

## ARTICLES

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# FIDUCIARY INJURY AND CITIZEN ENFORCEMENT OF THE EMOLUMENTS CLAUSE

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*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 action—such as a private lawsuit? If the Emoluments Clause can be enforced by private action, who has standing to sue? In the absence of explicit textual guidance, a broader constitutional theory is required to render enforcement of the Clause coherent.*

*This Article presents that broader theory. The Article argues 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 may serve as the basis for a private cause of action to enforce the Clause. Drawing on both the historical and textual context of the Clause, this Article concludes that enforcement of the Emoluments Clause is a tool that the Constitution reserves for “the People” as a means of policing the political branches.*

*The Article then positions this fiduciary injury into the broader question of standing in constitutional cases. The Supreme Court’s paramount concern in the context of standing in constitutional cases is to avoid separation-of-powers conflicts. That goal is best served by a focus on primary versus collateral injuries, rather than the Court’s current (and unevenly applied) “concrete and particularized” standard. In constitutional cases, a focus on primary injuries is consistent with much of the Court’s existing standing doctrine and offers a more coherent, parsimonious, and elegant approach to standing. More importantly, a focus on primary injuries allows the Court to safeguard separation-of-powers principles while avoiding the absurd results that necessarily follow from the Court’s current posture.*

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## INTRODUCTION

The presidency of Donald Trump has ignited much interest<sup>1</sup> in the Emoluments Clause.<sup>2</sup> At the time of publication, three separate 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.<sup>3</sup> The first lawsuit was filed in January 2017 by a nonprofit watchdog organization known as Citizens for Responsibility and Ethics in Washington (CREW).<sup>4</sup> The second suit was filed in June 2017 by the attorneys general of Maryland and the District of Columbia ("MD/DC").<sup>5</sup> The third suit was also filed in June 2017 by 196 Democratic members of Congress (the "DEM" lawsuit).<sup>6</sup> The central claims of these complaints are strikingly similar.<sup>7</sup> There is even some overlap among the counsel of record

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1 See, e.g., NORMAN L. EISEN ET AL., BROOKINGS INST., *THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP* 3 (2016), [https://www.brookings.edu/wp-content/uploads/2016/12/gs\\_121616\\_emoluments-clause1.pdf](https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf) ("It is widely accepted that Mr. 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 anticorruption principle—an argument that was cited by both a dissenting and concurring justice in *Citizens United*. Cf. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 359–60 (2009); *Citizens United v. FEC*, 558 U.S. 310, 391 (2010) (Scalia, J., concurring); *id.* at 424 n.51 (Stevens, J., concurring in part and dissenting in part).

2 Two distinct constitutional clauses are sometimes referred to as the "Emoluments Clause." The first appears 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 of Congress. See *id.* 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 encreased during such time." *Id.* A second "Emoluments Clause," also known as the "Foreign Emoluments Clause," appears at Article I, Section 9, Clause 8. It applies to any "Person holding any Office of Profit or Trust under" the United States. *Id.* art. I, § 9, cl. 8. When used in this Article, the term "Emoluments Clause" refers exclusively to the Foreign Emoluments Clause.

3 See Complaint at 18, *Blumenthal v. Trump*, 335 F. Supp. 3d 45 (D.D.C. 2018) (No. 17-1154) [hereinafter DEM Complaint]; Complaint at 2, 4, *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018) (No. 17-1596) [hereinafter MD/DC Complaint]; Complaint at 1, 3, *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17-458) [hereinafter CREW Complaint]; Second Amended Complaint at 1, 3, *Citizens for Responsibility & Ethics in Wash.*, 276 F. Supp. 3d 174 (No. 17-458) [hereinafter CREW Second Amended Complaint].

4 CREW Complaint, *supra* note 3, at 2, 4, 37; CREW Second Amended Complaint, *supra* note 3, at 4.

5 MD/DC Complaint, *supra* note 3, at 1, 7, 44.

6 DEM Complaint, *supra* note 3, at 17, 19–20, 54.

7 The CREW complaint, for example, complains both of general conflict of interests concerns and specific possible violations. General concerns include statements such as:

in the cases.<sup>8</sup> What primarily 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.<sup>9</sup>

Specifically, the plaintiff profiles in these three cases have been crafted to meet the injury-in-fact standing requirement, which proscribes “generalized grievances.”<sup>10</sup> It is unsurprising that these plaintiff profiles have been tailored with an eye to the standing requirement, as the generalized-grievance 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 “incoheren[t],”<sup>11</sup> “pointless,”<sup>12</sup> and variously inadequate.<sup>13</sup> But in the context of an Emoluments Clause challenge, an unreflective application of

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“Defendant owns and controls hundreds of businesses throughout the world, including hotels and other properties. His sprawling business empire is made up of hundreds of different corporations . . . .” CREW Second Amended Complaint, *supra* note 3, at 14; *see also id.* at 1 (“Defendant’s 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 Emoluments Clauses].”). 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, at 13–14 (footnote omitted). These specific allegations also appeared in the Second Amended Complaint in updated form: “The Embassy of Kuwait held its National Day celebration at Trump International Hotel on February 22, 2017,” the cost of which was an “estimated . . . \$40,000 to \$60,000.” CREW Second Amended Complaint, *supra* note 3, at 20; *see also* DEM Complaint, *supra* note 3, at 35, 41 (alleging both general and specific conflicts of interests concerns); MD/DC Complaint, *supra* note 3, at 10–11, 13–14 (same).

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* MD/DC Complaint, *supra* note 3, at 45; CREW Second Amended Complaint, *supra* note 3, at 66.

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 3, at 2; CREW Second Amended Complaint, *supra* note 3, at 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 3, at 6. The DEM complaint bases its standing on the unique interest that members of Congress have in enforcing the Clause. *See* DEM Complaint, *supra* note 3, at 53.

10 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014) (“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.” (citations omitted) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982))).

11 ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 59 (4th ed. 2011).

current standing doctrine could serve as a significant obstacle to any lawsuit seeking to enforce the Clause.<sup>14</sup>

Against this backdrop, this Article introduces a new critique of standing doctrine—as well as 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.<sup>15</sup> 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, owed 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

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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 Standing Is Good For*, 93 VA. L. REV. 1663, 1664–65 (2007) ("Standing has been subject to voluminous and sustained criticism over the past forty years. . . . Scholars almost unanimously regard it as pointless and incoherent at best, a veil for ideological manipulations at worst." (footnotes omitted)); see also Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 466–68 (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* subsection III.B.3.

15 A nonfrivolous 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 Nobel 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, O.L.C. slip op. at 4 (Dec. 7, 2009), <https://www.justice.gov/file/18441/download> (concluding that the award was not a gift from a foreign government, but was instead a gift from the Nobel Foundation). However, no sitting President has been the defendant in a nonfrivolous litigation alleging an Emoluments Clause violation.

“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 on either or both of the following premises: (1) the Constitution itself—either structurally, expressly, or in light of the Framers’ intent—requires collective rather than individual enforcement of the Clause; or (2) collective action is pragmatically better suited to safeguard the fiduciary duty enforced by the Clause, without sacrificing (and while simultaneously protecting) separation-of-powers norms. However, neither of these assumptions are justified in the 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 the Framers’ intent) requires that “the People” play a direct role in safeguarding certain democratic norms, and that as a practical matter, permitting “the People” to play an individual and direct role is the best means of safeguarding certain democratic norms.<sup>16</sup> Thus, the

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16 In using the phrase “the People” I refer to the group of people described by the Court in *United States v. Verdugo-Urquidez*:

[The term] “the people” seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by “the People of the United States.” The Second Amendment protects “the right of the people to keep and bear Arms,” and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to “the people.” See also U. S. Const., Amdt. 1 (“Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble”) (emphasis added); Art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States”) (emphasis added). While this textual exegesis is by no means conclusive, it suggests that “the people” protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

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. By dissecting the primary injury that follows from an emoluments violation and disaggregating it from the types of collateral injuries that are the focus of the Court's standing doctrine, this Part reveals that 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 inmost spirit, it really is,—the heart of all the virtues, the central duty amongst all duties.*

—*Josiah Royce*<sup>17</sup>

Article I, Section 9, Clause 8 of the U.S. Constitution, the Foreign Emoluments Clause, 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."<sup>18</sup>

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494 U.S. 259, 265 (1990) (omissions in original). In the context used here, every member of the community that constitutes "the People" is protected by the Emoluments Clause's guarantees, in exactly the same way that every one of the People is protected by the Fourth Amendment. Insofar as the Court has identified the term as a term of art (and correctly so), it is a term of *purchase*, identifying the party to whom the described benefit is directed. In the Fourth Amendment context the benefiting party is, literally, "the People," meaning each one of the people individually as well as the people collectively. In that context, it would be absurd to say that the only way to enforce the Fourth Amendment right of the people to be secure in their homes is through collective political action—i.e., waiting for the relevant legislative body to impeach the offending state official. Such an assertion would be equally absurd here.

17 JOSIAH ROYCE, *THE PHILOSOPHY OF LOYALTY*, at vii (1908).

18 U.S. CONST. art. I, § 9, cl. 8.

It is, in essence, an antibribery provision.<sup>19</sup> 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.”<sup>20</sup> For example, William Rawle, writing a commentary on the relatively new Constitution in 1825, described the utility of the Clause in terms of its capacity to hold foreign influence in abeyance.<sup>21</sup> 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 bribed into measures injurious to the nation by the gold of Louis XIV.<sup>22</sup>

The “profligate prince” Rawle mentioned is King Charles II (1630 to 1685) of England.<sup>23</sup> A notorious spendthrift, Charles II had difficulty living within the generous appropriation afforded him by Parliament,<sup>24</sup> 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.”<sup>25</sup> Charles II was repeatedly paid large sums by Louis XIV for various types of political support of France.<sup>26</sup>

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 interests of the nation in the context of foreign affairs.<sup>27</sup> The possibility that an officer of the then-nascent United States would be tempted by the sizable purses of

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 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 389 (Max Farrand ed., rev. ed. 1937) (“Mr Pinkney urged the necessity of preserving foreign Ministers [and] other officers of the U.S. independent of external influence and moved to insert . . . [the Emoluments Clause].”).

21 See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 116 (Philadelphia, H.C. Carey & I. Lea 1825).

22 *Id.*

23 See generally Clyde L. Grose, *Louis XIV’s Financial Relations with Charles II and the English Parliament*, 1 J. MOD. 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, 1225 n.145 (2009).

26 See Grose, *supra* note 23, at 187–88.

27 See EISEN ET AL., *supra* note 1, at 10 (“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 Saikrishna Bangalore Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 35, 41 (2009) (“[T]he provision barring Presidents from accepting foreign emoluments was arguably added to prevent Presidents from being cor-

established European crowns was a considerable concern of the time.<sup>28</sup> 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 among only a tiny handful of criminal and quasi-criminal prohibitions included in the Constitution itself.<sup>29</sup>

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 the legislative branch to resolve.<sup>30</sup> The place of the Clause in the Constitution signals not only the graveness of the wrong but also that, from the vantage point of the Framers, conspiring with a foreign state is fundamentally anathema to the solemn duty of loyalty that attends an “Office of Profit or Trust [held] under [the United States].”<sup>31</sup> A consideration of that duty follows.

### A. *The Emoluments Clause’s Duty of Loyalty*

The Emoluments Clause says nothing about how it is to be enforced or who is authorized to enforce it. Yet its function in the constitutional scheme is clearly to provide a mechanism for enforcing a federal officer’s fiduciary duty of loyalty to the United States against hostile foreign influence.<sup>32</sup> 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

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rupted 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.”).

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

30 Treason is one of only three crimes enumerated in the Constitution. Charles R. Fritch, Note, *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, 718 n.104 (2009) (“[P]iracy, 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 The Emoluments Clause is arguably one of several constitutional provisions that imposes 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.”).

accepts money in exchange for assisting a domestic political ally. It is directed exclusively at the external threat of foreign influence.

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

The Clause then is not just directed at corruption *per se*.<sup>38</sup> It is, instead, specifically directed at *loyalty*.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup>

I am not claiming that a general common-law fiduciary duty exists between every federal officer and every citizen.<sup>42</sup> The claim is instead much more circumscribed. The claim is merely that the Emoluments Clause itself

33 See 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 187–89 (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, at 359–62 (arguing that the Clause supports a broader, structural anticorruption 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) (exploring the notion that “the core purpose of the Foreign Emoluments Clause was to ensure the loyalty of those holding federal appointed or statutory offices”).

41 Cf. Andrew D. Miller, Note, *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).

42 *But cf.* D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 707 (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 owed by officers of the United States.

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-à-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.<sup>43</sup>

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

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.<sup>48</sup> Professor Robert Natelson, for example, has made a persuasive case that the Framers understood public officials to be

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43 *Id.* at 711 (“[T]here is evidence that the Framers intended to incorporate fiduciary principles into the constitutional structure.”).

44 *See, e.g.*, Ethan J. Leib & Stephen R. Galoob, Essay, *Fiduciary Political Theory: A Critique*, 125 *YALE L.J.* 1820, 1823 (2016) (“Our thesis is that fiduciary principles can be fruitfully applied to many domains of public law.”); Ethan J. Leib et al., *Translating Fiduciary Principles into Public Law*, 126 *HARV. L. REV. F.* 91, 91–92 (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, Essay, *Fiduciary Law’s Lessons for Deliberative Democracy*, 91 *B.U. L. REV.* 1249, 1250 (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, 1156–71 (2014) (describing fiduciary law as a poor fit as a mechanism of constraining the behavior of public officials).

45 Natelson, *supra* note 32, at 53 (“[T]he General Welfare Clause served the same end of fiduciary-style impartiality.”).

46 Rave, *supra* note 42, 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 [of representatives] 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 “[t]he Constitution should be read through a fiduciary lens,” in accordance with one of the document’s “central purpose[s]”—“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 & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 *B.U. L. REV.* 415, 428, 424–34 (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” (footnote omitted) (quoting U.S. CONST. pmb.)).

“legally bound to (appropriately adapted) standards borrowed from the law regulating private fiduciaries.”<sup>49</sup> 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.”<sup>50</sup> Natelson has argued that “[t]his was a subject on which there was no disagreement from the Constitution’s opponents.”<sup>51</sup> The *Federalist Papers*, too, are replete with references to a duty of loyalty and make frequent use of the term “fiduciary” in that context,<sup>52</sup> as are contemporary political writings in the period following the ratification of the Constitution.<sup>53</sup>

Professor 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.<sup>54</sup> 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.<sup>55</sup>

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’s prohibition is both narrow and specific.<sup>56</sup> It identifies a narrow class of behavior to be avoided in furtherance of a specific kind

49 Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077, 1088 (2004); see also Ponet & Leib, *supra* note 44, at 1249–50 (“[F]eatures 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 49, at 1084.

51 *Id.* at 1084–85. But see Davis, *supra* note 44, at 1171 (“[W]hen 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 No. 46*, where he wrote that “[t]he federal and State governments are in fact but different agents and trustees of the people.” *THE FEDERALIST NO. 46*, at 329, 330 (James Madison) (Benjamin Fletcher Wright ed., 1961).

53 Rave, *supra* note 42, 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.”).

54 See *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 711 (“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 Cf. 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).

of duty: a duty of loyalty to the people as against a foreign influence.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

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 characterize the injury that follows from a violation of the Clause? I turn to this question next.

### 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 principal. Because the duty requires that the agent put the principal’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

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57 U.S. CONST. art. I, § 9, cl. 8 (“[N]o Person holding any Office . . . shall . . . 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 40, at 185 (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. For example, Presidents Van Buren and Tyler sought consent from Congress to keep presents they received from foreign governments. President Jackson chose to submit a foreign gift to congressional control. *Id.* at 190.

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”).

injunctive relief to stop the bad behavior.<sup>60</sup> It is well settled that to redress a *purely* fiduciary injury, “[t]he court, on motion of the attorney general or on its own, can ‘enjoin[ ] wrongful conduct . . . [in] redress of a breach or performance of fiduciary duties.’”<sup>61</sup> The breach itself (being unlawful) can be enjoined even in the absence of a demonstration of actual harm to the principal.<sup>62</sup> An example that is similar to the emoluments context at issue here arises in the context of the employer-employee relationship.<sup>63</sup> 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.<sup>64</sup> It has been observed that “[t]his 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.”<sup>65</sup>

This low threshold for obtaining relief supports the deterrence value of the rule against disloyalty by punishing bad conduct *per se*.<sup>66</sup> While compensation is sometimes a functional component of the rule, it is not a necessary function of the rule.<sup>67</sup> As disloyalty in the context of a fiduciary duty is *malum in se* (or, at least so thought the Framers) it follows that the primary

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.*, MISSISSIPPI LAW OF TORTS § 17:13 (2d ed.), Westlaw (databased updated Dec. 2018) (“A breach of a fiduciary duty has been recognized by the [Mississippi] Supreme Court as an ‘extreme or a special additional circumstance’ in which punitive damages may be appropriate.” (quoting *Ross-King-Walker, Inc. v. Henson*, 672 So. 2d 1188, 1192 (Miss. 1996))).

61 Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 954 n.64 (2004) (second alteration in original) (quoting EDITH L. FISCH ET AL., CHARITIES AND CHARITABLE FOUNDATIONS § 711, at 549–50 (1974)).

62 *See* Christopher L. Gadoury, *Breach of Fiduciary Duty Remedies*, 32 ADVOC. (State Bar of Tex.), Fall 2005, at 54 (“A plaintiff can obtain injunctive relief [to] 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* *Burrow v. Arce*, 997 S.W.2d 229, 238–40 (Tex. 1999) (holding a client need not prove harm to recover fees in a breach of fiduciary duty action against an attorney).

63 *See, e.g.*, William Lynch Schaller, *Disloyalty and Distrust: The Eroding Fiduciary Duties of Illinois Employees*, 3 DEPAUL BUS. L.J. 1, 9–11 (1990) (discussing the imposition of a fiduciary duty of loyalty on employees under Illinois law).

64 *Id.* at 62.

65 *Id.*

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 *See* 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.” (footnotes omitted)).

function of the rule enforcing loyalty is to first stop the bad behavior and, secondarily, to deter others from similar malfeasance.<sup>68</sup> 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.<sup>69</sup>

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 as in the employer-employee context, harm is obvious 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 to the people at the behest of a foreign state exists solely by virtue of the breach itself.<sup>70</sup>

Further, by prohibiting the specific conduct of accepting an emolument, the Clause creates the terms of the breach.<sup>71</sup> Assuming we understand the officer-agent to owe a duty of loyalty to the principal-citizens 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 of the merits of a violation of the Clause is a successful demonstration of 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.<sup>72</sup> This is particularly true where the agent-principal relationship is a relationship of particular trust or unequal power, as is sometimes the case

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68 See *ABKCO Music, Inc. v. Harrison's 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.” (citing *Diamond v. Oreamuno*, 248 N.E.2d 910, 912 (N.Y. 1969))).

69 See Schaller, *supra* note 63, at 62.

70 See *ABKCO Music, Inc.*, 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 that] [a]n 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.” (second omission in original) (quoting and citing RESTATEMENT (THIRD) OF AGENCY § 8.01, § 8.01 cmt. b (AM. LAW INST. 2006))).

with attorneys, doctors, or clergy.<sup>73</sup> The attorney-client relationship, in particular, is one in which relief is often available in the absence of economic loss, largely in service of the prophylactic deterrent value of the rule proscribing breach.<sup>74</sup>

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.<sup>75</sup> In 1971, Harrison was involved in a copyright dispute with Bright Tunes Music Corp. over the song “My Sweet Lord.”<sup>76</sup> 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.<sup>77</sup> Harrison was unaware of these negotiations.<sup>78</sup> 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.<sup>79</sup> In that circumstance, Harrison suffered first a purely fiduciary injury.<sup>80</sup> 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 breach of his fiduciary duty, even if Klein’s breach had not yet caused Harrison any economic injury.<sup>81</sup> However, since the breach was not

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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.” (footnote omitted)).

74 See Buhai, *supra* note 72, at 587.

75 *ABKCO Music, Inc.*, 722 F.2d at 990.

76 *Id.*

77 *Id.* at 991.

78 *Id.* at 991 (“[A]pparently unknown to George Harrison, Klein had been negotiating with Bright Tunes to purchase all of Bright Tunes’ stock.”).

79 *Id.* at 995.

80 *Id.* at 995 (“[A]lthough not wholly analogous to the side-switching cases involving attorneys and their former clients, this fact situation creates clear questions of impropriety.”).

81 2 JOEL W. MOHRMAN & ROBERT J. CALDWELL, *HANDLING BUSINESS TORT CASES* § 28:8, Westlaw (database updated Nov. 2015) (“[T]he court can enjoin the fiduciary from contin-

discovered until after the economic damage was done, Harrison was able to recover compensatory damages for his economic loss.<sup>82</sup>

### 3. Primary Emoluments Injury as 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.<sup>83</sup> However, an economic loss associated with an Emoluments Clause violation will always be tangential or collateral to the primary injury. The *primary* injury that attends an emoluments violation is a purely fiduciary injury. The Clause is a guarantee that a federal officer will not breach his or her duty of loyalty to the people on behalf of a foreign state.<sup>84</sup> 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, regardless of whether that disloyalty results in economic or other loss.<sup>85</sup> Disloyalty will always be the primary injury that results from its violation.<sup>86</sup>

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 an individual with standing to sue could ask a court to enjoin the ongoing violation.<sup>87</sup> 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.<sup>88</sup>

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uing to breach his duties, or otherwise order him to do things that will protect the beneficiary.”).

82 *ABKCO Music, Inc.*, 722 F.2d at 996–97.

83 The *CREW* complaint, for example, asserts that plaintiffs who owned or were employed by hotels competing with President Trump's hotel would suffer an economic loss of lost business or commission-based income. *CREW Second Amended Complaint*, *supra* note 3, at 7–8.

84 *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.”).

85 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.”).

86 See *Rave*, *supra* note 42, at 707 (“[I]t 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.”).

87 See 2 *MOHRMAN & CALDWELL*, *supra* note 81, § 28:8.

88 See *Forell & Sortun*, *supra* note 73, at 567.

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 presents a potential obstacle to the redress of the type of fiduciary injury at issue in the emoluments context. This fact, coupled with the Court's preference for collective rather than 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

In agency law, when an agent violates his duty of loyalty, an individual principal can directly sue to enforce the duty or seek compensation.<sup>89</sup> In the context of a corporation, the agent may be a CEO and the principals may be shareholders.<sup>90</sup> In that context, a shareholder need not depend upon the board of directors to intervene to curb or redress the principal's disloyal behavior.<sup>91</sup> There are several reasons why the availability of a direct, rather than representative, mechanism of enforcement is important.<sup>92</sup> The most compelling reason is that the interests of the board and the interests of the principals may not perfectly align.<sup>93</sup> 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.<sup>94</sup> This is a classic agency problem.<sup>95</sup>

Agency law accounts for these potentially misaligned interests by providing the shareholder with a direct cause of action.<sup>96</sup> The reason for this is simple: the breach of a duty of loyalty is so serious a threat to the well-being of the corporation that the most robust set of tools possible must be made

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

90 *Id.* (“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.”).

91 *Id.* (“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 owed directly to the shareholders . . .”).

92 See Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467, 474–75 (“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.” (footnotes omitted)).

93 *Id.* at 474 (“[T]here is the ever-present risk that managers may fail to act in the interests of shareholders.”).

94 See *id.* at 474–75.

95 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.”).

96 DeMott, *supra* note 89, at 920.

available to arrest the malfeasance.<sup>97</sup> In this light, the broad grant of standing is less about making shareholders whole than it is about protecting the well-being of the corporation.<sup>98</sup> It is a prophylactic rule designed to discourage the unlawful behavior and to arrest it when it does arise.<sup>99</sup>

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 alleged to be 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’s 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 well-being of the nation is sufficiently severe as to warrant the empowerment of individual citizen suits.

This is particularly so when the federal officer involved is the President of the United States—a position that, if compromised by foreign influence, could impose unique and unprecedented damage on the country as a whole.<sup>100</sup> Because a breach of the duty of loyalty to the people in service to a foreign power poses so serious a threat to the well-being of the nation, the full panoply of enforcement mechanisms should be available to arrest the malfeasance, including both an impeachment proceeding by Congress *and* individual citizen suits. An Emoluments Clause 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 similar circumstances, the Supreme Court has demonstrated a preference for broad constitutional remedies that are mediated primarily through the elected representatives of the political branches.<sup>101</sup> The

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97 See Myers, *supra* note 92, at 474–75.

98 See *id.*

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

100 See Miller, *supra* note 41, 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 . . .”).

101 See *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013) (“[The prohibition against generalized grievances] is an essential limit on our power: It ensures that we act *as judges*, and

Court has repeatedly indicated that it is disinclined to be conscripted by individual citizen suits into checking the political branches when they overstep constitutional boundaries in a manner that affects all Americans in the same way.<sup>102</sup> The Court has communicated this preference through its “generalized-grievance” doctrine.<sup>103</sup> A consideration of that doctrine and its implications in the Emoluments Clause context follows.

### A. *The Pragmatism 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.<sup>104</sup> The Supreme Court locates the constitutional authority for its standing doctrine in Article III’s case-or-controversy requirement.<sup>105</sup> The Court has explained that Article III standing doctrine is necessary to protect the constitutional value of separation of powers.<sup>106</sup> In particular the Court has expressed a strong disinclination to have the judicial branch conscripted by individual citizens into policing the executive branch or legislative branch 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.<sup>107</sup>

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do not engage in policymaking properly left to elected representatives.”); *Arpaio v. Obama*, 27 F. Supp. 3d 185, 191 (D.D.C. 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.”).

102 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (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”).

103 *See 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”).

104 *Cf.* Jonathan H. Adler, *Why CREW’s Emoluments Clause Lawsuit Against President Trump Still Has Standing Problems*, WASH. POST (Apr. 19, 2017), [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](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) (discussing additional justiciability obstacles for CREW’s suit posed by the other two standing requirements: causation and redressability).

105 U.S. CONST. art. III, § 2, cl. 1. In explaining its standing doctrine, the Court has identified three broad components of Article III standing—injury in fact, causation, and redressability. *See Lujan*, 504 U.S. at 560–61. Of these, only injury in fact is of concern here.

106 *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.”).

107 *Lujan*, 504 U.S. at 573–75.

In service of this idea, the Court has articulated a prohibition against “generalized grievances.”<sup>108</sup> 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 failings.<sup>109</sup> The Court has explained that generalized injuries are best addressed through the political process.<sup>110</sup>

Standing doctrine as it is currently comprised is a distinctly modern development.<sup>111</sup> In the early 1920s, the Court adopted the position that the words “Cases” and “Controversies” used in Article III, Section 2, Clause 1 impose 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.<sup>112</sup> The Court explained that where plaintiff’s harm arises from his or her status as a taxpayer, his or her interest “is shared with

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108 The generalized-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.”” *Lujan*, 504 U.S. at 560 (footnote and citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The Court has confirmed that the injury-in-fact requirement is independently constitutionally mandated as a fundamental aspect of separation-of-power principles. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014).

109 See *Lee & Ellis*, *supra* note 106, 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.”).

110 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.”).

111 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 *Lujan*, 504 U.S. at 560 (“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”).

112 The objection to taxpayer suits was arguably introduced in *Fairchild v. Hughes*, 258 U.S. 126 (1922). The plaintiffs in *Fairchild* objected to the Nineteenth Amendment and asked, as taxpayers, that the Court declare it void and unconstitutional. *Id.* at 127. Rather than responding to the merits of the case, the Court declared: “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.” *Id.* at 129. The limiting principle of what constitutes an Article III case was then again articulated more famously the following year in another taxpayer suit, *Frothingham v. Mellon*, 262 U.S. 447, 486–89 (1923).

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.”<sup>113</sup> Such was the initial evolution of the “Cases” and “Controversies” language into the requirement that a plaintiff have what the Court would eventually describe as an “injury in fact.”<sup>114</sup> While these early cases might be described as protostanding cases, they only hint at the formulaic rendering the Court would ultimately embrace.<sup>115</sup>

While the Court continues to derive the constitutional dimension from the “Cases” and “Controversies” 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.<sup>116</sup>

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.<sup>117</sup> Thus, direct 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.<sup>118</sup>

One case, in particular, had an outsized hand in ushering in the modern standing era, although standing was not an issue in the case itself.<sup>119</sup> 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 in front of their six children while the police officers ransacked their home.<sup>120</sup> Mr. Monroe was then taken downtown and held for ten hours on

113 *Frothingham*, 262 U.S. at 487.

114 *Lujan*, 504 U.S. at 560–61 (describing the case-or-controversy requirement).

115 See Lee & Ellis, *supra* note 106, at 170–71, 186–87.

116 *Allen v. Wright*, 468 U.S. 737, 752 (1984) (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.”); see also F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 674 (2017) (“According to the Court, the ‘single basic idea’ underlying Article III standing is ‘separation of powers.’” (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997))).

117 *The Supreme Court, 1982 Term—Federal Jurisdiction and Procedure*, 97 HARV. L. REV. 208, 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.”).

118 See Christina 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,” standing doctrine among them.).

119 See Laura Oren, *Signing into Heaven: Zinermon 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 . . .” (footnote omitted)).

120 *Monroe v. Pape*, 365 U.S. 167, 169 (1961). The complaint also alleged that

“‘open’ charges” before he was released.<sup>121</sup> 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.<sup>122</sup> Although enacted as a Reconstruction-era statute in 1871, § 1983 was rarely invoked before 1961, because prior to *Monroe* it was understood that § 1983 applied only to actions that were authorized by state law or custom.<sup>123</sup>

*Monroe* reversed that understanding and simultaneously introduced a sea change in constitutional litigation.<sup>124</sup> The *Monroe* Court held that § 1983 applied to unauthorized or rogue acts<sup>125</sup> by those acting “under color of” state law—like the thirteen police officers who harassed Mr. Monroe—and the *Monroe* Court held that § 1983 provided a private cause of action for individual citizens to sue to enforce their constitutional rights *outside* the context of unconstitutional laws and policies.<sup>126</sup> This opened the door to a whole new class of constitutional litigation focused on abuse of power allegations.<sup>127</sup>

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.<sup>128</sup> Both commentators and members of the Court

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 “[the n-word]” and “black boy”; that another officer pushed Mrs. Monroe; [and] that other officers hit and kicked several of the children and pushed them to the floor.

*Id.* at 203 (Frankfurter, J., dissenting).

121 *Id.* at 169.

122 Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441, 1446 (1989) (noting that § 1983 was rarely successfully used to challenge unlawful behavior prior to *Monroe*).

123 *See Monroe*, 365 U.S. at 239–40, 240 n.68 (Frankfurter, J., dissenting).

124 To demonstrate the impact of *Monroe*, it is worth noting that in 1961, there were fewer than 300 suits brought in federal court under all civil rights acts; in 1971, there were 8267; and in 2010, there were 60,000. JOHN C. JEFFRIES, JR. ET AL., *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 14 (3d ed. 2013).

125 *Monroe*, 365 U.S. at 176, 187.

126 *Id.* at 180 (“[O]ne reason [§ 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.”).

127 William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 227 (1988) (“[G]enerally 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.”). This sequence of events sheds light on why a more formulaic standing standard consequently developed. *See id.* at 230.

128 Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 338, 340 (1989) (“The emergence of the constitutional tort forced the Court to strike a balance between protecting the rights of individuals to seek redress for violations of their constitutional rights and ensuring that the proper functioning of government is not hindered by a plethora of insubstantial lawsuits.”); *see also* José Roberto Juárez, Jr., *The Supreme Court as the Cheshire Cat: Escaping the Section 1983 Wonderland*, 25 ST. MARY’S L.J. 1, 51–52

expressed worry about *Monroe*'s impact on federal dockets almost from the moment that it was decided.<sup>129</sup> Concern was voiced that *Monroe* would open the "floodgates" of constitutional litigation and overwhelm the federal courts.<sup>130</sup> There was concern that the judiciary would be drawn into the uncomfortable position of supervising coequal branches of government.<sup>131</sup>

These separation-of-powers, docket-crowding, and institutional-competency concerns were often marshaled by the Court into standing principles, which began to serve as the anteroom of constitutional litigation.<sup>132</sup> One particularly standing-adjacent concern was raised by Justice Frankfurter in his *Monroe* dissent in which he worried that "[i]f [§ 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."<sup>133</sup>

The Court responded to this concern by developing the requirement that a plaintiff have a "concrete and particularized" (CAP) injury in fact.<sup>134</sup> A CAP injury is an injury that, by definition, is differentiated because it is "particularized" to the plaintiff in an individual way.<sup>135</sup> The CAP rule is designed to limit the number of potential plaintiffs who have standing in a given constitutional controversy.<sup>136</sup> In preventing plaintiffs without "particularized" injuries from accessing the courts, the CAP requirement is thought

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(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* have gone too far . . . ." (footnotes omitted)).

129 See Oren, *supra* note 119, at 26 n.162; see also 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." (footnote omitted)).

130 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.'" (citing *Ex parte Young*, 209 U.S. 123, 166-67 (1908))).

131 *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) ("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.").

132 See Whitman, *supra* note 118, at 6-7.

133 *Monroe v. Pape*, 365 U.S. 167, 241 (1961) (Frankfurter, J., dissenting).

134 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) ("[O]ur cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . .").

135 See *id.* at 560 n.1.

136 The idea that "generalized grievances" must be barred to reduce the sheer number of possible suits was first articulated in *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923) ("If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money . . . . The bare suggestion of such a result, with its attendant inconveniences, goes

to serve two pragmatic ends: (1) to limit the number of opportunities that federal courts have to pass upon the constitutionality of actions taken by the executive or legislative branches (and thereby safeguard separation-of-power values); and (2) to ensure that the people with the greatest stake in a controversy are the sole people authorized litigate it.<sup>137</sup>

Much criticism<sup>138</sup> has been leveled at the Supreme Court's translation of the case-or-controversy language in Article III into the CAP injury-in-fact requirement.<sup>139</sup> For example, criticism has been directed at its late appearance in constitutional doctrine.<sup>140</sup> Critics have likewise questioned the purported textual and historical foundation for the rule,<sup>141</sup> and ample criticism has been directed at what many perceive to be the Court's uneven application of the rule.<sup>142</sup> 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 CAP rule to evaluate whether those explanations and justifications obtain in the context of the Emoluments Clause.

### 1. A Pragmatic Explanation of CAP

Richard Posner has offered one of the more plausible explanations of the CAP injury-in-fact rule: judicial pragmatism.<sup>143</sup> Posner states:

The doctrine is needed [1] to limit premature judicial interference with legislation, [2] to prevent the federal courts from being overwhelmed by cases, and [3] 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.<sup>144</sup>

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far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.”).

137 See, e.g., *Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 655–57 (7th Cir. 2011) (emphasizing 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).

138 See Kontorovich, *supra* note 13, at 1664–65.

139 See Elliott, *supra* note 13, at 466–67.

140 Winter, *supra* note 111, 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.”).

141 *Flast v. Cohen*, 392 U.S. 83, 95–96 (1968) (describing with skepticism the “uncertain historical antecedents of the case-and-controversy doctrine”); *Am. Bottom Conservancy*, 650 F.3d at 655 (noting criticism of the claim that standing practice is derived from “the English royal courts, on which the federal judiciary was modeled”).

142 See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 116 (7th ed. 2015) (“During the twentieth century, courts became self-conscious about the concept of standing only after developments in the legal culture subjected the traditional model to unfamiliar strains.”).

143 *Am. Bottom Conservancy*, 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 . . .”).

144 *Id.*

The first of these justifications does not obtain in the context of constitutional claims, but the second and third justifications are consistent both with scholarly consensus and the Supreme Court's own justificatory explanations of CAP.

Within this rendering, Posner suggests a dichotomy between "primary victims" and "persons trivially or not at all harmed."<sup>145</sup> 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 . . . .<sup>146</sup>

Posner emphasizes that it is the *directness* of the injury that is important in this analysis rather than the magnitude of the loss.<sup>147</sup> 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."<sup>148</sup> Within this hypothetical, the California group's injury is cognizable and sufficiently "concrete."<sup>149</sup> The Court has been clear that intangible injuries (including "desires") are sufficiently concrete to confer standing.<sup>150</sup> Instead, the problem with the hypothetical California group's injury is that it is not as direct as an ideal plaintiff's injury might be.<sup>151</sup> Even though the California group has a cognizable desire to preserve the wetlands, Judge Posner can imagine a "better" plaintiff—the American Bottom Conservatory—whose members, ideally, would live near the park and

145 *Id.*

146 *Id.*

147 *Id.* ("The magnitude, as distinct from the directness, of the injury is not critical to the concerns that underlie the requirement of standing . . . .").

148 *Id.* at 656–57 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562–63 (1992)).

149 Although the Court has taken pains to articulate that the "concrete" is not merely a synonym for "particularized" in injury-in-fact analysis, the distinction the Court has drawn is exceedingly subtle, and for the purpose of our analysis it is sufficient to focus solely on the "particularized" aspect of the CAP rule. See Felix T. Wu, *How Privacy Distorted Standing Law*, 66 DEPAUL L. REV. 439, 454 (2017) ("[T]he 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.").

150 See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548–49 (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.' . . . 'Concrete' is not, however, necessarily synonymous with '*tangible*.' Although *tangible* injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete." (citations omitted)).

151 *Am. Bottom Conservancy*, 650 F.3d at 656.

visit it often.<sup>152</sup> But the “directness” requirement need not be fatal to the California group’s challenge in this action. Presumably, to cure this constitutional deficiency, the hypothetical California group need only find hypothetical local plaintiffs who are willing to join the complaint.

In this light, one wonders how much work the CAP rule is actually doing to reduce the overall number of cases. If the California group can cure its standing problem by finding like-minded environmentalists who happen to live closer to the park, the case will still be brought and standing will be found.<sup>153</sup> Yet, Posner’s pragmatic explanation for the CAP rule is in keeping with the general scholarly consensus<sup>154</sup> 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* constitutional litigation in which individual citizens are empowered to directly enforce rights secured by the Constitution.<sup>155</sup>

But Posner understands the CAP rule as both a *qualitative* and *quantitative* control of potential plaintiffs. The CAP rule, as applied in constitutional cases, is not about the underlying conduct (and whether it was constitutional); it is instead about *who* is empowered to bring a constitutional challenge. The argument that the CAP rule has the capacity to provide a quantitative control is fairly straightforward: by excluding plaintiffs who have a generalized (rather than particularized) grievance, fewer cases can be brought.<sup>156</sup> As noted above, there is reason to be skeptical as to whether CAP succeeds in limiting the number constitutional cases brought in federal court.<sup>157</sup> More significantly, however, the quantitative-control aspect of the rule cannot stand alone. One cannot justify *arbitrarily* excluding a class of potential plaintiffs from access to the courts, even on the grounds of conserving judicial resources or safeguarding separation of powers. While reducing the overall number of cases might be a justifiable aim, for the rule itself to be

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152 *Id.*

153 *See id.*

154 *See, e.g.,* Winter, *supra* note 111, at 1487 n.648 (“It may well be the case that the Court’s willingness to stretch standing doctrine . . . was the result of two intensely pragmatic concerns.”); *The Supreme Court, 1981 Term—Federal Jurisdiction and Procedure: 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.”).

155 *Flast v. Cohen*, 392 U.S. 83, 93 (1968) (describing the worry first expressed by the Court in *Frothingham v. Mellon* that taxpayer suits “might open the door of federal courts to countless such suits”).

156 *See, e.g.,* *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923) (explaining that generalized grievances must be barred to avoid an influx of cases).

157 Whether the CAP rule succeeds in limiting the number of constitutional claims that are adjudicated on the merits is, of course, an empirical question. Addressing that question would require evaluating a counterfactual situation in which *Monroe v. Pape* allowed individual constitutional enforcement in the absence of a requirement that plaintiff’s injury be particularized.

justified the rule must reduce the number of cases in a principled manner. In other words, for the rule to be justified it must exclude and include plaintiffs along a *qualitative* metric.

The CAP rule, in Posner's view, provides qualitative control over the class of potential plaintiffs in constitutional cases by preferring the best litigants ("directly" injured) over less desirable litigants (those who are "trivially" or "indirectly" injured).<sup>158</sup> The idea that those directly affected by an injurious event are the preferred litigants in a given scenario is intuitively appealing.<sup>159</sup> 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 rendering, a justification of the CAP rule that depends upon a meaningful 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*.<sup>160</sup> The plaintiffs in *Allen* objected to the IRS's granting of tax-exempt status to private schools that the plaintiffs believed were racially discriminating.<sup>161</sup> The injuries that the plaintiffs identified were undeniably serious.<sup>162</sup> 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.<sup>163</sup> As parents of black school-aged children, the plaintiffs argued that their children suffered the stigmatic and dignitary injuries incident to the federally funded "white flight" that precipitated the persistence of racially segregated schools.<sup>164</sup> While the *Allen* Court found the constitutional injury articulated by plaintiffs to be insufficiently *direct* to confer standing, it can

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158 See *Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 656 (7th Cir. 2011).

159 See *id.* ("This isn't to say that the doctrine of standing isn't well grounded. . . . [T]he solidest grounds are practical[,] . . . [c]onsistent with the practical as well as doctrinal thinking . . .").

160 468 U.S. 737 (1984).

161 *Id.* at 739.

162 *Id.* at 739–40 ("[Plaintiffs] assert that the IRS . . . interferes with the ability of their children to receive an education in desegregated public schools.").

163 *Id.* at 771 (Brennan, J., dissenting).

164 *Id.* at 754 (majority opinion).

hardly be described as trivial.<sup>165</sup> Obviously the stigmatic and dignitary injury that attends the persistence of racially segregated schools is a very grave constitutional injury.<sup>166</sup> *Allen* teaches us that an indirect injury can still be a substantial and serious injury.<sup>167</sup>

Similarly, some “direct” constitutional injuries are, in fact, trivial. For example, in *Parratt v. Taylor*,<sup>168</sup> an inmate sued a prison for misplacing a hobby kit that the inmate ordered through the mail. The value of the hobby kit was \$23.50.<sup>169</sup> 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.<sup>170</sup> Taylor’s injury, the Court found, was direct, concrete, and particularized.<sup>171</sup> In contrast, the *Allen* plaintiffs’ injuries were indirect and generalized.<sup>172</sup> Yet, if we assume the *Allen* plaintiffs stated their injuries accurately,<sup>173</sup> the *Allen* plaintiffs’ injuries represented a much more severe intrusion into a constitutionally protected interest.

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” or that they necessarily represent only minor intrusions into constitutionally protected interests.<sup>174</sup> In fact, the CAP rule does an especially poor job of selecting the “best” litigants if that category is understood to include plaintiffs who have the most at stake (as compared to other potential plaintiffs) or plaintiffs who suffered severe constitutional

165 *Id.* at 753–56. The Court agreed that the injury complained of was generally cognizable, stating, “There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing.” *Id.* at 755. But the Court concluded that these particular plaintiffs lacked standing because they were not “personally denied equal treatment.” *Id.* (quoting *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)).

166 *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“[T]he 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.” (alterations in original) (quoting the findings of the U.S. District Court of Kansas)).

167 *Allen*, 468 U.S. at 757 (identifying plaintiffs’ injury as “indirect”).

168 451 U.S. 527 (1981).

169 *Id.* at 529.

170 *Id.* at 536. Despite his standing and cognizable interest, however, the Court ultimately held that Taylor could not recover due to his failure to exhaust an adequate state-law remedial procedure. *Id.* at 543–44.

171 *See id.* at 536–37 (“[R]espondent’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 *Allen*, 468 U.S. at 755, 757.

173 *See id.* at 739–40.

174 *See Am. Bottom Conservancy v. U.S. Army Corps of Eng’rs*, 650 F.3d 652, 656 (7th Cir. 2011).

intrusions. It follows that the direct-versus-trivial dichotomy requires an additional principle or explanation to justify categorically excluding “indirectly” injured plaintiffs.

Similarly, if the purpose of the CAP rule is to include those plaintiffs who have the most at stake in the litigation, the direct-versus-trivial fiction leads to ironic and absurd results. Because the CAP rule includes plaintiffs like Taylor who suffer trifling but particularized economic injuries but excludes those like the *Allen* plaintiffs who suffer grave but “indirect” stigmatic injuries, the rule creates an incentive for those wishing to bring constitutional challenges to seek out plaintiffs who happen to have suffered trivial economic injuries that are clearly collateral to the primary wrong of the constitutional violation.<sup>175</sup>

This point is illustrated by the *CREW* litigation.<sup>176</sup> In their suit, the group Citizens for Responsibility and Ethics in Washington is similarly situated to Posner’s hypothetical “California group” in that both groups have an interest in challenging a governmental action, and each group must find a plaintiff with a sufficiently “direct” injury to satisfy the CAP rule. For *CREW*, clearing this hurdle means finding individuals who may have been incidentally harmed by the alleged presidential disloyalty.<sup>177</sup> Toward that end, *CREW* has put forth, inter alia, bellboys who claim to have suffered a loss of tips as a result of a fundamental breach in the President’s duty of fidelity to the United States.<sup>178</sup> It is an understatement to say that such a cynical posture—which is necessitated by the bifurcated pragmatics of CAP—debases the character of the claim at hand.<sup>179</sup> Insofar as the *CREW* case succeeds in

175 See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 421 (1998) (holding that plaintiffs who lost a limited tax benefit that Congress had enacted to facilitate the acquisition of processing plants had standing to challenge the constitutionality of the line-item veto under the Presentment Clause of the Constitution).

176 *CREW* Second Amended Complaint, *supra* note 3.

177 *Id.* at 53–56 (listing as plaintiffs, inter alia, the owner of hotels that compete with Trump hotels for business and an event planner who books events at hotels that compete with Trump hotels).

178 *Id.* at 51–52 (arguing that the amount the plaintiffs receive in tips “depends on the amount of business that the restaurants that employ them are able to attract,” and that accordingly the plaintiffs “have been harmed and will be harmed, by loss of income, due to Defendant’s receipt of benefits from foreign states, the United States, and various state governments”).

179 For example, there are currently several pending lawsuits challenging the constitutionality of the Trump administration’s announced plan to rescind the administrative program known as Deferred Action for Childhood Arrivals (DACA). See *DACA Litigation Timeline*, NAT’L IMMIGR. L. CTR., <https://www.nilc.org/issues/daca/daca-litigation-timeline/> (last updated Sept. 28, 2019). One lawsuit was brought by the University of California, which alleged standing based, in part, on the fact that it had expended resources to recruit DACA students and that those resources will have been wasted if the DACA students are deported. *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1033–34 (N.D. Cal. 2018). However, the most compelling basis for these suits is the claim that rescission of the program violates the due process rights of DACA recipients. To premise standing in that case on the fact that a university will have

describing a constitutional intrusion, that intrusion is not meaningfully connected to the loss suffered by a bellboy who might otherwise have gotten greater tips.<sup>180</sup> To require litigants to engage in such disingenuous theatrics is demeaning to the enterprise of constitutional litigation and its central role in the creation and vindication of constitutional norms. It is likewise demeaning to the federal courts—both lower and appellate—which must engage in rhetorical gymnastics to separate the direct and “particularized” wheat from the indirect, “generalized” chaff, as though there were a principled distinction to be made between them.<sup>181</sup>

This final point highlights a concerning consequence of the CAP rule’s failure to serve as a qualitative control. The CAP’s failure to provide a principled means for excluding cases—particularly in high-profile cases, as in the emoluments context—poses more than a *de minimis* threat to the perceived neutrality and integrity of the federal courts.<sup>182</sup> The CAP rule means that a case seeking to vindicate a fundamental constitutional norm may be brought—or not brought—based on the happenstance of the existence and cooperation of a person who has suffered a collateral injury from the constitutional wrong. A rule that affords and denies access to the courts in accordance with happenstance is an unsatisfying rule at best, and an unjustifiable rule at worst.

Moreover, by misconstruing constitutional injury as a toggle (i.e., if the injury is not “direct” it *must* be “trivial”) the CAP rule wholly omits from its analysis an important class of constitutional violations for which the concept of a “particularized” injury is nonsensical. As we will see in the following Section, rather than representing a toggle, constitutional injuries can be more accurately understood as falling along a spectrum of specificity. Understanding constitutional injury as a spectrum of specificity creates a more nuanced model of constitutional harm, and a model that can better illuminate the fiduciary injury that follows from an emoluments violation. A discussion of that model follows.

### B. *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

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expended unnecessary recruitment dollars diminishes the gravity of the underlying constitutional value at stake.

180 CREW Second Amended Complaint, *supra* note 3, at 51–52.

181 See *supra* note 174 and accompanying text.

182 Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 614 (2004) (“Underlying much of this criticism [of standing doctrine] is a common belief: Federal judges make standing decisions according to their own political and personal preferences, with little concern for existing legal precedent. This belief is not based on mere intuition—critics point to a range of qualitative and quantitative studies that confirm the correlation between judicial ideology and standing outcomes.”).

sufficient to confer Article III standing.<sup>183</sup> Plaintiff Richardson complained that the Central Intelligence Agency (CIA) was not reporting expenditures in compliance with the Constitution, and that, as a taxpayer who participated in funding those expenditures, he was injured.<sup>184</sup> 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.<sup>185</sup>

Richardson would be no more harmed than any other taxpayer should it turn out that the CIA is making improper use of taxpayer dollars.<sup>186</sup> Despite the fact that Richardson alleged a constitutional violation, the Court concluded that such conflicts are better resolved through the political process.<sup>187</sup>

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 right that finds us all. This is a very different idea than a “generalized” or “nonparticularized” injury that may affect a large number of people—but not necessarily all of the people. Similarly, a generalized or nonparticularized 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 primarily to protect us from differentiated injuries while others seem designed to primarily protect us from undifferentiated injuries. For example, the Constitution undoubtedly articulates a set of what are known as “individual rights,”<sup>188</sup> such as the right to be free from unreasonable seizures.<sup>189</sup> The hallmark of an individual right is that it can be directly enforced by the individual who has suffered its deprivation.<sup>190</sup> So for example, when an individual is subject

183 *United States v. Richardson*, 418 U.S. 166, 177 (1974) (quoting *Ex parte Lévit*, 302 U.S. 633, 634 (1937) (per curiam)).

184 *Id.* at 176.

185 *Id.* at 177.

186 *Id.* at 176–77.

187 *Id.* at 178–79. It should be noted that the Court has allowed a limited exception to taxpayer standing in the context of enforcing the Establishment Clause. *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968). This exception is discussed in greater detail *infra* Part III.

188 *Cf.* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1132–33, 1205 (1991) (challenging the conception of the Bill of Rights as concerned primarily with individual rights and arguing instead that the rights cannot be understood without also considering the structure).

189 U.S. CONST. amend. IV.

190 *See* Amar, *supra* note 188, at 1178.

to an unreasonable seizure owing to an excessive use of force, that individual can sue to recover damages.<sup>191</sup>

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.<sup>192</sup> The first promise is directed exclusively to those who are specifically physically harmed by excessive force.<sup>193</sup> It is a promise that we will not be physically harmed by the government.<sup>194</sup> 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, at least, that they do not occur with impunity).<sup>195</sup> The second guarantee is a promise about the kind of government that the Constitution has “ordain[ed] and establish[ed].”<sup>196</sup>

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.<sup>197</sup> Differentiated injuries are injuries that happen to someone because of who they are and how they are connected to the underlying events.<sup>198</sup> Differentiated injuries include, for

191 *See id.* at 1180.

192 *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 . . .”).

193 *Id.*

194 U.S. CONST. amend. IV (guaranteeing no unreasonable searches and seizures).

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

196 *See Amar, supra* note 188, at 1153 (alterations in original) (quoting U.S. CONST. pmb.); *see also id.* at 1177 (describing the collective—or political—versus individual dimensions of the Fourth Amendment).

197 *United States v. Richardson*, 418 U.S. 166, 177 (1974) (describing undifferentiated injuries as “common to all members of the public” (quoting *Ex parte Lévit*, 302 U.S. 633, 634 (1937) (per curiam))).

198 *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). In *Lyons* the Court held that the 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 “stand-

example, the physical suffering endured by the victim of excessive force.<sup>199</sup> On the other hand, in the context of an unreasonable seizure, the *undifferentiated* injury is the injury that follows from the failure of the government to be the kind of government that it has promised to be.<sup>200</sup> For the purpose of this discussion, we can think of this injury as a “character-of-government,” or COG, injury. 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.<sup>201</sup> Because the promise is made to each (and all) of 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.<sup>202</sup> Ronald Armstrong suffered from bipolar disorder and paranoid schizophrenia.<sup>203</sup> He had been off his medication for several days and was behaving in a manner that concerned his sister, Jinia Armstrong Lopez, so Lopez persuaded Arnold to accompany her to a local hospital.<sup>204</sup> While undergoing the process to be admitted, Armstrong became alarmed and left the facility.<sup>205</sup> 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.<sup>206</sup> The police were called to retrieve Armstrong and return him to the hospital.<sup>207</sup> The police encountered Armstrong and his sister a short distance away from the hospital.<sup>208</sup> When approached by police, Armstrong was not combative, but he clung to a stop sign pole when they tried to take him back to the hospital.<sup>209</sup> The police responded by tasing him five times within two minutes, which killed him.<sup>210</sup>

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ing to claim damages against the individual officers” but insufficient to confer standing for prospective injunctive relief to enjoin the practice. Because all citizens faced the same risk of future assault by police, Lyon’s claim to prospective harm was undifferentiated.

199 *Id.*

200 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575–76 (1992) (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” (quoting *Allen v. Wright*, 468 U.S. 737, 754 (1984))).

201 *See id.*

202 *Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst*, 810 F.3d 892 (4th Cir. 2016).

203 *Id.* at 896.

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.*

209 *Id.*

210 *Id.* at 897–98.

Clearly Ronald Armstrong suffered a differentiated harm.<sup>211</sup> 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.<sup>212</sup> Ronald Armstrong, and only Ronald Armstrong, lost his life.<sup>213</sup> 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 also witnessed his suffering and his death.<sup>214</sup> The harm she suffered is distinct from Ronald's injury. Others also were likely harmed by the excessive use of force.<sup>215</sup> The doctor, witnesses, other friends, and loved ones of Ronald all were likely injured by the constitutional violation. These harms are all differentiated harms—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.<sup>216</sup> It is likewise not a harm that arises from the want of a perfect government. In the specific case of the Fourth Amendment, the 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 well-being of a mentally ill man.<sup>217</sup> 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 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 we were given another. It is a character-of-government 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

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211 *See id.*

212 *See id.*

213 *Id.* at 898.

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

215 *See id.* at 906 (“Appellees used excessive force, in violation of the Fourth Amendment.”).

216 *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 that officers minimally make efforts to “de-escalate the situation and adjust the application of force downward” (quoting *Martin v. City of Broadview Heights*, 712 F.3d 951, 962 (6th Cir. 2013))).

217 *See id.*

occupied by the individual directly affected by the breach—for example, Ronald Armstrong, the victim who was physically harmed and suffered a unique and acute injury.<sup>218</sup> 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 a character-of-government injury that is identical to the victim himself with respect to the breach of the promise to be a government that does not use excessive force.

### 1. Primary and Collateral Differentiated Injuries

When we consider constitutional injuries along a continuum of specificity we see that when the Court makes a determination about whether an injury is “particularized,” the distinction the Court draws is a question of degree rather than a difference in kind. Moreover, we see that the concept of “particularized” as it is used in this context is not at all helpful in distinguishing between Armstrong’s injury and the injury of a bystander. If we were to pragmatically select the “best plaintiff” (i.e., the one with the most at stake) to challenge the constitutionality of repeatedly tasing a noncombative mentally ill person, Armstrong’s estate would clearly be that “best plaintiff,” as Armstrong had the most at stake.<sup>219</sup> Yet if a bystander brought a challenge arguing that he suffered psychological injury as a result of witnessing the encounter, the CAP rule would not help to exclude him. The bystander’s injury is particularized, even though it is not the *primary* injury that the Fourth Amendment seeks to avoid.

In fact, of these many injuries we could plot along the *Armstrong* spectrum of harm, the character-of-government injury alone would be insufficient to confer standing under the CAP rule. Of the *Armstrong* harms, only the COG injury is “generalized” rather than concrete and particular. An application of the CAP rule would therefore disallow the COG injury, which is consistent with the Supreme Court’s disinclination to serve as a vehicle for

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218 *Id.* at 898.

219 *See id.*

ensuring the proper functioning of government.<sup>220</sup> But in describing the *Armstrong* spectrum of harm, there were many differentiated injuries that were also clearly *collateral* to the harm done to Mr. Armstrong himself. Armstrong's sister and doctor, for example, each suffered differentiated, concrete, and particularized harm as a result of the constitutional violation. Although Armstrong's sister herself was not seized, she suffered a particularized injury as the result of an unconstitutional seizure. More significantly, Armstrong's sister's injury is *not* a character-of-government injury. Armstrong's sister's injury is a claim about how the Fourth Amendment violation harmed her *in particular*.

But the Fourth Amendment promises that we will not be unreasonably seized—which is not the same as a promise that we will not witness an unreasonable seizure and suffer because of it.<sup>221</sup> In this light, the injuries borne by Armstrong's sister and doctor are collateral to the injury suffered by Armstrong himself.<sup>222</sup> That is not to say they were not serious injuries, that they were trivial, that they were insufficiently direct, or that there was an insufficient causal nexus between the injury and the unconstitutional behavior—each of those are different concepts altogether. Instead, by “collateral” I mean to describe harm that does not mirror the primary benefit conferred by the constitutional promise. To locate the primary injury that follows from a Fourth Amendment violation, we might ask: Were this plaintiff's Fourth Amendment rights violated?<sup>223</sup> In the case of Armstrong's sister and doctor, the answer is no.<sup>224</sup>

To focus on the primary injury along the *Armstrong* continuum of harm makes for a more coherent and parsimonious standard, and one that is more likely to advance the pragmatic aims of the CAP rule. In fact, this method of identifying the *primary injury* is already the tacit but *de facto* practice of the Supreme Court in locating standing in individual-rights cases.<sup>225</sup>

220 *Flast v. Cohen*, 392 U.S. 83, 106 (1968) (observing that “generalized grievances about the conduct of government” are disallowed).

221 *See Alderman v. United States*, 394 U.S. 165, 174 (1969) (“Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.” (citing *Simmons v. United States*, 390 U.S. 377, 389–90 (1968))).

222 *See Rakas v. Illinois*, 439 U.S. 128, 139 (1978) (“[T]he rights secured by [the Fourth] Amendment are personal . . .”).

223 *See id.* at 132 (“[T]he person seeking to challenge the legality of a search . . . [must be] the ‘victim’ of the search or seizure.” (citing *Jones v. United States*, 362 U.S. 257, 261 (1960))).

224 *Jones*, 362 U.S. at 261 (“In order to qualify as a ‘person aggrieved by an unlawful search and seizure’ one must have been a victim of a search or seizure . . .” (quoting *FED. R. CRIM. P.* 41(e))).

225 *Rakas*, 439 U.S. at 139 (“[W]e think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.”).

## 2. The Primary-Injury Model in Individual-Rights Cases

The Court has long recognized that the CAP rule is overinclusive in the context of individual-rights cases.<sup>226</sup> The CAP rule allows *collateral* harms as long as they are particularized and are sufficiently causally related to the illegal conduct.<sup>227</sup> However, in the context of Fourth Amendment and other individual-rights provisions, the Court has recognized that whether a harm is particularized (i.e., differentiated) or generalized (i.e., undifferentiated) is not the most salient question.<sup>228</sup> Instead, the most salient question is whether the plaintiff has been harmed in a manner that the Constitution promised they would not be harmed.<sup>229</sup> It is *primary* rather than collateral harms that confer standing in individual-rights contexts.<sup>230</sup> To explain its departure from the CAP rule in this context, the Court has attempted to describe its approach as an idiosyncrasy mandated by the particulars of the Fourth Amendment guarantee.<sup>231</sup> The Court has stated, “Fourth Amendment rights are personal rights which . . . may not be vicariously asserted,”<sup>232</sup> and the personal right at issue is the right to be free from unreasonable search or seizure. Thus, in this context, the Supreme Court has abandoned the CAP rule and supplanted it with a more parsimonious question: Have the plaintiff’s Fourth Amendment rights been violated?<sup>233</sup>

Similarly, the primary-injury model has been utilized in the context of the Fifth Amendment<sup>234</sup> and the Eighth Amendment.<sup>235</sup> In both instances, the question is: Has the plaintiff been harmed in a way that the Constitution has promised she would not be harmed?<sup>236</sup> In these individual-rights con-

226 *Alderman*, 394 U.S. at 174 (holding that injuries suffered by parties who were not subject to the search do not confer standing in the Fourth Amendment context, even if the injuries are concrete and causally connected to a violation).

227 *See* *Clinton v. City of New York*, 524 U.S. 417, 421 (1998) (allowing collaterally injured plaintiffs to allege a violation of the Presentment Clause).

228 *Rakas*, 439 U.S. at 138–39 (rejecting the CAP metric in the context of the Fourth Amendment).

229 *Id.* at 140 (holding that the question of whether a defendant has standing depends upon “whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect”).

230 *Jones v. United States*, 362 U.S. 257, 261 (1960).

231 *See id.*

232 *Rakas*, 439 U.S. at 133–34 (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)).

233 *Id.* at 139 (stating that standing in the Fourth Amendment context “is more properly subsumed under substantive Fourth Amendment doctrine”).

234 *United States v. Richardson*, 1 F. Supp. 2d 495, 497 (D.V.I. 1998) (“[I]t is clear that the general rule is that defendants do not have standing to raise a third-party’s Fifth Amendment violations for their own defense.”).

235 *Gilmore v. Utah*, 429 U.S. 1012, 1014–15 (1976) (Burger, C.J., concurring) (arguing that an inmate’s mother who sought to challenge her son’s scheduled execution under the Eighth Amendment lacked standing to petition on his behalf because he was not incompetent); *id.* at 1017 (Stevens, J., concurring) (“[A] third party has no standing to litigate an Eighth Amendment claim . . . on [the plaintiff’s] behalf.”).

236 *See Rakas*, 439 U.S. at 133–34.

texts, the primary harm is one that mirrors the constitutional promise, and a collateral harm is one that is *caused* by a constitutional violation but does not mirror the constitutional *promise*.

The Court's abandonment of CAP in the context of individual-rights provisions is a step in the right direction towards focusing on primary injuries rather than particularized harms in constitutional claim cases. The appropriate next step is to apply that intuition across the board in the contexts of all constitutional claims. A consistent, universal focus on primary harms in cases involving constitutional claims would bring coherence and parsimony to a doctrinal area that is beset with idiosyncratic, byzantine rules and the perception of inconsistent (and even politicized) application.<sup>237</sup> But even in absence of a universal application of the primary-injury model across all constitutional claims, the primary-injury model is especially compelling in the specific and narrow context of the Emoluments Clause.

### 3. 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 character-of-government 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.<sup>238</sup> 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.<sup>239</sup>

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 (a "Person holding any Office of Profit or Trust" under the United States).<sup>240</sup> Professor Zephyr Teachout has argued that clauses like the Emoluments Clause provide a bulwark against corruption in the federal government.<sup>241</sup> We might imagine other benefits of the Emoluments

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<sup>237</sup> See Elliott, *supra* note 13, at 463–64 (“[S]tanding is ill-suited to most of the functions it is asked to serve, and . . . forcing standing into this variety of roles contributes to the scathing critiques leveled against the doctrine.”).

<sup>238</sup> Estate of Armstrong *ex rel.* Armstrong v. Vill. of Pinehurst, 810 F.3d 892 (4th Cir. 2016).

<sup>239</sup> See *id.* at 898.

<sup>240</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>241</sup> Teachout, *supra* note 1, at 359–62.

Clause, but virtually all plausible benefits revolve around an aligned premise: we prohibit federal officers from secretly accepting valuable gifts from foreign governments to prevent officers from using the power of their office to encourage or elicit such gifts, because such behavior would conflict with the officers' duty to act solely in the best interests of the United States.<sup>242</sup> Prohibiting the gifts, then, has the beneficial effect of removing a secret conflict of interest that would otherwise exist between officers' personal financial interests and the interests of the United States. The absence of the secret conflict of interest makes it more likely that an officer will act in the interests 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 on the people and the denial of that benefit imposes an *undifferentiated* harm on the people.

Moreover, the violation of the Emoluments Clause *only* imposes an undifferentiated *primary* harm. Unlike an unreasonable seizure, which can happen to one person at a time, the risks attendant to a disloyal federal officer happen to all the people simultaneously. No one person or entity is closer to that injury on the continuum of specificity than any other. 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.<sup>243</sup> 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.

To identify the primary harm of an Emoluments Clause violation, we can ask the same question that underlies the Supreme Court's individual-rights standing determinations: What character of injury mirrors the constitutional promise that has been broken? If the promise is that federal officers will not accept secret bribes and thus be potentially vulnerable to foreign influence, then the injury that mirrors that promise is the injury of living in a country in which a federal officer has accepted a secret bribe and is therefore susceptible to foreign influence in exactly the manner that the Constitution promises will not happen. We could propose a hypothetical plaintiff and ask: Has this person been harmed in a way that the Constitution has promised that she would not be? If the plaintiff is one of "the People" to whom the constitutional promise inures, then the answer will always be yes.

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),

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242 *Id.*

243 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.

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.

#### 4. Primary and Collateral 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 of 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.<sup>244</sup> First, a business owned by the President could accept a payment from a foreign government in exchange for goods or services.<sup>245</sup> We might think of this as a "services-rendered" 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.<sup>246</sup> Second, a Trump business operating abroad may receive a valuable legal or trade concession from a foreign government.<sup>247</sup> 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.<sup>248</sup>

Since President Trump's inauguration, both the services-rendered scenario and the foreign-state-favors 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. Professors Laurence Tribe, Erwin Chemerinsky, and Zephyr Teachout have recently tested some of these questions in the *CREW* litigation.<sup>249</sup> 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.<sup>250</sup>

244 See *DEM* Complaint, *supra* note 3, at 18; *MD/DC* Complaint, *supra* note 3, at 2; *CREW* Complaint, *supra* note 3, at 3; *CREW* Second Amended Complaint, *supra* note 3, at 3.

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

246 See, e.g., *CREW* Second Amended Complaint, *supra* note 3, at 3.

247 See, e.g., *MD/DC* Complaint, *supra* note 3, at 4.

248 See *id.* at 4 (alleging that President Trump violated the Foreign Emoluments Clause by receiving payments from foreign governments and those acting on their behalf).

249 See generally *CREW* Second Amended Complaint, *supra* note 3.

250 See *CREW* Complaint, *supra* note 3, at 3 (complaining of services-rendered violations); First Amended Complaint at 3, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17-0458) [hereinafter *CREW* First

The *MD/DC* litigation alleges that the “foreign-state-favors” scenario was implicated when China granted President Trump a valuable trademark in his surname.<sup>251</sup> President Trump had been seeking that legal protection for more than a decade.<sup>252</sup> Five days after President Trump won the presidential election China reversed its previous decade-long position and provisionally granted the trademark.<sup>253</sup> The final approval of the trademark was granted just days after President Trump publicly expressed support to China’s President Xi Jinping for the “One China” policy, a policy that President Trump had previously called into question.<sup>254</sup> Senator Dianne Feinstein of California publicly commented on the trademark grant, stating, “If this isn’t a violation of the Emoluments Clause, I don’t know what is.”<sup>255</sup>

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 application of the Court’s “concrete and particularized” rule to the President Trump trademark issue could confer standing exclusively to an American business 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 that 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 contorted confines of the doctrine of constitutional standing.

An application of the CAP rule could potentially confer exclusive standing on a plaintiff to bring a constitutional claim against a sitting President based on lost profits arising out of a trademark dispute simply because the lost 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 suffers an economic injury will have standing, while 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.

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Amended Complaint] (same); CREW Second Amended Complaint, *supra* note 3, at 3 (maintaining complaints of the services-rendered variety first made in the original complaint).

251 MD/DC Complaint, *supra* note 3, at 21–22.

252 Jackie Northam, *China Grants Trump a Valuable Trademark Registration*, NPR (Feb. 16, 2017), <http://www.npr.org/sections/thetwo-way/2017/02/16/515589191/china-grants-President-Trump-a-valuable-trademark-registration>.

253 *Id.*

254 Lincoln Feast, *Timeline: Trump Questions Then Honors “One China” Policy*, REUTERS (Feb. 10, 2017), <https://www.reuters.com/article/us-usa-trump-china-xi-timeline/time-line-trump-questions-then-honors-one-china-policy-idUSKBN15P0OQ>; Jeremy Venook, *The Story Behind Trump’s Chinese Trademark*, ATLANTIC (Feb. 22, 2017), <https://www.theatlantic.com/business/archive/2017/02/trump-chinese-trademark/517458/>.

255 Venook, *supra* note 254 (quoting Senator Feinstein).

Similarly, in the services-rendered scenario in which a representative of a foreign state stays in a Trump-owned hotel and pays for services rendered, application of the CAP rule 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 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 the law.<sup>256</sup> The *CREW* litigation provides an example of this strategy.<sup>257</sup> 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.<sup>258</sup> 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.<sup>259</sup> Later in the litigation, *CREW* amended its complaint to add as plaintiffs an association of restaurants and restaurant workers and individuals employed by hotels that compete with Trump-branded properties.<sup>260</sup> 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.<sup>261</sup>

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.<sup>262</sup> Yet it is difficult to reconcile these types of injuries with the history and structure of the Emoluments Clause. It is difficult to imagine 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.<sup>263</sup>

More significantly, the viability of an Emoluments Clause challenge is much too constitutionally significant to turn on the happenstance and availability of collaterally injured token plaintiffs. The *CREW* and *MD/DC* litigations offer concrete demonstrations of the precariousness of relying on token

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256 See *DEM* Complaint, *supra* note 3, at 49–51; *MD/DC* Complaint, *supra* note 3, at 31–41; *CREW* Second Amended Complaint, *supra* note 3, at 34–58.

257 See, e.g., *CREW* Second Amended Complaint, *supra* note 3.

258 *CREW* Complaint, *supra* note 3, at 23–32.

259 *Id.* at 23.

260 *CREW* First Amended Complaint, *supra* note 250, at 10, 44–53.

261 *Id.*

262 See, e.g., *CREW* Second Amended Complaint, *supra* note 3, at 6 (asserting loss of business and loss of wages as a basis for standing).

263 See *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 187–88 (S.D.N.Y. 2017) (indicating a disbelief that the Framers intended the Emoluments Clause to be a means of protecting anyone from competition), *vacated and remanded*, 939 F.3d 131 (2d Cir. 2019).

plaintiffs to enforce the President's duty of loyalty to the people. These cases are examined in turn below.

### C. *Token Plaintiffs and Zones of Interest*

At the time of publication, six federal court opinions have analyzed the question of standing in the emoluments context.<sup>264</sup> Each of these opinions engages in the set of byzantine legal fictions that are necessitated by the CAP rule's insistence on token plaintiffs. Unsurprisingly, the determination of standing in each opinion turns on speculation, minutiae, and trivial factual details that have nothing to do with presidential disloyalty. It is also unsurprising (given the inherent malleability of the CAP rule) that each of the opinions is at odds with one another in ways that render them vulnerable to the longstanding criticism that standing lies in the eye of the beholder.

In this way, each opinion to date offers a concrete illustration of the weakness of the CAP rule as applied to an emoluments case, and each also serves to illustrate the superiority of a primary/collateral and differentiated/undifferentiated injury analysis.<sup>265</sup> Two U.S. district courts, one in the District of Maryland<sup>266</sup> and one in the Southern District of New York,<sup>267</sup> have each rendered decisions coming to opposite conclusions on the question of standing in the Emoluments Clause context. The District Court for the District of Maryland found standing in the *MD/DC* case,<sup>268</sup> while the District Court for the Southern District of New York dismissed the *CREW* case for want of standing.<sup>269</sup>

Each of those district courts has also been subsequently reviewed by an appellate court.<sup>270</sup> The Fourth Circuit reversed the district court in the *MD/DC* case for want of standing (although the Fourth Circuit has also granted a

264 *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 52–72 (D.D.C. 2018), *rev'd and remanded*, No. 19-5237, 2020 WL 593891 (D.C. Cir. Feb. 7, 2020); *Citizens for Responsibility & Ethics in Wash.*, 939 F.3d at 142–58; *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 738–53 (D. Md. 2018), *rev'd and remanded*, *In re Trump*, 928 F.3d 360, 374–79 (4th Cir.), *reh'g en banc granted*, 780 F. App'x 36 (4th Cir. 2019); *Citizens for Responsibility & Ethics in Wash.*, 276 F. Supp. 3d at 183–93.

265 The *DEM* litigation has produced two such opinions. First, the trial court found standing, despite the Supreme Court's opinion in *Raines v. Byrd*, which denied standing to aggrieved members of Congress under circumstances that were more favorable to finding standing. See *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (denying standing to members of Congress who argued that the line-item veto denied them their constitutionally committed legislative role as articulated by the Presentment Clause); *Blumenthal*, 335 F. Supp. 3d at 55–57 (discussing *Raines*). The D.C. Circuit, however, found no standing and directed the trial court to dismiss the case. *Blumenthal*, 2020 WL 593891. Given the weakness of the plaintiffs' standing arguments, it is unlikely that the Supreme Court will weigh in.

266 *District of Columbia*, 291 F. Supp. 3d 725.

267 *Citizens for Responsibility & Ethics in Wash.*, 276 F. Supp. 3d 174.

268 *District of Columbia*, 291 F. Supp. 3d at 757.

269 *Citizens for Responsibility & Ethics in Wash.*, 276 F. Supp. 3d at 193, 195.

270 *Citizens for Responsibility & Ethics in Wash. v. Trump*, 939 F.3d 131 (2d Cir. 2019); *In re Trump*, 928 F.3d 360 (4th Cir.), *reh'g en banc granted*, 780 F. App'x 36 (4th Cir. 2019).

rehearing en banc in the *MD/DC* case), while the Second Circuit reversed in the *CREW* case, finding that the *CREW* plaintiffs had sufficient standing to proceed.<sup>271</sup> Consequently, at present there is a split between the Fourth Circuit and the Second Circuit regarding the question of standing in the emoluments context.<sup>272</sup> The cases are considered below.

### 1. The *MD/DC* Cases

The *MD/DC* district court found that the Maryland and the District of Columbia sufficiently alleged that conference centers that they owned suffered lost profits as a result of the alleged Emoluments Clause violations, and that the injury the plaintiffs alleged was fairly traceable to the President's alleged constitutional violation.<sup>273</sup> The *MD/DC* district court found that the causal connection between the alleged lost profits and the Emoluments Clause violations was not too attenuated to sustain standing, even though the lost profits were caused—at least in part—by the decision of third parties to stay at a Trump-owned hotel.<sup>274</sup>

It is notable that one of the reasons the *MD/DC* district court offered in support of its causation conclusion was overtly practical. The district court stated that the causal connection is sufficient, in part, because to hold otherwise would “render impossible any effort to ever engage in Foreign or Domestic Emoluments Clause analysis because action by a foreign or domestic government, i.e., by a third party, is always present by definition.”<sup>275</sup> While the *MD/DC* district court's inclination to engage the Emoluments Clause is understandable, causation in standing is not usually supported by the rationale that to find an insufficient causal nexus would destroy standing and make it impossible for anyone to sue.<sup>276</sup> It is a deeply pragmatic (and arguably tautological) rationale, which seeks to preserve the opportunity for the court to substantively engage with the Clause.<sup>277</sup> While the *MD/DC* district court's impulse to evaluate the substance of the emoluments claims may be laudable, this is exactly the type of rationale that could render the ruling vulnerable to reversal on appeal. This manner of rationale also fuels criticism that application of the CAP rule is so porous and flexible that its appli-

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271 *In re Trump*, 928 F.3d at 364, 379; *In re Trump*, 780 F. App'x at 37; *Citizens for Responsibility & Ethics in Wash.*, 939 F.3d at 158, 160.

272 *See supra* note 271 and accompanying text.

273 *District of Columbia*, 291 F. Supp. 3d at 745. The *MD/DC* district court also found standing based on two very narrow categories of injury that only sovereign states are able to advance: quasi-sovereign interests, and *parens patriae* interests. *Id.* at 742, 748.

274 *Id.* at 749–50.

275 *Id.* at 749.

276 *See, e.g.*, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (“The assumption that if respondents have no standing, no one would have standing, is not a reason to find standing.”).

277 *Id.* at 489.

cation frequently seems to serve primarily as a conduit for judicial sensibilities about the merits of the underlying case.<sup>278</sup>

Indeed, the *MD/DC* district court's standing conclusion was subsequently reversed by a panel of the Fourth Circuit composed of Judge Niemeyer (who wrote the unanimous opinion), Judge Quattlebaum, and Senior Judge Shedd.<sup>279</sup> The Fourth Circuit panel offered two reasons for its reversal. First the panel held that "the connection between the Hospitality Plaintiffs' alleged injury and Defendant's actions is too tenuous to satisfy Article III's causation requirement."<sup>280</sup> The Court noted that the plaintiffs were likely to have faced increased competition as a result of Trump's becoming President (and thereby drawing greater interest and attention to his branded properties) regardless of whether the Trump businesses accepted compensation for services rendered from foreign governments. As a consequence, the plaintiffs' alleged lost profits could have resulted in increased business at the Trump branded hotels regardless of any emoluments violation.<sup>281</sup>

Additionally, the panel concluded that government officials might continue to patronize Trump branded hotels even if the President were enjoined from personally accepting those remunerations, since such payments would still benefit members of the President's family. Consequently, the panel concluded that the plaintiffs' alleged injury was not redressable.<sup>282</sup>

The underlying difficulty faced by the *MD/DC* plaintiffs is that the wrong that the *MD/DC* plaintiffs want to rectify is the wrong of the President accepting money from foreign governments, which is a wrong that does not fit within the CAP framework. The harm of presidential corruption *could* be redressed by a federal injunction, but only if the plaintiffs have standing. However, because the CAP rule forces plaintiffs who want to enforce the Emoluments Clause to depend upon collateral injuries, both the court and the parties must engage in a charade about lost profits.

## 2. The *CREW* Decisions

The U.S. District Court for the Southern District of New York took the opposite approach to that of the *MD/DC* district court, initially granting a motion to dismiss the *CREW* litigation based on lack of standing.<sup>283</sup> The *CREW* district court found that while lost tips and wages do constitute a par-

278 See Elliott, *supra* note 13, at 463–64 (noting that standing doctrine has been the subject of "scathing critiques").

279 *In re Trump*, 928 F.3d 360 (4th Cir.), *reh'g en banc granted*, 780 F. App'x 36 (4th Cir. 2019).

280 *Id.* at 370 (quoting Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174, 186 (S.D.N.Y. 2017), *vacated and remanded*, 939 F.3d 131 (2d Cir. 2019)); see also *In re Trump*, 928 F.3d at 371 ("The *CREW* court's disagreement with the theory of competitor standing embraced by the [District of Maryland] is fundamental and obvious, and the [District of Maryland's] suggestion to the contrary blinks reality.")

281 *In re Trump*, 928 F. 3d at 376.

282 *Id.*

283 *Citizens for Responsibility & Ethics in Wash.*, 276 F. Supp. 3d at 193, 195.

ticularized injury in fact—thereby meeting the CAP requirement—the plaintiffs failed to allege that their injuries were *caused* by the alleged emoluments violation.<sup>284</sup> The *CREW* district court found the causal connection between the President owning a hotel and lost wages or tips at competing hotels to be too speculative.<sup>285</sup> Significantly the *CREW* court drew also upon the “zone-of-interests doctrine”—a doctrine usually reserved for statutory standing analysis<sup>286</sup>—to conclude: “Nothing in the text or the history of the Emoluments Clauses suggests that the Framers intended these provisions to protect anyone from competition. The prohibitions contained in these Clauses arose from the Framers’ concern with protecting the new government from corruption and undue influence.”<sup>287</sup>

The Second Circuit reversed the *CREW* district court, disagreeing on every substantive point, including the *CREW* district court’s zone-of-interests analysis.<sup>288</sup> The Second Circuit correctly observed that the question of whether the plaintiffs fell within the Emolument Clause’s “zone of interests” was a question of whether the plaintiffs stated a claim under the clause, not a question of standing.<sup>289</sup> The Second Circuit also found the *CREW* district court to be wrong on the merits in terms of applying the zone-of-interests test, concluding:

Every Supreme Court decision construing the zone of interests test as it pertains to competitors’ suits supports the view that Plaintiffs satisfy the zone of interests test. Without exception, the Court has held that a plaintiff who sues to enforce a law that limits the activity of a competitor satisfies the zone of interests test even though the limiting law was not motivated by an intention to protect entities such as plaintiffs from competition.<sup>290</sup>

This colloquy between the *CREW* and *MD/DC* district courts and the Second and Fourth Circuits (whose opinion the Second Circuit directly engaged) underscores the criticism that has so often been directed at standing doctrine—that standing is in the eye of the beholder. Facing substan-

284 *Id.* at 184–86.

285 *Id.* at 186.

286 *See* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (“Whether a plaintiff comes within ‘the “zone of interests”’ is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a *legislatively conferred cause of action* encompasses a particular plaintiff’s claim.” (emphasis added) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 97 (1998))).

287 *Citizens for Responsibility & Ethics in Wash.*, 276 F. Supp. 3d at 187. The court also found that the *CREW* organization itself failed to allege an injury in fact in alleging that the alleged Emoluments Clause violations forced it to divert increased resources to monitoring the violations. *Id.* at 188–93. The court concluded that *CREW*’s decision to monitor the violations was not necessitated by the President’s conduct in a manner that would sustain an injury in fact. *Id.*

288 *Citizens for Responsibility & Ethics in Wash. v. Trump*, 939 F.3d 131, 142, 154 (2d Cir. 2019) (“The district court thus misconstrued the nature of the zone of interests doctrine.”).

289 *Id.* at 154.

290 *Id.*

tially similar (and in some cases identical) facts, these courts have come to opposite conclusions about causation and redressability, and have announced those conclusions in opinions that are pointed and, at times, even sarcastic.<sup>291</sup>

The reason for both the tone and incongruence is the fact that everyone involved in these cases knows that the issue motivating the plaintiffs in each case is not the concrete and particularized loss of profits or wages, but is instead the wish to curb presidential disloyalty. Each of these four courts expressly or implicitly mention this underlying current of motivation. For example, the Second Circuit observed:

The Fourth Circuit expressed skepticism as to “why [the plaintiffs] came to the court for relief in the first place,” implying that their motivation was political and that this cast doubt on the federal court’s jurisdiction. While it is certainly possible that these lawsuits are fueled in part by political motivations, we do not understand the significance of that fact. It is true that a political motivation for a lawsuit, standing alone, is insufficient to confer Article III standing. But while the existence of a political motivation for a lawsuit does not supply standing, nor does it defeat standing.<sup>292</sup>

The elephant in the room, so to speak, is the fact that the CAP rule forces both the litigants and the court to engage in a legal fiction centered on trivial and collateral injuries. This leads to a porous doctrine insofar as courts describe the doctrines of zone of interests, causation, and redressability to try to make sense of the central failing of the CAP rule: the fact that it necessitates token plaintiffs. These problems could be resolved if, instead of trying to fit square pegs into round holes, the doctrine of constitutional standing was attentive to the two most salient metrics of constitutional injury: primary/collateral and differentiated/undifferentiated.

### 3. The Zone-of-Interests and CAP Analysis Versus the Primary/Collateral and Differentiated/Undifferentiated Injury Analysis

In some ways, the *CREW* district court’s application of the zone-of-interests doctrine is consistent with the argument advanced here: that the question of standing in constitutional cases should turn upon whether the plaintiff has suffered a primary (rather than collateral) injury, where “primary injury” is understood to reflect the primary promise made by the constitutional provision and the injury it is designed to prevent. In the Emoluments Clause context, the question of whether a plaintiff has stated a cause of action under the Clause depends upon what type of harm the Clause is designed to avoid. With respect to the purpose of the Clause, the *CREW* district court found that

291 See *In re Trump*, 928 F.3d 360, 377 (4th Cir.) (“When plaintiffs before a court are unable to specify the relief they seek, one must wonder why they came to the court for relief in the first place.”), *reh’g en banc granted*, 780 F. App’x 36 (4th Cir. 2019).

292 *Citizens for Responsibility & Ethics in Wash.*, 939 F.3d at 148 (alteration in original) (citations omitted) (quoting *In re Trump*, 928 F.3d at 377).

[T]here can be no doubt that the intended purpose of the Foreign Emoluments Clause was to prevent official corruption and foreign influence . . . . [Therefore] [t]here is simply no basis to conclude that the Hospitality Plaintiffs' alleged competitive injury falls within the zone of interests that the Emoluments Clauses sought to protect.<sup>293</sup>

Yet there are several reasons why the zone-of-interests test itself is not helpful in the Emoluments Clause context. First, the Supreme Court has made clear that a zone-of-interests inquiry is not a question of Article III standing.<sup>294</sup> Rather, as described above, the zone-of-interests inquiry is about whether plaintiff has stated a cause of action under the relevant law.<sup>295</sup> This is perhaps a trivial distinction insofar as plaintiffs must succeed in stating a cause of action to proceed with their case, but it is a significant distinction in that the failure to state a cause of action does not deprive the court of jurisdiction over the case. Looking at the zone of interests, however, requires paying attention to the harm the Clause is designed to avoid.

In employing the zone-of-interests framework, the *CREW* district court was seeking to vindicate the sensible intuition that the *CREW* plaintiffs were not describing the right kind of injury. Surely, the *CREW* district court presumed, in drafting the emoluments prohibitions the Framers did not intend to protect busboys' tips.<sup>296</sup> In this way, the *CREW* district court begins to ask the right question: What is the purpose or benefit of the Emoluments Clause? However, the *CREW* district court fails to take the question to its natural and logical terminus: If the Emoluments Clause is designed to protect all of the people from a corrupted President, how can the injury that follows from that harm *ever* be concrete or particular? By borrowing the zone-of-interests test from its ordinary home in statutory construction, the *CREW* district court begins down a fruitful path, but unfortunately aborts the mission prematurely.

Moreover, applying the zone-of-interests framework in the constitutional context—particularly, as here, in the context of a clause that directs its benefit to *all of the people at the same time and in the same way*—while simultaneously applying the CAP rule constitutes the worst of both worlds. Applying *both* the statutory zone-of-interests test *while also* applying the CAP rule (which necessitates the use of token plaintiffs) essentially ensures that no plaintiff can satisfy standing in the emoluments context. Because token plaintiffs, by definition, suffer collateral rather than primary constitutional injuries, token plaintiffs will necessarily fail the zone-of-interest test. The only way to avoid this outcome is to, in effect, expand the “zone” such that any injury fairly traceable to a violation of the Clause falls within the zone. At that point, it is not clear that the “zone” analysis is doing any work whatsoever.

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293 *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 188 (S.D.N.Y. 2017), *vacated and remanded*, 939 F.3d 131 (2d Cir. 2019).

294 *Citizens for Responsibility & Ethics in Wash.*, 939 F.3d at 154.

295 See *supra* notes 289–90 and accompanying text.

296 See *Citizens for Responsibility & Ethics in Wash.*, 276 F. Supp. 3d at 187.

The Second Circuit, when faced with the zone-of-interests and CAP dilemma employed an “expand the zone” approach to reconcile the difficulties presented by the conjunction of the two standards. The Second Circuit stated that the *CREW* district court misapplied the test, and that in fact:

[T]he zone of interests test does not require the plaintiff to be an intended beneficiary of the law in question. Plaintiffs who are injured by the defendant’s alleged violation of a limiting law may sue to enforce the limitation under the longstanding zone of interests test the Court has articulated.<sup>297</sup>

However, the Second Circuit’s “expand the zone” approach does nothing to alleviate the concern that in the absence of some kind of “zone” rule (i.e., a rule tethering standing to the purpose of the Emoluments Clause) the CAP rule necessitates token plaintiffs with trivial injuries that are utterly unrelated to the important constitutional values at issue in the Clause. So while the Second Circuit approach is to only focus on the technical application of the CAP rule, this approach remains unsatisfying for the reasons discussed above and demonstrated by the outcomes in *Parratt v. Taylor* and *Armstrong v. Village of Pinehurst*.

In truth, the zone-of-interests test (while a step in the right direction in terms of focus on the harm prevented) is of limited utility in the constitutional context. The zone-of-interests test is a statutory interpretation device and it is not especially well suited to serve as a gatekeeper of constitutional claims. The Supreme Court has described the zone-of-interests standard as a test that asks whether “this particular class of persons ha[s] a right to sue under [a particular] substantive statute.”<sup>298</sup> In applying the zone-of-interests test, the Court determines whether the plaintiff has stated a cause of action under a given statute, based on the Court’s interpretation of that statute. The zone-of-interests test asks whether a given plaintiff falls into the class of individuals to whom a statute has directed a benefit.

In this sense, there are obvious parallels between the zone-of-interests test and the primary/collateral and differentiated/undifferentiated injury analysis proposed here. Both ideas are focused on the plaintiff’s connection to the primary evil that the law would avoid. However, the zone-of-interests test (in the statutory context) is meant to apply in *conjunction with* the CAP test, meaning that if a plaintiff has stated a cause of action under the statute (i.e., they fall within the zone of interests) the plaintiff must still have a concrete and particularized injury. A “zone” connotes a broad, imprecisely defined area into which a plaintiff may fall. A plaintiff’s injury may lie along the periphery of the zone and still qualify as within the zone of interests. The perimeters of the zone can be constructed (and reconstructed) by the enacting legislative body, or it may be derived by courts based on evidence within the statutory text.

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297 *Citizens for Responsibility & Ethics in Wash.*, 939 F.3d at 158.

298 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (first alteration in original) (quoting *Ass’n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 676 (D.C. Cir. 2013 (per curiam))).

Yet in the constitutional context, this zone-of-interests delineation becomes muddled. As discussed in subsection II.B.2, the “zone of interests” that attends a constitutional promise is bifurcated. In an important sense, *all* of the people fall within the zone of interests with respect to each constitutional promise. Each constitutional promise is also a character-of-government promise made to each of the people. It would be worse than a legal fiction to pretend that only some of the people (or only those of the people who also suffered a monetizable harm) are the intended beneficiaries of constitutional promises.

But more concerning is the fact that a zone-of-interests analysis does not distinguish between differentiated and undifferentiated benefits and injuries. As such, a zone-of-interests analysis is overinclusive in the constitutional context. For example, a zone-of-interests analysis would find that a plaintiff such as Mr. Armstrong’s sister falls within the zone of interests of the Fourth Amendment (as a person harmed by an unreasonable seizure) even though she did not suffer the primary injury. In the constitutional context, a zone approach necessitates some additional limiting mechanism—such as the CAP rule. But a focus on primary/collateral *and* differentiated/undifferentiated provides a better limiting mechanism. The analysis advanced here has the capacity to supplant—in the constitutional context—both the CAP rule and the zone-of-interests metric, replacing both with a single, parsimonious, and theoretically coherent explanation of how constitutional injuries translate into standing to sue.

A final determination of Emoluments Clause standing will most likely rest with the Supreme Court. Yet the standing rulings in the *CREW* and *MD/DC* cases are instructive in illuminating the disutility of the CAP rule in the Emoluments Clause context. The *CREW* and *MD/DC* cases underscore that an application of the CAP rule to the potential emoluments violations 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 traceable to two concerns: (1) the Court’s pragmatic worry about constitutional litigation flooding the courts; and (2) the Court’s separation-of-powers worry about policing the political branches.<sup>299</sup> But we have also seen that CAP does an exceedingly poor job of addressing these concerns in a *principled* manner.

Under the CAP rule, so-called “generalized grievances” can be brought by motivated plaintiffs who are able to locate and befriend a collaterally injured plaintiff.<sup>300</sup> Because such suits survive the CAP rule, the Court still

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299 See *supra* Section II.A.

300 This is assuming sufficient causation can be established. While the district court in the *CREW* litigation found causation was lacking, under slightly different facts a collaterally injured plaintiff could have sustained standing. For example, within the China-trademark scenario, a plaintiff that could demonstrate that the grant of the trademark caused it economic harm (which is an easier train of causation to allege) could sustain standing within the *CREW* court’s analysis. See *Citizens for Responsibility & Ethics in Wash.*, 276 F. Supp. at 184–85.

has occasion to pass upon the merits of the underlying claims. Therefore, the CAP rule does not permit the federal courts to sidestep the thorniest of separation-of-powers questions. Indeed, the CAP rule is insensitive to whether a particular case presents an especially challenging separation-of-powers problem. Under the CAP rule, it is a matter of happenstance whether an especially difficult separation-of-powers case survives to the adjudication stage.<sup>301</sup>

Adoption of a universal primary-injury model of standing in constitutional claim cases would avoid these paradoxes and problems. An analysis that is focused on primary injuries (i.e., the character of injury that mirrors the constitutional promise) ensures that collateral injuries will not be prioritized. It also ensures that token plaintiffs and happenstance will not determine the fate of constitutional litigation. Perhaps more significantly, a primary-injury rule serves as a screening tool that is actually sensitive to the separation-of-powers concerns that animate the Court's standing doctrine. In focusing on primary injuries, the Court would only pass upon the conduct of coordinate branches when the constitutional *promise* itself requires it.<sup>302</sup> Anchoring the analysis in the constitutional promise avoids the inconsistencies that arise when discrete collateral injuries are permitted to confer standing. Moreover, this method of focusing on the constitutional promise itself is already the Court's preferred method of determining standing in individual-rights cases.<sup>303</sup> The whole of the doctrine of standing in constitutional cases would be rendered coherent and parsimonious if the Court were to extend this intuition across the doctrine.

Yet, there remains a residual obstacle to a unified approach to standing in constitutional cases: the Court's articulated belief that undifferentiated constitutional injuries are "best" resolved through the political process.<sup>304</sup> 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

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301 The *Lujan* plaintiffs, for example, could have likely sustained standing had they simply purchased airline tickets to demonstrate that they had a concrete plan to visit regions where endangered species were located, or if they had found someone who traveled to those areas regularly who was willing to join their suit. See *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 564 (1992) (explaining that without "concrete plans," the plaintiffs had not demonstrated "'actual or imminent' injury").

302 See *infra* note 420 and accompanying text.

303 See *supra* note 225 and accompanying text.

304 See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982) ("[E]ven when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." (quoting *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975))).

the political branches to resolve widespread constitutional injury.<sup>305</sup> However, in the context of the Emoluments Clause, that confidence is misplaced. A consideration of representative constitutionalism in the emoluments context follows.

### III. REPRESENTATIVE VERSUS DIRECT CONSTITUTIONALISM

Through its injury-in-fact requirement, the Supreme Court articulates a preference for the resolution of undifferentiated injuries through the political process, i.e., through representative constitutionalism.<sup>306</sup> 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 citizens’ lawsuits).<sup>307</sup> In the context of that preference, this Article makes three claims. The first claim is that the Court’s preference for representative constitutionalism is unevenly applied, such that it is difficult to map the Court’s invocation of the preference along a principled metric. As a result, any given application of the preference is vulnerable to the criticism that the CAP rule serves primarily as a bellwether of judicial sensibilities surrounding the merits of the underlying case. Thus, to be justifiable, the invocation of the preference in the emoluments context must be sustained with greater specificity than mere reference to the CAP rule.

The second claim is that the assumptions that undergird the Court’s preference for representative constitutionalism do not obtain in the context of cases in which undifferentiated injuries are the *primary* constitutional injury. Thus, a default preference for representative constitutionalism in those contexts is misplaced. The third claim is that a preference for representative constitutionalism is especially inappropriate in the context of the *fiduciary* injury that attends an Emoluments Clause violation. Each of these ideas is explored in greater detail below.

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305 See Mark Gabel, Note, *Generalized Grievances and Judicial Discretion*, 58 HASTINGS L.J. 1331, 1343 (2007) (“Effectively, the justices were saying that these institutional competence issues provided a policy justification for denying standing to generalized claims . . .”).

306 See *Warth*, 422 U.S. at 499–500 (“[W]hen the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. . . . Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.”).

307 See *Valley Forge Christian Coll.*, 454 U.S. at 474 (“Thus, this Court has ‘refrain[ed] from passing upon the constitutionality of an act [of the representative branches] unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.’” (alterations in original) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919))); see also *Warth*, 422 U.S. at 499–500.

### A. *An Inconsistent Preference*

The Court's preference for representative constitutionalism represents two related intuitions about widespread constitutional injuries. The first intuition is a pragmatic concern about the number of constitutional cases that come before the federal courts.<sup>308</sup> The Court has long worried that allowing generalized grievances to confer standing, even in limited contexts, would open the "floodgates" and overwhelm the federal courts with cases in need of resolution.<sup>309</sup>

The second intuition is about institutional competency. The Court has articulated the belief that elected bodies are better able to satisfactorily resolve widespread constitutional injuries as compared with countermajoritarian courts.<sup>310</sup> This intuition is premised on the notion that widespread constitutional injuries are likely to result from coordinate branches of government exercising their core prerogatives, such as the legislative branch making determinations about the allocation of taxpayer dollars in *United States v. Richardson*.<sup>311</sup> When coordinate branches exercise their core prerogatives, the Court is disinclined to assume a supervisory role of those prerogatives in furtherance of separation-of-powers values.<sup>312</sup> Each of these intuitions is considered in turn below.

#### 1. The Floodgate Intuition

The worry that allowing standing in a subset of cases will "open the floodgates" and overwhelm the judiciary has been handed down from one complement of Justices to another without rigorous investigation into whether there is an empirical basis for the concern.<sup>313</sup> In the absence of empirical support for this intuition, there are several reasons to be skeptical about the import and magnitude of this concern.<sup>314</sup>

First, as previously discussed, there is reason to be skeptical about the efficacy of the CAP rule in terms of reducing the overall number of cases in the federal courts.<sup>315</sup> Moreover, in addition to the fact that the CAP rule likely does little to reduce the overall number of opportunities for federal courts to judge the behavior of coordinate branches, there is reason to

308 Levy, *supra* note 130, at 1009.

309 See, e.g., *id.* at 1008 & n.1.

310 See *Valley Forge Christian Coll.*, 454 U.S. at 475 (asserting that generalized grievances are more "appropriately addressed in the representative branches").

311 418 U.S. 166, 177–79 (1974).

312 See *Valley Forge Christian Coll.*, 454 U.S. at 473–74.

313 See Levy, *supra* note 130, at 1008 n.1 (noting that a version of the floodgate concern was raised as early as 1908). Levy observes that there is little empirical support for the "floodgate" concerns and concludes that "if claims about increases in litigation are to influence at least some decisions, the justices need to provide support for those claims—both for each other and for the public." *Id.* at 1075.

314 *Id.* at 1008–09 (describing the "normative justification" of the floodgate argument as "highly contested").

315 See *supra* Section II.A.

believe that the opening-the-floodgates worry itself is overblown.<sup>316</sup> Not only is the floodgates argument in support of the CAP rule lacking in empirical support,<sup>317</sup> but it may also be lacking in a clear, germane, and substantive content when used by various members of the Court.<sup>318</sup> For example, Professor Marin Levy has observed that “recent cases show the justices vacillating between providing assurances that their decision will not result in a deluge of new claims, and accusing each other of being driven by an improper desire to stave off such a deluge.”<sup>319</sup> The floodgate alarm has been used in diverse and internally inconsistent contexts without the mooring benefit of evidentiary support, such that it has taken on more the character of epithet than of a serious constitutional obstacle.<sup>320</sup> Justice Ginsburg, writing in dissent, has succinctly summarized this development, stating: “The ‘floodgates’ argument the Court today embraces has been rehearsed and rejected before.”<sup>321</sup>

The fact that the floodgate rationale is frequently used to support both sides of a contested determination by the Court suggests that it may lack a stable normative content.<sup>322</sup> The floodgate rationale is, at heart, a prediction about how future litigants will behave if the Court adopts a new rule. Yet the ordinary norms of prediction with their attendant empirical safeguards seem not to obtain.<sup>323</sup> Those invoking the floodgate alarm have not felt

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316 See Levy, *supra* note 130, at 1068–69; see also *id.* at 1073 (“[T]he Court should be wary of relying on court-centered floodgates arguments, particularly when outside the policy-making context.”).

317 See, e.g., W. Justin Jacobs, Note, *Help or Hamp(er)?—The Courts’ Reluctance to Provide the Right to a Private Action Under Hamp and Its Detrimental Effect on Homeowners*, 47 VAL. U. L. REV. 267, 303 (2012) (“[T]he problem with the theory of ‘floodgates’ is that courts cannot know the *actual* effects on the judicial system of allowing third party beneficiary standing . . .”).

318 Levy, *supra* note 130, at 1037 n.153 (“Although the Court discusses floodgates in the context of frivolous cases and in the context of claims more generally, just which concern is animating the argument in a given opinion is not always clear.”); see also *id.* at 1077 (arguing that “court-centered floodgates arguments” should not “spill over into the substantive analysis of law”).

319 *Id.* at 1009 (footnote omitted).

320 See, e.g., *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 430 (1971) (Blackmun, J., dissenting) (“[The decision today] opens the door for another *avalanche* of new federal cases. . . . This will tend to stultify proper law enforcement and to make the day’s labor for the honest and conscientious officer even more onerous and more critical. Why the Court moves in this direction at this time of our history, I do not know.”).

321 *Wilkie v. Robbins*, 551 U.S. 537, 577 (2007) (Ginsburg, J., concurring in part and dissenting in part).

322 See Levy, *supra* note 130, at 1076 (“Though courts and scholars often refer to ‘the floodgates argument’ as if it had a singular, stable meaning, it can be invoked in various ways, depending upon who is being flooded, the effect of that flood, and what the flood contains.”).

323 It should be noted that Justice Scalia, in dissent, did offer some empirical information in support of his floodgate argument in the context of habeas petitions in *McQuiggin v. Perkins*, 569 U.S. 383 (2013). His information indicated that habeas filings had more than doubled between 1969 and 2012. *Id.* at 412 (Scalia, J., dissenting) (“By 1969, [the

obliged to supply evidence of past instances in which the federal courts were in fact “flooded” as the result of similar rule changes, *and* that the Federal Rules of Civil Procedure were inadequate to address the “flood.”<sup>324</sup> Given that members of the Court have so frequently predicted a litigatory deluge as a consequence of a rule change, it would seem a simple matter to confirm that a deluge has, in fact, occurred.<sup>325</sup> However, evidence of past flooding has yet to emerge within the floodgate discourse.<sup>326</sup>

It is possible that the reason that the floodgate worry has not been documented may be because it has yet to come to pass. There is ample reason to believe that the Federal Rules of Civil Procedure are generally commensurate to the task of *qualitatively* stemming the tide of litigation.<sup>327</sup> The Federal Rules of Civil Procedure are designed to weed out duplicative, harassing, frivolous, and meritless cases.<sup>328</sup> While no standing rule—including the CAP rule—prevents nonmeritorious cases from being filed in federal court, such cases are generally resolved on a Rule 12(b)(1) motion to dismiss.<sup>329</sup> The Rule 12(b)(1) motion to dismiss is also the first opportunity during which a defendant can challenge standing.<sup>330</sup> There is no strategic advantage to

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number of habeas filings] had grown to 7,359. In the year ending on September 30, 2012, 15,929 such petitions were filed.” (citation omitted)). However, the prison population also increased *eight-fold* during that time period, rendering Scalia’s causal claim (that a rule change caused a “flood” of new habeas filings) questionable. E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012, at 1 (2013), <https://www.bjs.gov/content/pub/pdf/p12tar9112.pdf> (total prison population in 2012 was 1,570,400); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, STATE AND FEDERAL PRISONERS, 1925–85, at 2 (1986), <https://www.bjs.gov/content/pub/pdf/sfp2585.pdf> (total prison population in 1969 was 197,136). If anything, the empirical evidence better supports the claim that the rule change *reduced* per capita habeas filing by a factor of four—although, of course, a causal claim cannot be supported in the absence of a consideration of other variables.

324 See *supra* note 323.

325 See *supra* note 313 and accompanying text.

326 See Levy, *supra* note 130, at 1074 (“[J]ustices often invoke floodgates arguments without much support for why they believe a large number of cases will come. . . . Forecasting the number of cases that will follow a decision is no easy task and may be near impossible in some cases.”).

327 See, e.g., Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 938–39 (1990) (“[C]ourts . . . utilize procedural mechanisms, particularly in the case of prisoner suits, to screen out meritless actions at the earliest stage of litigation.”).

328 The Court in *Flast v. Cohen* noted that the standing rule’s quantitative-control rationale might be unnecessary in light of “modern” civil litigation conditions, which include the availability of class actions. *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

329 For example, in response to Justice Blackmun’s concern that the decision in *Bivens* would cause an “avalanche” of new cases, Justice Brennan observed, “In estimating the magnitude of any such ‘avalanche,’ it is worth noting that a survey of comparable actions against state officers under 42 U.S.C. § 1983 found only 53 reported cases in 17 years . . . that survived a motion to dismiss.” *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391 n.4 (1971).

330 See Blaze, *supra* note 327, at 983–85.

defendants—in terms of the expenditure of resources—to having a case dismissed for want of standing as compared to any other grounds for dismissal under Rule 12(b)(1).<sup>331</sup> Likewise, doctrines and mechanisms designed to conserve both judicial and defendant resources, such as claim preclusion, issue preclusion, abstention, joinder, and case consolidation, all operate to prevent horizontal lawsuits alleging the same nexus of operative facts from going forward simultaneously in multiple district courts—a point that is especially important in the emoluments context where presumably any citizen suit would allege the same operative facts.<sup>332</sup>

Perhaps more significantly, scholars such as Levy have persuasively questioned whether it is appropriate for the judiciary to restrict access to courts based solely on the rationale of conserving its own resources.<sup>333</sup> This is particularly so if the restriction disproportionately burdens low-resource plaintiffs as may be the case with the CAP rule. If the CAP rule precludes generalized grievances except when a collaterally injured plaintiff can be produced, then low-resource plaintiffs who lack the capacity to locate and collaborate with collaterally injured plaintiffs will not be able to bring cases that high-resource plaintiffs (who can do the groundwork necessary to scour for collaterally injured plaintiffs) would be permitted to bring. In the context of an emoluments violation, for example, an individual citizen may lack the resources to locate and enlist Trump competitors (particularly if the competitors are abroad, as in the example of the Chinese trademark). As a consequence, the generalized-grievance prohibition might serve as a “litigation tax” or entry barrier to the enforcement of constitutional rights.

Moreover, regardless of whether the floodgate worry is well founded in other contexts, it has exceedingly little purchase in the context of the rule change proposed here. Shifting the standing prescription from a focus on *particularized* injuries to a focus on *primary* injuries will result in an alteration of standing availability in a very small subset of cases, as is discussed in detail below in Part IV. Given the modest effect that adoption of a primary-injury model of constitutional standing will have on the standing status quo, a floodgate concern is unfounded.

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331 FED. R. CIV. P. 12(b)(6) (permitting dismissal of cases in which plaintiff has failed “to state a claim upon which relief can be granted”).

332 For example, FED. R. CIV. P. 42(a) provides: “If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.” Ironically, the Court’s CAP rule currently precludes procedural mechanisms like consolidation in the three pending emoluments suits, since each suit advances a novel theory of standing which must be individually resolved and appealed before the courts can reach the merits. If the standing issue were removed, the three cases could be consolidated.

333 See Levy, *supra* note 130, at 1076–77 (arguing that floodgate arguments that are centered on conserving the courts’ own resources by manipulation of substantive law “raise serious concerns,” and that “[s]hort of a catastrophic situation, anxieties about caseload would do well to be addressed through Congress and the lower courts’ case-management tools”).

## 2. The Institutional Competence Intuition

In addition to assuming that the CAP rule reduces the overall number of cases, the Supreme Court has relied on the CAP rule to *qualitatively* screen cases along a separation-of-powers metric.<sup>334</sup> The Court has presumed a qualitative connection between “generalized grievances” and cases that are better resolved by the political branches.<sup>335</sup> The precise character of this connection is not clear, but it is safe to infer that the connection the Court presumes has to do with the intuition that undifferentiated injuries are more (or most) often the result of the political branches of government exercising their discretionary core functions.<sup>336</sup> In *Richardson*, for example, the plaintiff’s alleged injury involved discretionary decisions made about the allocation of taxpayer money.<sup>337</sup> The Court seems to understand the “particularized” rule to preclude cases that would require it to traverse difficult separation-of-powers terrain by eliminating the class of cases that implicate core functions of coordinate branches.<sup>338</sup>

However, even assuming *arguendo* that a connection exists between undifferentiated injuries and the exercise of political branches’ core functions (and there is considerable reason to be skeptical about such a connection),<sup>339</sup> the CAP rule is remarkably poorly suited to serve these functions. The CAP rule is both overinclusive and underinclusive with respect to eliminating opportunities for the Court to pass upon the core functions of coordinate branches.<sup>340</sup> The CAP rule is underinclusive in that it often allows cases that advance undifferentiated harms to go forward when they are sufficiently coupled with collateral differentiated harms.<sup>341</sup> This is illustrated by the CAP

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334 See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982) (noting that generalized grievances are prohibited because they are more appropriately resolved by the “representative branches”).

335 See *id.*

336 See, e.g., *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975) (positing that the political branches are more competent to resolve generalized grievances); *Valley Forge Christian Coll.*, 454 U.S. at 474–75 (stating that generalized grievances are more “appropriately addressed in the representative branches”).

337 *United States v. Richardson*, 418 U.S. 166, 177 (1974).

338 *Id.* at 179.

339 See Elliott, *supra* note 13, at 512–14.

340 See Hessick, *supra* note 116, at 675 (arguing that standing law is “overbroad” in that it fails to be sensitive to whether a particular case actually implicates separation-of-powers concerns).

341 See, e.g., *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 757 (D. Md. 2018) (finding that Maryland and the District of Columbia have standing to raise an emoluments challenge), *rev’d and remanded*, *In re Trump*, 928 F.3d 360, 374–79 (4th Cir.), *reh’g en banc granted*, 780 F. App’x 36 (4th Cir. 2019). If Maryland and the District of Columbia are able to advance to the merits of their case, the Court will pass upon questions that implicate not just the alleged injury to the plaintiffs at bar, but also the “generalized grievance” that each of “the People” share in a case of an alleged violation of a President’s duty of loyalty.

rule's uneven application in *CREW* and *MD/DC* cases.<sup>342</sup> The Second Circuit has found that the collateral injuries of the plaintiffs were sufficiently causally connected to the alleged presidential disloyalty to sustain and the Fourth Circuit will review that issue en banc.<sup>343</sup> If either the *CREW* or *MD/DC* case proceeds through all of the stages of appeal, the Supreme Court will have an opportunity to resolve the substantive questions of the case, regardless of the fact that the primary injury that attends the alleged emoluments violation has to do with presidential disloyalty. So, depending on the availability of collaterally injured plaintiffs, the CAP rule does not prevent the federal courts from resolving a case in which the primary injury is an undifferentiated injury. The Court frequently resolves those claims nonetheless, depending on the availability of collaterally injured plaintiffs.

It is also important to be clear that the Court is categorically selective in its preference to avoid a supervisory role when confronted with coordinate branches' core prerogatives. In many constitutional contexts, the Court is comfortable passing upon the core discretionary determinations of coordinate branches of government. Determining whether an executive action intrudes upon legislative prerogative<sup>344</sup> or determining whether a piece of legislation exceeds the power of Congress<sup>345</sup> is, after all, the core function of the federal judiciary. The Court is willing to engage with those questions, in many constitutional contexts, even when it is asked to define the content of constitutional promises that affect all of the people indiscriminately.<sup>346</sup> In the context of individual-rights cases, for example, courts do not rely upon the CAP standard to safeguard separation-of-powers values, even though in the context of individual rights courts are routinely called upon to pass upon the often highly politicized behavior of coordinate branches of government.<sup>347</sup> The Court has also evidenced a willingness to pass upon constitutionality of the actions of sovereign states in the context of deeply contested constitutional questions about which reasonable minds disagree.<sup>348</sup> It is not clear why separation-of-powers concerns are not equally implicated in cases

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342 *Id.* at 738–53 (finding standing); *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 183–93 (S.D.N.Y. 2017) (not finding standing), *vacated and remanded*, 939 F.3d 131 (2d Cir. 2019).

343 *Citizens for Responsibility & Ethics in Wash.*, 939 F.3d at 142–58; *In re Trump*, 928 F.3d at 374–80.

344 *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 421 (1998) (holding that Line Item Veto Act of 1996 violated the Presentment Clause).

345 *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeded Congress' power to legislate under the Commerce Clause).

346 *See, e.g.*, *Mueller v. Allen*, 463 U.S. 388, 390–91 (1983) (finding that tax deduction for parochial school tuition did not violate the Establishment Clause).

347 *See, e.g.*, *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556, 559–62 (S.D.N.Y. 2013) (proceeding to the merits on a Fourth Amendment challenge to New York City's highly controversial "stop-and-frisk" policy).

348 *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding that the District of Columbia's handgun prohibition violated the Second Amendment).

that require the Court to pass upon coordinate branches' core prerogatives by plaintiffs who happen to have suffered a differentiated rather than undifferentiated injury. If the concern is the Court's substantive supervision of core functions, it is not clear why this concern would be mitigated based on the degree of specificity of the plaintiff's injury.

So, the Court's intuition that the exercise of core prerogatives by representative bodies should be resolved through the electoral process is not absolute, and it certainly does not obtain in all cases. Moreover, in relying upon the exceedingly ill-suited CAP rule to insulate it from this subset of cases the Court is likely doing more harm than good. Indeed, Professor Heather Elliott has persuasively made the point that not only is our current standing doctrine not an essential element of separation-of-powers, the doctrine itself often serves to undermine separation-of-powers values.<sup>349</sup> Professor Elliott observes:

[T]here is no single "idea of separation of powers," but instead at least three—the concrete-adversity function, the pro-democracy function, and the anticonscription function—and each of these is contested. Arguably because of these submerged disagreements, standing performs these functions poorly. Standing is not particularly good at ensuring concrete adversity, gives incoherent and sometimes antidemocratic guidance on promoting democracy, and utterly fails at preventing Congress from conscripting the courts to ensure that the executive branch does its job.<sup>350</sup>

These doctrinal inadequacies prompt "repeated accusations of manipulation and illegitimacy," which ultimately damage the judiciary itself.<sup>351</sup> To address this crisis of legitimacy, Professor Elliott urges radical change, arguing that "the doctrine in its current form should be discarded."<sup>352</sup>

As a final point, as with the floodgate worry, the institutional-competency worry has especially little purchase in the context of the rule change that is proposed here. Shifting the focus to primary injuries has the ancillary benefit of causing the Court to engage directly with the *content* of constitutional promises, rather than the collateral consequences of their violation. This focus will eliminate the CAP rule's propensity to allow cases to proceed based on collateral harms that are not fairly within the contemplation of the constitutional promise. Instead, a primary-injury model would only call upon the judiciary to consider coordinate branches' discretionary core functions when the constitutional promise itself (rather than happenstance) requires it.

By the same token, the rule change proposed here would allow some cases to proceed that might (depending on the availability of collaterally injured plaintiffs) have been blocked by the CAP rule.<sup>353</sup> Yet there is no reason to suspect that those cases would especially or particularly implicate

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349 Elliott, *supra* note 13, at 500.

350 *Id.*

351 *Id.* at 501.

352 *Id.* at 508.

353 See, e.g., *Raines v. Byrd*, 521 U.S. 811, 830 (1997); *infra* Part IV.

separation-of-powers concerns. More importantly, there is no need to use the vague and poorly tailored proxy of “generalized grievance” to safeguard separation-of-powers values in those cases,<sup>354</sup> as other, better tools are available to serve that purpose.

### B. *The People’s Provisions*

Having explored the Court’s two primary assumptions about the connection between “generalized grievances” and separation-of-powers values—(1) that allowing generalized grievances to confer standing will create too many cases, and (2) that generalized grievances are more likely to implicate separation-of-powers concerns—we can turn now to consider these assumptions in the specific context of the rule change proposed here. This Article proposes focusing on *primary* injuries instead of *particularized* injuries across constitutional contexts. This change would bring the doctrine of standing in constitutional cases into uniformity with the Court’s existing (if tacit) approach in individual-rights cases.<sup>355</sup> To understand how this change would operate across constitutional contexts, it is helpful to first consider what the injury-specificity continuum can teach us about broad categories of constitutional provisions and their potential attendant injuries.

For example, looking through the lens of injury-specificity continuum, we can draw three conclusions in the context of individual rights. First, violations of individual rights always produce both differentiated and undifferentiated injuries. Second, the primary injury that follows a violation of an individual right is always differentiated.<sup>356</sup> Third, the Supreme Court has long tacitly acknowledged that a primary versus collateral inquiry is the more salient inquiry in the context of individual rights.<sup>357</sup>

We can now use this quadrangle analysis (differentiated versus undifferentiated and primary versus collateral) to better understand other categories of constitutional injuries. Adopting a quadrangle analysis, we see that other broad categories emerge. For example, there are many constitutional provisions of which the violation would seem to impose primary, differentiated harms on collective political bodies or institutions, such as Congress or the President. We might regard these provisions (from the harm-continuum perspective we are pursuing) as “political-entity” provisions. The primary harm that follows from a violation of a political-entity provision is a differentiated harm.<sup>358</sup> For example, if the House of Representatives were to adjourn for more than three days without the consent of the Senate in violation of the

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354 See Hessick, *supra* note 116, at 675.

355 See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 138–39 (1978); *supra* subsections II.B.1–2.

356 See discussion *supra* subsection II.B.1.

357 See *Rakas*, 439 U.S. at 138–39.

358 This primary, differentiated harm could just impact a political entity or it could impact one or more citizens *and* a political entity. However, the primary harm is not an undifferentiated harm, and so the primary harm would not impact all of “the People” in the same way.

Adjournment Clause,<sup>359</sup> the primary injury is likely a differentiated injury suffered by the Senate, with a collateral undifferentiated character-of-government injury to the rest of us.

In all instances, the violation of a political-entity provision produces primary, differentiated harms that impact some political entity. When a political-entity clause is violated, some political entity (i.e., the Senate in the example of the Adjournment Clause) has been deprived of its constitutionally committed power or role. The violation of a political-entity provision also always produces some undifferentiated harms. Minimally, the violation of a political-entity provision produces a character-of-government injury (as all constitutional violations do), but the *primary* injury that follows from the violation of a political-entity provision is a differentiated injury.

Consider, for example, the difficult case of the “Advice and Consent” language in the Appointments Clause.<sup>360</sup> The “Advice and Consent” language of the Appointments Clause makes a promise, but it is not obvious to whom the promise is made or what character-of-government injury is a mirror of that promise. This is because the Court has yet to address antecedent questions about the content of the promises made by the Appointments Clause.<sup>361</sup> Does the Appointments Clause promise the President that the Senate will formally consider a presidential nominee? Assuming *arguendo* that the Appointments Clause makes such a promise, what is the primary injury that follows from a breach of that promise? On one view, a differentiated injury would seem to fall upon the President who was denied her role in the constitutional scheme.<sup>362</sup> Moreover, that differentiated injury might be the *primary* injury—it might mirror the constitutional promise. Although a character-of-government injury would undoubtedly follow as well, it may be that the more salient promises made by the “Advice and Consent” language are made primarily to the President and the Senate, that each will have a role to play in the appointment process. Although the people are clearly the third-party beneficiary of these (and all) constitutional guarantees, the “Advice and Consent” language is not a promise to the people that the people themselves may appoint a Justice, or that the people themselves may vote on one. This is one way to identify the primary and collateral injuries in this context.

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359 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.”).

360 U.S. CONST. art. II, § 2, cl. 2.

361 Scholars have addressed some of these antecedent questions, arriving at various conclusions. See, e.g., Michael J. Gerhardt, *Putting Presidential Performance in the Federal Appointments Process in Perspective*, 47 CASE W. RES. L. REV. 1359, 1360 (1997) (arguing in favor of a more limited role for the Senate in the appointments process); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1493 (1992) (arguing that the Senate is not required to defer to presidential preferences in appointments).

362 See U.S. CONST. art. II, § 2, cl. 2 (“[W]ith the Advice and Consent of the Senate, [the President] shall appoint . . . Judges of the supreme Court . . .”).

However, a second way to analyze this language is to ask whether the primary benefit of the “Advice and Consent” language inures to the Senate and President or to the people who are represented by the Senate and President. If either the Senate or the President were to fail to uphold their constitutionally defined duties under the Appointments Clause, we might be tempted to conclude that the graver injury falls upon the people—after all, the Senate and the President are each acting on behalf of the people. Ultimately, as a result of the alleged violation, the people are potentially deprived of the benefit of the seating of a Supreme Court Justice nominated by the President whom they elected.

Here, however, it is instructive to arrive at the primary injury by identifying the protection the Constitution supplies. If all the relevant parties behaved as the Clause requires, there is no reason to believe the President’s nominee would be appointed. That is not the Appointment Clause’s promise.<sup>363</sup> The Constitution promises a process, not an outcome. It promises that the Senate will have a role to play, not that the Senate will do a good job executing its constitutionally committed role.<sup>364</sup> The Senate could consider and vote down every nominee put forward by a sitting President, and the formal requirements of the “Advice and Consent” language would presumably be met.<sup>365</sup> In that scenario, the proposed injury to the people (i.e., the absence of the elected President’s nominee on the Court) would be identical, but there would be no constitutional violation. Thus, in this context, even though the character-of-government harm is quite grave, it is not the primary harm. The constitutional promise is a *process* promise and its mirror is a process injury: the injury befalls the President whose nominee is not considered.<sup>366</sup>

Compare this scenario with an Emoluments Clause violation. The Emoluments Clause<sup>367</sup> also contemplates a role for Congress in the safeguarding of federal officer loyalty. A federal officer may accept an emolument if Congress consents.<sup>368</sup> Thus, we may be tempted to imagine that the injury that mirrors the Emoluments Clause’s promise of loyalty inures to the Congress that is empowered to authorize an emolument.

However, here, again, it is instructive to arrive at the primary harm of an emoluments violation by identifying the protection that it supplies. Keeping emoluments out of the hands of federal officers is not the benefit of the Clause. The benefit of the Clause is keeping *secret* emoluments out of the hands of federal officers. The benefit is preventing the kind of insidious

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363 *See id.*

364 This does not, of course, preclude standing by a President who was promised the power to appoint.

365 Strauss & Sustain, *supra* note 361, at 1491–94 (arguing that the Senate is not required by the Constitution to defer to the President on Supreme Court nominations).

366 This is assuming that the content of the Appointments Clause promise guarantees the President formal consideration of his or her nominee, which it may not.

367 U.S. CONST. art. I, § 9, cl. 8.

368 *See id.*

treachery that comes of having an *undeclared* indebtedness to a foreign head of state. If the constitutional mandate is followed, then the people are protected from that harm—whether Congress approves the emolument or not. In this light, the benefit to the people does not depend on the behavior of Congress. Congress could authorize even the most outrageous foreign emoluments and the benefit to the people would be left undisturbed. Congress's role is ancillary to the central promise of the Clause, which is to prohibit *secret* disloyalty.

Hence, the central promise of the Emoluments Clause is not a promise to Congress that it can pick and choose among acceptable emoluments. The emoluments promise is not a process promise; it is an *outcome* promise: that we will be protected from the danger that results from our federal officers forging secret alliances with foreign states. Congress has a constitutionally committed role to play in the emoluments context, and a differentiated injury follows when Congress is denied that role.<sup>369</sup> However, the injury that Congress suffers is collateral to the primary harm that follows from an emoluments violation: the harm of a disloyal federal officer. Thus, because the primary harm of a violation of the Emoluments Clause is not the differentiated injury suffered by Congress, the Emoluments Clause is not a “political-entity” provision.

We can now identify two categories of constitutional provisions: (1) individual-rights provisions in which the primary injury is always differentiated; and (2) political-entity provisions in which the primary injury is always differentiated.<sup>370</sup> Individual-rights provisions and political-entity provisions together constitute most of the Constitution. There is, however, another, third, 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. We might think of these as “people’s provisions” because all of the people are the direct (rather than third-party) beneficiaries of the constitutional promise.<sup>371</sup>

The Emoluments Clause is an example of a people’s provision. The Emoluments Clause confers a single, undifferentiated benefit: that we will have a government in which our federal officers are not vulnerable to foreign influence.<sup>372</sup> Unlike individual-rights or political-entity provisions, the Clause makes no promise more specific than the promise about the kind of government we will have (i.e., loyal).

369 See EISEN ET AL., *supra* note 1, at 7.

370 While it is helpful within this analysis to consider categories of constitutional provisions in light of the injuries they produce, this is not intended to be an exhaustive list of all possible categories. For example, there are some provisions, the violation of which would seem to produce differentiated injuries to groups of people, and as such do not fit neatly within the “individual-rights provision” category.

371 *Rakas v. Illinois*, 439 U.S. 128, 139 (1978) (observing that the question of standing depends upon “whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties”).

372 Or at least we will not have a federal officer who is vulnerable to foreign influence because she accepted a secret bribe from a foreign regime.

Unlike injuries to individual rights, which fall disproportionately on the person who is personally experiencing the illegal conduct, an emoluments injury falls upon all of the people in exactly the same way, with the same severity, and at the same time. When the Emoluments Clause is observed, no person or entity is particularly or uniquely benefited by having a loyal government, and when it is violated, no person or entity uniquely bears the risk of a disloyal government. When the Emoluments Clause is violated, the primary harm is *always* undifferentiated. Any differentiated harm that may coincide with the violation is a collateral harm.

It is worth noting that people's provisions seem to constitute a very small subset of constitutional provisions. While a comprehensive taxonomy of potential people's provisions exceeds the scope of this project (and would require considerable attention to magnitudes of heretofore unaddressed antecedent questions about the content of various constitutional promises) the contours of the concept of a "people's provision" may be made better illuminated in the context of a more familiar people's provision: the Establishment Clause.<sup>373</sup> A consideration of the Establishment Clause as a people's provision follows.

### 1. The Establishment Clause as a People's Provision

The Establishment Clause poses a perennial challenge to standing doctrine in general and to the CAP rule in particular.<sup>374</sup> Like the Emoluments Clause, the Establishment Clause protects against a specific harm that the framers understood to be an existential threat to the United States: the imposition of a state religion. The Clause states that "Congress shall make no law respecting an establishment of religion."<sup>375</sup> It is a promise that there will be no official religion in the United States.<sup>376</sup> As such, it is a character-of-government promise. Importantly, it is *only* a character-of-government promise. Consequently, the primary injury that attends an establishment violation is *always* undifferentiated. Unlike an unreasonable seizure, which affects one person at a time, an Establishment Clause violation affects all of the people simultaneously in exactly the same way. In this way, the Establishment Clause is a people's provision.

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373 U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion. . . .").

374 See William P. Marshall & Gene R. Nichol, *Not A Winn-Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215, 215 ("In no line of cases over the past half-century has the Supreme Court so directly faced the tension between constitutional accountability and jurisdictional traditions of personal harm as in the taxpayer standing decisions under the Establishment Clause.").

375 U.S. CONST. amend. I.

376 See generally Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 675 (2002) ("[T]he Establishment Clause was born, like many other elements of the Bill of Rights, out of a desire to protect the individual from coercion at the hands of the state.").

The fact that the primary harm that follows from an Establishment Clause violation is always an undifferentiated harm has placed it in a unique posture within the Court's larger standing doctrine.<sup>377</sup> An Establishment Clause violation often assumes the form of a governmental endorsement of religion (as with a public display of religious material), or a governmental sponsoring (as with financial support) of religion.<sup>378</sup> In the governmental endorsement cases, the Supreme Court has generally declined to apply the CAP rule.<sup>379</sup> It has, in fact, generally declined to interrogate standing at all, simply omitting it—without explanation—from the Court's analysis.<sup>380</sup> In these cases, the Court has proceeded to the merits of the case as though standing is categorically not an issue in the governmental endorsement context.<sup>381</sup>

In the context of governmental sponsorship cases, the Court has expressly rejected the CAP rule. In 1968, in *Flast v. Cohen*, the Court carved out an Establishment Clause exception to its longstanding prohibition of taxpayer standing, holding that a plaintiff's status as a taxpayer is sufficient to challenge governmental expenditures in support of religion.<sup>382</sup> In more recent cases, the Court has seemed inclined to narrow this singularly broad grant of standing in the governmental sponsorship context, but the Court has understandably struggled to articulate what a concrete and particularized injury is in context of objecting to state sponsorship of religion.<sup>383</sup> Attempts to apply the CAP rule only serve to underscore the fact that the primary harm imposed by a violation is essentially a "generalized grievance"—a grievance shared equally by all the people. Injuries that might be described as "direct" or "tangible" are also patently collateral to the injury the Clause promises to prevent.

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377 See Carl H. Esbeck, *Why the Supreme Court Has Fashioned Rules of Standing Unique to the Establishment Clause*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, OCT. 2009, at 134, 134 (2009) ("For over half a century . . . the Supreme Court has reduced the rigor of its standing rules when a claim is lodged under the Establishment Clause of the First Amendment.").

378 Cf. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) ("In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970))).

379 But see *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485–86 (1982) (stating that mere belief that government action violates the Establishment Clause is insufficient to confer standing).

380 Marshall & Nichol, *supra* note 374, at 215 ("[At] times, the Court has sidestepped the standing question and proceeded directly to the merits of the Establishment Clause claim, apparently assuming, without explanation, the existence of standing.").

381 See, e.g., *Mueller v. Allen*, 463 U.S. 388, 391–93 (1983).

382 *Flast v. Cohen*, 392 U.S. 83, 105–06 (1968); see also *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 143–44 (2011) (holding that the *Flast* exception does not apply in the context of a tax credit as opposed to a tax expenditure).

383 *Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 143–45.

We might, for example, be tempted to imagine that the Establishment Clause violation could impose differentiated harm based on factors like religious affiliation or atheism. If the state-sponsored religion were Roman Catholicism, for example, we might imagine that all non-Catholic religious people, atheists, and Catholics who do not want a state-sponsored religion would suffer an injury that is differentiated from the injury suffered by Catholics who do want a state-sponsored religion. But to understand the promise of the Establishment Clause this way is to understand its promise to be that there will be no state-sponsored religion *unless everyone is in favor of it*. Instead, the Establishment Clause promises that the character of American government will not change in this very specific way. The change in character *is* the injury.

Further, the change in character is the *primary* injury. Imagine, for example, that my town violated the Clause by placing the Ten Commandments on the courthouse lawn, resulting in large protests, and that the protests caused my nearby business to lose money.<sup>384</sup> Although I would have suffered a differentiated harm, that harm is clearly collateral to the harm that follows from the state's endorsing religion. It is the endorsement of religion (rather than the reduction of my profits) that the Establishment Clause promises to prevent.

The Court's inclination to broadly recognize standing in the Establishment Clause context suggests that its sensibilities in this area are consistent with a primary-injury model of Establishment Clause standing.<sup>385</sup> This inclination could be transformed into an internally consistent doctrine with the uniform adoption of a primary-injury model of standing across constitutional contexts. In that scenario, standing to enforce people's provisions, like the Establishment Clause or the Emoluments Clause, would resemble *qui tam* standing: any one of the people could challenge an alleged governmental endorsement or governmental sponsorship of religion on behalf of all of the people.<sup>386</sup>

Further, like *qui tam* standing in other contexts, plaintiffs who sue to enforce people's provisions (i.e., constitutional provisions in which the primary harm is undifferentiated) such as the Establishment Clause or the Emoluments Clause would serve as catalysts for the articulation and enforcement of constitutional values that might otherwise go unarticulated and unenforced. Allowing citizen suits to function as public attorneys general is

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384 See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 851, 881 (2005) (display of the Ten Commandments at a county courthouse violated the Establishment Clause).

385 See Marshall & Nichol, *supra* note 374, at 215 ("Sometimes, most notably in *Flast v. Cohen*, the Justices have explicitly embraced a broad understanding of standing to sue." (footnote omitted)).

386 The phrase "*qui tam*" is short for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which translates to "he who brings an action for the king as well as for himself." Here, I employ the term to convey a plaintiff who brings an action on behalf of herself and all of the people. Cf. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773–74 (2000) (holding that the False Claims Act permits a plaintiff to bring an Article III civil action to remedy an injury in fact suffered by the United States as a whole).

especially compelling in the context of people's provisions like the Establishment Clause or the Emoluments Clause, which are addressed to existential threats to the integrity of the United States. People's provisions inevitably involve high-stakes issues about the very character of the government itself. In this light, erring on the side of too broad a grant of standing is preferable to precluding altogether the private enforcement of these important constitutional norms.

Qui tam standing here would also mean embracing direct constitutionalism over representative constitutionalism in the narrow context of people's provisions. A consideration of the relative merits of direct constitutionalism in the context of people's provisions follows.

## 2. Standing and People's Provisions

When the primary injury that follows from the violation of a constitutional provision is undifferentiated—as with people's provisions like the Establishment Clause and the Emoluments Clause—the Court is presented with three standing options. The first option is to recognize broad, qui tam-like standing based on a primary-injury model of constitutional standing. The second option is to not allow private enforcement of the provision at all and to instead rely entirely on representative constitutionalism (e.g., action by Congress) to enforce the provision. The third option is to apply the CAP rule and allow collateral injuries to fitfully confer standing to plaintiffs as a means of allowing some (ostensibly quantitatively limited) private enforcement of the provision.

In the context of the Establishment Clause, the Court has historically been inclined toward the first option—a broad conferral of standing.<sup>387</sup> The Establishment Clause also provides a vantage point from which to view the limitations of the second and third options in the specific context of a people's provision. Relying entirely on representative bodies to enforce the liberty-of-conscience norms embedded in the Establishment Clause places too much trust in the political process, particularly in light of the seriousness of the underlying liberty interest.<sup>388</sup> Also, given that the Establishment Clause explicitly identifies Congress as a potential threat to the particular liberty interest at issue,<sup>389</sup> relying entirely on Congress (or other political bodies or entities) to enforce the Clause could turn out to be a bit like asking the cat to guard the canary.

Of the three standing options available to the Court in the context of a people's provision, the third option—applying the CAP rule and allowing collateral harms to unevenly confer standing—is perhaps the least satisfying. Allowing collaterally injured plaintiffs to *exclusively* enforce a people's provision leads to inconsistent and unjustifiable inclusion and exclusion criteria.

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387 Esbeck, *supra* note 377, at 134.

388 See Feldman, *supra* note 376, at 675 (“[T]he Framers . . . intended the Establishment Clause to protect the liberty of conscience of religious dissenters . . .”).

389 U.S. CONST. amend. I.

Moreover, application of the CAP rule in this context necessarily means that only collaterally injured plaintiffs can enforce the Clause because any differentiated harms are necessarily collateral. This unsatisfactory result is likely why the Court has largely abstained from applying the CAP rule in the Establishment Clause context.

These three options will also be before the Court when it eventually turns to the novel question of Emoluments Clause standing. In that context, the Court could adopt a primary-injury model of constitutional standing (as advanced here) and, following its lead in the Establishment Clause context, allow for a broad grant of *qui tam*-type standing to enforce the fiduciary duty embodied in the Emoluments Clause.

Alternatively, the Court could apply the CAP rule and allow collateral harms (such as loss of tips) to confer standing to challenge the alleged disloyalty of a sitting President. The district courts that have passed upon the pending emoluments challenges have presumed that the CAP rule is the appropriate rule in this novel context and have each applied it to similar facts with disparate results.<sup>390</sup> Should the Supreme Court adopt the CAP rule in the context of emoluments standing, the availability of standing would turn on the Court's view of how causally attenuated a plaintiff's collateral damages are permitted to be to sustain standing.<sup>391</sup> The considerable flexibility inherent in this assessment will render whatever decision the Court should make vulnerable to criticism that the decision is unprincipled and politicized.

On the other hand, the Court might revive its "generalized-grievance" rhetoric and, departing from its Establishment Clause precedent, determine that the best method of enforcing the fiduciary duty embodied in the Emoluments Clause is to abstain from addressing the constitutional question and instead entrust the resolution of the constitutional question to representative constitutionalism.

However, representative constitutionalism is especially poorly suited to safeguard the kind of broad-based character-of-government constitutional norms that are necessarily at issue when a people's provision has been violated.<sup>392</sup> That is not say that representative constitutionalism has no role to play in the development of constitutional norms. Judicial abstention in favor of representative constitutionalism makes the most sense when the constitutional conflict at issue involves the exercise of discretionary powers of coordi-

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390 *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 737–48 (D. Md. 2018) (finding standing), *rev'd and remanded*, *In re Trump*, 928 F.3d 360 (4th Cir.), *reh'g en banc granted*, 780 F. App'x 36 (4th Cir. 2019); *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 184, 188–93 (S.D.N.Y. 2017) (finding no standing), *vacated and remanded*, 939 F.3d 131 (2d Cir. 2019).

391 *Cf. Allen v. Wright*, 468 U.S. 737, 757–61 (1984) (finding that plaintiffs' alleged injury was insufficiently causally connected to the alleged constitutional violation).

392 Endowing the representative bodies with *concurrent* standing to enforce the Emoluments Clause may be perfectly acceptable. Given the high stakes at issue when the possibility of federal officer disloyalty lurks, we would ordinary expect the fullest possible panoply of enforcement avenues to be made available.

nate branches of government—as in the *Richardson* taxpayer case.<sup>393</sup> When discretionary spending, for example, only tangentially implicates constitutional norms, and any rubric of assessing that spending is highly malleable, then representative constitutionalism is a sensible choice. In that context, when all adjudicatory metrics are equally unsatisfactory, it may make sense to abstain and allow coordinate branches to exercise their discretionary functions without an unprincipled mediation from the judiciary.

However, the constitutional questions that arise in the context of people's provisions like the Emoluments Clause do not center upon the discretionary functions of coordinate branches. Instead, emoluments controversies center on questions about the character of the government itself—questions, for example, about the boundaries of government endorsement of religion or the scope of an officer's duty of loyalty to the people.<sup>394</sup> Given the content of these specific questions, there is no reason to believe that representative bodies are especially competent to address them or that judicial abstention in this specific context would support separation-of-powers values. In fact, in the context of enforcing people's provisions, direct constitutionalism is the better mechanism for safeguarding separation-of-powers values. These ideas are further explored below.

### 3. The Role of the People in Enforcing the People's Provisions

The fact that the Emolument Clause is silent on the matter of enforcement does not preclude the possibility that collective action (e.g., an impeachment action) is a perfectly plausible mechanism for enforcement of the Clause.<sup>395</sup> 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 some 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.<sup>396</sup> This assumption depends upon a specific—but unjustified—understanding of the relationship between the rights secured by the Constitution and the 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

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393 See *United States v. Richardson*, 418 U.S. 166, 189 (1974) (Powell, J., concurring).

394 See Teachout, *supra* note 1, at 361, 366.

395 Cf. *EISEN ET AL.*, *supra* note 1, at 22 (“[A]t least one prominent leader in the [constitutional] ratification process saw violations of [the Emoluments] Clause as grounds for impeachment.”).

396 See, e.g., Adler, *supra* note 104.

unduly attenuated understanding of the role of “the People” in the development of constitutional norms.<sup>397</sup>

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.<sup>398</sup> 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.<sup>399</sup> While the executive, legislative, and judicial branches of the federal government are each allocated unique enforcement powers within the Supreme Court’s 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 almost exclusively through the behavior of democratically elected representatives.<sup>400</sup>

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.<sup>401</sup> 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

397 See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 208 (2004) (criticizing the subordinate role assigned to the people in developing constitutional norms despite the fact that “[t]he Constitution was written against a background of popular constitutionalism”).

398 See *id.* at 7 (describing the modern trend to reserve constitutional interpretation for “elite to handle, subject to paramount supervision from the U.S. Supreme Court”).

399 See, e.g., St. George Tucker, *Of Sovereignty and Legislature*, in 1 BLACKSTONE’S COMMENTARIES app. at 3, 4 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) (“[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.” (emphasis omitted)), reprinted in ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES* 18, 19 (Liberty Fund 1999).

400 See, e.g., *United States v. Richardson*, 418 U.S. 166, 179 (1974) (describing the political process as the appropriate mechanism for ordinary citizens to demand enforcement of constitutional norms against the political branches).

401 See Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 675 (“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 also Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 140 (2001) (“Everyone, including everyone in Congress, agrees that the Constitution’s delegations have limits. The question has always been *deciding who should say what these limits are.*” (emphasis added)).

norms.<sup>402</sup> However, even those advocating popular constitutionalism have largely imagined the role of the people to be mediated by elected representatives.<sup>403</sup>

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-powers analysis for *direct* action by *individual* people to enforce—and thereby develop—constitutional norms through the judicial process.

The capacity for individual citizens to frame constitutional questions is especially compelling when a constitutional violation affects all the people in the same way. When a people’s provision is violated, all of the people are simultaneously and equally victimized. No individual is harmed more than another. In that context, mediating constitutional norms through a representative body makes sense only if that representative body were somehow able to approximate an absolutely perfect proxy for the will of each of the people—a proxy that is somehow inexplicably superior to the direct exercise of the power to enforce the Clause by individual citizens.

Representative constitutionalism, however, falls far short of that ideal. Actions undertaken by representative bodies are, of course, not coterminous with the will of each of the people.<sup>404</sup> It is axiomatic to state that actions by representative bodies fail to perfectly reflect the will of each of the people. Minimally, actions by representative bodies are, obviously, a *representative* rather than a direct democratic phenomenon.<sup>405</sup> Actions by representative bodies are instead the result of complex processes of mediation and consensus in which some views prevail and others do not.<sup>406</sup> Further, many people who are undoubtedly part of “the People” for the purpose of constitutional

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402 See, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 180–81 (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).

403 See KRAMER, *supra* note 397, at 7 (“[I]t 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.”); TUSHNET, *supra* note 402, at 186 (“Populist constitutional law returns constitutional law to the people, acting through politics.”).

404 See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003) (“[T]he precise lines drawn by any statute may reflect unrecorded compromises among interest groups, unknowable strategic behavior, or even an implicit legislative decision to forgo costly bargaining over greater textual precision.”).

405 By way of contrast, a ballot referendum represents a closer approximation of a direct democratic phenomenon than an action by Congress, yet even a ballot referendum serves as an imperfect proxy for the will of the people due to disenfranchisement and low voter participation, among other problems.

406 Manning, *supra* note 404, at 2390 (describing the legislative process as “complex” and “opaque”).

protections are excluded (by law or by circumstance) from the electoral process. Children, prisoners, and noncitizen residents, for example, all have a stake equal in safeguarding the United States from potentially treacherous foreign influence, yet none of these individuals are able to directly influence the composition of Congress.

Thus, as a conceptual matter, it is both facile and inaccurate to assume—as a preference for representative constitutionalism in this context must—that action or inaction by Congress to enforce the Emoluments Clause represents a safeguarding of constitutional values that is commensurate to or reflective of the will of the people themselves.

Similarly, as a pragmatic matter, there is ample reason to conclude that representative constitutionalism is particularly poorly suited for safeguarding the constitutional values implicated by the Emoluments Clause in particular. A consideration of that concern follows.

### C. *Direct Constitutionalism and Fiduciary Injury*

In addressing the novel question of standing in the emoluments context, the Court will face the three options previously discussed: (1) a broad, *qui tam*-like grant of standing; (2) the preclusion of private standing and reliance instead on Congress to enforce the Clause; or (3) a grant of standing exclusively to attenuated collateral injuries. In assessing these options, the Court may consider whether there exists an emoluments-specific reason to prefer representative constitutionalism in this novel context. An emoluments-specific preference for representative constitutionalism could conceivably be based on one of the following premises: (1) the Constitution itself—either structurally, expressly, or in light of the Framers’ intent—requires collective rather than individual enforcement of the Clause; or (2) collective action is pragmatically better suited to safeguard the fiduciary duty enforced by the Clause.

With respect to the first premise, the Clause does not express a preference for collective action in the context of Emoluments enforcement. Instead, the Clause is silent on the matter of enforcement. William Rawle, for example, writing in 1825, noted that the lack of an enforcement provision was the great weakness of the Emoluments Clause.<sup>407</sup>

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.<sup>408</sup> It does not, for example, state that violation of the Clause is an impeachable offence, or a

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407 See RAWLE, *supra* note 21, at 116 (“[T]he clause in the text is defective in not providing a specific penalty for a breach of it.”)

408 See U.S. CONST. art. I, § 9, cl. 8.

“high crime” or “misdemeanor,” which might signal enforcement of the Clause exclusively through the political process.<sup>409</sup>

The history of the Clause likewise fails to support an exclusively collective (rather than individual) remedy for its violation.<sup>410</sup> 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.<sup>411</sup> 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.

Neither the text of the Clause nor its history suggests or requires that collective action through elected representatives (i.e., impeachment) is the exclusive (or even preferred) mechanism for enforcing the Clause. We are left then with the premise that collective action is pragmatically better suited to enforce the fiduciary duty at issue.

Yet, as a pragmatic matter, direct constitutionalism is better suited to safeguard the fiduciary duty embedded in the Emoluments Clause. Recall the discussion presented in Section I.B about the duty of loyalty imposed by the Emoluments Clause as an analogue to a CEO’s duty of loyalty to a corporation. In that context, the agency law makes the fullest panoply of legal mechanisms available to enforce the fiduciary duty.<sup>412</sup> Individual shareholders are empowered to directly sue to enforce the duty.<sup>413</sup> Agency law could be more circumspect in conferring standing in this context, allowing, for example, the duty of loyalty to be enforced exclusively by action by the board of directors—a type of representative rather than direct enforcement of the duty. However, the broader grant of standing is justified in light of the seriousness the threat of a disloyal leader poses to the existence and well-being of the company.<sup>414</sup> Moreover, it is plausible that members of the board of directors may have incentive not to stop the disloyalty due to countervailing self-interested concerns.<sup>415</sup> This classic agency problem is resolved in the

409 Cf. 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.”).

410 See Teachout, *supra* note 1, at 366.

411 *Id.*

412 See Myers, *supra* note 92, at 474–75 (“The threat of a fiduciary suit can deter management misconduct, and this deterrence rationale is regarded as the chief justification for shareholder suits.” (footnote omitted)).

413 DeMott, *supra* note 89, at 920.

414 See *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 996 (2d Cir. 1983) (“[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.’” (alterations and omissions in original) (quoting *Diamond v. Oreamuno*, 248 N.E.2d 910, 912 (N.Y. 1969))).

415 Myers, *supra* note 92, at 474–75.

context of agency law by allowing shareholders to directly ask courts to decide whether the CEO has violated his fiduciary duty.<sup>416</sup>

The same pragmatic reasoning supports direct constitutionalism in the context of an Emoluments Clause violation. The classic agency problem presented by a potentially conflicted board of directors<sup>417</sup> exists with equal (if not much greater) force in the context of Congress. There are innumerable reasons why Congress may be ill equipped to safeguard the country from the looming threat of a disloyal President. Members of Congress may, for example, be constrained from acting to enforce the Clause by political conflicts of interest, unclear hands, or a free-rider problem.<sup>418</sup>

This classic agency problem is best resolved as it is in the context of other fiduciary duties: by a broad conferral of standing.<sup>419</sup> In light of the seriousness of the risk to the well-being of the United States that is posed by a disloyal federal officer, allowing a kind of *qui tam* standing (similar to the conferral of standing in the Establishment Clause context) is the appropriate way to safeguard the important constitutional values at stake in the emoluments context.

A primary-injury model of constitutional standing provides a coherent and justifiable means of conceptualizing standing across constitutional contexts. Moreover, in addition to providing conceptual coherence to a doctrinal area which is notoriously inconsistent, a primary-injury model safeguards separation-of-powers values by focusing attention on the constitutional promise at issue rather than the causal contrails of collateral injuries.<sup>420</sup> A primary-injury model fosters the optimum degree of judicial restraint by only militating in favor of judicial intervention when the constitutional promise itself requires it.

Yet, despite representing a significant shift in thinking about constitutional injuries, a primary-injury model of constitutional standing would not represent a sea change in standing outcomes. A brief consideration follows of what might—and might not—change in the context of a primary-injury model of constitutional standing.

#### IV. A PRIMARY-INJURY MODEL OF CONSTITUTIONAL STANDING

Adoption of a primary-injury model of constitutional standing embodies a substantial reconceptualization of constitutional injury, yet it would likely

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416 See DeMott, *supra* note 89, at 920.

417 Garten, *supra* note 95, at 588 (“Since the preferences of managers and shareholders diverge, a classic agency problem develops.”).

418 See David Orentlicher, *Conflicts of Interest and the Constitution*, 59 WASH. & LEE L. REV. 713, 762–65 (2002) (providing examples of various conflicts of interest that might motivate congressional action)

419 See DeMott, *supra* note 89, at 920.

420 See Laura A. Cisneros, *Standing Doctrine, Judicial Technique, and the Gradual Shift from Rights-Based Constitutionalism to Executive-Centered Constitutionalism*, 59 CASE W. RES. L. REV. 1089, 1093 (2009) (describing standing doctrine as “more than three decades of tortured constitutional discourse”).

only represent a modest alteration of existing standing outcomes. In the context of individual-rights provisions, for example, a primary-injury model would represent very little (if any) change in standing outcomes, as the Court has long tacitly embraced a primary-injury model in that context.<sup>421</sup>

In the context of political-entity provisions, a primary-injury model of constitutional standing would focus attention on the underlying constitutional promise and invite inquiry into the content of that promise. In this context, a primary-injury model is not likely to upset many existing standing determinations, although a primary-injury model may, on some occasions, remove standing from collaterally injured citizen-plaintiffs in favor of primarily injured political entities, depending on the resolution of antecedent questions about the content of constitutional provisions.<sup>422</sup>

For example, in 1996, Congress passed the Line Item Veto Act, and the day after it went into effect six members of Congress (who had voted against the Act) filed a suit<sup>423</sup> alleging that the Act violated the Presentment Clause.<sup>424</sup> The Supreme Court applied the CAP rule to deny standing, finding that the Congress members had failed to allege a sufficiently concrete and particularized harm.<sup>425</sup> When the President later used the line-item veto to remove a category of liability protections from a budget bill, the Supreme Court found that individual plaintiffs who lost the benefit of those protections had standing to sue under the theory that the line-item veto violated the Presentment Clause.<sup>426</sup>

Thus, in the Presentment Clause context the Court found the operative question to be whether the plaintiffs alleged a concrete and particularized injury.<sup>427</sup> However, under a primary-injury model of constitutional standing, the operative question would center on whether the Presentment Clause has promised that the plaintiff would not be injured in the manner that she has been injured. In this way, focus is directed at the content of the constitutional promise itself. One way of framing the question is whether the Presentment Clause promises that plaintiffs would not lose their liability protection in the manner that they did. The Presentment Clause does make

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421 *Rakas v. Illinois*, 439 U.S. 128, 138–39 (1978) (standing in the context of the Fourth Amendment is coterminous with the substantive guarantees of the Fourth Amendment itself); *see also supra* subsection II.B.2.

422 The converse would not occur because if a primary injury does not lie with a political entity, the provision is not a political-entity provision. It is instead a people's provision or an individual-rights provision.

423 *Raines v. Byrd*, 521 U.S. 811, 814–16 (1997).

424 U.S. CONST. art. I, § 7, cl. 2; *id.*

425 *Raines*, 521 U.S. at 828 (“There would be nothing irrational about a system that granted standing in [cases like the one at bar]; some European constitutional courts operate under one or another variant of such a regime. . . . But . . . [o]ur regime contemplates a more restricted role for Article III courts, well expressed by Justice Powell in his concurring opinion in *United States v. Richardson* . . .”).

426 *Clinton v. City of New York*, 524 U.S. 417, 421–23 (1998). The Court found that there were other, similar bases for standing as well. *Id.* at 430–31.

427 *Raines*, 521 U.S. at 820, 830.

a promise to the plaintiffs who lost their liability protections (along with all the people) to safeguard certain democratic values. In particular, the Presentment Clause promises that no law will be enacted in the absence of bicameralism and presentment (which the Court found absent in the context of the line-item veto).<sup>428</sup> The injury that would seem to mirror that promise is an undifferentiated character-of-government harm—the kind of harm that attends every constitutional violation. While it is possible that the COG harm is the primary harm (in which case the Presentment Clause is a people’s provision), the Clause also makes a more specific set of promises.

The more specific set of promises made by the Presentment Clause is directed to the President and the Congress, that each will have an irreducible role to play in the enactment of legislation.<sup>429</sup> A plausible rendering of the primary harm under the Presentment Clause then is harm that the President or Congress suffers when they are denied their constitutionally committed role in the legislative process.<sup>430</sup> In this light, a primary-injury model of constitutional standing might confer standing to the members of Congress who object to the line-item veto while withholding it from the members of the public who were collaterally injured by its application.<sup>431</sup> Yet because a primary-injury model is generally consistent with the Court’s constitutional standing sensibilities, reversals such as these would likely constitute the exception rather than the rule.

In the context of a people’s provision, such as the Emoluments Clause, a primary-injury model would confer a *qui tam* standing to those among the people who wish to challenge an alleged violation. In applying a primary-injury model in the Emoluments Clause context, a court would first identify the fiduciary injury that is the primary injury following from a violation of the Clause. Having identified the primary injury and determining it to be an undifferentiated injury, a court would next do as the Supreme Court has often done in the Establishment Clause context and assume, without analysis, that standing exists to challenge an alleged emoluments violation.

## CONCLUSION

To conclude, requiring plaintiffs to jump through the hoop of “concrete” and “particularized” injury in the context of an Emoluments Clause lawsuit serves no substantive purpose. The CAP rule fails to provide meaningful quantitative or qualitative limits on constitutional standing, and it likewise fails to advance separation-of-powers priorities. Further, requiring

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428 See U.S. CONST. art. I, § 7, cl. 2; *Clinton*, 524 U.S. at 448–49.

429 U.S. CONST. art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . .”).

430 See *id.*

431 See *Raines*, 521 U.S. at 814; see also *id.* at 831–32 (Souter, J., concurring in judgment) (stating that “simply claiming harm to the [ ] interest in having government abide by the Constitution, which would be shared to the same extent by the public at large,” would “provide no basis for suit”).

collaterally injured token plaintiffs demeans the constitutional value that the Emoluments Clause represents: the value of fidelity to the people of the United States as against foreign influence.

A preference for representative constitutionalism in the context of an emoluments challenge is also misplaced. Channeling emoluments cases toward the political branches runs the risk that Congress will act in its own self-interest rather than exclusively in the interest of the people or of the republic. There is also much reason to doubt that Congress is more competent than the judiciary to resolve questions about the nature of the fiduciary duty that lies at the heart of the Emoluments Clause. More importantly, the risk posed by a disloyal federal officer is so serious that all avenues for enforcing the duty of loyalty imposed by the Emoluments Clause should be made available. Direct, rather than representative, constitutionalism would prioritize the primary fiduciary injury that follows from an emoluments violation while simultaneously maximizing the likelihood that a violation will be redressed.

A uniform primary-injury model of constitutional standing would provide a true qualitative limit on standing in constitutional cases. It would also bring coherence and parsimony to a doctrinal area that is very much in need of it. A primary-injury model would avoid the unjustifiable and inconsistent standing outcomes that necessarily accompany the application of the CAP rule, particularly in the context of undifferentiated primary injuries. A primary-injury model would likewise result in a direct, rather than representative, approach to undifferentiated constitutional injuries. As such, a primary-injury model would afford the people a direct role in the development of important constitutional values.

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.