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## WHY GRIDLOCK MATTERS

*Michael J. Gerhardt\**

### INTRODUCTION

A week before the 2012 presidential election, I had the opportunity to speak with a former senator. I asked him about gridlock. I wondered what he would say to my law students who had lost hope in the legislative process because of the gridlock that defined the 112th Congress. He told me that they had good reason to have lost hope. He said that he conceived of the legislative process as a target; that the center of the target represented the areas that were most important to the country and the likeliest ones in which bipartisan agreement could be reached; and that the Patient Protection and Affordable Care Act (“ACA” or “Affordable Care Act”),<sup>1</sup> in which he said that President Obama had invested so much time and capital, was on the periphery, if not the outside, of the target. He explained that the ACA exceeded the scope of congressional power. He explained that opposing the ACA should be the top priority of legislators and citizens. When I asked him what issues were at the center of the target, he initially did not respond. After I politely pressed him for an answer, he eventually said that there was nothing more important than opposing the health care bill. For him, gridlock had become a constitutional necessity.

The former senator’s position on gridlock is hardly unique. Indeed, more than a year before President Obama’s re-election, Antonin Scalia, the longest serving justice on the current Supreme Court, told the Senate Judiciary Committee that, “Americans should learn to love gridlock . . . . The framers (of the Constitution) would say, yes, ‘That’s exactly the way we set it up. We wanted power contradicting power (to prevent) an excess of legislation.’”<sup>2</sup> A few weeks after the 2012 presidential election, Justice Scalia

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1 Patient Protection & Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010).

2 David G. Savage, *Justice Scalia: Americans “Should Learn to Love Gridlock,”* L.A. TIMES (Oct. 5, 2011), <http://articles.latimes.com/2011/oct/05/news/la-pn-scalia-testifies-20111005> (internal quotation marks omitted).

repeated the same message to a packed auditorium at Princeton University, adding “God bless gridlock.”<sup>3</sup>

This kind of praise for gridlock, coupled with the fact that the last Congress was the least productive in memory, has led many people—both before and after the presidential election—to worry about whether gridlock has become either a permanent fixture, or a reflection of a serious defect, in our constitutional system. Is the gridlock we have witnessed over the past two years something to applaud, as Justice Scalia suggests, or does it reflect some serious defect in the Constitution, the current composition of Congress, the design of the legislative process, or some combination of these things? To what extent is gridlock not just a constitutional virtue but also a constitutional necessity? To what extent does fidelity to the Constitution require embracing or rejecting gridlock?

While these and other similar questions motivated this symposium on constitutional gridlock, I do not believe that they are the right questions to ask. The critical question is, however, not whether gridlock is a constitutional necessity, virtue, or problem. If gridlock protects minorities, can it not also hurt them? If gridlock actually is a good thing, does transcending it produce harm? What does overcoming gridlock signify? Is it likely not the case that the failure of gridlock means that legislators somehow have failed minorities—or does it? The glorification of gridlock misses the point, perhaps deliberately so. After all, the framers did not design a constitution in which gridlock was the objective. The Constitution makes gridlock both possible and inevitable, but the purpose of the Constitution is not merely to allow gridlock. In fact, the Constitution makes federal lawmaking difficult but not impossible. Justice Scalia is thus only half correct: We should appreciate not only the salutary effects of gridlock but also its possible harms as well as what it means to say, as Justice Arthur Goldberg famously said in *United States v. Mendoza-Martinez*,<sup>4</sup> that, “while the Constitution protects against invasions of individual rights, it is not a suicide pact.”<sup>5</sup> The most important question is whether Justices Goldberg and Scalia can both be right and, if so, how?

The purpose of this Article is to put constitutional gridlock in perspective. It seeks to clarify both the values and the problems that gridlock can foster or produce. Perhaps most importantly, I seek to clarify not only why (or when) gridlock can be a good thing but also the constitutional significance of overcoming it. I consider not only the possible benefits and costs of gridlock but also the constitutional significance of the facts that, within a few weeks of Justice Scalia’s praise of gridlock and not long before the day of President Obama’s second inauguration, he and Congress had reached an agreement to bypass the fiscal cliff, at least for a couple months, and Senate leaders had forged a modest agreement to make filibustering of judicial

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3 Caleb Kennedy, *Scalia Defends Opposition to Gay Rights Position*, THE DAILY PRINCETONIAN (Dec. 10, 2011), <http://www.dailyprincetonian.com/2012/12/10/32135/>.

4 372 U.S. 144 (1963).

5 *Id.* at 160 (Goldberg, J.).

nominations more difficult. When gridlock fails, something else has been achieved, something that we invest with the force of law. The Constitution is a blueprint for gridlock *and* for making law.

In Part I, I clarify the values *and* the difficulties that gridlock and its transcendence might facilitate. There is not just one kind of gridlock, nor is there just one kind of benefit—or cost—to overcoming gridlock. The values of gridlock include protecting minorities and preserving the status quo and some freedom from federal regulation. The costs of gridlock are preventing progress, hindering legal change, exacerbating divisiveness, and empowering factions. But, overcoming gridlock or approving legal change promotes many values, including progress, solving social problems, and providing social benefits. Moreover, it achieves the usual benefits every time the legislative process works—deliberation, consensus, representativeness, and accountability. Lawmaking might also be costly and be harmful in some ways, including but not limited to social disruption and financial and other costs that compliance with new laws requires. The important thing to understand is glib one-liners about the virtues of gridlock or overregulation should not be mistaken for sophisticated or careful constitutional analysis. It is imperative that, in any discussion of gridlock in the legislative process, we need to move away from polemics and precisely identify which values and which costs are actually being promoted or produced in particular fights or areas of lawmaking.

In Part II, I use three examples of conflicts in Congress to illustrate the utility of a more nuanced understanding of gridlock. These are the fights over the Affordable Care Act, the filibuster, and the debt ceiling. In each of these instances, change in the status quo, even incrementally, was hard won. They underscore the importance of not confusing the gridlock of the moment with complete dysfunction. They illustrate the different values—and costs—of overcoming gridlock in both significant and incremental ways.

In Part III, I suggest two proposals for ameliorating more costly forms of gridlock. The first is to adopt the talking filibuster. The filibuster has long been a defining feature of the Senate. Its increased use in recent years has been costly to the image of the Senate, comity within the Senate, and the efficient production of legislation and confirmation of presidential nominations, particularly to Article III courts. The talking filibuster might make protracted delays on many issues more difficult to maintain, since it forces senators to be visible and thus more likely to be accountable for delaying various matters. The second proposal is to seek judicial review of partisan gerrymandering, which has facilitated divided government and provided a basis for gridlock in lawmaking. Overcoming partisan gerrymandering requires the intervention of courts, but if courts were to eliminate gerrymandering on this basis it could make it easier for voters to turn out legislators whenever they are not producing the kinds of actions that voters actually prefer. But, if voters prefer gridlock, they could still vote for it even without partisan gerrymandering. Its elimination simply allows voters more opportunities to vote on the substance of issues.

I conclude that both protestations about gridlock and the praise for it are overdone. Even a dialogue about gridlock is progress. It is better to understand why we are at an impasse, the values that it might foster, the costs it might incur, and the benefits and costs of transcending gridlock than simply to throw up our hands in disgust or consternation. Indeed, if we better understand why gridlock can be good, we will be in a better position to recognize the costs of gridlock when it is bad.

### I. ASSESSING GRIDLOCK AND ITS ALTERNATIVES

In a symposium focusing on gridlock, a good place to begin is with an understanding of gridlock. The temptation to oversimplify gridlock is strong. But, if we understand why gridlock can be good, we can appreciate the values, or positive outcomes or consequences, it facilitates. At the same time, we can appreciate and assess when it goes awry or produces the dysfunction my friend Josh Chafetz describes in his contribution to this Symposium.<sup>6</sup> In this Part, I offer a more nuanced account of gridlock and the legislative process than proponents and critics of gridlock often provide. I briefly describe the principal kinds of gridlock, their benefits and costs, and the possible values and costs when gridlock is overcome, i.e., when the lawmaking process works.

The principal kind of gridlock is structural gridlock. Both the constitutional design and the design of Congress allow for—indeed, anticipate—many more ways in which lawmaking may be stopped than achieved. These impediments or complications are called veto-gates<sup>7</sup> or the myriad paths by which laws can fail to be approved. Structural gridlock is reflected in numerous counter-majoritarian features of the Constitution, all of which require the participation of more than one branch in the alteration of the status quo. These features include the lawmaking process requiring participation of the House, the Senate, and the President (or overriding the President by supermajorities in both the House and the Senate);<sup>8</sup> judicial review; the impeachment process depending on the division of authority between the House and the Senate;<sup>9</sup> the appointment process requiring presidential nomination and Senate approval;<sup>10</sup> treaty ratification requiring at least two-thirds approval of the Senate;<sup>11</sup> and the appropriations process, which must begin in the House.<sup>12</sup>

Moreover, Article I, Section 5 empowers each chamber of Congress to adopt internal rules of governance, including but not limited to requiring

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6 See generally Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. \_\_\_ (2013) (discussing the institutional “dysfunction” that may arise from legislative inaction).

7 See William N. Eskridge Jr., *Vetogates and American Public Law*, J.L. ECON. & ORG. 1, 2–6 (2012).

8 See U.S. CONST. art. I, § 7.

9 *Id.* art. I, § 2, cl. 5; *id.* art. I § 3, cls. 6–7.

10 *Id.* art. II § 2, cl. 2.

11 *Id.*

12 *Id.* art. I, § 7, cl. 1.

committees (at least generally) to approve bills in order for them to reach the floor for final votes in the House or Senate.<sup>13</sup> It is nearly impossible for a bill to become a law if the relevant committee in the House or Senate does not approve it. There are also many procedural requirements that bills or other legislative initiatives must satisfy in order to be voted on in committees. Committee chairs generally control the timing of hearings, including whether there are any hearings on pending legislative business. Committee chairs also control the numbers of witnesses as well as whether or when their committees may vote on pending legislative business. A bill or other legislative initiative simply fails if it never manages to satisfy each and every procedural requirement of the House and Senate for lawmaking.

The other kind of gridlock is substantive. This is simply when, for whatever reason (including partisanship), the members in the House or senators cannot agree on a law or substantive matter or the President disagrees with Congress over the substance of a bill.

These various structural features of the Constitution reflect important values and veto-gates, which we must understand in any thorough analysis of constitutional gridlock. Substantive impasse might also reflect certain values, depending on the nature of the disagreement and the specific effects of the failure to reach agreement.

To begin with, one benefit of structural gridlock is, as Justice Scalia suggested, that minorities are not subjected to regulation.<sup>14</sup> The minorities to which he refers are political, i.e., defined by their opposition to some regulatory scheme or their preference to preserve the current legal regime (including non-regulation). Moreover, the failure of Congress to legislate inures to the benefit of federalism, particularly to the States. As the Supreme Court declared in *Gregory v. Ashcroft*,<sup>15</sup> state and federal governments “will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.”<sup>16</sup> As also emphasized by the Court, the framers recognized further benefits to the federalist structure of the Constitution:

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>17</sup>

When Congress fails to act, States are left with more room or opportunity to regulate a matter that potentially has had some interstate ramifications. The failure of Congress to regulate protects people and institutions from the costs of regulation.

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13 See *id.* art. I, § 5.

14 See *supra* notes 2–3 and accompanying text.

15 501 U.S. 452 (1991).

16 *Id.* at 459.

17 *Id.* at 458.

But, the effect of gridlock might not be purely salutary. Nor is it strictly true that gridlock means a void or complete absence of any legislative action. At the very least, gridlock leaves in place the legal status quo. Whatever problems or difficulties Congress failed to address remain in place. These could be rather extensive, including but not limited to discrimination or health and environmental risks. Hence, gridlock might actually allow certain factions to preserve their privileged status as well as certain minorities to continue to be subjected to inequitable or unfair treatment.

Moreover, when gridlock fails, does it necessarily follow that minorities will suffer? When the lawmaking process works, something more than just a law is approved. When gridlock fails and the system produces some positive outcome(s), it is not constitutionally insignificant.

In fact, legislative action that satisfies Article I's lawmaking requirements promotes five values. First, they reflect consensus. If a bill is approved by a majority in the House and the Senate and signed by the President, it obviously must command a fairly widespread degree of support from elected representatives.

Second, satisfying Article I's requirements for lawmaking reflects deliberation. In order for something to become a law, it must overcome or bypass numerous veto-gates.<sup>18</sup> A law is unlikely to achieve approval without careful scrutiny. The scrutiny the law is likely to receive in committee and on the floor as well as in the White House is bound to be relatively rigorous. The more important the law the more likely it will be that there will be careful scrutiny and deliberation over its substance and legality.

The third value that satisfying Article I's procedural safeguards effectuates is representativeness. The approval of a law will require a significant extent of support from the nation's representatives. A small faction of lawmakers lacks the power to make laws. Lawmaking requires the approval of most representatives in the House and most senators and thus, in all likelihood, the support of the people that these representatives and senators represent.

The fourth value that satisfying Article I's lawmaking requirements facilitates is accountability. Approval requires a public action, and the people who support or approve a law must be accountable for their approval and support.

The final value of satisfying Article I's lawmaking requirements is a change in the legal status that inures to the benefit of an oppressed minority or provides for some incremental (if not more significant) solution to a societal problem. For example, the Americans with Disabilities Act, signed into law by President George H. W. Bush, provided for certain beneficial treatments for persons with disabilities on a scale previously unseen, or experienced, in the United States.<sup>19</sup> While many businesses were challenged with

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18 See Eskridge, *supra* note 7, at 2-6.

19 Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213, 47 U.S.C. § 225 (2006)).

some greater expenses, thousands of disabled American workers experienced greater ease, or confronted fewer burdens, in the workplace.

But, enacting laws might not have purely salutary, or beneficial, effects. It is likely that a law might produce, require, or engender some costs. First, as we have already noted, enacting a law changes the legal status quo.<sup>20</sup> In some cases, it can produce social disruption. There is no question, for example, that the enactment of the Civil Rights Act of 1964 symbolized progress and achieved important legal change and important protection of racial minorities.<sup>21</sup> At the same time, the change effected was not easy for some parts or segments of society to accept or follow. The same is undoubtedly true for the Affordable Care Act<sup>22</sup> or perhaps with any major piece of legislation.

Second, a law's enactment is likely to require some institutional costs. A new regulatory regime might have to be constructed, and this could cost money. Moreover, compliance with the law could cost businesses or individual citizens money either in implementing procedural mechanisms to ensure compliance or fines. In other words, the enforcement could require businesses or individuals to incur costs. Consider, for example, a new environmental law. It could produce a cleaner environment, but it also requires government enforcement mechanisms to be implemented, and it requires businesses to invest in technology to avoid pollution for which they could be fined or potentially shut down.

What emerges from this analysis is a recognition that the lawmaking process, whether it works or not, is likely to produce complicated results. The rejection of a law is not necessarily an unqualified positive. Legally, gridlock signifies nothing, as suggested by other contributors to the Symposium.<sup>23</sup> But, there might be costs to inaction that should not be ignored. Because nothing changing the legal status quo is a result of gridlock, it is easy for observers or commentators to read into it almost anything (and any values) they want. At the same time, the approval of a law is likely to reflect various values and possibly incur some costs. Changing the status quo is unlikely to be cost-free, but then gridlock is also unlikely to be cost-free. In the next Part, I examine three areas of recent congressional conflict to illustrate not

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20 See *supra* note 14 and accompanying text.

21 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h-6 (2006)).

22 Pub. L. No. 111-148, 124 Stat. 119 (2010).

23 See Chafetz, *supra* note 6, at \_\_ (“[G]ridlock is the absence of phenomena; it is the absence, that is, of legislative action.”); Gerard N. Magliocca, *Don't Be So Impatient*, 88 NOTRE DAME L. REV. \_\_, \_\_ (2013) (“The right not to agree is fundamental. Though there are costs to congressional paralysis and filibuster reform is essential to protect the majority's right to legislate, aggressive action to transcend partisan divisions in the country would be unwise.”); John C. Roberts, *Gridlock and Senate Rules*, 88 NOTRE DAME L. REV. \_\_, \_\_ (2013) (“I am tempted to declare the symposium over by arguing that there are no such relevant legal issues . . . . But that would be too easy. There are legal defects . . . even if we may conclude that they are symptoms and not causes of gridlock.”).



just the costs, which have been played up in the media a good deal, but also the benefits that are likely to accrue both in the short- and long-terms.

## II. THE VALUE OF OVERCOMING GRIDLOCK

For all the praise and handwringing over gridlock, it is useful to consider the constitutional significance of overcoming it. Josh Chafetz has identified the prerequisites for legislative action and suggested ways in which to identify or measure dysfunction within our present scheme of lawmaking.<sup>24</sup>

In this Part, I suggest an inquiry that is complimentary to his. In particular, I discuss three examples of recent conflicts within Congress—the Affordable Care Act, the debt ceiling, and the filibuster—to illustrate what national leaders both gain—and lose—overcoming gridlock. In each of these instances, there was gridlock for a while (sometimes for quite a long while) and then some degree of legal change was achieved. Appreciating the nature and value of this change is critical for putting constitutional gridlock in the proper perspective.

The first is the Affordable Care Act,<sup>25</sup> which reflected the convergence of structural and partisan gridlock. It is among the many significant legislative achievements of the first two years of Barack Obama's presidency, including but not limited to the auto industry rescue,<sup>26</sup> reform of financial regulations,<sup>27</sup> and the appointments of Sonia Sotomayor and Elena Kagan to the Supreme Court.<sup>28</sup> Try as they might, the opponents of this law tried to stop it in every sphere in which it arose—the Senate and the House, in which it eventually passed; the President, who introduced the plan in his State of the Union and then urged it before a joint session of Congress, signed it into law, and was subsequently challenged unsuccessfully for reelection;<sup>29</sup> and the courts, which ultimately upheld most of the law, including its most controversial provision.<sup>30</sup> The ultimate passage of this law and its ratification (if not

24 See Chafetz, *supra* note 6, at \_\_\_\_.

25 Pub. L. No. 111-148, 124 Stat. 119 (2010).

26 See *Times Topics: Auto Industry Bailout*, N.Y. TIMES (Dec. 19, 2012), [http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit\\_crisis/auto\\_industry/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/auto_industry/index.html) (summarizing the auto industry collapse and the governmental response, as well as compiling links to additional articles on the topic).

27 See *Times Topics: Financial Regulatory Reform*, N.Y. TIMES (Sept. 20, 2011), [http://topics.nytimes.com/topics/reference/timestopics/subjects/c/credit\\_crisis/financial\\_regulatory\\_reform/index.html](http://topics.nytimes.com/topics/reference/timestopics/subjects/c/credit_crisis/financial_regulatory_reform/index.html) (chronicling the Obama administration and Congress's response to the financial and credit crises).

28 See Charlie Savage, *Sotomayor Sworn in as Supreme Court Justice*, N.Y. TIMES (Aug. 8, 2009), [http://www.nytimes.com/2009/08/09/us/politics/09sotomayor.html?\\_r=0](http://www.nytimes.com/2009/08/09/us/politics/09sotomayor.html?_r=0) (detailing the swearing in of Justice Sotomayor); Carl Hulse, *Senate Confirms Kagan in Partisan Vote*, N.Y. TIMES (Aug. 5, 2010), <http://www.nytimes.com/2010/08/06/us/politics/06kagan.html> (covering the Senate confirmation of Justice Kagan).

29 See, e.g., Tom Cohen, *Obama Takes Key Battlegrounds to Win Re-election*, CNN (Nov. 7, 2012 5:07 AM), <http://www.cnn.com/2012/11/06/politics/election-2012>.

30 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (upholding the Affordable Care Act).

vindication) in every phase of the legislative process demonstrates the important fact that this process is not necessarily meant to be fatal but instead constitutes a crucible that tests a law's legitimacy. The Affordable Care Act is a reminder that the veto-gates sanctioned by the Constitution are not supposed to be fatal in every instance and that a law that passes through them all is likely to reflect the values that the framers established the legislative process to facilitate.

The persistent complaints about the Affordable Care Act should not dilute the important fact that the law's passage (and later approval in almost all of its entirety by the Court) reflects its realization of the values the framers expected enactments to reflect. First, it was the product of intense deliberation in Congress and the media. Second, its enactment reflects widespread consensus among the members of Congress. A law's enactment will never be the product of unanimous agreement among the members of Congress, but the fact that most members of both the House and Senate approved the bill reflects its widespread support across national leaders and representatives. Third, its enactment reflects significant representativeness. People charged with representing Americans around the country largely supported the law. Fourth, everyone who voted for or against the law stood for reelection. Voters had the opportunities to express their support or disapproval of the law both in the midterm elections of 2010 and the presidential election of 2012. The outcomes suggest that the public largely supports the health care overhaul.

It bears repeating that the fact that the persistency and obstinacy of complaints about the Affordable Care Act do not diminish the constitutional significance of its approval in Congress and the upholding of its most controversial provision by the Supreme Court. Overcoming gridlock usually requires all three branches to fall behind a law. Once the efforts to stop a law have failed, it is appropriate to consider what has been achieved. At that point, there is progress, and the principal remaining costs are those associated with the implementation of the law. These might not be small, but they will also not arise in a vacuum. Any costs will be incurred for the sake of providing broadening access to health care and lowering its costs generally. The constitutional dialogue about the law's legitimacy will continue, but it must now be informed by the benefits and the costs entailed by the law's overcoming gridlock.

Another example of overcoming gridlock is the last minute detail to avert falling off the fiscal cliff in early January 2013.<sup>31</sup> Of course, failing to fix the debt ceiling could have been financially catastrophic. But, the overcoming of gridlock on the final day of the last Congress suggests that perhaps this last Congress might not have been as completely gridlocked as many pundits suggested. More importantly, the law signed by President Obama, just weeks before his second inauguration, reflects the same values that congressionally

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31 Matt Smith, *Obama Signs Bill Warding Off Fiscal Cliff*, CNN POLITICS (Jan. 3, 2013, 2:17 AM), <http://www.cnn.com/2013/01/02/politics/fiscal-cliff/index.html>.

approved legislation generally reflects. The deal was not struck in secret and was, however imperfect, at least not a victim of gridlock. Indeed, gridlock on this important issue should have been no surprise, because of both the cumbersome requirements for lawmaking (which are likely to be more cumbersome the more important the issue) and the substantive differences among the members of Congress over the important issues involved. Overcoming gridlock was not easy, especially for a Congress pilloried for its dysfunction. Overcoming gridlock on this issue differed from the health care overhaul in that it was not grand in scope; it was an incremental, temporary solution to a legislative problem. Such solutions are not unique, but reflect all the same values that approved legislation generally reflects—deliberation, representativeness, accountability, and consensus. These benefits outweigh, at least in the judgments of most members of Congress and the President, the costs emanating from the short-term solution.

The final example to consider is the filibuster. Much has been said about the use of the filibuster to obstruct judicial nominations and other compelling business in the Senate. Critics have loudly complained that Republicans in the 112th Congress abused the filibuster to delay judicial nominations, which actually enjoyed the support of more than a majority in the Senate.<sup>32</sup> In the 2012 elections, at least one Senate candidate (Angus King, Democrat from Maine) ran successfully on a platform to reform the filibuster,<sup>33</sup> and in the weeks between the 2012 presidential election and the first day of the 113th Congress, senators worked furiously behind closed doors to reach some meaningful accord over the use of filibusters to block presidential nominations, particularly nominations to Article III courts. Four days after President Obama's second inaugural, Senate leaders reached a modest agreement to limit the filibuster's deleterious effects by providing for "two new expedited options for bringing legislation to the floor" of the Senate for a final vote.<sup>34</sup>

The modesty of the reform adopted should not in any way diminish the significance of its having been achieved. First, the debate within the Senate over the reform was significant because it refined the institution's consideration of the effects of such reform. The debate reflected senators' widespread recognition of the institutional and constitutional issues at stake. It reflected

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32 See, e.g., Felicia Sonmez, *Senate Republican Filibuster Blocks Obama D.C. Circuit Nominee Caitlin Halligan*, WASH. POST POLITICS (Dec. 6, 2011, 2:35 PM), [http://www.washingtonpost.com/blogs/2chambers/post/senate-republican-filibuster-blocks-obama-dc-circuit-nominee-caitlin-halligan/2011/12/06/gIQAtp6nZO\\_blog.html](http://www.washingtonpost.com/blogs/2chambers/post/senate-republican-filibuster-blocks-obama-dc-circuit-nominee-caitlin-halligan/2011/12/06/gIQAtp6nZO_blog.html) (discussing how, despite fifty-four votes in favor of ending debate, the nomination of Caitlin Halligan was blocked from going to a vote).

33 See, e.g., Mark Trumbull, *Angus King Wins. Maine Sends New Voice of Moderation to Senate*, CHRISTIAN SCI. MONITOR (Nov. 6, 2012), <http://www.csmonitor.com/USA/Elections/Senate/2012/1106/Angus-King-wins.-Maine-sends-new-voice-of-moderation-to-Senate> (listing filibuster reform to combat "stalled progress" as one of King's campaign goals).

34 Niels Lesniewski, *Filibuster Changes Get Senate Approval*, ROLL CALL NEWS (Jan. 24, 2013), 8:53 PM) [http://www.rollcall.com/news/filibuster\\_changes\\_get\\_senate\\_approval-221072-1.html](http://www.rollcall.com/news/filibuster_changes_get_senate_approval-221072-1.html).

their awareness of the institutional costs of implementing a solution by a slim majority of the Senate. These costs include, most importantly, the possibility of blowing up the Senate. Having fifty-one senators agree to formally amending the rules (contrary to the supermajority that the rules require) would be unprecedented. Many senators were concerned that proceeding in this manner opened the door to enabling a majority to disregard the rules of the Senate whenever it suited their purposes. Such disregard would effectively render the rules of the Senate meaningless; they would only matter when a majority wanted them to matter. It appeared that there was a generational divide within the Senate, with newer senators more disposed to amend the rules in this radical fashion and longer serving senators disposed to protect the longstanding rules and norms of the Senate even at the risk of making their lives more difficult at least in the short term.

Senators understood that amending the rules in this manner undoubtedly ran the risk of provoking the minority to take retaliatory actions, such as denying unanimous consent to do other critical business in the Senate. Amending the rules in the Senate by majority vote also would make the Senate more like the House, in which a majority determines virtually everything of importance within the institution. For many senators, particularly those who had served in the Senate for a long time, the Senate's distinctive feature was that everyone shared the same degree of authority in contrast to the House in which someone who belonged to the minority effectively had no power.

Moreover, the debate reflected senators' concerns about the constitutionality of allowing a majority to amend the Senate rules. Proponents of such a change maintained that a majority was constitutionally entitled to change the rules as it saw fit and that, any rule or practice depriving of them of the opportunity, was unconstitutional. They argued that any requirement that rules could be amended only by a supermajority of the Senate deprived the current members of the Senate the power to change their own rules. They viewed that adherence to the rules of the Senate entrenched the preferences of a prior generation, which was no longer living or in power.

The fact that the actual agreement was modest in scope was not a victory for gridlock. Achieving any kind of solution, however incremental, was no small feat given the intensity (and complexity) of the issues involved. It was not insignificant because, at the very least, it underscores the nature of our legislative process. The Constitution does not establish a parliamentary system at the federal level. Under such a system, voters expect—and the system allows for—the legislative body to implement their preferred legislative priorities. The legislative process set forth in the Constitution was not designed to be efficient or effective. The failure of a legislative initiative, or gridlock, is always more likely in our legislative process than its approval or passage. Hence, it should not be terribly surprising when incremental change, even in the Senate rules, fails. It is more telling when senators choose to follow their own rules and only to change them in accordance with the procedures for amendment that they provide. In spite of our recent gridlock, it is not insig-

nificant that senators have actually amended, or approved reforms to, the filibuster on several occasions throughout our history. A gang of fourteen senators in 2005 averted the so-called “nuclear option” by forging an agreement on the extraordinary circumstances in which they would allow filibusters of judicial nominations.<sup>35</sup> These kinds of agreements are not unusual, even in the present era of bitter partisanship. To agree to incremental change is a defeat for gridlock; it demonstrates the extent to which senators can reach imperfect but still positive solutions to difficult procedural questions. In this instance, the solution preserved the rules and underscored the extent to which comity within the Senate is a significant feature of the institution but allowed for a change that decreased the likelihood of gridlock over legislation in the 113th Congress.

### III. FURTHER FIXING GRIDLOCK

In this Part, I suggest two possible reforms to reduce some of the more frustrating gridlock that occurred in the 112th Congress, particularly the obstruction and inordinate delays of judicial nominations. Neither is meant to minimize the incremental steps taken in the 113th Congress to reform the filibuster and to enact legislation addressing the debt ceiling. Nonetheless, one significant, long overdue reform is to reduce the opportunities to use the filibuster to obstruct floor votes on a wide range of legislative issues. The most meaningful reform of the filibuster is to require what is called “the talking filibuster.”<sup>36</sup> The present scheme dates back to 1975 when Senate Majority Leader Mike Mansfield created the two-track system in which he could remove from floor consideration any item of business on which one or more senators have threatened to filibuster.<sup>37</sup> This scheme has allowed business to be delayed without any debate. Instead, senators should be required what they were obliged to do prior to 1975—namely, to be forced openly to defend their obstruction and preferences for delay in front of the galleries, the media, and the American people.<sup>38</sup>

The advantages of this reform should be obvious. At the very least, it requires senators to engage in a public opposition of the business they wish to filibuster. In doing so, they can be held more easily politically accountable for their obstruction. Moreover, holding the floor requires that they be able

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35 See Michael Gerhardt & Richard Painter, “Extraordinary Circumstances”: *The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*, 46 U. RICH. L. REV. 969, 974 (2012).

36 Dylan Matthews, *Sen. Jeff Merkley’s Talking Filibuster: How it Would Work*, WASH. POST (Dec. 13, 2012, 12:47 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/13/sen-jeff-merkleys-talking-filibuster-how-it-would-work/>.

37 Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 200–02 (1997) (discussing the Stealth Filibuster from 1970 to the 1990’s).

38 See generally MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 120–23 (2008) (discussing majority rule in the Senate).

to maintain the support of at least a significant minority within the Senate.<sup>39</sup> In the absence of this support, they would have to relinquish the floor, and the obstructed item(s) would be allowed to come before the full Senate for a vote.<sup>40</sup>

The second reform is to do away with partisan gerrymandering. For over a decade, the Supreme Court has avoided deciding whether partisan gerrymandering poses a non-justiciable question.<sup>41</sup> The difficulty is that partisan gerrymandering allows one party to redraw district-voting lines within a State to protect its incumbents and aggrandize itself at the expense of the other. Some recent data suggests that such gerrymandering allows one party to maintain power even when statewide it might be losing in other elections.<sup>42</sup> One is hard pressed to explain why the Constitution protects such ploys. Moreover, partisan gerrymandering is not protected by the First Amendment, which cannot be used to privilege one party's expression over that of another.<sup>43</sup> The point of partisan gerrymandering is to privilege the political power (or voice) of one political party over another, which seems to conflict directly with the guarantee of the First Amendment to ensure that government does not silence or dilute the expression of a political point of view. To the contrary, partisan gerrymandering is the process by which one party seeks to diminish or even silence the political speech of its competitor. Just as judicial review is available to assess the constitutionality of racial gerrymandering,<sup>44</sup> it should prevent one faction, particularly one defined by its exercise of First Amendment rights, from dominating another, which is defined by similar means.

Making it much more difficult to effectuate partisan gerrymandering should serve the same ends as the Supreme Court's restrictions of racial gerrymandering. The latter only passes muster if it satisfies strict scrutiny.<sup>45</sup> Otherwise, it likely risks being based on stereotypes or overgeneralizations. On my view, partisan gerrymandering should not be treated any differently. It too should be subject to strict scrutiny based as it is on the exercise of First

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39 See Fisk & Chemerinsky, *supra* note 37, at 240 (noting that the law requires a sixty percent supermajority in the event of a filibuster).

40 See Matthews, *supra* note 36.

41 See *Davis v. Bandemer*, 478 U.S. 109, 138 (1986) (plurality opinion).

42 See Sam Wang, Op-Ed, *The Great Gerrymander of 2012*, N.Y. TIMES, February 2, 2013, [http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html?pagewanted=all&_r=0) ("To see how the [gerrymandering] works, start with the naïve standard that the party that wins more than half the votes should get at least half the seats. In November, five states failed to clear even this low bar: Arizona, Michigan, North Carolina, Pennsylvania and Wisconsin.")

43 See U.S. CONST. amend. I.

44 See, e.g., *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (examining whether the State engaged in unconstitutional political gerrymandering).

45 See Jeffrey G. Hamilton, *Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L.J. 1519, 1538 (1994) (arguing that the Supreme Court should hold racial and political gerrymandering per se unconstitutional under the Equal Protection clause of the Fourteenth Amendment).

Amendment expression.<sup>46</sup> Partisan gerrymandering should be barred in order to ensure state legislatures ground their line drawing of congressional districts on permissible, rather than constitutionally impermissible, bases.

#### CONCLUSION

Grappling with gridlock requires understanding both its benefits and costs. On the positive side, it can ensure the maintenance of the status quo and protect minorities (and many other citizens) from regulation generally and particularly over-regulation, including the costs (or burdens) of implementing or complying with new laws. But, its costs include inhibiting or impeding progress, allowing entrenched interests to maintain their privileged status, and permitting some injustice or inequity to persist.

Moreover, grappling with gridlock requires adjusting perspective. Understanding gridlock requires placing it in perspective. Broadening perspective allows us to appreciate that gridlock has often gripped our political system but it has rarely done so permanently. The history books are replete with instances in which, in one area or another, Congress—or other actors in our constitutional system—may have been gridlocked for a time, perhaps even a long time, in a particular area or on a particular matter, but the gridlock was not permanent.

Indeed, for those who have lost heart over constitutional gridlock, I suggest that the publication of our program at the *Notre Dame Law Review* is not insignificant. I say take heart from the ongoing vitality of the University of Notre Dame as an institution and its embrace of Catholicity. In a world that most of us at one time or another in recent times has said has lost its way, I suggest that gridlock is almost certainly a temporary condition. If you take a broader perspective, you will not only see that gridlock is not a permanent feature of the human condition or the American dream. More than a century ago, no one would have believed there could be an African-American president, and Catholic bias and anti-Semitism were rampant. Yet, today if you take the long view, you can take heart from the fact that less than two weeks ago we re-elected the nation's first African-American president, and there are six Catholics and three Jews who sit on the nation's highest Court. No one would have believed that was possible more than a century ago. More than a century ago, we would have been mired in the gridlock of prejudice. But, in time, the gridlock eroded, and in its place we achieved something we all call progress.

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46 See *supra* note 43 and accompanying text.