Grove City College v. Bell: Touchdown or Touchback?

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Three statutes bar discrimination against women, minorities, and the handicapped involved with a program or activity receiving federal financial assistance: Title IX of the Education Amendments of 1972
prohibits discrimination on the basis of sex; title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin; and section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap. From 1964, when title IX was enacted, until 1982, it was widely assumed that the government’s authority to enforce the statutes was quite broad. For example, the

   § 1681(a). 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. . . .
   § 1682. Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title . . . by issuing rules, regulations, or orders of general applicability. . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient . . . but such termination or refusal shall be limited to the particular political entity, or part thereof, . . . in which such noncompliance has been so found. . . .

   No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

   No otherwise qualified handicapped individual . . . shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .


This article focuses on the scope of the government’s authority to enforce the civil rights statutes. Many courts seem to have assumed, without analysis, that the statutory scope is the same for private parties as for the government. See, e.g., Rice v. President and Fellows, 663 F.2d 336, 338 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982). However, the holding in North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) that title IX is program-specific was addressed solely to the government’s enforcement power. The Court said:

We conclude, then, that an agency’s authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902.

Id. at 538. The Court thus did not decide whether a private party’s rights under title IX are subject to the program-specific limitation of § 901. The Court seemed to suggest, in fact, that private parties would be treated differently when it followed the above quotation with a “cf.” reference to the pages in Cannon v. University of Chicago, 441 U.S. 677, 690-93 (1979), that discuss how the language of title IX supports the conclusion that a private right of action is available under the statute.

One clear difference that could justify the absence of a program or activity limitation in private suits is that private parties are not entitled to cut-off government funding as relief. That extreme sanction justifies care in its application, and could explain a limitation on the government’s enforcement power that is not needed in private enforcement cases. Similarly, it may be possible that government enforcement is not constrained by the program-specificity
government asserted authority to bar discrimination anywhere in an educational institution or business or political entity, such as a school system, when federal funds were provided to any of the activities conducted by the institution or entity. In 1982, the Supreme Court undermined that assumption in *North Haven Board of Education v. Bell*, which found both the government's regulatory authority to prohibit recipients of federal funds from discriminating and the government's authority to remedy discrimination by terminating funds to be program specific under title IX.

The Court's program-specific interpretation of title IX turned on the term "program or activity," which appears identically in all three civil rights statutes. The Court found that the term limits the government's enforcement power more than had been assumed, but the Court declined to define the extent of the government authority. The Court suggested three possible approaches or nexus theories to be considered on remand. Under those nexus theories, the program-specific requirement of the statutes could be met where (1) federal funds are spent to pay the salary of a victim of discrimination; (2) the victim is employed in a federally-funded program; or (3) the victim participates in a privately-funded program in which discrimination occurs that affects a federally-funded program.

This article will argue that the nexus theories suggested in *North Haven* support institution-wide enforcement of the civil rights statutes to a considerable degree: The Government still could enforce the civil rights statutes on an institution-wide basis in most circumstances. In its decision this term in *Grove City College v. Bell*, however, the Court adopted a "purpose and effect" test to determine what constitutes a "program." Under that test, the potential for institution-wide enforcement has been reduced to a minimum. This article will discuss the enforcement options that were available under *North Haven* and contrast them with the enforcement options that are available after *Grove City*. It concludes that institution-wide enforcement of the civil rights statutes will be available in far fewer situations, and that, as a result, significant civil rights enforcement efforts will be impaired.

If the government lacks the power to enforce civil rights laws throughout an institution or political entity receiving federal funds, sig-

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8. Id. at 540.
10. Id. at 1222.
nificant civil rights objectives advanced during the last two decades will be impaired. For example, the usefulness of title IX in equalizing educational opportunities for women and girls will be reduced. A primary title IX enforcement objective for women during the last decade has been eliminating sex discrimination in athletics, because it was perceived that the pervasive discrimination suffered by women in athletics hindered them from taking an equal place in society, both on and off the playing field.\(^{11}\) In part, that objective has been achieved.\(^{12}\) Unquestionably, title IX enforcement efforts have been the impetus for much change.\(^{13}\)

If title IX enforcement is restricted to programs that receive traceable or specific federal funding, sex discrimination in an athletic program cannot be barred because few athletic programs are funded by federal grants earmarked or specifically intended for their use.\(^{14}\) More commonly, an athletic program is a subordinate unit within an institution which receives federal funding for a variety of purposes, such as student aid, construction funds for athletic and non-athletic facilities, or feeding programs and research grants.\(^{15}\) Under the institution-wide coverage theories, the government has succeeded in attacking sex dis-

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12. At the beginning of the last decade, colleges awarded virtually no athletic scholarships to women. Less than ten years later, women were awarded 10,000 athletic scholarships. The House Wednesday Group, Title IX and H. Res. 190: Issues for Discussion (1983). See Yellow Springs Exempted Village School Dist. v. Ohio High School Athletic Ass'n, 647 F.2d 651, 675 app. (noting expenditure differentials as high as one hundred to one in the money allocated to men's and women's athletic budgets). It is also clear that in athletics, as in education generally, much work remains to be done before sex discrimination can be considered a thing of the past. See, e.g., Hearings on Civil Rights in Education before the Subcomm. on Postsecondary Education and Civil and Constitutional Rights of the House Comm. on Education and Labor, 98th Cong., 1st Sess. (1983) (statement of Rep. Claudine Schneider); Gaal & DiLorenzo, The Legality and Requirements of HEW's Proposed "Policy Interpretation" of Title IX and Intercollegiate Athletics, 6 J.C. & U.L. 161, 162 nn.8-9 (1979-80); Thomas & Sheldon-Wildgen, Women in Athletics: Winning the Game but Losing the Support, 8 J.C. & U. L. 295, 297-98 n.7, 300 n.12 (1981-82); Note, Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX, 88 Yale L.J. 1254, 1254 (1979).


14. See, e.g., id. at 49 (statement of President Royal, American Football Coaches Association); id. at 90 (statement of Kathy Kelly, President, U.S. National Student Association); id. at 98-99 (statement of John Fuzak, President, National Collegiate Athletic Association); id. at 232-33 (statement of Dallin H. Oakes, President of Brigham Young University and Director and Secretary of the American Association of Presidents of Independent Colleges and Universities); id. at 284-85 (statement of Norman Raffel, Head of the Education Committee of the Women's Equity Action League); id. at 324 (statement of Dr. Bernice Sandler, Director, Project on the Status and Education of Women, Association of American Colleges).

crimination in athletics. In large measure it can continue to do so only if the term "program or activity" of the civil rights statutes is interpreted to require recipients to remedy discrimination throughout education institutions.\textsuperscript{16}

Institution-wide enforcement is needed to eliminate discrimination in other areas as well. Although title IX and section 504 bar employment discrimination,\textsuperscript{17} in the absence of institution-wide enforcement authority, those statutes supply no bar to discrimination in an English or math department of a university because such departments—like athletics—typically receive no federal funds earmarked or specifically dedicated for their use.\textsuperscript{18} Efforts to eliminate discrimination on the basis of race, sex, and handicap in sub-collegiate school systems that receive unrestricted federal funding such as impact aid and school lunches also would be limited.\textsuperscript{19}

A restrictive reading of the program or activity term also will impair enforcement efforts in non-educational institutions, such as private businesses and local governments, that receive unrestricted federal funding.\textsuperscript{20} For example, the current administration has attempted to protect handicapped infants from possible discrimination in the providing of health care (the so-called "Baby Doe" rules).\textsuperscript{21} The government's effort is premised on the argument that section 504 applies to the privately funded neonatal nurseries of the hospitals caring for the infants.\textsuperscript{22} Like athletic programs, many nurseries receive no federal funds that are either earmarked for, or specifically intended to subsidize, their operations. Also like athletic programs, the nurseries are housed in hospitals that receive unrestricted federal funds, such as Medicaid and Medicare

\textsuperscript{16} But see Letter of Paul M. Bator, Deputy Solicitor General, The Washington Post, Mar. 8, 1984, at A22, col. 3.

\textsuperscript{17} Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1253-54 (1984).


\textsuperscript{20} One example, which will be discussed at greater length later in this article, is Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984), which was argued before the Supreme Court on the same day as \textit{Grove City}. In \textit{Darrone}, the corporation received federal funding for essentially all of its functions, but none of the federal funds was earmarked specifically for the position in which the complainant was employed. \textit{See infra} text accompanying notes 131-34.


\textsuperscript{22} \textit{American Academy of Pediatrics}, 561 F. Supp. at 399.
payments for the benefit of non-handicapped patients and construction funds for nursery and non-nursery facilities. Just as with athletic programs, therefore, the government's enforcement efforts can be sustained only if the program and activity language of section 504 is interpreted to apply to an entire institution that receives unrestricted funds.

I. THE NORTH HAVEN Nexus Theories

Although commentators often debated its meaning, the term "program or activity" received remarkably little attention from the courts until the Supreme Court's decision in North Haven Board of Education v. Bell. North Haven involved two federally supported school districts which, it was alleged, had discriminated against female employees. After investigating the employees' complaints, HEW found that title IX had been violated and sought corrective actions by the school districts. Each board then sued HEW to enjoin the enforcement action, arguing that the regulations barring discrimination in employment under title IX exceeded HEW's statutory authority because title IX did not prohibit employment discrimination. Rejecting the school boards' arguments, the Court upheld the HEW regulations prohibiting employment discrimination. The Court also examined the regulations to determine whether they conformed to the program-specific limitation of title IX. Finding the regulations not inconsistent on their face with title IX's program-specific character, the Court remanded the case for a determination of whether the alleged discrimination was remediable in light of the program-specific requirement of the statute. Although the Court declined to define "program" because of the lack of a well-developed record, it suggested that on remand the defendant school boards could assert that title IX does not apply when:

1. the complaining employee's salary was not funded by federal money;
2. the complaining employee did not work in an education program that received federal assistance; or
3. the discrimination allegedly suffered by the complaining

23. See Memorandum of Amici Curiae in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss, United States v. University Hosp., State Univ. of N. Y., No. CV-83-4818 (E.D.N.Y. Nov. 1983); infra note 111.
25. The opinion did not specify the types of aid.
27. Id. at 534-35.
28. Id. at 536-39.
29. Id. at 540.
30. Id.
In light of the Court’s discussion of the program-specificity concept, federal intervention to enforce the civil rights statutes is barred in the absence of a sufficient connection or nexus between federal funding and the discriminating practice. In other words, the program-specific requirement of the statute is satisfied only if some nexus exists between the federal funds and the discrimination. The nexus requirement is not satisfied in the situations posited by the Court as possible defenses. If the Court’s hypotheticals are restated affirmatively, the nexus between the funding and the discrimination satisfies the statutory requirement if an employee’s salary is funded by federal assistance, an employee works in an education program that receives federal assistance, or the discrimination suffered affects a federally funded program. Each of these nexus theories has a history in the case law of title IX, title VI, and section 504 and has been found to satisfy the program or activity standard of those statutes. This section will explore the case law to determine whether each nexus theory can be sustained after North Haven, and if so, whether any of the theories permit institution-wide enforcement.

A. The Direct Expenditure Nexus

According to the first theory suggested by the North Haven Court, the program-specific nexus of the civil rights statutes is satisfied if the salary of the employee being discriminated against is federally funded. An institution’s discrimination against a particular employee is sufficiently connected to the federal government’s funding to fall within the purview of the civil rights statutes, therefore, if that employee’s salary is federally funded in whole or in part.

The nexus requires two elements: a specific person or group of per-

31. Id.
33. 456 U.S. at 540.
sons within an institution who are the identifiable payees of specific federal funds; and those people receive federal funds only because of their association with the institution. For example, a teacher employed by a school system that receives federal funds to subsidize all teachers' salaries is an identifiable payee of specific federal funds and continues as a payee until he leaves his teaching post. A Social Security disability insurance recipient, on the other hand, is an identifiable payee of specific federal funds, but she continues to be paid irrespective of any connection to any institution. If the two elements of the nexus are satisfied, the civil rights statutes are enforceable to the extent needed to protect payees from discrimination. If effective protection depends on an entire institution or entity being discrimination-free, the entire institution is subject to the civil rights statutes.

To understand how the nexus theory would apply, consider the example of students receiving federal educational assistance such as Basic Education Opportunity Grants (BEOGs). The funds are paid to a student who uses them to pay for educational expenses, such as tuition. If the student leaves the institution, he stops receiving the federal funds. In most educational institutions, students are allowed to participate—irrespective of the source of their tuition—in all aspects of the educational and extracurricular life of the institution. Effective protection of the federally funded student, therefore, means ensuring that no student in the entire institution is discriminated against. To ensure effective protection, the civil rights statutes should be enforceable throughout the institution.

The purpose and the language of the civil rights statutes indicate

34. Id. at 520-21.
35. The most common forms of federal financial aid for students are Basic Educational Opportunity Grants ("BEOGs" or "Pell Grants," after their Senate originator, Senator Pell), 20 U.S.C. § 1070a(a) (1982); Supplementary Education Opportunity Grants ("SEOGs"), 20 U.S.C. § 1070b(a) (1982); Work-Study Programs, 42 U.S.C. § 2753(a) (1982); National Direct Student Loan Program ("NDSLs"), 20 U.S.C. § 1087aa (a) (1982); and Guaranteed Student Loans, ("GSLs"), 20 U.S.C. § 1077(a) (1982). While SEOGs and Work-Study Grants were not at issue in Grove City because the College does not participate in the programs, they may be much the same as BEOGs for title IX purposes. See Brief Amicus Curiae of Hillsdale College, at 13-14 & asterisk, Grove City College v. Bell, 104 S.Ct. 1211 (1984). One difference pertaining to work-study is discussed later. See infra notes 149-151 and accompanying text.

Pell Grants were established by the Education Amendments of 1972, 20 U.S.C. § 1070 (1982), for the purpose of subsidizing tuition, fees, and certain costs of attendance for people pursuing an undergraduate degree. The undergraduate institution, using standard criteria, may compute the amount to be paid a student and distribute the money to him or her, or, at the election of the institution, the Department of Education may perform these tasks. Compare 34 C.F.R. § 690.78(a), with § 690.74. The institution is responsible for certifying, among other things, that the student meets initial eligibility requirements for a grant and makes continuing satisfactory progress in the educational program. 34 C.F.R. § 690.4; see id. at §§ 690.75, 690.77, 690.78(c), 690.83, 690.94-.96.
that Congress intended institution wide enforcement under a direct expenditure theory in appropriate circumstances. The fundamental purpose of the anti-discrimination statutes is "to avoid the use of federal resources to 'support' discriminatory practices."36 "Support," as commonly understood, means providing money. By their terms the first two clauses of the statutes prohibit using federal funds if a person would "be excluded from participation in [or] be denied the benefits of . . . any . . . program or activity receiving Federal financial assistance." These clauses refer to persons who "directly participate in federal programs or who directly benefit from the programs or who directly benefit from federal grants, loans or contracts. . . ."37 Only the third prohibitory clause of the statutes, barring discrimination "under any . . . program or activity," focuses on the program in which the protected person participates rather than on the person. Under the first two clauses, the prohibited act is discrimination in the use of federal funds spent directly on a person.

The direct expenditure nexus has a close analogy in cases in which discrimination has been barred within the walls of a building built with federal construction funds.38 The nexus between the federal subsidy for a building and the discrimination within appears to be more metaphysical than direct: How are the bricks and boards of a building relevant to what occurs inside? Courts that have considered the nexus between a building and the discriminatory habits of its residents have not articulated precisely why the nexus is sufficient,39 but one can discern in these cases the unquestioning assumption that the program and activity language of the anti-discrimination statutes is by necessity expansive enough to prohibit discrimination inside the walls of federally financed buildings.40

37. 456 U.S. at 520-21.
39. See cases cited supra note 38.
40. Cf. President and Directors, 417 F. Supp. at 384 (accepting construction funds obligates university to pursue non-discriminatory policies). The "inside the walls" predicate for the protection is quite mechanical. In one case, title IX was held not to apply to a law school where the federal funding went to build a dormitory next door to house law students. New York Univ., 430 F. Supp. at 1314. Even though the two buildings served the same educational
One reason that the nexus is sufficient is that, just as a person is entitled to an expectation of privacy that will be protected under the fourth amendment, a potential victim of discrimination is entitled to an expectation of safety within the walls of a federally funded building. The Supreme Court has held that the fourth amendment establishes an expectation of privacy when an individual is in a place that he reasonably believes is private: a bookmaker who is using a private phone booth has a reasonable expectation that his conversation will not be overheard by the government. Similarly, when in a building that was built with the government's aid, an individual has a reasonable expectation that he will not be subjected to discrimination. Although this expectation may not be constitutionally protected, the civil rights statutes give it effect. Because anyone entering the doors of the federally subsidized building is entitled to a reasonable expectation of non-discriminatory treatment, federal funding for a building can be considered a direct expenditure on every program and activity occurring under the building's roof. The same "directness" exists in the connection between a federally subsidized student and any program or activity in which he or she participates in the educational institution. A federally subsidized student has a reasonable expectation of safety that is protectable with respect to any program or activity, so institution-wide enforcement of the civil rights statutes is needed to ensure that the expectation is realized. The institution becomes, in essence, the equivalent of a federally protected building.

The direct expenditure nexus suggested in North Haven implies that discrimination occurring anywhere in an educational institution is barred by title IX if a federally subsidized student, who has an expectation of safety in the institution, will be subjected to or affected by the discrimination. Once an educational institution accepts a federally subsidized student and is paid the federally subsidized tuition fees, it is obli-

curriculum and student body, federal funding for the dormitory was an adequate basis for protecting residents from discrimination only within dormitory walls and not for protecting the same residents from the same discrimination next door. See Note, The Application of Title IX to School Athletic Programs, 68 CORNELL L. REV. 222, 233 (1983).

What is intriguing about the notion of a "direct" connection between federal construction funds and discrimination occurring inside the building is that the construction funds are not used to pay for the operation of the programs housed inside. None of these federal dollars is used "directly" to pay the salary of an employee who is suffering from discrimination or even the salary of the employee performing discriminatory acts. The building subsidy may well subsidize the programs housed within by providing them with less expensive housing or by relieving the program of the need to seek building funds from other sources, such as private donors or the commercial market. The program is then free to seek funds from the same private donors for other purposes and to use the money it would have paid in interest for a commercial loan on other activities.

gated not to discriminate against the student. Because the student usually is free to participate in all programs within the institution, effective assurance against discrimination is impossible unless discriminatory acts are banned everywhere in the institution. Thus, under North Haven, the nexus between direct federal funding and a discriminatory act anywhere in the institution is sufficiently close to permit institution-wide application of the civil rights statutes.

B. "Program" Equals Institution Nexus

Under the second nexus suggested by the North Haven Court, the civil rights statutes apply if the complaining employee works in an educational program that receives federal assistance.42 This nexus differs from the direct expenditure nexus because it does not require that specific federal funds be spent directly on an identifiable payee. Instead, the nexus requires only that the discrimination occur within the federally funded "program" in which the complainant participates or is employed. If a program constitutes the entire institution, discrimination can be barred institution-wide. The critical question, therefore, is when does an entire institution constitute a single program.43 The fact that an institution or entity receives unrestricted funds that are or can be spent throughout its budget makes it a candidate for consideration for institution-wide coverage.44

The first noteworthy case to equate the "program" with the institu-

42. 456 U.S. at 540.
43. The courts and commentators have posited several definitions of the term "program." For a discussion of these theories see Note, supra note 5, at 1211-17 (arguing that the enforcement section of title IX limits the scope of the term "program"); Note, Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language With Its Broad Remedial Purpose, 51 FORDHAM L. REV. 1043, 1060 (1983) (This article argues that a broad, integrated institution approach "gives meaning to the [statutory] language [and] also adequately guards against the harm that [the statute] was intended to prevent." Although this article discusses various theories, its concern is not to examine them in detail).
44. A related question is the degree of title IX coverage that results when a categorical grant is housed in an institution which is paid a portion of the grant funds as reimbursement for its overhead expenses. A categorical grant appears on its surface to be a program with boundaries smaller than the institution in which it is housed. The Haffer court suggested, however, that where the total amount of money so received by an institution is substantial, the entire institution can be considered the program. Haffer v. Temple Univ., 524 F. Supp. 531, 540 (E.D. Pa. 1981), aff'd per curiam, 688 F.2d 14 (3d Cir. 1982). Furthermore, the overhead may contribute directly to the general fisc just as do tuition and fee payments. See Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549, 561-62 n.22 (5th Cir.), vacated as moot, 458 U.S. 1102 (1983); Brief Amicus Curiae of American Association of University Women, et al., at 28, n.34, Grove City College v. Bell, 104 S. Ct. 1211 (1984). Finally, while the grant may be administered according to nondiscriminatory policies, it is not free of discrimination if it is housed within a discriminatory environment that effectively precludes protected minorities from participating in the grant program. See infra notes 65-75 and accompanying text. In all
tion because the federal funding was general and unrestricted was *Bob Jones University v. Johnson*, in which students used GI Bill education benefits to pay tuition and fees. The court held that title VI prohibited the University’s discriminatory admissions policies because the entire institution was covered. As the court put it, the institution was the program in which the veteran was participating, because the veteran’s enrollment in the entire University was the necessary prerequisite to the payment of the education benefits; no smaller unit was offered for admission or enrollment by the University, so no smaller unit would be covered.46

Following the *Bob Jones* analysis, the Third Circuit interpreted broadly the reach of the civil rights statutes.47 In *Grove City v. Bell*, the court held that for an entire institution to be covered by title IX, the institution must receive some form of general federal funding that can be and is used throughout the institution. It found federal student assistance in the form of BEOGs to be such funding. The court also held that the institution must meet the further requirement of being “integrated.”49 The entire institution must be funded out of a single

of these circumstances, title IX would be applicable under *North Haven* both to the categorical grant program and to the institution in which it is housed.

By drawing a sharp contrast between earmarked grants on the one hand and unrestricted grants on the other, the *Grove City* decision suggests in dicta that categorical grants can be the predicate solely for limited application of the civil rights statutes. 104 S. Ct. at 1220-1222. The Court had before it, however, no evidence as to the purposes of particular categorical grant programs or their actual or intended effect on the recipient institution, so it cannot be concluded finally that no categorical grant program can result in institution-wide civil rights coverage. A further question is raised by *Temple Uniu*. Where an institution receives a large percentage of its budget from numerous earmarked grants, no one of which has an institution-wide purpose and effect, does the cumulative effect of the federal grant presence mandate institution-wide coverage? The answer may turn on the distinction between actual effect and intended effect. The *Grove City* decision found that the latter is determinative in the use of BEOGs. The answer in the case of other statutes is not likely to be different.

It has been suggested that categorical grants may be the basis for subjecting the entire institution to title IX because the entire institution benefits from the grant insofar as funds are thereby freed for use by other programs. Where a categorical grant program includes a “maintenance of effort” clause, however, this approach may not be persuasive. Cf. Note, supra note 40, at 232; Comment, *HEW’s Regulation Under Title IX of the Educational Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U.L. Rev. 133, 183. It is unclear, however, what the result would be if there were evidence that the clause is honored in the breach.

49. Id. at 698-99.
pool of funds, and the students must be free to engage in all the activities offered by the college.\textsuperscript{50}

An integrated institution like that found in \textit{Grove City} frequently has another important characteristic: a hierarchical decision-making structure with uniformly applicable, institution-wide policies and practices. One court, for example, found that university policies that were based on instructions from the president's office governed an athletic department's rejection of a handicapped athlete.\textsuperscript{51} Although no federal funding was earmarked for the athletic department, the department was subject to university direction and was not separate from its governance structure.\textsuperscript{52} Based on this chain of command, the court held that the athletic department was subject to section 504.

In an integrated institution, discrimination may reveal itself in the policies and practices relating to faculty, staff, transportation, extracurricular activities, or facilities.\textsuperscript{53} The policies and practices affecting each element flow from the same source: the school board or governing body of the institution. Accordingly, discrimination in any one area may indicate that discrimination is occurring throughout the integrated system. Wherever it occurs, therefore, the discrimination must be remedied to assure that the federal funds are not spent in a similarly discriminatory manner.

Another factor that a court may consider when determining the scope of title IX is that students are essentially fungible. That is, all students are permitted access to all parts of an institution, and students' needs can be met only by an integrated administrative structure with uniform rules for all of the institution's subunits. An employee's ineligibility for his employer's only federally funded program led one court to hold that the employee had not shown a sufficient connection between the federal funding and the alleged discrimination. In \textit{Simpson v. Reynolds}\textsuperscript{54}.

\textsuperscript{50} See \textit{id.} at 696-97. The court concluded that no "Chinese wall" exists between any of the college's programs and activities and any other program and activity. It leaves open the possibility that a defendant institution may prove the existence of a Chinese wall, however, and implies that such a separate program or activity would not be considered an integrated part of the institution. \textit{id.} at 701 n.28. The Chinese wall would, in the contemplation of the Third Circuit, consist of a fiscal separation between the discrimination and the federally funded program. Where the financial separation is less than complete, the Chinese wall would not serve to insulate a program from the requirements of title IX.


\textsuperscript{52} \textit{Id.} at 792; see Uzzell v. Friday, 547 F.2d 801 (4th Cir. 1977), \textit{cert. denied}, 446 U.S. 951 (1980); Yakin v. University of Ill., Chicago Circle Campus, 508 F. Supp. 848 (N.D. Ill. 1981).

Metal Co., the business was accused of discrimination against an alcoholic employee. The only federal funding that the company received was for a veteran’s apprenticeship program for which the complaining employee was ineligible to participate and in which he had never expressed a desire to participate. The court found that although section 504 applied to the apprenticeship program, there was no adequate nexus between the program and the complaining employee because the business was not a "unified entity." An educational establishment is different, the court said, because a student may seek "to participate in a privately funded program conducted in conjunction with an educational institution’s overall program, other parts of which [are] federally funded." By denying the student participation in the privately funded activity, the institution denies the student participation in the overall program. An employee who is employed in a discrete, privately funded section of a business and who is ineligible for the publicly funded program does not connect the privately funded program to the publicly funded program, because the policies and practices of the one do not overlap the other. The employer’s alleged discrimination in the private program, therefore, is not connected through the employee to the publicly funded program in which such discrimination is barred.

When attempting to parse a program from its context, courts have employed a similar functional analysis of the budgetary structure of the parent institution. Courts have focused, for example, on such matters as the existence of a general fund. If the federal funds flow through a general fund, the entire institution is more likely to be found subject to title IX. When the federal funds are provided to several different types of narrow-focus programs under different budget processes and different governing bodies, on the other hand, it is more likely that each program will be evaluated separately for civil rights purposes.

54. Simpson v. Reynolds Metal Co., 629 F.2d 1226 (7th Cir. 1980).
55. Id. at 1231.
56. Id. at 1232.
57. Id. at 1233 n.12.
61. See Gautreaux v. Romney, 457 F.2d 124, 128 (7th Cir. 1972); cf. id. at 137-38 (Sprecher, J., dissenting); Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1075 (5th Cir. 1969) (title VI requires case-by-case analysis before cutting funds). The First Circuit’s decision in Rice is another example. Rice v. President and Fellows,
Because of their typically unified governance, budgetary, and administrative structures, and because students are permitted universal access to programs, the majority of educational institutions are integrated. The Third Circuit in Grove City justifiably found that title IX is enforceable throughout an integrated institution receiving unrestricted funds. Subdivided enforcement would permit an institution to use its integrated governance and budgetary structures to shift federal funds to those programs in which no discrimination occurs and thus insulate continued discrimination in other programs.6 Students who are subject to a single set of educational and administrative policies and practices in every other aspect of campus life would face varying degrees of exposure

663 F.2d 336 (lst Cir. 1981), cert. denied, 456 U.S. 928 (1982). The student complaining of sex discrimination in the grading policies of the Harvard Law School alleged that federal funding was received by the school for work-study students, but she did not allege that the discrimination occurred in the work-study program. Id. at 339. The Court held that only the work-study program was subject to the anti-discrimination statutes. The result is correct under the program-equals-institution nexus theory because of the lack of allegations showing defendant law school’s integrated characteristics. Under the direct expenditure nexus theory, the result is debatable because it effectively unties the work-study program from its moorings. As discussed earlier, the first nexus described in North Haven means that title IX covers discrimination against recipients of work-study grants just as it would against any other employee paid with federal funds. In a pure employment setting, discriminatory policies governing the evaluation of a federally funded employee without question would be prohibited. It is at least arguable, therefore, that an institution distributing work-study grants to its students must adopt non-discriminatory grading or evaluation policies to eliminate the possibility that the federally funded employee, i.e., the work-study student, will be victimized by discriminatory grading, and as a result, lose her or his status as a student/employee. See supra notes 33-41 and accompanying text.


The impracticality of applying title IX to subdivided parts of an educational, business, or governmental institution also suggests that Congress did not intend that result. Such was the testimony of Representative Mink during the Postsecondary Hearings:

It is difficult to trace the Federal dollar precisely. A narrow interpretation of title IX would render the law meaningless and virtually impossible either to enforce or to administer. For example, the slide projector in one classroom might be purchased with title I ESEA money, while the slide projector in the adjacent room was not. It surely is not the intent of Congress to prohibit sex--or race or national origin--discrimination in the room with the title I projector, while allowing it in the adjacent room. Surely we do not want HEW investigators to be charged with tracing exactly which classes used the federally funded slide projector.

Also, if this narrow interpretation of the scope of coverage were accepted for title IX, it might well be the wedge in the door for cutting back protection of racial and ethnic minorities under title VI of the 1964 Civil Rights Act. Such a narrow interpretation could open the floodgates for reversing 11 years of progress under title VI.

to discrimination based solely on the institution's bookkeeping decisions. The proper program unit in this situation is the entire integrated educational institution.  

C. "Infection" Nexus

Under the third nexus described in *North Haven*, title IX, title VI, and section 504 bar discrimination occurring in a non-federally funded program when the discrimination affects a federally funded program. The theory differs markedly from the direct-expenditure nexus theory and the program-equals-institution nexus theory because it does not require that an institution receive unrestricted federal funding. What is required instead is the existence within an institution of a federally funded program that is affected by discrimination occurring elsewhere in the institution. This third nexus theory, termed the "infection" theory, has proved to be the most common approach taken by courts that have held the anti-discrimination statutes applicable to a program that receives no earmarked federal funds. Under the theory, an institution enrolling students receiving federal financial aid is subject in its entirety to the civil rights statutes for the purpose of eliminating any discrimination that adversely affects the federally funded student aid program. The "infection" theory derives from the decision in *Board of Public Instruction v. Finch*, in which the court said:

In finding that . . . the Civil Rights Act [applies] on a program by program basis, we do not mean to indicate that a program must be considered in isolation from its context.

63. During the debate on title VI, one of the bill's sponsors, Senator Humphrey, described the effect of the program-specific limitation on the funding cutoff sanction that was adopted because of congressional concern that an unlimited sanction would give federal civil rights enforcers too great a sanction. He said that the program or activity language was not to be read as

authoriz[ing] any cutoff or limitation of highway funds, for example, by reason of school segregation. And it does not authorize a cutoff, or other compliance action, on a statewide basis unless the State itself is engaging in discrimination on a statewide basis. For example, in the case of grants to impacted area schools, separate compliance action would have to be taken with respect to each school district receiving a grant.

110 CONG. REC. 6,544 (1964).

It should be noted that the smallest unit mentioned by Senator Humphrey is a school district, not an individual school. The sensible analogy is to the entire body of an integrated educational institution. Typical school districts and integrated educational institutions share the critical characteristics: a single set of educational and administrative policies, a hierarchical governance structure, a unified budgetary process, and an essentially fungible student body. There are no important distinctions.

64. *North Haven*, 456 U.S. at 540.

65. See infra notes 75-78 and accompanying text.

66. 414 F.2d 1068 (5th Cir. 1969).
[It applies where either] a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory.67

Under the infection theory, institution-wide enforcement of the civil rights statutes is required if the facts show that the federally funded program cannot be "cured" of discrimination unless the entire institution is "cured." The case of the Iron Arrow Honor Society demonstrates how this works.68 Prior to the initiation of title IX enforcement proceedings, the all-male society, which was funded exclusively by private funds, occupied a unique and prominent role in the life of the University of Florida. Created by the University's first president, the society possessed a unique university charter and counted among its members alumni, staff, faculty members, and administrators of the university. Faculty members served on its membership screening committee; plaques and monuments on campus honored the society and its contributions to university life. Public recognition of members was promoted by, among other things, a public induction ceremony held during class hours on a mound on the campus.69

The court found that, in light of the University's close involvement with the activities of, and its public affirmations of support for, the society, the society's male-only policy pervasively undermined the self-worth of women participating in the University's programs.70 Because of its close ties with the society, the University was endorsing the message that, solely because of her sex, a female student's ideas and value in the university community were less significant than those of a male student. Thus the court found that the University could be required under title IX to sever its ties with the society because the society's exclusion of women affected the federally funded programs by maintaining an environment of sexual discrimination.71

A frequently cited source of discriminatory infection is the educational athletic program. The Supreme Court has recognized that athletics are a vital part of the total educational process.72 The policy of the

67. Id. at 1078.
69. Id. at 562-64.
70. Id. at 561.
71. Id. at 562-64.
National Collegiate Athletic Association is that athletic programs are to be "an integral part of the educational program," a policy which finds expression in the faculty status accorded coaches and the academic credit awarded for athletic courses. The public honor accorded athletes who perform well in the competitive athletic endeavors of their schools is well known. If an institution prevents women from fully participating in these athletic events, the institution is endorsing the same message that is sent by the males-only policy of the Iron Arrow Society: Only men are good enough to be honored in this university community. That message can act as a surface indicator of sex discrimination occurring in other programs of the university, just as discrimination in athletics has been found to act as a surface indicator of race discrimination occurring in other programs of a school system. In addition, discrimination in a public activity, such as athletics, infects other activities throughout the university, because other members of the university community will perceive discrimination as acceptable behavior that has the approval of university officials. A person inclined to discriminate, therefore, would experience no inhibition, while a person needing protection will perceive that none is provided. Discrimination in a public activity such as athletics, therefore, is good evidence that a federally funded program, such as student aid, is operating in a discriminatory environment. Participants in the federal program can be protected only if the discrimination in athletics is eliminated.

Sub silentio, the infection theory has been relied on frequently as the basis for application of the anti-discrimination statutes. In *Lau v. Nichols*, for example, the Supreme Court held that when a school district receives large amounts of federal financial assistance, the school district's failure to provide bilingual education violates Title VI. Although the federally funded programs were not earmarked to assist students needing bilingual education, they were the basis for invoking title VI

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73. Gaal & DiLorenzo, supra note 12, at 170-71 & n.49.
74. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 18; see Gaal & DiLorenzo, supra note 12 at 172.
because the discrimination against the non-English speaking students prevented them from participating in the federally funded programs. Thus the discrimination pervaded or infected the federally funded programs. The infection theory also has been the basis for findings that discrimination in extracurricular programs, such as athletics and school trips, can be barred because of its effect on federally funded programs conducted by the institution or school system.

In recent years, two courts have attempted to circumscribe the infection theory. Both concluded that the theory is inapplicable under title IX. Although the infection theory may be applicable under title VI because of its constitutional underpinning, these courts assert, it is inapplicable under title IX, which is a mere statutory bar to discrimination. These courts also argue that the infection theory is used properly only to ensure that educational institutions do not discriminatorily deny students access to federally funded programs. Thus, title IX or section 504 would not apply if discrimination in a program that does not receive earmarked funds, such as athletics, affects an entire institution or any other federally funded program within the institution, because the

77. Id.; see also, Riles, 495 F. Supp. at 964 (California State Board of Education and San Francisco Board of Education ordered to remedy system-wide discrimination against the educable mentally retarded; title IX and section 504 applicable because of “substantial federal assistance” received by the defendants); New York State Assoc. for Retarded Children, 612 F.2d at 649 (New York City Board of Education ordered to remedy discrimination against mentally retarded children; section 504 “fully applicable” because defendant receives federal funds); Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 604 (D.S.C. 1974) (college’s students’ VA educational benefits cut off under title VI because of discrimination against blacks in admission); cf. Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1967) (black children on Air Force base may attend integrated public schools because defendant school board received federal funds).

78. See, e.g., Iron Arrow Honor Soc’y, 702 F.2d at 561 (discrimination in honorary society barred where university receives federal assistance); Uzzell, 547 F.2d at 802 (discrimination in university’s administration of campus governing council and honor board barred where university receives federal financial assistance in the form of grants and contracts); United States v. Texas, 447 F.2d 441, 445 (5th Cir. 1971) (desegregation ordered under title VI in extracurricular as well as academic program); South Plainfield Bd. of Educ., 490 F. Supp. 948, 951 (D.N.J. 1980) (section 504 applies to interscholastic sports program if school system receives federal funds).

79. Hillsdale College v. HEW, 696 F.2d 418, 429 (6th Cir. 1982); Other v. Ann Arbor School Bd., 507 F. Supp. 1376, 1388 (E.D. Mich. 1982), aff’d on other grounds, 699 F.2d 309 (6th Cir. 1983). Other is discussed solely to illustrate the arguments surrounding the infection theory, and not as authority. The district court decision was affirmed on the ground that the plaintiff did not prevail; the Court of Appeals determined that it was not necessary for the district court to have decided whether title IX applies to the athletic programs of the defendant school district. Other v. Ann Arbor School Bd., 699 F.2d 309, 313 (6th Cir. 1983).

80. Hillsdale College, 696 F.2d at 429; Other, 507 F. Supp. at 1388-89; see also University of Richmond, 543 F. Supp. at 328.
discrimination would not bar anyone from admission to the federally funded program.\footnote{Hillsdale College, 696 F.2d at 429; Othen, 507 F. Supp. at 1388-89; see Kuhn, supra note 32, at 63 n.89, 70; see also Rice v. President and Fellows, 663 F.2d 336, 339 n.2 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Bennett v. West Tex. State Univ., 525 F. Supp. 77, 81 (N.D. Tex. 1981), rev'd in unpub'd op., No. 81-1398 (5th Cir. Jan. 31, 1983), cert. denied, 52 U.S.L.W. 3701 (March 27, 1984).}

The explicit language in \textit{North Haven} and the facts of Finch provide persuasive responses to both these arguments. In \textit{North Haven}, the Supreme Court approved the Finch court's use of the infection theory as a standard for the application of title IX—irrespective of the place of women in the constitution.\footnote{456 U.S. at 538-39. The Court supported its position by reiterating that Congress intended that title IX be interpreted consistently with title VI. See Cannon v. University of Chicago, 441 U.S. 677, 696 (1979).} Furthermore, by its terms the discrimination bar of title IX is not limited to admissions; it extends to any action by which a person is "excluded from participation in," "subjected to discrimination under," or "denied the benefits of" an educational program or activity receiving federal financial assistance.\footnote{20 U.S.C. § 1681 (1982).} Nothing in the identical statutory language of title IX, title VI, and section 504 suggests that an admissions program should be subjected to more stringent requirements than any other aspect of an educational institution.\footnote{See Iron Arrow Honor Soc'y, 702 F.2d at 556.}

The Finch facts also belie the notion that admissions are to be treated more stringently. In Finch, the Taylor County School system received categorical grants for a variety of school services. The court found that funding could not be terminated for any program unless discrimination occurred within the specific program proposed for funding termination or unless discrimination outside the program affected the program.\footnote{414 F.2d at 1078.} The court did not suggest that the extra-program discrimination must be a discriminatory entry barrier.\footnote{Such limitation would be inconsistent with the infection theory—to ensure that federally funded programs can operate in a discrimination free environment. See Comment, supra note 60, at 112.}

\section*{II. \textsc{Grove City College v. Bell}}

Institution-wide enforcement of the civil rights laws is an effective way for the government to assist protected minorities to achieve equality. Although the \textit{North Haven} decision raised doubts about the future of institution-wide enforcement, the program-specificity requirement of the civil rights statutes need not be a substantial bar. Under the three nexus theories suggested in \textit{North Haven}, institution-wide enforcement would be permissible if unrestricted federal funding may be spent
throughout an integrated institution, if federal funds are paid to or for the benefit of a potential victim of discrimination for the purpose of participation in all of a recipient institution’s or entity’s programs, or if a federally funded program is affected by discrimination occurring in a non-federally funded program elsewhere in an institution or entity. In its decision in Grove City College v. Bell, however, the Court adopted a “purpose and effect” test that will bar in large measure the institution-wide enforcement effects permissible under North Haven.

A. The Purpose and Effect Test

The Court’s new test can be stated quite simply: If the purpose and effect of federal funding is to assist a particular program, the civil rights statutes may be invoked to bar discrimination in that program. Applying the test to Grove City College, the Court found that discrimination in the financial aid program could be barred, but the rest of the college was not subject to the anti-discrimination statutes.

Grove City is a small, coeducational liberal arts college that receives federal funds only in the form of federal aid to students. As a matter of policy, the college did not apply for federal funding because of its traditional commitment to independence from the government. When HEW began the title IX enforcement action, one hundred forty of the school’s approximately twenty-two hundred students were eligible to receive BEOGs and three hundred forty-two students had obtained Guaranteed Student Loans (GSLs).

In 1976, HEW asked the college to sign an Assurance of Compliance form in which the college would promise to comply in all of its programs with title IX. Claiming that it was not subject to title IX because it received no federal financial assistance, the college refused to sign. An administrative law judge concluded that the college was a “recipient” of “federal financial assistance” and allowed HEW to terminate the BEOGs and GSLs. The college and four student recipients of financial aid sued the Department to declare the termination void and to enjoin the Department from requiring the college to sign an Assurance of Compliance as a condition of preserving its eligibility for the

88. Id. at 1222.
89. Id. at 1214.
90. Grove City, 687 F.2d at 688 n.7.
91. Id. at 688.
92. Id. at 689.
93. Id.
94. Id.
BEOG and GSL programs. 95 Although the district court rejected the college's argument that BEOGs and GSLs do not constitute "federal financial assistance," it refused to allow HEW to terminate the BEOGs and GSLs based on the college's refusal to sign an Assurance of Compliance. 96 Partially reversing the district court, the court of appeals held that the phrase "federal financial assistance" includes educational grants (BEOGs), but not loans (GSLs), paid to students. 97 Thus, institutions that receive aid only "indirectly," that is, through students' tuition, are within the purview of title IX. 98 The court also interpreted the "program-specific" language of title IX, "program or activity," to mean that when students receive federal student aid, the entire college constitutes the "program" covered by title IX. 99

In its brief to the Supreme Court in Grove City, the government shifted its position on the scope of title IX coverage. The government continued to argue that admitting students who receive federal financial aid subjects a college to title IX, 100 but it abandoned its traditional position that the entire college is covered. It argued that title IX applies only to the financial aid program of the college; 101 discrimination in another part of the college generally cannot be prohibited if the college

95. Id.
96. Id.
97. No appeal was taken with respect to the GSLs. Id. at 690 n.10.
98. Id. at 693.
99. Id. at 697-700.
101. Id. at 13-18; Post-Argument Brief for Respondent, Grove City College v. Bell, 104 S. Ct. 1211 (1984). Contrary to the consistent positions taken by HEW and DOE in the title IX regulations, earlier stages of the case, and other title IX litigation, the government argued that the coverage of title IX should be resolved "by a common sense discernment of what, in the most natural way, can be considered the educational 'program or activity' assisted by federal aid." Id. at 15-16. It asserted that its position is mandated by the "explicit direction in North Haven that [the title IX regulations] not be given . . . universal application." Id. at 15. Instead, the coverage should be limited to the financial aid program. Id. at 16.

Senator Dole described the government's position as a "legalistic, technical interpretation." The Washington Post, Aug. 7, 1983, at A5, col. 1; see id., Aug. 3, 1983, at A2, col. 1 (statement of Representative Schneider); id., Aug. 6, 1983, at A2, col. 1. Seventy-four members of Congress, including Representative Schneider and Senator Dole, filed a brief amicus curiae in the Grove City case urging the Court to interpret title IX coverage comprehensively in accordance with the intent of Congress. Brief Amicus Curiae of the Honorable Claudine Schneider, Grove City College v. Bell, 104 S. Ct. 1211 (1984). All of the amici are co-sponsors of one of two identical bills, S. 149, 98th Cong., 1st Sess. (1983), and H.R. 190, 98th Cong., 1st Sess. (1983), which reaffirm the congressional intention that title IX and the initial regulations issued pursuant to it "should not be amended or altered in any manner which will lessen the comprehensive coverage of such statute in eliminating gender discrimination throughout the American educational system." 98th Cong., 1st Sess., 129 Cong. Rec. H10085 (daily ed. Nov. 16, 1983). H.R. 190, which is co-sponsored by 225 members of the House of Representatives, was reported favorably to the House by the Education and Labor Committee on August 5, 1983 and passed the House of Representatives by a vote of 414 to 9.
receives only indirect financial aid. The effect of the government’s interpretation of the term “program or activity” is to limit the coverage of title IX to the particular aspect of the institution that the relevant funding statute was designed to benefit. Because Congress intended that the BEOG program subsidize the financial aid programs of institutions of higher education, the government argued, only the financial aid program is covered by title IX.102

The Court found that title IX applies to Grove City College because it admits students who participate in the BEOG program.103 The

102. Initially, the government cited no authority for its argument, asserting instead that “[t]he purpose of the program is specific and well-recognized: it enables schools to recruit students who otherwise could not afford to attend.” The Post-Argument Memorandum contained a slightly fuller explanation:

By contrast, when the government gives an institution BEOGs (to hand out under the RDS system), those funds are restricted in the sense that the school must use them for scholarships—that is, for recruiting students regardless of means. The funds are intended to be, and have the economic effect of providing, a subsidy to Grove City’s financial aid and scholarship program. (The situation is no different when BEOGs are handed out under the ADS system. The funds are again used for the purpose of recruiting to the school the most desirable students; the government simply relieves the school of the administrative burden of dispensing the money.)


103. Grove City, 104 S. Ct. at 1220. The “trigger” question turned on whether the Department of Education’s title IX interpretive regulations correctly define two statutory terms. Under these regulations, 34 C.F.R. § 106.2(g)(1) (1983), the term “federal financial assistance” is defined as including aid for education, whether payable to the student or the institution. The term “recipient” is defined as an institution “to whom Federal financial assistance is extended directly or through another recipient.” 34 C.F.R. § 106.2(h) (1983). When read together, a college such as Grove City is a recipient covered by title IX’s bar against sex discrimination because some of its students receive BEOGs which they use to pay tuition and fees to the college.

The arguments favoring the correctness of the inclusive interpretive regulations are quite strong. First, their interpretation is not precluded by the language of the statute, a factor to which the Supreme Court gave substantial weight when interpreting title IX in North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521-22 (1982). Second, the legislative history supports the inclusive interpretation. The most prominent contemporary forms of federal student aid either originated in or were amended by the Education Amendments of 1972, which also contained title IX. See Pub. L. No. 92-318, 86 Stat. 325; Conference Rep. No. 798, 92nd Cong., 2d Sess. passim (1972). The debates on the Amendments demonstrate that Congress was aware that title IX properly could be invoked when a higher education institution accepted students receiving aid under the other titles of the same Amendments. See, e.g., 113 Cong. Rec. 30,158-59 (1971) (remarks of Sen. McGovern); 117 Cong. Rec. 30,155-56, 30,408 and 30,412 (1971) (remarks of Sen. Bayh); 117 Cong. Rec. 39,255 (remarks of Rep. Cleveland); 117 Cong. Rec. 39,257 (1971) (remarks of Rep. Steiger).

In addition to the concurrent consideration of title IX and student aid, further evidence of congressional intent is found in title IV of the Education Amendments of 1972, relating to the Student Loan Marketing Association. Pub. L. No. 92-318, 86 Stat. 235, 266 (codified as amended at 20 U.S.C. § 1087-2 (1982)). Unlike the other titles, title IV applies to private lending institutions rather than to educational institutions. It is worthy to note that, although title IV contains a specific prohibition against gender discrimination, none of the
Court also agreed with the government's conclusion that the student financial aid program is covered, but its rationale is somewhat different. The "program" operated by a recipient is determined according to the "purpose and effect" of the federal funding program, BEOGs. According to the Court, the "purpose" of the BEOG program was restricted to assisting colleges to give aid to poor students; it was not to provide unrestricted assistance to the colleges. The "effect" of the titles applicable to educational institutions contains such a specific prohibition. This is an additional indication that Congress saw no need to include a specific prohibition against gender discrimination in any part of the bill applicable to educational institutions, such as the student financial aid programs, because it was assumed that title IX would apply.

The post-enactment history of title IX also lends weight to the Department's inclusive regulatory interpretation. See North Haven, 456 U.S. at 535-37; Comment, supra note 44, at 152-53. The regulations were subject to a congressional review which, after extensive explanations and discussion, resulted in no changes. Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 481, 484 (1975) (statement of Secretary of HEW Weinberger) [hereinafter cited as Postsecondary Hearings]; id. at 488 (letter from Secretary of HEW Weinberger); see id. at 65 (statement of Rep. Chisholm); id. at 163 (statement of Rep. Mink); see S. 2146, 94th Cong., 1st Sess., 121 CONG. REC. 23,845-47 (1975) (statement of Senator Helms); H.R. Con. Res. 330, 121 CONG. REC. 21,687 (1975); H.R. Con. Res. 329, 121 CONG. REC. 21,687 (1975); H.R. Con. Res. 310, 121 CONG. REC. 19,209 (1975); S. Con. Res. 46, 121 CONG. REC. 17,300 (1975).

Finally, in 1976 the Senate rejected the McClure Amendment, whose purpose was to limit the applicability of title IX to institutions that receive federal funding "directly from the federal government." Amend. 390, 122 CONG. REC. 28,144 (1976). The Senate was advised during the debate that the inclusive interpretation had been upheld in the title VI case of Bob Jones Univ. v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), afdmem., 529 F.2d 514 (4th Cir. 1975). Both Senator Bayh, the sponsor of title IX, and Senator Pell, the sponsor of the BEOG program, argued that Bob Jones was correctly decided. 122 CONG. REC. 28,145, 28,147 (1976). From the defeat of the amendment, it appears they were persuasive.

The major argument asserted against the inclusive regulatory interpretation of "receiving Federal financial assistance" is that the breadth of the interpretation alters the statutory scheme by effectively eliminating the program-specific limitation of the statute. To rephrase the argument in the words of the statute, if federal student aid is within the definition of "federal financial assistance," the "program or activity" "receiving" the assistance logically is the entire educational institution to which the funds are paid. Therefore, the argument proceeds, because title IX is intended to be enforced by the government only with respect to a "program or activity" and not with respect to an entire educational institution, the statutory scheme prohibits the initial step of finding that federal student aid constitutes "Federal financial assistance." See University of Richmond v. Bell, 543 F. Supp. 321, 329 (E.D. Va. 1982); Bennett v. West Tex. State Univ., 525 F. Supp. 77, 78 (N.D. Tex. 1981), rev'd in an unpub'd op., No. 81-1398 (5th Cir. Jan. 31, 1983), cert. denied, 52 U.S.L.W. 3701 (March 27, 1984); Brief for Petitioner at 19, Grove City College v. Bell, 104 S. Ct. 1211 (1984); Brief Amicus Curiae of Hillsdale College, Grove City College v. Bell, 104 S. Ct. 1211 (1984); Tashjian-Brown, Title IX: Progress Toward Program Specific Regulation of Private Academia, 10 J.C. & U.L. 1, 26 (1983-84). In light of the broad statutory language, the connection explicitly recognized by the enacting Congress between title IX and the student aid programs and the clear post-enactment history, the argument is weak. Furthermore, it rests on an inaccurate premise, that coverage of an entire institution is impermissible. See infra notes 111-114 and accompanying text.

104. 104 S. Ct. at 1220-22.
BEOG funding is also limited to the financial aid program; following the federal dollars through the operating budget of the college to ensure that the federally aided students always are protected from discrimination is not within the congressional intent. In addition, the effect is restricted because the aid represents an increase in both the resources and the obligations of the college. Student financial aid, in sum, is sui generis and does not support institution-wide coverage of title IX.\textsuperscript{105}

The Court’s interpretation of the term “program and activity” is not persuasive. The purpose and effect test, as it is explained and applied in \textit{Grove City}, ignores substantial evidence of a more expansive congressional intent with respect to both the BEOG program and the civil rights statutes.\textsuperscript{106} It also ignores long-standing administrative interpretations of title VI and title IX, which Congress has not overruled by amending either act.\textsuperscript{107} Without explanation, it accepts one congressional purpose for the BEOG statute while ignoring another.\textsuperscript{108} It determines the impact of the program on an educational institution without evidence although evidence could have shown a quite different picture.\textsuperscript{109} Finally, it permits scant and indecisive evidence of congressional intent as to the “regulatory impact” of the BEOG program to reduce substantially the scope of protection provided by the civil rights statutes.\textsuperscript{110}

Congress spoke with unusual clarity about its intention in enacting the BEOG program. The statute, as enacted, states five purposes: four relate to a single goal, meeting certain financial needs of students. The fifth, on the other hand, states that the grant program is to “provide assistance to institutions of higher education.”\textsuperscript{111} The House Report explained the relevance and importance of the fifth purpose:

\textbf{Institutions of higher education have sought federal assistance to enable them to meet their responsibilities to the nation. The bill . . . attempts to meet that need both by extending and amending existing categorical programs and accepting

\textsuperscript{105} Id. at 1221.
\textsuperscript{106} See infra notes 137-141 and accompanying text.
\textsuperscript{107} See infra notes 142-145 and accompanying text.
\textsuperscript{108} See infra notes 111-114 and accompanying text.
\textsuperscript{109} See infra notes 115-119 and accompanying text.
\textsuperscript{110} See infra notes 120-125 and accompanying text.
\textsuperscript{111} 20 U.S.C. § 1070(a)(1)-(5)(1982). An instructive contrast may be found in the Medicare enactment, which describes the purposes of the program solely in terms of benefiting the people needing medical care. The language of the statute does not evidence a congressional intention to benefit an entire institutional or non-institutional health care provider. See 42 U.S.C. § 1395c (1982). But see H.R. REP. NO. 213, 89th Cong., 1st Sess. 33 (1965) (effect of enacting Medicare-Medicaid programs would be to reduce the number of unpaid bills and patients too poor to pay, so hospitals could reduce income deficits).
new federal roles particularly in regard to the general support of higher education institutions.\textsuperscript{112}

Among the two primary congressional purposes in creating BEOGs, therefore, was assisting entire institutions of higher education, not just the impecunious student.

The Court acknowledged the dual purposes of the BEOG program, but chose, without explanation, to focus on the student aid purpose and to dismiss the institution aid purpose.\textsuperscript{113} As the Court put it,

The BEOG program was designed, not merely to increase the total resources available to educational institutions, but to enable them to offer their services to students who had previously been unable to afford higher education.\textsuperscript{114}

The Court implied that its finding of a single purpose was justified because Congress envisioned that the effect of the program would be singular: to aid the impecunious student and not the institution. Quite simply, the finding contradicts the evidence.

The effect side of the test is equally dubious. "Effect," as the Court describes it, is not the actual impact or uses of the student aid, because the "impact/effect" is as great on the institution as it is on the student. For example, federal aid enables an institution to recruit students otherwise unable to attend because of finances.\textsuperscript{115} Recruitment often serves goals that affect the school more than the student: schools may be interested in maintaining minimum student enrollment, creating a good football team, or improving the quality of a graduate program. In addition, federal aid subsidizes the privately funded financial aid program of an institution. Because of that subsidy, the institution may be able to redirect its private fund-raising efforts to other needs, such as a library.\textsuperscript{116} Furthermore, the ultimate destination of the federal dollar is neither the financial aid program of the institution nor the student's pocket. Rather, the general fisc of the institution is funded with tuition and fees paid by students, both with and without federal assistance.\textsuperscript{117} Finally, the federal aid funds are not spent to operate or improve the financial aid program.\textsuperscript{118} Rather, the aid is spent for tuition, fees, and

\textsuperscript{112} H.R. REP. NO. 554, 92nd Cong., 1st Sess. 2 (1971).
\textsuperscript{113} 104 S. Ct. at 1221-22.
\textsuperscript{114} Id.
\textsuperscript{115} Grove City, 687 F.2d at 696; Temple Univ., 524 F. Supp at 540; Bob Jones Univ., 396 F. Supp. at 603.
\textsuperscript{116} Grove City, 687 F.2d at 696; Bob Jones Univ., 396 F. Supp. at 602; Temple Univ., 524 F. Supp. at 540.
\textsuperscript{117} Grove City, 687 F.2d at 698.
\textsuperscript{118} The only exception to this general rule is that since 1977, educational institutions may be paid $10.00 for each student receiving a BEOG, 20 U.S.C. § 1070a(d)(1) (1982), in order
other education-related expenses. The federal dollar that enters the institution by way of tuition and fees is ultimately available for use by most, if not all, the programs in the institution. 119

Before Grove City, determining what was within the scope of a funding statute meant looking for the "impact/effect" of the funds: the civil rights statutes were enforceable wherever the "impact/effect" of the funds was felt. 120 The role of Congress was to decide what a funding program was to do, not how the civil rights statutes would be enforced in each instance. The Grove City standard reverses this formula. The civil rights statutes are enforceable only if Congress intends a funding program to be subject to their regulatory force. Instead of measuring the effect of the federal funding program by the actual impact or use of the funds, the Grove City Court defines effect in terms of the degree of regulation Congress intended to impose when it enacted the program. 121 Allowing congressional intent about the regulatory effect of a funding statute to determine the measure of enforcement permitted under the civil rights statutes fundamentally contradicts one of the major purposes of enacting the civil rights statutes: to guarantee that civil rights protection automatically accompanies every Congressional funding program. 122 Beginning with title VI, legislators have sought to avoid raising the difficult issue of civil rights every time a new program was proposed. Instead, they wished to settle the issue once in title VI, then have it applied without further selectivity to all federal programs within its scope. 123 The same was true for title IX and section 504. 124

With respect to the BEOG program, the Grove City Court says that congressional intent as to regulatory effect is evident from the program's

to defray the costs of providing information about and administering the program. 20 U.S.C. § 1088(b)(1982).

119. Grove City, 687 F.2d at 700; see Iron Arrow Honor Soc'y, 702 F.2d at 562 n.22; Hillsdale College v. HEW, 696 F.2d 418, 422 (6th Cir. 1982); Temple Univ., 524 F. Supp. at 537-38; Bob Jones Univ., 396 F. Supp. at 603 n.22.

120. See, e.g., Lau v. Nichols, 414 U.S. 563 (1974); 34 C.F.R. § 100.5 (1983); id. at 100.13(i); id. at 104.3(h); id. at 106.2(h).

121. 104 S. Ct. at 1222.


123. See, e.g., 110 CONG. REC. 7062 (1964) (statement of Senator Pastore); id. at 7065 (statement of Senator Ribicoff); id. at 2467 (statement of Rep. Lindsay); id. at 2467-68 (statement of Rep. Celler); id. at 2468 (statement of Rep. Rodino); id. at 2480-82 (1964) (statement of Rep. Ryan).

economic structure: it increases both the obligations and the resources of the recipient institution.\textsuperscript{125} Under this quid pro quo system, students receiving BEOGs pay tuition and, therefore, the recipient must provide them with an education. The obligations incurred by the recipient institution thus increase along with its resources.\textsuperscript{126} Why should that quid pro quo demonstrate a congressional intent that the BEOG program have a limited regulatory effect? Lower courts have suggested a quid pro quo should reduce the recipient institution's civil rights obligations because the institution is not being given unrestricted federal funds which could be used to remedy any civil rights deficiencies.\textsuperscript{127} The civil rights statutes do not by their terms, however, give any dispensation to recipients that incur a reciprocal obligation to non-governmental obligees. If they did, they would effectively exempt virtually all important funding statutes, because some degree of obligation generally is required of the recipient.

With the exception of its interpretation of the term "program" in \textit{Grove City}, the Court generally has adhered to the principle that civil rights statutes be given "a sweep as broad as [their] language."\textsuperscript{128} Had it done so in that case, it could have adopted a purpose and effect test. But in creating the test, it would have recognized all the purposes of Congress in enacting BEOGs, it would have sought accurate evidence of the impact of the funding program on an educational institution, and it would have given no weight to the congressional intent as to regulatory impact. If it had done so, the test that emerged would have been consistent with the broad intent of Congress in enacting the civil rights statutes.

\textit{B. Application of the Purpose and Effect Test}

Except for the limited question of whether the civil rights statutes can be enforced throughout an educational institution that accepts students receiving BEOGs, which the court called a sui generis situation, the \textit{Grove City} decision raises more questions than it answers. Two of the three nexus theories suggested in \textit{North Haven} are inconsistent with the application of the \textit{Grove City} standard. The inconsistency is most obvious when \textit{Grove City} is compared with the "program-equals-institution" theory. \textit{Grove City} also affects the direct expenditure theory, but will have little impact on the infection theory.

\begin{itemize}
\item \textsuperscript{125} 104 S. Ct. at 1222.
\item \textsuperscript{126} \textit{Id}.
\item \textsuperscript{128} \textit{See, e.g.,} \textit{North Haven}, 456 U.S. at 521.
\end{itemize}
1. Program Equals Institution. — The Grove City Court assumed that there are funding statutes the purpose and effect of which mandate institution-wide coverage. In contrast to BEOGs, according to the Court, such a statute would provide for "unrestricted grants that institutions may use for whatever purpose they desire." Under such a statute, as under the second North Haven nexus theory, the program and institution would be co-extensive; all the employees and participants would be protected by the civil rights statutes.

The Court gave no example of a qualifying statute. The companion case to Grove City, Consolidated Rail Corp. v. Darrone, which was remanded for additional evidence on the program issue, involves a statute that may meet the "purpose" half of the test. The complainant was a handicapped engineer who was denied employment by Conrail, an entity that received $3.28 billion in federal funds under the Regional Rail Reorganization Act of 1973. The funding statute authorized Conrail to use the money to modernize the rail properties of the corporation, to acquire equipment, to refinance indebtedness, and to provide working capital. Under the terms of that broad funding authorization, it is plain that the purpose of Congress in spending the money was to benefit the entire corporation. It was alleged during the litigation that the funds were in fact spent throughout the corporation for the purpose of paying employees, buying equipment, and other ordinary corporate expenses. On remand, therefore, the evidence may show that the funding program increased the money available to the entire corporation.

Federal impact aid program is another example of a funding statute the purpose of which is to benefit the entire entity that receives funds. The congressional declaration of policy indicates that Congress intended to benefit broadly entire school systems when it enacted the program. The policy declaration states:

In recognition of the responsibility of the United States for the impact which certain Federal activities have on the local educational agencies in the areas in which such activities are carried on, the Congress declares it to be the policy of the United States to provide financial assistance (as set forth in this subchapter) for those local educational agencies upon which the United States has placed financial burdens. . . .

129. Grove City, 104 S. Ct. at 1221.  
133. See Darrone, 104 S. Ct. at 1256 n.19.  
The impact aid statute does not limit the uses to which the money may be put. The statute provides only that it is to be paid to the local educational agencies to assist in providing free public education in the impacted area. \(^{135}\) If there is no recipient in an impacted area, the commissioner may establish an educational system to provide free public education to the children of federal personnel. \(^{136}\)

The "effect" half of the purpose and effect test is a problem for both the impact aid statute and the Conrail authorization statute. As in Grove City, a quid pro quo in a funding program may evidence a congressional intent that the statute's regulatory effect be limited. Under both the Conrail and the impact aid programs, the recipients' resources are increased by federal funding, but, at the same time, their obligations also increase. In Conrail's case the corporation must spend money to provide rail service, and the school systems must provide educational services to the children associated with the federal institutions. On the other hand, in both programs the breadth of the congressional purpose is clearly institution-wide. If a statute's purpose is more expansive than its effect, should the civil rights statutes apply according to the more expansive purpose or the more restrictive effect? Given the remedial purposes of the civil rights statutes, the answer should be that the purpose should control. After Grove City, however, that answer is not assured.

2. Direct Expenditure Nexus. — Grove City also undermined the extent of civil rights coverage when an employee is paid with federal funds, the first nexus suggested by the North Haven Court. As discussed earlier, this nexus supports institution-wide enforcement if federal funds are spent on, or for the benefit of, a person who is involved in the recipient institution due to the funds. The Grove City Court found that the BEOG program, which fits the direct expenditure criteria, \(^{137}\) does not support institution-wide enforcement, because Congress did not intend that the BEOG program would have so broad a regulatory effect. \(^{138}\) Thus, the direct expenditure theory is applicable after Grove City only when the legislative history of the funding program provides "persuasive" evidence that Congress intended an institution-wide regulatory effect.

The Court's failure to find persuasive evidence of congressional intent that BEOG funding support institution-wide enforcement is surprising. The BEOG student aid program and title IX were adopted as

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135. Id. at § 238.
136. Id. at § 241. See supra note 112.
137. See supra notes 34-35 and accompanying text.
138. Grove City, 104 S. Ct. at 1221-22.
separate titles of the Education Amendments of 1972. Although concurring on little else, proponents and opponents of title IX agreed that the student aid programs would generate a new and pervasive level of federal regulation of educational institutions, which had been practically free of such involvement. Proponents of title IX urged that the new regulatory opportunity be used to assist women, while opponents argued that title IX should be defeated because of the pervasive regulatory environment it would engender.

One explanation for the wide agreement on the regulatory effect of the BEOG program is that everyone recognized that title VI prohibited discrimination on an institution-wide basis by institutions enrolling students receiving student loans. Given title IX's identical language and the frequent reminders during the debate of their identity, Congress had no reason to expect a different regulatory approach to BEOGs, unless it required one. Nothing in the language of the BEOG enactment or in the debate on the Education Amendments of 1972 suggests any limitation.

140. See supra note 103.
141. Id.
142. 45 C.F.R. Part 80 (1972); see Grove City, 104 S. Ct. at 1226-28 (Brennan, J., concurring in part, dissenting in part).
143. See supra note 1.
144. Grove City, 104 S. Ct. at 1226-28 (Brennan, J., concurring in part, dissenting in part).
145. The best example of this is found in the congressional debate over HEW's assertion of title IX regulatory authority over athletic programs, which receive no "earmarked" federal funds, but which are subunits of institutions whose students receive BEOGs. The Subcommittee on Postsecondary Education of the House Committee on Education and Labor held hearings on HEW's title IX regulations to determine whether the regulations conformed to Congress's intent. Postsecondary Hearings, supra note 103, at 1. HEW's decision that title IX applies to athletic programs was the most controversial topic aired during the hearings. Secretary Weinberger explained that the decision to include athletic programs within the coverage of title IX was based on the clear analogy between title IX and title VI of the Civil Rights Act of 1964. Because recipients of general, non-earmarked federal funds are subject to the strictures of title VI under long-standing regulations, they are also subject to title IX. In light of the contemporary administration position that BEOGs are non-earmarked funds, it is clear that the Secretary was including BEOG funds among the federal funds he was discussing.

If the Federal funds go to an institution which has educational programs, then the institution is covered throughout its activities. That essentially was the ruling with respect to similar language in title VI, and that is why we used this interpretation in title IX.

Id. at 485.

Members of Congress advised the Committee that Congress intended to include athletic programs within the coverage of title IX because athletic programs are integral parts of
It is unfortunate that the *Grove City* Court declined to explain why it found the BEOG legislative history unpersuasive. The joint history of the BEOG statute and title IX are an unusual instance of explicit Congressional consideration of the effect of one statute on another. If that history is unpersuasive, a persuasive history will be rare indeed.

3. *Infection Theory.*—The third *North Haven* nexus theory, the infection theory, was not addressed explicitly in *Grove City*. Because the government never alleged that discrimination occurred anywhere at Grove City College, the case involved no suggestion that discrimination outside the financial aid program infected the program. 146 Although the decision neither reinforces nor restricts the infection theory, the Court’s language on a related question suggests that the theory cannot be used prophylactically as the basis for an institution-wide assurance of compliance. The Court decided that an institution properly could be required, as a condition of receiving federal funds, to execute an Assurance of Compliance certifying that “it will conduct the aided program or activity in accordance with title IX. . . .” 147 The Court appears to reject without discussion the possibility that an Assurance of Compliance could apply to unfunded programs that might infect a funded program. 148 The infection theory, therefore, seems to be limited to remedial enforcement actions.

In the remedial sphere, the infection theory supports institution-

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146. *Grove City*, 104 S. Ct. at 1224 (Powell, J. concurring) (quoting the Administrative Law Judge’s findings).
147. *Id.* at 1223.
148. *Id.* at 1222-23.
wide enforcement when institution-wide policies or practices must be eliminated to prevent discrimination in a federally funded program. It also supports enforcement in a specific unfunded program when that discrimination affects a funded program. But what if the victim of discrimination receives federal student assistance? Under Grove City, does that discrimination affect only the financial aid program which arranges the aid for the student-victim? When the student-victim receives BEOG funds, the answer is yes. But when the student-victim receives a work-study grant under the analogous but separate work-study program, the answer appears to be no.

Work-study students receive subsidized paychecks, rather than grants or loans, and they may be placed in jobs anywhere in an institution. As employees, they should not be subject to discrimination on the job. The work-study program, like BEOGs, was enacted by the Education Amendments of 1972 to provide money to impecunious students. Just as with BEOGs, therefore, the “funded program” for civil rights enforcement under Grove City is the financial aid program which determines who is eligible for subsidized employment and places eligible students in jobs. Given the involvement of the financial aid program with the students and the employers, discrimination against a work-study student-employee by a non-federally supported program-employer must entangle the federally supported financial aid program. If the discrimination occurs because of institution-wide policies or practices, the only remedy is to eliminate the policy or practice. If the discrimination occurs in the specific programs in which work-study students are placed, it should be eliminated. Given the ubiquity of work-study students on most campuses, the only practical and effective way to eliminate discrimination will be institution-wide enforcement.

III. Conclusion

Institution-wide enforcement of the civil rights laws is the most effective means of eliminating discrimination wherever federal funds are spent. Taken together, the Court’s decisions in North Haven and Grove City have restricted institution-wide enforcement to at most three situations: if a funding statute is unrestricted in its purpose and effect; if federal funds pay or benefit a person entitled to protection; or if a feder-

149. See supra note 35.
150. Id.
151. Discrimination could persist in these programs if the work-study students were simply not placed there. In practice, however, that would mean closing off job opportunities to women, minorities and the handicapped solely because of their status, a “solution” that serves only to raise other obvious constitutional and statutory problems.
ally funded program is affected by discrimination occurring in a privately funded program in the institution. Under the first situation, few if any funding programs will support institution-wide enforcement. The second two situations have not been tested since Grove City and may fail in significant ways. As a result, even the limited scope of institution-wide enforcement that Grove City may permit is confused and uncertain.

Consistent and certain institution-wide enforcement authority can be attained only by amending the civil rights statutes to overturn Grove City. Bills to do so were introduced in both houses of Congress within days after the decision. Although the future of legislation can never be predicted with certainty, it should be noted that a resolution supporting a broad reading of title IX passed the House by a vote of 414 to 9.

Effective civil rights enforcement is too important to the nation to rest on the narrow and insecure foundation left after Grove City. For nearly twenty years prior to Grove City, educational institutions and political and business entities that received federal funds realized that they must comply fully with the civil rights laws in essentially every aspect of their operation. Potential victims of discrimination had the assurance that they would not be arbitrarily subjected to discrimination as they moved from one schoolroom to another, or one worksite to another. If Congress moves rapidly to overturn Grove City, these assumptions need not be disturbed. If it does not, the civil rights laws will be left severely weakened.