Tulsa Law Review

Volume 22 | Issue 1

Fall 1986

Title IX and the Future of Private Education: Backdoor Regulation of a Private Entity

Brian T. Must

TITLE IX AND THE FUTURE OF PRIVATE EDUCATION: BACKDOOR REGULATION OF A PRIVATE ENTITY

I. INTRODUCTION

Prior to 1972, a student discriminated against in an educational program or activity on the basis of his or her sex was without recourse.[1] As originally enacted, the Civil Rights Act of 1964 did not recognize sex as a classification worthy of protection.[2] The 1972 Education Amendments to the Civil Rights Act, better known as Title IX, corrected this injustice.[3] Consequently, students involved in educational programs or activities receiving federal funds are no longer subject to discriminatory policies aimed at differentiating among the sexes. While the 1972 Amendments provide the guidelines for invoking Title IX protection, courts have had difficulty in consistently interpreting the scope of these amendments.[4]

1. Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000(d) (1982). In 1972, the Civil Rights Act was amended to include sex as a protected category. *See* Education Amendments of 1972, § 901, 20 U.S.C. § 1681 (1982).

2. *See* Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000(d) (1982). Title VI lists several classifications of persons protected under the Act. Section 2000(d) states in part: "[n]o person . . . 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.*

3. Education Amendments of 1972, § 901, 20 U.S.C. § 1681 (1982). Congress specifically addressed sex discrimination by including the phrase, "on the basis of sex," in the 1972 Amendments. *Id.*

4. *Compare, e.g.*, Hillsdale College v. Department of Health, Educ., and Welfare, 696 F.2d 418, 430 (6th Cir. 1982) (The court held that the entire college was not a recipient of Title IX funding merely because some of the students received student loans and government grants), *vacated*, 466 U.S. 901 (1984), *on remand*, 737 F.2d 520 (6th Cir. 1984); Rice v. President and Fellows of Harvard College, 663 F.2d 336, 339 (1st Cir. 1981) (stating that "[b]y alleging merely that Harvard Law School receives federal funds for its work-study program, without alleging sex discrimination in the School's handling of that program, Rice has failed to bring herself within the protection of Title IX."), *cert. denied*, 456 U.S. 928 (1982); University of Richmond v. Bell, 543 F. Supp. 321, 333 (E.D. Va. 1982) (The court refused to allow the Department of Education to investigate and regulate the athletic program of the private university. The court specifically stated that, "defendants will be enjoined hereinafter from investigating any program or activity at an educational institution located within the jurisdiction of this Court absent a showing that the program or activity is the recipient of direct federal financial assistance."); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376, 1386-87 (E.D. Mich. 1981) (The court found insufficient grounds to grant relief simply for a failure to provide a golf team for girls when the plaintiff's daughters were not excluded from participation in the team available for boys. "After evaluating all of the Title IX cases cited by the parties, the court finds that case authority interpreting Title IX is consistent with the program's specific language of the Act."), *aff'd on other grounds*, 699 F.2d 309 (6th Cir. 1983); Bennett v. West Tex.

The inconsistent interpretations of the 1972 Amendments involve two different views regarding the language, "any education program or activity receiving Federal financial assistance."[5] The first view is the program-specific approach, the presently prevailing position.[6] This view adheres to the statutory wording of Title IX and restricts coverage to the specific program receiving federal assistance. For example, a grant to the athletic department of a university would invoke Title IX coverage to eradicate sex discrimination in the athletic program. However, the remainder of the university would fall outside the scope of Title IX. The second view concerning the language of Title IX is the institution-wide approach.[7] This view asserts that educational assistance to a specific program or activity indirectly assists the entire institution. Thus, a federal grant to the athletic department indirectly benefits the entire university and, therefore, subjects the university to the restrictions of Title IX coverage.

The difficulty of adopting either the program-specific view or the institution-wide view arises in its application to private schools which do not receive direct federal assistance. Private schools which only receive indirect federal assistance through its students via a Pell grant, veterans benefits, or other federal assistance programs are considered recipients of federal funds under Title IX.[8] Regulation of the entire school or just the

State Univ., 525 F. Supp. 77, 81 (N.D. Tex. 1981) (The court stated that, "[i]n order for the strictures of Title IX to be triggered, the federal financial assistance must be direct."), *cert. denied*, 466 U.S. 903 (1984); *with, e.g.*, Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549, 555 (5th Cir. 1983) (A men's honorary group was held in violation of Title IX for excluding women. The circuit court reasoned that the entire institution conducted discriminatory practices based upon Iron Arrow Society's discrimination against women. "Each and every federal program at the University is necessarily discriminatory as a result of Iron Arrow's relationship to the University."), *vacated as moot*, 464 U.S. 67 (1983); Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982) (University undergraduates brought suit against the college charging sex discrimination in the athletic programs. The court held that the entire university was a recipient of federal funds if any one program received funds. The court patterned this decision after Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982) which held that Grove City College was a recipient of federal financial assistance on an institution-wide basis. The Supreme Court later reversed the Third Circuit's interpretation of Title IX. *See* Grove City College v. Bell, 465 U.S. 555 (1984)).

5. Education Amendments of 1972, § 901, 20 U.S.C. § 1681 (1982).

6. *See* Grove City College v. Bell, 465 U.S. 555 (1984). The Court finally had the opportunity to define the terms, "program or activity." This was the first time the Court specifically addressed the scope of these key words. The term "program" was defined to include only the specific program receiving federal assistance.

7. *See* Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549 (5th Cir. 1983), *vcacated as moot*, 464 U.S. 67 (1983).

8. *See* Grove City College v. Bell, 465 U.S. 555 (1984) (The Court found that the receiving of Pell grants by the students constituted aid to the institution.); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (Veteran's benefits received by students at the university qualified as government assistance to the entire university.); Hillsdale College v. Department of Health, Educ., and Welfare, 696 F.2d 418, 430 (6th Cir. 1982) ("We further agree with HEW that Hillsdale is a 'recipient' within

recipient program depends upon whether a court follows a program-specific view or an institution-wide view of Title IX.

Balancing the rights of private colleges and universities to remain free of excessive governmental regulations against the right of the federal government to prevent sex discrimination is a topic of legal uncertainty.[9] While the federal government has a legitimate interest in eradicating sex discrimination in federally funded programs, private colleges which neither discriminate nor receive any direct federal funds oppose federal regulations as a back door means of regulating a private entity. In *Grove City College v. Bell*, the Supreme Court had the opportunity to decide whether the government's interest in preventing sex discrimination is greater than the right of private colleges to remain free from excessive government control.[10] In *Grove City*, the Court tipped the scales in favor of private colleges by recognizing their right of autonomy.[11] Since then, there has been an outpouring of legal commentary[12] and congressional action[13] regarding the decision. The vast majority of legal commentary since the *Grove City* decision is aimed at persuading Congress to broaden the words of Title IX to legislatively overrule *Grove City*.[14]

The survival of private education as an independent entity mandates the narrow construction of Title IX. The program-specific view permits

---

the meaning of section 901. . . ."), *vacated*, 466 U.S. 901 (1984), *on remand*, 737 F.2d 520 (6th Cir. 1984).

9. *See supra* note 4.

10. *See* Grove City College v. Bell, 465 U.S. at 558.

11. *See Id.* The Court concluded that "the receipt of BEOG's [Basic Educational Opportunity Grants] by some of Grove City's students does not trigger institution-wide coverage under Title IX." *Id.* at 573.

12. *See, e.g.*, Czapanskiy, *Grove City College v. Bell: Touchdown or Touchback?*, 43 MD. L. REV. 379 (1984); Miller, *The Future of Private Women's Colleges*, 7 HARV. WOMEN'S L.J. 153 (1984); Note, *Grove City College v. Bell and Program Specificity: Narrowing the Scope of Federal Civil Rights Statutes*, 34 CATH. U.L. REV. 1087 (1985) [hereinafter cited as *Program-Specificity*]. "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." *Id.* at 1124; Note, *Grove City College v. Bell: Restricting the Remedial Reach of Title IX*, 16 LOY. U. CHI. L.J. 319 (1985) [hereinafter cited as *Restricting the Remedial Reach of Title IX*]; Note, *Grove City College v. Bell: A Proposal to Overturn the Supreme Court's Narrow Construction of Title IX's Sex Discrimination Prohibition*, 19 LOY. L.A.L. REV. 235 (1985) [hereinafter cited as *A Proposal to Overturn the Court*]. "Congress shall reaffirm the federal government's commitment to equal opportunity in education by enacting legislation that will both overturn *Grove City College* and make clear that sections 901(a) and 902 are equal in scope." *Id.* at 265; Note, *Discrimination: The Remedial Scope of Title IX of the Education Amendments of 1972, As Interpreted in Grove City College and Richmond University*, 36 OKLA. L. REV. 710 (1983) [hereinafter cited as *The Remedial Scope of Title IX*]. "An expansive reading of Title IX must be adhered to in order to vindicate its original purpose — to eradicate sex discrimination in education just as Title VI seeks to eradicate discrimination based on race, color and national origin." *Id.* at 721-22.

13. *See infra* notes 93-97.

14. *See supra* note 12 and accompanying text.

governmental influence only upon the program or activity which is the direct or indirect recipient of the federal funds. The remainder of the institution which is neither funded nor discriminatory will likewise not be subject to governmental intrusion. This position is adequately supported by the statutory language of Title IX,[15] the legislative history of Title VI,[16] and a review of post-enactment consequences of Title IX[17] which support the program-specific view. This view, however, does not encourage sex-discrimination in private colleges. The proponents of the program-specific view wish only to contain federal regulation to the specifically funded activity of the college. Private colleges should remain free of excessive governmental regulation in order to ensure the future of private institutions.

II. *GROVE CITY COLLEGE V. BELL*

Grove City College is a small liberal arts college of more than two thousand students, one half of which are female.[18] Grove City College, which is affiliated with the United Presbyterian Church, is proud of its deeply rooted belief in non-intervention by the government.[19] This commitment to financial autonomy is evident throughout the school's 110 year history of refusing any public monies offered to the institution.[20] "Committed to deliver a high quality alternative to state-supported education at minimal cost, the [c]ollege is convinced that it could not do so if it were obligated to comply with the expensive and burdensome regulation which invariably follows government funding."[21] Additionally, the college mandates that discrimination on the basis of sex or race is immoral and contrary to the traditional Christian values on which the school was founded.[22]

In July of 1977, the Department of Health, Education, and Welfare (HEW) requested Grove City College to comply with regulations and

15. Education Amendments of 1972, § 901, 20 U.S.C. § 1681 (1982). *See infra* notes 39-59 and accompanying text.

16. *See infra* notes 60-80 and accompanying text.

17. *See infra* notes 81-97 and accompanying text.

18. Brief for Petitioners at 3 n.2, Grove City College v. Bell, 465 U.S. 555 (1984).

19. *Id.* at 2. "The decision to forego participation in government assistance programs is premised on the College's belief in institutional self-sufficiency and autonomy." *Id.*

20. *Id.* "Since its founding in 1876, the College has refused consistently all forms of government assistance, whether federal, state, or local." *Id.*

21. *Id.* at 2-3.

22. *Id.* at 6. "Grove City told the Department that, as a matter of principle, it did not discriminate and did not intend to do so." *Id.*

execute an Assurance of Compliance form, "Form 639."[23] This form demanded that the college pledge its assurance that it will not violate Title IX.[24] Grove City College refused to sign the compliance form on the basis that it did not receive federal funds and therefore was not subject to the requirements of Title IX.[25] The college's refusal was in no way linked to any discriminatory practices mentioned in Title IX. More specifically, the administrative law judge in a lower court ruling found that " 'there was not the slightest hint of any failure to comply with Title IX [merely because of] the refusal to submit an executed assurance of compliance with Title IX. This refusal [was] obviously a matter of conscience and belief.' "[26] Nevertheless, the administrative law judge declared the students attending Grove City College ineligible for the receipt of Basic Educational Opportunity Grants (BEOGs) and terminated such assistance. Grove City College subsequently filed suit in the United States District Court for the Western District of Pennsylvania seeking judicial review of the administrative finding.

Certiorari was granted to *Grove City* by the United States Supreme Court in order to clarify and define the scope of Title IX.[27] The Court ruled that Grove City College was a recipient of indirect federal funds based on the rationale that some students who attended Grove City College received BEOG grants.[28] The Court qualified this ruling by pointing out that even though Grove City College was a recipient of federal funds, the entire institution would not be subject to Title IX coverage.[29] The only area that HEW was authorized to regulate was the specific program

23. *Id.* at 5.

24. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 34 C.F.R. § 106 (1985).

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

Id. § 106.4.

25. *See* Brief for Petitioners, *supra* note 18, at 5.

26. *Id.* at 7 (citation omitted).

27. Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), *cert. granted*, 459 U.S. 1199 (1983).

28. *See* Grove City College v. Bell, 465 U.S. 555 (1984). "[W]e have little trouble concluding that Title IX coverage is not foreclosed because federal funds are granted to Grove City's students rather than directly to one of the College's educational programs." *Id.* at 569-70. Approximately one hundred and forty of Grove City's 2200 students receive the BEOG grants as part of their tuition at Grove City College. *See also* Grove City College v. Bell, 687 F.2d 684, 688 (3d Cir. 1982).

29. *See* Grove City College v. Bell, 465 U.S. 555 (1984). "In purpose and effect, BEOG's represent federal financial assistance to the College's own financial aid program, and it is that program that may properly be regulated under Title IX." *Id.* at 573-74.

or activity which received the benefit of the federal monies.[30] The *Grove City* decision restricted the reach of Title IX to prevent sex discrimination in admissions — the only program at Grove City College where federal funds were spent.[31]

Within hours of the *Grove City* decision, legislation was introduced in Congress in an attempt to overrule the Court's interpretation of Title IX.[32] The belief that the Court misinterpreted the scope of the 1972 Education Amendments spurred congressional action for redrafting Title IX.[33] However, an analysis of the 1972 Amendments reveals that the Court in *Grove City* did not misinterpret the scope of Title IX. Instead, the Court merely reiterated the purpose of the Amendments, which was to end sex discrimination in federally-funded programs.

III. HISTORICAL BACKGROUND: PROGRAM-SPECIFIC VS. INSTITUTION-WIDE COVERAGE

The language of Title IX, the legislative history of Title VI, and the post-enactment consequences of Title IX in the mid-1970's were considered by the Court in *Grove City*.[34] Prior to the decision in *Grove City*, widespread disagreement concerning the scope of Title IX coverage prevailed among the lower courts.[35] The lack of legislative history surrounding Title IX resulted in a case by case interpretation of Title IX.[36] While some courts argued that it was the intention of Congress to limit the scope of Title IX to its statutory construction,[37] others defended the position that the goal of eradicating sex discrimination in education cannot be satisfied without a broad and comprehensive reading of the statute.[38] An independent analysis of each of these three factors mandates a

30. *Id.*

31. *Id.*

32. *See infra* notes 98-109.

33. K. LEWIS, GROVE CITY COLLEGE V. BELL AND ITS AFTERMATH, at 9 (Congressional Research Service No. 85-664A, 1985).

34. This three prong analysis was first utilized in North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982). This approach was later used by the Court in its decision in *Grove City*. *See Restricting the Remedial Reach of Title IX*, *supra* note 12, at 334; *see also infra* note 81 and accompanying text.

35. *See supra* notes 4 and 8.

36. *Id.*

37. *See, e.g.*, Hillsdale College v. Department of Health, Educ., and Welfare, 696 F.2d 418 (6th Cir. 1982), *vacated*, 466 U.S. 901 (1984), *on remand*, 737 F.2d 520 (6th Cir. 1984); Rice v. President and 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); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd on other grounds*, 699 F.2d 309 (6th Cir. 1983); Bennett v. West Tex. State Univ., 525 F. Supp. 77 (N.D. Tex. 1981), *cert. denied*, 466 U.S. 903 (1984).

38. *See, e.g.*, Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549 (5th Cir. 1983), *vacated as moot*, 464 U.S. 67 (1983); Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982).

program-specific approach to Title IX.

A. *The Statutory Language of Title IX*

The statutory language of Title IX fuels the controversy between the program-specific view and the institution-wide view of Title IX coverage. The language of the statute provides that discrimination on the basis of sex is forbidden once it is determined that a program or activity is federally funded.[39] Title IX reads in part, "[n]o 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."[40] The relevant clause of Title IX, "any education program or activity receiving Federal financial assistance,"[41] is the language which many lower courts have relied upon to support the institution-wide approach to Title IX.[42]

Lower courts have concluded that Title IX coverage extends to the entire institution based upon the view that the institution is the program which receives the financial assistance.[43] The rationale behind the institution-wide view is that federal aid to one specific program would free up the college's other funds, therefore expanding federal aid to the entire institution.[44] This broad reading of Title IX is intended to ensure the government's ability to enforce the discrimination statute.[45]

The institution-wide approach to Title IX is inconsistent with the

39. Recipients of financial assistance fall into one of two categories. In the first category are those receiving direct financial assistance. Programs or activities receiving direct financial assistance are forbidden under Title IX from conducting discriminatory activities. *See* 20 U.S.C. § 1681(a) (1982). The second category consists of recipients of indirect aid, institutions which do not accept any federal grants, but admit students who do receive federal grants. The liberal interpretation of "recipient" has caused private schools to be in violation of Title IX. The Supreme Court has allowed HEW to trace federal grants, issued to the students, to the institution where that grant is spent. This is accomplished by interpreting federal assistance as either direct or indirect assistance. *See supra* note 8 and accompanying text.

40. 20 U.S.C. § 1681(a) (1982).

41. *Id.*

42. *See supra* note 38.

43. *Id.* In *Iron Arrow*, the court utilized the infection theory expounded by the *Finch* court. *See Iron Arrow Honor Society*, 702 F.2d 549 (5th Cir. 1983) (construing Board of Pub. Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969)), *vacated as moot*, 464 U.S. 67 (1983). However, the *Iron Arrow* interpretation of the *Finch* decision was broader than the court had intended. *See infra* notes 67-76 and accompanying text.

44. Grove City College v. Bell, 465 U.S. 555 (1984). "[There is the] possibility that federal funds received by one program or activity [will] free up the College's own resources for use elsewhere. . . ." *Id.* at 572.

45. *See* LEWIS, *supra* note 33, at 17. "Generally, proponents of amending civil rights laws to ensure a broad interpretation of 'program or activity' argue that narrow coverage would undermine the federal government's ability to enforce the laws vigorously and fight discrimination." *Id.* at 17.

language of the statute. Nowhere in section 901 of Title IX,[46] or in its enforcement provision set out in section 902,[47] does the statute provide that once a program is found to be discriminatory on the basis of sex, the entire institution is in violation of Title IX.[48] This view does not arise from the language of Title IX; rather, it is derived from HEW's interpretation of its authority over the subject matter.[49]

In addition to the plain language of the statute, the legislative history of Title IX does not require a broader reading than the words "program or activity."[50] Title IX was originally introduced as a floor amendment and as such provides no informative committee discussion.[51] The available history indicates that Title IX was originally introduced and defeated in 1971.[52] Only after the bill was redrafted and narrowed in scope did Congress agree to pass the bill.[53] The enacted bill was much

46. 20 U.S.C. § 1681 (1982).

47. *Id.* § 1682.

48. *Id.* Section 1682 is the enforcement provision of 20 U.S.C. § 1681. When an institution violates § 1681, only the funds to that program or activity should be terminated. Section 1682 states in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section [901] with respect to such program or activity by issuing rules, regulations, or orders of general applicability. . . . 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 . . . but such termination or refusal shall be limited to the particular political entity, or part thereof, . . . in which such noncompliance has been so found. . . .

Id.

49. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 34 C.F.R. § 106 (1985). The Department of HEW defines recipient independently of 20 U.S.C. § 1681 (1982). The Department broadened their interpretation of the term "recipient" to include any direct or indirect recipient. Section 106.2(h) provides the following definition of "recipient."

> [A]ny State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance. . . .

Id. § 106.2(h).

50. The lack of legislative history regarding Title IX was called to the attention of Congress in 1975. Senator Helms alluded to this deficiency in the following statement.

> [I]n the House of Representatives, [Title IX] was made a part of the education amendments of that year in the full Education and Labor Committee, rather than the subcommittee, and it was not a product of adequate public hearings. In the Senate, [Title IX] was made a part of those amendments on the Senate floor, completely circumventing the committee and hearing process. Therefore, no adequate record of the legislative intent of Title IX exists.

S.2146, 94th Cong., 1st Sess., 121 CONG. REC. 23,845 (1975) (statement of Sen. Helms).

51. *See* Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549, 557 (5th Cir. 1983), *vacated as moot*, 464 U.S. 67 (1983).

52. *See Restricting the Remedial Reach of Title IX*, *supra* note 12, at 325-31.

53. The bill, as originally drafted, provided:

more specific and contained the wording "program or activity" which was omitted from the original bill.[54] Thus, it is apparent that Congress intended to limit the scope of Title IX to the exact wording adopted.[55]

It would be inconsistent with the entirety of Title IX to read section 901 as a broad, all-encompassing provision. For example, section 904 prohibits discrimination towards any *recipient* of federal assistance.[56] Although section 904 covers discrimination to the visually impaired, it was drafted at the same time as the other Title IX provisions.[57] If Congress intended section 901 to apply to recipients of federal financial assistance, it would have worded section 901 as it did section 904. Instead, Congress worded section 901 to apply only to *programs* or *activities* receiving federal assistance, and not to *recipients* in the overall sense. The statutory wording of Title IX is sufficient to mandate a literal reading of the program-specific language.

Courts which were not persuaded that the language of Title IX mandates a program-specific reading looked elsewhere for persuasive authority. Viewing Title IX as a hastily compiled statute which was molded after Title VI of the Civil Rights Act, courts were provided ample authority to interpret Title IX as institution-wide.[58] While it is virtu-

---

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

S. 659, 92nd Cong., 2d Sess., 117 CONG. REC. 30,156 (1971) (emphasis added). *Cf.* Education Amendments of 1972, § 901, 20 U.S.C. § 1681 (1982) (section 1681 as finally enacted omits the language "conducted by a public institution" which shows that adequate congressional thought was put into the bill).

54. Education Amendments of 1972, § 901, 20 U.S.C. § 1681 (1982).

55. Thomas, *Statutory Construction When Legislation is Viewed as a Legal Institution*, 3 HARV. J. ON LEGIS. 191 (1965-66). "It should again be emphasized that in applying statutory provisions, courts must limit themselves to the words. Legislative aims, purpose, and policy can be used only to add clarity to the words." *Id.* at 282. As a general rule to statutory construction, a court cannot add to a statute words or phrases which are omitted. *See* 82 C.J.S. *Statutes* § 328 (1953).

56. Education Amendments of 1972, § 904, 20 U.S.C. § 1684.

> No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a *recipient* of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

Id. (emphasis added).

57. *See id.*, § 1681.

58. For a discussion of Title VI cases and their application to Title IX, see Othen v. Ann Arbor School Bd., 507 F. Supp. 1376, 1387-89 (E.D. Mich. 1981), *aff'd on other grounds*, 699 F.2d 309 (6th Cir. 1983). *See also* Kuhn, *Title IX: Employment and Athletics are outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 50-56 (1976) (wherein the author claims that the legislative history of Title IX demonstrates that Congress intended Title IX to have the same effect as Title VI); *Restricting the Remedial Reach of Title IX*, *supra* note 12, at 345-46 (the author asserts that the language of the

ally undisputed that Title IX was patterned after Title VI,[59] the legislative history of Title VI does not definitively point to an institution-wide approach of Title IX.

B. *The Effect of Title VI*

In determining the statutory meaning of Title IX, it is imperative to study the legislative history of Title VI to properly ascertain the congressional intent. Title VI is part of the original Civil Rights Act of 1964.[60] Title VI prohibits discrimination on the basis of "race, color or national origin" in any program or activity which receives federal assistance.[61] The argument for analogizing Title VI to Title IX is that Congress failed to include sex as a classification of individuals protected by the Civil Rights Act in 1964. Therefore, the 1972 Amendment was an attempt by Congress to rectify this injustice.[62] The legislative history of Title VI is extensive and complex; thus, it is difficult to discern the underlying intent of Congress as to the breadth of the Act.[63] As Justice Brennan stated, "[f]or every instance in which a legislator equated the word 'program' with a particular grant statute, there is an example of a legislator defining 'program or activity' more broadly."[64] While there is sufficient documentation to support either proposition, generally the various court decisions regarding the scope of Title VI reflect an institution-wide interpretation.[65] This interpretation is not absolute, however, as other courts were contemporaneously restraining the outer limits of Title VI coverage.[66]

One of the most frequently cited cases interpreting Title VI as program-specific is *Board of Public Instruction v. Finch*.[67] In that case, the school board of Taylor County, Florida, was found in violation of Title VI because it did not adequately proceed with student desegregation.[68] Based upon these findings, HEW ordered the termination of any class of

statute, legislative history, and judicial interpretation of Title VI is integral to the understanding of Title IX).

59. Cannon v. University of Chicago, 441 U.S. 677 (1979). "Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefited class." *Id.* at 694-95.

60. Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000(d) (1982).

61. *Id.*

62. *See* LEWIS, *supra* note 33, at 3.

63. *See* Kuhn, *supra* note 58, at 50-56.

64. Grove City College v. Bell, 465 U.S. 555, 587 (1984) (Brennan, J., dissenting).

65. *See* LEWIS, *supra* note 33, at 17-22.

66. *See id.*

67. 414 F.2d 1068 (5th Cir. 1969).

68. *Id.* at 1071.

federal financial assistance making no determination of whether it should be restricted to one or more programs receiving federal funds.[69] The court noted that the legislative scheme of Title VI was designed to purposely guarantee that payment of federal monies be " 'pinpoint[ed] . . . to the situation where discriminatory practices prevail.' "[70] Thus, HEW was required to apply its sanctions only to the infected programs.[71] The *Finch* decision rejected the notion that the Taylor County School District itself was the program recipient.[72] The school district did not fall within one of the specifically enumerated programs which Congress listed as educational recipient programs.[73] Subsequent courts adopted the *Finch* rationale and restrained coverage within the statutory construction of Title VI.[74] In *Mayor of Baltimore v. Mathews*,[75] the court adopted the *Finch* approach and stated, "[w]hen the entire statutory and regulatory framework of Title VI is closely analyzed, it is clear that a programmatic approach to Title VI compliance must be followed in all phases of

69. *Id.*

70. *Id.* at 1075 (citation omitted).

71. *Id.* at 1078. "If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper." *Id.* The theory developed in *Finch* is popularly known as the infection theory. In its simplest form the theory states that only the infected programs should be subject to Title IX regulation. In dicta, the court supplied language which can be interpreted as applying the infection theory to the entire institution. The court instructs the administrative agency seeking to cut off the funds to prove that either the funded program is conducting discriminatory practices, or that the program so infects the entire institution that no distinction can be made between programs, "or [it] is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory." *Id.* at 1079. Subsequent courts have capitalized on this language to justify interpreting *Finch* on an institution-wide basis. *See supra* note 65 and accompanying text. It is important to note, that while the *Finch* court offers the possibility of a broad interpretation, the holding was program-specific. The court concluded that the language of Title VI was a "pinpointing" provision to protect the innocent beneficiaries of programs which do not discriminate. *Finch*, 414 F.2d at 1075.

72. *Id.* at 1078.

> Congress did not intend that such a program suffer for the sins of others . . . . Schools and programs are not condemned enmasse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure each program receives its own "day in court."

Id.

73. *Id.* at 1077.

74. The infection theory has been utilized as a source of institution-wide coverage in both Title VI and Title IX cases. *See, e.g.*, Lau v. Nichols, 414 U.S. 563 (1974) (A school system which receives large amounts of federal funds is found to be infected when it violates Title VI by not providing bilingual education); Haffer v. Temple Univ., 688 F.2d 14 (3d Cir. 1982); Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549, 555 (5th Cir. 1983) (A men's honorary society at the University of Miami was found to be in violation of Title IX. The court concluded, "[t]he discriminatory practices of the Society . . . infect[ed] the entire academic mission of the University."), *vacated as moot*, 464 U.S. 67 (1983).

75. 562 F.2d 914 (4th Cir. 1977).

compliance."[76]

When Congress adopted Title IX, they failed to change the language from "program or activity" to "institution" despite the difficulty previous courts experienced in interpreting Title VI.[77] The failure of Congress to change the wording of Title IX, in the presence of the Title VI confusion, lends support to the view that Congress intended Title IX to be program-specific.[78] In spite of the Title VI - Title IX relationship, attempts to alter the language of Title IX after its passage have failed.[79] However, these attempts have not been futile. At least one Supreme Court decision found these post-enactment modification attempts persuasive authority in finding Title IX program-specific.[80]

C. *Attempts to Clarify Title IX — Post-enactment Consequences*

The Court in *North Haven Board of Education v. Bell*[81] considered whether or not Title IX applies to employees of funded educational programs or activities. The Court utilized three factors in its analysis of the issue: (1) the statutory language, (2) the legislative history, and (3) the post-enactment attempts by Congress to clarify the meaning of the statute.[82] The Court concluded that Title IX extends to employees, as well as students, but only in a program-specific context.[83] The Court decided, however, not to define what actually constitutes a program or activity.[84]

This third prong of the *North Haven* test emphasizes that post-enactment congressional activity is helpful in determining congressional intent of the statute in question. The Court stated that, "[a]lthough post-enactment developments cannot be accorded 'the weight of contemporary legislative history, we would be remiss if we ignored these

76. *Id.* at 929.
77. *See* 20 U.S.C. § 1681 (1982).
78. *See supra* note 55.
79. *See infra* notes 86-97 and accompanying text.
80. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).
81. *Id.*
82. *Id. See Restricting the Remedial Reach of Title IX, supra* note 12, at 336.
83. *North Haven*, 456 U.S. at 536-37. The Court disallowed enforcement of the civil rights statutes unless there is a sufficient nexus between the discriminatory conduct and the federal funding. The Court reasoned that § 901 and its enforcement provision § 902, are read contemporaneously to mandate a program-specific interpretation. "It is not only Title IX's funding termination provision that is program-specific. The portion of § 902 authorizing the issuance of implementing regulations also provides [for program-specificity]." *Id.*
84. The Court chose not to define the program in the *North Haven* decision due to the lack of a well-developed record. *See* Czapanskiy, *supra* note 12, at 384. The Court had the opportunity for the first time to define the terms "program or activity" in the *Grove City* decision. *See* Grove City College v. Bell, 465 U.S. 555 (1984).

authoritative expressions concerning the scope and purpose of Title IX . . . .' "[85] The post-enactment events after 1972 which attempted to define "program or activity" implied that the Court would some day define "program or activity" on an institution-wide basis.[86]

In 1975, two resolutions were introduced which defined the terms "program or activity" narrowly. The first resolution was introduced by Senator Helms. This resolution limited the application of Title IX to a "program" which is a direct recipient of federal funds.[87] The second resolution was a similar measure in the House, sponsored by Representative Wirth. These attempts failed to pass in Congress. Arguably, the failure of these bills to pass in Congress was tantamount to a rejection of the program-specific view.[88] Nevertheless, this argument was rejected by the Court in *Grove City*.[89]

The Court in *Grove City* recognized that while subsequent treatment of Title IX is persuasive evidence of its construction, it is not dispositive.[90] The Court did not find any persuasive evidence suggesting that HEW had broad regulatory authority.[91] Instead, the Court focused on the "clear statutory language [and the] powerful evidence of Congress' intent"[92] to define "program or activity" restrictively. The Court did not entertain any evidence of post-enactment consequences in respect to the definition of the terms "program or activity."

Since the *Grove City* decision, additional congressional activity has lengthened the list of the post-enactment consequences of Title IX.[93] This activity attempts to define "program or activity" from an institution-wide perspective. The 98th Congress, like the 94th Congress, failed

85. *See North Haven*, 456 U.S. at 535 (quoting Cannon v. University of Chicago, 441 U.S. 676, 687 n.7 (1979)).

86. This conclusion can be reached from an analysis of the post-enactment events. The attempts to narrow Title IX which failed to pass in Congress can be interpreted as a congressional intention to broaden Title IX. *See infra* note 94.

87. *See* S. Con. Res. 46, 94th Cong., 1st Sess., 121 CONG. REC. 17,300 (1975).

88. Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549, 560 (5th Cir. 1983), *vacated as moot*, 464 U.S. 67 (1983).

89. *See Grove City*, 465 U.S. at 568. The Court in *Grove City* recognized the importance of post-enactment events when deciding the issue of what constitutes a recipient. "Congress' failure to disapprove the regulations is not dispositive, but . . . it strongly implies that the regulations accurately reflect congressional intent." *Id.* However, the Court did not utilize the post-enactment events as part of its decision in defining "program or activity." *Id.* at 571.

90. *Id.* at 568.

91. *Id.* at 573.

92. *Id.* at 579.

93. *See* H.R. 700, 99th Cong., 1st Sess., 131 CONG. REC. H135 (daily ed. Jan. 24, 1985); S. 431, 99th Cong., 1st Sess., 131 CONG. REC. S1303-15 (daily ed. Feb. 7, 1985); H.R. 5490, 98th Cong., 2d Sess., 130 CONG. REC. H2946 (daily ed. Apr. 12, 1984); S. 2568, 98th Cong., 2d Sess., 130 CONG. REC. S4584 (daily ed. Apr. 12, 1984).

to pass these amendments.[94] The failure of Congress to narrow the scope of Title IX with the 1975 Amendments, and the unsuccessful attempts to broaden Title IX with the 1984 Amendments merely demonstrates that Congress is unwilling to alter the politically controversial Title IX.[95] The post-enactment events of 1975 deserve no more credence than the bills of 1984.[96] However, the efforts to broaden Title IX have continued in the 99th Congress.[97] An analysis of the bills presently before Congress details the current status of Title IX.

IV. THE CONGRESSIONAL RESPONSE TO *GROVE CITY*

The Supreme Court refused to broaden the scope of Title IX in the *Grove City* decision.[98] The Court scrutinized many factors to conclude that Congress did not intend to trace federal dollars to every corner of a university which engages in a program receiving federal aid.[99] Within hours after the *Grove City* decision, legislation was introduced in Congress to partially overrule the Supreme Court's decision.[100] The legislation proposed was the Civil Rights Act of 1984 which attempted to broaden Title IX in four ways:

1) Remove the program or activity language;
2) Broaden the definition of recipient;[101]
3) Retain the pinpointing requirement for enforcement purposes; and
4) Amend Title VI, the Rehabilitation Act, and the Age Discrimination Act of 1975 in much the same way Title IX was amended.[102]

94. H.R. 5490, 98th Cong., 2d Sess. (1984) and S. 2568, 98th Cong., 2d Sess. (1984) were defeated before the 98th Congress terminated.

95. Widespread media attention was drawn from the *Grove City* battle. Coverage of the congressional response to the decision ranged from small town newspapers to the 1984 Presidential debate. *See* Maeroff, *College Challenges Federal Intervention*, N.Y. Times, Apr. 10, 1979, at C1, col. 1; *College refuses to sign form, ready to fight HEW in courts*, The Times Herald, July 12, 1979, at 30, col. 1; *Not Guilty, But Pay The Price*, Alumni News, Sept. 30, 1983, at 1, col. 1; Barringer, *Claiming Independence, College Challenges Federal Regulation*, Wash. Post, Aug, 21, 1983, at A2, col. 1.; Taylor, *Court Case Yanks on the Whole Ball of Federal-Aid Strings*, N.Y. Times, Sept. 25, 1983, at E5, col. 1.

96. In light of the refusal of Congress to narrow Title IX in the 98th Congress, the failure of the Helms and Wirth amendments cannot be read as a congressional mandate to broaden Title IX. It is inconsistent with the language of the *North Haven* Court to read the failure of one set of bills as more influential than the other.

97. *See infra* notes 98-118 and accompanying text.

98. *See* Grove City College v. Bell, 465 U.S. 555 (1984).

99. *Id.* The Court utilized the legislative intent of Congress, past Supreme Court decisions, and the clear statutory wording of Title IX.

100. *See supra* note 93.

101. The bill removed the wording "program or activity" and replaced it with "recipient." *See* H.R. 5490, 98th Cong., 2d Sess., 130 CONG. REC. H2946 (daily ed. Apr. 12, 1984).

102. *Id.*

This bill passed in the House, but faced opposition in the Senate.[103]

The Senate recognized the potential for widespread abuse of governmental regulation and therefore introduced Senate Bill 2910 as an alternative to the House version.[104] Senate Bill 2910 limited the action to Title IX cases. The new bill replaced the terms "program or activity" in the language of Title IX with the term "institution." This bill would not apply to Title VI, the Rehabilitation Act, or the Age Discrimination Act of 1975.[105] This bill also failed to pass Congress before adjournment of the 98th Congress.[106]

Congress attempted once again to modify Title IX with new House and Senate bills of the 99th Congress. The Civil Rights Restoration Act of 1985[107] and the Civil Rights Amendments Act of 1985[108] are presently competing for passage in the 99th Congress. If passage of either of these bills occurs, Title IX will be broadened and the future of private education will be in jeopardy.[109]

Passage of the Civil Rights Restoration Act, or the Civil Right Amendments Act of 1985 will ultimately have its adverse effects on the student who wishes to attend private school. If the school refuses all forms of federal funding, yet accepts the student who chooses to spend his or her federal grant at that university, autonomy is impossible. Therefore, private colleges and universities will be forced to exclude from admission any student who receives federal assistance. This is exactly the type of conduct the *Finch* court attempted to prevent.[110]

The Court in *Finch* adopted a program-specific view stating, "the purpose of limiting the termination power to 'activities which are actually discriminatory or segregated' was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs *not* tainted by discriminatory prac-

103. The Senate voted on October 2, 1984, by a 53-45 vote to table the legislation. *See Grove City Rights Bill Shelved by Senate*, CONG. Q., Oct. 6, 1984, 2430. *See also Restricting the Remedial Reach of Title IX*, *supra* note 12, at 350.

104. *See* S. 2910, DAILY LAB. Rep. (BNA) No. 177, at A-11 (Sept. 12, 1984).

105. *See* LEWIS, *supra* note 33, at 11.

106. *Id.*

107. H.R. 700, 99th Cong., 1st Sess., 131 CONG. REC. H135 (daily ed. Jan. 24, 1985); S. 431, 99th Cong., 1st Sess., 131 CONG. REC. S1303-15 (daily ed. Feb. 7, 1985).

108. S. 272, 99th Cong., 1st Sess. 131 CONG. REC. S632 (daily ed. Jan. 24, 1985).

109. S. 272 would amend Title IX (and other similar statutes) by defining "program or activity" as an educational institution which receives federal aid. H.R. 5490 retains the language of program or activity but specifically define it to mean "all of the operations of" a laundry list of possible activities covered. *See* LEWIS, *supra* note 33, at 12-13.

110. *See supra* note 67.

tices."[111] Applying this language to Title IX cases, the students are the innocent beneficiaries of the federal grants. The termination of federal funds to the entire institution is an undue hardship on students who participate in the non-discriminatory programs. By limiting the scope of Title IX to a program-specific interpretation, only a funded program in violation of Title IX will lose its federal support. This is consistent with the language of section 902, the enforcement provision of Title IX.[112]

It is difficult to imagine any university which does not receive some form of indirect financial assistance.[113] Veterans Administration benefits,[114] Basic Educational Opportunity Grants,[115] and guaranteed student loans,[116] have all constituted indirect aid to the college. Applying these isolated federal assistance grants to an entire university opens the back door to governmental regulation of nonfunded activities. Once the door is open to federal regulation, Congress is free to alter the activities of private schools. Utilizing the rationale that the school is under federal control, there is no limit to the burdensome regulations which may follow.[117] Interference with religious or social practices are possible once the entire institution is deemed a federal financial recipient. As Dr. Charles Mackenzie, President of Grove City College, testified,

> "[i]t is hard for me to believe that Congress wishes to bring every college and university under expansive federal control . . . [such] control of the diverse higher educational community which is the envy of the world [will] open the doors to creation of a government dominated network of colleges and universities."[118]

---

111. *Id.*

112. *See supra* note 45.

113. Only a handful of schools have rejected Washington's direct assistance and have still been able to thrive in the private sector. "One example is Grove City College in Grove City, Pa. . . . [another]. . . Hillsdale College in Michigan [which] raised 29 million dollars in private funds to make up for federal student aid that was refused." *See Freedom on Trial*, CHRISTIAN LIFE 16, 18 (1986).

114. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983). Students at Bob Jones University used GI Bill educational assistance to pay for tuition. Although a Title VI case, Bob Jones University was a recipient of federal aid.

115. *See* Grove City College v. Bell, 465 U.S. 555 (1984). *See also supra* notes 18-33 and accompanying text.

116. *See* Hillsdale College v. Department of Health, Educ., and Welfare, 696 F.2d 418 (6th Cir. 1982), *vacated*, 466 U.S. 901 (1984), *on remand*, 737 F.2d 520 (6th Cir. 1984).

117. *See Bill in Congress would Force Hospitals to Perform Abortions*, 11 Oklahomans-For-Life Letter No. 4 (April 1986). The far reaching efforts of the Civil Rights Restoration Act extend so far as to require "recipient" institutions to fund abortions for students and employees of the institution. Failure to do so can result in a Title IX violation suit. This is just one example of how Congress can expand federal control once one area of regulation is open. Although amendments have been proposed to limit H.R. 700/ S. 431 to not include abortion, no action has yet been taken.

118. Hearings on S. 431 Before the Senate Judiciary Subcomm. on the Constitution, 99th Cong., 1st Sess., (1985) (statement of Charles S. Mackenzie, President of Grove City College).

V. CONCLUSION

Title IX is an effective tool through which Congress can prevent federal dollars from advancing discriminatory practices based upon sex in an educational setting. It is essential for any form of federal assistance to be protected from sex, color, or race discrimination. The wording of Title IX was intended to limit regulation of federal assistance in two ways. First, the affected program must be a recipient of federal funds. Second, only that program or activity which receives the funds is regulated. In addition to the statutory language of Title IX, the legislative history of its forerunner — Title VI, and the post-enactment consequences of Title IX, a program-specific interpretation is mandated to the application of Title IX. Once it is determined that a college or university is not a recipient of federal funds and likewise conducts no discriminatory activities, that institution should be free of governmental regulation.

Proponents of the program-specific approach to Title IX do not condone any form of discrimination in the private school sector. Instead, these schools wish to provide higher education without the fear of governmental intrusion in the private, non-funded areas of the curriculum. To allow regulation of these institutions under Title IX opens the door to other congressional activities which increasingly expand governmental involvement in a traditionally private area. Excessive government involvement in private education was not the intention of Congress in 1972 when it passed the Education Amendments nor the intention of the Court in 1984 when it restricted Title IX actions to the program-specific approach.

Brian T. Must