The Grove City College Case: An Insider's View of Its History and Importance

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"Since its founding in 1876, the College has refused consistently all forms of government assistance . . . .The decision to forego participation in government assistance programs is premised on the College's belief in institutional self-sufficiency and autonomy."[1]

1 Brief for Petitioners at 2, Grove City College v. Bell, 465 U.S. 555 (1984).

Introduction

As we prepare to celebrate Grove City College's 150th anniversary, we should also look back on an event that dominated the early years of GCC's second century. 2026 will represent 42 years since the Supreme Court's decision in *Grove City College v. Bell*, or the "Supreme Court Case" as it is better known to Grove City alumni and friends. Although continuing to resonate legally and culturally, the case also stands as a signal event in the history of the College and the life of the writer. Along with several other lawyers from a Rochester, New York law firm,[2] I represented the College from the first federal court filing in 1978 through the case's sequel in the U.S. Congress ten years later. For this commemorative publication, I write to present an insider's retrospective on the case and to remind readers of its continuing relevance that guides the College's "Faith and Freedom" philosophy.

Few should doubt the case's importance. One commentator wrote that "Not since the Dartmouth College case of 1818 . . . had national policymaking centered so intensely and symbolically on a private collegiate institution."[3] De-

2 Then known as Nixon, Hargrave, Devans & Doyle, it's now the global law firm, Nixon Peabody.

3 Hugh Davis Graham, *The Storm Over Grove City College: Civil Rights Regulation, Higher Education, and the Reagan Administration,* 38 Higher Educ. Q. 407 (1998). The famous case was *Dartmouth College v. Woodwar*d, 17 U.S. (4 Wheat.) 518 (1819), where the Supreme Court upheld Dartmouth's independence despite the New Hampshire governor's attempt to assert control over Dartmouth through the appointment of its trustees. There, Dartmouth alumnus Daniel Webster made the famous winning peroration, "It's a small College, yet there are those who love her." I used the Webster quote to urge that I should argue the case in the Supreme Court because, as a GCC alumnus, I could credibly channel Webster's words. Alas, my senior colleagues did not take me seriously and David Lascell, later a GCC trustee, argued the case with me relegated to a supporting position in the Supreme Court chamber. As I reported to Lee Edwards in 1999, Lascell

spite its primary goal to maintain its independence by avoiding bureaucratic entanglements with federal regulators, from 1976 to the 1990s, the College found itself in a David versus Goliath controversy that implicated profound legal and policy issues extending beyond the institution's laudable desire to be left alone. Those cross-cutting issues dictated the Supreme Court's somewhat reluctant rejection of the College's plea for complete independence. Controversy related to the same issues also led Congress to overturn that part of the Supreme Court's decision that curtailed Title IX's regulatory reach.[4] Following these events, the College's leadership made the first of many principled decisions that chose maintaining independence instead of accepting federal dollars. To this day, the College stands as the most prominent example of the very few higher education institutions that forgo entirely the federal support that virtually all colleges and universities depend upon.

I. The Beginning[5]

The Grove City College case hinged on what we now call "Title IX," more technically, Title IX of the Education Amendments of 1972, as amended.[6] Congress passed the law in 1972 to extend educational opportunities to women by prohibiting sex discrimination in educational programs receiving federal financial assistance. Title IX, along with Title VI, its race and national origin analogue, have since

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"charmed the Court" despite not using the Webster quote.

4 Because the College's case ultimately turned on statutory construction rather than constitutional interpretation, Congress could "overturn" the Supreme Court decision by amending the statute, which it did in 1988. *See* discussion *infra* Part VI; *see also* Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat. 28 (1988).

5 A history of the case and its aftermath can also be found in chapter seven of Lee Edward's *Freedom's College* (2000). I acknowledge that I have partly relied on Edward's chapter in refreshing my memory and constructing my summary.

6 20 U.S.C. §§ 1681–1689.

evolved into a profound tool for federal control over educational institutions. As someone who delved deeply into both statutes' legislative history, I can confidently state that few of its current uses were intended or even contemplated by the senators and representatives who voted on the original law. Nonetheless, since the late 20th century federal regulators morphed Title IX into both a detailed federal code for addressing sexual misconduct and a legal regime requiring equal spending on men's and women's college athletics. The consequences have been profound. Title IX has provided meaningful opportunities for women, but it has allowed successive administrations to impose their will. Aware of their potentially vast regulatory reach, the current administration uses Title IX and Title VI as powerful tools to redress perceived imbalances in a "woke" higher education culture that in turn were fostered by previous administrations. Challenges to those attempts are currently playing out in the federal courts, with the ultimate outcome still uncertain.

Grove City President Charles MacKenzie surely sensed the potential for federal intrusion when in July of 1977 he read a form letter addressed to the College from the Civil Rights Division of the federal Department of Health Education and Welfare ("HEW").[7] The letter warned that the College must sign what it termed an "Assurance of Compliance" or face consequences. That document would have contractually obligated the College to follow current and

7 Today's Department of Education was not created until 1979. The original principal federal defendant was Joseph Califano, the then HEW Secretary. Because of changes in federal departments and the party appealing, the caption of the case changed over the years. It eventually became *Grove City College v. Bell*, the name attached to the Supreme Court case. Ironically, when Terrel Bell became the Reagan Administration's Secretary of Education he supported Grove City College's position that student grants and loans were "indirect" assistance not subject to Title IX. Bell lost an internal battle when civil rights groups protested other polices of the Administration. *See* Lee Edwards, Freedom's College: The History of Grove City College 206–08 (2000).

future interpretations of Title IX and its regulations. President MacKenzie refused to sign.[8] He maintained that Grove City had consistently refused to accept any federal funds and therefore was not a "recipient" within the meaning of Title IX. Grove City students did receive federal educational grants and loan guarantees,[9] but the College regarded those as assistance to the individual, not the College, as students could use their federal funds for a variety of educational purposes without any College control. We analogized the situation to social security recipients who choose to use their checks to buy groceries, housing, or living expenses. No one would call the convenience store or the apartment complex a recipient of federal funds under those circumstances. The Carter Administration's HEW took a different approach. Grove City economically benefited from the federal assistance to students who used it to pay tuition, so in HEW's view the College received federal financial assistance within the meaning of Title IX. HEW threatened to terminate students' loans and grants unless the College signed the Assurance.

Thus began the College's legal odyssey. It first played out before an HEW administrative law judge, who ultimately ruled that because some students used the federal monies to pay their Grove City tuition, the College became a "recipient" under Title IX. Administrative Law Judge Albert Feldman criticized HEW and gave the College an important argument point, however, concluding:

> It should also be noted that there was not the

8 He maintained his refusal through at least four other demands from HEW. *See* Brief for Petitioners, *supra* note, 1 at 5.

9 In 1976 these grants were called Basic Educational Opportunity Grants ("BEOGs"). The grants were later renamed Pell Grants, after former Senator Claiborne Pell. They currently retain that name. The loan guarantees were originally called the Guaranteed Student Loan Program but are currently called Stafford Loans after former Senator Robert Stafford.

> slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance with Title IX. This refusal is obviously a matter of conscience and belief.[10]

Still, he authorized HEW to cut off the students' grants and loans. His order dropped August 23, 1978, the week after I began my legal career at the Nixon law firm.

II. The District Court

a. A Lawsuit Filed in Pittsburgh

I had barely begun work and had not even learned the results of my bar exam when a senior partner came to me and asked me to research how Grove City could challenge the HEW ruling in court. Why me? I was working in the firm's department that defended clients accused under the discrimination laws. I suppose I had already proved my mettle on one of the partner's cases. He, Gerald Paley, had been an Assistant Solicitor of Labor in the Nixon Administration and was familiar with Title IX, although the law was so new that very few cases had been decided interpreting it. Paley knew I had previously worked on a Title IX matter during law school, so he figured I was familiar with Title IX. I began digging into how to appeal the HEW ruling. As is often the case, my research presented no clear answer. Title IX did not address appeals and the HEW regulations were silent. The federal Administrative Procedure Act, which applies generally to federal agency actions, suggested that an immediate appeal petition in a federal Court of Appeals might be appropriate. Still, in at least one case someone challenged an adverse HEW Title IX ruling in a United States District

10 Grove City College, Docket No. A-22 (Dep't Health, Educ., & Welfare Sept. 15, 1978) (Initial Decision and Order of the Administrative Law Judge), quoted in Petition for Writ of Certiorari at A-94, *Grove City College*, 465 U.S. 555 (1984) (No. 82-792).

Court. I concluded that we could proceed either way. I wrote up my conclusion and presented my research to Paley and David Lascell, who had just taken over the case. Lascell, an experienced trial lawyer at the Nixon Law firm,[11] immediately chose to proceed with a lawsuit in the district court, as we could add several students as plaintiffs and start in Pittsburgh where Grove City would be well known. Adding students as plaintiffs could generate sympathy, as students would be the ones who would be most affected if the government prevented them from attending their chosen college with their federal grants or loans.

The College recruited several willing students who had either grants or loans. Consequently, Marianne Sickafuse, Kenneth Hockenbery, Jennifer Smith, and Victor Vouga will forever be linked with the legal record. Their willingness to stand with the College on principle deserves continuing recognition. I drafted the complaint, others made edits, and we filed the lawsuit in the Western District of Pennsylvania on November 13, 1978. Under the usual federal courts' random assignment practice, the case went to Judge Paul Simmons, a new federal judge recently appointed by President Jimmy Carter. As is common in all litigation, we researched Judge Simmons' background to gain insight on what arguments might appeal to him. Judge Simmons, a former civil rights advocate and law professor at historically Black law schools in the South, was the first African American judge appointed to the Western District of Pennsylvania. That did not mark him as someone who would likely rule against the government in a civil rights case, but he possessed an intriguing personal history that suggested a mind that was self-reliant, powerful, and independent. Judge Simmons had graduated from Monongahela High School in 1939, where

11 Lascell, a graduate of Hamilton College, later became a College trustee and served until his death in 2016.

he grew up. He worked as a laborer for the railroad shortly after graduation and in 1942 lost his leg in a work-related accident. When no lawyer would take his case against the railroad, he went to the Allegheny County Law Library, studied the lawbooks, and handled the case himself. He won. The railroad gave him a favorable settlement, and a vocational rehabilitation scholarship paid his way through the University of Pittsburgh. His Pitt academic record gained him admission to Harvard Law School, where he graduated in 1949. He began by teaching law but after a few years returned to Monongahela and began a successful law practice. Governor Milton Shapp appointed Simmons to the Washington County Common Pleas Court in 1973. The Republican and Democratic parties together nominated him for a full term in 1975, and the people of Washington County voted him in.[12] His accomplishments and character made Simmons a natural choice for a democratic administration seeking to appoint federal judges in 1978.

Judge Simmons' background left us unsure of how the College's arguments might fare before him, but we had a case that we were certain would end up in the appellate courts in any event. Another attorney and I dug into legal research on Title IX and the developing case law. David Lascell oversaw the overall strategy, which aimed at getting the matter decided in the district court as soon as possible. We decided to bring what is known as a summary judgment motion, which would let the judge focus primarily on the legal arguments and the record formed by the HEW proceedings. Perhaps confident that they had a sympathetic judge, the De-

12 Facts taken from Paul Simmons Obituary, https://www.legacy.com/us/obituaries/observer-reporter/name/paul-simmons-obituary?id=18345774 (last visited Sept. 8, 2025). Although we did not know it at the time, Judge Simmons' also had a significant contributing role in one of the cases that led to the Supreme Court's landmark *Brown v. Board of Education* 347 U.S. 483 (1954) school desegregation case. Paul Simmons Obituary, *supra* note 12.

partment of Justice (DOJ) attorneys handling the case for HEW agreed to that approach. We brought our motion in mid-1979, filed extensive briefs based on the research we conducted, and considered how to respond to the opposition brief the government filed. As lawyers say, the case was then "teed up" for argument before Judge Simmons.

On behalf of the College and the students, our legal papers made several key arguments:

- The first was what we termed the recipient argument—the College could not be regarded as a recipient of federal assistance as (a) the government selected student eligibility; (b) Grove City did not seek the student grants and loans and merely certified the students' attendance; and (c) the students were paid directly and free to use the funds for any educational purpose.
- The second relied on what we called "program specificity." Title IX restricted its reach to the "program or activity" receiving federal aid. Because neither the Assurance of Compliance nor the HEW regulations were limited to any HEW funded programs, the Assurance and the regulations were unlawful.
- We also urged constitutional arguments on behalf of the College and the students, relying on due process and freedom of association. Throughout we also emphasized Grove City's co-educational status and the lack of any finding that it discriminated against women.

These arguments were powerful and the best available at the time, but as the case progressed, legal developments led us to modify them.

b. Title IX's Development and Cooperation with

Other Colleges and Universities

As we prepared the College's case before Judge Simmons, a number of political and legal developments were taking place across the country, including challenges to Title IX by other colleges and universities. These developments continued to occur throughout the history of the case up through the Supreme Court, creating favorable and unfavorable precedent as well as causing a major shift in the government's position. From the very beginning I reached out to other institutions and lawyers involved in related Title IX challenges. We met, shared information, and discussed legal strategies. Hillsdale College and its Washington DC lawyers were among our most important allies. From Hillsdale's perspective, it always claims that it should have been "the Hillsdale case" even though Grove City was the first to reach the Supreme Court and the College's name is the one that has gone down in history and the law reports.[13] We also

13 Grove City reaching the Supreme Court before Hillsdale was largely a function of different appellate strategies and timing by the separate appellate courts that handled the respective cases. Instead of appealing its adverse HEW ruling to a federal district court, Hillsdale chose to exhaust an internal HEW appellate process and then appeal directly to a U.S. Court of Appeal. By taking its case directly to the U.S. Court of Appeals for the Sixth Circuit, Hillsdale's lawyers may have believed that they had a quicker route to the Supreme Court, but the district and appellate courts in Pennsylvania moved more expeditiously than the Sixth Circuit, giving Grove City a head start on Hillsdale. When Grove City filed its petition for certiorari to the Supreme Court in November 1982, Hillsdale's case was still awaiting decision by the Sixth Circuit, where it had languished for months. The Sixth Circuit finally ruled in December of 1982, a month after Grove City filed its petition. Hillsdale then filed for certiorari to the Supreme Court, but it was four months behind the Grove City case. When the Supreme Court reached the *Hillsdale* case after *Grove City* was decided, it simply "vacated" the Sixth Circuit opinion and sent it back with instructions to rule in accordance with its opinion in *Grove City College v. Bell.* This was the position the government urged on the Court, and the Court accepted it, rejecting Hillsdale's earlier request to have its case consolidated with

maintained a close partnership with other organizations and institutions bringing Title IX challenges. Many eventually helped by filing "amicus" or friend-of-the-court briefs supporting Grove City.

c. The District Court Decision

In late 1979 we traveled to Pittsburgh for oral argument before Judge Simmons. David Lascell argued for Grove City against a lawyer DOJ sent from Washington DC. The DOJ lawyer, Mark Rutzick, was very smart, a bit arrogant, and appeared quite confident that he had the right judge to notch a win for the government.[14] Judge Simmons immediately set him straight, showing during the argument that he sympathized with the small college challenging the government Goliath. The judge pushed back hard on the government's position. As I listened to the argument, I was pleasantly surprised.

Several months later Judge Simmons issued a decision consistent with his courtroom comments and mostly favorable to the College's legal arguments. There was one problem, though. One of Judge Simmons' legal conclusions rejected our key "recipient" argument that Grove City did not receive federal aid. He concluded that federal aid to students constituted assistance to the College. He did so because of several court precedents in southern states involving race discrimination and Title VI, including an important case involving Bob Jones University and veterans' benefits.[15]

Fortunately, that was not the end of his opinion. He handed Grove City a complete victory despite rejecting the recipient argument. He seized on one key distinction be-

Grove City. *See* Hillsdale College v. Department of Education, 466 U.S. 901 (1984). The Sixth Circuit acted accordingly. *See* Hillsdale College v. Department of Education, 737 F.2d 520 (6th Cir. 1984).

14 He and Judge Simmons were also both graduates of Harvard Law School.

15 *See* Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), *aff'd per curiam*, 529 F.2d 314 (4th Cir. 1975).

tween the other cases and the College's case—Grove City did not discriminate on the basis of sex:

> In this case the College is coeducational, and there is no evidence of sex discrimination as discussed in other parts of this Opinion. It is the firm belief of this Court that termination of the BEOG student aid payments and/or the GSL payments is not the proper remedy for coercing the College into filing an Assurance of Compliance where there is no allegation or evidence of sex discrimination, and where the students who are receiving BEOG and GSL benefits will be punished needlessly for no good purposes.[16]

Judge Simmons also accepted our "program specificity" argument. The HEW regulations contained broad provisions regulating employment and many other aspects of campus activities. The Assurance of Compliance required contractual adherence to all these regulations, despite Title IX's narrowly targeted program specific regulation and funds termination language. Judge Simmons held that this was unlawful:

> This Court is holding that HEW may not lawfully demand that the College execute an Assurance of Compliance with Title IX (HEW Form 639) because said form presently improperly requires the College to abide by the implementing regulations of subpart E, which subpart E relates to whether there is sex discrimination in the College's employment policies. This Court is now holding that HEW by promulgating regulations subpart E, has exceeded the authority granted to it by Congress, and the subpart E regula-

16 Grove City College v. Harris, 500 F. Supp. 253, 268 (W.D. Pa. 1980).

tions are void and of no legal effect.[17]

Confirming our strategy to join the Grove City students to the lawsuit, he next showed sympathy for their plight and found HEW acted unconstitutionally by not giving them a due process hearing before terminating their ability to use their grants or loans at the College. Finally, in a holding that became crucial to subsequent College history, Judge Simmons relied on Title IX's statutory language to carve out HEW's guaranteed student loan program from Title IX. He ruled that the Guaranteed Student Loan Program, relied on by many Grove City students, was not federal assistance because Title IX specifically exempted "contracts of assurance or guarantee" from its definition of "Federal financial assistance."

The upshot was to grant Grove City's summary judgment in its entirety, even though Judge Simmons rejected our primary recipient argument. We celebrated the victory but realized the opinion's weaknesses. We also knew our victory might be temporary. The government was certain to appeal to the Third Circuit, the federal appeals court in Philadelphia. We wanted to make sure we did not concede the recipient issue that Judge Simmons had rejected. We debated over what to do, but once the government filed its appeal we cross-appealed on behalf of Grove City to preserve the recipient issue.[18] We submitted our brief in December 1980.

III. The Third Circuit

a. The Appeal Before the Third Circuit and Important Contemporaneous Legal Developments

In the meantime, politics and law were changing the legal climate surrounding Title IX. First, Ronald Reagan defeated Jimmy Carter in the 1980 presidential election. In the aftermath of the Reagan victory, we hoped that the new

17 *Id.* at 273.

18 *See* Grove City College v. Bell, 687 F.2d 684, 690 n.11 (3rd Cir. 1982).

administration might change its position. Early indications proved promising. In March 1980 Reagan DOJ lawyers requested a postponement from the Third Circuit, stating that the Department of Education, HEW's successor, was considering changing its definition of federal financial assistance. We sat back and awaited political developments but other federal courts continued to consider various Title IX issues. In July of 1980, for example, the influential Second Circuit U.S. Court of Appeals in the *North Haven* case upheld Regulation Subpart E, allowing HEW to regulate employment under Title IX.[19] Most earlier cases had decided the case consistently with Judge Simmons' conclusion, including a different federal court of appeal.

Politics added another problem. Unfortunately, the Reagan Administration had just walked into a firestorm of political controversy when low level staff announced a reversal of Internal Revenue Service (IRS) policies. The change would have allowed a charitable tax exemption for racially discriminatory schools. The White House quickly walked back the announcement, but the controversy resulted in the Administration trying to pacify the civil rights community. President Reagan dropped the IRS change and the Justice Department announced that it would resume its Grove City appeal.[20]

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19 North Haven Bd. of Education v. Hufstedler, 629 F.2d 773 (1980).

20 Based on subsequent research, Lee Edwards explained the link between the IRS effort, civil rights politics, and the decision to proceed with the Grove City appeal. *See* Edwards, *supra* note 7, at 206–08. We did not know that explicit link at the time, although we were aware of the Reagan Administration's ongoing controversies with the civil rights community, particularly as they applied to Bob Jones University and race discrimination. That was one reason why we and the College continually drew the distinction between Bob Jones and Grove City, frequently citing the College's co-educational history and the HEW administrative law judge's no-discrimination finding.

b. The Third Circuit Decision

The Third Circuit appeal ended badly for Grove City. A month before oral argument, the Supreme Court decided the *North Haven* appeal and affirmed the Second Circuit's Title IX interpretation that disagreed with Judge Simmons'.[21] Supreme Court Justice Harry Blackmun's *North Haven* opinion for a 6-3 majority took a bow to Title IX's program-specificity language but relied on legislative history and post-enactment events to conclude that Title IX encompassed employment discrimination within its prohibitions. The majority reached that conclusion even though Title VII, the general federal employment discrimination prohibition, would apply to virtually all educational institutions whether they received federal assistance or not.[22] The Supreme Court's *North Haven* decision adversely affected the Grove City appeal because Judge Simmons had struck down the Assurance of Compliance partly because it pertained to the Title IX regulations that prohibited employment discrimination. Justice Blackmun's liberal reading of Title IX in *North Haven* invited a similar reading in Grove City's case. The Third Circuit readily accepted the invitation.

First, it rejected Grove City's appeal on the recipient issue.[23] It regarded that issue as the "threshold question," one that had to be considered before any other. Interpreting Title IX's language in light of the broad reading that it believed the *North Haven* case dictated, the Third Circuit found that "by

21 North Haven Board of Education v. Bell, 456 U.S. 512 (1982).

22 The College has never argued its exemption from Title VII.

23 Judge Leonard Garth, a Richard Nixon appointee, wrote the majority opinion. In 1976 Justice Samuel Alito served as a law clerk for Judge Garth and called him a "tremendous judge." Instead of Grove City College, Judge Garth referred to the College as "Grove" throughout his opinion. I remember thinking that Garth disrespected the College by shortening its name, little knowing that today "Grove" is current Grove City students' favorite nickname for the College. The nickname is now installed in large red letters outside Crawford Hall and serves as a favorite outdoor site for selfies and other photos.

its inclusive terminology the statute appears to encompass *all* forms of federal aid to education, direct or indirect."[24] Rejecting our arguments, it reasoned that Title IX was structured so that "federal monies would not be expended in any fashion which would subsidize . . . [sex] discrimination."[25] Based on all my research I had concluded that Congress did not create Title IX to be so far reaching. Third Circuit judge Leonard Garth, however, cherry-picked individual legislators' statements to buttress his conclusion, including those made after Congress passed Title IX.[26]

Unfortunately, he did not stop there. Rejecting our arguments about Title IX's program-specific reach, the opinion stated:

> We cannot agree, however, that Congress intended to limit the purpose and operation of Title IX by a narrow and illogical interpretation of its program-specific provisions…. Contrary to Grove's argument, complete accommodation can be achieved between the concepts of "indirect federal financial assistance" and "program-specific" requirements.[27]

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24 *Grove City College*, 687 F.2d at 691.

25 Title IX was patterned on Title VI, which prohibited race and national origin discrimination by federal recipients. Like Judge Simmons, Judge Garth relied heavily on the Bob Jones University case to reason that Title IX should have the same broad reach as Title VI. *See id.* at 695 (citing Bob Jones University v. Johnson, 396 F. Supp. 59 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975)).

26 This same reliance on post-enactment history was used by the dissenting Justices once the Grove City case reached the Supreme Court and featured prominently in the arguments favoring the Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat. 28 (1988), which reversed the Supreme Court majority's program-specificity holding in *Grove City College*, 465 U.S. at 555.

27 *Grove City College*, 687 F.2d at 691.

The opinion reached its accommodation by turning Title IX's program-specific requirement on its head. The court reasoned that although Title IX's program-specific reach might be relevant when direct grants were involved, non-specified *indirect* funding had to be treated differently. In so concluding, the court relied on arguments by the American Association of University Women and a 1981 decision involving Temple University where the district court held that Temples' athletics programs were subject to Title IX regulation despite the fact that athletics received no federal dollars.[28]

According to Judge Garth's opinion, one dollar of federal aid to a student gave the government a right to regulate institution-wide, a result that completely ignored Congress' concern about federal overregulation. The opinion's conclusion was astounding:

> We conclude that the remedy to be ordered for failure to comply with Title IX is as extensive as the program benefited by the federal funds involved. Because the federal grants made to Grove's students necessarily inure to the benefit of the entire College, the "program" here must be defined as the entire institution of Grove City College.[29]

Finally, to clean up all remaining issues, the opinion concluded that Judge Simmons was wrong to hold that the Assurance of Compliance was overly broad, wrong that a discrimination finding was necessary to terminate assistance under Title IX, and wrong that the Grove City students had any right to a due process hearing.[30] To add a cherry to its poison pill,

28 *See* Haffer v. Temple University, 524 F. Supp. 531 (E.D. Pa. 1981). We had been in close contact with Temple's lawyers throughout their litigation.

29 *Grove City College*, 687 F.2d at 700.

30 *See id.* at 703–04, 702–03, 704.

the Court also rejected the College's constitutional argument based on first amendment associational rights.[31]

The only faintly positive signal from the Third Circuit, was a concurring opinion from Judge Edward Becker.[32] Judge Becker thought that the majority's rejection of Grove City's program specificity argument and its conclusion applying Title IX to the entire College was not necessary to decide the case. He joined the parts of the majority opinion that upheld Grove City's obligation to sign the Assurance of Compliance, however, and would have left the issue of regulatory scope to a future case where it was squarely presented.

The Third Circuit handed the College a complete defeat on every argument. The only positive outcome remaining from Judge Simmons' opinion was the prohibition against applying Title IX to the Guaranteed Student Loan Program, which the government had not appealed. The College understandably expressed huge disappointment with the Third Circuit opinions. President MacKenzie called their implications "frightening" in an interview he gave to the *Chronicle of Higher Education*. As I read through the opinions and their successive rejection of our arguments, my heart sank and my outrage grew. I thought, how could a court that must follow the Supreme Court's acceptance of Title IX program specificity authorize Title IX's application to the entire educational institution simply because seven percent of Grove City's students accepted government grants.

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31 *Id.* at 701–02.

32 I came to know Judge Becker well when I worked at the Supreme Court and served as the Chief Justice's representative to the federal courts' Long Range Planning Committee, where Judge Becker was a member. He also often played piano for the Chief Justice's sing-alongs at judges' conferences. I had many conversations with him over the six years that we worked together. Knowing my role on the Grove City case, he once commented to me that he sympathized with the College and thought the Third Circuit majority opinion may have gone too far but just could not find his way to accept our arguments.

IV. What to Do Next

Our next avenue for relief would be the Supreme Court, but that was far from a sure thing. Review by the Supreme Court under our system of laws is not by right. The Court chooses itself which cases it wants to hear and, in 1982, it only granted 3.5% of the petitions requesting review. Then, as now, the Court purposely did not exercise an error correction function for the lower courts. As its own Rule 10 states, the highest court in the land only grants certiorari (review) under compelling circumstances, usually when courts of appeals disagree over important issues of federal law or when it is presented with urgent and important Constitutional questions. That meant that we could not simply make the same arguments all over again and hope that the Supreme Court would see matters differently than the Third Circuit. It also meant that the Court could decline to grant certiorari and let the Third Circuit decision stand. Based upon that possibility, Grove City leaders began to discuss the implications of denying admission to students who depended on the federal grants and how it might replace the federal scholarship money by raising private funds.[33]

In the meantime, we contemplated what strategy would get the Court's attention. To aid our task, we sought advice from Susan Bloch, a former Supreme Court law clerk who had just begun to work as a professor at Georgetown Law School. Law clerks play an important role in the Supreme Court's certiorari process, summarizing the thousands of petitions that arrive seeking review. This makes the Justices' tasks easier when they meet at a private conference to

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33 In 1982 Grove City's endowment was $8.4 million, a tiny fraction of what it has become today after four decades of fundraising to replace the federal programs formerly relied on by the College's students. Also, J. Howard Pew, the great supporter, benefactor, and guiding hand for the College, died in November of 1971, ten years before Grove City faced this crisis in its epic fight with the federal government.

choose which cases to review.[34] As someone who knew the process from the inside, we believed Bloch could be helpful in shaping our strategy.

V. The Supreme Court

a. Getting the Supreme Court to Accept the Case

One of main reasons the Supreme Court accepts cases is to resolve conflicts among the Circuits. Accordingly, our petition focused on that issue. The conflict we urged, however, was somewhat marginal. The first conflict we identified was between the Third Circuit and the Court of Appeals for the First Circuit.[35] In the First Circuit case, ironically involving Harvard University, the plaintiff in a private enforcement action claimed that Harvard violated Title IX by using discriminatory grading practices. The only federal educational assistance to Harvard, however, was a work study program.[36] The First Circuit held that Title IX did not apply to the alleged grading discrimination because of Title IX's program specificity. The Third Circuit had simply noted

34 The certiorari process has evolved over the years, the petitions for the *in forma pauperis* (non-paying) docket are screened differently than most of the paid docket, and there are other efficient steps used to make the decision-making process more efficient. Former Chief Justice William Rehnquist described the process in Chapter 12 of his book. William Rehnquist, The Supreme Court: A New Edition of the Chief Justice's Classic History (Alfred A. Knopf 2004). The book contains a good nuts-and-bolts explanation of how the Justices do their work. It is also a charming history of the Court and William Rehnquist's experience there as a law clerk, Associate Justice, and Chief Justice.

35 The First Circuit case was *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981).

36 Although Harvard may have at the time received extensive federal grants for scientific and medical research, the case reflects a different Congressional choice on the scope of Title's IX's sex discrimination prohibition versus Title VI's prohibition of race and national origin discrimination. Title IX only applies to receipt by "*educational* programs or activities," whereas Title VI would apply to receipt of federal assistance through all federal programs. As the statutory language suggests, both laws were program specific.

the Harvard case in a footnote and refused to follow it. The Third Circuit opinion had also discounted another case we argued created a conflict, although this was a district court decision, which the Supreme Court usually does not regard as noteworthy enough to create "certworthy" conflicts. The case was *University of Richmond v. Bell*, where the district court held that, because of program specificity, Title IX did not apply to Richmond's athletics program.[37] The only federal assistance Richmond arguably received was student aid and a $1900 library grant. The Third Circuit's theory would have applied Title IX to the entire university, but the Virginia federal district court concluded otherwise. We had closely communicated with Richmond's lawyers and were well aware of what was happening in its case.

b. Our Petition for Certiorari

This was where the Reagan Administration's shifting position on Title IX enforcement helped Grove City rather than hurt it. In our petition for certiorari, we included a 1982 letter from Assistant Attorney General Bradford Reynolds explaining that the Administration would not appeal the *University of Richmond* case because it believed the case was rightly decided. We also referred to Hillsdale's appeal in the Sixth Circuit, which we thought would create a *future* conflict with the Third Circuit because we predicted correctly that the Sixth Circuit was likely to accept Hillsdale's argument on program specificity. Little precedent exists for urging the Supreme Court to review a case because of potential future conflicts, but we thought it might add to our argument. We included Hillsdale's case in our petition.

The second part of our plea to the Supreme Court was the argument that Grove City's case raised significant constitutional and statutory questions concerning the Government's power to regulate independent colleges. The meat

37 University of Richmond v. Bell, 543 F. Supp. 321, 332–33 (E.D. Va. 1982).

of our argument raised issues of academic freedom and First Amendment rights of association. It also enabled us to place the recipient argument before the Supreme Court and once again argue how unfair it was to punish the College and its students when there was no allegation that the College discriminated against women.

We put the final touches on the petition as Thanksgiving approached, sent it to the printers, and awaited the government response. It came two months later. The government was represented by Solicitor General Rex Lee, the third ranking lawyer in the Justice Department.[38] Four other DOJ lawyers signed the government response, including William Bradford Reynolds, the author of the 1982 *University of Richmond* letter cited in our petition.

Supreme Court rules specify two primary requirements for what they term a "brief in opposition." It must inform the Justices why the petitioner's case is not worth their attention and reveal if the petitioning party has misstated the law or the facts. Filing an opposition brief is not mandatory, but any filing must be stated "briefly and in plain terms."[39] Knowing the Justice Department public position in the *University of Richmond* case, we expected the government at least to argue that the Third Circuit was wrong on program specificity and were interested in how they would respond to our petition's link of program specificity to the recipient

38 Under the applicable statute, the Solicitor General must be "learned in the law." 28 U.S.C. § 505. General Lee, previously Dean of the Reuben Clark Law School and later President of Brigham Young University, more than met the law's requirement. He had been a law clerk for Justice Byron White, served as Assistant Attorney General in the Ford Administration, and gained a sterling reputation in private practice. President Reagan appointed him Solicitor General in 1981 and he served until 1985. Known for his intellectual integrity, Lee was criticized for occasionally staking out legal positions that disagreed with those advanced by White House aides. Lee famously pushed back, stating, "I am the Solicitor General, not the Pamphleteer General."

39 Sup. Ct. R. 15.2.

issue. We were dumbstruck when, in anything but "plain terms," the government's brief urged the Court to deny the petition as not worthy of the Court's attention. The brief began its argument by stating that despite the Third Circuit holding that the entire college was subject to Title IX jurisdiction, "the meaning of the concept of 'program specificity' was not presented by the case."[40] Extrapolating from Judge Becker's concurring opinion, DOJ argued that the Third Circuit majority's discussion of program specificity was "dicta"—something not necessary to the holding of the case. The brief then argued that there was no conflict among the circuits on the "recipient" issue and hence the case was not worthy of the Court's attention. To add insult to injury, the brief urged that Hillsdale's case, decided by the Sixth Circuit between the filing of our petition and the DOJ response, directly established that "Grove City, as an indirect recipient of federal funds through the BEOG student aid program, is a recipient of federal financial assistance within the meaning of Title IX."[41] Finally, the brief spent its next few pages arguing, unpersuasively, that although it disagreed with the Third Circuit majority's discussion of program specificity, Grove City's case was "not the proper case to resolve inconsistencies in statements by the courts of appeals." This was so despite the brief's recognition that there was "serious doubt" that the Third Circuit's institution-wide approach could be reconciled with the Supreme Court's decision in *North Haven* and several other courts of appeal decisions we had cited.

What to make of this? We regarded the government's brief as a feeble attempt to fudge the issue and duck the implications from its position change on program specificity. Supreme Court rules allowed us to file a Reply Brief for "new matter" presented in the Opposition. We regarded the

40 Brief in Opposition to Petition for Writ of Certiorari at 5, *Grove City College*, 465 U.S. 555 (1984) (No. 82-792).
41 *Id.* at 7.

government's position as "new" and got to work on a reply brief during the first week of February 1983.[42]

Our reply brief began by stating the Opposition "constituted a course of calculated obfuscation which not only does injustice to the Petitioners but does injustice to the Third Circuit which relied on the interpretation of Title IX advanced by the government before it."[43] We argued that the only possible reconciliation of Title IX's program-specificity requirement was to conclude that direct student grants could not constitute "federal financial assistance" to the education institution because there is no "program" to regulate.[44] In making that argument, we merged our recipient and program-specificity arguments by seizing upon the government's concession and the acceptance by a growing number of courts that Congress intended Title IX regulation to be narrowly focused.[45] We also relied on statements by Senator Birch Bayh, the lead Senate sponsor of Title IX, who stated:

> It is unquestionable in my judgment, that this would not be directed at specific assistance

42 These days were particularly memorable to me. In early 1983 my pregnant wife was confined to the couch because her doctor feared she would go into premature labor. As I worked on the brief at our dining room table, she reached a crisis. We immediately rushed to the hospital. The doctors and nurses made heroic attempts to suppress her labor, as at the time our baby was at least 12 weeks from full term. I had largely completed drafting our reply brief before the hospital trip but in 1983 there was no way to transmit it electronically. After getting my wife safely to the hospital, I drove to the office and left the draft with my colleagues, who finished the efforts to get it reviewed, printed, and filed. Our son was born February 7, the day the brief was filed at the Supreme Court. He weighed 2½ pounds and spent his first 83 days in the neonatal intensive care unit. Fortunately, he survived, thrived, and is now 43 years old and a father himself.

43 Petitioner's Reply to Brief in Opposition to Petition for Writ of Certiorari at 1, *Grove City College*, 465 U.S. 555 (1984) (No. 82-792).

44 *Id.* at 2.

45 *Id.* at 3–4.

> that was received by individual students.[46]

We also pointed out that Senator Abraham Ribicoff made a similar statement in connection with Title VI, the model for Title IX.[47] We cited additional legislative history to the same effect, and concluded this portion of the brief by stating: "If … the only power the government seeks to assert is to regulate the program or activity receiving Federal financial assistance, then the government need look no further than its own operations to ensure that the BEOG program is operated free of sex discrimination."[48]

We also rebutted the government's argument that the Assurance of Compliance could be interpreted in a program specific manner. Its own regulations belied this conclusion:

> [T]he final regulation applies to all aspects of all educational programs or activities of a school district, institution of higher education, or other entity which receives federal funds for any of those programs.[49]

c. The Supreme Court Accepts Our Petition

Our strategy worked. Although the Circuit split was marginal, the importance of the issue led at least four of the Justices to grant Grove City's petition and accept full review. We received word on February 22, 1983. That meant that another round of briefing would take place, interested amici, or "friends of the court," could file briefs, and Grove City would get to argue its case live before the Justices in Washington DC.

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46 117 Cong. Rec. 30408 (1971), quoted in *Id.* at 5.

47 Petitioner's Reply, *supra* note 43, at 5; *see* 110 Cong. Rec. 8424 (1964).

48 Petitioner's Reply, *supra* note 43, at 7.

49 Dept. of Health, Educ. and Welfare, Fact Sheet Accompanying the Final Title IX Regulations (1975), quoted in *Id.* at 8.

In our "merits" brief we made similar arguments as before but took into account the changing circumstances. We did so by emphasizing the issue before the Court was the same presented to Congress in 1972 and 1964—how to balance combatting invidious discrimination while preserving the nation's pluralistic system of public and private higher education. Title IX's program specificity, by now accepted by the government and many lower courts, was the means by which the Court could balance competing interests and preserve the innovation, freedom, and experimentation that was the hallmark of American higher education. As we wrote, Congress intended that "Institutions accepting government subsidies would knowingly accept some conditions as a price of the aid; other institutions could refuse the aid and set their own policies free from the often heavy hand of government regulation."[50] We urged the Court to accept this balance and ensure that "eager administrative agencies" could not extend their power "beyond the bounds that Congress carefully constructed."[51] With the assistance of Susan Bloch, we carefully re-crafted our three basic arguments to emphasize this theme. At the College's urging, we also beefed up our Constitutional argument, arguing that independence from governmental funding is essential to the College's First Amendment-protected academic freedom and institutional autonomy.

Politics continued to intervene, though. Incensed that the government had changed its position and fearing the implications of court decisions declaring Title IX's program specificity,[52] the National Women's Law Center and other civil rights groups sought to intervene in the Supreme Court

50 Brief for Petitioners at 9, *Grove City College,* 465 U.S. 555 (1984) (No. 82-792).

51 *Id.*

52 They particularly feared the impact on women's athletics, since direct federal assistance to college and university athletics programs was virtually non-existent.

and argue in support of the Third Circuit decision that one dollar of federal aid created institution-wide regulation. The Court rejected their attempt to participate in oral argument, but they and five other groups filed friend of the court briefs urging the Court to affirm the Third Circuit.[53]

Unsuccessful in convincing the Supreme Court to take a pass on Grove City's case, the Reagan Administration tried to thread its own needle between conservative principles and prohibiting discrimination. Its core argument was that federal grants to students represented a substantial subsidy for the College's financial aid and scholarship program. Brief for Respondents at 8. Because Title IX was part of the same law that created federal grants to undergraduates for the first time, the government also argued that it was inconceivable that Congress would have exempted them from Title IX's reach. It then reconciled its argument with program specificity by arguing that only Grove City's financial aid program was subject to Title IX regulation, thus rejecting the Third Circuit's institution-wide approach.[54]

53 They included groups headed by the American Association of University Women, the Council of Collegiate Women Athletic Administrators, the Lawyers' Committee for Civil Rights Under Law, the Mexican American Legal Defense and Educational Fund, and Representative Claudine C. Schneider. Grove City was supported by groups headed by the Equal Employment Advisory Council, Hillsdale College, the Pacific Legal Foundation, the Mountain States Legal Foundation, and Wabash College.

54 Much of the government's brief involved long arguments involving legislative history—citing numerous statements by individual Senators and Representatives (Brief for Respondent at 11–40, *Grove City College,* 465 U.S. 555 (1984) (No. 82-792)), which we had countered by many similar statements stating the opposite. My view, after substantial hours wading through the Congressional record, is that any fair-minded reading of the 1964 and 1972 legislative history of Titles VI and IX would lead the reader to conclude that the issue was confusing and unproven, supporting Justice Scalia's general criticism of legislative history as like "walking into a crowded cocktail party and looking over the heads of the guests to pick out your friends." Antonin Scalia &

d. Argument Day

The Court set Grove City's case as the first argument on November 29, 1983. David Lascell would argue for Grove City. I accompanied him along with President MacKenzie, Board of Trustees Chair Albert Hopeman,[55] and Public Relations Director Bob Smith. As "second chair" on the case, I sat at counsel table that day. Because of 1970's courtroom renovations led by then Chief Justice Warren Burger, the bench where the nine Justices sit had its original straight lines angled out at the sides, giving better sightlines to the more junior Justices sitting on the wings. The change also created a more intimate experience for arguing counsel, who would stand at eye level with the Justices while at the podium.

We arrived and reported to the Court Clerk's office, where then Clerk of Court Joseph Spaniol greeted us, gave us final directions, and wrote down a phonetic pronunciation for Lascell's name. A busload of Grove City students had traveled to Washington to support the College and courtroom deputies added extra chairs to the already crowded courtroom. The press gallery was full, and interested lawyers packed the section before the bar. We proceeded to the counsel table and laid out our papers. Precisely at 10:00 am the Marshal of the Court cried "oyez, oyez, oyez… ." The Justices entered simultaneously from behind a curtain and took their seats. They sat, from left to right, in this order:

Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 377 (2012) (quoting Judge Harold Leventhal).

55 Mr. Hopeman deserves special recognition for his role in the case. Along with President MacKenzie he took part ably in many of our strategy sessions and was instrumental in providing both the moral and financial support that enabled the case to be brought. Lee Edwards estimates the cost of legal fees at over half a million in 1980's dollars. I think it was higher. Most of that financial support came because of Mr. Hopeman's generosity and belief in the principles underlying the College.

Stevens, Powell, Marshall, Brennan, Burger, White, Blackmun, Rehnquist, and O'Connor.[56] Chief Justice Burger said, "Mr. Lascell, you may proceed."[57]

David Lascell began his argument with the traditional opening, "Mr. Chief Justice and may it please the court." Clued in beforehand, I watched then Associate Justice Rehnquist reach down and pull out an atlas to check the College's location.[58] Lascell began his argument but spoke only three sentences before Justice Byron White asked the first question, followed by 36 more from various Justices during Lascell's 25-minute argument. Lascell responded in a form of Socratic dialogue, as all counsel must, by incorporating our arguments in his response to the questions. Although it was his first Supreme Court argument, Lascell represented the College masterfully. He kept up an earnest, folksy tone that had helped him sway many upstate New York juries. Dean of the Supreme Court journalists Lyle Deniston wrote that Lascell's argument was one of the best of the Term, unusual for a first-time advocate. We had prepared him well through mock arguments. Still, the Justices' questioning showed that many were skeptical about the College's arguments on the critical recipient issue.

Supreme Court experts point out that questioning at oral argument does not necessarily predict how a Justice will decide the case. At the Grove City argument, the gov-

56 All have now passed away. Justice O'Connor was the last survivor, dying in 2023 after retiring in 2006.

57 Pronouncing counsel's name correctly is one of the Court's traditions. Obtaining counsel's correct pronunciation is now done through a form filed before argument.

58 One of the Nixon firm's lawyers had worked for William Rehnquist at the Department of Justice and later served as one of his first Supreme Court law clerks. He had told me of the Justice's fascination with place names and their location, perhaps a result of Rehnquist's meteorological training during World War II. I later confirmed his interest in weather and geography when I worked for then Chief Justice Rehnquist from 1991 to 1994.

ernment's lawyer faced equally tough questions. Normally the Solicitor General would argue a case as prominent as Grove City. This time Rex Lee's deputy, Paul Bator, argued after Lee recused himself because of his relationship with Brigham Young University, which had its own pending Title IX lawsuit. Bator, a Harvard Law professor and expert on the federal courts, was Acting Solicitor General for the case. He summarized the government's case succinctly before the Justices began pummeling him with questions:

> The government's position in this case is that Grove City College does conduct an education program or activity that receives federal financial assistance within the meaning of Title 9. Title 9 doesn't say that the college has to receive funds. It says it has to conduct a program that receives financial assistance. . . . We think that the government's BEOG grants, whether they funnel through the college or whether they go directly to the students, directly and unequivocally subsidize a financial aid program and scholarship program at Grove City.[59]

Most of the questions to Bator were hypotheticals testing the difference between the government's position and circumstances presented by other government aid programs, such as Social Security and Aid to Dependent Children. I silently cheered on the Justices raising these questions, which indicated that they understood the points we had made in our

59 Transcript of Oral Argument at 23, *Grove City College*, 465 U.S. 555 (1984) (No. 82-792), http://blackfreedom.proquest.com/wp-content/uploads/2020/09/grove21.pdf.

briefs.[60] Bator, though, was a skilled advocate.[61] He parried the Justices' questions and came up with probably the best possible defense of the government's position. It was one I doubted that Congress had contemplated, but it made logical sense and bowed to Title IX's program-specific nature:

> It is not the case, as Grove City seems to be saying, that the federal government just sends this money out and the students are free to do whatever they want with it. The purpose of these grants is to finance students' education at Grove City. The amount is measured by the cost of education, tuition, food, lodging, books. The federal government limits the amount, but the cost is figured on the basis of the actual expenses at the actual college.[62]

Bator then reiterated what turned out to be the eventual clinching argument, that the "program" to be regulated had to be limited to Grove City's scholarship program.[63] Bator

60 My memory is unclear as to who did most of this questioning, although I believe many of the questions to Bator came from Justices Powell, O'Connor, and White. You can read their interrogation of counsel in the oral argument transcript, but the Court does not identify the questioner in the transcripts. *Id.*

61 Illness ended Bator's life prematurely, but he left a legacy as a conservative legal scholar and brilliant teacher at both Harvard and the University of Chicago. Bator was on leave from Harvard during his tenure as Deputy Solicitor General. He won most of the cases he argued on behalf of the government. He also was one of the few law professors who supported Robert Bork during his nomination to the Supreme Court, edited two editions of Hart & Wechler's *The Federal Courts and the Federal System*, and had to turn down President Reagan's nomination of him to the U.S. Court of Appeals for the D.C. Circuit because of illness. I remember Bator as unfailingly courteous to me and David Lascell at the Grove City argument when we introduced ourselves and chatted briefly before and after the proceedings.

62 Transcript of Oral Argument, *supra* note 59, at 29.

63 *Id.* at 35.

took heat from the Justices for the government's inconsistent positions on program specificity.[64] He also faced tough questioning regarding the impact on innocent students. Bator offered, however, a response which allowed the College a path to maintain its independence once incorporated into the Supreme Court's majority opinion.

> I think the answer to that, Your Honor, is that it is quite easy for Grove City to stay out of the federal embrace. All they have to do is to say to their students, don't take federal scholarship money; we will give you our scholarship money. That's exactly what they would have had to do before '72 when there was [no] federal scholarship money. They would have had to go to their own alumni and support groups.[65]

e. The Supreme Court Decides

A little more than two months later, the Court issued multiple opinions but they all reached the same conclusion—Title IX applied to the College. Justice Byron White wrote the majority opinion, which was unanimous in rejecting Grove City's recipient argument. Justice White, known as a "lawyer's lawyer" because he could marshal the facts and law and write as if there could be little doubt as to the correct outcome, did the same this time. He followed the same path as Judges Simmons and Judge Garth had, relying on Title IX's purpose, legislative history, and post-enactment history. He did so despite his admission that "[t]he few contempora-

64 To be sure, Bator was not entirely consistent in his responses to the Justices. At one point he raised the "infection theory" that if Grove City discriminated in admissions (it did not), that would "infect" its scholarship program and lead to Title IX coverage for the admissions office also. These issues were played out in the partial dissenting opinions authored by Justices Stevens and Brennan.

65 Transcript of Oral Argument, *supra* note 59, at 30.

neous statements that attempted to give content to the phrase 'receiving Federal financial assistance,'" were "admittedly somewhat ambiguous."[66]

Justice White then moved on to the program specificity issue. Here this section of his opinion gained only six Justices' agreement. It rejected our attempt to combine the recipient issue with program specificity. Yet, in a conclusion that outraged the civil rights community and created the impression among some that Grove City had "won" its case, he also rejected the Third Circuit's institutional approach:

> . . . we cannot accept the Court of Appeals' conclusion that in the circumstances present here Grove City itself is a "program or activity" that may be regulated in its entirety. Nevertheless, we find no merit in Grove City's contention that a decision treating BEOG's as "Federal financial assistance "cannot be reconciled with Title IX's program-specific language since BEOG's are not tied to any specific "education program or activity."[67]

Following his treatment of program-specificity, Justice White moved on to reject the College's other contentions. Although he acknowledged that Grove City's objection to signing the Assurance of Compliance might have had validity before 1983, he lawyered his way to a conclusion that the Assurance contained language that limited its scope only to "applicable" regulations. Given the Reagan Administration's more limited reading of Title IX's scope, a far cry from the Carter Administration's, Justice White found that the Assurance was no longer objectionable.[68] Justice White's opinion then gave the College's constitutional arguments short shrift, concluding that Congress was constitutionally able to attach

66 *Grove City College*, 465 U.S. at 566.
67 *Id.* at 571.
68 *Id.* at 574–75.

reasonable and unambiguous conditions to federal financial assistance. This conclusion, though, endorsed a future path that Grove City could follow without violating the law or students' rights:

> Grove City may terminate its participation in the BEOG program and thus avoid the requirements of § 901(a). Students affected by the Department's action may either take their BEOG's elsewhere or attend Grove City without federal financial assistance. Requiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the BEOG program infringes no First Amendment rights of the College or its students.[69]

Justice White's opinion, although unanimous on the recipient, Assurance, and constitutional issues, did not attain complete unanimity and various Justices wrote additional opinions. Justice Brennan, writing for himself and Justice Marshall, would have affirmed the Third Circuit in all respects. He joined Justice White's opinion on the recipient issue, but strongly disagreed on program specificity, writing:

> Allowing Title IX coverage for the College's financial aid program, but rejecting institution wide coverage even though federal moneys benefit the entire College-may be superficially pleasing to those who are uncomfortable with federal intrusion into private educational institutions, but it has no relationship to the statutory scheme enacted by Congress.[70]

Justice Stevens, confirming his early reputation as an unpre-

69 *Id.* at 575–76.
70 *Id.* at 582.

dictable "wild card" who would go his own way on issues,[71] also agreed with Justice White's majority opinion except he would not have decided the program-specificity issue. In other words, he would have followed the path advocated by Third Circuit Judge Becker and the government's opposition to Grove City's certiorari petition.[72]

Only Justice Powell, writing for himself, Chief Justice Burger, and Justice O'Connor,[73] gave Grove City a sympathetic ear, even though he concluded, albeit "reluctantly," that "the holding in this case is dictated by the language and legislative history of Title IX, and the regulations of the Department of Education."[74] Noting the College's consistent history of refusing government aid and preserving its independence, Powell also acknowledged that the Record showed "no hint" that the College discriminated. He wrote:

> One would have thought that the Department, confronted as it is with cases of national importance that involve actual discrimination, would have respected the independence and admirable record of this College. But common sense and good judgment failed to prevail. . . . Only after Grove City had brought its case before this Court, did the Department retreat to its present position that Title IX ap-

71 Lesley Oelsner, *John Paul Stevens Is Proving to Be "Wild Card" in High Court Rulings*, N. Y. Times, Feb. 6, 1977.

72 *Grove City College,* 465 U.S. at 579–81.

73 From what I knew of him I would have expected Justice Rehnquist to have also joined Powell's concurrence, but he did not. I never learned why, as in the years I worked with him (1991-97) I never thought it would have been appropriate to ask him about a past case and he never volunteered his thoughts on Grove City. His actions indicated that he liked Western Pennsylvanians, though, as I was the third Western Pennsylvania native he hired for the job I held. I also had the double advantage of graduating from a law school that his daughter was attending when I was hired.

74 *Grove City College,* 465 U.S. at 576.

> plies only to Grove City's financial aid office. On this narrow theory, the Department has prevailed, having taken this small independent college, which it acknowledges has engaged in no discrimination whatever, through six years of litigation with the full weight of the Federal Government opposing it. I cannot believe that the Department will rejoice in its "victory."[75]

VI. The Aftermath

Justice Powell's kind words were an imperfect salve to a disappointing outcome. President MacKenzie went on record that he would recommend to Grove City's trustees that it maintain the College's independence by foregoing federal student grants entirely. As contemplated before the decision, he pledged that the College would seek to replace federal aid with private funding. Grove City alumni and others strongly supported the College and it gained stature from its principled stand. Yet, not surprisingly, the Court's decision provoked immediate condemnation across segments of U.S. society, who read it to countenance discrimination. As expected, the civil rights community roundly criticized the potential ramifications of program specificity and were joined by the mainline media. *The New York Times* condemned the Court for "judicial activism," criticizing it for needlessly reaching the program specificity issue and for refusing to allow oral argument from "women's groups and other victims of discrimination." It urged Congressional action, as did *The Washington Post.* The latter, in an editorial entitled "Cleaning Up After Grove City," endorsed legislation introduced in Congress two weeks after the decision.[76] The goal of the legislation—"to overturn the Grove City decision."

Those efforts continued over the next three years. I

75 *Id.* at 577–79.

76 *Cleaning Up After Grove City,* Wash. Post, April 16, 1984.

had moved to Washington by this point and was enlisted in the effort to tell Grove City's story before Congress as it considered overturning the Supreme Court. With our help, Dr. MacKenzie testified before Congressional committees and we lobbied Congressional staff. While the College began efforts to raise private money for scholarships, we proposed alternatives to Congress that would allow private colleges to escape the clutches of excessive federal regulation unless there was a finding of discrimination. Aware that such an outcome was unlikely to gain approval, we nonetheless wanted to keep Grove City's story alive and dispel any conclusion that it discriminated against women. Despite the setback in the Supreme Court, we believed that continuing to tell the College's story would eventually redound to the benefit of the College and its students. The battle and the continuing efforts certainly raised the College's profile. As Lee Edwards wrote, "Grove City College was now in the legal history books along with Dartmouth, as a school that had challenged the intrusive arm of the state."[77]

The Grove City Board of Trustees agreed to stop admitting students with federal grants for the 1985-86 academic year. Efforts continued to replace the federal monies with private funds, although endowment restrictions and Pennsylvania law would limit annual endowment spending to a maximum of seven percent of an endowed fund. Replacement of the federal monies would thus take great generosity, positive investment results, and a long time. In the meantime, because of the district court's ruling on federal guaranteed student loans, Grove City was able to allow its students to continue in the Guaranteed Student Loan Program. I had many conversations between 1984 and 1991 with federal regulators who raised questions about Grove City's compliance with federal requirements and did not seem aware of either Judge Simmons' ruling or Title IX's exemption for

77 Edwards, *supra* note 7, at 221–22.

"contracts of insurance or guarantee." David Lascell and I were able to keep the regulators at bay with letters and telephone explanations.[78]

Congress eventually passed the Civil Rights Restoration Act of 1987, also known as the "Grove City Reversal Act."[79] The law reinstated the Third Circuit position and applied Title IX and other federal anti-discrimination laws to all parts of a college or university if the institution received any federal assistance. Congress enacted the law despite President Reagan's veto. The President's veto message argued that the bill would "vastly and unjustifiably expand the power of the federal government over the decisions and affairs of private organizations, such as churches and synagogues, farms, businesses and state and local governments. In the process, it would place at risk such cherished values as religious liberty."[80] A bipartisan Congress overrode the veto by more than the necessary two-thirds majority, primarily at the urging of the nation's civil rights advocacy groups.[81] It seemed that few higher education institutions supported the President's veto, at least openly, and there was little public outcry. One commentator explained that although the pub-

78 Grove City properly decided to exit the federal Guaranteed Student Loan Program in 1996 as one more step in its principled stance of avoiding federal entanglement. By that year, it was able to establish a loan program through a private bank to replace the federal loan program now called Stafford Loans.

79 Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat. 28 (1988).

80 Ronald Reagan, Message to the Senate Returning Without Approval the Civil Rights Restoration Act of 1987 and Transmitting Alternative Legislation (1988), https://www.reaganlibrary.gov/archives/speech/message-senate-returning-without-approval-civil-rights-restoration-act-1987-and.

81 *See* Irvin Molotsky, *House and Senate Vote to Override Reagan on Rights*, N. Y. Times (March 23, 1988), https://www.nytimes.com/1988/03/23/us/house-and-senate-vote-to-override-reagan-on-rights.html.

lic initially sympathized with the "plucky little college battling the federal leviathan," the scene shifted as the matter moved inside the Beltway. Opinion polls and media coverage showed that the public did not fully comprehend the issues, which he described as "disagreements over complex issues of government authority, institutional autonomy, and civil rights regulation." This was just one example, he posited, of the increasing reliance of American higher education on federal funding and its consequent vulnerability to political disputes, ideological cleavages, and culture wars.[82] These were the cross-cutting currents that swamped the College's lawsuit and overturned the Supreme Court's attempted compromise. Although disappointed with Congress' action, the College had only a reputational stake in the legislation. We and the College understood the nature of the underlying dynamics, however, which confirmed the wisdom of the trustees' 1985 decision to decline further federal assistance.

VII. Legacy

My direct role in Grove City's battle with the federal government took place from 1978 until 1991, when I left the Nixon firm for public service. My close connection with the College and the case began again when I joined the Grove City board of trustees in 2010. Since that time, in chairing the College's Investment Committee, serving on its Executive Committee, and participating in its Legal Affairs Subcommittee, I am continually reminded of the costs and benefits the case created, along with the continuing vigilance required to maintain the College's independence.

The costs are tangible. Inflation and other factors have greatly increased the price of higher education everywhere, including Grove City. The College has been blessed by its donors' generosity, but it still has not been able to raise enough scholarship funds to meet all its students' financial needs. This affects the College's ability to attract students in

82 Graham, *supra* note 3, at 408–09.

a highly competitive higher education market. Grove City must continually compete for students with its federally funded peer colleges who can offer more scholarship aid because of their federal subsidies and tuition discounting policies. It must also forego other opportunities for federal largesse. During the 2020 COVID pandemic, for example, the College declined millions of dollars of federal aid that would have aided its adjustment to campus closure, underwritten remote learning, and offset costs related to keeping students healthy and safe. And, the College has continuously had to exercise due diligence to ensure that faculty and students do not unwittingly participate in federal research programs that would trigger federal oversight and regulation.

The benefits of independence, however, outweigh the negatives. Federal intrusion into higher education continues to grow, as numerous recent examples demonstrate. Title IX has expanded its reach considerably but so have other federal laws attaching strings to government aid.[83] Because of its principled battle for independence, Grove City has been able to avoid government's coercive entanglements. As it reaches its 150th anniversary Grove City College stands at a remarkable point in its history. It embraces this sesquicentennial milestone as an academically strong Christian liberal arts college and champion of faith and freedom. It continues to empower men and women students to grow holistically and provides a rigorous education grounded in timeless truths.

83 As a complement to federal regulation, Title IX and many other federal spending statutes also allow private litigants to sue federal recipients. A divided Supreme Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), held that Congress impliedly created a private right of action for Title IX. In recent decades lawyers representing private litigants have pushed the envelope under Title IX, reinforcing Grove City's wisdom to forego federal assistance. The existence of a private right of action also demonstrates that even if an administration sympathetic to Grove City holds sway in Washington, the College could still be hauled into federal court by someone with a different interpretation of Title IX.

It remains an exceptional value, still priced lower than most private colleges. As we reflect on Grove City's historic legal battle to preserve its independence, we can see that it not only established the College's national reputation as a principled advocate for its important mission, but that the case's lessons remain relevant today.

GROVE CITY COLLEGE

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