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Rebooting the Supreme Court

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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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> "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.").
2. *See, e.g.*, Joseph Baxter, *Harrison Ford Gave Oscar Isaac Some Blunt and Hilarious Advice About Star Wars Piloting*, CINEMABLEND (Apr. 9, 2015), https://www.cinemablend.com/new/Harrison-Ford-Gave-Oscar-Isaac-Some-Blunt-Hilarious-Advice-About-Star-Wars-Piloting-70783.html (quoting Isaac's recollection of conversation on *Late Night With Seth Meyers* talk show); *see also, e.g.*, Anthony Breznican, *Harrison Ford IS Han Solo: The* Star Wars *Actor Once Had Harsh Words for the Smuggler, But They're Closer Than You Think*, ENT. WKLY. (Nov. 11, 2015), https://ew.com/movies/2015/11/11/harrison-ford-is-han-solo/ ("'I said, "Just make s–t up!"' Ford says, getting suddenly animated. 'I mean, it's a movie, man. It's space. You don't fly in space the way you do in an atmosphere.'").
3. *See* Elie Mystal, *There is Only One Way Out of This Crisis: Expand the Court*, NATION (Sept. 23, 2020), https://www.thenation.com/article/politics/supreme-court-packing/.
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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5. *See generally* ERWIN CHEMERINKSY, THE CASE AGAINST THE SUPREME COURT xi, 14 (2023); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021); Daniel Epps & Ganesh Sitaraman*, How to Save The Supreme Court,* 129 YALE L.J. 148, 151 (2019); Mystal, *supra* note 3.

6. *See* Elena Schneider & Holly Otterbein, *'THE central issue': How the Fall of* Roe v. Wade *Shook the 2022 Election*, POLITICO (Dec. 19, 2022), https://www.politico.com/news/2022/12/19/dobbs-2022-election-abortion-00074426.

7. *See, e.g.*, JOAN BISKUPIC, NINE BLACK ROBES: INSIDE THE SUPREME COURT'S DRIVE TO THE RIGHT AND ITS HISTORIC CONSEQUENCES 3, 327 (2023); AARON TANG, SUPREME HUBRIS: HOW OVERCONFIDENCE IS DESTROYING THE COURT—AND HOW WE CAN FIX IT 7, 40, 239 (2023); STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC xiv, 25 (2023); MICHAEL WALDMAN, THE SUPERMAJORITY: HOW THE SUPREME COURT DIVIDED AMERICA (2023); Linda Greenhouse, *Is There Any Twinge of Regret Among the Anti-Abortion Justices?*, N.Y. TIMES (June 23, 2023), https://www.nytimes.com/2023/06/23/opinion/abortion-supreme-court-dobbs.html; James Taranto & David B. Rifkin, Jr., *Justice Samuel Alito: 'This Made Us Targets of Assassination'*, WALL ST. J. (Apr. 28, 2023), https://www.wsj.com/articles/justice-samuel-alito-this-made-us-targets-of-assassination-dobbs-leak-abortion-court-74624ef9; Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4492053.

8. *See* Mystal, *supra note* 3.

9. *See, e.g.,* Daniel Bukszpan, *Game of Thrones fans Are Angry About the Final Season – and the Franchise Could Suffer for It*, CNBC (May 19, 2019), https://www.cnbc.com/2019/05/19/game-of-thrones-fans-are-angry-about-the-final-season-and-the-franchise-could-suffer-for-it.html; Rebecca Rubin, *Is J.K. Rowling's 'Fantastic Beasts' Franchise Dead at Warner Bros?*, VARIETY (Nov. 16, 2022), https://variety.com/2022/film/news/fantastic-beasts-fourth-fifth-movies-franchise-harry-potter-jk-rowling-1235432523/; *see also infra* notes 116–124, 297–302 and accompanying text (discussing DC Comics and *Star Trek* film franchises).

10. *See, e.g.*, Brandon Katz, *Here's How Much Money Disney's 'Star Wars' Films Actually Earned*, OBSERVER (Aug. 6, 2020), https://observer.com/2020/08/star-wars-gross-profit-earnings-disney-box-office/ ("Thus, *Solo* became the first *Star Wars* movie to actually lose money, with Lucasfilm taking a $77 million write down on the film."); *id.* ("*Rise of Skywalker* marked lows in opening weekend ($177 million), domestic box office, international box office, and worldwide box office ticket sales among the sequel trilogy . . . It also received the lowest Rotten Tomatoes score (51%) of any live-action *Star Wars* flick."); Spencer Kornhaber, *How Disney Mismanaged the* Star Wars *Universe*, ATLANTIC (June 21, 2021), https://www.theatlantic.com/magazine/archive/2021/07/gross-altman-star-wars-mandalorian/619016/; Molly Jae Weinstein, *Disney's Mismanagement of Star Wars Brutally Explained By Industry Insider*, SCREENRANT (Sept. 23, 2022), https://screenrant.com/star-wars-disney-criticism-explained-matthew-belloni/.

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, later 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, *'Avatar 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[12]—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.[13] Both the Court and Lucasfilm are conclusive interpreters only because they are final, not because they are inherently correct.[14]

Some thoughtful commentators respond to such circumstances with an analysis grounded in realism, if not cynicism. *Star Wars* is fake and in space.[15] It's fiction; it's all made up anyway.[16] And, therefore, it is pointless to object to *Star Wars* storytelling decisions made by Lucasfilm.[17] Similarly, the meaning of the Constitution is indeterminate and eminently debatable.[18] Constitutional law is politics; it is values all the way down.[19] 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.[20] In the absence of an objectively provable correct meaning, a disputed text means what those with power decide that it means.[21]

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.[22] 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

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to 2025, Two 'Star Wars' Movies Head for 2026 and 'Avengers' Films Delayed, HOLLYWOOD REP. (June 23, 2023), https://www.hollywoodreporter.com/movies/movie-news/disney-moves-avatar-star-wars-avengers-1235514145/; Rebecca Rubin, *'Star Wars' Films, 'Avatar' Sequels Pushed Back a Year in Disney Release Calendar Shakeup*, VARIETY (July 23, 2020), https://variety.com/2020/film/box-office/star-wars-films-avatar-sequels-pushed-back-a-year-in-disney-release-calendar-shakeup-1234715104/.

12. *See* Benjamin J. Priester, *Media Paratext and Constitutional Interpretation*, 55 CREIGHTON L. REV. 1, 2 (2021).

13. *See* Benjamin J. Priester, *Is Originalism A Fandom?*, 53 STETSON L. REV. 29, 36 (2023).

14. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

15. *See, e.g.,* STAR WARS ON TRIAL: SCIENCE FICTION AND FANTASY WRITERS DEBATE THE MOST POPULAR SCIENCE FICTION FILMS OF ALL TIME 1–11 (2006).

16. *See, e.g., id.*

17. *See, e.g*., *id.* (considering and rejecting such perspectives).

18. *See, e.g*., ERIC J. SEGALL, ORIGINALISM AS FAITH 194 (2018).

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, but wholly unrealistic, and ultimately dangerous, article of faith.")

20. *See, e.g*., CHEMERINKSY, *supra* note 6, at xxiii, 10–11, 14, 302–10, 337–42; SEGALL, *supra* note 18, at 156-70; Nikolas Bowie, Testimony to the Presidential Commission on the Supreme Court of the United States, at 19 (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf ("[C]onstitutional interpretation is often impossible to distinguish from the ethical and political judgments that democracies otherwise resolve through democratic procedures."); *see also* ERWIN CHEMERINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY 31 (2018).

21. In constitutional theory, as elsewhere in legal interpretation, such claims have been vigorously contested for many years. *See generally* Sanford Levinson, *Law As Literature*, 60 TEX. L. REV. 373 (1982); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984); Lawrence Lessig, *Limits of Lieber*, 16 CARDOZO L. REV. 2249 (1995).

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.[23] 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.[24] When interpretation occurs within an interpretive community, the absence of certainty is not the same as anything goes.[25]

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.[26] 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.[27] 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.[28] When we engage in interpretation as part of an interpretive community, we participate in something greater than ourselves.[29]

Media franchise management involves a particular constellation of texts and interpreters.[30] The core texts are one or more forms of entertainment media, such as film, television, videogames, comics, or novels.[31] In addition to multiple entries in the core text,

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23. *See* Priester, *supra* note 12, at 16-20.
24. *See, e.g.*, WALDMAN, *supra* note 7, at 4 ("Throughout the country's history, most of the time the Court has reflected the public's consensus, or at least the approach of the governing political coalition.").
25. *See* Priester, *supra* note 12, at 11–16; Priester, *supra* note 13, at 90–99.
26. *See* WALDMAN, *supra* note 7, at 5; Kornhaber, *supra* note 10.
27. *See generally* Fish, *supra* note 21.
28. *Id*.
29. *Id*.
30. *See, e.g.*, JONATHAN GRAY, SHOW SOLD SEPARATELY: PROMOS, SPOILERS, AND OTHER MEDIA PARATEXTS (2010).
31. *See, e.g.*, GRAY, *supra* note 30.

a franchise frequently includes supplemental texts, such as licensed derivative works and unofficial unlicensed fanworks.[32] 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.[33] 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.[34] Poor franchise management can produce "fantagonism" 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.[35] 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.[36]

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.[37] 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.[38] 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.[39] 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.[40] 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.[41] 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.[42]

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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).
33. *See, e.g.*, GRAY, *supra* note 30; Jenkins, *supra* note 22, at 13; MARK DUFFETT, UNDERSTANDING FANDOM: AN INTRODUCTION TO THE STUDY OF MEDIA FAN CULTURE (2013); ANASTASIA SALTER & MEL STANFILL, A PORTRAIT OF THE AUTEUR AS FANBOY: THE CONSTRUCTION OF AUTHORSHIP IN TRANSMEDIA FRANCHISES (2020); FRANCESCA COPPA, FAN FICTION AND FAN COMMUNITIES IN THE AGE OF THE INTERNET (Karen Hellekson & Kristina Busse, eds., 2006).
34. *See, e.g.*, Jenkins, *supra* note 22; KRISTINA BUSSE, *May the Force Be With You: Fan Negotiations of Authority*, *in* FRAMING FAN FICTION: LITERARY AND SOCIAL PRACTICES IN FAN FICTION COMMUNITIES 99-120 (2017); JAMES FLEURY ET AL., THE FRANCHISE ERA: MANAGING MEDIA IN THE DIGITAL ECONOMY (2020).
35. *See* Derek Johnson, *Fantagonism: Factions, 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, *Fantagonism, 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.
37. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY ix–x (2012); DAVID A. STRAUSS, THE LIVING CONSTITUTION 47 (2010).
38. *See, e.g.*, Chiafalo v. Washington, 591 U.S. 578, 587 (2020) (resolving split of authority among state court decisions); Carpenter v. United States, 585 U.S. 296, 345-52 (2018) (Thomas, J., dissenting) (citing law review articles criticizing Fourth Amendment "reasonable expectation of privacy" test); Grutter v. Bollinger, 539 U.S. 306, 323, 328-31, 339-40 (2003) (emphasizing significance of arguments raised in briefs by parties and amici).
39. *See* Priester, *supra* note 13, at 36–39, 90–98.
40. *See* Priester, *supra* note 13, at 31.
41. *See, e.g.*, CHEMERINKSY, *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

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43. *Id.*

44. *See, e.g.*, STRAUSS, *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.

47. *See, e.g.*, Megan Garber, *Why Rewatching* Titanic *Is Different Now*, ATLANTIC (Feb. 23, 2023), https://www.theatlantic.com/culture/archive/2023/02/titanic-james-cameron-25-years-later/673185/; Darren Mooney, *The Fabelmans Is About the Great and Terrifying Power of Cinema*, ESCAPIST (Dec. 12, 2022), https://www.escapistmagazine.com/the-fabelmans-is-about-the-great-and-terrifying-power-of-cinema/.

48. *See, e.g.*, Travis Clark, *James Cameron Says 'Avatar 2' is Successful Enough for 3 More Movies*, INSIDER (Jan. 6, 2023), https://www.businessinsider.com/avatar-way-of-water-profitable-sequels-on-way-james-cameron-2023-1 (*"*Director James Cameron says it's enough to guarantee those planned third, fourth, and fifth installments get made and released.); James Hibberd, *Jerry Bruckheimer on Career, 'Maverick' Success, and 'Pirates' Sequels*, HOLLYWOOD REP. (Dec. 19, 2022), https://www.hollywoodreporter.com/feature/jerry-bruckheimer-interview-career-top-gun-maverick-sequels-1235282900/ (answering "I have no idea" regarding whether another *Top Gun* sequel might be made); *see also* James Fleury et al., *An Overview of the Media Franchise – From Jaws to the Avengers*, EDINBURGH UNIV. PRESS PUBL'G BLOG (June 6, 2019), https://euppublishingblog.com/2019/06/06/ an-overview-of-the-media-franchise-from-jaws-to-the-avengers/ (distinguishing between "cinematic universes" and "tentpole films").

networks and streaming services.[49] 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.[50]

Second, both endeavors are heavily reliant upon ***paratext*** in the establishment of dispositive meaning.[51] 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).[52] All controversially significant U.S. constitutional law is paratext: primarily, but not exclusively, the decisions of the Supreme Court.[53] Furthermore, the Court itself relies—and always has relied—on a variety of paratextual sources when interpreting constitutional meaning.[54] 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.[55] Constitutional interpretation is not merely reliant upon paratext—it usually amounts to interpretation not of the actual text, but of its associated paratexts.[56]

Media franchises frequently encounter a similar dominance of paratext over text.[57] The sheer amount of text may be far greater, particularly in television series running dozens or hundreds of episodes.[58] 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.[59] Inevitably, much of the dispositive meaning understood in the fan community arises not from the text, but from the paratext.[60] Which in turn necessitates that one important feature of successful media franchise management is a careful and thoughtful understanding of this dynamic.[61]

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49. *See, e.g.*, Collider Staff, *The Best TV Shows of 2022*, Collider (Dec. 16, 2022), https://collider.com/best-tv-shows-2022/; Matt Webb Mitovich, Stranger Things *Dominated as the Most-Streamed Series of 2022 — View Complete Nielsen Rankings*, TVLine (Jan. 26, 2023), https://tvline.com/lists/most-popular-streaming-series-movies-2022-stranger-things-ncis/.

50. *See, e.g.*, *STAR WARS* AND THE HISTORY OF TRANSMEDIA STORYTELLING 195 (Sean Guynes & Dan Hassler-Forest, eds., 2017); Matthew Freeman, *Rebuilding Transmedia* Star Wars*: Strategies of Branding and Unbranding a Galaxy Far, Far Away*, *in* DISNEY'S *STAR WARS*: FORCES OF PRODUCTION, PROMOTION, AND RECEPTION 4, 23 (William Proctor & Richard McCulloch, eds., 2019).

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

52. *See* Priester, *supra* note 12.

53. *See* Priester, *supra* note 12, at 8–9; H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL (1999) (reprinting and analyzing paratextual interpretations of the Constitution from the executive branch); Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2269–70 (2023); Neal K. Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1344 (2001).

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*.

59. *See* GRAY, *supra* note 30, at 23–26, 35–46, 79, 119–31, 135–41, 143–61, 173–74.

60. *See* Priester, *supra* note 12, at 4–5 (citing and discussing GRAY, *supra* note 30, at 22, 37–39, 40–42, 45–46, 159–66).

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.[62] 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.[63] Even within the realm of litigated controversies, the Court's power is (or ought to be) subject to various limitations on its institutional power.[64] 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.[65] 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.[66] 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.[67] A fan theory debunked by one of the creators becomes an interesting counterfactual, rather than a potentially accurate interpretation of the text.[68] 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.[69] Whether the

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62. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167 (1803); Cooper v. Aaron, 358 U.S. 1, 24–25 (1958).

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.

64. *See, e.g.*, Howard M. Wasserman, *Precedent, Non-Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Adjudication*, 23 LEWIS & CLARK L. REV. 1077, 1091–92 (2020); Howard M. Wasserman, *Concepts, Not Nomenclature: Universal Injunctions, Declaratory Judgments, Opinions, and Precedent*, 91 U. COLO. L. REV. 999, 1004 (2020); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018); *see also* 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.13 (2023) (discussing doctrinal limitations such as standing, ripeness, mootness, and impermissibility of advisory opinions).

65. *Supra* note 116.

66. *See, e.g.*, MEL STANFILL, EXPLOITING FANDOM: HOW THE MEDIA INDUSTRY SEEKS TO MANIPULATE FANS 104–29 (2019); Rebecca Tushnet, *Copyright Law, Fan Practices, and the Rights of the Author*, *in* FANDOM, *supra* note 35, at 77.

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.

68. *See, e.g.*, Riley DeBoer, *The Big Bang Theory Bosses Debunk a Popular Penny Fan Theory*, CBR (Oct. 16, 2022), https://www.cbr.com/big-bang-theory-penny-last-name-fan-theory-debunked/; Allie Gemmill, *'Batman Begins' Writer David S. Goyer Debunks Ra's al Ghul Fan Theory*, COLLIDER (July 25, 2020), https://collider.com/batman-begins-ras-al-ghul-death-theory-explained-david-s-goyer/.

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.[70] 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.[71]

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.[72] 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.[73] 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.[74] 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.[75]

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

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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. ANTI-FANDOM, *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.[76] 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.[77] 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.[78] 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.[79] On both occasions, the franchise suffered for being out of touch with the full scope of its actual fan interpretive community.[80] In 2022, by contrast, showrunner 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.[81] 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.[82]

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.[83] At times, this may reflect institutional and

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76. *See, e.g.*, Ben Kuchera, *It's Time to Start Ignoring the Star Wars Haters: Let's Stick to Real Criticism*, POLYGON (Jan. 17, 2018), https://www.polygon.com/2018/1/17/16901340/star-wars-last-jedi-fan-controversy-rotten-tomatoes.

77. *See, e.g.*, Kuchera *supra* note 76; Lucas Shaw, *Critics and Fans Have Never Disagreed More About Movies*, BLOOMBERG (Aug. 28, 2022, 5:00 PM), https://www.bloomberg.com/news/newsletters/2022-08-28/critics-and-fans-have-never-disagreed-more-about-movies.

78. *See* Tricia Barr, *Fangirl Speaks Up:* Star Wars *Books and Me—Caught in a Bad Romance*, FANGIRL BLOG (Feb. 14, 2011), http://fangirlblog.com/2011/02/fangirl-speaks-up-star-wars-books-bad-romance/; Tricia Barr, *Fangirl Speaks Up: The Missing Demographic*, FANGIRL BLOG (Feb. 24, 2011), http://fangirl-blog.com/2011/02/fangirl-speaks-up-fanfic/.

79. *See, e.g.*, Alex Abad-Santos & Alissa Wilkinson, *Star Wars: The Rise of Skywalker was Designed to Be the Opposite of The Last Jedi: J.J. Abrams Heard Toxic Fans' Complaints. And Now He's Trying to Distance Himself From Them — and Rian Johnson*, VOX (Dec. 27, 2019, 12:20 PM), https://www.vox.com/culture/2019/12/27/21034725/star-wars-the-rise-of-skywalker-last-jedi-j-j-abrams-rian-johnson.

80. *See* Katz *supra* note 10; Tricia Barr, *Fate of the Jedi: Not So Impressive*, FANGIRL BLOG (Mar. 16, 2011), http://fangirlblog.com/2011/03/fotj-not-so-impressive/ (noting decline of forty percent from one book series to the next); Tricia Barr, *Fangirl Speaks Up: Reenergizing the EU Novels*, FANGIRL BLOG (Mar. 19, 2011), http://fangirlblog.com/2011/03/fangirl-speaks-up-reenergizing-eu-novels/.

81. *See* Tricia Barr, *Andor: Striving To Get Back To Star Wars' Political Roots*, FANGIRL BLOG (Aug. 24, 2022), http://fangirlblog.com/2022/08/andor-striving-to-get-back-to-star-wars-political-roots/.

82. *See, e.g.*, James Hibberd, *How 'Andor' Broke Star Wars Rules to Reinvent Sci-Fi TV*, HOLLYWOOD REP. (June 8, 2023, 2:58 PM), https://www.hollywoodreporter.com/tv/tv-features/andor-broke-star-wars-rules-reinvent-sci-fi-tv-1235507880/.

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.[84] 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.[85] 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).[86] 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.[87] 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.[88]

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.[89] 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

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84. *See* CHEMERINKSY, *supra* note 3, at 159–64, 291–97; WALDMAN, *supra* note 7, at 77–78, 144; JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 147–48, 168 (2022) (addressing Gilded Age judges within chapter discussing constitutional political economy debates of the era).

85. *See, e.g.*, CARRIELYNN 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." CarrieLynn D. Reinhard, *Echo Chambers and Fandom*, PLAYING WITH RESEARCH (June 9, 2017), https://playingwithresearch.com/2017/06/09/echo-chambers-and-fandom/.

86. *See* CHEMERINKSY, *supra* note 3, at 297; WALDMAN, *supra* note 7, at 31–32.

87. *See generally* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT (2019); *see* Josh Gerstein, *Former Religious Right Leader: I Saw Our Phrases in Alito's Abortion Opinion: Rev. Rob Schenck Outlines His Former Group's Stealth Efforts to Get Conservative Justices to 'Be Bolder.'*, POLITICO (July 20, 2022, 8:27 PM), https://www.politico.com/news/2022/07/20/religious-right-alito-abortion-00047055; Katherine Long & Jack Newsham, *The Supreme Court's Back Door: How Anti-Abortion Activists, Corporate Bigwigs, and Conflicted Parties Co-opted a Little-Known Society to Buy Priceless Access to the Supreme Court*, INSIDER (Jan. 11, 2023, 4:54 PM), https://www.businessinsider.com/supreme-court-nonprofit-anti-abortion-access-1.

88. *See, e.g.*, Kevin Kruse, *Alito's Wrong. Attacks on the Supreme Court Are Nothing New*, BLOOMBERG L. (May 1, 2023, 3:01 AM), https://news.bloomberglaw.com/us-law-week/alitos-wrong-attacks-on-the-supreme-court-are-nothing-new (responding to remarks reported in Taranto & Rifkin, *supra* note 7).

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 interpretation 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.[90] 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.[91] 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.[92] 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).[93] 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.[94] 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.[95] 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.[96]

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90. *See e.g.*, SALTER & STANFILL, *supra* note 33, at 105.

91. *See generally* AMY PASCAL, JOSS WHEDON: THE BIOGRAPHY (2014); SALTER & STANFILL, *supra* note 33, at 87–92, 105.

92. *See, e.g.*, SALTER & STANFILL, *supra* note 33, at 92–97, 105–06; Robyn Bahr, *Joss Whedon's 'Feminist' Shows All Concealed Toxic Ideas About Women*, WASH. POST (Feb. 13, 2021, 3:01 PM), https://www.washingtonpost.com/outlook/2021/02/13/carpenter-whedon-buffy-feminist-legacy/; Kim Masters, *Ray Fisher Opens Up About 'Justice League,' Joss Whedon and Warners: "I Don't Believe Some of These People Are Fit for Leadership"*, HOLLYWOOD REP. (Apr. 6, 2021), https://www.hollywoodreporter.com/feature/ray-fisher-opens-up-about-justice-league-joss-whedon-and-warners-i-dont-believe-some-of-these-people-are-fit-for-leadership-4161658/; Lila Shapiro, *The Undoing of Joss Whedon: The* Buffy *Creator, Once an Icon of Hollywood Feminism, Is Now an Outcast Accused of Misogyny. How Did He Get Here?*, VULTURE (Jan. 17, 2022), https://www.vulture.com/article/joss-whedon-allegations.html.

93. *See, e.g.*, SALTER & STANFILL, *supra* note 33, at 54–59; Noah Berlatsky, *J.K. Rowling's 'Harry Potter' Goblins Echo Jewish Caricatures*, NBC NEWS (Jan. 5, 2022, 7:26 PM), https://www.nbcnews.com/think/opinion/j-k-rowling-s-harry-potter-goblins-echo-jewish-caricatures-ncna1287043; Aja Romano, *Harry Potter and the Author Who Failed Us: The Harry Potter Book Series Helped Me Realize I'm Nonbinary. Now I Know That Had Nothing to Do with J.K. Rowling*, VOX (June 11, 2020), https://www.vox.com/culture/21285396/jk-rowling-transphobic-backlash-harry-potter.

94. *See generally,* KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2018); VICTOR RAY, ON CRITICAL RACE THEORY: WHY IT MATTERS & WHY YOU SHOULD CARE (2022); THE 1619 PROJECT: A NEW ORIGIN STORY (Nikole Hannah-Jones et al., eds. 2021); *see also* DAVID THEO GOLDBERG, THE WAR ON CRITICAL RACE THEORY (2023).

95. *See* GRAY, *supra* note 30, at 40–45 (discussing "in media res" paratexts). "If the notion of a paratext changing our understanding of a text 'after the fact' sounds odd ... we might think of the construction and telling of history, wherein despite the seeming immutability of a past event, each retelling of the story can ascribe different symbolic value to it." *Id.* at 45. Similarly, "[e]specially thoughtful reviews may cause us to reflect once more upon an already-seen film or television program; academic articles and close readings" may do the same. *Id.* "In other words," Gray concludes, "there is never a point in time at which a text frees itself from the contextualizing powers of paratextuality." *Id.*

96. *See* SALTER & STANFILL, *supra* note 33, at 96–97; GRAY, *supra* note 30, at 45.

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.[97] To create a new constitutional meaning, a formal Amendment to the text is required.[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.[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.[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.[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.[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.[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.[104] Even without a formal Amendment, the interpretation and meaning of constitutional law

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97. *See* Lawrence B. Solum, *Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1245–46 (2019) (describing the Fixation Thesis and the Constraint Principle as core features of originalism); *see also, e.g.*, Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 23 (2006); Lee J. Strang, *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 930–31 (2009).

98. *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 11–15 (2013); Solum, *supra* note 97, at 1280–81. *Cf. infra* note 104 (non-originalist scholars advocating for adoption of new constitutional meanings without Article V amendment).

99. *See, e.g.*, William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351–63 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 820–22, 852–64 (2015). *But see* SEGALL, *supra* note 18, at 104–15 (critiquing Baude and Sachs).

100. *See, e.g.*, STRAUSS, *supra* note 37, at 3–4.

101. *See, e.*g., AMAR, *supra* note 37, at ix-xi; JACK M. BALKIN, LIVING ORIGINALISM 12 (2014); WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 1–4 (2010); JED RUBENFELD, REVOLUTION BY JUDICIARY 3–19 (2005).

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.

103. *See* AMAR, *supra* note 37, at ix–xi.

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* FISHKIN & FORBATH, *supra* note 84, at 4; STRAUSS, *supra* note 37, at 115–39.

changes as the paratext deemed significant by its interpretive community changes.[105] 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.[106] 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.[107] 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.[108] Of course, nonoriginalist justices also sometimes strategically join an originalist opinion whose doctrinal outcome they support for different reasons.[109] 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[110]—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.[111] When hate grifters monetizing their angry YouTube rants railed

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105. 3 ACKERMAN, *supra* note 102, at 3.

106. Cass R. Sunstein, Dobbs *and the Travails of Due Process Traditionalism*, *in* ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION 129, 129-31 (Lee C. Bollinger & Geoffrey Stone, eds., 2024).

107. *See, e.g.*, Lawrence B. Solum & Randy E. Barnett, *Originalism after* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. L. REV. 433, 449–50 (2023); Eric Segall, *Text, History, and Tradition in the 2021-2022 Term: A Response to Professors Barnett and Solum*, DORF ON LAW (Feb. 1, 2023), https://www.dorfonlaw.org/2023/02/text-history-and-tradition-in-2021-2022.html; Sunstein, *supra* note 106; *see also* Marc O. DeGirolami, *Traditionalism Rising* (forthcoming) (manuscript at 13) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205351); Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1478 (2023); Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism As Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023).

108. *See* Students for Fair Admins. v. President & Fellows of Harv. College, 600 U.S. 181, 228–30 (2023); Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 747 (2007).

109. *See, e.*g., United States v. Jones, 565 U.S. 400, 413–18 (2012) (Sotomayor, J., concurring); Florida v. Jardines, 569 U.S. 1, 12–15 (2013) (Kagan, J., concurring).

110. *See, e.g*., B.J. Priester, *We've Been Here Before: Parallels in the Public Narrative on the State of Star Wars*, FANGIRL BLOG (June 4, 2018), http://fangirlblog.com/2018/06/weve-been-here-before-parallels-in-the-public-narrative-on-the-state-of-star-wars/.

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).[112] 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.[113] 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.[114] 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.[115]

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.[116] 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

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knowledge of cinema foster a deeper love and appreciation, it allows audiences to think more critically about the art of the world."); Alissa Wilkinson, *The Last Jedi Is a Magnificent Next Step for the Star Wars Universe*, VOX (Dec. 16, 2017, 11:35 AM), https://www.vox.com/culture/2017/12/12/16765308/last-jedi-star-wars-review-rey-carrie-fisher-poe-finn-kylo-ren ("*The Last Jedi* doesn't just feel like a well-executed *Star Wars* movie—it feels like a well-executed *movie*, period.").

112. *See, e.g.*, B.J. Priester, *Leia At Risk Revisited: The Stakes After The Last Jedi*, FANGIRL BLOG (Jan. 30, 2018), http://fangirlblog.com/2018/01/leia-at-risk-revisited-the-stakes-after-the-last-jedi/; B.J. Priester, *Rey At Risk Revisited: The Danger Signs From The Last Jedi*, FANGIRL BLOG (Feb. 16, 2018), http://fangirlblog.com/2018/02/rey-at-risk-revisited-the-danger-signs-from-the-last-jedi/; B.J. Priester, *Reconsidering Rian Johnson's The Last Jedi After Knives Out*, FANGIRL BLOG (Sept. 4, 2020), http://fangirlblog.com/2020/09/reconsidering-rian-johnsons-the-last-jedi-after-knives-out/; *see also, e.g.*, Matthew Rozsa, *Toxic Nerds Are Making "Star Wars: The Last Jedi" Criticism Impossible*, SALON (July 12, 2018, 2:00 PM), https://www.salon.com/2018/07/12/toxic-nerds-are-making-it-impossible-to-criticize-star-wars-the-last-jedi/; Stitch, *Fandom Racism 101: Clocking and Closing The Empathy Gap*, STITCH'S MEDIA MIX (July 6, 2020), https://stitchmediamix.com/2020/07/06/fandom-racism-101-clocking-and-closing-the-empathy-gap/ ("From the start, John Boyega has been subject to racism in fandom. That is a documented fact of fandom. He was being called racist slurs by people angry that he was a Black Stormtrooper and disrupting their understanding of the troopers."); Kelly Marie Tran, *I Won't Be Marginalized by Online Harassment*, N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/movies/kelly-marie-tran.html.

113. *See, e.g.*, The Bitter Script Reader, *"My hero would never do that!" Defending* The Last Jedi*'s Luke Skywalker*, FILM SCH. REJECTS (Jan. 17, 2018), https://filmschoolrejects.com/defense-of-luke-skywalker-the-last-jedi/; *see also* Priester, *supra* note 12, at 18–23 (discussing history and trajectory of *Star Wars* paratext).

114. *See, e.g.*, B.J. Priester, *The Failures of The Rise of Skywalker, Part 6*, FANGIRL BLOG (Jan. 17. 2020), http://fangirlblog.com/2020/01/the-failures-of-the-rise-of-skywalker-part-6/.

115. *See e.g.*, Priester, *supra* note 112; B.J. Priester, *New Insights on the Flawed Finale: The Rise of Skywalker Revisited*, FANGIRL BLOG (Sept. 11, 2020), http://fangirlblog.com/2020/09/new-insights-on-the-flawed-finale-the-rise-of-skywalker-revisited/; Russell Murray, *10 Biggest Problems With the Star Wars Sequels, According to Critics*, CBR (June 11, 2022), https://www.cbr.com/biggest-problems-with-star-wars-sequels-according-to-critics/ (discussing, e.g., "lack of unified story" and "undermining previous films").

116. *See, e.g.*, Anthony Breznican, Justice League*: The Shocking, Exhilarating, Heartbreaking True Story of #TheSnyderCut*, VANITY FAIR (Feb. 22, 2021), https://www.vanityfair.com/hollywood/2021/02/the-true-story-of-justice-league-snyder-cut.

work.[117] But *Justice League* (2017) only fared worse.[118] 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.[119] 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).[120] 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.[121] 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.[122] In response, Snyder fans immediately demanded they be fired.[123] 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.[124] A more measured and deliberate approach, cognizant of both the quantitative and qualitative aspects of various segments of the fandom and

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117. *See e.g.*, Breznican, *supra* note 116.

118. *See, e.g.*, Alex Leadbeater, *Is Justice League Worse Than Batman v Superman? Batman v Superman May Be Controversial, but at Least It Had a Clear Vision. The Same Cannot Be Said for Justice League*, SCREENRANT (Nov. 20, 2017), https://screenrant.com/justice-league-movie-worse-batman-v-superman/. At the U.S. domestic box office, *Justice League* earned $100 million less than its predecessor, only $229 million compared to $330 million. *See Brand: DC Comics*, BOX OFFICE MOJO, https://www.boxofficemojo.com/brand/bn3664968194/ (last visited Mar. 21, 2024).

119. *See, e.g.*, SEAN O'CONNELL, RELEASE THE SNYDER CUT: THE CRAZY TRUE STORY BEHIND THE FIGHT THAT SAVED *ZACK SNYDER'S JUSTICE LEAGUE* (2021); SALTER & STANFILL, *supra* note 33, at 118–23; Breznican, *supra* note 116; Charles Pulliam-Moore, *Zack Snyder Owns Up to Provoking His Fans for Clicks and Charity*, GIZMODO (May 10, 2021), https://gizmodo.com/zack-snyder-owns-up-to-provoking-his-fans-for-clicks-an-1846861362; Tatiana Siegel, *Exclusive: Fake Accounts Fueled the 'Snyder Cut' Online Army*, ROLLING STONE (July 18, 2022), https://www.rollingstone.com/tv-movies/tv-movie-features/justice-league-the-snyder-cut-bots-fans-1384231/.

120. *See, e.g.*, Charles Barfield, *'Zack Snyder's Justice League' Will Reportedly Cost $70 Million To Produce*, PLAYLIST (Sep. 24, 2020), https://theplaylist.net/justice-league-snyder-cut-70-million-budget-20200924/.

121. *See, e.g.*, Scott Mendelson, *Why Zack Snyder's 'Justice League' Failed To Drive New HBO Max Subscriptions*, FORBES (Apr. 22, 2021, 1:05 PM), https://www.forbes.com/sites/scottmendelson/2021/04/22/zack-snyder-justice-league-bombed-on-hbo-max/. At the U.S. domestic box office, Snyder's highest-grossing DC film was *Batman v Superman: Dawn of Justice* (2016) at $330 million, while *Joker* (2019) grossed $335 million, and *The Batman* (2022) grossed $369 million. *See* BOX OFFICE MOJO, *supra* note 118.

122. *See, e.g.*, Borys Kit & Aaron Couch, *DC Shocker: James Gunn, Peter Safran to Lead Film, TV and Animation Division (Exclusive)*, HOLLYWOOD REP. (Oct. 25, 2022, 1:15 PM), https://www.hollywoodreporter.com/movies/movie-news/dc-movies-james-gunn-peter-safran-to-lead-film-tv-division-1235248438/; William Goodwin, *James Gunn Unveils His New DCU Slate With Reboots of Superman, Batman, Green Lantern and More*, GQ (Jan. 31, 2023), https://www.gq.com/story/james-gunn-dcu-slate-reveal-superman-legacy-batman-brave-and-the-bold.

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.cinemablend.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://variety.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.[125] 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.[126]

One task of media franchise management is to hire contributors who will advance, rather than hinder, the overall success of the franchise.[127] Interpretive methodology or passionate preexisting fandom for the franchise are not accurate predictors of favorable contributions.[128] 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.[129] 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.[130] Both men also cited as motivation their longstanding fandom, forged in childhood, for the respective franchises.[131] But in terms of disposition, they both acted with a singular focus to carry out

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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.").

127. Henry Jenkins, *Rethinking the "Value" of Entertainment Franchises: An Interview with Derek Johnson (Part One)*, Pop Junctions (Jan. 15, 2014), https://henryjenkins.org/blog/2014/01/rethinking-the-value-of-entertainment-franchises-an-interview-with-derek-johnson-part-one.html.

128. *See, e.g.*, Aeron Mer Eclarinal, *Zack Snyder Gets Honest About Batman v Superman's Negative Reception*, DIRECT (May 9, 2023), https://thedirect.com/article/zack-snyder-batman-v-superman-negative-reception.

129. *See* Tricia Barr, *Hyperspace Theories Episode 23: Rian Johnson Storytelling Camp*, FANGIRL BLOG (Nov. 26, 2016), https://fangirlblog.com/2016/11/hyperspace-theories-episode-23-rian-johnson-storytelling-camp/.

130. *See, e.g.*, Mer Eclarinal, *supra* note 128 ("this sort of hardcore deconstructivist, heavily layered, experiential modern mythological superhero movie…"); Joshua Rivera, *Zack Snyder Really Wants You to Care About the 'Mythology' of His Batman v Superman Villain*, GQ (Jan. 13, 2016), https://www.gq.com/story/zack-snyder-mythology-batman-v-superman.

131. *See, e.g.*, SALTER & STANFILL, *supra* note 33, at 107–17 (Snyder); Mandalit Del Barco, *For 'Last Jedi' Director, The Journey To 'Star Wars' Began With Action Figures*, NPR (Dec. 15, 2017), https://www.npr.org/2017/12/15/570590142/star-wars-action-figures-paved-the-way-for-the-last-jedi-director (Johnson).

their own personal vision for the franchise, rather than collaborating in synergy with the interpretive community as a whole.[132] Presumably each man genuinely believed he was making positive, rather than harmful, contributions to those franchises—but they also acted to make their mark on the franchise, to bend it to their will, to draw other contributors to the franchise into the gravity well of their impact on the franchise.[133] Such devotion to a unitary vision by a single filmmaker is often lauded in Hollywood, but it is not well suited to a media franchise and its interpretive community.[134]

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.[135] 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.[136] Non-originalist justices can interpret the Constitution deliberately, collaboratively, and incrementally—or not.[137] 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.[138] 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.

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132. 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.").

133. *See, e.g.*, SALTER & STANFILL, *supra* note 33, at ix-xxi, 9–13, 18, 107–24, 160–62 (Snyder); B.J. Priester, *Skywalker At Risk: Serial Storytelling and Brand Value*, FANGIRL BLOG (Feb. 11, 2018), http://fangirlblog.com/2018/02/skywalker-at-risk-serial-storytelling-and-brand-value/ (Johnson); *see also* Tricia Barr, *When Equal Isn't Equal – Troy Denning's Role in the Star Wars EU*, FANGIRL BLOG (Aug. 6, 2011), http://fangirlblog.com/2011/08/when-equal-isnt-equal-dennings-role/ (discussing previous example of same phenomenon in publishing segment of *Star Wars* franchise).

134. Priester, *supra* note 133.

135. TANG, *supra* note 7, at 6–7.

136. *See* WALDMAN, *supra* note 7, at 59 ("But the Warren Court got swept up in the excesses of the era ... [and] at times seemed to become unmoored."); *id.* at 65 ("[T]he Burger Court ... continued to exert its authority over more and more of American law and life. ... [Its] cases reflected the hubris of the Court in its full flush of power."); *see also, e.g.*, 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.").

137. *See, e.g.*, TANG, *supra* note 7, at 6–7, 21, 22–46, 237–44; WALDMAN, *supra* note 7, at 60–62 (criticizing Justice Douglas' majority opinion in *Griswold*); Carlos A. Ball, *The Judicial Activism of Justice Anthony Kennedy*, 72 AM. U. L. REV. 1501, 1509–10 (2023); Ruth Marcus, *The Tragedy of John Roberts*, WASH. POST (Nov. 6, 2022), https://www.washingtonpost.com/opinions/2022/11/04/supreme-court-john-roberts-tragedy-ruth-marcus/.

138. *See, e.g.*, TANG, *supra* note 7, at 6–7, 21, 22–46, 237–44; *see generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1991); Evan D. Bernick, *Substantive Due Process for Justice Thomas*, 26 GEO. MASON L. REV. 1087, 1087–88 (2019).

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 interpretive communities. 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.[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.[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 *The Hunger Games* series.[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.[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.[143] Franchise managers can make mistakes too,[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.[145] Life tenure and impeachment dramatically limit the ability of Congress, the

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139. *See e.g.,* Vary & Lang*, supra* note 123.

140. *See id.* The difficulties for Lucasfilm and Warner Brothers' DC Comics franchise, *see 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.

141. *See, e.g.*, David Levithan, *Suzanne Collins Talks About 'The Hunger Games,' the Books and the Movies*, N.Y. TIMES (Oct. 18, 2018), https://www.nytimes.com/2018/10/18/books/suzanne-collins-talks-about-the-hunger-games-the-books-and-the-movies.html; *see also, e.g.*, Xan Brooks, *'Like a Paranoid Tiger-Mom': How Control-Freak Authors Took Over Hollywood*, GUARDIAN (Feb. 9, 2017), https://www.theguardian.com/film/2017/feb/09/fifty-shades-darker-el-james-control-freak-authors-hollywood; Savannah Walsh, Harry Potter *to Reportedly Become a TV Show, With J.K. Rowling in Tow*, VANITY FAIR (Apr. 4, 2023), https://www.vanityfair.com/hollywood/2023/04/harry-potter-to-reportedly-become-a-tv-show-with-jk-rowling-in-tow.

142. *See* MCU, *supra* note 132, at 1–5, 116, 142–45, 187, 219, 235, 264–76, 350–52, 385–94, 407–08; Eric Eisenberg, *What Is the Marvel Studios Parliament? Producer Nate Moore Explains the Role of Marvel's Behind-the-Scenes Group*, CINEMABLEND (Nov. 9, 2022), https://www.cinemablend.com/interviews/what-is-the-marvel-studios-parliament-producer-nate-moore-explains-the-role-of-marvels-behind-the-scenes-group; *see also* BENNETT, *supra* note 132. Feige's prominence became a point of self-referential humor in the season finale episode of the irreverent and fourth-wall-breaking Disney+ series *She-Hulk*. *See* Rachel Paige, *'She-Hulk': Introducing Marvel Studios' K.E.V.I.N.*, MARVEL.COM (Oct. 13, 2022), https://www.marvel.com/amp/articles/tv-shows/she-hulk-finale-kevin.

143. *See* MCU, *supra* note 132, at 97, 107–10, 235, 252, 267, 274–75, 289-90, 319–21; Cristi Carras, *How Director Chloé Zhao Made 'Eternals' Epic, Intimate and Unlike Anything Else in the MCU*, L.A. TIMES (Nov. 4, 2021), https://www.latimes.com/entertainment-arts/movies/story/2021-11-04/eternals-director-chloe-zhao-marvel-mcu; Christine Dinh, *Director Chloé Zhao Discusses the Philosophy Behind 'Eternals'*, MARVEL.COM (Aug. 30, 2022), https://www.marvel.com/articles/culture-lifestyle/chloe-zhao-philosophy-behind-eternals-movie-special-book; *see also supra* note 132.

144. *See* Mer Eclarinal, *supra* note 128.

145. *About the Court*, SUPREME COURT OF THE UNITED STATES (last visited Mar. 21, 2024), https://www.supremecourt.gov/about/about.aspx.

President, and the voting public to discharge justices from their duties.[146] 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.[147] Importantly, however, the President and Senate, and thereby indirectly the voting public, have complete control over nominations and confirmations of justices.[148] 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.[149] 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).[150] Or the creators, actors, or other participants may simply feel the time is right to end one story and move on to another.[151] 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.[152] 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

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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).

148. *See* U.S. CONST., art. II, § 2.

149. *See e.g.*, Darren Mooney, *Barry, Ted Lasso, and the Value of Letting TV End on Its Own Terms*, ESCAPIST (Apr. 10, 2023), https://www.escapistmagazine.com/barry-ted-lasso-and-the-value-of-letting-tv-end-on-its-own-terms/ ("For most of television's history, the ending of a show was not determined by any artistic considerations, but by cynical business calculations. If ratings weren't strong enough, shows could be pulled off the air.").

150. *See, e.g.*, *id*; Rick Porter, *'Y: The Last Man's' "Steep Decline" in Viewers Helped Fuel Cancellation at FX*, HOLLYWOOD REP. (Feb. 17, 2022), https://www.hollywoodreporter.com/tv/tv-news/y-last-man-canceled-reason-1235095559/; Emily St. James, *Did Your Favorite TV Show Get Canceled? Here are 7 Reasons It Might Have*., VOX (May 16, 2017), https://www.vox.com/culture/2017/5/16/15633120/why-tv-shows-get-canceled-ratings-arent-everything. On continuing fan communities, *see* BUSSE, *supra* note 34; JAMISON, *supra* note 32, at 300; McCormick, *Active Fandom: Labor and Love in The Whedonverse*, *in* WILEY COMPANION, *supra* note 22.

151. *See, e.g.*, Jennifer Arbues, *The Real Reason Supernatural Is Ending After Season 15*, LOOPER (Aug. 18, 2022), https://www.looper.com/160415/the-real-reason-supernatural-is-ending-after-season-15/; Rebecca Mead, *The End of "Succession" Is Near: The Show's creator, Jesse Armstrong, Explains Why He Has Chosen to Conclude the Drama of the Roy Family in Its Fourth Season*, NEW YORKER (Feb 23, 2023), https://www.newyorker.com/culture/the-new-yorker-interview/the-end-of-succession-is-near.

152. *See, e.g.*, Epps & Sitaraman, *supra* note 5; Mystal, *supra* note 3.

fundamental premise of representative democracy grounded in popular sovereignty.[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.[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.[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.[156] By the turn of the twenty-first century—perhaps inauspiciously marked by the Court's decision in *Bush v. Gore* at year's end[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.[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.[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.[160] The text, however, does not expressly authorize judicial review of the constitutionality of federal or state legislation (or other acts of governmental power).[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.[162] Moreover, only after the

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153. *See, e.g.*, Bowie, *supra* note 20, at 1–2, 12–24; Eric J. Segall, *Foreword II: To Reform the Court, We Have to Recognize It Isn't One*, WIS. L. REV. 461–65, 470–71 (forthcoming); Epps & Sitaraman, *supra* note 5, at 166–67.

154. Bowie, *supra* note 20, at 1–24.

155. Segall, *supra* note 107, at 463.

156. *See, e.g.*, 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.").

157. *See generally* Bush v. Gore, 531 U.S. 98 (2000).

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.").

159. Like the path-dependent evolution of the interpretation of the scope of the judicial power under Article III, the extant 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, *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, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 581–84 (2017); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 578–79, 642 (2014).

160. *See* U.S. CONST., art. III, § 1.

161. *Id*.

162. *See, e.g.*, FEDERALIST No. 78, *supra* note 69, at 457 (Alexander Hamilton); WALDMAN, *supra* note 7, at 12; Feldman, *supra* note 45, at 3; Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS. 31, 34–41 (2020); Jud Campbell, *Compelled Subsidies and Original Meaning*, 17 FIRST AMEND. L. REV. 249, 262–67 (2019).

Reconstruction Amendments could the Court widely review cases arising from the states.[163] 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.[164] 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.[165] 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.[166] 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.[167] 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.[168] 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.[169] 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.[170] Enslavers, bakery owners, and manufacturers of filled milk may be dissatisfied with the outcome of majoritarian politics, but they are entitled to no special consideration of their interests outside that process. By contrast, majoritarian politics has incentives to ignore, if not impair, the interests of criminal defendants, religious minorities, and other politically or socially marginalized groups or communities.[171] Likewise, majoritarian

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163. *See, e.g.,* WALDMAN, *supra* note 7, at 31.
164. *See, e.g.*, CHEMERINKSY, *supra* note 3, at 273–74 (citing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 163–64 (1999)); Bowie, *supra* note 20, at 11–24; Epps & Sitaraman, *supra* note 5, at 167; STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY 211–13 (2023).
165. *See, e.g.*, STRAUSS, *supra* note 37, at 33–49.
166. *See, e.g.*, *id.*; Balkin, *supra* note 54, at 146; J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL'Y 351, 361–81 (2019).
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).
168. STRAUSS, *supra* note 37, at 7–49, 99–114.
169. *See, e.g.,* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 406–12, 417–22 (2011); *see also* Feldman, *supra* note 45, at 4–8 (describing three roles for judicial review).
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.[172] 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.[173]

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.[174] 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.[175] 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.[176] 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.[177] 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.[178] Political controversies over public policy certainly have

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172. *See, e.g.,* CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY, at 149–58 (2018); ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA, at 4–12 (2015); LEVITSKY & ZIBLATT, *supra* note 164, at 140–41.

173. *See, e.g.*, Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 UNIV. PA. J. CONST. L. 283, 289 (2010).

174. *Compare* CHEMERINKSY, *supra* note 3, at 289–91 (defending importance of countermajoritarian features in a constitutional democracy), *with* Bowie, *supra* note 20, at 8–14 (arguing that the Court's exercise of judicial review historically has primarily benefitted the powerful and is inconsistent with democratic equality).

175. *See, e.g.,* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 149–50 (2018); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2363 (2001). A politicized rather than independent civil service is a significant marker of democratic backsliding. *See, e.g.*, Huq & Ginsburg, *supra* note 175, at 127–30, 149–53; Heidi Kitrosser, *Accountability in the Deep State*, 65 UCLA L. REV. 1532, 1545–50 (2018); Andrea Scoseria Katz, *Defending the Defenders: Why Bureaucratic Independence Is a Necessary Supplement to Judicial Defense of Democracy*, 72 SYRACUSE L. REV. 1497, 1497–98, 1504, 1509, 1518 (2022); Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 15–16, 25–28 (2020); *see also* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 78–81, 100, 177–81 (2018).

176. *See* U.S. CONST. amends. XV, XVII, XIX; Kagan, *supra* note 175, at 2253–72.

177. *See, e.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551, 2575–76 (2019) (holding that the Secretary of Commerce's decision to include citizenship question in 2020 U.S. Census violated the Administrative Procedure Act (APA)); Biden v. Texas, 597 U.S. 785, 812–14 (2022) (holding that the Secretary of Homeland Security's second order rescinding Migrant Protection Protocols did not violate the APA).

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* [deference] ... 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 critiquing *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 *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

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179. *See, e.g.*, Kagan, *supra* note 175, at 2380–82 (seat belts); West Virginia v. Env't Prot. Agency, 597 U.S. 697, 706–08, 735, 752–53 (2022) (greenhouse gases); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109, 119–21, 126, 137–39 (2022) (vaccination mandate).

180. *See* Anya Bernstein & Cristina Rodríguez, *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 *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).

184. *See* Hammer v. Dagenhart, 247 U.S. 251, 268, 276 (1918); Adkins v. Child.'s Hosp. of D.C., 261 U.S. 525, 539, 561 (1923); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318–19, 337, 338–49, 371–72 (2010); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 530–32, 588 (2012).

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.*, CHEMERINKSY, *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.

186. *See* Dred Scott v. Sandford, 60 U.S. 393, 403–04 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; Plessy v. Ferguson, 163 U.S. 537, 540, 542, 550–52 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Minor v. Happersett, 88 U.S. 162, 165, 178 (1874); Korematsu v. United States, 323 U.S. 214, 219, 222–24 (1944); Hamdi v. Rumsfeld, 542 U.S. 507, 509, 537–38 (2004). *But see* Bowie, *supra* note 20, at 11–12 ("[J]udicial review in the United States directly contributed to the rise of Jim Crow—a point that cannot be emphasized enough.").

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 there[188]—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

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187. *See also, e.g.*, Boumediene v. Bush, 533 U.S. 723, 732–33 (2008) (the Military Commissions Act of 2006 unconstitutionally suspended the writ of habeas corpus); Kimbrough v. United States, 552 U.S. 85, 91, 94–95 (2007) (the statutory sentencing disparity between crack cocaine and powder cocaine offenses results in crack cocaine offenses receiving sentences between three and six times longer than cocaine offenses).

188. *See, e.g.*, Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765, 785, 796 (2021).

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 Isaacharoff & Richard H. Pildes, *Majoritarianism and Minoritarianism in the Law of Democracy* (NYU SCH. OF L., Paper No. 23-19 2022) (manuscript at 7) ("[W]e 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.

193. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L. J. 1346, 1350 (2006).

194. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 512–16 (2022); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 8–12 (2022); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318–19 (2010).

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[196]—as the only suitable mode of judicial review decision-making in light of our constitutional system and its history.[197] 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.[198] 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.[199] Some reboots are more successful than others, and reboots do not invariably improve the franchise's situation in the long run.[200] 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.[201] Some fans will find fault with each new iteration in a media franchise; some Americans will be

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196. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143–44, 151–52 (1893). For significant new archival research on the intellectual origins of Thayer's article, *see* Samuel Moyn & Rephael Stern, *To Save Democracy from Juristocracy: J.B. Thayer and the Tragic Origins of Constitutional Theory*, 39 CONST. COMMENT. (forthcoming 2023) (manuscript at 6) (the article "provide[s] the first archivally rooted . . . account of the . . . motivations and origins of . . . rational basis review in American constitutional law"). Scholars formulate in different ways the principle of deference, especially to Congress, that Thayerism requires for determinations of constitutionality in adjudication by the judiciary, especially the U.S. Supreme Court. *See, e.g.*, *id.* at 4 (using label "clear error rule" for Thayerian deference); Cass R. Sunstein, *Thayerism*, at 4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4215816 (emphasizing Thayer's use of phrases such as "so manifest as to leave no room for reasonable doubt" and "so clear that it is not open to rational question" to describe the requisite showing of unconstitutionality). *See* Moyn & Rephael, *supra* note 196 (manuscript at 47) (on file with SSRN) (discussing Thayer's clear error standard as a response to judicial review).

197. *See, e.g.*, SEGALL, *supra* note 18, at 141–55, 192–94; WALDMAN, *supra* note 7, at 268–69; *see also* Sunstein, *supra* note 196, at 1 (discussing Thayer's influence on important constitutional thinkers including justices Felix Frankfurter and Oliver Wendell Holmes and scholars Alexander Bickel and John Hart Ely). Thayer's continuing influence on constitutional theory is widespread. *See, e.g.*, Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 NW. U. L. REV. 1419, 1420 (2019); Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9, 26–27 (1993); G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 48–49 (1993).

198. *See* Genevieve Koski, *Reboots, Remakes, and Reimaginings: A Guide to Confusing Hollywood Terminology*, VOX (Sep. 16, 2015), https://www.vox.com/2015/9/16/9337121/reboots-remakes-reimaginings.

199. *See* Koski, *supra* note 198 ("The term reboot should be reserved for film properties that have extended beyond a single movie and have thus established a continuity that the subsequent reboot throws out in favor of a new status quo."); *see also, e.g.*, DAN GOLDING, *STAR WARS* AFTER LUCAS: A CRITICAL GUIDE TO THE FUTURE OF THE GALAXY 44–50 (2019) (discussing recent prominence of reboots in Hollywood franchises); James Fleury et al., *supra* note 48 (distinguishing between "soft" and "hard" reboots of a media franchise).

200. *See* Jessie Nguyen & Jessica Nobleza, *From 'Superman' to Hellboy': 13 Movie Reboots That Failed to Revive a Franchise*, COLLIDER (Oct. 19, 2023), https://collider.com/movie-reboots-that-failed/#39-ghostbusters-39-2016 (discussing movie reboots that failed to meet expectations).

201. *See, e.g.,* Priester, *supra* note 12, at 11–20, 31–32; Priester, *supra* note 13, at 80–85, 90–99.

disappointed or outraged by the decision in a prominent Supreme Court case.[202] The maxim "you can't please everyone" holds true in many areas of life, including these. Simplistically 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.[203] Empirical evidence includes data such as box office revenue, television or streaming viewership, sales of merchandise, consumer surveys, and social media engagement.[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.[205] Fan studies scholarship similarly incorporates both quantitative and qualitative research on the interactions between fans, audience, and franchises.[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.[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.[208] Nationally visible

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202. *See, e.g.*, Priester, *supra* note 12, at 16–20; Priester, *supra* note 13, at 73–79, 85–90; Nguyen & Nobleza, *supra* note 200.

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.

204. *See, e.g.*, *id.* at 402–16.

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").

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.

207. *See* Alexander, *supra* note 205; Napoli & Kosterich, *supra* note 203, at 402–16.

208. *See, e.g.*, CHEMERINKSY, *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 decades[213]—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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209. *See* WALDMAN, *supra* note 7, at 15–16. Congress successfully eliminated the entire 1802 Term of the Supreme Court and impeached Justice Samuel Chase in 1805. *See* Stephen Vladeck, *25. Judicial Independence vs. Judicial Accountability*, ONE FIRST (May 1, 2023), https://stevevladeck.substack.com/p/25-judicial-independence-vs-judicial; Steve Vladeck, *5. The Impeachment of Justice Samuel Chase*, ONE FIRST (Dec. 12, 2022), https://stevevladeck. substack.com/p/5-the-impeachment-of-justice-samuel; *see also, e.g.*, Barry Friedman, *What It Takes to Curb the Court*, 2023 WIS. L. REV. 513, 523–34 (summarizing historical instances).

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).

212. *See* WALDMAN, *supra* note 7, at 40–48; LAURA KALMAN, FDR'S GAMBIT: THE COURT PACKING FIGHT AND THE RISE OF LEGAL LIBERALISM 74 (2022); *see also* Gerard N. Magliocca, *'Not a Lawyer's Contract:' Reflections on FDR's Constitution Day Address*, 1 J. AM. CONST. HIST. 43, 47–50 (2023).

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

214. *See, e.g.*, 3 ACKERMAN, *supra* note 102, at 229–87 (discussing the Warren Court's role in desegregation); Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1053 (2014); Chris Ford, Stephenie Johnson, & Lisette Partelow, *The Racist Origins of Private School Vouchers*, CTR. FOR AM. PROGRESS (July 12, 2017), https://www.americanprogress.org/issues/education-k-12/reports/2017/07/12/435629/racist-origins-private-school-vouchers/; KEVIN M. KRUSE, *Whose Religious Tradition?*, *in* ONE NATION UNDER GOD 165–237 (2015) (discussing some of the history of the separation of church and state); Michael Vitiello, *Introducing the Warren Court's Criminal Procedure Revolution: A 50-Year Retrospective*, 51 U. PAC. L. REV. 621, 625–28 (2020) (discussing the Warren Court's effect on criminal procedure).

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.[217] 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.[218] Only recently, in the later years of the Roberts Court, has that situation changed.[219]

In terms of intensity and public visibility, the breadth and depth of today's legitimacy crisis is difficult to deny.[220] 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.[221] President Biden convened a bipartisan Presidential Commission specifically directed to evaluating proposals for Court reform, which ultimately produced a 288-page report.[222] 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.[223] Political candidates for federal, state, and local offices have campaigned—and fundraised—specifically in opposition to an illegitimate Court.[224] Law professors have

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217. *See, e.g.*, CHEMERINKSY, *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–xiii, 23–24, 166–85.

219. *See, e.g.,* CHEMERINKSY, *supra* note 6, at xi–xxiii; WALDMAN, *supra* note 7, at 101-270.

220. *See* Megan Brenan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx.

221. *See, e.g*., Spencer Bokat-Lindell, *Is the Supreme Court Facing a Legitimacy Crisis?*, N.Y. TIMES (June 29, 2022), https://www.nytimes.com/2022/06/29/opinion/supreme-court-legitimacy-crisis.html; Noah Feldman, *Guest Opinion: Ethics Code Wouldn't Fix Supreme Court's Legitimacy Crisis*, THE KEEN SENTINEL (Feb. 18, 2023), https://www.sentinelsource.com/opinion/op-ed/guest-opinion-ethics-code-wouldn-t-fi%20x-supreme-court-slegitimacy-%20crisis/article_ec49c519-f991-5297-8fc6-4f1b17df4804.html; Josh Gerstein, *Fighting For Trust: The Painful Journey of the Supreme Court After* Dobbs, POLITICO (June 25, 2023), https://www.politico.com/news/2023/06/25/supreme-court-dobbs-00102730.

222. *See* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT (2021); *see also Final Report*, WHITEHOUSE.GOV (Dec. 7, 2021), https://www.whitehouse.gov/pcscotus/final-report/; *Presidential Commission on the Supreme Court of the United States*, WHITEHOUSE.GOV, https://www.whitehouse.gov/pcscotus/ (last visited Mar. 25, 2023); Exec. Order No. 14023, 86 Fed. Reg. 19, 569 (Apr. 9, 2021).

223. *See, e.g.*, Sahil Kapur, *Democrats to 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-n1264132; 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[.]").

224. *See, e.g.,* Trip Gabriel, *Democrats Turn to Donors After the Abortion Decision, and Republicans Follow Suit—But With a Different Message*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/us/roe-donors-abortion-fundraising-democrat-gop.html; Patrick Hauf, *Senate Dems Target Clarence Thomas in Fundraising Emails: 'We Cannot Lose Momentum'*, FOX NEWS (May 7, 2023), https://www.foxnews.com/politics/senate-dems-target-clarence-thomas-fundraising-emails-cannot-lose-momentum; Adam Edelman, *Dem-Aligned Groups Launch Campaign to Keep Supreme Court Front of Mind in 2024*, NBC NEWS (June 12, 2023),

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.[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.[226] Rather, it has been prominent, persistent, and highly salient in the constitutional law interpretive community over a span of several years.[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.[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.[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. [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.[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.[232]

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https://www.nbcnews.com/meet-the-press/meetthepressblog/dem-aligned-groups-launch-campaign-keep-supreme-court-front-mind-2024-rcna88662.

225. *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Making the Supreme Court Safe for Democracy*, NEW REPUBLIC (Oct. 13, 2020), https://newrepublic.com/article/159710/supreme-court-reform-court-packing-diminish-power; Joseph Fishkin & William E. Forbath, *How Liberals Should Confront a Right-Wing Supreme Court*, N.Y. TIMES (Oct. 17, 2022), https://www.nytimes.com/2022/10/17/opinion/liberals-supreme-court-constitution.html; Shaw, *supra* note 178; Christopher J. Sprigman, *A Constitutional Weapon for Biden to Vanquish Trump's Army of Judges*, NEW REPUBLIC (Aug. 20, 2020), https://newrepublic.com/article/158992/biden-trump-supreme-court-2020-jurisdiction-stripping.

226. *See* Brenan, *supra* note 220.

227. *See* Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021), https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx.

228. *See, e.g.*, BISKUPIC, *supra* note 7, at 180–81; Gerstein, *supra* note 221 ("A long string of polls has shown record-low levels of public trust in the court."); Madison Hall, *SCOTUS Has a Legitimacy Problem: People Don't Think it Represents Them, and Want to See Term Limits, Polling Finds*, INSIDER (Sept. 22, 2022), https://www.businessinsider.com/majority-dont-trust-the-supreme-court-and-want-term-limits-2022-9. *Cf.* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1725–26 (2013) ("If the Court's opinions change with its membership, public confidence in the Court as an institution might decline. Its members might be seen as partisan rather than impartial and case law as fueled by power rather than reason.").

229. *See, e.g.*, Randy E. Barnett, *Presidential Commission on the Supreme Court of the United States* (July 20, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/Barnett-Testimony.pdf (arguing that partisan court expansion is unconstitutional); Philip Hamburger, *Court Packing Is a Dangerous Game*, WALL ST. J. (Apr. 15, 2021), https://www.wsj.com/articles/court-packing-is-a-dangerous-game-11618505061; Neil S. Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71, 143–47 (2022).

230. *See* WALDMAN, *supra* note 7, at 260–66; *see also supra* note 7.

231. *See, e.g.*, CHEMERINKSY, *supra* note 3, at xxiii; Epps & Sitaraman, *supra* note 5, at 150–51, 164–66; Levy, *supra* note 223; Tyler Pager, *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/.

232. *See, e.g.*, Jeremy Waldron, *supra* note 193, at 1348–49; Jeremy Waldron, *Denouncing Dobbs and Opposing Judicial Review* (Working Paper, Paper No. 22-39), https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=4144889; *see also, e.g.*, Richard H. Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1694–96 (2008) (responding to Waldron).

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 constitutively 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,

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233. *See, e.g.*, CHEMERINSKY, *supra* note 20, at xi–xxiii; ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA xx-xxvi, 207–12, 225–31, 243–45 (2019); WALDMAN, *supra* note 7, at 4–5, 51, 268–69; Bowie, *supra* note 20, at 3–12.

234. *See* ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES i (2012).

235. *See, e.g.*, Siegel, *supra* note 107, at 1129–31, 1148; WALDMAN, *supra* note 7, at 67–69, 73–76; Andy Kroll et al., *We Don't Talk About Leonard: The Man Behind the Right's Supreme Court Supermajority: The Inside Story of How Leonard Leo Built a Machine That Remade the American Legal System — and What He Plans To Do Next.*, PROPUBLICA (Oct. 11, 2023, 5:00 AM), https://www.propublica.org/ article/we-dont-talk-about-leonard-leo-supreme-court-supermajority; Andrea Bernstein & Andy Kroll, *Trump's Court Whisperer Had a State Judicial Strategy. Its Full Extent Only Became Clear Years Later*, PROPUBLICA (Oct. 23, 2023, 6:00 AM), https://www.propublica.org/article/leonard-leo-wisconsin-documents-state-courts-republicans-judges; AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION x–xvi (2019); JACK JACKSON, LAW WITHOUT FUTURE: ANTI-CONSTITUTIONAL POLITICS AND THE AMERICAN RIGHT 20–29 (2019); KEN I. KERSCH, CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM vii–xvii (2019); *see generally* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2010).

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 Kavanaugh[239]—ultimately an exercise of crass 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 alongside 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,

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237. *See, e.g.*, WALDMAN, *supra* note 7, at 88–89, 91; Epps & Sitaraman, *supra* note 5, at 156–58; Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 917 (2018) (discussing "arguably unprecedented blockade of the Merrick Garland nomination" and subsequent Senate confirmation of Justice Gorsuch); LEVITSKY & ZIBLATT, *supra* note 175, at 136, at 109–11, 115–16, 126–27, 138–41, 145–46, 149–51, 166. (discussing how constitutional hardball creates heightened risk of democratic decline); LEVITSKY & ZIBLATT, *supra* note 164, at 50–59, 65–91.

238. *See, e.g.*, WALDMAN, *supra* note 7, at 96; *see generally* LINDA GREENHOUSE, JUSTICE ON THE BRINK: THE DEATH OF RUTH BADER GINSBURG, THE RISE OF AMY CONEY BARRETT, AND TWELVE MONTHS THAT TRANSFORMED THE SUPREME COURT (2021).

239. *See, e.g.*, Epps & Sitaraman, *supra* note 5, at 150, 158–59; WALDMAN, *supra* note 7, at 93–94; RUTH MARCUS, SUPREME AMBITION: BRETT KAVANAUGH AND THE CONSERVATIVE TAKEOVER 169–365 (2019); JACKIE CALMES, DISSENT: THE RADICALIZATION OF THE REPUBLICAN PARTY AND ITS CAPTURE OF THE COURT 368–393 (2021).

240. *See, e.g.*, Friedman, *supra* note 209, at 519 ("shameless political manipulation"); Linda Greenhouse, *What in the World Happened to the Supreme Court?*, ATLANTIC (Nov. 14, 2022), https://www.theatlantic.com/ideas/archive/2022/11/supreme-court-dobbs-conservative-majority/672089/ ("[A] president who lost the popular vote would manage to lock in a conservative supermajority with three appointments, all of them confirmed by the narrowest of margins—following the Republicans' abolition of the filibuster for Supreme Court confirmations—by senators from states that collectively contain less than half the country's population."); Siegel, *supra* note 107, at 1132 ("Originalists can legitimate partisan appointments as embodying fidelity to law through a special set of claims about restoring the Founders' Constitution.").

241. *See supra* note 163; BISKUPIC, *supra* note 7, at 153, 327–29; WALDMAN, *supra* note 7, at 86 (describing President Obama's two Supreme Court appointments as "ideologically muted"); MARY ZIEGLER, DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT 61 (2022); *see also* Fishkin & Pozen, *supra* note 165, at 917; Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CAL. L. REV. 2323, 2325–34 (2021) (discussing increased partisan polarization and sorting in U.S. politics); Franita Tolson, *Countering the Real Countermajoritarian Difficulty*, 109 CAL. L. REV. 2381, 2386–87, 2390–92, 2402–05 (2021) (discussing state legislatures). Partisan polarization has impacted judicial nominations to the lower federal courts, as well. *See* Klarman, *supra* note 175, at 153–74, 250–51; Mark A. Lemley, *Red Courts, Blue Courts* (Nov. 2, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4266445; *see also* Gans, *supra* note 147, at 861–63. Beyond the courts, the extent of asymmetric partisan polarization in U.S. politics has increased dramatically in recent decades. *See* LEVITSKY & ZIBLATT, *supra* note 175, at 8–10, 120–25, 157–75, 220; *see also, e.g.*, LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY (2018).

242. *See, e.g.*, Bruce Ackerman, *Reclaiming the Constitution*, *in* 2 ACKERMAN, *supra* note 102, at 383–420; COHEN, *supra* note 233, at 25–30, 49–52, 56–61; WALDMAN, *supra* note 7, at 49, 64–65; Bowie, *supra* note 20, at 22 ("Supreme Court justices have never been selected for their political neutrality; they are selected precisely because of their ideological compatibility with the dominant party.").

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 manner[245]—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

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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.

245. *See, e.g.*, CHEMERINSKY, *supra* note 20, at xii–xiii, 306–07, 310–11; ZIEGLER, *supra* note 241, at 51–54, 204–12; Tsai & Ziegler, *supra* note 7 (manuscript at 22–32); Robert O'Harrow Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/.

246. *See, e.g.*, JOAN BISKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS 143 (2019); COHEN, *supra* note 233, at 72; MARCUS, *supra* note 239, at 62–63; WALDMAN, *supra* note 7, at 73; *No More Souters*, WALL ST. J. (July 19, 2005, 12:01 AM), https://www.wsj.com/articles/SB112173866457289093.

247. "Sandra Day O'Connor's 2005 retirement led to an inflection point in constitutional politics." Robert L. Tsai & Mary Ziegler, *Why the Supreme Court Really Killed Roe v. Wade: Don't Blame Partisan Judges. The Real Problem is 'Movement' Judges*, POLITICO (June 25, 2023, 7:00 AM), https://www.politico.com/news/magazine/2023/06/25/mag-tsai-ziegler-movementjudges-00102758. The influence of the Federalist Society and its leaders has received increasing attention in recent years. *See, e.g.*, BISKUPIC, *supra* note 7, at 26–28, 112–18; GREENHOUSE, *supra* note 238, at xxiii-xxviii, 87–90; WALDMAN, *supra* note 7, at 74–76, 90; Jamelle Bouie, *Samuel Alito Joins the Supreme Court's Billionaires' Club*, N.Y. TIMES (June 27, 2023), https://www.nytimes.com/2023/06/27/opinion/ samuel-alito-clarence-thomas-ethics.html ("If there is an evergreen presence in these stories concerning the court's ethical entanglement, it is Leonard Leo, one of the longtime leaders of the Federalist Society, a conservative legal organization."); Andy Kroll, et al., *We Don't Talk About Leonard*, *supra* note 235; Andrea Bernstein & Andy Kroll, *Trump's Court Whisperer Had a State Judicial Strategy*, *supra* note 235; Sheldon Whitehouse, *Scheme Speech 19: "Operation Higher Court" and the Supreme Court Ethics Crisis* (Nov. 30, 2022), https://www.whitehouse.senate. gov/news/speeches/scheme-speech-19-operation-higher-court-and-the-supreme-court-ethics-crisis ("[A] plan over 20 years for far-right activists to secretly wine and dine three FedSoc Justices as part of an orchestrated, multimillion-dollar influence campaign").

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 benefitting one party over another in national politics." LEVITSKY & ZIBLATT, *supra* note 164, at 142–64, 169–81, 216–18, 229–43 (emphasis in original)); *see also* VLADECK, *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).[249] 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.[250] 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.[251] 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.[252] 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.[253] 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.[254] 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.[255] 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.[256] 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.[257] 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

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249. *Historical U.S. Presidential Election Results*, BRITANNICA, https://www.britannica.com/topic/United-States-presidential-inauguration (last visited Mar. 25, 2024).

250. *See, e.g.*, 3 ACKERMAN, *supra* note 102, at 229–287; CHEMERINSKY, *supra* note 20, at 121–30, 137–46, 155–56; 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 perhaps 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.

255. *See generally* ALAN I. ABRAMOWITZ, THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP (2018)

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

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258. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2507–08 (2019); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 209 (2008); *see also* WALDMAN, *supra* note 7, at 101–13; Karlan, *supra* note 241, at 2344–54; Klarman, *supra* note 175, at 179-211; LEVITSKY & ZIBLATT, *supra* note 164, at 108–12, 133–37, 178–81, 195; Nicholas O. Stephanopoulos, *The New Promajoritarian Powers*, 109 CAL. L. REV. 2357, 2361–63 (2021) (discussing Article I Judging Elections Clause and Article IV Guarantee Clause as potential remedies for gerrymandering and voter suppression).

259. *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2010); CHEMERINSKY, *supra* note 20, at 233; WALDMAN, *supra* note 7, at 83–85, 103–04, 107, 113.

260. *See, e.g.*, Carson v. Makin, 596 U.S. 767, 785–89 (2022); United States v. Vaello Madero, 596 U.S. 159, 178–80 (2022); Trump v. Hawaii, 585 U.S. 667, 672–73, 709–11 (2018); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014); *see also* Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 85–86–132 (2021).

261. *See, e.g.*, Students for Fair Admins. v. President & Fellows of Harv. College, 600 U.S. 181, 225–27, 231 (2023); 303 Creative LLC v. Elenis, 600 U.S. 570, 577–81, 601–03 (2023); *but see* Haaland v. Brackeen, 599 U.S. 255, 263, 291–92, 296 (2023); *see also* Bridges, *supra* note 260, at 133–67.

262. *See, e.g*., Kennedy v. Bremerton School Dist., 597 U.S. 507, 512, 523–25 (2022); New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 8–12 (2022).

263. *See* VLADECK, *supra* note 7, at 129–259.

264. *See, e.g*., Jane Mayer, *Is Ginni Thomas a Threat to the Supreme Court?*, NEW YORKER (Jan. 21, 2022), https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court; Paul Blumenthal, *The Clarence Thomas Scandal Shows The Supreme Court Considers Itself Above Ethics*, HUFF. POST (Mar. 25, 2022, 11:41 AM), https://www.huffpost.com/entry/clarence-thomas-ginni-thomas-supreme-court ethics_n_623dd29be4b0bcc5b 4787724; Nina Totenberg, *Legal Ethics Experts Agree: Justice Thomas Must Recuse in Insurrection Cases*, NPR (Mar. 30, 2022, 5:00 AM), https://www.npr.org/2022/03/30/1089595933/legal-ethics-experts-agree-justice-thomas-must-recuse-in-insurrection-cases; BISKUPIC, *supra* note 7, at 55–56; WALDMAN, *supra* note 7, at 174; *see also* Matt Ford, *Ginni Thomas Is Giving the Supreme Court a Bleeding Ulcer It Can't Cure*, NEW REPUBLIC (Mar. 25, 2022), https://newrepublic.com/article/ 165858/ginni-thomas-january-6-texts ("Ginni Thomas has come under scrutiny before. In 2000, she worked for the Heritage Foundation to gather résumés for possible Bush administration appointees even as her husband took part in the *Bush v. Gore* litigation.").

265. *See supra* note 288.

her husband either her own post-election activism or the litigation filed to challenge the election results.[266] 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.[267] 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.[268] 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.[269] This context resurfaced inquiries surrounding Justice Kavanaugh's confirmation hearing, including the thoroughness of the FBI investigation and the full payment of significant debts.[270] Even in the absence of direct

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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-rcna49967; *see also* WALDMAN, *supra* note 7, at 150–52.

267. *See* Joshua Kaplan et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow; Joshua Kaplan et al., *Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice Didn't Disclose the Deal*, PROPUBLICA (Apr. 13, 2023, 2:20 PM), https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus; Joshua Kaplan et al., *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition*, PROPUBLICA (May 4, 2023, 6:00 AM), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus; Brett Murphy & Alex Mierjeski, *Clarence Thomas' 38 Vacations: The Other Billionaires Who Have Treated the Supreme Court Justice to Luxury Travel*, PROPUBLICA (Aug. 10, 2023, 5:45 AM), https://www.propublica.org/article/clarence-thomas-other-billionaires-sokol-huizenga-novelly-supreme-court; Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas Acknowledges Undisclosed Real Estate Deal With Harlan Crow and Discloses Private Jet Flights*, PROPUBLICA (Aug. 31, 2023, 4:25 PM), https://www.propublica.org/article/clarence-thomas-disclosure-filing-harlan-crow-real-estate-travel-scotus; Joshua Kaplan et al., *Clarence Thomas Secretly Participated in Koch Network Donor Events*, PROPUBLICA (Sept. 22, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-secretly-attended-koch-brothers-donor-events-scotus; Justin Elliott et al., *It's Not Personal: Why Clarence Thomas' Trip to the Koch Summit Undermines His Ethics Defense*, PROPUBLICA (Oct. 5, 2023, 6:00 AM), https://www.propublica.org/article/clarence-thomas-koch-network-trips-disclosure-law-scotus; *see also* CHEMERINSKY, *supra* note 20, at 328 (referencing previous instances of non-disclosure by Justice Thomas of his wife's income); Emma Brown et al., *Judicial Activist Directed Fees to Clarence Thomas's Wife, Urged 'no mention of Ginni'*, WASH. POST (May 4, 2023), https://www.washingtonpost.com/investigations/2023/05/04/leonard-leo-clarence-ginni-thomas-conway/; Jane Mayer, *How Troubling Are the Payments and Gifts to Ginni and Clarence Thomas?*, NEW YORKER (May 9, 2023), https://www.newyorker.com/news/daily-comment/how-troubling-are-the-payments-and-gifts-to-ginni-and-clarence-thomas.

268. *See* Justin Elliott et al., *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 21, 2023, 11:49 PM), https://www.propublica.org/ article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court; *see also* Bouie, *supra* note 247.

269. *See, e.g.*, Steve Eder, *At the Supreme Court, Ethics Questions Over a Spouse's Business Ties*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/us/john-roberts-jane-sullivan-roberts.html; Mattathias Schwartz, *Jane Roberts, Who is Married to Chief Justice John Roberts, Made $10.3 Million in Commissions from Elite Law Firms, Whistleblower Documents Show*, INSIDER (Apr. 28, 2023, 1:17 PM), https://www.businessinsider.com/jane-roberts-chief-justice-wife-10-million-commissions-2023-4; Heidi Przybyla, *Law Firm Head Bought Gorsuch-Owned Property*, POLITICO (Apr. 25, 2023, 4:30 AM), https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579. *See also* CHEMERINSKY, *supra* note 20, at 326–29 (arguing for increased ethics and recusal obligations for Supreme Court justices); Michael J. Gerhardt, *Supreme Myth Busting: How the Supreme Court Has Busted Its Own Myths*, 2023 WIS. L. REV. 603, 621–28.

270. *See, e.g.*, Cara Bayles, *Four Years Later, Kavanaugh Probe Still Raising Questions*, LAW360 (Sept. 27, 2022), https://www.law360.com/articles/1533616/four-years-later-kavanaugh-probe-still-raising-questions; Tracy Brown & Marc Olsen, *'People are terrified': Inside the Premiere of Sundance's Surprise Brett Kavanaugh Doc*, L.A. TIMES (Jan. 20, 2023, 10:08 PM), https://www.latimes.com/entertainment-arts/movies/story/2023-01-20/sundance-2023-justice-brett-kavanaugh-documentary-takeaways; Amy Brittain, *Inside Brett Kavanaugh's*

evidence of quid pro quo corruption, these revelations further reinforced the perception that the Roberts Court is compromised and illegitimate.[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.[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.[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.[274]

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-kavanaughs-personal-finances-credit-card-debts-and-a-92000-country-club-fee/2018/08/09/2820fee6-8e9f-11e8-8322-b5482bf5e0f5_story.html.

271. *See, e.g.*, Amanda Marcotte, *"Like erecting a dam with a chain link fence": Supreme Court refuses to get why people hate them*, Salon (Nov. 15, 2023), https://www.salon.com/2023/11/15/the-refuses-to-get-why-people-hate-them/. In November 2023 the Court acknowledged the issue by announcing a new Code of Conduct, but its voluntary nature and the absence of enforcement mechanisms only fueled further criticism. *See* Joshua Kaplan et al., *The Supreme Court Has Adopted a Conduct Code, But Who Will Enforce It?*, PROPUBLICA (Nov. 13, 2023, 4:47 PM), https://www.propublica.org/article/supreme-court-adopts-ethics-code-scotus-thomas-alito-crow (reporting on Supreme Court of the United States, *Statement of the Court Regarding the Code of Conduct*); *see also* SUPREME COURT OF THE UNITED STATES, STATEMENT OF THE COURT REGARDING THE CODE OF CONDUCT (2023); Abbie VanSickle & Adam Liptak, *Supreme Court Adopts Ethics Code After Reports of Undisclosed Gifts and Travel*, N.Y. TIMES (Nov. 13, 2023), https://www.nytimes.com/2023/11/13/us/politics/supreme-court-ethics-code.html; Ian Millhiser, *The Supreme Court's New Ethics Code is a Joke*, VOX (Nov. 14, 2023, 3:45 PM), https://www.vox.com/scotus/2023/11/14/23960027/supreme-court-new-ethics-code-clarence-thomas-unenforceable. Additionally, commentators and scholars noted that, even if the financial benefits provided to the justices did not constitute quid pro quo payments for specific actions in particular cases, they nonetheless could constitute a different form of quid pro quo: inducing certain justices to remain on the Court, rather than to retire and create the possibility of their replacement by a less reliable individual. *See, e.g.*, Peter Salib & Guha Krishnamurthi, *Justices on Yachts: A Value Over Replacement Theory*, S. CAL. L. REV. POSTSCRIPT (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4653228.

272. FISHKIN & FORBATH, *supra* note 84, at 423; CHEMERINSKY, *supra* note 20, at xi-xiii, xxiii.

273. *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.

274. *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); FISHKIN & 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[276]—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

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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 overturning 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.").

277. *See supra* text accompanying notes 125–138; Priester, *supra* note 13, at 99; POWELL, *supra* note 167, at 106–36, 172–99. *Cf.* TANG, *supra* note 7, at 11–17, 177–83 (advocating for adoption of "least harm principle" to reduce overconfidence and increase humility in decision-making by Supreme Court justices).

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.*, Doerfler & Moyn, *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.[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.[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,[282] term limits on each justice's service on the Court,[283] a fixed schedule of appointing new justices to significantly reduce the variability of attrition and nomination,[284] or a Court with an even number of justices and evenly split party appointments.[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

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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."); FISHKIN & 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; FISHKIN & FORBATH, *supra* note 84, at 429–32; Klarman, *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).

283. *See* CHEMERINKSY, *supra* note 3, at 310–12; Doerfler & Moyn, *supra* note 5, at 1724–25; Epps & Sitaraman, *supra* note 5, at 173–75; Segall, *supra* note 107, at 471; WALDMAN, *supra* note 7, at 263–65; Nate Raymond, *US Judge, Scholars Urge Supreme Court Term Limits in Bipartisan Push*, REUTERS (Oct. 25, 2023, 5:01 AM), https://www. reuters.com/legal/government/us-judge-scholars-urge-supreme-court-term-limits-bipartisan-push-2023-10-25/ (discussing The U.S. Supreme Court Working Group, *The Case for Supreme Court Term Limits* (2023), https://www.amacad.org/ourcommonpurpose/publication/supreme-court-term-limits). Some scholars believe that implementing term limits requires a constitutional amendment. *See* CHEMERINKSY, *supra* note 3, at 312; Doerfler & Moyn, *supra* note 5, at 1754–55. A formal amendment would be unnecessary, however, if the interpretive community adopted new paratextual interpretations of life tenure and service during good behavior that did not deem unconstitutional a statute providing for life-tenured federal judges to sit for a term-limited duration in service as a full-time justice of the Supreme Court.

284. *See* CHEMERINKSY, *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 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 supermajority 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

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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 Stripping*, 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'").

290. *See, e.g.*, FISHKIN & FORBATH, *supra* note 84 ("This year's Inflation Reduction Act, for example, contained some modest provisions insulating certain administrative actions from judicial review."); Lydia Wheeler, *Judiciary Used as 'Bargaining Chip' in Debt Limit Pipeline Deal*, BLOOMBERG LAW (May 31, 2023, 9:41 AM), https://news.bloomberglaw.com/us-law-week/judiciary-used-as-bargaining-chip-in-debt-limit-pipeline-deal (discussing "provision in the debt ceiling deal that strips Sen. Joe Manchin's (D-W.Va.) pipeline project of judicial review").

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 Connor, 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.[292] The justifications or rationalizations for a reboot can be complicated or multi-faceted, such as diminishing profitability, reduced viewership, perception of consumer fatigue, or reaction to audience fantagonism.[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.[294] Over the same timeframe, three different actors have starred as Batman in three different film storylines.[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.[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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series of all time," the challenge for Marvel Studios in 2023 and beyond is that it "has sailed at full speed into a sea of dilemmas familiar to the writers and illustrators of Marvel comics [including] how to constantly reinvent the formula for success without rebooting the whole enterprise." MCU, *supra* note 132, at 4, 8.

292. *See, e.g.*, Bethan Jones, *"Are You Ready For This?" "I Don't Know If There's A Choice.": Cult Reboots, The* X-Files *Revival, and Fannish Expectations*, *in* ROUTLEDGE COMPANION, *supra* note 35, at 347; Andrew Scahill, *Truly, Truly, Truly Outraged: Anti-Fandom and the Limits of Nostalgia*, *in* FANDOM: THE NEXT GENERATION, *supra* note 291, at 43; Nguyen & Nobleza, *supra* note 200. Michael Rothman, *What's Driving the Resurgence of Reboots, Remakes and Revivals in TV and Film*, ABC NEWS (May 31, 2017, 8:31 AM), https://abcnews.go.com/Entertainment/driving-resurgence-reboots-remakes-revivals-tv-film/story?id=476455 49.

293. *See supra* notes 122 & 198; Graeme McMillan, *'I wish there was a plan': The Inside Story of DC's Infamous New 52 Reboot*, POLYGON (Sept. 21, 2021, 12:10 PM), https://www.polygon.com/comics/22679756/dc-comics-reboot-new-52-writers-oral-history; Elizabeth Nelson, *The Trouble With Reboot TV*, N.Y. TIMES (Feb. 12, 2023), https://www. nytimes.com/2023/02/08/magazine/night-court-velma-that-90s-show-reboots.html; Rothman, *supra* note 292.

294. *See, e.g.*, David Betancourt, *A New Superman Signals a New Era for James Gunn and the DC Universe*, WASH. POST (Dec. 15, 2022, 1:59 PM), https://www.washingtonpost.com/comics/2022/12/15/james-gunn-dc-superman-henry-cavill/; Scott Mendelson, *Superman Returns: What Henry Cavill's Comeback Brings to DC Films*, FORBES (Oct. 25, 2022, 11:00 AM), https://www.forbes.com/sites/scottmendelson/2022/10/25/superman-returns-what-henry-cavill-comeback-brings-to-dc-films/.

295. *See, e.g.*, Andrew Waskett-Burt, *Why There Are 3 Batmans Now*, SCREENRANT (Feb. 13, 2022), https://screenrant.com/why-there-are-3-batman-movies-dceu/ (discussing Batman films starring Christian Bale, Ben Affleck, and Robert Pattison, as well as appearance by Michael Keaton in *The Flash* (2023).

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,[297] while other *Star Trek* stories told on television and streaming services unconnected to the rebooted films have achieved considerable fandom and cultural success.[298] 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.[299] For a time, the most famous brand in the industry even lost its status as the top-selling roleplaying game.[300] 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.[301] 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.[302] 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).[303] 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.[304] 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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297. *See, e.g.*, Craig Elvy, *What Went Wrong For J.J. Abrams' Star Trek Movie Series*, SCREENRANT (Jan. 12, 2020), https://screenrant.com/star-trek-movie-abrams-reboot-problems/.

298. *See, e.g.*, Dallas Lawrence, *Paramount+ Has Found the Winning Formula for 'Star Trek'*, WRAP (May 26, 2023), https://www.yahoo.com/lifestyle/paramount-found-winning-formula-star-160000646.html; Samantha Bergeson, *Quality Wins Out: The Best New 'Star Trek' Show Is Biggest Paramount+ Debut for the Franchise*, INDIEWIRE (Aug. 10, 2022, 11:10 AM), https://www.indiewire.com/features/general/star-trek-strange-new-worlds-breaks-records-paramount-plus-1234750208/.

299. *See, e.g.*, Kevin Ohannessian, *"Dungeons & Dragons Next" Creators Look To Simplicity, Open Development To Regain Lost Gamers*, FAST COMPANY (Mar. 2, 2012), https://www.fastcompany.com/1679620/dungeons-dragons-next-creators-look-to-simplicity-open-development-to-regain-lost-gamers; MICHAEL WITWER ET AL., DUNGEONS & DRAGONS ART & ARCANA: A VISUAL HISTORY 353, 357, 372 (2018) [hereinafter ART & ARCANA].

300. *See* Ohannessian, *supra* note 299; MICHAEL WITWER ET AL., ART & ARCANA, *supra* note 299, at 372.

301. *See* Ohannessian, *supra* note 299; MICHAEL WITWER ET AL., ART & ARCANA, *supra* note 299, at 387, 391, 396, 415; MICHAEL WITWER ET AL., DUNGEONS & DRAGONS LORE & LEGENDS: A VISUAL CELEBRATION OF THE FIFTH EDITION OF THE WORLD'S GREATEST ROLEPLAYING GAME 5–8, 29, 391, 403 (2023) [hereinafter LORE & LEGENDS].

302. *See* MICHAEL WITWER ET AL., ART & ARCANA, *supra* note 299, at 418, 421; MICHAEL WITWER ET AL., LORE & LEGENDS, *supra* note 301, at 1, 39, 79, 107, 116, 127, 163, 176, 262–65, 299, 315, 349; Max Ufberg, *The $1 Billion Company Behind 'Dungeons & Dragons' Is Coming Out of the Basement*, FAST COMPANY (Mar. 31, 2023), https://www.fastcompany.com/90873503/dungeons-and-dragons-wizards-of-the-coast; Sarah Whitten, *'Dungeons and Dragons' Has Found Something Its Early Fans Never Expected: Popularity*, CNBC (Mar. 18, 2019, 12:36 PM), https://www.cnbc.com/amp/2019/03/15/dungeons-and-dragons-is-more-popular-than-ever-thanks-to-twitch.html. Despite this financial success, recent franchise management decisions by corporate executives have a mixed track record. *See* James Whitbrook, *2023 Should Have Been* D&D*'s Best Year, Until It Wasn't*, GIZMODO (Dec 14, 2023), https://gizmodo.com/dungeons-dragons-2023-retrospective-ogl-baldurs-gate-1851097352 ("Two tales of corporate greed bookended what should've been one of the greatest years for *Dungeons & Dragons* the game has ever seen—more popular than ever, more accessible than ever, more culturally relevant than ever.").

303. *See* Priester, *supra* note 12, at 13.

304. *See id.* at 28–29.

perceived in the films.[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 *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.[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.[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[308]—at the very time when numerous films based on book series and comics were thriving at the box office.[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.[310] Although acclaim for *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.[311] As of this writing, the future of the *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.

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305. *See, e.g.*, Rhys McGinley, *Star Wars: 10 Prequel Trilogy Moments Improved By The Clone Wars*, SCREENRANT (Jan. 1, 2022), https://screenrant.com/star-wars-clone-wars-improved-prequel-trilogy/; Jesse Schedeen, *Star Wars: How The Clone Wars Redeemed the Prequel Trilogy*, IGN (May 15, 2020, 3:47 PM), https://www.ign.com/articles/star-wars-the-clone-wars-redeemed-the-prequel-trilogy-movies.

306. *See supra* notes 78 & 80.

307. *See* Tricia Barr, *Passing the Torch*, FANGIRL BLOG (July 9, 2013), http://fangirlblog.com/2013/07/passing-the-torch/ (discussing end of flagship novels storyline); Cyriaque Lamar, *A First Look At the Brand New Comic* Star Wars *(With Darth Vader Illustrated by Alex Ross!)*, GIZMODO (July 10, 2012), https://gizmodo.com/a-first-look-at-the-brand-new-comic-star-wars-with-dar-5924736 ("we're trying very hard to keep everything fresh—as if Episode IV had just come out in theaters."); Andrew Liptak, *Building a Galaxy Far, Far Away: Endings and Beginnings (2006-2015…and Beyond)*, B&N READS (Dec. 18, 2015, 3:30 PM), https://www.barnesandnoble.com/blog/sci-fi-fantasy/ building-a-galaxy-far-far-away-endings-and-beginnings-2006-2015-and-beyond/ ("In the same year, Del Rey announced a new set of books which would form a loose trilogy that would take the EU back to basics.").

308. *See* Priester, *supra* note 12, at 29; *The Legendary* Star Wars *Expanded Universe Turns a New Page*, STARWARS.COM (Apr. 25, 2014), https://www.starwars.com/news/the-legendary-star-wars-expanded-universe-turns-a-new-page ("In order to give maximum creative freedom to the filmmakers and also preserve an element of surprise and discovery for the audience, *Star Wars* Episodes VII-IX will not tell the same story told in the post-*Return of the Jedi* Expanded Universe.").

309. Roughly contemporaneous high-grossing films adapted from novel series included *Harry Potter*, *The Hunger Games*, *Twilight*, and *The Hobbit*. The films of the Marvel Cinematic Universe took inspiration from the comics source material but did not constitute direct adaptations of specific sources. *See* MCU, *supra* note 132, at 38, 81, 121, 235, 412–13, 428; *see also generally* BENNETT, *supra* note 132.

310. *See* Priester, *supra* note 12, at 30–31; *supra* notes 73, 75 & 77.

311. *See, e.g.*, Tracy Brown, *Why You Don't Need to Be a 'Star Wars' Fan to Enjoy 'The Mandalorian'*, L.A. TIMES (Nov. 8, 2019, 7:51 AM), https://www.latimes.com/entertainment-arts/tv/story/2019-11-08/disney-plus-star-wars-the-mandalorian-jon-favreau-novices; Allegra Frank, *You Don't Have to Love Star Wars to Dig The Mandalorian*, VOX (Oct. 30, 2020, 2:10 PM), https://www.vox.com/culture/21534638/the-mandalorian-disney-plus-explained-do-i-need-to-watch-star-wars-baby-yoda.

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.[312]

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[313]—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

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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*, THEFORCE.NET (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.[314] 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

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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 & ZIBLATT, *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.").

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