

## JANUS-FACED JUDGING: HOW THE SUPREME COURT IS RADICALLY WEAKENING STARE DECISIS

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### ABSTRACT

*Drastic changes in Supreme Court doctrine require citizens to reorder their affairs rapidly, undermining their trust in the judiciary. Stare decisis has traditionally limited the pace of such change on the Court. It is a bulwark against wholesale jurisprudential reversals. But, in recent years, the stare decisis doctrine has come under threat.*

*With little public or scholarly notice, the Supreme Court has radically weakened stare decisis in two ways. First, the Court has reversed its long-standing view that a precedent, regardless of the quality of its reasoning, should stand unless there is some special, practical justification to overrule it. Recent decisions instead claim that “poor reasoning” in a prior decision justifies overruling cases. Second, the Court has discredited older precedents. The Court has claimed such older decisions have less weight because they may have violated individual rights during their life span.*

*The radical weakening of stare decisis presents a grave threat to legal stability. Justices can always find reasoning they believe is “poor” in prior decisions, which they can also claim have long violated citizens’ rights. Under this formulation, stare decisis provides little restraint against changing course. It also opens the*

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*door to “wave theories” of stare decisis, whereby new Justices seeking rapid change can claim fidelity to a weak version of stare decisis early in their careers, only to suggest a stronger version later to protect their own decisions.*

*This weakening of stare decisis has deep analytical flaws that would allow perpetual changes to legal doctrine based simply on the current Justices’ preferences. The Court must not accept the alarming effects this movement would have on legal stability, doctrinal consistency, and judicial legitimacy.*

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## INTRODUCTION

Following several recent changes on the Supreme Court's bench, pundits have speculated that the Court may be willing to overturn prior decisions in controversial constitutional cases.<sup>1</sup> Though such forecasts are speculative,<sup>2</sup> there is evidence that a weaker version of stare decisis—the presumption that the Supreme Court generally should not overrule its prior decisions—is in vogue on the Court. The 2018 decision *Janus v. American Federation of State, County, and Municipal Employees, Council 31* has emerged as a new leading precedent on precedents.<sup>3</sup> The Court cited it twice in the 2018 Term in cases in which it overruled a precedent.<sup>4</sup> In two further opinions, Justice Gorsuch cited *Janus* when he would have overruled other precedents.<sup>5</sup> And in the 2019 Term, Justices across the ideological spectrum cited *Janus* in two major decisions, frequently using *Janus's* stare decisis framework to argue for overruling precedent.<sup>6</sup>

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1. See, e.g., Alexandra Hutzler, *Supreme Court Overturning 40-Year-Old Precedent Is 'Deeply Disturbing' Decision for Other Landmark Cases: Experts*, NEWSWEEK (May 13, 2019, 4:32 PM), <https://www.newsweek.com/supreme-court-overrule-precedent-roe-v-wade-1424322> [<https://perma.cc/MGJ6-DGZC>]; *In a Heartbeat—The New Push to Overturn Roe v. Wade*, ECONOMIST (Apr. 13, 2019), <https://www.economist.com/united-states/2019/04/13/the-new-push-to-overturn-roe-v-wade> [<https://perma.cc/4EDS-8YNE>]; Scott Lemieux, *Yes, Roe Really Is in Trouble*, VOX (May 15, 2019, 11:00 AM), <https://www.vox.com/2019/5/15/18623073/roe-wade-abortion-georgia-alabama-supreme-court> [<https://perma.cc/S5YP-FK6Y>]; Adam Liptak, *Justices Split over the Power of Precedent*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/us/politics/supreme-court-precedent-vote.html> [<https://perma.cc/W8CK-4YH6>]; Nina Totenberg, *Supreme Court Overturns Precedent in Property Rights Case—A Sign of Things to Come?*, NPR (June 22, 2019, 7:00 AM), <https://www.npr.org/2019/06/22/734919303/supreme-court-overturns-precedent-in-property-rights-case-a-sign-of-things-to-co> [<https://perma.cc/WR2Y-WDCF>]; AJ Willingham, *The Supreme Court Has Overturned More than 200 of Its Own Decisions. Here's What It Could Mean for Roe v. Wade*, CNN (May 29, 2019, 7:31 AM), <https://www.cnn.com/2019/05/29/politics/supreme-court-cases-overturned-history-constitution-trnd/index.html> [<https://perma.cc/K28Y-TLE7>].

2. In fact, those predicting immediate reversals of abortion rulings proved incorrect, at least for now. See *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

3. 138 S. Ct. 2448 (2018).

4. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019); *Franchise Tax Bd. of Ca. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019).

5. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2445 (2019) (Gorsuch, J., concurring); *Gamble v. United States*, 139 S. Ct. 1960, 2006 (2019) (Gorsuch, J., dissenting).

6. See *June Med. Servs. L.L.C.*, 140 Ct. at 2134 (Roberts, C.J., concurring); *id.* at 2152 (Thomas, J., dissenting); *id.* at 2170-71 (Alito, J., dissenting); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1409 (2020) (Sotomayor, J., concurring); *id.* at 1411, 1414 (Kavanaugh, J., concurring);

Though others have noted *Janus*'s importance,<sup>7</sup> this Article provides the first analysis both of that decision's place within a broader movement to weaken stare decisis and of the two unseemly changes that movement has made to stare decisis doctrine: (1) permitting the Court to overrule a precedent simply because of its "poor reasoning," and (2) discrediting older precedents because they may have violated individual rights during their life span.

*Janus*'s formulation of the stare decisis doctrine is a new zenith in the "weak" stare decisis tradition. The weak tradition posits that "poor reasoning" in a prior decision is not merely a condition precedent to stare decisis analysis but is also a substantive consideration in that analysis that may itself justify a reversal.<sup>8</sup> By contrast, under the "strong" stare decisis tradition, a precedent should stand unless there is some "special justification" to overrule it, regardless of the quality of its reasoning.<sup>9</sup> Potential justifications include whether the precedent "def[ies] practical workability," is subject to special reliance interests, is a mere "remnant of

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*id.* at 1439 (Alito, J., dissenting).

7. See, e.g., Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 137-38 ("Although none of the justifications in *Janus* for disregarding or overruling a precedent was entirely new in that case, the very act of listing and purporting to use all of them lays the groundwork in future cases for a further weakening of whatever strength a norm of stare decisis may hold.").

Justice Kagan also noted the heavy reliance several Justices placed on *Janus*'s formulation of the stare decisis doctrine when dissenting from the Court's decision in *Knick*. See 139 S. Ct. at 2190 (Kagan, J., dissenting). According to Kagan, the *Knick* majority overruled a 1985 precedent with little more in support than a citation to *Janus*, "[the 2018] Term's decision overruling a [forty]-year-old precedent." *Id.* (criticizing the Court's decision to overrule *Williamson County Regulatory Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). Kagan warned that "[i]f that is the way the majority means to proceed—relying on one subversion of stare decisis to support another—we may as well not have principles about precedents at all." *Id.*

8. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 53 (2001) (describing a "weak" form of stare decisis that "would begin by asking whether the past decision reflects a permissible or an impermissible view of the underlying law," then presumptively overruling impermissible, "demonstrably erroneous" interpretations); Colin Starger, *The Dialectic of Stare Decisis Doctrine*, in PRECEDENT IN THE UNITED STATES SUPREME COURT 19, 29 (Christopher J. Peters ed., 2013) (describing the "weak conception of stare decisis" as that which "sanctions overruling if a challenged precedent suffers from 'bad reasoning'").

9. See Starger, *supra* note 8, at 29 (describing the "strong" conception of stare decisis as that which "requires a 'special justification' for overruling beyond mere belief that the challenged precedent was 'wrongly decided'").

abandoned doctrine,” or is based upon facts that have changed so significantly that the rule is no longer applicable.<sup>10</sup>

Prior to *Janus*, the most prominent example of the weak stare decisis tradition was the Court’s discussion in *Citizens United v. Federal Election Commission*.<sup>11</sup> In that case, the Court overruled a twenty-year-old precedent<sup>12</sup> by emphasizing the “quality of reasoning” in that opinion, discussing it first in its stare decisis analysis before mentioning any other factors.<sup>13</sup>

In *Janus*, the Court made that weakened version of stare decisis even weaker. The majority’s reformulated list of stare decisis factors undermined the doctrine in two ways.<sup>14</sup> First, *Janus* placed “quality of ... reasoning” as the very first factor Justices should consider when unsatisfied with a precedent, and the whole of its analysis of *Abood* focused on its substantive flaws.<sup>15</sup> This suggests that poor reasoning in a prior decision is more than just a cause to turn to stare decisis analysis; it is instead a sufficient condition to overturn decisions. That elevates the “poor reasoning” factor to new and dangerous prominence.

Poor reasoning provides an ever-present justification for overturning decisions. Conversations about stare decisis only arise, after all, when current Justices believe that a prior decision was

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10. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992) (plurality opinion). Strong stare decisis is expressed most clearly in *Casey*. See Starger, *supra* note 8, at 39.

11. 558 U.S. 310 (2010); see Starger, *supra* note 8, at 30.

12. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), overruled by *Citizens United*, 558 U.S. at 310.

13. *Citizens United*, 558 U.S. at 363. The *Citizens United* Court used a formulation of stare decisis that analyzed the precedent’s “workability, ... the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.” *Id.* at 362-63 (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009)). The *Citizens United* Court borrowed its formulation from *Montejo v. Louisiana*, a 2009 case that likewise included the quality of the precedent’s reasoning as the last factor to consider within the doctrine. See *Montejo*, 556 U.S. at 792-93.

14. See *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018). It is worth noting that simply by articulating any standards at all while considering stare decisis, a Justice ascribes some content and value to prior decisions, even if only at a theoretical level. That Justice should, therefore, have some interest in the normative desirability of the factors they include in the doctrine.

15. *Id.* at 2478-86.

substantively incorrect and might warrant a change in direction.<sup>16</sup> Stare decisis in the wake of *Janus* would provide little restraint against changing course.<sup>17</sup> Such a conception of stare decisis would be unable to settle disputes independent of the Justices' views about the substantive correctness of a decision or the proper method to achieve substantively correct results.<sup>18</sup> Widespread adoption of *Janus* would significantly undermine doctrinal stability. The ability of judicial precedents to make the law "certain and known" through public announcement and repeated confirmation would be significantly reduced.<sup>19</sup> It would also undermine judicial legitimacy. The Court and the appointments process would become even more overtly politicized than they are today. *Janus* might also undermine legal consistency if lower courts freely deviate from Supreme Court precedent that appears substantively incorrect. The stare decisis doctrine itself would be rendered so incoherent and unworkable that it could hardly be considered a doctrine at all; even *Janus*'s supporters will struggle to identify any consensus about the substantive correctness of prior decisions. *Janus*'s emerging role as an authoritative precedent on precedent thus presents a grave danger.

The second way that the *Janus* formulation diluted the stare decisis doctrine was by overemphasizing the importance of a

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16. See, e.g., RANDY KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 102 (2017) ("By tethering a decision's continued vitality to the perceived gravity of its offenses—a perception that will vary from [J]ustice to [J]ustice—the prevailing approach to stare decisis robs precedents of independent value beyond their attractiveness on the merits."); Schauer, *supra* note 7, at 140 ("[T]he essence of a stare decisis claim is a content-independent appeal to respecting mistaken decisions despite their being mistaken."); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) ("[F]or precedent to mean anything, the doctrine [of stare decisis] must give way only to a rationale that goes beyond whether the case was decided correctly."). As Chief Justice Roberts acknowledged when asked about overruling precedent during his confirmation hearings, "it is not enough that you may think the prior decision was wrongly decided. That really doesn't answer the question. It just poses the question." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 144 (2005) [hereinafter *Roberts Hearing*] (response of Judge John G. Roberts, Jr., to questioning by Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary).

17. Schauer, *supra* note 7, at 128 ("For stare decisis to be of genuine importance, it must tell decision makers to make decisions they think mistaken on first-order substantive grounds.").

18. See KOZEL, *supra* note 16, at 61.

19. See Letter from James Madison to Charles J. Ingersoll (June 25, 1831), in 4 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 183, 184 (Philadelphia, J.B. Lippincott & Co. 1865).

precedent's age in determining its precedential weight. This factor came to prominence in two 2009 decisions, *Montejo v. Louisiana*<sup>20</sup> and *Pearson v. Callahan*,<sup>21</sup> in which the Court suggested that younger precedents can be more readily overturned,<sup>22</sup> though that trend was mitigated recently by the Court's deference to a four-year-old decision in 2020's *June Medical Services L.L.C. v. Russo*.<sup>23</sup> In contrast to the *Montejo/Pearson* approach, the *Janus* court suggested that some older precedents should receive less precedential weight as well.<sup>24</sup> For the *Janus* Court, older decisions that are substantively incorrect may have been violating citizens' rights for a longer period and are thus more dubious.<sup>25</sup> Additionally, because older decisions may have been judicially criticized over their long life span, rational actors have likely disregarded them, weakening the precedent's value.<sup>26</sup>

*Janus*'s claims invert the relationship between a precedent's age and its jurisprudential stability, even within the weak *stare decisis* tradition. If the fact that a precedent has been around for decades suggests that its substantive correctness is actually *more* dubious—no matter whether others have reviewed the precedent and supported it—the doctrine is far weaker. Older decisions can easily be discarded because they are both likely to have been criticized by

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20. 556 U.S. 778 (2009).

21. 555 U.S. 223 (2009).

22. In *Montejo*, the Court wrote that “[b]eyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.” 556 U.S. at 792-93 (citing *Pearson*, 555 U.S. at 234-35). *Pearson* itself did not use that “antiquity” language, instead only stating that “[r]evisiting precedent is particularly appropriate where ... the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts.” 555 U.S. at 233.

23. 140 S. Ct. 2103 (2020).

24. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478-86 (2018).

25. *Id.* at 2486. Justice Alito wrote that “[i]t 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. Those unconstitutional exactions cannot be allowed to continue indefinitely.” *Id.*

26. *Id.* at 2484-85. Alito suggested that it was permissible to overrule *Abood* because, in recent years, the Court had been especially critical of its underpinnings. *Id.* at 2484. Thus, Alito explained that “public-sector unions have been on notice for years regarding this Court’s misgivings about *Abood*.... During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.” *Id.* at 2484-85.



someone at some time and may have worked a substantive injustice upon citizens for a long period of time. When combined with earlier suggestions in the weak stare decisis tradition that young precedents are also entitled to less deference,<sup>27</sup> *Janus*'s conception of the doctrine seems to undermine the value of any precedent, no matter its vintage.

The *Janus* view of a precedent's age also opens the door to what I call a "wave theory" of stare decisis. Using either the *Janus* or the *Montejo/Pearson* approach to a precedent's age, Justices can make contrary suggestions about stare decisis's binding strength over time. A new Justice can begin her career by claiming fidelity to a weak stare decisis tradition that allows her to rapidly overrule cases with which she substantively disagrees, only to transition to a strong stare decisis tradition later in her career in an effort to protect her perceived gains from being overruled by subsequent judicial generations. Such waves in stare decisis are intellectually inconsistent, as the Justice who ascribes to changing conceptions of stare decisis over time in fact ascribes to no real, binding version of stare decisis at all. Furthermore, wave theories would render stare decisis so malleable as to become meaningless, rendering all precedents vulnerable to being overruled at any time.

Instead, a decision's age, and subsequent decisions reaffirming it, should increase its precedential weight. Although commentators have warned against the dangers of overruling a precedent too quickly<sup>28</sup>—a concern some Justices have also recognized<sup>29</sup>—history

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27. See *Montejo*, 556 U.S. at 792-93; *Pearson*, 555 U.S. at 233.

28. See, e.g., KOZEL, *supra* note 16, at 125 ("Abrupt overrulings following changes in the Court's composition can blur the line between the meaning of the Constitution and the identity of the individuals who occupy the bench.").

29. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting) (criticizing the Court's decision to overrule recent precedents in which "[n]either the law nor the facts" but "[o]nly the personnel of this Court" had changed); STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 151 (2010) ("Will a new case that resolves uncertainty long remain the law, or will a new Court overturn it, thereby denying the public the advantages of the newer, 'better' second decision for which the Court had hoped? At the same time, a Court that overturns too many earlier decisions encourages the public to believe that personalities or politics, not law, determine the outcome of Court cases. And that belief undermines the public's confidence in the Court."); see also KOZEL, *supra* note 16, at 124-25. Chief Justice Roberts's concurrence in *June Medical Services L.L.C. v. Russo* does not expressly take this position, but it implicitly supports it by holding that the four-year-old decision in *Whole Woman's Health* was binding. See 140 S. Ct. 2103, 2133-34 (2020) (Roberts,

shows that the Supreme Court has been more willing to overturn recent, rather than older, decisions.<sup>30</sup> *Janus* undermines this reverence for the long-decided precedent. Instead, the Justices should give some deference to ancient precedents, with perhaps a special examination of the factual underpinnings of those decisions to guard against the possible inapplicability of those precedents under changed factual conditions. In addition, relatively new precedents should be subject to genuinely critical review, thereby ensuring that when a precedent has aged well on the Court, it has been substantively reaffirmed by generations of Justices who had a genuine opportunity to reconsider it.

This Article will proceed as follows. After initially tracing the evolution of stare decisis doctrine in the Supreme Court's jurisprudence, the Article outlines the emergence of *Janus* as a pivotal precedent on precedent in the present day. The Article will then consider how the *Janus* formulation of stare decisis renders it almost incoherently ineffectual given the emphasis it places on the quality of a precedent's reasoning. Such poor reasoning is ever-present when Justices consider stare decisis, and thus its prominence will often tip the scales against upholding prior decisions. Next, the Article will consider how *Janus* alters the weight of a precedent based upon its age. The Article will explain how this factor wrongly suggests that older precedents are more dubious if

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C.J., concurring).

30. See Willingham, *supra* note 1 (noting that, of the more than three hundred occasions the Court has formally overruled one of its own decisions, more than 50 percent occurred when the decision was less than twenty years old). Justice Breyer seemed to acknowledge this reality when he argued that

the more recently the earlier case was decided, the less forcefully the stare decisis anti-overruling principle should be applied. When only a short time has elapsed, we may not yet know that a decision will have harmful effects; it is also unlikely that either the bar or the public will yet have relied significantly upon the earlier case.

BREYER, *supra* note 29, at 152.

However, Randy Kozel states that when the Court argues that recent decisions have weakened the doctrinal underpinnings of a precedent, as it did when overruling *Abood* in *Janus*, "the consequence is to elevate the new over the old." KOZEL, *supra* note 16, at 124. Thus, "[t]he principle that newer opinions can 'undermin[e]' the 'doctrinal underpinnings' of older ones means that in some cases, recent decisions take priority." *Id.* (second alteration in original) (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)).

they have been criticized at any time in their life span and worked any potential constitutional injustice upon citizens.

## I. THE EVOLUTION OF STARE DECISIS IN THE SUPREME COURT

This Part briefly reviews the history and evolution of the doctrine of stare decisis in the Supreme Court. The concept of stare decisis has deep historical roots<sup>31</sup> that heavily influenced the thinking of America's founding generation.<sup>32</sup> Yet the phrase itself did not play a significant role in the Supreme Court's jurisprudence until the early twentieth century. Prior to 1916, "the phrase 'stare decisis' appeared in only forty published decisions" of the Supreme Court.<sup>33</sup> Though reliance on precedent was a judicial norm in the early days of the republic, it was an implicit, unexpressed one in most published rulings.<sup>34</sup>

When Justice Louis Brandeis joined the Court, he began cataloging the nascent doctrine of stare decisis more formally. In his first two decades on the Court, "Brandeis so carefully mined and categorized the Court's own 'precedent about precedent' in his opinions that his attendant framework for the proper application of stare decisis itself assumed canonical authority."<sup>35</sup> This work culminated

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31. See, e.g., W. F. Kuzenski, *Stare Decisis*, 6 MARQ. L. REV. 65, 66 (1922) ("The origin of the doctrine of *stare decisis* is lost in antiquity. It is known to have been in effect long before the days of Hale and Blackstone. Some theorize that it originated in the Witenagemote, where all the men both made the laws and adjusted them, and that power of judging was afterwards assumed by the advisors who became the earliest judges. Others, like Spence, contend that the rule of precedent had its origin in the *jus praetorium* of the Roman Law, where the praetor issued irrevocable edicts having the effect of laws." (citations omitted)).

32. See, e.g., THE FEDERALIST NO. 78, at 383 (Alexander Hamilton) (Terence Ball ed., 2003) ("To 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; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them."). The Constitution itself, however, contains no express reference to the concept or any specific rules of judicial adjudication. Starger, *supra* note 8, at 22.

33. Starger, *supra* note 8, at 22. Starger adds that "the vast majority of these early stare decisis references involved no analysis of the concept. Instead, invocation of the maxim usually served a simple rhetorical function in arguments about following precedent." *Id.* at 23.

34. See *id.* at 22-23.

35. *Id.* at 26.

in Justice Brandeis's dissent in *Burnet v. Coronado Oil & Gas Co.*,<sup>36</sup> to which today's competing strong and weak traditions of stare decisis each claim fidelity.<sup>37</sup>

*Coronado Oil* concerned the federal government's ability to tax a private corporation that claimed an "instrumentality of the [s]tate" exemption from federal tax.<sup>38</sup> The *Coronado Oil* majority ruled in the corporation's favor, relying heavily upon a prior decision, *Gillespie v. Oklahoma*, that previously applied that exemption to a private corporation that derived its income from state contracts.<sup>39</sup>

In his dissent, Justice Brandeis railed against *Gillespie*, arguing that it "was wrongly decided and should now be frankly overruled."<sup>40</sup> Brandeis quickly noted that "[s]tare decisis is not ... a universal, inexorable command."<sup>41</sup> Its application was within the Court's discretion when the same issues arose in a subsequent case.<sup>42</sup> For several pages thereafter, Brandeis discussed the doctrine's meaning and limits, creating a touchstone for future debates about the role of stare decisis.<sup>43</sup> Brandeis's discussion provided fodder for each of today's competing weak and strong stare decisis traditions.

In possible support of a weak tradition that would allow overruling based largely upon the quality of the reasoning in a prior case, Brandeis described a sliding scale of stare decisis.<sup>44</sup> He noted that the Court could more readily reverse course to correct constitutional errors that the legislature could not easily remedy.<sup>45</sup> In those cases, "[t]he Court bows to the lessons of experience and the force of better reasoning."<sup>46</sup> This language suggests that only well-reasoned decisions in constitutional cases must be preserved, a view Brandeis supported further when he added that the "Court must, in

36. 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting).

37. See Starger, *supra* note 8, at 29-35.

38. 285 U.S. at 398. The corporation argued that because it derived all of its income from leases with the state, it should not be subject to federal taxation. *Id.*

39. *Id.* ("[T]he present claim of exemption cannot be distinguished from the one presented in [*Gillespie v. Oklahoma*] and we adhere to the rule there approved." (citing *Gillespie v. Oklahoma*, 247 U.S. 501 (1922))).

40. *Id.* at 405 (Brandeis, J., dissenting).

41. *Id.*

42. *Id.* at 405-08.

43. See *id.* at 405-13.

44. *Id.* at 406-08.

45. *Id.*

46. *Id.* at 407-08.

order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may ... depend altogether on the force of the reasoning by which it is supported.”<sup>47</sup> Brandeis thus appeared to suggest that poorly reasoned precedents could be overruled, much in the way that today’s weak stare decisis tradition focuses on the quality of a precedent’s reasoning as the primary, and perhaps only, consideration when determining whether to overrule that precedent.<sup>48</sup>

Brandeis’s *Coronado Oil* dissent also offered support for a strong stare decisis tradition, which would require the Court to consider factors aside from mere disagreement with the reasoning of prior cases before overruling. Brandeis believed that “in most matters it is more important that the applicable rule of law be settled than that it be settled right.”<sup>49</sup> Brandeis then carefully distinguished cases that involve “decisions of fact” from cases applying the law to facts, noting that “the decision of the fact [may] have been rendered upon an inadequate presentation of then existing conditions, [and] the conditions may have changed meanwhile.”<sup>50</sup> Additionally, Brandeis noted that “the judgment of the Court in the earlier decision may have been influenced by prevailing views as to economic or social policy which have since been abandoned.”<sup>51</sup> Brandeis thus canonized two possible justifications for overruling, beyond mere substantive disagreement with the prior opinion, that stand at the heart of today’s strong stare decisis tradition: changes in the underlying facts that undermine the old rule and alterations in prevailing views that render the prior decision “a remnant of abandoned doctrine.”<sup>52</sup>

In the decades since *Coronado Oil*, supporters of both the strong and weak stare decisis traditions have claimed to follow the spirit of Brandeis’s dissent. The weak tradition evolved in cases claiming that Justices should not follow precedents that are poorly reasoned.

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47. *Id.* at 412-13 (internal quotations omitted).

48. See Starger, *supra* note 8, at 29-30.

49. *Coronado Oil*, 285 U.S. at 406 (Brandeis, J., dissenting).

50. *Id.* at 412.

51. *Id.*

52. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (plurality opinion).

For instance, Justice Reed suggested in 1944's *Smith v. Allwright* that "when convinced of former error, this Court has never felt constrained to follow precedent" in constitutional cases.<sup>53</sup> Chief Justice Rehnquist similarly suggested that reversals are appropriate whenever a prior decision is "badly reasoned" in his 1991 opinion in *Payne v. Tennessee*.<sup>54</sup>

In contrast, following *Coronado Oil*, the strong stare decisis tradition has sought to clarify that precedents can only be overturned based upon objective factors, not including the current Justices' disagreement with a prior decision's reasoning. For instance, Justice O'Connor's majority opinion in *Arizona v. Rumsey* claimed that prior decisions, no matter how substantively incorrect, could only be overturned when some "special justification" was present.<sup>55</sup> *Rumsey* thus arguably attempted to formalize Brandeis's aphorism that often it is best that the Court settle the law, marking the beginning of an effort to explicitly detail the conditions under which reversals were possible. That claim found purchase again in *Payne*, in which a dissenting Justice Marshall objected to overruling prior cases merely because they included a narrow majority and a spirited dissent.<sup>56</sup> Marshall quoted O'Connor's language in *Rumsey* to claim that the Court had never departed from precedent without "special justification."<sup>57</sup> Marshall's dissent thus put O'Connor's language in the spotlight, setting the stage for a vigorous debate over the proper scope of stare decisis in 1992's landmark

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53. 321 U.S. 649, 665 (1944) (citing *Coronado Oil*, 285 U.S. at 410 (Brandeis, J., dissenting)).

54. 501 U.S. 808, 827 (1991) ("[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" (quoting *Smith*, 321 U.S. at 665)).

55. 467 U.S. 203, 212 (1984). "As scholars have previously acknowledged, Justice O'Connor introduced the phrase 'special justification' into Court discourse in 1984's *Rumsey*." Starger, *supra* note 8, at 35 (citing Emery G. Lee III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581 (2001)).

56. 501 U.S. at 845 (Marshall, J., dissenting) ("[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."); *see also* Starger, *supra* note 8, at 37.

57. *Payne*, 501 U.S. at 849 (Marshall, J., dissenting) (quoting *Rumsey*, 467 U.S. at 212); *see also* Starger, *supra* note 8, at 37.

*Planned Parenthood of Southeastern Pennsylvania v. Casey* decision.<sup>58</sup>

*Casey* is, in a sense, the acme of the strong stare decisis tradition; it created a formal list of the “special justifications” to which *Rumsey* had only alluded.<sup>59</sup> *Casey*’s plurality opinion suggested that, when considering whether to overrule a precedent, the Court should be “informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.”<sup>60</sup> The plurality then added a list of four considerations to weigh when contemplating overruling a precedent:

[W]e may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.<sup>61</sup>

Despite the enumeration of factors that might justify overruling precedent under the strong stare decisis tradition, *Casey* also marked an important moment in the history of the weak stare decisis tradition. Several Justices’ opinions pointed to the poor reasoning of a prior decision as a potential reason to overturn it.<sup>62</sup> First, Rehnquist’s partial dissent quoted the language from Brandeis’s *Coronado Oil* dissent that suggested “the Court bows to the lessons of experience and the force of better reasoning,” especially in constitutional cases.<sup>63</sup> Scalia’s partial dissent was even more

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58. 505 U.S. 833 (1992); see Starger, *supra* note 8, at 37-38.

59. *Casey*, 505 U.S. at 854-55 (plurality opinion).

60. *Id.* at 854.

61. *Id.* at 854-55 (citations omitted).

62. See *id.* at 955 (Rehnquist, C.J., concurring in part and dissenting in part); *id.* at 982-83 (Scalia, J., concurring in part and dissenting in part); see also Starger, *supra* note 8, at 39-40.

63. *Casey*, 505 U.S. at 955 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-08 (1932) (Brandeis, J.,

direct; he suggested that a proper stare decisis inquiry must ask “how wrong was the [original] decision on its face?”<sup>64</sup> Scalia would later express the weak tradition again in his majority opinion in *Montejo v. Louisiana* when he argued that one “relevant factor” in determining whether to adhere to a prior decision is “whether the decision was well reasoned.”<sup>65</sup>

By the time of *Casey*, then, the Justices had formally outlined the two traditions of stare decisis. The strong tradition, embodied in the *Casey* plurality opinion, seeks a special justification to overrule a prior decision beyond the quality of a precedent’s reasoning.<sup>66</sup> The weak tradition, represented in Rehnquist’s<sup>67</sup> and Scalia’s<sup>68</sup> opinions, would permit overruling more frequently on the grounds that poorly reasoned decisions, especially in constitutional cases, should not stand. As the following Part argues, that weak tradition has been reinvigorated in recent years, culminating in the Court’s opinion in *Janus* that many Justices have subsequently deployed as a new and authoritative statement of the stare decisis doctrine.

## II. JANUS’S EMERGENCE

This Part highlights the ascendance of the weak stare decisis tradition in recent decades, culminating in the prominent role *Janus* has played in the Court’s most recent discussions of the doctrine. It first describes how a weak stare decisis tradition has slowly overtaken the stronger tradition in the decades since the Court’s *Casey* decision. Next, this Part explains why *Janus* marks a new zenith in the weak stare decisis tradition. Finally, this Part traces the descendants of *Janus*, illustrating how frequently it has been cited by Justices arguing to overturn precedent.

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dissenting)).

64. *Id.* at 983 (Scalia, J., concurring in part and dissenting in part).

65. 556 U.S. 778, 792-93 (2009) (“Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.” (citing *Pearson v. Callahan*, 555 U.S. 223, 234-35 (2009))).

66. *Casey*, 505 U.S. at 854-55 (plurality opinion).

67. *Id.* at 955 (Rehnquist, C.J., concurring in part and dissenting in part).

68. *Id.* at 982-83 (Scalia, J., concurring in part and dissenting in part).



A. *The Ascendance of the Weak Stare Decisis Tradition*

Though the *Casey* plurality opinion seemed to give permanence to a strong stare decisis tradition, several decisions in recent decades have chipped away at *Casey*'s primacy as a precedent on precedent. One example is Justice Alito's 2009 majority opinion in *Pearson v. Callahan*.<sup>69</sup> In that case, the Court considered whether the two-step procedure to evaluate qualified immunity claims announced eight years earlier in *Saucier v. Katz*<sup>70</sup> should remain mandatory.<sup>71</sup> Justice Alito acknowledged the need to consider stare decisis doctrine, but claimed that reversing "precedent is particularly appropriate where ... a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings."<sup>72</sup> Alito would later confirm that, at least in constitutional cases, it is "appropriate" to overrule decisions that are "badly reasoned."<sup>73</sup>

*Pearson* thus supported a weak stare decisis tradition that would overrule constitutional cases based on the fact that the substantive decision itself was incorrect. Both Alito's allusion to "experience [that] has pointed up the precedent's shortcomings" and his reiteration that "badly reasoned" decisions are subject to reversal show a willingness to use the substantive quality of a prior decision as a basis to overturn it—though at the time Alito did not claim that consideration of the substance of the prior opinion should be the primary reason to overrule a precedent.<sup>74</sup> *Pearson* also introduced an age-based consideration in the stare decisis calculus, a theme that would become prominent in the weak stare decisis tradition. Alito suggested that a "rule that was recently adopted" is entitled to less deference from the Court simply because of its relative infancy

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69. 555 U.S. 223.

70. 533 U.S. 194 (2001), *overruled by Pearson*, 555 U.S. 223.

71. *Pearson*, 555 U.S. at 227.

72. *Id.* at 233.

73. *Id.* at 234 (citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). Interestingly, though, Alito argued that such consideration of *Saucier*'s reasoning was unnecessary because of the "considerable body of new experience" showing that *Saucier*'s two-step rule to resolve qualified immunity claims should be discretionary, not mandatory. *Id.*

74. *See id.* at 233-34.

in the Court's jurisprudence.<sup>75</sup> He thus suggested that age might be used as a weapon for rapid changes of course on the Court.

Justice Scalia reiterated each of those themes from *Pearson* in his majority opinion in *Montejo v. Louisiana*.<sup>76</sup> In *Montejo*, the Court overruled *Michigan v. Jackson*, a twenty-three-year-old precedent holding that a criminal defendant cannot waive his Sixth Amendment right to counsel and face further interrogation after the right has attached.<sup>77</sup> Scalia noted that “[b]eyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.”<sup>78</sup> Scalia then claimed that *Jackson*, which was barely over two decades old, was not entitled to deference under the “antiquity” factor of *stare decisis*.<sup>79</sup> For several pages, Scalia then railed against the quality of *Jackson*'s reasoning, concluding that it created unnecessary prophylactic protections of the right to counsel that undermined the criminal justice system.<sup>80</sup>

*Montejo* re-emphasized a weak *stare decisis* tradition on the Court. First, it focused upon the quality of the precedent's reasoning as a justification to overrule it. That consideration received the most attention from Scalia in his *stare decisis* discussion, even if it was not the first consideration that he discussed.<sup>81</sup> Just as the *Pearson* opinion suggested, *Montejo* used the young age of a precedent to justify a less deferential approach.<sup>82</sup> Scalia expanded the understanding of a “young” precedent slightly to claim that a decision that “is only two decades old” can readily be reversed.<sup>83</sup>

Both the quality of reasoning and antiquity factors were again prominent in Justice Kennedy's majority opinion in *Citizens United*.<sup>84</sup> In that case, the Court overruled the twenty-year-old decision in *Austin v. Michigan Chamber of Commerce* that corporate

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75. *Id.* at 233.

76. 556 U.S. 778, 792-93 (2009).

77. *Id.* at 797 (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986)).

78. *Id.* at 792-93 (quoting *Pearson*, 555 U.S. at 234-35).

79. *Id.* at 793.

80. *Id.* at 793-97.

81. *See id.* at 792-97.

82. *Id.* at 793.

83. *Id.*

84. *Citizens United v. FEC*, 558 U.S. 310, 362-63 (2010).

entities could not spend money from their general treasury to independently advocate for the election or defeat of a political candidate.<sup>85</sup> Borrowing language from *Montejo*, Kennedy explained that the stare decisis doctrine analyzed a precedent's "workability, ... the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned."<sup>86</sup> Kennedy then focused his analysis upon the quality of *Austin*'s reasoning, discussing it before other stare decisis factors.<sup>87</sup> In ultimately calling to overrule *Austin*, Kennedy emphasized that stare decisis is "not a mechanical formula of adherence to the *latest* decision."<sup>88</sup>

*Citizens United* was another brick in the foundation of the weak stare decisis tradition. It placed primary emphasis upon the quality of the precedent's reasoning as a ground to overturn it. That became not only the most discussed component of stare decisis analysis, but the initial, and most detailed, point of discussion.<sup>89</sup> *Citizens United* also re-emphasized that decisions of recent vintage are entitled to less deference from the Court. As an added basis for overturning the twenty-year-old *Austin*, Kennedy noted that stare decisis does not require as much adherence to recent decisions.<sup>90</sup>

### *B. Janus: The Strongest Expression of the Weak Stare Decisis Tradition*

The trend towards a weak stare decisis tradition culminated in *Janus*.<sup>91</sup> Justice Alito's *Janus* opinion, itself the product of a years-long effort to undermine the holding in *Abood v. Detroit Board of Education*,<sup>92</sup> reaffirmed that poor reasoning in a prior decision is

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85. *Id.* at 365 (overruling *Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990)).

86. *Id.* at 362-63 (quoting *Montejo*, 556 U.S. at 792-93). Kennedy's opinion also noted that in *Pearson v. Callahan*, the Court "examined whether 'experience has pointed up the precedent's shortcomings.'" *Id.* at 363 (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)).

87. *Id.* at 363-64.

88. *Id.* at 363 (emphasis added) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

89. *See id.* at 362-63.

90. *See id.* at 363.

91. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478-79 (2018).

92. 431 U.S. 209 (1977), *overruled by Janus*, 138 S. Ct. 2448.

grounds to overturn it and that the age of a precedent affects its deferential weight.<sup>93</sup>

Alito acknowledged that prior discussions of *stare decisis* listed several “factors” to consider when overruling a precedent.<sup>94</sup> Alito’s formulation, however, stated that “the quality of [the precedent’s] reasoning” is the very first consideration for Justices unsatisfied with an earlier decision.<sup>95</sup> Alito then relied heavily on that consideration, deriding the quality of *Abood*’s reasoning for several pages.<sup>96</sup> The poor quality of *Abood*’s reasoning was thus Alito’s primary ground for overruling it.

Alito’s analysis then turned to *Abood*’s workability, factual and legal underpinnings, and failure to generate reliance interests.<sup>97</sup> But, in each of those discussions, the focus was again on the substantive incorrectness of *Abood*. Alito’s discussion of workability highlighted the blurriness of the line between chargeable and non-chargeable union expenditures—a substantive complaint about *Abood*’s approach.<sup>98</sup> Scholars have noted that a decision’s workability is not measured by the nuance of its test, but by whether it “cannot be logically applied,” even by its supporters,<sup>99</sup> such that courts and litigants cannot “understand ... [the] rule without undue difficulty.”<sup>100</sup> The claim that *Abood* required subtle line-drawing—without further evidence that courts or litigants favoring *Abood* had difficulty applying it—was actually a complaint about *Abood*’s

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93. *Janus*, 138 S. Ct. at 2478, 2486. Alito presaged the decision to overrule *Abood* in several earlier opinions. In 2012, he wrote for the majority in *Knox v. Service Employees International Union, Local 1000*, warning that *Abood*’s holding was “something of an anomaly.” 567 U.S. 298, 311 (2012). In 2014, Alito authored *Harris v. Quinn*, in which he suggested in dicta that *Abood* was incorrectly decided because the First Amendment should prohibit fair-share fees in public sector unions. 573 U.S. 616, 633-38 (2014). While some have critiqued Alito’s effort to overrule *Abood*, see Kate Andrias, *Janus’s Two Faces*, 2018 SUP. CT. REV. 21, 26, 51, others have defended it as an effort to give defenders of *Abood* “one last chance” to argue for its preservation and to signal to those relying on *Abood*’s rule that change was likely coming, see Richard M. Re, *Second Thoughts on “One Last Chance”?*, 66 UCLA L. REV. 634, 636-42 (2019).

94. *Janus*, 138 S. Ct. at 2478.

95. *Id.* at 2478-79.

96. *Id.* at 2479-81.

97. *Id.* at 2481-86.

98. *See id.* at 2481-82.

99. Mary Ziegler, *Taming Unworkability Doctrine: Rethinking Stare Decisis*, 50 ARIZ. ST. L.J. 1215, 1254 (2018).

100. *See KOZEL, supra* note 16, at 110.

substantive accuracy.<sup>101</sup> When Alito turned to the factual and legal underpinnings of *Abood*, he again derided its substance, noting that his own prior opinions had decried *Abood* as “an ‘anomaly’ in our First Amendment jurisprudence.”<sup>102</sup> When Alito turned to the lack of reliance on *Abood*, he again critiqued *Abood*’s substance. First, Alito suggested that *Abood* was so substantively flawed that it could not generate reasonable reliance.<sup>103</sup> Alito then reiterated that his own prior opinions, which suggested that *Abood* was substantively incorrect, gave notice to contracting parties that it would likely be overruled.<sup>104</sup>

*Janus* thus contained a more extreme version of the weak stare decisis tradition found in *Pearson*, *Montejo*, and *Citizens United*. It did not merely claim that “poor reasoning” in a precedent is grounds for overruling it, as *Pearson* and *Montejo* suggested.<sup>105</sup> Nor did it merely focus upon that poor reasoning as a primary ground for overruling, as had the majority in *Citizens United*.<sup>106</sup> *Janus* went further. By discussing “the quality of *Abood*’s reasoning” in depth and before the other factors, *Janus* strongly suggested that a precedent’s reasoning should be the primary discussion point when determining whether to overrule a prior decision.<sup>107</sup> It then allowed that consideration to consume the discussion of other “special justifications” from the strong stare decisis tradition.<sup>108</sup> *Janus* thus overturned a prior decision solely based upon the Justices’ substantive disagreement with its reasoning.

*Janus* also re-emphasized the weak tradition’s claim that the age of a precedent is an important factor in the stare decisis analysis, but this time with a twist. In *Janus*, Alito avoided a direct citation to *Montejo*’s “antiquity” language, which posited that *recent*

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101. See *Janus*, 138 S. Ct. at 2481-82.

102. See *id.* at 2483 (first quoting *Harris v. Quinn*, 573 U.S. 616, 627 (2014); and then quoting *Knox v. Serv. Emps. Int’l Union, Loc. 1000*, 567 U.S. 298, 311 (2012)).

103. See *id.* at 2484 (“*Abood* does not provide ‘a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.” (quoting *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2098 (2018))).

104. See *id.* at 2484-85 (discussing multiple cases that the opinion argued should have placed public unions on notice of the Court’s skepticism of *Abood*’s future).

105. See *Pearson v. Callahan*, 555 U.S. 223, 234 (2009); *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009).

106. See *Citizens United v. FEC*, 558 U.S. 310, 363-64 (2010).

107. See *Janus*, 138 S. Ct. at 2478-81.

108. See *id.* at 2481-86.

decisions are entitled to less deference.<sup>109</sup> Instead, Alito argued that some *older* decisions that are substantively incorrect—especially those that have been violating citizens’ constitutional rights throughout their tenure—are entitled to less deference.<sup>110</sup> According to Alito, the forty-one-year-old decision in *Abood* had taken “billions of dollars” from nonunion members in violation of their First Amendment rights, a constitutional injustice that “cannot be allowed to continue indefinitely.”<sup>111</sup> Additionally, because older decisions like *Abood* may have been judicially criticized over their long life span, rational actors have likely disregarded them, weakening the precedent’s value.<sup>112</sup> *Abood* was subject to repeated criticism from the Court—most prominently from Alito himself<sup>113</sup>—and thus “public-sector unions ha[d] been on notice for years regarding this Court’s misgivings about *Abood*.”<sup>114</sup>

*Janus* thus re-emphasized that the age of a precedent is an important stare decisis consideration, but this time with a suggestion that Justices accord less deference to some older decisions that have worked a substantive injustice.<sup>115</sup> Following *Janus*, then, the age of a precedent is a double-edged sword in the weak stare decisis tradition. First, younger decisions are entitled to less deference, as *Pearson* and *Montejo* emphasized.<sup>116</sup> Second, following *Janus*, older decisions that are poorly reasoned are likewise entitled to less deference.<sup>117</sup> Because an incorrect precedent has been on the books for decades or centuries, it is both likely to have been criticized by commentators or judges and may have worked a substantive injustice upon citizens for an intolerable period of time.

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109. Compare *Montejo*, 556 U.S. at 792-93, with *Janus*, 138 S. Ct. at 2486.

110. See *Janus*, 138 S. Ct. at 2486.

111. *Id.*

112. See *id.* at 2484-85.

113. See *supra* notes 92-93 and accompanying text.

114. See *Janus*, 138 S. Ct. at 2484. “During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.” *Id.* at 2485.

115. See *id.* at 2486.

116. See *Pearson v. Callahan*, 555 U.S. 223, 233 (2009); *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). The lack of respect towards younger precedents has been tempered somewhat by the Court’s decision, and Chief Justice Roberts’s analysis, in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2141-42 (2020) (Roberts, C.J., concurring).

117. See *Janus*, 138 S. Ct. at 2486.

### C. *Janus's Descendants*

Because *Janus* presented an especially weak form of stare decisis, Justices interested in overruling a precedent have relied upon its wording to justify changes in course. When the Supreme Court has cited to *Janus*, it has almost always been in opinions that advocated overruling a precedent. As of August 2020, the Court has cited *Janus* in ten cases.<sup>118</sup> Subtracting two citations to remand companion cases to *Janus*,<sup>119</sup> one citation in a dissent from the denial of certiorari to note that *Janus* had in fact overruled *Abood*,<sup>120</sup> and one passing citation to the *Janus* dissent,<sup>121</sup> the majority opinion has been cited in six cases.

In the 2018 Term, the Court cited *Janus's* stare decisis discussion in two cases in which it struck down precedents that were roughly forty years old.<sup>122</sup> First, in *Franchise Tax Board of California v. Hyatt*, the Court cited the *Janus* formulation of stare decisis while overruling a forty-year-old precedent, *Nevada v. Hall*.<sup>123</sup> Justice Thomas's majority opinion cited the *Janus* formulation to emphasize the quality of the precedent's reasoning as a factor that can favor overruling.<sup>124</sup> Thomas then quickly noted that *Hall* was poorly reasoned, as it "failed to account for the historical understanding of state sovereign immunity and ... failed to consider how the deprivation of traditional diplomatic tools reordered the States'

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118. See *June Med. Servs. L.L.C.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring); *id.* at 2151 (Thomas, J., dissenting); *id.* at 2170-71 (Alito, J., dissenting); *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1720 (2020) (Thomas, J., dissenting); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1409 (2020) (Sotomayor, J., concurring); *id.* at 1411, 1414 (Kavanaugh, J., concurring); *id.* at 1439 (Alito, J., dissenting); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2445, 2447 (2019) (Gorsuch, J., concurring); *Iancu v. Brunetti*, 139 S. Ct. 2294, 2304 (2019) (Breyer, J., concurring in part and dissenting in part); *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019); *Gamble v. United States*, 139 S. Ct. 1960, 2006 (2019) (Gorsuch, J., dissenting); *Franchise Tax Bd. of Ca. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019); *Fleck v. Wetch*, 139 S. Ct. 590, 590 (2018); *Riffey v. Rauner*, 138 S. Ct. 2708, 2708-09 (2018).

119. See *Fleck*, 139 S. Ct. at 590; *Riffey*, 138 S. Ct. at 2708-09.

120. See *Jarchow*, 140 S. Ct. at 1720 (Thomas, J., dissenting).

121. See *Iancu*, 139 S. Ct. at 2304 (Breyer, J., concurring in part and dissenting in part).

122. See *Knick*, 139 S. Ct. at 2178; *Franchise Tax Bd. of Ca.*, 139 S. Ct. at 1499.

123. See *Franchise Tax Bd. of Ca.*, 139 S. Ct. at 1499 (citing *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478-79 (2018), in support of overruling *Nevada v. Hall*, 440 U.S. 410 (1979)).

124. *Id.*

relationships with one another.”<sup>125</sup> After quickly adding that *Hall* was an outlier in the Court’s sovereign immunity jurisprudence and engendered only “case-specific” reliance interests for the parties before the Court, rather than in the general public, it formally overruled that decision.<sup>126</sup>

That cursory examination of *stare decisis* drew heated criticism from Justice Breyer in dissent.<sup>127</sup> According to Breyer, the majority’s bare belief that *Hall* was wrong should not justify overruling it; an argument that a precedent was incorrect does not by itself justify reversal, especially when the dissenting Justices in the original case even considered the majority’s holding “plausible.”<sup>128</sup> After disagreeing that the law or the understanding of state sovereign immunity had changed since *Hall* was decided, Breyer argued that the reliance of all citizens upon the Court’s respect for precedent was at stake in the case.<sup>129</sup> Overruling cases “produces increased uncertainty,” with negative consequences including increased challenges to settled law and a public that is “uncertain about which cases the Court will overrule and which cases are here to stay.”<sup>130</sup> Noting the danger of “overrul[ing] a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult legal question,” Breyer warned that the “decision can only cause one to wonder which cases the Court will overrule next.”<sup>131</sup>

An answer to Breyer’s inquiry would come just months later in *Knick v. Township of Scott*, in which a majority led by Chief Justice Roberts again relied upon *Janus*’s formulation of *stare decisis* to overrule a precedent in its fourth decade.<sup>132</sup> *Knick* overruled *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, a 1985 case that suggested there was no taking from a property owner, and thus no Fifth Amendment claim in federal court, until a state court has denied the owner’s claim for

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125. *Id.*

126. *Id.*

127. *See id.* at 1504-05 (Breyer, J., dissenting).

128. *Id.* at 1505 (quoting *Hall*, 440 U.S. at 427).

129. *Id.* at 1505-06.

130. *Id.* at 1506.

131. *Id.*

132. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178-79 (2019) (citing *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018)).



just compensation under state law.<sup>133</sup> Roberts emphasized, however, that in *San Remo Hotel, L.P. v. City and County of San Francisco*, a previous Takings Clause case, the Court held that a state court's resolution of a claim for just compensation has preclusive effect in a subsequent federal suit, which had the practical effect of precluding any federal takings claim.<sup>134</sup> Roberts thus found *Williamson County's* reasoning unsound, a point he emphasized by again reciting the *Janus* formulation of stare decisis that places poor reasoning at the start of the analysis.<sup>135</sup> Because *Williamson County's* reasoning "was not just wrong" but "was exceptionally ill founded and conflicted with much of [the Court's] takings jurisprudence," the time had come to overrule it.<sup>136</sup>

Justice Kagan's *Knick* dissent emphasized *Janus's* flawed formulation of stare decisis that puts the quality of the precedent's reasoning at the start of any discussion about overruling. For Kagan, "it is not enough that five Justices believe a precedent wrong."<sup>137</sup> Kagan also questioned the majority's claim that *Williamson County* could be overruled because it did not generate reliance interests, arguing that such interests "are a *plus-factor* in the doctrine; when they exist, *stare decisis* becomes 'superpowered.'"<sup>138</sup> Kagan noted that Breyer's question about which cases the Court would overrule next "didn't take long" to answer.<sup>139</sup> Justice Kagan then added, "Now one may wonder yet again."<sup>140</sup>

Twice in the 2018 Term, Justice Gorsuch cited *Janus's* discussion of stare decisis to argue that a precedent should have been struck

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133. *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), *overruled by Knick*, 139 S. Ct. 2162.

134. *Knick*, 139 S. Ct. at 2167 (citing *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323 (2005)).

135. *Id.* at 2178 ("We have identified several factors to consider in deciding whether to overrule a past decision, including 'the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, ... and reliance on the decision.'" (alteration and omission in original) (quoting *Janus*, 138 S. Ct. at 2478-79)).

136. *Id.*

137. *Id.* at 2189 (Kagan, J., dissenting).

138. *Id.* at 2190 (quoting *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 458 (2015)).

139. *Id.* (citing *Franchise Tax Bd. of Ca. v. Hyatt*, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting)).

140. *Id.*

down.<sup>141</sup> First, in *Kisor v. Wilkie*, Justice Gorsuch cited to *Janus*'s formulation of the grounds for departing from stare decisis in a concurrence calling for the Court to overrule *Auer v. Robbins*.<sup>142</sup> Gorsuch wrote that the factors enumerated in *Janus*, which again started with the quality of the precedent's reasoning, have been fashioned "over time" as the Court "[r]ecogniz[ed] the need for balance" between the need for legal change and stare decisis.<sup>143</sup> Using this formulation, Gorsuch first emphasized the flaws in *Auer*'s reasoning as his initial argument against retaining that precedent.<sup>144</sup>

Just two weeks earlier, Gorsuch filed a dissenting opinion that seized upon the same language while arguing to overrule an opinion. In *Gamble v. United States*, Gorsuch's dissent suggested that the Court's separate sovereigns doctrine, encapsulated in a series of opinions over the past two centuries, should be overruled.<sup>145</sup> This time, Gorsuch began by quoting from the list of factors from the majority in *Hyatt*.<sup>146</sup> Once again, the first factor he analyzed was the quality of the precedent's reasoning, this time with a citation to *Janus*.<sup>147</sup>

In 2020's *Ramos v. Louisiana*, three Justices cited *Janus* in discussions of stare decisis that broadly perpetuated the weak stare decisis tradition.<sup>148</sup> The case concerned Louisiana's practice permitting criminal convictions obtained through nonunanimous jury verdicts. A series of fractured opinions in 1972's *Apodaca v. Oregon*<sup>149</sup> and *Johnson v. Louisiana*<sup>150</sup> upheld that practice, with the key vote coming from Justice Powell's view that, although the Sixth

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141. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2445, 2447 (2019) (Gorsuch, J., concurring); *Gamble v. United States*, 139 S. Ct. 1963, 2006 (2019) (Gorsuch, J., dissenting).

142. *Kisor*, 139 S. Ct. at 2425, 2445 (Gorsuch, J., concurring) (discussing *Auer v. Robbins*, 519 U.S. 452 (1997)).

143. *Id.* at 2445.

144. *Id.*

145. 139 S. Ct. 1960, 1996 (2019) (Gorsuch, J., dissenting).

146. *Id.* at 2006 (citing Franchise Tax Bd. of Ca. v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019)).

147. *Id.* (citing *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479 (2018)).

148. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1409 (2020) (Sotomayor, J., concurring); *id.* at 1411, 1414 (Kavanaugh, J., concurring); *id.* at 1439 (Alito, J., dissenting).

149. 406 U.S. 404 (1972), *abrogated by Ramos*, 140 S. Ct. 1390.

150. 406 U.S. 356 (1972), *abrogated by Ramos*, 140 S. Ct. 1390.

Amendment required unanimity, it was not fully applicable against the states.<sup>151</sup>

In *Ramos*, the Court reconsidered *Apodaca* and held that the Sixth Amendment, as incorporated against the states, requires that a jury find a criminal defendant guilty by a unanimous verdict.<sup>152</sup> Writing for the Court, Justice Gorsuch first suggested that *Apodaca* was so fractured that it did not “suppl[y] a governing precedent” at all.<sup>153</sup> But Gorsuch added an argument that, even if *Apodaca* were precedential, stare decisis would not prevent overruling it.<sup>154</sup> Gorsuch quoted the weak version of stare decisis from *Franchise Tax Board of California v. Hyatt*—which in turn relied upon the formulation in *Janus*—and emphasized that the quality of a decision’s reasoning is the primary consideration within stare decisis analysis, calling *Apodaca*’s reasoning “gravely mistaken.”<sup>155</sup>

In concurring opinions, Justices Kavanaugh and Sotomayor cited *Janus* as direct support for either ignoring or overruling *Apodaca*. Justice Sotomayor cited *Janus* in noting that “the Court has recently overruled precedent where the Court’s shift threatened vast regulatory and economic consequences.”<sup>156</sup> She argued that discarding *Apodaca* as a precedent would cause far less societal upheaval, explaining that “were this Court to take the dissent’s approach—defending criminal-procedure opinions as wrong as *Apodaca* simply to avoid burdening criminal justice systems—it would never correct its criminal jurisprudence at all.”<sup>157</sup> Though Sotomayor implicitly opposed overruling a “precedent ‘simply because a majority of this Court now disagrees with’ it,” her opinion citing *Janus* nonetheless counseled in favor of overruling precedent.<sup>158</sup>

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151. *Id.* at 371 (Powell, J., concurring).

152. *Ramos*, 140 S. Ct. at 1397.

153. *Id.* at 1402. For a discussion of this claim that *Apodaca* was really no precedent at all, see Michael Gentithes, *Phantom Precedents in Ramos v. Louisiana*, APP. ADVOC. BLOG (Apr. 22, 2020), [https://lawprofessors.typepad.com/appellate\\_advocacy/2020/04/phantom-precedents-in-ramos-v-louisiana.html](https://lawprofessors.typepad.com/appellate_advocacy/2020/04/phantom-precedents-in-ramos-v-louisiana.html) [<https://perma.cc/LC97-V3XY>].

154. *See Ramos*, 140 S. Ct. at 1404-05.

155. *Id.* at 1405 (citing *Franchise Tax Bd. of Ca. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019)).

156. *Id.* at 1409 (Sotomayor, J., concurring) (citing *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018)).

157. *Id.* at 1409-10.

158. *See id.* at 1409 (first quoting *Alleyne v. United States*, 570 U.S. 99, 133 (2013) (Alito, J., dissenting); and then citing *Janus*, 138 S. Ct. 2448).

Justice Kavanaugh cited *Janus* in his concurring opinion to suggest that he would likewise make the quality of a precedent's reasoning the primary stare decisis consideration.<sup>159</sup> Citing *Janus*, Kavanaugh noted, "[I]n just the last few Terms, every current Member of this Court has voted to overrule multiple constitutional precedents."<sup>160</sup> He claimed that overruling a precedent "always requires 'reasons that go beyond mere demonstration that the overruled opinion was wrong.'"<sup>161</sup> However, when Kavanaugh catalogued the stare decisis factors the Court had previously identified, he placed "the quality of the precedent's reasoning" at the top of the list.<sup>162</sup> Kavanaugh then suggested that the Court's first consideration when possibly overruling a precedent should be whether it was "grievously or egregiously wrong," yet another allusion to the quality of its reasoning.<sup>163</sup> When Kavanaugh then argued to overrule *Apodaca*, his first point was how "egregiously wrong" that decision was.<sup>164</sup>

Even *Ramos*'s three-Justice dissent made its argument in defense of precedent on the weak stare decisis tradition's terms. The dissent—an unexpected alignment of Justices Alito, Roberts, and Kagan—argued that *Apodaca* was not nearly as poorly reasoned as the majority would have it, but it was silent on whether such poor reasoning should be a reason to overrule a case on its own.<sup>165</sup> The dissent's apparent acceptance of poor reasoning as the first factor in stare decisis analysis was especially alarming given Kagan's vigorous opposition to that factor just a year earlier in *Knick*.<sup>166</sup>

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159. *See id.* at 1414 (Kavanaugh, J., concurring) (suggesting that the first factor in stare decisis analysis is whether the precedent is "grievously or egregiously wrong").

160. *Id.* at 1411.

161. *Id.* at 1414 (quoting *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring)).

162. *Id.*

163. *Id.*

164. *Id.* at 1416. In a separate concurring opinion that did not directly cite *Janus*, Justice Thomas argued that "demonstrably erroneous" decisions like *Apodaca* must be overturned irrespective of any practical stare decisis considerations. *See id.* at 1421 (Thomas, J., concurring) (citing *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring)).

165. *See id.* at 1425, 1432-36 (Alito, J., dissenting).

166. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2189-90 (2019) (Kagan, J., dissenting). The *Ramos* dissent did directly cite *Janus* in its discussion, but only to claim that the reliance interests at stake in *Janus* were lesser than those at stake in *Ramos*. 140 S. Ct. at 1439 (2020) (Alito, J., dissenting) (citing *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*,

Finally, the Court's 2020 decision in *June Medical Services L.L.C. v. Russo* continued the trend of supporting *Janus*'s weak stare decisis formulation, with three Justices citing it and two arguing to overrule a recent precedent.<sup>167</sup> The case concerned a Louisiana statute requiring abortion providers to hold admitting privileges within thirty miles of the abortion clinic—just like a Texas statute that the Court struck down only four years before in *Whole Woman's Health v. Hellerstedt*.<sup>168</sup> Stare decisis was thus front and center to the Court's decision.

Two dissenting Justices cited *Janus* while arguing to overrule *Whole Woman's Health*. First, Justice Thomas's dissenting opinion claimed that a precedent should be overruled when it is "demonstrably erroneous," a clear reference to the quality of that precedent's reasoning.<sup>169</sup> Thomas then cited *Janus* (along with *Knick* and *Hyatt*) to note that the Court "recently overruled a number of poorly reasoned precedents that have proved themselves to be unworkable."<sup>170</sup> In so doing, Thomas reiterated the weak stare decisis tradition's emphasis on poor reasoning, seemingly mixing it with a potentially distinct stare decisis factor of unworkability.

Justice Alito's dissent likewise relied upon *Janus*'s formulation of the weak stare decisis tradition. Alito first claimed that stare decisis requires the Court to "consider factors beyond the strength of the precedent's reasoning."<sup>171</sup> But he went on to claim, with citations to *Janus* and *Hyatt*, that "[r]eexamination of a precedent may be appropriate when it is an 'outlier' and its reasoning cannot be reconciled with other established precedents"—again focusing his stare decisis discussion first on the quality of a precedent's reasoning.<sup>172</sup>

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138 S. Ct. 2448 (2018)).

167. 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring); *id.* at 2151 (Thomas, J., dissenting); *id.* at 2170-71 (Alito, J., dissenting).

168. *Id.* at 2112 (plurality opinion) (citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016)).

169. *Id.* at 2151 (Thomas, J., dissenting) (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1985 (2019)).

170. *Id.* at 2151-52 (first citing *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019); then citing *Franchise Tax Bd. of Ca. v. Hyatt*, 139 S. Ct. 1485 (2019); and then citing *Janus*, 138 S. Ct. 2448).

171. *Id.* at 2170 (Alito, J., dissenting).

172. *Id.* (first citing *Hyatt*, 139 S. Ct. 1485; and then citing *Janus*, 138 S. Ct. 2448). Alito again cited *Janus* when arguing that there were also insufficient reliance interests on *Whole*

*June Medical Services* was different, of course, because Chief Justice Roberts's controlling concurrence relied upon stare decisis to uphold a precedent.<sup>173</sup> Roberts's opinion broadly supported the strong stare decisis tradition—a clear outlier amongst *Janus*'s descendants. Roberts noted that stare decisis is grounded in a judicial humility that recognizes the similarity between past and present cases; he then noted the doctrine's many practical benefits.<sup>174</sup> He added that overruling a previous case must be justified by some rationale beyond the precedent's substantive incorrectness.<sup>175</sup> Roberts cited *Janus* to list several stare decisis factors, but he noticeably excluded the quality of a precedent's reasoning—the very first factor in *Janus*—from the list.<sup>176</sup> Though Roberts alluded to the quality of a precedent's reasoning when noting that it is sometimes better to “remain[] true to an ‘intrinsically sounder’ doctrine established in prior cases” rather than following a “recent departure”—and later spent several pages deriding the balancing test that was central to *Whole Woman's Health*—he ultimately followed that four-year-old precedent on stare decisis grounds.<sup>177</sup>

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This Section has shown that nearly every opinion citing *Janus* has utilized its extremely weak stare decisis formulation to argue for overruling a precedent. Though there are hopeful outliers, such as Chief Justice Roberts's *June Medical Services* opinion, this Section illustrates that *Janus* is quickly developing into a preferred precedent on precedents when Justices want to overrule a prior decision. It is a new statement of the doctrine of stare decisis that must be taken seriously, one which both changes prior doctrine in the area and suggests that those changes are normatively desirable.

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*Woman's Health* to justify upholding it. *Id.* at 2171 (first citing *Hyatt*, 139 S. Ct. 1485; and then citing *Janus*, 138 S. Ct. 2448).

173. *Id.* at 2134 (Roberts, C.J., concurring).

174. *Id.* For further discussion of the importance of judicial humility, see Michael Gentithes, *Precedent, Humility, and Justice*, 18 TEX. WESLEYAN L. REV. 835, 868-69 (2012).

175. *June Med. Servs. L.L.C.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring).

176. *See id.* (citing *Janus*, 138 S. Ct. at 2478-79).

177. *Id.* (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231 (1995) (plurality opinion)).

Responding to *Janus* thus requires considering whether the stare decisis factors it deploys are normatively desirable.<sup>178</sup>

### III. POORLY REASONED JUSTIFICATIONS

As noted above, the *Janus* majority began its discussion of stare decisis by focusing on the poor quality of reasoning in *Abood*.<sup>179</sup> *Janus* listed the quality of the precedent's reasoning as the first consideration when deciding whether to overrule a case, then focused upon it throughout its stare decisis discussion, even when mentioning other "special justification[s]" found in the strong stare decisis tradition.<sup>180</sup> As this Part discusses, that elevation of poor reasoning within the stare decisis analysis is a dangerous error. This Part will first show how this confuses a condition precedent to stare decisis analysis with the conditions that are sufficient for overruling prior decisions. This Part will then demonstrate how efforts to create a "demonstrable error" criterion for overruling inevitably base their decisions to overrule on the quality of a precedent's reasoning, duplicating the confusion over conditions precedent in

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178. One might also consider whether *Janus* meets the standards necessary to change the Court's precedent on precedents, whatever those might be. Randy Kozel helpfully notes that such standards are hard to come by:

Stare decisis is a doctrine in the sense that it consists of several oft-recited considerations designed to shed light on a particular issue. But like the rules of constitutional interpretation, the rules of precedent are wide-ranging. They apply to thousands of cases dealing with all manner of fact, law, and procedural posture. They often have only the slimmest connection to particular disputes, operating instead at high levels of generality. The rules of stare decisis are thus best understood as residing outside a precedent's scope of applicability in future disputes.

See KOZEL, *supra* note 16, at 172. Stare decisis is more a guiding principle than a guiding decision to be overruled in one fell swoop. The doctrine has become so abused and malleable over the years that its exact contours are a matter of debate, as the competing "weak" and "strong" traditions well demonstrate. See Starger, *supra* note 8, at 44 ("The widespread inconsistency of Justices towards the proper stare decisis test suggests that the Court's 'precedent about precedent' itself has little precedential value. From one case to the next, a single Justice may analyze overruling questions using different stare decisis tests. Whether the test advocated is weak or strong depends almost entirely on the result being justified."). There is no singular precedent on precedents, but instead a series of decisions that discuss the value of aligning future decisions with those of the past. Given that malleability, it is all the more critical to examine new trends in the direction of the doctrine—as *Janus* itself certainly is—before they become entrenched.

179. See *Janus*, 138 S. Ct. at 2479.

180. See *id.* at 2478-86 (alteration in original).

the *Janus* formulation. Finally, this Part will illustrate the dangerous consequences of following a weak stare decisis tradition that elevates poor reasoning as *Janus* has.

*A. Poor Reasoning as a Condition Precedent to Stare Decisis Discussion*

Analysis of the quality of a precedent's reasoning—the cornerstone of the weak stare decisis tradition—is not a component of the stare decisis analysis in the strong tradition. Instead, it is a condition precedent to that analysis. Justice Stevens's partial dissent in *Citizens United* highlights this distinction.<sup>181</sup> For Stevens, the majority's claim that the precedent at issue was poorly reasoned represented “the Court's merits argument, ... and restating a merits argument with additional vigor does not give it extra weight in the *stare decisis* calculus.”<sup>182</sup> Stevens contended that stare decisis should not allow reversal based upon “nothing more than ... disagreement with [a precedent's] results.”<sup>183</sup> Instead, for stare decisis “to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine.”<sup>184</sup> Chief Justice Roberts recently echoed this view in his *June Medical Services* concurrence, noting that “for precedent to mean anything, the doctrine [of stare decisis] must give way only to a rationale that goes beyond whether the case was decided correctly.”<sup>185</sup>

These opinions highlight the appropriate role of a Justice's disagreement with a precedent in stare decisis analysis. Poor reasoning in a decision motivates a Justice to think about overruling that decision; it triggers stare decisis analysis of the costs and benefits

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181. *Citizens United v. FEC*, 558 U.S. 310, 408-09 (2010) (Stevens, J., concurring in part and dissenting in part).

182. *Id.* at 409.

183. *Id.* at 414; see also Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1120 n.75 (1995) (“To permit overruling where the overruling court finds only that the prior court's decision is wrong is to accord the prior decision only persuasive force.”).

184. *Citizens United*, 558 U.S. at 408 (Stevens, J., concurring in part and dissenting in part).

185. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring).



of overruling a previous case.<sup>186</sup> But *Janus's* version of the weak stare decisis tradition enlists “poor reasoning” for double duty. In that version, “poor reasoning” is both a condition precedent for stare decisis doctrine and a sufficient condition to overrule Court precedents.

Poor reasoning in a precedent cannot serve both functions. The only motivation for a current Justice to consider stare decisis at all is her belief that a prior Justice’s work was substantively incorrect. That belief is one Justices frequently reach in subsequent cases “[b]ecause it is not hard for intelligent Justices (particularly if they share strong views about how the Constitution should be interpreted) to find some fault with a constitutional precedent.”<sup>187</sup> It is easy for Justices to disagree with the reasoning of a decision and label it poor, so if that disagreement and labeling also stand as grounds to overrule precedent, Justices can readily reverse nearly any precedent.<sup>188</sup>

Defenders of the weak stare decisis tradition might respond that stare decisis is triggered by disagreement with the decision’s results, not its reasoning. Put another way, the condition precedent for a stare decisis discussion is a poor outcome, not necessarily poor reasoning. Once that initial hurdle is met, the argument goes, then the quality of the reasoning that led to it can be analyzed as a practical factor that may or may not favor overruling the prior decision.

But this analytical distinction between outcomes and reasoning collapses upon itself. To begin, the distinction between poor outcomes and poor reasoning is razor-thin; the two categories nearly, if not entirely, overlap. To the extent there is some space between the two concepts, there is no method through which Justices might identify a poor outcome other than to utilize the very same tools they employ to determine whether the reasoning that led

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186. Larry Alexander, *Did Casey Strike Out?*, in PRECEDENT IN THE UNITED STATES SUPREME COURT, *supra* note 8, at 47, 49 (“One necessary condition for overruling an erroneous interpretive precedent is that the interpretation of the Constitution that the precedent declares is now believed to be erroneous. That much is obvious once one accepts that one’s belief in the infelicity of the Constitution, correctly interpreted, is itself not a sufficient condition for departing from it.”).

187. Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 113 (1991).

188. *See id.*

to the poor outcome was likewise poor. A Justice cannot come to disagree with the outcome of a case unless she has applied her own interpretive methodologies to the problem—thereby reasoning her way through the issues—and has determined that the outcome was wrong. Disagreements about outcome thus dissolve into disagreements about interpretation and, by extension, reasoning. Thus, the claim that *stare decisis* can be triggered by mere disagreement with outcomes dissolves into a claim that *stare decisis* should be triggered by disagreement with a precedent’s reasoning; that disagreement about reasoning necessarily exists each time a Justice disagrees with the precedent’s outcome.

Defenders of a weak *stare decisis* tradition might also contend that the strong tradition’s allusion to practical justifications for overruling prior decisions are merely aspirational. As an empirical matter, “[o]verrulings of precedent rarely occur without a change in the Court’s personnel.”<sup>189</sup> When the Court does overrule a prior case, it often alludes to the fact that the precedent was “[w]rong the day it was decided,” an allusion to poor reasoning that often permeates more objective factors such as doctrinal erosion or changed facts.<sup>190</sup> Such arguments for a weak version of *stare decisis* are really arguments against any *stare decisis* doctrine at all.<sup>191</sup> If *stare decisis* does anything, it at least occasionally constrains Justices from overturning a case with which they disagree. To perform even that minimal function, it must appeal to some objective criteria beyond individual Justices’ interpretive methodologies, and those criteria must be ones upon which the Justices can agree.<sup>192</sup> Otherwise, *stare decisis* will never truly constrain any Justice.

Disagreement over the proper reasoning in precedents is rampant on the Court and unlikely to subside anytime soon.<sup>193</sup> To say that a

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189. *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting).

190. L.A. Powe, Jr., *Intragenerational Constitutional Overruling*, 89 NOTRE DAME L. REV. 2093, 2112 (2014).

191. See JOHN A. JENKINS, *THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST* 250 (2012) (quoting Chief Justice Rehnquist’s claim that “*stare decisis* in constitutional law is pretty much of a sham”).

192. See KOZEL, *supra* note 16, at 103.

193. Writing nearly three decades ago, Michael Gerhardt acknowledged this lack of interpretive agreement and the unlikelihood that consensus on matters of interpretation would be reached anytime soon:

Given the current Court’s lack of ideological balance, it probably would be some time before a majority of the Justices even acknowledged that any argument

decision can be overturned if it was “wrong when decided” or was “poorly reasoned” is to say nothing more than that a decision can be overturned if a Justice thinks it is substantively incorrect. Because there is no consensus on the Court about what qualifies as a substantively incorrect decision, there cannot be consensus about when to overrule cases under the weak *stare decisis* tradition.<sup>194</sup>

I am not suggesting that one constitutional interpretive methodology is superior, or that the Justices should agree on the outcome of cases more frequently. In fact, one reason to respect prior decisions is the accumulated wisdom those decisions represent.<sup>195</sup> Precedents have settled on answers to difficult questions through the adjudicative process, which required many legal thinkers to consider the question from contrasting viewpoints before reaching a resolution.<sup>196</sup> The very fact that such contrasting viewpoints exist demonstrates the lack of emerging consensus as to interpretive methodology and hence as to the substantive accuracy of prior decisions. Settlement achieved under those conditions is something to be celebrated and preserved, not perpetually revisited. Such settlement under trying conditions is at the core of *stare decisis*’s purpose. *Stare decisis*’s value lies in its ability to settle disputes independent of the Justices’ views about the substantive correctness of a decision, or about the proper method to achieve substantively

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except for one supporting *their* conservative viewpoint on a constitutional issue was persuasive or that the reasoning of some prior decision is wrong but respectable enough for them to leave it alone.

Gerhardt, *supra* note 187, at 113 (footnote omitted).

194. See, e.g., KOZEL, *supra* note 16, at 102 (“By tethering a decision’s continued vitality to the perceived gravity of its offenses—a perception that will vary from [J]ustice to [J]ustice—the prevailing approach to *stare decisis* robs precedents of independent value beyond their attractiveness on the merits.”).

195. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) (citing 3 EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 110 (1790)).

196. See, e.g., DAVID A. STRAUSS, THE LIVING CONSTITUTION 41 (2010) (“It is a bad idea to try to resolve a problem on your own, without referring to the collective wisdom of other people who have tried to solve the same problem. That is why it makes sense to follow precedent, especially if the precedents are clear and have been established for a long time.”); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 44-45 (2019) (“Adherence to tradition is said to respect the ‘accumulated wisdom of many generations’ and to ‘reflect a kind of rough empiricism.’” (quoting David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891-92 (1996))); see also, e.g., Gentithes, *supra* note 174, at 868; Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 370-72 (2006).

correct results.<sup>197</sup> Because they are unlikely to agree about what should have been the substantively correct decision, the Justices lack any agreed-upon criteria by which to evaluate whether the quality of a precedent's reasoning is "wrong enough" to merit overruling. If each Justice simply applies their own criteria, based upon their own interpretive methodologies, and thus overrules all decisions that fail to meet that standard whenever possible, stare decisis will lack the constraining power to settle disputes irrespective of interpretive methods.

### *B. Demonstrable Error and Stare Decisis*

Some Justices have suggested that constitutional decisions should be overturned when they are "grievously"<sup>198</sup> or "demonstrably"<sup>199</sup> wrong. For instance, in a concurring opinion in 2019's *Gamble v. United States*, Justice Thomas argued against the use of stare decisis in many constitutional cases. For Thomas, exercise of Article III's "judicial [p]ower" requires the Court to "liquidat[e] ... the meaning of the law."<sup>200</sup> Stare decisis, on the other hand, is derived from the English common law tradition, not our constitutional order.<sup>201</sup> Given the different role of federal courts in the American system, Thomas argued that "if the Court encounters a decision that is demonstrably erroneous—i.e., one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent."<sup>202</sup> Only

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197. See KOZEL, *supra* note 16, at 61.

198. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring). Justice Kavanaugh also used this language to explain when he would overrule a precedent during his confirmation hearings. For Kavanaugh, the factors in stare decisis include "whether the decision's not just wrong but *grievously wrong*. Whether it's inconsistent with the law that's grown up around it, ... what the real-world consequences are, including workability, and then reliance." *Confirmation Hearing on the Nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018) (response of Judge Brett M. Kavanaugh to questioning by Sen. Ben Sasse) (emphasis added).

199. *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring); *June Med. Servs. L.L.C.*, 140 S. Ct. at 2151 (Thomas, J., dissenting).

200. *Gamble*, 139 S. Ct. at 1982 (quoting THE FEDERALIST NO. 78, at 467-68 (Alexander Hamilton)).

201. *Id.*

202. *Id.* at 1984.

by reversing course from such “demonstrably erroneous” cases can the Court ensure “the Constitution’s supremacy over other sources of law—including our own precedents,” thereby avoiding the temptation to make, rather than interpret, the law.<sup>203</sup>

Justice Kavanaugh raised similar points in his opinion in *Ramos v. Louisiana*. In that case, Kavanaugh catalogued the stare decisis factors the Court had previously identified, listing “the quality of the precedent’s reasoning” first.<sup>204</sup> Kavanaugh then suggested that the Court’s first consideration when possibly overruling a precedent should be whether it was “grievously or egregiously wrong.”<sup>205</sup>

These opinions echoed Professor Caleb Nelson’s argument about overruling “demonstrably erroneous” precedents.<sup>206</sup> Nelson prescribed a weaker form of stare decisis that “would begin by asking whether the past decision reflects a permissible or an impermissible view of the underlying law.”<sup>207</sup> Only “permissible” interpretations would be presumptively affirmed, even though the current Court disagrees with them, “unless there is some practical reason for overruling”—an apparent reference to the typical factors in the strong stare decisis tradition, such as workability and reliance.<sup>208</sup> In contrast, impermissible, “demonstrably erroneous” interpretations would enjoy no such presumption; those precedents should be overruled, unless there are practical reasons to uphold them.<sup>209</sup>

Nelson’s thoughtful position seems to suggest, much as I have earlier,<sup>210</sup> that a current Justice’s belief that a prior decision was poorly reasoned typically is not grounds to overrule it, but rather is a condition precedent that triggers stare decisis analysis.<sup>211</sup> So long as the prior Supreme Court decision is a permissible view of the substantive law—which seems extremely likely given the Court’s expertise, the percolation of the issue in the lower courts, and the quality of arguments presented to the Court—current Justices

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203. *Id.* Justice Thomas reprised much of this argument in his dissent in *June Medical Services*. 140 S. Ct. at 2151 (Thomas, J., dissenting).

204. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring).

205. *Id.*

206. Nelson, *supra* note 8, at 3.

207. *Id.* at 53.

208. *Id.*

209. *Id.*

210. *See supra* Part III.A.

211. *See* Nelson, *supra* note 8, at 53.

should not use their disagreement with that view as grounds to overturn it. That disagreement merely triggers consideration of the costs of overturning the decision, in accord with the special justifications in the strong *stare decisis* tradition.

I depart with Nelson (and more sharply with Justices Thomas and Kavanaugh) in the suggestion that there is a wide category of demonstrably erroneous precedents undeserving of *stare decisis* protection.<sup>212</sup> Experience counsels otherwise. The Justices are locked in disagreement about whether many decisions are merely unwise, yet permissible and understandable as a matter of substantive law. Those Justices cannot possibly agree as to what makes a decision so demonstrably erroneous that it is not permissible and cannot stand as a matter of principle. To prove that a constitutional decision is demonstrably erroneous requires the Justices to apply their own interpretive methodologies to the question, which will produce varied, if not wholly dichotomous, results. Nelson's (and Thomas's and Kavanaugh's) theory is thus "derivative of broader theories of constitutional interpretation," and therefore doomed to "collapse into debates about which interpretive approach is best."<sup>213</sup> For *stare decisis* to constrain Justices across the ideological spectrum, it must not rely upon any particular interpretive method; yet determinations of the degree of error in a prior decision will always rely upon particular interpretive methods. Using a precedent's degree of error to determine when it should be overturned is thus circular and self-defeating.

Nelson admits that some may disagree that demonstrably erroneous precedents are readily identifiable; if fewer such precedents exist, efforts to eliminate them will likely generate "false positives," unnecessarily overruling a great many decisions and creating more practical problems than the very few erroneous precedents did in the first place.<sup>214</sup> He counters that, if the sources of legal decisions are so radically indeterminate that no "correct" answers can be

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212. *See id.* at 55-60; *Gamble v. United States*, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414-15 (2020) (Kavanaugh, J., concurring).

213. KOZEL, *supra* note 16, at 61.

214. Nelson, *supra* note 8, at 80 ("[O]ne might well think that trying to identify 'demonstrable errors' will be like looking for needles in a haystack. The fewer 'demonstrable errors' actually exist, the more one might think that the benefits of trying to eliminate those errors are outweighed by the risks that courts will reach 'false positives.' This line of analysis might well lead one toward the stronger version of *stare decisis*.").

identified and thus almost any interpretation is permissible, then precedent decisions will also be radically indeterminate to the point that subsequent Justices can reach any decision they like while claiming they are upholding the precedent.<sup>215</sup>

But I need not adopt radical indeterminism to argue that a weak version of *stare decisis*, which would overrule demonstrably erroneous precedents for that reason alone, will generate far too many false positives to justify the practice. My contention is founded in the lived experience of Supreme Court decision-making, not linguistic indeterminism. The Justices' interpretive methods are often diametrically opposed to one another. They struggle simply to agree which precedents are "wrong," yet might be considered permissible under Nelson's theory. Efforts to identify precedents that are so demonstrably erroneous as to merit overruling on that ground alone will similarly end in widespread disagreement. Such disagreement is not the fault of the language, but rather of the inability, if not impossibility, of Justices agreeing on how to interpret the law in the first place.

Theories like Nelson's, Thomas's, and Kavanaugh's imply that Justices in the majority should overrule decisions when their own interpretive methodology suggests extreme error in prior decisions. That view is shortsighted. What is a majority view on interpretive methodology today may be a minority view tomorrow. If the Court's theory of precedent deems "demonstrable error" correction appropriate, Justices of all interpretive stripes are likely to seek massive changes in jurisprudential course each time they find themselves in the present majority. That will lead the Court to play jurisprudential ping-pong in its decisions over the course of history, veering between substantive legal extremes and undermining society's reliance upon, and belief in the legitimacy of, the Supreme Court.

William Baude has noted an analogous problem in determining which constitutional provisions are sufficiently indeterminate to be subject to constitutional "liquidation"—a method to settle constitutional meaning in the political branches through a course of

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215. *See id.* at 79 ("[I]f words are indeterminate when they appear in written laws, they presumably are also indeterminate when they appear as statements of a court's holding. Thus, just as statutes and constitutional provisions cannot really constrain judges, neither can past opinions. For people who believe in the radical indeterminacy of legal language, it is hard to have any meaningful theory of *stare decisis* at all." (footnote omitted)).

deliberate, accepted practice.<sup>216</sup> According to Baude, our society may “have so much disagreement over theories of interpretation more generally that we cannot even agree on the proper methods for finding ambiguity.”<sup>217</sup> If “indeterminacy itself is indeterminate,” there is a great risk that “each interpreter will find indeterminacy whenever liquidation is convenient for her, and avoid it when liquidation is inconvenient.”<sup>218</sup> If that is so, liquidation will not constrain constitutional decision-making, but instead offer it new freedoms.<sup>219</sup> Similarly, the lack of agreement over methods of constitutional interpretation makes agreement that a decision is so poorly reasoned that it requires reversal difficult, if not impossible. Such indeterminacy creates the opportunity for each Justice to find poor reasoning whenever it is convenient, and thus to justify overruling precedent with little constraint from the stare decisis doctrine.

Furthermore, Nelson’s position misunderstands the role of the practical considerations that can counsel against preserving a precedent in the strong stare decisis tradition. Nelson suggests that practical considerations, like workability and reliance, might show the Justices when there is a good reason to overrule a permissible, but erroneous, interpretation.<sup>220</sup> But those stare decisis factors are not a sword to aid overruling; they are a shield to protect against overzealous reversals that might have disastrous real-world consequences. What those factors measure, in part, is whether a decision with which the Justices disagree is so erroneous that it can be overruled, because it will not upset societal expectations or will replace a rule that even its supporters struggled to implement.<sup>221</sup> By measuring the disruption that might be caused by overturning a precedent, both in the public perception and in the coherence of the Court’s and the nation’s jurisprudence, these factors will often protect an otherwise teetering precedent from being overruled.

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216. Baude, *supra* note 196, at 67-68.

217. *Id.* at 67.

218. *Id.* at 68.

219. *Id.*

220. See Nelson, *supra* note 8, at 53.

221. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992) (plurality opinion).



The factors in the strong stare decisis tradition are more appropriate for the role Nelson imagines they might play in evaluating an impermissible, demonstrably erroneous precedent.<sup>222</sup> In those rare cases, Nelson suggests that practical considerations can provide a reason to adhere to precedent.<sup>223</sup> Though this correctly explains the role of practical considerations, it unduly minimizes the effect of those practical considerations, making them nearly meaningless. According to Nelson, when a precedent must rely upon practical considerations for preservation, it is making a desperate Hail Mary pass; the Justices will already have determined that the precedent is demonstrably erroneous, and thus seemingly only worthy of preservation if the practical consequences of overturning are similarly demonstrably catastrophic.<sup>224</sup> Essentially, the demonstrably erroneous evaluation swallows the rest of the stare decisis analysis whole, leaving it with only one true factor for the Justices to consider: whether or not they disagree with the precedent. That formulation, much like the *Janus* Court's emphasis on the poor reasoning in a precedent that justifies overruling it,<sup>225</sup> undermines stare decisis beyond repair with grave consequences for our nation's legal stability.

### C. *The Consequences of the Weak Stare Decisis Tradition*

If poor reasoning is both a condition precedent to, and a substantive component of, stare decisis, then stare decisis itself may become so internally incoherent as to be unworkable. Even supporters of the weak stare decisis tradition cannot logically implement a doctrine whose primary analytical tool requires a nonexistent, widespread consensus about the substantive correctness of prior decisions. As Chief Justice Roberts has acknowledged, "It is not enough that you may think the prior decision was wrongly decided. That really doesn't answer the question. It just poses the question."<sup>226</sup>

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222. See Nelson, *supra* note 8, at 53.

223. See *id.*

224. See *id.*

225. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478-79 (2018).

226. *Roberts Hearing*, *supra* note 16. In *June Medical Services L.L.C. v. Russo*, Roberts similarly suggested that "for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly." 140 S. Ct. 2103, 2134

Stare decisis is a mechanism to constrain Justices from overturning every case with which they disagree. For the doctrine to have teeth, in at least some cases, “it must tell decision makers to make decisions they think mistaken on first-order substantive grounds.”<sup>227</sup> If stare decisis never tells a Justice to preserve a case with which they substantively disagree, it does no jurisprudential work. Stare decisis must be able to instruct the Justices that some prior decisions, simply because they were decided previously, should be preserved *independent of* the current Justices’ belief about the quality of the reasoning in those decisions.<sup>228</sup>

*Janus* has solidified a faulty path to overturning a prior decision. It is now a precedent on precedent of increasing prominence that suggests the poor reasoning of a prior decision is not merely a condition precedent for the consideration of stare decisis doctrine, but rather a substantive factor in stare decisis analysis that will almost certainly tilt the scales against precedent in each subsequent case.<sup>229</sup> Though *Janus* did not list any entirely new justifications for overruling precedent, “the very act of listing and purporting to use” the poor reasoning factor “lays the groundwork in future cases for a further weakening of whatever strength a norm of stare decisis may hold.”<sup>230</sup> As noted above, the jurisprudential seeds of *Janus* have already begun to bear fruit, allowing the Court to find more reasons that precedents should fall.<sup>231</sup> Left unchecked, *Janus*-faced judging will continue to undermine stability in the Supreme Court’s

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(2020) (Roberts, C.J., concurring). Justice Scalia also similarly remarked that when Justices overrule a case despite stare decisis, they “must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all).” *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring).

227. Schauer, *supra* note 7, at 128.

228. *See id.* at 125. Put another way, “stare decisis grants authority to the past simply because of its pastness.” *Id.* Schauer, however, argues that as an empirical reality, stare decisis has not had that effect on the Court. Instead, several empirical studies have shown that stare decisis’s primary effect is on the rhetoric of a decision to overrule a prior decision, rather than as a constraining mechanism that genuinely affects the outcome of cases. *Id.* at 129-30 (summarizing the empirical research on the issue).

229. *See supra* Part II.B.

230. Schauer, *supra* note 7, at 137-38.

231. *See supra* Part II.C (explaining that the Court cited *Janus*’s version of stare decisis to repeatedly argue that precedents should be struck down in the 2018 and 2019 Terms).

jurisprudence and render the stare decisis doctrine itself an unworkable, and perhaps reversible, rule of law.

The Supreme Court's current stare decisis formulation may also reduce the deference that lower federal courts show for Court precedent. Today, lower court adherence to Supreme Court precedent is so consistent that rare examples of direct defiance are highly notable.<sup>232</sup> But if the Court is willing to overrule prior cases simply because the Justices believe the decisions are poorly reasoned and hence substantively incorrect, little would constrain lower courts from taking the same tack in cases when the lower courts are confident that a majority of the Court agrees that a prior decision was poorly reasoned. Such a form of "anticipatory overruling" could become commonplace as lower courts disregard Supreme Court precedent they predict the Court itself will shortly overrule.<sup>233</sup> Lower courts may even read cases expressing the Court's disenchantment with a precedent, such as Alito's rebukes of *Abood* in the run-up to *Janus*,<sup>234</sup> as a signal that such decisions are already all but eradicated and can be ignored.<sup>235</sup> The costs of such a practice, if it became widespread, are clear. Legal stability would be significantly undermined if lower courts could act independently to change Supreme Court doctrine; legal disuniformity could proliferate as various lower courts accept different constructions of Supreme Court precedent over time;<sup>236</sup> and the perceived legitimacy

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232. See, e.g., Baude, *supra* note 196, at 40 (explaining that lower court adherence to Supreme Court precedent is so uniform that "apparent exceptions—such as Judge Silberman announcing that he would effectively nullify *Boumediene v. Bush* unless the Supreme Court made him stop, or lower courts seeming to resist the Supreme Court's decision in *Heller*—are sufficiently rare and controversial" (footnotes omitted)).

233. See, e.g., Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 941 (2016) (discussing the practice of "anticipatory overruling" and its potential shortcomings).

234. See *supra* notes 92-93 and accompanying text.

235. See Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 781 (2012) ("Anticipatory overruling" occurs when the Court does not overrule precedent but suggests its intention to do so in a future case."); Re, *supra* note 233, at 942 (discussing Supreme Court "signals" that Justices use to "indicate some aspect of how lower courts should decide cases").

236. See Re, *supra* note 233, at 924. More broadly, this practice would solidify a lower court decision-making model based upon predictions of what the lower court judges believe a majority of the Supreme Court is likely to do. See *id.* at 940-42 (discussing the "prediction model" of legal correctness). Re has argued that the Supreme Court has already suggested its agreement with this model of lower court decision-making in cases that have taken a

of the Supreme Court's decisions would be significantly undermined.<sup>237</sup>

Additionally, if *Janus* becomes entrenched as the Court's leading precedent on precedent, the Court will likely become even more overtly politicized than it is today. *Janus*'s version of the weak stare decisis tradition leaves Justices with almost no obligation to follow the direction of their prior brethren on the bench. If the membership of the Court is the only constraint upon doctrinal change, alterations to that membership become even more important to future decisions. Confirmation hearings will become the last opportunity to influence the new direction that the Court may take because the utility of precedent-based legal arguments in individual cases will decline precipitously. Because each subsequent Justice will have the opportunity to reverse the course of doctrine wholesale, all parties will rightly perceive that any Justice with ideological inclinations contrary to the current state of doctrine can readily implement those preferences without any constraint. The appointments process will be stuck in a one-way ratchet to further politicization and rancor. Nominees may overtly campaign for appointment by making private or public suggestions about which cases they will vote to overturn once confirmed. Without the constraint of stare decisis, the slippery slope to such judicial politicking by Supreme Court Justices is left open.

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As the weak stare decisis tradition's new acme, *Janus* presents a self-defeating version of the doctrine. It posits that the poor quality of a decision's reasoning is both a condition precedent to consideration of the stare decisis doctrine *and* a sufficient condition to

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"permissive attitude" towards "provocative narrowing" of Supreme Court precedent from lower courts. *Id.* at 958.

237. See Nelson, *supra* note 8, at 68. Caleb Nelson acknowledged the potential risks to judicial legitimacy that a weaker version of stare decisis may present, noting that "[a]ccording to many commentators, frequent overruling jeopardizes public acceptance of the courts' decisions." *Id.* But Nelson plausibly retorts that a Court that habitually follows demonstrably erroneous precedents will likewise hold little legitimacy in the public eye. *Id.* at 69. As noted above, because I disagree with Nelson's claim that there is a large category of readily-identifiable demonstrably erroneous precedents, see *supra* notes 212-14 and accompanying text, I likewise disagree that the Court loses legitimacy by upholding such precedents.

overrule the decision. Assigning those dual functions to the quality of reasoning factor makes the doctrine unworkable; even *Janus*'s supporters cannot logically discern a nonexistent consensus about the substantive correctness of prior decisions. *Janus*'s formulation also has vast potential to undermine legal stability. It allows Justices themselves to rapidly change course, rendering the Court ever more politicized in the eyes of the public. It invites lower courts to deviate from Supreme Court precedent that appears substantively incorrect. *Janus*'s emerging role as an authoritative precedent on precedent thus presents a grave danger to the Court.

#### IV. PRECEDENTIAL VINTAGE

As noted previously, several recent recitations of the weak stare decisis tradition suggested that a precedent's "antiquity" helps determine its precedential value.<sup>238</sup> This Part will first illustrate the Court's historical approach to older precedents, noting how *Janus* changes that approach. Next, this Part will discuss why precedential age may be an attractive stare decisis factor, given that it acts as a proxy for other desirable values. Next, this Part will note the dangers in what I call a "wave theory" of stare decisis, which seems particularly likely to take hold on the Court post-*Janus*. Finally, this Part reconsiders the proper role for precedential age in the stare decisis analysis, concluding that deference for older precedents, combined with genuinely critical review of newer precedents, is normatively desirable.

##### A. *The Court's Historical Approach to Historical Decisions*

In *Pearson*, the Court suggested that a "rule that was recently adopted" is entitled to less deference from the Court simply because of its relative infancy;<sup>239</sup> *Montejo* reiterated that idea when overruling a decision that was just over two decades old.<sup>240</sup> But *Janus* did not expressly apply that "antiquity" language. Instead the *Janus* Court emphasized that some *older* precedents are entitled to less

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238. See *supra* notes 75, 79 and accompanying text.

239. *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).

240. *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009).

deference, casting a precedent's age in a new light.<sup>241</sup> Following *Janus*, the weak stare decisis tradition has grounds to attack a precedent's age no matter how long it has been on the books. All precedents, whether aged a few years or a few decades, are entitled to less deference under either the *Pearson/Montejo* "antiquity" view or the *Janus* discussion of older decisions that are substantively flawed.

Historically, the Court's precedents on precedent have given an unclear role to the age of a precedent. As an objectively measurable criterion, age holds great potential to cut across the ideological differences and interpretive methodologies of different Justices, thereby helping Justices agree when a decision is ripe for overruling.<sup>242</sup> But the Court has not offered a consistent, convincing account of when a precedent's age entitles it to greater deference or explained why overruling older precedents may be more problematic than overruling younger ones.<sup>243</sup> *Pearson* and *Montejo* both suggested that a more recent rule is entitled to less deference from the Court because of its infancy.<sup>244</sup> But the Court has strayed from that suggestion significantly in recent years. In 2020's *June Medical Services L.L.C. v. Russo*, Chief Justice Roberts suggested that the decision in *Whole Woman's Health* reached just four years earlier garnered significant deference, forcing Roberts to follow a rule he felt was incorrect.<sup>245</sup> Nowhere did Roberts discuss the claim that recent decisions receive less deference. The Court also undermined the *Pearson/Montejo* suggestion in *Janus*. The *Janus* Court claimed that older decisions that are substantively incorrect receive less deference, both because they may have worked a substantive injustice for longer and because they have been subject to repeated criticism over their life span.<sup>246</sup> *Janus* used that rationale to

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241. See *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2484-86 (2018).

242. Randy Kozel rightly notes that possibility, highlighting that "[v]intage is the type of objective, independent factor that lends itself to application by [J]ustices across the methodological spectrum." KOZEL, *supra* note 16, at 125.

243. *Id.*

244. *Pearson*, 555 U.S. at 233; *Montejo*, 556 U.S. at 793.

245. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133-34 (2020) (Roberts, C.J., concurring).

246. *Janus*, 138 S. Ct. at 2484-86.

buttress overruling the forty-one-year-old decision in *Abood*, casting doubt on the role of age in the weak stare decisis tradition.

The Court's failure to explain the role of age may stem from the Justices' unwillingness to draw bright lines in stare decisis doctrine. Nothing in the Constitution requires a specific expiration date for previous interpretations of the document.<sup>247</sup> Even when Justices use stare decisis to uphold a controversial precedent, they are quick to note that the doctrine is fluid and "not an inexorable command."<sup>248</sup>

Putting *Janus* aside, Justices across the ideological and interpretive spectrums recently appeared to coalesce around the idea that especially old precedents are worthy of more deference. One example is 2019's *Gamble v. United States*, in which the Court reaffirmed the separate sovereigns rule—the idea that a state does not violate the Double Jeopardy Clause by prosecuting a defendant under state law even if the federal government has already prosecuted the same defendant for the same conduct.<sup>249</sup> Justice Alito wrote the majority opinion in *Gamble*, joined by six Justices across the ideological spectrum.<sup>250</sup> Citing *Montejo*, Alito claimed that "the strength of the case for adhering to [prior] decisions grows in proportion to their 'antiquity.'"<sup>251</sup> Alito thus posited that the defendant challenging the separate sovereigns rule "must overcome numerous major decisions of this Court spanning 170 years," and therefore his "historical evidence must, at a minimum, be better than middling."<sup>252</sup> The Court then upheld the centuries-old separate sovereigns rule.<sup>253</sup>

Similar themes emerged in the Court's 2010 decision in *McDonald v. City of Chicago*.<sup>254</sup> In *McDonald*, the Court declined to invoke the Privileges or Immunities Clause of the Fourteenth Amendment as the basis for making the Second Amendment binding on the

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247. See Starger, *supra* note 8, at 22.

248. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (plurality opinion).

249. 139 S. Ct. 1960, 1963-64 (2019).

250. Justice Alito's opinion was joined by Chief Justice Roberts, as well as Justices Breyer, Alito, Sotomayor, Kagan, and Kavanaugh. *Id.* at 1963. Justice Thomas also authored a concurring opinion. *Id.* at 1980 (Thomas, J., concurring).

251. *Id.* at 1969 (majority opinion) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009)).

252. *Id.* (internal quotations omitted).

253. *Id.* at 1964.

254. 561 U.S. 742 (2010).

states.<sup>255</sup> In doing so, the Court noted that the tradition of relying upon the Fourteenth Amendment's Due Process Clause to protect constitutional rights against state infringement dates back to the *Slaughter-House Cases* of 1873.<sup>256</sup> According to Justice Alito's majority opinion in *McDonald*, there was "no need to reconsider that interpretation" given that, "[f]or many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause."<sup>257</sup> Thus, without expressly invoking the "antiquity" factor in *Montejo*, the Court in *McDonald* showed its reticence to reverse a nearly 140-year-old rule without a significant reason to do so.

This trend to honor well-aged precedents was undercut slightly in *June Medical Services*, when Chief Justice Roberts suggested he was bound by the four-year-old decision in *Whole Woman's Health*.<sup>258</sup> But Roberts never directly addressed how age affected a precedent, be it ancient or immature. Thus, the long-term repercussions of *June Medical Services* on the Court's approach to precedential vintage, if any, are difficult to predict.

### *B. Age as a Proxy*

Are especially old precedents entitled to special weight? Though age is an objectively measurable criterion, age itself carries no normative value. Instead, age's potential as a *stare decisis* value comes from its ability to act as a proxy for principles already accepted as a component of the doctrine.

For instance, age may carry value as a proxy for reliance interests. Justice Scalia argued in 1989's *South Carolina v. Gathers* "that the respect accorded prior decisions increases ... with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity."<sup>259</sup> Scalia

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255. *Id.* at 758.

256. *See id.* at 754-58.

257. *Id.* at 758.

258. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133-34 (2020) (Roberts, C.J., concurring).

259. 490 U.S. 805, 824 (1989) (Scalia, J., dissenting), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).



likewise contended that especially young precedents should receive less deference because reliance interests have not yet solidified around them: “The freshness of error not only deprives [a precedent] of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it.”<sup>260</sup> Randy Kozel has similarly theorized that older precedents receive more deference because they have proven sound and have “had more time to generate reliance by stakeholders,” while newer precedents can be corrected before such reliance interests solidify.<sup>261</sup>

Similarly, the age of a precedent may be tied to perceptions of the Court’s legitimacy. When the Court sustains a rule for many decades, it gives societal stakeholders an opportunity to order their affairs accordingly. This is especially true when the rule touches upon business or commercial interests, areas in which doctrinal stability is especially important to the national economy. A Court that encourages citizens to trust that older decisions will remain undisturbed increases its legitimacy, both in the eyes of those citizens who come to trust the Court’s word and in the broader economic landscape in which the Court can play a steadying role.

Age may also serve as a proxy measurement of the reaffirmation of a precedent over time. Such reaffirmation lends extra weight to a precedent.<sup>262</sup> The longer a decision has lasted, the more likely it has met with approval from legal thinkers across the ideological spectrum. Contrary cases will be readily identifiable; members of the Court may signal their disagreement with the reasoning of a

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260. *Id.*

261. KOZEL, *supra* note 16, at 124.

262. STRAUSS, *supra* note 196, at 96. As David Strauss has argued, “When a precedent has been repeatedly reexamined and reaffirmed, over many years by a Court whose composition has changed, that should give us greater confidence that the precedent is correct.” *Id.* In contrast,

An old precedent that has never been reexamined, but has simply slipped into the background, has less of a claim on our allegiance than one that has been critically reexamined and reaffirmed; the later precedent is more likely to reflect the kind of accumulated practical wisdom that the common law approach values.

*Id.* Similarly for Kozel, “[I]f a decision has been reaffirmed by numerous judges across multiple cases, we might be more inclined to think deference is appropriate.” KOZEL, *supra* note 16, at 40. Kozel adds that “[t]here is good reason to draw distinctions such as these if deference to precedent is grounded in beliefs about individual limitations and the collective wisdom of the ages.” *Id.*

precedent—much as Justice Alito’s jurisprudence that led up to *Janus*’s decision to overrule *Abod*<sup>263</sup>—offering the precedent’s supporters one final opportunity to defend it in court before reversing course.<sup>264</sup> Absent such repeated, clear criticisms of a precedent’s validity, age again may signal that a precedent has been accepted and reaffirmed as correct over time.

Critics might contend that the older a precedent, the more likely that the precedent’s factual underpinnings have changed so much as to rob it of modern relevance—a special justification for overruling within the strong stare decisis tradition.<sup>265</sup> Though valid, this critique does not itself defeat the potential value of age as an objective factor in the stare decisis doctrine. It is surely true that the longer a precedent has existed, the more opportunity facts have had to shift underneath that precedent’s feet. But that shift should stand as its own factor to consider within the stare decisis calculus, as the strong stare decisis tradition suggests.<sup>266</sup> Perhaps in cases where a precedent’s age is invoked as a ground for special deference, Justices should closely examine the possibility that the precedent’s factual underpinnings have shifted, thereby counterbalancing the potential for weighing a precedent’s age too heavily in the analysis. With that counterbalance in place, though, it seems that age might persevere as a useful stare decisis factor.

If precedential age holds value as a proxy for reliance interests and Supreme Court legitimacy, then *Janus*’s claim that older precedents should be overruled because they have been violating rights longer or faced lengthier critiques is especially dubious. The *Janus* view misunderstands the reliance interest calculus that may favor a precedent, all in an apparent effort to make changes of course more readily justifiable. Age and reliance are undeniably related: the longer a precedent has existed, the more likely it is that interested stakeholders will have ordered their affairs around that precedent, on the expectation that no drastic changes in the legal

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263. See *supra* notes 92-93 and accompanying text.

264. See *Re, supra* note 93, at 644-45 (“When the Court gives notice that a precedent is on unstable ground, reliance interests are plausibly reduced, even if not eliminated. But when a precedent is affirmed or referred to another branch, the resulting notice preserves or reinforces the interests of reliant parties.”).

265. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (plurality opinion).

266. See, e.g., *id.*

landscape would emerge. *Janus* complicates the task for such stakeholders. It requires them to identify when a precedent's reasoning is so poor that it is likely to be overturned—a task, as noted above, that the Justices themselves seem unlikely to fulfill<sup>267</sup>—and then reorder their affairs based upon the expectation that the Court will soon change course. This both dilutes age's value as an objective factor in the stare decisis calculus and needlessly complicates the process through which ordinary citizens come to rely upon the Court's decisions.

Of course, under strong stare decisis, Justices can still overturn older precedents, though perhaps less frequently. Justices may be able to limit the damage to reliance interests by signaling the wobbliness of an ancient precedent in a series of tentative decisions that both give notice to interested parties to change their personal arrangements and offer the opportunity to the precedent's defenders to rescue it in future cases.<sup>268</sup> This route to overruling may be even more normatively desirable if it, too, is a slow-moving mechanism played out over more than one judicial generation. A present Justice might express disagreement with an ancient precedent's factual underpinnings but refuse to personally overrule it until a new generation of Justices has reviewed the same precedent and reached the same conclusion. That new generation would feel less constrained in changing course if they agree that the precedent is outdated. At that point, several jurists would have agreed that the ancient precedent needs adjustment, suggesting that the precedent's errors were truly so grave that a change in course was appropriate. That would likewise lend the overruling decision itself some historical clout to rival the historical bona fides of the ancient precedent.

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267. See *supra* notes 193-94 and accompanying text.

268. This argument is adopted from Richard M. Re's "doctrine of one last chance," whereby the Court signals willingness to overturn a decision without actually doing so, giving the decision's defenders one final chance to defend it in the next case that arrives and the Court the freedom to overturn with less disruption to settled reliance interests. See *Re, supra* note 93, at 636.

*C. Dangers in a “Wave Theory” of Stare Decisis*

Unfortunately, Justices often adopt what I call a “wave theory” of stare decisis, making contrary suggestions about its binding strength over time. Suppose that Judicial Generation A establishes a status quo on a particular jurisprudential question. When a new generation of Justices takes the bench—call it Generation B—that generation frequently adopts a weak stare decisis tradition that allows freedom to immediately change existing jurisprudence with which Generation B may substantively disagree. Generation B will thus effect great change to align the law with their substantive preferences, all while claiming fidelity to a relatively weak stare decisis tradition. But the members of Generation B will likely adopt a strong stare decisis view later in their careers. Once Generation B begins to feel that the gains it has made are under threat from yet another generation of Justices—call them Generation C—then Generation B will favor a stronger stare decisis tradition in order to protect the apparent gains it has made from being overruled. Justice Douglas sagely described this phenomenon in 1949, noting that “[t]oday’s new and startling decision quickly becomes a coveted anchorage for new vested interests. The former proponents of change acquire an acute conservatism in their new *status quo*.”<sup>269</sup>

The Warren Court, of which Douglas was a part,<sup>270</sup> well illustrated this principle. As one example, consider its take on the Fifth Amendment privilege against self-incrimination.<sup>271</sup> Prior to the Warren Court, Fifth Amendment jurisprudence firmly established that government investigators did not need to warn a criminal suspect of the right to remain silent prior to securing a confession that would be admissible at trial.<sup>272</sup> The prosecution could move to

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269. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 737 (1949) (“It will then take an oncoming group from a new generation to catch the broader vision which may require an undoing of the work of our present and their past.”).

270. See *Justices 1789 to Present*, SUP. CT. U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) [<https://perma.cc/H2P6-N4RR>].

271. “No person ... shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. Other examples might include the Warren Court’s approach to the exclusionary rule or equal protection as applied to voting rights. See Powe, Jr., *supra* note 190, at 2104-06 (summarizing the Warren Court’s “explosive change[s]” in these areas).

272. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 502 (1966) (Clark, J., concurring in part and dissenting in part) (“The rule prior to today ... depended upon ‘a totality of circumstances evidencing an involuntary ... admission of guilt.’” (second omission in original) (quoting

admit such a confession upon a showing, supported by the totality of the circumstances, that the confession was voluntary and not the result of coercive force.<sup>273</sup>

Perhaps quite justifiably, the Warren Court found this test deeply problematic given the potential for abusive tactics that eluded judicial oversight and the fact-intensive inquiry it required in lower courts.<sup>274</sup> The Warren Court thus hinted at possible changes in 1964's *Escobedo v. Illinois*, when it seemed to suggest that counsel may be required to protect against police abuse.<sup>275</sup> Then, in 1966's *Miranda v. Arizona*, the Warren Court established what are now remarkably well-known protections for suspects in a custodial interrogation—including the requirement that investigators inform the defendant both of his right to remain silent and of the consequences of speaking—before a confession could be admitted in court.<sup>276</sup> *Miranda* marked a sea change in Fifth Amendment doctrine and a cultural flash point in the decades that followed.<sup>277</sup> But when making this momentous change, the Court took a remarkably lax attitude towards *stare decisis*. Nowhere in the *Miranda* decision did the Warren Court explicitly address the doctrine, let alone discuss the cases that established the prior rule admitting confessions made voluntarily.

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Haynes v. Washington, 373 U.S. 503, 514 (1963)); *Wilson v. United States*, 162 U.S. 613, 623 (1896) (“[I]t is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned.”).

273. See, e.g., *Haynes*, 373 U.S. at 513; *Lyons v. Oklahoma*, 322 U.S. 596, 602 (1944).

274. For a helpful discussion of the Warren Court's discomfort with the pre-*Miranda* totality of the circumstances test, see Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 17-18 (2010).

275. 378 U.S. 478, 490-91 (1964) (“We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied ‘the Assistance of Counsel’ in violation of the Sixth Amendment to the Constitution as ‘made obligatory upon the States by the Fourteenth Amendment,’ and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.” (quoting *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963))).

276. 384 U.S. at 467-69, 479.

277. See FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 318-19 (1970); see also Friedman, *supra* note 274, at 18.

*Miranda* quickly faced resistance, both from Congress and newly appointed Justices.<sup>278</sup> In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act, which included a provision that purported to overrule *Miranda* for federal investigations.<sup>279</sup> After President Nixon appointed a series of new Justices to the Court, new majorities began to systematically reduce the impact of *Miranda*'s protections, if not outright overrule the decision—first by creating exceptions to its application, and later by suggesting that it was a mere prophylactic rule rather than a constitutional mandate.<sup>280</sup>

Members of the Warren Court aligned in resistance to the changes in *Miranda* sought by this later generation of Justices. Justice Brennan noted that the Court's decision permitting prosecutors to impeach defendants with confessions obtained in violation of *Miranda* "goes far toward undoing much of the progress made in conforming police methods to the Constitution."<sup>281</sup> Justice Marshall protested that a public-safety exception to *Miranda*'s protections "abandon[ed] the clear guidelines" of *Miranda*, standing "in direct conflict with [the] Court's longstanding interpretation of the Fifth Amendment."<sup>282</sup> Brennan and Marshall later joined in dissent to accuse the new generation of Justices of "a studied campaign to strip the *Miranda* decision piecemeal and to undermine the rights *Miranda* sought to secure."<sup>283</sup> Though these dissents did not directly engage the language of stare decisis, they exemplified the Warren Court's alarm at new Justices' efforts to erode *Miranda* without due deference to it. Yet those sounding the alarm never mentioned how significant a change *Miranda* itself was to existing doctrine at the time it was decided.

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278. See Friedman, *supra* note 274, at 18 ("*Miranda* was instantly controversial and in fact led to the undoing of the Warren Court.").

279. See Omnibus Crime Control and Safe Streets Act of 1968, tit. II, § 701(a), 18 U.S.C. § 3501, *invalidated by* *Dickerson v. United States*, 530 U.S. 428 (2000); GRAHAM, *supra* note 277, at 319-20. Though federal prosecutors declined to rely upon the statute for decades, it became the subject of the controversial decision reaffirming *Miranda*. See *Dickerson*, 530 U.S. at 432 (holding that Congress could not legislatively overrule *Miranda*).

280. See Friedman, *supra* note 274, at 18-21 (discussing *Dickerson*, 530 U.S. 428; *Oregon v. Elstad*, 470 U.S. 298 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971)).

281. *Harris*, 401 U.S. at 232 (Brennan, J., dissenting).

282. *Quarles*, 467 U.S. at 674, 678 (Marshall, J., dissenting).

283. *Elstad*, 470 U.S. at 319 (Brennan, J., dissenting).

These alarms against undoing Warren Court changes (that were themselves a drastic change from the prior status quo) were part of a broader conception of stare decisis ascribed to by the Warren Court's members in the later years of their careers. For example, in the early 1970s, Justice Goldberg sought to defend Warren Court decisions from being overruled by proclaiming that new Justices should adhere to a relatively strong stare decisis tradition.<sup>284</sup> For Goldberg, the Warren Court did not violate stare decisis when it vastly expanded civil liberties, because "stare decisis applies with an uneven force" that permits such expansions.<sup>285</sup> Stare decisis was a one-way ratchet: "[W]hen the Supreme Court seeks to overrule in order to cut back the individual's fundamental, constitutional protections against governmental interference, the commands of stare decisis are all but absolute; yet when a court overrules to expand personal liberties, the doctrine interposes a markedly less restrictive caution."<sup>286</sup> Post-Warren Court Justices should thus have deferred to the prior generation's expansive protections against government interference with personal liberty.<sup>287</sup>

I do not take any position here on the substantive accuracy of *Miranda* or its status as a necessary constitutional rule.<sup>288</sup> I simply use it to highlight one example, of which there are many,<sup>289</sup> of Justices applying a "wave theory" of stare decisis during their careers. When they are a part of a new generational shift, Justices will often support a weaker stare decisis tradition.<sup>290</sup> Yet, later in their careers, as a new generation threatens the changes they have

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284. See ARTHUR J. GOLDBERG, *EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT* 72-75 (1971).

285. *Id.* at 74-75.

286. *Id.*

287. See *id.*

288. Indeed, the *Miranda* decision itself may have been justified on stare decisis grounds if the Warren Court had engaged in that discussion within the decision.

289. See, e.g., GRAHAM, *supra* note 277, at 321 ("The complaint most frequently heard about the Warren Court during the 1960s was that the Justices had taken it upon themselves to change the law according to their own notions—that they were legislating, making the law instead of interpreting it, usurping the powers of Congress and the states. Wise old heads knew that this complaint had been hurled at the Supreme Court (and other courts as well) since the days of John Marshall and before."); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 *VAND. L. REV.* 647, 657-59 (1999) (noting criticisms of the Rehnquist Court's arguably inconsistent approach to stare decisis).

290. See, e.g., Douglas, *supra* note 269, at 737.

made, those same Justices will shift to a stronger form of stare decisis, hoping to solidify their perceived doctrinal gains.<sup>291</sup>

Such waves in stare decisis are normatively undesirable for several reasons. To begin, they are intellectually inconsistent, if not dishonest. The Justice who ascribes to changing conceptions of stare decisis over time, in fact, ascribes to no real, binding version of stare decisis at all. Although I have argued in favor of a strong stare decisis tradition rather than a weak one,<sup>292</sup> perhaps even more damaging is a “wave theory” of stare decisis that allows Justices to shift the strength of the doctrine at their whim. That does not merely allow Justices to change the law whenever they choose; it allows them to change the law, then protect whatever drastic changes they have made against further adjustment by later generations. And it does so without sufficient normative justification for a practice that favors only the immediate generation’s decisions.

Aside from the inherent intellectual inconsistency of a wave theory of stare decisis, these theories would render stare decisis so malleable as to become meaningless. In the name of protecting their own decisions, Justices that vacillate between weak and strong stare decisis traditions instead set the table for future generations of Justices to change their views on stare decisis as they please. In the long run, such vacillation weakens all of the Court’s decisions equally. The consequences for legal stability and the Court’s legitimacy could be dire.

#### *D. Youth Revisited*

What deference, then, is owed to relatively young precedents in the stare decisis analysis? As an empirical matter, the Justices historically have not given much deference to younger decisions. When the Supreme Court has overturned one of its own opinions, it has largely focused on those that are less than twenty years old.<sup>293</sup> Overturned opinions in that category make up more than 50 percent of all overturned opinions; in contrast, opinions more than 40 years

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291. See, e.g., *id.*

292. See *supra* Part III.

293. See Willingham, *supra* note 1.



old make up less than a quarter of all overturned opinions.<sup>294</sup> The Court's 2020 decision in *June Medical Services* following the four-year-old decision in *Whole Woman's Health* stands as a notable outlier to this trend.<sup>295</sup> The Court's discussions of antiquity in *Pearson* and *Montejo*—which overturned precedents aged just eight and twenty-three years, respectively<sup>296</sup>—were more accurate representations of the Court's historical approach to young precedents.<sup>297</sup>

The normative desirability of that approach merits closer analysis. There is risk in reversing course quickly when the only change in the interim is one of Court personnel.<sup>298</sup> Such rapid changes are likely to diminish the Court's legitimacy in the public eye, even if it might have a limited practical effect on the reliance that interested parties have placed upon prior decisions. These changes might also tempt lower courts to effectively ignore recent precedents until they are reaffirmed, providing some showing that the Supreme Court really meant what it only recently said.

But perhaps a short window for reversal in the early life of a precedent would help the Court achieve more accurate results. Recall that precedential age holds value, in part, because it is a proxy for judicial review and approval over time.<sup>299</sup> Such review, in turn, only carries normative value if it is a genuine crucible for the precedent to overcome in the eyes of skeptical Justices. Only if those early reviewing Justices were genuinely free to change course would their review truly carry that normative value. Justices reviewing a young precedent for the first time should feel less obligated to defer to that decision than they might feel when reconsidering a much older precedent that has already been reviewed and approved hundreds of times over; that early review can only support the likely

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294. *See id.* Writing in 2008, Michael Gerhardt concluded that “[t]he average life span of an overruled precedent is 29.2 years.” MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 11 (2008).

295. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

296. *Pearson v. Callahan*, 555 U.S. 223, 233 (2009); *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009).

297. For additional examples of cases that were overruled relatively quickly, see Powe, Jr., *supra* note 190, at 2110-11 & nn.162-72.

298. As discussed earlier, Justice Marshall was harshly critical of overruling recent precedents when “[n]either the law nor the facts” but “[o]nly the personnel of this Court” had changed. *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting); *see also* KOZEL, *supra* note 16, at 4.

299. *See supra* Part IV.B.

substantive merit of the initial decision if it is a harsh, skeptical re-analysis that demonstrates broad but begrudging agreement with the outcome and reasoning.<sup>300</sup> When the Court reviews an older precedent, it should typically uphold it because it has been approved by skeptical jurists. By contrast, when the Court reviews a newer precedent, it should lower the threshold to overruling in order to ensure that the reviewing Justices fulfill their role as those skeptical jurists whose review is worthy of respect by their descendants.

The position I describe above is tentative and does not come without caveats. Justices from the dissent in a prior case often refuse to follow the majority's rule later, even as it becomes doctrinally entrenched over time<sup>301</sup>—though again, Chief Justice Roberts's recent opinion in *June Medical Services* stands as a prominent outlier.<sup>302</sup> Generally, it would seem likely that, when a change in Court personnel renders a dissenting Justice suddenly a majority Justice, they may be tempted to use the relative youth of the decision as an excuse to overrule what was a perfectly acceptable choice by the earlier Court. But that second review will at least give the new Justice a chance to bring additional intellectual capital to bear on the problem, with the possible result that the new Justice will acknowledge the substantive correctness, or at least acceptability, of the prior decision. In other words, the risk of rapid overruling may be worth the reward of many steady long-term precedents in the Court's jurisprudence.

## CONCLUSION

With little public or scholarly notice, *Janus* has solidified an especially weak stare decisis tradition amongst many Justices and

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300. See Nelson, *supra* note 8, at 36 (“[I]f each judge in the series had felt bound by the first decision on the issue, then there would have been no difference between a series of decisions and an isolated precedent; the chance that the series was correct would be identical to the chance that the first decision was correct.”).

301. See HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 2-3, 288 (1999); Powe, *supra* note 190, at 2112-14.

302. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (Roberts, C.J., concurring).

emerged as a new leading precedent on precedents.<sup>303</sup> *Janus*'s discussion of whether to overrule *Abood* has threatened legal stability and Court legitimacy in two ways. First, *Janus* elevated the "poor reasoning" of a precedent to new prominence, suggesting it was both a necessary condition to trigger stare decisis analysis and a sufficient condition to overturn decisions. But poor reasoning cannot play both roles; such a conception of stare decisis would be unable to settle disputes independent of the Justices' views about the substantive correctness of a decision or the proper method to achieve substantively correct results.<sup>304</sup> Widespread adoption of *Janus* would significantly undermine doctrinal stability, judicial legitimacy, and legal consistency, all while rendering the stare decisis doctrine itself so incoherent and unworkable that it could hardly be considered a doctrine at all.

Second, *Janus* overemphasized the importance of a precedent's age in determining its precedential weight. It suggested that, while the weak stare decisis tradition has generally disfavored young precedents, it might also disfavor older precedents that are substantively incorrect and may have been violating citizens' rights for a longer period.<sup>305</sup> *Janus*'s claims thus lend support to overruling nearly any precedent based upon its age, young or old. It opens the door to a dangerous "wave theory" of stare decisis, under which Justices can adopt weak or strong traditions over the course of their careers as they suit their policy preferences. Instead, a decision's age, and subsequent decisions reaffirming it, should increase its precedential weight, with perhaps a special examination of the factual underpinnings of those decisions to guard against the possible inapplicability of those precedents under changed factual conditions. In addition, relatively new precedents should be subject to critical review, thereby ensuring that when a precedent has aged

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303. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2445 (2019) (Gorsuch, J., concurring); *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019); *Gamble v. United States*, 139 S. Ct. 1960, 2006 (2019) (Gorsuch, J., dissenting); *Franchise Tax Bd. of Ca. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019).

304. See KOZEL, *supra* note 16, at 61.

305. See *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018) ("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. Those unconstitutional exactions cannot be allowed to continue indefinitely.").

well on the Court, it has been substantively reaffirmed by generations of Justices who had a genuine opportunity to reconsider it.

*Janus*-faced judging is only likely to increase on the Court in the years to come, as more Justices find it a convenient mechanism for overturning decisions with which they substantively disagree. This Article sounds the alarm against such practices. It also analyzes the proper role of a precedent's reasoning and age in the stare decisis calculus. Thus, it stands as a bulwark against a conception of the stare decisis doctrine with the potential to do great damage to our legal system and tradition.