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Grove City College v. Bell and Program-Specificity: Narrowing the Scope of Federal Civil Rights Statutes

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GROVE CITY COLLEGE v. BELL AND PROGRAM-SPECIFICITY: NARROWING THE SCOPE OF FEDERAL CIVIL RIGHTS STATUTES

Title IX of the Education Amendments of 1972[1] marked the first congressional declaration of a national policy against sex discrimination in education.[2] Section 901, a cornerstone of the statute, contains a general

1. Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. §§ 1681-1983 (1982)) [hereinafter cited as title IX and referenced by section number].

2. *See* Cannon v. University of Chicago, 441 U.S. 677, 704 (1979) (opinion of Stevens, J.); 441 U.S. at 747 (Powell, J., dissenting).

Before title IX was enacted, only two federal statutes directly addressed discrimination on the basis of gender, title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-16 (1982), and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982). Until 1972, however, both title VII and the Equal Pay Act prohibited sex discrimination in employment, but exempted academic institutions. *See* North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773, 779-84 (2d Cir. 1980), *aff'd*, North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).

In addition, under the fifth and fourteenth amendments, constitutional protection against gender discrimination remained minimal until 1971 when the Supreme Court adopted a standard of review for gender classifications that went beyond the traditional rational basis analysis. Reed v. Reed, 404 U.S. 71, 76 (1971) (gender classifications 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."). Prior to *Reed*, discrimination against both men and women would be upheld if a state advanced a rational basis for disparate treatment of the sexes. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (upholding statute granting women automatic exemption from jury duty); Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding statute forbidding licensing of female bartenders unless applicant was the daughter or wife of male bar owner). *See also* Muller v. Oregon, 208 U.S. 412 (1908) (upholding statute prohibiting employment of women for more than ten hours per day in factories and laundries); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (upholding state constitutional provision denying women right to vote); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (upholding statute denying women licenses to practice law). For later construction of gender classifications under the Equal Protection Clause of the fourteenth amendment, see Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (intermediate standard of review applied by Court to invalidate single-sex admissions policy of state university nursing school); Craig v. Boren, 429 U.S. 190 (1976) (adopting an intermediate level of review in sex discrimination cases by requiring that gender classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives"); Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (opinion of Brennan, J.) (four justices would have held gender classifications inherently suspect and, like racial classifications, subject to strict judicial scrutiny).

Congress enacted title IX against a backdrop of testimony concerning widespread discrimination against women in education. *See Discrimination Against Women: Hearings on § 805 of H.R. 16,098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *1970 House Hearings*]. Chaired by Rep. Edith Green of Oregon, the hearings were held in conjunction with Congress' considera-

prohibition against discrimination on the basis of sex in federally assisted education programs.[3] This proscription has been construed broadly by the courts to include discrimination in admissions, athletics, employment, child care, student financial aid and vocational education.[4] To ensure that federal

tion of § 805 of H.R. 16,098, a bill that would have added the word "sex" to § 601 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-6 (1982)) [hereinafter cited as title VI and referenced by section]. For the exact language of title VI, see *infra* note 7. Title VI prohibits discrimination on the basis of race and national origin in all federally assisted programs, including education, housing, health services, and state and local governments. *See infra* note 7. Substantial portions of the testimony on § 805, however, concerned sex discrimination in educational institutions. *See supra 1970 House Hearings*. Moreover, sponsors of the legislation sought to accommodate members of Congress who opposed a comprehensive prohibition against gender discrimination in all federally assisted program areas. Thus, in 1972, Congress passed title IX, a measure patterned word-for-word after title VI but limited in scope to education. *See* § 901, *infra* note 3. *Cannon*, 441 U.S. at 694 n.16 (citing 117 CONG. REC. 30,407, 30,408 (1971); 118 CONG. REC. 5803, 5807, 18,437 (1972) (remarks of Sen. Bayh); 117 CONG. REC. 39,256 (1971) (remarks of Rep. Green)). *Accord* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523-25 (1982). The legislative history of title IX indicates that its sponsors intended title IX to be construed and enforced as title VI had been. *See, e.g., Cannon*, 441 U.S. at 694-96 & n.19.

For a discussion of the construction of title IX in relation to the equal protection clause, see Lamar, *The Expansion of Constitutional and Statutory Remedies for Sex Segregation in Education: The Fourteenth Amendment and Title IX of the Education Amendments of 1972*, 32 EMORY L.J. 1111 (1983); Note, *Reinforcement of Middle Level Review Regarding Gender Classifications:* Mississippi University for Women v. Hogan, 11 PEPPERDINE L. REV. 421-40 (1984); Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 MINN. L. REV. 313 (1977).

3. Title IX, § 901(a) (codified as amended at 20 U.S.C. § 1681 (1982), provides in relevant part that:

> 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 . . . .

Id. Unlike title VI, upon which title IX was modeled, title IX contains nine statutory exemptions: five were provided by the original statute and the remaining four were added by Congress in amendments to title IX in 1974 and 1976. *See* Pub. L. No. 93-568, § 3(a), 88 Stat. 1862 (1974); Pub. L. No. 94-482, title IV, § 412(a), 90 Stat. 2234 (1976). Under § 901(a)(1), the statute applies only to admissions practices of "institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education." Section 901(a)(2) allows certain exemptions for institutions in the process of converting from single-sex to dual-sex institutions. Other sections exempt: institutions controlled by religious organizations to the extent compliance with title IX would violate religious tenets, § 901(a)(3); military schools, § 901(a)(4); traditionally single-sex public undergraduate institutions, § 901(a)(5); social fraternities, sororities, and voluntary youth service organizations (e.g., Girl Scouts and Boy Scouts), § 901(a)(6); Boys State and Girls State conferences, § 901(a)(7); father-son and mother-daughter activities, § 901(a)(8); and scholarships awarded in beauty pageants, § 901(a)(9). *See also* title IX regulations, 34 C.F.R. § 106.42 (1984) (construing statute to exempt textbooks and curricular materials from nondiscrimination requirement).

4. *See, e.g.*, Grove City College v. Bell, 104 S. Ct. 1211 (1984) (student financial aid); North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) (employment practices); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (admissions to public nursing school); Can-

funds do not support discriminatory practices and to provide relief for victims of discrimination, section 902 authorizes a system of judical and administrative remedies.[5]

Students and employees in educational programs are protected by a two-

non v. University of Chicago, 441 U.S. 677 (1979) (admissions to private medical school); Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982) (intercollegiate athletics); De La Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979) (campus child care facilities); Canterino v. Wilson, 546 F. Supp. 174 (W.D. Ky. 1982) (vocational education and training program of state correctional system). *See also* title IX regulations, 34 C.F.R. § 106, subpart D (1984) (construing title IX to prohibit discrimination in student housing, § 106.32; in student counseling and guidance, § 106.36; in health insurance and health services, § 106.39; and on the basis of marital or parental status, § 106.40).

5. Title IX, § 902 (codified at 20 U.S.C. § 1682 (1982)), reads:

> 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 [§ 901] 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 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.

Id.

In addition to administrative and legal remedies available to the Department under this section, beneficiaries of the statute may maintain a private right of action for relief from discrimination. *Cannon*, 441 U.S. at 688-717. *See infra* notes 61-74 and accompanying text. Title IX, § 902(2), however, limits remedies available to private litigants to declaratory and injunctive relief; private plaintiffs may not seek damages under the statute. Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982). *See* Guardians Assoc. v. Civil Serv. Comm'n, 103 S. Ct. 3221 (1983) (absent showing of intentional discrimination, plaintiffs in title VI action are not entitled to compensatory damages). For a discussion of the scope of relief available to private litigants, see *infra* note 74. *See also infra* note 63.

tiered enforcement scheme administered principally by the Department of Education (the Department).[6] Closely patterned after title VI of the Civil Rights Act of 1964,[7] which proscribes racial discrimination in federally funded programs, title IX charges administrative agencies with an affirma-

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6. The Department of Health, Education and Welfare (HEW) originally had primary enforcement responsibility for title IX and issued the final title IX regulations. 40 Fed. Reg. 24,128 (1975). HEW's regulations initially were codified at 45 C.F.R. pt. 86. Pursuant to the Department of Education Organization Act, Pub. L. No. 96-88, § 301(a)(3), 93 Stat. 677-78 (1979), title IX enforcement authority was transferred to the new Department of Education. The pertinent regulations were recodified without substantial change, *see* 45 Fed. Reg. 30,802, 30,962-63 (1980), and are now found at 34 C.F.R. § 106 (1984) [all citations herein are to the 1984 C.F.R. unless otherwise noted].

The enforcement mechanisms provided by title IX, § 902, *supra* note 5, authorize the Department to effect compliance through either administrative proceedings or the courts. Under the former, termination of federal assistance may be ordered by the Department if voluntary compliance cannot be achieved. *See infra* note 11 and accompanying text. Under the latter, the Department may seek to enforce the provisions of § 901 "through any other means authorized by law." *See infra* note 12 and accompanying text.

7. Title VI, § 601 (codified at 42 U.S.C. § 2000d (1982), provides:

> No person in the United States shall, on the ground 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.

Id.; *see supra* note 3. For a discussion of the intent of Congress to model title IX after title VI, see *infra* notes 66-74 and accompanying text. Title VI's prohibition against discrimination has been construed to cover all areas of federal assistance. *See, e.g.*, Guardians Assoc. v. Civil Serv. Comm'n, 103 S. Ct. 3221 (1983) (municipal employment); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (public higher education); NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981) (relocation of private hospital); Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) (low-income housing); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967) (public education); Price v. Denison Indep. School Dist. Bd. of Educ., 348 F.2d 1010, 1012 (5th Cir. 1965) (public education); Johnson v. City of Arcadia, 450 F. Supp. 1363 (M.D. Fla. 1978) (municipal services); Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975) (private college). Moreover, every federal department or agency empowered to provide federal assistance has promulgated title VI regulations. See the list of references to the Code of Federal Regulations printed following 42 U.S.C.S. § 2000d-1 (Law. Co-op. 1984). A series of Executive Orders issued between 1965 and 1980 attempted to coordinate the implementation and enforcement of title VI under the direction of the U.S. Attorney General. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980); Exec. Order No. 11,764, 39 Fed. Reg. 2575 (1974); Exec. Order No. 11,247, 30 Fed. Reg. 12,327 (1965).

Title VI was enacted pursuant to the spending clause, U.S. CONST., art. I, § 8, cl. 1, and the fourteenth amendment enforcement power, U.S. CONST., amend. XIV, § 5. *See Guardians*, 103 S. Ct. 3221 (1983); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 284-87 (1978) (opinion of Powell, J.); *id.* at 325-40 (1978) (opinion of Brennan, J.). The courts uniformly have construed both titles VI and IX to be at least coextensive with the equal protection clause of the fourteenth amendment in their prohibitions against arbitrary, intentional discrimination. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (title IX does not permit discrimination otherwise barred under the fourteenth amendment); *Bakke*, 438 U.S. at 285-87 (title VI's sponsors repeatedly declared intention to incorporate constitutional standards into title VI); Bob Jones Univ. v. Johnson, 396 F. Supp. at 604. In enacting

tive duty to ensure that federal funds are not used to support discrimination.[8] To monitor compliance with the statute, the departmental regulations

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title VI, Congress believed it had a constitutional duty to ensure that federal funds were not used to support racial discrimination).

A more difficult question, however, is whether titles VI and IX were enacted to protect beneficiaries from discrimination not otherwise prohibited under the Constitution. It is well-settled that the fourteenth amendment prohibits only purposeful discrimination, *e.g.*, Washington v. Davis, 426 U.S. 229 (1975); City of Mobile v. Bolden, 446 U.S. 55, 65-69 (1980), and that disproportionate impact alone is insufficient to establish a constitutional violation. *Id.* at 68 (citing Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)). Title VI regulations, however, have prohibited disparate impact discrimination as well. *See Guardians*, 103 S. Ct. at 3227 nn.13-14. In Lau v. Nichols, 414 U.S. 563 (1974), the Supreme Court, without reaching the constitutional issues raised, noted that Congress has the power to establish terms for the receipt of federal assistance and upheld the bar of disparate-impact discrimination under the regulations. In *Bakke*, five Justices determined that title VI proscribed only racial classifications that would violate the Constitution, 438 U.S. at 287 (opinion of Powell, J.); *id.* at 325 (opinion of Brennan, J.), but disagreed as to what classifications for affirmative action purposes would be unconstitutional. *See id.* at 287-320 (opinion of Powell, J.); *id.* at 325, 350-79 (opinion of Brennan, J.). In *Guardians*, the Court confronted the question whether private plaintiffs in a title VI action needed to prove discriminatory intent in order to establish a violation of the statute. 104 S. Ct. at 3222. Five Justices concluded that a violation could be proven by showing a disparate impact. *Id.* at 3223 & n.2. Three Justices held that the statute itself required a showing of discriminatory intent but that the agencies charged with enforcing title VI properly could promulgate disparate-impact regulations because such regulations would be "reasonably related" to the purpose of the statute. *Id.* at 3249-55 (Stevens, J., dissenting). One Justice held that title VI itself permits a showing of disparate impact. *Id.* at 3239-49 (Marshall, J., dissenting). Justice White, who announced the judgment of the Court, agreed with Justice Marshall. *Id.* at 3223 n.2.

The issue of whether the statutes confer rights on beneficiaries not already guaranteed under the Constitution may have some bearing on how the question of the scope of coverage of the statutes in regard to suits by private litigants is resolved. It has been suggested that the Court's decision in *Grove City*, limiting agency jurisdiction to specific programs receiving federal assistance, may not impair the ability of private plaintiffs to sue for broader, institution-wide equitable relief. *See infra* notes 63 and 74. On the other hand, if a beneficiary of title IX, for example, sues a private university, *see generally Cannon*, 441 U.S. 675, she may be limited by constitutional rulings concerning state action and actual receipt of assistance. *See also* Comment, *HEW's Regulations Under Title IX of the Educational Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U. L. REV. 133. *See* Calhoun, *supra* note 2, at 326-49; *infra* note 74.

8. In Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1973), individual plaintiffs and civil rights organizations charged the department with failure to provide adequate enforcement of title VI. In WEAL v. Califano, No. 74-1720 (D.D.C. Dec. 29, 1979) (order), plaintiffs representing women's rights organizations filed a similar suit charging failure to enforce title IX. Over a period of more than 10 years the United States District Court for the District of Columbia found violations of the department's affirmative duty to enforce the statutes. In 1977, for example, the court ordered the Department's Office for Civil Rights to meet specific deadlines in resolving a backlog of unresolved complaints, to conduct compliance reviews of institutions, and to complete investigations. *See* Adams v. Bell, 711 F.2d 161 (D.C. Cir. 1983); Adams v. Califano, No. 3095-70 (D.D.C. Dec. 29, 1977) (order); WEAL v. Califano, No. 74-1720 (D.D.C. Dec. 29, 1977) (order); Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977) (second supplemental order); Adams v. Weinberger, 391 F. Supp. 269 (D.D.C. 1975) (first supplemental order); Adams v. Richardson, 356 F. Supp. 92 (D.D.C.) (declaratory judgment

require all recipients of federal funds to execute an "Assurance of Compliance" with title IX.[9] Additionally, the Department conducts routine compliance investigations and responds to complaints filed by beneficiaries of the statute.[10] Upon finding a statutory violation, the Department first must seek voluntary compliance from recipients. If such efforts fail, however, the government may terminate federal assistance to those recipients adjudicated to be in violation of the law.[11] Alternatively, the government may seek declaratory or injunctive relief in the courts.[12]

A threshhold issue in title IX enforcement proceedings is whether and to what extent an institution is subject to the requirements of the statute.[13] At the outset, the Department must show that two conditions are met in order to trigger section 901. First, "federal financial assistance" must be "received" within the statutory meaning of these terms.[14] Second, this federal financial assistance must be received by the particular "education program or activity" sought to be regulated.[15]

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and injunction order), *aff'd*, 480 F.2d 1159 (D.C. Cir. 1973) (per curiam, en banc); Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972) (memorandum opinion). For a discussion of the "*Adams* litigation," see CIVIL RIGHTS LEADERSHIP CONFERENCE FUND, AN OATH BETRAYED: THE REAGAN ADMINISTRATION'S CIVIL RIGHTS ENFORCEMENT RECORD IN EDUCATION 18-19 (1983). *See also* CENTER FOR NATIONAL POLICY REVIEW, AFFIRMATIVE ACTION AND MINORITY ACCESS TO GRADUATE AND PROFESSIONAL EDUCATION: A REPORT TO THE CARNEGIE FOUNDATION 25-27, 35-39 (Oct. 1984) (asserting that budget and staff reductions at the Department's Office for Civil Rights between fiscal years 1980 and 1983 have weakened enforcement of title VI); U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT BUDGET: FISCAL YEAR 1983, 10-18 (Clearinghouse Pub. 71, June 1982).

9. 34 C.F.R. § 106.4 (1984). *See* the Department's Form 639A, entitled *Assurance of Compliance with Title IX of the Education Amendments of 1972, and the Regulations Issued by the Department of [Education] in Implementation Thereof* (cited in Brief for Appellant at Appendix A, Grove City College v. Harris, 500 F. Supp. 253, 255 (W.D. Pa. 1980)).

10. For a discussion of *Adams* litigation, *see supra* note 8.

11. Title IX, § 902, *supra* note 3. *See* Caulfield v. Board of Educ., 632 F.2d 999 (2d Cir. 1980).

12. *Id.* For a discussion of the scope of legal remedies available to the Department and private litigants, see *supra* notes 5-6 and accompanying text.

13. *See, e.g.*, Grove City College v. Bell, 104 S. Ct. 1211 (1984); Hillsdale College v. HEW, 696 F.2d 418 (6th Cir. 1982) *vacated and remanded*, 104 S. Ct. 1673 (1984); Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982).

14. Title IX, § 901, *supra* note 3. The Department has defined "federal financial assistance" broadly to include grants, loans, and other forms of assistance. 34 C.F.R. § 106.2(g) (1984).

15. Title IX, § 901, *supra* note 3. The Department has defined "recipients" broadly to include an entire educational institution. 34 C.F.R. § 106.2(h) (1984). Curiously, the Department does not define "program or activity" in its regulations. The regulations, however, appear to compel federal grant applicants and recipients to comply with title IX on an institution-wide basis. 34 C.F.R. § 106.4(a) (1984).

Each of these conditions raises complex definitional questions that have serious implications regarding the scope of title IX. For instance, although direct grants clearly qualify as "federal financial assistance" received by an institution, a difficult question arises when aid to a school is indirect. For example, an institution may decline all direct federal grants but accept tuition and other payments from students who receive federal grants or loans for educational purposes. In such cases the relevant question is whether the institution is a recipient of federal financial aid and therefore subject to regulation under title IX. Moreover, the meaning of "program or activity" was never defined by the statute; title IX does not specify whether an "educational program or activity" refers to a particular office or department or whether the term encompasses the entire institution.

In *Grove City College v. Bell*,[16] the Supreme Court confronted and attempted to resolve these ambiguities in title IX. In a unanimous decision, the Court concluded that student financial aid in the form of Basic Educational Opportunity Grants (BEOGs)[17] constituted "federal financial assistance" to educational institutions within the meaning of section 901. By a six to three vote, however, the Court held that "program or activity" does not necessarily encompass the entire institution. Specifically, the Court held that in the instance of federal student aid, the "program or activity" for purposes of title IX jurisdiction was the college financial aid office.

The case arose when the Department sought to compel Grove City College (College) to execute an Assurance of Compliance with title IX as required by the Department's regulations.[18] The College refused, asserting that Departmental jurisdiction over the institution could not derive from the sole fact that some of the College's students received federal grants or loans. Although it did not allege discrimination, the Department sought to terminate financial aid because the College refused to file the mandated Assurance of Compliance. Both the district court and the court of appeals upheld the Department's determination that BEOGs constitute "federal financial assistance" to the College and that title IX coverage, therefore, was triggered.[19] The United States District Court for the Western District of Pennsylvania did not address the "program or activity" issue. The United States Court of Appeals for the Third Circuit, however, held that where federal grants are not earmarked for use by a particular department, or where funds received indirectly benefit the college as a whole, the "program" subject to section

16. Grove City College v. Bell, 104 S. Ct. 1211 (1984).
17. 20 U.S.C. § 1070a (1982).
18. 34 C.F.R. § 106.4 (1984).
19. Grove City College v. Harris, 500 F. Supp. 253 (W.D. Pa. 1980), *aff'd*, Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982).

901 is the entire institution.[20]

The Supreme Court affirmed in part and reversed in part.[21] In holding that BEOGs constituted "federal financial assistance," the Court relied on prior case law upholding statutory and constitutional mandates against federal financial support of discrimination.[22] Writing for the majority, Justice White stated that a recipient is bound by federal antidiscrimination laws even if it receives federal assistance indirectly. Moreover, Justice White stated the legislative history of title IX evinced a congressional intent to include student aid within the meaning of the term "federal financial assistance."[23] Relying upon precedent from another case interpreting title IX, however, six Justices reversed the Third Circuit holding that title IX applied only to specific programs receiving federal assistance.[24]

Justice Brennan, joined by Justice Marshall, dissented on the issue of program specificity. Justice Brennan contended that the legislative history did not support a program-specific interpretation of Congressional intent and that such an interpretation was inconsistent with the prior broad readings the Court had given to title IX.[25] In addition, he suggested that the legislative history and subsequent judicial and administrative interpretation of title VI provided a broader and more appropriate framework for title IX construction. Finally, the dissent asserted that the postenactment legislative history of title IX indicated clear congressional approval of a broad reading of the statute.[26]

Justice Stevens concurred with the result reached by the majority, but emphasized that the opinion on program-specificity was advisory in nature because the issue was not properly before the court.[27] Stevens noted that in the years between the initial administrative proceedings and the appeal to the

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20. 687 F.2d at 700.

21. Grove City College v. Bell, 104 S. Ct. 1211 (1984).

22. *See, e.g.*, Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973) (program of state tuition grants and tax credits for parents of parochial school students violates the establishment clause of first amendment); Norwood v. Harrison, 413 U.S. 455 (1973) (state program loaning textbooks to students at discriminatory private schools held unconstitutional); Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975). *But see* Mueller v. Allen, 103 S. Ct. 3062 (1983) (upholding state tax deductions for children's educational expenses).

23. 104 S. Ct. at 1216-20. See the discussion of Justice White's opinion, *infra* notes 151-67 and accompanying text.

24. 104 S. Ct. at 1220-22. The Court relied on North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982). *See infra* notes 114-21 and accompanying text.

25. 104 S. Ct. at 1226-37.

26. *Id.* at 1231-35. See the discussion of Justice Brennan's dissent, *infra* notes 168-87 and accompanying text.

27. *Id.* at 1225-26. Justice Powell filed a separate concurrence in which he was joined by Chief Justice Burger and Justice O'Connor. *Id.* at 1223-24. *See infra* note 168.

Supreme Court, the Department had reversed its position and no longer was seeking institution-wide enforcement of the statute.[28]

This Note will outline the historical practice of broad judicial and administrative construction of federal civil rights statutes, with particular reference to titles VI and IX. It will also examine a moderation of this trend in recent years with an emphasis on cases limiting the scope of title IX. Discussion will then proceed to the Supreme Court's decision in *Grove City College v. Bell*, suggesting that the Court's determination that title IX is "program-specific" contravenes Congressional intent and undermines prior broad construction given civil rights statutes. The Note will then consider the impact of the *Grove City* case on future enforcement of title IX and related statutes prohibiting discrimination in federally funded programs.[29] Ultimately, the Note will conclude that a combination of administrative consistency and statutory amendment by Congress is necessary to preserve the original legislative mandate against tax-supported discrimination in education.[30]

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28. The shift in the Department's position corresponded to the transition from the Carter to the Reagan administrations in 1981. *See Grove City*, 104 S. Ct. at 1216 n.10 (majority opinion) (citing Transcript of Oral Argument at 33-35). For a discussion of the Department's inconsistent construction of title IX, see *infra* notes 95-97, 117, 134 and accompanying text.

29. The Court's program-specific decision in *Grove City* is likely to be applied to three other federal statutes proscribing discrimination in federally assisted programs: title VI, *see supra* note 7; the Age Discrimination Act of 1975, 42 U.S.C. § 6101 (1982); § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982) (prohibiting discrimination against handicapped persons). *See* Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984) (decided the same day as *Grove City*, *Darrone* held that § 504 covered employment discrimination but was subject to the same "program-specific" limitation as title IX, citing *Grove City*); United States v. Baylor Univ. Medical Center, 736 F.2d 1039, 1049-50 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 958 (1985) (Department of Health and Human Services had authority to investigate medical center for possible violation of § 504 but investigation was restricted to inpatient and emergency room services, the two specific programs assisted by the federal Medicare Act, 42 U.S.C. §§ 1395c, 1395d, 1395f(d)(1) (1982)).

30. The *Grove City* decision raises complex questions regarding how to apply antidiscrimination statutes to a broad range of federally funded programs, including health facilities, housing projects, state and local governments, and private corporations. *See, e.g.*, *Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary*, 98th Cong., 2d Sess. 17-33 (1984) (statements of Linda Chavez and Mark Disler, U.S. Comm'n on Civil Rights) [hereinafter cited as *1984 Senate Hearings*]; *id.* at 25-74 (statement of William Bradford Reynolds, Assistant Attorney General for Civil Rights). *See also* Leadership Conference on Civil Rights, The Civil Rights Act of 1984 Restores Four Key Laws to Their Former Strength, *reprinted in 1984 Senate Hearings*, *supra*, at 501-26; Republican Policy Comm., What the Civil Rights Act of 1984 (S.2568) May Mean for the Private Sector, *reprinted in 1984 Senate Hearings*, *supra*, at 538-568. This Note, however, is limited in scope to federally assisted education programs covered by title VI and IX. It does not discuss case law as it developed under either § 504 or the Age Discrimination Act, nor does it discuss in detail the application of title VI outside the context of education.

I. DIFFERING APPROACHES TO "PROGRAM OR ACTIVITY"

A. Broad Coverage Under Title VI

Congress did not explicitly define the term "program or activity" in either title IX or title VI.[31] Early title VI cases indicated, however, an inclination of federal appellate courts to construe the statute broadly and to apply it on an institution-wide basis when significant amounts of federal funds were received by a college or school district.[32] Reinforcing this broad construction,

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31. Title IX, *supra* note 3; title VI, *supra* note 7.

32. In United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967), the United States Court of Appeals for the Fifth Circuit upheld the Department's school desegregation guidelines issued pursuant to title VI. *See* the Department's *General Statement of Policies under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools, reprinted in* Price v. Denison Indep. School Dist. Bd. of Educ., 348 F.2d 1010, 1015-20 (5th Cir. 1965). Department of Health, Education and Welfare, Office of Education, April 1964, as amended, 30 Fed. Reg. 35 (1965). The court found that the guidelines, which sought to compel desegregation throughout the entire district, were a valid exercise both of the department's statutory authority under title VI and of the constitutional mandate to desegregate declared in Brown v. Board of Educ., 347 U.S. 483 (1954) (cited in 372 F.2d at 881-82). *Id.* at 851-52, 857. Although it ordered desegregation of all aspects of the district's educational program, including extracurricular activities, the court did not conduct a precise inquiry into the nature of the federal assistance. *See id.* at 857-61.

In Bossier Parish School Bd. v. Lemon, 240 F. Supp. 709 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967), black children living on an Air Force base sought to attend integrated classes in the local school district. 370 F.2d at 849-50. Between 1951 and 1964, the district received close to $2 million in federal aid. The assistance included funds earmarked for building construction and unrestricted funds for maintenance and operation of the schools. 240 F. Supp. at 712. Based on these two forms of federal assistance, and without analysis of the function or purpose of the aid, the court of appeals found that acceptance of the funds brought the entire district "within the class of programs subject to . . . section 601." 370 F.2d at 852.

Finally, in Lau v. Nichols, 414 U.S. 563 (1974), the Supreme Court held that failure of the San Francisco school system to provide bilingual education to Chinese-speaking students violated § 601. *Id.* at 566. Reasoning simply that the school district "receives large amounts of federal assistance," and had contractually agreed to comply with title VI, the Court held the system bound to comply with the department's bilingual education requirements. *Id.* at 566-68. In support of the majority's holding, Justice Douglas cited the remarks of Senator Humphrey, a primary sponsor of title VI, made during the floor debate in 1964: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Id.* at 569 (citing 110 CONG. REC. 6543 (1964) (remarks of Sen. Humphrey, quoting from President Kennedy's appeal to Congress on June 19, 1963, urging passage of the Civil Rights Act).

See also Price v. Denison Indep. School Dist. Bd. of Educ., 348 F.2d 1010 (5th Cir. 1965); Marable v. Alabama Mental Health Bd. 297 F. Supp. 291 (M.D. Ala. 1969) (two federally-assisted hospitals and a state agency engaged in discriminatory practices; court upheld termination of all federal funds by HEW); United States v. Frazer, 297 F. Supp. 319 (M.D. Ala. 1968) (recipient state's acceptance of $150 million in federal grants contractually obligated state, under title VI, to refrain from discriminating in the administration of its programs); Note, *School Desegregation and the Office of Education Guidelines*, 55 GEO. L.J. 325 (1966);

the courts accorded substantial deference to the Department's interpretation of title VI as requiring institution-wide compliance.[33]

Early judicial construction of the meaning of "program or activity" under section 601 of title VI was imprecise.[34] A well-settled approach to the same term under section 602, however, evolved with regard to the government's

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Brief Amicus Curiae of Mexican American Legal Defense & Educational Fund, at 22 n.34, Grove City College v. Bell, 104 S. Ct. 1211 (1984).

33. *See* 34 C.F.R. pt. 100 (1984) (formerly 45 C.F.R. pt. 80). While *Bossier* and *Jefferson County* implicitly assumed district-wide coverage, the department's regulations explicitly required grant applicants to assure institution-wide compliance with title VI. In cases of colleges and universities, for example, an applicant for federal funds could avoid complete institutional compliance only by showing that the program for which assistance was sought could not be affected by discriminatory practices elsewhere within the institution. 34 C.F.R. §§ 100.4(d)(1) (1984) extends the Assurance of Compliance "to admission practices and to all other practices relating to the treatment of students." *Id.* 34 C.F.R. § 100.4(d)(2) (1984) provides that the Assurance

> shall be applicable to the entire institution unless the applicant establishes . . . that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which federal financial assistance is sought, or the beneficiaries of or participants in such program.

Id. If federal funds are granted for building construction, however, the regulations require compliance throughout the entire building and related facilities. *See, e.g.*, Flanagan v. President & Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976). In *Flanagan*, a white student challenged a policy of the university's law school to award 60% of its scholarship funds to minority students. Based on the university's receipt of $7 million for construction of its law school, the district court held it was required to comply with title VI in the allocation of financial aid to students. *Id.* at 382-83. One commentator has noted that under cases like *Flanagan*, there is no clear nexus between the federally subsidized building itself and the discrimination that occurs inside. Czapanskiy, *Grove City College v. Bell: Touchdown or Touchback?*, 43 MD. L. REV. 379, 387-89 (1984). Courts have assumed institution-wide coverage in such cases based on the reasoning that the institution is the federally funded building. *See, e.g., Flanagan*, 417 F. Supp. at 384; Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982); *but see* Stewart v. New York Univ., 430 F. Supp. 1305 (S.D.N.Y. 1976); *but cf.* Bennett v. West Texas State Univ., 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd*, 698 F.2d 1215 (1983) (district court held receipt of federal construction funds for dormitories and dining halls insufficient to trigger title IX coverage of intercollegiate athletic program). One possible rationale for broad coverage in building fund cases is the notion that federal subsidies for construction allow the institution to use private donations for other purposes. Another theory advanced is that, like the expectation of privacy in one's home protected by the fourth amendment, beneficiaries of federal grants expect to be free from discrimination within a federally funded program. Czapanskiy, *supra* at 388-89 & n.41 (citing United States v. Katz, 389 U.S. 347 (1967)).

34. *See supra* note 32 and accompanying text. One commentator has suggested that because early title VI cases dealt with admissions, coverage was necessarily institution-wide. Note, *Title IX Applies to Non-Earmarked General-Use Federal Financial Aid as Well as to Earmarked Aid*, 56 TEMP. L.Q. 605, 629 n.165 (1983). *Accord*, Oral Argument of Appellant Department of Education, at 37, Grove City College v. Bell, No. 82-792 (Nov. 29, 1983). *But cf.* Taylor County Bd. of Public Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969) (construing the meaning of the term "program or part thereof" as used in title VI, § 602). For a discussion of *Finch*, see *infra* notes 35-51 and accompanying text.

fund-termination powers. The lead case on the scope of administrative power to terminate federal funds, *Board of Public Instruction v. Finch*,[35] was decided by the United States Court of Appeals for the Fifth Circuit in 1969, three years before the passage of title IX.[36]

Finch arose when the Department instituted administrative proceedings against a small Florida school district that had made inadequate progress toward desegregation and had sought to perpetuate dual systems for black and white schoolchildren.[37] A hearing examiner ordered the termination of all federal assistance to the district.[38] The examiner's decision was affirmed by the Department's Reviewing Authority.[39] At neither stage during the enforcement proceedings did the Department conduct an inquiry as to whether a nexus existed between the discrimination and the federal funds received by the district.[40]

The Fifth Circuit[41] vacated and remanded the Department's fund-termination order.[42] The court held that wholesale termination of all funds without essential findings of fact related to each of the three federal grant programs at issue would harm the student beneficiaries of the statute.[43] Specifically, the court required the Department to show that the funds it sought to terminate actually were used to support discrimination.[44] Because it was conceivable that not every federal grant to the district supported discrimination, the court ruled that the Department must take care to ensure that any fund-termination be pinpointed to "those activities which are actually discriminatory or segregated."[45] In so limiting the Department's enforcement authority under section 602, the court determined that the term "program or part thereof" as used in that section was intended by Congress to mean each

35. 414 F.2d 1068 (5th Cir. 1969).

36. *See Cannon*, 441 U.S. at 694-99 (discussing the impact of pre-1972 judicial construction of title VI on title IX); *see also supra* notes 32-34 and accompanying text.

37. 414 F.2d at 1070.

38. *Id.* at 1071.

39. *Id.*

40. The school district received funds under three separate grant statutes: 1) $99,622 under title II, Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241a-241m (Supp. 1969); 2) $2,000 under the Basic Education for Adults program, 20 U.S.C. §§ 1201-1213 (Supp. 1969); and 3) $102,035 under title III, Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 841-848 (Supp. 1969). 414 F.2d at 1071. All three grants were terminated by the Department's order. *Id.* at 1071 n.2.

41. The district court dismissed the action because each of the grant statutes in question provided exclusive jurisdiction with the court of appeals. 414 F.2d at 1071.

42. *Id.* at 1079.

43. *Id.* at 1077.

44. *Id.* at 1078.

45. *Id.* at 1075 (citing 110 CONG. REC. 7103 (1964) (remarks of Sen. Long)).

federal grant program adopted by Congress.[46]

Alternatively, the appellate court recognized that within a school district, funds received under one grant statute might be used for nondiscriminatory purposes but, nonetheless, be tainted by discrimination elsewhere in the district.[47] The court ruled, therefore, that if federal funds "support a program which is infected by a discriminatory environment, then termination of such funds is proper."[48] The court suggested that an overall racial imbalance on the faculty or in the student body, for example, might affect a federally funded program within the school district, and, therefore, justify termination of funds on a district-wide basis.[49]

Numerous commentators have dubbed this secondary aspect of the *Finch* case the "infection" theory.[50] Under this theory, *Finch* is interpreted to mandate institution-wide compliance with section 601 and 901 prohibitions against discrimination, in order to ensure that federally funded components are not adversely affected by discrimination elsewhere in the system. Under this reading of *Finch*, the government may investigate the operations of an entire institution in order to determine whether federal programs were infected.[51]

In *United States v. El Camino Community College District*, the United States Court of Appeals for the Ninth Circuit followed *Finch*, upholding the district court's conclusion that title VI authorized the Department to investigate charges of discrimination on an institution-wide basis.[52] The district court determined that the Assurance of Compliance executed by the college, in exchange for over one million dollars in federal financial assistance,[53] was presumptively applicable to the entire college.[54] The court reasoned that the "pinpoint approach" of *Finch* applied only to the Department's fund-termination power but not to its investigative authority. Applying the "infection"

46. *Id.* at 1077.

47. *Id.* at 1078-79.

48. *Id.* at 1078.

49. *Id.* at 1079.

50. *See, e.g.*, Czapanskiy, *supra* note 33, at 394-98; *Civil Rights Act of 1984: Joint Hearings on H.R. 5490 Before the House Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 180-81 (1984) (statement of John Rhinelander); *id.* at 299 (statement of Dr. Herbert O. Reid) [hereinafter cited as *1984 House Hearings*].

51. *Id. See* Grove City College v. Bell, 104 S. Ct. at 1231 (Brennan, J., dissenting).

52. United States v. El Camino Community College Dist., 454 F. Supp. 825 (C.D. Cal. 1978), *aff'd*, 600 F.2d 1258 (9th Cir. 1979).

53. The college district received $1,838,313 in fiscal year 1976-77 and $1,121,883 in 1977-78. The district's annual budget each year was approximately $30 million. 454 F. Supp. at 827.

54. 454 F. Supp. at 830 (citing the Department's regulations at 45 C.F.R. § 80.4(d)). *See supra* note 33.

theory, the court underscored the notion that the Department must consider the institutional context of its particular grants and that discrimination in one aspect of a system "may affect the other parts of the system."[55]

The Ninth Circuit affirmed,[56] distinguishing the Department's investigative powers from its remedial powers.[57] The appellate court found that the Department needed "substantial latitude" to investigate whether institutional policies and practices had a "discriminatory impact" on beneficiaries of federal aid.[58] Moreover, the court determined that the college failed to sustain its heavy burden under the regulations to show that its federally funded programs could not be affected by its non-federally funded activities.[59]

Thus, in both *Finch* and *El Camino*, federal appellate courts construed title VI to allow the Department broad authority to investigate the policies and practices of an entire college or school district in order to determine compliance with the statute. Although they did not explicitly construe the term "program or activity" under section 601, the courts implied that institution-wide coverage was necessary to effectuate the purposes of the 1964 Civil Rights Act.[60] More importantly, the circuit courts evinced an under-

55. 454 F. Supp. at 830.

56. United States v. El Camino Community College Dist., 600 F.2d 1258 (9th Cir. 1979).

57. *Id.* at 1260-61.

58. *Id.* at 1260.

59. *Id.* at 1260 (citing 45 C.F.R. § 80.4(d)). *See supra* note 33.

60. Cases concerning racial discrimination have found no substantive difference between direct and indirect federal assistance. *See Grove City*, 104 S. Ct. at 1217. The principle that indirect aid received through a third party beneficiary of a grant statute binds the recipient to comply with title VI has both constitutional and statutory underpinnings. In Norwood v. Harrison, 413 U.S. 455 (1973), for example, the Supreme Court struck down a state program that lent textbooks to private school students, reasoning that the program provided a form of financial assistance "inuring to the benefit of the private schools." *Id.* at 463-64. Because the schools themselves were discriminatory, the textbook program was held unconstitutional under the equal protection clause of the fourteenth amendment. *Id.* at 462-63.

In Bob Jones Univ. v. Johnson, 396 F. Supp 597, 601-04 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975), a district court found that Veterans Assistance payments to students constituted assistance to the university and, consequently, compelled Bob Jones University to comply with title VI. The court rejected the university's assertion that because payments were made directly to the veterans, the university was not required to comply with title VI. 396 F. Supp. at 601-02. The court found that the Veterans Administration payments in fact provided financial assistance to the school because they released institutional funds that otherwise would be used to subsidize the student. *Id.* at 602-03. The court also found that the university conducted a "program" under § 601, and that the program was the educational program pursued by the student beneficiaries of the VA statute. *Id.* at 602. The court bolstered its expansive reading of the statute by citation to the congressional debate on the Civil Rights Act of 1964. *Id.* at 604. The court recalled that President Kennedy presented the Act to Congress as a sweeping measure designed to eliminate all federal financial support of racial discrimination. *Id.* When President Kennedy addressed Congress in June 1963 on the matter of civil rights, he

standing of the statute that was broad in scope. Significantly, the first Supreme Court opinions construing title IX were of a similar nature.

B. *Approaches to "Program or Activity" Under Title IX: Modifying Broad Coverage of Civil Rights Statutes*

In its first decision construing title IX, the Supreme Court interpreted the statute to reflect a broad congressional intent to eradicate widespread practices of gender discrimination in education. In *Cannon v. University of Chicago*,[61] the plaintiff, an unsuccessful applicant to medical school, brought suit against the University, alleging its admissions policies discriminated against women in violation of title IX.[62] The Court held that the plaintiff had a private right of action under title IX despite the fact that the right was not conferred explicitly by the statute.[63]

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challenged 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—by way of grant, loan, contract, guaranty, insurance or otherwise—to any program or activity in which racial discrimination occurs." H.R. DOC. NO. 124, 88th Cong., 1st Sess. 12 (1963) (quoted in 396 F. Supp. at 604). In addition, the *Bob Jones* district court recognized a concern among the Act's key sponsors that the federal government had a constitutional duty to divest itself of all participation in and support of private discrimination. *Id.* (citing 110 CONG. REC. 1464-65 (1964), (remarks of Rep. Celler, House sponsor of title VI) ("[T]he government may be under a duty to take affirmative action to preclude racial segregation or discrimination by private entities in whose activites it is a participant.").

61. 441 U.S. 677 (1979).

62. *Id.* at 680 n.2.

63. *Id.* at 709. In allowing a private right of action under title IX, the Court adopted a doctrine of implication and adhered to the test for private rights of action previously announced in Cort v. Ash, 422 U.S. 66 (1975). A relatively new development in statutory construction, the implication doctrine is premised on the notion that courts should "refrain from undue literalism" when confronting a statute and should undertake a more extensive examination of a statute's overall history and scheme in order to determine the legislative intent. Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333, 1338 (1980). If a statue is silent on whether a particular remedy is available but such a remedy is necessary to effectuate the statutory purpose, then courts may hold that the remedy is implied in the statute. *Id.* at 1338-39. The implication doctrine, however, is not universally accepted and has been the subject of extensive commentary. *Id.* at 1345 nn.71-74; *Cannon*, 441 U.S. at 730-49 (Powell, J., dissenting) (asserting that the majority's reading an implied right of action into the statute constituted an unwarranted intrusion by the judiciary into the province of the legislature). On the other hand, the implication doctrine has been a particularly helpful judicial tool to give effect to congressional intent behind civil rights statutes given that these statutes, aimed at the eradication of widespread, noxious practices, often contain broad, sweeping language that ultimately is left to the executive and the judiciary to interpret. *See, e.g.*, Hazen, *supra* at 1343-44, 1354-55; *Bakke*, 438 U.S. 265 (1978); Allen v. State Board of Elections, 393 U.S. 544 (1969) (upholding private right of action under § 5 of the Voting Rights Act, 42 U.S.C. § 1973 (1982); NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979) (private right of action upheld under title VI, § 504 of the Rehabilitation Act of 1973, *supra* note 29; Young v. Pierce, 544 F. Supp. 1010, 1016-19 (E.D. Tex. 1982) (upholding private right of

Writing for the majority, Justice Stevens articulated an analytical framework for construing title IX that would be useful in later cases.[64] Discussing the purpose of the statute, Justice Stevens examined the legislative history of title IX and discussed its relationship with title VI, which prohibits racial discrimination in education and other federally assisted programs.[65]

Examining title IX's preenactment legislative history, the Court initially recognized that title IX was modeled after title VI.[66] Justice Stevens noted that title IX had its origins in a 1970 bill that merely would have expanded title VI to prohibit gender-based discrimination along with racial discrimination.[67] Although the 1970 bill was not enacted, title IX eventually passed as a separate statute limited to education with wording identical to key portions of title VI.[68] Further, Justice Stevens stated that both statutes had the same enforcement mechanisms and remedial options.[69] The Court also considered the contemporaneous legislative history of title IX, focusing on floor remarks made by Senator Birch Bayh, the bill's primary sponsor.[70] Based on the similarity of statutory language and Senator Bayh's remarks, the Court concluded that Congress intended title IX to be interpreted and enforced as title VI had been since the enactment of the 1964 Civil Rights Act.[71]

The Court stated, moreover, that title IX's objectives were substantially the same as those of title VI, citing similar remarks of the respective acts' sponsors made during the 1964 and 1972 debates.[72] These objectives, the

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action under title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3501 (1982) and under the 1866 Civil Rights Act, 42 U.S.C. §§ 1981, 1982 (1982)). *See also* 3 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION §§ 60.01-60.05, 72.05 (4th ed. 1974).

64. 441 U.S. at 689-709.

65. *Id.* at 694-704.

66. *Id.* at 694 & n.16. *See, e.g.*, 117 CONG. REC. 30,407-08 (1971) (remarks of Sen. Bayh) ("This is identical language, specifically taken from title VI of the 1964 Civil Rights Act. . . . The same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder would be equally applicable [to title IX].")

67. H.R. 16,098, 91st Cong., 2d Sess. (1970) (cited in 441 U.S. at 694 n.16). For a discussion of title IX's preenactment legislative history, see *supra* note 2.

68. Title VI, § 601, *supra* note 7; title IX, § 901, *supra* note 3.

69. Title IX, § 902, *supra* note 5. The language in title VI, § 602 is identical. Each statute also contains nearly identical sections providing for judicial review of fund-termination decisions and other agency action. *See* title IX, § 903; title VI, § 602. *Accord Cannon*, 441 U.S. at 695-96 ("Both statutes provide the same administrative mechanism for terminating federal financial support for *institutions* engaged in prohibited discrimination.") (emphasis added).

70. 441 U.S. at 694-96 (citing 118 CONG. REC. 5807, 18,437 (1972) (remarks of Sen. Bayh). *See also infra* note 90.

71. 441 U.S. at 696-97. The Court stated: "It is always appropriate to assume that our elected Representatives, like other citizens, know the law." *Id.*

72. *Id.* at 704 n.36 (citing sponsors of title VI and title IX): "[T]he purpose of Title VI is

Court determined, were to prevent federal resources from supporting discrimination and to protect individual citizens from discriminatory practices.[73] The majority then reasoned that the first purpose was served by the fund-termination provisions in each statute, while the second could be achieved by a combination of administrative remedies and private actions by the statutes' beneficiaries.[74] Thus, the Court established that title VI precedent would be used to interpret title IX.

After a series of conflicting lower court opinions concerning the authority of the Department to promulgate employment discrimination regulations under title IX,[75] the Supreme Court again examined the statute's legislative history in order to determine congressional intent. In *North Haven Board of Education v. Bell*,[76] the Court held that employment regulations promulgated pursuant to title IX were valid but subject to a "program-specific" limitation in both sections 901 and 902.[77]

Employees of two Connecticut school systems filed complaints with the Department alleging gender discrimination in violation of title IX.[78] When the Department began to investigate and to consider initiating administra-

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to make sure that funds of the United States are not used to support racial discrimination." 110 CONG. REC. 7062 (1964) (remarks of Sen. Pastore).

> Any college or university which has [a] . . . policy which discriminates against women . . . is free to do so under [Title IX], but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access.

117 CONG. REC. 39,252 (1971) (remarks of Rep. Mink).

73. 441 U.S. at 704. *See* 110 CONG. REC. 1540 (1964) (remarks of Rep. Lindsey) ("this proposed legislation [provides] a body of law which will surround and protect the individual from some power complex").

74. 441 U.S. at 704-06. One commentator has suggested that private plaintiffs who are beneficiaries of title IX may not be constrained by the "program-specific" limitations placed on the government's enforcement power as a result of the *North Haven* and *Grove City* decisions. Czapanskiy, *supra* note 33, at 380 n.5. For an extensive discussion of the rights of beneficiaries under title VI, see Block, *Enforcement of Title VI Compliance Agreements By Third Party Beneficiaries*, 18 HARV. C.R.-C.L. L. REV. 1 (1983).

75. Five appellate courts had invalidated the employment regulations. Dougherty County School Sys. v. Harris, 622 F.2d 735 (5th Cir. 1980), *vacated and remanded*, 456 U.S. 986 (1982); Seattle Univ. v. HEW, 621 F.2d 992 (9th Cir.), *cert. granted*, 449 U.S. 1009, *vacated and remanded*, 456 U.S. 986 (1982); Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); Junior College Dist. v. Califano, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); Islesboro School Community v. Califano, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979). In North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773 (2d Cir. 1980), however, a court of appeals upheld the regulations. The Department's employment regulations are codified at 34 C.F.R. §§ 106.51-.61 (1984).

76. 456 U.S. 512 (1982).

77. *Id.* at 535-39.

78. North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773, 774-75 (2d Cir. 1980).

tive enforcement proceedings, the school boards brought actions in federal district court for the District of Connecticut challenging the Department's authority to promulgate regulations prohibiting employment discrimination under title IX.[79] The boards argued that while title IX prohibited gender discrimination against students, the intended beneficiaries of the statute, it did not prohibit such discrimination against employees.[80]

The district court held that title IX did not cover employment practices and, consequently, declared the regulations invalid.[81] The United States Court of Appeals for the Second Circuit reversed, upholding the regulations.[82] The court reasoned that Congress intended title IX to prohibit discrimination in employment as well as services and activities of educational institutions.[83] In remanding for a determination whether the school boards had actually discriminated in violation of title IX, the Second Circuit cautioned that the Department's fund-termination authority under section 902 contained a "program-specific" limitation.[84]

The Supreme Court granted certiorari in order to resolve a conflict among the appellate courts over whether title IX applied to employment practices.[85] The Supreme Court affirmed and remanded the Second Circuit decision.[86]

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79. *Id.* at 775; 456 U.S. at 517-18.

80. 456 U.S. at 521. *See* North Haven Bd. of Educ. v. Hufstedler, 629 F.2d at 775-77.

81. 629 F.2d at 774.

82. *Id.* at 786.

83. *Id.* at 777-85. The appellate court accorded considerable deference to the department's construction of title IX as covering employment. *See* NLRB v. Bell Aerospace, 416 U.S. 267, 274-75 (1974); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). Moreover, the court found persuasive evidence in the floor remarks of title IX's proponents that the 1972 measure, as well as the 1970 and 1971 proposals, all were intended to reach employment practices. 679 F.2d at 778-84. Finally, the court reviewed the postenactment legislative history of title IX and determined that the failure of Congress to act to exempt employment from the HEW regulations provided "some evidence" that employment coverage was intended. *Id.* at 784. For a more extensive discussion of the postenactment history of title IX, see *infra* notes 104-08 and accompanying text.

84. 629 F.2d at 785. The court of appeals acknowledged that § 902 limits fund-termination to the "program or part thereof" found not to be in compliance, but the court found nothing in this "program-specific" restriction that would require the department to issue regulations targeted to specific programs. *Id.* The court analogized employment practices to admissions practices, noting that title IX prohibited discrimination in admission to an institution's graduate school whether the discrimination occurred in a single graduate program or in the entire institution. *Id.* Citing *Jefferson County*, 372 F.2d at 847-61, for support, the court concluded that if the Department found discrimination throughout a school system, the entire system could be construed as a "program" under either title VI or IX for purposes of terminating funds. 629 F.2d at 785.

85. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 520 (1981).

86. *Id.* at 540. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, dissented. *Id.* at 540-55. The dissent maintained that if Congress had intended to cover employment discrimination, it would have made its intent explicit in the statute's language. *Id.* at

Writing for the majority, Justice Blackmun undertook an extensive analysis of title IX and further developed the framework for judicial construction that Justice Stevens had set out in *Cannon*.[87] Justice Blackmun determined that title IX should be construed broadly and was intended to apply to employment discrimination.[88]

Justice Blackmun first examined the statute on its face, noting that section 901 neither expressly included nor excluded employment discrimination from its broad prohibition.[89] The majority held that, absent a countervailing reason to exclude employees from the class of "persons" protected by section 901(a), the Court should construe title IX expansively to cover employment.[90] Citing the Court's prior construction of the Civil Rights Acts of 1866 and 1870,[91] Justice Blackmun wrote: "There is no doubt that 'if we are to give [title IX] the scope its origins dictate, we must accord it a sweep as broad as its language.' "[92]

Justice Blackmun next examined the legislative history of title IX for evidence of Congressional intent.[93] Noting that the broad statutory language tended to favor inclusion of employment, the Court determined this was not in itself conclusive.[94] Initially, the Court remarked that it normally would accord great deference to the interpretation of a statute by the agency charged with primary enforcement responsibility, particularly when the in-

541-43. In addition, Justice Powell noted that employment discrimination on the basis of gender was prohibited already by title VII and by the Equal Pay Act. *Id.* at 545. *See supra* note 2. Moreover, he considered that title IX contained no procedural provisions related to employment discrimination but delegated primary enforcement responsibility to HEW, a department with relative inexperience in employment discrimination. *Id.* at 553-54. Finally, the dissent asserted that it could not share the majority's perception that Congress intended to create a new remedy for victims of sex discrimination when Congress had failed to make such a remedy available to victims of racial discrimination. *Id.* at 554.

87. *See Cannon*, 441 U.S. at 689-709; *see also supra* notes 61-74 and accompanying text.

88. 456 U.S. at 521, 535.

89. *Id.* at 520-22.

90. *Id.* at 521. The Court noted that § 901(a) was worded to protect "persons" from discriminatory practices. *See* title IX, § 901(a), *supra* note 3. If Congress had intended to limit the class of individuals protected by the section, the majority stated that Congress could have used the words "student" or "beneficiary" instead. *Id.*

91. United States v. Price, 383 U.S. 787 (1966). *Price* concerned the applicability of the 1866 and 1870 Civil Rights Acts, 42 U.S.C. §§ 241-242 (1964), to the criminal prosecution of eighteen defendants, including three state officials, who were charged with slaying three civil rights workers in Mississippi. 383 U.S. at 790. The Court acknowledged the broad remedial purposes of Congress and liberally construed the statutes to apply to all 18 defendants. *Id.* at 791-806.

92. 456 U.S. at 521 (quoting *Price*, 383 U.S. at 801).

93. 456 U.S. at 523-30.

94. *Id.* at 522.

terpretation had been longstanding.[95] The Court explicitly noted, however, that the Department had changed its interpretation of the statute in 1981 by seeking to amend the regulations to restrict their coverage of employment practices.[96] The majority reasoned, therefore, that the Department's position was inconsistent and not entitled to judicial deference.[97]

The majority then conducted its own independent analysis of the statute's legislative history.[98] Justice Blackmun buttressed his broad reading of title IX with three distinct factors relevant to construction of title IX. First, the Court determined to give substantial weight to floor remarks made by the bill's primary sponsor, Senator Bayh, on the day title IX was passed.[99] The Court noted that Senator Bayh's remarks clearly indicated that employment discrimination against faculty members would be covered under title IX.[100] While stating a general rule that floor remarks are not controlling indications of congressional intent,[101] Justice Blackmun noted that title IX was introduced as a floor amendment and was not accompanied by the usual explanatory committee reports.[102] The Court concluded that Senator Bayh's remarks, therefore, should be considered "the only authoritative indications of congressional intent."[103]

The second factor examined by Justice Blackmun was the probative value of title IX's postenactment legislative history.[104] In 1975, the Department submitted its final title IX regulations to Congress in a "laying before" procedure designed to provide Congress with an opportunity to disapprove any portions of the regulations it found inconsistent with the Act.[105] The major-

95. *Id.* at 522 n.12 (citing *Bell Aerospace*, 416 U.S. at 274-75; Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969)).

96. 456 U.S. at 522 n.12. In 1981, Secretary of Education Bell proposed that the Attorney General limit employment coverage to cases in which a nexus between "employment discrimination and discrimination against the students" could be shown, or to cases where a "primary objective of the federal financial assistance is to provide employment." *Id. Cf. supra* note 28 and accompanying text (noting the Department's changed interpretation of "program or activity"). The Attorney General, however, continued to defend the employment regulations, and the Department subsequently withdrew its request. 456 U.S. at 522 n.12.

97. 456 U.S. at 522 n.12; *see also id.* at 538 n.29.

98. *Id.* at 523-30.

99. *Id.* at 526-27.

100. *Id.* at 524-26 (citing 118 CONG. REC. 5803, 5807, 5812 (1972) (remarks of Sen. Bayh)).

101. *Id.* at 526 (citing Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979)).

102. 456 U.S. at 527. Senator Bayh introduced title IX as amendment no. 874 to S. 659, 92d Cong., 2d Sess., 118 CONG. REC. 5802-15 (1972). In the House, the bill was included as title X of The Higher Education Act of 1971, H.R. 7248, 92d Cong., 1st Sess. (1971). *See* 117 CONG. REC. 39,248-63 (1971).

103. 456 U.S. at 526-27. *See, e.g.*, FEA v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976).

104. 456 U.S. at 530-35.

105. *See id.* at 531-32; Pub. L. No. 93-380, § 431(d)(1), 88 Stat. 567 (codified as amended

ity noted that although several measures had been introduced to modify or disapprove the regulations and that extensive hearings were held on the regulations, Congress had nevertheless failed to pass any amendments to clarify its intent.[106] Moreover, the Court observed that Congress had on other occasions amended title IX when it disagreed with the Department's interpretation.[107] Consequently, the majority concluded that although failure to amend the statute is not normally a definitive indication of congressional intent, title IX's postenactment developments in Congress properly should be construed as "authoritative expressions [of] the scope and purpose of title IX."[108]

In addition to examining title IX's legislative history, the Court defined the extent to which title VI should serve as a guide to courts in construing title IX.[109] Justice Blackmun first noted that title VI contained a provision limiting the statute's coverage of employment discrimination to situations in which the primary purpose of federal assistance is to pay salaries.[110] In rejecting the Boards' argument that title IX should be subject to this same limited coverage of employment as title VI,[111] Justice Blackmun cautioned

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at 20 U.S.C. § 1232(d)(1) (1982)). The "laying before" statute provided that if Congress failed to pass a disapproving resolution within 45 days, the department's regulations would become effective. After extensive consideration of the regulations, including six days of hearings in the House, Congress failed to pass any measures intended to limit the reach of the regulations. 456 U.S. at 531-35. *See also Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 House Hearings*].

106. *See* 456 U.S. at 532-33 & n.24 (citing H.R. Con. Res. 330, 94th Cong., 1st Sess. (1975) (Reps. Quie and Erlenborn)). *See also North Haven*, 629 F.2d at 783-84 (citing, e.g., S. 2146, a bill by Sen. Helms to amend § 901 of title IX to exclude employment from coverage). Other measures cited by the majority in *North Haven*, 456 U.S. at 533 n.24, would have: disapproved the title IX regulations in their entirety (H.R. Con. Res. 310) (Rep. Martin); disapproved portions of the athletic regulations, limiting coverage to where athletic programs "received or benefitted from" federal funds (H.R. Con. Res. 311) (Rep. Martin); and restricted the definitions of "program or activity" (S. 2657) (Sen. McClure). All measures cited were introduced in the 94th Cong., 2d Sess. (1975). None of the proposals, however, were approved by Congress. 456 U.S. at 532-33.

107. 456 U.S. at 532-35. In 1974, for example, Congress exempted social fraternities and sororities and voluntary youth service organizations (e.g., YMCA, Girl Scouts and Boy Scouts) from § 901. Pub. L. No. 93-568, § 3(a), 88 Stat. 1862 (codified at 20 U.S.C. § 1681(a)(6) (1982)). 456 U.S. at 534 n.25. *See supra* note 9.

108. 456 U.S. at 535 (citing *Cannon*, 441 U.S. at 687 n.7). *See* United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979).

109. 456 U.S. at 529-30.

110. *Id.* at 529; § 604 of title VI (codified at 42 U.S.C. § 2000d-3 (1982) provides: "Nothing contained in this title shall be construed to authorize action under this title with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the federal financial assistance is to provide employment." *Id. See supra* note 7.

111. Title IX does not contain a similar provision concerning employment practices. The

that title VI may be used to construe title IX only to the extent that title IX's own history and language do not suggest a "contrary interpretation."[112] Although the statutes are similar, Justice Blackmun indicated that the court must take notice of slight differences between the two. In the event there are discernible differences between the language and legislative history of each statute, the Court maintained that title VI precedent should not be persuasive.[113]

Although the meaning of "program or activity" was not directly before the Court in *North Haven*, Justice Blackmun nonetheless considered the meaning of the term.[114] Justice Blackmun noted that the Second Circuit had decided that the Department had authority to issue broad regulations, despite the fund-termination limitations of section 902.[115] The majority determined that while the regulations were valid insofar as employment discrimination was covered by the statute, they were subject to "program-specific" limitations in both sections 901 and 902.[116] In keeping with its interpretation of the employment issue, the Court again found no consistent administrative interpretation of title IX with regard to the "program or activity" issue, and noted that the Department's interpretation had "fluctuated from case to case."[117] The majority, therefore, declined to accord any weight to the Department's position on the question.[118]

The Court based its "program-specific" conclusion primarily on its reading of title IX's legislative history. Justice Blackmun noted that in 1970 and 1971 Congress passed over proposals explicitly prohibiting discrimination in "institutions" receiving federal financial assistance.[119] Because Congress

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boards had argued, however, that because title IX was patterned after title VI, *Cannon*, 441 U.S. at 710-11, title IX should be construed implicitly to incorporate the § 604 limitation.

112. 456 U.S. at 529.

113. *Id.* at 530. In this case because title IX did not contain a restriction on employment coverage comparable to § 604 of title VI, the Court declined to accord any weight to the title VI precedent.

114. *Id.* at 536-40.

115. *Id.* at 537. *See supra* notes 105-08 and accompanying text.

116. 456 U.S. at 514, 536-37.

117. *Id.* at 538. The Court compared the position of the Department in Dougherty County School Sys. v. Harris, 622 F.2d 735, 737 (5th Cir. 1980) (under the Carter Administration) and the testimony of HEW Secretary Weinberger, *1975 House Hearings, supra* note 105, at 485 (under the Ford Administration) where both previous administrations adopted an institution-wide reading of § 901, with the Department's position in *North Haven* (under the Reagan Administration) in which it argued for a more restricted, "program-specific" approach. *See* 456 U.S. at 538 n.29. *See also supra* note 28.

118. 456 U.S. at 538 n.29.

119. *Id.* at 537 (citing 117 CONG. REC. 30,155-57, 30,408 (1971) (amendment offered by Sen. Bayh); H.R. 5191, 92d Cong., 1st Sess., § 1001(b) (1971) (administration proposal); *1970 House Hearings, supra* note 2, at 690-91 (Department of Justice proposal).

eventually passed title IX prohibiting discrimination in "programs or activities," the Court concluded that Congress intended title IX to be program-specific.[120] The *North Haven* majority, however, explicitly declined to define "program-specificity," and remanded the case to the district court to determine whether the plaintiffs were employed in a federally assisted "program."[121]

The Supreme Court's decisions in *Cannon*,[122] upholding a private right of action, and in *North Haven*,[123] interpreting title IX to cover employment, accorded a broad reading to the language of the civil rights statutes. In each case, the Court relied on title VI precedent and on an examination of title IX's legislative history to decipher Congressional intent. At the conclusion of *North Haven*, however, the Court suggested a modification of its prior broad readings by noting that section 901 was "program-specific."[124] Nonetheless, the Court's phrase "program-specific" remained vague, providing little guidance as to its proper application. Consequently, lower court decisions following *North Haven* offered inconsistent interpretations regarding the reach of the statute. While some courts determined that the "program" governed by title IX could never mean an entire institution,[125] other

120. 456 U.S. at 537-38. In addition, the majority stated, without explanation, that *both* §§ 601 and 602 of title VI had been construed by the Department to be "program-specific" as a result of *Finch*, 414 F.2d 1068 (5th Cir. 1969). *See supra* notes 35-51 and accompanying text. Because the language of §§ 901 and 902 is nearly identical to §§ 601 and 602, the Court concluded that title IX also was subject to "program-specific" limitations. 456 U.S. at 538-39 (citing HEW's comments accompanying its final employment regulations, 40 Fed. Reg. 24,128 (1975)).

121. 456 U.S. at 539-40. Justice Blackmun did suggest three possible arguments that the defendant school boards might make in order to escape the jurisdiction of title IX:

> [1] the complaining employees' salaries were not funded with federal money . . .
>
> [2] the employees did not work in an education program that received federal assistance, or . . .
>
> [3] the discrimination employees allegedly suffered did not affect a federally funded program.

Id. at 540.

One commentator has suggested that these three situations conform to prior theories of coverage under federal antidiscrimination statutes, and that each, when stated in the affirmative, implies a nexus test that, if satisfied, might allow courts to prove institution-wide coverage in some cases. Czapanskiy, *supra* note 33, at 381. On the other hand, writing for the dissent, Justice Powell hinted that only those employees who were direct participants in federal programs, such as "teachers who receive federal grants," are protected by title IX. 456 U.S. at 542 n.3.

122. See the discussion of *Cannon*, 441 U.S. 677 (1979), *supra* notes 61-74.

123. See discussion of *North Haven*, 456 U.S. 512 (1982), *supra* notes 76-121 and accompanying text.

124. *See supra* notes 116-21 and accompanying text.

125. See Hillsdale College v. HEW, 696 F.2d 418 (6th Cir. 1982), *vacated and remanded*, 104 S. Ct. 1673 (1984), in light of Grove City College v. Bell, 104 S. Ct. 1211 (1984) and

courts proposed that if a nexus between the alleged discrimination and the

University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982). In *Hillsdale*, the United States Court of Appeals for the Sixth Circuit considered whether a small college whose only federal assistance was in the form of student grants and loans could be required by the Department to assure compliance with title IX institution-wide. *See* 696 F.2d at 424. The court examined the statutory language, legislative history, and case law on the issue of program-specificity and was pursuaded that Congress never intended to consider an entire educational intitution to be a "program or activity" under the statute. *Id.* at 424-29. In scrutinizing the language of title IX, the court observed that while the term "educational institution" appears throughout the statute's list of exemptions, *see* title IX, § 901, *supra* note 3, the term does not appear in the general prohibition against discrimination in § 901. 696 F.2d at 425. Instead, Congress chose the term "program or activity," a term that the Sixth Circuit reasoned must be narrower than "educational institution." *Id.*

Next the court examined the legislative history of title IX and noted three factors in its analysis. First, the court considered that an earlier version of title IX contained a clear institution-wide prohibition, while the version that ultimately passed applied only to "programs or activities." *Id.* at 426. Second, the court found no affirmative statements in the history to support institution-wide coverage. *Id.* at 426 n.22.

Finally, considering prior case law on the scope of title IX and title VI, the court noted that numerous title IX cases in the lower courts had favored more restrictive construction of the statute. *Id.* at 427-29. *See, e.g.*, Bennett v. West Texas State Univ., 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd*, 698 F.2d 1215 (1983); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983); Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979). The court conceded that in one particular case, Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975), institution-wide coverage had been accorded to title VI. 696 F.2d at 428-29. The *Hillsdale* court distinguished that case, however, by reasoning that in the particular case of discrimination in admissions, an entire institution should be covered by §§ 601 and 901 because such discrimination taints all programs within the college. 696 F.2d at 429 (citing *Othen*, 507 F. Supp. at 1387). Secondly, the court found a strong constitutional underpinning that exceeded the statutory basis for the termination of federal funds. *Id.* at 429. The court reasoned that, while there is a clear prohibition against race discrimination in admission under the fifth and fourteenth amendments, no similar constitutional basis for reaching sex discrimination in private schools existed beyond the specific program receiving federal assistance. *Id.* The court thus concluded that the only "program" the Department had authority to regulate was Hillsdale's student loan and grant program. *Id.* at 430.

In University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982), a district court rejected the Department's argument that it had jurisdiction over a college athletic program because that program "benefited" from federal funds received by other programs in the university, which in turn released funds for the athletic department. *Id.* at 329. Like *Hillsdale*, the *Richmond* court distinguished *Bob Jones* on the grounds that title VI has a broader constitutional scope than title IX. *Id.* at 328. The *Richmond* court also rejected application of the "infection theory" advanced in *Finch*, 414 F.2d 1068 (5th Cir. 1968), by maintaining that the theory applied only when a federally funded program is affected by discrimination from elsewhere. 543 F. Supp. at 329-30. Because the Department had failed to allege that discrimination in the athletic department "infected" federally funded departments of the university, the court held that the infection theory could not apply. *Id.* Finally, the court rejected the Department's insistence that it must be able to conduct an institution-wide investigation in order to determine whether the athletic department was in fact receiving federal funds. *Id.* at 331. Without explanation, the court implicitly found that § 902 prohibited such extensive investigation. *Id.*

federal assistance was shown, the institution as a whole would be subject to the statute.[126]

II. *GROVE CITY COLLEGE V. BELL*: A REJECTION OF INSTITUTION-WIDE COVERAGE UNDER TITLE IX

A. Applying the "Program-Specific" Rule to Student Financial Aid

In *Grove City College v. Bell*,[127] the Supreme Court confronted two issues crucial to the interpretation and application of title IX. For the first time, the Court addressed the question whether title IX is triggered when a college

126. *See* Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549 (5th Cir. 1983); Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982) (per curiam). In *Iron Arrow*, the United States Court of Appeals for the Fifth Circuit reconsidered a departmental fund termination order, in light of *North Haven*, 456 U.S. 512 (1982). The court's previous decision, 652 F.2d 445 (5th Cir. 1981), had been vacated and remanded as a result of *North Haven*. On remand, the court applied the "infection theory" of *Finch* and upheld the Department's order. 702 F.2d at 560-61. The Iron Arrow Society was the most prestigious honorary society at the University of Miami, a private university which received $46 million in federal assistance in 1980. *Id.* at 551 & n.2. Because the society denied admission to otherwise qualified women, the Department sought to terminate federal assistance to the university. *Id.* at 551.

The Fifth Circuit considered the *North Haven* framework for analyzing the scope of title IX. *Id.* at 555-60. The court first examined the language and legislative history of the statute and found that while Congress explicitly exempted "social fraternities" from coverage, 20 U.S.C. § 1681(a)(6)(A), *supra* notes 3, 107 and accompanying text, it did not exempt "professional" societies, like Iron Arrow, that might affect post-graduate employment opportunities for their members. 702 F.2d at 559 (citing 120 CONG. REC. 39,992 (1974) (remarks of Sen. Bayh, sponsor of 1974 amendment exempting social fraternities and sororities but not professional societies)). Next, the appellate court considered the relevant case law. 702 F.2d at 560-64. Citing *Finch*, the appellate court held that when a discriminatory program benefits from federal assistance, or when the federally assisted program is "infected by a discriminatory environment," the program-specific requirement of *North Haven* is met. 702 F.2d at 562. Finding that the society's exclusionary policies had the same "pervasive effect" as discriminatory admissions policies, the court concluded that the society's discriminatory nature tainted all other programs and activities within the university. *Id.* at 562-63. The court specifically noted that it did not rely on the "benefit" or "freeing up" theory, under which an entire institution is treated as the "program." *Id.* at 564. Instead, it remarked that given the Iron Arrow's "close historical ties" to the University the society's discriminatory practices were attributable to the university itself. *Id.*

In *Haffer*, 688 F.2d 14 (3d Cir. 1982), women students charged Temple University with gender discrimination in its intercollegiate athletic program, in violation of title IX. *Id.* at 15 n.1. The United States Court of Appeals for the Third Circuit rejected the university's contention that, under *North Haven*, title IX was inapplicable because the athletics program received no "direct, earmarked" federal aid. *See id.* at 16. The court reasoned that if a program within a university or the university itself benefits from federal aid, then that program was subject to title IX. *Id.* at 17. The court found that the university received "millions of dollars in federal grants and loans" and that the athletic program itself benefitted from Federal Work-Study money that paid the salaries of some of its employees. *Id.* at 15 & 16 n.5.

127. Grove City College v. Bell, 104 S. Ct. 1211 (1984).

receives indirect federal financial assistance. In addition, the Court considered the scope of the "program-specific" rule previously announced in *North Haven*.[128] Although a unanimous Court determined that indirect aid brought a college within the jurisdiction of title IX, a divided court ruled that the statute applied only to one discrete office within the institution. While the majority suggested a test for defining "program or activity" that would trace the purpose and effect of federal assistance, it provided no clear guidelines for future application of the test.[129]

Grove City College (College) is a small, private liberal arts institution in Pennsylvania that strongly believes in autonomy from government assistance and regulation.[130] The College consistently had refused all forms of direct government aid. Of its 2200 students, however, 140 received federal Basic Educational Opportunity Grants (BEOGs) and 342 received federal Guaranteed Student Loans (GSLs).[131] Based on its policy to construe student financial aid as assistance to the institution, [132] the Department determined that the College was a recipient of "federal financial assistance" and, therefore, subject to the requirements of title IX and its implementing regulations.[133] Pursuant to its regulations, the Department sought an "Assurance of Compliance" from the College.[134] Although it claimed to enforce a policy of nondiscrimination,[135] the College nonetheless refused to execute the com-

128. *Id.* at 1214. *See North Haven*, 456 U.S. 512 (1982); *supra* notes 114-21 and accompanying text. Following the *North Haven* decision, lower federal courts inconsistently construed the meaning of "program-specificity." *See supra* notes 125-26 and accompanying text. *See generally* Note, *supra* note 34.

129. *See infra* notes 208-14 and accompanying text.

130. *See* Grove City College v. Bell, 687 F.2d at 701 n.29 (citing Brief for Grove City College, No. 8-2384, at 35). The College also claims to enforce its own institutional policy of nondiscrimination. *Id.* In this respect, the *Grove City* case presents a greater moral dilemma for a court, than, for example, the *Bob Jones University* case. In Bob Jones Univ. v. Johnson, 396 F. Supp. 597, the institution's official policies were racially discriminatory. *Id. See supra* note 60 and accompanying text. In contrast, neither the Department nor any of Grove City's students ever alleged that the College engaged in discrimination on any basis. *See* 104 S. Ct. at 1224 (Powell, J., concurring).

131. Grove City College v. Harris, 500 F. Supp. at 259.

132. *See id.* at 258 (citing 45 C.F.R. §§ 86.2(g)(1), 86.2(h) (1977)) [redesignated as 34 C.F.R. §§ 106.2(h), 106.37 (1984)]; 687 F.2d at 693 (citing *1975 House Hearings*, *supra* note 105, at 481-84 (statement of HEW Secretary Weinberger construing both direct and indirect student assistance as "federal financial aid" to an institution)).

133. 104 S. Ct. at 1215.

134. *Id. See supra* note 9 and accompanying text. Initially, HEW Secretary Califano sought an Assurance of Compliance throughout the institution, but by the time the case reached the Supreme Court, the Department, under Secretary Bell, had reversed its position and sought compliance only in regard to the College's financial aid office. *Id.* at 1216 n.10. *See supra* note 28 and accompanying text. For a discussion of the Department's inconsistent position on employment coverage, see *supra* notes 95-97.

135. 687 F.2d at 701 n.29 (citing Brief for Grove City College, No. 80-2384, at 35).

pliance form. Consequently, the Department instituted administrative proceedings against the College culminating in an agency order terminating its students' federal grants and loans.[136]

The College and four students filed suit against the Department in the United States District Court for the Western District of Pennsylvania.[137] The plaintiffs alleged that the College was not a recipient of "federal financial assistance" and that the Department's regulations were overbroad because they were not limited to specific programs receiving federal aid.[138] The district court found that BEOGs received directly by the students constituted indirect financial assistance to the College because the students used portions of their aid to pay tuition and other fees.[139] The court, however, did not address directly the question whether the institution as a whole constituted a "program" subject to title IX.

The United States Court of Appeals for the Third Circuit affirmed in part and reversed in part, holding that indirect aid to the College sufficed to invoke the protections of title IX.[140] In reaching this conclusion, the court sought to define the "program" at issue in the case.[141] The Third Circuit initially recognized that neither the language nor the legislative histories of titles VI or IX conclusively defined the term.[142] The court determined, however, that Congress intended colleges and universities to be treated under the law as "integrated" institutions, rather than as a collection of smaller, dis-

136. Grove City College, No. A-22 (HEW Administrative Proceeding, Sept. 15, 1978) (final order), *cited at* 500 F. Supp. at 255-56.

137. Grove City College v. Harris, 500 F. Supp. 253 (W.D. Pa. 1980).

138. *Id.* at 265-66. The district court found that Guaranteed Student Loans were exempt from § 902 because they were "contracts of guarantee." *Id.* at 268-69. The Department did not appeal this aspect of the district court's decision. *See* 687 F.2d at 690 n.10.

139. 500 F. Supp. at 264-65.

140. Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982). In concluding the College was a recipient of "federal financial aid," the court relied both on *Bob Jones*, 396 F. Supp. 597 (D.S.C. 1974), and on an extensive analysis of title IX's legislative history. *Id.* at 690-97.

The Third Circuit reversed the district court's ruling that fund termination is an inappropriate remedy when a recipient refuses to execute an Assurance of Compliance Form. *Id.* at 702-04. The appellate court concluded that in such cases, the Department did not need to allege or prove discrimination in order to revoke government aid. *Id.* The Supreme Court affirmed the court of appeals on this issue. 104 S. Ct. at 1222-23.

141. *See* 687 F.2d at 690-91. The Third Circuit addressed the "program" issue because the College had argued that the concept of indirect assistance was incompatible with the "program-specific" nature of the statute. *Id.* at 696. The College asserted that only programs receiving specifically earmarked federal funds were subject to title IX. Moreover, the College reasoned that, by definition, indirect assistance could not be earmarked or "tied to any specific program" at the College. *Id.* at 696-97.

142. *Id.* at 698. The court of appeals refused to rely on the *North Haven* "program-specific" rule because in that case the Supreme Court explicitly declined to define the term "program." *Id.* at 697 n.20.

crete units.[143]

Moreover, the appellate court relied on the postenactment history of title IX to support a "benefits" theory of broad coverage.[144] Under this approach, the court stated that a program benefiting from indirect assistance is bound by the statute.[145] The court concluded that Congress intended such programs to be covered because, after extensive debate and hearings on the Department's intercollegiate regulations in 1975,[146] Congress declined to exempt athletics.[147] Because college athletic programs normally receive no direct, or "earmarked" federal funds,[148] the court reasoned that Congress must have contemplated a broader approach to the meaning of "program or activity."[149] The court then concluded that because all of its departments

143. *Id.* at 697. Under the "integrated institution" approach of the Third Circuit, an entire university is covered by title IX if its students are free to participate in all of the college's programs and activities. Additionally, an "integrated institution" typically has a uniform decisionmaking structure, institution-wide policies, and a single pool of funds or general operating budget. *See* Czapanskiy, *supra* note 33, at 390-91; *See also* Wright v. Columbia Univ., 520 F. Supp. 789, 791-92 (E.D. Pa. 1981).

144. 687 F.2d at 698-700. Several cases and commentators have referred interchangeably to the "benefits" or "freeing up" theory. *See Iron Arrow*, 702 F.2d at 564; *see also* Haffer v. Temple Univ., 688 F.2d at 16 (athletic program receives no earmarked federal grants but benefits from the "large amounts of federal financial assistance" received by the university); Wright v. Columbia Univ., 520 F. Supp. 789, 791-92 (E.D. Pa. 1981) (construing § 504); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 951 (D.N.J. 1980) (also construing § 504); *Bob Jones Univ.*, 396 F. Supp. at 602-03.

Several cases have rejected the "benefits" approach, favoring instead an approach that would require a program to receive direct or earmarked federal assistance in order to be subject to title IX. *See, e.g.*, *Hillsdale*, 696 F.2d 418 (6th Cir. 1982); *Richmond*, 543 F. Supp. 321 (E.D. Va. 1982); Bennett v. West Texas State Univ., 525 F. Supp. 77 (N.D. Tex. 1977), *rev'd*, 698 F.2d 1215 (5th Cir. 1981). In Grove City College v. Bell, 104 S. Ct. at 1220-22, the Supreme Court explicitly rejected the "freeing up" approach. *See infra* notes 161-62 and accompanying text; see also the discussion of Justice Brennan's dissent *infra* notes 185-87 and accompanying text (Justice Brennan found it unnecessary to consider the "benefits" theory in *Grove City*).

145. *Id.*; *1975 House Hearings*, *supra* note 105, at 171 (statement of Sen. Bayh), *quoted in Grove City*, 687 F.2d at 699 n.25. *See also 1975 House Hearings*, *supra* note 105, at 165-66 (statement of Rep. Mink).

146. *See 1975 House Hearings*, *supra* note 105 and accompanying text.

147. Grove City College v. Bell, 687 F.2d at 699. In the majority opinion in *North Haven*, 456 U.S. at 512, Justice Blackmun established the probative value of title IX's postenactment legislative history, noting that the Department had been required by statute to submit its regulations to Congress for formal review and that Congress had proceeded to amend title IX when it disagreed with the Department's interpretation. *Id.* at 530-35. *See supra* notes 104-08 and accompanying text.

148. 687 F.2d at 699 (citing *Haffer*, 524 F. Supp. 531, 532, 536 (E.D. Pa. 1981)). *See generally University of Richmond*, 543 F. Supp. 321 (E.D. Va. 1982); *Haffer*, 524 F. Supp. 531 (E.D. Pa. 1981).

149. 687 F.2d at 699-700 (citing *Haffer*, 524 F. Supp. at 541). The court of appeals also noted that similar "program-specific" provisions in § 504 of the Rehabilitation Act of 1973, *supra* note 29, had been construed under the "benefits" theory as invoking institution-wide

benefit when a college receives indirect, "non-earmarked" assistance, the entire institution must be considered the "program or activity" under title IX.[150]

The Supreme Court affirmed in part and reversed in part.[151] The Court unanimously affirmed the Third Circuit's finding that the College's indirect receipt of student financial aid triggered title IX.[152] A divided court, however, reversed the Third Circuit's conclusion that the entire institution constituted the education "program."[153]

Writing for the Court, Justice White examined the legislative history of the Education Amendments of 1972, under which Congress enacted title IX and created the BEOG program.[154] Justice White found no evidence during the hearings or the floor debate to indicate that Congress intended to limit title IX to direct federal aid.[155] Moreover, the Court reviewed the express statutory language and accompanying legislative history of the BEOG program and concluded that a substantial purpose of the student aid bill was to assist institutions of higher education.[156] The Court therefore reasoned that the College received "federal financial assistance" within the meaning of title IX.[157]

Finally, the Court examined the postenactment history, noting that when the Department submitted its regulations to Congress for review in 1975, neither House passed a resolution disavowing the Department's interpreta-

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coverage. *Id. See also* Wright v. Columbia Univ., 520 F. Supp. 789 (E.D. Pa. 1981); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980); *supra* note 144.

150. 687 F.2d at 700. The Third Circuit distinguished *Finch*, 414 F.2d 1068 (5th Cir. 1969), on the grounds that, in *Grove City*, the federal assistance was akin to a nonearmarked grant that supported the entire institution. *Id.* at 698 n.23. The court noted that in *Finch*, however, the federal assistance was earmarked according to three separate grant statutes, each of which was intended to support specific activities in the school district. *Id.* Thus, in *Finch*, each federal grant constituted a separate program, but in *Grove City* the "program" supported by BEOGs was the college as a whole. See the discussion of *Finch*, *supra* notes 35-60 and accompanying text.

151. Grove City College v. Bell, 104 S. Ct. 1211 (1984).

152. *Id.* at 1216-20.

153. *Id.* at 1220-22.

154. *Id.* at 1216-18.

155. *Id.* On the issue of indirect federal assistance, the Court acknowledged that evidence of congressional intent was "somewhat ambiguous." *Id.* at 1218. Nonetheless, the Court found the floor remarks to be consistent with broad coverage. *Id.* Additionally, the Court considered the administrative construction of title VI noting that the title VI regulations in effect in 1972 construed indirect student aid as "federal financial assistance." *Id.* at 1218 n.15 (citing 45 C.F.R. pt. 80, app. A (1972)).

156. *Id.* at 1218. The Court noted that an express purpose of the BEOG Act was to "provid[e] assistance to *institutions* of higher education." *Id.* (emphasis added) (citing Pub. L. No. 92-318, § 1001(c)(1), 86 Stat. 381 (codified as amended at 20 U.S.C. § 1070(a)(5) (1982)).

157. 104 S. Ct. at 1220.

tion that scholarships, loans, and grants to students constituted "federal financial assistance" to the college.[158] Consequently, the Court asserted that congressional inaction in this instance supported a broad construction of the statute.[159]

The majority next examined the meaning of the phrase "program or activity."[160] Justice White considered the theory advanced by the Third Circuit that aid to one program within an institution releases general funds, allowing school administrators to redirect those monies to other programs.[161] Justice White noted that in this case, there was no indication that funds had been diverted from the financial aid office to other departments at the College. Moreover, the majority determined that while most federal assistance has an "economic ripple effect," Congress never intended an entire institution to be covered in the event one of its students or departments received a small federal grant.[162]

The majority next considered the Third Circuit's finding that BEOGs were like unrestricted grants benefiting the entire institution because they were not earmarked for use in any particular program.[163] While conceding that BEOG funds ultimately may reach a college's general operating budget, Justice White rejected the notion that Congress ever intended the Department to regulate the treatment of students in every classroom, building, and activity of a college.[164] Moreover, he concluded that because BEOGs in-

158. *Id.* at 1219-20. In this section of the *Grove City* opinion, a unanimous Court recognized the probative value of the postenactment legislative history and the persuasive impact of Congress' failure to amend title IX after the extensive legislative review of the regulations in 1975. *See supra* notes 104-08 and accompanying text. *But see* 104 S. Ct. at 1220-22 (In construing title IX to be "program-specific," a six member majority neglected to mention the 1975 "laying before" procedure or the statutory amendments introduced to limit title IX's coverage.). *See generally infra* notes 199-203 and accompanying text.

159. 104 S. Ct. at 1219.

160. *Id.* at 1220-22. The Court examined the two methods of disbursing BEOGs utilized by the Department of Education. *Id.* The Court noted that under the Regular Disbursement System (RDS), 34 C.F.R. §§ 690.71-.85 (1982), a college receives BEOG funds from the Department and disburses them to eligible students, while under the Alternative Disbursement System (ADS), 34 C.F.R. §§ 690.91-.96 (1982), in which Grove City College participated, BEOGs do not flow through the College financial aid office. Instead, the Department disburses the grants directly to students. *See* 104 S. Ct. at 1215 n.5. The Court concluded that the breadth of the "program" receiving assistance was not contingent on whether federal grants were processed through the school or disbursed directly through the Department. *Id.* at 1221.

161. 104 S. Ct. at 1221-22. For a discussion of the "benefits" theory, see *supra* notes 144-45, 149 and accompanying text.

162. 104 S. Ct. at 1221-22.

163. *Id. See supra* notes 148-50 and accompanying text.

164. 104 S. Ct. at 1222. Justice White offered no explanation for this conclusion, but simply stated that the majority had "found no persuasive evidence that Congress intended the

creased a college's obligation to offer its services to students previously excluded from higher education, the student aid was more analogous to earmarked grants.[165] The majority thereupon concluded that in "purpose and effect" the BEOGs assisted the college financial aid office rather than the entire institution.[166] The Department, therefore, could require an Assurance of Compliance with title IX only in regard to the operation of the College's financial aid program.[167]

Justice Brennan, joined by Justice Marshall, dissented on the issue of program specificity.[168] Justice Brennan sharply criticized the majority's refusal to accord the term "program or activity" the same broad construction given the concept of "federal financial assistance." Moreover, the dissent expressly adhered to the *North Haven* framework by carefully analyzing title IX's legislative history and the prior interpretation of similar language in title VI.[169] Justice Brennan first examined the legislative history of title IX.[170] He observed that the 1970 House hearings and a 1971 predecessor bill both adopted an institutional approach to remedying sex discrimination.[171] Although this history could not definitively prove Congress' intent behind the 1972 Act, Justice Brennan noted that it did not support the majority's narrow construction either.[172]

The dissent next examined the meaning of the phrase "program or activity" under title VI, the parent statute of title IX.[173] Justice Brennan determined that both administrative and judicial interpretations supported

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Department's regulatory authority to follow federally aided students from classroom to classroom, building to building, or activity to activity." *Id.* at 1222. *But see Bob Jones*, 396 F. Supp. at 597 ("program" subject to title VI was the entire educational program in which federally aided student participated).

165. 104 S. Ct. at 1222.

166. *Id. But see id.* at 1218 (affirming purpose of BEOG Act to aid educational "institutions").

167. *Id.* at 1222-23.

168. *Id.* at 1226-37 (Brennan, J., dissenting). Justice Powell, joined by Chief Justice Burger and Justice O'Connor, filed a separate concurring opinion. *Id.* at 1223-24. The opinion criticized the Department for "overzealousness" in enforcing the title IX regulations and emphasized that there were no allegations of discrimination at the College. *Id.* at 1223. Justice Stevens also filed a separate concurrence, asserting that the Court's opinion concerning "program-specificity" was advisory in nature. *Id.* at 1225-26. For a brief discussion of Justice Stevens' opinion, see *supra* notes 27-28 and accompanying text.

169. 104 S. Ct. at 1226-27 (Brennan, J., dissenting).

170. *Id.* at 1227-28.

171. *See 1970 House Hearings* on § 805 of H.R. 16,098, *supra* note 2; H.R. 5191, 92d Cong., 1st Sess. §§ 1001(a) (1971); Amendment No. 398 to S. 659, The Higher Education Act of 1971, 92d Cong., 1st Sess., 117 CONG. REC. 30,156 (1971).

172. 104 S. Ct. at 1228.

173. *Id.* at 1228-31.

institution-wide coverage.[174] First, Justice Brennan noted that the Department's title VI regulations in effect in 1972 clearly required institution-wide Assurances of Compliance from colleges and universities.[175] Second, the dissent determined that two pre-1972 appellate court cases[176] each upheld the regulations and endorsed broad coverage of entire school districts under section 601.[177] Finally, the dissent asserted that, although *Finch* placed limitations on the government's fund-termination power under section 602, *Finch* also ruled that the Department could properly cut off funds when federally assisted programs were "infected" by discrimination from other programs within an institution or school district.[178] The dissent concluded, therefore, that *Finch* implicitly contemplated institution-wide coverage under section 601.[179]

Additionally, the dissent considered the postenactment legislative history of title IX.[180] Justice Brennan explained that the Department's title IX regulations had the same institution-wide scope as its title VI regulations.[181] Moreover, the 1975 "laying before" procedure and House hearings on the regulations indicated a Congressional awareness of the Department's institutional interpretation.[182] Justice Brennan pointed out that when faced with amendments narrowing the scope of "program or activity," Congress had declined to pass them.[183] Although Congressional inaction is not dispositive of intent, the dissent agreed with the majority in *North Haven* that such inaction following the extensive 1975 hearings should be given substantial weight by the Court.[184]

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174. *Id.* at 1231.

175. *See* 45 C.F.R. pt. 80 (1972). For a discussion of the institution-wide scope of title VI regulations, see *supra* notes 33, 52-59 and accompanying text.

176. See discussion of United States v. Jefferson County Bd. of Educ., 372 F.2d at 836 and Bossier Parish School Bd. v. Lemon, 370 F.2d at 847, *supra* note 32 and accompanying text.

177. 104 S. Ct. at 1230-31.

178. For a discussion of *Finch*, 414 F.2d at 1068, see *supra* notes 35-51. The dissent also relied on Lau v. Nichols, 414 U.S. 563 (1974) (treating an entire school district as a "program" under § 601). *See supra* note 32 and accompanying text.

179. 104 S. Ct. at 1230-31.

180. *Id.* at 1231-35.

181. *See* final title IX regulations, 40 Fed. Reg. 24,128 (1975) (originally codified at 45 C.F.R. pt. 86 (1975)); *see also supra* notes 33, 175 and accompanying text (discussion of title VI regulations).

182. 104 S. Ct. at 1232. *See 1975 House Hearings, supra* note 105.

183. *See* S. Con. Res. 46 and S. Con. Res. 52, 94th Cong., 1st Sess. (1975) (amendments by Senators Helms and Laxalt that would have subjected title IX to program-specific limitations), *cited in* 104 S. Ct. 1232 (Brennan, J., dissenting). *See also supra* note 156 and accompanying text (Court recognized the value of title IX's postenactment history in resolving indirect aid question but failed to consider it in resolving the meaning of "program or activity"); *supra* notes 104-08 and accompanying text.

184. 104 S. Ct. at 1231. *See supra* notes 104-08 and accompanying text.

Finally, the dissent disagreed that the purpose and effect of BEOGs was to assist a college's financial aid office rather than the institution as a whole.[185] Justice Brennan examined the legislative history of the BEOG program and found a clearly articulated purpose to assist entire institutions of postsecondary education.[186] Because the funds at issue in *Grove City* constituted assistance to the entire institution, the dissent found it unnecessary to consider the merits of the "freeing up" or "benefits" theory or the implications for institution-wide coverage when federal funds received by a college are targeted or "earmarked" for a specific purpose.[187]

B. Grove City College v. Bell: *Narrowing Coverage Under Civil Rights Statutes*

In *Grove City College v. Bell*,[188] a unanimous Supreme Court accorded a broad reading to title IX's language and legislative history in defining the phrase "federal financial assistance."[189] In this respect, the Court construed the statute to include a wide range of rights and remedies in continuation of the trend initiated in *Cannon* and elaborated in *North Haven*.[190] This aspect of the decision, however, was seriously undermined by the determination of six Justices that title IX must be construed narrowly in a "program-specific" manner.[191] This reading of title IX casts serious doubt on the appropriate manner in which to construe federal civil rights statutes. Moreover, as the dissent correctly noted, the Court's opinion is, as a consequence of these diverse holdings, internally inconsistent.

The Court's decision construing BEOGs disbursed directly to students as "federal financial assistance" to the College is sound. As a reaffirmation of a well-settled legal consensus that indirect aid subjects a college or university to federal antidiscrimination laws, the decision was not unique. This aspect of the opinion is well-grounded in precedent arising from other civil rights cases[192] as well as decisions under the first and fourteenth amendments prohibiting indirect governmental support of unconstitutional practices.[193]

185. *Id.* at 1235-37.
186. *Id.* at 1235-36. *See supra* note 156 and accompanying text.
187. 104 S. Ct. at 1236-37.
188. 104 S. Ct. 1211 (1984).
189. *Id.* at 1216-20.
190. *See supra* notes 61-74, 76-121 and accompanying text.
191. 104 S. Ct. at 1220-22. *See supra* notes 160-67 and accompanying text.
192. *E.g.*, Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (5th Cir. 1975). See *supra* note 60; *see also* Lau v. Nichols, 414 U.S. 563 (1974), *supra* note 32.
193. *E.g.*, Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973); Norwood v. Harrison, 413 U.S. 455 (1973). *See supra* note 22 and accompanying text; *see also* Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983).

More importantly, this portion of the decision employs sound reasoning in construing the specific congressional intent at issue. In confronting the indirect aid issues, the Court essentially follows the analytical framework of *Cannon* and *North Haven*,[194] first scrutinizing the legislative history of titles IX and VI for guidance. Further, the Court follows the *North Haven* analysis by carefully considering the postenactment legislative history in connection with the statutory "laying before procedures" in 1975,[195] concluding that Congress implicitly approved of the Department's regulations construing student aid as assistance to the College.

The Court fails to explain adequately, however, why this same analysis and broad construction should not be applied in defining the phrase "program or activity" under title IX. The Court's six to three decision concerning the "program-specific" nature of title IX marks a departure from prior Supreme Court decisions broadly construing the language of the statute. In both *Cannon* and *North Haven*, the Court held the statute to confer rights not granted explicitly in the statute. In *Cannon*, the Court acknowledged a broad-ranging congressional purpose to prohibit federal support of sex discrimination and held the statute to allow a private right of action.[196] In *North Haven*, the Court articulated a need to "accord [title IX] a sweep as broad as its language" and consequently found employment discrimination to be within section 901's prohibitions.[197] In contrast, the *Grove City* majority adopted a narrow and literal view of the statute's language, that is supported neither by the statute's own legislative history nor by parallel case law under title VI.[198]

Although the majority undertook a detailed analysis of the 1972 Education Amendments in order to find that BEOGs constituted "federal financial assistance," it gave cursory treatment to the legislative history of those same amendments when it approached the "program or activity" issue. Two aspects of the legislative history specifically contradict the majority's interpretation. First, as the dissent points out, numerous references were made by title IX's sponsors indicating a belief that the statute would ensure institu-

194. *See supra* notes 61-74, 76-121 and accompanying text.

195. For a discussion of the "laying before" procedures, see *supra* notes 104-08 and accompanying text.

196. For a discussion of Cannon v. University of Chicago, 441 U.S. 677 (1979), see *supra* notes 61-74 and accompanying text.

197. For a discussion of *North Haven*, 456 U.S. 512 (1982), see *supra* notes 76-121 and accompanying text.

198. For a discussion of the meaning of "program or activity" under title VI, see *supra* notes 32-60 and accompanying text.

tion-wide coverage.[199] Though they are not conclusive, they provide ample evidence that Congress was aware of the possibility that title IX would be construed to apply to entire institutions.[200] The majority neglected to consider any of these remarks in its discussion.[201] Moreover, the majority ignored the significance of the 1975 "laying before" procedures, during which the Department presented its final regulations to Congress for review.[202] Modeled after title VI, the final regulations clearly contemplated compliance on an institution-wide basis. Given the opportunity to disapprove portions of the regulations with which it disagreed, including amendments specifically limiting title IX's reach to direct federal aid, Congress declined to act. As the Court recognized in *North Haven*, the failure of Congress to pass disapproving measures may be construed as evidence of agreement with the Department's interpretation.[203]

The majority's resolution of the "program or activity" question is additionally flawed because it ignores prior judicial construction of the identical language in title VI. In relying on the "program-specific" rule announced in *North Haven*, the *Grove City* majority implicitly accepted Justice Blackmun's interpretation of *Finch* in *North Haven*.[204] *Finch* concerned the Department's power to terminate funds under section 602. Justice Blackmun construed the *Finch* court's limitation on fund-termination as a restriction on the scope of "program" as used in section 601 as well. As Justice Brennan implied, however, such a reading of the *Finch* case reflects a fundamental misunderstanding of the fund-termination provisions.[205] While *Finch* may have limited the Department's remedial powers under section 602, the case did not address the reach of the substantive prohibition against discrimination in section 601. Additionally, *Finch* upheld wide-ranging termination of funds in instances where they are "infected by a discriminatory environment."[206] Moreover, the fact that title VI cases decided both before and after 1972 indicate that title VI was construed to be institution-wide in coverage further undercuts the majority's reasoning.[207]

199. For a discussion of Justice Brennan's dissent in *Grove City*, 104 S. Ct. at 1226-37, see *supra* notes 168-87 and accompanying text.

200. *E.g.*, 117 CONG. REC. 30,156; 30,407-08 (1971) (remarks of Sen. Bayh); *see also* 118 CONG. REC. 5803-09, 5812 (1972) (remarks of Sen Bayh).

201. *See* 104 S. Ct. at 1220-22.

202. *See supra* notes 104-08 and accompanying text.

203. *North Haven*, 456 U.S. at 533-35, *supra* notes 107-08 and accompanying text.

204. *See North Haven*, 456 U.S. at 535-40. *See supra* note 120.

205. 104 S. Ct. at 1231.

206. *Finch*, 414 F.2d at 1078. For a discussion of *Finch*, see *supra* notes 35-51 and accompanying text.

207. *See supra* notes 32-60 and accompanying text. *See also* Civil Rights Act of 1984, H.R. REP. NO. 829, 98th Cong., 2d Sess. 21-22 (1984).

A final flaw in the majority's opinion is its failure to articulate a clear test for determining "program or activity." In holding that BEOGs were, in "purpose and effect," like earmarked grants, the Court seems to suggest a grant statute approach to coverage.[208] The Court's application of this test, however, is puzzling. Although Justice White notes in the first part of the Court's opinion that a stated purpose of the BEOG program was to assist "institutions," and despite a concession that the effect of BEOGs often is to supplement a college's general operating budget, he finds that BEOGs assist only the college financial aid office.[209] This reading undermines the theory of *Finch* that discriminatory conduct in a portion of an institution not in receipt of federal funds still could be remedied by the termination of those funds if the funds were shown to be "infected" by the discrimination. Under an approach to *Finch* favored by prior Administrations, an institution-wide Assurance of Compliance was both appropriate and necessary under title VI, and later under title IX, to ensure that federal dollars were neither infected by nor supportive of discrimination.[210]

The lack of a clear test or precise definition of "program or activity" raises additional questions of administrative enforcement of title IX and other antidiscrimination statutes. Because title IX is virtually identical to title VI, it is likely that title VI and other statutes modeled after it also will be interpreted to be program-specific.[211] Although the Department has announced its intention to apply the *Grove City* decision to all four civil rights statutes,[212] it will lack clear standards regarding jurisdiction and enforcement. Within the Department, for example, numerous active cases were closed in

208. *See* Note, *The Program-Specific Reach of Title IX*, 83 COLUM. L. REV. 1210, 1227-44 (1983). The author suggests that under a "grant statute" approach, the program-specificity requirement may be applied with different results to three different types of federal aid. *Id.* at 1232-43. If assistance is in the form of a categorical grant, coverage would be institution-wide, based on the "benefits" or "freeing-up" theory or, alternatively, on the "infection" theory. *Id.* at 1232-37. If assistance is not earmarked, such as Impact Aid grants, institution-wide coverage would be automatic. *Id.* at 1237-40. Finally, in the case of aid to students, the institution as a whole would be covered because such aid is not earmarked for a particular program or activity and it generally flows directly from the student to the general operating budget. *Id.* at 1240-43.

209. *See supra* notes 157-58 and accompanying text.

210. *See supra* notes 47-59 and accompanying text.

211. The two other civil rights statutes expressly modelled after title VI are § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982) and the Age Discrimination Act of 1975, 42 U.S.C. § 6101 (1982). In Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1255-56 (1984), decided the same day as *Grove City*, the Court noted that § 504 also would be construed as "program-specific." *Accord* United States v. Baylor Medical Center, 736 F.2d 1039, 1049-50 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 958 (1985). *See supra* note 29.

212. Memorandum from Harry S. Singleton, Assistant Secretary for Civil Rights, United States Department of Education, to Regional Civil Rights Directors (July 31, 1984) (analyzing *Grove City* and its application to the Department's enforcement activities).

the wake of *Grove City*.[213] In addition, once clear Departmental guidelines are developed, it is likely that more federal resources will need to be spent tracking and characterizing the "purpose and effect" of federal grants. As a result, the Department may devote less time to actual enforcement of the statutes, including investigating complaints of discrimination from students and faculty members, conducting compliance reviews, and seeking to end discriminatory practices.[214]

III. CONCLUSION

Title IX of the Education Amendments of 1972 prohibits sex discrimination in federally funded education programs. In *Grove City College v. Bell*, the Supreme Court held that when a college receives indirect "federal financial assistance" through educational grants to its students, the college is subject to the provisions of title IX. The Court adopted a narrow reading of the statute, however, by limiting title IX's coverage to the specific program or activity toward which federal funds are directed. The "program-specific" holding of *Grove City* indicates a shift away from a prior inclination of the Court to construe broadly both title IX and its parent statute, title VI of the Civil Rights Act of 1964.

Because the Court did not clarify a test for determining title IX's scope of coverage, the statute may be enforced inconsistently by the Department of

213. *See, e.g., 1984 House Hearings, supra* note 50, at 275-81 (statement of Marcia Greenberger); American Association for University Women v. United States Dep't of Educ., No. 84-1881 (D.D.C. complaint filed June 29, 1984). One week after the Supreme Court's decision in *Grove City*, the Department suspended a proposed investigation of an athletic discrimination complaint at Pennsylvania State University and compliance negotiations with the University of Maryland over intercollegiate athletics. In both cases, the Department concluded it no longer had jurisdiction under title IX. *See 1984 House Hearings, supra* note 50, at 279-80. Moreover, in *AAUW*, plaintiffs alleged the Department "closed, narrowed, suspended, failed to undertake or otherwise limited" enforcement activities, primarily in the area of intercollegiate athletics. *AAUW*, No. 84-1881, at 13 (complaint filed June 19, 1984). The plaintiffs alleged the Department closed cases at: Auburn University, Centralia College, College of Southern Idaho, Gonzaga University, Idaho State University, University of Maryland, Pennsylvania State University, South Dakota State University, and the University of Washington (all intercollegiate athletics cases); Mississippi College (multiple issue complaint); Addison, Carmel, East Greenbush and Sag Harbor School Districts (school athletics); Fashion Institute of Technology (faculty employment); and Duke University (multiple issue complaint, including discrimination in housing, student health insurance, employment, and athletics). *Id.* at 13-15. The plaintiffs alleged that the Department failed to issue clear guidelines interpreting *Grove City* and that the Department applied the decision inconsistently by closing or suspending some cases while continuing to pursue others with similar fact patterns. *Id. See also* Fields, *As Debate Continues on Grove City Ruling, U.S. Delays Action on Complaints of Bias*, THE CHRON. OF HIGHER EDUC., Apr. 3, 1984, at 19, col. 2.

214. See discussion of the "*Adams* litigation," *supra* note 8 (series of complaints charging Department with inadequate enforcement of civil rights statutes).

Education. The practical effect of *Grove City* likely will be to insulate a wide range of educational activities from title IX and other antidiscrimination statutes. In areas, such as athletics, where title IX has boosted opportunities for women, a college or school program may now be relieved from a duty to offer comparable resources and facilities.

In order to maintain broad protection from discrimination for women and girls in education, Congress should pass legislation to clarify the meaning of "program or activity" in title IX and related statutes.[215] Such legislation should provide institution-wide coverage of colleges, universities, school districts, and other educational entities. These amendments should expressly define "program or activity" and supporting committee reports should clearly describe and endorse Congress' intended approach to coverage in ambiguous situations. The legislation should be enacted expeditiously to avoid an otherwise inevitable retreat from our national policies against federally supported discrimination.

*Dianne M. Piché**

215. *See* The Civil Rights Act of 1984, S. 2568 and H.R. 5490, 98th Cong., 2d Sess., introduced 130 CONG. REC. S4582 and 130 CONG. REC. H2946, respectively (daily ed. April 12, 1984); The Civil Rights Restoration Act of 1985, S. 431, introduced 131 CONG. REC. S1264 (daily ed. Feb. 7, 1985) and H.R. 700, 99th Cong., 1st Sess., introduced 131 CONG. REC. H166 (daily ed. Jan. 24, 1985). *See generally 1984 Senate Hearings, supra* note 30, and *1984 House Hearings, supra* note 50.

* The author was employed as a legal intern with the Center for National Policy Review between May 1984 and December 1984. The views expressed in this Note are those of the author and do not necessarily reflect those of the Center for National Policy Review.