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IMPLICATIONS OF THE ALLEN TEXTBOOK DECISION†

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More than a few questions arise from the not entirely satisfactory rationale and reasoning of the majority opinion in the Allen decision.

The questions which will be discussed here include the following:

1) What precisely is the meaning of the terms “sectarian school” or “religious institution” as these notions are used in Justice White’s opinion? If a “sectarian school” teaches secular subjects, is state aid for such teaching permissible regardless of the intimacy of the church-relatedness of the school?

2) What is the prohibition by the Supreme Court of the “inhibition” of religion in McGowan,2 Schempp3 and Allen likely to mean in future decisional law?

3) Does Allen mean that the severe “anti-aid” amendments in a large number of state constitutions are open to challenge as being inconsistent with the establishment clause of the Federal Constitution?

4) Is there an argument that Allen has in effect contributed to the establishment of the “secular” or to the establishment of a form of secularism?

What is a “Sectarian School”?

Justice White was not very clear or cogent when he dismissed the appellants’ case by stating that “we cannot agree . . . either that

† An address before the 91st Annual Meeting of the American Bar Association, Philadelphia, Pennsylvania, August 4, 1968.
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1 Board of Educ. v. Allen, 392 U.S. 236 (1968), wherein it was held that a N.Y. statute requiring public school authorities to lend textbooks free of charge to students in certain grades, including those in private schools, was not violative of the establishment or free exercise clauses of the first amendment when applied to students in parochial schools.
all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." 4 It may be that this conclusion is inevitable if one holds, as Justice White put it, that "this Court has long recognized that religious schools pursue two goals, religious instruction and secular education." 5

This latter conclusion Justice White supports by citing Pierce, 6 a decision which, he asserts, had the premise that "the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters." 7 The use of the term "accompanied" tends to beg the crucial question whether the Pierce decision, by allowing church-related schools to have the enormous state aid available in the truancy laws, did not, in effect, make the further subsidization of sectarian schools inevitable. The fact (which no one wants to acknowledge) is that Pierce gave to Catholic and other religious schools far more aid than was given to these schools in Everson 8 or Allen. Pierce gave to the private and sectarian school a juridical existence and the power to use the truancy laws of the nation to bring Catholic children into a Catholic school for the twelve years of their compulsory schooling.

One could argue persuasively that Pierce gives an enormous benefit to religion and is therefore patently contrary to the "no-aid to religion" interpretation of the establishment clause. If, on the other hand, one desires to retain Pierce but to maintain that Everson or at least Allen was wrongly decided, he must advance a justification for the Pierce result which will make it somehow consistent with the ban, enunciated in Schempp and Allen, of all state action whose "primary effect" is to aid religion. The "primary effect" of Pierce — and indeed perhaps the "primary purpose" of Pierce — was to aid religion.

This is the first and most important dilemma which the Allen decision approached but then avoided. The Allen opinion hinted at the fact that Pierce made Allen inevitable when Allen stated that Cochran 9 was a "corollary" of Pierce. But the Court nonetheless avoided the crucial question: can the state allow a group of parents to opt out of the public school system, create fully accredited schools aided by the state's truancy laws, and then deny that aid which Justice White says is a "corollary" of Pierce?

The majority opinion in Allen seeks to blur the question of the permeation of religion into secular subjects in church-related schools by stating that the public's "continued willingness to rely on private school systems, including parochial sys-

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5 Id. at 245.
7 392 U.S. at 245 (emphasis added).
tems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students." 10 All of this may be so, but it is not responsive to the allegation of the plaintiffs that the textbook law of New York gave aid to Catholic schools in a way inconsistent with the substance and spirit of the establishment clause.

It may be that the Supreme Court will never be able to be very logical or consistent about aid to sectarian schools until it explores the second part of its own definition of neutrality and gives some thought and content to the "inhibition" of religion which the Court condemned in McGowan, Schempp and Allen. Let us then turn to this intriguing concept of the unconstitutionality of governmental "inhibition" of religion.

What is the "Inhibition" of Religion?

It is indeed curious that Church-State literature contains no discussion of the concept of the "inhibition" of religion which the Supreme Court made an essential part of its notion of governmental neutrality between religion and irreligion. The word "inhibition" is not a legal term. In its dictionary definition it means "any impediment to free activity, expression or functioning, — especially any psychical activity imposing restraint upon another activity."

Almost any activity of the state in the field of secular education could be deemed to be an inhibition of religion and to constitute at least some "psychical activity imposing restraint" on the forces of religion. But the 36 lawsuits now pending in 12 federal and 24 state courts dealing with tax support to religiously affiliated schools do not raise the "inhibition" prohibition. These suits are all brought by plaintiffs who seek to demonstrate that certain financial grants to church-related schools constitute an impermissible "advancement" of religion.

The meaning of the prohibition of the "inhibition" of religion may well be the next crucial issue in establishment cases. The Supreme Court in banning both the advancement and the inhibition of religion meant to clarify that "wholesome neutrality" which the Court adopted as its interpretation of the establishment clause. But the "inhibition" of religion which the Court forbade has not yet been the subject of even dicta in decisions dealing with the establishment doctrine.

Even a casual inspection of the number of occasions when the Supreme Court has reiterated its "no advancement — no inhibition" test, in McGowan, Schempp and Allen, indicates that the widely held notion that the establishment clause has been construed to mean "no-aid-to-religion" is a distortion of what the Court has said.

The amazing silence about the implications of the Court's prohibition of any state action whose "primary effect" is the "inhibition" of religion may be explainable in part by the posture of contemporary Church-State cases. Despite the "no-aid" orientation of the moving parties in the pending 36 lawsuits, however, decisional law may soon be ex-

pounding on the enormous ramifications of the Supreme Court's interdiction of any "inhibition" of religion.

The "inhibition" of religion which has been condemned by the Court as unconstitutional does not refer to any infringement of the free exercise of a person's religion. A long line of Supreme Court decisions on the free exercise clause has amply demonstrated the thrust of that guarantee. The "inhibition" which is forbidden relates to any pattern of governmental conduct which has either as its primary purpose or its primary effect the inhibition of institutionalized religion. Any other interpretation of the "no advancement—no inhibition" test seems impossible.

When, then, does the state "inhibit" religion? It is submitted that any law which creates serious difficulties for church-related groups in their attempts to integrate the sacred and the secular in a system of education is arguably "an inhibition" of religion and consequently a violation of the establishment clause.

It may be urged in reply to this contention that the Court did not say that religion has to be subsidized in order to prevent its "inhibition." While this assertion is true, the fact remains that the Court, while clearly forbidding aid to religion, also firmly held that the vast power of government may not discourage, impede or even, in a remarkably strong word, "inhibit" religion. If the parents and patrons of parochial schools contend that the government must give further aid to church-related schools because otherwise the state is inhibiting religion, their contention has more cogency than may appear at this time.

It should be noted that the ban on governmental "inhibition" of religion goes further than any previous test set forth by the Supreme Court. It is broader than the distinction used in the polygamy cases to the effect that the right to religious belief is absolute but that the right to act upon religious belief is not. The "inhibition" norm, moreover, would seem to be more sweeping than the test of direct and indirect restraints on religious exercise employed by the Court in some of the cases involving Jehovah's Witnesses.

The inhibition test may be the critical norm in the emerging struggle over the constitutionality of the severe "anti-aid" amendments which exist in the constitutions of several of the states. The impact of Allen on these provisions deserve exploring.

Can State "Blaine Amendments" Survive Allen?

It is somewhat anomalous that there has been little if any protest over the fact that Congress has on several occasions "subverted" the "anti-aid" amendments of several state constitutions by allowing sectarian groups within these states to apply directly to Washington for their share of aid. This practice started in 1946 with the National School Lunch Act. The most recent example of it is the 1965 Elementary and Secondary School Assistance Act (ESEA) which allows parochial schools to request and receive Federal aid, even though the reception of such aid is specifically contrary to the constitution of the state in which the school is located.

The Allen decision, by validating aid for the secular aspects of sectarian
schools, clearly raises the question of the constitutionality of those state prohibitions of any aid to a fully accredited school simply because, to cite some typical language, it is "directly or indirectly under the control of a religious body." To be sure, Allen made no specific finding as to the over-all question of permeation. It simply stated that in the case before the Court no proof of permeation existed. But the thrust of Allen is that the state cannot have it both ways: the state cannot permit the church-related school to substitute for a public school for the purposes of the secular education required of all young Americans while at the same time the state condemns that school a priori as a sectarian institution disqualified for any share of that governmental assistance given to other schools at which children can fulfill their legal obligations under the truancy laws.

The Allen decision raises, in other words, the fundamental policy question of what ideology or orientation or philosophy the government in America may or must endorse and/or support in its schools. The nineteenth century "anti-aid" amendments adopted the policy of giving support only to the secular public school. Oregon in 1923, by a popular referendum, voted to push this policy to its logical extreme and to outlaw all non-public schools. The Pierce decision reversed this referendum and held that private schools have a constitutional right to exist. Everson and Allen have ruled that states may, if they so desire, aid those private schools which they cannot constitutionally refuse to license.

The crucial question remains: does the Pierce-Everson-Allen rationale mean that a state cannot consistently and/or constitutionally prefer public schools over private schools? Does a state have the right to "use" church-related schools for the purposes of compulsory education and yet deny them all aid except their juridical existence? Does the mere presence of an affiliation with a church on the part of an elementary or secondary school justify a denial of aid to the pupils who attend these schools?

The Allen decision, like the Pierce ruling, indulges in answers without questions and leaves the juridical status of the non-public, religiously affiliated school to the mercy of state legislatures where the century-old ban on aid to denominational schools impedes creative thought. The Allen decision means in effect that the religious orientation of the electorate is likely to be more significant than any reasoned approach to the complex question of the role of the state vis-a-vis the types of education which it demands or allows all children under 16 to acquire.

It is submitted that the Allen decision severely undercuts the validity of "Blaine Amendments" at the state level and that states, pursuant to the Allen rationale "that parochial schools are performing, in addition to their sectarian function, the task of secular education," may not refuse all aid to these schools merely because of their religious affiliation. At least, states may not do so until or unless there is proof of that permeation—not found by the majority of the Court in Allen—which would convert secular education into sectarian indoctrination.

This question leads us to our fourth inquiry: can the Allen decision be said
to constitute an establishment of the secular or of secularism?

**Does Allen Establish Secularism?**

It is somewhat disconcerting, to say the least, for advocates of aid of church-related schools to be characterized in Justice Black's dissent in *Allen* as follows:

The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion.11

The *Christian Century*, a Protestant weekly, stated in its July 17, 1968 issue that Justice Black’s “vehement” dissent “could be interpreted as anti-Catholic.” Transmitting this allegation it must be conceded that the “sectarian religious propagandists” who think that “sectarian religious purposes” should be carried on in school have at least a right to have their aims stated more clearly and more fairly in a Supreme Court opinion.

If Mr. Justice White blandly assumes that there is no permeation by the sectarian of the secular in Catholic schools, Mr. Justice Black assumes the opposite—that the “religious sectarian purposes” of a Catholic school permeate all of its secular teaching.

The question as suggested by Justice White and Justice Black assumes that there is a form of secular education which is neutral as between religion and irreligion and that the government in its schools may transmit this form of secular education without being involved in either the “advancement” or the “inhibition” of religion. This assumption is based on the supposed neutrality of the public school as it exists today. But can this assumption stand up against the convictions of the parents of every eighth child in America? The parents of these six million children who are in church-related schools (92% of them in Catholic schools) assert that the public school by emphasizing only the secular and eliminating the scriptural sacred and even spiritual aspects of Western culture presents a distortion of the total reality of life and thereby inhibits religion and thus establishes secularism.

These parents to be sure have received in *Allen* a small amount of relief in the financing of their church-related schools. But it is relief which gives a new centrality to the public school in that the textbooks chosen must be approved as “secular” and not “sectarian” by public school officials. The textbooks must, in other words, be thoroughly conformable to the secular orthodoxy of the public school.

Justice Douglas, dissenting in *Allen*,12 contributes unwittingly by his shrill rhetoric to the cogency of the contention that the *Allen* decision has apotheosized the secular and to that extent has violated the establishment clause. Justice Douglas in a series of examples has stated by clear implication that any theistic interpretation of anthropology or of biology

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11 *Id.* at 251 (dissenting opinion).

12 *Id.* at 254 (dissenting opinion).
could not be communicated in a public school. But Justice Douglas has not even noticed the case which he has built, a case which demonstrates that the public school, as he envisions it, is \textit{not} neutral and is \textit{not} impartial as between religion and irreligion. It is, in Justice Douglas' own words, pervasively secular and non-theistic.

If one starts with the assumption that the public secular school as it exists today is perfectly neutral and not biased in favor of the secular as against the sacred, one is merely canonizing the orthodoxy of the public school. To say that this type of orthodoxy is the one constitutionally permissible philosophy which the government may assist and advance is at best a highly debatable proposition.

Justice Fortas appears to have accepted the prevailing idea that textbooks chosen by public school officials will be secular and therefore neutral with respect to religion. Justice Fortas, although dissenting, would apparently have validated the New York textbook law if the books to be loaned to private school students were the same books as public school children used. Such an arrangement would probably not result in anything substantially different from the results of the existing law except that the centrality and the exclusive legitimacy of the public school would have been further enhanced.

The assumption that the modern-day public school neither advances nor inhibits religion is a premise of each of the four opinions in the \textit{Allen} case. It is an assumption widely held in American society. Any suggestion that it is misleading and even false immediately elicits the retort that the state cannot aid religion. But such a retort completely misses the point of those who say that the public school, by highlighting the secular as the exclusively important reality of life, thereby downgrades the sacred, abandons a position of neutrality between religion and irreligion and, in violation of the substance and the spirit of the First Amendment, literally "establishes" a secular or non-sacred form of religion.

Those persons whose religious faith does not radiate itself into secular culture are usually unable to see any establishment of a non-sacred orthodoxy in the public school. But for those adherents of faiths such as Orthodox Judaism, Catholicism and some Protestant denominations to whom a fusion of the sacred and the secular is a religious imperative the public secular school is an institution which is inconsistent with their basic viewpoint of reality.

American law has not yielded to these individuals but has perpetrated a cultural monism and a secular orthodoxy in the public school. The ideology behind that secular orthodoxy may be rooted in Judaeo-Christian morality but it is today separated from that morality. The ideology or orthodoxy of the public school may communicate moral and spiritual values acceptable to most non-religionists and to some religionists in America. But the wide acceptance of the public school should not be a reason for a policy which gives aid to dissenters only by strengthening the centrality of the public school and

\footnote{Id. at 269 (dissenting opinion).}
by insisting that the secular learning it imparts and the secular textbooks it utilizes are so neutral that they cannot advance or inhibit religion. Such a view is naive, unrealistic and a further confirmation of the cogency of the contention that the public school establishes a religion or a non-religion in a way forbidden by the first amendment.

Judge Van Voorhis, dissenting in the New York Court of Appeals in the Allen case, urged that the New York textbook law was unwise because it would put secular books into religious schools and thereby lead to state domination of the church. A curious argument, to be sure, but one which raises the central issue underlying the Pierce-Cochran-Everson-Allen line of decisions. That issue might be phrased as follows: What interpretation of the establishment clause permits the state to claim that all of education at the primary and secondary level belongs exclusively to the government?

It is submitted that the decisions from Pierce to Allen have been correct in their results but that their reasoning has not faced up to the fact that the monopoly which the public school has on tax funds and the centrality it enjoys as the dispenser of a secular or non-sacred orthodoxy constitute a massive inhibition of religion and an unconstitutional establishment of secular values.

14 CATHOLIC LAWYER, AUTUMN 1968