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RETAINING JUDICIAL AUTHORITY: A PRELIMINARY INQUIRY ON THE DOMINION OF JUDGES

Larry Catá Backer*

Why do the people and institutions of democratic states, and in particular those of the United States, obey judges? This article examines the foundations of judicial authority in the United States. This authority is grounded on principles of dominance derived from the organization of institutional religion. The judge in Western states asserts authority on the same basis as the priest — but not the priest as conventionally understood. Rather, the authority of the judge in modern Western democratic states is better understood when viewed through the analytical lens of priestly function developed in the philosophy of Friedrich Nietzsche. Focusing on the United States Supreme Court and the European Court of Justice, this paper examines the manner in which high-court judges have successfully internalized the characteristics of Nietzsche's Paul and his priestly caste within the "religion" of Western constitutionalism.

Paul wanted the end, consequently he also wanted the means. What he himself did not believe, the idiots among whom he threw his doctrine believed. His need was for power; in Paul the priest wanted power once again — he could use only concepts, doctrines, symbols with which one tyrannizes masses and forms herds.¹

* * *

This critique of systems, and especially of systems locating the power of judgment, reward and punishment outside the self, is echoed in the recent constitutional jurisprudence of the United States Supreme Court and the European Court of Justice. This article examines American and European textualism as a mechanism for the reinforcement of judicial authority. Judges acquire a monopoly over communication with the "divine" — justice, truth, and norms — as expressed

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¹ Friedrich Nietzsche, *The Antichrist*, in *THE PORTABLE NIETZSCHE* 565, 618 (Walter Kaufmann ed. & trans., Penguin Books 1977) (1881–1892) [hereinafter *The Antichrist*].

in constitutions, whether or not written. That expression provides the basis for the regulation of sin, which is a deviation from the divine expression only the priest knows. "[T]he priest rules through the invention of sin."² The constitutional judge rules through the inversion of doctrine. The interpretive doctrines, standards and tests that have grown up around constitutionalism convert norms into a morass of the unknowable, with only the guidance of priests speaking through courts. And so the judge creates mechanics of authority based on self-reinforcing dependence.

[N]othing could be more obscure and out of reach of the common man than a law founded on precedent. . . . A French lawyer is just a man of learning, but an English or an American one is somewhat like the Egyptian priests, being, as they were, the only interpreter of an occult science.³

INTRODUCTION

The judiciary acquires supreme authority over matters of constitutional interpretation in one of two ways. In many countries, judicial power is conferred by the people, as ultimate sovereigns.⁴ The European Union, like other emerging supranational states, follows this model in constituting its European Court of Justice.⁵

² *Id.* at 631.

³ ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 267 (J.P. Mayer ed., George Lawrence trans., 1969).

⁴ Judicial power of this sort is usually vested in a specialized "constitutional court." *See, e.g.,* Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons From Four Constitutional Revolutions*, 25 *LAW & SOC. INQUIRY* 91 (2000) (noting how the increase of judicial power in Israel, Canada, New Zealand, and South Africa resulted from constitutional changes authorized by constituents); Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* (Douglas Greenberg et al. eds., Oxford Univ. Press 1993) (discussing how the people of some Western nations cede their sovereign power to interpret law to constitutional courts); *see generally* MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971) (examining the historical relationship between democratic will and judicial review by a judiciary that the democratic will itself legitimizes).

The jurisdiction of these courts is usually limited to issues of constitutional interpretation. Many of these courts have no authority over any underlying litigation from which constitutional issues may have arisen. However, these courts often have power to issue binding advisory opinions. *See* Louis Favoreu, *Constitutional Review in Europe*, in *CONSTITUTIONALISM AND RIGHTS* 38, 41 (Louis Henkin & Albert J. Rosenthal eds., Columbia Univ. Press 1990).

⁵ *See, e.g.,* ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 21–74 (1999); RENAUD DEHOUSSE, *THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION* 16–35 (St. Martin's Press 1998) (noting that the European Court of Justice

In some nations, like the United States, the judiciary confers this power on itself.⁶ This self-conferral of authority has produced a slow, episodic, reluctant — but nonetheless general — acquiescence of the other political institutions of government.⁷ Debates centering on reservations about the legitimacy of a judicially self-conferred supremacy “in the exposition of the law of the Constitution . . . as a permanent and indispensable feature of our constitutional system”⁸ continue to this day,⁹ even within the Supreme Court itself.¹⁰ This article will not contribute

derives its power by means of treaty); *see generally* L. NEVILLE BROWN & TOM KENNEDY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* (4th ed. 1994) (describing how international treaties give the Court specified powers of judicial review).

⁶ *See* *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (stating that Congress has no constitutional authority to overturn a constitutional interpretation of the Supreme Court through legislation); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

⁷ *Marbury* and its progeny generated a tremendous amount of formal and theoretical opposition. Perhaps the greatest representative of this oppositionist school was John C. Calhoun. *See, e.g.,* John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, in *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* 79, 186–87 (Ross M. Lence ed., 1992) (1850). The most extreme forms of rejectionism were discredited with the defeat of the secessionist states in the American Civil War, but prominent members of the federal government continue to echo this old rejectionism. *See, e.g.,* Edwin Meese III, *Perspective on the Authoritativeness of Supreme Court Decision: The Law of the Constitution*, 61 *TUL. L. REV.* 979, 982–83 (1987) (challenging the notion that constitutional case law carries with it the same authoritative weight as the text of the Constitution. Mr. Meese served as Attorney General of the United States during the administration of Ronald Reagan).

⁸ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

⁹ Jack Wade Nowlin nicely summarized this well known history:

Of course, the question of judicial overreach is scarcely a new issue in American politics. Indeed, the question of the proper judicial role dates back to the founding, as well as to the early Republic and the clashes between Federalists and Anti-Federalists, Hamiltonians and Jeffersonians. The role of the Supreme Court was also controversial during the Jacksonian era, the years leading up to the Civil War, and during Reconstruction. Moreover, democratic reform movements championing the participatory rights of ordinary Americans have made the elite judicial “usurpation” of democratic authority a regular part of our political discourse since the turn of the last century, when the state and federal courts first began to exercise the power of judicial review routinely and aggressively.

Jack Wade Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 *NOTRE DAME L. REV.* 171, 175–76 (2002) (citations omitted).

¹⁰ Consider, for example, Justice Scalia’s narrow reading of *Marbury* in *Dickerson v. United States*, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting) ([T]he *Marbury* tradition does not give] the Supreme Court [the] power to impose extraconstitutional constraints upon Congress and the States.”).

further to that debate.

My focus, instead, is on the *retention* of authority and of legitimacy once the legal framework confers the power of constitutional review. The ramifications of authority retention are particularly important because *judges make mistakes*.¹¹ These mistakes, when made concerning foundational matters of constitutional law, can have profound effects.¹² Moreover, the retention by judges of authority to definitively articulate and regulate the basic normative rules by which society is ordered suggests a transference of sovereign capacity within the state from the people, and their political institutions, to the judges.¹³ The result has been troubling

¹¹ Abraham Lincoln set the modern tone for nonjudicial approaches to judicial error. In an exchange with Stephen Douglas during the 1858 senatorial campaign, Lincoln described his opposition to *Dred Scott*:

We do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob, will decide him to be free. . . . [B]ut we nevertheless do oppose that decision as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject.

Abraham Lincoln, Speech During the Lincoln-Douglas Senatorial Campaign (Oct. 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (Roy P. Basler ed., 1953).

Various governmental and nongovernmental actors continue to follow this approach, opposing judicial construction of the Constitution in matters of religious rights and liberties and certain individual rights — among them abortion and sexual rights.

¹² “Mistakes,” in the form of discarded constitutional interpretation have been significant since the founding of the Republic. Judges themselves sometimes correct these mistakes. The “separate but equal” jurisprudence of *Plessy v. Ferguson*, 163 U.S. 537 (1896), gave way almost sixty years later to its opposite in *Brown v. Board of Education*, 347 U.S. 483 (1954). Likewise, the doctrine of “liberty of contract,” memorialized in *Lochner v. New York*, 198 U.S. 45 (1905) gave way to a doctrine more deferential to governmental power to regulate after *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). Subsequent constitutional amendments only rarely correct judicial mistakes. The constitutional law of citizenship, as expounded in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), were only partially corrected by the Fourteenth Amendment, and arguably undone thereafter in the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873) (narrowly construing the Privileges and Immunities Clause of the Fourteenth Amendment), and the *Civil Rights Cases*, 109 U.S. 3 (1883) (narrowing the applicability of the Fourteenth Amendment to state action).

¹³ Abraham Lincoln raised this issue on the eve of the Civil War:

[T]he candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

Abraham Lincoln, First Inaugural Address (Mar. 1861), in ABRAHAM LINCOLN IN HIS OWN WORDS 301 (Maureen Harrison & Steve Gilbert eds., 1994).

for intellectuals for much of the history of the American Republic. But, what had been a concern directed toward legislatures at the end of the nineteenth century,¹⁴ has become a more sharply defined "problem" at the end of the twentieth century.¹⁵ European commentators are becoming increasingly sensitive to the ramifications of the transfer of what they call "competences."¹⁶ "The only controller of high courts is public opinion and professional criticism."¹⁷

Yet, despite two centuries of inconsistent juridical constitutionalism, and the warnings of presidents and commentators, the authority of judges has *grown*.¹⁸ That

The French, and French constitutionalism, have traditionally been most wary of this — of a *gouvernement des juges*. Indeed, one of the more influential studies of judicial constitutionalism in France was devoted to a study of the constitutional functioning of the courts in the United States in the early part of the twentieth century. See ÉDOUARD LAMBERT, *LE GOUVERNEMENT DES JUGES A LA LUTTE CONTE LA LEGISLATION SOCIALE AUX ETATS-UNIS* (1921) (arguing that judges exert a conservative force on constitutional development). The American judicial model has provided reason enough for French political institutions to avoid imitation in the restructuring of French political institutions.

¹⁴ Thus, in his biography of Chief Justice Marshall, James Bradley Thayer, an influential constitutional theorist from the end of the nineteenth century, reminded his readers that:

[t]he exercise of [judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors.

JAMES BRADLEY THAYER, *JOHN MARSHALL* 106 (1901).

¹⁵ The issue has been framed in terms of evasion of the basic responsibility of citizens "in a democratic polity. The problem is not that too many issues are 'constitutionalized' . . . the problem, rather, is that we assume that only the Court is authorized . . . or is capable of deciding constitutional questions." Paul Brest, *The Thirty-First Cleveland-Marshall Fund Lecture: Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175 (1986); see also Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071, 1078 (1987) (arguing that the current system "legitimizes government by legally trained elites, speaking in evermore esoteric language").

¹⁶ See, e.g., J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2431 (1991).

¹⁷ Ulrich Everling, *Constitutional Problems of the European Union — A Lawyer's View*, in *CONSTITUTIONAL LAW AND ECONOMICS OF THE EUROPEAN UNION* 286, 296 (Dieter Schmidtchen & Robert Cooter eds., 1997).

¹⁸ An excellent example, perhaps, would contrast President Truman's reaction to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (the *Steel Seizure Case* in which the Supreme Court struck down the President's order seizing steel mills during the Korean War to avoid a shutdown of the mills) with President Lincoln's reaction to his suspension of habeas corpus during the Civil War. President Truman, though bitter about the decision, complied. See 2 HARRY S. TRUMAN, *MEMOIRS BY HARRY S. TRUMAN: YEARS OF TRIAL AND HOPE* 474–78 (Doubleday Inc. 1956). President Lincoln, a little less than a century earlier, took a very different approach:

privileged place is protected by the cultivation of neutrality.¹⁹ This neutrality based on devotion to the law, rather than to the law's partisans, becomes essential to the judges' status. That judges' jealously guard this appearance of neutrality and impartiality was starkly evidenced in the opinions generated in the recent decisions determining the winner of the presidential elections of 2000.²⁰ In dissenting from

Lincoln ignored an order by Chief Justice Taney to release a prisoner in *Ex parte Merryman*, and his cabinet (under Andrew Johnson) gave equally scant respect to the Supreme Court's command in *Ex parte Milligan* that military trials cease. But civil wars tend to strain the legal process, and none of Lincoln's successors have been quite so brazen. President Eisenhower came closest when faced with massive resistance to the Court's desegregation orders, for which Eisenhower seemingly had little enthusiasm. Even Eisenhower, however, ultimately backed the Court and acted to ensure that its orders were obeyed.

John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 983-84 (2002) (citations omitted).

¹⁹ The traditional view of American judges as striving for neutrality is written into the basic codes of judicial conduct. See, e.g., 28 U.S.C. § 453 (2000):

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of this office: "I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God."

Id. (emphasis added); see also *id.* § 455(a) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

It is also a foundation of modern model codes of judicial conduct. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) (1990) ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); see also, *id.* Canon 3(B)(5):

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Id.

Modern commentators have suggested judges are neither neutral, nor are the principles they deploy neutral. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) (illustrating how some judges fall to the temptation to use court decisions as a means to their ideological ends); MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988) ("Understanding the work of the court therefore requires that we give it a political analysis."). I do not mean to rehash either concept in this manner.

²⁰ *Bush v. Gore*, 531 U.S. 98 (2000) (debating how the proposed Florida state recount implicates the Equal Protection clause in its analysis but failing to mention the political

a majority opinion resisting a challenge to vote counting in Florida by the loser of the presidential election in 2000, Justice Breyer expressed the fear that the decision would erode public confidence in the neutrality of the Court:

That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of returning to the days when a President (responding to this Court's efforts to protect the Cherokee Indians) might have said, "John Marshall has made his decision; now let him enforce it!" . . . But we do risk a self-inflicted wound — a wound that may harm not just the Court, but the Nation.²¹

The American judiciary has come a long way from *Marbury* to *Bush*. There is no reason to believe that judges will avoid constitutional opinions which can be, in the disapproving words of Lincoln, "turn[ed] . . . to political purposes."²²

This article starts with the proposition that the stability of the authority of the judge in American society suggests a religious, rather than a political, normative basis. It is well understood that the relationship between constitution and judge is often compared to that between scripture and priest.²³ In the United States, this relationship is usually tied to the idea of the federal Constitution as divine text.²⁴

repercussions of the decision itself).

²¹ *Id.* at 157–58 (Breyer, J., dissenting) (quoting DAVID LOTH, CHIEF JUSTICE JOHN MARSHALL AND THE GROWTH OF THE AMERICAN REPUBLIC 365 (1948)).

²² Lincoln, *supra* note 13, at 301.

²³ "Judges are priests, not prophets. They are members of the structure of power, and when they try to speak like Amos, they almost always sound faintly ridiculous. However, a judge does not sound ridiculous when speaking like Moses. . . ." Lewis Henry LaRue, *How Not to Imitate John Marshall*, 56 WASH. & LEE L. REV. 819, 836 (1999).

²⁴ See, e.g., SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN (1986); Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Courts, Law and Interpretative Process*, 20 B.C. THIRD WORLD L.J. 291 (2000) [hereinafter *Chroniclers*]; David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127 (1988); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); Sanford Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123 (1979); Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331 (1995); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551 (1984); Philip Soper, *Metaphors and Models of Law: The Judge as Priest*, 75 MICH. L. REV. 1196 (1977); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1509–14 (1989) (book review) (examining the role of the priest in various Judeo-Christian denominations as interpreter of sacred text).

These examinations of the judge as priest and the basic law as scripture, have centered the judicial priest in the context of millennia-old battles over interpretive authority within Western systems of religion.²⁵ "The parallels between the practice of law and the practice of theology are too striking for the lawyer not to see."²⁶ Europeans tend to favor the language of ideology to theology, but it has a similar effect.²⁷

This analysis, while valid enough, misses an essential point critical for an understanding of the permanence of judicial authority in the United States and Europe. In order to understand the basis for the persistence of judicial authority, it is necessary to examine the priestly role of the judge from a counterreligious perspective. For that project, Nietzsche's priest and text, rather than those of Western religion, provide the authoritative analogy. This article examines the manner in which the judiciary plays the role of Nietzsche's Paul within the religion of American and European constitutionalism. American and European constitutionalism now function like *sin*. "[T]he priest rules through the invention of sin."²⁸ The constitutional judge rules through the inversion of doctrine. From this inversion arise the four great errors of modernity in law: (1) the error of confusing cause and effect; (2) the error of a false causality; (3) the error of imaginary causes; and (4) the error of free will.²⁹ These errors of causality are lapses of spiritual or normative causes.³⁰ Erroneous causality is the conscious and

²⁵ Professor Levinson's work provides a case in point. He examines religious analogies to interrogate the way in which lawyers and judges approach the authority of constitutional text. See LEVINSON, *supra* note 24, at 9–53 (deriving a "catholic" and "protestant" approach to the authority of constitution as text, and judges as interpreters of that text). Levinson states further:

It should be clear by now that the ability of "the Constitution" to provide the unity so desperately sought as a preventative against disorder depends on the resolution of the same issues that split Judaism, Christianity, Islam, and indeed, all other religions that have texts as a central part of their structure . . . We are not sure of what "the Constitution" consists, or how it is to be interpreted, or who is to be the authoritative interpreter.

Id. at 51.

²⁶ VINING, *supra* note 24, at 188.

²⁷ See, e.g., JOXERRAMON BENGOTXEA, THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE: TOWARDS A EUROPEAN JURISPRUDENCE 141–80, 190–95 (1993) (discussing legal and moral justification); HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING 13–14 (1986) (discussing European judges' use of ideology to decide federalism disputes).

²⁸ *The Antichrist*, *supra* note 1, at 631.

²⁹ Friedrich Nietzsche, *Twilight of the Idols*, in THE PORTABLE NIETZSCHE 492–501 (Walter Kaufmann ed. & trans., Penguin Books 1977) (1881–1892) [hereinafter *Twilight of the Idols*].

³⁰ For a discussion of this characterization, see WALTER KAUFMANN, NIETZSCHE: PHILOSOPHER, PSYCHOLOGIST, ANTICHRIST 265 (4th ed. 1974).

necessary product of a theological system that is denominated as "law" in the United States and Europe, and that constitutes systems every bit as complex as those theocratic systems that came before it in the Christian, Jewish and Muslim worlds.³¹ The interpretive doctrines, standards and tests that have grown up around constitutionalism convert norms into a morass of the unknowable, except with the guidance of judges speaking through courts. And so the judge creates mechanics of authority based on a self-reinforcing dependence.

The examination of the religious analogy from a Nietzschean perspective might seem odd or contrived. After all, the conventional religious analogy is commonplace. Judges welcome it.³² Many segments of the population insist on it.³³ Organized religion has based its attack on the exclusion of religion from the public sphere on it.³⁴ The practice of systems of religion within systems of law is efficient

³¹ Religion, after all, comprises wholly developed systems of laws, as comprehensive as anything devised by the secular state. Systems of Canon Law, of Talmudic Law, of Shari'a have from time to time, and to this day, functioned as separate, independent bases on which life and society are regulated. Law, in these systems, is the form of expression, existing as the means of communicating norms that proceed from the grammar emanating from the Word as received by His servants on Earth. Religion as legal codex and jurisprudence demands an exclusive allegiance every bit as jealous as that traditionally required by the state in civil matters.

Larry Catá Backer, *There Can Be Only One: Law, Religion, Grammar, and Social Organization in the United States*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY* 425, 438 (Stephen M. Feldman ed., 2000).

³² Consider the controversy stirred when an Alabama judge hung a hand-carved rendering of the Decalogue in his courtroom. See, e.g., Dustin Zander, *Thou Shalt Not Post the Ten Commandments on the Courtroom Wall: Judge Roy Moore and the Constitution*, 9 KAN. J.L. & PUB. POL'Y 371 (1999); Mark Hansen, *Decalogue Debate Back to Square One*, 84 A.B.A. J., Mar. 1998, at 22.

³³ The academic version of this notion runs something like this:

Religion has pervaded political debate in America since the birth of the republic. The Declaration of Independence invokes "the Laws of Nature and of Nature's God" to justify freedom from England. It declares "unalienable Rights" of man, including "Life, Liberty and the pursuit of Happiness," which are "endowed by [the] Creator." The Civil War grew out of the abolitionists' insistence that God abhorred slavery. Westward expansion was fueled by belief that God ordained a manifest destiny for America. Religion loomed large in public debate over Prohibition, civil rights, and American military involvement in Vietnam; it still features prominently in controversies over issues such as abortion.

George W. Dent, Jr., *Secularism and the Supreme Court*, 1999 BYU L. REV. 1, 30 (1999); see also David Hollenbach, S.J., *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877 (1993) (explaining that religion plays a public role through its influence in the broader realm of civil society and culture).

³⁴ Roman Catholics teach that:

The inversion of means and ends, which results in giving the value of ultimate end to what is only a means for attaining it, or in viewing persons as mere means

— it permits one system to serve two overlapping interpretive communities, each resonating against the other.³⁵

But Nietzsche?!

There are very few references to Nietzsche in the reported opinions of the United States Supreme Court.³⁶ In two of the most recent cases, Justice Scalia raised the specter of Nietzsche in connection with the Court's approach to *stare decisis* — prior judicial interpretation as authoritative, and binding as to the interpretation on courts, legislatures and administrators. In *Planned Parenthood v. Casey*,³⁷ Nietzsche was invoked as the creator of the basis for a theory of judicial legislation and constitutional revisionism:

to that end, engenders unjust structures which "make Christian conduct in keeping with the commandments of the divine Law-giver difficult and almost impossible."

It is necessary, then, to appeal to the spiritual and moral capacities of the human person and to the permanent need for his *inner conversion*, so as to obtain social changes that will really serve him. The acknowledged priority of the conversion of the heart in no way eliminates but on the contrary imposes the obligation of bringing the appropriate remedies to institutions and living conditions when they are an inducement to sin, so that they conform to the norms of justice and advance the good rather than hinder it.

CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1887, 1888, at 461 (1994).

³⁵ Both law and religion in the West adopt the pattern of the nomocracy.

A Theonomy, or a Religious Nomocracy differs from theocracy. In a classic theocracy, God is the ruler, and the means through which he rules — priests, judges, prophets etc. — have very minimal flexibility. In a religious nomocracy the divine law does indeed exist, but the power is invested in the hands of its interpreters. As Aaron Kirschenbaum has observed, "The distinction between theocracy and religious nomocracy is not merely semantic; its ramifications are far reaching Any Jurist knows that the law is not the ruler but rather its interpreter." The fact that most of the interpretive and creative power is invested, in a religious nomocracy, in the hands of the religious authorities may create a tension between the divine will and those in charge of its interpretation.

Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT'L & COMP. L. REV. 617, 640–41 n.83 (1999) (citations omitted). These notions apply to Christian and Muslim religious communities as well.

³⁶ A Westlaw search of Supreme Court cases reveals only four cases in which reference is made to Friedrich Nietzsche: Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000); Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993); Bd. of Educ. of Westside Comty. Schs. v. Mergens, 496 U.S. 226 (1990); Cramer v. United States, 325 U.S. 1 (1945). Of those, only two of them refer to his philosophy or writings in application to the decision of the case.

³⁷ 505 U.S. 833 (1992).

The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges — leading a Volk who will be “tested by following,” and whose very “belief in themselves” is mystically bound up in their “understanding” of a Court that “speak[s] before all others for their constitutional ideals” — with the somewhat more modest role envisioned for these lawyers by the Founders.³⁸

In the other reference to the philosophy of Nietzsche, he is deployed as the symbolic foreign devil. “Nietzscheanism” is corrupting the good morals of the Court and in its corruption abandons the solid old-fashioned values that made the American court great. Thus, Justice Scalia chided the Court for its corruption:

Justice O'Connor asserts that “[w]hen the Court changes its mind, the law changes with it.” That concept is quite foreign to the American legal and constitutional tradition. It would have struck John Marshall as an extraordinary assertion of raw power. The conception of the judicial role that he possessed, and that was shared by succeeding generations of American judges until very recent times, took it to be “the province and duty of the judicial department to say what the law *is*,” — not what the law *shall be*. That original and enduring American perception of the judicial role sprang not from the philosophy of Nietzsche but from the jurisprudence of Blackstone, which viewed retroactivity as an inherent characteristic of the judicial power, a power “not delegated to pronounce a new law, but to maintain and expound the old one.”³⁹

Justice Scalia, then, serves as the contemporary anti-apostle of Nietzsche on the United States Supreme Court. In both cases, the reference to Nietzsche was meant to frighten his colleagues by insinuating the monstrosity of their judicial project. For Justice Scalia, *stare decisis* in both cases permitted rule by judiciary, inflated the antidemocratic character of judicial review, and thus did great damage to the original understanding of the judicial role in the Republic.⁴⁰ Despite his best

³⁸ *Id.* at 996 (Scalia, J., concurring in part and dissenting in part). Justice Scalia was referring to that portion of Justice O'Connor's opinion describing the need to adhere to *stare decisis*. *Id.* at 854–55.

³⁹ *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 106–07 (citations omitted) (Scalia, J., concurring). The decision in *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989), applied retroactively to the benefit of the federal employee plaintiffs.

⁴⁰ Justice Scalia has been quite blunt about his approach to *stare decisis*:

It has been argued that we should not overrule so recent a decision, lest our action “appear to be . . . occasioned by nothing more than a change in the Court's personnel. . . .” I doubt that overruling *Booth* will so shake the citizenry's faith in the Court. Overrulings of precedent rarely occur without a change in the Court's personnel. . . . In any case, I would think it a violation of

intentions to the contrary, however, Justice Scalia draws a valid characterization of the work of judges that is worth exploring. Ironically, in articulating this view, Justice Scalia himself personifies Nietzsche's priest.

The article means to demonstrate just how the metaphor of Nietzsche's apocryphal priest — St. Paul⁴¹ — serves as an important normative model of judging. It is divided into three parts. After this introduction, Part I first develops the idea of the priestly type and its place within legal systems grounded in what is commonly described as "the rule of law." Part I then evaluates the methodologies of the exemplar of the American judge, the federal Supreme Court justice, and the emerging "European" judicial exemplar, the justice of the European Court of Justice, against the ideal type of the Nietzschean priest/judge. Part II introduces the reader to text, the relationship of priest/judge to text, and the cultivation of errors of causality as a necessary part of the use of text by priest to enhance control over text, and on that basis, secure their position at the apex of the community. Part III offers a brief argument of the utility of the priestly type within the normative framework of the democratic state.

I. THE JUDGE AS NIETZSCHE'S ST. PAUL

When Americans think of their judges in theological terms, the metaphor of the authoritative congregant comes to mind. Recourse to the dominant religions in the United States are usually made to fill the analogy. Thus, consider for example, Professor Levinson's examination of the Catholic and Protestant models of judging and the authoritativeness of text within American judging.⁴² Yet, such an understanding, valuable as it truly is, does not help explain the nature of the priestly function of judges. It is one thing to understand that judges function like priests, it is quite another to understand why priests, whether in the tightly controlled Catholic model, or the more freewheeling Protestant varieties, function as they do. In order to understand the American judge/priest — and especially the American federal judge, our trendsetter — it is necessary to look beneath religious habits. Nietzsche provides a useful avenue towards that understanding by his examination of the father of all priests — the Jew Saul, now known by many as the Christian Paul.

my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face.

South Carolina v. Gathers, 490 U.S. 805, 824–25 (1989) (Scalia, J., dissenting) (citing Booth v. Maryland, 482 U.S. 496 (1987)). For exploration of Justice Scalia's conservative political visions, see, RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL (1997); DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA (1996); CHRISTOPHER E. SMITH, JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOMENT (1993).

⁴¹ *The Antichrist*, *supra* note 1, at 617–18.

⁴² LEVINSON, *supra* note 24, at 18–53.

Who is this priest Paul? Paul is the essence of the juxtaposable. Paul is a *type* against which stands the ideal.⁴³ In the case of religion, and the Christian religions in particular, this ideal is Jesus, the Logos. "The very word 'Christianity' is a misunderstanding: in truth, there was only *one* Christian, and he died on the cross. The 'evangel' *died* on the cross. What has been called 'evangel' from that moment was actually the opposite of that which *he* had lived."⁴⁴ For Nietzsche, Paul serves as the bridge between the ideal — *The* Christian — and the applied — Christians. Paul sells himself as the necessary intermediary between conception and implementation, between those who would follow Logos, and Logos itself. Paul memorializes the lived experience of the evangel, and in so doing, is instrumental in its conversion from lived experience to binding, normative structure. The life of the evangel is reduced to legal code, the operation of which needs an intermediary — a seer, an interpreter.⁴⁵ But in the reduction to code, the story of the evangel is transformed, something of the evangel is lost, and something else — the priest — emerges. The person who tells the story, who creates a codex out of life, becomes the owner of the retold story, that is, the person vested with the authority becomes its highest interpretive source.

Without this strange story, however, without the confusions and storms of [Paul's] head . . . [Paul's] soul, there would be no Christianity. Of course, if this story had been understood in time; if Paul's writings had been read not as revelations of the "Holy Spirit" but with an honest and free spirit of one's own, and without at the same time thinking of all our personal troubles, if they had *really been read* — and for a millennium and a half there were no such readers — then Christianity would have been done for long ago. . . .⁴⁶

⁴³ I emphasize that the reference here is to a type, rather than to an individual. Nietzsche was clear about the significance of the difference. "Among them too there are heroes . . ." FRIEDRICH NIETZSCHE, *Thus Spoke Zarathustra*, in THE PORTABLE NIETZSCHE 203 (Walter Kaufmann ed. & trans., 1977) (1881–1892) [hereinafter *Thus Spoke Zarathustra*]. In *The Antichrist*, Nietzsche wrote:

Decadence is only a *means* for the type of man who demands power in Judaism and Christianity, the *priestly* type: this type of man has a life interest in making mankind *sick* and in so twisting the concepts of good and evil, true and false, as to imperil life and slander the world.

The Antichrist, *supra* note 1, at 593–94.

⁴⁴ *The Antichrist*, *supra* note 1, at 612.

⁴⁵ Thus, for Nietzsche, turning the liberating potential of the life example of the evangel into a set of conforming rules had the opposite effect of liberation when imposed on those who would follow Christ. *See id.* at 612–13.

⁴⁶ Friedrich Nietzsche, *The Dawn*, in THE PORTABLE NIETZSCHE 76–77 (Walter Kaufmann ed. & trans., 1977) (1881–1892) [hereinafter *The Dawn*].

The priest stands between Logos and humanity. He is the mediator, and the mediation is designed to preserve his power. "Disobedience of God, that is, of the priest, of 'the Law,' is now called 'sin'; the means for 'reconciliation with God' are, as is meet, means that merely guarantee still more thorough submission to the priest: the priest alone 'redeems.'"⁴⁷ Transcendence of law, the "rule of law," becomes the mask covering the critical relationship between law and its interpreter.

I know these godlike men all too well: they want one to have faith in them, and doubt to be sin. All too well I also know what it is in which they have most faith. Verily, it is not in afterworlds and redemptive drops of blood, but in the body, that they too have most faith; and their body is to them their thing-in-itself. But a sick thing it is to them, and gladly would they shed their skins. Therefore they listen to the preachers of death and themselves preach afterworlds.⁴⁸

This lust to power that drives the priest and accounts for his methods, is not limited to an occupation. As a type, the priest exists in any relationship in which one person stands as sole mediator of the good with respect to others, who are contented to seek the meaning of the good only from the priest.⁴⁹ "What is good? Everything that heightens the feeling of power in man, the will to power, power itself. What is bad? Everything that is born of weakness. What is happiness? The feeling that power is growing, that resistance is overcome."⁵⁰

Thus, the great power of the priest derives from his invention of a direct connection between priest and the Divine. The acceptance by the community of believers of this connection — or in the language of constitutional theory, the sovereign act of the community adopting a constitution defining the relations between the community and its institutions — permits an appropriation by the priest of a privileged place in the relationship between humans and the Divine.⁵¹ The priest "knows only one great danger, consequently 'God' knows only one great

⁴⁷ *The Antichrist*, *supra* note 1, at 597–98.

⁴⁸ *Thus Spoke Zarathustra*, *supra* note 43, at 145.

⁴⁹ But thus I counsel you, my friends: Mistrust all in whom the impulse to punish is powerful. They are people of a low sort and stock; the hangman and the bloodhound look out of their faces. Mistrust all who talk much of their justice! Verily, their souls lack more than honey. And when they call themselves the good and the just, do not forget that they would be pharisees, if only they had — power.

Id. at 212.

⁵⁰ *The Antichrist*, *supra* note 1, at 570.

⁵¹ "I have found the theologian's instinctive arrogance wherever anyone today considers himself an 'idealist' — wherever a right is assumed, on the basis of some higher origin, to look at reality from a superior and foreign vantage point." *The Antichrist*, *supra* note 1, at 574–75.

danger."⁵² What follows, of course, works to the advantage of the type of the priest. "They have called 'God' what was contrary to them and gave them pain; and verily, there was much of the heroic in their adoration. And they did not know how to love their god except by crucifying man."⁵³

The type of the priest is the archetype of the sort who would alter the world in the service of self-perpetuation as the arbiter, "the type of man who demands power in Judaism and Christianity, the *priestly* type: this type of man has a life interest in making mankind *sick* and in so twisting the concepts of good and evil, true and false, as to imperil life and slander the world."⁵⁴

Indeed, the priest would change God to suit his purpose. Those in control of God can make and remake the deity through recourse to the Divine word.⁵⁵ This remaking adds a certain utility to Logos, providing the basis, outside of the individual, on which individuals can base their control over others.

The *creator* they hate most: he breaks tablets and old values. He is a breaker, they call him lawbreaker. For the good are *unable* to create; they are always the beginning of the end: they crucify him who writes new values on new tablets; they sacrifice the future to *themselves* — they crucify all man's future.⁵⁶

This basic notion of the nature of the authority of priests, of those who would judge their community from a position of authority created outside of that community, is echoed often in the works of Nietzsche:

[H]e calls a state of affairs in which the priest determines the value of things "the kingdom of God"; he calls the means by which such a state is attained or maintained "the will of God"; with cold-blooded cynicism

⁵² *The Antichrist*, *supra* note 1, at 628.

⁵³ *Thus Spoke Zarathustra*, *supra* note 43, at 204.

⁵⁴ *The Antichrist*, *supra* note 1, at 594. Nietzsche commented elsewhere:

It was the sick and decaying who despised body and earth and invented the heavenly realm and the redemptive drops of blood: but they took even these sweet and gloomy poisons from body and earth. They wanted to escape their own misery, and the stars were too far for them.

Thus Spoke Zarathustra, *supra* note 43, at 144.

⁵⁵ The concept of God becomes a tool in the hands of priestly agitators, who now interpret all happiness as a reward, all unhappiness as punishment for disobeying God, as "sin": that most mendacious device of interpretation, the alleged "moral world order," with which the natural concepts of cause and effect are turned upside down once and for all.

The Antichrist, *supra* note 1, at 595.

⁵⁶ *Thus Spoke Zarathustra*, *supra* note 43, at 324–25.

he measures peoples, ages, individuals, according to whether they profited or resisted the overlordship of the priests.⁵⁷

The priestly type is, thus, essentially a parasite. Yet he is a parasite that finds a welcoming home in every culture. He exists because communities insist on the creation of the office. Judges, like priests, understand the consequences of a world in which communities take comfort from the supposition that “man does not know, *cannot* know, what is good for him, what [is] evil: he believes in God, who alone knows it. Christian morality is a command; its origin is transcendent; it is beyond all criticism, all right to criticism.”⁵⁸ Nature understands its needs. Parasites exist because nature has created creatures whose function is to serve as hosts. These creatures, these communities, thrive only in symbiosis with the parasite.⁵⁹

Why should we care? If indeed, as we have come to agree, the judge represents the priestly type, if there is something to “the possibility that the practice of law today is most like the practice of theology,”⁶⁰ then Nietzsche provides a bracing analysis of the pathologies of the priest in the West. Certainly, stripping away the holiness of time and tradition from the functioning of the judiciary, it is possible to see in our judge/priest the pathologies of the self-preserved that would remake the world to secure his place atop it, alongside the legislator and the executive. And it is possible to understand these pathologies as the foundation for a jurisprudence of preservation. Judges retain authority through an assiduous cultivation, an unconscious refinement, perhaps, of the cult of the judge as an indispensable feature of the religion (rule) of law.

A. *The American Judge/Priest*

I can think of no finer example of the Nietzschean priestly type than the current Chief Justice, and no more brilliant pronouncement of the primary purpose of the priest than in the Supreme Court’s opinion in *Bush v. Gore*.⁶¹ Consider the Nietzschean reevaluation of values, the inversions, required to support the rationale of the Chief Justice for deciding the outcome of the election for President:

⁵⁷ *The Antichrist*, *supra* note 1, at 596.

⁵⁸ *Twilight of the Idols*, *supra* note 29, at 516.

⁵⁹ See discussion *infra* notes 71–73 and accompanying text.

⁶⁰ VINING, *supra* note 24, at 187.

⁶¹ 531 U.S. 98 (2000) (*per curiam*). *Bush* is particularly interesting because, though the Court appears to speak in a singular and veiled voice — a *per curiam* opinion — it is clear that the case reflected a battle among the priests with respect to the nature of their functioning within the theological framework they had designed. See *id.*

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.⁶²

This inversion is not merely a matter of my delusion. The Chief Justice took a conscious pride in his priestly manipulations:

Just weeks after the controversial Supreme Court decision that ended manual recounts in Florida's presidential voting — effectively awarding the White House to George W. Bush — Chief Justice William H. Rehnquist gave a little-noticed history lecture suggesting that sometimes members of the court may have to become involved in political matters to prevent a national crisis.

Discussing the role of Supreme Court justices in a commission that decided the disputed 1876 election in favor of Republican Rutherford B. Hayes, Rehnquist argued that their involvement was vindicated by the results.⁶³

Here is Nietzsche's Paul, and Nietzsche's Luther. Here is the propounding of a priestly-centered conception of the state. Here is the church at the center of the life of the community — God's representative on earth through whom all questions must seek final resolution.

But Chief Justice Rehnquist is not unique among the occupants of the American equivalent of the throne of St. Peter. America has produced a Paul every bit the match of the original. John Marshall is the exemplar *par excellence* of the type. He is a man whose work parallels, whose work provides a legal analogue to, the work of Nietzsche's St. Paul. Paul's life work was inversion. For Paul, Jesus' death provided the gateway to the error of false causality: it "*had to be necessary, had to have meaning, reason, the highest reason; a disciple's love knows no accident.*"⁶⁴ The federal Constitution was John Marshall's Jesus. Its meaning and reason could not merely exist; rather, a foundation of that reason had to provide meaning for the judge. The disciple's love does indeed know no accident; it demands reciprocation. Paul disciplined the Logos through the doctrine of judgment.⁶⁵ The regulation of

⁶² *Id.* at 111.

⁶³ Charles Lane, *Rehnquist: Court Can Prevent a Crisis: Chief Justice Cites 1876 Election Role*, THE WASH. POST, Jan. 19, 2001, at A24.

⁶⁴ *The Antichrist*, *supra* note 1, at 614.

⁶⁵ *Id.* at 618.

humans in preparation for judgment upon death required rules which could only be validated by the priest. Marshall disciplined the Constitution through a doctrine of judgment as well — the regulation of the political community for the perpetuation of the Constitution's divine principle of a more perfect union, the rules for which could only be validated by the judge.⁶⁶ Even the very nature of the soul was in the hands of the priest after Paul,⁶⁷ as the nature of the sovereignty of the state was in the hands of the judge after Marshall.⁶⁸ It was to the will of the priest that the life of the evangel was bent.⁶⁹ It was to the overlordship of the judge that the constitutional order was reinvented. "The 'God' whom Paul invented . . . is in truth merely Paul's own resolute *determination* to do this: to give the name of 'God' to one's own will."⁷⁰ Paul looked beyond the lived life of the evangel to make the authority of the priest plausible.⁷¹ John Marshall looked beyond the text of the Constitution for the construction of the powers of the judicial priest. Post-resurrection and extra-constitutional areas are both areas beyond human reckoning. But both priest and judge induce us to vest in each of them a power to see well beyond the ordinary. Holding a monopoly on knowledge, judge and priest attain a monopoly on guidance. Each becomes indispensable.⁷² In this way both Nietzsche's Paul and Nietzsche's John Marshall bend and control. In this way, both are parasites — dependent upon and acting through a false relation between the type they represent and the text they alone can read. Nietzsche's Paul reminds us that if we had not had a John Marshall, we would have had to invent him.⁷³ Admission

⁶⁶ See *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803). Thus the birth of judicial review is bound up in the role of the priest — the "essence" of the judicial function. This is the core meaning of saying what the law is. This is a tenet of the power of the judge that has survived the centuries. The current version of this principle was uttered in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (holding that states are prohibited from adding qualifications to congressional representatives representing the people of that state).

⁶⁷ See *The Antichrist*, *supra* note 1, at 610–12.

⁶⁸ Here, John Marshall adopting the role of St. Paul births an enduring view of federal sovereignty in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

⁶⁹ [T]he priest formulated once and for all, down to the large and small taxes he was to be paid . . . what he wants to have, "what the will of God is." From now on all things in life are so ordered that the priest is indispensable everywhere; at all natural occurrences in life . . .

The Antichrist, *supra* note 1, at 597.

⁷⁰ *Id.* at 627.

⁷¹ See generally *The Antichrist*, *supra* note 1 (discussing *inter alia* how Paul used the faith in Jesus' immortality that became the doctrine of judgment to empower priests); *Twilight of the Idols*, *supra* note 29 (stating that the psychology of will was originated by priests who wanted to create, through them, the right to punish for God).

⁷² *The Antichrist*, *supra* note 1, at 595–98.

⁷³ Of course, the role of the priest is not limited to the "high priest." Though I focus on the "high priests" of American judicial culture, the culture of judging extends all the way down the hierarchy of the judge. Nor is the culture of the judge dependent upon a particular

to any fraternity of power is usually sufficiently alluring to make it the object of the ambitious in every generation.⁷⁴

However, the American judge/priest does not assert and maintain her power by the mere expedient of existence, as such. The judge/priest's tools are the techniques of interpretation through which she, and she alone, come to speak authoritatively to the masses,⁷⁵ and to the coordinate branches of government as well.⁷⁶ The common-law methodology of courts, "a process of argumentation, as a body of

political ideology other than an adherence to the ideology of judging. All judges, liberal or conservative, play this role. For a discussion of a particularly visible expression of the ideology of the judge, see Larry Catá Backer, *Race, "The Race," and the Republic: Reconceiving Judicial Authority After Bush v. Gore*, 51 CATH. U. L. REV. 1057 (2002) [hereinafter *Race, "The Race," and the Republic*].

⁷⁴ Truth confirmed by experience of ages that every *individual*, and all bodies of men invested with power, always attempt to increase it, and never part with any of it but by force. It is the very nature of man. The National government will possess this desire and having the means it will in time carry it into execution.

Samuel Chase's Notes of Speeches Delivered to the Maryland Ratifying Convention (Apr. 1788), in 5 THE COMPLETE ANTI-FEDERALIST 79, 85 (Herbert J. Storing ed., 1981). While this postulate of human behavior was accepted as basic to the American socio-political organization by the framers of the Constitution, see, for example, THE FEDERALIST PAPERS No. 10 at 80 (James Madison) ("The inference to which we are brought is, that the *causes* of faction cannot be removed . . ."), No. 59 (Alexander Hamilton) (Clinton Rossiter ed., 1961), its effect on the construction and constraining of a judiciary was dismissed, see, for example, *id.* No. 81 at 485 (Alexander Hamilton) ("There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption.").

⁷⁵ This speech, though directed at the coordinate or inferior branches of government, applies now directly to the people in a variety of areas that are central to the daily existence of people. These include interactions with the police power of the state, see, for example, *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring police to inform suspects of their Constitutional rights prior to interrogation), and the power to regulate morals, see, for example, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding state anti-sodomy law), *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down a ban on interracial marriage), or to create a hierarchy of life, see, for example, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (examining abortion regulations and holding that a woman's choice to have an abortion may be guaranteed against government regulation during first trimester of pregnancy).

⁷⁶ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (stating that the President had no authority under the U.S. Constitution to seize steel mills during the Korean conflict to avert a work stoppage). For a discussion of the means through which the judge applies the balancing test to control the other coordinate branches of the federal government, see Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 68-69, 77-83, 88-90 (1997) (citing examples of situations where the Supreme Court invoked balancing tests to consider the strength of governmental interest in tests of constitutional issues).

cases which form a point of departure for reasoning by analogy and distinction,"⁷⁷ subjects institutionally-enforced conduct norms to a web of understanding at the center of which stand the courts. In addition, and particularly with respect to the interpretation (and thus regulation) of the actions of legislatures, there are many modern methods of interpretation, created to maintain authority in an increasingly complicated world.

There is no shortage of theories from which courts might choose. Scholarly articles on statutory interpretation have proliferated over the last ten to fifteen years, and there are at least half-a-dozen competing models, including new textualism, intentionalism, "modified" intentionalism, "legal process," public justification, dynamic interpretation, and public choice theories.⁷⁸ There are, of course, any number of additional theories of interpretation, and additionally important works by other influential scholars of interpretation.⁷⁹ These developing theories of interpretation can be deployed to wrest from the legislature a power over the law which the legislature, at least in common-law countries, sought to wrest from the judiciary in the first place, by "draft[ing] statutes with particularity . . . so as to wrest from judicial control a particular situation for which the legislator wants to alter the course of judicially created common law."⁸⁰ I will focus, for purposes of

⁷⁷ Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 82 (2001). "Common-law judges' skill and habit are in reasoning by analogy and distinction between a particular confluence of factual circumstances and legal issues, to an accumulated body of arguably similar and dissimilar prior cases." *Id.* at 83.

⁷⁸ J. Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 SMU L. REV. 81, 81-82 (2000) (footnotes omitted). The authors cite the following works in support of the theories: William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (new textualism); Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (intentionalism); REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* (1975) ("modified" intentionalism); William N. Eskridge, Jr., *Symposium on Statutory Interpretation: Legislative History Values*, 66 CHI.-KENT L. REV. 365, 392-93 (1990) ("legal process"); Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1 (1999) (public justification); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U.P.A. L. REV. 1479 (1987) (dynamic statutory interpretation); Daniel A. Farber & Philip P. Frickey, *Symposium on the Theory of Public Choice: Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988) (public choice theory).

⁷⁹ See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997) (discussing the theory of formalism); John Hart Ely, *The Supreme Court: 1977 Term — Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978) (discussing instrumentalism); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899) (discussing functionalism).

⁸⁰ Curran, *supra* note 77, at 99.

illustration, on two interpretive instruments from the American judge's toolbox — contextualism (balancing tests) and functionalism. Both expose the nature of judging best — a dual nature meant to further substance and authority.

The rise of the balancing test provides an illustration of the priestly method of interpretation. Balancing tests are crucial for casting the judiciary as a vital element in the maintenance of the neutral and non-arbitrary cover of the rule of law. Balancing tests make all substantive choices uncertain until the judge, not the parties, provides the definitive balancing. The utility of balancing tests in constitutional jurisprudence is well exposed at times of internal conflict between members of the judiciary. One such period occurred at the end of the twentieth century between ideologically liberal and conservative judge/priests on the United States Supreme Court. A disaffected member of one of those political camps, Justice Scalia, exposed the true value of the balancing test:

We have no way of knowing how often these ends are in fact achieved, and the Court thus says little about them except to call them "an important factor to consider." Having evaluated the interests on both sides as roughly as this, the Court then proceeds to judge which is more important. This process is ordinarily called "balancing," . . . but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy. All I am really persuaded of by the Court's opinion is that the burdens the Court labels "significant" are more determinative of its decision than the benefits it labels "important." Were it not for the brief implication that there is here a discrimination unjustified by *any* state interest, I suggest an opinion could as persuasively have been written coming out the opposite way. We sometimes make similar "balancing" judgments in determining how far the needs of the State can intrude upon the liberties of the individual, but that is of the essence of the courts' function as the nonpolitical branch. Weighing the governmental interests of a State against the needs of interstate commerce is, by contrast, a task squarely within the responsibility of Congress, see U.S. Const., Art. I, § 8, cl. 3, and "ill suited to the judicial function."⁸¹

Indeed, Justice Scalia has been at the forefront of the judicial movement away from assertions of bald, judicial authority, evidenced by techniques such as balancing tests.⁸² In the application of the Religion Clauses, he has denigrated balancing as

⁸¹ *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 896–97 (1988) (Scalia, J., concurring) (citations omitted) (criticizing the balancing test used in *Dormant Commerce Clause* cases).

⁸² See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175

"psychology practiced by amateurs."⁸³ In the context of the recognition of privileges in the federal courts, Justice Scalia has criticized the use of balancing tests as the basis for the recognition and regulation of such privileges.⁸⁴

Yet, exposure of the manipulative potential of the balancing test should not be taken as evidence that Justice Scalia would deny the judicial priest use of techniques, such as the balancing test, for the maintenance of judicial monopolies over interpretive issues.

And yet that cannot be the entire explanation either, for Justice Scalia himself has authored opinions in the religion area as elsewhere that are not entirely rule-like. After all, in *Smith* itself, he wrote that generally applicable laws may not be challenged for having a disproportionate impact on religionists in violation of the Free Exercise Clause — only to qualify that rule with exceptions for "hybrid" claims, such as free exercise claims that are coupled with free speech claims or privacy claims.⁸⁵

Thus, in other areas, particularly in the context of the jurisprudence of the Eleventh Amendment,⁸⁶ Justice Scalia has remained silent as the Supreme Court has constructed elaborate systems of balancing state and federal government prerogatives.⁸⁷ And in the context of Fourth Amendment searches and seizures, Justice Scalia has affirmed the central role of the judge in determining the limits of governmental police power — through the imposition of a balancing test.⁸⁸

(1989) (analyzing the relationship between general rules of law and judicial discretion); see also Kathleen M. Sullivan, *The Supreme Court: 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 62-66, 83-88 (1992) (discussing Scalia's aversion to balancing tests).

⁸³ *Lee v. Weisman*, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting) (invalidating official prayer at a public middle school graduation, and criticizing the majority for espousing too loose and flexible a conception of coercion under the Establishment Clause).

⁸⁴ See, e.g., *Jaffee v. Redmond*, 518 U.S. 1 (1996) (holding that the United States acknowledges the existence of the psychotherapist-patient privilege in its common law). For Justice Scalia's criticism, see *id.* at 18-36 (Scalia, J., dissenting).

⁸⁵ Kathleen M. Sullivan, *Justice Scalia and the Religion Clauses*, 22 U. HAW. L. REV. 449, 464 (2000) (citing *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 882 (1990)).

⁸⁶ See discussion *infra* notes 157-61.

⁸⁷ See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (holding that a state cannot be sued in state court under the Fair Labor Standards Act absent its consent); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding Congress could not use the Indian Commerce Clause to undermine the state's immunity under the Eleventh Amendment).

⁸⁸ See *Wyoming v. Houghton*, 526 U.S. 295 (1999). Justice Scalia wrote:

In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure

Like the rise of the balancing test as a tool of priestly judicial authority, the development of a functionalist approach to the mediation of disputes among the branches of the federal government — executive, legislative, and judicial — provides an ideal example of the crafting of a doctrine where implementation requires the intervention of the priest.⁸⁹ These decisions follow the “tendency of our recent separation-of-powers jurisprudence to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much — how much is too much to be determined, case-by-case, by this Court.”⁹⁰ The examples of this approach have been both numerous and contentious.⁹¹ In each of these cases, functionalism provided the grease for the results reached in those cases. Functionalism preserves for the judge the power to determine the character of a function at issue, and to apply that characterization to the determination of an appropriate allocation of power among the coordinate branches of government and between the federal and state governments.⁹² Impairments of the political functions of government are thus the

under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

Id. at 299-300 (citations omitted). Here, balancing seems to be historically compelled.

⁸⁹ Functionalism, or instrumentalism, has been increasingly studied in recent years. For a taste of some original sources of this interpretive tradition, see, for example, Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Holmes, *supra* note 79.

⁹⁰ *Mistretta v. United States*, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting) (citations omitted) (holding that judicial participation in the work of the U.S. Sentencing Guidelines Commission, an independent agency charged with rulemaking, did not constitute a violation of the separation-of-powers doctrine, or of Article III).

But Justice Scalia tends to speak out of both sides of his mouth — especially where this activity advances his own individual political agenda. Thus, Justice Scalia was not above advocating the very functionalist approach he decried in *Mistretta*, when it was necessary to save the line-item veto, dear to the hearts of activist conservatives in the 1990s. See *Clinton v. City of New York*, 524 U.S. 417 (1998) (Scalia, J., concurring in part and dissenting in part).

⁹¹ See, e.g., *Mistretta*, 488 U.S. 361 (holding that judicial involvement in a legislative agency did not violate the Constitution); *Morrison v. Olson*, 487 U.S. 654 (1988) (holding that Congress has the power to appoint Independent Counsel without violating the President's authority); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (authorizing the President to transfer Iranian assets through the IEEPA Iran Hostage); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977) (holding the Presidential Recordings and Materials Preservation Act did not violate the separation of powers principle); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (analyzing the President's authority to seize steel mills).

⁹² Thus consider the possibilities given the Chief Justice's standard announced in *Morrison v. Olson* (discussing the Independent Counsel Statute):

subject for judicial regulation. It is error to presume that "interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions."⁹³

But formalism serves the judge in his manifestation as Nietzschean priest as well. Formalist analysis preserves in the priest the monopoly of rights in the interpretation of plain meaning.⁹⁴ Formalism, like functionalism, merely provides related avenues for the assertion of judicial interpretation. Formalism does not suggest in the least that the text is capable of a competent read by any lay official. Indeed, the opposite appears to be true. A priestly formalism posits the existence of a meaning to text that can be discerned only from the deployment of the arcana of history and linguistic ability marshaled in the courts of the land.

In the context of the Religion Clauses, the judge/priest also acts as arbitrator/regulator between and among religious communities, and between religious communities and the institutions of government. Here is the judge/priest in the role not of the Christian minister, but that of the priest of the Roman State religion.⁹⁵ The emphasis is on ritual, hierarchy, and the preservation of dominance over ethics and morality. *Smith*⁹⁶ puts this notion into practice. The judges in that

We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.

487 U.S. at 691. It is for the courts to determine the nature of the functions of the executive and the character of the impediment to those functions posed by the contested activity. Foundational power, even with respect to the core functioning of the coordinate branches, thus, tends to fall to the judge.

⁹³ *Clinton v. Jones*, 520 U.S. 681 (1997) (stating that a sitting president has no immunity to suit based on private conduct before or during his term in office).

⁹⁴ See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Comptroller General's role in Graham-Rudman-Hollings Deficit Reduction Act violated separation of powers); *INS v. Chadha*, 462 U.S. 919 (1983) (limiting congressional authority over immigration decisions because congressional control violated separation of powers).

⁹⁵ For a discussion of the priest in Roman state religion in historical context, see ALAN WATSON, *THE LAW OF THE ANCIENT ROMANS* (1970). Watson comments:

The pontiffs [leaders of state religion] gave advice as to what the law was to the magistrate and to the people. This gave them — and through them the patricians — enormous influence, especially because of the paucity of statute and . . . of the Edict, and because they controlled the forms of action (that is, the technical requirements for bringing lawsuits). They used their powers of interpretation as circumstances demanded — they could make a provision wide or very narrow. To achieve their object they were prepared to misinterpret the original provision *deliberately*.

Id. at 25.

⁹⁶ *Employment Div. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

case stood as arbitrators among lower order communities — the religious communities of priests subject to the overall regulatory will of the state. The act of arbitration itself is infused with the symbolism of hegemony. It is the court, as arbitrator, and not the parties, who has the power to set the standards under which interpretive disputes and allocations of power can be made among religious communities and between the state and favored or disfavored communities.⁹⁷

This dominance of mediation is fiercely protected by the judicial priest, not only against attack from the religious communities — as *Smith* clearly evidenced — but also against incursions by other institutions of government. The most dramatic example of this protection occurred in the context of the assertion by Congress of a power to redefine and protect constitutional rights. *Smith* again provided the setting. Using its power under Section 5 of the Fourteenth Amendment, Congress adopted the Religious Freedom Restoration Act,⁹⁸ through which it sought to effectively overturn the Supreme Court's interpretation as expressed in *Smith*.⁹⁹ In voiding this exercise of federal authority, and especially the authority to interpret the federal Constitution in contravention of a prior judicial determination, the Supreme Court clearly exposed its cardinal purpose as the institutional mediator *par excellence*, as well as the pedigree of its office extending back to John Marshall.

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and

⁹⁷ Michael McConnell nicely describes the power relationships, as well as the consequences, perhaps without meaning to, in his critique of *Smith*. See Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1133–35, 1148 (1990) (discussing the difference in treatment of religious peyote use and religious wine use).

⁹⁸ Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (1994).

⁹⁹ RFRA imposed on the government the burden to demonstrate that regulations that substantially burdened a person's exercise of religion are in furtherance of a compelling governmental interest and are the least restrictive means for furthering that compelling governmental interest. The authority to impose this standard on inferior governments is identified in Section 5 of the Fourteenth Amendment. See RFRA § 2000bb(a)(3) (stating that "governments should not substantially burden religious exercise without compelling justification"); § 2000bb-1(b) (stating that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

effectively circumvent the difficult and detailed amendment process contained in Article V.¹⁰⁰

How ironic! Consider how this, in a system designed as a Nietzschean priestly state, would appear ludicrous — the inversion of the above-quoted passage to substitute the Court and Article III, for Congress and the Fourteenth Amendment!¹⁰¹ Indeed, as the Supreme Court itself has just recently informed us, courts do legislate in the guise of interpreting;¹⁰² there are no principles limiting the judicial power, other than those bound up in ephemeral notions of popular sovereignty — the exercise by the people of a “power” to ignore the court.¹⁰³

¹⁰⁰ City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (citations omitted).

¹⁰¹ Thus, as applied to the judiciary, and turned on itself, the quoted provision might read like this:

If [the Supreme Court] could define its own powers by altering [Article III's] meaning, no longer would the Constitution be “superior paramount law, unchangeable by ordinary means.” It would be “on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.” Under this approach, it is difficult to conceive of a principle that would limit [judicial] power. Shifting [judicial] majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

¹⁰² See Bush v. Gore, 531 U.S. 98 (2000). But apparently, only the Supreme Court may engage in this practice without contradiction. For a discussion of this aspect of that case, see *Race, “The Race,” and the Republic*, *supra* note 73.

¹⁰³ This power, when exercised on a small scale, can be evidenced in something as mundane as what we have come to call jury nullification. For discussions of this, see JEFFREY ABRAMSON, WE, THE JURY 57–95 (1994); Vikramaditya S. Khanna, *Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve?*, 82 B.U. L. REV. 341, 396–99 (2002) (suggesting that the jury's power to nullify is a kind of “check” on the government). Jury nullification may become a formal vehicle for popular amendment of law, at least as applied to individual litigants. See Molly McDonough, *Jury Nullification on the Ballot: South Dakota's Amendment A Gets an 'F' From State Bar*, 1 N. 38 A.B.A. J. E-REP. 1, Oct. 4, 2002, available at WL, JLR database. Judicial recall or impeachment drives are more flamboyant demonstrations of this popular power. For a discussion, see, for example, William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483 (2002) (displaying the numerous efforts to curb federal judicial power during the Warren Era). Irrelevance, however, is the ultimate danger to the interpretive manipulations of the priest.

Thus, the Court is at once weighed down by the baggage of its doctrine and at the same time using the complexity of doctrine as a way of hiding its expression of personal politics in its decisions. Perhaps every organization must stand on its own unique constitutional footing. Justice O'Connor once told us this in connection with the University of Virginia's student fee program problems. Yet, if this is the case, then constitutional jurisprudence truly becomes both complex and irrelevant. Judgment based on the jurisprudence of peculiar facts, when all facts are peculiar, becomes no jurisprudence at all — instead jurisprudence is

Thus, among the institutions of government in the United States, it is only the courts, and their “priests,” who are endowed with the power to articulate normative *fundamental* rights. Other institutions of government — the federal legislature and executive, and state institutions — may articulate other normative expectations, but those articulations carry no normatively *fundamental* weight. It is in this sense that one acquires a fuller understanding of Justice O’Connor’s priestly form of judgment in *Kimel*.¹⁰⁴

Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. . . .” Our task is to determine whether the ADEA is in fact just such an appropriate remedy or, instead, merely an attempt to substantively redefine the States’ legal obligations with respect to age discrimination. One means by which we have made such a determination in the past is by examining the legislative record containing the reasons for Congress’ action.¹⁰⁵

Hence, the great contests over the nature and sources of fundamental rights of the last century within the American courts, between those who viewed fundamental rights as limited to that catalogue of rights that could be more or less strictly read into the federal Constitution,¹⁰⁶ and those who saw the Constitution as enabling (or not interfering with) the vindication of rights otherwise unenumerated within the Constitution,¹⁰⁷ can be understood in two senses. The common understanding starts

reduced to the form of answer to the supplication made to an Old Testament judge. Sadly, however, the cosmology of 21st Century Americans, unlike that of the ancient People of Israel, does not infuse judges with the spirit of God as the essence of the act of judging.

Larry Catá Backer, *Disciplining Judicial Interpretation of Fundamental Rights: First Amendment Decadence in Southworth and Boy Scouts of America and European Alternatives*, 36 TULSA L.J. 117, 141–42 (2000).

¹⁰⁴ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that ADEA could not abrogate a state’s sovereign immunity).

¹⁰⁵ *Id.* at 86–88 (citing in part *Boerne*, 521 U.S. at 532).

¹⁰⁶ For example, in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), Justice Powell, speaking for the Court, explained that only fundamental rights explicitly or implicitly identified in the Federal Constitution could be the basis of judicial vindication. “Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.” *Id.* at 35. “It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.” *Id.* at 33.

¹⁰⁷ This is illustrated quite nicely in Justice Cardozo’s opinion in *Palko v. Connecticut*, 302 U.S. 319 (1937).

[I]t is possible that some of the personal rights safeguarded by the first eight

from the presumption that these debates should be taken at face value, in other words, the only debates in the cases concern the character and nature of the sources of fundamental rights protected by the institutions of the federal government. But these debates can be understood in a more subtle and important way. The “face value” debate hides a more important contest which is centered on the distribution — among the institutions of the federal government — of the power to articulate (and thus name, expand, or contract) those fundamental rights.

Indeed, it is clear that the great debates of the twentieth century about the sources and nature of fundamental normative rights presupposes, as a necessary postulate, the fundamental norm that it is solely within the power of the judge to determine the meaning and limits of norms. Thus, within these debates, we see the American judge as the Nietzschean priest fully revealed.

B. The Judge/Priest in the European Court of Justice

The methodologies of the judicialization of politics is not confined to American judges. Other systems of law have developed interpretive techniques for the assertion of power. “Throughout the world, national high courts and supra-national tribunals . . . have become important loci for dealing with the most pertinent and polemical moral dilemmas and political controversies a democratic polity can contemplate.”¹⁰⁸ In each of them, the techniques of the judge have reinforced the place of the judge as an essential part of national political governance.¹⁰⁹ Political

Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.

Id. at 326 n.4 (citation omitted). It is more forcefully illustrated in Justice Harlan’s influential dissent in *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting). Harlan wrote:

However it is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights “which are. . . *fundamental*; which belong . . . to the citizens of all free governments,” for “the purposes [of securing] which men enter into society.” Again and again this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights.

Id. (Harlan, J., dissenting) (citations omitted).

¹⁰⁸ Ran Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J.L. & JURISP. 191, 217 (2002).

¹⁰⁹ An early expression of the political science of that involvement, still relevant, is Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. PUB. L. 279 (1957).

institutions have not resisted this juridification, and indeed, in some cases, have embraced it.¹¹⁰ Academics have rushed in to provide a theology for the judge as Nietzschean priest on the international stage.¹¹¹

The judicial institutions of the European Union (EU) serve as a dwelling place of the Nietzschean judge. Professor Weiler echoes the now common understanding of the effects of this sort of judging in describing how:

[D]espite the integrative radicalness of its doctrinal construct, with few exceptions, the Court managed to hegemonize the EC interpretive community, and to persuade, co-opt, and cajole most, if not all, of the other principal actors to accept the fundamentals of its doctrine and of its position in making the constitutional determinations for the Community.¹¹²

The European Court of Justice (ECJ) has developed from out of "general principles of Community law," a great edifice of power.¹¹³ The ECJ "has taken for itself, the sole right of interpretation of the acts of the Institutions of the Community, arguing that 'where the validity of a Community Act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.'"¹¹⁴ Indeed, the history of the ECJ has been one of the accretion of authority to the EU over matters to which neither text nor intent might have referred.¹¹⁵ The power of the priest as self-preserved provides the basis for a better

¹¹⁰ "Traditionally, political institutions have other means of promoting their views, and the resort to courts, because of its uncertainty, is not their favourite avenue for solving their disputes. Yet, judicial politics have developed in an unprecedented fashion at the European level." RENAUD DEHOUSSE, *THE EUROPEAN COURT OF JUSTICE* 97-98 (1998).

¹¹¹ See, e.g., Lawrence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

¹¹² J.H.H. WEILER, *THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 192 (1999).

¹¹³ Much has been written about the role of the ECJ in the construction of the EU, and the growth of its power. See STEPHEN WEATHERILL, *LAW AND INTEGRATION IN THE EUROPEAN UNION* 184-223 (1995) (including citations at *id.* at 221-23). For a classic discussion, see Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

¹¹⁴ Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173, 197 (2001). It is commonly accepted that:

Faced with the task of interpreting a constitutional framework that gives the Community's institutions wide powers to implement its goals, the Court has gone beyond the technical rules laid down in the Treaties themselves to establish the fundamental principles on which the creation of the Community is based. . . .

The principles in question are equality, freedom, solidarity and unity.

JEAN-VICTOR LOUIS, *THE COMMUNITY LEGAL ORDER* 50-51 (2d ed. 1990).

¹¹⁵ See BROWN & KENNEDY, *supra* note 5.

understanding of why such expansion, such function-expanding activity, can go unchallenged within the community where the judge serves.

The "new legal order" rhetoric of the EU judiciary provides the conceptual framework for norm making at the Community level by the ECJ.¹¹⁶ Within the constitutional context, the doctrines of autonomy and supremacy provide the framework for the possibility of norm making at the level of the EU.¹¹⁷

The doctrine of autonomy essentially posits the existence and independence of the Communities as a political unit of government. In its absence, what passes for the Community would amount to little more than collective obligations of the constituent states. Autonomy is the name the ECJ has given to the very notion of federalism so taken for granted in other federal states. Autonomy contains the idea that the Community is set apart from its constituent states. The Community, taken as a whole (under the doctrine of unity), constitutes an independent government with concurrent competence over the territories of the constituent states. Autonomy serves as a shield against Member State encroachment upon the governmental prerogatives of the Community.¹¹⁸

¹¹⁶ In now often quoted language, the ECJ stated that:

[T]he Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member-states, but also their nationals. Community law, therefore, apart from legislation by the member-states, not only imposes obligations on individuals, but also confers on them legal rights. The latter arise not only when an explicit grant is made by the Treaty, but also through obligations imposed in a clear, defined manner, by the Treaty on individuals as well as on member-states and on the Community institutions.

Case 26/62, *Van Gend en Loos v. Nederlandse Tariefcommissie*, 1963 E.C.R. 1, [1963] C.M.L.R. 105, 129 (1963).

¹¹⁷ See BROWN & KENNEDY, *supra* note 5; see also Case 14/1964, *Costa v. ENEL* 1964 E.C.R. 585, 593, [1964] C.M.L.R. 425 (1964).

By contrast with ordinary international treaties, the EC Treaty has created its own legal system which, on entry into force of the Treaty, became an integral part of the legal systems of the member-states and which their courts are bound to apply. By creating a Community of unlimited duration having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane, and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the member-states have limited sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

Id. at 593.

¹¹⁸ Larry Catá Backer, *Forging Federal Systems Within a Matrix of Contained Conflict*:

The European judges/priests' techniques of interpretation, like those of their American federal counterparts, provide the vehicle through which the judges, and they alone, speak authoritatively to the masses,¹¹⁹ and to the coordinate branches of government as well.¹²⁰ The development and control of general principles of Community law provides the greatest tool of judicial control of substantive norm making within the EU.¹²¹ More importantly, the ECJ has crafted for itself the

The Example of the European Union, 12 EMORY INT'L L. REV. 1331, 1339–40 (1998) (citing Case 9/65, *San Michele v. High Authority*, 1967 E.C.R. 1, and Case 34/73, *Variola SpA v. Amministrazione italiana delle Finanze*, 1973 E.C.R. 981).

¹¹⁹ The doctrine of direct effects, and the doctrine of state liability to individuals for failure to transpose directives, are two of the legal tools through which the ECJ has connected directly to the masses. For the doctrine of direct effects, see, for example, Case 26/62, *Van Gend en Loos*, 1963 E.C.R. 1, [1963] C.M.L.R. 105 (1963).

[T]he Court held in *Frankovich and Others* . . . that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty. It follows that that principle holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach. In addition, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied . . . the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities.

Joined Cases C-46 & 48/93, *Brasserie Du Pêcheur Sa v. Secretary of State for Transport ex parte Factortame Ltd.*, 1996 E.C.R. I-1144-I-1145, [1996] 1 C.M.L.R. 889 (1996).

For an example of how the doctrine of state liability for damages to individuals injured by a failure to transpose directives has been applied, see Joined Cases C-6&9/90, *Frankovich and Boniface v. Italy* 1991 E.C.R. I-5357, [1993] 2 C.M.L.R. 66 (1993). The Frankovich Doctrine has been refined considerably. See, e.g., *Brasserie du Pêcheur SA* 1996 E.C.R. I-1029 ¶¶ 31–33. For commentary, see Jane Convery, *State Liability in the United Kingdom After Brasserie du Pêcheur*, 34 COMMON MKT. L. REV. 603 (1997).

¹²⁰ See Opinion 2/94 on Accession of the Community to the ECHR 1996 E.C.R. I-1759 (holding, by the European Court of Justice, that the EU did not have competence under the EU Treaties to become a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms, unless the EU Treaties were amended to provide this authority).

¹²¹ The issues of the origin, use and limitations of the concept, "general principles of Community law" remain controversial in Europe. I do not discuss those questions here. For a general discussion of the genesis of principles of Community law, see JOXERRAMON BENGOTXEA, *THE LEGAL REASONING OF THE EUROPEAN COURT OF JUSTICE: TOWARDS A EUROPEAN JURISPRUDENCE* 71–79 (1993); NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY* 115–33 (1996); D. LASOK & J.W. BRIDGE, *LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES* 179–208 (5th ed. 1991); Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the*

authority to determine the sources that it will refer to for purposes of this norm making, and the interpretation of the power and authority of the institutions of the EU vis-à-vis the Member States.¹²²

As such, concessions of power to the federal level may be taken, as well as given. The single most important concession of this type has not been taken by the political bodies, but by the ECJ, which has embarked on the quite ambitious project of creating the normative foundation for social and political union. In the form of juridically-crafted fundamental principles of Community law, this appropriated concession of power creates the framework within which all political and social discussion must take place. This appropriation is not unconscious.¹²³ The ECJ itself has not shrunk from conceding, on occasion, that the real basis for the social disciplining of "fundamental principles" lies outside the "black letter" of the EU Treaty.¹²⁴

The ECJ has been faulted for looking outside of the EU Treaty. Anthony Arnall related a criticism of Sir Patrick Neill to the interpretive methodologies of the European Court: "The methods of interpretation adopted by the ECJ appear to have liberated the Court from the customarily accepted discipline of endeavouring by textual analysis to ascertain the meaning of the language of the relevant provision."¹²⁵ Indeed, the ECJ has been liberated, and that liberation has made those subject to its authority more dependent on the court for the authentic reading

Legal Order of the European Communities, 61 WASH. L. REV. 1103 (1986).

¹²² For this purpose, the ECJ has chosen to look, not only to the general principles inherent in the EU Treaty, but also to the general principles of interpretation and, more importantly, to the general principles the ECJ finds that are (or have become) common to the laws of the Member States. In Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491, [1974] 2 C.M.L.R. 338, ¶ 13, at 354 (1974), the ECJ identified the sources from outside the EU Treaty for the construction of general principles of Community human rights:

[T]he Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

Id. at 507.

¹²³ "This process has been accomplished by the Court in order to provide the constitutive Treaties with two essential characteristics of internal constitutions: the granting, by the constitution, of rights to the citizens which can be enforced before the national courts, and the supremacy of the constitutive Treaties. . . ." MARIA LUISA FERNANDEZ ESTEBAN, *THE RULE OF LAW IN THE EUROPEAN CONSTITUTION* 22 (1999) (noting, to this effect, the "circular trend through which the Treaties are interpreted").

¹²⁴ See Weiler, *supra* note 121.

¹²⁵ ARNULL, *supra* note 5, at 515 (citing to a paper authored by Sir Patrick Neill QC, uncited in the text).

of text. Others echo this criticism, especially in connection with the ECJ's assertion of a power to impose conduct norms in the arena of "human rights."¹²⁶

But despite a certain amount of academic criticism, the ECJ continues to adhere to a jurisprudence that has, as an objective, the retention by the ECJ of its authority to determine the scope of those general principles of Community law that may be imposed on the Member States, and all who reside within them.¹²⁷ In effect, an organ of the supranational entity now reserves to itself the power to determine the extent of its power to define the conduct parameters of all subordinate entities.¹²⁸ This is a very neat trick, one that significantly increases the power of the EU for the purposes of doing "good things," but also one that permits a substantial intrusion into the autonomy of the Member States.¹²⁹ It is now left to the ECJ, within the parameters that the ECJ itself has defined, to designate the base line and limits within which (non-dangerous) deviation will be permitted¹³⁰ through the Court's power to declare "fundamental principles of Community law."¹³¹

¹²⁶ See Weiler, *Distrust*, *supra* note 121. There is only one reference to "general principles" in the primary law. Article 288 (formerly Article 215) of the European Community (EC) Treaty provides for European Economic Community (EEC) liability in non-contractual matters, "in accordance with the general principles common to the laws of the Member States." European Community Treaty, art. 288, 1 EUROPEAN UNION SELECTED INSTRUMENTS TAKEN FROM THE TREATIES 331 (1999) [hereinafter European Community Treaty]. See LOUIS, *supra* note 114, at 68 (suggesting that this is a specific reference to a term of general applicability). The ECJ, however, may have taken inspiration from other sources. See, e.g., LASOK & BRIDGE, *supra* note 121, at 180 (stating "[A]rticle 173(I) . . . enables [the ECJ] to annul Community acts which 'infringe the Treaty or any rule of law relating to its application.'").

¹²⁷ See TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* (1999).

¹²⁸ Certainly, since *Stauder*, the ECJ has asserted that fundamental rights are "enshrined in the general principles of Community law and protected by the Court." Case 29/69, *Stauder v. City of Ulm*, Sozialamt, 1969 E.C.R. 419, ¶ 7, at 425 [1970] 9 C.M.L.R. 112, ¶ 7, at 119 (1970).

¹²⁹ It also permits the institutions of the supranational entity to resist intrusions into its power from potentially competing organs of norm making. Thus, for example, the ECJ has resisted permitting the EU from acceding to the Council of Europe's 1950 Convention for the Protection of Human Rights and Fundamental Freedoms. See, e.g., Giorgio Gaja, *Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Given on 28 March 1996, Not Yet Reported, 33 COMMON MKT. L. REV. 973, 989 (1996).

¹³⁰ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel*, 1970 E.C.R. 1125, [1970] 9 C.M.L.R. 255 (1970).

¹³¹ Case C-13/94, *P. v. S. & Cornwall County Council*, 1996 E.C.R. I-2143, [1996] 2 C.M.L.R. 247, ¶ 18 (1996). On the interpretive and supraconstitutional utility of principles in continental (and especially European) law, see, for example, TRIDIMAS *supra* note 127. Professor Tridimas makes two points worth remembering:

First, it must be emphasized that the significance of general principles is not exhausted in their gap filling function. They express constitutional standards

As significant to the enhancement of judicial authority — and to the construction of a regime of general principles of law within a framework of autonomy, supremacy and direct effect — was the framework created by the EC Treaty for review of EU issues in the national courts of the Member States.¹³² That framework provided the raw materials — legal disputes with potential Community law issues — that fueled the juridification project of the European Nietzschean judge. Article 234's references functioned as “the keystone in the edifice [of ECJ jurisprudence]; without it the roof would collapse and the two pillars [the doctrines of direct effect and supremacy] would be left as a desolate ruin, evocative of the temple at Cape Sounion — beautiful but not of much practical utility.”¹³³ Hjalte Rasmussen correctly observed how the ECJ was able to use the reference system as a vehicle for dividing judicial authority between it and the national courts of the Member States.¹³⁴ “The entailing presentation of the resolution of the Community’s federalism conflicts as being a by-product of a complex cooperation between (apolitical) judges on national and central levels of government served to yield the impression that, now, all had become a matter of pure law.”¹³⁵ Indeed, juridification through the application of general principles extended the power of the national courts of the Member States, even as the substance of the doctrines eroded the power of the Member States themselves in relation to the institutions of the EU. As between the judges, at every level of the EU, the net gain to authority more than compensated for shifts of lawmaking authority from the Member States to the institutions of the EU.¹³⁶

underlying the Community legal order so that recourse to them is an integral part of the [ECJ’s] methodology. The second point follows from the first. Once it is accepted that the general principles embody constitutional values, they may bear determinative influence on the interpretation of written rules, irrespective of the existence of gaps. In fact, the logical sequence may be reversed. Legislative provisions may be interpreted in light of the underlying premises of the legal system in such a way as to leave gaps which then need to be filled by recourse to general principles.

TRIDIMAS *supra* note 127, at 10.

¹³² Article 234 (formerly Article 177) of the EC Treaty confers on the ECJ jurisdiction to give preliminary rulings concerning the interpretation of the EC Treaty and the acts of the EU Commission and Council where such a question is raised before the national courts of the Member States. See European Community Treaty, *supra* note 126, at 293. For a discussion of the provision, see PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 406–52 (2d ed. 1998).

¹³³ G. Federico Mancini & David T. Keeling, *From CILFIT to ERT: The Constitutional Challenge Facing the European Court*, 11 Y.B. EUR. L. 1, 2–3 (1991) (referring in text to Article 177, which is now Article 234).

¹³⁴ See HJALTE RASMUSSEN, *ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING* 250–53 (1986).

¹³⁵ *Id.* at 251.

¹³⁶ On the basis of the principle of supremacy, all national courts now exercise the

Thus, the model of the judge/priest suggests an inversion, not apparent, from an understanding of the judge as priest in the conventional sense. Nietzsche's understanding of the priest forces us to look deeper for an understanding of the inherent nature of the judge/priest. We can see more clearly the core of the priestly functions — self-preservation, self-importance. This casts the nature of interpretive jurisprudence in a very different light. Who else but the court can divine the requirements of the basic law under these patterns of construction? Consider in this light Justice O'Connor's description of the judge's task in Establishment Clause cases: "Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging — sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case."¹³⁷

The rhetorical finery of the judges of the ECJ is no less compelling. What scholars of American judicial interpretation have discovered about the interpretive proclivities of American judges applies with equal force to the interpretive efforts of the EU judiciary. Interpretation, as a judicial tool, "should be viewed by scholars as embedded within deeply ingrained methods of decision-making which confounds efforts to impose a single theory of statutory interpretation upon the courts."¹³⁸ It is the power to interpret, rather than the peculiarities of the forms of interpretation, that sets the judge apart, and above.

power of judicial review of national legislative acts. . . . In matter of Community law . . . such judicial review should be exercised by all courts as a routine matter. This "empowerment" of ordinary courts was seen by some commentators as a major explanation for those courts' easy acceptance of supremacy.

Bruno de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, in *THE EVOLUTION OF EU LAW* 177, 207–08 (Paul Craig & Gráinne de Búrca eds., 1999) (citing, among others, K.J. Alter, *The European Court's Political Power*, 19 W. EUR. POL. 458 (1996); J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors*, 26 COMP. POL. STUDIES 510 (1994)).

¹³⁷ *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring). For a discussion, see Larry Catá Backer, *The Incarnate Word, That Old Rugged Cross and the State: On the Supreme Court's October 1994 Term Establishment Clause Cases and the Persistence of Comic Absurdity as Jurisprudence*, 31 TULSA L.J. 447 (1996).

¹³⁸ Kelso & Kelso, *supra* note 78, at 84. This statement, examined from a Nietzschean perspective, contains elements of miscausation. The premise that is grounded on the need for interpretation to call for the adoption of its singularly highest and best form can be countered by the premise that is grounded on the premise that the need to assert authority by the judge results in the creation of multiple forms of interpretation to confound those who would seek to wrest the authority to interpret away from the judge. For the effect of, and our delight in, errors of causation in the structuring of our society, see discussion *infra* notes 157–208.

II. THE JUDGES AND THEIR TEXTS

The source of a judge's authority, like that of the priest, is transcendent, rather than immanent. The source of the priest's authority is God, that of the judge is law.¹³⁹ Both God and law find concrete manifestation in text. Nietzsche's insights on the connection among text, transcendence, and authority is crucial for an understanding of the self-reinforcing nature of judicial power. A judge, like a priest, derives her authority from a societal acceptance of her unique connection to the ultimate manifestations of social power.¹⁴⁰

The American judge, like Nietzsche's priest, is ineffective without a text. Followers must be confined by something other than the charismatic effect of speech. Text serves as the basis of transcendent authority. *The Bible* serves as the "priestly book par excellence."¹⁴¹ It provides the priest with her magic wand — her connection and conduit to the divine. The text serves as the basis for the perpetuation of the power of the priest. The text itself makes the priest indispensable, and the priest constructs from the text a command to make the priest indispensable.

One step further: the "will of God" (that is, the conditions for the preservation of priestly power) must be *known*: to this end a "revelation" is required. In plain language: a great literary forgery becomes necessary, a "holy scripture" is discovered . . . From now on all things in life are so ordered that the priest is indispensable everywhere; at all natural occurrences in life, at birth, marriage, sickness, death, not to speak of "sacrifices" (meals), the holy parasite appears in order to denature them — in his language: to "consecrate."¹⁴²

Holy text requires a specialized socio-political class for its interpretation. Interpretation, and thus the need for text, provides its audience pleasure. Interpretation is an art, and, like any stage show, requires both audience and

¹³⁹ "Judges derive authority from speaking the divine. Only when judges lose their individual humanity, when they become the conduit for the vocalization of the voice of God, can we say that judges speak with authority. Judges speaking personally, no matter how chic today, carry no authority." *Chroniclers*, *supra* note 24, at 316.

¹⁴⁰ The cultural model for this connection in the West traces back both to the West's Graeco-Roman and Hebrew past. *Id.* at 315–18.

¹⁴¹ *The Antichrist*, *supra* note 1, at 628. In this paragraph, and through to the following chapter, Nietzsche shows the way *The Bible* redescribes the story of Genesis, from the creation of woman, to the tasting of the fruit of the tree of knowledge, to the expulsion from the Garden of Eden, and to the first destruction of humanity in the great flood, as a priestly parable of the danger of knowledge for the office of the priest, and the need to create a false causality of destruction following knowledge in an effort to contain knowledge to the priest. *Id.* at 628–31.

¹⁴² *Id.* at 597.

performer. That the performance is on a grand socio-political scale only heightens the pleasure — like a strong narcotic.¹⁴³

Nietzsche analogized the relationship between priest and text to that between parasite and host.¹⁴⁴ For the parasite in need of permanent employment, interpretation has its own benefits. Interpretation permits the obscuring of text so that its language becomes discernable only to those especially trained for that purpose — those in direct communion with the divine.

How little Christianity educates the sense of honesty and justice can be seen pretty well from the writings of its scholars: they advance their conjectures as blandly as dogmas and are hardly ever honestly perplexed by the exegesis of a Biblical verse. Again and again they say, "I am right, for it is written" . . . how crudely the preachers exploit the advantage that nobody can interrupt them, how the Bible is pricked and pulled and *the art of reading badly* formally inculcated upon the people — all this will be underestimated only by those who go to church either never or always.¹⁴⁵

It is the interaction of priest and text that gives rise to the peculiar ends of the art of interpretation — authority connected to symbols of power. The interpretative arts, and their monopolization in the hands of the judge, serve as the great tool of priestly power. Interpretation — the art of reading "badly" — gives rise to the most powerful of interpretive errors — those of an inverted causality.

The beginning of the Bible contains the *whole* psychology of the priest. The priest knows only one great danger: that is science, the sound conception of cause and effect. But on the whole science prospers only under happy circumstances — there must be a *surplus* of time, of spirit, to make "knowledge" possible. "Consequently, man must be made unhappy" — this was the logic of the priest in every age.¹⁴⁶

¹⁴³ To derive something unknown from something familiar relieves, comforts, and satisfies, besides giving a feeling of power . . . [F]irst principle: any explanation is better than none. . . . [T]he first representation that explains the unknown as familiar feels so good that one "considers it true." The proof of pleasure ("of strength") as a criterion of truth. . . . Consequence: one kind of positing of causes predominates more and more, is concentrated into a system, and finally emerges as *dominant*, that is, as simply precluding other causes and explanations. The banker immediately thinks of "business," the Christian of "sin."

Twilight of the Idols, *supra* note 29, at 497–98.

¹⁴⁴ See *The Antichrist*, *supra* note 1, at 596–98.

¹⁴⁵ *The Dawn*, *supra* note 46, at 80.

¹⁴⁶ *The Antichrist*, *supra* note 1, at 629–30.

The danger posed by the “sound conception of cause and effect” and the ability of the priest to distort this “science” form the core of Nietzsche’s critique of the priestly function. Its elaboration is centered on the “four great errors” of causality. “Every single sentence which religion and morality formulate contains it; priests and legislators of moral codes are the originators of this corruption of reason.”¹⁴⁷

The errors of causation are related.¹⁴⁸ The first three describe reversals or improbable causation — mistaking causes for effects, assuming a false causality, and creating an imagined causality. The last error is the assumption of a free will.¹⁴⁹ Here is causation one step removed. “Men were considered ‘free’ so that they might be judged and punished — so that they might become *guilty*.”¹⁵⁰ Free will in this sense was created to make people dependent upon the judge. In this case, an error of the causality of the will leads to the judge. The judge connects the causality of the will to the inversion and invention of causes and effects in law.¹⁵¹

Paul wanted the end, *consequently* he also wanted the means. What he himself did not believe, the idiots among whom he threw his doctrine believed. His need was for power; in Paul the priest wanted power once again — he could use only concepts, doctrines, symbols with which one tyrannizes masses and forms herds. What was the one thing that Mohammed later borrowed from Christianity? Paul’s invention, his

¹⁴⁷ *Twilight of the Idols*, *supra* note 29, at 492.

¹⁴⁸ Walter Kaufmann understands the four errors as part of “Nietzsche’s occasional insistence on a reversal of cause and effect, which would seem to imply a deprecation of consciousness [that] must be understood as a polemical antithesis against current prejudices.” KAUFMANN, *supra* note 30, at 265.

¹⁴⁹ Wherever responsibilities are sought, it is usually the instinct of wanting to judge and punish which is at work. . . . [T]he doctrine of the will has been invented essentially for the purpose of punishment, that is, because one wanted to impute guilt. The entire old psychology, the psychology of will, was conditioned by the fact that its originators, the priests at the head of ancient communities, wanted to create for themselves the right to punish — or wanted to create this right for God. Men were considered “free” so that they might be judged and punished — so that they might become *guilty*: consequently, every act had to be considered as willed, and the origin of every act had to be considered as lying within the consciousness.

Twilight of the Idols, *supra* note 29, at 499–500.

¹⁵⁰ *Id.* at 499.

¹⁵¹ I am moved by compassion for these priests. I also find them repulsive; but that matters least of all to me since I have been among men. But I suffer and have suffered with them: prisoners they are to me, and marked men. He whom they call Redeemer has put them in fetters: in fetters of false values and delusive words. Would that someone would yet redeem them from their Redeemer!

Thus Spoke Zarathustra, *supra* note 43, at 203.

means to priestly tyranny, to herd formation: the faith in immortality — that is, the doctrine of the “judgment.”¹⁵²

Thus, from the first reversal of causation, from the first creation of false and imaginary causality, from the illusion of free will, arises theology — and jurisprudence.¹⁵³ These twistings of causality are then, in another reversal of cause and effect, memorialized in the Logos created for the priestly caste to construct, and from which the priest derives his authority.¹⁵⁴

The four errors describe and predict the manner in which the socio-political priestly caste relates to, and operates in, the community over which it seeks to preserve its position. It has become a formidable weapon in the battle between the religious and judicial priests over the control of institutional expression of community norms. Catholic thought, though not unique among the religious castes, is worth considering for the beauty of its expression:

The inversion of means and ends, which results in giving the value of ultimate end to what is only a means for attaining it, or in viewing persons as mere means to that end, engenders unjust structures which “make Christian conduct in keeping with the commandments of the divine Law-giver difficult and almost impossible.”

It is necessary, then, to appeal to the spiritual and moral capacities of the human person and to the permanent need for his *inner conversion*, so as to obtain social changes that will really serve him. The acknowledged priority of the conversion of the heart in no way eliminates but on the contrary imposes the obligation of bringing the appropriate remedies to institutions and living conditions when they are an inducement to sin, so that they conform to the norms of justice and advance the good rather than hinder it.¹⁵⁵

¹⁵² *The Antichrist*, *supra* note 1, at 618.

¹⁵³ For Nietzsche, the connections between these notions and Christianity were starkly clear: “In Christianity neither morality nor religion has even a single point of contact with reality. Nothing but imaginary *causes* (‘God,’ ‘soul,’ ‘ego,’ ‘spirit,’ ‘free will’ — for that matter, ‘unfree will’), nothing but imaginary *effects* (‘sin,’ ‘redemption,’ ‘grace,’ ‘punishment,’ ‘forgiveness of sins’).” *Id.* at 581.

¹⁵⁴ Thus, Nietzsche clearly posits the relationship between priest and text: These priests accomplished a miracle of falsification, and a good part of the Bible now lies before us as documentary proof. With matchless scorn for every tradition, for every historical reality, they translated the past of their own people into religious terms, that is, they turned it into a stupid salvation mechanism of guilt before Yahweh, and punishment; of piety before Yahweh, and reward. *Id.* at 595–96.

¹⁵⁵ CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1887, 1888, at 514 (1994).

The group of priests that can most successfully deploy miscausation, tends to control the levers of institutional norm creation.

Is it possible to follow the trail of the judge/priest, to uncover these reversals of causation in the reported cases? Perhaps. The creation of, and control over, general principles of constitutional law provides an illustration of the utility of miscausation in the service of the station of the judge/priest at the level of the regulator of power balances among social and political institutions. For the priest, these principles provide proof (the effect) of the need for a mediator between text and people (for whom text is opaque). Yet, it may also demonstrate the effect of accepting a belief that a text may speak outside itself, the cause of which is the judge/priest interposing himself between people and text.¹⁵⁶ The United States Supreme Court, the ECJ, and the German Federal Constitutional Court all provide vivid examples of miscausation in the service of the Judiciary.

A. American Interpretivism in the Service of the Judge

The recent American jurisprudence over the constitutional value of the odors and emanations of the Tenth and Eleventh Amendments to the federal Constitution provides a telling example of the use of principle by the United States Supreme Court to capture act and meaning under the American basic law.¹⁵⁷ We have been instructed that the implications and logic of the Tenth Amendment produce a division of authority between federal and state governments for which the sovereign legislative and executive functions of the states mark a barrier.¹⁵⁸ The federal structure of government caused the erection of this barrier against incursion by the

¹⁵⁶ Thus, Nietzsche suggests that:

The "law," the "will of God," the "holy book," "inspiration" — all mere words for the conditions *under* which the priest attains power, *with* which the priest preserves his power; these concepts are found at the basis of all priestly organizations, of all forms of priestly or philosophic-priestly rule . . . "Truth is there": this means, wherever it is announced, *the priest lies*.

The Antichrist, *supra* note 1, at 641–42.

¹⁵⁷ For the development of Tenth Amendment doctrine, see *Reno v. Condon*, 528 U.S. 141 (2000) (holding Congress may restrict a state's ability to disclose a driver's personal information without consent); *Printz v. United States*, 521 U.S. 898 (1997) (deciding whether the federal government may command a state's executive to conduct background checks); *New York v. United States*, 505 U.S. 144 (1992) (holding Congress may obligate the states to provide radioactive waste sites). For development of Eleventh Amendment doctrine, see *Alden v. Maine*, 527 U.S. 706 (1999) (holding citizens of Maine could not sue the state under the Fair Labor Standards Act); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding Congress was authorized to allow suits by Indian tribes against states); *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding a state cannot be sued by its citizen without its consent).

¹⁵⁸ See *New York v. United States*, 505 U.S. 144 (discussing legislative function); *Printz*, 521 U.S. 898 (discussing executive function).

general government. Yet it can also be said that the desire for judicial mediation of the political contests between general and state governments resulted in the creation of a system of rules requiring judicial mediation of the barrier between general and state government. The nature of the traditional political order was not the cause of the creation of a zone of protection for states. Instead, the judge revealed the nature of a traditional political order, the effect of which was to produce a zone of protection for states, that served to inject the judge into the contest between governments. Thus, Tenth Amendment jurisprudence in this century serves the judge as much as it appears to serve the states.

In the Eleventh Amendment context, we experience the false, or imaginary, cause.¹⁵⁹ Elevation of state sovereign immunity to the dignity of constitutional text, in the absence of constitutional text, is based on a communication — or “communion” — with the Constitution, reserved solely to the judge. Here is wishful thinking of the Pauline sort,¹⁶⁰ transformed into a catechized false cause.

The Eleventh Amendment work of the Supreme Court illustrates another point — the utility of originalism for priestly miscausality. Originalism — a return or preservation of the basic text as originally conceived — forms a central part of the protection of the priest, whether in theology or law.¹⁶¹ Nietzsche suggests that a return to the past, to the organizing basis of the past, is impossible — there is only going forward, whether one looks backwards or forwards. “Yet all priests and moralists have believed the opposite — they wanted to take mankind back, to screw it back, to a former measure of virtue.”¹⁶² Control of the past, of the authorized version of the past, and its connection to the present, gives the judge/priest the means to preserve his own power. Text — the Logos — can always be denatured in the service of the judge.¹⁶³

¹⁵⁹ Here the judge, like Nietzsche’s Paul, “dresses up a hallucination as *proof* that the Redeemer still lives.” *The Antichrist*, *supra* note 1, at 618.

¹⁶⁰ See *Twilight of the Idols*, *supra* note 29, at 494–95, 515–16.

¹⁶¹ See, e.g., Morton J. Horwitz, *The Supreme Court 1992 Term — Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30 (1993); Morton J. Horwitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U. PITT. L. REV. 655, 663 (1989) (“To the extent that Constitution worship is America’s secular religion, and all religions have a tendency towards fundamentalism, originalism in constitutional discourse is the equivalent of religious fundamentalism.”). But cf. Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1512 (1989) (book review) (“Constitutional interpretation, performed in the manner of Orthodox Jews and Christian fundamentalists, would seek specific answers to specific questions from a particular time in the past (presumably the founding), and would enforce those answers in today’s world, notwithstanding considerable pressure arising from changes in context and circumstance.”).

¹⁶² *Twilight of the Idols*, *supra* note 29, at 546–47. “Even the politicians have aped the preachers of virtue at this point: today too there are still parties whose dreams it is that all things might walk backwards like crabs. But no one is free to be a crab.” *Id.* at 547.

¹⁶³ See *The Antichrist*, *supra* note 1, at 595.

Thus, techniques of interpretation, as well as interpretation itself, serve to feed the miscausation at the heart of the judge's work. Like originalism, balancing tests serve this purpose well. Balancing requires consideration of the context in which concepts must be weighed against each other. Context-specific constitutional judging requires a constant return to the judge for verification of appropriate weighing. The process, by nature, reduces the ability of people to act without the approval of the judge. "Psychologically considered, 'sins' become indispensable in any society organized by priests: they are the real handles of power. The priest *lives* on sins, it is essential for him that people 'sin.' Supreme principle: 'God forgives those who repent' — in plain language: those who submit to the priest."¹⁶⁴ Indeed, Justice Scalia, himself, has long argued that the balancing test serves no one better than the judge.¹⁶⁵

The interpretation of the federal constitutional right to a trial by jury¹⁶⁶ provides another example.¹⁶⁷ Here we have a case of imaginary causality.¹⁶⁸ "[I]n other words, it is in the realm of the abstract that the more important things happen in these times, and it is the unimportant that happens in real life."¹⁶⁹ The Seventh Amendment gives over to the judge the act of memory. For it is the judge that must create a memory out of the text of the Seventh Amendment. In so doing, the judge both creates a reality, where little existed before, and preserves for herself the task of guarding and elaborating on that memory as time creates a greater distance

¹⁶⁴ *Id.* at 598.

¹⁶⁵ See Scalia, *supra* note 82, at 1175 *et seq.* (arguing that bright-line rules and categorical tests produce a necessarily greater certainty, predictability, and fairness than flexible, multi-factored balancing tests).

¹⁶⁶ See U.S. CONST. amend. VII. The text of the Seventh Amendment states:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Id.

¹⁶⁷ For a history on the adoption of the Seventh Amendment, see Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

¹⁶⁸ We are never satisfied merely to state the fact that we feel this way or that: we admit this fact only — become conscious of it only — when we have furnished some kind of motivation. Memory, which swings into action in such cases, unknown to us, brings us earlier states of the same kind, together with the causal interpretations associated with them — not their real causes. The faith, to be sure, that such representations, such accompanying conscious processes, are the causes, is also brought forth by memory. Thus originates a habitual acceptance of a particular causal interpretation, which, as a matter of fact, inhibits any investigation into the real cause — even precludes it.

Twilight of the Idols, *supra* note 29, at 496–97.

¹⁶⁹ 1 ROBERT MUSIL, *THE MAN WITHOUT QUALITIES* 76 (Eithne Wilkins & Ernst Kaiser trans., 1953) (1930).

between the event memorialized and current times.¹⁷⁰ This is easy enough, perhaps, with respect to causes for which a jury trial is preserved — though even here there are problems: the time, place and manner of such preservation were early issues resolved by the courts.¹⁷¹ More difficult has been the construction of memory applicable in new contexts — the rise of new causes of action, and the abandonment of old forms of procedure. In both cases, it has been left to the judge to return to the place of memory and construct a recollection suitable for current times.¹⁷² The

¹⁷⁰ As time progresses, and the original witnesses die, then only the memorialized text of the events survive, as well as the collective memory of the caste whose task it is to preserve the memory. Thus, the Old and New Testaments both serve as efforts to preserve memory for future generations, and as the basis on which those assigned the task of reading this preserved memory are to proceed. The first four books of the New Testament are given over to the Gospels, describing the life, death and resurrection of Jesus. For the English-speaking world, each Gospel is aptly named — the term “Gospel” derives from the Middle English *God’s spell* or *God’s tale*. Thus memory comes in two parts — orally, and in writing — and it is to the priests that the teaching of the two traditions is assigned. See CATECHISM OF THE CATHOLIC CHURCH ¶ 76 (1994) (offering a traditional Christian exposition).

¹⁷¹ See, e.g., *Parsons v. Bedford*, 28 U.S. 266, 275 (1830) (“[T]he amendment then may well be construed to embrace all suits, which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.”). This rendering survived even the merger of law and equity in the twentieth-century federal courts; see also, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510–11 (1959). The Court opined:

If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

Id.

¹⁷² In this sense, of course, courts serve a cultural function as well. The astute judge/priest carefully tailors recollection to suit the popular conception of the day; obedience is thus naturalized.

Courts function as chroniclers of the norms through which people sharing a common culture understand themselves. The primary functions of courts are to identify cultural practice and then to memorialize that practice as law. Juridical expressions of law are essentially descriptive; standing alone, their pronouncements cannot coerce cultural practices. As such, law is an enterprise of affirmation.

Chroniclers, *supra* note 24, at 292.

result — a collective agreement of the “reality” of the imagined causality on which these exercises rest.

You have served the people and the superstition of the people, all you famous wise men — and *not* truth. And that is precisely why you were accorded respect. And that is also why your lack of faith was tolerated: it was a joke and a circuitous route to the people. Thus the master lets his slaves have their way and is even amused by their pranks.¹⁷³

It is in this spirit that *Tull v. United States*¹⁷⁴ and *Chauffeurs, Teamsters and Helpers Local 391 v. Terry*¹⁷⁵ become all the more sharply understandable as a “natural” product of Seventh Amendment interpretive form.

To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought. “First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.”¹⁷⁶

The resort to history can “leave us in equipoise as to whether respondents are entitled to a jury trial,”¹⁷⁷ and thus to the authority of the judge to put a definitive gloss on that history, no matter how far removed from that history the object of judging is lodged.¹⁷⁸

¹⁷³ *Thus Spoke Zarathustra*, *supra* note 43, at 214.

¹⁷⁴ 481 U.S. 412 (1987).

¹⁷⁵ 494 U.S. 558 (1990) (recognizing the right to trial by jury for allegations of breach of duty of fair representation under section 301 of the Labor Management Relations Act of 1947).

¹⁷⁶ *Id.* at 565 (quoting *Tull*, 481 U.S. at 417–18).

¹⁷⁷ *Id.* at 570.

¹⁷⁸ As Justice Kennedy suggested in dissent: “We cannot preserve a right existing in 1791 unless we look to history to identify it. Our precedents are in full agreement with this reasoning and insist on adherence to the historical test. No alternatives short of rewriting the Constitution exist.” *Id.* at 593 (Kennedy, J., dissenting). *But see* Wolfram, *supra* note 167, at 744–47 (1973) (suggesting flexibility as an alternative to judicial interpretation of the Seventh Amendment). But even here, the power of history as an institutional object rests with the judiciary.

B. European Interpretivism: Textualism Par Excellence

The ECJ has been active in the creation of a set of general principles of law by which it controls the exposition of the basic law of the EU.¹⁷⁹ General principles of law in the EU context serve as an extraordinary mechanics of judicial control — miscausation at its best. Said to be derived from the meaning or intent within the words of the Treaty themselves, the general principles in fact serve to add to the words of those very Treaties.¹⁸⁰ This is particularly the case with respect to the provisions of the Treaties, which the ECJ must accept as valid. General principles, as a set of rules of interpretation of the unchangeable, become the means by which change can be effected.¹⁸¹

Thus, for instance, the ECJ has derived a general principle of community law respecting non-discrimination and equal treatment from out of its sense of the general direction taken by the EC Treaty with respect to those concepts. Consider, *Joined Cases 103 & 145/77, Royal Scholten-Honig (Holdings) Ltd. v. Intervention Board for Agricultural Produce, Tunnel Refineries Ltd. v. Intervention Board for Agricultural Produce* (first isoglucose cases), 1978 E.C.R. 2037, 1 C.M.L.R. 675, where the Court, in interpreting EC Treaty Article 40(3) (prohibiting discrimination between producers and consumers within the Community), explained that the non-discrimination provision in that article of the EC Treaty “is merely a specific enumeration of the general principle of equality which is one of the fundamental principles of Community law.”¹⁸²

¹⁷⁹ For a discussion of the rise and effect of general principles of Community law and its effect on EU Law, see discussion *supra* notes 98–101.

¹⁸⁰ Emiliou suggests four applications of general principles in constitutional interpretation: (i) to guide the interpretation of primary law, (ii) to guide the exercise of power under the primary law, (iii) to provide criteria for determining the legality of acts, and (iv) to fill in gaps in primary or secondary law to prevent injustice. EMLIOU, *supra* note 121, at 121.

¹⁸¹ Takis Tridimas, in his analysis of general principles in EU jurisprudence quite correctly explained that:

Where courts are called upon to interpret rules which they have no jurisdiction to annul, interpretation becomes the primary means by which they can influence the effectiveness of such rules. Interpretation in that context becomes particularly instructive as the expression of judicial policy: it tells us what the court perceives to be its function, what it considers to be the underpinnings of the legal system, and how it prioritizes the rules of primary law of that system.

TRIDIMAS, *supra* note 127, at 33–34.

¹⁸² Larry Catá Backer, *Harmonization, Subsidiarity and Cultural Difference: An Essay on the Dynamics of Opposition Within Federative and International Legal Systems*, 4 TULSA J. INT'L & COMP. L. 185, 196 n.40 (1997) (citing in part SACHA PRECHAL & NOREEN BURROWS, *GENDER DISCRIMINATION LAW OF THE EUROPEAN COMMUNITY* 2–6 (1990)

A more interesting example, and one which reaches, in a sense, a position opposite from that taken by the United States Supreme Court in its interpretation of the Eleventh Amendment,¹⁸³ concerns the use of a general principle of effectiveness to interpret from out of the Treaties a right of individuals to obtain damages from Member States that fail to implement Community directives.¹⁸⁴ The principle of effectiveness is particularly interesting because, unlike other general principles of law used by the ECJ, which are derived from a sense of the legal and constitutional traditions of the Member States,¹⁸⁵ the principle of effectiveness has been created almost exclusively from a judicially-derived understanding of the meaning and effect of the Treaties themselves.¹⁸⁶ The ECJ's decision, in which the principle was announced that an individual would have a claim for compensation against a Member State for breach of Community law,¹⁸⁷ shows the court of the judge/priest at its best. The ECJ starts with the principle that the Treaties created "[their] own legal system, which is integrated into the legal systems of the Member States."¹⁸⁸ This legal system binds not only Member States but individuals as well.¹⁸⁹ The obligations imposed by this legal system must also create rights in individuals arising "not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions."¹⁹⁰ The

(expounding on the development of the principle of equal treatment within the ECJ and its application to sex and gender discrimination issues)).

¹⁸³ See discussion *supra* note 157.

¹⁸⁴ See Joined Cases C-46/93 & 48/93, *The Queen v. Secretary of State for Transport ex parte Factortame Ltd.*, 1996 E.C.R. I-1029, ¶ 95. The application of this principle to create a right of recovery in damages against Member States has generated a mountain of literature. See, e.g., Diedre Curtin, *The Decentralised Enforcement of Community Law Rights: Judicial Snakes and Ladders*, in CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW 33-49 (Diedre Curtin & David O'Keefe eds., 1992).

¹⁸⁵ See, e.g., Case 25/68, *Klomp v. Inspektie der Belastingie*, 1969 E.C.R. 43, ¶ 50 (1969). This does not mean that any particular principles of another legal order — even those embodied in the constitutions of the Member States — are binding as such on the Community organs. Rather, national principles simply offer authoritative evidence of an existing consensus which the Court may draw for persuasive support of its decisions.

EMILIOU, *supra* note 121, at 125.

¹⁸⁶ See TRIDIMAS, *supra* note 127, at 276 (stating that the principle "derives from the distinct characteristics of Community law, primary and direct effect. The origins of the principle lie in the interpretative techniques of the Court.").

¹⁸⁷ Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v. Italy* 1991 E.C.R. I-5357 (1991), [1993] 2 C.M.L.R. 66 (1993).

¹⁸⁸ *Id.* at ¶ 30.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

general principle of effectiveness requires that the rights of individuals would be impaired if individuals were unable to obtain compensation for breaches by Member States of their Treaty obligations,¹⁹¹ and requires that national courts ensure the full effect of rights and obligations.¹⁹² Individuals' rights are particularly impaired in the context in which this case arose.¹⁹³ "It follows that the principle whereby a State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty."¹⁹⁴ The relationship between judge and text is made clear. Text, clearly the supreme source of legitimacy in a system of civil law sensibilities, becomes a vehicle through which judges can assert a singular authority. "The response of the ECJ to the lack of legislation at Community level [was] to create a system of harmonized judicial remedies for breach of Community law, by intervening to bring about a more incremental judicial harmonization."¹⁹⁵ From this relationship springs readings that reinforce the authority of the judge as the exclusive and paramount reader of text at both the EU and national court levels. Indeed, one of the bases of academic criticism of this system of judicial ownership of the Treaties was the way in which it tended to include judges at all levels of the EU — both EU and national courts — but excluded the other institutions of government — legislatures and executives.¹⁹⁶

The same principle of effectiveness was the basis out of which the ECJ constructed one of the most important European rights of individuals against the Member States — the rule of the direct effect of directives.¹⁹⁷ Here, miscausation

¹⁹¹ *Id.* at ¶ 33.

¹⁹² *Id.* at ¶ 32.

¹⁹³ *Id.* at ¶ 34. The Court stated:

The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action individuals cannot enforce before the national courts the rights conferred upon them by Community law.

Id.

¹⁹⁴ *Id.* at ¶ 35.

¹⁹⁵ CRAIG & DE BÚRCA, *supra* note 132, at 252.

¹⁹⁶ Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 MOD. L. REV. 19, 51 (1993). Snyder comments: By breathing new life into the form of judicial cooperation envisaged by Article 177 [now Art. 234], it strengthens the vertical relations of collaboration within the judicial branch at two levels of government. However, it does not involve directly any other national institutions such as parliaments. In addition, it does not necessarily strengthen existing relations between Community institutions, nor does it create new horizontal links between them.

Id.

¹⁹⁷ See Case 9/70, *Franz Grad v. Finanzamt Traustein*, 1971 E.C.R. 825; Case 41/74, *van Duyn v. Home Office*, 1974 E.C.R. 1337, 1 C.M.L.R. 1 (1975).

is particularly acute. The principle of direct effects had an obvious impact on the power relationships between the institutions of the EU and the Member States. One might have expected a greater resistance on the part of the national courts of the Member States to this shifting of power up to the institutions of the EU. Instead, the opposite occurred. Bruno de Witte recently suggested that the lack of resistance should have come as no surprise.¹⁹⁸ The constitutional doctrines of the national courts of most of the Member States, with respect to the EU Treaties, permitted the courts to treat ECJ judgments (including that of direct effects) as definitive interpretations of the intentions of the contracting parties to the Treaties, and on that basis, applied domestically to the resolution of national cases, *power over which the national courts did not lose as a result of the direct effects doctrine*.¹⁹⁹

The process of miscausation through a jurisprudence of general principles becomes clear — general principles, the mechanics of interpretation of text, is deployed to find nontextual rules inherent in text itself. Interpretation permits revision without amendment. The judge, servant of text, becomes text itself — it is the European judge who has authority to see the language “inherent” (and thus binding) within the text. The servant thus becomes master. “The fact that . . . a rule is not mentioned in written law is not sufficient proof that it does not exist.”²⁰⁰ In this respect, the justice of the European Court differs little from his counterparts on the United States Supreme Court. There is no difference, *in effect*, between the American common law jurisprudence of “originalism” and the European civil law jurisprudence of interpretive general principles, though each is distinct and rooted thoroughly in their unique derivative legal cultures. But the originalism that constructed a principle of state sovereign immunity from the Eleventh Amendment has little difference in effect from the general principles of law that produced state liability to individuals for failure to transpose directives onto their national law. What has been said about the justices of the ECJ can be applied in equal measure to the justices of the United States Supreme Court.

¹⁹⁸ See Bruno de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, in *THE EVOLUTION OF EU LAW 177* (Paul Craig & Gráinne de Búrca eds., 1999).

¹⁹⁹ See *id.* at 195.

²⁰⁰ Case 108/63, *Merlini v. High Authority*, 1965 E.C.R. 1, 10, [1965] C.M.L.R. 109 (1965). As Professor Tridimas notes:

The interpretive function of general principles acquires particular importance in this context precisely because it is the only function which they may fulfill. Where courts are called upon to interpret rules which they have no jurisdiction to annul, interpretation becomes the primary means by which they can influence the effectiveness of such rules. Interpretation in that context becomes particularly instructive as the expression of judicial policy: it tells us what the court perceives to be its function, what it considers to be the underpinnings of the legal system, and how it prioritizes the rules of primary law of that system.

TRIDIMAS, *supra* note 127, at 33–34.

For his part the judge identifies a common, unwritten principle: "the general principle of the rights of the defence." Following a procedure of extension by analogy he ensures its application in all individual procedures well beyond the areas where the texts had enshrined them. Accordingly, "respect for the rights of the defence in all proceedings against a person liable to lead to an adverse act constitutes a fundamental principle of Community law that must be ensured even in the absence of any regulation concerning the procedure." This formula means that the content of the guarantees is amplified, their field of application extended and their effects reinforced.²⁰¹

Understood with a Nietzschean sensibility, the self-reinforcing potential of these forms of judging become evident.

The German Federal Constitutional Court has likewise constructed, from out of the German basic law, a fabric of principles that more and more closely tie the basic law to the interpretive vision of the Federal Constitutional Court.²⁰² Indeed, some have noted the similar ways in which American and German jurists function.²⁰³ But the similarity, the resort to interpretive techniques that rely on miscausation for their effectiveness, follows more closely the form of the ECJ, than of the United States Supreme Court.

In *The Southwest State Case*,²⁰⁴ the German Federal Constitutional Court used a dispute about the reorganization of certain German Lander to articulate a theory of the relationship between judge and text in German jurisprudence that would ensure the predominance of the judiciary in the reading of (and even perhaps over) the text of the German Basic Law. The court declared that constitutional provisions can be understood only against the base line of principles derived from an understanding of the Basic Law as a whole.²⁰⁵ Application of those principles may work to effectively nullify a constitutional provision that cannot be interpreted in

²⁰¹ Loïc Azoulay, *The Judge and the Community's Administrative Governance*, in GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 109, 114 (Christian Joerges & Renaud Dehousse eds., 2002).

²⁰² For a discussion of the development of the German law of general constitutional principles, see DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 507 (2d ed. 1997); SABINE MICHALOWSKI AND LORNA WOODS, *GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES* 7-50 (1999).

²⁰³ DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 215 (1994) ("But the fact is that in periods of real or imagined danger we have tended to adopt measures strikingly similar in effect to those expressly countenanced by the Basic Law, and the Supreme Court has tended to uphold them — in the teeth of an ostensibly absolute constitutional protection.").

²⁰⁴ (1951) 1 BVerfGE 14, translated in KOMMERS, *supra* note 202, at 62.

²⁰⁵ *Id.*

a manner compatible with those principles.²⁰⁶ And, it is for the judges to name these principles from their collective readings of the text, and to apply them to both an interpretation of provision of the Basic Law, and to application of the Basic Law to questions in the context of legal disputes.²⁰⁷ The principles of democracy and federalism were identified as having supraconstitutional effect.²⁰⁸

In the German case, we have evidence of the judge's power over text that is arguably even broader than that asserted by the justices of the ECJ. In both cases, the judge is bound by text; the judge serves the text as its faithful intermediary. The tools of mediation have permitted judges to assert an exclusive and superior relation to text, and the power to read text extra-textually. The polity looks at text; academics argue about the reasonableness of interpretation. Thus misfocused on substance, neither polity nor academics see with much clarity the subterranean reinforcement that such stances have for judicial power. For the judge, the correctness of this or that interpretation is less significant than the reaffirmation of the power of the judge to make the decision. In this respect, the text of European constitutions can achieve the malleability of the American federal constitution. The tools are different, the effect is the same — the judge is triumphant.

C. Is a Text Necessary for Interpretive Miscausation?

I have been speaking of text. In the American common law context, even the American constitutional common law context, that text is written. The same is true in civil law and socialist states worldwide, from France and Germany, to China. Theocratic priestly states certainly rely on the written text. Emerging international

²⁰⁶ *Id.*

²⁰⁷ The critical passage, now a fundamental part of German constitutional jurisprudence, stated:

An individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate Thus this court agrees with the statement of the Bavarian Constitutional Court: "That a constitutional provision itself may be null and void is not conceptually impossible just because it is a part of the Constitution. There are constitutional principles that are so fundamental and so much an expression of a law that has precedence even over the Constitution that they also bind the framers of the Constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles." From this rule of interpretation, it follows that any constitutional provision must be interpreted in such a way that it is compatible with those elementary principles and with the basic decisions of the framers of the Constitution.

Id. ¶ 2, at 63.

²⁰⁸ *Id.* ¶¶ 3–4, at 63–64.

legal orders, such as the EU, also ground their foundations on written text. The common assumption, since the middle of the last century, has been that constitutions are written.²⁰⁹ Reducing constitutional text to writing has a long pedigree in the West, extending back to classical Greece²¹⁰ and Rome.²¹¹

There are a number of conventional explanations for the value of written constitutions. Most center on the notions of uniform memorialization, accessibility, visibility, and availability.²¹² Indeed, the human rights components of modern instruments make visibility among the most useful of the characteristics of written constitutions.²¹³ And since the last century, at least, it has become almost unthinkable to base the legal order of a political community on anything other than a written instrument.

Yet, as we have seen, within a judicially ordered priestly state, a written constitution can be as mysterious, as unavailable, as invisible, as Egyptian hieroglyphics without a Rosetta Stone.²¹⁴ Traditionally in the West, the law has been a subject of discussion among elites in languages reserved for the educated who could not only read and write — any noble might be able to do this — but do so in a language other than the vernacular. In Europe, that language had been Latin.²¹⁵

²⁰⁹ See, e.g., EDWARD MCWHINNEY, *CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE* (1981); Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. PRAC. & PROC. 685 (1976); Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* (Douglas Greenberg et al. eds., 1993).

²¹⁰ Aristotle was among the first scholars of constitutionalism in the West. He based his studies on the written constitutions of the Greek city-states. See, e.g., CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM, ANCIENT AND MODERN* (1940); SIR DAVID ROSS, *ARISTOTLE* (1995).

²¹¹ The Roman basic law — the Twelve Tables — was written down soon after the fall of the monarchy. The act of writing was important for Romans; it served as a device to make Roman basic norms more accessible to the populace — or rather to those citizens who thereafter retained a monopoly over its deployment. For a discussion of Roman lawmaking in this respect, see ALAN WATSON, *THE LAW OF THE ANCIENT ROMANS* (1970); ALAN WATSON, *ROME OF THE XII TABLES: PERSONS AND PROPERTY* (1975).

²¹² See, e.g., MCWHINNEY, *supra* note 209.

²¹³ The German constitution provides an excellent, modern case-in-point: not only are the first twenty articles of the German Basic Law a memorialization of a basic catalogue of modern understandings of individual human and political rights, but the Basic Law itself prohibits amendments of those provisions. See GRUNDGESETZ [GG] [Constitution] arts. 1–20 (F.R.G.). In this sense, the human rights provisions of the German Basic Law acquire “superconstitutional” status.

²¹⁴ On the Rosetta Stone, see E.A. WALLIS BUDGE, *THE ROSETTA STONE* (1989). From my perspective, of course, the judicial priest embodies that stone — a living stone within the priestly state.

²¹⁵ In Europe, after the rediscovery of the *Corpus Iuris Civilis* and the development of legal study, Latin became the *lingua franca* of both canon and academic law. For a discussion, see John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93

Though law codes in England and on the continent of Europe had been translated into the vernacular after the first millennium,²¹⁶ Latinisms and Anglo-Norman French remained part of the language of the law in England and the United States well into the twentieth century.²¹⁷

Even when written in the vernacular, the written words of the law — and especially the words in the written constitution — could be infused with special meaning — with a unique construction — which has little relation to popular usage. The excuse, as Justice Marshall explained to Americans early in their national history, is simple: “[I]t is a *constitution* we are expounding.”²¹⁸ Within the EU, the jurisprudence of interpretation leading to the constitutional doctrines of direct effect²¹⁹ and equal treatment of the sexes²²⁰ produced similar results.²²¹

Text, as such, has served the judicial priest well, at least in the Nietzschean sense. Recall that the point I make here is not whether the words of a text ought to have one particular meaning or another, or whether common usage or a special vocabulary ought to apply to the language of the way. Those questions serve miscausation, invert cause and effect, by treating the symptom (the use of language) rather than the disease (the contest over the power to ask, and answer, these

COLUM. L. REV. 547, 587 (1993) (“Latin had been the ordinary language of European law into the seventeenth century.”).

²¹⁶ Thus, for example, Spanish law, *Las Siete Partidas* of Alfonso el Sabio (the Wise), became renowned in Europe as among the first translations of the law from Latin to the vernacular, with the purpose of making the letter of the law more accessible to those charged with its enforcement. On the *Siete Partidas*, see DWAYNE E. CARPENTER, ALFONSO X AND THE JEWS: AN EDITION OF AND COMMENTARY ON *SIETE PARTIDAS* 7.24 “DE LOS JUDIOS” (1986).

²¹⁷ See Alan J. Hartnick, *The Use of Latin in Law Today*, 66-Feb. N.Y. ST. B. J. 39, 39 (1994). As he explains it:

“LAW LATIN, or dog Latin, is the bastardized or debased Latin formerly used in law and legal documents, from which we have for the most part escaped. . . .” “LAW FRENCH refers to the Norman-French dialect used in all legal documents and judicial proceedings from the time of William the Conqueror to the reign of Edward III, and used with frequency in legal literature up to the seventeenth century. Though Law French may sound obscure to the English-speaking lawyer, its remnants abound in the language of the law, in common words such as appeal, assault, arrest, counsel, demand, disclaimer, escheat, escrow, heir, indictment, laches, lay, lien, merger, ouster, party, process, proof, suit, tort, and verdict. . . .”

²¹⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). Of course, Justice Marshall appeared to have something else in mind in the context from which this quotation was taken. Yet even in context, the quotation is revealing of the need to establish the supremacy of the judge over text, and text over government in the sense in which I use those terms here.

²¹⁹ See BROWN & KENNEDY, *supra* note 5.

²²⁰ See *id.*

²²¹ See discussion *supra* Part II.

questions about fundamental text). The recent jurisprudence over the meaning of Section 5 of the U.S. Constitution's Fourteenth Amendment,²²² culminating in *City of Boerne v. Flores*,²²³ which struck down the Religious Freedom Restoration Act,²²⁴ provides a recent example. On the one hand, *City of Boerne* can be read as a case involving the appropriate interpretation of constitutional text. On the other hand, *City of Boerne* illustrated the judge using text to discipline a political branch of government seeking to assert an independent power over the meaning of text.²²⁵ Thus, the Nietzschean insight of the priest, as applied to the judge serving in the same capacity, reveals these debates over language not as an ends — the search for meaning — but as a means to power for the judge. The control of meaning effectively reconstitutes the judge. No longer merely the protector of the sovereign authority of the people, as expressed in their written texts, the judge becomes sovereign authority itself.

Yet, a constitution need not be written to produce this transfer of effective sovereign authority to the priestly judge. The priestly relation between judge and text is not limited to written text. An oral tradition will do as well. The priestly office is as comfortable with oral tradition as with written text.²²⁶ The relation of

²²² This section provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

²²³ 521 U.S. 507 (1997). The thrust of *City of Boerne* was applied in *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), in which the Supreme Court held that Congress could not extend Title I of the American With Disabilities Act to the states.

²²⁴ 42 U.S.C. § 2000bb (1994).

²²⁵ In analyzing Congress' power to enforce the Fourteenth Amendment, William Araiza has suggested a similar understanding:

On this view, RFRA's problem was that it used these legal terms [terms developed and applied by the courts in matters of constitutional interpretation: "substantial burden," "compelling governmental interest," and "least restrictive means"] in an area subject to the courts' ultimate authority: the meaning of the Constitution. The sequences of events leading to *City of Boerne* suggests the problem. In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court interpreted the Free Exercise Clause so as to subject government action burdening religion to less stringent scrutiny than the compelling government interest test that had prevailed since *Sherbert v. Verner*. In RFRA, Congress sought to overturn *Smith* and reinstate a version of the *Sherbert* test. In turn, *City of Boerne* struck RFRA down as exceeding Congress' power to "enforce" the free exercise guarantee.

William D. Araiza, *ENDA Before It Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees Under the Proposed Employment Non-Discrimination Act*, 22 B.C. THIRD WORLD L.J. 1, 59 (2002).

²²⁶ Consider an expression of this comfort from the Catholic Catechism:

In keeping with the Lord's command, the Gospel was handed on in two ways:
— orally "by the apostles who handed on, by the spoken word of their preaching, by the example they gave, by the institutions they established, what they themselves had received — whether from the lips of Christ, from his way

the judge to the unwritten constitution of the United Kingdom provides a glimpse of the Nietzschean possibilities for judicial supremacy even in a regime of unwritten constitutions and nominal Parliamentary supremacy.²²⁷

An unwritten constitutional text, like that of the U.K.,²²⁸ provides a greater range of authority to the judge in his priestly role. In states without written constitutions, the judge may not only acquire a monopoly over the authority to say what the text means, she also acquires a monopoly over what the text says. In effect, the judge, and the judge alone, can authoritatively read *and* interpret constitutional text. The constraint of a written text, that might limit the interpretive potential of the judicial priest in states with a written constitution, is absent here.

of life and his works, or whether they had learned it at the prompting of the Holy Spirit”;

— *in writing* “by those apostles and other men associated with the apostles who, under the inspiration of the same Holy Spirit, committed the message of salvation to writing.”

CATECHISM OF THE CATHOLIC CHURCH ¶ 76, at 24–25 (1994).

²²⁷ Of course, British Parliamentary supremacy has been ceded, to a certain extent, to the institutions of the EU after Britain acceded to the EU Treaties. Traditionally, U.K. courts did not generally perform the same oversight of parliamentary law as American courts did. There is no general notion of “unconstitutionality.” However, as a member of the EU, and a signatory of the Human Rights Convention (Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222), U.K. law has felt the tug of the overarching quasi-constitutional principles of the EU Treaties. *See, e.g.,* Regina v. Sec’y of State for Transp., *ex parte* Factortame, Ltd., [1994] 1 A.C. 603 (1990) (holding the Merchant Shipping Act of 1988, and regulations thereunder imposing restrictions on Spanish fishing vessels, void as contrary to EU law); Equal Opportunities Comm’n v. Sec’y of State for Employment, [1994] 1 All E.R. 910 (voiding provisions of the English Employment Protection Act, making it more difficult for part-time workers to receive benefits than full-time workers on the basis of EU directive); J.W. Bridge, *The European Communities and the Criminal Law*, 1976 CRIM. L. REV. 88 (1976) (exploring the relevance of the criminal law to the European communities at present); Bernard Schwartz, *Wade’s Seventh Edition and Recent English Administrative Law*, 48 ADMIN. L. REV. 175, 176–78 (1996).

²²⁸ Traditionally, the British constitution was said to be an amalgam of rules and conventions that together comprised a “constitution.” An early and authoritative description is provided by A.V. Dicey:

“constitutional law,” as the expression is used in England, both by the public and by authoritative writers, consists of two elements. The one element, here called the “law of the constitution,” is a body of undoubted law; the other element, here called the “conventions of the constitution,” consists of maxims or practices which, though they regulate the ordinary conduct of the Crown, of Ministers, and of other persons under the constitution, are not in strictness laws at all.

A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION cxli (Liberty Classics ed., 1982) (1915). For a modern gloss on the existence and components of a constitution for the U.K., see NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND PRACTICAL REASON (1999); Rodney Brazier, *The Constitution of the United Kingdom*, 58(1) CAMBRIDGE L.J. 96 (1999).

Thus, consider the way in which U.K. courts have described and interpreted the fundamental rights of individuals.²²⁹ The essence of that description and interpretation involve the recollection, memory, and recasting of actions and texts with constitutional significance: Runnymede and the Magna Carta,²³⁰ the expulsion of James II and the Act of Settlement,²³¹ and other such critical events in the construction of the English constitution. Event and text provide a legitimacy based on past community — shared past action.²³² The judge asserts authority by making himself, and his caste, the unquestionable source of recollection of germinal events and explanation of the legal or constitutional importance of each. The judge/priest, in a sense, becomes memory itself. Thus, even the most conservative pronouncement of the limits of the judicial office can suggest a broad effect. Consider the caution of Francis Bacon:

Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not make law, or give law; else will it be like the authority claimed by the Church of Rome, which, under pretext of exposition of Scripture, doth not stick to add and alter, and to pronounce that which they do not find, and, by show of antiquity, to introduce novelty.²³³

²²⁹ The contrast which has been suggested between the difficulty of change in a progressive direction under the British Constitution is borne out by a consideration of the extent to which individual rights and liberties are guaranteed by the Constitution. The absence of any special legal guarantee of rights as is often to be found, although with greatly varying effectiveness, in other constitutions, is a marked feature of the British political system. It is an understanding of British government, rather than an enactment, that the individual has freedom of expression, movement, association, and meeting, and that he is not bound to belong to any religious sect.

H.R.G. GREAVES, *THE BRITISH CONSTITUTION* 21–22 (1955).

²³⁰ See J.C. HOLT, *MAGNA CARTA* (2d ed. 1992).

²³¹ The Act of Settlement is particularly interesting in this respect. Here, there exists a contemporary account of a controversy over the nature of the creation of the fictions of memory necessary to turn the expulsion of James II and the Act of Settlement into a regularized constitutional principle. Blackstone's narrative of the constitutional foundations of English constitutional law, *COMMENTARIES ON THE LAWS OF ENGLAND*, based on the creation of a host of legal fictions to regularize revolutionary events (particularly with respect to the events of 1688) is described and criticized by Jeremy Bentham. See JEREMY BENTHAM, *FRAGMENT ON GOVERNMENT* (J.H. Burns & H.L.A. Hart eds., Cambridge University Press 1988) (1776).

²³² In a sense, the relation between judge and constitutional event is similar to that between contemporary priest and Christ with his apostles. Cf. *CATECHISM OF THE CATHOLIC CHURCH* ¶ 76 at 24–25 (1994) (preaching the Gospel through oral and written words of the Lord from apostles).

²³³ FRANCIS BACON, *ESSAYS AND NEW ATLANTIS* 225 (Walter J. Black, Inc., 1969) (Classics Club ed.) (3d ed. 1625) (No. 59, Of Judicature).

We can all agree that the Magna Carta was executed at Runnymede. But only the priestly judge can explain to us that this event had constitutional significance; only the priestly judge can interpret the magnitude of the significance of that constitutional event; and only the priestly judge can apply the principles of constitutional significance derived from this event and text (Runnymede and the Magna Carta) to everyday life.

The priest in British society thus serves a critical stabilizing function by formulating and infusing with meaning a string of historic events that become important because of the meaning with which they are vested by the courts. So vested, they are deemed adopted by the political community as self-evidently true. Nietzschean miscausation stabilizes by furthering the fiction that what is believed has been done, and what is written has been agreed. In a sense, the priest becomes critical to the formation of constitutionalism where the text is unwritten. The priest is the parasite that sits in the belly of the social order and digests social action. Through acts of will and power (the decision), the priest regularizes the social order as practiced, and thus stabilizes it against internal and external attack. By creating an authority for the text, the priest invests herself with a like authority. Authority is created by grounding accepted social practice (with respect to the rights of individuals, the powers of the state or its institutions, etc.) *outside* of social practice. Thus, the right to be heard acquires an authority, not because it reflects the practice of the society from which it is derived, but because the priest reconstitutes the practice as deriving instead from universal principles, natural law, or the necessary fundamental ordering of society. What belongs to the human can be practiced by human society only by reconstituting it as outside the human. Thus, Nietzschean miscausation exists — resulting in the nexus of state stability and judicial authority.²³⁴

An objection, however, can be raised. It is unreasonable, the objection may go, to suppose that a caste of people — judge or priest — can be vested with the sort of authority necessary to induce society to accept this caste's version of how a text reads, as well as accept this caste's interpretation of the text so read. How does the judge/priest obtain the acquiescence of the herd with respect to the authority of the unwritten constitution? The answer lies in the relationship between the symbolic and theory. Shared memory of constitutional events, their reenactment, and the theater of authority provide the symbolic vehicle for acceptance. Thus, investiture of the judge, a symbolic touching, emphasizes the connection between the divine

²³⁴ Stability, of course, provides its own reward. By situating the constitutional, and even the unwritten constitutional, outside human practice, the priest creates a barrier to its modification. Once identified as constitutional, the practice is elevated and modification of the practice becomes harder. By vesting the priest with the authority to read and interpret the text of this now-constitutional practice, the people must find it more difficult to read, much less interrogate, the text of the constitutional text announced by the judge.

and the priest, or the connection between the law and the judge. Oath-taking, anointing, and baptism all serve this purpose as well. The preservation of relics provide a physical connection to the constitutional events.²³⁵ And the need to discipline, to interpret, and to apply the constitutional norms provides a vehicle for the reexpression of memory by the judge.²³⁶ Here, temptation and testing provide contemporary connection in a way that echoes the utility of temptation and testing within religion.²³⁷

III. THE JUDICIAL/PRIESTLY STATE: THE VALUE OF ERROR TO A POLITICAL COMMUNITY

Having attempted to expose the priestly drive to errors of causation, I do not mean to suggest the need to mount an effort to find and eradicate such error — or even to combat the *type* of the priest, as such — within our system. Nietzsche shows us how, from the individual perspective, priest and error can be dangerous.²³⁸

²³⁵ Consider, in this light, the importance to the American people of preserving the original copies of the federal Constitution and the Declaration of Independence. One enters the National Archives building in Washington, D.C. as if one were entering a temple or other sacred space. Across the entry, framed in an elaborate housing reminiscent of the structures used to house the Old Testament scrolls in Jewish houses of worship, sit the primary relics of American socio-political organization. For a visual depiction, see United States National Archives & Records Administration, <http://www.archives.gov> (last visited Nov. 17, 2003). Western society, no less than others around the globe, has a strong cultural attachment to relics in the construction and maintenance of core normative beliefs. See, e.g., P. R. L. BROWN, *RELIQS AND SOCIAL STATUS IN THE AGE OF GREGORY OF TOURS* (1977); JOHN BUTLER, *THE QUEST FOR BECKET'S BONES: THE MYSTERY OF THE RELICS OF ST. THOMAS BECKET OF CANTERBURY* (1995); THOMAS E.A. DALE, *RELIQS, PRAYER, AND POLITICS IN MEDIEVAL VENETIA: ROMANESQUE PAINTING IN THE CRYPT OF AQUILEIA CATHEDRAL* (1997); HERATH, DHARMARATNA, *THE TOOTH RELIC AND THE CROWN* (1994) (discussing the interaction of religion and politics in ancient Sri Lanka).

²³⁶ The disciplining of the sexual conduct of men through sodomy and solicitation laws provides a vivid exemplar of this need. See Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDISC. L.J. 611 (1998).

²³⁷ For a taste of the general discussion of temptation in the study of religion, see SIMCHA H. BENYOSEF, *THE LIGHT OF EPHRAIM: THE ASCENT FROM TEMPTATION TO DIVINE CONSCIOUSNESS* (2002); JEFFREY B. GIBSON, *THE TEMPTATIONS OF JESUS IN EARLY CHRISTIANITY* (1995).

²³⁸ In the relationship of Paul to law, Nietzsche describes the ultimate effect of the priestly project on law at its limit:

Paul became the fanatical defender of this god and his law and guardian of his honor; at the same time, in the struggle against the transgressors and doubters, lying in wait for them, he became increasingly harsh and evilly disposed to them, and inclined toward the most extreme punishments. And now he found that — hot-headed, sensual, melancholy, malignant in his hatred as he was—he was

Yet Nietzsche also confirms how priest and error can be of great value in the deployment of institutions meant to control communities.²³⁹ The examples of the priest among the People of Israel,²⁴⁰ and the construction of Christianity by Paul,²⁴¹ suggest the utility and strength of the model. Legal nomocracy, like its religious counterpart, can enhance democratic value, providing a meritocratic basis of sorts for the operation of the state.²⁴² In that sense, nomocracy both twists and enhances the fundamental organizing principles of our Republic. In an ironic twist of causation, I suggest that the priest did not usurp dominion over the herd. Instead, the herd, for its own preservation, demanded the overlordship of the priest.

I offer here a tangible expression of Nietzschean irony as an indication of the human social condition necessary to ensure the longevity of the authority of the judge: *The necessity of error*.²⁴³

himself unable to fulfill the law. . . . The tremendous consequences of this idea, of this solution of the riddle [transgress the law by annihilating it], spin before his eyes . . . the destiny of the Jews — no, of all men — seems to him to be tied to this idea [F]or he is from now on the teacher of the *annihilation of the law*. . . .

The Dawn, *supra* note 46, at 77, 79.

²³⁹ See *The Antichrist*, *supra* note 1, at 595–98.

²⁴⁰ *Id.* at 589–90.

²⁴¹ *Id.* at 616–18.

²⁴² Gidon Sapir notes that “the Jewish sages, those empowered to interpret and develop the Jewish Law, may come — and indeed came — from various classes and not only from the elite or any other special class. In such a nomocracy, certain aspects of democracy may exist.” Gidon Sapir, *Religion and the State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT’L & COMP. L. REV. 617, 641 n.83 (1999). The same, of course, has been true within the organizations of other Western religions — Christianity and Islam. See ERNEST L. FORTIN, CLASSICAL CHRISTIANITY AND THE POLITICAL ORDER: REFLECTIONS ON THE THEOLOGICO-POLITICAL PROBLEM (J. Brian Benestad ed., 1996); TILMAN NAGEL, THE HISTORY OF ISLAMIC THEOLOGY: FROM MUHAMMAD TO THE PRESENT (Thomas Thornton trans., 2000).

In the United States, the great parallel to this leveling social quality of nomocracy has been within the law. The apocryphal story of Abraham Lincoln remains a powerful cultural signifier. See WILLIAM LEE MILLER, LINCOLN’S VIRTUES: AN ETHICAL BIOGRAPHY (2002). The stories of the justices of the Supreme Court are also full of rags-to-riches stories. See THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS (Leon Friedman & Fred L. Israel eds., 1969). The power of the law as a class leveler is certainly evidenced by the great efforts of elite elements within legal academia and the bar to limit the opportunities of the poor, immigrants, and people of color during much of the twentieth century. For a history of those efforts, see JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 102–57 (1976) (containing chapters appropriately entitled “Cleansing the Bar” and “Babbitry at the Bar”).

²⁴³ Søren Kierkegaard, in his study of the concept of irony, noted that:

Tallyrand’s famous statement that man did not acquire speech in order to reveal his thoughts but in order to conceal them contains a profound irony about the world and from the angle of political prudence corresponds entirely to another

Nietzsche provides a useful insight, a necessary inversion, of our understanding of the judicial project. Judges work hard to create a form of law making, an engagement with law, that furthers the necessity for judicial engagement. Nietzsche also hints at the allure of such inversion. Those who seek out judges are eager to invest the judge with authority. The errors of causation in reverse, of the construction of false or imaginary causes, can be applied to the judicial project itself. Viewed from the perspective of the judge/priest, the basis of the judge's job appears to be the preservation of the judge's job. The task of judging well, then, in part depends upon the ability of the judge to preserve, for the judiciary, the task of judging. Everything else is, for the judge, to some extent incidental. The Christian, Catholic, Protestant, or Jewish manner of interpretation, of approaching the text in accordance with an interpretive tradition of one or another cadre of communities of priests so lovingly described by American commentators today,²⁴⁴ constitutes mere patina. Scholars have paid a great amount of attention to what constitutes only the overlayment (the form) through which the priestly tasks are accomplished in law. That sort of attention leaves undisturbed any consideration of the purposes for this overlayment, and its effect on the constitution of law, lawyers, and the courts. Nietzsche's exploration of the psychology and the philosophy of the priest helps in an understanding of the construction of judicial tasks from the perspective of the priest, herself, as elaborate forms of self-preservation, effected through a variety of forms in the United States and within the EU, but ultimately producing the same result in different form.

Joseph Vining reminds us that "law connects language to person, and person to action, through a form of thought that is not reducible to any other. The legal form of thought is not waning — rather the reverse."²⁴⁵ Walter Kaufmann, very early in his basic study of the philosophy of Friedrich Nietzsche, notes that "Nietzsche became a myth even before he died in 1900, and today his ideas are overgrown and obscured by rank fiction."²⁴⁶ Today Nietzsche continues to serve as fetish and bogeyman for the American courts. He is an apostle of "ruthlessness and barbarism."²⁴⁷ Nietzsche is served up as the Anti-Christ in the American world of divinely inspired "rule of law."

Yet, it seems that Nietzsche does provide a more human way of understanding the judicial project in the United States and Europe. Judge — like priest — confounds cause and effect, develops a system of false and imaginary causes, and

genuinely diplomatic principle: *mundus vult decipi, decipiatur ergo* [the world wants to be deceived; therefore let it be deceived].

SOREN KIERKEGAARD, *THE CONCEPT OF IRONY* 253–54 (Howard V. Hong & Edna H. Hong eds. & trans., 1989) (1841).

²⁴⁴ See *supra* notes 23–25 and accompanying text.

²⁴⁵ JOSEPH VINING, *FROM NEWTON'S SLEEP* 357 (1995).

²⁴⁶ KAUFMANN, *supra* note 30, at 3.

²⁴⁷ *Id.* at 8.

perpetuates the idea of a free will, grounded on the judicial will. It is not the imperial, but the priestly judiciary that lives, and that has lived since the time of John Marshall. Protestant, Catholic, Muslim, Mormon or Jew — the path of the priestly is all the same. All that is required for the supremacy of the cult of the priest is the elevation of the surface realities of the priestly cult, and the substitution of those realities for that of its substance. A necessary amnesia is cultivated, as well as the continued opaqueness of what lies below. The judges themselves have thoroughly internalized the notion of judiciary as protector — as the primary guardians of the democratic state.²⁴⁸ James Bradley Thayer's fears may well become a reality.²⁴⁹

Public law litigation has fundamentally transformed the judiciary from a marginal to a central player in the American political process.²⁵⁰ The success of this system has not gone unnoticed. The law of the judge forms a core of the legal structure of most modern democratic regimes.²⁵¹ The public law of the judge has become well established even in civil law states traditionally suspicious of the judge.²⁵²

The judges of the U.S. Supreme Court, in particular, demonstrate well the way judges play the role of Nietzsche's Paul within the religion of American constitutionalism. American constitutionalism, like American religion, functions

²⁴⁸ See Race, "The Race," and the Republic, *supra* note 73.

²⁴⁹ Thayer warned that increased reliance on the judiciary for definitive determinations of the constitutional permissibility of legislative and executive action at all levels of government could threaten the foundations of the state:

The people, all this while, become careless as to whom they send to the legislature; too often they cheerfully vote for men whom they would not trust with an important private affair, and when these unfit persons are found to pass foolish and bad laws, and the courts step in and disregard them, the people are glad that these few wiser gentlemen on the bench are so ready to protect them against their more immediate representatives.

THAYER, *supra* note 14, at 104.

²⁵⁰ See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 751 (1986); Jules Lobel, *Losers, Fools & Prophets: Justice As Struggle*, 80 CORNELL L. REV. 1331 (1995).

²⁵¹ See, e.g., *Forward: Constitutional "Refolution" in the Ex-communist World: The Rule of Law* September 26, 1996, 12 AM. U. J. INT'L L. & POL'Y 45 (1997); Jefferey M. Sellers, *Litigation as a Local Political Resource: Courts in Controversies over Land Use in France, Germany and the United States*, 29 LAW & SOC'Y REV. 475 (1995) (discussing the rise of juridification in Europe).

²⁵² In France, "[t]he most striking characteristic of the *Conseil Constitutionnel* has been the rapid ascent of its political influence and prestige." F.L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 AM. J. COMP. L. 89 (1988); see also Cynthia Vroom, *Constitutional Protection of Individual Liberties in France: The Conseil Constitutionnel Since 1971*, 63 TUL. L. REV. 265 (1988).

on the basis of *sin*, of error. “[T]he priest rules through the invention of sin[;]”²⁵³ the constitutional judge rules through the inversion of doctrine. As Nietzsche reminds us, “[d]isobedience of God, that is, of the priest, of ‘the Law,’ is now called ‘sin’; the means for ‘reconciliation with God’ are, as is meet, means that merely guarantee still more thorough submission to the priest: the priest alone ‘redeems.’”²⁵⁴ As the communities of the world construct forms of ever-wider unions based on the form of the priestly state²⁵⁵ — that is of the judicial state — the understanding of the ways in which judges approach their task, and its effect on the meaning and deployment of law, becomes ever more important.

But here again is the irony — another facet of the Nietzschean joke encapsulated by the judge. As a means of social control, for the ordering of an otherwise unruly democratic republic which means to remain democratic, there is probably no better way than that of the priest. It was not Hans Kelsen,²⁵⁶ or Alexander Hamilton,²⁵⁷ but Maximilien Robespierre, a father of unchecked state sponsored terror, who argued that “*ce mot de jurisprudence des tribunaux doit être effacé de notre langue*.”²⁵⁸ A system grounded on a tolerance of the priestly model of judging — whether by the ordinary judiciary or specialized constitutional

²⁵³ *The Antichrist*, *supra* note 1, at 631.

²⁵⁴ *Id.* at 597–98.

²⁵⁵ Consider the standard model for regional trade associations, and even the World Trade Organization, based on the concession of the power to resolve disputes to judicial, or quasi-judicial, bodies. The effect, the creation of pyramids of judges operating at ever greater levels of generality, has created the skeleton for a complex and interdependent worldwide priestly state. For some of the ramifications of this supra-nation building on the authority of the American courts, see Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257 (2000).

²⁵⁶ Hans Kelsen, one of the greatest European legal thinkers of the twentieth century, had designed the Austrian Constitutional Court after the First World War to which he had been appointed in 1921. See David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7, 30 (1994). For an introduction to his thought, see for example HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1945).

²⁵⁷ Alexander Hamilton was one of the great first defenders of the judiciary as an important element of a balanced federal government. See THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁵⁸ Maximilien Robespierre, Address at the Assemblée Constituante (Nov. 18, 1790) quoted in EVA STEINER, *FRENCH LEGAL METHOD* 75 (2002). The English translation is: “Jurisprudence of courts is a word that should be effaced from our language.”

The word “terrorism” was first coined in connection with the Jacobin “Reign of Terror,” a period of the bloody French Revolution in which the French state, under the control of Robespierre, executed approximately 17,000 presumed enemies of the state.” See Scott M. Malzahn, Note, *State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility*, 26 HASTINGS INT’L & COMP. L. REV. 83, 86 (2002). Robespierre was a leading member of the Committee of Public Safety which, in 1793–1794 presided over the Reign of Terror in Revolutionary France. For an older, provocative account, see NORMAN HAMPSON, *LIFE AND OPINIONS OF MAXIMILIEN ROBESPIERRE* (1974).

tribunals — perpetuates that diffusion of power which serves as an effective means of avoiding tyranny.

Alexander Hamilton went too far, perhaps, in characterizing the judicial branch as the least dangerous branch of government.²⁵⁹ The judiciary — *if unchecked* — is a dangerous branch, indeed. But, in its own way, the judge strives toward the creation of a system of self-perpetuation and aggrandizement every bit as powerful as those available to the legislator or to the executive. In a democratic polity, a polity in which every institution of power tends towards its limit, the cultivation of error as a means to judicial power provides a necessary indeterminacy in the locus of power within the institutions of government. A herd with many masters may well optimize the democratic potential of communal political organization.

²⁵⁹ THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).