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## Hews Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges

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## COMMENTS

### HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges

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#### INTRODUCTION

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.<sup>1</sup> In addition, title IX authorizes and directs the federal

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1. Education Amendments of 1972 § 901, 20 U.S.C. § 1681 (Supp. IV, 1974). Title

agencies responsible for administering the financial assistance to effectuate the title's prohibition against sex discrimination by

IX of the cited statute is composed of seven sections, §§ 901-907. Hereafter all citations will be to the *United States Code*.

20 U.S.C. § 1681 (Supp. IV, 1974) provides:

(a) Prohibition against discrimination; 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, except that:

(1) Classes of educational institutions subject to prohibition.

In regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned changes in admissions.

In regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets.

This section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine.

This section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine; and

(5) Public educational institutions with traditional and continuing admissions policy.

In regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex; and

(6) Social fraternities or sororities; voluntary youth service organizations.

This section shall not apply to membership practices—

(A) 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, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.

promulgating regulations.<sup>2</sup> Exercising that rulemaking authority, the Department of Health, Education, and Welfare (HEW) issued in June 1975, its final title IX regulation.<sup>3</sup> Following review

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(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance.

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) Educational institution defined.

For purposes of this chapter an educational institution means 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.

2. 20 U.S.C. § 1682 (Supp. IV, 1974) provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, 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, or (2) by any other means authorized by law: *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 the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

3. 45 C.F.R. § 86 (1975). The regulation was published in the June 4, 1975 edition of the Federal Register. 40 Fed. Reg. 24128 (1975).

by Congress,<sup>4</sup> the regulation became effective July 21, 1975.<sup>5</sup>

Although title IX and HEW's regulation raise several significant legal issues,<sup>6</sup> this comment identifies and evaluates only one:

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4. See notes 60-74 and accompanying text *infra*.

5. 45 C.F.R. § 86.1 (1975).

6. For example, title IX excepts private undergraduate schools from the requirement not to discriminate in admissions; but the title includes within the scope of the prohibition "professional" schools. 20 U.S.C. § 1681(a)(1) (Supp. IV, 1974). There is an overlap between the inclusion and the exclusion and hence a conflict that HEW attempted to resolve in the regulation

With respect to coverage of admissions to institutions of professional and vocational education, the Secretary has interpreted the statute as excluding admissions coverage of professional and vocational programs offered at private undergraduate schools. Thus, admission to programs leading to a first degree in fields such as teaching, engineering, and architecture at such private colleges will be exempt under paragraph 86.15 (d). A number of comments were received urging the Secretary to change his interpretation of the statute in this area. Even after reassessing the Department's position on this issue, the Secretary believes that Congress did not address the overlap between the term "professional" and the term "undergraduate." Thus, the Secretary remains convinced that, while that section of the statute pertaining to admissions might be read as including professional degrees wherever they are offered, the statute can also be read as stating that admissions to private undergraduate schools were to be totally exempt.

40 Fed. Reg. 24130 (1975).

Also, many women's organizations argued that HEW, through title IX regulations, should monitor and censor sexism and sex stereotyping in textbooks, primers, and readers. HEW declined the invitation on constitutional grounds:

As stated in the preamble to the proposed regulation, the Department recognizes that sex stereotyping in textbooks and curricular materials is a serious matter. However, the imposition of restrictions in this area would inevitably limit communication and would thrust the Department into the role of Federal censor. There is no evidence in the legislative history that the proscription in title IX against sex discrimination should be interpreted as requiring, prohibiting or limiting the use of any such material. Normal rules of statutory construction require the Department, wherever possible, to interpret statutory language in such a way as to avoid potential conflicts with the Constitution. Accordingly, the Department has construed title IX as not reaching textbooks and curricular materials on the ground that to follow another interpretation might place the Department in a position of limiting free expression in violation of the First Amendment.

40 Fed. Reg. 24135 (1975). A feminist responded to this argument in these terms:

Sex bias in materials is one of the most serious kinds of bias in education, probably among the most damaging. HEW has never backed up its argument on the first amendment by a legal brief.

I think it should be noted we have looked very carefully at the legal issues since the NOW legal defense fund certainly does not want to win rights for women at the expense of us all. We concluded that in the area of public elementary and secondary education, that there is no first amendment bar to some kind of coverage of textbooks which are already centrally selected by public school officials, and in higher education I think there is a somewhat different question.

Is HEW's title IX regulation ultra vires, that is, does the regulation improperly extend or modify the will of Congress as expressed in title IX? In light of this restricted focus, the comment is limited in two other important ways. First, the history and scope of title IX and HEW's regulation are considered only to the extent that they illuminate the ultra vires issue. Second, this comment does not enter into the debate over the wisdom and desirability of the social policy decisions reflected in HEW's title IX regulation;<sup>7</sup> rather, it attempts only to determine whether the regulation is inconsistent with the original title IX legislation or otherwise conflicts with legal principles.<sup>8</sup>

### I. HISTORY OF TITLE IX

Two fundamental historical facts underlie passage of title IX in 1972: (1) the national resurgence of the women's movement, particularly among academic women, in the second half of the 1960's, and (2) the emergence and publication of evidence that sex discrimination was widely practiced in American education.

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We submitted a legal memorandum to HEW to that effect, and that [they?], unfortunately, have ignored it and have decided to go on without any coverage at all.

*Hearings on Sex Discrimination and Sex Stereotyping in Vocational Education Before the Subcomm. on Elementary, Secondary, and Vocational Educational of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 183 (1975) (Ms. Holly Knox, Director, Project on Equal Education Right, National Organization of Women) [hereinafter cited as Hearings on Vocational Education].* The National Organization of Women (NOW) memorandum referred to is reprinted at 121 CONG. REC. S774-77 (daily ed. Jan. 23, 1975).

7. A large portion of that debate is found in *Hearings on Sex Discrimination Regulations Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. (1975) [hereinafter cited as 1975 Hearings on Title IX Regulation].*

8. This comment is restricted in its inquiry to those principles and policies that would be cognizable by a court reviewing the title IX regulation and exercising a proper measure of judicial self-restraint.

Professor Kenneth Culp Davis has identified the limitations on judicial review of administrative regulations in these terms:

In reviewing a legislative rule [promulgated by an agency] a court is free to make three inquiries: (1) whether the rule is within the delegated authority, (2) whether it is reasonable, and (3) whether it was issued pursuant to proper procedure. But the court is not free to substitute its judgment as to the desirability or wisdom of the rule, for the legislative body, by its delegation to the agency, has committed those questions to administrative judgment and not to judicial judgment.

1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.05, at 314-15 (1958).

### A. *The Women's Movement and Higher Education*

The resurgence of the women's movement in America generated a politically active and somewhat discrete submovement, the academic women's movement, sufficiently self-interested to take political and legal steps to eradicate sex discrimination in American education. Academic women's groups, generally more conservative and less radical than other feminist organizations, effectively focused their political and legal efforts not on the rights and advancement of women in general but rather on the rights and status of women within academe.<sup>9</sup>

Early legislation prohibiting sex discrimination, however, provided academic women no legal tools with which to attack discrimination in education. Title VII of the Civil Rights Act of 1964<sup>10</sup> prohibited sex discrimination in employment, but educational institutions were expressly exempted from the coverage of the title.<sup>11</sup> The Equal Pay Act of 1963,<sup>12</sup> designed to counter "the widespread and blatantly discriminatory practice of paying women less than men for the same work,"<sup>13</sup> likewise excluded academic women from its coverage.<sup>14</sup>

9. For a general history of the academic women's movement and the political action taken by academic women see Klotzburger, *Political Action by Academic Women*, in *ACADEMIC WOMEN ON THE MOVE* 359 (1973).

10. 78 Stat. 253 (1964), as amended, 42 U.S.C. § 2000e to e-17 (Supp. IV, 1974).

11. The original § 702 of the Civil Rights Act of 1964, 78 Stat. 255, provided that:

This title shall not apply to . . . an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

12. 29 U.S.C. § 206(d) (1970). The Equal Pay Act of 1963 was an amendment to the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.* (1970).

13. Murphy & Ross, *Liberating Women—Legally Speaking*, in *WITH JUSTICE FOR SOME* 112 (1970); see B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW* 440 (1975) [hereinafter cited as B. BABCOCK]. See generally Johnson, *The Equal Pay Act of 1963: A Practical Analysis*, 24 *DRAKE L. REV.* 570 (1975).

14. When Congress enacted the Equal Pay Act of 1963, the Fair Labor Standards Act of 1938 provided in pertinent part that:

The provisions of sections [206] and [207] of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity . . . .

Fair Labor Standards Amendment of 1961, Pub. L. No. 87-30, § 9(a)(1), 75 Stat. 71, as amended, 29 U.S.C. § 213(a) (Supp. IV, 1974). To clarify that this exception applied to teachers, it was amended in 1966 by adding after "or professional capacity" the following: "(including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools)." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 214, 80 Stat. 837 (1966), as amended, 29 U.S.C. § 213(a) (Supp. IV, 1974).

Indeed, prior to 1972, academic women's groups had only one effective legal tool against sex discrimination in higher education—Executive Order No. 11,246.<sup>15</sup> That order prohibits sex-based and other forms of discrimination in employment by employers, including colleges and universities,<sup>16</sup> holding contracts with the federal government. Once a contract is made, the entire employing institution must comply with the nondiscrimination requirements even though only one department is involved in performing the contract.<sup>17</sup> Also, the executive order requires affirmative action whenever necessary to remedy effects of past discrimination.<sup>18</sup>

The most prominent and active of the academic women's groups, Women's Equity Action League (WEAL),<sup>19</sup> conducted a massive campaign against sex discrimination in education under Executive Order No. 11,246. In January 1970, WEAL filed with the Department of Labor a class action complaint against every college and university in the United States. Other academic women's groups soon followed WEAL's example and brought complaints against the nation's law schools and such individual schools as Harvard. The Department of Labor delegated its investigative responsibilities to HEW, which, after some prodding, responded to the charges with investigations of many of the col-

15. 3 C.F.R. 169 (1975), 42 U.S.C. § 2000e (1970).

Executive Order No. 11,246 was first issued by President Johnson on September 28, 1965. It prohibited discrimination on the basis of race, color, religion, and national origin, but *not* sex. Pressure from women's groups, however, resulted in an amendment on October 17, 1967, extending the prohibition to sex discrimination. Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 comp.) (effective October 13, 1968). All references in the text or footnotes to Executive Order No. 11,246 are to the order as amended by Executive Order No. 11,375.

One feminist, commenting on Executive Order No. 11,246, stated that, "[u]ntil Title VII was amended in March 1972, the Executive Order was the *only* remedy for discrimination against academic women." Sandler, *A Little Help From Our Government: WEAL and Contract Compliance*, in *ACADEMIC WOMEN ON THE MOVE* 439, 441 (1973) (emphasis in original) [hereinafter cited as Sandler].

For a discussion of the uses of Executive Order No. 11,246 as a legal tool against sex bias see B. BABCOCK, *supra* note 13, at 509-59.

16. Most colleges and universities in America hold contracts, usually for research, with the federal government and thus come within the scope of the order's prohibition. Sandler 440.

17. B. BABCOCK 510; Sandler 442.

18. Sandler 441-42.

19. WEAL broke off from the National Organization of Women (NOW) in the fall of 1968. The split was prompted by a disagreement over the abortion issue. WEAL focuses its "energies on legal and economic discrimination in education and employment and makes a special effort to recruit women who already occupy positions of power." Freeman, *Women on the Move: The Roots of Revolt*, in *ACADEMIC WOMEN ON THE MOVE* 1, 25 (1973).



leges and universities complained of by academic women's groups.<sup>20</sup>

These actions by academic women under Executive Order No. 11,246 focused the attention of both the federal government and the general public on sex discrimination in American higher education and thereby served to prepare the political arena for passage of title IX. WEAL's complaints were accompanied by extensive materials documenting and substantiating that group's charges of discrimination.<sup>21</sup> Further, the resulting investigations of colleges and universities by federal agencies responsible for enforcement of Executive Order No. 11,246 brought to public attention additional evidence of sex bias in higher education.<sup>22</sup>

### B. *Evidence of Sex Discrimination in Higher Education*

Congressional hearings in 1970 first served to widely publicize evidence of sex discrimination in American education.<sup>23</sup> Those hearings, as well as subsequent studies, revealed a clear pattern of discrimination against women students in admission to higher education,<sup>24</sup> particularly to elite private universities.<sup>25</sup> Many witnesses and researchers also alleged discrimination in the award of financial aid to women,<sup>26</sup> in counseling,<sup>27</sup> and in place-

20. The story of WEAL's campaign and the parallel campaigns of other women's groups under Executive Order No. 11,246 is recounted in detail in Sandler, *supra* note 15.

21. *Id.* at 441.

22. *Id.* at 448-50.

23. See *Hearings on § 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor, 91st Cong., 2d Sess., pts. 1 & 2 (1970)* [hereinafter cited as *1970 Hearings*]. The charges, allegations, and evidence of discrimination in education presented at the 1970 hearings are summarized and organized at Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 5 VAL. U.L. REV. 237, 247-70 (1971) [hereinafter cited as Murray].

Some scholars had completed and published studies on sex discrimination in academe prior to the 1970 congressional hearings, e.g., H. ASTIN, *THE WOMAN DOCTORATE IN AMERICA* (1969); J. BERNARD, *ACADEMIC WOMEN* (1964); Bayer, *College and University Faculty: A Statistical Description*, 5 ACE REP. (1970); Bayer & Astin, *Sex Differences in Academic Rank and Salary Among Science Doctorates in Teaching*, 3 J. HUMAN RESOURCES 191 (1968); Rossi, *Status of Women in Graduate Departments of Sociology, 1968-1969*, 5 AM. SOCIOLOGIST 1 (1970), but perhaps because of the scholarly nature of the journals in which the studies appeared, they failed to attract wide public attention.

24. *1970 Hearings* 643-47 (testimony of Dr. Peter Muirhead, Deputy Assistant Secretary, Associate Commissioner for Higher Education, Office of Education, HEW); CARNEGIE COMMISSION ON HIGHER EDUCATION, *OPPORTUNITIES FOR WOMEN IN HIGHER EDUCATION* 35-59 (1963) [hereinafter cited as *CARNEGIE REPORT*]; Roby, *Institutional Barriers to Women Students in Higher Education*, in *ACADEMIC WOMEN ON THE MOVE* 37, 38-44 (1973) [hereinafter cited as *Roby*].

25. *CARNEGIE REPORT* 51-53.

26. E.g., 118 CONG. REC. 5808-09 (1972) (including remarks of Senator Bayh); Roby 44-50.

ment efforts.<sup>28</sup> The evidence revealed even greater discrimination against women faculty.<sup>29</sup> Not only were women hired to teach at a disproportionately lower *rate* than men,<sup>30</sup> they were also appointed to lower *ranks* than equally qualified or inferior men receiving new appointments.<sup>31</sup> Women faculty were also promoted at a slower rate<sup>32</sup> and paid significantly less than their male counterparts.<sup>33</sup> In addition, women were "so rarely represented in top academic administrative positions as to be practically nonexistent in the upper echelons."<sup>34</sup>

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27. *E.g.*, CARNEGIE REPORT 44-47; Roby 50-51.

28. *E.g.*, Murray 257-58.

29. *See, e.g.*, 1970 Hearings 196, 312, 645; CARNEGIE REPORT 109-26; Astin & Bayer, *Sex Discrimination in Academe*, in ACADEMIC WOMEN ON THE MOVE 333 (1973); Fidell, *Empirical Verification of Sex Discrimination in Hiring Practices in Psychology*, 25 AM. PSYCHOLOGIST 1094 (1970); Morlock, *Discipline Variation in the Status of Academic Women*, in ACADEMIC WOMEN ON THE MOVE 255 (1973); Robinson, *Institutional Variation in the Status of Academic Women*, in ACADEMIC WOMEN ON THE MOVE 199 (1973) [hereinafter cited as Robinson].

30. *See, e.g.*, Robinson 207 ("The general trend was to employ women at ratios lower than their proportion of earned degrees in respective fields."); CARNEGIE REPORT 110-11. The *Carnegie Report* noted that:

[D]uring the decade of the most explosive growth in the history of higher education—the 1960's—women lost ground as a percentage of members of regular faculty ranks in four-year institutions, especially at the associate professor level . . . .

*Id.* at 110. *See also* 1970 Hearings 645 (statement of Dr. Peter Muirhead, Deputy Assistant Secretary, Associate Commissioner for Higher Education, Office of Education, HEW).

31. A summary of several studies concluded that "the best women stand a chance of being hired but at a lesser position than inferior men." Robinson, *supra* note 29, at 212. The same survey, however, confessed that "little data" on appointment levels are available. *Id.* at 210.

Studies which used fictitious names and photographs (changed on the basis of sex) on job application resumes sent to colleges and universities demonstrated that women were offered lower levels of appointments than men. *See, e.g.*, Fidell, *Empirical Verification of Sex Discrimination in Hiring Practices in Psychology*, 25 AM. PSYCHOLOGIST 1094 (1970).

32. One study that analyzed reports prepared by educational institutions on their own practices found that "[e]very institutional analysis of promotion that examined length of time in rank showed that women progressed through the ranks at a significantly slower rate than men." Robinson, *supra* note 29, at 216 (emphasis omitted).

33. *E.g.*, Morlock, *supra* note 29, at 286.

Several studies, by analyzing a multitude of factors such as rank and achievement characteristics, attempted to determine whether the lower compensation paid women was attributable to discrimination or a collection of objective factors. After controlling for the variables, the researchers found an average yearly salary difference of from \$1,040 to \$2,300 in favor of men. The studies are cited and summarized at CARNEGIE REPORT 115-19; Morlock, *supra* note 29, at 286-92. The work of one researcher, Elizabeth Scott, is set forth in detail in CARNEGIE REPORT 199-235 (appendix C); the results of some work by two pioneering researchers in the field, Astin and Bayer, are reported in detail in Astin & Bayer, *supra* note 29, at 333-56.

34. CARNEGIE REPORT 123.

In response to the evidence emerging from its hearings, evidence of discrimination contained in recent studies, the charges of sex discrimination brought by women's groups, and, no doubt, the increasing political strength of the women's movement, Congress began action that eventually culminated in passage of title IX of the Education Amendments of 1972.

*C. Congressional Action Leading to Enactment of Title IX*

In 1971, two aid to higher education bills introduced in the House of Representatives contained provisions to promote non-discrimination on the basis of sex in education programs. The prohibition of discrimination contained in the Nixon administration's bill, H.R. 5191, was criticized as too susceptible of circumvention. The measure prohibited sex-based discrimination by a "recipient of Federal financial assistance for any education program or activity," but permitted differential treatment "where sex is a bona fide ground for such differential treatment."<sup>35</sup> Representative Edith Green's measure, H.R. 7248, on the other hand, constituted a more thorough-going attempt to prohibit sex discrimination and was adopted by the House in preference to the administration's bill.<sup>36</sup> H.R. 7248 provided that no person "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 . . . ."<sup>37</sup> The measure further proposed to amend title VII of the 1964 Civil Rights Act to eliminate the exemption extended to educational institutions; to amend the Equal Pay Act of 1963 to extend the protection of that measure to teachers and professors; and to grant to the United States Commission on Civil

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35. H.R. 5191, 92d Cong., 1st Sess. § 1001(a) (1971).

Section 1001(b) of H.R. 5191 proposed to prohibit sex discrimination in employment by a recipient of federal financial assistance for any education program. It provided:

No recipient of federal financial assistance for an education program or activity shall, because of an individual's sex—(1) discharge that individual, fail or refuse to hire (except in instances where sex is a bona fide occupational qualification) that individual, or otherwise discriminate against him or her with respect to compensation, terms, conditions or privileges of employment; or (2) limit, segregate, or classify employees in any way which would deprive or tend to deprive that individual of employment opportunities or otherwise adversely affect his or her status as an employee.

*Id.* § 1001(b).

36. See 117 CONG. REC. 39248-61 (1971).

37. H.R. 7248, 92d Cong., 1st Sess. § 1001 (1971), 117 CONG. REC. 39098-99 (1971).

Rights authority to investigate sex discrimination.<sup>38</sup>

Portions of the sex discrimination provisions of H.R. 7248 were patterned closely on title VI of the Civil Rights Act of 1964.<sup>39</sup> That title prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance.<sup>40</sup> It further authorizes all federal agencies administering such financial assistance to effectuate the title's prohibition through appropriate regulations and, if the recipient of the funds fails to comply with the nondiscrimination provisions, to terminate the federal assistance.<sup>41</sup> In adopting this scheme, H.R. 7248 incorporated much of the language of title VI.<sup>42</sup>

The Senate aid to higher education bill, S. 659, originally contained no reference to sex discrimination. In August 1971, however, Senator Bayh introduced an amendment to S. 659 gen-

38. H.R. 7248, 92d Cong., 1st Sess. §§ 1006-08 (1971), 117 CONG. REC. 39099 (1971).

Only the amendment of the Equal Pay Act of 1963 constituted a part of title IX of the Education Amendments of 1972 as finally enacted. Pub. L. No. 92-318, § 906(b), 86 Stat. 375, *amending* 29 U.S.C. § 213(a) (1970) (codified as 29 U.S.C. § 213(a) (Supp. IV, 1974)). See Johnson, *supra* note 13, at 574-75 ("Title IX of the Education Amendments Act of 1972 represents an important extension of the [Equal Pay] Act by establishing that exemptions to the equal pay provisions of the [Fair Labor Standards Act] no longer apply to executive, administrative, and professional employees . . .").

The proposed amendment of title VII of the 1964 Civil Rights Act was enacted in another bill, the Equal Employment Opportunity Act of 1972. Act of March 24, 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, *amending* 42 U.S.C. § 2000e-1 (1970) (codified as 42 U.S.C. § 2000e-1 (Supp. IV, 1974)).

The provision of H.R. 7248 authorizing the Civil Rights Commission to investigate the problem of sex discrimination was deleted when the House sustained a point of order by House Judiciary Committee Chairman Emanuel Celler that the provision came within the jurisdiction of his committee. See 27 CONG. Q. ALMANAC 595 (1971). The proposal was eventually passed as part of another measure. Act of Oct. 14, 1972, Pub. L. No. 92-496, §§ 3-4, 86 Stat. 813, *amending* 42 U.S.C. § 1975c(a) (1970) (codified as 42 U.S.C. § 1975c(a) (Supp. IV, 1974)).

39. 42 U.S.C. §§ 2000d to d-6 (1970).

40. *Id.* § 2000d.

41. *Id.* § 2000d-1.

42. See 117 CONG. REC. 39098-99 (1971); *Hearing on House Concurrent Resolution 330 (Title IX Regulation) Before the Subcomm. on Equal Opportunities of the House Comm. on Education and Labor, 94th Cong., 1st Sess.* 16 (1975) (testimony of Representative O'Hara reviewing relationship of title IX to title VI).

Representative Green's bill differed in some details from title VI. For example, title VI exempts discrimination in employment unless the primary objective of the federal grant or funding is to provide jobs. 42 U.S.C. § 2000d-3 (1970). H.R. 7248 in its final form contained no such exemption. (In its initial form, 117 CONG. REC. 39098-99 (1971), the bill contained the exemption because of a clerical error. For a discussion of the error and how it was remedied see 1975 *Hearings on Title IX Regulation* 409 (testimony of Representative O'Hara).) Also, while the former extends to any federally assisted program, 42 U.S.C. § 2000d (1970), the latter was expressly limited to education programs and activities. See 117 CONG. REC. 39098 (1971).

erally similar to Representative Green's sex discrimination measure yet containing several significant differences.<sup>43</sup> Whereas the Green bill prohibited discrimination in "any educational program or activity receiving Federal financial assistance,"<sup>44</sup> the Bayh amendment prohibited discrimination in "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 . . . ."<sup>45</sup> Also, the Green bill directed *all* federal agencies involved in dispensing federal financial assistance to education programs to enforce the prohibition of sex discrimination;<sup>46</sup> the Bayh amendment, only HEW.<sup>47</sup>

Senator Bayh's amendment was defeated in August 1971, when the Senate sustained a ruling by the Chair that the amendment was not germane.<sup>48</sup> In February 1972, Senator Bayh introduced a somewhat modified version of his original amendment that tracked almost exactly the language of Representative Green's House bill.<sup>49</sup> The modified measure prohibited sex discrimination only in education programs or activities receiving federal financial assistance and not in all programs conducted by an institution receiving assistance for any educational program. Further, the modified amendment directed every involved federal agency, not just HEW, to enforce the discrimination ban.<sup>50</sup> The Senate adopted Senator Bayh's modified amendment.<sup>51</sup>

On June 8, 1972, Congress adopted a conference version<sup>52</sup> of the Green and Bayh antidiscrimination provisions as title IX of

43. 117 CONG. REC. 30155-58 (1971).

44. *Id.* at 39098.

45. *Id.* at 30156.

46. *Id.* at 39099.

47. *Id.* at 30156.

The Bayh amendment did contain one new proposal, however, which Congress eventually enacted as part of title IX. That proposal constituted an amendment to titles IV and IX of the Civil Rights Act of 1964 and authorized the Attorney General (1) to initiate legal proceedings on behalf of individuals suffering sex discrimination in admissions to or continued attendance at a public college, and (2) to intervene, on behalf of the United States, in such litigation already commenced by others. *See id.* at 30156-57; Education Amendments of 1972, Pub. L. No. 92-318, § 906(a), 86 Stat. 375, *amending* 42 U.S.C. §§ 2000c(b), 2000c-6(a)(2), 2000c-9, 2000h-2 (1970).

48. 117 CONG. REC. 30408-15 (1971).

49. 118 CONG. REC. 5802-03 (1972).

50. *Id.* at 5803.

51. *Id.* at 5815.

52. The action of the conferees on the sex discrimination provisions is reported at S. REP. No. 798, 92d Cong., 2d Sess. 221-22 (1972).

the 1972 Education Amendments.<sup>53</sup> President Nixon signed the measure into law on June 23, 1972.<sup>54</sup>

## II. HEW'S TITLE IX REGULATION

### A. *History of the Title IX Regulation*

Soon after title IX was enacted, the Office of Management and Budget of the executive branch directed HEW to coordinate the efforts of the several agencies that fund education programs in their development of a title IX regulation.<sup>55</sup> HEW was to provide leadership by drafting a regulation that would be suitable both for its own use and, with only slight modifications, for adoption and use by the other agencies involved.<sup>56</sup>

In June 1974, two years to the month after passage of the original legislation, HEW published its proposed title IX regulation.<sup>57</sup> It immediately generated a heated debate both in Congress and among the public. Nearly ten thousand formal responses to the proposed regulation were received during the extraordinary 120-day comment period.<sup>58</sup> Most of the objecting comments criticized the effect of the proposed regulation on intercollegiate ath-

53. Congressional action leading to enactment of the 1972 Education Amendments is summarized, as is the legislation itself, at 28 CONG. Q. ALMANAC 385-98 (1972).

The Education Amendments of 1972 constituted a massive and unprecedented financial aid package to higher education. As finally enacted, the measure authorized \$19 billion in aid to postsecondary education. The measure not only expanded the amount of federal financial assistance available to needy students, it also provided for financial aid to be paid directly to educational institutions. For example, the act authorized over \$450 million in aid to developing institutions and \$40 million in aid to schools in serious financial distress. For a summary of the financial aid provisions of the Education Amendments of 1972 see *id.*

54. Two HEW attorneys present a summary and analysis of title IX in Buck & Orleans, *Sex Discrimination—A Bar to Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1 (1973). A student-written comment, Comment, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 TEX. L. REV. 103 (1974), also analyzes title IX and, in addition, HEW's proposed title IX regulation.

55. Letter from Robert E. Coy, Assistant General Counsel, Veterans Administration to Brigham Young University Law Review, October 21, 1975.

56. *Id.*

57. 39 Fed. Reg. 22227 (1974).

58. When HEW released its final title IX regulation on June 4, 1975, it described the comment period and the response to the proposed regulation in these terms:

Interested persons were given until October 15, 1974, in which to submit written comments, suggestions, or objections regarding the proposed regulation.

The Department received over 9700 comments, suggestions or objections . . . .

40 Fed. Reg. 24128 (1975).

letics, social fraternities and sororities, and youth service organizations.<sup>59</sup>

On June 4, 1975, HEW published its final title IX regulation.<sup>60</sup> That regulation did not become effective immediately, however. Section 431(d) of the General Education Provisions Act, as amended by the Education Amendments of 1974, required HEW to lay before Congress for a period of 45 days its final title IX regulation.<sup>61</sup> This "laying before" provision was designed to give Congress an opportunity to review the regulation and, if found to be "inconsistent with the Act from which it derives its authority," to disapprove it in a concurrent resolution.<sup>62</sup> If Congress passed such a disapproval resolution, HEW would be required to redraft the offending portions; otherwise, the regulation would become effective at the end of the 45-day period.<sup>63</sup>

Soon after the regulation was laid before Congress, members in both Houses introduced concurrent resolutions condemning the regulation either in whole or in part.<sup>64</sup> After the introduction

59. In May 1974, Senator Tower, anticipating the regulations' pervasive impact on athletics, introduced an amendment to the Education Amendments of 1974 exempting revenue-producing intercollegiate athletics from title IX's prohibition. 120 CONG. REC. S8488-89 (daily ed. May 20, 1974). The amendment, in pertinent part and in its final form, read:

This section [20 U.S.C. § 1681] shall not apply to an intercollegiate athletic [activity] to the extent that such activity does or may provide gross receipts or donations to the institution necessary to support that activity.

*Id.* at S8488. The Senate adopted the amendment. *Id.* at S8489.

Senator Tower's amendment was deleted and replaced with an exceptionally vague compromise measure termed "the Javits amendment." That measure required that HEW's regulations dealing with intercollegiate athletics consider "the nature of particular sports." Act of Aug. 21, 1974, Pub. L. No. 93-380, § 844, 88 Stat. 612.

Congress acted again in December 1974 by amending title IX to exempt the membership practices of social sororities and fraternities composed primarily of college students, the YMCA, YWCA, Boy Scouts, Girl Scouts, Camp Fire Girls, and other voluntary youth service organizations "the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age." Act of Dec. 31, 1974, Pub. L. No. 93-568, § 3(a), 88 Stat. 1862, amending 20 U.S.C. § 1681 (codified as 20 U.S.C.A. § 1681(a)(6) (Supp. 1976)).

60. 40 Fed. Reg. 24127 (1975).

Caspar Weinberger, Secretary of HEW, gives a brief history of the title IX rule-making process at 1975 *Hearings on Title IX Regulation* 437-38.

61. Education Amendments of 1974 § 509(a)(2), 20 U.S.C.A. § 1232(d)-(g) (Supp. 1976).

62. 20 U.S.C.A. § 1232(d) (Supp. 1976).

63. 20 U.S.C.A. § 1232(d), (e) (Supp. 1976).

The "laying before" provision, its legislative history, and its implications for judicial review of the title IX regulations are discussed in detail in notes 95-114 and accompanying text *infra*.

64. In the Senate, Senator Helms introduced a resolution that constituted a blanket disapproval of the regulation. S. CON. RES. 46, 94th Cong., 1st Sess., 121 CONG. REC. S9715

of two resolutions in the Senate,<sup>65</sup> however, that body took no further action on the matter.<sup>66</sup> In the House, Representative O'Hara, chairman of the Postsecondary Education Subcommittee, introduced a concurrent resolution disapproving those portions of the regulation (1) requiring educational institutions to evaluate their own practices, identify areas of sex discrimination, and take corrective action where necessary; and (2) requiring schools to establish a grievance procedure to resolve sex discrimination complaints.<sup>67</sup> Following six days of hearings to determine whether the regulation was "consistent with the law and with the intent of the Congress in enacting the law,"<sup>68</sup> the O'Hara subcommittee amended the resolution of its chairman to express disapproval of the requirement that church-sponsored schools petition HEW for an exemption from provisions of the regulation inconsistent with the school's religious tenets.<sup>69</sup> The subcommittee reported the resolution to the full House Education and Labor Committee.<sup>70</sup>

The full committee, in an action generally viewed as a victory for the lobbying efforts of women's organizations,<sup>71</sup> voted by a narrow margin to refer the matter to its Equal Opportunities Subcommittee.<sup>72</sup> As the end of the 45-day disapproval period approached, that subcommittee held a one-day hearing on the matter,<sup>73</sup> then recommended that the full committee reject the

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(daily ed. June 5, 1975); see 121 CONG. REC. S9713-15 (daily ed. June 5, 1975) (remarks of Senator Helms). Senator Laxalt introduced a resolution disapproving the sections regulating athletic programs. S. CON. RES. 52, 94th Cong., 1st Sess., 121 CONG. REC. S12695 (daily ed. July 16, 1975); see 121 CONG. REC. S12695-96 (daily ed. July 16, 1975) (remarks of Senator Laxalt.)

In the House, Representative Martin introduced a broad disapproval resolution, H.R. CON. RES. 310, 94th Cong., 1st Sess. (1975); see 121 CONG. REC. H5636 (daily ed. June 17, 1975), and a more narrow resolution focusing solely on athletics, H.R. CON. RES. 311, 94th Cong., 1st Sess. (1975). Representative O'Hara also introduced a resolution of disapproval that is discussed at notes 67-74 and accompanying text *infra*.

65. See note 64 *supra*.

66. The Senate Labor and Public Welfare Committee had jurisdiction over the Helms and Laxalt concurrent resolutions discussed in note 64 *supra*. Senator Javits, the ranking Republican on that committee, told Senator Helms during floor debate on June 6, 1975, that the committee intended to act on his resolution by mid-July. See 33 CONG. Q. 1298 (1975). No evidence could be found, however, that the committee ever took any action on the matter.

67. H.R. CON. RES. 330, 94th Cong., 1st Sess. (1975) (introduced July 8, 1975); see 33 CONG. Q. 1484 (1975).

68. 1975 Hearings on Title IX Regulation 1.

69. 33 CONG. Q. 1484 (1975).

70. *Id.*

71. *Id.*

72. *Id.*

73. Hearing on H.R. Con. Res. 330 Before the Subcomm. on Equal Opportunities of



O'Hara resolution.<sup>74</sup> No further congressional action followed. On July 21, 1975, HEW's title IX regulation became effective.

*B. Scope of HEW's Title IX Regulation*<sup>75</sup>

HEW's title IX regulation is divided into five major subparts and 43 sections. Only two sections, however, are pertinent to the analysis of this comment: the definitional section and the section identifying the general coverage of the regulation.

Central to the ultra vires issue raised by the title IX regulation are the definitions of "federal financial assistance" and "recipient." The first term is defined to include not only grants or funds extended directly to an institution but also scholarships, loans, grants, or funds extended directly to students for payment to the institution.<sup>76</sup> Thus the regulation brings such programs as veterans educational benefits authorized by the G.I. Bill within the scope of title IX. The regulation defines "recipient" as any entity (1) that receives federal financial assistance from the government or another recipient and (2) that "operates an education program or activity which receives or benefits from such assistance."<sup>77</sup> This definition is crucial since section 86.11, describing coverage, states that the title IX regulation "applies to every *recipient* and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance."<sup>78</sup>

Although it is nowhere explicit in the regulation, HEW takes the position that *all* education programs and activities of a "recipient" benefit from federal financial assistance. In other words, if any single education program of an institution receives federal assistance, *all* of the programs and activities of the institution,

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*the House Comm. on Education and Labor, 94th Cong., 1st Sess. (1975).*

74. 33 CONG. Q. 1563 (1975).

75. The discussion in this section is necessarily cursory; emphasis is placed only on those provisions treated in Part III of this comment. A more detailed discussion of the scope of the regulation appears in a HEW Fact Sheet released simultaneously with the final regulation and reprinted at OFFICE FOR CIVIL RIGHTS, HEW, FINAL TITLE IX REGULATION IMPLEMENTING EDUCATION AMENDMENTS OF 1972 (1975) [hereinafter cited as HEW FACT SHEET].

The scope of HEW's proposed title IX regulation is discussed in some detail in DUNKLE & SANDLER, SEX DISCRIMINATION AGAINST STUDENTS: IMPLICATIONS OF TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 (reprinted in 1975 *Hearings on Title IX Regulation* 354-77). For a detailed but disapproving examination of the final regulation see 1975 *Hearings on Title IX Regulation* 449-521 (memorandum submitted by Senator Helms).

76. 45 C.F.R. § 86.2(g) (1975).

77. *Id.* § 86.2(h).

78. *Id.* § 86.11 (emphasis added).

not just the single program receiving the aid, are subject to the regulatory scheme.<sup>79</sup> HEW stated this view in a memorandum released simultaneously with the final regulation:

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79. Both proponents and opponents of the regulation have recognized that HEW's approach is institutional rather than programmatic, that is, that if any one program receives or benefits from federal financial assistance, the entire institution is subjected to regulation. For example, NOW, a supporter of the regulation, made the following comment on the proposed regulation:

We have received reports from women around the country that some school administrators insist that the only activities covered are specific activities directly receiving federal aid (the school lunch program, for example, or a Title I ESEA tutoring project). This is a crucial point, since many areas of serious discrimination do not directly receive federal aid (athletics, shop, home economics, most curriculum materials, and so on).

On the other hand, HEW staff tell us that an "education program or activity" benefitting from federal financial assistance is almost anything that goes on in an institution of education. The regulation implies this interpretation, by covering athletics, dorm curfews, and the like, but it nowhere states it.

121 CONG. REC. S772 (daily ed. Jan. 23, 1975).

A university president testifying on the final regulation observed:

The Regulations seem to provide that if an educational institution has received, even indirectly, a single dollar of federal money, every decision, activity, facility, educational policy or communication of that institution is subject to review and regulation by the Department.

Sections 86.2 (g) and (h) of the Regulations provide that an institution is a "recipient", of "federal financial assistance" even if its receipt of federal assistance is only indirect or minimal. For example, they would apparently make an institution subject to control if it enrolled only one student receiving veteran's benefits or attending school under a federal grant or loan. In addition, the underlying premise of the Regulations—evident throughout—is that being a "recipient" subjects every institutional program or activity to regulation whether or not that particular program or activity received federal financial assistance. The Department has therefore taken the position that if a college or university receives some direct or indirect financial assistance for its department of chemistry it must accept government supervision of all of its other academic departments, its dormitories, its admissions and financial aids policies, and every other aspect of its operations.

1975 *Hearings on Title IX Regulation 232-33* (prepared statement of Dr. Dallin H. Oaks, president, Brigham Young University, and director and secretary of the American Association of Presidents of Independent Colleges and Universities).

A memorandum prepared by the American Law Division of the Library of Congress for Senator Bayh interpreted the scope of the proposed regulation in a slightly different way:

In short, the proposed regulations arguably reflect a position on the part of the agency [HEW] that, for purposes of determining compliance, the educational activities of institutional recipients may, where general admissions policies are concerned, be viewed as a [sic] individual entity. Where less pervasive forms of discrimination are involved, however, the regulations seem to contemplate a program by program approach to coverage.

1975 *Hearings on Title IX Regulation 188*. This latter interpretation seems to be foreclosed, however, by HEW's own statements. See note 80 and accompanying text *infra*.

Except for the specific limited exemptions set forth below, the final regulation applies to *all* aspects of *all* education programs or activities of a school district, institution of higher education, or other entity which receives Federal funds for *any* of those programs.<sup>80</sup>

HEW apparently bases its position on what may be termed the "benefit" theory: Federal financial assistance to one program benefits all of the institution's other programs since that assistance "releases" institutional funds for use in the other programs.<sup>81</sup>

### III. ULTRA VIRES ATTACKS ON HEW'S TITLE IX REGULATION

#### A. *Ultra Vires Challenges to Administrative Regulations: In General*

Ultra vires, a term normally used only in the law of corporations,<sup>82</sup> is employed in this comment as a shorthand reference to acts beyond the lawful power of an administrative agency or department. Thus, when an agency promulgates rules or regulations that extend or modify the authorizing statute, the act is ultra vires and, under well-established doctrine, invalid.<sup>83</sup> The Supreme Court has stated the principle in these terms:

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 . . . 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.<sup>84</sup>

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80. HEW FACT SHEET, *supra* note 75, at 3 (emphasis added). HEW's Secretary Weinberger repeated this language when testifying on the title IX regulation before Representative O'Hara's subcommittee:

The regulation, briefly, provides as follows: Except for certain limited exemptions, the final regulation applies to all aspects of all educational programs or activities of a school district, institution of higher education, or other entity which receives Federal funds for any of those programs.

1975 Hearings on Title IX Regulation 438.

81. The "benefit" theory has often been advanced by proponents of a broad interpretation of the regulation. See, e.g., 1975 Hearings on Title IX Regulation 171 (prepared statement of Senator Bayh); *id.* at 387 (statement of Dr. Bernice Sandler); Comment, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 TEX. L. REV. 103, 110 (1974).

82. See BLACK'S LAW DICTIONARY 1692 (rev. 4th ed. 1968).

83. See, e.g., *Campbell v. Galeno Chem. Co.*, 281 U.S. 599, 610 (1930); *Federal Maritime Comm'n v. Anglo-Canadian Shipping Co.*, 335 F.2d 255, 258 (9th Cir. 1964).

84. *Dixon v. United States*, 381 U.S. 68, 74 (1965), quoting *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

The process for resolving an ultra vires challenge to an administrative regulation is deceptively simple to outline. The reviewing court first construes the underlying statute and identifies its scope, then repeats this process with the regulation. The scope of both statute and regulation are then compared, and aspects of the regulation that extend the scope of the statute, if any, are declared invalid. In practice, however, proper resolution of such challenges can be exceedingly difficult. Nevertheless, unlike the delegation doctrine in administrative law, to which only lip service has been paid for the last thirty years,<sup>85</sup> the ultra vires principle is not infrequently applied to invalidate administrative regulations.<sup>86</sup>

As noted, courts in resolving an ultra vires challenge must construe the authorizing statute. Yet an administrative regulation itself often serves as an interpretation of the underlying statute. Because of the expertise generally ascribed to the promulgating agency or department, and perhaps for other more sensitive but often unarticulated reasons,<sup>87</sup> courts generally give some degree of deference to the interpretation embodied in the regulation.<sup>88</sup> The degree of deference afforded, however, extends from great, or even excessive, to minimal. At the one extreme, courts state that they will sustain a regulation unless it is "plainly and palpably inconsistent with the governing statute."<sup>89</sup> At the other

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85. See W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 84 (6th ed. 1974).

A delegation challenge to the title IX regulation may not be completely futile; certainly it would not be frivolous. See generally Wright, Book Review, 81 *YALE L.J.* 575, 582-87 (1972). A possible delegation challenge to title VI of the 1964 Civil Rights Act is examined and rejected in Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 *VA. L. REV.* 42, 49-53 (1967).

86. See, e.g., *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954); *Campbell v. Galeno Chem. Co.*, 281 U.S. 599 (1930); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *petition for cert. filed sub. nom. Virginia v. Train*, 44 U.S.L.W. 3439 (U.S. Jan. 26, 1976) (No. 75-1050); *Maryland v. EPA*, 8 *ENVIR. REP. DEC.* 1105 (4th Cir., Sept. 19, 1975), *petition for cert. filed*, 44 U.S.L.W. 3417 (U.S. Jan. 7, 1976) (75-960); *Brown v. EPA*, 521 F.2d 827 (9th Cir.), *petition for cert. filed*, 44 U.S.L.W. 3381 (U.S. Dec. 24, 1975) (No. 75-909); *Vialpando v. Shea*, 475 F.2d 731 (10th Cir. 1973), *aff'd*, 416 U.S. 251 (1974); *Federal Maritime Comm'n v. Anglo-Canadian Shipping Co.*, 335 F.2d 255 (9th Cir. 1964); *United States v. Silva*, 272 F. Supp. 46 (S.D. Cal. 1967).

87. A federal court, for example, may hesitate to invalidate the actions of a coequal branch of the government, such as the executive branch acting through one of its departments or agencies. Or a court may defer to an administrative interpretation out of a disinclination to undertake the almost always difficult task of statutory construction.

88. For an excellent summary of the aspect of judicial deference discussed here see *1975 Hearings on Title IX Regulation* 187, 190-91 (memorandum from the American Law Division of the Library of Congress to Senator Bayh).

89. E.g., *Mt. Vernon Cooperative Bank v. Gleason*, 250 F. Supp. 952, 954 (D. Mass. 1966). See also *Jno. McCall Coal Co. v. United States*, 374 F.2d 689, 691-92 (4th Cir. 1967).

extreme, courts state that "an inquiry to determine if the agency has exceeded its statutory power is a constitutional obligation" of the courts, discharge of which "is an exercise of judicial authority to preserve the legislative scheme."<sup>90</sup> Under the latter view, little, if any, deference is afforded the agency's interpretation.<sup>91</sup>

### B. *Ultra Vires Challenges to the Title IX Regulation*

This comment analyzes the two major *ultra vires* challenges that have been leveled at HEW's title IX regulation: (1) By defining "federal financial assistance" to include not only federal aid paid directly to an educational institution but also federal aid paid directly to students who in turn use it to meet education expenses at the school of their choice, the regulation goes beyond the scope of the statute. (2) By subjecting *all* programs of an institution to HEW regulation if any *one* program receives or benefits from federal financial assistance, the regulation improperly extends the authorizing statute. If these two challenges are sustained, the regulation would need to be extensively modified and the quantum of federal agency intervention in many schools and universities would be significantly reduced.<sup>92</sup>

In analyzing these two major *ultra vires* challenges, the crucial inquiry goes to the scope of the authorizing statute, title IX. This comment uses standard tools of statutory construction in measuring the scope of that statute: (1) the language of the statute itself; (2) the interpretation given similar or analogous statutes, in this case title VI of the 1964 Civil Rights Act; and (3) the legislative history of the statute, including congressional debate on the measure before its enactment. Before analyzing the scope of the statute, however, one unusual feature of title IX bearing on the *ultra vires* issues requires consideration. The title IX regulation was laid before Congress pursuant to section 431(d) of the General Education Provisions Act, as amended by the 1974 Edu-

90. *Elgin, Joliet & Eastern Ry. v. Benj. Harris & Co.*, 245 F. Supp. 467, 472 (N.D. Ill. 1965). See also *Board of Public Instruction v. Finch*, 414 F.2d 1068, 1074 (5th Cir. 1969).

91. See, e.g., *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969); *Federal Maritime Comm'n v. Anglo-Canadian Shipping Co.*, 335 F.2d 255 (9th Cir. 1964); *United States v. Silva*, 272 F. Supp. 46 (S.D. Cal. 1967).

92. There is a third possible *ultra vires* challenge of major proportions that alleges that title IX grants HEW no authority over employment practices. If such a challenge were upheld, it would completely eliminate subpart E of HEW's regulation. This challenge is presented at 1975 *Hearings on Title IX Regulation* 406-08 (testimony of Janet Kuhn); *id.* at 521 (memorandum submitted by Senator Helms).

cation Amendments.<sup>93</sup> Congress, or at least some parts of it, reviewed the regulation to determine whether it "is inconsistent with the Act from which it derives its authority . . . ."<sup>94</sup> That fact, coupled with the fact that Congress did not signal with a concurrent resolution of disapproval a finding of inconsistency, may have a significant impact on judicial review of any *ultra vires* challenges to the regulation.

### 1. The "laying before" procedure

From 1939 to the present, various statutes have contained a "laying before" provision, usually designed to make "administrative exercise of delegated power subject to congressional approval or disapproval by concurrent resolution or simple resolution."<sup>95</sup> Congress stated the purpose of the statute requiring HEW to lay its title IX regulation before Congress, section 431(d) of the General Education Provisions Act as amended in 1974,<sup>96</sup> in these terms:

The problem which this amendment seeks to meet is the steady escalation of agency quasi-legislative power, and the corresponding attrition in the ability of the Congress to make the law. For at least four decades now, the agencies of the Executive

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93. See note 61-74 and accompanying text *supra*.

94. General Education Provisions Act § 431(d), 20 U.S.C.A. § 1232(d) (Supp. 1976).

95. Cotter & Smith, *Administrative Accountability to Congress: The Concurrent Resolution*, 9 WESTERN POL. Q. 955, 959 (1956).

For a general history of the "laying before" procedure in the United States see J. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 204-38 (1964).

The British "laying before" procedure is discussed in detail at Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 FORDHAM L. REV. 638, 639-50 (1957).

Various constitutional attacks have been leveled at the "laying before" procedure. Commentators opposing the "laying before" procedure on constitutional grounds include HARRIS, *supra*, at 238-44; Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 586-87 (1953); Comment, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1065-81 (1975). Commentators arguing for the constitutionality of the procedure include Boisvert, *supra*, at 65x-61; Schwartz, *Legislative Control of Administrative Rules and Regulations: The American Experience*, 30 N.Y.U.L. REV. 1031, 1042 (1955) (All authorities who claim that the "laying before" procedure is unconstitutional, "eminent though they may be, are clearly wrong both in their approach to the question of constitutionality and their answer to it.").

No American court has yet resolved the constitutional issues. Justice White in a concurring opinion in *Buckley v. Valeo*, 44 U.S.L.W. 4127, 4212-13 (U.S. Jan. 30, 1976), however, argued that the "laying before" procedure could withstand the most prominent constitutional attack leveled at it: namely, that the procedure improperly infringes on the President's veto power.

96. 20 U.S.C.A. § 1232(d) (Supp. 1976).

Branch have increasingly used their rule-making authority to "correct" what they feel are the errors and ambiguities of the law. And for that same four decades, the Congress has, increasingly, given to those agencies, broader and broader areas of discretionary rule-making.

The Executive Branch, under administrations of both parties, has eagerly seized authority which Congress, under the control of either party, has all too carelessly allowed to slip from its hands.<sup>97</sup>

An early advocate of the "laying before" procedure, Professor Boisvert, identified the possibility that the "laying before" procedure may operate to narrow the scope of judicial review of regulations subjected to ultra vires attacks:

Legislative participation in rulemaking would be a persuasive indication to reviewing courts of legislative approval of any regulation placed before its scrutinizing committee. . . . Such legislative participation in agency rulemaking would . . . eliminate in part the possibility of future voiding of the regulation by the courts on an ultra vires basis, since such laying could be interpreted as congressional approval of the agency regulation.<sup>98</sup>

Professor Boisvert may have overstated the impact of the "laying before" procedure on judicial review in his eagerness to promote the device, but the central idea of his assertions appears to be sound and is supported by some judicial authority.<sup>99</sup> Indeed, a

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97. H.R. REP. No. 93-805, 93d Cong., 2d Sess. 73 (1974) (accompanying H.R. 69).

98. Boisvert, *supra* note 95, at 665 (footnotes omitted).

99. When an ultra vires attack on the then new Federal Rules of Civil Procedure was brought before the United States Supreme Court in *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), the Court found that the Rules did not go beyond the scope of the statute authorizing the Court to promulgate such rules. In support of this holding, the Court argued, *inter alia*:

Moreover, in accordance with the [Enabling] Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature [embodied in the Enabling Act.]

The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committees of the two Houses. . . . That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted.

*Id.* at 14-16 (footnotes omitted).

student commentator reached a similar, though more thoughtful, conclusion concerning the impact of the "laying before" procedure on judicial review.

The scope of judicial review will probably be narrowed by the existence of the laying procedure. . . . [T]he effect of congressional approval would seem . . . to be that of establishing a strong presumption that the rule was within the authority of the agency, but with an opportunity to establish the contrary. Unless congressional consideration became perfunctory, the effect of assent should be of considerably greater weight than that accorded such supposed expressions of congressional intent as renewing without comment the statute on which a regulation is based.<sup>100</sup>

This comment identifies two crucial concepts: (1) Congressional review does not preclude judicial review, and (2) the nature, or quality, of the congressional review should have a bearing on the extent and rigor of subsequent judicial review. The first concept appears almost self-evident and needs little elaboration. Congressional failure to disapprove a regulation laid before it cannot protect the regulation from an *ultra vires* attack; congressional inaction cannot operate to make a regulation an Act of Congress. The regulation remains merely the product of delegated rulemaking power exercised by an administrative department; as such, the possibility exists that it exceeds the scope of the Act that *was* passed by Congress and is therefore vulnerable to judicial review on *ultra vires* grounds.<sup>101</sup> The second concept is more complex than the first, however, and merits elaboration in the context of the title IX regulation.

Certain features of the congressional review of the title IX regulation may persuade a court to limit its review of the regulation. First, a great deal of publicity and public interest surrounded the laying of the regulation before Congress. Congress was not unaware of its opportunity to review the regulation or of its power to disapprove it by concurrent resolution. This fact is demonstrated by the action of several senators and representatives in introducing various concurrent resolutions of disap-

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100. Note, "*Laying on the Table*"—A Device for Legislative Control Over Delegated Powers, 65 HARV. L. REV. 637, 647 (1952) (footnotes omitted).

101. A British court has held that Parliamentary approval of an administrative regulation did not protect the regulation from *ultra vires* challenges in the courts, since the approval did not make the regulation an Act of Parliament. *Rex v. Electricity Comm'rs*, [1924] 1 K.B. 171.



proval.<sup>102</sup> Further, one subcommittee conducted rather extensive hearings on the matter and considered therein some of the same *ultra vires* arguments that may eventually be made to the courts.<sup>103</sup> In sum, to use the words of the student commentator quoted above, the "congressional consideration" was not "perfunctory."<sup>104</sup>

Other features of the congressional review, however, strongly suggest that the courts should be cautious not to accord undue weight to that review. First, no member of the Senate and only few members of the House considered and voted on the merits of any of the several concurrent resolutions of disapproval introduced in Congress.<sup>105</sup> This limited review was the result, at least in part, of the procedural maneuverings of congressional supporters of the regulation designed to delay and thereby prevent review on the merits during the relatively short 45-day review period.<sup>106</sup> Also in this context, it should be noted that of the two House subcommittees that did vote on a resolution of disapproval, the subcommittee that conducted the most thorough and extensive hearings on the matter, Representative O'Hara's Subcommittee on Postsecondary Education, voted to disapprove portions of the regulation.<sup>107</sup>

Second, the regulation came before Congress three years after Congress enacted the original title IX legislation.<sup>108</sup> The Ninety-second Congress enacted title IX; the Ninety-fourth Congress reviewed the title IX regulation. Undoubtedly there was a substantial continuity of membership between the enacting and the reviewing Congress. Nevertheless, many congressmen confronted with the task of reviewing the regulation had no part in the enactment of the authorizing statute and thus had no more direct access to the intent of Congress in passing title IX than a reviewing court will have when considering the same matter.<sup>109</sup>

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102. See note 64 and accompanying text *supra*.

103. See 1975 *Hearings on Title IX Regulation*.

The National Collegiate Athletic Association (NCAA) has already initiated a suit against HEW, challenging the validity of the title IX regulation. The complaint makes the same two *ultra vires* challenges examined in this comment. *NCAA v. Mathews*, Civil No. 76-32-C2 (D. Kan., filed Feb. 17, 1976).

104. Note, *supra* note 100, at 647.

105. See notes 62-74 and accompanying text *supra*.

106. See notes 71-74 and accompanying text *supra*.

107. See notes 67-70 and accompanying text *supra*.

108. See notes 54, 60-61 and accompanying text *supra*.

109. For example, 13 of the 40 members of the House Committee on Education and Labor of the Ninety-fourth Congress were not members of the Ninety-second Congress.

Also, the three-year delay may have dulled somewhat the recollection of congressmen engaged in both the enactment of title IX and the review of the regulation.<sup>110</sup>

Third, the limited review of the regulation that did occur was not a dispassionate, detached congressional attempt at legal analysis. Congressional review of the regulation was heavily influenced by political forces. Lobbyists representing feminist interests brought substantial pressure to bear on congressmen involved in the review.<sup>111</sup> Congressional consideration of the regulation resembled in many ways the activity that surrounds legislative action on a proposed statute.<sup>112</sup> A reviewing court, therefore, should not take at face value Representative O'Hara's statement opening the 1975 hearings that HEW's title IX "regulations will be reviewed [by Congress] solely to see if they are consistent with the law and with the intent of Congress in enacting the law."<sup>113</sup> Reviewing congressmen were at least as concerned with measuring the political ramifications of their approval or disapproval of the regulation as they were with measuring the regulation against the intended scope of title IX.

In light of the various features of Congress's review of the title IX regulation outlined above, a self-imposed limitation, of any significant degree, on the scope of judicial review of the regulation appears inappropriate.<sup>114</sup>

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*Compare* 28 CONG. Q. ALMANAC 24-25 (1972) (membership roll of the Ninety-second Congress) with 1975 Hearings on Title IX Regulation ii (membership roll of the House Committee on Education and Labor of the Ninety-fourth Congress).

110. For example, when Senator Bayh was debating in support of title IX on the floor of the Senate, he was asked what types of federal aid might be cut off if a violation occurred. He responded that "specific assistance that was being received by individual students" would not be cut off. 117 CONG. REC. 30408 (1971). During the 1975 hearings on the regulation, Representative Quie queried Bayh on this statement in light of HEW's action in bringing direct student assistance within the scope of the term *federal financial assistance*. See 45 C.F.R. § 86.2(g) (1975). Specifically, Quie wanted to know whether HEW had "overstepped its bounds in claiming that an institution is conducting a program or activity financed by the Federal Government if a student is receiving Federal aid to attend that program or those programs." Bayh responded: "You know, I just don't know. I would have to look that up if you would like . . ." 1975 Hearings on Title IX Regulation 181-82.

111. See, e.g., 1975 Hearings on Title IX Regulation 216 (statement of Lillian Hatcher, United Auto Workers (UAW) Women's Dept.) ("A vote against these regulations is a vote against the workers the UAW represents.").

112. The lobbying efforts of feminist groups in support of the regulation have already been mentioned. Strong opposition to the regulation came from, among others, the National Collegiate Athletic Association (NCAA) and various college football coaches. See, e.g., *id.* at 46 (Darrel Royal, president, American Football Coaches Ass'n); *id.* at 98 (John A. Fuzak, president, NCAA).

113. *Id.* at 1.

114. If perspective is yet possible on congressional action reviewing HEW's title IX

## 2. *The definition of "receiving federal financial assistance"*

Title IX prohibits, with certain exceptions, sex discrimination in any education program or activity "receiving Federal financial assistance."<sup>115</sup> HEW's title IX regulation defines "federal financial assistance" to include not only funds paid directly to an education institution but also "[s]cholarships, 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."<sup>116</sup> The question arises whether HEW's definition, particularly the provision covering direct student aid, exceeds the intended scope of the authorizing statute and is thus *ultra vires*.

*a. The language of the statute.* The language of title IX suggests two conditions for application of the statute's prohibition: (1) an institution must "receive" (2) whatever constitutes "federal financial assistance." Focusing for the moment solely on the first condition, it seems doubtful that an educational institution "receives" federal money paid to a student, such as veterans' educational benefits.<sup>117</sup> HEW apparently perceived this difficulty with its definition; in a subsequent definition, that of "recipient,"

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regulation, it indicates the validity of the following evaluation of the "laying before" procedure in general, made 20 years ago by two commentators on the procedure:

Experience with the concurrent resolution indicates that Congress is more imaginative in fashioning tools for checking and influencing the administration of delegated powers than it is skillful and determined in employing them to hold administrators to clearly defined standards of performance.

Cotter & Smith, *supra* note 95, at 966.

115. 20 U.S.C. § 1681(a) (Supp. IV, 1974); note 1 *supra*.

116. 45 C.F.R. § 86.2(g)(1)(ii) (1975).

117. One commentator on this issue stated:

Since the language of Title IX speaks in terms of "receiving Federal financial assistance," it is useful to consider the meaning of the term "receiving." Realizing that this term has historically been employed in the drafting of legislation, in addition to its wide use throughout the law, the commentator believes that recourse to a more legalistic definition is appropriate (although application of the common, customary definition as contained in Webster would render the same result). *Corpus Juris Secundum*, Volume 74, "Receive," page 643, provides that ". . . 'receiving' necessarily implies consenting to receive, and that there is a receiving whenever there is a change of possession, as when one parts with the control of a thing and another takes and accepts it." Clearly, the act of "receiving" occurs and is completed when one entity delivers possession of a thing to another entity, which accepts it. There is no basis for believing that Congress intended by the enactment of Title IX that the meaning of this term should be extended so as to indirectly encompass remote benefits to some program or activity separate from the education program or activity to which the Federal financial assistance is given.

*1975 Hearings on Title IX Regulation 508* (memorandum submitted by Senator Helms).

HEW provided that the regulation applies to an entity "which operates an education program or activity which receives or *benefits* from [federal financial] assistance . . . ."<sup>118</sup> A persuasive argument can be made that a school indeed benefits when it qualifies to enroll students receiving, for example, veterans' educational benefits or federally guaranteed loans.<sup>119</sup> HEW's use of the term *benefits*, however, is too facile a solution to its problem. Title IX, by its own language, extends only to programs that "receive" federal financial assistance. By superadding the broader, more inclusive term *benefits* to the language of the statute, thus permitting inclusion of direct federal aid to students in the definition of federal financial assistance, HEW undoubtedly extended the scope of the statute and, unless the Department has access to other saving arguments, rendered its regulation vulnerable to ultra vires challenges.<sup>120</sup>

b. *The legislative history.* The legislative history bearing on the scope and definition of "federal financial assistance" in title IX consists of only one statement by the sponsor of the Senate version of the measure, Senator Bayh. During debate on the measure, Senator Dominick asked what type of federal aid could be terminated for a violation of title IX.<sup>121</sup> This question can be read as going to the scope of the term *federal financial assistance* since the "assistance" federal departments or agencies may terminate, under the authority of title IX's second section, is obviously the same assistance termed "federal financial assistance" throughout other portions of the statute.<sup>122</sup> Senator Bayh responded initially that "all aid that comes through the Department of Health, Education, and Welfare" could be terminated.<sup>123</sup> He then qualified his answer, however, with these words: "It is unquestionable, in my judgment, that this [termination] would not be directed at specific assistance that was being received by individual students,

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118. 45 C.F.R. § 86.2(h) (1975) (emphasis added).

119. See *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 601-04 (D.S.C. 1974), *aff'd mem.*, No. 72-2164 (4th Cir., May 28, 1975); notes 129-133 and accompanying text *infra*.

120. For a more detailed discussion of the issues treated in this subsection see *1975 Hearings on Title IX Regulation* 499, 507-08 (memorandum submitted by Senator Helms).

121. 117 CONG. REC. 30408 (1971).

122. See notes 1-2 *supra*. 20 U.S.C. § 1682 (Supp. IV, 1974), the section of title IX providing for federal administrative enforcement, uses the full term *Federal financial assistance* initially; twice thereafter in the section, the shorthand term *assistance* is used.

123. 117 CONG. REC. 30408 (1971).

At the time of his response, Senator Bayh's bill directed only HEW and not all federal departments and agencies to effectuate the sex discrimination prohibition through regulations and, if necessary, fund termination. See notes 46-47 and accompanying text *supra*.

but would be directed at the institution . . . ."<sup>124</sup>

On its face, the Senator's response supports the conclusion that direct aid to students was intended to be left outside the scope of the term *federal financial assistance*. Supporters of the regulation, however, may argue that Senator Bayh's comment is not inconsistent with the regulation's inclusion of direct student aid within the definition of that term. The regulation provides that when a school violates title IX it may be denied the right to enroll students receiving federal aid, such as veterans' educational benefits. But since the individual *student's* right to receive those benefits continues if he or she matriculates at a qualifying school, the termination is not "directed at specific assistance that was being received by individual students." Only if the student elects—for personal, professional, educational, or religious reasons—to commence or continue at a school not in compliance with the regulation will his or her federal assistance be terminated.<sup>125</sup>

This last argument—that termination would be the result of a personal decision and not the result of HEW's title IX regulation—is at best only partially satisfactory. If a federal agency or

124. *Id.* The pertinent portion of the dialogue reads:

Mr. Dominick. What type of aid the recipient might be getting would be cut off? Let us suppose, for example, that they have guaranteed loans for construction. Let us suppose that they have research grants under the NIH. Let us suppose that they are doing graduate work in some programs authorized by the Defense Department. Just what type of aid are we cutting off here?

Mr. Bayh. We are cutting off all aid that comes through the Department of Health, Education, and Welfare, and as to the specific ones, the Senator has mentioned, I think they would all be included with the exception of research grants made through other departments such as the Department of Defense.

Mr. Dominick. The Senator is talking about every program under HEW?

Mr. Bayh. Let me suggest that I would imagine that any person who was sitting at the head of the Department of Health, Education, and Welfare, administering this program, would be reasonable and would use only such leverage as was necessary against the institution.

It is unquestionable, in my judgment, that this would not be directed at specific assistance that was being received by individual students, but would be directed at the institution, and the Secretary would be expected to use good judgment as to how much leverage to apply, and where it could best be applied.

125. See generally *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, No. 74-2164 (4th Cir., May 28, 1975); notes 129-133 and accompanying text *infra*. In the *Bob Jones* case, the court upheld administrative action terminating, under title VI, the right of eligible veterans seeking an education at the university to receive veterans' educational benefits. It was clear from the decision that an otherwise eligible veteran could requalify for benefits by matriculating at an eligible school. Also, the order of termination was prospective only; already enrolled veterans could continue receiving benefits until completion of their studies.

department terminated direct student aid following a student's decision to matriculate at a noncomplying school, the legal basis for the action would be title IX, as construed by the regulation. Title IX, in other words, would be employed to terminate "specific assistance that was being received by individual students," contrary to the assurance of Senator Bayh that the statute would not be used in that manner.<sup>126</sup>

In conclusion, the legislative history bearing on the definition of federal financial assistance indicates that Congress intended that no direct federal aid to individual students be terminated solely by operation of title IX. The legislative history is less conclusive when such termination results from both title IX sanctions directed at an institution and the personal decision of a federally assisted student to continue or commence his or her education at a noncomplying school. On its face, Senator Bayh's assurance permits not even contingent termination—that is, termination in the latter situation—of funds under title IX. If the statement is thus read, it indicates a congressional intent as broad as that defined above: Title IX is not to be used, directly or indirectly, to terminate federal aid to individual students. The regulation's inclusion of direct aid to students within the definition of federal financial assistance may, indeed is likely to, operate in contravention of that intent.<sup>127</sup>

c. *The interpretation of title VI of the Civil Rights Act of 1964.* Administrative regulations and federal court decisions construing and applying title VI of the Civil Rights Act<sup>128</sup> cannot be applied automatically in the title IX context, for reasons discussed below. Nevertheless, because of the similarity between title VI and title IX, regulations and court decisions construing the former must necessarily be persuasive and influential author-

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126. See note 124 *supra*.

127. Senator Bayh, in a letter to Senator Pell answering questions raised by a university president that was made a part of the record prior to enactment of title IX, stated that "the provisions of my amendment in question are parallel to those found in [title VI of the] 1964 Civil Rights Act. Since 1964, there has been ample opportunity to establish enforcement procedure with respect to discrimination on the basis of race; enforcement of my amendment will draw heavily on these precedents." 118 CONG. REC. 18437 (1972).

Proponents of the regulation may argue that this and similar statements reveal a congressional intent to construe title IX as broadly as title VI of the 1964 Civil Rights Act. It should be remembered, however, that at the time of enactment of title IX, title VI had not been applied to terminate federal aid paid directly to students. That broader application only came later. See notes 129-133 and accompanying text *infra*. Indeed, as late as the 1975 hearings on HEW's title IX regulation, Senator Bayh appears to have been unaware of such an application of title VI. See note 110 *supra*.

128. 42 U.S.C. §§ 2000d to d-6 (1970).

ity in the construction of the latter. Indeed, the strongest support for HEW's broad definition of "receiving federal financial assistance" comes from title VI regulations and cases.

The most important title VI case supporting HEW's position is *Bob Jones University v. Johnson*.<sup>129</sup> In that case, an administrative law judge of HEW, following an evidentiary hearing, issued an order terminating the right of eligible veterans to receive veterans' educational benefits while enrolled at Bob Jones University. The judge based the order on the university's refusal to admit unmarried blacks and otherwise to comply with the VA's regulation implementing title VI.<sup>130</sup> The VA approved and enforced the order.<sup>131</sup>

The university and an eligible veteran desiring to attend the university sought injunctive relief in federal district court to block the VA's action. The plaintiffs alleged, among other things, that the university did not receive federal financial assistance, as that term is used in title VI, and was therefore not subject to either title VI's prohibition or its sanctions.<sup>132</sup> The federal district court dismissed the complaint, holding that the university received federal financial assistance within the scope of title VI when it enrolled students receiving veterans' educational benefits. The Fourth Circuit Court of Appeals affirmed the decision *per curiam*.<sup>133</sup>

The holding of the district court is obviously based on a broad construction of "receiving federal financial assistance," one that includes federal aid paid directly to students. That construction is based in turn on the view that "all that is necessary for Title VI purposes is a showing that the infusion of federal money through payments to veterans *assists* the education program of the approved school."<sup>134</sup> In the *Bob Jones* case, the court found the requisite assistance or benefit in two facts: (1) But for the federal payment of veterans' benefits to qualifying students, the university would spend its own funds—through scholarships,

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129. 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, No. 74-2164 (4th Cir., May 28, 1975).

130. Specifically, the university refused to sign an assurance of compliance with title VI required by the VA's title VI regulation, 38 C.F.R. § 18.4 (1975), as a condition of federal assistance. 396 F. Supp. at 599.

131. The order was prospective only. Already enrolled veterans were permitted to continue receiving veterans' educational benefits during the duration of their studies. 396 F. Supp. at 599.

132. *Id.* at 601-02.

133. No. 74-2164 (4th Cir., May 28, 1975).

134. 396 F. Supp. at 603 n.22 (emphasis added).

grants, and loans—to assist those students.<sup>135</sup> (2) But for the availability of the federal funds, many veterans would not enroll at the university. Thus, the availability of the funds “benefits the school by enlarging the pool of qualified applicants upon which it can draw for its education program.”<sup>136</sup>

Obviously, these two “benefits” identified by the court are attenuated. As a practical matter, however, federal assistance, and hence federal involvement, may range from direct and substantial to minimal and highly attenuated. Thus the courts are confronted with a difficult task of line drawing: At what point does the federally-conferred “benefit” become so attenuated that it no longer constitutes “federal financial assistance” within the meaning of title VI? Some courts have taken the position that such indirect benefits as those flowing from tax deductions and exemptions fall within the scope of title VI,<sup>137</sup> or constitute “state action” for Fifth and Fourteenth Amendment purposes.<sup>138</sup> But no clear and definitive guidelines for resolution of the line-drawing issue have yet been articulated. Hence, the possibility exists that the attenuated, indirect “benefits” identified by the court in *Bob Jones* will not qualify as “federal financial assistance” or “state action” under standards yet to be devised.

Assuming, however, that the court in *Bob Jones* correctly resolved the line-drawing issue, the question remains whether the underpinnings of that case’s broad construction of title VI are applicable to title IX. Three identifiable underpinnings emerge from the court’s opinion. First, it would be incongruous to draw a distinction between payments received directly by the university and payments received by the veteran since the beneficial effect of the university is the same under either method of transmittal. “[T]he payments ultimately reach the same beneficiaries and the benefit to a university would be the same in either event.”<sup>139</sup> Second, the language and legislative history of title VI

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135. *Id.* at 602-03.

136. *Id.* at 603.

The court apparently failed to recognize that this second “benefit,” while arguably “federal” and “assistance,” is not essentially “financial.” The benefit is educational in a qualitative sense.

137. *E.g.*, *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court).

138. *E.g.*, *Green v. Connally*, 330 F. Supp. 1151 (D.D.C.) (three-judge court), *aff’d mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971). It is as yet unclear whether a finding of “federal financial assistance” for title VI purposes and a finding of “state action” for Fifth or Fourteenth Amendment purposes are based on the same standard.

139. 396 F. Supp. at 603.



revealed no congressional intent to exempt veterans' benefits from the scope of the statute.<sup>140</sup> Finally, since federal participation in or support of even private racially discriminatory conduct is unconstitutional,<sup>141</sup> the court adopted a broad construction of title VI, including the phrase "receiving federal financial assistance," to avoid raising questions concerning the constitutionality of the grant statutes.<sup>142</sup>

The first underpinning cannot bear close scrutiny in either the title VI or the title IX context. It is true that if tuition payments constitute a benefit, there may be little practical significance to the identity of the immediate recipient, whether the university or the veteran who in turn pays the funds to the university to meet tuition costs. But under the analysis of the *Bob Jones* court itself, the actual payment of tuition fees does *not* constitute the requisite benefit. Rather, all the "benefits" identified by the court flow from the fact that the school *qualifies* to enroll federally assisted veterans.<sup>143</sup> The payment of tuition fees must be viewed as merely a *quid pro quo* transaction. This is demonstrated by the approach taken in HEW's title IX regulation where exchanges between a university and the federal government for fair market value are expressly left outside the scope of "federal financial assistance."<sup>144</sup>

Strong arguments also appear that when the second and third underpinnings are transferred from the context of title VI

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140. *Id.* at 604 ("Nothing in the congressional debate on what became the Civil Rights Act of 1964 compels exclusion of these [veterans' benefits] statutes from Title VI coverage.").

141. The court stated:

Another dimension as to the federal government's Fifth Amendment responsibilities exists here. If this court were to hold that the VA payments to veterans do not constitute assistance to Bob Jones, it might be contended that the Fifth Amendment prohibits the government's payments to veterans attending the university. *Each time the VA approves an application for benefits to be used at Bob Jones, it extends a benefit to whites which it cannot grant to some blacks.* While this is an outcome of private discrimination, it is clear that no [not?] only is the government prohibited from authoring state sponsored discrimination, it is also prohibited from acquiescence in the discriminatory practices of public and private entities which participate in the federal program.

It is . . . axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.

*Id.* at 608 (citation omitted) (emphasis in original).

142. The court felt that it "should avoid a statutory interpretation which raises constitutional questions if there is a reasonable reading of the statute which does not raise those issues." *Id.*

143. See notes 135-136 and accompanying text *supra*.

144. 45 C.F.R. § 86.2(g)(2), (4) (1975).

(racial discrimination in general) to the context of title IX (sex discrimination in education) they lose much of their validity and persuasive force. The court stated, as the second underpinning for its holding, that the legislative history of title VI revealed no congressional intent to leave veterans' educational benefits outside the scope of the statute. Yet, as discussed above, the legislative history of title IX tends to indicate that Congress intended federal aid paid directly to individual students, and this would include veterans' educational benefits, to be excluded from the scope of that statute.<sup>145</sup>

The applicability of the third underpinning to title IX is a more complex issue. The federal government is as undoubtedly barred by the Fifth Amendment from aiding or participating in *unconstitutional* sex discrimination as it is from aiding *unconstitutional* racial discrimination.<sup>146</sup> Yet under currently applied constitutional doctrine, virtually all racial discrimination, where the requisite government involvement is present and where minority races are denied rather than accorded the benefits of the discrimination, is unconstitutional.<sup>147</sup> At the same time, many forms of sex-based discrimination are not constitutionally infirm.<sup>148</sup> These disparate consequences flow from the United States Supreme Court's treatment of race as a "suspect classification" in Fifth and Fourteenth Amendment equal protection analysis,<sup>149</sup> coupled with its refusal to accord the same treatment to sex-based or sex-related classifications.<sup>150</sup>

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145. See notes 121-127 and accompanying text *supra*.

146. Compare *Bolling v. Sharpe*, 347 U.S. 497 (1954) (race) and *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964) (race) with *Fronteiro v. Richardson*, 411 U.S. 677 (1973) (sex).

147. For a review of the United States Supreme Court's treatment of race discrimination, see G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 690-753 (9th ed. 1975).

148. See, e.g., *Kahn v. Shevin*, 416 U.S. 351 (1974); *Hoyt v. Florida*, 368 U.S. 57 (1961); *Leighton v. Goodman*, 311 F. Supp. 1181 (S.D.N.Y. 1970); *United States v. St. Clair*, 291 F. Supp. 122 (S.D.N.Y. 1968). See generally *Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675 (1971).

149. See note 147 *supra*.

150. See *Kahn v. Shevin*, 416 U.S. 351 (1974). *But cf.* *Fronteiro v. Richardson*, 411 U.S. 677 (1973) (plurality opinion).

While sex-based classifications are not treated as inherently suspect, as are racial classifications, neither are they accorded the wide deference the courts generally accord nonracial classifications under the "rational basis" test, the lower tier of the traditional two-tiered equal protection model. See generally *Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Rather, the Supreme Court now appears to apply an intermediate test to sex-based classifications, one that in its rigor falls somewhere between minimal scrutiny and strict scrutiny. A sex-based classification, in order to withstand this intermediate

An additional difference separates racial discrimination from sex-based discrimination. The courts have, either expressly or implicitly, treated elimination of the former as a national priority of the highest order.<sup>151</sup> Indeed, some courts have gone so far as to say that the interest in eliminating racial discrimination, as the highest national priority, must prevail over all other interests when a conflict is unavoidable.<sup>152</sup> Elimination of sex-based discrimination, although increasingly important as a national goal, has not yet been identified as a priority of the same stature.<sup>153</sup> Unless and until the proposed Equal Rights Amendment is ratified, it remains unlikely that the interest in eliminating sex-based discrimination will be judicially vaulted over other interests that must necessarily, in varying contexts, conflict with that interest. The difficult questions that remain are whether and how these identifiable differences between the legal status of racial discrimination and the legal status of sex-based discrimination should affect the application of title VI cases such as *Bob Jones University v. Johnson*<sup>154</sup> to the construction of title IX.

The court indicated in *Bob Jones* that federal assistance to or participation in, even indirectly, racially discriminatory conduct would be unconstitutional as violative of Fifth Amendment guarantees.<sup>155</sup> That assertion, however, remains valid only where the discrimination itself, once the requisite government involvement is identified, is constitutionally impermissible.<sup>156</sup> But as

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level of scrutiny, "'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . .'" *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

151. See, e.g., *Green v. Connally*, 330 F. Supp. 1150, 1167 (D.D.C.) (three-judge court), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971); *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 607-08 (D.S.C. 1974), *aff'd mem.*, No. 74-2164 (4th Cir., May 28, 1975).

152. Judge Leventhal, speaking for a three-judge district court, stated:

There is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War. That government interest is dominant over other constitutional interests to the extent that there is complete and unavoidable conflict.

*Green v. Connally*, 330 F. Supp. 1150, 1167 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971).

153. Compare *Kahn v. Shevin*, 416 U.S. 351 (1974) (sex) with *Green v. County School Bd.*, 391 U.S. 430 (1968) (race) and *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971) (race).

154. 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, No. 74-2164 (4th Cir., May 28, 1975).

155. *Id.* at 608.

156. See generally *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961);

noted above, virtually all racial discrimination is unconstitutional.<sup>157</sup> Thus a court would perhaps be justified in the racial context in giving a broad definition, as the *Bob Jones* court did, to "receiving federal financial assistance" in order to avoid raising questions concerning the constitutionality of federal grant statutes.<sup>158</sup> If, however, as is much more likely with sex-based discrimination, the assisted discriminatory conduct can pass constitutional scrutiny,<sup>159</sup> the federal assistance cannot be interdicted, and the reason for an all-encompassing view of what constitutes federal assistance disappears. Thus, to the extent a statute or regulation is promulgated or employed to interdict constitutionally permissible discrimination—as are, to a large extent, title IX and HEW's title IX regulation<sup>160</sup>—a primary reason lead-

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*Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court).

157. See note 147 and accompanying text *supra*.

158. See notes 141-142 *supra*.

159. See notes 148-150 and accompanying text *supra*.

160. Speaking of title IX, HEW has stated that "[w]hen Congress specifically prohibits certain discrimination by statute, a higher standard may well apply than under the Fourteenth Amendment." Letter from Caspar Weinberger, Secretary of HEW, to Representative James G. O'Hara, July 2, 1975, in *1975 Hearings on Title IX Regulation* 486-89.

Much of the conduct prohibited by HEW's title IX regulation, even assuming the requisite government involvement, could pass constitutional muster. It is doubtful, for example, that a court would intervene on constitutional grounds in a university's decision to provide—in the form of additional police surveillance, locks, or lighting—greater security for women's dorms than is provided for men's facilities. The regulation, however, prohibits such discriminatory conduct. 45 C.F.R. § 86.32(a) (1975). Also, the regulation interdicts the following practices that appear either sufficiently related rationally to a valid objective or sufficiently removed from actual sex discrimination to avoid invalidation on Fifth Amendment grounds: assigning students in a college of education to a student-teaching experience at an elementary or secondary school that treats the student-teacher in a manner inconsistent with any portion of HEW's regulation, *id.* § 86.31(d); failing to insure that companies interviewing and recruiting on campus are not tainted by sexist hiring practices, *id.* § 86.38(a); providing sex education courses for college undergraduates on a sex-segregated basis, *id.* § 86.34(e); failing to establish formal grievance procedures for complaints of sex discrimination, *id.* § 86.8; using a sex-based quota system to insure that an equal number of men and women are enrolled in a ballroom dance class, *id.* § 86.34; failing to insure, if the university lists off-campus housing as a service to its students, that the housing available to one sex is comparable in quantity and quality to the housing available to the other sex, *id.* § 86.32(c).

It should be noted in this context that HEW's regulation to implement title VI, particularly the regulation's prohibition of discrimination and segregation in education, has been viewed by the courts as *coextensive* with constitutional prohibitions. See *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 848 (5th Cir. 1966), *decree corrected*, 380 F.2d 385 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967) ("HEW's standards are substantially the same as this Court's standards. They are required by the Constitution . . ."). This is in contrast to HEW's Title IX regulation, which in many areas extends beyond constitutional prohibitions. Again, this difference in the title VI

ing a court to construe federal assistance broadly in order to avoid the possibility of Fifth Amendment violations is not applicable.

The above analysis focuses primarily on one of the two identified differences between racial and sex-based discrimination: the larger scope constitutionally permitted the latter. Analysis of the impact of the second difference—the relatively higher priority accorded the interest in elimination of racial discrimination—is discussed in conjunction with other considerations in section III,B,4 below. Analysis of the first difference, however, indicates that the reason leading courts to construe title VI broadly, including the language “receiving federal financial assistance,” does not to an indefinite but perhaps substantial extent apply to title IX.

d. *Implications of HEW's definition of "receiving federal financial assistance."* If HEW's broad definition of “receiving federal financial assistance” is sustained against the first ultra vires challenge, arguably every program of any educational institution enrolling students receiving federal aid or benefits will be subject to HEW regulation. This is so *even if* the second ultra vires challenge—that title IX was drafted to regulate specific programs and not entire institutions—prevails and HEW's regulatory scheme is modified accordingly. The reason for this broad impact can be readily outlined. A student receiving veterans' educational benefits, for example, uses a portion of those benefits to meet tuition costs. Tuition payments enter the general fisc of the university; from there the money is used to support the university's diverse programs and activities. Thus, every program supported by tuition payments of students can be viewed as receiving federal financial assistance. Consequently, only those programs—revenue-producing intercollegiate athletics at some colleges, for example<sup>161</sup>—not receiving tuition funds would remain free from federal intervention under the title IX regulation.<sup>162</sup>

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regulation and the title IX regulation probably results from the different constitutional standards applied to sex-based and racial discrimination. See notes 146-153 and accompanying text *supra*.

161. Testifying in the 1975 hearings, one coach explained:

[E]ach school is somewhat different in the athletic property they own. At the University of Illinois anything that is owned by the Athletics Association, which is a complete and separate corporation from the university, has been paid for 100 percent in one of two ways—either by revenue raised by sports or by contributions from interested alumni.

1975 *Hearings on Title IX Regulation* 54 (testimony of Bob Blackman, University of Illinois).

162. HEW has adopted the position outlined here. Letter from Caspar Weinberger, Secretary of HEW, to Representative James G. O'Hara, July 2, 1975, in 1975 *Hearings on Title IX Regulation* 486-89.

### 3. *Institutional vs. programmatic application of title IX and the title IX regulation*

HEW's title IX regulation, as has been noted above, prohibits sex discrimination in all programs or activities of an educational institution if any one of those programs receives or benefits from federal financial assistance.<sup>163</sup> In short, its approach is institutional, not programmatic, with the regulation imposing more or less specific mandatory guidelines and prohibitions on programs that traditionally do not receive federal funding such as athletics,<sup>164</sup> housing,<sup>165</sup> health services,<sup>166</sup> and scholarship administration.<sup>167</sup> The ultra vires issue is thus whether HEW exceeded the scope of title IX and its authority thereunder when it sought to regulate entire educational institutions rather than only those specific programs and activities receiving federal financial assistance.

a. *The language of the statute.* Both the language of the statute and the way in which that language was chosen tend to indicate that Congress intended title IX to be applied on a programmatic, not an institutional, basis. The statute's prohibition is limited on its face: It extends only to any "education program or activity."<sup>168</sup> Further, one remedy provided for enforcement of the prohibition—fund termination—must, pursuant to statutory mandates, be "limited in its effect to the particular program, or part thereof," in which discrimination is found.<sup>169</sup> Also, it seems that had Congress desired to prohibit sex discrimination throughout an entire institution, it could have readily found its way to the word *institution* or *recipient* in its drafting efforts. Indeed, in another section of title IX, one dealing with discrimination against the blind, Congress used such language, clearly revealing an intent to cover entire institutions: "No person in the United States shall, on the ground of blindness . . . be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity . . . ."<sup>170</sup>

Also, when drafting the sex discrimination provisions, Congress had before it bills obviously extending to entire institutions.

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163. See notes 79-81 and accompanying text *supra*.

164. 45 C.F.R. § 86.41 (1975).

165. *Id.* § 86.32.

166. *Id.* § 86.39.

167. *Id.* § 86.37.

168. 20 U.S.C. § 1681 (Supp. IV, 1974); note 1 *supra*.

169. 20 U.S.C. § 1682 (Supp. IV, 1974); note 2 *supra*.

170. 20 U.S.C. § 1684 (Supp. IV, 1974).

Of the three measures introduced in Congress prohibiting sex discrimination in education—Senator Bayh's original amendment,<sup>171</sup> the Nixon administration bill,<sup>172</sup> and Representative Green's measure<sup>173</sup>—the first two were drafted to cover entire institutions.<sup>174</sup> Only Representative Green's measure, the measure adopted by Congress, limited the scope of the prohibition to an "education program or activity."<sup>175</sup> Given the alternatives that were presented to it, Congress's selection of the more narrowly drawn measure lends strong support to the view that Congress intended to limit the application of title IX to programs rather than extend it to entire institutions.

*b. The legislative history.* As with the legislative history pertaining to the first major ultra vires challenge, the legislative history relevant to a determination of the second challenge is sparse. Unfortunately, it is also ambiguous and inconclusive. The following dialogue between Representatives Waggoner and Steiger and Representative Green, the author and floor manager in the House of the measure that became title IX, constitutes the only portion of the congressional debate directly pertinent to the scope of the sex discrimination prohibition.<sup>176</sup>

Mr. Waggoner. Let me clarify a little bit better the point I am trying to make and that is this: This [title] 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.

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171. Amendment 398 to S. 659, 92d Cong., 1st Sess., 117 CONG. REC. 30156-57 (1971).

172. H.R. 5191, 92d Cong., 1st Sess. (1971).

173. H.R. 7248, 92d Cong., 1st Sess. (1971).

174. Sen. Bayh's measure prohibited sex discrimination in "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 . . ." Amendment 398 to S. 659, 92d Cong., 1st Sess., 117 CONG. REC. 30156-57 (1971). The administration bill prohibited sex discrimination by a "recipient of Federal financial assistance for any education program or activity . . ." H.R. 5191, 92d Cong., 1st Sess. (1971).

175. H.R. 7248, 92d Cong., 1st Sess. (1971); see note 37 and accompanying text *supra*.

176. Senator Bayh made the following comment on the floor of the Senate concerning his proposed bill, but since the comment is little more than a paraphrase of the language of the bill, its illuminative value is marginal at best: "The effect of termination of funds is limited to the particular entity and program in which such noncompliance has been found . . ." 118 CONG. REC. 5807 (1972).

Mr. Steiger of Wisconsin. . . .

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 [IX] the gentleman from Louisiana asked relating to a program on [or?] activities receiving Federal financial assistance, and under the "program on [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 [IX], 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?

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.<sup>177</sup>

Representative Green's response—"With Federal funds."—to Representative Waggoner's inquiry may be read as an affirmative response with a clarification, in which case the statement would be indicative of a congressional intent that title IX apply only on a programmatic basis. Such a reading is plausible but not absolutely required. Representative Steiger's attempt to clarify the issue would have been helpful but for an unfortunate phrasing of his queries. It should be noted that he asks two questions. An affirmative answer to the first would indicate an institutional application; an affirmative answer to the second, a programmatic approach. Representative Green answered in the affirmative, but it is not clear to which of the two questions she is responding. The statement following that response—"Enforcement is limited to each entity or institution and to each program and activity."—tends to indicate that Representative Green was thinking in terms of programmatic application. Yet the sentence immediately following—"Discrimination would cut off all program funds within an institution."—points in turn towards an institutional application.

The portion of the dialogue immediately following this exchange, however, only brings confusion to an area not yet clarified:

Mr. Steiger of Wisconsin. So that the effect of title [IX]

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177. 117 CONG. REC. 39256 (1971).



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 [IX] is to end discrimination in all institutions of higher education, yes, across the board, but we do have the three exemptions to which I referred.<sup>178</sup>

Representative Green's response, which gives wide scope to the fund termination remedy, is puzzling in light of the provisions of her bill limiting the effect of termination to the "particular program, or part thereof," in which discrimination is found.<sup>179</sup> In any event, both Representative Steiger's final query and Representative Green's response may be read as revealing a congressional preference for an institutional application of the statute. Nevertheless, consideration of the dialogue in toto leads one to no conclusion other than that the relevant legislative history is hopelessly ambiguous.

c. *Interpretation of title VI of the 1964 Civil Rights Act.* Both proponents and opponents of HEW's title IX regulation resort to a crucial Fifth Circuit Court of Appeals case construing title VI, *Board of Public Instruction v. Finch*,<sup>180</sup> in support of their respective positions on the scope of the application of title IX. The case, therefore, merits consideration in some detail.<sup>181</sup>

Over a period of several years, from 1965 to 1968, a small segregated Florida school district and HEW engaged in negotiations in an effort to arrive at an acceptable desegregation plan for the school district. The pace of progress was slow, however; the faculties and studentries of the schools in the district remained racially segregated. Finally HEW broke off the negotiations as fruitless and commenced administrative proceedings under title VI. An HEW hearing examiner found that the school district's progress toward student and faculty desegregation was "inadequate" and therefore entered an order terminating "any classes of Federal financial assistance" administered by HEW and two other federal agencies. HEW adopted the order.<sup>182</sup>

The order was appealed to the Fifth Circuit Court of Appeals

178. *Id.*

179. *See id.* at 39098-99.

180. 414 F.2d 1068 (5th Cir. 1969).

181. For an instance where opponents of the regulation resort to the *Finch* case see 1975 *Hearing on Title IX Regulation* 242, 245 (prepared statement of American Association of Presidents of Independent Colleges and Universities). HEW cites the *Finch* case in the comments accompanying the final title IX regulation. 40 Fed. Reg. 24128 (1975).

182. 414 F.2d at 1070-71.

where two major issues were presented for review: (1) whether HEW's blanket termination of federal funds, coupled with a failure to make programmatically oriented findings of discrimination, violated section 602 of title VI, a section virtually identical to section 902 of title IX; and (2) whether that issue was properly cognizable on appeal since it had not been raised in the administrative hearing below.<sup>183</sup>

In order to resolve the procedural issue, the circuit court felt compelled to examine in part the substance of HEW's action. It noted that since the school district received federal funds under three separate federal grant statutes, a possibility existed that the school district operated one or more of those programs on a non-discriminatory basis and that such a program was not tainted by discrimination in other federally funded activities.<sup>184</sup> The court felt that it could not "assume, contrary to the express mandate of [section 602 of title VI], that defects in one part of a school system automatically infect the whole."<sup>185</sup> The congressional intent expressed in section 602 was that the effect of fund termination be limited, or "pinpointed," to programs operated discriminatorily *in fact*.<sup>186</sup> Because the "action of HEW in the proceedings below was clearly disruptive of the legislative scheme" and because of other defects in HEW's administration of the title VI sanction, the court felt compelled to proceed to the merits and resolve the first issue.<sup>187</sup>

On the merits, the court refused to permit HEW to treat a program as not in compliance with title VI, and thus subject to fund termination, unless that program was shown to be *in fact* administered in a discriminatory manner or infected by a discriminatory environment.

If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. But there will also be cases from time to time where a particular program, within a state, within a county, within a district, even within a school (in short, within a "political entity or part thereof"), is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others. HEW was denied the

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183. *Id.* at 1071-72.

184. *Id.* at 1071, 1074.

185. *Id.* at 1074.

186. *Id.* at 1075.

187. *Id.* at 1075-76.

right to condemn programs by association. The statute prescribes a policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. . . . Schools and programs are not condemned enmasse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends.<sup>188</sup>

The court recognized that a program not operated in a discriminatory fashion may still be so affected by a discriminatory environment as to render it violative of title VI. But since the contrary possibility exists, HEW cannot presume discrimination. Rather, before taking action in any case, HEW 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."<sup>189</sup>

In conclusion, the *Finch* case establishes two fundamental principles: (1) Title VI's prohibitions and sanctions apply to programs, not recipient institutions or entities. (2) No program violates title VI unless, as a matter of fact, it is operated discriminatorily or is affected to some unspecified degree by the discriminatory environment of the operating institution. These principles take on added significance in light of HEW's reliance on the *Finch* case in the comments accompanying its final title IX regulation.<sup>190</sup>

HEW uses the *Finch* case in those comments, however, in a particularly puzzling manner. The Department first quotes the "particular education program" language of section 902 of title IX that limits the permissible effect of fund termination and pledges to interpret that section consistent with section 602 of title VI. HEW then concludes that "[t]herefore, an education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it [the program or the recipient institution?] receives or benefits from such assistance."<sup>191</sup> HEW attempts to support the broad coverage of the regulation, however, by quoting language from the *Finch* case

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188. *Id.* at 1078.

189. *Id.* at 1079.

190. 40 Fed. Reg. 24128 (1975).

191. *Id.*

dealing with the "tainting" effect of discrimination: "Federal funds may be terminated under title VI upon a finding that they 'are infected by a discriminatory environment . . .'"<sup>192</sup>

Although puzzling at first, HEW's use of the *Finch* case reveals an additional premise underlying the institutional approach of the title IX regulation: If any program, whether federally funded or not, is operated discriminatorily, all other programs of the operating institution, including those receiving federal assistance, are so tainted by the discrimination as to render them violative of title IX. (The first presumption—the "benefit" theory—has been mentioned before and will be analyzed in more detail later.)<sup>193</sup> That use, however, arguably also constitutes abuse, for while the *Finch* court agreed that one program may in fact be tainted by the discrimination in another program, it forbade HEW from presuming that taint. Whether or not a funded program is so tainted by discrimination as to render it violative of the statute is in all cases a question of fact.<sup>194</sup> If HEW cannot presume that discrimination in one program taints all programs either as an aid in establishing a statutory violation or as a basis for terminating federal financial assistance, it is difficult to imagine how the Department could be justified in using that presumption to expand the scope of its regulatory powers.

Nevertheless, one of the first commentators on title IX argued that the tainting presumption should be used to expand the scope of the statute's prohibitor.<sup>195</sup> If a federally funded pro-

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192. *Id.* The entire paragraph reads:

Title IX requires in 20 U.S.C. 1682, that termination or refusal to grant or continue such assistance "shall be limited in its effect to the particular education program or activity or part thereof in which noncompliance has been found." The interpretation of this provision in title IX will be consistent with the interpretation of similar language contained in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-1). Therefore, an education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it receives or benefits from such assistance. This interpretation is consistent with the only case specifically ruling on the language contained in title VI, which holds that Federal funds may be terminated under title VI upon a finding that they "are infected by a discriminatory environment . . ." Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969).

*Id.*

193. See notes 79-81 and accompanying text *supra*; notes 229-236 and accompanying text *infra*.

194. See notes 184-189 and accompanying text *supra*.

195. Comment, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 Tex. L. Rev. 103, 111-12 (1974).

gram is tainted by discrimination in another, nonfunded program, both programs should be "considered *part of the same program* for purposes of bringing the latter [nonfunded program] within the reach of Title IX."<sup>196</sup> Nothing supports such a proposition, however, other than a desire to give title IX as wide a scope as possible. The statute prohibits sex discrimination not in discriminatory programs that taint funded programs but only in "any education program and activity receiving Federal financial assistance."<sup>197</sup> To bring nonassisted but tainting programs within the scope of title IX's prohibition, as the commentator suggested and as HEW has done with its regulatory scheme,<sup>198</sup> is to extend that prohibition beyond the limits set by Congress.

As a practical matter, however, the regulation promulgated by HEW for funded programs may serve as a useful, although not mandatory, guideline for nonfunded programs. If an educational institution is unable to effectively insulate discriminatory practices in a nonfunded program, those practices may taint a funded program to such an extent that the latter must be deemed in violation of title IX and thus subject to fund termination or other remedial action.<sup>199</sup> To avert fund termination, the institution would be obligated to end the discriminatory practices in the nonfunded program, even though that program is outside the scope of title IX's prohibition. If the institution elects such a course, guidelines or regulations promulgated by the federal department or agency holding the fund termination ax and outlining the steps necessary, in the agency's view, to eliminate discrimination in the nonfunded program would be a useful aid to the institution.

Before leaving the *Finch* case and its implications for title IX interpretation, an argument advanced by proponents of the regulation and designed to circumvent the programmatic approach and evidentiary standard mandated by that case should be considered. The Center for National Policy Review has contended that the "limitations on the scope of section 902, the statutory sanction for noncompliance with section 901, are independent

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196. *Id.* (emphasis added).

197. 20 U.S.C. § 1681(a) (Supp. IV, 1974); note 1 *supra*.

198. The commentator correctly recognized that HEW's cite to the *Finch* case in its comments accompanying the (then only proposed) regulation "indicates that tainted [but nonassisted] programs fall within the Secretary's ban, . . ." Comment, *supra* note 195, at 113.

199. For an excellent discussion of the ways in which one program can taint another program offered by the same institution see 1975 *Hearings on Title IX Regulation* 194-96 (memorandum prepared by Center for National Policy Review).

from and do not limit the general prohibition of section 901."<sup>200</sup> The *Finch* case, which mandated a programmatic approach, only construed title VI's equivalent of section 902, not section 901, and is therefore not dispositive. Section 901 is "properly interpreted as prohibiting discrimination based on sex in all aspects of a school program which is receiving Federal financial assistance."<sup>201</sup> Two cases, *Lau v. Nichols*<sup>202</sup> and *Bossier Parish School Board v. Lemon*,<sup>203</sup> support the institutional interpretation of section 901 found in HEW's title IX regulation.<sup>204</sup>

Severe difficulties plague this argument. First, the *Lau* and *Bossier Parish* decisions are doubtful authority for institution-wide application of title IX. In *Bossier Parish*, the Fifth Circuit Court of Appeals held that the racially segregated school district "accepted federal financial assistance . . . and thereby brought its school system within the class of programs subject to the section 601 prohibition against discrimination."<sup>205</sup> In *Lau*, the Supreme 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, based on section 601 of title VI, the Court referred to "the educational program" of the school district;<sup>206</sup> the concurring opinion also approved HEW's title VI guidelines that spoke of the "educational program offered by a school district."<sup>207</sup> Clearly, the Court's approach was unitary or institutional and not programmatic in the narrow sense. Nevertheless, in both cases, the courts had *no* need to distinguish between an institutional and a programmatic application of title VI: Both the defendant school districts received federal funds into their general fiscs which were then used, presumably, to finance all their activities and programs.<sup>208</sup> Any

200. 1975 Hearings on Title IX Regulation 191, 193.

201. *Id.* at 192-94 (emphasis omitted).

202. 414 U.S. 563 (1974).

203. 370 F.2d 847 (5th Cir. 1967).

204. 1975 Hearings on Title IX Regulation 193.

205. 370 F.2d at 852.

206. 414 U.S. at 568.

207. *Id.* at 570 (Stewart, J., concurring), quoting 35 Fed. Reg. 11595 (1970).

208. The Bossier Parish School District received federal funds under 20 U.S.C. §§ 236-241 (1970). 370 F.2d at 851. Such funds, commonly referred to as "federal impact funds," are paid directly to the school district; the use or purpose of the funds is not restricted beyond the requirement that they be used for "operation of schools." OFFICE OF EDUCATION, HEW, ADMINISTRATION OF PUBLIC LAWS 81-874 & 81-815: TWENTY-FIRST ANNUAL REPORT OF THE COMMISSIONER OF EDUCATION 5 (1971); see 20 U.S.C. § 240 (1970). In fact, part of the policy of the statutes providing for "federal impact funds" is to replace funds

distinction between programs would have been immaterial since all programs and activities comprising the total offering of the defendants would have been subject to section 601 even under a rigorous programmatic approach. In short, since the courts did not have the institutional vs. programmatic issue before them, it is simply unknown what they would have done had less than all of the programs offered by the school districts received federal assistance. Only when confronted with such a factual setting would a court be required to determine the scope of section 601 of title VI, or section 901 of title IX, and choose between an institutional and a programmatic application of the statute.<sup>209</sup>

Also, the Center's argument that section 901 is broader in application than section 902 inevitably leads to the conclusion that Congress prohibited some offensive conduct without providing a truly effective means of enforcing that prohibition.<sup>210</sup> That

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lost to a school district's general fund when private, taxable property within the district is acquired by the federal government and thus removed from the tax rolls. 20 U.S.C. § 236 (1970). The San Francisco School District also received, among other types of federal aid, "federal impact funds." See Brief for Petitioners at 45, *Lau v. Nichols*, 416 U.S. 563 (1974); OFFICE OF EDUCATION, HEW, ADMINISTRATION OF PUBLIC LAWS 81-874 & 81-815: TWENTY-FOURTH ANNUAL REPORT OF THE COMMISSIONER OF EDUCATION 38 (1974) (San Francisco School District received \$1,592,330 in "federal impact funds" in 1973).

209. The Fifth Circuit Court of Appeals was confronted with such a factual setting in *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969); it opted for "programmatic specificity." See notes 184-189 and accompanying text *supra*.

210. Section 902 of title IX, 20 U.S.C. § 1682 (Supp. IV, 1974), provides that compliance with the rules, regulations, and orders promulgated pursuant to that section may be effected by (1) fund termination or (2) "any other means authorized by law." The latter phrase refers to judicial, as opposed to administrative, remedies. Application of the identical phrase in title VI has been explained in these terms:

[I]f the violation cannot be corrected informally, HEW may submit a recommendation to the Department of Justice to commence appropriate proceedings, one of which may be an action under state or local law. A Justice Department suit may seek judicial enforcement of assurances by the recipient of federal financial assistance that its program is in compliance with Title VI and its regulations; such assurances are required in every application for financial assistance as a condition of approval or continuance and specifically provide that the United States has a right to seek judicial enforcement of them.

Slippen, *Administrative Enforcement of Civil Rights in Public Education: Title VI, HEW, and the Civil Rights Reviewing Authority*, 21 WAYNE L. REV. 931, 933 (1975) (footnotes omitted). The extent of the use, if any, of the second remedy could not be ascertained. Nevertheless, all commentators agree that, in the title VI context, fund termination or the threat thereof has been the device that has rendered title VI such an extremely effective tool in eliminating discrimination in federally assisted programs. See, e.g., Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967); Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after Brown v. Board of Education*, 41 U. CHI. L. REV. 742, 756-58 (1974); Slippen, *supra*. In addition, see 117 CONG. REC. 30408 (1971) (remarks of Senator Bayh: "The civil rights experience . . . indicates that the very possibility of such a sanction [fund termina-

Congress would engage in such a hollow exercise cannot be accepted without difficulty. Further, and perhaps most persuasively, there is no significant difference in the language of the two sections to indicate that "education program" in section 901 has a meaning different from "education program" in section 902.<sup>211</sup> Standard rules of statutory construction mandate that identical phrases in such close proximity within a statute, absent some clear indication to the contrary, be given the same meaning and scope.<sup>212</sup> Finally, if section 902 applies to specific programs while section 901 applies on an institution-wide basis, as the Center argues, HEW's rulemaking power under section 902 would appear to be inadequate to its purpose—effectuation of the provisions of section 901. Section 902 authorizes HEW (or any other federal department or agency) to promulgate regulations only "with respect to" education programs receiving federal financial assistance administered by HEW.<sup>213</sup> In other words, HEW cannot promulgate rules covering anything other than a section 902 "education program." If that term in section 902 is more limited in scope than the same term in section 901, HEW's authority is necessarily limited to a point where it cannot fully effectuate the provisions of section 901. It is doubtful that Congress intended such a limitation on HEW's rulemaking power. If it did, the institutional approach of HEW's title IX regulation is clearly *ultra vires*. If it did not, the scope of section 902, which under the *Finch* case requires programmatic specificity,<sup>214</sup> must be construed as identical to the scope of section 901.

*d. The program-as-institution issue.* The preceding portions of section III,B,3 evaluate, in the somewhat complex form

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tion] has worked wonders."'). The last cite and quotation is typical in its indication that to the Congressmen involved in passage of title VI and title IX fund termination constitutes *the effective remedy* of those statutes.

211. The Center for National Policy Review points up minor differences in the language of the two sections but fails to identify and ascribe any significance or materiality to those differences. *1975 Hearings on Title IX Regulation* 194.

212. See, e.g., *Schooler v. United States*, 231 F.2d 560, 563 (8th Cir. 1956) ("In the absence of anything in the statute clearly indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout . . ."); *Hull v. American Wire Weavers' Protective Assoc.*, 159 F. Supp. 425, 430 (N.D. Ohio 1957) ("It is a settled canon of construction that words used in one place in an enactment have the same meaning in every other place in the statute."); *Safeway Trails, Inc. v. Furman*, 76 N.J. Super. 90, 105, 183 A.2d 788, 796 (1962) ("It is a general rule of construction that where a word or a phrase occurs more than once in a statute, it should have the same meaning throughout unless there is a clear indication to the contrary.").

213. 20 U.S.C. § 1682 (Supp. IV, 1974); note 2 *supra*.

214. See notes 184-189 and accompanying text *supra*.



in which both proponents and opponents of the regulation have cast the issue, whether HEW's institutional approach is ultra vires. A much simpler formulation of the issue merits consideration: Is "education program" as that term is used in title IX coextensive with the total and combined educational activities of a school district, college, university, or other educational institution? In other words, does a university, for example, provide an "education program" or does it provide numerous separable programs and activities? Obviously, if a university were deemed to offer a unitary program, the ultra vires issue considered in this section would be resolved; there would be no difference between an institution and a program and no disparity between the institutional approach of HEW's title IX regulation and the programmatic approach that many argue title IX mandates.

Some indirect authority for the institution-as-program view exists. In two title VI cases, *Lau v. Nichols*<sup>215</sup> before the Supreme Court and *Bossier Parish School Board v. Lemon*<sup>216</sup> before the Fifth Circuit Court of Appeals, the courts approached the defendant school districts as if they provided a unitary education program. But as noted in the previous discussion of these two cases,<sup>217</sup> since both defendant school districts received federal funds into their general fiscs, the courts had no need to distinguish between a unitary and a separable approach to the programs offered by the school districts.

Other title VI cases, and most groups involved in construing or analyzing title IX, including HEW, view the various facets and activities of an educational institution as separable, distinct education programs. This is certainly the approach of opponents of the regulation. One university president testifying during the 1975 congressional hearings on the title IX regulation stated that "program or activity is subsumed in the institution. My institution has 100 programs or activities . . . . The intent of the statute is 'any education program or activity,' and not any institution."<sup>218</sup> HEW also, both in the regulation and in extrinsic statements, has adhered to this approach. For example, HEW's Secretary Weinberger, in testifying before Congress in the 1975 hearings, spoke of the "educational programs or activities of a school district,

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215. 414 U.S. 563 (1974).

216. 370 F.2d 847 (5th Cir. 1967).

217. See notes 205-209 and accompanying text *supra*.

218. 1975 Hearings on Title IX Regulation 260-61 (testimony of Dr. Dallin H. Oaks, President, Brigham Young University).

institution of higher education, or other entity which receives Federal funds for any of [its] programs."<sup>219</sup> The regulation speaks of the "educational programs or activities" which a recipient institution operates.<sup>220</sup> In addition, commentators reviewing title IX have indicated that a single institution may and generally does operate various separable education programs and that an athletic program within a high school, for example, constitutes an education program as that term is used in the statute.<sup>221</sup>

The latter approach to title IX—that separable education programs exist within a single institution—appears correct. Congressmen in the debates preceding passage of title IX generally used the word *program* to refer not to the total program of an educational institution but to smaller-scale activities within the institution.<sup>222</sup> The following query of Representative Steiger is typical: "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?"<sup>223</sup> Also, cases construing title VI, some decided prior to enactment of title IX, recognize that a school district or university operates various education programs within the total scope of its activities.<sup>224</sup> In *Board of Public Instruction v. Finch*,<sup>225</sup> for example, the Fifth Circuit Court of Appeals identified at least three separate education programs receiving federal aid within a school district accused of racially discriminatory conduct: a program for the education of children of low-income families, a program involving supplementary education centers, and a program for the education of adults with no college degree.<sup>226</sup> It should be noted that the court equated "program" with "federal grant statute," basing that view on the manner in which congressmen used the word in debates preceding the enactment of title VI.<sup>227</sup>

In conclusion, it appears that the term "education program" from title IX is *not* equivalent in scope to an entire educational

219. *Id.* at 436, 438.

220. 45 C.F.R. § 86.9(a) (1975). *See also id.* § 86.4(a), § 86.11, § 86.31(a).

221. *See, e.g.*, Comment, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 *TEX. L. REV.* 103, 107-13 (1974).

222. *See, e.g.*, 117 *CONG. REC.* 39256 (1971) (Representative Steiger); *id.* (Representative Waggoner); *id.* at 30406 (Senator Dominick).

223. *Id.* at 39256.

224. *See, e.g.*, *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969); *McLeod v. College of Artesia*, 312 F. Supp. 498 (D.N.M. 1970).

225. 414 F.2d 1068 (5th Cir. 1969).

226. *Id.* at 1074.

227. *Id.* at 1077-78.

institution; rather, it refers to such educational activities as an athletic program, an English department, ROTC, or a program outlined in and funded by a federal grant statute. The argument that the term "education program" is unitary and refers to the total activities of a school district or university is therefore unavailable to support the institutional approach of HEW's title IX regulation. But, as noted above, HEW has not resorted to that argument in support of its position.<sup>228</sup>

*e. Presumption vs. fact: the "benefit" theory and institutional application of title IX.* As noted above, proponents of an institutional application of title IX have urged a "benefit" theory in support of their position: Federal assistance received by one program benefits all other programs within the institution by "releasing" institutional funds—which would otherwise go to the recipient program—for use in those other programs.<sup>229</sup> It should be noted that this theory is based (1) on a fundamental presumption concerning the effect *in fact* of federal assistance on education programs and institutions and (2) on the assumption that the term "receiving federal financial assistance" includes the concept of "benefitting from." The latter aspect of the theory was treated above.<sup>230</sup> The portion of the comment that follows analyzes the first characteristic of the "benefit" theory: the presumption that federal assistance received by one program benefits all other programs within the institution.

*Board of Public Instruction v. Finch*<sup>231</sup> established that whether prohibited discrimination exists in or taints a program is a question of fact. Likewise, for purposes of applying either title IX's prohibition or its sanctions, it appears evident that a program must *receive* in fact—or, if the broad construction is adopted, be benefited by in fact—federal financial assistance. Any other approach would render meaningless the limitation inherent in the phrase "*receiving* federal financial assistance." Further, if a program does not actually receive federal aid, and therefore falls without the scope of section 901, no authorization appears for administrative regulation of the program. The statutory authorization for department or agency rulemaking in section 902 limits that rulemaking power to effectuation of section 901's prohibition.<sup>232</sup> Therefore, to the extent HEW's title IX regulation

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228. See notes 219-220 and accompanying text *supra*.

229. See notes 79-81 and accompanying text *supra*.

230. See notes 117-120 and accompanying text *supra*.

231. 414 F.2d 1068 (5th Cir. 1969).

232. 20 U.S.C. § 1682 (Supp. IV, 1974); note 2 *supra*.

covers education programs and activities that are presumed to but do not in fact receive—or perhaps, benefit from—federal financial assistance, it is *ultra vires*.

Nevertheless, it may be argued that the “benefit” theory’s presumption sufficiently conforms to actuality that HEW’s institutional approach may be viewed as warranted. The very nature of federal assistance to many education programs, however, greatly reduces the accuracy of HEW’s presumption and thus the validity of its institutional approach. Many federal grant statutes are subject to what is termed a maintenance of effort requirement.<sup>233</sup> Under such a requirement, the sponsoring institution is obligated to continue funding at historic levels a program newly receiving federal funds. The net result is twofold: (1) The federally assisted program receives an actual increase in its funding, and (2) the sponsoring institution does *not* have “released” to it institutional funds it may then expend on nonfunded programs and activities.

The ubiquity of maintenance of effort provisions is demonstrated by an examination of chapter 28 of title 20, *United States Code*, the chapter dealing with federal assistance to institutions of and students enrolled in higher education. A cursory survey revealed eleven separate provisions requiring maintenance of effort.<sup>234</sup> Of those eleven, seven appear in the Education Amendments of 1972, the same Act containing title IX.<sup>235</sup> More significant than the total number of such provisions, however, is the amount of federal assistance subject to them. For example, one provision covers all grants to students in attendance at institutions of higher education and requires participating colleges and universities to continue spending “in its own scholarship and student-aid program, from sources other than funds received [from the federal government], not less than the average expenditure per year made for that purpose during the most recent period of three fiscal years preceding the effective date of the agreement, . . .”<sup>236</sup> This wide use of the maintenance of effort concept throughout federal education assistance programs demonstrates the inaccuracy of the presumption of the “benefit” theory underlying HEW’s institutional approach. Given that sig-

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233. See, e.g., 20 U.S.C. §§ 1022, 1088c (Supp. IV, 1974).

234. 20 U.S.C. §§ 1022, 1023, 1054, 1070e, 1088c, 1134s(c), 1135b-7 (Supp. IV, 1974); 20 U.S.C. §§ 1087b, 1119c-2(c), 1124, 1125 (1970).

235. 20 U.S.C. §§ 1022, 1023, 1054, 1070e, 1088c, 1134s(c), 1135b-7 (Supp. IV, 1974).

236. 20 U.S.C. § 1088c (Supp. IV, 1974).

nificant inaccuracy, HEW should not be permitted to use the presumption as a basis for expanding the scope of its regulatory power.

#### 4. *Policy arguments for and against a narrow construction of title IX*

Proponents of HEW's title IX regulation argue that certain practical considerations, as well as a general view of the interests served by the authorizing statute, mandate a broad construction of the statute and support the institutional approach of the regulation. First, a narrow construction of title IX, one requiring programmatic application of both the statute's prohibition and its sanctions, would be difficult to administer. The enforcing federal department or agency would be required to identify which education programs receive federal funding and which do not. The resultant need to trace federal funds would impose an extraordinary work load on federal officials in addition to requiring excessive federal intervention in school affairs. These burdens would render title IX ineffective as an antidiscrimination device.<sup>237</sup>

Experience indicates that these fears of administrative difficulty are probably excessive and unwarranted. After the *Finch* case imposed a requirement of programmatic specificity on HEW in its title VI enforcement efforts,<sup>238</sup> some commentators forecast that the administrative burden would be unbearable.<sup>239</sup> "Administratively, a program-by-program determination of discrimination will place an enormous burden upon an understaffed agency. . . . The added work load will only exacerbate the difficult conditions and essentially render section 602 ineffective when applied to school desegregation."<sup>240</sup> That forecast has proven to be wrong. HEW has followed the *Finch* requirements,<sup>241</sup> the administrative burdens have not been unbearable, and title VI has continued to be an extremely effective desegregation device.<sup>242</sup> A contrary result of programmatic application of title IX is unlikely.

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237. See, e.g., *1975 Hearings on Title IX Regulation* 217 (statement of Holly Knox, NOW); *id.* at 296 (testimony of Dr. Norma Raffel, Education Committee, WEAL); *id.* at 416 (prepared statement of Nellie M. Varner).

238. See notes 184-189 and accompanying text *supra*.

239. See, e.g., 23 VAND. L. REV. 149 (1969), *noting* Board of Public Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969).

240. *Id.* at 155.

241. Slippen, *Administrative Enforcement of Civil Rights in Public Education: Title VI, HEW, and the Civil Rights Reviewing Authority*, 21 WAYNE L. REV. 931, 941-42 (1975).

242. See note 210 *supra*.

Also, the nature of federal education assistance programs makes unmanageable administrative burdens and additional federal intervention less than probable. Most federal education assistance programs already require recipient institutions to make reports, keep records, and provide for such other "fiscal control and fund accounting procedures as may be necessary to insure proper disbursement of and accounting for funds made available under" the federal grant statute.<sup>243</sup> With such "fiscal control and fund accounting procedures," reports, and records already in existence, it appears that federal officers engaged in title IX enforcement can readily identify the specific programs receiving federal aid. Equally important, they can do so without additional intervention into school affairs.

Proponents of the regulation raise a second argument. Title IX was drafted to serve the interest in eliminating sex discrimination in education. The statute should therefore be construed broadly and given the widest possible application in order that that interest may be fully vindicated.<sup>244</sup> Those who make this argument, however, overlook the readily apparent fact that Congress, when enacting title IX, was also concerned with the protection and vindication of other interests, certain of which in some contexts necessarily conflict with the interest in eliminating sex discrimination in education. Of those countervailing interests, Congress was perhaps most concerned with the interest in preventing the destructive intrusion of federal control into the autonomous and pluralistic world of American higher education.<sup>245</sup> Throughout the debates preceding enactment of title IX, congressmen, including the chief sponsors and proponents of the title,<sup>246</sup> repeatedly articulated an "unwillingness to require the

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243. 20 U.S.C. § 1054(c)(1)(D)-(E) (Supp. IV, 1974); e.g., *id.* §§ 1022(2)-(3), 1023(a)(1), 1070e(c)(1)(A), 1070e-1(c)(1)(A), 1134s(c)(2), 1135b-7(a)(4), (6); 20 U.S.C. §§ 1087b(3)-(4), 1119c-2(c)(3)-(4) (1970).

244. *See, e.g., 1975 Hearings on Title IX Regulation 324* (prepared statement of Dr. Bernice Sandler); *id.* at 163-64 (testimony of Representative Mink).

245. *See, e.g., 117 CONG. REC. 37784* (1971) (Representative Quie); *id.* at 37786-87 (Representative Sheuer); *id.* at 37790 (Representative Erlenborn); *id.* at 39249 (Representative Erlenborn); *id.* at 39254 (Representative Conte). *See generally* Buek & Orleans, *Sex Discrimination—A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1, 5, 16 (1973).

246. During debates, Representative Green made the following comment:

I think we ought to respect the autonomy of the institution and let the institutions determine their priorities and needs. The Federal Government has no business saying if you do not do what we have decided is important—you would not get any funds. I say if we follow this course, we will have more and more Federal control, which is what I want to avoid.

117 CONG. REC. 37785 (1971).

federal government to intrude into determining the nature of private educational organizations, and a conviction that one of the essential elements of a free society is the diverse nature of its educational institutions."<sup>247</sup>

Even prior to the title IX debates, however, Congress recognized and translated into legislation this interest in preserving the autonomy of American higher education from federal regulation and control. When Congress significantly increased federal assistance to education with the Higher Education Act of 1965, it provided:

Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, or over the selection of library resources by an educational institution.<sup>248</sup>

Thus, in the title IX debates, congressmen could accurately describe the policy against federal intervention in higher education as "long-standing."<sup>249</sup>

That policy, and the interests it seeks to further, influenced the drafting of title IX. This is most readily seen in the various exceptions provided to the general prohibition of section 901.<sup>250</sup> It can also be argued, however, that Congress, realizing that title IX's prohibition would necessarily operate to reduce the pluralism and autonomy of American education, carefully limited the scope of that general prohibition itself. This argument is supported in part by Congress's rejection of the institutional approach of Senator Bayh's original amendment and the Nixon administration bill in favor of the more narrowly drawn bill introduced by Representative Green.<sup>251</sup>

In conclusion, with title IX Congress sought to serve legitimate interests in addition to the primary interest in eliminating sex discrimination in education. The narrowing provisions of the statutes should not be viewed, therefore, as accidents of the legislative process needing to be corrected or glossed over by a regulatory scheme insensitive to all of the interests that Congress sought

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247. Buek & Orleans, *supra* note 245, at 5; *see* note 245 *supra*.

248. Higher Education Act of 1965, Pub. L. No. 89-329, § 804(a), 79 Stat. 1270.

The current prohibition against federal control of education is found at 20 U.S.C. § 1232a (Supp. IV, 1974).

249. 117 CONG. REC. 37784 (1971) (Representative Quie).

250. 20 U.S.C. § 1681(a)(1)-(6) (Supp. IV, 1974); note 1 *supra*.

251. *See* notes 35-53 and accompanying text *supra*.

to accommodate. Since Congress was not single-minded when it drafted title IX, it would be a mistake for a court and an ultra vires act for an agency to disregard the limiting features of the statute and apply it in a single-minded fashion.

#### IV. CONCLUSION

It should be remembered that the previous sections are concerned with what Congress did and not with what Congress could have done or can do now. Some of the most astute critics of HEW's title IX regulation have conceded that had Congress chosen to regulate all programs and activities of an educational institution even though only one of those programs received funding, it could have done so within constitutional strictures.<sup>252</sup> Yet if Congress, with its title IX prohibition, did not cut such a wide, leveling swath—and the short conclusion of the preceding sections is that it did not—it should be of no little concern that a segment of government largely immune from the democratic processes has advanced without authority its regulatory power over a part of society as crucial as education.

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252. See *1975 Hearings on Title IX Regulation* 261 (Dr. Dallin Oaks, president, Brigham Young University).