L. REV. 1449, 1483 (1993).

56. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

57. See, e.g., MARY F. BELENKY ET AL., *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* (1986), and DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1991).

58. Thomas R. McDaniel, *The Education of Alice and Dorothy: Helping Girls to Thrive in School*, CLEARING HOUSE, Sept. 1994, at 43.

59. *Id.*

60. Estrich, *supra* note 40, at 39.

61. Patricia Beard, *The Fall and Rise of the Seven Sisters*, TOWN & COUNTRY MONTHLY, Nov. 1994,

considering that only four percent of female college graduates attended women's colleges.⁶²

Also, many of our country's modern female role models attended women's colleges.⁶³ Several of these prominent, successful women have publicly stated their belief that their success was rooted in an all-female college education. For example, Susan Estrich, a professor of law and political science at the University of Southern California and a graduate of Wellesley College, recently wrote:

I was actually miserable a good deal of the time I was [at Wellesley], particularly during the long winters when the janitor was the only man around. But what I learned was worth it. I spent the better part of four years in a world in which women could do anything, because no one told us we couldn't. I even took some math courses. By senior year, somehow, I'd become an accomplished test-taker. When I got to Harvard Law School, where men vastly outnumbered women and sexism was the rule, a professor told me on the first day that women didn't do very well. I laughed and decided to prove he was wrong. That's a Wellesley education.⁶⁴

First Lady Hillary Rodham Clinton, also a graduate of Wellesley, has said:

Wellesley was very, very important to me and I am so grateful that I had the chance to go to college at a place where women were valued and nurtured and encouraged and where we didn't seem odd at all that we wanted to do whatever it was that we thought best for our lives.⁶⁵

Although the past several years have led to a growing awareness of the possible benefits of single-sex education, most women's colleges were unable to survive long enough to enjoy this new popularity. In 1960, there were 298 women's colleges,⁶⁶ but financial trouble caused by decreasing applications led to the close or the coeducation of more than two thirds of them in a period of thirty-five years; today, only eighty-four women's colleges remain.⁶⁷ After many years of uncertainty, most of these remaining women's colleges are experiencing a substantial increase in applications and enrollment during the 1990's.⁶⁸ Many attribute this sudden popularity to the growing opinion that women are "shortchanged" in coeducational settings, the statistical success of women's

at 159.

62. Estrich, *supra* note 40, at 39.

63. For example, columnist and author Anna Quindlen, Barnard, Class of 1974; playwright Wendy Wasserstein, Mount Holyoke, Class of 1971; feminist author Susan Faludi, Radcliffe, Class of 1981; author and activist Gloria Steinem, Smith, Class of 1956; actor Meryl Streep, Vassar, Class of 1971; news anchor Diane Sawyer, Wellesley, Class of 1967. Beard, *supra* note 61, at 159.

64. Estrich, *supra* note 40, at 39.

65. *Frontline: Hillary's Class* (PBS television broadcast, Nov. 15, 1994).

66. Susan Tift, *Dollars, Scholars and Gender; Must Women's Colleges Like Mills Either Go Coed or Go Under?*, TIME, May 21, 1990, at 85.

67. Linda Chavez, *Dare call it 'diversity'?*, DENV. POST, June 5, 1994, at D6.

68. Maria Newman, *Women's Schools See Resurgence; Harassment Concerns, Hillary Factor Cited*, DALLAS MORNING NEWS, Jan. 23, 1994, at 1A.

college graduates, and “the Hillary factor”—the success of Hillary Rodham Clinton and other famous women’s college graduates.⁶⁹

Mills College, in Oakland, California, is perhaps the clearest example of society’s growing support for women’s colleges. “Better dead than co-ed” was the battle cry of Mills women in 1990, when the administration announced its decision to admit men, after 138 years of admitting only women.⁷⁰ The trustees of Mills had made this unpopular decision out of financial necessity; there were too few students to support the college’s budget. Apparently, two major trends of the eighties affected Mills—a shrinking pool of applicants because of the “baby bust” of the late 1960’s and 1970’s, and the declining popularity of women’s colleges.⁷¹ Mills students blockaded buildings, boycotted classes and even shaved their heads in protest, until alumnae pledged to contribute several million dollars to the college and the administration backed down.⁷² Several years later, enrollment has increased and the college is on stronger financial ground.⁷³ If it is true, as many people argue, that attending a women’s college gives a young woman self-esteem, confidence and “the nerve to speak up,”⁷⁴ and that these qualities lead directly to the successful careers that many women’s college graduates experience, then the end of public and private single-sex education could make a very serious, lasting impact on the professional success of women in this country.

How then, when feminists acknowledge the numerous benefits that single-sex education has for women, do they justify their fight to deny men the same experience? Certainly, men receive similar benefits by attending a single-sex college.⁷⁵ Harvard sociologist David Reisman, in his testimony as an expert in the Citadel case, stated that in an all-male environment, men are freer to express their “gentler side.”⁷⁶ The presence of women may inhibit that sense of freedom. Also, there is the close bond that Citadel cadets form with each other because of their stressful environment and complete lack of privacy (they even share stall-less showers and toilets).⁷⁷ The college handbook states: “These classmates are your sole source of support and aid at this time. They will be your friends for life.”⁷⁸ Again, the admission of women would alter this part of the Citadel experience. Many argue that feminists want it both ways. As one editorialist has written: “Though [feminists] see the advantages of single-sex education, they do not want those advantages extended to males. To me it is clear: Feminists don’t want a level playing

69. *Id.* Since 1991, the number of applications received by the eighty-four women’s colleges has increased fourteen percent, and total enrollment has reached 98,000, up from 82,500 in 1981. *Id.*

70. Tiftt, *supra* note 66, at 85.

71. *Id.*

72. Newman, *supra* note 68, at 1A.

73. Sandra Reeves, *A Burst of Popularity*, U.S. NEWS & WORLD REPORT, Sept. 26, 1994, at 105, 108.

74. *Id.* at 105 (quoting Cokie Roberts, a 1964 graduate of Wellesley College).

75. Only four all-male colleges remain in the United States today. Two are public: The Citadel and VMI, and two are private: Hampden-Sydney College in Farmville, Virginia and Wabash College in Crawfordsville, Indiana.

76. Katha Pollitt, *Subject to Debate; Single Sex Education*, NATION, Aug. 22, 1994, at 190.

77. Faludi, *supra* note 2, at 64.

78. Manegold, *supra* note 36, at 58.

field—they want a head start.”⁷⁹

However, many supporters of private women’s colleges argue that because of their “private” status, they are not subject to the Equal Protection Clause, which provides that only a “state” may not discriminate. Private individuals and organizations may discriminate, as long as they are not acting “under color of state law” or on behalf of the state. So far, most courts have agreed with this argument; only a few have found that a private college has committed a “state action.” The Citadel is a public college and is therefore clearly subject to the Equal Protection Clause. In a discussion of the public or private distinction, syndicated columnist Ellen Goodman recently wrote that “[t]axpayer money is going to an institution that prohibits any chance of access to Shannon Faulkner or half the population of South Carolina Women’s colleges are private. The Citadel can save the males by rejecting public money.”⁸⁰

The “private” status of women’s colleges may not protect them from future constitutional challenges because of the increasingly blurred distinction between “public” and “private.” If a court characterizes the federal benefits which women’s colleges receive as public funding, then it may find that “state action” exists, and therefore withhold these benefits from women’s colleges because of their discriminatory admissions policy. Without the help of grants, tax-exempt status and student loan programs which the government provides them, most “private” colleges would be unable to survive.

The most recent legal challenge to the admissions policy of a private four-year liberal arts women’s college occurred in 1980. In *Naranjo v. Alverno College*,⁸¹ the plaintiff was denied admission to weekend nursing classes at Alverno College because of his gender. Alverno’s policy was to admit only women to its degree granting programs.⁸² Naranjo sued the college, claiming a violation of Title IX of the Education Amendments,⁸³ which prohibits discrimination in educational programs that receive federal financial assistance, and the Equal Protection Clause. The college’s motion for summary judgment was granted.⁸⁴

The court acknowledged that Alverno College received tax exempt status and leased land from the State of Wisconsin, and that Alverno students received state tuition grants and financial aid.⁸⁵ However, the court concluded that “allegations of governmental

79. Roger Soiset, *Letter to the Editor*, ATLANTA J. & CONST., Sept. 13, 1994, at 7.

80. Goodman, *supra* note 54, at 17.

81. 487 F. Supp. 635 (E.D. Wis. 1980).

82. *Id.* at 636.

83. 20 U.S.C. § 1681(a) (1994). It is important to note that this statute, which was enacted in 1972, states specifically that “in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education and to public institutions of undergraduate higher education.” 20 U.S.C. § 1681(a)(1). Certainly, a challenge to the admissions policies of the two remaining public women’s colleges may be successful under Title IX because the statute clearly applies to public colleges. The statute language specifically excludes the admissions policies of private colleges from its regulation; however, due to the fading distinction between public and private, a private women’s college may even fail under a Title IX challenge. See Janella Miller, Note, *The Future of Private Women’s Colleges*, 7 HARV. WOMEN’S L.J. 153, 158-61 (1984).

84. *Naranjo*, 487 F. Supp. at 638.

85. *Id.* at 636.

funding and general regulation cannot support a finding of state action unless such ties to the state directly encourage the challenged activity."⁸⁶

As for the Title IX argument, the court found that the admissions policies of private colleges are clearly not included within the language of the statute, which applies "only" to the admissions policies of "institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."⁸⁷ Therefore, the court found that Title IX regulation did not apply to Alverno College, which was not considered a "professional" institution although it offered a professional nursing degree in addition to its liberal arts program.⁸⁸

The 1980 *Alverno* decision is an example of a court upholding the single-sex admissions policy of a private college simply because it was a private college. However, since 1980, there have been several cases, discussed below, that have changed the law in this area, and have made the *Alverno* decision less clear. Most believe that this issue will not be resolved until it reaches the Supreme Court. Legally and socially, this country continues to progress towards equality between the sexes in almost all areas. Today, or in the near future, it is very possible that *Alverno's* reasoning may be rejected.

One indication that today's courts and legislatures are more likely to apply public laws to private organizations is the recent push to enact and enforce laws which prohibit discrimination by private clubs. In about a dozen states and cities, private golf and country clubs may no longer discriminate on the basis of race or gender.⁸⁹ Most of these laws resemble a New York City statute, which defines a social club as a public organization if it has more than 400 members, provides regular meal service and receives funds from non-members for the furtherance of trade or business.⁹⁰ In 1988, the Supreme Court ruled that the New York City statute was constitutional on its face.⁹¹

86. *Id.*

87. *Id.* at 637.

88. *Id.* at 638.

89. For example, Michigan, Ohio, Kansas, Florida, and New Orleans, Louisiana have enacted statutes similar to New York City's law. Marcia Chambers, *Opening 'Private' Clubs*, NAT'L L.J., June 13, 1994, at A21.

90. New York City's Human Rights Law of 1965 states that:

[It is] an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin or sex of any person directly or indirectly, to refuse, [or to] withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof.

N.Y. CITY ADMIN. CODE § 8-107(2)(McKinney 1986). A 1984 amendment extends the Human Rights Law to any "institution, club or place of accommodation [that] has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business." N.Y. CITY ADMIN. CODE § 8-102(9) (McKinney 1986).

91. *New York State Club Ass'n. v. City of New York*, 487 U.S. 1 (1988). In this case, the New York State Club Association sought a declaration that the 1984 amendment was unconstitutional on its face. The court stated that, strictly on its face, the law does not violate the First Amendment rights of club members. However, the Court, acknowledging that some clubs might have a legitimate case against the law, stated:

It is conceivable, of course, that an association might be able to show that it is organized for specific

Anti-discrimination laws have not only been extended to the membership practices of private clubs, but also to discriminatory treatment of club members. For example, courts in Florida and Kansas have ordered two private country clubs to end their practice of allowing only men to golf during the prime Saturday morning tee times. Also, the Florida club was ordered to open its "Men's Grill", the club restaurant, to women.⁹²

Some states have taken an even broader approach—New York State's anti-discrimination law applies to clubs which have more than 100 members,⁹³ and Michigan's law applies to all private clubs and service organizations, regardless of size.⁹⁴ This trend of prohibiting racial and gender discrimination in organizations which are more clearly "private" (in the sense that they receive no funding from the government) than private colleges, shows that the law may be leaning toward treating many more (and eventually, maybe all) so-called "private" organizations as public.

Also, it is noteworthy that VMI's "separate but equal" women's military-style program is being run at the private Mary Baldwin College. The recent decision of the Fourth Circuit Court of Appeals in *United States v. Virginia*,⁹⁵ which upheld this program as constitutional, seems to further erode the distinction between public and private.

In short, if a court were to find that a private women's college should be treated as a public institution due to the substantial government funds it receives, then it seems that the fate of the "Seven Sisters"⁹⁶ and the Citadel would be linked. For this reason, many feminists have found themselves in the ironic position of supporting the Citadel in its battle against Shannon Faulkner for the sake of protecting all single-sex education. This position is particularly difficult, considering the many articles written about the supposedly misogynistic atmosphere of the Citadel.⁹⁷ One writer reports that slang terms for women are commonplace; for example, cadets who show weakness are usually humiliated by being called "sluts," "whores," or "skirts."⁹⁸ In a recent *New Yorker* article, feminist author Susan Faludi describes the chants the cadets sing during their daily runs, which often include lyrics about "gouging out a woman's eyes, lopping off body parts, and

purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.

Id. at 13.

92. Chambers, *supra* note 89, at A21.

93. *Today's News Update*, N.Y. L.J., July 12, 1994, at 1.

94. Chambers, *supra* note 89, at A21.

95. *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995). See *supra* text accompanying notes 9-22.

96. The seven most prestigious women's colleges, all located on the east coast, are often referred to as the Seven Sisters (although one has gone coed). They are Barnard College in New York, New York, founded in 1889; Bryn Mawr College in Bryn Mawr, Pennsylvania, founded in 1885; Mount Holyoke College in South Hadley, Massachusetts, founded in 1837 (the oldest women's college in America); Radcliffe College in Cambridge, Massachusetts, founded in 1879 (Since 1942, Radcliffe women have attended classes with Harvard men; however, Radcliffe remains an all-female corporate institution separate from Harvard); Smith College, in Northampton, Massachusetts, founded in 1871; Vassar College in Poughkeepsie, New York, founded in 1861 (which has been coed since 1970); and Wellesley College, in Wellesley, Massachusetts, founded in 1875. For a discussion of the Seven Sisters, see Beard, *supra* note 61, at 159.

97. See, e.g., Faludi, *supra* note 2, and Wingert, *supra* note 1.

98. Manegold, *supra* note 36, at 59.

evisceration.”⁹⁹ Inevitably, during Faulkner’s fight to enter the Citadel, the general anger towards women which seems to be fostered at the Citadel was channeled directly at her. The Citadel newspaper referred to her as “the divine bovine” and a popular T-shirt on campus depicted several male bulldogs (the Citadel’s mascot) and one female bulldog in a red dress, with the caption, “1,952 Bulldogs and 1 Bitch.”¹⁰⁰ This controversy presents a tough choice for feminists. Many have chosen to continue the battle that Shannon Faulkner started, hoping that the distinction between public and private will remain clear in the courtroom. Others, fearing that private women’s colleges are linked to the Citadel’s fate, have chosen to support an institution which allegedly fosters contempt against women.

III. THE EQUAL PROTECTION CLAUSE

It is particularly difficult to predict the future application of the state action doctrine to private women’s colleges because the Supreme Court has yet to develop a specific test to determine the existence of state action.¹⁰¹ There are, however, several factors which the Court considers, including whether the private organization is engaged in a public function, whether the state has encouraged private activities, whether the government regulates the private entity, whether there is a symbiotic relationship between the government and the private entity, and whether the state provides funds to the private entity.¹⁰² Because private women’s colleges receive government funding, it is possible that the Court could find enough of a link between the states and the colleges to justify finding state action.

In *Grove City College v. Bell*, the Supreme Court found that a private college was subject to federal regulation because some of its students received federal tuition grants.¹⁰³ Grove City College refused all state and federal financial assistance in order to avoid federal regulation. However, many of its students received Basic Educational Opportunity Grants from the federal government.¹⁰⁴ Title IX of the Education Amendments of 1972 prohibits sex discrimination in “any education program or activity receiving Federal financial assistance.”¹⁰⁵ Grove City College had not actually violated Title IX, but it did refuse to produce the required written assurance of compliance to the government. The Court concluded that the statute’s language “contains no hint that Congress perceived a substantive difference between direct institutional assistance and aid received by a school through its students.”¹⁰⁶ Therefore, the Court found that the tuition grants were “federal financial assistance” to Grove City College, and as a result, the college was forced to comply with Title IX. Although *Grove City College* did not involve the issue of a discriminatory admission policy, and it did not apply the Equal Protection Clause or the

99. Faludi, *supra* note 2, at 72.

100. *Id.* at 79.

101. Yablonski, *supra* note 55, at 1482.

102. *Id.* at 1482-83.

103. 465 U.S. 555 (1984).

104. *Id.* at 559.

105. 20 U.S.C. § 1681(a) (1994). *See supra* note 83.

106. *Grove City College*, 465 U.S. at 564.

state action doctrine, it is significant to a discussion of this issue because of the court's reasoning. The Court classified student tuition grants as "federal financial assistance" in a Title IX case; therefore, similar reasoning may lead the court to find that state tuition grants also constitute state action.

In fact, there are at least a small number of cases in which courts have found state action in a private school. For example, *Norwood v. Harrison*¹⁰⁷ involved a Mississippi state program through which textbooks purchased by the state were loaned to students in public and private schools. When this case was brought before the Court, many of the private schools in Mississippi had racially discriminatory admissions policies of accepting only white students. In *Norwood*, the Supreme Court held that the textbook loaning program constituted state action because it was a form of "tangible aid" that supported racial discrimination.¹⁰⁸ The Court stated that "a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."¹⁰⁹ Interestingly, the Court also explained that: "Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves."¹¹⁰ With this statement, the Court acknowledged that tuition grants may subject private schools to the Equal Protection Clause.

In an earlier case, *Hammond v. University of Tampa*,¹¹¹ the all-white admissions policy of the University of Tampa, a private university, was challenged. The Fifth Circuit Court of Appeals ruled that because the University used a surplus city building and leased other city land for school purposes, it was acting on behalf of the state, and was therefore subject to the Equal Protection Clause.¹¹²

In the most recent Supreme Court case dealing with the issue of "state action" and private colleges, *Rendell-Baker v. Kohn*,¹¹³ the Court found that the discharge of teachers from a privately owned, publicly funded school was not state action. The New Perspectives School, which specialized in dealing with children with special needs, received at least ninety percent of its operating costs from state and federal agencies.¹¹⁴ Despite this significant amount of public funding, the Court compared the private school to a private corporation that makes contracts to build roads or bridges for the government. "Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."¹¹⁵

The Court also emphasized that the government did not closely regulate the personnel matters of the school. This fact somewhat separated the government from the school's decision to fire certain teachers.¹¹⁶ Justice Marshall, in his dissent, suggested that if the

107. 413 U.S. 455 (1973).

108. *Id.* at 464-65.

109. *Id.* at 465.

110. *Id.* at 463-64 (emphasis added).

111. 344 F.2d 951 (5th Cir. 1965).

112. *Id.* at 951.

113. 457 U.S. 830 (1982).

114. *Id.* at 832.

115. *Id.* at 840-41.

116. *Id.* at 841-42.

action had been brought by students, rather than teachers, the Court would have been more likely to find state action.¹¹⁷ So, although the Court did not find state action in this case, the Court's reasoning seems to support the idea that a publicly funded private school may be committing a state action if the action affects its students.

Since *Rendell-Baker*, there has been no Supreme Court decision on the issue of state action by a publicly funded private school. However, the three decisions previously discussed clearly show that the Court has the legal leeway to find that a private college has committed state action.

Some supporters of women's colleges—including the twenty-seven women's organizations which filed a joint amicus brief in the VMI case¹¹⁸—argue that even if the state action doctrine was applied to, for example, Smith College,¹¹⁹ Smith would survive because unlike VMI, a women's college could satisfy the constitutional test laid out in the VMI case.¹²⁰ First, Smith could argue that the exclusion of men is necessary to accomplish its purpose of providing an effective leadership program for women. Smith could point to the studies which show the higher rates of career success among women's college graduates, and the incidence of classroom discrimination against girls and women in coed education.¹²¹ The second prong—the presence of a governmental purpose—might be satisfied by arguing that the governmental purpose is a “compensatory” one—“to redress the effects of historic discrimination or disadvantage.”¹²²

However, due to the landmark case of *Mississippi University for Women v. Hogan*,¹²³ upon which the VMI court based much of its reasoning, these arguments would probably fail. Mississippi University for Women (MUW) was an all-female college, which included a nursing program. The plaintiff in this case, Joe Hogan, was a registered nurse who wished to pursue a baccalaureate degree in nursing. He was denied admission to MUW's program solely because of his gender. He was, however, offered the opportunity to audit nursing courses, but he could not enroll for credit.¹²⁴ The Court applied the two part test, which was subsequently applied in *VMI*, and also included a third prong:

[The test] must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypical notions. Thus, if the statutory objective is to exclude or “protect” members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior,

117. *Id.* at 851.

118. Stuart Taylor, Jr., *Standing Up For Single-Sex Education*, RECORDER, Oct. 13, 1994, at 8. The National Women's Law Center, the Women's Legal Defense Fund, the American Association of University Women, and The National Organization for Women were among the twenty-seven groups which filed this joint amicus brief. *Id.*

119. *See supra* note 96.

120. *Id.*

121. *See supra* notes 58-62 and accompanying text.

122. Taylor, *supra* note 118 (quoting amicus brief, citation omitted).

123. 458 U.S. 718 (1982).

124. *Id.* at 720-21.

the objective itself is illegitimate.¹²⁵

MUW failed all three prongs of the Court's test. The Court's reasoning suggested that any women's college might fail the test. MUW argued that its "governmental objective" was to "compensate for discrimination against women" by performing a sort of "educational affirmative action."¹²⁶ The Court stated that a compensatory purpose which favors one sex can only be justified if it "intentionally and directly assists members of the sex that is disproportionately burdened."¹²⁷ For example, the Court stated that a federal statute allowing women a longer tenure in the military before mandatory discharge "directly compensated" for the fact that women are unable to serve in combat, and therefore have fewer chances for promotion within the military.¹²⁸ However, nursing is a profession that has historically been open to women, and MUW showed no evidence of discrimination against women in this particular field.¹²⁹ Applying the third prong of the constitutional test, the Court noted that the exclusion of men from a nursing school simply perpetuated the stereotype that nursing is a women's profession.¹³⁰ Therefore, the Court found this "benign, compensatory purpose" of redress for historical discrimination insufficient.¹³¹

A women's liberal arts or business college may succeed in arguing that it has a "compensatory purpose" because most professions (aside from nursing and teaching) have traditionally excluded women. Also, because women lack female role models and mentors,¹³² they may find it more difficult to advance within many professions. In order to show that a single-sex education "directly remedies" this historical discrimination, it could also argue that graduates of women's colleges benefit from an alumnae network, by pointing to the studies which show that more women's college graduates succeed in their careers.¹³³ However, it is clear that these sexist attitudes are quickly changing. Currently, the majority of college students are women,¹³⁴ and generally, women receive higher grades than men.¹³⁵ It is possible that a modern Court would consider the purpose of women's colleges to be based on "archaic" stereotypes that women cannot succeed in a coed environment, and that women need a "head start" in order to compete with men. In this way, women's colleges may fail to satisfy the first and third prongs of the MUW test.

The Court decided that MUW failed the second prong of the test—that the gender classification is "substantially and directly related" to the proposed objective—because

125. *Id.* at 724-25.

126. *Id.* at 727.

127. *Id.* at 728.

128. *Id.* at 728-29.

129. *Id.* at 729. The Court noted that in 1971, when MUW's School of Nursing enrolled its first class, almost ninety-eight percent of all employed registered nurses were women. *Id.*

130. *Id.*

131. *Id.* at 730.

132. Cynthia Tyson, *A Woman's Defense of All-Male VMI*, WASH. TIMES, Apr. 27, 1993, at F2.

133. See *supra* notes 63-65 and accompanying text.

134. Lisa Hoffman, *Numbers Game; Big Leaps and Baby Steps in March to Equality*, CHI. TRIB., May 17, 1992, at 1.

135. Gerald W. Bracey, *Sex, Math and SATs*, PHI DELTA KAPPAN, Jan. 1993, at 415.

men were allowed to audit courses at the nursing school.¹³⁶ The Court stated that this fact was inconsistent with MUW's argument that men's presence in the classroom would adversely affect the women's education. The effect on women would presumably be no different if the men were taking the courses for credit, since auditors are permitted to participate fully in the classes.¹³⁷

Many women's colleges would probably fail to satisfy this prong for similar reasons. Wellesley College, for example, has an exchange program with Massachusetts Institute of Technology and Brandeis University, which allows male students to take Wellesley courses for credit.¹³⁸ Arguably, this program contradicts Wellesley's dedication to all-female education. Many other women's colleges have similar exchange programs.¹³⁹ Also, most women's colleges have a substantial number of male professors. For example, at Mount Holyoke, sixty percent of the tenured professors are men, and at Smith, sixty-nine percent are men.¹⁴⁰ Arguably, the presence of male professors in the classroom also contradicts the mission of a women's college. If a court were then to apply the *MUW* reasoning in a case against a women's college, the college may fail to satisfy the constitutional test for one or both of the foregoing reasons.

It is difficult to predict the outcome of the courts on this issue. However, due to society's continuous movement toward gender equality, it appears less likely women's colleges will survive.

IV. TAX EXEMPT STATUS

Currently, the very significant financial benefit of tax exempt status is granted to private women's colleges. Under the Internal Revenue Code (IRC) Section 501(c)(3), private colleges are exempt from paying income taxes because they are considered "corporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." Also, under IRC Section 170, financial contributions made to private women's colleges are deductible as "charitable contributions." This provision gives private women's colleges an additional financial benefit because it encourages taxpayers to contribute to the colleges in order to receive a tax deduction.

In 1982, the tax exempt status of Smith College was challenged on the theory that because its admissions policy was discriminatory, it should not be considered a "charitable institution." In that case, the court strictly applied the language of the IRC, finding that because Smith was an "educational institution," it was exempt from paying taxes.¹⁴¹

A year after *Smith College*, however, the Supreme Court decided *Bob Jones*

136. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1980).

137. *Id.* at 731.

138. 84 WELLESLEY C. BULL. 64 (1994).

139. For example, the following women's colleges have course exchange programs with coed colleges: Barnard, with Columbia College; Bryn Mawr, with Haverford, Swarthmore and University of Pennsylvania; Mount Holyoke, with Amherst College and Hampshire College; Smith, with Amherst and Hampshire; Vassar, with Bard College. Beard, *supra* note 61, at 159.

140. Susan Pouncey, *Hers*, N.Y. TIMES, Mar. 17, 1988, at C2.

141. *Trustees of Smith College v. Board of Assessors*, 434 N.E.2d 182 (Mass. 1982).

University v. United States,¹⁴² which appears to have made private women's colleges more vulnerable to losing their valuable tax exempt status. Bob Jones University is a private Christian college in Greenville, South Carolina. Because the University sponsors believed that interracial dating and marriage are contrary to the Bible's teachings, the University denied admission to applicants who were "engaged in an interracial marriage or known to advocate interracial marriage or dating." Unmarried African-Americans were allowed to enroll.¹⁴³

The Court ruled that Bob Jones University was not entitled to tax exempt status because of its racially discriminatory admissions policy. The Court looked to the intent of Congress in creating the tax exempt statute, and decided that "entitlement to tax exemption depends on meeting certain common-law standards of charity -- namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."¹⁴⁴ Considering the plethora of congressional acts and Supreme Court decisions (beginning with *Brown v. Board of Education*¹⁴⁵) that prohibited racial segregation in public education, the Court determined a racially discriminatory admissions policy to be "contrary to established public policy," and therefore, the Court revoked Bob Jones University's tax exempt status.¹⁴⁶

In its decision, the Court did not indicate whether it would consider sex discrimination in education to be contrary to public policy. A week after the decision was announced, women's groups had already recognized that it might lead to denial of tax exemption for single-sex organizations and schools. An attorney for the Women's Legal Defense Fund stated that "[t]he Bob Jones reasoning could apply in all kinds of cases, especially in a society where the federal government provides the financial incentive of federal money in so many places."¹⁴⁷ It is certainly possible that in this age of increasing equal opportunity between the sexes, the Court could decide that women's colleges are in violation of public policy when they deny men educational options that are afforded only to women. While there exists no Equal Rights Amendment, the Court might find that the Equal Pay Act of 1963,¹⁴⁸ Title VII of the Civil Rights Act of 1964,¹⁴⁹ and various

142. 461 U.S. 574 (1983).

143. *Id.* at 580.

144. *Id.* at 586.

145. 347 U.S. 483 (1954).

146. *Bob Jones*, 461 U.S. at 593.

147. Kathleen Sylvester, *Does the Bob Jones Case Have Wide Ramifications?*, NAT'L L. J., June 6, 1983, at 3.

148. The Equal Pay Act of 1963 states:

Prohibition of sex discrimination

- (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (I) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor than sex

other anti-discrimination acts are sufficient evidence of a national public policy against sex discrimination.¹⁵⁰

In *Bob Jones*, the Court stated that the IRS has the authority to withdraw tax exempt status from an organization, "only where there is no doubt that the organization's activities violate fundamental public policy."¹⁵¹ In 1977, the IRS issued an opinion letter, stating its position that "classification based on sex is not against declared Federal public policy and is educationally and socially beneficial to the community at large."¹⁵² According to Section 6110 (J)(3) of the IRC, these letter rulings "may not be used or cited as precedent," so the IRS is not bound by its 1977 opinion. After almost twenty years of social change and a major shift towards equal treatment, the IRS's opinion may be ripe for change as well.

In summary, both the judiciary and the IRS have the power to deny tax exempt status to private women's colleges. Such a denial would severely affect a college's finances, and would likely lead to the demise or coeducation of many private women's colleges.

V. THE COMMERCE CLAUSE

The Commerce Clause of the Constitution provides that "Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States."¹⁵³ The drafters of the Constitution granted Congress this power in order to prevent the individual states from creating "a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad."¹⁵⁴ Notably, the Constitution fails to provide a clear definition of "commerce," leaving Congress with extremely broad power. But this power is not unchecked; over the years, many acts of congressional Commerce Clause regulation have been challenged, and some overruled, through the judicial system.

Despite the original purpose of the Commerce Clause, Congress has increasingly used

29 U.S.C. § 206 (d)(1)(1988).

149. Title VII of the Civil Rights Act of 1964 states:

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1988).

150. Miller, *supra* note 83, at 164.

151. *Bob Jones University v. United States*, 461 U.S. 575, 598 (1983).

152. Tech. Adv. Mem. 7744007 (1977).

153. U.S. CONST. art. I, § 8.

154. *Gibbons v. Ogden*, 22 U.S. 1, 15 (1824).

this power to regulate "social evils," such as child labor,¹⁵⁵ racial discrimination,¹⁵⁶ and gambling.¹⁵⁷ If a private women's college were found to be affecting interstate commerce, then perhaps Congress would choose to regulate the "social evil" of sex discrimination through the Commerce Clause.

In *Heart of Atlanta Motel, Inc. v. United States*,¹⁵⁸ the Supreme Court approved Congress' regulation of a motel which denied accommodations to African-Americans. Before making their decision to apply the Commerce Clause, Congress had heard testimony that this motel's discrimination had a significant effect on interstate travel by African-Americans for two reasons: first, it caused inconvenience and displeasure for the African-American traveler who was uncertain of finding lodging. Second, this uncertainty discouraged many African-Americans from travelling. The Court agreed that interstate travel was within the definition of commerce, and was therefore subject to regulation. "Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property."¹⁵⁹

In this case, the Court defined the modern test for the constitutionality of Commerce Clause regulation: "The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate." If Congress has met both of these requirements, then the regulation is proper.¹⁶⁰

One could argue that the operation of a private women's college constitutes interstate commerce because it enrolls students from many different states outside of its own. Students move from all over the country to live in a college town and support the local economy with out-of-state money. Congress and the Court might agree that sex discrimination by private women's colleges often affects commerce because, as discussed previously, many women's colleges are financially unstable as too few women apply for admission. The admission of men would lead to a greater pool of applicants from other states, more admitted students from other states and more financial resources within the school and within the school's local community. If Congress found that this argument was a "rational basis" for finding an effect on interstate commerce, then it might follow that abolishing sex discrimination by private colleges would be a "reasonable and appropriate" way to eliminate this detrimental effect. This is one way in which the Commerce Clause may be used in the future to regulate the admissions policies of single-sex private colleges.

In *Katzenbach v. McClung*,¹⁶¹ the Supreme Court approved Congress' regulation of an Alabama restaurant which refused to serve African-Americans. Although the restaurant served mostly local patrons, it purchased approximately forty-six percent of the food it served from a local supplier who had purchased it from outside the state.¹⁶² The hearings which Congress conducted on this matter led Congress to conclude that the restaurant's

155. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

156. *Boynton v. Virginia*, 364 U.S. 454 (1960).

157. *Lottery Case*, 188 U.S. 321 (1903).

158. 379 U.S. 241 (1964).

159. *Id.* at 256 (quoting *Hoke v. United States*, 227 U.S. 308, 320 (1913)).

160. *Id.* at 258-59.

161. 379 U.S. 294 (1964).

162. *Id.* at 296.

discriminatory policy affected interstate commerce because "the fewer customers a restaurant enjoys the less food it sells and consequently the less it buys."¹⁶³ Further, as in *Heart of Atlanta Motel*, the court found that racial discrimination by restaurants discouraged African-Americans from traveling, thereby affecting interstate commerce.¹⁶⁴ The Court concluded that regulation was proper if the restaurant serves interstate travellers, or if a "substantial portion" of the food it serves has moved in interstate commerce.¹⁶⁵

The reasoning of *McClung* could apply to a case challenging the admissions policies of single-sex colleges. Private women's colleges are not self-contained organizations. Presumably, a "substantial amount" of the bookstore supplies (including textbooks), dining hall food, and office furniture and supplies which are used by women's colleges, have moved in interstate commerce. Following the Court's reasoning in *McClung*, the college's refusal to admit men often leads to fewer students, which leads to fewer textbook purchases and dining hall meals, which unnecessarily restricts the amount of these products bought and sold in interstate commerce.

These cases show that Congress certainly has the power, through the Commerce Clause, to regulate the admissions policies of women's colleges, and that the Court would likely approve this regulation. As the *McClung* Court noted, "the power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere."¹⁶⁶

CONCLUSION

Although Congress and the courts have not yet clearly shown a desire to put an end to private single-sex education, this Note argues that both have the power and the flexibility to do so, through the Equal Protection Clause, the tax-exempt status, and the Commerce Clause. As society progresses further and further towards gender equality in the workplace, in social organizations, and in education, it seems inevitable that the constitutionality of private women's colleges will become a major issue. Ironically, the feminist fight to admit Shannon Faulkner to the Citadel may bring that question to the forefront much sooner.

Many supporters of the Citadel, who may be unaware of the legal arguments involved, believe that a 152-year tradition simply should not be changed. One mother of two Citadel graduates recently stated, "It was built as a boys' school. It was always a boys' school and it always should be a boys' school."¹⁶⁷ Aware that tradition alone will not save the Citadel, Shannon Faulkner's mother has said, "Slavery was a tradition, too. Things change . . ."¹⁶⁸ Others have already resigned themselves to the loss of single-sex education in all forms. As one columnist recently wrote, "for better or worse the future

163. *Id.* at 299.

164. *Id.* at 300.

165. *Id.* at 304.

166. *Id.* at 305.

167. Manegold, *supra* note 4, at A10.

168. Pollitt, *supra* note 76, at 190.

is coed."¹⁶⁹

Shannon Faulkner has bluntly told her critics to "[w]ake up and smell the '90's."¹⁷⁰ As this Note illustrates, it is clearly possible that this decade may bring an end to all single-sex education, public and private. Until this issue is resolved by the Supreme Court, the future is uncertain for the Citadel, and for private single-sex colleges as well. There is one certainty, however; as laws and emotions are passionately argued in South Carolina courtrooms and across the country, there is always the sense that no matter what the outcome, something valuable will be lost.

169. *Id.*

170. *Id.*