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Preserving Private Colleges' Independence from Title IX Regulation: Grove City College v. Bell {104 S. Ct. 1211}

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PRESERVING PRIVATE COLLEGES' INDEPENDENCE FROM TITLE IX REGULATION: *GROVE CITY COLLEGE v. BELL*

Equal opportunity for men and women[1] has been a prominent goal of recent federal legislation.[2] Title IX of the Education Amendments of 1972[3] extends this goal by proscribing sex discrimination in education programs and activities[4] receiving[5] federal financial assistance.

1. Ruth Bader Ginsberg has written a series of articles outlining the constitutional evolution of the equality principle. *See Sex Equality Under the Fourteenth Amendment and the Equal Rights Amendments*, 1979 WASH. U.L.Q. 161 (1979); *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978); *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813 (1978); *Gender and the Constitution*, 44 CIN. L. REV. 1 (1975).

2. *See, e.g.*, Equal Employment Opportunity Act, Title VII, 42 U.S.C. § 2000e (1982); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982); Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758 (1982).

3. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (June 23, 1972) (codified at 20 U.S.C. §§ 1681-1686 (1982)).

4. Title IX authorized the Department of Health, Education and Welfare (HEW) to issue regulations to implement and enforce the statute. Section 902 of Title IX provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

20 U.S.C. § 1682 (1982). The regulations promulgated by HEW pursuant to Title IX provide for education programs and activities as follows:

> (a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any . . . education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

34 C.F.R. § 106.31(a) (1984).

5. One of the ongoing debates in Title IX analysis concerns the scope of the term "recipient." HEW regulations define recipient as follows:

> (h) "*Recipient*" means any State or political subdivision thereof, or any instru-

Both legislators[6] and educators[7] have attempted to limit this regulation in order to preserve the independence and diversity of private institutions.[8] Title IX's enforcement agency, the Department of Health, Education, and Welfare (HEW),[9] initially adopted an expansive interpretation of Title IX's regulatory powers[10] by applying the statute to entire institutions instead of assuming a programmatic focus. The Supreme Court rejected HEW's approach in *Grove City*

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mentality 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, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. § 106.2(h) (1984). *See infra* note 17 and accompanying text for an argument that an institution cannot be classified as a recipient if it does not accept federal aid.

Most courts have followed the definition of "recipient" developed in Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975). The district court described a "recipient" as the intermediary entity whose nondiscriminatory participation in a federally assisted program is essential to the provision of benefits to the identified class which the statute is designed to serve. *Id.* at 601 n.15. Some commentators argue, however, that "recipient" should be defined narrowly to protect the beneficiaries of federal aid from unnecessary fund cutoffs. *See, e.g.*, Note *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof,"* 78 MICH. L. REV. 608 (1980).

6. *See infra* note 25 for a discussion of the legislative history. One commentator argues that in enacting Title IX, Congress approved a general principle rather than for specific implementation features. It was not until the application of Title IX that Congress fully understood the possible implications of the statute. Since then, persistent efforts have been made to define and limit the scope of the provision, but these efforts have been thwarted largely because of the strength of the women's coalition. *See* A. FISHELL & J. POTTKER, NATIONAL POLITICS AND SEX DISCRIMINATION IN EDUCATION 95-136 (1977).

7. For a discussion of private institutions' response to HEW interpretations of Title IX, see *infra* notes 30-32 and accompanying text.

8. For an essay on the importance of private institutions and the effect of federal regulation upon them, see Note, *Title IX Sex Discrimination Regulations: Impact on Private Education*, 65 KY. L.J. 656 (1977). The author, addressing the fears of private institutions, observes that "[t]hese private institutions, many of which receive no direct financial aid, fear that the independence and diversity of thought which they foster will be lost if they are forced to comply with federal regulations." *Id.* at 663. *See also* 117 CONG. REC. 39,248-39,249 (1971) (Senator Erleborn's comments on the importance of protecting private institutions from government control).

9. Congress transferrred HEW's functions under Title IX to the Department of Education in 1979. Pub. L. No. 96-88, § 601, 93 Stat. 969 (Oct. 17, 1979). Throughout this Comment, both agencies will be referred to as "HEW."

10. *See infra* notes 28-30 and accompanying text (HEW's Title IX interpretations).

College v. Bell,[11] holding that Title IX's directive applies not to an entire institution, but only to the programs and activities receiving federal financial assistance.[12]

Grove City College is a private, coeducational college that has consistently refused to accept any federal or state financial assistance.[13] Grove City College, however, enrolls a substantial number of students who receive Basic Educational Opportunity Grants (BEOGs).[14] Student eligibility for BEOGs is determined by the Alternate Disbursement System,[15] which requires no direct involvement by the College. Based upon the receipt of BEOG's by Grove City students, HEW concluded that the institution was a recipient of federal financial assistance within the meaning of Title IX, and requested that Grove City execute an "Assurance of Compliance with Title IX Reg-

11. 104 S. Ct. 1211 (1984).

12. *See infra* text accompanying notes 44-63.

13. 104 S. Ct. at 1214. Grove City even refused to participate in student assistance programs in which the College would be responsible for determining student eligibility for federal aid. Many state and federal student assistance programs require that a student's educational institution calculate the student's financial need and make a determination as to the student's eligibility to receive assistance from that program. *See, e.g.*, 34 C.F.R. pt. 675 (1984) (College Work-Study Program); 34 C.F.R. pt. 674 (1984) (National Direct Student Loans); 34 C.F.R. pt. 676 (1984) (Supplemental Educational Opportunity Grants).

Grove City and Hillsdale College v. United States Dep't of H.E.W., 696 F.2d 418 (6th Cir. 1982), both involved colleges with unblemished records of sexual equality. Had HEW instead pursued, in principal cases, colleges with blatant discriminatory practices, this controversy may not have arisen.

14. Some Grove City students also receive Guaranteed Student Loans (GSLs). The district court, however, held that GSLs were "contract[s] of insurance or guaranty" that cannot be terminated under Section 902 of Title IX. 500 F. Supp. at 273. HEW did not challenge this conclusion on appeal; thus, the Supreme Court did not consider it. 104 S. Ct. at 1216 n.9.

15. 104 S. Ct. at 1215 n.5.

> The Secretary, in his discretion, has established two procedures for computing and disbursing BEOGs. Under the Regular Disbursement System (RDS), the Secretary estimates the amount that an institution will need for grants and advances that sum to the institution, which itself selects eligible students, calculates awards, and distributes the grants by either crediting students' accounts or issuing checks. 34 C.F.R. Section 690.71-85 (1982). Most institutions whose students receive BEOGs participate in the RDS, but the ADS is an option made available by the Secretary to schools that wish to minimize their involvement in the administration of the BEOG program. Institutions participating in the program through the ADS must make appropriate certifications to the Secretary, but the Secretary calculates awards and makes disbursements directly to eligible students. 34 C.F.R Section 690.91-96 (1982).

Id.

ulations."[16] When Grove City refused to file the Assurance, HEW initiated proceedings to declare the College and its students ineligible to receive BEOGs. HEW based its action on Grove City's refusal to file the Assurance of Compliance; HEW made no allegations of actual sex discrimination. The College responded that, absent receipt of federal or state aid and absent participation in BEOGs distribution, the institution could not be classified as a "recipient" within the meaning of Title IX.[17] The College also argued that because Title IX is program-specific,[18] only the school's financial aid department could be brought under Title IX.[19] Finally, the College argued that Title IX's remedial provision only applies to programs actually discriminating on the basis of sex.[20]

The administrative law judge held that Grove City College was a recipient of federal financial assistance within the meaning of Title IX and executed an order terminating assistance to the College until it complied with HEW regulations.[21] Grove City College and four students filed suit in federal court. The district court found that students' receipt of BEOGs constituted federal financial assistance to the College, but held that federal assistance could not be terminated without an actual finding of discrimination.[22] The Third Circuit Court of Appeals reversed, holding that when federal aid to an institution is indirect, the institution is the program.[23] The circuit court

16. 34 C.F.R. § 106.4 provides:

(a) *General.* Every application for Federal financial assistance for any education program or activity shall, as a condition of its approval, contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.

Id.

17. Grove City argued that since it was not a recipient of federal assistance, it was not required to comply with Title IX regulations. HEW's definition of recipient, however, covered almost all institutions, including institutions that have traditionally refused all aid. *See supra* note 5.

18. "Program-specific" is the term of art used to distinguish a programmatic approach from an institutional approach. According to the language of the statute, Title IX pertains only to those "program[s] or activit[ies] receiving financial assistance." 42 U.S.C. § 1681(a) (1982).

19. Grove City College v. Bell, 687 F.2d 684, 689 (3d Cir. 1982).

20. *Id.*

21. *See* 104 S. Ct. at 1216.

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

23. Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982).

also concluded that a showing of actual discrimination was not necessary to terminate a recipient program's funds.[24]

Title IX was designed to avoid the use of federal resources to support discriminatory practices at institutions of higher education.[25] In drafting Title IX, Congress instituted a program-specific mandate which provides that no person may "be subjected to discrimination under any education program or activity receiving federal financial assistance."[26] The ultimate sanction for noncompliance is the termination of aid to the discriminating program.[27]

HEW has interpreted Title IX broadly,[28] facially conforming to the program-specific language by treating the institution itself as the rele-

24. *Id.* at 700.

25. Title IX was modeled after Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d (1982), which prohibits racial discrimination in federally funded programs. Title IX's pinpoint termination provision was a duplication of Title VI's termination provision, except for the substitution of the word "sex" for "race, color, or national origin." In fact, the drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years. 117 CONG. REC. 30,408 (1971) (remarks of Sen. Birch Bayh). The Supreme Court subsequently ruled that Congress intended Title IX to be interpreted in the same way that Title VI had been interpreted. Cannon v. University of Chicago, 441 U.S. 677 (1979).

26. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (June 23, 1972) (codified at 20 U.S.C. §§ 1681-1686 (1982)).

27. 20 U.S.C. § 1682 (1982) delineates Title IX's enforcement procedure. It provides in pertinent part:

> 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 hereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law . . .

Id.

28. HEW Secretary Weinberger defined HEW's interpretation of the scope of Title IX, stating:

> [P]rograms that have any educational value or any educational meaning are the ones that are covered regardless of whether the Federal funds go specifically to those programs. In other words, if the Federal funds *go to an institution* which has educational programs, then the *institution is covered throughout its activities.*

Hearings on Sex Discrimination Regulations Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 466, 485 (1975), *reprinted in* Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 63-64 (1976) (emphasis added).

vant program.[29] This regulatory approach has been a subject of controversy since its inception.[30] In opposition to HEW's interpretation, private institutions argue that Title IX's provisions apply only to those programs and activities that directly receive federal financial assistance.[31] The critical issue between this dichotomy of viewpoints concerns the scope of the term "program."[32]

Congress used Title VI as its model when drafting Title IX,[33] substituting the prohibition of discrimination based on race with a prohibition of discrimination based on sex. The pertinent provision of Title VI was interpreted in *Board of Public Instruction of Taylor County v. Finch*.[34] *Finch* involved an appeal of HEW's decision to terminate all federal aid to a school district because of the district's inadequate progress toward desegregation. The *Finch* decision focused upon the "program or activity" phrase contained in Title VI.[35]

29. For HEW's institution-as-the-program analysis, see the discussion in Grove City College v. Bell, 687 F.2d 684, 690 (3d Cir. 1982).

30. A sampling of the cases dealing with HEW's interpretation of Title IX includes: Seattle Univ. v. United States Dep't of HEW, 621 F.2d 992 (9th Cir. 1980) *vacated sub nom.* United States Dep't of Ed. v. Seattle Univ., 456 U.S. 986 (1982); Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); Romeo Community Schools v. United States Dep't of H.E.W., 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); Isleboro School Comm. v. Califano, 593 F.2d 424 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

31. Some institutions have argued that Title IX only applies to programs directly receiving financial aid. *See, e.g.*, Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd*, 699 F.2d 309 (6th Cir. 1983).

The issue in this case is most pertinent to private educational institutions. Public institutions, because of the amount of federal aid they receive, are less likely to object to Title IX regulation. When public institutions are involved, the issue concerns the application of Title IX, and not whether or not the institution is subject to the statute.

32. A critical problem in Title IX analysis has been to balance the remedial goals of Title IX against the statute's restrictive language. Some argue that a narrow interpretation of Title IX serves only to frustrate its remedial goals. Others argue that a broad interpretation compromises the restrictive language that Congress built into the statute. *See* Note, *Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language With Its Broad Remedial Purpose*, 51 FORDHAM L. REV. 1043 (1983) (Title IX should not be watered down by technical exercises in statutory construction; rather, Title IX's remedial goals require that the statute be given an expansive reading).

33. *See supra* note 25.

34. 414 F.2d 1068 (5th Cir. 1969).

35. In Hillsdale College v. United States Dep't of HEW, 696 F.2d 418 (6th Cir. 1982), the court noted the similarity between the "program or activity" phrase contained in Title VI and Title IX:

The Fifth Circuit Court of Appeals held Title VI to be program-specific and ruled that each program deserves consideration on its own merits.[36] The *Finch* holding provided the early analytical framework for considering Title IX cases.

Several theories have emanated from the circuits regarding the scope of HEW's regulatory authority under Title IX. One such theory was adopted in *Haffer v. Temple University*,[37] when the Third Circuit affirmed the lower court's adoption of the "benefit theory."[38] The "benefit theory" postulates that federal assistance received by one program benefits all other programs within an institution by freeing funds that would otherwise be allocated to the federally assisted program. As long as at least one university program receives federal funding, the indirectly-benefited nonrecipient programs become subject to Title IX regulation.

Haffer involved an action filed by female students enrolled at Temple University charging that the University discriminated against women in the operation of its intercollegiate athletic program. The court found the athletic program subject to HEW regulation[39] even though none of the federal aid received by Temple was earmarked for that program.[40] The court accepted HEW's argument that the intercollegiate athletic program "benefited" from the federal assistance extended to other university programs.

Another theory which expands Title IX coverage beyond federally

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Sections 602 and 603 of Title VI are absolutely identical to sections 902 and 903 of Title IX; section 601 is almost identical except that it prohibits discrimination based on "race, color or national origin" whereas section 901 prohibits discrimination based on sex, and section 901 is limited to "any *education* program or activity" whereas section 601 covers "any program or activity."

Id. at 421 n.9 (emphasis added).

36. 414 F.2d at 1078. The court noted that "[u]nder this procedure each program receives its own 'day in court.'" *Id.*

37. 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982).

38. For a general discussion of the "benefit theory," see Kuhn, *supra* note 28, at 71.

39. Haffer v. Temple Univ., 524 F. Supp. 531, 540 (E.D. Pa. 1981). For an interesting discussion of the *Haffer* decision and its implications for intercollegiate athletics, see Note, *Title IX and Intercollegiate Athletics: Adducing Congressional Intent*, 24 B.C.L. REV. 1243 (1983).

40. Temple University received over $19 million in federal financial aid. That amount constituted over 10% of its budget. 524 F. Supp. at 540.

funded programs is the "infection theory."[41] This theory maintains that if discriminatory practices in one program infect the entire institution with a discriminatory environment, the entire institution should be subject to Title IX regulation. The best example of such a practice is a discriminatory admissions policy, such as the one found in *Bob Jones University v. Johnson.*[42] In *Bob Jones*, a Title VI case, the University excluded unmarried nonwhites from consideration for admissions. Although the University received no direct federal aid, some of its students received funds from the Veterans Administration (VA). The court upheld HEW's termination of VA benefits, classifying the entire institution as the relevant program.[43]

In light of these varying interpretations of the program or activity clause, the Supreme Court recently considered the spectrum of Title IX theories in *North Haven Board of Education v. Bell.*[44] The Court considered the issue of whether Title IX's prohibition included sex discrimination in educational employment.[45] In finding that Congress intended Title IX to include employment, the Court highlighted the program specific mandate of Title IX,[46] overruling the Second Circuit's finding that HEW's regulatory powers were broader than their termination powers.[47] Justice Blackmun, writing for the Court,[48] argued that it makes little sense to interpret Title IX so that HEW's authority to promulgate rules is broader than its authority to

41. For a general discussion of the "infection theory," see Kuhn, *supra* note 28, at 68-70. *See also* Note, *supra* note 5.

42. 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

43. Another example of the infection theory is found in Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549 (5th Cir. 1983). In *Iron Arrow*, an all-male honorary-recognition society brought action seeking to enjoin the Secretary of HEW from terminating federal funding to the University of Miami for giving "substantial assistance" to the society. On remand from the Supreme Court, the Fifth Circuit found that Iron Arrow's existence as the most prestigious society at the University had a pervasive discriminatory effect upon all of the University's academic programs, whether federally funded or not. The discriminatory practices of the society infected the entire academic mission of the University. *Id.* at 564-65.

44. 456 U.S. 512 (1982).

45. The issue of whether Title IX's prohibition includes sex discrimination in educational employment has been a subject of great controversy. The Third Circuit addressed this issue in *Grove City* in its Title IX analysis. 687 F.2d 684, 702 (3d Cir. 1982).

46. 456 U.S. at 536.

47. *Id.* at 514.

48. *North Haven* was a 6-3 decision. Chief Justice Burger and Justice Rehnquist joined Justice Powell's dissent.

enforce those rules.[49]

The rule in *North Haven*, that Title IX regulation must be applied in a program-specific manner, began a new period in Title IX interpretation. Until the Supreme Court's decision, courts had a free hand in choosing which interpretative theory to follow.[50] The *North Haven* decision severely limited the application of other theories to Title IX regulation. HEW must apply Title IX on a program-specific basis and can no longer rely on the infection or benefit theory to mask its institutional approach. Justice Blackmun, however, specifically noted the Court's failure to define what constitutes a "program."[51] The decisions since *North Haven*, therefore, have focused upon defining the scope of the "program or activity" clause.

Two conflicting explanations for the definition of "any program" developed in the post-*North Haven* period.[52] In *Grove City*, the Third Circuit adopted HEW's institution-as-the-program analysis.[53] The court was obviously constrained by the *North Haven* holding,[54] but

49. 456 U.S. at 537. Justice Blackmun wrote that "it makes little sense to interpret the statute . . . to authorize an agency to promulgate rules that it cannot enforce." *Id.* at 537. Justice Blackmun was responding to an argument that HEW's power to promulgate rules was extremely broad, although its power to enforce those rules was limited to the specific program receiving federal financial assistance. Justice Blackmun noted that both Title IX's funding termination provision and the portion of Section 902 authorizing the issuance of implementing regulations contain language suggesting a program-specific approach. *Id.* at 536-37.

50. *See supra* notes 37-43 and accompanying text.

51. 456 U.S. at 540.

52. Although most courts continued to express their opinions as to the definition of a recipient and whether or not Title IX is program-specific, the only issue that was still subject to controversy was the definition of a "program." The *North Haven* decision narrowed the controversy over Title IX interpretation by disposing of several corollary issues. Justice Blackmun was, however, keenly aware of the boundaries of his opinion. Justice Blackmun specifically wrote that "we do not undertake to define 'program' in this opinion." 456 U.S. at 540. The interpretation of a "program" was left for Justice White in *Grove City*.

53. *See supra* notes 28-29 and accompanying text.

54. Citing the *North Haven* decision, the Third Circuit held:

> We concede, as we must, that Title IX's provisions, on their face, are program-specific. *See North Haven*, 456 U.S. at 540. We cannot agree, however, that Congress intended to limit the purpose and operation of Title IX by a narrow and illogical interpretation of its program-specific provisions. Rather, we believe that Congress intended that full scope be given to the non-discriminatory purpose that Title IX was enacted to achieve, and that the program-specific terms of Title IX must therefore be construed realistically and flexibly.

Grove City College v. Bell, 687 F.2d 684, 691 (3d Cir. 1982) (footnote omitted).

reasoned that a program should not be defined so as to render Title IX ineffective when the federal financial assistance is non-earmarked or indirect.[55] The court held Grove City College subject to Title IX regulation, ruling that when aid to an institution is indirect, the institution itself must be the program.[56]

In *Hillsdale College v. Department of Health, Education and Welfare*,[57] the Sixth Circuit expressly rejected the *Grove City* decision.[58] Analyzing Title IX's statutory language and legislative history,[59] the *Hillsdale* court limited Title IX regulation to an institution's specific program or activity receiving federal financial assistance.[60] Even though the facts in *Hillsdale* are virtually identical to those in *Grove City*,[61] the court found that only the financial aid program of the College could properly be regulated under Title IX. The *Hillsdale* court reasoned that to hold an entire institution subject to Title IX regulation would render the program-specific mandate of *North Haven* nugatory.[62] Therefore, the court rejected the *Grove City* decision, finding it inconsistent with the program-specific language of Title IX.[63]

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55. 687 F.2d at 698.

56. *Id.* at 700.

57. 696 F.2d 418 (6th Cir. 1982).

58. *Id.* at 429-30.

59. Title IX originated as a floor amendment by Senator Bayh in 1971. In its original form, Title IX embodied an institutional approach; this was considered irrelevant to the bill under consideration. Senator Bayh's original version read:

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

117 CONG. REC. 30,156 (1971).

The provision ultimately enacted replaced the institutional language with the program-specific language presently contained in §§ 901 and 902. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523-30 (1982) (summary of Title IX's legislative history).

60. 696 F.2d at 424-27.

61. *Grove City* and *Hillsdale College* differ only because Hillsdale College participated in the direct disbursement system while Grove City College chose to have BEOGs distributed indirectly through the Alternate Disbursement System. As the Supreme Court noted, however, this difference is immaterial for the application of Title IX. 104 S. Ct. at 1218.

62. *Hillsdale College*, 696 F.2d at 430.

63. *Id.* at 429-30.

Faced with this split of interpretations in the circuits, the Supreme Court granted certiorari to hear *Grove City College v. Bell*.[64] The Court began its analysis by finding Grove City College to be a recipient of federal financial assistance within the meaning of Title IX.[65] Because BEOG's were one of the primary components of the Education Amendments of 1972, the Court stated that Congress could not have intended to exclude them from the nondiscrimination requirements adopted in the same bill.[66] Furthermore, the Court reasoned that any attempt to distinguish between direct and indirect aid would favor form over substance, a policy which has been rejected consistently by the rules of statutory construction.[67]

In construing Title IX's program or activity clause, the Court held that the program-specific language restricts regulation to an educational institution's individual program receiving federal financial assistance.[68] Justice White, writing for the Court, began by noting that, had the College been involved directly in the distribution of BEOGs through the Regular Disbursement System (RDS), there would be no doubt that only the student financial aid program would be subject to Title IX regulation.[69] It would be unfair to impose institution-wide coverage simply because the College chose to have BEOGs distributed indirectly through the Alternate Disbursement System (ADS).[70]

Justice White rejected the benefit analysis adopted by the court of appeals. First, there was no evidence that BEOGs divert funds to other programs.[71] Second, Justice White stated that a benefit analysis is inconsistent with Title IX's program-specific mandate. Under the benefit theory, an entire institution could be subjected to Title IX regulation because one student obtained a government grant.[72] Con-

64. 103 S. Ct. 1181 (1983).

65. 104 S. Ct. at 1216-20.

66. *Id.* at 1217.

67. *Id.* at 1218.

68. *Id.* at 1220-22. Part III of the Court's opinion, holding that Title IX regulation is limited to the specific program within an educational institution, is the most controversial section. Justices Burger, Blackmun, Powell, Rehnquist and O'Connor, joined in all but Part III. Justices Brennan, Marshall and Stevens joined Justice White in Part III of his decision.

69. *Id.*

70. *See supra* note 61.

71. 104 S. Ct. at 1222.

72. *Id.*

gress did not intend to follow financial aid dollars from classroom to classroom.

The Court, however, affirmed the lower court's ruling that Grove City was required to file an Assurance of Compliance.[73] Because the Assurance pertains only to those programs regulated under Title IX, its filing does not contravene Title IX's program-specific mandate. Grove City College must file an Assurance evidencing compliance with Title IX's nondiscrimination requirements in the operation of its student financial aid program.

Justice Brennan, joined by Justice Marshall, dissented from the Court's program-specific holding in Part III of its opinion.[74] The dissent asserted that the majority ignored congressional intent[75] and reached a conclusion unsupported by Title IX's legislative history.[76] Justice Stevens suggested three factors compelling a different result: 1) the Court should give a broad interpretation to remedial civil rights statutes;[77] 2) given the similarities between Title IX and Title VI regulations, the Court could assume that Congress anticipated the broad interpretation that HEW gave Title IX;[78] and, 3) Title IX's post-enactment history reveals several occasions when Congress not only approved HEW regulations but also refused to pass proposals to invalidate far-reaching regulations.[79] Justice Brennan concluded that the program-specific language of Title IX was intended only to en-

73. *Id.* at 1222-23.

74. 104 S. Ct. at 1226-37 (Brennan, J., concurring in part and dissenting in part). Justice Stevens also dissented from Part III of the Court's opinion, arguing that it was advisory, as well as based on an inadequate record. Justice Stevens relied on recent changes to Title IX interpretation made by HEW. HEW now limits Title IX regulation to the specific educational program or activity being assisted by federal aid. *See* Brief for the Respondents, at 15-16, Grove City College v. Bell. In *Grove City*, HEW conceded that the relevant program is the College's financial aid program. Based upon this reinterpretation, Justice Stevens argues that the definition of a program was no longer in dispute because the two parties were in agreement. Realistically, however, the Court's opinion would be meaningless without Part III because the definition of a program is the primary issue in Title IX analysis.

Justice Powell, joined by Chief Justice Burger and Justice O'Connor, concurred in Part III of the Court's opinion, but went on to call HEW's actions in the case "an unedifying example of overzealousness on the part of the Federal Government." 104 S. Ct. at 1223 (Powell, J., concurring).

75. 104 S. Ct. at 1226 (Brennan, J., concurning in part and dissenting in part).

76. *Id.* at 1227-28.

77. *Id.* at 1227.

78. *Id.* at 1228-29.

79. *Id.* at 1235.

sure that the coverage of the statute be dependent upon the scope of the assistance provided. According to Justice Brennan, if federal financial assistance is intended to aid an entire institution, then the institution as a whole should be subject to the nondiscrimination requirements of Title IX.[80]

Based upon the statutory language, the legislative history and the relevant case law, the Court correctly decided the *Grove City* case. A contrary finding would have been based upon either a limited selection of the available interpretative material or an inappropriate exercise of judicial policy-making. Justice White's opinion lays to rest the final issue of Title IX interpretation: the statute's program-specific language restricts regulation to an institution's individual program receiving federal financial assistance.

The most significant effect of the *Grove City* decision is to allow private institutions to continue admitting students who receive federal assistance without sacrificing the diversity and autonomy which represent the backbone of their excellence. The continuation of broader interpretations of Title IX would have presented private institutions with the decision of either closing their doors to those in need of federal assistance or compromising their tradition of academic autonomy and diversity of student populations.

An analysis of the history of Title IX reveals two fundamental flaws in HEW's interpretation of its regulatory authority. First, HEW became the victim of its own authority. Instead of enforcing the prohibition on sex discrimination in higher education, the primary purpose of Title IX, HEW attempted to test and expand the boundaries of its authority in situations never envisioned by the stat-

80. *Id.* at 1237.

> [T]he program-specific language in Title IX was designed to ensure that the reach of the statute is dependent upon the scope of federal financial assistance provided to an institution. When that financial assistance is clearly intended to serve as federal aid for the entire institution, the institution as a whole should be covered by the statute's prohibition on sex discrimination.

Id.

> Justice Brennan's argument contains two basic faults. First, Justice Brennan has conducted what can only be described as a selective analysis of the available interpretative material. By using a selective approach, he has been able to structure an argument which is not representative of Title IX's history. Second, Justice Brennan argues that if assistance is intended to benefit an entire institution, the entire school should be subject to Title IX regulation. Justice Brennan neglects the issue concerning student assistance programs. The federal dollars are intended to give students the opportunity to attend the college of their choice. The program is not intended for the benefit of the school itself.

ute's drafters. The two principal cases that HEW chose to pursue involved schools with unblemished records of sexual equality. Thus, even if HEW had been successful, its victories in these cases would not have affected sex discrimination in higher education.

In addition, there is a fundamental error in tying nondiscrimination requirements to student assistance programs. History has proven that private institutions will continue to reject students receiving such conditional aid to remain free of government regulation. The tying of government regulation to student assistance dollars has the effect of creating additional discrimination by depriving those students who cannot afford to finance their educations independently of the opportunity and choice of receiving a private education. Thus, any legislative response to the *Grove City* decision should not focus on restructuring Title IX, but should concentrate on finding alternate means of preventing discrimination in higher education.

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RECENT DEVELOPMENTS