# The Supreme Court Meets a Gridlocked Congress

*By Michael Ellement*

ABSTRACT

*Congress is at a standstill—increasingly unable to agree on, or even debate, new legislation widely supported by the American public. This Essay explores congressional gridlock and its effect on the Supreme Court. It reviews recent decisions involving federal legislation, as well as statements by the Justices on congressional inaction. The Essay concludes that Congress's intransigence presents serious separation of powers concerns. Namely, an ineffectual Congress may lead to the Supreme Court accounting for congressional ineffectiveness in its decisions. This takes the Court beyond its judicial function, and encroaches on legislative authority.*

## INTRODUCTION

During oral argument in *King v. Burwell*,[1] Solicitor General Donald Verrilli cautioned the Court that striking down the Administration's interpretation of the Affordable Care Act's ("ACA") subsidy provision would cause immediate harmful consequences—leading to millions losing health insurance coverage.[2] Justice Scalia was skeptical. He responded that if the Court's decision would lead to such a calamitous result, Congress could surely react to prevent it.[3] He asked Verrilli: "You really think Congress is just going to sit there . . . while all of these disastrous consequences ensue?"[4] The Justice noted that this was not the first time the Court had found a statutory interpretation invalid: "Congress adjusts, enacts a statute . . . that takes care of the problem. It happens all the time. Why is that not going to happen here?"[5] Verrilli responded rhetorically, "Well, *this Congress*, Your Honor . . . ?"[6] The gallery laughed.[7] He followed up, "Of course, theoretically they could."[8] Justice Scalia was not

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1 King v. Burwell, 135 S. Ct. 475 (2014).

2 *See* Transcript of Oral Argument at 44–45, King v. Burwell, 135 S. Ct. 475 (2014) (No. 14-114).

3 *Id.* at 54–55.

4 *Id.* at 54.

5 *Id.*

6 *Id.* (emphasis added).

7 *Id.*

8 *Id.*

amused: "I don't care what Congress you're talking about. If the consequences are as disastrous as you say, so many million people . . . without insurance and what not, yes, I think this Congress would act."[9] Verrilli pivoted, and moved to another issue.[10]

Although Verrilli's comment seemed spontaneous and unrehearsed, he was not off base. The 112th and 113th Congresses were two of the most ineffective in history.[11] The current 114th Congress has improved marginally but still lags behind historic rates and seems similarly unable to reach legislative compromises.[12] Accordingly, Verrilli's concern that Congress would be unable to react to a Supreme Court decision seems largely justified.

Justice Scalia was also right as a historic matter. In other eras Congress has been able to cure defects in legislation following a decision—avoiding harsh consequences resulting from the Court's ruling.[13] But the modern Congress appears uniquely ineffective—not only unable to reach any substantive agreements, but even failing to pass legislation when there is little partisan disagreement.[14]

The current state of congressional gridlock raises important policy questions as well as separation of powers concerns. As the exchange between Scalia and Verrilli suggests, Congress's inability to respond to Supreme Court decisions raises the specter that the Supreme Court might decide cases differently than it otherwise would in an effort to avoid incurable consequences resulting from the Court's decision. On the other hand, if the Court ignores congressional gridlock it may strike down a

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9 *Id.* at 54–55.

10 *See id.* at 55.

11 Morgan Little, *Congress Set to Pass Historically Few Laws in 2013*, L.A. TIMES (Dec. 11, 2013), http://articles.latimes.com/2013/dec/11/news/la-pn-congress-few-laws-2013-20131211; Amanda Terkey, *112th Congress Set to Become Most Unproductive Since 1940s*, HUFFINGTON POST (Dec. 28, 2012), http://www.huffingtonpost.com/2012/12/28/congress-unproductive_n_2371387.html.

12 *See* Philip Bump, *The 114th Congress Had a Pretty Productive Year (by Recent Standards, at Least)*, WASH. POST (Dec. 24, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/12/24/the-114th-congress-had-a-pretty-productive-year-by-recent-standards-at-least/.

13 *See generally* Neal Devins, *Congressional Responses to Judicial Decisions*, *in* ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 400 (Mark Graber et al. eds., 2008), http://scholarship.law.wm.edu/facpubs/1633/.

14 To cite one recent example, Congress allowed a health benefits bill for September 11th first responders to expire—not because of substantive disagreement on coverage, but mere intransigence. *See* Carolyn Maloney, *Zadroga Act Expires: Congressional Action Urgently Needed*, HILL (Sept. 30, 2015, 11:00 AM), http://thehill.com/blogs/congress-blog/255389-zadroga-act-expires-congressional-action-urgently-needed.

statute in a fashion that creates draconian results without a potential remedy. These concerns are exacerbated by the fact that the Roberts Court has faced, and will likely continue to face, numerous important challenges to congressional enactments effecting large numbers of Americans.

Chief Justice Roberts has touched on congressional gridlock and its potential to effect the Court's work. Asked in 2014 what challenges he saw facing the judiciary, Roberts said one problem

> causing a lot of concern . . . has to do with the other branches of government. They are not getting along very well these days among themselves. It's a period of real partisan rancor that I think impedes their ability to carry out their functions, and I don't want it to spill over and affect us.[15]

Chief Justice Roberts's comments foreshadowed the current controversy over filling Justice Scalia's seat on the Court. Congress's refusal to even consider a nominee submitted by President Obama is emblematic of the current state of congressional gridlock and has directly impacted the Court by leading to several equally divided decisions at the end of the 2015–16 Term.[16]

This Essay discusses the Roberts Court in the current age of congressional gridlock. It examines relevant opinions by the Court and comments by the Justices in an attempt to better understand how the Court views its own role during a time of congressional inaction.

## I. THE ROBERTS COURT'S JUDGMENTS AND POLITICAL RESPONSES

The Roberts Court has faced a unique series of highly politically charged challenges to congressional legislation and executive action. In many cases where the Roberts Court has struck down portions of a statute, Congress has failed to react and remedy curable statutory deficiencies—even when the Court has specifically invited Congress to act and where broad public support for a legislative remedy exists.

### *A.* Citizens United v. Federal Election Commission

Much of the Roberts Court has been defined by its decision in *Citizens United v. Federal Election Commission*.[17] There the Court struck down a

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[15] Adam J. White, *Judging Roberts: The Chief Justice of the United States, Ten Years In*, WKLY. STANDARD (Nov. 23, 2015), http://www.weeklystandard.com/articles/judging-roberts_1063131 html?page=3.

[16] *See* Lissandra Villa, *Antonin Scalia's Absence Felt as Court Ends Term*, TIME (June 27, 2016), http://time.com/4384855/antonin-scalia-supreme-court/.

[17] Citizens United v. FEC, 558 U.S. 310 (2010).

central piece of the Bipartisan Campaign Reform Act of 2002, also known as the McCain-Feingold Act.[18] The Act was passed to curb the influence of money in politics.[19] It instituted a series of restrictions and regulations aimed at restricting certain political advertisements and limiting donations to candidates and committees.[20] The bill originally attracted criticism from Republicans,[21] but it passed with bipartisan support and was signed into law by President George W. Bush.[22]

In *Citizens United*, the Court held unconstitutional a portion of McCain-Feingold that prohibited electioneering communication (most commonly TV ads) within a certain time period before an election.[23] The decision, combined with a later ruling from the Court of Appeals for the D.C. Circuit,[24] paved the way for a new influx of money in politics—namely through new sophisticated political messaging platforms called Super PACs.[25] Widespread criticism followed the decision. President Obama chastised the Court at his State of the Union speech.[26] Others followed, publically calling for a change in campaign finance law in the wake of the decision.[27]

Despite the bipartisanship that led to the passage of McCain-Feingold and broad public support for new legislation, Congress seemed unable to react to *Citizens United*. The DISCLOSE Act[28]—a modest proposal to add a level of transparency to political donations—failed a cloture vote in 2010.[29] No comparable bill has made it to the floor of either chamber in

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18 *Id.* at 365–66.

19 *See Major Provisions of the Bipartisan Campaign Reform Act of 2002*, FED. ELECTION COMM'N, http://www fec.gov/press/bkgnd/bcra_overview.shtml [https://perma.cc/RCG5-4VYG] (last visited July 26, 2016).

20 *See id.*

21 *See* Seth Gitell, *Making Sense of McCain-Feingold and Campaign-Finance Reform*, ATLANTIC (July 2003), http://www.theatlantic.com/magazine/archive/2003/07/making-sense-of-mccain-feingold-and-campaign-finance-reform/302758/.

22 *See* Presidential Statement on Signing the Bipartisan Campaign Reform Act of 2002, 1 PUB. PAPERS 503–04 (Mar. 27, 2002).

23 Citizens United v. FEC, 558 U.S. 310, 365 (2010).

24 *See* SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).

25 John Dunbar, *The 'Citizens United' Decision and Why It Matters*, CTR. FOR PUB. INTEGRITY (Mar. 14, 2016, 10:31 AM), http://www.publicintegrity.org/2012/10/18/11527/citizens-united-decision-and-why-it-matters.

26 Alan Silverleib, *The Gloves Come Off After Obama Rips Supreme Court Ruling*, CNN (Jan. 28, 2010, 1:26 PM), http://www.cnn.com/2010/POLITICS/01/28/alito.obama.sotu/.

27 *See* David D. Kirkpatrick, *Lobbyists Get Potent Weapon in Campaign Ruling*, N.Y. TIMES (Jan. 21, 2010), http://www nytimes.com/2010/01/22/us/politics/22donate html.

28 S. 3295, 111th Cong. (2010).

29 Dan Eggen, *Bill on Political Ad Disclosures Falls a Little Short in Senate*, WASH.

the years since. As of this writing, campaign finance regulation continues to maintain widespread support by many Americans[30]—yet Congress seems unlikely to act.

*B.* Shelby County v. Holder

In *Shelby County v. Holder*,[31] the Supreme Court reviewed a challenge to the Voting Rights Act's ("VRA")[32] preclearance review process.[33] Preclearance requires any jurisdiction covered by the requirement to submit for review changes to its election procedure to either the United States Department of Justice or the United States District Court for the District of Columbia.[34] The review procedure has been instrumental in removing limitations on minority voting rights, particularly in the South.[35] Although preclearance review was originally a temporary provision of the VRA, set to expire a few years after its adoption, Congress reauthorized preclearance several times in the following decades.[36] Most recently, Congress overwhelmingly reauthorized the preclearance requirement in 2006 by a vote of 390-33 in the House[37] and 98-0 in the Senate.[38]

At oral argument in *Shelby County*, Justice Scalia—as he would later do at argument in *King*—raised the issue of congressional effectiveness.[39] This time, though, he was not questioning whether Congress could react to the Court's eventual decision but instead suggested that the Court should save Congress from itself. Justice Scalia hypothesized that the near unanimous support in Congress for VRA reauthorization could be explained by "a phenomenon that is called perpetuation of racial entitlement."[40] According to the Justice, "[w]henever a society adopts

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POST (July 28, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/27/AR2010072704656.html.

30 Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERG (Sept. 28, 2015, 5:00 AM), http://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot.

31 Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).

32 Voting Rights Act, 52 U.S.C. §§ 10303–04 (2012) (transferred from 42 U.S.C.A. §§ 1973(b)–(c) through editorial reclassification and renumbering).

33 *Shelby Cty.*, 133 S. Ct. at 2613.

34 *Id.* at 2634 (Ginsburg, J., dissenting).

35 *See id.*

36 *See id.* at 2620 (majority opinion).

37 H.R. 9, 109th Cong. (2006).

38 S. 2703, 109th Cong. (2006).

39 Transcript of Oral Argument at 47, Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).

40 *Id.*

racial entitlements, it is very difficult to get out of them through the normal political processes."[41] For this reason, Justice Scalia placed little weight on the high majority voting for reauthorization.[42] Instead, Justice Scalia found the congressional representatives powerless, remarking: "I don't think there is anything to be gained by any Senator to vote against continuation of this act. And I am fairly confident it will be reenacted in perpetuity [] unless a court can say it does not comport with the Constitution."[43] He went on to describe the question before the Court as "not the kind of a question you can leave to Congress" and commented that some legislators "have no interest in voting against this . . . they are going to lose votes if they do not reenact the Voting Rights Act. Even the name of it is wonderful: The Voting Rights Act. Who is going to vote against that in the future?"[44] In sum, Justice Scalia was positing that Congress's ordinary deliberative process had broken down and the Court had a responsibility to reset the debate.

Following argument, the Court issued an opinion that effectively put the issue back with Congress. Rather than strike down the preclearance requirement as violating the Constitution (as litigants and amici had argued), the Court found the coverage formula used to determine which states were subject to preclearance was unlawful because it relied on outdated data.[45] However, the Court noted: "Congress may draft another formula based on current conditions."[46]

Legislation responding to *Shelby County* was doomed to fail. Despite wide support in 2006 for reauthorization,[47] by 2013 Congress was bitterly divided and had no political appetite to consider any changes to the VRA.[48] Even some who had fought to enact the original VRA during the tumultuous struggle for civil rights in the 1960s believed Congress would not act. Congressman John Lewis, whose Selma campaign led to the adoption of the VRA, remarked shortly after the *Shelby County* decision: "In 2006 we had the ability and capacity to come together in a bipartisan

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41 *Id.*

42 *See id.*

43 *Id.*

44 *Id.* at 47–48.

45 Shelby Cty. v. Holder, 133 S. Ct. 2612, 2629 (2013).

46 *Id.* at 2631.

47 *See supra* text accompanying notes 37–38.

48 *See* Jaime Fuller, *Republicans Used to Unanimously Back the Voting Rights Act. Not Any More*, WASH. POST (June 26, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/06/26/republicans-used-to-unanimously-back-voting-rights-act-not-any-more/ (detailing congressional resistance to amending the Voting Rights Act following the *Shelby County* decision).

fashion to renew the [VRA]. I'm not so sure whether we have the will to do what we must do and should do."[49] Times had changed, and the current era of congressional gridlock was in full effect.

### *C.* National Federation of Independent Business v. Sebelius

In 2012, congressional politics again made an appearance in one of the Court's decisions. In *National Federation of Independent Business v. Sebelius*,[50] the Supreme Court considered the first series of challenges to the ACA. Although most attention surrounding the case has revolved around the controversial individual mandate,[51] this Essay will instead concentrate on the Court's holding that the ACA's Medicaid expansion was unconstitutional.

As enacted, the ACA required states to expand their Medicaid program or risk losing all federal Medicaid funds.[52] The Court struck down this provision as violating the noncoercion principle of the Taxing and Spending Clause.[53] This principle had never before been used by the Court to strike down a federal statute.[54] Nonetheless, the Court applied the doctrine and found the Medicaid expansion unconstitutional, holding that requiring states to expand coverage or risk losing existing funding was unduly coercive.[55]

The Court was careful to note that it was striking down the law only because of the structure of the expansion.[56] Specifically, the Court's concern was that the expansion would mean states would lose funding they had been receiving for decades if they did not comply.[57] The Court found this presented the states with a Hobson choice: expand Medicaid or lose funding they had been relying on.[58]

The Court did not find unconstitutional Congress's ability to tie

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49 Jeff Zeleny, *John Lewis: Court's Decision Puts 'Dagger in Heart of Voting Rights Act*, ABC NEWS (June 25, 2013, 12:16 PM), http://abcnews.go.com/blogs/politics/2013/06/courts-decision-puts-dagger-in-heart-of-voting-rights-act/.

50 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

51 *See, e.g.*, Mark A. Hall*, Constitutional Mortality: Precedential Effects of Striking the Individual Mandate*, 75 LAW & CONTEMP. PROBS. 107 (2012); Adam Liptak*, Supreme Court Upholds Health Care Law, 5–4, in Victory for Obama*, N.Y. TIMES (June 28, 2012), http://www nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html.

52 *Sebelius*, 132 S. Ct. at 2582.

53 *Id.* at 2608.

54 *Id.* at 2634 (Ginsburg, J., dissenting).

55 *Id.* at 2607 (majority opinion).

56 *Id.* at 2607–08.

57 *Id.*

58 *Id.* at 2608.

Medicaid federal funds to state action in general.[59] In fact, the Court noted that Congress could essentially create the same Medicaid structure in the ACA, so long as it did not tie state compliance to existing funds[60]—meaning Congress could repeal the existing Medicaid funding statute and replace it with a new statute requiring state coverage in exchange for federal funds. As the Court put it,

> [n]othing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.[61]

Justice Ginsburg, in dissent, responded to the suggestion that Congress was still free to remedy the constitutional defect by stating: "A ritualistic requirement that Congress repeal and reenact spending legislation in order to enlarge the population served by a federally funded program would advance no constitutional principle and would scarcely serve the interests of federalism."[62] Chief Justice Roberts retorted in a footnote, noting "it would certainly not be that easy. Practical constraints would plainly inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for political reconsideration. Such a massive undertaking would hardly be 'ritualistic.'"[63] Indeed, the Chief Justice was right—Congress did not seriously consider any action to restore the mandatory Medicaid expansion post-*Sebelius*.[64]

## II. VIEWS ON GRIDLOCK

Recall now the terse exchange between Verrilli and Scalia at oral argument in *King*.[65] Given Congress's continued inaction in response to the decisions in *Citizens United*, *Shelby County*, and *Sebelius*, it is unsurprising that General Verrilli remained skeptical at Justice Scalia's suggestion that Congress could quickly react to the Court eliminating the

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59 *See id.*

60 *Id.*

61 *Id.* at 2607.

62 *Id.* at 2629 (Ginsburg, J., dissenting).

63 *Id.* at 2606 n.14 (majority opinion) (internal citations omitted).

64 *See generally* C. STEPHEN REDHEAD & JANET KINZER, CONG. RESEARCH SERV., R43289, LEGISLATIVE ACTIONS TO REPEAL, DEFUND, OR DELAY THE AFFORDABLE CARE ACT (2016) (providing an overview of legislation relating to the ACA that has been proposed).

65 *See supra* text accompanying notes 1–10.

ACA's subsidies in federal exchanges. Indeed, given the number of people that would lose health insurance if the Court ruled for the challengers,[66] General Verrilli's comments signaled that the Court should consider, prior to ruling in the case, the unlikelihood that Congress would respond.

### *A. Justice Scalia's Gridlock View of the Constitution*

Prior to his death, Justice Scalia would have been the least likely member of the Court to find congressional standstill a reason for upholding a statute. Justice Scalia had even spoken *in favor* of gridlock. He viewed it as a means for effectuating incremental change—a way to temper reactionary legislation. Addressing the Senate Judiciary Committee in 2011, the late Justice remarked, "I hear Americans . . . nowadays . . . talk about dysfunctional government because there is disagreement," but they should instead "learn to love the separation of powers, which means learning to love gridlock, that . . . [t]he framers believed that would be the main protection of minorities."[67]

Given this view of the Constitution, Justice Scalia's comments at argument in *Shelby County* and *King* are unsurprising. In *Shelby County*, Justice Scalia was bothered by what he saw as legislative acquiescence without substantive deliberation.[68] For this reason, he criticized the wide consensus on the final vote.[69] This is the essence of his pro-gridlock view of the Constitution, which prioritizes incremental change and disagreement over broad consensus. In *King*, the Justice was unsympathetic to General Verrilli's concerns for similar reasons.[70] Justice Scalia believed in the structure of the Constitution and its division of powers. If Congress truly needed to act, it would. If, however, gridlock prevailed and no legislation resulted, that itself was a sign of the system working and an indication that legislation was unnecessary.

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66 *See* Matthew Bloch et al., *The Health Care Supreme Court Case: Who Would Be Affected?*, N.Y. TIMES (June 22, 2015), http://www.nytimes.com/interactive/2015/03/03/us/potential-impact-of-the-supreme-courts-decision-on-health-care-subsidies html?_r=0 ("If the court rules against the Obama administration in the *King v. Burwell* case, about 6.4 million people could lose their subsidies in 34 states that use the federal health care marketplace.").

67 *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Antonin Scalia, Associate Justice, U.S. Supreme Court).

68 *See supra* text accompanying notes 39–44.

69 *See supra* text accompanying notes 39–44.

70 *See supra* text accompanying notes 3–5, 9.

### *B. Justice Kennedy's Response*

Just weeks after General Verrilli's comments at oral argument in *King*, Justice Kennedy offered a somewhat different response. Testifying before Congress, Kennedy remarked:

> We routinely decide cases involving federal statutes and we say, "Well, if this is wrong, the Congress will fix it." But then we hear that Congress can't pass a bill one way or the other. That there is gridlock. And some people say that should affect the way we interpret the statutes . . . . That seems to me a wrong proposition. We have to assume that we have three fully functioning branches of the government, that are committed to proceed in good faith and with good will toward one another to resolve the problems of this republic.[71]

Some speculated these comments were a direct response to the exchange at oral argument in *King*.[72]

Kennedy's own time on the Court likely colored his response. Kennedy had seen Congress respond to various Court decisions with legislation. In 2006 when Congress reauthorized the VRA (in the same bill referenced above), Congress specifically included language overruling two Supreme Court decisions.[73] Similarly, Congress passed an updated version of the Gun-Free School Zones Act[74] after the Court struck down provisions of the Act in *United States v. Lopez*.[75] Further, after the Court held that the First Amendment did not exempt religious adherents from generally applicable laws in *Employment Division v. Smith*,[76] Congress acted quickly to overturn the Court—enacting the Religious Freedom and Restoration

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[71] *Budget Hearing – The Supreme Court of the United States: Hearing Before the H. Subcomm. on Fin. Servs. & Gen. Gov't of the H. Comm. on Appropriations*, 114th Cong. (2015) (statement of Anthony Kennedy, Associate Justice, U.S. Supreme Court).

[72] *See, e.g.*, Michael Dorf, *Gridlock and Purposivism in Statutory Interpretation*, DORF ON L. (Mar. 27, 2015, 7:00 AM), http://www.dorfonlaw.org/2015/03/gridlock-and-purposivism-in-statutory html.

[73] H.R. REP. NO. 109-478, at 65 (2006) (explaining that Congress had not intended the burden of proof to be construed in the manner announced by the Supreme Court's decisions in *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) and *Georgia v. Ashcroft*, 539 U.S. 461 (2003)).

[74] Gun-Free School Zones Act, 18 U.S.C. §§ 921–922 (2012).

[75] United States v. Lopez, 514 U.S. 549, 567–68 (1995). *See* Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 101(f), 110 Stat. 3009, 3009–369–71 (1996); Seth J. Safra, *The Amended Gun-Free School Zones Act: Doubt as to Its Constitutionality Remains*, 50 DUKE L.J. 637, 638 (2000).

[76] Emp't Div. v. Smith, 494 U.S. 872, 878–79 (1990).

Act.[77]

Congress, the Bush Administration, and the Court additionally traded views in a series of cases centering on the indefinite detention of suspected terrorists at Guantanamo Bay, Cuba. After the Court found habeas protections extended to the prisoners in *Rasul v. Bush*,[78] Congress passed the Detainee Treatment Act of 2005[79] to establish military commissions to try the detainees. The Court found that the tribunals violated the Uniform Code of Military Justice and the Geneva Convention in *Hamdan v. Rumsfeld*.[80] Congress then passed the Military Commissions Act of 2006,[81] again attempting to eliminate court jurisdiction over the detainees. In *Boumediene v. Bush*,[82] the Court held this attempt unlawful, and found that constitutional habeas protections extended to the detainees.[83]

More recently, the first bill President Obama signed into law was the Lilly Ledbetter Fair Pay Restoration Act[84]—overruling a Court decision from two years earlier interpreting the statute of limitations in pay discrimination suits.[85]

Given this history, Justice Kennedy's comments seem reasonable—Congress would act if necessary. If Congress did not act, it was not the Court's prerogative to save it.

## III. THE COURT IN AN ERA OF GRIDLOCK

Ultimately in *King*, the Court upheld the Administration's interpretation of the ACA, leaving the federal subsidies in place.[86] There is no way to tell if General Verrilli's suggestion that harsh consequences could arise and Congress would be unable to react had any effect on the Court's decision. The opinion, written by Chief Justice Roberts, makes no

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77 Religious Freedom and Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb (2012)); *see also* Holt v. Hobbs, 135 S. Ct. 853, 859–60 (2015) ("Following our decision in *Smith*, Congress enacted RFRA in order to provide greater protection for religious exercise than is available under the First Amendment."). Kennedy would later write an opinion striking down portions of RFRA as it applied to state laws. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

78 Rasul v. Bush, 542 U.S. 466, 484 (2004).

79 Detainee Treatment Act of 2005, Pub. L. No. 109–148, § 1005, 119 Stat. 2739, 2740–41.

80 Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006).

81 Military Commissions Act of 2006, Pub. L. No. 109-366, § 948d, 120 Stat. 2600, 2603.

82 Boumediene v. Bush, 553 U.S. 723 (2008).

83 *Id.* at 771.

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

85 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

86 *See* King v. Burwell, 135 S. Ct. 2480, 2496 (2015).

mention of what the removal of subsidies would mean.[87] Conservatives were, however, quick to suggest Chief Justice Roberts had political motives behind his vote.[88] Roberts was also the author of *Sebelius*, meaning he twice upheld the controversial healthcare law, President Obama's signature political achievement.[89]

The statements by Verrilli, Scalia, and Kennedy reveal three distinct ways for the Court to react to congressional gridlock. Consistent with General Verrilli's concerns at argument,[90] the Court may account for the gridlock by being less likely to strike down legislation or executive interpretation where the decision's consequences would be disastrous and Congress would be unable to react. On the other end of the spectrum, the Court might endorse gridlock as a means to effectuate incremental change, and may therefore be more skeptical of legislation that has passed with near unanimous consensus, as Justice Scalia has suggested.[91] Or the Court might ignore the present politics of Congress altogether, and assume Congress is acting efficiently, as Justice Kennedy articulated.[92]

None of these views are satisfying. The Court is ill equipped to account for external factors like congressional gridlock before making a decision. Such considerations are not within the judicial prerogative. The Court's role is to "say what the law is,"[93] not uphold unlawful regulations out of a concern that the political branches will be unable to react.

A pro-gridlock judicial philosophy is also problematic. It likewise can lead the Court to decide cases based on political factors external to the case itself, as Justice Scalia's comments at argument in *Shelby County* suggest.[94] Further, while gridlock may be useful for implementing conscientious change, it can harm those individuals in need of congressional intervention—namely, those already relying on the benefits of the federal statute under consideration by the Court.

Ignoring gridlock is attractive because it keeps the Court in its proper sphere—deciding judicial cases rather than considering politics. But judges are often anxious about the real life consequences of their decisions.

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87 *See id.*

88 *See* Sarah Ferris, *Roberts Draws Wrath of Right in Saving ObamaCare a Second Time*, HILL (June 25, 2015, 6:27 PM), http://thehill.com/policy/healthcare/246219-roberts-draws-wrath-of-right-in-saving-obamacare-a-second-time.

89 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012).

90 *See supra* text accompanying note 6.

91 *See supra* Section II.A.

92 *See supra* Section II.B.

93 Marbury v. Madison, 5 U.S. 137, 177 (1803).

94 *See supra* text accompanying notes 39–44.

If a decision is likely to harm large numbers of people unless Congress acts, it seems probable that judges will consider the likelihood of a congressional response. Relatedly, while the Court may outwardly claim to ignore the consequences of its decisions—and thus profess the judicial virtues of objectivity and restraint—it will always be impossible to tell if the likely results of a ruling were considered.

Beyond methodological questions, the current state of congressional gridlock raises important separation of powers concerns. The Constitution envisions three separate branches providing checks on the power of the co-ordinate branches. If one branch is not functioning at full capacity, it fails to fulfill its constitutional role. Moreover, where one branch refuses to exercise its constitutional authority, the void might be improperly filled by another branch. This risks increasing the power of one branch beyond its constitutionally allocated authority.

Considering the existing circumstance, a dysfunctional Congress may lead to a more influential Court—one capable of making decisions altering policy choices made by the political branches without challenge. Further, the Court may avoid difficult constitutional questions while reaching a desired result by narrowly striking down statutes and suggesting a legislative remedy, knowing Congress is unlikely to react.

This Essay's aim is not to suggest that the Court has acted nefariously. Rather, its goal is to demonstrate that a dysfunctional Congress has consequences beyond gridlocked government. It directly harms our constitutional structure by failing to effectuate the system of checks and balances envisioned in the Constitution.

## CONCLUSION

The Roberts Court will surely be confronted with challenges to legislation and executive action in the years to come. For example, new challenges to the ACA are consistently being brought to the courts.[95] The political branches, for their part, remain divided and seem likely to remain so at least for the coming years. This dysfunction has begun directly affecting the Court's work, as Congress's unwillingness to consider President Obama's nominee to replace Justice Scalia has left the Court with

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[95] *See, e.g.*, Zubik v. Burwell, No. 14-1418, slip op. (U.S. May 16, 2016); David Blumenthal & Sara R. Collins, *Obamacare Cost-Sharing Provisions and the Stakes in* House v. Burwell, WALL ST. J. (Mar. 17, 2016, 2:06 PM), http://blogs.wsj.com/washwire/2016/03/17/obamacare-cost-sharing-provisions-and-the-stakes-in-house-v-burwell/; Greg Stohr, Supreme Court Declines Another Challenge to Affordable Care Act, Insurance Journal (Jan. 20, 2016), http://www.insurancejournal.com/news/national/2016/01/20/395654 htm.

only eight members—causing the Court to deadlock in controversial cases.[96]

This confluence of politically charged cases and a dysfunctional Congress means the relationship between the Court and Congress will be tested in the coming years. The Court will be tasked with fulfilling its judicial role while navigating the difficult separation of powers questions it confronts. How it resolves these difficulties will be an important factor in assessing the Court's work in years to come.

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[96] *See, e.g.*, United States v. Texas, No. 15-674, slip op. (U.S. June 23, 2016) (affirming lower court decision due to an equally divided Supreme Court).