

## Introduction

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Prevention and regulation of conflicts of interest among public officials has become a central theme in the study and practice of democratic politics. Recent political events have only intensified the spotlight on corruption in government, ending the careers of prominent politicians and fueling efforts to place comprehensive ethics reform at the top of the agendas of political leaders eager to reverse the steady erosion of public trust.<sup>1</sup> In the United States, ethics scandals involving lobbyist Jack Abramoff, former House Majority Leader Tom DeLay, and other political actors are credited with contributing to significant Republican losses in the 2006 congressional election and ushering in a wave of ethics reforms sponsored by the newly anointed Democratic House

<sup>1</sup> Over the past four decades, U.S. public opinion polls have shown that levels of public trust in government have eroded at the same time that public cynicism has risen. When asked, a majority of Americans agree you can't trust government or the politicians who run it to do what is right most of the time. A 1998 survey sponsored by the Council for Excellence in Government found that less than one-third of respondents agreed that today's public leaders are honest or have integrity. In light of recent ethics scandals plaguing Washington lobbyists and members of Congress, it is likely that this number is even lower today. The World Economic Forum's 2005 public opinion survey of over 20,000 citizens in twenty countries suggests a similar trend is developing worldwide. Public trust levels in national governments are at their lowest since tracking began in January 2001. ("Trust in Governments, Corporations and Global Institutions Continues to Decline," World Economic Forum Press Release, December 15, 2005, <http://www.weforum.org> (January 15, 2006).)

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leadership.<sup>2</sup> In 2005, a conflict-of-interest scandal ended the political career of a British Labour Party official, Secretary of State for Work and Pensions David Blunkett, and prompted the chairman of the Committee on Standards in Public Life to call for a review of the Ministerial Code. Political and administrative ethics scandals have influenced the outcome of the past two federal elections in Canada. Subsequently, the new Conservative government proposed its Federal Accountability Act, which offers a wide range of measures to increase accountability, transparency, and oversight in government operations. Other Western democracies have been similarly affected by elections that have been won or lost partly or primarily over ethics scandals.

Even though efforts to prevent private gain from public office have intensified in recent years, scholarship on the development, function, and impact of conflict-of-interest regulations is still relatively scarce. Even more rare is research that allows for a comparison of debates about conflict of interest across culture and modes of government. This volume seeks to fill this gap by bringing together leading scholars from four key Western democracies: the United States, Canada, the United Kingdom, and Italy. Each of these countries has conflict-of-interest rules or traditions that apply to public officials yet differ in their scope, emphasis, and relative success. What is a conflict and what is not? What structural, political, economic, and cultural factors contribute to the development of conflicts of interest involving public officials, and how do these factors shape the norms and legal remedies devised to address such conflicts in modern democracies? How should theories about democratic representation and government inform and shape the way that conflicts are defined and regulated? How have political elites sought to remedy conflicts, and what accounts for their success or failure? Where do the loopholes and gaps in current conflict-of-interest regulations lie, and how

<sup>2</sup> The Honest Leadership and Open Government Act, which was passed in the first 100 hours of the new Congress, strengthens disclosure and recusal requirements designed to prevent and prohibit conflicts of interest or even the appearance of a conflict of interest, bans members of Congress from accepting gifts and travel from lobbyists, and tightens restrictions on secondary and post-government employment, adding to an already complex web of ethics laws regulating public officials at local, state and federal levels of government in the United States.

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might they be filled? These are the central questions that the chapters in this volume seek to address.

By bridging theorists and empiricists, critics and advocates, this volume provides a comparative lens through which to study conflict-of-interest regimes. Contributors situate conflicts of interest within a broader discourse involving democratic theory; identify the structural, political, economic, and cultural factors that have contributed to the development of conflict-of-interest regulations in Western democracies; and assess the extent to which these efforts have succeeded or failed across and within different branches and systems of government. In so doing, this volume begins to explore the question of whether universal standards for the prevention and regulation of conflicts of interest can and should be created and enforced.

### Conflict-of-Interest Scholarship

Scholarship on conflict of interest in public life takes primarily two forms: studies that trace the history and causes of the evolution of conflicts statutes, and studies that examine and assess the effectiveness of conflicts regimes.<sup>3</sup> Scholars who research the evolution of conflicts statutes have sought to identify specific patterns in the development of these regulations. For example, authors trace the formation of conflict-of-interest legislation back to constitutional language regulating the structure of government and the behavior of public officials. Andrew Stark (1992b), who is also a contributor to this volume, shows that differences in the structure of government account for variations between U.S. and Canadian conflicts regulations. The constitutional stipulation of the separation of powers yields conflicts regulations that rest on different priorities and advance different remedies than conflicts statutes developed through parliamentary systems. Kathleen Clark (1996) argues that Article I of the U.S. Constitution, which prevents public officials from receiving gifts from foreign governments and forbids members of

<sup>3</sup> A significant subset of the conflict-of-interest literature focuses on legal analyses of specific conflicts statutes. These are not included in our review. See, e.g., Brown 2000; Collins 1994; Nardini 1996; Reeves 1983; Zinman 1994.

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Congress from accepting positions in a federal office that had been created during their tenure in Congress (64), has served as a model for future attempts to regulate the behavior of public officials. Similarly, Ian Greene (1990) demonstrates that current Canadian regulations, which focus on preserving impartiality in policy making and the execution of public office, rest on constitutional norms including social equality and the rule of law. Marion Doss and Robert Roberts (1997) refer to the founding when asserting that modern-day debates in the United States about regulating ethics mirror the disputes between Federalists and Anti-Federalists. Current concerns regarding the need to increase restrictions on the discretion of public officials echo the call by Anti-Federalists for limitations on the national government.<sup>4</sup>

Other scholars link the development of conflicts regulations to specific scandals or events that precipitated a decreased trust in government. These studies ask, how have conflict-of-interest statutes developed in response to corruption scandals? How does the specific nature of the scandal shape the resultant legislation? For example, Greene (1990) shows that scandals preceded many of the provincial and federal conflicts regulations that govern the behavior of Canadian public officials. The first major change to federal conflicts regulations occurred in 1973 after allegations of impropriety among Canadian cabinet ministers (246). A 1983 scandal involving a former cabinet minister who had engaged in business dealings with his department after his departure from office resulted, soon after, in the creation of an ethics task force (247). Conflicts of interest involving ministers' spouses precipitated 1988 legislation regulating the behavior of family members (248).

Scandal is also viewed as a catalyst of ethics reform in the United States. In *Scandal Proof*, Calvin Mackenzie (2002) traces the enactment of landmark ethics regulations since the early 1960s to a series of scandals involving American politicians. Doss and Roberts (1997) look further back in American history to show that scandals inspired members of Congress to place infringements on Truman political appointees – many of whom were involved in “influence peddling” (37).<sup>5</sup> New reforms were

<sup>4</sup> For a history of conflicts statutes in the United States see Green 2003.

<sup>5</sup> One of the most notorious of the Truman scandals involved tax evasion and employees accepting bribes.

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also created in response to the Eisenhower administration, which was plagued by scandals involving self-dealing (42–43).

Of course the most infamous of modern-day political scandals in the American context is Watergate.<sup>6</sup> As Doss and Roberts (1997) state, “Watergate constituted the single most important factor in building support for a new public integrity bureaucracy” (87). The scandal, and Nixon’s resignation, gave rise to comprehensive conflict-of-interest legislation that, among other things, imposed strict “revolving door” restrictions. More important, Congress adopted a vigilant and legalistic approach to preventing ethics violations that characterizes ethics statutes in the U.S. today. Even so, scandals continued to tarnish the administrations of Reagan through Bush. After continued allegations of abuse within both branches, Congress passed the Ethics Reform Act of 1989, which banned honoraria and other financial benefits, strengthened revolving-door restrictions and applied them to members of Congress, reaffirmed the “appearance standard,” and strengthened financial disclosure requirements (McBride 1990, 480–486; Clark 2002). Presidents George H. W. Bush and Bill Clinton also issued executive orders designed to demonstrate their commitment to upholding political ethics.

A second and more substantial area of conflict-of-interest scholarship examines how conflict-of-interest violations are defined or prioritized and the manner in which these conceptions impact the structure and efficacy of conflict-of-interest regulations. Within this literature scholars debate the effectiveness of conflict-of-interest legislation in general or assess the impact of specific regulations, in whole or in part. Are conflict-of-interest regulations overly legalistic? Have statutes drifted away from the principles on which they were developed? How should conflict-of-interest regulations be restructured to meet specific standards or to reflect general values of self-restraint or public service?

<sup>6</sup> Watergate reignited concerns about ethics in government and required Congress and the President to make concerted efforts to alleviate a growing public distrust in government. Congress responded with the Ethics in Government Act of 1978, which, among other things, instituted mandatory disclosure of financial assets for certain government employees, developed clear restrictions on post-employment activities for employees in the executive branch, and established the Office of Government Ethics (Clark 2001, 65; Walter 1981, 659).

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Conflicts of interest, according to this literature, violate two dimensions of public office: constituency relationships and institutional integrity. Regulations are crafted to address these different dimensions. Statutes concerned with the relationship between individual officeholders and their constituents typically focus on limiting private gain from public office. For example, Robert Vaughn (1990) argues that the notion of a public official as “an agent for broadly defined public interests” creates specific sets of responsibilities as well as a “moral calling” for public servants (421). For this reason, conflict-of-interest regulations are developed to ensure that public servants pursue their “moral calling” and make decisions that serve public, rather than personal, interests. Conflict-of-interest regulations, therefore, are intended to prevent both the appearance of using (Vaughn 1990, 428) and the opportunity to use (Nolan 1992) public office to advance private interests.

Andrew Stark (1997) examines the principles and theories driving concerns about private gain and questions how private gain should be construed in the context of public office. Private gain, argues Stark, occurs when a public official benefits privately from his or her role as a public official. Private gain need not come from private sources. Rather, public officials can accumulate personal benefits through public resources. To identify whether an action constitutes a conflict of interest in this sense, Stark asserts, we need to ask two questions: (1) Did the official participate in an activity “in order to advance a private interest that otherwise s/he would not have done?” and (2) Was the private benefit accrued from public office? (111). Stark uses this framework to evaluate the effectiveness of conflicts laws that attempt to curtail private gain.

In addition to prohibiting private gain from public office, conflict-of-interest regulations are also intended to preserve institutional integrity, which for Beth Nolan (1992) includes providing equal access to government services for all citizens. Nolan argues that in an effort to protect the integrity of government, conflicts statutes view the public servant as a “fiduciary” and encourage officeholders to act in the public interest. In this way, conflict-of-interest regulations help to ward off actions that may “threaten the trust with which the government employee is vested” (73). These regulations also serve to prevent bureaucratic capture. Thus, Nolan argues, conflict-of-interest regulations are established

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to “protect the integrity of . . . government” by keeping “government in the public interest rather than permitting it to be captured by private, monied interests” (79).

Within this literature, the scope of conflict-of-interest statutes is a matter of considerable debate. While some scholars call for more extensive conflicts regulations governing both private and legislative behavior (see, e.g., Vaughn 1990), Dennis Thompson (1995) asserts that conflicts statutes should be directed at preserving institutional integrity. Noting the recent proliferation of conflict-of-interest statutes in the United States, Thompson maintains that this development is not necessarily due to an upsurge in ethics violations. Rather, it is probably the result of an increased preoccupation with individual misconduct. Thompson distinguishes individual corruption – instances when “a legislator knew or should have known that the gain was provided in exchange for the service or that the legislator solicited the gain in exchange for the service” – from the “institutional conditions that tend to cause such services to be provided in exchange for gains.” For instance, Thompson explains, it is institutional, rather than individual, corruption that causes members to “combine fundraising and constituent service” and to ask the same staff members to perform both services (32). In this case, the norms and practices of Congress, rather than individual member motivation, lead to the potential for corruption. Asserting that “the harm that institutional corruption causes to the legislature and the democratic process is often greater than that caused by individual corruption” (8), Thompson urges policy makers to redirect their attention to addressing instances of institutional corruption through, for example, the development of external tribunals or commissions charged with assessing these institutional practices and their potential for corruption.

Other scholars claim that contestation over how conflicts of interest are defined is in part to blame for inefficiencies in the structure and implementation of conflicts regulations and a subsequent weakening of institutional integrity. Vaughn (1990), for example, argues that the development of legalistic conflicts rules, which can be traced to “the decline of the public service vision,” has rendered debates concerning political ethics “increasingly technical and arid” (419). By focusing on legal solutions to ethical problems, debates become centered on issues related to compliance, thus reducing the centrality of ethics. Vaughn

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predicts that unless the “ethical premises of the public service vision” (419) are re-incorporated into current discussions, the effectiveness of conflicts regulations will be eroded.

Stark (1997) is critical of a different aspect of debate over ethics reforms – the focus on restricting private gain in order to protect the integrity of public office – and he challenges the idea that private gain from public office always results in harm to the public. Looking at the “fiduciary role” of public officials, Stark identifies two “obligations” of professionals: the role-moral obligation and the ordinary-moral obligation. Unlike other professions, where the role-moral obligation requires professionals to develop a set of ethics to serve specific clients they encounter in their professional lives, the role-moral obligations of public officials serve the public at large (116). When individual officeholders gain privately from public office, explains Stark, private individuals or groups who feel that these officials have gained an unfair advantage because of their public office typically level complaints against them. Here, individuals and groups are responding to perceived violations of role-moral obligations. They are responding as citizens and taxpayers rather than as “client groups.” Debates regarding private gain from public office ultimately typically revolve around specific instances of unfair competition rather than broader notions of private gain. Consequently, argues Stark, the question of private gain for public officials is necessarily complicated. Public officials serve both the entire public and discrete publics. Given the fact that public officials serve many principals, it stands to reason that private gain may, on some occasions, benefit some portion of the public, while potentially harming others (118).

Similarly, Nolan (1992) cautions against prohibitions on outside income as a means for curbing ethics violations. These statutes may over-regulate, punishing individuals who did not abuse their public office. Nolan argues instead that the regulation of this activity should be refined to include only those instances where income is meant to compensate an individual for tasks completed in his or her capacity as a public official. Public officials, like other citizens, have the right to supplement their income through tasks completed outside the purview of government.

Some scholars point out that ambiguities in the definition or prioritization of conflicts violations may result in a contradictory or complex



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system of conflicts statutes, which in turn undermines the effectiveness of conflicts remedies. For example, Greene (1990) suggests that a disjuncture between Canadian conflicts regulations and their constitutional bases may have caused recent conflicts violations (256). In the absence of a clear connection to the constitutional principles that help frame conflicts statutes, asserts Greene, public officials are left with few tools to resolve statutory contradictions.<sup>7</sup> Echoing Greene's concerns, Nolan (1990) warns that goal ambiguity can lead to overly legalistic regimes of ethics regulations in which regulations are far removed from their intended goals and thus difficult to evaluate (409). Clark (1996) agrees that the lack of consensus regarding how to define and regulate conflicts violations has resulted in what one critic describes as "a complex and formidable rule structure, whose rationale is increasingly obscure" (58). She proposes that lawmakers adopt a model based on fiduciary theory to evaluate the utility of specific conflicts statutes. Clark is hopeful that legislators can "break out of the current morass" (101) of conflicts statutes by using fiduciary theory as a lens for identifying and filling gaps in conflicts regulations.

In his widely acclaimed book, *Conflict of Interest in American Public Life* (2000), Andrew Stark continues this line of argument. He asserts that changes over the past thirty years in how "conflicts" and "interests" are understood in the United States have altered how ethics violations are defined and subsequently regulated. Stark explains that the process used by lawmakers to identify a "conflict" has become increasingly objective, while our understanding of "interest" has become deeply subjective (4). U.S. legislators have developed a set of legalistic rules and laws that outline how to detect an ethical conflict and, more importantly, how to prevent one from occurring. Stark writes, "Because we cannot directly view mental states . . . conflict-of-interest structures remain concerned not with what 'actually happened' in the official's mind, but with 'what might have happened'; they make it illegal not to 'succumb to temptation' but 'to enter into relationships which are fraught with

<sup>7</sup> Greene identifies three problem areas plaguing Canadian conflicts regulations: (1) identifying the conditions under which patronage is perceived as legitimate, (2) establishing "the extent to which the rule against bias should constrain ministers," and (3) recognizing that legislators "wear two hats" and therefore are beholden to different, and sometimes contradictory, expectations of impartiality (244–245).

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temptation” (4). Thus, in an attempt to prevent temptation and the appearance of impropriety, subjective intent and motivation no longer play a role in evaluating whether an activity presents a conflict.<sup>8</sup>

Conversely, “interests,” according to Stark, are increasingly understood by U.S. lawmakers in subjective terms. No longer is it sufficient for public officials to divest themselves of specific and “objective pecuniary interests” (6). Their psychological and ideological dispositions may now be viewed as suspect. Stark demonstrates that these shifts have resulted in a set of conflicts regulations that attempt to control fundamentally moral dilemmas with overly legalistic solutions. Consequently, he calls for a realignment of conflicts regulations to more closely mirror the nature of the question or issue at hand. When we are concerned about “subjective encumbrances,” he argues, we should be frank about using our judgment rather than relying on technical rules or formulas. When questions or conflicts are technical in nature, we should resist the temptation to view them through the lens of morality (270).

The chapters in this volume continue to examine the evolution and implications of conflicts legislation. Some chapters directly address arguments that question how conflict of interest is conceptualized and whether specific sanctions are effective or appropriate. Others take up debates regarding the efficacy of legal mechanisms for combating conflict-of-interest violations. Some authors move beyond the American context to examine the theoretical assumptions that shape conflicts regimes in other Western democracies. Others expand the critique of conflicts statutes by arguing that the scope of legislation should be altered to include individuals beyond public office. Several chapters explore similarities and differences across nations in the development of remedies to conflicts of interest in public life, providing an important comparative dimension to scholarly literature that is heavily focused on the United States. Together, these chapters build on contemporary conflict-of-interest scholarship by expanding and supplementing debates generated in and by the literature reviewed above.

<sup>8</sup> Roberts and Doss (1992) suggest that one consequence of an over-reliance on legalistic rules is to “[diminish] the role of individual responsibility” (261) without resulting in any noticeable increase in public trust in government.