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TITLE IX AND THE OUTER LIMITS OF THE SPENDING POWERS

Grove City College v. Bell
104 S. Ct. 1211 (1984)

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INTRODUCTION

One of the fundamental maxims of equity is that for every legal wrong there is a remedy.[1] In some instances, however, there may even be a "remedy" where no wrong has occurred. In what has been termed a "blind pursuit of social perfection,"[2] one federal civil rights agency has been charged with vindicating sprawling social goals at the expense of private autonomy in the complete absence of any actual discrimination.[3]

One of the most controversial decisions of the 1983 Supreme Court term illustrates this situation. In *Grove City College v. Bell*,[4] the Court found that certain federal grants to less than 10% of the college's students constituted "federal financial assistance" sufficient to draw the private college's entire financial aid program within the regulatory control of Title IX,[5] and implicitly within the interests of the Department of Education.[6] In that decision, the Supreme Court attempted to merge two major competing interests—private higher education's struggle to remain autonomous and the broad remedial goals of anti-discrimination laws.

This comment will examine the validity of subjecting private entities to federal control through the untoward link of Congress' spending pow-

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1. 4 J.N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN THE UNITED STATES OF AMERICA, Vol. II § 363 (5th ed., 1941).

2. Hearings on the Civil Rights Policy in *Grove City* before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 98th Cong., 2d Sess. (1984) (statement of George Roche, President, Hillsdale College).

3. Hearings on the Civil Rights Policy in *Grove City* before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 98th Cong., 2d Sess. (1984) (statement of Charles Fried, Professor of Law, Harvard Law School).

4. 104 S. Ct. 1211 (1984).

5. 20 U.S.C. § 1681(a) (1982). Title IX has two objectives: first, to prevent the use of federal funds to support discriminatory practices; and second, to provide individuals effective protection against these practices. Cannon v. University of Chicago, 441 U.S. 677, 704 (1979).

6. 104 St. Ct. at 1222.

ers.[7] The comment will then address the Supreme Court's effort to resolve the tension between Title IX's broad anti-discrimination goals and its narrow statutory enforcement provisions through Title IX's program-specific language.

Finally, this comment will address the impact of *Grove City* on the lower courts as well as on the legislature, where Congress has already attempted to use that decision as an invitation to rewrite current civil rights laws to encompass a virtually limitless spectrum of private activities. This comment will conclude that unsolicited funds which happen to trace back to a federal source should not be considered "federal financial assistance" for purposes of Title IX coverage when the affected educational institution has sought to minimize federal involvement. In addition, the reach of legislation containing program-specific language, such as Title IX, should be limited to only that program or activity which directly solicits and receives federal money.

HISTORICAL BACKGROUND

In general, the federal government has been reluctant to interfere in matters of curriculum, admissions, personnel policies, and other segments of higher education.[8] Where the government has taken steps to intervene in the educational process, those steps have been taken with caution to avoid infringement on other constitutional interests potentially at stake.[9] After much debate, one such piece of legislation, Title IX,[10] was enacted to protect participants in federally financed educational programs from sex discrimination.[11] In order to fall within the

7. U.S. CONST. art. 1, § 8, cl. 1.

8. *See generally*, O'Neil, *God and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 U. CINN. L. REV. 525, 526 (1975). The author identifies five historical factors which catalyzed a higher degree of government involvement in colleges. These include: 1) the dramatic growth of governmental support of higher education at rates which exceeded student enrollment; 2) campus disruption of the late 1960's and early 1970's; 3) mounting concern over the quality and value of higher education; 4) financial crisis among many private colleges and universities as a result of rising inflation and dwindling enrollments; and 5) the under-representation of women and minorities in higher educational institutions. *Id.* at 527.

9. O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155 (1970). *See also*, National Defense Education Act of 1958, 20 U.S.C. § 401, *et seq.* (1982) Pub. L. No. 85-864, where Congress promised worried educators that ". . . nothing contained in the Act will be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution." Title I § 102. The programs under section 401, however, have not been amended for a number of years.

10. 20 U.S.C. § 1681 (1982), Pub. L. No. 92-318, 86 Stat. 373.

11. 20 U.S.C. § 1681(a) (1982) states in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.*

jurisdiction of this statute, an educational institution must receive federal financial assistance.[12]

Section 902 of Title IX[13] contains enforcement provisions which enable federal departments and agencies distributing financial assistance to issue rules, regulations, or orders of general applicability consistent with the objectives of the authorizing statute. This section also permits sanctions for non-compliance, including termination of the financial aid to a non-compliant recipient. Section 902 is commonly referred to as the "pinpoint regulation"[14] because it limits the reach of the enforcement provisions to the discriminating program.

A. Financial Assistance

In order to interpret the *Grove City* decision, it is necessary to understand the meanings of two important terms, "federal financial assistance" and "program or activity," within the context of Title IX. Only a few courts have addressed the issue of what constitutes "federal financial assistance" for Title IX purposes.[15] Two conflicting lines of reasoning have developed in these cases.

One line of cases takes a broad view and suggests that "federal financial assistance" encompasses any federal aid that can ultimately be traced back to discriminatory conduct by the institution. For example, in *Dougherty County School System v. Harris*,[16] the United States Court of Appeals for the Fifth Circuit stated in dicta that federal money used to defray the salaries of elementary and secondary school teachers was sufficient to establish federal financial assistance to the school under Title IX.[17]

12. *Id.*

13. 20 U.S.C. § 1682 (1982).

14. Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068, 1075 (5th Cir. 1969).

15. North Haven Board of Education v. Bell, 456 U.S. 512 (1982); Dougherty County School System v. Harris, 622 F.2d 735 (5th Cir. 1980), *vacated and remanded sub nom.* Bell v. Dougherty County School System, 456 U.S. 986 (1982); Iron Arrow Honor Society v. Schweiker, 652 F.2d 445 (5th Cir. 1981), *vacated and remanded*, 458 U.S. 1102 (1982); Bennett v. West Texas State University, 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd*, 698 F.2d 1215 (5th Cir. 1983); Haffer v. Temple University of Com. System, 524 F. Supp. 531 (E.D. Pa. 1981); Othen v. Ann Arbor School Board, 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd on other grounds*, 699 F.2d 309 (6th Cir. 1983). Commentators uniformly agree that there is little information in the legislative history which is of much help on this issue. *See, e.g.*, Cox, *Intercollegiate Athletics and Title IX*, 46 GEORGE WASH. L. REV. 34, 36 (1977); Comment, *HEW's Regulations Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U.L. REV. 133.

16. 622 F.2d 735 (5th Cir. 1980), *vacated and remanded sub. nom.* Bell v. Dougherty County School System, 456 U.S. 986 (1982).

17. *Id.* at 738. The *Dougherty* court was also careful to point out that Title IX only applies to those *programs* receiving financial assistance.

Later, in *Iron Arrow Honor Society v. Schweiker*,[18] the Fifth Circuit Court of Appeals expanded its reading of financial assistance to include indirect aid. In that case, an all-male honor society received no federal funds but did have its postage fees and certain secretarial services paid for by the university.[19] On remand, the *Iron Arrow* court found that the discriminatory practices of the all-male society had tainted every university activity through indirect federal financial assistance to other school programs.[20]

Similarly, in *Haffer v. Temple University of Com. System*,[21] the court found that over $19 million in federal funds used to support over ten percent of the university's budget constituted federal financial assistance to that entire university. The *Haffer* court did not analyze whether this was "direct" or "indirect" financial assistance, presumably because the size of the federal aid package was so large.[22] Consequently, *Haffer* left open the issue of how substantial the federal financial assistance must be before Title IX will apply.[23]

In contrast, a second line of cases takes a much stricter view of "federal financial assistance" under Title IX. This view is illustrated by *Othen v. Ann Arbor School Board*,[24] where the district court held that Title IX applied only to the specific class of educational programs or activities which receive *direct* federal financial assistance.[25] The court also relied on the "pinpoint" enforcement provisions to find that Title IX applied only to direct recipients of financial assistance.[26]

Likewise, in *Bennett v. West Texas State University*,[27] female undergraduate athletes sued the university for alleged Title IX violations. The court granted summary judgment for the university because the university's athletic program itself received no federal funding.[28]

18. 652 F.2d 445 (5th Cir. 1981), *vacated and remanded*, 458 U.S. 1102 (1982).

19. *Id.* at 447-48.

20. 499 F. Supp. 496, *aff'd sub. nom.*, 652 F.2d 445 (5th Cir. 1981), *vacated*, 458 U.S. 1102 (1982), *aff'd sub. nom.*, 702 F.2d 549 (5th Cir. 1983).

21. 524 F. Supp. 531 (E.D. Pa. 1981).

22. For instance, federal college work study monies were paid to over 80% of the intercollegiate athletic program employees, "several hundred thousand dollars" were spent each year on federal financial aid to the school's intercollegiate athletes, and the intercollegiate athletic program made direct use of campus buildings financed with federal funds. *Id.* at 540.

23. The court rejected the direct/indirect funding distinction, but inferred that the federal financial assistance must be more than a *de minimus* portion of the school's annual revenues, *citing* Stewart v. New York University, 430 F. Supp. 1305 (S.D.N.Y. 1976).

24. 507 F. Supp. 1376 (E.D. Mich. 1981).

25. *Id.* at 1381 (emphasis added).

26. *Id.* at 1382.

27. 525 F. Supp. 77 (N.D. Tex. 1981).

28. *Id.* at 81.

Similarly, in *University of Richmond v. Bell*,[29] a private university sought to enjoin a Department of Education investigation of the university's athletic program. The district court granted the injunction on the grounds that the athletic department was not a recipient of direct federal financial aid.[30] The court based its decision on the Supreme Court's recent holding in *North Haven Board of Education v. Bell*,[31] which held that the Department of Education's regulations apply only to programs or activities that receive or benefit from federal financial assistance.[32] According to the rule set out in *North Haven*, the federal financial assistance would have to go either directly to a program or be closely associated with it.[33]

B. Program Specificity

A second and related issue among these same Title IX cases is "program specificity," or the question of which entities within the institution are governed by a "federal financial assistance" finding. In the past, certain courts have reached opposite results when faced with the task of untangling the affected educational entities from the unaffected ones.[34]

On one side of the debate, the Department of Education (DOE) has taken the position that when an educational institution receives federal money for one of its programs, the entire institution falls under the governance of Title IX.[35]

Conversely, advocates of the program-specific view believe that the "pinpoint" enforcement provisions found in sections 901 and 902 of Title

29. 543 F. Supp. 321 (E.D. Va. 1982).
30. *Id.* at 333.
31. 456 U.S. 512 (1982).
32. *Id.* at 536.
33. *Id.* at 536-40. It has been urged that the Court in *North Haven* left open the possibility that a federal agency may terminate federal aid even when there is an indirect connection between the aid and the discrimination. *See, e.g.*, Note, *Civil Rights—Title IX Applies to Non-earmarked, General-use Federal Financial Aid as Well as to Earmarked Aid*, 56 TEMP. L.Q. 605, 626 (1983). However, this reasoning seems inconsistent with the narrow view the Court took in defining affected programs or activities in *North Haven*, 456 U.S. at 540.
34. Several courts have resorted to a strict programmatic approach. *See, e.g.*, Hillsdale College Department v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir.), *vacated and remanded*, 104 S. Ct. 1673 (1982); Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Othen v. Ann Arbor School Board, 507 F. Supp. 1376 (E.D. Mich. 1981) (*aff'd as to attorney's fees*, 699 F.2d 309 (6th Cir. 1983)). At least two lower courts have found support for a much broader institution-wide approach. Grove City College v. Bell, 687 F.2d 684 (3rd Cir. 1982); Haffer v. Temple University of Com. System, 524 F. Supp. 531 (E.D. Pa. 1981).
35. *See, e.g.*, Bob Jones University v. United States, 461 U.S. 574 (1983). Although the Department of Health and Human Services (HHS) argued that civil rights coverage should be institution-wide, the *Bob Jones* case is factually distinguishable because it involved admittedly discrimnatory admissions policies which affected the entire university.

IX support a narrow construction in which only specific institutional sub-units found to discriminate are subject to Title IX penalties.[36]

In one of the earliest cases to discuss program-specificity, the Court of Appeals for the Fifth Circuit in *Board of Public Instruction of Taylor County, Florida v. Finch*,[37] held that nearly identical funding provisions in Title VI of the Civil Rights Act of 1964 were directed only at the programs or activities engaging in the prohibited conduct.[38] More recently, in a case almost identical to the *Grove City* case, the court in *Hillsdale College v. Department of Health, Education and Welfare*[39] found that it would be inconsistent to terminate all federal student aid under Title IX to a college which discriminated only in a particular program.[40] The majority of courts have upheld this program-specific interpretation.[41]

Decision Of The Lower Court

Grove City College is a private coeducational liberal arts college located in Grove City, Pennsylvania. About 140 of Grove City's 2200 students were receiving Basic Educational Opportunity Grants (BEOG's) and 340 students were receiving Guaranteed Student Loans (GSL's) at the time the lawsuit was filed.[42] Grove City College strictly minimized its association with the government by participating in the Department of Education's Alternate Disbursement System (ADS) which allowed the Department to calculate the financial aid award and make disbursements directly to the student.[43] Other than the possible exception of this financial aid plan, Grove City established an affirmative policy of refusing all forms of government assistance in order to remain independent of gov-

36. *See* 117 Cong. Rec. 30156 (1971) (Senator Bayh, the main sponsor of Title IX, pressed for an amendment which would adopt an institutional approach. This amendment was defeated as non-germane to the bill).

37. 414 F.2d 1068 (5th Cir. 1969).

38. *Id.* at 1075.

39. 696 F.2d 418 (6th Cir. 1982).

40. *Id.* at 428.

41. Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981); Dougherty City School System v. Bell, 622 F.2d 735 (5th Cir. 1980), *on remand*, 694 F.2d 78 (5th Cir. 1982); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Bennett v. West Texas State University, 525 F. Supp. 77 (N.D. Tex. 1981).

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

43. Institutions participating in the ADS program must make certain certifications to the Department that the designated student is enrolled at the school and that the school will comply with the requirements of Title IX. Under the Regular Disbursement System (RDS), the Department estimates the amount of money an institution will need for grants and that sum is then sent directly to the institution. The school then selects grant recipients and advances the calculated grants to them.

ernment entanglement.[44]

In July of 1977, the Secretary of the Department of Health, Education, and Welfare[45] (HEW) requested that Grove City execute form 639A, "Assurance of Compliance with Title IX," as required by department regulations.[46] Failure to execute the form would result in termination of matriculating students' BEOG and GSL funds. The College objected to this requirement, contending that it was not a recipient of federal financial assistance and that HEW's regulations exceeded the scope of sections 901 and 902 of Title IX.[47] At the HEW compliance proceeding which followed, the administrative law judge (ALJ), somewhat reluctantly, ruled in favor of HEW, stating that as an ALJ he had no authority to rule on the constitutionality or statutory validity of the department's regulations.[48] The ALJ emphasized, however, that "there was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance."[49]

The college, along with four students who were not parties to the administrative proceeding, filed suit in federal district court, seeking to have the order of the HEW Secretary declared null and void. The district court granted summary judgment in favor of Grove City and held that although the college was covered by Title IX via its BEOG participation,[50] "only upon a showing of actual discrimination"[51] involving student programs at the College could federal assistance be terminated.

The Court of Appeals for the Third Circuit reversed, holding that both direct and indirect aid triggered Title IX.[52] Thus, the Department

44. 104 S. Ct. at 1223 (1984) (Powell, J., concurring).

45. HEW's functions under Title IX were transferred in 1979 to the Department of Education (DOE). Pub. L. No. 96-88, 93 Stat. 678, *codified* at 20 U.S.C. § 3441(a)(2)(D) (1982).

46. 34 C.F.R. § 106.4 (1981). The regulation reads in pertinent part:

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

34 C.F.R. § 106.4 (1981).

47. 500 F. Supp. 253, 255 (*quoting* Judge Feldman, In the Matter of Grove City College, docket no. A-22, p. 9 (HEW Administrative Proceeding, Sept. 15, 1978)).

48. *Id.*

49. *Id.* Administrative Law Judge Feldman wrote, "There is, very clearly, given to the Director total and unbridled discretion to require any certificate of compliance that he may desire . . . There are no guidelines. There is no necessary continuity, as from one Director to a successor Director whose opinions as to what constituted compliance might be totally different from those of his predecessor." *Id.*

50. *Id.* at 260. GSL participation was exempted from Title IX coverage because GSL's were considered contracts of guaranty.

51. *Id.* at 261.

52. 687 F.2d 684, 700 (3rd Cir. 1982).

could terminate grants to Grove City's students even though the Department had not proven that there had been any discrimination. In addition, the Court of Appeals held that the entire institution was governed by Title IX under the program specific language of the statute.[53]

The Supreme Court granted certiorari[54] to decide whether Grove City was a "recipient" of federal financial assistance, and if so, whether the entire institution could be brought within the ambit of Title IX.

THE COURT'S DECISION

The majority opinion, written by Justice White, first held that Title IX coverage is triggered when any of the college's students receive BEOG's to pay for their educational expenses.[55] Thus student BEOG's, even under the ADS plan, constituted "federal financial assistance" within the meaning of Title IX.[56] The Court was reluctant, however, to construe section 901(a) narrowly.[57] Lacking any substantive legislative history on the intended meaning of "federal financial assistance" in section 901(a), the Court resorted to interpretations of similar provisions in other statutes, such as Title VI, which at one time had been broadly construed to support a similar conclusion.[58]

Second, because the receipt of BEOG's by some students represented financial assistance only to the college's financial aid program, the Court held that only that program may be regulated by Title IX.[59] The Court looked to the language of the statute authorizing benefit termination to determine what was meant by program-specificity. According to the Court, that language was so ambiguous that the majority was only willing to extend Title IX coverage to the financial aid office, even though those funds eventually reached the college's general operating budget.[60]

Third, the Court held that the Department may terminate federal aid to the college's financial aid program for its refusal to execute a pro-

53. *Id. See generally*, Note, *Discrimination: The Remedial Scope of Title IX of the Education Amendments of 1972, as Interpreted in Grove City College and Richmond University*, 36 OKLA. L. REV. 710 (1983).

54. 459 U.S. 1199 (1983).

55. 104 S. Ct. at 1220-21.

56. *Id.*

57. *Id.* at 1217. Section 901(a) of Title IX states in pertinent part: "No person in the United States shall, on the basis of sex . . . be subjected to discrimination under any educational *program or activity* receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a) (1982) (emphasis added).

58. 104 S. Ct. at 1218-19. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677 (1979); Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582 (N.D. Ill. 1967).

59. 104 S. Ct. at 1222.

60. *Id.* at 1221.

gram-specific assurance of compliance, regardless of any finding as to actual discrimination.[61] Finally, the Court rejected the argument that these Title IX compliance requirements violated the first amendment rights of the college or its students.[62]

In a concurring opinion,[63] Justices Powell, Burger, and O'Connor criticized the federal agency for bringing this "overzealous" enforcement action.[64] Impressed with the ALJ's "no discrimination" finding, the concurrence questioned the efficacy of terminating financial aid of needy students for the sole purpose of vindicating the changing political views of the Department.[65]

Justice Stevens, in a separate concurring opinion,[66] accused the majority of rendering an "advisory opinion" on the hypothetical coverage of Title IX. He stated: "[T]here is no reason for the Court to hold that Grove City need not make a promise that the Secretary does not ask it to make, and that it in fact would not be making by signing the Assurance, in order to continue to receive federal financial assistance."[67]

Justices Brennan and Marshall based their dissent[68] on an interpretation of the "broad sweep" of Title IX. Arguing for institution-wide coverage, the dissent charged that "the Court's narrow definition of 'program or activity' is directly contrary to congressional intent"[69] and "has unjustifiably limited the statute's reach."[70] Fearing that the Court's holding now leaves Grove City "free to discriminate in other 'programs or activities' operated by the institution,"[71] the dissent warned that the Court was now implicitly sanctioning discriminatory practices.[72] Justice Brennan specifically criticized the Court for accommodating the executive branch's policy shift made midway through this litigation.[73]

61. *Id.* at 1223.
62. *Id.*
63. *Id.* at 1223 (Powell, J., Burger, C.J., and O'Connor, J., concurring).
64. *Id.* at 1223.
65. "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." *Id.* at 1224.
66. *Id.* at 1225-26.
67. *Id.* at 1225. *But see*, majority's comment at 1220 n.20.
68. *Id.* at 1227 and 1235.
69. *Id.* at 1227.
70. *Id.* at 1235.
71. *Id.* at 1236.
72. *Id.*
73. *Id.* at 1236. The *Grove City* litigation spanned the tenure of four Secretaries of HEW who were responsible for administering BEOG's: Joseph Califano, Patricia Roberts Harris, Shirley Hufstedler, and Terrel Bell. The Department of Education was later split from HEW pursuant to Pub. L. No. 96-88, 93 Stat. 677, 678 (1979). The government's position within the Department of Education shifted under the Reagan Administration.

ANALYSIS

The *Grove City* Court held that a private college's indirect receipt of federal funds brings its specific recipient programs under Title IX scrutiny. This holding is based on two interdependent issues: federal financial assistance and program specificity.

A. Financial Assistance

Numerous theories have been advanced as standards for identifying the ultimate beneficiaries of federal aid.[74] These theories, in turn, are used to ascertain the boundaries of federal regulatory power. The underlying question is whether it is constitutional to permit federal agencies to track *all* federal dollars into the private sector in order to compel compliance with broad social goals.

The power to subsidize frequently becomes the power to regulate that which is subsidized; that is, the power to encourage or discourage certain forms of behavior.[75] In this vein, several citizens groups have criticized the *Grove City* decision on the grounds that it is a contradiction to spend for the national welfare without the power to impose extensive conditions on that money to achieve those goals, such as the elimination of sex discrimination in education.[76]

In general, the Congressional authority to spend is much more extensive than its authority to regulate. Congressional regulation is constitutionally limited by Article I,[77] but the spending powers have no

74. *See, e.g.*, Bob Jones University v. United States, 461 U.S. 574 (1983) (direct/indirect dichotomy); North Haven Board of Education v. Bell, 456 U.S. 512 (1982) (benefit theories); Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969) (infection theories); and Note, *Civil Rights-Title IX Applies to Non-earmarked, General-use Federal Financial Aid As Well As to Earmarked Aid*, 56 TEMP. L.Q. 605 (1983) (use theories).

75. O'Neil, *God and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 U. CIN. L. REV. 525, 527-28 (1975).

76. Hearings on the Civil Rights Policy in *Grove City* before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 98th Cong., 21d Sess. (1984) (statement of Marcia Greenberger, Spokesperson, National Women's Law Center). ("Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access." *Quoting* Rep. Patsy Mink, 118 CONG. REC. 5806-5807 (1972)).

77. U.S. CONST. Art. I. § 8, cl. 3-18. "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ." *Id.* cl. 1. In United States v. Butler, 297 U.S. 1 (1936), the Court held that the general welfare clause does not grant Congress power to provide for the general welfare by any means it chooses. Instead, the general welfare clause confers only a power to spend; it does not confer any independent power to regulate. 297 U.S. at 64. Under the *Butler* analysis, Congress could not command a coercive purchase of compliance though it could appropriate funds conditioned on the undertaking of certain acts. *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 247-50 (1978).

comparable restrictions.[78] Congress, however, has successfully circumvented this clear constitutional mandate by adding "conditions" to federal grants.[79] In a frequently quoted commerce clause case, Justice Roberts warned that "the power to confer or withhold unlimited benefits is the power to coerce or destroy."[80]

Consequently, conditions imposed on federal aid grants must bear some reasonable relationship to the purpose of the spending power. Otherwise, plans like the BEOG program may become merely schemes for purchasing federal regulation of a subject properly reserved to the states. "The Congress cannot invade State jurisdiction to compel individual action; no more can it purchase such action."[81] It follows then, that the "integrity of the federal purse" is jeopardized when federal funds are withdrawn without any evidence of constitutional or national policy violations.

In holding that BEOG funds are federal financial assistance, the *Grove City* Court looked for support in the legislative history of the Education Amendments of 1972[82] and found that BEOG funds were "one of the primary components of Congress' comprehensive 'package of federal aid' to post-secondary education."[83]

The Court also rejected any distinctions between direct and indirect aid, relying instead on its recent expansive definition of financial assistance in *Bob Jones University v. United States*,[84] and the broad purposes underlying Title IX itself.[85] At the same time, in the second part of the *Grove City* decision, the Court was forced to look for restraints on this wide open door of "financial assistance" and did so by interpreting the

78. The federal government is one of delegated powers only under the Tenth Amendment. None of those delegated powers authorizes Congress to legislate for the national welfare. THE FEDERALIST PAPERS NO. 41 at 283-84 (J. Madison). (E. Bourne, ed. 1937) (explaining that the power to legislate for the general welfare is a qualification on the tax power—not a general grant of legislative power). The regulation of matters not enumerated in the Constitution is reserved to the States . . . or to the people." U.S. CONST. AMEND. X.

79. Child Nutrition Amendments of 1978, 42 U.S.C. § 1751 (1982) (national school lunch money cannot be spent on textbooks); Aid to Families with Dependent Children Act, 42 U.S.C. §§ 601 *et seq.* (1982) (funds may be disbursed only to those families which meet specified income standards); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1982) (federal funds may be withheld from any program or activity which is discriminatorily administered). *See generally*, Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

80. United States v. Butler, 297 U.S. 1, 71 (1936).

81. *Id.* at 73. The Due Process clause of the Fifth Amendment protects against arbitrary or capricious government action. This constitutional guarantee demands that the means selected should have a real and substantial relationship to the selected ends. U.S. CONST. amend. V.

82. 20 U.S.C. §§ 1681 *et seq.* (1982), Pub. L. No. 92-318, 86 Stat. 373 (1972).

83. *Grove City*, 104 S. Ct. at 1217, *quoting* 117 CONG. REC. 30412 (1971) (Sen. Pell). *See also*, C. FINN, SCHOLARS, DOLLARS, AND BUREAUCRATS 124-25 (1978).

84. 461 U.S. 574 (1983).

85. *See generally*, North Haven Board of Education v. Bell, 456 U.S. 512, 521 (1982).

statute to apply only to particular programs or activities which directly benefited from the financial assistance.[86] The Court did not accept Grove City's argument that the federal financial aid was aimed at aiding poor students rather than poor universities,[87] because the student aid provisions included the broad purpose of providing "assistance to institutions of higher education."[88]

Yet the Court was not forced to conclude that student educational grants are financial assistance to the school.[89] The plain meaning of "student aid" implies that federal financial assistance for education is designed to give financially needy *students* an opportunity to obtain a college or advanced degree. By terminating federal money to a qualified student who happens to attend a "noncomplying" institution, the Department primarily punishes the student rather than the institution.[90]

HEW relied heavily on its own regulations to support its position on the financial assistance issue. The interpretation of these regulations, however, has vacillated through the years to include expanding and contracting definitions of that term.[91] Under these circumstances, HEW's

86. *Grove City*, 104 S. Ct. at 1222-23.

87. *Id.* at 1217-18 n.13.

88. *Id.* at 1218, *citing* 20 U.S.C. § 1070(a)(3), Pub. L. No. 92-318, 86 Stat. 381. The Court also placed heavy emphasis for its financial assistance finding on the acquiescence of Congress during the post-enactment history of Title IX. 104 S. Ct. at 1219 n.19. *See also*, "Sex Discrimination Regulations Hearings Before the Subcommittee on Post-Secondary Education of the House Commission on Education and Labor," 121 CONG. REC. 482-84 (1975). Still, the legislative acquiescence argument proves too much because mere acquiescence is not conclusive evidence of legislative intent. *See, e.g.*, Othen v. Ann Arbor School Board, 507 F. Supp. 1376 (E.D. Mich. 1981), in which the court explicitly rejected the "omission to act" theory of determining legislative intent of Title IX financial assistance provisions. *Id.* at 1383 n.8. In *Othen*, the court concluded that Congressional inaction should not be construed as approval particularly with respect to failure to renounce agency regulations. *Id.* Likewise, the Supreme Court has concluded that where an agency's regulations conflict with the language of the statute, the regulations promulgated thereunder are no longer entitled to deference. *North Haven*, 456 U.S. 512, 522 n.12 (1982). This reasoning is especially applicable where the agency's interpretations of its *own* regulations are inconsistent. *Id.*

89. In O'Connor v. Peru State College, 605 F. Supp. 753 (D. Neb. 1985), a women's basketball coach and physical education instructor challenged her discharge from State College employment. In dismissing her Title IX claim the district court held that the Penn State College physical education division was not a recipient of direct federal funds. *Id.* at 760. Although the physical education program did receive Title III research project grants, the trial court found that those funds would only mandate the college's Title IX compliance in the selection and funding distributions of those projects. *Id.* at 761. ("[T]he mere fact that one or more of the projects submitted might have involved the Physical Education Division would not be sufficient to bring the entire athletic program within the purview of Title IX, absent any direct Federal funding to physical education programs.") *Id.*

90. Granted, the school also suffers if students leave to attend "complying" institutions, but the decline in enrollment would not be as significant as the effect on a certain group of needy applicants who might be financially precluded from attending an "independent" college. *See* Statement of Bruce C. Hafen, President, American Association of Presidents of Independent Colleges and Universities before the U.S. Comm. on Civil Rights, January 10, 1985.

91. *See Grove City*, 104 S. Ct. at 1216 n.10 (1984).

regulations deserved less than the traditional deference given administrative law. The Court should have looked instead to the practical functions served by student grants and concluded that Grove City had received no federal financial assistance.

By analogy, "indirect" educational assistance in the form of benefits to students or their families has recently been distinguished from "direct" benefits to schools in the context of aid to parochial schools.[92] This is true even though the financial assistance to parents ultimately has economic effects comparable to that of aid given directly to the schools attended by their children. In addition, student recipients of BEOG grants are allowed to spend that money for a variety of education-related expenses, including off-campus housing and meals. Consequently, it is not necessarily true that ADS student funds eventually wind up in the college's financial aid program, much less its general operating budget.

In short, the Court was not compelled to hold that Grove City was a recipient of "federal financial assistance" simply because the legislative history did not distinguish between direct and indirect aid recipients.[93] Yet, by so holding, the Court avoided the harder course of determining how tangential federal aid must be before it is not considered "federal financial assistance."

B. Program Specificity

Unlike the federal assistance issue, the *Grove City* Court did reach a proper, rational result with respect to the program-specificity issue. Despite the Department's vigorous arguments to the District Court in favor of institution-wide coverage[94] the Court held that the statute's program-specific enforcement provisions, sections 901 and 902, limited the Department's regulatory powers to the programs or activities receiving the assistance.[95] Under the facts of *Grove City*, BEOG funds were earmarked for the recipient's financial aid program[96] even though these funds may eventually be distributed throughout the college to cover any number of institutional costs. According to the Court, student financial aid programs are *sui generis* and the Department's regulatory authority

92. *See e.g.* Mueller v. Allen, 463 U.S. 388 (1983) (parents' state tax deductions for parochial school expenses held constitutional).

93. 104 S. Ct. at 1218. There is no reference to "indirect" federal financial assistance in the legislative history. As Justice Brennan aptly pointed out, "For every instance in which a legislator equated the word 'program' with a particular grant statute, there is an example of a legislator defining 'program or activity' more broadly." *Id.* at 1229.

94. 500 F. Supp. 253 (W.D. Pa. 1980).

95. 104 S. Ct. at 1222.

96. *Id.* at 1221.

does not "follow federally aided students from classroom to classroom, building to building, or activity to activity."[97]

This portion of the Court's holding has been severely criticized on the grounds that it unjustifiably restricts the intended scope of Title IX.[98] Under this view, longstanding administrative interpretations of Title VI and Title IX and evidence of more expansive congressional intent should have been accorded greater deference.[99] The decision has also prompted civil rights activists to paint bleak scenarios in which federal funds may, for example, be used to build a college library but the school's athletics programs and science departments would escape Title IX scrutiny.[100]

Such reasoning is based, however, on the assumption that federal subsidy should be equated with limitless federal control. Under this approach, the goal of crafting a remedy proportionate to the harm gives way when the broad purposes behind the civil rights legislation are at stake. Still, when the basis of civil rights enforcement no longer requires state action and actual discrimination, but instead is based on accomplishing changes in societal attitudes, serious constitutional questions arise.

A fundamental principle in American society is that the grant of governmental power from the states to the federal government is limited to the extent necessary to maintain a free society. The fourteenth amendment and the bill of rights, for example, require state action in order to hold institutions and individuals accountable to government standards.[101]

Under *Grove City*'s federal financial assistance standard, however, the state action requirement is effectively circumvented. Given the pervasiveness of current federal spending, the spending powers then become an extremely powerful jurisdictional weapon with which to manipulate society to the detriment of individual constitutional rights.[102] Faced with

97. *Id.* at 1221-22, *passim*.

98. Hearings on the Civil Rights Policy in *Grove City* before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 98th Cong., 2d Sess. (1984) (statement of Clarence Pendleton, Chairman, U.S. Commission on Civil Rights).

99. *See generally*, Czapanskiy, *Grove City College v. Bell: Touchdown or Touchback?*, 43 MD. L. REV. 379, 409 (1984).

100. *Cf.*, Frank, *A Return to Sex Bias? Title IX Ruling Raises Fears on Both Sides*, 70 A.B.A. J. 26 (Aug. 1984).

101. *See e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967); Civil Rights Cases, 109 U.S. 3 (1883).

102. Senator Packwood thus commented on the urgency of overruling the *Grove City* decision based on the repercussions the decision might have on several other major federal spending statutes. "But even more horrifying than Grove City's Title IX interpretation is the decision's staggering legacy. Not only has the Supreme Court substantially undercut the efficacy of Title IX, but the decision's precedential value with respect to Title VI, section 504, and the Age Discrimination Act cannot be overstated." 131 CONG. REC. S. 1309 (1985) (statement of Senator Packwood).

the prospect of authorizing unlimited federal government control via federal financial assistance, the court tempered such an outcome with a narrow construction of program-specificity.

GROVE CITY'S IMPACT

The Supreme Court has held that the freedom of a private university to make its own judgments in educational matters should be a special constitutional concern.[103] In particular, there may be unique interests of *private* education that are seriously jeopardized by government intervention. Private colleges and universities have historically been free to emphasize, if they wished, individualistic patterns of thought, social action, or political or religious activity.[104] Yet forcing these private colleges to conform to so-called public standards may ultimately produce a "homogenous, value-neutral, government-dominated network of colleges."[105] Permitting the federal government to trace *any* of its federal dollars to a school's treasury, could erase any meaningful distinctions between private and public education.

The duty of the federal government is to ensure that public funds are spent for their authorized purpose. Implicit in this duty is the responsibility to ensure that federal funds are not spent to further discrimination or any other unlawful activity. Nevertheless, when federal spending powers are used to "promote the general welfare" by dictating prospective social and moral attitudes, they are no longer remedying perceived social ills.[106] Consequently, there is the ever-present temptation to

103. Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978) (Powell, J.). *See also*, Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879 (1979).

104. Roche, *A View of Education in America*, 1 HARV. J. OF L. & PUB. POL'Y 27, 53 (1978); Oaks, *A Private University Looks at Government Regulations*, 4 J. C. & U.L. 1 (1976). Many students and parents are, of course, willing to make substantial financial sacrifices to obtain a private education.

105. Hearings on the Civil Rights Policy in *Grove City* before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 98th Cong., 2d Sess. (1984) (statement of Charles B. Mackenzie, President, Grove City College at p. 35).

106. In a recent Wisconsin case, the district court noted that:

> "Remedy" is something of a misnomer. Cutting off funds does nothing to make victims of discrimination whole. Except as a general deterrent mechanism, it does not curtail ongoing discrimination. Unlike punitive damages, termination bestows no tangible reward on individual victims. If remedial, it is only in the sense that termination removes the evil of providing government funds to discriminatory programs. From this perspective, members of the national community have equal interest. If victims' lawsuits could trigger termination, victims of discrimination might be better able to induce discriminators to cease discrimination and to make victims whole, but labelling termination a "remedy" stretches the concept. Nonetheless, like others, I will speak of termination as a remedy.

Storey v. Board of Regents of University of Wisconsin System, 604 F. Supp. 1200, 1201 n.1 (W.D. Wis. 1985) (holding that an alleged victim could not obtain termination of federal funds to state university as a remedy under Title IX).

misuse the potent coercive effects of the spending powers through unreasonable and ambiguous spending conditions. For example, federal conditions on spending could be used to impermissibly chill the rights of those who administer or attend small colleges which nurture religious values, even if the institutions are not "controlled" by any particular religious group.[107]

Not surprisingly, independent private educational institutions, such as Hillsdale College, have felt the immediate impact of the *Grove City* decision. Given the choice between autonomy or federal aid to a portion of its students, Hillsdale College has announced that it will end all federal financial aid participation.[108]

The precedential value of the *Grove City* decision is likely to extend beyond the education context because "financial assistance" and "program or activity" are frequently-used statutory terms. Several courts have already attempted to apply *Grove City*'s reasoning to non-education related activities, and have reached inconsistent results.

For example, in *United States of America v. Baylor University Medical Center*,[109] the Department of Health and Human Services (HHS) received a complaint that Baylor had refused to allow a deaf patient to bring an interpreter into the hospital to translate pre- and post-operation discussions with the medical staff. Insisting that Baylor was a recipient of federal financial assistance, HHS informed Baylor that it was obligated to comply with Section 504 of the Rehabilitation Act of 1973,[110] and demanded that HHS officials be permitted access to the medical center to investigate the alleged violations.

The court in *Baylor* compared BEOG's with Medicare/Medicaid payments and found that the *Grove City* decision foreclosed any distinctions between direct federal aid to an institution and indirect federal aid received through the participation of individual beneficiaries in federal programs.[111] Therefore, the court required Baylor to comply with Sec-

107. Small, independent colleges and universities, often comprised of students who share many common values, reflect decisions by their students to exercise their freedom of association rights by enrolling in such a school. Jensen, *Constitutional and Legal Implications of Tuition Tax Credits* in PUBLIC DOLLARS FOR PRIVATE SCHOOLS: THE CASE OF TUITION TAX CREDITS 151-71 (T. James & H. Levin 1983).

108. Hearings on the Civil Rights Policy in *Grove City* before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 98th Cong., 2d Sess. (1984) (statement of George Roche, President, Hillsdale College at pp. 107-10); Roche, *A View of Education in America*, 1 HARV. J. OF L. & PUB. POL. 27, 60-61) (1982).

109. 736 F.2d 1039 (5th Cir. 1984) *cert. denied*, 105 S. Ct. 958 (1985).

110. 29 U.S.C. § 794 (1982).

111. 736 F.2d at 1046-47. *See also*, Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center, 765 F.2d 1278 (5th Cir. 1985) in which the Fifth Circuit held that a private corporation which provided respiratory care for the Medical Center was a recipient of federal finan-

tion 504 of the Rehabilitation Act because it was a "recipient" of federal financial assistance—even though the plaintiff was not a Medicare patient. The scope of the HHS investigation, however, was limited to the program-specific reach of Section 504; in this case, Baylor's inpatient and emergency room services.[112]

Interestingly, the *Baylor* court defined the bounds of Section 504's program-specific reach by examining the hospital's accounting statements which detailed the spending of Medicare funds, an approach alluded to in the *Grove City* dissent.[113] Nevertheless, in blind obedience to the *Grove City* decision, the *Baylor* court failed to differentiate between major medical centers which are not free to "opt out" of the Medicare system from small private colleges which may be able to reject federal grant programs.

Another recent case purported to follow *Grove City* but reached the opposite result on the federal financial assistance issue. In *Neil Jacobson v. Delta Airlines, Inc.*[114] the court held that certain federally regulated and federally subsidized activities of a private airline were not federal financial assistance. In that case, a handicapped plaintiff argued that federal airmail subsidies, federally subsidized air service, and federal licensing and weather and air traffic control services constituted federal financial assistance to the airline sufficient to require it to comply with Section 504 of the Rehabilitation Act. Using the broad guidelines set out in *Grove City*, the court rejected each of these forms of aid as "federal financial assistance" and held that the plaintiff's claim was not covered by the Act.[115] The *Delta* court distinguished federal funds which subsidize an activity from those which merely compensate the private provider of federally regulated services.[116] The court then characterized the challenged activities as compensated services and therefore not "federal financial assistance" under the Act.

While the *Grove City* decision undermines the autonomy of educational institutions, these cases demonstrate that it is even more volatile when courts attempt to impose its reasoning on other activities which happen to receive federal dollars. Although the Court in *Grove City*

cial assistance under section 504 of the Rehabilitation Act, by virtue of its eventual receipt of Medicare/Medicaid funds. *Id.* at 1291.

112. *Id.* at 1050.

113. 104 S. Ct. at 1235 n.13. The dissent would seem to discourage an approach which reduced the financial assistance issue to an analysis of an institution's accounting statements. Instead, the dissent suggests that the court should look at the general effects of a federal grant to see to what extent the institution is benefited. *Id.*

114. 742 F.2d 1202 (9th Cir. 1984).

115. *Id.* at 1209-15.

116. *Id.* at 1209. *But see*, Frazier v. Bd. of Trustees, *supra* n.110.

stated that its treatment of educational benefits was *sui generis*, the *Baylor* and *Delta* cases show that the reasoning process employed by the *Grove City* Court may be used to determine federal control over other domains of private activity.[117]

The effects of the *Grove City* decision have stirred a response in the legislative branch as well. After *Grove City*, Congress hastily spawned legislation to "limit" its effects.[118] Legislators raised concerns about at least three other federal statutes which contain the same program-specific enforcement provisions as Title IX.[119] Though purportedly designed to return civil rights laws to pre-*Grove City* status, at least one bill[120] promised to do much more by extending the definition of "program or activity" to include entire institutions rather than simply the specific sub-units which receive the federal aid.[121] Moreover, rather than dealing only with Title IX, the proposed Civil Rights Restoration Act of 1985 also expanded the program-specific definition in Title VI, section 504 of the Rehabilitation Act, and the Age Discrimination Act.[122]

117. Nearly 25% of the gross national product (GNP) is spent by the government after it has been taxed away from the populace. Ofc. of Mgmt. & Budget of the United States Government—F.Y. 1986, Historical Tables at 1.2(1)(2), 1.3(1)(2). U.S. Gov't Prtg. Ofc. 1985, GPO No. S/N 041-001-00288-0 (Total federal government expenditures for 1985 were estimated at 24.8% of the GNP. Keynesian economists insist this process stimulates the economy. J.M. KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, & MONEY (1936). However, this "economic" process functions to stimulate federal power when dollars are vested with the prescriptive force of law.

118. *See*, H.R. 5011, H.R. 5490, S. 2363, S. 2412, S. 2568, 98th Cong., 2d Sess. (1984). None of the proposed bills were enacted by the 98th Congress. Similar legislation, however, has been introduced in the 99th Congress, *see* S. 272, S. 431, H.R. 700, 99th Cong., 1st Sess. (1985).

119. Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982) (in Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1255 (1984), the Court held that § 504 of the Act is program-specific); Age Discrimination Act, 42 U.S.C. § 6101 (1982), Pub. L. No. 94-135, 89 Stat. 728 (1980); Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1982), Pub. L. NO. 88-352, 78 Stat. 252 (1974).

120. S. 431, 99th Cong., 1st Sess. (1985), Sec. 2.

121. *See also*, S. 431, 99th Cong., 1st Sess., §§ 3, 4, and 5, which similarly were to amend three other statutes listed *supra* note 118. The Civil Rights Restoration Act of 1985 designated three standards for determining coverage under the four statutes:

1. When a state or local government agency or department receives Federal funds, the entire agency or department is covered.
2. When a university, higher education system, local education agency, or other elementary and secondary school system receives Federal funds, the entire entity is covered.
3. When a corporation, partnership, or other private organization receives Federal funds, the entire entity is covered.

131 CONG. REC. S. 1304 (1985) (statement of Senator Weicker).

As noted earlier, if there had been any *pre-Grove City* consensus, it would more likely be a program-specific approach that governed only institutional sub-units. *See supra* note 41.

122. Although *Grove City* did not explicitly address the impact of its program-specific holding on any other statutes other than Title IX, legislators nonetheless contended that the statutory reversal of the *Grove City* program-specific holding also required them to amend similar provisions in the Age Discrimination Act, Rehabilitation Act, and Civil Rights Act. Frank, *A Return to Sex Bias? Title IX Ruling Raises Fears on Both Sides*, 70 A.B.A. J. 26, 27 (Aug. 1984). A second proposed legislative response to *Grove City* called for institution-wide coverage of only educational institutions. 131 Cong. Rec. S. 272 (daily ed. Jan. 3, 1985) (statement of Carol Dinkins, Attorney General). Although this apparent legislative compromise would have granted educational aid recipients unex-

No legislative result can be predicted with certainty. Nevertheless, any approach that rests on the assumption that federal spending powers can be used to circumvent state action and actual discrimination requirements in civil rights enforcement cases must be closely scrutinized. While the *Grove City* Court blithely stated that Grove City College was free to "opt out" of the BEOG program if it was unwilling to accept the Title IX restrictions, as the federal government continues to weave more strings around federal money, many private entities may not be permitted to refuse the federal funds. For instance, even if a grocer could survive without the business of food stamp and welfare recipients, he might be found to be impermissibly discriminating against poor people if he refused to deal with federal aid recipients.[123] Thus, as "federally funded activity" becomes more broadly construed, the unsuspecting participant will be caught between the prerogatives of federal bureaucratic control and the constitutional rights of those on the receiving end of government money.

CONCLUSION

The Court's logic in *Grove City* compels the punishment of the student who receives the BEOG by limiting the choice of schools to those institutions willing to carry out the government's wishes. Moreover, it allows student aid termination in the complete absence of institutionally-inflicted discrimination. Yet the execution by the institution of an assurance of compliance form is no guarantee that the institution will not discriminate, any more than the nonexecution of the form is an indication that the school is discriminating. Therefore, no injustice was done to the BEOG recipient by Grove City College's refusal to sign the assurance of compliance, just as no injustice is remedied when the Department of Education terminates the student's grant.

With the help of the program-specific provisions in Title IX, the Court salvaged some semblance of reasonable limitations on the federal spending powers. Nevertheless, *Grove City*'s expansive definition of fed-

plained preferential civil rights status, it is foreseeable that despite the limitation of its coverage to educational institutions such coverage would eventually become a basis for expansive interpretations as broad as the first legislative approach. ("If Title IX is program-specific in effect, the other statutes, worded identically, are likely to suffer a similar analysis. Indeed, in the past year since the Court handed down its decision, the Department of Justice has moved forward on that basis in its so-called enforcement endeavors." 131 CONG. REC. S. 1309 (daily ed. Feb. 7, 1985) (statement of Senator Packwood).

123. Beside poverty being an impermissible classification, great numbers of welfare recipients are members of minority groups. Therefore, refusing to do business with federally-tainted money would be tantamount to refusing to do business with minorities in violation of the 13th and 14th amendments.

eral financial assistance is, in effect, another step toward limiting the autonomy of private entities through further federal government encroachments. The *Grove City* outcome demonstrates the truth today of nineteenth century historian and social commentator Alexis de Tocqueville's summation: "A great many persons . . . are quite contented with this sort of compromise between administrative despotism and the sovereignty of the people; and they think they have done enough for the protection of individual freedom when they have surrendered it to the power of the nation at large."[124]

124. A. DE TOQUEVILLE, DEMOCRACY IN AMERICA 337-38 (P. Bradley ed. 1945).