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THE UNION AS A SAFEGUARD AGAINST FACTION:  
CONGRESSIONAL GRIDLOCK AS  
STATE EMPOWERMENT

*Franita Tolson\**

*This short essay, written for Notre Dame Law Review's conference on congressional gridlock, argues that gridlock is an expected and integral component of the legislative process. The bicameralism and presentment requirements of Article I of the U.S. Constitution make legislation difficult to pass in order to protect the public from the whims of shifting congressional majorities. Nevertheless, gridlock that is based primarily on partisan considerations rather than policy differences can be unconstitutional, as defined by Supreme Court caselaw, if it stymies legislation that is in the public interest. The remedy for "unconstitutional" gridlock is not judicial action, however; the solution lies in devolving policymaking authority down to the states, allowing them to address the problem as it manifests within their borders. While not ideal, this temporary fix has some federalism benefits as it encourages experimentalism in law and policy as well as citizen participation in democratic processes at the state level. Moreover, as illustrated by recent controversies over immigration reform, when states take the initiative and craft policy to address national problems, their assertiveness can help break the gridlock by forcing Congress's hand.*

INTRODUCTION

In September of 2012, Republicans in the U.S. Senate blocked a jobs bill that would have provided one billion dollars over five years to help military veterans find work.<sup>1</sup> Veterans have one of the highest unemployment rates in the country, exceeding the national average of 7.8%.<sup>2</sup> Most states are facing their own budget deficits, making it unlikely that they could fund such an

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\* Betty T. Ferguson Professor of Voting Rights, Florida State University College of Law. Special thanks to Kirsten Sencil for excellent research assistance. The title of this piece comes from THE FEDERALIST No. 9.

1 See Karen McVeigh, *Veterans' Bill Voted Down by GOP as Senate Democrats Proclaim 'New Low'*, GUARDIAN (September 19, 2012, 2:53 PM), <http://www.guardian.co.uk/world/2012/sep/19/veterans-bill-voted-down-us-senate>.

2 See Gregg Zoroya, *Veterans' Jobless Rate Falls but Remains High*, USA TODAY (Jan. 6, 2013, 8:16 PM), <http://www.usatoday.com/story/news/nation/2013/01/06/vets-jobless-rate-drops/1812667/> ("Veteran advocates caution that joblessness among this group remains stubbornly high—well above the national unemployment rate of 7.8%.").

initiative. Despite the importance of this legislation, the media reported that Republicans in the Senate blocked the bill in order to deny the Democratic President, Barack Obama, any legislative accomplishments prior to the November 2012 election.<sup>3</sup>

This struggle over legislation that was once supported by members of both parties illustrates how the United States political system is a paradox of contrasts. It is governed by a Constitution designed to minimize faction and disperse ambition,<sup>4</sup> yet political scientists concede that “democracy is unthinkable save in terms of parties.”<sup>5</sup> Despite our reliance on them, however, political parties in Congress have been responsible for blocking legislation that would further the interests of their constituents and that solves problems that have proven intractable when approached on a state by state basis, like the Veterans Jobs Corp Act of 2012. The notion that our democracy cannot function without parties has led us to overlook whether the efforts of parties to block or defeat legislation in Congress that would otherwise be in the interest of the people is unconstitutional. Perhaps a more precise question would be whether there are constitutional safeguards in place that can and should prevent such gridlock from occurring.<sup>6</sup>

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3 See Jennifer Steinhauer, *Veterans' Job Bill Blocked in the Senate*, N.Y. TIMES (Sept. 19, 2012, 5:31 PM), <http://thecaucus.blogs.nytimes.com/2012/09/19/veterans-jobs-bill-blocked-in-the-senate/>; see also THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS* (2012) (describing how the politics of hostage-taking have emerged resulting in a dysfunctional political landscape leading up to the 2012 general election).

4 See THE FEDERALIST NO. 51, at 264, 266 (James Madison) (Ian Shapiro ed., 2009) (“In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature . . . [a]mbition must be made to counteract ambition. . . . But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary.”).

5 E.E. SCHATTSCHEIDER, *PARTY GOVERNMENT I* (1942) (“Parties and partisanship, it is safe to say, are now regarded by those who are supposed to know as legitimate and necessary features of the democratic political process.”); see also JOHN H. ALDRICH, *WHY PARTIES?*, at 3 (1995) (“Political parties lie at the heart of American politics.”).

6 Another contributor to this symposium, Gerald Magliocca, defines gridlock as encompassing four possibilities:

- (1) there is a national consensus on an issue, but our political structure prevents that view from being enacted;
- (2) there is a consensus among political elites about a course of action, but party loyalty stymies compromise;
- (3) political elites are deadlocked, but only because the voting system distorts public opinion; and
- (4) the nation is genuinely divided and our politicians reflect that view.

Gerard N. Magliocca, *Don't Be So Impatient*, 88 NOTRE DAME L. REV. 2157 (2013). He argues that the fourth definition of gridlock best describes our current situation, which is gridlock based on legitimate grounds, and he concludes that we have to suffer through it, as there is “no acceptable legal cure for a fractured Congress that is (broadly speaking) accurately representing a torn nation.” *Id.* at 2157. I am not convinced that Magliocca’s second definition of gridlock is not at work here, but arguably, it is this type of gridlock that would qualify as “unconstitutional” under my approach, or gridlock stemming solely from partisan considerations on an issue that is best addressed by uniform federal legislation.

This Essay argues that gridlock that is “excessively partisan,” as defined by U.S. Supreme Court precedent, is unconstitutional. Thanks to political parties, gridlock has reached beyond Congress and infected the states, and it has the potential to put the entire system into a state of paralysis. Nevertheless, the solution lies, not with the courts, but in those aspects of the constitutional structure that devolve lawmaking down to the states. In particular, the bicameralism and presentment requirements of Article I that make federal legislation difficult to pass allow states to experiment with different policies and procedures to address some of these problems on a local scale.<sup>7</sup>

The Framers of the Constitution adopted the bicameralism and presentment requirements to slow the process of federal lawmaking, permitting a certain level of gridlock to persist within the federal system.<sup>8</sup> This structural quirk makes excessively partisan and unconstitutional gridlock difficult to address, but the fact that states can exercise significant authority during these times suggests that partisan gridlock, although unconstitutional, may result in a net positive for helping to recalibrate the balance of power in our federal system. Indeed, the recent immigration case of *Arizona v. United States*<sup>9</sup> stands as an example of state action in the face of federal inaction, and is instructive of the systemic effects of excessively partisan gridlock in Congress. While much of Arizona’s immigration law was struck down by the Supreme Court, the small portion that was upheld makes the case a victory for Arizona

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7 The United States Constitution provides:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

U.S. CONST. art. I, § 7, cl. 2–3.

8 See generally Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1326 (2001) (“[M]any of the Supreme Court’s most significant separation-of-powers decisions also safeguard federalism by preventing each branch of the federal government from circumventing federal lawmaking procedures.”).

9 132 S. Ct. 2492 (2012).

because it leaves the state with more expansive authority to legislate in a domain that was previously thought to be exclusive to the federal government.

As the *Arizona* case shows, focusing on structural safeguards to address unconstitutional legislative gridlock is preferable to judicial action because the highly charged political disputes that often trigger excessive gridlock could undermine judicial legitimacy and make the Supreme Court appear political. In addition, it is doubtful whether there are any potential causes of action to address gridlock that do not run afoul of the Speech and Debate Clause of the Constitution or the ability of each House to choose the rules of its proceedings.<sup>10</sup> The states are not so limited in their ability to implement solutions within their borders in response to the gridlock in Congress.

Despite the lack of justiciability, it is still important to identify a threshold for when gridlock has exceeded constitutional bounds because, descriptively, it lets us know when the system has broken down. The Supreme Court's case law provides guidance on this point because, while there may be some disagreement over whether there should be judicial action in this area, many scholars agree that gridlock and the rules that promote it can be unconstitutional.<sup>11</sup> Like many other political issues resolved by the Court, congressional gridlock that is based on "excessive" partisanship is unconstitutional. Excessive partisanship is the threshold that the Court has used to describe what an unconstitutional partisan gerrymander would look like,<sup>12</sup> and alternatively, when political patronage in state employment has exceeded constitutional bounds.<sup>13</sup> Since legislative gridlock likely is not justiciable in the courts, the Supreme Court's case law has little else to offer the inquiry into gridlock's constitutionality besides serving as a descriptive starting point.

Pragmatically, the absence of a judicial remedy means that self-interested political factions in Congress can and will continue to block legislation on purely partisan grounds. While this certainly is not consistent with the

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10 U.S. CONST. art. I, § 6, cl. 1. With respect to one of the main causes of gridlock—the filibuster—Josh Chafetz puts it succinctly:

The judiciary is (rightly) impotent in the face of the filibuster for two reasons. First, cameral rules are nonjusticiable political questions. But second, even supposing that a court were willing to hear the claim, and even supposing that it found that someone had standing to bring the suit, there is no one who could properly be named as the defendant. The Speech or Debate Clause would require that the case be dismissed as against any Senators who were named as defendants. Who would be left to sue?

Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1036 (2011) (footnotes omitted).

11 See, e.g., *id.* (arguing that gridlock and the state of the Senate in the twenty-first century is unconstitutional).

12 See *infra* note 90 and accompanying text. The legal scholarship has also latched on to this idea that excessive gerrymandering is unconstitutional. See, e.g., Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781 (2005).

13 See *infra* Part I.B.

constitutional text and structure given the Founders' concerns about faction, states retain authority to address issues that would otherwise go unresolved if left to Congress. During times of legislative paralysis at the federal level, states have expanded authority to address short-term legislative problems. Moreover, the devolution of this authority to the states may be best over the long-term as our system settles back into the routine, state-protective gridlock that is an intentional part of our constitutional fabric.

## I. THE CONSTITUTIONAL STATUS OF GRIDLOCK: FRAMING THE PROBLEM

Gridlock is a problem that often delays or stymies action at the federal level, but arguably, its use and presence in our political system is consistent with the Framers' intent. In Article I, Section 7, or the Presentment Clause, the Constitution provides that "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . . ." <sup>14</sup> The Constitution further provides that a two-thirds majority in both houses is required to override the President's veto. <sup>15</sup> This is an extremely high threshold to meet to get legislation passed, but as James Madison pointed out in the Federalist 51, this threshold is necessary to avoid the concentration of power in the hands of a few and to respect separation of powers. As Madison famously stated:

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. <sup>16</sup>

As Rick Pildes and Daryl Levinson have argued, the emergence of political parties shortly after the Founding rendered nugatory much of Federalist 51; <sup>17</sup> the existence of parties also complicates the constitutional questions surrounding gridlock that brings the legislative process to a virtual standstill. As Levinson and Pildes observe, the homogeneity of the political party structure has undermined the traditional Madisonian conception of separation of powers, a structural flaw that has, not surprisingly, led to ideologically unified

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14 U.S. CONST. art. I, § 7, cl. 2.

15 U.S. CONST. art. I, § 7, cl. 3.

16 THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009).

17 Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2312 (2006) ("American political institutions were founded upon the Madisonian assumption of vigorous, self-sustaining political competition between the legislative and executive branches. . . . [A]mbition would counteract ambition. That is not how American democracy turned out. Instead, political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government, but rather through an institution the Framers could imagine only dimly but nonetheless despised: political parties.").

party platforms and internal legislative rules that contribute to lockstep partisan support (and opposition) to each party's governing agenda.<sup>18</sup>

Although our current system is an obvious departure from the Madisonian ideal, distinguishing "permissible" levels of gridlock from gridlock that is "excessive" and therefore unconstitutional remains difficult. In this symposium, Gerard Magliocca discusses gridlock that we have to "live with," that is, gridlock resulting from the fact that "the nation is genuinely divided and our politicians reflect that view,"<sup>19</sup> versus other types of gridlock that he believes are not at work in our current political climate. Arguably, one other form of gridlock that he identifies, where "there is a consensus among political elites about a course of action, but party loyalty stymies compromise," better defines the defeat of the Veterans Job Corp bill and also the obstructionism present in other highly politically charged situations like the debt ceiling and immigration debates.<sup>20</sup> It is this level of gridlock, which centers on party loyalty rather than a genuine divide over the issues, that is unconstitutional because it undermines our system of federalism—and the protection this system accords to individuals—in a meaningful sense.<sup>21</sup>

#### A. *Reconciling Our System of Federalism with Partisan Gridlock*

There are several federalism concerns presented by excessively partisan gridlock in the legislative process. Much of this concern is structural and implicates the balance of power in our system. The states, upon agreeing to enter the union, ceded some of their sovereignty to the federal government, hence the idea that the federal government is one of specific, enumerated powers while the states retain "a residuary and inviolable sovereignty . . . ."<sup>22</sup> This delegation of sovereignty was for the purposes of having a central government to address problems that are national in scope and that require a uniform solution; this was the power the Articles of Confederation denied to Congress—most action required the uniform consent of the states in order to occur.<sup>23</sup>

This compromise between the states and the federal government is reflected in the Constitution's enumeration of powers to Congress in Article I, and the Supremacy Clause's determination that laws passed in accordance with the Constitution are supreme over state law.<sup>24</sup> The Supremacy Clause prioritizes federal law, but only federal law that was passed consistent with the

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18 *Id.* at 2383–84.

19 Magliocca, *supra* note 6, at 2158.

20 *Id.* See generally MANN & ORNSTEIN, *supra* note 3 (discussing the American model's dysfunction rooted in long-term political trends, a coarsened political culture, and a new partisan media).

21 See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (noting the benefits to the citizenry that arise from the federal structure).

22 THE FEDERALIST NO. 39, at 197 (James Madison) (Ian Shapiro ed., 2009).

23 See Franita Tolson, *The Popular Sovereignty of the Tenth Amendment* (manuscript on file with author).

24 U.S. CONST. art. VI, cl. 2.

constitutional text and structure.<sup>25</sup> As Bradford Clark has argued, the Framers intended federal legislation to be difficult to enact because the Supremacy Clause is a powerful structural safeguard that protects the regulatory authority of the states from being encroached by laws that do not comply with the bicameralism and presentment procedures set forth in the Constitution.<sup>26</sup> While the Framers, when writing the Constitution, arguably did not expect gridlock to reach the heights that it has in modern times, the structure of the Constitution can address legislative standstill at every level because gridlock itself is a constitutional feature.

The Constitution promotes gridlock systemically by giving the states a substantial role in the composition of the federal government, which can intensify the gridlock that occurs at every level of government. First, the state's oversight of federal elections creates dissension within state legislative bodies that bleeds over into Congress. Article I, Section 4, also known as the Elections Clause, gives states the authority to choose the "Times, Places, and Manner of holding Elections for Senators and Representatives,"<sup>27</sup> a power that the Framers viewed as key to preventing federal encroachment of state regulatory authority, but instead, has indirectly contributed to legislative gridlock. For example, in 2003, the Texas Democrats fled the state in order to deny Republicans the quorum necessary to push through a bill that would have redrawn the state's legislative and congressional districts, which had already been adjusted after the 2000 census.<sup>28</sup> Notably, the redistricting occurred at the behest of Congressman Tom DeLay in an attempt to cement the Republicans' majority in the U.S. House of Representatives, contributing to the partisan wrangling that had come to define the chamber.<sup>29</sup>

The state's power over federal elections also stands in tension with other constitutional provisions, noticeably contributing to the gridlock in Congress. For example, Article I, Section 5, provides, "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members,"<sup>30</sup> a provision that states can potentially undermine through their power over the "Times, Places and Manner" of elections.<sup>31</sup> For example, in *U.S. Term Limits v. Thornton*, the Supreme Court held that Arkansas violated the Qualifications Clause because its state constitution prohibited anyone who had been elected

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25 *Alden v. Maine*, 527 U.S. 706, 731 (1999) ("As is evident from its text, however, the Supremacy Clause enshrines as 'the supreme Law of the Land' only those Federal Acts that accord with the constitutional design. Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power." (citation omitted)).

26 Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 *GEO. WASH. L. REV.* 91, 112 (2003).

27 U.S. CONST. art. I, § 4, cl. 1.

28 See Nick Madigan, *On the Lam, Texas Democrats Rough It*, *N.Y. TIMES* (Aug. 1, 2003), <http://www.nytimes.com/2003/08/01/us/on-the-lam-texas-democrats-rough-it.html>.

29 Jeffrey Toobin, *Drawing the Line: Will Tom DeLay's Redistricting in Texas Cost Him His Seat?*, *THE NEW YORKER* (March 6, 2006), [http://www.newyorker.com/archive/2006/03/06/060306fa\\_fact?currentPage=all](http://www.newyorker.com/archive/2006/03/06/060306fa_fact?currentPage=all).

30 U.S. CONST. art. I, § 5, cl. 1.

31 U.S. CONST. art. I, § 4, cl. 1.



to the House three times or the U.S. Senate two times from appearing on the ballot.<sup>32</sup> The Court so concluded by relying on an earlier case, *Powell v. McCormack*, which held that Congress cannot impose qualifications on its members other than those set forth in the Constitution, although it may still determine whether those qualifications are met.<sup>33</sup> *Thornton* resolved the question left open by *Powell*—whether the states, rather than Congress, can impose qualifications (to the extent that the ballot access restriction is a “qualification”) on members of Congress. The Court concluded that the power to add to the qualifications for members of Congress is not one of the powers that states had prior to ratification and therefore was not preserved under the Tenth Amendment.<sup>34</sup> The Court’s historically grounded holding ignores the practical reality that imposing term limits on members of Congress is one way in which voters can address the gridlock that often occurs because long-serving and intransigent legislators have little incentive to bargain given the high likelihood of reelection.<sup>35</sup>

Similar to the Elections Clause, the Electoral College presents another opportunity for electoral disagreements to spill over into the legislative process, and by implication, promote gridlock. Indeed, the states’ authority under Article II with respect to the allocation of presidential electors helped a small minority in Congress hold the federal legislative process hostage for decades.<sup>36</sup> In the 1930s and 1940s, the Democratic Party became more progressive on the issue of civil rights, adopting a civil rights platform in 1948 and nominating President Harry Truman, who promised to enact civil rights legislation during his term.<sup>37</sup> A number of Democratic legislators, known as Dixiecrats, opposed civil rights and had been able to successfully keep civil rights legislation off the legislative agenda in the decades prior to the 1948

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32 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783 (1995).

33 Powell v. McCormack, 395 U.S. 486, 550 (1969).

34 U.S. Term Limits, 514 U.S. at 802; see also Cook v. Gralike, 531 U.S. 510, 526 (2001) (holding that an attempt to instruct a congressional delegation to work towards a federal term limits amendment or have a notation placed by their name on the ballot was invalid and was not a part of states’ reserved powers).

35 Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT. L. REV. 97, 136 (1991) (“The regulation of qualifications by state constitutions is precisely such a protection of the political process, because the regulation gives the state peoples a means to insure that their federal representatives genuinely represent their constituents.”).

36 MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 114 (2004) (“The growing attentiveness of national Democrats to northern black voters and incipient changes in southern racial practices generated a backlash among southern whites. A few southern politicians, such as Senators Josiah Bailey of North Carolina and Harry Byrd and Carter Glass of Virginia, had always opposed the New Deal, but most had supported it, with the implicit understanding that race relations were off limits to reform. By 1936, southern political opposition to Roosevelt was growing, because of racial concerns and conservative discomfort with Roosevelt’s tilt to the left in 1936.”).

37 See Emile B. Adler, *Why the Dixiecrats Failed*, 15 J. POL. 356, 357 (1953).

Democratic convention.<sup>38</sup> This disagreement within the party reached its apogee in 1948, when the Dixiecrats broke off and ran their own candidate, Strom Thurmond, for President.<sup>39</sup> Although they had little hope of winning the presidential election, their goal was to control the 127 electoral votes of southern states, denying either the Republican or Democratic candidate a majority in the Electoral College and throwing the election to the House of Representatives, where Thurmond would have a higher likelihood of gaining the presidency.<sup>40</sup> This plan failed, with the Dixiecrats gaining the electoral votes of only four states, but this splinter group won well over a million popular votes.<sup>41</sup> What is notable about the Dixiecrat strategy, however, is that they would have been successful had they secured victory in only three more states.<sup>42</sup> Thus, our system is one in which the heckler's veto can both stymie legislation in Congress and also impact the outcome of the presidential election.<sup>43</sup> These are messy outcomes courtesy of our constitutional framework, but it still does not resolve the question of whether all gridlock is consistent with our federal system.

The Framers made the assumption, rightly or wrongly, that legislative gridlock is an inevitable byproduct of countering ambition and filtering the passions of the people so as to ensure that legislation is actually public-regarding.<sup>44</sup> Madison made this point in trying to articulate why the Founders chose representative government rather than a traditional democracy. As he noted in the Federalist 48, unlike a democracy:

[I]n a representative republic . . . the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes . . . .<sup>45</sup>

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38 See Ira Katznelson, Kim Geiger & Daniel Kryder, *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 108 POL. SCI. Q. 283 (1993); see also V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 329-44 (1984).

39 Adler, *supra* note 37, at 357.

40 *Id.*

41 *Id.* at 358. As historians have noted, the Dixiecrats won in these states because their candidates were listed as the official candidates of the Democrat Party, which kept Harry Truman from being listed on the ballot. *Id.* at 364.

42 *Id.* at 360.

43 See *id.* at 363 (noting that one of the criticisms of the Dixiecrat movement in the south was that the movement was trying “to destroy the South’s Senators and Congressmen—the South’s only chance’ to participate in the legislative definition of States’ rights” (citations omitted)).

44 See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1979) (the primary role of the legislature is to reflect the will and preferences of the people). But see Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1336 (1987) (explaining that “legislative selflessness” is not “likely to obtain in the American polity or indeed in any robustly competitive, complex political system”).

45 THE FEDERALIST NO. 48, at 252 (James Madison) (Ian Shapiro ed., 1999).

Yet, as has been well documented in the scholarly literature, the legislative process is not always rational and elected officials do not always act in the best interest of their constituents because of the presence of interest groups, who often advocate for legislation that is not in the national interest or the public good.<sup>46</sup> Similarly, the failure to pass legislation that could further the national interest can also be blamed on special interest groups. The political party apparatus makes it much easier for these groups to highjack the legislative process because the parties have staked out specific policy positions in order to distinguish their governing platforms from each other and gain votes. These interest groups simply align their interests with the party that can best represent their position, and then they promise electoral defeat if their interests are not promoted in Congress.<sup>47</sup>

In recent years, the level of polarization has significantly worsened the legislative standoff in Congress, a process already complicated by the self-regarding nature of elected officials. As commentators have recently noted, most of this polarization has been asymmetrical, with the Republicans in the House of Representatives becoming increasingly more conservative than the Democrats have become liberal.<sup>48</sup> Who is to blame seems to matter little when the end result is that the 112th Congress, which finished its legislative session in January 2013, is the least productive Congress in sixty-five years.<sup>49</sup> But the question of who is to blame (and their motivations) could be relevant to resolving the issue of whether gridlock has reached a level that offends the Constitution, which the next section explores.

### B. *Supreme Court Precedent and Unconstitutional Partisanship*

Although the judiciary plays a significant role in policing the legislative process, there is very little insistence on judicial intervention when Congress is hopelessly deadlocked and cannot pass legislation. Nevertheless, the idea that excessive partisanship can be inconsistent with the Constitution is a view that is in line with Supreme Court precedent.<sup>50</sup> Although the Court is ham-

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46 See, e.g., Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1620-33 (1988); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 341 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 12-13 (1971).

47 See Steve Kornacki, *Next Tea Party Targets*, SALON (May 16, 2012, 12:36 PM), [http://www.salon.com/2012/05/16/the\\_next\\_republican\\_to\\_fall/](http://www.salon.com/2012/05/16/the_next_republican_to_fall/).

48 See Harry J Enten, *How Polarisation in Washington Affects a Growing Feeling of Partisanship*, THE GUARDIAN (Dec. 28, 2012, 2:10 PM), <http://www.guardian.co.uk/commentisfree/2012/dec/28/democrats-republicans-polarisation-congress>.

49 Stephanie Condon, *Five Big Issues for the New Congress*, CBS NEWS (Jan. 4, 2013, 6:00 AM), [http://www.cbsnews.com/8301-250\\_162-57561973/five-big-issues-for-the-new-congress/](http://www.cbsnews.com/8301-250_162-57561973/five-big-issues-for-the-new-congress/); see also Jennifer Steinhauer, *Congress Nearing End of Session Where Partisan Input Impeded Output*, N.Y. TIMES (Sept. 18, 2012), available at <http://www.nytimes.com/2012/09/19/us/politics/congress-nears-end-of-least-productive-session.html>; *Outgoing 112th Congress Least Productive in 65 Years*, CBS (Jan. 3, 2013), <http://www.cbsnews.com/video/watch/?id=50138133n>.

50 See *Elrod v. Burns*, 427 U.S. 347 (1976).

pered by the task of developing manageable standards to govern issues that are inherently political, its caselaw still stands as a relatively clear articulation of this principle. The Court has been more successful in regulating excessive partisanship in its patronage cases than in its redistricting cases,<sup>51</sup> but not without significant criticism from those who believe that the Court is ill-suited to distinguish good from bad politics without completely undermining the party system.

In *Elrod v. Burns*,<sup>52</sup> for example, the Court held that the newly elected Democratic sheriff of Cook County, Illinois, could not terminate his Republican employees without running afoul of the First Amendment.<sup>53</sup> The Court concluded that the practice of political patronage violates the employees' freedom of association because they are forced to further beliefs that are contrary to what they believe in order to retain their jobs.<sup>54</sup> In other words, patronage is a way to starve the opposition party and tip the electoral process in the incumbent party's direction. The Court recognized, however, that forcing an elected official to retain employees that have adverse beliefs can be detrimental to the administration's ability to advance its own policies, at least to the extent that the employees have policymaking positions.<sup>55</sup> To address this concern, the Court created an exception that allows employers to terminate policymaking employees for political reasons, a holding which implicitly recognizes that there are instances in which partisan affiliation is relevant to assessing whether a person is suitable for employment.<sup>56</sup> *Elrod* usefully frames the principle that there are constitutional and unconstitutional uses of partisanship in government.

Despite *Elrod*, the Court has had difficulty delineating when partisanship is a legitimate criteria in deciding whether to hire, promote, demote, or fire public employees.<sup>57</sup> In *Rutan v. Republican Party*, for example, the Court found that the Governor of Illinois's practice of using a hiring freeze to institute a pseudo-patronage system violated the First Amendment, over the opposition of four dissenters.<sup>58</sup> The Governor prohibited any state agency

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51 See *infra* notes 52-72 and accompanying text.

52 427 U.S. 347.

53 *Id.* at 373.

54 *Id.* at 355.

55 *Id.* at 367; see also *Rutan v. Republican Party*, 497 U.S. 62, 92-115 (1990) (Scalia, J., dissenting) (describing how patronage has been a foundation for government employment since the beginning of the Republic).

56 *Elrod*, 427 U.S. at 367; see also *Branti v. Finkel*, 445 U.S. 507 (1980) (focusing less on the employee's status as a policymaker and more on whether partisan affiliation is a prerequisite to effective job performance).

57 *Rutan*, 497 U.S. at 64 ("To the victor belong only those spoils that may be constitutionally obtained.").

58 *Id.* at 66. The Court explained that:

By means of the freeze, according to petitioners and cross-respondents, the Governor has been using the Governor's Office to operate a political patronage system to limit state employment and beneficial employment-related decisions to those who are supported by the Republican Party. In reviewing an agency's

from hiring new employees unless he gave his permission,<sup>59</sup> and in making this decision, his office focused on voting behavior as a criterion for determining hiring and promotions. The majority found that *Elrod* governed, and therefore, the burden on the First Amendment rights of potential employees was not justified.<sup>60</sup> Yet, to present this as a clear application of precedent belies the deep disagreement between the dissenters and the majority over the role of partisanship in our system. For Justice Scalia, joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy, the patronage system is key to maintaining the strength of political parties and by implication, the stability of our system of democracy.<sup>61</sup> Justice Scalia argued that elected officials, rather than courts, should decide the validity of the patronage system; moreover, patronage plays an important role in our democracy, helping to maintain party strength, promote a two party system rather than one party dominance, and moderate the policy differences between the parties.<sup>62</sup> Justice Scalia recognized that there are drawbacks to the patronage system—namely the risk of corruption and kickbacks—but he ultimately concluded that the system does not have to be perfect, just reasonable under rational basis review.<sup>63</sup>

While the division on the Court clearly centers on a disagreement over whether the government can dismiss non-policymaking employees for partisan reasons, more telling is the point of agreement—that partisan affiliation can be relevant when it comes to policymaking employees. As the Court recognized in *Elrod*, “Limiting patronage dismissals to policymaking positions is sufficient to [address the concern that] representative government not be

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request that a particular applicant be approved for a particular position, the Governor’s Office has looked at whether the applicant voted in Republican primaries in past election years, whether the applicant has provided financial or other support to the Republican Party and its candidates, whether the applicant has promised to join and work for the Republican Party in the future, and whether the applicant has the support of Republican Party officials at state or local levels.

*Id.*

59 *Id.* at 65.

60 *Id.* at 68–71.

61 *Id.* at 104–10 (Scalia, J., dissenting).

62 *Id.* at 106–07. Justice Scalia wrote:

The patronage system does not, of course, merely foster political parties in general; it fosters the two-party system in particular. When getting a job, as opposed to effectuating a particular substantive policy, is an available incentive for party workers, those attracted by that incentive are likely to work for the party that has the best chance of displacing the “ins,” rather than for some splinter group that has a more attractive political philosophy but little hope of success. Not only is a two-party system more likely to emerge, but the differences between those parties are more likely to be moderated, as each has a relatively greater interest in appealing to a majority of the electorate and a relatively lesser interest in furthering philosophies or programs that are far from the mainstream. The stabilizing effects of such a system are obvious.

*Id.*

63 *Id.* at 110.

undercut by tactics obstructing the implementation of policies of the new administration . . . .”<sup>64</sup> Nevertheless, drawing the line between constitutional and unconstitutional partisanship continues to be a source of dissension between the majority and the dissenters that extends beyond its patronage cases to its partisan gerrymandering jurisprudence.

The Court has split in its partisan gerrymandering cases along the same lines as its patronage jurisprudence, with Justice Stevens as the lone outlier requiring complete government neutrality in official decisionmaking.<sup>65</sup> In *Vieth v. Jubelirer*,<sup>66</sup> a plurality of the Supreme Court held that partisan gerrymandering claims are nonjusticiable, concluding that “[t]he Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics.”<sup>67</sup> In arriving at this conclusion, the plurality looked at the text of the Elections Clause, which, in the view of these justices, provides a remedy for partisan gerrymandering by allowing Congress to “make or alter” districts drawn by the states.<sup>68</sup> The plurality also noted that Congress has used its power to regulate elections and reduce gerrymandering by passing the Apportionment Acts of 1842, 1862, and 1901, which initially instituted requirements of continuity, population equality, and compactness in redistricting.<sup>69</sup>

*Vieth* also highlights the reality that, over the course of four decades, some forms of partisan gerrymandering have morphed from constitutionally suspect to constitutionally protected.<sup>70</sup> In *Reynolds v. Sims*<sup>71</sup> and *Wesbury v. Sanders*,<sup>72</sup> the Supreme Court held that states violated the Equal Protection Clause when they failed to redraw their legislative districts in order to achieve absolute population equality;<sup>73</sup> as I have argued elsewhere, this failure to redistrict was, in effect, a type of partisan gerrymander that insulated incumbent representatives from electoral competition.<sup>74</sup> *Davis v. Bandemer*,<sup>75</sup> where the Court first held partisan gerrymandering claims to be justiciable,<sup>76</sup> is consistent with these early cases finding that the failure to redistrict is also

64 *Elrod v. Burns*, 427 U.S. 347, 367 (1976).

65 Only Justice Stevens would outlaw any consideration of partisan affiliation in government employment. See *Rutan*, 497 U.S. at 79-92 (Stevens, J., concurring). He takes a similar approach in the Court’s partisan gerrymandering cases. See *Vieth v. Jubelirer*, 541 U.S. 267, 317-41 (2004) (Stevens, J., dissenting).

66 541 U.S. 267.

67 *Id.* at 285 (plurality opinion).

68 *Id.* at 275.

69 *Id.* at 276.

70 *Id.* at 274-77.

71 377 U.S. 533 (1964).

72 376 U.S. 1 (1964).

73 See *Reynolds*, 377 U.S. at 568 (holding that under the Equal Protection Clause, both houses of a bicameral legislature must be apportioned substantially on a population basis); *Wesbury*, 376 U.S. at 7-8 (holding that “as nearly as is practicable, one [person]’s vote in a congressional election is to be worth as much as another’s”).

74 Tolson, *supra* note 23.

75 478 U.S. 109 (1986).

76 *Id.* at 113.

constitutionally problematic. *Vieth* represented a dramatic reversal, finding that some level of partisanship in the redistricting process can be consistent with the constitutional structure.<sup>77</sup>

This mixed approach to partisanship in redistricting has affected the Court's ability to craft judicially manageable standards to address partisanship that has crossed the threshold into unconstitutionality.<sup>78</sup> This line-drawing problem is a hallmark of most of the Court's jurisprudence that directly engages with and tries to regulate politics.<sup>79</sup> The idea that the Court can discern when politics has inappropriately infected the legislative process is fanciful at best.

Rather, what these cases tell us is that partisanship, while relevant to official decision-making, still can reach unconstitutional levels. Whether it is choosing elected officials, their employees, their constituencies, or crafting actual policy, partisanship will infect the decision-making process. But this does not alter the reality that, as illustrated by the Court's jurisprudence, partisanship can be unconstitutional. The plurality in *Vieth* and the majority in *Elrod* both recognized this fact. While the Court may not have an optimal approach in determining when partisanship has crossed the threshold from acceptable to unconstitutional, the constitutional structure does have something to teach us about how to survive highly charged political times.

Given their lack of foresight with respect to well-organized interest groups, political parties, and the strength of partisan motivations, the Framers predictably could not have foreseen that political parties would unite legislators at every level of government,<sup>80</sup> and that the unifying banner of the party label would allow legislative gridlock to bleed over into every level of government. As the next section shows, despite the shortcomings of the constitutional structure, the answer still lies in the Founders' design.

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77 *Vieth v. Jubelirer*, 541 U.S. 267, 275, 285 (2004) (arguing that the Framers anticipated that redistricting would be a political endeavor which is why they provided a textual remedy in the Elections Clause); *see also Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (arguing that in *Vieth* "all but one of the Justices agreed" that 'politics as usual' is a traditional redistricting criterion). *Compare Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (recognizing the incumbency protection is a legitimate redistricting criteria), *with League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 447 (2006) (using § 2 of the Voting Rights Act to invalidate an incumbent-protecting gerrymander).

78 *See* Franita Tolson, *Benign Partisanship*, 88 NOTRE DAME L. REV. 395, 401 (2012).

79 *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (providing the roots for the political question doctrine); *Luther v. Borden*, 48 U.S. (1 How.) 1 (1849) (finding the "Republican Form of Government" clause in Article IV nonjusticiable).

80 *See generally* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 215 (2000) (arguing that the Founders did not anticipate the development of political parties would "erode [ ] what the Founders had assumed would be a natural, permanent antagonism between state and national politicians").

## II. OUR DEFECTIVE CONSTITUTION: ADDRESSING EXCESSIVELY PARTISAN GRIDLOCK THROUGH THE CONSTITUTIONAL STRUCTURE

This section of the Essay focuses on ways in which the constitutional structure can address the problem of excessively partisan gridlock, much of which stems from the internal rules adopted by Congress in enacting policy and is exacerbated by the rigid ideological adherence of political parties to their policy agendas. The impasse created by gridlock can shift the power structure from the federal governments to the states, leaving them with substantial authority through their control over congressional redistricting and their own legislative mechanisms to pass laws during times of congressional gridlock.

Scholars have spent some time focusing on how micro-level rules have worsened the levels of gridlock in Congress,<sup>81</sup> but very little attention has been given to how this might strengthen the position of the states. There is substantial literature on the constitutionality of the filibuster and other rules that govern the legislative process, and how these rules contribute to the impasse that we see in Congress today.<sup>82</sup> Although the Constitution gives both houses of Congress the authority to “determine the Rules of its Proceedings,”<sup>83</sup> some commentators have argued that the adoption of supermajority requirements in order to pass bills raising taxes in the House,<sup>84</sup> and the use of the filibuster in the Senate, which refers to the ability of a minority of senators to invoke the chamber’s rule of unlimited debate in order to obstruct any action on a bill, are unconstitutional.<sup>85</sup> Because of the filibuster, two-thirds of the Senate, or sixty senators, have to agree to invoke cloture and end debate in order to force a vote on a bill.<sup>86</sup> Josh Chafetz in particular has argued that the filibuster cannot be constitutional because “the Constitution cannot countenance permanent minority obstruction in a house of Congress.”<sup>87</sup> This analysis is relevant here, where the gridlock that raises constitutional concerns is promoted through the use of House and Senate rules for the sole promotion of partisan ends.

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81 See, e.g., *infra* notes 81 and 83.

82 See, e.g., Chafetz, *supra* note 10, at 1040 (arguing the filibuster is unconstitutional “for it violates a structural principle against permanent minority obstruction in a house of Congress”); Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303, 303 (2011) (“The most troubling countermajoritarian difficulty in modern constitutional law is Rule XXII of the United States Senate.”); John C. Roberts, *Gridlock and Senate Rules*, 88 NOTRE DAME L. REV. 2189 (2013) (arguing that the Constitution demands “the power of a simple majority of members [of the Senate] present to adopt or amend rules governing the day-to-day business of the Senate at any time. Under this principle, the filibuster itself is not unconstitutional if a majority of senators wish to allow it for institutional reasons”).

83 U.S. CONST. art. I, § 5, cl. 2.

84 See Brett W. King, *Deconstructing Gordon and Contingent Legislative Authority: The Constitutionality of Supermajority Rules*, 6 U. CHI. L. SCH. ROUNDTABLE 133, 136 (1999).

85 See Chafetz, *supra* note 10, at 1007–08.

86 *Id.* at 1007.

87 *Id.* at 1015.



While it is debatable whether there is any legal recourse to challenge the filibuster or other internal rules that stymie the legislative process,<sup>88</sup> there are structural solutions that can help to break up gridlock in the interim. For example, where there is congressional gridlock and it undermines legislation seeking to address a problem that can be resolved best through a uniform solution, states can address the gridlock by pressuring their congressional delegations to act.<sup>89</sup> Under the Elections Clause, states draw the district lines for state legislative and congressional districts.<sup>90</sup> Because the use of partisanship in official decision-making is constitutional, the Supreme Court has, in a series of fractured opinions discussed in Part I.B, endorsed the use of partisanship in redistricting up to a certain threshold.<sup>91</sup>

The ability to partisan gerrymander is a tool that a state can use in order to influence its congressional delegation and federal policy in ways favorable to its interests.<sup>92</sup> The state, which can be a partisan entity, can use the threat or promise of a gerrymander in order to make its congressional delegation more responsive to its interests.<sup>93</sup> Its interests may be consistent with allowing a legislatively unproductive Congress to persist because in some sense this allows the states to exercise more regulatory authority within their spheres, but arguably, the state could also press its delegation to do more to break the impasse in Congress. Indeed, the ability of states to legislate during times of congressional gridlock, specifically to address national problems that may uniquely affect the interests of a particular state within its borders, is consistent with the states' authority under the Tenth Amendment.<sup>94</sup>

Undeniably, there is a risk that such state action could step on federal toes, but there are benefits that must be considered as well. In particular, state legislation to fill the gaps in federal lawmaking can have some federal-

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88 *Id.* at 1036. *See generally* John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 211 (2003) (explaining the problem of judicial confirmations, specifically filibusters).

89 *See, e.g.*, Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 862 ("When states gerrymander congressional districts pursuant to their power under the Elections Clause, they are in fact furthering the federalism embodied in the Clause when the gerrymandering results in the election of congressional representatives that are responsive to state interests.").

90 U.S. CONST. art. 1, § 4, cl. 1.

91 *Compare* League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 423 (2006) (analyzing and rejecting political gerrymandering claim), *with* Vieth v. Jubelirer, 541 U.S. 267, 355 (2004) (Breyer, J., dissenting) (recognizing the existence of political gerrymandering claim).

92 *See* Tolson, *supra* note 89, at 862.

93 *See* LULAC, 548 U.S. at 399–400 (arguing that the 2003 redistricting in Texas and the resulting congressional delegation made the national legislature more responsive to Texas' interests); Tolson, *supra* note 89, at 895–96 (discussing this phenomenon in the context of the Affordable Care Act).

94 *See* Tolson, *supra* note 23 (arguing that states have discretion under the Tenth Amendment to structure their governments and govern as they see fit so long as it exceeds the threshold imposed by the Guarantee Clause).

ism benefits that may be worth emphasizing. In *Gregory v. Ashcroft*,<sup>95</sup> the Supreme Court noted that, among the many benefits of the federalist system:

It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.<sup>96</sup>

Giving states the opportunity to solve national problems from a micro-level perspective would seem to promote most, if not all, of these goals of federalism. Indeed, if the federal government does not like a state's approach to a particular problem, this could motivate Congress to finally break the gridlock and act itself.

The recent case of *Arizona v. United States*<sup>97</sup> and the issue of immigration reform are instructive on this point. Both political parties have long acknowledged that immigration reform has to be on the horizon, but little has been done because of legislative gridlock in Congress.<sup>98</sup> To circumvent this gridlock, in 2012, President Barack Obama issued an executive order allowing some undocumented individuals, brought into the country through no fault of their own, to remain in the United States.<sup>99</sup>

This stopgap measure, although needed, did not address many of the problems stemming from illegal immigration that can only be addressed by comprehensive immigration reform. Arizona got tired of waiting for Congress to act on this issue because the presence of undocumented individuals within its borders had, in its view, become a public safety concern.<sup>100</sup> In 2010, Arizona passed the Support Our Law Enforcement and Safe Neighborhoods Act, more commonly known as SB 1070, in order to regulate undocu-

95 501 U.S. 452 (1991).

96 *Id.* at 458.

97 132 S. Ct. 2492 (2012).

98 See Stephanie Condon, *Despite Decades of Effort, Immigration Reform Still Eludes Congress*, CBS News (Feb. 5, 2013, 1:02 PM), [http://www.cbsnews.com/8301-250\\_162-57567583/despite-decades-of-effort-immigration-reform-still-eludes-congress/](http://www.cbsnews.com/8301-250_162-57567583/despite-decades-of-effort-immigration-reform-still-eludes-congress/).

99 Exec. Order No. 13,597, 77 Fed. Reg. 3373 (Jan. 19, 2012).

100 The Supreme Court described the problem as such:

Arizona bears many of the consequences of unlawful immigration. Hundreds of thousands of deportable aliens are apprehended in Arizona each year. Unauthorized aliens who remain in the State comprise, by one estimate, almost six percent of the population. And in the State's most populous county, these aliens are reported to be responsible for a disproportionate share of serious crime.

*Arizona v. United States*, 132 S. Ct. at 2500 (citations omitted); see also *id.* at 2517 (Scalia, J., concurring in part and dissenting in part) ("The Government complains that state officials might not heed 'federal priorities.' Indeed they might not, particularly if those priorities include willful blindness or deliberate inattention to the presence of removable aliens in Arizona. The State's whole complaint—the reason this law was passed and this case has arisen—is that the citizens of Arizona believe federal priorities are too lax. The State has the sovereign power to protect its borders more rigorously if it wishes, absent any valid federal prohibition.").

mented individuals within its borders because it felt that the federal government had failed to successfully resolve the problem of illegal immigration or secure the U.S. borders to prevent the influx of undocumented individuals.<sup>101</sup> The U.S. government filed suit, claiming that federal law comprehensively regulated immigration and the status of undocumented immigrants, and therefore, preempted SB 1070.<sup>102</sup> In SB 1070, the state of Arizona tried to address what it felt were lapses in coverage: Section 3 of SB 1070 “forbids the ‘willful failure to complete or carry an alien registration document . . . in violation of 8 United States Code section 1304(e) or 1306(a)’”; Section 5(C) “makes it a misdemeanor for an unauthorized alien to seek or engage in work in the State”; Section 6 “authorizes officers to arrest without a warrant a person ‘the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States’”; and finally, Section 2(B) “provides that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person’s immigration status with the Federal Government.”<sup>103</sup>

The Supreme Court held that federal law preempts the first three provisions of SB 1070 listed above.<sup>104</sup> Justice Kennedy, writing for the majority, described the federal government’s authority over immigration as “broad” and “undoubted,” resting on “the National Government’s constitutional power to ‘establish an uniform Rule of Naturalization,’ and its inherent power as sovereign to control and conduct relations with foreign nations.”<sup>105</sup>

Because of this broad authority, the Court viewed Arizona’s attempt to supplement federal law as problematic in several respects. In particular, Section 3’s attempt to add a state law penalty for conduct already proscribed by federal law undermined the careful balance of the federal scheme because it would have allowed Arizona to prosecute individuals even in circumstances in which the federal government has determined that prosecution might frustrate federal policies.<sup>106</sup> The provisions of Arizona law that created criminal prohibitions where no federal counterpart existed were also problematic because they could have frustrated the goals of federal policy and undermined the work of federal officers who have received specialized training on immigration policy.<sup>107</sup>

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101 *Id.* at 2497.

102 *Id.*

103 *Id.* at 2497–98, 2501 (alteration in original) (citations omitted).

104 *Id.* at 2510 (holding §§ 3, 5(C), and 6 are preempted but § 2(B) is not).

105 *Id.* at 2498 (citations omitted).

106 *Id.* at 2502–03.

107 *Id.* at 2503–04 (discussing Section 5(C) and arguing that the immigration framework adopted by Congress, which punishes the employer for hiring undocumented workers and not the workers themselves like Section 5(C), “reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives”); *see also id.* at 2506 (“Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability

What is notable, however, is that the Supreme Court did not invalidate the Arizona immigration law in its entirety. The Court upheld Section 2(B), which requires state officers to “make a ‘reasonable attempt . . . to determine the immigration status’ of any person they stop, detain, or arrest on some other legitimate basis if ‘reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.’”<sup>108</sup> The Court rejected the argument that this provision interferes with the federal immigration scheme because federal law encourages state officials to contact federal officials for information regarding immigration status; thus, a state law requiring law enforcement to check the immigration status of anyone who is lawfully detained is consistent with federal policy.<sup>109</sup>

*Arizona* stands for the proposition that the states can act where the federal government has failed to act or, alternatively, failed to enforce its own policies, so long as their actions do not frustrate the goals of federal law, and Congress has not indicated its intent to occupy the field.<sup>110</sup> Despite these limitations, this authority is still a meaningful way to address gaps in federal policy that persist because of Congress’s inability to act due to gridlock. Given that undocumented individuals have some impact on state resources and the scope of state regulation, the states have latitude to address federal policy failures or lapses in enforcement, consistent with their authority under the Tenth Amendment.<sup>111</sup>

#### CONCLUSION

The solution to legislative gridlock lies, not with the courts, but in those structural safeguards that anticipate faction and push lawmaking down to the states. The stringent requirements that legislation pass both houses of Congress and be presented to the President in order to become law show that the Framers anticipated some level of gridlock, indeed invited it, to prevent the federal government from usurping the authority of the states through erroneous and ill-conceived legislation. As the Supreme Court’s jurisprudence indicates, however, excessive gridlock based solely on partisan considerations can be unconstitutional. While the Court cannot comfortably delineate when gridlock that is motivated by excessive partisanship has crossed the line into unconstitutionality, its jurisprudence still provides a useful guidepost to determine when the legislative standstill in Congress has reached a point of concern. Unconstitutional gridlock can pose significant risks to our system of federalism, at least to the extent that the Constitution allocates to Congress the responsibility of crafting uniform solutions to problems that defy

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than Congress has given to trained federal immigration officers . . . allow[ing] the State to achieve its own immigration policy.”).

108 *Id.* at 2507 (alteration in original) (citing ARIZ. REV. STAT. ANN. § 11–1051(B) (2012)).

109 *Id.* at 2508–10.

110 *Id.* at 2510.

111 *Id.* at 2518–19 (Scalia, J., concurring in part and dissenting in part) (arguing that the state is defending its own sovereign interests in enacting its immigration policy).

state level action and gridlock undermines this task. Indeed, the structural solution is more apparent than the judicial one: our system of federalism is fluid, and gridlock in Congress pushes more power down to the states, allowing them to act when Congress cannot.

The problem is that state level solutions are often insufficient to address problems that benefit from uniformity. Despite this difficulty, the shifting balance of legislative power from Congress to the states is consistent with the constitutional design, which permits states to serve as the forums of first resort, increasing the legislative experimentalism that is supposed to be the hallmark of a federal system. It also allows the states to narrowly address national issues to the extent that they pose unique problems within the state's borders. *Arizona v. United States* makes it clear that states retain authority to legislate concurrently with the federal legislative scheme, which is key in times of congressional gridlock.