

# U.C.L.A. Law Review

## Second Thoughts on “One Last Chance”?

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### ABSTRACT

The Supreme Court’s recent decision in *Janus* resolved a major First Amendment question, but the Court’s treatment of precedent is arguably even more important, as Justice Elena Kagan’s forceful dissent indicates. In short, the Court held that its own recently expressed misgivings about a precedent contributed to the justifiability of overruling the precedent. This Article explores *Janus*’s implications in light of the Court’s apparent adherence to “the doctrine of one last chance,” which requires the Court to give advance notice of its willingness to issue disruptive decisions. Aptly enough, the doctrine is Janus-faced in that it is both restraining and empowering. And there are plausible reasons for adhering to at least some version of the doctrine, despite the serious concerns that Kagan has raised.

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## INTRODUCTION

The “doctrine of one last chance” is a principle of judicial decisionmaking that has two related aspects.<sup>1</sup> First, the U.S. Supreme Court “must signal its readiness to impose major disruptions before actually doing so,” thereby giving other actors an opportunity to avert or mitigate the Court’s decision.<sup>2</sup> Second, once it has given notice and another case arrives, the Court is free to lower its initially heightened inhibitions and issue a decisive ruling.<sup>3</sup>

So understood, last-chance decisions are both constraining and empowering. Constraining because they delay major changes, creating the possibility that they will not come to pass at all. Empowering because they can eventually make more palatable changes that might otherwise seem prohibitively disruptive. This approach to decisionmaking exhibits, even as it tries to reconcile, the abiding tension between precedential continuity and change.<sup>4</sup>

The Court’s 2018 ruling in *Janus* is the most recent example of the doctrine in action.<sup>5</sup> In short, *Janus* overruled a precedent that the Court had lambasted in recent years but pointedly declined to overrule. As a result, *Janus* managed to be both widely predicted and revolutionary—much like *Shelby County* after *NAMUDNO*, *Citizens United* after *WRTL*, and other decisions that accord with last-chance decisionmaking.<sup>6</sup>

Yet *Janus* is special because the justices came closer than ever to self-consciously debating the desirability of the doctrine.<sup>7</sup> *Janus* thus offers an opportunity to examine last-chance decisionmaking with the benefit of the justices’ thoughts. This Article argues that there are plausible reasons for adhering

1. See Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173 (2014), quoted in Robert Barnes, *A More Conservative Supreme Court Could Step, Not Lurch, to the Right*, WASH. POST (July 9, 2018), [https://www.washingtonpost.com/politics/courts\\_law/a-more-conservative-supreme-court-could-step-not-lurch-to-the-right/2018/07/09/48997ae6-83a4-11e8-8553-a3ce89036c78\\_story.html?utm\\_term=.50eec636822b](https://www.washingtonpost.com/politics/courts_law/a-more-conservative-supreme-court-could-step-not-lurch-to-the-right/2018/07/09/48997ae6-83a4-11e8-8553-a3ce89036c78_story.html?utm_term=.50eec636822b) [<https://perma.cc/VA2E-V6E3>].
2. Re, *supra* note 1, at 174. The doctrine could of course be used by courts other than the U.S. Supreme Court. But the Court is especially well positioned to issue last-chance rulings: Its prominence allows it to give effective notice, and it is empowered to set new, uniform precedents in follow-up rulings.
3. See *id.* at 174–79 (describing the doctrine as “a rule of limited postponement”).
4. See *id.* at 180–81.
5. *Janus v. Am. Fed. of State, Cty., & Mun. Emps., Council 31 (AFSCME)*, 138 S. Ct. 2448 (2018).
6. *Shelby County v. Holder*, 570 U.S. 529 (2013); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193 (2009); *FEC v. Wis. Right to Life, Inc. (WRTL)*, 551 U.S. 449 (2007). These cases involved the use of constitutional avoidance, but courts can implement the last-chance principle in other ways. See Re, *supra* note 1.
7. See *Janus*, 138 S. Ct. at 2484–86.

to at least some version of the doctrine, despite the trenchant criticisms leveled in the *Janus* dissent.<sup>8</sup>

## I. THE DOCTRINE IN *JANUS*

*Janus* overruled a decades-old First Amendment precedent called *Abood*, which allowed public-sector unions to compel nonmembers to pay fees for collective bargaining expenses but not for overt political advocacy.<sup>9</sup> While no justice in *Janus* precisely discussed the doctrine of one last chance, the opinions did explore and debate how judicial warnings influence precedential change. As a result, both Justice Samuel Alito's majority opinion and Justice Elena Kagan's dissent offer useful reflections on last-chance decisionmaking.

### A. *Janus* and Last Chances

The events that led up to *Janus* closely adhere to the doctrine of one last chance, albeit with a twist or two. The doctrine paradigmatically involves only two cases: a notice-giving deferral followed by a coup de grâce. However, reality is rarely quite so neat as theory, and the story of *Janus* actually involves four cases.

1. *The Signal*. In *Knox* (2012), the Court held that a particular union practice fell on the wrong side of *Abood* and so was unconstitutional.<sup>10</sup> Along the way, the Court said some skeptical things about *Abood* itself.<sup>11</sup> *Knox* was thus a clarion call for litigants to challenge *Abood* directly. However, that ambiguous signal did not provide notice that the Court was actually prepared to overrule *Abood*, particularly because the case did not present an opportunity to do so.<sup>12</sup>

2. *The Last-Chance Ruling*. A couple years later, *Harris* (2014) presented an opportunity to overrule *Abood*, as the plaintiffs had specifically requested and briefed that result.<sup>13</sup> But the doctrine of one last chance intervened: Despite an opportunity to rule broadly, the Court instead issued another narrow ruling that

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8. *Id.* at 2487–502 (Kagan, J., dissenting).

9. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), overruled by *Janus*, 138 S. Ct. 2448.

10. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 302, 320–23 (2012).

11. *Id.* at 313–14.

12. *Knox* argued that *Abood* was “an anomaly,” albeit “one that we have found to be justified,” and remarked that “our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.” *Id.* at 311, 314.

13. *Harris v. Quinn*, 134 S. Ct. 2618, 2638 n.19 (2014).

deferred issues of stare decisis.<sup>14</sup> And the Court, more forcefully than in *Knox*, evinced its antipathy to *Abood*.<sup>15</sup> Observers took note.<sup>16</sup>

3. *A Failed Chance*. In *Friedrichs* (2016), the Court made waves by again taking a case on whether to overrule *Abood*.<sup>17</sup> And under the doctrine, the time for a decisive ruling had arrived.<sup>18</sup> After all, the Court had given public-sector unions and the public one last chance by declining to rule broadly in *Harris*.<sup>19</sup> And in fact, the Court was prepared to overrule *Abood*.<sup>20</sup> But it was not to be. Justice Antonin Scalia passed away, leaving a 4-4 split.<sup>21</sup>

14. *Id.* at 2638 & n.19 (bracketing stare decisis issues while “refus[ing] to extend *Abood* to the new situation now before us”). Justice Kagan’s dissent recognized that “*Abood* remains the law.” *Id.* at 2653 (Kagan, J., dissenting).

15. Whole sections of the Court’s *Harris* opinion argued that *Abood* had “seriously erred” and was “troubling,” as well as that “a critical pillar of the *Abood* Court’s analysis rests on an unsupported empirical assumption” that was “unwarranted.” *Id.* at 2632–34.

16. See, e.g., Jack Goldsmith, *Five Justices Probably Still Want to Kill Abood*, ON LABOR (July 1, 2014), <https://onlabor.org/five-justices-probably-still-want-to-kill-abood> [<https://perma.cc/4ST2-QTE7>] (noting that *Harris* “is a clearly ominous sign” for *Abood*). But some observers thought otherwise. See, e.g., Charlotte Garden, *Harris v. Quinn Symposium: Decision Will Affect Workers & Limit States’ Ability to Effectively Manage Their Workforces*, SCOTUSBLOG (July 2, 2014, 1:08 PM), <http://www.scotusblog.com/2014/07/harris-v-quinn-symposium-decision-will-affect-workers-limit-states-ability-to-effectively-manage-their-workforces> [<https://perma.cc/5X5T-DXKM>] (noting that the Court “laid the groundwork” for overruling *Abood* in *Knox* and failed to follow through, concluding: “I predict the Court will be reluctant to revisit this issue again soon”); cf. Will Baude, *Abood Abides*, VOLOKH CONSPIRACY (July 1, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/01/abood-abides/?noredirect=on&utm\\_term=.6b32bcd553dc](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/01/abood-abides/?noredirect=on&utm_term=.6b32bcd553dc) [<https://perma.cc/EZ8Z-3LJG>] (raising the possibility that the Court was “bluffing” and asking “is there a certain number of close calls after which the court’s criticism starts to look like an empty threat?”). The latter two assessments suggest why last-chance decisions offer only limited postponements: As deferrals add up, their cautionary message can be lost. In other words, the Court might encounter the problem of crying wolf. That said, we will see that amicus participation increased in the cases leading up to *Janus*, which suggests that interested parties persisted in viewing *Abood* as under threat. See *infra* Table 1.

17. *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016) (mem.); see also Lyle Denniston, *New Threat to Public Employee Unionism*, SCOTUSBLOG (June 30, 2015, 11:04 AM), <http://www.scotusblog.com/2015/06/new-threat-to-public-employee-unionism> [<https://perma.cc/ZWZ7-NGFV>].

18. See Kimberly Robinson, *SCOTUS: Taking Care of (Unfinished) Business*, BNA (Sept. 22, 2015), <https://www.bna.com/scotus-taking-care-n57982058559> [<https://perma.cc/DZ8T-TMB7>] (discussing the “one last chance” idea and reporting: “Re said two cases from the Supreme Court’s upcoming term have been teed up for disruptive outcomes: *Friedrichs*[,] the public union case, and *Fisher*[,] on affirmative action.”). On *Fisher*, see text accompanying *infra* note 57.

19. *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

20. See Linda Greenhouse, *The Supreme Court’s Post-Scalia Term*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/23/opinion/the-supreme-courts-post-scalia-term.html> [<https://perma.cc/HQP6-A6WS>] (“Following the Jan. 11 argument, the justices voted 5 to 4 on the side of the anti-union forces . . .”). This reported vote was not public, of course.

21. *Friedrichs*, 136 S. Ct. at 1083.

4. *The Overruling*. Finally, we reach *Janus* (2018).<sup>22</sup> After Justice Neil Gorsuch joined the Court, five justices were once more positioned to follow through on the course of action that had been available but was not taken up four years before in *Harris*.<sup>23</sup> And they ultimately did just that, consistent with the doctrine. Again, *Harris* had postponed issuing a broad decision while providing notice of the Court’s desire to issue a disruptive ruling.<sup>24</sup> Thus, under the doctrine, the Court could shed its initial hesitancy to act. And so it did.

Amicus filings offer a useful if incomplete means of capturing the notice-giving effect of the decisions culminating in *Janus*.<sup>25</sup> Below, Table 1 shows that amicus participation at the merits stage steadily increased from just a handful of briefs in *Knox* to a large number in *Janus*, with the greatest absolute increase between *Harris*, the last-chance decision, and *Friedrichs*. Indeed, amicus filings more than doubled after *Harris*. These results suggest not only that *Knox* and *Harris* gave notice that *Abood’s* fate was on the Court’s agenda, but also that interested parties took the opportunity to provide input into *Friedrichs* and *Janus*. Interestingly, amicus filings also increased in number between *Friedrichs* and *Janus*, suggesting that the extra delay occasioned by *Friedrichs* increased the amount of input to the Court.

Case	<i>Knox</i>	<i>Harris</i>	<i>Friedrichs</i>	<i>Janus</i>
Amicus Briefs	3	18	49	66

Table 1: Merits-Stage Amicus Filings Leading up to *Janus*

Amicus filings also suggest that last-chance decisionmaking played an even greater role in the leadup to *Janus* than in other cases that exhibit last-chance decisionmaking. Below, Table 2 shows that amici filed a significant number of merits briefs in *NAMUDNO* and almost double that figure in *Shelby*. Much like *Knox* and *Harris*, *NAMUDNO* helped inform the public that an important decision was on the Court’s agenda. By contrast, amicus filings started out extraordinarily numerous in *Fisher I* and then declined slightly in *Fisher II*. This result shows that interested parties already understood at the time of *Fisher I* that affirmative action was on the

22. *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).  
23. *Harris*, 134 S. Ct. 2618.  
24. *Id.* at 2632–34.  
25. This data is drawn from the cases’ docket pages and cross-checked against Westlaw. Special thanks to Robert Bowen for his assistance in generating the data in the Tables, as well as to Will Baude for suggesting this research avenue.

Court's agenda. So while the Court's deferral in *Fisher I* may have created time for improved research and reflection, it was not instrumental in drawing attention to the case.

Case	<i>NAMUDNO</i>	<i>Shelby</i>	<i>Fisher I</i>	<i>Fisher II</i>
Amicus Briefs	26	49	92	85

Table 2: Merits-Stage Amicus Filings in *NAMUDNO*/*Shelby* and *Fisher*

In sum, *Harris* is best viewed as a last-chance decision, and *Janus*'s follow-through completes the pair. The story is complicated, but not fundamentally changed, by the signal given in *Knox* and the failed ruling in *Friedrichs*.<sup>26</sup>

## B. Notice and Reliance

In a formidable and complex dissent, Justice Kagan took aim at the majority's claim that its recent non-overrulings in *Knox* and *Harris* somehow supported the coup de grâce delivered in *Janus*. More than that, Kagan worried that the Court had found a way around *stare decisis*, thus jeopardizing precedent in general.

Kagan's critique became most vivid when she argued that *Abood* fully accorded with the Court's overall First Amendment case law. After distinguishing several cases discussed by the majority, Kagan continued:

Ignoring our repeated validation of *Abood*, the majority claims it has become "an outlier among our First Amendment cases." . . . [But] all that the majority has left is *Knox* and *Harris*. . . . Relying on them is bootstrapping—and mocking *stare decisis*. Don't like a decision? Just throw some gratuitous criticisms into a couple of opinions and a few years later point to them as "special justifications."<sup>27</sup>

Surely Kagan is right that the Court cannot properly dispose of a precedent simply by disparaging it once or twice before its overruling. But that description does not quite capture either *Janus*'s reasoning or what happened in the years leading up to that decision.

The *Janus* majority, consistent with the doctrine of one last chance, reasoned instead that the Court's recent decisions had critically undermined the importance

26. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298 (2012); *Friedrichs*, 136 S. Ct. at 1083.

27. *Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting) (citations omitted). Kagan also wrote, "The majority has overruled *Abood* for no exceptional or special reason, but because it never liked the decision. It has overruled *Abood* because it wanted to." *Id.* at 2501.

of both private and governmental reliance on *Abood*.<sup>28</sup> In other words, the force of stare decisis may properly diminish after a one-last-chance ruling has provided interested parties with notice of the Court's potential future course of action. Here is the key passage:

[P]ublic-sector unions have been on notice for years regarding this Court's misgivings about *Abood*. In *Knox*, decided in 2012, we described *Abood* as a First Amendment "anomaly." Two years later in *Harris*, we were asked to overrule *Abood*, and while we found it unnecessary to take that step, we cataloged *Abood*'s many weaknesses. In 2015, we granted a petition for certiorari asking us to review a decision that sustained an agency-fee arrangement under *Abood*. After exhaustive briefing and argument on the question whether *Abood* should be overruled, we affirmed the decision below by an equally divided vote. 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. . . . Thus, for the past three years, the Union could not have been confident about the continuation of the agency-fee arrangement for more than a year at a time.<sup>29</sup>

The Court was likely correct that it had given affected parties time to prepare for *Abood*'s potential overruling.<sup>30</sup> Unions with access to sophisticated counsel could have drafted their contracts and budgets with the result in *Janus* in mind, such as by reducing their dependency on agency fees or even suspending the fees altogether.<sup>31</sup> Further, state legislatures could have curbed or eliminated agency fees in favor of alternative arrangements, such as government-funded subsidies.<sup>32</sup> To be sure, those responses would themselves have come at some cost. Raising the possibility of a major overruling necessarily creates legal uncertainty, with all the anxieties that come with it. But these sorts of responses did offer ways to hedge against the risk of a case like *Janus*. Interestingly, the Court did not show that affected parties had actually taken steps to prepare for *Abood*'s overruling. Perhaps the Court

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28. *Id.* at 2484–85 (majority opinion).

29. *Id.* (citations omitted).

30. "By signaling that what was once settled is now up for grabs, the Court gives both officials and private parties a chance to modify their behavior so as to mitigate the costs of potential doctrinal change." *Re, supra* note 1, at 179.

31. *Janus*, 138 S. Ct. at 2484–85 (majority opinion). *Janus* also discussed, for example, how unions could have protected themselves by incorporating "severability clauses" into union contracts. *Id.*

32. See, e.g., Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. REV. 144, 197–204 (2016) (offering a pre-*Janus* proposal that the government reimburses unions in lieu of agency fees). *Janus* itself did not make this point.



presumed that some preparations had taken place.<sup>33</sup> Or perhaps the Court partially discounted the reliance interests of unions and legislatures that had received notice but failed to take advantage of it.<sup>34</sup>

“Reliance interests do not come any stronger than those surrounding *Abood*,” Kagan argued.<sup>35</sup> Perhaps, but when? The majority suggested that reliance on *Abood* had been nearer its acme at the time of *Harris* as opposed to *Janus*. Kagan was therefore on shaky ground in arguing that “judicial disruption does not get any greater than what the Court does *today*.”<sup>36</sup> Again, a “greater” disruption would have occurred if the Court had overruled *Abood* sooner, without warning. By adopting a dynamic analysis, the majority recognized that both reliance and disruptiveness can vary over time and, indeed, lie partly within the Court’s control.

Justice Kagan’s dissent responded by borrowing a page from Justice Scalia’s book—or, more precisely, from a Scalia concurrence.<sup>37</sup> The gist of Kagan’s response is that the Court should always expect people to treat its precedents as rock-solid guarantees, the kind of thing you could take to the bank. Here is the key passage:

[The majority’s] argument reflects a radically wrong understanding of how *stare decisis* operates. Justice Scalia once confronted a similar argument for “disregard[ing] reliance interests” and showed how antithetical it was to rule-of-law principles. *Quill Corp. v. North Dakota* (concurring opinion). . . . He concluded: “[R]eliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance.” *Abood*’s holding was square. It was unabandoned before today. It was, in other words, the law—however much some were working overtime to make it not. Parties, both unions and governments, were thus justified in relying on it. And they did rely, to an extent rare among our decisions. To dismiss the overthrowing of their settled expectations as entailing no more than some “adjustments” and “unpleasant transition costs,” is to trivialize *stare decisis*.<sup>38</sup>

33. In another recent case, the Court asked whether overturning an intellectual-property precedent would upset expectations and then answered: “To be honest, we do not know . . .” *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2410 (2015) (Kagan, J.). But the Court still concluded that it had reason to preserve the precedent, based on “a reasonable possibility that parties have structured their business transactions in light of” it. *Id.* So perhaps the Court presumes reliance, unless there has been a last-chance decision.

34. The Court appeared to say as much when it concluded that “the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain” worked “to undermine the force of reliance.” *Janus*, 138 S. Ct. at 2485.

35. *Id.* at 2487–88 (Kagan, J., dissenting).

36. *Id.* at 2488 (emphasis added).

37. *Id.* at 2500–01.

38. *Id.* (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 320–21 (1992) (Scalia, J., concurring)). In the elided portion of the quote, Kagan/Scalia cite the rule that “lower courts . . . ‘should . . . leav[e]

But whether the reliance interests are “justifiable,” as Scalia put it, is not the relevant question.<sup>39</sup> Certainly, reliance on any precedent does and should count in the stare decisis analysis. The real question is whether those reliance interests are nonetheless diminished by years of high-profile Supreme Court rulings sounding the alarm about a precedent’s longevity.

Once the overly simple justified/unjustified binary is set aside, a more nuanced spectrum of reliance interests becomes discernible. In the roughly four-year period between *Harris* and *Janus*, perhaps reliance interests diminished from “So Large as to Prevent Overruling” all the way down to “Significant but Surmountable.” That is the charitable reading of the majority’s argument, and the Scalia quotes that Kagan adduces do not persuasively refute it.<sup>40</sup>

Interestingly, Scalia’s *Quill* concurrence hadn’t been cited in *Janus*,<sup>41</sup> and Kagan may have had it on the mind for a paradoxical reason: When she was drafting her *Janus* dissent, *Quill*, too, was on the chopping block. In *Wayfair*, which came down just days before *Janus*, the Court overruled *Quill* and an even older case, thereby implicitly rejecting Scalia’s stare decisis analysis.<sup>42</sup> To her credit, Kagan joined the

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to this Court the prerogative of overruling its own decisions,” and they contend that that instruction is “incompatible’ with an expectation that ‘private parties anticipate our overrulings.’” *Id.* (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *Quill Corp.*, 504 U.S. at 320); see also *Rodriguez de Quijas*, 490 U.S. at 484 (stating the same). But private parties and lower courts need not—and likely should not—share the same attitude toward Court precedent. Lower courts must sometimes adhere to higher-court precedent for the sake of national uniformity and other values. By contrast, attorneys may best protect their clients’ interests by anticipating new Court decisions. So attorneys have every reason to counsel clients to hedge against adverse Court rulings, even if lower courts are properly bound to rule otherwise.

39. *Quill Corp.*, 504 U.S. at 321.

40. The view that reliance on *Abood* was “justified” could be legally relevant in other ways, apart from stare decisis. In particular, the unions might be entitled to a good-faith defense for having justifiably relied on *Abood* in collecting dues that, under *Janus*, are unlawful. Compare William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 201–04 (2018) (discussing potential union liability under *Janus* and arguing that, as private entities, the unions are likely ineligible to receive qualified immunity), with Aaron Tang & Fred O. Smith, Jr., *Can Unions Be Sued for Following the Law?*, 132 HARV. L. REV. FORUM 24 (2018) (responding to this aspect of the Baude-Volokh paper). In other words, the notice afforded by *Harris* could suffice to erode reliance interests for purposes of stare decisis but not liability. The result would be a limited defense to Section 1983 actions for reliance on squarely applicable precedent, somewhat akin to the good-faith exception to the exclusionary rule recognized in *Davis v. United States*, 564 U.S. 229 (2011).

41. This statement is based on review of the briefs in the case and the oral argument.

42. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). No last-chance decision preceded *Wayfair*, perhaps because the Court viewed the overruling as insufficiently disruptive. See *id.* at 2097–99.

*Wayfair* dissent, so her emphasis on reliance was consistent across the two cases. But so too was the Court's contrary approach.<sup>43</sup>

Kagan's position in *Janus* can be compared with the *Wayfair* dissent authored by Chief Justice John G. Roberts. Whereas Kagan sided in favor of retaining precedent in both cases, Roberts voted to overrule only in *Janus*. What's more, Roberts's *Wayfair* dissent initially seems in tension with his decision to join the *Janus* majority. Here is the key passage:

This is neither the first, nor the second, but the third time this Court has been asked whether a State may obligate sellers with no physical presence within its borders to collect tax on sales to residents. Whatever salience the adage “third time’s a charm” has in daily life, it is a poor guide to Supreme Court decisionmaking. If *stare decisis* applied with special force in *Quill*, it should be an even greater impediment to overruling precedent now, particularly since this Court in *Quill* “tossed [the ball] into Congress’s court, for acceptance or not as that branch elects.”<sup>44</sup>

Roberts appears to be saying that repeated attempts to overrule precedent should fare worse, not better, as time goes on. Thus, a “third time” trying to overrule should founder if the first and second times did as well. But after plaintiffs had unsuccessfully asked the Court to overrule *Abood* in *Harris* and again in *Friedrichs*, Roberts did not seem to mind that *Janus* vindicated the adage that “if at first you don’t succeed—try, try again.”

This apparent tension points out a key difference in the kind of notice at work in the two cases. As Roberts noted, *Quill* reaffirmed a doctrinal rule and did not signal a future change of course. *Quill* thus represented a doubly entrenched precedent, somewhat like the way that *Casey* entrenched the abortion right first recognized in *Roe*.<sup>45</sup> Further, *Quill* established a dormant Commerce Clause holding that was susceptible to legislative override and so expressly “tossed the ball” to Congress.<sup>46</sup> That move, too, strengthened reliance interests. By contrast, requests to overrule *Abood* had generated a cautionary last-chance decision.

In short, the precedential import of notice-giving cases turns on the content of the notice that is given. When the Court gives notice that a precedent is on unstable ground, reliance interests are plausibly reduced, even if not eliminated. But when a

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43. By contrast, Justice Ruth Bader Ginsburg joined the majority in *Wayfair*, which suggests she believed either that there was less reliance on *Quill* than *Abood* or that reliance is not a strong *stare decisis* factor.

44. *Wayfair*, 138 S. Ct. at 2102 (Roberts, C.J., dissenting) (quoting *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015)).

45. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

46. Though the *Wayfair* majority viewed the matter differently, *Quill*'s susceptibility to legislative override arguably implicated the heightened *stare decisis* protections for statutory rulings.

precedent is affirmed or referred to another branch, the resulting notice preserves or reinforces the interests of reliant parties.

### C. Signaling to Overrule

Justice Kagan also argued that *Janus* was the culmination of “a 6-year campaign” and, even more sharply, “a 6-year crusade.”<sup>47</sup> In Kagan’s view, “[d]icta” in *Knox* and *Harris* “indeed began the assault on *Abood* that has culminated today.”<sup>48</sup> In other words, the Court defied principles of judicial neutrality by initiating a deliberate course of conduct to achieve a desired outcome. This concern is both plausible and serious. Principles of judicial neutrality and restraint generally prevent courts from inviting litigants to raise certain types of arguments or bring particular cases. Unlike a legislature, the Court lacks authority to update the law whenever its own preferences are out of step with prevailing doctrine.

Still, the justices often have good reason to signal the possibility of overturning precedent. For one thing, these signals are provoked by the arguments and case at hand, even if they address unpresented issues. Thus, the signaling justices are still operating in a partly reactive mode befitting a court, rather than a legislative one.<sup>49</sup> For another thing, the signals do not in themselves purport to change the law or commit the Court to any particular course of action. Instead, the signals are either tentative or joined by a minority of the justices, leaving ample room for adjustment in light of new information. Finally, the signals can play an important role in fostering not just beneficial legal change, but also equal access to justice. Challenging extant precedent often seems like a fool’s errand: costly and counterproductive. But a signal can give litigants the encouragement they need to pursue a bold claim. And that goes double when litigants lack either the sophistication to anticipate which precedents are likely to fall or the resources to gamble on a potentially costly challenge.

So perhaps it is unsurprising the justices do in fact frequently send signals when they are interested in revising or overruling case law.<sup>50</sup> This practice has no particular

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47. *Janus v. AFSCME*, 138 S. Ct. 2448, 2487, 2500 (2018) (Kagan, J., dissenting).

48. *Id.* at 2498.

49. See, e.g., Girardeau A. Spann, *Advisory Adjudication*, 86 TUL. L. REV. 1289 (2012) (discussing the tensions inherent in the Court’s “retrospective” and “prospective” functions).

50. See Richard M. Re, *Narrowing Supreme Court Precedent From Below*, 104 GEO. L.J. 921, 942–45 (2016) (discussing Supreme Court “signals”); Linda Greenhouse, *Bring Me a Case*, N.Y. TIMES (Nov. 13, 2013), <https://www.nytimes.com/2013/11/14/opinion/bring-me-a-case.html> [<https://perma.cc/C2VH-FQVR>] (discussing *Knox* and other cases: “The court is an active participant in shaping its own destiny through a continuing dialogue with a legal system attuned to its every nuance and primed to respond accordingly.”). On avoidance strategies and

ideological valence. Recent examples advancing traditionally liberal causes include separate opinions calling into question aspects of the Armed Career Criminal Act,<sup>51</sup> the scope of the Fourth Amendment third-party doctrine,<sup>52</sup> and the legality of both capital punishment<sup>53</sup> and solitary confinement.<sup>54</sup> These signals often pan out. When *Wayfair* overruled *Quill*, for example, it fulfilled a hope raised by one of Justice Anthony Kennedy's recent concurrences.<sup>55</sup>

True, *Knox* signaled *Abood*'s vulnerability in a majority opinion, not a separate writing. But it is hard to see why that difference matters, particularly when *Knox* involved an unusually close link between the question presented (how broadly to apply *Abood*) and the issue being signaled (whether *Abood* comported with larger First Amendment jurisprudence). In any event, *Knox* is hardly the only majority opinion to exhibit this kind of signaling. For example, *Windsor* both reserved and cast doubt on *Baker*'s precedential fate, thereby creating an expectation of overruling fulfilled in *Obergefell*.<sup>56</sup> So the mere fact that the *Knox* majority signaled that *Abood* might be overruled is not especially unusual or objectionable.

More fundamentally, the apparent eagerness that often underlies signaling to overrule may seem to be in tension with the ostensible caution of last-chance decisions. Yet those two jurisprudential activities can be united to form a continuous pathway of increasingly confident exploration. What begins as a tentative interest (a signal to bring a case) can mature into a more considered warning and then, perhaps, a decisive action. That description fits the Court's gradual progression from *Knox* to *Harris* to *Janus*.

Kagan worries that last-chance opinions can help the Court to get around stare decisis and overrule unwanted cases. And she is right, at least in some cases. But is

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interbranch "dialogue," see Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016).

51. *Sykes v. United States*, 564 U.S. 1, 28–35 (2011) (Scalia, J., dissenting) (arguing that the residual clause of the Armed Career Criminal Act is void for vagueness, despite precedent to the contrary, a position later vindicated in *Johnson v. United States*).

52. *See United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring).

53. *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting) ("I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.").

54. *Davis v. Ayala*, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring) ("This separate writing responds only to one factual circumstance, mentioned at oral argument but with no direct bearing on the precise legal questions presented by this case.").

55. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

56. *See United States v. Windsor*, 570 U.S. 744, 775 (2013) (noting that "[t]his opinion and its holding are confined to those lawful marriages"); *id.* at 799 (Scalia, J., dissenting) ("[T]he view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion."); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) ("*Baker v. Nelson* must be and now is overruled . . .").

that conclusion necessarily a cause for concern? As we have seen, the issue is not so clear. The next Part sets out a framework for finding an answer.

## II. ASSESSING ONE LAST CHANCES

Are the Court's last-chance rulings anathema to the law of precedent, an ideal component of it, or something in between? The answer depends in part on one's larger view of judicial decisionmaking, as well as precisely how the doctrine is fleshed out.

### A. Restraint and Empowerment

In different ways, the doctrine of one last chance both restrains and empowers the Court: But are those effects desirable? To explore that question, imagine that the Court has an opportunity to overrule a precedent and is considering what to do. If we assume that a majority is prepared to overrule right away, then the doctrine of one last chance would seem restrained, particularly because delaying any definitive ruling would create the possibility that overruling might never happen at all.

For one thing, additional time for greater experience or research might persuade some justices to change their minds and vote against overruling. Something similar occurred after *Fisher I*, which can be viewed as a last-chance decision.<sup>57</sup> Reports suggest that the Court nearly issued a sweeping ruling that would have cut back on affirmative action.<sup>58</sup> But the Court blinked and instead issued a narrow remand. Then, in a later iteration of the case, *Fisher II* sustained the challenged university affirmative action program.<sup>59</sup> The reason? Justice Kennedy apparently revised his views.<sup>60</sup> Of course, neither Kennedy nor any other justices changed their minds between *Harris* and *Janus*. But the leadup to *Janus* nonetheless generated a wealth of new arguments in support of *Abood*, many of which found their way into salient amicus filings, and Justice Kagan's dissenting arguments

57. See Re, *supra* note 1, at 178 (discussing *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297 (2013), as a possible last-chance ruling).

58. See JOAN BISKUPIC, *BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE* 200–01 (reprint ed. 2015).

59. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016).

60. See, e.g., Steve Vladeck, *Symposium: So What Happened Between Fisher I and Fisher II?*, SCOTUSBLOG (June 23, 2016, 12:53 PM), <http://www.scotusblog.com/2016/06/symposium-so-what-happened-between-fisher-i-and-fisher-ii> [<https://perma.cc/D96R-MAAE>]; see also Mark Sherman, *Justice: Changing Course on the Bench Is Not Weakness*, ASSOCIATED PRESS (Sept. 23, 2016), <https://www.apnews.com/93476b06b78c409393f38df4d5d507b7> [<https://perma.cc/87BZ-RF4P>] (quoting Kennedy as saying, perhaps with regard to his vote in *Fisher*, that: “To re-examine your premise is not a sign of weakness of your judicial philosophy. It’s a sign of fidelity to your judicial oath . . .”).

discernibly evolved after *Harris*.<sup>61</sup> Further, we have seen that overall amicus participation steadily increased in the cases leading up to *Janus*.<sup>62</sup> So there is good reason to think that last-chance decisions foster new, better thinking.

In addition, the doctrine extends the Court's decisionmaking through time, creating the possibility that the Court's composition could relevantly change. That prospect almost materialized when Justice Scalia passed away during the pendency of *Friedrichs*.<sup>63</sup> Had Hillary Clinton won the presidency instead of Donald Trump, *Janus* almost certainly would not have happened—and *Abood*'s supporters would have had the doctrine of one last chance to thank. *Janus* thus offers an example of how deferred decisions create opportunities for politics to either check or reinforce the Court: During the 2016 presidential election, unions, their members, and the public were on notice that *Abood* was hanging in the balance.<sup>64</sup> Those actors could mobilize and vote accordingly.

Finally, political actors can respond directly to last-chance rulings and avert any final intergovernmental showdown. After *Harris*, for instance, some commentators proposed redesigning compulsory union funding schemes by incorporating government subsidies, thereby eliminating the alleged First Amendment problem.<sup>65</sup> That kind of preemptive response would amount to “cooperative avoidance,” “whereby the Court signals a potential constitutional problem and the political branches then modify the law so as to prevent the problem from ever having to be adjudicated.”<sup>66</sup> Cooperative avoidance promises the smooth resolution of otherwise divisive controversies. However, that sort of preemptive response poses obvious practical and political challenges, and there may be no good example of a last-chance ruling that actually yielded cooperative avoidance.

Of course, there is another possibility: In the absence of the doctrine, the Court might *not* be prepared to overrule the precedent at the first opportunity. In that

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61. See *Janus v. AFSCME*, 138 S. Ct. 2448, 2474 (2018) (noting a change in Kagan's dissenting position between *Harris* and *Janus*); *id.* at 2494–95 (Kagan, J., dissenting) (citing Brief of Eugene Volokh et al. as Amici Curiae in Support of Respondents, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (No. 16-1466), 2018 WL 527958; Brief of Professor Benjamin I. Sachs as Amicus Curiae in Support of Respondent, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (No. 16-1466), 2018 WL 527961; Brief for Amici Curiae Charles Fried et al. in Support of Neither Party, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (No. 16-1466), 2017 WL 6887509).

62. See *supra* Table 1.

63. *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (mem.).

64. See, e.g., Benjamin Sachs, *Some Quick Analysis of Harris v. Quinn*, ON LABOR (June 30, 2014), <https://onlabor.org/some-quick-analysis-of-harris-v-quinn> [https://perma.cc/4975-C36M] (“[M]ost completely obviously: the nomination and confirmation of the next Justice of the Supreme Court will matter a great deal to the future of labor law and labor unions.”).

65. See Tang, *supra* note 32 (discussing Aaron Tang's work).

66. Re, *supra* note 1, at 179 (discussing “cooperative avoidance”).

event, the doctrine could facilitate overruling by allowing the justices to give notice of their intention to overrule in the future. And, as we have seen, that notice would undermine at least some reliance-based arguments for adhering to *stare decisis* in a later case. So last-chance decisions can indeed enable vast precedential change. Yet that disruptive tendency must be balanced against the constraining tendencies discussed above. Depending on the Court's prior proclivity to overrule, the doctrine could defeat more overrulings than it enables.

Further, some of the overrulings that the doctrine facilitates will be desirable, despite their disruptiveness. When an existing legal rule is both legally wrong and harmful, *stare decisis* might nonetheless preserve it in order to avoid even larger transition harms. Last-chance decisions then supply an attractive third option. Rather than either preserving or immediately overruling the precedent, a last-chance decision can reduce transition costs by supplying notice of an impending legal change. While the resulting jolt of legal uncertainty will come at a short-term cost—and so should not be undertaken lightly—it also allows for mitigation of potentially greater harms. As a result, the doctrine creates opportunities for socially beneficial overrulings that would otherwise be prohibitively costly.

Still, one might question whether the Court can or would accurately gauge reliance interests at the time of overruling. Particularly when a last-chance decision has evinced an expectation that reliance costs would be small, a later ruling might pay them lip service. Even worse, a Court that has publicly fired a warning shot might be reluctant to back down from its plan, even if new information casts the plan in a bad light. The Court could even feel compelled to make good on its threat to preserve its own credibility, come what may. These problems point toward a possible biasing effect resulting from the interaction of the doctrine's two steps. The most obvious response to these problems is to make last-chance decisions more tentative, so that the justices will feel freer to change course. But moves in that direction must be taken with care, lest the Court fail to give adequate notice of the impending legal change.

Finally, one might worry that last-chance decisions invite bad faith, in that they can allow cynical justices to manipulate their critics.<sup>67</sup> By temporarily striking a pose of restraint, the Court can soften and legitimize disruptive decisions that would otherwise cause an uproar.<sup>68</sup> This worry has some force, in part because justices exercise discretion in deciding when a ruling is disruptive enough for the doctrine to apply. Still, last-chance decisions are an unattractive option for bad-faith

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67. *NAMUDNO* could be viewed as a strategic deferral that both muted the later dissent in *Shelby County* and postponed action until political control of Congress could shift. See *Re, supra* note 1, at 181, 184.

68. On the related issue of stealth overruling, see text accompanying *infra* note 70.



jurists. When the Court announces that a major decision is in the offing, it invites criticism and an organized response. So if last-chance rulings do help to pacify the Court's critics, the explanation is probably that affording notice achieved a worthwhile purpose, such as reducing reliance or fostering debate. And if the passage of time adds nothing to the Court's position, then providing a last chance would only have given critics a head start.

When evaluating the overall appeal of the doctrine, several variables stand out. In the absence of the doctrine, how often would the Court be prepared to overrule at its first opportunity? Do last-chance decisions create desirable opportunities for the democratic process to affect the Court? And, perhaps most importantly, will the Court accurately assess the abiding if diminished significance of reliance interests when it encounters the deferred question for the second time, or will it feel entitled or compelled to disregard those interests without fair consideration? The answers to these questions dictate whether and when the doctrine is constraining, empowering, and ultimately desirable.

## B. Last Chances as Stare Decisis

Another way to evaluate the doctrine of one last chance is to see whether it fits comfortably within or alongside existing theories of legitimate precedential change. That comparative approach suggests that at least some version of the doctrine is defensible, provided the right modifications.

Start with theories of precedent that object to "stealth overruling," a concept advanced under varying labels by several justices and commentators, particularly Barry Friedman.<sup>69</sup> The basic idea is that when a dramatic overruling might generate criticism or a political response, the Court sometimes achieves comparable ends gradually and so without attracting attention.<sup>70</sup> There are good reasons to be skeptical that "stealth overruling" is either stealthy or overruling.<sup>71</sup> But even if

69. See Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 8–16 (2010); e.g., Transcript of Oral Argument at 49, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (No. 10-238), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2010/10-238.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2010/10-238.pdf) (Breyer: "[I]t is better to say it's all illegal than to subject these things to death by a thousand cuts . . ."); see also *Pereira v. Sessions*, 138 S. Ct. 2105, 2129 (2018) (Alito, J., dissenting) ("[U]nless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law.").

70. See Friedman, *supra* note 69, at 33–39.

71. When the Court gradually erodes precedents, both dissenters and sophisticated observers will see what is happening and can sound the alarm—not just once, but each time the Court narrows the precedent. See Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1870–74, 1871 n.40 (2014). As a result, commentators can, and sometimes do, bewail the alleged overruling of their preferred precedents over and over again. See Richard M.

chipping away at precedent were stealthy and therefore problematic, the doctrine of one last chance would lack that problem. The essence of one-last-chance rulings is publicity and openness about what is happening—at both stages of the Court’s decisionmaking process. Initially, there is notice of a potential change. And then there is a candid overruling as follow-through. Thus, jurists and commentators who have suggested that they would prefer that precedents be squarely overruled instead of stealthily chipped away at should smile on last chances.<sup>72</sup>

Then there is “narrowing,” whereby a court reads a precedent more narrowly than it is best read.<sup>73</sup> Virtually all justices sometimes engage in narrowing, which is generally legitimate when the Court adopts a reasonable reading of case law.<sup>74</sup> But there are still times when narrowing is inapt. For one thing, the precedent at issue may not be reasonably susceptible to a reading that mitigates its wrongfulness. In addition, a narrowed reading, even if reasonably consistent with existing case law, can create new problems, such as when it generates rules that are unduly arbitrary or unadministrable.<sup>75</sup> In those circumstances, overruling may be called for. And, once again, the doctrine of one last chance supplies a means of achieving an overruling while desirably mitigating reliance costs. Further, narrowing and last chances can work in tandem: After narrowing as far as reasonably possible, the Court might give the defenders of a precedent one last chance to marshal their arguments before overruling. *Harris* itself could be viewed as a narrowing-plus-last-chance decision, as could *WRTL*. For all these reasons, narrowing and last-chance decisions can complement one another.

Finally, one might situate the doctrine of one last chance among the cases and theories of precedent that demand special reason to overrule, over and above the precedent’s being clearly wrong and even beyond requiring that the overruling seem socially beneficial, despite reliance interests.<sup>76</sup> Most salient here is Randy Kozel’s recent work on the need for *stare decisis* to create criteria for overruling that

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Re, *The Nine Lives of Bivens*, PRAWFSBLAWG (June 22, 2017, 8:30 AM), <https://prawfsblawg.blogs.com/prawfsblawg/2017/06/the-nine-lives-of-bivens.html> [<https://perma.cc/G5MS-6WJP>]. Moreover, the main examples Friedman discusses do not really amount to “overruling” because they leave the original precedent with significant even if reduced application. See Re, *supra*, at 1870–74, 1871 n.40.

72. See *supra* note 69.

73. See Re, *supra* note 71, at 1868–70. Narrowing is essentially “stealth overruling” but without the pejorative cast or claim to covertness.

74. See *id.* at 1874–89.

75. See *id.* at 1886. Of course, narrowing can sometimes foster *greater* clarity, as Gillian Metzger has noted. See Gillian E. Metzger, Tradoffs of Candor: Does Judicial Transparency Erode Legitimacy?, Remarks at the 2008 N.Y. Univ. Annual Survey of Am. Law Symposium (Mar. 11, 2008), in 64 N.Y.U. ANN. SURV. AM. L. 459, 460–62 (2008).

76. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

transcend disagreements of interpretive method and so focus on considerations like unworkability, practical exigency, and changed circumstances.<sup>77</sup> This general category of views tends to place a premium on legal stability over time, even as the Court's views on the law change. As a result, a focus on special reasons is in tension with last chances. Confirming as much, Kagan's *Janus* dissent emphasized the special-reason requirement and contended that the mere existence of prior decisions portending an overruling cannot qualify.<sup>78</sup>

Yet the special-reason requirement is better viewed as informing or shaping the doctrine of one last chance, rather than defeating it. In essence, the doctrine imposes an adaptive principle: Whatever the necessary conditions for overruling may be, the Court must be especially inclined to stay its hand until it has given notice in a first case; and then, once notice has been given, the Court can shed its initial reluctance. Again, *Janus* is illustrative, as the majority did not purport to jettison the normal *stare decisis* factors.<sup>79</sup> Instead, the Court viewed those factors differently because of its prior deferrals. That cautious use of the one-last-chance doctrine is generalizable to almost any form of the special-reason requirement.

Further, the doctrine could affect different kinds of special-reason requirements differently, depending on how the last-chance decision affects the special reason at issue. Again consider reliance. As we have seen, last-chance decisions supply notice that can not only prompt parties to reduce their reliance, but also reduce the force of reliance interests. So the Court has several reasons to apply a low threshold for finding reliance—that is, to preserve precedent whenever there is even a small amount of reliance—during its first opportunity to overrule a precedent. Doing so would allow time to learn about new research, create room for democratic input, and give notice to reliant parties. Then, in a later case, the Court would have reason to raise its reliance threshold, not only because it had allowed for input and deliberated, but also because reliance interests had been reduced or weakened.

By contrast, other special reasons are not affected by notice-giving decisions, or at least not affected in the same way. Take unworkability, which is perhaps the quintessential special reason. In general, a precedent's unworkability does not turn on whether the Court has given notice of its intention to overrule. So, during its first opportunity to overrule, the Court might choose to apply a high unworkability threshold—that is, preserve precedent unless it is highly unworkable—including to afford time for new research or to create room for democratic input. But it generally

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77. See RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* (2017); see also Randy J. Kozel, *Overruling With Respect* (working paper) (discussing *Janus*).

78. See *Janus v. AFSCME*, 138 S. Ct. 2448, 2500–02 (Kagan, J., dissenting).

79. *Id.* at 2482–86 (majority opinion).

would not make sense to reduce the unworkability threshold in a later case based on the notice-giving effects of a last-chance decision. After all, giving notice through a last-chance decision would not have altered the precedent's unworkability.

The bottom line is that the doctrine can affect the Court's assessment of each special reason differently. Because last-chance rulings directly affect reliance, the reliance showing necessary to maintain a precedent might go from "very low" in a first chance to "very high" in a last chance. By contrast, the Court's treatment of special reasons like unworkability might see smaller changes from one decision to the next, or no change at all.

Many readers will join Justice Kagan in lamenting the doctrine's role in facilitating right-of-center Roberts Court holdings like *Janus*. But the doctrine may actually do more to discourage than foster precedential change by creating potentially consequential delays, as in *Fisher I* and *Fisher II*. Further, last-chance decisions have generated politically liberal results—and could do so again.<sup>80</sup> In any event, shortcomings in the doctrine as currently practiced could simply point toward opportunities for its refinement, rather than abandonment. For almost any theory of precedent, there is a plausible version of last-chance decisionmaking.

### CONCLUSION

It is fitting that the doctrine of one last chance played a role in a case with the same name as Janus, the two-faced Roman god of beginnings and endings, changes and time.<sup>81</sup> When adhering to the doctrine, the Court generates a pair of linked decisions that respectively look forward and backward. The result is a Janus-faced principle that is either empowering or constraining—or both, depending on the context. *Janus* may be the Court's most recent and explicit engagement with the doctrine, but it is not the first and is unlikely to be the last. In the long run, *Janus*'s embrace of last-chance decisionmaking may prove to be its greatest legacy.

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80. See Re, *supra* note 1, at 177–78 (discussing *Rasul* and *Boumediene*, as well as *Hollingsworth*, *Windsor*, and the prospect of the ruling that—we now know—would ultimately issue in *Obergefell*); see also *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Hollingsworth v. Perry*, 570 U.S. 693 (2013); *Boumediene v. Bush*, 553 U.S. 723 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004).

81. See *Janus*, OXFORD CLASSICAL DICTIONARY (4th ed. 2012).