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Mostly Settled, but Right for Now Book Review Symposium: Settled versus Right: A Theory of Precedent

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MOSTLY SETTLED, BUT RIGHT FOR NOW

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).

*Corinna Barrett Lain*²

Randy Kozel's book, *Settled Versus Right: A Theory of Precedent*, is a laudable effort to make the law more stable, more cohesive, more *impersonal*—to show that “legal rules can endure . . . even as individual justices come and go” (pp. 18, 40).³ The core of the contribution is a proposed doctrine of stare decisis that disentangles deference to precedent from the interpretive methodologies that led to the precedent in the first place, and that so often determine the amount of deference a decision gets—a doctrine that aims to take disputes over interpretive methodology out of the stare decisis equation. Kozel's book is thoughtful and coherent, meticulously making the case for why we need a better theory of precedent and what it ought to look like, while addressing counter-arguments and complexities as they arise along the way. The writing is crisp and clear. The case is persuasive. *Settled Versus Right* is an unequivocal success within its domain.

Importantly, that domain is doctrinal. Kozel's theory of precedent aims to effectuate change within the four corners of the law, and this is just as one might expect—as Kozel himself puts the point, “Stare decisis is, at base, a legal doctrine” (p. 171). It is a set of rules and principles designed to guide the Justices' decisionmaking as to when to defer to precedent even when they

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3. See also RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 176 (2017) (“Judges come and go, but the law remains the law. That is the promise of precedent.”).

think it is wrong. But what happens when we add decisionmaking factors that operate *outside* of legal doctrine into the mix?

In this short essay, I focus on two: the Justices' policy preferences and the extra-legal context in which cases are decided. The first—the Justices' policy preferences—is clearly within the realm of influences that Kozel aims to minimize (and in a perfect world, prevent). Time and again, Kozel extols the virtues of law over the proclivities of individuals, the importance of enduring principles and precepts over the methodological and normative commitments that vary from judge to judge (pp. 27, 36-42, 45-49, 98-99, 103-106, 135, 175-176). These policy preferences operate in and outside of doctrine. They manifest in the Justices' interpretive methodologies, driving the approach to doctrinal decisionmaking that the Justices find attractive, but also predate those methodologies and influence judicial decisionmaking in ways not fully captured in the formal operation of the law.

The second factor—the extra-legal context in which Justices operate—is more clearly non-doctrinal, although as Kozel recognizes, some interpretive methodologies explicitly recognize larger societal change as a doctrinally relevant consideration (pp. 63-69). My interest in extra-legal context is broader than that; my interest is the influence of extra-legal context on the Justices' decisionmaking, whether or not interpretive methodologies recognize that sort of influence as legitimate (or even recognize it at all). In short, my interest is the realm of constitutional reality, as opposed to constitutional law.

In the discussion that follows, I first explain why these non-doctrinal decisionmaking factors matter in a conversation about *stare decisis*, and then explore how they might play out in the doctrine if Kozel had his way. The point is to consider how Kozel's theory of precedent might work in practice as well as theory—that is, to see how it might work beyond the strictly legal domain. As a purely doctrinal project, *Settled Versus Right* naturally assumes that if we fix the doctrine, we'll fix the decisionmaking. I'm not convinced that is true, not when non-doctrinal factors like policy preferences and extra-legal context influence the Justices' decisionmaking too. The best a theory of precedent can do, I submit, is to minimize the most corrosive effects of these non-doctrinal influences—the discarding of precedent based on nothing more than a change in the majority Justices' views—while accommodating the inevitable evolution of the law that comes

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with the passage of time. By this measure, Kozel's proposed doctrine fares remarkably well, limiting the avenues by which non-doctrinal policy preferences might find expression while leaving room for the law of stare decisis to respond to changes in extra-legal context over time. To see what I mean requires a closer look at how these non-doctrinal influences work in the first place, starting with the Justices' policy preferences.

I. THE JUSTICES' POLICY PREFERENCES

On several occasions, Kozel cites *Payne v. Tennessee*⁴ for the sort of Supreme Court decisionmaking that he hopes to prevent with his theory of precedent (pp. 4, 35, 124-125), and the case works well for highlighting the influence of non-doctrinal policy preferences too. *Payne* is the 1991 decision that held that the Eighth Amendment does not bar the admission of victim impact evidence in the penalty phase of a capital trial.⁵ In so doing, it overruled not one decision, but two. In *Booth v. Maryland*, decided in 1987, the Supreme Court held that the Eighth Amendment barred the introduction of victim impact statements, in part because those statements served only to inflame passions, and in part because those statements introduced an element of arbitrariness into death sentencing, allowing for the imposition of death based on how beloved a victim was, or, worse yet, how well the victim's family could express grief.⁶ Two years later, in 1989's *South Carolina v. Gathers*, the Court followed *Booth* and extended its reach to prosecutorial comments relating to victim impact evidence as well.⁷ *Payne* wiped out both decisions in one fell swoop, famously stating that "stare decisis is not an inexorable command,"⁸ and establishing itself as ground zero for the sort of instability in the stare decisis doctrine that makes Kozel's project so worthwhile today.

4. 501 U.S. 808 (1991).

5. *See id.* at 827.

6. 482 U.S. 496, 505-07; 521 n.8 (1987). *See also Payne*, 501 U.S. at 846 (Marshall, J., dissenting) ("As Justice Powell explained in *Booth*, the probative value of such evidence is always outweighed by its prejudicial effect because of its inherent capacity to draw the jury's attention away from the character of the defendant and the circumstances of the crime to such illicit considerations as the eloquence with which family members express their grief and the status of the victim in the community.").

7. 490 U.S. 805, 810-11 (1989) (reiterating reasoning in *Booth* and applying it to the prosecutor's argument to the jury).

8. *Payne*, 501 U.S. at 828.

As to what had changed in the intervening four years, the answer was twofold, and their names were Brennan and Powell. Both Justices had been part of the *Booth* majority and both had retired by 1990, sending Justices Souter and Kennedy to the bench in their stead and shifting the balance on the Supreme Court. In a stinging dissent, Justice Marshall called out the result in *Payne* for what it was, stating:

Power, not reason, is the new currency of this Court's decisionmaking Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did There is nothing new in the majority's discussion of the supposed deficiencies in *Booth* and *Gathers*. Every one of the arguments made by the majority [today] can be found in the dissenting opinions filed in those two cases, and, as I show in the margin, each argument was convincingly answered. . . .⁹

It is tempting to say that the dissent was just being the dissent, but what Justice Marshall wrote was true—neither the law nor the factual understandings underlying *Booth* and *Gathers* had changed over the previous four years. None of the arguments were new. Indeed, not even a shift in the predominant interpretive methodology on the Court can explain the result in *Payne*. The majority's opinion wasn't about original meaning, or original intent, or a reading of constitutional text; it was about fairness through and through. A capital trial is all about the defendant, the majority reasoned; it ought to be about the victim too.¹⁰ Indeed, in *Payne*, Justice Scalia wrote separately to note that this keen sense of fairness had “found voice in a nationwide ‘victims’ rights’ movement” that deserved respect lest it “diminish respect for the courts and for law itself”¹¹—quite the statement given his disdain

9. *Id.* at 484–86 (Marshall, J., dissenting).

10. *See id.* at 825 (“[J]ust as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.”); *id.* at 826 (“The Supreme Court of Tennessee in this case obviously felt the unfairness of the rule pronounced by *Booth* when it said: ‘It is an affront to the civilized members of the human race to say that, at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant . . . but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.’”).

11. *Id.* at 834 (Scalia, J., concurring).

for constitutional decisionmaking that considered political mobilization in a different, but nearly contemporaneous context.¹²

If *Payne* teaches anything, it is that the Justices' policy preferences will, in practice, impact the Court's fidelity to precedent even when interpretive methodologies provide no cover for those views. Indeed, as Fred Schauer's essay in this volume notes, empirical evidence has long shown this to be true.¹³ Non-doctrinal policy preferences impact the Justices' doctrinal decisionmaking, and the doctrine of stare decisis is no exception to that rule.

Two further illustrations round out the point, each offering a slightly different insight. The first is *Dickerson v. United States*, the 2000 decision that ostensibly reaffirmed the constitutional legitimacy of *Miranda v. Arizona*.¹⁴ On several occasions, Kozel cites *Dickerson* as an example of the Justices properly deferring to precedent (pp. 35, 79-80, 118), and this is readily understandable—the majority in *Dickerson* explicitly declined to overrule *Miranda* with the statement, “Whether or not this Court would agree with *Miranda*'s reasoning and its rule in the first instance, stare decisis weighs heavily against overruling it now.”¹⁵

But the case is not the star of stare decisis that it seems. Chief Justice Rehnquist, who authored the opinion in *Dickerson*, had been undermining *Miranda*'s constitutional legitimacy for years;¹⁶ indeed, he had written a DOJ memo condemning the decision before joining the bench, and may well have written a second DOJ memo opining that *Miranda* warnings “are not themselves

12. See *Planned Parenthood v. Casey*, 505 U.S. 833, 999–1000 (1992) (Scalia, J., concurring in judgment and dissenting in part) (“How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus.”).

13. See Frederick Schauer, *On Treating Unlike Cases Alike*, 33 CONST. COMMENT. 437, 439–40 (2018). For renewed validation of the original work on the attitudinal model, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

14. 530 U.S. 428 (2000) (striking down legislation purporting to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966)).

15. *Dickerson*, 530 U.S. at 443.

16. See, e.g., *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (Rehnquist, C.J., writing for the majority) (describing *Miranda* as “procedural safeguards [that] were not themselves rights protected by the Constitution”); *New York v. Quarles*, 467 U.S. 649, 654 (1984) (Rehnquist, C.J., writing for the majority) (“The prophylactic *Miranda* warnings . . . ‘are not themselves rights protected by the Constitution. . . .’”);

constitutional absolutes”¹⁷—the same position he would later take as a Justice and that, ironically, would be the basis for defending the statute that the Supreme Court would strike down in *Dickerson*. Why, then, would Chief Justice Rehnquist author an opinion rejecting a position that he himself had taken? Why would he lead the charge to affirm the constitutional legitimacy of *Miranda* when he had been undermining it for years?

The answer is necessarily speculative, but it is worth noting that the vote in *Dickerson* was 7-2, and would have been a solid 6-3 even if Chief Justice Rehnquist had joined the dissenters. Rehnquist could not change the outcome, but by siding with the majority, he could save the opinion for himself and uphold *Miranda* in the weakest way humanly possible—which is exactly what he did. Although the majority opinion described *Miranda* as a “constitutional rule” that could not be invalidated by statute,¹⁸ it refused to say (despite taunting by the dissenters) that *Miranda* was constitutional in the only way that mattered—it refused to say that violating *Miranda* was a violation of the Constitution too. As Justice Scalia noted wryly in dissent, “[The opinion] cannot say that, because a majority of the Court does not believe it [to be true].”¹⁹ What *Dickerson* illustrates best, I submit, is not fidelity to precedent, but rather the Justices’ ability to undermine stare decisis even when it looks like they are following the rule.

The final case, briefly, is *Hudson v. Michigan*, a 2006 decision that held that knock-and-announce violations of the Fourth Amendment do not merit the exclusionary rule.²⁰ *Hudson* would be relatively unremarkable, were it not for what the Supreme Court had to say about the exclusionary rule itself. In rejecting the

17. The first DOJ memo was an internal 19-page memorandum from Rehnquist to then-Associate Deputy Attorney General John Dean. The second was an external memo, sent to all US attorneys and ostensibly from then-Attorney General John Mitchell, while Rehnquist was the head of the Office of Legal Counsel. For an excellent discussion of both memos, see Yale Kamisar, *Dickerson v. United States: The Case That Disappointed Miranda’s Critics - And Then Its Supporters*, in *THE REHNQUIST LEGACY* 106, 112–14 (Curtis Bradley ed., 2006).

18. See *Dickerson*, 530 U.S. at 432, 444.

19. *Id.* at 446 (Scalia, J., dissenting); see also *id.* at 445 (“One will search today’s opinion in vain, however, for a statement (surely simple enough to make) that . . . the use at trial of a voluntary confession, even when a *Miranda* warning or its equivalent has failed to be given—violates the Constitution. The reason the statement does not appear is . . . that Justices whose votes are needed to compose today’s majority are on record as believing that a violation of *Miranda* is not a violation of the Constitution.”).

20. 547 U.S. 586 (2006).

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exclusionary rule's application and explaining its hostility to the rule, the Court stated, "We did not always speak so guardedly," adding: "Expansive dicta in *Mapp*, for example, suggested wide scope for the exclusionary rule. ('[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in state court')." ²¹ The problem is what 1961's *Mapp v. Ohio* actually said: "*We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in state court.*" ²² I added emphasis to the quote to most clearly make the point: The Supreme Court in *Hudson* (Justice Scalia writing for the majority) lopped off the words "We hold that" and then called *Mapp*'s holding dicta. Notwithstanding Kozel's claim that the holding-dicta divide is more porous than it seems, *Hudson* is a stark illustration of how the Justices' characterization of precedent can erode stare decisis too.

All this is to say that Kozel's project of producing a coherent theory of precedent is complicated by a much messier decisionmaking reality, one that resists rules and precepts when those constructs get in the way of where the Justices want to go. This is not to fault Kozel's project for being limited to the doctrinal context. Doctrinal work is hugely important; indeed, it is the very fabric of the law itself. But it is to say that the Justices' policy preferences will affect how Kozel's theory works in practice, and that how all this might play out is a worthy question of its own.

II. EXTRA-LEGAL CONTEXT

The second non-doctrinal influence—the extra-legal context in which the Justices operate—is equally important and impactful. Kozel recognizes this influence in the context of interpretive methodologies that explicitly condone it, but my focus here is neither normative nor doctrinal. My focus is on the larger historical backdrop against which doctrinal decisionmaking occurs, which may or may not be captured in doctrine and may or may not be something to condone.

Sometimes the influence of extra-legal context is a good thing. Consider, for example, the Supreme Court's iconic 1954

21. *Id.* at 591 (citation omitted).

22. 367 U.S. 643, 655 (1961). *See also Hudson*, 547 U.S. at 608 (Breyer, J., dissenting).

decision in *Brown v. Board of Education*.²³ It wasn't doctrine that led to the one of the most (if not *the* most) celebrated decisions in Supreme Court history; indeed, one searches in vain for any doctrinal recognition whatsoever of the tectonic shift in race relations that we now know was driving the Justices' decisionmaking in the case.²⁴

Other times the influence of extra-legal context is a bad thing. Examples in this category include *Plessy v. Ferguson*, the 1896 decision that upheld "separate but equal" racial classifications;²⁵ *Buck v. Bell*, the 1927 decision that upheld involuntary sterilization of the hereditary "feebleminded";²⁶ and *Korematsu v. United States*, the 1944 decision that upheld the removal of Japanese Americans from their homes during World War II.²⁷ All three of these decisions are among the most maligned in Supreme Court history, but as I have argued elsewhere, the historical context in which they were decided made it almost unfathomable for the Court to have ruled the other way.²⁸ For better or worse, extra-legal context matters—regardless of whether it matters in formal doctrine—because it determines what is plausible, and influences what is attractive, in the realm of rights claims.

One might contend that none of this holds for decisions based on originalist methodology, which explicitly rejects the notion of a living Constitution. But that would not be true. Consider, for example, *District of Columbia v. Heller*, the 2008 decision that recognized an individual right to possess firearms independent of service in state militia.²⁹ *Heller* is, as others have noted, a

23. 347 U.S. 483 (1954).

24. See THE SUPREME COURT IN CONFERENCE (1940–1985) 649 (Del Dickson ed., 2001) (quoting Justice Reed in conference discussion on *Brown* as stating, "Think of the advancements. . . Segregation is gradually disappearing."); *id.* at 652 (quoting Justice Jackson in *Brown* conference as stating that segregation was "nearing an end"); *id.* at 660 (quoting Justice Minton in *Brown* conference as stating, "The only justification for segregation is the inferiority of the Negro. So many things have broken down these barriers."); *id.* at 658 (quoting Justice Burton in *Brown* conference as noting "a trend away from separation of the races in restaurants). For additional statements outside the conference context, particularly from Justices Frankfurter and Clark, see Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 *Geo. L.J.* 113, 123–24 (2012).

25. 163 U.S. 537 (1896).

26. 274 U.S. 200 (1927).

27. 323 U.S. 214 (1944).

28. See Corinna Barrett Lain, *Three Supreme Court "Failures" and a Story of Supreme Court Success*, 69 *VAND. L. REV.* 1019, 1021–22 (2016).

29. 554 U.S. 570 (2008).

testament to the “Triumph of Originalism”³⁰—it is “the most explicitly and self-consciously originalist opinion in the history of the Supreme Court.”³¹

But *Heller* is difficult, if not impossible, to understand outside of the extra-legal context in which it was decided. For the first two hundred years of the Second Amendment’s existence, the right to bear arms was understood as a response to concerns raised during the ratification process that without the amendment, Congress would be able to disarm state militias.³² Indeed, no court—state or federal—had ever ruled otherwise; the first time a lower court invoked the Second Amendment to invalidate gun control legislation was the D.C. Circuit’s 2007 ruling in *Heller* itself.³³ When the NRA began its campaign to change this understanding of the Second Amendment—and it literally was a campaign³⁴—then-Chief Justice Burger, a Nixon appointee, publicly called the effort “one of the greatest pieces of fraud, I repeat the word fraud, on the American public by special interest groups that I have ever seen in my lifetime.”³⁵ Robert Bork, one of originalism’s original

30. Linda Greenhouse, *Three Defining Opinions*, N.Y. TIMES, July 13, 2008, at WK4.

31. Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 246 (2008).

32. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008) (discussing evolution of the claim that the Second Amendment contained an individual right to bear arms, starting with the presumption from the start—recognized in *United States v. Miller*, 307 U.S. 174 (1939), numerous lower court decisions, and various Congressional reports in the 1960s, when Congress was considering gun control legislation in the wake of President Kennedy’s assassination—that it did not); see also *Heller*, 554 U.S. at 637 (Stevens, J., dissenting) (noting that the Second Amendment “was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States.”).

33. See *Parker v. Dist. of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *aff’d*, Dist. of Columbia v. *Heller*, 554 U.S. 570 (2008); see also Sunstein, *supra* note 31, at 252 (“A quiz question: when was the first time a lower federal court invoked the Second Amendment to invalidate a state or federal law? Answer: *Heller* itself, in 2007. In well over half a century, the Court had many opportunities to reject the established view within the lower federal courts; it never did so.”).

34. See Siegel, *supra* note 32, at 202–36 (providing historical account of NRA position on gun control, which in the 1960s was supportive of reasonable regulation but in the 1970s shifted to a libertarian “no compromise” mode, and detailing the campaign that came with the shift).

35. See *id.* at 224 (quoting Chief Justice Burger’s comments on THE MACNEIL LEHRER NEWS HOUR (PBS Television Broadcast Dec. 16, 1991)).

thinkers, had a more doctrinal response to the NRA's interpretive claim: "But that's not the original understanding."³⁶

Fast forward to 2008, when the majority in *Heller* disagreed. Lacking the space here for a deep dive into the historical record, it suffices to say that both the majority and dissent made claims about the original meaning of the Second Amendment, and the majority's support for its newfound claim was problematic in numerous ways.³⁷ Yet my point here is less about whether the result in *Heller* was right or wrong, and more about the role of extra-legal context in producing that result in the first place. Even if the majority in *Heller* got the history right, that still doesn't explain why, as Cass Sunstein notes, it took the Supreme Court over two hundred years to figure it out.³⁸ What made *Heller* happen in 2008 when it was utterly unimaginable just a few decades earlier? The answer is the rise of an immensely influential gun rights movement, one that produced position papers, funded scholarship, lobbied legislatures, supported political campaigns, and changed the public discourse, all with the aim of transforming constitutional politics into constitutional law.³⁹ This is not to say that the majority in *Heller* was not interpreting the Second Amendment in good faith; I assume it was. But it is to say that *Heller* was as much a product of contemporary understandings as

36. See *id.* (quoting Robert Bork's comments in Miriam Bensimhorn, *Advocates: Point and Counterpoint, Laurence Tribe and Robert Bork Debate the Framers' Spacious Terms*, LIFE MAGAZINE, Fall 1991).

37. For an extended discussion of the reasons why the majority's reading of the Second Amendment did not make sense as a matter of original intent or original meaning, see Siegel, *supra* note 32, at 196-201. See also Sunstein, *supra* note 31, at 255-57 (discussing work of historians who insist that the Supreme Court got the history in *Heller* wrong and concluding that "the subtlety, nuance, acknowledgement of counterarguments, and (above all) immersion in Founding-era debates, characteristic of good historical work, cannot be found in *Heller*"). Interestingly (but an aside given the reason I discuss *Heller* here), the majority in *Heller* also disregarded the doctrine of stare decisis. See *infra* note 41.

38. See Sunstein, *supra* note 31, at 252 ("Even if the Court's understanding of the original public meaning is correct, why did the Court vindicate that understanding in 2008? Why not in 1958, or 1968, 1978, 1988, or 1998? . . . Indeed, for many decades, no member of the Court showed the slightest inclination to hold that the Second Amendment protects the right to have a gun for nonmilitary uses. Why did the Court accept that view in 2008?").

39. See Siegel, *supra* note 32, at 202-36 (providing detailed account of gun rights movement); *id.* at 224-25 (noting that between 1970 and 1989, at least 19 of the 27 law review articles espousing the view that the Second Amendment protected an individual right to bear arms were written by lawyers who were either directly employed by, or represented, the NRA or other guns rights organizations, although they did not always self-identify in the author's footnote).

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originalist ones, even though, ironically, the doctrine was fiercely against considering contemporary views.

The point in all this, here again, is that extra-legal context (like the Justices' policy preferences) adds a wrinkle to Kozel's project. In theory, fixing the doctrine of stare decisis will fix the Justices' decisionmaking in this area (at least as much as one can in a world of diverse interpretive methodologies). But in practice, extra-legal context will affect the Justices' decisionmaking too, and how that might play out in the context of Kozel's theory is a question worth considering all its own.

III. CONSIDERING KOZEL'S THEORY IN PRACTICE

In the remainder of this essay, I consider how Kozel's theory might work in practice—that is, how a theory built for the purely doctrinal domain might work when non-doctrinal decisionmaking considerations like policy preferences and extra-legal context are added to the mix. To do that, I first summarize Kozel's proposed doctrine. I then explore how the doctrine might play out with these non-doctrinal influences in mind.

As previously noted, the central aim of Kozel's proposed doctrine is to take disputes over interpretive methodology out of the stare decisis equation. As Kozel puts the point, the aim is “to demand a special justification for overruling a precedent . . . that goes beyond disagreement with the precedent's reasoning” (p. 118). To effectuate that aim, Kozel proposes to eliminate current stare decisis considerations like jurisprudential coherence, flagrancy of error, and a precedent's perceived harmfulness; these considerations, he reasons, too closely track the Justices' views of a decision on the merits (pp. 103-104). At the same time, Kozel proposes to keep (albeit in narrowly construed form) current considerations such as procedural workability, factual accuracy, and reliance expectations; these considerations, he reasons, are relatively distinct from an inquiry into a decision's methodological merits (pp. 103-104).

Knowing the general contours of Kozel's proposed theory, the discussion can now turn to how it might work in practice. Again, in my mind, the best a theory of precedent can do is to minimize the most corrosive effects of non-doctrinal decisionmaking—the Justices' proclivity to overrule precedent just because they disagree with it—while accommodating

transformations in the extra-legal context that would impact constitutional decisionmaking in any event and otherwise force the Justices to mangle and manipulate the doctrine. With these goals as my guide, how does Kozel's proposed doctrine do?

The answer is: remarkably well, actually. Consider first the doctrine's ability to constrain the Justices' policy preferences. I start with the frank recognition that if the Justices are determined to overrule precedent, that's what they're going to do. To borrow from an earlier context, if the Justices are willing to lop off the words "We hold that" and then call what follows dicta, there is no theory of precedent that can hold them.⁴⁰ There is nothing that doctrine can do.

Short of that, however, Kozel's proposed doctrine would appear to constrain as much as possible the Justices' ability to discard precedent based on pure policy preferences—largely by eliminating doctrinal considerations that allow for differences in interpretive methodology to come into play. By eliminating considerations like jurisprudential coherence, flagrancy of error, and a precedent's perceived harmfulness, Kozel's proposed doctrine removes the chief doctrinal considerations that allow for a Justice's disagreement with precedent on the merits to come into play. Granted, Kozel's interest is the purely doctrinal domain; his aim in this project is, again, to minimize the corrosive effects of interpretive pluralism on the doctrine of stare decisis. But in doing so—in minimizing the doctrine's capacity to reflect disagreement with precedent on the merits—Kozel manages to minimize the corrosive effects of the Justices' policy preferences too.

This is not to say that Kozel's proposal would completely eliminate the opportunity for policy preferences to seep through in the doctrine. Justices who disagree with precedent on the merits could still claim that a decision is unworkable in practice, or that it is based on factual inaccuracies, or that it has relatively low reliance interests supporting it.⁴¹ Justices would also still have

40. See *supra* notes 20–22 and accompanying text.

41. *Heller* is a striking example of the latter. Compare *Dist. of Columbia v. Heller*, 554 U.S. 570, 637 (2008) (Stevens, J., dissenting) ("Since our decision in [*United States v. Miller*, 307 U.S. 174 (1939),] hundreds of judges have relied on the view of the Amendment we endorsed there; we ourselves affirmed it in 1980.") with *id.* at 2815 n. 24 ("As for the 'hundreds of judges' who have relied on the view of the Second Amendment Justice Stevens claims we endorsed in *Miller*: If so, they overread *Miller*. And their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of

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room to disregard a decision by reading the scope of its ruling narrowly, a problem that Kozel recognizes as “thorny and contentious,” with no easy answers (p. 7). Unless the case under consideration is on all fours with precedent, the Justices’ ruling in that case will either extend the precedent’s reach or limit it, and where there is room to do either, the Justices’ normative pre-commitments will bleed through. But I see these sorts of opportunities for policy preferences to find expression in the doctrine as a necessary cost of doing business in this area, and the best that even a so-called “second best” theory of precedent can do (p. 13).⁴²

I consider separately Kozel’s recognition of “extraordinary harm” as a doctrinally legitimate consideration in exceptional cases (pp. 14, 123). These cases, Kozel explains, are those in which the precedent is “not merely unfair, but profoundly immoral,” an “intolerable affront” to democratic or other foundational norms (p. 122). In Kozel’s mind, *Brown v. Board of Education*’s rejection of “separate but equal” in *Plessy* can be readily understood in this manner (p. 102). The problem, however—at least by way of measuring the doctrine against its ability to minimize the influence of policy preferences—is that this doctrinal consideration is all about disagreement with a decision on the merits. It is simply a safety valve for when a majority of Justices conclude that their disagreement with a decision on the merits is extreme.

The question then becomes whether the “extraordinary harm” exception is the exception that swallows the rule, whether it invites the very same merits-based treatment of precedent that Kozel works so hard to exclude elsewhere. As a cautionary tale, *Payne v. Tennessee* is once again instructive. In *Payne*, the majority quoted the Tennessee Supreme Court’s articulation of the fairness point that drove its decisionmaking, stating:

It is an affront to the civilized members of the human race to say that, at sentencing in a capital case, a parade of witnesses may praise the background, character, and good deeds of [the

millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms.”)

42. For a discussion of Kozel’s “second-best” approach to the scope of precedent, see Kozel *supra* note 3, at 145–54.

defendant] . . . but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.⁴³

I added emphasis to the opening line, so readers probably know where I'm going: If *Payne* is a prime example of the sort of decisionmaking that Kozel's theory of precedent aims to prevent, it is not clear that his proposed doctrine would actually do that here. What it might do instead is simply incentivize the Justices to state their disagreement with precedent in the strongest of terms.

That said, by creating a safety valve in the doctrine for the Justices to express their disagreement with precedent on the merits, and by limiting the relevance of those disagreements to the "rare and exceptional situations" (p. 123) where the precedent is extraordinarily harmful (as opposed to just flagrantly wrong), Kozel's proposed doctrine at least channels non-doctrinal policy preferences into a forum where they can be debated directly. As Kozel puts the point, it places on the Justices an "argumentative burden" to justify why adherence to precedent is so fundamentally wrong that discarding it under the doctrine of stare decisis is right (p. 133). Here again, this strikes me as perhaps the best that a doctrine not built for recognizing the influence of non-doctrinal policy preferences can do.

What about the doctrine's ability to accommodate the inevitable influence of extra-legal change? Here the question is not what Kozel's proposed doctrine is able to keep out, but rather what it is able to let in. Yet the answer is the same: it does remarkably well. To see why, I return to what Kozel identifies as the core considerations under his proposed doctrine: a precedent's procedural workability, factual accuracy, and reliance expectations.

It is entirely possible that the sort of tectonic extra-legal change I have discussed might find expression in a precedent's procedural workability, but I don't see that as an obvious outlet for extra-legal change,⁴⁴ so I will focus my comments on Kozel's other two doctrinally legitimate considerations, starting with

43. *Payne v. Tennessee*, 501 U.S. 808, 826 (1991) (quoting *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990)).

44. Kozel construes the procedural workability component of his second-best doctrine of stare decisis narrowly, focusing only on whether the rule is "clear enough for courts to understand and apply" as opposed to "hopelessly convoluted or exceedingly vague" (p. 110). I don't see extra-legal context impacting that analysis, but I also don't rule it out.

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factual accuracy. As Kozel notes in his discussion of this consideration, “Judicial decisions contain factual premises, and those premises can be wrong” (p. 110). When that happens—that is, when a decision’s factual premise has eroded to such an extent that it no longer supports the holding—Kozel’s theory of precedent maintains that the precedent can be discarded (pp. 111-113).⁴⁵ Importantly, Kozel construes the notion of factual accuracy narrowly. He is interested in only the most objective of changes in facts (technological advances are an example he uses (p. 112)) as opposed to “the opinions and values through which reality is understood” (p. 111).

But I don’t see that distinction as doing much work in practice—how are the Justices to know when a change in facts is objective or just objective through the lens in which their reality is understood? Extra-legal context changes both facts and the way we view them, and distinguishing between the two would seem an impossible task. But more to the point, when a decision’s factual premise has eroded to such an extent that it no longer supports the holding, that is true whether the eroded premise is the result of technological change or some change in a social fact.

Consider again *Brown v. Board of Education*, which Kozel sees as too broad an application of the factual accuracy consideration (p. 111),⁴⁶ but I see as an instructive example. In *Brown*, the Supreme Court cited new research establishing the harms of racially segregated schooling as a changed circumstance that rendered *Plessy* obsolete.⁴⁷ But more than just research had changed in that case. As the Justices later said of *Brown* in 1992: “[T]he *Plessy* Court’s explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954” that the Court

45. Kozel does not say that precedent *must* be discarded in these situations, only that it can be without breaking the stare decisis rules (p. 113).

46. I leave to the reader what it says about Kozel’s theory that he needs an “extraordinary harm” exception to accommodate *Brown*, having drawn his doctrinally legitimate considerations so narrowly that under his theory, they would not otherwise legitimate *Brown*’s rejection of *Plessy*, even as late as 1954.

47. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). Returning to my first point in text, it is not clear to me (and I can’t imagine how it would be clear to the Justices) how the new research in *Brown* would not be an objective fact, but technological change would be. Indeed, one could argue that research establishing a changed fact is actually more objective than the Justices determining a changed fact (like technological change) for themselves. Perhaps the answer is in the obviousness of the change, but at the Supreme Court level, rarely is anything that obvious.

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in *Brown* was right to reject it.⁴⁸ The implicit premise of *Plessy* was that the races were unequal; once the Justices recognized that premise not to be true, the force of *Plessy* as precedent dissipated, allowing the Justices to forge a new rule.⁴⁹

In this regard, *Brown* is but one example of a much larger phenomenon; I could have cited the Supreme Court's recognition of changed facts as the mechanism by which larger societal change made its way into the law in the women's rights or gay rights context instead.⁵⁰ As others have recognized and developed at length, fact-based adjudication is a primary means by which our slowly evolving understanding of the world finds expression in the law; indeed, the Supreme Court's recognition of changed facts is often the first step in the evolution of larger constitutional norms.⁵¹ As Lawrence Friedman puts the point, "The obvious becomes dubious, the dubious obvious," and the law responds accordingly.⁵² Kozel's recognition of factual accuracy as a legitimate consideration in the doctrine of stare decisis provides an important outlet for extra-legal context to find expression in the law,⁵³ even though this is not his aim in including it.

48. *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992). For an earlier, but related example, see *Morgan v. Virginia*, 328 U.S. 373, 383 (1946) (striking down de jure segregation in interstate commerce and noting that "People of all races travel today more extensively than in 1878 when this Court first passed upon state regulation of racial segregation in commerce").

49. Indeed, one can see this exact line of reasoning in the Justices' comments in the *Brown* conference. See THE SUPREME COURT IN CONFERENCE, *supra* note 24, at 660 (quoting Justice Minton as stating, "The only justification for segregation is the inferiority of the Negro. So many things have broken down these barriers"). For additional *Brown* conference comments, see *supra* note 24.

50. Compare *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (noting "the natural and proper timidity and delicacy which belongs to the female sex" as justifying their exclusion from the practice of law) with *Reed v. Reed*, 404 U.S. 71, 75 (1971) (noting that today "a large proportion of estates, both intestate and under wills of decedents, are administered by surviving widows" in invalidating as arbitrary a state's statutory presumption that men administer estates). See also *Obergefell v. Hodges*, 135 S.Ct. 2584, 2596 (2015) ("For much of the 20th century, moreover, homosexuality was treated as an illness. . . . Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.").

51. For an excellent discussion of the phenomenon, see Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006).

52. Lawrence M. Friedman, *Judging the Judges: Some Remarks on the Way Judges Think and the Way Judges Act*, in NORMS AND THE LAW 139, 154 (John N. Droback ed., 2006).

53. Indeed, attentiveness to stare decisis while preserving judicial flexibility may be why fact-based adjudication is so prevalent in the first place. See Goldberg, *supra* note 51, at 2003–07.

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The same can be said of the reliance interests that Kozel's theory of precedent deems a legitimate consideration in the doctrine of stare decisis. As Kozel recognizes, Supreme Court decisions by their nature create significant reliance expectations (pp. 116-118); the country has heard the Court's ruling on an issue, and we are told it is the final word.⁵⁴ It is only natural that private and public actors will rely on those decisions as they go about their own affairs, and only right to consider those reliance interests in considering whether precedent ought to be discarded. Here again, Kozel construes the relevant reliance interests narrowly; he is interested in public and private reliance interests—reliance by the coordinate branches, private expectations grounded in property and contract, and the like—but not “reliance by society at large” (p. 117). The latter reliance interests, he reasons, “do not depend on the concrete expectations of stakeholders” and are “necessarily more abstract” (p. 117).

I don't get it. The distinction seems arbitrary not only because both types of reliance interests matter, and matter deeply to those doing the relying, but also because (and more importantly for Kozel's project) both present non-merits-based inquiries. One need not get tangled up in dueling interpretive methodologies to assess reliance interests *of any of these sorts* as an analytically independent inquiry.

That said, I'm once again not sure how much the theory's distinction would matter in practice, as I think the line it draws has plenty of blurred edges. If the Supreme Court were to consider overturning its recognition of the right to same-sex marriage, for example, would the reliance interest at stake be a social interest not entitled to weight, or an interest grounded in contract and property rights that ought to be weighed heavily? It may be the case that some social reliance interests are more purely social—that is, not bound up in property and contract rights and the like—but my guess is that many cases that give rise to “reliance by society at large” in turn give rise to concrete expectations by private actors and the coordinate branches as well.

54. Just how final the Supreme Court's word really is, is a question all its own and one I have explored elsewhere. See Corinna Barrett Lain, *Soft Supremacy*, 58 WM. & MARY L. REV. 1609 (2017).

To the extent I'm right about that (and perhaps even if I'm not), one can imagine how the consideration of reliance interests would allow Kozel's proposed doctrine to accommodate the sort of extra-legal change that inevitably influences the evolution of the law over time. Reliance interests dissipate as society passes a precedent by. Laws gradually become less enforced until they slip into a state of desuetude, and decisions get distinguished, chipped away, and ignored until they die on the vine. The process proceeds slowly, but it is as natural as the air we breathe. In recognizing reliance interests as a legitimate consideration in the doctrine of *stare decisis*, Kozel's theory of precedent leaves room for changes in extra-legal context to find expression in the law too. And here again, that's about the best that a doctrine not built for the expression of non-doctrinal influences can do.

CONCLUSION

In retrospect, I have asked much of Kozel's theory of precedent. In exploring how his theory would work in practice, I have measured it against a standard that aims to prevent changes in the law based on changes in personnel, while allowing changes in the law based on changes in society—a standard that rejects abrupt change but embraces that which is incremental. That's a tall order to fill. Yet that is the balance at the core of the complex doctrine of *stare decisis*, and Kozel's theory of precedent improves upon that balance significantly.

In the end, Kozel is right—his “second-best” theory of precedent is the best one can do in light of the complex legal landscape in which the Justices operate—but he is more right than he knows. In resolving the tension between settled versus right, Kozel's theory produces an equilibrium in practice that might best be described as “mostly settled, but right for now.” It is mostly settled—that is, settled in a way that gives stability to the law—but also right for now, as in, right for the time being, with the recognition that larger societal change may someday call for constitutional change as well. And that's about the best one can do in light of the *extra-legal* landscape in which the Justices operate too.