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

Place Washington, D. C.

Date March 3, 1971

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

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ELEANOR TAFT TILTON, ET AL.,

Appellants

vs

No. 153

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

Appellees

The above-entitled matter came on for argument at 10:05 o'clock a.m., on Wednesday, March 3, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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Washington, D. C. 20006
On behalf of Appellants

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On behalf of Appellees

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Number 153. Mr. Williams, are you on next?

MR. WILLIAMS: Yes, Mr. Chief Justice.

ORAL ARGUMENT BY EDWARD BENNETT WILLIAMS, ESQ.

ON BEHALF OF APPELLEES

MR. WILLIAMS: Mr. Chief Justice and may it please the Court:

I think it's fair to say that the Appellants have taken briefs and argued this appeal as if no evidence had been received and no records made in the court below. In effect, what they are asking this Court to do is to render an advisory opinion on a hypothetical caricature on what they call a "sectarian institution" of higher learning.

Twice in their briefs, and yesterday during oral argument, Counsel said what the court below has held is that an institution which admits only students of a particular religion requires them to participate in religious activity, compels them to comply with the doctrines and dogmas of the religion, forces them to attend church and does everything but propagate and advance a particular religion other than confer degrees in divinity, can constitutionally received governmental funds so long as in its bookkeeping it allocates these funds to the construction of a chemistry laboratory or gymnasium.

I say to the Court that the record will demonstrate

that not a single one of those qualifications is germane or applicable to a single institution before this Court as Appellee; nor do they make that contention, because in the very next sentence they say: "We do not contend that any of the four institutional defendants here and 50 above, composite a description of sectarian educational institution."

Now, in the court below the Appellees called witnesses to the point of taxing the spirit of the cumulative evidence rule and of testing the patience of a three-judge court to show without contradiction, without refutation and I say, without cross-examination, that first the funded facilities of these schools were never used, are not being used for any religious worship, for any religious instruction. They have no symbols or artifacts of religion housed therein.

Q Perhaps not, but do they teach the history of religion?

A There is no question, Mr. Justice, that they do teach the history of religion --

Q In these buildings?

A No, sir; not in these buildings, but the institutions themselves, first of all, do have courses in religion, but the evidence was without contradiction that none of these schools indoctrinate, propagate or proselytize the tenets of any religion.

Q But, my question was narrower. In these

buildings may they teach the history of religion?

A No; they do not, in fact, do that, Mr. Justice.

Q Is there anything which forbids them doing it?

A I think that there is nothing that would prevent them from teaching the history, but they don't do it, nor have they ever done it.

But, secondly, the evidence shows, without contradiction that these schools have a completely open admissions policy.

Q Mr. Williams, before you leave that, what would happen in response to Justice Brennan's question? Would there be a violation to --

A If they taught religion, Mr. Chief Justice, or if they worshipped in these buildings there would be a violation of their contractual commitment to the Government under which they received a small portion of the cost of these buildings, and they would be amenable to suit for recovery of the amount that the Government has contributed.

Q Now, we heard yesterday, I think, from Mr. Friedman, that there is something in the way of policing what goes on in these buildings. Do you see any problem connected with that?

A I see none, Mr. Justice. These

institutions contract in good faith that they will not teach religion, that they will not engage in any form of worship in these --

Q Well, is there any evidence in this case of any actual policing and what form it took?

A The Court found that the evidence was uncontradicted, unrefuted by any scintilla of evidence, that there was no worship --

Q Was there any evidence that, in fact, any policing had been done and that -- what form it took?

A There was no evidence of any policing in this case; no.

Q Is the commitment, Mr. Williams, a negative one or an affirmative one? Is it an affirmative one in the sense that there is an engagement, a commitment firmly to teach chemistry or whatever completely secular subjects?

A It's a negative commitment, Mr. Chief Justice. However, in this particular case the buildings were science buildings, a foreign language laboratory, a music, art and drama building and two libraries. The libraries were shown to have completely open policies with respect to books. The record shows that each of these institutions has adopted the American Association of University Professors' policy on tenure and academic freedom; that there is no inhibition with respect to what any teacher may teach within the confines of

his own discipline on this campus; that there is no required religious worship whatsoever at any of these institutions; that there is no form of indoctrination at any of these institutions, and that these institutions are funded by tuition, gifts, endowments and fees.

Q And you say, Mr. Williams, that there is no religious instruction at all at any of them?

A There is religious instruction at the colleges; yes, Mr. Justice.

Q I mean of the four -- we have four, don't we?

A We have four schools and --

Q And religious instruction at each?

A Each of the schools offers courses in religion.

Q Is attendance a part of the curriculum for a degree, the required attendance at those courses?

A At three of the institutions, Mr. Justice, it is required for Catholics to take courses in religion and at the fourth institution there is a requirement that all students take a course in religion, but it is interesting to note, Mr. Justice, that there is a stipulation in this case which covers all of the institutions that the courses in religious study cover a range of human religious experiences and are not limited to courses about the Roman Catholic

religion and it's further interesting to note, if the Court please, that the one institution which requires religion in order to matriculate for a Liberal Arts Degree, has a series of courses which are, in all respects, I suggest to the Court, identical with the courses being offered at Trinity College at Hartford, Connecticut.

And, at Weslyan University at Hartford, Connecticut, which Appellants concede wouldbe eligible for grants under this act. And I invite the Court to look at Defendant's Exibit SH-2, which is the Sacred Heart religious department, where courses and theories of religion, problems of religion, modern Jewish life and -- American protestantism, faith and unbelief, athiesm and secularism, search for a god in the modern novel, are courses that are being taught by priests, by rabbis, by Lutheran ministers and by laymen.

Q Of course, the District Court, as I read its opinion, didn't get into these facts that you are talking about.

A The District Court, Mr. Justice --

Q I understand that the attack is on the standards applied by the District Court in determining whether there is establishment or --

A The District Court, Mr. Justice, heard the evidence and the evidence is --

Q I'm talking about its opinion.

A There is a record. It does not get into these facts in its opinion, but if --

Q It doesn't have to, perhaps, if its standard is correct. It says on page 51: "We hold that the act has a primary effect that neither advances nor inhibits religion." Now, that's --

A That's exactly so, Mr. Justice.

Q But, as a secondary effect, is that the right test --

A I suggest it is. Appellants consistently urged upon the lower court that the test should be the nature of the institution which is the incidental beneficiary of the grant.

We consistently urged upon the Court that the test should be what this Court has evolved in the course of 25 years from Harrison to McGowan to Shant(?) to Allen and finally in Epperson, that the test is whether the statute has a secular purpose and its primary effect that neither advances nor inhibits religion and --

Q Would you stop right there a moment.

A Yes, sir.

Q To the extent that there is policing of what goes on in these funded public -- public-funded buildings, do you see any hazard of inhibition, inhibiting religion?

A I do not, Mr. Justice, for these reasons --

Q Well, as I gather, policing would mean stepping in and a lot of interrogation by government officials as to whether or not this course or that course has a religious content?

A I think it would not require stepping in and it would not require a lot of surveillance. First of all, I don't think it does violence presumptively to expect that these colleges and universities will deal with the government in good faith. Certainly there would be no incentive to conduct religious worship or sectarian instruction in an expensive building that is devoted to science and filled with laboratories or the library, when there are other buildings that can fully serve that purpose.

But I would like to take, Mr. Justice, the concave side of this convex proposition and apply the Walls Test, as articulated by this Court to the statute we're dealing with. In Walls there was a caveat, a caveat that was supplementary to the purpose and primary effect test, as I read that decision.

The Court said, "We must look at the primary effect and notice whether or not there is involved an excessive entanglement between state and religion; between church and state. Now, here there is the most perfunctory kind of surveillance that may take place in the event that a complaint is lodged that there was religion being conducted in one of these

buildings, but let's look at the other side.

Counsel for the Appellants say, and they say -- that "We concede that all church-related schools are not barred from this program." Well, then, what schools are barred?

"The schools that are barred,"say they, "the theory of our suit is that the constitution forbids support by the Federal Government of any institution which teaches or practices religion."

Again they said, in the lower court: "If the institution teaches or practices religion it is unconstitutional to allocate it funds."

In this Court they say, "We assert that under the establishment clause an institution is barred from receiving funds if the propagation, teaching or practice of religion is a meaningful and major part of its existence."

So, what is the criterion that they urge? They urge, laced throughout their briefs: the Horace Mann test, promulgated by the Court of Appeals of the State of Maryland in 1968. Now, what is the Horace Mann test? It involves, first of all, a determination of the purpose of the college. Second, it involves an analysis of the religious constituency of the governing board, the student body, the faculty and the administratives. It involves a determination as to where the school gets its financial support; whether religion and prayer are

meaningful and significant on these campuses; whether the activities of the alumni are really projections or extensions of the teachings of the school and what the image of the school is in the community.

I suggest that to applythat test that is being urged by the Appellants, is the very kind of entanglement that this Court has eschewed and shunned and avoided in relationship to the ad valorem real estate tax test, in Walls against the Tax Commission, because it would require a positive surveillance to determine the ever-changing character in institutions of 817 church-related colleges and universities.

Sixty percent of the private schools in America today, private higher educational institutions, are church-related. To think that Appellants' test would throw the whole administration of the Higher Education Facilities Act into chaos and confusion, it would cast doubt over the eligibility for a grant of 60 percent of the private higher educational institutions in the United States and introduce an amorphous test incapable of application without continued surveillance as these schools change their character to meet the test imposed by the Court.

So, I suggest, as against that, Mr. Justice, as against that, for which they contend that the kind of surveillance that is necessary to look at a building and see whether or not in a building there is any religious instruction,

is de minimis.

Q Mr. Williams, I take it you think it's unnecessary to address yourself to whether or not the case would be different if you did have a school here that satisfied your opponents' definition of a sectarian institution?

A I don't think it's unnecessary to address myself to that if you are interested in it, Mr. Justice. I think this: that the kind of institution that he has hypothesized here, as the basis for asking this Court for an advisory opinion, makes it impossible, I suggest, to segregate the secular from the sectarian; the secular from the religious. And I suggest to the Court --

Q In those institutions -- in an institution of that kind, if there are any?

A And I don't think that there is one unless it be a divinity school, Mr. Justice, and they have been carved out of the act specifically. But, the kind of institution that he hypothesizes, I don't know of a single one nor hasone been suggested by the Appellants.

And I suggest that the Appellants repeatedly reminded the lower court that they could have brought this case in any one of 50 jurisdictions and they could have named any one of a number of institutions and they named the Secretary of Health, Education, and Welfare; they brought it in Connecicut. I don't think that it's a violent presumption to suggest

that they brought it in a jurisdiction which was not evidentially unfavorable to the cause which they were asserting.

Q Well, under your argument, then, a clergyman could be put on the Federal payroll provided he was teaching physics or math or --

A There isn't any -- Mr. Justice, there isn't any teacher onthe payroll in this --

Q I understand. I just wonder how far this theory of yours goes, because we have other cases like that coming up.

A Well, we have clergymen across the road here on the payroll in Congress, and I suppose if they are doing a wholly secular function -- if it is secularly segregable so that there can be no gainsay that what they are doing is purely secular that would be possible.

In Bradfield against Roberts we had an institution owned, controlled and operated by a monastic order of nuns. This was decided in 1899 and a contract was entered into between the Federal Government and this monastic order of nuns to erect an isolation ward at the Providence Hospital, which is still extant here in the District of Columbia.

Q Of course that wasn't an educational institution.

A It was not an educational institution, Mr. Justice, but insofar as the focus is whether it is sectarian or

secular, I suggest to you that there is no difference between practical medicine and teaching science, mathematics or a foreign language because each is a fully secular function and that's what the Government is subsidizing in Bradfield v. Roberts and my brother concedes that so long as the function is purely secular that a contribution or subsidy may be made to a church institution. He made that concessionhere yesterday.

Now, this function was wholly secular in Bradfield v. Roberts and the sole line of distinction that counsel was able to draw between Bradfield against Roberts and the case at bar, was that Bradfield against Roberts had an open admissions policy, suggesting to this ourt that the institutions before the Court today do not and I say that's a demonstrable untruth from the record.

Q Well, what if they did, though, Mr. Williams. Suppose there was a condition for matriculation that you be a Catholic?

A Well, there couldn't be here, Mr. --

Q Well, I know there couldn't be, but -- and you suggest that it's just really an academic question, and itmay be that there aren't any schools like that.

A There aren't any schools like that and there can't be under this statute because Plaintiff's Exhibit Number 126, which is in evidence, shows that each of the schools must affirm and must give assurance that they are

complying with Title VI of the Civil Rights Act of 1964 which inhibits all forms of discrimination. But there is none in this case. And there can't be any.

Q What happens to these buildings at the end of an 18 to 20-year period. I think Mr. Friedman touched on that and I wasn't clear what his answer was.

A The Government's interest in these buildings, Mr. Justice, under the statute, exists for 20 years and at the end of 20 years there is no further surveillance.

I should say --

Q Are they free to use these buildings then for purely religious purposes?

A They are free to use them as they choose, Mr. Justice.

Q As they choose.

A Now, may I respond to a question that you propounded yesterday. I think you asked, if I recall correctly, how much money these institutions before the bar received in the STate of Connecticut?

They received a total of $1,800,000, out of $18 million that were given to institutions in the State of Connecticut during the same period of time.

Now, I think it's significant, Mr. Justice, to recognize that in each instance, in each instance the university or the college receives less than 20 percent of the cost

of the building. The maximum that they can receive is 33 percent. For example, the science building at Fairfield University, the record shows cost over $4 million; the grant was $500,000.

Now, comparable figures are true with respect to the library; and a library at Sacred Heart University; a $24,000 grant was given to Albertus Magnus for the foreign language laboratory where the students may go to listen and practice modern language.

So that it is not, Mr. Justice, as though the Government is giving a building, a whole building to these schools. It is giving a small percentage of the cost of the building and the schools must commit to pay the rest, the design fee to increase the academic facilities across the country. So that instead of 4,200,000 students having a college education in 1960, 7 million students are having a college education in the 1970s, as projected by the then President when he proposed this legislation.

Now, if the Court please --

Q I suppose you would agree that the Federal Government -- neither the Federal Government nor a state could have created these institutions, launched them, chartered them, financed them?

A Well, I think that, Mr. Justice --

Q In their entirety.

A In their entirety we would run afoul of the establishment clause because in that instance they would be launching an institution which was teaching religion and it would be subsidizing the institution in its entirety.

Q That would also, of course be true of Yale or Harvard or Columbia or Princton, wouldn't it?

A Yale --

Q The Federal Government couldn't have started any of those the way they were started.

Q Well, the way they were. I'm talking about today. Starting up Yale today I suppose that could be a Federal institution without any problem.

A Well, it's interesting to note, Mr. Justice, that Yale today, of course, has a department of religion and I think offers a selection about as broad as the institutions which are before the Bar. Trinity and Weslyan, which were mentioned in the complaint filed by the Plaintiffs, I suggest, has religious courses that are as broad as the religious courses that are offered in the case at Bar.

Q By any chance does this record show that the cost is of some of the major medical schools in the country, funded by the Federal Government, such as Harvard Medical School?

A No, Mr. Chief Justice, we never got into the area of graduate schools. Our focus was confined to --

exclusively to secondary schools offering academic degrees after high school. We did not get into medical schools and we didn't get into any other form of graduate education.

Now, this Court has recognized, in its promulgation of the purpose and primary effect test on four occasions -- on four occasions as that test has evolved, historically, beginning in 1947, and rearticulated again last year, that the purpose and primary effect test presumes that there may be some incidental benefits to religion. It

It presumed it in Epperson, it presumed it in McGowan against Maryland (the Sunday closing laws); it presumed it in Board of Education against Allen (the textbook law) and of course, it presumed it in Walz.

Now, again, this Court has said on three occasions, three occasions, clearly and unambiguously, that the mandate of the constitution in the establishment clause, is not that the Government must be hostile to religion, but that itmust be neutral as between religion and irreligion and as among the sects of religion.

It said this in Edison; it said it in Borak against Clausen and it said it in Abbington against Shem clearly. I suggest to the Court that if the Congress had gerrymandered the church-related schools out of this building by virtue of the fact that they were teaching religion, or by virtue of the fact that worship was taking place on the

campus, that it will have manifested a constitutionally inhibited hostility to religion.

Now, again, this Court has said and has said three times in applying the purpose and primary effect test, that the focus in determining the effect, the focus in determining the secularity of the effect, is not on the nature of the institution receiving the benefits, but is on the function being subsidized. It said it in Everson and it said it in McCollum against the Board of Education, which struck down a prior program, or a religious instruction program on the premises of the Illinois school system because it focused on the function being subsidized, not on the nature of the institution.

And finally, it said in Board of Education against Allen, that it's the function being subsidized that is the determinative factor.

So, I suggest here you have a wholly secular function; it is receiving a grant in part for the purpose of its erection, and that it clearly passes the purpose and primary effect test.

Q Do you suggest that the only test of primary effect is whether the Government achieves its secular purpose? And that it's irrelevant what consequences --

A I don't say quite that, Mr. Justice, but I do say that if there is a piece of education which is passed

by the Congress at the instance of the President, for a specific purpose and it is demonstrated that the legislation implements that purpose, that it's reasonable to say that that's the primary effect of the legislation.

Q Even if, wholly aside from how much or how important or how significant an aid to the religious activities may be?

A If the purpose is secular, if the purpose is secular, as it was here, then I suggest that if the purpose is fulfilled and implemented, as it was here, because it has been shown in this record that in fact, the purpose was fulfilled; then I suggest to the Court that that is the primary effect, notwithstanding that there may be some benefits flowing to religion.

Q Or regardless of how much benefit may flow?

A I don't think that it would be relevant as to how significant, if you are talking about significant in terms of monetary benefit, I don't think that that would be irrelevant.

Q I suppose if you put the clergyman on the payroll and he's teaching physics, that takes him off the budget of the school for the performance of other things that he --

A As long, Mr. Justice, as there can be a secularly segregable function. If it can effectively be

segregable, and we have to develop a record to show whether it would be or not. We didn't have that problem in this case, but if it could be a secularly segregable function there is no reason that the Government may not offer the service.

This Court has recognized for 50 years that church-related schools perform both a secular function and at the same time offer religious instruction. It recognized this in Pierce against the Society of Sisters in 1925; it recognized itin Board of Education against Allen that these schools are performing the function of great social dimension to the state of providing a secular education, by providing the --

Q I don't suppose anybody has ever doubted that on this Court.

A And, so long as legislation can be tailored so that the subsidy or the grant only affects the secular status of the school, this Court has consistently held that it is not violative of --

Q Well, if that's what it means, Mr. Williams, I take it -- take your $4 million building; support it had two wings. The Government's contribution is a half million dollars; one wing is the science laboratory; the other one is a church. Would that qualify?

A No; the statute covers that quite clearly, Mr. Justice. It says that the facility to which the contribution has been made or for which the contribution is made, may not

be used for sectarian religion or religious instruction. Now, this would be an area; it wouldn't be a facility that you were hypothesizing in the situation. Therefore, in that whole facility there could be no religious instruction; there could be no worship and I suggest that there could be no symbols or artifacts of religion and indeed, that is precisely what has taken place in the case at Bar at each of these four institutions.

I suggest to the Court that the participular phrases which form the establishment clause, finally come down to one basic principle: that the Government may not use religion as a standard for action or inaction; that it may not use the criteria to confer a benefit or to impose a burden.

And that this case passes that test.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Williams.

Mr. Pfeffer. You have eight minutes.

REBUTTAL ARGUMENT BY LEO PFEFFER, ESQ.

ON BEHALF OF APPELLANTS

MR. PFEFFER: Thank you, Mr. Chief Justice.

First, I find it necessary to correct a statement made by Mr. Williams. I do so because it's critical to this decision.

Mr. Williams said that the statute requires the institutions to comply with Title VI of the Civil Rights Act of

1964, which forbids all forms of discrimination. And Mr. Williams is in error, because it does not forbid all forms of discrimination. It does permit religious discrimination. It forbids discrimination on race, color or nationality, but it does permit -- the word "religion" was deliberately taken out. It does permit religious discrimination; it does permit the use of Federal funds to finance an institution which discriminates religiously. This is clearly within this case, because, as I pointed out, the difference between Bradfield, the difference in all of the cases is that this case allows an institution to discriminate religiously, to exclude on a religious basis.

I also want to make clear our position. We do not concede any facts other than the fact that the institutions which, in Connecticut or all over the United States, do make a written commitment that in the particular facilities filed they will not teach or practice religion.

We do not agree with Mr. Williams' interpretation of the record below. We have here -- we have prepared charts to show our analysis of the evidence, which to leads to conclusions directly contrary to Mr. Williams. We didn't bring them here because there have been no findings of fact. We don't believe this is a trial court.

There was a great dispute in the court below between what evidence is relevant. We contended that the

evidence which is relevant is that which dealt with the time when the grants to these institutions were authorized by the Government. Most of the testimony, the evidence put forth by Mr. Williams, why we didn't cross-examine -- we objected to it -- dealt with facts which occurred after -- after those grants were authorized, which, after the date of trial and even which were being planned for future implementation.

There are two different institutions in each case. One, when the grant was made, one when the trial was conducted. We contend that the evidence which we presented as of the time when the grant was authorized, did justify a finding of fact that at least one or more of these institutions did exclude students who were not of the requisite faith.

Now, if the Court views that to be a critical fact, as I believe it is, I think the Court is not a trial court. It didn't observe the demeaning of the witnesses. It should, I believe, remand it to determine those facts.

Now, on --

Q Do you think -- may I ask you a question, Mr. Pfeffer. Do you think your argument runs in in any way to a free exercise problem? Supposing the religious organizations were cut out of this statute, and you would concede the power of the Federal Government to subsidize a nonreligious school or you would cut out the religious grants. Do you run into any kind of a free exercise problem on that?

A Well, if we did -- well, let's say, Mr. Justice, that for well over a century and a half every State of the Union, bar none, was guilty of a violation of the freedom of religion of thousands and thousands of people, because never before -- and I repeat again -- before this act do we find a situation where public funds are used to subsidize an institution, educational institution, limited to one sex.(?)

Now, I --

Q Well, you wouldn't deny that the -- suggest also that the establishment clause is so rigid that a legislature may not take notice of free exercise values in terms of a program like this?

A On the contrary, I think the whole constitution must be considered. My argument is, on the contrary, that the history of the struggle for freedom of religion in this country is in a large measure a history against compulsory taxation for religious purposes.

It is ourcontention, on the contrary, that to tax me, a nonCatholic, in order to support an institution which is Catholic --to (undiscernable) --

Now, in respect to the Bradfield against Roberts, that Mr. Williams spoke on, I tried yesterday to distinguish that in the brief, but I think the test could be said to be this, to distinguish Bradfield and other cases: the test is

whether the facility is free-standing or integrated into the totality of a curriculum whereby the same student is exposed to the propagation of religion and the institution has, as its major purpose, to propagate religion to that student.

What I mean by this is that if the services at the hospital are part of a unit which includes inculcation of a religious doctrine and the student and the patient must take both, his treatment for his disease and propagation of religion, that's unconstitutional. That is the situation in this case.

No person can walk off the street and come in and say, "I want to use this chemistry laboratory or this biology laboratory," or "I want to enroll only for this one course." He is a complete student; he must take the whole works, including a course in the propagation of the Catholic religion. That, I believe, is the test.

Now, one word about purpose. We are in this Court because the Congress is a coordinate branch of government; this Court, of course, is bound by the Congress's statement of -- now, I don't believe that is true with respect to states, legislatures, but with respect to Congress. But, it must examine what that purpose is.

Mr. Friedman pointed out that the purpose is to increase enrollment in school, not to give additional facilities to anyone who wants those facilities, but in order to increase enrollment in those schools. And youcan't do it. Congress

said "by making these facilities available to enroll new students.

I submit, in all deference, that taking just one of the institutions, Sacred Heart University, just as an illustration, as an exhibit in this case, its own statement of what its purposes are. On Page 16 it says: Convinced of the necessity of a Catholic education and every letter from all Catholic youth, the Bishop has found that the Sacred Heart University, shortly before the opening of -- announced that Sacred Heart University would be organized. He said it was the conviction of its founder, and -- a major mission of the church can be carried on by the laymen in a Catholic University.

I submit, if a purpose of an institution is to carry out the major mission, the mission of the church, and funds are granted to that institution in order that it can expand its enrollment, I submit --

Q When was the institution founded, Mr. Pfeffer?

A I'm sorry.

Q When was the institution founded by that -- for that purpose?

A It was founded -- in the early sixties.

Q 1960s, 1860s, 1760s?

A 1962.

Q 1962?

A Yes; 1962, shortly before --1962. This is a very new institution.

I thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Pfeffer. Thank you Mr. Williams and Mr. Friedman.

The case is submitted.

(Whereupon, at 10:43 o'clock a.m. the argument in the above-entitled matter was concluded)