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Can Superman Save the Supreme Court after Dobbs? Using Analogical Reasoning to Teach the American People the Superpower of Stare Decisis

Brandon Stump
Cleveland State University College of Law, b.m.stump@csuohio.edu

Can Superman Save the Supreme Court after *Dobbs*?: Using Analogical Reasoning to Teach the American People the Superpower of *Stare Decisis*

BRANDON STUMP*

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I. INTRODUCTION

As the arbiter of Constitutionality, no branch of government wields more long-lasting and ultimate power over Americans' lives than the United States Supreme Court. Neither an American president nor Congress controls what the Constitution means. Only the Supreme Court can do this.[1] This is an awesome power that few Americans seemed to fully grasp until *Dobbs v. Jackson Women's Health Organization*,[2] when a majority of the Court, for the first time in its history, revoked a substantive right that had existed since 1973.[3]

Surely, plenty of Supreme Court Justices personally disagreed with *Roe*.[4] In fact, each time the Court considered *Roe* after it was decided in 1973, the reviewing Court was comprised of a majority of Republican presidential appointees. Nonetheless, the constitutional right to an abortion existed from 1973 until June 2022.[5] Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter—all Republican appointees—voted to uphold the right to an abortion in *Casey*.[6] In 1981, during her confirmation hearing after President Ronald Reagan's nomination, O'Connor explained that she personally was opposed to abortion as "birth control or otherwise."[7] O'Connor went so far in confirmation as to voice her "abhorrence of abortion as a remedy."[8] Even with her personal opposition to abortion as a practice, O'Connor penned the majority

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[1] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179–80 (1803).

[2] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[3] Roe v. Wade, 410 U.S. 113, 154 (1973), *overruled by Dobbs*, 142 S. Ct. 2228 (2022). Even after *Dobbs*, Americans struggle to understand or accept basic facts about the Court. Philip Bump, *It's Useful to Remember How Little Many Americans Know About Politics*, WASH. POST (July 5, 2023), https://www.washingtonpost.com/politics/2023/07/05/americans-polling-supreme-court/. For example, 3 in 10 Americans believe that a majority of the Court was appointed by Democratic presidents. *Id.*

[4] *Roe*, 410 U.S. 113; Caroline Kitchener, *After Leak of Draft Abortion Decision, Advocates React with Emotion*, The Washington Post (May 3, 2022), https://www.washingtonpost.com/politics/2022/05/03/abortion-reaction-alito-decision/; Giulia Carbonaro, *Women's March 2022 — Roe v. Wade Protesters take to the Streets Nationwide*, Newsweek (May 3, 2022), https://www.newsweek.com/women-march-2022-roe-v-wade-protesters-take-streets-nationwide-1702961.

[5] *Dobbs*, 142 S. Ct. 2288.

[6] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 841, 845–46 (1992), *overruled by Dobbs*, 142 S. Ct. 2288.

[7] Evan Thomas, *How the Supreme Court Justice Sandra Day O'Connor Helped Preserve Abortion Rights*, THE NEW YORKER (Mar. 27, 2019), https://www.newyorker.com/news/news-desk/how-the-supreme-court-justice-sandra-day-oconnor-helped-preserve-abortion-rights.

[8] Joshua Prager, *The Memo that Saved Abortion Rights in America*, CNN (Sept. 23, 2021), https://www.cnn.com/2021/09/23/opinions/abortion-rights-supreme-court-souter-prager/index.html.

opinion upholding the right in *Casey*.[9] Furthermore, before Justice Souter was a member of the Supreme Court, nominated by President George H. W. Bush, he served as New Hampshire's Attorney General. During his tenure, the attorney general's office filed a brief in federal court explaining that Medicaid funds should not be used to fund "the killing of the unborn."[10]

However, once on the Supreme Court, driven by his fundamental belief in *stare decisis*, Souter worked behind the scenes after the *Casey* oral arguments to garner O'Connor's and Kennedy's support to save *Roe*—not out of a belief or support of abortion, but out of a belief in *stare decisis*.[11] Finally, Justice Kennedy, a devout Catholic, professed to have no predetermined views of abortion during his confirmation hearing.[12] But his personal opposition can be inferred from his description of the process of "partial-birth abortions" in a dissent, including that the fetus "dies just as a human adult or child would: It bleeds to death as it is torn from limb from limb."[13] In fact, Kennedy later turned that dissent into law, upholding the

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[9] Thomas, *supra* note 7 ("[O'Connor] was circumspect with everyone, including her family. It is almost certain that she never favored outlawing abortion altogether, but it is also likely that she struggled in her own mind to settle on the proper legal limits.").

[10] Neil A. Lewis, *Souter Is Linked to Anti-Abortion Brief*, N.Y. TIMES (July 31, 1990), https://timesmachine.nytimes.com/timesmachine/1990/07/31/356390.html?pageNumber=12.

[11] Prager, *supra* note 8.

[12] *Nomination of Anthony M. Kennedy To Be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 100th Cong. 90–91 (1987).

[13] Stenberg v. Carhart, 530 U.S. 914, 958–59 (2000). While Kennedy's dissent referenced "partial-birth abortions," *Id.* at 957, medically and factually, "partial-birth abortions" do not exist. Julie Rovner, *'Partial-Birth Abortion': Separating Fact from Spin*, NPR (Feb. 21, 2006), https://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin. Instead, the real medical procedure is known as "dilation and evacuation":

> The further along a pregnancy is, the more complicated — and the more controversial — the procedures are for aborting it. Abortions performed after the 20th week of pregnancy typically require that the fetus be dismembered inside the womb so it can be removed without damaging the pregnant woman's cervix. Some gynecologists consider such methods, known as "dilation and evacuation," less than ideal because they can involve substantial blood loss and may increase the risk of lacerating the cervix, potentially undermining the woman's ability to bear children in the future.

Id. The women who undergo such procedures do so for their health and the health of the baby, if the fetus is viable. These procedures take place between the twenty-first and twenty-fourth week of pregnancy, not in the late term of pregnancy (beginning the thirty-seventh week of pregnancy) as many Right-wing politicians and influencers suggest. Ariana Eunjung Cha, *Tough Questions—and Answers—On 'Late-Term' Abortions, the Law, and the Women Who Get Them*, WASH. POST (Feb. 6, 2019), https://www.washingtonpost.com/us-policy/2019/02/06/tough-questions-answers-late-term-abortions-law-women-who-get-them/. According to data in 2016, abortions performed after twenty-one weeks of gestation accounted for only 1.3 percent of all abortions. *Id.* in 2020, the Center for Disease Control reported that only 1.1 percent of abortions occurred after twenty-weeks gestation. KATHERINE KORTSMIT ET AL., CDC, ABORTION SURVEILLANCE—UNITED STATES, 2020, 71 (10) MORBIDITY AND

federal ban on so-called "partial birth abortions," reasoning the State has "legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."[14] In *Casey*, though, Kennedy recognized the overwhelming importance of *stare decisis* and voted against his religious beliefs.[15]

O'Connor, Souter, and Kennedy possessed the same powers that the individual Justices in the *Dobbs* majority possessed. But in cases like *Casey*, rather than leaning into their power to flip precedents and eliminate fundamental rights, those Jutices leaned into precedent. Neither the Constitution nor their oath of office required O'Connor, Kennedy, or Souter to uphold a constitutional right that they believed either should not, or did not, exist. Instead, these three Justices in *Casey* voted to uphold a constitutional right because of their fidelity to *stare decisis*. Since 1973, each time the Supreme Court was faced with an abortion question, a majority of Justices, no matter which party's President they were appointed by, upheld the right to an abortion.[16] But Justice Samuel Alito's majority opinion in *Dobbs* changed all of this in June 2022.[17]

As a queer and disabled person whose fundamental rights depend on what the Supreme Court decides,[18] I[19] felt powerless and uncertain of what my life and future would look like in a country where the Court now seemed unbound by the precedents[20] that my entire social, political, and public existences depend upon. And as an Autistic person who depends on certainty and predictability to maintain equilibrium, I trusted in *stare decisis*—a guardrail to absolute power. I tried to wrap my mind around a Court without true and meaningful fidelity to *stare decisis*—the ultimate restraint that provides steadiness in a country prone to political and social

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MORTALITY WEEKLY REPORT SURVEILLANCE SUMMARIES, Nov. 25 2022, at 1-27, https://www.cdc.gov/mmwr/volumes/71/ss/ss7110a1.htm#T10_down.

14 Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

15 "[T]he reservations any of us may have in reaffirming the central holding in Roe are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 853 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

16 *A History of Key Abortion Rulings of the U.S. Supreme Court*, PEW RSCH. CTR. (Jan. 16, 2013), https://www.pewresearch.org/religion/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/.

17 *Dobbs*, 142 S. Ct. at 2242 ("*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.").

18 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023).

19 Like feminist scholars before me, as a queer and disabled professor, I choose to use first-person pronouns as a way to add both the narrative of a queer and Autistic author to the canon, but also to attach those particular experiences to scholarship. *See* Kathryn M. Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387, 388, 403 (2002).

20 David Litt, *A Court Without Precedent*, THE ATL. (July 24, 2022), https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-stare-decisis-roe-v-wade/670576/.

turmoil.[21] And I tried to think of examples in history when potently powerful entities functioned unrestrained. Truthfully, I could not even think of an analog to the power the Supreme Court holds—the power to remove rights that generations have relied on and to upend futures and destinies with a simple majority vote.

Then I looked to my coffee table, where my May and June 2022 Superman comics lay. Clark Kent—born on a distant planet and sent to Earth by his parents to escape their impending planetary doom, whose alien body designed for a different solar system was so uniquely impacted by his time on Earth, its atmosphere, its sun, that he could fly, breathe ice, shoot lasers from his eyes, and survive nuclear blasts—was the only entity as powerful as the Supreme Court.[22] Thus, in June 2022, times were so unprecedented that the closest analog I had to the dominating power of the Supreme Court was the metahuman prowess of Clark Kent—Superman.

Superman and I go way back. When I was five-years old, I walked through our local department store and saw the pajama section. As an Autistic child, I had horrible sensory pain when wearing pajamas with attached stocking feet. But on that day in the department store, above the rows and racks of clothing, I saw the chiseled jaw and black curl of hair in the middle of a plastic Superman mask that came with a pair of Superman pajamas, sans footies. I was sold. The Man of Steel's commitment to truth, justice, and the American way spoke to my Autistic-self, driven heavily by the binary of right-and-wrong, black-and-white. And the footless pajamas certainly didn't hurt.

So, it is not surprising that in those traumatizing moments after *Dobbs*, I reached out for Superman. And I began to think, would a country that truly understood civics and the role of the Court have allowed the nation to reach the point where *Dobbs* was even a possibility? For that matter, would a Supreme Court which knew and understood Superman have been able to avoid the pitfalls of absolute power by following Kal-El's guiding principle of restraint? America needed Superman. And Supreme Court Justices needed to be more like Superman.

In 2022, the University of Pennsylvania polled Americans regarding civics and the law. Startlingly, mere months after *Dobbs*, forty-five percent of those polled did not know what happened after the Supreme Court reached a five-four decision, an increase from thirty-nine percent the year before.[23] Additionally, fifty-one percent thought it was accurate to say that Facebook must permit all Americans to freely express themselves on the platform pursuant to the First Amendment.[24] Furthermore, the National Assessment of Educational Progress (NAEP), which tested approximately 7,800 eighth-grade students from about 410 public and private schools across the country on civics, found that students' average scores dropped two points in 2022

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[21] *See generally* Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY 160, 160–76 (2021).

[22] *See generally* Jessica Plummer, *What Are Superman's Powers?*, BOOK RIOT (Nov. 27, 2019), https://bookriot.com/supermans-powers/.

[23] *Americans' Civics Knowledge Drops on First Amendment and Branches of Government*, ANNENBERG PUB. POL'Y CTR. (Sept. 13, 2022), https://www.annenbergpublicpolicycenter.org/americans-civics-knowledge-drops-on-first-amendment-and-branches-of-government/.

[24] *Id.*

since the last time the test was administered in 2018.[25] This was the first decrease since the test was first administered in 1998, and interestingly the score was not significantly different when compared to those first results, both averaging 150 out of 300.[26] Clearly, Americans struggled with basic civics, especially those involving the judiciary.

I am not so naïve to suggest Americans' lack of knowledge and understanding of government can be fixed by a novel solution proposed in a law review article. But I do believe that teaching Americans Superman's story—how he tempers his extreme and unprecedented powers by *always* using restraint, even when that restraint is contrary to his emotional desires, self-interests, or that which is considered socially popular—would provide Americans a source analog for understanding how dangerous decisions like *Dobbs* are. Adherence to *stare decisis*, outside of predictability, provides Americans with the sense that—even if an individual judge personally disagrees politically with a decision—the Court is not explicitly, blatantly partisan. Ultimately, this "is the basis of the trust given to the [C]ourt by the public."[27] And

> [t]hat trust, in turn, is crucial to the [C]ourt's ability to exercise the vast power Americans have granted it. The nine justices have no control over money, as Congress does, or force, as the executive branch does. All they have is their black robes and the public trust. A court that does not keep that trust cannot perform its crucial role in American government.[28]

In this Article, I propose that in this post-*Dobbs* America, if Americans are ever able to believe in, or even understand the magnitude of the Supreme Court's power, practitioners, scholars, and educators should rely on the power of analogical reasoning, something attorneys are taught beginning their first weeks of law school. Using the power of analogy, we should take the simple story of Superman to explain the magnitude of the power held by the Supreme Court and the critical role that *stare decisis* must play in the Court's decision-making. Perhaps if we explain legal principles and the judiciary by comparing them to one of the most recognizable pop cultural symbols in American history, we might be able to better understand how the Supreme Court's power works—and how vital it is that it be bound by *stare decisis*.

Part II of this Article examines the way analogies and analogical reasoning neurologically work—how our brains process and understand information when we have a source analog to compare to a target. Given the effectiveness of analogical reasoning, neurologically and in law school, Part II suggests that lawyers and legal scholars use the power of analogy to compare the awesome power of Superman to the awesome power of the United States Supreme Court to help citizens and students

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25 *NAEP Report Card: 2022 NAEP Civics Assessment*, THE NATION'S REP. CARD (2022), https://www.nationsreportcard.gov/highlights/civics/2022/.

26 *Id.*

27 Christopher Lee, *The Supreme Court Isn't Listening, and It's No Secret Why*, N.Y. TIMES (Oct. 1, 2022), https://www.nytimes.com/2022/10/01/opinion/supreme-court-legitimacy.html.

28 *Id.*

better understand and process the magnitude of the Court's power. Furthermore, comics present simplified stories of power, which render the analogy of Superman to the Supreme Court graspable by the public at large—a fundamental goal if America is ever to stop future *Dobbs*-like decisions.

Part III introduces the story of Superman and the way he tempers his superpowers through self-imposed restraint, a direct analog for the Supreme Court's power and the role of *stare decisis*. Part IV examines the Supreme Court's powers and the evolution of *stare decisis*—the Court's version of Clark Kent's self-imposed restraint. Part V brings the analogy together, directly comparing the source—Superman and his restraint—to the target—the Supreme Court and the necessity of *stare decisis*. Ultimately, I hope that readers will consider this analogy and use it in simple conversations regarding the Court, a tiny idea explaining a large concept, during our most crucial hours as a country.

II. IT'S A BIRD! IT'S A PLANE! IT'S AN ANALOGY!

In a country where citizens struggle to understand and appreciate how our government works, especially the federal courts, this Article proposes that legal educators and lawyers find new ways to communicate complex principles like *stare decisis* by employing one of the bedrock methods of logic and legal analysis—analogical reasoning. Perhaps medical doctors, baristas, contractors, math teachers, and postal carriers will not understand the meaning and importance of *stare decisis*, but they certainly can readily understand the story of Superman. Understanding Superman, then, can help inform our understanding of *stare decisis*. According to the Department of Education, only twenty-two percent of American eighth graders are proficient in civics.[29] In a country with such a poor understanding of how government works, how can the average American understand how the federal courts work, let alone how monumental and unprecedented the Court's *Dobbs* decision is?

As a professor of first-year law students, I am tasked with teaching analogical reasoning in the first few weeks of law school to students who have rarely ever stopped to consider how they think and how often analog helps them throughout their day. "An analogy is a non-identical or non-literal similarity comparison between two things, which has a predictive or explanatory effect. This means that two items are compared and the outcome, result, or determination of one of these items is predicted or explained to be the same as the other."[30] The power of analogy comes from analogy's "one-to-one similarity that requires no generalization to operate effectively."[31] Metaphors, while similar to analogies, are different; in fact, a "[m]etaphor is an

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[29] *NAEP Report Card*, *supra* note 25.

[30] Dan Hunter, *Reason Is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197, 1204 (2001).

[31] *Id.* at 1208. *But see* Rachel E. VanLandingham, *Lost in Translation? The Relevancy of Kobe Bryant and Aristotle to the Legality of Modern Warfare*, 42 PEPP. L. REV. 393, 404–05 (2015) ("[T]hinkers since Aristotle have warned that this form of reasoning—from particular to particular, rather than general to particular or particular to general—allows for a greater range of conclusory mistakes. Therefore, some argue that analogical reasoning may be helpful, but that it lacks the high level of rational force of other purely deductive and inductive approaches.").

expression forming a non-literal similarity comparison between two things, which has an expressive or affective content and thereby carries meaning. Unlike analogies, metaphors do not have a predictive content and do not strongly constrain the outcome of the reasoning process."[32] Here, Superman and his nearly unlimited powers are used as analog comparisons to explain the power of the Supreme Court and the importance of restraint. Whether an analogy or a metaphor, "[b]oth . . . involve a mapping of concepts from one set of ideas (the source domain) to another set of ideas (the target domain)."[33]

In 1945, M.L. Gick and Keith J. Holyoak performed one of the first studies of the power of analogical mapping. The study's subjects were asked to solve how a cancerous tumor could be cured by radiation therapy when "[h]igh energy radiation would damage the patient's tissues; but low energy rays would not kill the tumor."[34] Given this information alone, few participants solved the problem, which "lay in directing a number of low energy rays from different positions on the body, but which intersected at the tumor site and created a point of high energy."[35] Gick and Holyoak adapted the radiation problem, providing study participants with stories seemingly directly unrelated to the radiation issue. In fact,

> [o]ne story involved an army of men who sought to overthrow a tyrannical ruler who was hiding in a fortress. Unfortunately for the rebels, the roads leading to the fortress were all mined, such that if a large number of men walked over any one road a mine would explode. The solution was to break the men into small groups and to send them down different roads to converge on the fortress at the same time.[36]

By analogy, the story of the mined lands "dramatically" increased the number of participants who solved the radiation problem, "especially where subjects were prompted that the solution to the radiation problem might lie in one of the previous stories" provided to participants.[37] In this example, the story of the tyrant serves as "the source" and the radiation issue serves as the "target."[38] Analogical reasoning, thus, "involves some kind of mapping between domains."[39] Furthermore,

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[32] Hunter, *supra* note 30, at 1209.

[33] *Id.* at 1212.

[34] *Id.*

[35] *Id.* at 1212–13.

[36] *Id.* at 1213.

[37] *Id.*

[38] *Id.*

[39] *Id.*

"[a]nalogical reasoning, or the ability to find correspondences between individual objects as well as their relationships, is central to learning and thought."[40]

Given the neuroscience behind the power of analogical reasoning, we as legal scholars should not be afraid to use analogical reasoning in an attempt to save our democracy. If analogies can be used to help save a person with cancer, legal scholars should not hesitate to use pop culture and stories to explain what happened in *Dobbs* (and other recent cases) in the Roberts Court.

Following the Court's June 2022 *Dobbs* decision, Georgetown University Law Center Professor Brad Snyder published an opinion piece in the online magazine *Politico*, wherein he discussed that the Court "[h]as [t]oo [m]uch [p]ower"—power which it "usurped [from] the elected branches to interpret the Constitution and to pass laws on behalf of the people themselves—the foundational principle of American representative democracy."[41] Mainstream media outlets, including ABC News, questioned whether "[a]fter Roe ruling, is 'stare decisis' dead?"[42] Similarly, *The Atlantic*—even before the Court issued *Dobbs*—published an article entitled: "The Supreme Court Is [n]ot Supposed to Have This Much Power."[43] And one year after the Court issued its decision in *Dobbs*, only twenty-seven percent of Americans expressed confidence in the Supreme Court.[44]

We are a country in crisis. Even if one disagrees with the magnitude of the crisis, the fact that so many Americans believe we are in a crisis is in and of itself a crisis.

Some scholars might find this analogy between the United States Supreme Court and *stare decisis* compared to Superman and his deep sense of morality exercised as restraint to be overly juvenile.[45] However, the simplicity of this analogy is its power. In fact, as comic historian Scott McCloud has written, the power of comics comes in

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[40] KIRSTIE J. WHITAKER ET AL., NEUROSCIENTIFIC INSIGHTS INTO THE DEVELOPMENT OF ANALOGICAL REASONING 1–2 (2018).

[41] Brad Snyder, Opinion, *The Supreme Court Has Too Much Power and Liberals Are to Blame*, POLITICO (July 27, 2022, 10:49 AM), https://www.politico.com/news/magazine/2022/07/27/supreme-court-power-liberals-democrats-00048155.

[42] Devin Dwyer, *After* Roe *Ruling, Is '*Stare Decisis*' Dead? How the Supreme Court's View of Precedent Is Evolving*, ABC NEWS (June 24, 2022, 12:20 PM), https://abcnews.go.com/Politics/roe-ruling-stare-decisis-dead-supreme-court-view/story?id=84997047.

[43] Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, THE ATL. (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/.

[44] Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, GALLUP (July 6, 2023), https://news.gallup.com/poll/508169/historically-low-faith-institutions-continues.aspx.

[45] Katherine Aiken, *Superhero History: Using Comic Books to Teach U.S. History*, 24 OAH MAG. OF HIST. 41, 41 (2010) ("As primary sources of popular culture, [comics] have emerged from a specific context, reflecting the politics, prejudices[,] and concerns of a particular historical moment. Comics have also shaped the outlook of America's young people."). Perhaps, then, America's first superhero and his immense powers and sense of restraint are influenced by America's civics.

their "amplification through simplification."[46] "[C]omic book superheroes, by disguising themselves in spandex and capes, can allow readers to grasp larger social, historical[,] or cultural issues . . . ."[47] Furthermore, comics are uniquely appropriate for the goal of this Article: Providing Americans with a tangible analog to help them better understand the Supreme Court and the role that *stare decisis* should play in our constitutional jurisprudence.[48] Using comics and the story of Superman requires us to engage in storytelling and texts that "interact with up to six design elements including linguistic, audio, visual, gestural, and spatial modes, as well as multimodal design . . . ."[49]

One can obviously share the definition of *stare decisis* and attempt to explain precedent, but outside of law schools and courtrooms, those concepts are shapeless and detached from meaning. But a comic, its panels of pictures and words, can provide a complex[50] "source" for an analogy, giving pictures, words, emotions, subtext, etc.

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46 SCOTT MCCLOUD, UNDERSTANDING COMICS: THE INVISIBLE ART 30 (1994).

47 Zachary King, *The Superhero Historicized, Theorized, and Read*, 39 J. OF MOD. LIT. 167, 167–70 (2016) (reviewing CHARLES HATFIELD ET AL., THE SUPERHERO HISTORICIZED, THEORIZED, AND READ (2016)); *see also* David Frauenfelder, *Popular Culture and Classical Mythology*, 98 THE CLASSICAL WORLD 210, 210–13 (2005) (discussing a classical mythology professor's use of the 1987 film *The Predator* to teach students about the Greek god Heracles).

48 Thomas Giddens, *Comics, Law, and Aesthetics: Towards the Use of Graphic Fiction in Legal Studies*, 6 L. & HUM. 85, 86–87 (2012).

> [T]he comics medium has much to offer the interdisciplinary study of law. This is not only in terms of comics' analytical potential as a narrative discourse on issues of law and justice, but also through engagement with comics' specific form as an epistemological exploration of the boundaries between word and image, and between rational and aesthetic ways of knowing. Law and legal knowledge are primarily concerned with text of various forms, with statutes and judgments, with articles and theory. As a broadly aesthetic or humanities-based approach to legal studies, engagement with various forms of art as alternative discourses on legal and jurisprudential issues is a key feature of law and humanities. Moreover, the relationship of the visual to the textual, of the aesthetic to the rational, and all of these to the 'legal', are central concerns in law and humanities' interdisciplinary blending. The epistemological make-up of comics, their 'in-betweenness' as a distinctly visual-verbal art form that operates at the boundary between rationality and aesthetics, makes the medium of potentially great significance for a discipline, such as law, that is primarily concerned with describing and managing the world through the development, analysis, and application of ostensibly rational texts.

Id. at 87.

49 Dale Jacobs, *More than Words: Comics as a Means of Teaching Multiple Literacies*, 96 THE ENG. J. 19, 21 (2007).

50 *Id.* at 22 ("Not only does this visual element help to place the reader temporally and generically, but it, along with lettering and punctuation, also aids in indicating tone, voice inflection, cadence, and emotional tenor by giving visual representation to the text's audio element. We are better able to 'hear' the narrator's voice because we can see what words are emphasized by the bold lettering, and we associate particular kinds of voices with the narrative

to compare to the target—the Supreme Court and *stare decisis*. In a country where Americans have never even seen video footage of the Supreme Court reading a decision from the bench, a comic—even if used only as a source analog rather than an illustration of the Court rendering a decision—provides the reader with an image and story which they can compare to theoretical constructs.

III. AMERICA NEEDS SUPERMAN – THE CREATION AND POWERS OF AMERICA'S FIRST SUPERHERO[51]

For this analogy to have maximum impact, we must begin with our source for comparison: The story of Superman and his reliance on self-imposed restraint to protect those around him.

A. He Looks Like a Man But Possesses the Power of a God

In 1938, two Jewish teenage boys from Cleveland created the first American superhero—Superman.[52] Superman first appeared in Detective Comics *Action* #1.[53] On that first cover, the Man of Steel, as he would later be known, appears in blue and red form-fitting spandex that shows off his impressive musculature as he holds a wrecked car above his head.[54] His red cape billows behind him.[55] From his first appearance in a comic, Superman is revealed to be something more than man—but also a man—a being so strong that he effortlessly glides across the cover of a publication lifting a vehicle above his head, no sweat or strain to be seen.

Over the years, Superman's origin mythos evolved to become more specific and complex.[56] In 1986, relying on nearly fifty years of Superman comic books, newspaper comic strips, radio shows, and movies, comic book artist and writer John Byrne set the "gold standard" for Superman mythology in his six-issue story arc: *The Man of Steel*.[57] In this retelling, a father and mother on a distant, dying planet called Krypton decided to send their only son, a baby named Kal-El, to "a distant world, a world not unlike Krypton of millennia past. A world the natives call Earth."[58] Kal-

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voice of a pirate's tale, especially emphasized here by the shape of the text boxes. Both the visual and the audio thus influence the way we read the words in a comic . . . .").

[51] *See generally* BRAD RICCA, SUPER BOYS: THE AMAZING ADVENTURES OF JERRY SIEGEL AND JOE SHUSTER—THE CREATORS OF SUPERMAN (2013) (detailing Jerry Siegel and Joe Shuster's development and creation of Superman).

[52] Cassandra Burris, *Origin Story: The Creation of Superman*, OHIO HIST. CONNECTION (Dec. 1, 2017), https://www.ohiohistory.org/origin-story-the-creation-of-superman/.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] Joshua Lapin-Bertone, *The Evolution of Superman's Origin*, DC COMICS (Apr. 18, 2023), https://www.dc.com/blog/2023/04/18/the-evolution-of-superman-s-origin.

[57] *Id.*

[58] JOHN BYRNE & DICK GIORDANO, *The Legend Begins*, *in* THE MAN OF STEEL 1, 6 (1986).

El's father studied Earth from afar, and in particular, he programmed Kal-El's escape pod to land in Kansas in the United States of America.[59] Kal-El's father eases his wife's worries about sending her son to a distant planet in a land far more primitive than their own, explaining that because Earth orbits a yellow sun, Kal-El's "Kryptonian cells will become living solar batteries making him grow ever more powerful."[60] The result, Kal-El's father explains: "In time he will become the *supreme being* on that planet. Almost a god!"[61] Moments after assuaging his wife's fears, Krypton begins to explode, the radiation at the planet's core creating too much pressure for the planet to survive.[62] The Kryptonian father launches the capsule containing his son just as their planet explodes, killing the remaining Kryptonians.[63]

Kal-El does, in fact, arrive in Kansas, and is discovered in his wrecked spaceship by Martha and Jonathan Kent.[64] The Kents named the baby Clark Kent and raise him as their own.[65] Throughout his childhood, the Kents discover that Clark is different than other children. After being trampled by a bull on their farm, Clark was uninjured. While retrieving a baseball that went under a piece of farm equipment, Clark lifted the entire machine with one hand. Clark could also see through walls, and he even discovered he could fly.[66]

B. The Humble Beginnings of a Superhero's Restraint

Eventually, Clark joins the high school football team where he is an "amazing, all-round champion[,]" using his physical strength and prowess to earn ten touchdowns in the *one* game.[67] Watching his son rely on these extreme abilities against other high school students who completely lacked his superhuman qualities, Jonathan takes his son for a drive to explain that while he is "not mad, exactly," he is "a little disappointed, maybe."[68] Jonathan then shows Clark the spaceship they found him in as a baby, and Clark begins to question his identity in light of his superpowers.[69] Jonathan explains that they may never know the source of all Clark's differences: "And maybe it doesn't *matter*. Whatever this thing really is, wherever you came from,

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[59] *Id.*

[60] *Id.* at 7.

[61] *Id.*

[62] *Id.* at 7–8.

[63] *Id.* at 8–9.

[64] *Id.* at 14.

[65] *Id.* at 15.

[66] *Id.* at 17.

[67] *Id.* at 10.

[68] *Id.* at 12.

[69] *Id.* at 13–14.

you're *our son* now. You're an American citizen – and that means you've got responsibilities!"[70]

Following this conversation with his father, Clark Kent, not yet adopting his Superman persona, outlines the code of morality that will govern his entire life:

> [Dad is] right to say he's disappointed in me. After all the times you and he have talked to me over the years, as each new power came along . . . .
>
> You told me all those times that I should never use my special abilities to make myself *better* than other people – to make other people feel *useless*.
>
> But that's what I've *been* doing.
>
> And . . . it's time to *stop*. It's time for me to *face* my responsibilities.[71]

On one page of comic book panels filled with art and text, in simple dialogue, Clark Kent explains his conscience—that in light of extreme power, he must use restraint. Thus, Clark Kent dedicates his life to seeking out the "people and places that *need* somebody who can do the things I can do."[72] And under the disguise of Superman—a red "S" on his chest, a cape at his back, and his body decked out in blue spandex—he does just that.

This self-imposed principle of restraint is central to all iterations of Superman.[73] In a more recent iteration of *The Man of Steel*, a villain finds Superman's secret lair and destroys all of the artifacts that remain of his birth-planet, Krypton, and its people, including an entire Kryptonian city that remained alive and thriving inside a glass bottle.[74] In doing so, the villain killed "the last true survivors of Krypton"—the last of his people.[75] Knowing all he has lost, Superman cries, and rather than leaning into the emotionality of blood lust and violence, he slows his emotions down.[76] Following the villain's trail, Superman is led from his lair in Antarctica to the city of Metropolis, where millions live, including his wife and son.[77] Far above the city on top of a skyscraper, Superman confronts the villain who has destroyed what remained of his home planet.[78] Superman punches the villain, a monstrous, otherworldly creature, but he realizes that if the villain falls as the result of one of Superman's superhuman

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[70] *Id.* at 18.

[71] *Id.* at 19.

[72] *Id.*

[73] *See infra* Part V.

[74] BRIAN MICHAEL BENDIS, *Man of Steel—Part 3*, *in* THE MAN OF STEEL 3, 11–13 (2018).

[75] *Id.* at 12.

[76] *Id.* at 12–13.

[77] *Id.* at 15–16.

[78] *Id.* at 18.

punches, the force will rattle the entire city with tremors.[79] So Superman calculates his punch: "I can't give it more than an eight. Anything past that and this city would tip over . . . ."[80]

In that moment, Superman realizes the villain lured him back to Metropolis, hoping he would be driven by his rage over all the villain destroyed.[81] If he were to have acted upon his rage, Superman would have inevitably hurt numerous citizens of Metropolis impacted by the literal shear force of his fist driving into a villain, crashing to the earth below. Superman would not have been hurt in this scenario. Instead, he would have exacted revenge. But once again, Superman calculates his restraint, understanding that his power—which he is free to exercise—will cause more damage than good.

IV. SUPREME POWER AND THE SUPREME COURT

Above, I have outlined the source analog for our comparison: Superman's powers coupled with his self-imposed restraint. Now, I will address the target of this analogy: The Supreme Court and its immense power and the vital role of restraint.

A. The Creation of a Supreme Power: Judicial Review

In Superman, Clark Kent, having been born under a red sun on his home planet Krypton, arrives on Earth as a baby, and in the literal light of day, beneath the yellow star of the sun, he becomes the only citizen of Earth with awesome superpowers.[82] Not unlike a plant's process of photosynthesis, Superman can "tap into a nearly limitless supply of energy" while also being nearly impervious to physical harm and pain.[83] While Superman had to travel the galaxy and live under a foreign sun to gain his intense and unequaled powers, the United States Supreme Court only needed to write an opinion that would gain significance and power over the course of more than two centuries.

Article III of the United States Constitution explicitly vests the judicial power of the United States "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[84] In large part, this judicial power extends to cases arising under the Constitution and laws of the United States.[85] In 1803, the United States Supreme Court, without explicit guidance from the Constitution, created its own powers in *Marbury v. Madison*, when it ruled, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation

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[79] *Id.* at 1, 4.

[80] *Id.* at 7.

[81] *Id.*

[82] S.D. PERRY & MATTHEW K. MANNING, ANATOMY OF A METAHUMAN 11–12 (2018).

[83] *Id.* at 11.

[84] U.S. CONST. art. III, § 1.

[85] *Id.* § 2, cl. 1.

of each."[86] It is true that "[b]etween 1803 and 1887, the Supreme Court never once cited *Marbury* for the principle of judicial review, and nineteenth-century constitutional law treatises were far more likely to cite *Marbury* for the decision's discussion of writs of mandamus or the Supreme Court's original jurisdiction than for its discussion of judicial review."[87] However, during the late nineteenth-century and early twentieth-century, the Court began to rely on *Marbury* for the proposition that the Supreme Court has the ultimate power of judicial review to decide whether laws enacted by Congress or executive actions taken by the President pass Constitutional muster.[88] "During the late nineteenth and early twentieth centuries, the issue of judicial review became far more controversial, as courts began to exercise judicial review more frequently than ever before."[89]

As the twentieth-century approached, along with industrialization, federal and state governments passed "legislation regulating economic affairs," causing distress among societal elites—including legal scholars and lawyers.[90] As a pushback against economic regulations that many feared were socialist in nature, "[d]uring the 1880s and 1890s, many state courts began to exercise judicial review more frequently, striking down state legislation that infringed private contract and property rights."[91] And in 1895, the United States Supreme Court "expressly relied on *Marbury* for the first time to justify striking down legislation in *Pollock v. Farmers' Loan & Trust Co.*"[92] Thus, "[t]he Court's inaugural use of the *Marbury* decision to defend an exercise of judicial review was saved for an extraordinarily controversial decision in which the Court's judgment was highly vulnerable to criticism."[93]

Eventually, legal casebooks for law students, treatises, and litigants challenging statutes began to highlight and rely on *Marbury* for the proposition that the Supreme Court had the legal authority to invalidate actions of the other branches of government.[94] And beginning in the 1950s, "the Court has used *Marbury* to justify the Court's assertion that its interpretations of the Constitution are supreme over those of other governmental actors, a claim that Marshall did not make in his *Marbury*

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86 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

87 Davison M. Douglas, *The Rhetorical Uses of* Marbury v. Madison*: The Emergence of a "Great Case,"* 38 WAKE FOREST L. REV. 375, 375–79 (2003).

88 *Id.* at 375–79, 380, 382. While a review of cases in the 1700s and the opinions of "[l]eading theorists" reveal that "by the time of *Marbury* [in 1803], the principle of judicial review was reasonably well established . . . [t]he Supreme Court did cite *Marbury* approximately fifty times between 1803 and 1894, but in almost all of those decisions the Court cited *Marbury* on issues pertaining to writs of mandamus or the Supreme Court's jurisdiction." *Id.* at 380, 382.

89 *Id.* at 386.

90 *Id.* at 387.

91 *Id.* at 389.

92 *Id.* at 390.

93 *Id.* at 395.

94 *Id.* at 405–07.

decision."[95] In the Court's 1958 decision *Cooper v. Aaron*, the Court found that *Marbury* "declared the basic principle that the federal judiciary is supreme on the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[96] Thus, the Supreme Court made *Marbury* its yellow sun, from which it derived superior governmental powers.

B. Tempering the Super-Powers of the Supreme Court: Stare Decisis

In comic book language: The Supreme Court is super powerful.[97] And outside of explicit limitations in the Constitution, the Court is restrained only by a non-binding legal doctrine: *stare decisis*, which is defined as "the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation."[98] Nothing in the Constitution requires the Court to follow its own precedent. However, in a country devoted to property rights, "[i]t should hardly be surprising that a Court that devoted its attention to cases involving property rights would maintain a relatively stable body of precedent . . . ."[99] Furthermore, "[i]n general terms, adherence to precedent advances the notion of a 'rule of law.' The 'rule of law' refers to the concept that judicial decisions are predicated on an established duty to apply the law both evenly and consistently to all that come before the bench."[100] While the Constitution does not require adherence to *stare decisis*, some of the country's founders considered the importance of precedent. For example, Alexander Hamilton wrote in Federalist No. 78 that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . ."[101] Furthermore, writing in his diary, John Adams expounded that "every possible Case being thus preserved in Writing, and settled in a Precedent,

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95 *Id.* at 409; *see, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958).

96 *Cooper*, 358 U.S. at 18.

97 Kimberly Wehle, *The Supreme Court Just Keeps Deciding It Should Be Even More Powerful*, THE ATL. (Mar. 13, 2023), https://www.theatlantic.com/ideas/archive/2023/03/supreme-court-decisions-conservative-justices-dobbs/673347/ ("By its own maneuvering, the modern Supreme Court has made itself the most powerful branch of government. Superior to Congress. Superior to the president. Superior to the states. Superior to precedent, procedure, and norms. In effect, superior to the people.").

98 *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

99 Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 650 (1999).

100 William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey, Dickerson *and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 59 (2002).

101 THE FEDERALIST NO. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

leaves nothing, or but little to the arbitrary Will or uninformed Reason of Prince or Judge."[102]

In 1989, three years before the Supreme Court decided *Casey*, retired Justice Lewis F. Powell, Jr., spoke on the importance of *stare decisis* and explained that it "enhances the stability in the law. This is especially important in cases involving property rights and commercial transactions. Even in the area of personal rights, [*stare decisis*] is necessary to have a predictable set of rules on which citizens may rely in shaping their behavior."[103] But Powell contended that "the most important and familiar argument for [*stare decisis*] is one of public legitimacy."[104] Powell argued that in order to garner the public's respect, as well as the respect of the other branches of government, Americans must know

> that the Court is not composed of unelected judges free to write their policy views into law. Rather, the Court is a body vested with the duty to exercise the *judicial power* prescribed by the Constitution. An important aspect of this is the respect that the Court shows for its own previous opinion.[105]

Ultimately, Powell concluded that *stare decisis* is "essential to the rule of law."[106] In their dissent in *Dobbs*, Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan called *stare decisis* "a foundation stone of the rule of law."[107] Other Courts in other decisions explained that "[*s*]*tare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision. This is particularly true in constitutional cases because in such cases correction through legislative action is practically impossible."[108] So, when the Supreme Court granted certiorari for *Dobbs* in 2022, it possessed all of the power to overturn the right to an abortion unless it chose to follow *stare decisis*.

C. From Casey *to* Dobbs*: The Choice of Power over Restraint*

As explained in the Introduction, in 1992 a conservative majority on the Supreme Court, powerful because of raw numbers and actual judicial/political power, faced a Constitutional question involving abortion rights. Like Superman after discovering the bottle containing the last remnants of Kryptonian civilization, a conservative Court

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102 JOHN ADAMS, NOV. 15, 1760, *reprinted in* THE ADAMS PAPERS: DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 167, 167 (1961).

103 Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286 (1989).

104 *Id.*

105 *Id.* at 286–87.

106 *Id.* at 289.

107 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2319 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting).

108 Payne v. Tennessee, 501 U.S. 808, 828 (1991) (quotations and citations omitted).

with ire for *Roe* had the opportunity to choose personal emotion and politics, destroying precedent. However, the *Casey* Court chose restraint.[109]

In *Casey*, the Court first examined the multiple instances *Roe* had been upheld, concluding that even if the central holding in *Roe* was reached in error, that error would only address the issue of fetal protection, not "the recognition afforded by the Constitution to the woman's liberty."[110] After concluding that there has been no change to *Roe*'s factual basis that would render it obsolete, the *Casey* Court held "the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it."[111]

The Court next justified upholding *Roe* despite several Justices' personal opposition to abortion by linking the importance of consistency and "making legally principled decisions."[112] The Court went further, explaining, "[t]he promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete."[113] Equating precedent to a promise of discretion, the Court held "[a] willing breach of [precedent] would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that."[114] Thus, the Court established what Justice Kavanaugh described in his nomination hearings as "precedent on precedent."[115]

In the decades following *Casey*, the conservatives on the Roberts Court began to slowly chip away at Justice Kavanaugh's theory of "precedent on precedent" and the strong commitment to *stare decisis* exhibited by the conservatives in the *Casey* majority. In the three decades that followed *Casey*, a new conservative majority of the

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109 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992), *overruled by Dobbs*, 142 S. Ct. 2228 (2022).

110 *Id.* at 858.

111 *Id.* at 860–61.

112 *Id.* at 866–68.

113 *Id.* at 868.

114 *Id.*

115 Adam Liptak, *The Threat to* Roe v. Wade *in the Case of the Missing Precedent*, N.Y. TIMES (Sept. 17, 2018), https://www.nytimes.com/2018/09/17/us/politics/kavanaugh-abortion-precedent.html. *But see* Michael Gentithes, *Janus-Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 87–90 (2020). Furthermore, it is worth noting that, although *Casey* upheld the right to an abortion by scrapping the trimester framework for an "undue burden" standard, the Court paved the way for more abortion restrictions, so those personally opposed to abortion were still able to allow States to limit abortions. *Casey*, 505 U.S. at 873 ("It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such a profound and lasting meaning. This, too, we find consistent with *Roe's* central premise, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.").

Court began to chip away at the "rock" of *stare decisis*.[116] Much the way the Court established its Constitutional supremacy in *Marbury*, the Roberts Court's conservative majority paved its way in precedents with new considerations for when the Court could ignore *stare decisis*.

Setting up the overturning of *Roe*, in 2018 Justice Alito wrote the majority opinion in *Janus v. AFSCME*, which overturned a forty-one-year-old labor law precedent.[117] Justice Alito's opinion in *Janus* outlined five factors when considering overruling precedent: (1) the quality of the precedent's reasoning; (2) the workability of the rule it established; (3) its consistency with other related decisions; (4) developments since the decision was handed down; and (5) reliance on the decision.[118] Following *Janus*, but before *Dobbs*, scholars warned that a "weaker version of *stare decisis*" would

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[116] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2348 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting). In a line of cases starting with *Pearson v. Callahan*, the Court added considerations of age and the quality of the reasoning behind cases when determining whether a precedent should be overturned. In *Pearson*, the Court overturned an eight-year qualified immunity precedent because it was "a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." Pearson v. Callahan, 555 U.S. 223, 233 (2009). Next, in *Montejo v. Louisiana*, the Court went even further by overturning a twenty-year-old precedent, arguing for the first time in the Court's history that the quality of a decision's reasoning dictates whether *stare decisis* applies: "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." Montejo v. Louisiana, 566 U.S. 788, 792–93 (2009). Finally, the Court in *Citizens United v. FEC* cited both *Montejo* and *Pearson* to overturn another twenty-year-old precedent regarding campaign finance laws and freedom of speech under the First Amendment. Citizens United v. FEC, 558 U.S. 310, 362–63 (2010). In *Citizens United*, the Court focused primarily on the quality of the reasoning as the primary consideration of the *stare decisis* analysis while giving added credence to the idea that younger precedents are entitled to less deference by virtue of their age. *Id.*

[117] Janus v. AFSCME, 138 S. Ct. 2448 (2018), *overruling* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[118] *Id.* at 2448, 2478–79. Justice Alito redefined how the factors considered when potentially overturning precedent were applied specifically to reach a desired outcome. Justice Alito declared *Abood* unworkable because the rule was "impossible to draw with precision." *Id.* at 2448, 2478–86. However, a decision's workability is typically measured by whether it is logically inapplicable "even by those who agree with the substance of the original opinion." Mary Ziegler, *Taming Unworkability Doctrine: Rethinking Stare Decisis*, 50 ARIZ. ST. L.J. 1215, 1254 (2018). When examining developments since the precedent was made, Alito cited his own previous opinion and declared that time had proven *Abood*'s central "empirical assumption" was fundamentally wrong. *Janus*, 138 S. Ct. at 2483 (quoting Harris v. Quinn, 573 U.S. 616, 638 (2014)). Next, Justice Alito concluded that previous decisions, including his own, suggested *Abood* was so substantively incorrect that it could not establish reasonable reliance, and relevant parties should be on notice that the precedent would likely be overruled. *Id.* at 2484–85. *Janus* also twisted the prevailing notion of age by suggesting older precedents should receive less precedential weight, noting the "unconstitutional extractions" of "many billions of dollars" could not "be allowed to continue indefinitely." *Id.* at 2486. Thus, in addition to a younger precedent being afforded less deference because of its age following the reasoning in *Pearson* and *Montejo*, a long-standing precedent is also entitled to less deference. *Id.* at 2484–86.

likely lead to overturning "precedents on precedents."[119] The Court's decision to focus on "[p]oor reasoning provide[d] an ever-present justification for overturning decisions."[120]

Those scholars were right. In 2022, *Dobbs* represented a culmination of a decades-long effort to weaken judicial restraint. Unlike the coalition of Justices in *Casey*, who chose restraint over ideology, Alito chose power and ideology. The Court radically changed between 2018 and 2022; with the addition of Justice Gorsuch, who replaced Justice Scalia; Justice Kavanaugh, who replaced Justice Kennedy; and Justice Coney-Barret, who replaced Justice Bader-Ginsburg.[121] In his *Dobbs* decision, Alito wrote:

> *Stare decisis*, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.
>
> It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.[122]

Notably, Alito separated the concept of *stare decisis* from the Constitution, explaining that overturning *Roe* would be to "heed the Constitution"; whereas, to uphold precedent would require that the Court follow the "doctrine" of *stare decisis* and not the Constitution—which *Casey*, in the majority's estimation, was not based on.[123] Thus, with a conservative supermajority on the Court, Justice Alito overturned *Roe*, molding *stare decisis* into a sword to attack precedent, rather than a shield to protect it.[124] In other words, the Court in *Dobbs* redefined restraint in ways that

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119 Gentithes, *supra* note 115, at 83, 87–90 (2020).

120 *Id.* at 88.

121 *See Dobbs*, 142 S. Ct. at 2335 (Breyer, Sotomayor, & Kagan, JJ., dissenting) ("The majority has overruled *Roe* and *Casey* for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.").

122 *Id.* at 2228, 2243.

123 *Id.* at 2272, 2243.

124 *See* N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2117, 2156 (2022) (holding a New York State gun regulation violated the Second Amendment and overturning a precedent that had been held since 1911); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2411, 2420, 2433 (2022) (finding a school district had violated the Free Exercise Clause of the First Amendment by firing a high school coach for praying midfield after games overturning a precedent it implemented in 1971). Therefore, in sum, over the course of three business days the Court jettisoned more than 200 years of law. Len Niehoff, *Unprecedented Precedent and Original Originalism: How the Supreme Court's Decision in* Dobbs *Threatens Privacy and*

rendered *stare decisis* to mean nothing more than upholding and relying only on precedents that the majority endorsed.[125] With *Dobbs*, and the decades of cases since *Casey* that altered and redefined *stare decisis*, the Supreme Court became an unbridled Superman—all might and few limits for how to use that power.

V. MAPPING THE SOURCE AND THE TARGET—SUPERMAN AND THE SUPREME COURT

Bruce Wayne, otherwise known as Batman, inhabits the same comic book universe as Superman. Batman, a skeptic by nature who prepares for all outcomes with researched and detailed contingency plans, studies all superheroes—a group he refers to as metahumans.[126] In particular, Batman studies the various powers and strengths these metahumans possess to plan for scenarios where that power is used for ill.[127] In his notes on Superman, Batman writes:

> While I would certainly do things differently if I had his power set, Clark is living proof that power doesn't always corrupt . . . . [Nonetheless, e]very precaution needs to be taken to ensure that there's a way to stop him if the need arises. Even Clark understands the necessity of this contingency, which is all the more reason to respect him.[128]

The same cannot be said for the Supreme Court.

I am under no illusion that this Article presents a solution for a truly monumental problem—an ends-based Supreme Court on a highway of reasoning that lacks lanes and guardrails. "When the Supreme Court rules on a constitutional issue, that judgment is virtually final; its decisions can be altered only by the rarely used procedure of constitutional amendment or by a new ruling of the Court. However, when the Court interprets a statute, new legislative action can be taken."[129] In *Dobbs*, the Court ruled on a constitutional issue;[130] thus, without a constitutional amendment

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Free Speech Rights, AM. BAR ASS'N (June 9, 2023), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-summer/unprecedented-precedent-and-original-originalism/.

125 Gentithes, *supra* note 115, at 88–89 ("Such a conception of stare decisis would be unable to settle disputes independent of the Justices' views about the substantive correctness of a decision or the proper method to achieve substantively correct results.").

126 Justin Epps, *Batman Admits Only ONE Thing Keeps Him on the Justice League*, SCREEN RANT (Jan. 6, 2023), https://screenrant.com/batman-justice-league-survival-weapons-metahumans/.

127 *See generally* S.D. PERRY & MATTHEW K. MANNING, ANATOMY OF A METAHUMAN (2018).

128 *Id.* at 29.

129 SUPREME COURT OF THE UNITED STATES, *The Court and Constitutional Interpretation*, https://www.supremecourt.gov/about/constitutional.aspx (last visited Nov. 6, 2023).

130 *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

creating the right to an abortion, we are unlikely to ever see a national right to an abortion, again. Nothing I write in this Article can have any impact on what has been taken from women and anyone who can become pregnant.

However, I do passionately believe that a citizenry with more tools for understanding our federal judiciary and the rule of law can be the safeguard that *stare decisis* used to be. One of those tools, I propose, is the use of analogy to help non-lawyers process and understand vital concepts like *stare decisis*. Perhaps if citizens understood more about the Court in the decades leading up to *Dobbs*, and had resisted more—consciously voting for politicians who appointed Justices who respected *stare decisis*— even with a conservative majority, *Dobbs* might have been avoidable.[131]

So, with all these symbols, facts, and law in mind, I leave the reader with a final source to apply to our target. I encourage anyone who reads this Article to share these ideas, this analogy.

In 2021, DC Comics launched the newest iteration of Superman, with Superman's openly queer son, Jon, taking the mantle of the world's most powerful superhero.[132] Not unlike the newest Justices on the Supreme Court, Jon is a new Superman dealing with his new position and power for the first time, taking the place of his father while Clark Kent has business to attend to on other planets.[133] Early in the series, a giant sea creature appears off the coast of Metropolis.[134] The creature, the size of a city block, appears to be ancient, as if it has come from the sea floor.[135] As citizens flee the boardwalk and military planes circle the creature, Superman flies to the creature's side, insisting that just because the creature was different did not mean it was a monster. Rather than assuage the frantic citizens and reactionary military, Superman follows the trail of disturbed ocean sediment to the bottom of the sea.[136] The creature left the sea floor, which had become a dead zone with deoxygenated water, suffocating slowly.[137] The dilemma before Superman? How to turn the creature around, away from the coast and the people.[138]

Before Superman can enact a plan to safely move the creature without hurting the land, the people, or the creature, a band of other super-powered people arrive, shooting

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131 If the Court derives its legitimacy and power not just from the Constitution but from the People, then an informed and educated citizenry has the opportunity to impact the Court's composition through their votes. *See* Anthony Fowler & Michele Margolis, *The Political Consequences of Uninformed Voters*, SCIENCEDIRECT (June 2014), https://www.sciencedirect.com/science/article/abs/pii/S0261379413001522.

132 TOM TAYLOR, *Truth, Justice, and a Better World*, *in* 1 SUPERMAN: SON OF KAL-EL (2021).

133 *See id.*

134 TOM TAYLOR, *The Rising: Part I*, *in* 7 SUPERMAN: SON OF KAL-EL 1, 11 (2022).

135 *Id.* at 13, 15.

136 *Id.* at 11–14.

137 *Id.* at 15.

138 *Id*. at 16.

and attacking the creature.[139] When Superman asks what they are doing, a representative of the group responds: "What you apparently won't. Dealing with a threat."[140] The group continues its attack against the creature, angering it, causing the creature to shift its enormous weight, causing waves to turn into a tsunami threatening the entire city of Metropolis.[141]

The city flooded, rapids traveling around skyscrapers and overtop people.[142] But Superman being Superman, rather than create more chaos, saves who he can and refuses to attack the creature.[143] One of the angry members of the band who attacked the creature says to Superman: "You can end this in a heartbeat. You're *Superman*. You can fly straight through its *brain*."[144] The power and force of Superman flying through the creature's brain would obviously be like a "needle trying to push against an *elephant*. [Superman would] go straight through [its brain]."[145] Then another superhero chimes in: "You think *Superman* can fly through a living being's brain? I think you missed the point of *Superman*."[146] Instead of killing the creature, Superman chooses another path. Using the lasers that shoot from his eyes, he carves out a massive piece of the ocean floor, and using his super strength, he carries it from the bottom of the ocean to the surface.[147] He uses a piece of the sea floor to gently push the creature away from the surface.[148] At least one person drowned in the streets of Metropolis as a result of Superman's choice to use restraint.[149]

Superman could have killed the creature. He could have used any of his powers to end its life. In doing so, who knows what the consequences might have been. Maybe the creature would have flailed in the ocean as it died, causing the same tsunami brought about after the group attacked the creature in the first place. Nonetheless, Superman followed his form of *stare decisis*—he restrained himself from exercising unfettered power, as he always does.

Some claim that in their initial creation, Siegel and Shuster created a character so powerful that "the Man of Steel's greatest strength is his greatest weakness, since the character is effectively too powerful to tell new stories - and his writers have all but

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139 *Id.* at 19–20.

140 *Id.* at 19.

141 TOM TAYLOR, *The Rising: Part II*, *in* 8 SUPERMAN: SON OF KAL-EL 5, 7 (2022).

142 *Id.* at 10.

143 *Id.* at 13.

144 *Id.*

145 *Id.* at 14.

146 *Id.* at 13 (emphasis in original).

147 *Id.* at 15.

148 *Id.*

149 *Id.* at 17.

admitted it."[150] Disagreements over the quality of stories and character aside, this inability to "tell new stories" makes Superman predictable, and his predictability makes him the perfect analogy for the importance of *stare decisis*. "Writers unfortunately aren't quite sure how to challenge Superman without removing his powers or his morality. But how he uses his morality to control his powers is a fundamental aspect of the character."[151]

In the source story here, of Superman and the sea creature, the most powerful superhero in the world must choose—use all of my power and kill this creature or find an alternate solution. "Jon's true strength is his willingness to hold back, and it makes him one of DC's best young superheroes."[152] Jon takes his father's restraint "a step further by fully embracing pacifism as an ideal worth striving for."[153] In fact, Jon "does everything he can to not get physical. Multiple stories focus on him protecting lives and the environment beyond punching enemies, highlighting his true strength."[154] Jon "chooses to look at the world as something breakable and precious, not to be melded and molded by his hands alone."[155] And "[b]y being something truly peaceful, Jon shows that strength can be found in restraint."[156]

VI. CONCLUSION

The world is, in fact, breakable. In the year since *Dobbs*, women across the country have died, given forced births, and changed their future life plans because they no longer could legally be as free as they were before June 2022.[157] Other minority

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150 Joshua Isaak, *Even Superman Writers Agree He's 'Too Powerful' For Good Stories*, SCREEN RANT (Mar. 19, 2022), https://screenrant.com/superman-writers-too-powerful-good-stories-dc-comics/.

151 *Id.*

152 Brandon Zachary, *DC's Most Powerful Superman is Also the Most Peaceful—and it Works*, CBR (Apr. 25, 2023), https://www.cbr.com/superman-jon-kent-powerful-peaceful-dc/.

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *See Human Rights Crisis: Abortion in the United States After* Dobbs, HUM. RTS. WATCH (Apr. 18, 2023), https://www.hrw.org/node/384623/printable/print; *see also* Marissa Ditkowsky, *Disabled People Face Renewed Threats to Autonomy After* Dobbs *Decision*, National Partnership for Women & Families (July 18, 2022) https://nationalpartnership.org/disabled-people-face-renewed-threats-to-autonomy-after-dobbs-decision/; John Hanna, *After Supreme Court abortion Decision, Some Fear Rollback of LGBTQ and Other Rights*, PBS NEWSHOUR (June 24, 2022), https://www.pbs.org/newshour/politics/after-supreme-court-abortion-decision-some-fear-rollback-of-lgbtq-and-other-rights.

groups have lived in fear of a Court that has openly acknowledged the limits on power shift when the opportunity for conservative social change presents itself.[158]

In Superman, America has an analog to what the Supreme Court can be. Just because Superman could kill the creature in the waters outside Metropolis does not mean that he should, even if that is the outcome he emotionally desires. Just because the Court can overturn precedent does not mean that it should, especially when the precedent it overturns *grants* rights, rather than eliminates them. Ultimately, the Court and its doctrines are not unknowable. If Americans can understand that a mythical hero is the strongest being in the world and that—as the strongest being in the world—he must restrain himself to not create havoc and pain for a world that did not choose him to be their superman, then Americans can understand that an unelected body of government with lifetime appointments with the power to acknowledge or destroy rights should practice the same kind of restraint.

158 *Id.*