Rebooting the Supreme Court

Benjamin J. Priester

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Rebooting the Supreme Court

Benjamin J. Priester*

Abstract

In 2023, the United States Supreme Court faced its greatest crisis of legitimacy in nearly a century, and one of the most severe in its history. Yet the Roberts Court majority has demonstrated little recognition of the legitimacy crisis or willingness to mitigate or ameliorate it. If the Court continues on its present trajectory, thereby exacerbating its diminishing legitimacy, both demands for reform and the extent of reforms demanded can be expected to continue to increase. Coincidentally, over the same recent timeframe, several prominent media franchises similarly have suffered precipitous collapses in their public standing. In both instances, the dearth of public trust has its origin in the divergence between the actions taken by those exercising the formal authority of interpretation and the normative and empirical consensus of the broader interpretive community.

How should the wider interpretive community respond when the interpreters with power fall so far out of alignment with the community as a whole? This question has no simple answer in either context, but the juxtaposition with media franchise management suggests several important considerations in evaluating and responding to the Roberts Court’s legitimacy crisis. The difficult work must begin by carefully and accurately identifying the sources of the divergence so that an appropriately tailored and effective remedy can be implemented. As media franchises have discovered to their detriment, failure to get that first step right all but dooms subsequent remediation efforts, leaving the interpretive legitimacy crisis unresolved—if not worsened. Especially for those calling for a fundamental rebooting of the nature of judicial review in U.S. constitutional law, the comparison to media franchise management provides a cautionary tale about the likelihood of success when a reboot is attempted.

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* Associate Professor of Law, St. Thomas University Benjamin L. Crump College of Law.
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“We are not final because we are infallible, but we are infallible only because we are final.” ~ Justice Robert Jackson, referring to the U.S. Supreme Court’s power to review criminal convictions from state courts.1

“It’s fake and it’s in space. So none of that applies, really.” ~ Harrison Ford to Oscar Isaac, comparing Star Wars to real-world aviation.2

I. INTRODUCTION

In 2023, the United States Supreme Court faced its greatest crisis of legitimacy in nearly a century, and one of the most severe in its history.3 Numerous decisions over the years have been highly controversial, of course, and sustained opposition to the Court’s doctrinal path in particular subject areas has occurred repeatedly. Moments of extreme crisis are distinguished by widespread rejection of the Court’s aggregate exercise of its power of judicial review, leading to calls for fundamental transformation in the nature of the Court and its role in our constitutional order.4 In the past few years, such calls have

1. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result); see also id. (“There is no doubt that, if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed.”).
4. See Daniel Epps & Ganesh Sitaraman, How to Save the Supreme Court, 129 YALE L.J. 148, 151 (2019); Mystal supra note 3.
been frequent, sustained, and influential among legal elites and other prominent voices.⁵ Among the broader public, evidence suggests that backlash against the Court likely played a significant role in the unprecedented success of the presidential incumbent party in the November 2022 midterm elections.⁶ Yet the Court majority has shown little recognition of the legitimacy crisis, much less any indication of a willingness to mitigate or ameliorate the self-inflicted reputational damage.⁷ If the Court continues on its present trajectory, thereby exacerbating its diminishing legitimacy, both demands for reform and the extent of reforms demanded can be expected to increase further.⁸

Coincidentally, over the same timeframe several prominent media franchises similarly have suffered precipitous collapses in their public standing, as illustrated by metrics such as box office performance, merchandise sales, reviews by critics, fan engagement on social media, and news coverage of corporate affairs.⁹ Most shockingly, Lucasfilm’s *Star Wars* franchise mismanaged the rare and enviable generational opportunity to release a Sequel Trilogy with legacy characters played by returning actors, while also accomplishing the astonishing feat of releasing a *Star Wars* film that failed to make a profit.¹⁰ Although Lucasfilm has found some success with series on the Disney+ streaming service, after releasing five films in five years *Star Wars* will be absent from movie screens for at least seven years after that.¹¹ Whether Lucasfilm recognizes the extent of its reputational

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⁸ See Mystal, supra note 3.


¹¹ See, e.g., Kornhaber, supra note 10; Rick Porter, *‘Star Wars’ vs. Marvel: Which Disney+ Shows Are Most-Viewed*, HOLLYWOOD REP. (Mar. 31, 2022), https://www.hollywoodreporter.com/tv/tv-news/star-wars-vs-marvel-which-disney-shows-are-most-viewed-1235122942/. After initially planning the next *Star Wars* theatrical release for 2022, Lucasfilm delayed to 2023 due to the COVID-19 pandemic, as of June 2023 the earliest another *Star Wars* movie will release in theaters is 2026. See Pamela McClintock & Aaron Couch, *Avator 3 Pushed a Year
harm, and is willing to course-correct its franchise management, remains very much an open question.  

In both instances, the dearth of public trust has its origin in the divergence between the actions taken by those exercising the formal authority of interpretation and the normative and empirical consensus of the broader interpretive community. Notwithstanding their obvious differences, that same core dynamic operates in each context: the power of judicial review wielded by the U.S. Supreme Court and the intellectual property authority to control official *Star Wars* storytelling carried out by Lucasfilm. Both contexts involve contestable interpretations of foundational texts susceptible to competing meanings—meanings derived by individual interpreters, and among a wider interpretive community, who are deeply invested in the specific interpretive conclusions and in the broader social and emotional significance of the outcomes. Both the Court and Lucasfilm are conclusive interpreters only because they are final, not because they are inherently correct.

Some thoughtful commentators respond to such circumstances with an analysis grounded in realism, if not cynicism. *Star Wars* is fake and in space. It’s fiction; it’s all made up anyway. And, therefore, it is pointless to object to *Star Wars* storytelling decisions made by Lucasfilm. Similarly, the meaning of the Constitution is indeterminate and eminently debatable. Constitutional law is politics; it is values all the way down. And, therefore, it is fruitless to expect the justices to be constrained by an interpretive methodology or constitutional theory to reach outcomes inconsistent with their values. In the absence of an objectively provable correct meaning, a disputed text means what those with power decide that it means.

But such a conclusion is only accurate to a point—interpreters with power do not act in isolation but rather within a wider interpretive community. Power can be lost; decision-makers can be replaced. Authority can be opposed or ignored; legitimacy can erode. The reality that the Constitution or the *Star Wars* canon may lack objectively provable

16. See, e.g., id.
17. See, e.g., id. (considering and rejecting such perspectives).
19. See, e.g., id. (“The belief that anything other than those values substantially drives the decisions of these life-tenured, governmental officials is nothing more than an overly optimistic, and wholly unrealistic, and ultimately dangerous, article of faith.”)
22. See, e.g., Henry Jenkins, Fandom, Negotiation and Participatory Culture, in *A COMPANION TO MEDIA FANDOM AND FAN STUDIES* 13 (Paul Booth, ed., 2018) [hereinafter WILEY COMPANION].
correct meanings does not preclude the possibility of consensus within the interpretive community that some interpretations are superior to others—or that some interpretations must be rejected. The text itself does not compel such interpretations, but that is beside the point: the interpretive community decides the meaning of the text, not the other way around. 

When interpretation occurs within an interpretive community, the absence of certainty is not the same as anything goes.

How should the wider interpretive community respond when the interpreters with power fall so far out of alignment with the community as a whole? This question has no easy answer—and the answer might vary with context. Addressing a Supreme Court pursuing an activist agenda at odds with the American political community is a different phenomenon than media franchise mismanagement within a multi-billion-dollar global entertainment corporation. But these dilemmas share one key feature: it is impossible to fix the problem without carefully and thoroughly identifying exactly what went awry and how and why it went awry in the first place. Examining the comparisons and contrasts of the two situations can provide important insights into their respective problems and solutions.

The juxtaposition of the Supreme Court’s current legitimacy crisis and the contemporaneous management failures in _Star Wars_ and other franchises supports the conclusion that the Court’s reputational damage is self-inflicted and deserved. Part II examines the similarities between media franchise management and the Court’s power of judicial review and demonstrates how dynamics observed in media franchise interpretive communities explain the Court’s divergence from the constitutional law interpretive community. Part III considers the role of judicial review in the U.S. constitutional order as an example of enduring paratextual meaning, which carries implications from the study of media franchises and fandoms. Part IV evaluates whether the current Court’s distorted exercise of judicial review is qualitatively different from previous crises of its legitimacy, necessitating a significant and perhaps unprecedented response. At the same time, the juxtaposition with media franchise management also suggests several important cautionary considerations in responding to the Court, especially the high stakes and long odds when seeking to execute a reboot of foundational principles and enduring interpretive meanings.

**II. MEDIA FRANCHISE MANAGEMENT AND JUDICIAL REVIEW**

Interpretation is a task we undertake with many different kinds of sources: legal documents, theological scriptures, prose fiction, song lyrics, visual arts, or movies, to mention only a few. Interpretation can be an individual and personal experience; it also can be collective or communal, as in a classroom, house of worship, theater, or online forum. When we engage in interpretation as part of an interpretive community, we participate in something greater than ourselves.

Media franchise management involves a particular constellation of texts and interpreters. The core texts are one or more forms of entertainment media, such as film, television, videogames, comics, or novels. In addition to multiple entries in the core text,
a franchise frequently includes supplemental texts, such as licensed derivative works and unofficial unlicensed fanworks. The interpreters include the original creator(s) of the first text, subsequent contributors to later core texts and ancillary works, an engaged and dedicated fandom, and the general audience—all of whom, in the aggregate, comprise the interpretive community for the franchise. Intellectual property law may entitle media franchise managers to do whatever they like, but they ignore their interdependence with the wider interpretive community at their peril. Poor franchise management can produce “fantasgonism” with the fan community that undermines its future prospects, while skillful franchise management can create positive synergies that reward both the franchise and the fandom. The endeavor of media franchise management, therefore, encompasses not only the supervision of the texts and interpretations generated by official interpreters, but also oversight of the relationship between the franchise and its interpretive community.

The power of judicial review exercised by the United States Supreme Court involves a different constellation of texts and interpreters. The core text is the Constitution. In reality, the Court’s prior decisions expounding its meaning hold equal, if not preeminent, position to the literal words of the Constitution. Additionally, the Court often considers external texts, such as lower court opinions, the briefs submitted by parties and amici, and scholarly research on the relevant topic. At any given time, the interpreters in a presently pending case are comprised of the current justices, but the interpretive community of U.S. constitutional law extends well beyond the Court’s walls. It includes former justices, federal and state judges, lawyers, law professors and other academics, and the American public. The power of judicial review is wielded by the Court as an institutional entity, but its persuasive power and institutional legitimacy are determined by its reputation within the wider interpretive community. Across U.S. history, the Court has at times been held in high esteem by a consensus among elite observers or the public at large, and viewed unfavorably or negatively at other times. The endeavor of judicial review represents not only the Court’s exercise of its institutional role in the separation of powers, but also its relationship with the constitutional law interpretive community.

32. See, e.g., GRAY, supra note 30; ANNE JAMISON, FIC: WHY FANFICTION IS TAKING OVER THE WORLD (2013); THE FAN FICTION STUDIES READER (Karen Hellekson & Kristina Busse, eds., 2014).


35. See Derek Johnson, Fantasgonism: Fractions, Institutions, and Constitutive Hegemonies in Fandom, in FANDOM: IDENTITIES AND COMMUNITIES IN A MEDIATED WORLD 369 (Jonathan Gray et al., eds., 2d ed. 2017) [hereinafter FANDOM]; Derek Johnson, Fantasgonism, Franchising, and Industry Management of Fan Privilege, in THE ROUTLEDGE COMPANION TO MEDIA FANDOM 395 (Melissa A. Click & Suzanne Scott, eds., 2018) [hereinafter ROUTLEDGE COMPANION]; see also, e.g., Ivan Askwith et al., Industry/Fan Relations: A Conversation, in ROUTLEDGE COMPANION, supra note 35, at 365.

36. See generally Askwith et al., supra note 35.


40. See Priester, supra note 13, at 31.

41. See, e.g., CHEMERINSKY, supra note 3, at xxiii, 335–36; WALDMAN, supra note 7, at 269.

42. See Priester, supra note 13, at 31.
A. The Unexpected—But Notable—Similarities Between Media Franchise Management and Constitutional Interpretation in the U.S. Supreme Court

At first glance, it might seem that the franchise management of a media storytelling property on one hand, and the U.S. Supreme Court justices exercising the power of judicial review on the other, are interpretive endeavors that have little in common. Yet they share prominent features which have important ramifications for those interpreters and their task of interpretation. The underlying source material may be different, but media franchise management and constitutional interpretation in the U.S. Supreme Court operate within several of the same parameters.

First, both endeavors are serialized—they involve an ongoing and iterative evolution of meaning over time.43 Although a particular case reaching the Supreme Court might present a question of first impression on a discrete matter of constitutional meaning, much of the Court’s docket involves deliberation about the meaning and application of its own prior decisions.44 In the aggregate, the Court’s development of constitutional law is a serialized process that includes announcing, clarifying, distinguishing, overruling, and otherwise interpreting its precedent setting forth the (Court’s opinion of the) meaning of U.S. constitutional law.45

Similarly, media franchise management is a particular form of serialized storytelling.46 Some media texts are singular objects, such as James Cameron’s Titanic (1997) or Steven Spielberg’s The Fabelmans (2022), although they are not interpreted in isolation but rather in light of, for example, conceits or conventions of cinematic storytelling, relevant extrinsic materials, or the creator’s body of work.47 Even sequels do not necessarily indicate the presence of a media franchise, such as the contrast between the publicly described aspirations of Top Gun: Maverick (2022) and Avatar: The Way of Water (2022) in following upon Top Gun (1986) and Avatar (2009), respectively.48 In 2022 on television alone, streaming services carried new series in longstanding media franchises including Star Wars, Star Trek, the Marvel Cinematic Universe, Lord of the Rings, Game of Thrones, and The Karate Kid, not to mention new seasons of numerous extant series on legacy

43. Id.
44. See, e.g., Strausss, supra note 37, at 47.
45. See, e.g., STRAUSS, supra note 37; Noah Feldman, Testimony to the Presidential Commission on the Supreme Court of the United States, at 5 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf (“The Court has gained tremendous public legitimacy by its iterated, seriously undertaken activity of fulfilling a key constitutional role that the other branches of government and states frequently do not seek to occupy at all.”).
46. See Priester, supra note 13, at 31.
networks and streaming services. In each of these media franchises, the addition of new storytelling may enhance, reinforce, undermine, or re-envision the meaning of particular elements of earlier materials, or even the franchise itself.

Second, both endeavors are heavily reliant upon paratext in the establishment of dispositive meaning. The text of the Constitution provides very few instances of indisputably clear meaning—and includes numerous provisions with disputed meanings that generate vigorously contested constitutional litigation (and legal scholarship). All controversially significant U.S. constitutional law is paratext: primarily, but not exclusively, the decisions of the Supreme Court. Furthermore, the Court itself relies—and always has relied—on a variety of paratextual sources when interpreting constitutional meaning.

Even originalism, which purports to constrain the discretion available to judges in constitutional interpretation, accomplishes that objective by elevating one particular set of paratexts, those which elucidate the original meaning of the Constitution’s text, over all others. Constitutional interpretation is not merely reliant upon paratext—it usually amounts to interpretation not of the actual text, but of its associated paratexts.

Media franchises frequently encounter a similar dominance of paratext over text. The sheer amount of text may be far greater, particularly in television series running dozens or hundreds of episodes. But even then, the paratext is always substantially larger: interviews and other public statements by creators, actors, and other contributors; officially released behind-the-scenes or making-of documentaries and publications; trailers, marketing, and promotional materials; toys, merchandise, and other licensed products; videogames, books, comics, and other ancillary storytelling that expands beyond the core film or television text; and fandom paratexts including discussion and analysis, spoilers and speculation, and fanfiction and other fanworks. Inevitably, much of the dispositive meaning understood in the fan community arises not from the text, but from the paratext. Which in turn necessitates that one important feature of successful media franchise management is a careful and thoughtful understanding of this dynamic.

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51. See Priester, supra note 12; GRAY, supra note 30.

52. See Priester, supra note 12.


54. See, e.g., PHILIP BOBBITT, CONSTITUTIONAL FATE (1982); Jack M. Balkin, Arguing About the Constitution: The Topics in Constitutional Interpretation, 33 CONST. COMMENT. 145, 182–85 (2018); David E. Pozen & Adam M. Samaha, Anti-Modalities, 119 MICH. L. REV. 729, 736 (2021). In District of Columbia v. Heller, for example, both the majority opinion by Justice Scalia and the principal dissent by Justice Stevens contained extensive citations to previous judicial decisions, statutes, legal treatises, historical materials, briefs submitted to the Court by the parties and by amici, and a wide variety of secondary sources. See 554 U.S. 570 (2008).

55. See Priester, supra note 12, at 8–11; Priester, supra note 13, at 36–39, 54–59, 85.

56. See Priester, supra note 12, at 14–18.

57. Id.

58. Id.


61. Id.
Third, both endeavors feature an official interpreter who can promulgate authoritative meanings of the text and paratext. Notwithstanding Marbury v. Madison and Cooper v. Aaron, it is overly simplistic to attribute to the U.S. Supreme Court the formal power to make authoritative official pronouncements of constitutional meaning in all situations. In cases that are not justiciable, for example, the power to interpret the Constitution may be held by one or both of the elected branches. Even within the realm of litigated controversies, the Court’s power is (or ought to be) subject to various limitations on its institutional power. Despite such constraints, however, the Court functionally has wielded preeminence in authoritative official interpretation as a matter of legal and political reality for over two hundred years. Most importantly for present purposes, it is certainly true that excellent legal arguments made in lawyer’s briefs or scholarly publications—no matter how persuasive they may be—are neither official nor authoritative in creating constitutional meaning.

This feature is less complicated in media franchises, where intellectual property and related legal principles signify the franchise holder’s authority to define and delimit the franchise. A novel published as an officially licensed derivative work stands on different footing—in the eyes of the franchise and the fan community alike—from a prose fanfiction novel of equal length and skillful storytelling. A fan theory debunked by one of the creators becomes an interesting counterfactual, rather than a potentially accurate interpretation of the text. Part of franchise management consequently involves decisions about when, how, and whether to make such authoritative official pronouncements.

Fourth, in both endeavors these official interpreters are nonetheless dependent on their legitimacy within a wider interpretive community. President Andrew Jackson’s declaration that “John Marshall has made his decision, now let him enforce it!” may be apocryphal, but it represents a bolder framing of Alexander Hamilton’s admonition in Federalist 78 that the courts have power over neither the purse nor the sword. Whether the

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63. Japan Whaling Ass’n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986) (“The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”); see also, e.g., Nixon v. United States, 506 U.S. 224, 228–29 (1993); Powell, supra note 53.
65. Supra note 116.
67. See, e.g., Priester, supra note 13, at 80–85; DUFFETT, supra note 33, at 216–18; Abigail Derecho, Archontic Literature: A Definition, a History, and Several Theories of Fan Fiction, in FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET, supra note 33, at 61; Aja Romano, Canon, fanon, shipping and more: a glossary of the tricky terminology that makes up fan culture, VOX (June 7, 2016), https://www.vox.com/2016/6/7/11858680/fandom-glossary-fanfiction-explained.
69. See THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see, e.g., Barry Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U. L. REV. 333, 399–400 (1998) (“although it is true Jackson had little sympathy for the Cherokee situation, he probably did not say exactly that”); WALDMAN, supra note 7, at 279.
President or Congress, the states or lower court judges, the legal profession and legal academia, or the public at large, the decision to accept the Court’s decisions as authoritative rests with others. Objections to a particular decision or line of cases are commonplace, but a broader loss of legitimacy for the Court has occurred more than once in U.S. legal history.

In media franchise management, the intellectual property steward faces the challenge of advancing the story in new directions while maintaining the confidence of the audience and their corresponding willingness to invest additional time—and money—in the franchise. The simple fact that a paratextual derivative work or a pronouncement of franchise lore is official does not, in and of itself, guarantee that the fan community will accept it as a legitimate contribution or interpretation. For example, when fans reject later seasons (or a series finale) of a television series, they hold no power to redact it from the official corpus of franchise storytelling—but they can choose to engage in fan discussion and fanworks that repudiate, ignore, or rewrite it. They even can choose to exit the franchise entirely by no longer engaging with the official materials, or potentially departing from the fandom, as well.

Taken together, these four features identify notable commonalities between the task undertaken by stewards entrusted with management of a media franchise and the exercise of judicial review by the justices of the U.S. Supreme Court. Most significantly, the two endeavors share what might be described as an inherent institutional constraint: the ability to promulgate official interpretations of serialized paratext is not unbounded, but rather is dependent for its present and future authoritativeness upon a continuing acceptance of the legitimacy of those interpretations among the wider interpretive community. When legitimacy erodes, authority fades—and the franchise stewards, or the Court’s justices, may discover to their detriment that their pronouncements are no longer respected, much less revered. Perhaps they may find themselves ignored, or even repudiated, by those with whom their interpretive pronouncements formerly had been quite influential.

B. Interpreters and Interpretive Communities

Even when an interpreter recognizes in principle the inherent institutional constraint described in the preceding section, it is not difficult to convince oneself—incorrectly—that the interpretations actually being promulgated pose no substantial threat to legitimacy in practice. One analytical move underlying such errors is especially likely to inhibit a correct perception of the risks: a narrow framing of the pertinent interpretive

70. See, e.g., Doerfler & Moyn, supra note 5, at 1715–17; Tara Leigh Grove, The Supreme Court’s Legitimacy Dilemma, 132 Harv. L. Rev. 2240, 2245–46 (2019) (reviewing Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court (2018)); Vladeck, supra note 7, at 21, 244–46, 277–79. “[I]nstitutions perceived as legitimate have a widely accepted ability to make binding judgments for a political community; those without legitimacy find their authority contested.” James L. Gibson, Losing Legitimacy: The Challenges of the Dobbs Ruling to Conventional Legitimacy Theory, Am. J. Pol. Sci. (forthcoming 2023) (manuscript at 3); see also id. (manuscript at 2–7) (discussing institutional legitimacy theory, as applied to the U.S. Supreme Court, in political science scholarly literature). “The Court has this power because we choose to believe in its status as above and beyond politics.” Waldman, supra note 7, at 1; see also id. at 125 (“its legitimacy depended more than usual on public acquiescence”).

71. See Grove, supra note 70, at 2241.

72. Askwith et al., supra note 35.

73. See, Melissa A. Click, Introduction: Haters Gonna Hate, in ANTI-FANDOM: DISLIKE AND HATE IN THE DIGITAL AGE 1 (Melissa A. Click, ed., 2019) [hereinafter ANTI-FANDOM]; Gray, supra note 30, at 141, 144–46.

74. Id., supra note 73, at 5–12.

75. See, e.g., Rebecca Williams, “Putting the Show Out of Its Misery”: Textual Endings, Anti-Fandom, and the “Rejection Discourse”, in ANTI-FANDOM, supra note 73, at 315.
community that encompasses members supportive of the interpretation but excludes members with contrary perspectives. Whether this move is made intentionally or subconsciously, the effect is to provide the interpreter with a false sense of confidence that their interpretation will be accepted as legitimate. This problem manifests in several ways that produce similar ramifications for media franchise management and for constitutional interpretation by Supreme Court justices.

The consequence of narrowly framing the pertinent interpretive community is to reduce the range and variety of sources from whom the serial interpreters acknowledge feedback on the persuasiveness or legitimacy of their iterative interpretations. In media franchise management, this typically involves the creators focusing on praise and criticism from certain segments of the audience, but not others—for example, by acknowledging the reactions of professional film or television critics but not those of ordinary fans or viewers. In the *Star Wars* franchise, creators and contributors during the heyday of the Expanded Universe stories (roughly 1999 to 2013) interacted extensively with fans on several prominent internet forums, whose dominant participants did not reflect the reactions or priorities of significant segments of the fans purchasing those tales. During the recent era of movie releases (roughly 2015 to 2019), creators and official *Star Wars* accounts demonstrated recognition of actively participatory fans on Twitter, YouTube, and Reddit, who again may not be representative of the more casual segments of fandom, much less the general audience. On both occasions, the franchise suffered for being out of touch with the full scope of its actual fan interpretive community.

In 2022, by contrast, show-runner Tony Gilroy specifically described his ambition to ensure the Disney+ series *Andor* would welcome in, and account for the perspectives of, potential viewers who might be “*Star Wars* adjacent” or “*Star Wars* averse” rather than longtime *Star Wars* fans. Sure enough, *Andor* received consistently high acclaim not only from vocal hardcore *Star Wars* fans but also from professional critics, consumers of “prestige television” generally, and the non-fan *Star Wars* audiences Gilroy had considered.

Throughout their history, the justices of the U.S. Supreme Court similarly have been susceptible to metaphorically closing their ears to the full span of the interpretive community for American constitutional law. At times, this may reflect institutional and

83. See CHEMERINKSY, supra note 3, at 294.
professional biases toward the perspectives of the legal elites from whom most justices have arisen: judges, law professors, the Supreme Court bar and Big Law generally, and politically connected lawyers in major cities. While understandable, such narrow feedback loops can be mitigated by a conscious effort to consider additional perspectives. Sometimes, however, the justices’ narrowed framing of the constitutional law interpretive community more closely resembles the “echo chambers” or “filter bubbles” described in fan studies scholarship. The justices in the 1930s who consistently struck down New Deal legislation were not obstructionist for its own sake, but because they shared the normative values of a segment of the constitutional law interpretive community—including judges, politicians, academics, and public intellectuals—who perceived New Deal programs as another iteration of the threat posed by socialism and communism to private property and individual liberty (as they understood those concepts). Recent reporting and commentary on the current Court has raised the prospect that today’s conservative justices have narrowed their field of vision to the Federalist Society and like-minded cohorts from which they were selected and with whom they share normative values. Such insight helps to explain both the justices’ overconfidence in aggressively asserting doctrinal agendas and their apparent surprise at the extent of the political backlash to their decisions with its corresponding rapid decline in their legitimacy among the broader public.

A related situation occurs when interpreters frame the interpretive community in a manner that excludes or discounts the perspective of members of the community who value a different or wider range of extratextual information when interpreting the core text and paratext. For example, some theories of textual interpretation assert that only the canonical text itself should be interpreted—or the canonical text plus the small amount of additional paratext relating exclusively to the intentions or understandings of the text’s author at the time of its writing. But these are not the only methods of textual interpretation that might be deployed.

The experiences of various fandoms demonstrate that interpretive communities have the capability to revisit their assessment of meanings found in the core canonical text.


85. See, e.g., Carrie Lynn D. Reinhard, Fractured Fandoms: Contentious Communication in Fan Communities 16, 185–88 (2018). “In media studies, an echo chamber is a community, usually one that is online, where the members of that community all have the same interests, values, and beliefs. This group of like-minded individuals talk with one another and share information meant to reinforce those interests, values, and beliefs. Contradictory information is either not shared or is quickly dismissed.” Carrie Lynn D. Reinhard, Echo Chambers and Fandom, Playing With Research (June 9, 2017), https://playingwithresearch.com/2017/06/09/echo-chambers-and-fandom/.

86. See Chemerinsky, supra note 3, at 297; Waldman, supra note 7, at 31–32.


89. See, e.g., Gray, supra note 30, at 4–8, 23–46, 107–113 (discussing the “death of the author” and other aspects of literary interpretational theory); Cornel Sandvoss, The Death of the Reader? Literary Theory and the Study of Texts in Popular Culture, in Fandom, supra note 35, at 34.
even when no edit, revision, or amendment has occurred to that text. For years, Joss Whedon was widely (though not universally) perceived as a feminist and an ally as a storyteller, especially due to his *Buffy the Vampire Slayer* and *Firefly* franchises. Later revelations of workplace misconduct, abusive behavior, and exploitative manipulation of young women led to a reexamination of Whedon’s portrayals of female characters and their relationships, with *Angel* and *Dollhouse* taking on more dubious valence—as well as his choices for the characterization and backstory of Natasha Romanoff, a/k/a Black Widow, in *The Avengers* and *Avengers: Age of Ultron* in the Marvel Cinematic Universe. Similarly, public comments and activism by J.K. Rowling in the years after the *Harry Potter* books and films released has led to increased recognition and discussion of interpretations of her work that identify a range of tropes about gender roles, racial and ethnic groups, antisemitism, classism and social hierarchy, and other issues, leading many fans to reject their prior assessment of the franchise as supporting progressive values (or to conclude that it does so in spite of, rather than because of, Rowling’s own authorial values and intentions). In the U.S. constitutional law interpretive community, critical race theory and similar reexaminations of longstanding mainstream narratives of the past and present of American constitutional law have emerged from a marginalized position in legal academia into mainstream public discussions of what our country does, and ought to, represent. In each of these instances the texts themselves remained unchanged, but over time the aggregate interpretive community learned that different meanings could be found in them than previously acknowledged. Equally important, in each of these instances the critiques underlying the new recognition had been present within the respective interpretive communities all along; what changed was the willingness of the full interpretive community to acknowledge and incorporate the critiques of previously ignored, discounted, or marginalized voices.
In a similar way, debates in U.S. constitutional theory between originalists and non-originalists can be understood as a battle over the permissible array of paratext that properly may be considered when interpreting the meaning of the Constitution. For originalists, the meaning of a constitutional provision is fixed at the time of ratification, and the only permissible paratextual sources are those that illuminate the text’s original meaning.\textsuperscript{97} To create a new constitutional meaning, a formal Amendment to the text is required.\textsuperscript{98} Some originalists maintain that a provision can be given new applications in new factual scenarios, potentially resulting in a doctrinal outcome different from the expectations of the drafters or ratifiers, but nonetheless insist that the fixed original meaning itself has not thereby changed.\textsuperscript{99} By contrast, non-originalists reject this restricted scope of permissible paratext. They are willing to consider additional paratexts such as the accretion of precedent over time or evidence and arguments relating to the significance of historical and social developments after ratification.\textsuperscript{100} The overarching theme of the New Haven School of non-originalist constitutional theory could be described as a defense of the importance of paratext in interpreting the Constitution’s text and meaning.\textsuperscript{101} Although their scholarly work frames the idea in different ways—such as “constitutional moments” or constitutional “cycles” or an “unwritten” constitution—the ultimate point is that the meaning of the Constitution changes when its paratext changes, even if the literal text remains the same.\textsuperscript{102} Texts are not interpreted in a vacuum, but within an interpretive community—and when the community’s interpretive consensus changes, so too does its understanding of the meaning of the text and paratext.\textsuperscript{103} Importantly, the New Haven School emphasizes that the interpretive community of U.S. constitutional law is not limited to the Supreme Court and other legal elites, but also includes the Congress and the President as well as those powerful social movements that have reshaped American law and society.\textsuperscript{104} Even without a formal Amendment, the interpretation and meaning of constitutional law


\textsuperscript{100} See, e.g., STRAUSS, supra note 37, at 3–4.


\textsuperscript{102} See, e.g., 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 266–94 (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 3–31 (1998); 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014); AMAR, supra note 37, at ix–xi; see generally Jack M. Balkin, The Cycles of Constitutional Time (2020); Robert C. Post & Reva Siegel, Democratic Constitutionalism, in The Constitution in 2020 25 (Jack M. Balkin & Reva B. Siegel eds., 2009). Ackerman, for example, argues that paratexts such as legislation, precedent, and speeches from key figures can create and solidify interpretive meaning during a constitutional moment. See 2 ACKERMAN, supra note 102, at 120–85, 279–344; 3 ACKERMAN, supra note 102, at 63–104, 200–25.

\textsuperscript{103} See AMAR, supra note 37, at ix–xi.

\textsuperscript{104} See, e.g., 3 ACKERMAN, supra note 102, at 1–11; Jack M. Balkin & Reva B. Siegel, Principles, Practices, and Social Movements, 154 U. PENN. L. REV. 927, 929 (2006); Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA, 94 CAL. L. REV. 1323, 1323 (2006); Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 HARV. L. REV. 947, 951 (2002); see also FISCHKIN & FORIBATH, supra note 84, at 4; STRAUSS, supra note 37, at 115–39.
changes as the paratext seemed significant by its interpretive community changes. When justices on the Supreme Court follow an originalist methodology, refusing to consider paratextual sources unrelated to original meaning, they widen the gap between the Court and the broader, fully constituted interpretive community of U.S. constitutional law that does not share the same commitment to a restricted perspective of permissible paratext.

Interpreters sometimes reframe the interpretive community to validate their own interpretations in another way: by adopting a perspective that relates not to inputs—such as text and paratext—but rather to outputs, in the form of interpretive conclusions. By prioritizing the perspectives of those who defend the same outcomes, even if for different reasons, interpreters justify their decision to ignore or discount the perspectives who urge a contrary outcome. The Court’s 2022 decision in Dobbs, for example, can be understood as an alliance between justices applying conventional originalism and justices applying a form of due process traditionalism not constrained to purely “original” meaning. Like Parents Involved before it, in the Harvard affirmative action case, the originalist justices ignored persuasive evidence that the original meaning of the Equal Protection Clause permitted race-conscious public policies by aligning themselves with an alternative “color-blind” conception of the Fourteenth Amendment. Of course, non-originalist justices also sometimes strategically join an originalist opinion whose doctrinal outcome they support for different reasons. In situations like these, justices in the majority use this kind of reframing to minimize their assessment of the degree of conflict between their views and the views of the interpretive community as a whole.

Here again media franchise management provides high-profile examples. In the Star Wars franchise, the release of The Last Jedi (2017) proved divisive in the fandom interpretive community as a sequel to The Force Awakens (2015). Rather than acknowledge the warning signs—such as notably weaker box office endurance than comparable releases, and a precipitous decline in merchandise sales—both official and fandom interpreters instead hurried to reframe the response. When professional critics and amateur cinephiles praised writer-director Rian Johnson’s film and story, negative reactions from Star Wars fandom could be dismissed as failure to appreciate the cinematic qualities of the movie. When hate grifters monetizing their angry YouTube rants railed

105. 3 ACKERMAN, supra note 102, at 3.
111. See, e.g., Michelle Buchman, A Complete Guide to the Cinematic References and Inspirations of Star Wars: The Last Jedi, NERDIST (Mar. 29, 2018, 11:57 AM), https://nerdist.com/article/star-wars-the-last-jedi-cinematic-references-guide-akira-kurosawa-jurassic-park-twin-peaks/ (Director Rian Johnson packs so many film references into Star Wars: The Last Jedi that it demands multiple viewings to spot them all. ... Not only does a
against the prominence of women and people of color in the film, it provided cover to ignore other criticisms of Johnson—including those which argued that he had diminished the trilogy’s female lead (Rey) and female legacy character (Leia) to bolster the white male antagonist (Kylo Ren), undermined the portrayals of both men of color protagonists (Finn and Poe), and relied upon numerous harmful tropes in his portrayals of female characters in general (Rey, Leia, Holdo, and Rose). When fan interpreters proffered arguments that the movie’s portrayal of Luke Skywalker was defensible based on inferences from the Original Trilogy, official interpreters could continue to believe they had successfully set aside two decades of previous Star Wars paratext elaborating the meaning of the franchise. The point is not whether these various framings of the reaction to The Last Jedi can be reconciled or synthesized into a coherent interpretation of the film and its place in the franchise, but rather that the franchise managers could justify discounting negative feedback because they could find ready affirmation from the movie’s defenders. Only when The Rise of Skywalker (2019) suffered an even worse reception did a broader recognition emerge that franchise mismanagement by Lucasfilm had plagued all three films of the Sequel Trilogy.

Roughly simultaneously, the DC Comics movie franchise experienced a similar struggle to balance competing perspectives in its interpretive community about a creator’s controversial contributions. After disappointing box office and mixed reactions to Batman v Superman: Dawn of Justice (2016), Warner Brothers leadership transferred control of its sequel from Zack Snyder to Joss Whedon, who carried out extensive script rewrites and scene reshoots to generate a film quite different in tone and style from Snyder’s


But Justice League (2017) only fared worse. Fans of Snyder organized and advocated on social media—later shown to have occurred with instigation from Snyder himself, and with the use of bots and other inauthentic accounts—for the studio to finish and “Release the Snyder Cut,” insisting that Snyder’s vision was the popular one and would restore audience confidence in the franchise. At least in part to boost subscriptions for its (ultimately short-lived) HBO Max streaming service, Warner Brothers relented and allowed Snyder to spend an additional $70 million to complete Zack Snyder’s Justice League (2021). Despite the social media trending hashtags and related attention, however, the Snyder Cut failed to attain either the additional subscribers or viewership numbers that Warner Brothers had targeted; in the meantime, two DC films unaffiliated with Snyder’s work, Joker (2019) and The Batman (2022), each outperformed all of Snyder’s movies at the box office. Following a corporate merger, Warner Brothers announced, in 2022, an official rebooting of its DC Comics film slate, with future releases to be developed under the leadership of filmmaker James Gunn and studio executive Peter Safran. In response, Snyder fans immediately demanded they be fired. The dilemma faced by Warner Brothers had no easy solution, but the path taken demonstrated poor franchise management: First, overreacting to general audience response, then overestimating the representativeness of a vocal online sub-community of fandom, and finally throwing up their hands to start over. A more measured and deliberate approach, cognizant of both the quantitative and qualitative aspects of various segments of the fandom and

117. See e.g., Breznican, supra note 116.
123. See, e.g., Sean O’Connell, Zack Snyder Fans Are Already Trying to Get DC to Change Leadership, and They've Got 'Fire James Gunn' Trending on Twitter, CINEMABLEND (Jan. 5, 2023), https://www.cinemab- ledge.com/superheroes/zack-snyder-fans-are-already-trying-to-get-dc-to-change-leadership-and-theyve-got- fire-james-gunn-trending-on-twitter; see also Adam B. Vary & Brent Lang, From 'Batgirl' Fallout to Rebooting 'Superman': All the Landmines Facing the Next DC Chief, VARIETY (Aug. 29, 2022), https://vari- ety.com/2022/film/news/batgirl- Ezra-miller-superman-next-dc-head-warner-bros-discovery-1235353666/ (‘Privately, studio insiders have lamented that ‘Zack Snyder’s Justice League’ never should’ve happened. [It] only further entrenched the vocal and extremely online ‘Snyderverse’ fanbase in opposition to the leadership at the studio in general and at DC in particular.’).
124. See, e.g., O’Connell, supra note 123.
audience, at least would have avoided multiple precipitous swings of the franchise pendulum across only a few years’ time.

The examples of Johnson and Snyder, and the media franchise management controversies they respectively created, demonstrate a final lesson from fandom interpretive communities that is relevant to the role of Supreme Court justices engaged in constitutional interpretation and judicial review: the importance of personal disposition, rather than methodological commitments, as the principal factor in constraining the exercise of interpretive authority. In the metaphorical sandbox, some people are inclined to play well with others and take care to respect the interests of the past, present, and future users of the shared space; but not everyone acts this way. Instead, some people are inclined to implement their own will, whether by dominating the sandbox so that everyone must play along or by retreating to play alone in a corner without cooperative interaction. When the sandbox is an interpretive community, it makes a great deal of difference whether authority figures have the former or the latter disposition.

One task of media franchise management is to hire contributors who will advance, rather than hinder, the overall success of the franchise. Johnson, for example, prepared for his Star Wars movie with a “film camp” that screened a half-dozen classic films (released between 1939 and 1964) for inspiration. In doing so, he followed the model of George Lucas, who has cited numerous classic films as inspiration for characters, story elements, scenes, or visual depictions across his six Star Wars movies. Snyder would speak of his superhero films not only in reference to their DC Comics source material, but also legendary heroes, mythic themes, epic stakes, and battles between the gods in ancient legends. Both men also cited as motivation their longstanding fandom, forged in childhood, for the respective franchises. But in terms of disposition, they both acted with a singular focus to carry out

125. See Priester, supra note 13, at 68–73, 85, 87–90, 93–99; see also Tsai & Ziegler, supra note 7 (manuscript at 7) (on file with the UC Davis Law School Library) (“We define a movement judge by reference to a decisionmaker’s apparent sense of role, their proximity to particular movements, and their rhetorical strategies rather than according to interpretive methodology or outcomes alone.”).

126. See, e.g., Dan Brooks, “Nothing Like This Has Ever Been Done Before”: A Roundtable Discussion with the Creators of Star Wars: The High Republic, STARWARS.COM (Feb. 27, 2020), https://www.starwars.com/news/star-wars-the-high-republic-interview (“Daniel José Older: Usually when you’re doing a Star Wars thing, you’re going to have in your head, ‘Okay, I’m kind of playing in someone else’s sandbox.’ There’s a certain respect and there’s an understanding that there’s stuff you’re not going to get to do that you want to do.”); Laura Hudson, For Some Lucky Fans, Writing A Star Wars Novel Is A Dream Come True, AUDIBLE BLOG (May 4, 2017), https://www.audible.com/blog/for-some-lucky-fans-writing-a-star-wars-novel-is-a-dream-come-true (“Since the Star Wars universe is shared, not just by the fans who enjoy it, but by many writers and artists working on films, novels, and comics, there’s a certain amount of care required for playing in the communal sandbox. As Freed puts it, you can’t break the toys so that no one else can play with them.”).


their own personal vision for the franchise, rather than collaborating in synergy with the interpretive community as a whole. By contrast, the Marvel Cinematic Universe films are produced with guardrails from franchise stewards, including hiring writers and directors with a disposition to collaborate. See generally TARA BENNETT, THE STORY OF MARVEL STUDIOS: THE MAKING OF THE MARVEL CINEMATIC UNIVERSE 1, 7–8 (2021); see generally JOANNA ROBINSON, DAVE GONZALEZ & GAVIN EDWARDS, MCU: THE REIGN OF MARVEL STUDIOS (2023) [hereinafter MCU]. At times, this results in a parting of ways with Marvel Studios, usually citing “creative differences” over the film, by directors or actors who prefer more autonomy in their creative process. See, e.g., MCU, supra note 132, at 96–110, 132, 278–86, 414–15; Kristopher Tapley, Playback: Edgar Wright on ‘Baby Driver.’ ‘Music and Walking Away From ‘Ant-Man’,’ VARIETY (June 22, 2017), https://variety.com/2017/film/news/playback-podcast-edgar-wright-baby-driver-1202467275/ (“I wanted to make a Marvel movie but I don’t think they really wanted to make an Edgar Wright movie.”); Samantha Bergeson, Edgar Wright Was Too Much of an ‘Auteur’ for Marvel’s ‘Ant-Man,’ Says Co-Writer Joe Cornish, INDIEWIRE (Jan. 30, 2023), https://www.indiewire.com/features/general/ant-man-edgar-wright-left-mcu-didnt-want-auteur-1234805015/ (“They had this universe where the movies had to integrate. Edgar is an auteur. Edgar Wright makes Edgar Wright movies. In the end, that’s why it didn’t happen, I guess.”).

Likewise, it is disposition, not methodology, that distinguishes the U.S. Supreme Court justices who primarily participate collaboratively in an interpretive community from those who principally pursue their personal vision for constitutional law. Liberal and conservative justices alike can undertake to use constitutional interpretation and judicial review to assertively implement public policy positions they favor or obstruct policies they disfavor. Non-originalist justices can interpret the Constitution deliberately, collaboratively, and incrementally—or not. Originalist justices, like originalist academics, may confidently declare the obvious correctness of their overall approach and its particular doctrinal results—or recognize the limitations of their perspective and express a willingness to reach compromises. The dispositive factor in the degree of constraint demonstrated by an individual justice is not interpretive methodology, but whether that justice will seek to impose an agenda or to decide each case with judicial humility.


134. Priester, supra note 133.

135. TANG, supra note 7, at 6–7.

136. See WALDMAN, supra note 7, at 6–7; See generally TANG, supra note 7, at 6–7; Josh Chafetz, The New Judicial Power Grab, 67 ST. LOUIS U. L. REV. 635, 640, 653 (2023); Mark A. Lemley, The Imperial Supreme Court, 136 HARV. L. REV. 97, 97, 113–14 (2022); Allen C. Sumrall & Beau J. Baumann, Clarifying Judicial Aggrandizement 24, 24 (2023). (["We advance a taxonomy for understanding the different aspects of contemporary judicial power by untangling several concepts: judicial supremacy, juristocracy, judicial activism, and judicial self-aggrandizement."])".)


Taken together, these lessons provide important analytical insights into the role of U.S. Supreme Court justices exercising the power of judicial review within the broader interpretive community for American constitutional law—but also identify one significant difference from media franchise management and fandom interpreters. When the official and authoritative serialized interpreters of text and paratext face a decline in their legitimacy among the wider interpretive community, or they seek to ward off the problem before it arises, the solution may be straightforward to explain, but challenging to implement.\textsuperscript{139} In media franchise management, the situation provides the solution: a hierarchy of authority within the franchise that is consistently exercised to manage and constrain subordinate interpreters and, if necessary, fire and replace them.\textsuperscript{140} For example, original creator Suzanne Collins possessed sufficient leverage from the success of her novels to ensure substantial creative control over the film adaptations of \textit{The Hunger Games} series.\textsuperscript{141} In the Marvel Cinematic Universe, both aggregate long-term planning and discrete films and streaming series are subject to oversight from a storytelling parliament and individuals in leadership at Marvel Studios, most prominently Kevin Feige.\textsuperscript{142} Even Oscar-winning or -nominated filmmakers must participate collaboratively, and some potential contributors part ways with the studio over “creative differences” that cannot be reconciled.\textsuperscript{143} Franchise managers can make mistakes too,\textsuperscript{144} of course, but their oversight can prevent the franchise’s official interpretations—or its relationship with, and internal framing of, its interpretive community—from being overtaken by the preferences, whims, agendas, or egos of individual interpreters.

With the U.S. Supreme Court, on the other hand, no comparable solution is readily available. The Court sits at the top of the judicial hierarchy, reporting to no superior authority.\textsuperscript{145} Life tenure and impeachment dramatically limit the ability of Congress, the

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139. See \textit{e.g.}, \textit{Vary & Lang}, supra note 123.
140. See \textit{id.} The difficulties for Lucasfilm and Warner Brothers’ DC Comics franchise, see \textit{supra} notes 47–51, 75–91, and accompanying text, can be attributed in significant part to the lack of such oversight authority and a corresponding delegation of essentially unbridled interpretive authority to individual filmmakers, for better or for worse.
144. See \textit{Mer Eclarinal}, supra note 128.
145. \textit{About the Court, SUPREME COURT OF THE UNITED STATES} (last visited Mar. 21, 2024), https://www.su-premecourt.gov/about/about.aspx.
\end{flushright}
President, and the voting public to discharge justices from their duties. For over 200 years, our system has counted on the justices to manage themselves as they exercise the power of judicial review within the interpretive community of American constitutional law. Importantly, however, the President and Senate, and thereby indirectly the voting public, have complete control over nominations and confirmations of justices. Just like a media franchise, hiring decisions matter.

One other option is available: ending the endeavor entirely. For some media franchises, the decision is involuntary. Driven by a decline in ticket sales or viewership, licensing revenue, and related metrics of profitability, it may no longer be worthwhile or feasible to invest in further serialized official interpretations of the text and paratext (although the fan community may continue its engagement and production of paratext long afterward). Or the creators, actors, or other participants may simply feel the time is right to end one story and move on to another. With judicial review by the U.S. Supreme Court, on the other hand, a voluntary relinquishment of the entire endeavor seems highly unlikely. But an involuntary diminution of interpretive authority could be forced upon the justices through external legal measures—and calls for such action have increased in frequency in recent years. To determine whether such a departure from historical practice is justified and appropriate in today’s America, we must evaluate whether the Court’s longstanding paratextual power of judicial review is irredeemably flawed, or whether the current crisis of legitimacy faced by the Supreme Court can (and should) be addressed by significant, but ultimately less drastic, remedies.

III. JUDICIAL REVIEW IS OUR PARATEXT

The notion of unelected, life-tenured judges wielding veto power over the decisions of elected officials—or worse, routinely acting as a “super-legislature” to block or decree public policy decisions—is in substantial tension with the Constitution’s

146. See U.S. Const., art. III, § 1 (providing life tenure by specifying that justices “shall hold their offices during good behaviour”); see also id. art. I, §§ 2–3 (providing for impeachment by House of Representatives and removal from office upon conviction by two-thirds supermajority vote in Senate).

147. See Marbury v. Madison, 5 U.S. 137 (1803). But not without exception: “During Reconstruction, Congress repeatedly changed the size of the Supreme Court, produced one of the notable examples of jurisdiction-stripping in American history, and enacted landmark statutes that greatly expanded the jurisdiction of the federal courts. Indeed, almost all of the court reforms being debated today have historical antecedents in the Reconstruction period.” David H. Gans, Court Reform and the Promise of Justice: Lessons from Reconstruction, 27 Lewis & Clark L. Rev. 825, 829 (2023).


151. See, e.g., Epps & Sitaraman, supra note 5; Mystil, supra note 3.
fundamental premise of representative democracy grounded in popular sovereignty.\textsuperscript{153} Consequently, the practice of judicial review should be, and has been, examined on an ongoing basis to evaluate whether the constitutional interpretation it reflects should be reconsidered.\textsuperscript{154} Does the Constitution require judicial review? If not, can we not get rid of it pretty easily? Even if we could do that, should we? Perhaps most importantly, has our constitutional order become distorted or corrupted to an intolerable extent—or is the root cause of the Court’s legitimacy crisis inherent in the nature of judicial review itself?

The U.S. Supreme Court has exercised the power of judicial review for over 200 years.\textsuperscript{155} Over time, through path dependency and other forces, the Court came to exercise that power with increasing frequency and scope, marked by ebbs and flows in the periods of relative stability or controversy in relation to Congress and the President, the states, legal profession elites, and the public.\textsuperscript{156} By the turn of the twenty-first century—perhaps inauspiciously marked by the Court’s decision in \textit{Bush v. Gore} at year’s end\textsuperscript{157}—the American political community could fairly be characterized as incorporating conventional wisdom that this aspect of the federal separation of powers and principles of federalism is simply a part of how our constitutional system operates.\textsuperscript{158} That conventional wisdom was not inevitable and is not entirely accurate beyond a high level of generality, but it exists all the same. For better or worse, in U.S. constitutional law, judicial review is our paratext.

Certainly, nothing compelled judicial review to develop as it did.\textsuperscript{159} The text of the Constitution necessitates a Supreme Court, authorizes the creation of lower federal courts, and empowers such courts to exercise enumerated components of “[t]he judicial power” of the federal government.\textsuperscript{160} The text, however, does not expressly authorize judicial review of the constitutionality of federal or state legislation (or other acts of governmental power).\textsuperscript{161} As an historical matter, judicial review existed within the states at the Founding, but the Framers did not contemplate or defend a federal judiciary practice that resembles the Court’s later implementation of it.\textsuperscript{162} Moreover, only after the

\begin{footnotes}
\item[153] See, e.g., Bowie, supra note 20, at 1–2, 12–24; Eric J. Segall, \textit{Foreword II: To Reform the Court, We Have to Recognize It Isn’t One}, \textit{Wis. L. Rev.} 461–65, 470–71 (forthcoming); Epps & Sitaraman, supra note 5, at 166–67.
\item[154] Bowie, supra note 20, at 1–24.
\item[155] Segall, supra note 107, at 463.
\item[156] See, e.g., \textit{BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION}, 1, 4–7 (2009); Feldman, supra note 45, at 2 (“Given the fact that the current constitutional system is the product of a complex process of evolution, in which the different elements of the system have [e]volved in dynamic relation to each other, radically altering the capacities of one crucial organ in the system creates a meaningful risk of overall systemic failure.”).
\item[158] See, e.g., Epps & Sitaraman, supra note 5, at 167 (“Whatever its merits, judicial review has been a longstanding and integral part of the American constitutional system. No one can know what would happen if it disappeared tomorrow.”).
\item[159] Like the path-dependent evolution of the interpretation of the scope of the judicial power under Article III, the extent interpretation of the implications of the enumeration of congressional powers in Article I is not the only available meaning of the text. See Richard Primus, \textit{Reframing Article I, Section 8, 89 FORDHAM L. REV. 2003, 2006 (2021)} (The 1787 Constitutional “Convention’s enumeration of congressional powers makes more sense as primarily a means of empowering Congress than as primarily a means of limiting Congress—though of course, it had aspects of both.”); see also David S. Schwartz, \textit{A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism}, 59 \textit{ARIZ. L. REV. 573, 581–84 (2017)}; Richard Primus, \textit{The Limits of Enumeration}, 124 \textit{YALE L.J. 576, 578–79, 642 (2014)}.
\item[160] See U.S. CONST., art. III, § 1.
\item[161] Id.
\end{footnotes}
Rebooting the Supreme Court

Reconstruction Amendments could the Court widely review cases arising from the states. Political philosophy and related theoretical methodologies support the conclusion that judicial review is not inherently necessary for a just government, for which further support can be found in the comparative constitutional law and practice of contemporary peer nations. How and why, then, did we end up with our system of judicial review?

First, to the extent judicial review functions as a form of common law decision-making, it finds support in our legal tradition dating back centuries. While statutes and administrative regulations have become dominant in many fields of law today, the incremental development of judicial precedent has longstanding legitimacy as a method for making, clarifying, and modifying governing legal principles. Across a wide variety of doctrinal areas, judges generating and applying precedent today are undertaking a task they have done all along and still do all the time. Common law constitutional interpretation is subject to normative challenges among constitutional theorists—particularly from originalists, who view it as a form of (impermissible) living constitutionalism—but as a descriptive matter it accurately explains the actual practice of the Supreme Court and the wider interpretive community. Judicial review carried out through common law constitutional interpretation involves interpreters who create and interpret an important source of paratext that elaborates the meaning of the Constitution’s text. Our doctrines of constitutional law include the power of judicial review not because the text says so, but because the interpretive community accepted this paratextual elaboration of its meaning.

Second, the Court’s own doctrine developed and implemented a paratextual justification for countermajoritarian judicial review. Simply characterizing judicial review as protecting individual rights from governmental interference proved insufficient—after all, decisions such as *Dred Scott* and *Lochner* could be (and were) justified on that basis. Beginning with the famous *Carolene Products* Footnote Four, the Court maintained that more rigorous judicial review of the constitutionality of actions by the elected branches or the states is justified in cases involving one or more of the following three situations: enumerated constitutional rights, distortions of the political process, or “prejudice against discrete and insular minorities” who accordingly may be unable to find redress in the political process. Enslavers, bakery owners, and manufacturers of filled milk may be dissatisfied with the interests of criminal defendants, religious minorities, and other politically or socially marginalized groups or communities. Likewise, majoritarian

163. See, e.g., WALDMAN, supra note 7, at 31.
165. See, e.g., STRAUSS, supra note 37, at 33–49.
167. See, e.g., STRAUSS, supra note 37, at 7–49, 99–114; SEGALL, supra note 18, at 175; Balkin, supra note 54, at 146; H. JEFFERSON POWELL, THE PRACTICE OF AMERICAN CONSTITUTIONAL LAW 1, 1–2 (2022).
170. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); see WALDMAN, supra note 7, at 48–49.
171. See LEVITSKY & ZIBLATT, supra note 164, at 137–40. But see Bowie, supra note 20, at 10 (“Yet if you look at the history of the judicial review of federal legislation, the principal “minority” most often protected by the Court is the wealthy.”); id. at 11 (“When these false negatives are compared with the false positives of cases like *Dred Scott* and *Shelby County*, it becomes pretty evident that the Court is, at best, unreliable at protecting politically marginalized groups.”).
politics has incentives to entrench incumbents and undercut the ability of political opponents and political dissidents to succeed in or influence the electoral process, either by direct manipulation of the right to vote and electoral processes, or by inhibiting freedoms of speech, press, and assembly. In a large body of precedent spanning eighty-five years, the Court has maintained that countermajoritarian judicial review is most strongly justified when the majority would have the weakest claim to insisting on having its way.

Third, as the Constitution and constitutional law have become more democratic, principles that restrain unbridled exercise of political power have remained important across the interpretive community. The President leads the executive branch, but the Civil Service Act of 1883 rejected patronage and cronyism and initiated the enduring aspiration for professional and nonpartisan bureaucracy in many (but not all) aspects of governmental action. The Seventeenth Amendment, combined with the Fifteenth and Nineteenth, made the federal Congress substantially more representative—but in the twentieth century Congress also increasingly delegated the details of public policy to an administrative state staffed by experts and specialists. At the same time, Congress relies upon the Administrative Procedure Act and related legislation to promote thoughtful and deliberative policymaking and constrain the opportunity for precipitous or politically expedient action. The Court has for many years recognized the significance of these developments at the federal level, providing formal or informal deference to the policies and regulations adopted by federal agencies. Political controversies over public policy certainly have

174. Compare Chemerinsky, supra note 3, at 289–91 (defending importance of countermajoritarian features in a constitutional democracy), with Bowie, supra note 28, at 8–14 (arguing that the Court’s exercise of judicial review historically has primarily benefitted the powerful and is inconsistent with democratic equality).
178. See, e.g., Kagan, supra note 175, at 2372–80 (discussing Chevron deference); see also Waldman, supra note 7, at 225 (noting that during the Reagan Administration “Chevron [defence] ... was seen as a way to protect conservative regulators from interference by federal courts, which then were stacked with liberal judges.”). Recently, however, the Roberts Court has called into question the continuing vitality of Chevron deference while also limiting Congress’ delegation of power to agencies under an emerging “major questions doctrine.” See Waldman, supra note 7, at 226–27, 229–32; Daniel Deacon & Leah Litman, The New Major Questions Doctrine, 109 Va. L. Rev. 1009, 1019–21, 1035–36 (2023); see, e.g., Biden v. Nebraska, 143 S. Ct. 2355, 2374–75 (2023). An optimally timed Tenth Circuit opinion harshly criticizing Chevron deference may have played a role in the selection of then-Judge Gorsuch as President Trump’s first Supreme Court nominee. See David A. Kaplan, THE MOST DANGEROUS BRANCH: INSIDE THE SUPREME COURT IN THE AGE OF TRUMP 41–44 (paperback edition 2019); Biskupic, supra note 7, at 28–29, 320–21. This doctrinal area is another example of the Roberts Court’s lack of alignment with longstanding paratext accepted by the constitutional law interpretive community. See Lemley, supra note 92, at 99–102; Kate Shaw, This Quiet Blockbuster at the Supreme Court Could Affect All Americans, N.Y. Times (Nov. 22, 2023), https://www.nytimes.com/2023/11/22/opinion/blockbuster-supreme-court-administrative.html.
not disappeared: Consider opposition to, for example, mandatory seat belts in cars, climate change mitigation, and measures to counteract the COVID-19 pandemic.\(^{179}\) But even when it is susceptible to regulatory capture, an administrative state based on expertise often (but not always) changes the terms of debate from simply which position has more votes to which position is more likely to be successful in serving the particular public policy objective at issue.\(^{180}\) For similar reasons, judicial review is less inconsistent with representative democracy to the extent it serves as a check on the potential excesses of political power—that is, when it functions as a form of professional expert decision-making rather than as crass political action.\(^{181}\)

Fourth, the paratext of American constitutional law similarly reflects heightened recognition of the danger that majoritarian democracy can pose in a diverse and pluralistic society.\(^{182}\) Elaborating a concern of the Framers and incorporating the transformations wrought by Reconstruction, the interpretive community has learned from history, experience, and academic inquiry.\(^{183}\) It is easy to cite examples of judicial overreach that impeded important legislative policies, such as prohibiting child labor or requiring a minimum wage, regulating campaign finance or expanding the availability of health insurance.\(^{184}\) But both normatively and empirically, our constitutional history reveals that legislatures and executives have caused considerably more aggregate injustice—in which, much of the time, the judiciary admittedly has been complicit.\(^{185}\) Nonetheless, it was not judicial review, for example, that imposed slavery, segregation, or the \textit{de jure} subordination of women, nor that ordered the internment of American citizens in the 1940s or indefinite detentions without trial at Guantanamo Bay in the 2000s.\(^{186}\) For federal policy, the elected branches cannot be reliably expected to safeguard the rights or interests of racial


\(^{180}\) See Anya Bernstein & Cristina Rodriguez, The Accountable Bureaucrat, 132 Yale L.J. 1600, 1615–17, 1663–66 (2023); Kitrosser, supra note 175, at 1542–45. Similar debates have played out regarding the use of juries in the criminal justice system, with the normative significance of citizen involvement balanced against preferences for expertise and accuracy in adjudication. See, e.g., Carissa Byrne Hessick, Punishment Without Trial: Why Plea Bargaining Is a Bad Deal 26–29 (2021) (“At the same time that some in the Progressive movement were criticizing jurors, the criminal justice system was becoming more professional.”).

\(^{181}\) See also David S. Law, A Theory of Judicial Power and Judicial Review, 97 Geo. L.J. 723, 723 (2009).

\(^{182}\) See Bowie, supra note 20, at 9.

\(^{183}\) Compare Bowie, supra note 20, at 9 (“Indeed, once \textit{Brown} and other cases enforcing federal law are removed from the equation, it is not clear whether there exists a strong historical counterargument demonstrating why judicial review is necessary.”), with Feldman, supra note 45, at 2 (“Taken as a whole, the Supreme Court’s modern power has made it into an integral, irreplaceable part of our constitutional system. Whatever alternative designs might once have existed in theory, sapping that power would, in practice, leave the current system with no institutional actor capable of protecting the rule of law, fundamental rights, or the structure of democracy and motivated to do so.”) (emphasis in original).


\(^{185}\) Bowie, supra note 20, at 10. “There is no question that Congress has adopted horrific legislation over the past 250 years. But there are few examples of the Supreme Court intervening in a timely fashion, as widespread popular prejudices against minorities are likely to be shared by a significant proportion of judges as well.”; see also, e.g., Chemerinsky, supra note 3, at 1–5, 10–11, 15–17, 21–24, 35–38, 54–89, 192–97, 331–33, 336–37; Waldman, supra note 7, at 20, 27–28, 31–36, 49.

or religious minorities or politically unpopular groups.187 Most importantly, many localities in the United States are far less pluralistic than the nation as a whole, reducing the electoral incentives to respond to minority interests there188—while the federal Congress too may lack the electoral incentives, or a majority of votes in each chamber, to enact protections responsive to the varying and sometimes diffuse arrays of pluralism throughout the country.189 At both the federal and state levels, it may be neither empirically feasible nor normatively defensible to require a dispositive number of citizens to act as single-issue voters to enforce legislative responsiveness and accountability on any particular issue of public policy.190 Congress occasionally legislates specifically to override state or local practices contrary to a nationwide consensus, but reining in outlier injustices typically has fallen to litigation and the courts.191 In the absence of a consistent pluralistic governing majority in Congress, judicial review serves as a shield against tyranny of the local majority.192

Notwithstanding the paratext undergirding judicial review, persistent doubts endure about the Court’s exercise of the power.193 The Court has continued to exercise judicial review for at least some unenumerated rights; it has pursued expansive and controversial interpretations of some enumerated rights, as well.194 Similarly, the Court has a mixed record in defending pluralism and in fulfilling its role as judicial rather than policy arbiter.195 To the extent the Court is acting outside the incremental serialized deliberative process of traditional common law constitutional interpretation, its exercise of judicial review must find legitimacy elsewhere. For these and related reasons, prominent scholars and justices have long advocated for versions of Thayerism—the principle that the Court


189. See, e.g., TANG, supra note 7, at 246 (noting that “today’s marginalized groups frequently lack the political clout to lobby state or federal lawmakers successfully, particularly in this moment of legislative dysfunction”); William N. Eskridge, Jr., Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics, 114 YALE L.J. 1279, 1294 (2005) (“The Constitution suggests principles for managing such dangers, what I call ‘pluralism-facilitating’ judicial review.”); Nicholas O. Stephanopoulos, The Sweep of the Electoral Power, 36 CONST. COMMENT. 1, 85 (2021) (arguing that “from a theoretical perspective, Congress is less apt to threaten democratic values than are the states or the courts [and] historically, most congressional electoral regulation has actually promoted democratic values”).

190. See Neal Devins, The Judicial Safeguards of Federalism, 99 NW. U. L. REV. 131, 133 (2004) (“Voters, even those who understand and value federalism, may nevertheless have strong overriding preferences about one or more substantive issues. Single issue voters are a classic and extreme example of this phenomenon. These voters are willing to subordinate secondary preferences (including federalism) in order to secure their first order preferences (typically the environment, civil rights, gun control, or abortion.”); Samuel Issacharoff & Richard H. Pildes, Majoritarianism and Minoritarianism in the Law of Democracy (NYU SCH. OF L., Paper No. 23–19 2022) (manuscript at 7) (“We now face the challenge of precluding extreme or factional minoritarian interests from capturing and controlling government”).

191. See, e.g., MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS 82–83, 90–92 (2000); WALDMAN, supra note 7, at 53 (noting that Brown and other desegregation decisions were supported by “broad majorities in the rest of the country,” excluding the South, in opinion polling at the time); Bowie, supra note 20, at 8 (“What Brown actually illustrates is how federal legislation has successfully expanded American democracy when the Supreme Court has stopped interfering with Congress.”); Justin Driver, Constitutional Outliers, 81 U. CHI. L. REV. 929, 937–39 (2014). A recent example is Ramos v. Louisiana, 140 S. Ct. 1390, 1394–95, 1397 (2020), in which the Court, not Congress, prohibited two states from continuing to enter criminal convictions by non-unanimous juries.

192. See Driver, supra note 191, at 956–57, 960.


195. See, e.g., CHEMERINSKY, supra note 20, at 24–27; Bowie, supra note 20, at 18–19; TANG, supra note 7, at 237–38.
should not render a holding of unconstitutionality except upon a convincing showing of its necessity— as the only suitable mode of judicial review decision-making in light of our constitutional system and its history. That perspective has much to commend it and is worth serious consideration. Nonetheless, the paratext of our constitutional law interpretive community remains to the contrary—and such paratextual meanings are not easily abrogated. But that is not the same thing as impossible.

The experiences of media franchise management and fandom interpretive communities demonstrate that it is difficult, but possible, to set aside and move beyond detrimental paratext. Whether overtly acknowledged as such by franchise stewards or undertaken with a formal pretext of ongoing continuity, a “reboot” seeks to compartmentalize interpretive developments that have undermined the franchise’s relationship with its fandom and then to begin again with a fresh opportunity for textual and paratextual interpretation. Some reboots are more successful than others, and reboots do not invariably improve the franchise’s situation in the long run. In many circumstances it would be wiser to course-correct than start over—but sometimes, when the goodwill is lost and the bridges are burned, the clean slate is the only viable path forward. In U.S. constitutional law, perhaps the time has come to reboot judicial review.

IV. REPAIR OR REBOOT? THE FUTURE(S) OF JUDICIAL REVIEW

Controversy is inevitable when official authoritative interpreters engage in serialized paratextual interpretation of a foundational text and its extant paratexts. Some fans will find fault with each new iteration in a media franchise; some Americans will be
disappointed or outraged by the decision in a prominent Supreme Court case. \(^\text{202}\) The maxim “you can’t please everyone” holds true in many areas of life, including these. Simplicistically eliding disagreement, however, would be a serious mistake in both media franchise management and constitutional interpretation. Who is objecting to the authoritative interpretation? On what basis? How representative, or not, is that perspective compared to the overall interpretive community? Does it concern a relatively discrete interpretive matter or a conflict of fundamental principles? Ultimately, it is imperative to distinguish between ordinary controversy over contestable interpretations on the one hand, and a demonstrable and genuine crisis of interpretive legitimacy on the other—because the appropriate remedy for the official interpreters needs to be very different depending on which situation actually exists in the particular context. Misdiagnosing the nature of the dispute creates a serious risk of exacerbating the divergence between the respective perspectives held by the official interpreters and the interpretive community.

Operating within the parameters of twenty-first century capitalism in the entertainment industry, media franchise management has the advantage of directly measurable metrics to assess the quantitative scope of the reactions of fans, audience, shareholders, and the rest of the interpretive community. \(^\text{203}\) Empirical evidence includes data such as box office revenue, television or streaming viewership, sales of merchandise, consumer surveys, and social media engagement. \(^\text{204}\) Social media praise for Zack Snyder’s work could not override the reality of a substantially less favorable box office and viewership response among the entire audience community; likewise, social media negativity toward Brie Larson and Captain Marvel could be readily discounted once the film grossed over a billion dollars worldwide. \(^\text{205}\) Fan studies scholarship similarly incorporates both quantitative and qualitative research on the interactions between fans, audience, and franchises. \(^\text{206}\) Corporate executives charged with responsibility for media franchise management may not always make wise decisions when seeking to preserve interpretive legitimacy, but they have plenty of relevant information at their disposal when they decide how (or whether) to manage damaging divergences between the official authoritative interpretations of the franchise stewards and the varied perspectives and values of the fandom interpretive community. \(^\text{207}\)

Within the interpretive community for U.S. constitutional law, by contrast, an assessment of the legitimacy of the Supreme Court’s exercise of its interpretive authority—especially in the aggregate over many years, rather than a discrete dispute at a particular time—invariably is grounded primarily in normative claims. \(^\text{208}\) Nationally visible


\(^\text{203}\) See, e.g., Philip M. Napoli & Allie Kosterich, Measuring Fandom: Social TV Analytics and the Integration of Fandom into Television Audience Measurement, in FANDOM, supra note 35, at 402–03.

\(^\text{204}\) See, e.g., id. at 402–16.

\(^\text{205}\) See, e.g., MCU, supra note 132, at 322–35; Alex Abad-Santos, How Captain Marvel and Brie Larson beat the internet’s sexist trolls, VOX (Mar. 11, 2019), https://www.vox.com/culture/2019/3/8/18254584/captain-marvel-boycott-controversy; Julia Alexander, Zack Snyder’s Justice League Remains Overshadowed by Its Social Media Campaign, VERGE (Mar. 17, 2021), https://www.theverge.com/22334362/zack-snyder-justice-league-fandom-release-cut-star-wars-twitter; Mendelson, supra note 121; SALTER & STANFILL, supra note 33, at 162 (noting that Captain Marvel was “the target of such intense review-bombing prior to its release—a coordinated campaign to post negative reviews by people who had not seen the film—that review aggregator Rotten Tomatoes changed its reviewing rules in response”).

\(^\text{206}\) See, e.g., DUFFETT, supra note 33, at 53–83; WILEY COMPANION, supra note 22, at 15–24; ROUTLEDGE COMPANION, supra note 35, at 365–80.

\(^\text{207}\) See Alexander, supra note 205; Napoli & Kosterich, supra note 203, at 402–16.

\(^\text{208}\) See, e.g., CHEMERINSKY, supra note 3, at 6 (“I realize, of course, that there needs to a rubric for assessing whether the Court is succeeding or failing.”), Gibson, supra note 70, manuscript at 2 (noting “legitimacy is a normative concept”).
political controversy surrounding the Court is not a new phenomenon, dating back to the Jefferson Administration.209 But parsing out the natures of these disputes is more complicated. Some Court decisions are highly salient at one time but later fade into obscurity, especially when the divergence between the Court and the interpretive (and political) community is quickly resolved against the Court’s ruling, such as the late nineteenth century doctrinal disputes implicated in the Legal Tender Cases.210 Other decisions, such as Dred Scott, even become overtly entangled in the contestation of a subsequent presidential election.211 More commonly, the divergence between the Court and the interpretive community extends over a span of time, such as the anti-regulatory doctrines of the Lochner era persisting until multiple nationwide electoral triumphs for President Roosevelt’s agenda ultimately compelled the Court to switch doctrines and uphold New Deal legislation.212

The Warren Court, too, faced significant vocal opposition from within the interpretive community across several decades213—though perhaps it is important to identify similarities and differences among, for example, the Southern Manifesto and massive resistance to desegregation, the backlash to separationist rulings under the Establishment Clause, and the condemnation of enhanced constitutional protections for criminal defendants.214 Undeniably, the Court’s exercise of judicial review in a manner that is out of alignment with the perspectives and values of the interpretive community has been a recurring problem in our constitutional history.215 The present moment again raises foundational questions about our constitutional future.

## A. The Roberts Court’s Legitimacy Crisis

The United States Supreme Court is no stranger to political controversy, public protest, partisan resentment, or academic critique.216 Its decisions on prominent issues of

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210. See Segall, supra note 107, at 469–70 (discussing context of Court’s rapid doctrinal reversal regarding the constitutionality of paper money); Moyn & Stern, supra note 196 (manuscript at 30–39) (discussing doctrinal controversy’s influence on Thayer); Hepburn v. Griswold, 75 U.S. 603, 606–07, 626 (1869); Legal Tender Cases, 79 U.S. 457, 529, 552–53 (1870). The controversy over the constitutionality of a federal income tax spanned two decades until the Court was definitively repudiated by a constitutional amendment. See Pollock v. Farmer’s Loan & Tr. Co., 158 U.S. 601, 618, 637 (1895); U.S. CONST. amend. XVI (1913).

211. See WALDMAN, supra note 7, at 20–25. Typically, however, a presidential candidate campaigns in opposition to the Court’s decisions more generally. See, e.g., WALDMAN, supra note 7, at 64 (Nixon’s “law and order” platform); Laura Kalman, Court Packing as History and Memory, Testimony to the Presidential Commission on the Supreme Court of the United States 4–7, 22–25 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Kalman-06.25.2021.pdf (FDR and the New Deal legislative agenda).


213. See, e.g., WALDMAN, supra note 7, at 63–64; 3 ACKERMAN, supra note 102, at 311–40.


215. See, e.g., WALDMAN, supra note 7, at 40–48.

216. See, e.g., WALDMAN, supra note 7, at 9–100.
individual rights and governmental power unsurprisingly have deep political, social, and emotional impact upon the political community as a whole, as well as the lives of individual Americans. Yet for nearly a century—since its surrender on the doctrinal constitutionality of the New Deal—the Court has not been confronted with a politically prominent majoritarian challenge to its fundamental legitimacy within the U.S. constitutional law interpretive community. Only recently, in the later years of the Roberts Court, has that situation changed.

In terms of intensity and public visibility, the breadth and depth of today’s legitimacy crisis is difficult to deny. The contestation over the Court and its role extends far beyond inside baseball among law professors and legal elites to encompass a widely shared topic of discussion in politics, news coverage, and social media, among other venues. President Biden convened a bipartisan Presidential Commission specifically directed to evaluating proposals for Court reform, which ultimately produced a 288-page report. Members of Congress have not merely criticized the Court and questioned its legitimacy, but have introduced legislation to expand the Court to thirteen justices, effective immediately. Political candidates for federal, state, and local offices have campaigned—and fundraised—specifically in opposition to an illegitimate Court. Law professors have

217. See, e.g., CHEMERINSKY, supra note 6.
218. See, e.g., Gibson, supra note 70 (manuscript at 39) (“the prospects today of a court crisis of the magnitude of the 1930s seem increasingly possible if not likely”). Originalism has been for many years a prominent challenge to longstanding orthodoxies in the constitutional law interpretive community. See supra notes 30–32 and accompanying text; ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 10–11 (2022). Originalism as a constitutional theory initially was justified principally by its proffered role in constraining judges in exercising the power of judicial review, not as a direct alteration of the Court’s institutional power as such. See, e.g., SEGALL, supra note 18, at 56–65; CHEMERINSKY, WORSE THAN NOTHING, supra note 218, at 19–23, 25–39. The Court’s self-identified originalist justices, however, have turned out not to be constrained in their willingness to wield that power. See, e.g., SEGALL, supra note 18, at 122–40; CHEMERINSKY, WORSE THAN NOTHING, supra note 218, at 139–65, 186–207. While they have been undeniably influential, originalists do not comprise a majority of the interpretive community and have not succeeded in superseding the interpretive norms and practices of the community as a whole. See POWELL, supra note 167, at 13–16; CHEMERINSKY, WORSE THAN NOTHING, supra note 218, at ix–xii, 23–24, 166–85.
219. See, e.g., CHEMERINSKY, supra note 6, at xi–xiii; WALDMAN, supra note 7, at 101-270.
223. See, e.g., Sahil Kapur, Democrats Introduce Bill to Expand Supreme Court From 9 to 13 Justices, NBC NEWS (Apr 14, 2021), https://www.nbcnews.com/politics/supreme-court/democrats-introduce-bill-expand-supreme-court-9-13-justices-nl264132; Pema Levy, The Movement to Expand the Supreme Court Is Growing, MOTHER JONES (May 26, 2023), https://www.motherjones.com/politics/2023/05/the-movement-to-expand-the-supreme-court-is-growing/ (“Last week, Democratic lawmakers gathered on the steps of Supreme Court to reintroduce the Judiciary Act, a bill to add four justices to the nation’s highest court[.]”).
written numerous scholarly articles describing the legitimacy crisis and advocating for various reforms, and have joined other academics and legal commentators in making the issues and proposals accessible to the general public.\textsuperscript{225} Most importantly, this contestation has not been merely a transient reaction to a decision in a particular case or an ephemeral stirring of consternation following a disputed confirmation hearing.\textsuperscript{226} Rather, it has been prominent, persistent, and highly salient in the constitutional law interpretive community over a span of several years.\textsuperscript{227} All of this had made a significant impact throughout the interpretive community—including the general public at large, with opinion polling indicating a precipitous collapse in confidence in the Supreme Court compared to quite consistent levels of relatively favorable views during the preceding decades.\textsuperscript{228} Finally, those in the interpretive community who oppose proposals for institutional reform nonetheless acknowledge the visibility and impact of the legitimacy crisis in their efforts to refute or discount it.\textsuperscript{229}

Nonetheless, the Court to date has shown no indication that it will change course to ameliorate its diminished legitimacy, thereby presumably creating a situation in which any repair or remediation to resolve the crisis must come from an external, rather than internal, source.\textsuperscript{230} To many in the interpretive community, the possibility of a dramatic reordering of the Court’s role as the official authoritative paratextual constitutional interpreter no longer seems farfetched, much less impossible, though it may not (yet?) seem likely, either.\textsuperscript{231}

For a range of scholars and commentators, this development is long overdue. Some have grounded their objections to the Court’s exercise of judicial review in political theory, deeming the countermajoritarian protection of individual rights an insufficient basis to override the decision of majoritarian institutions in a representative government.\textsuperscript{232}


\textsuperscript{226} See Brenan, supra note 220.


\textsuperscript{230} See Waldman, supra note 7, at 260–66; see also supra note 7.

\textsuperscript{231} See, e.g., Chemerinsky, supra note 3, at xxiii; Epps & Sitaraman, supra note 5, at 150–51, 164–66; Levy, supra note 223; Tyler Pager, \textit{Biden Faces Renewed Pressure to Embrace Supreme Court Overhaul}, WASH. POST (July 4, 2023), https://www.washingtonpost.com/politics/2023/07/04/biden-pressure-supreme-court-overhaul./.

Others have evaluated the span of U.S. constitutional history and concluded that the Court, in the aggregate, has done more harm than good to the causes of liberty, equality, and justice. 233 Professor Segall’s admonition that “the Court is not a court” arises from both the justices’ actual exercise of judicial review in practice and the structural features of the institution that produce the ability, and the incentives, for them to wield their power as political rather than judicial actors. 234 What these various perspectives share is the conclusion that the Court as an institution is constitutionally incapable of implementing judicial review in a manner that deserves legitimacy from the constitutional law interpretive community. The only remedy for a fundamentally broken institution is to reconstitute its nature and recalibrate its power such that its new existence will preclude—or at least substantially inhibit—a resurgence of those same flaws in the future.

As discussed in Part III, however, a longstanding consensus in the constitutional law interpretive community recognizes and authorizes the Court’s power of judicial review as a paratextual meaning of the Constitution defined and elaborated in the doctrines and practice of U.S. constitutional law. Accordingly, it is important to consider whether the Court’s current legitimacy crisis in fact arose from unavoidable detrimental consequences of implementing that paratextual meaning over time—or whether departures from paratext and practice instead produced that crisis.

In ongoing discussion and analysis of the Roberts Court’s legitimacy crisis, several factors are frequently mentioned as important contributing causes to the significant divergence between the Court and the interpretive community. Some of them have roots in decades-long political developments, 235 while others arise directly from the Court’s own actions and decisions. Taken together, they can be understood as vectors and influences that differentiate the composition, values, and actions of the current Roberts Court from its predecessors—and importantly, they may be distinctions not simply in degree, but in kind. If this understanding is correct, then the remedy for the Court’s legitimacy crisis does not require fundamental institutional change, but rather decisive action to revert the Court to its longstanding paratext and practice in alignment with the values and expectations of the constitutional law interpretive community.

The most prominent factor involves a set of interconnected issues related to the appointments process and the composition of the Roberts Court. Sometimes these issues are distilled into the proposition that two seats on the Court were “stolen” through an illegitimate abuse of power by a Republican Senate majority 236 —specifically, the lengthy refusal to consider the nomination of Merrick Garland following the death of Antonin Scalia,


236. COHEN, supra note 233, at 216–18; WALDMAN, supra note 7, at 91; LEVITSKY & ZIBLATT, supra note 164, at 52.
enabling the subsequent confirmation of Neil Gorsuch,237 paired with the rapid confirmation of Amy Coney Barrett following the death of Ruth Bader Ginsburg.238 These actions were derided as unprecedented in the history of nominations to the Court, unprincipled and hypocritical in their respective justifications, and—in combination with the contentious confirmation of Brett Kavanaugh239—ultimately an exercise of raw political power to deliberately manipulate the composition of the Court for partisan advantage.240 Perhaps a legitimacy crisis would have emerged from these instances standing alone, but they did not occur in isolation. Rather, they took place as the culmination of longer trends in the judicial selection process.

Nominations to the Supreme Court have never been neutral, apolitical, or non-ideological, but the conservative justices on the current Roberts Court reflect an asymmetrical polarization in federal court judicial appointments that was decades in the making.241 From President Franklin Roosevelt to President Ford, Supreme Court nominations in the aggregate naturally reflected the values of the presidential administration. For example, Roosevelt sought to ensure the justices would uphold rather than obstruct a public policy agenda with repeated electoral and legislative supermajority support, while Nixon sought to slow down or walk back some of the doctrinal developments of the Warren Court along-side a more conservative social policy agenda in the elected branches.242 Yet nominations also arose from other sources, such as political alliances or geographical considerations,
that could supersede ideology in importance.243 The Democratic appointees on the Warren Court were not always consistently the more liberal justices (Black, Frankfurter, Clark, White), nor were Republican appointees of Eisenhower (Warren, Brennan), Nixon (Blackmun), or Ford (Stevens) invariably the more conservative ones.244 Following President Reagan’s fulfillment of his campaign promise to appoint the first female justice, however, Republican presidents deliberately prioritized the ideological commitments of their nominees in an historically unprecedented manner245—and the one exception led activists and stakeholders to demand “no more Souters in the future.”246 From 2005 onward, each of the five justices appointed by Republican presidents had been thoroughly vetted to ensure proven ideological reliability, principally through gatekeeping by the Federalist Society, leading some commentators to apply the label “FedSoc Court” or “FedSoc justices” to the recently constituted conservative supermajority.247 Across an array of major issues, Republican presidents and their allies and donors have required such a commitment to ideological principles from their nominees precisely because their goal was (and is) to use the constitutional law decisions of the Court to thwart the majoritarian political process—to win at the Court on issues they could not win at the ballot box.248

This ideological asymmetry in nominations has been exacerbated by the timing of vacancies and appointments in recent decades. For the thirty-six years following Roosevelt’s landslide triumph in 1932, Democratic presidents served seven of the nine terms of office (all but Eisenhower’s); for the twenty-four years following Nixon’s win in 1968, Republican presidents served five of six terms (all but Carter’s, during which no Court

243. See WALDMAN, supra note 7, at 50, 56 (discussing political considerations behind President Eisenhower’s nominations of Earl Warren and William Brennan); Epps & Sitaraman, supra note 5, at 169 (“Even well after the rise of political parties . . . judicial ideology did not consistently track party affiliation.”).

244. See CHEMERINSKY, supra note 20, at 305; WALDMAN, supra note 7, at 57.


248. “This is an important reason why judicial entrenchment is so attractive to minoritarian interests: They can win by appealing to a handful of judges even when they lose decisively and repeatedly through the political process.” Tsai & Ziegler, supra note 247; see also ZIEGLER, supra note 241, at 51–54, 204–12; SHELDON WHITEHOUSE & JENNIFER MUELLER, THE SCHEME: HOW THE RIGHT WING USED DARK MONEY TO CAPTURE THE SUPREME COURT 33–35 (2022); “[O]nly in the twenty-first century has counter-majoritarianism taken on a partisan cast—that is, regularly benefiting one party over another in national politics.” LEVITSKY & ZHIBLATT, supra note 164, at 142–64, 169–81, 216–18, 229–43 (emphasis in original)); see also VLADIECK, supra note 7, at 18–21, 117–27, 134–39, 144–61, 189–91, 216–17, 226–27, 239–40, 246, 265–66.
vacancies arose). For the Court to generally trend from more liberal to more conservative over this time span would be expected, and consistent with the experience of U.S. constitutional history. Furthermore, in the sixty years after 1932, the party holding the presidency changed five times; in the thirty years from 1992 to 2022, the parties alternated the office another five times—despite the Democratic candidate winning the popular vote in seven of eight elections. From 1994 until 2005, the same nine justices served together on the Court, and a closely divided bench with at least one swing justice continued for more than a decade afterward. Since late 2020, however, the Roberts Court has consisted of a six-justice supermajority of Republican appointees, five of whom were nominated by presidents who took office by winning the Electoral College but not the popular vote. It has been ninety years since the composition of the Court was so far out of alignment with the political and interpretive communities.

The Court as an institution might have mitigated the impact of the foregoing factors on its interpretive legitimacy through humility and incrementalism. In addition to the presidential election results, the past three decades have seen Congressional elections producing divided government from the president’s party, opposed party leadership in the two chambers, and very narrow majorities in one or both chambers. The justices could have observed the ongoing and persistent closely divided nationwide electorate and recognized that they held no political mandate. Instead, the conservative justices of the Roberts Court—especially since 2021—have aggressively used the power of judicial review to impose the ideological agenda expected by their sponsors. An entirely predictable diminution in the Court’s interpretive legitimacy soon followed.

Furthermore, the Court has undermined its legitimacy by departing from the longstanding paratextual justifications for the power of judicial review and the corresponding understanding of the legitimate role of the Supreme Court within the interpretive community. Judicial review is supposed to guard against political process defects that inhibit the representativeness of elected institutions, yet the Court has refused to invalidate gerrymandering, voter suppression, and other laws enacted to entrench certain factions and

250. See, e.g., 3 ACKERMAN, supra note 102, at 229–287; CHEMERINSKY, supra note 20, at 121–30, 137–46, 135–56; COHEN, supra note 233, at xvi–xix, 36, 67–68, 70–78; GREENHOUSE, supra note 238, at 234; WALDMAN, supra note 7, at 53, 127.
251. See WALDMAN, supra note 7, at 2; LEVITSKY & ZIBLATT, supra note 164, at 182.
252. See CHEMERINSKY, supra note 20, at 160–61, 163; WALDMAN, supra note 7, at 97.
253. See CHEMERINSKY, supra note 20, at xi–xiii; Epps & Sitaraman, supra note 5, at 156; WALDMAN, supra note 7, at 2; see CHEMERINSKY, supra note 20, at 163 (President George W. Bush made his appointments of Chief Justice Roberts and Justice Alito during his second term, after he had won reelection with a narrow popular vote majority).
254. See TANG, supra note 7, at 107–09, 124–26, 197–98, 235–37, 245–46; see also, e.g., Greenhouse, supra note 240 (“Given the problematic circumstances of its acquisition of power, the new supermajority might have shown a little humility, or at least diffidence, before driving the Court off a cliff. Not so many years ago, the Court knew how to stop short.”); Kristin E. Hickman, The Roberts Court’s Structural Incrementalism, 136 Harv. L. Rev. F. 75, 75–76 (2022); see generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). “The idea of interpretive humility is backward-looking and forward-looking. Backward looking humility means that contemporary interpreters should recognize that earlier interpreters of the Constitution have something to teach them about its principles and purposes, even if they disagree with them. Forward looking humility is the recognition that we will be judged by later generations, often in ways we cannot yet imagine.” Balkin, supra note 54, at 166–67.
256. WALDMAN, supra note 7, at 85, 94 (discussing prior years of Roberts Court); see also, e.g., BISKUPIC, supra note 7, at 26; CHEMERINSKY, supra note 20, at xi–xiii, xxiii; TANG, supra note 7, at 14–16, 213–14.
257. CHEMERINSKY, supra note 20, at xi–xiii, xxiii.
make their ouster by the voters more difficult, especially at the state or local level.\(^{258}\) Worse, the Court has struck down efforts by the elected branches to enhance representative government.\(^{259}\) Similarly, in exercising judicial review to protect the interests of discrete and insular minorities, the Court has followed a narrow understanding of those identities it will protect,\(^{260}\) while simultaneously invalidating the efforts of the elected branches to provide or expand protections for other groups.\(^{261}\) When enforcing enumerated rights, the Court has adopted interpretations that are well outside the scope of our constitutional tradition or the contemporary consensus of the interpretive community.\(^{262}\) Lastly, the Court recently has abused its “shadow docket” procedures—intended for emergency situations and other exceptional circumstances—to issue precedential decisions on contested public policy issues without full briefing and argument.\(^{263}\) One of these dynamics alone would be problematic; taken together they indicate a Court unmoored from paratextual constraints on judicial review.

Finally, news coverage since 2022, which escalated throughout 2023, has added a further publicly salient factor into the mix: conflicts of interest, the appearance of impropriety, and ethical breaches perhaps even rising to the level of recognizable corruption.\(^{264}\) It began with reporting on Justice Thomas’ failure to recuse in a case seeking disclosure of Trump Administration records related to the January 6th insurrection, later revealed to include communications between his wife Ginni Thomas and the Chief of Staff, Mark Meadows, advocating for President Trump not to concede the election to President-Elect Biden.\(^{265}\) Her involvement with implicated individuals was substantial enough that she ultimately sat for an interview in September 2022 with the House Select Committee to Investigate the January 6th Attack on the United States Capitol, during which she stated that she still believed the election had been stolen—but insisted she had not discussed with


\(^{263}\) See VLADECK, supra note 7, at 129–259.


\(^{265}\) See supra note 288.
her husband either her own post-election activism or the litigation filed to challenge the election results. Further reporting uncovered substantial omissions from Justice Thomas’ financial disclosure reports, including years of income earned by Ginni Thomas from numerous sources—including parties with briefs, petitions, or cases before the Court—as well as lucrative gifts and beneficial financial transactions made by Harlan Crow, a billionaire Republican donor. Soon after, Justice Alito was revealed to have omitted financial benefits from a different billionaire, and to have failed to recuse himself from cases involving the individual and his business interests. Other reporters uncovered that Chief Justice Roberts had failed to accurately report his wife’s income as a legal recruiter, likewise including significant amounts from law firms with active practices before the Court, and that Justice Gorsuch had failed to disclose a similar connection regarding a real estate transaction shortly after his confirmation. This context resurfaced inquiries surrounding Justice Kavanaugh’s confirmation hearing, including the thoroughness of the FBI investigation and the full payment of significant debts. Even in the absence of direct

266. See, e.g., Summer Concepcion et al., Ginni Thomas Told Jan. 6 Committee She Still Believes the Election Was Stolen, Chair Says, NBC NEWS (Sept. 29, 2022, 9:07 AM), https://www.nbcnews.com/politics/congress/ginni-thomas-meeting-house-committee-investigating-jan-6-riot-rnc49967; see also WALDMAN, supra note 7, at 150–52.


evidence of quid pro quo corruption, these revelations further reinforced the perception that the Roberts Court is compromised and illegitimate.\textsuperscript{271}

B. Potential Remedies to Address the Crisis

The selection of the suitable remedies for an interpretive legitimacy crisis—when the actions of the official authoritative interpreters have become significantly out of alignment with the interpretive community—is dependent upon the conclusions reached about the origins and sources of the divergence.\textsuperscript{272} Numerous case studies in media franchise (mis)management confirm that incorrectly diagnosing the problem produces an inapposite remedy that does not solve it, which frequently exacerbates rather than ameliorates the divergence between the official interpreters and the pertinent fandom interpretive community.\textsuperscript{273} Addressing the Supreme Court’s legitimacy crisis likewise requires a remedy tailored to its root cause.

If one concludes that the current legitimacy crisis is a qualitatively unique moment in the Court’s history, produced by the factors outlined in the preceding section, then the appropriate remedies should be directed at repudiating the distortions to the Court’s membership and their corresponding values as well as resetting them into alignment with the overall interpretive community. Just as hiring different managers and storytellers changes the outputs of a media franchise, so too modifying the roster of the justices will conform the Court’s paratextual interpretations of constitutional law to the normative values they then hold. A legitimacy crisis determined to be attributable to personnel selection does not necessitate fundamental revision to the underlying system; the appropriate solution is one of restoration, not revolution, in the conceptual and paratextual nature of judicial review. Put simply, the remedy is to repair the interpretive divergence through the same vector by which it arose in the first place.\textsuperscript{274}

\textit{Personal Finances: Credit Card Debts, $92,000 Country-Club Fee, WASH. Post (Aug. 9, 2018, 9:40 PM); https://www.washingtonpost.com/politics/inside-brett-kavanahgs-personal-finances-credit-card-debts-and-a-92000-country-club-fee/2018/08/09/2820f9eb-8e9f-11e8-8322-b5482bf5e0f5_story.html.}


\textit{FISIKIN & FORBATH, supra note 84, at 423; CHEMERINSKY, supra note 20, at xi-xiii, xxiii.}

\textit{See supra notes 78–82, 116–123 and accompanying text; infra notes 291–311 and accompanying text. Professor Tang makes the same point about the Supreme Court. See TANG, supra note 7, at 7, 19, 47.}

\textit{Cf.} Doerfler & Moyn, supra note 5, at 1706, 1720–21 (distinguishing reforms that alter the Court’s personnel from reforms that disempower the Court as an institution); FISIKIN & FORBATH, supra note 84, at 423 (“The Court is always engaged in constitutional politics. That is part of its role. The question is whether the Court’s constitutional politics have strayed too far from the constitutional politics of the elected branches and the American people—and if so, what can be done to push the Court back into line.”).
It is important to emphasize that such an assessment of the Court’s legitimacy crisis focuses upon constitutional values and judicial disposition, not merely partisan affiliation.275 A Democratic president appointing new justices who will vote in favor of specific policy preferences or particular doctrinal outcomes, irrespective of the corresponding degree of support among the electorate and political community or the constitutional law interpretive community, would only compound rather than mitigate the Court’s legitimacy crisis. Instead, the intended objective would be to bring the Court’s constitutional values in line with those of the interpretive community—not simply one segment, or even a bare mathematical majority, thereof. Likewise, appointing new justices who will narrowly frame their conception of the interpretive community to reinforce their own views and discount others— but with a liberal rather than a conservative bent—would not contribute constructively to resetting the Court’s path. Rather, the solution is to appoint individuals with a disposition to exercise judicial review in line with longstanding paratext and practice within the interpretive community over time.277

How to actually implement this conclusion through specific reforms, however, is a more challenging and complicated question. Simply waiting out the natural attrition of justices to make new appointments obviously is not a feasible option to address an urgent legitimacy crisis.278 The most decisive and swift remedy would be to enact legislation expanding the number of seats on the Court to change its composition, effective immediately—an option with historical pedigree in moments of crisis surrounding the Court.279 If

275. Constitutional values frequently may align with broader political values, but they are (or should be) more than simply policy preferences or partisan allegiances. See Barrett, supra note 228, at 1729 (“To be sure, partisan politics are not a good reason for over-turning precedent. But neither are they a good reason for deciding a case of first impression.”); Segall, supra note 107, at 463 (“The almost complete linkage between partisan voting patterns and the justices’ ideologies we see today is relatively new.”); Tang, supra note 7, at 5–10, 47–48, 81–86; see also, e.g., Chemerinsky, supra note 20, at 122, 337–42; Brian Leiter, Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature, 66 HASTINGS L.J. 1601, 1602, 1606–07, 1614–16 (2015); Robert Post & Reva Siegel, Originalism As a Political Practice: The Right’s Living Constitution, 75 FORDHAM L. REV. 545, 562–68 (2006).

276. See supra Part II.B; see also Gans, supra note 147, at 859–60 (“While court expansion during Reconstruction did not achieve all that Republicans hoped, much of that had to do with the appointments made by Republican presidents. With the right appointments, court expansion could be a powerful tool to change a Supreme Court that, in case after case, turns its back on our whole Constitution’s core constitutional commitments to safeguarding the full promise of liberty, equal citizenship and an inclusive multiracial democracy.”); Fishkin & Forbath, supra note 84, at 430 (“But to convince a broad, reform-minded American public of the need for such dramatic measures, political leaders must offer arguments about constitutional substance, not just righting partisan wrongs.”).


278. Similarly, although the President might ignore, or refuse to enforce, a decision of the Court on the grounds that its reasoning is unworthy of recognition as binding authority on a coordinate branch. See, e.g., Segall, supra note 107, at 472. Such an action would not operate as a Court reform to address the underlying legitimacy crisis directly.

279. See, e.g., Doerrler & Myn, supra note 5, at 1721–22, 1753; Epps & Sitaraman, supra note 5, at 175–77; Friedman, supra note 209; Gans, supra note 147, at 834–40, 857–60; Levitsky & Ziblatt, supra note 175, at 80, 118–19, 130–33. Some scholars assess constitutional history, especially Roosevelt’s failure to persuade Congress to enact legislation to pack the Court, as creating a paratextual prohibition against court-packing. See, e.g., Curtis A. Bradley & Neil Siegel, Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers, 105 GEO. L.J. 255, 259 (2017); Tara Leigh Grove, The Origins (and Fragility) of Judicial Independence, 71 VAND. L. REV. 465, 506 (2018); Siegel, supra note 229, at 97–104. On the other hand, the reasons for Roosevelt’s failure, and the extent of its contribution to the emergence of a new coalition opposing the New Deal, are complicated to assess. See Kalman, supra note 211; Kalman, supra note 212, at 66; Waldman, supra note 7, at 265. Moreover, “[w]hile there is a mountain of scholarship on President Franklin Roosevelt’s court-packing plan that portrays Roosevelt’s 1937 plan as the paradigmatic example of an illegitimate threat to the judiciary, the story of how the Reconstruction Congress utilized the powers given to Congress to reform the federal judiciary remains underappreciated.” Gans, supra note 147, at 830 (internal quotations omitted). Consequently, the
the root cause of the legitimacy crisis is a Court membership too far out of alignment with the interpretive community, then recalibrating that membership would repair the divergence in short order.\textsuperscript{280}

But such a “court packing” solution also would be highly visible and intensely contested in a polarized political environment. This would reduce the likelihood of legislative enactment in a closely divided Congress while presenting serious risk of increasing the politicization and partisanship of debates about the Court throughout the political community.\textsuperscript{281} The reality of a newly constituted Court that accurately reflects the constitutional law interpretive community might be unable to overcome the perception that the action taken was not motivated by a genuine commitment to institutional legitimacy, but rather by a retaliatory raw exercise of political power to achieve partisan policy objectives.

For that reason, some proposals combine Court reform with measures intended to permanently deescalate the partisan valance of the Court and the appointments of its justices going forward. Suggested reforms include a large Court with randomly selected panels to hear each case,\textsuperscript{282} term limits on each justice’s service on the Court,\textsuperscript{283} a fixed schedule of appointing new justices to significantly reduce the variability of attrition and nomination,\textsuperscript{284} or a Court with an even number of justices and evenly split party appointments.\textsuperscript{285} Conceptually, these are intermediate responses to the Court’s legitimacy crisis: They change more than merely the Court’s membership, but they only indirectly influence the Court’s exercise of judicial review. Normative judgments about the optimal path for mitigating the Court’s legitimacy crisis, as well as pragmatic determinations about what (if any) proposal could be enacted under the contingencies of political realities, will play

paratextual meaning of the Constitution should not be interpreted to constitutionalize a Court of exactly nine justices and to deny a twenty-first century Congress the historically exercised power to alter the number of justices on the Court, even for political purposes.

280. See Doerfler & Moyn, supra note 5, at 1771 (“The conventional prevailing view is that we should use non-neutral means of reform that correct distortions in membership on the bench in order to achieve the neutral end of an apolitical Supreme Court.”); Fiskin & Forbath, supra note 84, at 430–31 (“On the last two occasions when Congress took up the idea of changing the Court’s size, once under Republican leadership and once under Democratic leadership, it came forward with the same argument: A reactionary Court has allied itself with a powerful (but distinctly minoritarian) social and political bloc on the side of oligarchy and racial and class domination. . . . It is time to revive these arguments.”).

281. See, e.g., Doerfler & Moyn, supra note 5, at 1722; Epps & Sitaraman, supra note 5, at 164–66, 170–72; Feldman, supra note 45, at 8–11; Fiskin & Forbath, supra note 84, at 429–32; Klarmann, supra note 175, at 242–53; Tang, supra note 7, at 7, 63–66; see also Brian L. Frye, Court Packing Is a Chimera, 42 CARDOZO L. REV. 2697 (2021).

282. See Doerfler & Moyn, supra note 5, at 1722–23; Epps & Sitaraman, supra note 5, at 175, 181–84 (proposing Supreme Court hear cases in panels of nine drawn, with various restrictions on selection process, from among all sitting U.S. Courts of Appeals judges).


284. See Chemerinsky, supra note 3, at 310–12.

285. See Doerfler & Moyn, supra note 5, at 1724; Epps & Sitaraman, supra note 5, at 193–200 (proposing five permanent justices from each political party, who then unanimously select five additional justices to serve one-year terms on a 15-member Court). Professor Segall advocated for maintaining an evenly divided Court after the death of Justice Scalia. See Eric J. Segall, Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court, 45 PEPP. L. REV. 547 (2018).
a role in determining what option(s) might find support among scholars, lawyers, politicians, and other members of the interpretive community.

On the other hand, if one instead concludes that the current legitimacy crisis is not a qualitatively unique moment in the Court’s history, but rather the most recent iteration of longstanding dynamics inherent in the paratextual power of judicial review as it has evolved in our historical constitutional practice, then the necessary remedy is more profound. Changing judicial personnel will not repair a fundamentally broken institution; hiring a new storyteller to continue existing tales will not undo the detrimental impacts of previous contributors to a struggling media franchise. Sometimes incremental change in paratext is an insufficient solution. For those who conclude the Court’s legitimacy crisis is inextricably connected to the relationship between the power of judicial review as exercised in practice and the Constitution’s provision for life tenure for federal judges, for example, even careful attention to the judicial disposition of nominees will prove inadequate to overcome the gravitational pull of this institutional feature and its paratextual legacy.286

From such a perspective, the only solution is a revolutionary alteration in the Court’s power of judicial review to diminish its grasp on our constitutional order. Interest is resurgent in the idea of mandating a Thayerian version judicial review, permitting a judgment of unconstitutionality only when a law clearly violates the text of the Constitution or indisputable constitutional principles.287 Another proposal would impose a super-majority vote requirement to invalidate federal legislation.288 On a more limited scale, Congress could use “jurisdiction stripping” to prevent the Court from interfering with the implementation of particular federal statutes.289 This option does not alter judicial review writ large, but operates to deprive the justices of the ability to substitute their constitutional values for those asserted by the elected branches on the discrete interpretive issue implicated in that legislation.290 Each of these proposals is grounded in the determination that the foundational problem is our existing paratext of judicial review itself, and therefore only a thorough reboot of that institutional power can solve it. Here again, the comparison to media franchise management provides a cautionary tale.

C. Be Careful What You Wish For: The Perils of Rebooting

Reboots are a familiar phenomenon in the realm of media franchises.291 Some reboots are done too hastily, hoping for a “quick fix” solution without adequate

286. See, e.g., Segall, supra note 107, at 463 (“That kind of power cannot be cabined by pre-existing theoretical commitments such as originalism, textualism, or even respect for prior case law.”).
287 See supra notes 196–197 and accompanying text.
288. See Doerfler & Moyn, supra note 5, at 1727; Epps & Sitaraman, supra note 5, at 182.
289. See, e.g., Doerfler & Moyn, supra note 5, at 1725–26; Epps & Sitaraman, supra note 5, at 177–79; Segall, supra note 107, at 472; Christopher Jon Sprigman, Congress’s Article III Power and the Process of Constitutional Change, 95 N.Y.U. L. REV. 1778, 1780–81 (2020). But see Daniel Epps & Alan A. Trammell, The False Promise of Jurisdiction Stripping, 123 COLUM. L. REV. 2077 (2023). Cf. Joseph Blocher & Brandon Garrett, Fact Striping, 73 DUKE L.J. 1, 1 (2023) (“Congress can, by statute, require Supreme Court Justices and appellate judges to view the factual record with some level of deference. We call this approach ‘fact stripping’”).
291. See supra note 198; see also GOLDING, supra note 199, at 65–88 (characterizing Star Wars: The Force Awakens as a legacy sequel rather than a reboot); Bridget Kies, “I Ain’t Afraid of No Bros”: The Generational Politics of Reboot Culture, in FANDOM: THE NEXT GENERATION 9 (Bridget Kies & Megan Conner, eds., 2022). After more than a decade of unprecedented theatrical achievements that made it “easily the most successful film
consideration, preparation, or careful implementation. Other reboots are effectuated too late, unable to regenerate interest in a declining franchise. The Goldilocks reboot—the one that carries it off just right—is difficult to accomplish and certainly not a reliable median outcome.\(^\text{292}\) The justifications or rationalizations for a reboot can be complicated or multifaceted, such as diminishing profitability, reduced viewership, perception of consumer fatigue, or reaction to audience fantagonism.\(^\text{293}\) At their core, however, media reboots reflect a determination by franchise managers that the present state of their authoritative serialized paratextual interpretations no longer holds sufficient regard with fans, customers, and audience—such that the divergence between the official interpreters and the interpretive community cannot be repaired within the parameters of its current form, but rather can only be remedied by a fresh start that, it is hoped, resets the opportunity for good will and favorable reception by the fandom and beyond.

Prominent media franchise reboots that have taken place during the span of the Roberts Court illustrate the high stakes and long odds. After studio executives were unsatisfied with the box office performance of *Superman Returns* (2006), the character was rebooted in *Man of Steel* (2013), kicking off the darker and grittier superhero saga crafted by Zack Snyder, which now has been rebooted in turn, including a planned *Superman: Legacy* (2025) proffered as a restoration of an optimistic and aspirational portrayal.\(^\text{294}\) Over the same timeframe, three different actors have starred as Batman in three different film storylines.\(^\text{295}\) Even in comics, a medium more accustomed to reboots and multiple story continuities, the DC franchise heavily promoted its “New 52” reboot in 2011, cancelling all of its existing titles and relaunching a new story universe with the express goal of enticing new readers—only to reboot everything again five years later when sales and fan response failed to meet expectations.\(^\text{296}\) The *Star Trek* franchise rebooted its film saga to much fanfare in 2009—recasting and retelling stories with Kirk, Spock, and the iconic crew of the starship *Enterprise* from the original television series and earliest films—but

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\(^{296}\) See, e.g., McMillan, supra note 293; see also GRAY, supra note 30, at 214 (“Marvel and DC have trained audiences to expect infinite reboots and alternate universes, a strategy that allows James Bond-like ease of movement across media venues, but also restricts the prospects for a continuing narrative to be told across those venues.”).
the performance and reception of the reboot collapsed after three movies, while other Star Trek stories told on television and streaming services unconnected to the rebooted films have achieved considerable fandom and cultural success. Concerned that the third edition of its tabletop roleplaying game had become too bloated, complicated, and uninviting to new players, the Dungeons & Dragons franchise in 2008 rebooted to a fourth edition ruleset seeking to widen its appeal to videogamers, but quickly discovered that its in-house development decisions had alienated a significant segment of its longtime fanbase without successfully creating many new ones. For a time, the most famous brand in the industry even lost its status as the top-selling roleplaying game. Design and playtesting for another rebooted ruleset began in 2012, this time focusing on feedback from players to identify and reaffirm the core rules, concepts, and ideas at the heart of the franchise. Aided by rise of celebrity roleplaying internet series like Critical Role, the fifth edition, released in 2014, achieved unprecedented success for Dungeons & Dragons, including at least five consecutive years of double-digit sales growth. That example stands out for the scale of its success, as well as its rarity.

Perhaps no other franchise demonstrates the perils of rebooting as much as Star Wars. During the release of the Prequel Trilogy films, Lucasfilm also undertook a multimedia storytelling project (including novels, comics, videogames, animated shorts, and other paratextual materials) for the Clone Wars taking place in-universe between Attack of the Clones (2002) and Revenge of the Sith (2005). In 2008, the animated series The Clone Wars created and overseen by George Lucas rebooted that storytelling period, although Lucasfilm refused to acknowledge that reality for many years in order to maintain the franchise’s longstanding avowal of a single story continuity integrating both text and paratext. For many fans, The Clone Wars elaborated upon the themes and characterizations of the Prequel Trilogy in a manner that helped to repair the weaknesses they had

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300. See Ohannessian, supra note 299; MICHAEL WITWER ET AL., ART & ARCANA, supra note 299, at 372.
303. See Priester, supra note 12, at 13.
304. See id. at 28–29.
perceived in the films.\textsuperscript{305} Around the same time, the ongoing Expanded Universe flagship storyline that had begun in 1999—featuring the heroes of the Original Trilogy films and a younger generation of familial protagonists in paratextual adventures taking place a quarter century after \textit{Return of the Jedi}—began to suffer a substantial decline in sales, attributable in significant part to fan dissatisfaction with storytelling and characterization decisions permitted by the franchise managers.\textsuperscript{306} After Disney purchased Lucasfilm in 2012, indications of a potential reboot appeared on the margins of the Expanded Universe publishing program, but the flagship storyline briefly continued forward.\textsuperscript{307} The first formal and official reboot in the franchise was announced in 2014, principally to make clear that the upcoming Sequel Trilogy films would not be adaptations of the Expanded Universe flagship storyline set during the comparable period on the franchise’s in-universe timeline\textsuperscript{308}—at the very time when numerous films based on book series and comics were thriving at the box office.\textsuperscript{309}

Unfortunately for the fans and the franchise alike, however, Lucasfilm failed to ensure that the new story continuity launched after its reboot would avoid repeating the same flaws that had undermined the previous one. Within five years, Lucasfilm again presided over a franchise that had failed not only to implement an internally consistent single continuity but also to safeguard the quality and esteem of its stories and their iconic characters.\textsuperscript{310} Although acclaim for \textit{The Mandalorian} series on the Disney+ streaming service mitigated some of the damage to the franchise in the short term, it did so in part by functioning essentially as a standalone story within the franchise.\textsuperscript{311} As of this writing, the future of the \textit{Star Wars} franchise is uncertain—but what can be asserted with confidence is that it stands as a principal example of the futility of a reboot unless the factors that precipitated it in the first place have been correctly identified and prevented from recurring following the new beginning.

The comparison to media franchise management suggests an analytical frame for addressing the Roberts Court’s legitimacy crisis. If the primary objective is to recalibrate the values of the justices to ensure future outputs more accurately aligned with, rather than significantly divergent from, the constitutional law interpretive community, then carefully selected personnel changes should be sufficient to repair that relationship. Like a media franchise disavowing an ill-received period in its storytelling by replacing the responsible storytellers, U.S. constitutional law could move forward on a new trajectory without needing to fundamentally rebuild institutional arrangements.

When the damage to the legitimacy of the official authoritative interpreters is severe, however, personnel change alone may be inadequate to restore the interpretive community’s confidence and trust. Media franchise managers may conclude—despite the inevitable outrage from some fans—that a storytelling reboot is additionally necessary to persuade the requisite critical mass of fans and audience that the new creatives are thoroughly distinct from the disavowed ones. We cannot go back in time and erase the detrimental contributions to the franchise as though they never existed at all, but a consensus in the interpretive community can compartmentalize them, set them aside, and move forward by recognizing the nature of the errors and deliberately implementing a different direction instead. Similarly, the United States Reports comprise a permanent collection of the Supreme Court’s decisions and the paratextual body of constitutional law they have promulgated across two centuries. But if the interpretive community concludes that the Court as an institution is fundamentally broken, such that no amount of personnel selection can supersede institutional imperatives, then only a fundamental reboot of judicial review itself offers hope for charting a different course in the future.

Likewise, the comparison to media franchise management also presents a cautionary tale about the likelihood of success in rebooting judicial review. In a media franchise, the intellectual property owner or other franchise manager ultimately wields the power to control how the franchise functions. For the U.S. Supreme Court, no appeal or override to a superior authority is possible. (One can fairly surmise that if the Congress consistently deployed the necessary majorities to wield the power of impeachment and removal of federal judges to constrain their decision-making, then the Court would behave differently irrespective of any other reforms which might be made.) Within that reality, how would we mandate Thayerism and who would enforce it? Even if future justices were selected conditioned on their acceptance of such a limitation, would the current justices accept it? Would lower federal court judges? Would the President or Congress refuse to follow decisions that deviated from Thayerism? Would the states—much less private litigants—be able to do the same? Similarly, how would the elected branches of the federal government respond to a diminished scope of judicial review? Would they become emboldened to act as they wish in its absence? What about the states—especially those where

312. See Gans, supra note 147, at 867 (“[T]he fight should be about the fact that the 6-3 Court is rolling back deeply rooted fundamental rights, not about the institution of judicial review, which is a bedrock and widely beloved feature of our constitutional system.”); Kalman, supra note 211, at 16 (“Those who lined up behind FDR had to argue that they promoted the least invasive remedy for conservative justices’ constitutional misinterpretation and attacked their ‘abuse of power,’ not judicial power itself, or the Constitution.”). As with the Court’s switch in 1937, implementing a new doctrinal trajectory today would require a majority of justices willing to swiftly and decisively overrule a non-trivial number of significant Roberts Courts decisions across a span of important doctrines. Fortunately, however, “the Roberts Court does not appear to consider itself particularly bound by stare decisis.” Bridges, supra note 260, at 53. It may be necessary and proper, therefore, to extend similar consideration to its decisions in the short run, so that Court ultimately can accomplish long-term objectives including restoration of judicial humility and a corresponding substantial weight to stare decisis.

313 See, e.g., Eric Geller, Anger Leads to Hate: Inside the Movement to Save the Expanded Universe, THEFORCENET (Oct. 7, 2014, 12:00 PM), http://www.theforce.net/story/front/Anger_Leads_To_Hate_Inside_The_Movement_To_Save_The_Expanded_Universe_160167.asp (discussing 2014 Star Wars reboot); O’Connell, supra note 123; Siegel, supra note 119; Vary & Lang, supra note 123.
pluralism imposes little electoral restraint on the political process? Furthermore, is our contemporary constitutional law interpretive community truly ready to disavow two centuries of paratext and reboot judicial review into a dramatically less visible or influential component of our constitutional order? How much of the interpretive community instead would insist upon the remedy of realignment of the values of the justices and their decisions, rather than a fundamental revision to the system itself? Even if we mustered the political will to amend the Constitution to impose Court reform, such as eliminating life tenure or codifying a Thayerian rule of decision, we still would need the political will to further ensure that the Court did not afterward undercut or ignore the import of the amendment—something, of course, the Court has done before. Even in media franchise management, reboots are easy to execute unsuccessfully and difficult to execute triumphantly. If we attempt to fundamentally reboot judicial review, how are we likely to fare?

V. CONCLUSION

A legitimacy crisis imperiling the authoritative position of the United States Supreme Court within the constitutional law interpretive community is not a new occurrence in our constitutional history. The phenomenon shares many features with the challenges of media franchise management when official interpreters have tarnished, or even sundered, the trust and confidence of the fandom interpretive community. In each context, no easy path exists for closing the schism and regaining alignment on interpretive values and outcomes. The difficult work must begin by carefully and accurately identifying the sources of the divergence so that an appropriately tailored and effective remedy can be implemented. As media franchises have discovered to their detriment, failure to get that first step right all but dooms the endeavor to leaving the interpretive legitimacy crisis unresolved—if not worsened.

In evaluating the Roberts Court, the constitutional law interpretive community contains considerably more agreement about the existence of a legitimacy crisis than it does about the appropriate remedial measures toward achieving realignment. Strong arguments can be made that the present divergence between the interpretive community and the Roberts Court is the product of recent factors that have distorted the Court and its justices away from multiple longstanding paratextual features of our constitutional order. Reforms directed at repairing this distortion, principally through personnel changes such as court-packing, would contemplate and carry out restoration of that previous paratextual constitutional order. Yet strong arguments also support a deeper and more fundamental critique of the power of judicial review itself, founded in the assessment that the Supreme Court as an institution has been, is, and inevitably will be constitutively incapable of wielding that power in a normatively desirable manner. Such a foundational flaw would have to be addressed with a fundamental change to the constitutional order, such as by permanently altering the selection and duration of the justices to indirectly induce a diminished exercise of the judicial role, or by directly depriving the Court of that power except on a drastically reduced scale. In light of our constitutional history and our constitutional values, rebooting judicial review may be the desirable course of action—but the experience of media franchise management provides a cautionary tale about the likelihood of success.

314. See CHEMERINKSY, supra note 3, at 27–38, 34; Bowie, supra note 20, at 6–8; Gans, supra note 147, at 838–40; see also LEVITSKY & ZILBLATT, supra note 175, at 89–92, 111, 123-25, 143–44 (discussing democratic backsliding and rise of authoritarianism in the South following the demise of Reconstruction). Most notoriously the Court adopted narrow, even retrogressive, interpretations the Fourteenth Amendment.
when a reboot is attempted. Perhaps, then, as with a media franchise, a less drastic measure should be undertaken first, and then a reboot as a last resort.

Finally, it is worth considering that judicial review is not the only countermajoritarian feature of our textual Constitution and paratextual constitutional law with high salience amid the legitimacy crisis of the Roberts Court.315 If the constitutional law interpretive community and the political community prove capable of successfully generating the necessary persuasive momentum to make rebooting judicial review a serious possibility, then perhaps the Roberts Court’s legitimacy crisis inadvertently may prove to be the fulcrum for a broader recalibration of our fundamental institutions and constitutional values.

315. See Karlan, supra note 241, at 2338–44. The text of the Constitution creates the countermajoritarian aspects of the United States Senate and the Electoral College. Id. The filibuster, by contrast, is a paratextual norm generated by the rules and traditions of the Senate over many decades. See LEVITSKY & ZIBLATT, supra note 164, at 160–64; WALDMAN, supra note 7, at 86 (“It is not in the Constitution.”).