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Claudia S. Lewis

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TITLE IX OF THE 1972 EDUCATION AMENDMENTS: HARMONIZING ITS RESTRICTIVE LANGUAGE WITH ITS BROAD REMEDIAL PURPOSE

INTRODUCTION

Title IX of the Education Amendments of 1972¹ proscribes gender discrimination in "any education program or activity receiving Federal financial assistance."² Each agency awarding federal funds to any education program or activity is authorized to promulgate regulations to effectuate the objectives of the statute.³ Enforcement may be carried out by any means authorized by law including the termination of or refusal to grant federal funds to the noncomplying recipient, but any such cut off or refusal "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found."⁴

The scope of Title IX, which is "program-specific" both as to its prohibition of sex discrimination and as to its enforcement provision,⁵

1. Pub. L. No. 92-318, tit. IX, 86 Stat. 373 (codified at 20 U.S.C. §§ 1681-1686 (1976 & Supp. V 1981)).

2. 20 U.S.C. § 1681(a) (1976). "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" *Id.*

3. *Id.* § 1682.

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 . . . 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 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 . . . of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law.

Id.

4. *Id.*

5. Two other remedial statutes contain virtually identical program-specific language. The Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4 (1976 & Supp. IV 1980), prohibits discrimination on the basis of race, color or national origin in a program receiving federal financial assistance. The Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976 & Supp. IV 1980), prohibits discrimination on the basis of being handicapped in a program receiving federal financial assistance. Therefore, the interpretation of the program-specific language in Title IX may have implications for understanding Title VI and the Rehabilitation Act.

has been the subject of much dispute.⁶ Some courts have narrowly construed its restrictive language,⁷ which has had the effect of frustrating the broad remedial goals of the statute. On the other hand, at least one court has given the statute its full remedial effect by ostensibly "reading out" the program-specific language.⁸

It is the thesis of this Note that the program-specific language can be given practical significance without compromising the effectiveness of Title IX in deterring sex discrimination in education.⁹ Part I discusses the two narrow interpretations of the statutory language, and shows that both frustrate the purposes of the statute by misconstruing the legislative intent. Part II argues that the broad approach gives practical meaning to the program-specific language without rendering the statute ineffective; it then proposes a test for the application of this approach.

I. THE NARROW APPROACHES

A. *Earmark Theory*

Several courts have defined "program or activity receiving Federal financial assistance" as the smallest identifiable unit that is within an institution responsible for the alleged discrimination and that is specifically "earmarked" to receive direct federal aid.¹⁰ In *University of*

6. See N.Y. Times, Sept. 10, 1982, at A17, col. 1.

7. *E.g.*, *Hillsdale College v. HEW*, 696 F.2d 418, 427-30 (6th Cir. 1982); *Rice v. Presidents & Fellows of Harvard College*, 663 F.2d 336, 338-39 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *University of Richmond v. Bell*, 543 F. Supp. 321, 322 (E.D. Va. 1982); *Bennett v. West Tex. State Univ.*, 525 F. Supp. 77, 80 (N.D. Tex. 1981); *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376, 1389 (E.D. Mich. 1981); *Stewart v. New York Univ.*, 430 F. Supp. 1305, 1314 (S.D.N.Y. 1976).

8. *Grove City College v. Bell*, 687 F.2d 684, 693 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983); *accord Haffer v. Temple Univ.*, 688 F.2d 14, 15-17 (3d Cir. 1982) (*per curiam*).

9. The scope of this Note is limited to the statutory construction of Title IX. Thus, constitutional issues that may arise in the context of Title IX—such as whether first amendment rights of freedom of association are violated by governmental regulation of private institutions or whether students' due process rights are violated by termination of their financial aid because of the institutional sex discrimination—are beyond the scope of this Note.

10. See *Rice v. Presidents & Fellows of Harvard College*, 663 F.2d 336, 338 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *Dougherty County School Sys. v. Harris*, 622 F.2d 735, 737 (5th Cir. 1980), *vacated on other grounds*, 102 S. Ct. 2264 (1982); *University of Richmond v. Bell*, 543 F. Supp. 321, 330 (E.D. Va. 1982); *Bennett v. West Tex. State Univ.*, 525 F. Supp. 77, 80-81 (N.D. Tex. 1981); *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376, 1387 (E.D. Mich. 1981); *Stewart v. New York Univ.*, 430 F. Supp. 1305, 1314 (S.D.N.Y. 1976); Note, *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof,"* 78 Mich. L. Rev. 608, 620-21 (1980) [hereinafter cited as *Defining Recipient*].

Richmond v. Bell,¹¹ for example, the Department of Education¹² (Department) sought to investigate a complaint of sex discrimination in the university's athletic department.¹³ The federal district court viewed the athletic department, not the whole university, as the relevant education program.¹⁴ Although the university was a beneficiary of a variety of federal grant and loan statutes,¹⁵ the court held that the Department had no authority to make such an investigation or to terminate any federal aid because the "athletic program" did not directly receive earmarked federal funds.¹⁶

The earmark theory is a very narrow interpretation of the scope of Title IX. Private universities that purposely avoid receiving direct federal aid¹⁷ would be entirely exempt from the statute, even though their students may receive federal grants and loans.¹⁸ Moreover, general non-earmarked federal aid, though directly received by an institution, would not trigger Title IX's application.¹⁹ Finally, compliance with and enforcement of Title IX would apply, if at all, only to scattered areas within an educational institution, not to the institution itself.²⁰ Beside these practical consequences, however, the remedial nature, statutory language and the legislative history of Title IX all mandate a rejection of this narrow reading.

11. 543 F. Supp. 321 (E.D. Va. 1982).

12. Originally, the Department of Health, Education and Welfare was the principal federal agency responsible for enforcement of Title IX. But in 1979 its functions under the statute were transferred to the Department of Education by § 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 678 (codified at 20 U.S.C. § 3441(a)(3) (Supp. V 1981)).

13. 543 F. Supp. at 323.

14. *Id.* at 330-31.

15. *Id.* at 323 & n.1.

16. *Id.* at 333.

17. See *Hillsdale College v. HEW*, 696 F.2d 418, 420 (6th Cir. 1982); *Grove City College v. Bell*, 687 F.2d 684, 689 & n.7 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983).

18. The earmark theory would exempt a whole class of private institutions from Title IX. See 122 Cong. Rec. 28,145 (1976) (remarks of Sen. Bayh). The impact would be great: Approximately 1000 private colleges receive federal aid only in the form of student loans and grants. N.Y. Times, Feb. 23, 1983, at A15, col. 1.

19. *University of Richmond v. Bell*, 543 F. Supp. 321, 328-29 (E.D. Va. 1982); see *Bennett v. West Tex. State Univ.*, 525 F. Supp. 77, 80-81 (N.D. Tex. 1981).

20. See *Rice v. President & Fellows of Harvard College*, 663 F.2d 336, 338 (1st Cir. 1981) (grading practices not covered by Title IX because federal aid earmarked only to work-study program), *cert. denied*, 456 U.S. 928 (1982); *University of Richmond v. Bell*, 543 F. Supp. 321, 330 (E.D. Va. 1982) (athletic department not covered by Title IX because federal aid disbursed only to library and to students); *Bennett v. West Tex. State Univ.*, 525 F. Supp. 77, 80-81 (N.D. Tex. 1981) (athletic department not covered by Title IX because federal aid disbursed only to students); *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376, 1389-90 (E.D. Mich. 1981) (athletic department not covered by Title IX because federal aid received was non-earmarked); *Stewart v. New York Univ.*, 430 F. Supp. 1305, 1314 (S.D.N.Y. 1976) (law school admissions not covered by Title IX because federal aid disbursed only for housing and to students).

I. Remedial Nature of Title IX

Title IX was enacted to achieve two remedial goals: "to avoid the use of federal resources to support discriminatory practices [and] to provide individual citizens [with] effective protection against those practices."²¹ The statute should be read liberally so that these benefits may be fully achieved.²² Indeed, the Supreme Court recently recognized the need to read Title IX broadly. In *North Haven Board of Education v. Bell*,²³ female teachers sued the school board under Title IX for alleged discriminatory practices.²⁴ The issue before the Court was whether the word "person" in Title IX's enforcement section²⁵ included not only students but employees of an education program as well.²⁶ While admitting that "Title IX does not expressly include or exclude employees from its scope,"²⁷ the Court nevertheless held that "person" does include employees of an education program.²⁸ The Court reasoned, "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language."²⁹

Contrary to Title IX's broad remedial objectives and to the Court's clear inclination in *North Haven* to read the statute expansively, the earmark theory severely restricts the intended remedial effects of the statute.³⁰ It inadequately prevents the use of federal monies in support of sex discrimination in education.³¹ Under the earmark theory, despite the presence of sex discrimination in certain areas of an institution, Title IX's proscription and enforcement provisions would not cover at least three forms of federal financial assistance: 1) direct

21. *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979); see 122 Cong. Rec. 28,145 (1976) (remarks of Sen. Pell); 118 Cong. Rec. 5808 (1972) (remarks of Sen. Bayh); cf. 110 Cong. Rec. 6543 (1964) (remarks of Sen. Humphrey, during the floor debates on Title VI of the Civil Rights Act of 1964).

22. It is a well-established principle of statutory construction that remedial statutes should be read broadly. 2A C. Sands, *Sutherland Statutory Construction* § 46.07, at 65 (4th ed. 1973) [hereinafter referred to as *Sutherland*]; 3 *id.* § 65.03, at 163 (1974).

23. 456 U.S. 512 (1982).

24. *Id.* at 517-18.

25. 20 U.S.C. § 1681(a) (1976).

26. 456 U.S. at 520.

27. *Id.* at 522.

28. *Id.* at 520-35. The language of the decision suggests that Title IX covers not only teachers but all employees, even those who are only remotely connected with the educational process, such as secretaries and janitors. *Id.* at 541-42. (Powell, J., dissenting).

29. *Id.* at 521 (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

30. See *Grove City College v. Bell*, 687 F.2d 684, 697 (3d Cir. 1982), cert. granted, 103 S. Ct. 1181 (1983).

31. 122 Cong. Rec. 28,145 (1976) (remarks of Sen. Pell); see *Grove City College v. Bell*, 687 F.2d 684, 691-92 (3d Cir. 1982), cert. granted, 103 S. Ct. 1181 (1983).

federal funds earmarked for an area free of discrimination,³² 2) general non-earmarked funds received directly by an institution³³ and 3) direct grants and loans to students.³⁴ Yet realistically, these forms of assistance may support discriminatory practices. First, these forms of federal aid, by defraying the overall costs of education to an integrated institution, in effect "release" institutional funds to be used for the benefit of discriminatory areas.³⁵ Second, the availability of stu-

32. The College Library Resources Program, 20 U.S.C. § 1029 (Supp. V 1981), which earmarks funds for the purchase of library materials, is an example of direct earmarked funds.

33. An example of general, non-earmarked funds is the Basic Education for Adults Program, Adult Education Act of 1966, §§ 301-314, Pub. L. No. 89-750, 80 Stat. 1216 (codified at 20 U.S.C. §§ 1201-1213 (1976)). While this aid is allocated to further a specific educational purpose, the funds are not earmarked for a particular area within an institution.

34. Students enrolled in higher education, for example, can receive grants or loans under four federal programs: 1) the National Direct Student Loan (NDSL) program, 20 U.S.C. §§ 1087aa-1087ff (1976 & Supp. V 1981), 2) the Supplementary Educational Opportunity (SEOG) program, *id.* §§ 1070b-1070b-3, 3) the Basic Educational Opportunity (BEOG) program, *id.* § 1070a, and 4) the Guaranteed Student Loan (GSL) program, *id.* §§ 1071-1087-4. These various programs have different methods of disbursement. Under NDSL and SEOG, federal monies are disbursed by the university to needy students. *Id.* §§ 1070b-1070b-3, 1087aa-1087ff. Under BEOG, as codified, federal monies were to be disbursed directly to students. *Id.* § 1070a. But its regulations set up a Regular and an Alternate Disbursement System: Under the Regular Disbursement System, 34 C.F.R. §§ 690.71-.85 (1982), the funds go to the college or university to distribute to eligible students, *id.* § 690.72; under the Alternate Disbursement System, *id.* § 690.91, the funds are disbursed directly to the students once the institution certifies that they are enrolled. *Id.* § 690.92. Under GSL, monies are disbursed by private lending institutions to the students, and the loans are guaranteed by the government. 20 U.S.C. §§ 1071-1087-4 (1976 & Supp. V 1981).

35. *Hillsdale College v. HEW*, 696 F.2d 418, 434 (6th Cir. 1982) (Edwards, C. J., dissenting); *Haffer v. Temple Univ.*, 688 F.2d 14, 16-17 (3d Cir. 1982); *Grove City College v. Bell*, 687 F.2d 684, 695-96 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983); *see Rivera & Frank, Othen v. Ann Arbor School Board: A Weakening of Title IX Protection Against Sex Discrimination*, 26 St. Louis L.J. 857, 873 (1982); *cf. Wright v. Columbia Univ.*, 520 F. Supp. 789, 792 (E.D. Pa. 1981) (Rehabilitation Act); *Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. 948, 951 (D.N.J. 1980) (same); *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 603 (D.S.C. 1974) (Title VI), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

The release theory was first adopted in *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975), a Title VI case. In *Bob Jones*, HEW terminated veterans' benefits to eligible students at the university because of the university's discriminatory practices. *Id.* at 600-01. The university brought an action to enjoin the termination order on the ground that it did not directly receive federal financial aid. *Id.* at 600. The court held that veterans' benefits, though disbursed directly to students, nevertheless constituted federal financial assistance under Title VI. *Id.* at 602-03. The court reasoned that because veterans' benefits "serve to defray the costs of the educational program . . . institutional funds which would, in the absence of federal assistance, be spent on the student [are thereby released.]" *Id.* at 602.

dent grants and loans enables some students to enroll in institutions that they otherwise could not afford to attend,³⁶ thereby maintaining full enrollment and maximizing tuition revenue for the institution.³⁷

Moreover, the earmark theory fails to provide individuals with effective protection against sex discrimination in education. Discrimination in unfunded areas may "infect" the whole institution, including funded areas, by creating a discriminatory environment.³⁸ Yet under the earmark theory Title IX's proscription and enforcement provisions would attach no consequence to this discrimination,³⁹ thus

Courts adopting the earmark definition reject the release theory in part because they view an institution as a collection of atomized parts, each discrete and separable for the purposes of compliance with Title IX. See *Rice v. President & Fellows of Harvard College*, 663 F.2d 336, 338-39 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982); *Dougherty County School Sys. v. Harris*, 622 F.2d 735, 737 (5th Cir. 1980), vacated on other grounds, 102 S. Ct. 2264 (1982); *University of Richmond v. Bell*, 543 F. Supp. 321, 330-31 (E.D. Va. 1982); *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376, 1387 (E.D. Mich. 1981); *Stewart v. New York Univ.*, 430 F. Supp. 1305, 1314 (S.D.N.Y. 1976). This Note contends, however, that an integrated institution does not contain wholly independent and insulated parts, and any attempt to so dissect an institution frustrates Title IX's broad remedial purposes. See *infra* notes 111-15, 122-35 and accompanying text.

36. *Bob Jones v. Johnson*, 396 F. Supp. 597, 603 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

37. *Id.*; see 122 Cong. Rec. 28,145 (1976) (remarks of Sen. Bayh); Drinan, *Education: To Cherish*, N.Y. Times, Feb. 27, 1983, at E17, col. 1.

38. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 539 (1982); *Board of Pub. Instruction v. Finch*, 414 F.2d 1068, 1078-79 (5th Cir. 1969); Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 Tex. L. Rev. 103, 111-12 (1974); *Defining Recipient*, *supra* note 10, at 624.

The infection theory was first articulated in the context of Title VI in *Board of Pub. Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969). In *Finch*, HEW granted the public schools of Taylor County general aid for specific educational purposes under three funding programs. *Id.* at 1074. The court recognized in dicta that the funded programs could be infected by discrimination in other areas of the institution. As the court stated, "if [the funds provided] support a program which is infected by a discriminatory environment, then termination of such funds is proper." *Id.* at 1078. Because the record on appeal was inadequate to determine whether "infection" had occurred, the court remanded the case to the trial court for further proceedings. *Id.* at 1073-74, 1079. The Supreme Court recently referred to the infection theory of *Finch*, *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 539 (1982), signaling that the Court may soon adopt the theory.

Critics of the infection theory argue that under the theory Title IX would be given such an expansive scope that the program-specific language would lose all its practical meaning. See, e.g., *Dougherty County School Sys. v. Harris*, 622 F.2d 735, 737 (5th Cir. 1980), vacated on other grounds, 102 S. Ct. 2264 (1982); Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 Geo. L.J. 49, 69 (1976). This Note argues, however, that the infection theory does not render Title IX's restrictive language nugatory, but rather adequately limits Title IX to avoid unduly harsh results. See *infra* notes 122-26 and accompanying text.

39. See *Dougherty County School Sys. v. Harris*, 622 F.2d 735, 737 (5th Cir. 1980), vacated on other grounds, 102 S. Ct. 2264 (1982); *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376, 1389 (E.D. Mich. 1981).

leaving many victims of discrimination unprotected. Additionally, under the earmark theory an institution may easily evade Title IX by constructing a "financial Chinese wall" around discriminatory areas so that they receive no direct federal funds.⁴⁰

For these reasons, the earmark theory frustrates the broad remedial purposes of Title IX.⁴¹ This approach should therefore be rejected unless it is clear that Congress intended such a restrictive reading.⁴² The statutory language and the legislative history indicate, however, that Congress intended Title IX to have a broader scope than that given it by the earmark theory.

2. Statutory Language

Title IX's coverage extends to "any education program or activity receiving Federal financial assistance."⁴³ This language, on its face, does not restrict the statute to institutions that receive direct federal grants for specifically earmarked areas. The statute makes no express distinction between general aid and funds that are earmarked for specific areas.⁴⁴ Moreover, the plain meaning of the statutory language encompasses more than the mere receipt of payment.⁴⁵ Federal

40. *Grove City College v. Bell*, 687 F.2d 684, 706 (3d Cir. 1982) (Becker, J., concurring), *cert. granted*, 103 S. Ct. 1181 (1983); see Rivera & Frank, *supra* note 35, at 873.

41. The earmark theory promotes an arguably legitimate policy—restricting governmental regulation of private institutions. See *Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 15-16, Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983) [hereinafter cited as *Petition for Certiorari*]; *Defining Recipient*, *supra* note 10, at 608. Advocates of this policy argue that a private institution that intentionally avoids direct assistance should remain unregulated. *E.g.*, *Petition for Certiorari*, *supra*, at 2-3. This policy argument, however, is not justified. First of all, a private institution is not truly self-sufficient if its students are subsidized by federal grants and loans. If these institutions wish to remain free of Title IX's regulations, they should provide their own financial assistance for their students. Furthermore, Congress has the authority to attach conditions on monies it disburses. See *Grove City College v. Bell*, 687 F.2d 684, 701 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983); *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 606 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975); *cf. O'Bannon v. Town Ct. Nursing Center*, 447 U.S. 773, 785 (1980) (recipient of Medicare must apply it to a nursing home deemed "qualified" by government standards to receive such benefits).

42. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982); *cf. Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 604 (D.S.C. 1974) (Title VI), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975). See generally 3 Sutherland, *supra* note 22, § 60.01, at 29, § 65.03, at 163, § 72.05, at 392.

43. 20 U.S.C. § 1681(a) (1976).

44. See *id.*

45. See *Grove City College v. Bell*, 687 F.2d 684, 691 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983); Rivera & Frank, *supra* note 35, at 861-62.

grants and loans to students clearly benefit educational institutions by reducing the strain on their financial aid programs⁴⁶ and by making it possible for more students to enroll,⁴⁷ and hence appear to be encompassed by the statute. Admittedly, the students themselves are the recipients of federal financial assistance in the forms of grants and loans.⁴⁸ The statute, however, does not by its terms limit its scope to direct receipt of federal aid. Had Congress meant to restrict the coverage of Title IX to directly funded programs, as the earmark theory contends, it could have simply added the word "direct" to the statute. The absence of such an easily rendered limitation suggests Congress had a contrary intention.⁴⁹ Thus, a fair reading of Title IX's broad extension of coverage, contrary to the interpretation of the earmark theory, indicates that the statute includes all forms of federal financial assistance to education—general aid, specifically earmarked aid and indirect aid.⁵⁰ Resort to the legislative history confirms that Congress intended Title IX to have such an expansive scope.

3. Legislative History

The legislative history of Title IX is sparse because the statute was introduced as a floor amendment, and therefore no committee reports exist.⁵¹ Although the pre-enactment history does not explicitly address the extent of Title IX's coverage,⁵² the evidence that does exist favors a broader reading of the statute's scope than that given it under the earmark theory. In 1971, a bill containing the key provisions of what

46. See *supra* note 35 and accompanying text.

47. See *supra* notes 36-37 and accompanying text.

48. See *supra* note 34.

49. 2A Sutherland, *supra* note 22, § 47.38, at 173. Addition of words when interpreting a statute is inappropriate if it "could partially defeat the purpose of the statute." *Id.*; cf. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 520-21 (1982) (refusing to exclude employees from Title IX coverage); Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 603 (D.S.C. 1974) (refusing to exclude veterans' benefits from Title VI coverage), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

50. Grove City College v. Bell, 687 F.2d 684, 691 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983). The *Grove* court stated that "by its all inclusive terminology the statute appears to encompass *all* forms of federal aid to education, direct or indirect." *Id.* (emphasis in original).

51. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 520-21 (1982); Hillsdale College v. HEW, 696 F.2d 418, 426 (6th Cir. 1982); Grove City College v. Bell, 687 F.2d 684, 692 n.15 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983); 121 Cong. Rec. 23,845 (1975) (remarks of Sen. Helms).

52. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 520-21 (1982); see Hillsdale College v. HEW, 696 F.2d 418, 427 (6th Cir. 1982); Grove City College v. Bell, 687 F.2d 684, 697-98 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983).

would later become Title IX⁵³ was introduced in Congress.⁵⁴ The statements of several senators speaking in favor of the bill, to the effect that "no funds" should be extended to institutions that discriminate on the basis of sex,⁵⁵ imply that the statute was intended to have an expansive reach.⁵⁶ Moreover, one year later on the day of Title IX's enactment, the floor debates clearly reveal Congress' broad objective to "root out [sex discrimination] as thoroughly as possible."⁵⁷ Senator Bayh, the sponsor of Title IX, called the statute "a strong and comprehensive measure,"⁵⁸ the impact of which was to be "far-reaching."⁵⁹ Surely this legislative understanding and intent conflict with the earmark theory's severely restrictive reading of Title IX.⁶⁰

The post-enactment history provides further evidence that Congress did not intend to restrict Title IX's coverage to those discrete areas within an institution that directly receive earmarked funds. The Department of Health, Education and Welfare (HEW) published final regulations in June 1975⁶¹ to implement and enforce the provisions of the statute. The regulations, in direct conflict with the earmark theory, indicate that institutions receiving general non-earmarked

53. *Grove City College v. Bell*, 687 F.2d 684, 692 & n.17 (3d Cir. 1982), cert. granted, 103 S. Ct. 1181 (1983); 118 Cong. Rec. 5808 (1972) (remarks of Sen. Bayh).

54. 117 Cong. Rec. 30,399 (1971) (remarks of Sen. Bayh).

55. 117 Cong. Rec. 30,158-59 (1971) (remarks of Sen. McGovern); *id.* at 30,408 (remarks of Sen. Bayh); *id.* at 39,256 (colloquy between Reps. Green and Steiger); *cf.* 110 Cong. Rec. 6543 (1964) (remarks of Sen. Humphrey during floor debates on Title VI).

56. *Grove City College v. Bell*, 687 F.2d 684, 692-93 (3d Cir. 1982), cert. granted, 103 S. Ct. 1181 (1983); *see* 2A Sutherland, *supra* note 22, § 49.11, at 265-66.

57. 118 Cong. Rec. 5804 (1972) (remarks of Sen. Bayh).

58. *Id.* at 5806 (remarks of Sen. Bayh).

59. *Id.* at 5808 (remarks of Sen. Bayh). Although the statements of one legislator on the floor of Congress usually should not be given great weight, the Supreme Court in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), stated that because Title IX's legislative history is so sparse "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *Id.* at 526-27.

60. *See supra* notes 55-59 and accompanying text. One commentator has pieced together different bits of legislative history to conclude that Title IX was enacted to serve a narrow purpose. Comment, *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U. L. Rev. 133, 158-61, 170-72, 186. The commentator, however, failed to mention and respond to the repeated indications in the legislative history that Title IX was to have an expansive scope. *See supra* notes 55-59 and accompanying text.

61. 40 Fed. Reg. 24,127 (1975), *reissued at* 45 Fed. Reg. 30,802 (1980). The regulations were reissued when the Department of Education took over HEW's functions under Title IX. *See supra* note 12. Today the regulations are in 34 C.F.R. §§ 106.1-.71 (1982). Although they have undergone some changes since they were published in 1975, the relevant sections remain unaltered.

funds⁶² and direct aid to students are subject to Title IX.⁶³ Under the General Education Provisions Act,⁶⁴ if within a forty-five day period⁶⁵ beginning on the publication date Congress determined that the regulations were inconsistent with the statute, it had the authority to adopt a concurrent resolution disapproving them.⁶⁶ Absent the adoption of such a resolution the regulations would become formally effective.⁶⁷

The day after publication of the regulations Senator Helms proposed a resolution to disapprove the regulations in part because they failed to limit the scope of Title IX to direct receipt of financial aid.⁶⁸ Several resolutions were concurrently introduced in the House to disapprove the regulations.⁶⁹ None of these resolutions was passed.

Congress not only refused to disapprove HEW's regulations; it also has repeatedly declined to amend Title IX to limit its scope expressly to the direct receipt of earmarked financial aid.⁷⁰ The statements

62. HEW's regulations, for example, specifically cover athletics, 34 C.F.R. § 106.41 (1982), which rarely, if ever, receive earmarked federal funds. *University of Richmond v. Bell*, 543 F. Supp. 321, 332 n.17 (E.D. Va. 1982); Cox, *Intercollegiate Athletics and Title IX*, 46 Geo. Wash. L. Rev. 34, 37 (1977); Kuhn, *supra* note 38, at 77; Rivera & Frank, *supra* note 35, at 867; see *Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 171 (1975) (remarks of Sen. Bayh) [hereinafter referred to as *Postsecondary Hearings*]. Therefore, the regulations seem to indicate that the receipt of general funds is sufficient to subject non-earmarked areas to Title IX.

63. The regulations define "*Federal financial assistance*" as including "[s]cholarships, loans, grants, wages or other funds extended to any entity . . . or extended directly to such students for payment to that entity." 34 C.F.R. § 106.2(g)(ii) (1982). A "*Recipient*" of federal assistance is defined as:

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

Id. § 106.2(h).

64. Pub. L. No. 93-380, § 431(d)(1), 88 Stat. 567 (1974) (codified at 20 U.S.C. § 1232(a)-(g) (1976 & Supp. V 1981)).

65. 20 U.S.C. § 1232(d) (1976 & Supp. V 1981).

66. *Id.* § 1232(d)(1).

67. *Id.* § 1232(g).

68. 121 Cong. Rec. 17,300 (1975) (remarks of Sen. Helms).

69. 121 Cong. Rec. 21,687 (1975) (remarks of Rep. O'Hara); *id.* at 19,209 (remarks of Rep. Martin).

70. On the last day of the 45-day review period, for example, Senator Helms introduced the following amendment to Title IX: "Title IX shall apply only to education programs and activities which *directly* receive Federal financial assistance." *Id.* at 23,846 (statement of Sen. Helms) (emphasis added). Unless such an amendment were enacted, Helms feared that HEW's regulations would bring within the coverage of Title IX "activities which do not receive Federal financial assistance

made by several senators opposing these amendments, including those of the sponsor of Title IX, clearly indicate that Congress intended Title IX to cover not only direct aid, but also general and indirect aid.⁷¹

Admittedly, Congress's failure to disapprove the regulations and to adopt restrictive amendments is not conclusive evidence that the broad regulations accurately reflect the legislative intent.⁷² Nevertheless, the fact that Congress failed to act, though fully aware of the broad sweep of the regulations and the controversy surrounding them, lends support to the argument that Congress intended Title IX to cover general and indirect aid.⁷³ This is particularly so since in the

in any reasonable sense of the concept." *Id.* at 23,845 (statement of Sen. Helms). Congress took no action on the Helms bill.

Similarly, in 1976, Senator McClure proposed defining federal financial assistance as "assistance received by the institution *directly* from the federal government." 122 Cong. Rec. 28,144 (1976) (emphasis added). McClure expressed concern that unless Title IX were so amended, private colleges that have gone to "great pains to avoid any appearance of Federal support" would nonetheless be "subjected to Federal control" merely because their students received federal loans and grants. *Id.* at 28,145 (statement of Sen. McClure). He argued that HEW was overreaching by regulating educational programs in which student grant and loans constituted the only federal link. *Id.* The amendment was defeated by a 50-30 vote. *Id.* at 28,148.

In addition to these unsuccessful attempts expressly to exclude direct grants and loans to students from Title IX, several amendments were proposed to eliminate intercollegiate athletics from the scope of the statute. *Id.* at 28,136 (remarks of Sen. McClure); 121 Cong. Rec. 17,300 (1975) (remarks of Sen. Helms); 120 Cong. Rec. 15,322 (1974) (remarks of Sen. Tower). Since athletics rarely receive earmarked funds, see *supra* note 62, these amendments were in effect attempts to limit Title IX to programs specifically earmarked to receive aid.

71. The McClure amendment to limit Title IX expressly to direct assistance, for example, elicited an immediate and vehement attack by Senator Pell, the chief Senate sponsor of the basic grant (BEOG) program. He objected to the amendment on the ground that "no funds under the basic grant program would be covered by title IX." 122 Cong. Rec. 28,145 (1976) (statement of Sen. Pell). Pell argued that "[w]hile these dollars are paid to students they flow through and ultimately go to institutions of higher education," and thus, Congress' position should not be "that these Federal funds can be used for further discrimination based on sex." *Id.* Senator Bayh also vigorously attacked the McClure amendment, arguing that Title IX should cover indirect federal assistance. *Id.* (statement of Sen. Bayh). He pointed out that if a student is benefited, the school is benefited, and therefore the distinction between direct and indirect receipt is spurious. Bayh argued that the amendment signaled "a great departure from equity. It would set a terrible example and would open the floodgates to other efforts to destroy what we are trying to accomplish here." *Id.*

Senator Bayh also objected to the attempts to exclude athletics from Title IX. He termed these attempts a "tragic departure" which would exclude the very areas Congress intended Title IX to cover. *Id.* at 28,144 (statement of Sen. Bayh).

72. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 533-34 (1982); see 2A Sutherland, *supra* note 22, § 49.10, at 261, § 49.05, at 238-39.

73. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 534 (1982); see 2A Sutherland, *supra* note 22, § 49.10, at 261-62. The Supreme Court in *North Haven* relied on

past Congress has not hesitated to modify the scope of Title IX when it disagreed with HEW's regulations.⁷⁴

In sum, the earmark theory, which curtails the remedial goals of the statute, finds no support in either the statutory language or the legislative history. This approach should therefore be rejected in favor

the post-enactment history of Title IX to conclude that employees were "persons" under Title IX's proscription section. 456 U.S. at 530-35. The Court looked to Congress' failure to disapprove HEW's regulations, which covered employment, *id.* at 530-33, and to the rejected amendments that would have excluded employment from Title IX, *id.* at 534-35, to support its conclusion that employees are within the scope of Title IX. *Id.*

74. After HEW had published for comment the Title IX regulations, Congress in 1974 amended the statute to exempt fraternities and sororities from its reach. Pub. L. No. 93-568, § 3(a), 88 Stat. 1855, 1862 (1974) (codified at 20 U.S.C. § 1681(a)(b) (1976)); *see* 120 Cong. Rec. 41,391 (1974) (remarks of Sen. Quie). Then, in 1976, Congress further exempted Boys and Girls conferences, father-son, mother-daughter events, and beauty pageant scholarships. *See id.* 27,979-88 (1976) (remarks of Sens. Fannin, Dole, Thurmond, Bayh, Humphrey and Eagleton). The proposition that Congress intended to include indirect assistance is further supported by the fact that Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4 (1976 & Supp. IV 1980), after which Title IX was patterned, has been interpreted to include aid to students. *Yakin v. University of Ill.*, 508 F. Supp. 848, 850 (N.D. Ill. 1981); *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 602-03 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975); *see* Rivera & Frank, *supra* note 35, at 864, 866; Note, Board of Public Instruction v. Finch: *Unwarranted Compromise of Title VI's Termination Sanction*, 118 U. Pa. L. Rev. 1113, 1121-22 (1970) [hereinafter cited as *Unwarranted Compromise*]. Title VI is an authoritative guide in ascertaining the meaning of Title IX. *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979). The two statutes have virtually identical language. *Compare* 42 U.S.C. §§ 2000d-2000d-1 (1976 & Supp. IV 1980) (Title VI) *with* 20 U.S.C. §§ 1681-1682 (1976 & Supp. V 1981) (Title IX). Furthermore, both statutes serve similar objectives—to prevent federal monies from being used to support discriminatory practices. *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).

Ample evidence exists that Congress expected the interpretation of Title VI to govern the interpretation of Title IX. *Id.* at 694-99 & nn.16-23. Originally, Congress planned to merely add the word "sex" to Title VI. *See Hearings on § 805 of H.R. 16098 Before the Special Subcomm. of the House Comm. on Educ. & Labor*, 91st Cong., 2d Sess. (1970), *reprinted in* *Discrimination Against Women 3* (C. Stimpson ed. 1973). Fearing that this would expose Title VI to further amendments that might leave the statute "gutted" on the floor of Congress, *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 546-47 (Powell, J., dissenting) (citing the *Postsecondary Hearings*, *supra* note 62, at 409), Congress instead enacted a separate statute lifting Title VI's language, *Postsecondary Hearings*, *supra* note 62, at 409 (remarks of Rep. O'Hara, arguing that Title IX was a "cut and paste job," using a "Xerox" of Title VI). Throughout the legislative debates repeated references to Title VI were made to explain Title IX's provisions. 122 Cong. Rec. 28,145-46 (1976) (remarks of Sen. Bayh); 118 Cong. Rec. 5803, 5807-08 (1972) (remarks of Sen. Bayh); 117 Cong. Rec. 30,407-08 (1971) (remarks of Sen. Bayh). On the day of Title IX's enactment, for example, Senator Bayh pointed out that since Title IX's provisions are parallel to those in Title VI, they "have been tested under title VI . . . for the last 8 years so that we have evidence of their effectiveness and flexibility." 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh).

of one that both promotes the statute's purposes and yields a meaning consistent with the legislative intent.

B. Grant-Statute Definition

One court recently construed the program-specific language in Title IX as referring to the particular federal grant statute providing aid to educational institutions. In *Hillsdale College v. HEW*,⁷⁵ certain students at a private college that had refused to accept any direct federal aid individually secured federal loans or grants to help defray the costs of their education.⁷⁶ According to HEW's regulations, this student aid was sufficient to subject the entire college to Title IX.⁷⁷ The college, however, refused to file the required Assurance of Compliance,⁷⁸ whereupon HEW sought an order terminating the students' financial assistance.⁷⁹ The Sixth Circuit held that the federal loan and grant statutes constituted the "program" under the statute.⁸⁰ Because the Assurance of Compliance would cover the entire college, and was not limited to the administration of the grant statutes, the college was not required to execute the Assurance.⁸¹

This interpretation of the program-specific language shares the weaknesses of the earmark theory. While somewhat broader, it still severely restricts the scope of Title IX, thereby unduly compromising the effectiveness of the statute. Moreover, it is based largely on a dubious analysis of legislative history.

75. 696 F.2d 418 (6th Cir. 1982).

76. *Id.* at 420.

77. *Id.* at 421; 34 C.F.R. § 106.2(g)(1)(ii) (1982); *see also* 122 Cong. Rec. 28,145 (1976) (remarks of Sen. McClure, arguing against this result).

78. HEW's regulations require that as a condition precedent to its approval of federal aid, the institution must file an assurance, HEW Form 639A, that it has complied with Title IX. 34 C.F.R. § 106.4(a) (1982). The regulations provide:

Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that 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. An assurance of compliance . . . shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary . . . to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

Id.

79. 696 F.2d at 421-22.

80. *Id.* at 430.

81. *Id.*

1. Narrow Scope

The grant-statute interpretation of the program-specific language is somewhat broader than that of the earmark theory. Clearly, broad funding statutes that provide general non-earmarked grants to institutions would be covered by Title IX.⁸² So, too, would be grant statutes providing aid to students, at least to the extent that an institution administers the assistance.⁸³ Nevertheless, although more forms of federal assistance are covered by Title IX under this interpretation, the statute's coverage remains too restrictive to effectuate its remedial purposes adequately.⁸⁴

Under the grant-statute definition, compliance is generally limited to administering the funding statutes in a sex-blind manner.⁸⁵ This minimal requirement renders Title IX ineffective. An institution that receives no direct aid but has students that receive grants and loans administered exclusively by a federal agency would have no obligations under Title IX.⁸⁶ And even when the institution administers student aid or receives direct assistance under the grant statute, widespread sex discrimination in an institution would be beyond the reach of Title IX so long as the administration of the discrete grant statute remained free of discrimination.⁸⁷ Yet these forms of federal assistance, contrary to the broad objective of Congress, support discriminatory practices by "releasing" funds for use in the discriminatory areas.⁸⁸ In addition, because compliance with the statute is required only in the administration of the funding program, individuals are afforded scant, if any, protection from sex discrimination in other areas.⁸⁹

82. *Id.* at 426-27; *cf.* Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1074, 1078-79 (5th Cir. 1969) (Title VI). *Finch*, for example, involved general grants for specific educational purposes, but not earmarked for specific areas within the school system. *Id.* at 1074. The *Finch* court held that the aid was subject to Title VI. *Id.* at 1078-79.

83. See Hillsdale College v. HEW, 696 F.2d 418, 429-30 (6th Cir. 1982).

84. *Id.* at 436-37 (Edwards, C.J., dissenting); *Unwarranted Compromise*, *supra* note 74, at 1140.

85. See Hillsdale College v. HEW, 696 F.2d 418, 430 (6th Cir. 1982); Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1078 (5th Cir. 1969).

86. See Hillsdale College v. HEW, 696 F.2d 418, 420 & nn.4-7, 430 (6th Cir. 1982).

87. Several courts and commentators have criticized limiting coverage of Title IX and Title VI to the specific grant statute for this reason. See, e.g., Grove City College v. Bell, 687 F.2d 684, 696 (3d Cir. 1982) (Title IX), *cert. granted*, 103 S. Ct. 1181 (1983); Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 603 (D.S.C. 1974) (Title VI), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975); Rivera & Frank, *supra* note 35, at 873; Todd, *supra* note 38, at 112.

88. See *supra* note 35.

89. See Hillsdale College v. HEW, 696 F.2d 418, 429-30 (6th Cir. 1982); Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969).

If compliance under the grant-statute definition is minimal, the enforcement power is undermined. Such a definition limits the termination sanction to federal monies connected with a discriminatory funding program. A potent enforcement weapon—the termination of direct aid to students—would therefore be automatically eliminated.⁹⁰ Moreover, even if discrimination exists in a particular funding program, only the aid given pursuant to that statute may be terminated; all other federal assistance, absent an independent showing of discrimination in each corresponding funding program, could not be terminated.⁹¹ This severely reduces the ability of a federal agency to exert economic pressure as a means to discourage discrimination within an institution, particularly if only relatively small amounts of money are involved in the discriminatory funding program. Thus, restricting the termination sanction to a case-by-case finding of discrimination within a particular grant statute greatly undermines the enforcement provisions of Title IX.

2. Legislative History

The legislative history does not support this restrictive definition of the program-specific language. Since the history of Title IX is sparse,⁹² proponents of the grant-statute definition rely on the legislative history of Title VI of the Civil Rights Act of 1964,⁹³ upon which Title IX is based,⁹⁴ to ascertain the meaning of the program-specific language.⁹⁵ Great significance is given under the grant-statute definition to the fact that during the congressional debates repeated references were made to various federal funding programs.⁹⁶ Based on these references it is reasoned that Congress intended the term "program" in Title IX to mean "funding program."⁹⁷

This is an erroneous interpretation of the legislative history. "Program" is a common word the meaning of which varies in different contexts. Thus, the use of the term in both the anti-discrimination statutes and the federal grant statutes does not necessarily mean that it has the same meaning in both contexts.⁹⁸ Clearer evidence is needed

90. See *Hillsdale College v. HEW*, 696 F.2d 418, 429-30 (6th Cir. 1982).

91. See *id.*; cf. *Board of Pub. Instruction v. Finch*, 414 F.2d 1068, 1078-79 (5th Cir. 1969) (Title VI).

92. See *supra* note 51 and accompanying text.

93. 42 U.S.C. §§ 2000d-2000d-4 (1976 & Supp. IV 1980).

94. *Cannon v. University of Chicago*, 441 U.S. 677, 694-98 (1979).

95. *Hillsdale College v. HEW*, 696 F.2d 418, 425-27 & n.24 (6th Cir. 1982).

96. *Id.* at 427 & n.24; cf. *Board of Pub. Instruction v. Finch*, 414 F.2d 1068, 1077 (5th Cir. 1969) (Title VI).

97. *Hillsdale College v. HEW* 696 F.2d 418, 427 & n.24 (6th Cir. 1982); cf. *Board of Pub. Instruction v. Finch*, 414 F.2d 1068, 1077 (5th Cir. 1969) (Title VI).

98. See 2A Sutherland, *supra* note 22, § 47.27, at 137; Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537-38 (1947).

before this conclusion can be confidently drawn,⁹⁹ particularly because on its face the program-specific language does not support such a reading. Section 901(a) of Title IX refers to a "program or activity receiving Federal financial assistance."¹⁰⁰ Were "program" to mean grant statute, however, this language would become nonsensical, for a funding program does not receive assistance—it is the assistance. Moreover, one commentator has correctly pointed out that the references in the debates to funding programs are not helpful in interpreting the statutory language because many of these references were made during the debates over the House version of Title VI, which contained no program-specific language.¹⁰¹

Thus, because the restrictive grant-statute definition both misconstrues the legislative history and frustrates the remedial purposes of the statute, it, like the earmark theory, should be rejected.

II. THE INTEGRATED INSTITUTION APPROACH

The Third Circuit recently defined "program or activity receiving Federal financial assistance" as an integrated institution that benefits, directly or indirectly, from federal aid to education.¹⁰² In *Grove City College v. Bell*,¹⁰³ a private college that received no direct federal funds but had students receiving federal grants¹⁰⁴ refused to file an Assurance of Compliance with the Department.¹⁰⁵ The court held that Title IX's proscription of sex discrimination reached every facet of the college's operation.¹⁰⁶ Because the college in question was an "integrated institution,"¹⁰⁷ the court reasoned, federal aid to students indirectly inures to the benefit of the entire college by releasing institutional funds for use elsewhere.¹⁰⁸ For this reason, the court stated that

99. 2A Sutherland, *supra* note 22, § 47.27, at 137. "The dominant consideration in deciding whether statutory language has general or special meaning, as with all other issues in statutory construction, is to discover legislative intent or meaning to others." *Id.* (footnote omitted).

100. 20 U.S.C. § 1681(a) (1976).

101. *Unwarranted Compromise*, *supra* note 74, at 1118 & n.24, 1119.

102. *Grove City College v. Bell*, 687 F.2d 684, 698-700 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983); *accord* *Haffer v. Temple Univ.*, 688 F.2d 14, 16-17 (3d Cir. 1982) (*per curiam*).

103. 687 F.2d 684 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983).

104. *Id.* at 688-89. Grove City College's philosophical reason for refusing direct federal financial assistance is that it believes in "institutional self sufficiency." Petition for Certiorari, *supra* note 41, at 2-3. The College also believes that if it had to comply with "expensive and burdensome regulations which invariably follow government funding" it would have to raise its tuition. *Id.* at 3.

105. 687 F.2d at 689.

106. *Id.* at 700-01.

107. *Id.* at 697, 699-700. For a definition of "integrated institution," see *infra* text accompanying note 122.

108. 687 F.2d at 696, 700.

the educational program must include the institution itself.¹⁰⁹ In addition, the remedy available for failure to comply with Title IX, the court stated, should be "as extensive as the program benefited by the federal funds involved."¹¹⁰

A. Remedial Effects

Unlike the earmark and grant-statute definitions, the integrated institution approach promotes the remedial purposes of Title IX. All forms of aid to education—general, earmarked and indirect—free institutional funds for the benefit of discriminatory areas, and therefore would subject the entire integrated institution to Title IX.¹¹¹ That all federal assistance to education triggers Title IX's application is not only consistent with the legislative intent,¹¹² but more importantly, furthers the principal purpose of the statute—preventing federal monies from ever being used, even indirectly, to support discriminatory practices.¹¹³ Moreover, individuals would be provided with maximum protection against sex discrimination because every facet of the institution would be covered by Title IX's proscriptions;¹¹⁴ thus, it would be impossible to evade the statute by simply constructing a "financial Chinese wall" around discriminatory areas. Additionally, the federal enforcement agency would have an effective sanction, the termination of all federal monies, to use as leverage in enforcing the statute.¹¹⁵

B. The Program-Specific Language

Despite these positive remedial effects, the integrated institution approach has been criticized and rejected on the ground that it gives no practical meaning to the program-specific limitation.¹¹⁶ Had Con-

109. *Id.* at 700.

110. *Id.*

111. *Id.* at 698-701 (non-earmarked and indirect aid subjects integrated institution to Title IX). Because no earmarked aid was involved in *Grove City*, the court did not decide whether such aid would subject the entire college to Title IX. *Id.* at 698. Earmarked aid should not be treated differently from general and indirect assistance. Like the other forms of financial assistance, earmarked aid releases institutional funds for use elsewhere, and therefore indirectly supports discriminatory practices.

112. See *supra* notes 68-71 and accompanying text.

113. See *supra* note 21 and accompanying text.

114. *Grove City College v. Bell*, 687 F.2d 684, 697-700 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983).

115. See *id.* at 700-01.

116. See *Hillsdale College v. HEW*, 696 F.2d 418, 429-30 (6th Cir. 1982); *Dougherty County School Sys. v. Harris*, 622 F.2d 735, 737 (5th Cir. 1980), *vacated on other grounds*, 102 S. Ct. 2264 (1982); *University of Richmond v. Bell*, 543 F. Supp. 321, 330-31 (E.D. Va. 1982); *Othen v. Ann Arbor School Bd.*, 507 F. Supp. 1376, 1382 (E.D. Mich. 1981); *Romeo Community Schools v. HEW*, 438 F. Supp. 1021, 1033-34 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444

gress intended Title IX to authorize HEW to regulate entire institutions pervasively, so the critics reason, Congress would not have expressly restricted the proscription and enforcement provisions to programs receiving federal aid.¹¹⁷ A careful analysis of the purpose of the program-specific language, however, indicates that the integrated institution approach not only gives meaning to the language but also adequately guards against the harm that it was intended to prevent.

Because Congress borrowed Title IX's program-specific language from Title VI of the Civil Rights Act of 1964 without explanation, reliance on the legislative history of Title VI to determine the purpose of the restrictive language is proper.¹¹⁸ The legislative debates indicate that the drafters feared that an unlimited termination sanction might lead to grossly unfair and harsh results. In particular, legislators were profoundly concerned that discrimination in an isolated state program could result in wholesale cut offs of federal aid to the entire state, thereby affecting innocent state programs wholly unrelated to the discriminatory practices.¹¹⁹ Local public school systems, for example, are geographically and administratively separate and distinct entities. Because discrimination in one school district would thus have no impact on another, Congress did not wish the discriminatory system to justify the cut off of aid to all public schools within that state.¹²⁰ Thus, to prevent such arbitrary and overbroad funding terminations, Congress adopted the program-specific language.¹²¹

U.S. 972 (1979). This criticism is particularly significant because the Supreme Court in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), reaffirmed that Title IX is to be limited by its program-specific language. *Id.* at 535-38. The Court, however, did not define "program" or what constitutes "program-specificity." *Id.* at 540.

117. See *supra* note 116 and accompanying text.

118. See *supra* note 74 and accompanying text.

119. 110 Cong. Rec. 14,330-31 (1964) (remarks of Sen. Williams); *id.* at 13,125-26 (remarks of Sens. Gore & Ribicoff); *id.* at 8642 (remarks of Sen. Stennis); *id.* at 8507-08 (remarks of Sens. Smathers & Allott); *id.* at 7103 (remarks of Sen. Javits); *id.* at 7067-68 (remarks of Sen. Ribicoff). For example, during the legislative debates on Title VI, Senator Javits remarked, "[p]roponents of the bill have continually made it clear that . . . it is the intent of title VI not to require wholesale cutoffs of Federal funds from all Federal programs in entire States." 110 Cong. Rec. 7103 (1964) (statement of Sen. Javits); see *Grove City College v. Bell*, 687 F.2d 684, 697 & n.21 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983); *Board of Pub. Instruction v. Finch*, 414 F.2d 1068, 1075 (5th Cir. 1969). For a thorough analysis of the purpose of the program-specific language in Title VI, see *Unwarranted Compromise*, *supra* note 74, at 1116-24.

120. See *supra* note 119 and accompanying text.

121. *Unwarranted Compromise*, *supra* note 74, at 1120-21. As the Fifth Circuit noted in *Board of Pub. Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969), the purpose of the language was not to protect the "political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs *not* tainted by discriminatory practices." *Id.* at 1075 (emphasis in original) (footnote omitted).

Application of the integrated institution approach does not run afoul of this congressional concern. For purposes of Title IX, an educational institution is integrated when discrimination in one area taints and infects the entire institution or when financial assistance to any part of the institution supports and benefits the discriminatory area.¹²² Under such circumstances it is neither arbitrary nor grossly unfair to regulate the whole institution and to apply the termination sanction to all of the institution's federal assistance.¹²³

Limiting Title IX to integrated institutions prevents the harm that Congress so feared—the termination of funds to innocent programs entirely free of sex discrimination.¹²⁴ For example, state-wide cut offs of federal aid to a public school system would not be possible under the integrated institution approach. A state-wide public school system is a collection of separate, independent parts; it is not an integrated institution. Due to separate locations, students and facilities, discrimination in one school district has no impact on another. Moreover, funds given to a non-discriminatory district do not significantly aid the discriminatory district, as each district operates on an independent budget.¹²⁵ By preventing such punitive results, the integrated institution approach gives the program-specific language its intended restrictive meaning.¹²⁶

C. Proposed Application of the "Integrated Institution" Approach

Title IX defines educational institution as a:

public or private pre-school, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.¹²⁷

Sufficient integration should be presumed at this institutional level. Each of these entities share common location, students, facilities and

122. See Todd, *supra* note 38, at 111-12.

123. Imposing a termination sanction necessarily involves some hardships to innocent beneficiaries, but this was Congress' chosen remedy. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535 n.26 (1982). Moreover, Congress traditionally has had authority to attach conditions to any monies disbursed by the federal government. See *supra* note 41.

124. See *supra* notes 119, 121 and accompanying text.

125. Arguably, federal aid to a non-discriminatory district frees state educational funds for use in a discriminatory district. But this benefit to the discriminatory district, to the extent any exists, is too remote and indirect to justify application of Title IX.

126. See *supra* notes 119, 121 and accompanying text.

127. 20 U.S.C. § 1681(c) (1976).

administration.¹²⁸ As a result of this web-like structure, it is not possible to separate the institution into discriminatory and non-discriminatory parts or funded and unfunded parts. The "release" and "infection" theories require treating the institution as the "program" under Title IX.¹²⁹ Indeed, to define program as something smaller than this basic institution frustrates the broad remedial purposes of the statute.¹³⁰

But "program" should not be limited to this atomized institutional level. After all, Congress could have easily substituted this definition of institution for program had it intended such a limitation.¹³¹ A particular school district or university, comprised respectively of several primary or secondary schools and several colleges, may be sufficiently integrated to justify Title IX coverage.¹³² Since integration will not always exist at this level, a case-by-case analysis should be conducted to determine the degree of integration and interdependence. Relevant factors should include: the concentration of decision-making power;¹³³ the financial structure of the entity, particularly the degree to which budgetary interdependence exists;¹³⁴ and the extent to which institutions share common students, facilities and administrative services.¹³⁵

CONCLUSION

In the educational process social values are molded, roles are learned and patterns of behavior are formed. Therefore, it is particularly important that sex discrimination in education be eliminated. Congress mandated that this formative environment be free of discrimination by enacting Title IX. The effects of this statute should not be watered down by technical exercises in statutory construction;

128. See Todd, *supra* note 38, at 110.

129. See *supra* notes 35-38 and accompanying text.

130. See *supra* notes 21-22, 30-35 & 82-91 and accompanying text.

131. 2A Sutherland, *supra* note 22, § 47.36, at 163. One court relied on the separate definition of "institution" to conclude that a "program" could never be an institution. *Hillsdale College v. HEW*, 696 F.2d 418, 424-25 (6th Cir. 1982). This approach is unnecessarily narrow: There is no reason why "program" cannot mean something as large as or larger than an institution as defined in Title IX. See *Grove City College v. Bell*, 687 F.2d 684, 697 (3d Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (1983).

132. See *Haffer v. Temple Univ.*, 688 F.2d 14, 16-17 (3d Cir. 1982); *cf. Wright v. Columbia Univ.*, 520 F. Supp. 789, 792 (E.D. Pa. 1981) (Rehabilitation Act); *Yakin v. University of Ill.*, 508 F. Supp. 848, 850 (N.D. Ill. 1981) (Title VI).

133. *Cf. Wright v. Columbia Univ.*, 520 F. Supp. 789, 792 (E.D. Pa. 1981) (Rehabilitation Act).

134. See Todd, *supra* note 38, at 110-13.

135. See *id.*

rather, Title IX's broad remedial purpose requires that the statute be given an expansive reading. The integrated institution approach, while giving the restrictive language a practical meaning, most fully promotes this vital social goal.

Claudia S. Lewis