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Janus (in)Decisis: The Role of (Purportedly) Poorly-Reasoned Precedent in the Stare Decisis Calculus

Daniel F. Carola

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I. INTRODUCTION

Supreme Court justices, like the rest of us, hold strong beliefs and convictions. But when those convictions involve the soundness of a challenged precedent, should that affect the Court's stare decisis analysis? Stare decisis features frequently in some of the most hotly-contested, politically-charged Supreme Court decisions of recent decades. Majorities and minorities alike lean on the doctrine with such fervor and frequency that any argument can seemingly be made to show stare decisis as either the "preferred course,"[1] merely a "principle of policy,"[2] or even sometimes both in the same opinion.[3] Nevertheless, stare decisis and the role of precedent remains so pervasively interwoven within our conception of the American legal tradition that it helps comprise our understanding of what the law is.[4] Though deference to precedent may shape the law, what stare decisis is—and is not—remains an evolving and ever-changing formulation.

The term "stare decisis" comes from the Latin phrase "*stare decisis et non quieta moevre,*" which means "to stand by things decided and not disturb what is tranquil."[5] Given the unsettled nature of the doctrine, it is ironic—though perhaps not altogether shocking—that common legal parlance omits half of the phrase. Black's Law Dictionary defines stare decisis as doctrine requiring courts "to abide by authorities or cases already adjudicated upon," and further refers to it as " [t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial

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[1] Payne v. Tennessee, 501 U.S. 808, 827 (1991).
[2] Helvering v. Hallock, 309 U.S. 106, 119 (1940).
[3] Citizens United v. FEC, 558 U.S. 310, 377–78 (2010) (Roberts, C.J., concurring).
[4] *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748 (1988).
[5] Julie E. Payne, *Abundant Dulcibus Vitiis, Justice Kennedy: In Lawrence v. Texas, an Eloquent and Overdue Vindication of Civil Rights Inadvertently Reveals What Is Wrong with the Way the Rehnquist Court Discusses Stare Decisis*, 78 TUL. L. REV. 969, 973 (2004).

decisions when the same points arise again in litigation."[6] While understanding a blackletter definition does not show the doctrine's functionality, recent cases display the inconsistent ways in which the Court approaches the question of whether to adhere to its own precedent.[7] The Supreme Court's decision in *Janus v. AFSCME*[8] only further clouds the doctrinal practicalities of an already tough-to-pin-down principle. *Janus* ushers in new concerns about the state and direction of stare decisis because of the depth of its detailed examination of the quality of the challenged precedent's reasoning.[9]

In the wake of *Janus,* various legal minds have expressed concern with its stare decisis implications. Justice Kagan's dissent decried the "subver[sion of] all known principles of stare decisis," noting the majority's disregard for the heavy reliance interests at stake.[10] Professor Fuentes-Rohwer considers *Janus* a "judicial foray into a politically charged controversy," thus raising concerns about the Court's legitimacy.[11] Focus on poorly-reasoned precedent and Justice Kennedy's departure from the Court present further questions. By joining the *Janus* majority, Justice Kennedy affirmed the view that a past precedent may be set aside because of the quality of its reasoning.[12] Should Justice Kavanaugh share different views than his predecessor on concepts like substantive due process, the Court could question the reasoning of precedents comprising

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[6] *Stare Decisis*, BLACK'S LAW DICTIONARY (B.A. Garner ed. 2014).

[7] While stare decisis refers to the level of deference a court gives to a prior opinion, it is important to distinguish between which court is interpreting which precedent for the purposes of this comment. Vertical stare decisis refers to a lower court's adherence to a higher court's precedent and the binding authority that precedent has. *See* Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460 (2010). This Comment does not examine or reference vertical stare decisis. Rather, it proceeds with an exposition and discussion of horizontal stare decisis, how a court—here, the United States Supreme Court—interprets and defers to its own precedent. *Id*. at 1461. Thus, as referenced herein, the term "stare decisis" refers only to the Supreme Court's treatment of its own precedent.

[8] 138 S. Ct. 2448 (2018).

[9] John O. McGinnis, *How Janus Weakens Stare Decisis*, L. & LIBERTY (2018), https://www.lawliberty.org/2018/06/29/how-janus-weakens-stare-decisis/ (last visited Aug. 30, 2018).

[10] *Janus*, 138 S. Ct. at 2497–99, (Kagan, J., dissenting).

[11] Luis Fuentes-Rohwer, *Taking Judicial Legitimacy Seriously*, 93 CHI.-KENT L. REV. 505, 507 (2018).

[12] Jonathan Turley, *Kennedy's Decisions Might Not Last, it Might Be His Own Fault*, WASH. POST (June 28, 2018), https://www.washingtonpost.com/outlook/kennedys-decisions-may-not-last-it-might-be-his-own-fault/2018/06/28/e39c3298-7a87-11e8-aeee-4d04c8ac6158_story.html?utm_term=.7d8a45e32278.

Kennedy's legacy.[13] The Cato Institute embraced the decision's stare decisis framework that they claim "largely mirrored" key portions of their amicus brief.[14] Professor McGinnis of Northwestern University believes *Roe v. Wade* (finding the right to privacy encompasses a woman's right to an abortion)[15] and *Morrison v. Olsen* (affirming the constitutionality of the independent counsel statute)[16] are potentially open to criticism based on their reasoning.[17] After all, divergent views on constitutional interpretation inform whether a particular justice agrees with the reasoning of a past precedent.[18] What may be poorly-reasoned to a textualist could at the same time contain sound legal theory to a legal pragmatist.[19]

Stare decisis promotes some of the most vital, yet fragile underpinnings of our judicial system. The doctrine supports notions of certainty, consistency, and impartiality.[20] Stare decisis is essential to the rule of law because of the importance of stability and moderation.[21] These values are imperative to the vitality and health of the legal system.[22] The doctrine imposes judicial restraint by preventing justices from "reconsider[ing] every potentially disputable issue as if it were being raised for the first time . . . ."[23] Further, because "public acceptance of judicial decision-making is grounded on an apolitical picture of judges as interpreters of the law," the Court's respect for stare decisis, particularly on a matter on which there is grave political pressure, serves as an

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[13] *Id.*
[14] Ilya Shapiro & Aaron Barnes, *Janus: Why It Was Proper (and Necessary) to Overturn Old Precedent*, CATO INSTITUTE (June 28, 2018, 10:02 AM), https://www.cato.org/blog/janus-why-it-was-proper-necessary-overturn-old-precedent.
[15] 410 U.S. 113 (1973).
[16] 487 U.S. 654 (1988).
[17] McGinnis, *supra* note 9.
[18] *See generally* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 80 (2004).
[19] McGinnis, *supra* note 9.
[20] *See* Thomas Healy, *Stare Decisis As A Constitutional Requirement*, 104 W. VA. L. REV. 43, 108–09, (2001).
[21] Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 289 (1990).
[22] *See* Healy, *supra* note 20, at 111.
[23] Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 573 (2001).

integral part of the Court's survival.[24] A more flexible iteration of the stare decisis doctrine—employing mechanisms by which mere disagreement with past precedent weighs heavily against retaining what had theretofore been the law of the land—would rob precedent of any weight whatsoever.[25]

If five justices feel that a challenged precedent is supported by what they consider bad reasoning, does that, has that, and should that weigh against overturning precedent? To answer these questions, this Comment will scrutinize the genesis and evolution of the poorly-reasoned consideration and how that factors into the Court's recognized stare decisis framework. In Part II, this Comment will analyze the Court's decision in *Janus* with particular focus on the majority's treatment of stare decisis. Part III will examine the historical progression of precedent to demonstrate its evolution over time. In Part IV, this Comment will offer a thorough exposition of the present factors which comprise the doctrine and important cases which implicate and explain stare decisis. Part V will review the poorly-reasoned factor, beginning with its origins, tracking its usage, analyzing how its consideration in *Janus* differs from prior usage, and the inherent problems with the appearance of judicial politicization and subjectivity. Part VI will argue for a clarification of the poorly-reasoned standard, address different possibilities by considering varying degrees of focus on the reasoning of a challenged precedent, and ultimately advocate for a middle-ground approach that incorporates the consideration but limits the role it can play in a decision to ultimately overturn past precedent. This normative proposal urges that consideration of a precedent's reasoning be non-dispositive, grounding any reasoning defects in objective concerns. Lastly, Part VII will offer a brief conclusion.

[24] Vanessa Laird, *Planned Parenthood v Casey: The Role of Stare Decisis*, 57 MOD. L. REV., 461, 467 (1994).
[25] Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173, 1219 (2008).

II. *JANUS* AND ITS IMPLICATIONS

To understand the renewed scrutiny the Court put upon the stare decisis doctrine, one must fully understand the recent precedent-overturning case that brought it to the forefront. Mark Janus was a child support specialist for the Illinois Department of Healthcare and Family Services, who, as an Illinois public employee, was permitted to unionize under state law.[26] When a majority of public workers opt for union protection, the union becomes the only entity which may negotiate labor contracts with that respective public institution.[27] The American Federation of State, County, and Municipal Employees, Council 31 (the "AFSCME") represents approximately 35,000 public workers in Illinois.[28] Because Mr. Janus disagreed with policy positions for which the union advocated, he opted out of union membership.[29] Mr. Janus therefore was not required to remit full union dues, but instead paid a lesser, so-called "agency fee."[30] This covered the costs of collective bargaining, but not the AFSCME's political activities with which he disagreed.[31] Even though he was not a union member, Mr. Janus's compensation, benefits, and other terms of employment were set by the collectively-bargained contract, which the AFSCME negotiated in part on his behalf.[32]

In an earlier case, *Abood v. Detroit Board of Education*, the Supreme Court upheld the constitutionality of agency fees in the public sector context.[33] There, all nine justices agreed that a public labor union could require non-members to pay fees to support the collective bargaining pursuits without impinging upon the non-members' constitutional rights.[34] These arrangements were permissible so long as the funds collected went toward activities germane to collective

[26] *Janus*, 138 S. Ct. at 2461.
[27] *Id.*
[28] *Id.* at 2461.
[29] *Id.*
[30] *Id* at 2460–61.
[31] *Id.*
[32] *Janus*, 138 S. Ct. at 2467.
[33] 431 U.S. 209 (1977).
[34] *Id.* at 226.

bargaining and not to ideological or political causes.[35] The Court rested its decision on two other decisions which similarly held such arrangements permissible in the private-sector union context.[36] The only union due schemes that implicate the First Amendment are those which require public, non-union-member employees to support political speech with which they disagree.[37]

Overturning *Abood* and writing for the majority, Justice Alito in *Janus* held that extraction of agency fees from public sector employees unwilling to join their union *did* violate the First Amendment and that *Abood* was wrong in holding otherwise.[38] The Court analyzed the *Abood* doctrine under applicable First Amendment principles, finding the precedent an outlier among First Amendment cases.[39] More recent cases found that the justifications for *Abood* did not withstand exacting scrutiny.[40] After holding that Illinois's scheme violated the First Amendment, the Court then addressed whether the doctrine of stare decisis nevertheless weighed against overruling *Abood*.

Stare decisis is the favored approach, the majority began, "because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[41] The doctrine, the Court recalled, is weaker in cases which interpret the Constitution, and perhaps even at its weakest in decisions which wrongly deny First Amendment rights.[42] Alito listed

[35] *Id.* at 235–36.
[36] *Id.* at 226 ("[*Hanson* and *Street*] appear to require validation of the agency-shop agreement before us.").
[37] *Id.* at 236.
[38] *Janus*, 138 S. Ct. at 2486.
[39] *Id.* at 2482.
[40] *See, e.g.*, Harris v. Quinn, 134 S. Ct. 2618, 2641 (2014).
[41] *Janus*, 138 S. Ct. at 2478 (quoting Payne v. Tennessee, 501 U. S. 808, 827 (1991)).
[42] *Id.*

standard stare decisis considerations but added an additional, more infrequent factor: the quality of the challenged precedent's reasoning.[43]

Opting to address the reasoning factor first in the Court's stare decisis analysis, Alito recited dicta from *Harris v. Quinn*, written just four years prior.[44] In *Harris*, the Court could not reach the issue of agency fee permissibility to rule on *Abood*'s constitutionality because the plaintiffs were not public sector employees *per se*.[45] Nevertheless, *Harris* still thoroughly and categorically condemned *Abood*'s reasoning, concluding that it had "questionable foundations,"[46] even though the merits of *Abood* were not at issue.[47] *Janus* also attacked *Abood* by contending that it fundamentally misunderstood the legal precedents applied, failed to appreciate the primary distinction between public and private-sector collective bargaining, neglected the extent to which the rule would lead to administrative dilemmas, and lacked the foresight to appropriately gauge the impact the rule would have on nonmembers.[48] So thorough is Alito's discrediting of *Abood's* premises in *Harris* that, in *Janus*, he states that he "will summarize, but not repeat, *Harris*'s *lengthy discussion* of the issue."[49] The language in the two pages in *Janus* detailing *Abood*'s shortcomings closely tracks the seven pages from *Harris* which discussed the same issue.[50]

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[43] *Id.* at 2478–79 ("Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: 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."). The evolution of this consideration as a stare decisis factor and its ramifications are addressed at length in Part V, *infra*.

[44] 134 S. Ct. 2618 (2014).

[45] *Id*. at 2638.

[46] *Id.* at 2632–38.

[47] *Janus*, 138 S. Ct. at 2479. *Abood* relied principally on two cases—*Hanson* and *Street*—which, as Alito discussed in *Harris*, were inapplicable because of the inherent differences between public and private sector employers in union agency fee contexts. Because of the unwarranted reliance on these two cases, *Abood* addressed the constitutionality of agency fees under weaker scrutiny not typically employed in speech cases. This more deferential standard, Alito contended, allowed the *Abood* court to deem that the purported state interests, labor peace and free rider mitigation, passed Constitutional muster. *Id.* at 2480.

[48] *Id.* at 2478–81.

[49] *Id.* at 2483 (emphasis added).

[50] *Compare Janus*, 138 S. Ct. at 2479–81, *with* Harris v. Quinn, 134 S. Ct. 2618, 2627–34 (2014).

The remainder of *Janus*'s stare decisis analysis generally accords with the considerations from *Planned Parenthood v. Casey*.[51] *Janus* questioned *Abood*'s workability because it created a rule which had proven "impossible to draw with precision."[52] In the intervening decades since *Abood*, the Court clarified the test used to determine which types of union activities were chargeable to non-members and which activities were non-chargeable because they crossed the boundaries into compelled speech.[53] Further, the *Janus* respondents, while advocating for retaining *Abood*, conceded that the chargeable/non-chargeable distinction was vague and sometimes led to erroneous results.[54] Indeed, the respondents themselves agreed that the Court could draw a firmer line.[55] Alito explained that this concession "only underscores the reality that *Abood* has proved unworkable: not even the parties defending [it] support the line that it has taken this Court over 40 years to draw."[56]

Alito's stare decisis examination also recognized changes to both the legal and factual underpinnings of *Abood* that weighed in favor of its overruling.[57] *Abood* was an outlier among the Court's First Amendment jurisprudence, as referenced in its precursors, *Knox* and *Harris*.[58] From a factual standpoint, *Abood* received similar heavy criticism. *Abood* did not require, but merely

[51] *See infra* Part IV.C.
[52] *Janus*, 138 S. Ct. at 2459.
[53] *See* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991) (devising a three-part test requiring that chargeable expenses be "germane" to collective bargaining, "justified" by the government's interests as explained in *Abood*, and not significantly further burden free speech.). This was not the first time that the Court addressed *Abood*. *See also*, Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 306 (1986) (requiring a union to provide nonmembers with "sufficient information to gauge the propriety of the union's fee.").
[54] *Janus*, 138 S. Ct. at 2481.
[55] *Id.*
[56] *Id.* at 2482.
[57] *Id.* at 2483.
[58] *See id.* at 2463 (*quoting* Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 311 (2012) ("[I]n more recent cases we have recognized that this holding is 'something of an anomaly.'"); *See also Harris*, 134 S. Ct. at 2627 ("[I]n Knox . . . we pointed out that *Abood* is 'something of an anomaly.'"). *But see* Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 311 ("Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly.").

permitted, states to adopt agency fee arrangements.[59] By the time the Court heard *Janus*, some twenty-two states had statutory and regulatory schemes based in whole or in part on the *Abood* precedent.[60] Free-rider mitigation and labor peace—the interests found by *Abood* to warrant permission of agency fees—had not run amok in any of the twenty-eight states which opted not to adhere to the doctrine.[61] On the contrary, Alito asserted, the years between *Abood* and *Janus* had shown the folly of such heavy-handed public employment focus.[62] The public fiscal crises propelled by rising salaries and pension underfunding in many of the states requiring *Abood*-like arrangements bore this out.[63] The *Abood* court did not have the evidence of its own experiment to consider.[64]

While the dissent and the respondents strongly advanced reliance interests as the most pervasive factor weighing in favor of retaining *Abood*, the majority, while purportedly understanding these concerns, felt dependence on reliance interests "lacked decisive weight."[65] The statutory schemes of twenty-two states—primarily large, populous states like Illinois, California, and New York—permitting *Abood*-based agency fees were part of the legal framework upon which hundreds of public union contracts existed and balanced.[66] Even though agency fee availability likely factored into the bargaining process at the time of the negotiation of these untold thousands of applicable contracts, reliance interests were not determinative because, as Alito wrote, "it would be unconscionable to permit free speech rights to be abridged in perpetuity in

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[59] *Abood*, 431 U.S. at 217–34.
[60] *Janus*, 138 S. Ct. at 2466.
[61] *Id.*
[62] *Id.*
[63] *Id.* at 2483 (noting that the "ascendance of public-sector unions has been marked by a parallel increase in public spending . . . . Not all that increase can be attributed to public-sector unions, of course, but the mounting costs of public-employee wages, benefits, and pensions undoubtedly played a substantial role.").
[64] *Id.*
[65] *Id.* at 2484.
[66] *See* Brief of Mayor Eric Garcetti et al. as Amici Curiae Supporting Respondents, Janus v. AFSCME, 138 S. Ct. 2448 (2018) (No. 16-1466) LEXIS 158.

order to preserve contract provisions that will expire on their own in a few years' time."[67] Contractual interests could not overcome the vindication of constitutional rights.[68] Given the Court's fairly recent tact against *Abood*, as shown in *Knox*, *Harris*, and *Friedrichs v. California Teachers Association*,[69] public unions should have been on notice that *Abood*'s days were effectively numbered.[70] The *Janus* decision took eight pages to summarize, explain, and evaluate whether the stare decisis doctrine weighed against or in favor of overruling *Abood*.[71] While precedent-overruling inquiries do not always receive comprehensive treatment, the extent to which the majority addressed stare decisis provided the dissent with ample opportunity to critique it.[72]

Justice Kagan's dissent in *Janus* took issue with the merits of the case and the quality of the majority's reasoning, but also addressed what the four-justice dissent considered the "trivializ[ing] [of] stare decisis."[73] The dissent cited some serious concerns regarding the state of the stare decisis doctrine in light of the decision to abandon *Abood*. The Court "succeed[ed] in its 6-year campaign to reverse" *Abood*.[74] Because neither *Knox* nor *Harris* addressed the ultimate question addressed in *Janus*, Kagan explained, such heavy reliance on them was as misplaced as

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[67] *Janus*, 138 S. Ct. at 2484 (majority opinion); *But see Janus*, 138 S. Ct. at 2499 (Kagan, J., dissenting) ("[c]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved." (quoting *Payne*, 501 U. S. at 828); Pearson v. Callahan, 555 U.S. 223, 233 (2009) ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved." (quoting *Payne*, 501 U. S. at 828)). Justice Alito authored the majority opinion in *Pearson* which quoted this line, but the decision in *Janus* did not.

[68] *Id*. at 2484. Severability clauses served as a built-in safe guard against contractual chaos for reasons like *Abood*'s overturning. *Id.* at 2485.

[69] 136 S. Ct. 1083 (2016).

[70] *Janus*, 138 S. Ct. at 2485. After the decisions in *Knox* and *Harris*, the Court granted certiorari in *Friedrichs v. California Teachers Association* in January 2016, but the death of Justice Scalia the following month resulted in an evenly-decided court issuing a per curium opinion in March that same year. James Taranto, *The Lawyers Who Beat the Unions*, WALL ST. J. (June 29, 2018), https://www.wsj.com/articles/the-lawyers-who-beat-the-unions-1530314801.

[71] *Janus*, 138 S. Ct. at 2478–86.

[72] *See* Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 599 (2011).

[73] *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

[74] *Id.* at 2487 (Kagan, J., dissenting).

the inexplicable and unnecessary depth of analysis *Abood*'s reasoning received within them.[75] Additionally, because so many binding contracts were negotiated with the understanding that agency fee arrangements would remain the law of the land, reliance interests remained profound.[76]

Concerning the reasoning of the challenged precedent, while the dissent argued that *Abood* "fit comfortably" within existing First Amendment principles, the majority's contention that *Abood* was poorly reasoned was insufficient to warrant overturning.[77] Finding that all stare decisis considerations weighed in favor of retaining *Abood*, Kagan concluded that "[t]he majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to."[78] By "pick[ing] the winning side," "black-robed rulers" are now permitted to "intervene in economic and regulatory policy" by using the First Amendment as a weapon.[79]

As with most decisions fraught with political implications, *Janus* received a mixed reaction. Labor unions are generally seen as proponents of the Democratic Party, in large part because the Democratic Party has long advocated for workers' rights, including the right of labor to organize.[80] For that reason, any weakening of labor unions, either legislatively or judicially, is often seen as motivated by partisan politics and a desire to weaken the Democratic Party.[81] Punctuating this point, President Trump, on the morning of *Janus*'s announcement, hailed the decision with a tweet which laid bare the partisan implications: "Supreme Court rules in favor of

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[75] *See Janus*, 138 S. Ct. at 2498 (2018) (Kagan, J., dissenting) ("Relying on [*Knox* and *Harris*] is bootstrapping—and mocking stare decisis. Don't like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as 'special justifications.'").
[76] *See id.* at 2499 (Kagan, J., dissenting).
[77] *Id.* at 2498 (Kagan, J., dissenting).
[78] *Id.* at 2501 (Kagan, J., dissenting).
[79] *Id.* (Kagan, J., dissenting).
[80] *See* James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws*, 3 (Jan. 30, 2018), https://jamesfeigenbaum.github.io/research/pdf/fhw_rtw_jan2018.pdf (last visited Oct. 30, 2018).
[81] *Id.* at 29–30 (finding that Democratic candidates receive fewer votes when states weaken labor unions).

non-union workers . . . Big loss for the coffers of the Democrats!"[82] Other reactions dealt with the more practical ramifications of the decision for public employees at large. Some non-union public school teachers brought suits against their unions to recover previously-withheld agency fees.[83] The organization National Right to Work created a "Janus Task Force" to help assist nonmembers with opting out of their agency fees to ensure compliance with the new decision.[84] For some, the debate waged on, with some commentators taking issue with the premises which laid the groundwork for the decision.[85] If one cannot opt out of paying property taxes that fund public schools—the opinions and teachings of which one may disagree—then compelled speech in the agency fee context should be viewed no differently.[86]

Concerns with a looser iteration of stare decisis principles accelerated with the retirement of Justice Kennedy. By siding with the *Janus* majority, Kennedy agreed that a constitutional precedent could be cast aside based on the quality of its reasoning.[87] This "downgrading" of stare decisis to a "pliable consideration" will permit future courts to reverse some of Kennedy's own landmark opinions.[88] The ensuing Kavanaugh confirmation hearings brought stare decisis to the

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[82] Donald J. Trump (@realDonaldTrump), TWITTER (June 27, 2018, 7:11 AM), https://twitter.com/realdonaldtrump /status/ 1011975204778729474.

[83] Kat Green, *Calif. Teachers Sue To Recover Past Union Dues Post-Janus*, LAW360 (Jul. 3, 2018), https://advance.lexis.com/api/permalink/ab71c620-1faf-4e5e-b07b-018cc4202728/?context=1000516. Alito concluded his majority opinion by noting: "It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment." *Janus*, 138 S. Ct. at 2486.

[84] Vin Gurrieri, *4 Post-Janus Developments You Need To Know*, LAW360 (June 28, 2018), https://advance.lexis.com/api/permalink/ee9742cf-1bc6-458c-80b8-ec7dcd79bb43/ ?context =1000516.

[85] *See* Eugene Volokh, '*The bedrock principle that, except perhaps in the rarest of circumstances, no person … may be compelled to subsidize speech by a third party that he or she does not wish to support'*, WASH. POST: VOLOKH CONSPIRACY (June 30, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/30/the-bedrock-principle-that-except-perhaps-in-the-rarest-of-circumstances-no-person-may-be-compelled-to-subsidize-speech-by-a-third-party-that-he-or-she-does-not-wish-to-support/?noredirect=on&utm_term=.bc7a875eea55.

[86] *Id.*

[87] Jonathan Turley, *Kennedy's Decisions Might Not Last, it Might Be His Own Fault*, WASH. POST, June 28, 2018, https://www.washingtonpost.com/outlook/kennedys-decisions-may-not-last-it-might-be-his-own-fault/2018/06/28/ e39c3298-7a87-11e8-aeee-4d04c8ac6158_story.html?utm_term=.b4d62c6d9ef9.

[88] *Id.* (noting that landmark decisions like *Lawrence v. Texas* (invalidating anti-sodomy laws), *Obergefell v. Hodges* (recognizing the Constitution affords same-sex couples a right to marry), *Planned Parenthood v. Casey* (reaffirming a woman's right to choose to end her pregnancy) were all five-to-four decisions which could be at risk given the focus on a past-precedent's reasoning, a "perfect weapon for activist judges.").

forefront, with concerns among many that Kavanaugh's presence on the Court could represent a fifth vote to overturn *Roe v. Wade*.[89] In her much-anticipated remarks on the Senate floor, Senator Susan Collins echoed these concerns, speaking to then-Judge Kavanaugh's conception of stare decisis, stating:

> He believes that precedent is not just a judicial policy, it is constitutionally dictated to pay attention and pay heed to rules of precedent. In other words, precedent isn't a goal or an aspiration, it is a constitutional tenet that has to be followed, except in the most extraordinary circumstances . . . . When I asked him would it be sufficient to overturn a long-established precedent if five current justices believed that it was wrongly decided, he emphatically said no.[90]

Despite Kavanaugh's insistence that stare decisis ought to be respected, concerns with the ultra-partisan perception of the Court, coupled with the acrimoniousness of the latter Kavanaugh hearings, lead some to question whether the new Court, as constituted, will attempt to safeguard its perception or dive further into partisan turmoil.[91] While Justice Kavanaugh's confirmation underscored the deep partisan judicial divide, it also inadvertently magnified concerns about whether the merits of a precedent will continue to factor into the Court's horizontal stare decisis framework regardless.

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[89] *See* Carole Joffe, *With the appointment of Brett Kavanaugh, Roe v. Wade is likely dead*, WASH. POST (July 10, 2018) https://www.washingtonpost.com/news/made-by-history/wp/2018/07/10/with-the-appointment-of-brett-kavanaugh-roe-v-wade-is-likely-dead/?utm_term=.842cb96619c6; Kimberly Atkins, *Brett Kavanagh tips scales against Roe v. Wade*, BOSTON HERALD (Oct. 10, 2018), http://www.bostonherald.com/news/columnists/kimberly_atkins/2018/10/brettkavanaughtipsscalesagainstroevwade.

[90] Abigail Abrams, *Here's Sen. Susan Collins' Full Speech About Voting to Confirm Kavanaugh*, TIME (Oct. 5, 2018) http://time.com/5417444/susan-collins-kavanaugh-vote-transcript/ (last visited Oct. 6, 2018). Interestingly, the contention that stare decisis is constitutionally required is one that legal academics across the ideological spectrum agree on. *See e.g.* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1549 (2000) (noting that "there is no 'stare decisis clause' in the constitution or anything that can fairly be read as creating one"); Healy, *supra* note 25, at 1180 (concluding that "stare decisis is not dictated by the Framers' assumptions about the nature of judicial power").

[91] *See* Joan Biskupic, *For Supreme Court, Kavanagh Marks a Partisan Turning Point*, CNN (Sept. 29, 2018) https://www.cnn.com/2018/09/28/politics/supreme-court-partisanship-kavanaugh/index.html (last visited Oct. 21, 2018). Despite Chief Justice Roberts' persistent concern with the Supreme Court's partisan perception, Kavanagh, after lamenting in his September confirmation hearing testimony that Democrats were "lying in wait" to derail his nomination, warned "what goes around comes around." *Id.*

III. THE PROGRESSION OF STARE DECISIS

The doctrine's utility and evolution have changed since early concepts of precedential deference first permeated the English common law tradition. Legal developments in England helped spur the use of stare decisis in the Colonies, which then took firm jurisprudential root in the nineteenth century. Perhaps not surprisingly, the way courts interpret the weight accorded the doctrine has fluctuated over time. As the ideology of the Supreme Court oscillates, stare decisis naturally factors more heavily in trickier 5-4 decisions as justices grapple with discarding or retaining established legal principles. The Court's ideological back-and-forth in the twentieth century produced some foundational decisions which altered the doctrine. These changes helped force the dilemma brought on by *Janus*. Tracing the function of precedent from England to the present-day provides the necessary context for this inquiry.

A. Precedent from England to The Founding Era

The examination of stare decisis necessarily requires a review of the doctrine's historical underpinnings to fully understand the role of precedent and the shifting trajectory of the doctrine's effect on the Court's jurisprudence. Traditions of consulting prior decisions to guide judicial opinions have roots in the legal histories of the Egyptian, Greek, and Roman civilizations.[92] Merely consulting prior decisions for their knowledge, however, is far different from a system of legal analysis where prior decisions bind future decisions.[93] Holding a judge to a past decision with which he disagrees is a concept unique to common law courts.[94] The role of precedent as a controlling principle first began to develop and take hold in England during the Middle Ages.[95]

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[92] Healy, *supra* note 20, at 54.
[93] *See* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 30, 41 (1959).
[94] Harold J. Berman & Charles J. Reid Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 445 (1996).
[95] Healy, *supra* note 20, at 54.

At this time, judges would review news of past cases distilled in compilations called Year Books.[96] During this period, a judge was free to disregard any past decision or court procedure with which he disagreed.[97] After Year Book publication concluded by the mid-sixteenth century, private case reports took their place.[98] Though partially unreliable, these private reports helped support the growing legal attitude that common law courts should more readily adhere to their past precedents.[99]

Though the use of precedent goes back to some of the earliest recorded legal histories, the formal doctrine of stare decisis—that precedent binds a court—is a relatively recent legal development.[100] The doctrine, as recognized today, began to develop in the late-eighteenth and early-nineteenth centuries.[101] Preeminent English jurist Sir William Blackstone envisioned precedent as a role of "general obligation."[102] He was the most influential scholar to advocate for a strong version of stare decisis, considering it "an established rule to abide by former precedents, where the same points come again in litigation . . . ."[103] Adherence to precedent was required "to keep the scale of justice . . . [from] waver[ing] with every new judge's opinion."[104] While Blackstone's work served as a turning point in common law conceptions of stare decisis, it also influenced the Founders' knowledge of a jurisprudential ideal.[105]

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[96] *Id.* at 58. Year Books differed greatly from modern law reports in that they did not often report the legal reasoning behind judicial decisions, instead focusing more on the intricate facts of the particular controversy. *See id.* Year Books were not regarded as a collection of binding precedents. *See* THEODORE F. T PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 272 (2010) (ebook).
[97] Berman & Reid Jr., *supra* note 94, at 445.
[98] *Id.* at 446.
[99] *Id.*
[100] Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 659 (1999).
[101] *Id.* at 661.
[102] *Id.*
[103] 2 WILLIAM BLACKSTONE, COMMENTARIES *69.
[104] *Id.*
[105] *See* Lee, *supra* note 100, at 662 (noting that Blackstone's work coincided with the Framer's drafting of the Constitution). Blackstone's influence on the Framers' understanding has been broadly accepted. *See id.* at 661 n.71.

In its infancy, notions of stare decisis and the controlling role of precedent served as foundational legal hallmarks passed down from common law courts to United States courts.[106] The role of precedent in the early American legal system evolved initially as a measure to help constrain the monarch's power.[107] Though lacking a cohesive or unified understanding of the role of precedent, the courts of the early American legal system were nevertheless imbued with a sense that precedent was a fundamental concept.[108] In addition to the Framers' awareness of Blackstone's work on expounding and codifying legal principles,[109] Alexander Hamilton referenced the importance of precedent in the Federalist Papers.[110] In *Federalist No. 78*, Hamilton wrote "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[111] Taken out of context, one could view Hamilton's remarks as a whole-hearted endorsement of stare decisis.[112] This passage was written as part of an argument for life tenure for judges, illustrating that they would require many years to familiarize themselves with procedures and the law.[113]

Other Founding-era scholars with legal influence provided more thoughtful and forceful commentary on the role of stare decisis. Madison espoused a more thorough view of the doctrine,

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See also Schick v. United States, 195 U.S. 65, 69 (1904) (stating that the Commentaries are "the most satisfactory exposition of the common law of England," which the Framers themselves were "undoubtedly" acquainted).

[106] Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 67 (2006).

[107] *Id.*

[108] *See id*. at 67–68.

[109] *See* Lee, *supra* note 100, at 661 n.71.

[110] *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

[111] *Id.*

[112] *See* Lee, *supra* note 100, at 663 (contending that *Federalist No. 78* is not a "comprehensive exposition" of the stare decisis doctrine).

[113] Healy, *supra* note 20, at 100–01. It is far from certain that Hamilton's discussion about precedent in *Federalist No. 78* was related to vertical stare decisis, and not whether or when the Supreme Court could overrule its own decisions. *See* Lee, *supra* note 100, at 664.

in part as a result of his experience.[114] He wrote that "precedents, when formed on due discussion and consideration . . . [were to be] . . . regarded as of binding influence, or, rather, of authoritative force in settling the meaning of a law."[115] Formed as a result of his shifting belief on the constitutionality of the Bank of the United States, Madison conceived a view of stare decisis where deference to precedent was permissible when a legal opinion thoughtfully explained or construed a law or the Constitution, but not when the opinion went so far as to change the meaning of it.[116] Similarly, William Cranch, the Supreme Court's second official reporter, wrote that "every case decided is a check upon the judge," and that judges should not depart from precedent without "strong reasons."[117] While some scholars remain skeptical about the extent to which early-American legal writers intended to enshrine precedent within our founding documents,[118] the development and pervasiveness of stare decisis shortly thereafter cannot be questioned.[119]

The nineteenth century saw a dramatic increase in American judicial commitment to stare decisis.[120] Two distinct and varied occurrences spurred the growth of the doctrine: the rise of legal positivism and the increased availability of law reports.[121] Law reports—recorded transcriptions of judicial decisions—initially sparse and unreliable in the late 1700s, were widespread and reliable by the mid-nineteenth century.[122] Positivist legal thought continued to take hold from the writings of Jeremy Bentham and John Austin, promoting the more widespread belief that cases *were* law, not mere evidence of law.[123] As reports of judicial decisions became widely circulated,

[114] Lee, *supra* note 100, at 664.
[115] *Id.* at 665.
[116] *Id.*
[117] 5 U.S. (1 Cranch) at iii (1801).
[118] Healy, *supra* note 25, at 1182.
[119] Healy, *supra* note 20, at 87.
[120] *Id.*; *see also* Kempin, Jr., *supra* note 93, at 34.
[121] Healy, *supra* note 20, at 87.
[122] Kempin, Jr., *supra* note 93, at 35–36.
[123] *Id.* at 32, 36.

so too grew the belief among scholars that those decisions *themselves* comprised law. From this, a more recognizable version of stare decisis took root and developed to what we see today.

B. Twentieth Century Stare Decisis and a Weaker View of Constitutional Precedents

Any meaningful exposition of the current state of stare decisis must necessarily include a discussion of its constitutional and statutory variations. The Supreme Court is less hesitant to overrule past precedent in cases involving a constitutional question because of the importance placed upon proper interpretation of the Constitution.[124] Conversely, the Court is more hesitant to overrule precedent in cases involving statutory construction.[125] If a court incorrectly divines legislative construction, Congress may simply legislate around the decision.[126] If the Court incorrectly decides a constitutional issue, the non-judicial mechanism by which to undo the decision—amending the Constitution—is an arduous and seldom-used process.[127] Therefore, when convinced of a previous error in a matter of Constitutional interpretation, the Court "has never felt constrained to follow precedent."[128]

That the strength of precedent is determined by the type of matter before the Court is a relatively modern concept which dates back to at least the 1930s. Justice Brandeis's dissent in *Burnet v. Colorado Oil & Gas Company* codified this concept.[129] *Burnet* questioned whether to adhere to or overrule *Gillespie v. Oklahoma*,[130] which invalidated a state tax provision as an infringement upon interstate commerce.[131] In an oft-quoted passage, Brandeis announced that

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[124] *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting) ("Stare decisis is not, like the rule of res judicata, a universal, inexorable command. The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible.").
[125] Lawrence C. Marshall, *Let Congress Do It: The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 181 (1989).
[126] *See Burnet*, 285 U.S. at 406.
[127] *See id.*
[128] Smith v. Allwright, 321 U.S. 649, 665 (1944).
[129] 285 U.S. 393 (1932).
[130] 257 U.S. 501 (1922).
[131] *Id.* at 506.

"[*s*]*tare decisis* is not . . . an inexorable command."[132] Though in an immediately preceding portion Brandeis remarked that in most cases it was of greater importance that the law "be settled than it be settled right," Brandeis later explained that, in matters of Constitutional concern, where legislative correction is "practically impossible," the Supreme Court "has often overruled its earlier decisions."[133] Twelve years later—and after the Court's renunciation of *Lochner v. New York*[134]—the Supreme Court lent support to Brandeis's contention regarding precedential departure when, in *Smith v. Allwright*, the Court struck down a Texas voting requirement which barred African-Americans from voting in primaries, thus overturning its own precedent in *Grovey v. Townsend*.[135] Exclaiming that "when convinced of former error, this Court has never felt constrained to follow precedent," the Court overruled a prior case because of the "erroneous . . . application of a Constitutional principle."[136] Commentators contend that *Allwright* stands as the turning point in delineating this more flexible iteration of the doctrine in constitutional matters, deferring exclusively to Brandeis's dissent which itself was of "questionable historical pedigree."[137] This differential standard continues to play an active role in the modern Court's stare decisis framework.[138]

The Warren, Burger, and Rehnquist Courts addressed issues of constitutional interpretation with far more frequency than did their predecessors in the century prior.[139] While Brandeis's

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[132] *Burnet*, 285 U.S. at 405 (Brandeis, J., dissenting).
[133] *Id*. at 406. Brandeis also offered further support for a flexible stare decisis standard by explaining that in overturning precedent, "[t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function. *Id.* at 407–08. Brandeis cited a myriad of cases in two footnotes in support of the proposition that the Court had always been willing to overturn precedent when convinced of constitutional error. *See id*. at 407 nn.2, 4.
[134] *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
[135] *Allwright*, 321 U.S. 649 (1944).
[136] *Id*. at 664–65.
[137] Lee, *supra* note 100, at 727.
[138] *See, e.g.*, *Janus*, 138 S. Ct. at 2478 (citing Agostini v. Felton, 521 U.S. 203, 235 (1997); Payne v. Tennessee, 501 U.S. 808, 828 (1991); *Burnet*, 285 U.S. at 407).
[139] Lee, *supra* note 100, at 649–50.

"inexorable command" quote is now enshrined in a large number of decisions, only six came in the sixty years between *Burnet* and *Casey*.[140] This shows the frequency with which the Rehnquist and Roberts Courts, particularly, have taken up challenged constitutional precedents.[141] This relaxed standard, as forged by more recent Courts, is not without its detractors. Some argue that "sliding scale" stare decisis is a product of the twentieth century, and completely at odds with the legal notions of the doctrine during the early years of the Marshall and Taney Courts.[142] "If the Rehnquist Court is bent on abandoning a constitutional decision, it may do so with little more than a citation to [*Burnet* and *Allwright*] and their self-fulfilling notion of an accepted practice."[143]

Other members of the Court embraced the weakened constitutional stare decisis. Justice Douglas preferred the tenuous nature of constitutional stare decisis, writing that "above all else . . . it is the Constitution which [we] swore to support and defend, not the gloss which [our] predecessors may have put on it."[144] But as it pertains to the ease with which the Court could overturn its own precedent, Justice Scalia likewise complained that "the doctrine of stare decisis has appreciably eroded" in more recent times.[145] Notwithstanding the critiques of its membership, the Court continues to purportedly apply a system of weakened stare decisis to constitutional matters.[146] The uptick in constitutional issues addressed by the Court brings with it a necessary

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[140] *See* Vasquez v. Hillery, 474 U.S. 254, 266 (1986); *Payne*, 501 U.S. at 828; Erie R.R. v. Tompkins, 304 U.S. 64, 92 (1938); Comm'r v. Estate of Church, 335 U.S. 632, 676 (1949) (Frankfurter, J., dissenting); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 454 (1939) (Black, J., dissenting).
[141] Lee, *supra* note 100, at 728.
[142] *Id.*
[143] *Id.*
[144] William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 743 (1949).
[145] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in 18 THE TANNER LECTURES ON HUMAN VALUES 79, 87 (Grethe B. Peterson ed., 1997).
[146] Despite the Supreme Court's purported likelihood to depart from precedent in constitutional decisions, empirical evidence contradicts that notion. A comprehensive evaluation found that the extent to which a challenged precedent implicates a constitutional issue plays only a marginal role in the Court's decision to overturn or affirm it. *See* Lee Epstein, William M. Landes & Adam Liptak, *The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1117 (2015). Upon review of the 558 precedents attacked in Supreme Court cases between 1986–2013, 296 were constitutional law decisions and 262 were not. Out

increase in stare decisis analysis.[147] But with Justices believing constitutional decisions permit less precedential deference, the precise factors used in that analysis become all the more critical to a stable determination of not only what the law is, but whether it will continue to be what it is.

IV. CURRENT STARE DECISIS DOCTRINE

What are the conditions required for the Court to engage in comprehensive and meaningful stare decisis analysis before overturning precedent? If stare decisis is tantamount to judicial calculus, how does a justice show her work?[148] Whether the Court requires a less-than-tangible "special justification," or objectively analyzes a list of codified and agreed-upon factors may determine the extent to which a challenged precedent's reasoning may be more or less likely to factor in. Fairly recent cases which delineate and expose the current state of stare decisis reinforce the open and unstable status of the doctrine. Understanding the interplay between these factors helps better explain the present status and functionality of the doctrine.

A. Special Justification

As the Court moved through the Rehnquist era where more cases challenged precedent, the Court began to settle upon a more codified framework for when to overturn prior decisions.[149]

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of the total number, only twenty-two cases were expressly overturned. Yet of these twenty-two, fourteen were constitutional precedents and nine were not. This statistical difference is relatively insignificant. *See id.* at 1140–41.

[147] Lee, *supra* note 100, at 649–650; *see also* Daniel Charles (DC) V. Wolf, David R. Fine, Robert B. Mitchell, *A* Janus*-faced Standard? Chief Justice Roberts's Approach to Stare Decisis at the Threshold of a Post-Justice Kennedy Supreme Court*, K&L GATES (July 17, 2018), http://www.klgates.com/a-ijanusi-faced-standard-chief-justice-robertss-approach-to-istare-decisisi-at-the-threshold-of-a-post-justice-kennedy-supreme-court-07-17-2018/ (noting that Roberts's seemingly disparate treatment of stare decisis in recent decisions "suggest[s] that the extent to which Congress has the power to fix a precedent he disagrees with is a key factor for him in deciding how much to defer to the Court's prior decisions") (last visited Feb. 14, 2019).

[148] In *Janus*, Justice Alito employs the phrase "stare decisis calculus." *Id*. at 2481. The phrase was only ever used in one other Supreme Court opinion: Justice Stevens' dissent in *Citizens United*. *See* 558 U.S. at 409 (Stevens, J., dissenting.). In light of the difficulty with which the Court has grappled with its own view of the doctrine, the term "calculus" seems an apt description of the exercise.

[149] *See* Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 582. Professor Lee argues that the move toward a more rigid version of stare decisis by the Rehnquist Court marks a "break with the Court's historical approach" whereby the Court need only be convinced of prior error to overrule a constitutional precedent. *Id*. (internal quotations and citations omitted).

Some commenters theorize that the Rehnquist Court may have begun to adopt a more cohesive stare decisis framework as a natural response to support the Court's legitimacy in light of the appointment of five seemingly-conservative justices by Presidents Reagan and Bush in a relatively short period in the 1980s and early 1990s.[150] Regardless of intention, the Court drifted toward a more codified stare decisis framework during this time. This codification provided that overruling precedent required more than disagreement with the prior ruling, but also some additional, "special justification."[151] Noting that "adherence to precedent is not rigidly required in constitutional cases," Justice O'Connor explained that "any departure from the doctrine of stare decisis demands special justification."[152]

Five years later, Justice Kennedy set forth a series of factors to consider when deciding whether such special justification exists.[153] In discussing the importance of the stare decisis doctrine, Kennedy explained that "stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon an arbitrary discretion."[154] First, Kennedy explained that developments in the law since the writing of the challenged decision could weigh against retaining that precedent.[155] Next, the Court could consider whether the challenged rule had demonstrated some unworkability.[156] Lastly, whether the past precedent had befallen

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[150] *Id.* at 583.
[151] *Id.* at 582. This special justification language was first used by Justice O'Connor in *Arizona v. Rumsey*, 467 U.S. 203 (1984), which declined to overturn *Bullington v. Missouri*, 451 U.S. 430 (1981).
[152] *See Rumsey*, 467 U.S. at 212 (noting that because the petitioner had not offered any such justification sufficient to overturn *Bullington*, the Court declined to do so).
[153] *See* Patterson v. McLean Credit Union, 491 U.S. 164 (1989).
[154] *Id*. at 172 (internal quotations omitted).
[155] *Id.* at 173. "Where such changes [(either by Congress or through subsequent actions by the courts)] have removed or weakened the factual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines, the court has not hesitated to overrule an earlier decision." *Id.* (internal citations omitted).
[156] *Id.* at 173–74. A decision is unworkable if it poses a "detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision…or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws . . . ." *Id.* at 173.

some level of publicly-perceived inconsistency with a "prevailing sense of justice" could weigh in favor of overturning a prior decision.[157] These three factors in *Patterson v. McLean Credit Union* lay the groundwork for Justice Kennedy's hallmark elucidation of stare decisis, authored just three years later.

B. *Payne v. Tennessee*

The buildup to the framework outlined in *Casey* was immediately preceded by what some consider a less-than-thorough approach to stare decisis in *Payne v. Tennessee*, decided just one term before *Casey* in 1991.[158] *Payne* overturned the Supreme Court's precedents in *Booth v. Maryland* and *South Carolina v. Gathers*, both of which held that the Eighth Amendment precludes a jury's consideration of victim impact statements in the sentencing phase of capital trials.[159] *Booth* was decided only four years before the Court overturned it in *Payne*, with *Gathers*' upholding of the *Booth* precedent in the intervening period. As noted by Justice Marshall in his scathing dissent, the Court only overturned *Booth* and *Gathers* after a consequential change in Court personnel.[160] In his dissent, Marshall pointedly decried the Court's novel and cavalier approach to stare decisis, noting that the decision whether to overturn *Booth* and *Gathers* was not a function of which parties in those cases "had the better of the argument."[161] Taking issue with the majority's notion that a precedent is somehow weaker if decided by a narrow margin in the face of "spirited dissents," Marshall lamented that the Court leaves open the possibility that any liberty hitherto protected by the Bill of Rights or the Fourteenth Amendment

[157] *Id.* at 174–75. "[A] precedent becomes more vulnerable as it becomes outdated and after being 'tested by experience, has been found inconsistent with…the social welfare.'" *Id*. at 174 (internal citations omitted).
[158] *See* Tom Hardy, *Has Mighty Casey Struck Out?: Societal Reliance and the Supreme Court's Modern Stare Decisis Analysis*, 34 HASTINGS CONST. L.Q. 591, 596 (2007).
[159] Payne v. Tennessee, 501 U.S. 808 (1991).
[160] *See id.* at 844 (Marshal, J., dissenting) ("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.").
[161] *Id*. at 848 (Marshall, J., dissenting).

could be "open for reexamination."[162] Concerned with what this meant for judicial legitimacy, Marshall contended that an "impoverished conception of stare decisis cannot possibly be reconciled with the values that inform the proper judicial function. . . . [F]idelity to precedent is part and parcel of a conception of 'the judiciary as a source of impersonal and reasoned judgments.'"[163]

Marshall's dissent underscores the continued struggles to balance judicial legitimacy within a proper stare decisis framework. He announced his retirement from the Supreme Court just one day after the decision in *Payne*.[164] The conservative Justice Thomas replaced Marshall, and the Court granted certiorari in *Casey* the following January.[165]

C. *The Casey Factors*

Conservative commentators fully expected the Court, with conservative Thomas on and liberal Marshall out, to overturn *Roe v. Wade*.[166] Instead of bringing Justice Marshall's concerns about debilitated stare decisis to fruition with yet another change in the Court's personnel ushering in a change in personal liberties, the joint opinion in *Casey* provided one of the strongest delineations of stare decisis ever announced.[167] *Casey*, for this reason, is considered the high water mark of stare decisis,[168] with many articles utilizing the *Casey* framework in thorough examinations of the doctrine.[169] This Comment proceeds no differently.

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[162] *Id.* at 851 (Marshall, J., dissenting).
[163] *Id.* at 852 (Marshall, J., dissenting).
[164] James J. Kilpatrick, *When Marshall Disrobed His Colleagues*, BALT. SUN (July 3, 1991), http://articles.baltimoresun.com/1991-07-03/news/1991184073_1_payne-v-justice-marshall-thurgood-marshall.
[165] 502 U.S. 1056, 1057 (1992).
[166] See Lee III, *supra* note 149, at 604.
[167] *See* Hardy, *supra* note 158.
[168] *See* Colin Starger, *The Dialectic of Stare Decisis Doctrine*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 19, 39 (C. J. Peters, ed., 2013) https://www.springer.com/cda/content/document/cda_downloaddocument/9789400779501-c2.pdf?SGWID=0-0-45-1491975-p176334460.
[169] *See, e.g.*, Healy, *supra* note 25, at 1210–18; Lee III, *supra* note 166, at 603–611.

Casey retained the central holding of *Roe*, opting to reaffirm "a woman's right to choose to have an abortion before fetal viability . . . [because] the State['s] . . . previability interests are not strong enough to support an abortion prohibition . . . ."[170] *Casey* serves as the apex of strong stare decisis doctrine because of the depth and importance of its treatment of the doctrine. There, the Court announced that the arguments against *Roe* were outweighed by the "explication of individual liberty . . . combined with the force of *stare decisis*."[171] While the opinion admits that, to some of the justices, "abortion [is] offensive to our most basic principles of morality," the stare decisis considerations outlined in the plurality opinion supported the retention of *Roe*'s central holding.[172] *Casey* set out four specific criteria which the Court should consider when taking up the question of whether or overrule precedent.[173] This analysis, which spans fifteen pages, is grounded in "pragmatic and prudential concerns."[174] By accentuating the importance of the doctrine, the opinion emphasizes judicial legitimacy, the overriding and pervasive justification for strong precedential reliance.[175]

1. Reliance

Of the four "practical and pragmatic considerations" set forth by the *Casey* joint opinion, three address whether the challenged precedent "can be reconciled with the continuity required by

[170] Planned Parenthood v. Casey, 505 U.S. 833, 843 (1992).
[171] *See id.* at 853. *See also id*. at 861 ("[T]he stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it."). Nevertheless, some commentators contend that *Casey* supports a knowingly false legal conception. *See, e.g.*, Michael Stokes Paulsen, *The Worst Constitutional Opinion of All Time*, 78 NOTRE DAME L. REV. 995, 1028 (2003) (asserting that some of the Justices who reaffirmed *Roe* "apparently did so in knowing violation of both law and personal conscience."); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 422 (2006) ("[D]espite admitted reservations about whether Roe correctly interpreted the Constitution, the Casey plurality decision followed Roe's result.").
[172] *Casey*, 505 U.S. at 850.
[173] *Id.* at 854–55.
[174] *Id*. at 854.
[175] *See id.* at 864 (*quoting* Mitchell v. W. T. Grant Co., 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.").

the rule of law."[176] The most outward-looking factor the Court considers is whether the challenged precedent has engendered the type of reliance "that would lend a special hardship to the consequences of overruling."[177] Here, reliance means not just commercial reliance as had been previously examined,[178] but also the social reliance implicit in the predictability of a particular rule of law continuing to govern.[179] Consideration of societal reliance highlights important stare decisis justifications like predictability and fairness, and better permits a reviewing Court to determine which cases it should *not* overrule.[180] Reliance interests would weigh against overruling precedent when to do so would "contradict what Americans have been told the Constitution requires."[181]

Casey noted that, in the time since *Roe*, many Americans had "ordered their thinking" around the availability of abortion, and that "the ability of women to participate equally in the economic and social life of the Nation" produced strong social reliance on the decision.[182] While reliance on the challenged precedent was not easily quantified, the costs of overruling it could not be completely cast aside.[183] Some have understood societal reliance—and the *Casey* stare decisis framework in general—as an understandable response to combat the perception of an overtly political Supreme Court.[184] Others have decried what they perceive as the Court's dereliction of its duty to faithfully interpret the Constitution itself, and that deference to societal expectations prevents the Court from carrying out its role of saying "what the law is."[185] Despite some scholarly

[176] Lee III, *supra* note 149, at 604–05.
[177] *Casey*, 505 U.S. at 854.
[178] *See, e.g.*, *Payne*, 501 U.S. at 828 ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved.").
[179] *See* Lee III, *supra* note 149, at 618
[180] Healy, *supra* note 25, at 1214.
[181] Lee III, *supra* note 149, at 618.
[182] *Casey*, 505 U.S. at 856.
[183] *Id.*
[184] Lee III, *supra* note 149, at 619.
[185] *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1539 (2000). *But see*, Hillel Y. Levin, *A Reliance Approach To Precedent*, 47 GA. L. REV. 1035, 1054–1055 (arguing that societal reliance should have the most dominant precedential effect).

criticism, the importance of societal reliance remains a key component of current stare decisis doctrine.[186]

2. Workability

The Court may overturn itself if a precedent's rule is "intolerable simply in defying practical workability."[187] The *Casey* majority did not expand on this factor, most likely because other cases offer a sufficient definition.[188] For example, the challenged legal rule in *Garcia v. San Antonio Metropolitan Transit Authority*[189] proved unworkable because, in the nine years since its inception in *National League of Cities v. Usery*,[190] courts were unable to distinguish between traditional and non-traditional governmental functions consistently.[191] Similarly, *Swift & Co. v. Wickham*[192] discarded a three-year-old rule in *Kesler v. Department of Public Safety*[193] because judges failed to apply it consistently.[194]

The *Casey* Court found that *Roe* had not become unworkable because it merely provides a "simple limitation beyond which a state law is unenforceable."[195] Even though *Casey* abandoned *Roe*'s trimester framework, a fairly substantial portion of the precedent, the mere need for judicial review and enforcement of a precedent does not by itself negatively implicate its workability.[196] Workability continued to play a role in whether to overturn precedent in a later case. In *Pearson*

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[186] Chief Justice Rehnquist, himself a *Casey* dissenter, considered societal reliance an important consideration which weighed in favor of retaining the core ruling of *Miranda*. See Dickerson v. United States, 530 U.S. 428 (2000) (noting that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."). *Id*. at 443.
[187] *Casey*, 505 U.S. at 854.
[188] *See* Healy, *supra* note 25, at 1211.
[189] 469 U.S. 528 (1985).
[190] 426 U.S. 833 (1976).
[191] *See* Healy, *supra* note 25, at 1211.
[192] 382 U.S. 111, 126–29 (1965).
[193] 369 U.S. 153 (1962).
[194] Healy, *supra* note 25, at 1212
[195] *Casey*, 505 U.S. at 855.
[196] *See id.*

v. Callahan,[197] the Court reversed a procedural requirement announced just eight years earlier in *Saucier v. Katz*,[198] which required qualified immunity inquiries to proceed in a specified order because "experience had pointed up the precedent's shortcomings."[199]

3. Remnant of Abandoned Doctrine

When a precedent has eroded to the point where its "doctrinal footings [are] weaker than they were" at the time of the original decision, such that it remains an outlier amongst more recent jurisprudence, the precedent is more easily overturned.[200] This factor was discussed briefly in *Patterson*,[201] but most noticeably employed in another politically-charged case decided some eleven years after *Casey*: *Lawrence v. Texas*.[202] The underpinnings of *Bowers v. Hardwick*[203] had weakened in light of the Supreme Court's decision in *Romer v. Evans*,[204] depriving the former of the force on which its reasoning principally relied.[205] The precedent challenged in *Casey* was upheld no less than three times by the Supreme Court in the first thirteen years following the initial decision.[206] If a legal principle evolves to the point where a challenged precedent has little remaining effective force, it is more easily overruled. *Roe* rested upon a series of principled and uneroded cases which, *Casey* argued, kept the doctrine on firm footing.[207] *Roe* and the substantive due process progeny it embodies was "not a series of isolated points, but mark[s] a rational

[197] 555 U.S. 223 (2009).
[198] 533 U.S. 194 (2001).
[199] *Pearson*, 555 U.S. at 233.
[200] *Casey*, 505 U.S. at 857.
[201] 491 U.S. 164 (1989).
[202] 539 U.S. 558 (2003).
[203] Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding constitutionality of sodomy laws).
[204] Romer v. Evans, 517 U.S. 620 (1996) (striking down a Colorado constitutional amendment preventing state actors from protecting homosexuals from discrimination).
[205] *See Lawrence*, 539 U.S. at 574.
[206] *See Casey*, 505 U.S. at 858 (citing Akron v. Akron Center for Reprod. Health, Inc., 462 U.S. 416, (1983) and Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986)).
[207] *See Casey*, 505 U.S. at 857 (noting that *Roe* evolves form liberty principles first exemplified in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and from cases preventing government infringement of bodily integrity as explained in *Cruzan v.Mo. Dept. of Health*, 497 U.S. 261 (1990)).

continuum."[208] Even if *Roe*'s central holding was wrong, the Court contended, its continued application would not diminish the liberty upon which it is based, but merely alter the extent of the state's pre-viability interest.[209] The clear implication is that the erroneousness of a past decision—even one as controversial as a right to an abortion—was not, without more, a sufficient justification to overrule precedent.

Whether stare decisis should consider the effect of a precedent as part of an abandoned doctrine inquiry has provoked some criticism. Some claim that a Court can simply overrule a case incrementally by weakening its effect in one case, and then in a subsequent one, overrule it altogether because of the erosion of the precedent at issue.[210] Others remark that notable doctrines abandoned throughout recent history have required more cases to chip away at the foundation.[211] No matter the history of abandoned precedent, more recently-reversed precedents rely on doctrines abandoned in a far shorter length of time.[212]

4. Changed Facts or Circumstances

When facts change or are viewed so differently "as to have robbed the old rule of significant application or justification," a court may overrule precedent.[213] This consideration addresses societal understanding of the issue in question. Thus, *Casey* examined whether, in the two decades

[208] *Casey*, 505 U.S. at 858 (internal citations omitted).
[209] *Id.*
[210] *See* Paulsen, *supra* note 185, at 1557.
[211] *See* Healy, *supra* note 25, at 1213–14 (recalling that *Plessy*'s doctrine was abandoned by Brown v. Bd. of Educ., 347 U.S. 483, 495–96 (1954) (banning segregation in public schools); Turner v. City of Memphis, 369 U.S. 350, 353 (1962) (per curiam) (banning segregation in restaurants); and Browder v. Gayle, 142 F. Supp. 707, 717 (M.D. Ala. 1956), *aff'd mem*., 352 U.S. 903 (1956) (banning segregation on public busses)).
[212] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 377–78 (2010) (Roberts, C.J., concurring). In *Citizens United*, because the challenged precedent, *McConnell v. FEC*, had come under criticism just three years earlier in *FEC v. Wisconsin Right to Life*, the fact that the challenged precedent continued to be a point of contention among the Justices "undermine[s] the precedent's ability to contribute to the stable and orderly development of the law." *Id.* at 380. This same trend appeared in *Janus*, where the Court relied heavily on is decisions in *Knox v. SEIU* from 2012 and *Harris v. Quinn* from 2014 to explain why the legal underpinnings of *Abood* sufficiently weakened its doctrinal foundations. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2483 (2018).
[213] *Casey*, 505 U.S. at 855.

since *Roe*, the factual premises had transformed past the point of *Roe*'s usefulness and relevancy.[214] For example, *Brown v. Board of Education* reconsidered the separate-but-equal doctrine of *Plessy v. Ferguson* and found a sufficient change in facts to warrant overturning because the "badge of inferiority" with which people of color were stamped at the time of *Plessy* no longer governed societal understanding.[215] Likewise, *Casey* wrote that *Lochner* had also been undermined by changed premises, explaining that the Great Depression had proved the failure of *laissez faire* economics which *Lochner*—according to the plurality opinion in *Casey*—embodied.[216] *Casey* found no such erosion of relied-upon factual assumptions which undercut *Roe*'s central holding.[217] While advances in medical technology made abortions safer and brought about fetal viability earlier than it had been in 1973, those changed facts did not weaken the fundamental right, but instead only impacted the judicial solution addressing the competing interests at stake.[218]

Casey's factors remain the most comprehensive codification of the stare decisis doctrine.[219] Yet, the Court's recent emphasis on the quality of a challenged precedent's reasoning provides a new set of challenges and concerns because the Court's ability to circumvent *Casey* could also mean circumventing stare decisis.

V. THE REASONING FACTOR

[214] *Id.*
[215] *Id.* at 863.
[216] *Id.* at 861–62. *But see id.* at 961 (Rehnquist, C.J., dissenting) ("The *Lochner* Court did not base its rule upon the policy judgment that an unregulated market was fundamental to a stable economy; it simply believed, erroneously, that 'liberty' under the Due Process Clause protected the 'right to make a contract.'").
[217] *Id.* at 864.
[218] *Casey*, 505 U.S. at 860. While retaining *Roe*'s central holding, *Casey* discarded *Roe*'s trimester framework, opting instead for an undue burden test, in part as a result of how "time [had] overtaken some of *Roe*'s factual assumptions." *Id.*
[219] *See* Starger, *supra* note 168.

The extent to which a challenged precedent's reasoning may weigh against its continued following dates back, as does the doctrine, to the Medieval era.[220] Because medieval English judges in no way considered themselves bound by a previous decision, most made decisions regardless of how instructive a past case may have been.[221] At times, mere disagreement with a prior decision served as sufficient justification to adopt a separate rule.[222] The amount of deference a precedent received depended almost entirely upon whether a current judge agreed with the reasoning of a prior decision.[223] Because they were not bound by precedent in a *per se*, formalistic sense, judges "stood above all precedent."[224] Later legal theorists expounded on the notion that reasoning plays a role in a precedent's retention.[225] Blackstone, himself a fervent supporter of strong stare decisis, contended that judges ought to neglect precedent only when a previous decision is "flatly absurd or unjust," or "evidently contrary to reason."[226] The level of a decision's wrongfulness plays a part in the modern standards of appellate review, where courts may reverse a lower court's factual findings only if they are clearly erroneous.[227] In light of the legal history of precedential reasoning and the way in which erroneousness factors into other facets of modern judicial calculus, consideration of a challenged precedent's reasoning flows naturally from these other legal foundations.[228]

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[220] *See* Healy, *supra* note 20, at 60–61.
[221] *Id.*
[222] *See* Carleton Kemp Allen, LAW IN THE MAKING (Legal Classics Library Special), 200 (1992) (noting that Chief Justice Bereford, in opting not to follow an earlier court's decision, explained "That was a mistake. We will not do so").
[223] *See* Healy, *supra* note 20, at 61 ("[I]f a previous decision was consistent with the judge's view of reason, it might be considered for its instructive value. But if it conflicted with reason - in other words, if the judge disagreed with it - it could have no value.").
[224] *Id.*
[225] *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *70.
[226] Healy, *supra* note 25, at 1182.
[227] *Id.*
[228] *Id.* at 1210, 1218 (asserting that courts utilize only a moderate presumption of precedential deference and thus, implicitly or otherwise, consider whether a challenged precedent is "egregiously wrong.").

Tracing the evolution of the reasoning factor through the cases *Janus* cites for the proposition uncovers a thin line of support. In *Janus*, Alito announced "[a]n important factor in determining whether a precedent should be overruled is the quality of its reasoning."[229] *Janus* cites Chief Justice Roberts's *Citizens United v. F.E.C.* concurrence, as well as the majority opinion in *Lawrence* for the contention that the quality of a precedent's reasoning serves a proper stare decisis function.[230] Incidentally, Roberts's *Citizens United* concurrence was devoted entirely to stare decisis in order to defend the majority from claims of judicial activism.[231] *Citizens United* overruled *Austin v. Michigan Chamber of Commerce*'s ban on corporate political speech.[232] The majority was right to overrule the challenged precedent, Roberts wrote, in part because *Austin* had proved to be a source of persistent judicial criticism.[233] The government urged the Court to retain *Austin* upon two new compelling interests that the Court had failed to recognize and upon which the precedent was not based. This proved most damning to *Austin*'s prospects for retention, as these implicit concessions "underscore[d] its weakness as a precedent of the Court."[234]

This treatment of stare decisis in *Citizens United* is not without its criticism. Professors Silver and Kozlowski take issue with the stare decisis analysis in *Citizens United*, calling the relevant factors considered by Kennedy's majority opinion and Roberts' concurrence "relatively new," "completely novel," and "problematic."[235] Of particular concern is Kennedy's and

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[229] *Janus*, 138 S. Ct. at 2479, (citing *Citizens United*, 558 U.S. at 363–64; *Lawrence*, 539 U.S. at 577–78).
[230] *Id.*
[231] Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 599 (2011).
[232] *Citizens United*, 558 U.S. at 365.
[233] *See id*. at 380. "[T]he validity of *Austin*'s rationale—itself adopted over two spirited dissents—has proved to be the consistent subject of dispute among Members of this Court ever since. The simple fact that one of our decisions remains controversial is, of course, insufficient to justify overruling it. But it does undermine the precedent's ability to contribute to the stable and orderly development of the law. In such circumstances, it is entirely appropriate for the Court–which in this case is squarely asked to reconsider Austin's validity for the first time–to address the matter with a greater willingness to consider new approaches capable of restoring our doctrine to sounder footing." *Id.* (internal quotations and citations omitted).
[234] *Citizens United*, 558 U.S. at 382–83.
[235] Derigan Silver & Dan V. Kozlowski, *Preserving the Law's Coherence: Citizens United V. FEC and Stare Decisis*, 21 COMM. L. & POL'Y 39, 83–84 (2016).

Roberts's reliance on the "soundness" of the challenged precedent.[236] Their stare decisis analysis, adequately distilled, underlines this central point: soundness of a past decision becomes merely another way of agreeing with that prior decision and tends to rob precedent of its otherwise binding effect.[237] Silver and Kozlowski also find fault with the notion that a precedent which has persisted amidst continued controversy and criticism is somehow less deserving of precedential weight.[238] Academic criticism notwithstanding, *Janus*'s reliance on *Citizens United*, while logically consistent, does not strengthen its stare decisis argument, but instead begs questions about the use of a precedent's reasoning.

The case made for considering a challenged precedent's reasoning in *Lawrence*—also cited in *Janus*—is even more insubstantial. Kennedy's stare decisis analysis in *Lawrence* includes discussion of crucial reliance interests and how they weigh in favor of overturning the precedent in *Bowers*.[239] The opinion then turns to the "rationale of *Bowers*" by quoting a passage of Stevens's dissent in that case.[240] The quoted portion of Stevens's dissent makes two arguments which are directly applicable to the majority's reasoning in *Lawrence*.[241] First, traditionally perceived immorality is an insufficient basis upon which to uphold a law.[242] Second, liberty, as protected by the Fourteenth Amendment, includes the decisions of one's intimate relationship, inclusive of married and unmarried persons.[243] The *Lawrence* majority states that Stevens's analysis should have been controlling then, and "should control here. *Bowers* was not correct when it was decided,

[236] *Id.* at 83.
[237] *Id.*
[238] *Id.* at 83–84. Roberts's *Citizens United* concurrence reiterated the idea from Rehnquist in *Payne* that a majority opinion authored "over spirited dissents" was potentially more likely to fall. *Citizens United*, 558 U.S. at 380 (Roberts, C.J., concurring).
[239] *Lawrence*, 539 U.S. at 577–78.
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.* at 578.

and it is not correct today. It ought not to remain binding precedent."[244] While extolling the wisdom of Stevens's dissent, the *Lawrence* majority does not examine *Bowers* for its wrongfulness, nor does the Court indicate that any wrongfulness of *Bowers* contributes to the reasons that weigh in favor of abandoning it. *Janus*'s reliance on *Lawrence*'s insinuations of precedential wrongness, therefore, appears ill-conceived at best.

Lawrence itself provides a less-than-perfect stare decisis showing because the Court overturned its own precedent but failed to engage in a thorough analysis of the *Casey* factors.[245] By failing to adhere to the *Casey* factors, the Court appears untethered to its own stare decisis jurisprudence at a time—while justifying the overruling of a constitutional precedent of obvious political importance—when consistency is inherently questioned. The *Lawrence* majority may have reached the same decision about overturning *Bowers* had the Court methodically employed the *Casey* factors in its analysis.[246] Yet, because it did not, the Court left itself open to claims of politicization and questions about its legitimacy.[247] Still, others contend that *Lawrence*'s stare decisis analysis satisfied objective concerns by properly showing that the majority's problems with the challenged precedent, *Bowers*, went well beyond "an overriding conviction of past error."[248]

The reasoning language used by Alito in *Janus*—from *Citizens United* and *Lawrence*—borrows stare decisis dicta from two other cases, *Allwright* and *Payne*, which altered constitutional precedent and helped shape stare decisis doctrine.[249] In *Allwright*, Justice Reed concluded by noting that "when convinced of former error, this Court has never felt constrained to follow

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[244] *Id.* at 577–78.
[245] Julie E. Payne, *Abundant Dulcibus Vitiis, Justice Kennedy: In Lawrence v. Texas, an Eloquent and Overdue Vindication of Civil Rights Inadvertently Reveals What Is Wrong with the Way the Rehnquist Court Discusses Stare Decisis*, 78 TUL. L. REV. 969, 1007 (2004).
[246] *Id.* at 973.
[247] *Id.*
[248] Kelly Parker, *Of Sleeping Dogs and Silent Love: Stare Decisis and Lawrence v. Texas*, 41 IDAHO L. REV. 117, 203 (2004).
[249] *See* Lee, *supra* note 100, at 727; *see also* Part IV-B, *infra*.

precedent."[250] *Payne* went further, linking the reasoning factor with the workability factor as proper justification to overturn precedent.[251] Despite the Court's justifications of its treatment of precedent, empirical data suggests that the Roberts's Court most reliably endorses three factors in practice: reliance, workability, and the quality of the challenged precedent's reasoning.[252] This same analysis also discovered a correlation between the frequency with which a brief before the Court demands that a precedent be overturned and the likelihood that precedent is in fact overturned.[253] For example, by the end of the Court's 2015 term, of the seventy-seven precedents challenged in briefs before the Roberts's Court, only five cases had been attacked more frequently than *Abood*.[254]

The primary concern with *Janus*'s view of stare decisis comes from the uneasiness implicit in the depth of its review of the challenged precedent's reasoning. *Janus* takes the poorly-reasoned consideration too far, bringing its review of *Abood* dangerously close to simply re-deciding the forty-one-year-old case on the merits.[255] In so doing, Alito dilutes the potency of the doctrine and ignores the importance of the justifications it supports. Identifying this dilemma does not, on its own, bring forth a solution. But the depth of the problem should be thoroughly vetted and understood before one posits a solution.

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[250] Smith v. Allwright, 321 U.S. 649, 665 (1944); see also Payne v. Tennessee, 501 U.S. 808, 827 (1991) (quoting Smith v. Allwright).

[251] *See Payne*, 501 U.S. at 827 (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)) ("When governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'"). Arguably, better support exists for the contention that the quality of a precedent's reasoning somehow plays a role in whether or not to retain it. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638–42 (1943) (offering a thorough refutation of the three-year-old opinion it overruled).

[252] Lee Epstein, William M. Landes & Adam Liptak, *The Decision To Depart (Or Not) From Constitutional Precedent: An Empirical Study of the Roberts* Court, 90 N.Y.U. L. REV. 1115, 1118 (2008).

[253] *Id.* at 1129–30.

[254] *Id.* at 1148–50. Of course, the frequency with which litigants cited *Abood* in Supreme Court briefs does not necessarily mean that *this* was the reason the Court was more likely to overrule it. Litigants were likely well aware of the Court's inclinations regarding *Abood*, particularly in light of *Knox*, *Harris*, and *Friedrichs*.

[255] *Janus*'s comprehensive review of *Abood* goes far beyond how *Citizens United* addressed *Austin*, or the cursory review *Lawrence* paid to *Bowers*.

Weakened stare decisis means less support for the justifications underlying the doctrine.[256] Of the reasons advanced for its continued vitality, the promotion of certainty in the law is perhaps the most frequently cited.[257] Stare decisis also impacts the perceived equality of the judicial system—one of the most deeply-entrenched notions of American democratic society—by helping to ensure that cases and controversies receive the same treatment.[258] Requiring adherence to precedent also helps constrain judicial choice and, in so doing, helps foster impartiality.[259] Impartiality, or at least the perception of it, is perhaps the most essential value served by stare decisis.[260] Faith in the entire system depends on the public believing that a judge's personal predilections do not factor into the equation.[261] This is undoubtedly an unrealistic—if not also unascertainable—expectation, and the normative proposal that follows attempts to account for that reality, rather than that ideal.

A diminished conception of stare decisis would bring about less-predictable results in matters that would have a profound impact on a variety of weighty constitutional issues. Abrupt changes to liberties codified through cases like *Casey*, *Lawrence*, and *Obergefell v. Hodges* demonstrate the extent to which a sudden change-of-mind by the Supreme Court would alter the daily lives of millions.[262] Similarly, sudden changes to politically consequential doctrines from

[256] *See, e.g.*, *Payne*, 502 U.S. at 827 ("[Stare decisis] promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").
[257] *See* Healy, *supra* note 20, at 108. This may explain in part the pervasiveness with which the court addresses reliance interests.
[258] *See id.* ("From the Declaration of Independence's claim that 'all men are created equal' to the Fourteenth Amendment's guarantee of 'equal protection of the laws,' our democracy has displayed a deep commitment to the principle of equal treatment. By adhering strictly to their own precedents, the courts help to strengthen that commitment.").
[259] *See id.* at 109.
[260] *See* Silver & Kozlowski, *supra* note 235, at 83 ("[A] major component of adherence to the Court's decision is the public's belief that opinions are based on legal reasoning rather than policy preferences.").
[261] *See generally* Payne, *supra* note 5, at 1008.
[262] Justice Kennedy, by siding with the majority in *Janus* and endorsing a view of precedent that focuses on its reasoning, may have "unwittingly . . . crafted the perfect weapon for activist judges" who would undue his legacy

cases like *Citizens United*, *Shelby County v. Holder*, and *Janus* could sharply re-align the nation's political trajectory.[263] If the public's faith in the rule of law depends, in part, upon the stability and consistency that stare decisis seeks to provide, any lesser version of the doctrine necessarily risks less faith in the Supreme Court.

VI. THE SUPREME COURT SHOULD CLARIFY THE POORLY-REASONED STANDARD

Stare decisis stresses the importance of certainty, yet the poorly-reasoned factor undercuts that certainty altogether. The stare decisis tension between *Casey* and *Janus* means a higher level of hesitation about how a challenged precedent will be examined, and ultimately whether it will be overturned. *Janus* accentuates the trend of the Roberts's Court, which makes clear that the quality of a precedent's reasoning continues to play a role in the Court's decisions which implicate stare decisis. The question is not whether a precedent's reasoning *should* be analyzed, but *how* it can and should be analyzed. This Section will offer three possible solutions for the poorly-reasoned factor, weighing the potential benefits and drawbacks of each. Ultimately, only one remedy allows precedential consideration to supplement more traditional stare decisis considerations while simultaneously constraining its ability to dominate the overall analysis. Clarifying the reasoning factor's functionality and confining its use helps foster consistency while preserving the justifications for the stare decisis doctrine, vitally important to the survival of the public perception of judicial objectivity and faith in the rule of law.

A. Poor Solutions for the Poorly-Reasoned Factor

which is "as fragile as it is immense." Jonathan Turley, *Kennedy's Towering, Teetering Legacy*, WASH. POST B05 (July 1, 2018).

[263] Some commenters note that the recent focus on the reasoning of a past decision is a concept pushed by the Court's Conservative Justices. Similarities in the *Payne* majority and *Casey* dissent also appear in the stare decisis formulation of *Citizens United. See* Colin Starger, *The Dialectic of Stare Decisis Doctrine*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 19, 39 (C. J. Peters, ed., 2013) https://www.springer.com/cda/content/document/ cda_download document/9789400779501-c2.pdf?SGWID=0-0-45-1491975-p176334460.

One possible answer to the question of whether the Court's stare decisis framework should include a challenged precedent's reasoning is to just exclude it from entering the equation altogether. This would minimize the possibility of a justice's policy preferences influencing a decision and guard against the perception of judicial subjectivity. It would also comport with the views of Justice Kagan's *Janus* dissent,[264] as well as Justice Marshall's dissent in *Payne.*[265] Because legal scholars have also warned about overreliance on the poorly-reasoned factor, keeping it out entirely seems a logical response to those concerns.[266]

This proposition is simply unrealistic. From a practical standpoint, justices will always bring their preconceived notions, policy preferences, and personal beliefs to the particular set of issues each case presents. The way some decisions link a precedent's workability to the reasoning factor indicate a predisposition to rely on one's own beliefs about the strength of a precedent in question.[267] In an ideal legal reality where purely objective judicial decision-making is not just ascertainable, but also identifiable, the complete exclusion of a challenged precedent's reasoning would certainly seem a benchmark worth striving. Such an ideal legal reality, however, is unattainable. Accordingly, forcing a Supreme Court justice to cordon off or disguise his or her

[264] *See* 138 S. Ct. at 2497 (Kagan, J., dissenting) ("The majority makes plain, in the first 33 pages of its decision, that it believes *Abood* was wrong. But even if that were true (which it is not), it is not enough.").
[265] *See* 501 U.S. at 844 ("[T]he majority declares itself free to discard any principle of constitutional liberty which was recognized or reaffirmed over the dissenting votes of four Justices and with which five or more Justices now disagree. The implications of this radical new exception to the doctrine of *stare decisis* are staggering.").
[266] *See* Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring) ("Who ignores [the doctrine of stare decisis] must give reasons . . . that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)."); Harris v. Quinn, 134 S. Ct. 2618, 2652 (2014) (Kagan, J., dissenting) ("The special justifications needed to reverse an opinion must go beyond demonstrations (much less assertions) that it was wrong; that is the very point of *stare decisis*."). *See also* Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U.L. REV. 789, 794 (The principle that overrulings should require more than disagreement allows precedent to play the constraining, stabilizing role . . . . [J]udges should resist the urge to overrule decisions that they deem to be clearly erroneous or poorly reasoned, because such descriptions tend to be bound up with methodological tendencies that vary from judge to judge."); Healy, *supra* note 25, at 1208 ("If courts are not bound, even presumptively, by decisions they disagree with, then precedent has no authority and courts are simply resolving cases on the merits.").
[267] *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (quoting Smith v. Allwright 321 U.S. 649 (1944) ("When governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'").

own inherent predispositions is not transparent. Clear expectations of the stare decisis doctrine better serve the public's faith in the judicial system.

At the other end of the spectrum, the counterpoint to complete exclusion altogether is to not only include the quality of a challenged precedent's reasoning, but to offer that consideration controlling weight. In short, if a majority of the Court feels the past precedent is poorly reasoned, then that alone could be sufficient justification to overturn past precedent. After all, if a justice will always, consciously or otherwise, rely on his or her personal view of the merits of a prior decision, then why not permit that factor to control?[268]

This too, for obvious reasons, misses the mark. While it would undoubtedly trim down the necessary briefing, it would also permit blatant subjectivity to infect the stare decisis process. Because predictability and consistency support the rule of law, placing controlling reliance on the perceived rightness or wrongness of past precedent destroys any semblance of apolitical respect the Court may still have in these bitterly partisan times. The Court should take strides to remove itself from day-to-day partisan acrimony and trumped-up political showdowns.[269] Making obvious that "power, not reason" controls the Court's decision-making, as Justice Marshall warned in *Payne*, would shake one of the most important institutions of American democracy.[270]

B. The Way Forward: Inclusion of a Precedent's Reasoning with Limited Weight

The soundness of a past precedent should be included in the Supreme Court stare decisis formulations, but its weight should be limited. Including this factor serves as an acknowledgment

[268] *But see Casey*, 505 U.S. 833, 861 (1992) ("[T]he stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.").
[269] The integrity of the Court has been a purported goal of Chief Justice Roberts during his tenure. Some contend that his vote breaking with the conservative wing and retaining the Affordable Care Act in *NFIB v. Sebelius*, 567 U.S. 519 (2012) was an action geared more toward preserving the perception of an apolitical judiciary amidst intense political scrutiny. *See* Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012), https://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/ (last visited Nov. 1, 2018).
[270] *See* Payne, 501 U.S. at 844 (Marshall, J., dissenting).

of the impossibility of completely sanitizing all personal inclinations from important decisions. Litigants should be on notice that the quality of a challenged precedent's reasoning will be evaluated by the Court when bringing a challenge to a precedent. Likewise, respondents arguing in favor of retaining the old doctrine should be on notice that they should be prepared to justify the precedent.[271] By including the factor, the Court will naturally avoid the likelihood of an ideological dissent decrying the subversion of stare decisis.[272] Transparency in the judicial process will help support belief in the Court and the rule of law.[273]

Whether a precedent truly is poorly-reasoned should hinge on more objective criteria. Such conditions may include the legitimate consistency of the challenged precedent with other similarly-related decisions amidst the jurisprudence of the time.[274] Additional, objective considerations could also include the extent to which a challenged precedent is based on non-analogous legal reasoning.[275] For example, in *Janus*, one of Alito's most convincing claims about *Abood*'s reasoning was how it misused *Hanson* and *Street*'s conclusions about private agency fee arrangements to justify them in the public sector.[276] If *Abood* completely misapplied then-existing First Amendment precedent, poor reasoning to that degree would be more firmly grounded in

[271] *See, e.g.*, *Janus*, 138 S. Ct. at 2481–82 ("Not even the parties defending agency fees support the line that it has taken this Court over 40 years to draw."); *Citizens United*, 558 U.S. at 383–84 (noting that the arguments made for retaining the challenged precedent were not the same on which the precedent was based).
[272] In light of Rehnquist's language in *Payne*, avoidance of "spirited dissents" seems a worthwhile endeavor before that issue develops into the next potential stare decisis consideration-to-be-included.
[273] *See* William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949) ("The principle of full disclosure has as much place in government as it does in the market place. A judiciary that discloses what it is doing and why it does it will breed understanding.").
[274] The most succinct way to illustrate this point is to liken it to the abuse-of-discretion standard of appellate review. An opinion can be poorly-reasoned—for the purposes of precedential reasoning inclusion in stare decisis formulations—if the then-existing operative law nearly required that the matter, in all likelihood, be decided one way, but it was decided another. However, if the precedent is objectively poorly-reasoned, but that reasoning now runs afoul of other *Casey* factors—most plausibly remnant of an abandoned doctrine or changed facts or circumstances—such that the original reasoning that should have controlled is itself no longer operable, the *Casey* factors should control. To allow to decades-old reasoning to still control would be to subvert the evolution of related doctrine.
[275] *See, e.g.*, *Janus*, 138 S. Ct. at 2479–80 (noting that *Abood* was based on two cases which failed to adequately address the First Amendment issues at play because the union agreements in *Hanson* and *Street* dealt with private-sector employment.).
[276] *Id.*

objective concerns.[277] This focus on objective reasoning criteria generally accords with how some scholars envision the role of the reasoning factor in stare decisis framework.[278]

Alito's predispositions toward agency fees, and perhaps public employee unions in general, as shown in *Knox* and *Harris*, bring forth dangerous concerns about the Court's over-politicization. That worry, while perhaps appropriately discomforting, does not on its own make *Abood* necessarily worthy of retaining.[279] Including the reasoning factor in the Court's stare decisis framework, while simultaneously limiting the role it can play, effectively guards against these overly-political concerns. Whether *Abood* impinges upon the First Amendment to the extent characterized by the majority, or whether reliance interests as strong as the dissent argues should—or even ought to—outweigh that impingement, would comprise part of a healthy debate on the existence of poorly-reasoned precedent.

Though it should be considered, the Court should not afford the quality of the challenged precedent determinative weight. As explained in Part IV, *infra*, stare decisis draws on a series of different considerations and weighs them together. These considerations, ideally the four factors explained in *Casey*, should predominate the analysis because of their prevalence, persistence, and

[277] *See generally* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 ("[W]hen a court says that a past decision is demonstrably erroneous, it is saying not only that it would have reached a different decision as an original matter, but also that the prior court went beyond the range of indeterminacy created by the relevant source of law….[T]he doctrine of stare decisis could take account of this difference."). Of course, reasonable Justices could differ as to whether a prior court even went beyond that "range of indeterminacy." Nevertheless, there remains a distinct difference between weighing the extent to which a past precedent strayed from its jurisprudential moorings and simply re-deciding a challenged precedent on the merits.

[278] *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 304 (1985) (Stevens, J., dissenting) (Though upholdingthe challenged precedent earlier on purely stare decisis grounds, recent legal challenges increased Stevens' inclination to overrule a decision that "can be properly characterized as 'egregiously incorrect'"); *see also* Healy, *supra note* 25, at 1209–10 (Courts in practice more closely follow the "moderate presumption" model of precedential deference, or the concept that "mere disagreement with an earlier decision is not enough to overrule . . . [but] the extent of disagreement with the earlier decision can be taken into account . . . . [O]ne of the special reasons that will justify the overruling of precedent is a conviction that the earlier decision was egregiously wrong.").

[279] *See* Nelson, supra note 277, at 8 ("The doctrine of stare decisis would indeed be no doctrine at all if courts were free to overrule a past decision simply because they would have reached a different decision as an original matter.").

objective focus. Even if a precedent is objectively poorly reasoned, the *Casey* factors should still carry the calculus.

The concerning dilemma with *Janus* is not its political outcome, but the ease with which a majority can choose different, and most alarmingly, unanticipated and enigmatic methods to arrive at the stare decisis result. Because stare decisis is not a mathematic formulation, it is difficult to definitively recognize the box-ticking mechanics of a particular stare decisis decision. In order to ensure that the Court has not given determinative weight to the reasoning factor, Supreme Court opinions that address comprehensive stare decisis concerns should proceed in a similar manner as one another. For stare decisis to lean in favor of overruling an objectively poorly-reasoned precedent, the Court should find a plurality of the *Casey* factors skew heavily against it.

A choose-your-own-adventure conception of the doctrine presents far too many risks. Adhering to a consistent framework strengthens the doctrine and allows for better judicial analysis.[280] Whichever way the scales tip, the reasoning of a challenged precedent should not be the controlling stare decisis factor. Other more traditional, and more ascertainably objective stare

[280] Several post-*Payne* articles urge a more consistent stare decisis framework and explain the detrimental effects of an inconsistent doctrine, notwithstanding the merits of a particular decision or the idealized stare decisis norms for which legal academics may advocate. *See, e.g.*, Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 153–56 (2008) (explaining the inconsistencies in Justice Stevens' stare decisis approaches); Payne, *supra* note 5, at 972–73 (failure of the Rehnquist Court to rigidly apply the *Casey* stare decisis framework in *Lawrence* risks the appearance of politicization); Parker, *supra* note 248, at 196 (expressing concern with stare decisis variability in *Lawrence* and the inherent risk of subjectivity and inconsistency by deviating from it); John Wallace, Note, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism and Politics in Casey*, 42 BUFFALO L. REV. 187, 251 (1994) (decrying the failure "traditional" stare decisis considerations to overrule *Roe* in *Casey*); David L. Berland, Note, *Stopping The Pendulum: Why Stare Decisis Should Constrain The Court From Further Modification Of The Search Incident To Arrest Exception*, U. ILL. L. REV. 695 (Calling for greater stare decisis consistency in the wake of the Court's decision in *Arizona v. Gant*); David Crump, *Overruling Crawford V. Washington: Why And How*, 88 NOTRE DAME L. REV. 115, 155 (2012) ("[B]y departing from stare decisis without analyzing whether the departure could be justified under the Court's decisions authorizing it, Justice Scalia arguably engaged in reasoning that ought itself to be rejected."). *But see*, Kurt T. Lash, *The Evolution Of Theory: The Cost Of Judicial Error: Stare Decisis And The Role Of Normative Theory*, 89 NOTRE DAME L. REV. 2189, 2206 (2014) (arguing that "varying application of the doctrine of stare decisis is perfectly appropriate in a system that allows for the application of normative constitutional theory.").

decisis factors, like the four in *Casey*, should predominate.[281] The more consistent and comprehensive the stare decisis analysis, the heavier the lifting done by the *Casey* factors.

C. Anticipated Criticism

One might object that this change to the stare decisis framework permits a justice to include—or at the very least attempt to less-than-cleverly disguise—his or her views of constitutional provisions at best, or his or her policy preferences at worst, in vitally important and consequential constitutional decisions. Some would argue that this poison the well, openly permitting a corruption of the process that stare decisis itself strives to prevent. Few would argue that faith in the Supreme Court would be enhanced by discarding all notions of stare decisis altogether. This attack presupposes that implicit judicial preferences can be definitively removed from the equation. The solution proposed recognizes that they cannot and seeks to prevent judicial subjectivity from controlling stare decisis. Tethering the poorly-reasoned factor to more objective considerations and providing it only limited weight keeps any bias as appropriately and efficiently cabined as possible.

Some may also disapprove of the inclusion of this standard because, even if it limits the weight of the poorly-reasoned factor, any watering-down of stare decisis risks sharper ideological swings on an already polarized Supreme Court. If established precedents are less likely to survive a definitive change in Court membership, such quick ideological changes would upset legitimate reliance interests and upend predictability, sullying the reputation of the Court. Concerns about the extent to which Justice Kavanagh may provide a decisive vote for the conservative wing if engaged in assaults on topics such as substantive due process or equal protection jurisprudence

[281] This Comment's normative proposal does not mean that utilization of this methodology would necessarily see *Janus*'s stare decisis analysis come out differently than it did. Alito makes a compelling argument that *Abood* was objectively poorly-reasoned. *See supra* note 275.

underscore the severity of these apprehensions. These concerns, however, assume that, but for the stare decisis doctrine, the Court would not otherwise limit its interpretation of challenged precedents. Indeed, the Court frequently limits its precedents without overtly overruling them.[282] And again, by constraining the use of precedential reasoning, the Court must still ground its stare decisis analysis in traditional and objective criteria. This may not completely deter shifting jurisprudence resulting from a change in the Court's membership, but a departure from precedent would still require justification over and above that personnel change. This proposal adheres to that ideal.[283]

VII. CONCLUSION

A Supreme Court justice is not cleansed of all political inclinations or personal policy preferences upon her swearing in. Indeed, a president selects nominees who will interpret the Constitution in a manner consistent with each respective administration's stated aims. Yet the perception of the Supreme Court as being comprised of nine justices blindly voting in partisan lock-step threatens to divest the entire system of the respect for process, and ultimately the belief in the rule of law. Stare decisis helps to protect against such troubling prospects. The inclusion of a challenged precedent's reasoning in the Court's stare decisis equation seeks to strike a balance between the need for practical transparency and the defense of the entire institution. Codifying but limiting the standard supports the justifications for stare decisis in general: stability,

[282] *Casey* made it easier for states to restrict abortions, and *Harris* all but signaled the end of *Abood*. *See* Harris v. Quinn, 134 S. Ct. 2618, 2652–53 (2014) (Kagan, J., dissenting) ("Readers of today's decision will know that *Abood* does not rank on the majority's top-ten list of favorite precedents—and that the majority could not restrain itself from saying (and saying and saying) so.").

[283] This Comment and its focus are spurred on by the contention that few greater threats to the legal system exist than a deepening mistrust of the Supreme Court akin to the bitter partisan divide and general public disregard for the other two branches of government. This proposal seeks to reinforce a doctrine—stare decisis—that inherently guards against such dangers.

predictability, and judicial legitimacy. Because the perceived sanctity of the process is a vital end unto itself, stare decisis should further sustain, not erode the perception of justice.