

## GRIDLOCK, LEGISLATIVE SUPREMACY, AND THE PROBLEM OF ARBITRARY INACTION

*Michael J. Teter\**

### INTRODUCTION

Gridlock has Congress in a headlock. Gripped by stalemate, America's chief lawmaking body can barely muster the ability to make law. Some argue that this is as it should be—or, at least, as the Framers planned.<sup>1</sup> In actuality, rather than furthering the Framers' vision, gridlock undermines many principles that, together, establish our governmental structure.

Specifically, gridlock threatens the fundamental constitutional doctrines of separation of powers and legislative supremacy. Moreover, as many scholars have noted,<sup>2</sup> the Framers were concerned with preventing arbitrary governmental action. Gridlock not only makes the arbitrary exercise of governmental power more likely, but also implicates a new concern: the problem of arbitrary *inaction*. From tax cuts and the budget deficit, to immigration policy, to taking up key executive and judicial nominations, gridlock prevents Congress from acting on matters that undoubtedly rest within the proper realm of the federal government.

My central thesis, then, is this: congressional gridlock threatens our constitutional structure—both as originally constructed in 1787 and as it currently stands. As discussed below, stalemate undermines the core constitutional principles of separation of powers and legislative supremacy, while heightening the risk of arbitrary government decisions—and indeci-

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\* Associate Professor of Law, University of Utah, S.J. Quinney College of Law. Special thanks to the participants at the Symposium, as well as to my colleagues at the University of Utah, for invaluable advice and feedback on earlier iterations of this paper. I would especially like to thank the *Notre Dame Law Review* staff for organizing the Symposium—if only Congress could run as smoothly.

1 See, e.g., Jeff Jacoby, Op-Ed, *Gridlock, or Democracy as Intended?*, BOSTON GLOBE, Dec. 25, 2011, at 9; David B. Rivkin Jr. & Lee A. Casey, Op-Ed, *Why Gridlock in Washington Is Good*, WALL ST. J., Feb. 22, 2010, at A17, available at <http://articles.latimes.com/2011/oct/05/news/la-pn-scalia-testifies-20111005>; David G. Savage, *Justice Scalia: Americans 'Should Learn to Love Gridlock'*, L.A. TIMES, Oct. 05, 2011, <http://articles.latimes.com/2011/oct/05/news/la-pn-scalia-testifies-20111005>.

2 See *infra* notes 67–70 and accompanying text.

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sion. Though these core ideas are linked, I will discuss each concept in turn, in hopes of better illustrating the constitutional problems posed by congressional gridlock.

### I. WHAT IS GRIDLOCK?

This Symposium rests on a basic premise: congressional gridlock presents a problem serious enough to warrant a day and valuable ink spent discussing it. I agree. But what is “gridlock?” Put simply, gridlock—or stalemate, as I will use these terms interchangeably—is the inability of Congress to make substantive policy decisions.<sup>3</sup> In other words, the failure by Congress to enact legislation is not, in and of itself, gridlock. Nor are plummeting confirmation rates for judicial and executive branch nominees necessarily signs that the Senate is suffering from stalemate. If Congress *chooses* to maintain the status quo or if the Senate *decides* to reject a nominee, that amounts to a substantive decision.

But that’s not what is happening. With increasing frequency, Congress fails to make policy decisions. For that reason, we’ve seen far fewer laws enacted during recent Congresses than in the past;<sup>4</sup> the percentage of nominees for whom the Senate takes no action is increasing;<sup>5</sup> the number of clo-

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<sup>3</sup> This definition is taken largely from the work of political scientists who have studied the concept of legislative gridlock. See, e.g., Sarah A. Binder, *Going Nowhere: A Gridlocked Congress?*, 18 BROOKINGS REV. 16, 17 (2000) (characterizing gridlock as the “inability to broach and secure policy compromise”); Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947–96*, 93 AM. POL. SCI. REV. 519, 519 (1999) (quoting Hamilton’s references to gridlock under the Articles of Confederation in the first *Federalist* as an “unequivocal experience of the inefficacy of the subsisting federal government” (internal quotation marks omitted)); Cynthia J. Bowling & Margaret R. Ferguson, *Divided Government, Interest Representation, and Policy Differences: Competing Explanations of Gridlock in the Fifty States*, 63 J. POL. 182, 182 (2001) (discussing the view that the U.S. government is “gridlocked and ineffective . . . [and] cannot make significant policy changes or can do so only rarely” (citations omitted)); George C. Edwards III et al., *The Legislative Impact of Divided Government*, 41 AM. J. POL. SCI. 545, 547 (1997) (describing gridlock in terms of legislation that has been “inhibit[ed]” or “obstructed”); Virginia Gray & David Lowery, *Interest Representation and Democratic Gridlock*, 20 LEGIS. STUD. Q. 531, 531 (1995) (describing gridlock as the government’s inability “to introduce and enact legislation”); William Howell et al., *Divided Government and the Legislative Productivity of Congress, 1945–94*, 25 LEGIS. STUD. Q. 285, 285 (2000) (contrasting highly productive legislatures such as the New Freedom, New Deal, and Great Society Congresses to those marked by “gridlock, paralysis, and legislative slumps”); David R. Jones, *Party Polarization and Legislative Gridlock*, 54 POL. RES. Q. 125, 125 (2001) (defining legislative gridlock as “the inability of government to enact significant proposals on the policy agenda”).

<sup>4</sup> SARAH A. BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* 41 (2003).

<sup>5</sup> See Sheldon Goldman et al., *Obama’s Judiciary at Midterm: The Confirmation Drama Continues*, 94 JUDICATURE 262, 293 (2011) (showing the confirmation rates of judicial nominees across presidencies).

ture votes is at record highs;<sup>6</sup> and Congress is routinely turning to new legislative procedures and gimmicks to overcome gridlock, but those often serve only to allow Congress to avoid making substantive policy decisions.<sup>7</sup>

Moreover, gridlock does not always result in preserving the status quo. It depends instead on the default rules in place. Take the recent example of the tax cuts enacted during President George W. Bush's first term. Those cuts were set to expire on December 31, 2012.<sup>8</sup> President Obama and congressional Democrats supported renewing the tax cuts for Americans earning less than \$250,000.<sup>9</sup> Republicans preferred to extend the cuts across the board.<sup>10</sup> Despite the shared desire to maintain the tax cuts for most people, gridlock nearly kept Congress from enacting any extension. In that case, the absence of a substantive decision from Congress would have been a change in the status quo.

There are many possible causes of gridlock: congressional rules<sup>11</sup>—and specifically, the Senate rules surrounding the filibuster<sup>12</sup>—gerrymandered congressional districts,<sup>13</sup> and a polarized electorate,<sup>14</sup> to name a few. The purpose of this piece, however, is not to debate the causes of, and possible fixes to, congressional stalemate. Instead, the focus is on the constitutional concerns raised by this period of acute gridlock, no matter its roots. It is to those problems that I will now turn.

## II. GRIDLOCK'S THREAT TO SEPARATION OF POWERS

The separation of powers principle forms the core of our constitutional structure.<sup>15</sup> Though justices and scholars disagree about much of the concept's requirements,<sup>16</sup> consensus exists as to the basic elements of the separa-

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6 Data available from *Senate Action on Cloture Motions*, U.S. SENATE, available at [http://www.senate.gov/pagelayout/reference/cloture\\_motions/clotureCounts.htm](http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm).

7 Barbara Sinclair labeled such legislative maneuvering “unorthodox lawmaking.” BARBARA SINCLAIR, *UNORTHODOX LAWMAKING* (4th ed. 2012).

8 Robert Pear, *6 Republicans Named to Congressional Committee to Reduce the Deficit*, N.Y. TIMES, Aug. 11, 2011, at A14, available at [http://www.nytimes.com/2011/08/11/us/politics/11panel.html?\\_r=0](http://www.nytimes.com/2011/08/11/us/politics/11panel.html?_r=0).

9 Tom Cohen & Jessica Yellin, *Obama Renews Calls for Holding down Middle-Class Tax Rates*, CNN (Jul. 9, 2012), <http://www.cnn.com/2012/07/09/politics/obama-bush-tax-cuts>.

10 *Id.*

11 See FRED R. HARRIS, *DEADLOCK OR DECISION* 151–58, 188 (1993) (focusing on the committee system's role in gridlock).

12 See *id.*

13 See THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S WORSE THAN IT LOOKS* 84–98 (2012).

14 See generally JOHN B. GILMOUR, *STRATEGIC DISAGREEMENT* (1995) (describing strategic reasons for politicians to disagree with their counterparts).

15 See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 412 (1996) (referring to the separation of powers as a “skelet[al]” feature of the Constitution).

16 Compare Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 853 (1990) (offering a “formalist” take on separation of powers), with Peter L.

tion of powers doctrine.<sup>17</sup> Specifically, the Framers built into the principle two distinct—and in many respects, contradictory—functions. First, the Framers adopted Montesquieu’s vision of a government composed of three distinct branches, each with its own legitimate sphere of authority, each serving separate functions.<sup>18</sup> The Framers then complicated the simple division of authority by combining the separate functions approach with a system of checks and balances.<sup>19</sup> This concept requires not separation, but interconnectedness. The branches check each other by involving themselves in the others’ functions, at least partially.

While efforts to reconcile these two competing elements of a “uniquely American”<sup>20</sup> version of separation of powers have resulted in an “incoherent”<sup>21</sup> and “abysmal”<sup>22</sup> jurisprudence, some clarity remains. In particular, for the separation of powers doctrine to fulfill its basic purposes, each branch of government must be able to act—both to meet its functional responsibilities and to check the other branches so as to maintain the proper constitutional balance of powers.

With this understanding in mind, it is not difficult to see the threat that congressional gridlock poses to separation of powers.<sup>23</sup> First, gridlock prevents Congress from acting—from fulfilling its functional role as the primary lawmaking body of our national government. The 112th Congress, for example, enacted only 283 laws, far fewer than past Congresses.<sup>24</sup> The 111th Con-

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Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Consistency?*, 72 CORNELL L. REV. 488, 492 (1987) (advocating a “functionalis[t]” approach to separation of powers). The jurisprudential dissonance extends so far, in fact, that on July 7, 1986, the Court announced two separation of powers opinions—relying on the same historical sources and precedents to reach divergent outcomes. In *Bowsher v. Synar*, 478 U.S. 714 (1986), the Court took a formalist approach and struck down much of the Gramm-Rudman-Hollings Act. *Id.* at 717–36. In *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986), the Court employed functionalist reasoning to uphold against constitutional attack portions of the Commodity Exchange Act. *Id.* at 835, 857.

17 See, e.g., M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1147–52 (2000) (describing the separation of powers consensus among scholars).

18 *Id.* at 1130–31 (discussing the two concepts within the separation of powers doctrine).

19 See *id.*

20 M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 135 (2d ed. 1967).

21 Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517–18 (1991) (arguing that in the realm of separation of powers, the Court has “embraced no doctrine, endorsed no philosophy that would provide even a starting point for a debate”).

22 E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989).

23 In another, longer piece, I focus exclusively on the dangers gridlock poses to separation of powers. See Michael J. Teter, *Imbalancing Act: The Constitutional Consequences of Congressional Gridlock* (Jan. 25, 2013) (unpublished manuscript) (on file with author).

24 All of the data regarding number of laws enacted comes from the Library of Congress database. See *Public Laws*, U.S. LIBRARY OF CONGRESS, <http://thomas.loc.gov/home/LegislativeData.php?n=PublicLaws> (last visited Mar. 7, 2013).

gress enacted 383 laws;<sup>25</sup> the 110th passed 460.<sup>26</sup> Indeed, if you look back at the period from 1973–1993, Congress enacted an average of 629 laws each session.<sup>27</sup> The closest any Congress has come to the futility of the current Congress was in 1995–1997, when it enacted 333 laws.<sup>28</sup> These figures are stark and only become more notable when one also takes account of the economic crisis the United States faced during this period. In other words, it is not from the lack of a compelling need for legislation that Congress fails to act. It is gridlock. Thus, a stalemated Congress means that the essential legislative functional needs of the national government largely go unmet and, as I will discuss later, push the executive and judiciary to fill in the gap.

Additionally, stalemate also negatively affects the other two branches' ability to fulfill their own functions. The federal judiciary is facing a vacancy crisis that stems in large part from gridlock.<sup>29</sup> The judicial emergency is affecting the branch's ability to satisfy its functional responsibilities in a timely and efficient manner.<sup>30</sup>

The consequences reach into the executive branch, too. For example, in 2010, the Supreme Court invalidated nearly 600 decisions by the National Labor Relations Board because the Board was operating without a quorum of at least three members.<sup>31</sup> Gridlock in the Senate that kept the chamber from acting on several nominations to the Board was largely responsible for the five-person Board dwindling down to two.<sup>32</sup> A similar fate befell the Federal Election Commission in 2007 and 2008, when it lacked the necessary membership to achieve a quorum.<sup>33</sup> There again, Senate stalemate was the culprit.<sup>34</sup> Gridlock, then, not only hinders Congress's own ability to function, but negatively affects the other branches' fulfillment of their constitutional responsibilities.

Gridlock also frustrates the second element of separation of powers: checks and balances. The underlying purpose of this feature is to allow each of the three branches to guard against efforts by the other two to aggrandize

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25 *Public Laws 111th Congress*, U.S. LIBRARY OF CONGRESS, <http://thomas.loc.gov/home/LegislativeData.php?&n=PublicLaws&c=111> (last visited Mar. 7, 2013).

26 *Public Laws 110th Congress*, U.S. LIBRARY OF CONGRESS, <http://thomas.loc.gov/home/LegislativeData.php?&n=PublicLaws&c=110> (last visited Mar. 7, 2013).

27 *See Public Laws*, U.S. LIBRARY OF CONGRESS, <http://thomas.loc.gov/home/LegislativeData.php?n=PublicLaws> (last visited Mar. 7, 2013).

28 *Id.*

29 *Current Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx> (last visited Mar. 7, 2013).

30 Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*, 73 OHIO ST. L.J. 287, 297–99 (2012) (discussing the consequences on the judiciary's functioning as a result of the vacancy crisis).

31 *New Process Steel, L.P. v. N.L.R.B.*, 130 S. Ct. 2635, 2644–45 (2010).

32 *See id.* at 2638.

33 Paul Kane, *FEC Nomination Impasse Stalls Disclosure of Bundling Data*, WASH. POST (Apr. 4, 2008), [http://articles.washingtonpost.com/2008-04-04/politics/36924400\\_1\\_closure-rule-fec-new-disclosure](http://articles.washingtonpost.com/2008-04-04/politics/36924400_1_closure-rule-fec-new-disclosure).

34 *See id.*

power or usurp another branch's authority.<sup>35</sup> The President's main checking power comes through his veto; the judiciary's ability to check stems from judicial review. Congress's check comes through its power to legislate: to set the nation's agenda through policymaking, to override presidential vetoes and judicial statutory interpretations, and to provide meaningful oversight of the executive branch. Congress cannot perform this checking function if it cannot make deliberative decisions. Were one of the other branches deprived of its checking power—imagine a President without the veto or a judiciary without judicial review—the separation of powers problem would be manifest.<sup>36</sup> A legislature unable to legislate presents no less serious a concern.

What practical effect does congressional gridlock have on checks and balances and the separation of powers? The starting point is to acknowledge that Congress's problems are not happening behind an iron curtain. The other two branches are well aware of the gridlock gripping Congress and, at least in some instances, this emboldens the other branches to fill in the power vacuum because they know that no inter-branch conflict will arise. Thus, when the President ignores the War Powers Resolution—thereby expanding executive power over an area constitutionally shared with the legislature—Congress cannot check him.<sup>37</sup> Nor can Congress assert its constitutional authority when the President responds to a stalemate in the Senate by recess appointing two National Labor Relations Board commissioners and the head of the Consumer Financial Protection Board, justifying the action by interpreting the Constitution's Recess Appointments Clause differently than congressional leaders and parliamentarians.<sup>38</sup> Gridlock also stymies efforts by Congress to respond to statutory interpretations by the federal judi-

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35 THE FEDERALIST NO. 48, at 252 (James Madison) (Ian Shapiro ed., 2009).

36 See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010) (striking down a provision of the Sarbanes-Oxley Act because the law created a "multilevel" of protection for members of the Public Company Accounting Oversight Board to be removed by the President). The Court noted that the tenure provisions limited the President's authority and that, "in a system of checks and balances, power abhors a vacuum, and one branch's handicap is another's strength." *Id.* at 3156 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 694 n.4 (D.C. Cir. 2008) (internal quotation marks omitted)). If the provisions in the Sarbanes-Oxley Act making members of the Board only removable for cause by the Securities Exchange Commission presents a separation of powers concern, it is safe to conclude that depriving the President of the veto would pose an even greater problem.

37 The U.S. military's recent engagement in Libya demonstrates the point. Despite protests by both Republicans and Democrats in Congress that President Obama was ignoring the War Powers Resolution, the military remained involved in the effort to overthrow Muammar Qadhafi well past the statutory deadline imposed by the War Powers Resolution. See Letter from Speaker John Boehner to President Obama on Military Action in Libya (Mar. 23, 2011), available at <http://www.speaker.gov/press-release/speaker-boehner-letter-president-obama-military-action-libya>.

38 See Jonathan Weisman, *Appointments Challenge Senate Role, Experts Say*, N.Y. TIMES, Jan. 8, 2012, at A19, available at <http://www.nytimes.com/2012/01/08/us/politics/experts-say-obamas-recess-appointments-could-signify-end-to-a-senate-role.html?pagewanted=all>.

ciary.<sup>39</sup> For example, were the judiciary to extend authority beyond its constitutional role—through employing improper statutory interpretation techniques, by ignoring limits on its jurisdiction, or by individual judges refusing to recuse themselves despite clear conflicts of interest—Congress could not step in to check the branch.

For these reasons, as well as several discussed in the next two sections, congressional gridlock poses a real and significant threat to the constitutional separation of powers.

### III. GRIDLOCK JEOPARDIZES THE CONSTITUTIONAL PRINCIPLE OF LEGISLATIVE SUPREMACY

The concept of legislative supremacy rests on the basic premise that the legislature, as the most representative branch of government, should play the leading role in setting national policy.<sup>40</sup> In concrete terms, this principle has come to mean that Congress should preside as the primary source of law as a means of ensuring democratic accountability and statutory legitimacy.<sup>41</sup> Additionally, legislative supremacy requires that the other branches undertake their functional engagement with statutes in a way that respects Congress's authority over making law. This second premise of legislative supremacy largely focuses on the judiciary's relationship with Congress and applies most often in the context of statutory interpretation. Its chief function is to encourage the judiciary to act as Congress's "faithful agent"<sup>42</sup> when interpreting a statute. In other words, the judiciary's job is to interpret a statute to meet Congress's intent without regard to the judge's view of the best policy.

Gridlock undermines both elements of legislative supremacy. Justice Frankfurter once stated, "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government."<sup>43</sup> Legislating, then, is a vastly different enterprise than executing and interpreting the policies. Legislation seeks to address a national concern with a national answer by initiating policy for the entire country. In many respects, "initiate" is the key—the notion that sets the legis-

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39 Rick Hasen recently completed a study showing a dramatic decline in the number of congressional overrides of Supreme Court decisions. See Richard L. Hasen, *End of the Dialogue? Political Polarization, The Supreme Court, and Congress* (Aug. 14, 2012) (unpublished manuscript) (on file with author).

40 See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1348–49 (2006) (criticizing judicial review on the ground that rights may not be better protected by judicial review than through the legislative process and that judicial review is democratically illegitimate).

41 *Id.* at 1349.

42 Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 *HARV. J.L. & PUB. POL'Y* 61, 63 (1994) (arguing that through legislation society wishes to confine judges so that they are "faithful agents, not independent principals").

43 Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUM. L. REV.* 527, 538–39 (1947) (explaining his objection to the use of the phrase "legislative intent").

lative function apart from that associated with the other branches. In setting policy, the nation, as a whole, should have a voice through the collective deliberation of the legislative process. Once the task of deciding policy has been made, it deserves greater respect and commands more authority than do the tasks of executing and interpreting. The practical rationale for this respect rests, in part, on the fact that national stability and transparency require one source of law. If each branch could rely on its own independent judgment as to the best policy, no coherent and effective national policy would emerge. Thus, legislative supremacy treats Congress as the decider of public policy and demands that once a decision is made, the rest of government abide by it until Congress decides otherwise.

But why should Congress be the branch that sets national policy? Put simply, democratic theory demands that national policy decisions be made by “those popularly chosen to legislate”<sup>44</sup> and be respected by other governmental actors. In other words, “[s]tatutory authority derives from its political source.”<sup>45</sup> The legislature—elected by and accountable to the people—must be the branch responsible for making national policy. When another branch fails to abide by a constitutional legislative pronouncement, “it arrogates the ultimate power to make public policy.”<sup>46</sup>

Legislative stalemate weakens Congress’s ability to serve as the primary source of American law. In part this is because of the simple fact that a Congress that cannot act cannot legislate. That does not leave the United States ungoverned, however. It just means that the executive branch often fills in the policy vacuum. For example, after gridlock prevented Congress from enacting the DREAM Act,<sup>47</sup> President Obama announced a new administration policy of issuing work visas to young, undocumented individuals who arrived in the country before the age of sixteen and who met several other criteria.<sup>48</sup> This shift in policy was only the most notable in a series of executive branch unilateral moves that the Obama Administration unveiled as a response to congressional stalemate.<sup>49</sup>

It’s not just that the executive assumes a greater lawmaking responsibility because of gridlock. Congress, itself, often responds to stalemate by pushing

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44 *Id.* at 545.

45 Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 226 (1983) (discussing the difference between precedential judicial authority and statutory authority).

46 Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 293 (1989) (“Violations of the supremacy principal are particularly serious because they impair the basic social norm of democratic self-government.”).

47 DREAM Act of 2010, S. 3962, 111th Cong. (2010).

48 Christi Parsons & Kathleen Hennessey, *Thwarted by Congress, Obama to Stop Deporting Young Illegal Immigrants*, L.A. TIMES (June 15, 2012), <http://articles.latimes.com/2012/jun/15/news/la-pn-thwarted-by-congress-obama-will-stop-deporting-young-illegal-immigrants-20120615>.

49 Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES, Apr. 23, 2012, at A1, [available at http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html](http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html).



substantive decision-making onto newly created bodies. The military base closure commission,<sup>50</sup> created by Congress in 1988, represents a useful example. For a variety of reasons, both political and structural, stalemate prevented Congress from acting on base closures for over twenty years, despite widespread consensus that bases needed to be closed.<sup>51</sup> As a solution, Congress devised the Defense Base Closure and Realignment (BRAC) Commission, composed of appointees selected by congressional leaders and the President, to study and recommend closures.<sup>52</sup> The Commission recommendations would go to the President as a package and, if approved by him, would be forwarded to Congress.<sup>53</sup> The Commission's closures would take effect unless Congress acted by passing a disapproval resolution in both chambers, subject to the President's veto.<sup>54</sup> In essence, then, Congress reversed the veto-gates and used gridlock to ensure policy action, rather than inaction. But to make that work, Congress had to transfer a significant degree of policymaking to an independent body over which Congress had no meaningful authority—indeed, that was the point.

The BRAC law is widely, and correctly, viewed as a substantive success.<sup>55</sup> Not every success, however, translates into a model solution for other problems caused by stalemate. Nevertheless, gridlock forces Congress to turn increasingly to commissions, triggers, and automated policymaking as a substitute for deliberative policymaking often associated with legislating. For example, as part of the 2011 debt ceiling showdown, Congress enacted the Budget Control Act,<sup>56</sup> which has two main features. First, the law raised the debt ceiling limit and permitted the President to *initiate* another raise in the ceiling, with Congress being able to disapprove the raise through a joint resolution.<sup>57</sup> Additionally, the law established the Joint Select Committee on Deficit Reduction, which was tasked with proposing \$1.5 trillion in budget cuts, with automatic cuts totaling \$1.2 trillion taking effect if Congress failed to enact sufficient cuts.<sup>58</sup> As everyone knows, the “Super Committee” efforts failed and, therefore, Congress was faced with trying to overcome gridlock during the December 2012 lame duck session to avoid the \$1.2 trillion in

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50 Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623 (1988) (codified as amended at 10 U.S.C. § 2687 note (2006)).

51 See Michael J. Teter, *Recusal Legislating: Congress's Answer to Institutional Stalemate*, 48 HARV. J. ON LEGIS. 1, 8–12 (2011) (describing the problematic history of base closures).

52 Defense Base Closure and Realignment Act of 1990 §§ 2901(a), 2902(c), 2903(b), 10 U.S.C. § 2687 note (1994).

53 *Id.* § 2903(e)(2).

54 *Id.* § 2908.

55 See Kenneth R. Mayer, *Closing Military Bases (Finally): Solving Collective Dilemmas Through Delegation*, 20 LEGIS. STUD. Q. 393, 396–98 (1995) (analyzing the structure of the base-closing process and the commissions' procedural requirements).

56 Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240.

57 *Id.* at 251.

58 See *id.* at 256–59.

budget cuts from taking effect.<sup>59</sup> As it turns out, Congress could only muster delaying the budget cuts for two months.<sup>60</sup> And though it's certainly true that Congress itself enacted these laws, that doesn't change the fact that over \$3.2 trillion in economic policy will be set not by congressional action, but by inaction. Congress is forced to respond to stalemate by abandoning its responsibility for driving national policy. The President decides whether to raise the debt ceiling. A Super Committee attempts to negotiate a \$1.5 trillion deficit reduction, leaving no opportunity for the other 523 members of Congress to alter the resulting policy. If such an effort fails, automatic cuts occur without Congress making an informed decision about the details of the deficit reduction package.

All this because Congress knew that gridlock would likely prevent it from acting to make substantive decisions. Are policies derived from legislative inaction entitled to the same authority given to substantive decisions? The underlying rationales for legislative supremacy suggest not. Either way, it's clear that gridlock is threatening Congress's role as the primary source of national policy.

Stalemate also undermines the doctrine of legislative supremacy that centers on the relationship between Congress and the federal judiciary. Courts are the "honest agents"<sup>61</sup> of Congress when seeking to determine what a statute means. The principle of legislative supremacy demands that an interpreting court respect the fact that Congress enjoys primary responsibility for making law. Thus, "when legislation clearly embodies a collective legislative understanding, the court must give way, even if its own view of public policy is quite different."<sup>62</sup>

Scholars and judges have long debated how courts should approach statutory interpretation with an eye toward legislative supremacy, and my intent here is not to jump into that fray. Instead, I want to focus on one other element of legislative supremacy as it relates to judicial statutory construction. The legislature's lawmaking supremacy includes the authority to override judicial statutory interpretations. Assuming the constitutionality of a statute, Congress is entitled to the "last word" as to what a statute means and how it is to be enforced. The judiciary recognizes this principle through various canons of statutory interpretation and by envisioning the interpretative

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59 That was coupled with over \$2 trillion in tax increases that were set to take effect because of the expiration of the Bush-era tax cuts, thus combining with the automated budget cuts to create a "fiscal cliff." See Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat 3296.

60 See Janet Hook et al., *Congress Passes Cliff Deal*, WALL ST. J. (Jan. 2, 2013, 1:42 PM), <http://online.wsj.com/article/SB10001424127887323320404578215373352793876.html> ("The compromise dodges one cliff, but it sends Congress barreling toward another.").

61 Or, at least, they claim to be. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 9-10 (1997) ("[Judges are] in a sense agents of the legislature . . ."). *But cf. id.* at 22-23 (arguing that the legislature's intent is irrelevant and that the semantic meaning of the statute governs).

62 Farber, *supra* note 46, at 292.

process as one of a dialogue between the courts and Congress.<sup>63</sup> In this view, if a court misinterprets a statute, Congress can correct it. Courts often take this further by applying “super strong” stare decisis to judicial statutory interpretations and by relying on legislative inaction to validate past interpretations.<sup>64</sup>

Congressional gridlock alters this dynamic by making it much harder for Congress to correct statutory decisions with which it disagrees. A recent study by Rick Hasen shows that the number of congressional overrides has dropped dramatically during this gridlocked period.<sup>65</sup> Even those few successful overrides help prove the rule. For example, it took nearly a decade for Congress to correct the Supreme Court’s restrictive and misguided reading of the Americans with Disabilities Act, despite the fact that significant support existed within Congress for an override much earlier.<sup>66</sup>

In short, congressional gridlock endangers legislative supremacy over the ultimate interpretation of statutes. In the dialogue between courts and the legislature over a statute’s meaning, stalemate prevents Congress from speaking, leaving the judiciary as the dominant voice in statutory interpretation.

#### IV. GRIDLOCK INCREASES THE RISK OF GOVERNMENTAL ARBITRARINESS

The doctrines of separation of powers and legislative supremacy are familiar founding principles. For the remainder of this Article, I want to focus on an equally important constitutional objective: avoiding arbitrary governmental action. Indeed, David Currie has argued that one of the chief purposes of separating powers is to serve “as a powerful check against arbitrary action.”<sup>67</sup> More recently, Lisa Schultz Bressman suggested that the “separation of powers was intended not merely to require Congress and the President to act independently of one another, but also to act in a nonarbitrary, public-regarding manner.”<sup>68</sup> Bressman goes further, by identifying several other constitutional elements that can be understood as ways the Framers sought to prevent arbitrary governmental decisions, such as bicamer-

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63 See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 31–32 (1982); see also *Johnson v. Transp. Agency*, 480 U.S. 616, 630 n.7 (1987) (“Any belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that on occasion an invitation declined is as significant as one accepted.”).

64 See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION* 642–45 (4th ed. 2007); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1482 (2010).

65 Hasen, *supra* note 39, at 4.

66 Chai R. Feldblum, *Roundtable On: The Americans with Disabilities Act and the ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 232, 239–40 (2008).

67 David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 19.

68 Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 499–500 (2003).

alism, presentment, and the jury trial provision of Article III.<sup>69</sup> In short, avoiding arbitrary action is a constitutional concern.<sup>70</sup>

I would add to that, however, that the Framers had another objective in mind: devising a system that avoided arbitrary governmental *inaction*. After all, the problem that led to the convening of the Constitutional Convention in Philadelphia in 1787 was the inability of the government under the Articles of Confederation to act.<sup>71</sup> Even when a large majority of delegates to the Continental Congress agreed on a policy, often the government still could not proceed.<sup>72</sup> Thus, though it is true that the Framers paid careful attention to creating a governmental structure that would avoid an “excess of law-making,”<sup>73</sup> they also sought to devise a workable, effective, and energetic national government.<sup>74</sup> Moreover, for the Framers, when broad consensus in support of a particular action exists throughout the system, government should be able to act.<sup>75</sup> It is certainly fair to debate what represents “broad consensus,” but it is worth noting that the Framers intentionally avoided cre-

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69 See *id.* at 500–03.

70 See *id.* at 468 (“[T]he concern for arbitrariness, a staple of administrative law, actually emanates from the constitutional structure.”).

71 See *Proceedings of Commissioners to Remedy Defects of the Federal Government: 1786*, AVA-LON PROJECT, [http://avalon.law.yale.edu/18th\\_century/annapoli.asp](http://avalon.law.yale.edu/18th_century/annapoli.asp) (last visited Mar. 7, 2013) (calling for a convention to draft a new constitution). See generally *1 1787: DRAFTING THE U.S. CONSTITUTION* 84–157 (Wilbourn E. Benton ed., 1986) (providing Convention notes discussing the weaknesses of the Articles of Confederation).

72 As Alexander Hamilton wrote in Federalist No. 22:

Congress . . . [has] been frequently in the situation . . . where a single vote has been sufficient to put a stop to all their movements. . . . [I]ts real operation is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, and corrupt junto, to the regular deliberations and decisions of a respectable majority. . . . If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good. And yet, in such a system, it is even happy when such compromises can take place: for upon some occasions things will not admit of accommodation; and then the measures of government must be injuriously suspended, or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savor of weakness, sometimes border upon anarchy.

THE FEDERALIST NO. 22, at 110–11 (Alexander Hamilton) (Ian Shapiro ed., 2009).

73 THE FEDERALIST NO. 62, at 315 (James Madison) (Ian Shapiro ed., 2009).

74 See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 448 (Max Farrand ed., 1966) (statement of James Madison).

75 See Teter, *supra* note 51, at 2.

ating supermajoritarian requirements for ordinary legislative actions.<sup>76</sup> As Madison wrote, requiring supermajorities for legislation would mean that

[i]t would be no longer the majority that would rule: the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or, in particular emergencies, to extort unreasonable indulgences.<sup>77</sup>

From Madison's standpoint, then, a majority having to succumb to the "unreasonable indulgences" of the minority represents, in most cases, governmental arbitrariness.

What else constitutes arbitrariness? Let me again turn to Professor Bressman, since she has offered the most precise definition I've encountered. Arbitrary decision-making "is not rational, predictable, or fair. . . . [I]t generates conclusions that do not follow logically from the evidence, rules that give no notice of their application, or distinctions that violate basic principles of equal treatment."<sup>78</sup> The same can be said for arbitrary indecision or inaction—that it is not "rational, predictable, or fair." Moreover, given the Framers' interest in devising a system that would function, it seems appropriate to say that congressional inaction is arbitrary when general consensus to act exists and yet Congress does not act.

Gridlock—the failure by Congress to make policy decisions—implicates concerns over arbitrary inaction in a variety of ways. When a president nominates an individual to serve on the federal judiciary or in the executive branch, the primary threat to the person's confirmation is not rejection by the Senate, but rather the failure by the upper chamber to make any substantive decision. Again, the distinction must be drawn between affirmative rejection of a nominee and the failure to act at all. The former is not a symptom of gridlock—the Senate, in the instance of voting against a nominee—has made a substantive decision. However, when the Senate fails to take up and decide a nomination, that nominee is a casualty of the system's gridlock, which is becoming more and more pronounced. There does not appear to be any "rational, predictable, or fair" explanation for which nominees will reach a substantive decision by the Senate and which will go unacted upon. In the past, some semblance of "rules" that "gave notice" and ensured something akin to "equal treatment" existed. For example, support from both home state senators nearly guaranteed action on a district court nomination.<sup>79</sup> No longer. Previously, a positive evaluation by the American Bar

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76 THE FEDERALIST NO. 58, at 299–300 (James Madison) (Ian Shapiro ed., 2009); see also Bruce Ackerman et al., Comment, *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539, 1540–44 (1995) (discussing the framer's intent to not require a supermajority in arguing against a proposal to amend the House Rules to require tax increases to command a three-fifths majority to pass).

77 THE FEDERALIST NO. 58, *supra* note 76, at 299.

78 Bressman, *supra* note 68, at 496.

79 See LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT* 75–78 (2005).

Association went far in ensuring a vote on the merits.<sup>80</sup> Not anymore.<sup>81</sup> The judicial confirmation process has become something of a crapshoot, where someone could be denied a vote before the Senate for no apparent or predictable reasons. It's a roll of the dice—and what's more arbitrary than that?

Arbitrary inaction isn't limited to the judicial and executive branch confirmation process. Many pieces of legislation that enjoy bipartisan majority support nevertheless succumb to congressional gridlock. In 2008, for example, Senator Tom Coburn placed holds on more than eighty pieces of legislation, many already having passed the House of Representatives with unanimous or near-unanimous support.<sup>82</sup> As a response to Senator Coburn's single-senator-induced gridlock, Senate Majority Leader Harry Reid packaged thirty-five of the least controversial bills into one major omnibus bill.<sup>83</sup> The effort to overcome the stalemate failed, as "only" fifty-two senators voted for cloture, depriving Senator Reid of the sixty votes needed to move the legislation forward to a decision on the merits.<sup>84</sup> Many of the senators voting against cloture had sponsored or co-sponsored bills within the package.<sup>85</sup> Had cloture been successfully invoked, it seems likely that the legislation would have passed with a substantial majority. Instead, a minority of senators chose to protect the peculiar, idiosyncratic judgments of a single senator instead of allowing the Senate a vote on the merits of the legislation. What is more arbitrary than one person's preferences preventing enactment of bills supported by an overwhelming majority of the 534 other members of Congress? How much broader consensus is required for action than unanimous or near-unanimous agreement on a measure? When gridlock prevents Congress from acting despite widespread support for a proposal, arbitrariness reigns.

Gridlock also pushes Congress toward establishing legislative mechanisms that themselves are arbitrary and that often result in arbitrary policy outcomes. Consider, again, the ad hoc committees and triggers that Congress relied on to overcome the stalemate that threatened our nation's credit

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80 See *id.* at 70–75.

81 See RUSSELL WHEELER, BROOKINGS INST., JUDICIAL NOMINATIONS AND CONFIRMATIONS IN OBAMA'S FIRST TERM, 3 (2012), available at [http://www.brookings.edu/~media/Research/Files/Papers/2012/12/13%20judicial%20nominations%20wheeler/13\\_obama\\_judicial\\_wheeler.pdf](http://www.brookings.edu/~media/Research/Files/Papers/2012/12/13%20judicial%20nominations%20wheeler/13_obama_judicial_wheeler.pdf) (stating that American Bar Association "ratings appear to have a relationship, albeit tenuous, to confirmations").

82 Carl Hulse, *Democrats Try to Break Grip of the Senate's Flinty Dr. No*, N.Y. TIMES, July 28, 2008, at A1; see also Advancing America's Priorities Act, S. 3297, 110th Cong. (2008) (providing the text of the omnibus bill proposed by Sen. Reid).

83 Hulse, *supra* note 82, at A1.

84 See U.S. Senate Roll Call Votes 110th Congress-2nd Session, U.S. SENATE, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=110&session=2&vote=00189](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00189) (last visited Mar. 7, 2013) (providing the roll call vote for cloture concerning S. 3297).

85 See David Waldman, *Coburn Omnibus Coming Up for Cloture Vote*, DAILY KOS (July 28, 2008, 12:15 PM), <http://www.dailykos.com/story/2008/07/28/558235/-Coburn-Omnibus-coming-up-for-cloture-vote?detail=hide>.

rating and economy. Congress could not get past the gridlock to make a substantive policy decision on the debt ceiling or deficit reduction. Instead, Congress's "solution" was to create a super committee to try to negotiate an answer while working against the threat that if Congress failed to enact a deficit reduction plan by January 2013, automatic cuts totaling \$1.2 trillion would occur. One could argue that passing the buck to twelve members of Congress to work out a compromise and dividing automatic cuts equally between domestic and defense spending without any explanation or study of the effects of such a division was arbitrary in and of itself. That's not my assessment, though, because such a definition of arbitrariness would prove over-inclusive, encompassing nearly every legislative decision. After all, policymaking is almost always an exercise in line drawing and that can often be seen as arbitrary to some degree. Instead, my concern rests with the fact that gridlock forces Congress to create compromise procedures as a substitute for negotiated substantive policy.

The problem this poses is twofold. First, for all of its (many) faults, the legislative process relies on inputs and follows paths that are generally well-known and understood after 230 years of congressional governing. In other words, while the outcomes may seem like arbitrary line drawing, the process itself is not. Moreover, abiding by the traditional legislative process provides some degree of transparency, accountability, and democratic control.<sup>86</sup> Establishing a new, unknown set of legislative procedures to set national policy is akin to changing the rules in the middle of a football game because neither team is scoring. It may result in a substantive decision—or a higher score—but not because of any "rational, predictable, or fair" standards.

Second, it's rare for such mechanisms to work, as seen recently with the super committee and with the Simpson-Bowles Commission.<sup>87</sup> The failure leaves Congress with one of two approaches to follow. Congress could follow the route it did with the Simpson-Bowles recommendations, which is to take no further action and make no substantive policy decision—an arbitrary outcome considering Congress's recognition that a decision needed to be made. Alternatively, Congress could take the approach it did with the super committee, by establishing triggers or other automated outcomes to make policy if the ad hoc committee fails. These automated triggers are substantive decisions by Congress, but they're being made without knowing whether they'll actually be necessary or take effect. Legislators don't have to weigh the consequences of their votes and they can distance themselves from the results because those outcomes occur only after some intervening failure on which

<sup>86</sup> It is partly for this reason that the Court rigorously enforced the "finely wrought" process of Article I, Section 7. See *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983).

<sup>87</sup> Though the National Commission on Fiscal Responsibility and Reform (the Simpson-Bowles Commission, as it quickly became known) was officially created by Executive Order, it grew out of bipartisan legislation. See *Simpson-Bowles Budget Plan (National Commission on Fiscal Responsibility and Reform)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/organizations/n/national\\_commission\\_on\\_fiscal\\_responsibility\\_and\\_reform/index.html](http://topics.nytimes.com/top/reference/timestopics/organizations/n/national_commission_on_fiscal_responsibility_and_reform/index.html) (last updated Apr. 4, 2013).

members can place blame. Limiting the efficacy of Congress's "decision," blurring the link between the decision and its policy consequences, and reducing the ability for an electorate to hold representatives accountable creates a greater risk of arbitrary decision-making.

Furthermore, as the deficit reduction effort shows, such mechanisms take time to complete. This means, then, that the "substantive" trigger decision that Congress did make in August 2011 will not take effect until January 2013. It was impossible for Congress in August 2011 to know what shape the economy would be in by January 2013, nor whether the Bush-era tax cuts would also expire, and whether America would be facing a "fiscal cliff," whether the country would be on safe economic ground, or whether we would have already fallen into the ravine. But triggers are triggers, and gridlock makes it exceedingly difficult for Congress to undo what it has set in place, even if the context has changed dramatically and even if a large majority in Congress prefers to change the policy. In other words, Congress most likely would not have voted for the substantive policy of \$1.2 trillion in budget cuts split evenly between domestic and defense spending in August 2011, and a majority in Congress would like to alter the decision now, but can't. Yet, because gridlock forced Congress to turn to alternative legislative mechanisms to tie its own hands, we are stuck (at the moment) with this outcome—an arbitrary one, supported by no theory of democracy or governance of which I'm aware.

Thus, congressional gridlock not only leads to arbitrary inaction, but arbitrary action, as well. The Framers intended to create a constitutional structure that guards against governmental arbitrariness. The current stalemate undermines that founding principle and frustrates Americans' rightful expectation of a rational, reliable, and fair government.

#### CONCLUSION

The policy consequences of congressional gridlock are real and often maddening. The constitutional implications of legislative stalemate are just as real—though perhaps sometimes less clear—and significantly more troubling. America's governmental system rests on the doctrines of separation of powers and legislative supremacy, and is designed to avoid arbitrary governmental action. Moreover, each of these principles serves important objectives that are central to the American concept of democracy and liberty.

As I've sought to show here, congressional gridlock undermines each of these foundational pieces of our constitutional structure. Recognizing the threat posed by congressional stalemate is an important first step. It's time to focus on ways to overcome the problem before the system collapses under the stagnant weight of a gridlocked legislature unable to legislate.