

Hugo Black's Wall of Separation of Church and State

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A Senior Thesis submitted in partial fulfillment
of the requirements for graduation
in the Honors Program
Liberty University
Spring 2012

Abstract

Justice Hugo Black and his 1947 opinion in Everson v. Board of Education. In this opinion, Justice Black quoted Thomas Jefferson's term "wall of separation" and further added his own opinion that the wall must be high and impregnable. This meant that from that day forward the separation of church and state would be applied to all aspects of government not just the federal level. Several key factors in Justice Black's background inclined the Justice to rule unfavorably against religion. First, it is a known fact that Justice Black was a member of the KKK, an organization that was known to be particularly bigoted towards Catholics. Second, Justice Black believed Paul Blanshard's writings concerning the Catholic Church and shared his mistrust of the Catholic Church. Finally, at the time of his opinion, Justice Black was not a practicing Christian and the evidence shows that the Justice did not believe in the supernatural aspects of Christianity. This evidence supports a conclusion that Justice Black was prejudiced against religion in his decision in Everson v. Board of Education and engaged in judicial activism.

Hugo Black's Wall of Separation of Church and State

Today, a small rural county in Virginia is being forced to stop offering what has been a traditional prayer referencing Jesus before its county board meetings.¹ Prayer has been banned in public schools; even if the prayer was just privately thanking God for lunch.² The Supreme Court has held that public schools cannot expose students to the Ten Commandments; this is because the students might read, mediate upon, respect, or obey them.³ In the United States, the courts have taken a position that tolerates little religious influence where the government is concerned.⁴ All of these cases and rules have followed the precedent set by one case and the opinion of one Justice, Hugo Black.⁵

To arrive at this momentous decision, Justice Hugo Black, with his Ku Klux Klan background, anti-Catholic beliefs, and his own disbelief in religion, was supports that Black may have been biased when he gave his judicial opinion concerning the separation of church and state. His biased beliefs led Justice Black to become a judicial activist bent on ridding any influence religion had concerning government.

For one hundred fifty years, the relationship of the church and state had been defined as a federal issue.⁶ The individual states were free to determine what role the government could have in religion.⁷ However, Everson v. Board of Education changed this approach and set new

¹ James Gherardi, Judge Asks Board to Cease Prayer & Plaintiff to Reveal Herself, (2012), <http://www.wset.com/story/16687424/judge-asks-board-to-cease-prayer-jane-doe-to-reveal-herself>.

² Engel v. Vitale, 370 U.S. 421 (1962). Note, Engel found state sponsored prayer unconstitutional. See also, Reed v. Van Hoven, 237 F Supp.48 (W. D. Mich, 1965). Note, the Court ruled that children could not recite vocal prayers over their lunch.

³ Stone v. Graham, 449 U.S. 39 (1980).

⁴ David Barton, Original Intent: The Courts, the Constitution, & Religion 16-17 (2008).

⁵ Id. at 17.

⁶ Id.

⁷ Id.

boundaries on what relationship could be accepted.⁸ This decision broadened the power of the Supreme Court and put a *wall of separation* between the church and any form of government in the United States.⁹ The most memorable part of the decision was the opinion of Justice Hugo Black, a former Alabama Senator who had been a member of the Ku Klux Klan.¹⁰ In his opinion the Justice stated,

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against

⁸ Id.

⁹ Id. Note, for the first time the Establishment Clause was incorporated to the states, thus, expanding the Supreme Courts power.

¹⁰ Daniel L. Dreisbach, Thomas Jefferson and the Wall of Separation Between Church and State 5 (2002). Note, Dreisbach contends that Justice Black's opinion has influenced discourse and policy concerning church state relations more than any other.

establishment of religion by law was intended to erect 'a wall of separation between Church and State.'¹¹

This broad opinion of Justice Black would establish a metaphor as law and lead to the mere mention of anything religious in nature being banned from all forms of government.¹² Justice Black's opinion changed America's perspective and attitudes concerning how the state and church relate to each other and his activism against religion established a new wall of hostility towards religion which is still felt today.¹³

Making of an Activist

There are many different circumstances in a judge's background that may lead to bias and eventually to judicial activism. A judge's surroundings, background, and upbringing all affect a judge's morals and beliefs.¹⁴ Past experiences and religious beliefs also forge perspectives and potential biases.¹⁵ To interpret some of these presumptions and feelings, many study a judge's past writings and speeches.¹⁶ In reality, many lawyers use these interpretations to determine whether a judge deciding their cases would have a favorable position toward a client.¹⁷

¹¹ Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

¹² Dreisbach, supra note 10, at 5-6.

¹³ Terence P. Jeffrey, Archbishop to U.S. Troops: Obamacare Reg 'Is a Blow to Freedom, http://www.catholic.org/national/national_story.php?id=44681. Note, after issuing an order from the United States Department of Health and Human Services, for federally mandated health insurance covering sterilization, abortifacients and contraception, the Catholic Church issued a letter calling on Catholics to resist the policy initiative. However, army priests were not allowed to read the letter to their military congregations. Archbishop Timothy Broglio has stated, "in trying to stop Catholic Army chaplains from reading his pastoral letter, the Army was violating his First Amendment rights to free speech and the free exercise of religion and the First Amendment rights of Catholic chaplains and Catholic service members."

¹⁴ Richard A. Posner, How Judges Think 94 (2008).

¹⁵ Id. at 95-96. Note, one's racial background is key also in the formation of bias.

¹⁶ Id. at 4.

¹⁷ Id. at 23. Note, studies show that political affiliation affects judgments, Republican judges rule more conservatively while Democrat judges rule more liberal.

Black's Roots for Activism

Following this formula of analysis, Justice Black's background and experiences show a probable reason for judicial activism against religion. Justice Black was born in the segregated South, which by the 1920s, was politically dominated by the Ku Klux Klan. The Klan espoused racial hatred and religious bigotry. Anti-Catholicism was popular, and the Klan threatened and intimidated the Catholic population while spreading lies and false innuendo about the Catholic Church. Justice Black himself was a member of the Ku Klux Klan. He gave many speeches concerning Catholics and the power of the Catholic Church. However, today, little written evidence exists of Justice Black's Klan involvement or his beliefs towards the Catholic Church. But it can be assumed he held some of the beliefs he was speaking on. His son, Hugo Black Jr., admitted that his father had suspicions concerning the Roman Catholic Church and would read Paul Blanshard's anti-Catholic books that professed a Catholic takeover of the United States. Moreover, Justice Black had misgivings about religion in general. As a child he felt the church was too overbearing in people's lives, and as an adult he professed to have no faith concerning religion. Taken together, these facts lead one to conclude Justice Black was biased against religious influence with the government.

Hugo Black and the Ku Klux Klan

Klan History

The first Klan. Hugo Black was born in Alabama just twenty-one years after the bloody Civil War.¹⁸ The South was financially and socially devastated, and the North was proceeding to reconstruct the South.¹⁹ During this time period of reconstruction, the South was under military

¹⁸ Hugo Black, Jr., My Father: A Remembrance 3 (1975). Note, Hugo Black was born on February 27, 1886.

¹⁹ Claudia D. Goldin & Frank D. Lewis, The Economic Cost of the American Civil War: Estimates and Implications, 35 J. Econ. Hist. 299, 299-303 (1975).

rule and the newly freed slaves received rights for the first time.²⁰ The white southern population resented these newly freed slaves and the occupying army of the North.²¹ A group of former Confederates came together to form an organization that would restore some of their former power and influence.²² That organization would become the Ku Klux Klan, an organization that would quickly rise to national notoriety.²³

The violence also entered its way into politics in the form of voter oppression and murder.²⁴ The Republican Party represented the northern and black interests in the southern government, and the Klan considered these Republicans scalawags.²⁵ In the spring of 1870, the Klan whipped or scourged over twenty men, black and white, in Caswell County, North Carolina to discourage any political participation by blacks or Republicans.²⁶ The climax came when Klan members killed John Walter Stephens, who was Caswell's state senator and a Republican leader.²⁷ Northern leaders began to take notice of the violence and the blatant rights violations perpetrated by the Klan.²⁸ By 1872, the forty-second Congress began investigating the activities and violence that was occurring in the South.²⁹ After Congress's investigation, the Klan's

²⁰ Eric Foner, Rights and the Constitution in Black Life during the Civil War and Reconstruction, 74 J. Am. Hist. 863-883, 863-868 (1987).

²¹ Paul J. Gillette & Eugene Tillinger, Inside Ku Klux Klan 21(1965).

²² Id. at 21-22. Note, on December 15, 1865 several Confederate veterans and college students banded together to form the Ku Klux Klan.

²³ Id. at 22-23. Note, in 1867 the Klan would have its first national convention and by 1868 it would have over 500,000 members.

²⁴ William P. Randel, The Ku Klux Klan: a Century of Infamy 50 (1965). Note, the killings happened in Kemper county Mississippi.

²⁵ Id. at 84. Note, a scalawag was any white male who aided blacks or supported the Northern reconstructive efforts.

²⁶ Id.

²⁷ Id. Note, Stephens was also serving as a detective and was investigating Klan activity.

²⁸ Gillette & Tillinger, supra note 21, at 24-28.

²⁹ Id. Note, Congresses report stated that in the South; schools had been burned, Georgia and South Carolina averaged one unsolved murder a month, the murders of black citizens in Texas are too numerous to count, and that in Louisiana more than 3000 blacks were forcibly kept from voting in the 1868 presidential election.

terrorism was outlawed, and the president was authorized to use the army to stop the violence and intimidation.³⁰ The Klan would soon disappear, only to rise again more motivated and powerful.

The second Klan. The second rising of the Ku Klux Klan began with a movie and a murder. The 1915 movie, Birth of a Nation, was an attempt to show the southern interpretation of the events leading to the Civil War and the aftermath.³¹ In the film, slaves were happy and content until the outbreak of war changed their disposition.³² The movie showed proud white Southerners sacrificing all they had for their noble cause while facing the indignity of black soldiers pillaging and burning their homes.³³ The movie went on to show that after the war, the former slaves now were having their way in the state legislatures.³⁴ According to the film, the only way to save the South was to organize and fight back.³⁵ The end of the film shows the “brave” southern knights of the Ku Klux Klan rescuing a white heroine from a black villain who had kidnapped her and was planning to rape her.³⁶ The movie served as a history lesson about the Klan, but the murder of Mary Phagan would serve as the catalyst for the rebirth of the Ku Klux Klan in America.³⁷

³⁰ Id. at 28.

³¹ Randel, supra note 24, at 178-181. Note, President Woodrow Wilson’s book History of the American People was quoted in the film. One quote from Wilson’s book used in the film stated, “the white men were roused by a mere instinct for self-preservation.” After seeing the film in a special White House screening, Wilson allegedly said, “It is like writing history with lightning, and my only regret is that it is all so terribly true. See also, John H. Franklin, “Birth of a Nation” Propaganda as History, 20 Mass. Rev. 417 (1979).

³² Id.

³³ Id. at 179.

³⁴ Id. at 180. Note, the film shows anarchy in the South Carolina Statehouse caused by what the film described as “arrogant, insolent, illiterate, bad-behaved negro-majority.”

³⁵ Id.

³⁶ Nancy MacLean, Behind the Mask of Chivalry: the Making of the Second Ku Klux Klan 12 (1994). Note, the end of the film shows the Klan castrating and lynching the black villain. This act of violence represented the uniting of all white men and the birth of a reunited America.

³⁷ Id. at 12.

Mary Phagan was a young white woman who was working in a factory in Atlanta, Georgia.³⁸ She was murdered, and the state convicted her supervisor, Leo Frank, a Jew, of murdering her.³⁹ Believing that someone else had committed the crime, Georgia's governor commuted Leo Frank's death sentence in 1915.⁴⁰ Consequently, four days later, a group of men calling themselves the Knights of Mary Phagan, took Leo Frank out of his state prison farm and hung him from a tree in Mary Phagan's hometown.⁴¹ Three months later, a lighted cross would signal the revival of the Klan, a new Klan slightly different from the original but just as vicious.⁴²

The birth of the second Klan. William Joseph Simmons served in the army during the Spanish-American War; he was an unsuccessful Methodist minister and history professor, yet he would spark a movement that would soon lead to millions of members.⁴³ The Birth of a Nation and the events surrounding Mary Phagan's murder inspired Simmons to begin the new Ku Klux Klan on Thanksgiving Day on top of Stone Mountain, in Georgia.⁴⁴ Growth of Simmons organization was slow at first until he hired an advertising firm that would promote the organization to potential members.⁴⁵ Members were led to believe they were an army of Protestant Americans pushing for temperance, American values, and charity.⁴⁶ However, the Klan's core values still focused on white superiority and the superiority of Protestant Christianity

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² Randel, supra note 24, at 183.

⁴³ Brian R. McGee, Rhetoric and Race in the Progressive Era: Imperialism, Reform, and the Ku Klux Klan, in Rhetoric and Reform in the Progressive Era 326 (J. Michael Hogan ed., 2003).

⁴⁴ Id. Note, two members who helped start the new Klan had been involved in the first Klan of the 1800s.

⁴⁵ Id.

⁴⁶ Id. Note, the Ku Klux Klan was a staunch supporter of the prohibition movement.

over other religions.⁴⁷ In an appearance before Congress in 1921, the Imperial Wizard, William Simmons testified,

We exclude Jews because they do not believe in the Christian religion. We exclude Catholics because they owe their allegiance to an institution that is foreign to the government of the United States. To assure the supremacy of the white race we believe in the exclusion of the yellow race and in the disenfranchisement of the Negro.⁴⁸

With this testimony, it was clear the real intentions of the Klan were not as wholesome as the Klan's leaders portrayed them to be and that the Klan was actually pushing for discrimination against Jews, blacks, and Catholics.⁴⁹

Hate and Anti-Catholicism. One of the main tenets of the new Klan was a suspicion and mistrust of Catholics in the United States.⁵⁰ This anti-Catholic stance of the Klan was not regionalized. In a survey, many from the north, south, east, and west all stated that anti-Catholicism was one of their main motivations for joining the Ku Klux Klan.⁵¹

When William Simmons lit a fiery cross on Stone Mountain, he began a new form of intimidation.⁵² The fiery cross would intimidate many and serve as a symbol of the Ku Klux

⁴⁷ Gillette & Tillinger, *supra* note 21, at 32-33.

⁴⁸ *Id.* at 38.

⁴⁹ *Id.* at 38-40. Note, Congress was investigating supposed Klan violence. Representative Peter F. Tague of Massachusetts noted how much evidence was against the Klan and that he would push for a full-scale investigation and the needed legislation to stop Klan violence.

⁵⁰ John M. Mecklin, *The Ku Klux Klan: a Study of the American Mind* 157 (1963). Note, in an early 1920's questionnaire, it was determined that the overall appeal to the Klan was the Klan's anti-Catholic stance.

⁵¹ *Id.*

⁵² *Id.* at 4.

Klan's power.⁵³ Any Catholic priest who spoke against the Klan soon had a cross burned in front of his church or home.⁵⁴ The Reverend Oren Van Loon spoke against such cross burnings in a sermon he gave at his Detroit church.⁵⁵ Subsequently, the Reverend Loon went missing for eleven days. When he returned his back had the letters KKK branded to his skin.⁵⁶ Elsewhere, the Klan became a menace by gathering close to a thousand men for an anti-Catholic riot in Carnegie Pennsylvania.⁵⁷ The riot resulted in one man losing his life, many being beaten, and others whipped.⁵⁸ Despite these violent acts, the Klan's most powerful weapon against Catholics was misinformation and innuendo.

Misinformation in the form of writings and pamphlets against Catholics was nothing new.⁵⁹ The Know-Nothing party of the 1850s and the American Protective Association had both used propaganda in their push for anti-Catholicism.⁶⁰ The Klan would print false truths and innuendo against the Knights of Columbus in an attempt to discredit the Knights.⁶¹ The Klan published articles accusing the Knights of being a standing army that was just waiting for the Pope to order them the take over America forcibly.⁶² The Klan even created a jingle that stated: "I'd rather be a Klansman robed in pure white, Than a Catholic priest black as night, Loyal to the

⁵³ David J. Goldberg, Disconnected America: The United States in the 1920s 118-119 (1999). Note, the Klan would burn crosses at the homes of wife beaters, adulterers, and others deemed not living a moral life.

⁵⁴ William W. Shannon The American Irish: a Political and Social Portrait 298 (1989).

⁵⁵ Randel, supra note 24, at 206.

⁵⁶ Id.

⁵⁷ Gillette & Tillinger, supra note 21, at 45.

⁵⁸ Id.

⁵⁹ Goldberg, supra note 53, at 120-121. Note, Maria Monk's Awful Disclosure of the Hotel Dieu Nunnery of Montreal was first published in 1836 and was now used by the Klan as propaganda.

⁶⁰ Id.

⁶¹ Randel, supra note 24, at 186-187.

⁶² Id. Note, The Klan created a forgery of a Knights of Columbus oath that stated their goal was to take over the United States and turn it over to Papal control.

United States, my home, Rather than the dago Pope of Rome.”⁶³ At Klan meetings, the members recited this jingle to the delight of the Klan leadership.⁶⁴ The Klan furthered the propaganda by publishing false accusations claiming Catholics stored arms and munitions in church basements for a future militant Catholic takeover.⁶⁵



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All of this propaganda succeeded in breeding distrust and violence against the Catholic community, but the political power, developed by the Klan, proved to be the greatest power formed against Catholics.

Political power of the Klan. The rise of the Klan’s popularity and political power surprised many observers.⁶⁷ With nine million members and an income of twenty-five million dollars a year, the Klan had the voters and the money to make a difference politically.⁶⁸ With

⁶³ Gillette & Tillinger, supra note 21, at 30.

⁶⁴ Id.

⁶⁵ Goldberg, supra note 53, at 122-123. Note, the Klan would also spread rumors that the Pope was moving to Washington D.C.

⁶⁶ David Neiwert, Bishop Tobin is Doing His Best to Prove Anti-Catholic Bigots Right (Nov. 25, 2009) Paragraph 10, available at <http://crooksandliars.com/david-neiwert/bishop-tobin-doing-his-best-prove-an>. Note, this was a typical political cartoon during this period, the illustration shows how the KKK protects the United States from the influence of Rome.

⁶⁷ Goldberg, supra note 53, at 122-123. Note, many news articles tried to understand the Klan’s surprising burst of growth. Many believed the anti-Germany feeling had found other targets after WWI ended, others noted the depressed economy, crime, prohibition, and the feeling that the country was drifting away from protestant white value led the way for the Klan’s growth.

⁶⁸ Gillette & Tillinger, supra note 21, at 41.

Klan voters and persuasion, the Klan dominated five state legislatures, elected several governors, controlled several United State Senators, and even had a member on the Supreme Court (Hugo Black).⁶⁹ The Klan's largest political base was in the Midwest where David C. Stevenson, the Grand Cyclops of the Indiana Ku Klux Klan, rose to power and dominated that state's political power.⁷⁰ Stevenson commanded a large membership of over five hundred thousand members in Indiana.⁷¹ With that many voters, Stevenson used his influence to control every aspect of Indiana politics from mayor to governor.⁷² The only areas he could not rein in were several areas controlled by moonshiners and South Bend, the home of the University of Notre Dame, the United States' largest Catholic University.⁷³ All of this political power was not just limited to the state level. The Klan's influence and beliefs would eventually determine who could run for the Presidency.⁷⁴

Democrat Al Smith was a popular two-term governor from New York and the likely candidate for President in 1924.⁷⁵ He had the support of the powerful Tammany Hall political machine, urban Democrats praised him, and many believed Smith would lead the Democrats back to power in the White House.⁷⁶ However, Al Smith's one perceived problem was that was he was a practicing Roman Catholic.⁷⁷ Because of Smith's Catholicism, the Democratic

⁶⁹ Id. at 42-44

⁷⁰ Id.

⁷¹ Id.

⁷² Id. Note, Stevenson directly controlled over 75% of Indiana's municipalities. Those who opposed him or the Klan were subject to floggings, cross burnings, house burnings, and various other forms of intimidation. Stevenson handpicked all of the candidates at the Indiana Republican Party convention, including the governor.

⁷³ Goldberg, supra note 53, at 129.

⁷⁴ Id. at 61-62.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id. Note, as the Governor of New York, Al Smith also signed a repeal of New York's prohibition law and supported anti-mask measures aimed at the KKK.

Convention split into factions that supported Smith and Klan supporters who opposed Smith.⁷⁸ Many members of the convention openly complained about the bigotry of the Klan; these members tried to have a resolution passed that denounced the Ku Klux Klan by name.⁷⁹ However, the Klan's political power was too great, the resolution failed and the convention chose John W. Davis, who was a much weaker candidate than Smith.⁸⁰ The ability to take down a Presidential candidate proved that the Klan could flex its political muscles, guide and direct policy, and choose policy makers.

Hugo Black's Involvement in the Ku Klux Klan

Hugo Black was born in Clay County, Alabama; his family's southern roots run deep, and he was proud to be from the South.⁸¹ Hugo Black studied hard and went to college, and then proceeded to study the law.⁸² After becoming a lawyer, he moved to Birmingham Alabama and found great success as a trial lawyer.⁸³ It was at that time that Hugo Black's official involvement with the Ku Klux Klan began.⁸⁴

First public involvement with the Klan. Black represented Edwin R. Stephenson in a sensational trial concerning a Methodist preacher accused of murdering a Catholic priest in Birmingham, Alabama.⁸⁵ Edwin R. Stephenson was a disreputable Methodist preacher known to hang around the city courthouse looking for young couples to marry so he would receive the

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id. Note, Davis lost to Calvin Coolidge in the national Presidential election.

⁸¹ Black Jr., supra note 18, at 3-7. Note, Hugo Black's uncle, Columbus Black, was killed in the battle of Gettysburg as he fought for the Confederacy

⁸² Id. at 16-17. Note, Black graduated with high honors at the University of Alabama Law School in 1907.

⁸³ Id. at 21-26.

⁸⁴ Philip Hamburger, Separation of Church and State 424 (2002).

⁸⁵ Id.

marriage fee for performing the ceremony.⁸⁶ Ruth Stephenson, Edwin Stephenson's daughter, had converted to Catholicism and had run away from home to get away from her father.⁸⁷ Edwin Stephenson proceeded to go to the local Catholic Church searching for his daughter.⁸⁸ Stephenson found Father James E. Coyle sitting on the rectory porch after dinner; Stephenson began to argue with Father Coyle about the whereabouts of his daughter.⁸⁹ Father Coyle informed Stephenson that his daughter Ruth had married a Puerto Rican named Pedro Gussman that day and he had performed the marriage ceremony.⁹⁰ Enraged, Stephenson produced a revolver from his pocket and shot Father Coyle through the head while the Father was still sitting on the porch.⁹¹ Stephenson was summarily arrested and charged with second-degree murder.⁹² Stephenson, however, was a Klan member, and many thought the killing of a Catholic priest was good, so Jim Esdale, the Grand Dragon of the state Ku Klux Klan, paid to have Hugo Black represent Stephenson at trial.⁹³

Black promotes bigotry. The defense, likely, did not have to put on much of a case since the majority of the jury, including the foreman, were Klan members.⁹⁴ Hugo Black did, however, put on a formidable defense that keyed in on the racial and religious tensions of the community.⁹⁵ At the trial he focused on Pedro Gussman's race, and the fact that he married a

⁸⁶ Id.

⁸⁷ Id. Note, Stephenson would tie his daughter to her bed and whip her, he also would lock her in her room for days. Anytime Ruth would run away Stephenson would claim the Catholics had kidnapped her.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Gerald T. Dunn Hugo Black and the Judicial Revolution 103 (1977).

⁹² Id.

⁹³ Hamburger, supra note 84, at 425. Note, Hugo Black had developed a reputation in Alabama as a very competent trial attorney.

⁹⁴ Id. at 426. Note, the police chief was also a Klan member and he testified for the defense.

⁹⁵ Id. at 425.

white woman.⁹⁶ When Ruth Stephenson’s husband was called into court, Black arranged for the window shades to be closed and the lights adjusted to make Gussman’s skin appear darker.⁹⁷ During Black’s examination of Gussman, he never asked any questions directly to Gussman; he just told the jury to look at Gussman, and Black hinted to the jury that Gussman had some “negro ancestry.”⁹⁸ On cross-examination, he proceeded to ask Gussman what the state had done to his hair to smooth it down.⁹⁹ Then, he produced an earlier photograph of Gussman with curly hair; Black stated, “I wanted the jury to see what Gussman looked like before his hair was worked on.”¹⁰⁰

Next, Black attacked the Catholic religion and Gussman’s foreignness.¹⁰¹ He noted that Ruth Stephenson getting married to a foreigner, “whether he was Greek, Puerto Rican, or Italian, would have agitated Stephenson like any other American.”¹⁰² Black then moved on to the Catholic religion itself.¹⁰³ He told the jury that, “because he was a priest doesn’t mean he was divine,” referring to Father Coyle.¹⁰⁴ He accused the Catholics of locking up Ruth Stephenson and brainwashing her to join their religion.¹⁰⁵ Black explained that Stephenson believed his daughter had been kidnapped and converted to Catholicism; Black noted, “how could a Methodist minister’s daughter be converted without some sort of wrongdoing?”¹⁰⁶ Black then

⁹⁶ Id.

⁹⁷ Id.

⁹⁸ Id.

⁹⁹ Roger K Newman, Hugo Black: A Biography 81-82 (1994).

¹⁰⁰ Id. At 82.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Hamburger, supra note 84, at 425.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Id.

called a Catholic witness for the prosecution a “brother in falsehood as well as faith.”¹⁰⁷ In the end, the jury acquitted Stephenson of any wrongdoing, and Hugo Black made the strongest political ally of his career.¹⁰⁸

Hugo Black joins the Klan. Hugo Black went on to join the Klan and became a member in the powerful Richard E. Lee “Klan No. 1.”, most importantly, he became the Kladd of his Klavern.¹⁰⁹ In this position, Black was the officer in charge of initiating new members by making them pledge to support white supremacy and separation of church and state.¹¹⁰ He was only in this position for a short time however, for a political opportunity rose that required Hugo Black to leave the Klan and hit the campaign trail.¹¹¹

Klan support for Senator Black. Hugo Black stepped into the race for the U.S. Senate when the incumbent Oscar W. Underwood fell out of favor with the Klan. Senator Underwood had risen to become the most popular politician in the South; many believed Underwood could be the first President from the South since the Civil War.¹¹² In 1924, Underwood was once again contending for the Democratic nomination for President.¹¹³ At the convention, the Klan was working against the popular frontrunner Al Smith because of Smith’s Catholic religion.¹¹⁴ Underwood spoke out against the Klan’s actions and proposed an official denouncement of the

¹⁰⁷ Id.

¹⁰⁸ Id. at 426.

¹⁰⁹ Id. Note, the Klan was enamored with the letter K and much of their secret vocabulary had words beginning with the letter K. A Klavern was the local order of the Ku Klux Klan.

¹¹⁰ Id.

¹¹¹ Id.

¹¹² Dunn, supra note 91, at 425. Note, Underwood was in strong contention for the Democratic Presidential nomination in 1912, which Woodrow Wilson would eventually win.

¹¹³ Id.

¹¹⁴ Id.

Klan by the Democratic Party.¹¹⁵ The denouncement failed to garner enough votes to pass, and the Klan became angry with Underwood.¹¹⁶ Thousands of Klansmen gathered in demonstrations against Underwood in Birmingham.¹¹⁷ The Klansmen buried a coffin to signify Underwood's burial in effigy.¹¹⁸ Finally, after losing the support of his party, Underwood stated that he would not seek re-election, leaving the door open for Hugo Black.¹¹⁹

Running for Senate.

When he decided to run for the open Senate position, Grand Dragon Jim Esdale advised Black to draft a letter of resignation from the Klan just in case Black ever needed to deny membership.¹²⁰ Black drafted the letter, and gave it to Esdale for safekeeping; Black signed the letter "I.T.S.U.B." which meant, "in the sacred unfailing bond."¹²¹ During the campaign, Hugo Black did not directly ask for Klan support, but everyone knew he had it.¹²² The newspaper Montgomery Advisor stated that Black was "the darling of the KKK."¹²³ Grand Dragon Esdale became his unofficial campaign manager booking him speaking engagements at Klan Klaverns all across the state.¹²⁴ At these Klaverns, Black's speeches would primarily focus on Catholics

¹¹⁵ Id.

¹¹⁶ Id. at 116.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id. Note, John H. Bankhead was challenging Underwood for the Democratic nomination.

¹²⁰ Hamburger, supra note 84, at 426.

¹²¹ Id. Note, this shows how strong Black's bond with the Klan was.

¹²² Id. at 427.

¹²³ Id.

¹²⁴ Id. Note, the Klan had 148 Klaverns and the Klan members served as an invisible campaign organization for Hugo Black. This would lead to Black claiming that he had no paid staff, no campaign managers, and no organization at all; he would claim that the people ran his campaign. Klan members were also given explicit instructions that when people ask about Hugo Black's involvement with the Klan they are to change the subject and not answer.

and not on politics.¹²⁵ Later, Jim Esdale would comment that “Hugo could make the best anti-Catholic speech you ever heard.”¹²⁶ All of this would add up to a rousing victory for Hugo Black and the Klan.¹²⁷ Both Black and the new Alabama governor, Bibb Graves, were elected as Klansman; it was now time to celebrate victory.¹²⁸

The Klan organized a Great Klorero, which was to be a large rally celebrating the victories of Hugo Black and Bibb Graves.¹²⁹ The rally began with speeches promoting the white race, Protestant morals and other Klan morals.¹³⁰ Both Black and Gibbs received the rare honor of receiving lifetime memberships to the Klan in the form of Golden Passports.¹³¹ After receiving the Passport, Black spoke and stated:

I know without the support of the members of this organization I would not have been called, even by my enemies, the Junior Senator from Alabama. I realize that I was elected by men who believe in the principles that I have sought to advocate and which are the principles of the organization.¹³²

This would be Black’s last official Klan meeting however; he would later deny being a member of the Klan and deny following its principles so he could save face in the public eye.¹³³

¹²⁵ Id.

¹²⁶ Id.

¹²⁷ Dunn, supra note 91, at 120.

¹²⁸ Id. at 121.

¹²⁹ Id.

¹³⁰ Id. at 122. Note, the Klan’s legal advisor, William Zumbrum, noted to the crowd, “you have given us a man named Black who wears white, to represent us in the Senate.” Zumbrum was refereeing to the white robes the Klan wears.

¹³¹ Hamburger, supra note 84, at 428.

¹³² Id.

¹³³ Id. at 430-431.

Black denies the Klan. In 1937, Hugo Black was serving his second term as a Senator from Alabama when the news came that President Roosevelt had nominated him to the Supreme Court of the United States.¹³⁴ This seemed a good fit since Senator Black had been one of the President's biggest supporters for New Deal legislation in Congress.¹³⁵ However, after the news broke of Black's Klan past, a public uproar emerged concerning Black's potential nomination to the Court.¹³⁶ To ease public concerns, Senator Black gave a public radio broadcast defending himself against his detractors.¹³⁷ The radio broadcast seemed to work; however, many believed the speech had double talk in it.¹³⁸ Though he never named them, Black alluded that Catholics were plotting against him and other Protestants as part of a larger conspiracy.¹³⁹ Many noted that Senator Black did not condemn the Klan or its activities; his speech seemed to many, more of a threat than an apology.¹⁴⁰ Despite all of the negative publicity, the Senate confirmed Hugo Black to the United States Supreme Court, and he would then spend years denying any substantial Klan involvement.

Hugo Black's son believed his father joined the Klan for the same reason he had joined so many other organizations before, the beneficial political and business contacts made by being a member.¹⁴¹ Some evidence also shows that Hugo Black did not hold to all of the tenants of the

¹³⁴ Black Jr., supra note 18, at 101.

¹³⁵ Id. at 82-84.

¹³⁶ Id. at 101. Note, many Catholics denounced Black's nomination to the Court.

¹³⁷ Hamburger, supra note 84, at 430-433. Note, during the speech fiery crosses lit the night sky in many communities. Former Imperial Wizard of the National Klan said that Black gave a "sincere speech" and that his "concept of religious and political freedom is sound Americanism."

¹³⁸ Id. at 430.

¹³⁹ Id.

¹⁴⁰ Id. Note, these were not the actual words of the speech just the analysis of others. The Herald Tribune, of New York, stated that Black was brazen to accuse the Catholics of intolerance while he was a member of the Klan.

¹⁴¹ Id. at 24-25. Note, Black was a member of the Kiwanis, Elks, Woodmen of the World, and many more organizations.

Klan.¹⁴² He had on many occasions defended black people when no one else would.¹⁴³ Later, as a Supreme Court Justice, Hugo Black cast his vote in favor of Brown v. Board of Education.¹⁴⁴ With the Brown decision, many in the South believed Black to be a “traitor to the South” since he had sided with black people against southern whites¹⁴⁵ However, despite his conflicting views towards blacks, Hugo Black’s son confirmed that Justice Black did hold strongly to one tenant of the Klan, anti-Catholicism. Hugo Black Jr. stated,

The Ku Klux Klan and daddy, so far as I could tell, only had one thing in common. He suspected the Catholic Church....He thought the popes and bishops had too much power and property. He resented the fact that rental property owned by the Church was not taxed; he felt they got most of their revenue from the poor and they did not return enough of it.¹⁴⁶

Black’s feelings towards the Catholic Church could have cumulated from years of being around anti-Catholic Klansmen or the reading of one of his favorite authors, Paul Blanshard, who used his writings to expose the supposed power abuses of the Catholic Church.¹⁴⁷

¹⁴² Id. at 27-29. Note, as county solicitor, Black did not allow false criminal claims against blacks proceed, Black believed the law was equal among the races.

¹⁴³ Id.

¹⁴⁴ Id. at 208-209. Note, afterwards, Hugo Black lost his political power in his home state of Alabama due to the uproar concerning Brown v. Board.

¹⁴⁵ Id. at 209.

¹⁴⁶ Id. at 104.

¹⁴⁷ Id.

Hugo Black and Paul Blanshard

Shared Beliefs

Hugo Black Jr. confirmed that his father and the Ku Klux Klan had only one belief in common; the Catholic Church should not be trusted in America.¹⁴⁸ Hugo Black Jr. went further by saying that his father read Paul Blanshard's anti-Catholic books and agreed with them that the Catholic Church had too much power.¹⁴⁹ To many, Paul Blanchard was the Ivy League anti-Catholic hero of his time.¹⁵⁰ He had been a lawyer, a theologian, State Department official and an author.¹⁵¹ His books looked at the power and influence of the Catholic Church in the world.¹⁵² Blanshard and the Ku Klux Klan share many of the same beliefs and concerns about the Catholic Church, but he approached the ideas systematically and scholarly view.¹⁵³

Power of the Catholic Church. Blanshard professed that to be able to comprehend the danger and power of the Catholic Church one has to know the structure of the Catholic Church.¹⁵⁴ He believed the Catholic Church was structured to be a hierarchy.¹⁵⁵ Blanshard contended that the Catholic Church never shed the old Roman hierarchy system of the past.¹⁵⁶ With the Papal variety of imperialism, the Pope was the Church's Caesar, and all of the Church

¹⁴⁸ Black Jr., supra note 18, 104.

¹⁴⁹ Id.

¹⁵⁰ Hamburger, supra note 84, at 451.

¹⁵¹ Paul Blanshard, Religion and the Schools 267(1963). Note, many believed Blanshard's background and thoughtful presentation gave legitimacy to anti-Catholicism compared to the harsh and bigoted rhetoric of the Ku Klux Klan.

¹⁵² John C. Murray, Paul Blanshard and the New Nativism, Freedom and Catholic Power at 215-216, available at <http://woodstock.georgetown.edu/library/murray/1951a.htm>.

¹⁵³ Id.

¹⁵⁴ Paul Blanshard, American Freedom and Catholic Power 10 (1949).

¹⁵⁵ Id. at 10.

¹⁵⁶ Id.

was his empire.¹⁵⁷ According to Blanshard, Caesar was the infallible leader of Rome; likewise, the Pope is the infallible leader of the Vatican.¹⁵⁸ With his advisors, the Pope directs what areas of life the Church can control, and the Church directs and controls its followers.¹⁵⁹ Blanshard contended that through the hierarchy of Church leadership, the Catholic Church can assert itself in all nation states where Catholics are found.¹⁶⁰ However, this structure is not just limited to Church activities, Blanshard stated, “The Church and the Church alone has the right to determine what areas the Church shall control.”¹⁶¹ He cited the Catholic Almanac as proof of this claim; the Catholic Almanac states, “The state, as a creature of God, cannot determine the extent of its power but must accept the limitations imposed by God.”¹⁶² However, the Church still has to have the support of the people to accomplish its goals.¹⁶³ Blanshard believed Catholics were manipulated and controlled by the hierarchy of the Church to do their will.

Power over people. According to Blanshard, the Catholic Church controls and manipulates its members by using three methods to control millions of people across the world.¹⁶⁴ According to Blanshard, the Catholic Church “denies them the right to think freely about certain vital moral problems by cutting them off from vital sources of information; it offers them a limited culture; and it promotes tradition and obedience as substitutes for scientific curiosity.”¹⁶⁵ Blanshard believed these three methods stifle human intelligence and promote a

¹⁵⁷ Paul Blanshard, Communism, Democracy, and Catholic Power 52 (1951). Note, this book outlines the similarities between the struggle for power by the Catholic Church and Communist Russia.

¹⁵⁸ Id.

¹⁵⁹ Id. at 56.

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² Id. Note, Blanshard notes that the god mentioned in this quote is the Pope, God’s representative on earth.

¹⁶³ Id. at 43.

¹⁶⁴ Id. At 105.

¹⁶⁵ Id.

systematic superstition that encourages the Church members to obey.¹⁶⁶ Likewise, Blanshard believed the many oaths Catholics take over their lifetime encourages obedience.¹⁶⁷ Under these oaths, the complete submission of the individual is made to the Church hierarchy, and to the superiors in the Church; all supposedly necessary for good Christian virtue.¹⁶⁸ To implement this control, Blanshard contended that the Catholic Church wanted to encourage these virtues at an early age; therefore, Catholics would try to influence Church control over the schools.¹⁶⁹ To accomplish this, the Catholic Church denies the state's authority in educational matters believing that education is best left to the Church.¹⁷⁰ However, in the United States, the Catholic Church has found resistance to its influence in public schools.¹⁷¹ Nevertheless, Blanshard contended the Catholic Church had been able to influence public schools in areas where the Catholic population is great.¹⁷² As an example he noted that in 1949, Chicago had a forty percent Catholic population and yet seventy five percent of all Chicago teachers were Roman Catholic.¹⁷³ Also during the same time period, the Catholic Church controlled over seventy percent of the school board and elected a Catholic superintendent of public schools in Newark, New Jersey.¹⁷⁴ Blanshard described how the Church used this power to influence and control moral standards in the field

¹⁶⁶ Id. Note, Blanshard believed the confessional a place where priests gained control over the congregation.

¹⁶⁷ Id. at 164. Note, Blanshard stated that the loyalty oaths of Catholics rival any oaths members of the Communist party had to make.

¹⁶⁸ Id.

¹⁶⁹ Id. at 141. Note, according to Blanshard, "the Church has never believed in the separation of church and state in education."

¹⁷⁰ Id.

¹⁷¹ Blanshard, *supra* note 154, at 84.

¹⁷² Id. Note, areas with high numbers of Catholics had a high number of officials overseeing public education.

¹⁷³ Id. Note, these are 1949 figures.

¹⁷⁴ Id. at 85. Note, the Newark school superintendent proceeded to permanently ban The Nation magazine from the public-school libraries because of the supposed anti-Catholic sentiment.

of public education where it could.¹⁷⁵ To gain this power, the Church had to delve into politics and win positions of power in the government to achieve its goals.

Catholic political power. When Theodosius the Great made the Catholic Church the official religion of the Roman Empire, the marriage of church and state became one of the cardinal tenets of the Catholic Church.¹⁷⁶ Consequently, Blanshard believed that no matter what any Catholic said concerning the separation of church and state, they would always be loyal to the Catholic Church when elected to power.¹⁷⁷ To get the votes needed to take over a democracy, the Church promoted large families according to Blanshard.¹⁷⁸ This plan was to outbreed Protestants and change the make-up of the country so that Catholics could vote their policies in place democratically.¹⁷⁹

Blanshard proposed a series of events that would take place after the Catholic population grew to $\frac{3}{4}$ of the population. At this point, new amendments would place the Roman Catholic Church as the sole religion of the nation and the Catholic Church would be the supreme authority.¹⁸⁰ One amendment would address education placing all control of education in the hands of the Church and Catholic schools would receive aid in the form of tax money and public schools would instruct Catholicism.¹⁸¹ Laws concerning matrimony and procreation would

¹⁷⁵ Id.

¹⁷⁶ Blanshard, supra note 157, at 45

¹⁷⁷ Id. at 222.

¹⁷⁸ Blanshard, supra note 154, at 277. Note, one parish in 1946 reported that the average family had an average of twelve children and that one hundred Catholic mothers had produced 1,262 children.

¹⁷⁹ Id.

¹⁸⁰ Id.

¹⁸¹ Id.

conform to the Canon Law of the Roman Catholic Church; divorce would be illegal, birth control outlawed, abortion banned, and the sterilization of any human being would be forbidden.¹⁸²

Blanshard's American Answer

According to Blanshard, publically addressing the influence of the Catholic Church without persecution is America's first step in addressing the Catholic question.¹⁸³ The issues cannot degenerate into a prejudice against Catholics.¹⁸⁴ In the field of politics, Blanshard believed a "wall of separation between church and state" should be the policy with no compromises.¹⁸⁵ With this belief, the appointment of Catholic judges should be resisted and high ranking officials in the Catholic Church residing in the United States should be required to register under the Foreign Agents Registration Law.¹⁸⁶ The goal of these proscriptions was not to discriminate against the Catholic people according to Blanshard, but, to raise concerns and oppose the un-American influence of a foreign entity.¹⁸⁷ These shared beliefs were just a continuation of beliefs Black had formed concerning religion since his childhood.

¹⁸² Id.

¹⁸³ Id. at 295.

¹⁸⁴ Id.

¹⁸⁵ Blanshard, supra note 154, at 277. Note, Blanshard used Justice Black's language from the 1947 Everson v. Board of Education case.

¹⁸⁶ Id. at 305.

¹⁸⁷ Id. at 306.

The Gospel According to Black

Church Experiences

Early years. Ashland, Alabama in the late nineteenth century was a small farming community with just three hundred residents.¹⁸⁸ It was here that a young Hugo Black, Sr. would have his first experiences with organized religion.¹⁸⁹ Although his mother was not a fundamentalist, she made sure all of her family went to church.¹⁹⁰ Every Sunday morning a young Hugo Black found himself at Sunday school in the Primitive Baptist Church, and at evening he would attend Sunday school at the local Methodist Church.¹⁹¹ Most people during that time attended one of the two local churches regularly, for the Church served as the social center of the county.¹⁹² Many looked forward to the annual two-week revival held by the two local churches.¹⁹³ People were thrilled to hear the “hell-fire and damnation” preachers and the wonders of a one-ring circus.¹⁹⁴ As a college student, Hugo still found time to go to church and Sunday school.¹⁹⁵ After graduating from law school with honors, Hugo Black began his law career and continued to attend church regularly.¹⁹⁶

Religious beliefs. As Hugo Black grew up in Ashland, he felt the church acted like the Puritans of New England.¹⁹⁷ The Puritans tried to live a pious life and believed it was a duty to

¹⁸⁸ Black Jr., supra note 18, at 6.

¹⁸⁹ Id.

¹⁹⁰ Id. at 11.

¹⁹¹ Id.

¹⁹² Id. at 10.

¹⁹³ Virginia V. Hamilton, Hugo Black: The Alabama Years 18-19 (1972)

¹⁹⁴ Id.

¹⁹⁵ Hugo L. Black, Sr. & Elizabeth Black, Mr. Justice Black and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black 16 (1986).

¹⁹⁶ Id. at 21.

¹⁹⁷ Id. at 10-11.

conform others to their lifestyle.¹⁹⁸ Just like the Puritans, Hugo Black believed the church intervened in everyone's personal affairs, and saw the Church try those accused of sin in makeshift trials.¹⁹⁹ If convicted, the sinner would have to beg for forgiveness from the whole congregation or be kicked out of the church.²⁰⁰ Hugo's own father felt this indignation after facing accusations of drunkenness.²⁰¹ However, his father would not ask for forgiveness, and he subsequently left the church.²⁰² Even at a young age, Justice Black believed these trials and punishments were unjust.²⁰³

After graduating from law school, Hugo Black knew his mother would want him to join the Baptist Church; however, he had a few stipulations to go over with the pastor of the church.²⁰⁴ Black had a conversation with the pastor to make sure he would not have to make any public confessions, or be judged over petty sins such as playing cards or dancing.²⁰⁵ Justice Black complained that he was uncomfortable with public displays of religious expression and when someone would stand in front of the congregation professing how Jesus intervened in their life or how the Holy Spirit convicted someone of their sins he felt embarrassed.²⁰⁶ This was especially true when someone he liked or respected stood up and witnessed.²⁰⁷ Justice Black stated, "I would have felt much prouder of them if the spirit had hit them when they were full of

¹⁹⁸ Edmund S. Morgan, *The Puritan Family: Religion & Domestic Relations in Seventeenth-century New England* 2-4 (1966).

¹⁹⁹ Black, Sr. & Black, *supra* note 195, at 10-11.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 12.

²⁰² *Id.* at 13. Note, Hugo's great-uncle, John B. Toland, was also expelled from the same church for drinking alcohol.

²⁰³ *Id.* at 10-11.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

the need to drink or for a woman.”²⁰⁸ However, he felt most embarrassed when someone spoke in tongues or as he called it “gibberish”; Justice Black stated to his son that “it’s hard to sit there and listen to that stuff.”²⁰⁹ After the pastor ensured him he would not have to make any public confessions Black joined the church and went on to become the Sunday school teacher. His law career was not making any headway in Ashland though, so he made the decision to move to Birmingham to make his fortune.²¹⁰ In 1907, Hugo Black moved to Birmingham, Alabama to expand his law practice, and it was here that he would join the First Baptist Church of Birmingham and once again become a Sunday school teacher.²¹¹ However, when Hugo Black became a United States Senator in 1926, he stopped regularly attending church.²¹²

True faith. During his lifetime, Hugo Black had many discussions concerning religion and the meaning of the Bible with his son Hugo Black Jr.²¹³ After moving to Washington, D.C., his son questioned why his father had not attended church regularly since they had moved to Washington.²¹⁴ His father responded by saying that he, “didn’t have to listen to a preacher who stands up talking about a lot of nothing.”²¹⁵ When they were in Alabama, he just taught Sunday school and he did not have to listen to the preacher. As the Sunday school teacher, he controlled the discussion.²¹⁶

²⁰⁸ Id.

²⁰⁹ Id.

²¹⁰ Black Jr., supra note 18, at 17.

²¹¹ Id. Note, Black would later become the Sunday school superintendent.

²¹² Id. at 173.

²¹³ Id. at 172-176.

²¹⁴ Id. at 172. Note, this time period was when Hugo Black was a Senator. Hugo Black Jr. thought it was odd that his father would be such a pillar in the church in Alabama but was not attending church in Washington.

²¹⁵ Id. at 173.

²¹⁶ Id.

Justice Black, when discussing the Bible, generally focused on the redemptive qualities of the parables found in the New Testament.²¹⁷ Hugo Black, Jr. concluded that for his father, the Bible was not about faith, but a lesson book for a positive good life.²¹⁸ Justice Black implored his son to study scripture, especially the New Testament parables, and question what the parables meant and how they applied to one's life.²¹⁹ However, within the teachings of the New Testament, Justice Black found one ideal he believed true: the Golden Rule.²²⁰ He noted how the Golden Rule was the core of all religions and that all of humanity should do the best to live by it.²²¹ However, living by the Golden Rule is one thing, having faith is another. Despite all of his religious background, Justice Black could never give himself to Christ.²²² His son believed his father was never concerned about seeking spiritual awareness, and that he could never establish a true belief in God, the divinity of Christ, life after death, heaven or hell; "He wanted to believe but he just could not."²²³

Other beliefs. Despite the opinions of many people, Justice Black was not antagonistic towards religion.²²⁴ He was honestly concerned about the decline of religion and the moral implications that would arise from its decline.²²⁵ Justice Black believed religion provided the moral groundings that some people needed.²²⁶ Despite this belief, he still contended that religion

²¹⁷ Id.

²¹⁸ Id.

²¹⁹ Barbara Perry, Justice Hugo Black and the Wall of Separation Between Church and State 31 J. Church & St. 59, 59 (1989). Note, Justice Black cited Thomas Jefferson's letter to his nephew Peter Carr instructing him to have a healthy skepticism towards the Bible, thus, Hugo Black encouraged his son to have a healthy skepticism as well.

²²⁰ Black Jr., supra note 18, at 174.

²²¹ Id. Note, Justice Black cited Confucius, Mohammedanism, and Taoism.

²²² Id. at 172.

²²³ Id.

²²⁴ Id. at 175.

²²⁵ Id.

²²⁶ Id. Note, Justice Black said that some people needed to "be scared into being good."

should be strictly personal.²²⁷ According to Black, beliefs should not be forced onto people either by the Church or the government.²²⁸ After Engel v. Vitale, the 1962 case that found compulsory prayer in schools unconstitutional, Justice Black faced harsh criticism from the public.²²⁹ He responded by telling his son, “Most of these people who are complaining, Son, are pure hypocrites who never pray anywhere but in public for the credit of it. Prayer ought to be a private thing, just like religion for a truly religious person.”²³⁰ Consequently, Justice Black continued his reasoning that religious matters were a concern for the individual and not the government. He maintained a suspicion that organized religion, mainly Catholicism, wanted to be involved with the government much like the Catholic Church’s involvement in Spain’s government.²³¹ In 1876, Spain’s new constitution made the Catholic Church the official state religion.²³² Spain would later establish a secular government that would find itself overthrown by General Francisco Franco.²³³ After General Franco’s victory in 1939, Protestant schools were closed down and schools that were left open were required to teach Catholic doctrine.²³⁴ Because most Protestant churches had been closed by the government, Spanish Protestants clandestinely met to worship.²³⁵ Franco’s government even required the members of his armed forces to give honor to the Catholic Church and participate in Church rituals.²³⁶ Alarmed by the example set by Spain

²²⁷ Id. at 176.

²²⁸ Id.

²²⁹ Id.

²³⁰ Id.

²³¹ Id.

²³² J.D. Hughey, Church, State, and Religious Liberty in Spain, 23 J. Church & St. 485, 486 (1981).

²³³ Id. at 488. Note, General Franco stated the Spanish Civil War was a "crusade for God and country." General Franco had the complete support of the Roman Catholic Church in Spain. The Church leaders believed Franco was saving the Church from the anticlericalism, atheism, and pluralism of the former republic.

²³⁴ Id.

²³⁵ Id. Note, at this time in Spain, Protestant worshippers faced fines and imprisonment for this clandestine activity.

²³⁶ Id.

and his own beliefs, Justice Black could not tolerate any mixture of religion with the government, especially if it was perceived the state was encouraging a religion.

Black's Judicial Activism

Judicial Activism Explained

Definition. Black's Law Dictionary defined judicial activism as "a philosophy of judicial decision making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent."²³⁷ However, this textbook definition can have many interpretations.²³⁸ Judicial activism is a phrase often heard in the news media concerning a particular ruling by a judge or the Supreme Court.²³⁹ For Justice Antonin Scalia, judicial activism means interpreting and rewriting the Constitution based on one's own views and not the true meaning of the Constitution.²⁴⁰ For others, judicial activism is not a method of interpretation, but, a way of getting good results.²⁴¹ In Justice Scalia's dissent in Lawrence v. Texas, he noted these "results" based judgments when addressing the gay rights movement.²⁴² Justice Scalia stated in his opinion,

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by

²³⁷ Black's Law Dictionary 862 (8th ed. 2004).

²³⁸ Bradley C. Canon, Defining the Dimensions of Judicial Activism, 237, 237-238 (1983). Note, Canon cites the opinions of several Justices and professors.

²³⁹ Erwin Chemerinsky, A Stunning Example of Judicial Activism: the Supreme Court Overturns Decades of Precedents on Campaign Spending, Pitt. Post-Gazette, Jan. 24, 2010, available at <http://www.post-gazette.com/pg/10024/1030449-109.stm>.

²⁴⁰ Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 47 (1997).

²⁴¹ David R. Dow, America's Prophets: How Judicial Activism Makes America Great 10 (2009).

²⁴² Id. at 107.

some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct...²⁴³

Many cite the recent ruling of a homosexual judge, who struck down California's gay marriage amendment, as an example of judicial activism brought on by bias.²⁴⁴ In today's society, some judges have become activists for gay rights just as Justice Black was an activist for ridding religion's influence on the government.

Elements of activism. Some jurists and legal philosophers have developed a criterion to identify judicial activism.²⁴⁵ For a judge to be considered an activist, his or her judgments must focus on the nullification of past precedents.²⁴⁶ By eliminating these past precedents, the judge can now impose his or her beliefs.²⁴⁷ One form of this judicial activism is called "interpretive fidelity."²⁴⁸ Interpretive fidelity means, "the degree which constitutional provisions are interpreted contrary to the clear intentions of their drafters or the clear implications of the language used."²⁴⁹ This form of judicial activism occurs "when an interpretation does not accord with the ordinary meaning of wording of the provision and/or with the known, consensual

²⁴³ Lawrence v. Texas, 539 U.S. 558 (2003).

²⁴⁴ Associated Press, Judicial Bias Alleged in a Ruling on Marriage, N.Y. Times, June 13, 2011, available at <http://www.nytimes.com/2011/06/14/us/politics/14prop8.html>. Note, the judge who ruled California's Constitutional ban of gay marriage was gay himself.

²⁴⁵ Canon, supra note 238, at 242.

²⁴⁶ Id.

²⁴⁷ Id.

²⁴⁸ Id.

²⁴⁹ Id.

intentions or goals of its drafters.”²⁵⁰ However, to get to the point of activism, a judge still has to form a bias against the precedent.²⁵¹

Evidence of Black’s Activism

Justice Black is known as a strict textualist, meaning he followed the plain meaning of the law, “what the law says is what the law means.”²⁵² When discussing the First Amendment’s wording, Justice Black stated that the amendment’s wording of “no law” meant “no law.”²⁵³ Many cite Justice Black’s opinion in Griswold v. Connecticut as an example of him sticking to the literal meaning of the Constitution.²⁵⁴ Justice Black stated that he could not find the right to privacy written anywhere in the Constitution.²⁵⁵ He stated,

The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it.²⁵⁶

However, Justice Black did not follow his own philosophy in other rulings.²⁵⁷ Justice Black’s opinion in Adamson v. California cited what some have called “questionable” history which stated the drafters of the Fourteenth Amendment believed the amendment would incorporate all

²⁵⁰ Id.

²⁵¹ Id.

²⁵² John D. Carter, The Warren Court and the Constitution 41 (1973).

²⁵³ Id. Note, many scholars have noted that when defending his position of incorporating the establishment clause to the states, Justice Black conveniently forgot the first part of the amendment which states “Congress shall”. Many imply that the words “Congress shall” limits the First Amendment to the Federal level.

²⁵⁴ Leonard W. Levy, Original Intent and the Framers’s Constitution 268-269 (1988).

²⁵⁵ Id.

²⁵⁶ Arthur S. Miller, Toward Increased Judicial Activism 315 (1982).

²⁵⁷ Id. at 315-316.

of the Bill of Rights to the states.²⁵⁸ Many historical scholars believed Justice Black had manipulated history in order to gain favor for his opinion that the Fourteenth Amendment incorporated the Bill of Rights to the states.²⁵⁹ In 1965, scholars believe Justice Black once again redefined historical events to his favor.²⁶⁰ Trying to find any historical evidence for his opinion, Justice Black “twisted” the writings of James Madison to fit his view of the law.²⁶¹ This case revolved around the idea of “one man equals one vote.”²⁶² Justice Black incorrectly used some of James Madison’s writings concerning the proportional power between small and large states to espouse his ideas concerning the drawing of district lines.²⁶³ This pattern of historical gerrymandering may have started in 1947 with Justice Black’s opinion in Everson v. Board of Education.

²⁵⁸ Id. at 315. Note, Justice Black had been quoting Senator John A. Bingham’s speeches during the debate over the adoption of the Fourteenth Amendment. Miller notes that Senator Bingham was unaware of the Supreme Court decision in Barron v. Baltimore and had assumed that the Bill of Rights already applied to the states. See also, Adamson v. California, 332 U.S. 46, 90 (1947). See also, Carter, supra, at 252. Note, in Barron v. Baltimore, Chief Justice John Marshall held that the first ten “amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.” Barron v. Baltimore, 32 U.S. 243, 250 (1833).

²⁵⁹ Levy, supra at 254, at 300. Note, Charles Fairman discredited Justice Black’s opinion in Adamson by criticizing Justice Black’s misuse of history, Fairman provided many instances where the founding fathers would have not approved of the Bill of Rights being incorporated to the states. See also, Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5, 130-139 (1949).

²⁶⁰ Id. at 319. The case involved the power of a person’s vote and proportional representation. See also, Baker v. Carr, 369 U.S. 186 (1962).

²⁶¹ Id.

²⁶² Id.

²⁶³ Id. Note, the dissenting Justices argued that the Court had cast aside history and judicial restraint in making its decision. Justice Frankfurter wrote: “he. was being asked to “choose among competing bases of representation—ultimately, really, among competing theories of political philosophy” and that was not an appropriate issue for judges.” Baker v. Carr, 369 U.S. 186, 300 (1962).

Activism in Black's Wall

In 1947 Justice Hugo Black wrote an opinion that many today believe is actually part of the Constitution.²⁶⁴ To give a historical backing to his opinion in Everson v. Board of Education, Justice Black cited a little known letter Thomas Jefferson had written in 1802 to the Danbury Baptist Association.²⁶⁵ Again, with this case, scholars cite Justice Black's ability to distort history in favor of his opinion.²⁶⁶ Some questioned Black's reliance on Jefferson concerning Constitutional issues.²⁶⁷ Many also consider Jefferson one of the least influential founding fathers concerning the Constitution, since Jefferson had no involvement in drafting the Constitution.²⁶⁸ After researching Jefferson's views concerning the separation of church and state, it can be concluded that Jefferson's views concerning the separation of church and state would not line up with Justice Black's "high and impregnable wall" theory.²⁶⁹ Jefferson is noted as believing in the federal system, which excluded the national government from interfering in religious affairs, but did not preclude the power of the state to be involved with religious matters.²⁷⁰ In a discussion about the First Amendment Jefferson stated, "certainly no power to prescribe any religious exercise or to assume authority in religious discipline has been delegated

²⁶⁴ Daniel Dreisbach, The Mythical "Wall of Separation": How a Misused Metaphor Changed Church-State Law, Policy, and Discourse, 6 First Principles Series, available at <http://www.heritage.org/research/reports/2006/06/the-mythical-wall-of-separation-how-a-misused-metaphor-changed-church-state-law-policy-and-discourse>.

²⁶⁵ Id.

²⁶⁶ Barton, supra note 4, at 201-212.

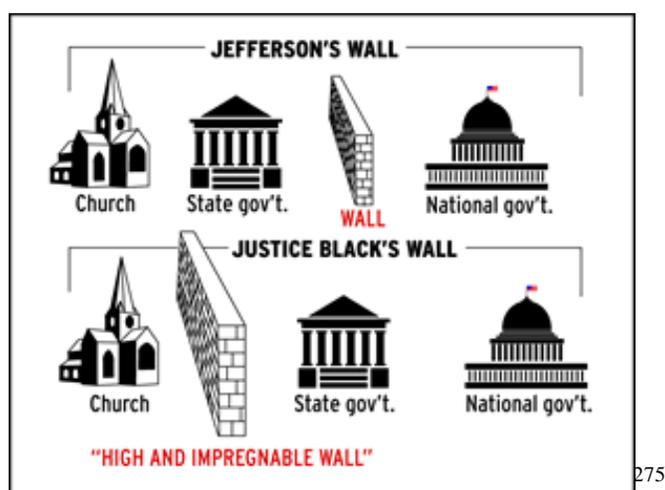
²⁶⁷ Id. At 204.

²⁶⁸ Id. Note, Jefferson himself, noted that "I was in Europe when the Constitution was planned, and never saw it till after it was established."

²⁶⁹ Dreisbach, supra note 264, at 5. Note, Daniel Dreisbach explains that, "throughout his public career, including two terms as President, Jefferson pursued policies incompatible with the 'high and impregnable' wall the modern Supreme Court has erroneously attributed to him. For example, he endorsed the use of federal funds to build churches and to support Christian missionaries working among the Indians. The absurd conclusion that countless courts and commentators would have us reach is that Jefferson routinely pursued policies that violated his own wall of separation."

²⁷⁰ Barton, supra note 4, at 199-200.

to the general [federal] government. It must, then, rest with the states.”²⁷¹ Jefferson’s actions also followed this approach as he first served as Governor of Virginia and then President.²⁷² As Governor, Jefferson made state proclamations for days of fasting and thanksgiving praising God and asking for His blessings.²⁷³ However, when Jefferson became President, he discontinued these proclamations, even though it had been tradition, because he believed that it was the responsibility of the states not the federal government to make such proclamations. Jefferson believed “the wall” was placed in between the state and federal governments.²⁷⁴



Hugo Black, in his Everson opinion moved that wall and placed “the wall” between the church and state.²⁷⁶ This wall now had the church on one side and the state and federal governments on

²⁷¹ Letter from Thomas Jefferson, to the Rev. Samuel Miller (1808), available at http://www.churchstatelaw.com/historicalmaterials/8_8_7.asp.

²⁷² Barton, supra note 4, at 206-212.

²⁷³ Id. Note, as Governor, Thomas Jefferson declared, “resolved, that it be recommended to the several states to appoint Thursday the 9th of December next, to be a day of publick [sic] and solemn Thanksgiving to Almighty God, for his mercies, and of prayer, for the continuance of his favour [sic] and protection to these United States; to beseech him that he would be graciously pleased to influence our publick [sic] Councils...” This was a proclamation appointing a day of Thanksgiving and prayer by Governor Thomas Jefferson, to the state of Virginia (1779), available at <http://www.foundingfathersfaith.org/index.php/thanksgiving-proclamation-1779>.

²⁷⁴ Dreisbach, supra note 264, at 5.

²⁷⁵ Jesus is Lord, Paragraph 12, http://www.worshippingchristian.org/constitution_and_religion.html.

²⁷⁶ Dreisbach, supra note 264, at 5.

the other.²⁷⁷ Many believe this is not what Jefferson and many other founding fathers considered the proper placement of the wall.²⁷⁸

Conclusion

No concrete conclusions can be made about the thoughts of Justice Black concerning his opinion in Everson v. Board of Education. However, after looking at the evidence, one should form a belief that Justice Black was definitely biased against religion, especially the Catholic Church, and became a judicial activist bent on removing any inclinations of religion out of government. Despite his denials of prejudice, Justice Black was a member of the Ku Klux Klan, which promoted the concept of separation of church and state based on Catholic prejudices. As a Klan member, Justice Black gave speeches denouncing the Catholic Church and the supposed infiltration of the Church into the government. He administered oaths to new Klan members that supported the separation of church and state. Justice Black was even uncomfortable with his own faith. He finally came to the conclusion that religion was good for some, but he did not need it. Therefore, he built a high and impregnable wall against religion that today has been twisted and used to eliminate inclinations that God exists in the name of religious freedom.

²⁷⁷ Id.

²⁷⁸ Barton, supra note 4, at 153-154. Barton cites Samuel Johnson, Samuel Adams, and George Washington as supports of the infusion of religion with the government on some level.

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