CONGRESSIONAL GRIDLOCK'S THREAT TO SEPARATION OF POWERS

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The principle of separation of powers serves as the foundation of our constitutional system. Though the doctrine's meaning is somewhat amorphous, at its core rests a simple assumption: each branch must be able to fulfill its functional duties, while also serving to check the other branches. A gridlocked Congress undermines these basic expectations. The result is a legislature that relies on ad hoc committees, triggers, and gimmicks to make law; an executive that fills in the policy vacuum through presidential initiatives and who expands executive power without rebuke; and a judiciary exercising increasing authority over the meaning of statutes. In other words, our separation of powers scheme suffers because Congress cannot fulfill its constitutional role. To appreciate how gridlock threatens separation of powers requires a more complete awareness of the doctrine's theoretical, historical, jurisprudential, and scholarly roots. From this review, I establish the broad contours of the separation of powers problem that gridlock poses. I then complete the analysis by turning to several real world examples to demonstrate how congressional stalemate actually undermines the separation of powers. In the end, I conclude that congressional gridlock poses such a threat to separation of powers that it places in peril the entire structural premises of American government.

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INTRODUCTION

Democratic Unity Forces McConnell to Filibuster His Own Proposal[1]

Perhaps no headline better epitomizes the current state of affairs in Congress than that which followed Senate Republican Leader Mitch McConnell's decision on December 6, 2012, to filibuster his own debt ceiling proposal once it became clear it had enough votes to pass the chamber. More striking than Senator McConnell's move was the lack of surprise among his colleagues. To them—indeed, to most inside "the Beltway"—it was simply another maneuver of a tactician.[2] To those

1. Greg Sargent, *Dem Unity Forces McConnell to Filibuster His Own Proposal*, WASH. POST (Dec. 6, 2012, 4:55 PM), http://www.washingtonpost.com/blogs/plum-line/wp/2012/12/06/dem-unity-forces-mcconnell-to-filibuster-his-own-proposal/.

2. *See, e.g.*, Kate Nocera & Seung Min Kim, *Senate Theatrics over Obama Debt Limit Plan*, POLITICO (Dec. 6, 2012, 1:45 PM), http://www.politico.com/blogs/on-congress/2012/12/senate-theatrics-over-obama-debt-limit-plan-151273.html (quoting Senator Chuck Schumer as stating that "Senator McConnell's usually very astute political radar is off today").

outside the nation's capital, however, Senator McConnell's act exemplified the magnitude of legislative dysfunction today.

The current Congress is certainly not the first that could be viewed as broken. On May 22, 1856, Representative Preston Brooks entered the United States Senate chamber and mercilessly beat—and nearly killed—Senator Charles Sumner with a cane.[3] Several decades later, in 1908, during one of Senator Robert LaFollette's famous filibusters, he was handed a glass of milk that he drank and then spat out when he realized it was poisoned.[4] And in 1964, Senator Strom Thurmond wrestled Senator Ralph Yarborough to the floor in an effort to prevent his colleague from entering a Senate committee room and creating a quorum.[5] To borrow a sentiment from Leo Tolstoy, all functioning Congresses are alike; each dysfunctional Congress, it seems, is dysfunctional in its own way.[6]

Today's congressional dysfunction manifests itself not so much in physical altercations, but rather in gridlock. Though this legislative paralysis poses no risk to the well-being of any individual congressman or senator, the threat to our constitutional system is quite severe.

Scholars have begun focusing on this new congressional period—a legislative regime defined by heightened partisanship, increasing polarization, and a resulting stalemate that grips the institution.[7] Indeed, "gridlock" is very much the term *du jour*.[8] Much of this scholarly attention is directed at defining the problem, identifying its causes, and drawing attention to the concerns arising from congressional gridlock.[9] Some of those consequences are plain and tangible: public disdain for the institution,[10] a stalled confirmation process that has fostered a judicial

3. DAVID M. KENNEDY, LIZABETH COHEN & THOMAS A. BAILEY, THE AMERICAN PAGEANT 442–43 (14th ed. 2010).

4. FRANKLIN L. BURDETTE, FILIBUSTERING IN THE SENATE 88 (1940).

5. RICHARD A. BAKER, 200 NOTABLE DAYS: SENATE STORIES, 1787 TO 2002, at 195 (2006).

6. LEO TOLSTOY, ANNA KARENINA 1 (1877) (Richard Pevear & Larissa Volokhonsky trans., Viking Penguin 2001) ("All happy families are alike; each unhappy family is unhappy in its own way.").

7. *See, e.g.*, DAVID W. BRADY & CRAIG VOLDEN, REVOLVING GRIDLOCK: POLITICS AND POLICY FROM JIMMY CARTER TO GEORGE W. BUSH 2–3 (2d ed. 2006); SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 23–25 (2003) [hereinafter BINDER, STALEMATE].

8. *See, e.g.*, *infra* note 18 and accompanying text. Commentators often use the terms "gridlock" and "stalemate" interchangeably. *See, e.g.*, BINDER, STALEMATE, *supra* note 7, at 3. I will follow this convention and use both terms to mean the same phenomenon.

9. *See infra* notes 19–20 and accompanying text.

10. Laura Litvan, *Congress's Job-Approval Rating of 10% Marks Another Low, Gallup Poll Shows*, BLOOMBERG (Feb. 8, 2012), http://www.bloomberg.com/news/print/2012-02-08/congress-s-job-approval-rating-of-10-marks-another-low-gallup-poll-shows.html.

vacancy rate that is rightfully labeled a crisis,[11] and, most recently, congressional gridlock nearly succeeded in causing an economic meltdown.[12] It is not hard to see why a little spilled milk—and even blood—on the Senate floor does not look so bad in comparison.

The media, political commentators, and public officials have also begun taking increasing note of gridlock.[13] Most of that attention focuses on the policy failures that can be traced to legislative stalemate, involving such issues as immigration reform, equal pay, climate change, and campaign finance reform.[14]

While there can be no doubt that the policy consequences of gridlock are significant, this discussion is missing a broader examination of the structural and constitutional concerns that this new congressional dynamic raises.[15] Stated directly, legislative gridlock threatens to undermine established principles of separation of powers. Moreover, these problems are quite acute, as I will show.

Gridlock's growing dominance has fundamentally altered how our government functions and how the three branches interact. The two basic premises of separation of powers are that each branch can fulfill their functional duties and that each can check the others to preserve the proper institutional balance.[16] If the president were deprived of the ability to veto legislation or if the judiciary were deprived of the power to decide cases, no one would dispute the implications for our constitutional system of separation of powers. Today's Congress largely cannot act. The vacuum created by congressional gridlock pushes the other branches to take a more pronounced role in creating national policy—going beyond their traditional functions. But the inability to legislate means

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11. Jerry Markon & Shailagh Murray, *Vacancies on Federal Bench Hit Crisis Point*, WASH. POST., Feb. 8, 2011, at A1.

12. *See* THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 3–30 (2012) (describing the 2011 budget fight).

13. *See, e.g.*, Mannix Porterfield, *Machin Hopes 'No Labels' Ends Gridlock*, REGISTER-HERALD (Beckley, W. Va.), Jan. 16, 2013, http://www.register-herald.com/todaysfrontpage/x1633453900/Manchin-hopes-No-Labels-ends-gridlock; Sean Sullivan & Aaron Blake, *5 Reasons Gridlock Will Seize Congress Again*, WASH. POST (Jan. 4. 2013, 6:30 AM), http://www.washingtonpost.com/blogs/the-fix/wp/2013/01/04/5-reasons-gridlock-will-seize-congress-again/; Jonathan Weisman, *Senate's Long Slide to Gridlock*, N.Y. TIMES, Nov. 24, 2012, at A1.

14. *See, e.g.*, Ezra Klein, *Goodbye and Good Riddance, 112th Congress*, WASH. POST (Jan. 4, 2013, 8:00 AM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/04/goodbye-and-good-riddance-112th-congress/.

15. A few scholars have begun noting concerns with how current congressional features—particularly the Senate filibuster—affect separation of powers. *See, e.g.*, Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041, 1052–53 (2011); Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 761–68 (2012).

16. *See infra* notes 130–34 and accompanying text.

much more than just the failure to craft policy; it also means that Congress cannot effectively check the other branches. The Executive pushes the boundaries of its constitutional powers outward, without concern that an inter-branch conflict will arise. The judiciary interprets statutes employing whatever canons of interpretation it likes and often disregards the statutory intent of Congress, knowing full well that Congress will not be able to override the court's decision. If Congress cannot function and cannot check the other branches, what is left of the separation of powers?

To answer this question, I begin by laying the foundation for the two key concepts that rest at its core: gridlock and separation of powers. Part I, therefore, lays out a working definition of gridlock, explaining how to identify, quantify, and explain the concept.

The more complex undertaking comes next: advancing a workable understanding of separation of powers. Most Americans have some familiarity with the doctrine, but it is largely a superficial acquaintance. To appreciate how gridlock threatens separation of powers requires a more complete awareness of the doctrine's theoretical, historical, jurisprudential, and scholarly roots.

The discussion of gridlock and separation of powers will provide a foundation for then turning to the central purpose of the Article: to explain how the current state of congressional dysfunction and gridlock threatens the constitutional system of separation of powers. The analysis develops over the two final Parts. First, I rely on the early Parts to draw out important lessons and observations that underscore the seriousness of the danger gridlock poses to separation of powers. Then, in Part V, I turn to several recent real-world examples to demonstrate how congressional stalemate actually serves to undermine separation of powers.

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The way Congress operates today is corrosive. Congressional gridlock poses such a threat to separation of powers that it places in peril the entire foundational premises of American government. This sounds alarmist, no doubt, but alarms sound for real fires just as loudly as they do for false ones. My purpose here is to make the case that our constitutional structure is ablaze.

I. UNDERSTANDING "GRIDLOCK"

This Article's principle argument is that congressional gridlock threatens the constitutional system of separation of powers. That contention obviously rests on the underlying premise that gridlock

currently grips Congress. It is necessary, therefore, to begin the analysis by discussing the rather inexact concept of gridlock.

A. Defining Gridlock

Identifying gridlock may not be as difficult as defining obscenity, but the task does have a "know it when you see it" feel.[17] As noted at the outset, many observers of, and participants in, the current legislative process have suggested that we are in a period of extreme congressional gridlock.[18] What, then, are they seeing? Put differently, what is meant by "gridlock" and how can we measure it?

Political scientists, more than legal scholars, have focused on congressional gridlock.[19] Though various definitions exist, at their root, they share a common claim: gridlock is the failure by Congress to make substantive policy decisions.[20] Though simple, there is nuance to this definition that requires attention. Maintaining the status quo is not, in and of itself, gridlock. If Congress makes an informed—or even

17. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (with Justice Stewart famously declaring that he may not be able to define obscenity, "[b]ut I know it when I see it"). Some have suggested that even "casual observers" can tell a productive Congress from an unproductive one. *See* BINDER, STALEMATE, *supra* note 7, at 34.

18. *See, e.g.*, BINDER, STALEMATE, *supra* note 7, at 41; Carl Hulse, *Senate Approves Changes Intended to Ease Gridlock*, N.Y. TIMES, Jan. 28, 2011, at A20; David Leonhardt, *The Gridlock Where Debts Meet Politics*, N.Y. TIMES, Nov. 6, 2011, at A1; Jonathan Easley, *Sen. Webb: State of Congress is 'toxic'*, THE HILL'S BLOG BRIEFING ROOM, (Nov. 4, 2011, 3:09 PM), http://thehill.com/blogs/blog-briefing-room/news/191919-sen-jim-webb-state-of-congress-is-toxic; Andrew Taylor, *Snowe Exits in Frustration with Senate Gridlock*, NBC POLITICS, (Mar. 2, 2012, 7:59 AM), http://nbcpolitics.msnbc.msn.com/_news/2012/03/02/10560634-snowe-exits-in-frustration-with-senate-gridlock?lite.

19. *See, e.g.*, Sarah A. Binder, *Going Nowhere: A Gridlocked Congress?*, BROOKINGS REV., Winter 2000, at 16, 17 (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) (citing 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") [hereinafter Binder, *Legislative Gridlock*]; 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."); George C. Edwards III, Andrew Barrett & Jeffrey Peake, *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").

20. *See* sources cited *supra* note 19.

ill-informed—decision to do nothing, then the absence of legislative outputs is not the equivalent of legislative gridlock. In other words, Congress can actively decide to keep things as they are. It may be foolhardy, it may be bad politics, it may be horrible policy, but it is not gridlock.

Decrying congressional gridlock, then, is not masking a call for a more activist federal government.[21] Instead, to lament that gridlock grips Congress is to say that Congress appears largely incapable of making substantive decisions—whether to change policy or maintain it—and that such stalemate harms our constitutional system.

B. Is Congress Gridlocked?

Because gridlock at its definitional core means that Congress cannot make policy decisions, political scientists often seek to measure gridlock by examining legislative outputs. David Mayhew set the standard when he studied whether divided government led to increased levels of gridlock.[22] Looking at the period from 1947–1990, Mayhew evaluated Congress's ability to enact "important legislation."[23] Mayhew's original study found no correlation between divided government and gridlock.[24] Many other political scientists relied on Mayhew's approach—and even his data—to come to different conclusions about the effects of divided government on the legislative process.[25] That said, the divergent results of these studies are less important than the fact that the researchers all relied on legislative output to measure gridlock.

The data on this front suggests that Congress is gridlocked. The 112th Congress, enacted only two hundred eighty-three laws—and that number is inflated considerably by a rush of last-minute efforts to name

21. Indeed, as I will discuss later, gridlock often motivates the Executive to act. *See infra* notes 291–300 and accompanying text.

22. *See* DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–1990 (1st ed.1991).

23. *Id.* at 34–50.

24. *Id.* at 3–4, 198. Mayhew found a stronger correlation when he conducted his study a decade later. *See* DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002, at 226 (2d ed. 2005).

25. *See, e.g.*, BINDER, STALEMATE, *supra* note 7; Robert H. Durr, John B. Gilmour & Christina Wolbrecht, *Explaining Congressional Approval*, 41 AM. J. POL. SCI. 175, 183–84 (1997); Sean Q. Kelly, *Divided We Govern? A Reassessment*, 25 POLITY 475, 475–77 (1993); Manabu Saeki, *Gridlock in the Government of the United States: Influence of Divided Government and Veto Players*, 39 BRIT. J. POL. SCI. 587 (2009); Andrew J. Taylor, *Explaining Government Productivity*, 26 AM. POL. Q. 439 (1998); Gregory R. Thorson, *Divided Government and the Passage of Partisan Legislation, 1947–1990*, 51 POL. RES. Q. 751, 752–53 (1998).

government buildings and make technical corrections to earlier laws.[26] Two hundred eighty-three is much lower than in past years. Indeed, it is possible to get a sense of just how strong of a hold gridlock has taken on the legislative process by comparing the number of laws enacted by each Congress over the last forty years. The table below provides that information.[27]

Years	**Congress**	**Number of Laws Enacted**
2011–2013	112th	283
2009–2011	111th	383
2007–2009	110th	460
2005–2007	109th	482
2003–2005	108th	498
2001–2003	107th	377
1999–2001	106th	580
1997–1999	105th	394
1995–1997	104th	333
1993–1995	103rd	465
1991–1993	102nd	590
1989–1991	101st	650
1987–1989	100th	713
1985–1987	99th	663
1983–1985	98th	623
1981–1983	97th	473
1979–1981	96th	613
1977–1977	95th	633
1975–1977	94th	588
1973–1975	93rd	649

26. *See Public Laws 151–283, 112th Congress*, U.S. LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/L?d112:./list/bd/d112pl.lst:151[1-283](Public Laws)|TOM:/bss/d112query.html (last visited Nov. 1, 2013). Congress passed 196 laws prior to November 2012. *Id.* The public laws enacted in the final two months of the legislative session include eighteen government building namings, three technical corrections to statutes, three public park designations, two commemorative coin authorizations, and one law removing the word "lunatic" from the United States Code. *Id.*

27. The data to create this table was taken from a compilation of public laws enacted by Congress made available by the U.S. Library of Congress. *See Public Laws, 112th Congress*, U.S. LIBRARY OF CONGRESS, http://thomas.loc.gov/home/LegislativeData.php?&n=PublicLaws&c=112 (last visited Nov. 1, 2013).

But if gridlock is about the legislature's inability to make decisions, simply measuring Congress's legislative productivity is not sufficient.[28] After all, as noted above, it may be that Congress *decided* not to act. Recognizing that fact, Sarah Binder added a "denominator" to the standard methodology that typically only measured the output "numerator,"[29] with the purpose of distinguishing low legislative output due to gridlock from times when Congress generates "few laws because it faces a limited agenda."[30] Binder, therefore, "recreate[d] the political agenda for each Congress" between 1947 and 2000 by turning to the daily unsigned editorials of the *New York Times*.[31] Through these editorials, Binder "extracted"[32] the issues of general concern from that congressional session, measured the issue's salience, and then tracked it through the legislative process.[33] From this, Binder was able to calculate a "gridlock score" for each Congress.[34] Binder's study showed that the frequency of policy gridlock has increased sharply since the 1940s and 1950s, and even since the early 1990s.[35] The change is even more pronounced when looking exclusively at issues of high salience.[36]

Mind you, Congress is expected to do more than legislate and Binder's "policy gridlock" focus does not take into account the fact that other measures exist by which to assess Congressional gridlock beyond legislative output.[37] These indicators also suggest that gridlock is threatening Congress's ability to function. The Senate, for instance, has failed to act on a higher percentage of executive nominations than in the past.[38] Bear in mind that this is not about the Senate affirmatively rejecting the nomination—it is the Senate not acting on it.[39]

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28. BINDER, STALEMATE, *supra* note 7, at 35.

29. *Id.* at 35–36.

30. *Id.* at 35.

31. *Id.* at 37.

32. *Id.*

33. *Id.* at 37–38.

34. *Id.*

35. *Id.* at 40–41.

36. *Id.*

37. Sarah Binder is also a prolific scholar on the politics of judicial confirmations. *See, e.g.*, Sarah Binder & Forrest Maltzman, *Advice and consent during the Bush Years: The politics of confirming federal judges*, 92 JUDICATURE 320 (2009); Sarah A. Binder & Forrest Maltzman, *Congress and the Politics of Judicial Appointments*, *in* CONGRESS RECONSIDERED 297 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 8th ed. 2005).

38. Theodoric Meyer, *Under Obama, More Appointments Go Unfilled*, PROPUBLICA (Feb. 27, 2013, 2:48 PM), http://www.propublica.org/article/under-obama-more-appointments-go-unfilled.

39. *See id.*

A similar fate has befallen judicial nominations. President Barack Obama has seen fewer of his judicial nominees confirmed than his two most immediate predecessors.[40] During President Obama's first two years—when Democrats enjoyed a filibuster-proof majority—the Senate confirmed only 56 percent of his district court nominees.[41] In fact, "[f]ewer judges won confirmation during Obama's initial year than under other presidents since the 1960s."[42]

Circuit court confirmation rates show a dramatic fall over the past few decades. The Senate confirmed 93 percent of President Carter's nominees, 88 percent of President Reagan's, 76 percent of President George H.W. Bush's, 61 percent of President Clinton's, and only 52 percent of President George W. Bush's.[43] The numbers under President Obama's first term offer a mixed bag. While President Obama appears to have enjoyed a higher confirmation *rate* than President George W. Bush,[44] the figure is deceptive, as President Obama made fewer nominations to the circuit courts than President George W. Bush.[45] Moreover, while President George W. Bush saw a 50 percent decrease in the number of judicial vacancies from his first to his second inauguration day, President Obama witnessed a 32 percent *increase* in the judicial vacancy rate.[46] According to an obstruction and delay index developed by judicial appointments scholars, President Obama faced "unprecedented" hurdles in seeking to appoint federal judges.[47]

Congress's use of "unorthodox" legislative maneuvers also serves as another indicator of gridlock's presence.[48] As congressional scholar Barbara Sinclair noted several years ago, Senate and House leaders are employing new rules, practices, and procedures much more frequently than in years past.[49] The use of task forces, omnibus bills, post-committee adjustments, and changes in parliamentary rules are

40. *See* Robert C. Post & Daniel Schuker, Op-Ed., *Filling the Federal Bench: Obama Needs to Fight Harder, and the Senate Needs to Give His Nominees Up-or-Down Votes*, L.A. TIMES, Dec. 14, 2012, at A37.

41. Sheldon Goldman, Elliot Slotnick, & Sara Schiavoni, *Obama's Judiciary at Midterm: The Confirmation Drama Continues*, 94 JUDICATURE 262, 293 (2011).

42. Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2253 (2013).

43. *See* Goldman et al., *supra* note 41, at 293.

44. *Id.*

45. *See* Sheldon Goldman, Elliot Slotnick, & Sara Schiavoni, *Obama's Judicial Appointments in a Time of Extraordinary Obstruction*, Aug. 2013, *available at* http://www.scholarsstrategynetwork.org/sites/default/files/ssn_key_findings_goldman_slotnick_and_schiavoni_on_obamas_first_term_judiciary.pdf.

46. *Id.*

47. *Id.*

48. *See* BARBARA SINCLAIR, UNORTHODOX LAWMAKING 258–61 (4th ed. 2012).

49. *Id.* at 132–33.

Congress's response to gridlock. As Sinclair suggests, leaders use "unorthodox" approaches to transform the law-making process from one akin to climbing a ladder to one more like climbing a tree.[50] The point, Sinclair says, is that, "[w]hen climbing a ladder, there isn't much one can do if a rung is broken," whereas, on a tree, "if one route is blocked there is always another one can try."[51] Gridlock is the broken rung that unorthodox law making seeks to circumvent. Therefore, the prevalence of unorthodox legislative procedures is a sign of institutional gridlock. As Sinclair shows, such unorthodox techniques are on the rise.[52]

C. Acknowledging the Role of the Filibuster in Congressional Gridlock

When speaking of the Senate and gridlock, special attention must be paid to the role of the filibuster. The filibuster—or perhaps more accurately, the Senate cloture rule[53] requiring sixty votes to end debate—has overtaken the Senate. Unlike in the past, when senators used the filibuster as a delaying tactic, today senators combine the filibuster and cloture rules to kill legislation and nominations.[54] The numbers show just how much more of a stranglehold the filibuster enjoys over Senate action than in years past. From the advent of the cloture rule in 1917 until 1988, there were a total of 385 motions filed to invoke cloture.[55] During the three most recent congressional sessions, covering a six-year span from 2007 to 2013, 391 cloture motions were filed.[56] From 1951 to 1960, the Senate averaged 0.4 cloture votes per session.[57] The 111th and 112th Congresses saw ninety-one and seventy-three cloture votes, respectively.[58]

It may be tempting to treat the Senate's failure to invoke cloture as equivalent to a substantive decision on the merits, and, therefore, not as

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50. BARBARA SINCLAIR, UNORTHODOX LAWMAKING 31 (1st ed. 1997).

51. *Id.*

52. SINCLAIR, *supra* note 48, at 133.

53. *See* SENATE COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. Doc. No. 110-9, R. XXII.2, at 15–16 (2007) [hereinafter STANDING RULES].

54. Michael J. Teter, *Equality Among Equals: Is the Senate Cloture Rule Unconstitutional?*, 94 MARQ. L. REV. 547, 568–69 (2010) (discussing the historical use of the filibuster compared with its use today).

55. Data compiled from U.S. SENATE, SENATE ACTION ON CLOTURE MOTIONS, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited Nov. 1, 2013).

56. *Id.*

57. Barbara Sinclair, *The "60-Vote Senate": Strategies, Process, and Outcomes*, *in* U.S. SENATE EXCEPTIONALISM 241, 243 (Bruce I. Oppenheimer ed., 2002).

58. *See* U.S. SENATE, *supra* note 55.

gridlock. This fails for several reasons. The question presented to the Senate when voting on cloture is whether it is the "sense of the Senate that the debate shall be brought to a close."[59] In other words, cloture aims to move the bill or nomination *to* a decision point. The failure to invoke cloture necessarily signifies the failure to decide. Additionally, the super-majoritarian requirement to invoke cloture means that it would be a mistake to equate a failed cloture vote with the *Senate* deciding not to act. Cloture vote statistics support this conclusion. Over the seven Congresses from 1999 to 2012, there were 225 cloture votes that failed to capture the necessary sixty votes.[60] Of those, 151—or 68 percent—failed, despite a majority of Senators supporting cloture.[61] Thus, the filibuster and cloture rules are contributors to, and strong indicators of, gridlock.

D. Gridlock Is Not an Intentional Part of the Constitutional Design

Scholars point to a variety of factors contributing to gridlock: divided government,[62] increased party polarization,[63] interest groups,[64] the congressional committee system,[65] Senate rules,[66] the health of the economy,[67] electoral pressures and strategies,[68] and even the national mood.[69] If this Article's focus were on resolving congressional gridlock, a thorough review of each of these possible causes would be necessary

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59. *See* STANDING RULES, *supra* note 53, at 15–16.

60. *See* U.S. SENATE, *supra* note 55.

61. *Id.* I arrived at this data by clicking on the congressional term and looking at the cloture vote. For every failed vote (F in the "result" column), I looked at the vote total. Anything with fifty-one votes or more, I counted toward the "majority support" category.

62. *See, e.g.*, Edwards et al., s*upra* note 19, at 554, 561–62.

63. *See, e.g.*, JOHN B. GILMOUR, STRATEGIC DISAGREEMENT: STALEMATE IN AMERICAN POLITICS 4–5 (1995).

64. *See, e.g.*, Gray & Lowery, *supra* note 19, at 531, 542.

65. *See, e.g.*, FRED R. HARRIS, DEADLOCK OR DECISION 151–158, 188 (1993) (arguing that the committee system has distributed power in a way that slows decision making).

66. *See, e.g.*, *id.*

67. *See, e.g.*, Binder, *Legislative Gridlock*, *supra* note 19 at 522–23, 529 (the health of the economy potentially plays a small role in determining gridlock, as during a budget surplus, policy objectives are more easily achieved, and during deficits, gridlock increases).

68. *See, e.g.*, JEROME M. CLUBB, WILLIAM H. FLANIGAN & NANCY H. ZINGALE, PARTISAN REALIGNMENT: VOTERS, PARTIES, AND GOVERNMENT IN AMERICAN HISTORY 11–17 (2d ed. 1990).

69. *See, e.g.*, Binder, *Legislative Gridlock*, *supra* note 19, at 522–23, 527–29. *See also* SAMUEL P. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 130–31 (1981).

before offering prescriptions. But that is not the goal here. Instead, my point is to focus on the threat that gridlock poses to separation of powers. For this reason, it is necessary to examine only one identified source of gridlock: the constitutional structure itself. This topic merits greater discussion because if gridlock is part of the intentional governmental design, then perhaps it serves distinct constitutional purposes that we should credit, even if one element of that design, separation of powers, suffers. Indeed, many commentators contend that the Framers sought to create a government with guaranteed gridlock.[70] That argument rests on the idea that the Framers feared excessive government lawmaking—especially at the national level—and therefore designed a system that would produce gridlock more often than legislative action.[71]

Undercutting the idea that the Framers desired gridlock is the fact that the stalemate arising under the Articles of Confederation was a significant driving force behind the call for a Constitutional Convention.[72] The Continental Congress, under the Articles of Confederation, epitomized a gridlocked chamber. During that period, the government was largely unable to make policy decisions. With the Articles, the nation "groan[ed] . . . [u]nder the weakness and inefficiency of its Governt. [sic]."[73] Alexander Hamilton noted that stalemate had "arrested all the wheels of the national government, and brought them to an awful stand."[74] For this reason, the Convention records and Federalist Papers are full of references to creating an active, energetic government.[75] It seems improbable, then, that to cure the stalemate problems under the Articles of Confederation, the Framers intentionally designed a system in which gridlock dominated.

That said, one of the primary causes of gridlock is, in fact, the constitutional system, but mostly because of unforeseen consequences rather than intentional design.[76] For example, the Framers separated the

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70. BINDER, STALEMATE, *supra* note 7, at 4–5.

71. ROBERT SHOGAN, THE FATE OF THE UNION: AMERICA'S ROCKY ROAD TO POLITICAL STALEMATE 5–16 (1998).

72. *See* 1 1787: DRAFTING THE U.S. CONSTITUTION 84–160 (Wilbourn E. Benton ed., 1986) (providing Convention notes discussing the weaknesses of the Articles of Confederation).

73. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 483–84 (Max Farrand ed., rev. ed. 1966) [hereinafter 1 RECORDS] (statement of James Wilson).

74. THE FEDERALIST NO. 15, at 98 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

75. *See, e.g.*, 1 RECORDS, *supra* note 73, at 448, 483–84; 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 9 (Max Farrand ed., rev. ed. 1966) [hereinafter 2 RECORDS]; THE FEDERALIST NO. 22 at 140–41 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (bemoaning the failures of the Continental Congress that had "arrested all the wheels of the national government, and brought them to an awful stand").

76. *See* BINDER, STALEMATE, *supra* note 7, at 7.

functions of government among three branches to protect against tyranny, to "insulat[e] the judiciary," and to limit "legislative encroachment over executive responsibilities."[77] Moreover, separating functions was seen as actually promoting efficiency in government by allowing each branch to specialize in particular tasks.[78] Instead, though, separation of powers is one of the most cited causes of congressional gridlock.[79]

So, too, is bicameralism. The Framers knew that dividing the legislature would serve as a check on legislative power and would affect the law-making process.[80] The Framers expected the Senate to proceed with "more coolness" than the House.[81] Importantly, this was to be accomplished through how senators were selected, the length of their terms, and the equality of representation—not through the filibuster or other procedural devices.[82] As Binder points out, the House was conceived as, and originally was, the more "active and visible" chamber, with the Senate "routinely defer[ring] to the House in originating legislative matters."[83] A "new bicameralism" emerged as senators became more interested in promoting their own agenda, independent of the House.[84] Binder argues that this change added an unanticipated layer into the lawmaking process: "[w]ith the House now more often confronted with measures biased by Senate rules and apportionment, the need for interchamber negotiation to secure major policy change" increased.[85] As we have seen recently, interchamber dynamics often stall or entirely halt the legislative process.[86] Thus, bicameralism now requires legislation to meet the preferences of two chambers' members, increasing the likelihood of gridlock.

None of these factors, alone, is *the* cause of gridlock, but each contributes. Moreover, sometimes one factor exacerbates the others'

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77. *Id.*

78. *See infra* notes 315–18 and accompanying text.

79. *See, e.g.*, Lloyd N. Cutler, *To Form a Government*, *in* SEPARATION OF POWERS—DOES IT STILL WORK? 1, 2 (Robert A. Goldwin & Art Kaufman eds., 1986) ("The separation of powers between the legislative and executive branches, whatever its merits in 1793, has become a structure that almost guarantees stalemate today.").

80. BINDER, STALEMATE, *supra* note 7, at 8–10.

81. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 83 (W.W. Norton & Co. 1987) (1840) (statement of James Madison).

82. Teter, *supra* note 54, at 562–63.

83. BINDER, STALEMATE, *supra* note 7, at 16.

84. *Id.* at 17–18.

85. *Id.* at 18.

86. *See, e.g.*, Ed O'Keefe, *Shutdown Looming, Senate Begins Debating Spending Measure*, WASH. POST (Sept. 23, 2013), http://www.washingtonpost.com/politics/shutdown-looming-senate-begins-debating-spending-measure/2013/09/23/d579dbe4-247d-11e3-b75d-5b7f66349852_story.html.

effect on creating gridlock. Cumulatively, therefore, these elements are correctly seen as the roots of gridlock.

II. UNDERSTANDING "SEPARATION OF POWERS"

Separation of powers is one of the fundamental tenets of American government, and yet the doctrine is as nebulous in American government as it is central. Indeed, to invoke the doctrine of separation of powers is really to conjure a concept, not a clearly defined rule. No single explanation, therefore, fully encapsulates the idea's features, purposes, or constraints. Thus, to say that the current gridlock in Congress implicates separation of powers means little without first explaining what the term means.

To do that, without oversimplifying, requires a brief foray into the theoretical roots of the doctrine, as well as an examination of how the Framers molded the idea to fit their governmental vision. The result was a "uniquely American"[87] version of separation of powers that combined the feature of separated functions with the system of checks and balances. This great American ingenuity, however, has led to significant debate and frustration, as courts, commentators, and government actors seek to enforce, comprehend, defend, and abide by this pillar of American government. This Part, therefore, traces the development of separation of powers, focusing on its historical traditions, its application in constitutional controversies, and its role in a debate that still captivates a wide range of legal scholars. Once that groundwork is laid, it will then be possible to explain how the current congressional gridlock threatens separation of powers.

A. Theoretical Foundations

Though the idea of separating the institutions of government dates at least to the 1600s,[88] the concept of separation of powers is most closely associated with Montesquieu,[89] the eighteenth century political philosopher whose treatise *The Spirit of the Laws* profoundly influenced America's Framers.[90]

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87. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 134 (1967).

88. WILLIAM B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 31–32 (1965).

89. VILE, *supra* note 87, at 76.

90. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 488 (1989) ("[T]he idea of a government structured by the separation of powers came to the Americans principally through the writings of Montesquieu.").

For Montesquieu, the separation of powers was part of a larger examination of "cause and effect in the political system."[91] After a lengthy discussion of various types of government—republican, monarchical, and despotic—Montesquieu set out to assess the English Constitution.[92] It is from this part of his work that the concept of separation of powers derives. He began by stating that "in every government there are three sorts of power"—the legislative, the executive, and the judicial.[93] In Montesquieu's vision, as in our own, the legislature "enacts," the executive "execut[es] the public resolutions," and the judiciary "tr[ies] the causes of individuals."[94] This, then, is the first feature of the modern doctrine of separation of powers—that governmental power can be categorized into three distinct functions.

Defining the responsibilities is just the starting point. Next is keeping them separate. "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty . . . ."[95] Moreover, the same concern arises "if the judiciary power be not separated from the legislative and executive."[96] Thus, the second feature of separation of powers: those exercising power within a particular governmental department must not be permitted to exercise a power of the other two branches. As articulated by Montesquieu, the underlying rationale is to protect liberty.[97]

There is considerable debate[98] over whether the concept of separation of powers that Montesquieu espoused required a strict, or "pure," separation[99] between the institutions of government. He certainly suggested a need for purity by declaring that nothing less than political liberty depends on the separation.[100] Yet Montesquieu did allow for the executive's involvement in the legislative process through the "power of rejecting"[101] and for the legislature to examine "in what manner its laws have been executed . . . ."[102] These suggestions find their modern form in the presidential veto and legislative oversight—two key aspects not of separating functions, but of checks and balances. The judiciary,

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91. VILE, *supra* note 87, at 77.

92. MONTESQUIEU, 1 THE SPIRIT OF THE LAWS, BK. XI, CHS. II–VI, at 171–86 (Thomas Nugent trans. 1873) (1748).

93. *Id.* at 173.

94. *Id.* at 174.

95. *Id.*

96. *Id.*

97. *Id.* at 173–74.

98. VILE, *supra* note 87, at 85–86.

99. *Id.* at 90.

100. MONTESQUIEU, *supra* note 92, at 171–74.

101. *Id.* at 183.

102. *Id.* at 181.

meanwhile, played no role in checking the other branches and was itself limited by being "merely the mouthpiece of the law . . . ."[103]

Overall, then, the theory of separation of powers, as first articulated in seventeenth century England and developed further by Montesquieu a century later, recognized three separate governmental branches, each entrusted with certain distinct responsibilities. Only in a relatively few well-defined instances would the executive become involved in the legislative process, and vice versa, with the goal being to preserve liberty.

B. The Framers' Constitutional Separation of Powers

Montesquieu's was a theory, though one built from observing England's constitutional structure. The delegates to the Federal Convention of 1787 faced the task of designing a government that could survive the tests of reality. Indeed, when forced to choose between theory and reality of past experience, theory gave way.[104] Nevertheless, both theory and experience pushed the delegates towards incorporating separation of powers into the government's new structure.

During the period leading up to the Revolution, Americans often criticized colonial regimes as violating the principles of separation of powers.[105] The tension was often a result of disputes between royally appointed governments and colonial legislatures comprised of local citizens.[106] Many colonial charters allowed the royal governor to nominate the upper legislative chamber and to enjoy greater influence over the legislative process than called for under Montesquieu's vision of separation of powers.[107]

As revolutionary governments started forming in America in 1776 and the new states began drafting their own constitutions, "separation of powers was being advanced as the only coherent constitutional theory upon which an alternative to colonial forms could be based."[108] Some state constitutions implicitly adopted the doctrine, while others were more explicit.[109] Further, most states rejected incorporating checks and balances into their constitutions, largely in response to the antagonism

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103. VILE, *supra* note 87, at 93.

104. John Dickinson, a delegate at the Constitutional Convention from Delaware, advised his colleagues: "Experience must be our only guide. Reason may mislead us." 2 RECORDS, *supra* note 75, at 278.

105. VILE, *supra* note 87, at 126.

106. *Id.* at 125–28.

107. *Id.* at 127–29, 131.

108. *Id.* at 126.

109. *Id.* at 134–41.

Americans felt toward the royal governors.[110] This pure doctrine of separated powers, however, proved problematic, as state legislatures operated without restraint, often at the expense of the institutional powers of the other two branches.[111] By the time the delegates to the Federal Convention met in Philadelphia in 1787 to devise a new Constitution, their shared experiences pushed them toward modifying the concept of separation of powers by combining it with a system of checks and balances.[112]

Thus, the American doctrine of separation of powers includes two distinct concepts, an important point that many commentators, and even the Supreme Court, miss.[113] The first is one of separated functions—dividing the government into three departments and assigning each different responsibilities. This was Montesquieu's vision of separation of powers.[114] The second aspect focuses on ensuring that each branch maintains its authority and guards against encroachments by the other two branches—or, as we know it, checks and balances. Not only are these two concepts distinct, and not only do they have their roots in very different places,[115] they are, at least facially, at odds with each other.[116] Separation of powers seeks to draw lines between the three branches of government and restricts each branch's ability to interfere with the others' functions. Checks and balances, on the other hand, requires the branches to engage with one another to ensure that no one branch becomes too powerful.

Drawing from these two concepts and their own experiences, the Framers developed the American understanding of separation of powers. The Constitution establishes three branches of government and vests in each certain powers. Congress enjoys "[a]ll legislative powers herein granted,"[117] the president exercises "[t]he executive power,"[118] including the responsibility to "take care that the laws be faithfully executed."[119] The Constitution vests the Supreme Court with "[t]he judicial power."[120] Here, then, are three branches, separate and distinct with specified powers and responsibilities.

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110. *Id.* at 132.

111. *Id.* at 152.

112. *Id.* at 152–54.

113. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1167–68 (2000).

114. *See supra* Part II.A.

115. VILE, *supra* note 87, at 153.

116. *Id.* at 153–54.

117. U.S. CONST. art. I, § 1.

118. U.S. CONST. art. II, § 1, cl. 1.

119. U.S. CONST. art. II, § 3.

120. U.S. CONST. art. III, § 1, cl. 1.

Had the Framers stopped there, they would have come quite close to adopting a pure separation of powers. But the Framers remained well aware of the problems that such an approach had created in Pennsylvania and other states after the American Revolution.[121] Therefore, they viewed incorporating a system of checks and balances into the Constitution as "essential."[122] To accomplish this, the Framers adopted Montesquieu's suggestion of an executive veto over legislation, though not an absolute one, as Congress can override the veto.[123] Additionally, Congress controls the federal budget;[124] holds the power to impeach federal judges and executive officials;[125] sets the size, jurisdiction, salaries, and budgets of the federal judiciary;[126] and the Senate confirms judicial and top executive department appointments.[127] Courts, of course, can declare laws and executive actions unconstitutional and oversee executive prosecutorial actions.[128] The Constitution, then, contains many checks, designed to ensure constitutional balance, that require interactions among the branches rather than separation.[129]

In the Federalist Papers, James Madison devoted considerable attention to "the distribution of this mass of power among [the government's] constituent parts."[130] To Madison, the checks the Framers placed into the Constitution played the critical role of giving each branch the ability to guard its powers "against the invasion of the others."[131] It was not enough to "mark with precision the boundaries of these departments in the Constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power."[132] Instead, Madison famously asserted, the answer to maintaining each branch's authority over its constitutional domain was to "contriv[e] the interior structure of the government, as that its several constituent parts may, by

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121. VILE, *supra* note 87, at 152–53.

122. *Id.* at 153.

123. U.S. CONST. art. I, § 7, cl. 2.

124. U.S. CONST. art. I, § 8, cl. 1–2.

125. U.S. CONST. art. I, §§ 2–3.

126. U.S. CONST. art. III, § 1.

127. U.S. CONST. art. II, § 2, cl. 2.

128. U.S. CONST. art. III, § 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

129. One thing the Framers did not include in the Constitution was an explicit separation of powers provision, though Madison did push for one. 12 PAPERS OF JAMES MADISON 202 (C. Hobson & R. Rutland eds., 1979); 1 ANNALS OF CONG. 760–61 (1789) (Joseph Gales ed., 1834).

130. THE FEDERALIST NO. 47 (James Madison), at 323 (Jacob E. Cooke ed., 1961).

131. THE FEDERALIST NO. 48 (James Madison), at 332 (Jacob E. Cooke ed., 1961).

132. *Id.* at 332–33.

their mutual relations, be the means of keeping each other in their proper place."[133] This meant, to the Framers, ensuring that no branch was defenseless against the "gradual concentration of the several powers in the same department."[134]

These constitutional provisions and subsequent explanations offered by Madison best represent the Framers' approach to separation of powers. In Part III, I will turn to the lessons we can draw from the Framers' broad conception of separation of powers.[135] For now, it suffices to say that the constitutional design and Federalist Papers leave much unsaid about the doctrine of separation of powers.

The Supreme Court has had many occasions to try to expound on the doctrine, but has yet to settle on a consistent approach to resolving separation of powers issues. Indeed, the Court has struggled to make concrete sense out of the "skeletal"[136] idea of separation of powers. The Court's shifting and inconsistent effort in this realm has created a "muddle."[137] It is to this muddle that we now turn.

C. The Separation of Powers Jurisprudence

The Framers embedded the concept of separation of powers into the federal governmental structure, but it is the Supreme Court that has given the doctrine its constitutional meaning—or at least tried to. In actuality, it is difficult to discern exactly what it is the Court thinks about separation of powers. Twenty years ago, after a series of cases implicating the principle, scholars labeled the Court's approach to separation of powers "elusive,"[138] "paradoxical,"[139] and "abysmal."[140] Since then, it has become no clearer. Indeed, the Court's approach to separation of powers as a whole remains "incoherent."[141]

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133. THE FEDERALIST NO. 51 (James Madison) at 347–48 (Jacob E. Cooke ed., 1961).

134. *Id.* at 349.

135. *See infra* Part III.

136. Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 412 (1996).

137. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991).

138. Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 225.

139. Erwin Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083 (1987).

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

141. Brown, *supra* note 137, at 1517.

As many scholars have noted, part of the problem derives from the fact that the Court relies on two divergent approaches to separation of powers problems.[142] One approach, labeled "formalism," emphasizes the importance of the Framers' decision to "divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial."[143] The other method the Court employs evinces a more "functional" understanding of separation of powers. Following this approach, the Court recognizes that the branches do not "operate with absolute independence."[144] Instead, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."[145]

The Framers' statements during the Constitutional Convention, the ratification debates, and the Constitution itself, provide support for both formalism and functionalism. The frustration, then, with the Court's separation of powers jurisprudence does not lie in the fact that its approach is ahistorical or manifestly wrong. Nor, even, does the scholarly dissatisfaction stem exclusively from the inconsistency of the Court's approach. Instead, the exasperation rests with the fact that the Court has never offered an overarching explanation for when it will employ formalism or functionalism to resolve a separation of powers problem. Moreover, the Court relies on the same historical quotes and explanations in nearly every separation of powers case, simply rearranging them to emphasize the principle that supports the particular conclusion the Court reaches in the case.[146]

Nevertheless, it is possible to discern the concerns that animate the Court and push it toward employing one approach over another. The Court, for instance, is especially troubled by—and therefore more likely to use a formalist approach to strike down—efforts by Congress to bypass the traditional legislative process when it makes laws.[147] The Court is particularly set on enforcing the "finely wrought"[148] process spelled out in Article I, Section 7 for enacting legislation and has relied on that constitutional language and a formalist vision of separation of

142. *See, e.g.*, Elliott, *supra* note 140, at 508–09.
143. *INS v. Chadha*, 462 U.S. 919, 951 (1983).
144. *United States v. Nixon*, 418 U.S. 683, 707 (1974).
145. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).
146. *Id.* at 634 (Jackson, J., concurring).
147. *See* Merrill, *supra* note 138, at 226.
148. *Chadha*, 462 U.S. at 951.

powers to invalidate congressional attempts to legislate through some other means.[149]

We saw that most recently in *Clinton v. City of New York*,[150] when the Court struck down the Line Item Veto Act that allowed a president to "cancel[] an item of new direct spending."[151] The Court concluded that Article I, Section 7's text regarding the veto power provided the only constitutional mechanism for a president to "return" a bill to Congress.[152]

The Court's focus in *Clinton* on Article I, Section 7 as establishing the formal—and only—mechanism for enacting legislation drew from several earlier cases. In *INS v. Chadha*,[153] the Court invalidated a statutory scheme that allowed a single chamber of Congress to "veto" a decision of the Attorney General.[154] The Court held that, "[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process."[155] The "explicit and unambiguous" provisions of which the Court spoke are found in Article I, Section 7, and are "integral parts of the constitutional design for the separation of powers."[156] Every "legislative act" must proceed through both the House of Representatives and the Senate to be effective.[157] This bicameralism requirement of Article I, Section 7 furthers "essential constitutional functions," particularly related to separation of powers, which the single chamber "veto" circumvented.[158]

This formalistic approach to enforcing Article I, Section 7 also played an important part in other separation of powers cases the Court decided around the same time as *Chadha*. In *Bowsher v. Synar*[159] the Court invalidated the Gramm-Rudman-Hollings Act,[160] which sought to eliminate the federal budget deficit by imposing automatic reductions in federal spending.[161] If the fiscal year budget deficit exceeded a statutorily

149. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417 (1998); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983).

150. 524 U.S. 417 (1998).

151. *Id.* at 444.

152. *Id.* at 448–49.

153. 462 U.S. 919 (1983).

154. *Id.* at 951–59.

155. *Id.* at 945.

156. *Id.* at 946.

157. *See id.* at 948–49.

158. *Id.* at 951.

159. 478 U.S. 714 (1986).

160. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038, *invalidated by Bowsher v. Synar*, 478 U.S. 714 (1986); *see Bowsher*, 478 U.S. at 717–21.

161. *Bowsher*, 478 U.S. at 717–18.

prescribed maximum, the Act gave the Comptroller General the authority to issue a report to the president imposing specific budget cuts.[162] Upon the issuance of the Comptroller General's report, the president was required to "issue a 'sequestration' order mandating the spending reductions specified by the Comptroller General."[163] The Court concluded that the Comptroller General is a member of the legislative branch because Congress could fire her,[164] but that the Comptroller General was engaging in an executive function.[165] It violated the separation of powers, the Court held, for Congress to supervise officers "charged with the execution of the laws it enacts."[166]

Similarly, in *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*,[167] the Court invalidated an effort by Congress to transfer operating control of Washington National Airport and Dulles International Airport from the U.S. Department of Transportation to a new entity created by an agreement between Virginia and the District of Columbia.[168] The new entity, the Metropolitan Washington Airports Authority (MWAA), would be overseen by a Board of Review, which was to be composed of nine congressmen, acting in their individual capacities.[169] In an opinion written by Justice John Paul Stevens, the Court determined that Congress exercised "substantial power over the appointment and removal of the particular Members of Congress who serve on the Board"[170] and that at issue was "an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to congressional officials."[171] Because of these facts, the Court held that the arrangement implicated separation of powers principles and violated the doctrine for one of two reasons. Either the Board's congressmembers were impermissibly vested with authority to exercise executive power or, alternatively, the Board was exercising legislative power outside the procedural requirements of Article I, Section 7.[172]

The Court also relies on a formalist approach to strictly enforce the separation of powers when it confronts efforts by Congress to claim for

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162. *Id.* at 718.
163. *Id.*
164. *Id.* at 730–32.
165. *Id.* at 733–34.
166. *Id.* at 722.
167. 501 U.S. 252 (1991).
168. *Id.* at 255.
169. *Id.* at 258–59.
170. *Id.* at 268.
171. *Id.* at 269.
172. *Id.* at 276.

itself a role in the execution of federal policy. This concern, which could be seen in *Metropolitan Washington Airports Authority*, fueled the Court's holding in one of its more recent separation of powers decisions, *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[173] In that case, the Court weighed a challenge to the portion of the Sarbanes-Oxley Act of 2002[174] that established the Public Company Accounting Oversight Board.[175] The Board was vested with "enforcing the Sarbanes-Oxley Act, the securities laws, the [Securities Exchange Commission (SEC)] rules, its own rules, and professional accounting standards."[176] The Board's five members were appointed by the SEC and could only be removed by the SEC "for good cause shown."[177] The SEC commissioners themselves can only be removed by the president for "inefficiency, neglect of duty, or malfeasance in office."[178] The Court detected within this scheme an attempt by Congress to limit the president's authority to oversee the executive branch.[179] Though the Court had upheld some limits imposed by Congress on the president's power to remove executive branch officials, the Court concluded that this double level of protected tenure went too far.[180] The Court was most concerned with the effects of such removal limitations on the president's ability to oversee the Executive Branch.[181] Finally, the Court noted that the tenure provisions limited the president's authority and that, "[i]n a system of checks and balances, '[p]ower abhors a vacuum,' and one branch's handicap is another's strength."[182] For this reason, the Court resists efforts by Congress to impair the other branches in the performance of their constitutional duties.

Were the Court to have adhered to the formalist principles announced in the cases discussed above, the task of evaluating possible separation of powers concerns would have been considerably easier. Instead, though, the Court regularly rejects formalism's rigidity and takes a functionalist approach. Functionalism provides the government more room to maneuver—to push the boundaries of the doctrine's requirements without violating the separation of powers.

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173. 130 S. Ct. 3138 (2010).
174. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.
175. *Free Enter. Fund*, 130 S. Ct. at 3147.
176. *Id.*
177. *Id.* at 3148.
178. *Id.* (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620 (1935)).
179. *Id.* at 3147.
180. *Id.* at 3154.
181. *Id.* at 3147.
182. *Id.* at 3156.

The Court's separation of powers jurisprudence suggests that the Court is much less concerned when Congress acts with no discernible effort to arrogate its own powers. In such instances, the Court is willing to engage in a functionalist approach that emphasizes the underlying policy merits of the law. For example, in *Morrison v. Olson*,[183] the Court swept aside concerns that the independent counsel law diminished executive authority.[184] The Court held that the case did "not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch," nor did it work "any *judicial* usurpation of properly executive functions."[185] The Court reached these conclusions despite the fact that "[i]t is undeniable that the Act reduce[d] the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity."[186] In other words, the Court was not concerned with enforcing a formalist view of separation of powers that would invalidate any usurpation of executive authority. The Court instead considered the overall effect of the law and concluded that the Executive Branch retained "sufficient control" over the independent counsel as to not violate the separation of powers.[187]

The Court took a similar, "flexible," approach in *Mistretta v. United States*,[188] which involved the creation of the U.S. Sentencing Commission.[189] There, the Court rejected arguments that the law establishing the Commission unconstitutionally accumulated power in the judicial branch by giving it the authority to set sentencing policy, while also diminishing the judiciary's power "by forcing judges to share their powers with nonjudges."[190] Adopting a functionalist outlook, the justices drew upon Justice Robert Jackson's famous "admonition" in *Youngstown Sheet & Tube Co. v. Sawyer*,[191] that "the separation of powers contemplates the integration of dispersed powers into a workable Government . . . ."[192] The Court looked past the fact that the Sentencing Commission was, in effect, "lawmaking," which under a formalist approach would have rendered the statute invalid.[193] Instead, the Court

183. 487 U.S. 654 (1988).
184. *Id.* at 680–81.
185. *Id.* at 694–95.
186. *Id.* at 695.
187. *Id.* at 696.
188. 488 U.S. 361 (1989).
189. *Id.* at 380–84.
190. *Id.* at 384.
191. 343 U.S. 579 (1952).
192. *Mistretta*, 488 U.S. at 386 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).
193. *Id.* at 419–22 (Scalia, J., dissenting).

rested on the functionalist notion that locating the Commission within the judiciary "pose[d] no threat" to the separation of powers because the Commission itself "is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch."[194]

One final functionalist opinion serves to sharpen the contrast between the two approaches and highlight the fact that the Court is not particularly troubled by arrangements that might technically violate separation of powers as long as Congress is not aggrandizing power. In *Commodity Futures Trading Commission v. Schor*,[195] the Court upheld a challenge to the Commodity Futures Trading Commission's (CFTC) statutory authority to decide state law counterclaims in proceedings before the Commission.[196] The Court brushed aside the argument that Article III requires that the *judiciary* decide cases or controversies and it therefore violated the separation of powers for the CFTC—an executive branch agency—to entertain such claims.[197] The argument was founded on the Court's precedents establishing that Article III serves as "an inseparable element of the constitutional system of checks and balances"[198] by "safeguard[ing] the role of the Judiciary Branch in our tripartite system . . . ."[199] A formalist approach would have ended the matter there, as the executive branch was being given the power that belonged principally (if not exclusively) to the federal judiciary. Nevertheless, the Court "declined to adopt formalistic and unbending rules" because they would "unduly constrict Congress' ability to take needed and innovative action."[200] The Court instead considered a number of factors—including the concerns that led Congress to "depart from the requirements of Article III"—to assess the "practical effect" on the separation of powers.[201] After weighing these factors, the Court determined that the statute did not violate separation of powers.[202]

What does all of this tell us? Most simply, that the Court vacillates between two very different and determinative approaches to resolving separation of powers disputes. When the Court is presented with Congress legislating outside of the regular Article I, Section 7 procedures or if the Court detects an effort by Congress to interfere with the power

194. *Id.* at 393.

195. 478 U.S. 833 (1986).

196. *Id.* at 856–57.

197. *Id.* at 853–55.

198. *Id.* at 850 (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982)).

199. *Id.* at 850.

200. *Id.* at 851.

201. *Id.*

202. *Id.* at 851–57.

of the other two branches, the formalist logic will allow the Court to invalidate the action.[203] If, however, Congress abides by Article I, Section 7 and enacts legislation that "reallocates the functions"[204] of the other two branches, while leaving the powers largely intact, the Court will employ a functionalist approach to uphold the law.[205] Of course, this analysis is retrospective and inductive[206]—only providing an explanation for what the Court has *done*, as opposed to what it *will do*. In other words, the Court itself does not draw any lines in its separation of powers cases to explain why sometimes the Court strictly enforces a formalist interpretation of the doctrine, while other times it weighs the functional, practical effect of the law. Despite this consistent inconsistency, the Court's separation of powers jurisprudence does offer valuable lessons in considering congressional gridlock's constitutional consequences. Before turning to these lessons, however, it is necessary to consider one final shaper of separation of powers law: legal scholars, whose conceptions and critiques of the doctrine provide a basis for much of this Article's analysis.

D. Separation Anxiety within the Legal Scholarship

Fueled by the Court's incoherent, inconsistent approach to resolving separation of powers disputes, legal scholars have devoted considerable attention to the topic. Interestingly, despite the fact that no one seems satisfied with the Court's jurisprudence in this area, most scholars can also be categorized into formalists and functionalists,[207] though gradations emerge.

Gary Lawson perhaps best represents the pure formalist position in legal scholarship.[208] In Lawson's formalism, "[t]he separation of powers principle is violated whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending."[209] In other words, in Lawson's view, the Constitution establishes three governmental functions—legislative, executive, and judicial—and requires that Congress, the president, and the judiciary fulfill these respective functions. Only Congress can

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203. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 736 (1986); *INS v. Chadha*, 462 U.S. 919, 945–46 (1983).

204. Merrill, *supra* note 138, at 226.

205. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 396–97 (1989); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 857 (1986).

206. *See* Merrill, *supra* note 138, at 226–27.

207. Magill, *supra* note 113, at 1136.

208. *See, e.g.*, Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853 (1990).

209. *Id.* at 858.

legislate; only the president can execute; and only the judiciary can adjudicate, unless specific constitutional text provides otherwise. As this formulation shows, for formalism to work requires correctly categorizing every exercise of governmental authority.[210] As Lawson himself acknowledges, however, this poses a significant challenge because "distinguishing the three functions of government has long been, and continues to be, one of the most intractable puzzles in constitutional law."[211] Intractable puzzles do not make for particularly clear jurisprudence. Consider, for example, *INS v. Chadha*, in which different justices labeled Congress's use of the legislative veto to overturn the Attorney General's decision to allow Chadha to stay in the country as legislative or judicial.[212] The difficulty the Court has in assigning a particular use of power a definitional framework creates not so much an "intractable puzzle" as an insurmountable obstacle for formalistic separation of powers theory.

Functionalist Peter Strauss offers a counter to Lawson, noting that formalism "cannot describe the government we long have had, is not required by the Constitution, and is not necessary to preserve the very real and desirable benefits of 'separation of powers.'"[213] Strauss contends, instead, that the Constitution only assigns functions to the heads of the three branches—Congress, the president, and the Supreme Court—but that lower administrative levels of government are not nearly so constrained by the Constitution.[214] Indeed, Strauss says that the Framers left the Constitution silent "about the shape of the inevitable, actual government" so that Congress could "make whatever arrangements it deemed 'necessary and proper' for the detailed pursuit of government purposes."[215] Thus, Strauss does not believe that the separation of powers doctrine restricts the ability of most government actors from exercising functions beyond those typically associated with the branch in which they serve.[216]

Lawson and Strauss represent the ends of the separation of powers spectrum. Many scholars have staked claims that fall more squarely in

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210. Magill, *supra* note 113, at 1141.

211. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1238 n.45 (1994).

212. *INS v. Chadha*, 462 U.S. 919, 952 (1983) (finding the one-house veto legislative); *Id.* at 960 (Powell, J., concurring in judgment) (Justice Powell finding the exercise of power to be judicial in nature).

213. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?* 72 CORNELL L. REV. 488, 492 (1987).

214. *Id.* at 493–94.

215. *Id.* at 493.

216. *Id.*

the middle, though tilting toward one side or the other.[217] In some sense, reading the scholarship on separation of powers has the distinct feel of watching a closely contested tug-of-war, with both sides doggedly pulling at the rope, but moving the flag very little. That said, several commentators have recently offered new takes on the doctrine, providing important insights for understanding how legislative gridlock threatens separation of powers.

1. ELIZABETH MAGILL: RETHINKING SEPARATION AND BALANCE

Elizabeth Magill rejects the dichotomy between formalism and functionalism, calling it a "distraction, masking a robust consensus to which nearly all participants in the debate subscribe."[218] According to Magill, formalists and functionalists agree that the objective of a separation of powers system is to "prevent a single governmental institution from possessing and exercising too much power."[219] Additionally, Magill argues, the two sides agree on the mechanism for meeting that objective, namely by dispersing government functions among different government institutions and by relying on checks and balances to maintain that system.[220]

Magill's contention that the two sides largely agree, while accurate, should not be overemphasized. After all, that the two sides share the belief that separation of powers is intended to prevent too much power from being exercised by one branch hardly amounts to consensus. Moreover, that formalists and functionalists agree on the uncontroversial, well-settled point that the Framers relied on separated functions and checks and balances to promote a system of separation of powers does not mean, as Magill suggests, that the differences between the two approaches are small. The better way of determining whether any meaningful consensus exists is to assess whether there is agreement on the questions that actually decide the outcome in separation of powers controversies. How is a court to measure "power" and to determine what constitutes "too much" of it? On these questions, formalists and functionalists divide.

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217. *See, e.g.*, Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 452–53 (1979); Stephen L. Carter, *From* Sick Chicken *to* Synar*: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 BYU L. REV. 719, 722 (1987); Farina, *supra* note 90, 526–28; Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 453–54 (1991) (offering "pragmatic formalism").

218. Magill, *supra* note 113, at 1129.

219. *Id.* at 1148.

220. *Id.* at 1149.

Magill's more important contribution though, is that the judicial and scholarly treatments of separation of powers inappropriately blend together the concepts of separated functions and balance of power.[221] Magill contends that these two ideas "do not easily relate to one another."[222] For starters, at their historical roots, the principles of separated functions and checks and balances directly conflict with one another.[223] Additionally, in the American version of balanced powers, the three branches check each other by involving themselves in other branches' functions—negating the notion of a pure separation.[224]

One explanation for combining these two competing principles is that functional separation creates "tension, and hence balance, among the departments."[225] In other words, separated functions is a way to foster institutional competition, which in turn helps create the balance of power that is the arrangement's ultimate aim. Magill rejects this idea. As she sees it, this notion requires the formation of "distinct institutional identities" for each branch that would make members of that institution partial to their own branch's approach to making decisions.[226] Even assuming that these institutional identities develop, Magill says, that hardly means that it is functional separation that created the identities.[227] After all, "[o]ne can easily imagine competition and tension among departments without any functional differentiation."[228] Finally, as she correctly notes, the functional separation may actually dilute tension and competition among branches by allowing officials within each branch to rely on their own, and respect each other branch's, expertise.[229] Thus, there is no reason to assume that functional differentiation actually leads to tension and competition that, in turn, creates institutional balance.

Magill's assault on current separation of powers logic does not end there. Not only does she challenge the conventional approach of treating separated functions and balance of powers as conceptually linked, she also contends that each of the ideas, individually, collapses.[230] She states, "[t]he effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between

221. *Id.* at 1130.
222. *Id.*
223. *Id.* at 1161–65.
224. *Id.* at 1165–66.
225. *Id.* at 1170.
226. *Id.* at 1170–71.
227. *Id.* at 1171–72.
228. *Id.* at 1172.
229. *Id.*
230. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 603–06 (2001).

the relevant powers."[231] Governmental power is not segmented into three, easily discernable functions and governmental officials should not be treated as if they are exclusively members of one branch.[232] "Instead, government authority is diffused among a large and diverse set of government decisionmakers who have a hand in the exercise of state power."[233]

Magill also asserts that the balance of power notion is "flawed."[234] Here, again, the problem Magill is pointing to is largely one of definition. "What is the proper distribution" of power among the branches?[235] Answering that question, according to Magill, would require not only a mechanism for measuring "power" and "balance," but also a shared understanding of what constitutes balance and how it might be affected by certain uses of governmental authority.[236] All of these concerns lead Magill to conclude that the traditional approach to separation of powers doctrine needs to be abandoned in favor of one that better aligns with our government's approach to fragmented power.[237]

Magill's arguments most resonate when the issue before the Court is whether too much power has been shifted from one branch to another. As I will discuss later, though, gridlock poses a uniquely different concern: that Congress cannot act—either to meet its core functional requirements or to check the other branches.[238] Thus, the separation of powers problems raised by gridlock are not focused on determining whether some moderate, but discernable, amount of power has been unconstitutionally transferred from one branch to another. Instead, the concern is more fundamental: congressional gridlock undermines the very tenets and assumptions of the separation of powers doctrine—namely, that Congress can act.

2. DARYL LEVINSON AND RICHARD PILDES: POLITICAL PARTIES OVER INSTITUTIONAL POWERS

While Magill directs her critique at the contemporary understanding of separation of powers, Daryl Levinson and Richard Pildes focus on whether the Framers missed the mark in their original conception of

231. *Id.* at 604.
232. *See id.* at 605–06.
233. *Id.* at 605.
234. *Id.* at 627.
235. *Id.* at 634.
236. *Id.* at 632–33.
237. *Id.* at 655.
238. *See infra* notes 286–309 and accompanying text.

separation of branches.[239] Labeling the Framers' vision of competing political branches as "clearly anachronistic,"[240] Levinson and Pildes contend that a more accurate and meaningful depiction of separation of powers requires taking into account the pervasive role that political parties play in American government.[241]

As a starting point, Levinson and Pildes direct attention to Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[242] in which he keenly observes that:

> [R]ise of the party system has made a significant extraconstitutional supplement to real executive power. . . . Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.[243]

Madison's notion that the institutions of government could be made to balance and check each other rested on assumptions that Justice Jackson's comments show are faulty. Madison expected that "[t]he interest of the man" could be made to rest with the "constitutional rights of the place."[244] In other words, Madison advanced the idea that an individual member's interests would be linked to protecting the functionary powers of the branch. As Justice Jackson's concurrence notes, in actuality, representatives', senators', and presidents' interests are more directly tied to the rise or fall of their respective political parties.[245] Those interests overwhelm most concerns public officials may have about institutional prerogatives and powers. As Levinson and Pildes say, "[t]he emergence of a robust system of democratic politics tied the power and political fortunes of government officials to issues and elections."[246]

Unlike the Madisonian vision of separation of powers—which dominates the separation of powers jurisprudence—Levinson and Pildes's "separation of parties" conception emphasizes the importance of real world politics, as evidenced by the fact that the "separation of

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239. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2312 (2006).

240. *Id.* at 2313.

241. *Id.* at 2314–15.

242. 343 U.S. 579 (1952).

243. Levinson & Pildes, *supra* note 239, at 2314–15 (quoting *Youngstown*, 343 U.S. at 654 (Jackson, J., concurring)).

244. THE FEDERALIST NO. 51, *supra* note 133, at 349.

245. Levinson & Pildes, *supra* note 239, at 2315.

246. *Id.* at 2323.

parties" model encourages different approaches to resolving controversies in times of unified government and in times of divided government.[247] Levinson and Pildes conclude that, "Under divided governments . . . policy agreement [will be] more difficult and interbranch disagreement more intense. Under unified governments, smaller partisan majorities will be able to effect major policy change without the full range of checks and balances that are supposed to divide and diffuse power in the Madisonian system."[248]

The problem, then, with the existing separation of powers doctrine is that it does not account for the varying degrees with which the branches are willing to check each other based on whether the government is unified or divided. Therefore, Levinson and Pildes encourage developing an understanding of separation of powers that accounts for the fact that unified government presents different, more stark challenges than does divided government.[249] They believe that adopting a separation of powers framework that recognizes the role of political parties would "compensat[e] for the disappearance of checks and balances during periods of strongly unified government."[250]

To emphasize their point, Levinson and Pildes focus on two areas in which the current separation of powers law fails. First, Levinson and Pildes note that the Court has developed an approach to policing the separation of powers in times of crisis or war that relies on the faulty Madisonian notion of institutional power struggles.[251] Thus, in assessing executive action in such times, the Court looks to whether Congress has agreed with or otherwise validated the executive's assertions of power. As an example, when, in *Hamdi v. Rumsfeld*,[252] the Court upheld the executive's detention of American citizens who had been detained in Afghanistan, it found authority for the executive action in the duly enacted Authorization for Use of Military Force (AUMF), despite the fact that the AUMF could hardly be read to expressly authorize the detention of American citizens.[253] But absent a more nuanced understanding of separation of powers and executive-congressional relations, what more could the Court do? Enter Levinson and Pildes's "separation of parties" theory. Levinson and Pildes contend that in times of unified control, the courts should be more exacting—requiring a

247. *Id.* at 2339–40.
248. *Id.* at 2338.
249. *Id.* at 2346–47.
250. *Id.* at 2348.
251. *See id.* at 2349–50.
252. 542 U.S. 507 (2004).
253. *Id.* at 517.

clearer, more direct authorization from Congress before approving a claim of increased executive authority.[254]

The inverse is true, as well—that "courts should more generously construe statutes as supporting executive authority when government is divided."[255] Levinson and Pildes justify this approach by returning to the basic point that a Congress controlled by the same political party of the president will provide insufficient checks on executive authority.[256] Incorporating into the separation of powers doctrine an appreciation for the role that partisan loyalties play in congressional-executive dynamics will better serve to protect the interests that the doctrine is intended to serve.[257]

The second area in which Levinson and Pildes see potential benefits to focusing on the role of political parties in governance is in the separation of powers jurisprudence dealing with the administrative state.[258] The Court relies on a Madisonian model of institutional ambition and conflict when considering issues related to the delegation of legislative authority and limits on presidential control of the executive branch.[259] But, as Levinson and Pildes point out, empirical research shows that Congress is much more willing to delegate—and to do so broadly—in times of unified party control.[260] The Court's jurisprudence in this area nevertheless shows little to no appreciation for the party interests that influence congressional actions involving the administrative state.[261]

The difficulty with Levinson and Pildes's approach rests in the fact that while they make a compelling case for why the Madisonian vision that focuses on institutional interests fails as a matter of real politics, it is not clear how Levinson and Pildes's party-centered version of separation of powers works as a judicial method. For example, it is easy enough to say that because the first seven years of the War on Terror occurred during unified control of the government, the Court should be more willing to police separation of powers and prevent excessive executive authority, but that does not help resolve what is meant by "excessive." Also, during times of crisis and war, partisanship plays a less predictable and noteworthy role in determining the relationship between Congress

254. Levinson & Pildes, *supra* note 239, at 2354.
255. *Id.*
256. *Id.* at 2353–55.
257. *Id.* at 2355–56.
258. *Id.* at 2356–64.
259. *Id.* at 2358, 2364.
260. *Id.* at 2357–58.
261. *Id.* at 2358.

and the president.[262] This may very well be because party interests are served by appearing to support the president and to stand strong in support of national security, but that does not change the ultimate fact that bipartisanship often dominates. The AUMF, after all, was enacted with near unanimity.[263] Thus, in assessing the efficacy of Levinson and Pildes's approach, it is relevant to ask what real effect, if any, a court considering unified versus divided government would have in those circumstances. If anything, the back and forth between Congress and the Court regarding habeas corpus and the Guantánamo detainees shows that wartime unified government can easily respond to the Court's increasing demands—and, generally, in a bipartisan fashion.[264]

In fairness, it might not actually be Levinson and Pildes's goal to delineate a workable jurisprudential approach to separation of powers. Instead, their objective is more related to pointing out the problem of a Madisonian vision of separation of powers, especially during times of unified government. Still, Levinson and Pildes's focus on party politics as the dominant influence on congressional-executive interactions misses key facts that help bolster the Madisonian conception of separation of powers. First, there is strong evidence that presidents are much more likely to defend the institutional prerogatives of the executive branch than Levinson and Pildes's theory would suggest.[265] And there is an easy explanation for why presidents—Democratic and Republican, liberal, conservative, and moderate—have defended expansive views of presidential authority. It is because, in the words of Madison, the "interest[s] of the man" coincide with the "constitutional rights of the place."[266]

This is not to say that Levinson and Pildes are wrong about the role that partisanship plays in how Congress and the executive interact—and, specifically, about Congress's willingness to serve as a check against the executive—but it is to say that Madison and separation of powers theorists did not get it all wrong, either.

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262. *See, e.g.*, Marc J. Hetherington & Michael Nelson, *Anatomy of a Rally Effect: George W. Bush and the War on Terrorism*, 36 PS: POL. SCI. & POL. 37 (2003).

263. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., PL10740, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS: LEGISLATIVE HISTORY 3 (2007).

264. Benjamin Wittes & Hannah Neprash, *The Story of the Guantánamo Cases: Habeas Corpus, the Reach of the Court, and the War on Terror*, *in* CONSTITUTIONAL LAW STORIES 513, 533–53 (Michael C. Dorf ed., 2d ed. 2009) (describing the back-and-forth between the Court and Congress regarding the Guantánamo cases).

265. *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057, 2059 (2012) (describing "the consistency with which Presidents of both parties have sought to expand their authority").

266. THE FEDERALIST NO. 51, *supra* note 133, at 349.

Moreover, though Levinson and Pildes ignore the role of courts in the separation of powers dynamics, the judiciary was very much a part of the Framers' separation of powers concept.[267] Thus, it may be that Madison was wrong in his assumptions that institutional ambitions in Congress could be made to counteract institutional ambitions of the executive, but, in such circumstances, the federal judiciary can play an ameliorative role. It is one of the reasons that the Framers sought to isolate the judiciary from electoral pressures and political accountability.[268]

Finally, Levinson and Pildes's concern focuses on the outcomes of the legislative-executive dynamic, rather than on the process that produces those outcomes. Thus, Levinson and Pildes do not contend that in times of unified government, Congress fails to follow the requirements of Article I, Section 7 or otherwise seeks to circumvent the legislative process. In fact, as I will discuss below, divided government is generally more gridlocked government, and in those times, Congress is more likely to enact constitutionally suspect mechanisms for overcoming that stalemate.[269] From this standpoint, Levinson and Pildes's conclusion that courts should be most rigid in enforcing separation of powers in times of unified government is based on fears about substantive policy choices that arise during unified government, rather than concerns over the type of process-oriented concerns that drive the Court's separation of powers jurisprudence. Levinson and Pildes, then, are not suggesting incorporating an understanding of partisan dynamics into the separation of powers fold, as much as they are proposing replacing the old doctrine with a new way of protecting different values—values which Levinson and Pildes do not adequately define or explain.

Nevertheless, Levinson and Pildes's general observation remains compelling and important: namely, that the dominant influence of political parties in American elections and government undermine a separation of powers approach that relies exclusively on institutional interests to preserve checks and balances.

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267. *See* VILE, *supra* note 87, at 157–61.

268. Now, it may be that party loyalties affect the judicial decisions on occasion, but that is not necessarily because of partisan interests, but instead because party membership strongly correlates with constitutional ideology. *See* Bradley W. Joondeph, *The Many Meanings of "Politics" in Judicial Decision Making*, 77 UMKC LAW REV. 347, 373–76 (2008).

269. After all, divided government produced the Graham-Hollings-Rudman Budget Control Act that was the center of *Bowsher v. Synar*. *See supra* notes 159–66 and accompanying text. It also produced the Line Item Veto Act at the heart of *Clinton v. City of New York*. *See supra* notes 150–52.

3. VICTORIA NOURSE: LOOKING VERTICALLY AT THE SEPARATION OF POWERS

Magill and Levinson and Pildes seek to knock the legs out of contemporary and historical underpinnings of separation of powers. One other, more mild, critique deserves attention before turning to how congressional gridlock implicates both these and traditional views of separation of powers.

Victoria Nourse offers what she calls a "vertical" approach to separation of powers.[270] Nourse posits that the Constitution creates more than just a horizontal dynamic among the three branches of government; it also establishes vertical relationships between these branches and their respective constituencies.[271] Focusing exclusively on the functional lines of the three branches creates an incomplete account of separation of powers because it ignores what the Framers were trying to accomplish in terms of how these constituencies influenced government decision making.[272]

In some ways, Nourse's approach offers an answer to the concern raised by Magill that it is simply too difficult to measure "power" and "balance." As Nourse says, "[v]erticality seeks to identify constitutional harm in something more than the transcendental—more than 'too much' power, 'balance' disrupted, or 'functions mixed.'"[273] Vertical separation of powers "posits that the constitutional danger in shifting functions lies in popular silences and amplifications, in empowering some constituencies at the expense of others."[274] As Nourse says, the Framers were concerned about ensuring that the right constituencies were represented in the right ways.[275]

This matters because, as Nourse notes—borrowing from Neal Komesar[276]—two countervailing risks emerge when vesting any institution with decision-making authority.[277] The first concern is over elitism—that "concentrated interests will gain at the expense of dispersed majorities."[278] The other risk, however, is that of majoritarianism—that

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270. Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 749 (1999).

271. *Id.* at 752. Nourse explains, "A 'constituency relationship' is one likely to create incentives to act in accordance with the power to elect, appoint, direct, or remove." *Id.* at 752 n.11.

272. *Id.* at 759–60.

273. *Id.* at 759.

274. *Id.*

275. *Id.* at 759–60.

276. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 65–82 (1994).

277. Nourse, *supra* note 270, at 783–84.

278. *Id.* at 783.

powerful majorities will run roughshod over discrete, insular minorities.[279]

The traditional, horizontal concept of separation of powers fails to account for this important structural element in the Constitution. The Court's and commentators' focus on determining whether a particular function is legislative, executive, or judicial in nature distorts the inquiry until it becomes nothing more than a battle of Madisonian quotes.[280] Nourse's vertical approach envisions separation of powers as achieving more than just functional separations, but also as creating a "separation of political relationships between the government and the people."[281] A proper separation of powers inquiry, then, seeks to determine whether the challenged statute alters the constituency whose voice will be directing the exercise of the power. For example, Nourse suggests that the Court's and dissenter's focus in *Morrison v. Olson* over the removal power missed the more important separation of powers issue: whether the independent counsel statute impermissibly shifted power away from Congress—and, therefore, local constituencies—to decide impeachment questions, while granting greater authority to Congress and its constituents to make prosecutorial decisions.[282]

As Nourse herself recognizes, her approach is still an effort to achieve the same ends as the standard separation of powers analysis that is grounded in functional considerations, namely to assess the structural risks that a particular statute or action poses.[283] The vertical approach serves as a better proxy to determine the risks of a given statute precisely because the Constitution's chief organizing principle is not in "vesting" three departments with particular authority, but in creating the political relationships between officials and constituents that permit those officials to exercise power on behalf of their constituents. For Nourse, then, rather than asking whether a particular arrangement respects the functional differences among the branches, we should instead ask "*from which* constituency the power comes, and *to which* constituency it is given, and *what* relative risks and incentives that shift entails for those constituencies."[284] If that becomes the standard separation of powers inquiry, Nourse believes it will not only free us from the morass of distinguishing legislative, executive, and judicial functions, but will better protect the constitutional design.[285]

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279. *Id.* at 783–84.
280. *See id.* at 754.
281. *Id.* at 781.
282. *Id.* at 775–76, 776 n.140.
283. *Id.* at 785–86.
284. *Id.* at 752.
285. *Id.*

These four scholars—Magill, Levinson, Pildes, and Nourse—expand our general understanding of separation of powers dramatically. At the very least, the discussion of these three critiques shows just how amorphous and broad the concept of separation of powers truly is. As I will discuss below, the critiques that they direct at contemporary—and, in Levinson and Pildes' case, historical—bases for separation of powers provide important insights into assessing the risks that congressional gridlock poses to separation of powers.

III. DRAWING THE CONTOURS OF GRIDLOCK'S SEPARATION OF POWERS PROBLEM

As the previous Part shows, there exists a wide-ranging and largely amorphous understanding of separation of powers. Because of that, before focusing on the specific examples of the problem, it is important to make out the contours of the threat that continuing congressional gridlock poses to the survival of the constitutional system of separation of powers. The history, jurisprudence, and commentary discussed in the last Part offer valuable lessons that help provide shape to the constitutional threat of gridlock. Indeed, these lessons provide the analytic framework for concluding that congressional gridlock implicates separation of powers. After drawing the lines around the problem, the next Part will color in the picture with specific recent examples demonstrating how congressional gridlock threatens separation of powers.

A. Gridlock Threatens Separation of Powers No Matter Which View of the Doctrine One Accepts

As the previous Part showed, there is no single vision of separation of powers. Formalists promote a strict separation among the branches that permits only those cross-branch involvements that are specifically provided for in constitutional text.[286] Functionalists prefer a more pragmatic approach that allows the branches some opportunity for shifting functions as long as important ends are served.[287] Then there are the countless critiques offered by scholars—including the three proposed by Magill, Levinson and Pildes, and Nourse. But no matter the approach one chooses to follow, the core elements of separation of powers remain: separated branches performing certain functions while serving as checks on the others as a means of preserving the proper balance of power.[288]

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286. *See supra* notes 208–11 and accompanying text.
287. *See supra* notes 213–16 and accompanying text.
288. *See supra* notes 220–21 and accompanying text.

These two features may not be linked to each other to the degree that the Court and commentators sometimes suggest, but they are equally important components of the Framers' separation of powers design. The separated functions piece aims to parcel responsibilities among the different branches. The goal of checks and balances is to ensure that no one branch becomes too powerful or usurps another branch's functions. Both elements are critical to the successful maintenance of the constitutional design.

Gridlock interferes with both features of separation of powers. Congress cannot fulfill its functional responsibility to legislate because of the stalemate that exists.[289] I realize that criticizing congressional stalemate often has the appearance of being ideological—all the more so because of gridlock's recent policy victims.[290] Perhaps even superficially it is—but diving deeper reveals the constitutional concerns at play. First, a gridlocked Congress pushes the executive to engage in its own form of law making to make up for Congress's failure. For example, last year President Obama directed his staff to "more aggressively use executive power to govern in the face of Congressional obstructionism."[291] In response, the Obama Administration unveiled a series of unilateral policy initiatives, under the slogan "We Can't Wait," addressing such issues as jobs for military veterans, prescription drug shortages, fuel economy standards, and domestic violence.[292]

As part of that effort, on June 15, 2012, President Obama announced that the Administration would no longer deport young undocumented immigrants who came to the country before they turned sixteen.[293] Instead, those individuals can seek work permits, as long as they meet certain criteria.[294] The policy shift represented the Administration's response to the gridlock that prevented Congress from

289. Gridlock also implicates the other branches' ability to function by depriving them of needed personnel and resources. *See, e.g.*, *New Process Steel, L.P. v. N.L.R.B.*, 130 S. Ct. 2635 (2010) (invalidating nearly six hundred decisions by the National Labor Relations Board because the Board lacked sufficient membership to constitute a quorum); Paul Kane, *FEC Nomination Impasse Stalls Disclosure of Bundling Data*, WASH. POST, Apr. 4, 2008, at A21 (documenting a similar quorum problem for the Federal Election Commission).

290. Immigration reform, a public option in the health care law, and comprehensive climate change and energy laws, to name but a few.

291. Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES, Apr. 23, 2012, at A1.

292. *Id.*

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

294. *Id.*

enacting the DREAM Act,[295] legislation that would have granted permanent legal residency status to many of the same people reached by President Obama's order.[296] Given that the DREAM Act passed the House of Representatives in 2010 and secured fifty-five votes in the Senate to invoke cloture in 2010,[297] President Obama could convincingly argue that because a majority of both chambers had supported an even stronger measure, with only gridlock preventing its enactment, his immigration decision was an appropriate response to congressional inaction.[298]

Even more recently, on January 16, 2013, President Obama signed twenty-three executive orders designed to address gun violence.[299] His administration decided to bypass Congress "after witnessing the gridlock that has consumed Congress in recent years when they've discussed hot policy topics."[300] It may well be that the President would have taken these unilateral steps on gun control even absent congressional gridlock on the subject. Indeed, the fact that President Obama signed the executive orders even before presenting legislative proposals to Congress strongly suggests that to be the case. Still, stalemate played an important role because it provided the Obama Administration with a plausible—even convincing—explanation for why it was necessary to bypass Congress.

This highlights an important consideration that is a common thread throughout much of the following discussion. As Congress becomes increasingly stalemated, and as public perception of Congress becomes one of a gridlocked body, it becomes far too easy to attribute any failure by Congress to act as a product of gridlock. It becomes a cover for the Executive to act even when the reasons for congressional inaction prove to be substantive disagreement with policy, rather than stalemate. Or, taken further, it becomes an anticipatory, affirmative defense to

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295. S. 3992, 111th Cong. (2010).

296. *Id.*

297. David Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES, Dec. 18, 2010, *available at* http://www.nytimes.com/2010/12/19/us/politics/19immig.html?_r=0.

298. *See* President Barack Obama, Remarks by the President on Immigration, (June 15, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration.

299. Press Release, Office of the Press Sec'y, The White House, Gun Violence Reduction Exec. Actions (Jan. 16, 2013), *available at* http://www.washingtonpost.com/wp-srv/politics/documents/gun-proposals/GunViolenceReductionExecutiveActions.pdf.

300. Chris Miles, *Executive Orders on Gun Control: Obama Will Enforce Existing Laws*, POLICYMIC (Jan. 15, 2013), http://www.policymic.com/articles/23280/executive-orders-on-gun-control-obama-will-enforce-existing-laws.

unilateral executive action that entirely circumvents the legislative process.

Moreover, if Congress cannot act, it cannot effectively check the executive—or the judiciary—when the other branch extends beyond its authority or impairs Congress's ability to fulfill its constitutional responsibilities. This represents the more critical problem of congressional gridlock. A Congress deprived of its legislative power is a branch unable to check.

This directly implicates Magill's main critique of the separation of powers doctrine: that this concept of institutional balance is "conceptually underdeveloped and flawed."[301] The difficulty Magill points out is that no benchmark exists for knowing when the branches are appropriately balanced and that there is no mechanism for discerning when a shift in authority results in an impermissible distribution of authority.[302] In addition, Magill disputes the idea that the branches of government can be said to have "unitary interests."[303] Instead, the branches are "complex institutions that are made up of many subparts; those subparts have varying interests that do not always coincide with one another."[304] It is therefore difficult to assess how a new arrangement may affect a branch's strength or weakness. Moreover, Magill argues, it is not necessarily true that a change in government process—she uses the extreme example of taking away the president's veto power—will result in a significant shift in institutional power that affects policy outcomes.[305]

To be sure, one can dispute Magill's many arguments. Perhaps the benchmark she seeks in vain is the balance that results directly from the constitutional text. Thus, *any* alteration to that balance results in unconstitutional imbalance. Moreover, one need not necessarily have a means to "define, measure, and compare government power across institutions"[306] to know whether imbalance exists. Like when a four-year-old sits on one side of a teeter-totter opposite a full-grown adult, sometimes you can see imbalance just by looking. Finally, Magill goes too far in her argument about institutions having varied interests. Magill focuses on policy outcomes and assumes that is the correct standard for concerns over imbalance. She says that the "special concern about imbalance is that interests that prefer a particular set of outcomes will be wrongly silenced or ignored (if they are the interests associated

301. Magill, *supra* note 230, at 627.
302. *Id.* at 633.
303. *Id.* at 645.
304. *Id.*
305. *Id.* at 648.
306. *Id.* at 633.

with the branch that is weakened), or will be inappropriately advantaged (if associated with the branch that is strengthened)."[307] Magill is drawing here upon Nourse's vertical separation of powers. But Nourse's vision—though compelling—is not the majoritarian view of separation of powers, nor of the principles underlying the doctrine.

For many, the concern about imbalance is not as outcome-oriented as Magill makes it out to be. Instead, it is about faithfulness to the constitutional text and law-making process. It is about ensuring transparency and accountability, and protecting individual liberty. The Court itself often gives little consideration to the type of realpolitik arguments that Magill makes. In other words, depriving the president of the veto diminishes his power—that is that. Moreover, Magill's focus on policy goals ignores the fact that constitutional powers assigned to each branch are not exclusively about determining policy outcomes. In other words, while the president may use the veto to influence legislation, it is also a tool to protect the executive (and judicial) institutions from encroachment by Congress. While there may be a variety of policy interests in the executive, the branch itself has an interest in preserving its power against congressional usurpation.

Importantly, though, one can accept all of Magill's arguments and still maintain that congressional gridlock threatens the balance requirements of separation of powers. After all, Magill acknowledges that the Framers intended institutional checks to be the means by which balance is maintained. A branch deprived of its ability to check the other branches threatens separation of powers, even if in the short run or in some circumstances balance is maintained. To borrow from deterrence theory,[308] a branch's ability to check serves as an important tool in preventing the other branches from acting beyond the scope of their constitutional authority.

Of course, more important than deterrence theory is that the constitutional design depends on institutional checks. The Framers placed those checks throughout the text and considered them a critical part of the soundness of the Constitution's structure. The Court, too, has emphasized the significance of those checks, which serve to make the separation of powers. Furthermore, Congress losing its ability to check the executive is all the more problematic because the Court often invokes the political question doctrine to avoid confronting issues related to

307. *Id.* at 647.

308. *See, e.g.*, KEITH B. PAYNE, DETERRENCE IN THE SECOND NUCLEAR AGE 60–73 (1996).

executive authority.[309] Thus, Congress is often the *only* check to counter a president seeking to aggrandize executive power.

Therefore, to state the concern as directly and clearly as possible, congressional gridlock threatens our constitutional separation of powers by depriving Congress of its ability to check the other two branches, thereby undermining the power balance that is critical to the separation of powers doctrine.

B. Gridlock Threatens the Many Values That Separation of Powers Serves

Montesquieu contended that separating governmental functions secured liberty by preventing the concentration of power into the hands of a few.[310] The Framers agreed.[311] The Court, too, has often justified formalist approaches by articulating a liberty-preserving effect of separation of powers.[312] Scholars also emphasize the important role the doctrine plays in protecting individual rights and liberties.[313] As Rebecca Brown has stated, "concern for the principle of due process has appeared repeatedly in the Court's separation-of-powers cases."[314]

While preserving liberty is an important goal of separation of powers, it is hardly the only end that the doctrine serves. In defending an executive separate from the legislature, the Framers emphasized the value to efficiency served by such an arrangement.[315] The belief that separation of powers improved governmental efficiency was hardly new—in fact, in advancing that purpose, the Framers were expounding on historic arguments made by the original theorists of the doctrine.[316]

On one hand, then, separation of powers seeks to divide governmental power to discourage "rash or arbitrary action"[317] and yet, at the same time, the concept of separating functions is also seen as

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309. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 142–45 (4th ed. 2011).

310. *See* MONTESQUIEU, *supra* note 92, at 168–69.

311. *See* THE FEDERALIST NO. 51, *supra* note 133, at 348.

312. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010); *Clinton v. City of New York*, 524 U.S. 417, 449–53 (1998) (Kennedy, J., concurring); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1990); *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

313. *E.g.*, Brown, *supra* note 137, at 1516.

314. *Id.* at 1516–17.

315. GWYN, *supra* note 88, at 34.

316. *See id.* at 126; William C. Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 721 (1984); Pushaw, *supra* note 136, at 402.

317. Pushaw, *supra* note 136, at 404.

necessary for effective, efficient government.[318] The Court, however, has not been kind to the efficiency rationale. In *INS v. Chadha*, invalidating the legislative veto, the Court said: "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."[319] It repeated the refrain in *Bowsher v. Synar*.[320] Instead, the Court cited preserving liberty as the hallmark purpose behind separation of powers, presumably relegating the efficiency justification to a much lower spot on the hierarchy.[321] Thus, when the two come into conflict, liberty is the rock to efficiency's scissors.

There is more, though. In some separation of powers cases, the Court has offered an additional end that the doctrine serves: increased transparency and accountability.[322] The relatively straightforward logic behind this idea is that dividing authority in a clear way allows citizens to know what branch of government is responsible for a particular function and can therefore hold that branch accountable. For example, in *Free Enterprise Fund*, the Court focused on the fact that the removal provisions relating to the Public Company Accounting Oversight Board commissioners restricted the ability of the president to hold officials within the Executive Department accountable, and that the provisions then limited the ability of the public to hold the president accountable to the people for the actions of the Board.[323] The Court said:

> Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." . . . By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers.[324]

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318. *See id.* at 403.

319. *INS v. Chadha*, 462 U.S. 919, 944 (1983).

320. 478 U.S. 714, 736 (1986).

321. *Id.* at 721.

322. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 712 (1997).

323. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010).

324. *Id.* (internal quotations and citations omitted).

Preserving liberty, promoting efficiency, and increasing accountability: a gridlocked Congress frustrates all three of the purposes of the separation of powers doctrine.

Congress's inability to act threatens individual liberty in ways that are more concrete than the grand notion that power concentrated in a single branch is tyranny or that any time a legislature enacts law, liberty is lost.[325] For example, the gridlock involving the judicial appointment process has produced a judicial vacancy rate that "erod[es] the quality of justice"[326] as courts cancel oral arguments, postpone cases for months, and take dramatically longer to dispose of matters.[327] A federal judiciary that cannot function not only directly threatens separation of powers, but also undermines that branch's ability to protect the liberty interests of those within its jurisdiction. Requiring a wrongfully convicted defendant to wait months or years for a court of appeals to hear and decide its case deprives the individual of liberty. Consider, as well, that legislative gridlock is at least partly responsible for the extraordinary amount of time it took for Congress to correct the crack/cocaine disparity that was literally depriving citizens of their liberty by incarcerating them for egregiously long times.[328] In short, congressional gridlock poses as serious a threat to liberty as any generalized concerns that the separation of powers doctrine is intended to address.

Gridlock also hinders the linked goals of transparency and accountability. As discussed above, when Congress grows frustrated with gridlock, it often seeks to find new mechanisms for legislating without law making.[329] In some cases, this can produce innovative approaches for overcoming institutional and political barriers to collective action—like in the case of closing military bases in the 1980s.[330] When Congress created the Base Realignment and Closure Commission (BRAC) in

325. *See* Redish & Cisar, *supra* note 217 at 463–65.

326. William H. Rehnquist, *The 1997 Year-End Report of the Federal Judiciary*, THE THIRD BRANCH, Jan. 1998, Special Issue, at 2–3. Chief Justice Roberts noted in his year-end 2010 report that the current judicial confirmation process "has created acute difficulties for some judicial districts." John G. Roberts, *2010 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 2011, at 3.

327. SARAH A. BINDER & FORREST MALTZMAN, ADVICE AND DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY 128–30 (2009).

328. Jim Abrams, *Congress Passes Bill to Reduce Disparity in Crack, Powder Cocaine Sentencing*, WASH. POST, July 29, 2010, at A9.

329. *See* Michael J. Teter, *Recusal Legislating: Congress's Answer to Institutional Stalemate*, 48 HARV. J. ON LEGIS. 1, 3–4 (2011) (describing the myriad ways in which Congress seeks to overcome gridlock).

330. Kenneth R. Mayer, *Closing Military Bases (Finally): Solving Collective Dilemmas through Delegation*, 20 LEGIS. STUD. Q. 393, 396 (Aug. 1995).

1988,[331] it overcame the political, electoral, and institutional obstacles that had produced a decades-long stalemate over the issue.[332] But even with the success of the BRAC base-closing process, there were genuine worries that this form of law making reduced transparency and accountability by placing important policy decisions into the hands of independent, ad hoc commissions.[333]

Gridlock is pushing Congress toward a form of legislating that makes those concerns more acute. The Super Committee discussed later illustrates this basic point.[334] There, only a handful of representatives and senators were responsible for putting together a $1.2 trillion deficit reduction plan that would not be subjected to the traditional legislative process, weakening democratic accountability.[335] The Super Committee operated largely behind closed doors, to the detriment of transparency.

As gridlock becomes more pronounced, calls for Congress to turn to this type of law making only grow. Recently, former Office of Management and Budget Director Peter Orszag promoted the increased use of automatic stabilizers, triggers, and independent commissions as a means of bypassing congressional gridlock to enact economic policy.[336] Others have proposed reforming tax policy and making infrastructure decisions.[337] These are noble efforts to address the problem that congressional gridlock poses to things that are undoubtedly important: national security, the economy, and the budget. But these proposals also undermine some foundational principles of democratic government that separation of powers is intended to promote: transparency and accountability.

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331. Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623, 20 U.S.C. § 2687 (1988).

332. Mayer, *supra* note 330, at 393–96.

333. *See, e.g.*, 134 CONG. REC. H30044 (daily ed. Oct. 12, 1988) (statement of Rep. Snowe) (arguing against enactment of the BRAC law and stating "[t]he kind of irresponsible legislation we are considering today should be an unpopular decision. Citizens throughout this country are entitled to ask why their elected representatives are so eager to abdicate Congress' most fundamental role, depriving the people of their voice in the base closing process to boot").

334. *See infra* Part IV.B.

335. The members of the Super Committee represented just 15.87% of Americans, according to data available from the U.S. Census Bureau. *See* U.S. CENSUS BUREAU, *Fast Facts*, http://www.census.gov/fastfacts. I arrived at this percentage by adding the populations of each of the states with a senator serving on the Super Committee, as well as the populations of the six congressional districts represented on the Committee (SC-6th, CA-34th, MD-8th, TX-5th, MI-4th, MI-6th) and found the percentage that total represented of the entire United States population.

336. Peter Orszag, *Too Much of a Good Thing: Why We Need Less Democracy*, THE NEW REPUBLIC (Sept. 14, 2011), http://www.newrepublic.com/article/politics/magazine/94940/peter-orszag-democracy.

337. *Id.*

Finally, it hardly seems necessary to spend much ink discussing how gridlock implicates the third separation of powers value: efficiency. By most measures, as well as most insider accounts, gridlock has eroded Congress's ability to address America's problems with effective and efficient policy prescriptions. This is not just about a more difficult, slow, and protracted legislative process. Instead, the gridlock means that the legislative outputs—when any exist—are "ineffectual compromises" rather than "programmatic, ideologically coherent initiatives."[338] As we have seen recently, Congress often "resolves" gridlock by enacting short-term solutions that simply require it to take up the matter again.[339] Moreover, moving legislation through a gridlocked Congress often requires meeting the individual, idiosyncratic demands of legislators. For example, when Senate Democrats needed sixty votes to pass the Affordable Care Act, we got the Cornhusker Kickback and the Louisiana Purchase to ensure the support of Senator Ben Nelson and Senator Mary Landrieu, respectively.[340] Speaker John Boehner has blamed some of the gridlock in the House on the fact that he cannot offer various earmarks and other budgetary incentives to his members,[341] confirming what we already know: congressional leaders often turn to such devices to resolve gridlock.

In sum, congressional gridlock not only frustrates the core features of separation of powers, but also undermines the objectives the doctrine is intended to serve.

C. Gridlock Poses a Unique Separation of Powers Problem

The separation of powers overview provided in Part II revealed another concern resting at the roots of the doctrine: legislative overreach. It is evident from the Constitutional Convention records, the Federalist Papers, case law, and the scholarly development of the doctrine that the Framers considered legislative aggrandizement of power to be the primary problem that a structural separation of powers would help to prevent.[342]

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338. Levinson & Pildes, *supra* note 239, at 2339.

339. Just this past January, for example, Congress addressed the debt ceiling problem by putting the matter off until May 2013. *See, e.g.*, Jonathan Weisman, *House Vote Sidesteps an Ultimatum on Debt*, N.Y. TIMES, Jan. 24, 2013, at A1.

340. Chris Frates, *Payoffs for States Get Harry Reid to 60 Votes*, POLITICO (Dec. 19, 2009, 7:56 PM), http://www.politico.com/news/stories/1209/30815.html.

341. Anna Palmer, *Boehner: Job More Difficult without Earmarks*, POLITICO (Apr. 29, 2012, 9:52 AM), http://www.politico.com/blogs/politico-live/2012/04/boehner-job-more-difficult-without-earmarks-121968.html.

342. *See, e.g.*, VILE, *supra* note 87 at 157, 159, 164, 268; Carter, *supra* note 217, at 777; Pushaw, *supra* note 136, at 478.

Congressional gridlock presents the opposite problem: it promotes executive and judicial supremacy at the expense of the legislature. It allows the executive and the judiciary to aggrandize institutional power, to encroach on the functions of the legislature, and to hold greater sway over governmental policy than the Framers envisioned for the two less democratic branches.

In part for this reason, congressional gridlock poses a unique separation of powers problem. As the overview of cases in Part II showed, few separation of powers cases have presented the Court with a situation in which the executive or judiciary was aggrandizing power at the legislature's expense.[343] The two closest examples of such instances came in *Youngstown Sheet & Tube Co. v. Sawyer* and *Clinton v. City of New York*. In *Youngstown*, the Court held that President Truman lacked authority to "seize" steel mills that were closing because of union strikes.[344] Much of the Court's rationale rested on the fact that Congress had failed to authorize the seizure or, even perhaps, had made an affirmative decision not to authorize the seizure.[345] In *Clinton v. City of New York*, the Court viewed the Line Item Veto Act as giving "the President the unilateral power to change the text of duly enacted statutes."[346] Many scholars agreed with this assessment, writing that "the item veto would rework a fundamental shift in the balance of power."[347] The facts in *Youngstown* and *Clinton* actually posed a less substantial risk of executive aggrandizement than that posed by congressional gridlock. In *Youngstown*, it was possible for Congress to respond to President Truman's action—either to endorse or oppose it.[348] Similarly, with the line-item veto presented in *Clinton*, Congress retained its ability to check the executive through a "disapproval" resolution.[349] Gridlock deprives Congress of this checking ability.

It is not just the legislative-executive dynamics that gridlock affects. Stalemate disrupts Congress's ability to check the judiciary in constitutionally suitable ways. To review, Congress's primary constitutional checks over the judiciary include impeachment, the power to create judgeships and establish the jurisdiction of the courts, and overriding judicial decisions by enacting laws or proposing constitutional amendments. Judicial impeachment as a particularly strong check died

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343. *See supra* Part II.C.

344. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–89 (1952).

345. *Id.* at 585–86.

346. *Clinton v. City of New York*, 524 U.S. 417, 447 (1998).

347. Maxwell L. Stearns, *The Public Choice Case against the Item Veto*, 49 WASH. & LEE L. REV. 385, 401 (1992).

348. *Youngstown*, 343 U.S. at 583.

349. *Clinton*, 524 U.S. at 436.

when Justice Samuel Chase survived his Senate impeachment trial in 1805.[350] That leaves altering the size and scope of the federal judiciary and overriding judicial decisions as the two remaining checks. The obvious problem is that gridlock stands in Congress's way in exercising this power. For this reason, judicial interpretations of a statute become even more final—even if a majority in Congress disagrees with it. This not only places greater power in judicial hands than separation of powers envisions, but the problem is exacerbated by the way the federal judiciary approaches its interpretative task. The judiciary imagines a "dialogue"[351] with the legislative branch over the proper meaning of statutes, but because of gridlock, one party to this supposed conversation is suffering from laryngitis.

Some may respond that Congress—through the Senate's advise and consent role—still maintains a check over the judiciary, and further, that gridlock actually strengthens this check. There are several problems with this formulation. First, the Senate's advise and consent function is better viewed as a check on executive power, not judicial. After all, the Senate exercises its authority *before* a nominee joins the court to which she has been nominated. Once a person has been confirmed by the Senate and begins serving in the judiciary, the Senate's advise and consent responsibilities likely have little to no influence over her.

It is true, though, that gridlock does have indirect effects on the judiciary. The Senate's role in the judicial confirmation process undoubtedly influences who the president nominates. In times of gridlock, it is possible that the president will nominate moderate judges who are more likely to be confirmed by the Senate. Thus, it is possible that Senate gridlock influences the overall ideological makeup of the federal judiciary. Additionally, as already discussed, the Senate stalemate over judicial confirmations is the primary cause of a vacancy crisis that affects the judiciary's ability to function effectively.[352] A less efficient judiciary, perhaps, is one that makes fewer decisions with which Congress disagrees.

Nevertheless, it is a mistake to conflate that direct consequence of gridlock with a constitutionally legitimate check on the judiciary. Checks are intentional, volitional acts to prevent aggrandizement by the other branches. They are not unintended side effects of inaction. Gridlock, therefore, leaves Congress with few, if any, checks over the judiciary.

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350. Richard B. Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49, 49 (1960).

351. Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 591 (1996).

352. *See, e.g.*, *supra* note 326 and accompanying text.

Finally, it makes no difference that Congress, itself, has caused this diminution in authority and could, at least theoretically, resolve it. The Court has made quite clear that acquiescence to a loss of constitutional authority does not validate an otherwise invalid transfer of power.[353] Separation of powers protects not just the three institutions, but also individual citizens as well.[354] Because of that, one institution cannot simply waive its right to enforce the doctrine. Congress cannot give away the power it constitutionally possesses at the expense of future Congresses.[355]

Lastly, it is difficult to see within congressional stalemate a deliberate decision to grant greater authority to the other branches. Unlike the Line Item Veto Act, Congress has not voted to gridlock itself, to diminish its ability to check the other branches, or to give the executive and judiciary greater authority over setting federal policy. Gridlock has gripped the institution against its own interests and to the detriment of separation of powers broadly and the ends that the doctrine promotes. The fact that the separation of powers problem posed by congressional gridlock involves executive and judicial aggrandizement at the expense of the legislature is irrelevant to the inquiry.

D. Gridlock, More Than Unified Party Control, Poses a Danger to Our Constitutional System of Separation of Powers

Before turning to the next Part's emphasis on recent history to demonstrate the separation of powers problems that congressional gridlock poses, it is necessary to respond more completely to Levinson and Pildes's arguments. Levinson and Pildes contend that the rise of political parties rendered obsolete Madison's vision of institutional separation of powers that tied the "interest of the man" with the

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353. *See, e.g.*, *Free Enter. Fund v. Public Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) ("But the separation of powers does not depend on the views of individual Presidents, nor on whether the 'encroached-upon branch approves the encroachment'. . . ." (citations omitted)). Justice Kennedy has also stated:

> It is no answer, of course, to say that Congress surrendered its authority by its own hand . . . . That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow.

Clinton, 524 U.S. at 451–52 (Kennedy, J., concurring).

354. *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853–54 (1986).

355. *See Free Enter. Fund*, 130 S. Ct. at 3155 ("The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.").

"constitutional rights of the place."[356] Political competition now occurs through parties, rather than branches.[357] In other words, the ambitions of an officeholder are tied to the interests of her political party.

Levinson and Pildes's work helps to explain why the executive power has grown, often at the legislature's expense. It is not necessarily that the executive has seized it from an unwilling legislature, but rather that a willing legislature has given it to the executive during periods of unified government.[358] Moreover, according to Levinson and Pildes, party control of the branches determines the dynamics of the competition between Congress and the executive, and it is therefore necessary to re-conceptualize the system of separated powers to account for this fact.[359] If Levinson and Pildes are correct, does that mean gridlock should not concern us? After all, if the true threat to separation of powers comes from a legislature willing—in times of unified government—to give the executive too much authority, then maybe gridlock serves as a prophylactic.[360]

In reality, however, Levinson and Pildes's "separation of parties" configuration serves a different purpose than the traditional separation of powers analysis. Levinson and Pildes suggest adopting a party-centric view of political competition as a means of recognizing the dangers inherent in unified party control.[361] Those dangers, they contend, are of the same variety that traditional separation of powers takes aim: threats to liberty and reduced accountability.[362] But Levinson and Pildes conception of those dangers is too limited. They adopt the standard line that too much executive authority poses the greatest risk to liberty and that administrative agencies are less accountable than Congress.[363] But this iteration of the general concerns about executive authority ignores the fact that congressional inaction places liberty in jeopardy for the reasons discussed earlier. Moreover, if Levinson and Pildes believe that Congress has already delegated too much power and authority to the executive, gridlock only serves to preserve that imbalance and further shield the executive's decisions from congressional scrutiny. Gridlock, then, is hardly the answer to the "separation of parties" fears raised by Levinson and Pildes.

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356. THE FEDERALIST 51, *supra* note 133, at 349.
357. Levinson & Pildes, *supra* note 239, at 2314.
358. *Id.* at 2357.
359. *Id.* at 2315.
360. *Id.* at 2384.
361. *Id.* at 2385–86.
362. *See id.*
363. *Id.* at 2342–44, 2355–57.

Nevertheless, to the extent that Levinson and Pildes are concerned about excessive executive power at Congress's expense, then my thesis is in harmony with theirs. The difference, really, is that Levinson and Pildes focus on Congress intentionally transferring authority to the executive because of partisan interest, whereas this Article tackles the unintentional loss of congressional power that results from gridlock. These two approaches, then, only truly come into direct conflict when one attempts to address the problem. Levinson and Pildes's thesis that we should fear unified government leads them to propose ways of increasing gridlock.[364] Needless to say, I think this is misguided, not only because, as discussed above, it will not reduce the harms that Levinson and Pildes identify, but because it will only serve to make the separation of powers concerns even more acute.

In the end, though, it depends on one's perception of the problem. I believe that a legislature unable to legislate poses a greater threat to liberty, accountability, efficiency, and, ultimately, democratic governance than does excessive delegations by Congress. In the next Part, I offer specific, recent examples to illustrate the dangers of congressional gridlock to convince the reader that such stalemate, more than unified government, presents the more serious problem.

IV. SPECIFIC THREATS GRIDLOCK POSES TO THE SEPARATION OF POWERS

The previous Part sought to explain how congressional gridlock raises separation of powers concerns by drawing lessons from the historical, jurisprudential, and scholarly understandings of the doctrine. Examining three specific, recent events provides a concrete dramatization of the threat that congressional gridlock presents to separation of powers.

A. Richard Cordray, Recess Appointment, and Diminishing the Role of the Senate

Congress enacted, and President Obama signed, the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010.[365] The law created the Consumer Financial Protection Bureau (CFPB), an independent agency to be housed in, and funded by, the Federal

364. *Id.* at 2380–85.

365. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

Reserve.[366] The CFPB enjoys the authority to promulgate and enforce rules related to federal consumer financial protection laws.[367]

Even before the CFPB began functioning, Republicans sought to weaken it.[368] In addition to proposing structural changes to the bureau, cuts to its budget, and revoking some of its authority, Republicans used their power in the Senate to block President Obama's appointment of Richard Cordray to lead the bureau.[369] Senate Republicans made clear that they were not preventing Cordray's confirmation because of concerns about him, but rather, because they wanted significant changes made to the CFPB.[370]

Cordray, of course, is hardly the first nominee who the Senate failed to confirm.[371] And, on its face, it might appear that the Cordray example, and the confirmation problem more generally, shows how gridlock can increase Congress's power vis-à-vis the other branches. After all, the executive and judicial branches are filled with individuals who must be confirmed by the Senate. High vacancy rates affect each branch's ability to carry out its functions.[372] Additionally, the failure to confirm the president's first choice perhaps pushes the president to acquiescence to the Senate's concerns.

Further analysis, though, shows the fallacy behind the idea that gridlock bolsters Congress. First, separation of powers is concerned with institutional authority, not partisan advantage. Therefore, while it is fair to say that Senate rules allowing a minority of senators to block an individual's appointment to executive or judicial office places greater power in the hands of that political minority, it hardly means that Congress—or even the Senate, itself—wields greater authority. After all, fifty-three senators voted to end the Republican filibuster of Cordray.[373] It cannot fairly be said, then, that Congress has made an intentional choice to check the executive or judiciary by refusing to confirm nominees.

But even if one accepts the idea that Senate stalemate checks the executive's appointment power, what happened after Senate Republicans

366. *New U.S. Consumer Financial Protection Bureau Has Wide Powers*, REUTERS (Sept. 14, 2010), http://blogs.reuters.com/financial-regulatory-forum/2010/09/14/factbox-new-us-consumer-financial-bureau-has-wide-powers.

367. *Id.*

368. *See* Binyamin Applebaum, *Former Ohio Attorney General to Head New Consumer Agency*, N.Y. TIMES, July 18, 2011, at B1.

369. John H. Cushman, Jr., *Senate Stops Consumer Nominee*, N.Y. TIMES, Dec. 9, 2011, at B1.

370. *Id.*

371. *See supra* notes 38–42 and accompanying text.

372. *See, e.g.*, *supra* note 326 and accompanying text.

373. *See* Cushman, *supra* note 369.

blocked Cordray's confirmation illustrates why gridlock nevertheless threatens Congress's institutional power in a more critical way. The cloture motion on Cordray's nomination failed on December 8, 2011.[374] On January 4, 2012, President Obama recess appointed Cordray to the position.[375] Republicans, however, had sought to prevent such a maneuver by holding pro forma sessions that last for mere seconds and at which no business is conducted.[376] The Senate and House leaders of both parties believed that such sessions, held every three days, meant that Congress was not in recess.[377] The executive branch disagreed with that interpretation, labeling them a "gimmick" that did not "override the President's 'constitutional authority' to make appointments."[378] The Justice Department determined that despite the pro forma sessions, the Senate had been in recess for weeks.[379] As such, the Department of Justice advised President Obama that he could recess appoint Cordray.[380]

After the recess appointment, many members of Congress—yes, largely Republicans—were up in arms.[381] They condemned the move, labeling President Obama's action a "blatant attempt to circumvent the Senate and the Constitution."[382] Speaker Boehner denounced the action as "an extraordinary and entirely unprecedented power grab by President Obama."[383] He worried that "[t]he precedent that would be set by this cavalier action would have a devastating effect on the checks and balances that are enshrined in our Constitution."[384] But what could they do? Here, again, courts are unlikely to get involved since the question is

374. *Id.*

375. George Zornick, *Obama Bucks GOP, Nominates CFPB Chief*, THE NATION (Jan. 4, 2012, 3:41 PM), http://www.thenation.com/blog/165446/obama-bucks-gop-nominates-cfpb-chief#. The Constitution grants the President the power to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. CONST. art. II, § 2, cl. 3.

376. Jonathan Weisman, *Appointments Challenge Senate Role, Experts Say*, N.Y. TIMES, Jan. 8, 2012, at A19.

377. Zornick, *supra* note 375.

378. Dan Pfeiffer, *America's Consumer Watchdog*, THE WHITE HOUSE BLOG (Jan. 4, 2012, 10:45 AM), http://www.whitehouse.gov/blog/2012/01/04/americas-consumer-watchdog.

379. *See* Memorandum Opinion for the Counsel to the President: Lawfulness of Recess Appointments during a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions (Jan. 6, 2012), *available at* http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

380. *Id.*

381. Charlie Savage, *Justice Dept. Defends Obama Recess Appointments*, N.Y. TIMES, Jan. 13, 2012, at A12.

382. *Id.*

383. Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1.

384. *Id.*

a dispute between the two political branches about what constitutes a "recess." Moreover, the President has seen no significant negative consequences for stretching the limits of the recess appointments clause, in part because gridlock prevents any institutional response. The President, in essence, overruled Congress's interpretation as to what it constitutionally means for Congress to be in recess. Thus, gridlock transformed what the Framers intended to be a check on the president's power into a cover for the expansion of executive authority.

B. The 2011 Debt Ceiling Crisis, Non-Legislative Law Making, and Extraordinary Executive Actions

On August 2, 2011, Congress enacted the Budget Control Act of 2011.[385] The law focused on two related issues: the federal debt ceiling and deficit reduction.[386] To address the immediate concerns over the debt ceiling having been reached several months earlier, the law increased the ceiling by $400 billion.[387] The law also allowed the president to request an additional $1.7 to $2.0 trillion increase, which would be subjected to a congressional motion of disapproval (which, in turn, could be vetoed by the president).[388] To reduce the federal deficit, the Act specified $917 billion in cuts over a ten-year period and established the Joint Select Committee on Deficit Reduction, which came quickly to be known as the "Super Committee."[389] The law tasked the Super Committee with putting together a plan to reduce the deficit by $1.5 trillion over ten years.[390] The twelve-member Super Committee would be composed of six Democrats and six Republicans, with three from each chamber.[391] The law set a November 23, 2011, deadline for a proposal from the Super Committee and provided for fast-track consideration of the plan, ensuring an up-or-down majority vote in both chambers.[392] Under the law, Congress's failure to enact deficit reduction legislation by December 23, 2011, would trigger across the board budget cuts of $1.2 trillion, split evenly between defense and non-defense programs.[393] The law itself, as well as the protracted contentious negotiations that preceded it, show the dangers gridlock poses to separation of powers. First, raising the debt

385. Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240.
386. *Id.* at tit. 3–4.
387. *Id.* at tit. 3.
388. *Id.*
389. *Id.* at tit. 1, 4.
390. *Id.* at tit. 4, § 401(b)(2).
391. *Id.* at tit. 4, § 401(b)(4).
392. *Id.* at tit. 4, § 401(b)(3)(B)(i).
393. *Id.* at tit. 3, § 302.

ceiling only became a crisis because of a political calculation by House Republicans to use the issue to secure other economic policy victories.[394] The result of the Republican insistence and unwillingness to compromise meant gridlock. On May 16, 2011, the United States reached the debt ceiling, prompting Treasury Secretary Timothy Geithner to declare a "debt issuance suspension period" and to take extraordinary measures to acquire the funds necessary to meet the government's obligations.[395] Secretary Geithner informed Congress that those measures could allow the government to continue to function until August 2, 2011, at which point the "borrowing authority of the United States will be exhausted."[396]

At various points during the summer negotiations, it appeared as if President Obama and Speaker Boehner were close to a "grand bargain" that would reduce the deficit by roughly $4 trillion over ten years, through a mix of spending cuts and revenue increases.[397] The potential for a deal blew up, however, when House Republicans balked at any revenue increases, even if the package was heavily weighted toward cuts.[398]

As the prospects for a deal dimmed and gridlock took hold, several Democratic law makers, legal commentators, and even former President Clinton began pushing various ways to address the crisis through executive action alone.[399] One option that captured the most attention was for the Administration to take the position that the debt ceiling limit violated the Fourteenth Amendment's command that, "[t]he validity of the public debt of the United States, authorized by law . . . shall not be questioned."[400] Under this theory, the Administration could continue to spend as the budget and appropriations bills authorized, without worrying about exceeding the debt limit.[401] Former President Clinton said he would take this approach because Congress would not be able to block it, leaving only the judiciary to "stop me."[402] The second option was for President Obama to use his executive power to pick and choose

394. *See* MANN & ORNSTEIIN, *supra* note 12, at 3–30.

395. *See* Letter from Timothy Geithner, Sec'y of the Treasury, to Sen. Harry Reid, Senate Majority Leader, May 16, 2011, *available at* http://www.treasury.gov/connect/blog/Documents/20110516Letter%20to%20Congress.pdf.

396. *Id.*

397. *See* MANN & ORNSTEIN, *supra* note 12, at 15–16.

398. *Id.* at 16.

399. *See* Adam Liptak, *The 14th Amendment, the Debt Ceiling and a Way out*, N.Y. TIMES, July 25, 2011, at A10.

400. *Id.*

401. *Id.*

402. *Id.*

which programs to continue to fund and which debts to pay.[403] While President Obama expressly rejected the idea of invoking the Fourteenth Amendment to declare the debt ceiling law unconstitutional, the second option remained on the table despite concerns over its legality.[404]

And who can blame him? Probably any president would take the same approach under the circumstances—but that is precisely the problem. Consider the Fourteenth Amendment solution. It would have entailed the President unilaterally interpreting the Fourteenth Amendment to require the executive branch to violate a duly enacted law, despite the unambiguous language of the debt ceiling law and without congressional authorization. If President Obama had taken this route, what could Congress do in response? Enough Democrats would have applauded the move—praising it, perhaps, as a courageous effort to save the economy from collapse—and would have thwarted any effort to respond as an institution to the usurpation by the executive.[405]

The same is true for the selective spending options. Though the degree of the executive aggrandizement is less severe, it still called for the president to make unilateral decisions regarding which parts of the budget appropriations law to follow and which to disregard.

Gridlock, then, was pushing the President toward exercising unprecedented executive power, with knowledge that Congress would not be able to respond and that it would be up to the courts to "stop him." The point, as with the other examples already discussed, is not that

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403. Bruce Bartlett, *Obama May Have to Break the Law if Debt Talks Collapse*, THE FISCAL TIMES (July 8, 2011), http://www.thefiscaltimes.com/Columns/2011/07/08/Obama-May-Have-to-Break-the-Law-if-Debt-Talks-Collapse.aspx?p=1.

404. Brad Plumer, *If We Hit the Debt Ceiling, Can Obama Choose Which Bills to Pay?*, WASH. POST (Jan. 14, 2013, 3:48 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/07/if-we-hit-the-debt-ceiling-can-obama-choose-which-bills-to-pay-2/ (stating that the White House insists it cannot prioritize spending, but also stating that the White House has "ruled out" the option of invoking the Fourteenth Amendment).

405. In fact, in January of this year, as government officials anticipated another protracted fight over raising the debt ceiling, Senate Democratic leaders wrote to President Obama to encourage him to "take any lawful steps to ensure that America does not break its promises and trigger a global economic crisis—without Congressional approval, if necessary." Letter from Senators Reid, Durbin, Murray, and Schumer to President Obama on Debt Ceiling Crisis (January 11, 2013), *available at* http://democrats.senate.gov/uploads/2013/01/Letter-to-POTUS.pdf. During early 2013, a third option for unilateral executive action emerged. Several commentators encouraged the Treasury Department to mint a $1 trillion platinum coin to deposit at the Federal Reserve, which would provide the Treasury with sufficient funds to meet its government obligations. *See* Brad Plumer, *Could the 'Platinum Coin Option' Solve the U.S. Debt Crisis?*, WASH. POST, Dec. 7, 2012, at A7. The Obama Administration rejected the idea. *See* Annie Lowrey, *Treasury Won't Mint Coin to Defy Debt Ceiling*, N.Y. TIMES, Jan. 12, 2013, at A22.

congressional gridlock necessarily equals a loss of congressional power. It is that gridlock pushes the president to take unilateral actions—to interpret the Constitution, to ignore laws—because Congress itself will not act and with the knowledge that gridlock will also prevent Congress from responding. This fact ultimately damages congressional authority and threatens separation of powers.

The Super Committee's creation and the trigger mechanism for budget cuts also illustrate how gridlock frustrates the separation of powers. It has become too difficult for Congress to legislate and so it resorts to "super committees," fast-track procedures, and triggers to enable policy to be set. As discussed earlier, this can be an effective tool in a limited number of circumstances in which broad consensus exists on appropriate policy but where institutional rules and electoral constraints prevent enactment. But it is quickly becoming the only mechanism for making policy. And now, unlike with other past uses, Congress employs these tactics to set the nation's entire fiscal policy, often in ways that no one in Congress supports.

C. Legislative Overrides and the Power to Check the Judiciary

Gridlock does not just erode Congress's power vis-à-vis the Executive, but also implicates the power dynamic between the legislative and judicial branches. To see this, it is helpful to focus on the two branches' constitutional functions and to recall how they check one another. The judiciary's primary check against the more powerful legislature rests in its authority to "say what the law is," and to invalidate acts that violate the Constitution.[406] These checks are themselves checked by Congress's ability to initiate constitutional amendments and to override statutory interpretations. This latter authority is, in fact, one of the few of substance that Congress still exercises over the judiciary.[407] Indeed, since impeachment fell away as a meaningful check in the early 1800s, congressional overrides realistically represent Congress's only substantive check over the judiciary. Studies suggest that Congress takes this checking power seriously.[408]

Congress's power to override judicial statutory interpretations not only serves as its primary check against the federal courts, but also

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

407. By "substance," I am referring to the fact that the override power allows Congress to check the substantive decisions of the courts, rather than checking the judiciary as an institution through jurisdictional changes or by withholding salary increases.

408. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 362 (1991).

stands as a basic tenet underlying many doctrines and canons of statutory interpretation. The judiciary is seen as Congress's "faithful agent"[409] when undertaking the task of interpreting a federal statute. In truth, however, that formulation has served to justify and insulate many judicial decisions. After all, if the judiciary is only acting as Congress's faithful agent in interpreting a statute, Congress is free to override the court's decision if Congress disagrees with the interpretation. As Guido Calabresi has put it, "[w]hen a court says to a legislature: 'You (or your predecessor) meant X,' it almost invites the legislature to answer: 'We did not.'"[410] The Supreme Court has adopted this approach.[411]

Based largely on this rationale, federal courts apply a "super strong" stare decisis to statutory precedents.[412] Indeed, courts often attach significance to legislative inaction: the failure of Congress to override a statutory decision is tantamount to agreement with the interpretative outcome.[413] Moreover, as Deborah Widiss has shown, courts often undermine overrides by reading the new statutory language in an overly restrictive way that allows the court to continue to rely on the overridden precedent.[414]

Given all of this, it is fairly easy to see how legislative gridlock undermines Congress's check on the judiciary. Simply put, congressional stalemate grants the courts the final word over what a statute means. The judiciary may very well act as an unfaithful agent, without Congress having the ability to declare its disapproval.

One can see how this plays out in the real world by looking at two recent instances of congressional overrides, one involving the Americans

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409. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010).

410. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31–32 (1982).

411. *Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 629 n.7 (1987).

412. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 642–45 (4th ed. 2007); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1482 (2010) (stating "[t]he premise of the Supreme Court's 'super strong' stare decisis rule in statutory cases is that Congress knows and, when needed, can correct what the Court has done with its statutes").

413. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 241–243 (1994) (describing the Court's reliance on legislative inaction as a positive demonstration by Congress of agreement with, or acquiescence to, a judicial decision). For a list of exemplar cases, see *id.* at 309–10.

414. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 516–17 (2009) (noting "the general tendency by courts to construe narrowly the significance of Congress' disapproval of prior holdings and instead rely upon the statutory analysis contained in the overridden decisions").

with Disabilities Act and the other relating to the Civil Rights Act. I have chosen to discuss two *successful* efforts to override Supreme Court decisions precisely because they highlight just how much of an obstacle congressional gridlock poses to such efforts. In short, these two exceptions help prove the rule.

In 1990, Congress enacted by an overwhelmingly bipartisan majority, and President Bush signed, the Americans with Disabilities Act (ADA).[415] The law prohibits discrimination based on disability in a wide variety of settings.[416] A series of Supreme Court cases in 1999, known as the *Sutton* trilogy,[417] followed by *Toyota Motor Manufacturing v. Williams*[418] in 2002, severely restricted the reach of the ADA.[419] In response to the *Williams* decision, Representative Steny Hoyer, one of the key sponsors of the ADA wrote, "[o]ur responsibility now is to revisit both our words and our intent in passing the ADA. In matters of statutory interpretation, unlike constitutional matters, Congress has the last word."[420]

It turned out that in this instance, Representative Hoyer was correct, but it took nearly a decade for Congress to undo the harm of *Sutton*, despite the fact that there was bipartisan agreement that the Supreme Court had gotten it wrong.[421] Indeed, by the time Congress officially overrode the Court's earlier ADA cases, the bill doing so received *unanimous* support in both chambers.[422] Given that Congress felt that the Court had gotten it horribly wrong in 1999, why did it take over nine years for Congress to correct its "faithful agent"? Why did it take so long for Congress to exercise its check over the judiciary?

The legislative history suggests that gridlock, at least in part, is to blame. Supporters of an override were well aware of a political minority's power to kill nearly any bill. As such, even the most ardent backers of a legislative fix refused to move forward until the various interest groups involved in pushing a change could reach a compromise

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415. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

416. *Id.*

417. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

418. 534 U.S. 184 (2002).

419. Chai R. Feldblum, et al., *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 188, 193–96 (2008).

420. Rep. Steny H. Hoyer, Op-Ed, *Not Exactly What We Intended, Justice O'Connor*, WASH. POST, Jan. 20, 2002, at B1.

421. Feldblum, et al., *supra* note 419, at 239–40.

422. *Id.*

that would ensure that no opposition to the legislation emerged.[423] They made this demand even though, at the time, legislation to override the Supreme Court's decisions enjoyed over two hundred fifty sponsors in the House of Representatives.[424] Put differently, despite the fact that a large majority of Congress thought that the Court (and, therefore, lower federal courts) had been misinterpreting a key civil rights law for nearly a decade, the threat of gridlock was sufficient to keep Congress from actively considering a statutory override.

This episode highlights two key points. First, while scholars understandably look for concrete measures to define and explain stalemate, in practice, gridlock's omnipresence influences policy makers and legislative decisions in many subtle and intangible ways as well. It is impossible to know how many legislative overrides a congressional majority never pursues because it is well aware that gridlock would render such efforts futile.

Second, despite broad consensus that the Court's interpretations of the ADA were wrong, gridlock—or even the threat of it—prevented a congressional override for nearly a decade. This raises the obvious question: if Congress can barely override a judicial statutory decision that an overwhelming and bipartisan majority disagrees with, has gridlock weakened this power to the point that it hardly serves as a reliable check any longer?

The Fair Pay Act's history provides further evidence of how gridlock can affect Congress's ability to respond to the judiciary's statutory decisions. In 2007, the Supreme Court, in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,[425] severely limited the scope of Title VII of the Civil Rights Act and the Equal Pay Act.[426] Members of Congress immediately sought to overturn the holding and the issue became an important part of the 2008 presidential campaign.[427] In 2009, as one of his first acts as president, Barack Obama signed the Lily Ledbetter Fair Pay Act.[428] Like the ADA fix discussed above, this example would, on its surface, appear to be a triumph of Congress's check over judicial statutory interpretations. But when one looks deeper, to the context of the events and the law's enactment, a different story emerges.

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423. *Id.* at 228–30.

424. *Id.* at 228.

425. 550 U.S. 618 (2007).

426. *Id.* at 621.

427. *See, e.g.*, Stephanie Mencimer, *Lilly Ledbetter: Obama's Newest Ad Star*, MOTHER JONES (Sept. 23, 2008, 10:44 AM), http://www.motherjones.com/mojo/2008/09/lilly-ledbetter-obamas-newest-ad-star (describing Lilly Ledbetter's role in the 2008 presidential campaign).

428. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

Congress quickly reacted to the Court's decision in *Ledbetter*. Within a few weeks after the Court announced its opinion, members of Congress proposed legislation to override the Court's interpretation of the Civil Rights Act and Equal Pay Act.[429] The legislation specifically stated that the Court's ruling was "contrary to the intent of Congress" and overrode the decision.[430] On July 31, 2007, the House of Representatives passed the bill.[431] As such, the legislation was then sent to the Senate,[432] where gridlock took hold. Eight months later, the Senate had still failed to act on the legislation. Finally, on April 23, 2008, the Senate voted—not on the merits of the bill itself, but rather on a cloture motion.[433] On April 23, fifty-six senators voted to proceed, falling four shy of the necessary sixty votes that would have allowed the Senate to decide on the substance of the legislation.[434] Thus, despite a clear and manifest congressional desire to override the Court's interpretation of two incredibly important statutes, the *Ledbetter* decision remained unchecked. It was only after the 2008 elections, in which Democrats captured sixty seats in the Senate,[435] that Congress could overcome the gridlock and override the judiciary.[436]

A gridlocked system transfers policy-making responsibility from Congress to the courts. Moreover, stalemate further weakens Congress by largely depriving the legislative branch of its ability to check the judiciary through overrides. Just as the president is emboldened by the knowledge that no institutional conflict will arise even in the face of extraordinary executive actions, so too must the judges of today's federal judiciary recognize that only rarely can Congress act to undo a statutory decision. Thus, gridlock threatens Congress's domain over its primary functions: enacting legislation and ensuring faithful judicial interpretation of those statutes.

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429. *See* H.R. 2831, 110th Cong., (2007); S. 1843, 110th Cong. (2007). The House bill was proposed June 22, 2007; the Senate bill was proposed July 20, 2007.

430. H.R. 2831, 110th Cong. (2007).

431. *See Bill Summary and Status 111th Congress (2009–2010) S.181*, U.S. LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00181:@@@R (last visited Nov. 1, 2013).

432. *Id.*

433. *Id.*

434. *Id.*

435. *See* Monica Davey & Carl Hulse, *Franken's Win Bolsters Democratic Grip in Senate*, N.Y. TIMES, June 30, 2009, at A1, *available at* http://www.nytimes.com/2009/07/01/us/politics/01minnesota.html.

436. *See Bill Summary and Status 111th Congress (2009–2010) S.181*, U.S. LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00181:@@@R (last visited Nov. 1, 2013); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

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I do not intend these three vignettes to provide comprehensive assessments of the institutional dynamics at play, nor do they take full account of the threats posed to separation of powers by congressional gridlock. They do, however, underscore the vast and sometimes hidden nature of the problem. As the frequency of these types of events increases, the underlying implications will become more pronounced, ultimately resulting in a full-scale constitutional crisis.

CONCLUSION

Congress's role as the law-making body of our federal government is quickly eroding. The president is setting national policy, the Supreme Court enjoys the de facto final say when interpreting statutes, and, it seems, the only time Congress can make law is when it relies on triggers, defaults, or other gimmicks—in other words, law making without legislating.

At its core, though, separation of powers presumes—even demands—that Congress be the branch primarily responsible for making law. If gridlock prevents Congress from fulfilling this function, the concept of separation of powers collapses under the weight of a nation in need of laws and policy. Moreover, if Congress cannot act, the other two branches go largely unchecked.

No simple solution presents itself to this unfolding crisis. It is easy enough to seek out the roots of gridlock, but once we identify those causes, they often appear intractable. Gridlock, then, seems likely to be with us for the foreseeable future. As such, we must begin to reexamine how we think about separation of powers—both as the bedrock of our governmental system and as a constitutional principle in its own right. More importantly, we may soon be forced to reconsider many of our basic assumptions about the functions of, and relationships among, our three branches of government.

Recall that separation of powers has two main features: separated functions and checks and balances. If Congress cannot function and if it cannot check, what is left of separation of powers? The answer may soon prove to be nothing. We must start paying attention to this situation now. We need to make something out of nothing.