



10-1981

North Haven Board of Education v. Bell

Lewis Powell Jr.

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Present issue in
U.S. v U. of Seattle

80-493 - That is
now moot. Dismiss it and

Grant

Q. Whether under §901 of
Title IX of Social Security Act,
Def Ed could prohibit sex
discrimination in employment
by universities receiving federal
funds.

CA 2 in this case, ~~held~~
answered Q affirmatively.

But several CAs & DC have
held that §901 prohibits

PRELIMINARY MEMORANDUM

February 20, 1981 Conference
List 7, Sheet 2

No. 80-986

NORTH HAVEN BD. OF EDUCATION

v.

BELL, Dept. of Education

Cert to CA 2

(Oakes, Kaufman,
Tenney, (DJ))

Federal/Civil

Timely

1. SUMMARY: This case is straightlined with Bell v.

Dougherty County School System, No. 80-1023. Both cases are

similar to United States v. Seattle University, No. 80-493, a
case on which cert has already been granted.

2. FACTS AND DECISION BELOW: The issue in all three of

these cases is whether §901 of Title IX authorizes the Department

As I have indicated before, I believe Seattle is moot. I would
dismiss it and grant this case. JPB

of Education to issue regulations prohibiting sex discrimination in the employment practices of institutions receiving federal financial assistance. §901 provides in pertinent part that "no person...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." HEW has interpreted §901 as prohibiting sex discrimination in the employment practices of educational institutions and has promulgated regulations to that effect. 34 CFR §106.51 and §106.54.

The majority of circuit courts, and virtually all of the District Courts, have held that the regulations are in excess of statutory authority. Seattle University, supra (CA9); Romeo Community Schools v. HEW, 600 F.2d 581 (CA 6), cert. denied, 444 U.S. 972 (1979), Junior College District of St. Louis v. Califano, 597 F.2d 119 (CA 8), cert. denied, 444 U.S. 972 (1979); Islesboro School Committee v. Califano, 593 F.2d 424 (CA 1), cert. denied, 444 U.S. 972 (1979). The courts reason that §901 covers only sex discrimination against students, not against employees. The CA 5, in Bell v. Dougherty Cty Sch. Sys., has taken a middle ground. Its view is that §901 does not cover employees generally, but does apply to those employees in specific programs which receive federal funds.

The CA 2 rejected the reasoning of those courts. It held that although the language of §901 is unclear, the legislative history of Title IX evinces Congressional intent that petr

regulate sex discrimination in employment. It relied particularly on a comment by Senator Bayh that:

"the portion of the amendment covers discrimination in all areas where abuse has been mentioned -- employment practices for faculty and administrators, scholarship aid, admissions, access to programs within the institution such as vocational education classes and so forth. 118 Cong. Rec. 5807 (1972).

3. CONTENTIONS AND DISCUSSION: Because of the conflict the case should be held for Seattle University. The caveat here is that respondent in Seattle University has filed a motion to withdraw, since in its view the case is now moot. The Department of Labor has apparently exonerated respondent of any discrimination in employment practices. That motion has been distributed to the Conference and will be considered at the February 20 Conference.

In response to Seattle's motion to withdraw, the SG reiterates its letter dated January 6, 1981 to the Clerk, contending that the mootness question had been fully aired in the Court before the grant of cert. It asserts it will proceed with its briefing of the case. It suggests that this Court might want to appoint counsel as amicus curiae to file a brief in support of the judgment on review there. If the Court decides to vacate the grant, it should grant the petition either in this case or in Bell v. Dougherty County School System, No 80-1023. If this court decides that briefing an argument in Seattle University should go forward, then both this case and Dougherty should be held for Seattle University.

I agree that if this Court decides to vacate the grant of cert in Seattle University, this case should be granted. Further, I recommend that Dougherty County be held.

2/11/81
JBP

Knauss

Op in petn.

Announced, 19...

Ball, Dept. of Ed.
~~HUFSTEDLER~~, ETC.

Granted

[illegible]

Revised 12/07 - Continued by reamend

meb 12/07/81

§901 & 902 of Title IX bar sex discrimination in "educational programs and activities" ^{supported by fed.} funds. This language was "lifted" from Title VI - as ~~the~~ Court said in Cannon, Title VI bars discrimination among persons entitled ~~to receive federal~~ aid because of race.

Sec. of HEW adopted Regs under IX that broadly regulate "employment practices" of the institutions that receive the funding.

CA 2 sustained validity of these Regs despite the plain language limited to "programs & activities".

Four (4) other CA have held to contrary. Leg. history is ambiguous, except the close relationship with Title VI.

BENCH MEMORANDUM

To: Mr. Justice Powell

December 7, 1981

From: Mary

Moreover, Title VII ~~is~~ the basic employment discrimination statute. Makes little sense to have duplicating No. 80-986, North Haven Board of Education v. Bell, et. al., & Trumbull Board of Education v. U.S. Department of Education & Potz agencies with same responsibility.

SG & Sec'y Ed disagree!

Question Presented

The question presented is whether the Sec'y of Educ. exceeded his authority when he promulgated regulations prohibiting discrimination on the basis of sex in employment under §901 of Title IX, 20 U.S.C. §1681(a), which prohibits sex discrimination in federally funded educational programs and activities.

I. BACKGROUNDA. The Unusual Posture of the Parties

The Sec'y of Educ. now argues that the regulation are "ultra vires," and he has published notification of new rulemaking. The Court might feel that there is little point to reaching the merits. The SG, unfortunately, disagrees with the Sec'y, and has continued to litigate despite the Sec'y's request that he reach some understanding with the private parties and stop. Indeed, the SG now maintains that the employment-discrimination regulations are mandated by the statute. He can, of course, no longer argue that they are within the scope of the Sec'y's discretion--the Sec'y has clearly stated that he will exercise his discretion by replacing them. See Brief of SG n.26 at 37; Reply Brief (yellow) of North Haven at 1-2.

I fully agree
I may be unaware of how things work, but it seems to me that the Executive should come before this Court with one consistent position in cases other than those involving independent regulatory agencies. And the SG's argument is somewhat irresponsible--by arguing that the regulations are mandated by the statute, he may be restricting future flexibility. The Executive would, one would think, necessarily prefer a broad range of options in implementing a statute.

At first, I could not understand why the SG is wasting the Court's time. It is true that, under 20 U.S.C. §1682, the Sec'y cannot promulgate the new regulations without the approval of the President. But it seems unlikely the SG will really be able to stop the Sec'y from replacing the regulations with new ones that do not

cover employment.¹ It may be, however, that the SG was unable to convince the individuals who filed charges to stop litigating, and one of them, Linda Potz, is a party to the Trumbull Board of Education suit, see note 14 infra. Until the regulations are actually rescinded, Potz has standing to enforce them regardless of the views of the SG. See Cannon v. University of Chicago, 441 U.S. 677 (1979) (private right of action under Title IX). And, having petitioned for cert supporting her, the SG may feel some reluctance 2 to abandon them because of a pending change in administration policy.

B. Title IX and the Regulations

Congress passed Title IX of the Educational Amendments of 1972 to proscribe discrimination based on sex in educational institutions with regard to employment, pay, and program participation. Title IX included an amendment to Title VII, 42 U.S.C. §2000e, et seq., removing the previous exemption for educational institutions with regard to employment discrimination.²

¹The Dept. of Education is no longer enforcing the regulation. Under the previous Administration, when the CAs began invalidating the regulations (in order to avoid wasting resources), the Dept. of Educ.'s Office for Civil Rights instructed its regional offices to proceed only when "(1) ... the principal purpose of the federal assistance in question is to provide employment or (2) ... the allegedly discriminatory employment practice may have a discriminatory impact upon students or other direct beneficiaries of federal assistance." Petn for Cert at 11 n.4 in Dept. of Educ. v. Seattle University, 101 S. Ct. 563 (1980).

²The amendment making Title VII applicable to educational institutions was originally part of Title IX; it passed both houses and was included in the Conference Report. But it was not included in the final codification enacted as Title IX because it had already

Footnote continued on next page.

Title IX also amended the Equal Pay Act by adding 29 U.S.C. §213(a) making that Act applicable to professionals and white-collar workers. And §901 of Title IX, 20 U.S.C. §1681, the provision quoted above, was enacted to bar discrimination in educational programs¹ and activities receiving federal funds.

Title IX (§901) was modelled after Title VI (§601) of Civil Rights Act of 1964, 42 U.S.C. §2000d, which prohibits discrimination excluding persons from federally financed programs or activities on the basis of race, creed, color, or national origin. The wording of the two statutes is virtually identical.³ In fact, the original proposal for Title IX was to add "sex" to the list of discriminations prohibited by Title VI. But a separate provision was used so that Title VI would not have to be opened for amendments, and a staffer with a xerox copy of Title VI cut and pasted it into Title IX. Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education and Labor, House of Representatives--Review of Regulations to implement Title IX, 94th Cong., 1st Sess. p.409 (1975). In the past, this Court has noted that "[t]he drafters of Title IX explicitly assumed that it would

been passed as part of the 1972 Civil Rights Act, P.L. No. 92-261.

³Title VI (§601) states:

"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."

Title IX (§901) is quoted in text at the beginning of section II.A.1 infra.

be interpreted and applied as Title VI had been ..." Cannon, 441 U.S. at 696 n.19.

In 1975, the Department of Health, Education, and Welfare (HEW) promulgated regulations implementing Title IX. Subpart E of these regulations, entitled "Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited," addresses employment, employment criteria, recruitment, compensation, job classification and structure, fringe benefits, marital or parental status, advertising for personnel, pre-employment inquiries, and sex as a bona fide occupational qualification. See separate appendix to petn for cert at 8A to 19A. Although some parts of the regulation refer to "programs or activities," for the most part the regulation regulates the general employment practices of recipients."

C. The Response in the Circuits, Including the Decision Below

1. The other CAs. Four CAs, CA1, CA6, CA8, & CA9, have held that Title IX does not authorize regulations covering the employment practices of recipients.⁴ The CA5 held that the current regulations exceeded the scope of HEW's authority, but noted that HEW would have authority to promulgate regulations applicable to

⁴See Seattle University v. HEW, 621 F.2d 992 (CA9 1980), cert granted, 449 U.S. 1009 (1980) (being held for this case; probably moot); Romeo Community Schools v. HEW, 600 F. 2d 581 (CA6), cert denied, 444 U.S. 972 (1979); Junior College v. Califano, 593 F. 2d 424 (CA8), cert denied, 444 U.S. 972 (1979); Islesboro School Committee v. Califano, 593 F. 2d 424, cert denied, 444 U.S. 972 (1979).

(CA1)

employees paid with federal funds.⁵ The CA5 agreed with the other CAs that Title IX does not, for example, give HEW authority to promulgate general regulations concerning recipients' pregnancy policies. Dougherty, 622 F. 2d at 737 n.5. But the CA5 thought that if, for example, a "female teacher whose salary is defrayed by federal funds and who is paid less than a male teacher in the same program," is subject to "discrimination under" a federally funded program and the recipient's conduct is therefore regulable under Title IX. Id., at 738.

CA2 stands alone

2. The decision below. Charges of discrimination in employment were filed with HEW against petrs, the North Haven and Trumbull Boards of Education. HEW investigated the charges and began administrative enforcement proceedings to determine whether funds should be terminated. The school boards brought separate suits in the D. Conn., seeking injunctive and declaratory relief against HEW's use of the Subpart E regulations. In separate actions before the same judge, summary judgment was granted for the School Boards. On appeal to the CA2, the cases were consolidated.

On July 24, 1980, the CA2 (Kaufman, Oakes, & Tenney) reversed the DC and held that HEW had "authority under Title IX to promulgate the employment discrimination regulations at issue here." Separate appendix to petn at 48A-2. The CA2 expressed no view about appropriate remedies. Id.

In reaching its decision, the CA2 relied on the language

⁵Dougherty County School System v. Harris, 622 F. 2d 735 (CA5 1980), cert pending No. 80-1023 (hold for this case).

and policies of Title IX. And it placed great weight on ambiguous remarks made on the floor of the Senate by Senator Bayh, sponsor of the amendment to the Education Bill that included Title IX. The only written statement of the Senator used by the CA was one published a month after passage of the legislation. In addition, the CA relied on other statements made in debate and on the fact that Title IX, unlike Title VI, has no provision stating that the title did not apply to employment and on the fact that Congress had not amended the statute to limit its scope.

II. DISCUSSION

A. The Statute

1. Section 901.

"No person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any "educational program or activity" receiving financial assistance, except that" §901, 20 U.S.C. §1681(a).

A natural reading of these words limit the statute's scope to discrimination against "beneficiaries." It strains the language to maintain that teachers, administrators, secretaries, etc., who are discriminated against in employment are thereby excluded from participating in a program (students, not teachers, and certainly not administrators or secretaries, participate in programs) or denied its benefits (it is not designed to benefit those running it but those participating in it) or subjected to discrimination under the program (they may be discriminated against by the recipient's policies, but it is not discrimination under the program--an administrator may even be running the program).

The natural reading of the statute is reinforced by the list of nine exemption's from Title IX, all of which deal with participants in "programs" ^{and} not recipient's employees.⁶ And because this list is so thorough and carefully drawn, one suspects that if Congress had meant to include employment discrimination under Title IX, it would have included some definitions or exemptions-such as the exemption for bona fide seniority systems under Title VII.

This is not to say that the language of the statute would never extend to any employment decisions. The statute does cover employment when the program or activity employs participants, e.g., a work-study program would be an educational program and therefore under Title IX even though the program is one of employment.

2. Section 902. Section 901 proscribes discrimination in an "educational program or activity." It is enforced by §902 which authorizes each federal department and agency extending financial assistance to educational programs to issue

"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.
.... Compliance with any requirement adopted pursuant to

⁶Section 901 is followed by these nine exceptions: (1) statute's coverage limited with regard to admissions to educational institutions; (2) gives dates for applicability of statute to admissions; (3) statute not applicable to religious institution if its application would be inconsistent with religious tenets; (4) exception for institutions training soldiers or merchant-marine personnel; (5) exception for admissions to college or university that has always and only admitted one sex; (6) exception for certain sororities, fraternities, the girl and boy scouts, etc.; (7) exception for certain national conferences for young people open only to one sex; (8) exception for mother-daughter father-son activities; and (9) scholarships awarded by institutions of higher education in "beauty" pageants.

this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding ... of a failure to comply with such requirement, but such termination or refusal shall be limited ... in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) any other means authorized by law" (emphasis added).

Thus, the enforcement mechanism, like §901 itself, applies to "educational programs and activities" rather than institutions. *you*

Section 902 provides for the termination of funding once a violation has been found, but funding is only cut-off on a "program" basis. The employment regulations operate on a recipient bases, regulating, for example, a recipient's general pregnancy policy. The regulations are therefore inconsistent with §902's requirement that funding terminations be progrma-specific. Indeed, the SG has now conceded this point, and is forced to urge a narrowing construction to preserve the regulations. See SG's Brief at 43-46. He also argues that although "the regulations are not models of clarity on this point, they do not necessarily mandate such broad coverage." Id., at 46. This later argument requires, however, that one ignore the clear language of the regulations stating that recipients "shall" and "shall not" have certain employment practices and policies as a general matter without the slightest suggestion that the regulations apply only to employment decisions and policies made to staff federally funded programs and activities.

B. Legislative Histroy

1. Modelled after Title VI. As discussed in section I.B supra, Title IX is modelled after (actually, cut and pasted from)

Title VI, which bans discrimination on the basis of race in federally funded programs and activities. From the beginning, it was understood that Title VI did not apply to discrimination in the employment of those operating the federally assisted programs and activities. See 110 Cong. Rec. 10076 (1964) (statement of Attorney General Kennedy)⁷; Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules, 88th Cong., 2d Sess. p. 198 (1964) (statement of Congressman Celler, chairman of the House Rules Committee and House Floor Manager for Title VI).⁸ Section 604 was nevertheless added to Title VI to ensure that it would not be construed as covering all employment in federally funded programs.⁹ This amendment was not, however, seen as a change in the law.¹⁰

⁷The Attorney General explained:

"Title VI is limited in application to instances of discrimination against beneficiaries of Federal assistance programs, as the language of §601 clearly indicates." 110 Cong. Rec. 10076 (1964).

⁸The Congressman agreed that Title VI

"applies only to the policy of the management of the school as far as students are concerned" and that discrimination against an applicant for employment in connection with a federally assisted program "has nothing to do with title 6. That would come under FEPC [Fair Employment Practices Commission]."

⁹Section 604, 42 U.S.C. §2000d-3:

"Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice or any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

The SG attempts to negate the inference drawn from Title VI by noting that Title IX does not have any provision analogous to §604 of Title VI. See Brief of SG at 36 n.25. The initial version of Title IX did include a §904 equivalent to §604 of Title VI, but this was deleted because parts of Title IX--namely, the amendments to Title VII and the Equal Pay Act--were to apply to employment. And §904 was then quietly removed from the bill to remedy the "drafting error"--not to make a substantive change.¹¹

Even the CA2 has construed Title VI as not covering employment except with respect to "federal funds aimed primarily at providing employment." Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 25 FEP Cases 1013, 1028 (CA2 1981). And, as mentioned above in section I.B supra, this Court has

¹⁰In the words of Senator Humphrey, the Senate Floor leader of the Civil Rights Act of 1964:

"[W]e have expressed in specific legislative language what has always been intended." 110 Cong. Rec. 12707 (1964).

¹¹See Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education and Labor, House of Representatives--Review of Regulations to implement Title IX, 94th Cong., 1st Sess. p.409 (1975) (comments of Congressman O'Hara):

"The staff was given overnight to draft this whole thing [Title IX] and they goofed, 904 got in there by mistake.
....

....
"Now, great significance is being given to the fact that it was dropped out. It was dropped out because it got in through a drafting error. So the quiet, easy way to get it out was to slide it out somewhere along the line without having to go through a long explanation of how it got in."

noted that "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been ..." Cannon, 441 U.S. at 696 n.19. Title VI is, therefore, strong evidence that Title IX was not intended to regulate employment practices of recipients of federal funds.

2. Senator Bayh and colleagues. The parties and the CA2 below present an exhaustive analysis of every relevant word ever spoken in either House. See Brief of Petrs (blue) at 63-79; Brief of SG at 23-28; decision below in separate appendix to petn for cert at 33A-41A & 44A-45A. On balance, the debates suggest that Congress as a whole perceived Title IX as not including employment discrimination. Senator Bayh, sponsor of the amendment that became Title IX, and a few other supporters, such as Senator McGovern, see Brief of SG at 22-23, may have had a different understanding. All statements providing support for the regulations were made in debate (or in an explanation prepared after the passage of the Act, see separate appendix to petn at 41A).

Although a few statements of a handful of legislators support the regulations, deference to those statements--rather than the Congress' understanding that this act was modelled after Title VI which did not encompass employment discrimination--is inappropriate. Legislative history has been used by the Court for a relatively short period--only since the late Thirties or the Forties. Initially, there was no danger of legislative history created under false pretenses, i.e., because courts had not, in the past, referred back to legislative history, the sources initially

consulted were the compilation of the legislative process in its natural condition.

As courts have turned increasingly to legislative history, it is increasingly difficult to be sure of the integrity of these sources. Reports continue to be the best indication of what the drafters and those who passed the legislative are likely to have thought. No doubt parts of reports are now written with an eye to the courts, but reports are available to all prior to the vote and reliance on the reports as indicating the understanding of Congress is not entirely misplaced. Reports will usually describe accurately the compromise between competing interest groups achieved in the legislation--and the interest groups certainly have adequate incentive to ensure that the reports do truthfully report the deal struck.

Remarks "on the floor" are another matter. There is no guaranty that any member of Congress heard statements appearing in the pages of Cong. Rec.; one cannot tell by looking at Cong. Rec. whether statements were actually made on the floor or whether they were added to the record in written form after Congress adjourned for the day. Even what looks like a colloquy between two members may have been added in written form without ever being spoken. And if the statements were actually made on the floor, it is likely that only a handful of members were present and that even fewer were paying attention. Courts engage in acts of pure fiction when they rely on such statements as indicative of anything other than one person's views--views he might be expressing only to influence courts on a point on which he lost in the legislative compromise and

could not, therefore, see included in a report.

Courts do accord greater weight to reports than "debates," but it would save everyone a lot of time and result in more accurate decisions if the Court were to hold that, as a general matter,¹² debates should not be considered because they are unreliable; considering them, as I think the case at bar indicates, is likely to frustrate, not fulfill, the understanding and intent of the Congress that enacted the legislation in question.

As Justice Jackson noted in Schwegmann Brothers v. Calvert Corp., 341 U.S. 384,, 395-96 (1951) (Jackson, J., joined by Minton, J., concurring):

"Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond the Committee reports, which presumably are well considered and carefully prepared. I cannot deny that I have sometimes offended against that rule. But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions.... For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation."

Jackson on "casual statements"

The decision below illustrates the broad latitude courts have in deciding what a statute means if remarks "on the floor" can be used

¹²There might be unusual circumstances in which courts can tell that a debate is actually reliable, but a per se rule might be best for two reasons. First, as soon as one opens this door at all, it is hard to keep courts from looking to see what is within--and once that happens, courts seem unable to restrain themselves from relying on legislative history regardless of reliability. Second, the legal community will save the time and money of searching through the Congressional Record only if the rule is per se.

as their rationale.

3. Failure to amend. The regulations were subject to a two-house veto; they were effective 45 days after promulgation unless overruled by a concurrent resolution. In the Senate, Senator Helms introduced a resolution disapproving the regulations in their entirety. See 121 Cong. Rec. 17300 (1975). No action was taken.

In the House, the Subcommittee on Post-secondary Education held six days of hearings and various members of the Subcommittee introduced resolutions disapproving various portions of the regulations, including the education portion. 121 Cong. Rec. 21687 (1975). No action was taken.

The SG argues that this history supports the proposition that the regulations are consistent with the intent of the enacting Congress. It is not all that easy to get bills through Congress, however. And the Court should be reluctant to read inaction when one- or two-house vetos are possible as endorsement of agency action. If anything, even this much negative committee response suggests that the regulations might not have been precisely what the earlier Congress had in mind. *yes*

C. Policy Considerations

1. Overlapping jurisdiction. If the regulations are valid, then the Dept. of Educ. (and any other agency authorized to spend money for educational programs and activities) and EEOC both have jurisdiction over the employment practices of educational organizations receiving federal funds. It would be one thing if

overlapping jurisdiction only meant an additional remedy in the event of the same unlawful act. The regulations define employment practices that may result in the termination of funds, however, and there is no guarantee that these regulations will be consistent with EEOC's.

Moreover, in maintaining that the regulations are mandated by the statute (not subject to agency discretion, see discussion in section I.A supra), the SG argues that the Sec'y of Educ. has but little expertise in this area: "The Department of Education has only limited expertise in employment matters." Brief of SG n.26 at 37. It would be interesting to ask the SG why he thinks Congress delegated jurisdiction over employment, duplicating the jurisdiction of the EEOC, to an inept administrator. If the Sec'y of Educ. is has little expertise with regard to employment (the regulations have been on the books since 1975), then the Sec'y of Educ. may not have been qualified to investigate the employment practices of the North Haven¹³ and Trumbull School Boards.¹⁴ *Yr*

¹³The North Haven Board refused to rehire a tenured teacher who had taken a one-year maternity leave. In the subsequent investigation, HEW asked North Haven to provide specific information concerning its policies on hiring, leaves of absence, seniority, and tenure. At this point, North Haven sought an injunction in DC.

¹⁴A former guidance counselor in the Trumbull public schools, Linda Potz, filed a charge that the Trumbull Board gave her inferior job assignments, inferior working conditions, and refused to renew her contract because of her sex. HEW determined that Trumbull had indeed violated Title IX by requiring Potz to type and run errands not required of male counselors, by moving her office to a smaller, poorly heated, and less comfortable space in the gym away from the other counselors, by asking her to change a report showing that she had seen many more students in a given week than the number seen by her male counterparts, and by not renewing her contract, all on the basis of sex.

2. Should participants be denied programs when there is employment discrimination? Another reason to hesitate before reading Title IX as covering employment discrimination is the effect such an extension would have. It is one thing to say, as Congress clearly did, that if a federally funded educational program discriminates among participants on the basis of sex, the federal government will not continue to fund it--in other words, if the recipient denies the benefit to an otherwise qualified applicant on the basis of sex, then all beneficiaries will receive that treatment. It is another to presume that Congress also meant to authorize the termination of funds benefiting program participants because the recipient discriminated against an employee.

III. CONCLUSION

The question presented is whether Title IX, which bans discrimination in federally funded educational activities and programs, covers discrimination in employment by recipients. The current regulations apply generally to a recipient's employment practices and are not limited by program (as required for fund terminations under §902) or to discrimination against participants in educational programs, such as work study, involving employment. Nor are the regulations limited to so-called "infectious" discrimination--discrimination in employment affecting the atmosphere of the program for participants.

The statute's language and legislative history indicate that the regulations are not authorized by §901. The contrary evidence consists of statements in Cong. Rec. (which might or might

not have been made on the floor), an explanation published after the statute's enactment, and congressional inaction in a two-house veto situation.

December 8, 1981

LFP/vde

80-986 North Haven Board of Education v. Bell

MEMORANDUM TO FILE: This is a brief memo dictated merely to refresh my memory as to the issues in these two consolidated cases, presenting the same question. I will want to take a closer look at the briefs, certainly before going to Conference.

Petitioners are two Connecticut school districts that receive federal financial assistance, and therefore are subject to the provisions of Title IX. The pertinent provisions of Title IX are:

Section 901 provides that "no person ... 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."

Section 902 provides, in substance, that each federal department or agency empowered to grant federal assistance is authorized to promulgate regulations to effectuate Section 901.

To implement Section 901, HEW issued regulations prohibiting sex discrimination in the "employment practices" of federally assisted education programs (1977).

After complaints were filed of discrimination in employment - by a tenured teacher who had taken a one year maternity leave and a former employee who had been given "inferior job assignments" and who was fired.

HEW notified petitioners that it had received complaints, and requested "information concerning their policies on hiring, leaves of absence, seniority, and tenure." The school districts instituted these consolidated suits, seeking a declaratory judgment that Title IX confers no authority on HEW to regulate employment practices. The DC agreed with respondents and invalidated the employment practice regulations. CA 2, however, reversed.

Petitioner's Argument

Their brief asserts there have been 17 decisions declaring subpart E of the Reg (herein referred to as the Reg) illegal, with only CA 2 holding otherwise. If the cases are correctly cited (Pl3), at least a half a dozen of these decisions are CA's.

The case is one of statutory construction, and - typically - the parties each ^{be}propert to rely on the plain

*E five
or
six
CA's
"the
other
way".
Only
CA2
sustains
the Reg.*

language, legislative history, and the structure of the various regulatory statutes.

Other pertinent statutes, in addition to Title IX, are Title VII (the basic anti-discrimination law), Title VI, The Equal Pay Act (equal pay for women), and Title XIX.

Petitioners' principal arguments are that Sections 901 and 902 are directed at beneficiaries (e.g. ^{persons attending} the schools or colleges) of federally financed education programs, and not at their employees; ~~and~~ that 902 speaks in terms of "particular programs or parts thereof that receive federal aid", and that therefore the regulation^s with respect to all employees of a school or college are not authorized.

The key language of Section 901 parallels directly, as the Court noted in Cannon, Section 601 of Title VI of the Civil Rights Act of 1964. The legislative history of Title VI makes clear that Section 601 thereof was not intended to cover employment discrimination.

Respondents also argue that the federal government and individual employees have other means to remedy employment discrimination by educational institutions, notably Title VII and the Equal Pay Act, functioning particularly through EEOC and the Secretary of Labor.

The Solicitor General's Brief

Apart from construing the language of Section 901 and 902 differently from petitioners, the SG relies heavily on his reading of the legislative history.

He notes the similarity between Sections 901 and 902 of Title IX to Title VI, but emphasizes that Title VI includes a provision (Section 604 thereof) that expressly excludes from its coverage "employment practices", subject to certain exceptions. The SG points out that similar language was proposed and rejected with respect to Title IX, quoting statements made on the Floor by Senator Byah.

The parties differ as to the significance of the rejection of a provision similar to Section 604. See petitioner's brief. Petitioners counter with the argument that the Justice Department propose^d language for Title IX that would have expressly included employment discrimination in the coverage of Section 901, a proposal that was rejected.

Some very tentative thoughts: It seems to me that the language itself rather strongly favors the petitioners. At best, it is ambiguous, and in view of other specific legislation authorizing employment regulation one normally would not construe ambiguous language as adding a further layer of federal oversight.

With EEOC and the Labor Department both having extensive authority over discrimination in employment, there appears to be no need to add a third regulatory agency. I would be reluctant to construe Sections 901 and 902 to this effect unless my clerk can persuade me rather clearly that this was congressional intent.

Finally, the decision of CA 2 stands alone against an impressive array of other federal court decisions. I would like to read one of the best of these decisions.

Handwritten note:
I am not
happy with
the decision of the
Supreme Court
in this case.

2.

With EEOC and the Labor Department both having extensive authority over discrimination in employment, there appears to be no need to add a third regulatory agency. I would be reluctant to construe Sections 901 and 902 to this effect unless my clerk can persuade me rather clearly that this was congressional intent.

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Teacher ~~not~~ not
reemployed after pregnancy
superior job arrangements

December 8, 1981

LFP/vde

80-986 North Haven Board of Education v. Bell

MEMORANDUM TO FILE: This is a brief memo dictated merely to refresh my memory as to the issues in these two consolidated cases, presenting the same question. I will want to take a closer look at the briefs, certainly before going to Conference.

Petitioners are two Connecticut school districts that receive federal financial assistance, and therefore are subject to the provisions of Title IX. The pertinent provisions of Title IX are:

Section 901 provides that "no person ... 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."

Section 902 provides, in substance, that each federal department or agency empowered to grant federal assistance is authorized to promulgate regulations to effectuate Section 901.

To implement Section 901, HEW issued regulations prohibiting sex discrimination in the employment practices of federally assisted education programs (1977).

After complaints were filed of discrimination in employment - by a tenured teacher who had taken a one year maternity leave and a former employee who had been given "inferior job assignments" and who was fired.

HEW notified petitioners that it had received complaints, and requested "information concerning their policies on hiring, leaves of absence, seniority, and tenure." The school districts instituted these consolidated suits, seeking a declaratory judgment that Title IX confers no authority on HEW to regulate employment practices. The DC agreed with respondents and invalidated the employment practice regulations. CA 2, however, reversed.

Petitioner's Argument

Their brief asserts there have been 17 decisions declaring subpart E of the Reg (herein referred to as the Reg) illegal, with only CA 2 holding otherwise. If the cases are correctly cited (Pl3), at least a half a dozen of these decisions are CA's.

The case is one of statutory construction, and - typically - the parties each proposit to rely on the plain

language, legislative history, and the structure of the various regulatory statutes.

Other pertinent statutes, in addition to Title IX, are Title VII (the basic anti-discrimination law), Title VI, The Equal Pay Act (equal pay for women), and Title XIX.

Petitioners' principal arguments are that Sections 901 and 902 are directed at beneficiaries (e.g. the schools or colleges) of federally financed education programs, and not at their employees; and that 902 speaks in terms of "particular programs or parts thereof that receive federal aid", and that therefore the regulation with respect to all employees of a school or college are not authorized.

The key language of Section 901 parallels directly, as the Court noted in Cannon, Section 601 of Title VI of the Civil Rights Act of 1964. The legislative history of Title VI makes clear that Section 601 thereof was not intended to cover employment discrimination.

Respondents also argue that the federal government and individual employees have other means to remedy employment discrimination by educational institutions, notably Title VII and the Equal Pay Act, functioning particularly through EEOC and the Secretary of Labor.

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Some very tentative thoughts: It seems to me that the language itself rather strongly favors the petitioners. At best, it is ambiguous, and in view of other specific legislation authorizing employment regulation one normally would not construe ambiguous language as adding a further layer of federal oversight.

With EEOC and the Labor Department both having extensive authority over discrimination in employment, there appears to be no need to add a third regulatory agency. I would be reluctant to construe Sections 901 and 902 to this effect unless my clerk can persuade me rather clearly that this was congressional intent.

Finally, the decision of CA 2 stands alone against an impressive array of other federal court decisions. I would like to read one of the best of these decisions.

Title IX - Validity of Reg construing § 501
as authorizing HEW to regulate employment
practices.

Mr. Krell (Pett ~~North~~ North Haven School Bd)

Title IX applies to student beneficiaries.

Title VII & Equal Pay Act were amended in 1971 (?) to protect female employees.

Title IX was enacted to protect student beneficiaries

When Congress has dealt with employment, exceptions have been included.

Sections 906 & 909 of Title IX were the provisions that amended Title VII & E/Pay Act to protect employment.

(The ^{old} Regs cannot be withdrawn w/o Justice Dept approval)

Knag (Trembule Bd of Ed)

No threat of cut-off of funds involved at all.

Neither TT was a recipient of funds.

Lee (SG)

Title VI excepted employment
& IX does not.

→ Leg. history is "crystal clear"
- it occurred ~~all~~ on one
day & by Sen. Bayh. This is
the only view expressed.

Position of House was to contrary
- but it accepted Sen. version.

Title IX has 3 sections not
in Title VII.

Agrees there is a "program
specific" statute - but this
is not true here. Agrees with
CA5 - but not here. CA5
is sound.

Ms. Hodgson (Resp)

Here client also has filed a Title VII
claim. All she wants is reinstatement
& back-pay. This is all she can get
under either Title.

Not surprising, she thinks CA2 is right

K Nag (reply)

Several cts have held no back-pay
under IX

SG erred in quoting former leg. hist.

(Check transcript of
what K Nag said. He
indicated that Lee read
only part - & lifted
sentences from context)

The Secretary's n.

(Summary out-line my views)

1. Title VII covers the claims that provoked HEW to act under its Reg. SG concedes.

2. SG's arguments: He says.

(i) "Plain language" of IX covers discrimination in employment.

SG stands alone. Four CAs (CA 1, 6, 8 & 9) + several DC's disagree.

CA 5 does not address the language in this context. It would invalidate this Reg.

It is plain that Rex Lee is wrong.

(ii) Leg. Hist (Bayle) also clear.

But history - such as it is is quite ambiguous.

3. My views

(i) As to "plain language" read CA 1

(ii) No need to resort to leg hist, but Rex Lee did not represent it fairly. As CA 1 & other CAs read it, the "sketchy" leg. hist. ^{comports} with language.

Title VII
is
preclusive.

(iii) Absent ~~clear~~ explicit intent, can't assume Congress intended to vest two Depts of Govt with this auth.
SG agrees no expertise

Many

1. Compare the language as
to ~~proscribe~~ proscribing discrimination
in Title VI, VII, IX & Equal Pay

2. leg. history - was SG fair?

3. SG statement that "no
ambiguity" in operative section
901 of Title ~~IX~~ IX.

What have other courts said?

Seattle University v. HEW, 621 F.2d 992 (CA9 1980), cert granted, 449 U.S. 1009 (1980) (being held for this case; probably moot) (CA9's description of rationale of other CA's, which it adopts).

The first of these CAs to reach the issue was the CA1 in Islesboro School v. Califano, 593 F. 2d 424 (CA1) (Coffin, Campbell, & Bownes), cert denied, 444 U.S. 972 (1979) (book attached) (good opinion). The court began with the language of the statute:

"on its face, [the statute] is aimed at the beneficiaries of the federal monies, i.e., either students attending institutions receiving federal funds or teachers engaged in special research being funded by the government. The section does not include employees within its terms. This reading of the plain language is buttressed by an examination of the specific exemptions mentioned in the statute. They all deal with student admissions or activities of a student nature, Nothing in the statute suggests that it should be construed to extend to employees qua employees (as opposed to their status as recipients of specialized federal funding for a special activity or research)." Id., at 426.

The next CA to consider the issue was the CA8 in Junior College v. Califano, 597 F. 2d 119 (CA8), cert denied, 444 U.S. 972 (1979). The First Circuit's decision in Islesboro is quite good, and the CA8 simply adopted it. After doing so, it remarked that "[t]he First Circuit accurately noted that the plain language ... does not include employment discrimination." Id., at 121.

The third CA was the CA6, in Romeo Community Schools v. HEW, 600 F. 2d 581 (CA6), cert denied, 444 U.S. 972 (1979). With regard to HEW's construction of Title IX, the court stated:

"We find HEW's construction of Title IX to be strained. It seeks a reading of ... 'no person shall be discriminated against, on the basis of sex, in the operation of any educational institution receiving federal financial assistance.' However, as actually written, the statute is not nearly so broad. The words 'no person' are

meh 12/10/81

To: Mr. Justice Powell

From: Mary

In Re: No. 80-986, North Haven Board of Education v. Bell, et. al.,
& Trumbull Board of Education v. U.S. Department
of Education & Potz

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I. THE STATUTES

1-4. The language

5. As drafted and as it originally passed both houses,
Title VI would have amended both Title VII and the Equal
Pay Act

*(This five memo
is in response
to my request
- made only this AM!)*

II. HAVE COURTS CONSIDERED THE STATUTORY LANGUAGE UNAMBIGUOUS
SUPPORT FOR THE REGULATIONS?

III. LEGISLATIVE HISTORY: Was SG fair?

I. THE STATUTES

1. Title VI (Section 601).

"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."
42 U.S.C. §2000d.

2. Title VII (Section §703(a)).

"It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, religion, sex, or national origin."

3. Title IX (section 901).

I identical with VI except "sex"

"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 educational program or activity receiving financial assistance, except that" §901,
20 U.S.C. §1681(a).

4. The Equal Pay Act (29 U.S.C. §206(d)).

"Prohibition of sex discrimination.

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for the equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex:
Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

5. As drafted and as it initially passed both houses, Title IX would have amended both Title VII and the Equal Pay Act. Title VII banned discrimination on the basis of sex from the very beginning, but §701(b) defined employer as not including a state or political subdivision with respect to its employees in educational institutions. There was also an exemption from Title VII coverage for all persons employed in all educational institutions.

The Equal Pay Act also banned discrimination on the basis of sex, but it did not apply to executive, administrative, or professional employment.

As originally drafted, Title IX of the Higher Education Act of 1971 included sections amending both Title VII and the Equal Pay Act, making both applicable to professionals employed at educational institutions. The amendments to Title VII were also included in the Civil Rights Act of 1972, which was enacted first. The amendments to Title VII were in the Higher-Education-Act bills all the way through Conference, and were dropped from the final codification only because the Civil Rights Act of 1972 was already law.

II. HAVE COURTS CONSIDERED THE STATUTORY UNAMBIGUOUS SUPPORT FOR THE REGULATIONS?

1. Four CAs (CA1, CA6, CA8, & CA9) think that the statutory language does not support the regulations. Four CAs have rejected the Sec'y's regulations because ~~they~~ "neither the plain language of Title IX nor the legislative history support HEW's contention that Congress intended that statute ^{to} reach employment discrimination."

CA9's description of holding in other circuits

Seattle University v. HEW, 621 F.2d 992 (CA9 1980), cert granted, 449 U.S. 1009 (1980) (being held for this case; probably moot) (CA9's description of rationale of other CA's, which it adopts).

The first of these CAs to reach the issue was the CA1 in Islesboro School v. Califano, 593 F. 2d 424 (CA1) (Coffin, Campbell, & Bownes), cert denied, 444 U.S. 972 (1979) (book attached) (good opinion). The court began with the language of the statute:

"on its face, [the statute] is aimed at the beneficiaries of the federal monies, i.e., either students attending institutions receiving federal funds or teachers engaged in special research being funded by the government. The section does not include employees within its terms. This reading of the plain language is buttressed by an examination of the specific exemptions mentioned in the statute. They all deal with student admissions or activities of a student nature, Nothing in the statute suggests that it should be construed to extend to employees qua employees (as opposed to their status as recipients of specialized federal funding for a special activity or research)." Id., at 426.

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"We find HEW's construction of Title IX to be strained. It seeks a reading of ... 'no person shall be discriminated against, on the basis of sex, in the operation of any educational institution receiving federal financial assistance.' However, as actually written, the statute is not nearly so broad. The words 'no person' are

5.
modified by later language which clearly limits their meaning, The concern of this particular statute is not with all discrimination against persons in any way connected with educational institutions which receive federal funding. Rather, it reaches only those types of disparate treatment which manifest themselves in exclusion from, denial of benefits of, or otherwise result in discrimination on the basis of sex 'under any education program or activity receiving Federal financial assistance' Unless the discrimination relates to a program or activity which receives federal funding, it is not prohibited by §1681."

The fourth CA, the CA9, in University v. HEW, 621 F.2d 992 (CA9 1980), cert granted, 449 U.S. 1009 (1980) (being held for this case; probably moot) simply reported and adopted the rationales of the other CAs after noting that the others had concluded that "neither the plain language of Title IX nor the legislative history support HEW's contention that Congress intended that statute reach employment discrimination." (As quoted in opening paragraph).

2. CA5 expressed no view on question. The only other CA to have considered the case is the CA5, in Dougherty County School System v. Harris, 622 F. 2d 735 (CA5 1980), cert pending No. 80-1023 (hold for this case). The CA5 held that the current regulations exceed the Sec'y's authority, but noted that the Sec'y would have authority to promulgate regulations applicable to employees employed in particular programs receiving federal funds. The CA did not directly address the clarity of the statutory language, though it did base its construction on the fact that a teacher discriminated in employment could be regarded as "subjected to discrimination under" a program receiving federal financial assistance. Id., at 738.

The CA5 did stress that it was "according great latitude to the Secretary." Id., at 737. And the CA5 also stressed that the

courts should accord deference to the Sec'y's interpretation. This emphasis suggests that the CA5 did not read the statute as unambiguous support for the regulations. If the clear language of the statute supported the regulations, reliance on broad agency discretion and notions of deference would not have been necessary.

The SG, at oral argument, said that he agreed with the CA5 decision and thought it was a good opinion. Not only did the CA5 overrule the current regulations because they are not program-specific, the CA5 by no means indicated that even the more limited regulations it would consider valid (applying to employment of teachers in federally funded programs) would be valid because mandated by the statute. Indeed, a reading of the CA5's decision suggests that those regulations would most likely be sustained by the CA5 only as a valid exercise of authority on the part of the Sec'y. The SG has conceded in n.26 at 37 that, were the Sec'y to exercise any discretion, he would rescind the regulations. This Court cannot, therefore, sustain the regulations on the basis the CA5 would presumably use in upholding the more limited regulations it indicated it would consider valid.

III. LEGISLATIVE HISTORY: Was SG fair?

1. Title VI. I think the SG's treatment of this point was very unfair. He made two main points. (i) The inclusion of §604 (Title VI does not apply to employment) creates a strong presumption that Title IX must since it does not include a similar §904. (ii) The House version contained a §904 and it "receded" at Conference

indicates that the House lost on the substantive question of whether Title IX applied to employment.

The SG agrees that §604 was meant to state the obvious. Its absence from Title IX should not, therefore, matter. I think he is wrong in stating that the inclusion of a clarification in one section means that that section is substantively different from another equivalent section lacking the clarifying language. His rigid rule does not recognize the sloppy way in which legislation is drafted--as the cut-and-paste job in the case at bar illustrates.

As I mentioned when we talked, the fact that the House "receded" hardly means the House recognized that it had lost on a substantive point. It simply means that the House agreed not to fight to retain §904. That concession should not mean much given that §604 was never regarded as necessary and §904, as then drafted, clearly had to come out of the bill since it was inconsistent with the amendments to Title VII and the Equal Pay Act which were within Title IX at the time of the Conference, see discussion in section I.2 supra. Given that the provision was apparently regarded as unnecessary (§604 was seen as unnecessary), the easiest solution would have been to simply drop it rather than re-draft it so as to apply to only parts of Title IX. All this is clear from looking at the bill before the Conference and the history of §604, even without relying on the corroborative testimony given by Congressman O'Hara at the later hearing.

2. The debates. The SG was no fairer here. He began by noting that two parts of Title IX ^{area} being discussed: (i) the amendments to Title VII and the Equal Pay Act (EPA) and (ii) Title

IX ~~it~~self (§901). He then stated that any portion of the legislative history--i.e., any specific reference to employment--might apply to (i) only or (ii) only or both. He then presented his two propositions: (a) no where was there any suggestion that Title IX only applied to employment through the amendments to the EPA and Title VII; and (b) there are three Bayh statements that are only consistent with coverage of employment by Title IX.

(a). No evidence employment only covered by EPA and Title VII amendments. *Equal Pay* This is certainly not true. Senator Bayh himself stated:

"I might point out that, so far as involvement or supervision by the Secretary of HEW is concerned, we really are not doing anything to the private school that is not now in the law under title VI of the 1964 civil rights Act, relating to discrimination in other areas.

"We are saying that the power which now resides in the Federal Government over private institutions shall be extended. We are only adding the 3-letter word 'sex' to existing law." 117 Cong. Rec. 30408 (1971) (Senator Bayh).

you In addition, there are many descriptions of the legislation which tacitly assume that employment is covered by the EPA and Title VII amendments rather than §901. It is true that these descriptions do not come out and state "and employment is covered only under §901, but such a broad statement would not really be true. All concede that §901 would cover employment when §601 would cover employment--e.g., in a work-study program or a program of grants for research. In the general descriptions of the legislation, even that given by Senator Bayh in the prepared portion of his remarks, the implicit understanding is that direct coverage of employment is under Title VII and EPA not Title IX:

"Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI. 118 Cong. Rec. 5807 (1972) (emphasis added) (Bayh).

Thus, in presenting the summary of §901 of Title IX, Bayh indicated that his amendment was equivalent to Title VI and would end discrimination against "the beneficiaries of federally assisted programs and activities." Senator Bayh then, in a separate part of this statement, discussed the changes in Title VII and the EPA under the heading "B. Prohibition of Education-Related Employment Practices." Id., at 5808. The relevant section of the House Report contains a similar breakdown. H. R. Rep. No. 554, 92d Cong., 1st Sess. 51-51 (1971). As the CAL noted in discussing Bayh's summary, of the bill:

"This breakdown demonstrates that the basic provisions dealing with admissions and services at educational institutions, now embodied in Title IX, were separate and distinct from the provisions amending Title VII and the Equal Pay Act, both of which dealt with employment." Id., at 428.

(2) Three statements demand that Title IX cover employment? There are three portions of Bayh's remarks which, if the words are parsed like a statute, indicate that §901 applies to employment. One of them--the prepared one!--is clearly confused. It uses the wrong section numbers in referring to the act and in one sentence indicates that §901 will apply to employment and in the next states that the provision has "been tested under title VI of the 1964 Civil Rights Act for the last 8 years so that we have evidence of [its] effectiveness and flexibility." 118 Cong. Rec.

5807 (1972). Bayh did not have a good grasp of the details of the statute.

Looking at the debates as a whole, I agree with the CA1. The remarks on which the SG would place ~~place~~ such reliance

"were the product of the imprecision of oral discussion rather than a reflection that the Act intended section 901 of Title IX to embrace prohibitions against sex discrimination in employment. This was reserved for the amended Title VII and Equal Pay Act." 593 F. 2d at 428.

Given that Bayh himself told the Congress his amendment would only extend the coverage of Title VI and did so in clear and unambiguous words, the fact that other portions of his statements in the rather confused debate suggest otherwise is far too little in the way of legislative history to overcome the language of the statute and the explicit adoption of Title VI's words, which were not regarded as extending to employment.

North Haven

INFORMATION REQUESTED

1. Description of hiring process
 - a. Persons involved in decision-making (by position); who makes what decisions?
 - b. Copy of established procedures; if not in writing, explain how the process is communicated to the decision-makers and to persons affected by it.
2. Description of criteria applied in hiring process
 - a. Nature, purpose and relative weight of each criterion.
 - b. A copy of written criteria; if not in writing, how are criteria communicated to decision-makers and persons affected.
3. Copy of employment application form for teaching positions.
4. Copy of collective bargain contract(s) covering teachers for period from January, 1976 to present.
5. Copy of all policies relating to granting of leaves of absence.
6. Copy of all policies relating to seniority and tenure.

North Haven was told the charge had been filed and asked to furnish this information. It then brought suit to stop HEW.

meb 12/10/81

To: Mr. Justice Powell

From: Mary

In Re: No. 80-986, North Haven Board of Education v. Bell, et. al.,
& Trumbull Board of Education v. U.S. Department
of Education & Potz

IV. WHAT MATERIALS DID HEW REQUEST FROM THE SCHOOL BOARDS?

1. North Haven. The North Haven Board refused to rehire a tenured teacher who had taken a one-year maternity leave. In the subsequent investigation, HEW asked North Haven to provide specific information concerning its policies on hiring, leaves of absence, seniority, and tenure. A xerox of the request is attached. Rather than respond, North Haven sought an injunction in DC.

2. Trumbull. A former guidance counselor in the Trumbull public schools, Linda Potz, filed a charge that the Trumbull Board gave her inferior job assignments, inferior working conditions, and refused to renew her contract because of her sex. HEW determined that Trumbull had indeed violated Title IX by requiring Potz to type and run errands not required of male counselors, by moving her office to a smaller, poorly heated, and less comfortable space in the gym away from the other counselors, by asking her to change a report showing that she had seen many more students in a given week

that the number seen by her male counterparts, and by not renewing her contract, all on the basis of sex.

The record received by the Clerk's Office does not include the DC proceedings for Trumbull. The briefs give only no description of the HEW investigation, only reporting that Trumbull cooperated up to the point at which it received a letter from HEW demanding Trunbull's agreement to HEW's remedial plan (which included reinstating Potz) under threat of a fund cutoff. At this point Trumbull sought declaratory relief. Without the record from the DC, further details are unavailable.

V. THE EEOC REGULATIONS AND THE SEC'Y'S

There do not seem to be any significant differences between the regulations. Although the Sec'y requires that all pregnant teachers be given unpaid leaves and the EEOC regulation does not, the EEOC regulation provides that an an employer must give such leaves (for disability) unless the policy does not have a disparate impact on one sex and is justified by business necessity. This makes little sense given that only one sex can be subject ot the disability, but, in any event, it seems unlikely that such a policy would be regarded by the EEOC as justified by business necessity in the context of operating a school.

The Chief Justice

Revised

Senate ~~Bayh~~ Bayh's comments are ambiguous at best
SG's position is dead wrong in plain
language & hint.

*9 irrational to say that discrimination
vs a janitor would cut off funds

Justice Brennan

Affirm

Crucial language of 901a is ambiguous
Thus must look to leg. hist & Bayh's
remarks (e.g. with Sen. Pell) make clear intent
to cover employee discrimination.

Justice White

Affirm

SG says IX reaches employment only with
respect to programs - as CA 5 held.

Agree with SG & CA 5, & if CA 2's opinion
is broader we should limit it.

Let reach sex discrimination in program
supported by Govt.

Justice Marshall

Affirm

Agrees with WJB

Justice Blackmun

Affirm - but on def. grounds
CA2's opinion identifies leg. hint that
supports its view that Act covers discrimination
~~the~~ 901 & 902 are program specific
& CA2 overlooked. Other CA construed
Act too strictly.

CA5 is right.

Rex Lee defends op. of CA2 & at
same time tells us CA5 is right

Justice Powell

Reverse

See my notes

Justice Rehnquist

Aff.

It is not implausible to read
901/482 as applying to program
CAS is right.

Justice Stevens

Aff.

Section 604 was added to Title VII, & Title IX
doesn't have a comparable provision.

Title VII & IX provide dif. remedies.

Agree with CAS's reasoning but not
its subj.

Justice O'Connor

Aff'm

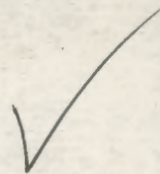
Agree with CAS - must
be program specific

20 100 normal hand
Mary -

Ask library to ascertain
how many public school districts
there are in U.S.

In Va. there are over 100

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

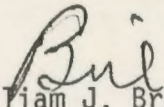
December 11, 1981

Dear Chief,

RE: No. 80-986 North Haven Bd. of Ed. v. Bell

Harry has agreed to undertake the opinion for
the Court in this case.

Sincerely,


William J. Brennan, Jr.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 11, 1982

may

RE: No. 80-986 North Haven Board of Education
v. Bell

Dear Lewis:

Would you be willing to take on a dissent in this
case?

Regards,

WRBZ

Justice Powell

ed
e in re.
Nony w 50
v r i.

February 16, 1982

80-986 North Haven Board of Education v. Bell

Dear Chief:

I will be glad to try a dissent, although it will
be some time before I get to it.

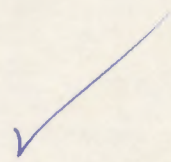
Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



March 16, 1982

Re: 80-986 - North Haven Board of Education
v. Bell

Dear Harry:

Please join me.

Respectfully,

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 16, 1982

Re: No. 80-986 - North Haven Board of Education v.
Bell

Dear Harry:

Please join me.

Sincerely,

T.M.
T.M.

Justice Blackmun

cc: The Conference

March 16, 1982

80-986 North Haven Board of Education v. Bell

Dear Harry:

I am in dissent in this case, and intend to write.
It will take some time.

Sincerely,

Justice Blackmun

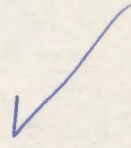
lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 17, 1982

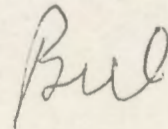


RE: 80-986 North Haven Board of Education v. Bell

Dear Harry:

I agree.

Sincerely,



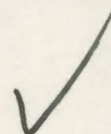
Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 22, 1982



Re: 80-986 - North Haven Board of
Education v. Bell

Dear Harry,

Please join me.

Sincerely yours,

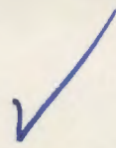
Justice Blackmun

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 22, 1982



Re: No. 80-896 North Haven Board of Education v. Bell

Dear Harry:

Although I find your opinion generally persuasive, I have two related concerns. The first is footnote 25, which suggests that the Department may investigate complaints of discrimination in programs not receiving federal funds. The second concern is footnote 29, which states that Title IX's provisions may be applicable "when employment discrimination has an adverse effect on federally funded programs or the beneficiaries of such programs, or when federal funds are not used directly to subsidize the institution's discriminatory practices but release other funds that are then used in a discriminatory fashion." The issues raised in these two footnotes were not presented to this Court for decision, and I am reluctant to join an opinion that effectively decides these issues without the benefit of an underlying record and full briefing.

Because neither of these footnotes is necessary to your holding, would you consider deleting them from the opinion?

Sincerely,

A handwritten signature in cursive script, appearing to read "Sandra", is written below the word "Sincerely,".

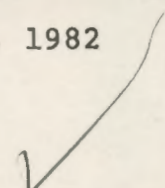
Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 25, 1982

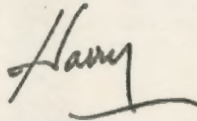


Re: No. 80-986 - North Haven Board of Education v. Bell

Dear Sandra:

This is in response to your letter of March 22. I do not think that the two footnotes "effectively decide" the issues. I thought, instead, that they made clear the limits of the opinion. These footnotes, however, apparently disturb you, and I therefore shall eliminate them. A new draft will be around shortly.

Sincerely,



Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 29, 1982

No. 80-986 North Haven Board of Education
v. Bell

Dear Harry,

Please join me in the third draft of your
opinion.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

MEMORANDUM

TO: Mary DATE: April 7, 1982
FROM: Lewis F. Powell, Jr.

80-986 North Haven

I have read with interest the first draft of your dissent. It is quite persuasive.

Part I is excellent.

Part II, addressing the legislative history, is a bit difficult to follow. This is understandable because the history itself is a bundle of ambiguities, and in reading both the Court's opinion and your draft I find it difficult to follow the references and interrelationship Titles VI, VII and IX, and the sections thereof. My suggestions below, therefore, are tentative.

I have dictated the attached rider as a possible introductory paragraph in Part II. The present first sentence in II, is not clear to me. Do we lose anything by omitting the first paragraph altogether, and commencing discussion of the legislative history with the paragraph that begins at the bottom of page 6?

On page 7, you make a good point in reliance on Chairman O'Hara's explanation of the background of Title IX. But I find the sentence beginning seven lines from the bottom of page 7, unclear to one without a detailed familiarity with all of this. I am sure you had in mind that the reader would be familiar in detail with the Court's

opinion, but I think it best to make our dissent clear on its face. Therefore, we should identify or describe the Bayh amendment before referring to it. Moreover, it is not entirely accurate to say that §904 "stated that the entire Bayh amendment did not apply to employment . . ." This requires some rephrasing, as a statute does not speak in terms of a Senator's amendment.

I have suggested, in a rider, language changes in the last paragraph of Part II.

Unless you have done so, you might take a look at the amicus brief filed by the Equal Employment Advisory Council. Although I have not reread it, my impression is that it was quite helpful on the legislative history.

Finally, I have suggested - by a rider - a somewhat different approach to our conclusion in Part III. You should take a close look at my language. I have not checked the accuracy of my statement.

L.F.P., Jr.

lfp/ss 04/07/82

MEMORANDUM

TO: Mary

DATE: April 7, 1982

FROM: Lewis F. Powell, Jr.

80-986 North Haven

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Finally, I have suggested - by a rider - a somewhat different approach to our conclusion in Part III. You should take a close look at my language. I have not checked the accuracy of my statements.

L.F.P., Jr.

ss

April 8, 1982

NORTH GINA-POW

To: Mary
From: LFP, Jr.
Subject: 80-986 North Haven Bd. v. Bell

We mentioned the absurdity of thinking that Congress intended to add a third statute on sex discrimination. We might add a footnote that emphasizes some of the consequences of having different statutes, administered by different agencies, regulating the same private action. At the government level, there is a needless duplication of the bureaucracy. In this case, for example, the Department of Education must maintain a staff of employees to enforce the anti-discrimination responsibility. These will be employees wholly unrelated to the purpose of the Department of Education, and duplicative - at least to some extent - to the large staffs of EEOC and the Department of Labor. From the viewpoint of the educational institutions, they will be subject to regulation and oversight by different departments of government that may, or may not, have the same regulations and standards, require the filing of the same reports, etc.

Our footnote also could develop, in more detail than my brief sentence or two, the contrast between the elaborate

provisions of Title VII and the absence of comparable provisions in the Education Act, the contrast in remedies, and - if I am right about it - the unwisdom and inequity of putting off funds (or the threat thereof) because a single person files a discrimination charge. And what if that individual simultaneously moves under Title VII and the Equal Pay Act).

I may be exaggerating these problems. I do not recall that they were addressed particularly in the briefs. In view of your greater familiarity with the statutes, what do you think?

LFP, Jr.

April 8, 1982

NORTH GINA-POW

To: Mary
From: LFP, Jr.
Subject: 80-986 North Haven Bd. v. Bell

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I may be exaggerating these problems. I do not recall that they were addressed particularly in the briefs. In view of your greater familiarity with the statutes, what do you think?

LFP, Jr.

lfp/ss 04/15/82

MEMORANDUM

TO: Mary DATE: April 15, 1982
FROM: Lewis F. Powell, Jr.

80-986 North Haven

I have read your revised draft of 4/14, and think we are quite close to having a strong and well written dissent.

I have done some light editing, and dictated three short riders for Part II, with no intent to change its substance. I think you have written Part II quite persuasively.

My only substantial revisions are in Part III, where you largely adopted draft language that I suggested. Thus, I was rewriting to some extent - and trying to improve - what I previously gave you.

You will note in the margin on page 13 my suggestion that the paragraph there be moved to an appropriate place in Part II, as it relates directly to the legislative history.

I have not tried to sort out the footnotes in my revisions of Part III, as you can do that better than I.

Do not hesitate to edit my Part III revisions if you think this desirable. I want your judgment particularly as to whether you think some of my language overstates our argument.

On page 13 of his brief, the Solicitor General refers to administrative remedies under Title IX in addition to fund termination. Are any of these relevant as compared to the elaborate Title VII remedies?

On minor point: The draft now refers inconsistently, perhaps, to HEW and to Department of Education. Perhaps we could put a note at the outset to the effect that the relevant department of government when Title IX was enacted was HEW, and that its responsibilities under Title IX were assumed by the DOE when it was created. We could say that where appropriate references to HEW should be read as meaning Department of Education from and after it was created.

When you have incorporated my editing and changes, unless you wish me to read any further changes, I suggest that you go to a printed Chambers draft. It then can be read by your co-clerks as well as by you and me.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 22, 1982

Re: No. 80-986 North Haven Board of Education v. Bell

Dear Lewis:

Please join me in your dissenting opinion.

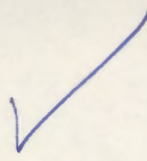
Sincerely,

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE



April 23, 1982

Re: No. 80-986 - North Haven Board of Education v.
Bell, Secretary, Dept. of Education

MEMORANDUM TO THE CONFERENCE:

I am not ready on this case for Wednesday release. It was listed as "tentative" in my earlier memo.

Regards,

cc: Mr. Stevas
Mr. Goldstraw

April 29, 1982

PERSONAL

80-986 North Haven v. Bell

Dear Chief:

When we mentioned North Haven earlier this afternoon, I had totally forgotten that on February 11 you assigned to me the task of writing a dissent.

You and I were the only dissenters at Conference, and I have assumed that you were still with me. Bill Rehnquist voted with the majority at Conference, but he was persuaded by my dissent, and has joined it. If there are statements in the dissent that give you difficulty, I would be happy to discuss them.

It may be when we were talking that there was confusion as to Hydrolevel, another CA2 case in which I circulated a strong dissent from Harry's Court opinion and rather hoped you would join me. In Hydrolevel you voted tentatively "the other way" at Conference.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

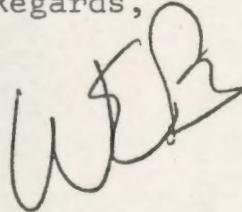
April 29, 1982

Re: 80-986 - North Haven Board of Education v. Bell

Dear Lewis:

Please join me in your dissenting opinion in this case.

Regards,

A handwritten signature in black ink, appearing to be 'W. Powell', written over the word 'Regards,'.

Justice Powell

Copies of the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

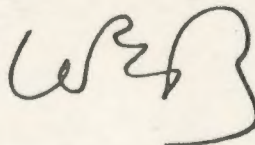
April 29, 1982

Re: No. 80-986 - North Haven Board of Education v. Bell

Dear Harry:

I continue to have problems with the breadth of the opinion and I will try to have a concurring draft out early next week when the "crunch" eases up.

Regards,



Justice Blackmun

Copies to the Conference

meb 05/04/82

Mary - Try drafts of ^{brief} responses to
n 10 & n 15. After we see
how a response looks, we can
decide whether to use it.

To: Mr. Justice Powell

From: Mary

In Re: No. 80-986, North Haven v. Bell

In second H of n 26 (p 24), H AB
& keep try to answer our Part III. They
say ~~but~~ the factors we consider
are not relevant to leg. intent.
Are not there cases
that say the need for leg. (i.e. the
problem - e.g. sex discrimination is
relevant? And cases that say
I don't think the new version of North Haven touches us. I
would not add anything in response because I think any response
we must give a "common sense"
would only detract from the strength of our arguments. (Their new
meaning to ambiguous leg. action?)
circulation and our dissent are attached.)

The changes they make that you might want to respond to are
footnotes 10 and 15. Note 10 unfairly uses our argument about the
ease with which the statute could have been written more clearly and
uses it to buttress their reading by acting as if the statute only
consists of the word "person." (if you want, we could make this
point in a footnote.)

Note 15 tries to save one of their arguments based on one
of Senator Bayh's statements by arguing that the inclusion of §1005
in the particular sentence quoted was inadvertant (on the part of
the Senator). We could add a note stating that the ambiguous
references to employment discrimination and Title IX could equally
well be inadvertant (as the CAs have found) given that all this took
place on the floor and it is clear that Senator Bayh was confused

you

about the exact scope of the various provisions of his amendment. In other words, there is no evidence to tell us which parts of his remarks were inadvertant.

But I would not respond to this argument at all because its weakness is apparent on its face. The Court is relying almost entirely on three statements, none of which is free of ambiguity. If parts are also "inadvertant," one would think little weight should be placed on the statements in the absence of any more concrete evidence of which parts are inadvertant.

meb 05/10/82

To: Mr. Justice Powell

From: Mary

In Re: Suggested responses in No. 80-986, North Haven v. Bell

1. Suggested new footnote to be called at end of first ¶ in § III, in response to last ¶ of n. 26 of Court opinion, at 24.

The Court maintains that by considering these factors, we "second-guess" Congress, substituting our view for that of Congress. See n. 26, ante at _____. But we ordinarily presume that Congress acts in a reasonable manner. See xxxxxxxxxxxxxxxx (cite to an opinion by Justice Stewart that states this--the library knows that it exists, and we should get the cite tomorrow when Steve Parken returns). This is a traditional rule of statutory construction based on the presumption that Congress, like other legislative bodies, usually does not act unreasonably in enacting legislation. See 2A C. Sands, Sutherland Statutory Construction, §456.12, at 38 (4th ed. 1973). Any ambiguity in the statutory language--such as the Court apparently conceded, ante at ____, should be resolved in light of this presumption of reasonableness.

Any argument that the statute unambiguously supports the Court's position--and consideration of the reasonableness of various interpretations of the statute therefore should be avoided in

deference to a decision made by Congress--would be difficult given the history of the issue at the appellate level. Twelve judges on 4 Courts of Appeals thought that the plain language of the statute indicated that the statute did not ban employment discrimination per se. See text at ____-____ and n. 6, ante. Six judges on two Courts of Appeals thought the language of the statute ambiguous in at least some respects. See n. 6, supra. And, although 18 judges considered the statute language at the appellate level, not a single one thought that the statute unambiguously banned employment discrimination per se in federally funded programs.

2. Suggested addition (new ¶) at end of n. 12, at 9, in response to ^{n. 15 at 13} ~~last ¶ of 26 at 24~~ of the ^u Cort opinion..

The majority discounts this point because the inclusion of §1005 in this statement was "inadvertant." There is, of course, no firm proof that such was the case. Perhaps the Senator only included the statement about employment discrimination being banned in federally-funded programs because, under Title VII as amended by §1005 of the Bayh Amendment, such discrimination would now be banned in all educational programs, including federally-funded ones.

Moreover, if parts of the Senator's remarks were inadvertant, how are we to know which ones were intended and which inadvertant? Perhaps the inadvertant statements were those that the Court reads as implying that employment discrimination per se is banned by Title IX. Most of the Courts of Appeals considering the

question have agreed with the Court of Appeals for the First Circuit's assessment of the legislative history:

"While it is true that there were occasional lapses during the discussions, wherein one of the senators would telescope the sections [of the Bayh Amendment], thereby suggesting that employment was to be covered under ... Title IX, a careful examination of the debates ... lead[s] us to conclude that these were the product of the imprecision of oral discussion rather than a reflection that the Act intended section 901 of Title IX to embrace prohibitions against sex discrimination in employment." Islesboro School Committee v. Califano, 593 F. 2d 424, 428 (1979).

See also, e.g., Seattle University v. HEW, 621 F. 2d 992, 995, cert. denied sub nom., Seattle University v. HEW, 444 U.S. 972 (1972). In Romeo Community Schools v. HEW, 600 F. 2d 581, 585, cert. denied, 444 U.S. 972 (1979), the Court of Appeals for the Sixth Circuit concluded that the legislative history actually argued against extending Title IX to prohibit employment discrimination-- noting, for example, that Senator Bayh had commented that the remedies under Title VII are "extremely effective." Id., at 585 (quoting 118 Cong. Rec. 5807 (1972)).

3. Suggested new footnote at end of first sentence on p. 12, responding to n. 10 of the Court's opinion.

The Court misrepresents our point in stating that the statute should be construed to cover employment discrimination because Congress could so easily have use a word other than "person." See n. 10, ante. The statute does not consist solely of the word "person," nor does it proscribe "persons." Rather, it prohibits certain form of discrimination against persons, and the

question presented is whether employment discrimination per se is one of the kinds of discrimination prohibited by Title IX.

502

[illegible]

L.F.P.

4/6

See my
memo of
4/7

DISS MARYB-POW

meb 04/06/82

DRAFT: NO. 80-986, North Haven Board of Education v.
Bell, et. al.,
& Trumbull Board of Education v. U. S.
Dept. of Education & Potz

POWELL, J., dissenting.

Title IX of the Education Amendments of 1972, 20
U.S.C. §1681 et seq., prohibits discrimination on the
basis of sex in education programs and activities
receiving federal funds. Pursuant to this provision, the
Department of ^{Health, and Welfare (HEW)} Education ^{in 1975} has promulgated regulations
prohibiting discrimination on the basis of gender in
employment by fund recipients. 34 C.F.R. §106.51(a)(1).

Today, the Court upholds the validity of these
regulations, relying on the statutory language, its
legislative history, and several post-enactment events.

*Mary - The Briefs
are HEW - as it promulgated the Regulations - 9 believe*

Because I believe the Court's interpretation is neither consistent with the statutory language nor compelled by its legislative history, I dissent.¹ ?

I

Although the majority begins with the language of the statute, it quotes the relevant language in its entirety only in the opening paragraphs of the opinion. In the section considering the statute's meaning, the Court quotes two words of the statute and ~~carefully~~ paraphrases the rest of the relevant language, thereby suggesting an interpretation actually at odds with the language used in the statute. Thus, according to the Court, "[s]ection 901's broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students.". Ante, at ____.

This is not at all what the statutory language provides.

¹Even the majority states that the post-enactment events it discusses only "lend credence" to its interpretation of the statute. Ante, at ____.

In relevant part, the statute actually states:

"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" §901(a).

A natural reading of these words would limit the statute's scope to discrimination against those who are enrolled in, or the beneficiaries of, programs or activities receiving federal funding. It strains the language chosen by Congress to conclude that not only teachers and administrators, but also secretaries and janitors, who are discriminated against on the basis of sex in employment, are thereby (i) denied participation in a program or activity²; (ii) denied the benefits of a program or activity; or (iii) subject to discrimination ^{etc} under an education program or activity. ^{Moreover,} And, ^{although} Congress made no reference ^{whatever} to employers or employees in Title IX, ^{which in contrast to quite language} it has been quite explicit in other statutes regulating employment practices.³

It is noteworthy that not one of the six Courts of Appeals, considering the question before us, has reached the conclusion that HEW's interpretation is supported by the statutory language. The issue was presented first to the Court of Appeals for the First Circuit in Islesboro School Committee v. Califano, 593 F. 2d 424, 426 (CA1),

²I agree with the majority that employees who directly participate in a federal program, i.e., teachers who receive federal grants, are, of course, protected by Title IX. See ante, at ____.

³See, e.g., 42 U.S.C. §2000e-2 (Title VII: "[i]t shall be an unlawful employment practice for an employer--"); 29 U.S.C. §206(d) (Equal Pay Act: "[n]o employer having employees").

cert denied, 444 U.S. 972 (1979), and that decision has been followed by most other Courts of Appeals to consider the question. There, the court concluded that "[t]he language of section 901, 20 U.S.C. §1681, on its face, is aimed at the beneficiaries of the federal monies, i.e., either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government." The court went on to point out that this reading of "the plain language of the statute is buttressed by an examination of the specific exemptions mentioned in the statute," all of which relate to students, not employees. Ibid.⁴ In the next appellate decision, Romeo Community Schools v. HEW, 600 F. 2d 581 (CA6), cert denied, 444 U.S. 972 (1979), the Court of Appeals for the Sixth Circuit rejected the interpretation of the statute ^{now} relied on by ~~the majority~~ ^{this Court,}, noting that "as actually written, the statute is not nearly so broad. The words 'no person' are modified by later language which clearly limits their meaning." The court concluded that the statute "reaches only those types of disparate

⁴The ~~majority~~ ^{Court today} not only finds this point unconvincing, but concludes that the "absence of a specific exclusion for employment among the list of exceptions tends to support the Court of Appeal's conclusion that Title IX does protect employees." Ante, at ____ (citation omitted). I am unable to follow this reasoning. ~~I agree that~~ the absence of employment-related exceptions ~~is not~~ conclusive proof that employment is not within the scope of the statute since Congress may have intended to cover all employment. But I fail to see how that absence affirmatively indicates that the statute was meant to apply to employees. Indeed, if Congress did intend to cover employees, it is anomalous that it did not provide exceptions similar to those in Title VII--for example, Title VII does not proscribe bona fide seniority plans, 42 U.S.C. §2000e-2(h), or preferential employment practices for Indians with regard to establishments operating on or near reservations, 42 U.S.C. §2000e-2(i).

Many-
We don't
refer to
the "majority"

may
not be

treatment" which ^{that} involve discrimination against program beneficiaries.⁵

II

After concluding
 Because the Court concludes that the statutory language "seems to favor inclusion of employees," but the inclusion is not explicit, it next ^{the Court} turns to the legislative history of Title IX. Ante at _____. As noted

⁵The question has also been presented to the Courts of Appeals for the Second, Fifth, Eighth, and Ninth Circuits. In Junior College Dist. of St. Louis v. Califano, 597 F. 2d 119, 121 (CA8), cert. denied, 444 U.S. 972 (1972) the Court of Appeals for the Eighth Circuit considered HEW's arguments but "adopted" the Court of Appeals for the First Circuit's decision in Isidoro. And in Seattle University v. HEW, 621 F.2d 992, 993 (CA9 1980), cert. granted sub nom. United States Dept. of Ed. v. Seattle Univ., 449 U.S. 1009 (CA9 1980), the Court of Appeals for the ^{Ninth} Eighth Circuit followed the three earlier circuit decisions, noting that each of those courts had held that the plain language of Title IX did not support HEW's position. Even the decision below, in which the Court of Appeals for the Second Circuit upheld the regulations, the court did not base its decision on the statutory language, but stated that the "language is more ambiguous than HEW suggests." 629 F. 2d, at 777.

^{that} The other appellate decision was entered by the Court of Appeals for the Fifth Circuit in Dougherty Cnty. School System v. Harris, 622 F. 2d 735 (CA5 1980), cert. pending sub nom. Bell v. Dougherty Cty School System, No. 80-1023. There, the Court of Appeals for the Fifth Circuit held the regulations invalid because they did not limit fund termination to the offending program or activity. In reaching this decision, the court noted that program-specific regulations might be sustainable in some instances, e.g., if they prohibited discrimination in pay against female teachers paid with federal funds relative to the amounts paid male teachers with federal funds. As noted by ^{it} the Court, of Appeals for the Fifth Circuit, an argument can be made that in such a case, the the woman teacher is "denied the benefits of" or "subject to discrimination under" the federal program. But ^{respect} it is by no means clear that the Court of Appeals for the Fifth Circuit would agree with the majority that the statutory language would support program-specific regulations prohibiting all kinds of discriminatory employment practices with regard to all types of employees, i.e., secretaries and administrators as well as teachers.

there is no indication

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~~The Title IX~~ "as" finally enacted" did not prohibit employment discrimination

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by the Court, ^{that} the earliest version of Title IX appeared in 1970. Like ~~the version~~ ^{that} finally enacted, the 1970 proposal would have amended Title VII of the Civil Rights Act of 1964 as well as the Equal Pay Act to explicitly prohibit discrimination in employment in educational institutions.

See n. 12, ante. In addition, this original proposal would have simply added the word "sex" to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, which then would have prohibited discrimination in federally funded programs or activities on the basis of sex as well as "race, color, or national origin." See n. 12 at ante. If Title VI had been amended, rather than a new Title IX enacted, it could not have been argued that the change banned employment discrimination in federally funded programs; Title VI includes ^{perhaps unnecessarily} a clarifying proviso stating that it covers only discrimination against program beneficiaries, not employees. See Title VI, §604, 42 U.S.C. §2000d-3.⁶

In 1972, the version finally enacted as Title IX was introduced into the Senate. ^{It is conceded that} The model for this provision ^{was} remained Title VI,⁷ but it was drafted as a new statute, Title IX, to be codified at 20 U.S.C. §1682 et

⁶42 U.S.C. §2000d-3 states:

"Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any department or agency or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

⁷The operative language in the two provisions is virtually identical. Compare 42 U.S.C. §2000d (Title VI) with 20 U.S.C. §1681a (Title IX).

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seq., rather than as a modification of Title VI. The reason for this change was strategic, not substantive; supporters feared that if Title VI were opened for amendment, Title VI itself would be in danger of being "gutted" on the floor of the Congress. Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education and Labor, House of Representatives--Review of regulations to implement Title IX, 94th Cong., 1st Sess. p. 409 (1975).

Moreover, the House version of Title IX originally contained a provision, §904, equivalent to §604 of Title VI, explicitly stating that Title IX did not apply to discrimination in employment per se. As noted by the Court, ante at ____, ^{the subsequent} this provision was eliminated by the Conference. But in 1975 hearings before the House Subcommittee on Postsecondary Education and Labor, Representative O'Hara, Chairman of that Subcommittee, while explaining the background of Title IX to a witness, noted that this change was made at conference simply to eliminate a drafting error with as little trouble as possible. Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education and Labor, House of Representatives--Review of regulations to implement Title IX, 94th Cong., 1st Sess. p. 409 (1975). Section 904 stated that the entire Bayh amendment did not apply to employment--but of course, the Bayh amendment included changes ⁱⁿ to Title VII and the Equal Pay Act in order to prohibit discrimination on the basis of sex in employment. Since the analogous provision of Title VI (§604) had been regarded as a mere clarification,⁸ the ^{Court} ~~majority~~ is on

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Footnote(s) 8 will appear on following pages.

~~S~~ rather weak ground in arguing that the Conference Report's use of the ritualistic words "the House receded" indicates a substantive change. As this Court noted in Cannon v. University of Chicago, 441 U.S. 677, 770-711, when ^{Congress} it passed Title IX, ^{it} Congress expected the new provision to be interpreted consistently with Title VI, which had been used as its model.⁹

In arguing that the legislative history indicates Title IX was intended to extend to employment discrimination, the ^{Court} majority relies heavily on three statements of a single senator. The first statement, ante at ____ (quoting 118 Cong. Rec. 5803 (1972)), is, however, ambiguous. ~~It is true that Senator Bayh states~~ ^{he} that faculty employment will be covered by his amendment after mentioning the provision enacting Title IX but prior to any mention of the provisions amending Title VII and the Equal Pay Act. But Bayh immediately thereafter ^{he} states that Title IX's enforcement powers parallel those in Title VI--and Title VI has never provided for fund termination to redress discrimination in employment. Next, the Court quotes Bayh's statements that (i) he regarded "sections

⁸See, e.g., 110 Cong. Rec. 10076 (1964) (statement of Attorney General Kennedy); Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules, 88th Cong., 2d Sess. p. 198 (1964) (statement of Congressman Celler, House Floor Manager of Title VI).

⁹The Court cites these same pages in Cannon for the proposition that it is Congress's intent in 1972, not 1964 (when Title VI was passed) that is determinative here. Ante at _____. This is, of course, true. But the point made by the Cannon Court was that when Congress passed Title IX, it presumed Title IX would mean what Title VI appeared to mean in 1972. This aspect of Cannon supports my dissent, not the majority's position, since the Court does not suggest that the 1972 Congress thought that Title VI applied to employment discrimination per se.

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1001-1005" as "[c]entral to [his] amendment" and (ii) "[t]his portion of the amendment covers discrimination in all areas," including employment. Ante at ____ (quoting 118 Cong. Rec. 5807 (1972)). But, §1005 of the Bayh amendment is the section amending Title VII and thus §§1001-1005 cover employment discrimination regardless of whether Title IX does.¹⁰ Moreover, the Court uses an elipsis rather than include the following words from the second Bayh statement:

"Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI." 118 Cong. Rec. 5807 (1972) (in elipses ante at ____).

Thus, for a second time, Bayh indicated to the Senate that he regarded Title IX of his amendment as parallel to Title VI rather than as a substantial departure from ^{it.} ~~Title VI.~~ ✓

In the third Bayh statement, ante at ____ (quoting 118 Cong. Rec. 5812 (1972)), the Senator is responding to a question from Senator Pell regarding Title IX, and the ^{Court} ~~majority~~ assumes that each sentence in that response refers to Title IX. But, as the Court of Appeals for the First Circuit noted in Islesboro:

"A fair reading both of the colloquy ..., as well as the discussion immediately preceding and following the above-quoted passage, indicates that Senator Bayh divided his analysis into three sections, two of which were specifically aimed at students (admissions and services), the third at employees (employment). While Senator Bayh's response was more extended than it needed

¹⁰In Bayh's amendment, §§1001-1004 address discrimination in federally funded programs; §1001 is Title IX. Section 1005 amends Title VII, and §§1009 & 1010 amend the Equal Pay Act. 118 Cong. Rec. 5803 (1972).

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✓ "Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions whcih generally parallel the provisions of title VI." 118 Cong. Rec. 5807 (1972) (in elipses ante at ____).

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to be for a direct answer to Senator Pell's question, we think HEW's reading is strained. We think this particularly in light of the fact that the discussion was an oral one and thus not as precise as a response in written form," 593 F. 2d, at 427.

(I added, in view of the evident confusion, it is extremely likely that the Senator

mis-
understood

~~Thus, the legislative history~~

lfp/ss 04/07/82

Rider B, p. 10 (North Haven)

NORTH10A SALLY-POW

Rather than support the Court's view, it is fair to say that the legislative history accords with the natural reading of the statute.

III

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The ~~majority~~ ^{*Court*} has allowed statements of one supporter of a statute to determine its interpretation. In the past, this Court has held that "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979). The majority nevertheless relies on such remarks, ignoring their ambiguity and the ~~Senator's~~ ^{*likelihood that*} failure to understand the differences between his amendment and its model, because the legislation is the result of a floor amendment and the Senator's remarks are "the only authoritative indications of congressional intent regarding the scope" of Title IX. Ante, at _____. Because I consider the statutory language authoritative, I dissent. As Justice Jackson warned in Schwegmann Brothers v. Calvert Corp., 341 U.S. 384, 395-

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96 (1951) (Jackson, J., concurring), "to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions...."

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lfp/ss 04/07/82

Rider A, p. 10 (North Haven)

NORTH10 SALLY-POW

III

As the sole issue before us is the meaning of
§901(a) of Title IX, I repeat the relevant language:

(Mary, here repeat the language you have on p. 3
of your draft identifying it).

The Court concludes that this language must be read to
proscribe sex discrimination in employment by educational
institutions that receive financial assistance under Title
IX. I submit that no lawyer, asked to read the foregoing
language alone, would think it had anything to do with the
employment practices of schools. An employee of a school
is not thought of as "participating in, or denied the
benefits of" an "education program or activity receiving
federal financial assistance". There could be part time

employees who also participated in such a program, but that is not what the Court holds today. The respondents who initiated these cases are two women seeking full time reemployment, and neither claims to being a participant in or to receive benefits of federal funding except in the tangential way that federal funds may aid the recipient schools in meeting general operating expenses.

If the draftsman of Title IX, and particularly of §901 - presumably one or more lawyers - had been instructed to include sex discrimination in employment, it cannot be argued seriously that the language of this section would have been written as above set forth. And whatever the skills of the draftsman may have been, the precedents of the anti-discrimination language in Titles VI and VII, presumptively would provided models for the

§901 language. We thus have a situation where the Court, presumably to reach a result deemed desirable, puts common sense aside and undertakes an elaborate examination of an ambiguous legislative history to conclude that after all Congress meant something it had not said.

Apart from statements of one supporter of Title IX, there is no substantial legislative history that supports the Court's interpretation.*

*Mary, you might add a footnote here discounting as essentially irrelevant the Court's reliance on post-enactment history.

The most dependable sources of legislative intent are the reports of the responsible committees. Nothing in either of these reports lends support to the Court's conclusion. Indeed, the Senate rejected a version of Title IX introduced by Senator McGovern, that would have expanded the bill specifically to include employment practices. The Court, in light of this legislative record, was forced to rely almost exclusively on fragmentary statements by one supporter of the statute. We previously have emphasized that "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history. Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979).

It seems to me that the Court also disregards the single most relevant evidence of what a reasonable

legislative body would have intended. There was no need to enact another statute proscribing employment discrimination in educational institutions on the basis of sex. Title VII and the Equal Pay Act had already met fully this legislative need.*

*Mary - if as I recall the SG conceded the reespondents had remedies available under Title VII, add a note.

Moreover, Title IX was to be administered by the Department of Health, Education and Welfare. Title VII and the Equal Pay Act were administered by the Department of Labor and EEOC. It seems beyond rational belief that Congress would have intended not only duplicative legislation but then placed its enforcement in the hands of a different department of government. Speaking of enforcement, Title VII - a comprehensive anti-discrimination statute - contains carefully prescribed procedures for conciliation, for oversight by EEOC, and finally for federal court remedies. This structured procedure is to be contrasted with the only remedy - an overkill type of remedy - provided by Title IX: the cutting off of funds, thereby penalizing innocent people. The District Court in Romeo Community Schools v. HEW, 438

F. Supp. 1021 (ED Mich. 1977), aff'd 600 F.2d 581 (CA6)

cert. den., 44___ U.S. 972 (1979), correctly observed:

(Mary: Copy here the quote from Romeo I
reprinted on page 104 of petitioner's brief.)

The Solicitor General, in the brief on behalf of the
federal respondents in this case, acknowledges what the
Romeo Court thought was self evident:

"The Department of Education has only limited
expertise in employment matters. Its view is
that employment cases are better resolved under
Title VII of the Civil Rights Act of 1964, which
provides more appropriate remedies for such
cases." Brief, p. 37.

In sum, the Court's decision today is predicated
on three assumptions that I am unwilling to impute to
Congress: (i) that it was incapable or neglected, to
state with any degree of clarity what a first year law
student should have been able to state, (ii) that it
enacted a third statute proscribing sex discrimination in

the absence of any showing of a need therefor, and (iii) finally, that it vested the authority to enforce of the third statute in the Department of Education that concededly lacks the experience and the qualifications to oversee and enforcement employment legislation.

Substitute for III

lfp/ss 04/07/82

Rider A, p. 10 (North Haven)

NORTH10 SALLY-POW

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 third statute in the Department of Education that
 concededly lacks the experience and the qualifications to
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 writing like a lawyer rather
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lfp/ss 04/07/82 Rider A, p. 5 (North Haven)

HAVEN5 SALLY-POW

The Court acknowledges, as it must, that §901 of Title IX "does not expressly include . . . employees". It relies on the negative fact that neither does §901 "exclude employees from its scope". Ante, at 9. The Court then turns to the "legislative history for evidence as to whether or not §901 was meant to prohibit employment discrimination". Id. I agree with the several Courts of Appeals that have concluded unequivocally that the statutory language cannot fairly be read to proscribe employee discrimination. Only rarely may legislative history be relied upon to read into a statute substantial ^{ive} language that Congress itself did not include. At least, the legislative history must show clearly and

unequivocally that Congress did intend what it failed to say. The Court's elaborate exposition of the history of Title IX and especially §901 falls far short of satisfying this standard.

LFD

lfp/ss 04/07/82

Rider A, p. 5 (North Haven)

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LTP

lfp/ss 04/07/82 Rider A, p. 10 (North Haven)

HAVEN10 SALLY-POW

The Court's decision today is another example of reaching to obtain a result perceived to be desirable. In doing so, it largely ignored the language of the statute itself, and relied upon HEW's strained interpretation of this language. In doing so, it rejected the views of six Courts of Appeals - each of which had concluded that HEW's regulation could not be reconciled with the statutory language. The Court turned for support to the legislative history. There is not a word in the reports of either the Senate or House that suggests that Title IX was an additional statute intended to prohibit discrimination in employment. (Mary, am I right about this?) But comfort was found in statements on the floor of the Senate by a

sponsor of Title IX, Senator Bayh, that - as indicated above - at least are ambiguous if not indeed reflecting misunderstanding. We held that "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history". Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979). Moreover, there was no reason for Congress to include anti-discrimination provisions within Title IX, a statute that addressed an entirely different purpose. Other statutes, then on the books, were specifically enacted to proscribe employment discrimination in all of its aspects. In addition to Title VI, the comprehensive legislation is Title VII that also contains carefully prescribed procedures for conciliation, for oversight by the Equal Employment Opportunities Commissions, and finally for federal court

remedies. Counsel for the government conceded, at oral argument, that the discrimination alleged in this case was within the jurisdiction of Title VII and all of its remedies. The Court today offers no explanation of why the Congress may have wished to provide duplicative legislation, especially as a "tag on" to a statute with an entirely different purpose. Moreover, the only remedy provided for a violation of Title IX is the cutoff of federal funds to the educational institution - a drastic remedy penalizing innocent people and one hardly designed as appropriate for alleged discrimination in the failure by each of two schools, petitioners in this case, to reemploy a single individual.

In sum, today's decision of this Court supplies both language in and a purpose to the statute not made

clear by Congress, or for which any need can be imagined in light of specific legislation dealing carefully and broadly with employment discrimination. As it seems to me that restraint appropriate to the Judicial Branch is absent in today's decision, I dissent.

L.F.P.

DISS MARYB-POW

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DRAFT: NO. 80-986, North Haven Board of Education v.
Bell, et. al.,
& Trumbull Board of Education v. U. S.
Dept. of Education & Potz

POWELL, J., dissenting.

Title IX of the Education Amendments of 1972, 20
U.S.C. §1681 et seq., prohibits discrimination on the
basis of sex in education programs and activities
receiving federal funds. ^{In 1975} ~~Pursuant to this provision~~ the
Department of Health, Education, and Welfare (HEW)
promulgated regulations ~~in 1975~~ prohibiting discrimination
on the basis of gender in employment by fund recipients.
34 C.F.R. §106.51(a)(1). Today, the Court upholds the
validity of these regulations, relying on the statutory
language, its legislative history, and several post-

enactment events. Because I believe the Court's interpretation is neither consistent with the statutory language nor ~~compelled~~ ^{supported} by its legislative history, I dissent.¹

I

Although the majority begins with the language of the statute, it quotes the relevant language in its entirety only in the opening paragraphs of the opinion. In the section considering the statute's meaning, the Court quotes two words of the statute and paraphrases the rest, thereby suggesting an interpretation actually at odds with the language used in the statute. Thus, according to the Court, "[s]ection 901's broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students." Ante, at _____. This is not ~~at all~~ what

¹~~Even the majority states~~ ^{Court acknowledges} that the post-enactment events it discusses only "lend credence" to its interpretation of the statute. Ante, at ____.

the statutory language provides.

In relevant part, the statute ~~actually~~ states:

"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" Education Amendments of 1972, §901(a), 20 U.S.C. §1681(a).

A natural reading of these words would limit the statute's scope to discrimination against those who are enrolled in, or the beneficiaries of, programs or activities receiving federal funding. It ~~strains~~ ^{torques} the language chosen by Congress to conclude that not only teachers and administrators, but also secretaries and janitors, who are discriminated against on the basis of sex in employment, are thereby (i) denied participation in a program or activity²; (ii) denied the benefits of a program or activity; or (iii) subject to discrimination under an education program or activity. Moreover, Congress made no reference whatever to employers or employees in Title IX, in ^{sharp} contrast to quite explicit language in other statutes regulating employment practices.³

It is noteworthy that not one of the six Courts of Appeals to consider the question before us has reached the conclusion that HEW's interpretation is supported by the statutory language. The issue was presented initially

²I agree with the majority that employees who directly participate in a federal program, i.e., teachers who receive federal grants, are, of course, protected by Title IX. See ante, at ____.

³See, e.g., 42 U.S.C. §2000e-2 (Title VII: "[i]t shall be an unlawful employment practice for an employer--"); 29 U.S.C. §206(d)(1) (Equal Pay Act: "[n]o employer having employees").

to the Court of Appeals for the First Circuit in Islesboro School Committee v. Califano, 593 F. 2d 424, 426 (CA1), cert denied, 444 U.S. 972 (1979), and that decision has been followed by most other Courts of Appeals to consider the question. There, the court concluded that "[t]he language of section 901, 20 U.S.C. §1681, on its face, is aimed at the beneficiaries of the federal monies, i.e., either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government." The court went on to point out that this reading of "the plain language of the statute is buttressed by an examination of the specific exemptions mentioned in the statute," all of which relate to students, not employees.⁴ Ibid.

In the next appellate decision, Romeo Community Schools v. HEW, 600 F. 2d 581 (CA6), cert denied, 444 U.S. 972 (1979), the Court of Appeals for the Sixth Circuit rejected the interpretation of the statute now relied on by this Court, noting that "as actually written, the statute is not nearly so broad. The words 'no person' are

⁴The Court today not only finds this point unconvincing, but concludes that the "absence of a specific exclusion for employment among the list of exceptions tends to support the Court of Appeal's conclusion that Title IX does protect employees." Ante, at ____ (citation omitted). I am unable to follow this reasoning. The absence of employment-related exceptions may not be conclusive proof that employment is not within the scope of the statute since Congress may have intended to cover all employment. But I fail to see how that absence affirmatively indicates that the statute was meant to apply to employees. Indeed, if Congress did intend to cover employees, it is anomalous that it did not provide exceptions similar to those in Title VII. For example, Title VII does not proscribe bona fide seniority plans, 42 U.S.C. §2000e-2(h), or preferential employment of Indians at establishments operating on reservations, 42 U.S.C. §2000e-2(i).

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modified by later language which clearly limits their meaning." 600 F. 2d, at 584. The court concluded that the statute "reaches only those types of disparate treatment" that involve discrimination against program beneficiaries.⁵ Ibid.

II

A

The Court acknowledges, as it must, that §901 of

⁵The question has also been presented to the Courts of Appeals for the Second, Fifth, Eighth, and Ninth Circuits. In Junior College Dist. of St. Louis v. Califano, 597 F. 2d 119, 121 (CA8), cert. denied, 444 U.S. 972 (1972) the Court of Appeals for the Eighth Circuit considered HEW's arguments but "adopted" the Court of Appeals for the First Circuit's decision in Islesboro. And in Seattle University v. HEW, 621 F.2d 992, 993 (CA9 1980), cert. granted sub nom. United States Dept. of Ed. v. Seattle Univ., 449 U.S. 1009 (CA9 1980), the Court of Appeals for the Ninth Circuit followed the three earlier circuit decisions, noting that each of those courts had held that the plain language of Title IX did not support HEW's position. Even ⁱⁿ the decision below, in which the Court of Appeals for the Second Circuit upheld the regulations, the court did not base its decision on the statutory language, but stated that the "language is more ambiguous than HEW suggests." 629 F. 2d, at 777.

The other appellate decision was entered by the Court of Appeals for the Fifth Circuit in Dougherty Cty. School System v. Harris, 622 F. 2d 735 (CA5 1980), cert pending sub nom. Bell v. Dougherty Cty School System, No. 80-1023. There, the Court of Appeals for the Fifth Circuit held the regulations invalid because they did not limit fund termination to the offending program or activity. In reaching this decision, the court noted that program-specific regulations might be sustainable in some instances, e.g., if they prohibited discrimination in pay against female teachers paid with federal funds relative to the amounts paid male teachers with federal funds. ^e ~~As noted by that court,~~ an argument can be made that in such a case, ~~the~~ the woman teacher is "denied the benefits of" or "subject to discrimination under" the federal program. But there is no indication it would agree with this Court that the statutory language supports program-specific regulations prohibiting all kinds of discriminatory employment practices with respect to all types of employees, i.e., secretaries and administrators as well as teachers. ^{The court noted that}

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Rider A, p. 6 (North Haven)

NORTH6 SALLY-POW

Title IX as finally enacted was part of a Senate bill, S. 659, 92nd Cong. 2d Sess. (1972), added - through an amendment sponsored by Senator Bayh. Loopholes in earlier civil rights legislation had been identified in hearings by a special House Committee in 1970.

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Rider A, p. 7 (North Haven)

NORTH7 SALLY-POW

With the purpose of closing these loopholes, the Bayh floor amendment (Amendment No. 874) was introduced in 1972. See 118 Cong. Rec. 5803 (1972) (print of amendment).

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Rider A, p. 6 (North Haven)

NORTH6 SALLY-POW

Title IX as finally enacted was part of a Senate
bill, S. 659, 92nd Cong. 2d Sess. (1972), added ⁵ through
an ^{floor} amendment sponsored by Senator Bayh. Loopholes in
earlier civil rights legislation had been identified in
hearings by a special House Committee in 1970.

Title IX "does not expressly include . . . employees." But it finds a strong negative inference from the fact that §901 does not "exclude employees from its scope". Ante, at _____. The Court then turns to the "legislative history for evidence as to whether or not §901 was meant to prohibit employment discrimination". Ibid. I agree with the several Courts of Appeals that have concluded unequivocally that the statutory language cannot fairly be read to proscribe employee discrimination. Only rarely may legislative history be relied upon to read into a statute language that Congress itself did not include. To justify such a reading of a statute, the legislative history must show clearly and unequivocally that Congress did intend what it failed to state.⁶ The Court's elaborate exposition of the history of Title IX falls far short of this standard.

A Title IX was enacted to close three loopholes in earlier civil rights legislation; each involved discrimination in educational institutions. Title VII of the Civil Rights Act of 1964, though generally barring employment discrimination on the basis of sex, race, religion, or national origin, did not apply to discrimination "with respect to employment of individuals to perform work connected with the educational activities of [educational] institutions." Pub. L. No. 88-352, title VII, §702, 78 Stat. 255. And the Equal Pay Act of 1963 banned discrimination in wages on the basis of sex, 29

⁶See, e.g., Citizens to Preserve Overton Park v. Volpe, 410 U.S. 402, 412 n. 29 (1971) ("Because of this ambiguity [in the legislative history] it is clear that we must look primarily to the statutes themselves to find the legislative intent.").

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Rider A, p. 7 (North Haven)

NORTH7 SALLY-POW

The Bayh floor amendment (Amendment No. 874)
was introduced in 1972, ~~See~~ 118 Cong. Rec. 5803 (1972)
(print of amendment), for the purpose of closing these
loopholes.

U.S.C. §206(d)(1), but it did not apply to administrative, executive, or professional workers, including teachers. See 29 U.S.S.C. §213(a) (1970) (no longer in force). Finally, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, barred discrimination on the basis of "race, color, or national origin," but not sex, in any federally funded programs and activities.

A → In 1972, Senator Bayh introduced a floor amendment, Amendment 874 (the Bayh amendment), which Congress subsequently enacted, to close these loopholes. See 118 Cong. Rec. 5803 (1972) (print of amendment). In §§ 1001-1003 of the Amendment, a new Title IX was created, banning discrimination on the basis of sex in federally funded educational programs and activities, thus effectively extending Title VI's prohibition to sex discrimination *in funded programs*. Section 1005 of that amendment amended Title VII to cover employment *discrimination* in educational institutions. Ibid. And §§ 1001-1010 amended the Equal Pay Act so that discrimination in pay on the basis of sex was barred, even for teachers and other professionals. Ibid.

e Since the amendments to Title VII and the Equal Pay Act explicitly covered discrimination in employment in educational institutions, there was no need to include §§ 1001-1003 of the Bayh Amendment to proscribe such discrimination. Instead, Title IX was presumably enacted, as its language *clearly indicates* ~~suggests~~ to bar discrimination against beneficiaries of federally funded programs and activities.

This interpretation of Title IX ~~receives further support from the~~ *is confirmed by the* fact that it was modelled after Title VI of the Civil Rights Act of 1964.⁷ Title VI *clearly* was limited in its

Footnote(s) 7 will appear on following pages.

scope to discrimination against beneficiaries of federally funded programs, not general employment practices of fund recipients. 42 U.S.C. §2000d-3. And, as this Court noted in Cannon v. University of Chicago, 441 U.S. 677, 770-711 (1979), when Congress passed Title IX, it expected the new provision to be interpreted consistently with Title VI, which had been its model.

B

The Court discounts the importance of Title VI to the proper interpretation of Title IX for two reasons. First, ~~the Court~~^{it} notes that "[i]t is Congress' intention in 1972, not in 1964, that is of significance in interpreting Title IX." Ante, at ____ (citing Cannon v. University of Chicago, 441 U.S. 677, 710-711 (1979)). This point begs the question, however, since there is no evidence that in 1972, when it passed Title IX, Congress thought Title VI applied to employment discrimination. The second reason^{advanced by the Court for disregarding} ~~the Court disregards~~^{it} Title VI is that ~~Title VI~~^{it}, unlike Title IX, includes a section, i.e. §604, 42 U.S.C. §2000d-3, expressly stating that Title VI applies only to discrimination against fund beneficiaries, not to employment discrimination per se. But in an earlier version of the legislation that was to become Title IX, the amendment was drafted as a modification of Title VI, simply adding the word "sex." In the end, it is true, Title IX was enacted as a statute separate from Title VI, but the reason for this approach was strategic, not substantive. Supporters feared that if Title VI were

⁷The operative language in the two provisions is virtually identical. Compare 42 U.S.C. §2000d (Title VI) with 20 U.S.C. §1681a (Title IX).

opened for amendment, Title VI itself might be "gutted" on the floor of the Congress. Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education and Labor, House of Representatives--Review of regulations to implement Title IX, 94th Cong., 1st Sess. p. 409 (1975).

Finally, to break the link between Titles VI and IX, the Court stresses ⁶that that the House version of the Senate's Bayh Amendment originally contained a provision, §1004, equivalent to §604 of Title VI, explicitly stating that no section of the 1972 legislation applied to discrimination in employment, but this provision was eliminated by the Conference. Ante, at _____. A strong argument can, however, be made that there was a non-substantive reason for eliminating §1004 from the House bill. In 1975 hearings before the House Subcommittee on Postsecondary Education and Labor, Representative O'Hara, Chairman of that Subcommittee, while explaining the background of Title IX to a witness, noted that this change was made at conference simply to eliminate, as quietly as possible, a recently discovered drafting error. Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education and Labor, House of Representatives--Review of regulations to implement Title IX, 94th Cong., 1st Sess. p. 409 (1975). Even without reference to Senator O'Hara's remarks, made in 1975, it is clear that, at the time of the Conference on the House bill and the Senate's Bayh Amendment, §1004 of the House bill was a drafting mistake; it stated that no section of the House bill applied to employment, though sections of the House Bill, as well as the Senate version, made express changes to the employment discrimination

Many - the preferred form here is to refer to the "Court"

provisions of Title VII and the Equal Pay Act. Since the analogous provision of Title VI, §604, had been regarded as a mere clarification,⁸ the ~~majority~~ ^{Court} is on weak ground in arguing that the Conference Report's use of the ritualistic words "the House receded" reveals a substantive change rather than the quiet correction of an obvious drafting error at a very late stage in the legislative process.

C

In concluding that the legislative history indicates Title IX was intended to extend to employment discrimination, the Court is forced to rely ^{primarily} heavily on three statements of a single senator. The first statement, ante at ____ (quoting 118 Cong. Rec. 5803 (1972)), is ambiguous. Senator Bayh did state that faculty employment would be covered by his amendment after mentioning the sections enacting Title IX but prior to any mention of those amending Title VII and the Equal Pay Act. Immediately thereafter, however, he stated that Title IX's enforcement powers parallel ^{and} those in Title VI ~~and~~ ^{and} Title VI has never provided for fund termination to redress discrimination in employment. ^{Yet} Next, the Court quotes Bayh's statements that (i) he regarded "sections 1001-1005" as "[c]entral to [his] amendment" and (ii) "[t]his portion of the amendment covers discrimination in all areas," including employment. Ante at ____ (quoting 118 Cong. Rec. 5807 (1972)). But, §1005 of the Bayh

⁸See, e.g., 110 Cong. Rec. 10076 (1964) (statement of Attorney General Kennedy); Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules, 88th Cong., 2d Sess. p. 198 (1964) (statement of Congressman Celler, House Floor Manager of Title VI).

amendment is the section amending Title VII and thus §§1001-1005 cover employment discrimination regardless of whether Title IX does.⁹ Moreover, the Court uses an elipsis rather than include the following words from the second Bayh statement:

"Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI." 118 Cong. Rec. 5807 (1972) (in elipses ante at ____).

Thus, for a second time, Bayh indicated to the Senate that he regarded Title IX of his amendment as parallel to Title VI rather than as a substantial departure from Title VI.

In the third Bayh statement, ante at ____ (quoting 118 Cong. Rec. 5812 (1972)), the Senator ^{was}₁ ~~is~~ responding to a question from Senator Pell regarding Title IX, and the Court assumes that each sentence in that response refers to Title IX. But, as the Court of Appeals for the First Circuit noted in Islesboro:

"A fair reading both of the colloquy ..., as well as the discussion immediately preceding and following the above-quoted passage, indicates that Senator Bayh divided his analysis into three sections, two of which were specifically aimed at students (admissions and services), the third at employees (employment). While Senator Bayh's response was more extended than it needed to be for a direct answer to Senator Pell's question, we think HEW's reading is strained. We think this particularly in light of the fact that the discussion was an oral one and thus not as precise as a response in written form," 593 F. 2d, at 427.

Rather than support the Court's view, it is fair

⁹See description of various sections of the Bayh Amendment, supra at _____. See also 118 Cong. Rec. 5803 (1972) (print of amendment).

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Rider A, p. 16 (North Haven)

NORTH16 SALLY-POW

In sum, the Court's decision today is predicated on four assumptions that I am unwilling to impute to Congress: (i) Congress neglectfully or forgetfully failed to include familiar language in §901, that would have made clear its intent; (ii) Congress enacted a third statute proscribing sex discrimination in employment in educational institutions in the absence of any showing of a need for the third; and (iii) that it failed to include in the third statute appropriate procedural and remedial provisions relevant to employment discrimination; and (iv) finally, that it vested the authority to enforce the third statute in the Department of Education, a department which, even the Soliciter General concedes, lacks the

experience and the qualifications to oversee and enforce
employment legislation.

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Rider A, p. 15 (North Haven)

NORTH15 SALLY-POW

Specifically, the cutoff of funds would be at the expense of innocent beneficiaries of the funded program, without remedying injustice to the employee. Title IX contains no provision for back pay or restoration of seniority rights. Indeed, it even fails to mandate employment or promotion to rectify discrimination. Title IX, by comparison with the other employment discrimination statutes, is deficient also in other respects: there are no time limits for action, no conciliation provisions, and no guidance as to procedure. The Solicitor General conceded at oral argument that appropriate relief for the two employees who initiated this suit was available under Title VII.¹³ See transcript of oral argument, 27.

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lfp/ss 04/15/82 Rider B, p. 12 (North Haven)

NORTH12B SALLY-POW

The Court acknowledges, in view of the ambiguity of §901, that we must look to the "legislative history for evidence as to whether or not §901 was meant to prohibit employment discrimination". Ante, at _____. In addition to what is normally embraced by the term "legislative history" the Court ignores other factors highly relevant to intent: they include whether the ambiguity easily could have been avoided by the legislative draftsman; whether Congress has prior experience in legislative with respect to the identical purpose now attributed to it; and whether other legislation clearly and specifically already addressed this purpose. If these factors are considered,

it is not an overstatement to say that it makes little sense to read employment discrimination into §901.

If there had been an intent to include sex discrimination in employment, no legislative draftsman - even a draftsman of modest accomplishments - would not have written it as above set forth. Moreover, the draftsman would have been guided by the employment discrimination language in Title VII and the Equal Pay Act that specifically deal with this problem.

Indeed, Title VII and the Equal Pay Act were the statutes previously enacted by Congress to deal expressly with employment discrimination, and at the same time new Title IX was being drafted and considered, Title VII and the Equal Pay Act were being amended to proscribe specifically employment discrimination in educational

institutions on the basis of sex. It is not easy to believe that Congress intended to enact a third statute addressing this identical problem, and that it chose language ambiguous at best and in important respects inconsistent with the other two statutes.

3 2nd
1fp/ss 04/15/82 Rider B, p. 12 (North Haven)

NORTH12B SALLY-POW

The Court acknowledges, in view of the ambiguity of this language, that we must look to the "legislative history for evidence as to whether or not §901 was meant to prohibit employment discrimination". Ante, at ____.

Although the Court examined at length the truncated legislative history, it ignored other factors highly relevant to intent: they include whether the ambiguity easily could have been avoided by the legislative draftsman; whether Congress had prior experience in legislating with respect to the identical subject; and whether existing legislation clearly and adequately proscribed the conduct in question. When these factors are considered, it is not an overstatement to say that it

makes little sense to read sex employment discrimination language into §901.

If there had been such an intent, no legislative draftsman - even one of modest accomplishments - would have written §901 as above set forth. Moreover, the draftsman would have been guided easily by the employment discrimination language in Title VII and the Equal Pay Act that specifically addresses this problem. These two statutes had been enacted previously by Congress to deal expressly with employment discrimination. At the same time Title IX was being drafted and considered, Title VII and the Equal Pay Act were being amended to proscribe specifically employment discrimination in educational institutions on the basis of sex. Congress hardly could

have intended to enact a third statute addressing this identical problem, choosing language ambiguous at best.

2712

lfp/ss 04/15/82

Rider A, p. 15 (North Haven)

NORTH15 SALLY-POW

_____, the cutoff of funds would be at the expense of innocent beneficiaries of the federally funded program. Title IX contains no provision for back pay or restoration of seniority rights. Indeed, it even contains no provision requiring employment or promotion to rectify discrimination. Title IX, by comparison with the other employment discrimination statutes, is deficient also in other respects: there are no time limits for action, no conciliation provisions, and no guidance as to procedure. The Solicitor General conceded at oral argument that appropriate relief for the two employees who initiated this suit was available under Title VII.¹³ See transcript of oral argument, 27.

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Rider A, p. 12 (North Haven)

NORTH12 SALLY-POW

As indicated above, where the critical words -
in this case ~~the~~ "employment discrimination" ~~are~~ ^{are} absent from
the statutory language and its meaning is otherwise clear,
reliance on the legislative history to add the omitted
words is rarely appropriate. Only if the legislative
history is clear and unequivocal as to congressional
intent, should a court supply what Congress failed to
include. ~~Whatever else may be said about~~ ^T the legislative
history today relied upon by the Court, ~~it~~ ^{is} is not clear
and unequivocal. ⁶⁷

Mary - we say this ~~at~~
earlier. Do you think
it helpful to repeat
~~at~~ at the end of II for emphasis?

lfp/ss 04/15/82 Rider B, p. 12 (North Haven)

NORTH12B SALLY-POW

The Court acknowledges, in view of the ambiguity of this language, that we must look to the "legislative history for evidence as to whether or not §901 was meant to prohibit employment discrimination". Ante, at ____.

Although the Court examined at length the truncated legislative history, it ignored other factors highly relevant to intent: they include whether the ambiguity easily could have been avoided by the legislative draftsman; whether Congress had prior experience in legislating with respect to the identical subject; and whether existing legislation clearly and adequately proscribed the conduct in question. When these factors are considered, it is not an overstatement to say that it

to deal with
conclude that Congress intended
makes little sense to ~~read~~ sex employment discrimination
in
~~language into~~ §901.

If there had been such an intent, no legislative draftsman - even one of modest accomplishments - would have written §901 as above set forth. Moreover, the draftsman would have been guided easily by the employment discrimination language in Title VII and the Equal Pay Act that specifically addresses this problem. These two statutes had been enacted previously by Congress to deal expressly with employment discrimination. At the same time Title IX was being drafted and considered, Title VII and the Equal Pay Act were being amended to proscribe specifically employment discrimination in educational institutions on the basis of sex. Congress hardly could

have intended to enact a third statute addressing this identical problem, choosing language ambiguous at best.

to say that the legislative history accords with the natural reading of the statute. Title IX prohibits discrimination only against beneficiaries of federally funded programs and activities, not all employment discrimination by recipients of federal funds. Title IX is modelled after Title VI, ^{that} which is explicitly so limited--and to the extent statements of Senator Bayh can be read to the contrary, they are ambiguous.

III

As the sole issue before us is the meaning of §901(a) of Title IX, I repeat the relevant language:

"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" §901(a).

The Court concludes that this language must be read to proscribe sex discrimination in employment by educational institutions that receive financial assistance under Title IX. If the draftsman^a of Title IX, and particularly of §901--presumably one or more lawyers--had been instructed to include sex discrimination in employment, it cannot be argued seriously that the section would have been written as set forth above. I submit that no lawyer, asked to read the foregoing language alone, would think it had anything to do with the employment practices of schools. An employee of a school is not thought of as "participating in, or denied the benefits of" an "education program or activity receiving federal financial assistance."¹⁰ Moreover, regardless of the skills of the

Footnote(s) 10 will appear on following pages.

to say that the legislative history accords with the natural reading of the statute. Title IX prohibits discrimination only against beneficiaries of federally funded programs and activities, not all employment discrimination by recipients of federal funds. Title IX is modelled after Title VI, ^{that} which is explicitly so limited--and to the extent statements of Senator Bayh can be read to the contrary, they are ambiguous.

III

As the sole issue before us is the meaning of §901(a) of Title IX, I repeat the relevant language:

which is proper here - clause being introduced is non-restrictive.

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.

It is concluded that this language must be read to prohibit discrimination in employment by educational institutions that receive financial assistance under Title IX. If the drafters of Title IX, and particularly of §901(a), had more lawyers--had been instructed to include non-discrimination in employment, it cannot be argued seriously that the section would have been written as set forth above. I submit that no lawyer, asked to read the foregoing language alone, would think it had anything to do with the employment practices of schools. An employee of a school is not thought of as "participating in, or denied the benefits of" an "education program or activity receiving federal financial assistance."¹⁰ Moreover, regardless of the skills of the

Footnote(s) 10 will appear on following pages.

draftsmen, the undisputed meaning of essentially identical anti-discrimination language in Title VI should guide our interpretation of Title IX. See Cannon v. University of Chicago, 441 U.S. 677, 710-711 (1979). But to reach a result it deems desirable, the Court puts common sense and precedent aside and undertakes an elaborate examination of an ambiguous legislative history to conclude that Congress has meant something it has not said.

Yet, apart from statements of one supporter of Title IX, there is no substantial legislative history that supports the Court's interpretation.¹¹ The most dependable sources of legislative intent are the reports of the responsible committees. Because Title IX is the result of a floor amendment, there is no explanation of its meaning in reports from the relevant House and Senate Committees.¹² In light of this legislative record, the

¹⁰Some employees might be beneficiaries of federally-funded programs--e.g., grant programs for faculty research--but the Court's holding today is not limited to discrimination against such employees. The respondents who initiated these cases are two women seeking full time reemployment, and neither claims to be a participant in or to receive the benefits of a federal funded program except tangentially in that federal funds aid recipients in meeting general operating expenses.

¹¹The Court devotes considerable time to describing post-enactment actions or inaction on the part of subsequent Congresses. See ante, at _____. The fact that, in 1975, Congress considered, but failed to enact, resolutions disapproving HEW's regulations is essentially irrelevant in determining the intent of the enacting Congress in 1972. Similarly, the fact that a subsequent Congress considered, but failed to enact bills limiting Title IX's coverage with respect to employment discrimination does not indicate that the 1972 Congress meant to include employment discrimination within Title IX.

¹²It is true that the Conference Report noted that "the House receded" with regard to the deletion of that section of the House bill stating that no section of the 1972 legislation applied to employment discrimination. S. Footnote continued on next page.

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Court is forced to rely almost exclusively on fragmentary statements by one supporter of the statute. We previously have emphasized that "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979), but the Court ignores this rule in reaching its result today.

The Court also disregards all evidence of what a reasonable legislative body would have intended. There was no need to enact a third statute proscribing employment discrimination in educational institutions on the basis of sex. Title VII and the Equal Pay Act were being amended to accomplish precisely that result.

Moreover, a comparison of the provisions of Title VII and Title IX suggests that Congress would not have enacted these ^{its} inconsistent provisions ^{with respect to remedies and procedures} to handle the same problem. Title VII is a comprehensive anti-discrimination statute with carefully prescribed procedures for conciliation by the EEOC, federal court remedies available within certain time limits, and certain specified forms of relief, available unless the discriminatory conduct falls within one of several exceptions. See 42 U.S.C. §2000e et seq. This thoughtfully structured approach is in sharp contrast to Title IX, which contains only one extreme remedy, fund termination, ^{female} ^{can prove} ^{ion} now apparently available at the request of any employee who has been discriminated against in employment in a federally funded program or activity. ~~and~~

Conf. Rep. No. 92-789, p.221 (1972); H.R.Conf. Rep. 92-1085, p. 221 (1972) (quoted ante, at ____). But, as discussed earlier in text, this evidence is as ambiguous as Senator Bayh's remarks. See supra at ____-____.

~~Under today's decision of the Court,~~

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continued

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Rider A, p. 15 (North Haven)

NORTH15 SALLY-POW

no A

← Specifically, the cutoff of funds would be at the expense of innocent beneficiaries of the funded program, without remedying injustice to the employee. Title IX contains no provision for back pay or restoration of seniority rights. Indeed, it even fails to mandate employment or promotion to rectify discrimination. Title IX, by comparison with the other employment discrimination statutes, ~~is~~ is deficient also in other respects: there are no time limits for action, no conciliation provisions, and no guidance as to procedure. The Solicitor General conceded at oral argument that appropriate relief for the two employees who initiated this suit was available under Title VII.¹³ See transcript of oral argument, 27.

17

Many or Equal Pay 15.
Act under EEOC also?

Appropriate

A "awarded" only at the expense of innocent beneficiaries of the federally funded program. In addition, under Title IX, there are no time limits, no conciliation provisions, and no remedies available ^{- such as back pay -} that will actually redress the wrong suffered by an aggrieved employee, though. As the Solicitor General conceded at oral argument, ^{such} relief is available under Title VII.¹³ See Transcript of Oral Argument, 27.

Finally, Congress delegated the administration of Title IX to the Department of Health, Education and Welfare.¹⁴ Title VII and the Equal Pay Act are administered by the Department of Labor and EEOC. It seems most unlikely that Congress would intend not only duplicate substantive legislation but also enforcement of such provisions ^{thereof} by different departments of government with different enforcement powers, areas of expertise, and enforcement methods.¹⁴ The District Court in Romeo Community Schools v. HEW, 438 F. Supp. 1021 (ED Mich. 1977), aff'd 600 F.2d 581 (CA6) cert. den., 444 U.S. 972

¹³An employee could presumably bring actions against the school district under Title VII, Title IX, and the Equal Pay Act, seeking redress of his or her wrong in the form of back pay and injunctive relief, and, in addition, request that funds be terminated.

¹⁴~~Thus~~ the Court's decision will result in needless duplication of governmental bureaucracy. Although HEW would prefer to have no involvement in employment discrimination, see Brief of Solicitor General 37, n. 26, it will be required to maintain a staff of employees to enforce the anti-discrimination in employment portion of Title IX. And these employees will duplicate the large staffs of the EEOC and the Department of Labor already devoted to employment discrimination.

From the viewpoint of educational institutions, there will now be two sets of federal regulations and regulators overseeing their employment practices. These different governmental departments may, or may not, have the same substantive standards and filing requirements at any given time.

*Mary - This is simply
a re-reading of the final H*

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Rider A, p. 16 (North Haven)

NORTH16 SALLY-POW

intent,
, finding an unarticulated,
In sum, the Court's decision ~~today~~ is predicated

on four assumptions that I am unwilling to impute to

Congress: *that* (i) Congress neglectfully or forgetfully failed
to include ~~familiar~~ *with respect to discrimination* language in §901, that would have made

clear its intent; (ii) Congress enacted a third statute

proscribing sex discrimination in employment in

educational institutions in the absence of any showing of

a need for ~~the third~~ *duplicative legislation;* and (iii) that it failed to include

in the third statute appropriate procedural and remedial

provisions relevant to employment discrimination; and (iv)

finally, that it vested the authority to enforce the third

statute in the Department of Education, a department

which even the Soliciter General concedes lacks the

experience and the qualifications to oversee and enforce
employment legislation.

(1979), correctly observed:

"These governmental agencies, particularly the EEOC, were established specifically for the purpose of regulating discrimination in employment practices. These agencies have the expertise and their enabling legislation has provided them with the investigative and enforcement machinery necessary to compel compliance with regulations against sex discrimination in employment. HEW does not have similar enforcement authority." 438 F. Supp., at 1034.

Even the Solicitor General, in the brief on behalf of the federal respondents in this case, acknowledges what the Romeo Court thought was self evident:

"The Department of Education has only limited expertise in employment matters. Its view is that employment cases are better resolved under Title VII of the Civil Rights Act of 1964, which provides more appropriate remedies for such cases." Brief, p. 37.

Lower
In sum, the Court's decision today is predicated on three assumptions that I am unwilling to impute to Congress: (i) Congress ~~neglectfully or forgetfully failed to~~ include language in § 901 that would have made clear its intent; any degree of clarity, not even that a first year law student would have been able to attain; (ii) Congress enacted a ^{third} ~~three~~ statutes proscribing sex discrimination in employment in educational institutions in the absence of any showing of a need for the third; ^{IV} and (iii) finally, that it vested the authority to enforce the third statute in the Department of Education, a department which, even the Solicitor General concedes, lacks the experience and the qualifications to oversee and enforce employment legislation.

appropriate
→ (iii) that it failed to include in the third statute procedural and remedial provisions relevant to employment discrimination;

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DRAFT: NO. 80-986, North Haven Board of Education v.

Bell, et. al.,

& Trumbull Board of Education v. U. S.

Dept. of Education & Potz

POWELL, J., dissenting.

Title IX of the Education Amendments of 1972, 20
U.S.C. §1681 et seq., prohibits discrimination on the
basis of sex in education programs and activities
receiving federal funds. In 1975, the Department of
Health, Education, and Welfare (HEW)¹ promulgated

¹As noted by the majority, ante at ____, n.4, HEW's
duties under Title IX were transferred to the Department of
Education in 1979 by §301(a)(3) of the Department of
Footnote continued on next page.

regulations prohibiting discrimination on the basis of gender in employment by fund recipients. 34 C.F.R. §106.51(a)(1). Today, the Court upholds the validity of these regulations, relying on the statutory language, its legislative history, and several post-enactment events. Because I believe the Court's interpretation is neither consistent with the statutory language nor supported by its legislative history, I dissent.²

I

Although the majority begins with the language of the statute, it quotes the relevant language in its entirety only in the opening paragraphs of the opinion. In the section considering the statute's meaning, the Court quotes two words of the statute and paraphrases the

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Education Organization Act, Pub. L. 69-88, 93 Stat. 678, 20 U.S.C. §3441(a)(3) (1976 ed., Supp. IV). I follow the majority in referring to both agencies as HEW since many of the relevant acts in this case took place before the reorganization. See ante, at ___, n.4. 3/H

²The Court acknowledges that the post-enactment events it discusses only "lend credence" to its interpretation of the statute. Ante, at ____.

rest, thereby suggesting an interpretation actually at odds with the language used in the statute. Thus, according to the Court, "[s]ection 901's broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students." Ante, at _____. This is not what the statutory language provides.

In relevant part, the statute states:

"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" Education Amendments of 1972, §901(a), 20 U.S.C. §1681(a).

A natural reading of these words would limit the statute's scope to discrimination against those who are enrolled in, or the beneficiaries of, programs or activities receiving federal funding. It tortures the language chosen by Congress to conclude that not only teachers and administrators, but also secretaries and janitors, who are discriminated against on the basis of sex in employment, are thereby (i) denied participation in a program or activity³; (ii) denied the benefits of a program or

Footnote(s) 3 will appear on following pages.

activity; or (iii) subject to discrimination under an education program or activity. Moreover, Congress made no reference whatever to employers or employees in Title IX, in sharp contrast to quite explicit language in other statutes regulating employment practices.⁴

It is noteworthy that not one of the six Courts of Appeals to consider the question before us has reached the conclusion that HEW's interpretation is supported by the statutory language. The issue was presented initially to the Court of Appeals for the First Circuit in Islesboro School Committee v. Califano, 593 F. 2d 424, 426 (CA1), cert denied, 444 U.S. 972 (1979), and that decision has been followed by most other Courts of Appeals to consider the question. There, the court concluded that "[t]he language of section 901, 20 U.S.C. §1681, on its face, is aimed at the beneficiaries of the federal monies, i.e.,

³I agree with the majority that employees who directly participate in a federal program, i.e., teachers who receive federal grants, are, of course, protected by Title IX. See ante at ____.

⁴See, e.g., 42 U.S.C. §2000e-2 (Title VII: "[i]t shall be an unlawful employment practice for an employer--"); 29 U.S.C. §206(d)(1) (Equal Pay Act: "[n]o employer having employees").

either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government." The court went on to point out that this reading of "the plain language of the statute is buttressed by an examination of the specific exemptions mentioned in the statute," all of which relate to students, not employees.⁵ Ibid.

In the next appellate decision, Romeo Community Schools v. HEW, 600 F. 2d 581 (CA6), cert denied, 444 U.S. 972 (1979), the Court of Appeals for the Sixth Circuit rejected the interpretation of the statute now relied on by this Court, noting that "as actually written, the statute is not nearly so broad. The words 'no person' are modified by later language which clearly limits their

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⁵The Court today not only finds this point unconvincing, but concludes that the "absence of a specific exclusion for employment among the list of exceptions tends to support the Court of Appeal's conclusion that Title IX does protect employees." Ante, at ____ (citation omitted). I am unable to follow this reasoning. The absence of employment-related exceptions may not be conclusive proof that employment is not within the scope of the statute. But I fail to see how that absence affirmatively indicates that the statute was intended to apply to employees. Indeed, if Congress did intend to cover employees, it is anomalous that it did not provide exceptions similar to those in Title VII. For example, Title VII does not proscribe bona fide seniority plans, 42 U.S.C. §2000e-2(h), or preferential employment of Indians at establishments operating on reservations, 42 U.S.C. §2000e-2(i).

meaning." 600 F. 2d, at 584. The court concluded that the statute "reaches only those types of disparate treatment" that involve discrimination against program beneficiaries.⁶ Ibid.

II

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⁶The question has also been presented to the Courts of Appeals for the Second, Fifth, Eighth, and Ninth Circuits. In Junior College Dist. of St. Louis v. Califano, 597 F. 2d 119, 121 (CA8), cert. denied, 444 U.S. 972 (1972) the Court of Appeals for the Eight Circuit considered HEW's arguments but "adopted" the Court of Appeals for the First Circuit's decision in Islesboro. And in Seattle University v. HEW, 621 F.2d 992, 993 (CA9 1980), cert. granted sub nom. United States Dept. of Ed. v. Seattle Univ., 449 U.S. 1009 (CA9 1980), the Court of Appeals for the Ninth Circuit followed the three earlier circuit decisions, noting that each of those courts had held that the plain language of Title IX did not support HEW's position. Even in the decision below, in which the Court of Appeals for the Second Circuit upheld the regulations, the court did not base its decision on the statutory language, but stated that the "language is more ambiguous than HEW suggests." 629 F. 2d, at 777.

The other appellate decision was entered by the Court of Appeals for the Fifth Circuit in Dougherty Cty. School System v. Harris, 622 F. 2d 735 (CA5 1980), cert. pending sub nom. Bell v. Dougherty Cty School System, No. 80-1023. There, the Court of Appeals for the Fifth Circuit held the regulations invalid because they did not limit fund termination to the offending program or activity. In reaching this decision, the court noted that program-specific regulations might be sustainable in some instances, e.g., if they prohibited discrimination in pay against female teachers paid with federal funds relative to the amounts paid male teachers with federal funds. The court noted that an argument can be made that in such a case, the woman teacher is "denied the benefits of" or "subject to discrimination under" the federal program. 622 F.2d, at 737-738. But there is no indication it would agree with this Court that the statutory language supports program-specific regulations prohibiting all kinds of discriminatory employment practices with respect to all types of employees, i.e., secretaries and administrators as well as teachers.

A

The Court acknowledges, as it must, that §901 of Title IX "does not expressly include . . . employees." But it finds a strong negative inference in the fact that §901 does not "exclude employees from its scope". Ante, at _____. The Court then turns to the "legislative history for evidence as to whether or not §901 was meant to prohibit employment discrimination". Ibid. I agree with the several Courts of Appeals that have concluded unequivocally that the statutory language cannot fairly be read to proscribe employee discrimination. Only rarely may legislative history be relied upon to read into a statute language that Congress itself did not include. To justify such a reading of a statute, the legislative history must show clearly and unequivocally that Congress did intend what it failed to state.⁷ The Court's elaborate exposition of the history of Title IX falls far short of

⁷See, e.g., Citizens to Preserve Overton Park v. Volpe, 410 U.S. 402, 412 n. 29 (1971) ("Because of this ambiguity [in the legislative history] it is clear that we must look primarily to the statutes themselves to find the legislative intent.").

this standard.

Title IX was a floor amendment sponsored by Senator Bayh to Senate Bill, S. 659, 92nd Cong., 2d Sess. (1972). The amendment closed loopholes in earlier civil rights legislation; three problem areas had been identified in hearings by a special House Committee in 1970. See Discrimination Against Women: Hearings on Section 805 of H.R. 16098 before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970). Title VII of the Civil Rights Act of 1964, though generally barring employment discrimination on the basis of sex, race, religion, or national origin, did not apply to discrimination "with respect to employment of individuals to perform work connected with the educational activities of [educational] institutions." Pub. L. No. 88-352, title VII, §702, 78 Stat. 255. And the Equal Pay Act of 1963 banned discrimination in wages on the basis of sex, 29 U.S.C. §206(d)(1), but it did not apply to administrative, executive, or professional workers, including teachers.

See 29 U.S.C. §213(a) (1970) (no longer in force).

Finally, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, barred discrimination on the basis of "race, color, or national origin," but not sex, in any federally funded programs and activities.

The Bayh floor amendment, Amendment No. 874, was introduced in 1972, 118 Cong. Rec. 5803 (1972) (print of amendment), to close these loopholes. In §§ 1001-1003 of the Amendment, a new Title IX was created, banning discrimination on the basis of sex in federally funded educational programs and activities, thus effectively extending Title VI's prohibition to sex discrimination in federally funded programs. Section 1005 of that amendment amended Title VII to cover employment discrimination in educational institutions. Ibid. And §§ 1001-1010 amended the Equal Pay Act so that discrimination in pay on the basis of sex was barred, even for teachers and other professionals. Ibid.

Since the amendments to Title VII and the Equal Pay Act explicitly covered discrimination in employment in educational institutions, there was no need to include §§ 1001-1003 of the Bayh Amendment to proscribe such

discrimination. Instead, Title IX presumably was enacted, as its language clearly indicates, to bar discrimination against beneficiaries of federally funded programs and activities. This interpretation of Title IX is confirmed by the fact that it was modelled after Title VI of the Civil Rights Act of 1964.⁸ Title VI was limited in its scope to discrimination against beneficiaries of federally funded programs, not general employment practices of fund recipients. 42 U.S.C. §2000d-3.⁹ And, as this Court noted in Cannon v. University of Chicago, 441 U.S. 677, 770-711 (1979), when Congress passed Title IX, it expected the new provision to be interpreted consistently with Title VI, which had been its model.

B

⁸The operative language in the two provisions is virtually identical. Compare 42 U.S.C. §2000d (Title VI) with 20 U.S.C. §1681a (Title IX).

⁹42 U.S.C. §2000d-3 states:

"Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any department or agency or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

The Court discounts the importance of Title VI to the proper interpretation of Title IX for three reasons. First, it notes that "[i]t is Congress' intention in 1972, not in 1964, that is of significance in interpreting Title IX." Ante, at ____ (citing Cannon v. University of Chicago, 441 U.S. 677, 710-711 (1979)). This point begs the question, however, since there is no evidence that in 1972, when it passed Title IX, Congress thought Title VI applied to employment discrimination. ^{least} The second reason advanced by the Court for disregarding Title VI is that it, unlike Title IX, includes a section, i.e. §604, 42 U.S.C. §2000d-3, expressly stating that Title VI applies only to discrimination against fund beneficiaries, not to employment discrimination per se. But in an earlier version of the legislation that was to become Title IX, the amendment was drafted as a modification of Title VI, simply adding the word "sex." In the end, it is true, Title IX was enacted as a statute separate from Title VI, but the reason for this approach was strategic, not substantive. Supporters feared that if Title VI were opened for amendment, Title VI itself might be "gutted" on

the floor of the Congress. Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education and Labor, House of Representatives--Review of regulations to implement Title IX, 94th Cong., 1st Sess. p. 409 (1975).

Finally, to break the link between Titles VI and IX, the Court stresses that the House version of the Senate's Bayh Amendment originally contained a provision, §1004, equivalent to §604 of Title VI, explicitly stating that no section of the 1972 legislation applied to discrimination in employment, but this provision was eliminated by the Conference. Ante, at ____ *least* A strong argument, however, can be made that there was a non-substantive reason for eliminating §1004 from the House bill. In 1975 hearings before the House Subcommittee on Postsecondary Education and Labor, Representative O'Hara, Chairman of that Subcommittee, while explaining the background of Title IX to a witness, noted that this change was made at conference simply to eliminate, as quietly as possible, a recently discovered drafting error. Sex Discrimination Regulations: Hearings Before the

Subcomm. on Postsecondary Education and Labor, House of Representatives--Review of regulations to implement Title IX, 94th Cong., 1st Sess. p. 409 (1975). Even without reference to Senator O'Hara's remarks, made in 1975, it is clear that, at the time of the Conference on the House bill and the Senate's Bayh Amendment, §1004 of the House bill was a drafting mistake; it stated that no section of the House bill applied to employment, though sections of the House Bill, as well as the Senate version, contained express changes to the employment discrimination provisions of Title VII and the Equal Pay Act. Since the analogous provision of Title VI, §604, had been regarded as a mere clarification,¹⁰ the Court is on weak ground in arguing that the Conference Report's use of the ritualistic words "the House receded" reveals a substantive change rather than the quiet correction of an obvious drafting error at a very late stage in the legislative process.

¹⁰See, e.g., 110 Cong. Rec. 10076 (1964) (statement of Attorney General Kennedy); Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules, 88th Cong., 2d Sess. p. 198 (1964) (statement of Congressman Celler, House Floor Manager of Title VI).

C

In concluding that the legislative history indicates Title IX was intended to extend to employment discrimination, the Court is forced to rely primarily on the statements of a single senator.¹¹ The first statement, ante, at ____ (quoting 118 Cong. Rec. 5803 (1972)), *is* ambiguous. Senator Bayh did state that faculty employment would be covered by his amendment after mentioning the sections enacting Title IX but prior to any mention of those amending Title VII and the Equal Pay Act. Immediately thereafter, however, he stated that Title IX's enforcement powers paralleled those in Title VI. Yet Title VI has never provided for fund termination to redress discrimination in employment.

Next, the Court quotes Bayh's statements that (i) he regarded "sections 1001-1005" as "[c]entral to [his] amendment" and (ii) "[t]his portion of the amendment covers discrimination in all areas," including employment.

¹¹The most dependable sources of legislative intent are the reports of the responsible committees. Because Title IX is the result of a floor amendment, there is no explanation of its meaning in reports from the relevant House and Senate Committees.

Ante¹ at ____ (quoting 118 Cong. Rec. 5807 (1972)). But, §1005 of the Bayh amendment is the section amending Title VII and thus §§1001-1005 cover employment discrimination regardless of whether Title IX does.¹² Moreover, the Court uses an elipsis rather than include the following words from the second Bayh statement:

"Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI." 118 Cong. Rec. 5807 (1972) (in elipses ante¹ at ____).

Thus, for a second time, Bayh indicated to the Senate that he regarded Title IX of his amendment as parallel to Title VI rather than as a substantial departure from Title VI.

In the third Bayh statement, ante¹ at ____ (quoting 118 Cong. Rec. 5812 (1972)), the Senator was responding to a question from Senator Pell regarding Title IX, and the Court assumes that each sentence in that response refers to Title IX. But, as the Court of Appeals for the First

¹² See description of various sections of the Bayh Amendment, supra, at _____. See also 118 Cong. Rec. 5803 (1972) (print of amendment).

Circuit noted in Islesboro:

"A fair reading both of the colloquy^{C...}, as well as the discussion immediately preceding and following the above-quoted passage, indicates that Senator Bayh divided his analysis into three sections, two of which were specifically aimed at students (admissions and services), the third at employees (employment). While Senator Bayh's response was more extended than it needed to be for a direct answer to Senator Pell's question, we think HEW's reading is strained. We think this particularly in light of the fact that the discussion was an oral one and thus not as precise as a response in written form," 593 F. 2d, at 427.

Rather than support the Court's view, it is fair to say that the legislative history accords with the natural reading of the statute. ¹ Title IX prohibits discrimination only against beneficiaries of federally funded programs and activities, not all employment discrimination by recipients of federal funds. Title IX is modelled after Title VI, which is explicitly so limited--and to the extent statements of Senator Bayh can be read to the contrary, they are ambiguous.¹³

¹³The Court devotes considerable time to describing post-enactment actions or inaction on the part of subsequent Congresses. See ante, at _____. The fact that, in 1975, Congress considered, but failed to enact, resolutions disapproving HEW's regulations is essentially irrelevant in determining the intent of the enacting Congress in 1972. Similarly, the fact that a subsequent Congress considered, but failed to enact bills limiting Title IX's coverage with respect to employment discrimination does not indicate that the 1972 Congress meant to include employment discrimination within Title IX.

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As indicated above, when critical words, in this case "employment discrimination," are absent from a statute and its meaning is otherwise clear, reliance on legislative history to add omitted words is rarely appropriate. Only when legislative history gives clear and unequivocal guidance as to congressional intent should a court presume to add what Congress failed to include. And, however else one might describe the legislative history relied upon by the Court today, it is neither clear nor unequivocal.

III

As the sole issue before us is the meaning of §901(a) of Title IX, I repeat the relevant language:

"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" §901(a).

The Court acknowledges that, in view of the lack of

support for its position in this language, it must look to the "legislative history for evidence as to whether or not §901 was meant to prohibit employment discrimination". Ante, at _____. Although the Court examines at length the truncated legislative history, it ignores other factors highly relevant to intent: (i) whether the ambiguity easily could have been avoided by the legislative draftsman; (ii) whether Congress had prior experience and a certain amount of expertise in legislating with respect to this particular subject; and (iii) whether existing legislation clearly and adequately proscribed and remedied the conduct in question. When these factors are considered, there is no reason to read sex employment discrimination language into §901.

If there had been such an intent, no legislative draftsman--even one of modest accomplishments--would have written §901 as above set forth. The draftsman would have been guided, of course, by the employment-discrimination language in Title VII and the Equal Pay Act, language specifically addressing this problem. Moreover, although these other statutes had been enacted by an earlier

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Congress, at the time Title IX was being drafted and considered, Title VII and the Equal Pay Act were also amended to proscribe explicitly employment discrimination in educational institutions on the basis of sex.

See #1 Congress would hardly have enacted a third statute addressing this problem, but, in contrast to the other two, use language ambiguous at best.

In addition, a comparison of the provisions of Title VII and Title IX suggests that Congress would not have enacted the inconsistent provisions of of the latter with respect to remedies and procedures. Title VII is a comprehensive anti-discrimination statute with carefully prescribed procedures for conciliation by the EEOC, federal court remedies available within certain time limits, and certain specified forms of relief, designed to make whole the victims of illegal discrimination and available unless discriminatory conduct falls within one of several exceptions. See 42 U.S.C. §2000e et seq. This thoughtfully structured approach is in sharp contrast to Title IX, which contains only one extreme remedy, fund termination, apparently now available at the request of

have #2

any female employee who can prove discrimination in employment in a federally funded program or activity. This cutoff of funds, at the expense of innocent beneficiaries of the funded program, will not remedy the injustice to the employee. Indeed, Title IX does not authorize a single action, such as employment, reemployment, or promotion, to rectify employment discrimination. And Title IX, unlike Title VII, has no time limits for action, no conciliation provisions, and no guidance as to procedure.¹⁴ Compare 20 U.S.C. §1681 et seq. (Title IX) with 42 U.S.C. §2000e et seq. (Title VII). The Solicitor General conceded at oral argument that appropriate relief for the two employees who initiated this suit was available under Title VII.¹⁵ See transcript III ✓

¹⁴ It is interesting to note that, whereas Congress itself provided for administrative procedures to redress employment discrimination in Title VII, see 42 U.S.C. §2000e et seq., it enacted no comparable provisions in Title IX, see 20 U.S.C. §1681 et seq. Such administrative procedures as are available under Title IX are part of the regulations promulgated by HEW, 45 C.F.R. §§80.7-80.10. Moreover, ⁴ the administrative procedures enacted by Congress in the U.S.C. and by HEW in the C.F.R. are quite different, though addressing a single problem. The Hew regulations provide for Administrative-Procedure-Act hearings, followed by judicial review. See 45 C.F.R. §§ 80.9-80.11. In Contrast, EEOC acts first as conciliator, attempting to settle employment disputes, and then, as counsel for the victims of discrimination in subsequent de novo judicial proceedings. See 42 U.S.C. §2000e, et seq. ✓

Footnote(s) 15 will appear on following pages.

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desires,

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✓✓ of oral argument, 27. ¶ Finally, Congress delegated the administration of Title IX to the Department of Health, Education and Welfare. Title VII and the Equal Pay Act are administered by the Department of Labor and EEOC. It is most unlikely that Congress would intend not only duplicate substantive legislation but also enforcement of these provisions by different departments of government with different enforcement powers, areas of expertise, and enforcement methods.¹⁶ The District Court in Romeo Community Schools v. HEW, 438 F. Supp. 1021 (ED Mich. 1977), aff'd 600 F.2d 581 (CA6) cert. den., 444 U.S. 972 (1979), correctly observed:

"These governmental agencies, particularly the

¹⁵An employee could presumably bring actions against the school district under Title VII, Title IX, and the Equal Pay Act, seeking redress of his or her wrong in the form of back pay and injunctive relief, and, in addition, request that funds be terminated.

¹⁶The Court's decision will result in needless duplication of governmental bureaucracy. Although HEW would prefer to have no involvement in employment discrimination, see Brief of Solicitor General 37, n. 26, it will be required to maintain a staff of employees to enforce the anti-discrimination in employment portion of Title IX. And these employees will duplicate the large staffs of the EEOC and the Department of Labor already devoted to employment discrimination.

From the viewpoint of educational institutions, there will now be two sets of federal regulations and regulators overseeing their employment practices. These different governmental departments may, or may not, have the same substantive standards and filing requirements at any given time. At the present time, the HEW and EEOC procedures in the event of non-compliance are quite different. See discussion in text supra, at ____.

EEOC, were established specifically for the purpose of regulating discrimination in employment practices. These agencies have the expertise and their enabling legislation has provided them with the investigative and enforcement machinery necessary to compel compliance with regulations against sex discrimination in employment. HEW does not have similar enforcement authority." 438 F. Supp., at 1034.

Even the Solicitor General, in the brief on behalf of the federal respondents in this case, acknowledges what the

Romeo Court thought was self evident:

"The Department of Education has only limited expertise in employment matters. Its view is that employment cases are better resolved under Title VII of the Civil Rights Act of 1964, which provides more appropriate remedies for such cases." Brief, p. 37.

In sum, the Court's decision today, finding an unarticulated intent on the part of Congress, is predicated on four assumptions that I am unwilling to impute that body: (i) that Congress neglectfully or forgetfully failed to include language in §901 with respect to discrimination that would have made clear its intent; (ii) that Congress enacted a third statute proscribing sex discrimination in employment in educational institutions in the absence of any showing of a need for such duplicative legislation; and (iii) that

Congress failed to include in the third statute appropriate procedural and remedial provisions relevant to employment discrimination; and (iv) finally, that it vested the authority to enforce the third statute in HEW, a department which even the Soliciter General concedes lacks the experience and the qualifications to oversee and enforce employment legislation.

lfp/ss 05/11/82

Rider A, footnote (North Haven)

NORTHFN SALLY-POW

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OK
if Mary
agrees

Possibly add a footnote along the following lines at the
point you suggest, Mary:

ignores the portion of
The Court puts aside Senator Bayh's statement
that is inconsistent with its position, characterizing the
statement as "inadvertent". ^{*cite*} This hardly gives one
confidence that the Senator's statements selectively
relied upon by the Court are not also inadvertent. As the
Court's decision concededly is based solely on the floor
debate, we note again--as evidence of how little it
actually supports the Court--that the views of Courts of
Appeals judges with respect to this debate have ranged

from viewing it as indicating no intention to read
employment discrimination into Title IX to recognizing
that--like most floor debates--the oral statements of
Senators even if not ambiguous must be viewed with
skepticism. (*note case*)

OK with
me if
many
agree.

lfp/ss 05/11/82 Rider A, p. 15 (North Haven)

NORTH15 SALLY-POW

Add in text^d of our opinion:

Responding to this dissent, see third paragraph
of fn. 26, ante at 24, the Court states that the factors
considered in ^{this} Part III of my opinion (at 11-15), and
summarized above, "are not relevant" to "ascertaining
legislative intent". If this were a "plain language"
case, perhaps this statement could be made. But the Court
recognizes that its position cannot be sustained by the
plain language, and therefore it relies exclusively on
ambiguous and muddled oral statements made in Senate
debate, to say that a court should not consider what

In these circumstances, it
defies reason

reasonable legislators surely would consider. After all, under settled rules of statutory construction legislation bodies are presumed to act reasonably. ^{73/} (cite cases).

17 The insistence of the Court that all of these ^{above}

*Many-
add
as a
final
note*

considerations are "irrelevant", and that it only need look at the brief and ambiguous legislative history, is all the more remarkable in light of the views of other federal judges. As noted above, of the six Courts of Appeals to consider whether Title IX prohibits employment discrimination, only the Court of Appeals for the Second Circuit in this case agrees with this Court. Twelve judges on four Courts of Appeals read the plain language as not banning employment discrimination. I share this view. But ^{even} on the Court's assumption of ambiguity in the language there is no justification in our authorities *or*

~~in reason~~ for closing one's eyes to the legislative realities identified in Part III above, and which the Court puts aside as "irrelevant".

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P

From: **Justice Powell**

Circulated: _____

Recirculated: _____

CHAMBERS DRAFT

4/17/82

Edited
4/17

SUPREME COURT OF THE UNITED STATES

No. 80-986

**NORTH HAVEN BOARD OF EDUCATION, ET AL.,
PETITIONERS *v.* TERREL H. BELL, SECRETARY,
DEPARTMENT OF EDUCATION, ET AL.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[April —, 1982]

POWELL, J., dissenting.

Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.*, prohibits discrimination on the basis of sex in education programs and activities receiving federal funds. In 1975, the Department of Health, Education, and Welfare (HEW)¹ promulgated regulations prohibiting discrimination on the basis of gender in *employment* by fund recipients. 34 CFR § 106.51(a)(1). Today, the Court upholds the validity of these regulations, relying on the statutory language, its legislative history, and several post-enactment events. Because I believe the Court's interpretation is neither consistent with the statutory language nor supported by its legislative history, I dissent.²

I

Although the majority begins with the language of the

¹ As noted by the majority, *ante* at —, n. 4, HEW's duties under Title IX were transferred to the Department of Education in 1979 by § 301(a)(3) of the Department of Education Organization Act, Pub. L. 69-88, 93 Stat. 678, 20 U. S. C. § 3441(a)(3) (1976 ed., Supp. IV). I follow the majority in referring to both agencies as HEW since many of the relevant acts in this case took place before the reorganization. See *ante*, at —, n. 4.

² The Court acknowledges that the post-enactment events it discusses only "lend credence" to its interpretation of the statute. *Ante*, at —.

Court

statute, it quotes the relevant language in its entirety only in the opening paragraphs of the opinion. In the section considering the statute's meaning, the Court quotes two words of the statute and paraphrases the rest, thereby suggesting an interpretation actually at odds with the language used in the statute. Thus, according to the Court, "[s]ection 901's broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students." *Ante*, at —. This is not what the statutory language provides.

In relevant part, the statute states:

"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. . . ." Education Amendments of 1972, § 901(a), 20 U. S. C. § 1681(a).

A natural reading of these words would limit the statute's scope to discrimination against those who are enrolled in, or the beneficiaries of programs or activities receiving federal funding. It tortures the language chosen by Congress to conclude that not only teachers and administrators, but also secretaries and janitors, who are discriminated against on the basis of sex in employment, are thereby (i) denied *participation* in a program or activity³; (ii) denied the *benefits* of a program or activity; or (iii) subject to discrimination *under* an education program or activity. Moreover, Congress made no reference whatever to employers or employees in Title IX, in sharp contrast to quite explicit language in other statutes regulating employment practices.⁴

³ I agree with the majority that employees who directly participate in a federal program, *i. e.*, teachers who receive federal grants, are, of course, protected by Title IX. See *ante*, at —. ¹

⁴ See, *e. g.*, 42 U. S. C. § 2000e-2 (Title VII: "[i]t shall be an unlawful

Mary -
do you
think
the
suggested
change
is better?

who are
denied the
benefits, of

Mary - add language
identify the employer
who initiated this suit

Mary, since CA 2 in this case
did uphold the Regs. it is better,
I think to rest on the other five cases

80-986-DISSENT

NORTH HAVEN BOARD OF EDUCATION v. BELL 3

It is noteworthy that not one of the ~~six~~ ^{other five} Courts of Appeals to consider the question before us ~~has~~ ^{had} reached the conclusion that HEW's interpretation is supported by the statutory language. The issue was presented initially to the Court of Appeals for the First Circuit in *Islesboro School Committee v. Califano*, 593 F. 2d 424, 426 (CA1), cert. denied, 444 U. S. 972 (1979), and that decision has been followed by most other Courts of Appeals to consider the question. There, the court concluded that "[t]he language of section 901, 20 U. S. C. § 1681, on its face, is aimed at the beneficiaries of the federal monies, i. e., either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government." The court went on to point out that this reading of "the plain language of the statute is buttressed by an examination of the specific exemptions mentioned in the statute," all of which relate to students, not employees.⁵ *Ibid.*

In the next appellate decision, *Romeo Community Schools v. HEW*, 600 F. 2d 581 (CA6), cert. denied, 444 U. S. 972 (1979), the Court of Appeals for the Sixth Circuit ~~rejected~~ ^{also} the interpretation of the statute now relied on by this Court, noting that "as actually written, the statute is not nearly so

employment practice for an employer—"); 29 U. S. C. § 206(d)(1) (Equal Pay Act: "[n]o employer having employees. . .").

⁵The Court today not only finds this point unconvincing, but concludes that the "absence of a specific exclusion for employment among the list of exceptions tends to support the Court of Appeal's conclusion that Title IX does protect employees." *Ante*, at — (citation omitted). I am unable to follow this reasoning. The absence of employment-related exceptions may not be conclusive proof that employment is not within the scope of the statute. But I fail to see how that absence affirmatively indicates that the statute was intended to apply to employees. Indeed, if Congress did intend to cover employees, it is anomalous that it did not provide exceptions similar to those in Title VII. For example, Title VII does not proscribe bona fide seniority plans, 42 U. S. C. § 2000e-2(h), or preferential employment of Indians at establishments operating on reservations, 42 U. S. C. § 2000e-2(i).

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an unlikely
exception for
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omit it.

broad. The words 'no person' are modified by later language which clearly limits their meaning." 600 F. 2d, at 584. The court concluded that the statute "reaches only those types of disparate treatment" that involve discrimination against program beneficiaries.⁶ *Ibid.*

II

A

The Court acknowledges, as it must, that § 901 of Title IX "does not expressly include . . . employees." But it finds a

⁶ The question has also been presented to the Courts of Appeals for the ~~Second~~, Fifth, Eighth, and Ninth Circuits. In *Junior College Dist. of St. Louis v. Califano*, 597 F. 2d 119, 121 (CA8), cert. denied, 444 U. S. 972 (1972) the Court of Appeals for the Eighth Circuit considered HEW's arguments but "adopted" the Court of Appeals for the First Circuit's decision in *Islesboro*. And in *Seattle University v. HEW*, 621 F. 2d 992, 993 (CA9 1980), cert. granted *sub nom. United States Dept. of Ed. v. Seattle Univ.*, 449 U. S. 1009 (CA9 1980), the Court of Appeals for the Ninth Circuit followed the three earlier circuit decisions, noting that each of those courts had held that the plain language of Title IX did not support HEW's position. Even in the decision below, in which the Court of Appeals for the Second Circuit upheld the regulations, the court did not base its decision on the statutory language, but stated that the "language is more ambiguous than HEW suggests." 629 F. 2d, at 777. ✓

The other appellate decision was entered by the Court of Appeals for the Fifth Circuit in *Dougherty Cty. School System v. Harris*, 622 F. 2d 735 (CA5 1980), cert. pending *sub nom. Bell v. Dougherty Cty School System*, No. 80-1023. There, the Court of Appeals for the Fifth Circuit held the regulations invalid because they did not limit fund termination to the offending program or activity. In reaching this decision, the court noted that program-specific regulations might be sustainable in some instances, *e. g.*, if they prohibited discrimination in pay against female teachers paid with federal funds relative to the amounts paid male teachers with federal funds. The court noted that an argument can be made that in such a case, the woman teacher is "denied the benefits of" or "subject to discrimination under" the federal program. 622 F. 2d, at 737-738. But there is no indication it would agree with this Court that the statutory language supports program-specific regulations prohibiting all kinds of discriminatory employment practices with respect to all types of employees, *i. e.* secretaries and administrators as well as teachers. — *and* *hourly employees,*

Mary - My language changes are to avoid the impression that the loopholes related to employment discrimination, with the possible inference that IX related also to employment

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strong negative inference in the fact that § 901 does not "exclude employees from its scope". *Ante*, at —. The Court then turns to the "legislative history for evidence as to whether or not § 901 was meant to prohibit employment discrimination". *Ibid*. I agree with the several Courts of Appeals that have concluded unequivocally that the statutory language cannot fairly be read to proscribe employee discrimination. Only rarely may legislative history be relied upon to read into a statute language that Congress itself did not include. To justify such a reading of a statute, the legislative history must show clearly and unequivocally that Congress did intend what it failed to state.⁷ The Court's elaborate exposition of the history of Title IX falls far short of this standard.

operative

Title IX was a floor amendment sponsored by Senator Bayh to Senate Bill, S. 659, 92nd Cong., 2d Sess. (1972). The amendment closed loopholes in earlier civil rights legislation; three problem areas had been identified in hearings by a special House Committee in 1970. See *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970)*. Title VII of the Civil Rights Act of 1964, though generally barring employment discrimination on the basis of sex, race, religion, or national origin, did not apply to discrimination "with respect to employment of individuals to perform work connected with the educational activities of [educational] institutions." Pub. L. No. 88-352, title VII, § 702, 78 Stat. 255. And the Equal Pay Act of 1963 banned discrimination in wages on the basis of sex, 29 U. S. C. § 206(d)(1), but it did not apply to administrative, executive, or professional workers, including teachers. See 29 U. S. C. § 213(a) (1970) (no

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⁷ See, e. g., *Citizens to Preserve Overton Park v. Volpe*, 410 U. S. 402, 412 n. 29 (1971) ("Because of this ambiguity [in the legislative history] it is clear that we must look primarily to the statutes themselves to find the legislative intent.").

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The Bayh floor Amendment, No. 874, introduced in 1972, 118 Cong. Rec. 5803 (1972) (print of amendment), closed these loopholes. Section 1005 amended Title VII to cover employment discrimination in educational institutions. Ibid. Sections 1001-1010 amended the Equal Pay Act so that discrimination in pay on the basis of sex was barred, even for teachers and other professionals. Ibid. And §§ 1001-1010 created a new Title IX banning discrimination on the basis of sex in federally funded educational programs and activities, thus effectively extending Title VI's prohibition to sex discrimination in such programs.

Title III was for all federal programs, but did not apply to "sex" discrimination -- only race, national origin, etc. religion. As far as I know, Representative O'Hare's theory on a separate statute is correct. The original 1970 provision actually would have amended Title VI. (See n.12 of Court opinion). Drafting Title IX separately might have also made it easier to draft the exceptions for single-sex educational institutions. See Patn App. 14 con.

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as I am doing this edit at home). ~~but~~ was it solely
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"strategic" reasons?

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d

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longer in force). Finally, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, barred discrimination on the basis of "race, color, or national origin," but not sex, in any federally funded programs and activities.

The Bayh floor amendment, Amendment No. 874, was introduced in 1972, 118 Cong. Rec. 5803 (1972) (print of amendment), to close these loopholes. In §§ 1001-1003 of the

Amendment, a new Title IX was created, banning discrimination on the basis of sex in federally funded educational programs and activities, thus effectively extending Title VI's prohibition to sex discrimination in federally funded programs.

Section 1005 of that amendment amended Title VII to cover employment discrimination in educational institutions. *Ibid.* And §§ 1001-1010 amended the Equal Pay Act so that discrimination in pay on the basis of sex was barred, even for teachers and other professionals. *Ibid.*

Since the amendments to Title VII and the Equal Pay Act explicitly covered discrimination in employment in educational institutions, there was no need to include §§ 1001-1003 of the Bayh Amendment to proscribe such discrimination. Instead, Title IX presumably was enacted, as its language clearly indicates, to bar discrimination against beneficiaries of federally funded programs and activities. This interpretation of Title IX is confirmed by the fact that it was modelled after Title VI of the Civil Rights Act of 1964.⁸ Title VI was limited in its scope to discrimination against beneficiaries of federally funded programs, not general employment practices of fund recipients.⁹ 42 U. S. C. § 2000d-3.⁹ And, as

⁸The operative language in the two provisions is virtually identical. Compare 42 U. S. C. § 2000d (Title VI) with 20 U. S. C. § 1681a (Title IX).

⁹42 U. S. C. § 2000d-3 states:

"Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any department or agency or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

this Court noted in *Cannon v. University of Chicago*, 441 U. S. 677, 770-711 (1979), when Congress passed Title IX, it expected the new provision to be interpreted consistently with Title VI, which had been its model.

B

The Court discounts the importance of Title VI to the proper interpretation of Title IX for three reasons. First, it notes that “[i]t is Congress’ intention in 1972, not in 1964, that is of significance in interpreting Title IX.” *Ante*, at — (citing *Cannon v. University of Chicago*, 441 U. S. 677, 710-711 (1979)). This point begs the question, however, since there is no evidence that in 1972, when it passed Title IX, Congress thought Title VI applied to employment discrimination. The second reason advanced by the Court for disregarding Title VI is that it, unlike Title IX, includes a section, *i. e.* § 604, 42 U. S. C. § 2000d-3, expressly stating that Title VI applies only to discrimination against fund beneficiaries, not to employment discrimination *per se*. But in an earlier version of the legislation that was to become Title IX, the amendment was drafted as a modification of Title VI, simply adding the word “sex.” In the end, it is true, Title IX was enacted as a statute separate from Title VI, but the reason for this approach was strategic, not substantive. Supporters feared that if Title VI were opened for amendment, Title VI itself might be “gutted” on the floor of the Congress. Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education and Labor, House of Representatives—Review of regulations to implement Title IX, 94th Cong., 1st Sess. p. 409 (1975).

Finally, to break the link between Titles VI and IX, the Court stresses that the House version of ~~the~~ Senate’s Bayh Amendment originally contained a provision, § 1004, equivalent to § 604 of Title VI, explicitly stating that no section of the 1972 legislation applied to discrimination in employment, but this provision was eliminated by the Conference. *Ante*,

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at —. A strong argument, however, can be made that there was a non-substantive reason for eliminating § 1004 from the House bill. In 1975 hearings before the House Subcommittee on Postsecondary Education and Labor, Representative O'Hara, Chairman of that Subcommittee, while explaining the background of Title IX to a witness, noted that this change was made at conference simply to eliminate, as quietly as possible, a recently discovered drafting error. Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education and Labor, House of Representatives—Review of regulations to implement Title IX, 94th Cong., 1st Sess. p. 409 (1975). Even without reference to ~~Senator~~ ^{Representative} O'Hara's remarks, made in 1975, it is clear that, at the time of the Conference on the House bill and the Senate's Bayh Amendment, § 1004 of the House bill was a drafting mistake; it stated that no section of the House bill applied to employment, though sections of the House Bill, as well as the Senate version, contained express changes to the employment discrimination provisions of Title VII and the Equal Pay Act. Since the analogous provision of Title VI, § 604, had been regarded as a mere clarification,¹⁰ the Court is on weak ground in arguing that the Conference Report's use of the ritualistic words "the House receded" reveals a substantive change rather than the quiet correction of an obvious drafting error at a very late stage in the legislative process.

C

In concluding that the legislative history indicates Title IX was intended to extend to employment discrimination, the Court is forced to rely primarily on the statements of a single

¹⁰ See, e. g., 110 Cong. Rec. 10076 (1964) (statement of Attorney General Kennedy); Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules, 88th Cong., 2d Sess. p. 198 (1964) (statement of Congressman Celler, House Floor Manager of Title VI).

senator.¹¹ The first statement, *ante*, at — (quoting 118 Cong. Rec. 5803 (1972)), is ambiguous. Senator Bayh did state that faculty employment would be covered by his amendment after mentioning the sections enacting Title IX but *prior* to any mention of those amending Title VII and the Equal Pay Act. Immediately thereafter, however, he stated that Title IX's enforcement powers paralleled those in Title VI. Yet Title VI has never provided for fund termination to redress discrimination in employment.

Next, the Court quotes Bayh's statements that (i) he regarded "sections 1001-1005" as "[c]entral to [his] amendment" and (ii) "[t]his portion of the amendment covers discrimination in all areas," including employment. *Ante*, at — (quoting 118 Cong. Rec. 5807 (1972)). But, § 1005 of the Bayh amendment is the section amending Title VII and thus §§ 1001-1005 cover employment discrimination regardless of whether Title IX does.¹² Moreover, the Court uses an elipsis rather than include the following words from the second Bayh statement:

"Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI." 118 Cong. Rec. 5807 (1972) (in ellipses *ante*, at —).

Thus, for a second time, Bayh indicated to the Senate that he regarded Title IX of his amendment as parallel to Title VI

¹¹ The most dependable sources of legislative intent are the reports of the responsible committees. Because Title IX is the result of a floor amendment, there is no explanation of its meaning in reports from the relevant House and Senate Committees.

¹² See description of various sections of the Bayh Amendment, *supra*, at —. See also 118 Cong. Rec. 5803 (1972) (print of amendment).

rather than as a substantial departure from Title VI.

In the third Bayh statement, *ante*, at — (quoting 118 Cong. Rec. 5812 (1972)), the Senator was responding to a question from Senator Pell regarding Title IX, and the Court assumes that each sentence in that response refers to Title IX. But, as the Court of Appeals for the First Circuit noted in *Islesboro*:

“A fair reading both of the colloquy . . . , as well as the discussion immediately preceding and following the above-quoted passage, indicates that Senator Bayh divided his analysis into three sections, two of which were specifically aimed at students (admissions and services), the third at employees (employment). While Senator Bayh’s response was more extended than it needed to be for a direct answer to Senator Pell’s question, we think HEW’s reading is strained. We think this particularly in light of the fact that the discussion was an oral one and thus not as precise as a response in written form,”
593 F. 2d, at 427.

Rather than support the Court’s view, it is fair to say that the legislative history accords with the natural reading of the statute. Title IX prohibits discrimination only against beneficiaries of federally funded programs and activities, not all employment discrimination by recipients of federal funds. Title IX is modelled after Title VI, which is explicitly so limited—and to the extent statements of Senator Bayh can be read to the contrary, they are ambiguous.¹³

As indicated above, when critical words, in this case “em-

¹³ The Court devotes considerable time to describing post-enactment actions or inaction on the part of subsequent Congresses. See *ante*, at — — —. The fact that, in 1975, Congress considered, but failed to enact, resolutions disapproving HEW’s regulations is essentially irrelevant in determining the intent of the enacting Congress in 1972. Similarly, the fact that a subsequent Congress considered, but failed to enact bills limiting Title IX’s coverage with respect to employment discrimination does not indicate that the 1972 Congress meant to include employment discrimina-

ployment discrimination," are absent from a statute and its meaning is otherwise clear, reliance on legislative history to add omitted words is rarely appropriate. Only when legislative history gives clear and unequivocal guidance as to congressional intent should a court presume to add what Congress failed to include. And, however else one might describe the legislative history relied upon by the Court today, it is neither clear nor unequivocal.

III

As the sole issue before us is the meaning of § 901(a) of Title IX, I repeat the relevant language:

"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. . . ." § 901(a).

The Court acknowledges that, in view of the lack of support for its position in this language, it must look to the "legislative history for evidence as to whether or not § 901 was meant to prohibit employment discrimination". *Ante*, at _____. Although the Court examines at length the truncated legislative history, it ignores other factors highly relevant to intent: (i) whether the ambiguity easily could have been avoided by the legislative draftsman; (ii) whether Congress had prior experience and a certain amount of expertise in legislating with respect to this particular subject; and (iii) whether existing legislation clearly and adequately proscribed and remedied the conduct in question. When these factors are considered, there is no ~~reason to read sex employment discrimination language into § 901.~~

If there had been such an intent, no legislative draftsman—even one of modest accomplishments—would have written § 901 as above set forth. The draftsman would have

tion within Title IX.

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no justification for reading

been guided, of course, by the employment-discrimination language in Title VII and the Equal Pay Act, language specifically addressing this problem. Moreover, although these other statutes had been enacted by an earlier Congress, at the time Title IX was being drafted and considered, Title VII and the Equal Pay Act were also amended to proscribe explicitly employment discrimination in educational institutions on the basis of sex. Congress would hardly have enacted a *third* statute addressing this problem, but, in contrast to the other two, use language ambiguous at best.

In addition, a comparison of the provisions of Title VII and Title IX suggests that Congress would not have enacted the inconsistent provisions of of the latter with respect to remedies and procedures. Title VII is a comprehensive anti-discrimination statute with carefully prescribed procedures for conciliation by the EEOC, federal court remedies available within certain time limits, and certain specified forms of relief, designed to make whole the victims of illegal discrimination and available unless discriminatory conduct falls within one of several exceptions. See 42 U. S. C. § 2000e *et seq.* This thoughtfully structured approach is in sharp contrast to Title IX, which contains only one extreme remedy, fund termination, apparently now available at the request of any female employee who can prove discrimination in employment in a federally funded program or activity. This cutoff of funds, at the expense of innocent beneficiaries of the funded program, will *not* remedy the injustice to the employee. Indeed, Title IX does not authorize a single action, such as employment, reemployment, or promotion, to rectify *employment* discrimination. And Title IX, unlike Title VII, has no time limits for action, no conciliation provisions, and no guidance as to procedure.¹⁴ Compare 20 U. S. C. § 1681

¹⁴ It is interesting to note that, whereas Congress itself provided for administrative procedures to redress employment discrimination in Title VII, see 42 U. S. C. § 2000e *et seq.*, it enacted no comparable provisions in Title

et seq. (Title IX) with 42 U. S. C. § 2000e et seq. (Title VII). The Solicitor General conceded at oral argument that appropriate relief for the two employees who initiated this suit was available under Title VII.¹⁵ See transcript of oral argument, 27. Finally, Congress delegated the administration of Title IX to the Department of Health, Education and Welfare. Title VII and the Equal Pay Act are administered by the Department of Labor and EEOC. It is most unlikely that Congress would intend not only duplicate substantive legislation but also enforcement of these provisions by different departments of government with different enforcement powers, areas of expertise, and enforcement methods.¹⁶ The District

IX, see 20 U. S. C. § 1681 et seq. Such administrative procedures as are available under Title IX are part of the regulations promulgated by HEW, 45 CFR §§ 80.7-80.10.

The administrative procedures enacted by Congress in the U. S. C. and by HEW in the CFR are quite different, though addressing a single problem. The HEW regulations provide for Administrative-Procedure-Act hearings, followed by judicial review. See 45 CFR §§ 80.9-80.11. In Contrast, EEOC acts first as conciliator, attempting to settle employment disputes, and then, if it so desires, as counsel for the victims of discrimination in subsequent *de novo* judicial proceedings. See 42 U. S. C. § 2000e, et seq.

¹⁵ An employee could presumably bring actions against the school district under Title VII, Title IX, and the Equal Pay Act, seeking redress of his or her wrong in the form of back pay and injunctive relief, and, in addition, request that funds be terminated.

¹⁶ The Court's decision will result in needless duplication of governmental bureaucracy. Although HEW would prefer to have no involvement in employment discrimination, see Brief of Solicitor General 37, n. 26, it will be required to maintain a staff of employees to enforce the anti-discrimination in employment portion of Title IX. And these employees will duplicate the large staffs of the EEOC and the Department of Labor already devoted to employment discrimination.

From the viewpoint of educational institutions, there will now be two sets of federal regulations and regulators overseeing their employment practices. These different governmental departments may, or may not, have the same substantive standards and filing requirements at any given time. At the present time, the HEW and EEOC procedures in the event

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Court in *Romeo Community Schools v. HEW*, 438 F. Supp. 1021 (ED Mich. 1977), *aff'd* 600 F. 2d 581 (CA6) *cert. den.*, 444 U. S. 972 (1979), correctly observed:

"These governmental agencies, particularly the EEOC, were established specifically for the purpose of regulating discrimination in employment practices. These agencies have the expertise and their enabling legislation has provided them with the investigative and enforcement machinery necessary to compel compliance with regulations against sex discrimination in employment. HEW does not have similar enforcement authority." 438 F. Supp., at 1034.

Even the Solicitor General, in the brief on behalf of the federal respondents in this case, acknowledges what the *Romeo* Court thought was self evident:

"The Department of Education has only limited expertise in employment matters. Its view is that employment cases are better resolved under Title VII of the Civil Rights Act of 1964, which provides more appropriate remedies for such cases." Brief, p. 37.

In sum, the Court's decision today, finding an unarticulated intent on the part of Congress, is predicated on four assumptions that I am unwilling to impute ~~to~~ ^{to} that body: (i) that Congress neglectfully or forgetfully failed to include language in § 901 with respect to discrimination that would have made clear its intent; (ii) that Congress enacted a *third* statute proscribing sex discrimination in employment in educational institutions in the absence of any showing of a need for such duplicative legislation; ~~and~~ (iii) that Congress failed to include in the third statute appropriate procedural and remedial provisions relevant to employment discrimination; and (iv) fi-

of non-compliance are quite different. See discussion in text *supra*, at —.

nally, that it vested the authority to enforce the third statute in HEW, a department ~~which~~ even the Solicitor General concedes lacks the experience and the qualifications to oversee and enforce employment legislation.

That

Surely Congress has more common sense and expertise than to blunder in this way.

Mary - does this last sentence go too far?

Mary - This is ready for
1st Draft to Circulate, subject
to changes on
page indicated
your changes
are good.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

LJP

Changes
2, 3, 5, 6, 10-15
See especially 14-15

From: Justice Powell

Circulated: _____

Recirculated: _____

wording change
- new

2nd CHAMBERS DRAFT

4/21/82

SUPREME COURT OF THE UNITED STATES

No. 80-986

NORTH HAVEN BOARD OF EDUCATION, ET AL.,
PETITIONERS v. TERREL H. BELL, SECRETARY,
DEPARTMENT OF EDUCATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[April —, 1982]

POWELL, J., dissenting.

Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.*, prohibits discrimination on the basis of sex in education programs and activities receiving federal funds. In 1975, the Department of Health, Education, and Welfare (HEW)¹ promulgated regulations prohibiting discrimination on the basis of gender in *employment* by fund recipients. 34 CFR § 106.51(a)(1). Today, the Court upholds the validity of these regulations, relying on the statutory language, its legislative history, and several post-enactment events. Because I believe the Court's interpretation is neither consistent with the statutory language nor supported by its legislative history, I dissent.²

I

Although the ~~majority~~ begins with the language of the

Count

¹ As noted by the Court, *ante*, at —, n. 4, HEW's duties under Title IX were transferred to the Department of Education in 1979 by § 301(a)(3) of the Department of Education Organization Act, Pub. L. 69-88, 93 Stat. 678, 20 U. S. C. § 3441(a)(3) (1976 ed., Supp. IV). I follow the ~~majority~~ in referring to both agencies as HEW since many of the relevant acts in this case took place before the reorganization. See *ante*, at —, n. 4.

² The Court acknowledges that the post-enactment events it discusses only "lend credence" to its interpretation of the statute. *Ante*, at —.

Count

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statute, it quotes the relevant language in its entirety only in the opening paragraphs of the opinion. In the section considering the statute's meaning, the Court quotes two words of the statute and paraphrases the rest, thereby suggesting an interpretation actually at odds with the language used in the statute. Thus, according to the Court, "[s]ection 901's broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students." *Ante*, at —. This is not what the statutory language provides.

In relevant part, the statute states:

"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. . . ." Education Amendments of 1972, § 901(a), 20 U. S. C. § 1681(a).

A natural reading of these words would limit the statute's scope to discrimination against those who are enrolled in, or who are denied the benefits of, programs or activities receiving federal funding. It tortures the language chosen by Congress to conclude that not only teachers and administrators, but also secretaries and janitors, who are discriminated against on the basis of sex in employment, are thereby (i) denied *participation* in a program or activity³; (ii) denied the *benefits* of a program or activity; or (iii) subject to discrimination *under* an education program or activity. Moreover, Congress made no reference whatever to employers or em-

³ I agree with the ^{Court}majority that employees who directly participate in a federal program, *i. e.*, teachers who receive federal grants, are, of course, protected by Title IX. See *ante*, at —. Respondents Elaine Dove and Linda Potz were not, however, participants in any grant program or in any other federally funded program or activity. Elaine Dove was a teacher and Linda Potz a guidance counselor. Both alleged only discrimination in employment.

ployees in Title IX, in sharp contrast to quite explicit language in other statutes regulating employment practices.⁴

It is noteworthy that not one of the other five Courts of Appeals to consider the question before us ~~had~~ reached the conclusion that HEW's interpretation is supported by the statutory language. The issue was presented initially to the Court of Appeals for the First Circuit in *Islesboro School Committee v. Califano*, 593 F. 2d 424, 426 (CA1), cert. denied, 444 U. S. 972 (1979), and that decision has been followed by most other Courts of Appeals to consider the question. There, the court concluded that "[t]he language of section 901, 20 U. S. C. § 1681, on its face, is aimed at the beneficiaries of the federal monies, *i. e.*, either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government." The court went on to point out that this reading of "the plain language of the statute is buttressed by an examination of the specific exemptions mentioned in the statute," all of which relate to students, not employees.⁵ *Ibid.*

In the next appellate decision, *Romeo Community Schools v. HEW*, 600 F. 2d 581 (CA6), cert. denied, 444 U. S. 972 (1979), the Court of Appeals for the Sixth Circuit also rejected the interpretation of the statute now relied on by this

⁴See, *e. g.*, 42 U. S. C. § 2000e-2 (Title VII: "[i]t shall be an unlawful employment practice for an employer—"); 29 U. S. C. § 206(d)(1) (Equal Pay Act: "[n]o employer having employees. . .").

⁵The Court today not only finds this point unconvincing, but concludes that the "absence of a specific exclusion for employment among the list of exceptions tends to support the Court of Appeal's conclusion that Title IX does protect employees." *Ante*, at — (citation omitted). I am unable to follow this reasoning. The absence of employment-related exceptions may not be conclusive proof that employment is not within the scope of the statute. But I fail to see how that absence affirmatively indicates that the statute was intended to apply to employees. Indeed, if Congress did intend to cover employees, it is anomalous that it did not provide exceptions similar to those in Title VII. For example, Title VII does not proscribe bona fide seniority plans, 42 U. S. C. § 2000e-2(h).

Court, noting that “as actually written, the statute is not nearly so broad. The words ‘no person’ are modified by later language which clearly limits their meaning.” 600 F. 2d, at 584. The court concluded that the statute “reaches only those types of disparate treatment” that involve discrimination against program beneficiaries.⁶ *Ibid.*

II

A

The Court acknowledges, as it must, that § 901 of Title IX

⁶ The question also has been presented to the Courts of Appeals for the Fifth, Eighth, and Ninth Circuits. In *Junior College Dist. of St. Louis v. Califano*, 597 F. 2d 119, 121 (CA8), cert. denied, 444 U. S. 972 (1972) the Court of Appeals for the Eighth Circuit considered HEW's arguments but “adopted” the Court of Appeals for the First Circuit's decision in *Islesboro*. And in *Seattle University v. HEW*, 621 F. 2d 992, 993 (CA9 1980), cert. granted *sub nom. United States Dept. of Ed. v. Seattle Univ.*, 449 U. S. 1009 (CA9 1980), the Court of Appeals for the Ninth Circuit followed the three earlier circuit decisions, noting that each of those courts had held that the plain language of Title IX did not support HEW's position. Even in the decision below, in which the Court of Appeals for the Second Circuit upheld the regulations, the court did not base its decision on the statutory language, and stated that the “language is more ambiguous than HEW suggests.” 629 F. 2d, at 777.

The other appellate decision was entered by the Court of Appeals for the Fifth Circuit in *Dougherty Cty. School System v. Harris*, 622 F. 2d 735 (CA5 1980), cert. pending *sub nom. Bell v. Dougherty Cty. School System*, No. 80-1023. There, the Court of Appeals for the Fifth Circuit held the regulations invalid because they did not limit fund termination to the offending program or activity. In reaching this decision, the court noted that program-specific regulations might be sustainable in some instances, *e. g.*, if they prohibited discrimination in pay against female teachers paid with federal funds relative to the amounts paid male teachers with federal funds. The court noted that an argument can be made that in such a case, the woman teacher is “denied the benefits of” or “subject to discrimination under” the federal program. 622 F. 2d, at 737-738. But there is no indication it would agree with this Court that the statutory language supports program-specific regulations prohibiting all kinds of discriminatory employment practices with respect to all types of employees, *i. e.*, hourly employees, secretaries and administrators as well as teachers.

"does not expressly include . . . employees." But it finds a strong negative inference in the fact that § 901 does not "exclude employees from its scope". *Ante*, at —. The Court then turns to the "legislative history for evidence as to whether or not § 901 was meant to prohibit employment discrimination". *Ibid.* I agree with the several Courts of Appeals that have concluded unequivocally that the statutory language cannot fairly be read to proscribe employee discrimination. Only rarely may legislative history be relied upon to read into a statute operative language that Congress itself did not include. To justify such a reading of a statute, the legislative history must show clearly and unambiguously that Congress did intend what it failed to state.⁷ The Court's elaborate exposition of the history of Title IX falls far short of this standard.

Title IX originated in a floor amendment sponsored by Senator Bayh to Senate Bill, S. 659, 92nd Cong., 2d Sess. (1972). The amendment was intended to close loopholes in earlier civil rights legislation; three problem areas had been identified in hearings by a special House Committee in 1970. See *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970)*. Title VII of the Civil Rights Act of 1964, though generally barring employment discrimination on the basis of sex, race, religion, or national origin, did not apply to discrimination "with respect to employment of individuals to perform work connected with the educational activities of [educational] institutions." Pub. L. No. 88-352, title VII, § 702, 78 Stat. 255. And the Equal Pay Act of 1963

⁷ See, e. g., *Citizens to Preserve Overton Park v. Volpe*, 410 U. S. 402, 412 n. 29 (1971) ("Because of this ambiguity [in the legislative history] it is clear that we must look primarily to the statutes themselves to find the legislative intent.").

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banned discrimination in wages on the basis of sex, 29 U. S. C. § 206(d)(1), but it did not apply to administrative, executive, or professional workers, including teachers. See 29 U. S. C. § 213(a) (1970) (no longer in force). Finally, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, barred discrimination on the basis of "race, color, or national origin," but not sex, in any federally funded programs and activities.

The Bayh floor Amendment, No. 874, introduced in 1972, 118 Cong. Rec. 5803 (1972) (print of amendment), closed these loopholes. Section 1005 amended Title VII to cover employment discrimination in educational institutions. *Ibid.* Sections 1009–1010 amended the Equal Pay Act so that discrimination in pay on the basis of sex was barred, even for teachers and other professionals. *Ibid.* And §§ 1001–1003 created a new Title IX banning discrimination on the basis of sex in federally funded *educational* programs and activities, thus effectively extending Title VI's prohibition to sex discrimination in such programs.

Since the amendments to Title VII and the Equal Pay Act explicitly covered discrimination in employment in educational institutions, there was no need to include §§ 1001–1003 of the Bayh Amendment to proscribe such discrimination. Instead, Title IX presumably was enacted, as its language clearly indicates, to bar discrimination against beneficiaries of federally funded educational programs and activities. This interpretation of Title IX is confirmed by the fact that it was modelled after Title VI, a statute ~~was~~ limited in its scope to discrimination against beneficiaries of federally funded programs, not general employment practices of fund recipients.⁸ 42 U. S. C. § 2000d–3.⁹ And, as this Court noted in *Cannon v. University of Chicago*, 441 U. S. 677, 770–711

⁸The operative language in the two provisions is virtually identical. Compare 42 U. S. C. § 2000d (Title VI) with 20 U. S. C. § 1681a (Title IX).

⁹42 U. S. C. § 2000d–3 states:

"Nothing contained in this subchapter shall be construed to authorize ac-

(1979), when Congress passed Title IX, it expected the new provision to be interpreted consistently with Title VI, which had been its model.

B

The Court discounts the importance of Title VI to the proper interpretation of Title IX for three reasons. First, it notes that “[i]t is Congress’ intention in 1972, not in 1964, that is of significance in interpreting Title IX.” *Ante*, at — (citing *Cannon v. University of Chicago*, 441 U. S. 677, 710–711 (1979)). This point begs the question, however, since there is no evidence that in 1972, when it passed Title IX, Congress thought Title VI applied to employment discrimination. The second reason advanced by the Court for disregarding Title VI is that it, unlike Title IX, includes a section, *i. e.* § 604, 42 U. S. C. § 2000d–3, expressly stating that Title VI applies only to discrimination against fund beneficiaries, not to employment discrimination *per se*. But in an earlier version of the legislation that was to become Title IX, the amendment was drafted as a modification of Title VI, simply adding the word “sex.” In the end, it is true, Title IX was enacted as a statute separate from Title VI, but the reason for this approach was strategic, not substantive. Supporters feared that if Title VI were opened for amendment, Title VI itself might be “gutted” on the floor of the Congress. Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education and Labor, House of Representatives—Review of regulations to implement Title IX, 94th Cong., 1st Sess. p. 409 (1975).

Finally, to break the link between Titles VI and IX, the Court stresses that the House version of the Senate’s Bayh Amendment originally contained a provision, § 1004, equiva-

tion under this subchapter by any department or agency with respect to any department or agency or labor organization except where a primary objective of the Federal financial assistance is to provide employment.”

lent to § 604 of Title VI, explicitly stating that no section of the 1972 legislation applied to discrimination in employment, but this provision was eliminated by the Conference. *Ante*, at —. A strong argument, however, can be made that there was a non-substantive reason for eliminating § 1004 from the House bill. In 1975 hearings before the House Subcommittee on Postsecondary Education and Labor, Representative O'Hara, Chairman of that Subcommittee, while explaining the background of Title IX to a witness, noted that this change was made at conference simply to eliminate, as quietly as possible, a recently discovered drafting error. Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education and Labor, House of Representatives—Review of regulations to implement Title IX, 94th Cong., 1st Sess. p. 409 (1975). Even without reference to Representative O'Hara's remarks, made in 1975, it is clear that, at the time of the Conference on the House bill and the Senate's Bayh Amendment, § 1004 of the House bill was a drafting mistake; it stated that no section of the House bill applied to employment, though sections of the House Bill, as well as the Senate version, contained express changes to the employment discrimination provisions of Title VII and the Equal Pay Act. Since the analogous provision of Title VI, § 604, had been regarded as a mere clarification,¹⁰ the Court is on weak ground in arguing that the Conference Report's use of the ritualistic words "the House receded" reveals a substantive change rather than the quiet correction of an obvious drafting error at a very late stage in the legislative process.

C

In concluding that the legislative history indicates Title IX was intended to extend to employment discrimination, the

¹⁰ See, e. g., 110 Cong. Rec. 10076 (1964) (statement of Attorney General Kennedy); Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules, 88th Cong., 2d Sess. p. 198 (1964) (statement of Congressman Celler, House Floor Manager of Title VI).

Court is forced to rely primarily on the statements of a single senator.¹¹ The first statement, *ante*, at — (quoting 118 Cong. Rec. 5803 (1972)), is ambiguous. Senator Bayh did state that faculty employment would be covered by his amendment after mentioning the sections enacting Title IX but *prior* to any mention of those amending Title VII and the Equal Pay Act. Immediately thereafter, however, he stated that Title IX's enforcement powers paralleled those in Title VI. Yet Title VI has never provided for fund termination to redress discrimination in employment.

Next, the Court quotes Bayh's statements that (i) he regarded "sections 1001-1005" as "[c]entral to [his] amendment" and (ii) "[t]his portion of the amendment covers discrimination in all areas," including employment. *Ante*, at — (quoting 118 Cong. Rec. 5807 (1972)). But, § 1005 of the Bayh amendment is the section amending Title VII and thus §§ 1001-1005 cover employment discrimination regardless of whether Title IX does.¹² Moreover, the Court uses an ellipsis rather than include the following words from the second Bayh statement:

"Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI." 118 Cong. Rec. 5807 (1972) (in ellipses *ante*, at —).

Thus, for a second time, Bayh indicated to the Senate that he regarded Title IX of his amendment as parallel to Title VI

¹¹ The most dependable sources of legislative intent are the reports of the responsible committees. Because Title IX is the result of a floor amendment, there is no explanation of its meaning in reports from the relevant House and Senate Committees.

¹² See description of various sections of the Bayh Amendment, *supra*, at —. See also 118 Cong. Rec. 5803 (1972) (print of amendment).

rather than as a substantial departure from Title VI.

In the third Bayh statement, *ante*, at — (quoting 118 Cong. Rec. 5812 (1972)), the Senator was responding to a question from Senator Pell regarding Title IX, and the Court assumes that each sentence in that response refers to Title IX. But, as the Court of Appeals for the First Circuit noted in *Islesboro*:

“A fair reading both of the colloquy . . . , as well as the discussion immediately preceding and following the above-quoted passage, indicates that Senator Bayh divided his analysis into three sections, two of which were specifically aimed at students (admissions and services), the third at employees (employment). While Senator Bayh’s response was more extended than it needed to be for a direct answer to Senator Pell’s question, we think HEW’s reading is strained. We think this particularly in light of the fact that the discussion was an oral one and thus not as precise as a response in written form,”

593 F. 2d, at 427. *ing* /

Rather than support the Court’s view, ~~it is fair to say that~~ the legislative history accords with the natural reading of the statute. Title IX prohibits discrimination only against beneficiaries of federally funded programs and activities, not all employment discrimination by recipients of federal funds. Title IX is modelled after Title VI, which is explicitly so limited—and to the extent statements of Senator Bayh can be read to the contrary, they are ambiguous.¹³

As indicated above, when critical words, in this case “em-

¹³ The Court devotes considerable time to describing post-enactment actions or inaction on the part of subsequent Congresses. See *ante*, at — — —. The fact that, in 1975, Congress considered, but failed to enact, resolutions disapproving HEW’s regulations is essentially irrelevant in determining the intent of the enacting Congress in 1972. Similarly, the fact that a subsequent Congress considered, but failed to enact bills limiting Title IX’s coverage with respect to employment discrimination does not indicate that the 1972 Congress meant to include employment discrimina-

ployment discrimination," are absent from a statute and its meaning is otherwise clear, reliance on legislative history to add omitted words is rarely appropriate. Only when legislative history gives clear and unequivocal guidance as to congressional intent should a court presume to add what Congress failed to include. And, however else one might describe the legislative history relied upon by the Court today, it is neither clear nor unequivocal.

III

As the sole issue before us is the meaning of § 901(a) of Title IX, I repeat the relevant language:

"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. . . ." § 901(a).

The Court acknowledges that, in view of the lack of support for its position in this language, it must look to the "legislative history for evidence as to whether or not § 901 was meant to prohibit employment discrimination". *Ante*, at —. Although the Court examines at length the truncated legislative history, it ignores other factors highly relevant to congressional intent: (i) whether the ambiguity easily could have been avoided by the legislative draftsman; (ii) whether Congress had prior experience and a certain amount of expertise in legislating with respect to this particular subject; and (iii) whether existing legislation clearly and adequately proscribed and remedied the conduct in question. When these factors are considered, there is no justification for reading sex employment discrimination language into § 901. *Competent*

*provided
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(#) If there had been such an intent, no legislative draftsman ~~even one of modest accomplishments~~ would have written § 901 as above set forth. The draftsman would have

tion within Title IX.

been guided, of course, by the employment-discrimination language in Title VII and the Equal Pay Act, language specifically addressing this problem. Moreover, although these other statutes had been enacted by an earlier Congress, at the time Title IX was being drafted and considered, Title VII and the Equal Pay Act were also amended to proscribe explicitly employment discrimination in educational institutions on the basis of sex. Congress hardly would have enacted a *third* statute addressing this problem, but, in contrast to the other two, use language ambiguous at best.

In addition, a comparison of the provisions of Title VII and Title IX suggests that Congress would not have enacted the inconsistent provisions of the latter with respect to remedies and procedures. Title VII is a comprehensive anti-discrimination statute with carefully prescribed procedures for conciliation by the EEOC, federal court remedies available within certain time limits, and certain specified forms of relief, designed to make whole the victims of illegal discrimination and available unless discriminatory conduct falls within one of several exceptions. See 42 U. S. C. § 2000e *et seq.* This thoughtfully structured approach is in sharp contrast to Title IX, which contains only one extreme remedy, fund termination, apparently now available at the request of any female employee who can prove discrimination in employment in a federally funded program or activity. This cutoff of funds, at the expense of innocent beneficiaries of the funded program, will *not* remedy the injustice to the employee. Indeed, Title IX does not authorize a single action, such as employment, reemployment, or promotion, to rectify *employment* discrimination. And Title IX, unlike Title VII, has no time limits for action, no conciliation provisions, and no guidance as to procedure.¹⁴ Compare 20 U. S. C. § 1681 *et seq.*

¹⁴ It is interesting to note that, whereas Congress itself provided for administrative procedures to redress employment discrimination in Title VII, see 42 U. S. C. § 2000e *et seq.*, it enacted no comparable provisions in Title

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(Title IX) with 42 U. S. C. § 2000e *et seq.* (Title VII). The Solicitor General conceded at oral argument that appropriate relief for the two employees who initiated this suit was available under Title VII.¹⁵ See Transcript of Oral Argument, 27.

Finally, Congress delegated the administration of Title IX to the Department of Health, Education and Welfare. In contrast, Title VII and the Equal Pay Act are administered by the Department of Labor and EEOC. It is most unlikely that Congress would intend not only duplicate substantive legislation but also enforcement of these provisions by different departments of government with different enforcement powers, areas of expertise, and enforcement methods.¹⁶ The

IX, see 20 U. S. C. § 1681 *et seq.* Such administrative procedures as are available under Title IX are part of the regulations promulgated by HEW, 45 CFR §§ 80.7-80.10.

The administrative procedures enacted by Congress in the U. S. C. and by HEW in the CFR are quite different, though addressing a single problem. The HEW regulations provide for Administrative-Procedure-Act hearings, followed by judicial review. See 45 CFR §§ 80.9-80.11. In Contrast, EEOC acts first as conciliator, attempting to settle employment disputes, and then, if it so desires, as counsel for the victims of discrimination in subsequent *de novo* judicial proceedings. See 42 U. S. C. § 2000e, *et seq.*

¹⁵ An employee could presumably bring actions against the school district under Title VII, and the Equal Pay Act, seeking redress of his or her wrong in the form of back pay and injunctive relief, and, in addition, request that funds be terminated under Title IX.

¹⁶ The Court's decision will result in needless duplication of governmental bureaucracy. Although HEW would prefer to have no involvement in employment discrimination, see Brief of Solicitor General 37, n. 26, it will be required to maintain a staff of employees to enforce the anti-discrimination in employment portion of Title IX. And these employees will duplicate the large staffs of the EEOC and the Department of Labor already devoted to employment discrimination.

From the viewpoint of educational institutions, there will now be two sets of federal regulations and regulators overseeing their employment practices. These different governmental departments may, or may not, have the same substantive standards and filing requirements at any given time. At the present time, the HEW and EEOC procedures in the event

} slight
clarification

67L

District Court in *Romeo Community Schools v. HEW*, 438 F. Supp. 1021 (ED Mich. 1977), *aff'd* 600 F. 2d 581 (CA6) *cert. den.*, 444 U. S. 972 (1979), correctly observed:

"These governmental agencies, particularly the EEOC, were established specifically for the purpose of regulating discrimination in employment practices. These agencies have the expertise and their enabling legislation has provided them with the investigative and enforcement machinery necessary to compel compliance with regulations against sex discrimination in employment. HEW does not have similar enforcement authority." 438 F. Supp., at 1034.

Even the Solicitor General, in the brief on behalf of the federal respondents in this case, acknowledges what the *Romeo* Court thought was self evident:

"The Department of Education has only limited expertise in employment matters. Its view is that employment cases are better resolved under Title VII of the Civil Rights Act of 1964, which provides more appropriate remedies for such cases." Brief, p. 37.

In sum, the Court's decision today, finding an unarticulated intent on the part of Congress, is predicated on five perceptions of congressional action that I am unable to share: (i) that Congress neglectfully or forgetfully failed to include language in § 901 with respect to discrimination that would have made clear its intent; (ii) that Congress enacted a *third* statute proscribing sex discrimination in employment in educational institutions in the absence of any showing of a need for such duplicative legislation; and (iii) that Congress failed to include in the third statute appropriate procedural and remedial provisions relevant to employment discrimination; (iv)

of non-compliance are quite different. See discussion in text *supra*, at —.

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to "sex" not "women".

that it vested the authority to enforce the third statute in HEW, a department that even the Solicitor General concedes lacks the experience and the qualifications to oversee and enforce employment legislation; and (v) finally, that in Title VI it gave a new "remedy" for employment discrimination to women, but did not make that remedy available to those discriminated against on the basis of race. *sex*

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: **APR 21 1982**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-986

NORTH HAVEN BOARD OF EDUCATION ET AL.,
PETITIONERS, *v.* TERREL H. BELL, SECRETARY,
DEPARTMENT OF EDUCATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[April —, 1982]

POWELL, J., dissenting.

Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.*, prohibits discrimination on the basis of sex in education programs and activities receiving federal funds. In 1975, the Department of Health, Education, and Welfare (HEW)¹ promulgated regulations prohibiting discrimination on the basis of gender in *employment* by fund recipients. 34 CFR § 106.51(a)(1). Today, the Court upholds the validity of these regulations, relying on the statutory language, its legislative history, and several post-enactment events. Because I believe the Court's interpretation is neither consistent with the statutory language nor supported by its legislative history, I dissent.²

I

Although the Court begins with the language of the stat-

¹ As noted by the Court, *ante*, at —, n. 4, HEW's duties under Title IX were transferred to the Department of Education in 1979 by § 301(a)(3) of the Department of Education Organization Act, Pub. L. 69-88, 93 Stat. 678, 20 U. S. C. § 3441(a)(3) (1976 ed., Supp. IV). I follow the Court in referring to both agencies as HEW since many of the relevant acts in this case took place before the reorganization. See *ante*, at —, n. 4.

² The Court acknowledges that the post-enactment events it discusses only "lend credence" to its interpretation of the statute. *Ante*, at —.

ute, it quotes the relevant language in its entirety only in the opening paragraphs of the opinion. In the section considering the statute's meaning, the Court quotes two words of the statute and paraphrases the rest, thereby suggesting an interpretation actually at odds with the language used in the statute. Thus, according to the Court, "[s]ection 901's broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students." *Ante*, at —. This is not what the statutory language provides.

In relevant part, the statute states:

"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. . . ." Education Amendments of 1972, § 901(a), 20 U. S. C. § 1681(a).

A natural reading of these words would limit the statute's scope to discrimination against those who are enrolled in, or who are denied the benefits of, programs or activities receiving federal funding. It tortures the language chosen by Congress to conclude that not only teachers and administrators, but also secretaries and janitors, who are discriminated against on the basis of sex in employment, are thereby (i) denied *participation* in a program or activity³; (ii) denied the *benefits* of a program or activity; or (iii) subject to discrimination *under* an education program or activity. Moreover, Congress made no reference whatever to employers or em-

³ I agree with the Court that employees who directly participate in a federal program, *i. e.*, teachers who receive federal grants, are, of course, protected by Title IX. See *ante*, at —. Respondents Elaine Dove and Linda Potz were not, however, participants in any grant program or in any other federally funded program or activity. Elaine Dove was a teacher and Linda Potz a guidance counselor. Both alleged only discrimination in employment.

ployees in Title IX, in sharp contrast to quite explicit language in other statutes regulating employment practices.⁴

It is noteworthy that not one of the other five courts of appeals to consider the question before us reached the conclusion that HEW's interpretation is supported by the statutory language. The issue was presented initially to the Court of Appeals for the First Circuit in *Islesboro School Committee v. Califano*, 593 F. 2d 424, 426, cert. denied, 444 U. S. 972 (1979), and that decision has been followed by most other courts of appeals to consider the question. There, the court concluded that "[t]he language of section 901, 20 U. S. C. § 1681, on its face, is aimed at the beneficiaries of the federal monies, *i. e.*, either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government." The court went on to point out that this reading of "the plain language of the statute is buttressed by an examination of the specific exemptions mentioned in the statute," all of which relate to students, not employees.⁵ *Ibid.*

In the next appellate decision, *Romeo Community Schools v. HEW*, 600 F. 2d 581, cert. denied, 444 U. S. 972 (1979), the Court of Appeals for the Sixth Circuit also rejected the interpretation of the statute now relied on by this Court, not-

⁴ See, *e. g.*, 42 U. S. C. § 2000e-2 (Title VII: "[i]t shall be an unlawful employment practice for an employer—"); 29 U. S. C. § 206(d)(1) (Equal Pay Act: "[n]o employer having employees. . .").

⁵ The Court today not only finds this point unconvincing, but concludes that the "absence of a specific exclusion for employment among the list of exceptions tends to support the Court of Appeal's conclusion that Title IX does protect employees." *Ante*, at — (citation omitted). I am unable to follow this reasoning. The absence of employment-related exceptions may not be conclusive proof that employment is not within the scope of the statute. But I fail to see how that absence affirmatively indicates that the statute was intended to apply to employees. Indeed, if Congress did intend to cover employees, it is anomalous that it did not provide exceptions similar to those in Title VII. For example, Title VII does not proscribe bona fide seniority plans, 42 U. S. C. § 2000e-2(h).

ing that "as actually written, the statute is not nearly so broad. The words 'no person' are modified by later language which clearly limits their meaning." 600 F. 2d, at 584. The court concluded that the statute "reaches only those types of disparate treatment" that involve discrimination against program beneficiaries.⁶ *Ibid.*

II

A

The Court acknowledges, as it must, that § 901 of Title IX "does not expressly include . . . employees." But it finds a

⁶The question also has been presented to the Courts of Appeals for the Fifth, Eighth, and Ninth Circuits. In *Junior College Dist. of St. Louis v. Califano*, 597 F. 2d 119, 121, cert. denied, 444 U. S. 972 (1972) the Court of Appeals for the Eighth Circuit considered HEW's arguments but "adopted" the Court of Appeals for the First Circuit's decision in *Islesboro*. And in *Seattle University v. HEW*, 621 F. 2d 992, 993, cert. granted *sub nom. United States Dept. of Ed. v. Seattle Univ.*, 449 U. S. 1009, the Court of Appeals for the Ninth Circuit followed the three earlier circuit decisions, noting that each of those courts had held that the plain language of Title IX did not support HEW's position. Even in the decision below, in which the Court of Appeals for the Second Circuit upheld the regulations, the court did not base its decision on the statutory language, and stated that the "language is more ambiguous than HEW suggests." 629 F. 2d, at 777.

The other appellate decision was entered by the Court of Appeals for the Fifth Circuit in *Dougherty Cty. School System v. Harris*, 622 F. 2d 735 (CA5 1980), cert. pending *sub nom. Bell v. Dougherty Cty. School System*, No. 80-1023. There, the Court of Appeals for the Fifth Circuit held the regulations invalid because they did not limit fund termination to the offending program or activity. In reaching this decision, the court noted that program-specific regulations might be sustainable in some instances, *e. g.*, if they prohibited discrimination in pay against female teachers paid with federal funds relative to the amounts paid male teachers with federal funds. The court noted that an argument can be made that in such a case, the woman teacher is "denied the benefits of" or "subject to discrimination under" the federal program. 622 F. 2d, at 737-738. But there is no indication it would agree with this Court that the statutory language supports program-specific regulations prohibiting all kinds of discriminatory employment practices with respect to all types of employees, *i. e.*, hourly employees, secretaries and administrators as well as teachers.

strong negative inference in the fact that § 901 does not "exclude employees from its scope." *Ante*, at ——. The Court then turns to the "legislative history for evidence as to whether or not § 901 was meant to prohibit employment discrimination." *Ibid.* I agree with the several Courts of Appeals that have concluded unequivocally that the statutory language cannot fairly be read to proscribe employee discrimination. Only rarely may legislative history be relied upon to read into a statute operative language that Congress itself did not include. To justify such a reading of a statute, the legislative history must show clearly and unambiguously that Congress did intend what it failed to state.⁷ The Court's elaborate exposition of the history of Title IX falls far short of this standard.

Title IX originated in a floor amendment sponsored by Senator Bayh to Senate Bill, S. 659, 92nd Cong., 2d Sess. (1972). The amendment was intended to close loopholes in earlier civil rights legislation; three problem areas had been identified in hearings by a special House Committee in 1970. See *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970)*. Title VII of the Civil Rights Act of 1964, though generally barring employment discrimination on the basis of sex, race, religion, or national origin, did not apply to discrimination "with respect to employment of individuals to perform work connected with the educational activities of [educational] institutions." Pub. L. No. 88-352, title VII, § 702, 78 Stat. 255. And the Equal Pay Act of 1963 banned discrimination in wages on the basis of sex, 29 U. S. C. § 206(d)(1), but it did not apply to administrative,

⁷ See, e. g., *Citizens to Preserve Overton Park v. Volpe*, 410 U. S. 402, 412 n. 29 (1971) ("Because of this ambiguity [in the legislative history] it is clear that we must look primarily to the statutes themselves to find the legislative intent.").

executive, or professional workers, including teachers. See 29 U. S. C. § 213(a) (1970) (no longer in force). Finally, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, barred discrimination on the basis of "race, color, or national origin," but not sex, in any federally funded programs and activities.

The Bayh floor Amendment, No. 874, introduced in 1972, 118 Cong. Rec. 5803 (1972) (print of amendment), closed these loopholes. Section 1005 amended Title VII to cover employment discrimination in educational institutions. *Ibid.* Sections 1009-1010 amended the Equal Pay Act so that discrimination in pay on the basis of sex was barred, even for teachers and other professionals. *Ibid.* And §§ 1001-1003 created a new Title IX banning discrimination on the basis of sex in federally funded *educational* programs and activities, thus effectively extending Title VI's prohibition to sex discrimination in such programs.

Since the amendments to Title VII and the Equal Pay Act explicitly covered discrimination in employment in educational institutions, there was no need to include §§ 1001-1003 of the Bayh Amendment to proscribe such discrimination. Instead, Title IX presumably was enacted, as its language clearly indicates, to bar discrimination against beneficiaries of federally funded educational programs and activities. This interpretation of Title IX is confirmed by the fact that it was modelled after Title VI, a statute limited in its scope to discrimination against beneficiaries of federally funded programs, not general employment practices of fund recipients.⁸ 42 U. S. C. § 2000d-3.⁹ And, as this Court noted in *Cannon*

⁸The operative language in the two provisions is virtually identical. Compare 42 U. S. C. § 2000d (Title VI) with 20 U. S. C. § 1681a (Title IX).

⁹42 U. S. C. § 2000d-3 states:

"Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any department or agency or labor organization except where a primary

v. *University of Chicago*, 441 U. S. 677, 770-711 (1979), when Congress passed Title IX, it expected the new provision to be interpreted consistently with Title VI, which had been its model.

B

The Court discounts the importance of Title VI to the proper interpretation of Title IX for three reasons. First, it notes that "[i]t is Congress' intention in 1972, not in 1964, that is of significance in interpreting Title IX." *Ante*, at — (citing *Cannon v. University of Chicago*, 441 U. S. 677, 710-711 (1979)). This point begs the question, however, since there is no evidence that in 1972, when it passed Title IX, Congress thought Title VI applied to employment discrimination. The second reason advanced by the Court for disregarding Title VI is that it, unlike Title IX, includes a section, *i. e.* § 604, 42 U. S. C. § 2000d-3, expressly stating that Title VI applies only to discrimination against fund beneficiaries, not to employment discrimination *per se*. But in an earlier version of the legislation that was to become Title IX, the amendment was drafted as a modification of Title VI, simply adding the word "sex." In the end, it is true, Title IX was enacted as a statute separate from Title VI, but the reason for this approach was strategic, not substantive. Supporters feared that if Title VI were opened for amendment, Title VI itself might be "gutted" on the floor of the Congress. Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education and Labor, House of Representatives—Review of regulations to implement Title IX, 94th Cong., 1st Sess. p. 409 (1975).

Finally, to break the link between Titles VI and IX, the Court stresses that the House version of the Senate's Bayh Amendment originally contained a provision, § 1004, equiva-

objective of the Federal financial assistance is to provide employment."

lent to § 604 of Title VI, explicitly stating that no section of the 1972 legislation applied to discrimination in employment, but this provision was eliminated by the Conference. *Ante*, at —. A strong argument, however, can be made that there was a non-substantive reason for eliminating § 1004 from the House bill. In 1975 hearings before the House Subcommittee on Postsecondary Education and Labor, Representative O'Hara, Chairman of that Subcommittee, while explaining the background of Title IX to a witness, noted that this change was made at Conference simply to eliminate, as quietly as possible, a recently discovered drafting error. Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education and Labor, House of Representatives—Review of Regulations to Implement Title IX, 94th Cong., 1st Sess. p. 409 (1975). Even without reference to Representative O'Hara's remarks, made in 1975, it is clear that, at the time of the Conference on the House bill and the Senate's Bayh Amendment, § 1004 of the House bill was a drafting mistake; it stated that no section of the House bill applied to employment, though sections of the House Bill, as well as the Senate version, contained express changes to the employment discrimination provisions of Title VII and the Equal Pay Act. Since the analogous provision of Title VI, § 604, had been regarded as a mere clarification,¹⁰ the Court is on weak ground in arguing that the Conference Report's use of the ritualistic words "the House receded" reveals a substantive change rather than the quiet correction of an obvious drafting error at a very late stage in the legislative process.

C

In concluding that the legislative history indicates Title IX was intended to extend to employment discrimination, the

¹⁰ See, *e. g.*, 110 Cong. Rec. 10076 (1964) (statement of Attorney General Kennedy); Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules, 88th Cong., 2d Sess. p. 198 (1964) (statement of Congressman Celler, House Floor Manager of Title VI).

Court is forced to rely primarily on the statements of a single senator.¹¹ The first statement, *ante*, at — (quoting 118 Cong. Rec. 5803 (1972)), is ambiguous. Senator Bayh did state that faculty employment would be covered by his amendment after mentioning the sections enacting Title IX but *prior* to any mention of those amending Title VII and the Equal Pay Act. Immediately thereafter, however, he stated that Title IX's enforcement powers paralleled those in Title VI. Yet Title VI has never provided for fund termination to redress discrimination in employment.

Next, the Court quotes Bayh's statements that (i) he regarded "sections 1001-1005" as "[c]entral to [his] amendment" and (ii) "[t]his portion of the amendment covers discrimination in all areas," including employment. *Ante*, at — (quoting 118 Cong. Rec. 5807 (1972)). But, § 1005 of the Bayh amendment is the section amending Title VII and thus §§ 1001-1005 cover employment discrimination regardless of whether Title IX does.¹² Moreover, the Court uses an elipsis rather than include the following words from the second Bayh statement:

"Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI." 118 Cong. Rec. 5807 (1972) (in ellipses *ante*, at —).

Thus, for a second time, Bayh indicated to the Senate that he regarded Title IX of his amendment as parallel to Title VI

¹¹ The most dependable sources of legislative intent are the reports of the responsible committees. Because Title IX is the result of a floor amendment, there is no explanation of its meaning in reports from the relevant House and Senate Committees.

¹² See description of various sections of the Bayh Amendment, *supra*, at —. See also 118 Cong. Rec. 5803 (1972) (print of amendment).

rather than as a substantial departure from Title VI.

In the third Bayh statement, *ante*, at — (quoting 118 Cong. Rec. 5812 (1972)), the Senator was responding to a question from Senator Pell regarding Title IX, and the Court assumes that each sentence in that response refers to Title IX. But, as the Court of Appeals for the First Circuit noted in *Islesboro*:

“A fair reading both of the colloquy . . . , as well as the discussion immediately preceding and following the above-quoted passage, indicates that Senator Bayh divided his analysis into three sections, two of which were specifically aimed at students (admissions and services), the third at employees (employment). While Senator Bayh’s response was more extended than it needed to be for a direct answer to Senator Pell’s question, we think HEW’s reading is strained. We think this particularly in light of the fact that the discussion was an oral one and thus not as precise as a response in written form,” 593 F. 2d, at 427.

Rather than supporting the Court’s view, the legislative history accords with the natural reading of the statute. Title IX prohibits discrimination only against beneficiaries of federally funded programs and activities, not all employment discrimination by recipients of federal funds. Title IX is modelled after Title VI, which is explicitly so limited—and to the extent statements of Senator Bayh can be read to the contrary, they are ambiguous.¹³

¹³ The Court devotes considerable time to describing post-enactment actions or inaction on the part of subsequent Congresses. See *ante*, at —. The fact that, in 1975, Congress considered, but failed to enact, resolutions disapproving HEW’s regulations is essentially irrelevant in determining the intent of the enacting Congress in 1972. Similarly, the fact that a subsequent Congress considered, but failed to enact bills limiting Title IX’s coverage with respect to employment discrimination does not indicate that the 1972 Congress meant to include employment discrimina-

As indicated above, when critical words, in this case “employment discrimination,” are absent from a statute and its meaning is otherwise clear, reliance on legislative history to add omitted words is rarely appropriate. Only when legislative history gives clear and unequivocal guidance as to congressional intent should a court presume to add what Congress failed to include. And, however else one might describe the legislative history relied upon by the Court today, it is neither clear nor unequivocal.

III

As the sole issue before us is the meaning of § 901(a) of Title IX, I repeat the relevant language:

“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. . . .” § 901(a).

The Court acknowledges that, in view of the lack of support for its position in this language, it must look to the “legislative history for evidence as to whether or not § 901 was meant to prohibit employment discrimination”. *Ante*, at ——. Although the Court examines at length the truncated legislative history, it ignores other factors highly relevant to congressional intent: (i) whether the ambiguity easily could have been avoided by the legislative draftsman; (ii) whether Congress had prior experience and a certain amount of expertise in legislating with respect to this particular subject; and (iii) whether existing legislation clearly and adequately proscribed and provided remedies for the conduct in question. When these factors are considered, there is no justification for reading sex employment discrimination language into § 901.

tion within Title IX.

If there had been such an intent, no competent legislative draftsman would have written § 901 as above set forth. The draftsman would have been guided, of course, by the employment-discrimination language in Title VII and the Equal Pay Act, language specifically addressing this problem. Moreover, although these other statutes had been enacted by an earlier Congress, at the time Title IX was being drafted and considered Title VII and the Equal Pay Act also were amended to proscribe explicitly employment discrimination in educational institutions on the basis of sex. Congress hardly would have enacted a *third* statute addressing this problem, but, in contrast to the other two, use language ambiguous at best.

In addition, a comparison of the provisions of Title VII and Title IX suggests that Congress would not have enacted the inconsistent provisions of the latter with respect to remedies and procedures. Title VII is a comprehensive anti-discrimination statute with carefully prescribed procedures for conciliation by the EEOC, federal court remedies available within certain time limits, and certain specified forms of relief, designed to make whole the victims of illegal discrimination and available unless discriminatory conduct falls within one of several exceptions. See 42 U. S. C. § 2000e *et seq.* This thoughtfully structured approach is in sharp contrast to Title IX, which contains only one extreme remedy, fund termination, apparently now available at the request of any female employee who can prove discrimination in employment in a federally funded program or activity. This cutoff of funds, at the expense of innocent beneficiaries of the funded program, will *not* remedy the injustice to the employee. Indeed, Title IX does not authorize a single action, such as employment, reemployment, or promotion, to rectify *employment* discrimination. And Title IX, unlike Title VII, has no time limits for action, no conciliation provisions, and no guidance as to procedure.¹⁴ Compare 20 U. S. C. § 1681 *et seq.*

¹⁴ It is interesting to note that, whereas Congress itself provided for ad-

(Title IX) with 42 U. S. C. § 2000e *et seq.* (Title VII). The Solicitor General conceded at oral argument that appropriate relief for the two employees who initiated this suit was available under Title VII.¹⁵ See Tr. of Oral Arg., 27.

Finally, Congress delegated the administration of Title IX to the Department of Health, Education and Welfare. In contrast, Title VII and the Equal Pay Act are administered by the Department of Labor and EEOC. It is most unlikely that Congress would intend not only duplicate substantive legislation but also enforcement of these provisions by different departments of government with different enforcement powers, areas of expertise, and enforcement methods.¹⁶ The

ministrative procedures to redress employment discrimination in Title VII, see 42 U. S. C. § 2000e *et seq.*, it enacted no comparable provisions in Title IX, see 20 U. S. C. § 1681 *et seq.* Such administrative procedures as are available under Title IX are part of the regulations promulgated by HEW, 45 CFR §§ 80.7-80.10.

The administrative procedures enacted by Congress in the U. S. C. and by HEW in the CFR are quite different, though addressing a single problem. The HEW regulations provide for Administrative-Procedure-Act hearings, followed by judicial review. See 45 CFR §§ 80.9-80.11. In contrast, EEOC acts first as conciliator, attempting to settle employment disputes, and then, if it so desires, as counsel for the victims of discrimination in subsequent *de novo* judicial proceedings. See 42 U. S. C. § 2000e *et seq.*

¹⁵ An employee could presumably bring actions against the school district under Title VII, and the Equal Pay Act, seeking redress of his or her wrong in the form of back pay and injunctive relief, and, in addition, request that funds be terminated under Title IX.

¹⁶ The Court's decision will result in needless duplication of governmental bureaucracy. Although HEW would prefer to have no involvement in employment discrimination, see Brief of Solicitor General 37, n. 26, it will be required to maintain a staff of employees to enforce the anti-discrimination in employment portion of Title IX. And these employees will duplicate the large staffs of the EEOC and the Department of Labor already devoted to employment discrimination.

From the viewpoint of educational institutions, there will now be two sets of federal regulations and regulators overseeing their employment practices. These different governmental departments may, or may not, have the same substantive standards and filing requirements at any given

District Court in *Romeo Community Schools v. HEW*, 438 F. Supp. 1021 (ED Mich. 1977), aff'd 600 F. 2d 581 (CA6), cert. denied, 444 U. S. 972 (1979), correctly observed:

"These governmental agencies, particularly the EEOC, were established specifically for the purpose of regulating discrimination in employment practices. These agencies have the expertise and their enabling legislation has provided them with the investigative and enforcement machinery necessary to compel compliance with regulations against sex discrimination in employment. HEW does not have similar enforcement authority." 438 F. Supp., at 1034.

Even the Solicitor General, in the brief on behalf of the federal respondents in this case, acknowledges what the *Romeo* court thought was self evident:

"The Department of Education has only limited expertise in employment matters. Its view is that employment cases are better resolved under Title VII of the Civil Rights Act of 1964, which provides more appropriate remedies for such cases." Brief of the Solicitor General, p. 37.

In sum, the Court's decision today, finding an unarticulated intent on the part of Congress, is predicated on five perceptions of congressional action that I am unable to share: (i) that Congress neglectfully or forgetfully failed to include language in § 901 with respect to discrimination that would have made clear its intent; (ii) that Congress enacted a *third* statute proscribing sex discrimination in employment in educational institutions in the absence of any showing of a need for such duplicative legislation; (iii) that Congress failed to in-

time. At the present time, the HEW and EEOC procedures in the event of non-compliance are quite different. See discussion in text *supra*, at —.

clude in the third statute appropriate procedural and remedial provisions relevant to employment discrimination; (iv) that it vested the authority to enforce the third statute in HEW, a department that even the Solicitor General concedes lacks the experience and the qualifications to oversee and enforce employment legislation; and (v) finally, that in Title VI, it gave a new "remedy" for sex discrimination in employment, but did not make that remedy available to those discriminated against on the basis of race.

Surely Congress has more common sense and expertise than the Court would attribute to it.

changes: 4, 9-10, 15-16

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: MAY 12 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-986

NORTH HAVEN BOARD OF EDUCATION ET AL.,
PETITIONERS, *v.* TERREL H. BELL, SECRETARY,
DEPARTMENT OF EDUCATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[April —, 1982]

POWELL, J., dissenting.

Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.*, prohibits discrimination on the basis of sex in education programs and activities receiving federal funds. In 1975, the Department of Health, Education, and Welfare (HEW)¹ promulgated regulations prohibiting discrimination on the basis of gender in *employment* by fund recipients. 34 CFR § 106.51(a)(1). Today, the Court upholds the validity of these regulations, relying on the statutory language, its legislative history, and several post-enactment events. Because I believe the Court's interpretation is neither consistent with the statutory language nor supported by its legislative history, I dissent.²

I

Although the Court begins with the language of the stat-

¹ As noted by the Court, *ante*, at —, n. 4, HEW's duties under Title IX were transferred to the Department of Education in 1979 by § 301(a)(3) of the Department of Education Organization Act, Pub. L. 69-88, 93 Stat. 678, 20 U. S. C. § 3441(a)(3) (1976 ed., Supp. IV). I follow the Court in referring to both agencies as HEW since many of the relevant acts in this case took place before the reorganization. See *ante*, at —, n. 4.

² The Court acknowledges that the post-enactment events it discusses only "lend credence" to its interpretation of the statute. *Ante*, at —.

ute, it quotes the relevant language in its entirety only in the opening paragraphs of the opinion. In the section considering the statute's meaning, the Court quotes two words of the statute and paraphrases the rest, thereby suggesting an interpretation actually at odds with the language used in the statute. Thus, according to the Court, "[s]ection 901's broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students." *Ante*, at —. This is not what the statutory language provides.

In relevant part, the statute states:

"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. . . ." Education Amendments of 1972, § 901(a), 20 U. S. C. § 1681(a).

A natural reading of these words would limit the statute's scope to discrimination against those who are enrolled in, or who are denied the benefits of, programs or activities receiving federal funding. It tortures the language chosen by Congress to conclude that not only teachers and administrators, but also secretaries and janitors, who are discriminated against on the basis of sex in employment, are thereby (i) denied *participation* in a program or activity³; (ii) denied the *benefits* of a program or activity; or (iii) subject to discrimination *under* an education program or activity. Moreover, Congress made no reference whatever to employers or em-

³ I agree with the Court that employees who directly participate in a federal program, *i. e.*, teachers who receive federal grants, are, of course, protected by Title IX. See *ante*, at —. Respondents Elaine Dove and Linda Potz were not, however, participants in any grant program or in any other federally funded program or activity. Elaine Dove was a teacher and Linda Potz a guidance counselor. Both alleged only discrimination in employment.

ployees in Title IX, in sharp contrast to quite explicit language in other statutes regulating employment practices.⁴

It is noteworthy that not one of the other five courts of appeals to consider the question before us reached the conclusion that HEW's interpretation is supported by the statutory language. The issue was presented initially to the Court of Appeals for the First Circuit in *Islesboro School Committee v. Califano*, 593 F. 2d 424, 426, cert. denied, 444 U. S. 972 (1979), and that decision has been followed by most other courts of appeals to consider the question. There, the court concluded that "[t]he language of section 901, 20 U. S. C. § 1681, on its face, is aimed at the beneficiaries of the federal monies, *i. e.*, either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government." The court went on to point out that this reading of "the plain language of the statute is buttressed by an examination of the specific exemptions mentioned in the statute," all of which relate to students, not employees.⁵ *Ibid.*

In the next appellate decision, *Romeo Community Schools v. HEW*, 600 F. 2d 581, cert. denied, 444 U. S. 972 (1979), the Court of Appeals for the Sixth Circuit also rejected the interpretation of the statute now relied on by this Court, not-

⁴See, *e. g.*, 42 U. S. C. § 2000e-2 (Title VII: "[i]t shall be an unlawful employment practice for an employer—"); 29 U. S. C. § 206(d)(1) (Equal Pay Act: "[n]o employer having employees. . .").

⁵The Court today not only finds this point unconvincing, but concludes that the "absence of a specific exclusion for employment among the list of exceptions tends to support the Court of Appeal's conclusion that Title IX does protect employees." *Ante*, at — (citation omitted). I am unable to follow this reasoning. The absence of employment-related exceptions may not be conclusive proof that employment is not within the scope of the statute. But I fail to see how that absence affirmatively indicates that the statute was intended to apply to employees. Indeed, if Congress did intend to cover employees, it is anomalous that it did not provide exceptions similar to those in Title VII. For example, Title VII does not proscribe bona fide seniority plans, 42 U. S. C. § 2000e-2(h).

ing that “as actually written, the statute is not nearly so broad. The words ‘no person’ are modified by later language which clearly limits their meaning.” 600 F. 2d, at 584. The court concluded that the statute “reaches only those types of disparate treatment” that involve discrimination against program beneficiaries.⁶ *Ibid.*

II

A

The Court acknowledges, as it must, that § 901 of Title IX “does not expressly include . . . employees.” But it finds a

⁶The question also has been presented to the Courts of Appeals for the Fifth, Eighth, and Ninth Circuits. In *Junior College Dist. of St. Louis v. Califano*, 597 F. 2d 119, 121, cert. denied, 444 U. S. 972 (1972) the Court of Appeals for the Eighth Circuit considered HEW’s arguments but “adopted” the Court of Appeals for the First Circuit’s decision in *Islesboro*. And in *Seattle University v. HEW*, 621 F. 2d 992, 993, cert. granted *sub nom. United States Dept. of Ed. v. Seattle Univ.*, 449 U. S. 1009 (1980), the Court of Appeals for the Ninth Circuit followed the three earlier circuit decisions, noting that each of those courts had held that the plain language of Title IX did not support HEW’s position. Even in the decision below, in which the Court of Appeals for the Second Circuit upheld the regulations, the court did not base its decision on the statutory language, and stated that the “language is more ambiguous than HEW suggests.” 629 F. 2d, at 777.

The other appellate decision was entered by the Court of Appeals for the Fifth Circuit in *Dougherty Cty. School System v. Harris*, 622 F. 2d 735 (1980), cert. pending *sub nom. Bell v. Dougherty Cty. School System*, No. 80-1023. There, the Court of Appeals for the Fifth Circuit held the regulations invalid because they did not limit fund termination to the offending program or activity. In reaching this decision, the court noted that program-specific regulations might be sustainable in some instances, *e. g.*, if they prohibited discrimination in pay against female teachers paid with federal funds relative to the amounts paid male teachers with federal funds. The court noted that an argument can be made that in such a case, the woman teacher is “denied the benefits of” or “subject to discrimination under” the federal program. 622 F. 2d, at 737-738. But there is no indication it would agree with this Court that the statutory language supports program-specific regulations prohibiting all kinds of discriminatory employment practices with respect to all types of employees, *i. e.*, hourly employees, secretaries and administrators as well as teachers.

strong negative inference in the fact that § 901 does not “exclude employees from its scope.” *Ante*, at —. The Court then turns to the “legislative history for evidence as to whether or not § 901 was meant to prohibit employment discrimination.” *Ibid*. I agree with the several Courts of Appeals that have concluded unequivocally that the statutory language cannot fairly be read to proscribe employee discrimination. Only rarely may legislative history be relied upon to read into a statute operative language that Congress itself did not include. To justify such a reading of a statute, the legislative history must show clearly and unambiguously that Congress did intend what it failed to state.⁷ The Court’s elaborate exposition of the history of Title IX falls far short of this standard.

Title IX originated in a floor amendment sponsored by Senator Bayh to Senate Bill, S. 659, 92nd Cong., 2d Sess. (1972). The amendment was intended to close loopholes in earlier civil rights legislation; three problem areas had been identified in hearings by a special House Committee in 1970. See *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970)*. Title VII of the Civil Rights Act of 1964, though generally barring employment discrimination on the basis of sex, race, religion, or national origin, did not apply to discrimination “with respect to employment of individuals to perform work connected with the educational activities of [educational] institutions.” Pub. L. No. 88-352, title VII, § 702, 78 Stat. 255. And the Equal Pay Act of 1963 banned discrimination in wages on the basis of sex, 29 U. S. C. § 206(d)(1), but it did not apply to administrative, executive, or professional workers, including teachers. See

⁷ See, e. g., *Citizens to Preserve Overton Park v. Volpe*, 410 U. S. 402, 412 n. 29 (1971) (“Because of this ambiguity [in the legislative history] it is clear that we must look primarily to the statutes themselves to find the legislative intent.”).

29 U. S. C. § 213(a) (1970) (no longer in force). Finally, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, barred discrimination on the basis of "race, color, or national origin," but not sex, in any federally funded programs and activities.

The Bayh floor Amendment, No. 874, introduced in 1972, 118 Cong. Rec. 5803 (1972) (print of amendment), closed these loopholes. Section 1005 amended Title VII to cover employment discrimination in educational institutions. *Ibid.* Sections 1009-1010 amended the Equal Pay Act so that discrimination in pay on the basis of sex was barred, even for teachers and other professionals. *Ibid.* And §§ 1001-1003 created a new Title IX banning discrimination on the basis of sex in federally funded *educational* programs and activities, thus effectively extending Title VI's prohibition to sex discrimination in such programs.

Since the amendments to Title VII and the Equal Pay Act explicitly covered discrimination in employment in educational institutions, there was no need to include §§ 1001-1003 of the Bayh Amendment to proscribe such discrimination. Instead, Title IX presumably was enacted, as its language clearly indicates, to bar discrimination against beneficiaries of federally funded educational programs and activities. This interpretation of Title IX is confirmed by the fact that it was modelled after Title VI, a statute limited in its scope to discrimination against beneficiaries of federally funded programs, not general employment practices of fund recipients.⁸ 42 U. S. C. § 2000d-3.⁹ And, as this Court noted in *Cannon*

⁸The operative language in the two provisions is virtually identical. Compare 42 U. S. C. § 2000d (Title VI) with 20 U. S. C. § 1681a (Title IX).

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v. University of Chicago, 441 U. S. 677, 770-711 (1979), when Congress passed Title IX, it expected the new provision to be interpreted consistently with Title VI, which had been its model.

B

The Court discounts the importance of Title VI to the proper interpretation of Title IX for three reasons. First, it notes that “[i]t is Congress’ intention in 1972, not in 1964, that is of significance in interpreting Title IX.” *Ante*, at — (citing *Cannon v. University of Chicago*, 441 U. S. 677, 710-711 (1979)). This point begs the question, however, since there is no evidence that in 1972, when it passed Title IX, Congress thought Title VI applied to employment discrimination. The second reason advanced by the Court for disregarding Title VI is that it, unlike Title IX, includes a section, *i. e.* § 604, 42 U. S. C. § 2000d-3, expressly stating that Title VI applies only to discrimination against fund beneficiaries, not to employment discrimination *per se*. But in an earlier version of the legislation that was to become Title IX, the amendment was drafted as a modification of Title VI, simply adding the word “sex.” In the end, it is true, Title IX was enacted as a statute separate from Title VI, but the reason for this approach was strategic, not substantive. Supporters feared that if Title VI were opened for amendment, Title VI itself might be “gutted” on the floor of the Congress. Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education and Labor, House of Representatives—Review of regulations to implement Title IX, 94th Cong., 1st Sess. p. 409 (1975).

Finally, to break the link between Titles VI and IX, the Court stresses that the House version of the Senate’s Bayh Amendment originally contained a provision, § 1004, equivalent to § 604 of Title VI, explicitly stating that no section of the 1972 legislation applied to discrimination in employment, but this provision was eliminated by the Conference. *Ante*,

at ——. A strong argument, however, can be made that there was a non-substantive reason for eliminating § 1004 from the House bill. In 1975 hearings before the House Subcommittee on Postsecondary Education and Labor, Representative O'Hara, Chairman of that Subcommittee, while explaining the background of Title IX to a witness, noted that this change was made at Conference simply to eliminate, as quietly as possible, a recently discovered drafting error. Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education and Labor, House of Representatives—Review of Regulations to Implement Title IX, 94th Cong., 1st Sess. p. 409 (1975). Even without reference to Representative O'Hara's remarks, made in 1975, it is clear that, at the time of the Conference on the House bill and the Senate's Bayh Amendment, § 1004 of the House bill was a drafting mistake; it stated that no section of the House bill applied to employment, though sections of the House Bill, as well as the Senate version, contained express changes to the employment discrimination provisions of Title VII and the Equal Pay Act. Since the analogous provision of Title VI, § 604, had been regarded as a mere clarification,¹⁰ the Court is on weak ground in arguing that the Conference Report's use of the ritualistic words "the House receded" reveals a substantive change rather than the quiet correction of an obvious drafting error at a very late stage in the legislative process.

C

In concluding that the legislative history indicates Title IX was intended to extend to employment discrimination, the Court is forced to rely primarily on the statements of a single

¹⁰ See, *e. g.*, 110 Cong. Rec. 10076 (1964) (statement of Attorney General Kennedy); Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules, 88th Cong., 2d Sess. p. 198 (1964) (statement of Congressman Celler, House Floor Manager of Title VI).

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¹¹ The most dependable sources of legislative intent are the reports of the responsible committees. Because Title IX is the result of a floor amendment, there is no explanation of its meaning in reports from the relevant House and Senate Committees.

¹² See description of various sections of the Bayh Amendment, *supra*, at —. See also 118 Cong. Rec. 5803 (1972) (print of amendment).

The Court argues against the relevance of the portion of Senator Bayh's statement that is inconsistent with its position, characterizing that portion as "inadvertent". See *ante* at —, n. 15. This hardly gives one confidence that the Senator's statements, selectively relied upon by the Court, are not also inadvertent. Moreover, the Court's decision concededly is based solely on discussion on the floor of the Senate. We note—as evidence of how little that discussion actually supports the Court—that the views of Courts of Appeals judges with respect to its import have ranged from viewing it as indicating *no intention* to include employment discrimination in Title IX to recognizing that, like most floor debates, the oral statements of Senators must be viewed with skepticism even when not ambiguous. See *Seattle University v. HEW*, 621 F. 2d 992, 995 (CA6), cert. granted *sub nom.*, *United States Department of Education v. Seattle University*, 449 U. S. 1009 (1980); *Romeo Community Schools v. HEW*, 600 F. 2d 581, 585 (CA6), cert. denied, 444 U. S. 972 (1979); *Islesboro*

elipsis rather than include the following words from the second Bayh statement:

"Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI." 118 Cong. Rec. 5807 (1972) (in ellipses *ante*, at —).

Thus, for a second time, Bayh indicated to the Senate that he regarded Title IX of his amendment as parallel to Title VI rather than as a substantial departure from Title VI.

In the third Bayh statement, *ante*, at — (quoting 118 Cong. Rec. 5812 (1972)), the Senator was responding to a question from Senator Pell regarding Title IX, and the Court assumes that each sentence in that response refers to Title IX. But, as the Court of Appeals for the First Circuit noted in *Islesboro*:

"A fair reading both of the colloquy . . . , as well as the discussion immediately preceding and following the above-quoted passage, indicates that Senator Bayh divided his analysis into three sections, two of which were specifically aimed at students (admissions and services), the third at employees (employment). While Senator Bayh's response was more extended than it needed to be for a direct answer to Senator Pell's question, we think HEW's reading is strained. We think this particularly in light of the fact that the discussion was an oral one and thus not as precise as a response in written form," 593 F. 2d, at 427.

School Committee v. Califano, 593 F. 2d 424, 428 (1979), cert denied, 444 U. S. 972 (1979).

Rather than supporting the Court's view, the legislative history accords with the natural reading of the statute. Title IX prohibits discrimination only against beneficiaries of federally funded programs and activities, not all employment discrimination by recipients of federal funds. Title IX is modelled after Title VI, which is explicitly so limited—and to the extent statements of Senator Bayh can be read to the contrary, they are ambiguous.¹³

As indicated above, when critical words, in this case "employment discrimination," are absent from a statute and its meaning is otherwise clear, reliance on legislative history to add omitted words is rarely appropriate. Only when legislative history gives clear and unequivocal guidance as to congressional intent should a court presume to add what Congress failed to include. And, however else one might describe the legislative history relied upon by the Court today, it is neither clear nor unequivocal.

III

As the sole issue before us is the meaning of § 901(a) of Title IX, I repeat the relevant language:

"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. . . ." § 901(a).

¹³The Court devotes considerable time to describing post-enactment actions or inaction on the part of subsequent Congresses. See *ante*, at _____. The fact that, in 1975, Congress considered, but failed to enact, resolutions disapproving HEW's regulations is essentially irrelevant in determining the intent of the enacting Congress in 1972. Similarly, the fact that a subsequent Congress considered, but failed to enact bills limiting Title IX's coverage with respect to employment discrimination does not indicate that the 1972 Congress meant to include employment discrimination within Title IX.

The Court acknowledges that, in view of the lack of support for its position in this language, it must look to the "legislative history for evidence as to whether or not § 901 was meant to prohibit employment discrimination". *Ante*, at _____. Although the Court examines at length the truncated legislative history, it ignores other factors highly relevant to congressional intent: (i) whether the ambiguity easily could have been avoided by the legislative draftsman; (ii) whether Congress had prior experience and a certain amount of expertise in legislating with respect to this particular subject; and (iii) whether existing legislation clearly and adequately proscribed and provided remedies for the conduct in question. When these factors are considered, there is no justification for reading sex employment discrimination language into § 901.

If there had been such an intent, no competent legislative draftsman would have written § 901 as above set forth. The draftsman would have been guided, of course, by the employment-discrimination language in Title VII and the Equal Pay Act, language specifically addressing this problem. Moreover, although these other statutes had been enacted by an earlier Congress, at the time Title IX was being drafted and considered Title VII and the Equal Pay Act also were amended to proscribe explicitly employment discrimination in educational institutions on the basis of sex. Congress hardly would have enacted a *third* statute addressing this problem, but, in contrast to the other two, use language ambiguous at best.

In addition, a comparison of the provisions of Title VII and Title IX suggests that Congress would not have enacted the inconsistent provisions of the latter with respect to remedies and procedures. Title VII is a comprehensive anti-discrimination statute with carefully prescribed procedures for conciliation by the EEOC, federal court remedies available within certain time limits, and certain specified forms of relief, designed to make whole the victims of illegal discrimina-

tion and available unless discriminatory conduct falls within one of several exceptions. See 42 U. S. C. § 2000e *et seq.* This thoughtfully structured approach is in sharp contrast to Title IX, which contains only one extreme remedy, fund termination, apparently now available at the request of any female employee who can prove discrimination in employment in a federally funded program or activity. This cutoff of funds, at the expense of innocent beneficiaries of the funded program, will *not* remedy the injustice to the employee. Indeed, Title IX does not authorize a single action, such as employment, reemployment, or promotion, to rectify *employment* discrimination. And Title IX, unlike Title VII, has no time limits for action, no conciliation provisions, and no guidance as to procedure.¹⁴ Compare 20 U. S. C. § 1681 *et seq.* (Title IX) with 42 U. S. C. § 2000e *et seq.* (Title VII). The Solicitor General conceded at oral argument that appropriate relief for the two employees who initiated this suit was available under Title VII.¹⁵ See Tr. of Oral Arg., 27.

Finally, Congress delegated the administration of Title IX to the Department of Health, Education and Welfare. In

¹⁴ It is interesting to note that, whereas Congress itself provided for administrative procedures to redress employment discrimination in Title VII, see 42 U. S. C. § 2000e *et seq.*, it enacted no comparable provisions in Title IX, see 20 U. S. C. § 1681 *et seq.* Such administrative procedures as are available under Title IX are part of the regulations promulgated by HEW, 45 CFR §§ 80.7-80.10.

The administrative procedures enacted by Congress in the U. S. C. and by HEW in the CFR are quite different, though addressing a single problem. The HEW regulations provide for Administrative-Procedure-Act hearings, followed by judicial review. See 45 CFR §§ 80.9-80.11. In contrast, EEOC acts first as conciliator, attempting to settle employment disputes, and then, if it so desires, as counsel for the victims of discrimination in subsequent *de novo* judicial proceedings. See 42 U. S. C. § 2000e *et seq.*

¹⁵ An employee could presumably bring actions against the school district under Title VII, and the Equal Pay Act, seeking redress of his or her wrong in the form of back pay and injunctive relief, and, in addition, request that funds be terminated under Title IX.

contrast, Title VII and the Equal Pay Act are administered by the Department of Labor and EEOC. It is most unlikely that Congress would intend not only duplicate substantive legislation but also enforcement of these provisions by different departments of government with different enforcement powers, areas of expertise, and enforcement methods.¹⁶ The District Court in *Romeo Community Schools v. HEW*, 438 F. Supp. 1021 (ED Mich. 1977), aff'd, 600 F. 2d 581 (CA6), cert. denied, 444 U. S. 972 (1979), correctly observed:

"These governmental agencies, particularly the EEOC, were established specifically for the purpose of regulating discrimination in employment practices. These agencies have the expertise and their enabling legislation has provided them with the investigative and enforcement machinery necessary to compel compliance with regulations against sex discrimination in employment. HEW does not have similar enforcement authority." 438 F. Supp., at 1034.

Even the Solicitor General, in the brief on behalf of the federal respondents in this case, acknowledges what the *Romeo* court thought was self evident:

¹⁶ The Court's decision will result in needless duplication of governmental bureaucracy. Although HEW would prefer to have no involvement in employment discrimination, see Brief of Solicitor General 37, n. 26, it will be required to maintain a staff of employees to enforce the anti-discrimination in employment portion of Title IX. And these employees will duplicate the large staffs of the EEOC and the Department of Labor already devoted to employment discrimination.

From the viewpoint of educational institutions, there will now be two sets of federal regulations and regulators overseeing their employment practices. These different governmental departments may, or may not, have the same substantive standards and filing requirements at any given time. At the present time, the HEW and EEOC procedures in the event of non-compliance are quite different. See discussion in text *supra*, at —.

"The Department of Education has only limited expertise in employment matters. Its view is that employment cases are better resolved under Title VII of the Civil Rights Act of 1964, which provides more appropriate remedies for such cases." Brief of the Solicitor General, p. 37.

In sum, the Court's decision today, finding an unarticulated intent on the part of Congress, is predicated on five perceptions of congressional action that I am unable to share: (i) that Congress neglectfully or forgetfully failed to include language in § 901 with respect to discrimination that would have made clear its intent; (ii) that Congress enacted a *third* statute proscribing sex discrimination in employment in educational institutions in the absence of any showing of a need for such duplicative legislation; (iii) that Congress failed to include in the third statute appropriate procedural and remedial provisions relevant to employment discrimination; (iv) that it vested the authority to enforce the third statute in HEW, a department that even the Solicitor General concedes lacks the experience and the qualifications to oversee and enforce employment legislation; and (v) finally, that in Title IX, it gave a new "remedy" for sex discrimination in employment, but did not make that remedy available to those discriminated against on the basis of race.

In response to this dissent, see n. 26, *ante* at 24, the Court states that the factors considered in Part III, *supra* at ———, summarized above, "are *not* relevant" to "ascertaining legislative intent". If this were a "plain language" case, this statement probably would be unobjectionable. But the Court recognizes that its position cannot be sustained solely by the plain language of the statute, and it therefore relies heavily on ambiguous and muddled oral statements made on the floor of the Senate. In these circumstances, it defies reason to say that a court should not consider what reasonable legislators surely would have considered. Where ambi-

guity exists surely it is not "irrelevant", to the process of ascertaining the intention of Congress, to consider specifically other statutes on the same subject. Nor must a court shun common sense in resolving ambiguities.¹⁷

¹⁷ See, e. g., *Buckey v. Valeo*, 424 U. S. 1, 77 (1976) (when statute is ambiguous, Court must "draw upon 'those common-sense assumptions that must be made in determining direction without a compass.'" (citation omitted); *Fairport R. Co. v. Meredith*, 292 U. S. 589, 595 (1934) (the interpretation that a reasonable Congress would have intended is adopted by the Court); 2A C. Sands, *Sutherland's Statutory Construction*, § 456.12, at 38 (4th ed. 1973) (legislative bodies presumed to act reasonably). See also *Kokoszka v. Belford*, 417 U. S. 642, 650 (1974) ("When 'interpreting a statute, the Court will look not merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law,'").

Changes 1, 3, 5, 15-16

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: **MAY 13 1982**

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-986

NORTH HAVEN BOARD OF EDUCATION ET AL.,
PETITIONERS, *v.* TERREL H. BELL, SECRETARY,
DEPARTMENT OF EDUCATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[May —, 1982]

JUSTICE POWELL, with whom THE CHIEF JUSTICE and
JUSTICE REHNQUIST join, dissenting.

Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681 *et seq.*, prohibits discrimination on the basis of sex in education programs and activities receiving federal funds. In 1975, the Department of Health, Education, and Welfare (HEW)¹ promulgated regulations prohibiting discrimination on the basis of gender in *employment* by fund recipients. 34 CFR § 106.51(a)(1). Today, the Court upholds the validity of these regulations, relying on the statutory language, its legislative history, and several post-enactment events. Because I believe the Court's interpretation is neither consistent with the statutory language nor supported by its legislative history, I dissent.²

¹ As noted by the Court, *ante*, at —, n. 4, HEW's duties under Title IX were transferred to the Department of Education in 1979 by § 301(a)(3) of the Department of Education Organization Act, Pub. L. 69-88, 93 Stat. 678, 20 U. S. C. § 3441(a)(3) (1976 ed., Supp. IV). I follow the Court in referring to both agencies as HEW since many of the relevant acts in this case took place before the reorganization. See *ante*, at —, n. 4.

² The Court acknowledges that the post-enactment events it discusses only "lend credence" to its interpretation of the statute. *Ante*, at —.

I

Although the Court begins with the language of the statute, it quotes the relevant language in its entirety only in the opening paragraphs of the opinion. In the section considering the statute's meaning, the Court quotes two words of the statute and paraphrases the rest, thereby suggesting an interpretation actually at odds with the language used in the statute. Thus, according to the Court, "[s]ection 901's broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students." *Ante*, at —. This is not what the statutory language provides.

In relevant part, the statute states:

"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. . . ." Education Amendments of 1972, § 901(a), 20 U. S. C. § 1681(a).

A natural reading of these words would limit the statute's scope to discrimination against those who are enrolled in, or who are denied the benefits of, programs or activities receiving federal funding. It tortures the language chosen by Congress to conclude that not only teachers and administrators, but also secretaries and janitors, who are discriminated against on the basis of sex in employment, are thereby (i) denied *participation* in a program or activity³; (ii) denied the *benefits* of a program or activity; or (iii) subject to discrimina-

³ I agree with the Court that employees who directly participate in a federal program, *i. e.*, teachers who receive federal grants, are, of course, protected by Title IX. See *ante*, at —. Respondents Elaine Dove and Linda Potz were not, however, participants in any grant program or in any other federally funded program or activity. Elaine Dove was a teacher and Linda Potz a guidance counselor. Both alleged only discrimination in employment.

tion *under* an education program or activity. Moreover, Congress made no reference whatever to employers or employees in Title IX, in sharp contrast to quite explicit language in other statutes regulating employment practices.⁴

It is noteworthy that not one of the other five courts of appeals to consider the question before us reached the conclusion that HEW's interpretation is supported by the statutory language. The issue was presented initially to the Court of Appeals for the First Circuit in *Islesboro School Committee v. Califano*, 593 F. 2d 424, 426, cert. denied, 444 U. S. 972 (1979), and that decision has been followed by most other courts of appeals to consider the question. There, the court concluded that "[t]he language of section 901, 20 U. S. C. § 1681, on its face, is aimed at the beneficiaries of the federal monies, *i. e.*, either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government." The court went on to point out that this reading of "the plain language of the statute is buttressed by an examination of the specific exemptions mentioned in the statute," all of which relate to students, not employees.⁵ *Ibid.*

In the next appellate decision, *Romeo Community Schools v. HEW*, 600 F. 2d 581, cert. denied, 444 U. S. 972 (1979),

⁴See, *e. g.*, 42 U. S. C. § 2000e-2 (Title VII: "[i]t shall be an unlawful employment practice for an employer—"); 29 U. S. C. § 206(d)(1) (Equal Pay Act: "[n]o employer having employees. . .").

⁵The Court today not only finds this point unconvincing, but concludes that the "absence of a specific exclusion for employment among the list of exceptions tends to support the Court of Appeal's conclusion that Title IX does protect" employees. *Ante*, at — (citation omitted). I am unable to follow this reasoning. The absence of employment-related exceptions may not be conclusive proof that employment is not within the scope of the statute. But I fail to see how that absence affirmatively indicates that the statute was intended to apply to employees. Indeed, if Congress did intend to cover employees, it is anomalous that it did not provide exceptions similar to those in Title VII. For example, Title VII does not proscribe bona fide seniority plans, 42 U. S. C. § 2000e-2(h).

the Court of Appeals for the Sixth Circuit also rejected the interpretation of the statute now relied on by this Court, noting that "as actually written, the statute is not nearly so broad. The words 'no person' are modified by later language which clearly limits their meaning." 600 F. 2d, at 584. The court concluded that the statute "reaches only those types of disparate treatment" that involve discrimination against program beneficiaries.⁶ *Ibid.*

II

A

⁶The question also has been presented to the Courts of Appeals for the Fifth, Eighth, and Ninth Circuits. In *Junior College Dist. of St. Louis v. Califano*, 597 F. 2d 119, 121, cert. denied, 444 U. S. 972 (1972) the Court of Appeals for the Eighth Circuit considered HEW's arguments but "adopted" the Court of Appeals for the First Circuit's decision in *Islesboro*. And in *Seattle University v. HEW*, 621 F. 2d 992, 993, cert. granted *sub nom. United States Dept. of Ed. v. Seattle Univ.*, 449 U. S. 1009 (1980), the Court of Appeals for the Ninth Circuit followed the three earlier circuit decisions, noting that each of those courts had held that the plain language of Title IX did not support HEW's position. Even in the decision below, in which the Court of Appeals for the Second Circuit upheld the regulations, the court did not base its decision on the statutory language, and stated that the "language is more ambiguous than HEW suggests." 629 F. 2d, at 777.

The other appellate decision was entered by the Court of Appeals for the Fifth Circuit in *Dougherty Cty. School System v. Harris*, 622 F. 2d 735 (1980), cert. pending *sub nom. Bell v. Dougherty Cty. School System*, No. 80-1023. There, the Court of Appeals for the Fifth Circuit held the regulations invalid because they did not limit fund termination to the offending program or activity. In reaching this decision, the court noted that program-specific regulations might be sustainable in some instances, *e. g.*, if they prohibited discrimination in pay against female teachers paid with federal funds relative to the amounts paid male teachers with federal funds. The court noted that an argument can be made that in such a case, the woman teacher is "denied the benefits of" or "subject to discrimination under" the federal program. 622 F. 2d, at 737-738. But there is no indication it would agree with this Court that the statutory language supports program-specific regulations prohibiting all kinds of discriminatory employment practices with respect to all types of employees, *i. e.*, hourly employees, secretaries and administrators as well as teachers.

The Court acknowledges, as it must, that § 901 of Title IX “does not expressly include . . . employees.” But it finds a strong negative inference in the fact that § 901 does not “exclude employees from its scope.” *Ante*, at —. The Court then turns to the legislative history for evidence as to whether or not § 901 was meant to prohibit employment discrimination. *Ibid.* I agree with the several Courts of Appeals that have concluded unequivocally that the statutory language cannot fairly be read to proscribe employee discrimination. Only rarely may legislative history be relied upon to read into a statute operative language that Congress itself did not include. To justify such a reading of a statute, the legislative history must show clearly and unambiguously that Congress did intend what it failed to state.⁷ The Court’s elaborate exposition of the history of Title IX falls far short of this standard.

Title IX originated in a floor amendment sponsored by Senator Bayh to Senate Bill, S. 659, 92nd Cong., 2d Sess. (1972). The amendment was intended to close loopholes in earlier civil rights legislation; three problem areas had been identified in hearings by a special House Committee in 1970. See *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970)*. Title VII of the Civil Rights Act of 1964, though generally barring employment discrimination on the basis of sex, race, religion, or national origin, did not apply to discrimination “with respect to employment of individuals to perform work connected with the educational activities of [educational] institutions.” Pub. L. No. 88-352, title VII, § 702, 78 Stat. 255. And the Equal Pay Act of 1963

⁷ See, e. g., *Citizens to Preserve Overton Park v. Volpe*, 410 U. S. 402, 412 n. 29 (1971) (“Because of this ambiguity [in the legislative history] it is clear that we must look primarily to the statutes themselves to find the legislative intent.”).

banned discrimination in wages on the basis of sex, 29 U. S. C. § 206(d)(1), but it did not apply to administrative, executive, or professional workers, including teachers. See 29 U. S. C. § 213(a) (1970) (no longer in force). Finally, Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, barred discrimination on the basis of "race, color, or national origin," but not sex, in any federally funded programs and activities.

The Bayh floor Amendment, No. 874, introduced in 1972, 118 Cong. Rec. 5803 (1972) (print of amendment), closed these loopholes. Section 1005 amended Title VII to cover employment discrimination in educational institutions. *Ibid.* Sections 1009-1010 amended the Equal Pay Act so that discrimination in pay on the basis of sex was barred, even for teachers and other professionals. *Ibid.* And §§ 1001-1003 created a new Title IX banning discrimination on the basis of sex in federally funded *educational* programs and activities, thus effectively extending Title VI's prohibition to sex discrimination in such programs.

Since the amendments to Title VII and the Equal Pay Act explicitly covered discrimination in employment in educational institutions, there was no need to include §§ 1001-1003 of the Bayh Amendment to proscribe such discrimination. Instead, Title IX presumably was enacted, as its language clearly indicates, to bar discrimination against beneficiaries of federally funded educational programs and activities. This interpretation of Title IX is confirmed by the fact that it was modelled after Title VI, a statute limited in its scope to discrimination against beneficiaries of federally funded programs, not general employment practices of fund recipients.⁸ 42 U. S. C. § 2000d-3.⁹ And, as this Court noted in *Cannon v. University of Chicago*, 441 U. S. 677, 770-711 (1979),

⁸The operative language in the two provisions is virtually identical. Compare 42 U. S. C. § 2000d (Title VI) with 20 U. S. C. § 1681a (Title IX).

⁹42 U. S. C. § 2000d-3 states:

"Nothing contained in this subchapter shall be construed to authorize ac-

when Congress passed Title IX, it expected the new provision to be interpreted consistently with Title VI, which had been its model.

B

The Court discounts the importance of Title VI to the proper interpretation of Title IX for three reasons. First, it notes that “[i]t is Congress’ intention in 1972, not in 1964, that is of significance in interpreting Title IX.” *Ante*, at — (citing *Cannon v. University of Chicago*, 441 U. S. 677, 710–711 (1979)). This point begs the question, however, since there is no evidence that in 1972, when it passed Title IX, Congress thought Title VI applied to employment discrimination. The second reason advanced by the Court for disregarding Title VI is that it, unlike Title IX, includes a section, *i. e.* § 604, 42 U. S. C. § 2000d–3, expressly stating that Title VI applies only to discrimination against fund beneficiaries, not to employment discrimination *per se*. But in an earlier version of the legislation that was to become Title IX, the amendment was drafted as a modification of Title VI, simply adding the word “sex.” In the end, it is true, Title IX was enacted as a statute separate from Title VI, but the reason for this approach was strategic, not substantive. Supporters feared that if Title VI were opened for amendment, Title VI itself might be “gutted” on the floor of the Congress. Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education and Labor, House of Representatives—Review of regulations to implement Title IX, 94th Cong., 1st Sess. p. 409 (1975).

Finally, to break the link between Titles VI and IX, the Court stresses that the House version of the Senate’s Bayh Amendment originally contained a provision, § 1004, equiva-

tion under this subchapter by any department or agency with respect to any department or agency or labor organization except where a primary objective of the Federal financial assistance is to provide employment.”

lent to § 604 of Title VI, explicitly stating that no section of the 1972 legislation applied to discrimination in employment, but this provision was eliminated by the Conference. *Ante*, at ——. A strong argument, however, can be made that there was a non-substantive reason for eliminating § 1004 from the House bill. In 1975 hearings before the House Subcommittee on Postsecondary Education and Labor, Representative O'Hara, Chairman of that Subcommittee, while explaining the background of Title IX to a witness, noted that this change was made at Conference simply to eliminate, as quietly as possible, a recently discovered drafting error. Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education and Labor, House of Representatives—Review of Regulations to Implement Title IX, 94th Cong., 1st Sess. p. 409 (1975). Even without reference to Representative O'Hara's remarks, made in 1975, it is clear that, at the time of the Conference on the House bill and the Senate's Bayh Amendment, § 1004 of the House bill was a drafting mistake; it stated that no section of the House bill applied to employment, though sections of the House Bill, as well as the Senate version, contained express changes to the employment discrimination provisions of Title VII and the Equal Pay Act. Since the analogous provision of Title VI, § 604, had been regarded as a mere clarification,¹⁰ the Court is on weak ground in arguing that the Conference Report's use of the ritualistic words "the House receded" reveals a substantive change rather than the quiet correction of an obvious drafting error at a very late stage in the legislative process.

C

In concluding that the legislative history indicates Title IX was intended to extend to employment discrimination, the

¹⁰ See, *e. g.*, 110 Cong. Rec. 10076 (1964) (statement of Attorney General Kennedy); Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules, 88th Cong., 2d Sess. p. 198 (1964) (statement of Congressman Celler, House Floor Manager of Title VI).

Court is forced to rely primarily on the statements of a single senator.¹¹ The first statement, *ante*, at — (quoting 118 Cong. Rec. 5803 (1972)), is ambiguous. Senator Bayh did state that faculty employment would be covered by his amendment after mentioning the sections enacting Title IX but *prior* to any mention of those amending Title VII and the Equal Pay Act. Immediately thereafter, however, he stated that Title IX's enforcement powers paralleled those in Title VI. Yet Title VI has never provided for fund termination to redress discrimination in employment.

Next, the Court quotes Bayh's statements that (i) he regarded "sections 1001-1005" as "[c]entral to [his] amendment" and (ii) "[t]his portion of the amendment covers discrimination in all areas," including employment. *Ante*, at — (quoting 118 Cong. Rec. 5807 (1972)). But, § 1005 of the Bayh amendment is the section amending Title VII and thus §§ 1001-1005 cover employment discrimination regardless of whether Title IX does.¹² Moreover, the Court uses an

¹¹ The most dependable sources of legislative intent are the reports of the responsible committees. Because Title IX is the result of a floor amendment, there is no explanation of its meaning in reports from the relevant House and Senate Committees.

¹² See description of various sections of the Bayh Amendment, *supra*, at —. See also 118 Cong. Rec. 5803 (1972) (print of amendment).

The Court argues against the relevance of the portion of Senator Bayh's statement that is inconsistent with its position, characterizing that portion as "inadvertent". See *ante* at —, n. 15. This hardly gives one confidence that the Senator's statements, selectively relied upon by the Court, are not also inadvertent. Moreover, the Court's decision concededly is based solely on discussion on the floor of the Senate. We note—as evidence of how little that discussion actually supports the Court—that the views of Courts of Appeals judges with respect to its import have ranged from viewing it as indicating *no intention* to include employment discrimination in Title IX to recognizing that, like most floor debates, the oral statements of Senators must be viewed with skepticism even when not ambiguous. See *Seattle University v. HEW*, 621 F. 2d 992, 995 (CA6), cert. granted *sub nom.*, *United States Department of Education v. Seattle University*, 449 U. S. 1009 (1980); *Romeo Community Schools v. HEW*, 600 F. 2d 581, 585 (CA6), cert. denied, 444 U. S. 972 (1979); *Islesboro*

elipsis rather than include the following words from the second Bayh statement:

“Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI.” 118 Cong. Rec. 5807 (1972) (in ellipses *ante*, at —).

Thus, for a second time, Bayh indicated to the Senate that he regarded Title IX of his amendment as parallel to Title VI rather than as a substantial departure from Title VI.

In the third Bayh statement, *ante*, at — (quoting 118 Cong. Rec. 5812 (1972)), the Senator was responding to a question from Senator Pell regarding Title IX, and the Court assumes that each sentence in that response refers to Title IX. But, as the Court of Appeals for the First Circuit noted in *Islesboro*:

“A fair reading both of the colloquy . . . , as well as the discussion immediately preceding and following the above-quoted passage, indicates that Senator Bayh divided his analysis into three sections, two of which were specifically aimed at students (admissions and services), the third at employees (employment). While Senator Bayh’s response was more extended than it needed to be for a direct answer to Senator Pell’s question, we think HEW’s reading is strained. We think this particularly in light of the fact that the discussion was an oral one and thus not as precise as a response in written form,” 593 F. 2d, at 427.

School Committee v. Califano, 593 F. 2d 424, 428 (1979), cert denied, 444 U. S. 972 (1979).

Rather than supporting the Court's view, the legislative history accords with the natural reading of the statute. Title IX prohibits discrimination only against beneficiaries of federally funded programs and activities, not all employment discrimination by recipients of federal funds. Title IX is modelled after Title VI, which is explicitly so limited—and to the extent statements of Senator Bayh can be read to the contrary, they are ambiguous.¹³

As indicated above, when critical words, in this case "employment discrimination," are absent from a statute and its meaning is otherwise clear, reliance on legislative history to add omitted words is rarely appropriate. Only when legislative history gives clear and unequivocal guidance as to congressional intent should a court presume to add what Congress failed to include. And, however else one might describe the legislative history relied upon by the Court today, it is neither clear nor unequivocal.

III

As the sole issue before us is the meaning of § 901(a) of Title IX, I repeat the relevant language:

"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. . . ." § 901(a).

¹³The Court devotes considerable time to describing post-enactment actions or inaction on the part of subsequent Congresses. See *ante*, at _____. The fact that, in 1975, Congress considered, but failed to enact, resolutions disapproving HEW's regulations is essentially irrelevant in determining the intent of the enacting Congress in 1972. Similarly, the fact that a subsequent Congress considered, but failed to enact bills limiting Title IX's coverage with respect to employment discrimination does not indicate that the 1972 Congress meant to include employment discrimination within Title IX.

The Court acknowledges that, in view of the lack of support for its position in this language, it must look to the legislative history for evidence as to whether or not § 901 was meant to prohibit employment discrimination. *Ante*, at —. Although the Court examines at length the truncated legislative history, it ignores other factors highly relevant to congressional intent: (i) whether the ambiguity easily could have been avoided by the legislative draftsman; (ii) whether Congress had prior experience and a certain amount of expertise in legislating with respect to this particular subject; and (iii) whether existing legislation clearly and adequately proscribed and provided remedies for the conduct in question. When these factors are considered, there is no justification for reading sex employment discrimination language into § 901.

If there had been such an intent, no competent legislative draftsman would have written § 901 as above set forth. The draftsman would have been guided, of course, by the employment-discrimination language in Title VII and the Equal Pay Act, language specifically addressing this problem. Moreover, although these other statutes had been enacted by an earlier Congress, at the time Title IX was being drafted and considered Title VII and the Equal Pay Act also were amended to proscribe explicitly employment discrimination in educational institutions on the basis of sex. Congress hardly would have enacted a *third* statute addressing this problem, but, in contrast to the other two, use language ambiguous at best.

In addition, a comparison of the provisions of Title VII and Title IX suggests that Congress would not have enacted the inconsistent provisions of the latter with respect to remedies and procedures. Title VII is a comprehensive anti-discrimination statute with carefully prescribed procedures for conciliation by the EEOC, federal court remedies available within certain time limits, and certain specified forms of relief, designed to make whole the victims of illegal discrimina-

tion and available unless discriminatory conduct falls within one of several exceptions. See 42 U. S. C. § 2000e *et seq.* This thoughtfully structured approach is in sharp contrast to Title IX, which contains only one extreme remedy, fund termination, apparently now available at the request of any female employee who can prove discrimination in employment in a federally funded program or activity. This cutoff of funds, at the expense of innocent beneficiaries of the funded program, will *not* remedy the injustice to the employee. Indeed, Title IX does not authorize a single action, such as employment, reemployment, or promotion, to rectify *employment* discrimination. And Title IX, unlike Title VII, has no time limits for action, no conciliation provisions, and no guidance as to procedure.¹⁴ Compare 20 U. S. C. § 1681 *et seq.* (Title IX) with 42 U. S. C. § 2000e *et seq.* (Title VII). The Solicitor General conceded at oral argument that appropriate relief for the two employees who initiated this suit was available under Title VII.¹⁵ See Tr. of Oral Arg., 27.

Finally, Congress delegated the administration of Title IX to the Department of Health, Education and Welfare. In

¹⁴ It is interesting to note that, whereas Congress itself provided for administrative procedures to redress employment discrimination in Title VII, see 42 U. S. C. § 2000e *et seq.*, it enacted no comparable provisions in Title IX, see 20 U. S. C. § 1681 *et seq.* Such administrative procedures as are available under Title IX are part of the regulations promulgated by HEW, 45 CFR §§ 80.7-80.10.

The administrative procedures enacted by Congress in the U. S. C. and by HEW in the CFR are quite different, though addressing a single problem. The HEW regulations provide for Administrative-Procedure-Act hearings, followed by judicial review. See 45 CFR §§ 80.9-80.11. In contrast, EEOC acts first as conciliator, attempting to settle employment disputes, and then, if it so desires, as counsel for the victims of discrimination in subsequent *de novo* judicial proceedings. See 42 U. S. C. § 2000e *et seq.*

¹⁵ An employee could presumably bring actions against the school district under Title VII, and the Equal Pay Act, seeking redress of his or her wrong in the form of back pay and injunctive relief, and, in addition, request that funds be terminated under Title IX.

contrast, Title VII and the Equal Pay Act are administered by the Department of Labor and EEOC. It is most unlikely that Congress would intend not only duplicate substantive legislation but also enforcement of these provisions by different departments of government with different enforcement powers, areas of expertise, and enforcement methods.¹⁶ The District Court in *Romeo Community Schools v. HEW*, 438 F. Supp. 1021 (ED Mich. 1977), aff'd, 600 F. 2d 581 (CA6), cert. denied, 444 U. S. 972 (1979), correctly observed:

"These governmental agencies, particularly the EEOC, were established specifically for the purpose of regulating discrimination in employment practices. These agencies have the expertise and their enabling legislation has provided them with the investigative and enforcement machinery necessary to compel compliance with regulations against sex discrimination in employment. HEW does not have similar enforcement authority." 438 F. Supp., at 1034.

Even the Solicitor General, in the brief on behalf of the federal respondents in this case, acknowledges what the *Romeo* court thought was self evident:

¹⁶ The Court's decision will result in needless duplication of governmental bureaucracy. Although HEW would prefer to have no involvement in employment discrimination, see Brief of Solicitor General 37, n. 26, it will be required to maintain a staff of employees to enforce the anti-discrimination in employment portion of Title IX. And these employees will duplicate the large staffs of the EEOC and the Department of Labor already devoted to employment discrimination.

From the viewpoint of educational institutions, there will now be two sets of federal regulations and regulators overseeing their employment practices. These different governmental departments may, or may not, have the same substantive standards and filing requirements at any given time. At the present time, the HEW and EEOC procedures in the event of non-compliance are quite different. See discussion in text *supra*, at —.

"The Department of Education has only limited expertise in employment matters. Its view is that employment cases are better resolved under Title VII of the Civil Rights Act of 1964, which provides more appropriate remedies for such cases." Brief of the Solicitor General, p. 37.

In sum, the Court's decision today, finding an unarticulated intent on the part of Congress, is predicated on five perceptions of congressional action that I am unable to share: (i) that Congress neglectfully or forgetfully failed to include language in § 901 with respect to discrimination that would have made clear its intent; (ii) that Congress enacted a *third* statute proscribing sex discrimination in employment in educational institutions in the absence of any showing of a need for such duplicative legislation; (iii) that Congress failed to include in the third statute appropriate procedural and remedial provisions relevant to employment discrimination; (iv) that it vested the authority to enforce the third statute in HEW, a department that even the Solicitor General concedes lacks the experience and the qualifications to oversee and enforce employment legislation; and (v) finally, that in Title IX, it gave a new "remedy" for sex discrimination in employment, but did not make that remedy available to those discriminated against on the basis of race.

In response to this dissent, see n. 26, *ante* at 24, the Court states that the factors considered in Part III, *supra* at ———, summarized above, "are not relevant" to "ascertaining legislative intent". If this were a "plain language" case, this statement probably would be unobjectionable. But the Court recognizes that its position cannot be sustained solely by the plain language of the statute, and it therefore relies heavily on ambiguous and muddled oral statements made on the floor of the Senate. In these circumstances, it defies reason to say that a court should not consider what reasonable legislators surely would have considered. Where ambi-

guity exists surely it is not "irrelevant," to the process of ascertaining the intention of Congress, to consider specifically other statutes on the same subject. Nor must a court shun common sense in resolving ambiguities.¹⁷

¹⁷ See, e. g., *Buckey v. Valeo*, 424 U. S. 1, 77 (1976) (when statute is ambiguous, Court must "draw upon 'those common-sense assumptions that must be made in determining direction without a compass.'" (citation omitted); *Fairport R. Co. v. Meredith*, 292 U. S. 589, 595 (1934) (the interpretation that a reasonable Congress would have intended is adopted by the Court); 2A C. Sands, *Sutherland's Statutory Construction*, § 456.12, at 38 (4th ed. 1973) (legislative bodies presumed to act reasonably). See also *Kokoszka v. Belford*, 417 U. S. 642, 650 (1974) ("When 'interpreting a statute, the Court will look not merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, . . . '").