

ARTICLE

THE POLITICAL THEOLOGY OF JUSTICE HUGO BLACK

BRETT BERTUCIO 

Doctoral Candidate, School of Education, University of Wisconsin–Madison

ABSTRACT

Associate Justice Hugo Black is often considered one of the giants of twentieth-century American religion clause jurisprudence. Especially regarding the Establishment Clause, Black sought to leave his mark on precedent. Previous biographers and legal scholars have noted the influence of his own religious convictions on his legal reasoning. I extend this line of inquiry but argue that Black’s decisions enshrine a more concrete, substantive view of religion and political life than has previously been acknowledged. By drawing primarily on archival research regarding Justice Black’s reading, correspondence, and religious membership, I argue that we can best understand his religious thought as a species of political theology, one I term *syncretic civic moralism*. In brief, Justice Black viewed the ideal religion as one free of doctrinal claims and primarily supporting prosocial behavior and civic loyalty. After outlining the impact of his theology on his landmark opinions, I conclude by suggesting some of the consequences of Black’s theo-political jurisprudence for contemporary American establishment debates.

KEYWORDS: Establishment Clause, religious freedom, judicial philosophy, political theology, legal history, Hugo Black

INTRODUCTION

If we are to understand the origins of modern Establishment Clause jurisprudence, we should first look to the thought of Justice Hugo Black. Black’s majority opinions in *Everson* (1947), *McCollum* (1948), *Torcaso* (1961), and *Engel* (1962) established a general framework that still governs the Supreme Court’s approach.¹ Even the Rehnquist Court, which worked to weaken the principles

1 James Hitchcock, *The Supreme Court and Religion in American Life*, vol. 1, *The Odyssey of the Religion Clauses* (Princeton: Princeton University Press, 2004), 90–98; James Hitchcock, *The Supreme Court and Religion in American Life*, vol. 2, *From “Higher Law” to “Sectarian Scruples”* (Princeton: Princeton University Press, 2004), 61. *Everson v. Board*, 330 U.S. 1 (1947); *McCollum v. Board*, 333 U.S. 203 (1948); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Engel v. Vitale*, 370 U.S. 421 (1962). In *Everson*, a 5–4 Court upheld a New Jersey program that reimbursed parents of both public and private school students for public bus fares. Many of the recipients sent their children to Catholic parochial schools. The case was the first to apply the Establishment Clause of the First Amendment to the states under the 14th Amendment. *McCollum* struck down an Illinois “released time” program

established by Black, took *Everson's* assumptions for granted.² One of the latest Establishment Clause cases to appear before the Court, *Trinity Lutheran v. Comer* (2017), cited *Everson* as precedent.³ If we are to sufficiently understand Black's thought in this area, I argue, we must explore his theological convictions.

There is strong evidence to suggest that Black purposefully sought to make the Establishment Clause his own. He clamored to write majority opinions in landmark establishment cases. His forceful presence in conference and refusal to cede ground, especially in deliberations on *McCullum*, gave Black a disproportionate influence.⁴ One biographer went so far as to describe him as a "compulsive winner."⁵ Once victorious, Black fought to solidify his position. He quoted his own definition of the Establishment Clause from *Everson* in *McCullum* and *Torcaso* and was rewarded when Justice Clark affirmed his definition in *Abington v. Schempp* (1963).⁶ While he is remembered as a famously principled justice,⁷ there is reason to suspect that Black's Establishment Clause jurisprudence carried hints of his private convictions. As he confessed to one of his clerks, "A wise judge chooses, among plausible constitutional philosophies, one that will generally allow him to reach results he can believe in."⁸

By incorporating the Establishment Clause in *Everson*, Black opened the door to constitutional challenges and issues that had few historical precursors. As Justice Jackson admitted in *McCullum*, the lack of firm precedent in this new area meant that justices were ruling according to their "own prepossessions."⁹ These "prepossessions" invariably included normative theological ideas. As threatening as this notion may be to the legal order of liberal democracies, it seems impossible for judges to escape their own religious worldviews, as Howard Kislowicz has recently noted in

whereby Protestant, Catholic, and Jewish religious leaders were given classroom time and space to conduct religious education during the school day. Black's decision in *Torcaso* invalidated a Maryland law requiring public officials to declare a belief in God to be eligible for office. His decision in *Engel* struck down a New York law requiring public school teachers to begin the school day with a composed "nonsectarian" prayer. The prayer read, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country. Amen."

2 Hitchcock, *The Supreme Court and Religion in American Life*, 2:10, 13–15.

3 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). This case involved the state of Missouri's decision to exclude a Lutheran preschool from participation in a grant program that provided tire scraps for use in playgrounds. The Court ruled that the school's religious affiliation could not bar it from participation.

4 Roger K. Newman, *Hugo Black: A Biography* (New York: Fordham University Press, 1997), 521; Howard Ball, *Hugo L. Black: Cold Steel Warrior* (New York: Oxford University Press, 1996), 128–29. Several of Black's colleagues eventually backed down from critiques of the *McCullum* decision. Harold Burton to Hugo Lafayette Black, undated memo, box 295, folder 2, Hugo Lafayette Black papers, 1883–1976, Library of Congress. Subsequent archival references are cited as "Black papers," and correspondence with Hugo Black are signified by his initials, "HLB." Felix Frankfurter to HLB, February 11, 1948; HLB to F. Frankfurter, February 12, 1948. Black papers, box 295, folder 2.

5 Gerald T. Dunne, *Hugo Black and the Judicial Revolution* (New York: Gallery Books, 1978), 20.

6 *Everson*, 330 U.S. at 15–16; *McCullum*, 333 U.S. at 210; *Torcaso*, 367 U.S. at 492–93; *School District of Abington Township v. Schempp*, 374 U.S. 203, 216 (1963). The *Schempp* ruling, which came one year after the *Engel* case, struck down a Pennsylvania law requiring public schools to begin the day with the reading of at least ten verses of the Bible, without comment.

7 Everette E. Dennis, Donald M. Gillmor, and David L. Grey, eds., *Justice Hugo Black and the First Amendment: "No Law" Means "No Law"* (Ames: Iowa State University Press, 1978).

8 Newman, *Hugo Black*, 435.

9 *McCullum*, 333 U.S. at 238. On the rather "personal" nature of mid-century religion clause cases, see [Samuel A. Alito, Jr.], "The Released Time Cases Revisited: A Study of Group Decisionmaking by the Supreme Court," *Yale Law Journal* 83, no. 6 (1974): 1202–36.

the pages of this journal.¹⁰ Black seems to have been aware of the inevitability of theologically inflected jurisprudence when he admitted in *West Virginia v. Barnette* (1943), “Decisions as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court.”¹¹ Phillip Hamburger, Barbara Perry, and even Jay Sekulow have taken the Justice at his word and examined Black’s personal theology for deeper insights into his jurisprudence.¹² Here I take a similar approach. By drawing on archival material and utilizing the theoretical framework of political theology, I argue that Black’s decisions enshrined a more concrete, substantive view of religion and political life than has previously been acknowledged.

I begin with a synthesis of previous biographical and legal analyses of Black’s religious thought. After summarizing patterns of Black’s early religious life, I draw on the Justice’s reading, correspondence, and involvement with Washington’s All Souls Unitarian Church to argue that we can best understand his religious thought as a species of political theology, one I term “syncretic civic moralism.” After establishing the principles of what I take to be Black’s coherent—as opposed to tentative or agnostic—theology, I examine how his personal thought became enshrined in law. I conclude by illuminating the consequences of Black’s theo-political jurisprudence for recent American establishment debates regarding education.

POLITICAL THEOLOGY AS ANALYTICAL FRAMEWORK

The language of political theology is particularly suited to analysis of Black’s religious thought and Establishment Clause jurisprudence. While the definition of the field is frequently contested, political theology is generally concerned with understanding how theological commitments shape visions of political life. Joshua Hawley has recently called for a renewal of political theology in legal analysis.¹³ Daniel Conkle and John Witte, Jr. and Joel Nichols have fruitfully analyzed the theological underpinnings of establishment in the early republic in order to understand the religion clauses, and Richard Garnett has taken a similar approach in regard to the late nineteenth-century Blaine Amendments.¹⁴ The field’s recent popularity arguably originated in a rediscovery of German

10 Howard Kislowicz, “Judging Religion and Judges’ Religions,” *Journal of Law and Religion* 33, no. 1 (2018): 42–60.

11 *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 644 (1943) (Black, J., concurring). The *Barnette* ruling reversed an earlier decision, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). The *Gobitis* case was brought by Pennsylvania Jehovah’s Witnesses who asked that their children be excused from mandatory flag salute exercises at school. When the Court ruled against them, public outcry led a slightly different set of justices to reverse the ruling a mere three years later.

12 Phillip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2004); Barbara A. Perry, “Justice Hugo Black and the ‘Wall of Separation Between Church and State,’” *Journal of Church and State* 31, no. 1 (1989): 55–72; Jay Alan Sekulow, *Witnessing Their Faith: Religious Influence on Supreme Court Justices and Their Opinions* (New York: Rowman & Littlefield, 2006). Black was reticent to release his personal papers for public use, as future historians might be tempted to misconstrue certain decisions. No doubt, his quarrel with Sidney Ulmer over the use of Justice Harold Burton’s conference notes in accounts of the *Brown* deliberations made him suspicious of academic interpreters. Black eventually burned many of his own conference notes. His children called the bonfire event, “Operation Frustrate the Historians.” See Jill Lepore, “The Great Paper Caper,” *New Yorker*, December 1, 2014; Hugo Black, Jr.: *My Father: A Remembrance* (New York: Random House, 1975), vii. I approach this article with the assumption that knowledge of a justice’s personal views will illuminate rather than cloud our understanding.

13 Joshua D. Hawley, “Return to Political Theology,” *Notre Dame Law Review* 90, no. 4 (2015): 1631–62.

14 Daniel O. Conkle, “The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future,” *Indiana Law Journal* 75, no. 1 (2000): 1–36; John Witte Jr. and Joel A. Nichols,

theorist Carl Schmitt's 1922 *Political Theology: Four Chapters on the Concept of Sovereignty*.¹⁵ Schmitt's aphorism, "All significant concepts of the modern theory of the state are secularized theological concepts," has inspired scholarship examining the religious roots of contemporary democracy.¹⁶ Some, like Mark Lilla, describe political theology as the project of those who seek to model the state on religious principles. Paul Kahn's approach, like Schmitt's, argues that theology is not imposed by partisans onto political life, but rather that "the state is not the secular arrangement it purports to be."¹⁷ Others take the heart of the field to be theological assessments of the justice or injustice of political arrangements. Still others may include any overlap of religion and political life in its domain.¹⁸

Here I take Kahn's decidedly descriptive approach to argue, *contra* Lilla, that precisely in the purported attempt to insulate political life from religious factionalism, Hugo Black succeeded in enshrining a particular normative notion of religion into constitutional law. In examining his background and attitudes, "political theology" most accurately describes Black's religious views. His lone legal monograph, *A Constitutional Faith*, mixed religious and legal language to define his deepest commitments.¹⁹ On several occasions, he sacralized circuit court meetings with scripture readings. One biographer remarked that Black saw democracy as "Protestantism in its secular form."²⁰ Finally, as I argue, the Unitarianism surrounding Black constituted a particularly *political* theology—one that might be described as inverting Lilla's conception. For the ministers of All Souls, their congregants, and Justice Black, faith was comprised primarily of shared political principles and a normative vision of religion as subsumed (in Rousseauian fashion) under the modern liberal state.

PREVIOUS PORTRAYALS OF HUGO BLACK'S RELIGIOUS THOUGHT

Biographers have consistently connected Black's religious upbringing and views to his legal opinions. Virginia Van der Veer Hamilton and Gerald Dunne have noted the anti-Catholicism pervasive in Black's Alabama upbringing, his 1926 Senate campaign speeches, and his comments to family

Religion and the American Constitutional Experiment, 4th ed. (New York: Oxford University Press, 2016), 24–40; Richard Garnett, "The Theology of the Blaine Amendments," *First Amendment Law Review* 45, no. 2 (2004): 45–84. Eric Gregory provides a helpful four-part typology of approaches in political theology. He distinguishes between studies of religious influence on politics, investigations into the theological underpinnings of political theory, theological reflections on the place of political movements in salvation history, and ethnographic examinations of the fluidity between democratic and religious practices. These works might fall under the first of the four strands in Gregory's typology. My approach falls into the second category. See Eric Gregory, "Christianity and the Rise of the Democratic State" in *Political Theology for a Plural Age*, ed. Michael Jon Kessler (New York: Oxford University Press, 2013), 99–107, at 99–101.

15 The introduction of Paul Kahn's new work offers an excellent summary of the career of Schmitt's work and its recent reception. See Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011); Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005).

16 Schmitt, *Political Theology*, 35, cited in Kahn, *Political Theology*, 1. For example, see Mark Lilla, *The Stillborn God: Religion, Politics, and the Modern West* (New York: Alfred A. Knopf, 2007); William T. Cavanaugh, *Migrations of the Holy: God, State, and the Political Meaning of the Church* (Grand Rapids: Eerdmans, 2011).

17 Kahn, *Political Theology*, 18.

18 Gregory, "Christianity and the Rise of the Democratic State," 99–101.

19 Hugo Lafayette Black, *A Constitutional Faith* (New York: Alfred A. Knopf, 1968).

20 Newman, *Hugo Black*, 521.

members. For the Justice, the Catholic hierarchy represented opposition to the Enlightenment free-thinkers he admired.²¹ Others, like Roger Newman and Howard Ball, have highlighted Black's conviction that religion should be an intensely private matter, free from external influence. His dissent in *Zorach v. Clauson* (1952) insisted that schools be completely separate from religious bodies.²² His assertion in *Engel* that "religion is too personal, too sacred, too holy" to permit civil interference was affirmed by an extemporaneous comment at the decision reading, in which the Justice declared, "[t]he prayer of each man from his soul must be his and his alone."²³

Steve Suits makes perhaps the clearest connections between Black's theology and his politics. In his childhood, Black witnessed the Harlan, Alabama Primitive Baptist Church attempt to publicly discipline both his father and his uncle for alcoholism. These episodes, as well as his father-in-law's exile from the Presbyterian hierarchy for heterodox opinions, led Black to fear the coercive power of organized religion. In early adulthood, he looked to historical Baptist theology as the origin of American civil liberties and saw religion's highest purpose as forming citizens.²⁴ In a similar vein, Newman notes that Black saw explicit connections between democratic government and Protestant principles and was quick to connect the Establishment Clause to historical narratives of religious persecution. As Black told his nephew, "All of my religious decisions are influenced by what happened to our Toland ancestors in Ireland."²⁵ His aversion to organized religion and a comment recorded by his son, Hugo Jr. — "I cannot believe. But I can't not believe either" — have led biographers to characterize the Justice as agnostic and uninterested in theology.²⁶ I argue, to the contrary, that Black's reading patterns, conversations, and correspondence demonstrate a keen interest in theology, albeit a theology that dogmatically rejected anything resembling traditional dogma.

Legal scholars, especially those critical of modern religion clause jurisprudence, have argued that Black's Establishment Clause decisions ironically constitute the establishment of his own religious views. Barbara Perry has argued, "Black's personal religious heritage and attitudes may well have served as the most formative components of his nearly unanimous record in religious establishment cases."²⁷ In her account, Black's religious thought was marked primarily by its similarity to Thomas Jefferson's. In practice, this meant that *Everson* and *Engel* defined religion as an eminently private practice, free from both governmental and ecclesiastical coercion.²⁸

While Perry contends that Black abandoned many of the tenets of his Baptist upbringing, Jay Sekulow argues that the Justice enshrined Baptist notions of separationism into law. In a 1970 interview with a graduate student, Black commented that the Baptist faith of his childhood was the most important influence in his legal career. The traditional Baptist position on church-state relations is reflected not only in Jefferson's famous 1802 letter to the Danbury Baptists, from which Black drew his "wall of separation" metaphor, but in Black's brief involvement with the

21 Virginia Van der Veer Hamilton, *Hugo Black: The Alabama Years* (Baton Rouge: Louisiana State University Press, 1972), 74–78; Dunne, *Hugo Black and the Judicial Revolution*, 268.

22 *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (Black, J., dissenting). This case dealt with a New York "released time" program. Unlike the Illinois program in *McCullum*, the New York program allowed students to leave school grounds for religious instruction during the day. The Court voted 6–3 to uphold the program.

23 *Engel v. Vitale*, 370 U.S. 421, 432 (1962). See Newman, *Hugo Black*, 521–23.

24 Steve Suits, *Hugo Black of Alabama: How His Roots and Early Career Shaped the Great Champion of the Constitution* (Montgomery: NewSouth Books, 2005), 43–50, 111–12, 220–31, 457.

25 Newman, *Hugo Black*, 365, 521.

26 Hugo Black, Jr., *My Father*, 172; Newman, *Hugo Black*, 521.

27 Perry, "Justice Hugo Black and the 'Wall of Separation between Church and State,'" 60.

28 Howard Ball also points to the Jeffersonian characteristics of Black's thought. See Howard Ball, "Hugo Black: A Twentieth Century Jeffersonian," *Southwestern University Law Review* 9, no. 1 (1977): 1049–68.

Southern Baptist Convention's Committee on Public Relations. Upon his nomination to the Supreme Court in 1937, Black had to leave the commission just before it released a statement condoning strict separationism. For Sekulow, Black's separationist position thus constitutes an establishment of Baptist theology. Sekulow also helpfully points to the influence of A. Powell Davies, pastor at All Souls Unitarian Church in Washington, DC. He concludes that the combination of Black's Baptist and Unitarian leanings led the justice to introduce strict separation, the "secular purpose" doctrine, and the possibility of government neutrality into jurisprudence.²⁹ I offer somewhat related arguments here but contend that instead of opening the possibility of "neutrality" in state action, Black's thought is best read as a positive theology of the state and civic life.

Phillip Hamburger has treated Black in a similar way, although he sees Justice Black's thought as only one expression of a broader establishment of liberal Protestantism.³⁰ Similarly, we might view mid-twentieth-century jurisprudence as an extension of the nineteenth-century nondenominational Protestant "moral establishment" described by David Sehat.³¹ My argument here fits well within existing "establishment thesis" scholarship but contends that Black enshrined a more distinct and personal theology into law. While the Justice was certainly influenced by particular aspects of his Baptist heritage, he melded this with the Unitarianism he discovered in mid-century Washington. The Unitarian tradition offered a more powerful, prescriptive understanding of the end of political life and therefore was more congenial and influential to his own "constitutional faith."

In adopting a species of this argument, I am aware that it risks a certain facetiousness. As Justice O'Connor warned in *Elk Grove v. Newdow* (2004), the Establishment Clause should not be a tool of the "heckler's veto."³² Here my intention is not to heckle the law itself. Rather, I am convinced that understanding the theological roots of Establishment Clause jurisprudence might help us better navigate a legal landscape which scholars have variously termed "impossible" and a "tragedy."³³

While his preeminent biographer, Roger Newman, has portrayed the Justice as ambivalent or skeptical about religious matters, a good deal of evidence suggests otherwise. Consistent with his attitude in other areas of life—politics, romance, finance, philosophy, and law—Hugo Black held firm religious opinions informed by wide reading.³⁴ He declared his favorite books to be the

29 Sekulow, *Witnessing Their Faith*, 209–33.

30 See generally Hamburger, *Separation of Church and State*, 422–75.

31 David Sehat, *The Myth of American Religious Freedom* (New York: Oxford, 2010), 6. As I explain later, my thesis directly contradicts Sehat's contention that the Vinson and Warren Courts represented a reprieve from the "moral establishment."

32 *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring). In this case a California man objected to the recitation of the Pledge of Allegiance in public schools, because it contains the words "under God." Justice O'Connor was concerned that suits might be brought in objection to any trace of religion in public life. While I am aware that merely a trace of religious thought in a justice's jurisprudence should not be cause for alarm, I believe Black's case is an exceptional one.

33 Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005); Marc O. DeGirolami, *The Tragedy of Religious Freedom* (Cambridge, MA: Harvard University Press, 2013). I discuss the relevance of this study to Sullivan's and DeGirolami's work in the concluding section.

34 Black's correspondence and conversations with his eldest son, Hugo Jr., contain innumerable words of advice regarding romantic relationships and personal finance. See Black papers, box 3, folders 1–5; box 4, folders 1–2. His notoriety as an autodidact impressed both his clerks and colleagues in the Senate and on the Court. Newman, *Hugo Black*, 125–26, 200–01, 415, 445–46; Daniel John Meador, *Mr. Justice Black and His Books* (Charlottesville: University Press of Virginia, 1974), 1–8.

Bible and John Bunyan's *Pilgrim's Progress*.³⁵ His personal library was filled with popular titles on religion, and he recommended works to religious seekers. He engaged in principled theological arguments, whether with angry correspondents or strangers on the street. We might then take Black's religious ideas as constituting a coherent—albeit uniquely personal— theology, the contours of which are revealed through his upbringing, reading, relationships, correspondence, and conversations.

ALABAMA LIFE: EARLY CHURCH MEMBERSHIP AND THE KLAN

Schmitt's assertion that theological ideas are eventually transformed into secular political principles found expression in Black's life. His earliest religious opinions would later animate his interpretation of constitutional principles. As Steve Suits has noted, his horror at the public shaming of his father and uncle at the hands of the Primitive Baptist Church led young Hugo to distrust religious authority.³⁶ However, this did not result in an antipathy toward religion, but rather a distinct pattern of religious membership. As a child, Black attended both Methodist and Baptist Sunday Schools.³⁷ Upon his arrival in Ashland, Alabama, in 1906, the young lawyer sought out the local Baptist minister to discuss his potential membership:

I went to the Pastor of the Baptist Church, told him I was sure my mother would have wanted me to join that church, and sought his advice. I did so because as an applicant for church membership I did not want to be publicly required to confess a religious faith greater than I had, nor did I intend to follow the custom of pretending that I had been a heavy sinner simply because I had sometimes played cards or danced. The preacher and I easily agreed, and I became a member of the church.³⁸

Upon his move to Birmingham one year later, Black established a similar arrangement with Birmingham First Baptist pastor Alfred Dickinson. He soon began to teach the "Baraca Sunday School Class" for young men. When Hugo Jr. later questioned how his father reconciled selective belief with a teaching position, Black replied, "All I did was teach the Bible in Alabama; those parts I selected, I taught. I didn't have to go listen to the preacher."³⁹ When his first wife Josephine, a Presbyterian, felt out of place at the church, Black simply skipped Sunday services and continued leading the class.⁴⁰ Thus while his pattern of membership was rather unorthodox and radically individualistic, it did not prevent Black from leadership in the church. The pattern would become something of an ideal of religious involvement when Black moved to Washington, DC. His sons attended a Methodist Sunday School, while he became loosely involved with All Souls Unitarian Church.⁴¹

35 Hugo Lafayette Black and Elizabeth Black, *Mr. Justice and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black* (New York: Random House, 1986), 21.

36 Suits, *Hugo Black of Alabama*, 50.

37 Black and Black, *Memoirs*, 8; Suits, *Hugo Black of Alabama*, 60.

38 Black and Black, *Memoirs*, 21.

39 Black Jr., *My Father*, 175; Black and Black, *Memoirs*, 33. Baraca Philathea, or simply "Baraca," was an ecumenical movement founded by Baptist pastor Marshall Hudson in Syracuse, New York, in the 1890s. Through Bible study programs, Hudson sought especially to evangelize young men. For a history of the movement, see Ann Elizabeth Olson, *A Million for Christ: The Story of Baraca Philathea* (Hamilton: Gordon-Conwell Theological Seminary, 2004).

40 Suits, *Hugo Black of Alabama*, 406.

41 Black Jr., *My Father*, 172. Howard E. Wahrenbrock to HLB, March 5, 1959. Black papers, box 53, folder 5.

Much has been made of Black's involvement in the Ku Klux Klan during his Alabama years. He joined the Klan in Birmingham in 1923, and his tour of Alabama Klaverns was crucial to his victory in the 1926 senate race.⁴² When the *Pittsburg Post-Gazette* uncovered details of his membership soon after his appointment to the Supreme Court in 1937, Black took to the radio to excuse his involvement as born of political expediency. Many biographers turn a somewhat sympathetic ear to this narrative. Black's history of legal advocacy for African Americans in Birmingham and the fact that in 1923 the Klan claimed 50,000 Alabaman members give some credence to his explanation.⁴³

Yet there is good reason to believe that as regards religion, Black adhered to Klan principles. After his radio address, a Birmingham friend alleged that Black had openly expressed his sympathy with the Klan's values during a golfing outing years after his Senate victory.⁴⁴ Yet another suggested that Hugo should openly admit the appeal of an organization that seemed "a tremendous power for good . . . a balance wheel against all the foreign 'isms' that afflict the United States."⁴⁵ Black's audience would have recognized both this suggestion and Black's comment that the *Post-Gazette* story was "a planned and concerted campaign . . . which fans the flames of prejudice" in part as a caution against the rising political power of American Catholics.⁴⁶ It seems the primary appeal of Klan membership for Black was the organization's strident anti-Catholicism. As his son Hugo Jr. remembered, "The Ku Klux Klan and Daddy, so far as I could tell, only had one thing in common. He suspected the Catholic Church."⁴⁷

While Black's record as a Birmingham lawyer included legal work in defense of African Americans and friendships with prominent Jews, it also gave evidence of anti-Catholic prejudice. In 1921, Black defended a Methodist minister, the Reverend Edwin Stephenson, who was charged with murdering a Catholic priest, Father James Coyle. Stephenson's daughter Ruth had married Pedro Gussman—a Puerto Rican and a Catholic—without her father's permission. Father Coyle had officiated at the private ceremony. On the evening of his daughter's marriage, Reverend Stephenson walked to Saint Paul's Church and found Father Coyle sitting on the rectory porch. A brief struggle ensued in which Stephenson shot and killed the priest.⁴⁸ Black's successful defense, which was funded by the Alabama Klan, relied not only on racial animus but on fears of Catholic influence. His closing remarks aimed to justify Stephenson's outrage by appealing to tropes of Catholic prelates as authoritative manipulators: "Because a man becomes a priest does not mean that he is divine. He has no more right to protection than a Protestant minister. Who believes Ruth Stephenson has not been proselytized? A child of a Methodist does not suddenly depart from her religion unless someone has planted in her mind the seeds of influence."⁴⁹ As if to ensure his meaning was clear, Black recited selections from an official Klan prayer to call the jury to the solemnness of their duty.⁵⁰

The Klan's specifically religious dimensions are often understated in historical memory. Yet the first grand wizard of the Revised Klan identified "spiritual independence" as one of three pillars of

42 Newman, *Hugo Black* 91–99.

43 See Newman, *Hugo Black*, 87–116; Suits, *Hugo Black of Alabama*, 511–17; Ball, *Hugo L. Black*, 60–63.

44 J. S. Conwell to HLB, October 1, 1937. Black papers, box 250, folder 6.

45 Lloyd Fogel-Songer to HLB, October 4, 1937. Black papers, box 250, folder 6.

46 Hamburger, *Separation of Church and State*, 430.

47 Black, Jr., *My Father*, 104.

48 Newman, *Hugo Black*, 71–76.

49 Newman, 83.

50 Newman, 83.

Klankraft, which “found its chief expression in Protestantism.”⁵¹ Official liturgies for both men and women members included a copper penny placed upon an altar to symbolize Christ’s admonition to “repay to Caesar what belongs to Caesar” (Matthew 22:21). The leader, or “Excellent Commander,” would inform the congregation, “we are especially reminded of this lesson—that Church and State ought forever to be kept separate.”⁵² Were Black to have participated in these rituals, he would understand government insulation from religious organizations as a theological principle ordained by Christ.

Black’s theo-political persuasions were reinforced not only by the Klan, but by a host of other fraternal organizations. As a young man, he submitted an application to the Birmingham Masons just before his twenty-first birthday so that it might be processed as soon as he was eligible.⁵³ He renewed his Masonic membership until at least 1965, and received correspondence from the Knights of Pythias, the Cyrene Commandery, the Knights of Khorassan, and the Shriners, all of whom counted Black as a member.⁵⁴ Many of these organizations shared not only a vague nativism but substantive ideas about the proper nature of religion. The Masons in particular viewed religion in Enlightenment rationalist terms and saw natural religion as essential for the health of the nation. An undated letter to Black from a fellow Shriner was signed “Yours in the Faith.”⁵⁵ Whether this faith was essentially a committed opposition to the Catholic Church—as the Mason-sponsored Oregon law which spurred the 1925 *Pierce v. Society of Sisters* decision indicates—or more akin to the Jeffersonian notion of natural religion, Black’s membership in these organizations indicates a particular normative view about religious life, one which influenced his jurisprudence.⁵⁶ As he told a friend after mailing him his *Engel* opinion, “I think the constitutional principles there relied upon are not so far away from the Scottish Rite lectures in which you have participated so many times.”⁵⁷

BLACK’S BOOKSHELF

Popular biographer and historian David McCullough has remarked, “We’re all what we read to a very considerable degree.”⁵⁸ As a child, Black was a prodigious reader and admired his parents’ modest library. His classical education at the Ashland Academy under the direction of headmaster Hiram Evans (whose son would become a future Klan Grand Wizard) inspired a lifelong love for

51 Hiram Wesley Evans, “The Klan’s Fight for Americanism,” *North American Review* 223, no. 1 (1926): 33–63, at 45–47, quoted in Hamburger, *Separation of Church and State*, 407.

52 *Ritual in the Second Degree of the Women of the Ku Klux Klan*, 3, quoted in Hamburger, *Separation of Church and State*, 411.

53 Newman, *Hugo Black*, 254–60; Black and Black, *Memoirs*, 32, 230.

54 See Black papers, box 28, folders 6–8. Black later described himself as a “life member” of both the Masons and the Knights of Pythias. Black and Black, *Memoirs*, 32.

55 George C. Wallace to HLB, undated letter. Black papers, box 28, folder 8.

56 *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). In *Pierce*, the Court invalidated an Oregon law that compelled attendance at public schools. Although popular memory often pins the Oregon initiative on a local Klan chapter, it was inspired by a wider Masonic resolution and sponsored by local Masons. See Paula Abrams, *Cross Purposes: Pierce v. Society of Sisters and the Struggle Over Compulsory Public Education* (Ann Arbor: University of Michigan Press, 2009), 16–17; Hamburger, *Separation of Church and State*, 431–32, 451. The Shriners are an appendant body of the Freemasons.

57 HLB to Fred Larkins, July 6, 1962. Black papers, box 354, folder 6.

58 David McCullough, “The Love of Learning” (Boston College Commencement Address, May 2008), in *The American Spirit: Who We Are and What We Stand For* (New York: Simon and Schuster, 2017), 145.

Greek and Roman philosophy and history.⁵⁹ Upon his election to the Senate in 1926, Black undertook a structured program of personal reading, soon guided by William Durant's 1929 article "One Hundred Best Books."⁶⁰ Throughout his career in Washington, he kept a rather active account at the Library of Congress and corresponded with several favorite booksellers.⁶¹ A list of the nearly one thousand volumes in the Justice's chambers and home study upon his death has been compiled by Daniel Meador. While Black's marginalia indicate that his library did not represent a mere catalogue of his intellectual sympathies, much can be gleaned from an examination of his reading habits and favored texts. Indeed, his son remarked that he only read what seemed relevant to his work on the bench.⁶²

Among the religious titles on Black's shelves, many seem to have reflected his preoccupation with Rome. In particular, biographers have noted his appreciation for Paul Blanshard's anti-Catholic works. Blanshard made his career arguing that rising Catholic political influence, especially among Irish-Americans, risked introducing anti-democratic principles into American government.⁶³ Other titles in Black's library, such as Kahlil Gibran's *The Prophet*, William Wilfred Walter's *The Unknown God*, and Joseph Gaer's *The Wisdom of the Living Religions* reflected an interest in Eastern religion shared by Josephine Black.⁶⁴

Still others represented some of Black's most enduring religious convictions. Bunyan's *Pilgrim's Progress*, a fixture in Hugo's youth, remained close throughout his life. While writing his *Engel* decision, he kept a copy on his desk for inspiration.⁶⁵ Penned during Bunyan's twelve-year imprisonment at the hands of the Anglican authorities, *Pilgrim's Progress* reflected its author's distaste for powerful ecclesiastical institutions. Accordingly, many scholars have described the epic as an early manifestation of modern radical individualism. For example, Robert Bellah has seen the work as a prototype of the particularly Puritan and American narrative of "leaving home" to "find oneself."⁶⁶ For seventeenth-century Anglicans or Catholics, a young person grew in faith because of her membership in the church. For the Puritans, Baptists, and other dissenters, individual discovery of God was a prior condition for church membership.

59 Black and Black, *Memoirs*, 21; Meador, *Mr. Justice Black and His Books*, 1–2; Newman, *Hugo Black*, 7–8.

60 Meador, *Justice Black and His Books*, 2, 8. See William Durant, "One Hundred Best Books for an Education," *America* (December 1929).

61 Black papers, boxes 17, 18.

62 Meador, *Mr. Justice Black and His Books*, 10; Black Jr., *My Father*, 157–61.

63 Hamburger, *Separation of Church and State*, 452. Black owned four Blanshard titles: *American Freedom and Catholic Power* (Boston: Beacon Press, 1949); *Communism, Democracy, and Catholic Power* (Boston: Beacon Press, 1951); *My Catholic Critics* (Boston: Beacon Press, 1952); and *The Irish and Catholic Power* (Boston: Beacon Press, 1953). Meador, *Mr. Justice Black and His Books*, 55. Interestingly, Blanshard's works were published by the Unitarian-affiliated Beacon Press. Black also possessed a copy of a 1961 speech Blanshard delivered at the headquarters of the Daughters of the American Revolution. See Paul Blanshard, "Church-State Separation and the Future of Catholic Power" (Washington, DC: Protestants and Other Americans United for the Separation of Church and State, 1961), Black papers, box 286, folder 6. Philip Hamburger has characterized Blanshard's works as "liberal, genteel, educated anti-Catholicism" for the American literati; he notes, for example, that they received praise from no less than John Dewey. Hamburger, *Separation of Church and State*, 452. See also James O'Neill, *Catholicism and American Freedom* (New York: Harpers, 1952).

64 Meador, *Mr. Justice Black and His Books*, 187–90. Black received *The Prophet* as a gift from a Denver attorney after their conversation at the 1941 Colorado Bar Association annual meeting. Frank L. Fetzer to HLB, March 10, 1943. Black papers, box 17, folder 12. On Josephine Black's religious inclinations, see Black, Jr., *My Father*, 169.

65 Black and Black, *Memoirs*, 13; Newman, *Hugo Black*, 9, 522.

66 Robert Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley: University of California Press, 1985), 32, 56–62; see also Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: Harvard University Press, 1989), 39.

“Christian,” the protagonist of the first part of *Pilgrim’s Progress*, has long been considered the archetype of this personal journey. While he is aided by a few close friends, most of the characters he encounters attempt to turn him from his path towards the Celestial City.⁶⁷ Christian meets “Formalist” and “Hypocrisy,” who claim that their thousand-year-old tradition is a sufficient substitute for a proper personal pilgrimage. The pilgrims pass by the giants “Pope” and “Pagan,” finding the first powerless and the second dead. When they reach the “Vanity Fair,” marked by the sale of “the Ware of Rome,” Christian’s friend “Faithful” is tried as a heretic.⁶⁸ For Bunyan, as well as for Black, dogmatism and traditional ecclesial institutions were not simply oppressive, they were opposed to true religion.

Black’s correspondence reveals another of his political and theological influences—the eighteenth-century Unitarian minister, scientist, and political exile Joseph Priestley. The Justice’s admiration for Priestley came forth in a series of letters exchanged with an Iowan of the same name. The twentieth-century Dr. Priestley wrote in 1961 to inform Black of the threat posed by communist sympathies among American voters. Similar letters were common and usually left unanswered, but Black responded by recommending several biographies and the writings of the historical Priestley, who “came to this country from England seeking political and religious freedom.” A curt response was received, recommending that Black not bother replying and instead “start working for the U.S.” The Justice persisted, encouraging the Iowa doctor to read Priestley’s works and continue the correspondence. The Iowan wrote twice again in the next decade, but only to condemn the Court’s decisions.⁶⁹

While cursory biographies might have hailed Priestley as simply a steadfast religious dissenter, his theological and political writings called for more than mere disestablishment of state churches. To be sure, he made cogent arguments for religious freedom. Not only do human rights demand protections of conscience, but churches often flourish under disestablishment, according to Priestley.⁷⁰ However, his idea of religious freedom meant freedom from many things others might consider essentially religious. Foremost among the things to be jettisoned was any suspected accretion or institution formed by “man.” Priestley’s *History of the Corruptions of Christianity* characterized most of traditional Christianity—the divinity of Christ, theologies of Atonement, sacramental life, liturgy, church discipline—as arbitrary inventions accrued over time. This bifurcation of divine and human realms, which in others may have led to doubts about human reason, turned towards radical individualism in Priestley. “The voice of conscience is, in all cases, as the voice of

67 On the radical individualism of *The Pilgrim’s Progress*, see Monica Furlong, *Puritan’s Progress: A Study of John Bunyan* (London: Hodder & Stoughton, 1975); Vincent Newey, “Bunyan and the Confines of the Mind,” in *The Pilgrim’s Progress: Critical and Historical Views*, ed. Vincent Newey (Liverpool: Liverpool University Press, 1980), 21–48; Stuart Sim and David Walker, *Bunyan and Authority: The Rhetoric of Dissent and the Legitimation Crisis in Seventeenth-Century England* (New York: Lang, 2000). Galen Johnson argues that contrary to most scholarly accounts, Bunyan affirms the importance of at least an informal Christian community. Here however, the majority reading of *Pilgrim’s Progress* as an acclamation for individualism in religion is most appropriate, as it seems most resonant with Black’s thought. See Galen K. Johnson, *Prisoner of Conscience: John Bunyan on Self, Community, and Christian Faith* (Eugene: Wipf & Stock, 2007).

68 John Bunyan, *The Pilgrim’s Progress*, ed. N. H. Keeble (New York: Oxford University Press, 1998), 32–34, 59, 73–79.

69 Joseph B. Priestley to HLB, June 5, 1961; HLB to Priestley, June 13, 1961; Priestley to HLB, November 28, 1961; HLB to Priestley, December 13, 1961; Priestley to HLB, October 21, 1963; Priestley to HLB, June 20, 1971. Black papers, box 45, folder 4.

70 Joseph Priestley, “Essay on First Principles,” in *Priestley: Political Writings*, ed. Peter Miller (New York: Cambridge University Press, 1993), 1–128, at 11, 60–61.

God to every man” meant that the teachings of religious authorities or the doctrines of religious communities were not only opposed to reason but constituted a kind of “bigotry.”⁷¹

In place of authority or communal teaching, Priestley affirmed a veritable faith in unfettered “reason” to “purify” religion. He frequently denied any difference between religious and scientific knowledge, confident that pure reason “would be the means, under God, of extirpating all error and prejudice, and of putting an end to all undue and usurped authority in the business of religion.”⁷² If religious thinking was left unencumbered by doctrine and open to continuous innovation, humankind would rapidly shed the impurities of past accretions, and “whatever is true and right will prevail.”⁷³ The result of Priestley’s simultaneous distrust of “man” and exaltation of individual conscience to “the voice of God” was a deep suspicion of catechetical instruction. Catechesis served to “obstruct freedom of inquiry in matters of religion, by laying an undue bias upon the mind.”⁷⁴

If theological doctrines professed by ecclesial institutions were obstacles to “pure” religion, most accounts of the supernatural, under Priestley’s schema, became irreligious superstition. Pure religion was then simply a matter of moral prescriptions. Indeed, this reduction to moralism enabled the Universalist contention that theological differences had no bearing on salvation.⁷⁵ As far as the civil authorities were concerned, religious doctrines were only useful or objectionable insofar as they encouraged morality or engendered unrest, a theme that would appear in Black’s thought.⁷⁶

It is crucial to note that Priestley’s reasons for disestablishment were almost entirely theological. He frequently appealed to scripture to argue that Christianity is a radically apolitical religion. “Then repay to Caesar what belongs to Caesar,” (Matthew 22:21) “call no one on earth your father” (Matthew 23:9), and various condemnations of the Pharisees served to show that true faith concerns only “spiritual” and not “temporal” matters.⁷⁷ Perhaps contradictorily, Priestley’s Unitarianism often drew political implications from traditionally soteriological doctrines. Paul’s exhortation “For freedom Christ set us free; so stand firm and do not submit again to the yoke of slavery” (Galatians 5:1) transformed under Priestley’s gaze from a statement regarding the place of Mosaic Law in salvation to an affirmation of disestablishment as divinely ordained.⁷⁸

We may allow that the theological flavor of Priestley’s arguments is tailored to his audience. Appeals to scripture might be convincing for the Anglican authorities in England or skeptical Congregationalists in America. If Priestley’s best arguments were somehow grounded in secular principles of political theory, we might expect to see his twentieth-century readers drop this

71 Priestley, “Essay on First Principles,” 67; Joseph Priestley, “The Importance and Extent of Free Inquiry in Matters of Religion,” in *Sermons by Richard Price and Joseph Priestly* (London: British and Foreign Unitarian Association, 1830), 81; Joseph Priestley, *Letters to the Inhabitants of Northumberland* (Philadelphia: John Conrad & Co., 1801), 133. Priestley’s use of “bigotry” may seem out of place to the twenty-first century reader. Its current use, often related to racial or religious animus, evolved from its original indication of strict adherence to religious teachings. Priestley’s use, which carries a negative connotation, makes a theological claim in itself—that adherence to doctrine is irreligious. For more on parsing the historical uses of “bigotry,” see Ta-Nehisi Coates, “Bigotry and the English Language,” *Atlantic* (December 3, 2013).

72 Joseph Priestley, *Experiments and Observations on Different Kinds of Air* (London: J. Johnson, 1775), xiv.

73 Priestley, *Letters to the Inhabitants of Northumberland*, 134–35.

74 Priestley, “The Importance and Extent of Free Inquiry,” 82–83; quotation from Priestley, *Essay on First Principles* (London: J. Johnson, 1771), 65.

75 Priestley, *Essay on First Principles*, 55; J. D. Bowers, *Joseph Priestley and English Unitarianism in America* (University Park: Pennsylvania State University Press, 2007), 2.

76 Priestley, “The Importance and Extent of Free Inquiry,” 85–86.

77 Priestley, *Essay on First Principles*, 70, 73, 77. All quotations from the Bible are from the New American Bible.

78 Priestley, *Essay on First Principles*, 78.

scriptural veneer when making appeals in the context of twentieth-century pluralism. But this was not the case for Hugo Black. When making a gift of Priestley's *Northumberland Letters* to Reverend A. Powell Davies of All Souls, the Justice remarked that Davies' message to both his "church and [his] country" were reminiscent of Priestley's.⁷⁹ For Priestley, Davies, and Black, the contents of politics and theology were mutually informing.

THE JUSTICE'S "CIRCLE OF FRIENDS" AND LIVED RELIGION

Black's peculiar union of political theory and theology is best illuminated through his conversations, friendships, and religious practice during his time on the Court. He was undoubtedly a culturally religious man. He sang Baptist hymns around the dinner table and during country drives with his second wife. Of course, he was given to mocking the same hymns by inventing alternative lyrics.⁸⁰ His irreverence had limits however, and he voiced concern over the decline of traditional religion in conversation with his eldest son. For Black, organized religious communities ordered the lives of those who lacked the moral rectitude or intelligence to act virtuously. As he told Hugo Jr., "This stuff's been a great foundation for doing right. Some people got to be scared into doing the right things, some others got to be given blind hope you gonna find it better somewhere else by doing right on this earth. You pull out faith in God and these incentives to do good disappear."⁸¹ The "Golden Rule" and Paul's discourse on love in 1 Corinthians 13 formed the backbone of his spiritual ideal. In his son's words, "Ethical conduct, his real religion, was of paramount importance to him."⁸²

While he rejected the Primitive Baptist Church of his youth, Black located the foundations of American religious freedom in the Baptist tradition. He was undoubtedly influenced by Alfred James Dickinson, the pastor of Birmingham's First Baptist Church. Dickinson was educated at Harvard and the University of Chicago, subscribed to the then-radical historical-critical school of Biblical theology, and took pains to emphasize the social implications of faith over doctrinal claims. While stumping for Populist politician Sidney Catts in 1916, Dickinson advocated more than the strict separationism historically associated with American Baptists.⁸³ He suggested that those who held religious allegiances in higher esteem than their American citizenship should be denied the vote.⁸⁴

Dickinson, Bunyan, and Thomas Jefferson's Danbury correspondents may have been on the Justice's mind when he agreed to receive a delegation of Southern Baptists in 1964. The Christian Citizenship Seminar of the South Baptist Convention drew over one hundred ministers to Washington, DC, and Black agreed to a private meeting with the group. On his insistence, the proceedings of the meeting—an informal presentation on the role of the judiciary—was not publicized, but his subsequent correspondence with attendees gives us an idea of Black's address.

79 HLB to A. Powell Davies, August 2, 1952; Davies to HLB, August 20, 1952. Black papers, box 25, folder 2.

80 Black and Black, *Memoirs*, 84, 112; Black Jr., *My Father*, 13.

81 Black Jr., 175.

82 Black Jr., 173–76, quotation at 176.

83 For the role of Baptists in the disestablishment of state churches during the early republic, see John A. Ragosta, *Wellspring of Liberty: How Virginia's Religious Dissenters Helped Win the American Revolution and Secured Religious Liberty* (New York: Oxford University Press, 2010).

84 Wayne Flynt, *Alabama Baptists: Southern Baptists in the Heart of Dixie* (Tuscaloosa: University of Alabama Press, 2005) 83, 159–60, 274–75; John Howard Burrows, "The Great Disturber: The Social Philosophy and Theology of Alfred James Dickinson" (master's thesis, Samford University, 1970).

Several were impressed with Black's knowledge of Baptist history and expressed a newfound admiration for the Court. The *Engel* and *Schempp* decisions of the prior two years had rankled many Protestants, including some Baptists. For many, the decisions threw doubt on the Court's legitimacy.⁸⁵ It seems that Black succeeded in convincing his visitors that the form of separation expressed in these decisions was the particular contribution of early American Baptists. As one Tennessee minister put it, the religion clauses were an example of "Baptist life as it is expressed in government."⁸⁶ Black exhorted his listeners to continue to champion their "high heritage of freedom and justice" and expressed his satisfaction that "the modern Baptists have not abandoned the old ideas of freedom which were their's [*sic*] from the beginning."⁸⁷ The greatest indication of Black's veritable political theology in this case was a newspaper report published contrary to the Justice's request. The Washington, DC, *Capital Baptist* reported, "Justice Black talked a great deal about his early life and the influence of the Baptist church in which he grew up. Several times he recalled how he received his concepts of democracy and freedom from the church."⁸⁸

On one hand, Black's affirmation of the Baptist roots of American religious freedom is historically undeniable. Baptists were instrumental in the movement for disestablishment in the state of Virginia, and prominent ministers like John Leland and Isaac Backus exchanged ideas with Madison and Jefferson.⁸⁹ On the other hand, Black may have meant something slightly different when he professed, "One of the reasons I have liked that church has been that throughout its entire existence, the predominating opinion has been in favor of complete religious liberty."⁹⁰ By *complete* religious liberty, Black may have been indicating what Rhode Island founder Roger Williams termed "soul liberty." Taken up into modern Baptist parlance as "soul competency" by E. Y. Mullins, the concept asserts that the individual must relate to the divine unencumbered by any civil or ecclesial authority.⁹¹ Read in this way, Black's jurisprudence might aim to procure not only civil liberty for Americans, but true spiritual liberty as well.

While Black admired his historical coreligionists, his religious involvement centered on All Souls Unitarian Church during his life in Washington. He counted pastor A. Powell Davies and his successor Duncan Howlett as close friends. Davies performed the funeral service for Black's first wife, Josephine, and officiated his marriage to his second, Elizabeth. The Blacks often hosted both the Davies and the Howletts in their home and sometimes attended services at All Souls. In her diaries, Elizabeth wrote, "Hugo says he's going to hold on to Dr. Howlett because he's his closest

85 Several historians have observed that antipathy toward the federal government in general and the Court in particular stemmed from not only the *Engel* and *Schempp* decisions but from the twin *Brown* decisions and efforts to enforce school desegregation orders. See Jonathan Zimmerman, *Whose America? Culture Wars in the Public Schools* (Cambridge, MA: Harvard University Press, 2005); Andrew Hartman, *A War for the Soul of America: A History of the Culture Wars* (Chicago: University of Chicago Press, 2015). One might be tempted to read Black's defense of the Court as a defense of desegregation as well, but his correspondence with his Baptist visitors seems to indicate that he focused his remarks on religion clause questions alone.

86 Charles C. Maples to HLB, April 7, 1964. Black papers, box 51, folder 10.

87 HLB to Orba Lee Malone, April 3, 1964. Black papers, box 51, folder 10.

88 "The Influence of the Church," *Capital Baptist* (April 2, 1964). Black papers, box 51, folder 10.

89 Charles McDaniel, "The Decline of the Separation Principle in the Baptist Tradition of Religious Liberty," *Journal of Church and State* 50, no. 3 (2008): 413–30.

90 HLB to Howard Bramlette, April 3, 1964. Black papers, box 51, folder 10.

91 William Rogers, *The Bloody Tenent of Persecution for Cause of Conscience* (Finsbury: J. Haddon, 1848), 294; Edgar Young Mullins, *The Axioms of Religion: A New Interpretation of the Baptist Faith* (London: Forgotten Books, 2018).

connection to God.”⁹² His closeness to Davies was no less profound. In a letter of condolence to Mrs. Muriel Davies upon the pastor’s passing, Black wrote, “I feel that a great light has been put out, one that helped many people see truth with clearer vision. My admiration for your husband was very great. This was why I turned to him for help in time of sorrow and in time of joy.”⁹³ The Justice donated to the church on several occasions, agreed to at least one speaking engagement (which was contrary to his habit), and served as part of the church’s National Advisory Group. His relationship to All Souls was best described by a trustee, who wrote after Davies’ passing, “Although you have not been a member or regular attendant, we have long felt that your attachment for what Dr. Davies stood for made you a part of the circle of friends of this Church.”⁹⁴

If Black’s affection for Davies and Howlett was grounded in shared convictions, it is worthwhile to examine the pastors’ ideas, especially any that emerged in exchanges with the Justice. While Davies professed notions of strict separationism and cited Black’s *McCullum* decision with approval, he did not conceive of religion as a mere private affair. Justice William Douglas, another Davies admirer, recalled this statement from the pulpit—“Religion that is not realistic, not practical, that does not enter the arena of public affairs—and enter it with importunate energy and relentless purpose—is not worth bothering with at all.”⁹⁵ For Davies, social influence was the primary characteristic of true religion. He was suspicious of any supernatural claims because they might both distract the faithful from social action and discourage the rightly skeptical from joining the fold.⁹⁶ In his view, true religion was summed up in the prophet Micah’s words, “Do justice, love mercy, and walk humbly with God” (Micah 6:8). As regards “walking humbly with God,” Davies contended that a formal theology or belief in the divine was not what was necessary for true religion. Rather, a “personal religion” expressed in any life-giving or selfless experience was all that was required.⁹⁷

The doctrinal and ecclesial trappings of “formal” religion were not simply unnecessary for Davies, they were definite obstacles. “Creeds have no place in the world,” he wrote upon his conversion from Methodism to Unitarianism, “because they transgress the free domain of the mind.”⁹⁸ Doctrinal claims not only barred dissenters from membership, but they led to violence. In Davies’ mind, traditional religion served to protect man from the frightening responsibilities of following his own conscience alone. Christ himself was crucified because he led his followers to embrace

92 Quotation from Black and Black, *Memoirs*, 92. For Josephine Black’s funeral sermon, see A. Powell Davies, “A Memorial to Josephine Foster Black,” in *The Mind and Faith of A. Powell Davies*, ed. William O. Douglas (New York: Doubleday, 1959), 242–44, at 242. For details of Elizabeth and Hugo Black’s wedding, see Black Jr., *My Father*, 204.

93 HLB to Muriel Davies, September 27, 1957. Black papers, box 25, folder 2.

94 Quotation from Howard E. Wahrenbrock to HLB, March 5, 1959. Black Papers, box 53, folder 5. For records of dinners, donations, and speaking engagements, see Black papers, box 53, folder 5; HLB to Howard Wahrenbrock, March 31, 1959; Leonard Ware to HLB, May 2, 1964; Duncan Howlett to HLB October 15, 1964; HLB to Howlett, Oct 13, 1964; HLB to Richard F. Gardner, December 11, 1964; HLB to Howlett, March 1, 1965; HLB to Richard F. Gardner, September 8, 1965. See also Program for A. Powell Davies Memorial Lecture Series, November 5, 1967; HLB to Russell B. Adams, December 11, 1957; HLB to A. Powell Davies, August 25, 1952. Black papers, box 25, folder 2.

95 A. Powell Davies, *The Urge to Persecute* (Boston: Beacon Press, 1953), 136; Davies, “The Separation of Church and State,” in *The Mind and Faith of A. Powell Davies*, 126–30, at 126–27; quotation from William O. Douglas, foreword to *The Mind and Faith of A. Powell Davies*, 11–34, at 13.

96 Davies, “The Old Time Religion” and “The Sin of Piosity,” in *The Mind and Faith of A. Powell Davies*, 276–79, 281–82; A. Powell Davies, preface to *The Faith of an Unrepentant Liberal* (Boston: Beacon Press, 1946), vii.

97 Davies, “Can We Be Good without Religion?” in *The Mind and Faith of A. Powell Davies*, 301–06.

98 Douglas, foreword to *The Mind and Faith of A. Powell Davies*, 19.

emancipation from traditional religion, thus destroying “their little false securities of body and soul.”⁹⁹ True religion resided in “the Free and Universal Church” whose only tenets were freedom of conscience and universal brotherhood.¹⁰⁰ Davies imagined “a universal common faith, a faith which might reform and federate the great religions.”¹⁰¹ Exclusivist claims—especially on the part of Christianity—were the major obstacles to his vision. Thus, he could declare with approval at Josephine Black’s funeral that she “had outgrown most forms of religion.”¹⁰²

Howlett’s low ecclesiology mirrored his predecessor’s. He insisted that the marks of the ideal church included the protection of free theological expression for all its members. His 1954 *Man against the Church* equated political and religious life, mirroring Justice Black’s opinions even more closely than Davies’ thought. Like the early American Baptists Black admired, Howlett believed that Revelation approached humanity through the individual soul. Thus ecclesial and governmental institutions were of the same type and faced the same central problem—how to preserve organizational unity without impinging on the freedom of individuals. In Howlett’s view, “The mechanics by which this is to be achieved in the church will be of the same kind as those in the state. They will involve freedom of speech, opportunity for experimentation, and checks and balances upon power wherever power is lodged.”¹⁰³ He rightly wondered whether identical, “democratic” institutional norms would subsume religious bodies under the state. Howlett insisted that the principle of “freedom” and free expression always be reserved for religious bodies, just as it was for individuals. However, “the state and the citizens of the state must be free to criticize—even to denounce—the church when they think it is at fault.”¹⁰⁴ What form state denunciation of a church might take was left unclear, but the statement indicates a desire for civil authority to regularly shape the life of religious institutions.

Howlett’s somewhat ironic (given his separationist position) loose equivalence between state and church found expression in Black’s own writing. The Justice was reluctant to explicitly share his own judicial philosophy and rejected many requests for academic lectures.¹⁰⁵ One exception was his 1968 lecture series at Columbia University Law School, published as *A Constitutional Faith*. As the title suggests, democratic and religious principles coincided for Black. Perhaps it would be more precise to say that constitutional law formed a sort of religion for Black, and the historical narratives he used to justify his judicial philosophy and his religious convictions were often indistinguishable. The most profound profession of Black’s “faith” came at the conclusion of his third lecture: “That Constitution is my legal bible; its plan of our government is my plan and its destiny my destiny. I personally deplore even the slightest deviation from its least important commands.”¹⁰⁶ His strict textual adherence, combined with what he described as “my historical beliefs” led a Harvard Law dean to label Black’s jurisprudence a “fundamentalist theological” approach.¹⁰⁷ That the Justice was buried with several 10-cent copies of the Constitution in his

99 Davies, “Parting with the Theists,” in *The Mind and Faith of A. Powell Davies*, 272–74, at 274.

100 Davies, *The Faith of an Unrepentant Liberal*, 13–14.

101 Davies, “One World,” in *The Mind and Faith of A. Powell Davies*, 300–01, at 300.

102 Davies, “Memorial to Josephine Foster Black,” 242; see also Black Jr., *My Father*, 169.

103 Duncan Howlett, *Man against the Church: The Struggle to Free Man’s Religious Spirit* (Boston: Beacon Press, 1954), 187.

104 Howlett, *Man against the Church*, 200–02, quotation from 202.

105 Black, introduction to *A Constitutional Faith*, vi–xvii, at xi, xiii.

106 Black, *A Constitutional Faith*, 66.

107 James J. MaGee, *Mr. Justice Black: Absolutist on the Court* (Charlottesville: University Press of Virginia, 1980), 9, cited in Perry, “Justice Hugo Black and the ‘Wall of Separation between Church and State,’” 59.

breast pocket gives credence to the view that liberal government amounted to a religion for Black, and his comment regarding his “destiny” suggests a bizarrely political eschatology.¹⁰⁸

HUGO BLACK, POLITICAL THEOLOGIAN

Many critics of Black’s Establishment Clause jurisprudence have characterized his opinions as “law office history.”¹⁰⁹ The historical narrative he constructed in *Everson*, which placed the origins of the First Amendment in the experience of late-18th-century Virginia and the minds of James Madison and Thomas Jefferson, has been described as a convenient fiction.¹¹⁰ Interestingly, the “Virginia understanding,” including Jefferson’s famous “wall of separation,” was not Black’s invention. Donald Drakeman has masterfully detailed how this narrative was grafted onto constitutional law through the efforts of professional historians. Chief Justice Morrison Waite’s 1879 opinion in *Reynolds v. U.S.*¹¹¹ was informed by the scholarship of his former neighbor George Bancroft, and Wiley Rutledge’s *Everson* dissent borrowed from his friend Irving Brant’s ongoing research on Madison. Black simply adopted a species of this history in response to Rutledge’s circulated dissent. Yet Black’s claim relating Virginian church-state debates to the original understanding of the First Amendment contained no citations, and his summary of the meaning of the Establishment Clause appeared in his first draft, long before the historical interlude was added to rebut Rutledge.¹¹² It seems Black played the historian in this case out of a desire to justify an a priori conclusion. I argue that Black was drawn to the Virginia narrative and its political implications largely because of his religious opinions. Further, it is his personal political theology, and not his reading of history, which holds the key to understanding Black’s jurisprudence.

Of course, the man who saw his father and uncle removed from polite society at the hands of their church would vehemently disagree with any characterization of his political views as “theological.” His efforts to lay out the principles of Establishment Clause jurisprudence during the mid-twentieth century aspired to Lilla’s vision of an atheological modernity. But precisely in his attempt to cordon off religion from politics, Black drew on his own religious background and convictions, crafting precedents that implied a normative view of “true religion.” His second wife Elizabeth observed that his *Engel* decision read like a sermon, and he justified his ruling to at least two correspondents by citing Matthew 6:6—“pray to your Father in secret.”¹¹³ He looked to scripture for explanations of political phenomena and models of good government. He explained the 1960s counterculture movement by reading 1 and 2 Samuel, and twice offered his favorite passage from 1 Corinthians 13:4—“Love is patient, love is kind”—to describe the ideals of the law in

108 Black Jr., *My Father*, 266.

109 John Phillip Reid, “Law and History,” *Loyola Los Angeles Law Review* 27, no. 1 (1993): 193–223, at 193.

110 For a comprehensive survey of critiques of Black’s historical narrative in *Everson*, see Daniel L. Driesbach, “Everson and the Command of History: The Supreme Court Lessons of History, and Church-State Debate in America,” in *Everson Revisited: Religion, Education, and the Law at the Crossroads*, ed. Jo Renne Formicola and Herbert Morken (Lanham: Rowman & Littlefield, 1997): 23–57.

111 *Reynolds v. United States*, 98 U.S. 145 (1879). This was one of the first cases involving religion to come before the Court. In *Reynolds*, the Court ruled that the right to free exercise of religion enumerated in the First Amendment did not protect Mormon men from prosecution under anti-polygamy laws.

112 Donald L. Drakeman, *Church, State, and Original Intent* (New York: Cambridge University Press, 2010), 48–63, 79–81, 109–118. Drakeman notes that while Rutledge drew a line between Virginia and the First Amendment via Madison’s influence, his connection was still rather spurious.

113 HLB to Dallas Sells, July 10, 1964. Black papers, box 354, folder 6; Black and Black, *Memoirs*, 95.

speeches to federal circuit judges.¹¹⁴ In short, the Justice was unable to escape Schmitt's maxim, and readily engaged in political theology.

What follows is an attempt to uncover several main principles of Black's theo-political view and their manifestations in his opinions. Together they form what might be termed "syncretic civic moralism." In a certain sense, Black's faith was not dissimilar to what Christian Smith has diagnosed as "moralistic therapeutic deism" in twenty-first-century teens.¹¹⁵ However, Black's faith lacked the therapeutic element that would be introduced to American religion by Norman Vincent Peale and a younger generation.¹¹⁶ In its place, Black's religion took on a certain civic instrumentalism. Once sufficiently atomized, religion could serve as a bulwark to unified civic life, rather than a potential rival with the liberal state for an individual's loyalty, as might be the case in more "thick" or hierarchically structured traditions. The following elements characterize Black's particular political theology.

First, the notion that a normative or pure version of religion was both within the ken of justices and within the object of law crept into several opinions. In *Everson*, Black appealed to Jefferson's reference to an ideal arrangement of temporal matters patterned after "the plan of the Holy author of our religion."¹¹⁷ In praising Madison's famous *Memorial and Remonstrance*, the Justice noted, "he eloquently argued that a true religion did not need the support of law."¹¹⁸ In *Engel*, this normative vision was exemplified by certain religious heroes. John Bunyan played the part of archetypical authority on church-state relations, and Roger Williams was credited as an early proponent of "the doctrine of separation of church and state." Interestingly, the latter's authority was established by quoting one biographer's comment that Williams was "the truest Christian amongst many who sincerely desired to be Christian."¹¹⁹ When Black continued by citing Williams' condemnation of Constantinian political arrangements as a betrayal of Christianity, we can only conclude that Black was engaging in immanent criticism. That is, his legal arguments appealed to theological notions of true Christianity.

Secondly, as many legal scholars and biographers have noted, Black saw religion as an ultimately private affair. His *Engel* decision famously labeled religion "too personal" to be placed in a public institution. Again, his addition while reading the decision—"The prayer of each man from his soul must be his and his alone"—shows Black to have distrusted not only government influence in religion, but any influence at all.¹²⁰ His prior dissent in *Zorach* gives an even clearer picture. Contending that release-time programs enlist compulsory education laws to evangelize those "presumably too unenthusiastic to go [to religious services] unless moved to do so by the pressure of this state machinery," Black argued that religious participation should be "as free as

114 Black and Black, *Memoirs*, 142–43, 242. The earlier occasion was especially noteworthy, as it came just weeks after Black voted in the majority in *Abington v. Schempp* (1963), which forbid the practice for teachers acting in a similar state capacity, albeit with a younger audience.

115 Christian Smith and Melinda Lundquist Denton, *Soul Searching: The Religious and Spiritual Lives of American Teenagers* (New York: Oxford University Press, 2009).

116 Interestingly, Peale sent Black a copy of Thomas James Norton's, *The Constitution of the United States—Its Sources and Its Application* (Boston: Little, Brown, and Company, 1922), in his capacity as the chairman of the Washington-based Committee for Constitutional Government. Norman Vincent Peale to HLB, January 7, 1944. Black papers, box 17, folder 12.

117 *Everson v. Board*, 330 U.S. 1, 13 (1947) (quoting Jefferson's 1786 "Virginia Statute for Religious Freedom").

118 *Everson*, 330 U.S. at 12.

119 *Engel v. Vitale*, 370 U.S. 421, 433–34 (1962) (quoting Vernon Louis Parrington, *Main Currents in American Thought*, vol. 1, *The Colonial Mind, 1620–1800* [New York: Harcourt, Brace, and Company, 1930], 76).

120 *Engel*, 370 U.S. at 432; Ball, *Hugo L. Black* 199; Newman, *Hugo Black*, 521–23.

the choice of those who answered the call to worship moved only by the music of the old Sunday morning church bells.” His conclusion, that “Government should not be allowed, under cover of the soft euphemism of ‘cooperation,’ to steal into the sacred area of religious choice,”¹²¹ evinces a vision of religious life as a kind of aesthetic or emotive marketplace. As commentators and sociologists have shown, many Americans have a uniquely voluntarist view of religion.¹²² Religion becomes a matter of radical choice, like clothing to be donned or discarded as it suits. Thus, adherents can be accurately described as “consumers,” having limited loyalty to religious traditions. This mode of belief seems to enjoy the support of law under Black’s jurisprudence.¹²³

Third, not only was religion a private matter, but it could be distinctly separated from other activities, forming its own discrete sphere. The foundational assumption behind the legality of state-aid programs—that religious schools engage in distinguishable “secular” and “religious” education—was first propounded by the *Everson* majority.¹²⁴ But this separability seemed to give way to Black’s suspicion of thickly institutional religions in his later career. Dissenting in *Board v. Allen* (1968), he claimed that “secular” textbooks loaned to religious schools would most certainly be turned to sectarian “propaganda” in the hands of religious teachers.¹²⁵

Fourth, like Davies and Howlett, Black’s insistence on the private nature of religion meant that communal or ecclesial expressions and influences were necessarily coercive or destructive. His historical narrative in *Everson* highlighted episodes of religious violence, and this theme seemed to be at the forefront of Black’s mind. It dominated his remarks to a 1964 All Souls gathering regarding *Engel*, and he had long conversations with his son and second wife regarding his fears of Spanish integralism.¹²⁶ Roman Catholicism seemed to symbolize this concern, and he underlined a suggestive phrase from his correspondence with a Congregationalist minister—“too bad that Justice Douglas weakened in our struggle against Rome”—following the *Zorach* decision.¹²⁷ His affinity for Paul Blanshard’s works suggests that Black embraced the view that the catechetical practice of the Catholic Church served to train “unthinking” devotees, a popular trope in mid-twentieth-century America.¹²⁸ In *Everson* and *Allen*, Black seemed to suggest that the maintenance of power was the main priority of institutional religions. Seventeenth-century European religion was marked by “established sects determined to maintain their absolute political and religious supremacy,” and mid-twentieth-century America was home to “powerful sectarian religious propagandist . . . looking toward complete domination and supremacy of their particular brand of religion.”¹²⁹

Like Bunyan, Roger Williams, and Joseph Priestly, Black’s personal understanding of religious liberty seems to have meant freedom from even the influence of religious authorities, including familial ones. While he did not go as far as his colleague Justice Robert Jackson, who expressed

121 *Zorach v. Claiborn*, 343 U.S. 306, 319–20 (1952) (Black, J., dissenting).

122 Stephen S. Warner, “Work in Progress toward a New Paradigm for the Sociology of Religion in the United States,” *American Journal of Sociology* 98, no. 5 (1993): 1044–93; Nancy T. Ammerman, “Organized Religion in a Voluntaristic Society,” *Sociology of Religion* 58, no. 3 (1997): 203–15; Harold Bloom, *The American Religion: The Emergence of the Post-Christian Nation* (New York: Simon & Schuster, 1992).

123 *Zorach*, 343 U.S. at 318–20.

124 *Everson*, 330 U.S. at 3.

125 *Board v. Allen*, 392 U.S. 236, 251–52 (1968) (Black, J., dissenting). *Allen* was one of the first of many cases dealing with in-kind aid to religious schools. Here, the Court upheld a New York law that required public school districts to loan textbooks to private schools within their boundaries, including religious schools.

126 Black and Black, *Memoirs*, 93–95; Black Jr., *My Father*, 176.

127 Cecil L. Horton to HLB, May 1, 1952. Black papers, box 313, folder 8.

128 John T. McGreevy, “Thinking on One’s Own: Catholicism in the American Intellectual Imagination, 1928–1960,” *Journal of American History* 48, no. 1 (1997): 97–131.

129 *Everson*, 330 U.S. at 9; *Allen*, 392 U.S. 236, 251 (Black, J., dissenting).

suspicion at any religious instruction for the young,¹³⁰ Black did not attempt to pass on his religious understanding to his children. While Josephine Black sent their sons to Methodist Sunday Schools, the Blacks did not regularly attend services. Hugo Jr. noted that he and his brother Sterling “had no religious guidance at home.”¹³¹

Indeed, the only lesson Black conveyed to his eldest son regarded his persistent reduction of religion to morality. By limiting “religion” to Paul’s exhortation to “love,” Black could conceivably join Justice Douglas in proclaiming Americans a “religious people.”¹³² But a religion that merely encouraged virtue in more vicious citizens would serve *primarily* to bolster civic order. A fifth identifiable theme in Black’s vision of religion is its relation to Rousseau’s concept of “civil religion”—a set of practices and beliefs which reinforced republican loyalty.¹³³ For Black, doctrinal claims were both superfluous and potentially divisive. His rather syncretist views were on display in his bookshelf, where Gibran’s *The Prophet*, Gaer’s *The Wisdom of the Living Religions*, and other works proclaiming (alongside Howlett) the futility of dogmatic differences. Indeed, Black’s famous *Torcaso* footnote, which listed “Ethical Culture” and “Secular Humanism” as veritable religions gives a nod to the non-necessity of doctrine.¹³⁴ These convictions were on display among the Birmingham Masons, where a younger Black affirmed a Brother’s displeasure at Protestant belief that non-Christian Jews could not enter heaven.¹³⁵

Black’s opinion was a particular theological stance that many of his congregants at Birmingham First Baptist could reasonably oppose. Paired with his comment to Hugo Jr.—that religion was only necessary to preserve the health of society from immoral citizens—Black’s concurrence in *West Virginia v. Barnette* (1943) takes on a less innocuous meaning than a simple precursor to *Employment Division v. Smith* (1990).¹³⁶ We might read the claim that “Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which . . . without any general prohibition, merely regulate time, place or manner of religious activity” to indicate that the state’s concern for public order not only may override religious practice, but is the proper end of religious life.¹³⁷ Black’s political theology seems to solidify the tendency, described by Joshua Hawley, for the state to subsume institutional religion under its own purview.¹³⁸ As William Cavanaugh has explained, private religious expression is permissible under

130 Everson, 330 U.S. at 24 (Jackson, J., dissenting).

131 Black Jr., *My Father*, 172. Black’s correspondence with Hugo Jr. is almost entirely bereft of spiritual guidance. See Black papers, box 4, folders 1–3.

132 Zorach v. Clauson, 343 U.S. 306, 313 (1952).

133 Jean-Jacques Rousseau, *On the Social Contract* (New York: Dover, 2003), 89–97.

134 *Torcaso v. Watkins*, 367 U.S. 488, 496 n.11 (1961).

135 Black and Black, *Memoirs*, 33. While contemporary sensibilities identify this sentiment as charitable or reasonable, we should remember that soteriological doctrines do not constitute intolerance. This confusion was made during confirmation hearings for Russell Vought, deputy director of the Office of Management and Budget. See Emma Green, “Bernie Sanders’s Religious Test for Christians in Public Office,” *Atlantic*, June 8, 2017, <https://www.theatlantic.com/politics/archive/2017/06/bernie-sanders-chris-van-hollen-russell-vought/529614/>.

136 *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), involved two members of the Native American Church who were denied unemployment benefits after being fired for using peyote as part of a religious ceremony. The Court ruled that facially neutral, generally applicable laws do not violate the Free Exercise rights of citizens, even if they place an undue burden on these citizens because of their religious belief. Public reaction to *Smith* set off a wave of bipartisan legislation aiming to shore up free exercise rights. State and federal “Religious Freedom Restoration Acts” (or RFRAs) are the result of this reaction.

137 *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 643 (Black, J., concurring).

138 Hawley, “Return to Political Theology,” 1653–56.

the liberal regime, but corporate activity is suspect, as it provides competition for citizens' loyalty under an imagined unitary civic space.¹³⁹

I contend that the reduction of religion to morality and the dissolution of theological differences prevalent in Black's circle generated a peculiar relationship between religious and political thought, a phenomenon I might term an "inverted" political theology. Whether we take Mark Lilla's conception of political theology as religious belief impressed on government or other scholars' notions of religious critique of political arrangements, political theology as it is commonly understood begins in theological principles. In contrast, the Unitarianism of Davies and Howlett and the syncretic civic moralism of Hugo Black seem to take political principles and forge from them a companion theology. Thus Howlett could proclaim that democracy "stands above all sects" as the pure expression of the human spirit,¹⁴⁰ and Black could identify his "constitutional faith" as in some ways a successor of the Mosaic Covenant.¹⁴¹ In this sense, Black's faith did not merely inscribe theological principles into law, it conscribed religious life into the broader civic project.

CONSEQUENCES

If the law cannot be separated from religion, even from the personal religion of one legal interpreter, what are the consequences for our ostensibly secular constitutional order? Here I point to two enduring effects of Black's political theology. First, the isolated individual is exalted as the heroic recipient of free exercise protections, especially against the subtly pervasive cultural marks of majority religion, which David Sehat has termed "moral establishment."¹⁴² Thus the original appellant in *Torcaso* is compared to the first Lord Baltimore and the defendants in *Barnette* are excused from civic liturgies. But contrary to Sehat's contention that the mid-twentieth-century Court represented a "liberal moment," a reprieve from previous establishment, analysis of Black's thought suggests that the Court merely endorsed a different conception of religion than the historically dominant mainstream Protestantism.¹⁴³

The second consequence of Black's thought is that the legacy of his "wall" winds in such a way as to reframe religious participation in America, making institutions less celebrated and less free. A good example is one of the most recent Establishment Clause cases as of this writing—*Trinity Lutheran*. The decision hinged on the rather questionable distinction between the religious "use" of an educational facility and its religious "status," a distinction made possible by the separation of "religious" and "secular" activities within a religious school first propounded in *Everson*. As Justice Sonia Sotomayor indicated in her dissent, this sphere separation would be rather alien to the self-conception of religious educators. Justice Neil Gorsuch's concurrence similarly called the use-status distinction into question.¹⁴⁴ Likewise, the more narrowly decided *Zelman v. Simmons-Harris* (2002) ruling was predicated on the idea that parent religious preferences

139 Cavanaugh, *Migrations of the Holy*, 13–27.

140 Howlett, *Man against the Church*, 40.

141 Hugo Lafayette Black, transcript of "Justice Black and First Amendment Absolutes," public interview held at the Biennial Convention of the American Jewish Congress, Hotel Waldorf Astoria, New York, April 14, 1962. Black papers, box 485, folder 1.

142 Sehat, *The Myth of American Religious Freedom*, 6.

143 Sehat, 227–54.

144 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2038–39, 2025–26 (2017) (Sotomayor, J., dissenting) (Gorsuch, J., concurring).

could be disaggregated and individualized.¹⁴⁵ The fact that the vast majority of Cleveland voucher recipients selected Catholic schools was interpreted as mere happenstance, rather than evidence of a community of religious and cultural dissent potentially in competition with the unitary state.

I do not argue that these decisions were decided wrongly. Rather, the legacy of Black's political theology forces religious institutions and communities to adopt a fictitious posture in order to avoid exclusion from general welfare programs. This argument is generally in accord with recent legal scholarship regarding the institutional or corporate dynamics of First Amendment rights.¹⁴⁶ As Richard Garnett has explained, institutions form "the scaffolding around which civil society is constructed, in which personal freedoms are exercised, in which loyalties are formed."¹⁴⁷ As such, they should be given protections similar to those generally granted to individuals.¹⁴⁸ Paul Horwitz has similarly argued that First Amendment interpretation has been largely "institutionally agnostic"—that is, legal analysis has traditionally been unconcerned with the context in which speech and free exercise rights are often enjoyed.¹⁴⁹

While Horwitz's recommendation that courts employ a degree of deference to the self-conceptions of religious institutions seems helpful,¹⁵⁰ I might suggest that at least modern Establishment Clause doctrine—insofar as it relies on Black's original framework—is not agnostic regarding institutions. Rather, it looks suspiciously at strong religious institutions. In this sense, my argument is in accord with Phillip Hamburger's contention that modern Establishment Clause jurisprudence places burdens on "those who do religion in a group."¹⁵¹ In the context of *Trinity Lutheran*, the burdens are not simply exclusion from social welfare programs, but rather self-effacement as a condition for inclusion.

Yet there is a more cynical possible reading of sphere separation, the use-status distinction, or even the public benefit theory that seems predicated on them. Read in the light of Justice Black's operative political theology, we might see the distinction between religious and secular activities as an aspirational statement regarding the ideal character of a religious school within a liberal state. While this school might be permitted religious activities as a sort of ancillary or ornamental performance, its true value (and reason for state support) would lie in the sort of "secular"

145 *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002). Here a divided Court upheld an Ohio voucher program that provided tuition for families to use at private schools, including religious ones.

146 See, for example, Richard Garnett, "Do Churches Matter?: Towards an Institutional Understanding of the Religion Clauses," *Villanova Law Review* 53, no. 2 (2008): 273–95; Richard Garnett, "Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?," *St. John's Journal of Legal Commentary* 22, no. 2 (2007): 515–33; Paul Horwitz, "Defending (Religious) Institutionalism," *Virginia Law Review* 99, no. 5 (2013): 1049–63; Paul Horwitz, *First Amendment Institutions* (Cambridge, MA: Harvard University Press, 2013); Frederick Schauer, "Towards an Institutional First Amendment," *Minnesota Law Review* 89, no. 5 (2005): 1256–79.

147 Garnett, "Do Churches Matter?," 273–74, cited in Horwitz, *First Amendment Institutions*, 3.

148 Many see the *Hosanna Tabor* and *Hobby Lobby* decisions as signaling a more "corporate" interpretation of civil liberties. See generally Micah Schwartzman, Chad Flanders, and Zoë Robinson, eds., *The Rise of Corporate Religious Liberty* (Oxford: Oxford University Press, 2016).

149 Horwitz, *First Amendment Institutions*, 5–6.

150 Horwitz, *First Amendment Institutions*, 80–92. It seems that the Roberts Court is rather receptive to the idea of recognizing free exercise rights for corporate groups. The most prominent victories of "religious institutionalism" have occurred in the unanimous *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012), and the more narrowly decided *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014). The former case retained a religious organization's right to hire according to principles of its mission, while the latter granted a religious exemption from mandated health care legislation requiring employers to cover contraceptive and abortifacient drugs.

151 Hamburger, *Separation of Church and State*, 14.

education expected of the American common school. By primarily inculcating civic loyalty and the sort of stabilizing social behavior Black held to be the end of religion, the religious school would serve to instill identification with the nation state, which Cavanaugh describes as unavoidably in competition with religious identification. Thus, participation in public benefit programs might serve to subtly erode the school's religious identity and conform it to the ideal expressed by the liberal state.¹⁵²

In the end, maintaining the promise of religious freedom seems rather “impossible,” but not for the precise reasons Winnifred Fallers Sullivan suggests. In the case of Black's foundational jurisprudence, it is not official, dogmatic religion which crowds out the individuated, “lived religion” of Sullivan and Robert Orsi.¹⁵³ Rather, it is one man's lived religion which has proscribed those more substantial traditions. In this sense, Black's theo-political activity gives more credence to Mark DeGirolami's interpretation of religion clause jurisprudence as a “tragic”—rather than “comic”—endeavor. The dark irony here is that precisely in the attempt to codify a neutral relationship between the law and religious communities, a substantive vision of proper religion inevitably becomes inscribed in law. There seems to be no solution, no way out of this conundrum. The best course of action might be to follow DeGirolami's recommendation for a dispositional and historically informed approach, as opposed to the search for invincibly coherent legal doctrines.¹⁵⁴ If Justice Douglas' demand—that government “have no interest in theology or ritual”¹⁵⁵—is ultimately impossible, perhaps one avenue of this requisite historical understanding lies in exploring the theological worlds of the justices themselves.

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- 152 Of course, the right to absent oneself from symbolic pledges of loyalty to the state within public schools was recognized in *West Virginia v. Barnette*. However, the citizenship-formation aims of “secular” learning as outlined in Justice Jackson's *Everson* dissent regard the entirety of one's educational experience. The prevailing Rawlsian movement in citizenship education literature would affirm Cavanaugh's assertion that religious identity is inexorably in conflict with the aims of liberal democratic citizenship. See Amy Gutmann, *Democratic Education* (Princeton: Princeton University Press, 1987); Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge, MA: Harvard University Press, 2000); Eamonn Callan, *Creating Citizens: Political Education and Liberal Democracy* (Oxford: Oxford University Press, 2004). On the danger that state aid programs may erode the religious identity of schools, see Brett Bertucio, “Voucher Programs: Problems and Promises for Catholic Schools,” *Church Life Journal* (May 4, 2018), <https://churchlifejournal.nd.edu/articles/voucher-programs-problems-and-promises-for-catholic-schools/>.
- 153 Sullivan, *The Impossibility of Religious Freedom*, 140–46; Robert Orsi, *Between Heaven and Earth: The Religious Worlds People Make and the Scholars Who Study Them* (Princeton: Princeton University Press, 2006).
- 154 DeGirolami, *The Tragedy of Religious Freedom*, 1–10.
- 155 *McGowan v. Maryland*, 366 U.S. 420, 564 (1961) (Douglas, J., dissenting).