(2017) 29 SAcLJ 596
(Published on e-First 4 September 2017)

Book Review

SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT*

by Randy J Kozel

CHOO Han Teck
LLB (Hons) (National University of Singapore), LLM (Cantab);
Judge of the Republic of Singapore.

> Judges come and go, but the law remains the law. That is the promise of precedent.[1]

1 The common law system of law relies on case law to interpret legislation as well as to declare what the law is where statute law is silent on the point, and the doctrine of *stare decisis*, the deference accorded to precedents, is fundamental to the system.[2] For something so fundamental, it is extremely complex and enigmatic.[3] Even as they prize predictability and consistency, lawyers fear the grip of the dead hand of law, as precedent is sometimes regarded. Given the rigorous debate about the use of precedent today, one might forget that the principle of *stare decisis* was not as always as strict as it is today.[4] The important first question was raised by Theodore Benditt when he wrote:[5]

> Is the principle of precedent a legal rule that is binding on all courts within a legal system that recognises precedent, or [is it], for at least some courts, simply a practice which they are free to ignore as they see fit? The principle of precedent could logically, be a practice, a tradition carried on by the courts. But in English and American law it is not.

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* Cambridge University Press, 2017.

1 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 176.

2 "*Stare decisis* refers … to the doctrine of binding or authoritative precedent, according to which judicial decisions must be followed in appropriate subsequent cases": Peter Wesley-Smith, "Theories of Adjudication and the Status of *Stare Decisis*" in *Precedent in Law* (Goldstein Laurence ed) (Clarendon Press, 1987) at p 73.

3 "Precedent" and "*stare decisis*" (let the decision stand) are often used synonymously and the choice is often a stylistic one. Most authors refer to both interchangeably.

4 See: Sir Rupert Cross & J W Harris, *Precedent in English Law* (Clarendon Press, 4 Ed, 1990) at pp 24–26.

5 Theodore Benditt, "The Rule of Precedent" in *Precedent in Law* (Goldstein Laurence ed) (Clarendon Press, 1987) at p 93.

2 When Michael J Gerhardt wrote *The Power of Precedent*,[6] he began with these words:[7]

> When the 81st – or the 181st – justice of the United States Supreme Court writes an opinion on an issue about which his predecessors have written, does he care about what they wrote? Does he feel absolute freedom to write whatever he pleases, as if he were writing on a blank slate? Does he merely manipulate the Court's precedents to support his preferred result, or does he defer to what his predecessors wrote on the subject before him? Does he, or should he, care about what his colleagues or successors think about what he writes?

And on the state of literature about precedents, Thomas G Hansford and James F Spriggs II had this to say:[8]

> The political science literature, however, manifests a significant disconnect between this common understanding of the importance of law and the state of knowledge regarding how law develops … Indeed, only a handful of studies directly seek to explain legal development at the Court, and even they provide somewhat inconsistent and potentially contradictory answers.

Settled Versus Right: A Theory of Precedent ("SVR") offers a partial, but important answer to the question posed.

3 Paying deference to *stare decisis* or applying precedent is more than just balancing a respect for past decisions and keeping an eye on the future just to be relevant; the doctrine of *stare decisis* would be a whole lot less problematic if it were the one rule that governs the entire realm, but that is not the case. Embedded in *stare decisis* is the rule that each decision may be overruled if there is justification for it. Understanding how the two rules work in tandem is the complex problem of the rule. When the words, "*stare decisis*" are used, it is usually to emphasise the positive aspect of the doctrine even though the rule it stands to maintain is challenged almost as frequently as the doctrine is invoked. It is the tension between the doctrine and the challenges to it that creates instability in the judicial decisions when, ironically, the doctrine is intended to establish predictability and stability in law.

6 Michael J Gerhardt, *The Power of Precedent* (Oxford University Press, 2008).

7 Michael J Gerhardt, *The Power of Precedent* (Oxford University Press, 2008) at p 3.

8 Thomas G Hansford & James F Spriggs II, *The Politics of Precedent on the US Supreme Court* (Princeton University Press, 2006) at p 3.

4 SVR is an attempt to disentangle the messiness in the way the US Supreme Court[9] approaches constitutional law. Much of the disagreement among the justices concern the principles of constitutional interpretation. Randy Kozel begins with a study of the two sources of precedent – horizontal, which is the previous decisions of the same court; and vertical, which is the previous decisions of a superior court. This book focuses on the Supreme Court and so is more concerned with the application of horizontal precedent. In the first chapter of his book, Kozel discusses the two factors that affect the court's decision to follow or reject a precedent. The first is the scope of the precedent, and the second is its strength. Kozel observes that the Supreme Court as well as lower courts tend to take a "capacious view of precedential scope". English courts and jurists tend to adopt a stricter reading of precedents by limiting their precedential scope. As Neil Duxbury warned, "*stare decisis* will be undermined where the distinction between *ratio decidendi* and *obiter dicta* is blurred".[10] After establishing the boundary of a precedent's scope, the next exercise is to determine the strength of that precedent because that may ultimately determine whether the court will follow it. It is certainly not enough, in Anglo-Saxon jurisdictions, to find that a previous decision was wrongly decided. In his confirmation address US Chief Justice John Roberts explained, "[i]t is not enough that you may think the prior decision was wrongly decided. That really doesn't answer the question. It just poses the question".[11] And the question is, "[n]otwithstanding that, should the court follow or overrule that precedent"? Throughout the book, Kozel will return to that question, and the difficulties posed by the pervasive interpretative disagreements in the court. Although couched in interpretative terms, the underlying question is, as Kozel sees it, "[h]ow does a court determine whether it is more important for the law to be settled or right"?[12]

5 Kozel is neutral as to whether it is better for the law to be settled or right, but he clearly sees the importance of precedent from the point of view of judicial economy and resource conservation: "[i]f judges could not treat some issues as settled, they might be obliged to spend immense amounts of time revisiting foundational issues over and over again", and, citing Benjamin Cardozo, the court will not "do society's

9 Unless specified, this author's references to "court" and "Supreme Court" are to the US Supreme Court.

10 Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) at p 91.

11 109th Congress 144 (2005).

12 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 33.

work if it eyed each issue afresh in every case that raised it".[13] Deference to precedent is also a disavowal of judicial arrogance when the court bows to the wisdom of others. The harder question, as Kozel says, "is whether judges should put the principle into practice by standing by precedents they believe to be wrong". He discusses examples of when it might be better to have status quo than to reject a precedent because a judge believes that precedent to be wrong. Tax cases and cases that have led society to conduct its affairs on the basis of a settled rule are instances for restraint.

6 Mindful that the court faces no threat of reversal should it decline to follow precedent, Kozel points to matters that may constrain the court. He probably had in mind the standing of the court when he wrote: "[o]verturning precedent without good reason risks subjecting a court's decision to criticism for being outcome oriented or ad hoc. Hasty or ill-explained overrulings might lead to 'a diminution in esteem within the legal profession, if not in the eyes of the broader public'".[14] Precedent also provides common ground for the interpretation of the US Constitution[15] even when the justices disagree. Kozel explains as follows:[16]

> The Supreme Court fills out the constitutional framework by resolving disputes and issuing opinions. It provides guidance for future courts and for those who live under the law, making norms 'thicker' and rules of conduct clearer. It also provides a basis for coordinated action going forward. Two justices might part ways over the best reading of a constitutional provision, but they might nevertheless agree that (at least in some cases) it is acceptable to leave matters settled by reaffirming precedent.

Furthermore, the court will address the issue of reliance, and the plans made by people based on the existing regime. Such considerations will also commonly take into account transitions costs that are best to be avoided.

13 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 37.

14 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at pp 43–44.

15 Unless specified, this author's references to "Constitution" are to The Constitution of the United States.

16 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 45.

7 But Kozel also examines the case against precedent. It includes considerations of error, unsoundness and injustice. Following a path that one believes to be wrong is certainly unpalatable. It runs against common sense. Yet, in spite of this, precedent holds sway more often than not. Kozel makes a brief examination about the legitimacy of deference in the light of Article III of the Constitution, but concludes that judicial power "seems to include the power to defer to precedent".[17] With that in place, Kozel then examines the more important issues relating to how precedents are understood and applied. He then reminds us to ask what it takes to overrule a precedent in order to get the law right.

8 "If the first rule of precedent is that prior decisions warrant respect, a close second is that no decision is untouchable". Hence, how law is made depends on whether precedent is followed or rejected. Constitutional theory in the US is increasingly discussed in the context of interpretative methodologies. Kozel examines the competing theories, including the methodology that poses a particularly strong challenge to *stare decisis* – the version of originalism that embraces the view that the Constitution sits above every rule and every law.[18] It is a position expressed by scholars such as Gary Lawson.[19] On the other side, "living constitutionalists" (such as David Strauss) argue that the requirements of the Constitution evolves over time, but Kozel quickly adds that evolution is not revolution, "and common law constitutionalism gives significant regard to precedent as a source of collective wisdom and common ground".[20] Competing methodologies are problematic in the establishment of any theory of precedent. The problem seems far more complex because the tussle is not just between originalists and living constitutionalists. Social scientists challenge legal scholars' conventional views about precedent, but even social scientists differ in their views as to how judges decide. One school thinks that "the court" is just a cipher for the individual judge whose judgment is handed down. Another

17 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 54.

18 But even one of the staunchest protagonist for originalism, Antonin Scalia J, regarded deference to precedent as a "pragmatic exception" to originalism: see Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann ed) (The University Centre for Human Values Series, 1997) and Antonin Scalia & Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson West, 2012) at pp 413–414.

19 Gary Lawson, "The Constitutional Case against Precedent" (1994) 17 Harv J L & Pub Pol'y 22 at 23 and 26.

20 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 63; see also David A Strauss, "Legitimacy, 'Constitutional Patriotism', and the Common Law Constitution" (2012) 126 *Harvard Law Review Forum* 49 at 50 and 55 and "Common Law Constitutional Interpretation" (1996) 63 U Chi L Rev 876 at 877 and 895.

believes that judges do have a system and method in which law is applied.[21]

9 From that point, Kozel brings up the problem of precedent in cases of plurality decisions.[22] An example he scrutinises is the case of *McDonald v City of Chicago*[23] concerning the issue of the application of the right to keep and bear arms and the Amendment XVI to the Constitution. In cases such as this, where a plurality decision recognised the applicability of past cases on certain constitutional rights to future cases involving other rights, the precedential scope may be too broad. The doctrinal problem thus arises as to this approach to the principle of narrowing precedential scope which favours the "application of narrow rules to concrete facts".[24] One solution is to embrace a different species of doctrine known as "codifying decisions" in which the court is seen as laying down detailed requirements in detailed and elaborate terms; an example is *Miranda v Arizona*[25] ("*Miranda*"). This is the approach that has been criticised, even before *Miranda*, as shifting "from following decisions to following principles", earning it the moniker *stare dictis*.[26] It is a criticism that remains with force long after *Miranda*.[27] Kozel suggests that this leads to "a zone of uncertainty" that might be resolved by recognising "the difference between a rationale that is expressed within a particular opinion and a rationale that is constructed by a court looking back over its prior decisions".[28]

10 The problem of pluralism is a major challenge to the doctrine of precedent because, as Kozel says:[29]

> The unifying effects of precedent are critical in a legal system characterized by interpretative pluralism. Pluralism increases the chances that substituting one justice for another will lead to the application of an entirely different methodology, particularly when the Court is closely divided.

21 Michael J Gerhardt, *The Power of Precedent* (Oxford University Press, 2008) Ch 3, at p 79.
22 This refers to decisions in which there is no consensus in the majority decision.
23 561 US 742 (2010).
24 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 78.
25 384 US 436 (1966).
26 Herman Oliphant, "A Return to *Stare Decisis*" (1928) 14 ABA Journal 71 at 71 and 72.
27 *Seminole Tribe of Florida v Florida* 517 US 44 at 66–67 (1996).
28 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 81.
29 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 98 (but Kozel points out that he makes no claim about the desirability of interpretative pluralism: see p 99).

11 Kozel's proposal lies in an approach he calls "[s]econd-best stare decisis". He explains that this arises from the second-best world of constitutional law, and "stands in contrast to the idealized state of affairs in which the justices largely agree on the appropriate ends and means of constitutional interpretation". Thus, he says, "[f]rom the standpoint of developing a workable and coherent doctrine of stare decisis, a world of pluralism is a second-best world".[30] This theory is not novel and has been used in other fields and by other scholars. Its adaptation here is to utilise it so that "the Supreme Court's doctrine of stare decisis could be revised to operate more effectively against a backdrop of pluralism … The second-best theory of stare decisis uses compensating adjustments to allow precedent to serve its central purpose".[31]

12 In explicating his theory, Kozel's belief in the importance of precedent comes through in bright shining light as he quotes from Alexander Hamilton and James Madison, emphasising precedent as a safeguard against "arbitrary discretion in the courts".[32] His model utilises *Planned Parenthood of Southeastern Pennsylvania v Casey*[33] ("*Casey*"). Kozel discusses four factors identified in *Casey* and to which he adds a couple of his own, namely, the reasoning of the precedent under review, and the substantive effect of following that precedent, as vital. The four *Casey* factors identified as essential components for the second-best *stare decisis* approach are: procedural workability; factual accuracy; jurisprudential coherence; and reliance and disruption.[34] The court ought to take these factors into account when they decide whether to follow a precedent or not. This approach ensures a measure of objectivity without making the judges feel that they have to discard or ignore their personal beliefs that come to bear on the case.

13 An inquiry into procedural workability is a response "to the 'mischievous consequences to litigants and courts' that can result from a vague or byzantine rule of decisions".[35] The pragmatic undertones of this factor spread across the interpretative divide; it excludes criteria that have no independent content within each method, and focuses on common, pragmatic grounds – although, there is no guarantee that

30 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 100.

31 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 101.

32 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 108.

33 505 US 833 (1992).

34 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 109.

35 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 109; see also *Swift & Co v Wickham* 382 US 111 at 116 (1965).

judges can still agree as to what is or is not procedurally workable. (But this is the second-best world, remember?) Judicial decisions are founded on facts; in the appellate world, this is described as "factual premises" because the court's decision is based on the premises that the facts as found by the trial court are valid. But, as Kozel points out, the premises may be wrong, for instance, when the court accepts a mistaken statement by a litigant as correct.[36] Kozel discusses in depth how the *Casey* court dealt with errors in previous decisions that were not central to the precedent they were considering, namely, *Roe v Wade*.[37] Kozel says that *Casey* is not the only way to identify errors in a judicial decision, or the only way to deal with them, citing the court's decision in *Quill Corp v North Dakota*[38] ("*Quill*"), affirming *National Bellas Hess Inc v Department of Revenue*[39] despite having doubts as to the latter because the internet age after *Quill* has brought about substantial technological changes to commerce, and "developments in e-commerce have changed what it means for a business to be 'present' in a state".[40] Kozel is not calling for *Quill* to be overruled. He merely maintains the balance of having a streamlined way of determining factual errors and the fact that "an incorrect factual premise is an incorrect factual premise, regardless of a justice's interpretative philosophy".[41] Kozel agrees that these are relevant factors.

14 Kozel is of the opinion that the third *Casey* factor, namely, jurisprudential coherence, unlike procedural workability and factual accuracy, does not admit of a narrowing of considerations, and therefore ought not to be included in the second-best *stare decisis*. Jurisprudential coherence seeks to justify broad complex issues, and thus cannot be extricated from interpretative considerations (although jurisprudential coherence is critical within each interpretative methodology).[42]

36 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 111.
37 410 US 113 (1975).
38 504 US 298 (1992).
39 386 US 753 (1967).
40 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 113.
41 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 114.
42 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at pp 114–115.

15 The fourth *Casey* factor is reliance and disruption. Unlike the other three, which are factors that are regarded as factors that the court may consider when deciding not to follow a precedent, this factor pushes the court to follow a precedent. It has a "sweep that exceeds methodological bounds".[43] It has a neutrality that Kozel regards as essential to the second-best *stare decisis*. Reliance on a precedent case and the potential disruption apply not only to economic cases but also to non-economic liberties as well. Kozel discusses the different aspects of reliance – by governmental officials and by society at large. In the latter, the court must recognise "the interests 'of people who have ordered their lives thinking and living around' the continued vitality of Roe".[44] To this, Kozel adds two other factors that the court has used in helping it decide whether to follow a precedent or not – namely, flawed reasoning and substantive effects – both of which Kozel explains, in detail, why he thinks are, like jurisprudential coherence, too far-ranging and may cohere with the doctrine of *stare decisis* only in a world of interpretative agreement, which is in the non-existent, idealised world.[45] Nonetheless, Kozel accepts 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".[46]

16 Kozel's book provides more than a working model in the discordant Supreme Court. It explains the important correlation between adherence to precedent and the rule of law:[47]

> Treating rationales as authoritative is a way of respecting the statements of prior justices. It also makes case law a source of more robust guidance for litigants, courts, and other stakeholders. [The second-best *stare decisis*] suggests the importance of interpreting decisional rationales objectively rather than subjectively. It is not the prior justices' private intentions that matter, but rather the words they used to explain themselves within the confines of a publicly released opinion.

43 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 116.

44 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 117; see also *Miranda v Arizona* 384 US 436 (1966).

45 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at pp 118–123.

46 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 123.

47 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 147.

The aim, therefore, is to reduce "the frequency of judge-made changes to the law" and thus promote consistency and continuity.[48] Kozel does not pretend to light an obstacle-free path through the discordance of a court riven by methodological and ideological difference, but he sets the test by which those outside the court can judge the judges.

48 Randy J Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge University Press, 2017) at p 166.