GROVE CITY COLLEGE V. BELL: HOW LONG IS THE FEDERAL REGULATORY REACH?

By David Lascell

Grove City is a college of about 2,200 students, located about an hour north of Pittsburgh, Pennsylvania. It is a little over one hundred years old. Like so many Eastern colleges, it was founded and begun as a school with some church affiliation. That affiliation ended a good many years ago, and while it retains many of its Christian values, it is not a church-related institution, as many of you would think of church-related institutions. Grove City has been co-educational since its founding and his has supported non-sex discrimination for many years, long before there was a Title IX. Despite that, back in 1976, Grove City began to have a run-in with the federal government which continues and will continue until a decision by the Supreme Court.* Its run-in with the federal government involved Title IX, that anti-sex discrimination statute passed back in 1972.

Grove City is a little different than most other colleges with which you might be familiar. It has consciously chosen to stay far apart from state and federal funding and from any kind of state and federal assistance. Thus, it has refused construction grants; it has refused loans from the State of Pennsylvania for a variety of puposes, the most recent one of which was a grant program started by Pennsylvania just a couple of weeks ago, to help train mathematics and science teachers. Grove City has refused those kind of programs. Grove City has refused to participate in any of the government programs which are campus-based. Grove City has done all that since its founding because it believes that if you accept federal money on an institutional basis, you can and should anticipate federal control of some sort, or state control of some sort if the assistance happens to be state funding. Instead, Grove City contends that it operates

* The *Grove City* case was decided by the Supreme Court as this issue was going to press. The Court held 9-0 that the College was a recipient of funds, but ruled 6-2 that only its financial aid program is subject to federal regulations – Ed.

and will operate differently from other educational institutions.

Most of you have heard a good deal about the role of the Board of Trustees in a private post-secondary institution, that a Board's function is to set policy and not to be involved in the day-by-day operation of the college and university. Grove City doesn't agree with that philosophy. Its Board of Trustees and particularly its Executive Committee is very active in day-by-day operations of the institution. Its Board is modeled much more closely after a corporate board than it is after a post-secondary educational Board of Trustees. It has seventeen administrators. Now by seventeen, I don't mean seventeen people who have administrative responsibilities. I mean a total of seventeen people, including the telephone operator of the college, who is included as an administrative employee; the president; the secretaries, and the financial vice president, the student aid officer. That group constitutes seventeen people. The professional part of that staff is expected to and does teach so that the administrative responsibilities are related to the teaching responsibilities. The cost of Grove City's educational program totals $4,270 per student, per year. That's tuition, fees, room, and board. That's a private institution, that's an institution which is debt-free, that's an institution whose buildings are paid for and which depreciates its buildings much as a private business organization would depreciate its capital assets. That's an institution whose graduate school enrollment record is excellent, an institution whose students receive, so far as I can tell, a first-rate academic education with a good deal of value orientation.

Now, the dilemma in which the College finds itself goes back to 1976, when about 140 of Grove City's 2,200 students received basic educational opportunity grants — Pell grants. Grove City does not participate in the Pell grant program as do so many other educational institutions. When the Pell grant program began, Grove City refused to participate in it on any basis. But at the request of the Department of Education, Grove City allowed its students to participate in that program and the alternate dispersal system. Instead of having the check come to the institution and having the students receive credit for the amount of the anticipated Pell grant, Grove City says to its students, our tuition, fees, room and board is $4,270 a year. That's what you owe. We don't really care from what source

that money comes, nor will we give you credit for Pell grants or any other educational grant or private scholarship assistance; we expect you to pay at the start of each semester one-half of the amount due. And, if you wish to participate in the Pell grant program, we will certify yóur attendance at the college, and that our costs are $4,270. When you get your government check, you can do with it what you want, but don't forget that at the start of the semester, you owe one-half of $4,270. I suppose that there have even been a few students who bought beer with their government check. Now that would be offensive to the College, but I suspect that the Pell grant has gone for that "educational purpose" during the time that some students have been at Grove City.

Back in 1976, the federal government said to Grove City, here is an "assurance of compliance with Title IX." Please execute this form and return it to us and assure us that you not only comply with Title IX as it now exists, but that you also agree that you will comply with Title IX regulations both now and forevermore, either now in existence or which might be promulgated. Grove City replied tht it did not participate in any program which received federal financial assistance – and those are the key words in that statute – "operates a program receiving federal financial assistance." And while the College told the government that it had no quarrel with Title IX, and in fact agreed that sex discrimination is abhorrent, it repeated that it did not participate in federally funded programs and it therefore refused to execute the assurance of compliance.

In response, the federal government said under those circumstances we will commence proceedings so that all your students cannot receive Pell grants. And that they did. And an administrative law judge within the then Department of Health, Education, and Welfare said there is absolutely no evidence that Grove City has discriminated. In fact, it is very apparent that Grove City does not believe in discriminatory practices. But the Title IX regulations say if an institution receives or benefits from federal financial assistance, that means that the entire institution is subject to Title IX regulation.

Now notice the difference in the words that were used. The government did not limit its claim to an institution that receives federal financial assistance or a program that receives federal financial assistance, but expanded its claim to the institution or the program that receives *or benefits* from federal financial

assistance. H.E.W. therefore claimed that under these circumstances at Grove City, it should uphold these regulations and terminate the assistance to students at the College.

Thereupon began the saga which continues and which will end at the end of next month, on November 29th, at 10 A.M., when *Grove City College v. Bell** will be argued before the Supreme Court. The case got to the Supreme Court in the manner you would anticipate. We began a proceeding in the federal district court to determine whether or not the decision of the administrative law judge was correct or incorrect. From that decision which was partly in the College's favor and partly in the government's favor, both the government and the college appealed to the Third Circuit Court of Appeals which sits in Philadelphia. After the case was argued, the Third Circuit Court of Appeals upheld the position of the government. Grove City asked the Supreme Court to allow it to appeal, and the Supreme Court agreed that it was a case which should be heard. The briefing schedule is virtually complete, although the college has one more bite at the apple. The college gets the last word, a reply brief which is due one week before the argument.

When the petition for certiorari was granted and the college was allowed to take the case to the Supreme Court, a good many people filed amicus briefs supporting the position which the college had taken. Many more filed briefs opposing that position. Some of the people who are writing about this case in the press or who have taken positions with respect to the arguments in this case don't seem to be involved in the same case that the college is. Many people apparently believe that Grove City discriminates against females or minorities. And that is not the case.

Grove City claims no right to discriminate and does not do so. Grove City receives not one cent of federal aid, claims no right to receive federal aid, and does not want any federal aid. Grove City, however, thinks that the student aid program was created so that students can choose among educational institutions, including any post-secondary, private or public educational institutions in this country. That ought not mean that the entire educational institution is subject to the entire range of federal regulation, particularly when the statute as adopted by

**Grove City College v. Bell*, 687 F. 2d 684 (3rd Cir. 1982), *cert. granted* (U.S. Feb. 22, 1983) (No. 82-792).

Congress in 1972 uses the word "receipt" of federal financial assistance by programs operated by the institution as opposed to "benefit." Wrong, says the government: let those 140 students come to Grove City, let them choose that institution, give money to the students, and those events subject the institution to the entire range of federal regulations so that it cannot, any longer, operate in the efficient way that it has chosen to do and thus charge $4,270 per student, per year.

The argument ought to be fascinating before the Court because there are some other cases which have been decided over the last year or two which seem to suggest that the Court might be sympathetic, at least to some degree, to Grove City's arguments. We'll hear about one of those from Ed Gaffney, the case involving Bob Jones University. The other case is one involving the Northhaven School District and the effect of Title IX in that case where the issue was not quite the same as it is in *Grove City*. *Northhaven's* question was whether Title IX covers employers of educational institutions. The Court decided that Title IX is broad enough so that it covered employees, but in doing so, the Court used fascinating language about program specificity, whether regulation is limited to the program which receives federal financial assistance. The administration has been soundly criticized by the popular press for the notion that the federal government in *Grove City* chose to say that Title IX is program specific. Many of those who read *Northhaven* carefully think that's in fact exactly what the Supreme Court said in that case, and that one of the questions to be determined by the *Grove City* case is the definition of "program." Title IX is clearly program specific, so what is meant by a program in terms to Title IX?

Question.

Are you in court because you are not complying with Title IX or because you have not signed the form?

Response:

Only because the college has not signed the assurance of compliance. There has never been an allegation of discrimination.

Question:

My recollection is that you argue in your brief that you don't receive government funds because you have no administrative role in the selection of the recipients. Are you making an argument by implication there that Hillsdale does receive government funds? Is your case a better case than Hillsdale's because of that reason?

Response:

I believe so. Let me just tell those of you who don't know about Hillsdale, about that institution. At the same time that Grove City is going along on its trip to the Supreme Court, so too has Hillsdale College in Michigan been under the same kind of pressure. Hillsdale, like Grove City, takes no federal financial assistance. Hillsdale students participate in the federal aid programs and in the guaranteed student loans programs. Hillsdale also has on its campus work study programs and the SEOG program. From Grove City's point of view, those programs may make a significant difference because claims can be made that Hillsdale to some degree operates those programs. As those of you who are involved with financial aid know, the claim would be that the college has some choice in who participates in those programs. The money comes to the college and the college then disperses it in return for services or because a student within that institution is eligible for funds. Grove City does not operate and does not participate in either of those programs and has deliberately chosen not to do so.

Hillsdale chose a slightly different route to test its use, but eventually it arrived at the same point where Grove City is. The Sixth Circuit found in favor of Hillsdale College, saying that Title IX is program specific. There is therefore a split between the Third Circuit and the Sixth Circuit. Grove City applied for *certiorari*, that petition was granted, and the Court decided to hear the *Grove City* case. Hillsdale also applied for *certiorari*. That petition is simply pending. Nothing has happened to it. And Hillsdale has filed an *amicus* brief in the *Grove City* case. Hillsdale's position is that participation in the aid programs does not make any difference to the outcome of the case, since colleges don't really have choice about who receives aid.

Question:

Suppose Grove City did not accept students who were getting federal aid? Could you discriminate if you wanted to at Grove City College?

Response:

Well, as a matter of fact, we could not. There is a state statute in Pennsylvania that says in any public accomodation, and Grove City is defined as such under the Pennsylvania statute, discrimination is prohibited. But Grove City does not discriminate in any event. Grove City did not discriminate long before statutory prohibitions against discrimination. It has been co-educational since its founding. Its faculty is about equally divided between male and female. Grove City simply does not believe in discrimination. But it could not discriminate even if it didn't participate in aid programs.

Question:

Suppose you were not accepting students on federal aid but you were accepting veterans who, because of Vietnam or whatever, would be getting federal money. Would that be in the same category?

Response:

Yes. In fact, what we lawyers call *Bob Jones I* involved Bob Jones University and veterans' benefits. Benefits were given to veterans in much the same manner as some of the student loan programs are now. The Fourth Circuit decided that that receipt, the use by those veterans of those funds at Bob Jones, made the university a recipient of federal assistance.

Now *Bob Jones*, as all of us know, taints the entire area. There is an institution which at the time refused admission to blacks. Because of that, people have emotional reactions. And when they do, cases like the one Ed Gaffney is going to describe occur.

BOB JONES UNIVERSITY: EPIPHENOMENON OR TIME BOMB?

By Edward M. Gaffney

Introduction

On May 24, 1983, the United States Supreme Court rendered its opinion in *Bob Jones University v. United States*,(1) denying tax-exempt status to a private university that maintained a policy of student discipline prohibiting interracial marriage or dating. Relying on a 1967 decision that invalidated state legislation banning interracial marriage,(2) the Court characterized the university policy as racially discriminatory(3) and denied the tax-exempt status to the university on the expansive view that all exempt organizations must serve a public purpose and must not be contrary to established public policy.(4) The Court acknowledged that "the sponsors of the university genuinely believe that the Bible forbids interracial dating and marriage,"(5) but brushed aside the issue of religious freedom by asserting briefly and without explanation that the governmental interest of eradicating racial discrimination in education "substantially outweighs whatever burden denial of tax benefits places on [the university's] exercise of their religious beliefs."(6)

In order to shed some light on the Court's treatment of these issues, this comment focuses on the parties in this case and the interests they were seeking to protect, and on the history of the legislation and litigation relating to the central theme of the case; it then hazards a prediction on the future impact of the case.

A. The Parties and Their Interests

The Court provided the following description of Bob Jones University:

> Bob Jones University is a nonprofit corporation located in Greenville, South Carolina. Its purpose is "to conduct an institution of learning. . . ,giving special emphasis to the Christian religion and the ethics revealed in the Holy Scripture . . ." The corporation operates a school with an enrollment of approximately 5,000