

CONFLICTS OF INTEREST AND THE CONSTITUTION

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Increasingly, society has recognized the concerns posed by conflicts of interest. 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, rules have been adopted to contain the influence of conflicts of interest. Codes of professional responsibility limit the ability of lawyers to represent both sides of a dispute, principles of corporate law prevent company directors from trading on inside information, and rules of agency law prohibit trustees from mingling their own funds with those of the trust.

Conflicts of interest also can play a critical role in shaping constitutional doctrine. However, that role is seriously underappreciated. Courts and scholars mention conflicts concerns on occasion, but there have been few analyses of the role of conflicts of interest in constitutional interpretation. Consequently, legal scholarship has not adequately considered how constitutional law does and should take account of such conflicts.

In this article, I offer a fuller discussion of conflicts of interest and constitutional interpretation. In particular, I will show how consideration of conflicts can help us solve 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 whether the process of constitutional amendment is governed exclusively by Article V. Addressing conflicts of interest can supply the missing theoretical principle for each of these important constitutional problems.

In short, from separation of powers concerns to the political question doctrine and the constitutional amendment process, we can bring more coherence to constitutional law if we judge constitutional questions according to the influence that conflicts of interest might have.

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INTRODUCTION

Increasingly, society has recognized the concerns posed by conflicts of interest. 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.¹ 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, that role is seriously underappreciated. Courts and scholars mention conflicts concerns on occasion, but there have been few analyses of the significance of conflicts of interest for constitutional interpretation, and they have been limited to one or another area of doctrine.⁵ Consequently, legal scholarship has not adequately considered how constitutional law does

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. If stock analysts for the automobile sector invest in General Motors, for example, 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.

The importance of conflicts of interest has been recognized not only in law, but also in other fields, including medicine. See, e.g., David Orentlicher, Paying Physicians More to Do Less: Financial Incentives to Limit Care, 30 U. Rich. L. Rev. 155, 161-162 (1996); Daniel P. Sulmasy, Physicians, Cost Control, and Ethics, 116 Annals Intern. Med. 920 (1992); Robert M. Veatch, Physicians and Cost Containment: The Ethical Conflict, 30 Jurimetrics J. 461 (1990) (all discussing the concerns that arise if physicians receive greater compensation for delivering less care to their patients).

² Model Rule of Professional Conduct 1.7(a) generally forbids lawyers from representing clients with directly adverse interests.

³ 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 (1998) (discussing how insider trading law reflects common law agency principles).

⁴ Restatement (Second) of Trusts, § 179 (1959); Cal. Prob. Code § 16009(a); Ind. Code § 30-4-3-6(b)(5); N.Y. Est. Powers & Trusts Law §11-1.6(a).

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 has considered conflicts of interest in the context of separation of powers doctrine. Paul R. Verkuil, Separation of Powers, the Rule of Law and the Idea of Independence, 30 Wm. & Mary L. Rev. 301 (1989), and his writing has sparked some commentary, primarily in the symposium issue in which his article appeared. See Paul Gewirtz, Realism in Separation of Powers Thinking, 30 Wm. & Mary L. Rev. 343 (1989); Robert F. Nagel, A Comment on the Rule of Law Model of Separation of Powers, 30 Wm. & Mary L. Rev. 355 (1989); Richard J. Pierce, Jr., Separation of Powers and the Limits of Independence, 30 Wm. & Mary L. Rev. 365 (1989); Peter M. Shane, The Separation of Powers and the Rule of Law: The Virtues of “Seeing the Trees,” 30 Wm. & Mary L. Rev. 375 (1989); Laura S. Fitzgerald, Cadenced Power: The Kinetic Constitution, 46 Duke L.J. 679, 720-722 (1997); 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). See also William B. Gwyn, The Meaning of the Separation of Powers 128 n.1 (1965) (concluding that the “purest version” of separation of powers doctrine is a “rule of law” version under which it is essential that the people who make laws not also administer them).

and should take account of conflicts of interest.⁶

In this article, I offer a fuller discussion of conflicts of interest and constitutional interpretation. In particular, I will show how consideration of conflicts can help us 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 whether the process of constitutional amendment is governed exclusively by Article V.

First, responding to concerns with conflicts of interest can help resolve a serious problem with the “functionalist” approach to separation of powers issues.⁷ The functionalist approach helps us understand why Congress can create administrative agencies that exercise legislative power and why Congress can authorize independent federal prosecutors who exercise executive authority without Presidential oversight. However, a functionalist approach has trouble telling us when Congress goes too far in reallocating national government authority, when the reallocation would upset the balance of power among Congress, the President and the courts. In other words, while a functionalist approach responds to problems with the leading alternative theory—the “formalist” approach to separation of powers questions⁸—functionalist analysis suffers from a lack of identifiable limits. How do we know when a reallocation of power too greatly undermines the constitutional structure? I will argue in this article that taking account of conflicts of interest can give us the limiting principle needed to make functionalism work.

Taking account of conflicts of interest can also resolve an important tension that exists between *Marbury v. Madison*’s principle of judicial supremacy⁹ and the political question doctrine.¹⁰ 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 U.S. Supreme Court has been recognized as the ultimate authority on constitutional questions.¹¹ By understanding *Marbury* and the political question doctrine in terms of the concerns raised by conflicts of interest, we can establish a political question doctrine that fits well with the principle of judicial supremacy.

Considering conflicts of interest can illuminate a third important constitutional question, this one having to do with the process for constitutional amendment. When Article V describes the steps to take

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* (1997); Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* (3d ed. 1999). Other treatises touch on conflicts of interest briefly. See 1 Laurence H. Tribe, *American Constitutional Law* 1427 (3d ed. 2000) (referring to conflicts of interest on 4 out of 1381 pages); 3 Chester James Antieau & William J. Rich, *Modern Constitutional Law*, at Index-17 (2d ed. 1997) (addressing conflicts of interest to the extent that they compromise a criminal defendant’s right to counsel).

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. Fitzgerald, *supra* note 5, at 702.

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 appropriate branch (executive tasks by the executive branch, etc.). *Id.* at 690.

⁹ 5 U.S. (1 Cranch) 137, 176-180 (1803).

¹⁰ Under the political question doctrine, certain disputes should be resolved by the political branches of government (the executive and legislative branches) rather than by the judicial branch. Accordingly, when faced with a political question, courts should dismiss the case. Chemerinsky, *supra* note 6, at 117.

¹¹ One can question whether *Marbury* really established a broad principle of judicial supremacy, Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet, *Constitutional Law* 51-52 (4th ed. 2001), but it has been widely interpreted that way.

For a recent statement of the Court’s supremacy in constitutional interpretation, see *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (writing 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 (1987) (distinguishing between the Constitution as the supreme law and the Supreme Court’s interpretation of the Constitution as having less force).

in amending the Constitution, its language 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. This has led a number of scholars to argue that the Constitution may be amended in ways other than those spelled out in Article V.¹² However, we still need a satisfactory principle that tells us when an amendment need not follow Article V. Taking account of conflicts of interest can supply that principle.

In short, from separation of powers concerns to the political question doctrine and the constitutional amendment process, we can bring more coherence to constitutional law if we judge constitutional questions according to the influence that conflicts of interest might have.¹³

¹² Bruce Ackerman and Akhil Amar are two of the most prominent proponents of this view. See, *infra*, notes 170-178 and accompanying text.

¹³ Moreover, by thinking about the concerns raised by conflicts of interest, we can respond to an important point made by Robert Pushaw. As he observes, 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 (e.g., the justiciability doctrines). Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 *Cornell L. Rev.* 393 (1996). Yet there is an artificiality to treating matters like the political question doctrine as distinct topics from those issues traditionally addressed under separation of powers analysis (e.g., the legislative veto, the balanced-budget law and the independent counsel law). 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 gives us one common approach.

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. To begin my discussion, I will explain what I mean by conflicts of interest. I have in mind situations in which a decision maker's neutrality or objectivity may be undermined by the decision maker's desire—or duty—to serve conflicting interests.¹⁴ 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 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,¹⁵ but, in this case, the physician can only put one patient's needs first. Or, suppose a lawyer provides estate planning counsel for a husband and wife, and the couple decides to become divorced. The lawyer would have a duty of zealous advocacy to both clients, but would have difficulty carrying out that duty for both clients fully.¹⁶

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—indeed 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 that entails the lawmaker's own institutional or other personal interests coming into play. 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. And their own power or welfare has both institutional and other 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. And when lawmakers act, the extent of their authority may be at stake. Federal legislation might not only address an area of regulatory concern, like immigration, it might also have the effect of enhancing the power of Congress at the expense of the executive branch.¹⁷ 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.¹⁸

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

¹⁴ At one time, it was common for scholars to speak of “potential” versus “actual” conflicts of interest. Those terms are still sometimes used, but most scholars now speak 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. I will use this latter approach.

¹⁵ Orentlicher, *supra* note 1, at 161; Veatch, *supra* note 1, at 469.

¹⁶ 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. Geoffrey C. Hazard, Jr., Susan P. Koniak, Roger C. Cramton, *The Law and Ethics of Lawyering* 679-681 (2d ed. 1994).

¹⁷ This example is taken from *INS v. Chadha*, 462 U.S. 919 (1983), discussed, *infra*, at text accompanying notes 40-42, 123-126.

¹⁸ This example is taken from *Myers v. United States*, 272 U.S. 52 (1926), discussed, *infra*, at text accompanying notes 111-112.

Department's antitrust suit against Microsoft,¹⁹ 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.²⁰

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' 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.²¹ 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.²² Judges, legislators and presidents must give consideration to a broad range of interests, but they must not inject their own interests into the mix.²³

¹⁹ *United States v. Microsoft*, 87 F. Supp. 2d 30 (D.D.C. 2000).

²⁰ 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).

²¹ This example is taken from *Coleman v. Miller*, 307 U.S. 433 (1939), discussed, *infra*, at text accompanying notes 157-161.

²² This example is taken from *INS v. Chadha*, 462 U.S. 919 (1983), discussed, *infra*, at text accompanying notes 40-42, 123-126.

²³ 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 124 (James Madison) (Isaac Kramnick ed. 1987) (drawing on the writings of John Locke, as found in John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government (The Second Treatise of Government)* ¶¶ 13, 87-91, 125, in *Of Civil Government: Second Treatise* 11-12, 68-73, 103 (Russell Kirk rev. ed., 1955) (1st ed. 1689).

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 supposed 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.

In short, by taking account of conflicts of interest, we can try to prevent a corruption of 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 a decision maker is actually influenced by personal interests, 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 decision was driven by the merits or by the Justices' concern for their judicial colleague.²⁴ 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 drove the vote.²⁵ Similarly, if Congress votes to require its approval before the President can fire an executive branch official, we cannot know whether the vote was motivated by the desire for adequate oversight of Presidential decisions or whether it was motivated by the desire by Congress for greater power. Appearances of impropriety undermine public trust even when nothing untoward has occurred.

²⁴ This example is taken from *Nixon v. United States*, 506 U.S. 224 (1993), discussed, *infra*, at text accompanying notes 149-156.

²⁵ To be sure, courts might be unduly harsh when reviewing an impeachment and conviction of a judge, out of anger for the harm to the judiciary done by their errant colleague. But that possibility does not change the fact that a lenient court could be viewed 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.

Conflicts of Interest and Constitutional Theory

It not only makes very good sense to take account of conflicts of interest in constitutional analysis, avoiding conflicts ties into fundamental constitutional principle.²⁶ Our constitutional system is ultimately premised on a rule of law that applies to everyone.²⁷ Or, in the words of John Locke, “[n]o man in civil society can be exempted from the laws of it.”²⁸ 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 are not entitled. We want our executive officers, judges and legislators to decide in the public interest rather than their own interest.

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. 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.

In the remainder of this article, I will discuss how constitutional doctrine can be better understood from the perspective of avoiding situations in which officers in different branches of the national government would face a conflict of interest between their governmental duties and their own interests. Each branch of government must balance the interests of different constituencies and the demands of different principles, and conflicts will often arise among the different constituencies or principles. It is part of the duty of government to resolve those conflicts. However, what is not acceptable is for government officers to decide on the basis of their own institutional or other personal interests; government officials must not compromise their duties to the public in order to satisfy their loyalties to themselves.

One final introductory point. As I have observed, government officials face conflicts of interest that can implicate a range of personal interests, including institutional and financial interests. In this article, I will address the institutional dimension of conflicts of interest for government officials.

II. CONFLICTS OF INTEREST AND CONSTITUTIONAL INTERPRETATION

Taking account of conflicts of interest has its greatest relevance to cases that turn on the division of authority among the three branches of the national government. And 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 constitutional framers proposed a tripartite national government, they sought to limit the accumulation of power in the new government.²⁹ Too much power in the hands of a single national authority would pose too great a risk of tyranny,³⁰ a quintessential abuse of authority. Just as the concern about abuse of authority is a key concern behind the separation of powers, so it is a key concern about conflicts of interest. When individuals who exercise power face a personal conflict of interest, we worry that they will misuse their power, that they will use power for their

²⁶ William Gwyn and Paul Verkuil have been important voices in articulating this view. See Gwyn, *supra* note 5; Verkuil, *supra* note 5.

²⁷ Gwyn, *supra* note 5, at 128; Verkuil, *supra* note 5, at 303-307.

²⁸ Locke, *supra* note 23, ¶94, at 77.

²⁹ The Federalist No. 51, at 319-320 (James Madison) (Isaac Kramnick ed. 1987).

³⁰ Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet, *Constitutional Law* 389 (3rd ed. 1996).

own good rather than for the good of the public.³¹

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 approach would have been to appeal to the good faith of government officials.³² 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 interest than to respond by asking government officers to put their self-interest aside.³³ Thus, rather than relying on legislators, presidents and judges to put the public interest first, we have structured our constitutional system to make 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?

What I will argue is 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. I will illustrate each of these benefits with specific examples. First, I will argue that taking account of conflicts can respond 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, I will show 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, I will demonstrate 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.

³¹ Still, concern about conflicts transcends separation of powers, as I will discuss in subsequent sections of this article.

³² Appeals to good faith are commonly used. 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.” American College of Physicians, Physicians and the Pharmaceutical Industry, 112 *Annals Internal Med.* 624, 624 (1990).

³³ The Federalist No. 10, at 124-125 (James Madison) (Isaac Kramnick ed. 1987).

A. Separation of Powers and Conflicts of Interest

For many years, scholars have debated how the Supreme Court should go about its review of 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.³⁴ Accordingly, if power that belonged 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.³⁵

From these competing considerations, we might conclude that a strict separation of powers 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 power are ultimately faithful to constitutional principle. Alternatively, we might conclude that unwavering adherence to the original framework is necessary. In this view, the constitutional framework took into account 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.³⁶

With two important perspectives, two leading schools of thought have emerged regarding separation of powers doctrine. One group 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.

³⁴ Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573, 577 (1984).

³⁵ Thus, for several decades now, the Supreme Court has rarely questioned delegations of authority by Congress to the executive branch. Stone et al., *supra* note 11, at 365-367. For its most recent affirmation of Congressional delegations of authority, see *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 121 S. Ct. 903, 911-914 (2001).

³⁶ 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); Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991).

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 *Bowsher v. Synar*,³⁷ the Court struck down the balanced budget act on account of its authorization of the Comptroller General to specify spending reductions in the event that Congress exceeded its budget targets in future years. 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.”³⁸

Just as Congress could violate the Constitution by assuming executive power for itself, it would violate the Constitution, according to formalists, if it 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 (a) exercise legislative power delegated by Congress and (b) engage in adjudicatory activities.³⁹

Congress might violate the division of power in a third way--by trying to legislate without meeting the Constitution’s requirements for legislating. In *INS v. Chadha*,⁴⁰ the Court invalidated the legislative veto⁴¹ 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.⁴²

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 take national power outside the three traditional branches of government.⁴³ 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.”⁴⁴ Innovation is driven not only by practicalities. It also reflects underlying principle. 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.⁴⁵ Innovative institutions permit greater efficiency.

³⁷ 478 U.S.714 (1986).

³⁸ *Bowsher*, 478 U.S. at 726.

³⁹ Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1233-1249 (1994). The Supreme Court has not followed formalist thinking in the example of administrative agencies. Lawson also criticizes administrative agencies because they operate beyond the direct control of the President, thereby undermining Presidential control of the executive branch. *Id.*

⁴⁰ 462 U.S. 919 (1983).

⁴¹ With a legislative veto, either the House or Senate acting alone has authority to veto action taken by the executive branch to implement a statute. Legislative veto provisions had been commonly included in federal statutes until the Supreme Court found the provisions unconstitutional in *Chadha*. *Id.* at 967 (White, J., dissenting) (observing that the Court’s invalidation of the legislative veto affected “nearly 200 other” statutes).

⁴² *Id.* at 946-955.

⁴³ 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.

⁴⁴ *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The *Mistretta* Court also quoted an earlier opinion in which it had written “[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.” *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

⁴⁵ Verkuil, *supra* note 5, at 303-304.

Even if we wanted to follow a formalist approach, it would not be possible to do so. We cannot develop independent definitions of executive, judicial and legislative action and assign those actions to their corresponding branch of government.⁴⁶ 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.⁴⁷ Inevitably, officials in the executive or judicial branch will be doing the same kinds of things when they exercise executive or judicial power that members of Congress do when they pass legislation. Thus, for example, when the Court in *Chadha* defined 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,”⁴⁸ the Court was including in its definition actions by Presidents when they issue executive orders,⁴⁹ actions by administrative agencies when they issue regulations,⁵⁰ and actions by the courts when they issue opinions.⁵¹

The Court has illustrated the definitional problem in other opinions. In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*,⁵² the Court invalidated a review board composed of nine members of Congress. According to the Court, the review board violated separation of powers principles if it exercised legislative power—the legislative power must be exercised by Congress as a whole, not by just nine of its members.⁵³ Alternatively, if the review board exercised executive power, it was still unconstitutional since members of the legislative branch would be usurping executive prerogatives.⁵⁴ But if formalist analysis is correct that executive and legislative functions are distinctive, then the Court should have been able to tell us whether the review board was engaged in legislative action or whether it was engaged in executive action.⁵⁵

One could make formalist analysis work in a tautological way. One could say that, when the legislature is acting, it is engaged in legislative action and it therefore must follow the requirements in Article I for legislative action (e.g., passage by both the House and Senate). Similarly, when executive

⁴⁶ William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 *Geo. Wash. L. Rev.* 474, 476 (1989). Even proponents of formalism acknowledge the difficulty of the definitional problem. Lawson, *supra* note 39, 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 (1990) (acknowledging that the definitional task is “a difficult and perhaps an insuperable” one).

⁴⁷ *The Federalist* No. 37, at 244 (James Madison) (Isaac Kramnick ed. 1987). Madison’s observation has been confirmed by Justice Scalia’s dissent in *Morrison v. Olson*. 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 once seen as a judicial function. Gwyn, *supra* note 46; Harold Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 *Am. U.L. Rev.* 275 (1989).

⁴⁸ *Chadha*, 462 U.S. at 952.

⁴⁹ 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.

⁵⁰ In other words, formalist thinking requires a serious revival of the non-delegation doctrine. Lawson, *supra* note 39, at 1237-1241.

⁵¹ Efforts by scholars to define legislative action are no more successful than the Court’s 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.

⁵² 501 U.S. 252 (1991).

⁵³ *Id.* at 276.

⁵⁴ *Id.* at 275-276.

⁵⁵ Martin S. Flaherty, *The Most Dangerous Branch*, 105 *Yale L.J.* 1725, 1735-1736 (1996).

branch officials are acting, they are engaged in executive action and therefore must be subject to the oversight of the President rather than Congress or the judiciary.⁵⁶ But tautological approaches do not tie doctrine to theory. Presidents could easily encroach upon legislative prerogatives since by definition whatever they do is executive action.

Formalist analysis is problematic also because it rests on a faulty view that the power 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.⁵⁷ And while Congress decides whether to pass legislation, the President can sign or veto Congressional bills.⁵⁸ As Richard Neustadt has 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.⁵⁹

1. 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 vast bureaucracies are needed to oversee far-reaching and complicated legislation.⁶⁰ In a number of cases, the Court has employed functionalist analysis to rebuff separation of powers challenges. The Court has upheld the ability of Congress to create administrative agencies and independent commissions⁶¹ and to enact an independent counsel law.⁶² 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."⁶³

Functionalist analysis does not permit all reallocations of authority. Sometimes, 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

⁵⁶ As Justice Stevens observed in his concurring opinion in *Bowsher v. Synar*, the majority opinion seemed to employ in fact a tautological approach to separation of powers analysis. *Bowsher*, 478 U.S. at 751 (Stevens, J., concurring). 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. *Id.* at 732-733. Since executive action must be performed by executive branch officers, 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. *Id.* at 734-736. 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.

⁵⁷ 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.

⁵⁸ U.S. Const., art. I, § 7, cl. 2.

⁵⁹ Richard Neustadt, *Presidential Power* 101 (1976) (cited in Walter F. Murphy, James E. Fleming & Sotirios A. Barber, *American Constitutional Interpretation* 424 (2nd ed. 1995)).

⁶⁰ Strauss, *supra* note 34, at 583-586.

⁶¹ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (upholding the establishment of the Federal Trade Commission); *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding the creation of the United States Sentencing Commission).

⁶² *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the independent counsel provisions of the Ethics in Government Act of 1978, which allowed for the appointment of independent persons to investigate and prosecute high-ranking members of the executive branch).

⁶³ *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 847-848 (1986) (quoting *Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568, 587 (1985)).

power of the other branches.⁶⁴

A key problem with functionalist analysis as a constitutional doctrine, however, is its openendedness.⁶⁵ Identifying whether a reallocation of authority goes too far in disrupting the balance of power is a very difficult endeavor. If the Supreme Court had upheld the legislative veto in *INS v. Chadha*,⁶⁶ would Congress have thereby become too powerful? Or, as Justice White suggested in his dissent, would Congress only have been able to limit the transfer of authority that it was making to the administrative agencies of the national government?⁶⁷ With functionalist analysis, 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 us much guidance in deciding whether we have gone too far in trying to accommodate.⁶⁸ According to one characterization of functionalist analysis, the issue 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.”⁶⁹

To be sure, this kind of fuzziness is a common problem in constitutional law. Consider, for example, the inquiry into whether a search and seizure is “reasonable” under the Fourth Amendment. 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*⁷⁰ and *Roe v. Wade*⁷¹). However, it is much more difficult to predict the effect of an alteration in the national government’s balance of power. In short, 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, we have a very hazy benchmark.⁷²

I shall have more to say about this later; in a subsequent section, I will recommend that courts take conflicts of interest into account as a way to bring some clarity to functionalist analysis.

⁶⁴ *Morrison*, 487 U.S. at 693-695.

⁶⁵ M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 Va. L. Rev. 1127, 1144-1145 (2000); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 Sup. Ct. Rev. 225, 234-235.

⁶⁶ 462 U.S. 919 (1983).

⁶⁷ *Id.* at 967-974 (White, J., dissenting).

⁶⁸ Redish & Cisar, *supra* note 5, at 454, 476-477. As Cass Sunstein has observed, functionalist approaches “allow[] for a large degree of discretion (and therefore uncertainty) both in characterizing the appropriate constitutional commitment and in deciding whether it has been violated.” Cass Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 496 (1987).

⁶⁹ 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 have acted within their constitutional restraints (e.g., the requirement that legislation be passed by both houses of Congress and presented to the President) and, if so, whether there has been an undue threat to the balance of power. *Id.* at 1256-1257.

⁷⁰ 347 U.S. 483 (1954) (finding separate educational facilities for whites and African-Americans to be unconstitutional).

⁷¹ 410 U.S. 113 (1973) (finding a constitutional right to abortion for pregnant women).

⁷² Redish & Cisar, *supra* note 5, at 476.

1. Judicial Abstention

Some scholars have abandoned formalism and functionalism and turned to third ways.⁷³ For example, we might adopt a Holmesian abstention approach.⁷⁴ Under this model, courts would abstain from deciding disputes about the balance of power between the executive and legislative branches. 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. 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. There is no need for courts to intervene because the structure is self-protecting.

The problem with this model is that it demands an abdication of responsibility by the judiciary. If the Holmesian 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 means that the executive and legislative branches are relieved of an important check on their power.

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 we at least need the judiciary to step in when that happens. The idea here is analogous to John Hart Ely's justification for when courts may override a legislature on constitutional grounds. Although representative democracy is designed to deliver just outcomes, the representative process may break down.⁷⁵ People possessing power may "chok[e] off the channels of political change" to preserve their status and prevent the disempowered in society from using the democratic process to effect change.⁷⁶ In Ely's view, judicial intervention is needed to respond to breakdowns in process, to reinforce the operation of representative democracy.⁷⁷ Similarly, judicial intervention is sometimes needed to reinforce our separation of powers structure.

1. Appealing to Principle—Functionalism Limited by Conflicts of Interest

To sort out the debate over the separation of powers, we can turn to first principles. We know that the structure of the national government, with its division of authority, was designed to serve two important goals—efficiency and liberty.⁷⁸

A division of authority promotes efficiency in several ways. By pairing a single executive with the legislative branch, for example, the Constitution gave the government someone who could act with decisiveness, speed, and secrecy.⁷⁹ Dividing authority promotes efficiency also 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, power is dispersed rather than concentrated. Moreover, public officials will find it more difficult to place themselves above the law when power resides elsewhere in

⁷³ See, e.g., Merrill, *supra* note 65, at 235-259 (arguing for a "minimal conception" of separation of powers doctrine which would require all federal agencies to be located within—and be accountable to—one of the three branches of the national government); Redish & Cisar, *supra* note 5, at 474-490 (advocating for a "pragmatic" form of formalism); Fitzgerald, *supra* note 5, at 766-779 (arguing for a more fluid theory that would judge challenged action in terms of whether the action promotes the principles of participation and accountability).

⁷⁴ Sunstein, *supra* note 68, at 494-495 (describing but not endorsing Holmesian approaches).

⁷⁵ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 102-103 (1980).

⁷⁶ *Id.* at 103.

⁷⁷ *Id.* at 102-104, 105-134, 135-179.

⁷⁸ Verkuil, *supra* note 5, at 303-304.

⁷⁹ *Id.* at 303; Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *Ark. L. Rev.* 23, 37-39 (1995); Pushaw, *supra* note 13, at 402-403.

government.⁸⁰ The members of Congress who pass laws are subject to the President's execution of the laws, and both are subject to the judiciary's interpretation of 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.⁸¹

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 rested governmental authority in the people, and they therefore made the national government accountable to the people.⁸² The President and members of Congress have to answer to the electorate by running for reelection if they want to remain in office.⁸³ Federal judges cannot be voted out of office, but the public 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 first principles of efficiency, liberty and accountability tell us for separation of powers doctrine? First, the goal of efficiency pushes us toward a functionalist analysis. If a reallocation of authority is needed 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.⁸⁴ Indeed, in upholding the independent counsel law and the federal sentencing commission, the Court recognized that Congress must be given the freedom to develop new structures and allocations of authority to respond to the demands and necessities of governing.⁸⁵

In addition to a theory that allows for flexibility, we need a theory that does not permit the government to compromise the interests in liberty and accountability. We need a theory that balances the need for innovation with the need to prevent both tyranny and the loss of accountability. Functionalist analysis purports to provide that balance, but we come back to the problem of knowing when an innovation requires too great a sacrifice of liberty or accountability. As I have discussed, such interests are inherently difficult to measure in the context of allocating national authority. Do independent agencies or commissions dilute too much the power of Presidents by limiting their control over the execution of the laws,⁸⁶ or, conversely, do independent agencies and commissions allow Congress to

⁸⁰ Verkuil, *supra* note 5, at 306; Pushaw, *supra* note 13, at 403.

⁸¹ Murphy, et al., *supra* note 59, at 61, 424-425.

⁸² *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part); Bernard Schwartz, Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegations of Power, 72 Nw. U. L. Rev. 443, 445 (1977); David Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance, 83 Mich. L. Rev. 1223, 1237-1238 (1985); Redish & Cisar, *supra* note 5, at 451; Pushaw, *supra* note 13, at 411-412; Fitzgerald, *supra* note 5, at 725-734, 767-773.

⁸³ 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.

⁸⁴ Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Penn. L. Rev. 1513, 1526 (1991) (criticizing formalist analysis for not permitting the national government to "respond to new needs in creative ways").

⁸⁵ *Morrison*, 487 U.S. at 693-694 (in upholding the independent counsel, observing that the need to fashion a workable government precludes a requirement that powers be strictly separated); *Mistretta*, 488 U.S. at 381 (in upholding the federal sentencing commission, noting that separation of powers must be understood flexibly to ensure an effective national government).

⁸⁶ Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1165-1168 (1992) (describing the unacceptability of independent commissions exercising executive authority to "unitary executive theorists"); Saikrishna Bangalore Prakash, Hail to the Chief Administrator: The Framers and the President's Administrative Powers, 102 Yale L.J. 991 (1993) (arguing that the historical

engage in necessary delegations of authority without creating an executive branch that is too powerful?

In short, what separation of powers doctrine needs is a principle that will provide some tangible limits to a functional type of analysis. As suggested earlier,⁸⁷ the need for limiting principles is a common need in constitutional law. When the Supreme Court recognizes the idea of fundamental rights of liberty that are protected by the Fourteenth Amendment's due process clause, it needs some way to avoid unprincipled expansion of that concept. We might be able to agree that liberty rights include the freedom to make important individual decisions, but we will have difficulty agreeing on a way to distinguish important decisions from those that are unimportant.⁸⁸ 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,⁸⁹ or why police officers can be prohibited from wearing beards or growing their hair long enough to touch their ears.⁹⁰ Accordingly, the Court has looked for limiting principles for liberty rights, sometimes invoking tradition as a source of fundamental rights,⁹¹ sometimes placing matters of family and bodily integrity at the heart of liberty.⁹² An analogous limiting principle, however, is lacking in functionalist theory for separation of powers questions.

For a principle to limit functionalism in separation of powers analysis, I believe we can look to concerns about conflicts of interest. Although we may not be able to decide directly whether a reallocation of authority goes too far in disrupting the balance of power, we can look for indirect evidence of disruption by considering the quality of the process that led to the reallocation. When substantive standards are difficult to fashion, procedural standards often provide a good alternative. If it is difficult to know whether the outcome is appropriate, in other words, we can see whether there has been a breakdown in process that would make us less confident about the substantive results. Thus, for example, we have John Hart Ely's theory of representation-reinforcement that justifies judicial intervention on constitutional grounds when the majoritarian process appears to give inadequate voice to a particular group's interests (e.g., a racial minority's interests).⁹³ The role of the courts, in Ely's view, is to reinforce the representative process, because a properly functioning representative process should be making substantive choices for society.

It is at the point of process that conflicts of interest come in. In the context of the allocation of national authority, an important indicator of a breakdown in process would be evidence that Congress was motivated by self-interest rather than public interest when it tried to reallocate authority. When conflicts of interest may be influencing decisions, we must question the trustworthiness of the results. 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 my subsequent discussion of separation of powers cases, I will show 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.

How would conflicts of interest concerns be incorporated into separation of powers theory as a limiting principle for functionalist analysis? For a reallocation of authority to survive constitutional scrutiny, it must first respond to the need for innovation—that is, the reallocation must genuinely serve a

evidence demonstrates the framers' intent to have the 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.

⁸⁷ See, *supra*, at text accompanying notes 70-72.

⁸⁸ Jed Rubenfeld, *The Right of Privacy*, 102 *Harv. L. Rev.* 737, 752-770 (1989).

⁸⁹ *Cleveland v. United States*, 329 U.S. 14, 18-19 (1946).

⁹⁰ *Kelley v. Johnson*, 425 U.S. 238 (1976).

⁹¹ *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997); *Bowers v. Hardwick*, 478 U.S. 186, 191-193 (1986).

⁹² *Planned Parenthood of Southeastern Pennsylvania, v. Casey*, 505 U.S. 833, 849 (1992).

⁹³ Ely, *supra* note 75, at 101-104. Ely reaches his process-oriented theory after rejecting the different candidates for a substantive theory of judicial intervention. *Id.* at 43-72.

functionalist purpose. Second, the reallocation must not reflect a serious conflict of interest for Congress when it enacted the reallocating legislation—that is, the functionalist purpose must be served within reasonable bounds. Thus, the Court should sometimes invalidate a reallocation of authority because it does not really serve a needed purpose, at other times because the reallocation entails a problematic conflict of interest (or because the legislation fails both tests). This approach in fact is implicit in much of the Supreme Court’s separation of powers cases. As I will indicate in the next subsections, we can generally understand the Court’s separation of powers decisions in terms of a functionalist approach limited by conflicts of interest concerns.⁹⁴

⁹⁴ Thus, although commentators have criticized the Supreme Court for incoherency in its separation of powers cases, Brown, *supra* note 84, at 1517-1519, 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 separation of powers analysis should be driven by conflicts of interest concerns, but he worries primarily about the possibility that government officials will face a conflict of interest when they make particular decisions implementing a law. Verkuil, *supra* note 5, at 313, 315, 320-321 (observing that a legislative veto allows members of Congress to be influenced by campaign contributions when they are asked to cast a veto, that the balanced budget law would have required the Comptroller General to be subject to legislative control when exercising executive authority, and that delegations of legislative power to the executive branch are problematic when the President’s discretion under a 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 between Verkuil and me 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. Gewirtz, *supra* note 5, at 344; Redish & Cisar, *supra* note 5, at 500.

Ronald Krotoszynski has illustrated the conflicts of interest problems that can arise in the implementation of federal statutes. He observes 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. Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 Wm. & Mary L. Rev. 414 (1997) (criticizing judges who have been sentencing commissioners for not recusing themselves from challenges to the Sentencing 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, we 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, we can just as readily come to the same conclusion through functionalist analysis. Indeed, we can make sense of the Court's jurisprudence in this area by observing that, when legislation serves a legitimate 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*.⁹⁵ As I mentioned above,⁹⁶ the Court in that case 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.⁹⁷ 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, Congress may not under the Constitution's division of power exercise control over a government official who has responsibilities for executing the law.⁹⁸

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.⁹⁹ In such cases, the Court has recognized the need in the modern state for administrative agencies that were not described in the original constitutional framework 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 have been upheld.

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, there is nothing about contemporary realities that make 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 I will discuss in the next section, we can also explain the *Bowsher* decision in terms of Congressional conflicts of interest.)

Clinton v. City of New York,¹⁰⁰ the line item veto case,¹⁰¹ also involved legislation that entailed an

⁹⁵ 478 U.S.714 (1986).

⁹⁶ See, *supra*, notes 37-38.

⁹⁷ *Bowsher*, 478 U.S. at 718.

⁹⁸ *Id.* at 726.

⁹⁹ Stone et al., *supra* note 11, at 365. 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 the 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"). However, at other times, the Court will acknowledge that Congress has transferred legislative power to the executive branch. See, e.g., *United States v. Chicago, M., St. P. & P. R. Co.*, 282 U.S. 311, 324 (1931) (observing that Congress "cannot delegate any part of its legislative power except under the limitation of a prescribed standard").

¹⁰⁰ 524 U.S. 417 (1998).

abdication of legislative authority rather than a recognition of modern complexities. According to the Court, a line item veto is unconstitutional because Article I, § 7 of the Constitution provides for only complete vetoes of bills, not partial vetoes.¹⁰² 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 constraint. If a line item veto exists, members of Congress can continue to fill their bills with pork barrel and rely on the President to excise those 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 also is like *Bowsher* in raising conflicts of interest problems, as I will discuss in the next section.)

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 v. Marathon Pipe Line Co.*,¹⁰³ the Supreme Court held that The Bankruptcy Act of 1978 was unconstitutional when it created bankruptcy courts with judges who lacked the usual rights and privileges of federal court judges.¹⁰⁴ In *Commodity Futures Trading Commission v. Schor*,¹⁰⁵ on the other hand, the Court permitted Congress to give jurisdiction over certain state law claims to administrative law judges, even though those judges do not enjoy the same rights and privileges as do federal court judges. In *Schor*, the statute in question allowed administrative law judges to decide matters of state law that were raised as counterclaims in regulatory proceedings before the Commodity Futures Trading Commission (CFTC).

We can understand the *Northern Pipeline* decision on the ground that there was no real need for Congress to relegate federal bankruptcy judges to second-class status. Having less privileged judges would not have facilitated the resolution of bankruptcy disputes.¹⁰⁶

At the same time, we can understand the *Schor* decision on the ground that important benefits resulted from letting state law counterclaims be raised in the CFTC's regulatory proceedings. By having administrative law judges decide commodity futures trading issues, Congress was able to create a "prompt, . . . expert and inexpensive method for dealing with a class of questions peculiarly suited to examination and determination by an administrative agency specially assigned to that task."¹⁰⁷ That valuable purpose would have been compromised if the CFTC was prevented from addressing all of the legal matters that were relevant to its regulation of commodity futures trading.

In short, under my suggested approach to separation of powers concerns, and in the Supreme Court's separation of powers decisions, a reallocation of national power will be rejected if it clearly does not serve a genuine governmental need. If the reallocation appears to serve a genuine governmental need, it may be upheld, but there is still a second step to the analysis. To uphold the reallocation of authority, we must conclude that Congress was not significantly influenced by a conflict of interest when it enacted the reallocation. This second step is important both because it will not always be clear whether the reallocation genuinely serves a legitimate need of government and also because the benefits for government efficiency may be outweighed by the harms to the balance of power among the three branches of government. In other words, conflicts of interest concerns provide a limiting principle for functionalism. Indeed, as I have suggested, the Court's separation of powers decisions implicitly incorporate this role for conflicts of interest analysis. I will elaborate on this point in the next section of the article.

¹⁰¹ 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 or permitting to take effect the entire bill.

¹⁰² *Clinton*, 524 U.S. at 438-440.

¹⁰³ 458 U.S. 50 (1982).

¹⁰⁴ The bankruptcy court judges received fixed-term appointments under the Act rather than lifetime appointments, and they were not protected from decreases in their salary. *Id.* at 56-59.

¹⁰⁵ 478 U.S. 833 (1986).

¹⁰⁶ In other words, the goal of having a group of judges with special expertise in bankruptcy law was not served by giving those judges second-class status.

¹⁰⁷ *Schor*, 478 U.S. at 856 (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)).

a. Invalidations because of conflicts of interest concerns

In its separation of powers decisions, the Court has been troubled when Congress appears to be acting out of a conflict of interest. More specifically, the Court has been troubled when Congress has tried to seize power from another branch of the national government or when a current Congress has tried to seize power from future Congresses. When Congress is trying to seize authority, thereby aggrandizing its power,¹⁰⁸ we have to worry that Congress is motivated not so much by the public good as by its own self-interest. Conversely, when Congress is yielding power to another branch of government, it is more likely to be motivated by the interests of the country.¹⁰⁹ Accordingly, the Court has had little trouble in the past sixty years with legislative delegations of authority to administrative agencies or independent commissions of the national government.¹¹⁰

Several cases illustrate the unacceptability of Congress seizing power. For example, in *Myers v. United States*,¹¹¹ the Supreme Court rejected an attempt by Congress to require Senate approval before the President could fire an official in the executive branch.¹¹² Similarly, in *Bowsher v. Synar*,¹¹³ the balanced budget case, Congress was trying to seize power in two ways—first by exercising control over a government officer with executive authority¹¹⁴ and second by transferring power to itself from future Congresses. As to the latter, if legislation requires balanced budgets (or limited deficits) in future years, and the legislation is given effect, then Congresses in the future years can no longer exercise their full legislative authority.¹¹⁵

Like the balanced budget act, the line item veto also suffered from a current Congress trying to seize power from future Congresses. As the Court in *Clinton v. City of New York*¹¹⁶ observed, it is permissible for Congress to give the President permission in a particular act to implement all or only part of the act (for example, by not spending all of the appropriated funds). However, it is not permissible for Congress in one bill to give the President authority in all future bills to implement all or part of each future bill.

Note, as I mentioned earlier, the correlation between a conflict of interest and the lack of a genuine functional purpose. In *Bowsher* and *Clinton*, the legislation was problematic because of a conflict of interest on Congress' part *and* because the legislation served no real need. And this is exactly what we would expect from conflicts of interest. When Congress serves its own interests, it is less likely

¹⁰⁸ *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (observing that the separation of powers is designed to prevent “the encroachment or aggrandizement of one branch at the expense of the other”); *Mistretta*, 488 U.S. at 382 (discussing the “concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence”). See also Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123, 161-165 (1994); Peter L. Strauss, *Bowsher v. Synar: Formal and Functional Approaches to Separation-of-Powers Questions - A Foolish Inconsistency?*, 72 Cornell L. Rev. 488, 519-521 (1987).

¹⁰⁹ See, e.g., *Mistretta*, 488 U.S. at 421 (1989) (Scalia, J., dissenting) (observing that, since Congressional delegation of lawmaking power increases the power of a coordinate branch of the national government, “the need for delegation would have to be important enough to induce Congress to aggrandize its primary competitor for political power”).

¹¹⁰ Stone, et al., *supra* note 11, at 366.

¹¹¹ 272 U.S. 52 (1926).

¹¹² In *Myers*, the statute at issue required Senate approval before a postmaster could be removed from office.

¹¹³ 478 U.S. 714 (1986).

¹¹⁴ As discussed above, the balanced budget act 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 97-98.

¹¹⁵ Another way of characterizing a balanced budget act, then, is that tries to amend the Constitution by a majority vote of Congress. Stone, et al., *supra* note 30, at 452-455.

¹¹⁶ 524 U.S. 417 (1998).

to also serve the public interest. This is similar to what we see when procedural standards are used elsewhere in constitutional analysis. Laws that are suspect under an Elyian representation-reinforcement analysis¹¹⁷ because of their effect on the political process are also suspect because it is difficult to identify a legitimate public purpose for the laws. For example, poll taxes are unconstitutional under a representation-reinforcement analysis because they impede participation of indigent persons in the political process. At the same time, poll taxes are problematic because their primary purpose is to prevent some classes of citizens from voting.

While reallocations of authority may be problematic both for failing to serve a genuine governmental need and because of a Congressional conflict of interest, other reallocations will be problematic only on conflict of interest grounds. When Congress required its approval before the President could fire an executive officer (the *Myers* case¹¹⁸), for example, Congress could have defended its action on the ground that governmental functioning would be facilitated if the President was unable to fire public officials at will. The problem with the statute in *Myers* was its transfer of authority from the President to Congress.

a. When does a conflict of interest become problematic?

So far, I have drawn an obvious distinction between Congress giving up some authority to another branch of the national government and Congress trying to seize power from another branch of the national government. But what if Congress tries to diminish the authority of another branch without increasing its own power? In a number of cases, Congress has insulated government officials with executive power from Presidential oversight but not tried to substitute its own oversight. In the case of the independent counsel statute, for example, Congress prohibited the President from firing an independent counsel without cause,¹¹⁹ even though the President ordinarily can fire a federal prosecutor without cause. Similarly, when Congress creates independent commissions, like the Federal Trade Commission, it permits removal of commissioners from office only for cause, even though executive branch officials ordinarily serve at the pleasure of the President.¹²⁰ In these cases, should we not worry about a conflict of interest since Congress is not seizing power? Or should we worry, since Congress increases its power relative to the other branch of government when it diminishes the authority of the other branch? In other words, relative increases in power can be as valuable to Congress as absolute increases in power.

In general, I think we can conclude that the Court has it right on conflicts of interest grounds when it permits Congress to insulate government officials from being fired without cause. Ordinarily, Congress may have as much to lose as it has to gain when Federal Trade Commissioners or Federal Communications Commissioners are protected from peremptory removal from office. It is true that an independent commissioner can more easily side 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 might seek the official's dismissal when engaged in its usual bargaining with the President over the terms of legislation. In short, because independent commissions do not necessarily increase the relative power of Congress, we can assume that Congress is motivated by the benefits for the country of commission independence when it creates independent commissions.

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 commission. When comparing the status quo

¹¹⁷ See, *supra*, at text accompanying notes 75-77 for a discussion of Ely's representation-reinforcement approach.

¹¹⁸ See, *supra*, at text accompanying notes 111-112.

¹¹⁹ *Morrison v. Olson*, 487 U.S. 654, 685-693 (1988).

¹²⁰ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

before the creation of an independent commission with the state of affairs after its creation, Congress probably has diminished its power more than it has diminished 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 have gotten it generally right in allowing independent commissions, we might come to a different conclusion on occasion, as in the case of the independent counsel law. Dissatisfaction with the operations of the independent counsel during the Clinton Administration illustrate the risks 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.¹²¹ It may not be clear whether Congress supports an independent counsel law for good or bad reasons. Accordingly, a strong conflicts of interest approach might not allow for an independent counsel law;¹²² a less aggressive conflicts approach would allow for such a law.

INS v. Chadha,¹²³ the legislative veto case, is also a close case under conflicts of interest analysis. On one hand, it appears that Congress was trying to seize some power from the executive branch. If a legislative veto could be imposed, then the House or Senate would be acting 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 was only trying to limit the amount of legislative power it was delegating to the executive branch when it passed acts that included a legislative veto.¹²⁴ If the legislative veto is viewed in the context of the entire piece of legislation in which it is included rather than by itself, it entails a diminution in authority relinquished by Congress rather than a seizure of authority by Congress.¹²⁵

Just as the legislative veto is a close call on conflicts grounds, it is also a close call on the question whether it served a genuine functionalist purpose. On one hand, a legislative veto can be justified as 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 functioning of the national government, the legislative veto may have had the effect of making it easier for special interests to dominate the political process. In this view, 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.¹²⁶

Although consideration of conflicts leaves some uncertainty, it does much to curtail the openendedness of current functionalist analysis. We can more readily assess the seriousness of a conflict of interest than we can measure the effect on the balance of power among Congress, the President and the

¹²¹ Justice Scalia's dissent in *United States v. Morrison* emphasized concerns about a President being harassed by an independent counsel. *Morrison*, 487 U.S. at 712-713, 727-734 (Scalia, J., dissenting).

¹²² In the absence of an independent counsel, Presidents and other officials are not immune from prosecution. Congress may impeach executive branch officials who act badly. Verkuil, *supra* note 5, at 327 (citing *In re Sealed Case*, 838 F.2d 476, 506-507 (D.C. Cir. 1988) for the point that the Constitution deals with the possibility of executive branch wrongdoing through the impeachment process).

¹²³ 462 U.S. 919 (1983).

¹²⁴ *Id.* at 967-974 (White, J., dissenting).

¹²⁵ Note in this regard an important distinction between the legislative veto and the line item veto. The line item veto was enacted in one bill to apply to all future spending bills. The Congress that enacted the line item veto was trying to bind all future Congresses. The legislative veto, on the other hand, was included in each bill to which it would apply.

¹²⁶ Harold Bruff & Walter Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1413 (1977) (observing that legislative vetoes had allowed special interest groups to affect policy outside public rulemaking procedures).

courts from a reallocation of national authority. Indeed, judging degrees of severity is a common exercise with conflicts of interest elsewhere in the law and in other fields. Rules of professional responsibility, for example, distinguish conflicts of interest involving current clients from conflicts involving former clients.¹²⁷ Similarly, the federal government's regulations for scientists conducting human research distinguish financial stakes in the outcome of the research that are above \$50,000 from those that are below \$50,000.¹²⁸ In short, the addition of conflicts considerations to the functionalist approach for separation of powers cases gives us a much stronger functionalist theory.

In the next section, I will indicate a second way in which consideration of conflicts of interest can clarify constitutional interpretation. Taking account of conflicts not only can turn functionalism into a stronger separation of powers theory, it can also reconcile the political question doctrine with the principle of judicial supremacy.

¹²⁷ Model R. Prof. Cond. 1.7, 1.9 (1983).

¹²⁸ 21 C.F.R. 54.2(b) (2001).

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.¹²⁹

¹²⁹ Chemerinsky, *supra* note 6, at 117.

1. Problems with Current Political Question Theory

Under the usual analysis, the political question doctrine is quite elusive. Martin Redish has observed, for example, that “[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.”¹³⁰ Louis Henkin has argued that, when the Supreme Court upholds legislative or executive action on political question grounds, it is doing nothing more than saying that no constitutional violation has occurred.¹³¹ In Henkin’s view, political question cases should be characterized as decisions on the merits since that is what they are in fact.¹³² And there may be a number of cases in which the courts should exercise substantial deference to Presidential or Congressional action when deciding on the merits. For example, on some matters, like the conduct of foreign policy, Presidents may need broad discretionary authority. Still, the courts can grant broad deference without abandoning judicial review altogether.¹³³

These critiques of the political question doctrine are what we 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.¹³⁴ Indeed, the political question doctrine creates a real tension with *Marbury*’s principle of judicial supremacy. If *Marbury* is correct that the courts should have final say on constitutional questions, then it is problematic to have the courts also invoke a doctrine in which they say that some constitutional questions are not to be heard by judges.

Given the tension between *Marbury* and the political question doctrine, it is not surprising that the justifications offered by the Supreme Court for a political question doctrine are not very persuasive. The Court announced its modern political question doctrine in 1962 in *Baker v. Carr*,¹³⁵ a case challenging the failure of some states to reapportion their legislative districts. 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 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.¹³⁶

Yet none of these standards gives very clear 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 of a set. If textually committed means an explicit statement in the Constitutional text 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

¹³⁰ Martin Redish, *Judicial Review and the Political Question Doctrine*, 79 Nw. U. L. Rev. 1031, 1031 (1985).

¹³¹ Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 Yale L.J. 597, 597-601 (1976).

¹³² *Id.* at 601. In some cases, the Court might conclude that, even though justiciable, a constitutional claim might fail out of the Court’s inability to respond to a request for an equitable remedy. *Id.* at 617-622.

¹³³ Redish, *supra* note 130, at 1051.

¹³⁴ Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517, 518 (1966). To be sure, the *Marbury* Court indicated that some constitutional questions were reserved for the political branches of the federal government. *Marbury*, 5 U.S. at 165-66. Nevertheless, one still needs to explain why and when there are exceptions to the principle of judicial supremacy.

¹³⁵ 369 U.S. 186 (1962).

¹³⁶ *Id.* at 217.

cannot intervene when a governmental power is expressly granted to the executive or legislative branch, the judicial branch would not be able to decide Commerce Clause claims and many other claims that have been regularly decided by the courts.¹³⁷

The other *Baker* standards are similarly unhelpful. For example, any time the Court overturns executive or legislative action, it is in some sense expressing a lack of respect for a coordinate branch of government. The *Baker* standard speaks about 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, matters of foreign policy are said to be especially inappropriate for judicial resolution. In that regard, Theodore Blumoff has argued that courts should decline review when the constitutional text does not explicitly address the foreign policy issue, and the executive and legislative branches are in agreement.¹³⁸ And in fact, a number of political question cases have involved foreign policy. The Supreme Court has left the determination of when a war ends to Congress.¹³⁹ Likewise, lower federal courts have often invoked the political question doctrine to dismiss challenges to a president’s exercise of the war powers.¹⁴⁰ Yet at other times, the Supreme Court and 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*,¹⁴¹ for example, the Court intervened when President Harry S. 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. Similarly, in *Dames & Moore v. Regan*,¹⁴² the Court upheld on the merits the President’s termination of court claims by U.S. nationals against Iran and transfer of the claims to a special Iran-United States Claims Tribunal. The lower courts have decided in a number of cases whether the United States was “at war” within the meaning of the Constitution or instead engaged in military action of another kind.¹⁴³ Moreover, there are real problems with judicial abstention on matters of foreign policy. 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

¹³⁷ 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.

¹³⁸ Theodore Blumoff, *Judicial Review, Foreign Affairs, and Legislative Standing*, 25 Ga. L. Rev. 227, 337-364 (1991).

¹³⁹ *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923) (writing that “[a] court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time”).

¹⁴⁰ 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 a challenge to the President’s authority to wage war in Vietnam without a congressional declaration of war); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971) (invoking the political question doctrine in response to a claim that the United States’ participation in Vietnam was unlawful because no formal declaration of war had been made).

¹⁴¹ 343 U.S. 579 (1952).

¹⁴² 453 U.S. 654 (1981).

¹⁴³ See, e.g., *Orlando*, 443 F.2d at 1042-1043 (observing that the political question doctrine does not preclude judicial scrutiny to determine whether Congress has satisfied the constitutional requirement of joint participation with the President in the prosecution of war even though the political question doctrine leaves it to Congress to decide how it signals its consent to a presidential waging of war); *New York Life Ins. Co. v. Bennion*, 158 F.2d 260, 264 (10th Cir. 1946) (holding that, for purposes of a life insurance policy, the United States was at war with Japan once Pearl Harbor was attacked).

constitutional system,¹⁴⁴ undermining individual protection from the excesses of the majority or those of overreaching government officials.

We might be especially concerned about judicial intervention when challenges are brought against the waging of a war. If courts could force the President to recall troops sent abroad, the judiciary might compromise our national security. Nevertheless, this is not a sufficient argument for judicial abstention. It is difficult to imagine that courts would interfere with a just war, and we need the courts to be available for an unjust war. When courts are too deferential to claims of national security, we end up with infamous decisions like *Korematsu v. United States*.¹⁴⁵

Undoubtedly, for some challenges to foreign policy decisions, courts should turn away the challenges. But they can do so by holding that the President or Congress has acted within its constitutional discretion. There is no need to abdicate responsibility by invoking a political question doctrine. And holding that the President or Congress has acted within its authority, rather than declining to decide the case, is a good approach for other issues that might fall under the political question doctrine. In other words, Henkin was largely persuasive when he argued that political question decisions should really be decisions on the merits in which the courts conclude that the President or Congress has acted within its legitimate discretion.¹⁴⁶

¹⁴⁴ Michael E. Tigar, "Judicial Power, the "Political Question Doctrine," and Foreign Relations, 17 UCLA L. Rev. 1135, 1178-1179 (1970).

¹⁴⁵ 323 U.S. 214 (1944). In *Korematsu*, the Supreme 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 to doubt the existence of military necessity for the internment at the time of the case. Murphy, et al., *supra* note 59, at 88-89.

¹⁴⁶ See, *supra*, at text accompanying notes 131-133.

2. Conflicts of Interest and Political Question Theory

There is nevertheless one area in which it does make sense for the 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 for judges signals that an issue ought not be decided by them, but instead should be left to the discretion of the executive and/or legislative branches.¹⁴⁷ 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 decision was driven by the court's institutional interest rather than an impartial interpretation of the law.¹⁴⁸

The case of *Nixon v. United States*¹⁴⁹ illustrates this point well. Walter Nixon was a district court judge in Mississippi who was impeached and convicted for committing perjury. He had lied to a grand jury investigating charges that he accepted a bribe to halt a prosecution.¹⁵⁰ Nixon sought judicial review of his conviction on the ground that the Senate had not properly tried him within the meaning of Article I's impeachment clause. According to Article I, the "Senate shall have the sole Power to try all Impeachments,"¹⁵¹ and Nixon objected to the use of a Senate committee rather than the full Senate to consider his impeachment.¹⁵² 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.¹⁵³ 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*,¹⁵⁴ an earlier case in which the Court did entertain Adam Clayton Powell's challenge to a House resolution that barred him from taking his seat in Congress. In that case, the Court interpreted Article I, § 5, cl.1, which states that "each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."¹⁵⁵ If the Court cannot second guess a conviction by the Senate, it would seemingly follow that

¹⁴⁷ To be sure, these other branches would be conflicted if they were left to decide the constitutionality of their action. Nevertheless, that conflict is not adequately addressed by bringing in another decision maker that will also be hampered by a conflict of interest and that is less accountable to the public (by virtue of the lifetime appointments of its members). I elaborate on this point, *infra*, at text accompanying note 163.

¹⁴⁸ This concern arose regarding Justice Sandra Day O'Connor's vote in *Bush v. Gore*, 531 U.S.98 (2000), the decision that closed off Al Gore's legal challenges to the Florida vote count in the 2000 Presidential election. When *Newsweek* reported that Justice O'Connor had expressed dismay to friends on election night about a Gore victory because of a desire to resign during the next Administration and to have a Republican President choose her successor, people wondered whether O'Connor's decision was driven by her personal preferences. Joan Biskupic, Election still splits court, USA Today, January 22, 2001, at 1A. See also Evan Thomas and Michael Isikoff The Truth Behind the Pillars, *Newsweek*, December 25, 2000, at 46 (story reporting Justice O'Connor's reaction to a Gore victory).

¹⁴⁹ 506 U.S. 224 (1993).

¹⁵⁰ *Id.* at 226.

¹⁵¹ U.S. Const., art. I, § 3, cl. 6.

¹⁵² *Nixon*, 506 U.S. at 227-228.

¹⁵³ *Id.* at 228-230. The Court also based its decision on other considerations, including the fact that the Senate is granted 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 229-235. This latter concern of the *Nixon* Court does in fact tie into conflicts of interest concerns.

¹⁵⁴ 395 U.S. 486 (1969).

¹⁵⁵ The Court overrode the House's denial of a seat to Rep. Powell, which was based on allegations that he illegally used official funds, concluding that the House could only decide whether a member satisfied the constitutional

the Court also ought not second guess a judgment by the House of a member's qualifications.

From a conflicts of interest perspective, however, we can understand the *Nixon* decision on its own as well as why it came out differently than the *Powell* case. In *Nixon*, the Court would have been reviewing the impeachment and conviction of a federal judge, and a reversal of the conviction would have raised questions as to whether the justices were simply protecting a judicial colleague.¹⁵⁶ With *Powell*, on the other hand, no such conflict of interest existed. When the Court overrode the House of Representatives, there was no reason to suspect ulterior motives at work.

*Coleman v. Miller*¹⁵⁷ 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 had ratified a constitutional amendment within a reasonable amount of time. The Court concluded that there were no judicially manageable standards for deciding what constituted a reasonable amount of time.¹⁵⁸ However, this logic is weak. Courts often give content to standards of reasonableness. Indeed, an earlier decision by the Court undermines its argument in *Coleman*. Although Article V makes no mention of time limits for constitutional amendments, the Court in *Dillon v. Gloss*¹⁵⁹ had considered whether Congress could set a limit on the time by which ratification had to be achieved when it proposed an amendment. In recognizing that authority, the Court understood the amendment process to envision a reasonable time between proposal and ratification, that the two steps "are not to be widely separated in time" but are to be "a single endeavor."¹⁶⁰ The *Coleman* Court would have been better off abstaining 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.¹⁶¹

Not only does the presence of a conflict of interest give a good reason for judicial abstention, it gives a justification that fits well with *Marbury v. Madison*. Recall the point that the political question doctrine currently creates tension with the judicial supremacy principle of *Marbury*. If courts are the final arbiters of constitutional questions, it is not a good idea for courts to abstain from deciding those questions. Doing so effectively constitutes an abdication of judicial authority. If, however, judicial abstention rests on concerns about conflicts of interest, then the political question doctrine becomes consistent with *Marbury*. When the courts would face a conflict of interest in asserting their *Marbury* authority, the case for judicial supremacy is much weaker than in the ordinary case. We 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 to both pass laws and decide their constitutionality.¹⁶² The alternative, in other words, is to put Congress in a hopelessly

requirements of age, citizenship and residency under Article I, § 2, cl. 2 of the Constitution. *Powell*, 395 U.S. at 547-548.

¹⁵⁶ The Court in fact recognized this problem. See, *supra*, note 153.

¹⁵⁷ 307 U.S. 433 (1939).

¹⁵⁸ *Id.* at 452-456.

¹⁵⁹ 256 U.S. 368 (1920).

¹⁶⁰ *Id.* at 374-375.

¹⁶¹ Scharpf, *supra* note 134, at 589 (cited in *Goldwater v. Carter*, 444 U.S. 996, 1001 n.2 (1979) (Powell, J., concurring) (cited in Laurence H. Tribe, *Constitutional Choices* 23-24 (1985)). Walter Dellinger argues that few constitutional amendments have in fact been passed to override the Supreme Court, Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 *Harv. L. Rev.* 386, 414-415 (1983), but that does not change the fact that the amendment process is the chief check on the Supreme Court.

¹⁶² David Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 *U. Chi. L. Rev.* 646, 657 (1982) (characterizing judicial supremacy as a way to avoid the proverbial situation of the fox guarding the chicken coop); Locke, *supra* note 23.

conflicted position. It could not make its constitutional judgments with the neutrality and objectivity that would be required. And 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 question. Similarly, the judiciary must be able to decide the constitutionality of executive action for otherwise the President would have the authority to both act and decide the constitutionality of the action. Taking account of conflicts of interest, then, can both explain the need for judicial supremacy and when judicial supremacy should be waived.

Although consideration of conflicts of interest helps us 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 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, we have to worry about their ability to make unbiased constitutional assessments of those actions. Nevertheless, we 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 more readily than the constitutional amendment process permits the public to express its disapproval of a governmental decision. Accordingly, the public is in a better position to correct the effects of a conflict of interest on Congressional or Presidential action than on judicial decisions. In other words, if we cannot eliminate conflicts of interest for the branches of the national government, it is better if Congress and the President face the conflicts than if the courts face them.¹⁶³

In short, by basing the political question doctrine on conflicts of interest concerns, rather than on the kinds of considerations cited by the Court in *Baker v. Carr*,¹⁶⁴ we end up with a doctrine that not only provides much clearer guidance to the courts but also one 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

Before I leave this section of the article, I will address two possible concerns with my argument: First, one might question whether courts facing a conflict of interest will properly take the conflict into account when reaching their decision. Second, one might observe that courts deciding the constitutionality of action by Congress or the President have their own conflict of interest at stake—they can enhance their power by asserting their power to override.

As to whether conflicts analysis can serve as a check on judges when they are the conflicted persons, that should not be a serious problem. It is of course true that people often act unthinkingly on the basis of conflicts of interest. The physician who recommends additional tests for a patient would probably 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, we can reasonably expect courts to be responsive to conflicts concerns 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 conflicts argument. Conflicts of interest are

¹⁶³ I am not suggesting that the electoral process is sufficient to check all legislative or presidential conflicts of interest. It clearly is not. Nevertheless, the point stands that the public is in a better position to check those conflicts of interest than it is to check judicial conflicts of interest.

¹⁶⁴ See, *supra*, text accompanying notes 135-136.

generally problematic precisely because they often operate without notice, and judges could not easily escape public scrutiny of their institutional conflicts of interest. Moreover, the fact that we 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 in deciding cases.

The second possible concern with my argument—whether courts themselves face a conflict of interest when deciding the constitutionality of actions by Congress or the President—can also be answered. The concern is not trivial. It can be said that the Supreme Court in *Marbury* may have been influenced in its decision by a desire to increase the authority of the judiciary. If the Court has final authority in interpreting 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 would be raised by Congress and the President determining the constitutionality of their actions. Indeed, we ordinarily do 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 the potential for conflicts of interest compromising internal police investigations, and we generally trust the independent commission's findings despite the possibility that it will have its own interests at stake (e.g., the commission may be driven to find problems with police practices in order to justify its efforts). Similarly, although the Securities and Exchange Commission (SEC) is able to increase its authority by penalizing corporations for violations of the law, we are much more comfortable with that conflict of interest than we are with leaving companies unregulated and able to abuse their power. It is difficult to imagine, for example, that the harms from a more aggressive SEC could ever equal the harms that have occurred from energy-trading giant Enron and its accounting firm, Arthur Andersen, having been able to operate under its own interpretation of what practices were legitimate.¹⁶⁵

When an independent body has oversight authority, the main concern is not that we are substituting one conflict of interest for another. Rather, the primary concern is that we are avoiding a serious conflict of interest by sacrificing expertise. If misconduct by physicians is judged by non-physicians, for example, we worry that the non-physicians will misunderstand the medical considerations.

To be sure, concerns about conflicts of interest do arise at times with independent bodies. Having an independent counsel law for the investigation and prosecution of executive branch officials was criticized in part because of concerns that some of the counsel were overly zealous in their efforts to find wrongdoing.¹⁶⁶ In this view, the independent counsel were driven to bring charges in order to justify their time and effort. Moreover, some oversight bodies can become too close to those whom they monitor. An administrative agency may be captured by lobbyists; an accounting firm may ignore corporate misconduct to protect its auditing fees. But these kinds of conflicts of interest are not likely to become very serious with the federal courts.

In short, the conflict of interest faced by the Congress or the President in deciding the constitutionality of its own action is at a higher order of concern than when the Supreme Court reviews the constitutionality of Congressional or Presidential conduct.

This point becomes clearer when we consider 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

¹⁶⁵ In December 2000, the Enron Corporation filed the largest corporate bankruptcy ever in the United States. Richard A. Oppel, Jr., & Andrew Ross Sorkin, Enron Corp. Files Largest U.S. Claim for Bankruptcy, N.Y. Times, December 3, 2001, at A1. Allegations of wrongful behavior have been made not only against Enron but also against Arthur Andersen. Alex Berenson & Jonathan D. Glater, A Tattered Andersen Fights for Its Future, N.Y. Times, January 13, 2002, at § 3, p.1.

¹⁶⁶ Christopher H. Schroeder, The Independent Counsel Statute: Putting Law and Politics in the Right Places - Reforming the Independent Counsel Statute, 62 Law & Contemp. Prob. 163, 170-171 (1999).

authority generously when contemplating new legislation, administrative agency regulation, or executive orders.

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 by either approving or invalidating the other branch's action. Its authority comes from the ability to decide, and that ability will often be independent of the direction of the decision. Whether the Supreme Court had ruled for George Bush or for Al Gore in *Bush v. Gore*,¹⁶⁷ 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 their authority.

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, it will be viewed as a rubber stamp. Consequently, to secure its authority, it must invalidate challenged actions some minimal amount of the time. But there is no reason to think that this minimal need to override Congress or the President will 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 kinds of conflicts of interest concerns that are raised when people are left unregulated.¹⁶⁸

In the next and final section, I will indicate a third way in which taking account of conflicts of interest can clarify constitutional interpretation. Conflicts considerations can respond to the question whether Article V provides the exclusive means for amending the Constitution.

C. Amending the Constitution and Conflicts of Interest

While conflicts of interest are most pertinent in constitutional law 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. The example I will use to illustrate this point is the example of amending the Constitution and whether Article V provides the exclusive means for doing so.

Recall that the Constitution speaks to amendments through Article V, whose relevant language follows:

¹⁶⁷ 531 U.S. 98 (2000).

¹⁶⁸ 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 the 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 rather than upsetting the balance of power between the legislative and judicial branches.

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 three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress. . . .¹⁶⁹

There are two key parts to Article V. It describes (1) how constitutional amendments may be proposed (either by Congress or by constitutional conventions requested by the state legislatures) and then (2) how constitutional amendments may be ratified (by state legislatures or state constitutional conventions).

In recent years, there has been an important debate as to whether Article V provides the exclusive means for amending the Constitution. A number of scholars have observed that Article V indicates how the Constitution *may* be amended, but it does not say that its methods of amendment are the *only* permissible methods.¹⁷⁰ In other words, Article V is written in language that describes *sufficient* procedures for constitutional amendment, but it is not written in language that provides *necessary* procedures for amendment.¹⁷¹

And there are good reasons to think that alternative methods can be used 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, § 7, clause 1 makes it clear that only the House of Representatives, and not the Senate, must initiate “Bills for raising Revenue.”¹⁷² Similarly, Article I, § 3, clause 6 makes it clear that impeachments of federal officeholders must be tried by the Senate.¹⁷³ Since Article V does not say that constitutional amendments may be proposed *only* by Congress or constitutional conventions, we need not conclude that they must be so initiated.¹⁷⁴

The nature of our constitutional system also suggests a role for alternative methods of constitutional amendment. We are fundamentally a government of the people.¹⁷⁵ We therefore would expect the Constitution to permit mechanisms for amendment when we have to worry that the mechanisms set out in Article V will frustrate the ability of the public to make legitimate constitutional change.¹⁷⁶

Finally, when the issue is how to judge the validity of constitutional change, we cannot restrict our analysis only to standards that are internal to the Constitution. As Frederick Schauer has observed, the process of adopting a new constitution or amending an existing constitution must be judged according

¹⁶⁹ U.S. Const., art. V.

¹⁷⁰ Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457, 459 (1994); James W. Torke, *Assessing the Ackerman and Amar Theses: Notes on Extratextual Constitutional Change*, 4 *Wid. J. Pub. L.* 229 (1994).

¹⁷¹ Bruce Ackerman, *Higher Lawmaking, in Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 63, 72 (Sanford Levinson, ed. 1995).

¹⁷² 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.

¹⁷³ The clause states that “[t]he Senate shall have the sole Power to try all Impeachments.” U.S. Const., art. I, § 3, cl. 6.

¹⁷⁴ But see Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 *Harv. L. Rev.* 1221, 1241-1245, 1273-1276 (1995); Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 *Colum. L. Rev.* 121, 131-132 (1996) (observing that constitutional provisions can be exclusive even without “only” language).

¹⁷⁵ Amar, *supra* note 170, at 457-460.

¹⁷⁶ There is some historical evidence to indicate that the framers intended for the public acting on its own to have the power to amend the Constitution. *Id.* at 463-494; Robert W. Scheef, Note, “Public Citizens” and the Constitution: Bridging the Gap Between Popular Sovereignty and Original Intent, 69 *Fordham L. Rev.* 2201, 2231-2232 (2001). Other historical evidence, however, points in the opposite direction. Monaghan, *supra* note 174, at 133-147.

to external standards, or higher legal norms, just as courts judge the validity of legislative action by its congruence with higher constitutional standards.¹⁷⁷ If the question is whether a constitution is defective and needs to be reconsidered, the constitution alone cannot give us the answer to that question. Thus, we cannot conclude that a constitutional amendment is valid or invalid simply by observing whether it was adopted according to the processes of Article V. We must also consider whether the method used for adoption is consistent with whatever social or political standards our country recognizes as giving legitimacy to constitutional change.¹⁷⁸

Although there are very good arguments for not limiting constitutional amendment to Article V's methods of amendment, we should hesitate to conclude that constitutional amendments are always possible by mechanisms other than those specified in Article V. Even if one rejects the idea that Article V provides the exclusive means of constitutional amendment, we would expect its processes to be at least presumptively required.¹⁷⁹ It is fair to say, I believe, that our social and political standards include the idea that Article V is the usual way by which constitutional change must occur.¹⁸⁰ In the way they wrote Article V, the constitutional framers did not suggest that amendments could ordinarily 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 amendment should generally follow the requirements of Article V.¹⁸¹

The better reading of the Constitution, then, is that constitutional amendment generally should

¹⁷⁷ Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 145, 146-152 (Sanford Levinson, ed. 1995). In making his argument, Schauer draws on Hans Kelsen's discussion of *Grundnorm* and H.L.A. Hart's discussion of rules of recognition. *Id.* at 148-152. For an analysis of Schauer's argument, see Eric Grant, *Book Review*, 13 *Const. Commentary* 125 (1996) (reviewing *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Sanford Levinson ed. 1995)).

¹⁷⁸ To be sure, the amendment process stated in a constitution may give 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. Schauer, *supra* note 177, at 157-159.

What those higher legal norms are is not always obvious, and an argument is needed to justify any proposed external standard. But the important point is that we cannot restrict our analysis solely to an internal, legal analysis of the Constitution. We must also make a social and political analysis of the external standards by which Constitutional validity is judged. *Id.* at 152-161.

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 decide when it is legitimate for it to be replaced by a new constitution. *Id.* at 154 n.20.

¹⁷⁹ *Id.* at 157-158.

¹⁸⁰ 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); John R. Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V's Mechanics*, 21 *Cumberland L. Rev.* 271 (1991). 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).

¹⁸¹ The Supreme Court has addressed the possibility of non-Article V mechanisms for amendment rarely, and it has rejected that possibility. See *Hawke v. Smith*, 253 U.S. 221 (1920) (holding that Article V does not permit a state to require that legislative ratification of an amendment be affirmed by popular referendum); *Rhode Island v. Palmer*, 253 U.S. 350 (1920) (concluding that state referendum provisions cannot be applied to the ratification of amendments to the U.S. Constitution); *Leser v. Garnett*, 258 U.S. 130 (1922) (holding that states may not impose limitations on the ratification process that are not included in Article V). However, one can read these cases as standing for the proposition that states cannot alter the federal-state balance in Article V, Gregory B. Mauldin, *Note, Informed Voter Initiatives and Uninformed Judicial Review Under Article V*, 34 *Ga. L. Rev.* 1701, 1723-1726 (2000), rather than as foreclosing the possibility of popular referenda when Congress and the state legislatures may be unresponsive to the public will.

proceed according to Article V, but that those procedures will occasionally, probably rarely, be inadequate. In exceptional circumstances, then, we should be able to go outside of Article V to amend the Constitution.¹⁸²

What would count as exceptional circumstances? I believe we 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 required. One important cause of a malfunctioning amendment process would be the presence of a substantial conflict of interest for both Congress and the state legislatures. The Article V process requires that constitutional amendments be initiated by a two-thirds vote of Congress or by a constitutional convention requested by two-thirds of the state legislatures. 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 requirement of Article V for ratification (i.e., amendment should occur upon approval by the public in three-fourths of the states¹⁸³). Thus, for example, we might say that a constitutional amendment would be ratified if adopted by popular referendum in three-fourths of the states.¹⁸⁴ With this approach, the critical, super majority-requirement of Article V would be preserved, but Congress and the state legislatures could not block a constitutional amendment by failing to act out of a conflict of interest.

One might respond that something important would be lost from Article V even if the super-majority requirement for ratification is preserved. 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 a proposed amendment is adopted.¹⁸⁵ If amendments could be passed by referendum, on the other hand, we might be concerned about the sufficiency of public deliberation. The typical voter might not engage in the constitutional debate.¹⁸⁶

This is a legitimate concern, but it does not necessarily doom constitutional amendment by public referendum. It might be possible with modern methods of communication to develop a national debate,¹⁸⁷

¹⁸² Bruce Ackerman has written about special moments in U.S. history in which constitutional change occurred without fidelity to Article V. Bruce Ackerman, 2 *We the People: Transformations* 7-27 (1998) (arguing that the 14th Amendment was adopted in violation of the rules of Article V and that the legal changes wrought by the New Deal effectively amounted to constitutional amendment).

¹⁸³ In addition to requiring approval in three-fourths of the states, we might also require a super-majority vote in each state. But note that constitutional amendments currently can be approved in some states by a simple majority vote. See, e.g., Ind. Code § 3-10-5-29 (requiring a “majority vote of the delegates” at a state constitutional convention called in response to a proposed constitutional amendment).

¹⁸⁴ It is not clear whether ratification would need to occur through conventions in the states (the alternative of 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 the mechanism of a citizens ballot initiative in many states since such initiatives do not require legislative involvement. In about half of the states, voter initiatives are already used to change state law, Steve LeBlanc, *Voter Initiatives Often a Matter of Big Money: Wealthy Groups Fund Drives to Push Agendas*, *Detroit News*, July 24, 2000, at 8, and they could readily be adapted for constitutional amendments. For the other states, ballot initiatives would require judicial intervention.

¹⁸⁵ Kris W. Kobach, Note, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 *Yale L.J.* 1971, 1995 (1994).

¹⁸⁶ By the same token, however, it is not so clear that legislators engage in their houses’ debates over constitutional amendments.

¹⁸⁷ Amar, *supra* note 170, at 502-503.

and today's citizenry is better educated than it was at the founding of the country.¹⁸⁸ Moreover, the super-majority requirement of Article V seems more important than the Article's mechanisms for ensuring proper deliberation.

Note that Article V could not be bypassed if only Congress faced a conflict of interest, but not the state legislatures. Article V already recognizes the possibility of Congressional self-interest and gives some protection against it. Article V can prevent Congress from acting out of self-interest because it *requires* Congress to convene a constitutional convention when requested to do so by two-thirds of the states. Congress cannot reject a request for a convention once two-thirds of the states support the idea.¹⁸⁹ In this way, Article V makes it more difficult for Congress to aggrandize its authority.¹⁹⁰ Article V does not, however, include a mechanism to prevent the undue operation of a conflict of interest faced by both Congress and the state legislatures. Hence, there needs to be some room for constitutional amendment outside of the strict requirements of Article V.¹⁹¹

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. Congress or a constitutional convention can ensure that an amendment is proposed only after careful deliberation. In this view, a body with a national perspective is charged with deciding when the national constitutional framework needs to be reconsidered.¹⁹² 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.¹⁹³

If constitutional amendment can proceed outside the strict requirements of Article V when a conflict of interest would discourage Congress and the state legislatures from initiating the Article V process, when would such a conflict arise? I will suggest two examples: term limits for members of Congress and campaign finance reform.

¹⁸⁸ Kobach, *supra* note 185, at 2002-2003.

¹⁸⁹ 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).

¹⁹⁰ The Federalist, No. 85, at 486 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (observing that Congress' obligation to call a convention upon request of two thirds of the states means that the 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, Amending the Constitution: Just Not Every November, 44 Clev. St. L. Rev. 303, 322-324 (1996) (discussing Article V's authority for the states to initiate the amendment process as a bulwark against tyranny by the national government); Kobach, *supra* note 185, at 1999-2001 (discussing how concerns about Congressional self-interest affected the debate at the Constitutional Convention over Article V).

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 amendments that might not be desired. *Id.* at 1996.

¹⁹¹ Kris Kobach has 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 Article I, § 3, cl. 1's provision for election by the state legislatures, and Congress proposed the 17th Amendment only after popular election had effectively been adopted in the country through measures taken at the state level. *Id.* at 1976-1980 (describing how state initiatives led to systems by which legislators agreed to abide by the public's choices for Senators).

¹⁹² *Hawke*, 253 U.S. at 226-227 (observing that both methods of ratification in Article V "call for action by deliberative assemblies"); Ishikawa, *supra* note 190, at 306-307.

¹⁹³ Amar, *supra* note 170, at 460 (observing that "[p]opular 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 wide support for Congressional term limits. Indeed, by the time the Supreme Court found term limit statutes unconstitutional in *U.S. Term Limits v. Thornton*,¹⁹⁴ twenty-three states had passed such laws by popular referendum.¹⁹⁵

But even with strong popular support,¹⁹⁶ 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 remaining option. However, as we have seen, Article V of the Constitution requires that the amendment process be initiated by Congress or by the legislatures in two-thirds of the states.¹⁹⁷ And neither Congress nor thirty-four state legislatures are likely to push for a term limit amendment. Members of Congress would be voting themselves out of office, and state legislators would be putting 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 they would therefore be unlikely to invite pressure to enact term limits on themselves by voting for term limits for members of Congress.¹⁹⁸ In other words, the people with authority to enact term limits by constitutional amendment face a powerful conflict of interest that will likely deter them from acting.¹⁹⁹ Article V's mechanisms for constitutional amendment are inadequate in the context of term limits.²⁰⁰

The conflict of interest not only will discourage legislators from acting, it will also counteract the usual incentive that legislators have to respond to their constituents.²⁰¹ When it comes to term limits, we cannot rely on the desire of legislators to be reelected to ensure that they will heed public preferences. Legislators *might* be voted out of office for not supporting term limits, but they *will be* turned out of office within a few terms if they do support term limits. A legislator's chances for a long tenure are always better in the absence of term limits.

Concerns about legislative conflict of interest, then, 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.²⁰²

¹⁹⁴ 514 U.S. 779 (1995).

¹⁹⁵ The wisdom of term limits is debatable. For a sampling of the literature, see Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. Chi. L. Rev. 83 (1997); Beth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 Cornell L Rev 623, 630 (1996); Kathleen M. Sullivan, *Dueling Sovereignities: U.S. Term Limits, Inc. v. Thornton*, 109 Harv L Rev 78 (1995).

¹⁹⁶ There is some question as to the strength of public support for term limits.

¹⁹⁷ U.S. Const., art. V.

¹⁹⁸ If voters in the state impose term limits by referendum on state legislators, the legislators would still be reluctant to support term limits on members of Congress. With their state office-holding careers shortened, the legislators would probably not want to also limit the duration of their potential federal office-holding careers.

¹⁹⁹ Recall, for example, how many officeholders have reneged on their promises to accept term limits voluntarily. Sam Howe Verhovek, *Some Backtracking on Term Limits*, N.Y. Times, April 12, 1999, at A20.

²⁰⁰ This point has been made in Kobach, *supra* note 185, at 1973-1974.

²⁰¹ Cf. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) (observing that “[t]he 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”).

²⁰² I mentioned earlier how public pressures at the state level can sometimes overcome Congressional conflicts of interest with respect to Article V. See, *supra*, note 191. The Supreme Court, however, 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 the ballot for candidates for Congress statements reflecting the candidates' non-support for a term limits constitutional amendment.

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*,²⁰³ many elements of campaign finance reform cannot be enacted without a constitutional amendment. And we can question whether members of Congress or the state legislatures would carry out their constituents' desires for a constitutional amendment that would implement those elements. Incumbents tend to benefit from the current system of campaign financing, so will generally not see campaign finance reform as furthering their own interests. And 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 more damage to their prospects for re-election (by helping their opponents) than they would by opposing 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 v. Valeo* reached the Supreme Court precisely because Congress enacted measures to reform campaign financing in 1974. More recent bills have not succeeded in Congress, but they have been considered seriously, and some may be passed yet.²⁰⁴ On the other hand, many legislators have voted for campaign finance reform proposals only because they know that the bills will not pass, and campaign finance reform in the states has proceeded primarily by voter initiative.²⁰⁵ In short, while there is good reason to think that voters ought to have the option of using non-Article V methods for incorporating campaign finance reform into a constitutional amendment, the case is weaker than for a term limits amendment.

Whether we would permit the public to go outside Article V only for term limits or also for campaign finance reform, the important point is that we have identified a solid answer to the question 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, the public should not be stymied by the requirements of Article V.

²⁰³ 424 U.S. 1 (1976).

²⁰⁴ Indeed, it appears that new campaign finance legislation may be enacted this year. A Big Win for Reform, N.Y. Times, February 14, 2002, at A34. Still, it is not clear that the legislatures would be willing to bring forward a constitutional amendment to override *Buckley*.

²⁰⁵ In Arizona, Maine, and Massachusetts, campaign finance reform was adopted by referendum. Carey Goldberg, Court Upholds Maine Campaign Law, N.Y. Times, November 9, 1999, at A14. In Vermont, on the other hand, campaign finance reform was enacted by the legislature. *Landell v. Sorrell*, 118 F. Supp. 2d 459 (D. Vt. 2000). Similarly, the Connecticut legislature passed campaign finance reform in April 2001, but the bill was vetoed by the governor. Paul Zielbauer, Rowland Vetoes Bill Setting Limits on Campaign Spending, May 6, 2000, at B5.

I have argued that conflicts of interest deserve a much greater role in constitutional interpretation than is currently recognized. Conflicts entail the same core concern about abuse of governmental power that underlies the Constitution's separation of powers. Consideration of conflicts therefore ties readily into fundamental constitutional principle.

Given its connection to a core constitutional value, we would expect consideration of conflicts to provide important insights into constitutional interpretation, and I have indicated how it can do so. Taking account of conflicts can provide answers to three important constitutional puzzles. It can give us 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.

Have I exhausted the role of conflicts of interest in constitutional interpretation? I suspect not. Conflicts concerns can arise whenever Congress, the President or the courts exercise their authority. Further thought by other scholars and by me will likely yield other constitutional questions that can be better understood from the perspective of conflicts of interest.²⁰⁶

²⁰⁶ We 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. Samuel Issacharoff, *In Real Elections, There Ought to Be Competition*, N.Y. Times, February 16, 2002, at A19. Conflicts of interest analysis could provide a strong basis for courts to impose nonpartisan methods of redistricting.