Time and Constraint: Executive Sunset and Executive Sunrise Rules

ALVIN PADILLA-BABILONIA*

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* J.S.D. Candidate, Yale Law School. B.A., University of Puerto Rico, 2013; J.D., University of Puerto Rico School of Law, 2016; LL.M., Yale Law School, 2019. Adjunct Professor of Law, University of Puerto Rico School of Law. Thank you to Cristina M. Rodríguez for reading and guiding me through multiple drafts. I also wish to thank Bruce Ackerman, who kindly commented on a draft of this Article during the Works-in-Progress Symposium of the Graduate Programs at Yale Law School. Finally, special thanks to the editors of *The University of Memphis Law Review* for their dedication and thoroughness.

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I. INTRODUCTION

There is widespread disillusionment with the current distribution of powers between the President, the House, and the Senate. In the quest for institutional reform, scholars often aspire to redeem the original intention or meaning of the Constitution. Instead, we should follow the example of the Founding Fathers and rely on contemporary political science literature to design new checks and balances that promote interbranch collaboration. Moreover, we cannot place all the blame on either the President or Congress. We must find a way to reduce both presidential aggrandizement and congressional abdication.

My claim in this Article is that time limits can be used to constrain the President and allow Congressional oversight over executive actions. Because time has the appearance of neutrality, constitutional analysis does not normally consider it to be a constitutive element. However, "[t]ime is actually a metric that is used to facilitate and veil all manner of normatively ambiguous political compromises."[1] Thus, laws and judicial decisions can employ time periods to enable compromises between the Executive and Congress in areas where they have concurrent authority.

This Article has three main goals. The first is to introduce the concept of the *political value of time*, the idea that time can facilitate transactions over power into the field of constitutional law, especially as a new way of thinking about separation of powers.[2] Part II conceptualizes time as a tool for facilitating political compromises to constrain the President. Because time is an effective way of achieving consensus, it can be used to bring clarity in those areas where the distribution

1. ELIZABETH F. COHEN, THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE 141 (2018).

2. *Id.* at 14.

of powers between the President, the House, and the Senate is uncertain. These constraints using time can take the form of *executive sunset* and *executive sunrise rules*. Executive sunset rules describe when executive action is authorized only for a fixed period. Executive sunrise rules describe when the President has to wait a certain period of time before exercising a constitutional power. In the constitutional areas where shared responsibility exists—war, international agreements, apportionment and spending, legislation and enforcement, appointment and removal—executive sunset and executive sunrise rules, created through statutes or judicial decisions, can specify when executive action is allowed or forbidden.

The second goal is to show how Congress can use time when enacting *framework statutes*: legislation that hopes to operationalize the Constitution, distribute power among the branches, and promote interbranch collaboration.[3] To illustrate this, Part III presents a paradigmatic example of a congressional executive sunset rule: The War Powers Resolution.[4] The Resolution allows the President to engage in armed conflict for a maximum of ninety days, but after that period, his power fades, and he needs congressional approval to continue to exercise that power. I argue that this time period played an overlooked role in Congress's effort to find common ground to simultaneously authorize and constrain the President's war powers. Part III also discusses other examples of laws that regulate the executive power through the use of time limits. Finally, it addresses the constitutional issues these measures may face after the Supreme Court invalidated the legislative veto in *INS v. Chadha*.[5]

While Congress is in a better position than the courts to review executive action, it will not always have the political incentives to do so. My third and final goal is to illustrate how the Judicial Branch can rely on time limits to constrain the President and promote interbranch

3. *See* HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 69 (1990) (defining framework statutes as "laws that Congress enacts and the President signs within their zone of concurrent authority") (citing Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 482 (1976) (defining framework statutes as those "which interpret[] the Constitution by providing a legal framework for the governmental decision-making process.").

4. War Powers Resolution of 1973, 50 U.S.C. §§ 1541–48.

5. 462 U.S. 919 (1983).

collaboration. To justify this exercise of judicial oversight, Part IV begins with a reinterpretation of the *Youngstown Steel* case.[6] While discussion of this case focuses on the formalism-functionalism debate, a careful reading of the different opinions will pave the way for a third way of thinking about the executive-congressional relationship: courts can consider the temporality of the executive action when determining the constitutional distribution of powers. By using time periods, courts can transcend the formalism-functionalism distinction, since they can take a pragmatic and flexible approach (functionalism) while also construing legal rules (formalism).

Moreover, courts can use time periods to transform standards into rules in the separation-of-powers context. To further develop this idea, Part IV discusses a recent example of an executive sunrise rule: *NLRB v. Noel Canning*.[7] In this case, the Supreme Court used time to balance the President's recess appointment power with the Senate's advice and consent role. It did so by establishing the following rule: the President cannot appoint someone during a recess of three days or less, and a recess lasting less than ten days is presumptively too short, but after that period the recess appointment power arises. The opinion in *Noel Canning* shows that courts can rely on text, history, structure, and precedent to construe how much time should be given to the President before he can exercise some faculty or before it requires congressional authorization.

Finally, Part V concludes that time can facilitate political compromises that constrain the President and stimulate collaboration between the political branches, and previews other possible areas of research, among them, time rules designed by the executive and the democratic legitimacy of political compromise through time.

II. CONCEPTUAL FRAMEWORK: TIME AND SEPARATION OF POWERS

A. Constraint and Interbranch Collaboration

Congress, through framework statutes, and the Judiciary, through constitutional rules, can use time to facilitate compromises that constrain the President and promote interbranch collaboration. Why

6. Youngstown Sheet & Tube Co. v. Sawyer (*Youngstown Steel*), 343 U.S. 579 (1952).

7. 573 U.S. 518 (2014).

do we need to constrain the Executive and stimulate cooperation between the political branches? There are differing accounts querying whether the Executive needs to be constrained and how that is achievable.[8] However, there seems to be unanimous support for the idea that the President is more powerful than ever.[9] Recent developments, such as Congress's failure to override President Trump's emergency declaration to use funds that had been allocated for other military constructions,[10] his unilateral action in Iran,[11] withholding congressionally approved military aid to Ukraine,[12] or his unilateral executive actions on

8. *See generally* Jon. D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 522 (2015) (describing the rise of "administrative separation of powers", or lack thereof, as a "subconstitutional checks and balances"); JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012) (arguing that constraint of the presidency is "messy," but that it is hard to know whether constraints on the Executive "go too far or not far enough"); ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 113–153 (2011) (arguing that "the system of elections, the party system, and American political culture" do more to constrain the president than formal legal rules from Congress or the Court); BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 69–70 (2010) (describing a dire legitimacy issue with continued executive aggrandizement); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789 (2010) (arguing that the constitutional system should be calibrated to avoid frequent executive declaration of emergencies); MAJORITY STAFF OF H.R. COMM. ON THE JUDICIARY, 111TH CONG., REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH (Comm. Print 2009) (200-page report seeking to investigate executive aggrandizement under President Bush); James P. Pfiffner, *Constraining Executive Power: George W. Bush and the Constitution*, 38 PRESIDENTIAL STUD. Q. 123, 139 (2008) ("Claims to executive power ratchet up; they do not swing like a pendulum unless the other two branches protect their own constitutional authorities."); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).

9. ACKERMAN, *supra* note 8, at 15.

10. Jennifer Scholtes, *Senate Fails to Override Trump on Border Wall Emergency*, POLITICO (Oct. 17, 2019, 3:13 PM), https://www.politico.com/news/2019/10/17/senate-fails-to-override-trump-on-border-wall-emergency-050266.

11. Catie Edmondson, *House Sends Trump Bill to Restrict War Powers on Iran, Setting Up Veto*, N.Y. TIMES (Mar. 11, 2020), https://www.nytimes.com/2020/03/11/us/politics/trump-iran-war-powers-congress.html.

12. Emily Cochrane et al., *G.A.O. Report Says Trump Administration Broke Law in Withholding Ukraine Aid*, N.Y. TIMES (Jan. 17, 2020), https://www.nytimes.com/2020/01/16/us/politics/gao-trump-ukraine.html.

COVID-19 relief,[13] illustrate how imbalanced the distribution of powers are between the Executive, the House, and the Senate. It seems as if the most pessimistic account of the American presidency has been confirmed.[14] At the same time, we cannot forget congressional abdication in this equation. In a way, congressional inaction "presents the real separation of powers dilemma of our time."[15]

Institutional reform is necessary to provide the adequate checks and balances.[16] However, a faithful "interpretation" of the constitutional text should be only the starting point for these institutional reforms.[17] In addition to discerning the meaning of the text, the political branches and the courts must give "legal effect" to the constitutional text, also known as "construction."[18] While I do not advance a concrete

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13. Heather Long, *Here's What Is Actually in Trump's Four Executive Orders*, WASH. POST (Aug. 17, 2020, 4:02 PM), https://www.washingtonpost.com/business/2020/08/09/heres-what-is-actually-trumps-four-executive-orders/.

14. ACKERMAN, *supra* note 8, at 181–88.

15. Cristina M. Rodríguez, *Complexity as Constraint*, 115 COLUM. L. REV. Sidebar 179, 197 (2015).

16. ACKERMAN, *supra* note 8, at 181–82. While some scholars distinguish separation of powers from the principle of checks and balances, this Article conceptualizes these terms as synonymous. *Compare* Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 459–66 (2013) (differentiating each concept), *with* David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 9 n.19 (2014) ("declining to draw any sharp distinction"). Moreover, while the Article focuses on the interbranch collaboration between the House, Senate, and the President, I will avoid framing the discussion as one involving the classical tripartite system of separation of powers, since it masks some of the complexities of the modern state. *See generally* CHRISTOPH MOELLERS, THE THREE BRANCHES: A COMPARATIVE MODEL OF SEPARATION OF POWERS (2013); EOIN CAROLAN, THE NEW SEPARATION OF POWERS: A THEORY FOR THE MODERN STATE (2009); EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE (2005).

17. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT 95, 95–96 (2010). In constitutional law, "interpretation is the activity that aims at discovery of the linguistic meaning of the various articles and amendments that form the United States Constitution." *Id.* at 101. The interpretation-construction distinction is commonly associated with the "New Originalism." *Id.* at 100, 116–18; *see, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 4 (2011); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 5 (1999). However, the distinction transcends the debate over originalism and the living Constitution. Solum, *supra*, at 117.

18. Solum, *supra* note 17, at 103. In constitutional law, "[c]onstructions do not pursue a preexisting if deeply hidden meaning in the founding document; rather,

institutional reform, in the following pages I will argue that time is a successful tool to propel Congress and the courts from their current state of inertia regarding executive power in order to give legal effect to the constitutional checks and balances.

B. Political Value of Time

Why the emphasis on time, instead of other ways to constrain the President and promote interbranch collaboration? Here, I build upon the work of Elizabeth Cohen, who describes time as "one of the most common units of value used for transactions over power and rights in democracies."[19] As such, the importance of time for the separation of powers lies in its ability to be a resource for transacting over power.[20] Time frames or measures included in laws can be useful to transact over power because they can be objective and impartial, normatively ambiguous, and transform legal principles into rules.

First, because time can be scientifically measured and quantified, it is perceived as "rational, objective, and impartial as opposed to the product of partial, subjective human judgment."[21] Intuitively we trust numbers, by contrast with qualitative standards.[22] This trust in time's objectivity and impartiality leads us "to infer that procedures using time to represent or measure traits, experiences, relationships . . .

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they elucidate the text in the interstices of discoverable, interpretative meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules." WHITTINGTON, *supra* note 17, at 5. Their aim is to "close the gap between legal requirements and constitutional sensibilities, speaking with the authority of the Constitution even where the text does not seem determinative." *Id.* at 8. Construction requires "implementing and applying the Constitution using all of the various modalities of interpretation: arguments from history, structure, ethos, consequences, and precedent." BALKIN, *supra* note 17, at 4. In other words, constitutional construction is how the President, Congress, and the courts enforce the Constitution when the text is so uncertain that it cannot, by itself, be reduced to legal rules.

19. COHEN, *supra* note 1, at 1–2.

20. *Id.* at 97–119.

21. *Id.* at 113.

22. *Id.* at 11; *see* THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE 74–75 (1996) (citing KARL PEARSON, *The Ethic of Free Thought*, *in* THE ETHIC OF FREETHOUGHT: A SELECTION OF ESSAYS AND LECTURES (1888)).

can also be objective."[23] Accordingly, the procedures that rely on time periods will be covered by "an aura of objectivity," regardless of whether they deserve it.[24] Time regulations, then, are perceived as an impartial way of transacting over power.

Second, time can be, but does not always have to be, normatively ambiguous. Time can be normatively ambiguous because a law that uses a time measure "can mean different things to different people."[25] I will call this time's *projective feature* because people can project their own normative values to the time periods established by law. This is a crucial element in how time "allows a society to gloss over its differences and come to agreements about how to transact over power."[26] Since the meaning of a time measure might not be specified, "it [is] a perfect medium for commensuration in a political system where contestation is a given."[27] Accordingly, when an issue is hotly contested, time can be a tool for building consensus because its normative value need not be specified, and political actors' diverse interests can be expressed in bargains for longer or shorter periods of time.

Regardless of whether time measures are normatively ambiguous, they can also be included in laws to form a legal rule, rather than a principle or standard. Ronald Dworkin saw principles as a standard that is observed because it is required by justice, fairness, or morality.[28] An example of a principle would be a law that says, "[n]o one shall be permitted to profit by his own fraud."[29] Rules, on the other hand, apply in an "all-or-nothing fashion."[30] For example, a law that states: "The maximum legal speed on the turnpike is sixty miles an hour."[31] Whereas principles allow weighing the situation and the context, rules specify the conditions that require their application—for instance, driving over sixty miles. This distinction between rules and principles

23. COHEN, *supra* note 1, at 113.

24. *Id.*

25. *Id.* at 14.

26. *Id.*

27. *Id.* ("[C]ommensuration is absolutely essential, not just to the state, but to liberal democracies in which divergent parties need to compromise in order to govern themselves together.").

28. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (1978).

29. *Id.* at 23.

30. *Id.* at 24.

31. *Id.*

applies to laws that rely on time since time measures are one of the means for transforming principles into rules.[32] In summary, this law might be perceived as objective and impartial, be normatively ambiguous, and also constitute a legal rule.

C. Time in Constitutional Law

Time is also a significant element of constitutional law. Redistricting, for example, occurs every decade.[33] Citizens can vote when they are eighteen years old.[34] The President has ten days to veto a bill.[35] The State has forty-eight hours to obtain a judicial determination of probable cause for arrest.[36] Many more examples abound. However, despite its ubiquity, scientifically measured time is often overlooked.[37] Because time appears neutral, constitutional analysis usually does not consider it as a constitutive element. Yet, all these measures have different hidden normative values and enabled different compromises.[38] For example, the decennial census that precedes redistricting—along with the infamous three-fifths compromise—originally was meant to balance the power between the North and the South.[39] Meanwhile, the ten-day presidential veto was a compromise between presidential and congressional supremacists.[40]

A different example that deserves more consideration is the thirty-five years age requirement to become president. At first glance,

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32. For instance, a principle that says immigrants must have close ties with the host country can be transformed into a rule that requires residence for a period of one year.

33. U.S. CONST. art. I, § 2, cl. 3.

34. U.S. CONST. amend. XXVI, § 1.

35. U.S. CONST. art. I, § 7, cl. 2.

36. Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

37. *See generally* TIME, LAW, AND CHANGE: AN INTERDISCIPLINARY STUDY (Sofia Ranchordás & Yaniv Roznai eds., 2020).

38. The Constitution was described by Max Farrand as a "bundle of compromises." Max Farrand, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 201 (1913).

39. Sean Suber, *The Senseless Census: An Administrative Challenge to Prison-Based Gerrymandering*, 21 VA. J. SOC. POL'Y & L. 471, 478 (2014).

40. John F. Manning, *The Role of the Philadelphia Convention in Constitutional Adjudication*, 80 GEO. WASH. L. REV. 1753, 1783 (2012) (listing the executive veto power as an example of how the Constitution is the result of compromise).

this appears to be an objective measure. On closer examination, we can tease out its hidden normative values; it embodies republican principles and implements an anti-dynasty rule. The Framers did not directly ban hereditary positions of power.[41] On one side, there were those who worried that presidents would resemble British kings, and for others, it did not make sense to completely bar capable sons from running for office.[42] Instead, the Constitution reduces this principle to an age-requirement rule.[43] The presidential age requirement achieved a common ground through "a clean and easily enforceable rule leveling the playing field somewhat, obliging favorite sons to bide their time and show their stuff and giving other men a chance to show theirs."[44] This example illustrates how time periods can be perceived as impartial, facilitate and veil normatively ambiguous political compromises (since people project their own meanings onto them), and be part of an enforceable rule.[45]

D. Executive Sunrise and Executive Sunset Rules

How can Congress and the Judiciary Branch avail themselves of temporary periods in the context of separation of powers? I propose that they can do this through framework statutes or constitutional rules that take time periods into consideration to *authorize* or to *forbid* executive action. They can authorize the Executive's exercise of power just for a fixed period of time and require Congressional authorization after that. I will call this an *executive sunset rule* because the executive power will fade after the explicit temporary period. In those areas where the constitutional distribution of power is uncertain, executive sunset rules can authorize presidential action for some period. Congress or the Judicial Branch can, for example, allow the President to seize production facilities for a period of sixty days during an emergency.

On the other hand, they can also forbid executive action for a fixed period but allow him to act after that. I call this an *executive sunrise rule* because the executive power will rise after an explicit

41. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 163 (2005).
42. *Id.* at 160, 163.
43. *Id.* at 163.
44. *Id.*
45. COHEN, *supra* note 1, at 14.

period. For example, Congress can legislate or the Supreme Court can decide that after the President reports a national emergency, he must wait thirty days before he seizes the production facilities. Thus, any measures the President takes during these thirty days will be incompatible with the will of Congress. Part III builds on this sketch and explains how Congress can use time in the formulation of framework statutes that distribute power among the political branches. Similarly, Part IV expands on how the courts can use time in the formulation of constitutional rules about separation of powers.

E. Separation of Powers and Temporal Boundaries

Time is especially useful in the context of separation of powers because this principle embodies multiple value commitments—liberty, effective administration, democratic accountability, and the rule of law—that are not always reconcilable.[46] This normative pluralism is tied to the prevention of tyranny, defined by Madison as the "accumulation of *all* powers, legislative, executive, and judiciary, in the same hands. . . ."[47] To stop tyranny and normative monopolization, separation of powers should "promot[e] the ebb and flow of negotiation and compromise."[48] Since time facilitates political compromise, it can be a useful tool to stimulate interbranch collaboration and prevent the accumulation of power.

This suggested framework cannot apply to every issue of separation of powers. After all, these controversies depend upon the generality or specificity of the constitutional text.[49] Yet in many situations,

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46. Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 351 (2016).

47. *Id.* at 388–89 (quoting THE FEDERALIST NO. 47 (James Madison)); *see also* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1155–82 (2000) (discussing the different intellectual traditions of separation of powers).

48. Huq & Michaels, *supra* note 46, at 390; *see also* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1978–79 (2011) ("[C]ompromise is inevitable whenever law-making reflects 'the product of a multimember assembly, comprising a large number of persons of quite radically differing aims, interests, and backgrounds.'" (quoting JEREMY WALDRON, LAW AND DISAGREEMENT 125 (1999)).

49. Manning, *supra* note 48, at 1945. Consistent with John Manning, this Article rejects that there is an overarching separation of powers theory. Instead,

Congress and the President have shared responsibility, and the constitutional text does not offer a clear answer. War, international agreements, apportionment and spending, legislation and enforcement, appointment, and removal—these constitutional areas have puzzled the courts and constitutional scholars throughout American history.[50]

The hardest question is how to constrain extraordinary executive power when the President claims a democratic mandate and must have latitude to exercise his duties in a complex and accelerated society.[51] The Executive must have discretion in the enforcement of laws, spending money, engaging in armed conflict, removing public officials, and negotiating international agreements.[52] The question is: how much discretion is permissible and ideal? Can temporal boundaries play a role in clarifying *when* the President has discretion in areas of concurrent constitutional authority? Can Congress decree that the President's non-enforcement of a certain law can only last six months? Can the Supreme Court reach the same conclusion?

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interpreters should evaluate whether the Constitution is specific or indeterminate on the specific power in controversy.

50. Huq & Michaels, *supra* note 46, at 349–50; E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 506–509 (1989).

51. See ACKERMAN, *supra* note 8, at 67–70 (arguing that the Executive should be restrained in "government by public opinion poll" actions); STEPHEN SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISE AND REAPPRAISAL 156 (2008) (discussing presidential mandates). The concept of "social acceleration" describes the quick tempo of modern societies. *See* HARTMUT ROSA, SOCIAL ACCELERATION: A NEW THEORY OF MODERNITY 71–80 (Amy Allen ed., Jonathan Trejo-Mathys trans., 2015). This acceleration of social, economic, and technological activity explains some of the transformations in legislative-executive relations where more political responsibilities and powers are given to the Executive. *See* William E. Scheuerman, *Liberal Democracy and the Empire of Speed*, 34 POLITY 41, 56 (2001).

52. *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 494 (1987) ("[E]ffectively carrying out governmental objectives requires a powerful, independent, politically accountable, and unitary executive.").

III. FRAMEWORK STATUTES: AUTHORIZATION AND FORBIDDANCE

The House, the Senate, and the President have constitutionally assigned roles in the creation of statutes.[53] In the classical distribution of powers, the legislative body had superior strength over the Executive in the legislative process,[54] but this constitutional rank has diminished over time.[55] However, the House and Senate can still provide incentives to persuade the President to sign a bill into law and in the case of a veto, preserve the formal faculty to override it. This section focuses on the best-case scenario in which Congress redeems its role by enacting framework statutes that supervise the Executive.[56] There is no disputing that we are living in a moment of peak polarization and congressional inaction.[57] In light of this congressional abdication, how can members of Congress gloss over their initial differences and find common ground to constrain the President?

This is where time comes in. As time facilitates and veils normatively ambiguous political compromises,[58] it can help the House and Senate enact framework statutes that fulfill their affirmative duty to implement the Constitution's text and principles. As this Part will explain, Congress can avail of time periods—a means of transacting power—to constrain the Executive and limit the boundaries of future political debate. Framework statutes can utilize time periods to authorize executive action during some specified time and forbid it in others. Thus, they can build executive sunset and executive sunrise rules that constrain the President and turn back the practice of congressional abdication. While there are inherent risks in giving the Executive Branch a grace period for executive action, there needs to be a trade-off, since

53. It must be noted, however, that debates over executive-congressional relations take shape over a "*thick political surround* of actors both external and internal to the three branches." Huq & Michaels, *supra* note 46, at 391.

54. THE FEDERALIST NO. 73 (Alexander Hamilton).

55. ACKERMAN, *supra* note 8, at 89–91.

56. Rodríguez, *supra* note 15, at 197 n.60 (describing the first-best world as one with "Congress willing and able to legislate in cooperation with [the] Executive Branch").

57. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 171–72 (2015).

58. COHEN, *supra* note 1, at 141.

the President is always in session and is more equipped to act swiftly and uniformly.

Because this proposal might be dismissed as idealistic, this Part starts with a backwards-looking approach by reappraising three framework statutes of the 1970s: the War Powers Resolution, the Impoundment Control Act, and the Trade Act. Part III will demonstrate that with these statutes' time periods played an overlooked role in facilitating political compromises to constrain the President and oversee his actions. My main interest is not the success of these particular measures in achieving their goals but to explore how time periods were essential in enabling rare congressional oversight over executive action. This will provide a common language to discuss future reforms. Because *INS v. Chadha* limited the ways by which laws can establish time limits, I will also discuss the ways to circumvent its constitutional problems.[59] As such, I will suggest how a Fast Track Procedure for special confirmatory bills could be included in laws, such as the National Emergencies Act, to constrain the President and promote interbranch collaboration.

A. Paradigmatic Example: War Powers Resolution of 1973

The War Powers Resolution, also known as the War Powers Act, was the most significant framework statute of the 1970s.[60] In the following pages, I will briefly describe how this law was a consequence of congressional abdication, executive self-aggrandizement, judicial withdrawal, and the necessity of interbranch collaboration. The War Powers Resolution, which requires the Executive to stop unilateral force after ninety days, will be reconceptualized as a paradigmatic example of an executive sunset rule. The ninety-day period of the War Powers Resolution facilitated a political compromise that promoted interbranch collaboration and constrained the President.

Prior to the War Powers Resolution, the Supreme Court indicated its reluctance to question the Executive's foreign relations powers in *United States v. Curtiss-Wright Export Corp*.[61] This judicial

59. 462 U.S. 919 (1983).

60. War Powers Resolution of 1973, 50 U.S.C. §§ 1541–50.

61. 299 U.S. 304, 329 (1936); s*ee also* GORDON SILVERSTEIN, IMBALANCE OF POWERS: CONSTITUTIONAL INTERPRETATION AND THE MAKING OF AMERICAN FOREIGN POLICY 37 (1997).

withdrawal and the United States' participation in World War II led to a radical aggrandizement of executive war-making powers.[62] Because of the Supreme Court's retreat, only Congress could counterbalance the President's claim to war powers. While it initially acquiesced to the growth of presidential power, Congress later adopted the War Powers Resolution as the first framework statute of the post-Vietnam era.[63]

The War Powers Resolution, enacted into law in 1973 over President Nixon's veto, intended to constrain the President and allow collaboration between the political branches over war powers.[64] Being a framework statute, it makes clear that its purpose is fulfilling "the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities."[65] It performs this constitutional requirement by compelling each political branch to collaborate with each other. First, the President must consult with Congress before introducing United States Armed Forces into hostilities.[66] Second, he must report any hostility or involvement and their estimated scope and duration.[67] Finally, he must terminate any use of United States Armed Forces within sixty calendar days after a report is submitted, or is required to be submitted, unless Congress (1) declares war, (2) extends the sixty-day period through a joint resolution or bill, or (3) "is physically unable to meet as a result of an armed attack."[68] This sixty-day period can be extended for an additional thirty days, for a maximum of ninety days, if the President certifies to Congress that the continued use of armed forces is an unavoidable military necessity for the safety of the United States Armed Forces.[69] Accordingly, the War Power Resolution establishes an executive sunset rule since the President is allowed to engage in armed conflict for a period of ninety days, but his power fades after that.[70]

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62. KOH, *supra* note 3, at 96.

63. *Id.* at 62.

64. *Id.* at 131–32.

65. War Powers Resolution of 1973, 50 U.S.C. § 1541.

66. § 1542.

67. § 1543(a).

68. § 1544(b).

69. *Id.*

70. However, even before the sixty-day period, Congress can order that the President removes the armed forces by concurrent resolution. § 1544(c). Finally, the

The War Powers Resolution ultimately failed in fulfilling its intended purpose.[71] It did not provide an adequate congressional check to the Executive since the long ninety-day period allowed him to create facts on the ground that make congressional override more difficult.[72] But for our current predicament, the important question is how did Congress move from its inertia and build a political compromise to constrain the President? How did Congress find solid bipartisan support to override the President's veto by gathering two-third majorities in both houses? The War Powers Resolution was a congressional response to the Vietnam War: specifically, the Cambodian invasion of 1970 since there was no previous consultation with Congress.[73] However, additional factors might explain how Congress overcame its inertia. There are strong grounds for believing that the use of time periods was fundamental in building a strong consensus in Congress.

Since the 1970 Cambodian campaign, the 91st Congress had been drafting legislation to limit Presidential unilateralism and undeclared wars.[74] Members of Congress, however, had differing views regarding both the constitutional and the practical aspects of the legislation.[75] For instance, some members of Congress were advocates of military spending while others opposed it. Some believed in leaving the day-to-day conduct to the Executive Branch, whereas more radical voices favored congressional supremacy. Some reformers wanted to participate in the decision-making, others were pacifists who opposed war-making. While some saw the power of the purse as the most effective constraint, others believed in drafting legislation that would narrow the war powers of the Commander-in-Chief.

Resolution also requires Congress to deal with the situation before the sixty-day period expires. § 1545(a).

71. KOH, *supra* note 3, at 133.

72. For a similar argument in the context of executive seizure during national emergencies, see HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1072 (3d ed. 1958) ("[R]ecognition of a power to initiative in the President subject to an after-check by Congress may be open to objection on the ground of the practical, political difficulties which attend any effort by Congress to undo what the President already has done.").

73. *See* JOHN H. SULLIVAN, THE WAR POWERS RESOLUTION: A SPECIAL STUDY OF THE COMMITTEE ON FOREIGN AFFAIRS 26 (1982).

74. *Id.* at 31.

75. *See id.* at 91.

In this contested scenario it was difficult for the House and the Senate to build a political compromise, even though both chambers had a Democratic majority. A bill by Representative Fascell was approved by the House, but it expired after the end of the legislative term without the Senate acting on it.[76] During this process, however, a bill was introduced by Senator Javits with a new concept that "set the Javits bill apart from all prior proposals."[77] Javits proposed an automatic termination of hostilities if they were not approved by Congress after thirty days. Congress could also end the hostilities via joint resolution within the thirty-day period.[78] While the initial Javits bill failed, the automatic sunset after a time period became a "touchstone[]" of the debate.[79]

During the 93rd Congress, the House adopted a bill that incorporated the sunset rule but extended the cutoff period to 120 days, while also allowing Congress to retrieve the armed forces at any moment by concurrent resolution.[80] The Senate, on the other hand, had approved a thirty-day period which provided that Congress could only act via joint resolution which requires the President's approval. Following a conference, the House and the Senate agreed to a compromise: a sixty-day period, which could be extended only thirty days, and the ability of Congress to order by concurrent resolution that the President remove the armed forces.[81] The bill finally became the War Powers Act after the House (284–135) and the Senate (75–18) overrode the President's veto.[82]

The War Powers Resolution gained considerable bipartisan support and ended congressional inertia because it relied on time periods to facilitate a normatively ambiguous political compromise. The time period allowed Congress to promote interbranch collaboration without having to define the scope of Presidential war powers. As such, the War Powers Resolution used time periods to operationalize the constitutional roles of the President and the Senate.[83] Time, because of its

76. *See id.* at 48–49.
77. *Id.* at 53–54.
78. *Id.* at 54.
79. *Id.* at 54.
80. *Id.* at 132.
81. *Id.* at 139.
82. *Id.* at 159–66.
83. *See* U.S. CONST. art. I, § 8, cl. 12; U.S. CONST. art. II, § 2, cl. 1.

capacity for commensuration, allowed the House and the Senate to find a compromise.

While the Senate wanted a thirty-day period, the House defended a 120-day period. Yet, because of time's malleability they were able to split the difference: a sixty-day period that could be extended for up to thirty additional days, for a total ninety-day period. Finally, since people ascribe their own meanings to time, the ninety-day time period of the War Powers Resolution allowed members of Congress to gloss over their differences and agree about how to transact over war power. Because the time period was constitutionally ambiguous, it was able to accommodate many normative viewpoints. The time period allowed the militarists, the pacifists, the congressional supremacists, and the President's sympathizers to come together to ensure congressional oversight of military action.[84] Thus, the War Powers Resolution works as a paradigmatic example of how members of Congress can use time periods to make political compromises in order to enact "a framework statute that aims to promote interbranch communication, consultation, and cooperation."[85]

B. Other Framework Statutes: The Impoundment Control Act of 1974 and The Trade Act of 1974

The War Powers Resolution might be the paradigmatic example, but Congress has resorted to time periods to constrain the President in various other constitutional areas. The Impoundment Control Act of 1974 and the Trade Act of 1974 are also framework statutes that legitimized Presidential authority over spending and international agreements, respectively, while also giving concrete meaning to the constitutional role of Congress.

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84. The scheme achieved one of its goals: to authorize the Executive to swiftly respond to hostilities, while simultaneously strengthening congressional oversight. Yet, this does not mean that the War Powers Resolution is sufficient or that it continues to be effective in constraining the President. One possible change, for example, could be shortening the "free period" to thirty days, as the Senate preferred, because ninety and sixty days are "an indefensibly long estimate of how long it should take Congress to decide whether the President's 'emergency' response should be made more permanent." John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1398 (1988).

85. KOH, *supra* note 3, at 190.

1. The Impoundment Control Act of 1974

The Impoundment Control Act has a similar backstory to the War Powers Resolution. Congress knew the Executive had too much control over budgeting and spending, but "for decades [it] was unwilling or unable to do anything about it."[86] The inability of Congress to regulate budgeting and spending led to more executive impoundments. While impoundments take many forms, the most controversial ones are when Congress enacts a program and decides its budget, but the Executive Branch refuses to spend the apportioned funds over policy differences.[87] By the 1970s, the congressional control over budgeting and spending had eroded, and—as with the war-making power—the Executive began to claim more control.[88] While some courts decided against the Executive Branch, the Supreme Court avoided settling the issue.[89] Congressional reform was necessary, but "complete congressional control would be undesirable" in the spending process.[90] Some discretion to the Executive was essential "since intelligent management of vast resources according to a set recipe is simply inconceivable."[91] The question, again, was how much.

In summary, in both the spending and war-making contexts, there was congressional abdication, executive self-aggrandizement, judicial withdrawal, and the necessity of interbranch collaboration. The abuse by President Nixon of the impoundment power only made the issue more salient and finally led to the enactment of the Impoundment Control Act of 1974. This framework statute developed "a hybrid process that differentiated between temporary actions (deferrals) and permanent actions (rescissions) by the [P]resident."[92] When the Executive Branch wanted a deferral in the expenditure of appropriated funds, either house could pass a resolution vetoing the delay. This legislative veto of deferrals is similar to an executive sunset rule since the deferral

86. LANCE T. LELOUP, THE FISCAL CONGRESS: LEGISLATIVE CONTROL OF THE BUDGET 16 (1980).

87. *See* LOUIS FISHER, PRESIDENTIAL SPENDING POWER 147–48 (1975).

88. *See* LELOUP, *supra* note 86, at 14.

89. FISHER, *supra* note 87, at 189–92.

90. LELOUP, *supra* note 86, at 14.

91. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 733 (3d ed. 2000); *see also* LELOUP, *supra* note 86, at 14.

92. LELOUP, *supra* note 86, at 25.

is authorized unless it fades because one House denies the delay. This is not an executive sunset rule as I have defined them in this Article, however, because the limit on executive power does not have a short and explicit time period for the deferral veto.

On the other hand, when the President wished to rescind congressional apportionments, it would be "automatically *rejected* unless Congress passes a bill to that effect within forty-five days."[93] The President could only request rescissions when: "1) a program's total budget authority will not be needed, 2) sound fiscal reasons exist for the withholding of funds, or 3) a single year's budget authority should be reserved from obligation."[94] Through this time period, Congress allowed "the President legally to suspend almost any program for a minimum of forty-five days."[95] This forty-five day period constituted an executive sunset rule whenever Congress refused to pass a bill to allow the rescission: the President could impound, but after a time period his authority fades.

How did the Democrat-controlled Congress find common ground with President Nixon, a Republican president? Similar to the War Powers Resolution, Congress relied on a time period, in this case forty-five days, to build consensus between members of Congress and the President. While congressmen agreed that budgeting and spending reform was necessary, they disagreed about their normative commitments. The reform coalition "was an unholy alliance of diverse interests with a few common objectives."[96] Most wanted to improve congressional oversight, but some were concerned about the growth in the budget while others were focused on reallocating the money to social programs.[97] In this contested scenario, time periods were key in allowing congressmen to gloss over their differences and come to agreements about how to transact over spending and impoundments.

The forty-five-day period, along with the rest of the proposals, facilitated a normatively ambiguous political compromise. The scheme allowed Congress to supervise impoundments without defining nor narrowing the scope of the executive powers. The "budget reform

93. *Id.*

94. Joseph Jucewicz, *Cooperation Altered by Adjudication: The Impoundment Process Since Nixon*, 3 J.L & POL. 665, 674 (1987).

95. *Id.*

96. LELOUP, *supra* note 86, at 20.

97. *Id.*

represented different things to different people."[98] According to Lance T. LeLoup, "[t]he architects of the Budget and Impoundment Control Act were able to arrive at a set of proposals for procedural change that the vast majority of Congress could agree on without arriving at consensus on fiscal policy goals or national priorities."[99] Thus, time allowed the fiscal conservatist, the social welfare spender, the congressional supremacist, and the Executive's supporters to compromise in order to guarantee congressional oversight on the impoundment process.

2. The Trade Act of 1974

The last example is the Trade Act of 1974. Here, history also repeats itself: congressional abdication of its constitutional role,[100] executive self-aggrandizement,[101] judicial withdrawal,[102] and the necessity of interbranch collaboration.[103] During the New Deal, Congress recognized that the President needed to act quickly when negotiating commercial agreements with other countries.[104] Consequently, Congress gave President Roosevelt "unprecedented flexibility in changing tariff rates established by statute."[105] However, this delegation was challenged because in the field of international agreements the Constitution authorizes the Senate—not Congress—to give "advice and consent" to the treaties proposed by the President.[106] Furthermore, the Treaty Clause requires the Senate to exercise this check through a two-

98. *Id.* This description is similar to time's projective feature–that it "can mean different things to different people." *See* COHEN, *supra* note 1, at 14.

99. LELOUP, *supra* note 86, at 20.

100. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 899 (1995).

101. *Id.* at 848.

102. *Id.* at 925.

103. *Id.* at 900; *see also* Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 144 (1992) (describing the Fast Track Procedure as facilitating interbranch collaboration).

104. Ackerman & Golove, *supra* note 100, at 848.

105. *Id.*

106. *Id.* at 849.

thirds majority vote.[107] Could the need for swift executive action in trade agreements be reconciled with the Constitutional text?

The Trade Act of 1974 was a framework statute that closed the gap between governmental practice and the constitutional sensibilities of the Treaty Clause. With this Act, Congress sought, among other things, to "rein in a runaway President by crafting statutory procedures that would impose greater congressional control on executive discretion and ensure unprecedented congressional participation in the upcoming multilateral negotiations."[108] It did so by creating a new form of international agreements called *congressional-executive agreements*, which required only simple majorities from both houses, and by innovating *the Fast Track Procedure*, which simultaneously authorized and constrained the President.

The Fast Track Procedure meant that the Executive could negotiate a foreign deal, including international trade agreements, but ninety days before it "enter[ed] into force,"[109] he had "to notify, consult, and subsequently submit the product of that action back to Congress for final, accelerated approval."[110] It stimulated interbranch collaboration: "So long as the executive plays by the rules at the earlier stages, it can guarantee an up-or-down vote, without amendments, after a relatively brief period for congressional hearings and floor debate."[111] Thus, it established a clear executive sunrise rule: the international agreement negotiated by the President would arise after a period of ninety days, unless either house voted down the proposal.

This Fast Track Procedure "allowed Congress to overcome both the political inertia and the procedural obstacles that frequently prevent a controversial measure from coming to a vote at all."[112] As such, this time measure—because of its projective feature—allowed members of Congress to transact over power and come to a normatively ambiguous political compromise. Thus, through this framework statute, Congress

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107. U.S. CONST. art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[.]").

108. Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After* I.N.S. v. Chadha, 18 N.Y.U. J. INT'L L. & POL. 1191, 1201 (1986).

109. Trade Act of 1974, Pub. L. No. 93-618, § 102(e), 88 Stat. 1978 (1975).

110. Koh, *supra* note 103, at 143.

111. Ackerman & Golove, *supra* note 100, at 905–06.

112. Koh, *supra* note 103, at 148.

availed itself of time periods to give practical meaning to the constitutional principle of "advice and consent."[113]

In these last two sections, I have laid out the parallels between the War Powers Resolution, the Impoundment Control Act, and the Trade Act of 1974. These framework statutes, putting aside their effectiveness and constitutionality, support the idea that Congress can use time periods to facilitate political compromises that promote interbranch collaboration and constrain the President. Time and again, Congress has resorted to time measures to facilitate a political compromise between the Executive, the House, and the Senate.[114]

C. Constitutional Problems: *INS v. Chadha*

For now, I have refrained from discussing either the success of these framework statutes or their constitutionality. These laws implemented their common aspirations through different mechanisms. Whereas the ninety-day period of the War Powers Resolution and the forty-five-day period of the Impoundment Control Act were clear examples of executive sunset rules, the Fast Track Procedure of the Trade Act of 1974 was an executive sunrise rule. After *INS v. Chadha* declared the legislative veto unconstitutional, the constitutionality of all these laws was questioned.[115] In this section, after discussing the Court's holding, I will address their constitutionality and discuss different ways Congress can constitutionally resort to time periods to constrain the President and promote interbranch collaboration.

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113. *See* Ackerman & Golove, *supra* note 100, at 905 (describing dysfunctional and ineffective treaty negation practices before the Fast Track Procedure) ("In short, the classic constitutional procedure not only generates unnecessary disaffection abroad but encourages political obfuscation at home.").

114. Another known example is the North American Free Trade Agreement ("NAFTA") Implementation Act, which allowed the President to modify tariffs, but they went into effect sixty days after he submitted a report to the pertinent committees in Congress. Pub. L. No. 103-182, 107 Stat. 2063 (codified at 19 U.S.C. 3301) (repealed Jan. 2020). This worked as an executive sunrise rule, where the executive power arises after a sixty-day waiting period. This and many other examples illustrate how Congress can effectively use time measures to promote interbranch collaboration and give legal effect to the checks and balances already established in the Constitution. This mechanism was preserved in the United States-Mexico-Canada Agreement Implementation Act, 19 U.S.C. § 4514.

115. 462 U.S. 919 (1983).

1. Constitutionality of Legislative Vetoes

The legislative veto was a device by which Congress, through resolutions or committees, rejected decisions in areas where Congress had delegated authority to the Executive Branch.[116] It was invented by Congress to exercise control over the actions of the Executive. Similar to the War Powers Resolution and the Fast Track Procedure, the legislative veto "effected a crucial political compromise: while the President gained current legislative authorization for his acts, his need to gain subsequent congressional approval (or to avoid subsequent disapproval) provided assurances to Congress that consultation would continue while his activities proceeded."[117] While it took several forms, one of the most common legislative vetoes was the "one-House veto," by which executive actions returned to Congress and could be overruled by one-House resolution. As we have discussed, the Impoundment Control Act provided a one-House veto for executive deferrals.

The one-House veto of the Immigration and Naturalization Act was challenged in *INS v. Chadha*.[118] This Act authorized the Attorney General to suspend the deportation of aliens if some conditions were met.[119] However, either the Senate or the House could pass a resolution invalidating the Executive's action.[120] This one-House veto had a long limitations period, as either House had until the end of the congressional session following the one when the case was reported.[121] Thus, this one-House veto was similar to an executive sunshine rule in that the right to suspend the deportation would only arise after a certain period. This was not an executive sunshine rule, though, because the period was not delimited by an explicit time period and the executive action would not arise if any House opposed the executive action.

In *Chadha*, the Supreme Court declared the legislative veto of the Immigration and Naturalization Act unconstitutional.[122] Its

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116. James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 323–324 (1977).

117. Koh, *supra* note 103, at 146.

118. 462 U.S. at 923.

119. *Id.* at 923–24.

120. *Id.* at 925.

121. *Id.*

122. *Id.* at 959.

reasoning suggested that other forms of legislative vetoes were also at risk. For the Court, the one-House veto was legislative in character, but it did not comply with two constitutional requirements for bills to become statutes: (1) the Presentments Clause of the Constitution, which requires that any bill be presented to the President for his signature or veto, and (2) the bicameral structure of Congress, since it compels that all bills have the concurrence of the members of both Houses.[123]

Because the one-House veto was not voted on by both Houses nor presented to the President, the Supreme Court concluded that it did not comply with the Constitution.[124] In many ways, *Chadha* was an easy case, but the Court's formalistic approach left a lot to be desired.[125] Whatever the case might be, the debate over its unconstitutionality is settled. We must now turn to other alternative techniques to promote interbranch collaboration.

2. Constitutionality of Other Oversight Frameworks

Where does this leave the time periods specified in the War Powers Resolutions, the Impoundment Control Act, and the Trade Act of 1974? After *Chadha*, there was a flood of law review articles examining the constitutionality of these laws. The War Powers Resolution was defended on the textual ground that the Constitution grants to Congress the power to declare war.[126] While *Chadha* invalidated six

123. *Id.* at 946–51.

124. *Id.* at 951–52.

125. *See* E. Donald Elliott, INS v. Chadha: *The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 176 (1983) (arguing that the problem with the legislative veto is that "it is an attempt by Congress to exercise powers that can no longer properly be considered legislative"); Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 16 (1984) (defending the result on the narrower ground that it constituted a bill of attainder or the usurpation of judicial function).

126. Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 101 (1984). However, there is debate concerning whether Congress can use a concurrent resolution to order the President to remove the armed forces. *See e.g.*, Bruce Ackerman, *Pelosi Made the Right Choice on Iran*, AMERICAN PROSPECT (Jan. 13, 2020), https://prospect.org/politics/pelosi-made-the-right-choice-on-iran/ (defending the constitutionality of the concurrent resolution).

legislative vetoes of the Trade Act of 1974,[127] the Fast Track Procedure avoids the constitutional problems of the legislate veto.[128] Indeed, the Fast Track Procedure has been kept in subsequent trade laws, such as the Bipartisan Trade Promotion Authority Act of 2002.[129]

However, the Impoundment Control Act of 1974 did not meet the same fate. In *City of New Haven v. United States*, the D.C. Circuit invalidated the executive deferrals of the Impoundment Control Act of 1974 because Congress oversaw them through legislative vetoes.[130] However, shortly after, Congress enacted the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, which allows deferrals under certain conditions without including a legislative veto.[131] The Court did not examine the constitutionality of the forty-five-day period for rescissions; however, because the rescissions required a "joint resolution submitted to the President" for approval, they were likely "unaffected" by *Chadha* and *City of New Haven*.[132]

3. Fast Track Procedure Framework

Fortunately, legislative vetoes are not the only way that Congress can constrain the President and promote interbranch collaboration. Congress can replace legislative vetoes with "a special fast track for special confirmatory laws," similar to the Fast Track Procedure of the Trade Act of 1974.[133] This veto substitute would have four

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127. Koh, *supra* note 108, at 1208 n.49.

128. Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 347–48 (2003) ("Not only do fast track rules offer a way to bypass many of the usual procedural hurdles, but, when conjoined with a delegation of authority to the executive branch, a fast track regime can act as a close substitute for the legislative veto."); Koh, *supra* note 108, at 1216–20.

129. Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (codified at 19 U.S.C. 3803); *see also* Kathleen Claussen, *Separation of Trade Law Powers*, 43 YALE J. INT'L L. 315, 334 (2018).

130. 809 F.2d 900, 906–07 (D.C. Cir. 1987).

131. Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, § 206, 101 Stat. 754, 785 (1987) (codified at 2 U.S.C. § 684).

132. Jucewicz, *supra* note 94, at 681 n.38.

133. Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785, 793 (1984).

elements: (1) before the executive action goes into effect, it needs a special confirmatory bill; (2) the bill will not be referred to committees; (3) the bill cannot be amended or discussed; and (4) each House must vote upon the bill within a certain period (e.g. sixty days) of the announcement of the executive action.[134] If the majority of either House votes down on the confirmatory bill, the executive action is denied. It replicates the one-House veto, but since the executive action requires a confirmatory law, it complies with bicameralism and presentment.[135]

Whereas with the legislative veto Congress nullified delegated executive action, the special confirmatory law requires a Fast Track Procedure for the executive action to arise. Thus, it is similar to an executive sunrise rule, but with the distinction that Congress is not merely authorizing executive action after a waiting period. Instead, the action "arises" when it is authorized by a law, even if it is a statute enacted quickly and without debate.

On the other hand, if Congress recognizes the "need to have the executive branch action take effect immediately instead of after sixty days, the basic authorizing law would simply allow the action (say, committing troops) for sixty days, but no longer, without a confirming law."[136] This would be a clear example of an executive sunset rule: Congress authorizes the executive action, but only for a period of time unless Congress acquiesces to the use of power. This is exactly what the Impoundment Control Act did with the forty-five-day period for rescissions. To conclude, this fast track option "can accomplish virtually everything that the legislative veto tried to accomplish, but without violating any constitutional rule."[137]

4. Example: Fast Track Procedure in National Emergencies Act

To fully understand how this procedure would work, let us consider the case of the National Emergencies Act. The Act was originally enacted "to provide for orderly implementation and termination of future national emergencies."[138] The concurrent resolution veto was a

134. *See id.* at 785–86 (describing three elements).

135. *Id.* at 794.

136. *Id.*

137. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1002 (6th ed. 2015).

138. National Emergencies Act of 1976, Pub. L. No. 94-412, 90 Stat. 1255.

key feature of this process. But in 1985, two years after the Supreme Court invalidated the legislative veto in *INS v. Chadha*,[139] Congress amended the statute to change *concurrent resolution* to *joint resolution*, which requires presentment to the President.[140] The law's purposes were turned upside down. Now it is almost impossible for Congress to terminate national emergencies.[141] Whereas before the lack of a definition for a national emergency could be justified on the grounds that a majority of Congress could review it, after the amendment a declaration by the President has more weight than ever. After this twisted outcome, "[i]t is hard to discern any progress from the post-war era of drastic abuses that Congress wanted to end."[142]

The problem, which was present in the original Act but intensified because of the 1985 amendment, is that Congress should not be required to override the emergency declaration. Instead, it should be the other way around to promote democratic self-government: the executive emergency declaration vanishes after a deadline unless there is positive authorization by Congress. This can be achieved by the Fast Track Procedure for special confirmatory bills. If the majority of either House votes down on the confirmatory bill, the declaration of emergency will fade after thirty days. Accordingly, this alternative procedure will operate as an executive sunset rule: the emergency declaration is authorized only for thirty days, for example, unless both House and Senate extend it.[143] Even when there are different normative views on emergency powers, time periods will facilitate agreement by the main political actors and therefore promote interbranch collaboration.

While the special confirmatory law resembles the legislative veto, there are important differences.[144] This process should not be

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139. 462 U.S. 919 (1983).

140. *See* Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 200 (2009) (criticizing the switch from concurrent resolution to joint resolution in the context of foreign relations law).

141. *See* Emily Cochrane, *House Fails to Override Trump's Veto*, *Preserving National Emergency Order*, N.Y. TIMES (Mar. 26, 2019), https://www.nytimes.com/2019/03/26/us/politics/national-emergency-vote.html.

142. Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1418 (1989).

143. This resembles other emergency proposals that also rely on sunset provisions for emergency declarations. *See* BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN THE AGE OF TERRORISM 128 (2006).

144. Breyer, *supra* note 133, at 794–95.

considered a legislative veto because the law will specify that the emergency declaration will not go into effect unless there is a confirmatory bill. As such, the House or the Senate will not bypass the constitutional requirements as the Court found in *Chadha*. Rather, for the emergency declaration to be valid, there must be a special confirmatory bill that complies with the constitutional requirement of bicameralism.[145]

The important aspect is that *Chadha* did not tie the hands of Congress.[146] Congress can still resort to time periods, like the Fast Track Procedure, to facilitate political compromises. On a final note, when evaluating the constitutionality of framework statutes, courts should be wary of following the formalist approach of *Chadha*. For one, "questions concerning national defense or the President's spending powers are quite different from those surrounding the regulatory powers."[147] When the President and Congress share responsibility—in areas like war, international agreements, and budgeting and spending—Congress should be allowed more flexibility in operationalizing the Constitution. These framework statutes should only be invalidated when Congress "exercise[s] powers that can no longer properly be considered legislative."[148] Otherwise, these constitutional responsibilities will not be shared but rather commanded by the Executive.

IV. CONSTITUTIONAL RULES AND THE ZONE OF TWILIGHT

Previous congressional abdication and judicial withdrawal have caused Congress to enact framework statutes that constrain the President and promote interbranch collaboration. However, Congress does not always have the necessary political incentives to restrain the Executive. When the same political party controls the House, the Senate, and Presidency, the President can exercise a political control that

145. The special confirmatory bill for emergency declarations would be similar to the one proposed in the Regulations from the Executive in Need of Scrutiny Act of 2019, which stops major executive rules from going into force until there is a joint resolution of approval. S. 92, 116th Cong.

146. *See* Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 L. & CONTEMP. PROBS. 273, 275 (1993); JESSICA KORN, THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO 35–37 (1996); TRIBE, *supra* note 91, at 150–51.

147. Breyer, *supra* note 133, at 796.

148. Elliott, *supra* note 125, at 176.

disrupts the Madisonian separation of powers.[149] In this scenario, the only structural check on the President's power is the judiciary. Similar to Congress, courts can build constitutional rules that use time periods to constrain the President and stimulate cooperation between the political branches. Time can allow justices to gloss over their differences and come to agreements about how to transact over issues of separation of powers.

What justifies the ability of courts to create constitutional rules that employ time periods? To understand how courts can rely on time in the field of separation of powers, I will begin with a reinterpretation of the *Youngstown Steel* case.[150] While the scholarly debate about *Youngstown* often focuses on the formalist versus functionalist approach, if we study the Justices' different opinions carefully, we can tease out that the temporal dimension of executive power was fundamental to their decision. Building on Justice Frankfurter and Justice Jackson's concurrences, as well as Chief Justice Vinson's dissent, I will propose a third way of thinking about legislative-executive relations that transcends the formalism-functionalism distinction. By construing temporal constitutional rules, federal courts can be flexible while establishing legal rules that authorize or forbid executive action.

Second, I will explore the distinction between rules and standards. I will show how the Supreme Court has used time to create constitutional rules. For example, in the context of voting, abortion, warrantless arrests, and the detention of noncitizens, the Court has created constitutional rules with specific time measurements to provide a more concrete application of a constitutional guarantee. I will also discuss why this shift from standards to rules is common in the doctrine of separation of powers.

Third, I will use one paradigmatic example to illustrate how courts can create time periods in the context of separation of powers. Accordingly, *NLRB v. Noel Canning* will be reconceptualized as a constitutional rule involving time periods and as an executive sunrise rule.[151] Finally, this Part suggests how courts can use this framework to constrain the President in gray areas like enforcement. I will end

149. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006).

150. 343 U.S. 579 (1952).

151. 573 U.S. 513 (2014).

with a brief discussion about how the doctrine of political question might complicate the development of constitutional rules about separation of powers.

A. Youngstown and Separation of Powers

Courts have long alluded to the role time plays in evaluating the constitutional powers of the Executive Branch.[152] In *Youngstown Steel*, decided under the shadow of the Korean War, the temporal dimension of executive action was also considered.[153] Here, the Supreme Court addressed the constitutionality of President Truman's decision to take possession of the nation's steel mills to avoid a shutdown. The Executive Order justified the seizure on the existence of a "national emergency" that required "a continuing and uninterrupted supply of steel."[154] The morning after the seizure, the President reported his action to Congress, but there was no congressional response.

Justice Black's judgment adopted a formalist approach that invalidated the President's action because it was not authorized by a statute or by the Constitution.[155] In 1947, Congress had considered and rejected amending the bill, that eventually became the Taft–Hartley Act, to authorize seizures in cases of emergency.[156] Moreover, the

152. In *Ex Parte Milligan*, resolved in 1866, the Supreme Court rejected the argument that Lincoln's suspension of habeas corpus rights, with congressional approval, authorized a military trial for a civilian detained during the Civil War. The Court reasoned that "[a]s necessity creates the rule, so it limits its duration." 71 U.S. 2 (4 Wall.) 80 (1866). In other words, the circumstances that justify swift executive action also limit how long that power lasts.

153. 343 U.S. at 583, 589–90.

154. *Id.*

155. *Id.* at 587–89; *see also* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 23 (1998); Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges,* 22 HARV. J.L. & PUB. POL'Y 13, 17 (1998) (classifying Black's opinion as formalist). In the context of separation of powers, formalism describes at least three different things. First, a preference for rules over standards. Eskridge, *supra*, at 21. Second, "[f]ormalism might be understood as deduction from authoritative constitutional text, structure, [or] original intent . . . ." *Id.* Finally, formalism "giv[es] priority to rule of law values such as transparency, predictability, and continuity in law." *Id.* at 22.

156. Instead, Congress allowed the President to seek injunctive relief for an eighty-day period in appropriate circumstances. According to the legislative history,

President could not rely on any implied power or on the President's military power.[157] As a result, Justice Black concluded that the Executive Order was an impermissible act of lawmaking by the President.[158] Even in times of emergency, this constitutional power cannot be exercised by the President.[159] After all, "[t]he Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."[160]

Justice Frankfurter joined Black's opinion but rejected his formalist approach in favor of a functionalist approach.[161] He followed in the steps of Justice Marshall, who famously said in *McCulloch v. Maryland* that "it is a *constitution* we are expounding."[162] For Frankfurter, that prescribed "a spacious view in applying an instrument of government 'made for an undefined and expanding future' and as narrow a delimitation of the constitutional issues as the circumstances permit."[163] He reasoned that the Court should not delineate which powers belong to Congress and which powers belong to the President.[164] Even if the judiciary may "have to intervene in determining where authority lies as between the democratic forces in our scheme of government," in doing so it "should be wary and humble."[165]

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this period would be sufficient for Congress to evaluate whether emergency legislation was necessary. *Youngstown Steel*, 343 U.S. 663, 663–64 (1952) (Jackson, J., concurring). This eighty-day period can be conceptualized as an executive sunset rule, since the injunctive relief expires after eighty days. However, President Truman declined to use the Taft–Hartley Act. *See* HART & SACKS, *supra* note 72, at 1070–71 (arguing that the eighty-day period did not preclude the President from seizing strike-bound industries during a national emergency).

157. *Youngstown Steel*, 343 U.S. at 587.

158. *Id.* at 587–88.

159. *Id.* at 654 (Jackson, J., concurring).

160. *Youngstown Steel*, 343 U.S. at 589 (Frankfurter, J., concurring).

161. *Id.* at 589–92; *see also* Eskridge, *supra* note 155, at 24 (classifying Frankfurter's opinion as functionalist). Functionalism, in contrast to formalism, (1) prefers standards to rules, (2) "might be understood as induction from constitutional policy and practice;" and (3) "emphasiz[es] pragmatic values like adaptability, efficacy, and justice in law." Eskridge, *supra* note 155, at 21–22.

162. 17 U.S. 316 (4 Wheat.) 407 (1819) (emphasis added).

163. *Youngstown Steel*, 343 U.S. at 596 (Frankfurter, J., concurring) (quoting Hurtado v. California, 110 U.S. 516, 530 (1884)).

164. *Id.* at 596.

165. *Id.* at 597.

This functionalist approach required Frankfurter to set aside two considerations that were not before the Court: "what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given."[166] This second question suggests that, at least for Frankfurter, the Court's decision might have been different if the executive unilateral action would have expired after a temporary period. In addition, he also stressed that Congress had used time periods when vesting the President with the power to seize production facilities.[167] This extraordinary authority was "given only for a limited period or for a defined emergency" or was "repealed after a short period."[168] This reexamination of Frankfurter's concurrence highlights that—when determining the scope of the President's authority—the Supreme Court should consider the temporal dimension of the executive action.

Justice Jackson's famous concurrence needs no introduction. It shares Frankfurter's functionalist approach but offers a framework to analyze the relationship between Congress and the President when the latter's authority is being challenged.[169] This framework was inspired by Jackson's view that the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[170] Furthermore, "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[171]

This framework consists of three zones.[172] Zone One consists of presidential actions with express or implied authorization of Congress. Here, the President's powers are at their highest. Zone Two, also called the "zone of twilight," is when the President and Congress have concurrent authority, but the President acts without congressional

166. *Id.*

167. *Id.*

168. *Id.* at 598.

169. Eskridge, *supra* note 155, at 23–24 (classifying Jackson's opinion as functionalist).

170. *Youngstown Steel*, 343 U.S. at 635 (Jackson, J., concurring).

171. *Id.*

172. Michael J. Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U.L. REV. 321, 327 (1985).

grant or denial of authority. In this zone of twilight—in which the distribution of powers is uncertain—"congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[173] Finally, Zone Three describes those situations in which the executive actions go against the expressed or implied will of Congress. Here, the President's powers are at their lowest, and his claim to power must be scrutinized with caution.

Applying this framework, Jackson concluded that President Truman's actions fell within Zone Three.[174] Consequently, he analyzed the constitutional clauses on which the President relied for his decision to seize the steel mills. Jackson ultimately rejected all of them, concluding that only Congress had the constitutional power to authorize the seizure: "In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute."[175] He finished his concurrence cautioning that he has "no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems."[176] Thus, for Justice Jackson, Congress is better suited than the courts to "prevent power from slipping through its fingers."[177]

Finally, Chief Justice Vinson filed a dissenting opinion, joined by Justices Reed and Minton, in which the temporal dimension of the executive emergency power was front and center. He started his opinion with the following phrase: "The President of the United States directed the Secretary of Commerce to take *temporary possession* of the Nation's steel mills during the existing emergency."[178] It was a temporary possession because, when the President communicated his decision to Congress, he clarified that he seized the steel mills for a "temporary period."[179] In his view, without this temporary seizure, there would have been an immediate threat to national security. In another

173. *Youngstown Steel*, 343 U.S. at 637 (Jackson, J., concurring).
174. *Id.* at 640.
175. *Id.* at 653.
176. *Id.* at 654.
177. *Id.*
178. *Id.* at 667 (Vinson, J., dissenting) (emphasis added).
179. *Id.* at 676.

letter, sent twelve days later, the President stated that "Congress can, if it wishes, reject the course of action I have followed in this matter."[180]

Thus, for the dissenting opinion, the question was whether the President could order a *temporary* seizure of industrial plants to meet a national emergency. For the dissenting justices, it was clear that presidents have that authority in order to comply with their duty to "take Care that the Laws be faithfully executed."[181] The conclusion stressed this point even further: "There is no question that the possession was other than temporary in character and subject to congressional direction—either approving, disapproving or regulating the manner in which the mills were to be administered and returned to the owners."[182] Hence, the President acted pursuant to his constitutional duties.

There is still a lot to be learned from these opinions. Black's formalist approach rejects any temporal dimension in this context; the Constitution entrusts Congress with the sole lawmaking power in good and bad times. By contrast, the other opinions take a more flexible approach. Both Frankfurter and the Chief Justice singled out the consideration of temporary periods and disagreed only on how they applied in this case. Frankfurter emphasized that the seizure was not "for a *short*, *explicitly temporary period*."[183] This strongly implies that for him, the controversy would have been different if the President had outlined for how long he planned to control the steel mills and if he had stopped after that time period, pending Congressional authorization.[184] Moreover, Congress typically delineates time periods for seizures, but in this case, it chose not to do so. On the other hand, for the Chief Justice it was enough that the President anticipated that it was a temporary possession, there was a national emergency, he had informed Congress, and he was willing to comply with its decision. Thus, while they disagreed on its application, for both Justices the temporality of the executive action was highly relevant.

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180. *Id.* at 677.

181. *Id.* at 683 (quoting U.S. CONST. art. II, § 3).

182. *Id.* at 710.

183. *Id.* at 597 (majority opinion) (emphasis added).

184. *See* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1725 n.614 (2001).

The formalism-functionalism distinction permeates separation-of-powers scholarship.[185] Under the classical account, formalism values legal rules and rule of law, while functionalism prefers standards and pragmatism.[186] Time measures, however, offer a way to break away from these conceptual categories. Through time periods, such as executive sunset and sunrise rules, functionalist concerns for flexibility can turn into formalist legal rules that authorize or forbid executive action for a period of time.

In *Youngstown*, for example, the Court could have clarified that without Congressional authorization the "temporary possession" could only last for sixty days.[187] Through this executive sunset rule, the Supreme Court could have taken a flexible approach that, in turn, created a legal rule; thus, merging elements of formalism and functionalism. Likewise, the Supreme Court could have construed an executive sunrise rule that authorized the Executive to act after a period of time. For instance, the President could only seize the steel mills after thirty days of Congressional inaction. Instead of just legitimizing the executive action, as the dissenting opinion did, courts can also find a middle ground: encourage Congressional oversight for a period of time and, if it does not act within that fixed period, it means Congress acquiesces to the use of executive power.[188] At the same time, if Congress does not agree to the terms set out by the courts, it can enact legislation that authorizes or forbids the executive action.[189]

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185. *See generally* Strauss, *supra* note 52, at 489; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596–97 (1984); Easterbrook, *supra* note 155, at 13 (defending the formalism-functionalism distinction). For scholarship challenging the formalism-functionalism distinction, see Eskridge, *supra* note 155, at 21 ("The formalist-functionalist dichotomy is an appealing way to understand and to teach the cases, but it masks complexities I should like to explore."); Manning, *supra* note 48, at 1948 (proposing a clause-centered approach that would "break the stalemate between formalists and functionalists"); and Huq & Michaels, *supra* note 46, at 437 ("Indeed, having identified the salience of the thick political surround and normative pluralism, we see no turning back to the stale, over-determined formalism/functionalism binary.").

186. Eskridge, *supra* note 155, at 23–24.

187. 343 U.S. at 631 (Douglas, J., concurring).

188. *Id.* at 613 (Frankfurter, J., concurring).

189. *Id.* at 588 (majority opinion). Thus, courts can avail themselves of time periods to bring light to actions in the twilight zone and encourage Congressional oversight to move the executive action to either Zone One or Zone Three. *Id.*

Constitutional rules that employ time measure can facilitate compromises between formalists and functionalists. Time allows the Justices to gloss over their normative differences and come to agreements about how to transact over power. Furthermore, in the context of separation of powers, time periods can be used by the courts to invite Congressional oversight. This will remediate the common practice of the branches of passing the buck to each other.

B. Constitutional Rules and Standards

This reinterpretation of *Youngstown* illustrates why temporality should be considered when evaluating issues of separation of powers. However, this by itself does not legitimize the courts designing constitutional rules that use time periods to constrain the Executive. We must also look at how the Supreme Court has relied upon time when giving legal effect and construing the Constitution.

Constitutional rules that employ time are part of a broader discussion involving the differences between rules and standards, similar to Dworkin's distinction between rules and principles.[190] Rules and standards can be distinguished by the extent to which they give content to the law *ex ante* or *ex post*, or before or after individuals act.[191] A rule will entail an advance determination of whether certain conduct is permissible.[192] The individual can know that driving in excess of sixty miles per hour is forbidden before he gets into the car.[193] Standards, on the other hand, leave the determination of whether the conduct is permissible to the adjudicator. If the law only prohibits driving with excessive speed, the individual will not know in advance whether driving at sixty miles per hour constitutes a violation. Accordingly, rules are considered more restrictive than standards, which leave more room for

190. *See* Larry A. Alexander, *Constitutional Rules, Constitutional Standards, and Constitutional Settlement:* Marbury v. Madison *and the Case for Judicial Supremacy*, 20 CONST. COMMENT. 369, 375 (2003); Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–59 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1695–96 (1976).

191. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992).

192. Sullivan, *supra* note 190, at 64.

193. *See id.; see also* DWORKIN, *supra* note 31 and accompanying text.

unanticipated consequences.[194] The difference between rules and standards allows us to understand how courts can use time periods in the process of constitutional adjudication.

One clear example of a constitutional rule that uses time is *County of Riverside v. McLaughlin*.[195] In *McLaughlin*, the Supreme Court held that after a warrantless arrest the State must obtain a determination of probable cause as soon as is reasonably possible and no later than forty-eight hours after the arrest. While the Fourth Amendment does not provide a time frame, the Court moved from its "promptly" standard in *Gerstein v. Pugh* to a constitutional rule of a forty-eight-hour period that better captures the constitutional purposes.[196] Meanwhile, in his dissent, Justice Scalia relied on state and federal courts decisions to argue that no more than twenty-four hours is necessary from arrest to arraignment.[197] In conclusion, all of the Supreme Court justices imposed time limits to concretize the constitutional right and only disagreed about how much time the State should have.

Dunn v. Blumstein is another example of the courts using time to give concrete meaning to the Constitution.[198] A Tennessee law required year-long residency in the state, as well as three months in the county, as prerequisites for voter registration.[199] The plaintiff argued that the law was unconstitutional because it amounted to an interference with his right to vote and it created a suspect classification for citizens who had recently moved there.[200] The Supreme Court rejected the durational residence requirements imposed by the State.[201] The Court concluded that thirty days was ample time to complete voting registration without harming the equal protection of the law and the right to vote, and while it may appear that Tennessee's law was neutral, in reality it limited access to the political process.[202] Many could argue that the Court was legislating this thirty-day limit. However, by

194. Huq & Michaels, *supra* note 46, at 357.
195. 500 U.S. 44 (1991).
196. *Id.* at 56; *see also* Gerstein v. Pugh, 420 U.S. 103 (1974).
197. *McLaughlin*, 500 U.S. at 67–71 (Scalia, J., dissenting).
198. 405 U.S. 330 (1972).
199. *Id.* at 331.
200. *Id.* at 332–33.
201. *Id.* at 360.
202. *Id.* at 348, 358–60.

creating this constitutional rule, the Supreme Court was notifying *ex ante* that some state efforts to regulate voting will not be permissible.

Even some of the most important constitutional cases of the twentieth century can be conceptualized as establishing rules involving time periods. In *Roe v. Wade*,[203] Justice Blackmun initially set the cut-off date for legalized abortion at the first thirteen weeks.[204] He acknowledged in an internal memo that this determination was "arbitrary" and even accepted that it constituted "dictum."[205] Justice Stewart responded that this dictum was inevitable and wise but questioned the desirability of it being "quite so inflexibly 'legislative.'"[206] On the other hand, while Justice Marshall shared the concern "for recognizing the State's interest in insuring that abortions be done under safe conditions," focusing only on the first thirteen weeks would give states too much control after that time.[207] Moreover, "[g]iven the difficulties which many women may have in believing that they are pregnant and in deciding to seek an abortion," Justice Marshall feared "the earlier date may not in practice serve the interests of those women, which Justice Blackmun's opinion sought to serve."[208] Ultimately, Blackmun changed the opinion to accommodate Marshall's concerns. During the first thirteen weeks, abortion was left entirely up to the patient and her physician, but after that time and before viability, the states could regulate abortion in ways that were reasonably related to maternal health.[209] Thus, the Court's framework was not only the consequence of the stages of pregnancy as divided into trimesters, but a rule concerning how much time women need to realize they are pregnant and seek an abortion.

Finally, sometimes the Supreme Court creates a rule involving time to save the constitutionality of a statute. *Zadvydas v. Davis* concerned the indefinite detention of immigrants under order of

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203. 410 U.S. 113 (1973).

204. Bob Woodward, Opinion, *The Abortion Papers*, WASH. POST (Jan. 22, 1989), https://perma.cc/DE5W-L8GR (quoting a memo from Justice Marshall to Justice Blackmun dated December 12, 1972).

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. Roe v. Wade, 410 U.S. 164 (1973).

deportation.[210] The Immigration and Naturalization Act authorized the Attorney General to remove noncitizens from the United States within a period of ninety days; however, the statute also authorized the detention past this deadline, which could lead to indefinite and even permanent detention.[211] The Supreme Court, in an opinion authored by Justice Breyer, reasoned that if the law allowed permanent detention it would violate the due process clause; rather than declaring the statute unconstitutional, the Court created a six-month maximum period of detention after which the government must hold a hearing.[212] Thus, the Court availed of time limits to avoid holding the statute unconstitutional. It did so through a rule that notifies the Executive Branch, and all parties involved, that detention for a period longer than six months will be impermissible. While the Supreme Court did not follow *Zadvydas* in *Jennings v. Rodriguez*,[213] *Zadvydas* and all these cases illustrate how the Supreme Court has relied on time to create constitutional rules that give concrete meaning to the Constitution.

If this constitutional creativity is allowed in the context of the Bill of Rights, what stops the courts from being ingenious with time in the context of separation of powers? After all, both aim to provide checks to state power, although in different ways. Accordingly, the idea of constitutional rules involving time should apply in this context as much as in any other.

The differences between rules and standards is also characteristic of separation of powers jurisprudence.[214] Huq and Michaels describe the cycles of separation of powers as one involving the shift from

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210. 533 U.S. 678 (2001).

211. *Id.* at 682.

212. *Id.* at 701.

213. 138 S. Ct. 830, 843–44 (2018). Temporal considerations in the immigration context have a long history. *See, e.g.,* Keller v. United States, 213 U.S. 138, 149 (1909) (Holmes, J., dissenting) (suggesting that Congress's "power to retain control over aliens" cannot go on forever).

214. While it is easier to see the rules-standards distinction in judicial decisions, federal statutes can also regulate the executive-legislative relationship through either rules or standards. To complicate things more, in the separation of powers context, federal courts sometimes read federal statutes as broad standards, while others as narrow rules. *See* Huq & Michaels, *supra* note 46, at 414. Here, however, I focus on the standards or rules established by federal courts, rather than on the judicial interpretation of federal statutes.

rules to standards and vice versa.[215] Rules, however, tend to be the endgame because once judges and administrators "see similar legal challenges recurring with some frequency, there are strong incentives to recall formal and informal precedents, develop guidelines, employ 'rules of thumb,' and rely on 'historical gloss,' if for no other reason than to lower the transaction costs of mundane or repetitive governance."[216] Accordingly, rules are developed to facilitate governance and notify *ex ante* what is permissible and what is not.

Courts can legitimize the rules built by other actors and, in that process, create their own rules and provide concrete meaning to the Constitution. In many occasions, the rules created by the political branches and the administrative agencies will involve time periods. Courts might legitimize these constructions or modify them according to historical practice, among other factors. Even when the other actors do not use time periods, courts might still rely on them to facilitate compromises among the justices. Since justices have different normative views regarding separation of powers, time could aid them in finding common ground in balancing the power between the Executive, the

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215. *Id.* at 416. Huq and Michaels acknowledge that formalism is more associated with rules and functionalism with standards, but they prefer to keep both concepts separate from each other. *Id.* at 356. For examples from the Supreme Court cycling between rules and standards, see Skidmore v. Swift & Co., 323 U.S. 134, 136 (1944) (declining to adopt a formal rule); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (insisting upon formal rules based upon statutory text); Myers v. United States, 272 U.S. 52, 116 (1926) (establishing a bright-line rule); and Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (adopting a flexible standard).

216. Huq & Michaels, *supra* note 46, at 421–22. In certain circumstances, however, it might be preferable to start with standards and shift to a rule once there is more information about how that standard works in practice. *Id.* at 417–18; *see also* Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 992 (1995) ("The first problem with rules is that it can be very hard to design good ones. In many areas, people lack enough information to produce rules that will yield sufficiently accurate results."); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974) (discussing the tradeoffs between rules and standards). An additional problem with rules is that they "are not well suited to accommodating novel considerations, new developments, or unexpected contingencies." Huq & Michaels, *supra* note 46, at 427. However, "[e]ven if judges have all the necessary information, it still may be difficult for them to determine whether a rule or standard will generate better deliberative processes or substantive outcomes." *Id.* at 414.

House, and the Senate. Thus, time will also play a role when justices design constitutional rules in the context of separation of powers.

C. Paradigmatic Example: National Labor Relations Board v. Noel Canning

Occasionally, the Supreme Court has also created rules using time periods in the context of separation of powers to balance the powers between the Executive and the Legislative Branch. *NLRB v. Noel Canning* offers a recent, but clear illustration. With *Canning*, the Supreme Court formulated a constitutional rule that resorted to time periods: the President cannot appoint someone during a recess of three days, and a recess lasting less than ten days is presumptively too short.[217] Similar to what we saw with framework statutes, this constitutional rule was the Court's response to congressional inaction, the fear of presidential aggrandizement, political party dynamics, and the necessity of interbranch collaboration. The reliance on time periods facilitated a political compromise that promoted interbranch collaboration and constrained the President.

Our Constitution requires the Senate to consent to the appointments of the President.[218] However, the Recess Appointments Clause creates an exception: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[219] Therefore, the general rule is that the Senate must provide "advice and consent" when the President appoints officers of the United States, but when there is a recess of the Senate, the President can ignore this constitutional requirement of interbranch collaboration and appoint officers that will last until the end of the next congressional session.[220]

Recesses happen between formal sessions of Congress (*inter-session*)—as between the 115th Congress and 116th Congress—or within the midst of a formal session (*intra-session*)—such as a summer recess.[221] When there is an intra-session recess, each House approves

217. 573 U.S. 513, 523 (2014).
218. U.S. CONST. art. II, § 2, cl. 2.
219. U.S. CONST. art. II, § 2, cl. 3.
220. *Canning*, 573 U.S. at 518–19.
221. *Id.* at 518–19.

a resolution stating that there will be an adjournment *sine die* or without day of return.[222] *Canning* involved an intra-session recess during which the members of the National Labor Relations Board ("NLRB") were appointed by the President.[223]

The NLRB consists of five members and requires a quorum of three members.[224] During his last year in office, President Bush and the Senate, controlled by the Democratic Party, did not agree on who the three newest members should be.[225] President Obama suffered a similar fate.[226] Even when his political party controlled the Senate, the Senate Republicans filibustered his appointments. Meanwhile, the House of Representatives, controlled by the Republican Party after 2010, "refused to adjourn and refused to allow the Senate to adjourn" to prevent President Obama from making any recess appointments.[227] To achieve this, "the Senate held a series of *pro forma* meetings on Tuesdays and Fridays at which no business was conducted."[228] If President Obama could not make any recess appointments, the NLRB would not have quorum and Republicans would have effectively disabled an agency they opposed.[229]

In January 2012, President Obama challenged the validity of these *pro forma* sessions. He invoked the Recess Appointments Clause to appoint three members to the NLRB, whose appointments had been pending since 2008.[230] These intra-session recess appointments were made between the January 3 and January 6 *pro forma* sessions. Noel Canning, which was ordered by the NLRB to comply with a collective-bargaining agreement, questioned the validity of the appointments. The case rose to the Supreme Court.[231] During oral arguments, it was clear the Supreme Court would favor the Senate instead of the

222. *Id.* at 525–26.

223. *Id.* at 519–21.

224. *Id.* at 520–21.

225. William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1519 (2015).

226. *Id.* at 1520–22.

227. BREST ET AL., *supra* note 137, at 974.

228. *Id.*

229. *Id.* at 978.

230. *Id.* at 974.

231. NLRB v. Noel Canning, 573 U.S. 518, 520 (2014).

President.[232] There was consensus that the Senate could decide when it goes out of recess. However, there was disagreement about how to resolve the case. Justices Ginsburg and Sotomayor, for example, implied with their questions and comments that they would authorize short-term recess appointments.[233]

The Supreme Court unanimously ruled in favor of Noel Canning and the Senate.[234] However, the five–justice majority and Justice Scalia, who filed a concurring opinion that was joined by the Chief Justice Roberts and Justices Thomas and Alito, disagreed on the constitutional arguments.[235] The opinion of the Court, delivered by Justice Breyer, addressed three questions: (1) if the words "recess of the Senate" included only the recess between formal sessions (inter-session) or also breaks within a formal session of Congress (intra-session); (2) whether "vacancies that may happen" included vacancies that arose prior to the recess; and (3) whether the *pro forma* sessions should be ignored for calculating the length of a recess.[236]

Before answering any of these questions, the opinion mentioned two background considerations relevant to all three. First, the constitutional text, *The Federalist Papers*, and the constitutional structure required the Court "to interpret the Clause as granting the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation."[237] Second, because the questions "concern the allocation of power between two elected branches of Government," the Court must place significant weight upon historical practice.[238] In other words, recess appointments must be interpreted in light of a long-continued practice that was as old as the Republic.

To answer the first question, the Court paid close attention to the constitutional text. Because the clause says that presidents can fill vacancies during "the Recess of the Senate," one possible interpretation

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232. Lyle Denniston, *Argument Recap: An Uneasy Day for Presidential Power*, SCOTUS BLOG (Jan. 13, 2014, 1:35 PM), http://www.scotusblog.com/2014/01/argument-recap-an-uneasy-day-for-presidential-power/.

233. *Id.*

234. *Canning*, 573 U.S. at 557.

235. *Id.* at 569 (Scalia, J., concurring).

236. *Id.* at 519 (majority opinion).

237. *Id.* at 524.

238. *Id.*

was to emphasize "*the* recess" and conclude that it refers only to an inter-session recess.[239] However, the Court rejected this approach because a broad reading of *the* can include both inter and intra-session breaks.[240] Moreover, "Presidents have made thousands of intra-session recess appointments."[241] Finally, the Court concluded that "restricting the Clause to inter-session recesses would frustrate its purpose."[242] Thus, following text, history and a purposive approach to interpretation, the Court determined that "recess" included intra-session as well as inter-session breaks.

Once it resolved that the Recess Appointments Clause applied to intra-session breaks, the Court had to clarify how long the recess needs to be to fall within the clause. For the Court, this represented the "greater interpretive problem."[243] The majority opinion repeated the same concerns that most troubled Justices Ginsburg and Sotomayor during oral arguments: "Is a break of a week, or a day, or an hour too short to count as a 'recess'? The clause itself does not say."[244] Following the Adjournments Clause, which states that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days,"[245] the Court reasoned that "[a] Senate recess that is so short that it does not require the consent of the House is not long enough to trigger the President's recess-appointment power."[246] Therefore, the President cannot appoint any officer during a recess of three days or less.

The Court, however, did not limit itself to this conclusion. It was worried that it could be interpreted that any recess that is longer than three days could allow the President to make recess appointments.[247] Even if the "Recess Appointments Clause seeks to permit the Executive Branch to function smoothly when Congress is unavailable," in almost 200 years there has never been "a single example of a recess appointment made during an intra-session recess that was shorter than

239. *Id.* at 538.
240. *Id.* at 529.
241. *Id.*
242. *Id.* at 534–36.
243. *Id.* at 535.
244. *Id.*
245. *Id.* (quoting U.S. CONST. art. I, § 5, cl. 4)
246. *Id.* at 537.
247. *Id.* at 537–38.

10 days."[248] The Supreme Court relied on this historical fact to create the following rule: "a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause."[249] Moreover, this constitutional rule can be excepted when unusual circumstances, like a national catastrophe, require the appointment during a shorter break.[250]

The second question, concerning the scope of the phrase "Vacancies that may happen during the Recess of the Senate,"[251] was also interpreted in a broader way after consulting the historical practice and a purposive approach to interpretation. The Court resolved that "'*all vacancies'* includes vacancies that come into existence while the Senate is in session."[252] In other words, the President could use the clause to fill vacancies that arose prior to the recess. Finally, the last question was whether the *pro forma* sessions should be treated as part of the period of recess, as the Government argued. The Court answered that "the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business. The Senate met that standard here."[253] Therefore, the *pro forma* sessions counts as sessions and not as periods of recess. Given the answers to all these issues, the Court concluded that, since the recess only lasted three days, the President did not have the constitutional authority to make the recess appointments in controversy.

Justice Scalia, on the other hand, thought that the clause limited the President's recess-appointment power in two significant ways.[254] First, the recess had to be inter-session. Second, the vacancy must arise during the recess. These two arguments, rejected by the Court, invalidated President Obama's appointments. On a final note, Scalia stressed that real damage was not "the abolition of the Constitution's limits on the recess-appointment power" but the "damage done to our separation-of-powers jurisprudence more generally."[255] Because "[m]ost of

248. *Id.* at 537.

249. *Id.* at 538.

250. Alluding to Scalia's concurrence and the political debate concerning the case, the opinion clarified that "political opposition in the Senate would not qualify as an unusual circumstance." *Id.*

251. *Id.* (quoting U.S. CONST. art. II, § 2, cl. 3).

252. *Id.* at 549 (emphasis added).

253. *Id.* at 550.

254. *Id.* at 556–57.

255. *Id.*

the time, the interpretation of those provisions is left to the political branches," which "in deciding how much respect to afford the constitutional text, often take their cues from this Court," the Court should have seized this case to "to affirm the primacy of the Constitution's enduring principles over the politics of the moment."[256] For Scalia, the Court's opinion "will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers."[257]

Canning was the Court's response to a constitutional and political controversy that required interpreting and construing an uncertain constitutional text.[258] On the one side, the Supreme Court validated intra-session recess appointments and disregarded the distinction concerning when the vacancies occurred. It also allowed the President to appoint someone if the recess is longer than ten days. But on the other side, the Court also legitimized the practice of holding *pro forma* sessions just to block the President from making recess appointments. As such, the majority decision has been criticized "as an exercise in pragmatic formalism."[259] More surprising, however, is that the dissenting judges would have gone even further in constraining the President.[260]

But my main interest, as with the War Powers Resolution, is not whether *Canning* successfully balanced the powers of the President and the Senate. Instead, I want to explore how time could have been influential in facilitating a compromise between justices who share different views of separation of powers. In order to balance the interests at hand, the Court relied on time periods to create a constitutional rule that promoted interbranch collaboration. The clause itself could not be reduced to legal rules.[261] However, the Court, relying on historical practice, constructed a constitutional rule: an officer cannot be appointed during

256. *Id.*

257. *Id.*

258. *See id.*

259. Ronald J. Krotoszynski Jr., Johnjerica Hodge & Wesley W. Wintermyer, *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941, 959 n.105 (2015).

260. Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 288 n.378 (2015).

261. *See* U.S. CONST. art. II, § 2, cl. 3.

a recess of three days or less, and a recess lasting less than ten days is presumptively too short.[262]

Moreover, the Court resorted to a ten-day period to facilitate an agreement between the justices and force a political compromise between the President and the Senate. The temporal dimension of the recess was crucial in balancing the Executive recess appointment power with the Senate's "advice and consent" duty. In the end, the Court did not follow either the President's argument or the Senate's. Instead, the Court added "precision to a previously uncertain constitutional text" and "pressed the law on recess appointments toward precision and away from open-texturedness."[263] Through this normatively ambiguous constitutional rule, the Court licensed and constrained the President, while simultaneously encouraging interbranch collaboration.

As mentioned previously, this decision can also be explained as a transition from standards to rules.[264] This rule can be conceptualized as an executive sunrise rule. It holds that the President's recess appointment power will arise only after a period of ten days. During this interval of ten days the president is forbidden, barring very unusual circumstances, from making any recess appointments. Through this action, the Supreme Court brought clarity to a twilight zone of executive power. Instead of being in a constitutional limbo, the Court legitimized the Senate's holding *pro forma* sessions. If the Senate wants to limit his authority, it can hold *pro forma* sessions every ten days. However, if the Senate holds *pro forma sessions* just to stop presidential appointments and also refuses to engage in the ordinary appointment process, it will be evident that the Senate is refusing to collaborate with the President.[265] What is clear, however, is that the Supreme Court used time to balance the powers between the President and the Senate in the hope of encouraging interbranch collaboration in the appointment process.

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262. *Canning*, 513 U.S. at 515. The Court made clear, among other things, that political opposition would not qualify as an unusual circumstance to allow the President to appoint an officer during a short break. *Id.* at 538.

263. Huq & Michaels, *supra* note 46, at 424.

264. *See id.* at 421–27.

265. One could certainly find the practice of holding *pro forma* sessions problematic despite the fact that it was given the seal of approval in *Noel Canning*, especially when they deliberately obstruct the exercise of the appointment power.

D. Other Constitutional Rules: Enforcement Power

Canning is a recent example of a judicial decision that avails of time periods to facilitate a political compromise that constrained the President and encouraged interbranch collaboration, though it is one of few.[266] However, this third way of thinking about separation of powers can be applied to other powers exercised by the President. Prosecutorial discretion, also known as enforcement, is one of the most contested issues of separation of powers.[267] Congressional inaction, the fear of presidential aggrandizement, political party dynamics, and the necessity of interbranch collaboration contribute to the elusiveness of this constitutional gray zone. The Judicial Branch can use time periods to bring clarity in this zone of twilight, however.

The President has an obligation to "take Care that the Laws be faithfully executed."[268] However, sometimes the Executive, exercising his prosecutorial discretion, refuses to enforce a particular law. For example, the Executive Branch should "have some discretion to decide whether and when to initiate a prosecution in an individual case."[269] That does not mean that the President can "decline to enforce altogether a law that is constitutional," though, because it would be an abdication of his constitutional duty.[270] The difficulty is distinguishing "the constitutional exercise of prosecutorial discretion from an impermissible abdication of the President's duty to enforce the law."[271] In other words, the question is how much discretion the Executive should have.

In 2012, President Obama announced the Deferred Action for Childhood Arrivals ("DACA"), an exercise in prosecutorial discretion

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266. While there are few constitutional rules like *Noel Canning*, in the context of separation of powers federal courts have, on occasion, decided to stay their judgments until a later date to give Congress the time to amend the statutes or appoint federal officers pursuant to their decision. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982) (stayed until Oct. 4, 1982); Buckley v. Valeo, 424 U.S. 1, 143 (1976) (thirty-day stay); *see also* Aurelius Inv., L.L.C. v. Puerto Rico, 915 F.3d 838, 863 (2019) (ninety-day stay), *rev'd*, Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020).

267. *See* Cox & Rodríguez, *supra* note 57 at 108.

268. U.S. CONST., art. II, § 3.

269. Cox & Rodríguez, *supra* note 57, at 142.

270. *Id.* at 143.

271. *Id.*

in the context of immigration policy.[272] The policy established special removal proceedings for individuals who came illegally to the United States under the age of sixteen and who had resided continuously for at least five years. If they were already in removal proceedings, the U.S. Immigrations and Customs Enforcement ("ICE") would defer action "for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States."[273] Meanwhile, for individuals who were not currently in removal proceedings, the U.S. Citizenship and Immigration Services ("USCIS") "should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by deferring action against individuals who meet the above criteria and are at least 15 years old, for a period of two years, subject to renewal."[274] Finally, USCIS shall determine if these individuals qualify for work permits during this period of deferred action. Two years later, with the announcement of the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"), the Administration extended the relief period to three years.[275]

These Obama relief initiatives chose "rules over standards, centralization over diffusion, and transparency over secrecy."[276] However, they were challenged on the basis that the categorical exercise of discretion, instead of one based on individual cases, amounted "to an unconstitutional act of executive 'lawmaking.'"[277] In *Texas v. United States*, the state of Texas and its officials sought injunctive relief against the United States and officials of the Department of Homeland Security ("DHS") to prevent the implementation of DAPA and the

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272. Press Release, U.S. Dep't of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), http://www.dhs.gov/news/2012/o6/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low.

273. *Id.*

274. *Id.*

275. Memorandum from Jeh Charles Johnson, Sec'y of Dep't Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, and R. Gil Kerlikowske, Comm'r of U.S. Customs & Border Prot. 4 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_112omemodeferred action.pdf.

276. Cox & Rodríguez, *supra* note 57, at 205.

277. *Id.* at 176.

expansion of DACA.[278] The District Court of the Southern District of Texas concluded that "[n]on-enforcement does not entail refusing to remove these individuals as required by the law *and then* providing three years of immunity from that law, legal presence status, plus any benefits that may accompany legal presence under current regulations."[279] Thus, the district court refused to legitimize the deferral periods established by the President under the exercise of his prosecutorial discretion.

On review, the Fifth Circuit upheld the District Court's decision on other grounds.[280] However, the Court equated the deferral period to a permanent legal status. Accordingly, it stated that the Immigration and Naturalization Act "flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits, including work authorization."[281] The Supreme Court granted *certiorari*, but the judgment was affirmed by an equally divided Court.[282]

One of the questions in this complex case was whether the three-year deferral period violated the Take Care Clause of the Constitution. I do not intend to add to or question the substantive merits of this controversy.[283] Instead, I want to use this example to illustrate two things. First, the courts participate in the process of building constitutional rules by legitimizing what the political branches do or creating new rules along the way. Second, the temporal dimension should be crucial in balancing the Executive prosecutorial discretion with the Take Care Clause of the Constitution.

One alternative the Judicial Branch has is to legitimize the rule created by the political branches. Here, President Obama's three-year deferral rule operationalized his enforcement power. These three-year deferral periods "promote[d] rule-of-law values," "constrained executive power," and "represent[ed] responsible uses of the enforcement

278. Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

279. *Id.* at 655.

280. Texas v. United States, 809 F.3d 134, 184 (5th Cir. 2015).

281. *Id.*

282. United States v. Texas, 136 S. Ct. 2271 (2016) (mem.).

283. However, I should note that the enforcement power over immigration has a long history, influenced by Congress's "de facto delegation" of "vast screening authority" to the Executive Branch. ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 105 (2020).

power."[284] Against the charges of executive lawmaking, the Judicial Branch can emphasize that there is "no reason why the practical durability of the policy should be constitutionally relevant: there is no plausible constitutional theory of which we are aware under which a promise not to prosecute becomes unconstitutional whenever that promise might be politically durable."[285] Thus, the courts can bring clarity to this zone of twilight and validate this constitutional rule.

On the other hand, courts can also declare the three-year deferral illegitimate, which is what the inferior courts did in *Texas v. United States*. For instance, the Judicial Branch can conclude that by "choosing rule-like criteria for relief . . . and by establishing a transparent application process, the Obama Administration has conferred on DACA and DAPA recipients a promise of nonenforcement that differs in kind from a mere guideline that de-prioritizes removal on the basis of certain characteristics."[286] This will also bring some clarity to this zone of twilight. However, unless the Supreme Court attends the controversy, nonenforcement power will be more contested than ever, and the political debate over it will continue.[287]

Finally, the Judicial Branch, especially the Supreme Court, can resort to time to facilitate a political compromise that constrains the President and encourages interbranch collaboration. Because of its projective feature, time can allow the justices to gloss over their constitutional differences and agree about how to transact over the

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284. Cox & Rodríguez, *supra* note 57, at 205.

285. *Id.* at 208.

286. *Id.* at 205.

287. In September 2017, the Department of Homeland Security, by petition of the U.S. Attorney General, rescinded DACA. Among the reasons for the termination, the memo mentioned the Fifth Circuit's decision and the Supreme Court's affirmation by an equally divided court. Texas v. United States, 809 F.3d 134, 146–47 (5th Cir. 2015); United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (mem.) *aff'g* 809 F.3d 134 (5th Cir. 2015). Soon after, the University of California filed a lawsuit to prevent the termination of the program. In *Department of Homeland Security v. Regents of the University of California*, the Supreme Court decided that the DHS order to rescind DACA was "arbitrary and capricious" under the Administrative Procedure Act. 140 S. Ct. 1891, 1912 (2020). The decision left unanswered the constitutionality of the DACA program, as it relates to the President's enforcement power. Justice Thomas, however, filed a concurrent and dissenting opinion stating that the DACA was unlawful from its inception. *Id.* at 1918 (Thomas, J., concurring). He was joined by Justices Alito and Gorsuch. *Id.*

enforcement power. To measure how long the deferral period should be, courts can look to text, history, structure, and precedent to weigh the constitutional powers of the political branches. For example, the Supreme Court can conclude that three years of nonenforcement is too long. The Court might reason that "the practical entrenchment likely to arise from the President's actions separates constitutional exercises of prosecutorial discretion from unconstitutional ones."[288] Accordingly, the Court could build an executive sunset rule by which the President's nonenforcement power on the context of immigration policy fades after six months, for example. The Court could justify its time rule on considerations of historical practice; by looking at how long past presidents have refused to enforce similar laws. Meanwhile, if Congress does not agree with this period, it can enact legislation that extends or abridges the deferral period or limit enforcement discretion through other ways.[289] This does not mean that these decisions will not be highly questionable, depending on the political context and the persuasiveness of the historical practice argument. But they showcase how courts can use time periods to facilitate political compromises and balance the powers between the different political branches.

In conclusion, the Judicial Branch can use *Canning* as a paradigmatic example to develop other rules that use time to facilitate political compromises that constrain the President and promote interbranch collaboration. The enforcement power is just one of the constitutional gray areas to which courts can bring clarity by creating rules that give practical meaning to the Constitution.

E. Constitutional Problems: Political Question

As we have seen, judicial withdrawal is common in these contested areas of constitutional law. The Judicial Branch relies on the "political question" doctrine to avoid deciding these constitutional questions.[290] Therefore, "it is all too likely that the Court will use the 'political question' doctrine to stage a dignified retreat and allow the

288. Cox & Rodríguez, *supra* note 57, at 207.

289. Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1044 (2013); *see also* BREST ET AL., *supra* note 137, at 966 ("[L]egal rules often establish a baseline, or default rule, against which further bargaining among interested parties may take place.").

290. ACKERMAN, *supra* note 8, at 142.

plebiscitary presidency to work its will."[291] But this should not be the case, because "the notion that judicial authority evaporates when an ambiguity arises in the Constitution's allocation of a given power is profoundly counterintuitive."[292] The Court abdicates its constitutional role when it refuses to resolve ambiguous controversies where there is joint authority between Congress and the President.

The political question doctrine should be "invoked in precisely the *opposite* situation, where there *is* 'a textually demonstrable constitutional commitment of the issue to a coordinate political department.'"[293] These constitutional controversies, on the other hand, are characterized by the lack of textual determinacy. In these scenarios, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[294] As John Hart Ely advised in the war-making context, "[t]he judiciary shouldn't decide what wars we fight, but it can insure that Congress play its constitutionally mandated role in such decisions."[295] In conclusion, the Judicial Branch has a shared responsibility to give practical meaning to the Constitution, but it cannot do this if it refuses "to intervene in determining where authority lies as between the democratic forces in our scheme of government."[296]

IV. CONCLUSION

Time is not the key to resolving every conflict that arises with the separation of powers. But during moments of peak polarization, time periods can facilitate political compromises that advance the purposes of the doctrine of separation of powers; among them, accountability, constraint, and collaboration between the political branches. This is because time is regarded as impartial, can be normatively ambiguous, and can transform standards and principles into rules. In this Article, I refrained from resolving any particular separation of powers

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291. *Id.; cf.* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002).

292. TRIBE, *supra* note 91, at 383.

293. *Id.* (quoting Baker v. Carr, 369 U.S. 186, 217) (1962)).

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

295. JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 67 (1993).

296. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 597 (1952).

issue. Rather, I propose a new way of thinking about separation of powers by highlighting the overlooked role time has played on past reforms and suggesting the role it can play on future reforms. It borrows from political science to create a roadmap for how to constrain the President and encourage interbranch collaboration.

Here, I have focused on how Congress and the Judicial Branch can give practical meaning to the constitutional separation of powers. The President, however, can also use time periods to constrain himself and realize some of the values of the constitutional principle of separation of powers. DACA, for instance, can be understood as a paradigmatic example of this concept. To that end, presidential rules that resort to time periods to facilitate political compromises could be a fruitful area for future research.

As we have seen, time can veil all manner of normatively ambiguous political compromises. However, we have not asked ourselves how these political compromises are consistent with democratic legitimacy. Should Congress and the Judiciary rely on time to hide their disagreements instead of building clear and normatively sound constitutional interpretations? In many situations, a unified voice is simply not possible, and time can be a "means to make concrete that which is intangible and make commensurate those things which are incommensurate."[297] But this "is neither inherently oppressive or liberating."[298] The answer will depend on how each framework statute and constitutional rule improves accountability, Executive constraint, and collaboration between the political branches.

In the end, the most efficient constraint will be an engaged citizenry. Citizens should demand interbranch collaboration, criticize judicial and congressional abdication, and be cautious of executive aggrandizement. They should also legitimize or reject the constitutional decisions, be it framework statutes or constitutional rules, by the branches of government. New constitutional designs will arise, while others will fade. Maybe some of them will be executive sunrise or executive sunset rules. Nevertheless, with or without time periods, we need to draw on the contemporary political science literature to conceive new ways to constrain the President and promote interbranch collaboration.

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297. COHEN, *supra* note 1, at 163.

298. *Id.*

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