



Fall 9-1-2000

Defining Recipients of Federal Financial Assistance Under the Nondiscrimination Statutes

Heidi A. Reamer

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Civil Rights and Discrimination Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Heidi A. Reamer, *Defining Recipients of Federal Financial Assistance Under the Nondiscrimination Statutes*, 57 Wash. & Lee L. Rev. 1355 (2000).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol57/iss4/8>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Defining Recipients of Federal Financial Assistance Under the Nondiscrimination Statutes

Heidi A. Reamer*

Table of Contents

I. Introduction	1356
II. Historical Development of "Federal Financial Assistance" Law	1364
A. Statutory Beginnings	1365
1. Statutory Demands	1365
2. Statutory Remedies	1369
B. Early Developments in Definitions	1373
1. <i>Grove City College v. Bell</i>	1373
2. Civil Rights Restoration Act of 1987	1375
III. Refinement of Definitions	1377
A. Supreme Court Refining	1378
1. <i>United States Department of Transportation v. Paralyzed Veterans of America</i>	1378
2. <i>National Collegiate Athletic Ass'n v. Smith</i>	1383
3. Summary	1384
B. Lower Courts' Interpretations	1385
1. Indirect Recipient	1387
a. The Theory	1387
b. The Critique	1389
2. Controlling Authority	1391
a. The Theory	1392
b. The Critique	1394
3. Summary	1395

* The author thanks Susan Ballantine and Jim Phemister for their invaluable assistance in the development of this Note. She owes special thanks to Thomas Anderson for his encouraging support throughout the writing process.

IV. Proposed Categories	1396
A. Contractual Recipients	1397
B. Intended Recipients	1399
1. Explicitly Intended	1400
2. Implicitly Intended	1401
V. Conclusion	1402

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.

– President John F. Kennedy¹

I. Introduction

Tai Kwan Cureton planned to go to college on an athletic scholarship.² He had the grades.³ He had the athletic prowess.⁴ What he did not have, however, was a high enough standardized test score.⁵ According to rules

1. See 133 CONG. REC. S2353 (daily ed. Feb. 19, 1987) (statement of Sen. Kerry) (quoting President John F. Kennedy's appeal to Congress on June 19, 1963, upon submission of Civil Rights Act of 1964). Senator Kerry quoted President Kennedy during his opening statement in support of the Civil Rights Restoration Act of 1987. *Id.* For a more detailed discussion of the Civil Rights Restoration Act, see *infra* Part II.B.2.

2. See *Cureton v. Nat'l Collegiate Athletic Ass'n*, 198 F.3d 107, 109 (3d Cir. 1999) [hereinafter *Cureton III*] (detailing steps Plaintiff took towards pursuing opportunity to compete as freshman in varsity intercollegiate athletics), *rev'g* 37 F. Supp. 2d 687 (E.D. Pa. 1999) [hereinafter *Cureton I*]. For clarity purposes, this Note will refer to the *Cureton* district court opinion, *Cureton v. National Collegiate Athletic Ass'n*, 37 F. Supp. 2d 687 (E.D. Pa. 1999), as *Cureton I*. This Note will refer to the Third Circuit opinion, *Cureton v. National Collegiate Athletic Ass'n*, 198 F.3d 107 (3d Cir. 1999) as *Cureton II*. *Cureton II* reversed *Cureton I*, but the district court's fact finding and analysis remain crucial. See *infra* notes 18 and 26 for a more complete discussion of *Cureton II* and its grounds for reversal.

3. See *Cureton II*, 198 F.3d at 109 (noting that Plaintiff Tai Kwan Cureton ranked twenty-seventh out of class of 305 students at Simon Gratz High School in Philadelphia, Pennsylvania). Plaintiff Leatrice Shaw ranked fifth in the same class and also was selected for membership in National Honor Society. *Id.* at 109-10.

4. See *id.* at 109 (acknowledging that plaintiff Tai Kwan Cureton earned athletic honors as member of his high school track team and was recruited by several Division I schools). The National Collegiate Athletic Association (NCAA) separates its member institutions – a majority of which are public and private four-year colleges – into three Divisions for competition and organizational purposes. See *Cureton I*, 37 F. Supp. 2d at 690 (describing structural details of voluntary athletic association). Plaintiff Cureton eventually enrolled in a Division III school. *Cureton II*, 198 F.3d at 109.

5. See *Cureton I*, 37 F. Supp. 2d at 689 (noting that all four named plaintiffs failed to meet minimum standardized test cutoff score).

promulgated by the National Collegiate Athletic Association (NCAA), Cureton failed to achieve the combination score necessary to participate in intercollegiate athletics and to receive athletically related financial aid during his freshman year.⁶ Simply put – no score, no scholarship.

Cureton and other similarly situated plaintiffs sued the NCAA under Title VI of the Civil Rights Act of 1964 (Title VI).⁷ In *Cureton v. National Collegiate Athletic Association*,⁸ plaintiffs claimed that the NCAA's minimum test score requirement had an unjustified "disparate impact"⁹ upon African-American student-athletes, and the district court agreed.¹⁰ Although the dis-

6. See *id.* at 690-91 (interpreting academic standards required by NCAA Bylaw 14.3, also known as "Proposition 16"). The eligibility rules implemented in the 1996-97 academic year require high school graduates to earn a 2.000 grade point average (GPA) in thirteen academic core courses in tandem with a composite standardized test score determined by a "sliding scale." *Id.* at 690. For example, a student with a 2.000 GPA could establish eligibility if he or she also scores either a 1010 on the Scholastic Aptitude Test (SAT) or an 86 on the American College Test (ACT). *Id.* at 690-91. However, a student with a GPA of 2.500 or higher need only score a minimum of 820 on the SAT or a 68 on the ACT. *Id.* at 691. The NCAA has promulgated minimum academic standards like Proposition 16 since 1965. See Kenneth L. Shropshire, *Colorblind Propositions: Race, the SAT, & the NCAA*, 8 STAN. L. & POL'Y REV. 141, 143 (1997) ("The 1965 rule required students to have a high school record and standardized test scores sufficient to 'predict' a college grade point average of 1.6" (citing PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 532 (1993))). However, the initial standards were insufficient because "[d]uring the early 1980s . . . evidence existed that student-athletes were being exploited for their athletic talents and were exhausting their athletic eligibility without any realistic hope of obtaining an undergraduate degree." See *id.* Stories of star college athletes such as Chris Washburn and John "Hot Rod" Williams also motivated the NCAA to adopt a rule utilizing more than a subjective GPA standard. *Id.* Washburn and Williams scored a combined 470 on the SAT, yet both were still eligible under the old rules. *Id.* In fact, both athletes were recruited by over 100 schools despite the gross disparity between their scores and the scores of the average student. *Id.* For example, Washburn initially enrolled at North Carolina State University, where the average SAT score was 1020. *Id.* Williams enrolled at Tulane University, where the average score was 1120. *Id.* (citing MURRAY SPERBER, *COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VERSUS THE UNIVERSITY* 218-19 (1990)).

7. *Cureton I*, 37 F. Supp. 2d 687, 687 (E.D. Pa. 1999); see 42 U.S.C. § 2000d (1998) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

8. 37 F. Supp. 2d 687 (E.D. Pa. 1999).

9. See *Cureton II*, 198 F.3d 107, 112 n.4 (3d Cir. 1999) (explaining that "[a] disparate impact case is based upon the idea that 'some . . . practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination'" (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988))). Many cases have applied this theory to educational institutions and practices. See *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (collecting cases).

10. See *Cureton I*, 37 F. Supp. 2d 687, 689 (E.D. Pa. 1999) (holding that NCAA's initial eligibility rule had unjustified disparate impact upon African-Americans). In *Cureton I*, the district court considered whether the NCAA was subject to suit under Title VI, and if so,

parate impact analysis is indeed interesting, one preliminary holding emerges as even more striking.¹¹ Before addressing the constitutionality of the score minimums, the court first had to rule that Title VI's standards applied to the NCAA.¹² Title VI's nondiscrimination requirements only apply to entities that receive federal financial assistance.¹³ Therefore, Cureton's discrimination claim could succeed only if the court first ruled that the NCAA was a statutory recipient of federal financial assistance.¹⁴

The *Cureton* court rested its ruling that the NCAA had to comply with Title VI's standards on two theories that the plaintiffs proposed.¹⁵ First, the court found that Title VI's standards bound the NCAA because it was an "indirect recipient" of federal financial assistance.¹⁶ The court ruled that the NCAA was an indirect recipient because the organization exercised complete control over a federal grant to its National Youth Sports Program Fund.¹⁷

whether the organization's minimum standardized test score requirement had an unjustified disparate impact against African-Americans. *Id.* Plaintiffs alleged that the NCAA's initial eligibility rules governing how one qualifies to participate in collegiate athletics violated their Title VI rights. *Id.* However, before it could consider granting Plaintiffs' requested relief, the court first had to hold the NCAA subject to Title VI. *Id.* at 692. After proffering two possible grounds for subjecting the NCAA to a Title VI suit, the court next considered whether the organization's rules had an unjustified disparate impact. *Id.* at 696-712. The court ultimately declared the score minimums illegal under Title VI and permanently enjoined the NCAA from using them. *Id.* at 715.

11. *See id.* at 696-714 (discussing whether Proposition 16 causes racially disproportionate effect and whether educational necessity justifies Proposition 16).

12. *See id.* at 692-96 (analyzing plaintiffs' theories why NCAA qualifies as "recipient" of federal financial assistance).

13. *See* 20 U.S.C. § 1681 (1998) (prohibiting discrimination in any "program or activity receiving Federal financial assistance").

14. *See Cureton I*, 37 F. Supp. 2d at 692 (recognizing that court must decide, as preliminary matter, whether NCAA is recipient of federal financial assistance). For clarity purposes, this Note will often use the term "statutory recipient" as a shorthand reference for an entity that qualifies as a "program or activity receiving Federal financial assistance."

15. *See id.* at 694 (listing Plaintiff's theories "to support a conclusion that the NCAA is subject to the reach of Title VI"). The district court also explicitly rejected two of plaintiffs' theories. *Id.* at 693-94. First, the district court ruled that the organization's receipt of dues did not automatically subject the NCAA to suit under Title VI. *Id.* at 693 (citing *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999)). Second, the court refused to "pierce the corporate veil" of the National Youth Sports Program Fund based on an alter-ego theory. *Id.* at 694.

16. *See Cureton I*, 37 F. Supp. 2d 687, 694 (E.D. Pa. 1999) (offering first theory that subjects NCAA to mandate of Title VI); *cf. Cureton II*, 198 F.3d 107, 118 (3d Cir. 1999) (finding it unnecessary to determine whether NCAA's relationship with Fund makes organization indirect recipient of federal financial assistance). *See infra* notes 18 and 26 for a more detailed analysis of the Third Circuit's holding on appeal.

17. *See Cureton I*, 37 F. Supp. 2d at 692 n.3 (describing Fund as "an enrichment program for economically disadvantaged youths that provides summer education and sports instruction on the campuses of NCAA member and non-member institutions of higher education").

Second, the court found the NCAA subject to Title VI because federally funded NCAA member schools granted the organization "controlling authority" over their schools' federally-funded programs.¹⁸ The court concluded that either the "indirect recipient" theory or the "controlling authority" theory qualified the NCAA as a statutory recipient subject to Title VI's nondiscrimination requirements.¹⁹

The *Cureton I* ruling is controversial for two reasons. First, it is controversial because of its potentially sweeping effects on intercollegiate athletics.²⁰ Second, it is controversial because of its apparent conflict with the Supreme Court's holding – only one month earlier – in *National Collegiate Athletic Ass'n v. Smith*.²¹ In *Smith*, the Court found that receiving membership dues

18. See *id.* at 694-96 (emphasizing that NCAA is "the decisionmaking and enforcement entity behind legislation adopted by, and enforced against, its membership"). But see *Cureton II*, 198 F.3d at 116-18 (ruling that NCAA does not have controlling authority over its members' programs receiving federal financial assistance). The *Cureton II* court relied upon the Supreme Court's decision in *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988), for the principle that the NCAA does not "control" its members. *Id.* at 117. The fact that noncomplying schools may face sanctions from the NCAA does not change the fact that each school still makes the ultimate decision regarding who receives scholarships and who participates in athletics. *Id.* Each school also has the option of voluntarily withdrawing from the NCAA. *Id.* Furthermore, the court reiterated the contractual character of the antidiscrimination regulations and found it significant that the NCAA was not in a position to accept or reject the federal funds received by the schools. *Id.* at 118 (citing *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605-06 (1986)).

19. See *Cureton I*, 37 F. Supp. 2d at 696 (reiterating grounds for holding the NCAA subject to Title VI).

20. See Mark Conrad, *NCAA's Proposition 16 Eligibility Rules Struck*, N.Y.L.J., Mar. 26, 1999, at 5 ("Judge Buchwalter's ruling in *Cureton v. NCAA*, and his subsequent refusal to stay the decision throws the college selection process for talented student-athletes in disarray."). The NCAA eligibility rules affect over one thousand member colleges and universities. *Cureton II*, 198 F.3d 107, 110 (3d Cir. 1999). Despite the potentially huge impact of its decision, the district court permanently enjoined the NCAA from continuing the operation of its eligibility rules contained in Proposition 16. *Cureton I*, 37 F. Supp. 2d 687, 715 (E.D. Pa. 1999). However, the court later modified its order to allow the NCAA to use a grade point average cutoff. *Cureton v. Nat'l Collegiate Athletic Ass'n*, 37 F. Supp. 2d 687, 715-17 (E.D. Pa. 1999). In the same proceeding, the district court denied the NCAA's motion for a stay of the injunction pending appeal to the Third Circuit. *Id.* at 716-17. The Third Circuit subsequently granted the stay on March 30, 1999 and finally reversed the district court on October 1, 1999. *Cureton II*, 198 F.3d 107, 118 (3d Cir. 1999).

21. See *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 468 (1999) (concluding that NCAA's receipt of dues from federally funded educational institutions was insufficient to trigger Title IX coverage). In *Smith*, the Court considered whether the NCAA was subject to Title IX because it received dues money from federally funded member institutions. *Id.* at 462. The plaintiff claimed that the NCAA's failure to waive its rule regarding the athletic ineligibility of postgraduate students was sex discrimination prohibited by Title IX of the Education Amendments of 1972. *Id.* at 464. Before deciding whether the organization's actions were discriminatory, the plaintiff first had to show that the NCAA was a recipient of federal financial

from federally assisted educational institutions was an insufficient basis for subjecting the NCAA to Title IX's standards.²² Therefore, the NCAA was not a statutory recipient.²³ Finally, the *Smith* Court articulated its version of the federal financial assistance standard: "Entities that *receive* federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only *benefit* economically from federal assistance are not."²⁴ Although the *Cureton I* court acknowledged the *Smith* holding,²⁵ the court still found that either the "indirect recipient" theory or the "controlling authority" theory was a sufficient basis for making the NCAA a statutory recipient.²⁶

assistance. *Id.* at 466. The plaintiff alleged that the NCAA received federal financial assistance because it received dues from federally-funded member institutions. *Id.* at 465. The Court first explained that if any part of the NCAA received federal assistance, then the entire organization would be subject to Title IX. *Id.* at 466. However, the Court also explained that there is a crucial distinction between an entity that receives federal assistance and one that merely benefits economically from such assistance. *Id.* at 466-69 (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 563-70 (1984), and *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 603-12 (1986)). The Court distinguished *Grove City* because the schools did not pay their NCAA dues with federal funds earmarked for that purpose. *Id.* at 468. Instead, the NCAA was at most a beneficiary of the federal assistance given to its members and not a recipient. *Id.*

22. *See id.* (distinguishing dues money from kind of earmarked funds involved in *Grove City College v. Bell*, 465 U.S. 555, 563-70 (1984)). The *Smith* holding is relevant to the *Cureton* analysis because Title IX (at issue in *Smith*) and Title VI (at issue in *Cureton*) feature the same triggering language. An entity is subject to either title if it is a "program or activity receiving Federal financial assistance." *See id.* at 466 n.3 (noting that scope of several federal anti-discrimination measures is defined in nearly identical terms to those used in Title IX); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-96 (1979) ("Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefited class . . ."). In *Cannon*, the Court explained that "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." *Id.* at 696. The primary difference is that Title IX covers only "educational" programs or activities. *See* 20 U.S.C. § 1681 (1998) (prohibiting sex discrimination "under any *education* program or activity receiving federal financial assistance" (emphasis added)); Diane M. Piche, Note, *Grove City College v. Bell and Program-Specificity: Narrowing the Scope of Federal Civil Rights Statutes*, 34 CATH. U. L. REV. 1087, 1088 n.2 (1985) ("[C]ongress passed [T]itle IX, a measure patterned word-for-word after [T]itle VI but limited in scope to education.").

23. *See infra* Part III.A.3 (explaining effect of *Smith* on definition of statutory recipient).

24. *See Smith*, 525 U.S. at 468 (emphasis added) (interpreting Department of Education's definition of "recipient" in light of *Grove City College v. Bell*, 465 U.S. 555 (1984), and *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986)).

25. *See Cureton I*, 37 F. Supp. 2d 687, 693 (E.D. Pa. 1999) (discussing application of *National Collegiate Athletic Ass'n v. Smith*, 119 S. Ct. 924 (1999)). The *Cureton I* court reasoned that plaintiffs could still use the dues theory in combination with other theories in order to establish Title VI coverage. *Id.* at 693-94.

26. *Cureton I*, 37 F. Supp. 2d at 696. *See supra* notes 15-19 and accompanying text

The harm the *Cureton I* court was trying to correct may indeed fall within the original purpose of Title VI as articulated by President John F. Kennedy.²⁷ However, Title VI was not intended to apply to all "discriminators."²⁸ Instead, Title VI applies only to those programs or activities that receive federal financial assistance.²⁹ More succinctly, Title VI applies only to statutory recipients.³⁰

(detailing theories accepted in *Cureton I* that subject NCAA to Title VI coverage); see also *Cureton II*, 198 F.3d 107, 114-15 (3d Cir. 1999) (concluding that disparate treatment regulations passed under authority of Title VI remain program-specific and therefore only apply to NCAA's use of funds within National Youth Sports Program – funds not at issue in case). In *Cureton II*, the Third Circuit considered whether the NCAA was subject to the discriminatory impact prohibitions of Title VI according to the theories approved of in the district court opinion. *Id.* at 114-18. First, the court found it unnecessary to determine whether a federal grant to fund the NCAA's National Youth Sports Program made the entire organization a recipient of federal financial assistance because it ruled that the regulations regarding disparate impact were program-specific. *Id.* at 114. Because the plaintiffs did not allege discrimination in the precise program or activity alleged to receive federal financial assistance – the National Youth Sports Program Fund – their claims had to fail. *Id.* at 115. Because of the program-specific limitation, the court did not review the merits of the "indirect recipient" theory suggested by the district court. *Id.* at 116 ("[E]ven if the NCAA directly received the Federal financial assistance paid to the Fund our result would be the same."). The court next rejected the second theory proffered by the district court – that the NCAA enjoyed controlling authority over programs or activities receiving federal financial assistance. *Id.* at 116-18 (noting that each school still makes ultimate decision regarding who receives scholarships and who participates in athletics). Furthermore, the court reiterated the contractual character of the antidiscrimination regulations. *Id.* at 118 (citing *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605-06 (1986)). The court found it significant that the NCAA was not in a position to accept or reject the federal funds received by the schools. *Id.* at 118 (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 637-41 (1999)).

27. See 133 CONG. REC. S2353 (daily ed. Feb. 19, 1987) (statement of Sen. Kerry) ("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." (quoting President John F. Kennedy's comments before Congress upon submission of Civil Rights Act of 1964)). Senator Kerry quoted Kennedy during his opening statement regarding the Civil Rights Restoration Act of 1987. *Id.* For a more detailed discussion of the Act, see *infra* Part II.B.2.

28. See *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 604 (D.S.C. 1974) (noting that in message accompanying proposed Civil Rights Act of 1963, President Kennedy challenged Congress to "pass a single comprehensive provision making it clear that the federal government is not required under any statute, to furnish any kind of financial assistance – by way of grant, loan, contract, guaranty, insurance or otherwise – to any program or activity in which racial discrimination occurs" (citing H.R. DOC. NO. 88-124, at 12 (1963))). In fact, the final version of the Act excluded contracts of insurance and guaranty from coverage. See 42 U.S.C. § 2000d-4 (1998).

29. See 42 U.S.C. § 2000d (1998) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

30. See *supra* note 14 (explaining this Note's shorthand use of "statutory recipient").

The *Smith* Court asserted that a statutory recipient is more than a mere "beneficiary" of such assistance; however, the Court failed to articulate any specific factors to help lower courts distinguish between a recipient and a beneficiary.³¹ The absence of a more specific definition of statutory recipient burdens lower courts, and also frustrates organizations unsure of their potential recipient status.³² Unfortunately, after *Smith*, the ultimate issue concerning both courts and organizations remains unanswered: What are the characteristics of an entity that is a statutory recipient of federal financial assistance as opposed to the characteristics of an entity that is a mere beneficiary of federal financial assistance?³³

The answer to this question is important because it impacts other areas of federal legislation beyond Title VI; several subsequent federal antidiscrimination measures also feature the same "Federal financial assistance" trigger.³⁴

31. See Nat'l Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459, 467-68 (1999) (stating distinction between recipient and beneficiary); *infra* Part III.A.2 (explaining *Smith* Court's interpretation of recipient versus beneficiary standard).

32. See Brief for Petitioner at 35, Nat'l Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459 (1999) (No. 98-84) (arguing that "to extend Title IX to the NCAA would have broad implications beyond the NCAA and even Title IX"). Petitioner in *Smith* noted that "[i]n addition to the NCAA, there are hundreds if not thousands of private organizations and associations that do not themselves receive federal financial assistance, but have members -- including colleges and universities, hospitals, and public contractors -- that do." *Id.* For example, petitioner in *Smith* listed 126 organizations with higher education institutions as members. *Id.* (citing 1 ENCYCLOPEDIA OF ASSOCIATIONS (Christian Maurer & Tara E. Sheets eds., 34th ed. 1998); HIGHER EDUCATION PUBLICATIONS, INC., 1998 HIGHER EDUCATION DIRECTORY (1997)). Organizations listed included: the American Association of Christian Schools, the Association of American Medical Colleges, the Law School Admission Council, the National Consortium for Black Professional Development, and The College Board. *Id.* at 1-4(a).

The organizations may take comfort in two other Supreme Court rulings. First, the Supreme Court already rejected one view that would make various industries and institutions part of a federally assisted program or activity merely because they are "inextricably intertwined" with a recipient of federal financial assistance. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 610-11 (1986) (expressing concern that appellate court's view of recipient would broaden scope of § 504 of Rehabilitation Act beyond Congress's intent). Also the Supreme Court recently recognized the importance of notice before sanctions can be imposed upon a recipient of federal financial assistance. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289 (1998) ("It would be unsound, we think, for a statute's express system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially implied system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice." (citation omitted)).

33. See *Smith*, 525 U.S. at 467-68 (stating categorical distinction between recipients and beneficiaries of federal financial assistance); *infra* Part III.A.2 (explaining *Smith* Court's interpretation of recipient versus beneficiary standard).

34. See *Smith*, 525 U.S. at 466 n.3 (noting that nearly identical terms define scope of several federal anti-discrimination measures). The Supreme Court listed Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (prohibiting race discrimination in "any

Statutes explicitly modeled after the Title VI language include Title IX of the Education Amendments of 1972,³⁵ Section 504 of the Rehabilitation Act of 1973,³⁶ and Section 303 of the Age Discrimination Act of 1975.³⁷ Applying the reasoning in *Smith* to the other statutes modeled after Title VI, a statutory recipient of federal financial assistance is subject to lawsuits based on race, gender, disability, or age discrimination.³⁸ In contrast, a mere beneficiary of federal financial assistance is not subject to these same lawsuits.³⁹

This Note examines the definition of statutory recipient as it applies to Title VI and the three other nondiscrimination statutes featuring the same triggering language.⁴⁰ Part II.A discusses the historical development of the "Federal financial assistance" language as contained in the nondiscrimination statutes.⁴¹ Part II.B interprets the initial attempts of Congress and the Su-

program or activity receiving Federal financial assistance"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (prohibiting discrimination on basis of disability in "any program or activity receiving Federal financial assistance"), and Section 303 of the Age Discrimination Act of 1975, 42 U.S.C. § 6102 (prohibiting discrimination on basis of age in "any program or activity receiving Federal financial assistance"). *Id.*

35. See 20 U.S.C. § 1681(a) (1998) ("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 . . ."); *infra* notes 66-69 and accompanying text (detailing development of Title IX legislation).

36. See 29 U.S.C. § 794(a) (1998) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, 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 . . .").

37. See 42 U.S.C. § 6102 (1998) ("[N]o 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.").

38. See *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 467-68 (1999) (distinguishing between "recipient" and "beneficiary" of federal financial assistance (citing *Grove City Coll. v. Bell*, 465 U.S. 555 (1984), and *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986))). The *Smith* Court explained that entities merely benefiting economically from federal assistance are not recipients within the meaning of Title IX. *Id.* Because the other nondiscrimination statutes contain the same triggering language, entities that merely benefit from federal assistance would not be recipients for purposes of those statutes either. See 42 U.S.C. § 2000d (1998) (prohibiting race discrimination in "any program or activity receiving Federal financial assistance"); 29 U.S.C. § 794(a) (1998) (prohibiting discrimination on basis of disability in "any program or activity receiving Federal financial assistance"); 42 U.S.C. § 6102 (1998) (prohibiting discrimination on basis of age in "any program or activity receiving Federal financial assistance").

39. See *Smith*, 525 U.S. at 467-68 (articulating difference between "recipient" and "beneficiary").

40. See 42 U.S.C. § 2000d (1998) (Title VI); 20 U.S.C. § 1681(a) (1998) (Title IX); 29 U.S.C. § 794(a) (1998) (Section 504 of Rehabilitation Act); 42 U.S.C. § 6102 (1998) (Section 303 of Age Discrimination Act).

41. See *infra* Part II.A (discussing chronological development of nondiscrimination statutes featuring "program or activity receiving Federal financial assistance" triggering language).

preme Court to actually define "program or activity" receiving federal financial assistance.⁴² Part III.A then analyzes the Supreme Court's refinement of its early definition.⁴³ Part III.B synthesizes lower courts' attempts to apply Supreme Court precedent to various factual situations.⁴⁴ In doing so, Part III.B identifies the specific inconsistencies between the lower courts' methods and the general problems with the law as it stands now.⁴⁵ Part IV proposes two ultimate categories of statutory recipients – contractual recipients and intended recipients – that should guide both courts and organizations alike.⁴⁶ Finally, Part V concludes that the categorical definition of statutory recipient in Part IV accomplishes the goals of the nondiscrimination statutes better than the current distinction between a recipient and a beneficiary.⁴⁷

II. Historical Development of "Federal Financial Assistance" Law

The four statutes detailed below represent Congress's consolidated effort to ensure that federal funds do not operate as a government subsidy for discrimination.⁴⁸ The statutes' basic structures include three relevant parts: a triggering phrase,⁴⁹ a prohibition of discrimination,⁵⁰ and a remedial provision.⁵¹ What the statutes' structures do not include is a definition section.⁵² In the absence of a definition section, the United States Supreme Court and Congress initially battled over the meaning of "program or activity" as contained in the statutes' triggering language.⁵³ However, even after this initial

42. See *infra* Part II.B (interpreting early congressional and Supreme Court efforts to define "receiving Federal financial assistance").

43. See *infra* Part III.A (analyzing Supreme Court's refinement of early definition of "receiving Federal financial assistance").

44. See *infra* Part III.B (synthesizing lower courts' attempts to apply Supreme Court precedent in "receiving Federal financial assistance" context).

45. See *infra* Part III.B (identifying lower court inconsistencies and outlining general problems with current state of law regarding what it means to "receive" federal financial assistance).

46. See *infra* Part IV (proposing two categories of recipient).

47. See *infra* Part V (concluding that proposed categories define statutory recipient better than current recipient versus beneficiary standard).

48. See *supra* note 40 (citing statutes prohibiting discrimination on basis of race, color, national origin, sex, disability, and age).

49. See *supra* notes 29, 35-37 (citing statutes prohibiting discrimination on basis of race, color, national origin, sex, disability, and age).

50. See *infra* Part II.A.1 (discussing nondiscrimination demands of statutes).

51. See *infra* Part II.A.2 (analyzing remedial provisions of nondiscrimination statutes).

52. See *supra* notes 29, 35-37 (citing statutes prohibiting discrimination on basis of race, color, national origin, sex, disability, and age).

53. See *infra* Part II.B (detailing battle between Supreme Court and Congress over appropriate definition of "program or activity").

exchange, the overall definition of statutory recipient still remained unclear.⁵⁴

A. Statutory Beginnings

Congress first created the "program or activity receiving Federal financial assistance" trigger in Title VI of the Civil Rights Act of 1964.⁵⁵ Congress used the same triggering language in subsequent measures prohibiting discrimination on the basis of sex, age, and disability.⁵⁶ At no point did Congress define statutory recipient.

1. Statutory Demands

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any "program or activity receiving Federal financial assistance."⁵⁷ Congress passed Title VI with two main objectives in mind. First, Congress wanted to prevent the use of federal funds to support racial discrimination.⁵⁸ Second, Congress sought to provide individuals with a private remedy for discrimination.⁵⁹

Despite its good intentions, Congress initially failed to define three key terms in the act: "program or activity,"⁶⁰ "receiving,"⁶¹ and "Federal financial

54. See *supra* note 14 (explaining this Note's use of "statutory recipient").

55. See 42 U.S.C. § 2000d (1998) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

56. See 20 U.S.C. § 1681(a) (1998) (Title IX); 29 U.S.C. § 794(a) (1998) (§ 504 of Rehabilitation Act); 42 U.S.C. § 6102 (1998) (§ 303 of Age Discrimination Act).

57. 42 U.S.C. § 2000d (1998).

58. See 110 CONG. REC. 7062 (1964) (remarks of Sen. Pastore) ("[T]he purpose of Title VI is to make sure that funds of the United States are not used to support racial discrimination."). Congress also may have enacted Title VI out of a sense of constitutional duty. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 285 (1978) ("[S]upporters of Title VI repeatedly declared that [Title VI] enacted Constitutional principles.").

59. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (reiterating that "[Congress] wanted to provide individual citizens effective protection against [discriminatory] practices" (citing remarks of Rep. Lindsay, 110 CONG. REC. 7062 (1964))). Representative Lindsay remarked:

This bill is designed for the protection of individuals. When an individual is wronged he can invoke the protection to himself, but if he is unable to do so because of economic distress or because of fear then the federal Government is authorized to invoke that individual protection for the individual

Id. at 1540. For a more complete discussion of government and private remedies, see *infra* Part II.A.2.

60. See 42 U.S.C. § 2000d (1998) (exhibiting absence of definition section); see also Piche, *supra* note 22, at 1096 (observing that "Congress did not explicitly define the term 'program or activity' in either [T]itle IX or [T]itle VI"). Congress did, however, later define

assistance."⁶² Nowhere does Congress define the characteristics of a statutory

"program or activity" via the Civil Rights Restoration Act of 1987. *See infra* Part III.B.2 (discussing Civil Rights Restoration Act). The definition of "program or activity" is now codified in each of the nondiscrimination statutes. *See* 42 U.S.C. 2000d-4(a) (Section 606 of Title VI), 20 U.S.C. § 1687 (Section 908 of Title IX); 29 U.S.C. § 794(b) (Section 504 of Rehabilitation Act); 42 U.S.C. § 6107(4) (Section 309 of Age Discrimination Act). This Note, however, concentrates upon the second definitional problem: "receiving Federal financial assistance." For a fuller historical discussion of "program or activity" under Title VI and Title IX, *see* Piche, *supra* note 22, at 1096-1111 (detailing various approaches to defining "program or activity" under Title VI and Title IX).

61. *See* 42 U.S.C. § 2000d (1998) (exhibiting absence of definition section). Although Congress initially failed to define "recipient," Congress did subtly limit the reach of the word in the Civil Rights Restoration Act of 1987 (CRRA). *See* Rules of Construction of the CRRA, Mar. 22, 1988, P.L. 100-259, § 7, 102 Stat. 31. The Rules of Construction provide: "Nothing in the amendments made by this Act [enacting this section, 20 U.S.C.S. § 1687, and 42 U.S.C.S. 2000d-4a; and amending 29 U.S.C.S. §§ 706 and 794 and 42 U.S.C.S. § 6107] shall be construed to extend the application of the Acts so amended to ultimate beneficiaries of Federal financial assistance excluded from coverage before the enactment of this Act." *Id.* Legislative remarks also indicate Congress's intent to differentiate between a recipient and a beneficiary. *See* 133 CONG. REC. S2249 (daily ed. Feb. 19, 1987) (remarks of Sen. Chafee). Senator Chafee explained:

There were numerous concerns that previously introduced versions might broaden the coverage of these laws beyond their effect prior to the *Grove City* decision. These concerns have now been addressed, and the relevant provisions tightened. . . . There were concerns that the measure would have adverse effect upon persons whom we never intended to reach. There was a fear, for instance, that corner grocery storeowners who accept food stamps would be deemed subject to the Rehabilitation Act and be forced to erect ramps and electric doors in order to provide equal access under the new legislation. Such concerns have been addressed in the bill we are introducing today. There is now a specific exemption for small providers in the language of the statute. Last, there was a concern that food stamp recipients, students receiving school loans, and farmers operating with federal subsidies would not be subject to the law, as ultimate beneficiaries of federal funds. They, too, have now been specifically exempted in the statute.

Id. Agencies later defined the term "recipient" in regulations passed pursuant to the nondiscrimination statutes. *See* 34 C.F.R. § 100.13(i) (1999) (defining "recipient" for purposes of Title IX). For example, the Office of Civil Rights, Education Division, defined "recipient" as follows:

The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.

Id. Despite this multidisciplinary approach to defining the term, courts only interpret the actual triggering language contained in the statutes.

62. *See* 42 U.S.C. § 2000d et seq. (exhibiting absence of definition section). Agencies later defined the term "Federal financial assistance." *See* 34 C.F.R. § 100.13(f) (1999) (defining "Federal financial assistance" for purposes of Title IX). For example, the Office of Civil Rights, Education Division, defined the term as follows:

recipient.⁶³ The lack of definition for these terms has caused confusion for the courts and for the parties before them.⁶⁴ Because later statutes suffer from the same lack of definition, the same type of confusion has proliferated.⁶⁵

Congress used the same triggering language only eight years after Title VI when it enacted Title IX of the Education Amendments of 1972.⁶⁶ Congress enacted Title IX in reaction to widespread reports of pervasive discrimination against women.⁶⁷ Title IX prohibits sex discrimination in "any educa-

The term *Federal financial assistance* includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

Id.

63. See *supra* note 14 (explaining this Note's use of term "statutory recipient").

64. See *infra* Part III (analyzing attempts of Supreme Court and lower courts to refine triggering language). Despite this lack of definition, early appellate courts broadly interpreted Title VI coverage. See, e.g., *Lau v. Nichols*, 414 U.S. 563, 566-68 (1974) (concluding that fact that San Francisco school system "receives large amounts of federal financial assistance" demands compliance with federal bilingual education requirements); *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967) (stating that acceptance of federal funds for construction and maintenance subjected entire school district to Title VI coverage); *Piche*, *supra* note 22, at 1096 n.32 (describing appellate courts' tendencies to construe Title VI as requiring institution-wide coverage when "significant amounts of federal funds were received by a college or school district").

65. See 20 U.S.C. § 1681(a) (1998) (prohibiting sex discrimination under "any education program or activity receiving Federal financial assistance"); 29 U.S.C. § 794(a) (1998) (prohibiting discrimination against disabled persons under any "program or activity receiving Federal financial assistance"); 42 U.S.C. § 6102 (1998) (prohibiting age discrimination in any "program or activity receiving Federal financial assistance").

66. See 20 U.S.C. § 1681(a) (1998) (prohibiting sex discrimination "under any education program or activity receiving Federal financial assistance").

67. See *Piche*, *supra* note 22, at 1087 n.2 (observing that "Congress enacted [Title IX] against a backdrop of testimony concerning widespread discrimination against women in education" (citing *Discrimination Against Women: Hearings on § 805 of H.R. 16,098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970))). *Piche* further noted that "the hearings were held in conjunction with Congress' consideration of § 805 of H.R. 16,098, a bill that would have added the word 'sex' to § 601 of the Civil Rights Act of 1964." *Id.*; see also 117 CONG. REC. 39, 252 (1971) (remarks of Rep. Mink) (articulating need for legislation against sex discrimination). Representative Mink explained:

Any college or university which has [a] . . . policy which discriminates against women . . . is free to do so under [Title IX], but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds

tion program or activity receiving Federal financial assistance.⁶⁸ Congress expressly modeled the statute's triggering language after the language in Title VI.⁶⁹

Apparently unaware of the confusion its choice would cause, Congress once again failed to include a definition section.⁷⁰ Thus, Congress left the Supreme Court with the task of interpreting the triggering terms.⁷¹ For example, the Supreme Court originally ruled that Title IX covered only the specific program or activity receiving the federal funding.⁷² However, later legislation and case law have muddled the Court's program-specificity ruling.⁷³ Thus,

should be used for the support of the institutions to which we are denied access.

Id. (cited in Piche, *supra* note 22, at 1102 n.72).

68. 20 U.S.C. §1681(a) (1998). Section 901(a) provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." *Id.*

69. See Piche, *supra* note 22, at 1088 n.2 (observing that "[t]he legislative history of title IX indicates that its sponsors intended title IX to be construed and enforced as title VI had been" (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-96 & n.19 (1979))).

70. See 20 U.S.C. §1681(a) (1998) (exhibiting absence of definition section); see also Piche, *supra* note 22, at 1093 ("Moreover, the meaning of 'program or activity' was never defined by the statute."). However, this time, Congress did find it necessary to include several explicit exemptions both in the original statute and in several subsequent amendments. See Pub. L. No. 93-568, § 3(a), 88 Stat. 1862 (1974); Pub. L. No. 94-482, Title IV, § 412(a), 90 Stat. 2234 (1976) (codified as amended at 20 U.S.C. § 1681(a), (a)(2) to (a)(9) (1988)). The following entities were excluded from coverage: single-sex institutions currently converting to dual-sex, Section 901(a)(2); institutions for whom Title IX would violate religious tenets, Section 901(a)(3); military schools, Section 901(a)(4); traditionally single-sex public institutions, Section 901(a)(5); social fraternities, sororities, and voluntary youth service organizations, Section 901(a)(6); Boys and Girls State conferences, Section 901(a)(7); father-son and mother-daughter activities, Section 901(a)(8); and beauty pageant scholarships, Section 901(a)(9). *Id.* Subsequent regulations also excluded textbooks and curricular materials. See 34 C.F.R. § 106.42 (1999) (exempting materials from nondiscrimination requirement).

71. See *infra* Parts II.B-III.A (detailing Supreme Court and Congress's efforts to further define terms within "program or activity receiving Federal financial assistance" trigger). Regulations passed pursuant to Title IX purport to define "recipient." See 34 C.F.R. § 106.2(h) (1999) (defining recipient as one "to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance"). However, courts attempting to define statutory recipient concentrate on the triggering language contained in the statute itself. See *Grove City Coll. v. Bell*, 465 U.S. 555, 560-70 (1984) (citing agency definition but interpreting statute's own triggering language).

72. See *Grove City*, 465 U.S. at 573-74 (concluding that college's receipt of federal grants from its students "does not trigger institution-wide coverage under Title IX"); see also *infra* Part II.B.1 (discussing *Grove City* decision in more detail).

73. See Civil Rights Restoration Act of 1987 (CRRRA), 102 Stat. 28, codified in 42 U.S.C. § 2000d-4a (Title VI); 20 U.S.C. § 1687 (Title IX); 29 U.S.C. § 794(b) (Rehabilitation Act); 42 U.S.C. § 6107-4 (Age Discrimination Act); see also *infra* Part II.B.2 (discussing Civil Rights Restoration Act of 1987 in more detail).

notwithstanding some judicial attempts at defining "statutory recipient," the exact meaning remains unclear.

Despite the still unclear meaning of the "program or activity receiving Federal financial assistance" trigger, Congress again used the language in two later pieces of legislation. First, Section 504 of the Rehabilitation Act of 1973 prohibited discrimination against disabled individuals "under any program or activity receiving Federal financial assistance."⁷⁴ Second, Section 303 of the Age Discrimination Act of 1975 prohibited discrimination on the basis of age "in any program or activity receiving Federal financial assistance."⁷⁵ Congress modeled both statutes after Title VI.⁷⁶ However, no definition of statutory recipient emerged from the latter two statutes either.⁷⁷

2. Statutory Remedies

Each of the nondiscrimination statutes features a provision for agency enforcement.⁷⁸ The enforcement provisions authorize departments and agencies

74. See 29 U.S.C. § 794(a) (1998). The nondiscrimination statute provides in relevant part:

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, 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 an Executive agency or by the United States Postal Service.

Id.

75. See 42 U.S.C. § 6102 (1998). The Act provides in relevant part:

Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) and section 6103(c) of this title, 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.

Id.

76. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 600 n.4 (1986) (explaining that "Title VI is the congressional model for subsequently enacted statutes prohibiting discrimination in federally assisted programs").

77. See *supra* notes 29, 35-37 (citing statutes exhibiting absence of definition section); see also *supra* note 14 (explaining this Note's use of term "statutory recipient").

78. See 20 U.S.C. § 1682 (1998) (providing for enforcement of Title IX); 29 U.S.C. § 794a (1998) (providing for enforcement of Rehabilitation Act by referencing remedies available in Title VI of Civil Rights Act of 1964); 42 U.S.C. § 2000d-1 (1998) (providing for enforcement of Title VI); 42 U.S.C. § 6104 (1998) (providing for enforcement of Age Discrimination Act). For example, 20 U.S.C. § 1682 (Title IX) provides:

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 pro-

to issue rules, regulations, and general orders necessary to achieve the objectives of the statutes.⁷⁹ Agencies may assure compliance with their demands in either of two ways.⁸⁰ First, the agency may terminate or refuse to grant assistance to an entity that fails to comply with its requirements.⁸¹ Second, the agency may use "any other means authorized by law," as long as it follows specific procedures.⁸² In practice, an agency usually requires a written assur-

gram 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: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Id.

79. For example, Title IX provides in relevant part:

Each federal department and agency which is empowered to extend Federal financial assistance . . . is authorized and directed to effectuate the [statute's] provisions . . . 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.

20 U.S.C. § (1682) (1998).

80. See *supra* note 78 (listing enforcement provisions of nondiscrimination statutes).

81. See *supra* note 78 (listing enforcement provisions of nondiscrimination statutes). For example, 20 U.S.C. § 1682 (1998) provides in relevant part:

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 . . .

Id.

82. See *supra* note 78 (listing enforcement provisions of nondiscrimination statutes). For example, 20 U.S.C. § 1682 (1998) provides in relevant part:

Each federal department and agency which is empowered to extend Federal finan-

ance of compliance before issuing any federal assistance.⁸³ Despite their many avenues of redress, agencies charged with enforcement of the nondiscrimination statutes remain bound by the "program or activity receiving Federal financial assistance" trigger.⁸⁴ The triggering language thus limits agencies' reach to statutory recipients.⁸⁵

The federal government is not the only enforcer of the nondiscrimination statutes.⁸⁶ Although the nondiscrimination statutes originally contained no express provision for a private remedy, the courts have consistently implied a private right of action for persons unlawfully excluded from participation in federally-funded programs.⁸⁷ The potential consequences of agency action are clear: Failure to comply could result in a refusal of or withdrawal of federal funds.⁸⁸ However, the appropriate relief for private litigants is less clear.⁸⁹ For

cial assistance . . . is authorized and directed to effectuate the [statute's] provisions . . . (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Id.

83. See 34 C.F.R. § 106.4 (1999) (requiring "Assurance of Compliance"). Section (a) provides:

Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.

Id.; see *Grove City Coll. v. Bell*, 465 U.S. 555, 560-61 (1984) (describing agency procedure following conclusion that entity is recipient of federal financial assistance).

84. See *supra* notes 29, 35-37 (listing statutes that use "program or activity receiving Federal financial assistance" triggering language).

85. See *supra* note 14 (explaining this Note's use of "statutory recipient")

86. See *supra* note 78 and accompanying text (listing private enforcement provisions of each nondiscrimination statute).

87. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 (1979) (detailing decisions that construed Title VI as creating private remedy (citing *Bossier Parish Sch. Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir. 1967))). The *Cannon* Court reasoned further that the words, history, subject matter, and underlying purposes of Title IX all supported implied private cause of action for victims of discrimination. *Id.* at 709.

88. See *supra* notes 78-85 and accompanying text (discussing government remedies provided for in nondiscrimination statutes).

89. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 70-76 (1992) (analyzing appropriate relief for Title VI and Title IX violations).

example, whether a private litigant is entitled to monetary damages depends upon the type of discrimination at issue.⁹⁰

Courts that decide the appropriateness of private monetary relief also consider the nature of the nondiscrimination statutes' status as spending legislation.⁹¹ They do so because spending legislation is built around a contractual relationship between the government and the recipient of the funds.⁹² In spending legislation, the government's enforcement power is limited to the funding recipient.⁹³ Because the private right of action under the statutes is likely no broader than the government's enforcement authority thereunder, the private litigant's enforcement power is also limited to the funding recipient.⁹⁴ Therefore, no matter what the remedy, neither the government nor a private litigant may enforce the nondiscrimination statutes against an entity unless that entity first qualifies as a statutory recipient of federal financial assistance.⁹⁵

90. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (holding that damages remedy will not lie under Title IX unless official has actual knowledge of discrimination in recipient's programs and fails to adequately respond); *Franklin*, 503 U.S. at 74 (explaining that monetary damages are not available for unintentional violations of nondiscrimination statutes because "the receiving entity of federal funds lacks notice that it will be liable for a monetary award" (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981))). The Supreme Court in *Gebser* found that allowing private damages when the recipient of federal funds has no actual knowledge of the discrimination would clash with the central purpose of requiring notice of the violation followed by an opportunity for voluntary compliance. *Gebser*, 524 U.S. at 289-90.

91. See *Gebser*, 524 U.S. at 287 ("When Congress attaches conditions to the award of federal funds under its spending power, U.S. CONST., art. I, § 8, cl. 1, as it has in Title IX and Title VI, we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition."); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 27-28 (1981) (explaining that typical remedy is termination of federal funds and not private action for noncompliance). Furthermore, the Supreme Court explicitly has concluded that Title VI is spending-power legislation. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598-99 (1983) (citing cases and legislative history as support for Title VI's status as "a typical 'contractual' spending-power provision").

92. See *Pennhurst*, 451 U.S. at 17 (recognizing that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions"). The *Pennhurst* Court concluded: "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.*; see also 110 CONG. REC. 1542 (remarks of Rep. Lindsay) ("The mandate of Title VI is very simple. Stop the discrimination, get the money; continue the discrimination, do not get the money.").

93. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640-41 (1999) (explaining that recipient itself must discriminate in order to be liable under Title IX).

94. See *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 467 n.5 (1999) (suggesting "it would be anomalous to assume that Congress intended the implied private right of action to proscribe conduct that Government enforcement may not check" (citing 20 U.S.C. § 1682 (1998))).

95. See *supra* note 14 (explaining this Note's shorthand use of "statutory recipient").

B. Early Developments in Definitions

Initially, Congress's choice to model each of the later nondiscrimination statutes after Title VI may have appeared wise.⁹⁶ After all, eliminating federally-funded discrimination was the goal of each statute, and therefore Congress had little reason to question using the same language in each subsequent statute.⁹⁷ However, Congress's repeated failure to define key terms in the statutes' triggering language made statutory interpretation much more difficult.⁹⁸ For example, in the mid-1980s, the Supreme Court and Congress clashed over the definition of "program or activity."⁹⁹ The Supreme Court limited the term's reach,¹⁰⁰ and Congress acted swiftly to overturn the Court's decision.¹⁰¹ The following section details this early definitional disagreement between the Court and Congress.¹⁰²

1. Grove City College v. Bell

*Grove City College v. Bell*¹⁰³ marked the United States Supreme Court's first controversial foray into interpreting the "receiving Federal financial assistance" triggering language.¹⁰⁴ The *Grove City* Court considered whether

96. See *supra* notes 29, 35-37 (citing statutes that use same triggering language).

97. See *Smith*, 525 U.S. at 466 n.3 (noting that scope of several antidiscrimination statutes is defined in "nearly identical terms").

98. See *infra* Part II.B-III (chronicling Supreme Court and lower court interpretations of triggering language).

99. See *infra* Part II.B (describing interaction between *Grove City* Court and Congress concerning definition of "program or activity").

100. See *infra* Part II.B.1 (explaining Supreme Court's program-specific approach to defining "program or activity").

101. See *infra* Part II.B.2 (indicating Congress's response to *Grove City* through Civil Rights Restoration Act of 1987).

102. See *infra* notes 103-31 and accompanying text (chronicling battle between Congress and Supreme Court over appropriate definition of "program or activity").

103. 465 U.S. 555 (1984).

104. See *Grove City Coll. v. Bell*, 465 U.S. 555, 573-74 (1984) (concluding that college's indirect receipt of federal student financial aid triggered Title IX coverage but only for precise program or activity that received aid). In *Grove City*, the Supreme Court considered whether Title IX applied to a small liberal arts college, and if so, which programs or activities within the school were bound by Title IX. *Id.* at 558. Based on a conclusion that "Grove City was a 'recipient' of 'Federal financial assistance,'" the Department of Education asked the college to complete an Assurance of Compliance in which it would agree to comply with Title IX's ban on sex discrimination. *Id.* at 560-61. The college refused, and instead suggested that merely enrolling students who receive federal Basic Educational Opportunity Grants did not subject the entire institution to Title IX coverage. *Id.* at 563. The Supreme Court agreed in part, and disagreed in part, with the school's contention. First, the Court held that the college was subject to Title IX even though the aid was indirect because Congress perceived no difference between

a private college qualified as a statutory recipient of federal financial assistance.¹⁰⁵ The Court held that the college's indirect receipt of its students' federal financial aid did qualify the school as a statutory recipient.¹⁰⁶ Statutory recipient status triggered Title IX coverage; however, Title IX's prohibition of sex discrimination covered only the financial aid program itself and not the rest of the institution.¹⁰⁷

Overall, the *Grove City* Court attempted to better define statutory recipient of federal financial assistance in two ways.¹⁰⁸ First, the Court limited "program or activity" to the precise program or activity that received the aid.¹⁰⁹ In this case, the program or activity receiving the aid was not the entire educational institution.¹¹⁰ Instead, the actual recipient was the school's financial aid program.¹¹¹ The Court reasoned that to ignore program-specificity would confuse the distinction between an actual recipient and an entity that merely benefits from assistance.¹¹² The Court's program-specific ap-

direct institutional assistance and aid received by a school through its students. *Id.* at 564-67. However, receipt of the funds did not trigger institution-wide coverage for two reasons. *Id.* at 571-74. First, the funds were earmarked specifically for the financial aid program. *Id.* at 572. Second, it was not Congress's intent for the entire school to be subject to Title IX because of one student's grant. *See id.* at 573 (noting "no persuasive evidence suggesting that Congress intended that the Department's regulatory authority follow federally aided students from classroom to classroom, building to building, or activity to activity").

105. *See id.* at 563-70 (analyzing student grants as source of indirect federal assistance to college).

106. *See id.* at 569-70 (reasoning that Congress's intent and administrative construction mandate conclusion that "Title IX coverage is not foreclosed because federal funds are granted to Grove City's students rather than directly to one of the College's educational programs").

107. *See id.* at 573-74 (concluding that grants to students represent federal financial assistance only to college's financial aid program).

108. *See id.* at 559-74 (interpreting "program or activity" in way that also limits definition of other terms in triggering language).

109. *See id.* at 573-74 (distinguishing between student grants and "unrestricted grants that institutions may use for whatever purpose they desire"). The program-specific ruling technically was the second ruling within the opinion. *Id.*

110. *See id.* at 573-74 (interpreting Congress's intent).

111. *See id.* (noting that only college's own financial aid program could be regulated under Title IX).

112. *See id.* at 572-73 (articulating potential consequences of ignoring program-specificity). The *Grove City* Court warned: "Most federal education 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." *Id.* at 572. If one eliminates the word "educational," the *Grove City* Court was a prophetic court. It is the exact task they dreaded – distinguishing a recipient institution from those entities who merely "benefit" from assistance – that current courts now face. *See infra* Part III.B (detailing lower courts' attempts to distinguish between recipient and beneficiary of federal financial assistance).

proach¹¹³ would not require such a detailed "recipient versus beneficiary" analysis. The line was clear; only the specific receiving program – in this case, the financial aid program – was subject to Title IX coverage.¹¹⁴

Second, the *Grove City* Court refused to limit the definition of statutory recipient to direct recipients.¹¹⁵ Instead, indirect recipients of federal aid could still qualify as statutory recipients if they were also the congressionally-intended recipients of the aid.¹¹⁶ The Court recognized that the individual student, and not the college itself, was the direct recipient of federal financial assistance.¹¹⁷ However, the language of the grant statute and its legislative history clearly manifested Congress's intent for the college to be the ultimate recipient of the aid.¹¹⁸ Therefore, the college's financial aid program qualified as a statutory recipient and thus was bound by the nondiscrimination requirements.¹¹⁹

The Court's choice to include indirect but intended recipients within the definition of statutory recipient initially may have drawn little attention.¹²⁰ However, the definition of indirect recipient eventually would need refining.¹²¹ In the meantime, the Court's limiting interpretation of "program or activity" attracted most of the immediate attention, especially from Congress.¹²²

2. Civil Rights Restoration Act of 1987

Dismayed by the *Grove City* decision, Congress finally attempted to define at least one of the terms in the triggering language.¹²³ Congress passed

113. See *Grove City Coll. v. Bell*, 464 U.S. 555, 573-74 (1984) (articulating program-specific approach).

114. *Id.*

115. See *id.* at 563-70 (considering whether college received federal financial assistance via grants to its students).

116. See *id.* at 565-70 (emphasizing that Congress explicitly intended for college to receive federal financial assistance).

117. See *id.* at 559-60 (describing grant statute that provides money to individual students).

118. See *id.* at 564-69 (analyzing grant statute and congressional intent).

119. First, the Supreme Court found no apparent distinction between direct and indirect aid. See *Grove City*, 465 U.S. at 564 (noting that "economic effect of direct and indirect assistance often is undistinguishable"). Second, the Court deferred to the Department of Education regulations that clearly considered student grants to be federal financial assistance to the schools themselves. *Id.* at 566-68. See *supra* note 14 (explaining this Note's use of "statutory recipient").

120. See *supra* note 14 (explaining this Note's use of "statutory recipient").

121. See *infra* Parts III.A & B (chronicling efforts of Supreme Court and lower courts to better refine definition of statutory recipient).

122. See *infra* Part II.B.2 (describing Congress's effort to redefine "program or activity" for purposes of nondiscrimination statutes).

123. See 133 CONG. REC. S2353 (daily ed. Feb. 19, 1987) (remarks of Sen. Kerry) (explaining motivation behind Civil Rights Restoration Act of 1987). Senator Kerry warned

the Civil Rights Restoration Act of 1987 (CRRA) to overturn the *Grove City* Court's program-specific interpretation of "program or activity."¹²⁴ In doing so, Congress instead defined "program or activity" to cover the entire institution and all of its programs.¹²⁵ Congress further provided that this institution-wide definition would apply to Title IX as well as to the other nondiscrimina-

that "[t]he Supreme Court's decision in . . . *Grove City College v. Bell* was a step backward in the continuing struggle for civil rights in this country." *Id.*

124. See 133 CONG. REC. S2353 (remarks of Sen. Kerry) (noting that "[t]his legislation would reverse the *Grove City* decision and restore full constitutional and civil rights protections under Title VI of the 1964 Civil Rights Act, Title IX of the 1972 Education Amendments, Section 504 of the 1973 Rehabilitation Act, and the Age Discrimination Act of 1975").

125. See 20 U.S.C. § 1687 (1998) (defining "program or activity"). Section 1687 provides:

Interpretation of "program or activity."

For the purposes of this title, the term "program or activity" and "program" mean all of the operations of—

(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 government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local education agency (as defined in [20 U.S.C.S. § 8801]), 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 term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.

Id.; see 133 CONG. REC. S2249 (daily ed. Feb. 19, 1987) (remarks of Rep. Boschwitz). Representative Boschwitz announced:

I have chosen to cosponsor this bill because it would amend our civil rights laws to define "program or activity" in a way that makes it very clear that an entire institution is covered when any part of the institution received federal funds. This would clearly restore these laws to their original intent.

Id.

tion statutes featuring the now familiar triggering language of "program or activity receiving Federal financial assistance."¹²⁶

The CRRA definition provides that if any part of an entity receives federal money, all operations of that entity then are subject to the nondiscrimination demands of civil rights legislation.¹²⁷ In statutory recipient terms, if any program or activity within an entity receives federal financial assistance, then the entire entity qualifies as a statutory recipient.¹²⁸ Overall, the idea appears both simple and admirable. The application of the definition, however, proved both difficult¹²⁹ and potentially unconstitutional.¹³⁰

III. Refinement of Definitions

Although the CRRA resolved the issue of Congress's intent concerning the reach of "program or activity," the other terms featured in the statutes' triggering language remained undefined.¹³¹ For example, defining what it means to "receive" federal financial assistance proved to be an especially

126. See 133 CONG. REC. S2353 (daily ed. Feb. 19, 1987) (Sen. Kerry) ("This legislation would . . . restore full Constitutional and Civil Rights protections under Title VI of the 1964 Civil Rights Act, Title IX of the 1972 Education Amendments, Section 504 of the 1973 Rehabilitation Act, and the Age Discrimination Act of 1975.").

127. See 20 U.S.C. § 1687, Findings of Congress, Pub. L. No. 100-259 (explaining Congress's inspiration). Section 2 provided:

The Congress finds that –

"(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], and title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] and

"(2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered."

Id.; see 133 CONG. REC. S2249 (remarks of Sen. Kennedy). Senator Kennedy stated:

That basic principle – that the Federal Government should not do business with those who violate its law or allow public tax dollars to underwrite discrimination – is as valid today as it was in 1961. Congress must act in this bicentennial year to clarify these laws and reaffirm our commitment to end discrimination in federally assisted institutions.

Id.

128. See *supra* note 14 (explaining this Note's use of "statutory recipient").

129. See *infra* Parts IIIA & B (detailing lower courts' problems).

130. See *supra* notes 91-94 and accompanying text (discussing constitutional limits of pending legislation).

131. See *supra* Part II.B (chronicling interaction between Supreme Court and Congress concerning definition of "program or activity").

troublesome task.¹³² In its interpretation of "receive," the Supreme Court ultimately drew a line between a "recipient" and a "beneficiary"; the nondiscrimination statutes would cover the former, but not the latter.¹³³ Lower courts, however, found the recipient versus beneficiary distinction difficult to apply in some situations¹³⁴ and completely inadequate in others.¹³⁵ The following subpart details the Supreme Court's and lower courts' efforts to refine the definition of statutory recipient for purposes of the nondiscrimination statutes.¹³⁶

A. Supreme Court Refining

While Congress battled to rework the definition of program or activity,¹³⁷ the Supreme Court struggled over defining "recipient."¹³⁸ The Court initially laid down a "recipient versus beneficiary" distinction it hoped would guide lower courts.¹³⁹ However, over a decade passed before the Court applied its own distinction in an effort to provide better guidance.¹⁴⁰

1. United States Department of Transportation v. Paralyzed Veterans of America

Subsequent to Congressional fiddling, *United States Department of Transportation v. Paralyzed Veterans of America*¹⁴¹ emerged as the Supreme Court's primary interpretation of what it means to "receive" federal financial assistance.¹⁴² In *Paralyzed Veterans*, the Court concluded that because com-

132. See *infra* Part III.B (discussing courts' attempts to refine definition).

133. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 606 (1986) (criticizing argument for confusing "intended *beneficiaries* with intended *recipients*"); *infra* Part III.A.1 (discussing *Paralyzed Veterans* in more detail).

134. See *infra* Part III.B.1 (discussing problems with lower court approaches to applying Supreme Court definition).

135. See *infra* Part III.B.2 (describing problems with lower court attempts to redefine scope of nondiscrimination statutes via controlling authority theory).

136. See *supra* notes 29, 35-37 (listing nondiscrimination statutes); see also *supra* note 14 (explaining this Note's use of "statutory recipient").

137. See *supra* Part II.B.2 (discussing development of Civil Rights Restoration Act of 1987).

138. See *infra* Part III.A (discussing Supreme Court's attempts to refine definition of recipient through "recipient versus beneficiary" standard).

139. See *infra* Part III.A.1 (analyzing *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986)).

140. See *infra* Part III.A.2 (analyzing *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999)).

141. 477 U.S. 597 (1986).

142. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 607

mercial airlines did not receive federal financial assistance, Section 504 of the Rehabilitation Act of 1973¹⁴³ did not cover the airlines' activities.¹⁴⁴ The airlines were not statutory recipients because they did not directly receive the federal grant money directed to airport operators through the grant statute.¹⁴⁵ Instead, Congress specifically mandated that the funds for airport development and planning were to go to the airport operators.¹⁴⁶ Therefore, the operators, and not the airlines, were the only statutory recipients of federal financial assistance.¹⁴⁷

(1986) (concluding that Section 504 of Rehabilitation Act is applicable to airport operators but not to commercial airlines). In *Paralyzed Veterans*, the Supreme Court considered whether commercial airlines were subject to the nondiscrimination demands of Section 504 of the Rehabilitation Act of 1973. *Id.* at 599. The airlines would be subject to Section 504's prohibition of discrimination against handicapped persons only if they qualified as a program or activity receiving federal financial assistance. *Id.* at 604. Plaintiffs suggested two potential grounds for subjecting the airlines to Section 504 coverage: (1) federal grants to airport operators pursuant to the Airport and Airway Development Act of 1970, and (2) government operation of a nationwide air traffic control system. *Id.* at 599. In its analysis of the federal grant theory, the Court first identified the "recipient" of the federal assistance. *Id.* at 604-05. The Court examined the underlying grant statute and Congress's intent to conclude that the recipient of the funds was the airport operators and not its users. *Id.* at 605. In doing so, the Court emphasized the contractual nature of Section 504. *Id.* The Court also rejected the notion that the airlines were "indirect recipients" of the grant money because operators converted the cash into structures that benefit airlines, for example runways. *Id.* at 606. Instead, the Court emphasized the distinction between "intended beneficiaries" and "intended recipients." *Id.* at 606-07. Finally, the Court also disagreed with the Court of Appeals's conclusion that the airlines are "part of a federally assisted program of 'commercial air transportation.'" *Id.* at 610-11. The Court rejected plaintiffs' second theory – the air traffic control theory – rather quickly. *Id.* at 611-12. The Court reasoned that the system is not "federal financial assistance." *Id.* at 612. Instead, "it is a federally conducted program that has many beneficiaries but no recipients." *Id.* Overall, the Court concluded that none of plaintiffs' theories subjected the commercial airlines to Section 504; the airlines are beneficiaries of assistance and not recipients. *Id.*

143. See 29 U.S.C. § 794(a) (1998). The nondiscrimination statute provides in relevant part:

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, 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 an Executive agency or by the United States Postal Service.

Id.

144. See *Paralyzed Veterans*, 477 U.S. at 604-12 (entertaining yet ultimately rejecting series of theories making commercial airlines recipients of federal financial assistance).

145. See *id.* at 604-06 (analyzing Airport and Airway Development Act of 1970 governing disbursement of federal funds for airport projects).

146. See *id.* at 605 (noting that "[n]ot a single penny of the money is given to the airlines").

147. See *id.* (identifying recipient of funds).

In reaching the conclusion that airlines did not receive federal funds, the Court emphasized the contractual nature of Section 504.¹⁴⁸ The Court explained that statutory recipients of federal funds under Title VI, Title IX, and Section 504 of the Rehabilitation Act enter into a contractual relationship with Congress.¹⁴⁹ An entity that accepts Congress's offer of funds does so knowing that receipt of those funds will subject it to coverage under the nondiscrimination statutes.¹⁵⁰ However, in *Paralyzed Veterans*, the commercial airlines were not in a position to accept or reject the nondiscrimination obligations imposed.¹⁵¹ Instead, only the actual airport operators were in such a position.¹⁵² Therefore, only the airports, and not the airlines, qualified as statutory recipients.¹⁵³

The contractual question did not end the inquiry. Rather, the Court next addressed whether the commercial airlines were "indirect recipients" of federal financial assistance as defined in *Grove City College v. Bell*.¹⁵⁴ The Court rejected the indirect recipient theory as inapplicable to the kind of federal financial assistance involved.¹⁵⁵ Although the *Grove City* Court observed "no distinction between direct and indirect aid," that observation was limited to determining whom Congress intended to receive the federal money.¹⁵⁶ Thus, for example, it was clear in *Grove City* that the government used the direct recipient – the student – as an intermediary to the indirect yet intended recipient – the college's financial aid program.¹⁵⁷ In *Paralyzed Veterans*, however,

148. See *id.* at 604-06 (noting that Congress limited scope to recipients because "it sought to impose § 504 coverage as a form of contractual cost of the recipient's agreement to accept the federal funds").

149. See *id.* at 605-06 (citing *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983)). The *Heckler* court explained: "Under the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision." *Id.* The Court's omission of § 303 of the Age Discrimination Act is likely inadvertent.

150. *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605-06 (1986).

151. See *id.* at 606 (explaining that Congress obligates only those parties "in a position to accept or reject those [nondiscrimination] obligations as a part of the decision whether or not to 'receive' federal funds").

152. See *id.* (noting that "the only parties in that position are the airport operators").

153. See *supra* note 14 (explaining this Note's use of "statutory recipient").

154. See *Paralyzed Veterans*, 477 U.S. at 606-07 (explaining difference between beneficiary and recipient (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 564-65, 572 (1984))).

155. See *id.* at 606-11 (rejecting indirect aid as basis for statutory recipient status).

156. *Id.* at 606 (citing *Grove City*, 465 U.S. at 564).

157. See *id.* at 606-07 (explaining that in *Grove City* intended recipient was college and not individual students).

Congress did not use the direct recipient – the airport operator – as an intermediary to the commercial airlines. Instead, the direct recipient – the airport operator – was also the only intended recipient.¹⁵⁸ The airlines only benefited from the federal funding; they did not receive it.¹⁵⁹ Therefore, the airlines failed to qualify as statutory recipients.¹⁶⁰ Overall, the *Paralyzed Veterans* Court clarified the *Grove City* Court's definition of indirect recipient: An indirect recipient qualifies as a statutory recipient only if Congress intended for that recipient to be the ultimate recipient.¹⁶¹ Although the Court announced that "the key is to identify the recipient," the process for identifying an indirect yet intended recipient remained unclear.¹⁶²

In addition to clarifying the definition of indirect recipient, the *Paralyzed Veterans* Court also provided a basic analytical framework for the statutory

158. See *id.* at 606-07 (emphasizing Congress's intent in application of *Grove City* Court's indirect recipient theory).

159. See *id.* at 607 (concluding that "statute covers those who receive the aid, but does not extend as far as those who benefit from it"). In fact, the *Grove City* Court explicitly recognized the distinction between a recipient and a beneficiary. See *id.* (distinguishing "economic ripple effects" from direct federal assistance (citing *Grove City*, 465 U.S. at 572)).

160. See *supra* note 14 (explaining this Note's use of "statutory recipient"). The *Paralyzed Veterans* Court rejected two other potential theories that would subject the commercial airlines to the nondiscrimination provisions of Section 504. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 610-12 (1986) (rejecting "inextricably intertwined" theory and beneficiaries of air traffic control system theory as bases for Section 504 coverage). First, plaintiffs suggested that because airports and airlines are "inextricably intertwined" in a commercial air transportation system, the airlines are subject to coverage. *Id.* at 610-11. The Court rejected the argument because such an interpretation of the Section 504 triggering language would clearly exceed the scope intended by Congress. See *id.* at 611 (offering analogy to illustrate dangers of court of appeals's theory). The Court criticized the slippery slope tendencies of the "inextricably intertwined" theory because various unintended industries and institutions would become parts of federally assisted programs or activities. *Id.* at 610. The Court elaborated:

For example, Congress . . . has engaged in a mammoth program of interstate highway construction and maintenance If we accepted the ["inextricably intertwined" theory], we would also be compelled to conclude that industries that depend on the federally funded highways for their existence, such as trucking firms and delivery services, are part of a program or activity of national highway transportation.

Id. at 610-11. Second, the plaintiffs asserted that the commercial airlines use of the air traffic control system also qualified them as recipients of federal financial assistance. *Id.* at 611. The Court also rejected this theory. *Id.* at 612. The air traffic control system was not a grant from Congress to the commercial airlines. *Id.* Instead, the system is a public program with many beneficiaries. *Id.* at 612 (quoting legislative history of Title VI for support).

161. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 606-07 (1986) (emphasizing importance of intent element in statutory recipient inquiry).

162. *Id.* at 607.

recipient inquiry.¹⁶³ Under this framework, one first must identify the recipient of the aid.¹⁶⁴ To answer this inquiry, one should look to the underlying grant statute to determine whom Congress intended to benefit.¹⁶⁵ Second, one should ask whether the candidate for statutory recipient status had an opportunity to accept or reject the funds in question.¹⁶⁶ This inquiry is necessary because the various nondiscrimination statutes all contemplate a contractual arrangement.¹⁶⁷ In the contract, statutory recipients exchange a promise not to discriminate for federal funds.¹⁶⁸

Other than this limited guidance, *Paralyzed Veterans* offers only a nondescript, yet supposedly crucial, distinction: One must find some way to draw the line between a recipient and a beneficiary.¹⁶⁹ The nondiscrimination statutes bind recipients of federal financial assistance; they do not bind beneficiaries of that same assistance.¹⁷⁰ Unfortunately, neither the Supreme Court nor the lower courts have come to any consensus about how to distinguish between a recipient and a beneficiary.¹⁷¹

163. See *id.* at 604-06 (detailing steps used to determine whether commercial airlines receive federal financial assistance).

164. See *id.* at 604 (suggesting that one must "[a]t the outset . . . identify the recipient of the federal assistance").

165. See *id.* (looking first to terms of underlying grant statute, i.e., Airport and Airway Improvement Act of 1982). Congress made it "explicitly clear" that funds were for airport operators and not for airlines. *Id.* at 605.

166. See *id.* at 606 (explaining that Congress only obligates those "in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds"); see also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (reasoning that Title IX "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of federal funds").

167. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986) (noting that "Congress enters into an arrangement in the nature of a contract with the recipients of the funds").

168. See *id.* at 605 (noting that "the recipient's acceptance of the funds triggers coverage"). Furthermore, "Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds." *Id.* (quoting *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 633 n.13 (1984)).

169. See *id.* at 607 ("Congress tied the regulatory authority to those programs or activities that receive federal financial assistance; the key is to identify the recipient of that assistance.").

170. *Id.*

171. See *infra* Part III.B (outlining lower courts' attempts to apply "recipient versus beneficiary" standard).

2. National Collegiate Athletic Ass'n v. Smith

In *National Collegiate Athletic Ass'n v. Smith*,¹⁷² the United States Supreme Court finally revisited the definition of statutory recipient.¹⁷³ The Court concluded that a private organization with federally-funded members did not qualify as a statutory recipient.¹⁷⁴ The athletic association's mere receipt of dues from its federally-assisted members did not trigger Title IX coverage.¹⁷⁵

In reaching its conclusion, the Court had to distinguish dues paid by federally-assisted member colleges from the monies paid to colleges by the federally-assisted students in *Grove City*.¹⁷⁶ In *Grove City*, federally-funded students paid their tuition to the college with federal money specifically earmarked for that purpose; the money was granted to the students, but intended for the schools.¹⁷⁷ Therefore, the college was a statutory recipient of federal financial assistance and thus was subject to Title IX.¹⁷⁸ In contrast, federally-funded NCAA member schools paid their dues to the organization, but they did not pay their dues with federal funds earmarked specifically for that purpose; Congress did not have NCAA dues in mind when it granted the schools money.¹⁷⁹ Therefore, the NCAA was not a statutory recipient of federal financial assistance.¹⁸⁰ Instead, the organization's receipt of dues merely demonstrated that it "indirectly benefits from the federal assistance afforded its members."¹⁸¹ Finally, the Court reiterated the test gleaned from

172. 525 U.S. 459 (1999).

173. See *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) (concluding that receipt of dues from member institutions did not subject organization to Title IX coverage). For a more complete case summary of *Smith*, see *supra* notes 21-24 and accompanying text.

174. See *Smith*, 525 U.S. at 468 (distinguishing dues money from "earmarked student aid" in *Grove City*).

175. *Id.* at 470.

176. *Id.* at 468.

177. See *Grove City Coll. v. Bell*, 465 U.S. 555, 575-76 (1984) (concluding that college's acceptance of money from students' federal tuition grants subjected college financial aid program to Title IX). The *Grove City* Court emphasized the "powerful evidence of Congress' intent" as a basis for its holding. *Id.* at 569-70. For example, the Court noted that "provid[ing] assistance to institutions of higher education" was one of the stated purposes of the student aid provisions. *Id.* at 565-66.

178. See *id.* at 569-70 (concluding that "Title IX coverage is not foreclosed because federal funds are granted to *Grove City*'s students rather than directly to one of the College's educational programs").

179. See *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 468 (1999) (explaining that "[u]nlike the earmarked student aid in *Grove City*, there is no allegation that NCAA members paid their dues with federal funds earmarked for that purpose").

180. See *supra* note 14 (explaining this Note's use of "statutory recipient").

181. *Smith*, 525 U.S. at 468.

Grove City and Paralyzed Veterans: "Entities that receive federal assistance, whether directly or through an intermediary, are [statutory recipients]; entities that only benefit economically from federal assistance are not."¹⁸²

Although the *Smith* Court found the dues theory unpersuasive, it did not conclusively eliminate the possibility that some other reasoning could still subject the NCAA to coverage.¹⁸³ In its final footnote, the Court mentioned the NCAA's relationship with the National Youth Sports Program Fund ("the Fund") as a possible ground for classifying the NCAA as a statutory recipient.¹⁸⁴ Two district courts and the Department of Health and Human Services previously had suggested that the NCAA was a statutory recipient because of the NCAA's relationship with the Fund.¹⁸⁵ However, instead of offering its analysis of this potential source of federal financial assistance, the Supreme Court ruled that it could not address issues not decided in the courts below.¹⁸⁶ Overall, the *Smith* Court added no other factors or levels of analysis to an already vague "recipient versus beneficiary" test.¹⁸⁷

3. Summary

Although the above chronological interplay between congressional legislation and Supreme Court interpretation leaves several specific questions unanswered, one distinction emerges as definite. The demands of the nondiscrimination statutes – Title VI, Title IX, Section 504 of the Rehabilitation Act, and Section 303 of Age Discrimination Act – apply to all "recipients" of federal financial assistance, but do not apply to mere "beneficiaries."¹⁸⁸ Although Congress and the Court provide few, if any, specific factors to distinguish between the two categories, some common principles do spring forth. Two specific categories of entities automatically qualify as statutory recipients.¹⁸⁹

182. *Id.*

183. *See id.* at 469 n.7 (acknowledging alternative theories).

184. *Id.*

185. *Id.* (citing *Bowers v. Nat'l Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460, 494 (D.N.J. 1998) (denying NCAA's motion for summary judgment in Rehabilitation Act suit because "there are genuine questions of material fact as to whether the NCAA receives federal funds through the [National Youth Sports Program Fund]"); *Cureton v. Nat'l Collegiate Athletic Ass'n*, No. 97-131, 1997 WL 634376, at *2 (E.D. Pa. Oct. 9, 1997) (refusing NCAA's motion for summary judgment in Title VI action)).

186. *Smith*, 525 U.S. at 470.

187. *See id.* at 467-69 (stating test).

188. *See id.* at 468 (explaining that those who "only benefit economically from federal assistance" are not recipients within meaning of Title IX); *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 609-10 (1986) (distinguishing recipient and beneficiary).

189. *See supra* note 14 (explaining this Note's use of "statutory recipient").

First, any entity explicitly designated as a recipient in a federal grant statute obviously qualifies as a statutory recipient.¹⁹⁰ Second, an indirect recipient of federal financial assistance may qualify as a statutory recipient if Congress intended it as the ultimate recipient.¹⁹¹

If the entity does not fit into either of those categories, the "recipient versus beneficiary" analysis becomes complicated.¹⁹² The only principles provided may be best understood in the negative; certain characteristics alone *fail* to subject an entity to the nondiscrimination statutes. First, an entity that does not share a contractual relationship with the federal government may not qualify as a statutory recipient.¹⁹³ Second, an entity that only receives dues from federally-funded members may not qualify as a statutory recipient.¹⁹⁴ Instead, such creatures are mere beneficiaries of federal funds and thus are not bound by the nondiscrimination statutes.¹⁹⁵ Unfortunately, the murky issues in the "recipient versus beneficiary" debate make it difficult for lower courts to determine whether an entity is a statutory recipient.¹⁹⁶

B. Lower Courts' Interpretations

Not surprisingly, lower courts faced with the task of distinguishing between a recipient and a beneficiary have produced a quagmire of case law

190. See *Paralyzed Veterans*, 477 U.S. at 604 (examining terms of underlying grant statute to identify explicit recipient). Furthermore, regulations require direct recipients of federal financial assistance to file a written assurance of compliance upon application for funding. See 34 C.F.R. § 100.4 (1999) (describing assurances required of applicants for federal financial assistance). Section 100.4 provides, in relevant part:

Every application for Federal financial assistance . . . shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part.

Id.

191. See *Paralyzed Veterans*, 477 U.S. at 606-07 (explaining that "*Grove City* stands for the proposition that Title IX coverage extends to Congress' intended recipient"); *Grove City Coll. v. Bell*, 465 U.S. 555, 565-66 (1984) (considering evidence of Congress's intent).

192. See *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 468 (1999) (explaining that Title IX covers recipients of federal financial assistance but does not cover "entities that only benefit economically from federal assistance").

193. See *supra* notes 148-52 and accompanying text (detailing emphasis on contractual relationship between government and recipient of funds).

194. See *supra* Part III.A.2 (describing rule in *Smith*).

195. See *supra* notes 169-70 and accompanying text (differentiating between recipient and beneficiary).

196. See *infra* Part III.B (analyzing lower courts' interpretations of Supreme Court recipient versus beneficiary standard).

laced with conclusory statements and little consistency.¹⁹⁷ To the courts' credit, Congress and the Supreme Court have provided only a few tools with which to work: two definite categories of statutory recipients¹⁹⁸ and two vague, general factors to emphasize.¹⁹⁹ However, despite the confusion, two common approaches have emerged as most favored.²⁰⁰

First, courts purport to apply the general principles drawn from *Grove City* and *Paralyzed Veterans* to determine whether an entity is an indirect intended recipient.²⁰¹ However, the problem with this approach is that courts faced with similar factual scenarios, applying the same vague principles, have reached opposite results.²⁰² Second, some lower courts have abandoned or de-emphasized the "recipient versus beneficiary" distinction altogether.²⁰³ Instead, those courts have found alternative grounds for determining that an entity *should* be subject to the nondiscrimination statutes;²⁰⁴ they argue that an

197. See *infra* Parts III.B.1-3 (describing lower courts' approaches to recipient versus beneficiary analysis).

198. See *supra* notes 189-91 and accompanying text (describing direct and intended indirect recipients).

199. See *supra* notes 193-95 and accompanying text (discussing contractual relationship and receipt of dues as potential principles in recipient versus beneficiary distinction).

200. See *infra* Part III.B.1-3 (describing approaches).

201. See generally *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986) (drawing distinction between recipient and beneficiary); *Grove City Coll. v. Bell*, 465 U.S. 555 (1984) (discussing indirect recipient).

202. Compare *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994) (concluding that high school athletic association is recipient of federal financial assistance because it is school board's agent) with *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 656 (6th Cir. 1981) (concluding that high school athletic association is not recipient of federal funds); see also *infra* Part III.B.1 (describing and critiquing lower courts' application of indirect recipient theory).

203. See *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 735 (W.D. Mich. 2000) (concluding that Title IX's antidiscrimination rule applies to any entity with controlling authority over program or activity receiving federal financial assistance even if entity does not receive federal funds). The *Communities for Equity* court rejected the athletic association's argument that "only recipients of federal funds are subject to Title IX" because that interpretation "is at odds with the plain meaning and purpose of the statute." *Id.* at 733. The court thought such a restrictive interpretation was "empty formalism" because it "would allow entities that controlled [federal] funds to discriminate so long as those entities were not themselves 'recipients.'" *Id.* at 734; see *infra* Part III.B.2 (describing and critiquing controlling authority theory).

204. See *Kemether v. Pa. Interscholastic Athletic Ass'n*, No. 96-6986, 1999 U.S. Dist. LEXIS 17331, at *45-52 (E.D. Pa. Nov. 8, 1999) (citing *Cureton I*, 37 F. Supp. 2d 687 (1999), in support of "controlling authority" theory). The *Kemether* court also found the high school association subject to Title IX because it was an "assignee" under the definition of recipient in Department of Education regulations. *Id.* at 52-53.

entity that exercises "controlling authority" over a statutory recipient should also qualify as a statutory recipient.²⁰⁵

1. Indirect Recipient

Lower courts have attempted to apply Supreme Court precedent to determine whether an entity qualifies as a statutory recipient of federal financial assistance.²⁰⁶ Unfortunately, their attempts to apply the general principles from *Grove City* and *Paralyzed Veterans* have led to mixed results.²⁰⁷ The most common area of confusion involves the applicability of the "indirect recipient" theory.²⁰⁸

a. The Theory

The indirect recipient theory grew out of *Grove City College v. Bell*.²⁰⁹ The *Grove City* Court concluded that the college's financial aid program was a statutory recipient bound by Title IX because the college indirectly received federal assistance through federal grants to some of its students.²¹⁰ Because Title IX did not limit its coverage only to direct recipients, the fact that the college did not receive an actual check from the federal government was not determinative.²¹¹ Instead, Title IX's inclusive terminology demanded a broad sweep of coverage.²¹²

205. See *supra* note 14 (explaining this Note's use of "statutory recipient"); see also *infra* Part III.B.2 (describing and critiquing controlling authority theory).

206. See *infra* note 220 and accompanying text (listing cases in which courts applied indirect recipient theory).

207. See *infra* Part III.B.1 & 2 (chronicling and critiquing lower courts' approaches).

208. See *supra* notes 115-19 and accompanying text (describing indirect recipient theory utilized in *Grove City*); see also *infra* Part III.B.1 (describing and critiquing lower courts' approaches).

209. See *supra* Part II.B.1 (discussing *Grove City* decision in more detail).

210. See *Grove City Coll. v. Bell*, 465 U.S. 555, 569-70 (1984) (determining that Congress intended for college to be recipient). Despite classifying the college as an indirect recipient of federal financial assistance for purposes of Title IX, the Court limited the Title's coverage to the specific "program or activity" receiving the aid. See *id.* at 573 (finding "no persuasive evidence suggesting that Congress intended that the Department's regulatory authority follow federally aided students from classroom to classroom, building to building, or activity to activity"). The Civil Rights Restoration Act of 1987 subsequently reversed the program-specific approach taken by the Court in *Grove City*. See *supra* Part II.B.2. Congress instead mandated that receipt of federal funding by any education program or activity triggered institution-wide coverage. *Grove City*, 465 U.S. at 573-74.

211. See *Grove City*, 465 U.S. at 563-70 (analyzing potential effects of college's receipt of Basic Educational Opportunity Grants); see also *supra* Part II.B.1 (discussing *Grove City* decision in more detail).

212. See *Grove City*, 465 U.S. at 564 (recognizing need to "'accord [Title IX] a sweep as broad as its language'" (citing *North Haven Bd. of Educ. v. Bell*, 465 U.S. 512, 521 (1982))).

If the reasoning stopped there, the indirect recipient theory would appear quite broad. However, as the Court in *Paralyzed Veterans* explained, *Grove City* does not stand for the principle that any indirect recipient qualifies as a statutory recipient.²¹³ Instead, it stands for the principle that an indirect recipient qualifies as a statutory recipient only if it is also the *intended* recipient.²¹⁴ For example, the college program qualified as a statutory recipient because Congress intended for the college program to be the eventual recipient of the funds.²¹⁵ Because of the student's unusual status as a mere intermediary of the aid, the indirect recipient – the college program – qualified as a statutory recipient.²¹⁶ In contrast, a commercial airline that merely benefited from federal assistance to airport operators did not qualify as a statutory recipient.²¹⁷ The operators were not mere conduits for the airlines.²¹⁸ The airline may have benefited indirectly from the aid to the operators, but it was not the congressionally-intended recipient of the aid.²¹⁹

Despite the Supreme Court's limiting interpretation of the indirect recipient theory, lower courts still subject entities to the nondiscrimination statutes on that basis; they conclude that an indirect recipient is also a statutory recipient.²²⁰ For example, in *Cureton I*, the district court determined that the

First, the face of the statute supported "no distinction between direct and indirect aid." *Id.* Second, Congress evidenced no intent to distinguish between direct and indirect assistance. *Id.* at 565-70. Congress was aware "that the student assistance programs established by the amendments would significantly aid colleges and universities. In fact, one of the stated purposes of the student aid provisions was to 'provid[e] assistance to institutions of higher education.'" *Id.*

213. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 607 (1986) (reasoning that "[*Grove City*] does not stand for the proposition that federal coverage follows the aid past the recipient to those who merely benefit from the aid").

214. See *id.* at 606-07 (explaining that "[i]t was clear in *Grove City* that Congress' intended recipient was the college, not the individual students to whom the checks were sent from the Government").

215. *Id.*

216. See *id.* at 607 (reiterating that "[i]t was this unusual disbursement pattern of money from the Government through an intermediary (the students) to the intended recipient that caused us to recognize that federal financial assistance could be received indirectly").

217. *Id.* at 607; see also *supra* note 14 (explaining this Note's use of "statutory recipient").

218. *Paralyzed Veterans*, 477 U.S. at 607.

219. See *id.* (reasoning that "it is clear that the airlines do not actually receive the aid; they only benefit from the airports' use of the aid").

220. See *Dupre v. Roman Catholic Church*, No. 97-3716, 1999 U.S. Dist. LEXIS 13799, at *13 (E.D. La. Sept. 2, 1999) (rejecting argument "based on the perceived distinction between direct and indirect aid"). The *Dupre* court disregarded the fact that the Catholic school defendant received federal funds through the school board rather than "being paid to it by the United States directly." *Id.* at *15. Thus, the school's receipt of federal financial assistance through the school board "trigger[ed] the antidiscrimination prohibitions against the disabled [in the Rehabilitation Act]." *Id.* at *16; see also *Sandison v. Mich. High Sch. Athletic Ass'n*,

defendant athletic association was a statutory recipient because it was an indirect recipient of federal funds.²²¹ The athletic association did not receive a direct grant from the federal government; however, it did indirectly receive federal assistance through a grant to a separate corporation with which it was affiliated – the Fund.²²² Although the federal grant explicitly named the Fund as the recipient, the court ruled that the Fund – like the student in *Grove City* – was "merely a conduit" for the ultimate recipient organization.²²³ Thus, the athletic association qualified as a statutory recipient.²²⁴

b. The Critique

The indirect recipient theory appears doctrinally sound and supported by precedent.²²⁵ However, lower courts' application of the indirect recipient

863 F. Supp. 483, 487 (E.D. Mich. 1994) (concluding that "[a]lthough MHSAA is not a direct recipient of federal funding, it is subject to the Rehabilitation Act because it receives federal funds indirectly"); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 857 F. Supp. 654, 663 (E.D. Mo. 1994) (concluding that high school athletic association "is a 'federally-assisted program' within the meaning of the Rehabilitation Act, as it receives federal funds indirectly through its members, which delegate to it a portion of their responsibilities for regulation of interscholastic activities" (citing *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202, 1212 (9th Cir. 1984))). Furthermore, at least one court took the indirect recipient theory a step further and concluded that an "assignee" could also qualify as a statutory recipient. See *Kemether v. Pa. Interscholastic Athletic Ass'n*, No. 96-6986, 1999 U.S. Dist. LEXIS 17331, at *53 (E.D. Pa. Nov. 8, 1999) (fitting defendant within broad definition of assignee as contained in regulation's definition of recipient for Title IX purposes (citing 34 C.F.R. § 106.2(h) (1992))); see also *supra* note 14 (explaining this Note's use of "statutory recipient").

221. See *Cureton I*, 37 F. Supp. 2d 687, 694 (E.D. Pa. 1999) (concluding that because "NCAA exercises effective control and operation," organization is "to be construed as an indirect recipient of federal financial assistance").

222. See *Cureton I*, 37 F. Supp. 2d at 694 (emphasizing that Fund was "ultimately being controlled by the NCAA"). The grant at issue in *Cureton I* and *II* was a Community Services Block Grant from the United States Department of Health and Human Services. See *id.* (describing grant arrangement). The National Youth Sports Program (NYSP) "is a youth enrichment program that provides summer education and sports instruction on NCAA member and non-member institution campuses." *Cureton II*, 198 F.3d 107, 110 (3d Cir. 1999). The federal funds were at one time advanced to the NCAA. *Id.* However, "[i]n 1989, the NYSP Fund (the 'Fund') was established as a nonprofit corporation to administer the NYSP." *Id.* "Since 1992, the department has granted the financial aid intended for the NYSP directly to the Fund. The Fund is regarded as an NCAA 'affiliate.'" *Id.*

223. See *Cureton I*, 37 F. Supp. 2d at 694 (emphasizing that NCAA makes all decisions about Fund and use of federal funds).

224. *Id.*; see also *supra* note 14 (explaining this Note's use of "statutory recipient").

225. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 604-07 (1986) (reiterating intent element of *Grove City* indirect recipient theory); *Grove City Coll. v. Bell*, 465 U.S. 555, 564-70 (1984) (accepting college's receipt of indirect aid through its students as basis for statutory recipient status).

theory is problematic for two main reasons – vertical inconsistency and horizontal inconsistency.²²⁶ First, lower courts' application is vertically inconsistent because they often misapply the theory as limited by the Supreme Court.²²⁷ They categorize indirect recipients as statutory recipients without asking whether the indirect recipient was also the intended recipient.²²⁸ The *Paralyzed Veterans* Court dictated that the indirect recipient theory depended upon Congress's intent; an indirect recipient qualifies as a statutory recipient only if it was also Congress's intended recipient.²²⁹ A failure to inquire into Congress's intent is thus one crucial flaw in the lower courts' application of the indirect recipient theory.

The second flaw with the indirect recipient theory is horizontal inconsistency; lower courts disagree with each other on the application of the theory to similar fact patterns. A comparison of two very similar cases with very different results illustrates the horizontal inconsistency problem.²³⁰ An issue arose concerning whether a bank that made loans guaranteed with federal funds qualifies as a statutory recipient for purposes of the Rehabilitation Act.²³¹ Plaintiffs in two cases argued that the bank was an indirect recipient and therefore subject to coverage under the nondiscrimination statutes as a statutory recipient.²³² One court explained that Section 504 coverage did not

226. See *infra* notes 228-37 and accompanying text (detailing inconsistencies in lower courts' application of indirect recipient theory).

227. See *supra* note 220 (citing cases that omit intent element from indirect recipient theory). But see *Cureton II*, 198 F.3d at 116 (observing that "[t]he case law suggests that the critical inquiry in determining whether an entity is an indirect recipient of Federal financial assistance is whether that entity is the intended indirect recipient of Federal funds, intention being from Congress's point of view" (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 563-65 & n.13 (1984))).

228. See *supra* note 220 (citing cases that omit intent inquiry). But see *Moreno v. Consol. Rail Corp.*, 99 F.3d 782, 787 (6th Cir. 1996) (concluding that railroads were subject to nondiscrimination demands even though funds were distributed to states first). The *Moreno* court explained that the railroads had "to comply with the nondiscrimination regulations for federally assisted programs" because they were the *intended* recipients of the funds. *Id.*

229. See *Paralyzed Veterans*, 477 U.S. at 606 (remarking that indirect aid inquiry should be made in context of determining whom Congress intended to receive federal money).

230. Compare *Gallagher v. Croghan Colonial Bank*, 89 F.3d 275, 278 (6th Cir. 1996) (concluding that bank did not receive federal financial assistance by disbursing federal student loans) with *Moore v. Sun Bank*, 923 F.2d 1423, 1432 (11th Cir. 1991) (deriving opposite conclusions from similar fact pattern). *Gallagher* involved a bank's participation in a federal student loan program. *Gallagher*, 89 F.3d at 277. *Moore* concerned a bank's participation in a Small Business Administration guaranteed loan program. *Moore*, 923 F.2d at 1425.

231. See *Gallagher*, 89 F.3d at 277 (involving bank's participation in federal student loan program); cf. *Moore*, 923 F.2d at 1425 (concerning bank's participation in Small Business Administration guaranteed loan program).

232. *Gallagher*, 89 F.3d at 277. Plaintiff argued that the bank received federal funds as

extend past the direct recipient – the borrower – to the indirect recipient – the bank.²³³ In a similar case, another court reached the opposite conclusion.²³⁴ That court determined that Section 504 coverage did indeed extend past the direct recipient – the borrower – to the bank.²³⁵ This example illustrates that although *Grove City* and *Paralyzed Veterans* limited the reach of the indirect recipient category to Congress's intent, the standard remains sufficiently vague that courts' broad interpretations have led to disparate results.²³⁶

2. Controlling Authority

In addition to fitting entities into a previously defined category such as "indirect recipient," lower courts also have outlined another theory for subjecting an entity to the nondiscrimination statutes – "controlling authority."²³⁷ These courts do not feel that the "indirect recipient" and the "recipient versus beneficiary" distinctions sufficiently define the appropriate coverage of the

direct compensation for making student loans at below market interest rates. *Id.* The *Gallagher* court explicitly rejected the reasoning in *Moore*. *Id.* at 278.

233. See *id.* at 278 (explaining how coverage under nondiscrimination statute "does not follow federal aid 'past the intended recipient to those who merely derive a benefit from the aid or receive compensation for services rendered pursuant to a contractual arrangement'" (quoting *Hamilton v. Ill. Cent. R.R. Co.*, 894 F. Supp. 1014, 1022 (S.D. Miss. 1995))).

234. See *Moore*, 923 F.2d at 1431-33 (concluding that bank was recipient of federal financial assistance and thus subject to coverage under Rehabilitation Act).

235. See *id.* at 1432 (explaining how coverage under nondiscrimination act does cover banks receiving federal default reimbursements on federally guaranteed loans).

236. See *supra* Part II.B.1 (discussing *Grove City* in more detail); *supra* Part III.A.1 (discussing *Paralyzed Veterans* in more detail).

237. See, e.g., *Homer v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994) (emphasizing that school board "controls and manages" schools and programs on behalf of recipient of federal funds and that it has exercised its authority "with respect to a number of federal financial assistance programs"); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 733 (W.D. Mich. 2000) (concluding that "any entity which has controlling authority over a 'program or activity receiving Federal financial assistance' is subject to Title IX's anti-discrimination rule, even if that entity does not itself receive the federal funds which finance the program or activity"); *Kemether v. Pa. Interscholastic Athletic Ass'n*, No. 96-6986, 1999 U.S. Dist. LEXIS 17331, at *45-52 (E.D. Pa. Nov. 8, 1999) (finding "controlling authority" over express recipients of federal financial assistance sufficient basis for holding entity subject to Title IX (citing *Cureton I*, 37 F. Supp. 2d 687, 687, 689, 695 (E.D. Pa. 1999))); *Sandison v. Mich. High Sch. Athletic Ass'n*, 863 F. Supp. 483, 487 (E.D. Mich. 1994) (reasoning that association is subject to Rehabilitation Act because (1) schools and buildings where association carries out its functions receive federal assistance, and (2) coaches in association-sponsored competitions are employees of recipients); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 857 F. Supp. 654, 663 (E.D. Mo. 1994) (finding high school athletic association subject to Rehabilitation Act in part because its members "delegate to it a portion of their responsibilities for regulation of interscholastic activities").

nondiscrimination statutes.²³⁸ Therefore, they extend statutory coverage to entities that exercise controlling authority over a statutory recipient.²³⁹ Although the goal of extending the prohibitions on discrimination may be desirable, the controlling authority theory is problematic for multiple reasons.²⁴⁰

a. The Theory

The theory appears simple: If a direct recipient of federal financial assistance cedes controlling authority over its federally-funded program to another entity, then that entity is subject to the nondiscrimination statutes.²⁴¹ As a corollary to the controlling authority inquiry, some courts ask whether the entity in question performs or has taken over the statutory duties of the recipient of federal financial assistance.²⁴²

238. See *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 733 (W.D. Mich. 2000) (reasoning that nothing on face of Title IX limits class of potential defendants to recipients).

239. See *Kemether v. Pa. Interscholastic Athletic Ass'n*, No. 96-6986, 1999 U.S. Dist. LEXIS 17331, at *48 (concluding that high school athletic association was bound by Title IX because federally funded schools "ceded [it] controlling authority").

240. See *infra* Part III.B.2.b (detailing problems with lower courts' extension of nondiscrimination statutes' coverage).

241. See *Cureton I*, 37 F. Supp. 2d 687, 694 (E.D. Pa. 1999) (deciding that "NCAA is subject to suit under Title VI irrespective of whether it receives federal funds, directly or indirectly, because member schools (who themselves indisputably receive federal funds) have ceded controlling authority over federally funded programs to the NCAA"). In *Cureton I*, the NCAA argued that its constitution expressly states that "the control and responsibility for the conduct of the intercollegiate athletics shall be exercised by the institution itself." *Id.* at 695. The court recognized that a school is technically free to choose not to abide by NCAA legislation. *Id.* However, the court noted that such a school would either suffer serious sanctions from the organization or be forced out of the organization altogether. *Id.* at 695-96. Overall, the court found it significant that "[members] granted to the NCAA the authority to promulgate rules . . . that the members are obligated to abide by and enforce." *Id.* at 696. On appeal, the Third Circuit disagreed. *Cureton II*, 198 F.3d 107, 116-18 (3d Cir. 1999). The Third Circuit did not reject "controlling authority" as a theory itself; however, it did reject the theory's application to the NCAA. *Id.* The "controlling authority" theory did not apply to the NCAA because the NCAA does not actually control its members. *Id.* at 117 (citing *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988)). Instead, the ultimate decision regarding students' athletic participation still belongs to the member schools. *Id.* For instance, "[t]he fact that the institutions make these decisions cognizant of NCAA sanctions does not mean that the NCAA controls them, because they have the option, albeit unpalatable, of risking sanctions or voluntarily withdrawing from the NCAA." *Id.* Furthermore, the schools still "decide what applicants to admit, what employees to hire, and what facilities to acquire." *Id.* at 118.

242. See *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994) (concluding delegation of duties in statutory recipient inquiry); *Graham v. Tenn. Secondary Sch. Athletic Ass'n*, No. 1:95-CV-044, 1995 WL 115890, at *11 (E.D. Tenn. Feb. 20, 1995) (concluding that school athletic association was subject to Title VI because direct recipient of

The obvious problem with the controlling authority theory is that the two words do not appear anywhere in the nondiscrimination statutes' triggering language.²⁴³ Lower courts have thus chosen one of two approaches to bring the controlling authority theory within the language of the statutes.²⁴⁴ Some courts simply equate controlling authority with statutory recipient status.²⁴⁵ Other courts conclude that coverage under the nondiscrimination statutes is not necessarily limited only to statutory recipients.²⁴⁶

The latter group cites the "plain meaning and purpose" of the nondiscrimination statutes in support of its broad interpretation.²⁴⁷ These courts do not view the words "receiving Federal financial assistance" as triggering language that restricts the application of the statutes requirements only to statutory recipients.²⁴⁸ Instead, these courts characterize the nondiscrimination statutes as providing remedies for those individuals discriminated against in the "operation" of programs receiving federal aid.²⁴⁹ This approach provides plaintiffs with the remedy Congress intended and prevents direct recipients from avoiding liability simply by transferring control over their programs to nonrecipients.²⁵⁰

funds delegated responsibility "to supervise and regulate the athletic activities in which [the schools] of Tennessee participate on an interscholastic basis").

243. See *supra* notes 29, 35-37 (citing statutes without "controlling authority" language).

244. See *infra* notes 245-46 (listing cases).

245. See, e.g., *Kemether v. Pa. Interscholastic Athletic Ass'n*, No. 96-6986, 1999 U.S. Dist. LEXIS 17331, at *46-47 (E.D. Pa. Nov. 8, 1999) (ruling that athletic association qualifies as recipient under Title IX); *Horner*, 43 F.3d at 271-72 (refusing summary judgment on recipient ground because entity exercised statutory authority); *Sandison v. Mich. High Sch. Athletic Ass'n*, 863 F. Supp. 483, 487 (E.D. Mich. 1994) (classifying association as indirect recipient of federal financial assistance under Rehabilitation Act).

246. See *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 733 (W.D. Mich. 2000) (refusing to limit Title IX coverage to "recipients" of federal funds).

247. See *id.* (rejecting argument that only recipients of federal funds are subject to Title IX because that interpretation would be "at odds with the plain meaning and purpose of the statute").

248. See *id.* (interpreting § 902 of Title IX). The *Communities* court acknowledged that Supreme Court precedent implies that Title IX will be triggered only if the defendant is a recipient of federal financial assistance. *Id.* at 732 (citing *Grove City Coll. v. Bell*, 465 U.S. 555 (1984); *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986)). However, the court found this interpretation at odds with *Cannon v. University of Chicago*, 441 U.S. 677 (1979). *Id.* at 733.

249. See *id.* at 733-34 (citing *Cannon*, 441 U.S. at 691-92).

250. See *id.* at 734 (reasoning that limiting Title IX coverage to "recipients" of federal funds "would allow entities that controlled those funds to discriminate so long as those entities were not themselves 'recipients'").

b. The Critique

Although the lower courts' goal of preventing "pass the buck" discrimination is indeed laudable, the controlling authority distinction is problematic for several reasons.²⁵¹ First, as a matter of statutory interpretation, the "controlling authority" language has no basis in the statutes.²⁵² The statutes' triggering language provides for coverage under a program or activity that receives federal financial assistance.²⁵³ It does not purport to cover an entity that exercises controlling authority over a program or activity receiving such assistance.²⁵⁴

The second problem with the controlling authority theory is that it clashes with Congress's intent.²⁵⁵ The remedies provided for under the non-discrimination statutes do not contemplate a "controlling authority" defendant.²⁵⁶ Furthermore, language in the CRRA conflicts with reading "controlling authority" into the statutes.²⁵⁷ In the CRRA, Congress included a rule of construction that forbid extending the application of the act to ultimate beneficiaries of assistance.²⁵⁸ To judicially add a "controlling authority" trigger in light of the CRRA and the remedial provisions, therefore, would frustrate Congress's intent.

Third, the controlling authority theory fails from a practical application standpoint. Courts have had enough trouble interpreting the "recipient versus beneficiary" distinction without a definition of statutory recipient.²⁵⁹ An inquiry into whether an entity exercises controlling authority absent any statutory definition of the term only invites more confusion and disagreement in the lower courts.

251. See *infra* notes 253-63 and accompanying text (detailing problems).

252. See *supra* notes 29, 35-37 (citing statutes without "controlling authority" language). This point is more significant considering that the "starting point of any inquiry into the application of a statute is the language of the statute itself." *Paralyzed Veterans of Am.*, 477 U.S. at 604 (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)).

253. See *supra* notes 29, 35-37 (citing statutes that feature almost identical triggering language).

254. See *supra* notes 29, 35-37 (citing statutes that feature almost identical triggering language).

255. See *infra* notes 257-59 and accompanying text (describing intent).

256. See *supra* Part II.A.2 (analyzing statutory remedies).

257. See Rules of Construction of the CRRA, Mar. 22, 1988, P.L. 100-259, § 7, 102 Stat. 31 (providing that nothing in Act's amendments "shall be construed to extend the application of the Acts so amended to ultimate beneficiaries of Federal financial assistance excluded from coverage before the enactment of this Act").

258. *Id.*

259. See *supra* Part III.B.1 (detailing lower courts' application of recipient versus beneficiary standard).

Fourth, the controlling authority theory fails to provide the notice that spending legislation constitutionally compels.²⁶⁰ The Supreme Court has recently reiterated the notice requirement in the context of Title IX.²⁶¹ Subjecting an entity to the nondiscrimination statutes without notice of its obligations would frustrate both the statutes' protective purpose and the statutes' remedial scheme.²⁶²

3. Summary

The "indirect recipient" and "controlling authority" rationales serve as lower courts' responses to the general lack of Supreme Court guidance regarding whether an entity is subject to the nondiscrimination statutes.²⁶³ The Court handed down and has since reiterated a supposed distinction between a recipient and a beneficiary, but has yet to delineate any clear factors to distinguish between the two categories.²⁶⁴ The lack of standards becomes an even greater problem once one considers the significant duties attendant to recipient status.²⁶⁵

Although the Supreme Court's definition of statutory recipient needs refining, lower courts' reliance upon the above two theories to supplement the Supreme Court's definition of statutory recipient is misplaced.²⁶⁶ First, the courts' reliance upon the indirect recipient theory is troublesome because courts either omit the necessary intent inquiry or they disagree about the theory's application.²⁶⁷ Furthermore, the courts' reliance upon the controlling authority theory signals its own whole new set of problems.²⁶⁸ In light of both

260. See *supra* notes 91-94 and accompanying text (examining nature of nondiscrimination statutes as spending legislation).

261. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287-91 (1998) (precluding award of monetary relief absent notice); see also *supra* notes 91-94 and accompanying text (further describing significance of spending legislation).

262. See *Gebser*, 524 U.S. at 289-90 (reasoning that it would be unsound for statute's enforcement system to require notice and still permit liability without regard to recipient's knowledge); see also *supra* notes 91-94 and accompanying text (further describing significance of spending legislation).

263. See *supra* Parts III.B.1 & III.B.2 (analyzing theories).

264. See *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 467 (1999) (endorsing recipient versus beneficiary standard); *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 606 (1986) (distinguishing between recipient and beneficiary).

265. See *supra* Part II.A (describing duties).

266. See *supra* Parts III.B.1.b & III.B.2.b (critiquing lower courts' approaches).

267. See *supra* notes 227-37 and accompanying text (highlighting vertical and horizontal inconsistencies with lower courts' approaches).

268. See *supra* notes 244-63 and accompanying text (detailing list of problems with controlling authority theory as independent basis for coverage under nondiscrimination statutes).

the current problems with the "recipient versus beneficiary" standard and the lower courts' problematic refinement of that standard, the United States Supreme Court has two options: It may articulate some factors to help lower courts distinguish between a recipient and a beneficiary, or it may redefine statutory recipient. This Note suggests the latter option.²⁶⁹

IV. Proposed Categories

The need for a clear articulation of who qualifies as a recipient of federal financial assistance is certain. The potential duties linked with statutory recipient status are considerable.²⁷⁰ If an entity qualifies as a recipient, it must abide by the nondiscrimination demands of four major pieces of legislation.²⁷¹ If the entity's actions fall short of the nondiscrimination provisions, either the government or private individuals may take serious action against the entity.²⁷²

The current "recipient versus beneficiary" standard provides an insufficient definition of statutory recipient for two broad reasons. First, lower court approaches have resulted in both vertical and horizontal inconsistency; lower courts either misapply the standard as defined by the Supreme Court,²⁷³ or they disagree with each other about the appropriate application of the standard.²⁷⁴

Second, some lower courts have already found the "recipient versus beneficiary" standard insufficient.²⁷⁵ These courts have supplemented the standard with their own theory: controlling authority.²⁷⁶ The controlling authority theory provides that an entity is a statutory recipient if it exercises "controlling authority" over a direct recipient of federal financial assistance.²⁷⁷ However, the problems with the controlling authority theory include its potential clash with statutory language and Congress's intent, its difficulty in application, and its failure to provide entities with notice of their statutory recipient status.²⁷⁸

269. See *infra* Part IV (proposing new categorical definition of statutory recipient).

270. See *supra* Part II.A (describing duties triggered by statutory recipient status).

271. See *supra* Part II.A.1 (explaining statutory demands).

272. See *supra* Part II.A.2 (explaining statutory remedies).

273. See *supra* notes 228-30 and accompanying text (detailing vertical inconsistency).

274. See *supra* notes 231-37 and accompanying text (detailing horizontal inconsistency).

275. See *supra* Part III.B.2 (describing and analyzing lower courts' reliance upon "controlling authority" as basis for coverage under nondiscrimination statutes).

276. See *supra* Part III.B.2.a (describing controlling authority theory).

277. See *Cureton I*, 37 F. Supp. 2d 687, 694 (E.D. Pa. 1999) (deciding that "NCAA is subject to suit under Title VI irrespective of whether it receives federal funds, directly or indirectly, because member schools (who themselves indisputably receive federal funds) have ceded controlling authority over federally funded programs to the NCAA"); see also *supra* Part III.B.2.a (describing controlling authority theory in more detail).

278. See Part III.B.2.b (listing problems within critique of controlling authority theory).

Several organizations like the NCAA await the Supreme Court's position on the controlling authority theory.²⁷⁹ Regardless of its eventual decision, both the potential consequences of statutory recipient status and lower court confusion over the definition demand a better definition of statutory recipient for purposes of the nondiscrimination statutes.²⁸⁰

This Note suggests a two-part solution to the definition problem.²⁸¹ First, the Court should abandon, or at least de-emphasize, the "recipient versus beneficiary" distinction for the reasons detailed above.²⁸² Then, the Court should identify and define two specific categories of entities that qualify as statutory recipients of federal financial assistance: contractual recipients²⁸³ and intended recipients.²⁸⁴ The following subsections describe the two proposed categories in more detail.²⁸⁵

A. Contractual Recipients

An entity should qualify as a statutory recipient if it is a contractual recipient of federal financial assistance. The *Paralyzed Veterans* Court explicitly emphasized the contractual nature of the nondiscrimination statutes.²⁸⁶ The Supreme Court has cited both Congress's intent²⁸⁷ and the inherent nature of spending clause legislation²⁸⁸ in support of that contractual emphasis. Any

279. See Brief for Petitioner at 35, *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999) (No. 98-84) (listing organizations with federally funded members).

280. See *supra* Part II.A (describing potential consequences); *supra* Part III.B (chronicling lower court confusion).

281. See *infra* notes 283-326 and accompanying text (detailing two-part solution).

282. See *supra* Part III (analyzing Supreme Court's refinement of recipient versus beneficiary standard and lower courts' application thereof).

283. See *infra* Part IV.A (offering and explaining merits of contractual recipient category).

284. See *infra* Part IV.B (offering and explaining merits of intended recipient category).

285. See *infra* notes 287-326 (detailing proposed categories).

286. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986) (acknowledging that "[u]nder the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds"). Justice Powell further explained that "the recipient's acceptance of the funds" is what triggers the coverage of the nondiscrimination provisions. *Id.*

287. See *id.* (recognizing Congress's intent "to impose § 504 coverage as contractual cost" of accepting federal funds). The *Paralyzed Veterans* Court noted that Congress required providing for the handicapped as a "*quid pro quo*" for federal funds. *Id.* (citing *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 633 n. 13 (1984)).

288. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (recognizing that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions"). The *Pennhurst* Court concluded: "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of 'con-

categorical definition of statutory recipient should also emphasize contractual principles for those very same two reasons. Therefore, the first question under the statutory recipient test should be whether the entity and the government enjoy a contractual relationship.²⁸⁹ If they do, then the entity is subject to the nondiscrimination statutes.²⁹⁰ If not, the court should proceed to the second category.²⁹¹

A determination of whether an entity is a contractual recipient is a simple process. As mentioned earlier, one must first look to the grant statute to determine to whom the statute authorizes direct federal disbursements.²⁹² An entity should be characterized as a contractual recipient only if it exchanged a promise to abide by the nondiscrimination statutes in exchange for federal funds.²⁹³ The principle here is that only those parties in a position to accept or reject the funds should be subject to the nondiscrimination obligations.²⁹⁴

The contractual emphasis is appealing from a procedural standpoint as well. The nondiscrimination statutes provide the government with an explicit remedy for the violation of the statutes.²⁹⁵ If the recipient of federal financial assistance fails to comply with the nondiscrimination demands, the government may refuse or withdraw funds.²⁹⁶ However, if there is no explicit contractual relationship, then the government would be in no position to effectuate the primary remedy for violation.²⁹⁷ Furthermore, private suits against

tract." *Id.*; see also 110 CONG. REC. 1542 (remarks of Rep. Lindsay) ("The mandate of Title VI is very simple. Stop the discrimination, get the money, continue the discrimination, do not get the money.").

289. See *supra* notes 148-53, 166-68 and accompanying text (explaining significance of contractual principles within statutory recipient inquiry).

290. See *supra* notes 29, 35-37 (citing statutes prohibiting discrimination based on race, color, national origin, sex, disability, and age).

291. See Part IV.B (describing second proposed category – intended recipients).

292. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 604 (1986) (examining terms of underlying grant statute); see also *supra* notes 163-65 and accompanying text (detailing initial step of statutory recipient inquiry).

293. See *Paralyzed Veterans*, 477 U.S. at 605 (explaining that coverage under nondiscrimination statute was contractual cost of accepting federal funds); see also *supra* notes 148-53, 166-68 and accompanying text (detailing nondiscrimination statutes' contractual nature).

294. See *Paralyzed Veterans*, 477 U.S. at 606 (noting that Congress intended to impose obligations as result of acceptance of federal funds); see also *supra* notes 148-53, 166-68 and accompanying text (detailing nondiscrimination statutes' contractual nature).

295. See *supra* Part II.A.2 (detailing remedies for violation of nondiscrimination statutes).

296. See *supra* notes 78-85 and accompanying text (explaining government's remedial options).

297. See *supra* notes 78-85 and accompanying text (explaining government's remedial options). Another issue courts may need to consider is whether it would be fair to the direct recipient to revoke its funds for another entity's discrimination.

non-contractual recipients may also be precluded because it is doubtful that Congress intended for an implied private right of action to cover conduct the government itself can not check.²⁹⁸ Thus, a definition of statutory recipient that emphasizes contractual principles is consistent with the remedial provisions of the nondiscrimination statutes.²⁹⁹

A contractual emphasis also guarantees notice to an entity. Notice is important in spending legislation because Congress's power to legislate under the spending clause depends on the recipient's knowing acceptance of the conditions.³⁰⁰ The nondiscrimination statutes recognize the necessity of notice and thus require recipients of federal financial assistance to execute a written assurance of compliance.³⁰¹ To hold an entity such as the NCAA subject to the nondiscrimination provisions without first giving it notice of its obligations could violate the constitutional limitations of spending clause legislation.³⁰² Classifying an entity as a statutory recipient because it is a contractual recipient would assure an entity of its exact status.

B. *Intended Recipients*

If an entity is classified as a contractual recipient, then the entity should qualify as a statutory recipient.³⁰³ However, an entity should also qualify as a statutory recipient if it is an intended recipient. Although the face of the nondiscrimination statutes purports to apply only to contractual recipients, such a limited reading of the statutes' application would severely frustrate their purposes.³⁰⁴ Congress could not have intended to let a recipient of federal funds avoid the nondiscrimination obligation simply by turning over its funds

298. See *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 467 n.5 (1999) (rejecting position that private right of action available under 20 U.S.C. § 1681(a) (Title IX) is potentially broader than government's enforcement authority under § 1682); see also *supra* notes 86-94 and accompanying text (discussing nature of private remedy in light of limitations on government remedy).

299. See *supra* Part II.A.2 (describing statutory remedies for violation of nondiscrimination statutes).

300. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (discussing legitimacy of Congress's spending power); *supra* notes 91-94, 262-64 and accompanying text (describing how nature of nondiscrimination statutes as spending legislation limits definition of statutory recipient).

301. See 34 C.F.R. § 106.4 (1999) (requiring "Assurance of Compliance"); see also *supra* note 83 (providing text of "Assurance of Compliance" regulation).

302. See *supra* notes 91-94, 261-63 and accompanying text (describing how nature of nondiscrimination statutes as spending legislation may require notice before liability under statutes).

303. See *supra* note 14 (explaining this Note's shorthand use of "statutory recipient").

304. See *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 733 (W.D. Mich. 2000) (rejecting argument that "only recipients of federal funds are subject to Title IX" because that interpretation "is at odds with the plain meaning and purpose of the statute").

to a third party.³⁰⁵ Furthermore, Congress may explicitly grant money to one entity, but at the same time, intend for a different entity to be the ultimate recipient.³⁰⁶ The definition of recipient must include a category that will encompass both of the above-described scenarios. The proposed category of "intended recipient" detailed below does just that.³⁰⁷

The intended recipient category may be applied as follows. If the court finds no express contractual privity between an entity and the government, the court should then ask whether the entity is the intended recipient of the federal financial assistance.³⁰⁸ An entity may qualify as the intended recipient in either of two ways.³⁰⁹ First, the entity may qualify as the explicitly intended recipient of the funds.³¹⁰ Second, an entity may qualify as the implicitly intended recipient.³¹¹

1. Explicitly Intended

An entity is the explicitly intended recipient if the grant statute or its legislative history indicates that it was the intended recipient. For example, in *Grove City*, the Court deemed the college a statutory recipient of federal financial assistance even though individual students were the direct recipients of the federal grants.³¹² The indirect aid still qualified the college for statutory recipient status because Congress intended for the educational institutions to be the ultimate recipients of the federal funds.³¹³ Although the *Grove City* Court labeled the college an "indirect" recipient, the college was actually a recipient because it was the "intended" indirect recipient.³¹⁴

305. See *id.* at 734 (expressing court's concern that restricting coverage under nondiscrimination statutes to statutory recipients was "empty formalism" because it "would allow entities that controlled [federal] funds to discriminate so long as those entities were not themselves 'recipients'").

306. See *Grove City Coll. v. Bell*, 465 U.S. 555, 565-70 (1984) (describing how Congress intended college as statutory recipient even though grant statute designated student as recipient).

307. See *infra* Parts IV.B.1 & 2 (offering two categories of intended statutory recipients that will encompass both indirect yet intended recipients and also third party recipients).

308. See *supra* Part IV.A (providing test for contractual privity as primary basis for statutory recipient status).

309. See *infra* Part IV.B.1 & 2 (delineating test for explicitly intended and implicitly intended recipients).

310. See *infra* Part IV.B.1 (outlining explicitly intended inquiry).

311. See *infra* Part IV.B.2 (listing factors that favor qualifying entity as implicitly intended recipient).

312. See *Grove City Coll. v. Bell*, 465 U.S. 555, 564-70 (1984) (subjecting college program to Title IX coverage based on indirect yet intended federal financial assistance).

313. See *id.* at 565-66 (explaining that one of Congress's stated purposes was to provide assistance to educational institutions).

314. See *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 606-

However, limiting the intended recipient category to explicitly intended recipients may not define statutory recipient broadly enough. For example, the explicitly intended recipient category fails to cover the situation in which a contractual recipient parcels out all of its federal assistance or passes on complete control over the assistance to a third party.³¹⁵ Lower courts have recognized this gap and have responded with the problematic "controlling authority" theory.³¹⁶

However, despite its problems as a category of its own, the controlling authority inquiry may still be useful.³¹⁷ Controlling authority could be a factor – among other factors – in a second sub-category of intended recipient: implicitly intended recipients.³¹⁸

2. *Implicitly Intended*

An entity may also qualify as a statutory recipient if it is an implicitly intended recipient. Whether an entity is an implicitly intended recipient depends on several factors, including controlling authority.³¹⁹ If an entity exercised controlling authority over a program or activity at the time of the grant, one may infer that Congress intended for the assistance to go to that entity. A court inquiring into whether an entity is the implicitly intended recipient should thus examine controlling authority as one factor, but not as the only factor.³²⁰

A court should also examine whether the contractual recipient is a "mere conduit" of the aid. A mere conduit of federal financial assistance is an intermediary contractual recipient who does not have a contractual right to use the money on its own. Rather, the mere conduit depends upon the existence of a separate entity – the implicitly intended recipient – in order to use the assistance. For example, in *Grove City*, the student's right to the federal money

07 (1986) (framing *Grove City* Court's indirect recipient inquiry within context of intended recipient inquiry).

315. See *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 733 (W.D. Mich. 2000) (rejecting argument that "only recipients of federal funds are subject to Title IX" because that interpretation "would allow entities that controlled [federal] funds to discriminate so long as those entities were not themselves 'recipients'").

316. See *supra* Part III.B.2 (describing and critiquing controlling authority theory).

317. See *supra* Part III.B.2.a (listing problems with controlling authority as basis for statutory recipient status).

318. See *infra* Part IV.B.2 (outlining factors that weigh for and against classifying entity as implicitly intended recipient of federal financial assistance).

319. See *supra* Part III.B.2.a (explaining lower courts' reliance upon controlling authority theory).

320. See *infra* notes 323-27 and accompanying text (delineating other factors within implicitly intended recipient category).

was contingent upon the student's transfer of the money to the college.³²¹ Therefore, the college was likely the implicitly intended recipient of the federal financial assistance and, under this approach, is subject to the nondiscrimination statutes.³²²

A court may also examine the nature of the grant money involved. If Congress singles out the money in the grant statute for a specific purpose and the entity in question already holds or later accepts assignment of that statutory duty or function, then it is more likely that Congress intended that entity as the recipient.³²³ The entity performing the statutory duty or function is more likely the implicitly intended recipient and, therefore, is subject to the nondiscrimination statutes.³²⁴

A court could also examine the extent of the grant money involved. More specifically, the court could inquire into whether the entity would still be able to operate absent the government's financial assistance to the contractual recipient. If one of the statutory remedies – the termination of federal funds to the contractual recipient – would also trigger the demise of the entity in question, then that entity is more likely the implicitly intended recipient.³²⁵

V. Conclusion

Congress passed Title VI, Title IX, the Rehabilitation Act, and the Age Discrimination Act to ensure that federal funds are not used in a discriminatory manner.³²⁶ Congress chose to accomplish that goal with an explicit "trig-

321. See *Grove City Coll. v. Bell*, 465 U.S. 555, 565 n.13 (1984) (explaining that students' eligibility for federal assistance is conditioned upon continued enrollment and progress in course of study). Furthermore, regulations required students to file affidavits promising that they would use their awards solely for attendance-related expenses. *Id.* (citing 20 U.S.C. § 1091(a)(5) (1982); 34 C.F.R. §§ 690.79, 690.94(a)(2) (1983)). The Court was careful to distinguish student grant money from other individual grants that benefit individuals and other "down the line" beneficiaries, such as food stamps, Social Security benefits, and welfare. *Id.*

322. See *Grove City*, 465 U.S. at 569-70 (finding powerful evidence of Congress's intent). The Court also noted that educational institutions could still opt out of federal student assistance programs. *Id.* at 565 n.13.

323. See *Homer v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272 n.5 (6th Cir. 1994) (distinguishing indirect recipient athletic association from commercial airlines in *Paralyzed Veterans* because association "performs the statutory duties of a recipient of federal funds"); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 857 F. Supp. 654, 663 (E.D. Mo. 1994) (concluding that delegation of responsibilities for regulation of interscholastic activities favored recipient status).

324. See *supra* notes 29, 35-37 (citing statutes that prohibit discrimination on basis of race, color, national origin, sex, disability, and age).

325. See *supra* notes 78-85 and accompanying text (discussing remedies available to government for violation of nondiscrimination statutes).

326. See *supra* Part II.A (including discussion of Congress's intent within explanation of nondiscrimination statutes).

ger" – only those programs or activities receiving federal financial assistance are subject to the nondiscrimination demands of the statutes.³²⁷ However, absent a statutory definition section from Congress, courts have toiled over the years to define exactly what kinds of entities qualify as a statutory recipients.³²⁸

Although the Supreme Court has offered the distinction between a recipient and a beneficiary as guidance,³²⁹ lower courts have struggled with the task of applying that distinction.³³⁰ Unsatisfied with their results, some courts have proffered another basis for liability under the nondiscrimination statutes: controlling authority over a recipient.³³¹ However, the controlling authority theory suffers from its own problems in definition and in application.³³²

This Note suggests that a recognition of two specific categories of recipients – contractual recipients and intended recipients – more clearly defines the coverage of the nondiscrimination statutes.³³³ The theory is simple. A court first should ask whether an entity is the contractual recipient of federal financial assistance.³³⁴ If an entity is not a contractual recipient, then a court should ask whether the entity qualifies as an intended recipient of federal financial assistance.³³⁵ If the entity is neither a contractual nor an intended recipient, then it is not bound by the nondiscrimination statutes.³³⁶

The two categories feature definite inquiries and specific factors and, therefore, would provide more guidance to the lower courts than the vague "recipient versus beneficiary" standard currently in place.³³⁷ A categorical definition also would aid organizations like the NCAA in determining whether they qualify as statutory recipients.³³⁸ Moreover, the two categories would

327. See *supra* notes 29, 35-37 (listing nondiscrimination statutes).

328. See *supra* Part III (chronicling both Supreme Court and lower courts' attempts to define statutory recipient).

329. See *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 468 (1999) (endorsing distinction between recipients and beneficiaries of federal financial assistance).

330. See *supra* Part III.B.1 (detailing lower courts' problems with applying indirect recipient theory suggested by Supreme Court).

331. See *supra* Part III.B.2.a (explaining controlling authority as basis for statutory recipient status).

332. See *supra* Part III.B.2.b (critiquing controlling authority as basis for statutory recipient status).

333. See *supra* Part IV (proposing categorical definition of statutory recipient).

334. See *supra* Part IV.A (outlining test for contractual recipient).

335. See *supra* Part IV.B (delineating factors within intended recipient test).

336. See *supra* notes 29, 35-37 (listing nondiscrimination statutes).

337. See *supra* Part III.A (describing Supreme Court's distinction between recipient and beneficiary).

338. See *supra* notes 2-26 and accompanying text (describing situation of NCAA).

encompass some of the entities that the controlling authority theory sought to include, without also involving all of the negative consequences of that theory.³³⁹ Of course, a definition of recipient from the pens of Congress would be an ideal solution. However, until then, court designated categories of "contractual recipient" and "intended recipient" seem best suited to accomplish the goals of the nondiscrimination statutes within their inherently contractual framework.³⁴⁰

339. See *supra* Part IV.B.2 (suggesting that controlling authority should remain factor within implicitly intended recipient category).

340. See *supra* notes 148-52 (noting *Paralyzed Veterans* discussion of statutes' contractual framework).