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Conflicts of Interest and the Constitution

David Orentlicher*

Table of Contents

I. Introduction	714
II. Why Conflicts of Interest Matter	717
A. Concerns Raised by Conflicts of Interest	717
B. Conflicts of Interest and Constitutional Theory	720
III. Conflicts of Interest and Constitutional Interpretation	722
A. Separation of Powers and Conflicts of Interest	723
1. Formalism	724
2. Functionalism	728
3. Judicial Abstention	731
4. Appealing to Principle – Functionalism Limited by Conflicts of Interest	732
a. Invalidations for Lack of a Genuine Functionalist Justification	737
b. Invalidations Because of Concerns About Conflicts of Interest	740
c. When Does a Conflict of Interest Become Problematic?	742
B. The Political Question Doctrine, Judicial Supremacy, and Conflicts of Interest	745
1. Problems with the Current Political Question Theory	745
2. Conflicts of Interest and Political Question Theory	749
3. Potential Concerns with Conflicts of Interest as a Basis for the Political Question Doctrine	753

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C. Amending the Constitution and Conflicts of Interest	756
1. Term Limits for Members of Congress	763
2. Campaign Finance Reform	764
IV. Conclusion	765

I. Introduction

Increasingly, society has recognized the concerns posed by conflicts of interest.¹ Conflicts of interest may compromise audit reports by accounting firms, courtroom decisions by judges, and treatment decisions by physicians. In several areas of the law, concerns about conflicts of interest play a critical and widely recognized role. Codes of professional responsibility limit the ability of lawyers to represent both sides of a dispute,² principles of corporate law prevent company directors from trading on inside information,³ and rules of agency law prohibit trustees from mingling their own funds with those of the trust.⁴

Conflicts of interest also can play a critical role in shaping constitutional doctrine. However, this role is seriously underappreciated. Occasionally, courts and scholars mention conflicts concerns when discussing the Constitu-

1. By "conflicts of interest," I mean situations in which a person is trying to serve different interests and satisfying one interest may come at the expense of another interest. For example, if stock analysts for the automobile sector invest in General Motors, they may face a conflict of interest between their duty to provide reliable analyses of car manufacturers to the public and their desire to protect the value of their investment portfolio. With conflicts of interest, individuals face competing interests, and service to one interest may entail sacrifice of the other interests. Note that the competing interests may all be interests of other people, but they may also include the individual's own interests.

Fields other than law, including medicine, recognize the importance of conflicts of interest. See, e.g., David Orentlicher, *Paying Physicians More to Do Less: Financial Incentives to Limit Care*, 30 U. RICH. L. REV. 155, 161-62 (1996) (discussing concerns that arise if physicians receive greater compensation for delivering less care to their patients); Daniel P. Sulmasy, *Physicians, Cost Control, and Ethics*, 116 ANNALS INTERNAL MED. 920, 920-21 (1992) (discussing ethical considerations of cost-control proposals); Robert M. Veatch, *Physicians and Cost Containment: The Ethical Conflict*, 30 JURIMETRICS J. 461, 466-70 (1990) (discussing concerns that arise if physicians receive greater compensation for delivering less care to their patients).

2. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2000) (forbidding generally lawyers from representing clients with directly adverse interests).

3. See A.C. Pritchard, *United States v. O'Hagan: Agency Law and Justice Powell's Legacy for the Law of Insider Trading*, 78 B.U. L. REV. 13, 47-52 (1998) (discussing how insider trading law reflects common law agency principles).

4. See RESTATEMENT (SECOND) OF TRUSTS § 179 (1959) (requiring trustee to keep trust property separate from other non-trust property); CAL. PROB. CODE § 16009(a) (West 1991) (same); IND. CODE ANN. § 30-4-3-6(b)(5) (Michie 2000) (same); N.Y. EST. POWERS & TRUSTS LAW § 11-1.6(a) (McKinney 2001) (requiring fiduciary to keep property received as fiduciary separate from his individual property).

tion, but few writers really analyze the significance of conflicts of interest for constitutional interpretation, and such analyses are usually limited to a single area of doctrine.⁵ Consequently, legal scholarship has not adequately considered how constitutional law accounts for, or should account for, conflicts of interest.⁶

This Article offers a fuller discussion of conflicts of interest and constitutional interpretation. In particular, this Article shows how consideration of conflicts can help answer three leading puzzles in constitutional theory and doctrine – the lack of a strong theory for separation of powers cases, the tension between judicial supremacy and the political question doctrine, and the question of whether Article V of the Constitution exclusively governs the process of constitutional amendment.

First, responding to concerns about conflicts of interest can help resolve a serious problem with the "functionalist" approach to separation of powers issues.⁷ The functionalist approach can explain Congress's power both to create administrative agencies that exercise legislative power and to authorize

5. Some scholars discuss conflicts in the context of judicial supremacy, others in the context of the political question doctrine, and still others when analyzing separation of powers cases. Most notably, Paul Verkuil considered conflicts of interest in the context of the separation of powers doctrine. See Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 307 (1989) (proposing conflicts of interest approach to separation of powers analysis). His writing sparked some commentary, primarily in the symposium issue in which his article appeared. See Symposium, *The American Constitutional Tradition of Shared and Separated Powers*, 30 WM. & MARY L. REV. 343 (1989) (presenting four articles responding to Verkuil's article); see also WILLIAM B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 128 n.1 (1965) (concluding that "purest version" of separation of powers doctrine is "rule of law" version under which it is essential that people who make laws not also administer them); Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 720-22 (1997) (criticizing Verkuil's conflicts of interest approach for omitting role of politics); Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 498-501 (1991) (criticizing Verkuil's approach for falling short of protecting values fostered by separation of powers).

6. Indeed, it is not unusual for constitutional law treatises to lack an index entry for conflicts of interest. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (2d ed. 2002) (giving no reference to conflicts of interest); RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* (3d ed. 1999) (same). Other treatises touch on conflicts of interest briefly. See 3 CHESTER JAMES ANTEAU & WILLIAM J. RICH, *MODERN CONSTITUTIONAL LAW*, *index* at 17 (2d ed. 1997) (addressing conflicts of interest to extent that they compromise criminal defendant's right to counsel); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1427 (3d ed. 2000) (indexing conflicts of interest on four out of 1381 pages).

7. By "functionalist" approach, I refer to the idea that Congress may reallocate authority among the three branches of the national government if the reallocation facilitates the functioning of the national government without too greatly undermining the division of authority among the executive, legislative, and judicial branches. See Fitzgerald, *supra* note 5, at 702 (defining functionalism).

independent federal prosecutors that exercise executive authority without presidential oversight. However, a functionalist approach has trouble establishing when Congress goes too far in reallocating national government authority and thereby upsets the balance of power among the Congress, the President, and the courts. In other words, while a functionalist approach responds to the problems of the leading alternative theory – the "formalist" approach to separation of powers questions⁸ – the functionalist analysis suffers from a lack of identifiable limits. How do we know when a reallocation of power too greatly undermines the constitutional structure? This Article argues that accounting for conflicts of interest in constitutional interpretation can provide the limiting principle needed to make functionalism work. Specifically, courts should strike down legislation when it is likely that Congress passed the law to serve its own self-interest.

Second, accounting for conflicts of interest can also resolve an important tension that exists between *Marbury v. Madison*'s⁹ principle of judicial supremacy¹⁰ and the political question doctrine.¹¹ Under current applications of the political question doctrine, courts must try to explain why the judiciary should not decide certain constitutional questions despite the fact that under *Marbury* the Supreme Court is the ultimate authority on constitutional questions.¹² Understanding *Marbury* and the political question doctrine in terms of the concerns raised by conflicts of interest can establish a political question doctrine that fits well with the principle of judicial supremacy. In particular,

8. By "formalist" approach, I refer to the idea that the national government's power is divided among executive, legislative, and judicial tasks and that the different tasks can be carried out only by the corresponding branch of the national government. See *id.* at 690 (defining formalism).

9. 5 U.S. (1 Cranch) 137 (1803).

10. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803) (deciding that it is sole province of judiciary "to say what the law is").

11. Under the political question doctrine, the political branches of government (the executive and the legislative branches) rather than the judicial branch should resolve certain disputes. Accordingly, when faced with a political question, courts should dismiss the case. See CHEMERINSKY, *supra* note 6, at 127-28 (describing political question doctrine).

12. Although courts and scholars widely interpret *Marbury* as establishing a broad principle of judicial supremacy, one can question whether such an interpretation is justified. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 51-52 (4th ed. 2001) (arguing that *Marbury* gave courts authority to interpret and apply Constitution to cases before them, but no special authority to be sole interpreters of Constitution).

For a recent statement of the Supreme Court's supremacy in constitutional interpretation, see *Dickerson v. United States*, 530 U.S. 428, 437 (2000), in which the Court noted that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution." Detractors to the principle of judicial supremacy exist. See, e.g., Edwin Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 981-85 (1987) (arguing that Supreme Court's interpretation of Constitution has less force than Constitution as supreme law itself).

courts should abstain when their involvement would entail a serious conflict of interest for them.

Finally, considering conflicts of interest can illuminate a third important constitutional question – does Article V of the Constitution alone govern the process for constitutional amendment? The amendment process described in Article V is not stated in exclusive terms. That is, Article V indicates clearly how an amendment *may* be passed, but it does not state explicitly that its procedures are the only avenue for constitutional amendment.¹³ This has led a number of scholars to argue that constitutional amendments need not follow the process spelled out in Article V.¹⁴ However, a satisfactory principle is still necessary to identify when an amendment need not follow Article V. Accounting for conflicts of interest can supply that principle. Specifically, Article V should not control the amendment process when a conflict of interest would discourage Congress and the state legislatures from initiating the Article V process.¹⁵

In short, from separation of powers concerns to the political question doctrine and the constitutional amendment process, judging constitutional questions according to the potential influence of conflicts of interest can bring more coherence to constitutional law.¹⁶

II. Why Conflicts of Interest Matter

A. Concerns Raised by Conflicts of Interest

Conflicts of interest matter because they can compromise decision making, and they can do so in a number of ways. Before elaborating on the harm from conflicts of interest, it is important to define the term. Conflicts

13. See U.S. CONST. art. V (describing constitutional amendment processes).

14. Bruce Ackerman and Akhil Amar are two of the most prominent proponents of this view. See *infra* notes 198-206 and accompanying text (discussing view that Article V is not sole means of amending Constitution).

15. Under Article V, Congress or the state legislatures must launch the amendment process. U.S. CONST. art. V.

16. Moreover, addressing concerns raised by conflicts of interest can also respond to an important point made by Robert Pushaw. As he observed, scholars have generally analyzed separation of powers questions separately from other doctrines that also address the allocation of authority among the different branches of government. See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 396-97 (1996) (observing that scholars treat justiciability and separation of powers as discrete topics). Yet treating matters like the political question doctrine as distinct topics from those issues traditionally addressed under separation of powers analysis is artificial. In fact, all issues that implicate the allocation of authority among the branches of the national government are questions about the separation of powers. Accordingly, we should anticipate a similarity of analysis across the different issues. Thinking about conflicts of interest provides one common approach.

of interest occur in situations in which a decision maker's desire – or duty – to serve conflicting interests might undermine the decision maker's neutrality or objectivity.¹⁷ A conflict can arise when a decision maker represents the interests of multiple other persons, and the interests are at odds with each other. A conflict can also arise when the decision maker's own interests are at stake.

For an example of a decision maker facing a conflict between the different interests of other persons, consider a physician asked to ration a single intensive care unit bed when two patients of the physician require intensive care. Physicians assume a professional obligation to put the needs of their patients first,¹⁸ but, in this case, the physician can only put one patient's needs first. Or, suppose a lawyer provides estate planning for a husband and wife and the couple decides to divorce. The lawyer has a duty of zealous advocacy to both clients, but he would have difficulty fully carrying out that duty for both clients.¹⁹

Although this kind of conflict is important in many areas of law, and also in other professions, it is not a real concern for constitutional law. Constitutional doctrine accepts the idea that Presidents, legislators, and judges will consider and balance conflicting interests. In fact, it is an essential part of these officials' roles to weigh the needs of some constituents or parties against those of other constituents or parties.

The conflict of interest that matters for constitutional law is the conflict created when public officials consider their own institutional or personal interests. That is, constitutional doctrine should worry about situations in which government officials might be influenced by the effect of their decisions on their own power or welfare. Their own power or welfare has both institutional and personal dimensions.

As to the institutional dimension of conflicts of interest, Presidents, judges, and members of Congress are concerned with the amount of authority they enjoy in their official capacity. When lawmakers act, the extent of their authority may be at stake. Federal legislation might not only address an area

17. At one time, it was common for scholars to speak of "potential" versus "actual" conflicts of interest. Those terms are still sometimes used, but this Article speaks of weaker and stronger conflicts of interest, on the ground that all conflicts of interest are actual conflicts, and the question is whether the conflicts are severe enough that they are likely to influence the conflicted person's judgment or decision making.

18. See Orentlicher, *supra* note 1, at 161 (discussing fiduciary role of physicians with respect to their patients); Veatch, *supra* note 1, at 469 (discussing duty of physician to patients).

19. Accordingly, state courts do not permit a lawyer to represent both spouses if their divorce proceedings lead to courtroom litigation. Some states, however, permit a lawyer to represent both spouses in mediation or negotiation of a divorce. See GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 679-81 (2d ed. 1994) (discussing joint representation in context of divorce).

of regulatory concern, like immigration; it might also enhance the power of Congress at the expense of the executive branch.²⁰ Or, when Congress decides whether to require its approval before the President fires a political appointee, the decision will implicate not only the need for oversight of the executive branch, it will also implicate the extent of legislative authority in the constitutional system.²¹

In addition to their institutional interests, lawmakers may have other personal interests at stake. If Judge Thomas Penfield Jackson had owned Microsoft stock when he was deciding the Justice Department's antitrust suit against Microsoft,²² his rulings would have affected not only the future of the computer industry but his own wealth as well. Likewise, when members of Congress vote on legislation that affects the fortunes of major contributors, their positions may influence the flow of funds to their campaign treasuries.²³

Whether institutional or financial, personal conflicts of interest are cause for concern because government decision makers may not be trustworthy when they have their own interests at stake. They no longer possess the necessary degree of independence and neutrality. Justices hearing a challenge to Congress's interpretation of provisions for the constitutional amendment process may not be able to ignore the implications of their decision on the durability of their constitutional holdings.²⁴ A Congress writing legislation that would give it the authority to employ legislative vetoes may not be able to dispassionately weigh the advantages and disadvantages for the country of the veto authority.²⁵ Judges, legislators, and Presidents must give consideration to a broad range of interests, but they must not inject their own interests into the mix.²⁶

20. This example is taken from *INS v. Chadha*, 462 U.S. 919 (1983). See *infra* text accompanying notes 47-49, 142-46 (discussing *Chadha*).

21. This example is taken from *Myers v. United States*, 272 U.S. 52 (1926). See *infra* text accompanying notes 128-29 (discussing *Myers*).

22. *United States v. Microsoft*, 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part, rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 952 (2001).

23. Thus, for example, federal law prohibits payments to public officials with the intent "to influence any official act." 18 U.S.C. § 201(b)(1)(A) (2001).

24. This example is taken from *Coleman v. Miller*, 307 U.S. 433 (1939). See *infra* text accompanying notes 182-88 (discussing *Coleman*).

25. This example is taken from *INS v. Chadha*, 462 U.S. 919 (1983). See *infra* text accompanying notes 47-49, 142-46 (discussing *Chadha*).

26. As James Madison wrote, "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." THE FEDERALIST NO. 10, at 131 (James Madison) (Benjamin Fletcher Wright ed., 1966) (drawing on writings of John Locke); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 293-94, 341-45, 369 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1988) (1690) (arguing that men cannot judge their own cases and that civil government requires impartial third party to decide controversies).

To be sure, we do not expect governmental decision makers to be fully neutral. Senators are supposed to give priority to the interests of their states' residents; representatives are sup-

In short, by taking account of conflicts of interest, we can try to prevent corruption in the decision making process. We worry that conflicts will cause decision makers to unduly favor their own interests and sacrifice the interests of other persons. Accordingly, it is important to ensure that lawmakers exclude their personal interests from consideration.

There is a second important reason to keep a decision maker's personal interests out of the picture. Whether or not personal interests actually influence a decision maker, there will be the appearance of impropriety. If the federal courts could entertain appeals by federal judges of their impeachment by the House and conviction by the Senate, and the Supreme Court reversed a conviction, the public might wonder whether the merits or the Justices' concern for their judicial colleague drove the decision.²⁷ It may not matter whether in fact the Justices were influenced by their sense of collegiality. The important point is that the public cannot know whether collegial loyalty shaped the vote.²⁸ Similarly, if Congress votes to require its approval before the President can fire an executive branch official, we cannot know whether the motivation behind the vote was the desire for adequate oversight of presidential decisions or whether it was Congress's desire for greater power. Appearances of impropriety undermine public trust even when nothing untoward has occurred.

B. Conflicts of Interest and Constitutional Theory

It not only makes good sense to take account of conflicts of interest in constitutional analysis; avoiding conflicts also ties into fundamental constitutional principles.²⁹ Our constitutional system is ultimately premised on a rule of law that applies to everyone.³⁰ In the words of John Locke, "[n]o man in

posed to give priority to the interests of their districts' residents. Still, we do not want senators, representatives, or other government officials to give priority to their own interests.

27. This example is taken from *Nixon v. United States*, 506 U.S. 224 (1993). See *infra* text accompanying notes 172-81 (discussing *Nixon*).

28. To be sure, courts might be unduly harsh when reviewing an impeachment and conviction of a judge out of anger for the harm done to the judiciary by their errant colleague. But that possibility does not change the fact that the public could view a lenient court as acting out of a conflict of interest. Indeed, the possibility of both undue lenience and undue harshness further reinforces the concern that a reviewing court might bring inappropriate considerations to its decision.

29. William Gwyn and Paul Verkuil have been important voices in articulating this view. See GWYN, *supra* note 5, at 128 n.1 (stating that if same people make and execute laws, they have unbounded power); Verkuil, *supra* note 5, at 307 (proposing conflict of interest approach to separation of powers issues).

30. See GWYN, *supra* note 5, at 38 (explaining argument that even Parliament must obey its own laws); Verkuil, *supra* note 5, at 303-07 (discussing rule of law approach to separation of powers).

civil society can be exempted from the laws of it."³¹ Avoiding conflicts of interest helps ensure that government officials are not able to exploit their positions to secure institutional or other personal advantages to which they have no entitlement. We want our executive officers, judges, and legislators to make decisions in the public interest rather than in their own interest.³²

The concern about conflicts of interest is obvious in some constitutional provisions and more implicit in others. The Fifth and Fourteenth Amendments' guarantees of due process, for example, mean that judges must be neutral decision makers and therefore must not decide cases in which their own interests are at stake.³³ Likewise, by dividing the powers of the national government in Articles I, II, and III, the Constitution provides a mechanism to limit government officials from exploiting their positions to serve their institutional interests. If the different branches of government must share the national power and be subject to the checks and balances of the other branches, they will find it much more difficult to abuse their authority for their own interests.³⁴

The remainder of this Article discusses how to better understand constitutional doctrine from the perspective of avoiding situations in which government officials face a conflict of interest between their governmental duties and their own interests. Each branch of government must consider the interests of different constituencies and the demands of different principles, as conflicts will often arise among these different constituencies or principles. It is part of the duty of government to resolve these conflicts. However, it is not acceptable for government officers to decide on the basis of their own institutional or personal interests. Government officials must not compromise their duties to the public in order to satisfy their loyalties to themselves.

31. LOCKE, *supra* note 26, at 348.

32. As public choice theory argues, there may not be a "public interest" for Congress to serve. Rather, legislators may simply be choosing among competing private interests. See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 223-24 (1986) (discussing interest group or economic theory of legislation).

Public choice theory has spawned much debate, but whether it is empirically or normatively valid is not critical to my argument. Even if legislators are not expected to serve an overarching public interest (a claim belied by Madison's concern about the national government's ability to control factions, see Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 29 (1985), who discusses dissatisfaction with the influence of interest groups on government decisions), legislators should not be using their governmental power to advance their own interests.

33. See *Ward v. Village of Monroeville*, 409 U.S. 57, 59-60 (1972) (discussing Fourteenth Amendment's Due Process Clause).

34. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 433 (1987) (discussing justifications for constitutional distribution of national powers).

One final introductory point. As previously observed, government officials face conflicts of interest that implicate a range of personal interests, including institutional and financial interests. This Article addresses the institutional dimension of such conflicts of interest.

III. Conflicts of Interest and Constitutional Interpretation

Accounting for conflicts of interest has its greatest relevance to cases that turn on the division of authority among the three branches of the national government. This is not surprising – there is significant overlap between the principle of dividing power among different branches of government and the desire to avoid conflicts of interest. When the Framers of the Constitution proposed a tripartite national government, they sought to limit the accumulation of power in the new government.³⁵ Too much power in the hands of a single national authority would pose too great a risk of tyranny,³⁶ a quintessential abuse of authority. Just as the concern about abuse of authority is a key concern behind the separation of powers, so is it a key concern about conflicts of interest. When individuals that exercise power face a personal conflict of interest, we worry that they will misuse their power for their own good rather than for the good of the public.³⁷

Indeed, one can view the separation of powers as a key strategy for minimizing the effects of conflicts of interest. It is in the institutional interest of public officials to enlarge their power – with a few exceptions, people exhibit a strong desire to increase their authority. Accordingly, in designing our national government, it was important for the Framers to counter the risk of corruption from conflicts of interest. One possible approach was to appeal to the good faith of government officials.³⁸ However, as James Madison observed when discussing factions in the political process, public officials will inevitably bring their own interests to the table, and it will be more effective to respond with mechanisms that cabin the effects of conflicts of

35. See THE FEDERALIST NO. 51, at 355-57 (James Madison) (Benjamin Fletcher Wright ed., 1966) (discussing constitutional safeguards against accumulation of power).

36. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 388 (3d ed. 1996) (discussing purposes of constitutional distribution of power).

37. Still, concern about conflicts transcends separation of powers, as discussed in subsequent Parts of this Article.

38. Appeals to good faith are common. For example, when the American College of Physicians (an organization of specialists in internal medicine) issued guidelines on the conflicts of interest raised by relationships between physicians and drug companies, it did not specify the kinds of gifts that physicians could or could not accept. Rather, the College recommended that physicians decline gifts from drug companies when they would not "be willing to have these arrangements generally known." Am. Coll. of Physicians, Position Paper, *Physicians and the Pharmaceutical Industry*, 112 ANNALS INTERNAL MED. 624, 624 (1990).

interest rather than to respond by asking government officers to put their self-interest aside.³⁹ Thus, rather than relying on legislators, Presidents, and judges to put the public interest first, the structure of our constitutional system makes it difficult for government officers to put their personal interests first. By dividing power among three branches of government and employing different checks and balances, the Constitution frustrates efforts by government officials to exploit their authority for their own gain. In short, if one is concerned about minimizing the influence of conflicts of interest in government, one would look to the separation of powers for assistance.

If conflicts of interest concerns are simply a different way of characterizing separation of power concerns, it is worth asking what a focus on conflicts will add to separation of powers doctrine. If conflicts of interest concerns only reiterate what we already know, will we learn anything new from a consideration of conflicts?

This Article argues that consideration of conflicts can bring important definition to separation of powers doctrines that are plagued by openendedness or serious tension. Taking account of conflicts of interest can also help with constitutional questions that separation of powers principles do not reach. This Article illustrates each of these benefits with specific examples. First, this Article argues that taking account of conflicts can be a response to the lack of identifiable limits in the functionalist approach to separation of powers cases, thereby giving us a strong separation of powers theory. Second, it demonstrates how consideration of conflicts can overcome the current tension that exists in constitutional law between the principle of judicial supremacy and the political question doctrine. Finally, this Article demonstrates how consideration of conflicts can help ensure that the public has a genuine opportunity to amend the Constitution when Congress or the state legislatures are likely to be unresponsive to the citizenry's desire for amendment.

A. Separation of Powers and Conflicts of Interest

For many years, scholars have debated how the Supreme Court should review challenges to laws that reallocate authority among the executive, judicial, and legislative branches. On one hand, the Constitution seems to envision a separation of powers among the three branches, with the President responsible for the executive power, Congress for the legislative power, and the federal courts for the judicial power.⁴⁰ Accordingly, if power that be

39. See THE FEDERALIST NO. 10, at 131-32 (James Madison) (Benjamin Fletcher Wright ed., 1966) ("[T]he causes of faction cannot be removed, and . . . relief is only to be sought in the means of controlling its effects.") (emphasis in original).

40. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577 (1984) (describing separation of powers

longed to one branch ended up in the hands of government officials outside of that branch, we would have an apparent violation of the Constitution. On the other hand, the necessities of the modern state demand innovative government institutions like administrative agencies and independent commissions that combine executive, judicial, and legislative activities but that may not be part of the original constitutional framework. If the Court does not allow some flexibility in the constitutional joints, the national government will not be able to meet its responsibilities to the public.⁴¹

From these competing considerations, we might conclude that a strict application of separation of powers principles provides a framework that is generally useful but that can accept deviation when justified by underlying theory. In this view, the key question is whether our interpretations of the Constitution's separation of powers are ultimately faithful to constitutional principle. Alternatively, we might conclude that unwavering adherence to the original framework is necessary. In this view, those building the constitutional framework considered the trade-off between clear rules that limit flexibility and guiding principles that offer greater flexibility, but are typically vague, and came down in favor of clear rules for separation of powers questions.⁴²

With two important perspectives, two leading schools of thought have emerged regarding separation of powers doctrine. One school advocates a formal analysis that requires a strict separation of powers, the other a functional analysis that permits flexibility. Some Supreme Court decisions employ formalist analysis; other decisions take a functionalist approach.

1. Formalism

In the formalist view, the critical question is whether a reallocation of authority would cause a departure from the tripartite division of power enunciated in the Constitution. If, for example, Congress tries to give itself authority to engage in executive action, it would be overstepping its bounds. Thus, in

as separation of acts performed by each branch).

41. Thus, for several decades now, the Supreme Court has rarely questioned delegations of authority by Congress to the executive branch. See *STONE ET AL.*, *supra* note 12, at 365-67 (discussing nondelegation doctrine). For the Court's most recent affirmation of congressional delegations of authority, see *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472-76 (2001), in which the Court discussed non-delegation doctrine.

42. For more discussion of the advantages and disadvantages of clear rules, see DAVID ORENTLICHER, *MATTERS OF LIFE AND DEATH: MAKING MORAL THEORY WORK IN MEDICAL ETHICS AND THE LAW* 11-15 (2001), discussing rules and moral principle. See generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991) (analyzing role of rules in decision making in all areas of life and society).

Bowsher v. Synar,⁴³ the Court struck down the balanced budget act because it authorized the Comptroller General to specify spending reductions in the event that Congress exceeded its budget targets in future years.⁴⁴ The Comptroller General is a member of the legislative branch, and the Court observed that Congress may not exercise control over "an officer charged with the execution of the laws" (in this case the execution of the balanced budget act) because the "structure of the Constitution does not permit Congress to execute the laws."⁴⁵

Just as Congress could violate the Constitution by assuming executive power for itself, it would also violate the Constitution, according to formalists, if Congress transferred legislative or judicial power to the executive branch. Thus, in the view of Gary Lawson and other formalists, administrative agencies violate the Constitution because they both exercise legislative power delegated by Congress and engage in judicial activities.⁴⁶

Congress might violate the division of power in a third way – by trying to legislate without meeting the Constitution's requirements for approving legislation. In *INS v. Chadha*,⁴⁷ the Court invalidated the legislative veto⁴⁸ on the ground that the exercise of the veto constituted legislative action without the consent of both houses of Congress and presentment to the President.⁴⁹

Formalism may provide answers to a number of constitutional questions, but it has serious difficulties as a theory. The necessities of the modern state demand innovative government institutions, like administrative agencies, that exercise broad discretion and that combine executive, judicial, and legislative activities, or independent officers and commissions that exercise national

43. 478 U.S. 714 (1986).

44. See *Bowsher v. Synar*, 478 U.S. 714, 732-34 (1986) (finding that Comptroller General was executive officer over which Congress improperly exercised control).

45. *Id.* at 726.

46. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233-49 (1994) (discussing death of constitutional government). The Supreme Court has not followed formalist thinking in the example of administrative agencies. See *id.* at 1240-41 (lamenting Court's failure to overturn statutes that establish and govern administrative agencies on nondelegation grounds). Lawson also criticizes administrative agencies because they operate beyond the direct control of the President, thereby undermining presidential control of the executive branch. See *id.* at 1241-46 (discussing unitary executive).

47. 462 U.S. 919 (1983).

48. With a legislative veto, either the House or Senate (or a House or Senate committee) acting alone has authority to veto action taken by the executive branch to implement a statute. Federal statutes commonly included legislative veto provisions until the Supreme Court found the provisions unconstitutional in *Chadha*. See *INS v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting) (observing that invalidation of legislative veto affected "nearly 200 other" statutes).

49. See *id.* at 946-55 (discussing presentment and bicameralism).

power outside of the three traditional branches of government.⁵⁰ As the Supreme Court has observed, "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."⁵¹ Innovation in government is driven not only by practicalities. It also reflects underlying principles. While the separation of powers was designed to protect liberty by dividing instead of concentrating national power, it was also designed to foster efficiency of operations by the national government.⁵² Innovative institutions permit greater efficiency.

Even if we wanted to follow a formalist approach, it is impossible to do so. We cannot develop independent definitions of executive, judicial, and legislative action and assign those actions to their corresponding branch of government.⁵³ As James Madison observed: "Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces – the legislative, executive and judiciary."⁵⁴ Inevitably, officials in the executive or judicial branch will do the same kinds of things when they exercise executive or judi-

50. In addition, it is by no means clear that the modern administrative state is inconsistent with the constitutional structure envisioned by the Framers of the Constitution. *Cf.* Sunstein, *supra* note 34, at 430 (observing that "separation of powers is in important respects a mischaracterization of the constitutional system").

51. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The *Mistretta* Court also quoted an earlier opinion in which it had written that "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function." *Id.* (quoting *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935)).

52. *See Verkuil, supra* note 5, at 303-04 (discussing purpose of separation of powers).

53. *See William B. Gwyn, The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 476 (1989) (noting lack of definition in Constitution of executive, legislative, and judicial categories). Even proponents of formalism acknowledge the difficulty of the definitional problem. *See Lawson, supra* note 46, at 1238 n.45 (observing that "[t]he problem of distinguishing the three functions of government has been, and continues to be, one of the most intractable puzzles in constitutional law"); Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1390 n.47 (1994) (recognizing that this definitional task is "a difficult and perhaps an insuperable" one).

54. THE FEDERALIST NO. 37, at 269 (James Madison) (Benjamin Fletcher Wright ed., 1966). Justice Scalia's dissent in *Morrison v. Olson* confirmed Madison's observation. In his opinion, Scalia admits of "no possible doubt" in his conclusion that "prosecution of crimes is a quintessentially executive function." *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting). Yet, several scholars have found from the historical record that law enforcement was also seen as a judicial and legislative function. *See Harold Krent, Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989) (giving historical account of legislative role in law enforcement); Gwyn, *supra* note 53, at 484-94 (discussing role of federal judiciary in criminal prosecution).

cial power that members of Congress do when they pass legislation. Thus, for example, when the *Chadha* Court characterized legislative action as "action that ha[s] the purpose and effect of altering the legal rights, duties and relations of persons, . . . all outside the Legislative Branch,"⁵⁵ the Court necessarily included in its characterization executive orders issued by the President,⁵⁶ regulations promulgated by administrative agencies,⁵⁷ and opinions handed down by courts.⁵⁸

The Court has illustrated the definitional problem in other opinions. In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*,⁵⁹ the Court invalidated a review board composed of nine members of Congress.⁶⁰ According to the Court, the review board violated separation of powers principles if it exercised legislative power because, in conformity with the requirements of bicameralism and presentment, Congress must exercise that power as a whole, and not through just nine of its members.⁶¹ Alternatively, if the review board exercised executive power, its action was still unconstitutional because members of the legislative branch cannot usurp executive prerogatives.⁶² But if formalist analysis is correct in viewing executive and legislative functions as distinctive, then the Court should have been able to determine whether the review board engaged in legislative or executive action.⁶³

One could make formalist analysis work in a tautological way. One could say that, when the legislature is acting, it is engaging in legislative action and it therefore must follow the bicameralism and presentment requirements of Article I. Similarly, when executive branch officials are acting, they are engaging in executive action and therefore must be subject to the oversight

55. *INS v. Chadha*, 462 U.S. 919, 952 (1983).

56. Consider, for example, the effects on people's rights and duties when the President sets aside millions of acres of land as a federal wilderness area.

57. In other words, formalist thinking requires a serious revival of the nondelegation doctrine. See Lawson, *supra* note 46, at 1237-41 (discussing "the demise of the nondelegation doctrine").

58. Efforts by scholars to define legislative action are no more successful than the Court's effort in *Chadha*. Gary Lawson, for example, suggests the admittedly circular formulation that "Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them." *Id.* at 1239.

59. 501 U.S. 252 (1991).

60. See *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991) (concluding that review board was impermissible expansion of Congress's confined legislative role).

61. *Id.* at 277.

62. *Id.* at 275-76.

63. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1735-36 (1996) (discussing *Metropolitan Washington Airports Authority*).

of the President rather than Congress or the judiciary.⁶⁴ But tautological approaches do not tie doctrine to theory. Presidents could easily encroach upon legislative prerogatives because by definition whatever they do is executive action.

Formalist analysis is problematic also because it rests on a faulty view that the powers of the three branches of government are distinct and separated powers. In fact, the Constitution envisions not only some separation of powers, but also some sharing of powers. The President and Congress, for example, enjoy authority with respect to the waging of war.⁶⁵ And while Congress decides whether to pass legislation, the President can sign or veto congressional bills.⁶⁶ As Richard Neustadt observed, rather than characterizing our system as one that separates power, it is more accurate to speak of the Constitution as separating institutions and requiring them to share power.⁶⁷

2. Functionalism

Many scholars respond to the problems of formalist analysis by supporting a functional approach to separation of powers cases. In this view, reallocations of power are permitted to ensure that the national government has the flexibility to adapt to the demands of the modern state. A model of strict separation may have been possible two hundred years ago when the national government had relatively few employees and little regulatory responsibility, but not at a time when the government needs vast bureaucracies to oversee far-

64. As Justice Stevens observed in his concurring opinion in *Bowsher v. Synar*, the majority opinion seemed to employ a tautological approach to separation of powers analysis. See *Bowsher v. Synar*, 478 U.S. 714, 751 (1986) (Stevens, J., concurring) (discussing characterization of Comptroller General's action under balanced budget law). The Court struck down the balanced budget law at issue because it gave the Comptroller General, an official of the legislative branch, authority to execute the law by specifying budget cuts to meet the deficit targets. See *id.* at 732-34 (finding that Congress improperly retained control over executive function through Comptroller General). Because executive branch officers must perform executive action, the Comptroller General's role in implementing the law was invalid. However, the Court upheld the law's fallback provision, which entailed the passage by Congress of the report that the Comptroller General would have issued. See *id.* at 734-36 (discussing issue of remedy). Thus, the same action – issuance of the Comptroller General's report – would be executive action if performed by the Comptroller General but legislative action if performed by Congress.

65. The President is the "Commander in Chief of the Army and Navy of the United States . . . when called into the actual Service of the United States." U.S. CONST. art. II, § 2, cl. 1. Congress has the power to "declare War," to "raise and support Armies," and to "provide and maintain a Navy." U.S. CONST. art. I, § 8, cls. 11-13.

66. U.S. CONST. art. I, § 7, cl. 2 (providing that "[i]f he [the President] approve[s] he shall sign it [the bill], but if not he shall return it").

67. See RICHARD E. NEUSTADT, *PRESIDENTIAL POWER* 101 (1976) (stating that constitutional convention "created a government of separated institutions *sharing* powers").

reaching and complicated legislation.⁶⁸ In a number of cases, the Court employed functionalist analysis to rebuff separation of powers challenges. The Court upheld the ability of Congress to create administrative agencies and independent commissions⁶⁹ and to enact an independent counsel law.⁷⁰ According to the Court, it is important to look at underlying purposes of the Constitution's separation of powers provisions rather than adhering to "doctrinaire reliance on formal categories."⁷¹

Functionalist analysis does not permit all reallocations of authority. If Congress is to stretch the Article I, II, and III boundaries, it must do so for innovations that are "needed,"⁷² not those that are merely convenient or helpful. In addition, a proposed reallocation can go too far in its innovation and disrupt the Constitution's careful balance of power. If one branch's authority is usurped too much, it cannot serve its role as a check and balance against the power of the other branches.⁷³

A key problem with functionalist analysis as a constitutional doctrine is its openendedness.⁷⁴ Identifying whether a reallocation of authority goes too far in disrupting the balance of power is a difficult endeavor. If the Supreme Court had upheld the legislative veto in *INS v. Chadha*, would Congress have thereby become too powerful?⁷⁵ Conversely, as Justice White suggested in his dissent, would Congress only have had the ability to limit the transfer of

68. See Strauss, *supra* note 40, at 583-86 (discussing agency function and structure).

69. See *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding creation of United States Sentencing Commission); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (upholding establishment of Federal Trade Commission).

70. See *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding independent counsel provisions of Ethics in Government Act of 1978, which allowed for appointment of independent persons to investigate and prosecute high-ranking members of executive branch).

71. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847-848 (1986) (quoting *Thomas v. Union Carbide Ag. Prods.*, 473 U.S. 568, 587 (1985)) (discussing application of separation of powers analysis to Article III of Constitution).

72. See *Schor*, 478 U.S. at 851 (noting that while formalistic rules may lend greater coherence in deciding when Congress can authorize adjudication of Article III business in non-Article III tribunals, such rules could constrict Congress's ability to take needed action); see also *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) (discussing Court's recognition of "necessity" of provisions by which Congress delegates authority to administrative agencies).

73. See *Morrison*, 487 U.S. at 693-95 (discussing reasons why independent counsel law does not unduly interfere with executive branch).

74. See M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1144-45 (2000) (criticizing indefiniteness and difficulty in applying functionalism's separation of powers standards); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 234-35 (1991) (criticizing nebulosity of functionalism's underlying concepts).

75. See *supra* notes 47-49 and accompanying text (discussing *Chadha*).

authority to the administrative agencies of the national government?⁷⁶ In their functionalist analyses, scholars and courts cite the need for flexibility in the constitutional system to accommodate the necessities of the modern world, but they do not give much guidance in deciding whether such accommodations have gone too far.⁷⁷ According to one characterization of functionalist analysis, the issue addressed is whether a "contested action usurps a function constitutionally reserved to [an]other branch or whether it threatens to interfere substantially with operations of the other branch of government."⁷⁸

If the benchmark for courts is to ensure that they do not permit too great an accumulation of power in one or another branch of the national government, it may be too hazy of a benchmark to give much guidance.⁷⁹ To be sure, this kind of fuzziness is a common problem in constitutional law. Consider, for example, the inquiry into whether certain rights are protected as fundamental rights because they are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed."⁸⁰ Still, the lack of clarity in functionalist analysis of separation of powers questions can be substantially greater than with other constitutional questions. It is often clear whether recognition of an equal protection or substantive due process claim will have a significant impact on individual liberty (as illustrated by *Brown v. Board of Education*⁸¹ and *Roe v. Wade*⁸²). However, it is much more difficult to predict the effect of an alteration in the national government's balance of power. In a subsequent subpart, this Article recommends a conflict of interest analysis as a way to bring some clarity to functionalist analysis of separation of powers questions.

76. See *INS v. Chadha*, 462 U.S. 919, 967-74 (White, J., dissenting) (commenting on congressional use of legislative veto).

77. See Redish & Cisar, *supra* note 5, at 454, 476-77 (commenting on functionalism's lack of limitations for validating inter-branch usurpations of power). As Cass Sunstein observed, the functionalist approach "allows for a large degree of discretion (and therefore uncertainty) both in characterizing the appropriate constitutional commitment and in deciding whether it has been violated." Sunstein, *supra* note 34, at 496.

78. Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1283 (1988). Krent recommends a two-step analysis, asking first whether the branches acted within their constitutional restraints and, if so, whether there was an undue threat to the balance of power. See *id.* at 1256-57 (describing two-step analysis).

79. See Redish & Cisar, *supra* note 5, at 476-77 (discussing "intellectual bankruptcy" of functionalist approach).

80. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Palko v. Conn.*, 302 U.S. 319, 325, 326 (1937)) (discussing substantive due process rights).

81. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding separate educational facilities for whites and blacks inherently unequal and therefore unconstitutional).

82. See *Roe v. Wade*, 410 U.S. 113 (1973) (finding constitutional right to abortion for pregnant women), *modified*, *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992).

3. Judicial Abstention

Some scholars have abandoned formalism and functionalism and turned to other ways to analyze separation of powers problems.⁸³ For example, courts might adopt a Holmesian abstention approach.⁸⁴ Under this model, courts would abstain from deciding disputes about the balance of power between the executive and legislative branches.⁸⁵ Instead, they would rely on the constitutional structure of separate and competing powers to prevent the accretion of too much power in either of the other branches of government.⁸⁶ In this view, when the Constitution established the three branches of government and divided power among them, it did so in a way that would ensure that each branch would have sufficient authority to prevent one branch from becoming too powerful. Because the structure is self-protecting, no need for courts to intervene arises.⁸⁷

The problem with the Holmesian model is that it demands an abdication of responsibility by the judiciary. If this model is premised on the nature of the constitutional structure, then it cannot require the judicial branch to renounce its constitutional role. An uninvolved judiciary results in the elimination of an important check on the power of the executive and legislative branches.

In addition, even accepting the idea that the constitutional structure is designed such that the executive and legislative branches can protect their authority from each other, we cannot always assume that the structure works as intended. Even well-designed systems sometimes fail, and the judiciary needs to step in when the system fails. This criticism of the Holmesian approach is analogous to John Hart Ely's justification for the ability of courts to override the legislature on constitutional grounds. Although representative democracy is designed to deliver just outcomes, the representative process may break down.⁸⁸ People possessing power may "chok[e] off the channels of political change" to preserve their status and prevent the disempowered in society

83. See, e.g., Fitzgerald, *supra* note 5, at 766-79 (arguing for more fluid theory that would judge challenged action in terms of whether action promotes principles of participation and accountability); Merrill, *supra* note 74, at 235-59 (arguing for "minimal conception" of separation of powers doctrine that would require all federal agencies to be located within – and be accountable to – one of national government's three branches); Redish & Cisar, *supra* note 5, at 474-90 (advocating for "pragmatic" form of formalism).

84. See Sunstein, *supra* note 34, at 494-95 (describing Holmesian approach).

85. See *id.* at 494 (stating that under Holmesian approach, separation of powers issues are nonjusticiable).

86. See *id.* at 494-95 (describing Holmesian approach).

87. See *id.* at 494 (stating that Holmesian nonjusticiability view is based on each branch's ability to protect itself).

88. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102-03 (1980) (discussing Ely's approach to constitutional adjudication).

from using the democratic process to effect change.⁸⁹ In Ely's view, judicial intervention is necessary to respond to breakdowns in process in order to reinforce the operation of representative democracy.⁹⁰ Similarly, judicial intervention is sometimes necessary to reinforce our separation of powers structure.

4. *Appealing to Principle – Functionalism Limited by Conflicts of Interest*

Turning to the fundamental principles underlying our constitutional system of government can help sort out the debate over separation of powers theory. We know that the Framers designed the structure of the national government, with its division of authority, to serve two important goals – efficiency and liberty.⁹¹ A division of authority promotes efficiency in several ways. For example, by pairing a single executive with the legislative branch, the Constitution gave the government someone who could act with decisiveness, speed, and secrecy.⁹² Dividing authority also promotes efficiency because different types of power draw on different skills and expertise. Consider, for example, the skills required to shepherd legislation through Congress, to administer an executive branch, or to decide lawsuits.

In addition to promoting efficiency, the division of authority promotes liberty by thwarting tyranny. With a division of authority, there is a dispersion, rather than a concentration, of power. Moreover, public officials will find it more difficult to place themselves above the law when power resides elsewhere in government.⁹³ Members of Congress that pass laws are subject to the President's execution of the laws, and both are subject to the judiciary's interpretation of the law. Tyranny is prevented not only because power is divided but also because it is shared, with the different branches of government enjoying checks and balances over the other branches of government. Absent a supermajority, for example, Congress cannot pass legislation without the President's signature, and the President cannot appoint judges or senior executive officials without the advice and consent of the Senate.⁹⁴

89. See *id.* at 103 (discussing when malfunction of representative process occurs).

90. See *id.* at 102 (discussing means to facilitate representative democracy).

91. See Verkuil, *supra* note 5, at 303-04 (discussing purposes of separation of powers).

92. See *id.* at 303 (discussing efficiency); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 37-39 (1995) (discussing arguments for unitary executive); Pushaw, *supra* note 16, at 402-03 (discussing justifications for separation of powers).

93. See *id.* at 403 (discussing separation of powers justifications); Verkuil, *supra* note 5, at 305-06 (discussing analytical advantages of rule of law rationale for separation of powers).

94. See WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 61, 424-25 (2d ed. 1995) (discussing institutional structure of federal government).

While the advantages of a division of governmental authority were well-recognized before the founding of the United States, the Framers of the Constitution incorporated a novel, critical feature to further protect liberty from governmental tyranny. They vested governmental authority in the people, and they therefore made the national government accountable to the people.⁹⁵ The President and members of Congress have to answer to the electorate by running for reelection if they want to remain in office.⁹⁶ The people cannot vote federal judges out of office, but they can press Congress to override the courts on non-constitutional matters, and they can seek a constitutional amendment to override the courts on constitutional matters.

What do the fundamental constitutional principles of efficiency, liberty, and accountability say about the separation of powers doctrine? First, the goal of efficiency pushes us toward a functionalist analysis. If a reallocation of authority is necessary to respond to the necessities of governing, then a failure of the reallocation to fit within a formalist framework should not doom it. If we are to respect underlying principle, the national government should be able to adopt innovations that promote greater efficiency.⁹⁷ Indeed, in upholding the independent counsel law and the United States Sentencing Commission, the Court recognized that Congress must have the freedom to develop new structures and allocations of authority to respond to the demands and necessities of governing.⁹⁸

In addition to a theory that allows for flexibility, we need a theory that does not permit the government to compromise the interests of liberty and accountability. In other words, we need a theory that balances the need for

95. See *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part) (describing principle that authority granted by Congress must have adequate limiting standards); see also Fitzgerald, *supra* note 5, at 725-34, 767-73 (discussing representation and separation of powers, and constitutional commitment to accountability); Pushaw, *supra* note 16, at 411-12 (discussing relocation of sovereignty with "the people"); Redish & Cisar, *supra* note 5, at 451 (describing accountability as device to combat concentration of power); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1237-38 (1985) (citing and quoting *Arizona v. California*); Bernard Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegations of Power*, 72 NW. U. L. REV. 443, 445 (1977) (describing principle that authority granted by Congress must have adequate limiting standards).

96. Originally, the Constitution did not impose term limits on the President. In 1951, the Twenty-Second Amendment incorporated a two-term limit. U.S. CONST. amend. XXII, § 1.

97. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1526 (1991) (criticizing formalist analysis for not permitting national government to "respond to new needs in creative ways").

98. See *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (noting that separation of powers must be understood flexibly to ensure effective national government); *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988) (observing that need to fashion workable government precludes requirement of strict separation of powers).

innovation with the need to prevent both tyranny and the loss of accountability. Functionalist analysis purports to provide that balance, but we return to the problem of knowing when an innovation requires too great a sacrifice of liberty or accountability. As discussed above, such interests are inherently difficult to measure in the context of allocating national authority. Do independent agencies and commissions dilute the power of the executive branch too much by limiting its control over the execution of the laws;⁹⁹ or, conversely, do independent agencies and commissions allow Congress to engage in necessary delegations of authority without creating an executive branch that is too powerful?

In short, separation of powers doctrine needs a principle that will provide some tangible limits to a functional type of analysis. As suggested earlier, the need for limiting principles is a common need in constitutional law.¹⁰⁰ When the Supreme Court recognizes fundamental rights of liberty protected by the Fourteenth Amendment's Due Process Clause, it needs some way to avoid unprincipled expansion of that concept. Most might agree that liberty rights include the freedom to make important individual decisions, but people will have difficulty agreeing on a way to distinguish important decisions from those that do not merit constitutional protection.¹⁰¹ If we say, for example, that people must be free to shape their sense of personhood, we can explain why individuals have the right to make decisions about marriage and procreation. However, we have trouble explaining why states can outlaw polygamy,¹⁰² or why a police department can prohibit its officers from wearing beards or growing their hair long enough to touch their ears.¹⁰³ Accordingly, the Court has looked for limiting principles to avoid the boundless expansion of liberty rights. Sometimes the Court invokes tradition as a source of fundamental rights;¹⁰⁴ other times it places matters of family and bodily integrity at the heart

99. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-68 (1992) (describing unacceptability to "unitary executive theorists" of independent commissions exercising executive authority); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 991 (1993) (observing that historical evidence demonstrates Framers' intent to have President accountable for all executive action).

One might also argue that federal agencies and commissions are more problematic in their exercise of legislative power than in their independence from presidential oversight.

100. See *supra* text accompanying notes 79-82 (discussing fuzziness of functionalism).

101. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 752-70 (1989) (discussing difficulty in determining inviolable human qualities).

102. See *Cleveland v. United States*, 329 U.S. 14, 18-19 (1946) (discussing historical treatment of polygamy in law).

103. See *Kelley v. Johnson*, 425 U.S. 238, 247-49 (1976) (discussing deference to police department in organizing and equipping its officers).

104. See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (discussing methods of

of liberty.¹⁰⁵ Analogous limiting principles are lacking, however, in functionalist theory for separation of powers questions.

Conflicts of interest analysis can provide a principle to limit functionalism in separation of powers theory. Although courts may have difficulty deciding directly whether a reallocation of authority goes too far in disrupting the balance of power, they can look for indirect evidence of disruption by considering the quality of the legislative process that led to the reallocation. When substantive standards are difficult to fashion, procedural standards often provide a good alternative. In other words, if it is difficult to know whether the outcome is appropriate, a court can look to whether there was a breakdown in process that would lessen confidence in the substantive results. Thus, for example, John Hart Ely's theory of representation-reinforcement justifies judicial intervention on constitutional grounds when the majoritarian process appears to give inadequate voice to a particular group's interests (as with a racial minority's interest).¹⁰⁶ The role of the courts, in Ely's view, is to reinforce the representative process, because only a properly functioning representative process can produce substantive choices that bind society.

Conflicts of interest considerations factor in when judging the adequacy of the process. In the context of the reallocation of national authority, evidence that self-interest rather than public interest motivated Congress would indicate a breakdown in process.¹⁰⁷ When conflicts of interest may influence decisions, the trustworthiness of the results is questionable. In such cases, it is less likely that the reallocation is designed to foster the functioning of the national government and more likely that the reallocation is designed to serve the institutional interests of Congress. Indeed, in subsequent discussion of separation of powers cases, this Article shows how legislation that was problematic on conflicts of interest grounds was also sometimes problematic in terms of identifying a genuine functional purpose of the legislation.¹⁰⁸

How would separation of powers theory incorporate conflicts of interest concerns as a limiting principle for functionalist analysis? For a reallocation

identifying substantive due process rights); *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (same).

105. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 849 (1992) (noting that Constitution limits states' ability to interfere with basic family decisions).

106. See ELY, *supra* note 88, at 101-04 (outlining his theory briefly). Ely reaches his process-oriented theory after rejecting the different candidates for a substantive theory of judicial intervention. See *id.* at 43-72 (discussing fundamental principles that may apply to interpreting open-ended constitutional provisions).

107. Public choice theorists have questioned the premise of a "public" interest. See *supra* note 32 (discussing public choice theory).

108. See *infra* text accompanying notes 135-36 (discussing link between conflicts of interest and lack of functionalist purpose).

of authority to survive constitutional scrutiny, it must first respond to the need for innovation – the reallocation must genuinely serve a functionalist purpose. Second, the reallocation must not reflect a serious conflict of interest for Congress when it enacted the reallocating legislation – the reallocation must serve the functionalist purpose within reasonable bounds. Thus, courts should sometimes invalidate a reallocation of authority because it does not really serve a needed purpose and at other times invalidate it because the reallocation entails a problematic conflict of interest (or because the legislation fails both tests). In fact, this approach is implicit in much of the Supreme Court's separation of powers case law. As the subsequent subparts indicate, one can generally understand the Court's separation of powers decisions in terms of a functionalist approach limited by conflicts of interest concerns.¹⁰⁹

109. Thus, although commentators have criticized the Supreme Court for incoherency in its separation of powers cases, *see* Brown, *supra* note 97, at 1517-19 (describing Court's separation of powers jurisprudence as "an incoherent muddle"), the decisions make a good deal of sense when considered from the perspective of responding to conflicts of interest concerns.

I am not arguing for functionalism limited by conflicts of interests considerations only on the ground that it can explain Supreme Court doctrine. I would make my argument even if it did not fit with past decisions by the Court. Nevertheless, I believe it helpful that a conflicts of interest perspective fits well with the Court's jurisprudence.

Paul Verkuil has argued previously that conflicts of interest concerns should drive separation of powers analysis, but he worries primarily about the possibility that government officials will face a conflict of interest when they make particular decisions implementing a law. *See* Verkuil, *supra* note 5, at 313, 315, 320-21 (observing that legislative veto allows campaign contributions to influence members of Congress when asked to cast veto, that balanced budget law at issue in *Bowsher v. Synar* would have subjected Comptroller General to legislative control when exercising executive authority, and that delegations of legislative power to executive branch are problematic when President's discretion under statute is not sufficiently cabined to prevent biased decision making).

I see my discussion of conflicts as stronger than Verkuil's in two ways. First, I take a broader view of conflicts of interest, looking not only at how they influence government officials implementing the law, but also at how they influence Congress in passing laws. Second, I do not suggest that conflicts concerns alone explain separation of powers theory. Rather, taking account of conflicts gives us a limiting principle for functionalist analysis. This second difference responds to some of the leading critiques of Verkuil's approach. Other scholars have observed that Verkuil tries to apply a single principle to separation of powers questions when multiple concerns are at work. *See* Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 344 (1989) (criticizing Verkuil's approach); Redish & Cisar, *supra* note 5, at 500 (same).

Ronald Krotoszynski illustrated the conflicts of interest problems that can arise in the implementation of federal statutes. He observed that some federal judges have created at least an appearance of impropriety with their participation on the United States Sentencing Commission and their administration of the independent counsel provisions of the Ethics in Government Act. *See* Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 419-21 (1997) (criticizing judges who served as sentencing commissioners for not recusing themselves from challenges to Commission's work and criticizing judges for ex parte contacts when appointing independent prosecutors).

a. Invalidations for Lack of a Genuine Functionalist Justification

In some cases in which the Court has found a separation of powers problem, one can explain the decision as a failure of the invalidated legislation to serve a truly functional role. Although the Court typically uses formalist reasoning to explain its result, the same conclusion results through functionalist analysis. Indeed, the Court's jurisprudence in this area makes sense by observing that when legislation serves a real governmental need, and does not raise conflicts of interest problems, the Court will use functionalist analysis to uphold the statute. Conversely, when no genuine functional purpose is served, the Court will override the statute, using formalist analysis.

Consider, for example, the Court's decision in *Bowsher v. Synar*.¹¹⁰ As discussed above,¹¹¹ the *Bowsher* Court struck down the Gramm-Rudman-Hollings balanced budget act on formalist grounds. The Act authorized the Comptroller General to specify spending reductions in the event that Congress exceeded its budget targets under the Act.¹¹² Thus, the Comptroller General was given some authority to execute the balanced budget act. However, the Comptroller General is a member of the legislative branch and, according to the Court, under the Constitution's division of power Congress may not exercise control over a government official that has responsibilities for executing the law.¹¹³

The Court's reasoning is perfectly fine on its own, but it is incomplete when considered with other separation of powers decisions. If the Constitution does not permit members of the legislative branch to engage in executive action, it also should not permit members of the executive branch to engage in legislative action. Yet the Court has generally upheld the authority of administrative agencies like the Environmental Protection Agency or the Occupational Safety and Health Administration to engage in rulemaking that is effectively legislative in nature.¹¹⁴ In such cases, the Court has recognized the

110. See *supra* text accompanying notes 43-45 (discussing *Bowsher*).

111. See *supra* text accompanying notes 43-45 (discussing *Bowsher*).

112. See *Bowsher v. Synar*, 478 U.S. 714, 717-18 (1986) (describing act).

113. See *id.* at 726 (discussing rationale for decision).

114. See *STONE ET AL.*, *supra* note 12, at 365 (describing lawmaking character of much executive action). Typically, the Supreme Court will say that the rulemaking of an administrative agency constitutes the execution of existing law rather than the legislation of new law. See, e.g., *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407 (1928) (discussing distinction "between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law") (internal quotations omitted). However, at other times, the Court will acknowledge that Congress has transferred legislative power to the executive branch. See, e.g., *United States v. Chi., Milwaukee, St. Paul. & Pac. R.R. Co.*, 282

need in the modern state for administrative agencies that the original constitutional framework did not describe and that violate a strict, formalist theory of the separation of powers. Accordingly, a complete opinion in *Bowsher* would have explained why the particular reallocation of power involved was not acceptable when other reallocations were.

And for such an explanation, one can point to the absence of any real need for the Comptroller General to specify budget cuts. Although a modern industrialized nation would have difficulty functioning if administrative agencies did not enjoy lawmaking power, nothing about contemporary realities makes it infeasible for national legislatures to spend within their countries' means. The Gramm-Rudman-Hollings Act was an abdication of legislative authority, reflecting a lack of congressional will to make tough cuts in the budget, not an unavoidable reallocation of authority reflecting the necessities of the modern state. As discussed in the next subpart, conflicts of interest analysis also can explain the *Bowsher* decision.

Clinton v. City of New York,¹¹⁵ the line item veto case,¹¹⁶ involved legislation that entailed an abdication of legislative authority rather than a recognition of modern complexities. According to the Court, a line item veto is unconstitutional because Article I, Section 7 of the Constitution provides only for complete vetoes of bills, not partial vetoes.¹¹⁷ Instead of this formalist argument, the Court could have observed that a line item veto does not serve a genuine functionalist purpose. The line item veto is not designed to respond to modern complexities but to let Congress avoid responsibility for budgetary constraints. If a line item veto exists, members of Congress can continue to fill their bills with pork barrel projects and rely on the President to excise the pieces of pork that are unaffordable or otherwise undesirable for the country. *Clinton* is like *Bowsher* not only in terms of failing to reflect a legitimate functional need; it is also like *Bowsher* in raising conflicts of interest problems, as discussed in the next subpart of this Article.

A comparison between two of the Court's decisions on judicial authority also illustrates the requirement that reallocations of authority must serve a genuine governmental need. In *Northern Pipeline Construction Co. v. Mara-*

U.S. 311, 324 (1931) (observing that Congress "cannot delegate any part of its legislative power except under the limitation of a prescribed standard").

115. 524 U.S. 417 (1998).

116. With a line item veto, the President can veto specific items in a bill and allow the remainder of the bill to take effect, rather than having to choose between vetoing the entire bill or permitting it to take effect. See *id.* at 438-39 (distinguishing line item veto from Article I, § 7 "return" of bill).

117. See *Clinton v. City of New York*, 524 U.S. 417, 438-40 (1998) (finding that line item veto violates procedure of Article I, Section 7).

thon Pipe Line Co.,¹¹⁸ the Supreme Court held Section 241(a) of the Bankruptcy Act of 1978 unconstitutional because the Act created bankruptcy courts with judges that lacked the essential rights and privileges of federal court judges.¹¹⁹ On the other hand, in *Commodity Futures Trading Commission v. Schor*,¹²⁰ the Court permitted Congress to grant jurisdiction over certain state law claims to administrative law judges, even though such judges do not enjoy the same rights and privileges as federal court judges.¹²¹ In *Schor*, the statute in question allowed administrative law judges to decide matters of state law that arose as counterclaims in regulatory proceedings before the Commodity Futures Trading Commission (CFTC).¹²²

One can understand the *Northern Pipeline* decision on the ground that Congress had no real need to relegate federal bankruptcy judges to second-class status because having less privileged judges would not facilitate the resolution of bankruptcy disputes.¹²³ At the same time, one can understand the *Schor* decision in terms of the important benefits that result from allowing the resolution of state law counterclaims in the CFTC's regulatory proceedings. By permitting administrative law judges to decide commodity futures trading issues, Congress created a "prompt, . . . expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."¹²⁴ Preventing the CFTC from addressing all of the legal matters relevant to its regulation of commodity futures trading would have compromised that valuable purpose.

In short, consistent with this Article's suggested approach to separation of powers concerns and the Supreme Court's separation of powers decisions, the Court will reject a reallocation of national power if it clearly does not serve a genuine governmental need. If the reallocation appears to serve a genuine governmental need, the Court may uphold it, but there is still a second step of the analysis. To uphold the reallocation of authority, a court must conclude that a conflict of interest did not significantly influence Congress when it enacted the reallocation. This second step is important, both because

118. 458 U.S. 50 (1982).

119. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982). The bankruptcy court judges received fixed-term appointments under the Act, rather than lifetime appointments, and received no protection from decreases in their salaries. *Id.* at 56-59.

120. 478 U.S. 833 (1986).

121. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847-57 (1986).

122. *Id.* at 835-36.

123. In other words, the relegation of such judges to second-class status did not serve the goal of creating a group of judges with special expertise in bankruptcy law.

124. *Schor*, 478 U.S. at 856 (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)).

it will not always be clear whether the reallocation genuinely serves a legitimate need of government, and because the harms to the balance of power among the three branches of government may outweigh the benefits to government efficiency. In other words, concerns about conflicts of interest provide a limiting principle for functionalism. Indeed, as this Article has suggested, the Court's separation of powers decisions implicitly incorporate this role for conflicts of interest analysis. The next subpart elaborates on this point.

b. Invalidations Because of Concerns About Conflicts of Interest

In its separation of powers decisions, the Court has been troubled when Congress appears to act out of a conflict of interest. More specifically, the Court dislikes attempts by Congress to seize power from another branch of the national government or from future Congresses. When Congress tries to seize authority, thereby aggrandizing its power,¹²⁵ the Court worries that Congress's motivation is not so much the public good as its own self-interest. Conversely, when Congress yields power to another branch of government, it is more likely that interests of the country motivated it to do so.¹²⁶ Accordingly, the Court has shown little concern in the past sixty years with legislative delegations of authority to administrative agencies or independent commissions of the national government.¹²⁷

Several cases illustrate the unacceptability of congressional seizures of power. For example, in *Myers v. United States*,¹²⁸ the Supreme Court rejected an attempt by Congress to require Senate approval before the President could fire an official in the executive branch.¹²⁹ Similarly, in *Bowsher v. Synar*, the balanced budget case, Congress tried to seize power in two ways – first by

125. See *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (discussing "concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence"); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (observing that separation of powers doctrine aims to prevent "the encroachment or aggrandizement of one branch at the expense of the other"); see also Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 161-65 (1994) (discussing "no congressional aggrandizement" theory); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions – A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 519-21 (1987) (criticizing *Bowsher* Court's narrow concept of aggrandizement).

126. See, e.g., *Mistretta*, 488 U.S. at 421 (1989) (Scalia, J., dissenting) (observing that, because congressional delegation of lawmaking power increases power of coordinate branch of national government, "the need for delegation would have to be important enough to induce Congress to aggrandize its primary competitor for political power").

127. See *STONE ET AL.*, *supra* note 12, at 366 (discussing demise of nondelegation doctrine).

128. 272 U.S. 52 (1926).

129. *Myers v. United States*, 272 U.S. 52, 176 (1926). In *Myers*, the statute at issue required Senate approval before the President could remove a postmaster from office. *Id.* at 107.

exercising control over a government officer with executive authority,¹³⁰ and second by transferring power to itself from future Congresses.¹³¹ With respect to the latter method, if legislation requires balanced budgets (or limited deficits) in future years, and such legislation has effect, then Congresses in future years no longer can exercise their full legislative authority.¹³²

Like the balanced budget act, the line item veto also suffered from a congressional attempt to seize power from future Congresses. As the Court observed in *Clinton v. City of New York*, it is permissible for Congress to give the President permission in a particular piece of legislation to implement all or only part of the legislation.¹³³ However, it is not permissible for Congress, in one bill, to give the President authority to implement all or part of every future bill.¹³⁴

Note, as mentioned previously,¹³⁵ that the cases show a correlation between a conflict of interest and the lack of a genuine functional purpose for a law. In *Bowsher* and *Clinton*, the legislation was problematic because of Congress's conflict of interest *and* because the legislation served no real need. This is exactly what we would expect from conflicts of interest. When Congress serves its own interests, it is less likely to serve the public interest. Similar correlations result from the use of procedural standards elsewhere in constitutional analysis. Laws that are suspect under an Elyian representation-reinforcement analysis¹³⁶ because of their effect on the political process also

130. *Bowsher v. Synar*, 478 U.S. 714, 718 (1986). The balanced budget act at issue gave the Comptroller General, an official in the legislative branch, authority to make cuts in the national budget, an activity entailing execution of the law. *See supra* notes 112-13 and accompanying text (discussing *Bowsher*).

131. The Court did not cite this problem with the balanced budget act, although other scholars have done so. STONE ET AL., *supra* note 36, at 455.

132. Another way of characterizing a balanced budget act, then, is an attempt to amend the Constitution by a majority vote of Congress. *Id.*

133. *See Clinton v. City of New York*, 524 U.S. 417, 442-46 (1998) (discussing cases approving discretion granted by Congress to President in execution of certain laws).

134. This distinction between giving the President power to implement all or part of one law and giving the President power to implement all or part of all future laws explains why the line item veto is not merely a transfer of power from Congress to the President. When a current Congress seizes power from future Congresses, it is aggrandizing its own power, even if it is not doing so at the expense of a coordinate branch of government. Any aggrandizement of power raises concerns that self-interest is behind the aggrandizement. In other words, we should worry about conflicts of interest even when they do not change the balance of power among the three branches of the national government. Indeed, one of the virtues of a conflicts analysis is its ability to identify problems that other theoretical frameworks might miss.

135. *See supra* text accompanying notes 110-17 (discussing *Bowsher v. Synar* and *Clinton v. City of New York*).

136. *See supra* text accompanying notes 88-90 (discussing Ely's representation-reinforce-

are suspect because it is difficult to identify a legitimate public purpose for such laws. For example, poll taxes are unconstitutional under a representation-reinforcement analysis because they impede participation by indigent persons in the political process. At the same time, poll taxes are problematic because their primary purpose is a discriminatory one – to prevent some classes of citizens from voting.

While some reallocations of authority may be problematic both because they fail to serve a genuine governmental need and because they grow out of a congressional conflict of interest, other reallocations will be problematic only on conflict of interest grounds. For example, when Congress required its approval before the President could fire an executive officer, as in the *Myers* case,¹³⁷ Congress could have defended its action on the ground that the functioning of the government would improve if the President could not fire public officials at will. The problem with the statute in *Myers* was its transfer of authority from the President to Congress.

c. When Does a Conflict of Interest Become Problematic?

This Article has drawn an obvious distinction between Congress giving up authority to another branch of the national government and Congress seizing power from another branch of the national government. But what if Congress tries to diminish the authority of another branch of the national government without increasing its own power? In a number of cases, Congress insulated government officials with executive power from presidential oversight but did not try to substitute its own oversight. For example, Congress prohibited the President from firing an independent counsel without cause,¹³⁸ even though the President ordinarily can fire a federal prosecutor without cause. Similarly, Congress has created independent commissions, like the Federal Trade Commission, and allowed removal of commissioners from office only for cause, even though executive branch officials ordinarily serve at the pleasure of the President.¹³⁹ Do such cases not give rise to conflict of interest concerns because Congress does not seize power? Or should one worry, because Congress increases its power relative to another branch of government when it diminishes the authority of that branch? In other words,

ment approach).

137. See *supra* notes 128-29 and accompanying text (discussing *Myers*).

138. See *Morrison v. Olson*, 487 U.S. 654, 685-93 (1988) (upholding "good cause" removal requirement).

139. See *Humphrey's Executor v. United States*, 295 U.S. 602, 621-32 (1935) (discussing constitutionality of statutory restrictions on President's removal power over Federal Trade Commissioners).

are relative increases in power as valuable to Congress as absolute increases in power?

In general, the Court is correct on conflicts of interest grounds when it permits Congress to insulate government officials from termination without cause. Congress may have as much to lose as it has to gain when it protects Federal Trade Commissioners or Federal Communications Commissioners from peremptory removal from office. It is true that an independent commissioner can side more easily with Congress when Congress and the President disagree. At the same time, however, Congress cannot influence the President to fire an independent commissioner who has fallen into disfavor with Congress. When a public official serves at the pleasure of the President, Congress may seek the official's dismissal while engaged in its usual bargaining with the President over proposed legislation. In short, because independent commissions do not necessarily increase the relative power of Congress, it is reasonable to assume that when Congress creates independent commissions, it is motivated by the benefits that the independence of commissions creates for the country.

Moreover, it may not be accurate for another reason to characterize the creation of independent commissions as giving Congress a relative increase in power. When Congress creates independent commissions, it must delegate some of its power to the commissions. When comparing the status quo before the creation of an independent commission with the state of affairs after its creation, Congress probably diminishes its power more than it diminishes executive power. In other words, the relevant comparison may not be between an independent commission and an administrative agency subject to presidential control, but between an independent commission and no commission.

Although the Court seems to be correct in allowing independent commissions, one might come to a different conclusion on occasion, as in the case of the independent counsel law. Dissatisfaction with the independent counsel during the Clinton administration illustrates the risk of allowing Congress to insulate all executive branch officials from presidential oversight. An independent counsel can become an attack dog on the President as well as a guardian of the public interest.¹⁴⁰ It may be unclear whether Congress supports an independent counsel law for good or for bad reasons. Accordingly, a strong conflicts of interest approach might disallow an independent

140. Justice Scalia's dissent in *Morrison v. Olson* emphasized concerns about an independent counsel harrasing the President. See *Morrison*, 487 U.S. at 712-13, 727-34 (Scalia, J., dissenting) (emphasizing intimidation of presidential advisors, erosion of public support, and lack of political check on independent counsel).

counsel law,¹⁴¹ while a less aggressive conflicts approach would allow such a law.

INS v. Chadha, the legislative veto case, also is a close call under conflicts of interest analysis.¹⁴² On one hand, it appears that Congress tried to seize power from the executive branch. By wielding a legislative veto, the House or Senate could act as a super-executive, reviewing the actions of the executive branch and stepping in at times of disagreement. On the other hand, as Justice White's dissent in *Chadha* suggested, Congress may have tried only to limit the amount of legislative power it delegated to the executive branch when it passed acts that included a legislative veto.¹⁴³ If one views the legislative veto as part of a larger piece of legislation rather than by itself, it entails a diminution in authority relinquished by Congress and not a seizure of authority by Congress.¹⁴⁴

Just as a legislative veto is a close call on conflicts grounds, it is also a close call whether the legislative veto served a genuine functionalist purpose. On one hand, a legislative veto may be an innovative way for Congress to draw a balance between delegating legislative power to administrative agencies and maintaining adequate control over its legislative power. On the other hand, Harold Bruff and Walter Gellhorn have argued that rather than improving the function of the national government, the legislative veto may have made it easier for special interests to dominate the political process.¹⁴⁵ Special interests could use their lobbying tactics more effectively to achieve a legislative veto than to influence decisions by an administrative agency or to push legislation through both houses of Congress.¹⁴⁶

Although consideration of conflicts leaves some uncertainty, it does much to curtail the openendedness of current functionalist analysis. One can

141. In the absence of an independent counsel, Presidents and other officials are not immune from prosecution. Congress may impeach executive branch officials that act improperly. See Verkuil, *supra* note 5, at 327 (citing *In re Sealed Case*, 838 F.2d 476, 506-507 (D.C. Cir. 1988), for point that Constitution deals with possibility of executive branch wrongdoing exclusively through impeachment process).

142. See *supra* notes 47-49 (discussing *Chadha*).

143. *INS v. Chadha*, 462 U.S. 919, 967-74 (1983) (White, J., dissenting).

144. Note in this regard an important distinction between the legislative veto and the line item veto. Congress enacted the line item veto in one bill and applied it to all future spending bills. Congress thus tried to bind all future Congresses. Conversely, Congress included the legislative veto in each bill to which it would apply.

145. See Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1413 (1977) (observing that legislative vetoes allowed special interest groups to affect policy outside public rulemaking procedures).

146. *Id.*

assess the seriousness of a conflict of interest more readily than one can measure the effect of a reallocation of national authority on the balance of power among Congress, the President, and the courts. Indeed, judging degrees of severity is a common exercise with regard to conflicts of interest elsewhere in the law and in other fields. For example, rules of professional responsibility distinguish conflicts of interest involving current clients from conflicts involving former clients.¹⁴⁷ Similarly, the federal government's regulations for scientists conducting human research distinguish financial interests in the outcome of such research that exceed \$50,000 from those that do not exceed \$50,000.¹⁴⁸ In short, the addition of conflicts considerations to the functionalist approach for separation of powers cases substantially strengthens functionalist theory.

The next subpart analyzes a second way in which consideration of conflicts of interest can clarify constitutional interpretation. Consideration of conflicts not only can strengthen functionalist separation of powers theory, but also it can reconcile the political question doctrine with the principle of judicial supremacy.

B. The Political Question Doctrine, Judicial Supremacy, and Conflicts of Interest

According to the political question doctrine, some constitutional questions fall within the exclusive jurisdiction of the executive and legislative branches, the politically accountable branches of government. If someone challenges executive or legislative action on a political question, federal courts must refrain from deciding the challenge.¹⁴⁹

1. Problems with the Current Political Question Theory

Under the usual analysis, the political question doctrine is quite elusive. As Martin Redish observed, "[t]he doctrine has always proven to be an enigma to commentators . . . [who have] disagreed about its wisdom and validity . . . [and] have also differed significantly over the doctrine's scope and rationale."¹⁵⁰ Louis Henkin argued that when the Supreme Court upholds legislative or executive action on political question grounds, it does nothing more than say

147. See MODEL RULES PROF'L CONDUCT RS. 1.7, 1.9 (2002) (forbidding representation if it involves concurrent conflict of interest and describing duties to former clients).

148. 21 C.F.R. §§ 54.2(b), 54.4(a)(3)(iv) (2001).

149. See CHEMERINSKY, *supra* note 6, at 127-28 (discussing political question doctrine).

150. Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1031 (1985).

that no constitutional violation occurred.¹⁵¹ In Henkin's view, courts should characterize political question cases as decisions on the merits because that is what they are in fact.¹⁵² A number of cases in which the courts should exercise substantial deference to presidential or congressional action when deciding on the merits may exist. For example, on some matters, like the conduct of foreign policy, the President may need broad discretionary authority. Still, courts can grant broad deference without abandoning judicial review altogether.¹⁵³

These critiques of the political question doctrine are what one might have expected. The idea of such a doctrine seems inconsistent with *Marbury v. Madison*'s recognition of judicial supremacy on matters of constitutional interpretation.¹⁵⁴ Indeed, the political question doctrine creates a real tension with the principle of judicial supremacy. If the *Marbury* Court is correct that courts should have the final say on constitutional questions, then it is problematic to have courts also invoke a doctrine that precludes judges from hearing some constitutional questions.

Given the tension between *Marbury* and the political question doctrine, it is not surprising that the Supreme Court has offered unpersuasive justifications for the political question doctrine. The Court announced its modern political question doctrine in 1962 in *Baker v. Carr*,¹⁵⁵ a case challenging Tennessee's failure to reapportion its legislative districts.¹⁵⁶ In *Baker*, the Court listed several indicia of a political question:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent

151. Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 597-601 (1976).

152. *Id.* at 601. In some cases, the Court might conclude that, even though justiciable, a constitutional claim might fail due to the Court's inability to respond to a request for an equitable remedy. *Id.* at 617-22.

153. See Redish, *supra* note 150, at 1051 (proposing that courts could vary level of deference given depending on severity of particular emergency and loss of liberty involved).

154. See Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 518 (1966) (noting that if courts are free to disregard their judicial duties by treating political questions as determinative of some questions of law, this would destroy notion of judicial supremacy). To be sure, the *Marbury* Court reserved some constitutional questions for the political branches of the federal government. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803). Nevertheless, one still must explain why and when there are exceptions to the principle of judicial supremacy.

155. 369 U.S. 186 (1962).

156. *Baker v. Carr*, 369 U.S. 186, 187-91 (1962).

resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁵⁷

Yet none of these standards gives much guidance. The standard of "a textually demonstrable commitment of the issue to a coordinate political department," for example, yields either an empty set of political questions or too large a set. If textually committed means an explicit statement in the Constitution that recognizes executive or legislative authority to *interpret* the particular provision, then no provision meets that definition. On the other hand, if textually committed means that the courts cannot intervene when the Constitution expressly grants a governmental power to the executive or legislative branch, the judicial branch would not be able to decide Commerce Clause claims and many other claims that courts regularly decide.¹⁵⁸

The other *Baker* standards are similarly unhelpful. For example, any time the Court overturns an executive or legislative action, it in some sense expresses a lack of respect for a coordinate branch of government. The *Baker* standard speaks of a lack of "due" respect, but when exactly would judicial intervention cross the line from due to undue respect? As to deciding whether a policy determination is "of a kind clearly for nonjudicial discretion," that standard is circular, a restatement of the inquiry. The issue for the political question doctrine is when executive or legislative action is beyond the reach of the courts.

Some scholars have focused on particular issues as demanding judicial abstention. For example, some suggest that matters of foreign policy are especially inappropriate for judicial resolution. In this regard, Theodore Blumoff argued that courts should accept review only when Congress and the President cannot agree about the policy at stake.¹⁵⁹ And, in fact, a number of political question cases have involved foreign policy. The Supreme Court has left to Congress the determination of when a war ends.¹⁶⁰ Likewise, lower federal courts often have invoked the political question doctrine to dismiss

157. *Id.* at 217.

158. According to the Commerce Clause, "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Moreover, "[a]ll legislative Powers . . . shall be vested in a Congress of the United States . . ." U.S. CONST. art. I, § 1.

159. Theodore Blumoff, *Judicial Review, Foreign Affairs, and Legislative Standing*, 25 GA. L. REV. 227, 233-35 (1991).

160. *See* *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923) ("A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time . . .").

challenges to the President's exercise of the war powers.¹⁶¹ Yet at other times the Supreme Court and the lower federal courts have entertained cases involving the exercise of the war powers or other foreign policy actions. In *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁶² the Court intervened when President Truman tried to take possession of and operate most of the steel mills in the United States to prevent a nationwide steelworkers strike during the Korean War.¹⁶³ Similarly, in *Dames & Moore v. Regan*,¹⁶⁴ the Court upheld on the merits the President's termination of court claims by U.S. nationals against Iran and his transfer of the claims to a special Iran-United States Claims Tribunal.¹⁶⁵ The lower courts have decided in several cases whether the United States was "at war" within the meaning of the Constitution or instead engaged in military action of another kind.¹⁶⁶ Moreover, judicial abstention from matters of foreign policy creates real problems. Rather than reflecting a sensitive regard for the prerogatives of a coordinate branch of government, judicial abstention entails an erosion of one of the important checks and balances in our constitutional system¹⁶⁷ and undermines individual protection from the excesses of the majority or those of overreaching government officials.

One might have special concerns about judicial intervention when a plaintiff challenges the waging of a war. If courts could force the President to recall troops sent abroad, the judiciary might compromise national security. Nevertheless, this argument is not sufficient for judicial abstention. It is difficult to imagine that courts would interfere with a just war, and the courts

161. See, e.g., *Sarnoff v. Connally*, 457 F.2d 809, 810 (9th Cir. 1972), *cert. denied*, 409 U.S. 929 (1972) (declining on political question grounds to hear challenge to President's authority to wage war in Vietnam without congressional declaration of war); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971) (invoking political question doctrine in response to claim that United States' participation in Vietnam was unlawful because Congress had not made formal declaration of war).

162. 343 U.S. 579 (1952).

163. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-84 (1952).

164. 453 U.S. 654 (1981).

165. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

166. See, e.g., *Laird*, 443 F.2d at 1042-43 (observing that political question doctrine does not preclude judicial scrutiny to determine whether Congress has satisfied constitutional requirement of joint participation with President in prosecution of war even though political question doctrine leaves to Congress power to decide how it signals its consent to presidential waging of war); *New York Life Ins. Co. v. Bennion*, 158 F.2d 260, 264 (10th Cir. 1946) (holding that, for purposes of life insurance policy, United States was at war once Japan attacked Pearl Harbor).

167. See Michael E. Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135, 1179 (1970) (concluding that judicial abdication erodes "formal structural guarantees" of Constitution).

need to be available to interfere with an unjust war. When courts are too deferential to claims of national security, infamous decisions like *Korematsu v. United States*¹⁶⁸ result.

Undoubtedly, courts should turn away some challenges to foreign policy decisions. But courts can do so by holding that Presidents or Congresses acted within their constitutional discretion. There is no need to abdicate responsibility by invoking a political question doctrine. Holding that Presidents or Congresses acted within their authority, rather than declining to decide the case, also is a good approach for other issues that might fall under the political question doctrine. In other words, Henkin largely was persuasive when he argued that political question decisions really should be decisions on the merits in which the courts conclude that Presidents or Congresses acted within their legitimate discretion.¹⁶⁹

2. *Conflicts of Interest and Political Question Theory*

There is nevertheless one area in which it makes sense for courts to yield authority to the executive or legislative branch. In some cases it would be unwise for courts to take jurisdiction. Specifically, courts should find a political question when their involvement would entail a serious institutional conflict of interest for the judiciary. The presence of such a conflict signals that a judge ought not decide an issue, but instead should leave the issue to the discretion of the executive or legislative branch.¹⁷⁰ If courts overrode an executive or legislative decision in the face of a conflict of interest, they would invite questions about the legitimacy of the override. The public would suspect that the court's institutional interest, rather than an impartial interpretation of the law, drove the court's decision.¹⁷¹

168. *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, the Court upheld the internment during World War II of all persons of Japanese ancestry living on the West Coast, even though there was strong reason at the time of the case to doubt the existence of military necessity for the internment. See MURPHY ET AL., *supra* note 94, at 88-89 (discussing political and economic factors motivating Court to uphold internment of persons of Japanese ancestry in *Korematsu*).

169. See *supra* notes 151-52 and accompanying text (discussing Henkin's view).

170. The other branches also would face conflicts if left to decide the constitutionality of their actions. Nevertheless, that conflict is not adequately addressed by bringing in another decision maker that is also hampered by a conflict of interest but is less accountable to the public (by virtue of having a lifetime appointment). I elaborate on this point *infra* notes 193-96 and accompanying text.

171. This concern arose regarding Justice O'Connor's vote in *Bush v. Gore*, 531 U.S. 98 (2000), the decision that closed off Vice President Gore's legal challenges to the Florida vote count in the 2000 presidential election. When *Newsweek* reported that Justice O'Connor expressed dismay to friends on election night about a Gore victory because of a desire to resign

The case of *Nixon v. United States*¹⁷² illustrates this point well. Congress impeached Walter Nixon, a district court judge in Mississippi, and convicted him for committing perjury.¹⁷³ He lied to a grand jury investigating charges that he had accepted a bribe to halt a prosecution.¹⁷⁴ Nixon sought judicial review of his conviction on the ground that the Senate did not properly try him under the impeachment clause in Article I of the Constitution. According to Article I, the "Senate shall have the sole Power to try all Impeachments,"¹⁷⁵ and Nixon objected to the use of a Senate committee rather than the full Senate to consider his impeachment.¹⁷⁶ The Supreme Court rejected the challenge on political question grounds, concluding in part that there were no judicially manageable standards for deciding what the word "try" means in the impeachment clause.¹⁷⁷ The Court's logic is difficult to accept when it reasons that courts cannot figure out what it means to try a case. Indeed, judges have special expertise in understanding what it means to try a case. Moreover, it is difficult to square the *Nixon* case with *Powell v. McCormack*,¹⁷⁸ an earlier case in which the Court entertained Adam Clayton Powell's challenge to a House resolution that barred him from taking his seat in Congress.¹⁷⁹ In the *Powell* case, the Court interpreted Article I, Section 5, Clause 1, which states that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members"¹⁸⁰ If the Court cannot

during the next administration and to have a Republican president choose her successor, people wondered whether Justice O'Connor's personal preferences drove her decision. See Joan Biskupic, *Election Still Splits Court*, USA TODAY, Jan. 22, 2001, at 1A (discussing fallout over Justice O'Connor's alleged election night statements); see also Evan Thomas & Michael Isikoff, *The Truth Behind the Pillars*, NEWSWEEK, Dec. 25, 2000, at 46 (reporting Justice O'Connor's reaction to Gore victory).

172. 506 U.S. 224 (1993).

173. *Nixon v. United States*, 506 U.S. 224, 226 (1993).

174. *Id.* at 226.

175. U.S. CONST. art. I, § 3, cl. 6.

176. *Nixon*, 506 U.S. at 227-28.

177. *Id.* at 228-30. The Court also based its decision on other considerations, including the fact that the Senate has the "sole" power to try impeachments and the concern that judicial involvement in impeachments of judges would compromise the ability of Congress to check abuses by the judicial branch. *Id.* at 229-35. This latter concern of the *Nixon* Court ties into conflicts of interest concerns in a second way – the propriety of the Court passing judgment on another member of the judiciary.

178. 395 U.S. 486 (1969).

179. *Powell v. McCormack*, 395 U.S. 486, 489 (1969).

180. The Court overrode the House's denial of Rep. Powell's seat. *Id.* at 547-48. The denial resulted from allegations that he illegally used official funds. *Id.* The Court concluded that the House could decide only whether a member satisfied the constitutional requirements of age, citizenship, and residency under Article I, Section 2, Clause 2 of the Constitution. *Id.*

second guess a conviction by the Senate, it seemingly would follow that the Court ought not to second guess a judgment by the House of a member's qualifications.

From a conflicts of interest perspective, however, one can understand the *Nixon* decision on its own and why it came out differently than the *Powell* case. In *Nixon*, the Court would have reviewed the impeachment and conviction of a federal judge, and a reversal of the conviction would have raised questions as to whether the Justices acted simply to protect a judicial colleague.¹⁸¹ With *Powell*, on the other hand, no such conflict of interest existed. When the Court overrode the House of Representatives, there was no reason for the public to suspect that ulterior motives were at work.

*Coleman v. Miller*¹⁸² also illustrates the role of conflicts of interest in political question analysis. In *Coleman*, the Court held it to be a political question whether three-fourths of the states ratified a constitutional amendment within a reasonable amount of time.¹⁸³ The Court concluded that no judicially manageable standards were discernable for deciding what constituted a reasonable amount of time.¹⁸⁴ However, the Court's logic was weak. Courts often construe standards of reasonableness. Indeed, an earlier decision by the Court undermines its argument in *Coleman*. Although Article V does not mention time limits for constitutional amendments, the Court in *Dillon v. Gloss*¹⁸⁵ considered whether Congress could set a time limit for ratification when it proposed an amendment.¹⁸⁶ In recognizing such authority, the Court understood the amendment process to envision a reasonable time between proposal and ratification and stated that the two steps "are not to be widely separated in time" but are to be "a single endeavor."¹⁸⁷ The *Coleman* Court was correct to deny jurisdiction, but it should have abstained on conflicts of interest grounds. Since the amendment process is the chief way by which the public can check decisions by the Supreme Court, the Court faces a serious conflict of interest in interpreting the procedures for amendment described in Article V.¹⁸⁸

181. The Court in fact recognized this problem. See *supra* note 177 (discussing *Nixon*).

182. 307 U.S. 433 (1939).

183. *Coleman v. Miller*, 307 U.S. 433, 453-54, 456 (1939).

184. *Id.* at 452-56.

185. 256 U.S. 368 (1921).

186. *Dillon v. Gloss*, 256 U.S. 368, 371 (1921).

187. *Id.* at 374-75.

188. See Scharpf, *supra* note 154, at 589 (distinguishing case in which Court strikes down law as incompatible with its choice of constitutional values and case in which Court could, by narrow interpretation of amendment procedures, prevent ratification of amendment intended to overrule one of its previous decisions), cited in *Goldwater v. Carter*, 444 U.S. 996, 1001 n.2 (1979) (Powell, J., concurring); see also CHEMERINSKY, *supra* note 6, at 131 (discussing defense of political question doctrine on ground that "courts' self-interest disqualified them

Not only does the presence of a conflict of interest provide a good reason for judicial abstention, it provides a justification that fits well with *Marbury v. Madison*. Recall that the political question doctrine currently creates tension with the judicial supremacy principle of *Marbury*.¹⁸⁹ If courts are the final arbiters of constitutional questions, then it is not a good idea for courts to abstain from deciding those questions. Such abstention effectively constitutes an abdication of judicial authority. If instead judicial abstention rests on concerns about conflicts of interest, then the political question doctrine becomes consistent with *Marbury*. When courts face a conflict of interest by asserting their *Marbury* authority, the case for judicial supremacy is much weaker than in the ordinary case. One should be reluctant to permit judicial overrides of the political process when the courts may not be reliable decision makers.

Note that concerns about conflicts of interest also provide an important justification for the *Marbury* principle of judicial supremacy. As other scholars have indicated, it is important to have judicial review of federal legislation because the alternative is for Congress to have the authority both to pass laws and to decide their constitutionality.¹⁹⁰ In other words, the alternative is to put Congress in a hopelessly conflicted position. Congress could not make its constitutional judgments with the neutrality and objectivity required. Even if Congress could separate its legislative judgment from its constitutional judgment, it would be difficult for the public to trust congressional judgments upholding the constitutionality of legislation that raised serious constitutional questions. Similarly, the judiciary must be able to decide the constitutionality of executive action, for otherwise the President would have authority both to act and to decide the constitutionality of the action. Taking account of conflicts of interest explains both the need for judicial supremacy and when judicial supremacy is no longer appropriate.

Although consideration of conflicts of interest helps one to understand *Marbury* and the political question doctrine, it also points to another conflicts problem. Even with a political question doctrine based on conflicts of interest

from ruling on certain matters").

Walter Dellinger argues that few constitutional amendments have been passed to override the Supreme Court, see Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 414-15 (1983), but that does not change the fact that the amendment process is the chief check on the Supreme Court.

189. See *supra* text accompanying note 154 (discussing tension created).

190. See David Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-35*, 49 U. CHI. L. REV. 646, 657 (1982) (characterizing judicial supremacy as way to avoid proverbial situation of fox guarding chicken coop); LOCKE, *supra* note 26, at 293-94, 341-45, 369 (arguing that civil government requires impartial third party to decide controversies).

considerations, judicial abstention leaves a conflict of interest behind. If the executive and legislative branches have authority in some cases to decide the constitutionality of their actions, one must worry about their ability to make unbiased constitutional assessments of those actions. Nevertheless, one can conclude that the conflicts faced by Congress or the President are more tolerable than substituting a judicial conflict for them. The legislative and executive branches are more accountable to the voter than is the judiciary; the ballot permits the public to express its disapproval of a governmental decision more readily than the constitutional amendment process. Accordingly, the public is in a better position to correct the effects of a conflict of interest arising from congressional or presidential action than one arising from a judicial decision. In other words, if it is not possible to eliminate conflicts of interest in the branches of the national government, it is better if Congress and the President face the conflicts than if the courts face them.¹⁹¹

In short, by basing the political question doctrine on conflicts of interest concerns, rather than on the considerations cited by the Court in *Baker v. Carr*,¹⁹² one ends up with a doctrine that not only provides much clearer guidance to the courts but also that does not create tension with the principle of judicial supremacy in constitutional interpretation.

3. *Potential Concerns with Conflicts of Interest as a Basis for the Political Question Doctrine*

There are two potential concerns with this Article's conflicts of interest analysis for the political question doctrine. First, one might question whether courts facing conflicts of interest will properly take the conflicts into account when reaching their decisions. Second, one might observe that courts deciding the constitutionality of action by Congress or the President have their own conflicts of interest at stake – courts can enhance their political power by asserting their power to override.

As to whether conflicts analysis can serve as a check on a judge that is the conflicted person, that should not be a serious problem. It is true that people often act unthinkingly on the basis of conflicts of interest. The physician who recommends additional tests for a patient probably would explain the recommendation in terms of the patient's best interests rather than in terms of any financial gain that the physician would realize from the testing. Nevertheless, one reasonably can expect courts to be responsive to conflicts con-

191. I do not suggest that the electoral process is sufficient to check all legislative or presidential conflicts of interest. It clearly is not. Nevertheless, it remains that the public is in a better position to check these conflicts of interest than it is to check judicial conflicts of interest.

192. See *supra* notes 155-57 and accompanying text (discussing *Baker v. Carr*).

cerns in their decision making. When a conflict of interest is involved, one of the parties to the case would argue for judicial abstention because of the conflict, and the court would have to explain why it accepted or rejected the conflict argument. Conflicts of interest generally are problematic precisely because they often operate without notice, but judges could not easily escape public scrutiny of their institutional conflicts of interest. Moreover, the fact that one can explain decisions like *Nixon* (involving the conviction of Judge Nixon) and *Coleman* (regarding amendments to the Constitution) in terms of conflicts of interest considerations suggests that courts will take those considerations into account when deciding cases.

The second potential concern with this Article's argument – whether courts themselves face a conflict of interest when deciding the constitutionality of actions by Congress or the President – also is answerable. The concern is not trivial. In *Marbury*, a desire to increase the authority of the judiciary may have influenced the Supreme Court's thinking. If the Court has final authority to interpret the Constitution, it enjoys power that the other branches of the national government lack.

Yet the conflict of interest for the Court in asserting its oversight of executive and legislative action does not raise the kinds of concerns that are raised by Congress and the President determining the constitutionality of their actions. Indeed, one ordinarily does not worry very much about an independent government entity's self-interest when it has oversight authority over another institution or organization. If there are concerns about police corruption, for example, the appointment of an independent commission responds to potential conflicts of interest that might compromise internal police investigations, and one generally trusts the independent commission's findings despite the possibility that it has its own interests at stake. For example, the commission may be driven to find problems with police practices to justify its efforts. Similarly, although the Securities and Exchange Commission (SEC) can increase its authority by penalizing corporations for violations of the law, that conflict of interest is much less discomfoting than leaving companies unregulated and able to abuse their power. It is difficult to imagine that the harms of a more aggressive SEC could ever equal the harms caused by the ability of energy-trading giant Enron and its accounting firm, Arthur Andersen, to operate under their own interpretations of what practices were legitimate.¹⁹³

193. In December 2001, the Enron Corporation filed what was then the largest corporate bankruptcy ever in the United States. See Richard A. Oppel, Jr. & Andrew Ross Sorkin, *Enron Corp. Files Largest U.S. Claim for Bankruptcy*, N.Y. TIMES, Dec. 3, 2001, at A1 (giving overview of Enron collapse). Allegations of wrongful behavior targeted not only Enron but also Arthur Andersen. See Alex Berenson & Jonathan D. Glater, *A Tattered Andersen Fights for Its*

When an independent body has oversight authority, the main concern is not that society substitutes one conflict of interest for another. Rather, the primary concern is that we avoid a serious conflict of interest by sacrificing expertise. If non-physicians judge misconduct by physicians, for example, one worries that the non-physicians will misunderstand the medical considerations.

To be sure, concerns about conflicts of interest arise at times with independent bodies. The independent counsel law for the investigation and prosecution of executive branch officials drew criticism in part because of concerns that some of the counsel were overly zealous in their efforts to find wrongdoing.¹⁹⁴ According to this view, the independent counsel have an incentive to bring charges to justify their time and effort. Moreover, some oversight bodies can become too close to those whom they monitor. Lobbyists may wield influential power over an administrative agency. An accounting firm may ignore corporate misconduct to protect its auditing fees. But these conflicts of interest problems are not likely to become serious with the federal courts.

In short, the conflict of interest faced by Congresses or Presidents in deciding the constitutionality of their own actions is of greater concern than the Supreme Court's review of the constitutionality of congressional or presidential conduct. This point becomes clearer when one considers more closely the conflicts involved. For Congress and the President, the conflict of interest is most serious. They would be inclined to use a power to decide the constitutionality of their action to enlarge their own power. They could interpret the limits of their authority generously when contemplating new legislation, administrative agency regulations, or executive orders. The President would have a temptation to encroach upon legislative prerogatives; Congress would have a temptation to infringe upon executive authority.

In contrast, when the Supreme Court decides the constitutionality of congressional or executive action, it need not act in a systematic way to change the constitutional order. The Court can exercise its power either by approving or invalidating the action of the other branch. Its authority comes from the ability to decide, and that ability often will be independent of the direction of the decision. Whether the Supreme Court ruled for George Bush or for Al Gore in *Bush v. Gore*,¹⁹⁵ it would have played a pivotal role in deciding the 2000 presidential election. In other words, the Court can assert its authority either by giving greater rein to the other branches of government or by constraining

Future, N.Y. TIMES, Jan. 13, 2002, at § 3, at 1 (detailing Arthur Anderson's problems stemming from its connection with Enron).

194. See Christopher H. Schroeder, *Putting Law and Politics in the Right Places – Reforming the Independent Counsel Statute*, LAW & CONTEMP. PROBS., Winter 1999, at 163, 170-71 (discussing independent counsel law's effects on law enforcement).

195. *Bush v. Gore*, 531 U.S. 98 (2000).

their authority. The Court does not need to limit presidential or congressional power in order to enhance its own power.

To be sure, one can argue that conflicts of interest will bias decisions by the Supreme Court. If the Court too often upholds congressional or executive action, the public will view the trend as a rubber stamp. Consequently, to secure its authority, the Court sometimes must invalidate challenged actions. But there is no reason that this minimal need to override Congress or the President should have a strong effect on the Court. In fact, this argument takes us back to the previous point about independent commissions with oversight authority. Such commissions may have an institutional interest in finding fault with the people whom they regulate, but acting out of that conflict of interest does not raise nearly the concerns raised when people are left unregulated.¹⁹⁶

The next, and final, subpart discusses a third way in which taking account of conflicts of interest can clarify constitutional interpretation. Conflicts considerations can respond to the question of whether Article V provides the exclusive means of amending the Constitution.

C. Amending the Constitution and Conflicts of Interest

While conflicts of interest in constitutional law are most pertinent to the relationships among the three branches of the national government, their relevance does not end there. Conflicts of interest can also affect relations between individuals and the national government. Illustrative of this point is the process of amending the Constitution and the question of whether Article V provides the exclusive means for doing so.

Recall that the Constitution addresses the amendment process through Article V, the relevant language of which follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in

196. In addition, recall that Congress already enjoys an important check on the authority of the judiciary to override legislative action. According to Article III of the Constitution, the Supreme Court has appellate jurisdiction in federal cases, "with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2. If courts become too aggressive in their oversight of Congress, then Congress can limit judicial oversight. In other words, judicial supremacy does more to create a balance with congressional power over the judiciary than it does to upset the balance.

three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress¹⁹⁷

Article V has two key parts. It describes: (1) the proposal of constitutional amendments (either by Congress or by constitutional convention requested by the state legislatures); and (2) the ratification of constitutional amendments (either by state legislatures or by state constitutional conventions).

In recent years, an important debate as to whether Article V provides the exclusive means of amending the Constitution has occurred. A number of scholars have observed that while Article V indicates how the Constitution may be amended, it does not provide that its methods of amendment are the only permissible methods.¹⁹⁸ In other words, Article V describes *sufficient* procedures for constitutional amendment, but its text does not speak in terms of *necessary* procedures for amendment.¹⁹⁹

There are good reasons to think that alternative methods are available for constitutional amendment. If one wants to argue from text, one can observe that the Framers knew how to state that a provision has no exceptions. For example, Article I, Section 7, Clause 1 makes it clear that only the House of Representatives, and not the Senate, may initiate "Bills for raising Revenue."²⁰⁰ Similarly, Article I, Section 3, Clause 6 makes it clear that the Senate must try impeachments of federal officeholders.²⁰¹ Since Article V does not say that *only* Congress or constitutional conventions may propose constitutional amendments, it is not necessary to conclude that they alone have the power to do so.²⁰²

197. U.S. CONST. art. V.

198. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 459 (1994) (arguing that Congress would be obliged to call convention to propose revisions to Constitution if majority of American voters so petitioned and that amendment to Constitution could be lawfully ratified by simple majority of American electorate); see also James W. Torke, *Assessing the Ackerman and Amar Theses: Notes on Extratextual Constitutional Change*, 4 WID. J. PUB. L. 229 (1994) (discussing generally possibility of constitutional amendment outside of Article V).

199. Bruce Ackerman, *Higher Lawmaking*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 63, 72 (Sanford Levinson ed., 1995).

200. The clause states that "[a]ll Bills for raising Revenue shall originate in the House of Representatives . . ." U.S. CONST. art. I, § 7, cl. 1.

201. The clause states that "[t]he Senate shall have the sole Power to try all Impeachments." U.S. CONST. art. I, § 3, cl. 6.

202. But see Henry Paul Monaghan, *We the Peoples, Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 131-32 (1996) (observing that constitutional provisions can be exclusive even without "only" language); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1241-45, 1273-76 (1995) (same).

The nature of our constitutional system also suggests a role for alternative methods of constitutional amendment. The United States is fundamentally a government of the people.²⁰³ One therefore would expect the Constitution to permit alternative mechanisms for amendment when the mechanisms set out in Article V would frustrate the public's ability to make legitimate constitutional change.²⁰⁴

Finally, when the issue is how to judge the validity of constitutional change, one cannot restrict analysis to standards that are internal to the Constitution. As Frederick Schauer observed, one must judge the process of adopting a new constitution or amending an existing constitution according to external standards or higher legal norms, just as courts judge the validity of legislative action by its congruence with higher constitutional standards.²⁰⁵ If the question is whether the Constitution is defective and needs reconsideration, the Constitution alone cannot provide the answer. Thus, one cannot conclude that a constitutional amendment is valid or invalid simply by observing whether its adoption was consistent with the processes of Article V. One also must consider whether the method used for adoption is consistent with whatever social or political standards the public recognizes as legitimizing constitutional change.²⁰⁶

203. See Amar, *supra* note 198, at 457-60 (noting that "We the People of the United States have a legal right to alter our Government").

204. There is some historical evidence to indicate that the Framers intended that the public, acting on its own, should have the power to amend the Constitution. *Id.* at 463-94; see Robert W. Scheef, Note, "Public Citizens" and the Constitution: Bridging the Gap Between Popular Sovereignty and Original Intent, 69 FORDHAM L. REV. 2201, 2231-32 (2001) (suggesting that because Framers considered "We the People" unrestrained by textual limitations, people of United States, acting alone, have power to amend Constitution). Other historical evidence, however, points in the opposite direction. See Monaghan, *supra* note 202, at 133-47 (disputing Akhil Reed Amar's interpretation of phrase "We the People").

205. See Frederick Schauer, *Amending the Presuppositions of a Constitution*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145, 146-52 (Sanford Levinson ed., 1995) (proposing that amendment process should include consideration of changes in underlying presuppositions of Constitution). In making his argument, Schauer draws from Hans Kelsen's discussion of *Grundnorm* and H. L. A. Hart's discussion of rules of recognition. *Id.* at 148-52. For an analysis of Schauer's argument, see Eric Grant, Book Review, 13 CONST. COMMENTARY 125, 128-31 (1996).

206. To be sure, the amendment process stated in the Constitution may provide reliable guidance about the process of constitutional change, but only insofar as it correctly reflects the country's higher legal norms for determining when constitutional change is legitimate. See Schauer, *supra* note 205, at 157-59 (discussing society's determination of when constitutional amendment outside of constitutional text is proper).

What those higher legal norms are is not always obvious, and one needs an argument to justify any proposed external standard. But the important point is that one cannot restrict the inquiry solely to an internal, legal analysis of the Constitution. One also must undertake a social and political analysis of the external standards by which the public judges constitutional

Although there are very good arguments for not limiting constitutional amendment to the Article V methods of amendment, one should hesitate to conclude that constitutional amendments always are possible by means other than those specified in Article V. Even if one rejects the idea that Article V provides the exclusive means of constitutional amendment, one would expect its processes to be at least presumptively required.²⁰⁷ It is fair to say that our social and political standards include the idea that Article V is the usual way by which constitutional change must occur.²⁰⁸ The Framers of the Constitution did not suggest in the language of Article V that amendments ordinarily could proceed outside the Article V process, and this country's social and political practices since the adoption of the Constitution suggest an understanding that constitutional amendments generally should follow the requirements of Article V.²⁰⁹

The better reading of the Constitution is that constitutional amendments generally should proceed according to Article V, but that those procedures will occasionally, probably rarely, be inadequate. Thus, in exceptional circum-

validity. *See id.* at 152-61 (discussing constitutional change outside of Constitution itself).

Thus, it is illogical to ask whether the U.S. Constitution was legal or illegal according to the Articles of Confederation. An existing constitution alone cannot state when it is legitimate to replace it with a new constitution. *See id.* at 154 n.20 (discussing argument that current Constitution is illegal according to Articles of Confederation).

207. *See id.* at 157-58 (discussing presumption in favor of Article V amendment process).

208. For an argument that Article V provides the exclusive means of amending the Constitution, see David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990). *See also* John R. Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V's Mechanics*, 21 CUMB. L. REV. 271 (1990-1991) (examining proposed alternatives to Article V amendment process and rejecting them based on historical and textual evidence); For a more qualified defense of Article V, see Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155 (1997).

209. The Supreme Court has addressed the possibility of non-Article V mechanisms for amendment on a few occasions and rejected such a possibility. *See Leser v. Garnett*, 258 U.S. 130, 136-37 (1922) (holding that states may not impose limitations on ratification process not included in Article V); *Hawke v. Smith*, 253 U.S. 221, 227-31 (1920) (holding that Article V does not permit state to require affirmation by public referendum of legislative ratification of amendment); *Nat'l Prohibition Cases*, 253 U.S. 350, 386 (1920) (concluding that state referendum provisions cannot be applied to ratification of amendments to Constitution). However, one can read these cases as standing for the proposition that states cannot alter the federal-state balance in Article V, rather than as foreclosing the possibility of popular referenda when Congress and the state legislatures may be unresponsive to the public will. *See Gregory B. Mauldin, Note, Informed Voter Initiatives and Uninformed Judicial Review Under Article V*, 34 GA. L. REV. 1701, 1723-26 (2000) (noting that Supreme Court's opinions addressing Article V involved power of states versus Congress, not power of people versus their legislators).

stances, the public should be able to go outside of Article V to amend the Constitution.²¹⁰

What would count as exceptional circumstances? Voters should be able to go outside Article V when the mechanisms of Article V are inherently unreliable. If the standard procedures for amendment cannot work properly, their use should not be necessary. One important cause of a malfunctioning amendment process is the presence of a substantial conflict of interest for both Congress and the state legislatures. Article V requires that a two-thirds vote of Congress initiate constitutional amendments or that two-thirds of the state legislatures request a constitutional convention. Moreover, ratification requires action by three-fourths of the state legislatures or by constitutional conventions in three-fourths of the states. If a conflict of interest would discourage Congress and the state legislatures from acting on a public desire for a constitutional amendment, then Congress and the state legislatures ought not have the power to frustrate the public will by failing to propose or ratify the desired amendment. In such cases, the public should be able to enact a constitutional amendment by satisfying the super-majority ratification requirement of Article V.²¹¹ Thus, for example, courts might permit ratification of a constitutional amendment when adoption occurs by popular referendum in three-fourths of the states.²¹² This approach would preserve the critical super-majority requirement of Article V, but would not allow Congress or the state

210. Bruce Ackerman wrote about special moments in U.S. history when constitutional change occurred without fidelity to Article V. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 7-27 (1998) (arguing that Fourteenth Amendment was adopted in violation of rules of Article V and that legal changes wrought by New Deal effectively amounted to constitutional amendment).

211. That is, amendment should occur upon approval by the public in three-fourths of the states. In addition to requiring approval in three-fourths of the states, one also might require a super-majority vote in each state. But note that in some states a simple majority vote can approve a constitutional amendment. See, e.g., IND. CODE § 3-10-5-29 (1998) (requiring "majority vote of the delegates" at state constitutional convention considering proposed constitutional amendment).

212. It is not clear whether ratification would need to occur through conventions in the states (the alternative to state legislative ratification being blocked by the legislatures' conflict of interest). If state legislatures control the convention process, then the public in a state should be able to demonstrate its approval of a proposed amendment in a statewide referendum. Supporters of an amendment could use a citizens ballot initiative in many states because these initiatives do not require legislative involvement. In about half of the states, voters already change state law by initiative. See Steve LeBlanc, *Voter Initiatives Often a Matter of Big Money: Wealthy Groups Fund Drives to Push Agendas*, DETROIT NEWS, July 24, 2000, at 8 (describing rise in popularity of citizen ballot initiatives). The initiative process readily could adapt to use for constitutional amendments. For other states, ballot initiatives would require judicial intervention.

legislatures, because of a conflict of interest, to block a constitutional amendment by failing to act.

One might respond that Article V would lose something important even if courts preserve the super-majority requirement for ratification. Under the ordinary amendment process, Congress proposes amendments and state legislatures ratify them. Proposed amendments must pass through two levels of deliberative bodies. As a result, Article V promotes a process of careful consideration before adoption of a proposed amendment.²¹³ If the public could pass amendments by referenda, however, there might be concerns about the sufficiency of public deliberation. The typical voter might not engage in the constitutional debate.²¹⁴

This is a legitimate concern, but it does not necessarily doom constitutional amendment by public referendum. It might be possible, using modern methods of communication, to develop a national debate,²¹⁵ and citizens are better educated today than they were at the founding of the country.²¹⁶ Moreover, the super-majority requirement of Article V seems more important than the Article's mechanisms for ensuring proper deliberation.

Note that bypass of Article V could not occur if Congress faced a conflict of interest, but the state legislatures did not. Article V already recognizes the possibility of congressional self-interest and provides some protection against it. Article V prevents Congress from acting out of self-interest because it *requires* Congress to convene a constitutional convention when two-thirds of the states request one.²¹⁷ Congress cannot reject a call for a convention once two-thirds of the states support the call. In this way, Article V makes it more difficult for Congress to aggrandize its authority.²¹⁸ However, Article V does

213. See Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971, 1995 (1994) (noting structural characteristics of Article V).

214. However, it also is not clear that legislators engage in their houses' debates over constitutional amendments.

215. See Amar, *supra* note 198, at 502-03 (arguing that because of vast improvements in communication and transportation technology there may be ways to retain deliberation of constitutional convention while providing for direct popular participation).

216. See Kobach, *supra* note 213, at 2002-03 (noting that elitist notions of Framers reflected world in which they lived and that their conception of American citizenry is no longer descriptively correct).

217. According to Article V, "The Congress, . . . on the Application of the Legislatures of two thirds of the several states, *shall* call a Convention for proposing Amendments . . ." U.S. CONST. art. V (emphasis added).

218. See THE FEDERALIST, NO. 85, at 546 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1966) (observing that Congress's obligation to call convention upon request of two-thirds of states means that country "may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority"); see also Brendon Troy Ishikawa,

not include a mechanism to prevent the undue operation of a conflict of interest faced both by Congress and by the state legislatures. Hence, there needs to be some room for constitutional amendment outside of the strict requirements of Article V.²¹⁹

A conflicts justification for modification of the Article V process ties well into Article V theory in other ways. Ordinarily, it makes sense to employ the Article V methods for initiating constitutional amendments because Congress or a constitutional convention can ensure that an amendment is proposed only after careful deliberation. In this view, the Constitution charges a body with a national perspective with the decision of when the national constitutional framework needs reconsideration.²²⁰ However, when legislative self-interest conflicts with the national interest, Congress and the state legislatures may not give adequate recognition to the need for constitutional reconsideration.²²¹

If constitutional amendment can proceed outside the strict requirements of Article V when a conflict of interest discourages Congress and the state legislatures from initiating the Article V process, when would such a conflict arise? Two examples illustrate when such conflicts may arise: term limits for members of Congress and campaign finance reform.

Amending the Constitution: Just Not Every November, 44 CLEV. ST. L. REV. 303, 322-24 (1996) (discussing Article V authority for states to initiate amendment process as bulwark against tyranny by national government); Kobach, *supra* note 213, at 1999-2001 (discussing how concerns about congressional self-interest affected debate over Article V at Constitutional Convention). Note that this safeguard has limited utility. States desiring a particular amendment might be reluctant to request a constitutional convention. A convention could propose many undesirable amendments. *Id.* at 1996.

219. Kris Kobach discussed how popular pressure at the state level can overcome congressional conflicts of interest. The U.S. Senate resisted the public's desire for popular election of Senators instead of the Article I, Section 3, Clause 1 provision for election by the state legislatures, and Congress proposed the Seventeenth Amendment only after popular election effectively had been adopted in the country through measures taken at the state level. *See* Kobach, *supra* note 213, at 1976-80 (describing how state initiatives led to systems by which legislators agreed to abide by public's choices for Senators).

220. *See* *Hawke v. Smith* 253 U.S. 221, 226-27 (1920) (observing that both methods of ratification in Article V "call for action by deliberative assemblies"); *see also* Ishikawa, *supra* note 218, at 306 ("In originating amendments, Congress serves as the single, deliberate body best able to suggest improvements to constitutional system.")

221. *See* Amar, *supra* note 198, at 460 ("Popular sovereignty cannot be satisfied by a Government monopoly on amendment, for the Government might simply block any constitutional change that limits Government's power, even if strongly desired by the People.")

1. Term Limits for Members of Congress

The public often displays broad support for congressional term limits. Indeed, by the time the Supreme Court found term limit statutes unconstitutional in *U.S. Term Limits, Inc. v. Thornton*,²²² twenty-three states had passed such laws by popular referendum.²²³

But even with strong popular support,²²⁴ term limits at the national level are nearly impossible to enact. With the Supreme Court having found state term limit statutes unconstitutional when applied to members of Congress, proponents of the limits must turn to the constitutional amendment process as their sole remaining option. However, Article V of the Constitution requires that Congress or two-thirds of the state legislatures initiate the amendment process.²²⁵ And neither Congress nor thirty-four state legislatures are likely to push for a term limit amendment. Members of Congress would vote themselves out of office, and state legislators would put constraints on their future opportunities – many of them aspire to membership in Congress. More importantly, state legislators will not want to impose term limits on themselves, and therefore, would be unlikely to invite pressure to enact term limits on themselves by voting for term limits for members of Congress.²²⁶ In other words, the people with authority to enact term limits by constitutional amendment face a powerful conflict of interest that likely will deter them from acting.²²⁷ Article V's mechanisms for constitutional amendment are inadequate in the context of term limits.²²⁸

222. 514 U.S. 779 (1995).

223. Kathleen M. Sullivan, Comment, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 78 (1995). The wisdom of term limits is debatable. For a sampling of the literature, see *id.*; Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83 (1997); Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623 (1996).

224. There is some question as to the strength of public support for term limits.

225. U.S. CONST. art. V.

226. If voters in the state impose term limits on state legislators by referendum, the legislators still would be reluctant to support term limits on members of Congress. With their state office-holding careers shortened, the legislators probably would not also want to limit the duration of their potential federal office-holding careers.

227. For example, recall how many officeholders have reneged on their promises to accept term limits voluntarily. See Sam Howe Verhovek, *Some Backtracking on Term Limits*, N.Y. TIMES, Apr. 12, 1999, at A20 (profiling members of Congress who have reneged on term limit promises).

228. See Kobach, *supra* note 213, at 1973-74 (noting that alternative amendment process is necessary for term limit amendment because direct stake that existing members of Congress have in existing institutional arrangement makes it impossible to persuade two-thirds of both houses to propose term limit amendment).

The conflict of interest not only will discourage legislators from acting, it also will counteract the usual incentive that legislators have to respond to their constituents.²²⁹ When it comes to term limits, one cannot rely on legislators' desire for reelection to ensure that they will heed public preferences. People *might* vote legislators out of office for not supporting term limits, but legislators *will* turn themselves out of office if they enact term limits. A legislator's chances for a long tenure always are better in the absence of term limits.²³⁰

In sum, concerns about legislative conflict of interest provide a justification for permitting a term limits amendment without observing the strict requirements of Article V. Voters should be able to propose and ratify a term limits amendment without having to rely on the discretion of Congress or the state legislatures.²³¹

2. Campaign Finance Reform

Campaign finance reform is a second issue for which legislative conflicts of interest might thwart constitutional amendment. After the Supreme Court's decision in *Buckley v. Valeo*,²³² many elements of campaign finance reform require a constitutional amendment for enactment. However, one can question whether members of Congress or the state legislatures would carry out their constituents' desires for a constitutional amendment that would implement campaign finance reform. Incumbents tend to benefit from the current campaign finance system, and so generally will not see campaign finance reform as furthering their interests. Moreover, as with term limits, the usual need to respond to constituents may not adequately counteract the influence of personal interest. If legislators support campaign finance reform, they may do

229. Cf. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) ("The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections . . . are the restraints on which the people must often rely solely, in all representative governments.").

230. Some legislators might serve longer by supporting and enacting term limits. If their constituency strongly supports term limits, the legislators might have to support term limits to gain reelection. Even so, it remains that a legislator's prospects for a *long* tenure are always better without term limits.

231. I mentioned above how public pressures at the state level sometimes can overcome congressional conflicts of interest with respect to Article V. See *supra* note 219 (discussing popular pressure at state level). However, the Supreme Court has made it difficult for the public to exert its pressure for a term limits constitutional amendment. In *Cook v. Gralike*, 531 U.S. 510 (2001), the Court prohibited states from adding to congressional ballots statements reflecting a candidate's non-support of a term limits constitutional amendment.

232. *Buckley v. Valeo*, 424 U.S. 1 (1976).

more damage to their prospects for reelection (by helping their opponents) than they would if they opposed campaign finance reform.

On this issue, the conflicts argument is less clear than it is for term limits. Many incumbents dislike the current system of campaign financing, with its constant demand for more fundraising, and *Buckley* reached the Supreme Court precisely because Congress enacted measures to reform campaign financing in 1974. Congress passed new reform measures in March 2002.²³³ Still, it is not clear that Congress or the state legislatures would be willing to bring forward a constitutional amendment to override *Buckley*. Indeed, campaign finance reform in the states has proceeded primarily by voter initiative.²³⁴ In short, while good reason exists to think that voters ought to have the option to use non-Article V methods to incorporate campaign finance reform into a constitutional amendment, the case is weaker than the case for a term limits amendment.

Whether the public should be able to go outside Article V only for term limits or also for campaign finance reform, the important point is that conflict of interest analysis is a solid answer to the question of whether Article V provides the exclusive means for amending the Constitution. When a conflict of interest would discourage Congress and the state legislatures from acting under Article V, constitutional requirements should not stymie the public.

IV. Conclusion

This Article has argued that conflicts of interest deserve a much greater role in constitutional interpretation than they currently enjoy. Conflicts entail the same core concern about abuse of governmental power that underlies the

233. See Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (amending various sections of Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-455).

234. In Arizona, Maine, and Massachusetts, voters adopted campaign finance reform by referendum. See Carey Goldberg, *Court Upholds Maine Campaign Law*, N.Y. TIMES, Nov. 9, 1999, at A14 (reporting on decision of federal court to uphold law that offers incentives for candidates to take public money instead of private contributions). In Vermont, the legislature enacted campaign finance reform. See *Landell v. Sorrell*, 118 F. Supp. 2d 459, 462-63 (D. Vt. 2000) (finding Vermont campaign law's limits on contributions to candidates and political parties constitutional, but limits on campaign expenditures and contributions from political parties to candidates unconstitutional), *aff'd in part, rev'd in part, and remanded*, *Landell v. Vt. Pub. Interest Research Group*, 300 F.3d 129 (2d Cir. 2002) (this Second Circuit opinion has been withdrawn at the request of the court pending further proceedings and possible amendment). Similarly, the Connecticut legislature passed a campaign finance reform bill in April 2001, but the governor vetoed the bill. See Paul Zielbauer, *Rowland Vetoes Bill Setting Limits on Campaign Spending*, N.Y. TIMES, May 6, 2000, at B5 (noting that governor's explanation for vetoing bill was that it raised serious First Amendment concerns).

separation of powers doctrine. Consideration of conflicts therefore readily ties into fundamental constitutional principles.

Given its connection to a core constitutional value, one would expect consideration of conflicts to provide important insights into constitutional interpretation, and this Article's arguments show how it can do so. Taking account of conflicts can provide answers to three important constitutional puzzles. It can give a strong functionalist theory for separation of powers cases, it can resolve the tension between judicial supremacy and the political question doctrine, and it can indicate when constitutional amendment may proceed outside of Article V.

Has this Article exhausted the role that conflicts of interest can play in constitutional interpretation? Probably not. Conflicts concerns can arise whenever Congress, the President, or the courts exercise their authority. Further thought by other scholars and the author of this Article likely will yield other constitutional questions that can be better understood from the perspective of conflicts of interest.²³⁵

235. One might expect conflicts of interest concerns to be important for challenges to a state legislature's reapportionment of voting districts. Currently, legislatures redraw district lines in ways that protect incumbents rather than in ways that would make elections more competitive. See Samuel Issacharoff, *In Real Elections, There Ought to Be Competition*, N.Y. TIMES, Feb. 16, 2002, at A19 (expressing dismay at redistricting process ran by political insiders). Conflicts of interest analysis could provide a strong basis for courts to impose nonpartisan methods of redistricting.