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

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I. INTRODUCTION

Presidents of private colleges and universities have argued strongly for institutional autonomy, and in particular, freedom from federal government regulation. 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. This argument will be tested before the U.S. Supreme Court during the 1983-84 term in the appeal of Grove City College v. Bell, where college officials assert that the Assurance of Compliance Form required by the Department of Education Title IX enforcement regulations violates First Amendment rights of academic freedom and association.

Grove City College also contends that (1) its programs and activities are not subject to Title IX of the Education Amendments of 1972 solely because some of its students receive federal funds (Basic Education Opportunity ("Pell") Grants and Guaranteed Student Loans (G.S.L.'s)) 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 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 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 federal 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:

(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 sub-unit, successor, assignee or transferee thereof.\textsuperscript{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.\textsuperscript{17} Two main issues are raised by the Grove City case and will be analyzed in this article.\textsuperscript{18} First, should the Court construe a postsecondary institution as a "program" for purposes of Title IX? Second, should aid to students be considered federal financial assistance to the institution?

II. POSTSECONDARY 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.\textsuperscript{19} An act that the corporation has no power to perform is void.\textsuperscript{20} An act in excess of power is voidable if the parties can be returned to the position they occupied before the act.\textsuperscript{21} When evaluating the actions of a public corporation, the 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 granted to the public corporation and thus, ultra vires.\textsuperscript{22}

The ultra vires doctrine can be applied to administrative agency regulations.\textsuperscript{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.\textsuperscript{24}

Thus, in order to analyze if an administrative agency's regulations are enforceable, the 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 statute\textsuperscript{25} and next to the legislative intent behind the statute.\textsuperscript{26} If the court concludes that the agency 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
postsecondary institutions that are, as individual units, recipients of federal funding. 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

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). 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 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 § 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education . . .

Congress was concerned enough about this exemption to make it retroactive to July 1, 1972. 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, 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 scholarship awards in beauty pageants from the restrictions of Title IX. Again, this amendment was unnecessary 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 to Title VI of the Civil Rights Act of 1964 34 and to Section 504 of the Rehabilitation Act of 1973 35 as well; 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 activity . . . 41

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 those who are
especially well qualified." 42

Senator Bayh was also concerned about the shortage of women
employed at higher professional levels and included the clause "or
any school or department of graduate education, which is a
recipient of Federal financial assistance for any 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 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 exception. 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 themselves receive direct Federal assistance. He adds the caveat, "we permit no exceptions," implying that no available services or studies within an institution are exempt from Title IX.

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

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. "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 benefitting 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."
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. However, the Committee took no action on the matter.

In the House, Representative Martin introduced a broad disapproval resolution, which failed to pass. The HEW regulations went into effect, unchanged by Congress, on July 21, 1975.

On the same day that the HEW regulations took effect, Senator Helms introduced a bill to amend Title IX. 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" mean only programs and activities which are an integral part of the required curriculum of an educational institution subject to this title.

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 . . . " 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.\textsuperscript{61}

Senator McClure's amendment was defeated on the floor of the Senate by a 52-28 vote margin.\textsuperscript{62}

Although the statutory 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 definition of "education program and activity," is 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.

3. Judicial Interpretation. Court opinions fall on both sides of the question of whether a postsecondary 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.

(a) Courts' views of legislative history of Title IX

One of the most extensive discussions of Title IX legislative history comes from the U.S. Court of Appeals for the Third Circuit in Grove City College v. Bell. 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.
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.\(^61\) In finding for the plaintiffs, the U.S. 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 narrow 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 the 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 Complaince invalid. Judge Brown, speaking for the majority of the U.S. Court of Appeals for the Sixth Circuit, concluded "we find that the legislative history of . . . Title IX reveal[s] no indication that Congress contemplated that an entire educational institution could constitute a single 'program or activity.'" However, Chief Judge Edwards registered a vigorous dissent. After an extensive discussion of the historical struggle of women for equal rights in the U.S., 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. Hillsdale is currently on appeal.

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. 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.
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. Nonetheless, the Sixth Circuit erroneously concluded that all undergraduate programs at private postsecondary institutions would have been covered in the 1971 proposed amendment. The 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 amendment 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. 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.'" The court based this conclusion in part on a dialogue between Representatives Waggoner and Steiger and Representative Green, the author and floor manager in the House of the measure (Title X) that eventually became incorporated in Title IX.
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 of Oregon. With Federal funds.

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

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

Mr. STEIGER of Wisconsin. 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 on 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 the 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 question in the negative 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 Rep. Steiger's first question:

Mrs. GREEN of Oregon. 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 of Wisconsin. 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 of Oregon. The purpose of Title X is to end discrimination in all institutions of higher education, yes, across the board . . . 82

Consequently, the Sixth Circuit wrongly concludes 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. Moreover, Bennett was reversed without opinion by the Fifth Circuit and is currently on appeal.

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 § 504 (i)

Title VI

The leading case supporting the application of an institutional approach to Title VI is Bob Jones University v. Johnson. An Administrative Law Judge had terminated the rights of eligible veterans attending Bob Jones University from receiving veterans' educational benefits because the University failed to comply with Title VI. 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.

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.

[The participation of veterans who--but for the availability of federal funds--would not enter the education programs of the approved school, benefits the school by enlarging the pool of qualified applicants upon which it can draw for its educational program.}
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 nondiscriminatory 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 H.E.W. cited another case, Board of Public Instruction v. Finch. 94 From 1965 to 1968, a segregated Florida school district and H.E.W. engaged in negotiations in an effort to arrive at an acceptable desegregation plan for the school district. The pace of progress toward desegregation was slow; finally, H.E.W. broke off negotiations as fruitless and commenced administrative proceedings under Title VI. An H.E.W. 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

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 U.S. 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 its decision 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, 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, court interpretation of both should be parallel.

(ii) Section 504

Section 504 of the Rehabilitation Act of 1973\textsuperscript{100} contains language similar to 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."\textsuperscript{101} Consistently, courts have applied Section 504 to all available programs and activities within an institution that receives federal financial assistance.\textsuperscript{102}

Columbia University challenged an expansive interpretation of "program" in Wright v. Columbia University,\textsuperscript{103} claiming that its football program received no direct federal funding and therefore was outside the coverage of 504.\textsuperscript{104} The district 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.\textsuperscript{105} The Wright court also concluded that Columbia University viewed itself as a singular institution, not "a composite of discrete entities."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{109} Further, such
definitions would allow schools to use federal dollars in
nondiscriminatory programs, 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.\textsuperscript{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, with final approval by a Board
of Trustees or Board of Regents.\textsuperscript{111} Decision-making processes
are shared between individual department chairpersons or directors
and their deans.\textsuperscript{112} Some courts have termed this
"infection,"\textsuperscript{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 postsecondary 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 its 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 position is 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" 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's argument in support of its definition of "recipient" centers around the infection theory. When a college or university 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 gives little guidance as to the nature of aid in a "program or activity receiving federal financial assistance." 116 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,

"but 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.

2. Legislative History

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

Both attempts to exclude intercollegiate athletics from the coverage of Title IX failed.\textsuperscript{121} Senator Tower introduced an amendment, defeated in Committee, to exclude revenue-producing intercollegiate athletic activities from Title IX.\textsuperscript{122} He reintroduced the amendment in 1975 and it was defeated by the Senate.\textsuperscript{123}

3. Judicial Interpretations of Title IX

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

In Haffer v. Temple University,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

The trial court in Iron Arrow Honor Society v. Hufstedler,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.\textsuperscript{130}

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

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 \textit{direct} Federal financial assistance.\textsuperscript{133}

Despite the confidence of the \textit{Othen} court, however, Congress' use of "programs" and "recipients" is far from precise.\textsuperscript{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.\textsuperscript{135} Moreover, 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.\textsuperscript{136}
Nonetheless, a similar link between "program" and "recipient" was drawn by the district court in *University of Richmond v. Bell.* Judge Warriner concluded:

> Were the court to adopt plaintiff's argument, the programmatic institution 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 direct aid received by the university athletic program does not bring them within the ambit of Title IX.  

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.  

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.

**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,* 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 HUD with respect to . . .
the Law School dormitory does not help the
plaintiff, since the discrimination alleged here
did not involve [the dormitory] but rather the
minority admissions policy.\textsuperscript{141}

As in Othen, the \textit{Stewart} court considered the amount of aid
involved to be "\textit{de minimus.}"\textsuperscript{142} But the district court in
\textit{Flanagan v. President and Directors of Georgetown College}\textsuperscript{143}
criticized the court's reasoning in \textit{Stewart}, stating that:

this 'pinpoint' approach is ostensibly based on
Sec. 602, . . . which provides that compliance
with Title VI may be effected by the termination
of such program or activity in which
discrimination is found.\textsuperscript{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.\textsuperscript{145}

Other Section 504 decisions have come down squarely for the
inclusion of indirect aid. In \textit{Poole v. South Plainfield Board of
Education},\textsuperscript{146} Judge Ackerman found it
absurd to ban discrimination in a discrete area
of 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 benefitting 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 504 strictures. Columbia's construction of Section 504 would sanction this circumvention of federal policy against discrimination for institutions benefitting 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 funding 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 receives direct federal funds.

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. 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 the Pell Grant. The Pell Grant was established as the Basic Educational Opportunities Grants (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 System or the Alternate Disbursement System.
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. The Secretary advances funds for each award year, from time to time, to each institution based upon the estimate of the institution's need for funds to pay Pell Grants to its students.

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

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)

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

2. **Legislative History**

While preenactment discussion is vague and does not specifically speak to the types of funds that can encompass federal financial assistance, it is quite clear from post-enactment legislative action that the Senate intended to include student aid.
In 1976, Sen. McClure proposed a second amendment to Title IX that provided:

For the purposes of this chapter, federal financial assistance received means assistance received by the institution directly from the federal government.¹⁵⁹

Sen. McClure made it very clear what the intended effect of his proposed amendment would 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 we should take the position that these federal funds can be used to further discrimination based on sex.\textsuperscript{161}

Sen. Bayh concurred,

If a student is benefitted, the school is benefitted. 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.\textsuperscript{162}

The McClure amendment was defeated by a 50-30 vote margin on the same day that it was introduced.\textsuperscript{163}

3. **Court Interpretation**

After discussing the defeat of the amendment 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].\textsuperscript{164}
Even the Sixth Circuit in Hillsdale admitted that although it felt that Title IX was program-specific, the college was a recipient of the aid to its students.\textsuperscript{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.

It 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.\textsuperscript{166}

Only one court has argued that aid to students is not aid to the institution.\textsuperscript{167} The district court in University of Richmond v. Bell,\textsuperscript{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'."\textsuperscript{169}

The court's argument is unconvincing in two respects. First, student aid is provided to an individual for the sole purpose of attending a postsecondary 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. Yet it is quite clear that this line of reasoning contravenes the express language of § 901 which proscribes discrimination in any program or activity receiving federal financial assistance.

In analogous Title VI litigation, the court in Bob Jones v. Johnson 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 by enlarging the pool of qualified applicants upon which it can draw for its educational program.

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 the University of Richmond case the court recognized that at least some part of a college or university is aided by this influx of federal monies.
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 aid and an overreliance upon the fund termination clause. 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.

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. 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.

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 also has been interpreted to support an institution wide approach to the meaning of "education program" and to justify 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 top-level college administration's 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, Congress's repeated defeat of attempts to exempt collegiate athletics from Title IX also implies that Congress intended indirect aid to be considered "federal financial assistance."

In adopting Title IX, Congress attempted to provide to both sexes the same quality of opportunity to pursue higher education. Private universities and colleges have resisted federal government regulations, but 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 effect its goal of eliminating sexual discrimination in higher education programs.
FOOTNOTES

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3. 687 F.2d 684 (3rd Cir. 1982), cert. granted, 103 S. Ct. 1181 (1983), ___ U.S. ___.

4. 34 C.F.R. § 106.4(a). The regulation provides in pertinent part:

   Every application for Federal financial assistance for any education program or activity shall as a 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.
5. Petitioner's Brief for a Writ of Certiorari, Grove City v. Bell, No. 82-792.


9. Petitioner's Brief for a Writ of Certiorari, Grove City v. Bell, No. 82-72.


   (a) Prohibition against discrimination; exceptions.

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


13. 34 C.F.R. 6106.
14. *Grove City College*, *supra*, at 690.

15. 34 C.F.R. 6106.2(g)(1)(ii).

16. 34 C.F.R. 6106.2(h).

17. *Grove City College*, *supra*, at 690.

In the district court, the Department claimed that the availability of Guaranteed Student Loans (GSL's) and Pell Grants made Grove 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. (n.10). See also, *Hillsdale College v. Department of H.E.W.*, 696 F.2d 418 (1982) 424, n.17.

18. Two secondary issues are also raised in the *Grove City* case: 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?, does termination of aid to students because an institution does not comply with Department regulations violate the Constitutional guarantee of free association? and

The argument that termination of student aid is a violation of the right to free association was raised in *Bob Jones v. Johnson*, 306 F. Supp. 597 (D.S.C. 1974), 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 in <em>Cannon v. Univ. of Chicago</em>, 441 U.S. 677, 704, 99 S. Ct. 1946, 1961 (1977), noted: 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 <em>Gardner v. State of Alabama</em>, 385 F.2d 804 (5th Cir. 1967), <em>cert. denied</em>, 389 U.S. 1046, 88 S. Ct. 773, 19 L.Ed.2d 839 (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 <em>Gardner</em>, 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 <em>Grove City v. Bell</em>, 687 F.2d 684 (1982) 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, the "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.


29. The 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. 30156).


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


39. 117 Cong. Rec. 30412 (1971),

Senator Bayh, the amendment's sponsor, stated:

the 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 . . . "

41. 117 Cong. Rec. at 30156 (1971) (emphasis added).

42. Id. at 30155-56 (1971).

43. Id. at 30156 (1971).

44. Id. at 3048-15 (1971).

45. 118 Cong. Rec. 5802-03 (1972).

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

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 that in large part became § 901(a) and (b) (emphasis added).

48. The Supreme Court gave post-enactment legislative history a great deal of credence as it related to Congress' intent of Title IX to encompass employment discrimination in North Haven v. Bell, 456 U.S. 512, 102 S.Ct. 1912 (1982). Certainly, there are problems with post-enactment history that make it less persuasive than pre-enactment history, but nevertheless, it should
be entered into the legislative intent equation. See, Ultra Vires Challenges, supra.


52. This "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 dissapproval 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); Harris, Congressional Control of Administration 204-38 (1964).


54. 121 Cong. Rec. 17301 (1975) (citations omitted).
55. Sec. 33 Cong. Q. 1298 (1975). Sen. Laxalt's resolution suffered the same fate; see note 53, supra.


57. See note 53, supra.


62. Id. at 28147.

63. Grove City College supra.

64. Id. at 697.

66. Id. at 533.

67. Id. at 535.

68. Grove City College, at 691-695; Haffer, at 533-536.


70. Id. at 427.

71. Id. at 425-426. See notes 39-45, supra.

72. Id. at 436-437.

73. See supra note 69.

74. 689 F.2d 418 at 426.

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

76. See note 41, supra and accompanying text.

77. See notes 39-45, supra.
78. 696 F.2d 418, 427 quoting *Ultra Vires Challenges*, *supra*, at 181.


80. Id.

81. Id. (emphasis supplied).

82. Id.

83. 696 F.2d 418, 427.

84. 525 F.Supp. 77 (N.D. Texas, 1981), 698 F.2d 1215 (5th Cir. 1983), reversed without opinion.


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 Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912 (1982). *North Haven* was an employment discrimination case and the Supreme Court spent a great deal of discussion and analysis on legislative
history behind employment discrimination proscriptions in Title IX, then on trying to define, "program" (at 1926).

86. 698 F.2d 1215 (5th Cir. 1983).


88. Id. at 598.

89. Id. at 600.

90. Id. at 603 (emphasis added).

91. Id. at 604 (emphasis added).


94. 414 F.2d 1068 (5th Cir. 1969).

95. Id. 1070-71.

96. Id. at 1078-79.

98. Id. at 568.

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

100. 29 U.S.C. § 701 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 participation in, be denied benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.


104. Id. 791.
105. Id. at 792.

106. Id.

107. Id. see also Poole v. South Plainfield Board of Education, supra at 951.

108. For 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.


112. See e.g. D. B. Hornby, "Delegating Authority to the Community of Scholars," 1975 Duke L. J. 279.

113. Finch supra 1078.
114. The Supreme Court failed to define "program" in North Haven v. Bell, supra at 1927.


116. See note 10, supra.


118. Id.

119. See e.g. Haffer v. Temple University, supra; Grove City College, supra; note 37, supra.

120. Sec. 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.

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


124. 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 Texas Law Review, 103, 112; Grove City College, supra at 698-699.


129. Id. at 503.


132. Id. at 1378.


134. Bennett v. West Texas University, supra, relies heavily on the conclusions developed on Othen (see, e.g. 525 F. Supp. 77 at 79). However, the Sixth Circuit reversed Bennett without opinion.

135. 507 F. Supp. at 1390. In Othen, the amount of federal funds received by the District in 1979 amounted to twelve-hundredths of one percent of the total budget. The court concluded "this de minimus percent of the district operating budget can not form the basis for invocation of Title IX." It would be difficult for the Department of Education to determine on a case by case basis 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. 699 F.2d at 312.


138. Id. at 329.

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


142. 430 F. Supp. at 1312.


144. Id. at 383.

145. Id. at 384. See also Bob Jones University v. Johnson, supra, at 602-603.

147.  *Id.* at 95.  It should also be noted that the Supreme Court's decision in *Southeastern Community College v. Davis*, 422 U.S. at 400, applied § 504 to a nursing program in a school receiving federal funds without inquiry into whether the nursing program itself received direct federal moneys.


149.  *Id.* at 792.

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

151.  34 C.F.R. § 690.71.

152.  34 C.F.R. § 690.91.

153.  34 C.F.R. § 690.72.

154.  34 C.F.R. § 690.74.

155.  34 C.F.R. § 690.92.

156.  34 C.F.R. § 690.94.

157.  34 C.F.R. § 690.79.

158.  34 C.F.R. § 690.94.

160. Id. at 28145.

161. Id.

162. Id.

163. Id. at 28148.

164. Grove City, supra at 695, see also Hoffer, supra at 540.

165. Hillsdale, supra at 424, see also Rice, supra at 339.

166. Hillsdale, supra 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. H.E.W., 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).


169. Id. at 330.

171. 396 F. Supp. 597.

172. Id. at 603. See supra, note 78. See contra, Stewart, supra at 1314.

173. 543 F. Supp. at 328.

174. See note 168 and accompanying text, supra.

175. See note 119, supra.

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

177. See e.g. 120 Cong. Rec. 15322 (1974).

178. 520 F.Supp. 789, at 792.