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Title VI, Title IX, and the Private University: Defining “Recipient” and “Program or Part Thereof”

"Liberty without learning is always in peril, and learning without liberty is always in vain."

John F. Kennedy, May 18, 1963

Federal aid to private colleges and universities threatens the American ideal of independent private higher education. A private university’s reliance on federal funds casts doubt on its independence; restrictions on the use of such funds tend to confirm that doubt. Title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 restrict the use of federal aid by universities. How title VI and title IX restrictions are interpreted determines, to a significant degree, how independent private universities can be.

Section 601 of title VI provides:

No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 901 of title IX, in virtually identical language, forbids discrimination on the basis of sex in any education program or activity receiving federal assistance. The ultimate sanction for violating title VI or title IX is to cut off aid to the noncomplying “recipient,” but


2. See generally THE UNIVERSITY AND THE STATE: WHAT ROLE FOR GOVERNMENT IN HIGHER EDUCATION? (S. Hook, P. Kurtz & M. Todorovich ed. 1978) [hereinafter cited as THE UNIVERSITY AND THE STATE]. The federal government spends $15 billion annually on higher education, or roughly $1500 for every college student in America. Finn, Federal Patronage of the Universities: A Rose by Many Other Names?, in THE UNIVERSITY AND THE STATE, supra, at 7. Private colleges today draw one third of their revenue from direct or indirect federal aid. See TIME, March 24, 1980, at 70. This enormous amount of aid understandably frightens academics, for “[n]othing draws American academics to the barricades more readily than threats of government interference with the internal affairs of a faculty, or attempts by public officials to limit what a faculty might think or teach so as to conform to political standards of orthodoxy.” McGill, Government Regulation and Academic Freedom, in THE UNIVERSITY AND THE STATE, supra, at 143. Extensive federal aid may render unrealistic the Supreme Court’s 1819 decision that a private college should not be considered a public trust subject to government control. See Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).


6. 20 U.S.C. § 1681 (1976). Title IX applies only to education programs, and hence is considerably less comprehensive than title VI.
any such cutoff is limited "to the particular program, or part thereof, in which . . . noncompliance has been . . . found."7 This parallel language in title VI and title IX leaves two alarming uncertainties for private university officials who seek both a large, balanced budget and independence from government influence. First, when is a university a "recipient" subject to title VI and title IX restrictions? One federal court has held that when students receive veterans' educational benefits, their school is a recipient.8 Another court agreed that direct aid to students makes their alma mater a recipient, but refused to permit a funds cutoff.9 Second, although title VI and title IX limit cutoffs to "the program, or part thereof" in which discrimination occurs, they do not indicate what constitutes a program. May an entire university be considered a single program? Or could a university's medical school avoid cutoffs even though its law school discrimi-

nated? Although the Department of Health, Education, and Welfare (HEW) presumes that funds for an entire university may be cut off if any division discriminates,10 that presumption is contradicted by the legislative history and the reasoning of several courts.

This Note explores the meaning of "recipient" and "program or part thereof" in title VI and title IX. Section I studies federal court definitions of "recipient" and the legislative history of title VI; it concludes that only organizations that exercise discretion in disbursing federal funds to students are "recipients." Section II explores the "program or part thereof" language as applied to the university by examining legislative history and recent discrimination cases. It argues that, since Congress sought to protect beneficiaries both from discrimination and from overbroad cutoffs, courts and agencies should draw the perimeters of a funds cutoff by balancing the effect of each of these hazards on the students. The Note therefore concludes that both "recipient" and "program or part thereof" should be defined in terms of the ultimate beneficiaries of federal aid — the students.

I. WHAT IS A "RECIPIENT"?

Only recipients of federal assistance need comply with the restrictions and regulations of title VI and title IX. Federal assistance to education includes direct grants to universities, direct grants to students (such as veterans' benefits), and a wide variety of loans and loan guarantees.11 Courts and commentators disagree over which

10. See text at notes 64-67 infra.
11. In fiscal year 1976, the federal government spent $8.1 billion on programs assisting
federal programs make private universities "recipients." This section describes the views of district courts and then turns to the legislative history of title VI to identify the most sensible construction.

A. Court Approaches to "Recipient": Bob Jones University and Grove City College

In Bob Jones University v. Johnson, the federal district court of South Carolina held that any university whose students receive federal scholarships is a "recipient" of federal funds and hence subject to title VI. The Veterans Administration had cut off scholarship money to a veteran attending Bob Jones University because the university systematically discriminated against blacks. The university received no direct federal aid — the student had independently qualified for the scholarship, and all payments were made directly to him. Nevertheless, the district court ruled that Bob Jones University, by accepting the student's tuition, received federal financial assistance within the meaning of title VI.

students (including Basic Educational Opportunity Grants, Guaranteed Loans, Social Security Benefits, and Veterans' Benefits) and paid $4.4 billion directly to institutions of higher education. See Finn, supra note 2, at 12. Finn aptly describes the variety of governmental programs:

[Federal] money flows through so many channels, twists and turns so many times between its source and its destinations, is so uneven in its impact, so cramped in the uses to which it can be put, and requires of its recipients so much in return, that one hesitates to describe Washington as a patron of the higher learning. Perhaps the only form of financing that cannot be found among the more than four hundred separate federal legislative provisions bearing on higher education is unrestricted support for such learning.

Finn, supra note 2, at 7 (emphasis in original).

13. 396 F. Supp. at 602-04. See also In re Hillsdale College and the State of Michigan, Docket No. A-7, Initial Decision, August 23, 1978, described in [1978] COLL. & UNIV. REP. (CCH) 18,577, in which an HEW administrative law judge ruled that the grants and loans Hillsdale students receive constitute direct federal aid and thus make the school subject to federal civil rights laws.


The Congress . . . hereby declares that the education program created by this chapter is for the purpose of (1) enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country.

The statute expresses no intent to aid the school; it seeks only to help the veteran. Related provisions lend support to this conclusion. 38 U.S.C. § 1681 (1976) mandates: "The Administrator shall . . . pay to each eligible veteran who is pursuing a program of education under this chapter an educational assistance allowance . . ." (emphasis added). Likewise, 38 U.S.C. § 1685 (1976), dealing with Veterans Work Study, states, "Veteran students . . . shall be paid an additional educational assistance allowance . . ." (emphasis added). Finally, the Predischarge Educational Program, 38 U.S.C. 1696 (1976), requires: "The Administrator shall . . . pay the educational assistance allowance . . . to an eligible person . . ." (emphasis added). Thus, the funds cut off in Bob Jones were paid directly to the veteran, and the University had no control over who received the funds.
Judge Hemphill rested his conclusion on three grounds. First, he pointed out that by subsidizing students with either loans or grants, the federal government frees a portion of the school's loan or scholarship funds for distribution to students not receiving federal aid. Second, he refused to distinguish between direct payments to the university and indirect payments through the student, "since the payments ultimately reach the same beneficiaries." Both of these arguments assume that Congress intended "recipient" status to attach to any university that touches federal dollars, no matter what path the dollars take from the government to the school. Finally, Judge Hemphill claimed that the legislative history indicated that "narrow readings of title VI coverage are inappropriate." Therefore, all three grounds of Bob Jones stand or fall with the legislative history of title VI.

In Grove City College v. Harris, Judge Simmons of the Western District of Pennsylvania applied the Bob Jones definition of recipient, but reached a markedly different result. Like Bob Jones University, Grove City College received no direct federal aid. When the college refused to complete an HEW form assuring compliance with title IX, HEW threatened to cut off Guaranteed Student Loans and Basic Educational Opportunity Grants that were made directly to Grove City's students. Grove City prevailed upon Judge Simmons to enjoin the cutoff.

Although the grants were made directly to students, the court ruled that Grove City was a recipient of federal assistance subject to title IX restrictions: "Since funds are provided which the college would otherwise have to supply from its own resources, the total funds available to the College to carry on its education programs and activities are increased." The court repeatedly cited Bob Jones in support of its definition of recipient. Unlike the Bob Jones court, however, Judge Simmons refused to allow a funds cutoff. He dis-

15. 396 F. Supp. at 602-03.
17. 396 F. Supp. at 604.
19. Grove City College refused to execute the form "on the basis of conscience and principle." The College insisted that it received no federal assistance and hence was not subject to title IX. Grove City is coeducational, and no evidence of sex discrimination was presented by HEW. Grove City College v. Harris, slip op. at 2.
20. Judge Simmons held that Guaranteed Student Loans are not assistance within the meaning of title IX because "contracts of insurance or guaranty" are expressly exempted by section 902. Although the government pays interest on the loan during the time the borrower attends a school, Simmons ruled that the interest payments are not assistance since they are paid directly to the lender and hence appear to be part of the exempted contract of guaranty with the lender. See Grove City College v. Harris, slip op. at 28. Since Guaranteed Student Loans were exempted from title IX, Grove City's status as a recipient hinged solely upon the Basic Educational Opportunity Grant Program.
21. See Grove City College v. Harris, slip op. at 23.
distinguished *Grove City* from *Bob Jones* by noting that actual discrimination had been shown in the earlier case, but no discrimination in Grove City's student programs was even alleged. Absent a showing of discrimination, Judge Simmons ruled, innocent students should not be punished merely because the College refused to fill out an HEW form.

The *Grove City* court reached the right result for the wrong reasons. By accepting the broad *Bob Jones* definition of recipient, it had to find other, more troubling grounds to justify its decision not to terminate federal assistance. Thus the court held that HEW cannot cut off funds without evidence of discrimination, and it cannot use the threat of a cutoff to force colleges to complete the forms that enable it to document discrimination. Under the *Grove City* rule, colleges violating title IX may avoid a cutoff simply by withholding the information necessary to establish the violation.

To find a more satisfying justification for *Grove City*'s result, we must step back and reevaluate Judge Simmons's premises. *Grove City* relies heavily upon *Bob Jones* for its definition of recipient. *Bob Jones* in turn rests upon interpretation of the legislative history of title VI. A careful reexamination of that history reveals cracks in the foundations of both decisions.

22. *See* Grove City College v. Harris, slip op. at 34.

23. Judge Simmons offered several other reasons for enjoining the grant cutoff. First, the students were held to have a constitutional and statutory right to a hearing before their federal financial assistance could be terminated. Second, the HEW form required assurance of compliance with regulations prohibiting sex discrimination in employment in educational programs. Judge Simmons ruled that these regulations unlawfully exceeded the statutory authority of title IX, and hence HEW could not require Grove City to execute the form. *See* Grove City College v. Harris, slip op. at 29, 30A.

24. Judge Simmons recognized this possibility:

A situation may arise where the BEOG program is in effect and the College refuses to sign a revised and properly drafted Assurance of Compliance upon request of HEW, and in an instance where there is no available proof of actual sex discrimination in student programs at the College.

As to the hypothetical situation, this Court offers no opinion as to what other legal sanctions, if any, are available to HEW for use against the College.

Grove City College v. Harris, slip op. at 36.

A recent district court decision illustrates the importance of compliance reports in identifying violations. A college charged with discrimination against Chicanos refused to complete compliance reports for those programs not receiving federal assistance. The court ordered the college to complete the reports, saying:

"[S]ince the purpose of a Title VI investigation is to enable [the Office of Civil Rights] to determine whether a recipient is in compliance with Title VI, to interpret the provisions of Title VI as limiting the scope of OCR's investigative authority to investigation of the federally assisted programs or activities would essentially preclude OCR from effectively discovering and determining whether the defendants herein are in compliance with Title VI and from protecting the beneficiaries of the federally assisted programs or activities even if there was rampant discrimination elsewhere in the college and such discriminatory practices were affecting the federally assisted programs or activities. The distinction between the authority to investigate and the power to terminate should not be lost." United States v. El Camino Community College Dist., 454 F. Supp. 825, 831 (C.D. Cal. 1978) (emphasis added).
B. The Legislative History of "Recipient"

The enforcement provisions of title VI and title IX are identical, and the legislative history of title IX indicates that Congress intended "recipient" to have the same meaning under both provisions.25 This Note therefore looks to the legislative history of title VI to determine the correct definition.

A thorough study of the legislative history of title VI calls into question the Bob Jones court's assertion that "narrow readings of title VI coverage are inappropriate."26 Judge Hemphill supported this conclusion weakly, citing only a statement by President Kennedy in his original civil rights proposals to Congress in 1963, and a vague statement delivered in committee by Representative Celler.27 Although Kennedy's statement and proposals together suggest an executive intent that title VI be construed broadly,28 they do not indicate that the President intended the statute to have the expansive reach given it in Bob Jones.29 Celler's statement, even assuming it

25. See Cannon v. University of Chicago, 441 U.S. 677, 696 (1979) ("The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years"); Kuhn, Title IX: Employment and Athletics Are Outside HEW's Jurisdiction, 65 Geo. L.J. 49, 50 (1976).


27. 396 F. Supp. at 604.

28. The court quoted Kennedy as urging Congress to "pass a single comprehensive provision making it clear that the federal government is not required under any statute, to furnish any kind of financial assistance . . . to any program or activity in which racial discrimination occurs," 396 F. Supp. at 604 (citing H.R. Doc. No. 124, 88th Cong., 1st Sess. 12 (1963)).

29. While President Kennedy signed executive orders aimed at preventing discriminatory disposition of federal funds in certain specific areas during the first half of his term in office, see Exec. Order No. 11063, 3 C.F.R. 652 (1959-63 Compilation); Exec. Order No. 1114, 3 C.F.R. 714 (1959-63 Compilation), they were no more sweeping than similar orders previously issued by President Roosevelt, see Exec. Order No. 8802, 3 C.F.R. 957 (1938-43 Compilation). The Roosevelt order, signed on June 25, 1941, required all defense contracts to contain a covenant against discrimination. President Roosevelt and President Truman amended it several times, see Exec. Order No. 9346, 3 C.F.R. 1054 (1938-43 Compilation); Exec. Order No. 9664, 3 C.F.R. 480 (1943-48 Compilation); Exec. Order No. 10210, 3 C.F.R. 390 (1949-53 Compilation); Exec. Order No. 10308, 3 C.F.R. 837, (1949-53 Compilation). Unlike Title VI Executive orders, however, those orders were tied to the war powers of the President. See, e.g., Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159, 169 (3d Cir. 1971); Exec. Order No. 10557, 3 C.F.R. 961 (1949-53 Compilation). Furthermore, they did not completely ban racial discrimination in all federally funded projects.

Presidential candidate Kennedy chided his Republican opponent in 1960 because President Eisenhower could have ended discrimination in federally assisted housing with the stroke of a pen but had not done so. Kennedy apparently lost the ink on the way to his inauguration; he was not to sign an order dealing with discrimination in housing, or in any other area, for two years. Civil rights activists sent the Chief Executive pens in a sarcastic effort to speed an executive order on housing. See A. Schlesinger, A THOUSAND DAYS 929, 939, 948-49 (1965). Kennedy delayed two years before introducing a comprehensive civil rights bill, despite great pressure from liberals in Congress. Id. at 930-31.

Kennedy was particularly reluctant to introduce a bill with any kind of wholesale provision outlawing discrimination in the use of federal money, especially one that employed a funds cutoff sanction. This reluctance appeared in his response to recommendations by the Civil Rights Commission that all federal aid to the state of Mississippi be cut off as punishment for discriminatory practices in federally assisted programs there. Kennedy reacted unfavorably:
accurately reflected Congressional intent, sheds no light on the issue of whether federal aid furnished to students makes their alma mater a recipient of federal assistance.\textsuperscript{30}

The legislative record indicates that “recipient” should be read narrowly rather than broadly. The language of the original civil rights bill was quite expansive, conditioning “direct or indirect financial assistance” on nondiscriminatory behavior.\textsuperscript{31} The wording was not a draftsman’s blunder. In testimony before the House Judiciary Subcommittee, HEW Secretary Celebrezze stood behind the inclusion of “indirect.”\textsuperscript{32} After Secretary Celebrezze testified, the

\begin{quote}
“I don’t have the power to cut off the aid in a general way as was proposed by the Civil Rights Commission, and I think it would be unwise to give the President of the United States that kind of power . . . .” Remarks and Question and Answer Period Before the American Society of Newspaper Editors, 1963 \textit{Kennedy Pub. Papers} 323, 333 (1964). However, as pressure for civil rights legislation grew in the spring and summer of 1963, Kennedy finally responded with a civil rights bill that prohibited discrimination in the use of the funds and included a funds cutoff provision. The provision, though written in broad terms, was not mandatory; it provided only for optional cutoffs at the discretion of the agency head involved: “All contracts made in connection with any such programs shall contain such provisions as the President \textit{may prescribe} for the purpose of assuring that there shall be no discrimination . . . .” H.R. 7152, 88th Cong., 1st Sess. (1963), reproduced in \textit{Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcommittee No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess.} 659 (1963) [hereinafter cited as \textit{Subcommittee No. 5 Hearings}] (emphasis added). In his message accompanying the proposed bill to Congress, Kennedy emphasized his reservations about applying the provision too broadly:

[The cutoff provision] would not permit the Federal Government to cut off all Federal aid of all kinds as a means of punishing an area for the discrimination occurring therein—but it would clarify the authority of any administrator with respect to Federal funds or financial assistance and discriminatory practice.


Thus, in President Kennedy’s mind, the proposed title VI was in no way a license for wholesale cutoffs of funds. Rather, it was drawn flexibly to allow federal agencies to apply the statute in a manner causing the least harm to the beneficiaries of federal aid.

30. Celler, the House sponsor of Kennedy’s bill, made the following statement before the House Rules Committee:

If the Government, through such an arrangement [financial assistance], can be said to have “elected to place its power, prestige, and property behind the admitted discrimination,” the courts may deem it a “joint participant” and hold the segregation or discrimination unlawful. . . . In such circumstances, the Government may be under a duty to take affirmative action to preclude segregation or discrimination by private entities in whose activities it is a participant.

Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 604 (D.S.C. 1974). The citation given by the Court for Celler’s statement, 396 F. Supp. at 604 n.36, is incorrect; the correct citation is 110 \textit{Cong. Rec.} 1527 (1964). The statement does not address the issue of whether aid funnelled through a student constitutes sufficient federal assistance to make a university a “recipient” (or in Celler’s words, a “joint participant”).

31. See \textit{Subcommittee No. 5 Hearings}, supra note 29, at 659.

32. Mr. Rodino. Mr. Secretary, I would like to get this because it’s rather important. Under title 6, would it not actually mean that you would have the power to withhold funds in most any program that you administer where there is direct or indirect financial assistance by way of grant contract, loan . . . ?

Secretary Celebrezze. Under existing law we probably do not have the power . . . . Title 6 says, in the first sentence it says, “Notwithstanding any other provision of law you will have this right.” That is the difference.
Subcommittee deleted "indirect" from the proposed draft it submitted to the Judiciary Committee.33 The deletion may have reflected a desire to restrict the reach of title VI and to avoid the result reached in *Bob Jones*.

Although legislative history suggests Congress disfavored applying title VI to indirect funding, it also shows that Congress contemplated more than a simple direct/indirect test for indentifying title VI and title IX recipients. The executive and the legislative branches envisioned a distinction between "ultimate beneficiaries" and "recipients" of federal assistance. Congress drafted both statutes to protect ultimate beneficiaries from misconduct by recipients, and intended their sanctions to apply only to recipients—not to beneficiaries. "Ultimate beneficiaries" of federal funds are those intended to reap the benefits of the aid. Students are the ultimate beneficiaries of most federal programs aiding education. "Recipients" should be defined as those institutions that receive federal funds and have discretionary power to disburse or spend them to aid these ultimate beneficiaries.

Substantial evidence supports the contention that the government cannot coerce a university to comply with title VI and title IX by penalizing individual students. During the congressional debate on title VI, Attorney General Robert Kennedy wrote to Senator Cooper of Kentucky that "title VI is limited in application to instances of discrimination against the beneficiaries of federal assistance programs, as the language of section 601 clearly indicates."34 A 1964 Justice Department memorandum indicates a similar intent—title VI was meant to prevent discrimination against beneficiaries,35 not to restrict use of federal aid by beneficiaries. Indeed, neither title VI nor title IX was to be used to punish ultimate beneficiaries whose conduct does not affect the benefits that other intended beneficiaries can derive from the program.36

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33. The subcommittee divided the bill into an introduction and an effectuating clause. The introductory language, which in the original bill had contained the words "or indirect," was revised:

Notwithstanding any inconsistent provision of any law, no person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance.

Civil Rights: Hearings on H.R. 7132 as amended by Subcomm. No. 5 Before the House Comm. on the Judiciary, 88th Cong., 1st Sess. (1963) [hereinafter cited as House Judiciary Hearings].

None of the testimony in subsequent Judiciary Committee hearings mentions this change, or explains its significance. Although the record is not explicit, it seems fairly clear that Congress was worried about the scope given title VI by the word "indirect," and for that reason excised it from the bill.

34. 110 Cong. Rec. 10076 (1964) (emphasis added).

35. See Kuhn, supra note 25, at 52.

36. See Letter from Attorney General Robert Kennedy to Senator John Sherman Cooper
HEW and Veterans Administration regulations issued under title VI also draw a line between recipients and ultimate beneficiaries. In almost identical language, they state:

The term "recipient" means any State, political subdivision... or instrumentality of any State of political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program... but such term does not include any ultimate beneficiary under any program. Thus, the legislative history and the regulations under title VI agree that (1) the statute's purpose is to protect only those persons whom the federal funds are designed to help, (2) the statute's sanctions apply only to recipients, not to beneficiaries.

Congress probably viewed a recipient as someone who, like a beneficiary, receives federal money, but who, unlike a beneficiary, has the power and duty to choose which beneficiaries receive federal aid. Applying this definition, a recipient who discriminates harms the intended beneficiaries of federal aid. A beneficiary who discriminates cannot prevent another intended beneficiary from receiving federal aid. If Bob Jones University seeks a federal grant to finance chemistry instruction, title VI bars the grant because the school's discriminatory policies prevent the aid from reaching some of the intended beneficiaries — in this case, black chemistry students. On the other hand, if the government selects a particular student for assistance...
tance (say, because he is a veteran or because he qualifies for social security benefits), that student should receive the money regardless of which college he decides to attend; his decision to attend a university that violates title VI or title IX does not deny aid to other beneficiaries, and to deny him that choice is to punish a beneficiary of federal aid.

Consequently, when an institution is given the power to select specific beneficiaries of federal aid, it must distribute that aid within the restraints Congress has imposed: it must not discriminate on the basis of sex or race. But when the federal government designates specific beneficiaries, such as the veterans in Bob Jones, or the grant-recipients in Grove City, it has assumed the power of selecting beneficiaries and removed the college’s discretion to do so. Whether the check is sent directly to the student or to the university for credit to the student’s account, the school is not a “recipient” for title VI and title IX purposes.

Bob Jones and Grove City express concerns that any definition of recipient should reflect. The Bob Jones court correctly pointed out that the form of payment of federal aid should not govern whether title VI applies; the Grove City court was properly concerned that a cutoff would injure the intended beneficiaries of federal aid. But the courts failed to define recipient in a manner that would allay both concerns while comporting with congressional intent. The best definition is that recipients are those with discretion to choose among potential beneficiaries; Grove City, Bob Jones, and other similarly situated universities cannot be recipients if they lack that discretion.

II. WHAT IS A “PROGRAM OR PART THEREOF”?

Recipients of federal assistance, however that class is defined, face a further troublesome uncertainty. The ultimate sanction for violation of title VI or title IX is termination of federal funding. But both statutes limit any cutoff to the “particular program, or part thereof,” in which noncompliance is found. This “pinpoint provision” has been applied to universities in markedly different ways. HEW presumes that all federal aid to a university may be ter-

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39. How the beneficiary spends the money is irrelevant since his spending habits will not affect other beneficiaries. His decision to spend it at a university having discriminatory policies should make no difference — the schools where the money is spent are not intended beneficiaries of the aid. His choice of school is analogous to a farmer’s decision to use price support money to hire only white workers, and title VI does not prohibit the farmer’s discrimination; see note 36 supra. Moreover, the school is not the recipient since it has no power to disburse federal aid. The federal government performed that function when it extended the aid directly to the beneficiary.

40. Even if a student selects a particular school because of its discriminatory policies, no direct aid to the student should be cut off since beneficiaries are not subject to the sanctions of title VI and title IX. See text at notes 34-36 supra.

nated if any part discriminates; one court has suggested that discrimination in law school admissions warrants termination of aid only to that admissions program and not to the rest of the law school or university. This Section examines the legislative history of the pinpoint provisions and describes how courts and agencies have applied the provisions to universities.

A. The Legislative History of the Pinpoint Provisions

Although title IX applies exclusively to education programs, its pinpoint provision was copied from title VI with little comment; hence title IX legislative history sheds little light on how the pinpoint provision applies to private universities. The title VI legislative history also is ambiguous on this issue. The pinpoint provision was added to title VI relatively late in the legislative process, and Senators and Representatives only vaguely explained its meaning. Discussion of the effect of title VI on education centered on elementary and secondary schools.

The original House version of title VI did not include a pinpoint provision; it stated only that any "agency . . . empowered to extend . . . assistance to any program" would have full power to cut off funds "under such program." Although most agreed that the "program" limitation was designed to penalize only the specific parties or activities guilty of discrimination, even the bill's sponsors ad-

42. See text at notes 64-67 infra.
44. See Kuhn, supra note 25, at 50, 64-65.
45. The pinpoint provisions were included in amendments proposed by Senators Mansfield and Dirksen after the Civil Rights Bill, H.R. 7152, had already passed the House of Representatives and after several months of debate in the Senate. See BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT OF 1964, at 289 (1964).
47. See, e.g., 110 CONG. REc. 7101-04, 14433-41 (1964) (discussion of effect of segregation on school lunch programs in primary and secondary schools).
49. Secretary Celebrezze of HEW confirmed this interpretation during questioning before Subcommittee No. 5 of the House Judiciary Committee:

Mr. Meader. . . . Would you. . . . because the participants or beneficiary is discriminated against on the ground of race with respect to voting, be able to withhold library funds? Secretary Celebrezze. Not under my interpretation. It would be specifically aimed at one program.

[Under existing law, we do have a hardship in some cases where, if it applies to one part of a state it applies in the total state program. Title VI would avoid that part at least. 110 CONG. REC. 7483 (1964).

Attorney General Kennedy took the same position in hearings before the full House Judiciary Committee:

Mr. Willis. . . . If there is discrimination in one program, does it go to that one or the others? Does the bill say that?
mitted that its language might be too broad to ensure that only the offending parties' funds would be cut off. Many Representatives feared broad cutoffs of aid to numerous beneficiaries in response to discrimination involving but a few.

When the bill reached the Senate, the relatively unqualified termination provision disturbed many Senators. Fearing that the entire bill might fail to pass, Senators Mansfield and Dirksen introduced an amendment limiting any cutoff to the "political entity or part thereof" and to the "program or part thereof" found to be in violation of title VI. Although these pinpoint provisions were adopted and incorporated into what is now section 602 of title VI, there was little discussion of the meaning of "program or part thereof." In explaining the Senate amendments to the House of Representatives, Judiciary Committee Chairman Celler stated that all federal "aid to a particular program will not be cut off because

50. Representative McCullough, one of the bill's sponsors, was forced to admit that the bill's language might be too general to guarantee pinpointing of cutoffs. See Rules Hearings, supra note 36, at 247-48. Emanuel Celler, the House proponent of H.R. 7152, commented in hearings to HEW Secretary Celebrezze that "great powers are given to you [by title VI] ... there should be some standards to govern your action." Subcommittee No. 5 Hearings, supra note 29, at 1520-21.
52. Although the Senators agreed that activities so obviously different as highway projects and school projects would not be considered one "program," they were unsure about borderline cases, such as school lunch programs and general school expenditures. When Senator Long asked Senator Javits whether federal lunch aid would be continued if sent to both black and white students, though in segregated schools, Javits replied: "I do not feel we should continue that kind of aid ... " 111 Cong. Rec. 7101 (1964). No Senator disputed Senator Javit's analysis, not even Senator Ribicoff, one of those who had been designated to explain title VI. Ribicoff commented only that the agency head involved might find ways to enforce desegregation other than by cutting off lunch money:

Is it not true that the administrator's responsibility, if he felt that the cutoff of the lunch program might be detrimental to the health of Negro youngsters, would have the alternative of requesting the Attorney General to bring a lawsuit ...? 

... [U]nder Title VI the cutting off of funds is the last resort.” 111 Cong. Rec. 7107 (1964).
53. One such Senator was George Aiken of Vermont:
The House report would limit punishment only to that area which is in violation. Others, however, interpret the language of the bill as authorizing the application of penalties to the whole state.
... I believe that Title VI should be greatly improved and made more specific. ... President Johnson must know that continued insistence on the Senate passing the bill identically as it came from the House will likely result in killing the legislation.
55. See Comment, supra note 46, at 1121.
one particular part of the program or institution is being operated in violation of the law.”56 Celler’s words suggest that discrimination by only part of a university should not trigger cutoffs to the rest of the university. At the very least, Celler’s statement evinces a concern that too many beneficiaries may lose federal funding if cutoffs are not pinpointed.

Although the legislative history of the pinpoint provisions is meager, two conclusions can safely be drawn from it. First, Congress wanted to protect beneficiaries from discrimination by the recipients of federal funds.57 Members of Congress repeatedly insisted that the purpose of any aid cutoff was to “see to it that federal funds were not used in a discriminatory manner.”58 Second, Congress desired to protect beneficiaries from an unnecessary funds cutoff due to discrimination in a distinct program or area.59 The delicate tradeoff between the two types of protection goes to the heart of both the ambiguity of the pinpoint provision’s legislative history and the dilemma of how to apply the pinpoint provision to a university.

B. Applying the Pinpoint Provision to Private Universities

The scant legislative history of the pinpoint provisions indicates that Congress had the somewhat inconsistent goals of protecting students from discrimination and protecting them from aid cutoffs. Given such a vague mandate, courts and agencies have applied the provisions to universities in a variety of ways. This Section reviews several applications and advocates that courts and agencies avoid extreme construction of the words “program or part thereof” in the context of a university.

In Stewart v. New York University,60 Judge Bonsal of the Southern District of New York defined “program or part thereof” as if a university were a collection of many atomistic parts. A woman denied admission to New York University’s law school alleged that the school violated titles VI and IX by admitting less qualified minority students. Her suit to terminate federal loans and grants to the law school and the university was dismissed. Although the court dis-
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discussed the validity of the admissions policy in the context of other counts of the complaint, it held that policy to be “irrelevant” to the Court’s jurisdiction under title VI and title IX. Termination of assistance under the statutes is limited to the noncomplying “program or part thereof,” reasoned Judge Bonsal, and the assistance at issue (restricted purpose grants and loans for law school dormitory construction) was not awarded in connection with the minority admissions policy. The opinion implies that admissions is “part of a program,” and that federal retaliation for discriminatory admissions policies cannot embrace cutoffs of any aid except to admissions.

Although this analysis of Stewart reads much between the lines of a decision presenting peculiar circumstances, the implications of an atomistic interpretation of the pinpoint provisions should not be ignored. If university aid cutoffs are restricted to the smallest identifiable unit responsible for discrimination, ignoring effects of the discrimination outside that unit, title VI and title IX sanctions are excessively weakened. However distinct the admissions department’s budget or organization may be, discriminatory admissions will cause all federal aid to a university to be spent in a discriminatory manner. A black student denied access to all programs of a university would find title VI protection chimerical if the admissions office alone were denied federal funds.

If Stewart protects students from aid cutoffs at the cost of leaving them defenseless against discrimination, HEW enforcement of title VI and title IX approaches the opposite extreme. HEW often presumes that aid to an entire university may be terminated if any division discriminates. Secretary Weinberger’s explanation of HEW’s authority under title IX exposes this presumption: “if the Federal funds go to an institution which has educational programs, 

61. 430 F. Supp. at 1314.

62. The opinion does not clearly state the reason the plaintiff’s claims under title IX and title VI were dismissed. After quoting the pinpoint provision of title VI, the court inserted a paragraph emphasizing that the plaintiff “must show that the Federal financial assistance received by the Law School constitutes more than a de minimus portion of its annual revenues and that there is some material connection between said assistance and the minority admissions policy. . . .” 430 F. Supp. at 1314. The court then argued that, since grants to the law school, loans for construction of a law dormitory, and loans to law students were not connected to the admissions policy, they did not give the court jurisdiction under title VI or title IX. Since the court presumably would have assumed jurisdiction had that aid been awarded through the admissions office, it seems likely that the court considered admissions a separate part of a program for title VI and title IX purposes.

63. Stewart raised two complex issues which were unsettled at the time of the suit. First, the status of private suits for violation of title VI and title IX remained uncertain until Cannon v. University of Chicago, 441 U.S. 677 (1979), authorized such suits. Second, the scope of title VI rights of persons injured by minority admissions programs remained uncertain at least until Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978). The Stewart court apparently used the pinpoint provisions of title VI and title IX as escape clauses to avoid these troublesome issues.
then the institution is covered throughout its activities." HEW regulations implementing title VI also imply that cutoffs will be university wide. HEW’s approach effectively deletes the “program or part thereof” limitations from title VI and title IX.

The implications of HEW’s expansive interpretation of the pinpoint provisions are as disturbing as the atomistic approach of Stewart. As the President of Columbia University observed:

[T]he regulations provide no flexibility for dealing with minor inadequacies or limited noncompliance. One entrenched and misguided department chairman can bring an entire university under federal threat. It would be more reasonable and perhaps also more just if federal regulators could direct their pressures pointedly at the malingerers.

The most extreme possible applications of the HEW presumption have not yet been attempted; no large university has lost all grants and scholarships because a few students in an isolated program suffered discrimination. The prospect of such a cutoff nevertheless remains troublesome; thousands of student beneficiaries would suffer in order to protect a few from discrimination.


65. One regulation that establishes when forms assuring compliance with title VI must be submitted states:

The assurance required with respect to an institution of higher education . . . shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution’s practices in designated parts or programs of the institution will in no way affect its practices in the programs of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program.

45 C.F.R. 80.4(d)(2) (1979). Although requiring a compliance form is different from requiring termination of assistance, see United States v. El Camino Community College Dist., 454 F. Supp. 825, 831 (C.D. Cal. 1978), the regulation creates a presumption that cutoffs will be university wide unless an individual department establishes that it is unaffected by discrimination elsewhere in the university. Although the regulation clearly permits pinpointing title VI cutoffs, it increases the likelihood of blanket cutoffs by shifting to individual departments the burden of proving the absence of discrimination. See also H. Edwards & V. Nordin, Higher Education and the Law 545 (1979) (“It is clear that to date, HEW is unwilling to go along with the “program specific” limitation in enforcement of Title IX”).

66. McGill, supra note 2, at 152.

67. This may not yet have occurred because of the effect such a threat has upon a university. Fearing loss of all federal aid due to a policy in one tiny program, a large university may avert the risk by changing the policy. That would, of course, achieve one of the goals of title VI and title IX — it would prevent discrimination. But it would do so by imposing a sanction beyond that intended by Congress. And such a broad sanction would have profound impact on the operation of private universities. Forcing a central administration to dictate specific policies to formerly independent departments would alter the pluralism and diversity to which many have ascribed the greatness of American universities. See, e.g., Regents of the Univ. of California v. Bakke, 438 U.S. 265, 311-15 (1978) (importance of a diverse student body); M. Moos & F. Rourke, The Campus and the State 309-10 (1959) (the central administrator of a university “occupies a position of supreme legal responsibility in higher education, but if he exercises this authority in a pervasive way in the internal affairs of the university, he risks destroying the vitality and the creative energy by which the institution is nourished”).
Stewart and HEW mark opposite extremes in interpreting the pinpoint provisions of title VI and title IX. Although the appropriate balance between protecting students from aid cutoffs and protecting them from discrimination probably lies somewhere between these extremes, developing a formula that determines the proper balance is extraordinarily difficult. If a university were a hierarchy, with programs, departments, and schools ranked in an ascending series, and with little interchange among units at any level, the perimeter of a federal aid cutoff could be easily drawn. If one discovered discrimination in a program of a university, aid cutoffs could be confined to that program, or expanded to embrace the entire department under which it operates, or further expanded to cover an entire school within a university. But universities often differ from this hierarchical model in two important ways. First, the faculty of each department or school may be primarily responsible for supervising its own conduct, with relatively little control by a central administration. Second, although each department or school acts independently, departments often share ideas, students, faculty, and a broad range of services.

This model of a university with independent yet interdependent departments and schools makes drawing the perimeter of a funds cutoff difficult. A discriminatory policy independently created by one department may have effects far beyond that department through the students, faculty, and services shared with other parts of the university. Cutting off the aid of the discriminating department alone may narrow the sanction disproportionately; cutting off aid to all departments affected by the discrimination may punish many students in departments innocent of discrimination. The balance between protection from discrimination and protection from cutoffs is precarious indeed.

Yet courts have not left us totally without guidance in applying the pinpoint provisions to balance these goals. In Board of Public Instruction v. Finch, the Fifth Circuit held that all funding to sev-

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68. See McGill, supra note 2, at 151: "Any university, as we all know, operates best as a loosely coupled collegial organization in which each academic unit is primarily responsible for supervising its own conduct." Of course, some universities may bear no resemblance to a loosely coupled collegial organization. If a university is tightly controlled by a central administration, with little independent policy-making by each department and school, the case for a blanket aid cutoff in the face of discrimination becomes more persuasive.

69. Undergraduate students usually "major" in one department but take numerous courses in other departments as well. Even at the graduate level, multidisciplinary programs and teaching appointments are becoming the order of the day. All departments and professional schools often share recreational facilities, student housing, maintenance services, and even admissions and placement services.

70. Discrimination in a history department, for example, may affect students from other schools or majors enrolled in history courses and faculty from other departments who use the resources of the history department for their research and teaching.

71. 414 F.2d 1068 (5th Cir. 1969).
eral programs of a local public school district could not be cut off without a showing of discrimination under each program. The court overturned HEW's blanket cutoff of aid to the school district because it interpreted the pinpoint provision of title VI to protect programs that were "insulated" from discriminatory practices. Nevertheless, the court noted that programs may be so interrelated that a program guilty of no overt discrimination may be "infected by a discriminatory environment" and subject to termination of federal aid.72

Though this "infection theory" has its critics, it offers a helpful standard in applying the pinpoint provision to universities. If discriminatory practices in one division, such as admissions, infect the entire university with a discriminatory environment, then all federal aid should be terminated.75 But the harder case, where discrimination in one division of a university has varying effects on other divisions, requires a much more careful examination of those effects. Rather than assume that all aid will be terminated or that only aid to the smallest identifiable discriminating unit must be cut, courts and agencies should balance the degree of discriminatory infection in each department or school against the extent of hardship that cutoffs would inflict on the division's student beneficiaries. The most attractive attribute of this balancing approach is that it would define "program or part thereof" in each case according to the best interests of the beneficiaries of federal aid — the students.76

Whatever standard is used to draw the perimeters of a federal aid cutoff when a university violates title VI or title IX, rote application of the extreme Stewart or HEW approaches should be avoided. Both title VI and title IX seek to protect students from discrimina-

72. 414 F.2d at 1078-79.
73. This is the label commonly applied to the Board of Pub. Instruction v. Finch approach to pinpointing cutoffs. See Islesboro School Comm. v. Califano, 593 F.2d 424, 430 (1979).
74. See, e.g., Comment, supra note 46.
75. Hence federal aid to a university with practices like those of Bob Jones University would be terminated, assuming the university is a "recipient." See notes 2-40 supra and accompanying text. See also Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973), in which a system-wide racial imbalance in admissions to a network of state universities led to imposition of title VI sanctions on the entire university system.
76. At least one court has applied an analysis similar to that proposed here. In Seattle Univ. v. HEW, No. C77-6315 (W.D. Wash. Jan. 3, 1978), appeal docketed, No. 78-1746 (9th Cir. April 6, 1978), the court looked to the beneficiaries of education programs to decide whether federal aid to a university could be terminated because of discrimination in employment alleged to violate title IX. After ruling that termination was improper since the sanction would not be imposed "for the purpose of enforcing [the students'] rights," the court added, on the other hand, in a situation where students or other direct beneficiaries of federally funded programs are themselves the victims of discrimination in that program, the cutoff has obvious justification and enforcement value. (Emphasis added.) For a different view on how the words "program or part thereof" in title VI should be interpreted, see Note, Administrative Cutoff of Federal Funding Under Title VI: A Proposed Interpretation of "Program," 52 IND. L.J. 631 (1977).
tion and, through their pinpoint provisions, from unlimited cutoffs of federal assistance. Any definition of "program or part thereof" should reflect congressional concern for both hazards. To neglect one in pursuit of the other — to narrow cutoffs while ignoring the need for deterrence of discrimination, or to broaden cutoffs until many students in innocent departments or schools suffer for one school's discrimination against a few students — harms the very beneficiaries Congress sought to protect.

CONCLUSION

Concern for the student beneficiaries of federal aid should guide any court that applies title VI and title IX to private universities. Since both statutes seek to protect beneficiaries from discrimination by recipients, a "recipient" should be defined as an institution with the power to discriminate — to choose which of many potential beneficiaries will receive federal assistance. If a university lacks that power because the government selects the beneficiary, then it is not a recipient and the sanctions of title VI and title IX should not apply.

As well as seeking to protect students from discrimination, both statutes also seek to protect students from overbroad cutoffs of federal assistance; they limit cutoffs to the program or part thereof that violates the law. A proper definition of "program or part thereof" will balance these twin dangers to beneficiaries. It will avoid any extreme presumptions that offer students complete protection from one risk but leave them defenseless against the other. By defining "recipient" and "program or part thereof" in these ways, courts and agencies will fulfill the purposes of title VI and title IX while preserving the independence of the private university.