

# CASE NOTE

## The Civil Rights Restoration Act of 1987— A Defeat for Judicial Conservatism

### INTRODUCTION

On May 20, 1987, the Senate Committee on Labor and Human Resources voted to close a major loophole in our civil rights laws. The bill, S. 557, or what is commonly referred to as the Civil Rights Restoration Act of 1987,<sup>1</sup> seeks to restore the broad scope of civil rights coverage that had been diluted by the United States Supreme Court decision in *Grove City College v. Bell*.<sup>2</sup> Specifically, the Act will clarify and promote the universal application of the following statutes: Title VI of the Civil Rights Act of 1964,<sup>3</sup> Title IX of the Education Amendments of 1972,<sup>4</sup> the Age Discrimination Act of 1975,<sup>5</sup> and section 504 of the Rehabilitation Act of 1973.<sup>6</sup>

### I. PURPOSE

Senator Edward Kennedy introduced the Act on February 19, 1987, to overturn the U.S. Supreme Court decision in *Grove City*. The Act was designed to restore the effectiveness and vitality of the aforementioned four major civil rights statutes that explicitly prohibit discrimination in federally

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1. The Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 (1988).

2. 465 U.S. 555 (1984).

3. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1981 & Supp. 1988) states in part that:

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

4. Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373-75 (codified as amended at 20 U.S.C. § 1681-86 (1978 & Supp. 1988)), states, in part:

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

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

5. Section 4 of the Age Discrimination In Employment Act, 29 U.S.C. § 623 (1975) states:

(a) It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of age;

(2) to limit, segregate, or classify his employees in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

6. § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1985 & Supp. 1988) states, in part:

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

assisted programs.<sup>7</sup>

The Supreme Court, by its ruling in *Grove City*, severely limited the application of coverage of Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.<sup>8</sup> The stated purpose of the Civil Rights Restoration Act of 1987 is to reaffirm pre-*Grove City* judicial and executive branch interpretations and enforcement practices which provided for broad coverage of the anti-discrimination provisions of these civil rights statutes.<sup>9</sup>

## II. BACKGROUND

The Civil Rights Act of 1963 was a congressional response to minority protest over systematic racial discrimination in public accommodations, housing, voting and education. The purpose of Title VI of the Act was to bar discrimination based on race, color, or national origin in a "program or activity" that receives federal aid.<sup>10</sup> Title VI thus became the major vehicle for attacking racial discrimination that denied millions of Americans basic racial equality.

Title IX of the Education Amendments of 1972 was instituted to prohibit sex discrimination "under any program or activity conducted by a public institution of higher education . . . which is the recipient of Federal financial assistance."<sup>11</sup> Congress also sought to protect the disabled by passing section 504 of the Rehabilitation Act of 1973. This Section prohibited discrimination against the disabled in education, transportation, housing, employment, and health and social services.<sup>12</sup>

The Age Discrimination Act of 1975 was aimed at prohibiting discrimination based on age. It affects all federally funded delivery services and benefits. This act has been successfully used to attack discriminatory barriers and open full economic opportunity to millions of Americans.<sup>13</sup>

Congress, in enacting the aforementioned statutes, was careful to employ the same careful language to describe coverage "so that the same standards are used to interpret and enforce all four laws."<sup>14</sup> Therefore, when the Supreme Court of the United States decided *Grove City* on February 28, 1984, all four statutes were adversely affected.

### A. *Pre-Grove City*

#### 1. *Congressional Intent*

Congress intended that all four statutes be given institution-wide coverage. The statutes were to be broadly interpreted in order to provide parties subjected to discrimination an effective remedy.<sup>15</sup> The anticipated breadth of

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7. S. REP. No. 100-64, 100th Cong., 1st Sess. 2 (1987) [hereinafter Senate Report].

8. *Id.* at 2.

9. *Id.* at 2.

10. *Id.* at 2.

11. 117 CONG. REC. 30,156 (1971).

12. Senate Report, *supra* note 7, at 3.

13. *Id.* at 3.

14. *Id.*

15. *Id.* at 5.

coverage as well as the important and fundamental aims these statutes would achieve were made clear during the congressional debates on the statutes. Contrary to the view of the Supreme Court that "the language common to these statutes (i.e., 'program or activity') should be given a limited interpretation," Congress clearly intended that the coverage be applied institution-wide.<sup>16</sup> All parties understood from the outset that discriminatory practices could only be eliminated from institutions receiving federal funds if, and only if, the statutes were given the broadest possible interpretation.<sup>17</sup>

When Congress enacted Title VI, it emphasized the breadth of its coverage.<sup>18</sup> Both the proponents and opponents of Title VI agreed that any attempt to legislate against discrimination should be a broad one.<sup>19</sup>

Many observers feared that the passage of Title VI would lead to massive immediate cutoffs in federal aid to many institutions that openly engaged in discrimination. These parties were reassured that this was not the intended effect of the statute. Senator Humphrey noted that the purpose of Title VI was not to penalize recipients of federal financial assistance, but to end discrimination.<sup>20</sup> To that end, Senator Humphrey stated that agencies would have broad discretion to adopt measures which would accomplish the goal of eliminating discrimination in a "state agency" or "institution" which engages in discrimination. Furthermore, he said that "[a]ny non-discrimination requirement an agency adopts must be supportable as tending to end racial discrimination with respect to the particular program or activity to which it applies."<sup>21</sup> Senator Humphrey pointed out that agencies were authorized to achieve compliance "by any other means authorized by law" in order to encourage them to find ways to remedy past discriminatory practices without the federal government having to resort to a termination of federal assistance.<sup>22</sup>

Title IX, which Congress modeled after Title VI, was also to be broadly interpreted.<sup>23</sup> During its debate, several members of Congress stated that Title IX prohibitions would apply to universities "across the board", irrespective of whether individual departments received federal funds.<sup>24</sup> Institution-wide coverage was intended if Congress was to accomplish the broad goals of the bill.

The prohibitions of section 504 of the Rehabilitation Act were also to be applied institution-wide. Sponsors of the bill spoke of the broad purposes

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16. *Id.*

17. Senator Hubert Humphrey stated that "the purpose of Title VI is to make sure the funds of the United States are not used to support racial discrimination." 110 CONG. REC. 6544 (1964).

18. *Id.*

19. See 110 CONG. REC. 6,544 (1964) (broad power to eliminate discrimination conferred); *Id.* at 13,322 ("title VI sufficiently broad . . . for issuance for open housing order affecting the entire United States"); *Id.* at 13,378 (broad power delegated to eliminate discrimination).

20. 110 CONG. REC. 6,544, 13,322, 13,378.

21. *Id.*

22. *Id.*

23. Senator Birch Bayh, chief sponsor of Title IX said that Congress intended that Title IX be "a strong and comprehensive measure [that] is needed to provide women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 CONG. REC. 5,804 (1972).

24. See 117 CONG. REC. 39,256 (1971) (remarks of Rep. Green); *Id.* at 30,407 (intent is to "provide equal access for women and men students to the educational process and the extracurricular activities . . ."); *Id.* at 39, 251-52 ("institutions of higher learning [must] practice equality or not come to the Federal Government for financial support.") (remarks of Rep. Mink).

which would underlie a prohibition against discriminatory practices aimed at the handicapped.<sup>25</sup> One year after passage of section 504, Congress clearly expressed its intent that prohibition against discrimination included in section 504 was to be read as broadly as that included in Title VI.<sup>26</sup>

Congress also intended the Age Discrimination Act of 1975 to be interpreted in the same fashion as the three statutes previously discussed. The Age Discrimination Act is virtually identical to the previous nondiscrimination statutes.

Thus, the intent of Congress is inescapable: Title VI as well as its progeny — Title IX, § 504, and the ADA — should be given the broadest possible interpretation. There is little question that Congress passed all four statutes to assist in the battle to rid our society of the lingering vestiges of discrimination.

## 2. Judicial Decisions/Interpretation

Prior to the United States Supreme Court's decision in *Grove City and North Haven Board of Education v. Bell*<sup>27</sup> the courts have consistently interpreted and applied the nondiscrimination statutes broadly in discrimination cases. In a string of Title VI cases decided across the nation, this pattern was especially strong.<sup>28</sup> The various facts of these cases left little doubt that the courts intended and endorsed institution — wide coverage of the nondiscrimination statutes.

The Supreme Court had defined the scope of Title IX on two prior occasions. In *Cannon v. University of Chicago*,<sup>29</sup> the Court emphasized that the primary purpose behind Title IX was to "avoid the use of federal resources to support discriminatory practices" and this purpose "is generally served by the statutory procedures for termination of federal financial support for institutions engaged in discriminatory practices."<sup>30</sup> The lower courts, in accord with *Cannon*, consistently found that broad institution wide coverage by Title IX

25. Rep. Vanik stated that "my proposed legislation will insure equal educational and employment opportunities for the handicapped by making discrimination illegal in federally assisted programs and activities." 118 CONG. REC. 526 (1972).

26. "Section 504 was patterned after, and is almost identical to, the anti-discrimination language of . . . [Title VI] . . . and [Title IX] . . . the Section therefore constitutes the establishment of a *broad* (emphasis supplied) government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap." *Senate Report (Labor and Public Welfare Committee) (No. 93-1297, November 16, 1974)*, 120 CONG. REC. 30,534 (1974).

27. In *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), the Supreme Court held that Title IX prohibited sex discrimination in employment in educational institutions. In dicta, however, the Court suggested that Title IX should be viewed as "program specific" in its coverage as well as its fund termination provisions. This dicta paved the way for *Grove City*.

28. See *Board of Public Instruction of Taylor Co., Florida v. Finch*, 414 F.2d 1068 (5th Cir. 1969) (assumes institution-wide coverage and that pinpointing limited to fund termination); *United States v. Jefferson Co. Board of Education*, 372 F.2d 836 (5th Cir. 1966) *aff'd en banc*, 380 F.2d 385, *cert. denied sub. nom.*, *Caddo Parish Board of Education v. United States*, 389 U.S. 840 (1967) (Title VI institution wide desegregation order appropriate); *Bossier Parish School Board v. Lemon*, 370 F.2d 847, (5th Cir.), *cert. denied*, 388 U.S. 911 (1967) (system-wide application of Title VI); *United States v. El Camino Community College District*, 454 F.Supp. 825 (C.D. Cal. 1978), *aff'd*, 600 F.2d 1258 (9th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980) (Title VI investigation of entire college appropriate); *Bob Jones University v. Johnson*, 396 F.Supp. 597 (Dist. S.C. 1974) (Veterans Administration education grants aid to whole university); *Flanagan v. President and Directors of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976) (Financial Aid activities covered).

29. 441 U.S. 667 (1979).

30. *Id.* at 704.

was applicable.<sup>31</sup> This was later reemphasized in *North Haven v. Bell*.<sup>32</sup> Judicial recognition of institution-wide coverage was therefore the rule rather than the exception.<sup>33</sup> Prior to *North Haven*, the weight of authority was clearly on the side of institution-wide coverage of the nondiscrimination statutes.

## B. Grove City College v. Bell

### 1. *The Decision*

On February 28, 1984, the Supreme Court of the United States decided the Title IX case of *Grove City College v. Bell*.<sup>34</sup> This was a landmark decision because of its impact on the other three nondiscrimination statutes. The Court's decision came in two parts. First, the Court unanimously held that the student aid dollars reaching the college through its students constituted federal financial assistance to the school.<sup>35</sup> But, a sharply divided Court in determining the scope of the duty not to discriminate, interpreted Title IX's "program or activity" phrase narrowly.<sup>36</sup> It reasoned that because the only federal monies reaching the college were in the form of BEOGs and GSL student aid, only the college's financial aid office was affected by Title IX.<sup>37</sup> The end result was a college that was free to deny equal opportunity to women (and by analogy, to minorities, the disabled and senior citizens).<sup>38</sup>

The Court established a new "purpose and effect" test.<sup>39</sup> Simply put: "if the purpose and effect of federal funding is to assist a particular program, the civil rights statutes may be invoked to bar discrimination in that [specific] program . . . but the rest of the [institution] is not subject to the anti-discrimi-

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31. See, e.g., *Haffer v. Temple University of the Commonwealth System of Higher Education*, 524 F.Supp. 531 (E.D. Pa. 1981), *aff'd* 688 F.2d 14 (3d Cir. 1982) (athletic program which did not receive earmarked funds covered); *Wolff v. South Carolina School District*, 534 F.Supp. 758 (N.D.N.Y. 1982) (school trips covered); *but see*, *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981).

32. 456 U.S. 512. In *North Haven*, the Court, while holding that employment discrimination is within the reach of Title IX, expressed "no doubt the if [the Court] is to give [Title IX] the scope that its origin dictate[s], [they] must accord it a sweep as broad as its language." *id.* at 521, quoting *U.S. v. Price*, 383 U.S. 787, 801 (1966).

33. See *Dougherty County School System v. Bell*, 694 F.2d 78 (5th Cir. 1982) (follows *North Haven* dictum that Title IX requires program specific interpretation).

34. 465 U.S. 555. Grove City College is a coeducational liberal arts institution of approximately twenty-two hundred students. At the time of the Title IX action the school only received federal funding in the form of student aid.

35. *Id.* at 1220.

36. On the same day the Supreme Court ruled in an employment case arising under Section 504 that the phrase "program or activity" was as narrow under that law as under Title IX. *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624 (1984).

37. *Id.* at 1221.

38. Justices Brennan and Marshall, concurring and dissenting, explained the effect of the Court's holding: "The absurdity of the Court's decision is further demonstrated by examining its practical effect. According to the Court, the "financial aid program" at Grove City College may not discriminate on the basis of sex because it is covered by Title IX, but the College is not prohibited from discriminating in its admissions, its athletic programs, or even its various academic departments. The Court thus sanctions practices that Congress clearly could not have intended: for example, after today's decision, Grove City College would be free to segregate male and female students in classes run by its mathematics department. This would be so even though the affected students are attending the College with the financial assistance provided by federal funds. If anything about Title IX were certain, it is that discriminatory practices like the one just described were meant to be prohibited by the statute." *Id.* 465 U.S. at 601-602 (Brennan, J., dissenting).

39. *Id.* at 1222.

nation statutes."<sup>40</sup>

## 2. *The Impact*

The impact of the Supreme Court's decision in *Grove City* was immediate. The Department of Education dropped sex discrimination charges against the University of Maryland.<sup>41</sup> In addition, the Department dropped at least 674 complaints filed under the other three respective nondiscrimination statutes.<sup>42</sup>

The decision allowed clear violations to go uninvestigated. Students lost valuable educational benefits; minorities, the elderly and handicapped lost jobs or job opportunities.<sup>43</sup> This was all the result of the ongoing debate as to what constituted a "program or activity."<sup>44</sup>

In sum, the total impact of the *Grove City* decision was to destroy two decades of hard fought gains on the part of minorities, women, the handicapped, and the elderly. In response, Congress promulgated the Civil Rights Restoration Act of 1987, thereby once again making enforcement of civil rights in America a national priority.

## III. INTERPRETATION OF THE CIVIL RIGHTS RESTORATION ACT OF 1987

### A. *Scope of Coverage*

The major provisions of S. 557 govern the application of the broad principle of "institution-wide" coverage to both public and private entities, each of which receives federal financial assistance for its "program or activity."<sup>45</sup>

40. Czapanskiy, *Grove City College v. Bell: Touchdown or Touchback*, 43 MD. L. REV. 379, 399 (1984).

41. The Department of Education's Civil Rights Enforcement Department which enforces Title VI, Title IX, Section 504 as they apply to education had uncovered discrimination by the University in travel and per diem allowance, the accommodation of student interests and abilities and the schools support services. Senate Report, *supra* note 7, at 11.

42. *Id.*

43. Examples of unchallenged discrimination was rampant during this period. In Greater Los Angeles Council of Deafness v. Zolin, County of Los Angeles, No. CV 81-6338-ER, slip op. (D. Cal. July 2, 1984) produced a decision that held that the refusal to seat deaf jurors may not be challenged under Section 504 where superior court has been in the past but not in the present receiving federal financial assistance; Gallagher v. Pontiac School District, No. 85-1134, slip op. (6th Cir. Dec. 16, 1986) (a handicapped student's case was dismissed because the court held that there was no federal assistance to a specific program, even though the student participated in special education which received federal funds); Price v. John Hopkins University, No. HM83-4286, bench opinion (D. Md. 1985), involved a blind philosophy professor who was denied access to an adequate number of college work study readers by the University and was forced to pay for necessary extra readers from his own funds, citing *Grove City*, the court ruled that a program-specific approach was in order, and thus the case must be limited to the work study program only; Russell v. Salve Regina College, No. 85-06 28-S, slip op. (D. R.I. Nov. 17, 1986) the court held that there was no cause of action under Section 504 in a case alleging discrimination in a nursing program where the only money received by the college is through financial aid to students.

44. Senate Report, *supra* note 7, at 11.

45. S. 557 amends the four Civil Rights statutes to include the definition of "program or activity".

See Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373-75 [codified as amended at 20 U.S.C. § 1681-86 (1982)], which states, in pertinent part, as follows:

§ 908. For the purposes of this title, the term "program or activity" and the term "program" mean all of the operations of—(1)(A) a department, agency, special purpose district, or other instrumentality 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 State or local government entity) to which the assistance is extended, in the case of assistance to a State or local govern-

### 1. *Governmental Entities*

S. 557 mandates that the entire agency or department be covered if any part of the state or local governmental entity receives federal financial assistance.<sup>46</sup>

### 2. *Educational Entities*

S. 557 requires that all the operations of the educational entity be covered if any part of the university, college, post-secondary institution, public system of higher education, vocational school, business school, elementary or secondary school system receives federal financial assistance.<sup>47</sup>

### 3. *Corporations/Private Entities*

S. 557 mandates that the entire corporation, partnership, private organization, or sole proprietorship be governed by S. 557 if the entity receives federal financial assistance as a whole or if the entity is principally engaged in specifically delineated types of activities. Where the entity is not engaged in one of the delineated activities, the mandates of S.557 are applicable only to the full operations of the geographically separate facilities, which receive the federal funds.<sup>48</sup> For example, companies that provide services in "non-traditional" areas<sup>49</sup> are governed by the geographical facility rule rather than the institution-wide rule, without regard to whether they directly or indirectly provided those governmental services.<sup>50</sup>

### 4. *Other Entities*

S. 557 provides a "catch-all" provision which amends the definition of "program or activity" to include entities receiving federal financial assistance which were not specifically delineated in the bill's definition of "program or activity". The entities that fall into the "catch-all" provisions are governed by S.557 in the same manner as those entities specifically delineated.<sup>51</sup> The above

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ment; (2)(A) a college, university, or other post-secondary institution, or a public 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), system of vocational education, or other school system; (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship-(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; or (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance, except that such terms do not include 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.

*See also*, § 504(b) of the Rehabilitation Act of 1973; § 309(4) of the Age Discrimination Act of 1975, and § 606 of Title VI of the Civil Rights Act of 1964.

46. Senate Report, *supra*, note 7 at 16.

47. *Id.* at 16-17.

48. *Id.* at 17-18.

49. As defined by statute to include garbage collection, highway maintenance, and the operation of public utilities. *See generally* Broadus, *infra* note 50.

50. Such as education, housing, health care and social services. Broadus, *Grove City: More Red Tape for American Business*, Legal Backgrounder, The Heritage Foundation, April 22, 1988, at 2-3.

51. Senate Report, *supra* note 7, at 19-20.

coverage provisions of S. 557, as applied to governmental, educational, corporate, private, and other entities, clearly seek to re-establish pre-*Grove-City* conditions of "institution-wide" rather than "program-specific" standards.<sup>52</sup> Under this bill, a recipient of federal financial assistance is required to comply with non-discrimination laws in all activities.

The adoption of the "institution-wide" rather than the "program-specific" standard narrows the defined scope of "institution". Under circumstances where funds are earmarked for a particular purpose, the scope of the regulatory impact of S. 557 is limited to the geographically separate facility which has been awarded the funds. The adoption of the "firm-wide" standard narrows the application of discrimination in all of the operations and facilities of the entity as a whole. The legislative history demonstrated the effect of the adoption in the General Motors Auto Plant Example.<sup>53</sup> In that example, where federal funds are provided through a grant by the state health department for first aid training, all the operations of that plant in Dearborn would be covered, but not the company's other plants. This "institution-wide" application of S. 557 is limited to the geographically defined plant involved in the program.<sup>54</sup>

Under S. 557, organizations which engage principally in providing education, health care, housing, social services, parks or recreation services have new and expanded obligations imposed upon them. Congress identified these services as "traditional governmental services" so that those institutions providing them have a special obligation to comply with the non-discrimination laws. The entities involved in such activities are under a firm-wide obligation not to discriminate when receiving federal funds. For example, if corporation Y is a chain of ten nursing homes, federal financial assistance to one of the nursing homes requires compliance with the four civil rights laws in all of the operations of all ten of the nursing homes, subject to the education limitation in Title IX. Key here is that a corporation, receiving federal financial assistance, that is principally engaged in one of the delineated traditional services is subject to a firm wide obligation not to discriminate.<sup>55</sup>

S. 557 does not modify what is defined as "federal financial assistance." S. 557 is intended to address only the scope of coverage for recipients of federal financial assistance under Title VI, Title IX, § 504, and the Age Discrimination Act. The prior legal determinations of what constitutes "federal financial assistance"<sup>56</sup> will continue after the bill's enactment. The critical question is the proper limitation of the phrase, "federal financial assistance." The seminal case focusing on how far such relationships should go to determine "federal financial assistance" is *U.S. Department of Transportation v. Paralyzed Veterans of America*.<sup>57</sup> In its holdings, the Court leaves many un-

52. Broadus, *supra* note 50, at 3.

53. If the Dearborn, Michigan plant of General Motors is extended federal financial assistance for first aid training through the state department of health, all the operations of the Dearborn plant are covered (the state health department is also covered as a state agency to which federal financial assistance is extended).

54. Broadus, *supra* note 50 at 3.

55. *Id.*

56. *Id.* at 4.

57. In *U.S. Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986), the court rejected a U.S. Court of Appeals holding that airlines indirectly received federal funds because they used federally assisted airports and the airport managers converted the cash bene-

resolved issues regarding the range of federal financial assistance that would trigger the federal civil rights provisions. Future litigation may be required to resolve the issue of what activity constitutes receipt of federal financial assistance.<sup>58</sup>

### B. *Small Provider Exception*

S. 557 provides an exclusion from coverage for the "small provider". S. 557 adds a new subsection (c) to § 504 of the Rehabilitation Act of 1973<sup>59</sup>, which states that when alternative means of providing the services are available, small providers are not required to make significant structural or architectural modifications to their existing facilities to ensure accessibility to handicapped persons.

S. 557(c) upholds the status quo of the law regarding "program accessibility", which requires that a federally funded program be modified to ensure participation by the handicapped. Small providers, defined as those with fewer than 15 employees, such as pharmacies and mom and pop grocery stores, are given a limited exception to the accessibility requirement under S. 557. In addition, the bill also retains the present small provider exception which allows a firm, after consultation with the handicapped person seeking its services, to refer that handicapped person to another provider if the other provider is (1) accessible and (2) willing to provide the service.<sup>60</sup>

### C. *Ultimate Beneficiaries Exception*

Section 7 of S. 557 provides an exclusion from coverage for those ultimate beneficiaries who were excluded from coverage prior to the bill's enactment. Ultimate beneficiaries are recipients of federal assistance such as individual farmers, person receiving social security benefits, and persons receiving food stamps.

In those instances where the type of aid and recipient is analogous to the existing categories of ultimate beneficiaries, S. 557 would not prohibit exemption of recipients of new forms of federal financial assistance created after the enactment and implementation of the bill.<sup>61</sup>

### D. *Religious Tenet Exception*

S. 557 retains the religious tenet exemption in Title IX, with the proviso

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fits airlines received into non-cash benefits. See Broadus, *supra* note 50, at 5. The Court's rationale was that the airlines were mere beneficiaries of the funds and had no other obligations related to fund receipt under the civil rights statutes. However, the Court did not reject the theory that non-cash benefits could legally be the source of a claim. While conceding that "financial" usually means money, the Court left the door open for future lawsuits. It insisted that civil rights obligations are imposed only by contract and would attach only to those who decided to accept them by accepting the federal funds.

58. Broadus, *supra* note 50, at 30.

59. § 504(c) of the Rehabilitation Act of 1973, 29 U.S.C. § 794(c) (Supp. 1989), states in pertinent part:

Small providers are not required by subsection (a) [to] make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1989.

60. Broadus, *supra* note 50, at 3.

61. Senate Report, *supra* note 7, at 24.

that the exemption is only as broad as the Title IX coverage of education "programs and activities."<sup>62</sup> The Title IX exemption allows educational institutions to request exemption from the prohibition on sex discrimination if such prohibition would be inconsistent with its religious tenets. "For example, a religiously controlled university that wished to exclude insurance coverage of abortions from an otherwise comprehensive student health insurance policy could seek a religious exemption."<sup>63</sup>

This provision specifies that nothing in the bill neither prohibits nor requires any religious entity to provide or pay for services related to abortion. S. 557 does not attempt to broaden or narrow the religious tenet provision. It merely leaves it intact to avoid the expansion and maintenance of more egregious sex-based discrimination patterns in education.<sup>64</sup>

### E. Fund Termination

S. 557 does not affect the public and private enforcement mechanisms common to all four of the civil rights statutes. The relevant section of each statute provides for termination of assistance to the particular program or part thereof, in which non-compliance has been found. This has the legal effect of not terminating federal funds used for a specific purpose, unless discrimination was found somewhere within the operations of the recipient in the use of those funds.<sup>65</sup>

## CONCLUSION

Congress' legislative response to the Supreme Court's 6-3 decision in *Grove City* was the enactment of the "Civil Rights Restoration Act of 1987", that was described as "necessary to restore the prior consistent and long standing executive branch interpretation and broad, institution-wide application of those laws as previously administered."<sup>66</sup>

The legislation had a long and difficult path to enactment. President Reagan vetoed the legislation. The major criticism was that the bill created new law or expanded civil rights and would allow unwarranted government intrusion into state and local government activities, private sector endeavors, and into everything from mom and pop grocery stores to religious institutions.<sup>67</sup> Reagan's veto message stated that it "would vastly and unjustifiably expand the power of the federal government over the decisions and affairs of private organizations, such as churches, synagogues, farms, business, and state and local governments."<sup>68</sup> In an apparent attempt to counter an override of the veto and to avert a possible anti-civil rights image, President Reagan combined his veto with an alternative bill to accomplish the goals of S. 557, to "ensure equality of opportunity for all Americans while preserving their basic

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62. Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373-75, *supra* note 4, at 1.

63. Senate Report, *supra* note 7, at 27.

64. Broadus, *supra* note 50, at 3.

65. *Id.*

66. Cong. Rec. S266-7 (daily ed. Jan. 28, 1988).

67. *Congress Overrides Reagan's Grove City Veto*, CONG. Q., Mar. 26, 1988, at 774.

68. *Reagan Vetoes Grove City Bill; Override Vote Set For March 22*, CONG. Q., Mar. 19, 1988 at 752.

freedoms from governmental interference and control.”<sup>69</sup> However, the Democrats considered this alternative measure as “too little, too late.”<sup>70</sup>

President Reagan’s veto generated an intensive lobbying battle between a coalition of religious and civil rights groups. Leading the opposition were the U.S. Catholic Conference and anti-abortion groups, such as the National Right to Life Committee, Inc., whose disagreement centered around the legislation’s impact on the abortion issue. Most of the public debate over the bill’s enactment stemmed from a massive lobbying campaign organized by the Moral Majority and other evangelical groups, who contended that the bill’s enactment would mean unwarranted government intrusion in church affairs.<sup>71</sup>

Legislation to overturn the *Grove City* decision was spearheaded by the Leadership Conference on Civil Rights with a coalition of civil rights groups. They contended that this measure would neither create new law nor expanded civil rights, nor jeopardize existing religious freedoms, but would merely restore the broad enforcement of the four civil rights statutes that existed before the *Grove City* decision. Those participating included: the U.S. Catholic Conference of Bishops, American Jewish Congress, Union of American Hebrew Congregations, National Council of Churches, the American Baptist Churches and the United Methodist Church, as well as groups representing women, the elderly, and the handicapped. On the day of the actual congressional vote, the halls of the Senate and House office buildings were filled with people in wheelchairs.<sup>72</sup>

On March 22, 1988, Congress voted to override President Reagan’s *Grove City* veto: the Senate voted 73-24, and the House voted 292-133, clearly more than the two thirds necessary to override the Presidential veto.

Congress handed President Reagan, and, by extension, the Supreme Court, a devastating defeat on *Grove City*. The message was clear. Americans wanted to undo the effects of the Supreme Court’s unfortunate 1984 decision in *Grove City*. The American majority supports the status quo for broad enforcement of the four civil rights statutes: Title VI of the 1964 Civil Rights Act, barring discrimination by race, color, or national origin in federal assisted programs; Title IX of the 1972 Education Amendments, barring discrimination in education; § 504 of the 1973 Rehabilitation Act, barring discrimination against the handicapped in federally aided programs; and the 1975 Age Discrimination Act, barring discrimination based on age in receiving federal aid.

Although Americans have made great strides to overcome discrimination in the past two decades, there is much work yet to be done to realize the ultimate goal of equality for all. The passage of S. 557 sends a clear signal: discrimination is illegal and will be prohibited through broad enforcement of the Civil Rights Restoration Act of 1987. Consequently, the enactment of S.

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69. Marcus, *Reagan Vetos Civil Rights Restoration Act*, Wash. Post, Mar. 17, 1988, at A1, column 4.

70. *Congress Overrides Reagan’s Grove City Veto*, CONG. Q., Mar. 26, 1988, at 775.

71. *Id.* at 776.

72. *Id.*

557 closes a major loophole in our civil rights laws and preserves two decades of hard-won civil rights for all Americans.

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