BOOK REVIEW

PRECEDENT IN A POLARIZED ERA

SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT. By Randy J. Kozel. Cambridge University Press. 2017.

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Introduction

Randy J. Kozel's new book, *Settled Versus Right: A Theory of Precedent*, offers a timely and important contribution to the age-old debate over stare decisis. Advocating an institutional rather than personal view of judicial authority, he urges judges and Justices to focus on nonmerits factors such as workability, factual accuracy, and reliance in deciding whether to overrule most types of constitutional precedent. Judges today must craft constitutional doctrine in an environment characterized by what Kozel (rather politely) calls "interpretive pluralism": the polity is riven by sharp disagreements not only over particular results in constitutional cases, but also over interpretive method, and even the character of law and the nature of legal inquiry. Focusing on the merits in that environment, Kozel warns, is a road to perdition. Unable to agree on which past decisions are most wrong, and thus most in need of overruling, we will keep goring each other's oxen until we are knee-deep in blood. To avert this unappealing outcome, Kozel proposes that judges and Justices maintain a stable peace between warring constitutional factions by

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generally adhering to precedent unless nonmerits factors support a course correction.

Kozel's book is exceptionally timely for two reasons. First, the structural problem he identifies—sharp and pervasive disagreement over legal issues—seems only to have gotten worse in the months since his book appeared. The Supreme Court's most recent Term, indeed, was chock full of cases presenting such sharp political and methodological disagreements.[1] In two cases, moreover, the Court self-consciously overruled precedent, ostensibly (though unconvincingly) for reasons consistent with Kozel's theory.[2] Second, the most recent Term also proved to be Justice Anthony Kennedy's last, thus giving President Trump the opportunity to appoint a second Justice and cement a conservative majority.[3] Trump's choice of then-Judge Brett Kavanaugh, furthermore, led to an exceptionally bitter confirmation fight featuring allegations of sexual assault among other things.[4] For all these reasons, it seems safe, then, to expect many more fights over stare decisis in the years ahead, and Kozel's cogent articulation of a workable theory will at least provide a basis for evaluating such disputes through analysis rather than intuition.

Sadly, however, the same developments that make Kozel's contribution so timely may well limit its influence. Amid sharp partisan disagreement, with a newly emboldened conservative majority on the Court, the institutional outlook Kozel advocates is unlikely to restrain the Court from delivering the goods, in at least some cases, for the political coalition its majority represents. By the same token, partisan pressure on courts, combined with legislative gridlock and governing incapacity due to partisan paralysis, may tempt courts to try solving problems better left to the political process, even when doing so requires departing from settled understandings. At the least, two cases overruling precedent in the last Term suggest such dynamics are likely: in one, *Janus v. American Federation of State, County & Municipal Employees, Council 31*, the Court overruled a disfavored precedent for transparently ideological reasons; in the other, *South Dakota v. Wayfair, Inc.*, it took responsibility upon itself for updating longstanding Dormant Commerce Clause principles despite Congress's failure to do so.[5]

Kozel's proposal might then go unheeded, but his contribution is no less valuable for that. By showing that a value-neutral approach to precedent is at

1 *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018); Gill v. Whitford, 138 S. Ct. 1916 (2018); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

2 *See* Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

3 *See* Adam Liptak & Alicia Parlapiano, *Conservatives in Charge, the Supreme Court Moved Right*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html.

4 *See* Seung Min Kim & John Wagner, *Divided Senate Clears Way for Kavanaugh's Confirmation to Supreme Court*, WASH. POST (Oct. 6, 2018), https://www.washingtonpost.com/politics/kavanaugh-vote-hours-before-a-key-test-grassley-says-he-doesnt-know-how-it-will-go/2018/10/05/a71d92ba-c886-11e8-b1ed-1d2d65b86d0c_story.html?utm_term=.739e38598e2d.

5 *See Janus*, 138 S. Ct. at 2460; *Wayfair*, 138 S. Ct. at 2099.

least possible, Kozel has provided a means of calling judges to account when they pursue an ideological agenda instead. He has also powerfully defended an institutionalist understanding of judicial authority at a time when it may be under threat. To the extent judges allow erosion of that understanding through incautious disregard for precedent, we will all be worse off.

My Review begins below in Part I with a brief synopsis of Kozel's argument. Part II then discusses his theory's particular value, and challenges, in our historical moment of acute polarization and political conflict over constitutional law. To make Part II's claims more concrete, Part III then turns to *Janus* and *Wayfair*. It uses the two cases to illustrate pressures courts may face in the years ahead and assesses how well these decisions accord with Kozel's theory. The Review ends with a conclusion reflecting more broadly on the importance of stare decisis and other institutional restraints in the current moment.

I. KOZEL'S THEORY

Kozel's overall objective is to "develop[ ] a theory of precedent designed to enhance the stability and impersonality of constitutional law."[6] Kozel frames his theory, however, not as a theory of precedent for all time, but rather as a theory appropriate for our particular historical moment. "The American legal system," he observes, "has not reached anything approaching consensus regarding the proper method for understanding and applying the Constitution."[7] On the contrary, "US law is home to pervasive disagreement over constitutional interpretation."[8] This context, he argues, requires a theory of precedent that can reinforce an impersonal and institutional understanding of judicial authority while taking account of "the unique challenges posed by disagreements—good-faith, principled disagreements—about the proper ends and means of constitutional interpretation."[9]

Kozel's solution is to refocus the stare decisis inquiry on nonmerits considerations—those which "are susceptible to principled application by justices across the philosophical spectrum."[10] This is concededly a "second-best theory of stare decisis," Kozel argues, but it is necessary "to complement our second-best world of interpretive disagreement."[11]

As groundwork for this argument, the book's early chapters offer a perceptive discussion of many key questions regarding how precedent does and should operate within our legal system. Kozel begins by discussing precedent's key functions, distinguishing in particular between "vertical" stare decisis (which settles disputed questions for courts lower down in the judicial hierarchy) and "horizontal" stare decisis (which constrains a single court

6 RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 6 (2017).
7 *Id.*
8 *Id.*
9 *Id.* at 6–7.
10 *Id.* at 13.
11 *Id.*

from lurching too sharply in unexpected directions). He also distinguishes between a precedent's "scope," meaning what features of a decision's outcome and reasoning count as binding authority, and its "strength," meaning what burden must be met to override it. He then canvasses various benefits and drawbacks of horizontal stare decisis. Adhering to past precedent promotes judicial economy, harnesses collective wisdom, promotes uniformity in case outcomes, constrains individual judges, promotes an impersonal understanding of judicial authority, and protects reliance on past decisions. On the other hand, stare decisis allows errors and injustices to persist and may encourage judges to overreach, so as to stretch their own preferred views into the future.

Kozel then focuses in more detail on problems of precedential strength and scope. On the question of strength, Kozel unpacks how merits-focused assessments of precedential strength collapse into primary debates of interpretive method. How wrong a decision appears, and even how much weight judges should give to values of stability and consistency in judicial decisions, are questions whose answers may vary depending on whether one subscribes to originalism, common-law constitutionalism, living constitutionalism, or something else altogether. "Determining how costly it would be to uphold a precedent depends on underlying methodological and normative conclusions," Kozel argues.[12] "There is no universal explanation for why it is important for the law to be right or why it is problematic for the law to be wrong."[13]

As to scope, Kozel perceptively challenges the conventional assumption that a decision's holding is binding but not its dicta. In fact, courts often treat broader features of past opinions—their doctrinal frameworks and supporting rationales as well as even hypothetical statements and asides—as controlling in future cases. Just as a precedent's strength is bound up with primary interpretive commitments, moreover, so too are questions of precedential scope. Some interpretive theories will support giving broad effect to past decisions' reasoning; others would give it narrower effect.

Having thus exposed how deeply stare decisis questions are enmeshed with primary interpretive disputes, Kozel proceeds to offer his affirmative solution. First, he points out that the Supreme Court itself has reflected the broader interpretive disagreements in the legal community by employing different methods and theories in different cases. "For better or worse," he observes, "the Court has been willing to emphasize different argument styles from case to case without presenting an overarching theory grounded in a defined set of normative values. It has, in short, been pluralistic in its reasoning."[14] According to Kozel, this "second-best world of interpretive pluralism" necessitates a "second-best doctrine of stare decisis," in which the Justices aim to preserve legal stability and the Court's institutional authority by self-con-

12 *Id.* at 69.

13 *Id.*

14 *Id.* at 96.

sciously separating "precedent from interpretive theory in a way that transcends the identities of individual judges."[15]

Accordingly, in Kozel's view, judges and Justices should generally determine a precedent's strength not based on its merits, but rather based on more neutral considerations such as whether the rule it adopts has proven workable, whether its factual assumptions remain accurate, whether it coheres with other decisions and developments in the law, and whether it has fostered significant reliance.[16] (Keeping a small window open for the merits, Kozel does recognize that "second-best stare decisis can recognize exceptional cases in which substantive effects are relevant without jeopardizing the larger project of accommodating the treatment of precedent to a pluralistic world," so long as such "attention to substantive effects remains the exception rather than the rule.")[17]

With respect to scope, moreover, Kozel suggests this approach to stare decisis may support giving effect to broader features of opinions than their narrow holdings, as an opinion's reasoning may reflect the Court's considered past judgment just as much as the case's particular outcome.[18] Kozel balks, however, at giving such effect to interpretive methodologies, or even general interpretive approaches such as the *Chevron* framework for deferring to reasonable agency constructions of ambiguous administrative statutes.[19] Giving precedential effect to such methodological claims would be "asking too much": it would place stare decisis at war with the very reality of interpretive pluralism that Kozel's theory aims to accommodate.[20]

Overall, apart from stabilizing the law over time, Kozel argues that his proposed emphasis on nonmerits considerations will encourage individual judges or Justices to view themselves as participants in an "impersonal and enduring institution," rather than freelance change agents with a mandate to shift constitutional law in one direction or another.[21] After rejecting as flawed or unworkable some competing proposals such as requiring a Supreme Court supermajority to overturn precedent,[22] he closes by noting that stare decisis itself is not a matter of stare decisis, any more than more general interpretive methodologies are.[23] He argues that the Supreme Court should "adopt an approach to stare decisis that it believes to be desirable in its own right," yet urges adoption of his proposed framework as a theory of precedent well suited to the Court's institutional role and the particular challenges of our moment.[24]

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15 *Id.* at 103.
16 *Id.* at 109–18.
17 *Id.* at 123.
18 *Id.* at 146–55.
19 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).
20 KOZEL, *supra* note 6, at 153–54.
21 *Id.* at 130.
22 *Id.* at 140–44.
23 *Id.* at 172.
24 *Id.* at 172–73.

II. The Theory's Value in Our Time

Kozel's core argument, then, is that the best approach to stare decisis in our time is to focus the inquiry in constitutional cases on nonmerits considerations. Contrary to this proposal, as Kozel himself lets on, I suspect most judges and Justices do the opposite. They focus precisely on the merits, basing their fidelity to precedent on an intuitive judgment about how wrong a past decision is and how important (or disruptive) fixing the past error would be.[25] Neutral criteria such as workability, factual accuracy, and reliance (or lack thereof) may provide a vocabulary to justify departing from past decisions. At least in consequential cases, however, they will rarely provide a motive, and one suspects they can often be reverse engineered to support either departing from precedent or upholding it as the judge desires. (As we shall see, the two examples from the Court's most recent term highlight just this possibility.[26]) As Kozel himself recognizes, furthermore, overruling a decision that is wrong enough may be justified regardless of neutral considerations. The Court was correct to overrule *Plessy v. Ferguson*[27] in *Brown v. Board of Education*,[28] reliance and workability be damned.

Whether or not it ultimately succeeds, however, Kozel's attempt to reorient stare decisis away from the merits is a valuable contribution. The intuitive, "how wrong is it" approach has twofold problems that Kozel's book helps highlight. First, it is hopelessly fuzzy. Legal validity is typically a binary question, not a question of degree, and judges lack any obvious metric beyond gut feeling and professional judgment for assessing how wrong a wrong decision is. Second, as Kozel astutely explains, whether decisions are wrong at all, let alone how wrong they are, is unlikely to be a point of consensus in a political environment like ours that is characterized by widespread disagreement over proper constitutional interpretation.

Indeed, the problem seems to me to be worse than Kozel lets on. Constitutional disagreement is not just "pervasive," as Kozel suggests.[29] It is increasingly binary and polarized. In a process likely accelerated by our divisive current president, Americans are steadily organizing themselves into two partisan camps divided not only by political outlook, but also by other forms of

25 *Cf.* Stephen E. Sachs, *Precedent and the Semblance of Law*, 33 CONST. COMMENT. 417, 419 (2018) (reviewing KOZEL, *supra* note 6) (arguing that adherence to precedent is justified by precedent's approximation of true law, rather than based on stability for its own sake), http://ssrn.com/1d=3170047; Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1020 (2018) (reviewing KOZEL, *supra* note 6) (contending that arguments over precedent are and should be normative and questioning Kozel's prioritizing of legal stability over competing values).

26 *See infra* Part III.

27 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

28 *Brown*, 347 U.S. 483.

29 KOZEL, *supra* note 6, at 6.

identity and affiliation (such as religion, race, culture, and geography).[30] This process naturally extends into constitutional law as well, producing divergent perspectives in the electorate on hot-button constitutional issues (and thus divergent views on when the Court is being partisan and results-driven as opposed to neutral and objective).[31]

For those who care about courts' institutional authority and about legal stability over time, Kozel has thus made the important contribution of articulating a position that more ideological judges and commentators will need to push against. In the political system, partisan competition has felled one fuzzy norm after another, causing previously accepted restraints on the filibuster, enforcement discretion, recess appointments, and Senate confirmation procedures to give way (and in some cases require litigated resolution). Absent some clear articulation and defense, stare decisis could easily fall prey to the same forces. Kozel's theory might thus help stabilize the caselaw, even if judges and commentators ultimately find it unpersuasive.

By the same token, however, the very pressures that make Kozel's theory valuable could also be its undoing. At the least, the newly strengthened conservative majority on the Supreme Court is widely expected to reconsider some decisions that conservatives have long disfavored. Two cases overturning precedent in the Court's most recent term might offer some hints about what to expect, as well as some perspective on how likely courts are to adhere to Kozel's views.

III. Stare Decisis in the Supreme Court's Recent Term

Two Supreme Court decisions overruling precedent this past June (after Kozel's book appeared) provide useful opportunities to assess how well Kozel's theory may fair, both descriptively and normatively, in the years ahead. The two cases seem to me to illustrate two different pressures courts are likely to face in other cases as well: the pressure to overturn politically disfavored decisions, and the pressure to intervene to solve societal problems because the political system has failed to do so. In both cases, the majority paid lip service to considerations Kozel argues should be central, yet seemed motivated by different concerns. These cases thus suggest that, for all its normative appeal, Kozel's theory might well prove less descriptively accurate over time than it appears at present.

30 *See, e.g.*, Alan I. Abramowitz, The Great Alignment: Race, Party Transformation, and The Rise of Donald Trump (2018); Lilliana Mason, Uncivil Agreement: How Politics Became Our Identity (2018).

31 *See, e.g.*, Pew Research Ctr., The Public, the Political System and American Democracy 21, 84 (2018), http://www.people-press.org/2018/04/26/the-public-the-political-system-and-american-democracy/ (discussing polling evidence that "[m]ost Republicans viewed the Supreme Court unfavorably after its decisions on the Affordable Care Act and same-sex marriage in summer 2015" and that Republicans and Democrats hold differing views as to whether "the U.S. Supreme Court should make its rulings based on what the Constitution 'means in current times,'" or based on "what the Constitution 'meant as originally written'").

A. *Ideological Overruling:* Janus

In the first case, *Janus v. American Federation of State, County, & Municipal Employees, Council 31*,[32] the Court overruled its forty-year-old precedent in *Abood v. Detroit Board of Education*.[33] Under *Abood*, public employers could require employees represented by a union to pay dues supporting the union's representational activities, but could not require union membership or compel support for union political activities.[34] Overturning this compromise result, *Janus* held instead that even supporting the union's representational activities was compelled expression in violation of the First and Fourteenth Amendments.[35] A public-sector union's bargaining positions and advocacy on employees' behalf, the majority held, are so suffused with public concerns that supporting them amounts to compelled support for ideological positions that individual employees may not favor.[36]

Janus is an enormously controversial case, both because of its clear "political valence"[37]—public-sector unions are key supporters of the Democratic Party—and because it may augur further use of the First Amendment to invalidate economic regulations and workplace requirements. (Four dissenting Justices, at any rate, worried it could have this effect.[38]) The opinion's key feature here, however, is its discussion of stare decisis.

The Court indicated, to begin with, that overturning precedent requires "strong grounds for doing so," a requirement the majority obviously felt was satisfied in *Janus*.[39] It went on to discuss other "factors that should be taken into account in deciding whether to overrule a past decision," including "the quality of *Abood*'s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."[40] Following extensive criticism of *Abood*'s reasoning (which largely recapitulated the majority's disagreement on the merits), the majority characterized *Abood*'s holding as unworkable because the "line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision."[41] Next, the majority suggested that *Abood* rested on an "unsupported empirical assumption" because unions had continued to represent federal employees despite absence of mandatory fees and because union support for generous public employee wages and benefits had "given collective-bargaining issues a political valence that *Abood* did not fully appreciate."[42] Finally, the majority

32 138 S. Ct. 2448 (2018).
33 431 U.S. 209 (1977), *overruled by Janus*, 138 S. Ct. 248.
34 *Id.* at 245.
35 *Janus*, 138 S. Ct. at 2466.
36 *Id.* at 2484.
37 *Id.* at 2483.
38 *Id.* at 2487 (Kagan, J., dissenting).
39 *Id.* at 2478 (majority opinion).
40 *Id.* at 2478–79.
41 *Id.* at 2481.
42 *Id.* at 2483.

argued that *Abood* was anomalous in light of later cases on compelled speech and cases holding that public employers may not condition employment on party membership, and it closed by asserting that reliance provided no reason to preserve *Abood*, given that public-sector contracts typically have "rather short duration" and dicta in prior cases had placed unions on notice that *Abood* might be reconsidered.[43]

From the perspective of Kozel's theory, *Janus*'s treatment of *Abood* appears woefully deficient. As the dissenting Justices pointed out, *Abood* at least plausibly cohered with other related First Amendment caselaw;[44] the line it required drawing between representational and political activities was no more imprecise than many others considered administrable,[45] and legislatures in some twenty states had crafted legislative regimes for collective bargaining in reliance on *Abood*'s compromise holding on agency fees and union membership.[46] The dissenters thus made a powerful case that nonmerits considerations—considerations of the sort Kozel argues should be dispositive—weighed against overruling *Abood*, notwithstanding the majority's attempt to show otherwise.

Janus, then, suggests that the Court may be disinclined in practice to follow Kozel's theory. The divergence between majority and dissent on nonmerits considerations, moreover, might suggest a conceptual problem with Kozel's approach. In most cases that matter, it may be possible to argue nonmerits criteria both ways, as the majority and dissent did in *Janus*. At least without some clear standard of proof—how unworkable or inaccurate or reliance-fostering a precedent needs to be to trigger the bar on overruling—criteria such as workability, accuracy, and reliance may be too manipulable to provide firm protection for precedent in a world of sharp disagreement over which precedents are most worthy of overruling. What is more, the relevant standard of proof on such factors may be no more amenable to precise definition than the gut intuition about how wrong a past decision is that seems to drive most judges' general approach to stare decisis. At any rate, *Janus* suggests that courts may often reverse engineer their assessment of nonmerits factors to keep a path open to overrule decisions they feel are just too wrong (or too "poorly reasoned") to justify continued adherence.

From another point of view, however, *Janus* illustrates precisely the value Kozel's theory may have in the current moment. On a blank slate, *Janus* might well be a close case, yet the dissenters seem to have had the better of the argument on nonmerits considerations. At the least, nonmerits factors gave some objective support to preserving *Abood*. Focusing the inquiry on them, and not the merits, might thus have provided reason to adhere to precedent despite thinking it was wrong—and the Court's failure to do so seems to have invited a widespread sense that the Court acted out of ideological bias rather than commitment to impersonal institutional norms.

43 *Id.* at 2484–85.

44 *Id.* at 2498 (Kagan, J., dissenting).

45 *Id.*

46 *Id.* at 2499.

B. Temptations to Save the Day: Wayfair

South Dakota v. Wayfair, Inc., another case overruling precedent in the last Term, illustrates a different sort of pressure that courts may come under in the current era. *Wayfair* was not an ideological case, or at least not conventionally so. Though a five–four decision, Justices Kennedy, Thomas, Ginsburg, Alito, and Gorsuch formed the majority, while Chief Justice Roberts wrote a dissent joined by Justices Breyer, Sotomayor, and Kagan. The case did, however, involve the Court reaching out to resolve a perceived problem that, in the dissenters' view at least, might better have been left to the political process.

As polarization and the resulting incentives for partisan obstruction increasingly stall legislation in Congress, such cases could become more common: courts may be similarly tempted in other cases to intervene to correct perceived errors in the law. At the least, recent judicial interventions with respect to gridlocked policy questions suggest this possibility.[47] From that point of view, *Wayfair* may be another important test for how well Kozel's proposed focus on nonmerits considerations fared (or should have fared) in recent litigation.

The Court in *Wayfair* reconsidered the rule, adopted fifty years earlier in *National Bellas Hess, Inc. v. Department of Revenue*[48] and reiterated twenty-five years after that in *Quill Corp. v. North Dakota*,[49] that states violate the Dormant Commerce Clause by imposing an obligation to remit sales taxes on sellers who lack "physical presence" in the state. The Court in *Wayfair* held instead that states may tax certain activities "with a substantial nexus with the taxing State" without regard to whether the taxpayer has a physical presence in the state.[50] Much as in *Janus*, the *Wayfair* majority based its reconsideration of precedent principally on the merits. "*Quill* [was] flawed on its own terms," the majority held.[51] It had no adequate basis in the Court's general understanding that states can only tax activities with a "substantial nexus" to the state; it "create[d] rather than resolve[d] market distortions"; and it imposed an "arbitrary, formalistic distinction" out of step with modern Commerce Clause jurisprudence.[52]

The Court also, however, addressed nonmerits reasons to adhere to precedent. The majority observed, for example, that "attempts to apply the

47 *See, e.g.*, Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011 (N.D. Cal. 2018) (enjoining termination of nonbinding immigration relief program). For my contemporaneous critique of this decision, see Zachary Price, *Why Enjoining DACA's Cancellation Is Wrong*, TAKE CARE BLOG (Jan. 12, 2018), https://takecareblog.com/blog/why-enjoining-daca-s-cancellation-is-wrong.

48 386 U.S. 753 (1967), *overruled by* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

49 504 U.S. 298 (1992).

50 *Wayfair*, 138 S. Ct. at 2099.

51 *Id.* at 2092.

52 *Id.*

physical presence rule to online retail sales have proved unworkable."[53] The Court also addressed reliance concerns, observing that the *Quill* rule's lack of clarity diminished any proper reliance on it and that in any event such reliance was suspect because it mainly served to avoid remittance of concededly lawful sales taxes.[54] Throughout, moreover, the Court emphasized the *Quill* rule's purported disconnect with other aspects of Commerce Clause doctrine, particularly the trend away from bright-line "formalistic" tests.[55]

By contrast, Chief Justice Roberts's dissent highlighted practical complexities that would arise from the majority's new approach. "Over 10,000 jurisdictions levy sales taxes," he wrote, "each with 'different tax rates, different rules governing tax-exempt goods and services, different product category definitions, and different standards for determining whether an out-of-state seller has a substantial presence' in the jurisdiction."[56] Roberts emphasized, furthermore, that stare decisis should have applied more strongly in *Wayfair* than in cases like *Janus*.[57] Whereas Congress generally cannot overturn constitutional precedents, under settled doctrine it can reverse Dormant Commerce Clause rulings.[58] And Congress, Roberts observed, "has in fact been considering whether to alter the rule established in *Bellas Hess* for some time."[59] Roberts worried that the Court's decision would only disrupt such legislative deliberations. "Armed with today's decision," he observed, "state officials can be expected to redirect their attention from working with Congress on a national solution, to securing new tax revenue from remote retailers."[60]

Overall, *Wayfair* again suggests that the Court may not heed Kozel's advice in the years ahead. Insofar as political dynamics leave problems like internet sales taxation without any satisfactory legislative resolution, *Wayfair* suggests courts will be tempted to fix the problem themselves. What is more, the decision suggests courts may have little qualm about overruling precedent to do so if they consider the past approach seriously flawed on the merits. By the same token, however, *Wayfair* also suggests Kozel's perspective could be a useful means of maintaining discipline in this environment. At least if reliance and workability concerns are more straightforward than they were in *Wayfair*, focusing on those considerations rather than the merits might help preserve stability in the law and keep greater pressure on legislatures to adjust policy in ways courts cannot do as competently.

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53 *Id.* at 2086.

54 *Id.* at 2098.

55 *Id.* at 2085, 2092.

56 *Id.* at 2103 (Roberts, C.J., dissenting) (quoting U.S. Gov't Accountability Off., GAO-18-144, Taxes, States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs 3 (2017)).

57 *See id.* at 2101.

58 *See, e.g.*, S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984).

59 *Wayfair*, 138 S. Ct. at 2102 (Roberts, C.J., dissenting).

60 *Id.* at 2103.

CONCLUSION

Two overrulings in the Court's recent term suggest that, for better or worse, Kozel's theory of precedent may fail to match actual judicial behavior in the years ahead. More substantively, the theory may focus attention on considerations that are inevitably secondary in judges' minds when deciding whether to overrule a past case. Nevertheless, Kozel's overall goal of articulating an impersonal, institutional standard for judicial behavior is an important effort in a polarized moment that is straining shared institutional commitments. It is one other scholars should take up as well.[61] At the very least, his cogent articulation of a nonmerits approach to stare decisis should compel judges and commentators bent on more ideological rulings to better explain why weaker respect for stare decisis is justified. For those committed, as I am, to preserving the institutional understanding of judicial and governmental authority that has always made America great, that consequence alone is reason to admire Kozel's worthy contribution to an age-old debate.

61 For some thoughts of my own about how to craft constitutional doctrine in a polarized era, see Zachary S. Price, *Symmetric Constitutionalism: An Essay on* Masterpiece Cakeshop *and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. (forthcoming 2019).