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Restoring Stare Decisis in the Wake of *Janus v. AFSCME, Council 31*

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I. INTRODUCTION

With the 2018 confirmation of Justice Brett Kavanaugh, the notion that the Supreme Court enjoys insulation from partisan politics is on the verge of extinction.[1] In the eyes of the public, it is certain that the Court will be viewed as a political unit motivated, at least in part, to further political ends. Now more than ever, the Court needs a tool that will reestablish the public's faith that it will exercise independent judgment in deciding the law. The doctrine of stare decisis serves as the appropriate agenda-limiting function necessary to curb the—perceived or actual—politicization of the Court. However, in its current state, the doctrine of stare decisis is too weak to serve that function.

Restructuring the stare decisis analysis, along with an increased focus on the reliance interests involved in overturning or upholding precedent, will serve to strengthen this doctrine and help reestablish the Court's legitimacy as an apolitical body. Most importantly, the reconceptualization of stare decisis will help limit the ability of the Court to overturn precedent as a means to achieve contemporary political ends. This Note traces the evolution of the stare decisis doctrine, contends that Justice Samuel Alito's 2018 majority opinion in *Janus v. AFSCME, Council 31*[2] significantly weakened the doctrine, and explores a solution to strengthen it.

The doctrine of stare decisis, while still legitimate, is wielded inconsistently, relied on at random, and in a constant state of flux.[3] Stare decisis plays an important role in the legal system—it promotes system stability and legitimacy, and strengthens settled law, such as the prohibition of racial discrimination by the government.[4] How the doctrine is used is relatively clear when deciding cases at one of two extremes. On one end of the spectrum are "super-precedent"—cases that set forth well-settled norms and are essentially irreversible, as any change would destabilize the government and society.[5] In super-precedent, stare decisis serves an agenda-limiting function by removing certain constitutional questions from reconsideration.[6] At the other end of the spectrum are cases in which the Court encounters precedent that is fundamentally

1. *See* Zack Beauchamp, *The Supreme Court's Legitimacy Crisis is Here*, Vox (Oct. 6, 2018), https://www.vox.com/policy-and-politics/2018/10/6/17915854/brett-kavanaugh-senate-confirmed-supreme-court-legitimacy.

2. 138 S. Ct. 2448 (2018).

3. Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, 414 (2010). Kozel explains:

> The catalog of factors that inform the *stare decisis* inquiry is lengthy and uncertain . . . . The sheer number of these considerations, combined with the fact that the Court often selects a few items from the catalog without explaining how much work is being done by each, makes it difficult even to find a starting point for thinking critically about *stare decisis* as a judicial doctrine.

Id.

4. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

5. *See generally* Michael J. Gerhardt, *Super Precedent*, 90 Minn. L. Rev. 1204, 1205–10 (2006).

6. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 745 (1988).

incompatible with contemporary society.[7] Application of stare decisis in these cases would only perpetuate laws that are irreconcilable with modern times; such precedent can be overturned without objection.[8]

Between these two extremes, of course, lie the difficult cases. The question of when and how to apply stare decisis to these cases remains contested and is rooted in two competing viewpoints.[9] The strict view promotes legitimacy, consistency, and continuity, and argues that precedent should be granted deference, regardless of the prior decisions' reasoning.[10] Conversely, the lax view argues that responsiveness to contemporary issues demands a more forgiving and flexible doctrine of stare decisis.[11]

Courts look at several factors when conducting a stare decisis analysis to determine whether precedent should be followed.[12] Factors frequently cited as important include: (1) the precedent's soundness of reasoning; (2) the workability of the precedent in contemporary times; (3) legal developments since the precedent came down that may have "eroded" the decision's "underpinnings," and (4) the

7. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896). Note that *Plessy* was not overruled by a single case. Rather, in *Brown*, the Court initially declared segregation in public schools unconstitutional. *Brown*, 347 U.S. at 495. The Court would go on to extend *Brown* in a series of cases that declared segregation unconstitutional in various public settings—essentially eviscerating *Plessy* in piecemeal fashion. *See* Erwin Chemerinsky, Constitutional Law 795–98 (4th ed. 2013).

8. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003) (holding that the Texas statute making it a crime for two persons of the same sex to engage in certain sexual acts violated the Due Process Clause of the U.S. Constitution, expressly overruling Bowers v. Hardwick, 478 U.S. 186 (1986)); Loving v. Virginia, 388 U.S. 1 (1967) (holding statutes that restrict the freedom to marry solely based on racial classifications violate the Equal Protection Clause of the U.S. Constitution, expressly overruling Pace v. Alabama, 106 U.S. 583 (1883)).

9. Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of Brady v. Maryland*, 46 Loy. L.A. L. Rev. 77, 90–91 (2012). Any Supreme Court decision in which there is a dissenting opinion that involves potentially reversing precedent will inevitably contain a discussion of stare decisis. For example, in *Citizens United v. Federal Election Commission,* the majority opinion found that stare decisis did not serve to uphold the precedent in question. *See* 558 U.S. 310, 310 (2010). However, in his dissent, Justice Paul Stevens argued that the doctrine of stare decisis should have applied. *Id.* at 478–79.

10. Starger, *supra* note 9, at 90. *See also* Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992) ("[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.").

11. Starger, *supra* note 9, at 91. This view was articulated by Justice Louis Brandeis in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–06 (1932) (Brandeis, J., dissenting). *See also* Hertz v. Woodman, 218 U.S. 205, 212 (1910) ("The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.").

12. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2458 (2018) ("An analysis of several important factors . . . should be taken into account in deciding whether to overrule a past decision[.]").

reliance interests[13] at stake.[14] Undoubtedly, the potential impact on the people and governmental institutions should be deliberated whenever the Court considers overruling precedent. Recently, however, when articulating the reason for overturning precedent, the Court has begun to dismiss reliance interests and instead has focused on the reasoning of the decision in question.[15] This inconsistent—and often incoherent—approach has drawn criticism as the Court invokes stare decisis at seemingly random points, strengthening the suspicion that the Court is manipulating the doctrine as a way to achieve varying political ends.[16]

This trend continued in 2018 when the Court, in *Janus*,[17] overturned its 1977 decision in *Abood v. Detroit Board of Education*[18] In *Janus*, the Court held that government workers who choose not to join public unions cannot be forced to pay for collective bargaining.[19] In doing so, the Court overturned its decision in *Abood* that required nonmembers of a public union to help pay for the union's collective bargaining

13. Reliance interests are a form of remedy that intends to "put [the nonbreaching party back] in the position that would have resulted if the contract had not been made, including out-of-pocket costs." *Reliance Interests*, Black's Law Dictionary (11th ed. 2019). Reliance interests are especially important in cases involving contract and property disputes. *See* Payne v. Tennessee, 501 U.S. 803, 828 (1991) (finding that cases involving property and contract disputes, where reliance interests were especially strong, are more amenable to the doctrine of stare decisis). However, the Court's decisions often emphasize the reliance interests involved in regards to the judicial goals of stability and reliability, rather than the contractual remedy. *See, e.g.*, *Casey*, 505 U.S. at 855–56; Starger, *supra* note 9, at 90. In upholding *Roe v. Wade*, the Court explained how women have relied on *Roe* and modified their behavior on the presumption that the decision will remain. *Casey*, 505 U.S. at 855–56. The Court further stated:

> The *Roe* rule's limitation on state power could not be repudiated without serious inequity to people who, for two decades of economic and social developments, have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

Id. The Court has explained that, generally: "*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991).

14. Brandon J. Murrill, Cong. Research Serv., R45319, The Supreme Court's Overruling of Constitutional Precedent 12 (2018).

15. *See Janus*, 138 S. Ct. at 2460.

16. Derigan Silver & Dan Kozlowski, *Preserving the Law's Coherence: Citizens United v. FEC and Stare Decisis*, 21 Comm. L. & Pol'y 39, 51–52 (2016); *see also Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting) ("Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard to the usual principles of *stare decisis*.").

17. 138 S. Ct. 2448, 2486 (2018).

18. 431 U.S. 209 (1977).

19. Adam Liptak, *Supreme Court Ruling Delivers a Sharp Blow to Labor Unions*, N.Y. Times (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/supreme-court-unions-organized-labor.html.

to ensure labor peace and prevent "free riders."[20] The *Janus* Court claimed that its departure from the *Abood* precedent was necessary because it was "poorly reasoned," led to practical problems, was inconsistent with First Amendment cases, and had been undermined by recent decisions.[21] Notably, the Court dismissed the reliance interests involved in *Janus* as insufficient to justify upholding *Abood*.[22] The Court came to its decision without regard to the practical impact the ruling would have on individuals and entities that had relied on *Abood* in organizing their affairs.[23] With its focus on the "poor reasoning" and dismissal of reliance interests, the Court crippled the doctrine of stare decisis.[24] This approach fails to properly moderate ideological swings and threatens the integrity of the Court as an apolitical body.[25]

This Note argues that (1) the Court's dismissal of the reliance interests significantly weakened the doctrine of stare decisis and (2) whether a precedent is "poorly reasoned" should not serve as a factor in a stare decisis analysis, but rather, should serve to trigger a stare decisis analysis. Part II of this Note explores the evolution of the stare decisis doctrine and traces the path to its contemporary form. Part III discusses the problems with the current interpretation of stare decisis, as highlighted in Justice Alito's 2018 majority opinion in *Janus.* Part IV proposes a new stare decisis analysis—one that, by maintaining a focus on reliance interests, serves to strengthen the doctrine. Finally, Part V concludes this Note.

II. HISTORY OF THE DOCTRINE & COMPETING INTEPRETATIONS

A. Tracing the History of Stare Decisis

Up until the early eighteenth century, common-law judges and scholars followed the declaratory theory of common law.[26] This theory rested on the notion that the law had an "ideal existence" notwithstanding the decision of any one court.[27] Thus, any judicial declaration that seemed inconsistent with the "ideal existence" could be superseded by a new decision.[28] In other words, it was the function of the judge not to

20. *Abood*, 431 U.S. at 224.

21. *Janus*, 138 S. Ct. at 2460.

22. *Id.*

23. In *Citizens United*, Justice Stevens articulates that relitigating the merits of the precedent in question is simply a tool used by justices to overturn precedent that they do not like. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 409–11 (2010) (Stevens, J., concurring in part and dissenting in part).

24. Michael J. Gerhardt, The Power of Precedent 18 (2008) [hereinafter The Power of Precedent].

25. *Id.*

26. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647, 659–60 (1999).

27. *Id.* at 660.

28. *Id.*

make, but rather, to declare law.[29] Accordingly, adherence to prior decisions was not necessary because such decisions were merely evidence of the law, not the law itself.[30]

In the eighteenth and early nineteenth centuries, there was a shift in ideology that laid the foundation for stare decisis.[31] During this period, Anglo-American courts came to regard past decisions as more persuasive and became compelled to articulate some justification for setting aside prior decisions.[32] William Blackstone's reasoning is reflected in Founding-Era stare decisis jurisprudence, and his general theory, that precedent has binding properties,[33] was recognized at the time the Constitution was framed.[34] Evidence suggests that the Framers intended to include, within Article III's grant of "the judicial Power,"[35] the power to create binding law and precedent.[36] While the Court has stated that stare decisis is "not an inexorable command,"[37] courts today still recognize that the doctrine is necessary to preserve legitimacy and provide stability.[38]

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29. Edward Coke, The Second Part of The Institutes of the Laws of England 51 (1642).

30. Lee, *supra* note 26, at 660.

31. *Id.* at 661.

32. *Id.* William Blackstone expressed this idea in the late eighteenth century by stating that "it is an established rule to abide by former precedents, where the same points come again in litigation; as well as to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." William Blackstone, Commentaries on the Laws of England 69 (1765). However, Blackstone cautioned that blindly adhering to precedent might not be the best approach "since it sometimes may happen that the judge may *mistake* the law." *Id.* at 71.

33. Lee, *supra* note 26, at 681–84.

34. Richard H. Fallon, *Stare Decisis and the Constitution*, 76 N.Y.U. L. Rev. 570, 579 (2001) ("Historians record that the doctrine of precedent either was established or becoming established in state courts by the time of the Constitutional Convention."). Alexander Hamilton referenced the role of precedent in *The Federalist No. 78*. He stated that, "to avoid an arbitrary discretion in the courts, it is indispensable that [the courts] should be bound down by strict rules and precedents[.]" The Federalist No. 78 (Alexander Hamilton) [hereinafter Hamilton]. Hamilton took a very narrow approach to stare decisis, believing that precedent should serve as strict rules that bind and define the duty of the court in every case. *See* Lee, *supra* note 26, at 663. However, *The Federalist No. 78* is not a treatise on stare decisis, and it is unclear whether Hamilton was merely describing a vertical rule of stare decisis requiring lower courts to follow higher federal court precedent. *Id.* at 664. Other Founding-Era commenters took a position similar to Blackstone, writing that stare decisis should be tempered to some degree when there is a strong reason for doing so. *Id. See also Cranch's Preface*, 5 U.S. iii, iv (1804) ("Every case decided is a check upon the judge. He can not decide a familiar case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues to corruption are thus obstructed, and the sources of litigation closed.").

35. U.S. Const. art III, § 1.

36. *See* Fallon, *supra* note 34, at 579. While there is no question that decisions of higher courts bind lower courts in the same jurisdiction, the Supreme Court is not subject to the same limitations because it is the highest court in the United States. *See* Hamilton, *supra* note 34.

37. *See* Payne v. Tennessee, 501 U.S. 808, 828 (1991).

38. *See* The Power of Precedent, *supra* note 24, at 18.

B. Contemporary Interpretations and Competing Ideologies

Most contemporary jurists recognize that the Supreme Court is not bound by—and thus has the power to overrule—its own precedent.[39] Two competing positions have emerged regarding the degree to which the Court should follow its precedent.[40] The strict—or strong—view of stare decisis calls for adhering to precedent absent some particular justification.[41] Conversely, the lax—or weak—view accepts overruling precedent more easily.[42] The lax view was best articulated in 1932 by Justice Louis Brandeis' dissent in *Burnet v. Coronado Oil*.[43] Under Brandeis' view, the Court may overrule its own precedent when experience, coupled with the passage of time, dictates that the "force of better reasoning" must prevail.[44] Empirically, Brandeis' view has prevailed, as the Court has overruled precedent over two hundred times in its history.[45] The strict view of stare decisis was manifested in 1992 when the Court in *Planned Parenthood v. Casey*[46] declined to overturn its 1973 decision in *Roe v. Wade*.[47] The *Casey* plurality viewed overruling as appropriate only in narrow circumstances, such as when: (1) a rule has become practically unworkable; (2) developments in the law have left an old rule a remnant of abandoned doctrine, or (3) facts have changed to a degree that the old rule is simply inapplicable.[48] This strict view directs the Court to follow its precedent regardless of whether it was wrong or poorly reasoned.[49]

These two views of stare decisis essentially differ in the deference given to the underlying reasoning of the precedent in question.[50] The lax view justifies overturning

39. Starger, *supra* note 9, at 89.

40. *Id.* at 90–91.

41. *Id.* at 90.

42. *Id.*

43. 285 U.S. 393, 405–13 (1932) (Brandeis, J., dissenting). In his dissent, Justice Brandeis stated:

> Stare decisis is not, like the rule of res judicata, a universal inexorable command. . . . Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions.

Id. (citations omitted).

44. *Id.* at 408.

45. *See Table of Supreme Court Decisions Overruled by Subsequent Decisions*, Constitution Annotated, https://constitution.congress.gov/conan/appendix/decisions-overruled/ (last visited Mar. 29, 2020).

46. 505 U.S. 833, 854–69 (1992).

47. 401 U.S. 1113 (1973) (holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages).

48. *Casey*, 505 U.S. at 854–55.

49. Starger, *supra* note 9, at 92.

50. *Id.*

poorly reasoned precedent and authorizes more change and fluidity in Supreme Court jurisprudence.[51] The strict view places little emphasis on a precedent's reasoning and focuses on the importance of promoting stability and the rule of law.[52]

Regardless of whether one takes a strict or lax view of stare decisis, there are sound policy rationales for adherence to Supreme Court precedent, at least to some extent.[53] The doctrine remains functionally desirable because it promotes stability, protects settled expectations, conserves judicial resources, and adds predictability to the everyday affairs of citizens.[54] Further, stare decisis acts as a bastion of legitimacy by moderating potential ideological swings and assuring the public that the Court is an apolitical legal institution.[55] Significantly weakening or eliminating the doctrine undermines the rule of law and "represent[s] an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is."[56]

III. THE PROBLEM: CONTINUED WEAKENING OF STARE DECISIS

Over the last decade, two Supreme Court decisions—*Citizens United* and *Janus*—have weakened the doctrine of stare decisis in significant ways.[57] In 2010, the Court in *Citizens United*[58] overruled two Supreme Court decisions from 1990 and 2003, *Austin v. Michigan Chamber of Commerce*[59] and *McConnell v. Federal Election Commission,* respectively.[60] The majority reasoned:

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51. *Id.*

52. *Id.*

53. *See* Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations.").

54. Fallon, *supra* note 34, at 587–88; *see also* Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 Harv. J.L. & Pub. Pol'y 67, 70 (1988).

55. Fallon, *supra* note 34, at 587–88.

56. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 Wash. & Lee L. Rev. 281, 288 (1990).

57. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 411 (2010) (Stevens, J., concurring in part and dissenting in part) ("*Stare decisis* protects not only personal rights involving property or contract but also the ability of the elected branches to shape their laws in an effective and coherent fashion. Today's decision takes away a power that we have long permitted these branches to exercise."); Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2497 (2018) (Kagan, J., dissenting). In the *Janus* dissent, Justice Elena Kagan states:

> But the worse part of today's opinion is where the majority subverts all known principles of *stare decisis*. The majority makes plain, in the first 33 pages of its decision, that it believes *Abood* was wrong. But even if that were true (which it is not), it is not enough. Respecting *stare decisis* means sticking to some wrong decisions.

Id. (citations omitted).

58. *Citizens United*, 558 U.S. at 312.

59. 494 U.S. 652 (1990).

60. 540 U.S. 93 (2003).

> 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. [The Court has] also examined whether experience has pointed up the precedent's shortcomings.[61]

In 2018, the majority in *Janus* eschewed the doctrine of stare decisis by overturning its 1977 decision in *Abood*.[62] The majority reasoned that *Abood* was "poorly reasoned," led to practical problems, and was inconsistent with other First Amendment cases.[63] Most importantly, the Court dismissed the reliance interests as insufficient to justify upholding the precedent and thus, overruled *Abood*.[64] Like in *Citizens United*, the Court in *Janus* came to the conclusion that the prior decision—*Abood*—was not well-reasoned and therefore overturned it.[65]

The majority opinions in *Citizens United* and *Janus* erode the doctrine of stare decisis in two ways. First, by focusing on the merits of the reasoning in the past Court decisions in question, the Court made it easier to overturn decisions that any current majority of the Court disfavors. This is dangerous because an application of stare decisis that results in overturning precedent primarily on the merits of its reasoning leaves the door open for politically motivated actors to manipulate our law by placing partisan justices on the Court—causing further politization.[66] This is evidenced from the increased political jockeying involved in Supreme Court nominations.[67] Political leaders of both parties understand that if they are able to get a justice on the Court who disagrees with prior jurisprudence, precedent will not be upheld.[68] Weakening the doctrine of stare decisis by relitigating the merits of important precedent undermines the Court's image as an apolitical body.

Second, the *Janus* opinion significantly weakens the importance of one of the traditional factors of the stare decisis analysis—reliance interests. Most jurists agree

61. *Citizens United*, 558 U.S at 362–63 (citation omitted).

62. *Janus*, 138 S. Ct. 2448.

63. *Id.* at 2460.

64. *Id.* at 2560.

65. *Id.*

66. *See* Andrew Chung, *Conservative U.S. Justices Draw Criticism by Overruling Precedent Again*, Reuters (June 21, 2019), https://www.reuters.com/article/us-usa-court-precedent/conservative-u-s-justices-draw-criticism-by-overruling-precedent-again-idUSKCN1TM27G (stating that stare decisis "protects the court's credibility by avoiding politization" and discussing the then-recent Supreme Court decisions in which the Court's conservative majority failed to adhere to stare decisis, which "rais[ed] alarm bells among its liberal members.")

67. *See* Daniel Bush & Jessica Yarvin, *Is The Hyper-Partisan Supreme Court Confirmation Process 'The New Normal'?*, PBS NewsHour (Sept. 13, 2018), https://www.pbs.org/newshour/nation/is-the-hyper-partisan-supreme-court-confirmation-process-the-new-normal.

68. Rick Noack, *The U.S. Supreme Court is Highly Politicized. It Doesn't Have to be That Way.*, The Wash. Post (June 28, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/06/28/the-u-s-supreme-court-is-highly-politicized-it-doesnt-have-to-be-that-way/?noredirect=on.

that reliance interests should be weighed by the Court when considering overturning precedent.[69] Even Justice Alito's majority opinion in *Janus* acknowledges that:

> Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood's* reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.[70]

However, the opinion goes on to dismiss the reliance interests involved in *Janus* as insufficient to support upholding the precedent,[71] arguing that the poor reasoning in *Abood* countervails any reliance interests involved.[72] Moreover, by dismissing the reliance interests involved in *Janus*—a case involving significant contract interests where thousands of contracts had been drafted in reliance of the rule in *Abood*—Alito and the Court significantly weaken the importance of reliance interests in future cases involving contract and property rights.[73] Reliance interests have traditionally been "at their acme" in cases involving property and contract rights.[74] Here, even with tremendous contract interest ramifications at stake, the Court dismisses the importance of reliance interests.[75]

Most concerning, however, is Justice Alito's reasoning in dismissing the reliance interests. Alito reasoned that reliance is lessened because "public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*."[76] Essentially, Alito claimed that unions should have been "on notice" because the Court had

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69. MURRILL, *supra* note 14, at 18–22.

70. *Janus*, 138 S. Ct. at 2478–79.

71. *Id.* at 2484.

72. *See id.* Justice Alito ignored one of the main tenets of stare decisis as articulated by Justice Brandeis in his *Burnet* dissent: "[I]n most matters it is more important that the applicable rule of law be settled than it be settled right. This is commonly true even where the error is a matter of serous concern[.]" Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1931) (Brandeis, J., dissenting).

73. *Janus*, 138 S. Ct. at 2499–2500 (Kagan, J., dissenting) (citations omitted). In her dissent, Justice Kagan stated:

> The majority undoes bargains reached all over the country. It prevents the parties from fulfilling other commitments they have made based on those agreements. It forces the parties—immediately—to renegotiate once-settled terms and create new tradeoffs. It does so knowing that many of the parties will have to revise (or redo) multiple contracts simultaneously. . . . It does so knowing that those renegotiations will occur in an environment of legal uncertainty, as state governments scramble to enact new labor legislation. It does so with no real clue of what will happen next—of how its action will alter public-sector labor relations. It does so even though the government services affected—policing, firefighting, teaching, transportation, sanitation (and more)—affect the quality of life of tens of millions of Americans.

Id. (citations omitted).

74. *See* Payne v. Tennessee, 501 U.S. 803, 828 (1991).

75. *Janus*, 138 S. Ct. at 2460.

76. *Id.* at 2484.

articulated, in two subsequent opinions, that it had misgivings about *Abood*.[77] Therefore, according to Alito, reliance is diminished because any public-sector union interested in seeking nonmember fees "must have understood that the constitutionality of such a provision was uncertain."[78] Taking this logic a step further presents an even more concerning implication. According to Alito, if individuals or entities should know—or are "on notice"—that precedent has been questioned or is in jeopardy of being overturned, then they should not rely on the precedent.[79] But other justices believe that "reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance, regardless of whether that holding seems (to someone or another) unusually dubious on the merits."[80] Individuals and entities should be able to rely on what the law is, not what the law might be.

The Court's interpretation and application of stare decisis in *Janus* leaves the doctrine weakened and lacking the bite necessary to ensure it limits the furtherance of political agendas in the Court. Without considering the practical effects a change in the law might have, the Court is free to focus on the reasoning of the precedent and decide whether it likes the decision in question. If it finds the reasoning to be poor, then the decision may be overturned without regard to the parties involved or the impact on society. Any change in the political composition of the Court leaves all of those seemingly settled principles that society, and other actors, have relied upon open for reconsideration.[81] To combat this potentially tumultuous deconstruction of our legal system, the doctrine of stare decisis must be strengthened by focusing on the societal impact a change in the law might have, rather than the reasoning of the precedent in question.

IV. STRENGTHEN BY RESTRUCTURING WITH A FOCUS ON RELIANCE

The weakening of stare decisis undermines the legitimacy of the Court and calls into question its apolitical status.[82] To counter these problems, the doctrine of stare decisis needs to be strengthened in two ways. First, the stare decisis analysis must be restructured. A precedent's "soundness of reasoning" should not serve as a factor in the Court's stare decisis analysis—as it did in *Citizens United* and *Janus*—but rather,

77. *Id*. The two cases cited by Justice Alito that catalogue the Court's misgivings are *Knox v. Service Employees* and *Harris v. Quinn*. *Id.* In *Knox*, the Court found that compelling nonmembers to pay a portion of union dues represents something of an anomaly. Knox v. Serv. Emps., 567 U.S. 298, 311 (2012). In *Harris*, the Court considered the holding in *Abood* to be an anomaly. Harris v. Quinn, 573 U.S. 616, 626–28 (2014).

78. *Janus*, 138 S. Ct. at 2485.

79. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 313 (2010).

80. Kozel, *supra* note 3, at 420 (citations omitted).

81. *See generally* Frank H. Esterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 422 (1988) (outlining the interactions between text and precedent throughout U.S. history based on changes in the Court).

82. *See* Noack, *supra* note 68.

should trigger a stare decisis analysis.[83] Eliminating the "soundness of reasoning" factor from a stare decisis analysis prevents the Court from relitigating the merits of the precedent in question.[84] Professor Fred Schauer[85] articulated the problem with relitigating the merits of precedent:

> If precedent is seen as a rule directing a decisionmaker to take prior decisions into account, then it follows that a pure argument from precedent, unlike an argument from experience, depends only on the *results* of those decisions, and not on the validity of the reasons supporting those results. . . . When the strength of a current conclusion totally stands or falls on arguments for or against that conclusion, there is no appeal to precedent, even if the same conclusion has been reached in the past.[86]

Arguments contending that precedent was poorly reasoned are simply vehicles which may be used by justices to overrule certain decisions based on personal disfavor or political views.[87]

However, one exception to this proposed analysis must be considered. When it is certain that precedent is "clearly erroneous," then the "soundness of reasoning" of the decision may be a factor in the Court's stare decisis analysis.[88] A decision is "clearly erroneous" if reasonable justices may agree that the decision was poorly reasoned or fundamentally incorrect.[89] When precedent is "clearly erroneous," the Court is able to reconsider the precedent's reasoning where, the combination of experience and time serve to illustrate that the previous decision was manifestly incorrect.[90] Analyzing precedent through the lens of this exception allows the Court to overturn decisions that are incongruent with contemporary norms—where failure to overturn such decisions would result in stunting society's progress.[91] An interpretation of stare

83. Esterbrook, *supra* note 81, at 418.

84. *See Citizens United*, 558 U.S. at 409 (Stevens, J., concurring in part and dissenting in part).

85. Frederick Schauer is the David and Mary Harrison Distinguished Professor of Law at the University of Virginia. *See Panelist*, *2019 Leon Jaworski Program*, A.B.A. (Apr. 12, 2019), https://www.americanbar.org/groups/public_education/Programs/jaworski-public-programs/2019-jaworski-public-programs/frederick-schauer. He was the Frank Stanton Professor of the First Amendment at Harvard University from 1990 to 2008. *Id.*

86. Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 576 (1987).

87. *Id.*

88. *See* Kozel, *supra* note 3, at 418 (exploring what he calls "the degree-of-wrongness" theory).

89. *See* Gamble v. United States, 139 S. Ct. 1960, 1984–86 (2019) (Thomas, J., concurring).

90. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2605–08 (2015) (overruling Baker v. Nelson, 409 U.S. 810 (1972), by declaring that the fundamental constitutional right to marry extends to same-sex couples and citing contemporary cultural views on the nature of marriage).

91. Tom Hardy, *Has Mighty Casey Struck Out: Societal Reliance and the Supreme Court's Modern Stare Decisis Analysis*, 34 Hastings Const. L.Q. 591, 615 (2007).

decisis that contends otherwise would "bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."[92]

The second way to strengthen the doctrine of stare decisis is to make the reliance interests and societal impact of changing the law key factors when determining whether precedent should be overturned.[93] The Court's evisceration of the reliance interest factor in *Janus* is troubling given the substantial contract interests involved in the case—an area of law where the Court would normally defer to precedent to protect the actors who relied on the then-existing law when negotiating and entering into contracts.[94]

Courts should contemplate reliance interests on a spectrum in order to determine the extent to which they should be relied on. On one end of this spectrum is super-precedent—decisions that will likely never be overturned because they are so ingrained in society that overturning them might disturb societal and governmental foundations.[95] On the other end of the spectrum is precedent that—through the passage of time and shifting societal norms—has become patently incompatible with contemporary society.[96] This type of precedent falls into the "clearly erroneous" category and thus, dovetails nicely with the restructured stare decisis analysis suggested in this Note. In "clearly erroneous" cases, it is evident that the precedent in question should no longer be relied upon and thus, may be overturned.[97]

Cases that fall between these two extremes are more difficult to classify. This Note does not attempt to do so, and any such determination will likely center around the Court's analysis of the specific facts of each case. This Note does suggest that the

92. *See* Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) ("I have no assurance . . . that the opinion announced today may not be shortly repudiated and overruled by justices who deem they have new light on the subject.").

93. *See* Kozel, *supra* note 3, at 452.

94. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2478–79 (2018); *see also*, Kozel, *supra* note 3, at 452–55. Kozel identifies four different species of reliance that must be taken into account when considering stare decisis. *Id.* Specific reliance encourages actors to behave in a certain manner confident that the law will remain the law of the land. *Id.* at 453. Governmental reliance considers the effect on the legislative and executive branches of the government. *Id.* at 454. Doctrinal reliance considers the effect on the other branches of the judiciary and the Supreme Court itself. *Id.* at 459. Finally, societal reliance considers the effect of the precedent on societal behavior and norms. *Id.* at 460.

95. Gerhardt, *supra* note 5, at 1214. Gerhardt explains that in some of the Supreme Court's foundational decisions justly labeled as "super-precedent," reliance is one of the main reasons for upholding such precedent. *Id.* Discussing the *Legal Tender Cases*—cases that established the constitutionality of paper currency—Gerhardt notes:

> There has been extraordinary social, political, and economic reliance on this decision in both the public and private sectors. Indeed, no one—not even scholars who believe the case was wrongly decided—seriously believes the decision ought to be revisited. The prospect of the social, political, and economic disaster that would result from its overruling makes it a permanent fixture in American Constitutional law.

Id.

96. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896). Shifting political and social norms created an environment where society demanded that the holding from *Plessy* no longer be relied upon. *See id.*

97. *Id.*

issue in *Janus* clearly involved property and contract rights and thus, would traditionally have been protected by stare decisis from being overruled. Overturning *Abood* had a direct impact on the rights of the parties who relied on the law set forth in the case; therefore, *Janus* should have been classified as super-precedent as opposed to a "clearly erroneous" case.[98] By minimizing reliance interests in cases such as *Janus*, the Court severely undermines the effectiveness of the stare decisis doctrine for cases that would normally demand extra protection. The Court created dangerous precedent that paves the way for future incarnations of the Court to similarly disregard reliance interests in cases that would demand otherwise.

The Court must continue to respect the individuals, groups, and entities that have come to rely on settled precedent put down by the Court.[99] These actors rely on the law to establish certain courses of behavior and should be confident that the law will remain settled. The majority opinion in *Janus* dispenses with reliance interests because the individuals affected should have known that precedent was likely to be overturned.[100] This reasoning represents a fundamental misunderstanding of stare decisis.[101] Namely, that reliance on good law is always justifiable reliance.[102]

V. CONCLUSION

The Court is trending in a direction that signals it is no longer an apolitical body;[103] and therefore, the doctrine of stare decisis must be strengthened to reestablish the legitimacy of the Court. If precedent is routinely overturned and decisions to overturn are driven—even if only in appearance—by a political agenda, the public's faith in the Court will only continue its downward spiral.[104] By restructuring the stare decisis analysis to eliminate the focus on the reasoning of the precedent in question, the Court will be forced to consider the societal impact a change in law will have and, most importantly, it will be unable to overturn precedent in a politically motivated manner. This restructured stare decisis analysis strengthens the doctrine, allowing it to serve as the appropriate agenda-limiting function necessary to rebuild, and preserve, the Court as an apolitical arbiter of justice.

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98. *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

99. *See* Kozel, *supra* note 3, at 454.

100. *Janus*, 138 S. Ct. at 2484.

101. *Id.*

102. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 409 (2010) (Stevens, J., concurring in part and dissenting in part).

103. David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, The Atlantic (June 29, 2012), https://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/.

104. *See* Silver & Kozlowski, *supra* note 16, at 48.