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The Constitutional Marriage of Personality and Impersonality: Office, Honor, and the Oath Book Review Symposium: Settled versus Right: A Theory of Precedent

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THE CONSTITUTIONAL MARRIAGE OF
PERSONALITY AND IMPERSONALITY:
OFFICE, HONOR, AND THE OATH

**SETTLED VERSUS RIGHT: A THEORY OF
PRECEDENT.** By Randy J. Kozel.¹ Cambridge University
Press. 2017. Pp. x + 180. \$99.99 (hardcover), \$34.99 (paper).

*Paul Horwitz*²

Randy Kozel's book, *Settled Versus Right: A Theory of Precedent*, is a splendid accomplishment. It is clarifying in its treatment of the existing law of precedent, reasonable in its proposals for modifications of that law, and thoughtful and careful throughout. More than that, it *sparkles*. Ideas and apothegms adorn every page. As the diverse responses in this review symposium suggest, despite its concision, *Settled Versus Right* generates countless questions, befitting both the vital field of law it treats and the depth and breadth of Kozel's discussion. The pleasure and agony consist in selecting just one aspect of the book for discussion, when it provides such a wealth of material to choose from.

One key element of Kozel's book is its identification of "impersonality" as a central good served by precedent. The book's introduction asserts that a key benefit of *stare decisis* is that "the potential vacillation of constitutional law following changes in judicial personnel is replaced by an abiding sense of stability and impersonality" (p. 18). The book concludes, "Deference to prior decisions takes the abstract ideal of impersonal judging and transforms it into something concrete. Judges come and go, but

1. Professor of Law and Associate Dean for Faculty Development, Notre Dame Law School.

2. Gordon Rosen Professor, University of Alabama School of Law. I am grateful to the participants in the symposium on Randy Kozel's book held at the University of Richmond School of Law in April 2017 for questions and discussion, to Kurt Lash and Jason Mazzone for organizing that event, and to Randy Kozel both for his comments and for his book, which provided the splendid occasion for that discussion.

the law remains the law. That is the promise of precedent” (p. 176). Impersonality—as an essential quality of law, a crucial feature of judging, and a compromise or sacrifice made by individual judges in the service of a “continuous and impersonal Court”—is one of the book’s dominant ideals (p. 164).

Such a sacrifice demands a great deal of a judge, or indeed of any individual. This is especially true in a culture in which the dominant modes of self-understanding and action do not involve impersonality, but strong attachments to specific substantive commitments; individual visions of life, law, and justice; political commitments and polarization; and other deeply *personal* views. In the face of this culture and its powerful motivations, why would one willingly submerge and sacrifice oneself, and one’s deepest conceptions of justice, for the sake of a “continuous and impersonal Court” (p. 164)? Even if doing so is understood to be the duty of a “good” judge, why settle for dutiful obedience if it risks sacrificing one’s deepest substantive commitments? Why be a mere “good” judge, dutifully following precedent, when one can be a *great* judge, celebrated for one’s boldness and one’s dramatic effect on the substance of the law?³ One can understand why judges often fall short of the mark of impersonality set by Kozel.

Nor is this true only of judges, or of legal officials more generally. Impersonality is in disrepute throughout our culture today: our official and professional culture, our popular culture, and our public discourse. A judge, or some other individual, who is committed to impersonality or required to strive for it will need a substantial amount of virtue and character to resist the call of personality and substantive justice. She will need a strong source of motivation to supply the energy *and* restraint needed to persist in the face of these dominant social, political, and legal currents. Although I do not doubt that Kozel’s book will be much admired, I suspect that many readers will resist any edifice of law and precedent built on a foundation of impersonality. Even those judges who agree with him will need something more than “the

3. See, e.g., Sam Roberts, *Stephen Reinhardt, Liberal Lion of Federal Court, Dies at 87*, N.Y. TIMES: OBITUARIES (April 2, 2018), <https://www.nytimes.com/2018/04/02/obituaries/stephen-reinhardt-liberal-lion-of-federal-court-dies-at-87.html> (noting the response of Judge Reinhardt, unquestionably celebrated as a “great” judge by many, to the large number of reversals he faced at the Supreme Court: “They can’t catch ‘em all”); *id.* (quoting a former clerk noting of Judge Reinhardt’s repeated dissents in death penalty cases that “[I]t was the right thing to do, and that’s what mattered. He wanted his voice and his objections heard.”).

loftiest Law Day rhetoric” about “the rule of law” to lash themselves to the mast of impersonality.⁴

In this reaction to Kozel’s focus on individual subordination to the ideal of impersonality, I focus on a vision of judging—or of any office—that draws on values beyond the constitutional text to supply the energy and motivation necessary to achieve what Kozel seeks. That vision is not impersonal, but *personal*. It uses personal motivations to tie the individual officeholder to the “impersonal” features of his or her office. It is not a set of prescriptions or an instruction manual for what judges should *do*, but for who they should *be*.⁵ It is virtue- and character-centered rather than purely institutional, impersonal, or mechanical.⁶ And, as both the ancients and the early moderns did, it seeks to ensure virtue and character in part by tying it to *personal* motives rather than hoping that officials or others will be virtuous for the sake of virtue itself. In short, it seeks to achieve Kozel’s vision of

4. See RICHARD A. POSNER, *HOW JUDGES THINK* 1 (2008).

5. This is, I believe, the main distinction between my work and that of Professor Richard Re, whose excellent scholarship on oaths is concerned with many of the same issues I am in an ongoing project on oaths and the Constitution. See Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 305 (2016) (drawing from the oath specific “implications for interpretive methodologies, substantive commitments, and constitutional change”); Richard M. Re, “*Equal Right to the Poor*,” 84 U. CHI. L. REV. 1149, 1153 (2017) (“explor[ing] the possibility that the federal judicial oath calls for some measure of substantive economic equality” in judicial interpretations of the Constitution).

6. For introductory and basic texts on virtue ethics and the law, see VIRTUE JURISPRUDENCE (Collin Farrelly & Lawrence B. Solum eds., 2008); LAW, VIRTUE, AND JUSTICE (Amalia Amaya & Ho Hock Lai eds., 2013); Lawrence B. Solum, *Law and Virtue*, in THE ROUTLEDGE COMPANION TO VIRTUE ETHICS 491 (Lorraine Besser-Jones & Michael Slote eds., 2015); Chapin Cimino, *Virtue Jurisprudence*, in THE OXFORD HANDBOOK OF VIRTUE 621 (Nancy E. Snow ed., 2018). For a discussion of virtue ethics and constitutional law, including the role of precedent, see Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 521 (2004) (listing adherence to precedent as the first of six basic principles of virtuous constitutional judging). Recent events are, I venture to suggest, sparking a wider interest among legal scholars in the role of virtue and character in constitutional officeholding and constitutional interpretation. For an interesting example, see Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publican Presidents: Constitutional Interpretation in a Broken Constitutional Order*, 21 CHAP. L. REV. 133, 145–51 (2018) (emphasizing the central role of character and virtue in the original constitutional design and the expectations of its designers, and noting the importance of “integrat[ing] character and institutions” as opposed to a view of constitutional interpretation that is indifferent to the character of the actual individuals occupying constitutional offices). Levinson and Graber suggest that President Donald Trump does not quite manage to embody these character traits. See *id.* at 140–45 (offering evidence of “Donald Trump’s gross unfitness for office”).

impersonality through the device of personality—properly understood, channeled, and constrained.

Given space and other constraints, I offer here only a brief sketch of what such a vision involves, and I do not address the many sound criticisms that could be made of such a vision, whether in its details or in its plausibility, especially in contemporary society.⁷ My goal is neither to bury nor to praise Kozel's theory of precedent. It is to supplement it, by offering one way to think about how to achieve the "abstract ideal of impersonal judging" that Kozel sees as one of the central "promise[s] of precedent" (p. 176).

* * *

Our constitutional text and culture⁸ rely on three interrelated "institutions"⁹ to achieve sound governance by those holding offices under the Constitution. This troika of institutions consists of office, honor, and the oath. I will sketch each institution, and its relationship to the others, in turn.

Office. The notion of office dates back at least to the evolution of the concept in ancient Roman law and government.¹⁰ The term itself derives from "the classical concept of officium, the sense of duty belonging to a person with recognized responsibilities."¹¹

7. For a preliminary but more detailed discussion, see Paul Horwitz, *Honour, Oaths, and the Rule of Law* (unpublished manuscript) (on file with author). Some of the material below draws heavily on that manuscript, which itself flows from my Coxford Lecture on honor and the rule of law at the University of Western Ontario Faculty of Law in March 2016.

8. Cf. Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1082 (2013) (describing a "small-c" approach" to the Constitution under which American constitutionalism involves "the web of documents, practices, institutions, norms, and traditions that structure American government") (citation omitted).

9. "Institution" is meant here not to refer to specific organizational forms, but to "commonly accepted norms and understandings that organize behavior in any given setting over time." See Michael R. Siebecker, *Building a "New Institutional" Approach to Corporate Speech*, 59 ALA. L. REV. 247, 259 (2008). It "encompasses individuals, groups, relationships, and cognitive schemes and frames for constructing them." Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1628 (2004). It can range from "the handshake to marriage to, presumably, sanctioning regimes." John R. Sutton, *Rethinking Social Control*, 21 L. & SOC. INQUIRY 943, 946 (1996) (reviewing *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (Walter W. Powell & Paul J. DiMaggio eds., 1991)).

10. For an especially rich treatment, see J.E. LONDON, *EMPIRE OF HONOUR: THE ART OF GOVERNMENT IN THE ROMAN WORLD* (Oxford Univ. Press paperback ed., 2001).

11. Joshua Getzler, *An Interdisciplinary View of Fiduciary Law: "As If." Accountability and Counterfactual Trust*, 91 B.U. L. REV. 973, 981 (2011) (citing MARCUS

This conception remains relevant today, despite considerable change in how (or how strongly) it is viewed. As Steve Sheppard writes, “The building blocks of a modern legal system are offices, and the essential purpose of offices is to fulfill tasks of the legal system.”¹² Sheppard defines legal officials as “the individuals in whom all of the powers of the state are allocated, divided among many roles.”¹³ In each case, “the official is both empowered and limited by the law,” both subject to “the legal obligations embedded in that particular office by the rules of law” and, within the scope of that office, possessing substantial “discretion to act or not to act.”¹⁴

This understanding was reflected in English and early American law, which defined “office” as “. . . a duty. Although in general an office was a moral duty, in government it was the specialized office or duty of a particular government employee or servant.”¹⁵ Although the modern conception of a governmental office became more bureaucratized over time, and the officer came to be seen simply as whichever person happens to fill that office at the moment, it was still essential to the evolving English understanding of the concept of office that it involved “both a *duty* and the position of a particular officer.”¹⁶ Thus, Richard Hutton, a judge of the Court of Common Pleas, asked: “What are the highest places, but obligations of the greatest dewties?”¹⁷ “The citizen who becomes an official” thus “accepts an array of additional duties that differ from those of [other legal] subjects.”¹⁸

Different offices and officers, of course, have different duties.¹⁹ Judges, in particular, have a set of *judicial* duties that

TULLIUS CICERO, DE OFFICIIS 6 (Arthur L. Humphreys 1902) (44 B.C.E.).

12. STEVE SHEPPARD, I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS 10 (2009).

13. *Id.* at 20.

14. *Id.* at 20, 21; *see also id.* at 22 (“[O]ffices have powers that are circumscribed so that they can only be used toward certain ends at certain times and in certain ways. This circumscription is established by the same legal obligations that, within these boundaries, describe the powers the official controls to act according to the official’s substantive discretion.”).

15. Philip Hamburger, *Judicial Office*, 6 J.L. PHIL. & CULTURE 53, 54 (2011).

16. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 104 (2008).

17. *Id.* at 125 (quoting THE DIARY OF SIR RICHARD HUTTON 1614-1639 (W.R. Prest, ed., 1991)).

18. SHEPPARD, *supra* note 12, at 95.

19. Cf. ANDREW SABL, RULING PASSIONS: POLITICAL OFFICES AND DEMOCRATIC ETHICS (2002) (discussing the different functions performed by different officers and other key democratic actors and the different practices and qualities of character required by

define the judicial office. Modern discussions of judging and judicial review often speak in terms of judicial *authority* or power. A focus on judicial *duty*, and the limitations it imposes on the performance of one's office as a judge, encourages us to think differently about the judicial role and the relationships of individual judges to that role and its obligations—including the obligation to follow precedent.²⁰

Honor. As the ancient and modern writers alike understood full well, office does not magically transform its occupant into a Solon or Solomon or divest that person of human frailty. Despite our attachment to the proposition that ours is “a government of laws and not of men,”²¹ the character and virtue of the men and women who occupy offices was and remains an essential element of our political and constitutional order.²²

As those writers also understood, however, even if we select virtuous individuals to occupy important offices, they will not maintain those virtues without powerful motivations. Ambition and a desire for glory comprise one such motivation: “the love of fame,” which Hamilton called “the ruling passion of the noblest minds.”²³ Such a motivation is not a virtue in itself, and is as likely to lead one astray as to keep one on the path of virtue. It must be channeled productively.

The institution that does so is the love of *honor*. Honor, properly understood, is neither merely outward-looking nor merely the desire for fame. It is the desire to be thought well of by those whose opinion ought to matter, and the desire to *deserve* to be thought well of by those individuals. It is Janus-faced, both inward-and outward-looking. As the anthropologist Julian Pitt-Rivers defined it:

Honor is the value of a person in his own eyes, but also in the eyes of his society. It is his estimation of his own worth, his claim to pride, but it is also the acknowledgement of that claim, his excellence recognized by society, his right to pride.²⁴

each).

20. See, e.g., HAMBURGER, *supra* note 16, at 1–2, 9–14.

21. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

22. Cf. Levinson & Graber, *supra* note 6.

23. THE FEDERALIST NO. 72 (Alexander Hamilton), in THE FEDERALIST 488 (Jacob E. Cooke ed., 1961).

24. JULIAN PITT-RIVERS, HONOUR AND SOCIAL STATUS, in HONOUR AND SHAME: THE VALUES OF MEDITERRANEAN SOCIETY 19, 22 (J.G. Péristiany ed., 1965) (emphasis

At its best, honor seeks regard in the eyes of those real or imagined individuals who are worthy to confer it: what Cicero called “the agreed approval of good men.”²⁵ Crucially, this desire is *internalized*, so that the office holder wants to exemplify the virtues that ought to accompany *earned* honor, whether those virtues are publicly recognized or not. As Adam Smith wrote, honor involves not just a desire for approval, but “a desire of being what *ought* to be approved of.”²⁶ In her invaluable book on liberalism and honor, Sharon Krause speaks in terms of “a quality of character, the ambitious desire to live up to one’s code and to be publicly recognized for doing so.”²⁷ Honor, thus understood, is both less and more than a virtue. It is a motivation and spur to virtuous conduct, but one that is experienced internally as the desire to earn honor properly and virtuously.

As Krause argues, in terms that are highly relevant to the question of what will provide judges with the personal motivations that will convince them to honor precedent and thus value “impersonality” highly, this conception of honor may be *more* rather than *less* urgent in our contemporary, egalitarian democratic society. A strong motivation is needed if

in original).

25. PETER OLSTHOORN, *HONOR IN POLITICAL AND MORAL PHILOSOPHY* 24 (2015) (quoting CICERO, *Tusculanae Disputationes* III.3–4).

26. *Id.* at 8 (quoting ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* III.2.7: Oxford Clarendon Press 1976) (1759)) (emphasis added).

27. SHARON KRAUSE, *LIBERALISM WITH HONOR* 2 (2002). Krause’s book is essential reading for those who are interested in the value and viability of honor in contemporary liberal democracies, and is the leading edge of a number of recent writings constituting what we might call modern “honor studies.” A short list, in alphabetical order, would include: KWAME ANTHONY APPIAH, *THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN* (2010); ANTHONY CUNNINGHAM, *MODERN HONOR: A PHILOSOPHICAL DEFENSE* (2013); KRAUSE, *supra* note 27; OLSTHOORN, *supra* note 25; ROBERT L. OPRISKO, *HONOR: A PHENOMENOLOGY* (2012); WILLIAM LAD SESSIONS, *HONOR FOR US: A PHILOSOPHICAL ANALYSIS, INTERPRETATION AND DEFENSE* (2010); BRUCE CRAIG SMITH, *AMERICAN HONOR: THE CREATION OF THE NATION’S IDEALS DURING THE REVOLUTIONARY ERA* (2018); TAMLER SOMMERS, *WHY HONOR MATTERS* (2018); FRANK HENDERSON STEWART, *HONOR* (1994); JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* (Meir Dan-Cohen ed., 2012) (comparing honor and dignity); ALEXANDER WELSH, *WHAT IS HONOR?: A QUESTION OF MORAL IMPERATIVES* (2008). Also relevant to the study of honor, although I make no use of it here, is Stephen Darwall’s philosophical work on so-called “second-personal ethics.” See STEPHEN DARWALL, *MORALITY, AUTHORITY, AND LAW: ESSAYS IN SECOND-PERSONAL ETHICS I* (2013); STEPHEN DARWALL, *HONOR, HISTORY, AND RELATIONSHIP: ESSAYS IN SECOND-PERSONAL ETHICS II* (2013); STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2009). A recent edited collection provides an excellent survey of the field. See *HONOR IN THE MODERN WORLD: INTERDISCIPLINARY PERSPECTIVES* (Laurie M. Johnson & Dan Demetriou eds., 2016).

officeholders—including judges—are to exhibit qualities of virtue and excellence. That motivation must be especially strong where doing so might conflict with their own substantive views of law or justice, or deprive them of opportunities to put their own stamp on the law and gain some measure of glory. In her argument, “liberal honor” fills that role. It supplies the basis for the personal agency that can bring out these qualities in the individual and give him or her the strength of character to maintain them in the face of contrary pressures.

At least since Peter Berger, drawing on a long set of historical developments, wrote about the “obsolescence of the concept of honor,” honor has been widely viewed with suspicion or outright hostility. In particular, it has been unfavorably compared with the democratic quality of equal human dignity.²⁸ But demanding honorable conduct from our highest officials, and encouraging in them a sense of honor, is not incompatible with a belief in equal human dignity. Indeed, encouraging honor as a motivation for officeholders may be necessary, supplying the energy and agency that will lead officeholders to maintain a legal and political regime in which human dignity is forcefully defended and advanced. For the purposes of Kozel’s book, that includes the desire to treat cases “impersonally,” respecting the equal dignity of litigants by treating them similarly, rather than treating like cases differently or departing from precedent based on a judge’s personal view of the parties in a particular case.

Oath. In our constitutional system, the device that ties individual honor to the ostensibly “impersonal” office, and that encourages honor properly understood and internalized rather than the mere love of fame, is the *oath*. Most or all officials take an oath to defend the Constitution,²⁹ and judges take oaths that commit them to a particular vision of justice and judicial duty.³⁰

28. See PETER BERGER, ON THE OBSOLESCENCE OF THE CONCEPT OF HONOUR, reprinted in LIBERALISM AND ITS CRITICS 149 (Michael J. Sandel ed., 1984). See also CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 225–56 (1989).

29. See U.S. CONST., art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States, and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .”). I place oaths and affirmations on equal footing here and refer generically to the “oath.”

30. See 8 U.S.C. § 453 (1990); Re, *supra* note 5, at 1166 n.89 (citing examples of state constitutional provisions providing for judicial oaths).

The oath serves multiple functions. It is a prerequisite to and a performative act for taking office.³¹ It solemnizes the act of taking office and commits the oath-taker to act faithfully to fulfill the duties, and observe the limits, of that office.³² And it is a *publicly* performed act, one that ties the oath-taker to public regard and calls on him or her to maintain the approval and avoid the disapprobation of both his or her peers—or “honor group”—and the wider public community he or she serves.³³

Despite its religious roots in calling on God to witness the promise, the oath is no more magical a device than office itself. But it is or can be—or *ought* to be—a powerful, even transformative, device. It serves as a linchpin. It connects the individual to the office and the officeholder to the commitment to act honorably. The oath thus provides a deeply personal motive and wellspring for the commitment to “impersonality” in judicial office. It is tied to both an internalized personal sense of honor and a desire to be *seen* by one’s peers and others as having acted honorably. To be sure, these qualities, and the oath that serves to connect them to the individual and the office, are aspirational and rarely completely fulfilled. It is imperfect. But that does not make it unimportant or a mere fiction.³⁴

31. See, e.g., JEFFREY BRAND-BALLARD, *LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING* 155 (2010). For a rich discussion of the oath, including its performative nature, see GIORGIO AGAMBEN, *THE SACRAMENT OF LANGUAGE: AN ARCHAEOLOGY OF THE OATH* (Adam Kotsko trans., 2011).

32. See, e.g., Steve Sheppard, *What Oaths Meant to the Framers’ Generation: A Preliminary Sketch*, 2009 *CARDOZO L. REV. DE NOVO* 273, 276; HAMBURGER, *supra* note 16, at 109; Daniel P. Sulmasy, *What is an Oath and Why Should a Physician Swear One?*, 20 *THEORETICAL MED. & BIOETHICS* 329, 332 (1999).

33. See Sulmasy, *supra* note 32, at 332; Sheppard, *supra* note 32, at 107; HAMBURGER, *supra* note 16, at 106–08.

34. At least judges *say* they take the oath seriously and are impressed by the solemnity of the act. See, e.g., Hon. Nathaniel R. Jones, *Judge Frank J. Battisti and the Promises He Kept*, 42 *CLEV. ST. L. REV.* 367, 367 (1994) (“Judge Battisti viewed the oath of office very seriously. Swearing-in ceremonies were important to him and he presided with great solemnity over them. He considered the assumption of public office to be on par with the undertaking of a sacred trust.”). The language here is strikingly similar to the discussion above of offices, which have been described as “‘trusts’ to be executed by public officials,” and which are “bound on the conscience” of the oath-taker as a kind of fiduciary duty. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 93 (1988) (quoting 14 *WRITINGS OF JAMES MADISON* 191 (Robert Rutland, ed., 1983)). Not incidentally to the office- and virtue-based approach taken here, a recent strain of public law literature emphasizes the fiduciary nature of public officials in constitutional systems and seeks to draw implications for judging and other official actions. See, e.g., GARY LAWSON & GUY SEIDMAN, *A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION* (2017); EVAN FOX-DECENT, *SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY*

* * *

This vision of the troika of office, honor, and the oath is intended as a modest supplement to Kozel's careful account of precedent. It *may* place a different gloss on his emphasis on "continuity, constraint, and impersonality" as the core judicial ideals (p. 4). To paraphrase Justice Blackmun, it suggests that in order to achieve judicial impersonality we must first take account of personality—of the motivations that give judges the agency and energy to strive for impersonality in a personal world.³⁵ It certainly does not demand, however, that we reject Kozel's emphasis on the importance of impersonality in judging and the law of precedent.

Neither, unfortunately, does it tell us how to resolve the difficult questions and compromises that are involved in Kozel's account—or *any* account—of judicial precedent. It does not tell us when or how to respect and observe, to reject, or to modify a particular precedent. But it may offer a way of thinking about the judicial oath, the judicial office, and the relationship of both to precedent and its difficulties. That way of thinking may help raise useful questions about both Kozel's book and the judicial task itself.

In possible tension with Kozel's desire to find an approach to precedent that is compatible with "interpretive pluralism" on the Supreme Court (pp. 11-17), a virtue-based approach grounded in the troika of office, honor, and oath suggests that each judge, in taking the oath, faces an indefeasible obligation to reflect on what the judicial office and judicial duty demand, and to follow that

(2012); Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513 (2015); Ethan J. Leib, David L. Ponet, & Michael Sirota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004). For critiques, see, e.g., Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820 (2016); Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145 (2014).

In this review symposium, Professor Allison Orr Larsen usefully examines various existing or proposed practices on the Supreme Court that can entrench and enhance this perspective and encourage judicial "norms of impersonality." Allison Orr Larsen, *Supreme Court Norms of Impersonality*, 33 CONST. COMMENT. 373 (2018). Professor Larsen's contribution surely has far more immediate practical value than mine. But both can be read together productively, inasmuch as her article offers concrete means of encouraging and holding judges to the higher-level but more abstract virtue-based approach that I argue for here.

35. See *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring) ("In order to get beyond racism, we must first take account of race.").

vision faithfully.³⁶ But in connecting that indefeasible *personal* obligation to a sense of office that focuses on duty and constraint rather than power, it requires a commitment to an office-centered vision of justice, rather than one that is strictly personal or idiosyncratic. That commitment may require obedience to precedent, and self-restraint in the face of a desire to radically reshape the law or remake it in one's own image of justice. It requires the judge to "do the office of a *Judge*, and to receive information by *witnesses* and *solemnities of law*, and . . . not to bring his own private conscience to become the public measure."³⁷ And, through the oath, it connects that obedience to the individual judge's personal and official honor: to his or her desire to be, and be seen to be, a loyal and virtuous officeholder and oath-keeper.

For better and worse, there is nothing mechanical or exact about this vision. It does not answer the questions that Kozel asks, or that flow from a careful examination of his description of and prescriptions for the law of judicial precedent. But it may suggest that we should view those questions differently: perhaps differently than Kozel does, and certainly differently than our contemporary legal and political culture generally does. It suggests that the impersonality Kozel seeks is and must be powerfully and ineluctably personal. And it calls on us, and our culture, to revisit, perhaps to revise, but most vitally to *recommit* ourselves to the importance, even in our contemporary egalitarian and dignitarian culture, of virtue, honor, office, and the oath.

36. See Paul Horwitz, *Honor's Constitutional Moment: The Oath and Presidential Transitions*, 103 NW. U. L. REV. 1067, 1074–77 (2009) (discussing the indefeasibility of the oath-taker's responsibility in the context of the presidential oath).

37. HAMBURGER, *supra* note 16, at 164 (quoting JEREMY TAYLOR, DUCTOR DUBITANTUM, OR THE RULE OF CONSCIENCE IN ALL HER GENERAL MEASURES 82 (James Fleisher ed., Oxford Univ. Press 2012) (1660)).

