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Meredith M. Render

Working Paper



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CITIZEN STANDING AND THE EMOLUMENTS CLAUSE

Meredith M. Render*

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ABSTRACT

The text of the Emoluments Clause provides no explicit enforcement mechanism, raising questions about who may enforce the Clause, and the mechanism by which it might be enforced. Is the Clause enforceable exclusively by collective action – such as an impeachment proceeding by Congress—or is it also enforceable by individual lawsuit? If it can be enforced by private action, who has standing to sue? In the absence of textual guidance, it is necessary to turn to a broader constitutional theory to render enforcement of the Clause coherent.

This Article presents that broader constitutional theory. The Article demonstrates that the Emoluments Clause imposes a fiduciary duty on officers of the United States. When that duty is breached, all Americans suffer an undifferentiated injury which can serve as the basis for a private cause of action to enforce the Clause. Drawing on historical context and the constitutional context of the Clause, this Article demonstrates that enforcement of the Emoluments Clause is an example of a power that the Constitution reserves for “the People” to police the political branches.

More significantly, this Article presents the insight that, to date, separation-of-powers analysis has neglected this important aspect of constitutional design. The Supreme Court’s constrained understanding of the role of “the People” in the development of constitutional law has been increasingly the subject of “populist” criticism from those who understand the Framers to have constructed a central rather than derivative role for “the People.” While most of that criticism has been directed at the exclusive role that the judiciary plays in creating constitutional law, this Article applies a similar critique in the context of constitutional enforcement.

INTRODUCTION

The presidency of Donald President Trump has ignited a great deal of interest¹ in the Emoluments Clause.² At the time of publication, three separate

¹ See e.g., Norman L. Eisen, Richard Painter, and Laurence H. Tribe, *The Emoluments Clause: Its Text, Meaning, and Application To Donald J. President Trump*, available at https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf (“It is widely accepted that Mr. President Trump’s presidency will present a variety of conflicts issues, many of them arising from his far-flung domestic and global business activities. Indeed... the possibility of skewed incentives will haunt literally every interaction between the federal government and any Trump-associated business.”) It is worth noting that that scholarly interest in the Emoluments Clause has been recently generated in a related context by Zephyr Teachout’s use of the Emoluments Clause to support her claim that the Constitution embodies a structural anti-corruption principle – an argument that was cited by both a dissenting and concurring justice in *Citizens United*. C.f., Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

² Two distinct constitutional clauses are sometimes referred to as the “Emoluments Clause.” The first appear in Article I, and is also known as the “Ineligibility Clause” or the “Domestic Emoluments Clause.” U.S. CONST. ART. I, § 6, cl. 2. It applies only to members

lawsuits are pending in federal courts alleging that President Trump's decision not to divest from his business holdings prior to his inauguration has resulted in violations of the Clause.³ The first lawsuit was filed in January 2017 by a non-profit watch dog organization known as Citizens for Responsibility and Ethics in Washington (CREW lawsuit).⁴ The second suit was filed in June 2017 by the Attorneys General for the State of Maryland and the District of Columbia (MD/DC lawsuit).⁵ The third suit was also filed in June 2017 by 196 Democratic members of Congress (DEM lawsuit).⁶ The central claims of these complaints are strikingly similar.⁷ There is even some overlap among the counsel of record in the cases.⁸ What primarily

of Congress. It states that members of Congress shall not serve in "any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time." *Id.* A second "Emoluments Clause," also known as the "Foreign Emoluments Clause" appears at U.S. CONST. ART. I, § 9, cl. 8. It applies to any "person holding any office of profit or trust under" the United States. *Id.* When used in this Article, the term "Emoluments Clause" refers exclusively to the Foreign Emoluments Clause.

³ CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. Donald J. TRUMP, in his official capacity as President of the United States of America, Defendant., 2017 WL 277603 (S.D.N.Y.)[hereinafter CREW Complaint]; THE DISTRICT OF COLUMBIA, and THE STATE OF MARYLAND, Plaintiffs, v. Donald J. TRUMP, in his official capacity as President of the United States of America, Defendant., 2017 WL 2559732 (D.Md.) [hereinafter MD/DC Complaint]; and BLUMENTHAL et al., Plaintiffs, v. Donald J. TRUMP, his official capacity as President of the United States of America, Defendant., 2017 WL 2561946 (D.DC)[hereinafter DEM Complaint].

⁴ CREW Complaint, *supra* note 3.

⁵ MD/DC Complaint, *supra* note 3.

⁶ DEM Complaint, *supra* note 3.

⁷ The CREW Complaint, for example, complains both of general conflict of interests concerns and specific possible violations. General concerns include statements such as: "Defendant owns and controls hundreds of businesses throughout the world, including hotels and other properties. His business empire is made up of hundreds of different corporations... those business interests are creating countless conflicts of interest, as well as unprecedented influence by foreign governments, and have resulted and will further result in numerous violations of ...the 'Foreign Emoluments Clause.'" More specific allegations include statements such as: "The Embassy of Kuwait is scheduled to hold its National Day celebration at Defendant's Washington, D.C. hotel on February 25, 2017. A portion of the funds to pay for this Kuwaiti celebration will go directly to Defendant while he is President." CREW Complaint, *supra* note 3.

⁸ For example, Noah Bookbinder, who is affiliated with Citizens for Responsibility and Ethics in Washington and is one of the attorneys of record in the CREW lawsuit, is also an attorney of record in the Maryland and District of Columbia lawsuit. *See*, CREW Complaint and MD/DC Complaint, *supra* note 3.

distinguishes them from one another is the identity of the plaintiffs. The three lawsuits represent three distinct—and to some degree, creative—strikes at the same target: the Article III standing requirement.⁹

Specifically, the plaintiff profiles in these three cases have been crafted to meet the injury-in-fact standing requirement, which proscribes “generalized grievances.”¹⁰ It is unsurprising that these plaintiff profiles have been tailored with an eye to the standing requirement, as the generalized grievances prohibition will present significant challenge to any emoluments lawsuit filed against a sitting President. Article III standing is, of course, a hurdle that all federal cases must clear, and as a doctrine it has long been criticized as “incoherent,”¹¹ “pointless,”¹² and variously inadequate.¹³ But in the context of an Emoluments Clause challenge, an unreflective application of current standing doctrine could serve as a significant obstacle to any lawsuit seeking to enforce the Clause.¹⁴

⁹ The CREW Complaint posits standing based on the increased resources that the organization must expend to monitor President Trump’s business ties. CREW Complaint *supra*, note 4. On the other hand, the MD/DC Complaint bases standing on, *inter alia*, the “sovereign and quasi-sovereign interests of the District and Maryland. Maryland has an interest in preserving its role as a separate sovereign and securing observance of the terms under which it participates in the federal system.” MD/DC Complaint, *supra* note 4. The DEM Complaint bases its standing on the unique interest that members of Congress have in enforcing the Clause. DEM Complaint, *supra* note 3.

¹⁰ *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377(2014) at n. 3 (“While we have at times grounded our reluctance to entertain [generalized grievances] in the ‘counsels of prudence’ ... we have since held that such suits do not present constitutional ‘cases’ or ‘controversies.’ They are barred for constitutional reasons, not ‘prudential’ ones.”).

¹¹ ERVIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 60 (3rd ed. 2006) (describing standing doctrine as “incoherent.”).

¹² Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 75 (2007) (“In many cases, justiciability rules do no more than act as an apparently pointless constraint on courts.”).

¹³ See e.g., Eugene Kontorovich, *What is Standing Good For*, 93 VA. L. REV. 1663, 1665-66 (2007) (“Standing has been subject to voluminous and sustained criticism over the past forty years... Scholars almost unanimously regard the doctrine as pointless and incoherent at best, a veil for ideological manipulations at worst.”). See also, Heather Elliott, *The Functions of Standing*, 61 Stan. L. Rev. 459, 465 (2008) (arguing that standing doctrine is widely criticized because it cannot satisfy the goals that it purportedly serves).

¹⁴ To be clear, Article III standing is likely to be a challenge for any *lawsuit* that is filed against a President. It would not present an obstacle in an impeachment proceeding, which is a possible but not exclusive (or, under certain circumstances, likely) means of enforcing the Emoluments Clause, as is discussed *infra* at Part III.

Against this backdrop, this Article introduces a new critique of standing doctrine – as well a new understanding of existing critiques – by revealing the weaknesses of standing doctrine that are uniquely apparent in the context of an Emoluments Clause challenge to a sitting President.¹⁵ This Article advances two related theses. The first thesis is that current standing doctrine fails to adequately account for the *fiduciary* injury that arises in the context of an Emoluments violation. The second thesis is that current standing doctrine undervalues the important and constitutionally-committed role that individual citizen suits play in enforcing constitutional provisions, like the Emoluments Clause, the sole purpose of which is to ensure that those subject to it will not be tempted to abrogate their duty of loyalty to the United States.

In support of those theses, this Article presents three key insights: first, that current standing doctrine fails to recognize or address the kind of *fiduciary* injury that is the primary injury that follows from an Emoluments Clause violation. When the Emoluments Clause is violated, a federal officer (such as the President of the United States) has breached his fiduciary duty to the People. When that happens each one of the People suffers an identical fiduciary injury. However, fiduciary injury is not cognizable under current standing doctrine owing to the Court’s categorical exclusion of “generalized grievances.”

The second key insight is that the Supreme Court’s disinclination to recognize fiduciary injury represents a substantive, normative preference for “representative constitutionalism” as the principle means by which separation-of-powers norms are enforced. The principle of “representative constitutionalism” assumes that separation of powers norms are best enforced through collective action (via elected representatives) rather than individual action (via individual citizen’s lawsuits). This assumption is based either on one (or more) of the following premises: (1) the constitutional itself—either structurally, expressly, or in light of the framer’s intent—requires collective rather than individual enforcement of the Clause; or (2) collective action is pragmatically better suited to safeguard fiduciary duty enforced by the Clause, without sacrificing (while simultaneously protecting) separation-of-powers norms. However, neither of these assumptions are justified in the

¹⁵ A non-frivolous Emoluments Clause challenge to a sitting President was an unprecedented event prior to January 2017. Previous Presidents have been involved in Emoluments Clause issues -- for example, President Obama consulted with the Department of Justice and White House counsel prior to accepting the Noble Peace Prize. *See*, APPLICABILITY OF THE EMOLUMENTS CLAUSE AND THE FOREIGN GIFTS AND DECORATIONS ACT TO THE PRESIDENT'S RECEIPT OF THE NOBEL PEACE PRIZE, 33 O.L.C., 2009 WL 6365082, at *4 (Dec. 7, 2009) (The DOJ concluded that the award was not a gift from a foreign government, but was instead a gift from the Noble Foundation). However, no sitting President has been the Defendant in a non-frivolous litigation alleging an Emoluments Clause violation.

context of an Emoluments Clause violation. The available evidence surrounding the Clause suggests that the framers contemplated a robust and direct role for the People in enforcing constitutional norms. Moreover, a direct role for citizen participation in policing the political branch is particularly apt when the threat to be remediated is external (undue foreign influence) rather than internal (*e.g.*, the judicial branch usurping the role of the executive branch). While the Court's preference for representative constitutionalism may have merit in other constitutional contexts, it is inapposite in the context of a fiduciary injury, which itself represents the failure of collective action to adequately protect the interests of the People.

The third key insight is that "direct constitutionalism," rather than representative constitutionalism, is the principle most suited to redressing an undifferentiated fiduciary injury in general and in the Emoluments Clause context in particular. Direct constitutionalism posits that the constitution (structurally, expressly, and in light of framers' intent) requires that "the People" play a direct role in safeguarding certain democratic norms, and that as a pragmatic matter, permitting "the People" to play an individual and direct role is the best means of safeguarding certain democratic norms. Thus, the principle of direct constitutionalism is a better fit than representative constitutionalism for enforcing the Emoluments Clause.

These arguments are presented in the following format. Part I offers an introduction to the Foreign Emoluments Clause, providing a history of the Clause. Part I also provides a foundation for the argument that a violation of the Clause produces a fiduciary injury. Part II explains how the Supreme Court's prohibition of "generalized grievances" operates as an unnecessary obstacle in the Emoluments context by failing to recognize the fiduciary injury at the heart of an Emoluments violation. Part II also demonstrates that an unreflective application of the categorical exclusion of generalized grievances in the Emoluments context leads to absurd results. Part III posits that the Supreme Court's avoidance of generalized grievances in the context of fiduciary injuries represents an unjustifiable preference for representative rather than direct constitutionalism. Part III also explains why direct constitutionalism is a better fit with an Emoluments violation, both from the vantage point of the purpose and history of the Clause, and as a pragmatic means of enforcing important constitutional and democratic norms. Finally, Part IV offers a conclusion.

I. THE FOREIGN EMOLUMENTS CLAUSE IN CONTEXT

*“Everybody has heard of loyalty; most prize it; but few perceive it to be what, in its in most spirit, it really is, — the heart of all the virtues, the central duty amongst all duties.”*¹⁶

The Foreign Emoluments Clause is Article 1, Section 9, Clause 8 of the United States Constitution.¹⁷ It states:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.¹⁸

It is, in essence, an anti-bribery provision.¹⁹ Although contemporaneous records discussing the Clause are sparse, what evidence we do have suggests that the Clause was directed at preserving the independence of “foreign Ministers and other officers of the U.S.” from “external influence.”²⁰ For example, William Rawle, writing a commentary on the relatively new Constitution in 1829 described the utility of the Clause in terms of its capacity of hold foreign influence in abeyance.²¹ He stated:

There cannot be too much jealousy in respect to foreign influence. The treasures of Persia were successfully distributed in Athens; and it is now known that in England a profligate prince and many of his venal courtiers were

¹⁶ ROYCE, JOSIAH, *THE PHILOSOPHY OF LOYALTY* 1 (1908).

¹⁷ U.S. CONST. ART. I, § 9, cl. 8.

¹⁸ *Id.*

¹⁹ *See*, Teachout, *supra* note 1, at 366 (discussing the Emoluments Clause as a response to the worry among constitutional convention delegates that a president would be susceptible to bribery from foreign states.)

²⁰ FARRAND, MAX, ED. *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (1937) at 2:389 (“Mr Pinkney urged the necessity of preserving foreign Ministers & other officers of the U. S. independent of external influence and moved to insert [the Emoluments Clause].”).

²¹ William Rawle, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES* (1829) 119-120.

bribed into measures injurious to the nation by the gold of Louis XIV.²²

The “profligate prince” Rawles mentioned is a reference to King Charles II (1630 to 1685) of England.²³ A notorious spendthrift, Charles II had difficulty living within the generous appropriation afforded him by parliament,²⁴ so he supplemented his official income by accepting “secret payments from Louis XIV in return for his agreement to follow France's lead on certain matters.”²⁵ Charles II was repeatedly paid large sums by Louis XIV for various types of political support of France.²⁶

So taken were the Framers with this tale of royal treachery that the Foreign Emoluments Clause was inserted expressly to prevent an officer of the United States from putting his own financial interest above the interest of the nation in the context of foreign affairs.²⁷ The possibility that an officer of the then nascent United States would be tempted by the sizable purses of established European crowns was a considerable concern of the time.²⁸ While domestic bribery was left to the legislative branch to resolve, the Framers concluded that bribery from a foreign state posed such a uniquely grave threat to the survival of the nation that they included the emoluments prohibition

²² *Id.* at 119.

²³ See Clyde L. Grose, *Louis XIV's Financial Relations with Charles II and the English Parliament*, 1 J. Modern Hist. 177 (1929)(detailing Louis XIV's successful attempts to bribe Charles II of England in order to influence English domestic law and foreign policy.).

²⁴ *Id.* at 178 (describing Charles II's financial situation as “desperate” under the subsidy provided him by Parliament.)

²⁵ Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207 at n. 145 (2009).

²⁶ Grose, *supra* note 23, at 204.

²⁷ See Painter and Tribe, *supra* note 1, at 12(“Familiar with the corruption of King Charles II of England by lavish pensions and promises from King Louis XIV, the Framers manifestly did not see national leaders as immune from foreign influence.”). See also, Seth Barrett Tillman, *Interpreting Precise Constitutional Text: The Argument for A "New" Interpretation of the Incompatibility Clause, the Removal & Disqualification Clause, and the Religious Test Clause-A Response to Professor Josh Chafetz's*, 61 CLEV. ST. L. REV. 285, 356 (2013)(“But the provision barring Presidents from accepting foreign emoluments was arguably added to prevent Presidents from being corrupted by foreign bribes, as occurred when Charles II accepted money from France's Louis XIV.”).

²⁸ Teachout, *supra* note 1, at 366 (“The [constitutional convention] delegates were concerned that the short executive tenure could lead Presidents to be seduced by promises of future opulence by foreign powers, and give over their country for their own advantage.”).

among a only a tiny handful of criminal and quasi-criminal prohibitions included in the Constitution itself.²⁹

Arguably, the Framers viewed foreign bribery so severely because they conceived of it as a *malum in se* tantamount to (or at least akin to) treason itself -- which would also explain why foreign bribery was singled out and a prohibition against domestic bribery was left to legislative branch to resolve.³⁰ Its place in the Constitution signals not only the graveness of the wrong but that from the vantage point of the Framers, conspiring with a foreign state is fundamentally anathema to the solemn duty of loyalty that attends the “Office of Profit or Trust [held] under [the United States].”³¹ A consideration of that duty follows.

A. *The Emolument Clause’s Duty of Loyalty*

Although silent regarding its own enforcement, the Emoluments Clause itself is a mechanism for enforcing a federal officer’s fiduciary duty of loyalty to the United States against hostile foreign influence.³² The threat that the Framers addressed with the Emoluments Clause is more complex than an ordinary problem of political corruption. It is a problem of political corruption coupled with the menacing threat of a hostile foreign state obtaining secret and outsized influence over a person who is elected to serve the interests of “the People.” The Clause does not target practices in which an officer of the United States exploits his or her office for personal enrichment (e.g. by promoting domestic projects in which he or she has a financial interest). It also fails to capture instances in which an officer accepts money in exchange for assisting a domestic political ally. It is directed exclusively at the external threat of foreign influence.

²⁹ See *id.* at 373 (describing the framer’s worry about corruption as an “obsession.”).

Zephyr Teachout, *The Anti-Corruption Principle*, 94 *Cornell L. Rev.* 341, 373 (2009).

³⁰ Treason is one of only three crimes enumerated in the Constitution. Charles R. Fritch, *Drug Smuggling on the High Seas: Using International Legal Principles to Establish Jurisdiction over the Illicit Narcotics Trade and the Ninth Circuit’s Unnecessary Nexus Requirement*, 8 *WASH. U. GLOBAL STUD. L. REV.* 701, 721 (2009) (“Piracy, treason, and felonies on the high seas, are the only enumerated crimes in the entire Constitution.”).

³¹ U.S. CONST. ART. I, § 9, cl. 8.

³² It is arguably one of several constitutional provisions that impose fiduciary duties on government actors. See Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 *U. KAN. L. REV.* 1, 52–53 (2003) (“Although the drafters were not utopian enough to create a purely fiduciary government, fiduciary principles pervade the Constitution.”).

Further, the Clause does not impose a *complete* ban on accepting money from foreign states.³³ After all, an officer may keep an emolument if he or she first receives the consent of Congress.³⁴ Instead, the Clause imposes a ban on *secret*, undeclared bribes – the very bribes that allowed Charles II to manipulate Parliament on behalf of Louis XIV.³⁵ Had Parliament been made aware of the agreements between Charles II and Louis XIV, they would have understood Charles’ political maneuvering within the context of the French agenda and could have defended English interests accordingly.³⁶ Similarly, the Emoluments Clause demands that money received from foreign states be declared in the light of day, and subject to Congressional scrutiny.³⁷

The Clause then is not just directed at corruption per se.³⁸ It is, instead, specifically directed at *loyalty*.³⁹ The Emoluments Clause prohibition is rendered sensible only by the understanding that in accepting a foreign bribe, a federal officer breaches a preexisting duty of loyalty owed to the American People.⁴⁰ Moreover, the duty of loyalty that the Clause enforces is a duty of loyalty to the People of the United States, jealously and exclusively, as against any external threat.⁴¹

³³ U.S. CONST. ART. I, § 9, cl. 8.

³⁴ *Id.* (stating that no officer can accept an emolument without the consent of Congress).

³⁵ *See* Grose, *supra* note 23, at 189 (describing bribes offered to Charles II in return for not calling Parliament to session).

³⁶ *See id.* at 180 (describing the secret Treaty of Dover that Charles II hid from the English people).

³⁷ U.S. CONST. ART. I, § 9, cl. 8 (emoluments from foreign states require the consent of Congress).

³⁸ *But see*, Teachout, *supra* note 1 (arguing that the Clause supports a broader, structural anti-corruption principle in constitutional doctrine).

³⁹ *See e.g.*, Christopher M. Petras, *Serving Two Masters: Military Aircraft Commander Authority and the Strategic Airlift Capability Partnership's Multinational Airlift Fleet*, 77 J. AIR L. & COM. 105, 144 (2012)(stating that the Emoluments Clause was designed to address the problem of “divided loyalty.”).

⁴⁰ *See* Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U.L. REV. COLLOQUY 180, 185 (2013) (positing that “the core purpose of the Foreign Emoluments Clause was to ensure the loyalty of those holding federal appointed or statutory offices.”).

⁴¹ *Compare*, Andrew D. Miller, *Terminating the "Just Not American Enough" Idea: Saying "Hasta La Vista" to the Natural-Born-Citizen Requirement of Presidential Eligibility*, 57 SYRACUSE L. REV. 97, 117 (2006)(describing the importance of undivided presidential loyalties in another context.”).

I am not claiming that a general common law fiduciary duty exists between every federal officer and every citizen.⁴² The claim is instead much more circumscribed. The claim is merely that the Emoluments Clause itself presumes and enforces a duty of loyalty to the People of the United States as against a foreign state. However, while the Emoluments Clause itself is directed at enforcing a fairly narrow and specific duty (i.e. loyalty to the American People vis a vis a foreign threat), it may also serve as evidence that the Framers presumed and contemplated a broader fiduciary relationship between the American People and their officers.⁴³

There has recently been emerging scholarly interest in understanding the ethical and legal obligations of political leaders through the lens of the fiduciary relationship.⁴⁴ Support for the proposition that fiduciary principles are legally binding on federal officers has also been identified in the General Welfare Clause,⁴⁵ the Twenty-Seventh Amendment,⁴⁶ and other Constitutional provisions.⁴⁷

⁴² *C.f.*, D. Theodore Rave, *Politicians As Fiduciaries*, 126 HARV. L. REV. 671 (2013)(arguing that common law fiduciary principles apply to politicians.). I do not take a position here as to whether there exists (either literally or by profitable analogy) a general common law fiduciary duty among officers of the United States.

⁴³ *Id.* at 711 (arguing that there “is evidence that the Framers intended to incorporate fiduciary principles into the constitutional structure.”).

⁴⁴ *See e.g.*, Ethan J. Leib, Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1822 (2016)(“Our thesis is that fiduciary principles can be fruitfully applied to many domains of public law.”); Ethan J. Leib, David L. Ponet, Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91, 101 (2013) (“What might be called ‘fiduciary political theory’ can indeed provide us with insight into institutional design within liberal democracies... Because public office is a public trust, fiduciary architecture can help orient us in figuring out how political power should be exercised legitimately.”); David L. Ponet, Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249, 1249–50 (2011)(“If our elected political leaders are, after all, our public fiduciaries, they may be bound by fiduciary duties that underwrite a dialogic imperative with their constituents.”). For a contrary view, *see*, Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1146 (2014)(describing fiduciary law as a poor fit as a mechanism of constraining the behavior of public officials).

⁴⁵ Natelson, *supra* note 33 at 53 (“The General Welfare Clause served the same end of fiduciary-style impartiality.”).

⁴⁶ Rave, *supra* note 43, at 714 (“The Twenty-Seventh Amendment attempted to solve what would otherwise be a breach of the duty of loyalty by providing that no change in compensation may take effect before an intervening election of representatives.”).

⁴⁷ *See e.g.*, Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52, 52-53 (Gary Lawson et al. eds., 2010) (arguing that the Necessary and Proper Clause is a constitutional source of fiduciary duty, and stating that “the Constitution should be read through a fiduciary lens. A central

Several scholars have also argued that the record of debate at the constitutional convention of 1787 and other contemporaneous writing of the time indicate that the Framers presumed that federal officers would be bound by enforceable fiduciary obligations.⁴⁸ Robert Natelson, for example, has made a persuasive case that the Framers understood public officials to be “legally bound to (appropriately adapted) standards borrowed from the law regulating private fiduciaries.”⁴⁹ Natelson makes the case that discussions surrounding constitutional structure at the constitutional convention in 1787 were frequently based on fiduciary principles, and that the delegates described government officials as “the people's servants, agents, guardians, or trustees.”⁵⁰ Natelson has argued that “this was a subject on which there was no disagreement from the Constitution's opponents.”⁵¹ The Federalist Papers, too, are replete with references to a duty loyalty and make frequent use of the term “fiduciary” in that context,⁵² as are contemporary political writing in the period following the ratification of the Constitution.⁵³

purpose of the document was to adopt for America a federal government whose conduct would mimic that of the private-law fiduciary.”).

⁴⁸ See e.g., Gary Lawson, Guy I. Seidman, and Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 428 (2014) (arguing that the Framers understood the Constitution to be “a grant of powers from a principal, identified in the Preamble as ‘We the People of the United States,’ to various designees or agents.”).

⁴⁹ Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1083–85 (2004). See also, David Ponet and Ethan Leib, *supra* note 45 (“Features of fiduciary law usefully model how deliberation can be understood between political unequals, in particular when the individual with more political power is supposed to be holding the interests of the individual with less power in trust.”).

⁵⁰ Natelson, *supra* note 50, at 1088.

⁵¹ *Id.* But see, Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1171 (2014) (“When the Founders raised the theory of fiduciary government, they often did so in connection with political, not judicial, mechanisms for holding government accountable. As a result, there simply is not compelling enough evidence that the Founders intended to incorporate trust law as constitutional law to justify disturbing settled constitutional understandings.”).

⁵² For example, James Madison described the government as an agent of the people in Federalist 46 where he wrote, “the federal and State governments are in fact but different agents and trustees of the people.” FEDERALIST 46 (James Madison).

⁵³ Rave, *supra* note 43, at 710 (“In the years following the Revolution, the newly independent Americans frequently used the language of agency and trusteeship in reference to their legislative representatives.”)

Theodore Rave has extended Natelson's argument that the Framers presumed and contemplated a broad and binding fiduciary relationship between elected officials and the People.⁵⁴ Rave provides two theoretical bases that justify the imposition of a binding fiduciary duty on elected officials, arguing that both contract theory and the theory of delegated political authority support the proposition that politicians are bound by fiduciary principles.⁵⁵

However, we need not here undertake the project of weighing the full scope and implications of a federal officer's binding fiduciary duty because the Emoluments Clause as an enforcement mechanism is both narrow and specific.⁵⁶ It identifies a narrow class of behavior to be avoided in furtherance of a specific kind of duty: a duty of loyalty to the People as against a foreign influence.⁵⁷ The core of this insight is simple: federal officers – including, as in the case at hand, the President of the United States -- owe a duty of loyalty to the people they govern.⁵⁸ If we apply this idea to the President of the United States, it would follow that the President has an ethical and legal obligation not to put his own interest before the interest of the People when the two interests are in conflict.⁵⁹

So if the Emoluments Clause is a mechanism to enforce an underlying duty of loyalty to the People as against foreign influence, how might we

⁵⁴ *Id.* at 720 (“Indeed, in *The Federalist* No. 78, Alexander Hamilton explained that it was the role of the judiciary to keep elected agents within the limits of their delegated authority.”).

⁵⁵ *Id.* at 712 (“Recognizing that political representatives bear a duty of loyalty is also consistent with two major theoretical justifications for fiduciary duties in private law: contract and delegated power.”).

⁵⁶ *Compare*, EVAN FOX-DECENT, *SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY* 22 (2011) (grounding constitutional authority in the implicit fiduciary relationship that exists between the state and the governed).

⁵⁷ U.S. CONST. ART. I, § 9, cl. 8. (Officers cannot “accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.”).

⁵⁸ There is some dispute about whether the Foreign Emoluments Clause applies to the President of the United States. *See e.g.*, Tillman, *supra* note 41, at 413 (arguing that the Clause does not apply to the President). However, presidents and their legal counsel have generally behaved as though presidents are bound by the Clause. There is some history of presidents of expressly complying with the Emoluments Clause. For example, Presidents Van Buren, Tyler, and Jackson all sought consent from Congress to keep presents they received from foreign states. Teachout, *supra* note 1, at 42.

⁵⁹ *See* D. Theodore Rave, *Fiduciary Voters?*, 66 DUKE L.J. 331, 342 (2016)(identifying the core of fiduciary duty as “ the duty of loyalty, which requires the fiduciary to act for the exclusive benefit of the beneficiary--to put the beneficiary's interests ahead of his own.”).

characterize the injury that follows from a violation of the Clause? A consideration of this question follows.

B. Fiduciary Injury

If the Emoluments Clause imposes a fiduciary duty, then the injury that follows from a violation of the Clause -- at least the *primary* injury, the injury we should care about -- is a *purely* fiduciary injury. By “purely” fiduciary I mean to describe an injury that stands apart from any economic or liberty injury that might also be incidental to the disloyalty. A purely fiduciary injury is the unique injury that follows breach of the duty of loyalty. Disloyalty in this context may involve putting the agent’s own interest ahead of the interest of the principle. Because the duty requires that the agent put the principle’s interest ahead of his own, when the agent fails to do so, he or she is in breach. The breach itself, being unlawful is remediable, and the injury that it remediates is a purely fiduciary injury. A consideration of the manner in which a purely fiduciary injury is distinct from other forms of injury incidental to a breach, as well as the types of relief available for fiduciary injury follows.

1. Injunctive Relief for Purely Fiduciary Injury

When a breach of fiduciary duty occurs, several remedial possibilities loom. The most important of these – from the Emoluments perspective - is injunctive relief to stop the bad behavior.⁶⁰ It is well settled that to redress a *purely* fiduciary injury, “the court, on motion of the attorney general or on its own, can ‘enjoin wrongful conduct...redress of a breach or performance of fiduciary duties.’”⁶¹ The breach itself, being unlawful, can be enjoined even in the absence of a demonstration of actual harm to the principal.⁶² An

⁶⁰ Punitive damages are a second important form of relief available in the context of a purely fiduciary injury, a full discussion of which exceeds the scope of this piece. *See e.g.*, § 17:13. *Breach of fiduciary duty—Punitive damages*, MISSISSIPPI LAW OF TORTS § 17:13 (2d ed.) (“A breach of a fiduciary duty has been recognized by the Supreme Court as an ‘extreme or a special additional circumstance’ in which punitive damages may be appropriate.”).

⁶¹ Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 1036 (2004).

⁶² *See* Christopher L. Gadoury, *Breach of Fiduciary Duty Remedies*, 32 THE ADVOC. (TEXAS) 52, 54 (2005) (“A plaintiff can obtain injunctive relief enjoin a fiduciary's continued breach of duty, such as an agent's or former agent's misappropriation of trade secrets and competition with the principal.”). *See also*, *Arce v. Burrow*, 997 S.W.2D 229, 238-40 (Tex. 1999) (a client need not prove harm to recover fees in a breach of fiduciary duty action against an attorney.).

example that is similar to the emoluments context at issue here arises in the context of the employer-employee relationship.⁶³ When an employee is subject to a fiduciary duty of loyalty to an employer and breaches that duty, the employee can be preliminarily enjoined on a prima facie showing of wrongdoing.⁶⁴ It has been observed that “this liberal preliminary injunction proof standard is especially necessary in fiduciary duty cases, for the injured employer will rarely be able to offer direct proof of misconduct by its agents; employees invariably disguise their disloyal activities.”⁶⁵

This low threshold for relief supports the deterrence value of the rule against disloyalty by punishing bad conduct per se.⁶⁶ While compensation is sometimes a functional component of the rule, it is not necessarily the primary function of the rule.⁶⁷ As disloyalty in the context of a fiduciary duty is *malum en se* (or, at least so thought the Framer) it follows that the primary function of the rule enforcing loyalty is to first stop the bad behavior and, secondarily, to deter others from similar malfeasance.⁶⁸ The employer-principal need not show that he or she will or has already suffered an economic injury as a result of the breach in order to ask a court to enjoin it.⁶⁹

Similarly, in the context of an Emoluments violation, when the officer-agent who is bound by a duty of loyalty to the principal-citizens violates that duty, the breach itself is remediable without a further showing of other harm. The harm is in the breach itself. This is so because like the

⁶³ William Lynch Schaller, *Disloyalty and Distrust: The Eroding Fiduciary Duties of Illinois Employees*, 3 DEPAUL BUS. L.J. 1, 10 (1991) (Illinois law imposes a fiduciary duty of loyalty on employees).

⁶⁴ *Id.* at 14.

⁶⁵ *Id.* at 62.

⁶⁶ See e.g., George P. Roach, *Texas Remedies in Equity for Breach of Fiduciary Duty: Disgorgement, Forfeiture, and Fracturing*, 45 ST. MARY'S L.J. 367, 391–92 (2014) (“Traditionally, Texas courts have offered two explanations for the apparent severity of remedies for breach of fiduciary duty...Courts emphasize the need for deterrence and to minimize the temptation for fiduciaries to abuse their powerful positions of control over their clients' assets and opportunities.”).

⁶⁷ Sandra K. Miller, *The Best of Both Worlds: Default Fiduciary Duties and Contractual Freedom in Alternative Business Entities*, 39 J. CORP. L. 295, 326 (2014) (“Fiduciary duties are believed to serve a number of important policy interests, including, but not limited to, a socialization function; a culturally based, expressive objective; a deterrence role; and a remedial role.”).

⁶⁸ See *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 995–96 (2d Cir. 1983) (“An action for breach of fiduciary duty is a prophylactic rule intended to remove all incentive to breach—not simply to compensate for damages in the event of a breach.”)

⁶⁹ Schaller, *supra* note 64, at 10.

employer-employee context, harm is handily inferred in the context of an officer conspiring with a foreign state. Thus injunctive relief should be available upon a prima facie showing of breach. As in other contexts, the rule in the Emoluments context should be construed as prophylactic and the injury that follows from an officer's disloyalty as against a foreign state should be inferred by the breach itself.⁷⁰

Further, by prohibiting the specific conduct of accepting an emolument, the Clause creates the terms of the breach.⁷¹ Assuming we understand the officer-agent to owe a duty of loyalty to the principal-citizen that is, in part, codified in the Emoluments Clause, violation of the Clause constitutes breach of the duty. A prima facie showing of violation is then a prima facie showing of breach, and should be adequate to compel preliminary injunctive relief. Successful demonstration on the merits of a violation of the Clause is a successful demonstration on the merits of breach, and should be adequate to compel permanent injunctive relief.

2. *Distinguishing Economic Injury from Fiduciary Injury*

It is important to be clear that an economic injury is distinct from a purely fiduciary injury. While an economic injury may coincide with a fiduciary injury, the two types of harms should not be conflated. When an agent breaches a duty of loyalty relief may be available regardless of economic loss.⁷² This is particularly true where the agent-principal relationship is a relationship of particular trust or unequal power, as is sometimes the case with attorneys, doctors, or clergy.⁷³ The attorney-client relationship, in particular, is one in which relief is often available in the

⁷⁰ 722 F.2d at 995–96.

⁷¹ U.S. CONST. ART. I, § 9, cl. 8. (using words such as “shall” and “of any kind” to indicate prohibited conduct.).

⁷² See, e.g., Sande Buhai, *Lawyers As Fiduciaries*, 53 ST. LOUIS U. L.J. 553, 580–81 (2009) (“The Restatement (Third) of Agency [states] an agent has an affirmative fiduciary duty ‘to act loyally for the principal's benefit. . . .’ And breaches of these duties are broadly enforceable, regardless of whether the principal can show actual harm.”).

⁷³ Caroline Forell & Anna Sortun, *The Tort of Betrayal of Trust*, 42 U. MICH. J.L. REFORM 557, 567 (2009) (“During the past thirty years, numerous breach of fiduciary duty claims have been brought where the injury is essentially non-financial; on review, appellate courts have occasionally allowed them to go forward. In these cases, the impermissible conflict of interest may be financial, personal, or both. The parties most frequently sued in these contexts are doctors, lawyers, clergy, and other professionals whose main role is not managing money or running a business. Instead, their central role is to provide services to people who are faced with personal problems that require both undivided loyalty and the maintenance of confidentiality.”).

absence of economic loss, largely in service of the prophylactic deterrent value of the rule proscribing breach.⁷⁴

Of course, when a principle *has* been economically harmed by the breach, he or she may seek compensation in the same way that compensation is available whenever a plaintiff suffers an economic injury caused by the illegal conduct of the defendant.⁷⁵ In that context, the fact that the injury occurred in the context of a breach of fiduciary duty may modify the causation aspect of the cause of action.⁷⁶ For example, a principle may not need to show that the agent's disloyalty was even the proximate cause of his or her economic injury.⁷⁷ This is because "[a]n action for breach of fiduciary duty is a prophylactic rule intended to remove all incentive to breach."⁷⁸ The remedy is designed to discourage and punish the disloyalty. Courts have recognized that causation is difficult to trace to in these contexts, and that the rule is designed primarily to deter.⁷⁹

Because a fiduciary injury can coincide with an economic injury in many circumstances, there is occasionally some confusion surrounding the concept of fiduciary injury. This is especially so where injunctive relief is not requested and only compensatory damages (or punitive and compensatory damages) are sought. However, a helpful way to isolate fiduciary injury is to interrogate whether a court could enjoin a breach of fiduciary duty in the absence of economic loss.

Consider, for example, *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, a case involving George Harrison, of The Beatles fame.⁸⁰ In 1971,

⁷⁴ Buhai, *supra* note 73, at 581.

⁷⁵ John F. Mariani, Christopher W. Kammerer, Nancy Guffey-Landers, *Understanding Fiduciary Duty*, FLA. B.J., March 2010, at 20 (the beneficiary of a fiduciary duty can obtain both legal and equitable remedies).

⁷⁶ 722 F.2d 988 ("Once breach of fiduciary duty was established, preventive function of action therefore warranted imposition of liability, even without [a] showing [of a] 'but for' relationship between [the agent's] improper conduct and [the principal's injury].").

⁷⁷ *Id.* at 995-996 (Appellant urges, in essence, that a finding of breach of fiduciary duty by an agent, to be actionable, must be found to have been the proximate cause of injury to the principal. We do not accept appellant's proffered causation standard... [T]he function of [an action founded on breach of fiduciary duty] ... is not merely to compensate the plaintiff for wrongs committed by the defendant but ... 'to prevent them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates.'").

⁷⁸ *Id.* at 996.

⁷⁹ *Id.* at 803 ("Intrusion into and interference with Harrison's 1975 and January 1976 settlement efforts were to the probable detriment of its former client.").

⁸⁰ 722 F.2d 988 (1983).

Harrison was involved in a copyright dispute with Bright Tunes Music Corp. over the song “My Sweet Lord.”⁸¹ In the midst of the copyright dispute, Harrison’s business manager, Allen Klein, engaged in negotiations with Bright Tunes to purchase Bright Tunes for Klein’s own use.⁸² Harrison was unaware of these negotiations.⁸³ To advance his cause to purchase the company, Klein provided Bright Tunes with inside information about the value of the song in dispute, thereby harming Harrison’s effort to reach a settlement with Bright Tunes.⁸⁴ In that circumstance, Harrison suffered first a purely fiduciary injury.⁸⁵ Had Harrison discovered that Klein was negotiating on his own behalf before Klein’s action had actually affected Harrison’s ongoing negotiation with Bright Tunes, Harrison could have enjoined Klein from continued or future breaching his fiduciary duty, even if Klein’s breach had not yet caused Harrison any economic injury.⁸⁶ However, since the breach was not discovered until after the economic damage was done, Harrison was able to recover compensatory damages for his economic loss.⁸⁷

3. *Emoluments Injury as an Exclusively Fiduciary Injury*

In the Emoluments context, it *could* be the case that a citizen-principal suffers an economic loss caused by an officer’s breach of the duty of loyalty imposed by the Emoluments Clause.⁸⁸ However, an economic loss associated with an Emoluments Clause will *always* be tangential or collateral to the primary injury. The primary injury that attends an Emoluments violation is a

⁸¹ *Id.* at 990.

⁸² *Id.* at 991.

⁸³ *Id.* at 991 (“Apparently unknown to George Harrison, Klein had been negotiating with Bright Tunes to purchase all of Bright Tunes’ stock.”).

⁸⁴ *Id.* at 995.

⁸⁵ *Id.* at 996 (“Although not wholly analogous to the side-switching cases involving attorneys and their former clients, this fact situation creates clear questions of impropriety.”).

⁸⁶ REMEDIES, 2 HANDLING BUSINESS TORT CASES § 28:8 (2015) (“The court can enjoin the fiduciary from continuing to breach his duties, or otherwise order him to do things that will protect the beneficiary.”).

⁸⁷ 722 F.2d at 997.

⁸⁸ The CREW Complaint, for example, asserts that plaintiffs who owned hotels competing with President Trump’s hotel suffered an economic loss of lost business. CREW Complaint, *supra* note 3.

purely fiduciary injury. The Clause is a guarantee that a federal officer will not breach his or her duty of loyalty to the People as against foreign states.⁸⁹ Thus, the injury caused by a violation of the Clause is tied to the fiduciary nature of that promise. Like the injury that arises from the breach of an attorney-client fiduciary relationship, an Emoluments Clause injury is an injury of disloyalty, whether or not that disloyalty results in economic or other loss.⁹⁰ Disloyalty will always be the primary injury that results from its violation.⁹¹

One way that we can identify the fiduciary injury inherent in a violation of the Clause is by imagining that an Emoluments violation was currently happening and that the unlawful behavior was ongoing. In that circumstance it is uncontroversial that individual with standing to sue could ask a court to enjoin the ongoing violation.⁹² In that situation – *assuming a plaintiff with standing* -- injunctive relief would almost surely be available. The court has the power to stop the unlawful behavior even in the absence of demonstrable economic loss.⁹³

However, the key to judicial intervention in the preceding hypothetical is the existence of a plaintiff with standing. The Supreme Court’s current standing doctrine adopts an unjustifiably unfavorable view of fiduciary injuries and other non-monetizable injuries. This fact, coupled with the Court’s preference for collective rather individual action to redress a certain class of constitutional wrong creates a complicated picture for any Emoluments-based lawsuit. A fuller discussion of these points follows.

II. STANDING AND FIDUCIARY INJURY

⁸⁹ Eisen, et al., *supra* note 1, at 7 (“Ultimately, the theory of the Emoluments Clause—grounded in English history and the Framers’ experience—is that a federal officeholder who receives something of value from a foreign power can be imperceptibly induced to compromise what the Constitution insists be his exclusive loyalty: the best interest of the United States of America.”).

⁹⁰ See *Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 OP. O.L.C. 13, 18 (1994) (“Those who hold offices under the United States must give the government their unclouded judgment and their uncompromised loyalty.”).

⁹¹ See Rave, *supra* note 43, at 707 (“It is appropriate to think of political representatives as standing in a fiduciary capacity to the people they represent, giving rise to a fiduciary duty of loyalty.”)

⁹² See REMEDIES, *supra* note 87, at 2.

⁹³ See Forell & Sortun, *supra* note 74, at 567.

In agency law, when an agent violates his duty of loyalty an individual principal can directly sue to enforce the duty or seek compensation.⁹⁴ In the context of a corporation, the agent may be a CEO and the principles may be shareholders.⁹⁵ In that context, a shareholder need not depend upon the Board of Directors to intervene to curb or redress the principle's disloyal behavior.⁹⁶ There are several reasons why the availability of a direct, rather than representative, mechanism of enforce is important.⁹⁷ The most compelling reason is that the interests of the Board and the interests of the principals may not perfectly align.⁹⁸ The Board may have an interest in maintaining the unlawful behavior or it may have an interest in shielding the CEO from scandal or criticism.⁹⁹ This is a classic agency problem.¹⁰⁰

Agency law accounts for these potentially misaligned interests by providing the shareholder with a direct cause of action.¹⁰¹ The reason for this is simple: the breach of a duty of loyalty is so serious a threat to the wellbeing of the corporation, that the most robust set of tools possible must be made available to arrest the malfeasance.¹⁰² In this light, the broad grant of standing

⁹⁴ Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 920 (1988) (“Cases permit individual shareholders to sue directly when the directors misuse their powers” resulting in a breach of fiduciary duty.).

⁹⁵ *Id.* at 920 (“The corporation's directors surely owe a fiduciary obligation to the corporation, and, in the United States, are often assumed to owe such an obligation directly to the corporation's shareholders as well.”).

⁹⁶ *Id.* at 920 (“That an individual action is permitted, and the claim is not treated as one that must be asserted derivatively on the corporation's behalf, is consistent with treating the director's duty as one directly to the shareholders.”)

⁹⁷ Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467, 474–75 (2014) (“The great bulk of corporate law is directed at minimizing the costs associated with [the] agency problem [of managers not acting in the interests of their shareholders]. State law fiduciary duties are the principal substantive corporate law rules that limit director and manager opportunism, and shareholder suits--either derivative actions or direct claims--are the mechanism for enforcing those duties. The threat of a fiduciary suit can deter management misconduct, and this deterrence rationale is regarded as the chief justification for shareholder suits.”).

⁹⁸ *Id.* at 474 (“There is the ever-present risk that managers may fail to act in the interests of shareholders.”).

⁹⁹ *Id.* at 474-475.

¹⁰⁰ Helen Garten, *Institutional Investors and the New Financial Order*, 44 RUTGERS L. REV. 585, 588 (1992) (“Since the preferences of managers and shareholders diverge, a classic agency problem develops.”).

¹⁰¹ DeMott, *surpa* note 95, at 920.

¹⁰² Myers, *surpa* note 98, at 474-475.

is less about making shareholders whole than it is about protecting the wellbeing of the corporation.¹⁰³ It is a prophylactic rule designed to discourage the unlawful behavior and to arrest it when it does arise.¹⁰⁴

A similar set of principles is applicable in the context of an Emoluments violation. In that context, the principal is the People and the agent is the federal officer in violation of the Clause. We might think of Congress as the Board of Directors in this analogy. Congress is empowered to sanction an officer who is in violation of the Clause, but Congress' interests may not align perfectly with the interests of the People with respect to protecting the United States from the consequences of foreign influence. The self-interest of Congress as a whole—or a significant segment of individual members—may counsel against sanctioning a federal officer who has violated the Emoluments Clause. Members of Congress may have partisan or personal reasons for declining to act against an officer in violation of the Clause. The solution to avoiding this classic agency problem in the context of an Emoluments violation is to allow citizens to sue directly to enforce the Clause. As in other agency situations, the threat of harm to the wellbeing of the nation is sufficiently severe as to warrant individual

This is particularly so when the federal officer involved is the President of the United States – a position which, if compromised by foreign influence, could impose unique and unprecedented damage on the country as a whole.¹⁰⁵ Because a breach of the duty of loyalty to the People as against foreign influence poses so serious a threat to the wellbeing of the nation, the full panoply of enforcement mechanism should be available to arrest the malfeasance, including an impeachment proceeding by Congress *and* individual citizen suits. An Emoluments violation presents a quintessential checks-and-balances scenario, in which each of the other branches of government should be empowered to place a check on an allegedly disloyal executive branch.

However, in terms of applying separation-of-powers principles in the context of checking an overstep or misstep by the political branches, the Supreme Court has demonstrated a preference for “representative constitutionalism”—that is, broad constitutional remedies that are mediated

¹⁰³ *Id.* at 474-475.

¹⁰⁴ *Id.* at 474-475 (“The threat of a fiduciary suit can deter management misconduct, and this deterrence rationale is regarded as the chief justification for shareholder suits.”).

¹⁰⁵ *See Miller, supra* note 42, at 117 (“Ensuring that the President of the United States does not suffer from divided loyalties, and that the corresponding foreign influence is not introduced into American government [is a compelling interest]... given that the office of President of the United States has become the most powerful such position in the world and that the President holds the power of commander-in-chief of the American military.”).

primarily through the elected representatives of the political branches.¹⁰⁶ The Court is disinclined to be conscripted by individual citizen suit into checking the political branches when they overstep constitutional boundaries in a manner that affects all Americans in the same way.¹⁰⁷ The Court has communicated this preference through its “generalized grievance” doctrine.¹⁰⁸ A consideration of that doctrine and its implications in the Emoluments Clause context follows.

A. *The Pragmatic Rise of Injury-In-Fact*

The Supreme Court’s standing doctrine is an obstacle to direct, individual enforcement of the duty of loyalty in the Emoluments context.¹⁰⁹ The Supreme Court locates the constitutional authority for its standing doctrine in Article III’s “case or controversy” requirement.¹¹⁰ The Court has explained that Article III standing doctrine is necessary to protect the constitutional value of separation-of-powers.¹¹¹ In particular the Court has expressed a disinclination to have the judicial branch conscripted by individual citizens

¹⁰⁶ See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (“[The prohibition against generalized grievance] is an essential limit on our power: It ensures that we act as judges, and do not engage in policymaking properly left to elected representatives.”); *Arpaio v. Obama*, 27 F. Supp. 3d 185, 191 (2014) (“The role of the Judiciary is to resolve cases and controversies properly brought by parties with a concrete and particularized injury--not to engage in policymaking better left to the political branches.”).

¹⁰⁷ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (describing a generalized grievance suit as one that claims only harm to “every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large.”).

¹⁰⁸ *Flast v. Cohen*, 392 U.S. 83, 106 (1968) (stating standing should be denied in “cases such as *Frothingham* where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.”).

¹⁰⁹ See *c.f.*, Jonathan Adler, *Why CREW’s Emoluments Clause Lawsuit Against President Trump Still has Standing Problems*, available at: https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/19/why-crews-emoluments-clause-lawsuit-against-president-trump-still-has-standing-problems/?utm_term=.9a5ac3c814c2.

¹¹⁰ U.S. CONST. art. III, § II, cl. 1. In explaining its standing doctrine, the Court has identified three broad components of Article III standing – injury-in-fact, causation, and redressability. Of these, only injury-in-fact is of concern here.

¹¹¹ See Evan Tsen Lee, Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U. L. REV. 169, 171 (2012) (“Although it is hardly obvious from analysis of the constitutional text, the Supreme Court has long held that Article III compels most of the requirements of the standing doctrine.”).

into policing the executive branch or legislative branches where the wrong complained of is an *undifferentiated* wrong – that is, a wrong that burdens all of the People to the same degree or in the same way.¹¹²

In service to this idea, the Court has articulated a prohibition against “generalized grievances.”¹¹³ One might understand the prohibition against generalized grievances as a requirement that plaintiff must be hurt in a way that is distinct from the way that all Americans are hurt by certain governmental foibles and failings.¹¹⁴ The Court has explained that generalized injuries are best addressed through the political process¹¹⁵.

Standing doctrine as it is currently comprised is distinctly modern development.¹¹⁶ In the early-1920s, the Court adopted the position that the words “Cases” and “Controversy” used in this Clause imposes an affirmative separation-of-powers limit on the power of the federal courts to hear cases where the plaintiff’s grievance was based on his or her status as a taxpayer.¹¹⁷

¹¹² 504 U.S. at 560.

¹¹³ The generalize grievance prohibition is a subset of the Court’s broader injury-in-fact requirement. The injury-in-fact rule requires that a plaintiff demonstrate “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’” 504 U.S. 555, 560. The Court has confirmed that the injury-in-fact requirement is independently constitutionally mandated as a fundamental aspect of separation-of-power. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

¹¹⁴ See Lee and Ellis, *supra* note 112, at 184 (“In the end, Fairchild’s complaint was a generalized grievance--a request by no one in particular to have courts police the government to see that it follows the law.”).

¹¹⁵ See e.g., *United States v. Richardson*, 418 U.S. 166, 179 (1974) (“Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.”)

¹¹⁶ Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1064 (2015) (“Through most of American legal history, standing doctrine as we know it today -- as a doctrine regulating who is a proper party to invoke the jurisdiction of a federal court to assert a legal claim or defense, either at trial or on appeal -- did not exist.”); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988) (“Rather, a painstaking search of the historical material demonstrates that—for the first 150 years of the Republic—the Framers, the first Congresses, and the Court were oblivious to the modern conception either that standing is a component of the constitutional phrase ‘cases or controversies’ or that it is a prerequisite for seeking governmental compliance with the law.”); *but see*, 504 U.S. 555 at 560 (“The core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”).

¹¹⁷ The objection to taxpayer suits was arguably introduced in *Fairchild v. Hughes*,

The Court explained that where plaintiff's harm arises from his or her status as a taxpayer, his or her interest "is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, [is] so remote, fluctuating and uncertain."¹¹⁸ Such was the initial evolution of the "Case" and "Controversy" language into the requirement that a plaintiff have what the Court would eventually described as an "injury-in-fact."¹¹⁹ While these early cases might be described as proto-standing cases, they only hint at the formulaic rendering the Court would ultimately embrace.¹²⁰

While the Court continues to derive the constitutional dimension from the "Case" and "Controversy" language just as it did in the 1920s taxpayer suits, the original textual support for the doctrine has largely been subsumed by focus on the rationale that Article III standing doctrine is necessitated by separation-of-powers principles.

The impetus for the separation-of-powers rationale is fairly traceable to the Court's articulated anxiety about the federal courts being "flooded" with constitutional complaints from individual citizens, an anxiety that was fueled by a 1960s and 1970s era movement by private citizens seeking to directly enforce their constitutional rights.¹²¹ Consequently, citizen enforcement of constitutional provisions can be understood to be a constitutive force in modern standing doctrine, and as such, it occupies a unique place within broader standing doctrine.¹²²

258 U.S. 126 (1922). The plaintiffs in *Fairchild* objected to the 19th Amendment and asked, as taxpayers, that the Court declare it void and unconstitutional. Rather than responding to the merits of the case, the Court declared that: "Plaintiff's alleged interest in the question submitted is not such as to afford a basis for this proceeding. It is frankly a proceeding to have the Nineteenth Amendment declared void." The limiting principle of what constitutes as an Article III "Case" was then again articulated more famously the following year in another taxpayer suit, *Frothingham v. Mellon*, 262 U.S. 447 (1923).

¹¹⁸ 262 U.S. at 486-89.

¹¹⁹ 504 U.S. 555 at 560 (describing the case-or-controversy requirement.).

¹²⁰ See Lee and Ellis, *supra* note 112, at 180.

¹²¹ *Standing to Seek Equitable Relief*, 97 HARV. L. REV. 215 (1983) ("In the mid-1970's, the Supreme Court began using standing doctrine and a heightened standard for obtaining injunctive relief to limit the access of civil rights litigants to the federal courts.").

¹²² See Christina B. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 6 (1980) ("During recent years federal judges have elaborated various doctrines that, in purpose or effect, discourage section 1983 litigants and dispose of specific cases: [including] standing...these doctrines close construction of...of the scope of the constitutional rights, and of the elements of a cause of action.").

One case, in particular, had an outsized hand in ushering in the modern standing era, even though standing was not an issue in the case itself.¹²³ In 1961, the Supreme Court decided *Monroe v. Pape*, in which thirteen Chicago police officers, acting without a warrant, broke into the plaintiff's home, roused him and his wife from sleep and made them stand naked in the living room while the police officers ransacked their home.¹²⁴ Mr. Monroe was then taken downtown and held for ten hours on "open charges" before he was released.¹²⁵ Monroe challenged the constitutionality of the officers' actions bringing his claim under what was then a rarely used piece of reconstruction legislation known as 42 U.S.C. 1983.¹²⁶ Although enacted as a Reconstruction Era statute in 1871, Section 1983 was rarely invoked before 1961 because the Court had ruled in an early case that the Section 1983 only applied to actions that were authorized by state law or custom.¹²⁷

Monroe reversed that holding and simultaneously introduced a sea change in constitutional litigation.¹²⁸ The *Monroe* Court held that Section 1983 applied to unauthorized or rogue acts by those acting "under the color of state law" – like the thirteen police officers who harassed Mr. Monroe.¹²⁹ The *Monroe* Court held that Section 1983 provided a private cause of action for individual citizens to sue to enforce their constitutional rights *outside* the

¹²³ See Laura Oren, *Signing into Heaven: Zimermon v. Burch, Federal Rights, and State Remedies Thirty Years After Monroe v. Pape*, 40 EMORY L.J. 1, 10 (1991) ("Thirty years after Monroe resuscitated the Reconstruction-era civil rights statute, there are cries that the federal courts are flooded with insignificant section 1983 lawsuits.").

¹²⁴ *Monroe v. Pape*, 365 U.S. 167, 230 (1961). The complaint also alleged that "the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy'; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor." *Id.* at 230.

¹²⁵ *Id.* at 169.

¹²⁶ Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441 (1989)(§1983 was rarely successfully used to challenge unlawful behavior prior to *Monroe*).

¹²⁷ 365 U.S. at 240.

¹²⁸ To demonstrate the impact of *Monroe*, it is worth noting that in 1961, there were less than 300 suits brought in federal court under all civil rights acts. In 1971, there were 8,267 and in 2010, there were 60,000. JOHN C. JEFFRIES, JR., PAMELA S. KARLAN, PETER W. LOW, GEORGE A. RUTHERGLEN, CIVIL RIGHTS ACTIONS 14 (3rd ed. 2013).

¹²⁹ 365 U.S. at 476.

context of unconstitutional laws and policies.¹³⁰ This opened the door to a whole new class of constitutional litigation focused on abuse of power allegations.¹³¹

Insofar as the Court was worried about being conscripted by individual citizen suits into policing the political branches, *Monroe* was the case that set that worry aflame.¹³² Both commentators and members of the Court expressed worry about *Monroe's* impact on federal dockets almost from the moment that it was decided.¹³³ Concern was voiced that *Monroe* would open the “floodgates” of constitutional litigation and overwhelm the federal courts.¹³⁴ There was concern that the judiciary would be drawn into the uncomfortable position of supervising co-equal branches of government.¹³⁵

These separation-of-powers, docket-crowding, and institutional competency concerns were often marshalled by the Court into standing principles, which began to serve as the anteroom of constitutional litigation.¹³⁶ One particularly standing-adjacent concern was raised by Justice Harlan in his *Monroe* dissent in which he worried that “if [§1983] is made a vehicle of constitutional litigation in cases where state officers have acted lawlessly...difficult questions of the federal constitutionality of certain official practices...may be litigated between private parties without the participation of responsible state authorities.”¹³⁷ It was a version of the concerns that has come to animate the Court’s (constitutional) injury-in-fact

¹³⁰ *Id.* at 180 (“[§ 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced...by the state agencies.”).

¹³¹ *See supra* note 129 and accompanying text.

¹³² Jose Roberto Juarez, Jr., *The Supreme Court As the Cheshire Cat: Escaping the Section 1983 Wonderland*, 25 ST. MARY'S L.J. 1, 51–52 (1993) (“The flood-of-cases argument suggests that the federal courts are burdened with a deluge of Section 1983 cases because decisions like *Monroe v. Pape*.”).

¹³³ *See Oren, supra* note 124.

¹³⁴ Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1008 (2013) (“Over the past several decades, the Supreme Court has increasingly considered a particular kind of argument: that it should avoid reaching decisions that would “open the floodgates of litigation.”)

¹³⁵ 418 U.S. at 188 (“We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch.”).

¹³⁶ *See Whitman, supra* note 123, at 6.

¹³⁷ 365 U.S. at 241.

and (prudential) third-party standing rules both of which seek to ensure that the people with the greatest stake in a controversy are the sole people authorized litigate it.¹³⁸

Harlan's worry that, post-*Monroe*, the Court would be called upon to evaluate the constitutionality of an increasing array of official practices was, in part, borne out by a flood of individual citizen suits.¹³⁹ This post-*Monroe* flood of constitutional litigation has been viewed as an animating force behind the Court's turn towards a more formulaic approach to standing in a series of cases in the 1960s and 1970s.¹⁴⁰ By the end of the 1970s, the Court had solidified its bifurcated approach to constitutional and pragmatic standing.¹⁴¹

Much criticism¹⁴² has been leveled at the Supreme Court's translation of the case-or-controversy language in Article III into the injury-in-fact requirement.¹⁴³ For example, criticism been directed at its late appearance in Constitutional doctrine.¹⁴⁴ Critics have likewise questioned the purported textual and historical foundation for the rule,¹⁴⁵ and ample criticism has been directed at what many perceive to be the Court's uneven application of the

¹³⁸ See e.g., *Am. Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 656-657 (7th Cir. 2011) (stating that plaintiffs with the most direct interest in a matter should be authorized to litigate it, rather than those with a remote connection to the injury at hand).

¹³⁹ Kevin J. Hamilton, *Section 1983 and the Independent Contractor*, 74 GEO. L.J. 457, 464 (1985) ("*Monroe* breathed new life into section 1983. Its broad interpretation, combined with the 'incorporation' of the Bill of Rights into the fourteenth amendment, led to a flood of litigation.").

¹⁴⁰ William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 227 (1988) ("Generally speaking, federal litigation in the 1960's and 1970's increasingly involved attempts to establish and enforce public, often constitutional, values by litigants who were not individually affected by the conduct of which they complained in any way markedly different from most of the population" which was consequently followed by a more formulaic standing standard).

¹⁴¹ *Id.* at 227-228.

¹⁴² See Kontorovich, *supra* note 13, at 1665.

¹⁴³ See Elliott, *supra* note 13, at 465.

¹⁴⁴ Winter, *supra* note 117, at 1377("One legitimately may wonder how a constitutional doctrine now said to inhere in article III's 'case or controversy' language could be so late in making an appearance, do so with so skimpy a pedigree, and take so long to be recognized even by the primary academic expositors of the law of federal courts.").

¹⁴⁵ 650 F.3d at 655 (criticizing the claim that standing practice is derived from "the English royal courts, on which the federal judiciary was modeled.").

rule.¹⁴⁶ We need not re-plow those furrows here. For our purposes it is enough to consider plausible explanations and justifications offered in support of the rule to evaluate whether those explanations and justifications obtain in the context of the Emoluments Clause.

1. Posner's Pragmatic Explanation

Richard Posner has offered one of the more plausible justifications for the injury-in-fact rule: judicial pragmatism.¹⁴⁷ Posner states, “The doctrine is needed to limit premature judicial interference with legislation, to prevent the federal courts from being overwhelmed by cases, and to ensure that the legal remedies of primary victims of wrongful conduct will not be usurped by persons trivially or not at all harmed by the wrong complained of.”¹⁴⁸ Within this rendering, Posner suggests a dichotomy between “primary victims” and “persons trivially or not at all harmed.”¹⁴⁹ To illustrate this point, he poses a hypothetical based on the facts of the case pending before him:

Imagine an environmental group located in California suing to prevent the Corps of Engineers from granting a permit to destroy wetlands at the North Milam site even though no member of the group planned ever to visit the American Bottom. The suit might be brought before American Bottom Conservancy brought its own suit and the Conservancy's suit might be overshadowed by the suit by the California group, even though the Conservancy's members have a greater stake because they actually frequent the Horseshoe Lake State Park.¹⁵⁰

¹⁴⁶ See Richard H. Fallon, Jr., *et al.*, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 114 (7th ed. 2009) (“During the twentieth century, courts became self-conscious about the concept of standing only after developments in the legal culture subjected the private law model to unfamiliar strains.”).

¹⁴⁷ 650 F.3d at 656 (“This isn't to say that the doctrine of standing isn't well grounded. But the solidest grounds are practical.”).

¹⁴⁸ *Id.* at 654.

¹⁴⁹ *Id.* at 656.

¹⁵⁰ 650 F.3d at 656.

Posner emphasizes that it is the *directness* of the injury that is important in this analysis rather than the magnitude of the loss.¹⁵¹ Posner points out that even *Lujan*, which offered the most complete articulation of the modern rule of injury-in-fact, recognized that “the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.”¹⁵² The sentence he quotes from *Lujan* would also seem to suggest that despite using the phrase “concrete and particularized” to describe the requisite type of injury a plaintiff must demonstrate, “concrete” may not convey an independent factor in this context.¹⁵³ Minimally, “concrete” in this context does not necessarily describe something tangible (for a “desire” cannot be reasonably described as a tangible thing or something readily monetized).¹⁵⁴ “Concrete,” here, might connote nothing more than a synonym for “particularized.”¹⁵⁵

Posner’s pragmatic approach is in keeping with the general scholarly consensus¹⁵⁶ that the generalized grievance prohibition is largely, if not exclusively, a pragmatic solution to the Court’s worry about being inundated with cases – a worry, as we have seen, that is particularly acute in the context of post-*Monroe* individual citizen suits that are based on rights secured by the Constitution.¹⁵⁷ Posner’s view supports the Court’s inclination to stem the tide of those cases, while providing a plausible rationale for categorically excluding an enormous class of cases.¹⁵⁸ The idea that those *directly* affected

¹⁵¹ *Id.* at 656 (“The magnitude, as distinct from the directness, of the injury is not critical to the concerns that underlie the requirement of standing.”).

¹⁵² 504 U.S. 555, 562-563.

¹⁵³ Felix T. Wu, *How Privacy Distorted Standing Law*, 66 DEPAUL L. REV. 439, 454 (2017) (“The Court seemed also to invoke something like a canon against surplusage, suggesting that the words “concrete” and “particularized” in the test for Article III standing surely could not mean the same thing.”).

¹⁵⁴ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (“A ‘concrete’ injury must be ‘de facto’; that is, it must actually exist. When we have used the adjective “concrete,” we have meant to convey the usual meaning of the term—‘real,’ and not ‘abstract.’”).

¹⁵⁵ Wu, *supra* note 154, at 454.

¹⁵⁶ See e.g., Winter, *supra* note 112, at 1516 (It may well be the case that the Court’s willingness to stretch standing doctrine ... was the result of two intensely pragmatic concerns.”); *Citizen and Taxpayer Standing*, 96 HARV. L. REV. 196, 205 (1982) (“The radical reformulation of ordinary standing doctrine in the years following Flast promised a new, more pragmatic theory of standing that could have superseded the artificial and technical doctrine of taxpayer standing.”).

¹⁵⁷ See Fallon, *supra* note 147 at 114.

¹⁵⁸ See Levy, *supra* note 135, at 1008.

by an injurious event are the preferred litigators in a given scenario is intuitively appealing.¹⁵⁹

However, while Posner’s pragmatic justification of the generalized grievance prohibition may have merit in other contexts, in the context of an Emoluments violation – and indeed, in the context of many (if not most) constitutional violations -- categorical adherence to the “direct” versus “trivial” dichotomy is a legal fiction at best. At worst it produces absurd results. A consideration of these best and worst possibilities follows.

2. *The Pragmatic Explanation as Legal Fiction*

Even within the most generous possible rendering, a distinction between “direct” and “trivial” constitutional injuries is a legal fiction. As a starting point, the terms “direct” and “trivial” are themselves misleading. Without doubt, citizens often suffer very grave yet “indirect” constitutional injuries.

Consider, for example, the classic standing case of *Allen v. Wright*.¹⁶⁰ The plaintiffs in *Allen* objected to the IRS’s granting of tax-exempt status to private schools that the plaintiffs believed were racially discriminating.¹⁶¹ The injuries that the plaintiffs identified were undeniably serious.¹⁶² The plaintiffs argued that by granting tax exempt status to racially discriminatory schools, the IRS was fostering racial segregation in public schools by providing a segregated private alternative for white families seeking a segregated school.¹⁶³ As parents of black school-aged children, the plaintiffs argued that their children suffered the stigmatic and dignitary injuries incident to and the persistence of racially segregated schools.¹⁶⁴ While the *Allen* Court found the constitutional injury articulated by plaintiffs to be insufficiently direct to confer standing, it can hardly be described as trivial.¹⁶⁵ Obviously the stigmatic and dignitary injury that attends the persistence of

¹⁵⁹ See 650 F.3d at 656.

¹⁶⁰ *Allen v. Wright*, 468 U.S. 737 (1984).

¹⁶¹ *Id.* at 739.

¹⁶² *Id.* at 739-740 (“[Plaintiffs] assert that the ... interferes with the ability of their children to receive an education in desegregated public schools.”).

¹⁶³ 468 U.S. at 771.

¹⁶⁴ *Id.* at 754.

¹⁶⁵ *Id.* at 753-756.

racially segregated schools is a very grave constitutional injury.¹⁶⁶ *Allen* teaches us that an indirect injury can still be a substantial and serious injury.¹⁶⁷

Similarly, some “direct” constitutional injuries are, in fact, trivial. For example, in *Parratt v. Taylor*, an inmate sued a prison for misplacing a hobby kit that the inmate ordered through the mail.¹⁶⁸ The value of the hobby kit was \$23.50.¹⁶⁹ The Court found that Taylor had standing to sue and had a cognizable interest in recovering the value of the kit under the Due Process Clause.¹⁷⁰ Taylor’s injury, the Court found, was direct, concrete and particularized.¹⁷¹ In contrast, the *Allen* plaintiffs’ injuries were indirect and generalized.¹⁷² Yet, if we assume the *Allen* plaintiffs stated their injuries accurately, the *Allen* plaintiffs’ injuries represented a much more severe intrusion into a constitutionally protected interest.¹⁷³

Minimally, then, we can conclude that the “directness” of an injury—in and of itself—is an inadequate justification for providing or withholding relief. It is not the case, as Posner and others have implied, that indirect injuries are necessarily “trivial.”¹⁷⁴ It follows that if indirect injuries are not necessarily trivial (or even less serious) than direct injuries, then to sustain the “direct” versus “trivial” dichotomy would require something else—an additional principle or explanation—to provide justification for categorically excluding “indirect” injuries.

¹⁶⁶ See e.g. *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 494 (1954) (“The policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.”).

¹⁶⁷ 468 U.S. at 757 (identifying Plaintiffs’ injury as indirect.”).

¹⁶⁸ 451 U.S. 527 (1981).

¹⁶⁹ *Id.* at 529.

¹⁷⁰ *Id.* at 536.

¹⁷¹ *Id.* at 536 (“Respondent’s claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation.”).

¹⁷² 468 U.S. at 757

¹⁷³ See 468 U.S. at 739-740.

¹⁷⁴ See 650 F.3d at 656.

Because the terms “direct” and “trivial” do a poor job describing the distinction that current standing doctrine has drawn, we might begin to clarify the distinction the Court is capturing by substituting the words “primary” and “collateral” for Posner’s “direct” and “trivial.”¹⁷⁵ Additionally, as we will see in the following section, rather than representing a toggle (i.e., if the injury is not “direct” it *must* be “trivial”) injuries that attend constitutional violation can be more accurately understood as falling along a spectrum of specificity. These insights combined created a more nuanced and helpful model of constitutional injuries, and a model that can better illuminate the fiduciary injury that follows from an Emoluments violation. A discussion of that model follows.

B. Differentiated and Undifferentiated Constitutional Injuries

In *United States v. Richardson*, the Supreme Court announced that “undifferentiated” harms that are “common to all members of the public” are not sufficient to confer Article III standing.¹⁷⁶ Plaintiff Richardson complained that the CIA was not reporting expenditures in compliance with the Constitution, and that, as a taxpayer who participated in funding those expenditures, he was injured.¹⁷⁷ The Court, however, explained:

While we can hardly dispute that this respondent has a genuine interest in the use of funds and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute.¹⁷⁸

Richardson would be no more harmed than any other taxpayer should it turn out that the CIA is making improper use of taxpayer dollars.¹⁷⁹ Despite the fact that Richardson alleged a Constitutional violation, the Court articulated that the resolution of conflicts such the one raised by Richardson are better resolved through the political process.¹⁸⁰

¹⁷⁵ *Id.* at 656.

¹⁷⁶ 418 U.S. 166, 177 (1974).

¹⁷⁷ *Id.* at 176.

¹⁷⁸ 418 U.S. at 176.

¹⁷⁹ *Id.* at 176-177.

¹⁸⁰ *Id.* at 178-179.

This early standing language of “differentiated” and “undifferentiated” harms is more analytically helpful in understanding constitutional injuries than the “concrete” and “particularized” language that the Court favors in later cases or the “direct” and trivial” language supplied by Posner. The concept of an undifferentiated injury is one that falls indiscriminately on all of the People. It is an injury to which no one person or entity can lay special claim. It is a night that finds us all. This is a very different idea than a “generalized” or “non-particularized” injury that may affect a large number of people—but not necessarily all of the People. Similarly, a generalized or non-particularized injury may, presumably, affect different people or entities in different ways. In contrast, an undifferentiated injury affects all of the People and it affects them each in exactly the same way.

Some types of constitutional provisions seem designed to primarily to protect us from differentiated injuries while others seem designed to primarily protect us from undifferentiated injuries. For example, the Constitution of the United States undoubtedly articulates a set of what are known as “individual rights.”¹⁸¹ A paradigmatic example of an individual right guaranteed by the Constitution is the right to be free from unreasonable seizures.¹⁸² The hallmark of an individual right is that it can be directly enforced by the individual who has suffered its deprivation.¹⁸³ So for example, when an individual is subject to an unreasonable seizure owing to an excessive use of force, that individual can sue to recover damages.¹⁸⁴

However, we might also conceive of the Fourth Amendment right to be free from unreasonable seizures more broadly. We could imagine it embodying two distinct guarantees.¹⁸⁵ The first promise is directed exclusively to those who are specifically physically harmed by excessive force.¹⁸⁶ It is a promise that we will not be physically harmed by the

¹⁸¹ *C.f.*, Akhil Reed Amar, *The Bill of Rights As A Constitution*, 100 YALE L.J. 1131 (1991).

¹⁸² U.S. CONST. AMEND. IV, CL. 1.

¹⁸³ *See* Amar, *supra* note 182, at 1178.

¹⁸⁴ *Id.* at 1180.

¹⁸⁵ *See id.* at 1177 (“In the Fourth Amendment... we need not view the phrase ‘the people’ as sounding solely in collective, political terms...[I]n the Fourth Amendment, as nowhere else in the Constitution, the collective-sounding phrase ‘the people’ is immediately qualified by the use and subsequent repetition of the more individualistic language of ‘persons.’ The Amendment’s text seems to move quickly from the public to the private, from the political to the personal.”).

¹⁸⁶ *Id.* at 1177.

government.¹⁸⁷ The enforcement mechanism for this first guarantee is a remedy that can only be exercised by those who personally experience excess force. However, the second guarantee is broader. The second guarantee is a promise to all of the People (whether they personally experience excess force or not) that the United States is a country where such things do not occur (or, alternatively, that they do not occur with impunity).¹⁸⁸ The second guarantee is a promise about the kind of government that the Constitution “ordain[ed] and establish[ed].”¹⁸⁹

It is axiomatic that the Constitution represents a set of guarantees to the People about the kind of government it ordains and establishes. Each individual provision of the Constitution describes a normative commitment to engage in (or forego) certain behaviors, and that commitment is both binding on successive generations and legally enforceable. When a Constitutional provision is violated – as when the government uses excessive force - the People (both individually and collectively) can be said to be injured by the breach of the promise. In such a case, the government has failed to be the kind of government that the Constitution has guaranteed to the People.

So when individual right guarantees are violated, there are differentiated injuries and undifferentiated injuries.¹⁹⁰ Differentiated injuries are injuries that happen to someone because of who they are and how they are connected to the underlying events.¹⁹¹ Differentiated injuries include, for example, the physical suffering endured by the victim.¹⁹² On the other hand, an *undifferentiated* injury is the injury that follows from the failure of the

¹⁸⁷ U.S. CONST. AMEND. IV, CL. 1. (guaranteeing no unreasonable searches and seizures).

¹⁸⁸ Stating that this is a promise of the Fourth Amendment is not to say that it is or has been realized.

¹⁸⁹ See Amar, *supra* note 182, at 117 (describing the collective (political) versus individual dimensions of the Fourth Amendment).

¹⁹⁰ 418 U.S. at 177 (describing “undifferentiated” injuries as “common to all members of the public.”).

¹⁹¹ See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (holding that Plaintiff Lyons had a differentiated injury insofar as he was personally the subject of a police chokehold, and that differentiated injury was sufficient to afford Lyons “standing to claim damages against the individual officers” but insufficient to confer standing for injunctive relief to prospectively enjoin the practice. Because all citizens faced the same risk of future assault by police, Lyon’s claim to prospective –based harm was undifferentiated.).

¹⁹² *Id.* at 105.

government to be the kind of government that it has promised to be.¹⁹³ While the physical harm of excess force falls uniquely upon the victim, the injury that follows from the failure of the government to live up to its promise to be the kind of country that does not use excessive force falls indifferently and equally upon each (and all) of the People.¹⁹⁴ Because the promise is made to each (and all) the People indiscriminately, the benefit of that particular Constitutional guarantee falls indiscriminately upon the People.

Consider, for example, *Armstrong v. Village of Pinehurst*, an excessive use of force case recently decided by the Fourth Circuit.¹⁹⁵ Ronald Armstrong suffered from bipolar disorder and paranoid schizophrenia.¹⁹⁶ He had been off his medication for several days and was behaving in a manner that concerned his sister, so she persuaded him to accompany her to a local hospital.¹⁹⁷ While undergoing the process to be admitted, Armstrong became alarmed and left the facility.¹⁹⁸ Based on his admitting interview, the admitting doctor deemed Armstrong to be a danger to himself and the doctor signed papers authorizing an involuntary commitment.¹⁹⁹ The police were called to retrieve Armstrong and return him to the hospital.²⁰⁰ The police encountered Armstrong and his sister a short distance away from the hospital.²⁰¹ When approached by police, Armstrong was not combative, but he clung to a stop sign poll when they tried to take him back to the hospital.²⁰² The police responded by tasing him five times within two minutes, and consequently killing him.²⁰³

¹⁹³ 504 U.S. at 576 (describing an undifferentiated injury as an “assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently.”).

¹⁹⁴ *Id.* at 576.

¹⁹⁵ *Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst*, 810 F.3d 892 (2016).

¹⁹⁶ *Id.* at 896.

¹⁹⁷ *Id.* at 896.

¹⁹⁸ *Id.* at 896.

¹⁹⁹ 810 F.3d at 896.

²⁰⁰ *Id.* at 896.

²⁰¹ *Id.* at 896.

²⁰² *Id.* at 896.

²⁰³ *Id.* at 897-898.

Clearly Ronald Armstrong suffered a differentiated harm.²⁰⁴ He was injured because of who he was and his relationship to the underlying events: he was the person whose body received tens of thousands of amps of electricity.²⁰⁵ Ronald Armstrong and only Ronald Armstrong lost his life.²⁰⁶ His harm is distinguishable from the harms that befell others. Armstrong's sister was also uniquely harmed because of who she is and her relationship to the underlying events. She not only lost her brother, but witnessed his suffering and his death.²⁰⁷ The harm she suffered is distinct from Ronald's injury. Others also were likely harmed by the excessive use of force.²⁰⁸ The doctor, witnesses, other friends and loved ones of Ronald all were likely injured by the Constitutional violation. These harms are all differentiated harm – that is, harms that are specific to those people and their relationship to the underlying events.

But the rest of us were harmed as well. We were harmed when our government violated the guarantee that it would execute seizures in a reasonable manner. It is important to be clear that this harm arises not from the failure of law enforcement (or other government officials) to exercise their discretion in a manner that comports with our expectations of what they *should* do – that is, what we think the best course of action would have been.²⁰⁹ It is likewise not a harm that arises from the want of a perfect government. In the specific case of the Fourth Amendment the Constitutional doctrine provides ample room to make reasonable mistakes. For example, in the *Armstrong* circumstance, the Fourth Amendment does not require that the officers employ “state of the art” or “best practices” in executing their duty to safeguard the wellbeing of a mentally ill man.²¹⁰ The Fourth Amendment allows officers room to make reasonable mistakes. Tasing a nonthreatening mentally ill person five times in two minutes was simply not a reasonable mistake, and the Constitution does not provide room for officers to make

²⁰⁴ 810 F.3d at 897-898.

²⁰⁵ *Id.* at 897-898.

²⁰⁶ *Id.* at 898.

²⁰⁷ *Id.* at 897 (“Lopez was the first to notice that her brother was unresponsive, so she asked the officers to check on him.”).

²⁰⁸ 810 F.3d at 906 (“Appellees used excessive force, in violation of the Fourth Amendment.”).

²⁰⁹ *See e.g. id.* at 900 (listing both “ideal” and less than ideal methods for officers to reasonably seize a suspect they know to be mentally ill—all of which would have been constitutional—while noting that the constitution requires officers minimally make efforts to “e-escalate the situation and adjust the application of force downward.”).

²¹⁰ *Id.* at 900.

unreasonable mistakes. When unreasonable mistakes are made, every one of the People suffers the harm that follows from the broken guarantee: we were promised one sort of a government, but were given another. It is an injury that falls indiscriminately upon all of us.

In this way, the harm that follows from constitutional violations can be said to fall along a continuum of specificity. One end of the spectrum is occupied by the individual directly affected by the breach – for example, Ronald Armstrong victim who was physically harmed and suffers a unique and acute injury.²¹¹ The opposite end of the spectrum is occupied by those among the People who have no connection to the victim or the event and who therefore suffer only the undifferentiated injury of their government having failed to live up to its promise.

Between these two poles lies everyone else. The family and friends of Ronald Armstrong occupy a space on the continuum nearer to the victim himself. Their injuries are more specific than someone entirely unconnected to the event. Similarly, those who live in the same city and who fear similar treatment at the hands of the police perhaps likewise occupy a portion of the continuum nearer the individual victim. On the farther end of the continuum are those among the People whose lives and prospects are less affected by the particular constitutional violation in question, perhaps because they have a low likelihood of interacting with that particular aspect of government. However, even those on the farthest end of specificity continuum suffer an injury that is identical to the victim himself with respect to the breach of the promise to be a certain kind of government because that promise applies with equal force to all of us.

In the context of individual rights provisions, the most salient injuries are differentiated injuries. In that context it may make sense to impose a standing rule that is sensitive to the distinction between differentiated and undifferentiated injuries. But where on this spectrum does the fiduciary injury that attends an emoluments violation fall?

1. Primary and Collateral Injuries

Looking through this lens of how a constitutional violation imposes injury along a continuum of differentiated-to-undifferentiated harms, it is notable that “individual rights” provisions invariably include differentiated harms that fall uniquely on one or more individuals or entities. Plaintiffs like those representing Armstrong’s estate have unquestionable standing to bring those cases.

If we use this same lens of the injury-specificity-continuum to examine non-individual rights provisions, we see that other broad categories emerge. For example, the violation of some constitutional provisions, like the

²¹¹ *Id.* at 898.

Import-Export Clause, would seem to impose a differentiated harm on a particular state or states.²¹² The Import-Export Clause prohibits each state from entering into an “agreement or compact” with another state or with a foreign government.²¹³ If the State of Maine were to enter into an exclusive trade deal with the State of Wisconsin – thereby violating the provision – one might plausibly contend that the other forty-eight states would suffer a differentiated harm caused by their exclusion from the deal. Depending on each state’s stake in the business regulated by the agreement, the injuries that each state suffers could be sufficiently differentiated as to confer standing on that state.

Yet, both a natural reading of the provision and the Supreme Court’s treatment of it suggest that the object of the provision is not to ensure equity among or between the states.²¹⁴ It is designed to avoid the State of California, for example, becoming embroiled in a conflict with a foreign power, because the harm that would result from such an entanglement would not fall upon California alone, but upon the whole of the country.²¹⁵ If California provoked a war with a foreign state, the entire United States would be drawn into it.²¹⁶

It would be peculiar then, to adopt the position that avoiding injury to individual states is a primary target of the provision. To borrow from the Supreme Court’s description of its prudential standing doctrine, the harm suffered by an individual state that was excluded from a trade deal between Maine and Wisconsin would not fall within the “zone of interest...to be protected by... the Constitutional guarantee in question.”²¹⁷

Similarly, while an individual business in Maine might be particularly harmed by a trade deal struck between Maine and Wisconsin, but that harm, while differentiated, would be *collateral* to the *primary* harm the provision seeks to eliminate: i.e. the harm that follows from undermining the United States’ capacity to communicate to foreign powers with one voice.²¹⁸ If the

²¹² See e.g., U.S. CONST. art. I § 10, cl.2.

²¹³ *Id.*

²¹⁴ *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1875). (On striking down an immigration law passed by California, the Court stated: “[if a foreign state objected to the law, the objection] would be made upon the government of the United States. If that government should get into a difficulty which would lead to war...would California alone suffer, or all the Union?”).

²¹⁵ *Id.* at 279.

²¹⁶ *Id.* at 279.

²¹⁷ *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970).

²¹⁸ *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 286 (1976)(The purpose of the Import-Export Clause is to ensure the country can speak with one voice in foreign affairs.).

United States' capacity to communicate effectively with foreign powers is undermined, the harm that results is an undifferentiated harm: all the People of the United States suffer it to the same degree and in the same way. In this instance, the undifferentiated harm is the more salient of the harms that could follow from a violation of the provision. In this context, the undifferentiated harm is the *primary* harm (in light of our received understanding of the provision) and the differentiated harm (the unique harm that may befall an individual state or an individual business) is the subsidiary or *collateral* harm.

Just as there are provisions that seem to primarily impact states, there are also many provisions the violation of which would seem to impose differentiated harms on collective political bodies or institutions, such as Congress or the Executive Branch. We might regard these provisions (from the harm-continuum perspective we are herein pursuing) as the "political entities" provisions. Depending on the provision and the particular violation, the primary harm that follows from a violation of a political entity provision may be differentiated harm or the primary harm may be undifferentiated. For example if the House of Representatives were adjourn for more than three days without the consent of the Senate in violation of Adjournment Clause, the primary injury is likely a differentiated injury suffered by the Senate, with a collateral undifferentiated injury to the rest of us.²¹⁹

The individual rights provisions and the political entities provisions together constitute most of the provisions in the Constitution. There is, however, another broad category of constitutional provision within this framework. There is a category of constitutional provisions for which undifferentiated harms are the only possible primary harms. The violation of these provisions may also, incidentally, impose undifferentiated collateral harms. But unlike individual rights provisions or political entity provisions, a violation of these provisions *always* imposes a primary harm that falls equally upon all the People. We might think of these as "the People's provisions" because their violation only imposes undifferentiated primary harms. Like individual rights provisions, the People's provisions constitute a set of promises about what kind of government we have. However, unlike individual rights provisions, that promise about the kind of government we have is the primary (or even sole) benefit of the provision.

The Emoluments Clause is one example of a People's provision. The primary (or even sole) benefit the Clause confers is the promise it extends about the kind of government we have: i.e. we have a government in which our federal officers are not vulnerable to foreign influence. When the Emoluments Clause is violated, the primary harm is *always* undifferentiated.

²¹⁹ U.S. Const. art. I § 5, cl.4. ("Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.")

Any differentiated harm that may coincide with the violation is a collateral harm. These ideas are explored in greater detail below.

2. *Primary Emoluments Harms as Undifferentiated Harms*

We have seen that when individual rights like the Fourth Amendment are violated, differentiated and undifferentiated harms follow. Indeed *both* classes of harm *always* follow the violation of an individual right, because the victim always suffers a specific kind of injury, while the People suffer an undifferentiated injury.

It follows, too, that we might just as easily cast this proposition in terms of benefits rather than harms. Where constitutional harms are differentiated, so too, are constitutional benefits. Consider again Ronald Armstrong.²²⁰ Just as Armstrong was uniquely harmed by the violation of the Fourth Amendment, so too would he have been uniquely protected by the Fourth Amendment had its prohibitions been observed by the officers that he encountered. Had the officers who encountered Armstrong that day been both aware of the contours of the Fourth Amendment and inclined to regulate their behavior accordingly, the Fourth Amendment would have saved Armstrong's life.²²¹

What is the nature of the benefit provided by the Emoluments Clause? It is clear the Clause is a prohibition. The text plainly prohibits a class of behavior (accepting foreign emoluments without the consent of Congress) by a class of actors ("no Person holding any Office of Profit or Trust" under the United States).²²² What is the benefit of this prohibition? Zephyr Teachout has argued that clauses like the Emoluments Clause provide a bulwark against corruption in the federal government.²²³ We might imagine other benefits of the Emoluments Clause, but virtually all plausible benefits revolve around an aligned premise: we prohibit federal officers from accepting valuable gifts from foreign governments to prevent officers from using the power of their office to encourage or illicit such gifts, because such behavior would conflict with the officers' duty to act solely in the best interest of the United States. Prohibiting the gifts, then, has the beneficial effect of removing a conflict of interest that would otherwise exist between officers' personal financial interest and the interest of the United States. The absence of the conflict of interest makes it more likely that the officers will act in the interest

²²⁰ 810 F.3d 892 (2016).

²²¹ *See id.* at 897.

²²² U.S. CONST. ART. I, § 9, cl. 8.

²²³ Teachout, *supra* note 1, at 366.

of the United States. It is a benefit that attends the imposition of any duty of loyalty.

If the benefit of the Emoluments Clause is to increase the likelihood that federal officer will act in the interest of the United States, then the Emoluments Clause confers an undifferentiated benefit and the denial of that benefit imposes an *undifferentiated* harm.

Moreover, the violation of the Emoluments Clause *only* imposes an undifferentiated *primary* harm. No one person among the People benefits any more than any other from having federal officers act in the best interest of the United States.²²⁴ Constitutional provisions that are designed to protect the integrity of the government itself confer undifferentiated benefits and impose undifferentiated harms, as each of the People has an equal and undifferentiated interest in the integrity of government of the United States. In this way, the Emoluments Clause is a People's provision.

While some individuals may benefit *collaterally* as a result of policy decisions that are made by uncorrupted officers (assuming they would have made other, less favorable, decisions in the absence of the Emoluments Clause), those benefits are ancillary to or coincidental with the behavior the Clause regulates. An examination follows of the kinds of primary and collateral injuries that might arise in the context of the pending Emoluments litigation.

3. *Possible Emoluments Violations: Services Rendered and Foreign State Favors*

While there are many ways in which the Emoluments Clause might be violated, the facts alleged by the CREW, MD/DC, and DEM complaints provide a ready example for exploring Emoluments violations that might arise as the result of a sitting President choosing not to divest from his private business holding prior to taking office. There are two scenarios in which a violation of the Emoluments Clause might occur as the result of a sitting President's private business holdings.²²⁵ First, a business owned by the President could accept a payment from a foreign government in exchange for goods or services.²²⁶ We might think of this as a "services-rendered"

²²⁴ The Clause confers a second undifferentiated benefit that is identical to the undifferentiated benefit that all constitutional provisions provide. It provides the benefit that follows from the government's binding commitment to being a certain type of government.

²²⁵ See CREW Complaint, *supra* note 3; MD/DC Complaint, *supra* note 3; DEM complaint, *supra* note 3.

²²⁶ These potential violations would be cured if the President sought and received the consent of Congress to accept the payment.

scenario, and it could arise, for example, if a representative of a foreign head of state stays at a Trump hotel and pays the hotel for services rendered.²²⁷ Second, a Trump business operating abroad may receive a valuable legal or trade concession from a foreign government.²²⁸ We might think of this as a “foreign-state favors” scenario. Assuming the foreign state afforded a Trump-held business a favor or concession that contributed to the monetary value of the President’s business, the Emoluments Clause could be implicated.²²⁹

Since President Trump’s inauguration, both the services-rendered scenario and the foreign-state-favor scenario have been implicated by real world events, raising a complex of novel questions about whether and how the Foreign Emoluments Clause applies to businesses that are owned by a sitting President. Larry Tribe, Erwin Chemerinsky, and Zephyr Teachout have recently tested some of these questions in the CREW litigation.²³⁰ The violations alleged by the original and amended complaints are largely of the “services-rendered” variety, including issues arising from leases in Trump Tower that are held by foreign-government-owned entities and issues arising from foreign-government representatives staying in the President’s D.C. hotel.²³¹

The MD/DC litigation alleges that the “foreign-state favors” scenario implicated when China granted President Trump a valuable trademark in his surname.²³² President Trump had been seeking that legal protection for more than a decade.²³³ Five days after President Trump’s inauguration, China reversed its previous decade-long position and provisionally granted the trademark.²³⁴ The final approval of the trademark was granted two days after President Trump publically expressed support to China’s President Xi Jinping for the “One China” policy, a policy that President Trump had

²²⁷ See e.g., CREW Complaint, *supra* note 3.

²²⁸ See e.g., MD/DC Complaint, *supra* note 3.

²²⁹ *Id.*

²³⁰ CREW Complaint, *supra* note 3.

²³¹ *Id.*

²³² MD/DC Complaint, *supra* note 3.

²³³ See Jackie Northam, *China Grants Trump A Valuable Trademark Registration* available at: <http://www.npr.org/sections/thetwo-way/2017/02/16/515589191/china-grants-President-Trump-a-valuable-trademark-registration>.

²³⁴ *Id.*

previously called into question.²³⁵ California Senator Dianne Feinstein publically commented on the trademark grant, stating, “If this isn’t a violation of the Emoluments Clause, I don’t know what is.”²³⁶

Both the services-rendered and foreign-state-favors scenarios present novel questions about how the Emoluments Clause can or should be enforced. However, of the many novel issues raised by President Trump’s decision not to divest, the question of Emoluments enforcement stands alone because it implicates a set of deeper concerns about separation-of-powers and our Constitutional system as a whole.

The question of who has the power to enforce the Emoluments Clause unearths a series of uncomfortable paradoxes within the Supreme Court’s standing jurisprudence. For example, an unreflective application of current standing doctrine to the President Trump trademark issue could confer standing exclusively to an American businesses operating in China that currently uses the name “Trump” without obtaining a license from President Trump. The idea that businesses in China that are competing for the use of the “Trump” name are potentially the *only* private entities who have the power to enforce a Constitutional provision designed to protect the American people from disloyalty in our public officials strains credulity, even within the confines of the doctrine of constitutional standing.

An unreflective application of current standing doctrine could potentially confer exclusive standing on a plaintiff to bring a *constitutional* claim against a sitting President based on loss profits arising out of a trademark dispute simply because the loss profits constitute a direct and particularized injury. That rule would deny standing based on the very injury the Emoluments Clause was designed to protect against, while granting standing for a very attenuated collateral injury. Under that rule, a plaintiff who complains that the sitting President is violating his fiduciary duty would be turned away, despite the fact that the fiduciary injury is both the primary injury and the injury that the Emoluments Clause is designed to abate. In that situation standing doctrine denies[?] standing based on the injury that follows from the inference that the President of the United States potentially has a personal financial stake in maintaining a favorable relationship with China.

Similarly, in the services rendered scenario in which a representative of a foreign state stay in a Trump-owned hotel and pay for services rendered, an unreflective application of current standing doctrine could mean that only hotels competing with President Trump’s hotel for business would have standing to sue to enforce the Clause. Understandably, plaintiffs in the CREW, MD/DC, and DEM lawsuits have sought to meet the Court’s

²³⁵ Jeremy Venook, *The Story Behind Trump’s Chinese Trademark*, available at: <https://www.theatlantic.com/business/archive/2017/02/trump-chinese-trademark/517458/>.

²³⁶ *Id.*

articulated injury-in-fact standard by pleading concrete and particularized injuries that are differentiated from injuries that each American suffers when the President fails to abide by (or enforce) the law.²³⁷ The CREW litigation provides an exemplar of this strategy.²³⁸ In its original complaint, CREW alleged that it was personally and concretely harmed by the President's alleged emoluments violations because it was obliged to spend additional resources in response to the President's emoluments-related actions.²³⁹ Because CREW is a nonprofit directed at monitoring government corruption, the President's alleged corruption caused the organization to undertake more work at additional expense.²⁴⁰ Later in the litigation, CREW amended its complaint to add additional plaintiffs including an association of restaurants and restaurant workers and individuals employed by hotels that compete with Trump-branded properties.²⁴¹ The amended complaint alleged that the newcomer plaintiffs were injured by the emoluments violations because the violations caused businesses that compete with Trump-branded properties to lose business, and their employees to lose wages and tips.

As a litigation strategy, it is imperative that plaintiffs in the CREW, MD/DC, and DEM litigations plead personal and monetizable injuries such as loss of business or loss of wages.²⁴² Yet it is difficult to reconcile these types of injuries with the history and structure of the Emoluments Clause. It is difficult to image that the same people who were worried about a betrayal along the lines of Charles II would be persuaded that a cause of action should lie with competing hotels for loss of profits but not with an ordinary citizen seeking to enforce the fiduciary duty of the executive branch.

An unreflective application of standing doctrine to the potential Emoluments violations that might arise in the context of a sitting President's business interests would likely lead to prioritizing collateral and (from a constitutional perspective) trivial injuries over primary and constitutionally profound injuries. As we have seen, the reason for this inversion is fairly

²³⁷ See CREW Complaint, *supra* note 3; MD/DC Complaint, *supra* note 3; DEM complaint, *supra* note 3.

²³⁸ CREW Complaint, *supra* note 3.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Restaurant Opportunities Centers (ROC) United, Inc., Jill Phaneuf, and Eric Goode, Plaintiffs, v. Donald J. TRUMP, in his official capacity as President of the United States of America, Defendant., 2017 WL 2734681 (S.D.N.Y.) [hereinafter CREW Amended Complaint].

²⁴² See *e.g.*, CREW Complaint, *supra* note 3 (asserting loss of business and loss of wages as a basis for standing).

traceable to two concerns: (1) the Court's pragmatic worry about constitutional litigation flooding the courts; and (2) the Court's disinclination to be conscripted into policing the political branches.

In light of these concerns the Court has articulated the understanding that generalized constitutional injuries are "best" resolved through the political process. In diverting broadly shared constitution-based injuries to the political process, the Court manifests a preference for "representative constitutionalism" – a type of institutional competency principle that places greater confidence in the political branches to resolve wide-spread constitutional injury. However, in the context of the Emoluments Clause, that confidence is misplaced. A consideration of the impact of the Court's embrace of representative constitutionalism in the Emoluments context follows.

III. REPRESENTATIVE VERSUS DIRECT CONSTITUTIONALISM

The Supreme Court's injury-in-fact requirement represents an articulated preference for the resolution of undifferentiated injuries through the political process.²⁴³ This preference can be described as a preference for representative constitutionalism. The principle of "representative constitutionalism" assumes that separation of powers norms are best enforced through collective action (via elected representatives) rather than individual action (via individual citizen's lawsuits).

The preference for representative constitutionalism is presumably based on one (or more) of the following premises: (1) the Constitution itself – either structurally, expressly, or in light of the framer's intent – requires collective rather than individual enforcement of the Clause; (2) collective action is pragmatically better suited to safeguard fiduciary duty enforced by the Clause, without sacrificing (while simultaneously protecting) separation-of-powers norms. The separation-of-powers worry for the Court is that allowing undifferentiated injuries to sustain standing would place the judiciary in the role of usurping the Executive Branch's prerogative to "take Care that the Laws be faithfully executed."²⁴⁴

To assess whether the Court's preference for collective action is mandated or even warranted, it is helpful to evaluate these premises individually. A first possibility to explore is the premise that the Constitution itself is committed to collective action (rather than individual citizen suits) in the context of enforcing the Emoluments Clause. However, the Clause does

²⁴³ See *supra* note 107 and accompanying text.

²⁴⁴ 136 S. Ct. 1540, at 1553 (Congress is not permitted "to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed'").

not expressly commit itself to this proposition. Instead, the Clause is silent on the matter of enforcement. William Rawle, for example, writing in 1829, noted that the lack of an enforcement provision was the great weakness of the Emoluments Clause.²⁴⁵

Further, while the Clause does identify a role for collective action (i.e. accepting an emolument is only a violation if it is done *without* the consent of Congress), the role it identifies is not an enforcement role.²⁴⁶ It does not, for example, state that violation of the Clause is an impeachable offence, or a “high crime” or “misdemeanor,” which might signal enforcement of the Clause exclusively through the political process.²⁴⁷

The history of the Clause likewise fails to support an exclusively collective (rather than individual) remedy for its violation.²⁴⁸ What we know about contemporaneous discussion of the provision suggests that the framers viewed as a grave threat the possibility that a federal officer would be rendered vulnerable to foreign influence.²⁴⁹ The seriousness of the threat and the absence of a specified remedy supports – if anything – the inference that all reasonable enforcement mechanisms would be made available to police the fiduciary duty of federal officers.

So neither the text of the Clause nor its history suggests or requires that collective action through elected representatives (i.e. impeachment) is the sole mechanism for enforcing the Clause. We are left then with two premises in support of a representative constitutionalism in the context of the Emoluments Clause. The first of these is that the structure of the Constitution recommends (or requires) collective action in the Emoluments context. A “structure” argument in this context would typically assume the form of a separation-of-powers argument. The second premise is that collective action is pragmatically better suited to enforce the fiduciary duty at issue while simultaneously safeguarding separation-of-powers norms. These premises are explored below.

A. *The Role of ‘The People’ in Separation-of-Powers Analysis*

²⁴⁵ See Rawle, *supra* note 21, at 20 (observing, “the clause in the text is defective in not providing a specific penalty for a breach of it.”).

²⁴⁶ U.S. CONST. ART. I, § 9, cl. 8.

²⁴⁷ U.S. Const. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

²⁴⁸ See, Teachout, *supra* note 1, at 366

²⁴⁹ *Id.*

The fact that the Emolument Clause is silent on the matter of enforcement does not exclude the possibility that impeachment is a perfectly plausible mechanism for enforcement. The question is, however, whether there is justification for the understanding that impeachment is the *only* permissible mechanism for enforcing the Emoluments Clause. Ordinarily we would assume that constitutional silence should suggest that all the conventional mechanisms for constitutional enforcement are available, including both impeachment and individual citizen suits. Yet many commentators have assumed that if action were taken against a sitting President under the Emoluments Clause, that action would necessarily take the form of an impeachment proceeding initiated by Congress.²⁵⁰ This assumption depends upon a specific—but unjustified—understanding of the relationship between the rights secured by the Constitution and the American people’s capacity to enforce those rights directly. The idea that Congress must act as an intermediary for citizens who seek to enforce the substantive provisions of the Constitution depends upon an inexplicably entrenched and unduly attenuated understanding of the role of “the People” in the creation of constitutional norms.

The challenge of enforcing the Emoluments Clause illuminates the surprisingly subordinate role that the Supreme Court has historically assigned ordinary people within its separation-of-powers narrative.²⁵¹ Despite the fact that the constitutional text and contemporaneous writings by the framers and their contemporaries seem to contemplate a central role for what the Constitution describes as “the People,” the Supreme Court has historically been inclined to minimize the role that ordinary people play in the enforcement—and thereby development—of constitutional norms.²⁵² While the executive, legislative, and judicial branches of the federal government are each allocated unique enforcement powers within the Supreme Court separation-of-powers narrative, the scope of the People’s constitutionally-committed power to police the government remains unarticulated and undeveloped. Instead, the Supreme Court and many constitutional scholars have generally understood the People’s power to be divined and exercised

²⁵⁰ See e.g., Adler, *supra* note 110.

²⁵¹ See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7-8 (2004) (describing the modern trend to reserve constitutional interpretation for “elite to handle, subject to paramount supervision from the Supreme Court.”).

²⁵² See e.g., ST. GEORGE TUCKER, “On Sovereignty and Legislature,” in BLACKSTONE’S COMMENTARIES, app. A (Philadelphia, 1803), reprinted in ST. GEORGE TUCKER, A VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 19 (Liberty Fund ed. 1999). (“[T]he powers of the several branches of government are defined, and the excess of them, as well in the legislature, as in the other branches, finds limits, which cannot be transgressed without offending against the greater power from whom all authority, among us, is derived; to wit, the PEOPLE.”).

almost exclusively through the behavior of democratically elected representatives.²⁵³

This view of the People as subordinate or even irrelevant in terms of the development of constitutional norms has been increasingly challenged by a handful of scholars over the last decade.²⁵⁴ Scholars advancing an idea known as “popular constitutionalism” have championed the view that ordinary people should play a larger role in the development of constitutional norms.²⁵⁵ However, even those advocating popular constitutionalism have largely imagined the role of the people to be mediated by elected representatives.²⁵⁶

While aligned with the view that ordinary people have a role to play in developing constitutional norms, this Article takes the idea of “popular constitutionalism” in a different direction. Rather than primarily equating the collective will of the People with the behavior of elected bodies or officials, this Article argues that the Constitution contemplates a role in separation-of-power analysis for *direct* action by *individual* people to enforce—and thereby develop—constitutional norms through the judicial process. A consideration of the People’s role in both the development and the enforcement of constitutional norms follows.

1. *Populism in Constitutional Theory*

The question of the appropriate role of the “the People” in formulating constitutional norms has been of interest in constitutional law discourse for

²⁵³ See e.g. 418 U.S. 166 at 179 (describing the political process as the appropriate mechanism for ordinary citizens to demand enforcement of constitutional norms against the political branches).

²⁵⁴ See Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 675 (2004) (“In the last several years, the trendiest development in constitutional scholarship has prominent progressive scholars arguing against judicial review... This body of scholarship has acquired the label ‘popular constitutionalism,’ reflecting the notion of people--not judges--interpreting the Constitution.”); see e.g., Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 140 (2001).

²⁵⁵ See e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 181 (1999) (describing and advocating what he calls “populist constitutional law” in which, among other things, the people amend the constitution through the political process rather than the Supreme Court amending it exclusively through constitutional interpretation.)

²⁵⁶ See *id.*, at 186, (“Populist constitutional law returns constitutional law to the people, acting through politics.”); Kramer, *supra* note 252, at 7 (“It was ‘the people themselves’—working through and responding to their agents in the government—who were responsible for seeing that [the Constitution] was properly interpreted and implemented.”).

more than a decade.²⁵⁷ Scholars such as Mark Tushnet, Larry Kramer, and Jeremy Waldron²⁵⁸ have all contributed to an idea that has been described as “popular constitutionalism.”²⁵⁹ Although the term “popular constitutionalism” means various things to various people, within the prevailing view it embodies the idea that “the people” (denoted here as “the People” to signify that a unique legal concept is employed) have a central role to play in the development of constitutional norms.²⁶⁰ It also has come to represent a scholarly stand against what its proponents have describe as “judicial review supremacy”—or the supremacy of judicial interpretations of constitutional concepts.²⁶¹

Popular constitutionalism to date has largely understood the “popular” aspect of popular constitutionalism to be mediated by collective bodies – most notably legislative bodies.²⁶² The is project is primarily directed at the relative power that the legislative and judicial branches each enjoy with respect to articulating important constitutional norms.²⁶³ Waldron’s project, in particular, is directed at elevating the legislative body from its current depreciated position in scholarly regard.²⁶⁴ Kramer also lauds the legislature both as a manifestation of “the people” and as a body that is at least as good as the judiciary in arriving at respectable deliberative decisions.²⁶⁵ Tushnet likewise images a more robust role for the political

²⁵⁷ See e.g., Tushnet, *supra* note 256; Kramer, *supra* note 255; Kramer, *supra* note 252.

²⁵⁸ Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 640 (1995) (describing scholarly diminishment of the legislative process as a mechanism for rationalizing the undemocratic nature of judicial review.).

²⁵⁹ Chemerinsky, *supra* note 255, at 675.

²⁶⁰ See e.g., Kramer, *supra* note 255.

²⁶¹ *Id.* at 13 (contrasting popular constitutionalism with judicial supremacy).

²⁶² Tushnet, *supra* note 256, at 157 (“Populist constitutional law rests on the idea that we all ought to participate in creating constitutional law through our actions in politics.”).

²⁶³ See Chemerinsky, *supra* note 255, at 676 (“Popular constitutionalists maintain that judicial review is unnecessary. They argue that the majoritarian processes can be trusted to adequately comply with the Constitution.”).

²⁶⁴ Waldron, *supra* note 259, at 640 (describing the general disdain with which most scholars regard the legislative process).

²⁶⁵ See Chemerinsky, *supra* note 255, at 676 (“Professor Kramer, for example, argues that the people can be trusted, and he defends the deliberative processes of Congress as at least equal to those of the judiciary.”).

branches to establish constitutional norms.²⁶⁶ In each of these renderings, the People come into constitutional focus primarily when they are acting through their elected representatives.

For example, Larry Kramer has described popular constitutionalism as a response to the mistaken (but pervasive) view that our Constitution “was adopted first and foremost to put a check on the people, to minimize their role in governing, to shove them as far offstage as possible without technically abandoning republicanism.”²⁶⁷ Kramer makes the case that the framers had in mind quite the opposite idea.²⁶⁸ Kramer describes the framers as “wild-eyed radicals taking a risky gamble on popular rule” who “embraced a political ideology that celebrated the central role of ‘the people’ in supplying government with its energy and direction, an ideal that remained at all times in the forefront of their thinking.”²⁶⁹ Kramer argues that not only is the weight of judicial supremacy contrary to the constrained judicial power imaged by the founding generations, but that “constitutional understandings determined in *politics* over the course of American history have been impressively stable, often lasting for decades and proving themselves at least as durable as judicial doctrine.”²⁷⁰

Jeremy Waldron has also has described a misstep in modern constitutional interpretation in terms of a tension between the legislature and judiciary. Waldron observes that, “The very unattractive image of legislation that prevails in modern jurisprudence.... is an image that portrays legislative activity as...as anything...except principled political decision-making. We set this sort of thing up as our model of legislation partly...to lend credibility to our normative models of judicial review of legislation and thus silence misgivings about the undemocratic character of that review.”²⁷¹ Waldron defends the democratic virtue of the legislative process as a manifestation of the “voices plural, not just of a unitary *vox populi*.”²⁷² Waldron views the fact

²⁶⁶ Tushnet, *supra* note 256, at 157 (“Populist constitutional law rests on the idea that we all ought to participate in creating constitutional law through our actions in politics.”)

²⁶⁷ Kramer, *supra* note 252, at 5.

²⁶⁸ *Id.* at 6 (“[The] Constitution remained, fundamentally, an act of popular will: the people’s charter, made by the people. And... it was “the people themselves”— working through and responding to their agents in the government— who were responsible for seeing that it was properly interpreted and implemented.”).

²⁶⁹ *Id.* at 6.

²⁷⁰ Kramer, *supra* note 252, at 235 (emphasis added).

²⁷¹ Waldron, *supra* note 259, at 640.

²⁷² *Id.* at 635.

that the judiciary has been placed in a superordinate position with respect to legislation as anti-pluralist and thereby anti-democratic.²⁷³

Similarly, Mark Tushnet has detailed a popular constitutionalism critique of “judicial supremacy” in which constitutional questions are exclusively reserved for the courts and both elected officials and ordinary citizens are excluded from the process of determining what the constitution means.²⁷⁴ Tushnet attributes the prevalence of this wrong-headed approach to, among many things, a misreading of *Marbury v. Madison*’s famous line, “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”²⁷⁵ Tushnet presents judicial supremacy misreading as: “It is emphatically the province and duty of the judicial department-and no one else-to say what the law is,” and once the courts articulate the law, “no one obliged to support the Constitution can fairly assert that the Constitution means something different from what [the courts] said it meant.”²⁷⁶ Tushnet argues that this second reading inappropriately imbues the Court with special authority about what the Constitution means in a manner that undermines the authority of other constitutional decision-makers.²⁷⁷ Tushnet would remove this “judicial supremacy” in favor of a more populist process of constitutional decision-making.²⁷⁸ The remedy for judicial supremacy is the development of constitutional norms through the ordinary political process.²⁷⁹

Kramer, Waldron, and Tushnet each begin with foundational notion that the People should play a more substantial role in the development of constitutional norms than they currently do. Kramer’s foundation is grounded in a careful and persuasive historical plumbing of the framers’ understanding of the role of the People.²⁸⁰ Tushnet locates his foundation in an important

²⁷³ *Id.* at 636 (“Almost all modern legislatures claim their democratic credentials in virtue of their inherent plurality...This contrasts quite markedly with the other great institutions of government.”).

²⁷⁴ Tushnet, *supra* note 256, at 169.

²⁷⁵ Tushnet, *supra* note 256, at 6-7.

²⁷⁶ *Id.* at 7.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 7-9.

²⁷⁹ *Id.* at 181-186.

²⁸⁰ Kramer, *supra* note 252, at 208 (concluding that “the Constitution was written against a background of populism.”).

misreading of *Marybury*.²⁸¹ Waldron begins with Locke's view of the legislature as the "soul" of the commonwealth.²⁸²

While there is much merit in the view of popular constitutionalism as it is currently comprised, it is a view that equates elected bodies with the People.²⁸³ A weakness of this approach is that it takes the legislative branch to be an arm of the People.²⁸⁴ It fails to take into account systemic political entrenchment and the potential subordination of the People to the legislative branch. Minimally, it fails to encompass a constitutional structure that imagines the political branches as potentially in conflict with the People. If the legislative branch is the servant of the people, what happens when the servant is clandestine and treacherous? What happens when the political process itself is compromised, gerrymandered, or corrupt?²⁸⁵ What mechanism – aside from the political process itself that may incorporate significant flaws – allows the people to exercise power against an overstepping executive or legislative branch? When the political process itself lists, what structural constitutional components should we depend upon to right the ship?

The problem with conventional renderings of constitutional populism is that they tend to equate action by the People (or vindication of the People's rights) as a political value that is dependent on – or in some versions – coterminous with action by the people's elected representatives.²⁸⁶ Within

²⁸¹ Tushnet, *supra* at note 256 at 7-8. Tushnet uses *Brown v. Board of Education* as an important example of such a misreading. He notes that in *Brown*, "Marbury 'declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution.' Calling that principle 'a permanent and indispensable feature of our constitutional system,' the Court said that 'it follows that the interpretation of [the Constitution] enunciated by this Court in the *Brown* case is the supreme law of the land.'"

²⁸² Waldron, *supra* note 259, at 633 (quoting John Locke: "Tis in their Legislative, that the Members of a Commonwealth are united, and combined together into one coherent living Body. This is the Soul that gives Form, Life, and Unity to the Commonwealth: From hence the several Members [of society] have their mutual Influence, Sympathy, and Connexion." John Locke, *Two Treatises of Government* 425 (Peter Laslett ed., Cambridge Univ. Press 1970) (3d ed. 1698) (Second Treatise P 212)).

²⁸³ See e.g., Tushnet, *supra* note 256, at 157 (the remedy for judicial supremacy is the people acting through their elected officials).

²⁸⁴ See e.g., Kramer, *supra* note 252, at 83 (describing Congress as controlled by the people).

²⁸⁵ See Chemerinsky, *supra* note 255, at 680 (raising the example of gerrymandering as a challenge to popular constitutionalism).

²⁸⁶ See e.g., Tushnet, *supra* note 252, at 187 (advocating taking constitutional law away from the courts and placing it in the hand of the people who demonstrate their will through the political process).

these approaches, the People's will is best made known by the action of their elected representatives.²⁸⁷ When constitutionally challenged legislation is upheld, it is a victory for the People, because the people went to their polling places and directly elected the lawmakers who wrote the law.²⁸⁸ The law, therefore, reflects the constitutional judgments and sensibilities of the People. In contrast, when judges strike down enacted legislation on constitutional grounds, those judges – who are *not* (in most cases) directly elected – are voicing disagreement with the constitutional sensibilities and judgments of the People.²⁸⁹ In this type of conflict, the conventional constitutional populist would hold that on points of fair disagreement – where reasonable minds differ – the will of the people should prevail.²⁹⁰

There is much rhetorical and intuitive appeal to the conventional populist approach to democratic constitutionalism. There are, too, significant shortcomings. For example, the conventional approach mistakenly conflates the will of the People with the behavior of the People's elected representatives, when these are, quite obviously, not the same thing.

Consider, by way of example, *Brown v. Board of Education*, a case that Professor Kramer points to as an example of the Court especially flexing its judicial supremacy arm.²⁹¹ At the time *Brown* was decided, the political branches were doing an especially poor job of representing the will of black Americans.²⁹² Jim Crow and entrenched and institutional racism ensured that black voices were largely excluded from deliberative legislative decisions and most American elected representative bodies lacked the pluralist virtue and character that Professor Waldron would assign them.²⁹³

Moreover, exclusion from political consensus is a problem for many of the People even outside the context of systemic racism.²⁹⁴ Many people who

²⁸⁷ *Id.* at 187.

²⁸⁸ See Chemerinsky, *supra* note 255, at 676 (“[Popular constitutionalists] exalt majority rule and argue that judicial review replaces majoritarian choices with decisions of unelected judges.”).

²⁸⁹ *Id.* at 676.

²⁹⁰ Tushnet, *supra* note 256, at 187.

²⁹¹ *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).

²⁹² MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 4 (2004).

²⁹³ In fairness, Waldron notes that to be truly pluralistic in character it may be necessary to randomly select a representative segment of legislators rather than elect them. Waldron, *supra* note 259, at 636 (“Maybe random selection or statistical sampling would be preferable.”).

²⁹⁴ See Klarman, *supra* note 291 (describing systemic racism and exclusion from the political process).

are undoubtedly part of “the People” for the purpose of constitutional analysis are excluded (by law or by circumstance) from the electoral process. Children, prisoners, and noncitizen residents, for example, all have a stake equal to any other member of the People in the adjudication of questions of equal protection, the 8th Amendment, and Due Process, but none of them have a direct voice in the electoral process. To the extent that the product of a legislative body reflects this segment of the People’s will, it does so through an elaborately mediated process in which enfranchised members of society can chose to take into account the needs of the officially disenfranchised. Parents, for example, may vote the “will” or, more likely, interests (which may be what we really care about in this context anyway) of their kids, assuming parents are good at knowing those interests and fairly mediating conflicts between their children’s interests and their own.²⁹⁵ Prisoners and noncitizen residents likewise depend on the benevolence of their enfranchised neighbors to give political voice to their “will.”

Further, the primary argument in support of the claim that action by politically elected officials is more likely to do the People’s will than action by the courts is the argument that the courts are counter-majoritarian while the elected branches are inherently majoritarian.²⁹⁶ A more majoritarian body, it is argued, must do a better job representing the will of the People.²⁹⁷ While there is great rhetorical appeal in such an argument, it does not, of course, obtain in all cases. The first problem with the argument is that the majoritarian/counter-majoritarian distinction between courts and congresses is a distinction of degree, not of kind. Appointment to the federal courts is, of course, unquestionably a political act. This truth has been laid spectacularly bare in these last few years.²⁹⁸ Yet before even these latest spectacles, criticisms of the politicization of the courts had long been the (most likely

²⁹⁵ See Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 Minn. L. Rev. 1463, 1465–66 (1998) (“Even if we assume that the parents who reside with them vote in their interest, children continue to be substantially underrepresented [in the electoral process].”).

²⁹⁶ See Waldron, *supra* note 259, at 636 (comparing unfavorably the fact that “the highest court in each system characteristically comprises a very small number of judges and the executive is often just one person or a small cabinet” with the fact that legislative bodies tend to be comprised of larger numbers of people.”)

²⁹⁷ Waldron makes the more nuanced argument that the more representative and pluralistic the body, the more likely it is to do the People’s will. Waldron, *supra* note 259, at 636.

²⁹⁸ *C.f.*, James E. Britton, *The Constitution That Couldn't: Examining the Implicit Imbalance of Constitutional Power in the Context of Nominations, and the Need for Its Remedy*, 43 J. LEGIS. 214, 215 (2017) (describing the failed nomination of Merrick Garland by President Obama).

intractable) bane of the nominating process.²⁹⁹ In this light, both all three branches of government represent, to various degrees, a consensus of the collective. None of the three branches purely represents the value of independent and direct participation in the deliberative process.

Thus, while I share the intuition that the People play an unduly subordinated role in our current separation-of-powers narrative for many of the reasons advanced by those advocating popular constitutionalism, the argument presented here departs from the body of popular constitutionalism discourse in one very substantial respect. The argument presented here posits that the constitutionally-committed role of the People to participate in the development of constitutional norms ought not to be defined and limited by the behavior of their elected representatives. The behavior of the political branches is not a perfect proxy for the will of the People, but even if it were a perfect proxy, there is a unique power inherent in direct action through citizen suits that cannot be replicated through collective proxies. Individual citizen suits provide an excellent means for ordinary people to directly influence and develop constitutional norms. Further, empowering citizen suits in the context of a broadly-shared fiduciary injury is a particularly important means of engaging in the kind of separation-of-powers policing of the political branches that the Constitution contemplates. These ideas are explored in more detail below.

2. *Individual Citizen Suits as Popular Constitutionalism*

A common refrain in current popular constitutionalism scholarship is that the courts are not the appropriate institution to referee contested constitutional disputes.³⁰⁰ The reasons for this are many and persuasive, but what this line of argument omits is the possibility that referring is not the only – or even, perhaps, the most important – function in the development of constitutional norms. Arguably more important than the outcome of a particular constitutional dispute is the capacity to raise and frame the debate. On this view, the much more important question than who referees the dispute is who is invited into the discussion.

Consider, again the *Brown* example.³⁰¹ At the time that *Brown* was decided, the People’s will as mediated by the political process was settled:

²⁹⁹ David R. Stras, *Understanding the New Politics of Judicial Appointments Confirmation Wars: Preserving Independent Courts in Angry Times*, 86 TEX. L. REV. 1033 (2008) (“Legal scholars have written a litany of articles decrying the increasing politicization of the [judicial nomination] process and proposing reform measures to make the process more orderly and genteel.”).

³⁰⁰ See Kramer, *supra* note 255, at 13 (criticizing “judicial supremacy”).

³⁰¹ 347 U.S. 483.

legislative bodies had determined that separate but equal accorded with constitutional norms, and the courts, in previous renderings, had agreed.³⁰² The power inherent in the capacity of the plaintiffs in *Brown* to challenge that political and judicial consensus in court should not be underestimated. Because they had standing to challenge the political consensus, the *Brown* plaintiffs were able to step up to the microphone take part in the national debate surrounding segregated schools, after having long been silenced in other parts of the political process. The capacity to individually sue meant that the *Brown* plaintiffs did not have to depend upon the goodwill of their elected representatives to make their case on their behalf. Instead, the *Brown* plaintiffs were able to make the case directly – not only to the Supreme Court, but also to the American people. The *Brown* plaintiffs could choose the framing that mattered to them and that resonated with their experience. In so doing, they participate in the development of constitutional norms. Whether the Supreme Court agreed with their framing or not, the grant of standing meant that the plaintiffs’ framing had to be *addressed*. The plaintiffs’ framing became a substantial part of the development of the constitutional norms that followed.³⁰³

The capacity for an individual citizen to have a seat at the table in that regard may be more important to the value of participation in the development of constitutional norms than deciding which deliberative body ultimately should decide the question at hand. After all, because both the legislature and the courts are multi-member bodies, no one person or perspective is guaranteed a favorable result regardless of the body that determines with finality the constitutional norm. However, in a constitutional structure in which standing is made reasonably available for challenging broad constitutional injuries, meaningful participation in the dialogue surrounding that decision could be guaranteed to both *each* and *all* of the People.

The power of individual constitutionally-based citizen suits to contribute to the development of constitutional norms has played out in much the way that the *Monroe* dissenters feared that it might.³⁰⁴ A flood of post-*Monroe* constitutional cases has provided the federal courts with ample opportunity to articulate the boundaries of constitutional provision – an

³⁰² See, Klarman, *supra* note 293, at 4.

³⁰³ See generally, Martha Minow, *Surprising Legacies of Brown v. Board*, 16 WASH. U. J.L. & POL’Y 11 (2004).

³⁰⁴ 365 U.S. 167 at 242 (Frankfurter, J. *dissenting*) (“[The decision in *Monroe*] makes the extreme limits of federal constitutional power a law to regulate the quotidian business of every traffic policeman, every registrar of elections, every city inspector or investigator, every clerk in every municipal licensing bureau in this country.”).

articulation that would not have happened in the absence of availability of a private cause of action.³⁰⁵ One of the areas where the private cause of action has had the most impact is in illuminating the contours of the Eighth Amendment.³⁰⁶ The members of the People who are most affected by Eighth Amendment guarantees are, of course, prisoners. As prisoners do not vote and are not a politically popular constituency, when the development of Eighth Amendment norms was left to the political branches (pre-*Monroe*) there was very little public or political deliberation about the substantive content of the guarantee against cruel and unusual punishment.³⁰⁷ However, once an individual cause of action was made available to prisoners, the judiciary became obliged to address the constitutional challenges as they were raised.³⁰⁸ Once prisoners were given a meaningful means of contributing to the dialogue about the minimal constitutional requirements of confinement, the corresponding legal doctrines shifted appreciably.³⁰⁹

Thus the *individual* capacity to *directly* come to the table (via individual citizen suits) and participate in the dialogue that surrounds constitutional norms is particularly important because giving meaning to the “will of the people” is more than a collective value. The capacity of an individual person—regardless of whether that person is herself enfranchised or politically popular—to protect herself from the consequences of an overreaching government is obviously (at least nominally) a central value of the constitutional scheme.

In these ways, granting reasonable standing in instances of widely-shared constitutional injury may be a more effective means of granting meaningful access to participate in the development of constitutional norms than even the elimination of the notion of “judicial supremacy.” Because any deliberative body will serve as an inadequate proxy for the People’s will – at least in the context of the development of constitutional norms – it is at least as important that each of the People has an opportunity to make a meaningful contribution to the conversation surrounding constitutional norms.

B. Emoluments Citizen Suits as Separation-of-Powers Safeguard

³⁰⁵ Oren, *supra* note 124, at 10.

³⁰⁶ See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 904-905(2009)(discussing the impact of the *Monroe* decision on the development of Eighth Amendment norms).

³⁰⁷ See Michael Tonry, *Explanations of American Punishment Policies: A National History*, 11 PUNISHMENT & SOC'Y 377 (2009) (a historical account of changing attitudes towards American prison conditions).

³⁰⁸ Dolovich, *supra* note 307, at 904-905.

³⁰⁹ *Id.* at 905.

As the popular constitutionalism literature makes clear, both the text of the constitution and what we know about from the founders' contemporaneous writings suggest that the founders imagined a greater role for the people in the development of constitutional norms.³¹⁰ However, an even stronger case can be made for the argument that both the constitution and the founders' writings suggest that the People themselves should play a central role in policing the federal government.³¹¹ The *enforcement*, perhaps even more than the development, of constitutional norms seems squarely placed in the hands of the People. It is for the People to ensure that their elected officials are abiding by constitutional limitations. The very provisions that support separation-of-powers as a constitutional norm to begin with, support the idea that the People are ultimately responsible for policing and enforcing those norms. However, the People's role in separation-of-power analysis has been subsumed by the pervasive understanding that the behavior of the political branches is an adequate proxy for the will of the people. Similarly, in separation-of-powers analysis the assumption persists that the People's role policing the federal government is entirely executed by resort to the electoral process. This assumption, however, is unfounded for many of the reasons just discussed.

Despite the fact that a great deal of literature has been devoted to the notion and significance of "separation of powers" as a structural feature of our constitution, separation-of-powers discourse almost exclusively centers on the three branches of government described and constituted in the first three articles of the Constitution. What is omitted from this tripod approach to separation of powers is the role that the framers expressly reserved for the *fourth*, and most important, source of political and legal power: the People.

The primary obstacle to the People fulfilling their constitutionally committed role as policers of executive branch in the context of the Emoluments Clause is the Supreme Court's prohibition against generalized grievances. Having discussed in detail most of the possible justifications for applying the generalized grievance ban in the context of an Emoluments challenge, we are left primarily with the Supreme Court's frequently voiced concern that allowing generalized grievances to go forward would conscript the Court into an inappropriate supervisory role over the executive branch. The primary weakness of this worry as a basis for denying standing in broadly-shared constitutional injury cases is that it is simply not [!?] unique to the generalized grievance context. It is, after all, the province of the judiciary to decide what the law is (even assuming all popular

³¹⁰ Kramer, *supra* note 252, at 208 ("The Constitution was written against a background of popular constitutionalism.").

³¹¹ Tucker, *supra* note 253, at 19.

constitutionalism qualms about the supremacy of those determinations) and part of deciding what the law is entails deciding when another branch has broken it. The heart of Court's worry seems to be that if many people are equally affected by an executive branch act, that act is, somehow, inherently *political* in nature and as such should be resolved through the political process.

This conclusion, however, is not sustainable. All acts by the executive branch are inherently political. It does not follow that a political act – even one that affects all Americans equally – does not also have a profound constitutional impact. If, for example, the President were to impose (via executive order) a national curfew in the interest of national security that would be a political act that would affect all Americans equally, yet it would also have profound constitutional implications.

Further, the ban on generalized grievances does not remove the “inherently political” a category of cases from the Supreme Court's docket. Instead, it merely shifts *who* can bring those cases. In the curfew hypothetical, for example, an individual who claimed a unique monetary injury from the curfew could have standing to sue, while most Americans would not. Similarly in the Emoluments context, individuals or entities who can demonstrate a monetary injury that results from the alleged emoluments activity could have standing to sue, but an individual without that particular economic tie may not. The wisdom of creating an “economic interest” barrier to constitutional adjudication in the context of widely-shared injuries is certainly vulnerable to considerable critique.

More importantly, the conscription worry has less purchase in the context of the kind of fiduciary injury at issue in an Emolument context. In that context, the threat that is being remediated is an external threat – the threat of foreign influence. The question in that context is not whether the executive branch has made wise decisions regarding the allocation of scarce enforcement resources, but rather whether the President personally has adhered to a constitutional prohibition in his personal capacity. In this context, the worry about intra-branch overstepping if present at all, is certainly subordinate to the threat that the Emoluments Clause is directed at mitigating.

Thus, the “conscription” worry in the generalize grievance context is ultimately unpersuasive and it has particularly little purchase in the narrow context of an Emolument challenge. The Court is already involved in policing the executive branch in exactly the manner that it claims to eschew in the generalized grievance context. The legislative branch is also co-equally charged with the duty to enforce the fiduciary duty imposed by the Clause. However, the People need not be behold to the political branches to safeguard this constitutional value. The People, as individuals, should be afforded a reasonable opportunity to sit at that same deliberative table and frame that debate on an equal footing with the other three branches.

IV. Conclusion

To conclude, the enforcement of the Emoluments Clause presents a complex challenge to existing standing doctrine. Because the primary injury that follows from an Emoluments violation is *always* an undifferentiated fiduciary harm, an unreflective application of current standing doctrine would perversely award standing to those plaintiffs who present to the Court attenuated and tangential collateral harms, while denying standing for claims unapologetically directed at enforcing the fiduciary duty that the Emoluments Clause imposes on federal officers. Requiring plaintiffs to jump through a legal fiction hoop of “concrete” and “particularized” injury in the context of an Emoluments Clause serves only to encourage gamesmanship in the structuring of plaintiff profiles, while serving no substantively limiting purpose. In this scenario, individual Emoluments lawsuits would go forward, they would just be helmed exclusively by plaintiffs who happen to have a coincidental connection to the aggrieved of conduct. Requiring Emoluments enforcement advocates to search out and secure these standing-token plaintiffs is an exercise in cynicism and disingenuousness that is beneath the dignity of the value the Emoluments Clause represents: the value of loyalty to the People of the United States against foreign influence.

Alternatively, an unreflective application of current standing doctrine could plausibly conclude that no individual lawsuit can enforce the doctrine, and—consistent with the Supreme Court’s preference for representative constitutionalism—hold that only Congress is empowered to enforce the Clause (at least as against a sitting President) through an impeachment proceeding. Such a conclusion would shuffle fiduciary injuries (as a class of cases) out of the federal courts and into the fray of the political process. Yet by channeling Emoluments cases towards the political branches, the Court evidences an unwarranted confidence in those collective bodies to overcome their structural inclination toward the classic agency problem of acting in their own self-interest rather than in the best interest of the People. This agency problem is particularly pronounced and acute in the Emoluments context, where the risk to be avoided is dire (a disloyal federal officer—let alone a president—can do much damage to the nation) and the likelihood is high that interests of elected officials and the People will diverge.

Whether the Court controls access to enforcing the Emoluments Clause through the mechanism of standing, or the mechanism of representative constitutionalism, such control robs the People of their constitutionally-committed role as the group primary responsible for the enforcement of constitutional norms. Moreover, while the People’s enforcement role is often augmented by collective action through the political branches, direct, *individual* action through citizen suits is a core element of the People’s enforcement power. Direct, individual action frees the People from

dependence on the political branches to protect their interest in enforcing constitutional norms. Direct, individual citizen suits allows individual people—who may otherwise be excluded through the political process—to participate on a equal footing with political leaders, jurists, and other civic leaders in the deliberation, development and enforcement of Constitutional norms.

The Emoluments controversies of the present moment will test the boundaries and internal consistency of the Supreme Court’s current approach to citizen suits as a mechanism for redressing primary, undifferentiated public harms. The cases currently pending provide an opportunity for the Court to reconsider the wisdom and efficacy of its current approach, while opening the door to navigating a new doctrinal path in this important, complex and controversial area of constitutional law.