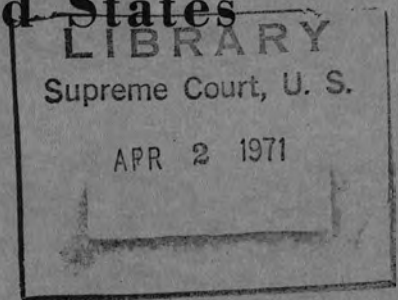


Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

Docket No. 153

ELEANORE TAFT TILTON, ET AL.,

Appellants,

VS.

ELLIOT L. RICHARDSON, SECRETARY
OF THE UNITED STATES DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE, ET AL.,

Appellees.

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Place Washington, D. C.

Date March 2, 1971

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NA 8-2345

1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1970

3 -----
4 ELEANORE TAFT TILTON, ET AL. :

5 :
6 Appellants :

7 vs. :

No. 153

8 :
9 ELLIOT L. RICHARDSON, SECRETARY :
10 OF THE UNITED STATES DEPARTMENT :
OF HEALTH, EDUCATION, AND WELFARE, :
ET AL., :

11 :
12 Appellees :
13 -----

14 Tuesday, March 2, 1971
15 Washington, D.C.

16 The above entitled matter came on for ar-
gument at 1:35 pm.

17 BEFORE:

18 WARREN E. BURGER, Chief Justice
19 HUGO L. BLACK, Associate Justice
20 WILLIAM O. DOUGLAS, Associate Justice
21 JOHN M. HARLAN, Associate Justice
22 WILLIAM J. BRENNAN, JR., Associate Justice
23 POTTER STEWART, Associate Justice
24 BYRON R. WHITE, Associate Justice
25 HENRY BLACKMUN, Associate Justice

C O N T E N T S

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ARGUMENT OF:

PAGE:

LEO PFEFFER, ESQ.
ON BEHALF OF APPELLANTS

4

DANIEL M. FRIEDMAN, ESQ.
ON BEHALF OF APPELLEES

42

F. MICHAEL AHERN, ESQ.
ON BEHALF OF APPELLEES

63

1 And as far as is relevant to this case iddefined
2 academic facilities amont others to exclude those used for
3 sectarian instruction or religious worship, or any
4 school which is part of a school or department of divinity.

5 Other than that it does not contain any express
6 exclusion predicated upon the nature of the beneficiary insti-
7 tution. The question as presented by this appeal, as we see
8 it, first, is not, although that appears to be how all appellees
9 seek to frame it, is not whether church related colleges are
10 disqualified from participating in the benefit of the statute.

11 If it were, that was the question, we would not be
12 here, we conceed, and have never contended to the contrary,
13 that the mere fact that a college is church related does not
14 either statutorily or constitutionally disqualify it from
15 relieving federal funds.

16 The question as we see it, is whether a sectarian
17 institution is disqualified both statutorily and constitution-
18 ally.

19 Now we have defined in our complaint, in our brief,
20 what we mean by sectarian. And specifically we call it one
21 in which the provocation teaching, or practice of religion is
22 a meaningful and major part of its existence.

23 Q Where is that written down in your brief?

24 A Well the latest is in reply brief. I'm reading
25 from reply brief, page 3.

1 Q All right.

2 A This, well, it's in our original brief, as
3 well. But I'm reading now from the reply brief, it's in the
4 original brief as well.

5 The provocation, or practice of religion is a mean-
6 ingful and major part of its existence.

7 This case was brought before this Court decided
8 Walz against Tax Commissioners of New York. Had this case
9 been brought after that decision perhaps we would have defined
10 sectarianin terms of the Courts decision in Walz as one whose
11 dominant policy is to assure future adherance to a particular
12 faith by having control of their total education at an early
13 age. That's in the Walz case.

14 Now---

15 Q What do you mean by the word ---?

16 A Well---

17 Q Are you suggesting that the two definitions
18 are synonomous?

19 A Basically, I guess---

20 Q Or that one is preferable to the other---

21 A No--

22 Q Or that---

23 A Well, they;re preferable in the sense that it's
24 wiser to use the language of a recent decision of the Court
25 than to use your own language. But basically I don't consider

1 any substantial difference between---

2 Q So that they are basically synonomous.

3 A They're basically synonomous, yes.

4 Now---

5 Q Well, Mr. Pfeffer, isn't a meaningful and major
6 part of its existence a little different from control of
7 total education at an early age?

8 A Well, total education, as I understand it, total
9 education in Walz in the context and I think what it meant
10 was that instead of assuring adherence to a faith by teaching
11 them only religion, and a lot of them go to a secular institution
12 for a secular education, it's a total education so that it
13 has, as it were, total control of both the secular and the
14 religious aspects, that's how I interpret total education, and
15 I believe that's what the was the intent of---

16 Q We're not talking about -- how many church re-
17 lated are Roman Catholic parochial schools? There are Lutheran,
18 there are Jewish, I suppose both Reformed and --- Orthodox,
19 aren't there?

20 A How many are there?

21 Q Church related parochial schools. How many dif-
22 ferent faiths?

23 A How many different faiths have parochial schools,
24 or how many faiths have church related institutions? Which are
25 completely different.

1 Q No, that have parochial schools.

2 A Well, the major ones, as I know, the major
3 ones are the Jewish, the Lutheran, the Seventh Day Adventist,
4 and of course, the Roman Catholics. Those are the majors, there
5 are some Episcopalians---

6 Q Now under your definition all 4 of them would
7 be sectarian?

8 A I have no definition which necessarily charact-
9 erizes an institution as sectarian or merely church related,
10 simply on the basis of a faith to which it has a relationship.

11 There are many , many institutions which---

12 Q Well, let me put it this way. Has any one of
13 those 4, can it be said that the propogation, practice, or
14 teaching of a religion is not a meaningful and major part
15 of the existence of a parochial school?

16 A I think so. If we use the term church related.
17 If we use the term sectatian, no.

18 Q I'm trying to get at this through your defin-
19 tion.

20 A Oh. If it's not a meaningful or major, then
21 it's not sectarian.

22 Q Well does any of the 4 that you named---

23 A Well there are---

24 Q Roman Catholic, Lutheran, Jewish, and what was
25 the 4th, Seventh Day Adventist?

1 A Yes, sir. But there are some of those in which
2 the relationship to the church is so tenuous, it's a vestige
3 of a nations history.

4 Q You mean by that that some particular, let's say
5 a college identified perhaps with a Roman Catholic order,
6 may, in its particular circumstances not be sectarian--- .

7 A Yes, indeed. Yes, indeed, the mere fact that
8 it is Catholic does not mean it must be sectarian. And there
9 are Catholic institutions-----

10 Q Can you think of any Roman Catholic elementary
11 schools that would not be sectarian?

12 A Well, I---

13 Q in---

14 A Well, I, offhand I can't think of any, but---

15 Q Can you think of any Lutheran elementary
16 schools that---

17 A I can't. I can think of Episcopalians, I can
18 think of Unitarians.

19 Q Let's hold it to your 4 for a moment. Can you
20 think of any Jewish elementary schools as to which---

21 A yes, I think it's quite possible. For example,
22 let me give you an example what are known as Sholem Alechem
23 schools which are secular schools. They do not have a religious
24 context.

25 Q There are no elementary schools --- .

1 A No. At this point we're talking about colleges.
2 As in response to Mr. Justice Brennan's inquiry.

3 Q Well let me finish. How about any elementary
4 schools in the Seventh Day Adventist?

5 A My knowledge is that they would all be deemed
6 sectarian. I think there are Episcopalians that would not.
7 And certainly ethical culture which would---

8 Q Are there some Baptist---

9 A Pardon?

10 Q Baptist?

11 Q Baptists prefer to have very little purpose,
12 because they don't use---

13 Q How about Methodists?

14 A I don't think they have parochial schools. Now
15 the reason we have used the term sectarian in this brief and
16 in our procedure because that's a term which has a long history
17 behind it.

18 Thirty three of the fifty states of the Union use
19 the term sectarian and none of them uses the term church rel-
20 ated.

21 And indeed the statute which is at issue here uses
22 the term sectarian. It does not use the word church related.
23 Now the posture of this controversy, by reason of the fact
24 that the Court below did not pass upon the basic issue which
25 we present. We had a trial in which we sought to present evidence

1 in respect to 4 institutions in Connecticut, all Catholic,
2 to show primarily to present, to create a record as to what
3 might be deemed sectarian and what might not be.

4 We had precedent for that in state Court in Maryland
5 just 2 or 3 years ago. There were 4 institutions which were
6 challenged under similar statute. Court held 3 of them sec-
7 tarian, one of them said the relationship of that fourth
8 institution to a faith or a religion was so tangential that
9 it could not be deemed sectarian.

10 But the Court took the position---

11 Q Tell me, did the Maryland Court of Appeals
12 adopt your definition of a sectarian in that case?

13 A Basically. The Court below took the posi-
14 tion that under the statute, and this was a decision urged
15 by the government, and this is the oposition, this is the
16 interpretation that the Commissioner has applied throughout the
17 nation.

18 That it is completely irrelevant as to what the bene-
19 ficiary institution --- . What it was created for, what it's
20 purpose is, what its practice is. The sole test, both as to
21 meaning and as to constitutionality is whether the particular
22 facility to which the federal funds are earmarked whether that
23 particular facility is not used either for sectarian instruction,
24 or religious worship.

25 If that facility, an island of secularity, so to speak,

1 surrounded by a sea of sectarianism, is clear of religion, then
2 it matters not what the sea is, and there fore the Court
3 found in finding the facts, the only finding of the facts it
4 made was that we presented no evidence, in fact we do not contend
5 we did not contest the fact that in these 4 institutions, the
6 facilities which were financed, in part, with federal funds
7 were not used for religious instruction or worship, indeed, the
8 evidence showed there were no cruxifices there, no religious
9 images, that they were completely secular.

10 And the Court below adopted the goverments position
11 and simply disregarded and felt it, deemed irrelevant all
12 the evidence presented as to the nature of these institutions.

13 NOW, on the basis of that, the Court in effect held
14 this: that this is a fair conclusion, I believe, of what the
15 Court has held and what the government contends that it is
16 perfectly constitutional for the government to appropriate
17 funds for building facilities, and I want to interrupt for
18 one moment.

19 The term facilities has been interpreted by the
20 Commissioner quite broadly. It does not mean necessarily a
21 building, a library or a chemistry laboratory in a building,
22 the rest of the building which is committed to the devotion of
23 religious teaching so long as that library is not used for that
24 purpose, that library can be financed.

25 Now, an institution which admits only students of a

1 particular religion requires them to participate in religious
2 activities, compells them to comply with the doctrines of the
3 religion, forces them to attend church, requires them under
4 penalty of dismissal to take instruction in the theology and
5 doctrines of that religion, and does everything to propropagate
6 and advance a particular religion, other than confer degrees in
7 divinity, that such an institution can constitutionally re-
8 cieve governmental funds, so long as in its bookkeeping, it
9 allocates those funds to the construction of a chemistry lab-
10 oratoy, or a biology classroom.

11 This is the crux of the Courts decision. I cannot
12 see how the Constitution of the United States, which forbids
13 a religious test for public office, nevertheless permits the
14 financing of public facilities which apply to anybody but mem-
15 bers of a particular religion.

16 This, yet, is what the governments position---

17 Q Does the record show, in this case, whether
18 the Catholic schools in Connecticut admit only Catholics?

19 A Well, we believe that such a finding could
20 have been made by the Court. Among them, the institutions, more
21 than 95% of these students are Catholic.

22 We do not contend, necessarily, that any one of these
23 institutions fits this description, but we do noot concede
24 that they do not.

25 We are unable to draw conclusions because the Court

1 below made no relevant findings of the fact. It says its all
2 irrelevant. We don't care how many students there are. We don't
3 care if the students are required to take theology. We don't
4 care if they're all Catholic. So long as the money is allocated
5 to that part of the institution from which religion is excluded
6 this is within the purpose of the statute and the Constitution.

7 Q Does the record itself in this case
8 answer the question I asked?

9 A I think so.

10 Q What does it show?

11 A It shows at least one of the institutions
12 has ~~is~~ over 95% Catholic. It shows that it advertises in
13 primarily Catholic periodicals.

14 It asks---

15 Q But your general statement was at the be-
16 ginning, that these institutions at least, would not admit
17 anybody except from this denomination.

18 A I'm sorry, I don't think I said that.

19 Q Well, then I misunderstood you.

20 A I said the Court could have so found that
21 at least one of them, it could have so found. It made no
22 findings. It could have so found. Had it so found, I believe
23 such a finding would have been supported by the evidence in
24 the record.

25 But we don't know what the Court found. The Court said

1 it doesn't make any difference.

2 And the lower Court, these 4 institutions are really
3 not the important things in this case. We brought them in only
4 to create a record. To provide specificity to use the language
5 in Flast against Cohen of this Court.

6 But the Commission who is the real defendant in
7 this case is applying this law nationwide. We'd be perfectly
8 willing to drop the suit against these 4 defendants, we have
9 no desire to recoup any of the money they have gotten.

10 We are seeking an adjudication which will be a
11 party to the Commissioner of Education, in carrying out the
12 functions and duties and obligations under this Act.

13 Now we claim that first our argument is that it is
14 not necessary for this Court to reach the constitutional
15 issue. We believe that the statute can be reasonably read
16 to limit it to such institutions which are not sectarian in
17 the sense which we have indicated. And in the sense which has
18 been used in the State Courts in interpreting their own
19 statutes.

20 I say that there are 150 years of interpretation of
21 the word sectarian. We do not contend, we've never contended
22 that merely because an institution is church related is dis-
23 qualified or that Congress intended that it should be disqual-
24 ified.

25 Now, we think it is reasonable and under the well

1 established rules, the Court should seek, if it really would
2 do so, it could seek to interpret the statute in the context
3 which I suggest.

4 Certain far more acceptable, far more defensible,
5 or far more acceptable in interpretation, than, for example,
6 the interpretation of the Supreme Being in the (Seeger) case.

7 Q The statute had been administered on the
8 other premise, though?

9 A Yes, indeed, it had been administered ---.
10 Or else we would n't be in Court.

11 But leaving aside any further discussion of consti-
12 tutionality which is inextricably wound up with constitutional-
13 ity, we claim that it is part of the Constitution of the United
14 States and of all the states of the Union that public funds
15 may not be used to finance the operation and construction
16 of a sectarian institution of the type which we describe.

17 We believe that is a principle which might be said
18 to be part of the common law of the American Constitutional
19 System.

20 It was given its most perhaps broadest pronouncement
21 in the Everson case in 1947, in upholding bus transportation.
22 The Everson case which was a 5 - 4 split was meant nothing if
23 there were not agreement that you could not finance the oper-
24 ations of the institution itself. The Everson principle has
25 been criticized because it the term no aid is too broad. This

1 Court in Walz also suggested it may have been too broad.

2 The Everson principle is not a no-aid principle. The
3 Everson principle is no-subsidy principle and the Court dis-
4 tinguished in Walz, it distinguished in (Allan) the textbook
5 case, between aiding an institution which the government does
6 many times, and subsidizing it, financing it, that is what
7 we contend is unconstitutional.

8 Now, we have said, in our brief, and the government
9 takes exception to it, that we have been unable to find in
10 the history of the United States, a precedence to this Higher
11 Education Facilities Act of 1963 for governmental financing of
12 the construction of a sectarian institution.

13 The government says ever since their brief, ever
14 since the moral act, the (Landgrand) Act of 1962, the gov-
15 ernment has financed church related institutions, we've said
16 sectarian, and gives as evidence for that, support for that
17 assertion, a study made by I presume the Library of Congress,
18 which is called in the Congressional Record, listing the
19 educational institutions, church related educational institu-
20 tions, which have recieved (Landgrand) funds.

21 I should like to, it's a brief list, I should like
22 to list, read you the list of, I think, less than a dozen in-
23 stitutions which are cited in support of this assertion.

24 Brown University

25 Yale University

1 Rutgers University
2 Dartmouth University
3 University of Kentucky
4 University of Delaware
5 Atlanta University
6 Maryland State College
7 Auburn University
8 Kansas State University
9 University of California.

10 Yes, University of California, and Kansas State
11 University. How are these church related? Well, each one has
12 a little --- to show how it's church related. I will read only
13 one: Kansas State University. To the naked eye I would assume
14 one would not suspect Kansas State University of being church
15 related.

16 But this government says it is. It reads as follows:
17 Kansas State University, Methodist Church gave (Bluemont) Cen-
18 tral College to State as site for new agricultural college,
19 which was to receive (Landgrant) funds. The Kansas State Ag-
20 ricultural College became the State University.

21 This is the whole part, ergo it follows that the
22 government has given money to a church related college.

23 I submit, Your Honors, if this proves anything, it
24 proved the opposite of what the government decided for. It
25 proved a recognition that (Bluemont) College so long a part of

1 the Methodist church could not receive government funds. So
2 what was done? A gift was made to a state university, the
3 state of Kansas, the state of Kansas made it a public insti-
4 tution, and received funds.

5 This is, I submit, an argument which does not stand
6 strongly in this case. Now I recognize that the Everson
7 decision is a decision of discord. And what this Court gives,
8 this Court can take away.

9 And if the Everson principle is dead, perhaps this
10 Court should say so. My argument is that the Court did not
11 say so. That notwithstanding the criticisms and it is legion.

12 There's not a Law Review in the country which from
13 time to time does not have an article showing how broad the
14 Everson dictum is and criticizing for overbreadth.

15 But the supreme judiciary body of the United States
16 is not the Law Reviews. It is not the briefs of ---. It is
17 this Court, and I submit that this Court did not in any way
18 impair the integrity of the basic principle of Everson of no
19 financing of sectarian institutions.

20 Q What do you say about the conclusion in
21 Everson, apart from the language?

22 A The conclusion is certainly not a---

23 Q I mean the judgement.

24 A The judgement said and indeed this is how
25 Everson is interpreted in every one of the cases, this statute

1 is constitutional because it does not subsidize the operations
2 of parochial schools. It does not finance. This statute is
3 constitutional --- it provides welfare with safety benefits.
4 The Court said it just deals with --- . It's to protect the
5 children from the hazards of the road.

6 It does not, and the (Allan) textbook case, the Court
7 said the same thing. This statute does not subsidize, does
8 not finance the operations of the parochial schools.

9 Q I guess the Court could say the same
10 thing in these cases.

11 A It could say, I wonder how it could say
12 it, but of course---

13 Q If it could say so in (Allan) and if it
14 could say so in Everson, then it could say so in this---

15 A It could say but respectfully and with
16 a good deal less validity. I don't know how the Court could
17 say that financing a building which is part of an institution,
18 not financing an institution---

19 Q How do you distinguish a building, really,
20 from transportation facilities, as a tool of education?

21 A Well, the answer is, Mr. Chief Justice, that
22 Everson was based on the fact that transportation was not
23 a tool, but the --- claims that it was. The 4 Justices, Mr.
24 Justice (Ruthers) Mr. Justice Jackson asserted that it was.

25 But the --- Court said it is not, said it is a tool

1 of public safety. It is to protect the children from getting
2 run over.

3 That's the premise of the Everson case. It is how
4 it is interpreted. Now if the Court, if the Court is prepared
5 to overrule Everson, I think it should do so in clear unam-
6 biguous language.

7 I should like to quote to the Court a short state-
8 ment from the treatise of Chief Justices. He said, "In the Un-
9 ited States against (parth) and opinion which is to overrule
10 all former precedents and to establish a principle never
11 before recognized should be expressed in plain and explicit
12 terms, A mere implication ought not to cause prosopstrate
13 a principle which seems to have been so well established.
14 General expressions ought not to be considered as overruling
15 settled principles without direct declaration to that effect.'

16 If this Court is prepared to correct a century and
17 a half of error, I submit it should do so clearly and unam-
18 biguously. I submit further it has not done so. In no
19 case has this Court in any way impaired the integrity of the
20 basic principle of Everson, no financing or subsidy of the
21 operations or construction of a sectarian institution in this
22 sense that we are using that term.

23 Q Mr. Pfeffer---

24 A Yes.

25 Q ---some time, would you comment on the

1 Bradfield case---

2 A Yes.

3 Q ---particularly in the light of the fact
4 that it is not cited in the governments brief?

5 A At this particular point. There is no
6 need to --- . Bradfield against Roberts was an 1899 decision
7 in which the Supreme Court unanimously upheld a contract be-
8 tween the city of Washington and a corporation formed by an
9 order of nuns to operate the Providence Hospital in the city
10 of Washington.

11 The Court held the statute constitutional on two
12 basic concepts. First, that there is nothing sectarian in
13 the operation of the hospital. This hospital, the Court said
14 is operating according to its charter, and it is a hospital
15 which treats ill people. It does not teach, it does not
16 propogate religion.

17 Within the term sectarian as I've used it, they are
18 not a sectarian institution. The Court indicated that it's
19 a separate corporation, but I don't think that's a critical
20 factor, I think the law pierced the corporate veil to prevent
21 fraud, and I think the law would pierce the corporate veil
22 to prevent violation of the first amendment.

23 But the critical factor is not whether this is a
24 legal fiction, a separate corporation, but when this is in
25 truth and fact an institution which propogates and practices

1 religion. It does not. It propogates nothing and teaches med-
2 icine.

3 Secondly, here's another critical distinction. The
4 Court pointed out that no person is denied admission and
5 treatment to that hospital because of the religion or faith.
6 It is not limited to members of that faith. It said, indeed,
7 it had to be, because as part of its contract with the city
8 of Washington, it had to take indigent patients.

9 Now I submit to you, that a state cannot make a con-
10 tract, the federal government cannot make a contract with a
11 sectarian educational institution of the type I've described
12 whereby the state will pay that institution money and send
13 its students there.

14 It can do it with a hospital. But an institution has
15 the right to say indeed has a constitutional right to say
16 under the religious liberty clause, we will not admit anybody
17 here unless he's part of our faith and indeed if he is part
18 of our faith as hhe record shows he must take Catholic theo-
19 logy, or Lutheran theology, must go to mass or to communion,
20 this is a condition which a sectarian institution has under
21 the free exercise clause an absolute right to make.

22 That was not involved in Bradfield against Roberts.

23 Now if I am correct, that up to the present this Court
24 has not impaired the integrity of the basis of Everson, I
25 submit that the fact that the funds which are allocated are

1 earmarked for a particular facility which of itself is not
2 religion---

3 Q I take it from your discussion of Bradfield,
4 though, that the, since you say the separate corporation is
5 not very important in the case, that the government may give
6 money to a church, a religious organization to carry on a non-
7 religious activity.

8 A A welfare activity.

9 Q A non-religious activity.

10 A Well---

11 Q Well that's what they did in Bradfield.

12 They gave money to the church to carry on a hospital. In which
13 hospital there were no religious activities.

14 A That's not all. In which activity was avail-
15 able to everybody.

16 Q Well, I agree with that---

17 A But that's part of the picture.

18 Q I know, but nevertheless the government may
19 give money to a church to carry on non-religious activities.

20 A Subject to certain other qualifications.

21 Q So the answer is yes.

22 A Yes, subject to qualifications. Yes, to a
23 non-religious activity, but not one which is limited to the
24 members of that faith, or which has a religious bar or deter-
25 mination. And to who can get the benefit of those facilities.

1 Q But would it have made any difference in
2 Bradfield if there had been a place for prayer and worship in
3 the hospital?

4 A It would have, if every patient were re-
5 quired to go to prayer as they are in religious institutions.
6 It would have made all the difference in the world. The re-
7 cord shows that Catholic participation in Catholic theology
8 courses is required.

9 Q Would it have made any difference in Brad-
10 field if as I think is the custom in Catholic hospitals, there
11 were a crucifix on the wall of each hospital room?

12 A I don't think that would have been enough
13 to make a difference. I don't think that would have been enough
14 to make a difference. I don't think, if that's all there
15 was, I don't think that would have brought it into the frame-
16 work of a sectarian educational institution of the type
17 which I've discussed.

18 Q Nor, that each nurse was a nun?

19 A No, I think not.

20 Q And that she was wearing---

21 A No, I think not. I think---

22 Q Nor that the director of the hospital---

23 A I don't think that would have made---

24 Q Well, then, Mr. Pfeffer, I suppose the
25 government had given the money to the church to carry on the

1 non religious activity even though the church might have
2 carried it on, anyway.

3 A Well, I don't see what the relevance of
4 whether the church would carry it on or not.

5 Q Well,---

6 A I would say yes. Offhand I can't see how
7 that makes it constitutional---

8 Q Well if just saves the church money.

9 A Oh, that I don't ---

10 Q But the bookkeeping really isn't very
11 important.

12 A It's not the bookkeeping that's not very
13 important, it's the point that the bookkeeping is impor-
14 tant for this reason. The bookkeeping is important that it's
15 not because it saves the church's money, but because, indeed
16 it's not important, I think it's absolutely not important,
17 but not for the reason which you might be suggesting. It's
18 not important because the money is used, not to save the
19 church money, not the church might be a case of the church
20 has to go, indeed that they claim that they have to go out
21 of business unless they get the federal funds.

22 Qq Well Mr. Pfeffer, you certainly have to
23 concede that what happened in that case was the subsidy of
24 a religious order operating a hospital, wasn't it? It was
25 government subsidy with government money to operate an activity

1 of a religious order, to the hospital---

2 A It was not, again I'm I must go back, Mr.

3 Justice---

4 Q but wasn't it that?

5 A It was that, it was more than that.

6 Q It was a religious subsidy, wasn't it?

7 A It was a subsidy to operate a public service

8 available to all of the public without any requirements of

9 religion, without being---

10 Q No matter how you parcel it, it was still

11 a subsidy of a religious institution, wasn't it? To that

12 extent?

13 A It was not, I've never said that the
14 constitution forbids the subsidy of religious institutions.

15 I said, of an institution which is engaged in the propagation
16 and teaching of religion.

17 Q Well---

18 A This hospital is not engaged.

19 Q Well isn't it the Catholic church?

20 A But that the hospital.

21 Q So you're saying that you may not subsidize

22 an activity which is a religious activity.

23 A Exactly. An activity which is a religious
24 activity.

25 Q Then the only question in this case is

1 whether the teaching of mathematics in a building is a rel-
2 igious activity or not.

3 A The teaching of mathematics in a building
4 may be a religious activity---

5 Q Well, we haven't reached that point, have
6 we? We've only reached the point whether the government can
7 subsidize the construction of a building. We don't know
8 what it's going to be for.

9 A I say the government cannot subsidize the
10 construction of a building whether you call it religious or
11 not religious.

12 Q Then why can it subsidize the operation of
13 a hospital?

14 A Because nobody was barred from entering
15 that hospital because of religion, I cannot get away from
16 that. This is the critical difference.

17 Q Well I suppose the government could have
18 gone into the business of building hospitals on its own---

19 A It could, but it could not bar a non-mem-
20 ber of any particular religion because of religious---. And
21 I cannot see how the government can itself subsidize somebody
22 else to do what it cannot do.

23 Q Well suppose that the government would be
24 barred by the First Amendment from building a sectarian
25 school---

1 A Indeed it would. Now if you take, Mr.
2 Justice Brennan, you take your argument and carry it out---

3 Q I'm not making an argument, I'm asking
4 a statement.

5 A I'm sorry, your suggestion. Seeking to meet
6 your question, suppose you have a church that does nothing
7 but prayer and worship and the government gives it money
8 to be used only for the construction of a new furnace? Because
9 the furnace is out of order and the church has no money.

10 So the government gives it money to construct a
11 furnace room at that church. Is that constitutional?

12 Q But that's not the case we have here.

13 A It is, indeed. The argument which we make
14 and the case which we make and the Court said that even by
15 its decision even so, if the chemistry laboratory, if the
16 biology laboratory, if they're in order to make it possible
17 for a student to get all of their education under religious
18 auspices, which is what the Court said in *Walz*, then this
19 chemistry lab is just as much part of the whole religious unit
20 as is the room used for teaching religion or prayer. Now
21 I must, in view of the time, I must go, if you'll permit me,
22 to the *Walz* test, which is the latest voice of this Court, the
23 latest statement of this Court on what the establishment
24 cases---.

25 The *Walz*---

1 Q This Connecticut case, was that decided
2 before we decided Walz?

3 A Yes, indeed. Yes, indeed. I'm---

4 Q I gather from your brief you're suggesting
5 that we may have a different test in Walz than the purpose-
6 effect test we have in---

7 A No, I'm not contending that at all. I'm
8 contending all tests, Everson, (Shimp)(Allan) and Walz are
9 basically---

10 Q All the same?

11 A ---all the same. Are basically all the same.
12 They are different formulations of what I've said to be a
13 hundred and fifty years of constitutional law of the United
14 States.

15 If there are going to be changes, this Court will
16 have to make them. I am not challenging constitutional law.

17 Q I think --- judicial opinions attempting
18 to draw a distinction between an exemption and --- .

19 A Yes, indeed. Walz does this. And the
20 difference is that the exemption applies no surveyance, no en-
21 tanglement, subsidy does. And entanglement and surveyance
22 here there is galore.

23 The Act provides that for 20 years a facility is used,
24 if at any time in 20 years a facility financed with federal
25 funds is used for sectarian worship or prayer, the institution

1 must pay back to the government---

2 Q ---20 years, what happens?

3 A It belongs to the institution.

4 Q And then it can be converted --- .

5 A Anything.

6 Q Even though the government paid for it.

7 A Presumably, I'm not saying that's consti-
8 tutional, but the government feels that 20 years is the life
9 expectancy of a building, after 20 years the --- depreciating
10 value, they can do anything that they want. I presume that
11 that's the rationale.

12 But if Your Honors, please, what is required under
13 this statute? The government must keep an eye on that in-
14 stitution for 20 lest religious teaching be --- into a
15 humanities class. Because if it does it violates a law.

16 This is surveillance for 20 years. Moreover, In Everson,
17 this Court ruled not only that it's unconstitutional for a
18 public financed institution to teach the Genesis version
19 of the Creation, but it's unconstitutional not to teach the
20 Darwinian version. of the Creation, of evolution.

21 So that this Court, the United States will have
22 to police these colleges, make sure not only do they not
23 teach Genesis, or evolution or the Creation with point to
24 Genesis, that they not teach the Creation with point to Dar-
25 win.

1 This is surveillance of the most extreme kind. This
2 is the entanglement of the state and religion of a type
3 which every decision of this Court, going back to Watson
4 against Jones, 1870, in every decision the Court said that
5 the government must keep out of censuring, looking into
6 what's happening in the religious institution.

7 It's done that in Russian Orthodox cases. It's done
8 it in the (Cattle) against Connecticut. It says, this we are
9 not to go into. The ecclesiastical or theological religious
10 institution and spy upon them or oversee them or entangle
11 ourselves in their activities.

12 I cannot see how, under this statute, the government
13 to be faithful to its constitutional obligation because I'm
14 sure can see that the government may not finance a facility
15 which is used for religion---

16 Q What is that form of surveillance?

17 A Well,---

18 Q It lasts for 20 years.

19 A Yes,---

20 Q What form does it take?

21 A Well according to what appeared from the
22 government, the government will probably be in a better position
23 to answer this than I am, if they have any reason to believe
24 that there may be use of the premises for religion they in-
25 spect it. And they can and do exercise control to make sure

1 that either that's discontinued or that appropriate counter-
2 measures are taken.

3 Now, I'm not privy to how they administer it, I'm
4 saying that there is no way of avoiding it. There is no
5 avoiding the constitutional barrier or the statutory barrier.

6 Q Well is it an express statutory provision
7 which says you shall keep this surveillance over 20 years?

8 A No, the statute says if this facility is
9 used in violation of this provision as well as other pro-
10 visions, but I'm talking only about this provision, within
11 a 20 year period, that the institution must reimburse the gov-
12 ernment.

13 Q Well, now the procedure for surveillance,
14 is that set up by regulation, is that it?

15 A I think the government would have to answer
16 that. But whether there are or there aren't I think it's not
17 constitutional. If there aren't it means only that the gov-
18 ernment is neglecting its constitutional statutory obligations.

19 The test is not whether it's doing it, the test is
20 whether it's required by the law of the constitution.

21 Q That's why I was asking you whether it was
22 required by the law---

23 A Yes, indeed. they are required by law and
24 the constitution to uphold the statute and the constitution.
25 And this requires no other way unless they take the institutions.

1 Where if they don't at least they don't there is some
2 evidence to the contrary.

3 Q And you say that the surveillance adds to
4 the unconstitutionality---

5 A Under the Walz test. The title ---. It
6 is not the only thing. There is far more than that, but this
7 is, it is our contention that no matter how you look at this
8 , it's unconstitutional.

9 The basic premise is a premise which is long establishe
10 in constitutional law. The struggles which have been had,
11 both this Court and the Law Review and the --- of how to
12 formulate that.

13 But the heart and blood of it is that you cannot tax
14 the whole community to support a religious enterprise whose
15 purpose is to propogate and teach religion. And who bars from
16 its facilities those who are not of the faith.

17 This to me is basic constitutional law, and I don't
18 think any test how ever formulated can get away from a face
19 to face encounter with that basic proposition.

20 Now, one word---

21 Q So fundamentally, I take it you just take
22 issue with the notion from the ground up that there if there
23 is more than one activity going on in a sectarian school, that
24 everything that goes on in it is sectarian---

25 A That's not the--- I didn't say that.

1 Q Well is there any secular education going
2 on?

3 A In, surely.

4 Q You think it's inextricably intermingled
5 with---

6 A Absolutely. I'm saying that that secular--
7 under the --- test it doesn't make any difference. Under the
8 entitlement case it makes no difference because it still re-
9 quires surveillance to keep it that. Unless you want to overrule.

10 Q Then you think it's irrelevant to some
11 schools that you would classify as sectarian under your def-
12 inition, some school undertakes to live up to the conditions
13 to grant that you must nevertheless disregard the conditions
14 or to say it's unconstitutional for them to agree with those
15 conditions.

16 A Yes, unless the Court wants to overrule
17 Everson, wants to overrule Walz, and I believe overrule Allan,
18 too.

19 Q So I take it that you would agree that you
20 can subsidize a church, give money to a church to carry on
21 an activity, which activity itself is not aimed at propagating
22 a faith.

23 A Yes, subject to a condition which I've re-
24 peated many times.

25 Q Well, yes, well---

1 A I can't get away from it because the mere
2 fact---

3 Q We'' remember that.

4 A The mere fact, it's more than that, it's
5 more than that. The mere fact that the institution is limited
6 to members of a faith, and the members of the faith are re-
7 quired to accept instirction which they are, in that faith,
8 as a condition to using that facility which is the key sweep,
9 indicates to me, sir, that that facility is a means not an
10 end.

11 It's there in order to make sure that we get kids
12 who will take religion.

13 Q By the facility you mean the institution,
14 not---

15 A No,---

16 Q Not the particular laboratory, though,
17 is it?

18 A That's what I mean. Why does an institution
19 which is---

20 Q I thought what we were dealing with here
21 was the construction of a building which was to be used as
22 a laboratory, for something, chemistry, has nothing whatever
23 to do with religious teaching. And you say that that's---

24 Q It has nothing to do with religion, Mr.
25 Justice Brennan, if it's, anybody can go in there,,it's not

1 parto of the institution, it's not a means to achieve the end
2 of the institution. We cannot---

3 Q Recently you may have noticed that opened
4 on the campus of Catholic University, is a theatre.

5 A Yes.

6 Q The Harkness. He's its director, that's
7 open to the public. But if the government had built the
8 Harkness Theatre, since it's on the campus of Catholic Univer-
9 sity, he's on the faculty of Catholic University---

10 A That's not enough---

11 Q Would you---

12 A That is not enough for me to express an
13 opinion. In fact I don't have that here, and I'm not required
14 to express an opinion, that's not in any of these cases.

15 Q Wouldn't necessarily be invalid.

16 A What?

17 Q It wouldn't necessarily---

18 A It would not necessarily but in order to
19 get into that theatre, you had to go first to a chapel, where
20 you got a sermon on religion, and then we went to the theatre,
21 I would say we have an analogous case here.

22 That's what I would say, because that's exactly what
23 the government, and I say that is perfectly permissible.

24 Q Mr. Pfeffer, suppose, against the back-
25 ground that we have in this country of a shortage of doctors,

1 probably a shortage of lawyers, the government embarked on a
2 grant program to grant to any school, any university, including
3 Georgetown, and Catholic University, grants for law schools,
4 and basic science, and medical schools, to be built on the
5 land owned by the University, and to revert to them as it
6 does here, in fee after 20 years. Would you, I'm not clear
7 from what you said now whether that would nor would not be
8 permissible, constitutional.

9 A I will not say whether it would be per-
10 missable. I'll say under what conditions it would not be
11 permissible.

12 I think, because that, I think, is what is relevant
13 here. I am not required to spell out for the government what
14 it may do. We are here to try to convince the Court what
15 the government may not do. It may not say you cannot go to
16 the law school unless you take theology, unless you participate
17 in mass, unless you are of the Catholic religion, the Luth-
18 eran religion---

19 Q I should have included in my hypothesis
20 what I believe to be the fact that at Georgetown University
21 you can go to the law school without going to any other school
22 or the chapel.

23 A Then I say a very good case could be made
24 our for saying that as in the Maryland case that the relation-
25 ship of that institution to the church has reached a point

1 where it is no longer sectarian.

2 And indeed this is what is happening with many of
3 them; it's what happened with Yale, with Harvard, with Col-
4 umbia, with Princeton. They started out as sectarian insti-
5 tutuion. This is what happened with some --- institutions.
6 They are going through the same proceeedures, Fordham, Notre
7 Dame. I wouldn't be surprisèd that in 10 or 15 years, the
8 relationship between Notre Dame and the Catholic church will
9 be somewhat analogous to the relationship with Columbia Univ-
10 ersity and the Episcopal Church.

11 Or Princeton to the Presbyterian Church. All the
12 institutions, now many of the institutions are going through
13 the same development. And they reach a time, as with the
14 Court of Appeals in Maryland, held when you can say that this
15 is nolonger a sectarian institution.

16 The public school system of the United States went
17 through the same metamorphosis. It started out as Protestant
18 schools, as bible schools, and it was against this cpntext
19 that the state constitutions were written, provided that
20 they cannot be supported because of their Protestant, not their
21 Catholic church relationship, church sectarianism.

22 But little by little, through a period of development
23 they became truly non-sectarian institutions. And I say that
24 there are many such institutions, of higher education, that
25 have a church relationship.

1 Q Well, Mr. Pfeffer, let's take these specific
2 institutions here, could the government include students who
3 want to go to these schools in a generally applicable scholar-
4 ship program?

5 A In scholarship to students who could choose
6 any college that they want---

7 Q That's a scholarship program based on finan-
8 cial need, but he can take his scholarship and go anywhere
9 he wants to.

10 A If Your Honor please, I would like to exer-
11 cise my priveledge of not replying to a question which I
12 believe is not relevant to this case.

13 Q Yes.

14 A Because the issue is a difficult one and I
15 don't want to foreclose any possible position which I can take
16 sufficient time.

17 Q Of course in that situation the government
18 would be furnishing the most critical element of religious
19 activity, namely, the people.

20 A Well, then perhaps if that's so, then I
21 would say assuming you'd say that, I'd say it's constitutional
22 --- but I'm not prepared at this point either to make any
23 claim or to defend it, I'm not required in the light of this
24 case, nothing in the Courts opinion below, nothing in the
25 position taken by the government.

1 Q Well I thought you read Allan as a part of
2 going on the ground that it went to the student instead of
3 the institution.

4 A I---

5 Q don't I find that in your brief?

6 A I said that Allan pressed that there was
7 no subsidy for the institution.

8 Q Well, isn't that the same as saying it
9 went to the student instead of the school?

10 A No, there was no subsidy there involved.
11 The use of books was involved. Allan, as I interpret Allan,
12 is---

13 Q Do you think it might have been different
14 if the student had got the money to go to a bookstore and buy
15 the books? Do you think Allan would have come out then?

16 A I'd rather not speculate on what Allan was
17 decided. I would say it didn't decide that. What I think
18 Allan decided was this: that just as a Catholic child, or a
19 Lutheran child can go to a public library to borrow a book
20 which he needs to help him in his studies, he can, under this
21 statute get in from the state directly without going to the
22 public library.

23 But I do not interpret Allan to say that the fact
24 that this book is limited only to persons of a particular
25 religion will nevertheless make it constitutional.

1 Q Does the record show how many of the
2 institutions in Connecticut were receiving this aid, are sec-
3 tarian and non-sectarian?

4 A Well, in Connecticut here's what we did.

5 Q Yes.

6 A We show in the record, those who brought
7 the suit, I mean those who examined the various institutions
8 in Connecticut which they could, and they chose, in bringing
9 the suit, they chose those which they deemed would be basically
10 religious.

11 They did not choose others which were not sectarian,
12 according to the standards used, which did have church re-
13 lationship.

14 If Your Honors please, I should like to reserve the
15 balance of my time for rebuttal.

16 Q Very Well.

17 A Thank you.

18 Q Thank you, Mr. Pfeffer. Mr. Friedman?

19 ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.

20 ON BEHALF OF APPELLEES

21 MR. FRIEDMAN: Mr. Chief Justice, and may
22 it please the Court.

23 The Higher Educational Facilities Act of 1963 rests
24 on findings by Congress that at that time there was an urgent
25 need for a tremendous expansion of the higher educational fac-

1 ilities in the United States. And in order to enable the
2 young people of this country to obtain an education which they
3 needed and which held out great promise, for the future, the
4 provision in Title I, for grants to educational institutions
5 only permits grants upon a determination that the grant will
6 result in the creation of urgently needed expansion of fac-
7 ilities which will increase the enrollment of the colleges.

8 so that the critical fact of this statute is that
9 it was designed in order to enable this country to expand its
10 higher educational facilities at a time when existing fac-
11 ilities were inadequate.

12 Now, the statute as Mr. Pfeffer has indicated is
13 very explicit that no federal grants may be made for any fac-
14 ility which is used for sectarian instruction, or sectarian
15 worship. And in addition, no grant may be made for any facility
16 which is all or part of a school of divinity, and school of
17 divinity, in turn, is defined very broadly.

18 It's defined as a school for the education of students
19 to prepare them to become ministers of religion, or to enter
20 upon some other religious vocation, or to prepare them to
21 teach theological subjects.

22 Q Now once a grant is made, though, Mr. Fried-
23 man---

24 A Pardon?

25 Q Mr. Pfeffer suggests that once a grant is

1 made, once you get over these hurdles, if the institution
2 qualifies for a particular facility, then is the --- policing
3 arrangement?

4 A Let me say specifically what the -- there
5 is no policing as we use the term---

6 Q Well what is the statutory policing --- deals
7 with?

8 A There's no statutory provision for that. The
9 only statutory provision is that academic facilities cannot
10 be used for sectarian instruction or as a place for religious
11 worship.

12 Now, what the Office Of Education has done in this
13 area, is it relies primarily upon the representations made
14 by the institutions, when they seek a grant. They are required
15 to certify that none of these facilities will be used for re-
16 ligious purposes. They are specifically instructed in several
17 places on the application forms, that this is the limited
18 purpose.

19 They do have some on site inspections. The on site---

20 Q Is this under some standard procedure,
21 regulations, or---

22 A No, this is just under what I might call
23 informal procedures. They are informal procedures. From time
24 to time,---

25 Q ---regional setups throughout the country?

1 A They have regional offices but they do
2 not have regional inspection procedures. The information
3 they have given me is that since the funds were recieved
4 in 1965 there have been approximately 3200 grants. Of the
5 3200 grants approximately half of 1600 resulted in facilities
6 that have now been completed.

7 And of the 1600 completed, there have been approxima-
8 tely 400 on site inspections.

9 But the nature of these facilities since these are
10 buildings, the nature of these facilities means that the
11 inspection, the kind of inspection is relatively simple.

12 In other words, a look-see, look at the catalogue,
13 to see what courses it---

14 Q Well, where did I--did I read in one of
15 the briefs, there are so many briefs here I can't be sure,
16 that there had been an indident about some institution in
17 Mississippi---

18 A There are shown in the record in a stipula-
19 tion, the page is 82 - 84, three instances where information
20 came to the attention of the Office of Education that 3 insti-
21 tutions apparently had been using some of their facilities for
22 religious purposes.

23 In 2 instances, the institution agreed to stop it,
24 in the thirrd instance, where they were using an assembly hall
25 for a chapel, the institution decided to return to the federal

1 government the money it had recieved for the grant.

2 The federal government in these grants, I think it
3 is self evident, does not pay the full amount for the facility.
4 It's only a porpportionate amount.

5 Q Now is it so that at the end of the per-
6 iod, 20 years, I think Mr. Pfeffer suggested, then the fee---

7 A That is---

8 Q ---and I gather at that time, the assembly--

9 A That's---

10 Q It could be converted into a---

11 A That's right. Twenty years, I think, is
12 the regognition by Congress as that point at which the con-
13 nection is --- .

14 One thing I should say, however, that if during the
15 20 year period it is discovered that an impermissable use
16 is being made of one of these facilities, it does not necess-
17 arily automatically revert back to the government and they
18 do not necessarily have to refund the amount.

19 They have the priveledge of terminating the imper-
20 misable use, which is what happened in 2 Or 3 of these hypo-
21 thetical cases.

22 Q What happens if they do not terminate?

23 A If they do not terminate the use? Then they
24 are required under the statute to refund what they have re-
25 cieved from the government, but it's on a formula under which

1 they refund the relative value of what they got from the
2 government to the total cost of the facility on the basis of
3 the then value of the facility.

4 Q Is that a statutory formula, or---

5 A Yes, that is the statutory formula.

6 Q Suppose they don't return it?

7 A Well if they, I presume the government could
8 either then bring a suit to---

9 Q What happens to the building?

10 A I suppose this would depend on what relief
11 the government seeks. The building might revert to the gov-
12 ernment.

13 Q Does the statute provide that it does?

14 A The statute is not explicit on that, the
15 statute merely states that if---

16 Q You mean that it's not clear on it.

17 A It's not clear on it. That's right. And
18 we're hopeful that no such cases will arise, this, at least
19 as of this time, there have been no instances where the gov-
20 ernment has had to resort to that, except for these 3 instan-
21 ces.

22 Now let me, since Mr. Pfeffer has been talking largely
23 about what I might call theoretical institutions, let me say
24 that as far as these 4 colleges are concerned, the record in
25 this case is unequivocal, that there has been no prohibited

1 religious use of any of the facilities here, which was testi-
2 fied to without any question, in the Appellants here introdu-
3 ced no evidence that there was no religious use made of any
4 of these buildings that there were no religious plaques,
5 no religious symbols in any of these buildings.

6 Q Mr. Friedman, in these, what does the
7 evidence show about whether these institutions limit their
8 student to one freligious faith?

9 A The evidence is very explicit on that,
10 that they do not. There was again, uncontradicted testimony
11 by the heads of all of these institutions---

12 Q But the Court made no findings, on that?

13 A Court made no findings.

14 Q And it's implication was that it would n't
15 have made any difference.

16 A Presumably

17 Q So we must consider this case as hough it
18 were a case involving an institution that did limit it's
19 enrollment?

20 A I don't think, Mr. Justice, it would
21 necessarily make any difference, but I don't think the Court
22 should consider it on that basis, but even though the Court,
23 the District Court did not make any findings, we have this
24 record, and this record is uncontradicted, 1) that they did
25 not discriminate, that they do permit members of any faith

1 to attend the schools.

2 Q So that what does the record show about
3 whether or not people who attend these institutions must
4 attend chapel?

5 A The evidence is again uncontradicted that
6 no non-Catholic is required to attend any religious service.

7 Q what about Catholics?

8 A Catholics it varies, I believe, in some,
9 the testimony was that in some of the institutions they are
10 not required to, and in some they were.

11 Some of the institutions---

12 Q What about the ones where they require
13 some of the students, mainly Catholics to, as a condition
14 for participating in the secular education program, to attend
15 chapel and to take a course in ---

16 A Well, Mr. Justice, I'd like to correct my
17 answer, on thinking back---

18 Q Yes.

19 A ---the testimony is, by the presidents
20 of these colleges that the Catholic students are not required
21 to attend any religious services.

22 They say that Catholic doctrine may require them in
23 some circumstances to do so, but that that is a matter for
24 their own consciences.

25 Q In other words, that's independent of any

1 without the compulsion of any school regulations---

2 A That's correct.

3 Q ---it's just a matter of faith involved.

4 A That's right.

5 Q Well how about a school that does require,
6 Mr. Friedman, and some schools do, West Point, for example.

7 A Well again, Mr. Justice, I wouldn't
8 think that that would make any difference, because as I will
9 come to in a minute, under what we think is the appropriate
10 test, the question is you look to see the facilities being
11 subsidized.

12 Are they secular? Now as Mr. Justice Brennan has
13 suggested, West Point, they may have compulsory chapel.
14 Litigation now pending in the District of Columbia over the
15 validity at the Naval Academy.

16 But if I may say one other thing Mr. Justice White,
17 with respect to the way that these schools operate, the
18 evidence is also uncontradicted, that there are a large number
19 of lay people on the faculty.

20 Indeed, the head of the Psychology Department in
21 one of these colleges testified that of the 7 full professors
22 on his staff, 4 of them were Jewish.

23 Q How about the curriculum. Do they include
24 courses in religious instruction, which it's mandatory for
25 the student to take?

1 A I believe that those courses are not
2 mandatory for non-Catholic students. I think that Catholic
3 students are required in some instances to take certain courses.

4 Again, however, these courses are not taught exclu-
5 sively by Catholic teachers. Almost every one of the schools,
6 for example, has a Rabbi on the staff. And interestingly en-
7 ough, the Rabbi is not restricted to teaching Jewish theology,
8 he, one of the Rabbis teaches a basic course in introductory
9 Survey of Religion.

10 Now, I would like, if I may, just briefly, to refer
11 to the contention of Appellants that the statute doesn't apply
12 to these, does not permit these grants.

13 That is, that the statute is silent on the type of
14 institutions that may receive grants. All that it speaks
15 about is that it permits grants to institutions of higher
16 education. And that seems to be a neutral thing. But the
17 qualifications that the statute creates for the receipt of
18 these grants is based on the academic situation of the school,
19 not upon its religious affiliation.

20 However, the language of the statute strongly suggests
21 that Congress recognized that grants would be made to church
22 affiliated, religiously affiliated institutions because of
23 the specific exception for grants to divinity schools.

24 Now it's common knowledge that most divinity schools
25 are operated by religiously affiliated institutions, and Congress

1 when Congress excepts from the permissible category of insti-
2 tutions that may receive these construction grants, divinity
3 schools, it seems to me a very clear implication that grants
4 are permitted for non-divinity school aspects of these church
5 related institutions.

6 But if there is any question about this, I think
7 they're completely dispelled by the legislative history in
8 this case.

9 Q Did you say that --- make grants to divinity
10 schools?

11 A No, they can not make, they specifically
12 cannot make grants to divinity schools under this statute,
13 and what I suggested is that the existence of that exception
14 is rather strong evidence, we think, that Congress recognized
15 that grants could be made to non-divinity school institutions
16 that were connected with religious organizations.

17 But the legislative history, it seems to me, is really
18 clear beyond any doubt. First of all, there are a number of
19 people who testified during the course of the debates in
20 Congress that in order to accomplish the necessary expansion
21 of the educational facility, the private, non-religiously
22 affiliated and the public higher education institutions in
23 this country would not be enough.

24 They need to pull upon the existing facilities of
25 the religious institutions. And while there was considerable

1 debate during the course of this legislation over the wisdom
2 and constitutionality of these grants, there was nobody who
3 suggested that the statute did not cover grants to these
4 institutions indeed, it's exactly to the opposite, because
5 several of the sponsors of the legislation explicitly
6 stated during the course of the debate that this statute does
7 cover religiously affiliated institutions and indeed, in both
8 the House and the Senate, an amendment was proposed that
9 would have excluded grants to religiously affiliated insti-
10 tutions and that amendment was defeated by a voice vote, --- ,
11 in both instances.

12 Q Mr. Friedman, somewhere along the line
13 tell me whether there's any implication in the fact that your
14 brief did not cite Bradfield.

15 A No, Mr. Justice, there is no implication
16 and I have to confess that perhaps it is an oversight because
17 I think that is a persuasive authority, and if I may, may I
18 cite another case that we have not cited in our brief, which
19 refers to Bradfield, and that is a case called Quick Bear v.
20 (Lupe) in 210 US 50, and that was a case which involved the
21 validity of grants by the SEcretary of the Interior of Indian
22 Trust Funds, to be used to sponsor and send Indian children
23 to a parochial mission school on an Indian Reservation.

24 This was attacked on a number of grounds, including
25 the constitutional ground, and the Court disposed of the con-

1 stitutional question in one sentence, citing the Bradfield
2 case, the Court said, "It is not contended that it is uncon-
3 stitutional and it could not be."

4 Q Which Court said that?

5 A This Court, Mr. Justice.

6 Q In what case?

7 A In a case called Quick Bear v. (Lupe)
8 in 210 US in 1908.

9 Q That was a long time ago, when was that?

10 A Pardon me?

11 Q When was that?

12 A 1908. More that 60 years ago.

13 Q Mr. Friedman, grants of a non religiously
14 affiliated school, have they exceeded an amount of grants
15 to religiously affiliated schools?

16 A Yes. Let me just give you some rough fig-
17 ures on that.

18 The record shows that the total grants since they've
19 started making grants in 1965 have been about a billion and
20 a half dollars. The best estimate they give is roughly 15% of
21 those grants have been to religiously affiliated schools,
22 another 15% have been to non religiously affiliated private
23 schools, and the remaining 70% roughly, have been to public
24 schools which may include state universities, community colleges,
25 technical---

1 Q I take it the commitment which you mentioned
2 earlier, not to use to teach religion and so forth, is that
3 limited to a commitment by the religiously affiliated schools?

4 A Oh no. That is across the board and indeed,
5 the specific forms which they have to fill out in order to
6 qualify for the grant, these documents repeatedly point this
7 out to them and they are required to make these representations
8 along with many others with respect to the way the facility
9 will be constructed.

10 Q Does the legislative history show whether
11 there are any statements to the effect that the church schools
12 do not continue to run without government support?

13 A there were not in connection, no, this bill,
14 Mr. Justice, was not directed to that issue, this was just
15 directed, of course, to institutions of higher education,---

16 Q Well, did it show anything about that?

17 A No. What it shows, Mr. Justice, is that
18 the belief of the Congress that the necessary expansion of
19 higher education facilities could not be accomplished without
20 the participation of the religiously affiliated institution.

21 Q Why?

22 A Because there just wasn't enough capacity
23 available with the existing---

24 Q Wait a moment, they've been building, haven't
25 they?

1 A Well it was one thing, I suggest, Mr.
2 Justice, to try to create a new institution, it's another to
3 increase the capacity of existing institutions. And Congress
4 decided that the best way to deal with this problem facing
5 American higher education was to increase the capacity of
6 existing institutions that already had the experience in this
7 area.

8 Now if I may turn to the---

9 Q Before you turn, let me just ask you one
10 thing about the surveillance question. Suppose, 3 years after
11 a grant were made, and the building built, for chemistry and
12 mathematics, and biology, it suddenly developed that all
13 those subjects had been abandoned and it was being used for
14 a divinity school. I suppose the government would move in and
15 do something about it, wouldn't they?

16 A Yes. We would do one of two things. As soon
17 as we found about it, the first thing we'd do is to tell them
18 to stop it. And if they were reluctant to stop it, refused
19 to stop it, we would then tell them that they had to refund,
20 give us back some money, and I suppose that if they in effect
21 said that we won't do either, we would then take whatever steps
22 had to be done.

23 Q I suppose maybe an eviction proceeding.

24 A Concievably an evirtion proceeding, concie-
25 vably a suggestion of some sort of forfeiture, well I don't

1 know if we could forfeit the land, but certainly we could go
2 against them and I suppose sue them in effect for breach of
3 contract and get as a measure of damages whatever the amount
4 was we contributed.

5 Q Then, if I may pursue that by carrying it
6 over to the Everson case, suppose it developed after school
7 busses were provided to take elementary children to school
8 it was learned that a religious teacher was put on the bus
9 every morning so that they wouldn't lose this time and they
10 were reciting the Lords Prayer and singing religious hymns,
11 and listening to religious instruction.

12 I suppose that would be stopped too, wouldn't it?

13 A I would suppose they presumably would
14 say that they would not extend any subsidy to parents as
15 long as the bus was being used for that purpose.

16 Q Does the one in your mind under the Ever-
17 son situation call for any more surveillance, government sur-
18 velance of the religious institution than the other?

19 A I don't think so, Mr. Chief Justice.

20 Q I suppose as soon as this deviation occurred
21 there would be a great many people calling attention to it.

22 A Well, that's right. For example the way
23 the record shows the way they found about one of these 3 cases
24 that I have referred to is someone sent in a news-
25 paper clipping to the Office of Education containing a story

1 on the use of one of these facilities as apparently as a chapel
2 for holding religious exercises.

3 Q Mr. Friedman, is there anything in the
4 legislative history indicating that there was consideration
5 whether building more colleges, more universities was or was
6 not a more acceptable alternative than using religiously af-
7 filiated schools?

8 A I don't think it was focused that specif-
9 ically. I cannot be sure of that, Mr. Justice, because I
10 haven't read, frankly all of the debates are very lengthy, but
11 the debates I have read indicate that there was a recognition
12 of the fact that the capacity was needed and that the relig-
13 iously affiliated schools for a long time had been an essen-
14 tial portion of American higher education---

15 Q And it was better to expand that---

16 A To expand that---

17 Q ---then to build new ones?

18 A I can't go so far as to say, that, but what
19 I do suggest and it seems to me that this is quite clearly
20 implicit in the Congressional judgement to structure the
21 statute this way.

22 Q Did you all participate in the Horace
23 Mann case in Maryland?

24 A The government? No, we did not Mr. Justice.

25 Q Are you going to say something about that

1 case?

2 A Yes, I would be bappy to say right now that
3 I think it fits into the---

4 Q It was cited only once, I guess, cited
5 as a compare case.

6 A Yes, the Appellants rely very heavily on
7 the Horace Mann standard. We think that the standard applied
8 by the Maryland Court of Appeals in the Horace Mann case,
9 which is a determination whether the institution as an entity
10 was primarily sectarian or primarily secular, we do not think
11 that that is the test that this Court has considtently applied
12 in dealing with establishment clause.

13 Q What did we do, dismiss that?

14 A Well, there were two things. You denied
15 the Petition for Certiorari in one of them and you dismissed
16 the Appeal in the other one. There were two---

17 Q When you say we haven't consistently done
18 anything, you're only talking about 2 cases.

19 A Well, Mr. Justice, I suggest I'm talking
20 about 4. Because I'd like to---

21 Q Everson and Walz and what else?

22 A Everson, Walz, we start with the test, which
23 is the purpose and primaryeffect test. That test was formulated
24 in 1963 in (Shemp). That test was used 3 times more in 1968,
25 the Court applied the purpose and primary effect test in the

1 Allen case. And the same year it applied the same test in
2 the Everson case involving the validity of the Arkansas anti-
3 evolution statute and then last year in the Walz case, al-
4 though it didn't quote the language of that purpose and
5 effect test, it did use that language and cited the case at
6 that point.

7 Q You're saying, really, that there is only
8 one test that---

9 A That is---

10 Q ---define, and that's the purpose--

11 A That is correct, Mr. Justice, and let
12 me say with respect to Mr. Pfeffers contention that somehow
13 Everson is the test and if this Court is going to drop
14 Everson now it should do so explicitly.

15 In the (Shemp) case, when the Court first enunciated
16 the purpose and primary effect test, immediately after quoting
17 the language which we rely on, it cited the Everson case.

18 So obviously the Court must have believed that the
19 purpose and effect test, it was there announcing represented
20 an application of the somewhat broader generalized principles
21 that the Court announced in Everson.

22 Now, the Appellants argument, the Appellants attack
23 on the purpose and effect test, rests almost exclusively
24 on the notion that somehow the secular and the sectarian are
25 so intertwined that any meaningful separation is impossible.

1 I think the Court crossed that bridge in the Allen
2 case, where it rejected the notion that somehow you couldn't
3 separate secular and the sectarian. It recognized there that
4 the religiously affiliated schools performed two distinct
5 functions.

6 And if it was felt there that there was no such per-
7 meation of the two, such intermingling of the two, when you're
8 dealing with children in the primary and elementary schools,
9 where they're far more impressionable than mature college
10 students, certainly you cannot make that claim in this con-
11 text, where we're dealing with students in college and indeed,
12 some of these universities have graduate schools.

13 The purpose here is plainly secular, there can be
14 no question of that. It was designed to accomplish an expansion,
15 a desperately needed expansion of the facilities available,
16 for higher education.

17 Q Facilities as defined in the legislation,
18 includes only buildings, does it not?

19 A Buildings or certain equipment.

20 Q for---

21 A Yes. For example, one of the grants here
22 involved a foreign language laboratory. And it also excludes
23 certain types of buildings. For example they ordinarily couldn't
24 give a grant for athletic facilities unless this was part of
25 a course in Physical Education.

1 Q Does it include books, could it include
2 books?

3 A I don't believe, not books. Mr. Justice.
4 It does include libraries, two of these grants are for
5 libraries.

6 Q Libraries has two meanings, it means a
7 collection of books, or it means---

8 A No, this means the building in which the
9 books are housed. That's all they give. These are grants for
10 facilities, for physical facilities to be used---

11 Q Structures, building structures plus cer-
12 tain equipment.

13 A Yes. And I would just like to say one last
14 thing in conclusion because I have to turn the argument over
15 to my Co-Counsel, that the statute, the test is the primary
16 effect. Now of course, this statute, these grants obviously
17 do help the church affiliated institutions. They help them in
18 much the same way that the parochial schools were aided by
19 subsidizing their parents for the bus fares in Everson, that
20 they are aided by paying for the books in Allen.

21 But the critical thing it seems to us is the primary
22 effect, and the primary effect here, while it helps the rel-
23 igious schools does not constitute a forbidden government
24 intervention, consider it an actual government support in
25 furthering a religion as such.

1 The government here does maintain its neutral position
2 toward religion and we think that the way this statute is
3 structured does permit room for that benevolent play at the
4 joints which this Court indicated last year in Walz is one
5 of the essential elements under the establishment clause.

6 Q Thank you, Mr. Friedman, Mr. Ahern you
7 have five minutes, but we'll run a few minutes over if
8 necessary to let you finish today.

9 ARGUMENT OF F. MICHAEL AHERN, ESQ.

10 ON BEHALF OF APPELLEES.

11 MR. AHERN: I think I can finish in that
12 time, Mr. Chief Justice. Mr. Chief Justice and may it please
13 the Court.

14 Since the interest in the State of Connecticut in
15 this case is identical to the interests of the United States
16 government, we subscribe to the arguments advanced by the
17 government in its briefs and in oral argument here this morning.

18 In addition I should like to point up one or two as-
19 pects of the case very briefly which we think the Court
20 should consider very carefully.

21 Now while the Appellants in this case have stated
22 that they brought this action, they could have brought this
23 action in any state of the United States, the fact remains
24 that they brought the action against 4 colleges in the state
25 of Connecticut, and named the state of Connecticut as a defendant.

1 in the case.

2 While we have not officially sought to represent all
3 of the states in this matter, we feel that by being named a
4 defendant in the case we have been cast in the role of rep-
5 resentative without portfolio for all of the states , in this
6 area.

7 Incidentally, this role seems quite appropriate in
8 this case, because Connecticut is known as the Constitution
9 state.

10 I want to emphasize to the Court that each of the
11 states in the United States are participating in this grant
12 program and are vitally interested in seeing that federal
13 funds continue to flow under this Act to the states to enlarge
14 and expand educational facilities in order to accomodate the
15 rapidly growing numbers of young people aspiring to higher
16 education.

17 I should also like to direct the Courts attention
18 to the fact that in view of the state of the Congressional
19 Record, when this Act was being considered, I don't think it
20 can be seriously contended by Appellants that Congress intended
21 to violate the establishment clause of the Constitution by pro-
22 viding federal funds to religion.

23 The Congressional purpose, clearly stated in debate
24 and in Section 701 of the Act, was to meet an educational
25 crisis by providing funds for academic facilities to further the

1 educational development of its citizenry which would be bene-
2 ficial to the whole nation.

3 We submit it was to implement that national purpose
4 that the Act was adopted. And it was to advance that purpose
5 that the states have participated in the grant program.

6 I would also like to point out that Congress
7 evidently anticipated the recent holding of this Case in
8 Courts Walz decision to the effect that excessive entanglement
9 by the government in administration of religion might
10 make the legislation be declared unconstitutional.

11 Under the Act under consideration here, each state
12 was required to establish an agency for the purpose of screening
13 grant applications and establishing priorities among projects
14 within the state.

15 However, the states were given no authority to adopt
16 supplemental guidelines with respect to hiring practices,
17 or for inspection procedures subsequent to construction.

18 The states' responsibility and authority terminated
19 when the application was approved and submitted to the U.S.
20 Commissioner of Education.

21 In like manner, the Congress provided in Section 757
22 of the Act, that the United States Government could not
23 become involved in, and I quote, "the personnel, curriculum,
24 methods of instruction, or administration of the colleges
25 which receive grants".

1 The sole responsibility and authority of the gov-
2 ernment after completion of construction was to determine
3 for a period of 20 years, by on site inspection, whether
4 the facility was being used for the purpose for which it
5 was constructed.

6 That is, education, rather than being used for
7 religious purposes.

8 Accordingly, I submit that Congress could not have
9 done more to avoid entanglement with religion by the Federal
10 Government of the states.

11 Q What's the total amount of these religious
12 institutions in Connecticut have recieved since the Act---

13 A I don't recall how much was recieved
14 by all of the religious, the church related institutions in
15 Connecticut, but it's only a portion of the building costs
16 for each project.

17 Q You don't know the dollar figure?

18 A I don't know the dollar figure, I believe
19 Mr. Williams will have that for the Court tomorrow.

20 In conclusion I would just like to state that Counsel
21 for the Appellants here this afternoon has made an issue
22 and quite a significant issue, of the fact that he has labeled
23 the 4 colleges in this case sectarian whereas the Appellees
24 refer to them as church related.

25 And he indicated that he was consistent throughout the

1 case in labeling and calling them sectarian.

2 I would refer the Court to page 99 of the Appendix
3 in which the stipulation entered into between Counsel for
4 the Appellants and the State of Connecticut as set forth, and
5 further direct the Courts attention to paragraph 16 in which
6 we considered and used and agreed upon the following lang-
7 uage. "The Commission and members thereof have had occasion
8 to consider questions raised concerning the constitutionality
9 of grants to church related institutions on at least several
10 occasions."

11 So I submit that Counsel for the Appellants on
12 occassion has used ther term church related in referring
13 to these institutions. Thank you.

14 Q Thank you, Mr. Ahern.

15
16 (Whereupon argument in the above entitled
17 matter was adjourned, to resume at 10:00 a.m. the following
18 day.)