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No. 82-792

In The

Supreme Court of the United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs.

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondents.

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

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Can a college which concededly operates no program or activity receiving federal assistance be made subject to Title IX of the Educational Amendments of 1972 solely because some of its students receive federal grants limited to educational purposes?

2. Is the College's entire operation subject to Title IX regulation where the College itself receives no federal financial assistance, but where some of its students participate in direct student assistance programs over which the College can exercise no selection or control?

3. May the Department of Education terminate direct grants to students, without a finding of discrimination in any program which receives federal financial assistance, solely because their College refused to sign an Assurance of Compliance?

4. Does the application of Title IX regulation to the College and its students violate First Amendment rights to academic freedom and association?

PARTIES

The caption of the case in this Court contains the names of all parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Statutes:

Page

Legislative Materials:

Law Review Articles:

Page

Other Authorities:

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OPINIONS BELOW

The opinion of the Court of Appeals (Reproduced in Appendix to Petition for Writ of Certiorari ("A")1) is reported at 687 F.2d 684 (3d Cir. 1982). The opinion of the District Court (A 45) is reported at 500 F. Supp. 253 (W.D. Pa. 1980). The decision of the Administrative Law Judge (A 89) is not reported.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on August 12, 1982. (A 99). The petition for a writ of certiorari was filed on November 9, 1982, and was granted on February 22, 1983. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The following pertinent constitutional provisions, statutes and regulations are reproduced in relevant part in the appendix to the petition:

1. The First Amendment to the United States Constitution. (A 101).
2. Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). (A 101).
3. Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682. (A 105).
4. The regulations of the Department of Education, 45 C.F.R. Pt. 86.[1] (A 106).

STATEMENT OF THE CASE

Petitioner Grove City College ("Grove City" or "College") is an independent, co-educational liberal arts college located in western Pennsylvania. Since its founding in 1876, the College has refused consistently all forms of government assistance, whether federal, state, or local. The decision to forego participation in government assistance programs is premised on the College's belief in institutional self-sufficiency and autonomy. Committed to deliver a high quality alternative to

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[1] When this lawsuit commenced, these regulations were administered by the Department of Health, Education and Welfare (HEW) and were codified at 45 C.F.R. Pt. 86. They were recodified at 34 C.F.R. Pt. 106 in virtually identical form on May 9, 1980, in connection with the establishment of the Department of Education. 45 Fed. Reg. 30802, 30962-63 (1980).

state-supported education at minimal cost,[2] the College is convinced that it could not do so if it were obligated to comply with the expensive and burdensome regulation which invariably follows government funding. This decision is not premised on any desire to discriminate. To the contrary, the College maintains that discrimination on the basis of race or sex is morally repugnant to its principles, a belief it has held voluntarily long before the advent of the nondiscrimination laws. Therefore, even before Title IX was passed, the College claimed no right to discriminate and has consistently maintained a policy of nondiscrimination. (Joint Appendix "JA" 22).[3]

While the College itself accepts no government funding, it will admit students who receive financial aid from various private and governmental organizations. The only role which the College plays in this process is supplying requested information to the scholarship or loan-granting organization — it will certify the student's attendance at the College, indicate the student's full or part-time status, and provide general information about the College's academic program and cost of tuition, room, and board. (JA 22).[4] Grove City does not

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[2]Despite the lack of a significant endowment and notwithstanding the lack of any government funding, the College's current tuition, fees, room and board charges for its 2200 students total only $4270 per academic year, significantly less than other comparable institutions of high academic quality. The College's operating practices are different than other institutions. Making its operations as efficient as possible, it has only 17 administrators and a Board of Trustees very active in the operation of the College.

[3]In addition, the College's admissions and treatment of students are presently regulated by Pennsylvania law, which, *inter alia,* prohibits discrimination on the basis of sex. *See* 17 Pa. Cons. Stat. Ann. § 5001 (Purdon 1981).

[4]This latter information is available in the College's published catalogue.

participate in any government student aid program which provides funds to Grove City for distribution, or which requires any determination by the College of a student's eligibility to receive financial aid. Accordingly, Grove City does not accept students who wish to participate in federal student aid programs where the federal monies are given to the institution to distribute. Under these programs, the institution is required to determine eligible recipients and to select the amounts of grant, loan, or work funds to be furnished the student. *See* Supplemental Educational Opportunity Grant Program, 34 C.F.R. Pt. 676; National Direct Student Loan Program, 34 C.F.R. Pt. 674; College Work Study Program, 34 C.F.R. Pt. 675.

The same desire to avoid any entanglement with federal funding also led Grove City to reject participation in the Basic Educational Opportunity Grant ("BEOG") program[5] when that program was first instituted in 1972. The BEOG program, under its Regular Disbursement System, requires participating colleges to select eligible students, calculate BEOG awards, and disburse the grant proceeds. *See* 34 C.F.R. §§ 690.71-690.85. After Grove City's refusal to participate in the BEOG program, the Department of Health, Education and Welfare ("Department")[6] requested that the College's financial aid office provide forms to its students so that the students could participate in the BEOG program, through its Alternate Disbursement System, by applying directly to the United States Commissioner of Education for the BEOG grants. *See* Letter of Peter K.U. Voigt to Dr. Charles S. MacKenzie, dated January

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[5]20 U.S.C. § 1070a. Grants under this program are now called "Pell Grants."

[6]Unless the context demands greater specificity, both HEW and its successor, the Department of Education, will be referred to as "the Department." In the interests of consistency, the regulations at issue will be cited as 45 C.F.R. The regulations' numbering scheme remains the same, however, whether codified at 34 or 45 C.F.R.

14, 1974. (JA 30). In accordance with this request, and for the convenience of its students, the College stocks Department provided forms. (JA 32-59). In addition to stocking forms, the only role the College has in the BEOG process is to complete Part B of the OE Form 304 (JA 59), which contains only a certification of the student's attendance and publicly available academic and cost information. After the form is completed, it is returned to the student, who submits the form to the Department. The Department then makes an award directly to the student.

In July 1977, the Department requested that the College execute its Form 639 (A 124), an Assurance of Compliance in the manner required by 45 C.F.R. § 86.4.[7] The Assurance, ostensibly a pledge of nondiscrimination, required that the College acknowledge that it was operating federally funded educational programs and was therefore subject to all current and future Department regulations implementing Title IX. 45 C.F.R. Pt. 86. The Department contended that executing the Assurance was necessary because a number of the College's students received grants or loans through the BEOG or Guaranteed Student Loan (GSL)[8] programs. Despite the fact that the grants and loans were paid by the government or private lenders directly to the students, the Department maintained that funds from these sources might be paid eventually to Grove City.[9] This was alleged to make the College a "recipient" of federal financial assistance as that term was

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[7]Now required by 34 C.F.R. § 106.4.

[8]20 U.S.C. § 1071.

[9]The College has neither control over nor knowledge of students' use of BEOG or GSL funds. Under either program, moreover, the funds are not required to be used to pay college charges, but may be used for virtually any purpose. This broad condition, for example, allows the student to spend BEOG funds with private vendors for books, off-campus housing, travel, child care, and miscellaneous personal expenses. See 34 C.F.R.

Footnote continued on next page—

defined in 45 C.F.R. § 86.2(h)(A 108), and, therefore, made all the College's programs subject to all the Department's Title IX regulations.

Grove City told the Department that, as a matter of principle, it did not discriminate and did not intend to do so. The College emphasized, however, that it had consistently refused to accept assistance from the government and that it did not operate any programs or activities which received federal financial assistance. Therefore, Grove City stated that it would not execute the Assurance, especially since the Assurance by its terms imposed institution-wide regulation over all the College's activities.

Faced with Grove City's refusal to sign the Assurance, the Department began proceedings to declare the College, and thereby its students, ineligible to receive GSLs and BEOGs.[10] Following a hearing, an HEW Administrative Law Judge found that the College was not in compliance with the Title IX regulations solely because it refused to execute the Assurance. Concluding that he had no power to change the regulations, the Administrative Law Judge therefore held that students attending the College were ineligible to receive BEOGs or GSLs and ordered termination of their grants and loans. *In re Grove City College,* No. A-22 (September 15, 1978). (A 89). Significantly, the Administrative Law Judge also found that:

—*Footnote continued from preceding page*

§ 690.51 (1981). This wide discretion given to students to spend BEOG funds recently led one court of appeals to conclude that BEOG funds could not be said to be earmarked for educational purposes as that phrase is used in the Food Stamp Act. *See Shaffer v. Block,* Nos. 81-3475/3476/3654 (6th Cir., April 20, 1983). The implication that BEOG funds automatically flow undiverted from the federal treasury to the College must therefore be rejected.

[10] In the administrative proceedings only the College was named as a respondent.

> [T]here was not the 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. (A 94).

The Administrative Law Judge's order became final on October 14, 1978. (45 C.F.R. § 81.104). On November 29, 1978, the College and several of its students commenced suit in the United States District Court for the Western District of Pennsylvania, seeking judicial review of the administrative determination pursuant to 20 U.S.C. § 1682 and 5 U.S.C. §§ 701 *et seq.* In an amended opinion on June 26, 1980 (500 F. Supp. 253 (A 45)), the district court granted plaintiffs' motion for summary judgment, holding that the Department could not terminate federal assistance to Grove City students because the College refused to sign the Assurance of Compliance.

Although the district court accepted the Department's argument that BEOGs and GSLs constituted "Federal financial assistance" to the College within the meaning of Title IX, it nonetheless upheld Grove City's position in other respects. First, the court held that the Department could not terminate GSLs because section 902 of Title IX (20 U.S.C. §1682) (A 105) precludes any Title IX enforcement authority with respect to "a contract of insurance or guaranty." 500 F. Supp. at 268-69 (A 75-76). Second, the district court held that the College was not required to sign the Assurance of Compliance because the Assurance required agreement with invalid regulations, as subpart E of the Department's regulations had then been held to be invalid by a number of courts. 500 F. Supp. at 269 (A 76-77). Alternatively, the district court held that termination of assistance to students based solely upon the College's refusal to sign the Assurance of Compliance was unlawful because section 902 of Title IX permitted termination only upon an actual finding of sex discrimination. 500 F. Supp. at 270-72 (A 79-84). Finally, the district court held that termination was impermissible absent a due process hearing for the students affected. 500 F. Supp. at 269-70 (A 78-79).

The Department appealed the failure of the district court to uphold termination of assistance to the College's students.[11] Grove City cross-appealed on the basis that the district court erred in finding it to be a recipient of federal financial assistance within the meaning of Title IX.

In an opinion dated August 12, 1982, the Court of Appeals for the Third Circuit upheld the district court on the recipient issue and reversed it in all other respects. Relying substantially on post-enactment legislative history, the court of appeals held that direct receipt by students of BEOGs rendered the College subject to Title IX as a recipient of federal financial assistance. 687 F.2d at 690-96 (A 10-20). Moreover, in answering the College's argument that upholding Title IX jurisdiction was incompatible with the explicit program-specific limitation contained in Title IX, the court of appeals held that the receipt by students of federal grants rendered the entire College subject to Title IX regulation. In doing so, the circuit court specifically held that "program or activity", as that term is used in Title IX, encompasses the entire educational institution. 687 F.2d at 696-701 (A 23-31). The court of appeals additionally held that the Department may lawfully terminate assistance to students solely because the College refused to sign an Assurance of Compliance and notwithstanding a lack of any proven discrimination. 687 F.2d at 702-04 (A 34-37). Finally, it held that no individual due process hearings were necessary before terminating assistance to students. 687 F.2d at 704 (A 38-39).

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[11] During the appeal the Department withdrew its claim that GSLs are not within the exclusion of section 902 (20 U.S.C. § 1682) for contracts of insurance or guaranty. The Guaranteed Student Loan Program is therefore not at issue in this case. *See* A 9, n.10.

SUMMARY OF ARGUMENT

The issue before this Court is the same as that before Congress in 1972 — to balance two important and constitutionally recognized values: the need to preserve a pluralistic system of higher education, in which some institutions are free to go their own way without governmental intrusion, and the commitment of the government to combat invidious discrimination. In theory these ideals need not necessarily conflict. Institutions accepting government subsidies would knowingly accept some conditions as a price of the aid; other institutions could refuse any governmental aid and set their own policies free from the often heavy hand of government regulation.

In today's world, however, the vast range of government programs providing aid to individuals makes it easy to find traces of governmentally derived benefit wherever those individuals spend their government dollars. If every educational institution that could be said to benefit from federal monies automatically became subject to government regulations, this would obliterate entirely the public/private distinction in higher education. No educational institution's treasury is without some dollars which can be traced to a governmental source. Virtually every educational institution benefits in some way from a whole range of government services. The problem, then, is one of balancing conflicting interests.

In enacting Title IX and its model, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* ("Title VI"), Congress was acutely aware of the need to balance the nondiscrimination imperative with other, equally weighty concerns. When enacting Title IX and Title VI, Congress chose to draw a line between those concerns in two ways: 1) by imposing a program-specific restriction designed to curb excessive executive action and to protect innocent beneficiaries of federal aid; 2) by limiting Title IX and Title VI so that they did not apply to individual recipients of direct federal aid.

Congressional action in establishing the scope of the Title IX must be viewed against the backdrop of its efforts to aid American higher education without sacrificing the institutional diversity and autonomy which are its acknowledged strengths. *See, e.g.,* 20 U.S.C. § 1232(a). When it passed Title IX, Congress balanced against the nondiscrimination principle not only the limitations already set out in Title VI, but a protection of certain existing practices, such as the preservation of single sex institutions, which would have been prohibited under a broad nondiscrimination command. *See* 20 U.S.C. § 1681(a)(5).[12] The result of congressional balancing was the program-specific language of section 901(a), modeled on that of Title VI, which allows regulation only of those educational institutions which conduct a program or activity receiving federal financial assistance.

It is undisputed that Grove City conducts no such program or activity. The College has purposely avoided doing so not because it disagrees with the principle of nondiscrimination, but because it strongly believes in the value of institutional autonomy and desires to continue its long tradition of providing an alternative to state-supported institutions at the lowest possible cost. Its acceptance of students who receive federal grants and then spend them in exchange for educational services — some of which may be provided by the College — does not transform the College into a recipient of federal financial assistance. The regulations which attempt to accomplish this result are inconsistent with the plain language of section 901(a); they expand the concept of receipt contained in section 901(a) to the more expansive and illusive one of benefit. *See* 45 C.F.R. § 86.2(h). Moreover, the regulations, if upheld,

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[12]One of those congressional choices, to legalize a state operated undergraduate school traditionally maintained as a single-sex institution, was recently struck down as violating the Equal Protection Clause. *Mississippi University for Women v. Hogan,* ____ U.S. ____, 102 S. Ct. 3331, 73 L. Ed.2d 1090 (1982).

will have the anomalous effect of forcing colleges such as Grove City to deny admission to beneficiaries of federal funds, many of whom are women and minorities, in order to preserve the colleges' uniqueness and freedom.

The transformation of Grove City into a recipient of federal assistance, solely because its students receive grants, conflicts with the program-specific limitation of Title IX. To conclude that direct student aid is federal financial assistance to the College requires a holding, as the Third Circuit found, that the entire institution is subject to Title IX. But this result is inconsistent with the program-specific limitation Congress enacted in section 901(a) and with this Court's holding in *North Haven Board of Education v. Bell,* 456 U.S. 512 (1982) (hereinafter *"North Haven"*). Direct student aid can be logically reconciled with program-specificity only by holding that, within the meaning of Title IX, direct student grants do not constitute "Federal financial assistance" to the educational institution. The only alternative is to accept the Third Circuit's reasoning and give Title IX institutional scope, a conclusion clearly rejected by Congress and this Court in *North Haven.*

Similarly, the legislative history of Titles IX and VI does not support including direct student aid within those statutes' jurisdictional scope. A statement by the Senate sponsor of Title IX, the only contemporaneous legislative history on the issue, demonstrates an intent to exclude direct student aid from Title IX. Furthermore, Congress modeled Title IX's scope on that of Title VI. The legislative history of that title clearly demonstrates that Congress did not consider direct federal grants to individuals to be assistance to a program or activity as used in Title VI. The same consideration was imported into Title IX. Despite the Third Circuit's conclusion, post-enactment events do not provide persuasive evidence of a contrary intent.

Nor does the case law upon which the Third Circuit relied support its interpretation of Title IX. Those cases, which arose in the context of pervasive racial discrimination, have limited applicability where there is no claim of discriminatory action and where the college under scrutiny consistently has denied any right or intent to discriminate.

Having found Grove City to be a recipient of federal financial assistance under Title IX, the Third Circuit concluded that the Department could terminate students' BEOGs solely because Grove City refused to sign the Department's Assurance of Compliance. Should this Court hold that Grove City does not receive federal financial assistance, it will not be necessary to reach this issue. Should the issue be considered, Title IX's program specificity, contrasted with the nature of the obligation imposed by the Assurance of Compliance, requires reversal of the Third Circuit's holding. By its terms, and by consistent administrative interpretation, that assurance subjects the entire educational institution to Title IX regulation, even in programs or activities not receiving federal assistance. The rejection of such an institutional approach in *North Haven* makes the assurance obligation fatally defective.

Similarly defective is the Third Circuit's conclusion upholding termination of students' BEOGs absent any claim or proof of discrimination. Under Title IX's enforcement scheme, termination of funds was considered to be a last resort invoked only after a hearing where discrimination was alleged and proven. Congress was primarily concerned with protecting innocent beneficiaries of federal aid; it did not contemplate termination of funds as a sanction to be used for the violation of a procedural regulation.

Finally, Congress structured Title IX in recognition of the heritage of American higher education, which fostered a large number of independent, non-tax supported institutions. Those institutions have long been centers of innovation, freedom, and experimentation. To preserve this academic diversity, Congress designed its higher education assistance programs to achieve the least intrusive means of achieving its intent to aid education. It hardly contemplated the imposition of uniform standards on all higher education institutions covering subjects such as dormitory regulations, scholarships, campus recruiting, student teacher training, athletics, abortion, illegitimacy and pre-marital sex.[13]

The extent to which Congress may attach such long and intrusive strings to its money is a troubling question. *See, e.g.*, Comment, "The Federal Conditional Spending Power: A Search for Limits," 70 *N.W.U.L. Rev.* 293 (1975). But even assuming Congress has such powers, when Congress has not clearly indicated an intent to use them, but on the contrary has defined a spending program that limits intrusion into higher education, this Court must ensure that eager administrative agencies are not permitted to extend their sphere of regulation beyond the bounds Congress carefully constructed.

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[13]*See* 45 C.F.R. Pt. 86, subparts C & D, (A 112-124).

ARGUMENT

POINT I

The College does not receive federal financial assistance under Title IX.

All parties agree that the only federal funds involved in this case are grants which are paid directly to students by the Department of Education without the knowledge, intervention, or control of Grove City. Nonetheless, because some students may spend their grants at Grove City in the form of tuition, room, or board payments, the Department contends that the College is a recipient of "Federal financial assistance" as that phrase is used in section 901(a) of Title IX (20 U.S.C. § 1681(a)).

A. *The Statutory Language Demonstrates an Intent that Assistance Provided Directly to Students Does Not Constitute Federal Assistance to the Educational Institution.*

Section 901(a) of Title IX states its prohibition of sex discrimination in the following language:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

20 U.S.C. § 1681(a) (A 101-104). By its terms, section 901(a) protects the participants in federally financed programs and activities from sex discrimination by the educational institution operating such programs or activities. As a condition precedent to becoming a covered recipient of "Federal financial assistance," however, the institution must conduct an "education program or activity" which receives federal assistance.

The Department and the Third Circuit apparently concede that Grove City conducts no programs or activities which are recipients of "Federal financial assistance" in the normally understood sense of the term. Grove City has not applied for assistance under any federal educational program; it has no knowledge of or control over the disbursement of federal funds. The Department contends, however, that it may regulate Grove City by equating "receipt" and "benefit." It argues that because Grove City *benefits* from its students' potential use of federal assistance for tuition and other institutional fees, Grove City receives federal assistance. The Third Circuit also reached this conclusion "since student grants *benefited* the educational institution." 687 F.2d at 695, 700 (emphasis added) (A 19; A 31).[14]

The Department's Title IX regulations make the same equation between "receiving" and "benefiting," stating in their general application section that the regulations apply:

> [T]o every recipient *and* to each education program or activity operated by such recipient which receives *or benefits* from Federal financial assistance.

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[14]The Department's position has not been a model of consistency throughout this litigation. Under its most recently asserted test of coverage in a case presenting nearly identical issues, it states: "In attacking the regulation as a threshold matter, the College would need to show that it operates no education program or activity that receives federal financial assistance," thus intimating that if a College made such a showing, it would be beyond the reach of Title IX. *See* Supplemental Brief for Federal Respondents at 3-4, *Hillsdale College v. Department of Health, Education and Welfare,* 696 F.2d 418 (6th Cir. 1982), quoted in Brief for the Federal Respondents in response to Petition for Certiorari by Hillsdale College, at n.10. (No. 82-1538). As Grove City has maintained consistently, it has made the required showing by demonstrating it has no capacity to discriminate within the BEOG program, as it neither chooses participating students, determines amounts of awards, or disburses funds. It thus conducts no education program or activity receiving federal financial assistance. Until the Department makes its position on the recipient issue clearer, however, Grove City will continue to assume that the Department supports the concepts advanced in the Title IX regulations and upheld by the Third Circuit below.

45 C.F.R. § 86.11 (emphasis added) (A 111). Similarly, the Department's regulations define "recipient" to include:

> any . . . institution . . . to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance . . .

45 C.F.R. § 86.2(h) (A 108). *See also* 45 C.F.R. § 86.31(a) (A 114).[15] "Federal financial assistance" is in turn defined to bring within its ambit even the student assistance at issue herein. See 45 C.F.R. § 86.2(g)(1)(ii) (A 107) set out in the footnote below.[16]

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[15]Contrary to this Court's apparent belief in *North Haven* (456 U.S. at 539 n.30), the Department's use of the disjunctive "receives or benefits" does not express a semantic redundancy. Rather, it incorporates what has been termed the "benefit theory," an inherently non-program-specific concept adopted by the district court in *Bob Jones University v. Johnson,* 396 F. Supp. 597 (D.S.C. 1974), *aff'd without opinion,* 529 F.2d 514 (4th Cir. 1975). The theory holds that any receipt of federal assistance by any program at an educational institution automatically infects the entire institution because all other programs benefit from the institution's receipt of assistance. *See "Sex Discrimination Regulations: Hearings Before Subcomm. on Postsecondary Education of the House Comm. on Education and Labor,"* 94th Cong., 1st Sess. at 403-406 (1975) (testimony of Janet L. Kuhn) (hereinafter *"Sex Discrimination Hearings"*); *University of Richmond v. Bell,* 543 F. Supp. 321, 323-25, 328-30 (E.D. Va. 1982); *Bennett v. West Texas State University,* 525 F. Supp. 77, 80-81 (N.D. Tex. 1981), *rev'd in unpub'd opinion,* No. 81-1398 (5th Cir., Jan. 13, 1983) *pet. for cert. pending,* No. 82-1683.

[16]*"Federal financial assistance"* means any of the following, . . .

* * * *

> (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of student admitted to that entity, or extended directly to such students for payment to that entity.

Grove City maintains that such a recharacterization is not consistent with the statutory language chosen by Congress. The coverage of Title IX is by its terms limited to "education program[s] or activit[ies] *receiving* Federal financial assistance." The statutory touchstone is receipt, not receipt or benefit as maintained by the Title IX regulations and the Third Circuit.[17] Had Congress wished to bring colleges like Grove City within the scope of federal control, it could have easily said programs or activities "receiving or benefiting" from federal assistance are covered by Title IX. Similarly, it could have adopted language encompassing all forms of direct and indirect financial assistance. *Cf.* H.R. 7152, 88th Cong., 1st Sess. (1963); S. 1731, 88th Cong., 1st Sess. (1963), quoted at pp. 29-30, *infra*. It instead expressly rejected broader coverage proposals and chose more restrictive language. Thus, that language must be given its intended effect. *North Haven,* 456

[17] *Accord,* Comment, "HEW's Regulation under Title IX of the Education Amendments of 1972: Ultra Vires Challenges," 1976 *B.Y.U. L. Rev.* 133 (hereinafter "Ultra Vires Challenges"). While reaching the same conclusion equating benefit and receipt (A 31), the Third Circuit also relied on equating the concept of "indirect" assistance with the student assistance at issue herein. *See* A 15. We maintain that in the sense understood by the Third Circuit, Congress did not adopt language which would have applied Title IX to all forms of direct and indirect assistance. *Cf.* H.R. 7152, 88th Cong., 1st Sess. (1963); S. 1731, 88th Cong., 1st Sess. (1963), discussed at pp. 29-30, *infra; Cannon v. University of Chicago,* 441 U.S. 677, 693 n.14 (1979). This is not to say that assistance which is provided through another recipient to an educational program or activity is not within the scope of Title IX coverage. Because federal assistance is often passed through state agencies, this type of indirect assistance leads to Title IX jurisdiction *over the education program or activity* which ultimately receives the assistance. The Title IX regulations recognize this concept, but erroneously broaden it to include monies potentially paid by individual recipients to an educational institution. *See* 45 C.F.R. § 86(h) (A 108). Where an individual is the ultimate beneficiary of the assistance, however, flow-through application of Title IX was not contemplated. *See* 3 R. Cappalli, *Fed. Grants & Coop. Agreements* § 19:36 (1982); Note, "Title VI, Title IX and the Private University: Defining 'Recipient' and 'Program or Part Thereof'," 78 *Mich L. Rev.* 608, 615 (1980).

U.S. at 521; Note, "Title VI, Title IX, and the Private University: Defining 'Recipient' and 'Program or Part Thereof'," 78 *Mich. L. Rev.* 608, 614 (1980) (hereinafter "Title VI, Title IX and the Private University").

B. *Congress and this Court's Rejection of an Institutional Approach to Title IX Requires Reversal of the Decision Below.*

This Court determined in *North Haven* that any agency activity under Title IX must be tested in light of the statute's program-specific command:

> [A]n agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902.

456 U.S. at 538. While paying lip service to *North Haven's* holding on program specificity, 687 F.2d at 697 (A 24), the Third Circuit concluded that *North Haven* "implicitly" adopted an institutional approach to the concept of program. 687 F.2d at 697 (A 25). It then held that "[b]ecause 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." 687 F.2d at 700 (A 31) (footnote omitted).

As the government concedes, there is "serious doubt" whether the Third Circuit's equation of "program" and educational institution can be reconciled with *North Haven*. *See* Brief for the United States in Opposition to Petition for Certiorari at 8. Yet, the government would construe the Third Circuit's reasoning as *dicta* and avoid any discussion of program-specificity and its effect on what the government describes as the "narrow question" of whether the College is a recipient of federal financial assistance. The government's desire is understandable; it wishes to avoid the inconsistency inherent between the position adopted by the Third Circuit and that adopted by this Court in *North Haven*. However, the

government cannot make this issue disappear simply by labeling it *dicta*. The two concepts are inextricably linked. As the Third Circuit realized, Grove City's recipient status cannot be resolved without consideration of the impact of Title IX's program-specific thrust on the meaning of "receiving Federal financial assistance."

Contrary to the government's position, the Third Circuit correctly perceived that it had to reconcile regulation of a college which conducts no program receiving federal funds with Title IX's program-specific command. Recognizing that federal assistance given directly to the students could not be tied to any specific recipient program at Grove City, the Third Circuit ultimately concluded that the only means of reconciling Title IX coverage over Grove City with program specificity was to hold the entire institution to be a program subject to Title IX. 687 F.2d at 700, 706. (A 31 n. 28; A 43).

While posing the correct question, the Third Circuit reached an erroneous conclusion clearly at odds with *North Haven's* rejection of an institutional approach in favor of a program-specific one. As this Court noted in *North Haven,* Congress failed to adopt proposals which would have applied Title IX institution-wide. 456 U.S. at 537. Both the Nixon administration and Senator Bayh proposed versions of a non-discrimination amendment which would have applied across the board to all programs or activities operated by a recipient of federal assistance. *See* H.R. 5191, 82d Cong., 1st Sess. §1001(b)(1981) (administration proposal); 117 Cong. Rec. 30155-57, 30408 (1971) (Bayh proposal). That Congress knew how to take an institutional approach when it so desired is demonstrated in another section of Title IX. *See* 20 U.S.C. § 1684. Moreover, its precision in defining "educational institution" indicates that it did not equate an education program or activity with the educational institution. 20 U.S.C. §1681(c). *See Rice v. President & Fellows of Harvard College,* 663 F.2d 336, 338 (1st Cir. 1981), *cert. denied,* 456 U.S. 928 (1982);

Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418, 426-427 (6th Cir. 1982) (hereinafter "*Hillsdale*"). Finally, because virtually every educational institution in the United States enrolls students receiving federal grants or loans, to accept the benefit theory and apply Title IX institution-wide would eliminate program-specificity from the statute. *See Hillsdale,* 696 F.2d at 430; *University of Richmond v. Bell,* 543 F. Supp. 321, 329 (E.D. Va. 1982) (hereinafter "*Richmond*").

Because an educational institution cannot be equated with the "program or activity" under Title IX, the question becomes what program or activity can be regulated where federal assistance is paid directly to students and the educational institution they attend has no discretion to choose the recipient, no discretion to choose the amount of the award, and no role in disbursing those funds. The answer clearly cannot be that reached by the Third Circuit. Rather, the concept of a recipient program or activity under Title IX must be co-extensive with the scope of the underlying grant statute. *Cf. Board of Public Instruction v. Finch,* 414 F.2d 1068, 1077-78 (5th Cir. 1969) (same conclusion with respect to Title VI); 3 R. Cappalli, *Fed. Grants & Coop. Agreements* § 19:33 (*Id.*). If chemistry research is assisted by federal grants, for example, then that is the program to which Title IX should be applied. Similarly, when funds are provided to an institution to conduct a student assistance program, the federal government may ensure that those funds are not distributed or assigned in a discriminatory manner.[18]

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[18]This would not preclude termination of assistance to those programs where pervasive discrimination by the institution "infects" a funded program by in fact denying the funded program's intended beneficiaries meaningful participation in the program. *See Board of Public Instruction v. Finch,* 414 F.2d at 1078; *Richmond,* 543 F. Supp. at 329-330; *Rice v. President & Fellows of Harvard College,* 663 F.2d at 339 n.2; *Iron Arrow Honor Society v. Heckler,* 702 F.2d 549, 564 (5th Cir. 1983).

Where the institution does not conduct that student assistance program, no Title IX regulation can apply, as there is no assistance to a program or activity at the educational institution. Instead, the effect of the student's use of the grant at the educational institution he or she chooses to attend should be equated with the permitted use of grant funds with any off-campus vendor. In this context it is not seriously argued that such market transactions equal "Federal financial assistance" to those entities. Similarly, students' use of their grant funds at educational institutions are payments for services rendered rather than assistance. *Richmond,* 543 F. Supp. at 330; 3 R. Cappalli, *Fed. Grants & Coop. Agreements* § 19:36. *Cf. Trageser v. Libbie Rehabilitation Center, Inc.,* 462 F. Supp. 424, 426 (E.D. Va. 1977), *aff'd,* 590 F.2d 87 (4th Cir. 1978), *cert. denied,* 442 U.S. 947 (1979) (similar conclusion under § 504 of Rehabilitation Act). Giving full consideration to the program-specific limitation of Title IX, therefore, no program or activity at Grove City receives federal financial assistance and hence no program or activity is subject to Title IX regulation.[19]

C. *Legislative History Cannot Support the Application of Title IX to the College When Only Direct Student Grants Are Involved.*

In order to justify their expansion of the statute's scope, the Department and the Third Circuit maintain that legislative history supports their equation of receipt and benefit. Upon close review of the contemporaneous sources, however, the limited congressional discussion regarding the meaning of recipient lends no weight to such an interpretation. On the

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[19]This position is not inconsistent with the conclusion of the Sixth Circuit in *Hillsdale,* which found that the "programs" within the meaning of Title IX were the federal loan and grant programs for students. *See* 696 F.2d at 429. *Hillsdale* involved in part campus-based loan and grant programs where the college disbursed federal funds to eligible students. *See* 696 F.2d at 420.

contrary, the evidence strongly supports the conclusion that direct payments to individuals were in no manner meant to be subject to Title IX.

1. *Contemporaneous legislative history of Title IX.*

There is little in the Title IX legislative history which is directly relevant to the meaning of "receiving Federal financial assistance" under Title IX. The Senate version of Title IX was first introduced by Senator Bayh as an amendment to the Higher Education Bill of 1971, but was ruled non-germane. *See* 117 Cong. Rec. 30415 (1971). Senator Bayh later reintroduced his proposal as a floor amendment to the 1972 Higher Education Bill. 118 Cong. Rec. 5803 (1972). Therefore, there are no committee reports discussing its scope. While the 1971 version of the House proposal which became Title IX was reported in committee[20], that report offers no assistance in determining the issue here. Accordingly, the floor debates surrounding the passage of Title IX provide the only authoritative indications of congressional intent regarding the scope of section 901. *See North Haven,* 456 U.S. at 512; *Grove City College,* 687 F.2d at 692 n.15 (A 14); *Hillsdale,* 696 F.2d at 426. In assessing these floor debates, the Court should note that there were differing versions of Title IX proposed. Many of the statements upon which the Third Circuit and the Department rely concerned an earlier version of Title IX which was *not* passed and which was substantially altered and narrowed in scope in the subsequent legislative session. *North Haven,* 456 U.S. at 527; *Hillsdale,* 696 F. 2d at 425-426.[21]

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[20] *See* H.R. Rep. No. 92-554, 92d Cong., 1st. Sess. (1971), [1972] U.S. Code Cong. & Ad. News 2462, 2511-12.

[21] In relying substantially on statements surrounding Senator Bayh's 1971 proposal, the Third Circuit acknowledged differences between the 1971 proposal and Title IX as passed in 1972, but held that its conclusion was not affected. 687 F.2d at 692-93 n.17 (A 15).

A striking example of the difference between Senator Bayh's original nondiscrimination proposal and that ultimately adopted as Title IX is that the original proposal did not apply to private institutions of undergraduate education:

> Sec. 601. No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of or be subject to discrimination under any program or activity conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance for any education program or activity . . .

117 Cong. Rec. 30399 (1971). Equally important, the original version did not contain the program-specific limitation included in the Title IX which Congress eventually passed.

The Third Circuit relied on broad statements accompanying this original version as indicating authoritative evidence of congressional intent. 687 F.2d at 692 (A 14). Those statements referred instead to public institutions and graduate schools which were unquestionably receiving substantial direct federal assistance and were not intended to apply to private undergraduate institutions like Grove City.[22] Moreover, had the Third Circuit carefully examined the legislative history of the early versions of Title IX, it would have discovered that the statements expressing the intent of Congress to eradicate sexual discrimination at institutions supported by federal funds are balanced by statements indicating the intent of Congress to avoid infringing on institutional autonomy and preserve institutional diversity. *See* 117 Cong. Rec. 37778 (1971) (Rep. Quie); 117 Cong. Rec. 37785 (1971) (Rep. Green); 117 Cong.

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[22]Student assistance provided by the Higher Education Act of 1971, commensurate with the intent to foster freedom of choice among students, could be used at private or public institutions of undergraduate and graduate education.

Rec. 37790 (1971) (Rep. Erlenborn). Some of the latter concerns were in fact met by amendments which narrowed the scope of Title IX. *See, e.g.*, 117 Cong. Rec. 37790 (1971) (Erlenborn Amendment).

The only contemporaneous legislative history directly discussing the application of Title IX to student assistance occurred in discussions over Senator Bayh's original 1971 proposal. Explaining the scope of the government's termination power under Title IX, Senator Bayh engaged in the following colloquy with Senator Dominick:

> Mr. Dominick. What type of aid the recipient might be getting would be cut off? Let us suppose, for example, that they have guaranteed loans for construction. Let us suppose that they have research grants under the NIH. Let us suppose that they are doing graduate work in some programs authorized by the Defense Department. Just what type of aid are we cutting off here?
>
> Mr. Bayh. We are cutting off all aid that comes through the Department of Health, Education, and Welfare, and as to the specific ones, the Senator has mentioned, I think they would all be included with the exception of research grants made through other departments such as the Department of Defense.
>
> Mr. Dominick. The Senator is talking about every program under HEW?
>
> Mr. Bayh. Let me suggest that I would imagine that any person who was sitting at the head of the Department of Health, Education and Welfare, administering this program, would be reasonable and would use only such leverage as was necessary against the institution.
>
> *It is unquestionable, in my judgment, that this would not be directed at specific assistance that was being received by individual students, but would be directed at the institution,* and the Secretary would be expected to use good judgment as to how much leverage to apply, and where it could best be applied.

117 Cong. Rec. 30408 (1971) (emphasis added). Bayh's answer strongly suggests that he did not consider student aid to be institutional assistance and hence not "Federal financial assistance" received by a program or activity conducted by the public undergraduate institutions or graduate schools covered under his proposal. Bayh's later testimony before the House committee reviewing the Department's Title IX regulations confirms further that in 1971 he believed that direct student assistance did not provide a basis for claiming that an institution is conducting a program or activity receiving federal financial assistance:

> Mr. Quie. I am talking about whether the Department of Health, Education, and Welfare has overstepped its bounds in claiming that an institution is conducting a program or activity financed by the Federal Government if a student is receiving Federal aid to attend that program or those programs.
>
> Senator Bayh. You know, I just don't know. I would have to look that up if you would like; perhaps you know. That is not generally the kind of penalties that are meted out, as I am sure you realize.
>
> Mr. Quie. But I have heard it claimed that that is one of the reasons why they have jurisdiction.
>
> Senator Bayh. I have not.
>
> Mr. Quie. You have not.

Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 182 (1975) (hereinafter *"Sex Discrimination Hearings"). See also id.* at 411, 481 (Rep. Quie's belief that Bayh rejected the Department's attempt to base Title IX jurisdiction on student *assistance).*[23]

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[23]Senator Bayh later changed his mind. In 1976, he opposed an amendment proposed by Senator McClure to exempt student assistance from the reach of Title IX. *See* 122 Cong. Rec. 28144-45 (1976).

Bayh's belief is further underscored by the distinctions drawn by Congress in the 1971 Higher Education Act between student assistance and institutional assistance. That Act, along with its student assistance provisions, created or continued programs such as community service and continuing education (Title I), library grants (Title II), grants to developing institutions (Title III), construction grants (Title VII), and direct assistance to institutions (Title VIII). This latter program, intended to fund general operational expenses, was a novel and unprecedented form of funding. It was proposed because, contrary to the Department's and Third Circuit's assumption, student assistance programs were perceived as a burden on institutions, not a benefit. Accordingly, the 1971 Higher Education bill would have provided direct assistance to institutions in proportion to the amount of assistance their students received from federal sources. The Senate report explained this proposal for a "Cost of Instruction Allowance" as follows:

> The Committee presumes that, *by making basic grants available . . .*, more students will attend institutions. All evidence available to the Committee indicates that the tuition and fees paid by a student do not cover the cost of instruction for that student, and that the difference between the cost of instruction and the amount of tuition and fees paid by the student must be made up by the institution either from other sources or by raising the amount of tuition and fees paid by the student. To the extent that enrollments increase as a result of Federal activities, *the Federal Government is imposing a burden on the institution . . .* The payments provided for the subpart 5 [the institutional aid] are designed to reimburse the institutions for part of the Federal burden incurred by them.

S. Rep. No. 92-346, 92d Cong., 1st Sess. 43 (1971) (emphasis added).[24]

[24]A general assistance provision, in slightly altered form, was ultimately passed by Congress. At no time has Grove City received any assistance under this program.

The 1972 Act, which included Title IX, maintained the same distinction between institutional assistance and student assistance and confirms that Congress considered — and intended — student assistance programs to be aid to students as distinct from other programs which are aid to institutions. The House report accompanying the Education Amendments of 1972, for example, devoted several pages to a discussion of "Title IV-Student Assistance."[25] The report focused consistently on the student as the sole recipient of the assistance, emphasizing that "the need of each student for federal aid is treated, as much as possible, as an individual matter."[26] Also emphasized was the importance of each student's "desire to attend the college of his choice."[27] Separate sections of the report discussed various programs of assistance to institutions.[28]

The legislative history of Title IX thus cannot support a congressional intent to expand "receiving Federal financial assistance" beyond its natural meaning to the concept of benefit in which the Department and Third Circuit indulged. More importantly, it demonstrates that the Senate sponsor of Title IX gave assurances that Title IX would not permit the very act undertaken by the Department and endorsed by the Third Circuit. Similar kinds of assurances were given during the passage of Title IX's precursor, Title VI, and a study of that title demonstrates that the concept of "program or activity receiving Federal financial assistance" excludes the type of direct individual assistance at issue herein.

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[25]H.R. Rep. No. 92-554, 92d Cong., 1st Sess. 2214, [1972] U.S. Code Cong. & Ad. News 2462.

[26]*Id.*, at 2219, [1972] U.S. Code Cong. & Ad. News 2481.

[27]*Id.*

[28]*See*, e.g., "Title VI-Financial Assistance to Institutions of Higher Education for the Improvement of Undergraduate Education," *Id.*, at 2237, [1972] U.S. Code Cong. & Ad. News 2499.

2. *Title VI legislative history.*

There can be no doubt that Title IX was explicitly modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq. See Cannon v. University of Chicago,* 441 U.S. 677, 696 (1979); 118 Cong. Rec. 18437 (1972) (statement of Senator Bayh); 117 Cong. Rec. 39256 (1971) (statement of Rep. Green). Title VI legislative history does provide guidance in interpreting Title IX. While accepting this premise, several cautions are in order. *See North Haven,* 456 U.S. at 529 ("The meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the extent that the language and history of Title IX do not suggest a contrary interpretation.").

First, Title IX is recognizably more limited in scope than Title VI. Title IX does not prohibit some forms of discrimination which Title VI would condemn if based upon race (*See* 20 U.S.C. §§ 1681(a)(4) and (a)(5)), and in other areas its prohibitions are far less sweeping.[29] Some broad pronouncements in the Title VI legislative history simply do not apply to Title IX; in enacting Title IX, Congress accommodated a more complicated clash of competing interests.[30]

Second, the BEOG program at issue here was not in existence when Title VI was passed. The Department-administered student assistance programs then in existence were similar to

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[29] *See, e.g.,* the comment of Representative Bingham at 117 Cong. Rec. 39257 (1971):

> We have not said — perish the thought — we have never said that an institution can be all black, or that if it is all white, it does not have to accept blacks. Here we are saying just that, so far as discriminating on the basis of sex is concerned.

[30] The College's admissions, for example, are exempt from the reach of Title IX. *See* 20 U.S.C. § 1681(a)(1). As a matter of policy, however, the College does not discriminate in admissions. (JA 25).

the campus-based programs now sponsored by the Department — federal funds were paid to the educational institution which had the discretion to choose the ultimate student beneficiary. *See* Pub. L. No. 85-864, Title II, § 204, 72 Stat. 1584, codified at 20 U.S.C. § 424 (National Defense Student Loan Program); Pub. L. No. 85-864, Title IV, § 404, 72 Stat. 1591, codified at 20 U.S.C. § 464 (National Defense Education Act Graduate Fellowship Program); *Civil Rights Hearings: Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 88th Cong., 1st Sess., pt. II 1542 (1963) (hereinafter "*Civil Rights Hearings*"). This Court must therefore resist the Department's attempt to lump all forms of student assistance into an undifferentiated mass. Grove City does not maintain that all student assistance programs are beyond the reach of Title IX. Rather, it maintains only that Title IX does not reach those programs where the ultimate student beneficiary receives the assistance directly from the Department without the intervention, selection, or control of the educational institution. In those instances, the educational institution is not a recipient of federal financial assistance under Title IX.

The legislative history of Title VI supports this narrower reading of recipient. The language of the originally proposed Title VI was expansive enough to authorize the Department to regulate all forms of financial assistance received by or benefiting an institution:

> Notwithstanding any provision to the contrary any law of the United States providing or authorizing *direct or indirect* financial assistance for or in connection with any program or activity by way of grant, contract, loan, insurance, guarantee, or otherwise, no such law shall be interpreted as requiring that such financial assistance shall be furnished in circumstances under which individuals participating in or benefiting from the program or activity are discriminated against on the ground of race, color, religion, or national origin or are denied participation or benefits therein on the ground of race, color, religion, or national origin.

H.R. 7152, 88th Cong., 1st Sess. (1963); S. 1731, 88th Cong., 1st Sess. (1963) (emphasis added). This proposal was revised in committee to eliminate the reference to "indirect" assistance. As one commentator concludes, this suggests a congressional refusal to include indirect funding within the scope of Title VI.[31] It also reflects congressional intent to distinguish between ultimate beneficiaries of federal assistance (those individuals designed to be aided by federal funds) and recipients who were private organizations or governmental entities with the capacity to discriminate against the ultimate beneficiaries. This distinction arose from a concern to avoid punishing innocent beneficiaries through cut-offs of federal funds. Both Congress and the executive branch drew a distinct line between direct federal assistance to individuals and assistance to programs or activities. For example, then Deputy Attorney General Nicholas Katzenbach wrote to Representative Emmanuel Celler, then chairman of the House Judiciary Committee, expressing the following distinction between covered and non-covered federal assistance:

> A number of programs administered by Federal agencies involve direct payments to individuals possessing a certain status . . . [T]o the extent that there is financial assistance . . . *the assistance is to an individual and not to a "program or activity" as required by Title VI.*

Hearings on Civil Rights: H.R. 7152, *As Amended by Subcomm. No. 5 Before the House Comm. on the Judiciary,* 88th Cong., 1st Sess., ser. 4, pt. IV, 2773 (1963) (emphasis added).[32]

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[31]Note "Title VI, Title IX and the Private University," 78 *Mich L. Rev.* at 614-15. *Accord,* 3 R. Cappalli, *Fed. Grants & Coop. Agreements* §§ 19:30, 19:36.

[32]Katzenbach also noted that while various other activities of the United States carried out with federal funds could be interpreted as constituting federal assistance, as they resulted in general economic benefit to communities, these activities were not financial assistance to a program or activity within the meaning of Title VI. Katzenbach's careful exclusion underscores the line-drawing difficulties inherent in the Department's and Third Circuit's equation of receiving and benefiting.

Similarly, Senator Ribicoff, former secretary of HEW and one of the sponsors of Title VI, remarked before the Senate that direct payments to individuals did not constitute federal financial assistance under Title VI:

> The individual who receives a direct payment has a right. It has nothing to do with Federal assistance. It is not Federal assistance to an individual, but a direct payment. Direct payments are not covered in any way by Title VI.

110 Cong. Rec. 8424 (1964).

The Department takes the position that the references in the Katzenbach and Ribicoff letters apply only to unrestricted payments, such as social security, and distinguishes those payments from student assistance under the BEOG program, which is said to be earmarked for use in an education program or activity and hence assistance to the education program or activity. This conclusion is erroneous in two respects. First, contextual examination of these statements, and related statements by other Title VI supporters, indicates that these references to direct payments were not limited to social security, but were intended to distinguish any direct federal payment to the ultimate beneficiary, which was outside the scope of Title VI, from federal payments to intermediaries, who had the capacity to discriminate within the programs against intended beneficiaries. Representative Celler states, for example:

> The bill will not punish beneficiaries of Federal aid for wrong committed by others. The bill would not affect an individual homeowner or farmer, for example, who borrows money through a Government agency. It would affect only the distributor of those federal funds if the distributing agency refused to lend to Negroes but did lend to white persons.

110 Cong. Rec. 1519 (1964). Similarly, Senator Case stated:

> This title would not affect Veteran's Administration payments. It would not affect social security payments. It would not affect pensions, or civil service retirement, or railroad retirement, *or any similar programs which involve direct payments by the Federal Government to the beneficiary*. It affects only federally assisted programs where the State or State agency is the intermediary and the chief distributor of the benefits which are involved in such programs.

110 Cong. Rec. 5229-30 (1964) (emphasis added).

Second, the Department's position ignores that student assistance under the BEOG program is virtually unrestricted. *See* 34 C.F.R. § 690.51 (1982). The funds do not have to be spent for tuition or institutional charges and, in fact, represent only a minor fraction of total institutional expenses charged to the student. (JA 60, 63). If the College becomes a recipient of federal financial assistance under Title IX because students may spend their federal dollars there, logic demands that the Department assign similar status to the local bookstore, the landlord, or the neighborhood tavern.[33] It would be ludicrous to claim that these entities are thus transformed into "education programs or activities," demonstrating the absurdity of basing jurisdiction on a nexus so attenuated as that between students' receipt of financial assistance and a private entity's possible benefit therefrom. This in turn underscores the intent of Congress in Title VI to prevent discrimination against beneficiaries, not to restrict use of federal aid by beneficiaries. *See* 110 Cong. Rec. 6544-45 (1964) (Sen. Humphrey's statement that "It is irrelevant, to the purpose of the acts, what the [individual] recipient does with the money he receives."). *See also* Letter from Attorney General Robert Kennedy to Senator John Sherman Cooper (April 29, 1964), *reprinted in* Bureau of

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[33] *Cf. Disabled in Action v. Mayor & City Council of Baltimore*, 685 F.2d 881, 884-85 (4th Cir. 1982) (under Rehabilitation Act, 29 U.S.C. § 974, one does not become subject to act merely by enjoying indirectly the benefits of assistance to another).

National Affairs, the *Civil Rights Act of 1964,* at 360 (1964) (Title VI would not authorize imposition of any non-discrimination requirements on individual farmers who were ultimate beneficiaries of federal program); Note, "Title VI, Title IX and the Private University," 78 *Mich. L. Rev.* at 615-616.

This conclusion is confirmed by the exemption from Title VI of an educational benefits act for orphans of veterans which was administered almost identically to the current BEOG Alternate Disbursement System. *See* War Orphans' Educational Assistance Act, Pub. L. No. 85-857, § 1731, 73 Stat. 1192, 1197-98 (Sept. 2, 1958). Explaining the House bill which eventually became Title VI, Senator Humphrey confirmed the exclusion of this direct student assistance program from the reach of Title VI:

> The title does not provide that individuals receiving funds from government agencies under Federally assisted programs — for example, widows, *children of veterans,* homeowners, farmers, elderly persons living on Social Security benefits — would be denied the funds they receive.

110 Cong. Rec. 11848 (1964) (emphasis added).

3. *Post-enactment legislative history.*

In endorsing the theory that an institution's benefit from its students' receipt of BEOGs was enough to justify Title IX coverage, the Third Circuit relied substantially on post-enactment legislative events. 687 F.2d at 693-95(A 16-20). It held that the congressional failure to pass resolutions disapproving the Title IX regulations, the congressional failure to pass amendments to Title IX exempting all student assistance from its reach, and later statements by several senators provided "a substantial indication" that Congress intended to include BEOGs within the coverage of section 901(a). 687 F.2d at 695(A 20). The language, structure, and contemporaneous

legislative history contradicts such an indication and this Court should reject the Third Circuit's attempt to bootstrap an erroneous conclusion by means of either the political viscissitudes of a subsequent Congress or the retroactive wisdom of individual members gained four years after enactment.

While recognizing that post-enactment events can provide "additional evidence" or "lend weight" in instances where they are not inconsistent with legislative language or contemporary understanding (*See North Haven,* 456 U.S. at 530, 534), this Court has consistently recognized that post-enactment events are unreliable guides to congressional intent. *See, e.g., Southeastern Community College v. Davis,* 442 U.S. 397, 411 n.11 (1979); *Bryant v. Yelleh,* 447 U.S. 352, 376 (1980). With respect to the types of disapproval resolutions in issue, Congress has reached the same conclusion. *See* 20 U.S.C. § 1232(d)(1)(1976). In light of the separation of powers doctrine, refusal to accord controlling weight to post-enactment legislative history is a sound policy of judicial restraint. Otherwise, the legislative process may be chilled by an intervening judicial holding that legislative intent may be found in the defeat of the proposal.

D. *Cases Upon Which the Department and Third Circuit Relied Do Not Support their Expansion of the Statute.*

The Department and the Third Circuit placed much reliance on several cases under Title VI and the Constitution in reaching their conclusion that the possible benefits educational institutions derive from direct student assistance render them subject to Title IX as recipients of federal financial assistance. 687 F.2d at 695-96 (A 21-22). For several reasons, these cases do not provide a persuasive analogy for application of Title IX. The race discrimination cases decided under Title VI and the Fourteenth Amendment presented entirely different problems

than the present case. Both *Bob Jones University v. Johnson,* 396 F. Supp. 597 (D.S.C. 1974), *aff'd without opinion,* 529 F.2d 514 (4th Cir. 1975) (hereinafter *"Bob Jones I"*), and the *Norwood*[34] line of cases had constitutional underpinnings which, because of the existence of pervasive discrimination, required a careful analysis of whether federal funds, however indirectly, flowed to the discriminating entity. Here, there is no allegation that Grove City has discriminated on the basis of sex in any manner. The Department's and Third Circuit's position, therefore, must rest on the statutory language of Title IX. *Hillsdale,* 696 F.2d at 429.

Moreover, because of the all-pervasive discriminatory practices at issue in *Bob Jones I,* analysis based upon program-specific statutory language was unnecessary. See *Othen v. Ann Arbor School Bd.,* 507 F. Supp. 1376, 1387 (E.D. Mich. 1981), *aff'd on other grounds,* 699 F.2d 309 (6th Cir. 1983), where the court commented:

> Racial discrimination respecting acceptance or admission into educational institutions permeates all programs and activities within those institutions. Once racially discriminatory admission policies have been found to exist, the taint of racial discrimination affects all programs and activities within the particular institution. Therefore, the courts which have decided suits brought under Title VI did not have to carefully focus upon the institutional/programmatic conflict which is now squarely before this court.

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[34] *Norwood v. Harrison,* 413 U.S. 455 (1973).

Accord, Hillsdale, 696 F.2d at 429; *Richmond,* 543 F. Supp. at 328.[35]

In any event, the concept of institution-wide benefit applied by the *Bob Jones I* court is not consistent with congressional limitation of recipient and is completely irreconcilable with the program-specific limitation on the Department's regulatory and enforcement power under Title IX. While the *Bob Jones I* court assumed that "all that is necessary for Title VI purposes is a showing that the infusion of federal money through payments to veterans assists the educational program of the approved school," 396 F. Supp. at 603 n.22, it reached this assumption without any examination of the relevant legislative history. Analysis of that legislative history demonstrates a rejection of institution-wide coverage as well as a rejection of the equation of receipt and benefit assumed by the *Bob Jones I* court.[36] *See* pp. 22-33, *supra.*

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[35]Similarly, *Bob Jones University v. United States,* 51 U.S.L.W. 4593 (No. 81-3, May 24, 1983), is not helpful to the resolution of this case. There this Court upheld the ruling of the Internal Revenue Service that avowedly racist schools were not entitled to federal tax exemptions. Grove City fully endorses that result, but maintains that a conclusion reached in light of those institutions' undeniable discriminatory practices and the clear public policy against racial discrimination in education has no applicability to the issues presented here.

[36]Courts and commentators, while recognizing that *Bob Jones I* may have reached the correct *result* in light of the institution's invidious discriminatory practices, have criticized its interpretation of the statutory language and particularly the case's application to Title IX. *See* Note, "Title VI, Title IX and the Private University," 78 *Mich. L. Rev.* at 613-14; *Richmond,* 543 F. Supp. at 328, 332 n.14.

POINT II

Even if Grove City may be termed a recipient of federal financial assistance, the Third Circuit improperly ordered termination of the student grants.

Having found Grove City to be a recipient under Title IX, the Third Circuit went on to hold that students' BEOG funds could be terminated solely because Grove City refused to sign an Assurance of Compliance (HEW Form 639 (A 124)) in the form prescribed by the Department's regulations, 45 C.F.R. § 86.4 (A 110). *See* 687 F.2d at 702-05 (A 35-37). The Department argues that resolution of this "narrow question" is all that is necessary for the disposition of the case and that the Third Circuit's conclusion holding the "program or activity" at Grove City to be the entire institution is *dicta*. *See* Brief for the United States in Opposition to Petition for Certiorari at 5-8. The College has argued above that the Department's position begs the question presented — how to reconcile regulation of a private college which itself neither receives nor distributes federal aid, but whose students receive direct federal grants, with a statute which applies only to "an education program or activity receiving Federal financial assistance" — and that application of Title IX to Grove City is not possible given the language and intent of Congress.[37] Nonetheless, should this Court find that Grove City does receive federal financial assistance, it will be necessary for it to confront further questions relating both to the viability of the Department's

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[37]Only Congress can rewrite Title IX to bring direct student grants within the coverage of the statute. Nonetheless, it would be possible to create statutory language which allows the Department to disallow students' use of their federal grants at institutions which practice discriminatory policies, such as admissions, that cut across the spectrum of all their programs or activities. *Cf. Rice v. President & Fellows of Harvard College,* 663 F.2d at 339 n.2. This would allow Congress to prohibit avowed and invidious discriminatory practices yet preserve Title IX's programmatic thrust in other instances.

Assurance of Compliance requirement in light of Title IX's program-specificity and the Department's power to terminate student assistance without any finding of sex discrimination, solely because Grove City refused to sign that Assurance.

A. *The Department's Assurance Requirement Violates the Program-Specific Limitation of Title IX.*

Throughout this litigation, Grove City has advanced the argument that even if it could be deemed a recipient of federal financial assistance, it could not properly be forced to execute HEW Form 639 — the Assurance of Compliance (A 124-133), because that document, by its terms and by its reference to existing Title IX regulations (A 106-123), applied those regulations to the entire educational institution. While the Department now appears to contend otherwise (Brief of United States in Opposition to Petition for Certiorari at 7, n.7), historically it has been its consistent position that the "receipt" of federal aid for any purpose subjects an educational institution to regulation in all of its programs or activities.[38]

The Third Circuit majority never discussed the scope of the assurance requirement, presumably because it agreed that Grove City was obligated to accept institution-wide Title IX coverage. Judge Becker's concurring opinion, however, states his belief (687 F.2d at 706 (A 41-43)), now apparently adopted by the Department, that the Assurance could be made consistent with Title IX's program-specific requirement. Such an effort would require a rewriting of the Assurance, the Title IX

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[38]The Department has maintained that this position may be reconciled with a program-specific interpretation of the statute. *See Sex Discrimination Hearings* at 485 (testimony of Secretary Weinberger). Its path to this reconciliation requires an extremely strained interpretation of *Board of Public Instruction v. Finch,* however. "Ultra Vires Challenges," 1976 *B.Y.U. L. Rev.* at 172-76; *Sex Discrimination Hearings* at 404-406 (testimony of Janet Kuhn).

regulations, and Title IX history over the past ten years.[39] As the Sixth Circuit concluded in *Hillsdale:*

> The difficulty with Judge Becker's view is that it is HEW's very position that the entire college is a program and that by executing the Assurance, the college agrees to comply with regulations as they apply to the entire institution. Simply stated, it appears to us that it would be anomalous to hold that the college may be required to execute the Assurance because it is so limited by its terms when HEW construes the Assurance and its regulations to apply to the college as an institution, a position that is, in our view, not supportable under Title IX.

696 F.2d at 430. The *Hillsdale* court's conclusion is confirmed by the position taken by the Department on oral argument before the Third Circuit, as well as its position when Grove City was first commanded to sign the Assurance.

The Department's own fact sheet accompanying the Title IX regulations unequivocably states:

> [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.

HEW Fact Sheet accompanying the Final Title IX Regulations (1975). Communicating to a House Committee when the Title IX regulations were first promulgated, then HEW Secretary Weinberger restated the *Fact Sheet's* interpretation and also confirmed that even if the only assistance being "received" by a college or university was limited to students receiving federal grants or loans, the whole institution would still be regarded as being subject to all of the Title IX regulations:

> . . . if students attending an institution of higher education are receiving benefits under the various Federal educational assistance programs, then *all* of the institu-

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[39]Cf. G. Orwell *1984* at 36-38 (New Am. Lib. ed 1949).

> tion's activities that are supported by tuition payments of the students can be said to be receiving Federal financial assistance. (emphasis in original).

Sex Discrimination Hearings at 438; Letter from HEW Secretary Weinberger to Hon. James G. O'Hara, Chairman, House Subcommittee on Postsecondary Education (July 2, 1975), reprinted in *Sex Discrimination Hearings* at 488.[40]

Therefore, despite the Department's reliance on its *current* interpretation of the Assurance of Compliance requirement, the truth of the matter is that Grove City students are having their federal grants terminated because Grove City refused to execute a specific document, HEW Form 639 (A 124), and it is the application of that document which is at issue here. Form 639 provides:

> The Applicant hereby agrees that it will:
>
> 1. Comply [with] all applicable requirements imposed by or pursuant to the Department's regulation issued pursuant to Title IX, 45 C.F.R. Part 86 . . .

(A 126-27). As explained in an accompanying attachment, the Assurance:

> . . . constitutes a legally enforceable agreement to comply with Title IX and *all* of the requirements of Part 86.

(A 131) (emphasis added).

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[40]See also *id,* at 485, where then Secretary Weinberger, in response to a question, states, "In other words, if the Federal Funds go to an institution which has educational programs, then the institution is covered throughout its activities;" *id.*, at 171 (statement of Senator Bayh); *id.* at 387 (statement of Dr. Bernice Sandler). Courts and commentators have similarly recognized that the Department's "benefit" or "institutional" approach is reflected in the regulations. *See Bennett v. West Texas State University,* 525 F. Supp. at 79 (N.D. Tex. 1981); *Romeo Community Schools v. HEW,* 438 F. Supp. 1021, 1033 n.18 (E.D. 1977), *aff'd,* 600 F.2d 581 (6th Cir.), *cert. denied,* 444 U.S. 972 (1979); Note, "Title IX Sex Discrimination Regulations: Impact on Private Education," 64 *Ky. L. J.* 656, 689-94 (1977); "Ultra Vires Challenges," 1976 *B.Y.U. L. Rev.* at 148-50.

The Department's assertion that the Assurance requires only that Grove City pledge that it will not discriminate is simply wrong. Execution of the Assurance will require Grove City to (1) concede the propriety of Title IX coverage over all its programs and activities which "benefit" from federal financial assistance and thereby submit itself to the institution-wide applicability of the regulations; (2) undertake, at its peril, to decide with which regulations it must comply and with which it need not because they have not been lawfully adopted;[41] and (3) undertake an independent contractual duty of compliance with the Department's regulations. A 131; *Lau v. Nichols,* 414 U.S. 563, 570 (1974); *United States v. El Camino Community College District,* 600 F.2d 1258 (9th Cir. 1979), *cert. denied,* 444 U.S. 1013 (1980); *United States v. Phoenix High School Dist.,* 681 F.2d 1235, 1237 (9th Cir. 1982), *cert. denied,* ____ U.S. ____, 103 S. Ct. 1169, 75 L.Ed.2d 422 (1983); *Richmond,* 543 F. Supp. at 325. The College must take these actions in the absence of any showing that the failure to execute the Assurance will impede, in any way whatsoever, the Department's enforcement of Title IX. Contrary to the Third Circuit's apparent belief (A 36), neither the Assurance of Compliance nor the Title IX regulations themselves require any information to be disclosed.[42]

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[41] Such uncertainty would violate the duty imposed on the executive branch to state in unambiguous terms the conditions it seeks to impose on the grant of federal funds. *Cf. Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 17 (1981); *United States v. Phoenix Union High School Dist.,* 681 F.2d 1235, 1237 n. 2 (9th Cir. 1982), *cert. denied,* ____ U.S. ____, 103 S. Ct. 1169, 75 L.Ed.2d 422 (1983) (regulations' ambiguity may raise questions of constitutional infirmity under *Pennhurst*).

[42] Accepting the Department's apparent position that all that it wishes is to ensure that there is no discrimination in programs or activities receiving federal financial assistance, all the information concerning the participation of the College's students in the BEOG program is provided in the forms each student must submit each year as a condition of receipt of the federal grant. *See* JA 59.

In the face of its own statements and the commonly understood interpretation of the Title IX regulations' scope, the Department can hardly argue now that the Assurance can be saved by interpreting it in a program-specific manner. In fact, the Department, in the contract it seeks to impose on the College, requires fealty to obligations which are far broader than the statutory mandate. This fact alone compels reversal of the decision of the Third Circuit.

B. *Student Assistance Funds Cannot Be Terminated in the Absence of Proven Discrimination Solely Because the College Refused to Sign the Assurance of Compliance.*

Despite his finding that "[t]here was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed Assurance of Compliance with Title IX" (A 94), the HEW Administrative Law Judge ordered a cut-off of federal assistance to Grove City students (A 96-97). The district court held this action to be inconsistent with Title IX's purpose. Seeking to avoid the "absurd result" whereby innocent students would be punished by loss of BEOG assistance in the absence of any concomitant benefit (the eradication of sex discrimination), the district court enjoined the Department from terminating assistance to students in the absence of a specific finding of sex discrimination. 500 F. Supp. at 261, 270-72 (A 60, 79-84). The Third Circuit reversed, holding that Title IX allows the Department to terminate assistance solely because Grove City refused to sign the Assurance, even in the absence of any allegation or finding of sex discrimination. 687 F.2d at 703 (A 37).

The Third Circuit based its conclusion on the language of section 902, which authorizes the promulgation of regulations "consistent with achievement of the objectives of the statute authorizing the financial assistance . . ." (A 36-37). Assuming that the Assurance requirement was consistent with this authorization, the Third Circuit upheld the Department's termination of the BEOGs on the basis of section 902's language permitting termination upon a failure to comply with "any requirement adopted pursuant to this section." (A 36). The court reasoned:

> We are satisfied that Title IX authorizes the promulgation of the assurance regulation and that the Department can therefore properly condition its grant or denial of funds upon adequate representations that the recipient does not discriminate.

687 F.2d at 703 (A 37).

Such a result stands Title IX on its head. Congress simply did not contemplate the termination of assistance upon a failure to comply with some formalistic prerequisite. The safeguards incorporated in section 902 were intended to ensure that federal funds would not be denied absent a finding of discrimination. Title IX, as well as its precursor, Title VI, were designed to protect beneficiaries of federal assistance both from the effects of discrimination and from overzealous terminations of their government grants. The statutes are remedial in intent, not punitive. Yet, despite the availability of other enforcement mechanisms,[43] and despite the fact that there is not even an allegation of discrimination on Grove City's part, the Department has chosen to use termination of assistance to individual students as a club to force its interpretation of Title IX's scope on Grove City. By this act, it has turned a remedy of last resort into a front-line choice of bureaucratic coercion. Such an action is far from the intent of Congress, which envisioned use of the termination power only after all attempts at voluntary elimination of discriminatory practices occurred and only after a hearing proved that discrimination was in fact taking place.

This conclusion can be inferred from congressional adoption of the pinpoint termination provision of section 902 which provides that the drastic remedy of funds termination be limited only to the program where discrimination occurs.[44] This

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[43]The "any other means authorized by law" spelled out in section 902. *See also Sex Discrimination Hearings* at 483 (statement of then HEW Counsel Rhinelander.)

[44]The pinpoint termination provision limits funds termination to "the particular program or part thereof" where discrimination is found. *See* 3 R. Cappalli, *Fed. Grants & Coop. Agreements* § 19:52 (history and explanation of pinpoint provision).

intent can also be extracted from the congressional consensus that a finding of discrimination was necessary before funds termination could take place. While those statements are contained in the legislative history of Title VI, section 602 (42 U.S.C. § 2000d-1), that title's enforcement provision was copied verbatim into section 902 of Title IX.[45] Title IX's authors assumed that the enforcement policies would be the same under both statutes. *See, e.g.*, 118 Cong. Rec. 18437 (1972) (statement of Senator Bayh).

Those expressions of congressional intent belie the Third Circuit's interpretation of section 902's language as authorizing termination of assistance for the violation of any validly promulgated regulation. Rather, they indicate that the termination power pertains only to a violation of a substantive nondiscrimination requirement, not a procedural regulation. The Third Circuit's contrary interpretation ignores both the enforcement alternatives contemplated by section 902 and the careful limitations placed by Congress on the termination power.

Senator Humphrey, Senate sponsor of Title VI, for example, explained that any funds cut-off could be made only after an express finding that the particular recipient had failed to comply with a nondiscrimination requirement. 110 Cong. Rec. 7063 (1964). Similarly, one of the designated Senate captains of Title VI, Senator Pastore, confirmed that the "requirements" adopted by an agency to which section 602 refers must be nondiscrimination requirements. 110 Cong. Rec. 7063 (1964). He explained further that before funds could be cut off, "[t]he agency must first adopt a general non-discrimination rule, regulation, or order." *Id.* Then, "[i]f the agency determines that a refusal or termination of funds is appropriate, it must make an express finding that the particular person from whom funds are to be cut off is still discriminating." *Id.*

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[45] *Compare* 42 U.S.C. § 2000d-1 *with* 20 U.S.C. § 1682 (A 105).

Congress similarly intended that section 602's public hearing requirement protect those recipients not guilty of discrimination. Over and over during the Senate debates, Title VI proponents outlined the importance of the hearing requirement as a procedural safeguard. As enacted, section 602 provides for the termination of assistance "to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply . . ." with an agency's nondiscrimination requirement. 42 U.S.C. § 2000d-1. Section 902 of Title IX is identical. 20 U.S.C. § 1682(A 105). That hearing process is meaningful only when a factual question exists as to a recipient's discriminatory practices. Otherwise, as in the present case, the hearing process becomes a meaningless formality. Thus, Congress understood and intended the termination provision to authorize the cut-off of funds only after an express finding of discrimination had been made. Senator Humphrey, for example, stated:

> [T]he authority to cut off funds is hedged about with a number of procedural restrictions. Before funds would be cut off, the following would have to occur: First, the agency must adopt a nondiscrimination requirement, by rule, regulation, or order of general applicability; . . . sixth, if [the agency] determines that a refusal or termination of funds is appropriate, the agency must make an express finding that the particular person from whom funds are to be cut off has failed to comply with its nondiscrimination requirement.

110 Cong. Rec. 6544 (1964). *See also* 110 Cong. Rec. 7066 (1964) (Sen. Ribicoff); 110 Cong. Rec. 8344 (1964) (Sen. Proxmire); 110 Cong. Rec. 9111 (1964) (Sen. Keating).

The same understanding existed in the House. During hearings on early versions of Title VI, for example, a colloquy between HEW Secretary Celebreeze and Representative Rodino emphasized the procedural safeguards which would be established by the Bill. After Celebreeze's statement that an investigation and finding of facts would take place before

termination, Representative Rodino asked in addition whether a finding of discrimination would be required. Secretary Celebreeze replied affirmatively. *Civil Rights Hearings* at 182. *See also* 110 Cong. Rec. 15894 (1964) (Rep. Celler). Thus, there was no doubt in the collective mind of Congress that Title VI afforded the recipients of federal financial assistance a continuing right to receive that assistance until an express finding of discrimination was made. There can be no doubt that Title IX does the same.

A conclusion that termination would only occur after a finding of discrimination also follows from the concerns expressed by Congress about avoiding use of the termination power as a punitive sanction, and, particularly, avoiding punishing innocent beneficiaries. As Senator Humphrey stated:

> Termination of assistance . . . is not the objective of the title — I underscore this point — It is a last resort, to be used only if all else fails to achieve the real objective, the elimination of discrimination in the use and receipt of Federal funds. This fact deserves the greatest possible emphasis: Cut-off of Federal funds is seen as a last resort, when all voluntary means have failed.

110 Cong. Rec. 6544 (1964).

Implicit in this remark, and in the multitude of other comments by Senator Humphrey and his colleagues, is the understanding that the termination sanction under Title VI would be appropriate and necessary only where discrimination exists. Logically, if no discrimination is occurring, no termination of funds can take place. The whole framework of section 602 presupposes the existence of discrimination before the invocation of the termination sanction. Senator Ribicoff, in responding to those "under the impression that the provision would result in cutting off of Federal programs as a punishment, affecting the innocent as well as the guilty," stated:

> Title VI does not affect those who do not discriminate. We are trying to establish a record on the floor of the Senate to spell out what Title VI does and what it does not do.

110 Cong. Rec. 7068 (1964).

Unfortunately, in its single-minded pursuit of the theory that Grove City is a recipient of federal assistance, the Department and the Third Circuit have ignored the foregoing record, thus disregarding also the plight of Grove City students, the real losers should an aid cut-off occur. The district court correctly rejected the Department's contention "that innocent students should be punished for no good or legally sufficient reason relating to the extinguishment of on-going sex-discrimination, . . . merely because their College refused to fill out a regulatory form . . ." 500 F. Supp. at 272 (A 84). Grove City has not discriminated, yet students who attend Grove City will be prevented from participation in aid programs designed especially to support their educational aspirations. To avoid such an arbitrary injustice, the Department's termination power must be restricted to cases of actual discrimination.

POINT III

Application of the Title IX regulations to Grove City violates the College's and its students' First Amendment rights to academic freedom and association.

The genius of American higher education derives from the great variety of philosophies, operating practices, and ideals offered by the nation's educational institutions, ranging from the largest state university system to the smallest private academy. Much as a multiplicity of voices promotes a free press, this diversity of educational offerings preserves academic freedom and serves as an important source of democratic values and ideas. The Department's disregard of the limitations upon its regulatory authority has led to regulations which, by attempting to control every facet of Grove City's academic community, threaten to destroy one part of this valued diversity. Despite the attenuated nexus between Department-administered funds and the College, the Department asserts control over the College's day-to-day operations, threatening to destroy its autonomy and eliminate its unique characteristics, in a misguided attempt to place it in the same mold as its tax-supported sisters.[46]

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[46]Over thirty years ago, the Commission on Financing Higher Education predicted the trend exemplified by the Department's action:

Footnote continued on next page—

Such an attempt violates the core principles for which Grove City stands and disregards the sacrifices it has made for decades to avoid federal control. Since its founding, Grove City College has professed deeply held beliefs regarding the proper role of the individual, government and private education. For over a century, the College has steadfastly maintained a strict independence from governmental funding, holding that the practice of institutional self-sufficiency and autonomy is essential to its educational philosophy. (JA 21-22). A similar philosophy guides the political and economic teaching of the College's faculty. Moreover, the College has continued its strong espousal of religious principles. Although it is not controlled or operated by any church, it retains its Christian conscience. In an atmosphere of toleration for all creeds and disregard of all irrelevant characteristics such as race, sex, national origin, or handicap, Grove City inculcates in its students the importance of economic freedom, religious liberty, and the individual responsibility to conform those values to standards of Christian ethics. Similarly, Grove City has undertaken itself to do what is morally right without government compulsion.

It is significant to note that Grove City and its students are asserting a *protected* right; they claim no right to engage in discrimination and, indeed, such a claim would be repugnant to the moral principles which guide Grove City. The Department's

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—*Footnote continued from preceding page*

> We thrive on our diversities, on the competition of our American life, on our varying institutions and businesses, on our differing interests and loyalties, on the very vitality of our independence, free in its broader aspects from dominance and control. Such independence will be threatened if higher education is subjected to further influence from the federal government . . . Diversity disappears as control emerges. Under control our hundreds of universities and colleges would follow the order of one central institution. And the freedom of higher education would be lost . . .
>
> Direct federal control would in the end produce uniformity, mediocrity, and compliance. Verve, initiative, and originality would disappear . . . This must not be. There must be no such control.

Nature and Needs of Higher Education: The Report of the Commission on Financing Higher Education, (Col. Univ. Press. 1952), quoted in *Sex Discrimination Hearings* 237 (statement of Dallin Oakes, President of Brigham Young University).

and Third Circuit's reflexive invocation of this Court's cases denying any First Amendment right to discriminate must therefore be rejected as inapplicable to the issues presented by this case.

Rather, the issue is one of government regulation and academic freedom. This Court has long recognized the importance of preserving the autonomy of an academic community from overzealous state intervention.[47] Those doctrinal threads support striking down the intrusion into Grove City's institutional autonomy contemplated by the Department's regulations and endorsed by the Third Circuit. *See* brief, *amicus curiae,* of Wabash College. In any event, there can be no doubt that a serious constitutional question is raised by the Department's action, an issue that requires balancing of two important principles.

When presented with a First Amendment issue which would give rise to "serious constitutional questions," this Court has cautioned that the federal courts must first identify "the affirmative intention of Congress clearly expressed" before concluding that the statute in question vests broad-based regulatory jurisdiction within a government agency. *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 500-501 (1979). *Cf. Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). The statutory language, structure, and legislative history urged by Petitioners belie any clearly expressed congressional intention to include situations such as the College's within the scope of Title IX.

The Department's action, as endorsed by the Third Circuit, creates a senseless predicament for Grove City: compromise its autonomy or deny admission to students receiving any kind of

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[47] *See Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518 (1819). Numerous commentators have suggested a constitutional basis for protecting the institution's version of an ideal academic community from intrusive Federal legislation. *See, e.g.,* O'Neil, "God and Government at Yale: The Limits of Federal Regulation of Higher Education," 44 *Cinc. L. Rev.* 525 (1975); Oakes, "A Private University Looks at Government Regulation," 4 *J.C. & U.L.* 1 (1976); Note, "Academic Freedom and Federal Regulation of University Hiring," 92 *Harv. L. Rev.* 879 (1979).

federal financial support. Such a Hobson's choice was never contemplated by Congress, which deliberately crafted Title IX to balance the nondiscrimination principle with the ideals of institutional diversity and student free choice. This Court should restore that balance.

CONCLUSION

Title IX was never intended to authorize regulation of a college solely because some of its students receive federal grants. Similarly, it was never intended to authorize termination of students' grants solely because this College refused to file a regulatory form. Based on the foregoing, the decision of the United States Court of Appeals for the Third Circuit should be vacated and the case remanded to the United States District Court for the Western District of Pennsylvania for entry of an order declaring that Grove City is not a recipient of federal financial assistance under Title IX and enjoining the Department from terminating assistance to students attending Grove City.

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