

# Emoluments, Zones of Interests, and Political Questions: A Cautionary Tale

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The “political question” doctrine is hotly contested in 2018, and perhaps on the verge of its biggest reversal since the *Baker v. Carr* revolution. Later this year, we will learn if the Supreme Court in *Whitford v. Gill* will regard extreme partisan gerrymandering as a violation of the First and Fourteenth Amendments, rather than as a nonjusticiable political question.<sup>1</sup> It turns out that another high-profile case in the lower courts illuminates the use and misuse of the political question doctrine. The Emoluments cases, and in particular, the Southern District of New York’s dismissal of *CREW v. Trump*,<sup>2</sup> offers a cautionary tale about how the political question doctrine is too often an unconsciously tempting escape for judges facing challenging legal questions.

The Southern District of New York dismissed the first Emoluments case, *CREW v. Trump*. He avoided reaching the merits of the emoluments claims by finding that the plaintiffs do not have standing to bring the suit.<sup>3</sup> While we disagree with the court on his application of competitor standing, it is a complicated and close question. The problem is that this decision contains many serious errors, so that it seems that these close questions did not receive adequate attention. Two of the court’s “prudential standing”

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1. *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *hr’g granted*, 137 S. Ct. 2268 (2017) (No. 16-1161).

2. *CREW v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017), *dismissed on Dec. 21, 2017*.

3. *Id.* at 179.

holdings, on the “zone of interests” test and on the political question doctrine, are like the proverbial thirteenth and fourteenth strokes of the clock. To paraphrase the fictional case of *Rex v. Haddock* (and perhaps Mark Twain, and George Orwell’s *1984*), those strokes are not only incorrect of themselves, but cast doubt on the preceding twelve.

First, we note that we are two of five coauthors of a legal historians’ amicus brief supporting the plaintiffs.<sup>4</sup> Our brief does not discuss standing directly, but it does relate to the zone of interests of the Emoluments clauses. One reason we helped write this brief is that we thought that some of the plaintiffs had a strong claim for standing (particularly ROC United, the association of restaurants who are disadvantaged competitively by Trump’s use of office to draw foreign and domestic state business).

In this Essay, we will briefly describe the Emoluments cases filed against Trump. Then we will turn to the Southern District’s “zone of interests” argument, which reveals glaring problems. These errors cast a shadow on the “political question” analysis, which also contains basic errors. There are certainly times when it is appropriate for courts to invoke the political question doctrine. However, this episode is a reminder for judges to slow down and reflect on whether there may be an intuitively appealing resolution, lest claiming political question is just dodging a tough constitutional issue.

## I. The Emoluments Cases

In *CREW v. Trump*, the plaintiffs allege that President Trump is accepting payments and benefits from foreign governments, the federal government, and the states in violation of the two Emoluments Clauses:

[N]o 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>5</sup>

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.<sup>6</sup>

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4. See Brief for Certain Legal Historians as Amici Curiae Supporting Plaintiffs, *CREW v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017).

5. U.S. CONST. art. I, § 9, cl. 8.

6. U.S. CONST. art. II, § 1, cl. 7.

There are currently three separate Emoluments cases with various types of plaintiffs: an anticorruption good-government nonprofit organization (Citizens for Responsibility and Ethics in Washington (“CREW”)); the attorneys general of Maryland and D.C.; two-hundred members of Congress; and a set of private competitors. This Essay will focus on the competitors. They relied on Supreme Court and Second Circuit precedents, establishing that private businesses have standing to challenge government acts that give an impermissible advantage to competing businesses. If plaintiffs “personally compete[] in the same arena” as the entities that received the illegal advantage, they have “competitor standing.”<sup>7</sup>

For example, Jill Phaneuf works for a hospitality company, booking embassy events, and foreign governments’ political functions at two D.C. hotels that compete with the new Trump International Hotel. She is paid per booking. The Trump International Hotel has hired a “director of diplomatic sales,” who performs the equivalent of Phaneuf’s job, so that the two are in direct competition. Leah Litman has named this Trump employee an “emolument granter.”<sup>8</sup> Eric Goode owns a luxury New York hotel. ROC United is an organization of restaurant employees and owners competing with Trump Tower restaurants. While there were questions about the specific degree of competition experienced by each private competitor, the threshold for factual allegations was low when the DOJ filed its motion to dismiss.

Nevertheless, the district court dismissed the case on standing grounds without much analysis. First, he wrote that it is “wholly speculative” whether plaintiffs have been injured by losing foreign and domestic government business to Trump hotels and restaurants. Second, he doubted whether the court could redress those injuries. Third, he concluded that the competitor claims by the plaintiffs did not fall within the “zone of interests” of the clauses. Fourth, the Foreign Emoluments Clause is a nonjusticiable political question. Fifth, because Congress has not acted, the Foreign Emoluments issue is not yet ripe for judicial resolution. It is not clear how the Foreign Emoluments clause could both be a nonjusticiable political question and also a justiciable question awaiting ripeness. Other commentators have already addressed the shortcomings of the opinion.<sup>9</sup> In

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7. See, e.g., *In re U.S. Catholic Conference*, 885 F.2d 1020, 1029 (2d Cir. 1989).

8. Leah Litman, *Standing Up for Standing in CREW v. Trump*, TAKE CARE BLOG (Apr. 26, 2017), <https://takecareblog.com/blog/standing-up-for-standing-in-crew-v-trump>.

9. Leah Litman & Daniel Hemel, *On the Ripeness of Potted Plants and Other Non Sequiturs*, TAKE CARE BLOG (Dec. 22, 2017), <https://takecareblog.com/blog/on-the-ripeness-of-potted-plants-and-other-non-sequiturs>; Michael Dorf, *District Court Tries Too Hard to Duck Emoluments Clause Case*, DORF ON LAW (Dec. 27, 2017), <http://www.dorfonlaw.org/2017/12/district-court-tries-too-hard-to-duck.html>.

this Essay, we will focus on the zone of interest and political question issues, two “prudential standing” issues.

## II. The “Zone of Interests” Analysis

Article III standing depends on injury, traceability, and redressability. On top of those questions, “prudential standing” can raise questions about whether the plaintiffs’ claims are within the zone of interests of the law and whether the claims are justiciable. The district court found that the plaintiffs’ competitive disadvantage is not within “the zone of interests” of the two Emoluments Clauses and that they are not covered by the purposes envisioned by the Framers in drafting them. On the merits, we think the court is incorrect. Our amicus brief emphasizes that the Framers focused intensely on the problem of corruption, and they explained that one of the chief purposes of the Emoluments Clauses was to guard against corruption (see, e.g., Edmund Randolph and Alexander Hamilton). One of the primary and obvious concerns about corruption is that it creates an “unlevel playing field,” “stacking the deck” in favor of some interests—and some businesses—over others. We will discuss this point more below. But more glaring is the problem in the district court’s legal framing of this argument. It gets the precedents backwards.

For the sake of clarity, we are pasting the court’s introduction of its “zone of interests” analysis. Please note that it is thin, and it relies almost exclusively on *Wyoming v. Oklahoma*, a 1992 Supreme Court decision:

### The Hospitality Plaintiffs’ Competitive Injuries Do Not Fall Within the Zone of Interests of the Emoluments Clauses

The zone of interests doctrine demonstrates that the Hospitality Plaintiffs are not the right parties to bring a claim under the Emoluments Clauses. Beyond the Article III requirements, “the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982). “One of these is the requirement that the plaintiff establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the zone of interests sought to be protected by the statut[e] [or constitutional guarantee] whose violation forms the legal basis for his complaint.” *Wyoming v. Oklahoma*, 502 U.S. 437, 468–69 (1992) (emphases in original) (citation and quotation marks omitted). While it is true that the “zone of interests” test first appeared in cases brought under the Administrative Procedure Act, 5 U.S.C. § 702, see *Data Processing*, 397 U.S. at 153, the Supreme Court has “made clear that the same test similarly applies to claims under the

Constitution in general[.]” *Wyoming*, 502 U.S. at 469. In fact, the Supreme Court has “indicated that it is *more* strictly applied when a plaintiff is proceeding under a constitutional . . . provision instead of the generous review provisions of the APA.” *Id.* (emphasis in original) (citation and quotation marks omitted).<sup>10</sup>

The court cited *Valley Forge Christian College* once for the general proposition on prudential standing.<sup>11</sup> That decision mentions a “zone of interests” test once, and only as a matter of overview in dicta, and never returned to explain it or apply it. So, the district court relied entirely on *Wyoming v. Oklahoma* as the precedent for his analysis, citing it three times.<sup>12</sup> But here is the surprise: It was relying only on the dissent by Justice Scalia in *Wyoming*.<sup>13</sup> Even more surprising is that the district court never acknowledged that it was citing a dissent, rather than a majority opinion. This is a very basic but very important citation error because there is an obvious problem whenever one cites a dissent: The majority may have actually rejected that argument. A lawyer, judge, or scholar needs to alert the reader of that potential problem. And most troubling is that the district court twice claimed that it was quoting “the Supreme Court” in *Wyoming*, but it was not. It was quoting Justice Scalia’s dissent. As of the publication of this Essay, we can find no record of the Southern District correcting these errors. To its credit, when the Department of Justice (“DOJ”) cited Scalia’s *Wyoming* dissent in its brief, it clearly signaled it was a dissent with the appropriate parenthetical: (Scalia, J., dissenting).

The citation errors are part of a more serious substantive problem. It turns out that six Justices (White, Blackmun, Stevens, O’Connor, Kennedy, and Souter) rejected Justice Scalia’s conclusion, which only persuaded Chief Justice Rehnquist and Justice Thomas. The basic facts of *Wyoming*, a dormant commerce clause case, are that Oklahoma required its utilities to burn mixtures containing at least ten percent Oklahoma-mined coal. The state of Wyoming does not mine coal but alleges that the Oklahoma statute reduced the demand for coal mined from Wyoming, which reduces the amount of taxes paid to the state of Wyoming. This seems like a relatively marginal and attenuated injury, but six Justices ruled that Wyoming had standing anyway.

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10. *CREW v. Trump*, 276 F. Supp. 3d 174, 187 (S.D.N.Y. 2017).

11. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982).

12. *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

13. *Id.* at 468–69 (Scalia, J., dissenting).

The majority did not explicitly reject Scalia's "zone of interest" analysis of Wyoming's interests and the dormant commerce clause's purposes. But it implicitly addressed this question with a broad interpretation of the Commerce Clause's federalism concerns: "As such, Wyoming's challenge under the Commerce Clause precisely 'implicates serious and important concerns of federalism fully in accord with the purposes and reach of our original jurisdiction.'"<sup>14</sup> So, in addition to the significant mistake of relying on a dissent without acknowledging it, an even bigger problem for the Southern District's decision is that *Wyoming* actually rules the opposite way on the fundamental point upon which it was relying.

The district court did not cite the one precedent the DOJ offered that seemed to offer some support for a "zone of interest" requirement for constitutional claims. Though the DOJ did not offer a Supreme Court precedent actually applying the test to a constitutional claim, it offered a Second Circuit opinion, *Center for Reproductive Law & Policy v. Bush*, in which an American non-governmental organization ("NGO") is asserting the due process rights of foreign NGOs, not its own rights.<sup>15</sup> The problem with this case is the court explains that its "zone of interest" analysis is "coupled with the rule against asserting the rights of a third party," and this foreign-third-party problem drives the zone of interest analysis:

Plaintiffs' due process claim is based on their allegation that the challenged restrictions fail to give clear notice of what political speech, public education, and law reform activities they prohibit and that they encourage arbitrary and discriminatory enforcement. . . . It is not the plaintiffs, however, who are allegedly left uncertain of their rights by unconstitutionally vague language in a government provision; it is the foreign NGOs who are allegedly left in this position. Plaintiffs' harm is derivative of this due process-type harm, and their alleged injury (albeit an unactionable one) concerns First Amendment interests. Plaintiffs' allegation, simply put, is that the vague language of the Standard Clause causes the foreign NGOs to be overly cautious in avoiding interaction with plaintiffs, which in turn harms plaintiffs' speech and association interests. On appeal, plaintiffs expressly acknowledge that "[t]his vagueness claim is premised on the [restrictions'] chilling effect on protected speech and association." As plaintiffs do not assert a harm to their own interest in receiving due process of law, this is precisely the sort of claim that the prudential standing doctrine is designed to foreclose. Plaintiffs

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14. *Wyoming*, 502 U.S. at 451 (citing *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981)).

15. *Ctr. for Reproductive Law & Policy v. Bush*, 304 F.3d 183 (2002).

cannot make their First Amendment claims actionable merely by attaching them to a third party's due process interests. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 809 (D.C. Cir.1987) (explaining that because due process rights "do not protect a relationship" between a third party and a litigant, a plaintiff "could never have standing to challenge a statute solely on the ground that it failed to provide due process to third parties not before the court"). Plaintiffs' due process claim is therefore dismissed for lack of prudential standing.<sup>16</sup>

Perhaps the Southern District understood how distinguishable this foreign third-party problem was from the domestic first-party claims in the Emoluments cases, and wisely did not rely upon it.

Moreover, *CREW* and the amicus briefs raised many good arguments and precedents for private plaintiffs to invoke structural constitutional clauses, when the interest of the plaintiff is not the obvious purpose of the clause. *CREW* cited *Bond v. United States* (Tenth Amendment federalism interest), and *Immigration & Naturalization Service v. Chadha* (the famous legislative veto case, in which a noncitizen facing removal raised bicameralism and presentment concerns).<sup>17</sup> An amicus brief by administrative law scholars (including Litman and Hemel) cited *Free Enterprise v. PCAOB*, *Plaut v. Spendthrift Farm*, and *Northern Pipeline v. Marathon Pipeline*.<sup>18</sup> There may be good reasons to distinguish all of these precedents, but this opinion dismissing *CREW*'s case did not even try.

Most significantly in the long run, all of the plaintiffs in this case raise claims that do fall under the Emoluments Clauses' zone of interests: anti-corruption. Edmund Randolph, delegate to the Constitutional Convention and the first U.S. Attorney General, explained the Foreign Emoluments Clause in the Virginia ratifying convention as such: "This restriction is provided to prevent corruption."<sup>19</sup> In Federalist No. 73, Hamilton emphasized that the Domestic Emoluments Clause was to guard against corruption: Congress and the states "can neither weaken [the President's] fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice."<sup>20</sup> Our legal historians' amicus brief put these clauses in a larger context of the Founders' anticorruption principles. And historians understand that one of the reasons Americans fought a revolution

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16. *Ctr. for Reproductive Law & Policy*, 304 F.3d at 196.

17. *Bond v. United States*, 564 U.S. 211, 223 (2011); *INS v. Chadha*, 462 U.S. 919 (1983).

18. *Free Enterprise v. PCAOB*, 561 U.S. 477 (2010); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); and *N. Pipeline v. Marathon Pipeline*, 458 U.S. 50 (1982).

19. 3 ELLIOT'S DEBATES 465-66 (1836).

20. THE FEDERALIST NO. 73 (Alexander Hamilton).

was because corrupt British policies created an unfair playing field in commerce and business competition.

The United States emerged as a nation at a moment when transatlantic political thought was deeply concerned about the intersection of power and governance. This anxiety chiefly manifested during debates about the susceptibility of sovereigns and their subordinate officers to wielding their official powers to enlarge their power and fortunes on the one hand, and on the other hand, being ensnared by the nefarious designs of others. Thus, the term “corruption,” and its numerous intellectual valences, became the crux of eighteenth century Anglo-American political thought.

Intellectual historians in the mid-to-late twentieth century argued that this broad concern with corruption owed to the influence of radical Whig thought in early eighteenth century England. Bernard Bailyn’s *Ideological Origins of the American Revolution*, for instance, argued that the English Civil War provoked a radical Whig opposition that positioned itself as the “country” faction to confront a power-hungry “court” cabal.<sup>21</sup> These radical Whigs would become most influential in the 1720s and 1730s due to the leadership of men such as Thomas Gordon and John Trenchard. According to Bailyn, Trenchard and Gordon believed that assertive ministerial officers such as Robert Walpole used the trappings of power such as titles and estates to seduce legislators to acquiesce to a political agenda that featured growing centralization of government authority. Corruption was thus both the act of offering and accepting inducements and the resulting, if more abstract, disruption of the natural balance of authority between Parliament and the executive.

A precipitant of the Whig concern about corruption was the emergence of the modern English state, replete with new bureaus and officers to tax, regulate and channel commerce. Under the Stuart monarchs and through the arrival of William and Mary, a “financial revolution” had centralized the

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21. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 48–60 (Harvard University Press 1967); see also J. G. A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 401–505 (1975); M. M. Goldsmith, *Public Virtue and Private Vices: Bernard Mandeville and English Political Ideologies in the Early Eighteenth Century*, 9 *EIGHTEENTH-CENTURY STUD.* 477–510 (Summer 1976); Jessie R. Goodale, *J. G. A. Pocock’s Neo-Harringtonians: A Reconsideration*, 1 *HIST. OF POL. THOUGHT* 237–59 (Summer 1980); Thomas Horne, *Politics in a Corruption Society: William Arnall’s Defense of Robert Walpole*, 41 *J. OF THE HIST. OF IDEAS* 601, 601–14 (Oct.-Dec. 1980); MICHAEL P. ZUCKERT, *NATURAL RIGHTS AND THE NEW REPUBLICANISM* 180–81 (Princeton University Press 1994); Simon Targett, *Government and Ideology During the Age of Whig Supremacy: The Political Argument of Sir Robert Walpole’s Newspaper Propagandists*, 37 *HISTORICAL J.* 289, 289–317 (June 1994); Robert Sparling, *Political Corruption and the Concept of Dependence in Republican Thought*, 41 *POL. THEORY* 618, 618–47 (Aug. 2013).



English state's ability to borrow and access finance capital.<sup>22</sup> Under the auspices of the Treasury, the Board of Trade, and other organs of the Crown-in-Parliament, officeholders spanned the British Isles and extended British Empire to collect taxes in order to strengthen creditworthiness and the government's power to borrow.<sup>23</sup> Mercantilism, the economic theory of channeling colonial commerce through and for the benefit of the metropole, also required its share of manpower. This centralization of the English state only heightened fears that the government would use the lure of offices and title to subvert traditional concepts of English liberty.

This Whig fear of corruption would find its way into the British colonies in North America and become a central structure of colonial political thought before and especially during the American Revolution. According to Gordon S. Wood's riff on Bailyn's influential work, corruption was among other "inflammatory phrases" that became the stuff of colonial politics and precipitants of the American Revolution. Writing of American politics in these years, Wood explains, "one cannot but be struck by the predominant characteristics of fear and frenzy, the exaggerations and the enthusiasm," and finally, "the general sense of social corruption and disorder" flowing from the metropole.<sup>24</sup> Corruption seemed to be everywhere by the 1760s: sabotaging the structure of politics, stacking the decks of mercantilism, and coloring the pages of British propaganda.<sup>25</sup>

Puritanism was of the cultural frameworks through which English-speaking American colonists made sense of the Whig critique of corruption. As Edmund Morgan explained, the Protestant Ethic and all it entailed—frugality and public conscience—had become part of how Americans understood their political process by the eighteenth century. The Puritan Ethic thus almost predetermined a colonial critique of corruption. For those so taken by the ethic, "the human capacity for corruption had transformed the balanced government of King, Lords, and Commons into a single-minded body of rulers bent on their own enrichment and heedless of the

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22. CARL WENNERLIND, *CASUALTIES OF CREDIT: THE ENGLISH FINANCIAL REVOLUTION, 1620-1720* (2011); Patrick K. O'Brien, *The Political Economy of British Taxation, 1660-1815*, 41 *ECON. HIST. REV.* 1, 1-32 (Feb. 1988); P. G. M. DICKSON, *THE FINANCIAL REVOLUTION IN ENGLAND: A STUDY IN THE DEVELOPMENT OF PUBLIC CREDIT, 1688-1756* (Routledge, 1967); JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger trans., The MIT Press, 1962).

23. JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY, AND THE ENGLISH STATE, 1688-1783* (1989); MICHAEL J. BRADDICK, *THE NERVES OF THE STATE: TAXATION AND THE FINANCING OF THE ENGLISH STATE, 1558-1714* (1996).

24. Gordon S. Wood, *Rhetoric and Reality in the American Revolution*, 23 *WM. & MARY Q.* 3, 25 (1966).

25. *Id.* at 21, 25, 28-29.

public good.”<sup>26</sup> This was particularly so when it came to the imperial officers who proliferated in the colonies after 1756. “To Americans bred on the values of the Puritan Ethic,” concludes Morgan, “England seemed to have fallen prey to her own opulence, and the government shared heavily in the corruption.”<sup>27</sup> The Puritan critique thus centered around the concept that the British government dispersed its officers to profit from the colonists’ good works.<sup>28</sup>

Americans perceived that the British had privileged monopolistic power of its own favored businesses, to the disadvantage of American colonial competition. The English before Empire already criticized monopolies. Lord Edward Coke wrote in 1599 that monopolies “do not conduce to the public weal.”<sup>29</sup> Americans’ colonial experience underscored this point. In the mid-seventeenth century, the English began regulating trade in the colonies. In 1651, Parliament passed the Navigation Acts for the advantage of the English at the expense of the colonies, prohibiting trade with other European powers. American merchants were angry and started organizing politically.<sup>30</sup> After colonists began to compete more directly with English businesses, the English created the Dominion of New England in 1686 to regulate and disadvantage the colonists as competitors.<sup>31</sup> Americans rose up during the Glorious Revolution to overthrow the Dominion regime.<sup>32</sup>

Even after the Glorious Revolution, the British increasingly turned to tax policy and regulation to limit the colonists’ ability to compete. Americans perceived these policies as harming their economy and their capacity to compete.<sup>33</sup> The Currency Act, Sugar Act, the Stamp Act, and the Townshend Acts each limited colonial business activity. The Colonists reacted by organizing boycotts of British goods, fighting anticompetitive regulation with anticompetition boycotts. Americans also turned to smuggling, which increased tensions with the British. These events

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26. Edmund S. Morgan, *The Puritan Ethic and the American Revolution*, 24 WM. & MARY Q. 3, 14, 15, 18 (1967).

27. *Id.* at 3, 14, 15, 18.

28. *Id.* at 3, 14, 15, 18.

29. ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 78 (2014).

30. Gary M. Walton, *The New Economic History and the Burdens of the Navigation Acts*, 24 ECON. HIST. REV. 533, 533–42 (1971); CARLA GARDINA PESTANA, *THE ENGLISH ATLANTIC IN AN AGE OF REVOLUTION: 1640-1661* 120 (2007).

31. VIOLA FLORENCE BARNES, *THE DOMINION OF NEW ENGLAND: A STUDY IN BRITISH COLONIAL POLICY* (Yale University Press 1923).

32. JOHN PALFREY, *HISTORY OF NEW ENGLAND: HISTORY OF NEW ENGLAND DURING THE STUART DYNASTY* 596 (Boston: Little, Brown, & Co. 1864).

33. JOHN C. MILLER, *ORIGINS OF THE AMERICAN REVOLUTION* 95–99 (Little, Brown, & Co. 1943).

ultimately led to the Boston Massacre of 1770.<sup>34</sup> In 1773, Parliament passed the Tea Act which similarly privileged British corporations (particularly the East India Company), and limited colonial competition—and thus followed the Boston Tea Party.<sup>35</sup> Some Anti-Federalists refused to sign the Constitution because it lacked an antimonopoly provision.<sup>36</sup> In many ways, the American revolution is a story of the British using governmental power—with corrupt self-dealing—to frustrate colonial competition.<sup>37</sup>

The Americans put the Emoluments clauses in the context of Louis XIV buying influence over the English Kings Charles II and James II during this period. In the secret Treaty of Dover of 1670, Louis XIV paid Charles II (and supplied a young French mistress) to bribe Charles to convert to Catholicism and to buy an alliance with France in an ill-advised war against the Dutch. In 1687, Louis XIV secretly paid Charles's successor, James II, for further shady allegiances.<sup>38</sup> The English had their suspicions of Catholic conspiracies, which led to the Glorious Revolution of 1688, and which in turn inspired the American Revolution and the Founding. But intriguingly, historians did not find hard evidence of the secret payments until 1771.<sup>39</sup> At the Federal Convention, Gouverneur Morris, regarded as a chief architect of the presidency, explicitly invoked this episode during the July 20, 1787, debate over impeachment:

Our Executive was not like a Magistrate having a life interest, much less like one having a hereditary interest in his office. He may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard agst it by displacing him. One would think the King of England well secured agst bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was bribed by Louis XIV.<sup>40</sup>

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34. HILLER B. ZOBEL, *THE BOSTON MASSACRE* (W.W. Norton & Co. 1996).

35. BENJAMIN L. CARP, *DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY AND THE MAKING OF AMERICA* (2010); MILLER, *supra* note 33, at 353–76.

36. TEACHOUT, *supra* note 29.

37. See Steven Calabresi & Larissa Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983 (2013); Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 42, 49–50 (1926).

38. GEORGE CLARK, *THE LATER STUARTS (1660-1714)* 86–87, 130 (2d ed. 1956); BARRY COWARD, *THE STUART AGE: 1603-1714* 262–65, 267, 274–75 (1980).

39. See J.P. KENYON, *THE HISTORY MEN. THE HISTORICAL PROFESSION IN ENGLAND SINCE THE RENAISSANCE* 67–68 (Weidenfeld and Nicolson, 2d. ed., 1993).

40. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 68–69 (Max Farrand ed., 1937).

Morris did not use the word “emolument” here, but he still offers some key background context for why the framers prohibited foreign emoluments. Moreover, two prominent early commentators on the Constitution, St. George Tucker<sup>41</sup> and William Rawle,<sup>42</sup> emphasized Charles II and the Secret Treaty of Dover as the specific background for the Foreign Emoluments Clause.

The framers understood that emoluments fed corrupt uses of power, and corrupt uses of power led to self-dealing and anticompetitive regulations. For generations, Americans have understood corruption in terms of unfair competition. And thus, it is puzzling that the district court did not see the link between these historic interests that deeply resonate today.

And then there is this sentence in the opinion, which, we must confess, we find totally confusing:

Therefore, the Hospitality Plaintiffs’ theory that the Clauses protect them from increased competition in the market for government business must be rejected, especially when (1) the Clauses offer no protection from increased competition in the market for non-government business and (2) with Congressional consent, the Constitution allows federal officials to accept foreign gifts and emoluments, regardless of its effect on competition.<sup>43</sup>

Is the court suggesting that the plaintiffs want to be protected from all competition? Their claim is that the market for foreign government business and domestic government business is unfairly skewed by unconstitutional emoluments, which creates an injury in a particular market. The plaintiffs might be disadvantaged in permissible ways by Trump’s presidency, but that does not eliminate the smaller but still concrete injury from impermissible emoluments. The plaintiffs are not seeking protection against legal nongovernment business. As for (2), Congress has not consented to these emoluments, perhaps because of their corrupt effect on competition, and moreover, President Trump will not disclose his income from foreign and

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41. 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE TO THE FEDERAL CONSTITUTION AND THE CONSTITUTION OF VIRGINIA 295–96 (1803) (“In the reign of Charles the second of England, that prince, and almost all of his officers of state were either actual pensioners of the court of France, or supposed to be under its influence, directly or indirectly, from that cause. The reign of that monarch has been accordingly proverbially disgraceful to his memory.”)

42. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 120 (Philadelphia, Philip H. Nicklin, 1829) (“[I]t is now known that in England a profligate prince [Charles II] and many of his venal courtiers were bribed into measures injurious to the nation by the gold of Louis XIV.”)

43. CREW v. Trump, 276 F. Supp. 3d 174, 188 (S.D.N.Y. 2017).

domestic state sources. Invoking what Congress might or might not do to make foreign payments legal has no bearing on the merits now of the injury. Moreover, Congress can only consent to foreign emoluments. The court's second point does not address the Domestic Clause. Readers of this opinion leave the zone of "zone of interests" more confused than when they entered.

We add one more note on the zone of interests: the court at least acknowledged a federalism interest in the clauses, which bodes well for the pending case *Maryland v. Trump* in the District Court of Maryland. Our legal historians' amicus brief emphasizes the states' federalism interests at the heart of *both* clauses.

### III. The "Political Question" Question

In *Baker*, the Supreme Court listed six characteristics of a nonjusticiable political question: (1) a "textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) a "lack of judicially discoverable and manageable standards for resolving it"; (3) the "impossibility for a court's independent resolution without expressing a lack of respect for a coordinate branch of the government"; (4) the "impossibility of deciding the issue without an initial policy decision, which is beyond the discretion of the court"; (5) an "unusual need for unquestioning adherence to a political decision already made"; or (6) the "potentiality of embarrassment from multifarious pronouncements by various departments on one question."<sup>44</sup>

There are certainly times when judges appropriately invoke the political question doctrine. The Constitution assigns the rules of impeachment and removal to each House, and "Each House may determine the Rules of its Proceedings, [and] punish its Members for disorderly Behaviour."<sup>45</sup> The district court added the Foreign Emolument clause as nonjusticiable, because it is, in its view, solely a political question: "As the explicit language of the Foreign Emoluments Clause makes clear, this is an issue committed exclusively to Congress."<sup>46</sup> Beware of the words "explicit," "clear," and "exclusively." The clause gives Congress a voice on the foreign emoluments issue, but it most certainly does not do so exclusively.

During oral argument, it was surprising that the court spent so much time on this argument, so one of us wrote up a post addressing this straining

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44. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

45. U.S. CONST. art. I, § 5, cl. 2.

46. *CREW v. Trump*, 276 F. Supp. 3d 174, 193 (S.D.N.Y. 2017).

of the Foreign Emoluments clause's text.<sup>47</sup> The court emphasized the Foreign Emoluments clause's text: "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>48</sup>

At oral argument, the court asked (we are paraphrasing here), "Why doesn't the political question doctrine apply? The clause assigns the power to Congress to consent or not. If the President is taking emoluments from foreign governments, let Congress weigh in." CREW's Deepak Gupta gave a clear answer then: "Because that approach would flip the clause on its head. The structure is a clear rule, with exceptions given to Congress. It's a ban, but Congress can create exceptions to the ban. If you say it is nonjusticiable, then you flip the script: you turn it into a broad permission to accept emoluments, unless Congress says no. That's the opposite of the text and the Framers' purpose."

The court replied: "Congress has the power to prevent emoluments if it wants to."

Gupta answered that constitutional clauses are justiciable unless they are exclusively assigned to another branch, and if there are no manageable rules. He emphasized that the DOJ (through the Office of Legal Counsel) has crafted manageable rules over many generations and many cases.

In its decision, the court first acknowledged that the DOJ never explicitly argued that the Foreign Emoluments Clause was a political question. The fact that the DOJ did not make this argument should have been a cautionary yellow flag. But the court went down this path anyway. He relied on just two Supreme Court cases, both on the particularly nettlesome gerrymandering problem: *Baker v. Carr* and *Vieth v. Jubelirer*.<sup>49</sup> Gerrymandering is the classic political question case, for which there is no constitutional text directly on point (and thus courts turn to the Fourteenth Amendment's broad Equal Protection Clause). Nevertheless, in *Baker v. Carr*, the Supreme Court rejected the political question doctrine. If the Supreme Court could tackle the politics of gerrymandering with the Fourteenth Amendment, it surely can adjudicate emoluments with Emoluments Clauses. *Vieth*, on partisan gerrymanders, presented a much

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47. Jed Shugerman, *Is the Foreign Emoluments Clause Only a "Political Question" for Congress?*, SHUGERBLOG (Oct. 20, 2017), <https://shugerblog.com/2017/10/20/is-the-foreign-emoluments-clause-only-a-political-question-for-congress/>. See also Joshua Matz, *Will Trump's Lawyers Rewrite and Invert the Emoluments Clause?*, TAKE CARE BLOG, (Apr. 18, 2017) <https://takecareblog.com/blog/will-trump-s-lawyers-rewrite-and-invert-the-emoluments-clause>.

48. CREW v. Trump, 276 F. Supp. 3d 174, 181 (S.D.N.Y. 2017).

49. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

thornier problem in the political thicket, and the Supreme Court may be on the verge of clearing through that thicket this term. The Foreign Emoluments Clause isn't in this political thicket at all.

The court emphasized the first factor under *Baker v. Carr*'s justiciability test: "[A] case may be dismissed on the basis of the political question doctrine if there exists: '[I] a textually demonstrable constitutional commitment of the issue [at hand] to a coordinate political department.'"<sup>50</sup> After describing the factors and precedents in two paragraphs, the court provided just two paragraphs of cursory analysis that confuse the possibility of Congressional action with exclusive commitment to Congress, as opposed to another branch.

The Foreign Emoluments clause is not the only place in the Constitution that uses a similar structure: a barring of an act, with a grant of a power to Congress to make exceptions. In fact, right after the Foreign Emoluments Clause, the following section of the Constitution offers two other examples with prohibitions on state power and with the same language, "without the Consent of Congress."<sup>51</sup>

The first is in Article I, Section 10, Clause 2:

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.<sup>52</sup>

According to the court's interpretation, this clause should be nonjusticiable. Congress can always declare or legislate its nonconsent, so this clause would be a political question. In fact, this clause adds that these state laws are "subject to Revision and Controul of the Congress," so accordingly, this clause has an even stronger case to be a political question relative to the Foreign Emoluments Clause.<sup>53</sup> Nevertheless, we can find about two dozen Supreme Court cases ruling on this clause, treating it as

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50. *CREW v. Trump*, 276 F. Supp. 3d 174, 193 (S.D.N.Y. 2017).

51. U.S. CONST. art. I, § 10.

52. U.S. CONST. art. I, §10, cl. 2.

53. U.S. CONST. art. I, §10, cl. 2.

clearly justiciable.<sup>54</sup> It is particularly interesting to see that Chief Justice John Marshall wrote one such opinion in *Brown v. Maryland*.<sup>55</sup>

The next clause in Article I, Section 10, Clause 3 is similar:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.<sup>56</sup>

Again, this clause contains the same textual hook: a blanket prohibition, with an exception for congressional consent. Yet the Supreme Court has treated this clause as justiciable, ruling on tonnage duties under this clause at least a dozen times.<sup>57</sup> It has ruled on the troops provision,<sup>58</sup> and there are countless cases on interstate compacts.<sup>59</sup>

54. See, e.g., *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976); *Kosydar v. Nat'l Cash Register Co.*, 417 U.S. 62 (1974); *Canton R. Co. v. Rogan*, 340 U.S. 511 (1951); *Empresa Siderurgica v. Cty. of Merced*, 337 U.S. 154 (1949); *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946); *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), *overruled by* *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984); *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940); *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218 (1933); *Gulf Fisheries Co. v. MacInerney*, 276 U.S. 124 (1928); *Crew Levick Co. v. Pa.*, 245 U.S. 292 (1917); *Cornell v. Coyne*, 192 U.S. 418 (1904); *F. May & Co. v. City of New Orleans*, 178 U.S. 496 (1900); *Schollenberger v. Pa.*, 171 U.S. 1 (1898); *Patapsco Guano Co. v. Bd. of Agric. of N.C.*, 171 U.S. 345 (U.S. 1898); *Bowman v. Chi. & N.W. Ry. Co.*, 125 U.S. 465 (1888); *Cook v. Pa.*, 97 U.S. 566 (1878); *Low v. Austin*, 80 U.S. 29 (1871); *Turner v. Md.*, 107 U.S. 38 (1883); *Waring v. Mayor*, 75 U.S. 110 (1868); *Woodruff v. Parham*, 75 U.S. 123 (1868); *Pervear v. Mass.*, 72 U.S. 475 (1866); *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851); *Nathan v. La.*, 49 U.S. 73 (1850); *Mager v. Grima*, 49 U.S. 490 (1850); *Brown v. Md.*, 25 U.S. 419 (1827).

55. *Brown v. Md.*, 25 U.S. 419 (1827).

56. U.S. CONST. art. I, §10, cl. 3.

57. See, e.g., *Clyde Mallory Lines v. Ala.*, 296 U.S. 261 (1935); *Ouachita & M.R. Packet Co. v. Aiken*, 121 U.S. 444 (1887); *Morgan's La. & T. R. & S. S. Co. v. Bd. of Health*, 118 U.S. 455 (1886); *Huse v. Glover*, 119 U.S. 543 (1886); *Parkersburg & O.R. Transp. Co. v. City of Parkersburg*, 107 U.S. 691 (1883); *Cincinnati, P., B.S. & P. Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881); *Transp. Co. v. Wheeling*, 99 U.S. 273 (1879); *Nw. Union Packet Co. v. City of St. Louis*, 100 U.S. 423 (1879); *Keokuk N. Line Packet Co. v. City of Keokuk*, 95 U.S. 80 (1877); *Cannon v. City of New Orleans*, 87 U.S. 577 (1874); *City of Vicksburg v. Tobin* (1879); *Ex parte McNeil*, 80 U.S. 236 (1871); *Peete v. Morgan*, 86 U.S. 581 (1873); *S. S. Co. of New Orleans v. Portwardens*, 73 U.S. 31 (1867); *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851).

58. See, e.g., *Phila. & S. M. S.S. Co. v. Pa.*, 122 U.S. 326 (1887); *Presser v. Ill.*, 116 U.S. 252 (1886); *Gloucester Ferry Co. v. Pa.*, 114 U.S. 196, (1885); *Wiggins Ferry Co. v. City of E. St. Louis*, 107 U.S. 365 (1883); *Osborne v. City of Mobile*, 83 U.S. 479, (1872), *overruled in part by* *Leloup v. Port of Mobile*, 127 U.S. 640, (1888); *In re State Tonnage Tax Cases*, 79 U.S. 204 (1870).

59. See, e.g., *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978); *N.H. v. Me.*, 426 U.S. 363 (1976); *Petty v. Tenn.-Mo. Bridge Comm'n*, 359 U.S. 275 (1959); *State ex rel. Dyer v. Sims*, 341 U.S. 22 (1951); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92



The same section of the Constitution that includes the Foreign Emoluments Clause provides another broad proscription on the executive branch, with a similar recognition of Congress's powers: Art I, Sec. 9, cl. 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>60</sup> Here again the Constitution provides a prohibition, unless Congress consents (by passing an appropriations measure). Yet there are a dozen Supreme Court cases that have treated the clause as justiciable.<sup>61</sup>

And yet there is more: the creation of new states has a similar structure. "[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."<sup>62</sup> It turns out that the Supreme Court has adjudicated this clause often.<sup>63</sup>

Imagine if California tried to split into two states. Imagine next that a Democratic Senate decided to seat an extra two Democratic Senators, while a

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(1938); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Ariz. v. Cal.*, 292 U.S. 341 (1934); *Olin v. Kitzmiller*, 259 U.S. 260 (1922); *Stearns v. Minn.*, 179 U.S. 223 (1900); *St. Louis & S.F. Ry. Co. v. James*, 161 U.S. 545 (1896); *Wharton v. Wise*, 153 U.S. 155 (1894); *Va. v. Tenn.*, 148 U.S. 503 (1893); *Pa. v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518 (1851); *Holmes v. Jennison*, 39 U.S. 540 (1840); *Poole v. Fleegeer's Lessee*, 36 U.S. 185 (1837); *Green v. Biddle*, 21 U.S. 1, 57 (1823).

60. U.S. CONST. art. I, § 9, cl. 7.

61. See, e.g., *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937); *Allen v. Smith*, 173 U.S. 389 (1899); *Austin v. United States*, 155 U.S. 417 (1894); *Hart v. United States*, 118 U.S. 62 (1886); *United States v. Price*, 116 U.S. 43 (1885); *Knote v. United States*, 95 U.S. 149 (1877); *United States v. Klein*, 80 U.S. 128 (1871); *Reeside v. Walker*, 52 U.S. 272 (1850).

62. U.S. CONST. art. IV, § 3.

63. See, e.g., *Idaho v. United States*, 533 U.S. 262 (2001); *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469 (1988); *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *United States v. Me.*, 420 U.S. 515 (1975); *Ala. v. Tex.*, 347 U.S. 272 (1954); *United States v. La.*, 339 U.S. 699 (1950); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *McCabe v. Atchison, T. & S.F. R. Co.*, 235 U.S. 151 (1914); *John v. Paullin*, 231 U.S. 583 (1913); *United States v. Sandoval*, 231 U.S. 28 (1913); *City of Cincinnati v. Louisville & N.R. Co.*, 223 U.S. 390 (1912); *Ex parte Webb*, 225 U.S. 663 (1912); *Joy v. City of St. Louis*, 201 U.S. 332 (1906); *Dick v. United States*, 208 U.S. 340 (1908); *United States v. Winans*, 198 U.S. 371 (1905); *Draper v. United States*, 164 U.S. 240 (1896); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Ill. Cent. R. Co. v. State of Illinois*, 146 U.S. 387 (1892); *Willamette Iron-Bridge Co. v. Hatch*, 125 U.S. 1 (1888); *Sands v. Manistee River Imp. Co.*, 123 U.S. 288 (1887); *Huse v. Glover*, 119 U.S. 543 (1886); *Brown v. Grant*, 116 U.S. 207 (1886); *Escanaba & Lake Mich. Transp. Co. v. City of Chi.*, 107 U.S. 678 (1883); *United States v. McBratney*, 104 U.S. 621 (1881); *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. 57 (1873); *Baker v. Morton*, 79 U.S. 150 (1870); *Freeborn v. Smith*, 69 U.S. 160 (1864); *Withers v. Buckley*, 61 U.S. 84 (1857); *Hunt v. Palao*, 45 U.S. 589 (1846); *Permoli v. Municipality No. 1 of New Orleans*, 44 U.S. 589 (1845); *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842).

Republican President and a Republican House rejected the creation of a North California and a South California. What if the Senate passed legislation with the help of those two Senators? And what if California sent an extra pair of electors to the Electoral College? I imagine the courts would rule on these questions (although they would handle the question of standing separately).

For another example, turn to the appointment power in Art II, Sec. 2: “[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.”<sup>64</sup>

What if President Obama had decided that Congress’s silence on his nomination of Judge Garland to the Supreme Court or his nomination of Elizabeth Warren to head an agency was tantamount to implicit consent? Could these appointments be challenged in court? Surely if Justice Garland tried to rule on a case or if agency head Warren tried to regulate a bank, a plaintiff would have a day in court to challenge the legitimacy of those appointments. The Senate’s potential power to vote yes or no does not eliminate the judiciary’s role.

The district court surely does not mean to push his interpretation this far, but if one applied this logic to the Thirteenth, Fourteenth, and Fifteenth Amendments, would those transformational amendments be rendered nonjusticiable political questions? Each of those amendments contains a clause that permits Congress to legislate the enforcement of these amendments. Section 5 of the Fourteenth Amendment states, “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”<sup>65</sup>

Arguably, we have a set of prohibitions protecting individual rights to equal protection, privileges and immunities, and due process of law, but the enforcement of these rights is explicitly granted to Congress. An extension of this textual approach would be to say that the Fourteenth Amendment assigns enforcement explicitly to Congress, so the enforcement of the Fourteenth Amendment is a political question and nonjusticiable (notwithstanding the Court’s proportionality and congruence jurisprudence). He can’t possibly mean that as a matter of textual interpretation. But two cursory paragraphs of analysis of the Foreign Emoluments Clause seems to open the door to such untenable results.

In a footnote, the court wrote, “Congress is not a potted plant. It is a coequal branch of the federal government with the power to act as a body in response to Defendant’s alleged Foreign Emoluments Clause violations, if it

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64. U.S. CONST. art. II, § 2.

65. U.S. CONST. amend. XIV, § 5.

chooses to do so.”<sup>66</sup> But the possibility that Congress might one day legislate would render nonjusticiable any case relying on a federal statute and administrative action. That cannot be correct. As Hemel and Litman observe:

[T]he fact that Congress could—hypothetically—consent to an action can’t be enough (or even be a reason) to conclude that a plaintiff lacks standing to challenge that action on the grounds that Congress hasn’t authorized it. Otherwise, there would never be standing when a plaintiff challenges *ultra vires* executive action—executive action that exceeds the scope of congressionally delegated authority, or executive action that violates a statutory prohibition. In all of those cases, Congress could have authorized the action, but didn’t. The same would be true in dormant commerce clause cases—no plaintiff would have standing to challenge a dormant commerce clause violation because Congress could always consent to and thus cure the violation.<sup>67</sup>

The Framers drafted many clauses in the Constitution with a broad prohibition, but with the power of Congress to make exceptions and permissions. Two clauses use the exact same language of “without the consent of Congress.” Nevertheless, the courts have treated those clauses as justiciable over and over again, from Chief Justice Marshall’s court through modern cases. The courts certainly have not treated the language of these clauses as committing issues “exclusively” to Congress, to paraphrase the district court. The Foreign Emoluments Clause offers a manageable text for courts to interpret, even if Congress remains silent, and even if Congress makes some exceptions.

## Conclusion

The district court’s dismissal of the *CREW* plaintiffs contained many significant errors. In its section on “zone of interests,” the reliance on a dissent was not just a problem of misciting. It misunderstood that the majority opinion had rejected the Scalia dissent upon which it was relying. And more importantly, it misunderstood this area of law and erred in its interpretation of the anticorruption purposes of the clause. In its section on the political question, it relied on a Supreme Court precedent that counseled the opposite result (*Baker*) and it overlooked a series of similar clauses that counseled the opposite textual interpretation. In both sections, the decision

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66. *CREW v. Trump*, No. 1:17-CV-00458 2017 U.S. Dist. LEXIS 210326, at \*42 n.8 (S.D.N.Y. 2017).

67. Litman & Hemel, *supra* note 9.

did not engage many precedents that either raised significant questions or reached a different result. If this decision made so many errors on “zone of interests” analysis and its political question analysis, it would be a mistake to rely too heavily on its analysis of standing doctrine, either.

For the bigger picture, this lower court opinion is a cautionary tale for other judges who consider relying on the “passive virtues,” in Alexander Bickel’s phrasing,<sup>68</sup> of the political question doctrine. Of course, there is a time and a place for the political question doctrine: national security, foreign policy, and arguably even a closely contested election and the electoral college.<sup>69</sup>

But for too long, judges used the political question doctrine to punt on gerrymandering by grossly unequal districts, until *Baker v. Carr* and *Reynolds v. Sims*. Then judges punted too long in tolerating racial gerrymandering. Then the Supreme Court punted on partisan gerrymanders in *Vieth v. Jubilerer*. As they face ever more abusive partisan gerrymanders by Republicans in Wisconsin and Democrats in Maryland, will the Justices be tempted to punt with the political question doctrine again? The Southern District offers a reminder for the Justices to pause and reflect: Are we relying on the political doctrine because of deep principles and deference to democratic structures? Or are we avoiding a difficult but still justiciable legal problem? In both the Emoluments cases and the gerrymandering cases, it is time for judges to face these challenges and do their best to address them, even if the solutions are imperfect.

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68. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

69. *Bush v. Gore* arguably should have been left to the electoral college, as the framers may have intended the resolution of elections too close to call around election day. See RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001); Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001).