

American Magisteria in the Twenty-First Century

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INTRODUCTION

Federal and state courts, and especially the Supreme Court, are surrounded by grandeur, their operations impelled by an ever-present sense of duty to higher authority. These rituals and ceremonies—right down to the Latin language employed in court opinions¹—evoke the religious heritage that continues to permeate American civic life. This resemblance, however, is more than a mere surface-level similarity. In many respects, the Supreme Court in its institutional capacity mirrors traditional religious authority structures. In so doing, the Court stands at the forefront of a set of philosophical norms often described, in the aggregate, as “ceremonial deism.”²

This Essay argues that, in the American experience of civic identity, the Supreme Court fulfills a sociological role comparable to that of the Magisterium³ of pre-Protestant Christianity.⁴ The Essay looks through four

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1. See, e.g., Isabel Balteiro & Miguel Ángel Campos-Pardillos, *A Comparative Study of Latinisms in Court Opinions in the United States and Spain*, 17 INT’L J. SPEECH, LANGUAGE & L. 95 (2010) (discussing the frequency with which the U.S. Supreme Court employs Latinate phrases).
 2. The first use of this term has been attributed to Yale Law School Dean Eugene Rostow. Davison M. Douglas, *Ceremonial Deism*, in 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 259 (Paul Finkelman ed., 2006). For cases discussing and epitomizing manifestations of American ceremonial deism, see *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O’Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting); and *Marsh v. Chambers*, 463 U.S. 783, 795 (1983).
 3. See Jean Bainvel, *Tradition and Living Magisterium*, CATHOLIC ENCYCLOPEDIA, <http://www.newadvent.org/cathen/15006b.htm> [<http://perma.cc/C4NW-2J9P>] (“[W]ith regard to the organ of tradition it must be an official organ, a *magisterium*, or teaching authority.”).
 4. Crucially, I offer here a *holistic*, and not exclusively *hermeneutic*, assessment of the ways in which the Court’s actual praxis—not merely its truth-claims—functionally models Magisterial tendencies. See Ronald R. Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 35, 75-76 (1985) (“A comparison of the Supreme Court to the *magisterium* is obvious but superficial. Claims to inerrancy, and to direct Revelation, which are sometimes made about the *magisterium*, are very definitely *not* made about the Supreme Court.”).

discrete lenses to see how the Supreme Court functions as a proxy Magisterium: tradition, mediation, sacramentalism, and anthropology. In service of these purposes, this Essay uses the term “Magisterium” broadly. Here it refers not only to the institutional aspects of the Roman Catholic Church, but also to those Christian religious traditions that, to some extent, view the teachings and tradition of that Church as having some binding theological force.⁵ Some attributes of this Magisterium, while not sine qua non, include an embrace of apostolic succession, or the tracing of an unbroken stream of ecclesiastical authority from the days of the early Church until the present;⁶ sacramental theology, or the celebration of unique rites understood as occurring at the nexus of the material and the sacred;⁷ and the cognizability of moral truth-claims.⁸ The Essay subsequently assesses current trends in religious circles towards deinstitutionalization, and suggests that similar patterns may eventually compromise the Court’s institutional legitimacy.

I. THE COURT AS MAGISTERIUM

Several features of the institutional Supreme Court—namely, tradition, mediation, sacramentalism, and anthropology—bear a striking resemblance to those same features of the religious Magisterium. In a sociological sense, the Supreme Court is situated at the head of the ceremonial-deist philosophical schema,⁹ serving as an institutional intermediary between fundamental American values and the public at large. Moreover, its structural authority is the wellspring from whence flows the authority exercised by judges in lower courts.

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5. See Bainvel, *supra* note 3 (“Between Catholics and the Christian sects of the East there are not the same fundamental differences, since both sides admit the Divine institution and Divine authority of the Church with the more or less living and explicit sense of its infallibility and indefectibility and its other teaching prerogatives . . .”).
 6. *See id.*
 7. KENAN B. OSBORNE, SACRAMENTAL GUIDELINES: A COMPANION TO THE NEW CATECHISM FOR RELIGIOUS EDUCATORS 13-14 (1995).
 8. *See* Robert E. Rodes, Jr., *What O’Clock I Say: Juridical Epistemics and the Magisterium of the Church*, 14 J.L. & RELIGION 285, 300-01 (2000) (“The church, unlike the state, has a substantial set of epistemic pronouncements that we are not expected immediately to act on, but simply to believe. . . . The unique epistemic authority of the church goes by the name of magisterium.”).
 9. By “ceremonial-deist philosophical schema,” I refer to the fact that although the American religious landscape is undeniably diverse and multifaceted, certain rudimentary theological axioms (axioms closely correlated with the tenets of liberal political thought) are broadly reflected throughout the practice of American civic life. These axioms have been understood by the Supreme Court as so culturally ubiquitous (and so comparatively innocuous) that they withstand challenge on Establishment Clause grounds. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O’Connor, J., concurring).

A. Tradition

Within both sacred and secular Magisteria, tradition exerts a binding, even if not an *absolutely* binding, force. In the Catholic religious context, the doctrine of *infallibility*¹⁰ is one means by which this tradition is codified and operationalized. In the legal context, the principle of *stare decisis* serves as such a tool.¹¹ Within the Catholic tradition, the Pope's rare pronouncements in an *ex cathedra* capacity carry more binding force on a particular matter of faith and morals than all other church pronouncements, such as conciliar doctrinal formulations and encyclicals.¹²

This view of Magisterial proclamations as “more or less” binding, depending on certain characteristics of the pronouncement in question, is similarly present in the judicial context. Many judicial decisions of the Supreme Court are the law of the land; but they are not necessarily final¹³—subsequent Courts may overrule legal precedents, and statutes or constitutional amendments may alter the rule system underlying a given decision, warranting reevaluation. Conversely, William Landes and Judge Richard Posner have argued convincingly that some “superprecedent”-type opinions exist that are irremovably entrenched within the judicial landscape.¹⁴ These superprecedents parallel the more authoritative doctrinal formulations that a Magisterium may periodically hand down.

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10. Patrick Toner, *Infallibility*, CATHOLIC ENCYCLOPEDIA, <http://www.newadvent.org/cathen/07790a.htm> [<http://perma.cc/G5WK-7D72>] (“[I]t is only bishops who are in corporate union with the pope . . . who have any claim to share in the charisma by which the infallibility of their morally unanimous teaching is divinely guaranteed according to the terms of Christ’s promises.”).
 11. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”).
 12. Edward Pace, *Ex Cathedra*, CATHOLIC ENCYCLOPEDIA, <http://www.newadvent.org/cathen/05677a.htm> [<http://perma.cc/334B-X7QX>] (“[Ex cathedra is] a theological term which signifies authoritative teaching and is more particularly applied to the definitions given by the Roman pontiff.”).
 13. See Garet, *supra* note 4, at 76 (“Apostolic succession invests the Supreme Court Justices with dignity, but not with definitive interpretive authority.”).
 14. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 251 (1976); see also Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 365 (2007) (explaining that “[t]o say a case is a super-precedent means it is judicially unshakeable, a precedential monument which may not be gainsaid, akin to having the statute-like force of vertical stare decisis horizontally”).

B. Mediation

Both the religious and judicial Magisteria are intended to function the same way: an individual human agent interacts in an ongoing process with a transpersonal source of higher authority. In the religious sense, this authority source is God or the Ultimate; in the judicial sense, it is the Constitution (alongside, for some, the expressed or unexpressed will of the Founders). The theology of the Magisterium posits that only those who serve in a particular vocational role—namely, the clergy—may properly interpret both Scripture and tradition.¹⁵ Through the process of ordination—which, in some traditions, requires the ordained to renounce certain aspects of public life¹⁶—one is imbued with the authority to interpret and interact with the sacred.

The judicial Magisterium—the Supreme Court and the federal court system under it—operates similarly. Only the members of a certain vocation, the judiciary, can bindingly interpret the Constitution and the precedents that have developed in its shadow.¹⁷ And judges, like the clergy, are held to higher behavioral standards than the public. They must forgo possible conflicts of interest, adhere to specific ethical canons, and comport themselves with due solemnity.¹⁸ Such conduct norms are linked to the gravitas of their task: both judges and clergy stand between a higher authority and laypersons, translating abstracted moral principles into concrete directives.¹⁹

Furthermore, the authority of both theological and judicial mediators is not self-imbued. The religious clergy, inducted via the laying on of hands, participate in a theological tradition allegedly dating to the time of the first apostles.²⁰ They derive authority from that unbroken line, which is ceremonially passed down from one generation to the next. Likewise, federal

15. See CATECHISM OF THE CATHOLIC CHURCH ¶ 1552 (“The ministerial priesthood has the task not only of representing Christ - Head of the Church - before the assembly of the faithful, but also of acting in the name of the whole Church when presenting to God the prayer of the Church . . .”).

16. See *id.* ¶ 1579.

17. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (“In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—‘to say what the law is.’” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

18. See, e.g., Judicial Conference of the United States, *Code of Conduct for United States Judges*, U.S. COURTS (Mar. 20, 2014), <http://www.uscourts.gov/rules-policies/judiciary-policies/code-conduct> [<http://perma.cc/ZGJ3-HEHL>].

19. See Liaquat Ali Khan, *The Immutability of Divine Texts*, 2008 BYU L. REV. 807, 833 (“Church Magisteria may also presume that only inspired persons devoted to divine texts receive access to their meaning. Like other professional groups, such as physicians and lawyers, the clergy develops special knowledge of divine texts and employs the special knowledge to offer spiritual enlightenment, healing, redemption, and forgiveness.”).

20. See CATECHISM OF THE CATHOLIC CHURCH ¶¶ 76, 1538.

judges are appointed by the President,²¹ whose own authority in turn rests upon the popular will.²² In neither case does authority vest through personal choice alone: in both cases, the authority of individual agents arises from, and is contingent upon, the larger institution within which they participate.

C. Sacramentalism

Another point of connection between religious and judicial Magisteria is that properties of sacramental theology are present within both. This theology manifests in two distinct ways: the centrality of *sacrifice* and the *instantiation of the metaphysical within the physical*.

According to the historic teachings of the Magisterium, baptism effects a drowning of the “Old Adam;”²³ it is a rite through which one’s originally sinful nature is subsumed and destroyed.²⁴ And in the Eucharist (Holy Communion), the presence of the body and blood of Christ causes an experience of grace.²⁵ Both rituals entail a participation in sacrifice.²⁶ This participation echoes in the civic space through our reverence for the lives sacrificed in defense of national ideals²⁷ and the occasional requirement to sacrifice our rights on the altar of national necessity.²⁸

Another defining aspect of sacramental theology is its emphasis on the interaction between *materiality* and *transcendence*.²⁹ In the baptismal rite, water is the physical conduit of divine grace;³⁰ in the communion rite, bread

21. U.S. CONST. art. II, § 2.

22. *Id.* § 1.

23. See Martin Luther, *The Large Catechism*, in TRIGLOT CONCORDIA: THE SYMBOLICAL BOOKS OF THE EVANGELICAL LUTHERAN CHURCH 565-773 (F. Bente & W.H.T. Dau trans., 1921).

24. See CATECHISM OF THE CATHOLIC CHURCH ¶ 1262.

25. See *id.* ¶ 1357.

26. The norm of sacrificial renunciation—and its corollary, the affirmative embrace of something higher and better—is explicitly reflected in the words of the Magisterium’s baptismal rite. “Do you reject Satan? And all his works? Do you reject sin, so as to live in the freedom of God’s children?” the priest asks. See *Rite for the Baptism of One Child*, CATHOLIC LITURGICAL LIBRARY, <http://www.catholicliturgy.com/index.cfm/fuseaction/textcontents/index/4/subindex/67/textindex/7> [<http://perma.cc/794G-QCS>].

27. See, e.g., *Salazar v. Buono*, 559 U.S. 700, 716 (2010) (“Congress ultimately designated the cross as a national memorial, ranking it among those monuments honoring the noble sacrifices that constitute our national heritage.”).

28. See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010) (“The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.”).

29. CATECHISM OF THE CATHOLIC CHURCH ¶ 1228.

30. *Id.* ¶ 1238.

and wine play this role.³¹ This intersection between the physical and the nonphysical is mirrored on the judicial level. When the Supreme Court hands down a judgment, evanescent claims to metaphysical “rights” become actualized via injunctive relief or declaratory judgments with real-world consequences.³²

Receiving the asked-for remedy in a circumstantial vacuum, unaccompanied by a pronouncement of how one’s rights bear a relationship to the remedy sought, is meaningless. What matters is *who* grants the remedy and *why*. The Court is tasked with providing that meaning—just as in the religious system of sacramental theology, where water, bread, and wine take on unique spiritual qualities when a member of the Magisterium’s clergy administers them.

D. Anthropology

The religious Magisterium relies on its authority to make claims about human nature, purpose, and destiny—often sparking controversy in the public square. That asserted authority covers questions as diverse as the mind-body relationship, the morality of gender and sexuality, and the unique properties of “humanness.”³³ The American judicial Magisterium has, for its part, taken stances on these and countless other normative anthropological questions.³⁴ The norm of personal autonomy, for example, translates into an anthropological claim about human society: ours is one in which an individual possesses the right to define one’s own identity and to define the nature of the moral claims that may be exerted upon that individual. In *Planned Parenthood v. Casey*, the Court explicitly grappled with these claims: “[T]he urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty, require us to perform that function. Liberty must not be extinguished for want of a line that is clear.”³⁵ Per the *Casey* formulation, one need not look to an extrinsic authority when the validity of moral truth claims is unclear: instead, individual conscience is properly capable

31. *Id.* ¶ 1390.

32. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 399 (1971) (Harlan, J., concurring) (“I am of the opinion that federal courts do have the power to award damages for violation of ‘constitutionally protected interests’ and I agree with the Court that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment.”).

33. CATECHISM OF THE CATHOLIC CHURCH ¶¶ 355-79.

34. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (“With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at [fetal] viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb.”).

35. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992).

of drawing independent conclusions and taking action accordingly. Yet in formally defining the individual as emancipated from traditional institutional controls, the Court perhaps foreshadows its own future deinstitutionalization.

II. DEINSTITUTIONALIZATION AND THE MAGISTERIAL COURT

The ability of the Church—or the Court—to perform the above functions is contingent upon the faith of those subject to the Magisterium’s authority. In the case of religion, this faith may no longer be taken for granted: traditional religious institutions—particularly those bearing the liturgical features common to Magisterium-type churches—have experienced significant membership declines over the past several years.³⁶ The religious Magisterium has often been criticized as too partisan and too eager to sidestep the separation of church and state.³⁷

But so too has the Court been decried as an increasingly political body, beholden to party politics and special interests.³⁸ Like the religious Magisterium, the Court’s institutional legitimacy has come under threat; confidence in the Court continues to decline.³⁹ The decline of Magisterial authority—in both ecclesiastical and judicial contexts—connects to several structural changes in public life. The story of the Church sheds light on the story of the Court.

First, for the Magisterium’s institutional power to persist, its subjects and participants must have faith in the significance and necessity of the

36. See *America’s Changing Religious Landscape*, PEW RES. CTR. (May 12, 2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> [<http://perma.cc/B9BT-P8BM>] (presenting demographic data articulating this trend towards declining membership).

37. See, e.g., Patricia Miller, *The Catholic Church’s American Downfall: Why its Demographic Crisis Is Great News for the Country*, SALON (May 21, 2015), http://www.salon.com/2015/05/21/the_catholic_churchs_american_downfall_why_its_demographic_crisis_is_great_news_for_the_country [<http://perma.cc/JUQ8-T7TA>].

38. See, e.g., Brandon L. Bartels & Christopher D. Johnston, *Political Justice? Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process*, 76 PUB. OPINION Q. 105 (2012); Eric Hamilton, Recent Development, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35 (2012) (discussing ways in which the Supreme Court is increasingly understood as standing within, rather than outside, an increasingly politicized governmental landscape).

39. See Stan Greenberg et al., *Broad Bi-Partisan Consensus Supports Reforms to Supreme Court* DEMOCRACY CORPS 1-2 (May 7, 2014), <http://www.democracycorps.com/attachments/article/979/DCorps%20SCOTUS%20Memo%20FINAL%20050614.pdf> [<http://perma.cc/7JKU-KJKA>] (“Just 35 percent of Americans give the Supreme Court a positive job performance rating By a nearly two-to-one ratio, Americans say Supreme Court Justices OFTEN let their own personal or political views influence their decisions rather than deciding cases based on legal analysis.”).

functions that it uniquely performs: mediation, sacramentalism, interpretation, etc. These functions, however, require the Magisterium and its adherents to behave in fundamentally antidemocratic ways⁴⁰: adherents must accept unyielding and inflexible hierarchies as foundational features of the social-epistemological enterprise. All may avail themselves of the Magisterium's work, but all may not participate coequally in it. In an era of information democratization, antihierarchicalism, and open access to data, such a view is countercultural at best and indefensibly retrograde at worst.⁴¹

Second, participants must believe in the sacredness, vis-à-vis other organs of civil society, of the office itself— regardless of whoever happens to hold it at a given time. This too has come under attack. Sexual-abuse scandals have roiled dioceses across the world, driving a clear wedge between possession of ecclesiastical authority and tendency toward moral behavior.⁴² Reflecting a parallel disillusionment, a political narrative has emerged alleging mass judicial abuse of office—a narrative under which court decisions adverse to one's interest are labeled not as error, but as outright "tyranny."⁴³ Such a narrative undercuts any notion, vital to interpretive authority, that the Court, or the Church, is a disinterested force bound to norms beyond mere personal preferences.⁴⁴ Given this new narrative, one might reasonably wonder whether a higher morality is actually demanded of clergy and judges.⁴⁵ After all, what good are the demands and sacrifices called for by a particular office, if they are often flouted? Just as some members of the laity may be disillusioned by diocesan corruption, some citizens may be disillusioned by what they perceive as judicial "lawlessness." This loss of credibility naturally rebounds from individual malefactors onto the office itself, compromising the

40. See Frances Hagopian, *Social Justice, Moral Values, or Institutional interests? Church Responses to the Democratic Challenge in Latin America*, in RELIGIOUS PLURALISM, DEMOCRACY, AND THE CATHOLIC CHURCH IN LATIN AMERICA 257 (Frances Hagopian, ed., 2009) (discussing the challenge of Catholic engagement with democratizing impulses).

41. See, e.g., Joseph A. Varacalli, *Catholicism and Democracy*, (conference paper presented at the Federalist Society's Conference on "Faith Under Democracy," Sept. 21, 2001), <http://www.catholicculture.org/culture/library/view.cfm?recnum=4327> [<http://perma.cc/7VEX-VH3Q>] ("[I]n our society the natural law and Catholic social doctrine are more and more viewed as obsolete and anachronistic, if indeed, they are thought about at all [E]mpirically speaking, American democracy works more against the maintenance of an authentic Catholic faith than for it.").

42. See *The Pope Meets the Press: Media Coverage of the Clergy Abuse Scandal*, PEW RES. CTR. (June 11, 2010), <http://www.pewforum.org/2010/06/11/the-pope-meets-the-press-media-coverage-of-the-clergy-abuse-scandal> [<http://perma.cc/459M-QWHZ>].

43. See, e.g., ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003); MARK I. SUTHERLAND ET AL., *JUDICIAL TYRANNY: THE NEW KINGS OF AMERICA?* (2005).

44. This idea has influenced academic inquiry since the heyday of legal realism, but has become increasingly mainstream in the popular consciousness.

45. See *supra* notes 13, 15 and accompanying text.

institution's broader, metaphysical claim to legitimacy in the performance of its duties.

Third, participants must willingly comply with unfavorable institutional rules and decisions. Magisterial religious institutions have largely lost this battle,⁴⁶ and are accordingly perhaps further along the road to deinstitutionalization⁴⁷ than courts.⁴⁸ Signs of defiance, however, have also begun to surface in the judicial context. While the idea is not new,⁴⁹ political figures have proposed state-level "nullification" of unpopular Supreme Court rulings with increasing stridence in the wake of *Obergefell v. Hodges*.⁵⁰ And while institutions tasked with making normative claims may *survive* without participant compliance, their sociocultural relevance becomes essentially nil. For the Court to function effectively, therefore, it must continue to be viewed as authoritative within its particular jurisdictional ambit.⁵¹

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46. For example, while the Catholic Church formally opposes the use of contraceptives, their use is endemic among self-professed adherents to Catholicism. See Rachel K. Jones & Joerg Dreweke, *Countering Conventional Wisdom: New Evidence on Religion & Contraceptive Use* 4, GUTTMACHER INST. (April 2011) ("Among all women who have had sex, 99% have ever used a contraceptive method other than natural family planning. This figure is virtually the same, 98%, among sexually experienced Catholic women.") <http://www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf> [<http://perma.cc/L79J-HDG7>].
47. By "deinstitutionalization," I here refer to the breakdown of participant compliance within an institution that is defined, to some degree, by the existence and exercise of the authority to *compel* compliance.
48. As of 2007, a majority of American adults still believed that Supreme Court rulings ought to be treated as binding. See, e.g., Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899, 901 (2007) ("Fifty-eight percent [of surveyed American adults] believes that if the President disagrees with a Supreme Court ruling, he should follow the Supreme Court's ruling rather than do what he thinks is in the country's best interest.").
49. See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958) (weighing the nullification issue).
50. During public debate over *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), various political figures expressed a willingness to defy the Court's authority. See, e.g., David Edwards, *Mike Huckabee: Next President Must Obey 'Supreme Being' Instead of Supreme Court on Gay Marriage*, RAWSTORY (May 24, 2015, 11:02 AM), <http://www.rawstory.com/2015/05/mike-huckabee-next-president-must-obey-supreme-being-instead-of-supreme-court-on-gay-marriage> [<http://perma.cc/8W2F-SDVE>]; Ken Meyer, *Santorum: Supreme Court Doesn't Get Final Say on Gay Marriage*, MEDIAITE (May 31, 2015, 3:35 PM), <http://www.mediaite.com/tv/santorum-supreme-court-doesnt-get-final-say-on-gay-marriage> [<http://perma.cc/A6MR-F67M>]. But see John Nichols, *Four Years After 'Citizens United,' There Is Real Movement to Remove Big Money from Politics*, NATION (Jan. 21, 2014) <http://www.thenation.com/article/four-years-after-citizens-united-there-real-movement-remove-big-money-politics> [<http://perma.cc/CB9Z-RD85>] (discussing the movement toward a formal campaign finance reform constitutional amendment, as opposed to efforts to nullify the Supreme Court's ruling via noncompliance).
51. Assertions of institutional moral authority directly conflict with the societal ideal of personal autonomy, according to some critics—an ideal, in their view, inextricable from the civic project. See, e.g., Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33

If that authority diminishes, we may see more stories like Kim Davis's. Post-*Obergefell*, some governmental clerks, and Davis most famously, refused to issue marriage licenses to same-sex couples.⁵² The Sixth Circuit refused to exempt Davis from the performance of her official duties.⁵³ In this controversy, individual autonomy, central to both the religious and judicial frameworks, subverts both simultaneously—an irony that undoubtedly warrants further investigation. Not only is the clerk adjudicating her own perceived religious obligation, but she is also adjudging the legal obligation to which she is subject.⁵⁴ First, she engages in an individualized act of constitutional interpretation and reaches a conclusion diametrically opposed to that reached by the authoritative interpreter—the Supreme Court. Second, she grounds this conclusion in an individualized act of *religious* interpretation: her reticence to issue the licenses does not appear connected to a specific entity's authoritative interpretation of a religious doctrine. In neither case do the positions adopted by traditional Magisterial authorities, whether religious or judicial in character, factor into this philosophical calculus. Religious and judicial deinstitutionalization patterns have converged.

Unless our commitment to autonomy is balanced out by a belief in the Court's institutional legitimacy, the Court's authority is likely to come under

LOY. U. CHI. L.J. 121, 137 (2001) (“[T]he Church’s efforts to shape Catholics’ thinking on political matters offended liberals’ understanding that a free society required individuals who would reason based on independent, common sense assessments of evidence.”).

52. See, e.g., *Kim Davis’s Gay Friends*, ATLANTIC (Sept. 22, 2015), <http://www.theatlantic.com/national/archive/2015/09/kim-davis-kentucky-gay-marriage-friends/406672> [<http://perma.cc/7DBD-H8ZV>]; *Kim Davis Isn’t the Only One Refusing Same-Sex Marriages*, USA TODAY (Sept. 5, 2015, 3:42 PM), <http://www.usatoday.com/story/news/nation-now/2015/09/05/kentucky-clerk-same-sex-marriage-license-religious-freedom/71770124> [<http://perma.cc/683T-WGXR>].
53. See *Miller v. Davis*, No. 15-5880, slip op. at 2 (6th Cir. Aug. 26, 2015) (order denying motion for stay of preliminary injunction) (“[I]t cannot be defensibly argued that the holder of the Rowan County Clerk’s office, apart from who personally occupies that office, may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court.”).
54. See *The Latest: GOP Nominee for Governor Says He Supports Clerk*, ASSOCIATED PRESS (Sept. 1, 2015, 6:05 PM), <http://bigstory.ap.org/article/4432092615494d229e78c5ce5ab0c930/latest-no-marriage-licenses-kentucky-clerks-office> [<http://perma.cc/35YK-ZMCR>] (“[County clerk Kim] Davis says her office is continuing to deny marriage licenses to gay couples ‘under God’s authority’. . . . On Monday, the Supreme Court declined to intervene in the case, leaving Davis no legal grounds to refuse to grant licenses.”). The rationale she advance reflects a kind of “attitudinal Protestantism” in which one’s synergistic understanding of *both* religious and legal obligations is deeply individualistic in character. See also SANFORD LEVINSON, CONSTITUTIONAL FAITH (2d ed. 2011) (offering a favorable assessment of “constitutional Protestantism” as a vital part of the social enterprise). Levinson’s analysis explores the question of whether or not the authority to interpret “sacred” texts is vested exclusively in the courts, but does not discuss the role of the Court as a distinct trans-constitutional institution possessed of Magisterial properties.

fire again and again. The modern disestablishmentarian impulse that has led to religious fragmentation thus has a parallel in the impulse towards the democratization of the Magisterial court system. The “constitutional Protestantism” discussed by Sanford Levinson,⁵⁵ in which nonjudicial agents espouse independent interpretive prerogatives, inherently conflicts with claims of institutional uniqueness and importance.

CONCLUSION

Given that a number of distinct similarities exist between the role of the Magisterial Church in religious life and the Supreme Court as arbiter of ceremonial deism, mistrust in the Court will likely increase alongside mistrust of religion. The social trends that have caused this mistrust may be irreversible. Information continues to be democratized, “equality” continues to be viewed as a central moral and political imperative, and claims to personal and political autonomy continue to upend established institutional hierarchies. None of this is within the Court’s and Church’s control. But the conduct of clerics and judges is. An enhanced level of professional self-policing may mitigate any abuses of office, real or perceived—and in some areas, such self-policing has already begun.⁵⁶ Whether such discipline will effectively rebuild public trust is another question entirely. As demographic and ideological currents shift the American landscape, the problem of Magisterial legitimacy is likely to remain salient well into the future.

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55. See LEVINSON, *supra* note 54.

56. See generally U.S. CONFERENCE OF CATHOLIC BISHOPS, REPORT ON THE IMPLEMENTATION OF THE CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE, 2012 ANNUAL REPORT vi (2013), <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/annual-report-on-the-implementation-of-the-charter-for-the-protection-of-children-and-young-people-2012.pdf> [http://perma.cc/A7KF-CLED] (discussing Catholic institutional reforms as a result of “the way abuse was handled in the past”).