

3-2023

Justice Delayed: Government Officials' Authority to Wind Down Constitutional Violations

Neil H. Buchanan

University of Florida Levin College of Law, neil.h.buchanan@law.ufl.edu

Michael C. Dorf

Cornell Law School

Follow this and additional works at: <https://scholarship.law.ufl.edu/facultypub>



Part of the [Law Commons](#)

Recommended Citation

Boston University L. Rev. (Forthcoming)

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in UF Law Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

**JUSTICE DELAYED: GOVERNMENT OFFICIALS'
AUTHORITY TO WIND DOWN CONSTITUTIONAL VIOLATIONS**

Neil H. Buchanan* and Michael C. Dorf**

Forthcoming in the Boston University Law Review

* James J. Freeland Eminent Scholar Chair in Taxation and Professor of Law, University of Florida Levin College of Law.

** Robert S. Stevens Professor of Law, Cornell Law School. The authors gratefully acknowledge the excellent research assistance of Sav Evans, Cornell Law School class of 2020, and especially Steven D. Mirsen, Cornell Law School class of 2023. We received very helpful comments on earlier drafts of this Article from Jack Barceló, Mitchell Berman, Kevin Clermont, Zachary Clopton, Sherry Colb, Barry Friedman, Jean Galbraith, Maggie Gardner, Sarah Gordon, George Hay, Robert Hillman, Sheri Johnson, Mitchel Lasser, Oskar Liivak, Neysun Mahboubi, Jens Ohlin, Eduardo Peñalver, Jeffrey Rachlinski, Kermit Roosevelt, Kate Shaw, Emily Sherwin, Allan Stein, Sidney Tarrow, Gustavo Perez Tavares, Nelson Tebbe, and Christopher Yoo.

Abstract

Upon finding that a government program is unconstitutional, courts in the United States sometimes allow executive officials a grace period to wind it down rather than insisting on its immediate cessation. Courts likewise occasionally afford a legislature a grace period to repeal an unconstitutional law. Yet no one has even attempted to explain the source of authority for allowing ongoing constitutional violations or to prescribe the limits on permissible compliance delays. Until now.

Judicial toleration of a continuing constitutional violation can be conceptualized as an exercise of the equitable discretion to withhold injunctive relief, but that rationale does not justify the practice of executive officials and legislatures phasing out rather than immediately ceasing their own violations without judicial intervention. The authority for *that* practice inheres in the merely *prima facie* nature of the obligations law imposes. Where immediate compliance would risk disaster, government actors, no less than individuals, act justifiably (even if technically illegally) by decelerating gradually rather than slamming on the brakes.

Building on principles some of which are implicit in extant case law, this Article proposes three limits. First, wind-down authority exists only where immediate compliance would lead to extreme harms that clearly and overwhelmingly outweigh the harms of non-compliance; mere inconvenience or expense does not suffice. Second, the duration of any compliance delay should be specified in advance and minimized. Third, failure to wind down a violation in the prescribed time should be excused only following good-faith efforts; even then, in general at most one extension should be allowed before courts impose sanctions for non-compliance. These limits will deter the kind of recalcitrance associated with massive resistance to desegregation that the Supreme Court invited with the “all deliberate speed” formulation of *Brown v. Bd. of Educ. II*, 349 U.S. 294, 301 (1955).

The legitimacy of wind-down authority also implies power to *initiate* a constitutional violation in extraordinary circumstances. Thus, for example, should Congress fail to raise the debt ceiling before government obligations outstrip revenue, the President need not exhaust technically legal but disastrous options (such as selling national parks to real estate developers at fire sale prices) before taking unconstitutional measures (such as borrowing in excess of the debt ceiling) to mitigate the harm.

I. Introduction**II. Sources of Wind-Down Authority**

A. Distinguishing Judicial from Executive Action

B. Unavailing Sources

1. Equity's Historical Roots in the Executive Branch
2. Prosecutorial Discretion

C. Inherent Wind-Down Authority

III. The What, When, and How of Wind-down Authority

A. What is the Threshold for Winding Down Rather than Ceasing Immediately?

B. Minimizing Delay and the One-Extension Rule

C. In Cases of Chronic Delay

IV. Anticipating and Acting in Advance of a Constitutional Crisis

A. The Debt Ceiling and the Trilemma

B. The Requirement to Avoid a Trilemma: Congress and the President

C. Exhaustion Requirements in a Crisis

V. Conclusion

I. Introduction

In June 2012, the U.S. Department of Homeland Security adopted a program of Deferred Action for Childhood Arrivals (“DACA,” which soon became known as the “Dreamers” program), under which certain undocumented immigrants who had been brought to the United States as minors could obtain renewable temporary relief from deportation and potential eligibility to work in the United States legally.¹ In September 2017, the Trump administration rescinded DACA.² Meanwhile, President Trump announced that he was eager to sign legislation providing benefits similar to those in DACA,³ although his subsequent actions cast substantial doubt on the sincerity of that announcement.⁴

¹ See Memorandum of Secretary Janet Napolitano (Jun. 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

² See Letter of Attorney General Jefferson B. Sessions III (undated but issued Sep. 5, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf; Memorandum of Acting Secretary Elaine C. Duke, Dep’t of Homeland Security (Sep. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

³ In January 2018, President Trump initially stated that legislation to protect young undocumented immigrants should be a “bill of love.” Lauren Gambino, *Trump Touts ‘Bill of Love’ for Dreamers and Raises Sweeping Immigration Reform*, THE GUARDIAN (Jan. 9, 2018), <https://www.theguardian.com/us-news/2018/jan/09/trump-daca-immigration-reform-congress-dreamers>; Washington Post, *Trump Says He Wants a ‘Bill of Love’ on DACA, Border Security*, YOUTUBE (Jan. 9, 2018), <https://www.youtube.com/watch?v=JeWYPk7fBA8>.

⁴ President Trump’s statements changed in tone almost immediately after his “bill of love” remarks. On January 11, 2018, he reportedly objected to the extension of protections for those with Temporary Protected Status on the ground that he did not want people from “shithole countries” coming to the United States. On January 19, then-Senate Minority Leader Chuck Schumer believed he and President Trump had struck a deal: \$25 billion in border wall funding in exchange for providing Dreamers a path to citizenship. The same day, however, then-White House Chief of Staff John Kelly reportedly called Schumer to tell him the deal was off the table. Dara Lind, *Trump is the Obstacle to a Shutdown Deal*, VOX (Jan. 4, 2019), <https://www.vox.com/policy-and-politics/2019/1/4/18168652/shutdown-border-immigration-wall-daca>. In December 2018, President Trump again threatened a government shutdown if Congress did not pass an appropriations measure that included border wall funding. Julie Hirschfeld Davis, *Trump Threatens Shutdown in Combative Appearance with Democrats*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/politics/trump-border-wall-government-shutdown.html>. Later, amidst a government shutdown that had by that point spanned

Various plaintiffs filed multiple lawsuits seeking to enjoin the rescission of DACA. The plaintiffs acknowledged that the Trump administration had the authority to rescind DACA lawfully; however, they argued, the manner in which it actually had done so was unlawful. The Supreme Court ultimately agreed, ruling in June 2020 that DACA's rescission was arbitrary and capricious.⁵ Before the Department of Homeland Security could complete a new and improved process to rescind DACA, however, President Biden took office and on the very day of his inauguration reversed course again, reiterating and strengthening the federal government's commitment to DACA and its beneficiaries.⁶ The Dreamers received a reprieve, albeit a precarious one, because absent a statute enacted by Congress, a future administration could once again seek to rescind DACA.

We support DACA. Indeed, we go further and support legislation comprehensively overhauling U.S. law to make it much more open to legal immigration and much more humane towards undocumented immigrants. However, this is not an Article about DACA or immigration policy more broadly. Rather, we focus on an episode early in the course of the litigation against the Trump administration to introduce and illustrate a cross-cutting problem concerning the nature and scope of the government's obligation to act constitutionally.

In explaining the Trump administration's decision to rescind DACA in 2017, then-Attorney General Sessions pointed to earlier court rulings invalidating a different program of deferred action. Sessions contended that DACA had "the same legal and constitutional defects" as that other program.⁷ Thus, the

29 days, President Trump offered to extend protections for Dreamers by three years in exchange for \$5.7 billion in border wall funds, a proposal Democrats rejected on the ground that it fell far short of the "path to citizenship" that they, along with some congressional Republicans, had long supported. Steve Holland & Jan Wolfe, *Trump Proposes Wall-For-DACA in Bid to End Shutdown*, REUTERS (Jan. 19, 2019), <https://www.reuters.com/article/us-usa-shutdown-trump/trump-proposes-wall-for-daca-in-bid-to-end-shutdown-idUSKCN1PD0KF>.

⁵ See *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891 (2020).

⁶ See *Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)*, White House Memorandum for the Attorney General and Secretary of the Department of Homeland Security (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/>.

⁷ Letter of Attorney General Sessions, *supra* note 2 (citing *Texas v. United States*, 86 F. Supp. 3d 591, 669-70 (S.D. Tex.), *aff'd*, 809 F.3d 134, 171-86 (5th Cir.

administration had concluded that DACA was an unconstitutional executive exercise of legislative authority. Yet even before any lawsuits were filed challenging DACA rescission, the Trump administration itself announced that it would delay elimination of DACA. Rather than immediately ending DACA, the Attorney General called for “an orderly and efficient wind-down process.”⁸ A contemporaneous Department of Homeland Security memorandum indicated that the wind-down process would extend DACA for persons already enrolled in the program for six months.⁹ The lawsuits to block rescission beyond the wind-down period then ensued and, as we observed above, were ultimately successful.

Indeed, they were also *initially* successful. Before the issue reached the Supreme Court, three district courts enjoined DACA rescission.¹⁰ We focus our attention on the reasoning of one such court.

In his February 2018 Memorandum and Order, Judge Garaufis stated that DACA rescission was arbitrary and capricious in violation of the Administrative Procedure Act because, *inter alia*, the Trump administration’s own decision to wind down DACA over the course of six months, rather than to end it immediately, was self-contradictory. “If the DACA program was, in fact, unconstitutional,” Judge Garaufis wrote, “the court does not understand (nor have Defendants explained) why Defendants would have the authority to continue to violate the Constitution, albeit at a reduced scale and only for a limited time.”¹¹

Ironically, Judge Garaufis appears to have objected to the one aspect of the Trump/Sessions policy that was somewhat humane: the decision to wind down DACA in an orderly fashion rather than create chaos for the Dreamers then enrolled in the program by ending it immediately. We pass over that irony to pose a more fundamental question: was Judge Garaufis *correct* that the Trump administration’s decision to delay the end of DACA by six months—or, apparently, by any amount of time at all—contradicted the administration’s stated view that DACA was unconstitutional? If a government actor concludes that some course of action is

2015) (enjoining Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA)), *aff’d* by equally divided Court, 136 S. Ct. 2271 (2016).

⁸ Letter of Attorney General Sessions, *supra* note 2.

⁹ See Memorandum of Acting Secretary Duke, *supra* note 2.

¹⁰ See *NAACP v. Trump*, 298 F.Supp.3d 209, (D. D.C. 2018) (vacating DACA rescission but staying holding for 90 days); *Regents of Univ. of Calif. v. Dep’t of Homeland Sec.*, 279 F.Supp.3d 1011 (N.D. Cal. 2018) (granting preliminary injunction); *Batalla Vidal v. Nielsen*, 279 F.Supp.3d 401 (E.D.N.Y. 2018) (granting preliminary injunction).

¹¹ *Batalla Vidal*, 279 F.Supp.3d at 428.

unconstitutional (or even unlawful on sub-constitutional grounds), must that actor immediately cease the unconstitutional (or otherwise unlawful) conduct, come hell or high water?

This Article argues that the answer is no. Presidents and other government officials have some authority to temporarily act unlawfully, even unconstitutionally, in order to avoid sufficiently harmful consequences. We contend that no administration should *necessarily* be faulted for choosing to cure a constitutional defect over six months or some other reasonable period of time, rather than immediately. As serious as constitutional violations are, there will often be compelling reasons why any legal actor—a President, the courts, or a legislature—should not end them at once. To the extent that Judge Garaufis said that delays in constitutional cures are axiomatically unacceptable, therefore, he overstated his case.

That is the easy part. The hard part is specifying the details. Where does the authority to act unconstitutionally (or otherwise unlawfully) come from? What is a sufficiently harmful consequence to justify temporarily unconstitutional (or otherwise unlawful) actions? What counts as a reasonable length for a wind-down period? We answer these and other questions both by looking to norms implicit in existing practice and turning to first principles.

Start with the extant, albeit implicit, norms. The case reporters contain numerous examples of courts granting legal actors found to have acted unconstitutionally a grace period in which to transition from the unconstitutional regime to a valid one. For instance, despite finding that members of the Federal Election Commission were selected in violation of the Appointments Clause, the Supreme Court in *Buckley v. Valeo* permitted the unconstitutionally appointed Commission to continue to function for thirty days,¹² a period the Court subsequently extended for another twenty days.¹³

Likewise, upon finding that the jurisdiction of the bankruptcy courts as then configured violated Article III of the Constitution, in *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, the Supreme Court stayed its judgment for over three months to “afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws.”¹⁴ When Congress failed to act within the grace period, the Court extended the stay for nearly another two months.¹⁵

¹² 424 U.S. 1, 142-43 (1976).

¹³ See *Buckley v. Valeo*, 424 U.S. 936 (1976) (granting motion).

¹⁴ 458 U.S. 50, 88 (1982).

¹⁵ *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 459 U.S. 813 (1982).

Perhaps the most compelling example of a delayed constitutional remedy is the Supreme Court of Canada's decision in the *Manitoba Language Rights Case*.¹⁶ Having found that nearly all of Manitoba's laws were invalid because they had been promulgated in English but not also in French, as required by Section 133 of the Constitution Act of 1867 and Section 23 of the Manitoba Act of 1870, the high court nonetheless gave the provincial legislature a grace period to translate the laws, so as to avoid the chaos that would ensue from a legal vacuum.¹⁷ Faced with the choice between temporarily permitting the continuation of a constitutional violation while the translators could do their work or inviting anarchy in the streets of Winnipeg, the court understandably and wisely chose the former course.

If a court has the authority to permit the legislature and the executive branch a grace period in order to wind down an unconstitutional program in an orderly fashion, then it would seem to follow that the executive and legislative branches, acting without judicial intervention to cease their own constitutional violations, have the same authority. Congress or a state legislature should be able to repeal what it comes to realize is an unconstitutional law, with the effective date of the repeal scheduled to occur sometime after the date of passage of the repealing legislation. Likewise, an administration that concludes it is violating the Constitution should be able to wind down, rather than immediately cease, the offending program, where countervailing interests so counsel.

Yet how shall we answer the broader questions implied by Judge Garaufis's puzzlement? Can a power to delay implementation of a constitutional requirement be squared with constitutional supremacy? Where does such a power come from? And assuming the legitimacy of such a power, what are the limits on the ability of courts and other legal actors to delay the cures to the violations that they themselves have found to exist? This Article offers a framework for addressing such questions and provides tentative answers.

In Part II, we argue that it fetishizes and misunderstands constitutional supremacy to treat constitutional imperatives as supreme relative to all possible reasons for acting. While constitutional supremacy means that the Constitution prevails in conflicts with other sources of law, it does not necessarily prevail over all other considerations. Just as the criminal law recognizes defenses of justification and excuse for failure to comply with a legal duty, so, we contend, a tacit principle of constitutionalism allows government to act in violation of constitutional obligations in *extremis*, at least temporarily.

Part II also contextualizes that tacit principle as applied to each of the three branches of government. When a court delays a remedy for a constitutional

¹⁶ Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721 (Can.).

¹⁷ See *id.* at 747-49.

violation, it can be understood as exercising its traditional discretion to withhold an equitable remedy or to condition such a remedy on particular terms. That power can be granted in so many terms, as it is in the South African Constitution.¹⁸

Yet a review of the case law indicates that such an express textual grant merely formalizes a traditional understanding of the remedial discretion of courts of equity. Thus, courts in the United States,¹⁹ which cannot rely on any explicit constitutional text for delaying constitutional remedies, nonetheless do so when they deem it appropriate. Still, while the judicial power to grant a grace period may have originated in equitable discretion, this causal explanation does not provide a fully satisfying normative justification for the practice, nor does it inform the

¹⁸ See Constitution of South Africa, Art. 172(1)(b)(ii) (“When deciding a constitutional matter within its power, a court . . . may make any order that is just and equitable, including . . . an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”). In 2016, Erin Delaney reported that since its first use of the delay power in *State v. Ntuli*, 1996 (1) SA 1207 (CC) (S. Afr.), the Constitutional Court of South Africa had invoked the power over 40 times. See Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 48 (2016) (counting 34 direct delays, three partial suspensions of remedies, and “at least four” extensions of prior delays). Professor Delaney treats a delayed remedy under Article 172 and under a parallel doctrine in Canada as a rough substitute for procedures by which courts in the United States and other countries avoid adjudicating the merits of constitutional cases. See *id.* at 55-58. We agree that these mechanisms can substitute for one another in some circumstances, but we focus in this Article on issues peculiar to delayed compliance with an acknowledged constitutional violation.

¹⁹ Our references in this Article to non-U.S. jurisdictions such as Canada and South Africa reflect the fact that the United States is part of a family of legal systems. However, we do not consider ourselves experts in any other legal system, and thus we use these foreign examples only illustratively. The conclusions we draw may not be fully valid in other legal systems. Indeed, they may not even be valid in state court systems. Consider the decision of the Massachusetts Supreme Judicial Court staying its judgment recognizing a state constitutional right to same-sex marriage for 180 days to allow the state legislature to prepare to implement the substantive ruling. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 970 (2003). Although raising the same types of questions that such stays raise in the federal system, the answers might be different in the Massachusetts courts, which differ from the federal courts in various ways, including their ability to issue advisory opinions. The Massachusetts Constitution requires the Justices of the Supreme Judicial Court to give opinions to the Governor, the Legislature, or the Executive Council “upon important questions of law, and upon solemn occasions.” Part II, c. 3, art. 2, of the Massachusetts Constitution, as amended by art. 85 of the Amendments.

discretion that courts exercise in deciding when to allow a period of noncompliance or, where they do allow such a period, how long it should last.

Furthermore, there are compelling reasons why executive officials and legislators ought to have some power to delay compliance with the Constitution, even absent judicial intervention. And, to state the obvious, executive officials and legislative officials cannot be exercising any *judicial* power to withhold equitable remedies when they act accordingly—even though, as we explain in Part II, equity courts originated within the executive branch.

Historical accidents aside, Part II further argues that all government officials have an inherent, albeit in our legal system, unenumerated, power to delay complying with the Constitution and sub-constitutional law. Because we conclude that the courts are constrained in their discretion in curing violations, we necessarily argue that the political branches are at least as constrained, and possibly more so.

To say that a delay in coming into compliance with the Constitution may sometimes be justified is not to say when such a delay is appropriate or how long it may properly last. We consider these issues in Part III. The questions matter because the best-known example of a delay in constitutional compliance is a cautionary tale. In *Brown v. Board of Education II*,²⁰ the Supreme Court instructed state and local governments that had been operating *de jure* racially segregated schools to desegregate “with all deliberate speed”²¹ rather than immediately. Recalcitrant segregationists then used that formula as an excuse for over a decade of foot-dragging. Given such an infamous and unacceptable abuse of the Court’s permission to perpetuate white supremacy, it is clear that any persuasive delineation of the power of various government actors to delay constitutional compliance must avoid the pitfalls of *Brown II*.

The need to phase out rather than immediately cease an unlawful program can arise in varied and unpredictable circumstances. Accordingly, a satisfying answer to the central question we address in this Article must take the form of a standard rather than a rule, but current law and practice do not even provide a vague standard. And as *Brown II* shows, a too-forgiving attitude towards delaying implementation can result in not just the delaying but the denial of justice. A satisfactory formula must allow government actors working in good faith adequate time to cure constitutional violations expeditiously, but it must not license the kind of evasions that *Brown II* invited from bad faith actors.

As we elaborate in Part III, at a minimum, the length of delay should be specified in advance and extended, if at all, only briefly and, absent the most compelling reasons, only where substantial progress towards compliance is being

²⁰ 349 U.S. 294 (1955).

²¹ *Id.* at 301.

made. Such principles are, we argue, already more or less implicit in the cases allowing a grace period for compliance with the law. But making the relevant principles governing acceptable and unacceptable delays explicit would lead to greater consistency and clarity for courts as well as other government actors.

If avoiding very serious harm can sometimes justify continuing a constitutional violation for a limited period, can the threat of such harm also justify simply violating the Constitution when timing is not at issue? We acknowledge that in principle the answer could be yes, but given the long history of flexible constitutional interpretation, we doubt that many real-world examples would arise in which the courts or other legal actors would conclude that some course of conduct is both unconstitutional and must continue indefinitely. In such settings, courts would more likely conform their understanding of the Constitution to the practice in question, rather than insist that the practice change to conform to a pre-existing constitutional understanding. A court need not acknowledge that it is allowing, say, a police investigatory practice to continue in perpetuity even though it is a violation of the Fourth Amendment. Instead, the court would almost certainly characterize the practice as not a constitutional violation at all. The practice would be subsumed under an exception to the Fourth Amendment or to the exclusionary rule—such as doctrines governing “inevitable discovery,”²² “exigent circumstances,”²³ and “good faith” reliance on a facially valid warrant.²⁴ By contrast, the need to act unconstitutionally for some temporary transition period is both real and under-theorized.

That said, crises can arise in which a new constitutional (or other legal) violation may be justified, not indefinitely, but for the duration of the crisis. Once the crisis passes, the violation ceases, and thus such circumstances closely resemble the wind-down process on which this Article primarily focuses. Part IV therefore investigates whether our proposed framework for addressing wind-down authority might also yield insights relevant to a short-term crisis in which initiating a new constitutional violation can mitigate a great harm.

The classic statement of the argument for authority to act unlawfully in that kind of crisis is President Lincoln’s “all the laws but one” speech justifying his unilateral suspension of habeas corpus.²⁵ Because that episode occurred during an existential military conflict over the great evil of slavery, however, we worry that

²² *Nix v. Williams*, 467 U.S. 431 (1984).

²³ *Kentucky v. King*, 563 U.S. 452, 455 (2011).

²⁴ *United States v. Leon*, 468 U.S. 897 (1984).

²⁵ Abraham Lincoln, President, *Message to Congress in Special Session* (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

it may not be ideal as a source of general principles. Accordingly, we use a somewhat less bloody but still high-stakes example as the principal test of our proposal's applicability to new temporary constitutional violations.

In Part IV, we ask whether, if faced with a debt-ceiling crisis—in which Congress fails to authorize borrowing sufficient to make up the shortfall between appropriations and revenue—the President must exhaust all severely damaging but technically legal options before taking unlawful or even unconstitutional action. We conclude that, just as the law should allow some wiggle room to avoid destroying the lives of the Dreamers or licensing mayhem in Manitoba, so it allows the President some wiggle room to mitigate an economic catastrophe. The framework we develop in Part III for regulating wind-down periods for constitutional violations proves adaptable to the kind of one-off crisis we consider in Part IV.

Part V concludes.

II. Sources of Wind-down Authority

The *Manitoba Language Rights Case* and other real and imaginary cases make the need for a wind-down power evident. Severe and perhaps irreparable injuries would result if Manitoba were rendered lawless even for a few days, if Dreamers were immediately deportable, or if insolvent debtors in the United States had to forgo bankruptcy protection for some months. If it is possible to avoid these and other extreme hardships by an expeditious process of winding down rather than immediately ceasing a constitutional violation, sensible legal actors will have a motive to find that some form of wind-down authority exists. Why, then, did Judge Garaufis think that the government lacked such authority?²⁶

A. *Distinguishing Judicial from Executive Action*

Perhaps the judge reasoned that unconstitutionality is a special kind of illegality. After all, unconstitutional actions do not merely *violate* the law but, as the Supreme Court explained in *Marbury v. Madison*,²⁷ “an act of the legislature repugnant to the constitution is void.”²⁸ Thus, absent some express authority of the

²⁶ To be clear, we are not interested in this particular judge's subjective mental process. We mean to ask how a thoughtful and well-informed jurist could reach what seems to us such a counter-intuitive conclusion.

²⁷ 5 U.S. (1 Cranch) 137 (1803).

²⁸ *Id.* at 177.

sort found in the South African but not the U.S. Constitution, government has no power to give effect to a law or policy that, in principle, never was.

Yet surely Judge Garaufis was aware that the Supreme Court had, in cases like *Buckley* and *Northern Pipeline*, allowed the government to do exactly what the foregoing *Marbury*-based argument appears to forbid—namely to treat what had supposedly always been “a nullity”²⁹ not only as the law that was previously in effect (as a legal realist might acknowledge or as the law permits in some settings in order to protect good-faith reliance³⁰) but as the law going forward for at least some period. Did Judge Garaufis simply goof?

Not necessarily. Cases like *Buckley* and *Northern Pipeline* need not rest on the existence of any wind-down power *per se*. Instead, Judge Garaufis might have reasonably thought that the grace periods extended in those cases were rooted in longstanding remedial practices of courts of equity that are unique to the judiciary and thus unavailable to justify the executive branch in unilaterally winding down rather than immediately ceasing constitutional violations.

Consider *Railroad Comm’n of Texas v. Pullman Co.*,³¹ which held that federal courts should generally abstain from enjoining state laws challenged as unconstitutional where state court resolution of a contested question of state law could render the federal constitutional ruling unnecessary. The case fell squarely within the federal courts’ jurisdiction. Nonetheless, the Supreme Court found a basis for abstention in the traditional discretion of courts sitting in equity to withhold injunctive relief. “The history of equity jurisdiction,” Justice Frankfurter wrote for the Court, “is the history of regard for public consequences in employing

²⁹ E.g., *Frost v. Corporation Commission*, 278 U.S. 515, 528 (1929).

³⁰ For example, the judge-made doctrine of qualified immunity shields government officials from civil liability for violating civil rights, unless they “violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Similarly, federal law denies district courts the power to grant state prisoners writs of habeas corpus even if they are unlawfully detained, unless the state court determination on which detention rests “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). See *Williams v. Taylor*, 529 U.S. 362, 411 (2000) (opinion of O’Connor, J., for the Court in this respect) (construing that language to mean that “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”). See also *infra*, note 72 (discussing unavailability of most “new rules” to habeas petitioners).

³¹ 312 U.S. 496 (1941).

the extraordinary remedy of the injunction.”³² Even though equity developed in a monarchical system of government, Frankfurter had little difficulty seeing in it what was already in 1941 a longstanding practice of adapting equitable discretion to serve as a vehicle for avoiding unnecessary constitutional questions and for promoting comity in state/federal relations.³³

Pullman was a challenge to state-mandated racial segregation in Texas passenger railway trains. The decision on the facts of the case was highly problematic because in 1941 the state courts of Texas were hardly likely to be a fair forum for litigating a challenge to Jim Crow. Perhaps the best that can be said for the bottom line is that even if a majority of the Justices were sympathetic to the challenge, they did not think the country yet ready to abandon the separate-but-equal doctrine of *Plessy v. Ferguson*.³⁴ But whatever one thinks of the outcome of the *Pullman* case, or even of the general policy of what has come to be known as *Pullman* abstention,³⁵ Justice Frankfurter was surely correct in recognizing the discretionary nature of injunctive relief.³⁶ Thus, the courts’ traditional power to withhold equitable remedies undergirds other abstention doctrines as well.³⁷

³² *Id.* at 500.

³³ See *id.* at 501 (citing *Cavanaugh v. Looney*, 248 U.S. 453, 457 (1919); *Di Giovanni v. Camden Fire Ins. Ass’n*, 296 U.S. 64, 73 (1935)).

³⁴ 163 U.S. 537 (1896). It should come as no surprise that Justice Frankfurter, whose fear of civil unrest would eventually lead to the wishy-washy “all deliberate speed” formulation in *Brown II*, was fearful of getting ahead of public opinion nearly a decade and a half earlier. (Although Chief Justice Warren delivered the opinion in *Brown II*, he borrowed “all deliberate speed” from language proposed by Justice Frankfurter. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 743 (1976)).

³⁵ See *Pullman Abstention*, 90 HARV. L. REV. 1250, 1253 n.20 (1977) (citing scholarship urging the abandonment of *Pullman* abstention).

³⁶ See Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1040 (2015) (noting that bounded discretion “is deeply rooted in the tradition of equity”).

³⁷ “The [Supreme] Court has ‘located the power to abstain in the historic discretion exercised by federal courts ‘sitting in equity’ to decline to exercise their jurisdiction.’” Deborah Channeler, *Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 RUTGERS L.J. 847, 851 (2007). See also Drew Allen Hillier, Note, *The Necessity of an Equity and Comity Analysis in Younger Abstention Doctrine*, 46 CONN. L. REV. 1975, 1977, 1979-82 (2014) (discussing the equitable principles underpinning *Younger* abstention); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971) (“courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the

The remedial approach in cases like *Buckley* and *Northern Pipeline* arguably rests on the same logic. In the abstention cases, equitable discretion permits a court to withhold a remedy either temporarily (pending completion of other proceedings) or permanently (if those other proceedings fully resolve the controversy). So too, in affording the government a grace period to wind down a constitutional violation, a court exercises its equitable discretion to temporarily withhold a remedy.

If one understands the wind-down cases in this way—as the exercise of equitable discretion by a court—then the view expressed by Judge Garaufis begins to look plausible. When a court declines to order immediate compliance with a constitutional obligation, the court does not exercise any wind-down authority as such; rather, it uses its equitable discretion to decline to provide an immediate remedy. By contrast, executive branch officials are not chancellors sitting in equity. Acting under the authority of the President, they partake of the latter’s obligation to “take care that the laws be faithfully executed.” Because an unconstitutional law is no law, but the Constitution is the supreme law of the land, executive officials would appear to be obligated to set aside unconstitutional laws and policies, and to do so without delay.

B. Unavailing Sources

So, was Judge Garaufis right after all? Must a President who concludes that a course of action is unconstitutional immediately cease engaging in that course of action? In this sub-Part we consider two potential grounds for saying no—although we find that neither of them quite works. The next sub-Part then offers what we regard as a more persuasive justification for executive (and legislative) wind-down authority.

moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief”). Principles of equity similarly underpin *Burford* abstention. Kade N. Olson, *Burford Abstention and Judicial Policymaking*, 88 N.Y.U. L. REV. 763, 764-65 (2013) (noting that the abstention doctrine associated with *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), has not been grounded “in anything other than equitable principles”). While *Thibodaux* abstention was established in an action at law rather than one at equity, the Court in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), applied familiar abstention principles in order to further comity between the Federal and State governments. See Channeler, *supra*, at 856-57.

1. Equity's Historical Roots in the Executive Branch

Insofar as Frankfurter's argument for equitable discretion in *Pullman* rested on the history of equity, we might be tempted to mine that history to establish a similar discretion in the executive branch. After all, the flexibility traditionally associated with equity arose from the fact that it was a means of circumventing the procedural rigidity of the courts of law.³⁸ An appeal to the chancellor was an appeal to a direct agent of the king, who, prior to the emergence of equity courts as such during the reign of Edward I in the late thirteenth century, entertained petitions from his subjects addressed to his discretionary sense of justice.³⁹ Thus, it might be said that executive rather than judicial action lies at the very core of equitable discretion. Whereas the courts of law were relatively rule-bound, the king, as sovereign, had discretion to do justice—including granting and withholding remedies—as in his judgment befit all the circumstances. Insofar as the United States President inherited powers previously exercised by the English King,⁴⁰ equitable discretion could be said to inhere in modern executive action no less than in courts ruling on petitions for injunctive relief.

Nonetheless, we hesitate to lean too heavily on the early history of equity to justify executive wind-down authority. Although equity originated as a means of

³⁸ Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 917-18 (1987) (“Bills in equity were written to persuade the Chancellor to relieve the petitioner from an alleged injustice that would result from rigorous application of the common law. The bill in equity became the procedural vehicle for the exceptional case”). By the sixteenth century, common law was characterized by predictability and rigidity, while equity was comparatively “more flexible, discretionary, and individualized.” *Id.* at 920. Just as common law procedures grew alongside common law rights, a similar developmental relationship bloomed between “the wide-open equity procedures related to the scope of the Chancellor’s discretion and his ability to create new legal principles.” *Id.* See also Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 36 (1951) (explaining that the need for the English Court of Chancery derived from common law courts’ tendency to “become firmly settled into a policy of confining their jurisdiction to cases which fitted their customary writs”).

³⁹ Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 440-42 (2003).

⁴⁰ In construing “The executive power” that Article II vests in the President, courts frequently look to the powers that English monarchs exercised. See, e.g., *Ex Parte Grossman*, 267 U.S. 87, 113 (1925) (disclaiming “any substantial difference . . . between the executive power of pardon in [o]ur [g]overnment and the King’s prerogative”); *Myers v. United States*, 272 U.S. 52, 118 (1926) (“In the British system, the Crown, which was the executive, had the power of appointment and removal of

executive dispensation from judicial rigidity, by the time of the adoption of the Constitution, in both England and the American colonies it had become a distinctively judicial institution.⁴¹ Indeed, already in the late eighteenth century, equity courts were well on their way to becoming the procedurally complex and burdensome bodies that Charles Dickens would portray critically in the middle of the nineteenth.⁴²

Moreover, even if we were to associate equity with the executive in England, the Constitution broke with English institutional patterns in important respects. Most relevantly here, the Constitution established separation of powers. In England, equity courts *and* courts of law were both located within the executive branch. Not for nothing were the latter designated as *the King's bench* (or the Queen's bench when a reigning queen sat on the throne). Accordingly, to note that equity originated in royal practice is to say not very much of relevance to the United States circa 1789 or today.

executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words 'executive power' as including both"); *Zivotofsky v. Kerry*, 576 U.S. 1, 41-42 (2015) (Thomas, J., dissenting) (observing, without contradiction by the majority on this point, that "passports have consistently been issued and controlled by the body exercising executive power—in England, by the King; in the Colonies, by the Continental Congress; and in the United States, by President Washington and every President since").

⁴¹ Main, *supra* note 39, at 440-44, 449-52.

⁴² See CHARLES DICKENS, *BLEAK HOUSE* 3 (Project Gutenberg ed. 1997) (1853) (describing members of the English High Court of Chancery as "mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horsehair warded heads against walls of words and making a pretence of equity with serious faces, as players might"). See also WILLIAM T. QUILLEN & MICHAEL HANRAHAN, *A SHORT HISTORY OF THE COURTS OF CHANCERY 1792-1992*, in *COURT OF CHANCERY OF THE STATE OF DELAWARE 1792-1992* (1992), <https://courts.delaware.gov/chancery/history.aspx> ("By the end of the eighteenth century, chancery practice became as intricate and inflexible as that of the common law courts. The effort to systemize Chancery's rules and formalize its equitable doctrines undermined the fundamental purpose—to do equity in the particular case"). This procedural rigidity ultimately led Parliament to dismantle the English High Court of Chancery in 1875. *Id.* See also 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 390-404 (3d. ed. 1944). In the United States, the adoption of the Federal Rules of Civil Procedure abolished equity as a wholly separate body of procedural rules in the federal courts, see FED. R. CIV. P. 2, although the historical distinction between actions at law and those in equity remains important for construing the scope of the Seventh Amendment civil jury trial. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999).

Finally, the constitutional text confirms that in the United States, equity is a distinctly judicial practice. Section 2 of Article III extends jurisdiction over cases “in law and equity.” By contrast, the only authority to dispense individualized mercy or justice that Article II vests in the President is the “power to grant reprieves and pardons.” Whatever general equitable discretion kings exercised in England devolved to U.S. courts, not to the President.

2. Prosecutorial Discretion

To be sure, although the constitutional text does not literally lodge any general power of equitable discretion in the executive branch, it does obligate the President to “take care that the laws be faithfully executed.” To carry out that duty, the President and other executive officials must have prosecutorial discretion to prioritize scarce law enforcement resources.⁴³ Indeed, the Supreme Court has indicated that separation of powers limits the power of Congress and the courts to override executive branch decisions about how vigorously to enforce the law.⁴⁴ Prosecutorial discretion is thus a uniquely executive form of discretion. Might it encompass or entail equitable discretion?

We have no interest in the semantic question whether to *call* prosecutorial discretion a form of equitable discretion. Our question is practical: does prosecutorial discretion encompass or entail wind-down authority to temporarily keep in place unconstitutional policies? The answer to that question would appear to be no.

Prosecutorial discretion is the power of the executive to *decline to enforce* a concededly *valid* law to its full extent in particular cases and circumstances.

⁴³ Heckler v. Chaney, 470 U.S. 821, 832 (1985) (describing prosecutorial discretion as “the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed’”). Prosecutorial discretion also finds root in the separation of powers. Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379-80 (2d Cir. 1973) (“as an incident of the constitutional separation of powers . . . the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”) (quoting United States v. Cox, 342 F.2d 157, 171 (5th Cir. 1965)).

⁴⁴ See Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (“To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed’”).

Wind-down authority is nearly the opposite. It is the power *to enforce* a concededly *invalid* law for some period. Although a broad conception of executive power might entail both kinds of discretion, prosecutorial discretion itself hardly entails or implies wind-down authority. If both prosecutorial discretion and wind-down authority instantiate some broader principle of general executive branch equitable discretion, there must be some source for that broader principle. The Take Care Clause is not such a source, and as we noted above in sub-Part (1), neither is any other constitutional provision.

Before concluding this brief sub-Part, we should address a potential source of confusion in the case that Judge Garaufis confronted. Although prosecutorial discretion does not usually entail executive branch discretion to continue implementing an unconstitutional policy during a wind-down period, DACA is unusual. DACA gives certain undocumented immigrants access to various government programs and benefits but is also—and so far as the Obama administration’s defense of it was concerned, chiefly—an exercise of prosecutorial discretion. The “action” that DACA “defers” is deportation, which is a kind of prosecution. If DACA is the exercise of prosecutorial discretion, then perhaps the Trump administration was justified in winding down rather than immediately ending DACA upon concluding DACA was unconstitutional.

The Trump administration did not, however, attempt to defend its wind-down authority on that basis, nor could it have done so successfully. As Chief Justice Roberts observed for the majority when the issue came before the Supreme Court, “DACA is more than simply a non-enforcement policy.”⁴⁵ To be sure, later in his opinion, the Chief Justice found that the wholesale rescission of DACA was arbitrary and capricious because the Department of Homeland Security (DHS) could have rescinded DACA’s benefits while leaving in place DACA’s policy of forbearance with respect to deportation.⁴⁶ But that does not bear on wind-down authority with respect to the affirmative benefits (such as eligibility for work authorization) DACA confers. If, as the Trump administration believed, DACA’s conferral of benefits was unconstitutional or otherwise unlawful, the administration needed some authority to continue them in effect during the wind-down period. Prosecutorial discretion would have been unavailing.

⁴⁵ Dep’t of Homeland Sec. v. Regents of the Univ. of Calif., 140 S. Ct. 1891, 1907 (2020).

⁴⁶ See *id.* at 1912.

C. *Inherent Wind-Down Authority*

The Supreme Court's opinion in the DACA case not only shows why prosecutorial discretion was not a plausible source of authority for winding down the portions of DACA that go beyond enforcement forbearance; it also points the way towards a firmer foundation for wind-down authority more broadly. At two points in the Chief Justice's majority opinion, he matter-of-factly states that once DHS was informed by the Attorney General that in the administration's view DACA is unconstitutional, DHS of course had the discretion, as a matter of policy, to decide the precise details of how to wind down DACA.⁴⁷ In the next Part we map out limits on that discretion, but for now we observe simply that the Court did not identify any source of wind-down authority, treating it instead as simply obvious that federal agencies have wind-down authority. It apparently did not occur to any of the Justices—or indeed to any jurist prior to Judge Garaufis—to ask where such authority comes from.

We have to this point treated that seeming lack of curiosity as a problem—a gap that virtually no one had heretofore noticed and thus had not tried to fill. But what if the reason no one asked where wind-down authority originates is that there is no need for any authorization as such? What if wind-down authority is either implicitly assumed by the law (including the Constitution) or a commonsense limit on the obligations law imposes? We cannot say for certain that the Chief Justice or anyone else had such an idea in mind. We can say that there is some explicit precedent for something like wind-down authority—albeit in the somewhat different context of administrative law in the D.C. Circuit. We can also say that the practice makes sense.

Consider the longstanding but controversial D.C. Circuit practice known as “remand without *vacatur*.”⁴⁸ “[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated.”⁴⁹

⁴⁷ See *id.* at 1910 (“deciding how best to address a finding of illegality moving forward can involve important policy choices, especially when the finding concerns a program with the breadth of DACA. Those policy choices are for DHS. Acting Secretary Duke plainly exercised such discretionary authority in winding down the program.”); *id.* at 1914 (“DHS has considerable flexibility in carrying out its responsibility. The wind-down here is a good example of the kind of options available.”).

⁴⁸ See generally Kristina Daugirdas, Note: *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. Rev. 278 (2005) (describing, tracing the history, and evaluating the D.C. Circuit practice of leaving in place some agency actions despite having ruled them unlawful).

⁴⁹ *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989).

Adherence to this approach, however, is “not absolute.”⁵⁰ The court sometimes declares the rule invalid but leaves it in place while the agency attempts to cure any procedural or other defects.” Potentially “disruptive consequences” counsel against *vacatur*.⁵¹

Just as Judge Garaufis questioned the government’s authority to continue DACA in force temporarily despite its conclusion that the program is unconstitutional, so jurists and scholars have criticized remand without *vacatur* as unauthorized. Most prominently, Judges Randolph and Sentelle have each argued that courts have no power to keep in force an agency rule that was adopted illegally.⁵² To be sure, the skeptics chiefly argue that no statute authorizes remand without *vacatur*,⁵³ but the parallel to the critique of constitutional wind-down authority remains—as does the rejoinder. In each context, critics argue that an ostensible legal rule that was adopted unlawfully can have no force; and defenders of the respective practices nonetheless assume that dire necessity forges authority.⁵⁴

⁵⁰ *Bauer v. DeVos*, 332 F. Supp. 3d 181, 184-85 (D.D.C. 2018) (collecting cases). Notably, in addition to citing administrative law decisions of the D.C. Circuit, the *Bauer* court cited *Buckley v. Valeo*, *id.* at 185, thereby tacitly recognizing the similarity between the D.C. Circuit practice and the wind-down of constitutional violations.

⁵¹ *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm’n*, 988 F.2d 146, 151 (D.C. Cir. 1993). An instructive example from before the D.C. Circuit formally recognized the practice of remand without *vacatur* is *Rodway v. United States Dep’t of Agric.*, 514 F.2d 809 (D.C. Cir. 1975). There the court determined that promulgation of allotment requirements for a food stamp program did not comply with procedural requirements of the Administrative Procedure Act (APA). *Id.* at 817. It held that the regulations were “invalid as promulgated” and needed to be returned to the Secretary of Agriculture for APA-compliant rulemaking. *Id.* In rendering this decision, however, the court explained that it was “mindful of the critical importance of the allotment regulations to the functioning of the entire food stamp system, on which over ten million American families are now dependent to supplement their food budgets.” *Id.* Accordingly, rather than vacating the then-extant regulations, the court stated that “they must continue in effect” until valid regulations supplanted them. *Id.* The court ordered that the agency complete the rulemaking process within 120 days of the Circuit decision. *Id.* at 818.

⁵² See *Checkosky v. SEC*, 23 F.3d 452, 490-93 (D.C. Cir. 1994) (separate opinion of Randolph, J.) (arguing that the APA does not permit remand without *vacatur*); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757-58 (D.C. Cir. 2002) (Sentelle, J., dissenting) (same).

⁵³ For other criticisms of remand without *vacatur*, see Daugirdas, *supra* note 48, at 288-90 and sources cited therein.

⁵⁴ Remand without *vacatur* is somewhat less potent than the most robust version of wind-down authority, which extends to any constitutional violation. The

A stylized example drawn from everyday experience illustrates why that assumption is justified. Suppose Alexis is driving at the speed limit of 55 miles per hour when she sees a sign that had previously been blocked from her view by a truck in the breakdown lane. The sign indicates that drivers are entering a residential area where the speed limit is 30 miles per hour. If Alexis slams on the brakes, she will be able to decelerate to 30 miles per hour just in time to avoid exceeding the speed limit. Doing so, however, will endanger Alexis, her passengers, and the occupants of the vehicles behind her. Accordingly, Alexis would be justified in gradually decelerating to 30, even though for a few seconds she will be driving faster than the speed limit. Indeed, Alexis would act recklessly if she slammed on the brakes rather than gradually decelerating.

In the foregoing hypothetical example, Alexis exercises *de facto* wind-down authority, even if no provision of law says that drivers should or even may slow down gradually and even if the traffic law contains no catch-all allowing the violation of some express rules in the greater interest of safety.⁵⁵ Where it is needed to avoid a very bad outcome, wind-down authority can be understood as either an implicit limit on the obligations law imposes or as satisfying supervening moral obligations that outweigh whatever duty one has to obey the law.⁵⁶

There is no reason in principle to distinguish private actions regulated by law from the actions of the government. Consider the Biden administration's

D.C. Circuit applies remand without *vacatur* where an agency's adoption of a rule was procedurally flawed but not where the rule exceeds the power granted the agency under the statutory delegation from Congress. *See* Daugirdas, *supra* note 48, at 283.

⁵⁵ To be sure, many jurisdictions treat traffic violations as a revenue source. Mike Maciag, *Addicted to Fines*, GOVERNING (Aug. 19, 2019), <https://www.governing.com/archive/gov-addicted-to-fines.html>. *See also* Nick Sibilla, *Nearly 600 Towns Get 10% of their Budgets (or More) from Court Fines*, FORBES (Aug. 29, 2019) (noting that 84 percent of the highway-adjacent village of Robeline, Louisiana's total budget is financed by forfeitures and fines). Thus, absent a statutory catch-all provision requiring drivers to operate their vehicles safely, there is some risk that a police officer will ticket Alexis, that a prosecutor will charge her with speeding, and that a judge will find her guilty, notwithstanding the fact that Alexis acted rightly by decelerating gradually. If so, however, those actors would be acting wrongly (albeit legally) in declining to exercise their respective powers to show mercy. In any event, the point of the example is not that the law sometimes permits its own violation; rather, we mean it to show that wind-down authority can sometimes be derived from common sense.

⁵⁶ *See, e.g.*, George C. Christie, *On the Moral Obligation to Obey the Law*, 1990 DUKE L.J. 1311 (“[T]o say that one has a moral obligation to obey the law does not mean that one must necessarily obey the law. Other more important countervailing moral obligations may require that one not obey the law.”).

announcement in late January 2023 that it would end the COVID-19 national emergency and public health emergency first declared by the Trump administration in 2020 and repeatedly extended thereafter.⁵⁷ Rather than immediately terminating the emergencies, as proposed by bills then pending in the House of Representatives, the Biden administration announced its intention to renew each declaration once more before finally terminating them both on May 11, 2023. Why the delay? The announcement stated that immediate termination “would create wide-ranging chaos and uncertainty”⁵⁸ in the health care system and border policy that could be avoided by an orderly “wind-down.”⁵⁹ In light of the improved public health situation in late January 2023, the Biden administration would not have been justified in declaring new emergencies—just as Alexis would not be justified in stepping on the gas once she sees the 30 mph speed limit sign—but the administration wisely took for granted that practical necessity can sometimes validate wind-down authority.

To be sure, where government actors assert a power to break—or at least bend—*the Constitution*, we have familiar bromides to explain why. Whether the government asserts affirmative authority not expressly enumerated or the power to override rights provisions that use seemingly absolute language, necessity forges authority, for “while the Constitution protects against invasions of individual rights, it is not a suicide pact.”⁶⁰ Or (to use an example we identified in the Introduction), as President Lincoln asked rhetorically in defending his decision to suspend the privilege of the writ of habeas corpus while Congress was out of session but the Confederacy was in rebellion, “are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?”⁶¹ Whatever one thinks about the particulars of any invocation of authority to break the law, including the Constitution, even if only temporarily,⁶² statements of this sort underscore a sensible pragmatism that runs through American constitutionalism.

⁵⁷ Statement of Administration Policy, Executive Office of the President (Jan. 30, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf>.

⁵⁸ *Id.* at 2.

⁵⁹ *Id.* at 1.

⁶⁰ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

⁶¹ *See supra*, note 25.

⁶² We think President Lincoln correctly identified the factors relevant to determining whether temporary lawbreaking for the greater good is justified, although we are agnostic about whether he applied them correctly. *See* Neil H. Buchanan and Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the*

Lincoln's suspension of habeas corpus initiated (what would turn out to be)⁶³ a new course of lawbreaking. One might take a dimmer view of such acts than one takes with respect to winding down existing unconstitutional or otherwise unlawful programs. We consider the difference that distinction might make in Part IV. Here we invoke Lincoln's all-the-laws-but-one speech and the aphorism that the Constitution is not a suicide pact simply to put wind-down authority in context. If pragmatism can sometimes even arguably justify new law breaking (or bending), then justifying wind-down authority should be easier. And to repeat the takeaway from our car-deceleration example, the pragmatic justification for wind-down authority extends to all actors. It does not rest on any special power or obligation of the President to rescue the republic from a great calamity.

Although wind-down authority does not reside uniquely in the executive, recognizing executive wind-down authority serves an important function in a system of separation of powers in which each branch has an independent obligation to construe and comply with the law. Moreover, and perhaps counter-intuitively, recognizing executive wind-down authority gives executive officials an incentive to comply with the law. An example will illustrate.

U.S. courts sometimes find that prison overcrowding violates the Eighth Amendment but that no immediate remedy is available. They then give prison officials a timetable for achieving constitutional compliance through a combination of prisoner release and prison construction. The litigation that reached the Supreme Court in *Brown v. Plata*⁶⁴ is fairly typical. The decision of the three-judge district court that the high Court affirmed gave the state of California two years to achieve the requisite reduction in prison crowding.⁶⁵ We can assume that the judicially authorized grace period was an exercise of equitable discretion to withhold injunctive relief.

Now suppose that before any prisoners file suit, a governor or President concludes that the prisons in the state or country, respectively, are overcrowded in violation of the Eighth Amendment. Surely, we would want the executive branch to provide redress without having to wait to be sued. Equally surely, we would want the executive to have wind-down authority. After all, if there is no executive wind-down authority, then the conclusion that the prisons are overcrowded will lead to

President (and Others) From the Debt Ceiling Standoff, 112 COLUM. L. REV. 1175, 1220 (2012).

⁶³ See *Ex parte Merryman*, 17 F. Cas. 144, 149 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9,487).

⁶⁴ 563 U.S. 493 (2011).

⁶⁵ See *id.* at 509-10.

the further conclusion that government must remedy the problem immediately. Because new prison construction takes time, the only way to address the issue immediately—the equivalent of slamming on the brakes—could be to release large numbers of otherwise parole-ineligible prisoners, including some violent ones whose premature release will endanger public safety. How likely is it that a governor or President would take that course? Executive actors without wind-down authority will more likely conclude that their prisons are in constitutional compliance and await litigation for a court to tell them otherwise.

More generally, if concluding that some policy is unlawful triggers an obligation to end the policy immediately—even if doing so can only be accomplished in ways that harm the public good and are thus politically unpopular—executive branch actors will find ways to conclude that the policy is lawful after all. Wind-down authority thus removes a potential disincentive to executive actors taking seriously their obligation to comply with the Constitution and other legal requirements.

* * *

The analysis in this Part indicates that courts have wind-down authority rooted in equitable discretion, while the executive branch has the same kind of inherent wind-down authority that private actors possess. What about Congress and state legislatures? We see no reason why our discussion of the executive branch would not apply with equal force to the legislature. When—as in *Northern Pipeline* or *Manitoba Language Rights*—constitutional compliance requires new legislation, courts extend a grace period to the legislature. If rather than waiting for litigation challenging existing law, Congress or a state legislature decides to pro-actively address what it deems a constitutional violation by repealing or amending the law, the same sorts of pragmatic grounds that justify the executive branch in phasing out an invalid policy will justify the legislature in phasing in the new law.

III. The What, When, and How of Wind-down Authority

To this point, we have argued that any sensible legal system must afford some flexibility to government actors in situations where the Constitution or laws are being violated. As much as we understand the instinct to reject delay in curing a legal violation,⁶⁶ some problems require time for even the most highly motivated actors to fix, meaning that some period of noncompliance is often not only inevitable but desirable, all things considered. If slamming on the brakes would cause whiplash or worse, a driver acts wisely by decelerating more gently.

⁶⁶ See *supra* Part I (discussing Judge Garaufis's argument).

Where some wind-down period is justified, the first key question, then, is how long it can last. Whatever the answer to that question, the creation of a time limit necessarily implies that there must be consequences should that time limit be breached. Thus, a second key question is what those consequences should be.

Given the frequency with which wind-down issues arise, one might expect that there would be a deep and firmly established body of precedent and commentary addressing the law of delayed justice. So far as we have been able to determine, however, there is nothing of the kind. There is obviously no Restatement of Delay, for example, nor is there a treatise dedicated to wind-down authority or any other exegesis of the state of this area of the law. To be sure, we can discern in the cases some broad patterns, but neither courts nor political actors have offered anything resembling a coherent justification for the delays they allow or undertake. Indeed, there is rarely even the acknowledgement that any question of delay is a necessary element in dispensing justice.

There is, it seems, a sense in which delay feels so inevitable and will so obviously have to be allowed at some point that judges, executive officials, and legislatures have rarely if ever paused to consider what a broader rule or standard regulating delays might look like. In turn, this means that there is no opportunity to assess whether any particular delay conforms to a broader legal requirement. The need for some period of delay is taken for granted in the way that we rarely notice the ground under our feet, and we only occasionally stop to ask how solid that foundation is in supporting decisions not to proceed to do justice immediately.

To the extent that there are areas of the law in which judges have consciously and deliberately wrestled with questions of delay, the two leading categories appear to be litigation over prison conditions⁶⁷ and voting rights.⁶⁸ Even

⁶⁷ See, e.g., *Inmates of Suffolk County Jail v. Kearney*, 573 F.2d 98, 101 (1st Cir. 1978) (allowing the continuation of a constitutional violation “until such time as a suitable plan for a new jail facility has been approved by the court.”). Although the detainees were “entitled to be incarcerated under constitutional conditions of confinement,” the court allowed their incarceration “under lower standards for a fixed interim period . . . because of practical exigencies.” *Id.* See also *Palmigiano v. Garrahy*, 599 F.2d 17 (1st Cir. 1979) (allowing prison conditions that violated the Eighth Amendment by “creat[ing] a total environment where debilitation [was] inevitable, and which [was] unfit for human habitation and shocking to the conscience of a reasonably civilized person”—but setting a compliance date nine months after the decision was issued).

⁶⁸ See, e.g., *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 674-76 (1964) (finding an apportionment scheme unconstitutional but declining to set a time limit, noting that the next election was almost two years away and saying only that the courts should intervene if the state legislature failed to act “in a timely fashion after being afforded a further opportunity by the courts to do so.”) Notably,

within these two relatively large bodies of caselaw, however, the decisions are notable for the *ad hoc* nature of the timeframes that are set by judges and the lack of any reference to a concept of justice or a balancing test which might be applied to each admittedly unique situation. We find this rootlessness not only troubling but genuinely surprising, given that American legal traditions, even with respect to equity, so strongly favor conformity with articulated rules or standards to guide decisions. Instead, courts have invoked the need to take account of “practical exigencies”⁶⁹ and stayed their decisions to give a “legislature time to amend the laws . . . [i]n light of the substantial hardship immediate judgment would wreak;”⁷⁰ yet there is little to no discussion of how much leeway must be given in light of any given exigency or why the choice is between the extremes of “immediate judgment” and open-ended noncompliance. Even if a legislature were acting in good faith (an assumption that is often difficult to sustain on the facts of some of these cases), surely there must be something more to be said than, in essence, “please go fix the problem that was brought to your attention years ago but that you have allowed to continue to this day.”

In offering these observations, it is not our intent to disparage those courts and other government actors that have honestly struggled with these difficult questions. When there is no body of law on which to rely, and when there are reasons both good and bad not to act, there is not much to be done other than to take an all-things-considered approach. Especially because any time limit must inevitably be somewhat arbitrary—why, for example, would nine months be allowed but nine months and one day be unacceptable?—the temptation must surely be to tread lightly and say as little as possible.

under the so-called *Purcell* principle, courts permit a putatively illegal election to proceed rather than intervene on the eve of the election. *See* *Merrill v. Milligan*, 142 S.Ct. 879, 879 (2022) (Kavanaugh, J., concurring in stay application grants) (citing *Purcell v. Gonzalez*, 591 U.S. 1 (2006) (per curiam), for the propositions that “(i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when . . . lower federal courts contravene that principle.”). Thus understood, the *Purcell* principle amounts to a *requirement* of delay, with the duration on the order of the time until the next election. We hesitate to build a general approach on the basis of *Purcell*, however, given our doubts about the consistency with which the Court has applied it. *See* *Merrill*, 142 S.Ct at 888-89 (Kagan, J., dissenting)(criticizing the invocation of *Purcell* in a case occurring four months prior to the primary election and nine months prior to the general election).

⁶⁹ *Suffolk County Jail*, 573 F.2d at 101.

⁷⁰ *Holmberg v. Holmberg*, 588 N.W.2d 720, 727 (Minn. 1999).

Is there a way to do better? As we noted earlier, because these questions of timing are necessarily context-dependent, the most that one can reasonably offer is a standard rather than a rule. If “right away, every time” cannot be the rule, neither can we say that “within a week” or “before the legislative term has ended” are presumptively reasonable or could even be enforced sensibly across multiple and varied contexts. Again, the analysis to this point shows that government actors have *some* wind-down authority. The challenge is to make some progress in addressing the many practical questions that remain. We sketch out a standards-based approach in the remainder of this Part.

A. What is the Threshold for Winding Down Rather than Ceasing Immediately?

Having allowed that there will inevitably be situations in which delays in curing constitutional and other legal violations are unavoidable, we hasten to emphasize that the default presumption must certainly be that a violation should be cured as soon as it is discovered. If people are imprisoned based on conduct that the Constitution places beyond the power of the state to forbid (such as consensual sexual relations between adults),⁷¹ justice requires that they be freed immediately.⁷²

⁷¹ See *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (invalidating state’s “Homosexual Conduct” law).

⁷² The Supreme Court’s habeas corpus jurisprudence more or less reflects this principle. Although so-called “new rules” of constitutional law generally do not apply retroactively (i.e., to benefit petitioners whose convictions and sentences became final before the rules were announced), “courts must give retroactive effect to new substantive rules of constitutional law . . . ‘forbidding criminal punishment of certain primary conduct’” *Montgomery v. Louisiana*, 577 U.S. 190, 198 (2016) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). Non-retroactivity is justified in general on grounds of finality. See *Teague v. Lane*, 489 U.S. 288, 310-11 (1989) (plurality opinion) (explaining that retroactive application of new rules “*continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards”). However, a successful showing that a habeas petitioner is imprisoned for having engaged in constitutionally protected conduct imposes no substantial cost on the state or others (such as witnesses and victims), because retroactive application of the new substantive constitutional rule results in the constitutionally innocent petitioner’s release, not in a new trial or sentencing proceeding. The state has no legitimate interest in the petitioner’s continued imprisonment; thus, retroactive application of a new rule imposes no real cost.

We should be clear, however, that we are invoking habeas jurisprudence suggestively, not as a direct analogue. Under the Court’s non-retroactivity doctrine

If a person's land is being polluted by waste that another person is pouring into groundwater, the polluter should be required to stop. Where a person is being incarcerated in what amounts to a torture chamber, that should not continue. None of those wrongs should have happened at all, and the unfortunate reality that they did happen does not mean that they are not violations in the first place or can be allowed to continue merely because they are facts on the ground.

We emphasize this point because our reading of the cases suggests that there is sometimes a tendency to treat *all* delays as inevitable and even unremarkable. Where delay is unnecessary, however, there obviously should be no delay. Courts as well as executive officials or a legislature acting without prior judicial intervention should thus acknowledge the presumption of immediacy and, if necessary, explain why that presumption must be set aside in a given instance. Indeed, even where appeals and similar procedural delays are inevitable, the presumption should be that the violative action is to be suspended.

It is only with that rebuttable presumption in place that the analysis can proceed sensibly. After all, compliance with legal obligations will almost always exact some cost. To justify delay, that cost needs to cross a threshold, one that has at least two dimensions. First, the benefits of delay need to be very substantial, both qualitatively and quantitatively. To return to two of our animating examples in this Article, failing to give Manitoba's legislature adequate time to enact a constitutionally permissible bilingual legal code would leave that province in

and the additional limits imposed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d), a petitioner who relies on a merely procedural new rule receives no relief at all, not delayed relief. *See* *Edwards v. Vannoy*, 141 S. Ct. 1547, 1559-60 (2021) (abandoning a previously articulated additional exception to nonretroactivity for "watershed" constitutional rules of criminal procedure). Meanwhile, our invocation of the habeas cases raises the question of where the courts derive the authority to deny relief completely to persons whose trials or sentencings did not comply with the Court's current best view of the Constitution. That question is largely beyond the scope of this Article, so we note only that the answer could be quite different in shape from our answer to the wind-down question. Conventional wisdom holds that with the possible exception of persons incarcerated for constitutionally protected conduct or subject to sentences for which they are categorically ineligible, there is no constitutional right to habeas as a collateral remedy. *See* Richard H. Fallon, Jr., et al., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1290-92 (7th ed. 2015) (acknowledging that no Supreme Court decision definitively resolves the question but describing cases that leave the matter almost exclusively to Congress). Hence, it could be argued, when federal habeas courts dismiss petitions based on new constitutional rules of criminal procedure, they do not deny relief to anyone whose constitutional rights are being violated.

lawless chaos, costing untold loss of life and limb, property damage, and irreversible harm. Similarly, in the DACA situation, forcing people immediately to leave the only country they have ever known, without giving the President or Congress time to develop more humane options, would be not only cruel to the deportees but harmful to other people whose lives intersect with those who would be suddenly displaced.

In these situations, the presumption of immediate corrective action is overcome not only because of the scope of the possible damage but because the injuries would be borne not by the government actors who failed to do the right thing in a timely fashion but by innocent third parties—in these cases, potential crime victims in Manitoba and now-adult American residents who were brought to the United States as innocent children. That will often be true where the constitutional violation that takes time to cure is *structural* (as in the DACA and Manitoba cases). By contrast, where government officials seek to wind down rather than immediately cease violating third parties' constitutional *rights* (as in the prison cases), the presumption should be harder to overcome.⁷³

Again, we do not presume to say that there is a rule- or formula-based method by which a government actor can determine that delay is justified. We are certain, however, that the threshold of harm that would result if no remedial delay were allowed must be high. As a matter of procedure, courts (and other officials when litigation is not at issue) should be expected to expressly grapple with these questions and to be transparent in doing so. Acknowledging the presumption in favor of speed and then articulating the grounds for rebuttal of that presumption will inevitably focus courts and other actors on the legitimacy of arguments for delay.

“Things take time” cannot be an all-purpose excuse. Similarly, executive officials and legislatures (to the extent that their decisions not to act can be made transparent) should explain why immediate action is impossible or unwise; and when executive officials and legislatures find themselves defending their delays in litigation, courts should require them to give explicit reasons for the time needed to act—again, particularized to the facts and circumstances, not relying on generic excuses about how difficult it is to issue regulations or to enact statutes.

⁷³ Harder but not impossible, as the prison cases themselves illustrate. Continuing to incarcerate persons in overcrowded prisons rather than immediately releasing enough people to comply with the Eighth Amendment imposes a cost on the incarcerated persons, but immediately releasing hardened criminals (and not only nonviolent offenders) imposes a cost on the innocent public. Where the cost to the innocent public of premature release of violent offenders substantially exceeds the cost to the persons incarcerated in unconstitutionally overcrowded conditions, delay may be justified. See *supra*, text accompanying notes 64-70; *infra*, note 75.

B. Minimizing Delay and the One-Extension Rule

For these reasons, a government entity that seeks to delay justice must explain not only that *some* delay is needed but *how much* delay is permissible. Any delay should be minimized. Therefore, a judge should grant, or executive officials and legislatures curing their own violation should allow themselves, only the minimum amount of time necessary to address the constitutional violation.

As we noted above, a large part of the solution here is to force actors consciously to confront and justify their decisions to tolerate (or perpetrate) delays. After adequately explaining why a delay is required in a given context, it is essential to set a limit on that delay at the outset. The failure to do so, after all, is why the Supreme Court's *Brown II* invitation to the states to act "with all deliberate speed" to vindicate the rights recognized in *Brown I*⁷⁴ is now viewed as a tragic error rather than the hopeful exhortation that it might have appeared to be at the time. In every instance, the thought process should be something like this: "Given that any delay of justice is a tragedy, we must end that delay as soon as possible, taking into account the costs and benefits of doing so. Shorter is better."

So much for the initial deadline. What happens if there is further delay? It is hardly a surprise to note that deadlines are often violated, and the cases amply demonstrate that tendency.⁷⁵ A court or other actor can say—and truly mean—that a violation can and must be cured within, say, 30 days; but what if the deadline comes and goes without the problem being fixed?

⁷⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁷⁵ For example, in *Brown v. Plata*, the Supreme Court held that a three-judge panel's order to release members of California's prison population was necessary to cure systemic Eighth Amendment violations. 563 U.S. 493, 499-502 (2011). At the time of the initial order's entry, California's correctional facilities were home to a population nearly double the number of people they were designed to hold. *Id.* at 501. The panel then established a specific timetable for incremental reduction in the prison population. *Coleman v. Brown*, 952 F. Supp. 2d 901, 912 (E.D. Cal. 2013). California responded with intransigence that the panel described as "astonishing[]," refusing to answer the panel's questions about its ability to comply and calling for an *increase* in its prison population. *Id.* at 914. The State "failed to comply" with the order and conceded as much to the panel. *Id.* at 921. See also Andrew Cohen, *Jerry Brown, Constitutional Scofflaw*, ATLANTIC (June 22, 2013), <https://www.theatlantic.com/national/archive/2013/06/jerry-brown-constitutional-scofflaw/277095/> (discussing Governor Brown's "direct defiance" of court orders).

Again, the reasons for the continued delay matter. A failure to act because, for example, government operations ceased or were severely curtailed by a global pandemic or a natural disaster is unfortunate but unavoidable. Too often, however, the most plausible explanation for inaction is deliberate foot-dragging—again, with *Brown II* being the most poignant instance⁷⁶ but no shortage of examples in other contexts.⁷⁷

Here, the courts should adopt a rule (not a standard) requiring that there be at most one extension of a deadline, and only then when the request for extension is accompanied both by an adequate explanation of the reasons for non-compliance with the original deadline and a justification for the shortest extension possible under the new circumstances. Such a rule would necessarily leave discretion in the hands of judges both in granting extensions and in determining their length, but at

⁷⁶ *Brown II* was met by a strategy of “massive resistance.” Mark Golub, *Remembering Massive Resistance to School Desegregation*, 31 L. & HIST. REV. 491, 495-97 (2013). Responses included the repeal of laws mandating school attendance, the passage of state constitutional amendments mandating resistance to *Brown*, and deployment of state National Guard troops to prevent integration. *Id.* at 525. Somewhat ironically, these delays proved so egregious and extreme as to eventually induce the Court to depart from the ordinary judicial approach to delays (or lack thereof) and insist upon “immediate progress toward disestablishing state-imposed segregation,” declaring the achievement of this progress to be “incumbent upon the school board.” *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 439 (1968).

⁷⁷ Plaintiffs engaging in what Abram Chayes famously called “public law litigation” have repeatedly asked courts to reform institutions that legislatures and executive officials had allowed to fall into states of unconstitutional disrepair. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Over time, judicial intervention evolved from detailed command and control to the establishment of reform processes that give stakeholders, including elected officials, a role in the formulation of policies aimed at curing or at least ameliorating the violations. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004) (discussing litigation involving school desegregation and funding equity, mental health, prisons, policing, and housing). These mechanisms give political actors a substantial role in the formulation of concrete remedies. *See id.* at 1056 (explaining that the new forms of public law remedies “induce[] the institution to reform itself”). Thus, they raise fewer concerns about courts going beyond the proper judicial role than do some more substantively directive judicial remedies. However, by their nature, multi-player collaborative remedial processes take time. Thus, under newer no less than the older style of public law litigation approach, judicial supervision may persist for years. *Cf.* *Coleman v. Brown*, 952 F. Supp. 901, 932 (E.D. Cal. & N.D. Cal. 2013) (rejecting state’s request for further delay in reducing California prison crowding nearly two years after the Supreme Court decision in *Brown v. Plata*, 563 U.S. 493 (2011)).

the very least it would put in place a process by which recalcitrant non-actors would know that they cannot simply return to court again and again with further excuses to continue to deny justice to wronged parties.

At a minimum, the request for extension should demonstrate good faith on the part of the requesting party. And in all but the most unusual circumstances, this “one and done” rule should as a matter of course involve an extension period that is shorter than the initial time allowed for compliance.

C. In Cases of Chronic Delay

While it is simple to describe a rule that would deny second or subsequent extensions after deadlines are missed, it is surely the case that even extended deadlines will sometimes end with a party saying that they truly need even more time to comply. What happens if there still is no resolution after the additional time granted by the extension has expired?

Although the answer is frustrating, the only possible path toward justice is to reconsider the situation as it then presents itself. Again, the presumption must be that prompt compliance is to be expected. But also again, that presumption must continue to be rebuttable. If immediately ending the constitutional violation would still be catastrophic (such as, again, the anarchy that would befall Manitoba if a court held that the legislature’s continued refusal to pass a criminal code in French as well as English meant that there was no valid criminal law in the province), then of course the wise course would be to allow further delay, reluctantly but necessarily.

At such a point, however, there would need to be consequences for inaction. If the executive or legislative branches are initially undertaking the cure voluntarily and are not subject to sufficient political pressure to comply (and there are many such situations in which the political pressure quite explicitly pushes elected officials in the wrong direction), they can only be required to act by being subject to suit (where such legal actions would of course necessarily be constrained by doctrines of absolute and qualified immunity as well as other possible limits on judicial intervention).

In cases of continued inaction by political actors, the only way to contest further delays is to go to court, where there are well known mechanisms to punish foot-dragging and other dilatory behavior. When confronted with a party that has failed to meet both the initial deadline and (if granted) the extended deadline, judges would be expected to rely on the panoply of coercive measures available to them, such as contempt sanctions against the noncompliant parties.⁷⁸

⁷⁸ In *Spallone v. United States*, 493 U.S. 265 (1990), the Supreme Court affirmed contempt sanctions against the City of Yonkers for its failure to remedy

We close this Part with a promising example of the style of legal reasoning that should become the standard when actors consider the consequences of delayed justice. In 2022, a district court issued a ruling in response to litigation over the continued use of so-called Title 42 power, which the Trump and Biden administrations had both relied on to deny entry at the United States border to people who otherwise would be permitted to enter the country to submit a claim for asylum. The district court vacated Title 42, which would have had the immediate effect of allowing migrants to enter the country and try to vindicate their rights under the law.⁷⁹

The court initially announced that it would not delay the implementation of its order. The government requested a delay, however, saying that it needed to prepare to “move additional resources to the border and coordinate with stakeholders, including non-governmental organizations and state and local governments, to help prepare for the transition to Title 8 processing.”⁸⁰ The complainants in the case did not oppose the government’s request. Even so, the court issued an order allowing the delay but noted that it did so “WITH GREAT RELUCTANCE.”⁸¹ Although the court did not provide a full explanation of how it decided on the specific length of the extension, it made clear that it would not tolerate continued delays in doing justice, even in an instance where the extension itself is uncontested by the opposing party. The court sent the appropriate message that wind-down authority is limited and should be used as little as possible.

In the end, any standards-based approach is likely to seem unsatisfactory, especially where courts are limited in their ability to compel compliance by the political branches. Even so, because the existing legal landscape is surprisingly

housing discrimination with sufficient alacrity but reversed sanctions the district court had imposed on four individual members of the city council. *See id.* at 276-80. The Court did not reach the question whether individual sanctions against legislators for failing to vote to cure a constitutional violation would ever be consistent with the absolute immunity legislators generally enjoy, finding that the district judge should have first waited to see whether sanctions against the city “failed to produce compliance within a reasonable time” before considering sanctioning the individual city council members. *Id.* at 280.

⁷⁹ *See* *Huisha-Huisha v. Mayorkas*, 2022 WL 16948610 (D. D.C. Sep. 15, 2022), *cert.* and stay granted by *Arizona v. Mayorkas*, 143 S.Ct. 478 (2022).

⁸⁰ J.A. at 57, *Arizona v. Mayorkas*, 598 U.S. ___, 214 L. Ed. 2d 312, (2022).

⁸¹ *Id.* (all caps in original).

undeveloped and under-theorized, it will count as progress if decision makers expressly articulate the reasons for delay, provide grounds for the length of a delay, and are held accountable for unjustified deviations from the specified timetable. While delay is sometimes not only inevitable but sensible, it should not be left to unguided discretion.

IV. Anticipating and Acting in Advance of a Constitutional Crisis

Our conclusion that all legal actors have inherent wind-down authority has potential implications for avoiding constitutional violations in the first place. The core of our argument to this point is that the imperative to end a constitutional violation is not necessarily so great as to warrant absorbing extremely high costs, at least where a transition period during which the violation persists can substantially mitigate the harm. Does the same principle apply to *avoiding* a constitutional violation in the first place? Is the imperative to comply with the Constitution so demanding that it requires absorbing enormous damage, even when the damage can be greatly reduced by *initiating* a temporary period of constitutional violation?

The logic of our argument would seem to treat these circumstances as parallel. Our schematic example in Part II—in which Alexis gradually decelerates rather than slams on the brakes—illustrates the close relation between the two scenarios. It should not matter whether Alexis has already driven a few feet into the 30 mph zone (in which case she would be winding down a violation by slowing down gradually) or she is just about to enter it (in which case she would be initiating a temporary violation). In either instance, she has good reason not to slam on the brakes.

Even so, there may be reasons peculiar to constitutional law or to government as opposed to private actors that differentiate the wind-down case from the new-violation case. Accordingly, in this Part, we consider whether government officials may initiate a temporary constitutional violation to avoid (or greatly reduce the magnitude of) a very substantial harm.

Although our argument has implications for state and local officials, we focus on national actors, who would be most likely to face the most serious crises. We ask whether a President would be required to avoid an imminent (or possible) constitutional crisis by taking actions in advance to avoid or delay the course of events that could lead to such a crisis. We also ask whether, on the eve or in the midst of a crisis, the President must exhaust even the most extraordinarily costly but constitutional measures before turning to unconstitutional ones.

We focus specifically on a recurring near-crisis that has bedeviled our political and legal system for more than a decade: one political party's strategic decision to use the statutory limit on gross federal debt —the so-called debt

ceiling⁸²—to extract policy concessions from the other party. In particular, we look at Republican-led Congresses' threats to refuse to increase the debt ceiling on several occasions in the early 2010s, which are mirrored by the current Republican-led House of Representatives' threat to do the same. These threats are designed to pressure a Democratic President to concede to policy priorities that the Republicans have not succeeded in enacting as part of the standard lawmaking process.

The President's obligations leading up to and during a debt ceiling impasse raise a key question implied by our analysis of justice delayed: whether any requirement to end—or at least minimize the duration of—constitutional violations necessarily implies a duty to exhaust all legal options in advance of a possible violation? After all, if we are saying that every branch of government has an affirmative duty to cure any constitutional violations as expeditiously as possible (albeit not always immediately), might we not also be implying that a legal actor must do everything possible to make sure that we never reach such a point? It turns out that the answer to that question is no, because timing issues are complicated even prospectively, not merely after the fact.

In this particular context, our focus on the President may seem odd. After all, Congress could wholly avoid a debt ceiling crisis by raising (or better yet, repealing) the debt ceiling. As we explain below, Congress should indeed do just that. But constitutional crises often arise when various actors behave irresponsibly. That fact does not relieve other actors of *their* duties. We thus accept that the President has some obligation to prevent a debt-ceiling-fueled impasse of Congress's making from blossoming into a crisis. Even so, however, the President's obligation to avoid a crisis is not absolute.

A. *The Debt Ceiling and the Trilemma*

Starting in 2011, the Republican majority in the U.S. House of Representatives engaged in an unprecedented strategy, threatening to refuse to increase the maximum limit on gross federal debt as a means of pressuring President Obama to give in to their demands for reductions in discretionary social spending. Notably, this strategy took place outside of the standard procedures by which the annual federal budget is determined. To understand why this strategy was both unprecedented and dangerous, it is first necessary to be clear about how the debt ceiling statute interacts with the laws governing federal spending and taxation.

At the beginning of any given fiscal year, accumulated debt carries forward from previous years' borrowing. Through the standard constitutional lawmaking process, governed by additional arcane rules specified in the Congressional Budget

⁸² The current version of the debt ceiling is codified at 31 U.S.C. § 3101.

and Impoundment Control Act of 1974,⁸³ Congress and the President (or Congress alone, if the President vetoes the relevant bills but Congress overrides those vetoes) enact laws each year specifying in detail how much money the government shall spend (the “spending law”) and the sources and rules by which it shall collect revenue (the “taxing law”). Together, those two laws⁸⁴ determine whether the government will run an annual deficit, which would require borrowing additional money that will be added to existing debt. Or, the spending and taxing laws could instead result in an annual surplus, in which case some existing debt could be paid down.

In short, the combination of the spending and taxing laws determines by simple arithmetic whether the government will need to borrow additional money. If Congress does not want debt to rise, or if it is willing to allow debt to rise but only by a specific amount, it has the authority to limit the need to take on additional debt by enacting spending and taxing laws that would achieve that end. If, for example, Congress decides that an existing \$1 trillion gross debt should rise by \$50 billion, then it will require the government to spend \$50 billion more than it collects in total tax revenues in that year.

Even if Congress does not collectively think of its spending and taxing laws in that way, the laws it enacts necessarily imply a policy decision about how much new borrowing will be added to the existing debt each year. In that very important sense, there is always a “debt limit,” because the President is not permitted to spend more (or less)⁸⁵ than the amount appropriated by the spending laws, nor to collect

⁸³ Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. §§ 681–688).

⁸⁴ Formally, more than two laws will typically be involved. For example, some expenditures are required by so-called entitlement laws rather than annual spending bills. “Mandatory spending” refers to budget outlays mandated by laws other than specific appropriation acts. Entitlement programs such as Social Security and Medicare are responsible for the majority of such mandatory spending. MINDY R. LEVIT ET AL., CONG. RSCH. SERV., RL33074, MANDATORY SPENDING SINCE 1962 (2015). The existence of separately enacted laws does not alter the analysis, so we refer to the combination of all such laws as one “spending law” for simplicity. Our reference to one “taxing law” is similarly stylized.

⁸⁵ See Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. §§ 681–688). As we have previously noted, the Act is predicated on the principle that presidential failure to timely and fully pay Congress’s spending priorities would be an unconstitutional usurpation of congressional spending power. Neil H. Buchanan & Michael C. Dorf, *Borrowing by Any Other Name: Why Presidential “Spending Cuts” Would Still Exceed the Debt Ceiling*, 114 COLUM. L. REV. SIDEBAR 44, 56 (2014). As the Supreme Court’s decision in *Clinton v. New York* makes clear, congressional appropriations are to be

less (or more) than is required under the taxing laws.⁸⁶ As a policy matter, Congress limits the debt by passing laws that in combination require a specific amount of new borrowing.

The debt ceiling statute purports to change that reality by specifying as a separate matter the maximum amount of money that the government can owe in total federal gross debt at any given time.⁸⁷ But what happens if, in the example above, Congress has passed a law that limits the total amount of federal debt to \$1.03 trillion, whereas the spending and taxing laws together would result in total debt rising to \$1.05 trillion by the end of the year? Given that he cannot simultaneously satisfy the requirements of those mutually inconsistent laws, what can or must the President do?

After all, Congress will have put the President in an impossible situation. He cannot spend the money that Congress has required—in the exact amounts and on the various programs that the spending law specifies in detail—and gather tax revenues only in the amounts that Congress has required him to collect, because to do so would require borrowing \$50 billion, whereas Congress has also stated that the debt can only rise by \$30 billion, to a total of \$1.03 trillion.

paid in exact amounts unless Congress specifically provides the President authorization to spend “up to” specific sums. *Id.*; 524 U.S. 417, 445-47 (1998).

⁸⁶ Of course, Congress’s failure to fund the Internal Revenue Service adequately ensures that it will lack the resources to enforce the tax laws fully. John Koskinen, *How More IRS Funding Could Create a Less Frustrating IRS*, BARRON’S (Nov. 26, 2021), <https://www.barrons.com/articles/how-more-funding-could-create-a-less-frustrating-irs-51637785406> (“billions of dollars of taxes owed are not being collected” due to a 50 percent decrease in the IRS’s audit rate caused by “significant underfund[ing]”). See also CTR. BUDGET & POL’Y PRIORITIES, CHART BOOK: THE NEED TO REBUILD THE DEPLETED IRS, (last updated Dec. 16, 2022), <https://www.cbpp.org/research/federal-tax/the-need-to-rebuild-the-depleted-irs>. For that reason, as a practical matter the government will collect less in taxes than the law specifies. In saying that the President may not collect less than the tax laws require to be paid, we mean simply that, resource constraints aside, a President who unilaterally decided not to collect some tax that was due would violate the constitutional obligation to take care that the laws are faithfully executed.

⁸⁷ The debt limit statute governs the *gross* federal debt rather than the *net* federal debt. For reasons not germane to our argument in this Article, gross debt is a meaningless concept, so even if there were a good reason to have a debt ceiling statute, it should limit net debt. Here, we will proceed as if the debt limit statute applied to correctly measured debt. See, e.g., CTR. BUDGET & POL’Y PRIORITIES, POLICY BASICS: DEFICIT, DEBT, AND INTEREST, (last updated July 29, 2022), <https://www.cbpp.org/research/federal-budget/deficits-debt-and-interest>.

In a series of articles from 2012 through 2014, we labeled this impossible three-way problem a “trilemma,” and we argued that any President who is ever faced with a trilemma must set aside the debt ceiling in order to obey Congress’s commands under the spending and taxing laws.⁸⁸ We argued that although it would be unconstitutional for a President to violate the debt ceiling (because doing so would usurp the power of Congress to borrow money), his “least unconstitutional option” to violate the debt ceiling is in fact required by the Constitution itself. Our argument rested on principles of separation of powers and the ability of Congress to enact subsequent legislation to mitigate any damage that it wishes to limit. As we discuss below, we also concluded that there is a requirement to minimize or avoid sub-constitutional harm, and the President would meet that requirement by borrowing in excess of the debt ceiling.

Our argument that the President should borrow in excess of the debt ceiling challenged the conventional wisdom that a President should instead address a trilemma by refusing to pay some of the legally enforceable obligations that were created by the spending law.⁸⁹ We based our contrary conclusion partly on the ground that deciding which obligations to flout and by how much usurps a great deal more legislative-style discretion than deciding to borrow exactly the amount

⁸⁸ Buchanan and Dorf, *supra* note 62; Neil H. Buchanan & Michael C. Dorf, *Nullifying the Debt Ceiling Threat Once and For All: Why the President Should Embrace the Least Unconstitutional Option*, 112 COLUM. L. REV. SIDEBAR 237 (2012); Neil H. Buchanan & Michael C. Dorf, *Bargaining in the Shadow of the Debt Ceiling: When Negotiating Over Spending and Tax Laws, Congress and the President Should Consider the Debt Ceiling a Dead Letter*, 113 COLUM. L. REV. SIDEBAR 32 (2013) (hereafter *Bargaining in the Shadow*); Buchanan & Dorf, *supra* note 85.

⁸⁹ For a defense of the conventional wisdom rooted in historical practice, see Conor Clarke, *The Debt Limit* (unpublished draft on file with authors). Although we find Clarke’s account of the history of federal borrowing enlightening, we disagree with his conclusion that executive branch practices in circumstances in which *appropriations* laws are inadequate to meet statutory requirements bear significantly on the unprecedented circumstance in which appropriations laws are adequate but the debt ceiling law poses the key obstacle. We also disagree with Clarke’s largely undefended assumption that “public debt” as used in Section 4 of the Fourteenth Amendment refers only to payments due on government bonds. *See Perry v. United States*, 294 U.S. 330, 354 (1935) (“Nor can we perceive any reason for not considering the expression ‘the validity of the public debt’ as embracing whatever concerns the integrity of the public obligations.”) That assumption underlies Clarke’s contention that for the foreseeable future, even assuming the debt ceiling is reached, smoothed-out revenues will always suffice to cover constitutionally obligatory debt.

of the revenue shortfall.⁹⁰ However, for the purposes of this Article, it does not matter how the President should respond to a trilemma, once it has occurred. Instead, we concern ourselves here with whether the very possibility of a future trilemma changes how the President must act in the moment. Is he affirmatively required to look for gathering clouds? And how long before the storm might hit must he act?

B. The Requirement to Avoid a Trilemma: Congress and the President

Before we answer those questions about the President, we add a word about Congress's responsibility. It should be clear that legislators are affirmatively required to guarantee that there will never be a day when the President is faced with a trilemma. Indeed, although the courts might invoke the political question doctrine to avoid ruling on a challenge to the debt ceiling in the midst of a crisis, if a court were to reach the merits, it should hold the debt ceiling statute invalid, because so holding is the only way to guarantee that that statute will not be used to put the President in a situation in which everything he might do (including doing nothing) would violate the Constitution (and, again, inflict very substantial sub-constitutional harm).

Given that there must always be spending laws to fund the government's activities and services, and that there must then be revenue laws to finance the government, the law that must fall by the wayside is the debt ceiling statute. Moreover, as noted above, the debt ceiling does not serve its supposed purpose of limiting federal debt, whereas the spending and revenue laws collectively do serve that purpose. This means that Congress would violate its duty to avoid a constitutional crisis were it ever to force the President to face a trilemma. And because it cannot fail to pass spending and taxing laws, it must not pass a debt

⁹⁰ According to one of our critics, if Congress were to fail to raise the debt ceiling adequately to cover the gap between revenues and expenditures, it would not create a trilemma but would thereby delegate to the President "unprecedented discretion to unilaterally cancel legislative programs, borrow money, or even raise taxes." Chad DeVaux, *The Fourth Zone of Presidential Power: Analyzing the Debt-Ceiling Standoffs Through the Prism of Youngstown Steel*, 47 Conn. L. Rev. 395, 433 (2014). In light of the major questions doctrine, which requires a clear statement from Congress to sustain a very broad delegation of power to the executive, see *West Virginia v. EPA*, 142 S. Ct. 2587, 2607-09 (2022), we do not see how such an enormous grant of power could be inferred from congressional silence. Indeed, Professor DeVaux himself clearly disapproves of such a delegation. See DeVaux, *supra* at 433 ("Such an acquiescence of authority constitutes an existential threat to the delicate balance of power upon which our freedom ultimately rests.") We think that his own analysis thus ought to lead him to agree with our framing of the problem.

ceiling law.⁹¹ However, neither this obligation nor Congress's failure to satisfy it presents a timing problem as such. Only when Congress violates its duty by creating a trilemma (or by making it possible that one will arise) does the clock start ticking. Congress is never forced by exigency into creating a trilemma.

Suppose, then, that at least one house of Congress decides to ignore its constitutional duty and that the courts do not intervene, but that the President could conceivably carry out actions in advance (even at the very last moment) to prevent a constitutional violation from occurring. Does the President have an affirmative duty to anticipate and cure the incipient debt ceiling problem? If so, does this mean that he must take every available executive action in advance that would raise as much revenue as possible under the law and to spend as little as possible, no matter how cramped a reading of the statutes might be required to justify doing so? In short, is there an exhaustion requirement before the President could declare that he was facing a trilemma? If he fails to exhaust all possible crisis-forestalling measures, is everything that happens from that point forward his fault?

On one level, the allocation of fault would not matter if the trilemma were ever in fact to arise. At that point, the question is not whom to blame but what to do next. By analogy, the doctrine of mutually assured destruction holds that a nuclear superpower should vow to destroy any country that attacks it with nuclear weapons, which is meant to deter any other nuclear-armed country from attacking in the first place. Once the enemy's missiles are launched, however, the logic changes, because there is no longer any good reason to kill tens of millions of additional people after it becomes impossible to stop the initial carnage. Who is to blame is beside the point.

Similarly, if the President were to find himself in a trilemma, the only thing that would matter is what to do next. As we noted above, we argue that he must set aside the debt ceiling and instead follow Congress's orders on spending and taxing, but even if he were to follow our advice, there is no doubt that his doing so would

⁹¹ As a trivial matter, we concede that Congress could pass a debt ceiling law that was never binding, either by setting the ceiling so high that it could never be reached or by allowing the President to reset the maximum debt amount as needed to execute the taxing and spending laws. Similarly, the now-defunct "Gephardt Rule" required Congress itself to include a provision in each year's budgetary laws that reset the debt limit to match what Congress's spending and taxing decisions required. See H.R. Doc. No. 94-661, at 351 (2013) ("[T]he 'Gephardt rule' used to provide a mechanism for a joint resolution establishing the public debt limit to be automatically generated upon the adoption of the concurrent resolution of the budget."). But in each of those cases, that simply means that the debt ceiling would never force a constitutional crisis because it was never binding. We thus happily stipulate that only a *binding* debt ceiling statute is unconstitutional.

at best contain the fallout from Congress's foolish decisions. When the President must choose among unconstitutional options, there is no getting away from the fact that the country is in a crisis. Everything from that point forward involves choosing from among only very bad options.

Even so, because we have specified what Congress should do in advance, we might also be able to specify what the President should do in advance. In addition to offering guidance to avoid a specific kind of crisis, thinking through these issues will help to clarify the President's discretion in the larger context of the wind-down authority question that frames this Article. To reiterate, we are asking whether the limits on the President's discretion to allow constitutional violations to continue, which we discussed above, implies a requirement to act in a timely fashion to prevent ever being in a wind-down situation at all.

Suppose that the President recognizes that Congress is holding the debt ceiling at a level that, at some point in the not-too-distant future, will prevent him from executing the spending and taxing laws as written by Congress. Let us say further that based on advice from his budget officers, the President concludes that the government will reach the current debt limit in six months' time, and if Congress fails to act to increase the debt ceiling before then, its spending and taxing laws will create the trilemma that everyone should want to avoid. Suppose also that a blocking coalition in at least one house of Congress has credibly threatened not to raise the debt ceiling absent concessions that the President regards as not merely politically painful but disastrous policy. What should the President do? What can he do?

As a threshold matter, the President is not permitted to begin something analogous to a wind-down process in advance, resetting spending and taxing levels to accommodate the debt ceiling's limitation. Doing so would mean that the President was violating the Constitution in the present merely because he fears (or claims to fear) that Congress will not do the right thing and increase the debt ceiling before it binds. The conventional wisdom is that the President can ignore and rewrite spending laws *ex post* when faced with a trilemma. As we noted above, we strongly disagree, but at the very least the conventional wisdom's adherents have limited themselves to the assertion that such unilateral executive action can be taken only on the day that the borrowing limit is reached.

That seems clear, but what else can or must the President do when he has good reason to believe that a trilemma will occur in six months? The obvious answer is that he must remind Congress of its responsibilities under the law. Telling the people who are empowered to change course to avoid hitting a looming constitutional iceberg is in some sense entirely hortatory but also absolutely required.

Beyond that, must the President do anything in the months preceding the possible crisis to prevent or at least delay it? We note here that our language above

regarding the spending and taxing laws “requiring” specific amounts of money to be spent and specific amounts of revenue to be collected was in fact a bit of a simplification. This is most obvious in the case of the Internal Revenue Code (the Code), the “taxing law” that tells the President in detail exactly how to collect revenues—from whom money is to be collected, on what schedule, using specific tax bases and rates, and so on. In fact, however, the Code is notably nonspecific in many of its details.

For example, Congress allows the exclusion from taxable income of up to \$250,000 (\$500,000 for married couples filing jointly) of the gain on the sale of a principal residence.⁹² It further stipulates that each taxpayer can use such an exclusion only once every two years, unless such an additional sale “is by reason of a change in place of employment, health, or, to the extent provided in regulations, unforeseen circumstances.”⁹³ That is, Congress delegated to the executive branch the power to issue regulations that will determine whether certain taxpayers will or will not be required to include in their gross incomes the possibly substantial gains on the sale of a home. This determination, in turn, will affect how much revenue the government will collect each year.

Although this obscure tax provision might not add up to many dollars of lost revenue each year, it is hardly an isolated example. Some tax regulations become politically salient. In 2015, for example, Senator Bernie Sanders sent a letter to President Obama identifying six specific regulations that are within the President’s power to change.⁹⁴ These included the notorious “carried interest loophole,” which allows certain financial market professionals to dramatically reduce their tax obligations, as well as “check-the-box regulations” that allow multinational corporations to reduce their tax payments. And although Senator Sanders focused on relatively large revenue-draining regulations that favor wealthier taxpayers and corporations, it should not matter from the perspective of revenue maximization whether revenue loss helps the rich, the poor, or the middle class.

Similarly, on the spending side, the President has a limited amount of discretion in determining exactly when certain expenditures will be released. He even retains limited authority to impound funds for 45 days without congressional

⁹² 26 U.S.C. §121(a).

⁹³ 26 U.S.C. §121(c)(2)(B).

⁹⁴ Bernie Becker, *Senate Liberal to Obama: Act on Tax Breaks*, HILL (Mar. 2, 2015), <https://thehill.com/policy/finance/234302-senate-liberal-to-obama-act-on-tax-breaks/>.

authorization.⁹⁵ Moreover, it is standard operating procedure for the executive branch to have some residual authority to decide within limits the exact day when funds will be spent, simply because it is often not knowable in advance when, say, a new federally funded hospital construction project will break ground or how quickly it will be built.

In addition, for both taxing and spending laws, the timing of transactions will change the amount of interest that the government owes on its debt each year. The longer spending can be delayed, and the sooner revenues can be maximized and collected, the more slowly the government takes on new debt, which then reduces interest costs, however minimally.

Without the specter of a trilemma, Presidents exercise this kind of discretion in light of various policy goals. For example, the Treasury Regulations implementing the tax exclusion noted above—allowing an exception to the one-sale-every-two-years rule—now include a list of instances that trigger forbearance, by defining the vague term “unforeseen circumstance.”⁹⁶ One example is divorce; successive Presidents have signed off on the regulation to allow divorcing spouses to sell their house without paying taxes on any gain up to the normal limitation.⁹⁷ Even setting aside the question of whether divorce is reasonably understood as an unforeseen circumstance, the point here is that the President in his discretion is collecting smaller amounts of revenue than the law might allow. Again, he might very well have a good policy reason for doing so, and Congress might similarly have had a good reason to delegate the authority to write such a regulation and to allow that regulation to stand. If so, then there is no good reason to interfere with that policy choice by the elected branches of government.

But if the President were required to make sure that a trilemma never happened—or at least to delay such an event as long as possible—then he would be required to scour the taxing and spending laws for every item, large and small, that would slow down the accumulation of debt as the government heads toward the ceiling. It is arguable that the President would be required to do so even when the debt ceiling is not in imminent danger of being reached, because one can never be certain that Congress will act in time to avoid disaster. Unlike the situation noted above, in which the President unilaterally—that is, without congressional authorization and thus unlawfully—refuses to comply with spending obligations and raises taxes in advance of reaching the debt limit, here the President would be

⁹⁵ 2 U.S.C. §§ 682-683.

⁹⁶ Treas. Reg. § 1.121-3 (e) (2023).

⁹⁷ *Id.* at § 1.211-3(e)(2)(iii)(D).

using the legal authority given to him by Congress to maximize revenues, minimize expenditures, and thus put off the day of reckoning.

As a policy matter, it would be perverse to read an override provision into all federal law that essentially would remove executive discretion in any area that has a budgetary impact, even where such discretion has been expressly approved by Congress. As a narrowly legal matter, however, is this what the existence or possible existence of a binding debt limit requires?

One further confounding factor in this analysis is that Congress has not to this point ever failed to increase the debt ceiling in time to prevent a constitutional crisis. Even in the years since Republicans have been threatening to force the President to respond to a trilemma, the brinkmanship has always been resolved at the eleventh hour, either by increasing the debt ceiling or by suspending it for months or years at a time on several occasions. Each time, Republicans threatened to carry through with their threats—just as they are now saying in light of the next debt ceiling “drop-dead date” in mid-2023 that this time they mean what they say.

It cannot possibly make sense to say that the President is constitutionally required to exhaust every possible debt-minimization strategy—in contravention of Congress’s own contradictory enactments—in response to a repeated threat that has never been carried out.

Even so, however, it might be possible to argue that a President has an obligation to make a calculated judgment as to the seriousness of any threat by Congress not to increase the debt ceiling. This might in turn mean that the nearer a drop-dead date is, the more important it is for the President to take anticipatory action. That calculus, however, runs into two further logical problems.

First, and as a further analogy to the mutually assured destruction scenario, the very nature of debt ceiling standoffs is that each side tries to wait out the other, refusing to be the first to blink in a staring contest. Threatening to obliterate an adversary’s population and threatening to bring about an economic crisis that would severely damage one’s own people (as well as the global economy) both involve negotiators who have an interest in making their opposites wonder whether they are crazy enough to go through with the unthinkable. Saying that the President is constitutionally obligated to start taking actions that are harmful, simply because the negotiations are nearing the point of no return, completely misunderstands that aspect of bluffing.

Second, the types of executive discretion that we described above require actions that can take months or years to implement. Yes, the executive branch does have the ability to change its regulations (as applied to the tax code or any other federal law), but it cannot do so at a moment’s notice. The Administrative

Procedure Act (APA) generally requires time for the notice-and-comment process⁹⁸ and much else under the panoply of administrative due process.⁹⁹ As we noted in Part I, Judge Garaufis's ruling against the Trump Administration's attempt to end DACA was based on the APA's prohibition of "arbitrary and capricious" administrative action.¹⁰⁰

This tension leads to a somewhat paradoxical result. For the President to fully exhaust all of his powers to prevent a debt ceiling crisis from occurring, he would need to begin on his first day in office, making every discretionary decision necessary to delay economic doomsday. Yet doing so would mean that he would have used up all of those options well in advance of any actual crisis. So long as Congress continues to require spending (even fully minimized by the President) and tax collections (even fully maximized by the President) that together will eventually push the government over the line, the President's attempts to exhaust all legal remedies will not in fact prevent a determined Congress (or even a blocking faction of one house thereof) from precipitating a crisis. At some point, then, the President will be out of options and will simply be back in the stare-down that we described above.

C. Exhaustion Requirements in a Crisis

But what of the possibility of requiring the President not to maximize revenues and minimize expenditures in advance of a debt ceiling crisis but to take extraordinary actions that are arguably legal when there is an actual crisis? Specifically, is the President required to go to extraordinary lengths, manipulating existing laws to prevent government default after Congress has failed to increase the debt ceiling?

In our first article discussing the debt ceiling, we addressed the notion of sub-constitutional harm precisely in this context.¹⁰¹ The President might, for example, announce at midnight on the drop-dead date that he will sell Yellowstone, the Washington Memorial, and Mount Rushmore to the highest bidder, or that he will license naming rights for the White House, or that he will become a paid spokesperson for a cryptocurrency company and sign over the proceeds to the

⁹⁸ 5 U.S.C. § 553(b).

⁹⁹ An agency can dispense with otherwise required notice and comment "for good cause," 5 U.S.C. § 553(b)(3)(B), but that decision itself is subject to judicial review and possible invalidation. *See Biden v. Missouri*, 142 S. Ct. 647, 659-60 (2022).

¹⁰⁰ 5 U.S.C. § 706(2)(A).

¹⁰¹ *See Buchanan & Dorf, supra* note 62, at 1197 n. 94; *id.* at 1218.

federal government.¹⁰² To be sure, taking such actions at the last minute—which he would have to do in order to avoid undermining his negotiating position—would not bring in fair-market value for these transactions, but fire sales are sometimes necessary. We argued that any such course of action was simply absurd, meaning that the President should ignore those possibly legal options in favor of issuing debt in excess of the statutory ceiling.

Only slightly less fancifully, many commentators (including prominent economists) have argued that the President must respond to a trilemma by exploiting a supposed loophole in the Coinage Act, which authorizes the President to issue commemorative platinum coins.¹⁰³ Because the Act omits the language that limits the denominations of the coins containing any other metals, the President supposedly could issue a platinum coin (but not one made of gold, for example) with any nominal value—one trillion dollars, ten trillion dollars, or more—and use the coin to pay the government’s bills.¹⁰⁴

If Congress were then to decide that it will never increase the debt ceiling, apparently this would go on forever, as Congress would certainly not stop appropriating funds for the military, for Social Security and Medicare, for aid to universities and schools, and for every other popular spending program that the public demands. Moreover, if platinum coins can be minted to pay for everything, Congress might even be tempted simply to eliminate the tax code. Meanwhile, financial markets and the economy in general, in both the United States and the rest of the world, would be seriously endangered, to say the least.

This scenario is but one example of what we meant when we wrote that the President is required to avoid enormous sub-constitutional harms, even if the alternative is to violate the Constitution outright. Forcing a President to inflict severe harm on the financial markets and thus the national and global economies, merely because of a tendentious reading of the Coinage Act, is an apt example of what Lincoln warned about with his “all the laws but one” admonition.

¹⁰² Admittedly, some of these ploys might violate various laws, such as those governing the national parks, 54 U.S.C. § 100101 *et seq.* Because we offer them simply as examples of what the President should *not* do, we merely assume their legality *arguendo*.

¹⁰³ 31 U.S.C. § 5112(k) (“The Secretary may mint and issue platinum bullion coins and proof platinum coins in accordance with such specifications, designs, varieties, quantities, denominations, and inscriptions as the Secretary, in the Secretary’s discretion, may prescribe from time to time.”)

¹⁰⁴ For the most elaborate defense of this approach, see Rohan Grey, *Administering Money: Coinage, Debt Crises, and the Future of Fiscal Policy*, 109 KY. L. REV. 229, 260-82 (2021).

As it happens, both of the current authors have argued in various writings that the Coinage Act does not in fact permit the creation of such a platinum coin for this purpose and that, even if we were to read that Act in such an impermissible way, the coin itself would constitute “debt” for the purposes of the debt ceiling law.¹⁰⁵ Moreover, because the government cannot literally pay its bills with coins (platinum or otherwise), it would need to deposit the coin as collateral with the Federal Reserve, which would then allow the Treasury to use its checking account to continue to pay its bills on time and in full. However, the Federal Reserve need not¹⁰⁶ (and arguably cannot legally¹⁰⁷) accept the coin. Indeed, if the Federal

¹⁰⁵ See, e.g., Buchanan & Dorf, *Bargaining in the Shadow*, *supra* note 88, at 36 n.14 (2013); Neil H. Buchanan, *Even After the Coin is Gone, the Legal Analysis is Instructive*, DORF ON LAW (Jan. 13, 2013), <http://www.dorfonlaw.org/2013/01/even-after-coin-is-gone-legal-analysis.html>.

¹⁰⁶ The Federal Reserve is not required to accept any deposit of any form from the Treasury. Andrew Duehren, *Janet Yellen Dismisses Minting \$1 Trillion Coin to Avoid Default*, WALL ST. J. (Jan. 22, 2023), https://www.wsj.com/articles/janet-yellen-dismisses-minting-1-trillion-coin-to-avoid-default-11674417541?mod=pls_whats_news_us_business_f (quoting Secretary Yellen’s statement that “[t]he Fed is not required to accept [the coin;] there’s no requirement on the part of the Fed. It’s up to them what to do”). Accordingly, forcing the Federal Reserve to accept the coin is impossible in light of its independence from the Treasury, which we have previously highlighted as essential to its ability to perform its core functions as a central bank. See Neil H. Buchanan & Michael C. Dorf, *Don’t Audit or End the Fed: Central Bank Independence in an Age of Austerity*, 102 CORNELL L. REV. 1, 11-12 (2016). At minimum, the Federal Reserve possesses the discretion to reject deposits in the form of trillion-dollar coins. See 12 U.S.C. § 342 (“Any Federal reserve bank *may* receive from any of its member banks, or other depository institutions, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks, and drafts, payable upon presentation or other items, and also, for collection, maturing notes and bills”) (emphasis added).

¹⁰⁷ Even if the Federal Reserve wanted to play along with an attempt by Treasury to deposit a platinum coin, it can only do so if the coin is “lawful money,” as it clearly does not fall within any of the other statutory categories of acceptable deposits. For that to be the case, however, the Federal Reserve (and potentially the courts if the issue were litigated) would need to reject a purposive interpretation of the statutory provision authorizing the minting of platinum coins, which is hardly a given. That provision, 31 U.S.C. § 5112(k), does not itself state that it permits the minting of only commemorative coins, but it was enacted as part of the same omnibus statute that also limited the number of “commemorative coin programs” that the Secretary of the Treasury may annually invoke “under this section” of the statute—i.e., under the section that includes the authorization to mint platinum coins. See Pub. L. 104-208, Div. A, Title I, § 101(f) [Title V, §§ 524, 529(a)], Sept. 30, 1996, 110 Stat. 3009-347, 3009-348 (codifying 31 U.S.C. §§ 5112(k) and (m)). Thus, read in context, the statute

Reserve were willing to come to the rescue at midnight on the drop-dead date, it should simply credit the Treasury's accounts and hold illegally issued government securities as collateral instead of platinum coins. Again, that would be illegal on a number of grounds, but it would at least minimize the additional damage that would be done by going through a farcical sham transaction based on a magical coin.

Even so, suppose that there were a little-used or even unknown option available to the President that would not potentially set off a global financial panic. Would he be required to exhaust that option? As we argued above, many of these questions can only be answered with an all-things-considered approach. If the President has good reasons to agree with his predecessors that, say, the little-used option should continue to be ignored, then he will not violate his constitutional duties simply because someone can say that there was one last legal maneuver that he could have choreographed in the face of a crisis, no matter how extreme that maneuver was or how remote was the possibility that it would in fact forestall the crisis.

In the end, we find that the President is required to act prudently and to follow the law wherever possible, which we concede might sound like a truism. It is not a truism, however, because our conclusion entails the facially controversial claim that the President, Congress, and the courts are sometimes permitted to initiate new constitutional violations for at least some amount of time.

* * *

In the first three Parts of this Article, we explained that when government actors conclude that the Constitution is being violated, it is not always wise, or even possible, to cure that violation in the blink of an eye. In this Part, we used the example of a debt-ceiling crisis to illustrate the related proposition that it is not always wise, or even possible, to *avoid* constitutional violations, even those that government actors can anticipate well in advance. Rather, they must retain the flexibility to respond to changing facts on the ground, to weigh the consequences of legal and illegal actions, and to recall that the Constitution should never be read as a suicide pact.

appears to limit the Treasury's ability to mint platinum coins to commemorative programs for sale to the public. See *Platinum Coins*, United States Mint, <https://catalog.usmint.gov/coins/precious-metal-coins/platinum> (listing past, current, and future platinum commemorative coins offered for sale to the public). A trillion-dollar coin that commemorates nothing (except perhaps government dysfunction) would thus appear to be beyond the scope of the statutory authorization. See also Neil H. Buchanan, *Big Coins, Political Credibility, and Hatred of Lawyers*, DORF ON LAW (Jan. 10, 2013), <http://www.dorfonlaw.org/2013/01/big-coins-political-credibility-and.html>.

V. Conclusion

Ronald Dworkin famously described rights as “trumps” to signify that they cannot be balanced away merely because they conflict with social policies not encapsulated in rights.¹⁰⁸ Yet that framing, which implies that rights are absolute, fits awkwardly with a body of constitutional doctrine that allows sufficiently important or compelling government interests to override rights when the overriding law or policy is closely tailored to advancing those interests. As Jamal Greene observes, given the variety of constitutional rights and the tests that go with them, the American practice is closer to European-style proportionality review than to Dworkinian rights as trumps.¹⁰⁹ As Frederick Schauer long ago suggested, in American constitutional law, rights are best conceived as shields, not trumps.¹¹⁰

This Article has sought to do for the Constitution as a whole more or less what Greene, Schauer, and other of Dworkin’s critics did for rights. The analogy is not perfect, however. Courts do not use heightened scrutiny to say that a compelling interest justifies *violating* free speech or equal protection. Rather, the conclusion that a law satisfies heightened scrutiny entails that the law justifiably *infringes* but does not *violate* the right in question. By contrast, in the paradigmatic cases this Article explored, courts or other actors conclude that, at least for a limited time, some overriding interest justifies *violating* the Constitution. As discussed in Part II, while courts may be said to derive authority to permit delays from equity practice, for legislators and executive officials, the imperative to delay compliance for a limited time in appropriate circumstances either inheres in the nature of or supersedes legal obligations.

¹⁰⁸ Ronald Dworkin, *Taking Rights Seriously* xi (1977).

¹⁰⁹ Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 70 (2017) (“Proportionality does not treat rights as trumps, but neither does it simply subject them to utilitarian balancing.”).

¹¹⁰ Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 428-31 (1993) (comparing rights to a suit of armor that protects against some but not all weapons). One might think that the Supreme Court’s recent turn to history spells the end for balancing, but if so, that end is not yet in sight. Justice Thomas, writing for the Court in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), sought to characterize First Amendment case law as utilizing the same history-only approach that his opinion adopted for firearms restrictions challenged under the Second Amendment. *See id.* at 2130. Yet the comparison works, if at all, for only one category of First Amendment cases. “Judges, of course, regularly use means-end scrutiny, including both strict and intermediate scrutiny, when they interpret or apply the First Amendment.” *Id.* at 2176 (Breyer, J., dissenting).

Because the stakes are high, legal actors will rarely be justified in delaying constitutional compliance. Moreover, as we explained in Part III, even then, the period of non-compliance should be minimized. With those important caveats, however, a commonsense rationale emerges for a hitherto largely untheorized practice of winding down constitutional and other legal violations rather than invariably halting them immediately. And as we explained in Part IV, that same rationale will sometimes even warrant the initiation of a new temporary constitutional violation.

Justice delayed can be justice denied, but sometimes justice rushed is justice denied while justice delayed is simply justice.