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**GROVE CITY COLLEGE v. BELL: A PROPOSAL TO
OVERTURN THE SUPREME COURT'S NARROW
CONSTRUCTION OF TITLE IX'S SEX
DISCRIMINATION
PROHIBITION**

I. INTRODUCTION

*Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in . . . discrimination.*¹

In 1972, eighteen years after enactment of the Civil Rights Act of 1964,² Congress reaffirmed the federal government's commitment to ending discrimination by enacting Title IX of the Education Amendments of 1972.³ Title IX prohibits sex discrimination in federally funded education programs and provides that federal agencies extending aid may terminate funding upon a finding of discrimination.⁴

Title IX has proven an effective tool for ending discrimination.⁵ The Supreme Court's decision in *Grove City College v. Bell*,⁶ however, narrowed the scope of Title IX's coverage. Although legislation has been introduced to overrule the case,⁷ Congress' failure to act on the bills raises questions about the ability of federal agencies to continue to combat discrimination.⁸

This Note examines the *Grove City College* decision and its impact on efforts to end sex discrimination in education. It also discusses legislation proposed in Congress to overturn the decision. Finally, the Note

1. 109 CONG. REC. S11,161 (1963) (Pres. Kennedy's message to Congress).

2. Pub. L. No. 88-352, 78 Stat. 241, 252 (codified at 42 U.S.C. §§ 2000d to 2000d-4 (1982)).

3. Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681-1686 (1982)).

4. 20 U.S.C. §§ 1681-1682 (1982).

5. 130 CONG. REC. S4585-86 (daily ed. Apr. 12, 1984).

6. 104 S. Ct. 1211 (1984).

7. The Civil Rights Act of 1984, S. 2568, 98th Cong., 2d Sess., 130 CONG. REC. S4585-88 (daily ed. Apr. 12, 1984), passed the House overwhelmingly on June 26, 1984. 130 CONG. REC. H7017-18 (daily ed. June 27, 1984). The Senate, however, failed to vote on the measure, and tabled the bill on October 2, 1984. 130 CONG. REC. S12,642 (daily ed. Oct. 3, 1984). For a discussion of the fate of the Civil Rights Act of 1984, see *infra* notes 145-53 and accompanying text.

8. 130 CONG. REC. S4585-87 (daily ed. Apr. 12, 1984).

proposes new legislation consistent with the federal government's broad policy against discrimination.

II. STATEMENT OF THE CASE

In *Grove City College v. Bell*,⁹ the Supreme Court interpreted the program-specific language of Title IX of the Education Amendments of 1972.¹⁰ Section 901(a) thereof provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subject to discrimination under any education program or activity receiving Federal financial assistance."¹¹

Grove City College is a private, coeducational institution which receives no direct federal financial assistance.¹² Large numbers of its students, however, receive Pell grants¹³ and Guaranteed Student Loans (GSL's)¹⁴ from the Department of Education.¹⁵ The Department contended that such aid made Grove City College a recipient of federal financial assistance and therefore subject to the anti-discrimination requirements of section 901(a).¹⁶ Accordingly, it requested that the College execute an Assurance of Compliance¹⁷ with Title IX as required under the Department's Title IX regulations.¹⁸ The College refused to execute an Assurance, arguing that since it received no direct federal aid, it was not required to comply with Title IX.¹⁹

A. *The Administrative Proceedings*

The Department responded by initiating proceedings pursuant to its

9. 104 S. Ct. 1211 (1984).

10. *Id.* at 1220-22.

11. 20 U.S.C. § 1681(a) (1982).

12. 104 S. Ct. at 1214.

13. *See* 20 U.S.C. § 1070(a) (1982) (formerly Basic Educational Opportunity Grants (BEOG's)). Section 1070(a) authorizes the Department of Education to award grants to college students based on need. *Id.*

14. *See* 20 U.S.C. § 1071 (1982). Section 1071 authorizes the Department of Education to set up a program of federal loan insurance for lenders and interest subsidies to students for education loans. *Id.*

15. *Grove City College*, 104 S. Ct. at 1214-15. The Department of Education, formerly the Department of Health, Education, and Welfare, administers federal education aid and is responsible for enforcing Title IX. 20 U.S.C. § 1682 (1982).

16. *Grove City College*, 104 S. Ct. at 1215.

17. *See* 34 C.F.R. § 106.4 (1982).

18. Section 902 of Title IX authorizes federal agencies extending federal financial assistance for education to promulgate regulations to ensure compliance with Title IX. 20 U.S.C. § 1682 (1982).

19. *Grove City College v. Harris*, 500 F. Supp. 253, 255 (W.D. Pa. 1980), *rev'd sub nom. Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *aff'd*, 104 S. Ct. 1211 (1984).

authority under section 902 of Title IX to declare the College and its students ineligible to receive Pell grants and student loans.²⁰ Section 902 provides that federal assistance may be terminated for failure to comply with Department regulations implementing Title IX after notice and opportunity for a hearing.²¹

At the hearing, the administrative law judge found that Grove City College had failed to comply with Department regulations requiring execution of an Assurance and ordered that the loans and grants be terminated.²² The judge refused to consider Grove City's challenge to the validity of the regulation, holding that such a question was beyond the scope of his authority.²³

B. The District Court Decision

Grove City College and four of its students sought judicial review of the decision in the district court, claiming, *inter alia*, that the Department had exceeded its authority under section 901(a) of Title IX in finding that the College was a recipient of federal financial assistance.²⁴ The district court held that while the students' Pell grants and GSL's²⁵ made the College a recipient of federal financial assistance within the meaning of the statute, the aid could be terminated only upon a finding of actual discrimination.²⁶

C. The Court of Appeals Decision

The Third Circuit reversed, holding that the Department need not

20. *Id.*

21. 20 U.S.C. § 1682 (1982).

22. *Grove City College v. Harris*, 500 F. Supp. at 255-56.

23. *Id.* at 255.

24. *Id.* at 256-57.

25. The district court held that while Guaranteed Student Loans do constitute federal financial assistance, they cannot subject a recipient institution to Title IX. *Id.* at 268. Section 902 of Title IX empowers federal agencies extending financial assistance to students to terminate such assistance for failure to comply with Title IX. 20 U.S.C. § 1682 (1982). Contracts of insurance or guaranty are excluded from the types of aid which may be terminated. *Id.* The district court held that GSL's are contracts of insurance or guaranty. *Grove City College v. Harris*, 500 F. Supp. at 268.

26. *Grove City College*, 500 F. Supp. at 272. The district court also held that because Subpart E of the Department's Title IX regulations was invalid, the Department could not require the College to execute an Assurance. Subpart E prohibits employment discrimination and has since been upheld in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982). In addition to holding that termination was permitted only upon a finding of actual discrimination, the court found that affected students were entitled to a hearing before their aid could be discontinued. *Grove City College v. Bell*, 104 S. Ct. 1211, 1216 n.9. The court of appeals rejected this reasoning. *Grove City College v. Bell*, 687 F.2d 684, 704 (3d Cir. 1982), *aff'd*, 104 S. Ct. 1211 (1984).

make a finding of actual discrimination before terminating funds for failure to execute an Assurance of Compliance.²⁷ The court agreed with the Department and the district court that student loans and grants, without more, made Grove City College a recipient of federal financial assistance subject to Title IX coverage.²⁸ However, in response to Grove City's contention that even if it did receive federal financial assistance, section 901(a)'s program-specific language precluded the Department from requiring the entire institution to comply, the court noted that "[w]here the federal government furnishes indirect or non-earmarked aid to an institution, . . . the institution itself must be the 'program'."²⁹ The court therefore upheld the Department's order terminating funds to Grove City College.

III. THE SUPREME COURT DECISION

A. *The Majority Opinion*

1. The meaning of "receiving federal financial assistance"

In affirming the judgment of the court of appeals, the Supreme Court first rejected Grove City College's contention that it received no federal financial assistance within the meaning of section 901(a).³⁰ The Court found no indication in the language of section 901(a) that Congress intended to distinguish between federal aid paid directly to an insti-

27. *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *aff'd*, 104 S. Ct. 1211 (1984).

28. *Id.* at 693. The Supreme Court also agreed that the College was covered by Title IX because some of its students received federal financial assistance for their education costs. See *infra* notes 42-47 and accompanying text. According to the Court, Congress intended both direct aid to a college and funds received through its students to trigger Title IX coverage. *Grove City College v. Bell*, 104 S. Ct. 1211, 1217 (1984).

The *Grove City* decision on this issue is consistent with a 1974 district court ruling involving Title VI of the Civil Rights Act of 1964. *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975). Bob Jones University is a private, religiously affiliated school that accepts no direct federal financial assistance. *Id.* at 599-600. The University denied admission to unmarried nonwhites and expelled students who dated outside their own race, consistent with the administration's conviction that racial segregation is mandated by God. *Id.* at 600.

During 1971-72, 221 students at Bob Jones received approximately \$397,800 in Veterans Administration (VA) educational benefits. The court found that the students' receipt of the VA benefits subjected the University to Title VI coverage. *Id.* at 601-02.

The Sixth Circuit found *Bob Jones University* persuasive when it held that Title IX covered an institution receiving federal assistance only through its students. *Hillsdale College v. Dep't of Health, Educ. and Welfare*, 696 F.2d 418, 422, 430 (6th Cir. 1982). The *Hillsdale* court, however, went on to presage *Grove City College* by holding that only the financial aid department of the College was subject to Title IX regulation. *Id.* at 430. See *infra* notes 36-60 and accompanying text for a discussion of this issue.

29. *Grove City College v. Bell*, 687 F.2d at 700.

30. *Grove City College v. Bell*, 104 S. Ct. 1211, 1220 (1984).

tution and aid which indirectly reaches an institution through payments to students.³¹ In addition, the Court noted that Congress intended student assistance programs to benefit colleges and universities.³² Finally, the Court relied on "Title IX's unique post-enactment history."³³ The Court concluded that Congress' failure to disapprove Department regulations defining "recipient"³⁴ provided a strong inference "that the regulations accurately reflect congressional intent."³⁵

2. The meaning of "program or activity"

The Supreme Court rejected, however, the court of appeals' conclusion that Grove City College in its entirety was the "program" subject to the anti-discrimination provisions of section 901(a).³⁶ According to the Court, the program-specific language of section 901(a) limits Title IX coverage to the particular program or activity within the college that received federal financial assistance.³⁷

The Court noted that Pell grants can be administered to students in two ways.³⁸ Most institutions participate in the Regular Disbursement System, under which each college receives a lump sum from the Department based on an estimate of the college's needs. The institution then calculates awards and disburses the money to individual students.³⁹ Grove City College, however, participated in the Alternative Disbursement System, designed to minimize the institution's involvement with the federal government.⁴⁰ Under this system, Grove City College gave information concerning its students' eligibility to the Department. The Department then calculated and disbursed awards.⁴¹

The Court opined that if Grove City College had participated in the Regular Disbursement System, the Court "would have [had] no doubt that the 'education program or activity receiving federal financial assistance' . . . would be its student financial aid program."⁴² According to the

31. *Id.* at 1217.

32. *Id.* at 1217-18.

33. *Id.* at 1219. The Court had twice before "recognized the probative value of Title IX's unique post-enactment history." *Id.* (citing *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982); *Cannon v. University of Chicago*, 441 U.S. 677, 687 & n.7 (1979)).

34. *See* 40 Fed. Reg. 24,137 (1975) (codified at 34 C.F.R. § 106 (1984)).

35. *Grove City College*, 104 S. Ct. at 1219.

36. *Id.* at 1220.

37. *Id.*

38. *Id.* at 1214-15 & n.5.

39. *Id.* at 1215 n.5.

40. *Id.* at 1214-15 & n.5.

41. *Id.* at 1215 n.5.

42. *Id.* at 1220-21 (footnote omitted).

Court, although such institutions receive aid directly from the federal government, the funds can only be used to expand financial aid.⁴³ This restriction, reasoned the Court, meant that such aid is in fact earmarked for the financial aid program.⁴⁴ Thus, only that program can be required to comply with section 901(a) of Title IX.⁴⁵

The Court then reasoned that Grove City College's participation in the Alternative Disbursement System provided the same benefit to its financial aid program as would result under the Regular Disbursement System.⁴⁶ Because the effect under the two systems would be the same, the Court concluded that Grove City College's financial aid department must comply with section 901(a).⁴⁷

The Court discounted "isolated suggestions"⁴⁸ in the legislative history that Congress intended an entire institution to be subject to Title IX coverage if one of its programs received federal financial assistance.⁴⁹ The Court also rejected the argument that because federal funds freed up the College's own resources for use in other areas, the entire institution benefited from the aid. Conceding that federal aid creates such an "economic ripple effect" throughout an institution, the majority found section 901(a)'s program-specific language inconsistent with this conclusion.⁵⁰

The Court also faulted the lower court's analogy between grants and

43. *Id.* at 1221.

44. *Id.*

45. *Id.* at 1222.

46. *Id.* at 1221.

47. *Id.* The Court stated that to conclude that student financial aid funds paid to the college as tuition constitute aid to the entire college ignores the program-specific language of § 901(a). *Id.* at 1221. The Court first rejected the court of appeals argument that because such aid benefited the entire institution, the institution was the program subject to § 901(a). According to the Court, there was no evidence that Grove City College diverted funds from its own financial aid program to other areas as a result of federal aid to students. *Id.* However, the Court did not consider such lack of evidence to be determinative. Even if federal aid to students resulted in benefit to the entire institution, the Court concluded that Congress did not intend to subject the entire College to Title IX coverage. *Id.*

The court of appeals in effect defined "program" as an entity which benefits from Federal financial assistance. The Supreme Court rejected this approach without explanation. *See infra* notes 51-58 and accompanying text.

48. *Grove City College*, 104 S. Ct. at 1220.

49. *See, e.g.*, SEX DISCRIMINATION REGULATIONS: HEARINGS BEFORE THE SUBCOMM. ON POSTSECONDARY EDUCATION OF THE HOUSE COMM. ON EDUCATION AND LABOR, 94TH CONG., 1ST SESS. 178 (1975). Again, the majority gave no explanation for its rejection of the court of appeals' reading of congressional intent. Nor did the majority either discuss or cite to Title IX's legislative history to support its contrary finding of Congressional intent. Thus, the rationale for the Court's interpretation of § 901(a)'s program-specific language remains obscure.

50. *Grove City College*, 104 S. Ct. at 1221.

loans to students and non earmarked federal assistance.⁵¹ The Third Circuit reasoned that an institution in its *entirety* must comply with section 901(a) if it receives non earmarked grants.⁵² The court of appeals likened non earmarked grants to student financial aid because the student aid eventually goes into the institution's general operating budget for use in a variety of programs.⁵³

However, the Supreme Court characterized student financial aid programs as "*sui generis*,"⁵⁴ and concluded that Pell grants are not the same as unrestricted direct grants to a college.⁵⁵ The Court conceded that substantial portions of funds from student aid end up in the institution's general budget,⁵⁶ but refused to infer that "Congress intended . . . the Department's regulatory authority [to] follow federally aided students from classroom to classroom, building to building, or activity to activity."⁵⁷ Moreover, according to the majority, because student aid increased both an institution's resources and its obligations, it more closely resembled earmarked federal grants.⁵⁸

In summary, the majority refused to require Grove City College to comply with section 901(a) in its *entirety*,⁵⁹ even though it held that the

51. *Id.*

52. *Grove City College v. Bell*, 687 F.2d 684, 700 (3d Cir. 1982), *aff'd*, 104 S. Ct. 1211 (1984). Although the Supreme Court rejected the court of appeals' characterization of student financial aid as non earmarked, the Court implicitly agreed that, as a general proposition, general use aid would subject an entire institution to Title IX coverage. *Grove City College*, 104 S. Ct. 1211, 1221-22. See also *Haffer v. Temple Univ. of Commonwealth Sys. of Higher Educ.*, 524 F. Supp. 531, 541 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982).

53. *Grove City College v. Bell*, 687 F.2d at 700.

54. *Grove City College*, 104 S. Ct. at 1221-22.

55. *Id.*

56. *Id.* at 1222.

57. *Id.*

58. *Id.* Although the Court did not explain its statement that student aid increases an institution's obligations, it may have been referring to the costs of participation in student financial aid programs. The Court cited to 20 U.S.C. § 1070e, which provides for cost-of-education payments to institutions of higher education whose students receive Pell grants. Section 1070e(c)(1)(A)(i)-(iii) provides that an institution receiving such payments shall "set forth such policies, assurances, and procedures as will insure that" the funds will be used only for academic programs, that they will not be used for religious activity and that the recipient will not decrease its own spending on academic programs. 20 U.S.C. § 1070e(c)(1)(A)(i)-(iii) (1982). Although the statute clearly imposes requirements on a recipient institution, it is difficult to see how this makes student financial aid different from any other type of federal financial aid. First, the requirements of § 1070e(c)(1)(A)(i)-(iii) arguably apply only to an institution which accepts such payments. Although Grove City College students received Pell grants, the College refused to accept the payments provided for by § 1070e. Thus, it could not be subject to the requirements of § 1070e(c)(1)(A)(i)-(iii). Second, all federal extensions of financial assistance contain restrictions and requirements, however general, which attend their use.

59. *Grove City College*, 104 S. Ct. at 1222. The Court's holding on this issue resolved a

College received federal financial assistance through loans and grants to students. The Court's holding that only the College's financial aid department must comply with section 901(a), however, did not change the factual result of the lower court's judgment. Because the College and the financial aid department persisted in refusing to execute an Assurance of Compliance, the Court upheld the Department's order terminating the assistance.⁶⁰

B. *The Dissenting Opinion*

Justice Brennan, joined by Justice Marshall, agreed with the Court that Grove City College received federal financial assistance within the meaning of section 901(a) because its students received federal grants and loans.⁶¹ He would have held, however, that the entire College must comply with section 901(a), rather than only the financial aid department.⁶² Justice Brennan charged that the Court's holding ignored congressional

conflict between the circuit courts of appeals. *See, e.g.,* Haffer v. Temple Univ. of Commonwealth Sys. of Higher Educ., 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982); and Hillsdale College v. Department of Health, Educ. and Welfare, 696 F.2d 418 (6th Cir. 1982).

The Supreme Court adopted the result reached by the Sixth Circuit in *Hillsdale College*. *Hillsdale College*, 696 F.2d at 430. The *Hillsdale* court, under facts identical to those in *Grove City College*, rejected the Third Circuit's reasoning in *Grove City College*. *Id.* at 429-30. Noting that the Third Circuit based its interpretation of Title IX's program-specific language primarily on the statute's post-enactment history, the Sixth Circuit maintained that such broad coverage would render the language meaningless. *Id.*

60. *Grove City College*, 104 S. Ct. at 1222-23. The Court rejected Grove City College's contention that the Assurance of Compliance it refused to sign was invalid. *Id.* at 1222. According to the Court, the Assurance required only that Grove City College comply with the applicable requirements of Title IX. *Id.*

The Court also decided that an actual finding of discrimination was not required before funds could be terminated under Title IX, and that conditioning the College's eligibility to participate in the Pell grant program on compliance with Title IX did not infringe upon any first amendment rights of the College or its students. *Id.* at 1222-23.

61. *Grove City College v. Bell*, 104 S. Ct. 1211, 1226 (Brennan, J., concurring in part).

62. *Id.* (Brennan, J., concurring in part).

Justice Powell filed a concurring opinion, in which Chief Justice Burger and Justice O'Connor joined, decrying the "overzealousness" of the federal government. *Id.* at 1223 (Powell, J., concurring). Although Justice Powell agreed that the language and legislative history dictated the Court's holding that Grove City College was covered by Title IX, *id.* (Powell, J., concurring), he pointed out that the record revealed no allegations of discrimination against the College. *Id.* at 1224 (Powell, J., concurring).

Justice Powell also objected to the fact that if the College refused to execute an Assurance of Compliance, a termination of funds would force students to change schools or give up their education. *Id.* (Powell, J., concurring).

Justice Stevens refused to join in the Court's holding that only the financial aid department was covered by Title IX. *Id.* at 1225 (Stevens, J., concurring in part). In a short opinion, Justice Stevens contended first that the Court need not have reached the issue, and second, that the Court's holding would require a "factual inquiry . . . as to which of Grove City's programs

intent and the broad purpose Title IX was enacted to serve.⁶³

Justice Brennan first turned to the legislative history of Title IX to determine the meaning of the program-specific language. Although he found the record ambiguous, he argued that it clearly showed that Congress intended "Title IX to mirror . . . Title VI" of the Civil Rights Act of 1964.⁶⁴ Title VI prohibits race discrimination in federally funded programs and activities and contains the same program-specific language

and activities . . . benefit from federal financial assistance." *Id.* (Stevens, J., concurring in part).

63. *Id.* at 1226 (Brennan, J., concurring in part).

64. *Id.* at 1228 (Brennan, J., concurring in part).

Title IX began as a floor amendment to the Higher Education Act of 1971, S. 659, 92d Cong., 1st Sess., 117 CONG. REC. 30,155 (1971). The amendment, proposed by Senator Bayh, included enforcement provisions identical to those of Title VI of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000d-1 (1982) and 117 CONG. REC. 30,157 (1971). The coverage provision, however, differed from that of Title VI. Senator Bayh's amendment provided, in pertinent part, that:

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

.....

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

The record reveals no explanation of the coverage provision or of whether it was intended to have a scope similar to that of Title VI. The amendment was ruled non-germane on August 6, 1971. *Id.* at 30,415.

Representative Edith Green included provisions prohibiting sex discrimination in H.R. 7248, the House version of the Higher Education Act of 1971. H.R. 7248, 92d Cong., 1st Sess., 117 CONG. REC. 39,098-99 (1971). Those provisions were closely patterned after Title VI of the Civil Rights Act of 1964. *See* 42 U.S.C. §§ 2000d to 2000d-4 (1982). Representative Green's bill prohibited sex discrimination in "any educational program or activity receiving Federal financial assistance." H.R. 7248, 92d Cong., 1st Sess., 117 CONG. REC. 39,098 (1971).

Senator Bayh incorporated the language of Representative Green's coverage and termination provisions when he introduced a modified version of his original amendment to S. 659 in 1972. 118 CONG. REC. 5802 (1972). Again, Senator Bayh characterized the enforcement provisions of his amendment as "parallel to those found in Title VI of the 1964 Civil Rights Act." *Id.* at 5803.

On its face, Senator Bayh's modified amendment called for a narrower scope of coverage than did his original measure. The original language prohibits discrimination in institutions which receive federal aid for "any program or activity." Amendment 398 to the Higher Education Act of 1971, S. 659, § 601, 92d Cong., 1st Sess., 117 CONG. REC. 30,155, 30,156 (1971). The 1972 amendment tracks the language of Representative Green's bill, prohibiting discrimination in "program[s] or activit[ies]" receiving aid. Amendment 874 to the Higher Education Act of 1972, S. 659, § 1001(a), 92d Cong., 2d Sess., 118 CONG. REC. 5802, 5803 (1972). Courts and commentators have made much of the apparent difference in the two versions. *See, e.g.,* Comment, *HEW's Regulations Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U. L. REV. 133, 144; *Haffer v. Temple Univ. of Commonwealth Sys. of Higher Educ.*, 524 F. Supp. 531, 534 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982); *Hillsdale College v. Department of Health, Educ. and Welfare*, 696 F.2d 418, 426 (6th Cir. 1982). All agree, however, that the lack of explanation for the change only heightens the

found in Title IX.⁶⁵ Justice Brennan therefore looked to the legislative history of Title VI for an understanding of the statutory term.⁶⁶

Although no precise understanding of the meaning of the program-specific language emerged from the record, congressional debate on the issue suggests the purpose that the language was intended to serve.⁶⁷ Great controversy surrounded the application of Title VI's fund termination sanction⁶⁸ to states reluctant to end racial discrimination in public schools.⁶⁹ Southern senators were concerned that noncompliance in one school district would result in termination of federal funds to an entire

ambiguity surrounding the meaning of the program-specific language in the legislative history. *Id.*

The following colloquy between Representatives Green, Waggonner and Steiger only aggravates the problem:

Mr. WAGGONNER. Let me clarify a little bit better the point I am trying to make and that is this: This applies, apparently, only to those programs wherein the Federal Government is in part or in whole financing a program or an activity?

.....
Mrs. GREEN of Oregon. It is really the same as the Civil Rights Act in terms of race.

.....
Mr. STEIGER of Wisconsin. . . . In title IX [Mr. Waggonner] asked relating to a program on [sic] activities receiving Federal financial assistance, and under the "program on [sic] activity" one could not discriminate. That is not to be read, am I correct, that it is limited in terms of its application, that is, title [IX], to only programs that are federally financed? For example, are we saying that if in the English department they receive no funds from the Federal Government that therefore that program is exempt?

Mrs. GREEN of Oregon. If the gentleman will yield, the answer is in the affirmative. Enforcement is limited to each entity or institution and to each program and activity. Discrimination would cut off all program funds within an institution.

Mr. STEIGER of Wisconsin. So that the effect of title [IX] is to, in effect, go across the board in terms of the cutting off of funds to an institution that would discriminate, is that correct?

Mrs. GREEN of Oregon. The purpose of title [IX] is to end discrimination in all institutions of higher education, yes, across the board

117 CONG. REC. 39,256 (1971).

Thus, as this excerpt illustrates, Title IX's legislative history provides little help in determining the precise scope of the statute.

65. See *supra* note 2. Title VI provides that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 20 U.S.C. § 2000d (1982).

66. As Justice Brennan pointed out, "the voluminous legislative history of Title VI is not easy to comprehend." *Grove City College*, 104 S. Ct. at 1228 (Brennan, J., concurring in part). For every statement equating the word "program" with a specific federal grant statute, another gives it a more expansive meaning. *Id.* at 1228, 1229, nn.5 & 6 (Brennan, J., concurring in part).

67. See Note, Board of Public Instruction v. Finch: *Unwarranted Compromise of Title VI's Termination Sanction*, 118 U. PA. L. REV. 1113, 1118, 1119-20 (1970).

68. Section 602 of Title VI provides that federal financial assistance can be terminated for failure to comply with Title VI. 20 U.S.C. § 2000d-1 (1982).

69. See Note, *supra* note 67, at 1118, 1119-20.

state school system, or that discrimination in an education program would result in an end to federal assistance to unrelated programs such as highways.⁷⁰ Justice Brennan concluded that the program-specific language was included to allay these concerns.⁷¹ Since Title IX, unlike Title VI, is limited by its terms to education aid, these concerns did not arise under Title IX. Thus, the legislative history of Title VI provided little guidance as to the meaning of Title IX's program-specific language.

Justice Brennan next examined Congress' understanding of judicial and administrative interpretations of Title VI at the time it enacted Title IX.⁷² Administrative regulations adopted in compliance with Title VI

70. One commentator has remarked, "[t]he constant maneuvering and persuasion required to secure supporting votes often precluded any single congressional understanding of the purpose of many provisions of the [Civil Rights] Act [of 1964]." Note, *supra* note 67, at 1117 & n.17.

The program-specific language of Title VI originated in Senate amendments to the House bill. H.R. 7152, 88th Cong., 1st Sess. (1963). The amendments resulted from an informal bipartisan conference and were accepted without change by the House. Note, *supra* note 67, at 1117 (citing BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT OF 1964 at 289 (1964)). Thus, no committee reports on the changes were produced. *Id.*

Although the program-specific language was clearly intended to limit Title VI to prevent wholesale fund cutoffs to an entire state, *id.* at 1118, no clear explanation of the scope of the provision emerges from the record. According to Senator Humphrey, "[w]e have made no changes of substance in Title VI, which is concerned with discrimination in programs that receive financial assistance from the Federal Government. We have made several minor adjustments and, in addition, we have modified the language to make explicit the declared intention of this title." 110 CONG. REC. 12,714 (1964).

The Senate debates surrounding the program-specific language of Title VI indicate that the primary concern was to place geographical and subject matter limits on fund termination. In response to southern senators fearing fund cutoffs to entire states, Senator Humphrey remarked that, "[T]itle [VI] is designed to limit any termination of Federal assistance to the particular offenders in the particular area where the unlawful discrimination occurs." *Id.*

During debates on Title VI which gave rise to the program-specific amendments, Senator Ribicoff stated that, "if there were 100 school districts and discrimination was found in 1 school district, the funds would be cut off for only that one school district, but not the funds for the other 99." 110 CONG. REC. (1964). Senator Pastore illustrated the subject matter limits on termination as follows:

Let us assume that we are considering aid to dependent children. We could not cut off funds for the building of a road because that is another program, although it is a Federal grant. The action must be confined to the specific program in which discrimination exists, and then only within the particular jurisdiction where the discrimination takes place.

Id.

Although these debates took place before the introduction of the program-specific amendment, the changes were intended to clarify the scope of Title VI, as articulated during these discussions, rather than to alter it. *Id.* at 12,714. Thus, they furnish reliable indications of the meaning of the limiting language.

71. *Grove City College*, 104 S. Ct. at 1229 (Brennan, J., concurring in part).

72. *Id.* (Brennan, J., concurring in part).

took a broad view of coverage.⁷³ Justice Brennan argued that Congress must have been aware that the same approach would be taken under Title IX.⁷⁴ He reasoned that “nothing in the legislative history suggests otherwise, and [it] is always appropriate to assume that our elected representatives, like other citizens, know the law.”⁷⁵ Justice Brennan argued that a review of case law indicated that Congress understood the program-specific language of Title VI to be consistent with broad coverage.⁷⁶ Although he also concluded that no court has construed section 601(a) of Title VI narrowly, in fact, no court has reached the issue.⁷⁷

Next, noting that members of Congress repeatedly discussed Title VI and its provisions during debates on Title IX, Justice Brennan contended that “[courts] are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.”⁷⁸

Finally, Justice Brennan focused on the “unique post-enactment history” of Title IX to show that Congress approved of administrative regulations adopting an expansive interpretation of section 901(a).⁷⁹ The Court had twice before “recognized the probative value of Title IX’s unique post-enactment history” and did so again in *Grove City College*.⁸⁰ In *Cannon v. University of Chicago*,⁸¹ the Court found that a persistent assumption among judges and administrative officials that Title IX created a private right of action, coupled with Congress’ failure to change that assumption through legislation, provided evidence that Congress intended the remedy.⁸²

In *North Haven Board of Education v. Bell*,⁸³ the Court relied on Congress’ failure to disapprove agency regulations prohibiting employment discrimination to support its holding that section 901(a) authorized

73. See 45 C.F.R. § 80.4(d) (1972).

74. *Grove City College*, 104 S. Ct. at 1230 (Brennan, J., concurring in part).

75. *Id.* (Brennan, J., concurring in part) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)).

76. *Id.* at 1230-31 (Brennan, J., concurring in part).

77. *Id.* at 1231 (Brennan, J., concurring in part). Justice Brennan relied on *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969). *Finch*, however, construed the fund termination provision of Title VI, not the anti-discrimination provision. See *infra* notes 114-32 and accompanying text for a discussion of *Finch*.

78. *Grove City College*, 104 S. Ct. at 1231 (Brennan, J., concurring in part) (quoting *Cannon*, 441 U.S. 677, 697-98 (1979)).

79. *Id.* (Brennan, J., concurring in part).

80. See *id.* at 1219.

81. 441 U.S. 677 (1979).

82. *Id.* at 702-03.

83. 456 U.S. 512 (1982).

the prohibition.⁸⁴ The Court noted that “[w]here ‘an agency’s statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.’”⁸⁵

The Department of Education proposed and adopted regulations implementing Title IX that included the same broad view of coverage found in Title VI regulations.⁸⁶ The regulations prohibited sex discrimination “under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from federal financial assistance.”⁸⁷ They also provided that an institution would become a recipient of federal financial assistance if it or any of its students received federal funds directly or through a student.⁸⁸

Pursuant to section 431(d)(1) of the General Education Provisions Act,⁸⁹ Congress explicitly reviewed the regulations to see that they were consistent with the statute from which they derived their authority.⁹⁰ Resolutions proposed in the Senate to invalidate the regulations⁹¹ challenged the extension of Title IX to intercollegiate athletics and extracurricular activities,⁹² which rarely receive direct federal aid. Nevertheless, according to Justice Brennan, Congress has consistently refused to invalidate Department regulation of college athletic programs.⁹³

Moreover, Congress has not hesitated to amend Title IX when it

84. *Id.* at 535.

85. *Id.* at 535 (quoting *United States v. Rutherford*, 442 U.S. 544, 554 & n.10 (1979)).

86. *See* 40 Fed. Reg. 24,128 (1975).

87. 34 C.F.R. § 106.31(a) (1983).

88. 34 C.F.R. § 106.2(h) (1983).

89. Pub. L. No. 93-380, 88 Stat. 567 (1964).

90. According to § 431(d)(1), new regulations become effective 45 days after submission to both houses of Congress, unless Congress disapproves the rule by concurrent resolution. *Id.* The Supreme Court declared this type of legislative veto an unconstitutional violation of separation of powers in *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

91. S. Con. Res. 46, and S. Con. Res. 52, 94th Cong., 1st Sess. (1975).

92. All attempts to amend Title IX to expressly exclude coverage of intercollegiate athletics have failed. *Haffer v. Temple Univ. of Commonwealth Sys. of Higher Educ.*, 524 F. Supp. 531, 534 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982). The issue of sexual equality in intercollegiate sports has generated great controversy. *See, e.g., Gaal & DeLorenzo, The Legality and Requirements of HEW's Proposed "Policy Interpretation" of Title IX and Intercollegiate Athletics*, 6 J. COLL. AND UNIV. L. 161 (1979); Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49 (1976); Martin, *Title IX and Intercollegiate Athletics: Scoring Points for Women*, 8 OH. NORTH. UNIV. L. REV. 481 (1981); Note, *Title IX and Intercollegiate Athletics: HEW Gets Serious About Equality in Sports?*, 15 N. ENG. L. REV. 573 (1979).

93. *Grove City College*, 104 S. Ct. at 1232 & n.9 (Brennan, J., concurring in part).

disagreed with agency interpretations. For example, in both 1974 and 1976, Congress excepted certain activities from Title IX coverage, including social fraternities and sororities, dormitory arrangements, and father/son, mother/daughter events.⁹⁴ Justice Brennan contended that the failure to exclude athletics demonstrates Congress' understanding that Title IX coverage extends to activities not receiving direct federal aid as long as some part of the institution does receive such aid.⁹⁵

In summary, Justice Brennan's opinion on the meaning of section 901(a)'s program-specific language paralleled the majority's analysis of whether Grove City College received federal financial assistance. In holding that student loans and grants made Grove City College a recipient of federal aid, the majority opinion carefully reviewed the legislative histories of Title IX and the Pell grant statute, and analyzed the post-enactment history of Title IX.⁹⁶ Yet the Court summarily dismissed contrary indications of Congressional intent and completely ignored Title IX's post-enactment history when it held that only the financial aid program must comply with section 901(a).⁹⁷ Justice Brennan's thorough treatment of these factors underscores the weaknesses of the majority's reasoning on this issue.

94. 20 U.S.C. § 1681(a)(1)-(9) (1982).

95. *Grove City College*, 104 S. Ct. at 1234 (Brennan, J., concurring in part). Justice Brennan's thoroughly researched and well-argued analysis presents a formidable challenge to the majority's interpretation of Title IX's coverage provisions. Justice Brennan attacked the majority's reasoning on several grounds. First, he argued that Congress was not only aware of benefits to colleges and universities resulting from such programs as the Pell grant, but intended to provide those benefits. *Id.* at 1235 (Brennan, J., concurring in part). Thus, Justice Brennan argued, students' use of Pell grants made the entire institution the recipient of federal aid not because it "frees up" other funds, but because Congress intended the grants to provide aid to colleges as well as to students. *Id.* at 1236-37 (Brennan, J., concurring in part).

Second, Justice Brennan argued that the Court's declaration that "student financial aid programs are . . . *sui generis*," *id.* at 1221, severely limits the effect of the holding. *Id.* at 1237 (Brennan, J., concurring in part).

Finally, Justice Brennan attributed the Court's ruling to its willingness to defer to policy changes under the Reagan Department of Education. *Id.* (Brennan, J., concurring in part). Although the Department had argued consistently in the lower courts that student financial aid would trigger institution-wide coverage, *id.* at 1216 & n.10, it abandoned that position in 1983, claiming the court of appeals was incorrect in holding the entire College subject to Title IX coverage. *Id.* at 1237 (Brennan, J., concurring in part). The Court's facile treatment of the legislative history and its failure to consider nearly 10 years of administrative history lend credence to Justice Brennan's charge that the Court deferred to executive branch policy changes.

96. *Grove City College*, 104 S. Ct. at 1216-20.

97. *Id.* at 1220-22.

IV. THE IMPACT OF *GROVE CITY COLLEGE v. BELL*A. *Narrowing the Scope of Section 901(a)*

The Court's decision in *Grove City College v. Bell* represents a serious setback in the federal government's effort to end discrimination. Although the Court correctly ruled that Congress intended the statute to apply to colleges receiving no federal aid other than loans and grants to students,⁹⁸ it severely limited the effect of this ruling. If only the financial aid program at Grove City College must comply with section 901(a), the federal government is powerless to prevent discrimination in admissions, course enrollments, student housing and, indeed, in any other area of the institution.

Additionally, it makes little sense to speak of isolated "programs" in the context of an institution of higher education. Although individual departments each have their own internal administrative hierarchies, all are responsible to the policy-making body of the institution as a whole. A department within a college does not ordinarily function as a wholly independent entity.⁹⁹

The *Grove City College* interpretation of section 901(a)'s program-specific language may completely undermine progress in many areas of sex discrimination in programs which receive no direct federal aid. For instance, in *Haffer v. Temple University of Commonwealth System of Higher Education*,¹⁰⁰ decided two years before *Grove City College*, the district court held that section 901(a)'s anti-discrimination provisions applied to the University's intercollegiate athletic department.¹⁰¹ Although the University received over nineteen million dollars in federal grants and contracts in addition to loans and interest subsidies for construction, none of the aid went directly to the athletic program.¹⁰² The court based its holding on two grounds: (1) Congress intended section 901(a) to have a broad scope and specifically approved its application to athletics,¹⁰³

98. *Grove City College v. Bell*, 104 S. Ct. 1211, 1220 (1984).

99. See Comment, *Title IX of the 1972 Education Amendments: Harmonizing its Restrictive Language with its Broad Remedial Purpose*, 51 *FORDHAM L. REV.* 1043 (1983).

100. 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982).

101. *Id.* at 540.

102. *Id.* at 532.

103. *Id.* at 534. Although the court noted the ambiguity of Title IX's legislative history, it relied on Congress' resistance to several attempts to amend the statute to exclude intercollegiate athletics from coverage. *Id.* at 534-35. In addition, the court noted the intense controversy surrounding proposed Department regulations covering intercollegiate athletics. *Id.* at 536. During six days of hearings to determine whether the regulations complied with the law, coverage of athletics emerged as the most hotly contested issue. *Id.* at 536 & nn.9-10. Because of the prominence of the debate and the intense scrutiny which the regulations underwent, the

and (2) even if section 901(a) were narrowly interpreted to cover only directly assisted programs, such direct assistance could be found in the close connection between federal funds and athletics.¹⁰⁴

Under the *Grove City College* decision,¹⁰⁵ *Temple University* cannot be sustained on the first ground. If the athletic department receives no direct federal aid, it cannot be subject to Title IX's prohibition on sex discrimination.¹⁰⁶ Moreover, the second ground supporting the *Temple University* decision can be vigorously attacked under the *Grove City College* reasoning. In writing for the majority in *Grove City College*, Justice White expressly negated the proposition that because federal student aid goes eventually to an institution's general operating budget, and thus benefits all activities and programs, it triggers institution-wide coverage.¹⁰⁷ He concluded that Congress did not intend the Department's regulatory authority to reach beyond the particular program that directly receives the assistance.¹⁰⁸ Thus, according to Justice White, compliance with section 901(a) is to be determined not by how federal funds are spent, but by how they are tagged before disbursement to the institution.

In *Temple University*, for example, eighty percent of the wages of more than fifty employees of the college athletic department were paid through the federally funded College Work Study Program.¹⁰⁹ Under Justice White's reasoning in *Grove City College*, only the financial aid department administering the Work Study Program must comply with section 901(a) since the financial aid department is the only "program" receiving federal financial assistance.

Thus, the decision in *Grove City College* leaves the federal government unable to stop sex discrimination in athletic programs in federally funded institutions of higher education. Similarly, institutions which receive federal building loans and grants would be free to discriminate in admissions, education programs, athletics—in short, in everything but

court felt justified in relying on Congress' approval of the regulations as reflecting its intent that Title IX covered intercollegiate athletics. *Id.* at 536.

104. *Id.* at 540. The court found that athletic program employees received wages through the federally funded College Work Study Program, 42 U.S.C. § 2751 (1982), that intercollegiate athletes received hundreds of thousands of dollars in federal financial aid and that the athletic program used buildings financed by federal funds. *Id.* The court concluded that this established enough connection between the intercollegiate athletic program and federal funds going to Temple University to warrant Title IX coverage of athletics. *Id.*

105. 104 S. Ct. 1211 (1984).

106. *See id.* at 1221-22.

107. *Id.* at 1222.

108. *Id.*

109. *Temple Univ.*, 524 F. Supp. at 540.

the administration of their building funds. Such results cannot be tolerated in a nation committed to equality of opportunity for all citizens.

B. Extending the Grove City College Construction of Section 901(a) to the Fund Termination Provisions of Section 902

Although the Court in *Grove City College v. Bell* did not reach the issue of the proper construction of section 902 of Title IX,¹¹⁰ that section, which provides for administrative enforcement of section 901(a), also contains program-specific language.¹¹¹ Thus, it is likely that courts and agencies will apply the same narrow interpretation supplied by the *Grove City College* decision to section 902 enforcement powers.

Section 902 provides that:

Compliance with any requirement adopted pursuant to this section may be effected . . . 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, or other recipient as to whom . . . a finding [of noncompliance] has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found¹¹²

1. Current interpretations of section 902's fund termination provision

a. Board of Public Instruction v. Finch

Section 902 of Title IX is identical to section 602 of Title VI of the Civil Rights Act of 1964,¹¹³ which makes fund termination available to enforce prohibitions against race discrimination in federally funded programs or activities.¹¹⁴ Although no court has addressed the scope of the fund termination power of Title IX, the Fifth Circuit construed Title VI's fund termination provision in *Board of Public Instruction v.*

110. 20 U.S.C. § 1682 (1982).

111. *Id.*

112. *Id.*

113. *See* 42 U.S.C. § 2000d-1 (1982).

114. Section 602 of Title VI provides that:

Compliance with any requirement adopted pursuant to this section may be effected . . . 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, or other recipient as to whom . . . a finding [of noncompliance] 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

42 U.S.C. § 2000d-1 (1982).

Finch.¹¹⁵

In 1964 the public school system in Taylor County, Florida was almost completely segregated on the basis of race.¹¹⁶ Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race in federally funded programs or activities.¹¹⁷ The Taylor County School Board received federal assistance under three different grant statutes.¹¹⁸

After several years of unsuccessful attempts to achieve voluntary compliance with the Civil Rights Act of 1964, the Department instituted administrative proceedings to terminate all federal funds received by the School Board.¹¹⁹ The Department's hearing examiner entered an order terminating funds after finding that "progress toward student desegregation was inadequate."¹²⁰ Under the review provisions of the relevant grant statutes, the Board appealed directly to the Fifth Circuit Court of Appeals, claiming that the Department had failed to make findings of discrimination under each of the School Board's federal grant programs.¹²¹

On appeal the Department first contended that the word "program" in section 602 meant an entire school program rather than a particular federal grant program.¹²² Second, it argued that the court must reject the School Board's argument on appeal because the Board did not raise it at the administrative proceedings.¹²³

The Fifth Circuit held that the program-specific language of section 602 required the Department to make findings of discrimination in each federal grant program in which the School Board participated.¹²⁴ The court reasoned that the case presented an exception to the general rule

115. 414 F.2d 1068 (5th Cir. 1969).

116. *Id.* at 1070.

117. 42 U.S.C. § 2000d (1982).

118. *Finch*, 414 F.2d at 1071. The Board received a total of \$203,657.55 in aid for education of low income families, Title II, Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241a-241m (Supp. 1969), grants for supplementary education centers, Title III, Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 841-848 (Supp. 1969), and for adult education, Basic Education for Adults, 20 U.S.C. §§ 1201-1213 (Supp. 1969).

119. *Finch*, 414 F.2d at 1070-71. Until 1965, the school district was completely segregated by race. The Board responded to the enactment of the Civil Rights Act of 1964 by adopting a "freedom of choice" plan. *Id.* at 1070. Although the Commissioner of Education approved the plan and the Board formally complied with Department of Health, Education and Welfare (HEW) requirements, by 1967 HEW believed the pace of desegregation in Taylor County was unacceptable. *Id.*

120. *Finch*, 414 F.2d at 1071.

121. *Id.* at 1071-72.

122. *Id.* at 1076.

123. *Id.* at 1072.

124. *Id.* at 1079.

governing judicial review of agency adjudications.¹²⁵ Ordinarily a court “‘usurps the agency’s function when it sets aside the administrative determination upon a ground not theretofore presented.’”¹²⁶ The Fifth Circuit concluded, however, that because the Department made its determination in “excess of statutory authority,”¹²⁷ preventing the court from evaluating possible prejudice to Taylor County, it could not affirm the agency’s order.¹²⁸ The court reasoned that the Board’s segregation of faculty and students did not automatically render all programs in Taylor County schools defective.¹²⁹

The Fifth Circuit’s interpretation of the word “program” in section 602 of Title VI to mean “particular grant statute” is questionable.¹³⁰ As noted above,¹³¹ the program-specific language of Title VI is better explained in terms of Congressional concern that discrimination in public schools would lead to cutoffs of federal aid unrelated to education. The *Finch* decision, with its emphasis on the scope of judicial review of administrative fact finding, may have been motivated by a desire to exercise more control over agency adjudication. Thus, the court may have looked for a statutory construction that would require the Department to make more specific findings.

In fact, the court’s construction of section 602 probably did not affect the outcome of the case. The court noted that “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.”¹³² The Department only had to make findings on the record that the School Board’s federal grants supported programs infected by a discriminatory environment. Given that Taylor County schools were entirely segregated, such a finding was reasonable.

b. application of Finch to Title IX’s fund termination provision

The Department focused on dicta in *Board of Public Instruction v. Finch* to support a broad construction of Title IX’s fund termination provision in the preamble to its Title IX regulations.

125. *Id.* at 1073.

126. *Id.* at 1072 (quoting Unemployment Compensation Comm’n v. Aragon, 329 U.S. 143, 154 (1946)).

127. *Id.* at 1073.

128. *Id.* at 1074.

129. *Id.*

130. See Note, *supra* note 67.

131. See *supra* notes 66-71 and accompanying text.

132. *Finch*, 414 F.2d at 1074 (emphasis added).

The preamble states that:

[T]he interpretation of the [fund termination] provision in Title IX will be consistent with the interpretation of similar language contained in Title VI . . . [T]he only case specifically ruling on the language contained in Title VI . . . holds that Federal funds may be terminated under Title VI upon a finding that they "are [sic] infected by a discriminatory environment."¹³³

The preamble misstates the *Finch* holding. *Finch* requires that the agency make findings of fact to determine whether discrimination occurred in each "program" funded by federal grants.¹³⁴ A situation in which the funds "support a program . . . infected by a discriminatory environment" satisfies the requirement.¹³⁵ Thus, before *Grove City College v. Bell*, the scope of the fund termination power in section 902 of Title IX turned on the meaning of the phrase "infected by a discriminatory environment."

2. The effect of *Grove City College* on *Finch*

A broad interpretation would find "infection" of federally funded programs whenever a connection existed between those programs and discrimination in another part of the institution receiving the assistance. For example, in *Haffer v. Temple University of Commonwealth System of Higher Education*,¹³⁶ the district court concluded that because employees paid through the College Work Study Program worked for the University's intercollegiate athletic department, the athletic department must comply with section 901(a).¹³⁷ Under a broad interpretation of the infection concept, College Work Study funds could then be terminated to enforce compliance with section 901(a).

A narrow interpretation of "infection" would confine termination to assistance which directly funded the discriminatory program. Under this view, for example, because Temple University's athletic program did not

133. 40 Fed. Reg. 24,128 (1975) (citing *Board of Pub. Instruction v. Finch*, 414 F.2d 1068, 1078 (5th Cir. 1969)). The fund termination provision of Title IX is mentioned only in the preamble to the Department's Title IX regulations. The preamble states that, consistent with the interpretation of Title VI's fund termination provision, aid received by an education recipient will be subject to termination "if it receives or benefits from such assistance." *Id.* Beyond this, no other regulation addresses fund termination. See 34 C.F.R. §§ 106 to 106.71 (1984).

134. *Finch*, 414 F.2d 1079.

135. *Id.* at 1078.

136. See *supra* notes 100-109 and accompanying text.

137. *Haffer v. Temple Univ. of Commonwealth Sys. of Higher Educ.*, 524 F. Supp. 531, 540 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982).

receive federal aid intended expressly to benefit athletics, no federal aid could be terminated on the basis of discrimination in athletics.

The decision in *Grove City College* narrowing the scope of section 901(a) makes it highly unlikely that a court would adopt a broad interpretation of section 902 fund termination powers. As noted earlier, under the *Grove City College* construction of section 901(a) the Department could not require Temple University to end sex discrimination in athletics, even though the University received many types of federal financial assistance. It would make no sense to construe section 902 to allow termination of funds not directly intended to support athletics, no matter how "infected" the funded programs might be. The *Grove City College* decision, then, will have the effect of limiting the scope of both section 901(a) and section 902.

V. CONGRESSIONAL REACTION TO *GROVE CITY COLLEGE V. BELL*

Congress reacted swiftly to the *Grove City* decision.¹³⁸ On April 12, 1984, less than two months after the decision came down, Senator Edward Kennedy introduced S. 2568, "a bill to clarify the application of Title IX."¹³⁹

Senator Kennedy's bill, the Civil Rights Act of 1984, would have enlarged the scope of section 901(a)'s anti-discrimination provisions.¹⁴⁰

138. The Civil Rights Act of 1984, *supra* note 7, was introduced on April 12, 1984 and represented the most comprehensive legislative response to the issues raised in *Grove City College*. The bill would have amended not only Title IX, but also Title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. 130 CONG. REC. S4586 (daily ed. Apr. 12, 1984). The Senate sponsors of the bill believed that because the language interpreted in *Grove City College* was similar to the language of the other civil rights statutes, a clarification amendment was necessary for each. *Id.*

139. 130 CONG. REC. S4585.

On February 28, 1984, the day *Grove City College* was decided, Senator Packwood introduced the Sex Discrimination in Education Reform Act of 1984. S. 2363, 98th Cong., 2d Sess., 130 CONG. REC. S1890, S1894 (daily ed. Feb. 28, 1984). This bill would have replaced the words "education program or activity" with the words "education program, activity or institution" in section 901(a) of Title IX. *Id.* at S1894.

That same day, Representative Schneider proposed a bill in the House "to clarify the intent of Congress in adopting title IX . . . to prohibit any educational institution which receives any Federal assistance, direct or indirect, from discriminating on the basis of sex." H.R. 5011, 98th Cong., 2d Sess., 130 CONG. REC. H1096 (daily ed. Mar. 1, 1984).

Neither bill was reported out of committee.

140. Section 901(a) of the Civil Rights Act of 1984 provided in pertinent part, that, "[n]o person in the United States shall, on the basis of sex, be excluded from participation, be denied benefits, or be subjected to discrimination by any education recipient of Federal financial assistance." H.R. REP. NO. 829, 98th Cong., 2d Sess. 40 (1984).

Section 902 defined "recipient" as:

(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organ-

It nevertheless would have retained the requirement of a nexus between funds terminated under section 902 and discrimination found.¹⁴¹ Thus, the proposed language would have given the executive branch broad powers to regulate and investigate an entire institution if any of its subunits received federal financial assistance. The power to terminate funding upon a finding of discrimination, however, would have been limited to "the particular assistance which supports such noncompliance."¹⁴²

The bill's fund termination language could, on its face, support a broad interpretation, but the legislative history indicates that its drafters intended to make enforcement powers under section 902 more narrow than the coverage provisions of section 901(a).¹⁴³ Thus, the amendment, if enacted, would have created a disparity between the scope of section 901(a) and the fund termination powers in section 902.¹⁴⁴ It would have enabled the Department of Education to require all parts of an institu-

ization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity) . . .

. . . to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

Id. at 40-41.

Under proposed section 902, fund termination "shall be limited to the particular political entity or part thereof, or other recipient as to which [a finding of noncompliance] has been made, and shall be limited in its effect to the particular assistance which supports such noncompliance." *Id.*

By substituting the word "recipient" for the words "program or activity" in section 901(a), the bill would have made clear that Title IX coverage extends to an entire institution if any of its subunits receives federal aid. The new language would have shifted the focus of the anti-discrimination provision from the level of direct aid to a program to that of an institution or entity which actually receives direct or indirect support from federal funding.

The bill also would have eliminated the words "program or activity" from the fund termination provision, but would have retained the concept of limiting cutoffs. *Id.* The new language would have limited fund termination to the "particular assistance which supports the noncompliance." *Id.*

141. *See supra* note 140.

142. H.R. REP. NO. 829, 98th Cong., 2d Sess. 40-41 (1984).

143. *Id.* at 33.

144. On its face, the fund termination provision provided in the bill was much narrower than the coverage provision. The termination provision seemed to embody two distinct limitations. The first part of the sentence, limiting termination to the "particular political entity, or part thereof, or other recipient" found to be in noncompliance, seemed to address geographical limitations. Presumably, it would have prevented a cutoff of funding to an entire state school system after a finding of discrimination in one district. This language was not substantively different from that of the original Title IX. *See* 20 U.S.C. § 1682 (1982).

The second part of the sentence would have limited the effects of the fund termination. It can be read to mean that within the political entity found to be in noncompliance, the assistance to be cut off is that which "supports the noncompliance so found." 130 CONG. REC. S4588 (daily ed. Apr. 12, 1984). Although the word "supports" is susceptible to a broader

tion to comply with section 901(a) if any part received federal financial assistance, but the Department could terminate funds to enforce section 901(a) only if that money were intended to directly benefit the program in which discrimination occurred. If no assistance went directly to that program, no funds could be terminated.

The Civil Rights Act of 1984 passed the House of Representatives overwhelmingly,¹⁴⁵ but it failed to pass the Senate despite having sixty-three co-sponsors there.¹⁴⁶ Republican senators were concerned that the

interpretation than that given to the original program-specific language, one would be straining to accord it the same breadth as the coverage provision in section 901(a).

The legislative history of the Civil Rights Act of 1984 indicates that Congress did not intend to alter the fund termination provision. H.R. REP. NO. 829, 98th Cong., 2d Sess. 33 (1984). The bill retains the requirement that a nexus be established between the discrimination and any federal funding to be terminated. *Id.* Pinpointing would apply to termination only. *Id.* According to the report of the House Committee on Labor and Education, the concept of "support" is consistent with that found in *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969). The language deletes "program or activity" in the enforcement as well as coverage sections to avoid inconsistency. Congress intended to retain current enforcement procedures as practiced by the Department of Education. H.R. REP. NO. 829, 98th Cong., 2d Sess. 34 (1984).

145. 130 CONG. REC. H7057 (daily ed. June 26, 1984).

146. The Republican leadership in the Senate never scheduled a vote on the measure. 130 CONG. REC. S12,143 (daily ed. Sept. 27, 1984) (remarks of Sen. Kennedy).

In the final days of the session, Senator Byrd introduced a modified version of the bill as an amendment to the fiscal 1985 spending bill, H.R.J. Res. 648, 98th Cong., 2d Sess. (1984), in an effort to force Senate Republicans to vote on civil rights just before adjourning to campaign for the November 1984 elections.

The amendment dropped the definition of "recipient" contained in S. 2568 § 2(a) and substituted a clause providing that the term should be construed according to agency regulations in effect prior to the *Grove City College v. Bell* decision. 130 CONG. REC. 12,144 (daily ed. Sept. 27, 1984). According to Senator Packwood, the purpose of the change was "to remove all doubt that the bill will result in an expansion of civil rights jurisdiction." *Id.* Since the agency definition of "recipient," 34 C.F.R. 106 (1984), was the same as that in S. 2568 § 2(a), however, the amendment represented no substantive difference from the original bill.

Senator Byrd's substitute retained the narrow fund termination provision of S. 2568 § 2(b)(2)(A). 130 CONG. REC. S12,144 (daily ed. Sept. 27, 1984). According to Senator Packwood, "discrimination in the English department at a college would not require termination of all Federal funds received by the college simply because [the] funds . . . may have freed up other college funds to be used in the English department." *Id.*

Senator Byrd's amendment survived a ruling that it was not germane to the spending bill by a vote of 51-48. *Id.* at S12,166-67. Immediately following the vote, Senator Hatch, a major opponent of the Civil Rights Act of 1984 and chairman of the Senate Committee on Labor and Human Resources, introduced three controversial amendments of his own in an attempt to beat Senator Byrd at his own game. Senator Hatch tacked onto Senator Byrd's measure an amendment granting tuition tax credits to parents of children attending private schools, an anti-gun control provision and a measure prohibiting the use of busing to achieve school desegregation. *Id.* at S12,167. Senator Hatch apparently sought to force Senate Democrats to vote on these controversial conservative issues if the Democrats wanted to force a vote on civil rights.

Pressed for time as the federal government threatened to grind to a halt for lack of money,

bill would expand civil rights jurisdiction if courts construed the proposed changes too broadly.¹⁴⁷ The bill would have amended not only Title IX, but Title VI of the Civil Rights Act of 1964,¹⁴⁸ section 504 of the Rehabilitation Act of 1973,¹⁴⁹ and the Age Discrimination Act of 1975.¹⁵⁰ All of these laws contain similar language prohibiting discrimination in programs or activities receiving federal financial assistance.¹⁵¹

Special language was included in the proposed amendments to Title VI and section 504 to exclude from coverage the "ultimate beneficiary" of such assistance as Social Security benefits or food stamps.¹⁵² Senator Hatch, one of the chief conservative opponents of the Civil Rights Act of 1984, nevertheless insisted that the bill would result in Title VI coverage of grocery stores accepting food stamps, drug stores filling Medicaid prescriptions and the like.¹⁵³ Thus, at the close of the session, the Ninety-eighth Congress failed to agree on legislation overturning *Grove City College v. Bell*.

Senate majority leader Robert Dole, an early sponsor of the Civil Rights Act of 1984 who later withdrew his support, introduced a compromise bill, S. 272, in the early days of the Ninety-ninth Congress.¹⁵⁴

The compromise bill, titled the Civil Rights Amendment Act of 1985, "would amend all four laws to make clear that where Federal financial assistance is extended to any educational program or activity of an education institution, the institution itself is to be considered the covered program."¹⁵⁵ The Dole bill also provides that in cases "not involving education institutions, the meaning of the phrase program or activity remains the same and should be construed without consider[ing] . . . the *Grove City* decision"¹⁵⁶

Two weeks later, Senator Kennedy introduced S. 431, the Civil

and wishing to avoid controversy and commence election campaigns, the Senate tabled Senator Byrd's civil rights amendment on October 2, 1984 by a vote of 53-45. 130 CONG. REC. S12,642 (daily ed. Oct. 2, 1984).

147. 130 CONG. REC. S12,144 (daily ed. Sept. 27, 1984).

148. 42 U.S.C. §§ 2000d to 2000d-4 (1982).

149. 20 U.S.C. § 794 (1982).

150. 42 U.S.C. §§ 6101-6107 (1982).

151. See 42 U.S.C. § 2000d, 29 U.S.C. § 794, and 42 U.S.C. § 6101 (1982).

The Senate sponsors believed that because courts might apply the *Grove City College* construction to each civil rights law, each should be clarified. 130 CONG. REC. S4586 (daily ed. Apr. 12, 1984).

152. H.R. REP. NO. 829, 98th Cong., 2d Sess. 27 (1984).

153. See 130 CONG. REC. S12,149-50 (daily ed. Sept. 27, 1984) (selected illustrations of the impact of the bill offered by Sen. Hatch).

154. 131 CONG. REC. S636 (daily ed. Jan. 24, 1985).

155. *Id.*

156. *Id.* at S637.

Rights Restoration Act of 1985.¹⁵⁷ Senator Kennedy's proposed amendment would define the words "program or activity" in all four civil rights laws "to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives federal financial assistance."¹⁵⁸ The Kennedy bill would not limit the new definition of "program or activity" to education programs only, as would the Dole bill. Further, the Kennedy bill would replace the words "program or activity" in the fund termination provision with the language "assistance which supports the noncompliance," although this change is not intended to alter current interpretations of section 902.¹⁵⁹ The Dole bill makes no express reference to termination powers.

VI. ENSURING THE EFFECTIVENESS OF TITLE IX

A. *Ineffectiveness of Legislation Proposed to Date*

Title IX must be amended to accomplish two purposes: (1) to overturn the *Grove City College v. Bell* decision narrowing the scope of section 901(a)'s anti-discrimination provisions, and (2) to clarify the scope of the fund termination power accorded in section 902.

Both of the pending bills achieve the first goal. Each would make clear that an entire college must comply with section 901(a) if any part of the college receives federal financial assistance. Each recognizes that to regard programs or departments within an integrated educational institution as isolated entities seriously hampers efforts to end discrimination.¹⁶⁰

Congress has failed to recognize, however, the relationship between section 901(a) and 902 and the impact of the *Grove City College* decision and the proposed amendments on section 902 fund termination powers. First, the existence of program-specific language in *both* sections leaves open the possibility that courts will apply the *Grove City College* reasoning in construing section 902. Congress seems not to have considered this likelihood. Each of the bills is intended only to change the scope of section 901(a), leaving the substance of section 902 unchanged.¹⁶¹ Because no court has yet construed the program-specific language of section 902, Congress in effect proposes to retain an ambiguity. A court subsequently interpreting section 902 may infer that even though Congress

157. 131 CONG. REC. S1303, 99th Cong., 1st Sess. (daily ed. Feb. 7, 1985).

158. *Id.* at S1302.

159. *See, e.g.*, S. 431 § 3(b), 99th Cong., 1st Sess., 131 CONG. REC. S1303 (daily ed. Feb. 7, 1985).

160. *See supra* note 99 and accompanying text.

161. *See, e.g.*, 131 CONG. REC. S1303 (daily ed. Feb. 7, 1985) (remarks of Sen. Kennedy concerning enforcement powers under S. 431).

intended to overturn *Grove City College*, it intended only to disavow the narrow construction as it applies to section 901(a).

Second, it makes little sense to require that an entire institution comply with section 901(a) and then to limit section 902 fund termination to assistance that directly benefits the discriminatory program.¹⁶² The result in many cases will be to deprive the Department of an effective means of enforcing compliance with Title IX. Yet both bills retain program-specific limitations on the scope of the fund termination provision.

The scope of section 902 fund termination powers must be co-extensive with the proposed broad scope of section 901(a)'s prohibition on sex discrimination. The proposed bills do not go far enough in simply making an entire institution subject to section 901(a) if any part receives federal financial assistance. The Department must also be able to terminate any federal assistance received by the institution if discrimination occurs in any part of it.

A more narrow fund termination provision, even if coupled with institution-wide coverage under section 901(a), would cripple the effectiveness of Title IX for several reasons. First, there are indications that the Department of Education will not investigate discrimination complaints if it believes that fund termination is unavailable as an enforcement tool.¹⁶³ It would be inefficient to expend time and limited agency resources to pursue a claim which, even if true, the agency could not enforce.

Second, although the Department rarely cuts off funding because of noncompliance, the threat of termination gives the Department the leverage to negotiate effective remedial measures with noncompliant entities.¹⁶⁴ Limiting termination powers may substantially reduce a recipient's incentive to bring its programs into compliance.

Finally, the possibility exists that retention of the limiting language in the fund termination provision may influence courts to limit the other means of enforcement available under Title IX.¹⁶⁵ Title IX can be enforced by injunction¹⁶⁶ and by a private right of action.¹⁶⁷ The Justice Department has contended that the Supreme Court in *North Haven*

162. See *supra* notes 133-37 and accompanying text.

163. H.R. REP. NO. 829, 98th Cong., 2d Sess. 7 (1984).

164. 130 CONG. REC. S4587 (daily ed. Apr. 12, 1984).

165. 20 U.S.C. § 1682(2) (1982). "Compliance . . . may be effected . . . by any other means authorized by law." *Id.*

166. 130 CONG. REC. S4587 (daily ed. Apr. 12, 1984). A funding agency may refer discrimination cases to the Justice Department, which may seek injunctive relief against the offending entity. *Id.*

167. *Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979).

*Board of Education v. Bell*¹⁶⁸ construed the program-specific language to limit all enforcement practices.¹⁶⁹ Since the proposed bills would retain limitations on fund termination, by analogy, the limit may be held to apply to all enforcement practices.

Yet the fund termination provision must not be so broad as to permit wholesale fund cutoffs not reasonably related to the discrimination found. Title IX would be rendered nugatory if the Department could not terminate a library grant upon a finding of discrimination in a college athletic program. However, if the college were part of a statewide system of campuses, a termination of funds to the entire system would seem unfair and excessive.

Additionally, colleges and universities are not the only entities that receive federal education aid. Federal aid may go directly to states, cities, or state and local government agencies. The fund termination provision must be drafted to prevent termination of education aid to an entire state based on discrimination in one public school district.

The drafters of the Civil Rights Act of 1984 attempted to balance these competing concerns, but only with respect to section 901(a)'s prohibition on discrimination. They sought to define the term "recipient of Federal financial assistance" to differentiate between appropriate and inappropriate applications of section 901(a). They wanted to limit federal intrusion into the affairs of states and private organizations that receive federal financial assistance.¹⁷⁰

One way to balance these competing concerns would be to include a precise definition of the term "recipient of Federal financial assistance" in the statute. The definition should be drafted to clearly differentiate between appropriate and inappropriate applications of sections 901(a) and 902.

The drafters of the unsuccessful Civil Rights Act of 1984 took this approach,¹⁷¹ but only with respect to section 901(a)'s prohibition on discrimination. Section 901(a) of the bill would have prohibited sex discrimination "by any education recipient of Federal financial

168. 456 U.S. 512 (1982).

169. 130 CONG. REC. S8040 (daily ed. June 21, 1984) (opinion of Justice Department on impact of Title IX amendments). The Court's holding in *North Haven* provides no support for this contention. *North Haven*, 456 U.S. at 538. The Court held only that "an agency's authority under Title IX to both promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902." *Id.* (citation omitted). The case makes no reference to the "other means" of enforcement provided for in section 902 of Title IX.

170. 130 CONG. REC. S4586 (daily ed. Apr. 12, 1984).

171. See *supra* notes 145-53 and accompanying text.

assistance."¹⁷² It defined recipient as:

Any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization or entity), . . . to which Federal financial assistance is extended (directly or through another entity or a person) or which receives support from the extension of Federal financial assistance to any of its subunits.¹⁷³

The drafters intended aid to a subunit to trigger coverage of a parent entity only if that aid benefits or supports the parent.¹⁷⁴ Examples given in the Report of the House Committee on Education and Labor¹⁷⁵ indicate clearly that "support" meant direct financial support.¹⁷⁶

For example, a state receiving education block grants which it disburses to school districts as it chooses would not be subject to section 901(a) coverage, except in the distribution of the funds, unless the state agency administering the funds received direct financial benefit.¹⁷⁷ The type of benefit contemplated would exist only if the agency retained some

172. S. 2568, § 2(a)(3), 98th Cong., 2d Sess., 130 CONG. REC. S4588 (daily ed. Apr. 12, 1984).

173. S. 2586, § 2(b)(2)(A)-(B), 98th Cong., 2d Sess., 130 CONG. REC. S4588 (daily ed. Apr. 12, 1984).

174. *Id.*

175. H.R. REP. NO. 829, 98th Cong., 2d Sess. 28 (1984).

176. *Id.* at 26-27.

177. *Id.* at 26. The Committee explained the language as follows:

A recipient is covered in its entirety, including its subunits. Political subdivisions (such as cities) are legal entities unto themselves and should not be treated as subunits of their States. Thus, the receipt by a State of federal funds would not necessarily lead to coverage of all political subdivisions, but it would lead to coverage of all State agencies and departments. A political subdivision must itself receive assistance in order to be covered. This may happen through the direct receipt of federal funds, or through the receipt of federal funds from a State or other recipient, but it is not the automatic result of a State's coverage.

Id.

The report includes several hypotheticals illustrating how the concept of support should operate. For example, under the following fact situation, the university would not be covered by Title IX:

A researcher in his or her individual capacity receives a National Institute of Mental Health (NIMH) research grant of \$1 million. The grant is distributed through the university but it serves only as a conduit of the funds (no portion is retained by the university for administrative purposes . . .).

. . . Under these provisions, the researcher is a recipient and must comply with the antidiscrimination provisions. . . . [T]he university would not be covered.

Id. at 28.

money for administrative expenses.¹⁷⁸ Even then, only the state agency, not the entire state, would be subject to section 901(a). If the agency disbursed all the funds to the school districts, discrimination in a district could not subject the state agency or the state itself to section 901(a).

Although the attempt was laudable, the Civil Rights Act of 1984 suffered from two flaws, one of which proved fatal. First, the bill failed to extend the broad scope of section 901(a) to section 902 enforcement powers. Second, the bill's vague and confusing definition of recipient, intended to cover every situation that might arise, ultimately stalled its passage. Many senators found the language too imprecise to exclude inappropriate federal jurisdiction over civil rights.¹⁷⁹

A definition of "recipient" should differentiate simply and precisely between the various entities affected when the government extends federal financial assistance for education. Once developed, such a definition should apply equally to section 901(a) and section 902 to ensure that funds can be terminated to the same extent that discrimination can be prohibited.

B. A Proposal to Amend Title IX

Title IX should be amended to reflect these considerations. First, section 901(a) should be amended to read: *Recipients of federal aid for education shall not exclude, deny benefits to, or discriminate in any way against persons on the basis of sex.*

Second, a section should be added defining recipient as:

Any entity which receives direct financial benefit from federal financial education assistance extended

- (a) to the entity itself;*
- (b) to those organizations the entity oversees;*
- or*
- (c) to the entity's parent organization.*

Third, section 902 should be revised to read:

(a) Each federal department or agency authorized to extend federal financial assistance for education, other than by contract of insurance or guaranty, shall make rules implementing section 901(a) of this Title. These rules shall be consistent with the statute authorizing the financial assistance and shall apply generally to recipients of such assistance. The President must approve all rules before they become effective.

178. *Id.* at 26-27.

179. *See supra* notes 152-53 and accompanying text.

(b) Federal departments and agencies may enforce rules adopted pursuant to section 902(a) in the following ways:

(1) By terminating or refusing to grant education assistance to a noncompliant recipient after opportunity for hearing and after an express finding on the record of the recipient's failure to comply.

(A) Any termination or refusal to grant assistance shall be limited to assistance which benefits the recipient found to be noncompliant.

(B) An order terminating or refusing to grant assistance shall only take effect thirty days after the head of the department or agency files a written report of the circumstances and grounds for such action with the House and Senate Committees in charge of the federal assistance involved.

(2) By any other means authorized by law, but only after notice to the recipient and a determination that the recipient will not comply voluntarily.

The proposed language seeks to simplify section 901(a) by eliminating program-specific language and making the provision easier to follow. The proposed definition of "recipient" builds in the flexibility of the definition in the Civil Rights Act of 1984 but eliminates some of the confusing terminology. For example, under the proposed language, the Temple University athletic department¹⁸⁰ would be a recipient because assistance extended to its parent organization, Temple University, supported the athletic department. On the other hand, a state education department which disbursed all federal assistance to school districts would not be a recipient because the agency receives no direct support from the aid.

The use of the word "recipient" in the fund termination provision ensures that fund cutoffs will be co-extensive with the scope of section 901(a), but no broader. For example, the Department could terminate Temple University's federal assistance if it supported a discriminatory athletic department. However, noncompliance in a school district receiving federal assistance through the state could not result in termination of all federal education aid to that state.

Other changes in the language of section 902 are intended only to express existing provisions more clearly.

180. See *supra* notes 100-109 and accompanying text.

VII. CONCLUSION

In *Grove City College v. Bell*,¹⁸¹ the Supreme Court narrowed the scope of section 901(a) of Title IX of the Education Amendments of 1972 which prohibits sex discrimination¹⁸² in federally funded programs and activities. The Court first held that a college must comply with section 901(a) even if it received no aid other than federal loans and grants to students.¹⁸³ It also held, however, that only the particular program within the College that received the federal assistance must comply.¹⁸⁴ Thus, because Grove City College received no federal assistance beyond federal financial aid to students, only the College's financial aid department must comply with section 901(a).¹⁸⁵

The Ninety-eighth Congress failed to pass the Civil Rights Act of 1984,¹⁸⁶ which would have broadened the scope of section 901(a). Although the bill would have overturned the Court's construction of section 901(a) in *Grove City College v. Bell*, it would have left the scope of section 902 fund termination powers vulnerable to a narrow construction.¹⁸⁷

Two bills introduced early in the Ninety-ninth Congress, S. 272¹⁸⁸ and S. 431,¹⁸⁹ suffer from the same problem. Both would overturn the Court's narrow interpretation of section 901(a), but fail to address the ambiguity left in section 902.¹⁹⁰

Congress should 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. This Note proposes legislation that will enable federal agencies to effectively enforce their anti-discrimination regulations and prevent fund cutoffs unrelated to discriminatory practices.

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181. 104 S. Ct. 1211 (1984).

182. See 20 U.S.C. § 1681(a) (1982).

183. *Grove City College*, 104 S. Ct. at 1220.

184. *Id.* at 1222.

185. *Id.*

186. See *supra* note 7.

187. See *supra* notes 140-44 and accompanying text.

188. See *supra* note 154.

189. See *supra* note 157.

190. See *supra* note 164.

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