A PARADOX WITHOUT A PRINCIPLE: A COMMENT ON THE BURGER COURT'S JURISPRUDENCE IN SEPARATION OF POWERS CASES

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The Supreme Court's approach to separation of powers cases under the leadership of Chief Justice Burger was paradoxical. On the one hand, the Court declared unconstitutional important congressional statutes on the ground that they infringed executive powers. For example, a few years ago, the Court declared unconstitutional the legislative veto as a means of congressional oversight of administrative agencies, a mechanism that existed in over 200 different federal laws. During the 1985 Term, in one of the Court's most important and closely followed decisions, the Court declared unconstitutional a portion of the Gramm-Rudman-Hollings Deficit Reduction Act as violating the doctrine of separation of powers.

On the other hand, the Burger Court was unwilling to declare unconstitutional any presidential act as an infringement of congressional authority. In only one case, the unanimous decision in United States v.

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Nixon,\textsuperscript{4} did the Burger Court vote against the President in a separation of powers case. In that instance the objection was not that the President had usurped the powers of Congress; but, rather, the Court found the President had obstructed the courts by denying them evidence needed in a criminal trial.\textsuperscript{5} In numerous other cases, the Court either rejected challenges to presidential actions\textsuperscript{6} or refused to rule by declaring that the litigation presented non-justiciable political questions.\textsuperscript{7}

Simply stated, the Burger Court was totally deferential in reviewing challenges to executive conduct, but was very willing to declare unconstitutional congressional statutes as violating separation of powers. This disparity in results cannot be explained solely by that Court's views on the merits of the particular cases. Curiously, the Court used completely different methods and standards for judicial review depending on whether the challenge was directed to the President or to Congress. The Court was strictly originalist, limiting the Constitution's meaning to the text and the Framers' intent, when evaluating congressional actions. But the Court was non-originalist, emphasizing the importance of an evolving Constitution, when considering objections to presidential conduct. Moreover, the Court refused to find challenges to congressional statutes ever to pose a political question, but frequently found suits against the President to be non-justiciable on that basis.

This inconsistency in approach requires justification. In part, exploration of the methodological disparity is crucial because the cases themselves are so important to governance of the nation. Few decisions so dramatically affected the day-to-day operation of the federal government as those in which the Court invalidated part of the Gramm-Rudman-Hollings Act and declared the legislative veto unconstitutional. Moreover, the methodological disparity warrants examination because of its

\textsuperscript{4} 418 U.S. 683 (1973) (holding that executive privilege does not authorize the President's non-compliance with a subpoena dicens testimon for evidence necessary in a criminal trial).

\textsuperscript{5} Id. at 707, 712 (Court's decision based on the fact that presidential withholding of information would "conflict with the function of the courts under Art. III" and would "gravely impair the basic function of the court"). Although there were impeachment proceedings pending against President Nixon and the information on the requested White House tapes was pertinent to those proceedings, the Court focused exclusively on the judiciary's need for the information for the pending criminal trials.

\textsuperscript{6} See, e.g., Nixon v. Fitzgerald, 457 U.S. 731 (1982) (holding that the President has absolute immunity in suits for monetary damages); Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding the constitutionality of an executive agreement between the United States and Iran); see also infra discussion accompanying notes 42-48.

\textsuperscript{7} See, e.g., Goldwater v. Carter, 444 U.S. 996 (1979) (holding non-justiciable a challenge to the constitutionality of the President's rescission of the United States' treaty with Taiwan).
impact on separation of powers and the structure of the federal government. The effect of the Burger Court's position was to increase the power of the President by refusing to review challenges to the constitutionality of executive actions, and, at the same time, to decrease the ability of Congress to check the Executive by invalidating legislative controls on the Presidency.

Unfortunately, the Court has failed to recognize this disparity in its approach, let alone explain it. Nor is there any apparent justification for treating separation of powers questions differently depending on the institution being challenged. Arguably the disparity reflects a difference in the Court's treatment of domestic and foreign policy, with much greater judicial deference in the latter arena. But this distinction does not explain the Court's opinions or its results. The Court never has announced, let alone justified, that the method of constitutional interpretation should vary depending on whether the case involves domestic or foreign affairs. Furthermore, this distinction does not account for the decisions and their likely effects. The *Chadha* decision, for example, involved immigration, an aspect of foreign policy. The invalidation of the legislative veto threatens the constitutionality of the War Powers Resolution. Ultimately, even if the cases could be explained by the domestic-foreign policy distinction, this merely poses the question; it does not answer it! Why this difference in the methods and standards of judicial review?

This Article examines the troubling and unexplained disparity in the jurisprudence of the Burger Court in separation of powers cases.\(^8\) Section one of the Article describes the paradox in more detail, examining

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8. At the outset, I acknowledge two limitations in my analysis. First, I recognize that there are relatively few Burger Court separation of powers cases and therefore caution is necessary in generalizing about the existence of a pattern. However, because of the importance of the cases, the Burger Court's marked inconsistency even in this limited sample is noteworthy. Moreover, the interesting and troubling pattern is not just that the court always sides with the President and frequently rules against Congress—because that can be explained by the Court's views of the merits of the specific cases. Rather, what is so remarkable is the Court's totally different methodology and approach to judicial review depending on whether the challenge is to the President or Congress.

Second, I recognize that the pattern I identify probably began before 1969. It is difficult to determine when this trend started. Earlier Courts held some presidential acts unconstitutional. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding unconstitutional the President's order to seize plaintiff's steel mills); Humphrey's Executor v. United States, 295 U.S. 602 (1935) (ruling against a presidential assertion of authority to remove commissioners of independent regulatory agencies). Rather than focus on the question of when deference began, it is simplest and clearest to examine the Burger Court's approach to separation of powers cases. This focus seems especially appropriate because the Burger Court dealt with several significant separation of powers cases and because its decisions are of current importance in defining separation of powers doctrines. Additionally, in light of Chief Justice Burger's resignation and the end of the Burger Court, a retrospective on that Court's position on important issues is appropriate.
the Court's different manner of treating challenges to executive and legislative powers. Specifically, I identify the Court's use of radically different methods of constitutional interpretation, and of different standards for determining the availability of judicial review, depending on whether the lawsuit is against Congress or the President. The second section considers the Court's failure to justify its different approaches and discusses how neither interpretive nor political theory provide a ready explanation for the Court's behavior. Finally, the third section offers some observations and suggestions on the judicial role in separation of powers cases. As the Rehnquist Court begins, a high priority should be given to ending the paradoxical approach to separation of powers cases that characterized Chief Justice Burger's tenure on the Court.

I. THE PARADOX DESCRIBED: THE COURT'S INCONSISTENCY IN SEPARATION OF POWERS CASES

There is an unmistakable pattern in the Burger Court's separation of powers decisions. Claims that the President usurped Congress' powers were always rejected. Yet the Burger Court never once declared unconstitutional a presidential action as an infringement on legislative prerogatives. In some cases, the Burger Court explicitly rejected claims that the President violated separation of powers. In other cases, the Court deferred to the President, holding that challenges to presidential acts pose non-justiciable political questions. The Court refused to decide the constitutional challenge, and the President's act, which allegedly infringed separation of powers, in effect was upheld. Furthermore, the Burger Court consistently refused to review lower court cases upholding presidential actions and rejecting claims that the President usurped congressional powers.

9. See, e.g., Dames & Moore, 453 U.S. 654 (approving the constitutionality of an executive agreement with Iran).

10. See, e.g., Goldwater, 444 U.S. 996 (declaring non-justiciable a claim that the President violated separation of powers by unilaterally rescinding treaty with Taiwan). For a discussion of the political question doctrine, see, e.g., Henkin, Is There a "Political Question" Doctrine?, 85 YALE L.J. 597 (1976); Scharpf, Judicial Review and the Political Question Doctrine: A Functional Analysis, 75 YALE L.J. 517 (1966); Tigar, Judicial Power, the "Political Question Doctrine," and Foreign Relations, 17 UCLA L. REV. 1135 (1970).

11. See, e.g., AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir.), cert. denied, 443 U.S. 915 (1979) (upholding the President's authority to impose wage-price controls on government contractors); Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980) (upholding the President's power to require all Iranians in the United States to provide information as to their residence and maintenance of their non-immigrant status); Consumers Union of United States, Inc.
In marked contrast to the Court’s deference in challenges to the President’s powers, the Burger Court frequently declared unconstitutional congressional actions as infringing executive powers. For instance, the Court held unconstitutional, as violating separation of powers, Congressional statutes creating legislative veto provisions, 12 a portion of the Gramm-Rudman-Hollings Deficit Reduction Act, 13 and a section of the Federal Election Act. 14

Perhaps this difference in results was simply a coincidence engendered by the Burger Court’s views of the merits of the specific cases brought. By chance, over the last two decades, it is possible the Court believed that Congress got it wrong several times, but consistently agreed with the President’s interpretation of the Constitution. Possible, but not probable, because it does not adequately explain the inconsistency in the Burger Court’s approach to separation of powers cases. Rather, the differences in results described above reflect a more fundamental inconsistency of the Burger Court: It used completely different methods and approaches to judicial review in reviewing challenges to the President than it used in cases involving challenges to Congress.

A. **THE COURT’S INCONSISTENT METHOD OF CONSTITUTIONAL INTERPRETATION IN SEPARATION OF POWERS CASES**

The Burger Court employed radically different methods of constitutional interpretation in cases against Congress than in litigation challenging the President. Specifically, in declaring congressional statutes to unconstitutionally violate the separation of powers, the Court followed a

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14. Buckley v. Valeo, 424 U.S. 1, 119 (1976) (declaring unconstitutional a portion of the Federal Election Act, 2 U.S.C. §§ 431-442 (1982), which allowed the President Pro Tem of the Senate and the Speaker of the House of Representatives to appoint a majority of the members of the Federal Election Commission. The Court concluded that “the Legislative Branch may not exercise executive authority by retaining the power to appoint those who will execute its law.”). This is not to say that the Court always rules against Congress. See, e.g., Nixon v. Administrator of Gen. Serv., 433 U.S. 425 (1977) (upholding the Presidential Recordings and Material Preservation Act, 44 U.S.C. § 2107 (1982)). Rather, the point is that often, especially in cases concerning important congressional statutes, the Court has ruled against Congress in favor of the Executive.
strict originalist methodology. The Court declared these statutes unconstitutional because they were inconsistent with the text of the Constitution and the Framers' intent. The Court refused to consider policy arguments that the challenged constitutional practice should have been allowed under an evolving separation of powers doctrine. In contrast, in upholding presidential actions in the face of challenges that they violated separation of powers, the Court clearly used a non-originalist methodology, rejecting arguments based on the Constitution's text and emphasizing the importance of policy considerations and constitutional evolution.

_Immigration and Naturalization Service v. Chadha_ 

Illustrates the Burger Court's approach to claims that congressional actions unconstitutionally violate separation of powers. In that case, the Court rejected several justiciability arguments against judicial review and held it unconstitutional for Congress to legislatively veto presidential actions. Over 200 federal statutes granted the executive branch specific powers subject to the ability of Congress to overturn such executive actions by resolution of Congress or some sub-part of it. By holding that the legislative veto is an unconstitutional congressional violation of separation of powers, the Court struck down "in one fell swoop provisions in more laws enacted by Congress than the Court [had] cumulatively invalidated in its history." 

Chief Justice Burger's opinion for the majority was a paradigm example of originalism and formalism. Burger reasoned in a syllogism. He began with the major premise that all legislation requires "bicameralism"—approval by both Houses of Congress—and "presentment"—submission to the President for his signature or veto. Burger supported

15. The term originalism refers to a method of constitutional interpretation under which the Court must confine itself to norms clearly stated or implied in the language of the Constitution. The term "originalism" often is used interchangeably with "interpretivism." Professor Tom Gray is credited with originating the phrasing of the distinction between "originalism" and "non-originalism." See Gray, Do We Have an Unwritten Constitution, 27 STAN. L. REV. 703 (1975). In recent years, the debate over the method of judicial review has focused on this distinction. See, e.g., J. Ely, DEMOCRACY AND DISTRUST 1 (1980); M. Perry, THE CONSTITUTION, THE COURT, AND HUMAN RIGHTS 1 (1982).


17. Id. at 935-44.


19. 462 U.S. at 1002 (White, J., dissenting).

20. Id. at 946-51.
this premise solely by reference to the text of Article I of the Constitution and quotations from the Federalist Papers and Joseph Story's Commentaries on the Constitution.21

Burger's minor premise was that a legislative veto is a type of legislation without bicameralism and presentment. Burger argued, in essence, that something is legislation when it changes the status quo and that the legislative veto does this because the situation is different after the veto from what it would have been without the veto.22 For instance, Chadha was required to leave the country because of Congress' legislative veto of the Immigration and Naturalization Service decision to allow him to remain.23 Furthermore, Congress' legislative veto was accomplished by one House of Congress and did not require presentment to the President.

Chief Justice Burger concluded that because all legislation requires bicameralism and presentment, and since the legislative veto is legislation without bicameralism and presentment, the legislative veto is unconstitutional. Burger based his opinion entirely on an analysis of the Constitution's text and the Framers' intent. He made no mention of whether it would be desirable or undesirable to allow legislative vetoes. It was argued that the growth in the power of executive agencies, and the widespread delegation of powers to the executive in a way that the Framers did not envision, justified the legislative veto. Burger explicitly stated that such policy arguments are totally irrelevant; claims of efficiency or improvements in government do not justify departures from the text or the Framers' intent.24


22. Id. at 952-54.

23. The Attorney General, acting through the Immigration and Naturalization Service, had suspended an order for Chadha's deportation from the United States pursuant to the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1) (1982). The House of Representatives vetoed this decision pursuant to the authority contained in 8 U.S.C. § 1254(c)(2) (1982). There is no discussion in the case as to why the House of Representatives vetoed the INS decision to allow Chadha to remain in the country. One of Chadha's attorneys, the day after the Supreme Court's decision, said that he had no idea why the House used its legislative veto authority in Chadha's case. Smolla, Bring Back the Legislative Veto: A Proposal for a Constitutional Amendment, 37 Ark. L. Rev. 509, 515 n.33 (1984).

24. 462 U.S. at 958-59 (rejecting claim that legislative veto is necessary to control executive actions). Professor Smolla described Chief Justice Burger's opinion as:

a masterpiece of the trite and true writ large: the opinion simply recited the facts, conjured up the patriotic image of the framers' political wisdom, and delivered a quick civics lesson in "how a bill becomes law." Only the wispiest dash of homage to the concept of separation of powers was thrown in as forensic seasoning.
Similarly, in the recent decision of *Bowsher v. Synar*, the Court's opinion, also written by Chief Justice Burger, is pure originalism and formalism. The Court declared unconstitutional a portion of the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985. The Court, rejecting justiciability objections to review, concluded that the Act violated separation of powers. The Court held that it was impermissible for the Comptroller General, an official not subject to removal from office by the President, to perform the executive task of implementing the statute and prescribing spending cuts in federal programs.

Under the Gramm-Rudman-Hollings Act, Congress set maximum permissible levels for the federal deficit for each of five years until 1991. The maximum deficit amounts decline each year, to no deficit in 1991. The Act creates a process whereby the Congressional Budget Office and the Office of Management and Budget must estimate the size of the deficit. If, on the basis of these estimates, the Comptroller General concludes that the deficit will exceed the maximum allowable by $10 billion, the Comptroller General is to prescribe cuts in government programs according to a defined formula. Under the formula, all programs are to be cut by the same percentage amount—fifty percent from domestic programs and fifty percent from defense spending—with specified programs exempted.

Again, Chief Justice Burger's opinion can be summarized as a syllogism. His major premise was that only executive officers removable by

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27. *Bowsher*, 106 S.Ct. at 3185-86.
30. The Act creates the procedure whereby the Directors of the Office of Management and Budget and the Congressional Budget Office estimate the size of the deficit. 2 U.S.C.A. § 901(a).
31. *Id.* § 901(3)(B).
32. Exempt from cuts are, *inter alia*, Social Security, interest on the federal debt, veterans' compensation, veterans' pensions, Medicaid, Aid to Families with Dependent Children, WIC (a food program for women and children), Supplemental Security Income, food stamps, and child nutrition. The Act also limits cuts in five medical programs, including Medicare. *Id.* § 905.
the President can perform executive tasks. The sole support for this claim came from a discussion of the intent of the Framers of article II. Burger argued that the text of the Constitution provides little authority for congressional oversight of executive officials. Quoting from James Madison, Burger argued that the Framers did not intend a congressional role in overseeing the performance of executive conduct. Although the Court long has allowed the Executive to possess legislative power because of a congressional tendency to grant broad delegations of authority, Burger concluded that it was impermissible for an officer of Congress to perform any executive duties. (As an aside, this is yet another reflection of the paradox: the Court allows the Executive to have legislative powers, but holds that it violates separation of powers for the legislature to have any executive responsibilities.)

Chief Justice Burger’s minor premise was that the Comptroller General is a congressional official performing an executive task. The Court said the Comptroller General must be viewed as a legislative officer because, under the statute creating the office, the President cannot remove the person holding that office; only Congress, based on “just cause” as defined in the statute, can remove the Comptroller General. Chief Justice Burger also concluded that the task of determining the amount that executive agencies can spend is an executive task rather than a legislative one because it is part of the process of implementing a congressional statute.

Thus, the Court concluded that it is unconstitutional for Congress to allow the Comptroller General to prescribe cuts in federal spending under the Gramm-Rudman-Hollings Act. The Court did not discuss whether from a policy perspective it is desirable to have an officer independent of the Executive perform this task.

In both Chadha and Synar the methodology was strikingly the

34. Id. at 3187.
35. The lower court in Bowsher v. Synar explicitly rejected a claim that the Act was an unconstitutional delegation of congressional power. See Bowsher v. United States, 626 F. Supp. 1374 (D.D.C. 1986). The court observed that in the last “fifty years . . . the Court has consistently rejected delegation challenges.” Id. at 1383. For a discussion of the Court’s willingness to approve broad delegations, see R. Pierce, S. Shapiro, & P. Verkuil, Administrative Law and Process 57 (1985) (describing “modern trend to accommodate broad and vague delegations”); L. Tribe, supra note 18, at 284-91.
36. By statute, the Comptroller General only is removable by Congress for “(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude.” 31 U.S.C. § 709(e)(1) (1982).
37. Bowsher, 106 S.Ct. at 3192.
same. Both were originalist decisions; in neither did the Court give any
weight to policy arguments in interpreting the meaning of the constitu-
tional provisions. It should be noted that the Court's approach cannot be
taken to reflect that these were simple cases with easy answers. For in-
stance, with regard to the legislative veto, there was voluminous aca-
demic literature arguing both sides. There were strong arguments that
the legislative veto enhances the Constitution's design of separation of
powers and that the legislative veto should not be viewed as a form of
legislation in that it prevents the Executive from implementing a change
and therefore preserves, rather than changes, the status quo. Likewise,
in Synar, the Court ignored strong arguments such as the fact that Con-
gress frequently vests Executive tasks in officers who are protected from
presidential removal (such as the commissioners of independent regula-
tory agencies), or that, in any event, the Comptroller General was per-
forming a legislative task in setting spending levels.

In sharp contrast, when the Burger Court reviewed challenges to
presidential actions, it followed a non-originalist method of constitu-
tional interpretation, emphasizing modern needs and historical evolution
rather than textual analysis and Framers' intent. In Dames & Moore v.
Regan the Court upheld the constitutionality of President Carter's ex-
eecutive agreement with Iran to secure the release of American hostages
in that country. Under the agreement, President Carter promised that
the United States would release its freeze on Iran's American assets and
that all claims pending against Iran in United States' courts would be
transferred to a new Iran-United States claims tribunal for binding
arbitration.

38. These cases are not unique. For example, in Buckley v. Valeo, 424 U.S. 1, 143 (1976), the
Court declared unconstitutional a section of the Federal Election Act which authorized the Presi-
dent Pro Tem of the Senate and the Speaker of the House to appoint a majority of the members of
the Federal Election Commission. The Court's analysis was entirely based on analysis of the text of
article II and the Framers' intent. There was no discussion as to whether it would be desirable to
have congressional involvement in appointments for a Commission so closely overseeing the presi-
dential election process.

39. See, e.g., Dixon, The Congressional Veto and Separation of Powers: The Executive on a
Leash?, 56 N.C.L. REV. 423 (1978); Miller & Knapp, The Congressional Veto: Preserving the Consti-
tutional Framework, 52 IND. L.J. 367 (1977); Schwartz, The Legislative Veto and the Constitution—

the legislative veto preserves rather than changes the status quo).

41. For example, it could be argued that the process of setting spending levels is inherently a
legislative task and therefore it was permissible for Congress to vest it in a legislative officer.

It was argued that it violated separation of powers for the President to negotiate changes in foreign policy through executive agreements rather than treaties. The text of the Constitution makes no provision for executive agreements, although it does prescribe the manner for negotiating and ratifying treaties. Moreover, there is strong indication that the Framers intended that both branches of government be involved before America makes a significant foreign policy commitment. The claim was that the President usurps the Senate’s treatymaking function by implementing foreign policy via executive agreements.

The Court, however, rejected these originalist arguments. The Court emphasized the need for presidential agreements to settle claims between nations as a way to reduce international frictions. The Court spoke of past legislative acquiescence and described a congressional statute that implicitly gives the President authority for some of the actions taken (releasing the frozen Iranian assets). Finally, the Court concluded that historical practice supported the Executive’s action. Justice Rehnquist, writing for the majority, quoted Justice Frankfurter that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on “Executive Power” vested in the President by § 1 of Art. II.”

43. Id. at 667. For a discussion of constitutional objections to executive agreements, see Borchard, Treaties and Executive Agreements—A Reply, 54 YALE L.J. 616 (1945); Mathews, The Constitutional Power of the President to Conclude International Agreements, 64 YALE L.J. 345 (1955); McDougal & Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy (pts. 1 & 2), 54 YALE L.J. 181 (1945), 54 YALE L.J. 534 (1945); Roane, Separation of Powers and International Executive Agreements, 52 IND. L.J. 397 (1977). In addition, there have been many congressional hearings on the subject of the constitutionality of executive agreements. See, e.g., Congressional Review of International Agreements: Hearings Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations, 94th Cong., 2d Sess. (1976); Congressional Oversight of Executive Agreements-1975: Hearings Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm., 94th Cong., 1st Sess. (1975).

44. U.S. CONST. art. II, § 2, cl. 2, defines the procedure for ratifying treaties.

45. For example, Alexander Hamilton said with regard to the treaty power “the joint possession of the power in question, by the President and the Senate, would afford a greater prospect of security, than the separate possession of it by either of them.” THE FEDERALIST NO. 75, at 488 (A. Hamilton) (Mad.Lib. ed. 1941); see also Berger, The Presidential Monopoly of Foreign Relations, 71 Mich. L. Rev. 1, 39 (1972) (Framers’ intent for Senate participation in making foreign policy commitments); Kurland, The Impotence of Reticence, 1968 Duke L.J. 619, 626.

46. 433 U.S. at 679, 682-83.

47. Id. at 686-88.

Notice the dramatic difference in the Court’s methodology in reviewing a challenge to presidential actions compared to its approach in deciding objections to congressional statutes. In *Dames & Moore*, the Court rejected an originalist argument and decided based on policy considerations favoring the use of executive agreements to settle claims. In the cases challenging Congress’ statutes, the Court relied solely on the originalist arguments and refused to even consider the policy reasons why the congressional approach is desirable. In *Dames & Moore*, the Court emphasized the existence of past practice and many decades of settlement of international claims through executive agreements. The Court treated the Constitution as an evolving document that gains meaning from experience. But in *Chadha* the Court gave no weight to the existence for over a half of a century of legislative vetoes. Similarly, in *Synar*, the Court ignored the fact that Congress frequently has given executive officers, such as the heads of independent regulatory agencies, protection from presidential removal. In *Dames & Moore*, the Court relied heavily on Congress’ acquiescence to the President’s conduct, treating separation of powers issues as subject to modification by agreement of the President and Congress. In *Chadha* and *Synar*, the Court gave no weight to the fact that the President signed and agreed to the challenged congressional statutes.

In sum, the Burger Court used a completely different method of constitutional interpretation depending on whether the claim was that the President or Congress was violating separation of powers.

**B. THE COURT’S INCONSISTENT APPROACH TO JUDICIAL REVIEW IN SEPARATION OF POWERS CASES**

In virtually every separation of powers case, one party argues that the litigation should be dismissed from federal court as presenting a non-

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49. See 453 U.S. at 680-82.
51. 106 S. Ct. 3181 (1986). An example of the protection can be found in Humphrey's Ex'r v. United States, 295 U.S. 602 (1935), where the Court approved the Federal Trade Commission Act, which gives Commissioners protection against presidential removal. Congress provided that a President only could remove a Commissioner for "inefficiency, neglect of duty, or malfeasance in office." Federal Trade Commission Act, 15 U.S.C. § 41 (1982). The statute creating the Comptroller General, 31 U.S.C. § 703 (1982), goes further and gives that officer complete immunity from presidential removal. The Court, however, did not address the constitutional difference between limiting the President's removal power by specifying criteria and limiting the President's removal power by prohibiting removal.
52. See 453 U.S. at 686.
justiciable political question. The Burger Court accepted this position in cases presenting separation of powers challenges to presidential actions. In contrast, the Court never dismissed a separation of powers challenge to Congress as posing a political question or being non-justiciable.

In *Goldwater v. Carter*, the Court was asked to decide whether the President could unilaterally rescind the United States treaty with Taiwan without the advice and consent of the Senate.53 The Constitution is silent about the proper procedure for rescission of treaties. Arguably, unilateral rescission by the President usurps the Senate's power to participate in the formulation of the United States' foreign policy objectives.54 The Court, however, neither invalidated President Carter's rescission of the Taiwan treaty, nor questioned whether the President infringed on the Senate's powers. Rather, the Court declared the matter to be non-justiciable. Justice Rehnquist, writing for the plurality, concluded that the case presented a political question.55 Justice Powell, concurring in the result, said that the matter was non-justiciable as not ripe because Congress had not taken a position on the issue.56

Declaring the matter to be non-justiciable was a clear ruling in favor of the President. The plaintiffs claimed that two-thirds of the Senate had to approve a treaty rescission; that is, one-third of the Senators could block rescission. However, once the issue is left to the political process, one-third of the Senators are completely impotent; they cannot even call an issue to the floor of the Senate, let alone enact legislation challenging the treaty's rescission.

Moreover, in numerous cases challenging the constitutionality of the Vietnam War, the Burger Court denied certiorari and let stand lower court decisions declaring the lawsuits to pose non-justiciable political questions.57 There was no review of the claim that the President was usurping the congressional power to declare war. The President's actions thus were allowed to continue.

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55. See 444 U.S. at 1002.
56. Id. at 997 (Powell, J., concurring).
In marked contrast, not once did the Burger Court declare a separation of powers challenge to a congressional action to constitute a political question or to be non-justiciable. For instance, in Buckley v. Valeo, the lower court found the case to be non-justiciable because it was not ripe for review, and the Court was urged to dismiss the litigation as posing a political question. The Court found the case to be sufficiently ripe and brushed aside the political question doctrine. The Court concluded that there is not a political question whenever there is a claim that a congressional action "offend[s] some other constitutional restriction." Yet, as described above, in Goldwater, the Court found there to be a political question even though there was an allegation that the President violated the constitutional restriction on treaty formation.

Similarly, in Chadha the Court was urged to dismiss the case on numerous justiciability grounds, including that the litigation presented a political question because Congress possesses plenary authority over aliens under article I, section 8 of the Constitution. The Court held that there was not a political question because: "No policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts."

In other words, challenges to the constitutionality of a congressional statute never present a political question because it is the role of the judiciary to rule on the constitutionality of statutes. But, according to the Court, challenges to the constitutionality of Executive actions do present political questions; it is not the role of the judiciary to rule on the constitutionality of presidential actions. By juxtaposing the cases involving review of presidential and of congressional actions, the peculiarity and inconsistency in the Burger Court's position is obvious. Marbury v. Madison established the power of the Supreme Court to review the constitutionality of both presidential actions and congressional statutes. The Burger Court took a baldly inconsistent approach to the availability of judicial review depending on whether the case presented a challenge to the President or an objection to congressional action.

59. 424 U.S. 1, 132 (1976) (per curiam).
61. 5 U.S. (1 Cranch) 137 (1803).
II. THE PARADOX ANALYZED: THE ABSENCE OF A JUSTIFICATION FOR THE COURT'S INCONSISTENCY IN SEPARATION OF POWERS CASES

Because of the importance of the separation of powers doctrine in constitutional law and national governance, it is essential that the Burger Court's inconsistent approach either be justified or abandoned. Justification for the paradoxical approach described above is crucial because of the effects of the Court's decisions on the system of checks and balances. The Burger Court upheld increased presidential power, either explicitly or implicitly by refusing to rule, in every case in which the Executive was challenged as violating separation of powers. At the same time, the Burger Court lessened restraints on the Executive by decreasing Congress' ability to enact checks, such as the legislative veto and the use of officers independent of the President to implement congressional policy. Additionally, the Burger Court's deferential posture to the Executive, and the judiciary's frequent unwillingness even to reach the merits of such challenges, has reduced the judicial role as a check on the Presidency.

This, of course, does not establish that the Burger Court necessarily erred in taking an inconsistent approach to separation of powers questions. Rather, I suggest that the Court's inconsistency has troubling consequences and therefore only is tolerable if it can be justified. As Justice Frankfurter noted: "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."62

How did the Burger Court justify the inconsistent approach it adopted in separation of powers cases? It didn't. The Court gave no indication that it recognized different methods of constitutional interpretation and different approaches to the availability of judicial review depending on whether it was the President or Congress that is being sued. Nor is there discussion or explanation for the inconsistency in the academic literature.

The most important point of this Article is that the burden is on the Court to justify its paradoxical approach to separation of powers cases.

If the Court cannot provide an adequate explanation for its seeming inconsistency, then it must adopt a unified approach to separation of powers challenges, using the same method of constitutional interpretation and the same standard for the availability of judicial review regardless of whether the litigation is against the legislature or the Executive.

Although it is conceivable that a justification for the differing approaches might be developed, none readily comes to mind. Neither interpretive nor political theory seem to explain why the Court should have an approach to judicial review that causes it always to side with the President and frequently to rule against Congress.

Nothing in the recent voluminous literature on constitutional interpretation explains why the Court should use different methods depending on the institution being challenged. Nor do any of the particular interpretive theories account for the variance in approach. Current discussions of constitutional interpretation focus on originalism and nonoriginalism as the primary alternative methodologies; neither seems to explain the Court's differing approach in separation of powers cases.

Originalism—the view that constitutional interpretation should be confined to that which is stated in the Constitution or intended by its drafters—does not justify treating separation of powers challenges to the President differently from those to Congress. To begin with, the Framers undertook remarkably little discussion on the entire subject of judicial review, making it difficult to discern any intent on the availability of judicial review, let alone its scope, approach, or methodology. Nor, of course, does the text of the Constitution offer any basis for greater judicial deference to the President than to Congress.

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63. For a review of the recent debate over the proper method of constitutional interpretation, see Chemerinsky, *The Price of asking the Wrong Question: An Essay on Constitutional Interpretation and Judicial Review*, 62 Texas L. Rev. 1207, 1234-36 (1984) (summarizing the various theories that have been advanced).

64. Prominent defenses of originalism include, R. Berger, *Government By Judiciary* (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1972); Rehnquist, *The Notion of a Living Constitution*, 54 Texas L. Rev. 693 (1976). All advocate originalism across the board; none advocate nonoriginalism for a particular class or sub-class of cases, such as judicial review of challenges to the President.

65. See J. Choper, *Judicial Review and the National Political Process* 423 nn.7-8 (1980) (evidencing the dispute over whether the Framers intended to establish judicial review); W. Crosskey, *Politics and the Constitution* 1008-46 (1953) (arguing that the Framers did not intend judicial review); Monaghan, *The Constitution Goes to Harvard*, 13 Harv. C.R.-C.L. L. Rev. 117, 125 (1978) (noting that it is "increasingly doubtful that any conclusive case can be made one way or the other [as to whether the Framers intended judicial review]").
Moreover, there is no doubt that the Framers distrusted executive power at least as much, if not more, than they distrusted the legislature. As Louis Henkin observed, the Framers were guided by the "unhappy memories of royal prerogative, fear of tyranny, and distrust of any one man."66 Marbury v. Madison—the source of American judicial review—created judicial authority to review both the President and Congress to assure the constitutionality of their actions.67

Nor does non-originalism offer any apparent justification for the Burger Court's inconsistent behavior. There is, of course, no single non-originalist theory; non-originalism frees the Court from the binds of deciding solely on the basis of text and intent and therefore opens the door to a wide range of different theories. I know of no non-originalist theory which explains why the method of constitutional interpretation should vary in separation of powers cases depending on the institution being sued.

Some non-originalist theorists, such as Dean Jesse Choper, Professor Michael Perry, and Professor Stephen Carter, argue that a different method of interpretation should be used in structure of government cases—issues involving separation of powers and federalism—from that used when individual rights issues are presented.68 But these scholars advocate a single method of constitutional interpretation in all separation of powers and federalism cases. Their analysis is based on a claimed distinction between issues concerning the structure of government and those that directly involve the protection of liberty and equality. Nothing in their theories explains why varying methods of constitutional

67. 5 U.S. (1 Cranch) 137 (1803). In fact, most of the contemporaneous controversy surrounding Marbury involved the Jefferson Administration's disagreement about the Court's authority to review the Executive. G. GUNTHER, CONSTITUTIONAL LAW 12 (11th ed. 1985).
68. Dean Choper, for example, argues that questions concerning the structure of government should not be reviewed by the Court and should be left, instead, to the political process. J. CHOPER, supra note 65, at 263. But see Chemerinsky, Controlling Inherent Presidential Power: Providing a Framework for Judicial Review, 56 S. CAL. L. REV. 863, 896-900 (1983) (criticizing Choper's proposal for judicial abstention in separation of powers cases). Dean Choper, however, argues for a unified approach in all separation of powers cases; he does not argue for the differential approach now employed.

Professors Stephen Carter and Michael Perry argue for originalism in structure of government cases, but non-originalism in individual liberties cases. See M. PERRY, supra note 15, at 37-60 ("There is no functional (or other) justification for non-interpretive review in separation of powers cases."); Carter, Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle, 94 YALE L. J. 821, 861-62 (1985) (arguing for an originalist approach to parts of the Constitution dealing with the structure of government). Again, however, they argue for the same approach in all separation of powers and federalism cases, not for one standard in judicial review of the President and another in review of Congress.
interpretation should be used in separation of powers cases depending on the institution being reviewed. Many other prominent non-originalist theorists, such as Dean John Ely and Professor Ronald Dworkin, do not discuss separation of powers at all.

Of course, non-originalism allows the Court to use both the lessons of history and modern values in deciding constitutional questions. Thus, a non-originalist could argue from political theory that the Court's differential approach to separation of powers questions is correct. However, traditional American political theory suggests the importance of checks and balances and of judicial review of both the President and Congress, and because both are obligated to stay within the bounds of the Constitution, judicial review of each traditionally has been assumed.

What kind of political theory might justify the Burger Court's position and a departure from the traditional assumptions? One might argue that society needs a very strong President and hence it is desirable for the Court to defer to the President and limit Congress' ability to restrict the Executive. Accordingly, the Court should use a different method of

69. For example, Dean Choper argues that the Court should preserve its institutional capital for individual rights cases and therefore not become involved in disputes concerning the structure of government. J. CHOPER, supra note 65, at 263-98. Professor Carter argues for originalism in separation of powers and federalism cases because he believes that there are not the same interpretive problems that plague the Court in individual rights cases. Carter, supra note 68, at 861-62. But see Chemerinsky, Wrong Questions Get Wrong Answers: An Analysis of Professor Carter's Approach to Judicial Review, 66 B.U.L. REV. 47 (1986) (arguing that Professor Carter's objections to originalism in individual rights cases apply with equal force in structure of government cases). Neither of these theories explains any reason for treating challenges to the President differently from suits against Congress on separation of powers grounds.

70. See R. DWORIN, TAKING RIGHTS SERIOUSLY (1958); J. ELY, supra note 15.


72. There is an alternative version of this argument that says that Court decisions which defer to the President can be explained by the Court's traditional deference in areas of foreign policy. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16, 318-19 (1936). But see Levitan, The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory, 55 Yale L.J. 467, 497 (1946); Lofgren, United States v. Curtiss-Wright Export Corp.: A Historical Reassessment, 83 Yale L.J. 1, 30 (1973). In other words, the argument would be that the distinction is not between review of the President and of Congress, but instead between domestic and foreign policy.

I believe this is incorrect for several reasons. First, the Court has deferred to the President in cases involving domestic policy as well as foreign affairs. See, e.g., AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir. 1979) (upholding the President's authority to impose wage-price controls on government contractors), cert. denied, 443 U.S. 915 (1979). Second, the Court has overturned congressional laws which, in part, involved foreign policy. For instance, many statutes involving foreign relations—most notably the War Powers Resolution—contain legislative veto provisions. Justice White lists
interpretation and a different approach to judicial review in order to achieve the desired degrees of deference and control.

The advocate of this position, however, would need to meet many burdens. First, the theory would need to explain why judicial review of presidential actions, and congressional controls of the type that have been invalidated, excessively weaken the Presidency. Second, the theory would need to offer a defense of the “proper” scope and strength of presidential powers so as to allow a conclusion that judicial review and congressional checks overly restrict the Executive. Third, the theory would need to respond to the dangers of an “imperial presidency”—explaining why society is better off, on balance, without judicial review of allegedly unconstitutional presidential acts and without congressional controls such as the legislative veto. Fourth, the theory would need to explain why the method of constitutional interpretation and the standard for the availability of judicial review should vary. Deference to the President could be achieved by judicial acceptance of presidential positions on the merits of the cases presented.

I am not saying that it would be impossible to develop such a political theory. However, the merits of such a theory are hardly intuitive; such a theory certainly contradicts the traditional wisdom concerning separation of powers. Therefore, the Court cannot assume the validity of such a theory without explicitly justifying it.

In sum, interpretive and political theory do not provide an apparent justification for treating challenges to the Presidency differently than objections to congressional actions. No explanation has been offered in either the judicial or academic literature.

III. THE PARADOX RESOLVED: OBSERVATIONS ABOUT THE JUDICIAL ROLE IN SEPARATION OF POWERS CASES

Thus far, I have established three points. First, the Burger Court used a different approach in reviewing challenges to executive actions than in deciding claims that Congress violated separation of powers. Second, given the importance of separation of powers and the effects of the Court's decisions, the difference in treatment is intolerable and
twelve statutes pertaining to “foreign affairs and national security” that had legislative veto provisions invalidated by Chadha. INS v. Chadha, 462 U.S. 919, 1003-05 (1983) (Appendix to Opinion of White, J., dissenting). Finally, there still would need to be some theory as to why the Court should use different methods of interpretation in separation of powers cases, instead of exercising greater deference on the merits of foreign policy issues.
should be discarded unless it can be justified. Third, no justification has been offered yet and none is readily apparent.

If the Court cannot justify differential treatment, it must adopt a unified approach, using the same methods in all separation of powers questions. Specifically, there are three questions that must be answered in developing a consistent approach to separation of powers cases. First, are separation of powers issues justiciable? That is, should the Court decide cases presenting claims that the President or Congress is infringing upon separation of powers or should the Court declare that such cases pose a non-justiciable political question? Second, if such cases are justiciable, what method of constitutional interpretation should be used in separation of powers cases? Should the Court adopt an originalist or a non-originalist approach in deciding claims that the President or Congress is usurping the powers of the other branch of government? Third, if the Court decides that its role is to decide whether one branch is infringing the powers and prerogatives of another, what criteria should the Court use in determining whether a particular action constitutes an infringement?

Having defined the agenda of issues to be resolved, it is tempting to conclude the Article here. For the sake of completeness, however, I wish to shift from the largely descriptive focus thus far, and offer my views as to the proper answers to the above questions. In large part, I choose to do this to make clear that the Court is not limited to choosing between the Burger Court’s approach in deciding suits against the President and that which it employed in deciding challenges to congressional statutes. I believe the Burger Court was right and wrong in reviewing both presidential and congressional actions; there are some aspects of both which should be followed and some aspects which should be discarded.

Hopefully, even those who disagree with my suggestions nonetheless will agree as to the existence of inconsistency, the need for and absence of justification, and the questions the Court needs to confront in developing a unified approach to separation of powers questions. My goal is not to develop a full theory of constitutional interpretation or of the role of the judiciary or separation of powers. Instead, here I wish to sketch my views as to how the Court should resolve the paradox I have described.

A. Justiciability

Separation of powers questions should be justiciable; that is, allegations that one branch of government is violating the constitutional prerogatives of another branch should be resolved by the judiciary. The
Court should not dismiss such cases as posing a political question. As described above, the Burger Court held that it is never a political question when there is a challenge to the constitutionality of a statute, but frequently held that it is a political question when there is a challenge to the constitutionality of an executive action.\textsuperscript{73} I believe the former is correct and the latter in error.

If claims that the President is unconstitutionally violating separation of powers are deemed to be non-justiciable, then the only enforcement of the Constitution and the only direct restraint on the President comes from congressional actions. Legislative inaction means that violations of the Constitution go unremedied. Repeated congressional inaction could result in a dramatic growth in the power of the Executive and a concomitant decrease in legislative powers simply by virtue of congressional acquiescence. Such a growth in executive authority threatens the notion of checks and balances that is so universally regarded as essential to our democratic system of government.

Furthermore, it is extremely difficult for Congress to check or constrain the President, even when it believes that the Executive is acting unconstitutionally. If Congress wishes to force the Executive to stop an allegedly unconstitutional practice, it must enact a statute. However, the President has the authority to veto the bill before it becomes law. Thus, in order to check the President, Congress must be able to muster a two-thirds majority of both Houses to override the veto, substantially lessening the likelihood that Congress can restrain the Executive.

The result of declaring challenges to presidential actions to be unreviewable political questions is that the President is allowed to continue allegedly unconstitutional practices and only rarely will the political process stop them. The separation of powers concepts contained in the Constitution are rendered much less effective; they are enforced only when Congress can muster sufficient strength to act by super-majority. This is inconsistent with the widely accepted idea of a constitution: A constitution exists to assure that important matters, such as individual liberties and the structure of government, cannot be ignored or easily changed.\textsuperscript{74}

\textsuperscript{73} See supra text accompanying notes 53-61.

\textsuperscript{74} A constitution is different from a statute primarily because it is much more difficult to change or revise a constitution. Separation of powers is placed in a constitution, in part, because of fear of despotic rule especially in times of crisis. A constitution, more than anything else, is meant to be a limit on what government can do. See H. ARENDT, \textit{On Revolution} 143 (1977); C. McCL-WAIN, \textit{Constitutionalism: Ancient and Modern} 24 (1940); L. TRIBE, supra note 18, at 10.
Judicial review was envisioned by Alexander Hamilton,\textsuperscript{75} articulated by \textit{Marbury v. Madison},\textsuperscript{76} and employed for almost two centuries, as a way of assuring that the Constitution is enforced. The Court abdicates its duty when it holds that any suit to declare presidential actions unconstitutional poses a political question. In fact, prior to the Burger Court, the Supreme Court repeatedly “decided disputes between Congress and the President under its general power to hold the other two departments within the ambit of the Constitution.”\textsuperscript{77}

This is not a call for a radical revision of the political question doctrine. Quite the contrary, I am urging an adherence to its traditional scope. The political question doctrine, as set forth in \textit{Marbury v. Madison} and as followed through most of American history, provides that courts should not review an official’s performance of duties in which he or she has discretion.\textsuperscript{78} Only the exercise of lawful discretion is reviewable. Claims that an official is acting without constitutional authority or violating a constitutional provision are not political questions. The Supreme Court explicitly recognized this in \textit{Baker v. Carr}:

Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds [its] authority . . . , is itself a delicate exercise in constitutional interpretation, \textit{and is a responsibility of this Court as ultimate interpreter of the Constitution}.\textsuperscript{79}

Thus, the political question doctrine, properly understood, precludes review of the exercise of discretionary power; it does \textit{not} prevent a court from determining whether the Executive’s conduct is an unconstitutional usurpation of legislative power. Justice Brennan explained that the political question “doctrine does not pertain when a court is faced with the \textit{antecedent} question whether a political branch has [acted unconstitutionally]. . . . The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.”\textsuperscript{80}

\textsuperscript{75} \textit{The Federalist NO. 78} (A. Hamilton).
\textsuperscript{76} 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{78} Henkin, supra note 10, at 606; Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 \textit{Harv. L. Rev.} 1, 7-9 (1959) (the political question doctrine does not prevent the Court from reviewing claims of allegedly unconstitutional presidential acts).
\textsuperscript{79} 369 U.S. 186, 211 (1961) (emphasis added).
Thus, the Court should decide claims that Congress or the President violated the Constitution's requirements of separation of powers. It should consistently apply the justiciability doctrine in all separation of powers cases and it should not dismiss allegations of constitutional violations as posing political questions.

B. THE METHOD OF CONSTITUTIONAL INTERPRETATION

The Court should use non-originalism in deciding all separation of powers cases. Recall that the Burger Court strictly applied originalism in reviewing claims that Congress has violated separation of powers, but used non-originalism in approving challenged presidential actions. For example, even Justice Rehnquist, the Court's most outspoken advocate of originalism, used non-originalism in approving the President's use of executive agreements.  

Notwithstanding the lack of textual authority for executive agreements and the Framers' seeming intent to require Senate approval of foreign policy commitments, Justice Rehnquist, writing for the Court, emphasized the policy needs favoring executive agreements and the "gloss" placed on the Constitution by history and experience.

There is a voluminous literature debating the relative merits of originalism and non-originalism. I do not wish to rehash that debate here. Rather, I wish to make several points specifically about why the Court should use non-originalism in separation of powers cases.

First, originalism is particularly poorly suited to separation of powers cases because there are many essential government powers that are not specified in the Constitution and where the Framers' intent is unclear or non-existent. For instance, what branch of government has the authority to remove cabinet officials from office? This question is

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81. See, e.g., Rehnquist, supra note 64, at 693, 696-97.
84. For a discussion of the general problems with following Framers' intent because of the incompleteness of materials and the difficulty with deciding whose intent counts and what that intent was, see J. Ely, supra note 15, at 11-41; Shalman, The Constitution, the Court, and Creativity, 9 Hastings Const. L.Q. 257 (1982); Wolford, The Blinding Light: The Uses of History in Constitutional Interpretation, 31 U. Chi. L. Rev. 502, 508-09 (1964).
85. See, e.g., Weiner v. United States, 337 U.S. 349 (1958) (President's removal power depends on tasks performed by official and importance of independence from the Executive); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (Congress can restrict President's ability to remove heads
hardly academic—it led to the impeachment of Andrew Johnson and was the basis for the Court's recent decision invalidating a portion of the Gramm-Rudman-Hollings Deficit Reduction Act. Article II of the Constitution gives the President appointment powers, but not removal powers. Article I does not give Congress removal powers. Does the originalist premise, that government only may act when there is express or intended constitutional authority, mean that no one can remove cabinet officials? Similarly, consider the question of which branch of the government can recognize foreign governments. Article II does not give the recognition power to the President. Neither does article I or article III give this power to Congress or the courts respectively. An originalist methodology could lead to the conclusion that no one has the power to recognize foreign governments.

It is because the Constitution is silent in many crucial areas of governing authority that the Court has used non-originalism in approving presidential powers such as the removal power, the recognition power, executive privilege, and the use of executive agreements. The Court repeatedly recognized the undesirability and impossibility of originalism in separation of powers cases.

Second, it distorts separation of powers to use non-originalism in approving presidential powers, while using originalism in deciding what congressional checks on the Executive are permissible. It makes little sense to allow the President authority never intended by the Framers, but at the same time to hold that Congress only may restrain these powers with mechanisms enumerated in the text and intended by the drafters. The legislative veto decision, Immigration and Naturalization Service v.

of independent regulatory agencies); Myers v. United States, 272 U.S. 52 (1926) (President's authority to remove cabinet officials).

86. The originalists' premise is that the federal government only may act when there is explicit or implicit constitutional authority. See, e.g., Bork, supra note 64, at 7-8.

87. Weiner, 357 U.S. 349; Myers, 272 U.S. 52.


91. For example, the Court has spoken of the "gloss" that history places on the Constitution with regard to the separation of powers issues. See, e.g., Regan, 453 U.S. at 686; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring).
Chadha,\footnote{462 U.S. 919 (1983).} illustrates this point. The Supreme Court has allowed Congress to delegate legislative powers to administrative agencies in ways obviously never contemplated by the Constitution's Framers.\footnote{43. Id. at 978, 984-92 (White, J., dissenting) (change in government from what Framers envisioned). The Court has not declared unconstitutional a delegation of power since 1935. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542-42 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935). Professor Kenneth Culp Davis explains that: Congress may and does lawfully delegate legislative power to administrative agencies . . . . The Supreme Court throughout the twentieth century has upheld congressional delegations without standards, and except for two 1935 decisions, it has never held unconstitutional any delegation to an administrative agency. Since 1935 the delegation doctrine has had no reality in its holdings . . . . 1 K. Davis, Administrative Law Treatise 149-50 (2d ed. 1978).} Since the mid-1930s, the judiciary has approved every delegation of legislative powers, no matter how expansive. Although the Framers and earlier Courts envisioned strict limits on congressional delegation of power,\footnote{44. The traditional principle was that Congress could not delegate its legislative powers. See, e.g., Field v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").} the rise of the regulatory state and the need for administrative discretion caused the Court to discard the non-delegation doctrine.\footnote{45. For a discussion of the causes of broad delegations of power, see Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1675 (1975).}

The legislative veto was intended as a way by which Congress could check and review the exercise of delegated legislative power. Chief Justice Burger, writing for the majority in Chadha, invalidated the legislative veto based on an entirely originalist analysis. As described earlier, his analysis focused exclusively on the test of the Constitution and the Framers' intent.\footnote{46. See supra text accompanying notes 17-24.} He refused to consider the policy argument that the legislative veto was a desirable innovation to check the expansion of delegated power.\footnote{47. Justice White emphasized these policy considerations in his dissent. INS v. Chadha, 462 U.S. 919, 984-90 (1983) (White, J., dissenting).}

But it is paradoxical to allow the President authority unintended by the Framers, while restricting Congress to those checks contemplated by the Framers. If non-originalist power is permitted, so should non-originalist controls be allowed. And as argued above, it is unrealistic and undesirable to eliminate all non-originalist powers possessed by the presidency.

Third, originalism is methodologically unsound in separation of powers cases because there is fairly strong evidence that the Framers
meant for the allocation of powers to be adjusted among the branches over time. Therefore, an originalist methodology compels the use of non-originalism. The Framers recognized that no document could list all of the powers that a government would need. 98 For example, historians have observed that the Framers realized no formal constitution would be able to create an executive office that would be adequate for the future as the country grew and changed. 99 As Justice Jackson pointed out, the Framers provided an "[e]ighteenth-century sketch of a government hoped for, not . . . a blueprint" for the future. 100 Originalism commands an interpreter to follow the Framers' intent. Because the Framers intended non-originalism in separation of powers cases, the originalist methodology compels the use of non-originalism.

Finally, originalism is inappropriate in separation of powers cases because it blinds the Court to what should be the real issue: is one branch of government usurping the powers of another? The only way to answer this question is to analyze the powers of each branch and how they interact. This must include consideration both of the Constitution's provisions and of actual practice. Originalism omits the latter.

For example, in Bowsher v. Synar, the Court invalidated part of the Gramm-Rudman-Hollings Act on originalist grounds 101 but ignored what I find to be the most constitutionally troubling part of the Act. In that Act, Congress specified maximum deficit levels for each of the next five years. The Act made it extremely difficult for a future Congress to change these limits. Any proposal in a House of Congress to exceed the prescribed levels is out of order, thus requiring the approval of a super-majority of the members of that House even to hear the proposal. 102 But what right does this session of Congress have to bind future sessions?

99. Id. See generally National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) ("certain concepts in the Constitution were "left to gather meaning from experience").
100. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).
101. See supra discussion accompanying notes 25-37.
102. The Act
[d]esignates the following items to be out of order (ineligible for floor consideration if a member objects by raising a point of order and if the objection is not overruled):
1) Budget legislation . . . that would cause projected deficits to exceed specified levels . . . .
3) Legislation exceeding a subcommittee's allocation . . . .
4) Until completion of a budget resolution, any legislation providing new budget authority, increases or decreases in revenues, increases or decreases in the federal debt . . . .
5) Legislation exceeding the budget resolution . . . .
6) Legislation providing new spending authority . . . .
There are troubling implications in terms of the democratic process and the ability of the people to change government through elections if one session can bind and limit future legislatures. To my knowledge, this objection was not raised by the attorneys, who focused on originalist arguments concerning delegation of powers and the removal power.

Similarly, the Court invalidated all legislative vetos based on its originalist analysis, failing to recognize that there is a strong argument for distinguishing between legislative vetos of agency rulemaking and vetos of administrative adjudications. In other words, originalism may divert attention from real constitutional problems, albeit ones not foreseen by the Framers.

There are many other objections to originalism and arguments in favor of non-originalism. However, the above represent several important reasons why the Court should follow a non-originalist methodology in separation of powers cases.

C. AN APPROACH TO SEPARATION OF POWERS CASES

Once originalism is rejected as a basis for decisions, the Court must develop an alternative method of evaluating separation of powers challenges to government actions. For all the reasons presented above, there never will be a formula for resolving separation of powers controversies. Decisions inevitably will turn on views about the appropriate powers of

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104. The lower court in Chadha implied a distinction between legislative vetos of rules and adjudications. See Chadha v. INS, 634 F.2d 408, 433 (9th Cir. 1980). In the Supreme Court's review of the case, Justices Powell (in concurrence) and White (in dissent) may be read as arguing that rulemaking should be reviewed as a distinct issue from legislative vetos of adjudications. 462 U.S. at 960, 967. Many scholars have argued for such a distinction. See Elliott, INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto, 1983 SUP. CT. REV. 125; Strauss, supra note 24, at 797-801.

each branch and how they should interact. However, I believe it is possible and necessary for the Court to clarify the issues it will look to in deciding separation of powers challenges.

Specifically, I can identify three questions the Court should focus on in deciding separation of powers cases. These questions do not yield determinate results or specific answers; rather, they are the issues the Court should consider in formulating the law of separation of powers and in deciding if a particular action violates the Constitution.

First, is one branch of government exercising powers that are constitutionally committed to another branch? Violations of separation of powers frequently take the form of one branch of government assuming and performing the duties assigned to another. For example, in Bowsher v. Synar, the major issue was whether Congress was exercising the President's power of implementing the laws by assigning to the Comptroller General responsibility for prescribing spending cuts.106 In Buckley v. Valeo, the issue was whether Congress was exercising the President's appointment power by appointing the majority of the members on the Federal Election Commission.107 This first question requires the Court to analyze and decide what powers are committed to which branches of government and under what circumstances a branch unconstitutionally assumes the power of another.

Second, is one branch preventing another from performing its functions or duties? Another classic way in which a branch of government violates separation of powers is by interfering with another branch and preventing it from performing its constitutional responsibilities. In United States v. Nixon, for example, the Court recognized a "presumptive privilege for Presidential communications,"108 but held that the privilege was inapplicable where it would "conflict with the function of the courts under Article III."109 Likewise, in deciding whether it is constitutional for the President to negotiate executive agreements instead of treaties, the Court must decide whether the President is preventing the Senate from performing its constitutional function of approving foreign policy commitments. In deciding whether one branch is preventing another from performing its functions, the Court must decide what the functions of each branch are in the area being challenged and what constitutes an impairment of functions.

109. Id. at 707.
Third, is one branch of government acting in a way as to prevent sufficient review or control by another? It has long been recognized that the Constitution requires concurrence among the branches as a prerequisite for government action in order to check the abuse of governmental power.110 At the simplest level, enacting a law requires action by both Congress and the President, and enforcing a law necessitates action by both the Executive and the judiciary. Therefore, the courts should scrutinize acts of one branch that tend to insulate that branch from checks and balances. For example, in rescinding the treaty with Taiwan without congressional consent, was there an adequate opportunity for another branch of government to check the President's action? In considering this third question the Court must analyze the opportunities for checks and review and determine what is a sufficient form of control.

CONCLUSION

In this Article I have tried to do many things. First, I described the inconsistent approach the Burger Court adopted in separation of powers cases. That Court used a different method of interpretation and a different approach to judicial review depending on whether the President or Congress was being sued. The effect was that without exception presidential actions that were challenged for usurping legislative powers were sustained, but many congressional statutes were invalidated. Second, I argued that this inconsistency is troubling in its effect of increasing presidential power and lessening checks on the Executive. As such, the differential approach only should continue if it can be justified. Third, I pointed out the Burger Court's failure to justify its paradoxical approach in separation of powers cases, and I observed that neither interpretive nor political theory provide a ready explanation for the Court's conduct. Fourth, assuming that no justification is developed, I suggested an agenda for the Court in developing a unified approach in separation of powers cases. The Court needs to decide whether such litigation is justiciable, what method of constitutional interpretation to use, and how to approach separation of powers cases. Fifth, and finally, I sketched my views about how the Court should handle separation of powers issues.

Clarity in the law matters. Checks and balances matter. The Court's inconsistency in separation of powers cases must be faced and resolved by the Rehnquist Court.
