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Abstract

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.