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Supreme Court Norms of Impersonality Book Review Symposium: Settled versus Right: A Theory of Precedent

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SUPREME COURT NORMS OF IMPERSONALITY

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).

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INTRODUCTION

In his new book, *Settled Versus Right: A Theory of Precedent*, Professor Randy Kozel assumes a rare role for law professors; he serves as a helpful collaborator rather than a snarky critic. Professor Kozel seeks a commitment to the impersonal features of Supreme Court decisions and a retreat from individual disputes over interpretive philosophy when it comes to discussion of precedent. His optimism is contagious, and Kozel has made bold strides towards a “second best stare decisis” that can be applied regardless of vast disagreement on the merits. Cynics may remain unpersuaded that nine individual Justices can transcend interpretive disagreements and commit to a communal understanding of a doctrine of precedent. But even for those cynics, Professor Kozel’s work provides a powerful lesson about norms. The Supreme Court is more than just a building across from the Capitol that houses nine individual lawmakers. As a two hundred and thirty-year-old institution with a rich tradition of its own, the Court has developed a set of distinct norms over time. From “the rule of four” (not needing a majority to grant cert) to the taboo of vote-trading, to the use of a plural noun when referring to past decisions, to the expectation that every word

1. Professor of Law, Notre Dame Law School.

2. Professor of Law, College of William & Mary. This Review was written for a conference in celebration of Randy Kozel’s book, *Settled Versus Right: A New Theory of Precedent* (Cambridge University Press 2017). I am very grateful to the organizers of the event, Kurt Lash & Jason Mazzone, for inviting me, and to my fellow participants for an engaging and inspiring discussion.

change in a draft opinion merits a re-circulation, the Court has developed its own norms of impersonality—norms that emphasize the “we” over the “I’s.”

This Review will explore Supreme Court norms that both help and hinder Professor Kozel’s aspiration for impersonality at the Court. I will reiterate my old complaint about “self stare decisis”—the habit of reiterating a dissenting view each time an issue presents itself again; and I will offer a new norm when it comes to discussion of precedent. Even if the Justices can’t agree on whether a precedent is worthy of overruling, it seems a modest request to suggest such discussions happen at the outset, perhaps in their own initially circulated opinion or dedicated time at Conference. Bifurcating the discussion in this way (separating the discussion of precedent from the discussion of the merits) will help abate the temptation to gloss over the precedential discussion in order to get to the particulars of the case at hand. My hope is that norm changes such as these will further Professor Kozel’s laudable goal of changing “attitudes” and will capture many of the benefits he articulates that arise from demanding a common set of playing rules for nine individual decisionmakers.

I. WHY IS IMPERSONALITY IMPORTANT?

An important premise of Professor Kozel’s new book is that a collective doctrine of stare decisis is critical to demonstrating that the Constitution “truly is more than what five Justices say it is” (p. 5). His goal is to create a theory of stare decisis that is “designed to enhance the stability and impersonality of constitutional law” (p. 6). And he makes a powerful case for why this goal is an important one.

Professor Kozel argues that precedent has value in conserving resources, acknowledging our limitations as individual decisionmakers, treating similar cases in a similar way, and furnishing common ground for justices who often disagree (pp. 36-45). But, to me, the most compelling reason Professor Kozel offers for a communal understanding of precedent is its part in bolstering what Professor Kozel calls “impersonality” at the Supreme Court. By “impersonality,” Kozel means making “judge specific characteristics less salient in determining legal rights” (p. 41). As he elegantly explains,

to follow the decisions of one's predecessors is to embrace a conception of a court continuing over time. By deferring to precedent, a [J]ustice highlights her membership in a larger institution that predates her and will continue long after she is gone. . . . This is another way of saying the rule of law prevails over the rule of men and women (pp. 41-42).

It is too easy to shorten this rationale (as we often do) to the simple—and all too loaded—word, “legitimacy.” The Court must keep more or less consistent over time, the common argument goes, in order to maintain its stature in the eyes of the public.³ But, as Professor Kozel helpfully reminds us, this argument undersells the value of impersonality quite a bit. What hangs in the balance of the precedent debate is more than just an approval rating for the Justices in a national opinion poll. The stakes are much higher than that. In Professor Kozel's words, driving the commitment to impersonality at the Court is “the principle that all government officials, including judges, are bound by rules” (p. 42). Debates about precedent are so important, therefore, because the rule of law is so important.

The rest of Professor Kozel's book is devoted to developing a theory of what he calls “second best stare decisis”—a theory that operates independently of any interpretive methodology and seeks to unify judicial voices that find themselves so often in discord. Professor Kozel seeks to offer a set of rules about precedent that many can join as a second-best solution (second-best to the result that would be reached under his or her preferred methodology). The goal of second-best stare decisis is to prevent discussions of precedent from getting bogged down into the merits and “becoming an echo chamber for controversial assertions about which theory of constitutional interpretation is best” (p. 139).

There are likely some cynics who find this laudable goal a bit out of reach. The cynic's concern is that no one Justice will check his interpretative baggage at the door in order to truly engage with the question of precedent in a way that is detached from his other commitments. The fear is that a communal doctrine of stare decisis will not constrain at all; a Justice will just manipulate the seemingly objective factors of second best stare decisis (reliance interests, factual change and the like) in order to reach the result

3. See *Planned Parenthood v. Casey*, 505 U.S. 833, 864–69 (1992) (plurality opinion).

that best aligns with his favored interpretive philosophy or normative priors or even the outcome that he wants to reach in the individual case.

But even for those cynics, Professor Kozel's work sheds light on an important problem and a potential solution. For hundreds of years, the Justices of the Supreme Court have created and maintained important norms of impersonality. They act and speak as a "we" over time. Even if those norms don't constrain in any technical sense, they enact a powerful force of habit.

To take an analogy that may speak to dog lovers, a dog on a leash will sometimes stay still in the park even when there is no one holding on to the leash's handle. Because the dog is accustomed to the constraint, it tows the line even when it need not.⁴ So, too, can norms of impersonality act to constrain a Justice even when it does not formally bind her. The Court is an institution with a rich history and a prized internal reputation for objectivity and fairness. Perhaps it is time to leverage those norms of impersonality to change how the Justices discuss precedent.

II. EXISTING NORMS OF IMPERSONALITY AT THE SUPREME COURT

When a new member of the Court gets sworn in and walks up those stairs at number One First Street for the first time, he or she will quickly encounter some internal norms (and even more important norms than the weekly rotation of Wednesday mac and cheese in the cafeteria). These norms are the rules of the road—common traditions passed down from one generation of Justices to the next. Of course Supreme Court norms are not formally binding, nor are they necessarily permanent, but they have proved to be sticky over time and (like for the dog in the park) they can do important constraining work.

One norm at the Court that is firmly entrenched is the unwritten rule against vote trading. While some forms of strategic behavior at the Court are seen as permissible and perhaps inevitable (like, for example "insincere voting"—voting for one's second choice—to form a majority coalition), the prevailing consensus is that explicit vote trading between cases is "roundly

4. As my co-panelists helpfully observed, this characteristic is not true of all dogs and likely has much to do with how an individual dog is trained—an aspect of the analogy that is still relevant to the present discussion.

condemned.”⁵ This norm means one Justice won’t say to another “I’ll vote with you in case *X* if you vote for me in case *Y*.”⁶ There are likely many reasons for this norm: when votes are traded across cases it decreases meaningful participation by the parties in any given case and cuts against the idea that deliberation between multiple minds within any one case improves decisionmaking. But another reason for this norm has to be related to fostering impersonality at the Court. As Evan Caminker explains in his article on the subject, there is a “commodification objection” to vote trading or a fear of a “market orientation towards judicial decisionmaking.”⁷ If votes can be traded across cases then that makes the judicial process look more like political wheeling and dealing by nine individuals and less like the work of a deliberative independent body that acts as one unit. Vote-trading cuts against, in other words, a sense of Supreme Court impersonality.

A second Supreme Court norm is what has been called an “agenda-setting norm” colloquially known as “the Rule of Four.”⁸ Under well-settled tradition (but not a written rule), when the Justices decide whether to hear a case it only take four votes to grant certiorari, not a majority of the Court.⁹ This non-majority rule is buttressed by another norm—“the Rule of Three”—meaning that it only takes three votes to hold a case while decision of a related issue is already pending at the Court.¹⁰

Behind these agenda-setting norms is the sense that oral argument and briefing can change one’s mind about a case, and thus if enough members of the Court think a case is cert-worthy it makes sense to hear the case and see if a fifth member can be convinced. In the words of Justice Brennan: “in the context of a preliminary five to four vote to deny, five give four an opportunity

5. Evan Caminker, *Sincere and Strategic Voting on Multi-Member Courts*, 97 MICH. L. REV. 2297, 2300 (1999).

6. *Id.* at 2331. (“It is very difficult to identify clear examples of explicit vote trading. My own sense, in accord with that of other scholars, is that explicit vote trading rarely—and perhaps never—takes place.”)

7. *Id.* at 2351–52.

8. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 113 (1998).

9. The Rule of Four dates back at least until 1925 (or at least that is the year the norm became public). See Richard Revesz & Pam Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1069 (1988).

10. *Id.* at 1068.

to change at least one mind.”¹¹ Indeed, this norm has led to a separate less well-known tradition—a “join three” custom.¹² Under this norm, if three Justices want to hear a case, and a fourth Justice is on the fence, the undecided member of the Court will cast her vote to “join three” and grant certiorari to hear the case. The idea behind this norm is a “team player” sensibility. For the Justice who supplies that fourth vote to grant cert she is sending a signal: we are more than just expressing individual preferences and there is value to deliberation and consideration as a collective unit. If three of her colleagues are sure a case is cert-worthy, then that is enough of a reason to at least flesh out the arguments and hear what the litigants have to say. There are institutional reasons, in other words, to vote to take a case even if as an individual one is unsure the case is cert-worthy.

A third—more subtle—norm at the Court is the use of a plural pronoun when describing majority opinions (even old ones). When Justices refer to outcomes and rationales of past cases, they use the word “we,” even for cases that were decided long before the current Justices were born. And when an opinion is announced it is styled not as “the majority opinion,” but as “the opinion of the Court.”¹³ Relatedly, any time an author of an opinion changes a word of that opinion, the norm is that he will re-circulate the draft again to make sure that those Justices who have joined the initial draft opinion are comfortable with the change. Further, a majority will try “to accommodate a marginal Justice” by tweaking the opinion so the unsure Justice can join it, even when a five-vote coalition is already formed and that “marginal” vote is not strictly necessary.¹⁴ These norms of authorship play a role in enforcing impersonality at the Court. Every time a Justice writes the word “we” instead of “I” he is subtly enforcing—to himself as well as to others—that the enterprise of Supreme Court decisionmaking is a collective one.

11. *Id.* at 1100 (quoting *Straight v. Wainwright*, 106 S. Ct. 2004, 2006 (1986) (Brennan, J., dissenting)).

12. S.M., *How the Supreme Court Chooses Its Cases*, THE ECONOMIST EXPLAINS (Feb. 24, 2015), <https://www.economist.com/blogs/economist-explains/2015/02/economist-explains-19> (“When Warren Burger was [C]hief [J]ustice in the 1970s and 1980s, a “join-3” tradition meant that a [J]ustice might extend a courtesy fourth vote to supplement those of three of his colleagues who wanted to hear a case. This form of collegiality helped swell the [C]ourt’s docket to over 150 cases, but it is largely a thing of the past.”).

13. Lewis Kornhauser & Lawrence Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 7 (1993).

14. Caminker, *supra* note 5, at 2322.

This list of impersonality norms is only the beginning. There are plenty of other norms that have evolved around the Court's work: no one but the nine Justices can enter the conference room to discuss the cases at the end of the argument week, the Justices offer their comments at conference in the order of their seniority,¹⁵ a brand new Justice is typically assigned an "easy" unanimous opinion to write first,¹⁶ and the Chief Justice attempts to assign opinions in a way that divides the workload evenly.¹⁷ Moreover (in perhaps my favorite tradition) before proceeding to the bench or to conference the Justices all shake hands—a ritual that began in 1888 and requires 36 different handshakes.¹⁸

Why do the Justices conform to these norms? To be sure, one reason is just to make life more pleasant for people who work together every day. As Chief Justice Warren explained after he retired, "[w]hen you are going to serve on a court . . . for the rest of your productive days, you accustom yourself to the institution like you do to the institution of marriage, and you realize that you can't be in a brawl every day and still get satisfaction out of life."¹⁹

But there is more to it than that. As Justice O'Connor put it when explaining the handshake tradition:

[It's] a symbol of work we do as a collegial body. That is, you may be temporarily miffed because you received a spicy dissenting opinion from a colleague, but when we go to sit on the bench, we look at each other, shake hands, and it's a way of saying, "We're all in this together." We care about this institution more than our individual egos, and we are all devoted to keeping the Supreme Court in the place that it is—as a co-equal third branch of government and I think a model for the world in collegiality and independence of judges.²⁰

"We're all in this together." The sentence bears repeating. Justice O'Connor is echoing what Professor Kozel calls the need for "impersonality" at the Court; it is the desire to be a "we" rather than a set of "I's." And the reason for this impersonality is

15. CLARE CUSHMAN, *COURTWATCHERS: EYEWITNESS ACCOUNTS IN SUPREME COURT HISTORY* 101 (2011).

16. *Id.* at 103. Justice Ginsburg has lamented that her first assignment was not in keeping with this tradition (or "legend") that a "brand new Justice be slated for an uncontroversial unanimous opinion." *Id.*

17. *Id.* at 154–55.

18. *Id.* at 146–47.

19. *Id.* at 143.

20. *Id.* at 147.

more than just for professional collegiality. The idea is that by building this sense of institutional duty—reflected in internal norms—the Court reinforces the notion that (in Professor Kozel’s words) “bedrock principles are founded in the law rather than the proclivities of individuals” (p. 41).

These norms of impersonality are not inevitable and are not unbreakable. Indeed one can likely think of examples where the norms are violated—where the Justices do not comply with the rule of Four,²¹ or where the Court talks skeptically about an opinion as a “majority opinion” as opposed to a “majority of the Court.”²² But the fragility of the norms (and the fact that we notice and bristle when they are ignored) underscores the power and the importance of the norms to begin with.

III. BUILDING NORMS OF IMPERSONALITY FOR PRECEDENT DISCUSSIONS

The fact that so many norms bind the nine Justices to act like one institution makes me optimistic that a similar norm (or norms) could be built to surround precedent discussions. But for this to work there need to be at least two changes to existing norms: (1) a retreat against the current custom of pursuing a “self stare decisis”; and (2) an internal change to the timing of precedent discussions.

A. THE UNHEALTHY NORM OF SELF STARE DECISIS

Supreme Court Justices often repeat resistance to a decision even years after the ink on the decision dries in the U.S. Reports. I’ve called this practice a “perpetual dissent”²³ and it should not take long for examples to come to mind: “I adhere to my belief that the death penalty is in all circumstances cruel and unusual punishment”²⁴; “I continue to believe that campaign finance laws are subject to strict scrutiny”²⁵; “I am not yet ready to adhere to

21. See Revesz & Karlan, *supra* note 9.

22. Justice Scalia remarked on this phenomenon. See *Martinez v. Ct. of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring) (“I do not share the apparent skepticism of today’s opinion concerning the judgment of the Court (often curiously described as merely the judgment of ‘the majority’) in *Faretta v. California*.”).

23. Allison Orr Larsen, *Perpetual Dissents*, 15 *GEO. MASON L. REV.* 447 (2008).

24. *Blystone v. Pennsylvania*, 494 U.S. 299, 324 (1990) (Brennan, J., dissenting).

25. *FEC v. Beaumont*, 539 U.S. 146, 164 (2003) (Thomas, J., dissenting).

the proposition of law set forth in *Seminole Tribe*.²⁶ Perpetual dissents like these range widely over subject matter and are not confined to Justices of any particular ideology.²⁷ The most well-known use of the perpetual dissent was Justice Brennan and Justice Marshall repeating their view over 2,100 times that the death penalty was unconstitutional. But although this may be the most dramatic use of the perpetual dissent, Justices Brennan and Marshall are not alone: “[t]raditionally conservative justices are just as likely to dissent perpetually on issues such as abortion, sentencing reform, or punitive damages.”²⁸

Perpetual dissents are not brand new, but they do not have a long pedigree. It was not unusual as late as the 1930s for a Justice to engage in “silent acquiescence”—to decide not to register his disagreement with a decision in a dissent at all. Indeed separate opinions generally are relatively recent; political scientists mark the early 1940s as the moment in time where the Supreme Court saw “‘a radical and apparently permanent change’ from unanimity to ‘surging rates of concurring and dissenting opinions.’”²⁹

Importantly, these perpetual dissents are not generally accompanied by discussions of *stare decisis* (as in whether the Court should overrule the precedent due to changed circumstances or unworkability or the like). Instead, the Justice will repeat a dissent because of a continued distaste for the controlling precedent—because he dissented originally and still thinks the decision was wrong. The fact that a Justice dissented originally, in other words, is reason enough to dissent again when the rule from the first case is applied in a second case. A perpetual dissent leads to a custom of selective engagement with precedents. (“I’m not bound by case *X* because I didn’t join it originally.”)

This norm can be seen as a form of “self *stare decisis*”—by which I mean the apparently important need the Justices feel to stay consistent over time as an individual jurist. Evidence for this norm goes beyond the perpetual dissent. It is common for the Justices to cite their own separate concurrences or dissents as

26. *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 699 (1999) (Breyer, J., dissenting).

27. Larsen, *supra* note 23, at 450.

28. *Id.* at 451 (citations omitted).

29. *Id.* at 450 (quoting Thomas Walker, *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 361 (1988)).

authorities in a new case.³⁰ The Justices will also cite separate opinions of their colleagues in an argumentative way as a means of pointing out inconsistencies. And they will even argue that because an individual Justice joined a prior dissent he or she should be embarrassed to join a majority in a new case touching on the same issue.³¹ Indeed, sometimes one can even find an explicit discussion by a Justice in one opinion explaining why it is consistent with his views in the past.³² These types of discussions reveal an anxiety—a need the Justices feel to appear intellectually consistent over time as an *individual* (hence, *self stare decisis*) separate and apart from the debate about the *law's* need to be settled versus right.

None of this is helpful for Professor Kozel's goal of fostering impersonality at the Court. To be clear, I think it is perfectly legitimate for a Justice to vote to overrule a precedent—sometimes it is more important for the law to be right rather than settled. My complaint instead is about venting individual disputes about Supreme Court precedents when overruling the precedent isn't even on the table. Those norms—the norms that reinforce individual consistency over time as opposed to Court consistency—erode the goal of impersonality at the Supreme Court and detract from all of the rule-of-law reasons Professor Kozel persuasively offers for why impersonality is critical.

There is an alternative. As Maurice Kelman suggested thirty years ago, a Justice can “table” her dissenting view until a majority of the Court agrees to revisit the question.³³ This does

30. See, e.g., *American Trucking Ass'n v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 439 (2005) (Thomas J., dissenting) (“[T]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application” (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting))).

31. See, e.g., *McConnell v. FEC*, 540 US 93, 326 (2003) (Kennedy, J., concurring) (“I dissented in *Austin*, and continue to believe that the case represents an indefensible departure from our tradition of free and robust debate. Two of my colleagues joined the dissent including a Member of today's majority.”).

32. See, e.g., *United States v. White Mountain Apache Tribe*, 537 US 465, 479 (2003) (Ginsburg, J., concurring) (“I join the Court's opinion, satisfied that it is not inconsistent with the opinion I wrote for the Court in *United States v. Navajo Nation*.”); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 545 (1991) (White, J., concurring) (“Nothing in the above, however, is meant to suggest that I retreat from those opinions filed in this Court which I wrote or joined holding or recognizing that in proper cases a new rule announced by the Court will not be applied retroactively even to parties before the Court.”).

33. Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 230–31 (1985).

not have to be done silently. A Justice could even note in concurrence that he is “concurring under compulsion, abiding the time when he may win over the majority.”³⁴ This was the path opted for by the second Justice Harlan. Although Justice Harlan was a known critic of *Miranda* and *Mapp v. Ohio*, he routinely joined subsequent opinions that applied these precedents.³⁵ Far from sacrificing his own individual views on what was right, he was just following a Supreme Court norm of—in Kelman’s words—“tabling” his dissenting view for the time being since revising the precedent as a Court was not in the cards.

I suggest reviving the Justice Harlan norm of impersonality. This “concurring under duress”³⁶ approach strikes a middle ground between allowing an individual Justice to stick to his guns while also conceding that there is a linear connection between individual Justices of the past and individual Justices of the present and recognizing the importance of reinforcing that line even at the expense of venting continued disagreement.

B. A PROPOSAL FOR A NEW NORM OF TIMING FOR PRECEDENT DISCUSSIONS

I have a second proposal for advancing the norms of impersonality with regard to Supreme Court precedent. Professor Kozel has entirely persuaded me that the question of stare decisis (the settled versus right debate) is too bogged down in principled disagreements among the Justices about constitutional methodology. Further he has convinced me that not only is the discussion of *whether* to overrule a precedent mired in disagreement on the merits, but so too is the discussion of *when* the precedent controls to begin with. Thus a champion for impersonality at the Court is facing a real uphill battle. The problem goes beyond knowing when the time is right to make a change in precedent (from, for example, *Bowers* to *Lawrence* or *Plessy* to *Brown*); the problem extends to even knowing when the time is right to have the discussion about whether the time is right.

34. *Id.* at 230–31.

35. *See Orozco v. Texas*, 394 U.S. 324, 327 (1969) (Harlan, J. concurring) (“The passage of time has not made the *Miranda* case any more palatable to me than it was when the case was decided . . . [but] purely out of respect for stare decisis, I reluctantly feel compelled to acquiesce[.]”).

36. *See, e.g., Larsen, supra* note 23, at 452.

Professor Kozel makes strong efforts to find a doctrinal solution to this problem. I wonder though if a separate route to the same destination lies in adjusting Supreme Court norms. The new norm would relate not to the *content* but to the *timing* of precedent discussions. I propose bifurcating the internal discussion at the Court about any particular case such that the Justices first debate whether a precedent applies or whether it is ripe for reversal before then turning to the merits of the case at hand.

What I am suggesting is akin to an order of operations rule in math. The Justices should debate the scope of a precedent first: is there a prior decision on point? Or is the language in the prior case just dicta—a judicial “aside or hypothetical”—that does not earn binding effect? Second, assuming the prior case is on point, then the Justices can further debate whether the precedent deserves to be overruled. The second discussion can revolve around the issues Professor Kozel identifies as things the Justices should debate (the inquiry into workability, factual accuracy, and whether this is an exceptional case where undesirable consequences of a precedent should be given a shelf life) (pp. 99-106). Only after those two discussions would the Justices then turn to the merits of the case (if necessary). This bifurcated discussion will, I think, significantly add to Professor Kozel’s goal for precedent generally—“that it allows some points to be taken as a given rather than perpetually debated” (p. 15). Perhaps the Justices need a chance to debate candidly with each other about “what is given.”

This separate opinion circulation—the precedent discussion alone—could be done either orally (at Conference) or in written form, but I think it is likely to be most valuable if it is kept private. While I am in favor of transparency generally, norm generation may take some internal politicking that should be shielded from external scrutiny. The need that the Justices feel to stay internally consistent as individuals might at least partially exist from criticism originating from Court-watchers and academics. It might foster more candid conversations for the nine to debate the scope and applicability of precedent internally—free from eyes of outsiders.

In this vein, consider how Justice Thomas describes the Conference discussions (discussions kept secret from all but the nine): “people are engaged; they actually talk about the case.

They actually tell you what they think and why. . . [a]nd there's some back and forth . . . [even] discussions off to the sides."³⁷ The internal deliberation—the back and forth—is part of what justifies a counter-majoritarian judiciary in the first place. Why not leverage this candor to discuss one of the hardest things the Court has on its plate—the settled versus right question. The ultimate opinion disposing of the case would be published and would likely include elements of the initial conversation. But by giving the Justices space to debate precedent privately first, we encourage the difficult cognitive task of separating “is this the outcome I want?” from “is there a reason to overrule the past decision?”

Another benefit to a separate internal discussion on precedent is to stem the temptation to distinguish precedents artificially in order to avoid them. To be sure, there is nothing to stop a determined Justice from disingenuously distinguishing a precedent she does not want to deal with—either in a publicly accessible opinion or an internally debated one. But one should not overlook the power of internal dynamics, particularly from repeat players who work closely together for decades and are committed to being a “we.”

Why would the Justices adopt this new procedural custom, particularly if they have the votes to do what they want to do without it? For one thing, the Justices might be more likely to reach agreement in the abstract rather than when a concrete outcome is on the table. There are reasons we have a preliminary discussion on the rules of a poker game, for example, at a moment before the cards are dealt. Assuming everyone at the table thinks agreement is a good thing, it is easier to get there before we know what cards we have and are differently invested in the results. Certainly some of the “cards” are already dealt at the Court—the Justices hold various commitments to stare decisis that reflect their interpretive methodology. But even so, the conversation dynamics change when the issue is front and center and the battle lines are drawn. Thus, perhaps a new norm about the timing of precedent discussion could be instituted at an annual retreat, or a discussion among the Justices that is otherwise independent from the merits of any particular issue.

Still, why would the Justices have the motivation to bind themselves in this way? It is important to remember that of all the

37. CUSHMAN, *supra* note 15, at 152.

firm advocates for impersonality at the Supreme Court (including Professor Kozel and myself), the Justices themselves are the true believers. The Justices don't want to believe that "power not reason is the currency of the Court's decision-making" (p. 35). It is the Justices themselves who promote the view that the Constitution "truly is more than what five Justices say it is" (p. 5). The "we're all in this together" sentiment voiced by Justice O'Connor is very much a real sentiment at the Court, buttressed by years of norms that reinforce it.

What is often overlooked—but is important to recognize—is that this norm of impersonality is not just crucial for the appearance of legitimacy to the outside world, but it is also central to the way the Justices view each other. When describing what Conference looks like from the inside, Justice Kennedy explained:

It's like being an attorney once again. . . . We sometimes have as many as six cases and I have to present the argument . . . and I have to be professional and accurate and fair. And each of my colleagues feels the same way so there is a little tension and excitement in the room, but we love it. We're lawyers, we're designed to do that.³⁸

It is that internal commitment to being "professional and accurate and fair" (in Justice Kennedy's words) that I think can be used to improve the Court's approach to precedent. The Justices can be trusted to call each other out for shenanigans (disingenuous distinctions, for example) when they are given the space to do so.

At bottom, my suggestion is to take what the Supreme Court already seems to have—an internal commitment to impersonality and (relatedly) an ambition to strive to protect the rule of law—and leverage that institutional desire to improve discussion of precedent. By separating the discussion of precedent from the discussion on the merits and cementing that bifurcation as a Supreme Court norm, we may be able to achieve Professor Kozel's goal of "using precedent to bridge judicial disagreements." We are using Supreme Court custom and commitment to legal reasoning to achieve a more objective conversation about the hardest choices they must make. Along the way we remind each other of the important last lines of

38. CUSHMAN, *supra* note 15, at 147.

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Professor Kozel's book: "Judges come and go but the law remains the law. That is the promise of precedent" (p. 176).