


July 2015

Measuring the Reach of Title IX: Defining Program and Recipient in Higher Education

James H. Brooks

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <https://ideaexchange.uakron.edu/akronlawreview>

 Part of the [Civil Rights and Discrimination Commons](#), [Education Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Brooks, James H. (1984) "Measuring the Reach of Title IX: Defining Program and Recipient in Higher Education," *Akron Law Review*: Vol. 17 : Iss. 3 , Article 1.

Available at: <https://ideaexchange.uakron.edu/akronlawreview/vol17/iss3/1>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

Brooks: Title IX

MEASURING THE REACH OF TITLE IX: DEFINING PROGRAM AND RECIPIENT IN HIGHER EDUCATION

by

JAMES H. BROOKS*

I. INTRODUCTION

PRESIDENTS OF PRIVATE COLLEGES and universities have argued strongly for institutional autonomy, and in particular, freedom from federal government regulation.¹ They assert that the government's role in forcing colleges and universities to comply with specified social justice goals erodes established concepts of academic freedom.² This argument will be tested before the United States Supreme Court during the 1983-84 term in the appeal of *Grove City College v. Bell*,³ where college officials assert that the Assurance of Compliance form required by the Department of Education Title IX enforcement regulations⁴ violates first amendment rights of academic freedom and association.⁵

Grove City College also contends that (1) its programs and activities are not subject to Title IX of the Education Amendments of 1972⁶ solely because some of its students receive federal funds — Basic Educational Opportunity (Pell) Grants⁷ and Guaranteed Student Loans (G.S.L.'s)⁸ to be used to pay educational expenses; (2) the college's entire operation is not subject to Title IX regulations where the college itself receives no direct federal financial assistance and exercises no control over governmental subsidies given to some of its students; and (3) the Department of Education may not terminate direct grants to students, without a finding of discrimination in a program receiving federal financial assistance, solely because the college refuses to sign the

*Dean of Students and Adjunct Professor of Law, William Mitchell College of Law. The author gratefully acknowledges the research of Cyndi Woodbury, third year student at the J. Reuban Clark School of Law, Brigham Young University and Barbara Becker, third year student at William Mitchell College of Law.

¹See Oaks, *A Private University Looks at Government Regulations*, 4 J. COLL. & U.L. 1 (1976); Brewster, *The Report of the President* (New Haven: Yale U., 1974-75), Bok, *The Federal Government and the University*, 58 THE PUBLIC INTEREST 80 (1980).

²Edwards, *Higher Education and the Unholy Crusade Against Government Regulation* (Institute for Educational Management, Harvard University, 1980) at 43.

³687 F.2d 684 (3d Cir. 1982), cert. granted, 103 S. Ct. 1181 (1983).

⁴34 C.F.R. § 106.4(a) (1983). The regulation provides in pertinent part:

Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.

⁵Petitioner's Brief for a Writ of Certiorari, *Grove City College v. Bell*, No. 82-792 (1982).

⁶20 U.S.C. §§ 1681-86 (1976).

⁷20 U.S.C. § 1070 (1976).

⁸20 U.S.C. § 1071 (1976).

Assurance of Compliance form.⁹

Title IX of the Education Amendments of 1972 prohibits, with certain exceptions, discrimination on the basis of sex in any education program or activity receiving federal financial assistance.¹⁰ Pursuant to Congress' directive,¹¹ the Department of Health, Education and Welfare (HEW, now the Department of Education)¹² promulgated a comprehensive set of regulations to govern the conduct of federally assisted schools in a number of specific areas.¹³

The Department of Education contends that "federal financial assistance" includes direct and indirect assistance and that "programs and activities" receiving federal financial assistance includes any institution which receives "[f]ederal financial assistance . . . through another recipient . . ."¹⁴ The Department's regulations define federal financial assistance as:

- (i) A grant or loan of federal financial assistance, including funds made available for:
- (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.¹⁵

The Department's regulations also define a "recipient" of federal financial assistance as follows

- (h) "Recipient" means . . . any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee or transferee thereof.¹⁶

Thus, the Department of Education maintains that Grove City College is a "recipient" since students attending Grove City receive federal monies in the form of Pell Grants, which are used to pay their expenses at Grove City College.¹⁷

⁹Petitioner's Brief for a Writ of Certiorari, *Grove City College v. Bell*, No. 82-792.

¹⁰20 U.S.C. § 1681 (1976).

(a) Prohibition against discriminations; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, . . .

¹¹20 U.S.C. § 1682 (1976).

¹²20 U.S.C. § 3441 (Supp. V 1981).

¹³34 C.F.R. § 106 (1983).

¹⁴*Grove City*, 687 F.2d at 690. In its case before the U.S. Supreme Court, the Department of Education modified its definition of program to include only the financial aid program at Grove City College although it still maintained that its regulations were enforceable. See Respondent's Brief at 82-792.

¹⁵34 C.F.R. § 106.2(g)(1)(ii) (1983).

¹⁶*Id.* at § 106.2(h).

¹⁷*Grove City*, 687 F.2d at 690. In the district court, the Department claimed that the availability of Guaranteed Student Loans (GSL's) and Pell Grants made Grove City College a recipient of Federal financial assistance and therefore subject to Title IX. The district court held that GSL's were contracts of guarantee within the exception to Section 902(a). On appeal the Department did not contest the district court. See also, *Hillsdale College v. Department of HEW*, 696 F.2d 418, 424 n.17 (6th Cir. 1972).

Two main issues are raised by *Grove City* and will be analyzed in this article.¹⁸ First, should the Supreme Court construe a post-secondary institution as a "program" for purposes of Title IX? Second, should aid to students be considered federal financial assistance to the institution?

II. POST-SECONDARY INSTITUTION AS A "PROGRAM"

A. *Ultra Vires* Challenges

Central to the debate over the Department of Education's definition of "program" is whether section 106.2 and similar sections are *ultra vires*. The phrase "*ultra vires*," most commonly used in the law of corporations, refers to attempts by a corporation to exercise powers it does not possess or when, in the exercise of specifically designated powers, the corporation exceeds the scope of those powers.¹⁹ An act that the corporation has no power to perform is void.²⁰ An act in excess of power is merely voidable if the parties can be returned to the position they occupied before the act.²¹ When evaluating the actions of a public corporation, a court must consider the original delegation of powers and subsequent statutory modifications as well as the intentions of the legislature before deciding whether an act was beyond the power

¹⁸Two secondary issues are also raised in *Grove City*: 1) can the Department of Education terminate aid to students, absent a finding of discrimination, solely because an institution refuses to sign an Assurance of Compliance?, and 2) does termination of aid to students because an institution does not comply with Department regulations, violate the constitutional guarantee of free association?

The argument that termination of student aid is a violation of the right to free association was raised in *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 606-07 (D.S.C. 1974), which involved a claim arising under Title VI. The district court upheld the termination of almost \$400,000 of assistance distributed among 221 students attending the university, stating that "Congress unquestionably has plenary authority to impose such reasonable conditions on the use of granted funds or other assistance as it deems in the public interest." In specific response to the free association claim, the court noted that the Constitution (via the Free Exercise Clause) does not provide an absolute protection to invidious discrimination and that "courts have not hesitated to reject the argument of free association as a defense to an otherwise valid civil rights action." As the Supreme Court noted in *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1977): Title IX, like Title VI, was designed to "avoid the use of federal resources to support discriminatory practices . . ." This compelling government interest should override an attempt to shield discriminatory activity with the constitutional umbrella of free association.

Termination of federal assistance, based on failure to execute an Assurance of Compliance, was upheld in *Gardner v. Alabama*, 385 F.2d 804 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968); Approximately one million dollars of federal assistance was terminated after the state of Alabama refused to sign the Assurance form. Because actual discrimination was established in the record in *Gardner*, the opinion of the case does not reach termination for refusal to sign an assurance as a "matter of conscience," when no evidence of discrimination exists. However, the court of appeals in *Grove City*, 687 F.2d at 704, stated that no evidence of actual discrimination is needed. Assuming that the regulations have been properly enacted and reflect the intent of Congress, termination based upon failure to sign the Assurance of Compliance form is within the authority of the Department and is, in addition, the only practical approach. It is obvious that the resources of the Department are not adequate to conduct individual investigations of the activities of all recipients of federal funds. Thus, "self-monitoring" via obtaining signatures on the Assurance of Compliance becomes necessary. Without such an enforcement scheme, the Department of Education would face an impossible burden in attempting to carry out its Congressional mandate to ensure that federal funds are not used to subsidize discriminatory activities.

¹⁹*People ex rel. Barrett v. Bank of Peoria*, 295 Ill. App. 543, 15 N.E.2d 333 (1938); *McWilliams v. Central States Life Insurance Co.*, 137 S.W.2d 641 (Mo. Ct. App. 1940).

²⁰*Walton v. Albers*, 313 Ill. App. 304, 40 N.E.2d 99 (1942); *Causeway Inv. Co. v. Nass.*, 111 S.W.2d 703 (Tex. Comm. App. 1938).

²¹*Highway Mut. Cas. Co. v. Stern*, 306 Ill. App. 506, 29 N.E.2d 281 (1940).

granted to the public corporation and thus, *ultra vires*.²²

The *ultra vires* doctrine may also be applied to administrative agency regulations.²³ The Supreme Court has stated:

The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law — for no such power can be delegated by Congress — but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable.²⁴

Thus, in order to determine whether an administrative agency's regulations are enforceable, a court must ascertain whether or not the agency exceeded its authority when drafting the regulations. As with public corporations, the court will first look to the language of the legislative statute²⁵ and then to the legislative intent behind the statute.²⁶ If the court concludes that the agency has exceeded its authority, the regulations are *ultra vires* and therefore unenforceable. If the court concludes otherwise, the statute should stand.

B. Interpretation of the Statute

1. The Language of the Statute

On its face, Title IX appears to apply only to programs and activities within post-secondary institutions that receive federal funding as individual units.²⁷ Yet a broader reading of "education program and activity" supports the conclusion that a single-campus college, a multi-campus university, or a state system may be an education "program" within the meaning of the statute. Consequently, many separate parts or activities could together comprise a "program."

Congress defined "educational institution" as:

any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units such term means each such school, college, or department.²⁸

²²First Equity Corporation Fla. v. Utah State Univ., 544 P.2d 887, 891 (Utah 1975).

²³See *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 BRIGHAM YOUNG UNIVERSITY 133 (1976) [hereinafter cited as *Ultra Vires Challenges*].

²⁴Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936) citation omitted. See also, *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Dixon v. United States*, 381 U.S. 68 (1965); *Lynch v. Tilden Produce Co.*, 265 U.S. 315 (1924).

²⁵See *United States v. American Trucking Ass'n.*, 310 U.S. 534, 543 (1940).

²⁶See *Schmid v. United States*, 436 F.2d 987, 989 (Ct. Cl. 1971).

²⁷20 U.S.C. § 1681(c) (1976).

²⁸*Id.*

Congress failed, however, to define “education program or activity” and further neglected to include the term “educational institution” in its basic prohibition in section 1681(a) of the Education Amendments of 1972. Had the term “educational institution” been introduced into the language of section 1681(a), the intent to include such units in whole or in part as programs within the scope of Title IX would be clear.²⁹

Two amendments dealing specifically with higher education institutions were added to Title IX in 1974 and 1976. The wording of these two amendments implies that Congress understood Title IX to apply broadly to higher education. The 1974 amendment states in pertinent part: “[Title IX] shall not apply to membership practices . . . of a social fraternity or social sorority which is exempt from taxation under section 501(a) of [Title 26], the active membership of which consists primarily of students in attendance at an institution of higher education”³⁰

Congress was concerned enough about this exemption to make it retroactive to July 1, 1972.³¹ The amendment was unnecessary if Title IX was understood to apply narrowly, i.e., only to specific programs within an institution. Fraternities and sororities are considered educational activities in the broad sense of the term,³² and generally receive no direct federal financial assistance but instead are funded almost exclusively by dues-paying members. Clearly, Congress believed the amendment was necessary in order to exempt fraternities and sororities from the otherwise broad reach of the term “program” under Title IX.

The 1976 Amendment states in pertinent part:

[Title IX] shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise and talent of such individual and in which participation is limited to individuals of one sex only, *so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.*³³

Here, Congress exempted higher education scholarships awarded in beauty pageants from the restrictions of Title IX. Again, this amendment was un-

²⁹The phrase “under any education program or activity conducted by an educational institution receiving Federal financial assistance” would connote institution-wide compliance, while the phrase “under any education program or activity receiving Federal financial assistance conducted by an educational institution” would connote pinpoint program-specificity. This may have been an oversight since the language of Title IX was copied almost verbatim from the language of Title VI. See 117 CONG. REC. 30,156 (1971).

³⁰20 U.S.C. § 1681(a)(6)(A) (1976).

³¹Pub. L. No. 93-568 § 3(b).

³²See, e.g., *City of Baltimore v. Poe*, 224 Md. 428, 168 A.2d 193 (1961); See also 120 CONG. REC. 39,992-93 (1974) (Statement of Sen. Bayh).

³³20 U.S.C. § 1681(a)(9) (1976) (emphasis added).

necessary if Congress understood Title IX to apply narrowly to education “programs.” More significantly, Congress added the phrase “so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.” This language implies not only a broad approach to Title IX, but also to Title VI of the Civil Rights Act of 1964³⁴ and section 504 of the Rehabilitation Act of 1973³⁵; both statutes are similar in wording to Title IX.³⁶

2. Legislative History

Courts and commentators alike have concluded that Title IX was patterned after Title VI.³⁷ Title VI was designed to eliminate racial discrimination in “any program or activity receiving Federal financial assistance,”³⁸ while Title IX was designed to eliminate sexual discrimination in education programs and activities.³⁹ Senator Bayh first introduced the provisions embodying Title IX as an amendment to S. 659, the Education Amendments of 1971.⁴⁰ The provision reads:

No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of or be subject to discrimination under any program or activity conducted by a *public institution of higher education* or any school or department of graduate education, which is a recipient of federal financial assistance for any education program or activity⁴¹

Senator Bayh, concerned that women attain equal access to public higher education, stated:

While racial discrimination has been explicitly prohibited for nearly 20 years, only a few months ago the Supreme Court summarily affirmed a lower court decision upholding the constitutionality of a State’s maintenance of a branch of its public university system on a sexually segregated basis

How equal is educational opportunity when admissions brochures for a State university can explicitly state — as one did recently:

“Admission of women on the freshmen level will be restricted to

³⁴42 U.S.C. § 2000d (1976).

³⁵29 U.S.C. § 794 (1976).

³⁶See *infra* notes 87-100 and accompanying text.

³⁷See, e.g., *Ultra Vires Challenges, supra* note 23 and Note, *Title VI, Title IX, and the Private University: Defining “Recipient” and “Program or Part Thereof,”* 78 MICH. L. REV. 608 (1980); See also *Grove City*, 687 F.2d 684; *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982); *Haffer v. Temple Univ.*, 524 F. Supp. 531 (E.D. Pa. 1981) *appeal pending*, No. 82-1049 (3d Cir. 1982).

³⁸42 U.S.C. § 2000d (1976).

³⁹See 117 CONG. REC. 30,412 (1971), Senator Bayh, the amendment’s sponsor, stated that “[t]he bill deals with equal access to education. Such access should not be denied because of poverty or sex. If we are going to give all students an equal education, women must finally be guaranteed equal access to education”

⁴⁰S. 659, 92d Cong., 1st Sess. (1971), 117 CONG. REC. 30,500 (1971).

⁴¹117 CONG. REC. at 30,156 (1971) (emphasis added).

those who are especially well qualified.”⁴²

Senator Bayh was also concerned about the shortage of women employed at higher professional levels, and therefore included the clause “or any school or department of graduate education, which is a recipient of federal financial assistance for any education program or activity” to ensure that women would have an equal opportunity for graduate education.⁴³ This proposed amendment was meant to apply institution-wide, but it was defeated when the Senate sustained a ruling by the Chair that the amendment was not germane.⁴⁴

In February 1972, Senator Bayh introduced a slightly modified version of his original amendment that was ultimately adopted as Title IX.⁴⁵ The Senator concluded:

Many of the provisions of this amendment have been discussed on the Senate floor in the past. Some have been passed by either the House or the Senate.

. . . When I proposed an amendment similar to this last August it was ruled “nongermane.” Now I am coming back to the Senate with this comprehensive approach which incorporates not only the key provisions of my earlier amendment, but the strongest points of the antidiscrimination amendments approved by the House.⁴⁶

In clarifying his proposed amendment, Senator Bayh explained:

As [Senator Pell] knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of *available* services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.

In the area of employment, we permit no exceptions. *In the area of services, once a student is accepted within an institution, we permit no exceptions.* The Senator from Rhode Island asked about admissions policies of private secondary and primary schools. They would be excepted.⁴⁷

Senator Bayh’s statement that the amendment is intended to eliminate discrimination in *available* services or studies “within an institution once students are admitted” goes beyond the scope of services and studies that receive direct federal assistance themselves. He adds the caveat, “we permit no exceptions,” implying that no available services or studies within an institution are exempt from Title IX.

⁴²*Id.* at 30,155-56 (1971).

⁴³*Id.* at 30,156 (1971).

⁴⁴*Id.* at 30,481-85 (1971).

⁴⁵See 118 CONG. REC. 5802-03 (1972).

⁴⁶*Id.* at 5805. See *supra* notes 40-44.

⁴⁷*Id.* at 5812. The quote is taken from a discussion between Senator Bayh and Senator Pell, Chairman of the Senate Subcommittee on Education and Floor Manager of the Education Bill of which Title IX was an amendment. Bayh responded to Pell’s inquiry about the scope of sections which in large part became § 901(a) and (b) (emphasis added).

Post-enactment legislative history provides additional evidence that Title IX was to be applied institution-wide.⁴⁸ In June 1974, HEW published proposed regulations pursuant to Congress' mandate.⁴⁹ In June, 1975 HEW published its final Title IX regulations⁵⁰ and, as required by section 431(d)(1) of the General Education Provisions Act,⁵¹ submitted the regulations to Congress for review.⁵²

Resolutions of disapproval were introduced in both houses of Congress. In the Senate, Senator Helms introduced a resolution that constituted a blanket disapproval of the regulations:⁵³

Resolved by the Senate (the House of Representatives concurring), That pursuant to the provisions of Section 431(d) of the General Education Provisions Act, the Congress of the United States finds that the regulations of the Department of Health, Education, and Welfare relating to non-discrimination on the basis of sex in education programs and activities receiving or benefiting from Federal financial assistance are inconsistent with the provisions of title IX of the Education Amendments of 1972 . . . , and disapproves such regulations which were transmitted to the Congress on June 3, 1975.⁵⁴

The Senate Labor and Public Welfare Committee had jurisdiction over the Helms concurrent resolution. Senator Javits, ranking Republican on that committee, told Senator Helms during floor debate that the Committee planned to act on his resolution.⁵⁵ However, the Committee took no action on the matter.

In the House, Representative Martin introduced a broad disapproval resolution,⁵⁶ which failed to pass.⁵⁷ The HEW regulations went into effect, unchanged by Congress, on July 21, 1975. On the same day that the HEW regula-

⁴⁸The Supreme Court gave post-enactment legislative history a great deal of credence as it related to Congress' intent that Title IX encompass employment discrimination in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982). Certainly, there are problems with post-enactment history that make it less persuasive than pre-enactment history; nevertheless, it should be entered into the legislative intent equation. See *Ultra Vires Challenges*, *supra* note 23.

⁴⁹See *supra* note 11, and 39 Fed. Reg. 22, 228 (1974).

⁵⁰40 Fed. Reg. 24,128 (1975).

⁵¹20 U.S.C. § 1232(d) (1976).

⁵²This "laying before" provision is designed to afford Congress an opportunity to examine a regulation and, if it is found inconsistent with the Act from which it derives its authority, to disapprove it in a concurrent resolution. If no such disapproval resolution is adopted within 45 days, the regulation becomes effective. See, Cotter & Smith, *Administrative Accountability to Congress: The Concurrent Resolution*, 9 WESTERN POL. Q. 955 (1956); J.P. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 204-38 (1964).

⁵³S. Con. Res. 46, 94th Cong., 1st Sess., 121 CONG. REC. 17,300 (1975); See also 121 CONG. REC. 19,874 (1975) (Statement of Sen. Helms). Senator Laxalt introduced a resolution disapproving the sections regulating athletic programs. S. Con. Res. 52, 94th Cong., 1st Sess., 121 CONG. REC. 22,940 (1975). The Senate took non action on the matter.

⁵⁴121 CONG. REC. 17,301 (1975) (citations omitted).

⁵⁵Sec. 33 CONG. Q. 1298 (1975). Senator Laxalt's resolution suffered the same fate; See *supra* note 53.

⁵⁶H.R. Con. Res. 310, 94th Cong., 1st Sess. (1975); See CONG. REC. 19,209 (1975) Representative Martin also introduced H.R. Con. Res. 311 dealing with athletics. See 121 CONG. REC. 19,209 (1975).

⁵⁷See *supra* note 53.

tions took effect, Senator Helms introduced a bill to amend Title IX.⁵⁸ The section pertinent to this discussion reads:

Notwithstanding any other provisions of law, this section shall apply only to education programs and activities which directly receive financial assistance from the Federal Government. For the purposes of this paragraph, "education programs and activities" means *only programs and activities which are an integral part of the required curriculum of an educational institution* subject to this title.⁵⁹

The Helms bill was not reported out of committee.

One year later, Senator McClure introduced two amendments, one of which defined education programs and activities as "such programs or activities as are curriculum or graduation requirements of the institutions defined"⁶⁰ Senator Bayh's objection to these amendments further illustrates Congress' intent in legislating Title IX:

I think it would be a tragic departure from the whole concept of providing quality education to take the amendment.

It is my understanding that the Senator's amendment will exempt any courses not required for graduation from the purview of title IX. The impact of this amendment is enormous — it would exempt those areas of traditional discrimination against women that are the reason for the Congressional enactment of title IX. These areas would include scholarship aid, employment and employment benefits and extracurricular activities such as athletics.⁶¹

Senator McClure's amendment was defeated on the floor of the Senate by a fifty-two to twenty-eight margin.⁶²

Although the language of Title IX does not specifically define "education program or activity," a close reading of the subsequent 1974 and 1976 amendments, coupled with the testimony of Title IX's chief sponsor (Senator Bayh) prior to and subsequent to adoption, supports the conclusion that the Department of Education's regulations interpreting "education program and activity" are not inconsistent with Congressional intent. Furthermore, neither house of Congress has, to date, succeeded in passing any legislation that would modify or nullify the Department's definitions. Consequently, the regulations are not *ultra vires*.

⁵⁸S. 2146, 94th Cong., 1st Sess. (1975). See 121 CONG. REC. 23,845 (1975).

⁵⁹121 CONG. REC. 23,847 (1975) (emphasis added).

⁶⁰Amend. 389, 94th Cong., 2d Sess. (1976), 122 CONG. REC. 28,136 (1976). The second amendment defined federal financial assistance received as "assistance received by the institution directly from the Federal government." Amend. 390, 94th Cong., 2d Sess. (1976). 122 CONG. REC. 28,144 (1976). See *infra* notes 159-63 and accompanying text.

⁶¹122 CONG. REC. 28,144 (1976).

⁶²*Id.* at 28,147.

3. Judicial Interpretation

Court opinions fall on both sides of the question of whether a post-secondary institution can be considered a “program” under Title IX. Courts uniformly agree that the statutory language is vague and confusing. Most decisions, therefore, rely upon legislative history as judges and justices interpret it, and on Title IX’s close parallels with Title VI and section 504 of the Rehabilitation Act of 1973.

a. Judicial Views of Title IX Legislative History

One of the most extensive discussions of Title IX legislative history comes from the United States Court of Appeals for the Third Circuit in *Grove City College v. Bell*.⁶³ Judge Garth, speaking for a unanimous court, said:

As we understand these legislative concerns, the legislators did not contemplate that separate, discrete, and distinct components or functions of an integrated educational institution would be regarded as the individual programs, to which [Title IX] refer[s]. Whatever the legislators did contemplate by their use of the term “program and activity” we can be certain on only two things: (1) “program or activity” was never intended to be defined in the narrow and restrictive manner urged by Grove; and (2) the precise meaning, content, and parameters of “program” as it applies to the issue presented here have never been established.⁶⁴

In *Haffer v. Temple University*⁶⁵ women students brought an action against Temple University alleging discrimination in the operation of its intercollegiate athletic program. Temple claimed that its athletic program was beyond the scope of Title IX since it is not a program that receives federal funds.⁶⁶ In finding for the plaintiffs, the United States District Court for the Eastern District of Pennsylvania made the following conclusion based upon a review of the legislative history: “I have found nothing in the legislative history reflecting a Congressional intent to limit the scope of the general statement of prohibition to programs receiving earmarked federal funds. Instead, the opposite intention appears from the repeated defeats [in Congress] of precisely the limited view Temple now advocates.”⁶⁷ These courts, and others that have adopted an “institutional approach” to Title IX, have relied upon pre- and post-enactment legislative history consistent with the analysis presented earlier in this article.⁶⁸

Other courts have taken a pin-point program approach after an incomplete analysis of the statute’s legislative history. The leading case adopting the nar-

⁶³*Grove City*, 687 F.2d 684 (3d Cir. 1982).

⁶⁴*Id.* at 697.

⁶⁵524 F. Supp. 531 (E.D. Pa. 1981).

⁶⁶*Id.* at 533.

⁶⁷*Id.* at 535.

⁶⁸*Grove City*, 687 F.2d at 691-95; *Haffer*, 524 F. Supp. at 533-36.

row view of "program" is *Hillsdale College v. Department of Health, Education & Welfare*.⁶⁹

In *Hillsdale*, HEW sought an order terminating financial assistance received by students enrolled at Hillsdale College. Although the court recognized that the college was a "recipient" under Title IX and that funds could be terminated without an actual finding of discrimination, it held the regulations authorizing termination of funds for failure to sign the Assurance of Compliance invalid.⁷⁰ Judge Brown, speaking for the majority of the United States Court of Appeals for the Sixth Circuit, concluded "we find that the legislative histor[y] of . . . Title IX reveal[s] no indication that Congress contemplated that an entire educational institution could constitute a single 'program or activity.'" ⁷¹ However, Chief Judge Edwards registered a vigorous dissent. After an extensive discussion of the historical struggle of women for equal rights in the United States, he stated that the broad remedial purpose of the statute and the benefits derived by Hillsdale College as a whole from the aid to its students justified termination of aid for failure to sign the Assurance of Compliance.⁷² *Hillsdale* is currently on appeal.⁷³

The majority opinion is based upon an analysis of the legislative history of Title IX that is incomplete. The court first cites Senator Bayh's amendment as originally proposed and compares its language with the adopted 1972 amendment.⁷⁴

[The 1971 proposed] amendment embodied an institutional approach as it would regulate *all* operations of an educational institution which received federal assistance for any of its programs or activities In February, 1972 the provision ultimately enacted as Title IX was introduced The institutional approach . . . was replaced by the program-specific language presently contained in Sections 901 and 902. *No explanation or discussion was given for the change of approach.*⁷⁵

This interpretation is incorrect in two respects. First, the amendment as originally proposed would have regulated all operations of a public institution of higher education or any school or department of graduate education that is a recipient of federal financial assistance.⁷⁶ Nonetheless, the Sixth Circuit erroneously concluded that all undergraduate programs at private post-secondary institutions would have been covered in the 1971 proposed amendment. The

⁶⁹696 F.2d 418 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3704 (U.S. Mar. 16, 1983) (No. 82-1538).

⁷⁰*Id.* at 430.

⁷¹*Id.* at 427. *See supra* notes 39-45.

⁷²*Id.* at 436-37 (Edward, C.J., dissenting).

⁷³*Hillsdale*, 696 F.2d 418 (6th Cir. 1982) *petition for cert. filed*, 51 U.S.L.W. 3704 (U.S. Mar. 16, 1983) (No. 82-1538).

⁷⁴*Id.* at 426.

⁷⁵*Id.* (emphasis added in final sentence).

⁷⁶*See supra* note 41 and accompanying text.

Sixth Circuit's decision in *Hillsdale* characterizes the proposed amendment as much more sweeping than it actually was.

Second, the court apparently did not consider Senator Bayh's remarks, when introducing the 1972 amendments, that no available services or studies within an institution are exempt from Title IX. Clearly, Bayh's comments point to a more expansive interpretation of "program" than the Sixth Circuit conceded.⁷⁷ It is not surprising, therefore, that the court concluded, based on an erroneous and incomplete analysis of legislative history, that Congress intended a narrow "program" approach in the 1972 amendment.

The Sixth Circuit reasoned that "the term 'program' was used in the Congressional debates preceding passage of Title IX 'to refer not to the total program of an educational institution but to smaller-scale activities within the institution.'"⁷⁸ The court based this conclusion in part on a dialogue between Representatives Waggoner (Louisiana) and Steiger (Wisconsin) and Representative Green (Oregon), the author and floor manager in the House of the measure (Title X) that eventually became incorporated in Title IX.⁷⁹

Mr. WAGGONER: Let me clarify a little bit better the point I am trying to make and that is [Title X] applies, apparently, only to those programs wherein the Federal Government is in part or in whole financing a program or an activity?

Mrs. GREEN: With Federal funds.

Mr. WAGGONER: That is what I mean, Federal funds.

Mrs. GREEN: It is really the same as the Civil Rights Act in terms of race

Mr. STEIGER: Mr. Chairman, I move to strike the requisite number of words, and I rise in support of the amendment. Mr. Chairman, let me proceed along the line of the gentleman from Louisiana, and let me ask the gentlewoman from Oregon [Mrs. GREEN] for clarification on what I thought I heard.

In title X the gentleman from Louisiana asked relating to a program or activities receiving Federal financial assistance, and under the "program or activity" one could not discriminate. That is not to be read, am I correct, that it is limited in terms of its application, that is, title X, to only programs that are federally financed? For example, are we saying that if in the English department they receive no funds from the Federal Government that therefore that program is exempt?⁸⁰

Representative Steiger asked two questions above. It is clear from the fact that he was a supporter of the amendment that he asked the first in the negative

⁷⁷See *supra* notes 39-45.

⁷⁸*Hillsdale*, 696 F.2d at 427 (quoting *Ultra Vires Challenges*, *supra* note 23, at 181).

⁷⁹117 CONG. REC. 39,256 (1971).

⁸⁰*Id.*

as a rhetorical question. But he asked a second question, apparently for clarification. Although Representative Green's response may appear unclear, it would seem that she is responding to Representative Steiger's first question:

Mrs. GREEN: If the gentleman will yield, the answer is in the affirmative. Enforcement is limited to each entity or *institution* and to each program and activity. Discrimination would cut off *all* program funds within an institution.⁸¹

The dialogue which follows clarifies Representative Green's response as intending an institutional interpretation for "program" in Title X.

Mr. STEIGER: So that the effect of Title X is to, in effect, go across the board in terms of the cutting off of funds to an institution that would discriminate, is that correct?

Mrs. GREEN: The purpose of title X is to end discrimination in all institutions of higher education, yes, across the board⁸²

Consequently, the Sixth Circuit incorrectly concluded that the term "program" was intended to refer to "smaller-scale activities within the institution."⁸³

The *Hillsdale* court relied heavily on program-specific conclusions in *Bennett v. West Texas State University*,⁸⁴ a case alleging denial of equal opportunity in the University's intercollegiate athletic program. Yet, the district court's review of Title IX legislative history in *Bennett* consists of a one paragraph comparison of the 1971 proposed amendment with Title IX.⁸⁵ Moreover, *Bennett* was reversed without opinion by the Fifth Circuit and is currently on appeal.⁸⁶

Contrary to the conclusions reached in the *Hillsdale* and *Bennett* cases, the courts which have extensively reviewed the legislative history of Title IX favor adoption of an institutional approach in defining "program."

b. Court Interpretations of Title VI and Section 504 of the Rehabilitation Act of 1973

i. Title VI

The leading case supporting the application of an institutional approach

⁸¹*Id.* (emphasis supplied).

⁸²*Id.*

⁸³*Hillsdale*, 696 F.2d at 427.

⁸⁴525 F. Supp. 77 (N.D. Texas 1981), *rev'd. mem.* 698 F.2d 1215 (5th Cir. 1983).

⁸⁵*Id.* at 79. See also *Rice v. President and Fellows of Harvard College*, 663 F.2d 336, 338 (1st Cir. 1981) *cert. denied*, 456 U.S. 928 (1982); *Dougherty County School Sys. v. Harris*, 622 F.2d 735 (5th Cir. 1980); *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376, 1382-83 (E.D. Mich. 1981). All of these cases either do not discuss the legislative history or do so in insufficient detail to draw accurate conclusions. The Supreme Court dealt with "program" in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982). *North Haven* was an employment discrimination case and the Supreme Court spent a great deal of discussion and analysis on the legislative history behind employment discrimination prescriptions in Title IX, than on trying to define "program."

⁸⁶698 F.2d 1215 (5th Cir. 1983).

to Title VI is *Bob Jones University v. Johnson*.⁸⁷ An administrative law judge had terminated the rights of eligible veterans attending Bob Jones University from receiving veterans' educational benefits because the University had failed to comply with Title VI.⁸⁸ At the time of the decision, Bob Jones University was a religious institution that forbade intermarriage of the races, denied admission to unmarried non-whites, and expelled students who dated members of another race.⁸⁹

In upholding the termination of federal funds, the district court implied that "program" under Title VI could have two meanings — individual programs within the institution, and Bob Jones' entire education program: "[t]he participation of veterans who — but for the availability of federal funds — would not enter the *educational programs of the approved school*, benefits the school by enlarging the pool of qualified applicants upon which it can draw for *its educational program*."⁹⁰

The court drew the following conclusion from its analysis of Title VI legislative history: "Since the VA payments to veterans are conditioned upon participation in an approved *program of education*, it is relevant to the Congressional purpose to ensure that such programs be conducted on a non-discriminatory basis so that no eligible veteran is excluded from participation."⁹¹

Bob Jones University has since had its tax exempt status revoked by the Internal Revenue Service because of its racially discriminatory practices and governmental policy against subsidizing racial discrimination in education.⁹²

In its comments accompanying its final Title IX regulations,⁹³ HEW cited another case, *Board of Public Instruction v. Finch*.⁹⁴ From 1965 to 1968, a segregated Florida school district and HEW engaged in negotiations in an effort to arrive at an acceptable desegregation plan for the school district. Progress toward desegregation was slow; finally, HEW broke off negotiations as fruitless and commenced administrative proceedings under Title VI. A HEW hearing examiner found that the school district's progress toward desegregation was inadequate and entered an order terminating any federal financial assistance administered by HEW, the National Science Foundation, and the Department of the Interior until such time as the school district corrected its noncompliance with the Act. The HEW Reviewing Authority adopted this order.⁹⁵

⁸⁷396 F. Supp. 597 (D.S.C. 1974) *aff'd. mem.* 529 F.2d 514 (4th Cir. 1975).

⁸⁸*Id.* at 598.

⁸⁹*Id.* at 600.

⁹⁰*Id.* at 603 (emphasis added).

⁹¹*Id.* at 604 (some emphasis added).

⁹²*Bob Jones v. United States*, 51 U.S.L.W. 4593, 4594 (U.S. May 24, 1983).

⁹³40 Fed. Reg. 24,128 (1975).

⁹⁴414 F.2d 1068 (5th Cir. 1969).

⁹⁵*Id.* at 1070-71.

Although ruling that individual programs within an institution can be separated for the purposes of terminating federal funds, the court added a word of caution:

In finding that a termination of funds under Title VI of the Civil Rights Act must be made on a program by program basis, we do not mean to indicate that a program must be considered in isolation from its context In deference to that possibility, the administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory.⁹⁶

This reasoning presumes that there are instances where individual programs within an institution cannot be separated from the broader educational mission of the institution.

The United States Supreme Court took an institutional approach to Title VI in *Lau v. Nichols*.⁹⁷ In *Lau*, the Court reviewed the challenge of Chinese-speaking students to the San Francisco school district's failure to provide bilingual training for a substantial proportion of its students who could speak only Chinese. In deciding for the students, the Court referred to "the educational program" of the school district;⁹⁸ Justice Stewart's concurring opinion also approved HEW's Title VI guidelines and referred to "the educational program offered by a school district."⁹⁹ As shown by the cases cited, the institutional definition of "program" has gained wide acceptance by courts interpreting Title VI. Since the wording of the Title IX prohibition is parallel to that found in Title VI, judicial interpretation of both should be parallel.

ii. Section 504

Section 504 of the Rehabilitation Act of 1973¹⁰⁰ contains language similar to that of Title IX, but pertains to "otherwise qualified handicapped individuals." Therefore, it is useful to examine how the courts have interpreted "program" in Section 504 decisions. Recognizing that Section 504 contains little legislative history, the courts have assigned their own interpretation to the term "program."¹⁰¹ They have consistently applied Section 504 to all available programs and activities within an institution that receives federal finan-

⁹⁶*Id.* at 1078-79.

⁹⁷414 U.S. 563 (1974).

⁹⁸*Id.* at 568.

⁹⁹*Id.* at 570. See also *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir. 1967).

¹⁰⁰29 U.S.C. § 794 which reads "No otherwise qualified handicapped individual . . . as defined in section [706(7) of this Title], shall, solely by reason of his handicap, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

¹⁰¹See e.g., *Wright v. Columbia University*, 520 F. Supp. 789, 792 (E.D. Pa. 1981).

cial assistance.¹⁰²

Columbia University challenged an expansive interpretation of "program" in *Wright v. Columbia University*,¹⁰³ claiming that its football program received no direct federal funding and therefore was outside the coverage of Section 504.¹⁰⁴ The district court judge ruled that a major university is not made up of discrete entities, but rather each entity is a part of the broader educational program.¹⁰⁵ The *Wright* court also concluded that Columbia University viewed itself as a singular institution, not as "a composite of discrete entities."¹⁰⁶

Clearly, Columbia has consistently represented to the plaintiff that the University as a whole, not the limited athletic program, was the official decisionmaker

[T]he Section obviously applies to the University, which made the ultimate decision. Consequently, if plaintiff was the victim of discrimination based upon his handicap, the University, not the athletic program, is the party responsible therefor.¹⁰⁷

It is far more feasible for a large university like Columbia than it is for a small single-campus college to argue that it is composed of distinct programs.¹⁰⁸ Yet the district court concluded that the component parts of any college or university are so interrelated that to define only one part as a "program receiving federal financial assistance" is impractical and runs counter to the purpose of the statute.¹⁰⁹ Further, such definitions would allow schools to use federal dollars in nondiscriminatory programs, while at the same time channelling the money released by federal funds into discriminatory programs within the school. This "shell game" approach would effectively circumvent the Congressional intent behind such remedial legislation as Title VI, Section 504, and Title IX.

There is ample evidence to support this "component parts" theory of higher education; e.g., that a higher education institution is comprised of component parts that interact with one another in some direct or indirect way.¹¹⁰ Indeed, at most universities, budget approval for all academic and extra-curricular programs comes from a single office, either that of the President or the Treasurer,

¹⁰²See *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1981); *Wright v. Columbia Univ.*, 520 F. Supp. 789 (E.D. Pa. 1981); *Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. 498 (D.N.J. 1980); *Borden v. Rohr*, No. 75-844 (S.D. Ohio 1975); *Suemnick v. Michigan High School Athletic Ass'n.*, No. 4-70592 (E.D. Mich. 1974).

¹⁰³520 F. Supp. 789, 792 (E.D. Pa. 1981).

¹⁰⁴*Id.* at 791.

¹⁰⁵*Id.* at 792.

¹⁰⁶*Id.*

¹⁰⁷*Id.* See also, *Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. at 951.

¹⁰⁸For instance, a large university is made up of separate schools or colleges, each headed by a separate dean. A small college would not have this arrangement.

¹⁰⁹520 F. Supp. at 792.

¹¹⁰See J. BRUBACHER & W. RUDY, *HIGHER EDUCATION IN TRANSITION: A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES* (3d ed. 1976); K. MORTIMER & T. MCCONNELL, *SHARING AUTHORITY EFFECTIVELY* (1978).

with final approval by a Board of Trustees or Board of Regents.¹¹¹ Decision-making processes are shared between individual department chairpersons or directors and their deans.¹¹² Some courts have termed this “infection,”¹¹³ arguing that discrimination in one part of the institution may “infect” several or even all parts of that institution. This analysis has been applied by the courts to the language of Title IX, its legislative history, and to interpretations of Title VI and Section 504.

Neither the language of Title IX nor its accompanying legislative history precludes a college or university, as a whole, from being an “education program.” The fact that Congress defined “educational institution” does not necessarily mean that it did not intend for the total “education program” of a post-secondary institution to be one species of program under Title IX, particularly when its individual entities are interrelated. In order for the Department of Education regulations that broadly define “program” to be ruled ultra vires and therefore unenforceable, a court would have to determine that the Department went beyond its authority in promulgating the regulations. There clearly is not a sufficient basis for such a claim. Indeed, Congress declined to alter the Department of Education regulations despite the fact that several opportunities were available to do so. Resolutions disapproving the regulations were raised in both the House and the Senate; the Senate resolution failed to reach a floor vote while the House resolution was defeated. Two amendments to Title IX were unsuccessfully raised in the Senate that would have defined “education program” narrowly — one dying in committee and the other voted down by almost a two to one margin. In addition, the Department’s regulations are supported by a number of courts which have applied an institutional approach to the definition of “program” in interpreting Title IX, as well as by courts which have analyzed the definition of “program” under Title VI of the Civil Rights Act and Section 504 of the Rehabilitation Act. Therefore, the Department’s definition of “program,” as promulgated in its regulations, should be accepted by the Supreme Court.

III. DEFINITION OF “RECIPIENT”

Although closely related to the “program” definition, the “recipient” issue can be discussed independently. Regardless of how the Supreme Court ultimately defines “program,” it will still need to decide whether indirect aid constitutes “federal financial assistance.”¹¹⁴

The Department of Education’s argument in support of its definition of “recipient” centers around the infection theory. When a college or university

¹¹¹See, e.g., Berry & Buchwald, *Enforcement of College Trustees’ Fiduciary Duties: Students and the Problems of Standing*, 99 U.S.F.L. REV. 1 (1974).

¹¹²See, e.g., Hornby, *Delegating Authority to the Community of Scholars*, 1975 DUKE L.J. 279.

¹¹³Florida v. Finch, 414 F.2d 1068, 1078 (5th Cir. 1969).

¹¹⁴The Supreme Court failed to define “program” in North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 102 S. Ct. at 1927 (1982).

receives federal financial assistance all of its component programs benefit either directly or indirectly.¹¹⁵ In order to draw a final conclusion on the issue of federal assistance, two questions must be answered. First, must the federal aid be received directly by a specific program or activity within an institution for discrimination to be prohibited in that activity? Second, can aid to a student be considered aid to the institution?

A. *Direct vs. Indirect Assistance*

1. The Language of the Statute

The prohibition in Section 1681 of the Education Amendments of 1972 gives little guidance as to the nature of aid in a “program or activity receiving federal financial assistance”¹¹⁶ because Congress failed to define “federal financial assistance.” Further confounding the issue is the fund termination clause found in Section 1682.¹¹⁷ Should the fund recipient fail to comply with Title IX, the Department of Education may, under certain conditions, terminate or refuse to grant or continue assistance,

[b]ut such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.¹¹⁸

Supporters of the direct assistance position, that is, that Title IX applies only to institutional programs that receive direct federal financial assistance and not to all activities within an institution, cite the language of this fund termination clause to support their position.¹¹⁹

Yet the phrase “or part thereof” suggests that the fund termination clause should be interpreted more narrowly than Section 1681. Fund termination is a drastic step and, if initiated, should pinpoint the activity in which discrimination occurred. The prerequisites for fund termination specified in Section 1682 support this interpretation.¹²⁰ However, this should not prevent subjecting activities receiving indirect aid to Title IX scrutiny in accordance with the remedial purpose of the statute.

¹¹⁵40 Fed Reg. 24,128 (1975).

¹¹⁶See *supra* note 10.

¹¹⁷20 U.S.C. § 1682 (1976).

¹¹⁸*Id.*

¹¹⁹See, e.g., *Grove City*, 687 F.2d 284; *Haffer*, 524 F. Supp. 531; *supra* note 37.

¹²⁰20 U.S.C. § 1682 reads in pertinent part:

Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

2. Legislative History

Pre-enactment legislative history does not address the specific question of the meaning of "recipient." Post-enactment history, however, offers some guidance as to legislative intent. Various members of Congress attempted to exempt intercollegiate athletics from Title IX coverage. Athletics is one activity that universally receives no direct federal financial assistance. Therefore, athletics is a good area to test in order to determine whether Congress intended indirect aid to be considered in the determination of the applicability of Title IX.

Two attempts to exclude intercollegiate athletics from the coverage of Title IX failed.¹²¹ Senator Tower introduced an amendment, defeated in Committee, to exclude revenue-producing intercollegiate athletic activities from Title IX.¹²² He re-introduced the amendment in 1975 and it was again defeated, this time by the full Senate.¹²³

3. Judicial Interpretation of Title IX

It is not surprising that judicial opinions concerning the infection theory are split along the same lines as the judicial definitions of "program." The courts which have defined an entire institution as an educational program have concluded that federal funds earmarked for a specific activity benefit all parts of an institution.

In *Haffer v. Temple University*,¹²⁴ for example, the University alleged that since its athletic program received no direct federal funding, athletics were exempt from Title IX — even though other parts of the university received Federal financial assistance.¹²⁵ The court did not agree:

If Congress had not intended Title IX to cover indirectly funded athletic programs, the intense media and congressional scrutiny of the regulations on athletics should have led to a congressional resolution of disapproval. But it did not.¹²⁶

A university . . . cannot use federal money to support one graduate program, such as the law school, run that program in perfect compliance with Title VI or Title IX, transfer nonfederal money from the law school budget to the budget of another program, such as the medical school, and deny blacks or women admission to the medical school.¹²⁷

¹²¹See *supra* notes 53-56, and accompanying text.

¹²²Amend. 1343, 93d Cong., 2d Sess. (1974), 120 CONG. REC. 15,322 (1974).

¹²³S. 2106, 121 CONG. REC. 22,775 (1975).

¹²⁴*Haffer*, 524 F. Supp. 531.

¹²⁵*Id.* at 538.

¹²⁶*Id.* at 536.

¹²⁷*Id.* at 538. See also Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 TEX. L. REV. 103, 112; *Grove City College*, 687 F.2d at 698-99.

The trial court in *Iron Arrow Honor Society v. Hufstедler*¹²⁸ went one step further with the infection theory. It concluded that activities such as single-sex honor societies, which were

once removed from direct federal assistance, still must comply with Title IX because it is useful and necessary to the effectuation of 20 U.S.C. § 1681, which demands an end to federal governmental support of the perpetuation of discrimination against women in an educational institution. Sexually discriminatory honor societies significantly assisted by federally supported universities perpetuate sexual discrimination. Thus, Congress' authorization . . . was not exceeded by H.E.W. [regulations] which reach organizations that do not directly receive federal support.¹²⁹

Here the court took for granted that federal financial assistance permeated the entire university and that any assistance from the university to the student organization was indirect federal assistance. The decision of the Fifth Circuit Court of Appeals affirming the trial court's holding has been vacated by the Supreme Court as moot.¹³⁰

Some courts do not accept the infection theory. In *Othen v. Ann Arbor School Board*,¹³¹ the plaintiff alleged that his daughter was unjustly "cut" from the high school golf team because of her sex.¹³² The district court tied together its definition of "program" with its interpretation of "recipient," to wit:

Congress intended to make a distinction between an institutional approach and a programmatic approach. The precise, selective use of the terms "programs" and "recipient" throughout the various section of Title IX evidences a clear intent to have Sections 1681 and 1682, and the regulations thereunder, apply only to specific educational programs or activities which receive *direct* federal financial assistance.¹³³

Despite the confidence of the *Othen* court, Congress' use of "programs" and "recipients" is far from precise.¹³⁴ The court noted that it considered the amount in controversy to be *de minimus*, a factor that may have led it to a less than thorough investigation of Title IX legislative history.¹³⁵ Moreover,

¹²⁸499 F. Supp. 496 (S.D. Fla. 1980), *aff'd*, in *Iron Arrow Honor Soc'y v. Schweiker*, 652 F.2d 445 (5th Cir. 1981).

¹²⁹*Id.* at 503.

¹³⁰*Iron Arrow Honor Soc'y v. Hufstедler*, 52 U.S.L.W. 3384 (U.S. Nov. 15, 1983), *vacating as moot* 449 F. Supp. 496 (S.D. Fla. 1980).

¹³¹507 F. Supp. 1376 (E.D. Mich. 1981), *appealed on other grounds* 699 F.2d 309 (6th Cir. 1983).

¹³²*Id.* at 1378.

¹³³*Id.* at 1382 (emphasis added). *See also* *Romeo Community Schools v. HEW*, 438 F. Supp. 1021, 1033 (E.D. Mich. 1977) *aff'd* 600 F.2d 581 (6th Cir.) *cert. denied*, 444 U.S. 972 (1979).

¹³⁴*Bennett*, 525 F. Supp. 77, relies heavily on the conclusions developed in *Othen*. *See, e.g.*, 525 F. Supp. 77, 79. However, the Fifth Circuit reversed *Bennett* without opinion, 698 F.2d 1215 (5th Cir. 1983).

¹³⁵*Othen*, 507 F. Supp. at 1390. In *Othen*, the amount of federal funds received by the district in 1979 amounted to twelve-one hundredths of one percent of the total budget. The court concluded that "[t]his *de minimus* percentage of the district's total operating budget cannot form the basis for invocation of Title IX." *Id.* It would be difficult for the Department of Education to determine on a case by case basis

the Sixth Circuit Court of Appeals, in reviewing the district court's ruling, stated that it was unnecessary for the district court to decide whether the athletic programs were subject to Title IX because the plaintiff had voluntarily dismissed all claims for relief except a request for attorneys' fees.¹³⁶

Nonetheless, a similar link between "program" and "recipient" was drawn by the district court in *University of Richmond v. Bell*,¹³⁷ in which Judge Warriner concluded:

Were the court to adopt Plaintiff's argument, the programmatic instruction of Title IX would be rendered nugatory, because every program activity at the university would be subject to Title IX In order for the strictures of Title IX to be triggered, the federal financial assistance must be direct The type of indirect aid received by the University athletic program does not bring them within the ambit of Title IX.¹³⁸

Judge Warriner's comments seem to directly contradict legislative intent, as indicated by the failure of Congress to adopt either of the two proposed amendments that would have expressly excluded athletic programs from the reach of Title IX.¹³⁹

Post-enactment legislative history, as well as the *Haffer* and *Iron Arrow* opinions, are persuasive authority for adopting a broad approach in subjecting education programs to Title IX scrutiny.

4. Judicial Interpretation of Title VI and Section 504

Two cases, both decided in 1976, are at odds on the indirect aid analysis in the Title VI context. In *Stewart v. New York University*¹⁴⁰ the court reasoned that a \$625,000 federal loan for the construction of a law school dormitory did not subject the admissions procedure to Title VI. "[T]he indebtedness to H.U.D. with respect to . . . the Law School dormitory, does not help the plaintiff, since the discrimination alleged here does not involve [the dormitory] but rather the minority admissions policy."¹⁴¹

As in *Othen*, the *Stewart* court considered the amount of aid involved to be *de minimus*.¹⁴² However, the district court in *Flanagan v. President and*

whether student aid has a significant impact upon the operation of the college. It is generally conceded that no such impact test is needed to measure direct aid. The prohibition in § 1681 is against sexual discrimination in any education program or activity which receives federal financial assistance. It seems inappropriate, therefore, to impose the *de minimus* test upon indirect aid.

¹³⁶*Othen*, 699 F.2d at 312.

¹³⁷543 F. Supp. 321 (E.D. Va. 1982).

¹³⁸*Id.* at 329.

¹³⁹The *Richmond* court relied heavily on conclusions developed in *Othen* and *Bennett*.

¹⁴⁰430 F. Supp. 1305 (S.D.N.Y. 1976).

¹⁴¹*Id.* at 1314; *Cf.* *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir. 1967); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972); *McLeod v. College of Artesia*, 312 F. Supp. 498 (D.N.M. 1970).

¹⁴²*Stewart*, 430 F. Supp. at 1312.

*Directors of Georgetown College*¹⁴³ criticized the *Stewart* court's reasoning, stating that "[t]his 'pinpoint' approach is ostensibly based on § 602 of Title VI, . . . which provides that compliance with Title VI may be effected by the termination of such program or activity in which discrimination is found."¹⁴⁴ The court concluded that "by accepting federal financial assistance for the construction of the Law Center, Georgetown and the Law Center were required to refrain from discrimination on the basis of race in providing any service, financial aid or other benefits to its Law Center students."¹⁴⁵

Other Section 504 decisions have come down squarely for the inclusion of indirect aid. In *Poole v. South Plainfield Board of Education*,¹⁴⁶ Judge Ackerman found it

absurd to ban discrimination in a discrete area of a school system that receives federal funds while permitting it throughout the rest of the system. I do not believe that Congress intended to ban discrimination during school hours while permitting it in officially sponsored extracurricular activities. This belief is supported by the fact that federal aid to any program in a school system releases local money for other uses, thereby benefiting those programs that are not direct beneficiaries of federal aid.¹⁴⁷

In *Wright*,¹⁴⁸ Judge Troutman used the same reasoning:

To the extent that the University receives federal funding, component entities thereof benefit indirectly through the reallocation of funds received from other sources. Moreover, to accept defendant's argument would allow major institutions receiving substantial amounts of federal aid to dissect themselves, at whim, into discrete entities, to allocate federal dollars into programs which cannot discriminate against handicapped persons, and to free privately obtained funds from those programs and instead to channel such money into programs purportedly immune from Section 504 strictures. Columbia's construction of Section 504 would sanction this circumvention of federal policy against discrimination for institutions benefiting from federal aid.¹⁴⁹

Understandably, the courts that conclude that the institution as a whole can comprise an education "program" also conclude that federal aid to one component is aid to the total program. At the very least, each education program within a system or institution must be viewed as interrelated, since fun-

¹⁴³417 F. Supp. 377 (D.D.C. 1976).

¹⁴⁴*Id.* at 383.

¹⁴⁵*Id.* at 384. See also *Bob Jones*, 396 F. Supp. at 602-03.

¹⁴⁶490 F. Supp. 948 (D.N.J. 1980).

¹⁴⁷*Id.* at 95. It should also be noted that the Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397, 400 (1979), applied § 504 to a nursing program in a school receiving federal funds without inquiry into whether the nursing program itself received direct federal moneys.

¹⁴⁸520 F. Supp. 789.

¹⁴⁹*Id.* at 792.

ding for a single program releases funds for use by other programs. Thus, the courts that broadly define "recipient" and "program" conclude that no program within an institution can be administered in a discriminatory manner if any program in that institution receives direct federal funding.

Those who oppose the institutional approach in defining "program" cite the language in the fund termination clause, arguing that "program" should be defined as narrowly as possible to include only direct aid since only direct aid should be terminated.¹⁵⁰ However, this approach does not seem to recognize the remedial purpose behind the enactment of Title IX.

B. *Aid to Students Benefits the Institution*

The remaining issue relating to the Department of Education's definition of "recipient" is whether, under Title IX, federal aid to the students that enroll at an institution constitutes aid to the institution itself.

1. Nature of the Aid

The aid in question in the Grove City College case is a Pell Grant. The Pell Grant was established as the Basic Educational Opportunities Grant (BEOG) appropriated by Congress and allocated by the Department of Education pursuant to 20 U.S.C. § 1070a. Under Department regulations, a student receives money through either the Regular Disbursement System¹⁵¹ or the Alternate Disbursement System.¹⁵²

Through the Regular Disbursement System, the Secretary of Education enters into an agreement with an institution of higher education under which the institution calculates and pays Pell Grants to its students.¹⁵³ From time to time, the Secretary advances funds for each award year to each institution, based upon the estimate of the institution's need for funds to pay Pell Grants to its students.¹⁵⁴

If a college elects the Alternate Disbursement System, the Secretary of Education will calculate and pay the Pell Grant directly to the student.¹⁵⁵ This system requires the institution to verify that the student is an eligible recipient.¹⁵⁶

¹⁵⁰See, e.g., Note, *The Program-Specific Reach of Title IX*, 83 COL. L. REV. 1210 (1983).

¹⁵¹34 C.F.R. § 690.71 (1983).

¹⁵²*Id.* at § 690.91.

¹⁵³*Id.* at § 690.72.

¹⁵⁴*Id.* at § 690.74.

¹⁵⁵*Id.* at § 690.92.

¹⁵⁶*Id.* at § 690.94.

Under either system, the student must sign the following statement:

Statement of Educational Purpose

I declare that I will use any funds I receive under the Pell Grant program solely for expenses connected with attendance at

_____ (Name of Institution)
_____ (Date)
_____ (Signature)¹⁵⁷

A student retains eligibility if he or she remains in good standing in an undergraduate program.¹⁵⁸

2. Legislative History

While pre-enactment discussion is vague and does not specifically speak to the types of funds that federal financial assistance may encompass, it is quite clear from post-enactment legislative action that the Senate intended to include student aid.

In 1976, Senator McClure proposed a second amendment to Title IX which provided that “[f]or the purposes of this chapter, federal financial assistance received means assistance received by the institution directly from the federal government.”¹⁵⁹

Senator McClure made it very clear what the intended effect of his proposed amendment should be.

We seek in this instance, in the amendment that I have here, . . . to limit that overreach by saying in this amendment that you cannot exert Federal control over an institution where the institution does not take Federal money directly, but the only Federal involvement is the aid that a student may get. HEW regulations seek to exercise control over colleges which have no more connection . . . or no Federal-aid programs directly to the college or university at all, but who may, as a matter of happenstance, have a veteran student who is going to school under the GI bill, or some student who has some kind of grant from some Federal program who is a student at that college, which then will subject the college to Federal control and Federal regulation.¹⁶⁰

Senator Pell’s remarks in response to the McClure amendment illustrate how far-reaching the Congress intended Title IX to be:

[T]o my mind, . . . the enactment of this amendment would mean that no funds under the basic grant program would be covered by title IX.

While these dollars are paid to students they flow through and ultimately go to institutions of higher education, and *I do not believe that*

¹⁵⁷*Id.* at § 690.79.

¹⁵⁸*Id.* at § 690.94.

¹⁵⁹122 CONG. REC. 28,144 (1976).

¹⁶⁰*Id.* at 28,145.

*we should take the position that these Federal funds can be used to further discrimination based on sex.*¹⁶¹

Senator Bayh concurred:

If a student is benefited, the school is benefited. It is not new law; it is traditional, and I think in this instance it is a pretty fundamental tradition, that we treat all institutions alike as far as requiring them to meet a standard of educational opportunity equal for all of their students.¹⁶²

The McClure amendment was defeated by a fifty to thirty margin on the same day that it was introduced.¹⁶³

3. Court Interpretation

After discussing the defeat of the amendment designed to limit the definition of federal assistance to direct aid only, the Third Circuit in *Grove City* drew the following conclusion:

[W]here the Department's interpretation of "federal financial assistance" has been directly brought to Congress' attention, Congress' specific rejection of proposed legislation that would have overturned that interpretation provides a substantial indication that it was Congress' intent to include BEOG's [Pell Grants] within the coverage of [Title IX].¹⁶⁴

Even the Sixth Circuit in *Hillsdale* admitted that although it felt that Title IX was program-specific, it also felt that the college was a recipient of the aid to its students.¹⁶⁵ Chief Judge Edwards, in his dissent, criticized the program-specific nature of the majority opinion and concurred that funds given to students for paying expenses while matriculating at an institution of higher education benefit the institution itself: "[i]t seems clear to me that each of these [student aid] programs provides funds which when paid to the college are used for the general support of the educational program of the college as a whole."¹⁶⁶

Only one court has argued that aid to students is not aid to the institution.¹⁶⁷ The district court in *University of Richmond v. Bell*,¹⁶⁸ stated that "[the University of Richmond] provides numerous programs, activities and services for which it receives remuneration from its students. Thus the fees paid are compensation for services rendered and as such do not constitute 'aid'."¹⁶⁹

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 28, 148.

¹⁶⁴ *Grove City*, 687 F.2d at 695. See also *Haffer*, 524 F. Supp. at 540.

¹⁶⁵ *Hillsdale*, 697 F.2d at 424. See also *Rice*, 663 F.2d at 339.

¹⁶⁶ *Hillsdale*, 697 F.2d at 434.

¹⁶⁷ The employment discrimination cases in higher education decided prior to the Supreme Court's decision in *North Haven* do not address the question of student aid. See, e.g., *Seattle University v. HEW*, 621 F.2d 992 (9th Cir. 1980), *vacated*, 102 S. Ct. 2264 (1982); *Junior College District of St. Louis v. Califano*, 597 F.2d 119 (8th Cir. 1979), *cert. denied*, 444 U.S. 172 (1979).

¹⁶⁸ 543 F. Supp. 321 (E.D. Va. 1982).

¹⁶⁹ *Id.* at 330.

The court's argument is unconvincing in two respects. First, student aid is provided to an individual for the sole purpose of attending a post-secondary institution. Should a student terminate his or her matriculation at some college or university, he or she will cease to receive the funding. Second, to remain consistent with the "services rendered" approach, most federal research grants and government contracts with higher education institutions would have to be exempted from Title IX restrictions, since the college or university is providing a service to the federal government in exchange for funds.¹⁷⁰ Yet it is quite clear that this line of reasoning contravenes the express language of Section 901 which proscribes discrimination in any program or activity receiving federal financial assistance.

In analogous Title VI litigation, the court in *Bob Jones University v. Johnson*¹⁷¹ deduced two ways in which Veteran's Administration benefits aided Bob Jones University.

First, payments to veterans enrolled at approved schools serve to defray the costs of the educational program of the schools thereby releasing institutional funds which would, in the absence of federal assistance, be spent on the student

A second reason supporting the proposition that Bob Jones receives federal assistance is that the participation of veterans who — but for the availability of federal funds — would not enter the educational programs of the approved school, benefits the school by enlarging the pool of qualified applicants upon which it can draw for its educational program.¹⁷²

By and large, all courts that have dealt with the issue agree that student aid flows ultimately from the federal government to the institution. Even in *University of Richmond* the court recognized that at least some part of a college or university is aided by this influx of federal monies.¹⁷³

The determination of whether the Department of Education's definition of "recipient" is ultra vires lies in the court's assessment of the nature of student aid and the validity of the infection theory. The mistake perpetuated by many lower courts is to make judgments based upon a misunderstanding of the nature of student aid¹⁷⁴ and an over-reliance upon the fund termination clause.¹⁷⁵ A careful reading of Congress' intended purpose for student aid in higher education yields the conclusion that federal assistance was never intended to support discrimination in education.¹⁷⁶

¹⁷⁰ See, e.g., 20 U.S.C. § 1221d; 20 U.S.C. § 3051.

¹⁷¹ 396 F. Supp. 597 (D.S.C. 1974).

¹⁷² *Id.* at 603. See *supra* note 78; *contra Stewart*, 430 F. Supp. at 1314.

¹⁷³ *University of Richmond*, 543 F. Supp. at 328.

¹⁷⁴ See *id.* at 321.

¹⁷⁵ See *Grove City*, 687 F.2d 684; *Haffer*, 524 F. Supp. 631.

¹⁷⁶ See, e.g., *supra* note 61 and accompanying text.

Congress' continued application of Title IX to collegiate athletics supports the notion that indirect aid can constitute "federal financial assistance" and lends credence to the infection theory.¹⁷⁷ Many courts have been offended by the argument that major institutions can, "at whim," divide themselves into discrete entities for the sole purpose of rationalizing discrimination.¹⁷⁸

As with the Department of Education's definition of "program," there is not a sufficient basis for the claim that the Department went beyond its authority in promulgating its Title IX regulations related to "recipient." Therefore, the Department's definition of recipient should be accepted by the Supreme Court.

IV. CONCLUSION

It is clear from a thorough analysis of legislative history and post-enactment Congressional debate that the Department of Education's definitions of "program" and "recipient" under Title IX are not ultra vires. Courts that have thoroughly analyzed Congressional intent have consistently upheld the enforceability of the Department's Title IX regulations. Parallel Title VI and Section 504 legislation has also been interpreted as supporting an institution-wide approach to the meaning of "education program" and as justifying the inclusion of student financial aid as "federal financial assistance" to a college or university.

A narrow definition of "education program" assumes that an educational institution can be divided into distinct, unrelated parts. A close reading of the 1974 and 1976 amendments to Title IX together with the remarks of Title IX's chief sponsor supports the conclusion that Congress never intended a narrow definition of "education program." Moreover, both the House and the Senate have defeated all resolutions and amendments that would define "program" narrowly. The correct perception seems to be that a college's "education program" is made up of interrelated parts that are centrally managed.

An understanding of a higher education institution's administration is also central to the concept of "federal financial assistance." Because of the fiscal control that top-level college administrations exercise over institutional affairs, it does not matter whether federal aid flows from a student to a college that discriminates or whether funds can be moved from one activity to another with discrimination as the result. The effect is the same as if funds were given directly for a discriminatory purpose. Pell grants, for example, are given to qualified students who pay to enroll in undergraduate academic programs. Federal aid that benefits a student ultimately benefits the school in which he or she is enrolled. Furthermore, the defeat of repeated attempts to exempt collegiate athletics from Title IX implies that Congress intended indirect aid to be considered "federal financial assistance."

¹⁷⁷See, e.g., 120 CONG. REC. 15,322 (1974).

¹⁷⁸See, e.g., *Wright*, 520 F. Supp. at 792.

In adopting Title IX, Congress attempted to provide both sexes with the same quality of opportunity to pursue higher education. Private universities and colleges have resisted federal government regulations, however, a narrow view of the applicability of Title IX would subvert the Congressional intent in providing federal aid to assist students in meeting their educational goals. Title IX must apply to both public and private institutions if it is to effectuate its goal of eliminating sexual discrimination in higher education programs.

EDITOR'S NOTE: On February 28, 1984, subsequent to the submission of this article, the United States Supreme Court issued its opinion on *Grove City College v. Bell*.¹⁷⁹ Justice White wrote the opinion of the Court, with all nine justices concurring that Title IX coverage was triggered because some of the college's students received Pell grants to pay for their education. The Court concluded that Title IX coverage was not foreclosed merely because federal funds were granted to the students rather than to the college's educational programs, basing its conclusion on,

the structure of the Education Amendments of 1972, the clear statutory language, the legislative history (including post-enactment history) showing Congress' awareness that the student assistant programs established by the Amendments significantly aided colleges and universities, and the longstanding administrative construction of the phrase "receiving Federal financial assistance" as including assistance to a student who uses it at a particular institution, . . .¹⁸⁰

The Court further held that refusing to execute a proper Assurance of Compliance warrants the Department of Education's termination of federal assistance to the student financial aid program¹⁸¹ and that there is no infringement of first amendment rights when a college is required to comply with the prohibition of discrimination of Title IX as a condition of its continued eligibility to participate in the Pell program.¹⁸²

However, the majority of the Court also held that the receipt of Pell Grants did not trigger institution-wide coverage under Title IX.¹⁸³ In purpose and effect, Pell Grants represented financial assistance to the college's own financial aid program and it is that program which may properly be regulated under Title IX's non-discrimination provision. The fact that federal funds may eventually reach the college's general operating budget could not subject it to institution-wide coverage.¹⁸⁴ Justice White stated, "we have found no persuasive evidence

¹⁷⁹104 S.Ct. 1211 (1984).

¹⁸⁰*Id.* at 1213 (Court's Syllabus).

¹⁸¹*Id.* at 1222.

¹⁸²*Id.* at 1223.

¹⁸³*Id.* at 1222. Justices Brennan, Marshall and Stevens dissented from this portion of the decision.

¹⁸⁴*Id.*

suggesting that Congress intended the Department's regulatory authority follow federally aided students from classroom to classroom, building to building, or activity to activity."¹⁸⁵

Justice Brennan, joined by Justice Marshall in partial dissent,¹⁸⁶ stated that program specific language in Title IX was designed to insure that the reach of the statute is dependent upon the scope of federal financial assistance provided to an institution. Justice Brennan stated,

When that financial assistance is clearly intended to serve as federal aid for the entire institution, the institution as a whole should be covered by the statute's prohibition of sex discrimination. Any other interpretation clearly disregards the intent of Congress and severely weakens the added discrimination provisions included in Title IX.¹⁸⁷

Justice Stevens, in his concurrence, stated that the program specificity issue was not in dispute and therefore needed not be decided but that,

a factual inquiry is nevertheless necessary as to which of Grove City's programs and activities can be said to receive or benefit from financial assistance Until we know something about the character of the particular program, it is inappropriate to give advice about an issue that is not before us.¹⁸⁸

Justice Powell, Chief Justice Burger and Justice O'Connor, in Justice Powell's concurrence, chastised the Department of Education for "having taken a small independent college, which it acknowledges has engaged no discrimination whatever, through six years of litigation with the full weight of the federal government opposing it."¹⁸⁹

¹⁸⁵*Id.*

¹⁸⁶*Id.* at 1226 (Brennan, J., dissenting in part).

¹⁸⁷*Id.* at 1237.

¹⁸⁸*Id.* at 1225 (Stevens, J., concurring).

¹⁸⁹*Id.* at 1224 (Powell, J., concurring).

