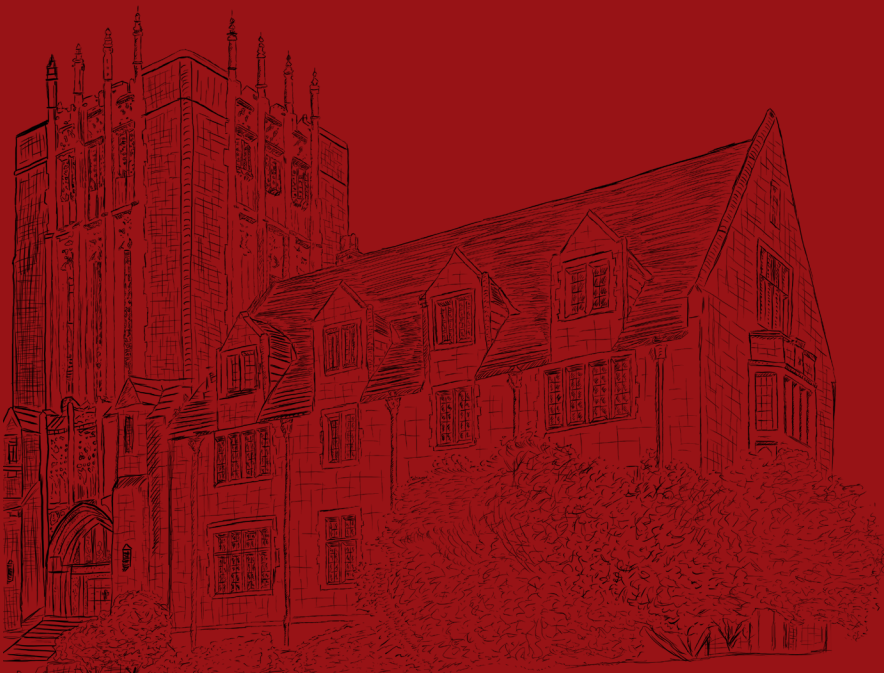




Grove City College

JOURNAL OF LAW
& PUBLIC POLICY



GROVE CITY COLLEGE

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The *Grove City College Journal of Law & Public Policy* invites submissions of unsolicited manuscripts, which should conform to *The Bluebook: A Uniform System of Citation* (21st ed. 2020). Manuscripts should be submitted electronically in Microsoft Word™ format to LawJournal@gcc.edu.

The editors strongly prefer articles under 15,000 words in length, the equivalent of 50 *Journal* pages, including text and footnotes. The *Journal* will not publish articles exceeding 20,000 words, the equivalent of 60 *Journal* pages, except in extraordinary circumstances.

To facilitate our anonymous review process, please confine your name, affiliation, biographical information, and acknowledgements to a separate cover page. Please include the manuscript's title on the first text page.

Please use footnotes rather than endnotes. All citations and formatting should conform to the 21st edition of *The Bluebook*.

For additional information about the *Grove City College Journal of Law & Public Policy*, please email us at LawJournal@gcc.edu or visit us online at <https://stuorgs2.gcc.edu/lawjournal/> or search for us at HeinOnline.

*The views expressed within these articles are those of the authors and do not necessarily reflect the policies or opinions of the *Journal*, its editors and staff, or Grove City College and its administration.

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Grove City College

Grove City College was founded in 1876 in Grove City, Pennsylvania. The College is dedicated to providing high quality liberal arts and professional education in a Christian environment at an affordable cost. Nationally accredited and globally acclaimed, Grove City College educates students through the advancement of free enterprise, civil and religious liberty, representative government, arts and letters, and science and technology. True to its founding, the College strives to develop young leaders in areas of intellect, morality, spirituality, and society through intellectual inquiry, extensive study of the humanities, the ethical absolutes of the Ten Commandments, and Christ's moral teachings. The College advocates independence in higher education and actively demonstrates that conviction by exemplifying the American ideals of individual liberty and responsibility.

Since its inception, Grove City College has consistently been ranked among the best colleges and universities in the nation. Recent accolades include: The Princeton Review's "America's Best Value Colleges," Young America's Foundation "Top Conservative College," and U.S. News & World Report's "America's Best Colleges."

Grove City College
Journal of Law & Public Policy

The *Grove City College Journal of Law & Public Policy* was organized in the fall of 2009 and is devoted to the academic discussion of law and public policy and the pursuit of scholarly research. Organized by co-founders James Van Eerden '12, Kevin Hoffman '11, and Steven Irwin '12, the *Journal* was originally sponsored by the Grove City College Law Society. The unique, close-knit nature of the College's community allows the *Journal* to feature the work of undergraduates, faculty, and alumni, together in one publication.

Nearly entirely student-managed, the *Journal* serves as an educational tool for undergraduate students to gain invaluable experience that will be helpful in graduate school and their future careers. The participation of alumni and faculty editors and the inclusion of alumni and faculty submissions add credence to the publication and allow for natural mentoring to take place. The *Journal* continues to impact educational communities around the country and can now be found in the law libraries of Akron University, Regent University, Duquesne University, the University of Pittsburgh, and Pennsylvania State University. The *Journal* has been cited in numerous academic publications and continues to be supported by a myriad of law schools, law firms, and think tanks around the nation.

EDITOR'S PREFACE

Dear Esteemed Reader,

It is my honor to present Volume 17 No. 1 of the *Grove City College Journal of Law & Public Policy*. The *Journal* is excited to join the 150th anniversary celebration of Grove City College and highlight the incredible work of our distinguished alumni. This edition would not have been possible without the help of Jeff Prokovich and Brian Powell in connecting with donors to fund this academic venture. We are indebted to our supporters whose generosity allows Grove City students to engage with scholarship of the highest level and advance the College's commitment to academic excellence.

I am also privileged to introduce new additions to our Faculty Advisory panel and Editorial Board. After years of advisement and dedication to the *Journal*, President Emeritus Paul McNulty has stepped down from his role as Faculty Advisor and joined our distinguished Editorial Board. His service to the College and care for the *Journal* influenced countless editors in their pursuit of legal careers. We are extremely grateful for all of his help. In his stead, we are pleased to announce two additions to our Faculty Advisory panel. Bringing passion for the Law to Grove City, President Bradley Lingo joins as an advisor and eagerly engaged with the *Journal's* preparation for this edition. Dr. Caleb Fuller, Associate Professor of Economics, also joins as an advisor to assist the editorial staff to strengthen articles related to public policy.

The 25-26 academic year is filled with celebrations and exciting opportunities. With the celebration of the 150th of the College and the 250th of America, we are on track to publish our first two volume edition since 2011. I am extremely grateful for the support on and off campus which has provided students with opportunities to explore the legal world and develop editorial skills which we will take with us far beyond the classroom.

Roan A. Fair '26

Editor-in-Chief

FORWARD

Dear Reader,

Welcome to Volume 17 No. 1 of the *Grove City College Journal of Law and Public Policy*. I am grateful to have worked alongside the Executive Committee, our associate editors (the content team in particular), and our contributors. The *Journal* is one of the few undergraduate peer-reviewed journals in the nation and I have seen firsthand the effort shown by our editors that proves their commitment to quality scholarship.

Volume 17 is a special edition of the *Journal*. As Grove City College nears its sesquicentennial and the United States its semiquincentennial, we decided to publish two issues in Volume 17. The first issue contains articles only from Grove City College alumni and current students. The second issue to be published this spring in honor of the nation's semiquincentennial, will explore constitutional questions.

Volume 17 No. 1 opens with a commentary on the role of the judge by Hon. Brad Charles '78. Drawing on over 25 years of experience, he provides a unique biblical perspective on the judiciary. Scott Bullock '88 then reflects on his time at Grove City College and notes how Grove City College uniquely prepared him for practice of law. The third essay, written by Isaac J. Good '26 and Brae F. Sadler '27, details the history of Austrian economics and its ties to Grove City College. The issue concludes with Robb Jones '75, who provides an insider's perspective on our very own Supreme Court case, *Grove City College v. Bell*.

Once again, many thanks to this year's team of editors for their hard work and quick turnaround on this semester's issue. We hope these articles provide valuable insight into the history and legacy of Grove City College and its graduates.

Joshua C. Xu '26

Executive Content Editor

One Christian's View on Judges and Judgment

Hon. Brad Charles*

**Brad Charles '78 is a graduate of GCC, where he competed for GCC's Varsity Swim Team and served as Student Government President. In 1983, Brad received a J.D. from Dickinson School of Law. In 1993, he was elected as District Attorney of Lebanon County. He was elected Judge in 1999 and has served on the Bench since that time.*

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I am a Christian. I am a sinner. I am also a judge of 25 years who struggles to reconcile my job with biblical precepts regarding judgment.

In his Sermon on the Mount, Jesus said: “Do not judge, or you too will be judged. For in the same way you judge others, you will be judged, and with the measure you use, it will be measured to you.”¹ In his letter to the Romans, the apostle Paul wrote: “[L]et us stop passing judgment on one another.”² These passages, and others, caution all Christians against becoming judgmental. Does that mean that society should rid itself of judges? From both a practical and biblical standpoint, my answer to that question is a resounding “No.”

I. Society’s Need for Judges

A reality of human existence is that people sin. A reality of human interaction is that people will become involved in disputes. No human society will long survive without a methodology to address sins and disputes that negatively impact others. From a practical standpoint, societal self-preservation demands that individuals be appointed to resolve disputes and supervise the punishment of aberrant behavior. In the United States, our Constitution requires that these roles be performed by judges.

As a historical document, the Bible acknowledges the need for judges. In his first letter to Corinth, Paul responded to the inability of the Corinthian church to resolve disputes among its members.³ In the Old Testament, Ezra was instructed to “appoint magistrates and judges to administer justice to all the people....”⁴ Similarly, Moses gave specific instructions to judges: “Hear the disputes between your people and judge fairly, whether the case is between

1 *Matthew 7:1–2.*

2 *Romans 14:13.*

3 *1 Corinthians 6.*

4 *Ezra 7:25.*

two Israelites or between an Israelite and a foreigner residing among you. Do not show partiality in judging; hear both small and great alike.”⁵ In fact, two entire books of the Bible—Judges and Job—focus upon the tribulations and exploits of early Israelite judges.

Time and again, the Bible teaches that a societal hierarchy—we call this government—is required to avoid the perils of anarchy. The apostle Paul wrote: “the law is good if one uses it properly.”⁶ Even in an era of despotic Roman rule, Paul instructed Christians to respect and obey governing authorities “for there is no authority except that which God has established.”⁷ In fact, Paul referred to government officials as ones who “bear the sword” and who act as “God’s servants, agents of wrath to bring punishment on the wrongdoer.”⁸

Without question, judges are part of the “authorities” referenced by Paul in many of his epistles. By instructing Christians to obey those in authority, Paul is instructing Christians to adhere to judicial decisions. By implication, Paul recognizes that God has installed judges and imbued them with the authority to render human legal judgment. As to why judges are part of God’s plan, we need look no further than Paul’s letter to Timothy: “I urge, then, first of all, that petitions, prayers, intercession and thanksgiving be made for all people—for kings and all those in authority, that we may live peaceful and quiet lives in all godliness and holiness.”⁹ Judges maintain order so that godly people can worship and interact in peace.

5 *Deuteronomy 1:16–17.*

6 1 *Timothy 1:8. See also Romans 7:7.*

7 *Romans 13:1. See also Titus 3:1; 1 Peter 2:13–17; Hebrews 13:17.*

8 *Romans 13:4–5.*

9 1 *Timothy 2:1–2.*

II. Human Need to Accept Judgment

Not everyone leaves the courtroom happy. However, for a society to avoid chaos, those who leave a courtroom must accept the outcome. Judicial decisions are not popularity contests; almost all represent the honest effort of judges to “get it right.”

Unfortunately, many today have begun to question the legitimacy of judicial decisions. In July of 2024, the Annenberg Public Policy Center associated with the University of Pennsylvania published a report entitled: “The Withering of Public Confidence in the Courts.”¹⁰ According to this report, the percentage of Americans who express trust and confidence in the judiciary fell from 75% in 2002 to under 50% in 2022. A survey of 479 trial judges conducted by the National Judicial College in March of 2024 revealed that 90% believed that respect for judges has declined over the past 10 years.¹¹ This trend is alarming. If we are to remain a society where citizens can live in “peace and quietness,” trust in the judiciary must be maintained.

III. Biblical Limits on Human Judgment

As a Christian, I am keenly aware of the biblical limits and instructions placed upon judges. These include:

- (1) Judges cannot judge a man’s soul: they are limited to assessing a man’s conduct. Only “God judges people’s secrets.”¹²
- (2) Judges should not be hypocrites. Paul wrote: “So when you, a mere human being, pass judgment on them and yet do the same things, do you think you

10 Shawn Patterson Jr. et al., *The Withering of Public Confidence in the Courts*, 108 JUDICATURE 22 (2024).

11 Jenna Delacruz, *Nearly All Judges Believe the Public’s Respect For Judges Has Declined*, THE NATIONAL JUDICIAL COLLEGE (Mar. 5, 2024), <https://www.judges.org/news-and-info/nearly-all-judges-believe-the-publics-respect-for-judges-has-declined/>.

12 *Romans 2:16*.

will escape God's judgment?"¹³

- (3) Judges must work very hard to "get it right," because they are empowered by God "to punish those who do wrong and commend those who do right."¹⁴
- (4) Judges should not view themselves as superior to those who are being judged "for it is not those who hear the law who are righteous in God's sight, but it is those who obey the law who will be declared righteous."¹⁵

Does this mean that all judges must acknowledge the authority of the above Biblical precepts? No, it does not. I know quite a few excellent jurists who are not Christians, but who nevertheless adhere on a daily basis to the principles outlined above. They do so not because they have read or even believe in the authority of the Bible, but because they intuitively recognize the wisdom of the tenets expressed within.

Unlike many countries, America's system of justice is not governed by one religious belief-set. Judges swear an oath to the Constitution and not to a deity. That said, I believe that the more judges adhere to the guiding principles outlined above, the more that society—religious or not—will respect the judiciary and the decisions it renders.

IV. Confidence and Humility

Judges are a pretty confident lot. It takes confidence to render decisions that affect the lives of others. Without confidence, people become indecisive. Almost by definition, indecisive people do not make good judges.

There is a fine line between confidence and arrogance. While the former is a necessity for a judge, the latter can lead to decisions rendered based upon impulse and/or

13 *Romans 2:3.*

14 *1 Peter 2:14.*

15 *Romans 2:13.*

preconceived notions rather than thoughtful consideration.

I have always tried to maintain a level of confidence about my decisions and the process that led to them. I am, however, keenly aware that my confidence could be perceived as arrogance, especially by those whose thinking may not align with my own.

Is it possible for a judge to maintain confidence without being perceived as arrogant? I honestly do not know. As a Christian, I am aware of a Biblical preference for humility.¹⁶ How can judges portray both confidence and humility? These are a few strategies I have seen:

- Acknowledge the reality that some decisions are agonizingly difficult. Let people see when their judge is struggling to weigh different and sometimes irreconcilable perspectives.
- Admit when you are wrong. Judges are human. All humans make mistakes. When a judge's own mistake becomes apparent to him/her, it should be openly acknowledged, and corrected when possible.
- Use self-deprecating humor. (I am not good at this, but I have seen other judges use this tactic effectively.)
- Listen. Even when what is being said is ridiculous. Even when the ultimate outcome is pretty apparent. It is the job of a judge to make sure that litigants feel that they have been heard.
- As the Apostle Paul instructed in his first letter to the Corinthians, always strive to maintain an "even-tempered" demeanor. This is not always as easy as it might sound, but it is important to avoid displays of

¹⁶ See *Proverbs 11:2* ("When pride comes, then comes disgrace, but with humility comes wisdom."); *James 4:10* ("Humble yourselves in the sight of the Lord..."); *1 Peter 5:5-6* ("[C]lothe yourselves with humility toward one another, because, 'God opposes the proud but shows favor to the humble.'").

emotion on the Bench.

- Treat people with respect. Even accused felons can be called “sir” and “ma’am”.

V. Conclusions

What personal conclusions can I draw from all of the above? There are several: *First*, judges perform an essential function within any human society. *Second*, God understands and authorizes the existence of judges to resolve disputes and maintain societal peace. *Third*, judges who understand and accept their role and the limits of their role will not face God’s wrath merely by virtue of their occupation. *Fourth*, society will respect judicial decisions that are honestly rendered within the parameters of the Biblical precepts outlined above. *Fifth*, and perhaps most important, I pray the above are not rationalizations.

Litigating for Liberty— and the Lessons Learned from Grove City College

Scott Bullock *

**Scott Bullock '88 is President and Chief Counsel of the Institute for Justice.*

Reflecting on a legal career that's now approaching its 35th year, I am struck by how my experiences with three professors from Grove City College (GCC)—Drs. John Sparks, Hans Sennholz and Richard Trammell—taught me lessons that I have carried forward as a public interest litigator and now president of a non-profit law firm, the Institute for Justice (IJ).

Even before I started at Grove City, I thought I wanted to go to law school. The law allows you to combine an adherence to principles with the ability to effectuate real-world change. And the area of law where this ability is most pronounced is constitutional law, which is always at the heart of the intersection between the proper role of government power and the guarantees of individual liberty enshrined in the Constitution.

My primary motivation throughout my education and career has been to advance individual liberty and to pursue justice for those whose rights have been violated. My nascent idea that constitutional law was the most effective vehicle for accomplishing those goals was confirmed by the constitutional law class I took from Professor Sparks. Many of the cases we studied—where individuals challenged the abuse of government power and to enforce the rights guaranteed by the Constitution—are the types of public interest cases we've litigated at IJ for the past 34 years.

One of the quintessential constitutional cases we studied in class was *Brown v. Board of Education*.¹ In that case, the U.S. Supreme Court overturned the doctrine of separate but equal, which had sanctioned racial segregation in the public schools and other public institutions for decades.² *Brown* was litigated by one of the first public interest organizations, the National Association for the Advancement of Colored People (NAACP). Even though the Supreme

1 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

2 *Id.* at 495.

Court had previously upheld legal segregation in its infamous *Plessy* case in the late 1800s,³ the NAACP established a multi-year, strategic campaign to challenge legal segregation and to eventually overturn *Plessy*, which it finally accomplished in the *Brown* decision from 1954. The NAACP's campaign to overturn segregation established the template for the approach to public interest litigation followed by IJ and many other organizations.

In our constitutional law class at GCC, Dr. Sparks brought cases like *Brown* to life. It further convinced me that if I were going to go to law school I wanted to focus on constitutional litigation. I graduated from Grove City and headed straight to law school. And, from there, I immediately began my work at the Institute for Justice. We opened our doors in September 1991. I was the first attorney hired by IJ's two co-founders. We were a very small but determined public interest law firm adhering to the principles of classical liberalism and committed to shaping the future course of American constitutional law.

In the regular practice of law, lawyers are typically hired guns. You represent the interests of the people who are paying you without any overarching purpose or goal in mind, and you are comfortable arguing either side of a case or controversy. In the regular practice of law, for instance, you might in one case represent a governmental agency trying to take property for a project and then in another case represent a landowner trying to save his land. And most lawyers in private practice are very reluctant to speak to the media or members of the public about their case or client.

But public interest law is different. There, you have strategic goals in litigation that you try to achieve by carefully selecting cases and championing both the interests of a client along with a larger cause. You seek not just to win your individual case, but to have as broad an impact as pos-

3 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

sible by setting legal precedent that will impact thousands of others. Moreover, in public interest law, you are not just arguing your case in court, but making your broader case in the court of public opinion, to shift the minds of as many people as possible on the issues you champion.

So in public interest law, it is essential to be zealous, persuasive, and principled in your arguments. And I had an outstanding role model at Grove City by majoring in economics and taking every class offered by the legendary Dr. Hans Sennholz. Like so many GCC graduates from the late 1950s through the early 90s, I could fill this entire article telling stories—some hilarious—about Dr. Sennholz. But Dr. Sennholz was more than just an inspiring and often amusing teacher. He took the sometimes dry subject of economics and made it interesting and relevant through his passionate style of teaching (or, more accurately, lecturing). Moreover, Dr. Sennholz zealously advocated for the free market and for the principles of Austrian economics, which he learned directly from one of its founders, Ludwig von Mises. And Dr. Sennholz spoke not in the jargon of an economist but in plain English (albeit with a lingering German accent). Finally, Dr. Sennholz was devoted to principles, not to partisanship or political parties. (Apart from perhaps Ron Paul, I got the sense that he didn't really like politicians or political parties).

All of the above attributes of Dr. Sennholz are essential to the practice of public interest law. In public interest law, you have to be a zealous advocate for the principles you champion. You also have to discuss these principles and the cases you are taking on in a direct, simple manner without legal terminology. That way, you can make your case beyond the audience of judges and fellow members of the bar to the broader public. Also, it is essential to sustained success in public interest law to not be drawn into partisan score-settling nor to take part in whatever is the latest polit-

ical cause *de jour*. You must be willing to challenge those in positions of authority who abuse their power no matter who is in power or what political party they might belong to. You must base your arguments on principles and be committed to seeking long-range change in the law and in the greater world.

While passion is essential in public interest law, you are still representing real people in court whose freedom is on the line. Zeal must be balanced by cool, clear-headed rigor. This is needed for the practice of law in general, but it's doubly important in public interest law. Because you are trying to often challenge current legal doctrine, judges are more skeptical of you from the outset. So it's imperative to be rigorous in every document you file in court and every argument you make.

I learned so much about the importance of rigorous thinking and argument from GCC Professor Richard Trammell. Though my primary focus at GCC was economics and the classes and seminars of Dr. Sennholz, I ended up double-majoring in both economics and philosophy. My more practical-minded father—who never went to college but was thrilled that I did so—wasn't so delighted about my second degree in philosophy. (“What are you ever going to do with that?!” he proclaimed.) But I often tell people who are interested in going to law school that philosophy is actually a better major for learning vital critical thinking skills than the more traditional law school pathways of political science, history, and the like.

I took every class I could from Dr. Trammell, including an important course in Symbolic Logic, and, after I ran out of course offerings, I turned toward doing independent seminars with him. At that time, I was brimming with passion for the ideas and books I was reading by thinkers such as Milton Friedman, Frederich Hayek, Ayn Rand, and the Toms (Jefferson, Paine, and Szasz), and I was pretty zealous

in my advocacy of the ideas gleaned from these great thinkers. But from Dr. Trammell, I learned how to think through the problem areas in each approach—to be an advocate but also to be rigorous in answering objections and examining thorny questions with logic and a commitment to reason.

Also from Dr. Trammell, among other role models, I learned to keep my cool and offer criticism with a light touch. Those skills have proven especially invaluable after I became president of IJ. No one wants to see the person in charge losing his cool—even when things are not going the way you would like. You need to impart to the people you’re leading that you’ve got this, and we’ll all get through it together. Also, when you’re in charge, you must sometimes have difficult conversations with people about their performance or other issues. It’s important to be direct but also calm and understanding.

The above lessons I learned from these Grove City professors have served me well during the course of my career at IJ. I litigated public interest cases for 25 years at IJ in all of our areas of focus, including the infamous *Kelo v. New London* case at the U.S. Supreme Court, involving the abuse of eminent domain for private development projects.⁴ Even though we lost the case in a narrow 5-4 decision, *Kelo* was a classic example in public interest law of how you can turn what was a setback in court into a victory by effectuating massive change through follow up litigation and significant legislative and constitutional reforms. You can raise the profile of an issue through your litigation so much that change must come about even when the highest court in the land doesn’t agree with you.

I had the honor of becoming IJ’s second president when I took over from our co-founder Chip Mellor at the start of 2016. Since then, IJ has experienced explosive growth. Our caseload, including the number of our Supreme

4 *Kelo v. New London*, 545 U.S. 469 (2005).

Court cases, our budget, and our team of litigators and other staff have all more than doubled. Despite all of this change, IJ remains committed to classical liberal principles and to the feisty, start-up culture we had from our earliest days. And I am still excited by what IJ can accomplish in the years ahead.

The inspiring Founding-era liberal Thomas Paine wrote in *Common Sense* about the drafting of our Constitution: “[W]e have every opportunity and every encouragement before us, to form the noblest[,] purest constitution on the face of the earth. We have it in our power to begin the world over again.”⁵ Thankfully, that is a power you have at your disposal in public interest law. Through deliberate and strategic yet bold public interest legal work, IJ has begun the world over again on causes like economic liberty, educational choice, eminent domain abuse, civil forfeiture, fines and fees, and free speech. We have made significant progress in each of these areas although more work remains.

Recently, we have begun the world over again on issues like qualified immunity and other doctrines that make it difficult to hold government officials accountable even when they egregiously violate constitutional rights; on better protecting Fourth Amendment rights against unlawful searches and seizures; and on challenging unjust zoning laws that prevent people from owning a home, starting a small business, or doing charitable works. And, like all public interest advocates, we are always looking for the next world-changing initiative to champion. I am forever indebted to my time at Grove City for instilling values that have helped facilitate IJ’s success and growth over the past 34 years.

5 THOMAS PAINE, *COMMON SENSE* 57 (Harvard Univ. Press 2010) (1776).

Austrian Economics at Grove City College¹

Isaac J. Good & Brae F. Sadler *

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Brae Sadler '27 is a junior student of economics at Grove City College. In 2025 he joined the Institute for Faith and Freedom as a research fellow, where he researches economics with Grove faculty and heads IFF's new video project "Free Inquiry." After graduation Brae plans to pursue a Ph.D. in finance.

¹ We thank Caleb Fuller for his guidance throughout this project, as well as Peter Boettke and Shawn Ritenour for their helpful comments. All remaining errors are our own.

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Introduction

In 1871, Carl Menger's *Principles of Economics* began the Austrian School of economics. Since Menger, generations of scholars have developed the Austrian tradition. In 1876, a small town in western Pennsylvania opened the doors of a new select school for young scholars eager to pursue faith and freedom. This school would become Grove City College. As the influence of the Austrian tradition spread, the educational values of the College provided fertile ground for the ideas of Austrian economics to flourish. The College's commitment to pursuing truth still stands, and it has played a vital role in developing the Austrian tradition into what it is today.

I. The Marginal Revolution

The roots of the Austrian tradition can be traced back to 1871 when Carl Menger published his *Principles of Economics*.² Menger's *Principles* is one of three works that improved on the existing economic orthodoxy of the late 19th century.³ Also published in 1871 was William Stanley Jevons' *The Theory of Political Economy*, and in 1874 Léon Walras published *Elements of Pure Economics*.⁴ Each man worked independently of the others. In fact, each work

2 Translated from *Grundsätze der Volkswirtschaftslehre*.

3 The work of Menger in the late 19th century challenged the school of economic thought that dominated the German-speaking world, the German Historical School. Menger took issue with the extreme historicism of the German scholars who denied the ability of economic science to produce universal principles that hold across time and space. CHRISTOPHER J. COYNE & PETER J. BOETTKE, *THE ESSENTIAL AUSTRIAN ECONOMICS* 2–3 (2020). Economic laws, according to Menger, do indeed hold true universally across these dimensions. Despite the hostility Menger's methodology faced from the German Historical School, his ideas fit comfortably within economic thought beyond the German-speaking world. RANDALL G. HOLCOMBE, *ADVANCED INTRODUCTION TO THE AUSTRIAN SCHOOL OF ECONOMICS* 106–07 (2nd ed. 2020).

4 Translated from *Éléments d'économie politique pure*.

was in a different language: Menger's in German, Walras' in French, and Jevons' in English.⁵ Despite being unaware of the works of the others, each contributed to ushering in the "marginal revolution" and forming the cornerstone of early Neoclassical economics.⁶

The marginal revolution presented an alternative to the labor theory of value of the Classical tradition.⁷ According to the prevailing economic thought at the time, the value of a good was derived from the labor required to produce it. The marginal utility analysis of Menger, Jevons, and Walras argued that value is independent of labor and instead is derived from the perceived usefulness of individuals. This method of analyzing commodities answered the age-old question of why diamonds, despite being unnecessary for sustaining human life, command a higher price than water.

The marginal revolutionaries solved the diamond-water paradox by distinguishing between units and classes of goods. Rather than examining the entire classes of diamonds and water, the revolutionaries asked why an additional (marginal) unit of diamond was more valuable than an additional unit of water. Given the abundance of water, its use value is

5 See William Jaffé, *Menger, Jevons and Walras De-Homogenized*, 14 *ECON. INQUIRY* 511 (1976). This classic paper highlights the original intents and theoretical designs of Menger, Jevons, and Walras, shedding a necessary light on the key differences and contributions that each author made to the subsequent development of economic thought.

6 PETER J. BOETTKE & CHRISTOPHER J. COYNE, *THE OXFORD HANDBOOK OF AUSTRIAN ECONOMICS* 1 (2015). The economics of the Austrian tradition and the Neoclassicals, although close intellectual cousins, remains distinct today. Over time, series of social-historical events have repeatedly vindicated the perspective of the Austrian tradition. Caleb Fuller, *150 Years of the Austrian School of Economics*, *ECONLIB* (Nov. 29, 2021), <https://www.econlib.org/library/columns/y2021/fulleraustrian.html>.

7 Notable Classical economists include Adam Smith, Thomas Malthus, David Ricardo, John Stuart Mill, Jean-Baptist Say, and Frédéric Bastiat to name a few. COYNE & BOETTKE, *supra* note 3, at 2.

relatively low, and therefore the marginal use value of another unit of water is low. This is reflected in a low price. Diamonds, on the other hand, are relatively scarcer than water, making the use value and price of an additional unit higher. The marginal utility analysis was revolutionary in that it became the foundation of a new method to understand human action.⁸

The Austrian tradition began with the work of Menger. While as chair of political economy at the University of Vienna, his students built upon his work.⁹ The generations of Austrian scholars to follow would stretch Menger's influence well beyond Vienna.

II. The Growth of the Austrian Tradition¹⁰

After World War I, the Austrian tradition saw new intellectual leadership under Ludwig von Mises and F.A. Hayek. Mises enrolled at the University of Vienna in 1900 where he heard lectures from Eugen Böhm-Bawerk. Mises would go on to become a professor at the university, where he would teach Hayek.¹¹

In the 1930s, the devastation of the Great Depression was felt throughout the world. After moving to the

8 *Id.*

9 The most notable disciples of Menger are Eugen Böhm-Bawerk and Friedrich von Wieser, who would assume the chair of political economy. Those in the German Historical School labeled the ideas of Menger, Wieser, and Böhm-Bawerk the "Austrian School" because the three men were working out of Vienna. *Id.* at 3.

10 For a summary of the core propositions of Austrian economics, see Peter J. Boettke, *Austrian School of Economics*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS 23, 23–27 (David R. Henderson ed., 2008). Austrian economic analysis begins with the beliefs of the individual and his actions within markets. From there it considers the subjectivity of value and costs, economic calculation, and the role of the entrepreneur in the competitive market. At the macro level, it considers the nonneutrality of money, the heterogeneity of goods that compose the capital structure, and the spontaneous rise of social institutions. *Id.*

11 HOLCOMBE, *supra* note 3, at 107.

London School of Economics in 1931, Hayek worked on understanding business cycles through the Austrian lens. At this time, his business cycle theory offered a prominent alternative to the dominant macroeconomic ideas of John Maynard Keynes.¹² In the 1940s, Hayek's work provided a solid foundation to the Austrian view of how markets operate. Also around this time, Mises used the Austrian lens to argue for the impossibility of socialism.¹³ Hayek's work bolstered Mises' stance in the socialist calculation debate.¹⁴ In 1949, Mises published his magnum opus, *Human Action*, a comprehensive treatise of the Austrian approach to economic analysis.¹⁵ Just a few decades later, in 1974, Hayek won the Nobel Prize for his work in business cycles and monetary economics, thereby cementing the contributions of the Austrian tradition. Together the work of Mises and Hayek expanded the Austrian approach to cover monetary theory, business cycle theory, capital theory, political theory, legal theory, economic methodology, as well as the economics of government bureaucracies and intervention.

In 1940, after being pushed out of his native Austria

12 *Id.* at 108.

13 Mises' work builds upon that of his teacher, Böhm-Bawerk, who delivered a devastating critique of Marxism at the close of the 19th century. Fuller, *supra* note 6.

14 HOLCOMBE, *supra* note 3, at 108.

15 The effects of *Human Action* in economics continue today, more than 75 years after its publication. In their introduction to the *Scholar's Edition* (1998), Jeffrey M. Herbener, Hans-Hermann Hoppe, and Joseph T. Salerno place the impact of Mises' work beyond that achieved by other pioneers of economic thought: "Not even such milestones in the history of economic thought as Adam Smith's *Wealth of Nations*, Alfred Marshall's *Principles*, Karl Marx's *Capital*, or John Maynard Keynes's *General Theory* can be said to have such enduring significance and embody such persuasive power that today's students and scholars, as much as those who read it when it first appeared, are so fully drawn into the author's way of thinking." LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS, THE SCHOLAR'S EDITION V* (Jeffrey M. Herbener et al. eds., 1998).

by the Nazis, Mises arrived in the United States.¹⁶ He began teaching at New York University in 1944.¹⁷ There, Mises trained the next generation of Austrian scholars through whom the tradition persisted.

III. Laying a Foundation for Faith and Freedom

As the marginal revolutionaries made their contributions to the landscape of economic thought in Europe, a town nestled in the woods of western Pennsylvania sought to change the landscape of educational opportunity. With a surge of public schools taking root in Pennsylvania in the wake of the Free School Act of 1834, the town of Pine Grove hoped to maintain an education system of both public and private schools. In 1876, the town leaders elected the twenty-three-year-old Isaac Conrad Ketler to be the principal of the Pine Grove Normal Academy.¹⁸ By November of 1884, under the leadership of Ketler, the academy grew from an inaugural class of 26 young men and women to a student body of over five hundred. That same month, the court of Mercer County allowed the academy to be reclassified as a college.¹⁹ On the 21st of November, the town became home to Grove City College.

As president of the college, Ketler sought to ground the curriculum in Christian doctrine.²⁰ In the 1894-95 edition

16 Fuller, *supra* note 6.

17 JÖRG GUIDO HÜLSMANN, *MISES: THE LAST KNIGHT OF LIBERALISM 789–90* (2007). The positivism of American economics and Mises' political views made finding employment difficult. "In the land of the free—the very cradle of radical *laissez-faire* policies—the philosophy of the founding fathers of the American republic was all but dead in 1940... The contemporary American intellectual world was deeply anti-capitalistic. How could a man like Mises integrate himself into such an environment?" *Id.*

18 LEE EDWARDS, *FREEDOM'S COLLEGE: THE HISTORY OF GROVE CITY COLLEGE 7–8* (2000).

19 *Id.* at 13.

20 Peter M. Frank & Shawn Ritenour, *Economics Education at Grove City College 3* (March 2, 2023) (unpublished manuscript) (on file with

of the College *Bulletin*, Ketler stated,

It has always been the ambition of the President, under whose instruction this work is given, to make the department eminently disciplinary to the student and thoroughly to ground those who receive this instruction in those ethical and theistic principle which alone harmonize with the great doctrines of Evangelical Christianity.²¹

To meet this standard of Christian education, Ketler integrated studies of political economy into the College's curriculum.²²

From its earliest years,²³ students at Grove City College studied Francis Bowen's *The Principles of Political Economy*, Arthur Latham Perry's *Elements of Political Economy*, Adam Smith's *An Inquiry into the Nature and Causes of the Wealth of Nations*, John Stuart Mill's *Principles of Political Economy*, and Francis A. Walker's *Money*.²⁴ At the heart of these works, and what made them attractive to Ketler, was the emphasis on economic law as a pillar of the created order. In a lecture on epistemology, Ketler stated that,

The a priori philosophy is the only philosophy which furnishes a ground for science and faith. Empiricism means that denial of both.... Few even among intelligent men and women appreciate the importance of a true theory of knowledge to science and faith.

authors).

21 GROVE CITY COLLEGE, BULLETIN 39 (1894-1895 ed. 1894).

22 Frank & Ritenour, *supra* note 20, at 3.

23 In fact, even during the days as Pine Grove Normal Academy, students studied Francis Wayland's *The Elements of Political Economy*. *Id.* at 4.

24 *Id.* at 4-7.

Few even of those who erroneously adopt an empirical theory recognize its incompatibility with the possibility of science.²⁵

However, as the cultural and political environment shifted the economics profession towards secularism,²⁶ the College's curriculum saw an ideological drift. The assigned readings no longer maintained an emphasis on the Christian principles underlying economics.²⁷ The College's economics tradition would eventually see a return to its roots thanks to the personal connections between the College and prominent Austrian scholars.

IV. The Mises, Pew, and Sennholz Years

In 1931, leaders of Grove City College elected J. Howard Pew to serve as the Chairman of the Board, a position he would hold until his passing in 1971. Pew graduated from the College in 1900 at the age of eighteen. At the age of thirty, he inherited the Sun Oil Company from his father. Pew found great entrepreneurial success as the company's president. Upon assuming the role at his alma mater, Pew served the College with singular dedication.²⁸ His devotion to the College and its values were evident in his commitment to the quality education students received, particularly *25 Thoughts Gleaned from President Ketler's Talk on Philosophy*, COLLEGIAN (Grove City, PA), Feb. 1891, at 1–2.

²⁶ MICHAEL A. BERNSTEIN, *A PERILOUS PROGRESS* 15–39 (2001). This was, in large part, a result of the influences of fascism in the 1930s, war and reconstruction in the 1940s, and the Cold War in the 1950s. During the Cold-War science period, the idea of a free pursuit of science was overtaken by national interests and fear of the country's enemies. Science as a practice was now “closer [to] the ideal of planned science than it was to that of the free, and individual, pursuit of knowledge.” ERWIN DEKKER, *THE VIENNESE STUDENTS OF CIVILIZATION: THE MEANING AND CONTEXT OF AUSTRIAN ECONOMICS RECONSIDERED* 169, 176 (2016).

²⁷ Frank & Ritenour, *supra* note 20, at 8.

²⁸ MARY SENNHOLZ, *FAITH AND FREEDOM: THE JOURNAL OF A GREAT AMERICAN*, J. HOWARD PEW 35 (1975).

in economics. Through his own interest in economic science, Pew developed a relationship with Mises that dated back to the late 1940s.²⁹ Mises was teaching at NYU at this time. During his twenty-four-year professorship, Mises only sponsored four candidates for dissertations, one of whom was Hans Sennholz.

After receiving his Ph.D. in economics from the University of Cologne in the spring of 1949, the young Sennholz immigrated from Germany to the United States.³⁰ Sennholz would intersect Mises at NYU, where he attended his seminars in economics. A few months later, Sennholz asked Mises to supervise his Ph.D. dissertation. While Sennholz pursued his doctorate under the tutelage of Mises, Pew and Mises continued their correspondence.

In 1950, Pew wrote to Mises, seeking his advice on understanding the principles of the free market:

[Do] you think I am justified in defining the free market as:

- (1) The free exchange of goods at prices which the public is willing to pay.
- (2) The free exchange of money with a value convertible into gold.
- (3) Free interest rates responsive only to the needs of commerce and finance.
- (4) Freedom from intervention by government or any other outside force.³¹

In his response, Mises commended Pew for his principles that “adequately circumscribe the free market” (Mises 29 Frank & Ritenour, *supra* note 20, at 10. After publishing *Human Action* in 1949, Mises sent a signed copy to Pew. In a letter to Mises, Pew described the work as “the finest presentation of what I consider to be the proper function of economics that I have ever read.” Letter from J. Howard Pew to Ludwig von Mises (Feb. 23, 1950) (on file with the Ludwig von Mises Collection at Grove City College).

30 HÜLSMANN, *supra* note 17, at 917.

31 Pew, *supra* note 29.

1950).³² As Sennholz continued his formal education under Mises and Pew his informal education, Grove City College's new president, John Stanley Harker, was preparing to bring the College into a new era.

During his first meeting with the College's trustees, Harker offered a blunt assessment of the state of the school. In his address, Harker called for a larger budget for hiring better faculty and strengthening the curriculum.³³ In 1956, Pew, in alignment with Harker's mission, urged the President to hire Sennholz as the College's chair of the economics department. At the time, Mises had made clear to both Pew and Sennholz that there is no place better suited for the Austrian economist than the College.³⁴

During his thirty-six years as a professor at the College, Sennholz developed the economics program to be thoroughly Austrian. When asked, Sennholz did not shy away from praising the superiority of the Austrian approach:

I used Menger's *Principles of Economics* for many years. The text is simple and clear. Sometimes, other professors would ask why I was using a one-hundred-year-old book for first-year economics. I would always say that

32 Letter from Ludwig von Mises to J. Howard Pew (Feb. 25, 1950) (on file with the Ludwig von Mises Collection at Grove City College). Mises' response also contained a slight reformulation of Pew's fourth point. Mises was concerned that bad actors might offer the objection "that government intervention is necessary for the preservation of domestic pence and the defense of society against the machinations of domestic gangsters and external foes." To safeguard against this, the revised fourth point reads, "Freedom from compulsion and coercion which would divert production and consumption from the lines enjoined by the endeavors of business to satisfy consumers' demand in the best possible and cheapest way, no matter whether much compulsion and coercion is practiced by the government or by other agencies." *Id.*

33 EDWARDS, *supra* note 18, at 134.

34 Frank & Ritenour, *supra* note 20, at 12.

economics is like philosophy; it has no age. We are dealing with principles of action and logic, and those do not change. In addition to Menger, I would also use books and essays by Mises.³⁵

The College's economics program thrived under the leadership of Sennholz. As chair of the department, he developed an economics major at the College and published twenty courses that were added to the curriculum. Additionally, he brought in faculty who would continue to strengthen the Austrian perspective. Likely due to the influence of Mises at NYU, Sennholz encouraged a strong pipeline of NYU graduates who would go on to teach at the College.³⁶ After the retirement of Sennholz³⁷ in 1992 and those of his contemporaries at the College, the economics program held fast to its free market ideals. However, it could no longer be said that the program was explicitly Austrian.³⁸

V. Grove City College and Economics Abroad

Despite its strength at the College during the Sennholz years, the Austrian tradition found no home in mainstream economics thanks to the rise of the "New Economics" of John Maynard Keynes, institutionalism, and mathematical market socialism in the mid-nineteenth century.³⁹ As a result

35 *Misesian for Life: An Interview with Hans F. Sennholz*, AUSTRIAN ECON. NEWSL., Spring 2002, at 8.

36 This pipeline included Robert G. Anderson, William H. Burdick, Robert H. Miller, and Paul J. Fair. Anderson and Fair were both GCC graduates.

37 It ought to be mentioned that Sennholz's retirement party drew a crowd of over 300 attendees.

38 Frank & Ritenour, *supra* note 20, at 15.

39 BOETTKE & COYNE, *supra* note 6, at 2. In the 1950s, the focus of economics had been shifted by an alliance of scientism and statism. As a result, from an Austrian perspective, economics was "too aggregative in perspective, too formalistic in presentation, too positivistic in scientific purpose, and too interventionist in practical importance." This

of the postwar state of social science in America, Austrian scholars, most notably Mises, lacked the support to build an academic base necessary to broaden their influence.⁴⁰ Adding to this difficulty, Mises passed away in 1973, and long before then, Hayek appeared to have lost interest in economic theory.⁴¹ The mantle of the Austrian tradition was now left to but a few, who faced a hostile intellectual landscape.

In the summer of 1974, the small town of South Royalton, Vermont, witnessed the beginning of the Austrian tradition's modern resurgence.⁴² Recognizing the need for the Austrian tradition, George Pearson, a 1964 graduate of Grove City College, proposed the idea of hosting a series of lectures on Austrian economics for young scholars. Presenting these lectures were the three leading scholars of the Austrian tradition of the day, Israel Kirzner,⁴³ Ludwig Lachmann, and Murray Rothbard. From this conference came a published volume of the lectures in 1976. Peter Boettke, a 1983 graduate of Grove City College who began teaching at George Mason University in 1998,⁴⁴ credits this volume as being the major introduction to the Austrian tradition for graduate students in the 1980s. "The success of the South Royalton conference demonstrates how small events can

shift was in large part due to the growing popularity of Keynesian and Samuelsonian economics. *Id.*

40 HÜLSMANN, *supra* note 17, 845.

41 Peter J. Boettke, *The Story of a Movement*, FOUND. FOR ECON. FREEDOM (May 1, 1995), <https://fee.org/articles/the-story-of-a-movement/>.

42 *Id.*

43 Kirzner was one of the four students to have his dissertation sponsored by Mises while at New York University. HÜLSMANN, *supra* note 17, at 917.

44 Boettke is now the Distinguished University Professor of Economics and Philosophy at George Mason University (GMU). There are many connections between GCC and GMU. In addition to many GCC alumni pursuing graduate studies at GMU, former department chairman and Distinguished Professor of Economics Walter Williams was a long-time trustee at GCC.

have a major impact.”⁴⁵

After the South Royalton lectures, the Austrian tradition’s influence spread. Israel Kirzner, with the assistance of Pearson, began an Austrian program in the economics department at NYU. In more recent history, Boettke has worked to engage the Austrian tradition with the mainstream lines of thought, highlighting its distinct and insightful approach.⁴⁶ The research into the intellectual history leading up to the marginal revolution by Alejandro Chafuen, who studied at Grove City College and conducted his dissertation under Sennholz, has now been translated into Chinese, Polish, Czech, Italian, Slovenian, and Spanish.⁴⁷ From 2008 to 2019, Lawrence Reed, a 1975 graduate of the College, served as the President of the Foundation for Economic Education, the oldest free market think tank in the nation.

Since the Sennholz years, Grove City College has continued to support the Austrian tradition. In 1997, then-President John H. Moore⁴⁸ hired Jeffrey Herbener who revived the Austrian tradition within the College’s eco-

45 Boettke, *supra* note 41.

46 Mario Rizzo, *South Royalton: Before, During, and After*, ONLINE LIBR. OF LIBERTY (June 6, 2024), <http://oll.libertyfund.org/publications/liberty-matters/2024-06-06-south-royalton-before-during-and-after>.

47 Alongside being a leading scholar in late-Scholastic economic thought, Chafuen served as President and CEO of Atlas Network from 1991-2018, and President of the Philadelphia Society from 2017-18. Currently, he is Senior Executive Fellow at the Acton Institute, Chairman of the Board of the Chase Foundation of Virginia, and a member of the Mont Pèlerin Society since 1980. *Our Team: Alejandro A. Chafuen, Ph.D.*, ACTON INST., <https://www.acton.org/about/staff/alejandro-chafuen> (last visited Nov. 20, 2025).

48 President Moore received his Ph.D. in economics from the University of Virginia, where he worked with the notable economist G. Warren Nutter. Alongside being a widely published economist, Moore worked for the National Science Foundation, Stanford University’s Hoover Institute, and George Mason University where he was director of its International Institute. EDWARDS, *supra* note 18, at 271.

nomics department.⁴⁹ In 2024, Herbener was named Peterson-Luddy Chair in Austrian Economics at the Mises Institute in recognition of his dedication to teaching the Austrian tradition.⁵⁰ As of 2025, he remains the chair of the economics department at the College. Under his leadership, decades of students have continued to study the Austrian tradition, reflecting the continued strength of Mises' influence on the College.

One way in which the College's emphasis of the Austrian tradition is evident is in its annual conference. Not long after his arrival to the College, Herbener began the Austrian Student Scholars Conference for young scholars around the world interested in the Austrian tradition to gather and promote their research.⁵¹ Additionally, the College is also home to a 20,000-page archive of Mises' academic papers, journal articles, and letters.⁵² The archive has been digitized since February of 2025.⁵³ The same year, it was announced that the College would offer a M.A. in Economics program with a distinct Austrian emphasis.

Alongside these programs and resources, students have access to the wealth of knowledge offered by their professors. Since 2020, Peter Frank, who graduated from the College in 1995 and later studied under Boettke, has served

49 Frank & Ritenour, *supra* note 20, at 15.

50 *Herbener Named to Prestigious Mises' Peterson-Luddy Chair*, GROVE CITY COLLEGE (Oct. 30, 2024), <https://www.gcc.edu/Home/News-Archive/News-Article/herbener-named-to-prestigious-mises-peterson-luddy-chair>.

51 Participation in this conference has become part of the capstone for students pursuing a B.A. in economics at GCC.

52 Prior to its digitization, the archive was used by German economist Jörg Guido Hülsmann to write a roughly 1,000-page biography of Mises titled *Mises: The Last Knight of Liberalism* (2007).

53 *Online Mises Archive is Boon to Austrian School Scholars*, GROVE CITY COLLEGE (Feb. 18, 2025), <https://www.gcc.edu/Home/News-Archive/News-Article/online-mises-archive-is-boon-to-austrian-school-scholars>.

as both Professor of Economics and the Provost and Vice President of Academic Affairs. Prior to this role, Frank studied and taught economics in Moldova as a Fulbright scholar.⁵⁴ In 2023, Professor of Economics Shawn Ritenour published his book *The Economics of Prosperity: Rethinking Economic Growth and Development*, continuing the Austrian approach to examining the institutions necessary for economic expansion. In 2025, Associate Professor of Economics Caleb Fuller, who graduated from the College in 2013 and went on to become a student of Boettke, published his co-authored book *Mere Economics* in which he makes accessible core tenants of economics and examines their connections to Christian principles. Also in 2025, the College welcomed Tegan Truitt, a 2021 graduate who studied under Boettke,⁵⁵ as Assistant Professor of Finance and Economics.

Conclusion

In an address to faculty, J. Howard Pew made clear what the focus of Grove City College ought to be:

If we work upon marble, it will perish; if we work upon brass, time will efface it; if we rear temples, they will crumble to dust; but if we work upon men's immortal minds, if we imbue them with high principles, with just fear of God and love of their fellow man, we can engrave on these tablets something which no time can efface and which will brighten and brighten to all eternity.⁵⁶

Grove City College students past and present bear the marks

54 Peter M. Frank '95 Selected as Provost, *Academic Affairs VP*, GROVE CITY COLLEGE (June 4, 2019), <https://www.gcc.edu/Home/Academics/Faculty-Directory/Faculty-Detail/peter-m-frank-95-selected-as-provost-academic-affairs-vp>.

55 While studying at GMU, Truitt was awarded the Israel M. Kirzner Award for Outstanding Dissertation in Austrian Economics.

56 SENNHOLZ, *supra* note 28, 148.

of an education founded upon the principles of faith and freedom. It is difficult to separate this mission of the College from the influence of the Austrian tradition.

What began as an intellectual revolution in Europe has given birth to generations of scholars pursuing truth through the Austrian perspective. Thanks to the influences of Ludwig von Mises and Hans Sennholz, Grove City College students today continue to study Austrian economics, and in doing so, are shown the beauty of God's created order on display within markets.

Economics helps makes sense of a seemingly senseless world.⁵⁷ It offers a lens through which generations of students have been equipped to discover truth. Upon returning to his alma mater as its new president, Bradley Lingo emphasized the importance of the pursuit of truth: "To discover truth is to discover Christ."⁵⁸ These words echo those of King David as he expressed the yearning of his soul for his Creator, "O God, you are my God; earnestly I seek you."⁵⁹ For the Christian scholar, there is no greater end to pursue than God. In a world where the truth may seem scarce and hard to find, the Austrian tradition 'mid the pines at Grove City College continues to equip students with the means necessary to pursue this end.

57 Institute for Faith and Freedom, *Meet the Scholars – Season 1, Episode 4 – Dr. Caleb Fuller '13*, YOUTUBE (Feb. 23, 2021), <https://www.youtube.com/watch?v=ft27EwXg6Yc>.

58 Bradley Lingo, Grove City College President, *Our Aspirations for the Coming Year*, Opening Convocation Address at Grove City College (Aug. 27, 2025).

59 *Psalm 63:1*.

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

Robb Jones *

**B.A. Grove City College '75; J.D., M.A. University of Virginia 1978. Jones was an associate and partner in the Nixon Law Firm (1978-91), Counselor to Chief Justice William Rehnquist (1991-94), Director of Judicial Education at the Federal Judicial Center (1994-97), and Senior Vice-President and General Counsel at United Educators Insurance (1997-2020). He is a member of the American Law Institute and a Life Fellow at the National Association of College and University Attorneys. He has served as a member of Grove City College's Board of Trustees since 2010.*

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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. Woodward*, 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 Beginning⁵

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

"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 policies 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 Simons, 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

19 *North Haven Bd. of Education v. Hufstедler*, 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

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.

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

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 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.

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.

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COLLEGE

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