The “Program or Activity” Rule in Anti-Discrimination Law: A Comment on S.272, H.R.700, and S.431

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ARTICLE
THE "PROGRAM OR ACTIVITY" RULE IN ANTIDISCRIMINATION LAW: A COMMENT ON S. 272, H.R. 700, AND S. 431

JOHN H. GARVEY*

In 1984 the Supreme Court determined in Grove City College v. Bell that the antidiscrimination provisions of Title IX of the Education Amendments of 1972 were program-specific rather than institution-wide in application. In response, several legislative proposals designed to mitigate or reverse the Grove City decision have been introduced in Congress. These proposals include the Civil Rights Restoration Act of 1985 (H.R. 700 and S. 431) and the Civil Rights Amendments Act of 1985 (S. 272).

In this Article, Professor Garvey argues that institution-wide application of Title IX and similar antidiscrimination statutes would in many instances lead to results inconsistent with statutory language and the public interest. By examining and analyzing the current statutes' language and by reviewing and applying various theories of nondiscrimination law, Professor Garvey concludes that most of the current proposals addressing Grove City involve misconceptions of the statutes they would amend and fail to conform to any of the numerous underlying theories of antidiscrimination law.

Since the Supreme Court's decision in Grove City College v. Bell a number of bills have been introduced in Congress to amend the "program or activity" requirement currently found in Title VI of the Civil Rights Act of 1964 (Title VI), Title IX

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of the Education Amendments of 1972 (Title IX), Section 504 of the Rehabilitation Act of 1973 (Section 504), and the Age Discrimination Act of 1975 (ADA). Grove City held that the words “program or activity” limited, to some degree, the federal government’s ability to control discriminatory behavior occurring within institutions that receive federal financial assistance. For example, if the government provides student financial aid (Pell grants), as it did at Grove City College, Title IX’s prohibition against sex discrimination can be enforced against the college’s financial aid program, but not elsewhere in the institution. A similar conclusion would follow for Title VI, Section 504, and the ADA, whose language is virtually identical to that of Title IX.

The bills before the 99th Congress would amend the “program or activity” restriction in different ways. To put the matter briefly, S. 272 would require that in the case of educational institutions (but not in other cases), the phrase “program or activity” shall mean the entire “institution.” H.R. 700 (S. 431 is its companion bill) proposes more substantial changes. Though described as a bill “[t]o restore the broad scope of

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4 20 U.S.C. §§ 1681–1686 (1982). Section 901 of Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .” 20 U.S.C. § 1681(a) (1982) (emphasis added).

5 29 U.S.C. § 794 (1982). Section 504 provides:

No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id. (emphasis added).

6 42 U.S.C. §§ 6101–6107 (1982) (hereinafter cited as ADA). 42 U.S.C. § 6102 (1982) provides that “no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance” (emphasis added).

7 Pell grants (Basic Educational Opportunity Grants) provide eligible undergraduate students with up to 70% of the cost of attendance at an institution of higher education. The grants are designed to supplement family and student contributions to educational expenses. See 20 U.S.C. § 1070a (1982).

8 See id. The Court found that Pell grants count not just as aid to students, but also as assistance to the college they attend. Grove City, 465 U.S. at 563–70. This is obvious from the legislative history of Title IX. See 117 CONG. REC. 30,408 (1971) (statement of Sen. Bayh (D-Ind.)).

9 See supra notes 3, 5, and 6.

10 Hereinafter references to S. 272 will be by section number, without supporting citations.

11 Hereinafter references to H.R. 700 will be by section number, without supporting citations.
coverage" to the antidiscrimination laws, it actually envisions radical reform rather than restoration. H.R. 700 would require institution-wide coverage not just for schools, but for all recipients of federal aid: state and local government agencies, corporations and other private organizations, and so on.

This Article will discuss three points relevant to these bills. Part I concludes that the present language of the antidiscrimination laws—despite what the proponents of H.R. 700 have said—plainly requires program-specific rather than institution-wide coverage. Part II reviews the reasons underlying the “program or activity” rule. Part III evaluates the proposed legislation. I hope to show that the current limited degree of coverage decreed by Grove City sufficiently advances Congress’s concern to keep federal dollars separated from discrimination, and that abolition of the “program or activity” rule would entail costs that have not been sufficiently appreciated by the bills’ supporters.

I. THE STATUTORY LANGUAGE

In large part the impetus behind the various bills designed to overturn the Grove City decision stems from the idea that the Supreme Court “unduly narrowed,” cut back, restricted, or limited the well understood meaning of Title IX, and paid insufficient heed to the intent of Congress in enacting that law and its cognate statutes. If one subscribes to this notion it becomes easy to represent amending legislation as nothing more than a return to the status quo ante—a state of affairs with which recipients were already accustomed to living, and to which they could readjust with a minimum of bother. This is a myth, composed in equal parts of wishful thinking and tactical exaggeration. If amendment is desirable, it would be wise for reformers to acknowledge that Congress has refused to impose institution-wide coverage in the past, and that requiring such coverage now would substantially change the law even as it stood before Grove City.

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12 H.R. 700, enacting clause (emphasis added).
13 H.R. 700, sec. 2(1); S. 431, sec. 2(1).
A. "Program or Activity," "Recipient," "Institution," and "Political Entity"

There is a kind of doublethink involved in H.R. 700 and its predecessor in the last Congress, H.R. 5490.14 After proclaiming that the Supreme Court has "unduly narrowed . . . the broad application" of the antidiscrimination laws (section 2(1)) and that "legislative action is necessary to restore the prior consistent and long-standing" interpretation (section 2(2)), H.R. 700 goes on to state that "the term 'program or activity'" does not mean "program or activity," but instead means "all of the operations of" a recipient institution.15 H.R. 5490 would have gone one better, wiping out all references to "program or activity" and replacing the phrase (as though it never existed) with "recipient."16

It is clear from the current language of Title VI, Title IX, Section 504, and the ADA that the obligations they now impose are not institution-wide. Each begins with a prohibition against discrimination in any "program or activity receiving Federal financial assistance."17 The statutes go on to make clear that the phrase "program or activity" means something less than "recipient," "educational institution," or "political entity."

As to the term "recipient," Title IX says: "No person . . . shall, on the ground of blindness . . . , be denied admission in any course of study by a recipient . . . for any education program or activity . . . ."18 It also says that compliance may be effected "by the termination of . . . assistance under such program or activity to any recipient . . . , but such termination . . . shall be limited in its effect to the particular program, or part thereof, in which . . . noncompliance has been . . . found."19 So Title IX presumes that a "recipient" (a university, for example) may conduct any number of "programs or activities" (a financial aid program, a physics program, an athletics program, and so on). And it generally forbids discrimination within any program

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14 H.R. 5490, supra note 2.
15 See H.R. 700, secs. 3(a), 4(2)(b), 5(a)(3), 6(a).
only if that program receives federal money. Blindness is an exception: there "any" of a recipient's programs are covered.

Title VI speaks of effecting compliance in terms identical to those used by Title IX. The ADA is even clearer. After stating that "[a]ny termination . . . shall be limited to the particular . . . recipient," it goes on to declare that "[n]o such termination . . . shall be based . . . on any finding with respect to any program or activity which does not receive Federal financial assistance."

The term "educational institution" is defined in Title IX to mean

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

But Title IX elsewhere speaks of "any program or activity of any secondary school or educational institution." Thus an "educational institution" might be something narrower than a "recipient," but still broader than a "program or activity." If University X is a "recipient," it may comprise several "educational institutions" if it has separate admissions requirements for its law school, business school, and college of arts and sciences; but within the college of arts and sciences there may also be a number of "programs or activities."

The term "political entity" is used in the enforcement sections of Title VI, Title IX, and the ADA, and is intended to refer to something that conducts various programs and activities, not as something that is itself a program or activity. Thus Title VI, using language common to all the statutes, speaks of "termination . . . limited to the particular political entity . . . and . . . limited in its effect to the particular program . . . in which . . . noncompliance has been . . . found." Section 504, speaking

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23 Id.
25 Id. at § 1681(a)(7)(B).
not of state but of federal political entities, addresses its prohibition of discrimination to "any program or activity conducted by any Executive agency or by the United States Postal Service."\(^{27}\)

Debate on this matter has tended to obscure rather than clarify this obvious point. There is a difference between "program"-specific coverage and "institution"-wide (or "recipient"-wide) coverage. It is impossible to read these statutes as they are currently written and conclude that they intend the latter type of coverage.

**B. Coverage and Enforcement Are Coextensive**

A number of witnesses have suggested a different way of parsing the current language. What the laws do now, they have argued, is to distinguish between *coverage* (which is institution-wide) and *fund termination* as a means of enforcement (which is program-specific).\(^{28}\) This interpretation is plainly wrong. To begin with the most obvious point, both the prohibitions against discrimination\(^{29}\) and the authorizations for funds termination\(^{30}\) speak of "programs," not of "recipients."

Moreover, the fund termination provisions follow right after the directions to federal agencies to issue regulations. Title IX's section 902, for example, says that each agency granting assistance must carry out the provisions of section 901 by issuing

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\(^{29}\) See supra notes 3–6 and accompanying text.

regulations.\textsuperscript{31} It then says that "[c]ompliance with any [regulation] may be effected" by cutting off funds "to the particular program, or part thereof"\textsuperscript{32} in which noncompliance is found. But if coverage (section 901) is really broader than the funds termination provision (section 902), agencies would be required to issue regulations that they could not enforce. As the Supreme Court said in \textit{North Haven Board of Education v. Bell},\textsuperscript{33} it would be bizarre to suppose that Congress had ordered them to do that.

One cannot avoid this problem by saying that broader statutory coverage and broader regulations could be enforced, not by funds termination, but by the "other means authorized by law" mentioned in section 602 of Title VI,\textsuperscript{34} section 902 of Title IX,\textsuperscript{35} and section 305(a) of the ADA.\textsuperscript{36} If the "other means" are supposed to include private actions, we would have a situation—unique in administrative law—where private individuals could enforce an agency's regulations but the agency itself could not.\textsuperscript{37}

\textsuperscript{31} 20 U.S.C. § 1682 (1982). Section 902 states in part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law. . . .

\textsuperscript{32} Id.

\textsuperscript{33} 456 U.S. 512, 537 (1982) ("it makes little sense to interpret the statute . . . to authorize an agency to promulgate rules that it cannot enforce").


\textsuperscript{36} 42 U.S.C. § 6104(a) (1982).

\textsuperscript{37} I might add that there is an anachronism involved in relying on the possibility of private actions to read the statutory coverage provisions more broadly than the enforcement provisions. After all, it was not until 1979 that the Supreme Court found private actions to be a permissible means of enforcing Title IX. Cannon v. University of Chicago, 441 U.S. 677 (1979). Not until 1983 did a majority of the Court explicitly acknowledge the possibility of private actions under Title VI—and even then only against "a state or local agency." Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 595 (1983) (opinion of White, J.); \textit{id.} at 625 (opinion of Marshall, J., dissenting); \textit{id.} at 635-36 (opinion of Stevens, J., dissenting). And as late as 1984, the Court suggested that it was still an open question whether there was a private right of action under
The more obvious "other means" are injunctive actions to enforce contractual conditions (assurances of compliance) signed by recipients at the time of the grant,\textsuperscript{38} and actions to enforce legal obligations imposed by the Constitution or other statutes.\textsuperscript{39} But an agency cannot make institution-wide coverage a contractual condition that recipients must agree to before getting assistance, since not only termination but also "refusal to grant or to continue assistance" must be "limited in its effect to the particular program, or part thereof, in which . . . non-compliance has been . . . found . . . ."\textsuperscript{40} And even if recipients do have legal obligations under other laws, those laws do not in any way enlarge the coverage of Title VI, Title IX, Section 504, and the ADA.

\textbf{C. Conclusion}

The point made thus far has been a limited one: that these statutes as currently written cover a narrower range of behavior than many of those who favor amendment have asserted. This is not an argument against amendment, for I have said nothing about the reasons for covering a narrow (program-specific) rather than a broad (institution-wide) range of behavior. It is a reason, however, for exercising more caution than H.R. 700

\textsuperscript{38} \textit{See} United States v. Marion County School Dist., 625 F.2d 607 (5th Cir. 1980); 110 CONG. REC. 7066 (1964)(statement of Sen. Ribicoff (D-Conn.)); 28 C.F.R. § 50.3 (1984) (federal agencies may sue for specific enforcement of assurances of compliance).

\textsuperscript{39} \textit{See}, e.g., 42 U.S.C. § 2000c-6 (1982) (civil action by Attorney General to challenge school segregation); 45 C.F.R § 80.8(a)(l) (1984) ("a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act)").

Senator Pastore (D-R.I.) explained the purpose of the "other means" alternative thus:

\begin{quote}
This alternative is designed to permit the agency to avoid a fund cutoff if some other means of ending discrimination is available. This will enable the agency to achieve compliance without jeopardizing, even in limited fashion, its basic program objective by terminating or refusing aid. Perhaps the best example of this relates to school lunches or other assistance to segregated schools. Cutoff of the lunches or other assistance will obviously impose a severe hardship upon students who are intended to be benefited. The way to avoid such a hardship will be for the Attorney General to institute a desegregation suit under title IV [42 U.S.C. § 2000c-6], rather than to terminate the assistance.
\end{quote}

shows. That bill does not just "restore" or "clarify" statutory meaning that the Supreme Court somehow missed. It changes the theory underlying the obligations these laws impose.

The next Part turns to the reasons why the federal government forbids people who get federal money to discriminate on the basis of race, sex, handicap, and age. That discussion has two objectives. The first is to show that the purposes Congress, the courts, and federal agencies have historically given for these rules are best accomplished by coverage of "programs and activities," not "institutions." The second is to demonstrate that to justify extending coverage as H.R. 700 would, one must resort to a new theory, and be willing to accept costs to which little attention has been devoted.

II. THE THEORIES SUPPORTING NONDISCRIMINATION CONDITIONS ON FEDERAL SPENDING

One can find in congressional deliberations, judicial decisions, and executive action seven different kinds of explanations for why Congress must, or should, or may attach nondiscrimination conditions to grants of federal money.41 I shall discuss these various explanations by beginning with the most compelling (those that are obligatory under the Constitution) and proceeding more or less in sequence to the least compelling (those that are sensible, desirable, or if nothing else, permissible). The scope of coverage increases along this ranking: obligatory conditions entail the narrowest coverage, merely permissible ones the broadest.

A. The Intent Theory

The most obvious reason why Congress should insist on nondiscrimination by recipients of federal funds, at least on the basis of race or sex, is that the Fifth Amendment forbids the federal government to advance discriminatory ends in an intentional fashion.42 The prohibition against intentional discrimina-

41 For an earlier and briefer statement of this thesis, see Garvey, Another Way of Looking At School Aid, 1985 Sup. Ct. Rev. 61. I argue there that the same kinds of explanations underlie the Establishment Clause rules the Supreme Court has designed to limit aid to parochial schools.

tion of course forbids laws that expressly discriminate. It also forbids Congress to give money in an apparently neutral fashion to recipients who will spend it all on white males, for example, if that result is one that Congress anticipates and desires.

This theory played an important role in the enactment of Title VI. Representative Celler (D-N.Y.), Chairman of the House Judiciary Committee and sponsor of the bill passed by the House, introduced at the outset of debate a statement indicating that "as to many of the Federal assistance programs to which title VI would apply, the Constitution may impose on the United States an affirmative duty to preclude racial segregation or discrimination by the recipient of Federal aid." To the same effect, Senator Pastore (D-R.I.), who was responsible for managing Title VI in the Senate, opened the debate by declaring that "so long as we spend that money to support a 'separate but equal' system which has been denounced by the Supreme Court of the United States, we are committing an unconstitutional act ...." As both Celler and Pastore were aware, there were at the time several federal aid programs—among them the Hill-Burton Act, the Second Morrill Act, and impact aid for school construction—that expressly or implicitly authorized recipients to spend assistance under a "separate but equal" formula. And frequent mention was made of the Fourth Circuit decision in Simkins v. Moses H. Cone Memorial Hospital, which held the "separate but equal" provision governing Hill-Burton grants unconstitutional.

46 42 U.S.C. § 291e(f) (1958) (repealed 1964) said that state plans should provide for hospital facilities without discrimination, "but an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group ...."
47 7 U.S.C. § 323 (1958) provided that "the establishment and maintenance of [land grant] colleges separately for [white and colored students shall be held to be a compliance with the provisions of said sections if the funds received in such State or Territory be equitably divided as hereinafter set forth ...."
48 20 U.S.C. § 636(b)(1)(F) (1958) provided that each application for a grant should include assurance that the school facilities of such agency will be available to the children for whose education contributions are provided in this chapter on the same terms, in accordance with the laws of the State in which the school district of such agency is situated, as they are available to other children in such school district.
50 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964).
51 Id. at 969. See, e.g., 110 Cong. Rec. 1527 (statement of Rep. Celler); id. at 6544
The intent theory is a limited one, however. It requires that Congress not only must foresee that its money will be spent in a discriminatory fashion, but also must want that to happen. There must be a showing that it "selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."52

That limitation on the theory entails several restrictions on the scope of a recipient's activities controlled by the constitutional principle. The first is that, at least as a practical matter, the recipient as well as Congress must be engaged in intentional discrimination, not merely discrimination in effect. Second, it may not be enough that Congress provides substantial funding to the recipient, or even to the particular project in which the recipient has acted improperly. There might also have to be a showing that Congress "is responsible for the specific conduct of which the plaintiff complains."53 Finally, it must be remembered that while the Constitution quite strictly enjoins government discrimination on the basis of race, and to a less exacting degree gender, it does not afford very impressive protection against discrimination on the basis of age54 or handicap.55

B. The Opportunity Theory

Quite apart from what the Constitution requires, it is objectionable to have recipients spending federal money in a discriminatory fashion even without Congress's approval or awareness. This is not a matter of moral responsibility on the part of the federal government, since we are accustomed to think that people are blameworthy only for what they purposefully do. But

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53 Blum v. Yaritsky, 457 U.S. 991, 1004 (1982) (emphasis added and original emphasis omitted) (the fact that the state regulates and funds private nursing homes does not render it responsible for decisions of homes to discharge patients); see also Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (a private school's receipt of public funds does not make its decision to discharge teachers state action). Though state action law is unclear on the subject, I have some reservations about whether this requirement would be enforced in a case of intentional discrimination—a problem not presented in Blum and Rendell-Baker. The Court might be more willing to hold the government responsible in a case of wrongful intent, much as we do "in blaming a defendant for remote damages caused by intentional torts, or in finding complicity in someone else's criminal conduct." Garvey, supra note 41, at 73.
citizens and taxpayers are entitled to insist that their representatives exercise sufficient foresight to preclude even unwitting discrimination from occurring (by providing opportunities for recipients to misbehave).

This theory was the primary concern voiced during the debates on Title VI, which are replete with references to the use of federal dollars to "support" or "subsidize" discrimination. As Senator Pastore put it, "Title VI is necessary, first of all, because the Federal Government simply cannot be expected to continue to pay out tax dollars contributed by all the people to just some of them and to exclude others because of the color of their skin." 

A similar concern prompted Congress to attach Title IX restrictions to Pell grants. As Representative May (R-Wash.) stated in the first hearings to be held on the subject:

Here we have this scholarship money—much of it . . . federal—going to students. Which students receive this scholarship money is decided upon by the individual colleges and universities—where there are often quota restrictions on women recipients. Thus, we find ourselves faced with a situation wherein federal funds are subsidizing discriminatory opportunities—and there is no way to get it back!

The principle supporting the Opportunity Theory is that the government should not increase the resources recipients have

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57 Id. at 7055 (statement of Sen. Pastore).
58 Id. at 7061–62. See also id. at 7058 (statement of Sen. Pastore); id. at 7061 (statement of Sen. Pastore); id. at 7063 (statement of Sen. Pastore); id. at 7064 (statement of Sen. Ribicoff) ("That principle is [that] taxpayers' money, which is collected without discrimination, shall be spent without discrimination."); id. at 7065 (statement of Sen. Keating (R-N.Y.)) ("the principle that Federal money should be fairly distributed when the tax collector comes along and takes money from the pocket or the pay envelope of everyone.").

See also H.R. REP. No. 914, pt. 2, 88th Cong., 1st Sess. 25 (serial set 12544), reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2391, 2512 (Additional views of Reps. McCulloch (R-Ohio), Lindsay (R-N.Y.), Cahill (R-N.J.), Shriver (R-Kan.), MacGregor (R-Minn.), Mathias (R-Md.), and Bromwell (R-Iowa): "In every essential of life, American citizens are affected by programs of Federal financial assistance. . . . For the Government, then, to permit the extension of such assistance to be carried on in a racially discriminatory manner is to violate the precepts of democracy and undermine the foundations of Government.")

available to engage in discrimination. Whatever evil a recipient could work within the limits of its pre-grant budget, Congress should not enable it to do more evil with federal assistance. To safeguard that principle, it suffices to trace the federal dollars and insist that they be spent for proper purposes. To return to Representative May's example, it would satisfy the Opportunity principle if Congress insisted that federal scholarship money be given evenhandedly to men and women alike, even if the school continued to restrict its own scholarship money to men.

If one reads the "program or activity" language of the anti-discrimination statutes with this theory in mind, it appears that the most sensible construction would limit that phrase to the federal grant program (Pell grants), rather than to the recipient's program (a college financial aid program, including the school's own scholarship funds) that receives federal aid. That is the interpretation adopted by several early cases. In Board of Public Instruction v. Finch, the court—discussing the legislative history of Title VI—noted:

In the Senate where the program limitation was initiated, reference was frequently made to the school lunch program, to the agricultural extension program for home economics teachers, to the farm-to-market road program, to aid for vocational agriculture teaching, and to aid to impacted school districts. Senator Eastland went so far as to introduce in the Congressional Record a long list of the federal programs to which the cutoff provision was applicable, as did Congressmen Poff and Cramer in the House. HEW in issuing regulations to implement the cutoff provision has followed a similar procedure. All of these lists refer to particular grant statutes such as those before us, not to a collective concept known as a school program or a road program.

As I will indicate below, the Supreme Court adopted a more expansive theory of coverage in Grove City. For the moment, I wish only to observe that this fairly narrow Opportunity Theory has played a central role both in Congress's deliberations and the courts' interpretations.

60 414 F.2d 1068 (5th Cir. 1969).
61 Id. at 1077 (citations omitted).
62 See infra text accompanying notes 68-69.
63 465 U.S. at 571 n.21.
64 Cases besides Finch that rely on the Opportunity Theory include Lau v. Nichols, 414 U.S. 563, 569 (1974) ("Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination"); Gautreaux v. Romney, 457
C. The Joint Venture Theory

Even if it can be shown that federal money has not been spent in a discriminatory fashion, there often arises a legitimate concern with the appearance of impropriety. In cases where the federal government undertakes a joint project, and its partner engages in discrimination in the very same project, one may rightly feel that the government is condoning, if not supporting, wrongful behavior. As Representative Mink (D-Hawaii) stated in 1975:

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.65

This Joint Venture Theory is the most appropriate justification for the "program or activity" rule in each of these statutes and the regulations that carry them out.66 It is illustrated by the Department of Health and Human Services' (HHS) Title VI regulation defining "program": "The services . . . provided un-

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F.2d 124, 128 (7th Cir. 1972) ("schools and programs are not condemned en masse by Section 602 . . . where racial discrimination and segregation are found in isolated activities, but only if such activities utilize federal money for unconstitutional ends"); and Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir. 1967) (school district receiving impact aid to pay for the education of children at an air force base is obligated to spend it in a nondiscriminatory fashion).

The Opportunity Theory, with its emphasis on the use of federal program monies, provides the most natural interpretation for much of the statutory language in Title VI and Title IX. For example, section 602 of Title VI speaks of termination of "assistance under such program or activity to any recipient" (emphasis added), and says that termination reports have to be filed "with the committees of the House and Senate having legislative jurisdiction over the program or activity involved . . . ." 42 U.S.C. § 2000d-1 (1982). Section 605 also speaks of "any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty" (emphasis added). 42 U.S.C. § 2000d-4 (1982). See also 20 U.S.C. §§ 1682, 1685 (1982). This "federal program" interpretation of the "program or activity" language is urged in 3 R. Cappalli, Federal Grants and Cooperative Agreements §§ 19.33, 19.52 (1982).


66 While there is language in each of the statutes that is best read as referring to federal programs and adopting Theory B (Opportunity), see supra note 64, there is also language suggesting an intent to control some things a recipient does with its own money. The prohibition section of each act speaks of a "program or activity receiving federal financial assistance" (emphasis added). 20 U.S.C. § 1681(a) (1982) (Title IX); 29 U.S.C. § 794 (1982) (§ 504); 42 U.S.C. § 2000d (1982) (Title VI); 42 U.S.C. § 6102 (1982) (ADA).
der a program receiving Federal financial assistance shall be
deemed to include any services . . . provided . . . with the aid
of any non-Federal funds . . . required to be expended or made
available for the program to meet matching requirements . . . . \(^{67}\)

This is also the theory relied on by the Supreme Court in
*Grove City* and *North Haven*. In *Grove City* the college argued
that, if Pell grants were financial assistance to the school, it
should be subject to Title IX only in its administration of the
Pell grant program. \(^68\) The government contended, on the con-
trary, that it would be just as incongruous to cover federal
scholarships and exempt the school’s own as it would be to
cover one slide projector but not another. The Court upheld the
government’s contention, saying:

Just as employees who “work in an education program that
receive[s] federal assistance,” *North Haven Board of Edu-
cation v. Bell*, [456 U.S.] at 540, are protected under Title
IX even if their salaries are “not funded by federal money,”
*ibid.*, so also are students who participate in the College’s
federally assisted financial aid program but who do not them-
selves receive federal funds protected against discrimination
on the basis of sex. \(^69\)

This Joint Venture Theory is not, however, equivalent to a
general principle of guilt by association. \(^70\) It distinguishes—as
do Title VI, Title IX, Section 504, and the ADA—between a
“recipient” and the various “programs or activities” that a re-
cipient might conduct, and forbids government participation in
the latter if they involve discrimination. The Supreme Court
recognized this distinction in *Grove City* by declining to apply
Title IX to the entire college. Its holding only confirmed what
the lower courts had been saying for a long time. \(^71\)

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tion’s Title IX regulation on student financial aid).

\(^68\) 465 U.S. at 571 n.21.

\(^69\) Id.

\(^70\) “Congress did not intend that such a program suffer for the sins of others. HEW
was denied the right to condemn programs by association.” *Finch*, 414 F.2d at 1078.

\(^71\) For a sampling of the numerous cases applying the nondiscrimination statutes in a
program-specific fashion, see Hillsdale College v. United States Dep’t of Health, Educ.
and Welfare, 696 F.2d 418 (6th Cir. 1982)(Title IX), *vacated and remanded*, 466 U.S.
901 (1984); Doyle v. University of Ala., 680 F.2d 1323, 1326–27 (11th Cir. 1982) (§ 504);
(Title IX), *cert. denied*, 456 U.S. 928 (1982); Dougherty County School Sys. v. Harris,
622 F.2d 735, 736–38 (5th Cir. 1980) (Title IX), *vacated and remanded on other grounds*;
456 U.S. 986 (1982); Romeo Community Schools v. United States Dep’t of Health,
Educ. and Welfare, 600 F.2d 581, 584 (6th Cir. 1979) (Title IX), *cert. denied*, 444 U.S.
HHS's Title VI regulations respect the same distinction. They give the following example to "illustrate the programs aided by Federal financial assistance of the Department": "In a training grant to a hospital or other nonacademic institution, discrimination is prohibited in the selection of individuals to be trained and in their treatment by the grantee during their training."72

The regulation does not say that the entire hospital—the "recipient"73—is subject to Title VI by virtue of the training grant.74

The distinction between "recipients" and "programs" is intended to protect the public interest in a government project

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74 This distinction between a narrower "program or activity" (covered by nondiscrimination rules) and a wider "recipient" institution (which may conduct a number of programs or activities) permeates the Title VI, Title IX, Section 504, and ADA regulations.

As to Title VI, see HHS's regulations at 45 C.F.R. §§ 80.2 ("Application of this regulation"), 80.3 ("Discrimination prohibited"), 80.8(c) ("Procedure for effecting compliance: termination of or refusal to grant or to continue Federal financial assistance"), 80.13(g), (i) definitions of the terms "program" and "recipient") (1984).

As to Title IX, see the Department of Education's (ED) regulations at 34 C.F.R. §§ 106.11 ("Application"), 106.31(a) ("Education programs and activities"), 106.51(a) ("Employment") (1984). These provisions, particularly the latter two, are slightly ambiguous. The employment regulation, for example, prohibits gender discrimination "under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance . . . ." 34 C.F.R. § 106.51(a) (1984). The "which" clause may modify either "recipient" or "program or activity." But since a "recipient" by definition gets federal financial assistance, 34 C.F.R. § 106.2(h) (1984), while a "program or activity" may not, the clause is redundant if it does not refer to the latter. See North Haven, 456 U.S. at 539 n.30. The explanation given when the regulations were promulgated makes clear that this reading is the correct one. See 40 Fed. Reg. 24,128 (1975).

As to Section 504, see the Department of Justice's (DOJ) regulations at 28 C.F.R. §§ 41.5(8) ("Enforcement"), 41.51 ("General prohibitions against discrimination") (1984); and HHS's regulations at 45 C.F.R. § 84.5 ("Assurances required") (1984); id., Pt. 84, App. A, para. 7 ("Assurances of compliance") (1984).

As to the ADA, see HHS's regulations at 45 C.F.R. § 90.3(2) (1984) ("What programs and activities does the Age Discrimination Act of 1975 cover?").
(training nurses or promoting the study of chemistry, let us say), which would be frustrated if an unrelated but discriminatory program brought the federally funded project to a halt. As the Fifth Circuit stated in Finch, the program-specific limitation is "not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices."\(^7\)

D. The Infection Theory

Infection is not an independent theory, but a means of expanding the reach of Theories B (Opportunity) and C (Joint Venture). The Infection Theory rests on the notion that a recipient may, by discriminating in a project closely related to one receiving federal funds, either cause the federal money to be used in a discriminatory fashion (B), or at least cause discrimination to occur in the funded project (C). For example, if the federal government gave financial aid to some students at Law School X, Grove City holds that the Law School's financial aid office would be covered by Title IX. But if the Law School discriminated against women in its admission process, some qualified women (denied admission) would never reach the financial aid office. One could thus say that discrimination in the admissions program "infected" the financial aid program, and that both should therefore be covered by Title IX.\(^7\)

In fact it is fair to say that "[o]ne who is discriminated against in seeking admission is denied access to all educational programs and activities within an institution, and the entire body of programs within the school is tainted."\(^7\) For this reason the regulations under Title VI, Title IX, and Section 504 all forbid

\(^\text{75}\) 414 F.2d at 1075 (emphasis in original).


\(^\text{77}\) Rice, 663 F.2d at 339 n.2; Othen, 507 F. Supp. at 1387.
recipients to discriminate in admissions, no matter what part of their operations might receive federal aid.\textsuperscript{78}

In other contexts the infection could be harder to trace. If the federal government funds a college physics lab, and women are permitted to take physics but not math, it seems obvious that the federal project (training physicists) is significantly undermined. Excluding women from math classes would effectively preclude aspiring female physicists from taking full advantage of the government's program. Hence the school's math department should also be covered by nondiscrimination requirements.\textsuperscript{79} More tenuous is the Eleventh Circuit's conclusion that discrimination in selection for a private honor society (assisted in various ways by the University of Miami) necessarily infected all federally funded programs at the school.\textsuperscript{80} If the question were whether the Department of Education should cut off aid to Miami's physics department, I think it should be resolved under the Infection Theory by asking whether ineligibility for election to the honor society would deprive women of the benefits that Congress intended to confer, in the same way that

\textsuperscript{78} See 34 C.F.R. § 106.15(c) (1984) (ED Title IX regulations) (prohibition against discrimination on basis of sex in admission and recruitment "applies to each recipient," except as provided in § 106.15(e) (see supra note 76)); 45 C.F.R. § 80.4(d)(1), (2) (1984) (HHS Title VI regulations) (nondiscrimination requirements apply to "admission or recruitment" practices of a recipient). Of course when an institution has separate admissions policies for different programs, it may not make sense to presume that discrimination in admissions to program A will infect program B. See, e.g., 45 C.F.R. § 80.5(c) (1984):

In a research, training, demonstration, or other grant to a university for activities to be conducted in a graduate school, discrimination in the admission and treatment of students in the graduate school is prohibited, and the prohibition extends to the entire university unless it satisfies the responsible Department official that practices with respect to other parts or programs of the university will not interfere, directly or indirectly, with fulfillment of the assurance required with respect to the graduate school. (Emphasis added).

\textsuperscript{79} Consider another problem that arises with some frequency. Title VI does not apply to claims for employment discrimination, except where a primary objective of the federal financial assistance is to provide employment. 42 U.S.C. § 2000d-3 (1982); Valentine v. Smith, 654 F.2d 503, 511–12 (11th Cir.), cert. denied, 454 U.S. 1124 (1981). But in some circumstances discrimination in employment will infect the product the federal government is paying to deliver to the program beneficiaries. For example, discrimination in the selection of faculty to deliver Title I services (now chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801–3808 (1982 & Supp. 1 1983)) to disadvantaged children in grade schools and high schools would be forbidden because of its effect on the children, even if individual teachers had no Title VI claim. See, e.g., United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 882–86 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967); United States v. El Camino Community College Dist., 454 F. Supp. 825, 830–31 (C.D. Cal. 1978), aff'd, 600 F.2d 1258 (9th Cir. 1979), cert. denied, 444 U.S. 1013 (1980).

\textsuperscript{80} Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549 (5th Cir. Unit B), vacated as moot, 464 U.S. 67 (1983).
discriminating in admissions or closing the math department to them would. I would be surprised it it did.

This is not to say that sex discrimination in selection for honor societies is morally neutral conduct, or even that Congress should not undertake to combat it. In fact S. 272 and H.R. 700 would do just that. The Infection Theory, however, properly understood as a qualification of Theories B (Opportunity) and C (Joint Venture), does not provide a reason for doing so. Infection is not an independent justification for rooting out discrimination wherever it occurs, but simply a way of protecting federal programs from corruption—originating elsewhere—that is certain to affect their intended beneficiaries in a discriminatory fashion.

E. The Benefits Theory

The Infection Theory rests on the idea that discrimination upstream from the federal program can sometimes flow into and corrupt it. The Benefits Theory holds that federal aid to an innocent program may provide a benefit to discrimination that occurs downstream. The objections to this phenomenon are not new: the federal government should not assist, even unwittingly, in providing opportunities for discrimination to occur (Theory B), or the federal government should not appear to condone discrimination by participating in a project where it occurs (Theory C). The Benefits Theory augments these theories by following the principles of opportunity and participation beyond the boundaries of the federally assisted program or activity.

This theory is a relatively recent concoction. It has no current statutory foundation, and does not appear in the Title VI regulations. The Benefits Theory first arose in limited form in the Title IX regulations promulgated in 1975. Those regulations apply the theory to different programs within the same recipient institution: "[T]his Part . . . applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance."82

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Pell grants, for example, which Grove City held are "received" by a college's financial aid program, may "benefit" the physics department if that is where the tuition money is ultimately applied. Or suppose that a university receives a grant to buy land for a law school, including space for a parking lot. To the extent that the law school's lot relieves congestion around the physics department and the business school, those programs may be said to "benefit" from the federal assistance.

The Section 504 regulations promulgated in 1977 take the theory one step further. They suggest that program x (and maybe even institution X, which runs it) is subject to the regulations if it benefits in some way from federal aid to program y (run by institution Y): "Subpart F applies to health, welfare, and other social service programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities." This version of the theory could mean that a trucking company, which "benefits" from highways built by the state with federal assistance, would for that reason alone be subject to Section 504 in its hiring of drivers.

As I said, both versions of the Benefits Theory stretch the current statutory language; the response of the courts and commentators has not been favorable to it. One difficulty, apart from the statutory language problem, is that it requires grant administrators to perform an analytical task which has baffled philosophers for centuries. No human or

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83 465 U.S. at 571, 573–74.
84 45 C.F.R. § 84.51 (1984); see also 45 C.F.R. §§ 84.31, 84.41 (1984) (similar provisions for preschool, elementary, secondary, and postsecondary education programs).
85 The Supreme Court in Grove City rejected the Title IX version, holding that "Congress [did not] intend[] that the Department's regulatory authority [should] follow federally aided students from classroom to classroom, building to building, or activity to activity." 465 U.S. at 573. The Section 504 theory was rejected in Disabled in Action v. Mayor of Baltimore, 685 F.2d 881, 884 (4th Cir. 1982) (where city had received federal funds for stadium improvements, baseball club using stadium was not a "recipient" subject to the requirements of Section 504), and Angel v. Pan Am. World Airways, 519 F. Supp. 1173, 1178 (D.D.C. 1981) (receipt of federal funds by airport does not thereby subject commercial airline to the requirements of Section 504). See also Jacobson v. Delta Airlines, 742 F.2d 1202, 1213–15 (9th Cir. 1984) (federal airport grants do not subject air carriers to the proscriptions of Section 504), cert. dismissed, 105 S. Ct. 2129 (1985). But see Paralyzed Veterans of America v. Civil Aeronautics Bd., 752 F.2d 694, 713–16 (D.C. Cir.), cert. granted, 106 S. Ct. 244 (1985). The D.C. Circuit, overruling Angel, held that Section 504 regulations apply to all commercial air carriers based on federal funding of airports and "airways," their integration with all commercial air carriers, and the clear intent of Congress. See also 3 R. CAPPALLI, supra note 64, at § 20.10 (1982).
machine mind can trace all the cause-effect relationships generated by a social program or activity. One will always be able to construct, but never be able to verify, a logical chain in which a federal dollar entering Point A in an organization is shown to have had beneficial effects at Point B (the area of discrimination).86

The Section 504 version of the theory is also inconsistent with an enforcement scheme keyed to the federal spending power. Where a recipient of federal funds is innocent, but its federal funds are thought to aid discrimination occurring in another institution downstream, it would be perverse to cut off funding to the innocent party in order to reform someone else’s behavior.87

F. Accounting Problem #1: The Tracing Theory

The difficulties of accounting for federal money once it reaches a recipient affect the question of coverage for nondiscrimination conditions in several ways. First, it is often hard to tell exactly where federal money is spent. Second, it may be that aid to one of a recipient’s programs could free up portions of the pre-grant budget to be spent elsewhere. Both of those possibilities are reasons for enlarging coverage to some degree. This section will deal with the first problem (the Tracing Theory); the next section will deal with the second (the Freed-Up Funds Theory).

The Tracing Theory is a method of rounding off the area in which Theory B (Opportunity) applies. The theory’s underlying principle is a narrow one: federal dollars should not be put to

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86 3 R. Cappalli, supra note 64, at § 20.10.
87 I should clarify this point by making two qualifications. First, there is a difference between institutions (or programs) that merely “benefit” from federal aid in the sense used in the text, and those that might be called “subrecipients”—i.e. those “to whom Federal financial assistance is extended . . . through another recipient.” 34 C.F.R. § 106.2(h) (1984). For example, the federal government gives money for the school lunch program to state educational agencies, which in turn give the money to schools. 42 U.S.C. §§ 1753, 1756, and 1757 (1982). Congress plainly intended that the schools themselves should be covered by Title VI, see 110 Cong. Rec. 8978–80 (1964) (statement of Sen. Humphrey), because they do not merely “benefit” from, but actually “receive” the federal money; they are the last stop before the program beneficiary. And cutting off funds to a discriminating school applies pressure in the right place.

Second, colleges whose students receive Pell grants, though they are not “subrecipients” in the sense used above, should also be considered as “receiving” rather than merely “benefiting” from federal aid because that is where Congress intended the money to go. See Grove City, 465 U.S. at 563–70.
discriminatory use. To enforce that principle it is necessary to find out precisely how a recipient spends its federal money. However, as Representative Mink said about Title IX: "It is difficult to trace the Federal dollars precisely. A narrow interpretation of Title IX would render the law meaningless and virtually impossible either to enforce or to administer."\(^8\)

One possible solution to the tracing problem is for Congress to require physical segregation of federal funds, separate line-item accounts, and federal audits so that each dollar can be followed until it leaves the recipient's hands. That solution is unpalatable for two reasons. First, it complicates potential enforcement actions by the granting agency and by private plaintiffs, since they must follow a tortuous paper trail to prove the path of the federal dollar before even reaching the merits of any discrimination question. Second, such accounting requirements place a heavy burden on the recipient, which must keep its books and funds in the prescribed fashion, and periodically entertain squads of federal overseers.

A second solution to the tracing problem, easier to enforce and on balance less burdensome for the recipient, is to extend the nondiscrimination conditions to its smallest administrative unit within which the money will be spent. Where a college and the government share the cost of constructing a building, one cannot assume that the school paid for one portion of the building and the government for another,\(^9\) or that the government paid for the first half of its useful life and the school for the second half.\(^9\) But if one can be sure that the government's

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\(^8\) 1975 Hearings, supra note 65, at 166.
In case of hospital construction grants the assurance . . . will apply to the entire facility for which, or for a part of which, the grant is made, and to facilities operated in connection therewith. In other construction grants the assurances required will similarly be adapted to the nature of the activities to be conducted in the facilities for construction of which the grants have been authorized by Congress.


In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient . . . for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

money was spent somewhere on the building, then Theories B and F (Opportunity and Tracing) would be satisfied by imposing nondiscrimination restrictions on the entire building, and it is unnecessary to extend them to the entire college.91

The Tracing Theory would, however, require institution-wide coverage in the case of unrestricted grants. If a local educational agency receives impact aid92 or a college gets aid for developing institutions,93 the money can be used for almost any programs or activities the recipient conducts. Rather than require plaintiffs to prove where the assistance actually was spent, the Tracing Theory would permit the assumption that it flowed throughout the institution.94

The results one reaches applying this theory are similar to those dictated by Theory C (Joint Venture). The concern of this theory is to follow federal dollars to ensure that they are not misspent. Theory C is concerned with the federal government appearing to condone discrimination by sharing in a project with a partner that misuses its own money. But the difficulties of fund accounting will often require the tracing of federal money to stop at the project—a building, a college financial aid program, a park, a sewer system—for which it was appropriated. Like the Joint Venture Theory, then, the Tracing Theory pro-

91 Compare Flanagan, 417 F. Supp. at 382–84, with Stewart v. New York Univ., 430 F. Supp. 1305, 1313–14 (S.D.N.Y. 1976) (law school receiving HUD money to build a private school dormitory was not therefore obligated to comply with Title VI in law school admissions). In Stewart, admissions “activity” presumably was conducted on premises other than those of the federally funded dormitory. 430 F. Supp. at 1314.


The Revenue Sharing Act, 31 U.S.C. § 6716(c)(1) (1982 & Supp. I 1983), has adopted a variation on this approach. It relieves plaintiffs of the obligation of tracing funds by adopting a presumption of institution-wide coverage, but permits the recipient state or local government to prove, “by clear and convincing evidence, that a payment received under this chapter is not used to pay for any part of the program or activity with respect to which the allegation of discrimination is made.” Id.

That variation can also be found in the HHS Title VI regulation discussing the assurance of compliance form required of colleges and hospitals. The regulation states that the assurance shall, in certain instances, be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution’s practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought . . . .

vides a justification for forbidding discrimination in any "program or activity" receiving federal financial assistance—the rule adopted by Title VI, Title IX, Section 504, and the ADA as currently written.

G. Accounting Problem #2: The Freed-Up Funds Theory

This theory underlay the Third Circuit's decisions in Grove City and Haffer v. Temple University, and an earlier district court decision in Bob Jones University v. Johnson. The idea is that when the federal government gives a college $500,000 to spend on teaching physics, the college can then take $500,000 of its own money out of the physics budget and spend it on men's athletics. Furthermore, the theory continues, just as it is wrong for a recipient to spend the government's money in a discriminatory fashion, so it is also wrong to spend funds which the government's money has "freed up" in such a fashion. This approach makes tracing federal monies irrelevant, since the precise source of the funds spent on discrimination is unimportant. What counts is the ripple effect caused by the federal splash.

There are circumstances in which this makes practical as well as economic sense. Suppose that my law school got a grant to develop a clinical training program. Some of the money would go toward paying my salary, if I were the one chosen to run the program. In actual practice the university central administration would not reduce my dean's budget by that sum, since he would need it to hire a visitor to teach my courses. If my dean then...
discriminated on the basis of race or sex in hiring a visitor, there would be a fairly direct connection between the federal aid and his act: not only was the money freed up by a federal grant, but the university left the money in the law school's budget, and the need to spend it on a visitor arose only because I had gone to work on the clinical training program.

On the other hand, there are situations in which this theory makes little sense. Suppose that my school has traditionally given scholarships from an endowed fund to one hundred students, and that the federal government then gives it money in the form of Supplemental Educational Opportunity Grants for another twenty-five scholarships. Since those students used to pay their own way anyway, the school is financially no better off. And the law, as well as the terms of the endowment, would prevent the university from reducing its own scholarship contribution and spending that money on something else. Similar statutory provisions often forbid recipients to reduce their level of support to federally assisted programs.

Thus it is often not true that the recipient's own money is freed up by a federal contribution—or at least it is not freed up for expenditure outside the federally assisted program or activity. But even when money is freed up it is often impossible to determine where such funds are spent. One might suppose that a federal grant to my law school frees up money which the university can then spend on athletics. But one could also envision the state legislature reducing the university's budget by that amount, and spending the money on roads. The point is that if the justification for imposing restrictions on a recipient is that federal aid has caused discrimination by freeing up funds, that assumption becomes more unlikely the further one travels in the budgetary process away from the program assisted by a federal grant. This accounting difficulty is like the problem of following chains of causation under Theory E (Benefits). The Supreme Court reached this very same conclusion in Grove City.

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100 20 U.S.C. § 1094(a)(2) (1982) (institution receiving federal funds must agree not to diminish its own contributions to its scholarship and student aid programs).
101 See, e.g., 20 U.S.C. §§ 1143(b)(3), 2736 (1982); Bennett v. Kentucky Dep't of Educ., 105 S. Ct. 1544 (1985) (Secretary of Education may recover federal funds granted to a state if funds are used to supplant, rather than supplement, state expenditures).
102 465 U.S. at 571–74.
H. The Theory of Unrelated Conditions

I said above that there are seven different kinds of explanations in current law for why Congress might attach nondiscrimination conditions to grants of federal money. In fact, there is an eighth possibility, not embodied in current law, which underlies H.R. 700, and to a much more limited extent S. 272. The idea here is not that the federal government is in any way at fault (Theory A), that it unwittingly contributes to discrimination (Theories B, E, and G), that it may be perceived as contributing to discrimination even if it is not actually doing so (Theory C), that its purposes are frustrated by discrimination for which it is not responsible (Theory D), or that it is hard to tell where federal money is going (Theory F). As a general rule those theories do not warrant imposing conditions on all of a recipient’s activities simply because it receives federal aid for one portion of them. There are exceptions to that general rule. Most significant are the cases where: (i) pervasive discrimination, such as in admissions to school, necessarily infects all of the recipient’s operations, or (ii) aid is given in unrestricted form, and can be used anywhere in the recipient’s operations. But those cases are sufficiently unusual that they cannot support a broad rule of institution-wide coverage.

1. The Theory

Even where none of the seven theories I have discussed applies, one might look on the federal grant as an occasion for buying as much nondiscrimination as possible from the recipient. Congress might say, for example, “We’ll give you money to build a park provided: (i) it’s open to everyone, and (ii) you eliminate any discrimination in your city government.” Congress might go on to add any number of similar conditions: “provided (iii) your municipal buildings conform to the following federal fire code: . . . ; (iv) your city high schools require all students to take four years of mathematics; (v) you forbid possession of handguns within the city limits;” etc. Notice that conditions (ii)–(v), unlike condition (i), have nothing to do with how the federal money will be spent.

These expansive restrictions are an unusual use of the spending power. In fact it is an interesting constitutional question whether the spending power alone gives Congress authority to
impose such conditions.\textsuperscript{103} Bear in mind that the Constitution limits the federal government to certain enumerated powers, augmented by the Necessary and Proper Clause. One of those powers is the power to spend money for the "general Welfare of the United States."\textsuperscript{104} That allows the money itself to be put to most any use—\textit{e.g.}, building parks. And conditions on how a recipient uses the government's money are necessary and proper means of making the spending power effective—\textit{e.g.}, requiring that the parks be open to everyone. But there is no functional connection between the government's money and conditions (ii)-(v). The only relation between spending and the antidiscrimination rule (ii), or the handgun rule (v), is that the grants serve to identify the class subject to the rule.\textsuperscript{105}

I raise this point more as a scruple than as an argument against any of these bills. The Supreme Court has frequently suggested that "[t]here are limits on the power of Congress to impose conditions . . . pursuant to its spending power,"\textsuperscript{106} but it has been a long time since it has actually identified one.\textsuperscript{107} Moreover, it may be that authority for these rules can be found elsewhere.

\textsuperscript{103} Cf. Fullilove v. Klutznick, 448 U.S. 448, 474–75 (1980) (opinion of Burger, C.J.) (the reach of the spending power, within its sphere, is at least as broad as the regulatory powers of Congress).

\textsuperscript{104} U.S. CONST. art. I, § 8, cl. 1.

\textsuperscript{105} There could be another connection between the rule and the grants: the threat of revocation might also serve as a means of enforcing the rules. But oddly enough, under the original version of H.R. 700 (sec. 3(b)), revocation would be limited to cases where there was a causal nexus between the grant and the discrimination, \textit{i.e.}, to cases where the condition was relevant to the use of the money.


\textsuperscript{106} Pennhurst State School v. Halderman, 451 U.S. 1, 17 n.13 (1981) (states must have the benefit of a clearly expressed congressional intent to impose conditions on federal grants when determining whether or not to accept such funds).

\textsuperscript{107} See United States v. Butler, 297 U.S. 1 (1936) (federal government right to appropriate and spend money under contracts for reasonable governmental purposes cannot justify contracts not within federal power).
in the Constitution: section five of the Fourteenth Amendment and the Commerce Clause.\textsuperscript{108}

Still, if the most convincing justifications for institution-wide coverage are the Fourteenth Amendment and the Commerce Clause, and not the spending power, one wonders why the nondiscrimination rules are not extended to everyone rather than limited to grant recipients. The obvious reason is that the rules impose real costs, and the rules’ sponsors believe that the benefits from attacking discrimination absolutely everywhere, taken alone, do not justify those costs. They think instead that the costs imposed on any institution should be outweighed by the private benefit that federal dollars confer on the institution plus the public benefit from eliminating discrimination.

To reiterate, we should be cautious about imposing a general rule of institution-wide coverage for two reasons. First, no one who supports these bills assigns an absolute value to eliminating all forms of discrimination; everyone instead believes that that is a good (maybe even the highest good, but still not an absolute) to be weighed against harms in considering legislation.\textsuperscript{109} Second, everyone believes that the cost of implementing thoroughgoing nondiscrimination rules should be related somehow to the benefits that federal aid confers.

\textsuperscript{108} See Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (Title II of the Civil Rights Act is a valid exercise of power under the Commerce Clause as applied to a place of public accommodation); Katzenbach v. McClung, 379 U.S. 294 (1964) (Congress was within its power when it protected commerce by extending coverage of Title II to a restaurant involved in interstate commerce in food).

\textsuperscript{109} The process of weighing benefits (from eliminating discrimination) and costs (from implementing the rules) is undoubtedly affected by the fact that these statutes or the regulations implementing them have been held to forbid disparate-impact, as well as intentional, discrimination by recipients. In Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582 (1983), for example, a majority of the Court held that actions having an unjustifiable disparate impact on minorities could be redressed by agency regulations designed to implement the purposes of Title VI. \textit{Id.} at 584 (White, J., announcing the judgment of the Court); \textit{id.} at 623 n.15 (opinion of Marshall, J.); \textit{id.} at 644 (opinion of Stevens, J., in which Brennan and Blackmun, JJ., joined). Moreover, in Alexander v. Choate, 105 S. Ct. 712 (1985), the Court “assume[d] without deciding that Section 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.” \textit{Id.} at 720.

The inclusion of disparate-impact discrimination affects the cost/benefit analysis in two ways. First, it greatly increases the number of cases where a recipient’s conduct is subject to federal control, and at the same time increases the possible gains for those protected by Title VI, Title IX, Section 504, and the ADA. Whether these costs and gains cancel each other out is not immediately apparent. Second, it subjects to coverage recipient conduct that is not morally blameworthy—since it is by definition unintended—and that therefore demands a more impressive showing of benefit to justify regulation.
2. The Costs

I think that everyone involved agrees on the benefits that would flow from a rule of institution-wide coverage. For that reason I will focus on the countervailing costs, which seem more controversial. I will begin not with the cost of compliance—the one most frequently stressed—but with the cost to federal program objectives when institutions refuse to participate. Suppose, for example, that federal money is offered to fund a burn treatment center at Hospital X, part of a large university complex. Suppose too that the hospital would decline the funds if the whole university would thereby be subjected to regulation, but would take them if coverage were restricted to the burn treatment center, or perhaps to the hospital itself. In those circumstances the federal government cannot get everything it wants. It would be nice (i) if the hospital would take the money to provide treatment for people with severe burns, and (ii) if at the same time the government could look into charges of age discrimination at the university's performing arts center. But the choice the federal government has here is between option (i) and nothing at all. In such a case it would be completely irrational to deny federal funding, particularly when funding would result in the elimination of discrimination at the hospital, if not elsewhere in the university system.

I stress that this cost to federal program objectives is unique to Theory H (Unrelated Conditions). If the hospital threatened to discriminate on the basis of race in admitting people to the burn treatment center there would be nothing irrational about denying funding, since the hospital would be misusing the government's money (Theory B), or at least creating the false impression that the government found the hospital's discriminatory practices worthy of support (Theory C). Only when the

110 The example is not purely hypothetical. Both Grove City College and Hillsdale College have announced that they would refuse to admit students with Pell grants in order to avoid the costs of coverage just in their financial aid programs. Hearings on S. 2568 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2nd Sess. 35 (1984) (statement of Charles S. MacKenzie, President of Grove City College); id. at 107–08 (statement of George Roche, President of Hillsdale College). To the extent that such a response deprives needy students of the opportunity to attend the college of their choice, it frustrates a central purpose of the Pell grant program.

For another illustration of the problem discussed in the text—recipients turning down federal money when the conditions attached become too onerous—see id. at 554–55 (corporations may refuse to participate in on-the-job training programs if their entire operations thereby become covered).
strings attached to funding have no relation to the funded program is there a risk of losing an unmitigated good (option (i) above) by trying, like Aesop's greedy dog, to get too much (options (i) and (ii)).

Now the choice between option (i) and nothing at all is not exactly the choice Congress faces at this point. There will be some institutions in the same class as Hospital X, but Congress might gamble that there won't be too many. It could hope that the rest—faced with the choice between institution-wide coverage and loss of a grant—would cave in, and the federal government could then have options (i) and (ii). How many institutions would fall into each group depends on the costs of compliance and enforcement. But extending coverage beyond a funded program to the entire recipient institution will increase some of those costs exponentially. The obligations to undertake self-evaluation,111 to take remedial action,112 to publicize to protected groups one's obligations under the law,113 to file compliance reports,114 to submit to periodic compliance reviews,115 to keep records,116 to entertain federal officials responding to complaints,117 to keep abreast of new regulations, and so on, will be multiplied not only by the number of newly covered programs, but also by the number of federal agencies which—by granting money to some activity within the institution—would now be able to assert jurisdiction over every aspect of the institution's affairs.

Imposing unrelated conditions has still a third cost, more difficult to quantify, apart from the cost to federal program objectives and the cost of compliance. If H.R. 700 is accepted as a proper exercise of Congress's spending power then there is almost no theoretical limit to the kinds of demands Congress can make of those who get federal money. If a local grade school participates in the school lunch program, Congress could dictate to the state educational agency (which hands out the money) what math and science courses must be included in the high school curriculum. If a law school gets money to develop a clinical training program, Congress could dictate to the state educational agency (which hands out the money) what math and science courses must be included in the high school curriculum. If a law school gets money to develop a clinical training program, or if an undergraduate English major

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111 See, e.g., 34 C.F.R. § 106.3(c) (1984) (ED Title IX regulations).
112 See, e.g., id. § 106.3(a).
113 See, e.g., id. § 106.9.
114 See, e.g., 45 C.F.R. § 80.6(b) (1984) (HHS Title VI regulations).
115 See, e.g., id. § 80.7.
117 45 C.F.R. §§ 80.6(c), 80.7 (1984).
gets a Pell grant, then Congress might insist that the university hospital not perform abortions.\textsuperscript{118} If the state police get some money to buy new cars, Congress could order the state attorney general to focus his prosecution efforts on organized crime and drug offenses. In short, the Theory of Unrelated Conditions threatens to work a major reallocation of decision-making authority from local government and institutions to the national level.

III. The Proposed Legislation

A. S. 272

The choice presented by these competing bills is a substantial one. S. 272 is designed to "overrule" the Supreme Court's decisions in Grove City and North Haven, which held that Title IX covered educational institutions in a program-specific fashion.\textsuperscript{119} It would accomplish that result by adding to Title IX a new section:

Sec. 908. (a) Notwithstanding the decisions of the Supreme Court in [Grove City], and in [North Haven], the phrase "program or activity" as used in this title shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution.

(b) In any other application of the provisions of this title, nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase "program or activity" and that phrase shall be construed without reference to or consideration of the Supreme Court decisions in Grove City and North Haven.\textsuperscript{120}

S. 272 would add identical provisions to Title VI, Section 504, and the ADA, so that their coverage of educational institutions would be coextensive with Title IX's.\textsuperscript{121}

These amendments do not necessarily mean that aid to a university hospital would result in coverage of the university's

\textsuperscript{118} That is not a practice that the government has any authority to forbid outright, Roe v. Wade, 410 U.S. 113 (1973), but it is one that the government can refuse to fund, Harris v. McRae, 448 U.S. 297 (1980). And if one takes seriously the implications of Theory E (Benefits) or G (Freed-Up Funds), Congress would be doing nothing more than refusing to fund abortions by refusing to contribute money to an institution (the university) that conducted a program (at the hospital) where abortions were performed. Grove City, 465 U.S. at 570-71; North Haven, 456 U.S. at 538.

\textsuperscript{119} S. 272, sec. 2(a).

\textsuperscript{120} S. 272, sec. 2(b)-(d).
performing arts center. The reason is that the definition of “educational institution” currently found in Title IX includes the following qualification: “[I]n the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.”222 The amendments would mean, however, that aid in the form of Pell grants to undergraduate students would result in coverage of the entire college of arts and sciences, and the athletics department,223 not just the college’s financial aid office.224

Though I have misgivings, on the whole I think there is good reason to enact S. 272. First of all, as the public reaction to Grove City has indicated, there is significant public support for wider coverage within universities despite the attendant costs. Second, Pell grants and other forms of student aid—if followed beyond the financial aid office—provide assistance to a fairly broad range of activities within the institution. Although the 92d Congress in enacting Title IX was mainly concerned with discrimination in the awarding of student aid,225 it would be proper for this Congress to acknowledge that the money is returned as aid to the school in fairly unrestricted form. Once the grant is returned to the school as payment for tuition, the money can be applied toward any of the numerous activities supported in the school’s general operating budget. And because it would be so difficult to follow the federal dollars along that trail, Theory F (Tracing)justifies a statutory presumption that they may be spent for any activity supported by tuition and fees. Pell grants then begin to look like impact aid and similar kinds of unrestricted grants. As to those forms of assistance, the rule has always been that antidiscrimination rules apply to the entire educational institution.

122 20 U.S.C. § 1681(c) (1982). ED’s Title IX regulations define an “administratively separate unit” to mean “a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.” 34 C.F.R. § 106.2(o) (1984).

123 See supra note 122.

124 Enacting and codifying S. 272 in its present form would cause this glitch: the term “educational institution” is not defined in Title VI, Section 504, and the ADA, although it is in Title IX. One reading 42 U.S.C. §§ 2000d to 2000d-6, where the Title VI amendment would be codified, would thus be unaware that “educational institution” was intended to mean “administratively separate unit.” The problem could be easily solved by saying that “program or activity” shall “mean the educational institution, as that term is defined in 20 U.S.C. § 1681(c).”

125 See 118 Cong. Rec. S405 (1972) (statement of Sen. Bayh); see also id. at S508-69.
Moreover, several peculiarities of the current law suggest that S. 272 will not work changes for which people are unprepared. In the context of elementary and secondary education, much of what Section 504 would do if applied institution-wide is now already done better by the Education for All Handicapped Children Act. Moreover, Title VI has long applied in a nearly institution-wide fashion to grade schools and high schools (and school districts) with segregated admissions practices. School segregation was one of the chief evils at which Title VI was aimed, and as I explained above, under Theory D (Infection) the pervasive discrimination that results from segregated admissions justifies institution-wide coverage. The reason is that "[o]ne who is discriminated against in seeking admission is denied access to all educational programs and activities within [the] institution." Given this inevitable effect, it is entirely appropriate to attack the evil even though it occurs upstream from any federally assisted program.

In the context of higher education, one of the chief concerns under Title IX has been sex discrimination in athletics—a subject the Department of Health and Human Services (and the Department of Education) has addressed with regulations now a decade old. While I doubt that those regulations, read literally, are currently authorized by Title IX, the agencies nonetheless enforced them with some vigor for at least five years (1975–1980) and schools as a result have largely conformed their behavior.

My major criticism of S. 272 concerns the curious drafting of subsection (b) of section 908. That provision has two clauses.

129 The regulations state that:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.


If the regulations are really meant to apply to all recipient institutions, they ignore the program-specific language of Title IX. Since the federal government does not generally provide categorical aid for athletics, the regulations can properly only apply, under Theory F (Tracing), to schools that get unrestricted assistance.
130 See Directive on the Application of Title IX to Intercollegiate Athletics, 43 Fed. Reg. 18,772 (1978); see also Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (1979).
The first says that "nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase 'program or activity.'" The second says that "that phrase shall be construed without reference to or consideration of the Supreme Court decisions in Grove City and North Haven."  

I think it is wise to include the first clause, and I will explain why by way of an analogy. In General Electric Co. v. Gilbert the Supreme Court held that an employer did not violate Title VII of the Civil Rights Act of 1964 when its disability plan provided all employees with sickness and accident benefits, but excluded disabilities arising from pregnancy. Congress then enacted the Pregnancy Discrimination Act of 1978 for the express purpose of overruling Gilbert. It did so by adding to Title VII a new definition of the phrase interpreted in Gilbert, just as S. 272 adds a new definition of the phrase interpreted in Grove City. But it was not clear from the new language whether Congress intended simply to overturn the specific holding of Gilbert, or also to reject the test of discrimination which the Court used in that case. In Newport News Shipbuilding & Dry Dock v. EEOC the Court imputed the latter, broader, purpose to Congress, and held that an employer who provided full coverage, including pregnancy, for all its employees still violated Title VII by providing inadequate pregnancy benefits for the wives of male employees.

Likewise, it may be wise to overrule the specific holding of Grove City in the context of education, but it would be a mistake to reject entirely the larger principle on which the case rested: that "program or activity" means something less than the entire recipient institution. Lest the courts construe the bill in the latter way, as Newport News did, it is prudent to say that the bill has no effect on any other application of the program or activity rule.

The second clause, by contrast, is simply confusing. It could lead to any of three very different results. First, and most likely, the courts may reach, outside the context of education, conclusions consistent with what the Supreme Court did in Grove City and North Haven. It will just take them more time to get there, since they will have to do over again what the Court did in

131 See supra text accompanying note 120.
those cases. If that is what Congress wants, it should not make their job more difficult.

On the other hand the courts might reason that this clause was meant to tell them something about the issue of coverage that the first clause did not. By barring consideration of Grove City and North Haven, a judge might conclude, Congress was suggesting disapproval of the principles announced in those cases. One such principle was Theory C (Joint Venture): the idea that Title IX is meant to control some things a recipient does with its own money. Grove City College was forbidden to discriminate not only in handing out Pell grants, but also in handing out its own scholarships. If Congress meant to signal disapproval of that principle, then the courts should turn to a narrower rule of coverage, like Theory B (Causation). They might therefore say that the statutory term “program” means “federal program,” and thus the government’s partners can do what they like with their own money so long as they do not put federal dollars to discriminatory use.

Grove City also rejected several principles broader than Theory C. It held that Theory G (Freed-Up Funds) was “inconsistent with the program-specific nature of [Title IX],” and suggested the same thing about Theory E (Benefits). So a third possible result of subsection (b) is that some courts will turn to a broader rule of coverage. None of these three results is desirable. All of them could be avoided simply by ending section 908(b) after the first clause.

B. H.R. 700

Like S. 272, H.R. 700 would amend Title IX by adding a new section 908:

Sec. 908. For the purposes of this title, the term “program or activity” means all of the operations of—

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135 465 U.S. at 572.

136 The Court said: “Most federal educational assistance has economic ripple effects throughout the aided institution, and it would be difficult, if not impossible, to determine which programs or activities derive such indirect benefits.” 465 U.S. at 572.

137 It would then read:

(b) In any other application of the provisions of this title, nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase “program or activity.”

I would of course change the parallel provisions for each of the other statutes as well.
(1)(A) a department or agency of a State or of a local government; or
   (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other entity) to which the assistance is extended, in the case of assistance to a State or local government;
(2)(A) a university or a system of higher education; or
   (B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965) or other school system;
(3)(A) a corporation, partnership, or other private organization; or
   (4) any other entity determined in a manner consistent with the coverage provided with respect to entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.\textsuperscript{138}

Essentially identical amendments would be made to Title VI, Section 504, and the ADA.\textsuperscript{139}

It is obvious that these changes are more radical than those proposed by S. 272. Subsection (1) broadens the coverage of state and local government agencies. Subsection (2) does the same for educational institutions, though it goes further than S. 272 would. Subsection (3) tries to define the coverage of corporations and other private (noneducational) organizations. The effort to be specific about what "program or activity" means in various practical contexts is commendable. The proposed definitions warrant rather less praise.

Consider subsection (1), which deals with state and local government agencies. One difficulty with the proposed definition

\textsuperscript{138}H.R. 700, sec. 3. Amendments to H.R. 700 proposed May 23, 1985 (on file at HARV. J. ON LEGIS.) and currently being considered in the Judiciary and Education and Labor Committees are slightly more specific. Subsections (1) and (2) of the amendments have a slightly broader scope than the parallel provisions of H.R. 700. Subsection (3) would read thus:

(3)(A) an entire corporation, partnership, or other private organization, or
   (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
   (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
   (B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization or sole proprietorship[.]

The amendments also exempt "any operation of an entity which is controlled by a religious organization [. . . ] if the application of section 901 to such operation would not be consistent with the religious tenets of such organization" (subsection (4)).

\textsuperscript{139}H.R. 700, secs. 4–6. Sections 4–6 of the May 23, 1985 amendments, see supra note 138, omit the religious exemption included for Title IX. Section 4 of the amendments (dealing with Section 504) includes an exemption for "small providers" from the duty to make "significant structural alterations" to accommodate the handicapped.
arises when a city or a state is itself the technical grantee of categorical assistance. In that event the nondiscrimination rules apply to "all of the operations of" the city or state government. Suppose that City X has received federal aid to build an airport, and is charged with discrimination against the handicapped in hiring at its sewage treatment plant, or in designing a city park. The federal government is not, even unwittingly, contributing to discrimination in either of the latter programs. One could easily show that its airport money was not spent there (Theories B (Opportunity) and F (Tracing)). And it is hard to imagine what indirect benefit the federal grant might provide to the City's other programs (Theories E (Benefits) and G (Freed-Up Funds)). No one would suppose that the airport grant signified approval of discrimination in the park or sewage treatment plant (Theory C (Joint Venture)). Finally, the federal purposes in sponsoring airport improvements—such as increasing the volume and speed of interstate travel—would not be affected at all by the city's discriminatory action (Theory D (Infection)). Thus the only supportable argument for coverage in these circumstances is Theory H: the Theory of Unrelated Conditions.

As I explained in Part II, however, that theory entails costs that may outweigh any resulting benefits. One such cost is the possibility that City X will simply decline various kinds of categorical aid rather than subject itself to coverage in its parks, sewage treatment plant, and elsewhere. The federal government then loses (i) the primary benefits of its airport development (or other categorical aid) program, and (ii) the chance to eliminate discrimination at airports (or other places where its categorical aid goes). Nor would it be irrational for the city to decline federal aid. It might already spend a lot of time and money keeping the Environmental Protection Agency satisfied with its sewage treatment operation. Giving the Federal Aviation Administration jurisdiction over the same operation (and over the city parks, police department, garbage department, hospital, etc.) for pur-

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140 See, e.g., Walker Field, Colo., Pub. Airport v. Adams, 606 F.2d 290 (10th Cir. 1979) (county and city must join as sponsors of airport improvement project to be funded from the Airport and Airway Development and Revenue Act of 1970, 49 U.S.C. §§ 1701-1742 (1976), repealed by Pub. L. 97-248, tit. V, § 523(a), 96 Stat. 695 (1982)). In such a case the city, county, or state would be "the entity of . . . State or local government that distributes [or 'is extended'] such assistance." H.R. 700, sec. 3 (new § 908(1)(B)).
poses of Title VI, Title IX, Section 504, and the ADA could entail considerable additional cost.141

The same kinds of problems afflict subsections (2) and (3). Since a “system of higher education” is defined as one “program or activity,” receipt of federal aid for a university hospital at UCLA would result in coverage of a performing arts center at Berkeley. A research grant received at an Exxon subsidiary in Texas could subject Exxon’s worldwide operations to Title VI, Section 504, and the ADA.142

In short, H.R. 700 would greatly change existing law and expectations, and would entail the costs discussed in Part II. In the debates on that bill to date, there appears to be no evidence that existing law is so unsatisfactory as to warrant such drastic change. As best I can discern, many of those supporting the bill have acted under the mistaken impression that it would simply restore the law to some happy state that it enjoyed before Grove City. I hope I have at least succeeded in dispelling that impression.

141 A second difficulty concerns the “trickle-down” provision in subsection (1)(B): “program or activity” includes “the entity of . . . State . . . government that distributes . . . assistance and each [entity] to which the assistance is extended . . . .” For example, if highway or education money is given in the first instance to a state highway or education agency, see, e.g., Federal-Aid Highway Act, 23 U.S.C. §§ 101-157 (1982 & Supp. II); Education for All Handicapped Children Act, 20 U.S.C. § 1413 (1982 & Supp. II); and then redistributed to local entities, both levels are covered. But consider what happens to the local entity in Ashland, Kentucky when the local entity in Paducah is charged with discrimination. Section 902 now provides that discrimination may be punished by cutting off funds to “the particular program, or part thereof, in which . . . noncompliance has been . . . found.” 20 U.S.C. 1682 (1982). But since “program” has been redefined to include all local subrecipients, it is possible that Ashland could have its funds cut off for what happened in Paducah.

One could avoid this unsavory result by stressing the “part thereof” language of section 902. The difficulty is that section 902 may leave the funding agency discretion to choose between “program” and “part” in cutting off funds. Another problem is that by expanding the meaning of “program” one also may expand the meaning of “part.” H.R. 700 would solve this problem by amending section 902 to limit funds cutoff to “the particular assistance which supports such noncompliance.” H.R. 700, sec. 3(b).

The May 23, 1985 amendments unfortunately delete this provision.

142 The May 23, 1985 amendments would deal with this by breaking some kinds of corporations up into geographically separate units. See supra note 138.