

2019

Disgorging Emoluments

Caprice L. Roberts

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Law and Politics Commons](#), [Legal Remedies Commons](#), and the [President/Executive Department Commons](#)

Repository Citation

Caprice L. Roberts, *Disgorging Emoluments*, 103 Marq. L. Rev. 1 (2019).
Available at: <https://scholarship.law.marquette.edu/mulr/vol103/iss1/3>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

MARQUETTE LAW REVIEW

Volume 103

Fall 2019

Number 1

DISGORGING EMOLUMENTS

CAPRICE L. ROBERTS*

This Article is about unjust enrichment. It includes a theory of an unjust enrichment cause of action against executive actors who receive unlawful emoluments. Interpretations of the boundaries of unlawful emoluments range from receipt of a gift or benefit because of the position of power held to quid pro quo exchanges of a thing of value in exchange for government information or advantage. Wherever the proper line, the purpose of the law of unjust enrichment is to prevent and undo benefits one has no right to retain. It achieves those goals with the use of restitution remedies including disgorgement of unjust profits.

Unjust enrichment is particularly suited to remedy wrongful emoluments because the goal is to undo improper gain rather than compensate for any plaintiff losses. Unjust enrichment law and restitution-based remedies law are experiencing a revival in the United States. This resurgence of interest in and use of unjust enrichment theory has led to increased application of

* Visiting Professor of Law, The George Washington University Law School. This Article benefitted from presentation at the International Remedies Forum in Aix-en-Provence, France; the Southeastern Association of Law Schools Conference in Ft. Lauderdale, Florida; the Remedies Forum at the University of Louisville Brandeis School of Law; and the Colloquia Series at the University of Florida, Levin College of Law. For challenging feedback that aided the advancement of arguments in this Article, special thanks to Gabe Franca, Andrew Kull, Cortney Lollar, Doug Rendleman, Laura Rosenbury, Danny Sokol, and Andy Wright. For continued dialogue on restitution theory and applications, the author remains grateful to Andrew Kull and Doug Laycock. Thanks also to Brian Frye for the opportunity to explore the concepts in this Article in a podcast discussion. *Ipse Dixit*, *Caprice Roberts on Remedies for Emoluments Violations*, Season 1, Episode 371 (Sept. 6, 2019), <https://shows.pippa.io/ipse-dixit/episodes/caprice-roberts-on-remedies-for-emoluments-violations> [<https://perma.cc/UQS8-RPJY>].

restitutionary remedies. This Article proposes the restitutionary-based remedy of disgorgement of emoluments that constitute unjust gains. This cause of action and remedy already lie in American common law. Unjust enrichment provides a freestanding basis for disgorgement relief as well as restitution remedies to protect against fiduciary breaches and violations of other protected interests. Article III standing and other jurisdictional obstacles may pose a need for a cleaner, additional path. No existing statutes cover this field. Thus, I propose a statutory solution that operationalizes restitutionary disgorgement as the preferred remedy to undo unjust emoluments.

I. INTRODUCTION	3
II. EMOLUMENTS.....	6
A. Emoluments under the United States Constitution	6
B. Goals of Anti-Emolument Laws	10
C. Pending Emoluments Litigation.....	13
1. The District of Columbia and Maryland.....	13
2. Citizens for Responsibility and Ethics in Washington.....	15
3. Democratic Legislators	16
D. Restitution Road.....	18
III. THE DISGORGEMENT REMEDY.....	19
A. Disgorgement Remedy Shaping Rights	19
1. Historical Roots and Development of the Disgorgement Remedy	20
2. The Import of the Law-Equity Classification on Constitutional Rights and Defenses.....	24
B. Disgorgement as the Proper Remedy for Emoluments Violations..	30
C. Unjust Enrichment and Emoluments.....	35
IV. REMEDYING EMOLUMENTS VIOLATIONS	36
A. Whistleblower Legislation	36
1. Congress’s Power to Legislate Against Emoluments	36
2. Legislating an Emoluments Disgorgement Remedy.....	39
B. Failsafe of Unjust Enrichment as a Common Law Claim.....	41
V. CONCLUSION	42

I. INTRODUCTION

*disgorge: Yield or give up (funds, especially when dishonestly acquired) “they were made to disgorge all the profits made from the record”*¹

One of the basic tenets of good government is that public officials act on behalf of the public interest rather than to enrich themselves at the public’s expense. No doubt since the founding of America, government officials have engaged in behavior that risks violation of constitutional, statutory, and ethical prohibitions against certain emoluments. Issues of conflicts of interest, improper gains, and recusal are not unique to modern times. Historically, such matters have generated public criticism, advisory opinions by the Office of Legal Counsel, administrative corrective actions, statutory amendments, enhanced regulations, and sometimes governmental censures. These forces include separation-of-powers tension that may help, along with accountability to voters, lead to a satisfactory resolution of the arguably problematic conduct. Government actors and challengers have sought regulatory and ethical clarification of what constitutes an unlawful emolument, but this subject has never been litigated until now.²

The sitting President of the United States maintains financial interests in companies with hotels bearing his last name. One such hotel is in Washington, D.C., not far from the White House. The President continues to receive profits from that hotel, which allegedly welcomes foreign diplomats as guests. These profits are emoluments as most broadly defined: any gain, benefit, advantage, or profit.³ Such profits, however, may or may not be unconstitutional or otherwise unlawful. The Justice Department maintains that such profits are not unlawful as there is no proof that the President has done anything in exchange for such profits.⁴ Government officials of prior administrations—Democratic and Republican—have engaged in behavior raising ethical questions that

1. *Disgorge*, ENGLISH OXFORD LIVING DICTIONARIES (OUP), <https://www.lexico.com/en/definition/disgorge> [<https://perma.cc/7L5T-KSGW>] (“Origin Late 15th century: from Old French *desgorger*, from *des-* (expressing removal) + *gorge* ‘throat.’”).

2. “Until now, the issue of what constitutes an illegal emolument has never been litigated.” Sharon LaFraniere, *Judge Questions Defense of President’s Hotel Profits*, N.Y. TIMES, June 12, 2018, at A18.

3. *See infra* Section II.A.

4. The Justice Department maintains a narrow interpretation of emoluments limited to payment for labor and further argues that something must be given in exchange for the payment evidencing a corrupt intent. *See, e.g.*, Defendant’s Motion to Dismiss, *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018) (No. 8:17-cv-1596-PJM), ECF No. 21-1.

sometimes also triggered emoluments concerns, if not, violations.⁵ None of the prior allegations, however, rose to litigation over whether certain emoluments were in fact unlawful. Several lawsuits filed against President Trump seek to prove that receipt of such profits—regardless of any lack of quid pro quo—are unlawful emoluments warranting relief.⁶

Such emoluments controversies fill the news.⁷ Whether emoluments are improper as alleged is hotly debated among scholars and pundits.⁸ Scholarship

5. *Id.* at 41–49. At the June 2018 hearing on defendant’s motion to dismiss one of the emoluments suits, the Department of Justice emphasized that the prior administration’s commerce secretary kept stock in Hyatt Hotels Corporation, while foreign governments rented rooms worldwide. LaFraniere, *supra* note 2. Penny Pritzker was the Secretary of Commerce in President Obama’s administration from 2013 to 2017; when nominated, Penny held a vast array of stocks and served as a board member of Hyatt Hotels among other boards. Angel Au-Yeung, *Former Secretary of Commerce and Hyatt Hotels Heir Penny Pritzker Identified in Paradise Papers*, FORBES (Nov. 5, 2017), <https://www.forbes.com/sites/angelauyeung/2017/11/05/former-secretary-of-commerce-and-hyatt-hotels-heir-penny-pritzker-identified-in-paradise-papers/#1ee851212618> [https://perma.cc/729Q-PWDL]. She drafted a letter detailing her plans to divest ownership of 221 holdings and resign from several boards including Hyatt Hotels in order “to avoid an actual or apparent conflict of interest in the event that [she is] confirmed for the position of Secretary, U.S. Department of Commerce.” Letter from Penny Pritzker to Barbara Fredericks, Assistant Gen. Counsel for Admin., U.S. Dep’t of Commerce (May 8, 2013), <https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/56D8501C3C6375D285257FC20010E4A7/%24FILE/Penny-S-Pritzker-EA.pdf> [https://perma.cc/9WTH-2UZC]; see Au-Yeung, *supra*. Government documents show former Secretary Pritzker claimed simply that she had sold certain holdings; an international group of investigative journalists claim that leaked records, known as the Paradise Papers, reveal a more complex picture regarding the path of divestment—a transfer of those holdings to an LLC that may have been owned by trusts for Pritzker’s children. Au-Yeung, *supra*. Pritzker’s spokesperson maintains that Pritzker consulted with the Office of Government Ethics and complied with all government requirements regarding her divestitures and holdings. *Id.*

6. See *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 877 (D. Md. 2018); *Citizens for Responsibility and Ethics in Washington v. Trump*, 276 F. Supp. 3d 174, 179 (S.D.N.Y. 2017).

7. See, e.g., Ann E. Marimow & Jonathan O’Connell, *Trump’s Hotel Profits at Center of Emoluments Clause Hearing*, WASH. POST, June 12, 2018 at B4; Jonathan Stempel, *Trump’s Lawyers Say Trump SoHo Exit Undermines Emoluments Lawsuit*, REUTERS NEWS (Nov. 24, 2017), <https://www.reuters.com/article/us-usa-trump-lawsuit-emoluments/trumps-lawyers-say-trump-soho-exit-undermines-emoluments-lawsuit-idUSKBN1DO2FK> [https://perma.cc/98WS-32ZY]; Ann Telnaes, *Emoluments, Schmoluments*, WASH. POST, (May 16, 2018), <https://www.washingtonpost.com/news/opinions/wp/2018/05/16/emoluments-schmoluments/> [https://perma.cc/SU5N-H7FZ].

8. See, e.g., Brief for Scholar Seth Barrett Tillman and the Judicial Education Project as Amici Curiae In Support of the Defendant, *District of Columbia v. Trump*, 291 F. Supp. 2d 725 (D. Md. 2018) (No. 8:17-cv-01596-PJM) (arguing the Foreign Emoluments does not apply to elected positions such as the presidency); Seth Barrett Tillman, *Business Transactions and President Trump’s “Emoluments” Problem*, 40 HARV. J.L. & PUB. POL’Y 759 (2017) (disproving broad interpretations of constitutional

continues to mount on the meaning of constitutional emoluments and modern applications to alleged violations.⁹ These debates leave a gap in the literature with respect to addressing the remedies question. The relevant constitutional provisions state no remedies. Assume constitutional emoluments violations exist, what are we going to do about it? This Article offers answers to that core question and pathways to achieve desired goals of the underlying laws.

Putting aside the precise boundary on the impropriety of certain emoluments, what is the proper remedy? Which remedy will achieve the primary aims of the governing laws? This inquiry is vital for accountability of this and future administrations. If our laws—especially constitutional ones—lack bite, the temptation to engage in improper conduct, downplay arguable conflicts, and cover up questionable behavior will rise. Where unjust emoluments are proven, this Article explains why restitutionary disgorgement is a well-suited remedy to serve the goals of unjust enrichment and anti-corruption laws.

This Article introduces the constitutional boundaries for emoluments and the Framers' goals. Next, it summarizes the pending emoluments cases—all of which fail to allege an unjust enrichment claim or remedy. In Part III, it situates the disgorgement remedy within restitution law. This Article address challenges, but ultimately promotes restitutionary disgorgement as a powerful remedy to serve preferred goals. Part IV operationalizes potential paths for pursuing the disgorgement remedy against government officials including a statutory solution and a common law path. The Article concludes that restitutionary disgorgement is the optimal remedy to deter corruption and self-dealing, as well as prevent unjust enrichment.

emoluments); John Mikhail, *The Definition of "Emolument" in English Language and Legal Dictionaries, 1523–1806* (June 30, 2017), <https://www.ssrn.com/abstract=2995693> [<https://perma.cc/XJ8R-CXAE>] (refuting the administration's narrow interpretation of emoluments and correcting the historical record with an exhaustive definitional review); Norman Eisen, Richard Painter & Laurence Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, BROOKINGS (Dec. 16, 2016), <https://www.brookings.edu/research/the-emoluments-clause-its-text-meaning-and-application-to-donald-j-trump/> [<https://perma.cc/4E37-9D2N>].

9. See, e.g., Andrew Kent, Ethan J. Leib, & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2113 (2018) (“The faithfulness of a President to the Constitution, the laws, and the ideals and traditions of the United States is at issue as never before Does the Constitution have a plan for when it appears that a President may be motivated not by a view of the public good but by self-regarding or bad faith purposes?”).

II. EMOLUMENTS

A. *Emoluments under the United States Constitution*

What are emoluments? The English definition is “[a] salary, fee, or profit from employment or office.”¹⁰ The French word “émolument” means benefit or revenue.¹¹ The Latin word “emolumentum” means advantage, benefit, gain, or profit.¹² A much more narrow interpretation is only profit from employment.¹³ Sources contemporary with the Framers’ environment and then public understanding¹⁴ provide support for broader interpretations such as any gain.¹⁵ Regardless of the ultimate interpretative winner (scholarly or litigative)

10. *Emolument*, ENGLISH OXFORD LIVING DICTIONARIES, <https://www.lexico.com/en/definition/emolument> [<https://perma.cc/YK5D-YLNJ>] (last visited Oct. 7, 2019).

11. *Emolument*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/emolument> [<https://perma.cc/GM3V-CU8A>] (last visited Oct. 7, 2019) (explaining partial roots of the term emolument derive “from Old French émolument ‘advantage, gain, benefit; income, revenue’” in the 13th century).

12. *Emolumentum*, THE OXFORD LATIN DICTIONARY (2d ed. 2012).

13. In pending litigation discussed *infra* Section II.C, President Trump has argued that emolument means only “profit from labor.” Defendant’s Motion to Dismiss at 35, District of Columbia v. Trump, 291 F. Supp. 3d 725 (D. Md. 2018) (No. 8:17-cv-1596-PJM), ECF No. 21-1. The President advances the *noscitur a sociis* rule of construction for interpreting terms in written documents by gleaned “meaning naturally attaching to them from their context.” District of Columbia v. Trump, 315 F. Supp. 3d 875, 886–87, n.21 (D. Md. 2018) (citations omitted). In addition to the context, the President relies on more narrow definitional examples defining emolument as profit from employ: “profit, what is gained by labour,” “profit from an office or position,” “payment to a miller for grinding corn.” Defendant’s Motion to Dismiss at 35 n.28, District of Columbia v. Trump, 291 F. Supp. 3d 725 (D. Md. 2018), ECF No. 21-1 (citing Walter W. Skeat, *An Etymological Dictionary of the English Language* 189 (1888), and *The Barnhart Dictionary of Etymology* 326 (1988)).

14. For advancement of a public-meaning conception of originalism for constitutional interpretation, see for example Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12–41 (Grant Huscroft & Bradley W. Miller, eds. 2011), and Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Account of Constitutional Interpretation* (Apr. 9, 2018) (“The Public Meaning Thesis is the claim that the original meaning of the constitutional text is its public meaning: roughly, the meaning that the text had for competent speakers of American English at the time each provision of the text was framed and ratified.”) (on file with author).

15. To examine a helpful collection of historical resources on the Framers’ views on emoluments and related goals tied to both Emoluments Clauses, explore 3 THE FOUNDERS’ CONSTITUTION 379–90 (Philip B. Kurland & Ralph Lerner, eds. 1987). This same collection is also available online: *The Founders Constitution*, ONLINE LIBRARY OF LIBERTY, <https://oll.libertyfund.org/pages/vol-3-the-constitution-part-2> [<https://perma.cc/X34A-VDUV>] (last visited Oct. 7, 2019). Pending emoluments

on the precise constitutional meaning of emoluments, this Article assumes that certain emoluments may be lawful while others unlawful. In order for an emolument to constitute an unjust benefit and warrant a disgorgement remedy, receipt of a particular emolument must be improper under emoluments prohibitions or other law.¹⁶

The United States Constitution prohibits federal government officials from receiving emoluments from foreign states without congressional consent:

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.¹⁷

This constitutional provision is known as the Emoluments Clause, the Foreign Emoluments Clause, and also as the Title of Nobility Clause.¹⁸ The United States Supreme Court has never interpreted the meaning of this clause.¹⁹ The Foreign Emoluments Clause and surrounding clauses say nothing about what remedy might lie in the event a government official violates the clause.²⁰

The United States Constitution also contains a Domestic Emoluments Clause: “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.”²¹

This clause applies explicitly to the President and bars the receipt of, during the elected period, “any other emolument” from the United States or any state

litigation, discussed *infra* Section II.C., have included extensive briefing from the parties and amici curiae on historical evidence on how to interpret the constitutional meaning of emoluments including definitions stemming from dictionaries, THE FEDERALIST (*infra* Section II.B), and well-read authors of the Framers’ day (*infra* Section II.B). One such court detailed the key evidence and sided with broader conceptions such as any profit or gain over narrow definitions such as mere bribery. *District of Columbia v. Trump*, 315 F. Supp. 3d at 891 (“The clear weight of the evidence shows that an ‘emolument’ was commonly understood by the founding generation to encompass any ‘profit,’ ‘gain,’ or ‘advantage.’”).

16. See *infra* Part III.

17. U.S. CONST. art. I, § 9, cl. 8.

18. Legal Information Institute, *Emoluments Clause*, CORNELL LAW SCH., https://www.law.cornell.edu/wex/emoluments_clause [<https://perma.cc/5P94-DPUQ>] (last updated June 2017).

19. Disagreement exists about the reach of the clause, including whether it covers elected officials. Also, the Articles of Confederation explicitly covered state government actors, while the Foreign Emoluments Clause does not.

20. See U.S. CONST. art. I, § 9.

21. U.S. CONST. art. II, § 1, cl. 7.

within the United States.²² The Supreme Court has not interpreted the Domestic Emoluments Clause.²³

The Emoluments Clauses have several functions. One is to safeguard the government official's dedication and loyalty to aims of the country—to do the government's business rather than one's own private business. A founding view of republican virtues included a strong bias against self-dealing,²⁴ though the Founders often engaged in behavior that would violate conflicts of interest under modern norms.²⁵

Another purpose is the protection of national security. Directly related to national security is the creation of constitutional boundaries that ensure against public corruption.²⁶ At the country's founding, fears existed that our government leaders would be susceptible to capture by foreign monarchs.²⁷ For example, if the President could accept emoluments from foreign leaders, the

22. *Id.*

23. See *Citizens for Responsibility and Ethics in Washington v. Trump*, 939 F.3d 131, 161 (2d Cir. 2019) (Walker, J., dissenting) (“Invoking constitutional provisions never directly litigated in the 230-year history of our Republic prior to the Trump presidency, the plaintiffs in this case claim that the President has inflicted competitive injury on their businesses by maintaining ownership over the Trump Organization’s high-end hotels and restaurants and accepting the business of foreign and state official clientele in contravention of both the Foreign Emoluments Clause and the Domestic Emoluments Clause.”); *In re Trump*, 928 F.3d 360, 373 (4th Cir. 2019) (“As the [Foreign and Domestic Emoluments] Clauses do not expressly confer any rights or provide any remedies, efforts to enforce them in courts have been virtually nonexistent prior to President Trump’s inauguration in 2017.”).

24. See, e.g., Evan C. Zoldan, *The Klein Rule of Decision Puzzle and the Self-Dealing Solution*, 74 WASH. & LEE L. REV. 2133, 2140–41 (2017) (“Governmental self-dealing is a phenomenon disfavored in constitutional law and jurisprudence. The generation that framed the Constitution, steeped in republican tradition, developed a strong aversion to self-dealing—that is—the act of trading on public prerogative for private gain.”) (citing, among others, NICHOLAS R. PARILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* 10 (2013); and then citing ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZEN’S UNITED* 39 (2014)); see also Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

25. One prominent example is Chief Justice Marshall’s authoring the opinion in *Marbury v. Madison* when he previously served as the government actor who failed to deliver the commissions at issue. 5 U.S. (1 Cranch) 137 (1803).

26. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 447–48 (2010) (Stevens, J., concurring in part and dissenting in part) (criticizing majority opinion for “disregard[ing] our constitutional history and the fundamental demands of a democratic society” that show the important governmental interest in preventing all manner of corruption not just limited to *quid pro quo* iterations because “[c]orruption can take many forms . . . operat[ing] along a spectrum” from “selling a vote” to “selling access” for the opportunity to influence).

27. See THE FEDERALIST NO. 2 (John Jay) (Am. Bar Ass’n 2009).

Framers worried that foreign influences could buy favor, weaken the Executive, and threaten the national security of the United States. Emoluments, therefore, should not be accepted that would create an allegiance or curry favor on behalf of certain states or countries over others. The interest in protecting national security surpasses the more straight-forward, ethical goal of good government.

Other laws and ethical restrictions also govern improper gains including using one's public office for private gain.²⁸ Such laws may bolster claims of wrongdoing as they help maintain the public trust and avoid the appearance of corruption. Ethical constraints may overlap with anti-corruption concerns. For now, however, the Emoluments Clauses are the primary mode of substantive attack in pending lawsuits against the Executive.

The current Executive's failure to divest ownership interests in a company with an international brand (among other alleged gains) has raised both Foreign and Domestic Emoluments controversies.²⁹ A debate exists as to the scope and meaning of emoluments under both constitutional provisions.³⁰ The vigorous substantive and historical debate offers two basic poles: (i) a broad interpretation and (ii) a narrow construction. This Article does not resolve the constitutional interpretative debate. Whatever the scope of emoluments

28. See, e.g., The Foreign Gifts and Decorations Act, 5 U.S.C. § 7342 (2012) (prohibiting federal employees, including the Executive, from accepting anything beyond *de minimis* gifts except as explicitly provided); The Ethics in Government Act, 5 U.S.C. § 7353 (2012) (prohibiting gifts to federal employees); Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.702 (2010) ("An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations.") Of course, such regulations provide avenues of institutional self-policing and sanctioning of bad actors. It remains unclear if such provisions offer a viable avenue for court-based remedies. And, if so, by whom?

29. See *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018); *Citizens for Responsibility and Ethics in Washington v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017).

30. See, e.g., Josh Blackman, *The Originalist Analysis About the Emoluments Clause from President-Elect Trump's Legal Team*, JOSH BLACKMAN'S BLOG (Jan. 11, 2017), <http://joshblackman.com/blog/2017/01/11/the-originalist-analysis-about-the-emoluments-clause-from-president-elect-trumps-legal-team/> [<https://perma.cc/6F3Q-SK3Q>]; Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses Litigation, Part 1: The Constitution's Taxonomy of Officers and Offices*, WASH. POST: VOLOKH CONSPIRACY (Sept. 25, 2017, 9:04 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/25/the-emoluments-clauses-litigation-part-1-the-constitutions-taxonomy-of-officers-and-offices/?utm_term=.19f68d41b822 [<https://perma.cc/RHP8-VXE8>]; Jed Shugerman, *Is Trump Receiving "Office-Related" Emoluments?*, SHUGERBLOG (Feb. 25, 2017), <https://shugerblog.com/2017/02/25/is-trump-receiving-office-related-emoluments/> [<https://perma.cc/Q5YD-FN5C>]; see also Jed Handelsman Shugerman & Gautham Rao, *Emoluments, Zones of Interests, and Political Questions: A Cautionary Tale*, 45 HASTINGS CONST. L.Q. 651, 652–63 (2018).

provisions, I argue that disgorgement is an appropriate and desirable remedy as a judicial or legislative matter.

A few interpretative opinions offer insights into the possible scope of emoluments. Most of the opinions establish what activities do not rise to the level of unlawful emoluments.³¹ Through the decades, the Office of Legal Counsel (OLC) of the Department of Justice has issued opinions suggesting its interpretation of the scope of the Emoluments Clauses. Some of these opinions clarify the OLC's position that certain honors and monies do not constitute unlawful emoluments.³² For example, a president's receipt of the Nobel Prize Award is not violative.³³ Nor was another president's receipt of state retirement benefits as they did not subject him to improper influence.³⁴ The OLC has not publicly issued an opinion on the current emolument controversies.³⁵ The current President's failure to divest has reinvigorated the debate about the scope of the Emoluments Clauses and about the reach and relevance of the OLC's prior opinions.³⁶ Regardless of the resolution of the fight on the merits, disgorgement of gains should be on the short list of potent remedies if any emoluments prove unlawful. Disgorgement will best serve the underlying goals.

B. Goals of Anti-Emolument Laws

This Article does not resolve the constitutional battle over the precise meaning of unlawful emoluments and whether any particular allegation fits that definition. To discern ideal remedies, the goals behind anti-emolument laws are more important than definitive boundaries of application. *The Federalist Papers* contain at least fifteen instances of the word emolument. Some of the

31. See *infra* notes 34–37.

32. See *infra* notes 34–37.

33. Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1 (2009).

34. President Reagan's Ability to Receive Retirement Benefits from the State of California, 5 Op. O.L.C. 187 (1981).

35. A pending Freedom of Information Act (FOIA) request seeks all O.L.C. opinions interpreting the emoluments clause. Citizens for Responsibility and Ethics in Washington FOIA Request to the Office of Legal Counsel, (Dec. 22, 2016), <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/05/02143023/2016-12-22-FOIA-Request-OLC-Memos-Domestic-Emoluments-Clause.pdf> [<https://perma.cc/Y66G-A56B>]. No results are posted.

36. See, e.g., Marty Lederman, *How the DOJ Brief in CREW v. Trump Reveals that Donald Trump is Violating the Foreign Emoluments Clause*, TAKE CARE BLOG (June 12, 2017), <https://takecareblog.com/blog/how-the-doj-brief-in-crew-v-trump-reveals-that-donald-trump-is-violating-the-foreign-emoluments-clause> [<https://perma.cc/XBW8-C43E?type=image>].

references appear to simply acknowledge that “emoluments will flow” from governmental offices.³⁷ At times, the word emolument connotes simple receipt of payment³⁸ or related benefit.³⁹ At other times, the discussion seeks to ensure the receipt of no “other emolument”⁴⁰ or to prevent any increase in emoluments.⁴¹

Framers’ discussions of emoluments were part of the overarching interest in rejecting England’s monarchy system. For example, after quoting the proposed text of the Foreign Emoluments Clause and comparing other constitutional provisions and lack of provisions (such as Titles of Nobility) to England’s foundation, Hamilton expressed the import of certain prohibitions such as against titles of nobility to ensure protection of America’s republican form of government “of the people.”⁴²

More specifically, the Framers had concerns about government officials engaging in self-dealing behavior.⁴³ Self-dealing, in this context, arises when government actors use their public offices to create and achieve advantages furthering personal interests.⁴⁴ It also includes using their government positions to line their own pockets.⁴⁵

Another goal of anti-emolument laws is simply that the government officers should have undivided loyalty to the government.⁴⁶ This ideal requires

37. See, e.g., THE FEDERALIST NO. 46, *supra* note 27, at 265 (James Madison) (“From the gift of these a greater number of offices and emoluments will flow.”).

38. THE FEDERALIST NO. 55, *supra* note 27, at 320 (James Madison).

39. THE FEDERALIST NO. 73, *supra* note 27, at 421 (Alexander Hamilton) (“The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him.”).

40. *Id.* (“It is there provided that ‘The President of the United States 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.’”) (emphasis in original); *id.* at 421–22 (“Neither the Union, nor any of its members, will be at liberty to give, nor will he be at liberty to receive, any other emolument than that which may have been determined by the first act.”).

41. THE FEDERALIST NO. 55, *supra* note 27, at 320–21 (“The members of the Congress are rendered ineligible to any civil offices that may be created, or of which the emoluments may be increased, during the term of their election.”).

42. THE FEDERALIST NO. 84, *supra* note 27, at 497 (Alexander Hamilton) (“Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the cornerstone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.”).

43. See THE FEDERALIST NOS. 2, 22, *supra* note 27, at 7, 120 (Alexander Hamilton).

44. See THE FEDERALIST NOS. 2, 22, *supra* note 27, at 7, 120 (Alexander Hamilton).

45. See THE FEDERALIST NO. 10, *supra* note 27, at 47 (James Madison).

46. See S. Rep. 95-194, at 30 (1977); Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 18 (1994).

government actors to hold allegiance only to America.⁴⁷ That loyalty may be placed in jeopardy should the government officer receive favors and benefits from foreign countries and their officials.

Anti-corruption is also a key sentiment for such prohibitions: “It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states.”⁴⁸ A limit on receipt of emoluments operates to avoid one’s loyalty being bought or clouded.⁴⁹ Related to this interest is a desire to ensure the government actor’s integrity remains intact and uncorrupted.⁵⁰ Avoiding the appearance of corruption is also important to maintaining public trust.

There are other remedial paths that could serve similar, desirable goals. Remedies other than disgorgement, however, may go farther than preferred. More importantly, they are more difficult to achieve than disgorgement. For example, criminal sanctions could also serve anti-corruption and related goals, but criminal sanctions would also address a more serious goal: punishing offenders. Even if the Framers sought to punish those who violated anti-emolument prohibitions, criminal penalties measurably raise the stakes. Any criminal culpability would require *mens rea*, prosecutorial interest in pursuing, and challenges including possible immunities. Unjust enrichment theory generally requires lower levels of intentional behavior to reach unjustness. Restitution does not punish. Disgorgement of improper gains is not punitive, though it often exceeds compensatory loss. If one fears overapplication of disgorgement as a bold remedy, Congress could tailor the intent to be higher. Similarly, criminal law would default to a higher burden of proof (beyond a reasonable doubt) than restitution law’s default of preponderance. Again, though, if a restitution-based theory becomes statutory, the legislature could adjust the required proof level to a clear and convincing standard or higher.

Another alternative remedial device is impeachment. Of course, the requirements are constitutional and extremely high. Political momentum and

47. See S. Rep. 95-194, at 30 (1977) (The committee approved a series of more stringent rules and procedures relating to the receipt of gifts, which demonstrates that the committee’s consciousness of American loyalty and disapproval of the receipt of foreign gifts).

48. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 327 (Max Farrand, ed., Yale University Press 1911) (statement of Governor Edmond Jennings Randolph).

49. 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. That judgment might be biased, and that loyalty divided, if they received financial benefits from a foreign government.”).

50. THE FEDERALIST NO. 73, *supra* note 27, at 421 (ensuring that a president’s integrity not be weakened or corrupted by “appealing to his avarice”).

proof would be paramount. Unlawful emoluments in some iterations could include behavior that amounts to an impeachable offense, but daylight remains for a range of emoluments that could be improper yet do not amount to impeachable conduct. The House of Representatives would have to choose to include in its impeachment inquiry possible emoluments violations. If the House did so, and then the Senate later found that any such violations amounted to an impeachable offense such as bribery, the consequence would be removal from office. Still, such an inquiry could also lead to an interest in recovering any ill-gotten gains on behalf of the United States government. Certain potential emoluments may be unlawful, but not rise to the level of impeachable offenses. Accordingly, it is important to have effective civil remedies, including restitutionary disgorgement, to help enforce emoluments prohibitions.

C. Pending Emoluments Litigation

Several emoluments-based lawsuits are pending against the President. Each of the suits faces jurisdictional obstacles such as standing challenges; so far, a couple have survived initial challenges and will advance to discovery. On relief sought, the various emoluments complaints do not include unjust enrichment or restitution as a claim or a remedy.⁵¹

1. The District of Columbia and Maryland

In one of the suits, the state of Maryland and the District of Columbia filed a lawsuit claiming that President Trump violated the Foreign Emoluments Clause by accepting gifts and benefits from foreign entities seeking to curry favor with the then-new administration.⁵² The plaintiffs also allege that foreign leaders are more likely to stay at the Trump Hotel in Washington, D.C., and that the affiliation with President Trump gives the hotel an unfair advantage over other hotels who lose the business.⁵³

51. Emoluments litigation should explicitly include unjust enrichment and restitution remedies. Should courts vindicate plaintiffs' claims as pleaded, however, restitutionary goals may be achieved based on general prayers for equitable relief because an injunction could be framed to order divestment. Again, though, the strategic advantage of pleading restitution is that it takes the focus away from plaintiff's proof of loss to defendant's wrongful gain. A restitution and unjust enrichment count would also broaden the emoluments inquiry to include fiduciary breaches and other wrongs.

52. Complaint at 41–42, *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018) (No. 8:17-cv-1596-PJM).

53. *Id.* at 40–42.

The complaint fails to include any restitutionary theory or remedy. Plaintiffs' complaint requests declaratory, injunctive, and other relief as the court deems just and proper.⁵⁴

Despite serious challenges, the Maryland-District of Columbia suit survived a motion to dismiss.⁵⁵ The court ruled that plaintiffs stated actionable claims upon which relief could be granted.⁵⁶ Specifically, the court reasoned that the plaintiffs established a proprietary harm satisfying "competitive standing" by alleging that the purported wrongful transactions will "almost surely" result in plaintiffs losing business.⁵⁷ The court also articulated two alternative theories supporting standing: *parens patriae* (standing to protect the economic interests of a state or district's citizens) and quasi-sovereign interests (competitive favoritism that disrupts the federal-state balance of power).⁵⁸ On other issues including individual immunity, the court deferred ruling.⁵⁹ Based upon more persuasive evidence on interpretations of emoluments, the court determined that plaintiffs alleged viable constitutional violations against the President in his official capacity under both emolument clauses.⁶⁰ The court denied the President's motion to certify questions for appeal, and instead it directed the parties to propose a schedule for civil discovery.⁶¹

The President in his official capacity then filed a writ of mandamus and sought a stay. The United States Court of Appeals for the Fourth Circuit granted the stay pending consideration of the writ, granted oral argument with two questions in addition to the procedural issues raised by the mandamus request,⁶² and ultimately ruled in the President's favor on the writ of mandamus.⁶³ The Fourth Circuit held that the plaintiffs lacked standing focusing on the lack of causation and redressability elements of constitutional standing.⁶⁴ Further, the court quickly rejected the alternative bases for standing

54. *Id.* at 44.

55. *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 757 (D. Md. 2018).

56. *Id.*

57. *Id.* at 744–45, 747.

58. *Id.* at 736–38.

59. *Id.* at 733 n.4.

60. *Id.* at 747, 757.

61. *District of Columbia v. Trump*, 344 F. Supp. 3d 828, 844 (D. Md. 2018) (denying interlocutory appeal and request for stay and requesting discovery schedule).

62. *In re Trump*, 928 F.3d 360, 368 (4th Cir. 2019). Questions for oral argument included whether either emoluments clause supports plaintiffs' cause of action for injunctive relief and whether plaintiffs allege a cognizable injury to satisfy constitutional standing requirements. *Id.*

63. *Id.* at 380.

64. *Id.* at 376.

and noted that the suit amounted to no more than a constitutionally prohibited generalized grievance.⁶⁵ Maryland and the District of Columbia petitioned for rehearing.⁶⁶ The Fourth Circuit granted the petition for rehearing en banc.⁶⁷

The two underlying opinions disagree completely on all facets of standing analysis. Standing remains in dispute for each of the pending suits until, and if, the Supreme Court decides to clarify what constitutes cognizable injury for emoluments. Whether one sides with the lower or appellate court's analysis on the standing threshold, this is the moment to lay the foundation for a thoughtful remedial approach for emoluments violations of the future.

2. Citizens for Responsibility and Ethics in Washington

Another is a lawsuit filed by the Citizens for Responsibility and Ethics in Washington (CREW).⁶⁸ CREW alleges that President Trump's businesses have benefitted from him becoming president.⁶⁹ For example, plaintiffs claim the Trump Hotel in Washington D.C. is leased from the General Services Administration, and membership fees at President Trump's Mar-a-Lago Resort in Florida doubled from \$100,000 to \$200,000 after his election.⁷⁰

The CREW litigation is more detailed in its prayer for relief, but it asks for the same basic categories of remedies: declaratory, injunction, and other proper relief.⁷¹ Again, it does not include an unjust enrichment claim or restitution-based remedy.

A federal district judge in the Southern District of New York dismissed the CREW litigation.⁷² The court reasoned that the action was not ripe for adjudication.⁷³ According to the judge, plaintiffs' suit raises concern about a conflict between two co-equal branches of government: Congress and the

65. *Id.* at 379.

66. Petition for Panel Rehearing or Rehearing En Banc at 16–22, *In re Trump*, 2019 WL 5212216 (4th Cir. Oct. 15, 2019) (No. 18-2486) (criticizing the court's use of mandamus jurisdiction and arguing that the court reconsider its ruling against quasi-sovereign standing and competitor standing, especially in light of the Second Circuit's ruling in favor of standing in an analogous matter).

67. *District of Columbia v. Trump*, No. 18-2488, 2019 WL 5212218 (4th Cir. Oct. 15, 2019) (order granting petition for rehearing en banc).

68. Second Amended Complaint at 1, *Citizens for Responsibility and Ethics in Washington v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 1:17-cv-00458-RA).

69. *Id.*

70. *Id.* at 3, 34.

71. *Id.* at 64–65.

72. *Citizens for Responsibility and Ethics in Washington v. Trump*, 276 F. Supp. 3d 174, 188, 195 (S.D.N.Y. 2017) (ruling that plaintiffs' "alleged competitive injury" did not fall "within the zone of interests that the Emoluments Clauses sought to protect" and therefore lacked constitutional standing to proceed).

73. *Id.* at 195.

President.⁷⁴ As a matter of judicial restraint, the court reasoned that it “should not interfere unless and until Congress has asserted its authority and taken some sort of action with respect to [the President’s] alleged constitutional violations of its consent power.”⁷⁵ CREW’s appeal to the Second Circuit primarily argues that plaintiffs satisfy Article III standing and overcome prudential barriers.⁷⁶

The Second Circuit, in a 2-1 decision, resuscitated the CREW litigation.⁷⁷ The court found that plaintiffs satisfied standing requirements by alleging sufficient injury including the competitive injury from lost patronage caused by the President’s unfair advantage over the same customer base.⁷⁸ This reasoning creates a circuit split with the Fourth Circuit’s ruling against standing in the Maryland-District of Columbia litigation.⁷⁹ Whether the Second Circuit’s favorable standing determination remains intact will be up to the Supreme Court should the Court opt to consider resolving the justiciability issues in the emoluments context once the cases are ripe.⁸⁰

3. Democratic Legislators

A third lawsuit includes 201 Democratic legislators who assert that the Constitution mandates that Congress should have been consulted on whether the President may accept foreign payments to his company, the Trump Organization.⁸¹ The primary allegation in the complaint is that the President accepted emoluments without first obtaining congressional assent.⁸²

As to remedies sought, again no restitution. The Democratic legislators’ suit seeks declaratory and injunctive relief, as well as the catchall for further relief as the court deems just.⁸³

74. *Id.* at 194.

75. *Id.* at 194–95. “Congress is not a potted plant. It is a co-equal 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 chooses to do so.” *Id.* at 195 n.8.

76. Brief of Plaintiffs-Appellants at 2, *Citizens for Responsibility and Ethics in Washington v. Trump*, 939 F.3d 131 (2d Cir. 2019) (No. 18-474).

77. *Citizens for Responsibility and Ethics in Washington*, 939 F.3d at 131.

78. *Id.* at 143–44.

79. *See id.* at *9 (noting the creation of a circuit split); *supra* Section II.C.1.

80. *See* Andy Grewal, *The Second Circuit’s Botched “Zone of Interests” Analysis in CREW v. Trump*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 14, 2019), <https://yalejreg.com/nc/the-second-circuits-botched-zone-of-interests-analysis-in-crew-v-trump/> [<https://perma.cc/3NH7-7B4K>].

81. *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 50 (D.D.C. 2018).

82. *Id.* at 50.

83. Complaint at 53–54, *Blumenthal*, 335 F. Supp. 3d 45 (1:17-cv-01154-EGS).

Much like the CREW litigation, the Democratic lawmakers' Foreign Emoluments suit faced formidable standing problems.⁸⁴ The legislators, however, survived the standing challenge for now.⁸⁵ The court limited its ruling to only the standing threshold.⁸⁶ The legislators alleged the President violated the Foreign Emoluments Clause by accepting “prohibited foreign emoluments without seeking the consent of Congress.”⁸⁷ Plaintiffs maintained that each plaintiff suffered a concrete, particularized injury. United States District Court Judge Emmet Sullivan ruled that 201 minority legislators (Senators and Representatives) demonstrated sufficient injury to satisfy Article III standing requirements.⁸⁸ The judge reasoned that the legislators alleged concrete injuries sufficient to satisfy standing.⁸⁹

According to the court, Plaintiffs satisfied the standing hurdle by alleging denial of a voting opportunity that constituted a cognizable actual injury caused by defendant and redressable by a favorable court opinion notwithstanding separation-of-powers constraints.⁹⁰ The court justified its standing holding despite the separation-of-powers tension on the basis that “plaintiffs have no adequate legislative remedy,” but instead the matter is resolvable in the courts.⁹¹

The court's opinion greatly relied on amici briefs to support a broad interpretation of emoluments as a powerful guard against corruption and foreign influence.⁹² Per the amici's evidence, the court noted that presidents historically have sought OLC advice *before* accepting possible emoluments.⁹³ Further, because the Constitution's Foreign Emoluments Clause explicitly prohibits presidential acceptance of unlawful foreign emoluments, “the Constitution gives each individual Member of Congress a right to vote before

84. *Blumenthal*, 335 F. Supp. at 52–57 (relying heavily on Court's standing analysis in *Raines v. Byrd*, 521 U.S. 811 (1997)). In *Raines*, individual members of Congress were found to lack standing because they did not have “sufficient personal stake in [the] dispute and [did] not allege[] a sufficiently concrete injury” because the members of Congress “alleged no injury to themselves as individuals . . . , the institutional injury they allege is wholly abstract and widely dispersed . . . , and their attempt to litigate this dispute at this time is contrary to historical experience.” *Id.* at 57 (quoting *Raines*, 521 U.S. at 829–30).

85. *Id.* at 72.

86. *Id.*

87. *Id.* at 50.

88. *Id.* at 49–50, 72. Specifically, plaintiffs argue that they suffer particularized injury “when his or her vote is nullified by the President's denial of the opportunity to vote on the record about whether to approve his acceptance of a prohibited foreign emolument.” *Id.* at 50.

89. *Id.* at 50–51, 64–65.

90. *Id.* at 54, 64–65.

91. *Id.* at 54–55.

92. *Id.* at 51 n.2 (“The Court appreciates the illuminating analysis provided by the amici.”).

93. *Id.* at 53–54.

the President accepts.”⁹⁴ All of this set the backdrop for the court to find that plaintiffs possessed standing under Article III to protect against foreign corruption of the Executive.

With the legislators surviving the initial standing threshold, discovery ordinarily would commence. As with all the pending suits, however, the government is advancing substantial arguments for stays pending an expedited appeal. The United States Court of Appeals for the District of Columbia Circuit remanded the matter back to the district court for consideration of unexplored separation-of-powers issues.⁹⁵ Given the directive, Judge Sullivan put a hold on thirty-seven subpoenas previously issued to obtain the President’s financial and business records. Judge Sullivan has requested new briefing from both parties. The Department of Justice persists in its efforts seeking the federal appellate court reverse the favorable standing ruling.

The Democratic legislators’ case poses the strongest case for standing, yet it is not without critique given the novelty and magnitude of the allegations as well as the political stage. Again, regardless of the standing fight, it is an ideal time to consider both the scope of unlawful emoluments and the proper remedy for future emoluments violations by any administration.

D. Restitution Road

Restitution should be a part of litigation strategy and any regulatory reform for emoluments violations. For the pending litigation that has so far survived, the standing rulings remain subject to appeal. Formidable challenges on appeal include ripeness and separation-of-powers concerns. The standing rulings remain vulnerable because much hinges on the interpretation of emoluments and the cognizability of injuries as alleged. Also, the remedies sought may pose roadblocks during the course of litigation. For example, even assuming standing, serious issues may arise regarding whether plaintiffs can satisfy equitable requirements for the remedies sought.⁹⁶ These remedies will encounter other challenges. For example, the President argues that the

94. *Id.* at 54.

95. *In re Trump*, 2019 WL 3285234, *2 (D.C. Cir. July 19, 2019) (No. 19-5198) (order of remand) (“The district court did not adequately address whether—given the separation of powers issues present in a lawsuit brought by members of the Legislative Branch against the President of the United States—resolving the legal questions and/or postponing discovery would be preferable, or whether discovery is even necessary (or more limited discovery would suffice) to establish whether there is an entitlement to declaratory and injunctive relief of the type sought by plaintiffs.”).

96. Equitable requirements include formidable proof obstacles such as proving legal remedies are inadequate.

injunctive remedy sought by the 201 legislators is unconstitutional.⁹⁷ Assuming injunctive relief is constitutional, such an *in personam* order is intrusive by nature and poses separation-of-powers concerns that restitution awards do not.

Restitution-based remedies also avoid challenges rooted in a plaintiff's inability to demonstrate compensatory loss as well as other classic hurdles.⁹⁸ Again, restitution remedies including disgorgement are gain-based. The remedy looks to what defendant has gained unjustly. For this simple reason, restitution is an advantageous alternative frame for plaintiffs attempting to show cognizable injury. Still, constitutional standing requires more than a generalized grievance—citizens cannot simply claim a government official has violated a statute or constitutional provision.⁹⁹ Under a restitutionary theory, plaintiff would need to show a causal link to the government actor's wrongful gain or otherwise satisfy the constitutional minimum of standing as a statutorily created whistleblower status with sufficient nexus to the harm.

III. THE DISGORGEMENT REMEDY

A. *Disgorgement Remedy Shaping Rights*

Determining who has a right matters less than how we choose to protect that right to serve our desired goals.¹⁰⁰ Substantive rights shape remedies, and remedies in turn shape rights.¹⁰¹ The latter is especially true when there are

97. *Blumenthal*, 335 F. Supp. 3d at 50 n.1.

98. *See, e.g.*, *Wright v. Genessee County*, No. 156579, 2019 WL 3242418 (Mich. July 18, 2019) (ruling that unjust enrichment for which one seeks restitution rather than compensatory damages is an freestanding cause of action—independent of tort and contract—and overcomes governmental tort immunity).

99. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575–76 (1992); *see also* F. Andrew Hessick, *Quasi-Sovereign Standing*, 94 NOTRE DAME L. REV. 1926, 1927–28 (2019) (exploring state versus individual standing and noting the state's interest in defending the public interest). For a call to reconsider *Lujan*'s reasoning based on the underexamined Anglo-American legal history of *qui tam* legislation that authorized private informers to monitor and collect litigation bounties for unlawful acts of executive officials, *see* Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235 (2018).

100. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 859 (1999) (“[D]eciding who has a right (or, in Cathedral terms, an ‘entitlement’) is often less important than deciding how that right should be protected in order to best facilitate efficient transfers.”).

101. My body of work and planned manuscript echo and further articulate this theme. *See id.* at 858 (advancing a public law correlation—inextricable intertwinement—between remedy and right); *see also* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (theorizing a correlation between private law rights and remedies); John F. Preis, *How the Federal Cause of Action Relates to Rights, Remedies, and Jurisdiction*, 67 FLA. L. REV. 849 (2015) (explaining the historical relationship between federal

intersections or gaps in the law. Remedies like disgorgement—stripping defendant’s wrongful profits—help serve previously unmet or underserved goals of the law. Of course, a remedy should not flow where no right exists. There must be a sufficient foundation and a need for the remedy to reach the offensive conduct that will otherwise go undeterred.

A modern example in American law is opportunistic breaches of contract.¹⁰² Conventional breach of contract remedies, such as expectancy and reliance damages, did not capture the wrongfulness. Restitution concepts enable a plaintiff, in rare cases of proven opportunism, to strip defendant’s wrongful gain. Aside from specific performance, conventional contract law monetary remedies serve only a compensation function. For rare breaches that are opportunistic, compensation does not suffice. The law of unjust enrichment stepped in to fill the gap between contract and tort law¹⁰³ by disgorging defendant’s unjust gain from a deliberate, profitable breach in which defendant took conscious advantage of plaintiff’s insufficient ability to achieve substitute performance. American cases underlying the remedy did not use proper labels¹⁰⁴ but achieved the same result on grounds captured by the Restatement (Third) of Restitution and Unjust Enrichment.¹⁰⁵

1. Historical Roots and Development of the Disgorgement Remedy

Disgorgement of improper gains is a remedy much broader and more storied than an opportunistic breach of contract claim. It seeks to undo unjust gain and deter wrongfulness. Restitutionary-based disgorgement serves as a remedy across a host of underlying causes of action from common law

cause of action and rights, remedies, and jurisdiction, and finding closeness only to remedies). *But see* Jules Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986) (lamenting the conflation between private rights and remedies).

102. I have written much in this area. *See, e.g.*, Caprice L. Roberts, *Restitutionary Disgorgement as a Moral Compass of Breach of Contract*, 77 U. CIN. L. REV. 991 (2009); Caprice L. Roberts, *A Commonwealth of Perspective on Restitutionary Disgorgement for Breach of Contract*, 65 WASH. & LEE L. REV. 945 (2008); Caprice L. Roberts, *Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 LOY. L.A. L. REV. 131 (2008).

103. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. d. (AM. LAW INST. 2011) (operationalizing disgorgement as the remedy for opportunistic breaches of contract).

104. *Laurin v. DeCarolis Constr. Co.*, 363 N.E.2d 675, 679 (Mass. 1977) (stripping defendant’s profits in breach of contract action, though not using the label disgorgement); *see also* *Snepp v. United States*, 444 U.S. 507, 515 (1980) (imposing a constructive trust on book royalties where defendant failed to obtain prepublication clearance).

105. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, pt. II, ch. 4, introductory note & reporter’s note a.

examples like breach of fiduciary duty¹⁰⁶ to statutory examples like federal securities law violations.¹⁰⁷ It has historical roots in equity.¹⁰⁸ But, it is a mistake to assume disgorgement is always equitable because of its historical ties. Specifically, it is tied to the equitable remedy of accounting for profits¹⁰⁹ through which the Chancellor¹¹⁰ would order defendant to deliver accounting books to an equitable master to unearth sources of potential wrongful profits.¹¹¹ The Chancellor no longer operates in this realm;¹¹² instead a judge uses discretion to permit and shape an equitable accounting. The modern disgorgement remedy may stem from a common law or statutory claim and may not have any identifiable association with an equitable accounting. Again,

106. See Samuel L. Bray, *Fiduciary Remedies*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 449, 449 (Evan J. Criddle, Paul B. Miller, & Robert H. Sitkoff eds., 2019) [hereinafter Bray, *Fiduciary Remedies*] (analyzing fiduciary law remedies including accounting for profits, disgorgement, and constructive trusts to discern if a distinct body of law emerges based on the remedial goals sought); see also Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J.L. & PUB. POL'Y 463 (exploring historical support for fiduciary constitutionalism and advancing remedies for public fiducial breaches).

107. *Kokesh v. SEC*, 137 S. Ct. 1635, 1640 (2017) (explaining that courts have ordered disgorgement in SEC enforcement actions since the 1970's upon the SEC's requests for the grant of disgorgement as part of the court's "inherent equity power" ancillary to injunctive relief and that the SEC continued to request disgorgement even after 1990's legislation explicitly authorized civil monetary penalties). Such instances may well run contrary to conventional restitution doctrine due to legislative design. Such a legislative creature may present a distinct type of disgorgement that is more akin to a penalty; where classic restitution remedies are neither penalties nor designed to be punitive.

108. Bray, *Fiduciary Remedies*, *supra* note 106, at 449; Paul B. Miller, *The Fiduciary Relationship*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 63, 63 (Andrew S. Gold & Paul B. Miller eds., 2014).

109. DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 4.3(5). (3d ed. 2018) (tracing the development of the common law accounting for profit to equity and also then the modern connection to unjust enrichment and development of a disgorgement remedy); see also Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 482 (2017) [hereinafter Bray, *Multiple Chancellors*] ("A medieval Chancellor spoke on behalf of God and King; an early modern Chancellor spoke on behalf of conscience and King.").

110. See DOBBS & ROBERTS, *supra* note 109, at 58–63 (summarizing the history of the Chancery Court and its Chancellor, who began in the medieval sense as "high minister of the king," turned novel writ maker, and ultimately turned judge of an equity court).

111. See *id.* at 415–16 ("Regular officers of the Chancery Court, the masters, could serve as auditors and work through complex accounts if necessary and report to the court. Chancery could use its powers of discovery to find hidden assets in the hands of defendant, and altogether the chancery accounting worked out pretty well.").

112. Bray, *Multiple Chancellors*, *supra* note 109, at 420 (explaining how the Chancellor's authority is now dispersed to every judge that has the authority to issue equitable relief).

disgorgement may constitute a legal or equitable remedy depending on the circumstances.¹¹³

Disgorgement operates in both public and private law contexts.¹¹⁴ A classic basis for wrongfulness is a fiduciary breach. Wrongfulness may arise, however, from the presence of an enrichment that is unjust.¹¹⁵ Any benefit is unjust if the recipient has no right to retain it or in good conscience ought to pay value for it.¹¹⁶ In this way, restitution turns the focus away from plaintiff's loss to defendant's wrongful gain.¹¹⁷ Accordingly, restitution-based remedies often exceed compensation.¹¹⁸ Punishment, however, is not the aim of restitution: "The object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty."¹¹⁹ Instead, the aim is to undo defendant's unjust enrichment. Thus, where defendant unjustly profits, restitution remedies operate to strip the profit that is wrongful. Restitutionary remedies that achieve this goal are most commonly referred to

113. See *infra* Section III.A.2. For a useful discussion of the complexity of jury trial rights regarding accounting and disgorgement remedies, see generally Doug Rendleman, *Commercial Bribery: Choice and Measurement Within a Remedies Smorgasbord*, 74 WASH. & LEE L. REV. 369 (2017).

114. See, e.g., *Kansas v. Nebraska*, 135 S. Ct. 1042, 1059 (2015) (public: affirming \$1.8 million disgorgement award for opportunistic breach of an interstate compact agreement over allocation of water rights); *Watson v. Cal-Three, LLC*, 254 P.3d 1189, 1194–95 (Colo. App. 2011) (private: ruling proper a disgorgement of net profits award in real estate transaction case); *Enslin v. Coca-Cola Co.*, 136 F. Supp. 3d 654, 678, 678 n.9 (E.D. Pa. 2015) (private: determining that plaintiff had stated a restitution claim for opportunistic breach of contract to disgorge benefits).

115. Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929, 930 (2012) ("The law of restitution and unjust enrichment creates distinctive causes of action with many and diverse applications—to mistake, to joint owners and joint obligors, to unenforceable contracts, to disrupted transactions of all kinds. And it creates distinctive remedies with applications to all sorts of causes of action—to claims in contract, tort, and unjust enrichment, and to claims for equitable wrongs and for violation of statutes.").

116. Unjust enrichment could be properly characterized as "unjustified enrichment"—"enrichment that lacks an adequate legal basis." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. LAW INST. 2011) (grounding unjust enrichment law on legal, rather than moral, bounds); see also Laycock, *supra* note 115, at 932.

117. Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1279 (1989).

118. E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1341, 1392 (1985) (opposing a disgorgement of defendant's gains for contract law based on the core purpose of contract law remedies to compensate plaintiff for loss).

119. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(4); see also DOBBS & ROBERTS, *supra* note 109, at § 4.3(5).

as an accounting or disgorgement.¹²⁰ In this context, disgorgement is a *giving-up* rather than a *giving-back* form of restitution, and plaintiff's "at-the-expense-of" loss is not required.¹²¹

Disgorgement is technically not a proprietary remedy.¹²² A proprietary remedy yields a property right such as title to a particular asset.¹²³ Disgorgement of gains as a remedy does not, by itself, create a right to title in property. It is often linked to an accounting for profits, which is also not proprietary.¹²⁴ Rather, disgorgement targets defendant's monetary gains. If the court orders a defendant to deliver financial books to discern profits and losses, the remedy appears to operate in *personam*—on defendant.¹²⁵ If, instead, the court or jury awards a monetary remedy in an amount that equals defendant's net gains, the remedy appears to operate in *rem*—on property.¹²⁶

Disgorgement may be confused with the proprietary remedy of constructive trust for unjust enrichment or fiduciary breach. A constructive trust specifically operates *in personam*, but the effect is *in rem* in that the order once performed results in the transfer of title to property based on defendant's unjust enrichment that began with plaintiff. Each of these remedies relates to one another, but they are distinct in how they operate. The constructive trust is equitable, requires tracing, and orders defendant to place the title of the trust property (the trust res) in the name of the true equitable owner, plaintiff. An accounting for profits is also equitable¹²⁷ and orders defendant to provide an account of profits to plaintiff. Disgorgement awards plaintiff defendant's wrongful gain.

120. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(4) ("Restitution remedies that pursue this object are often called 'disgorgement' or 'accounting.'"). See also DOBBS & ROBERTS, *supra* 109, at § 4.3(5) (discussing the same).

121. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51.

122. Bray, *Fiduciary Remedies*, *supra* note 106, at 454.

123. *Id.* at 455.

124. See generally KATY BARNETT, ACCOUNTING FOR PROFIT FOR BREACH OF CONTRACT: THEORY AND PRACTICE (2012) (interchanging an award of an account of profits with "disgorgement damages" and calling for adoption of equitable barriers to disgorgement awards for certain contractual breaches).

125. DOBBS & ROBERTS, *supra* note 109, at 397 ("Equity's theory was that it did not decide title but acted *in personam*. It did not act on title or property but upon the person of defendant, compelling him to follow good conscience rather than good title.").

126. *Id.* § 1.4 (explaining how money judgments "at law" are enforced "*in rem*, that is against things or property, not against persons").

127. Though the history is more complicated, an accounting is generally presumed equitable. *Dairy Queen v. Wood*, 369 U.S. 469, 478 (1962); GEORGE E. PALMER, 1 THE LAW OF RESTITUTION § 1.5(c) (1978); DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES—CASES AND MATERIALS 440 (2018) (discussing mischaracterizations of an accounting for profit as legal and connection to application of statute of limitations versus laches considerations).

2. The Import of the Law-Equity Classification on Constitutional Rights and Defenses

Simple classification of the disgorgement remedy as either equitable or legal is complex. The law-equity distinction matters because it affects related rights. Equity has distinct features that create a body of law,¹²⁸ and equity also has its own defenses.¹²⁹ For example, if disgorgement is categorized as a *remedy at law*, it triggers federal and state constitutional rights to a jury trial.¹³⁰ If instead the remedy is deemed *equitable*, the determination of whether and how to calculate a disgorgement award rests solely with the judge.¹³¹ Further, as part of equitable discretion, the judge might deny an equitable remedy if a plaintiff comes to the court with unclean hands. Federal legislation could extend a jury trial right even if disgorgement were truly equitable, but it cannot (without a constitutional amendment) strip a right to a jury if the constitutional right applies.

Historically, the law-equity divide corresponded to the distinction between law's goal of compensation and restitution's sole focus on defendant's wrongful gain:

[T]he law estimates the damage done to the plaintiff by the defendant's wrongful act and gives judgment for damages sufficient to compensate him. Equity, on the other hand, does not concern itself with the damage done to the plaintiff: *it concerns itself solely with the profits made by the defendant through his wrongdoing*. These it holds he cannot in conscience retain; and so *it orders him to deliver them up to the plaintiff even when the plaintiff has suffered no actual damages through the wrong*. This is the principle upon which

128. Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 533 (2016) [hereinafter Bray, *Equitable Remedies*] (maintaining that equity constitutes its own system and one that is usefulness in modern law).

129. Two common equitable defenses are unclean hands and laches. The judge will use unclean hands to deny an equitable remedy where the movant engaged in misconduct directly related to the underlying case. Laches serves to thwart an action for equitable relief where plaintiff slept on its rights by unreasonably delaying the litigation and prejudicing defendant. *Id.* at 581.

130. See U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

131. Bray, *Equitable Remedies*, *supra* note 128, at 545.

the remedy by account is based.¹³²

Still, classification of disgorgement remains unresolved in American law. Further, litigant characterization is not dispositive.¹³³ Misclassifications and myths regarding the general topic of unjust enrichment and restitution abound.¹³⁴ Judicial and scholarly treatment of the disgorgement remedy is inconsistent.¹³⁵ Most determinations favor an equitable framing, but recent Supreme Court interpretations favor legal classification without resolving constitutional jury trial rights.¹³⁶ Courts have treated disgorgement as equitable in many contexts,¹³⁷ but also as a remedy at law garnering a constitutional right to a jury.¹³⁸

132. J.A. STRAHAN, A DIGEST OF EQUITY 418–19 (5th ed. 1928) (emphasis added) (citations omitted).

133. See *Dairy Queen v. Wood*, 369 U.S. 469, 476–79 (1962). In *Dairy Queen*, plaintiff’s complaint alleged breach of a licensing agreement covering a trademark. *Id.* at 473. Plaintiff sought an injunction and an accounting of profits; plaintiff asserted the “purely equitable” nature of the remedies it sought. *Id.* at 477. The Court declined the invitation to allow plaintiff’s “choice of words used in the pleadings” to dictate proper classification: “the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings.” *Id.* at 477–78. Rather, the Court noted that “[a] jury, under proper instructions from the court, could readily determine the recovery, if any, to be had here, whether the theory finally settled upon is that of breach of contract, that of trademark infringement, or any combination of the two.” *Id.* at 479. It further reasoned that legal damages would not be inadequate simply because measuring such damages might require obtaining and examining defendant’s business records. *Id.*

134. RENDLEMAN & ROBERTS, *supra* note 127, 539–46.

135. For confusing aspects of disgorgement, see Bert I. Huang, *The Equipose Effect*, 116 COLUM. L. REV. 1595, 1598 (2016) (“Our usual rhetoric hides [the equipose effect of disgorgement] because the way we speak about disgorgement often conflates the remedy itself with the trappings of its usage, implicitly piling on extra nonremedial costs.”).

136. See, e.g., *Castrol, Inc. v. Pennzoil Quaker State Co.*, 169 F. Supp. 2d 332 (D.N.J. 2001); *Am. Cyanamid Co. v. Sterling Drug, Inc.*, 649 F. Supp. 784 (D.N.J. 1986); George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 FORDHAM J. CORP. & FIN. L. 1, 48 (2007).

137. See, e.g., *Kansas v. Nebraska*, 135 S. Ct. 1042, 1057 (2015) (disgorgement as remedy for Nebraska’s opportunistic breach of the Republican River Compact); *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1053–54 (10th Cir. 2006) (disgorgement as equitable remedy for FDCA violation); *Roberts v. Sears, Roebuck & Co.*, 617 F.2d 460, 465 (7th Cir. 1980) (“Restitution for the disgorgement of unjust enrichment is an equitable remedy with no right to a trial by jury.”); *Castrol*, 169 F. Supp. 2d at 344 (disgorgement as equitable under the Lanham Act); *Am. Cyanamid*, 649 F. Supp. at 789 (denying constitutional right to jury trial distinguishing disgorgement as equitable in nature and reasoning that “a claim for profits seeks relief recognized by the Seventh Amendment as fundamentally different from a claim for damages, the cases relied upon by American Cyanamid—involving claims for both damages and unjust profits—cannot be interpreted as blurring the two claims and rendering legal an otherwise purely equitable claim for profits”).

138. See, e.g., *SEC v. Lipson*, 278 F.3d 656, 663 (7th Cir. 2002) (“Disgorgement is another form of restitution, as Judge Friendly noted . . . , and restitution, as we have noted in several non-SEC cases,

Classification of disgorgement as legal instead of equitable is contested and important. Resolution of the law-equity issue implicates constitutional jury trial rights as well as other meaningful issues such as the available defenses. Though many courts view, if not assume, disgorgement as equitable, the United States Supreme Court has muddied the waters in two recent cases—both of which lean toward legal classification. Could this be another “accidental revolution”¹³⁹ for remedies law on the Court’s part?

The first case does not consider the constitutional right to a jury trial. Rather, the case raised a statute of limitations question. In *Kokesh v. SEC*, the Supreme Court unanimously ruled that disgorgement in the context of a securities-enforcement action is a legal “penalty” rather than an equitable remedy, and as such, would be subject to the five-year statute of limitations under the Securities Exchange Act.¹⁴⁰ The Court expressed that the ruling was for the narrow question at issue.¹⁴¹

A federal district court subsequently noted that the *Kokesh* ruling did not determine the law-equity classification as a matter of constitutional analysis but rather only as to the statute of limitations.¹⁴² After conducting historical analysis, the federal district court ruled that disgorgement is equitable and denied any constitutional right to a jury trial.¹⁴³

The law-equity distinction surrounding the disgorgement remedy also arose in *Samsung Electronics Co. v. Apple Inc.*,¹⁴⁴ a case involving a design-patent

is both a legal and an equitable remedy.”); Roach, *supra* note 136, at 48 (maintaining disgorgement may be either equitable or legal); *cf.* ROBERT M. LANGER, JOHN T. MORGAN, & DAVID L. BELT, CONNECTICUT PRACTICE SERIES: UNFAIR TRADE PRACTICES, BUSINESS TORTS, AND ANTITRUST § 6.9 (2019–2020 ed.) (noting disgorgement’s classification is complex). For reasoning on the right to a jury trial for legal restitution generally, see *First Nat’l Bank of DeWitt v. Cruthis*, 203 S.W.3d 88, 92–94 (Ark. 2005).

139. See Mark P. Gergen, John M. Golden, & Henry E. Smith, *The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 203 (2012) (arguing that the Court’s modern injunction holdings caused an “accidental revolution”).

140. *Kokesh v. SEC*, 137 S. Ct. 1635, 1639, 1645 (2017) (interpreting 28 U.S.C. § 2462).

141. *Id.* Notably, the Supreme Court leaves open the question of judicial power to order disgorgement in SEC enforcement actions: “Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context. The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462’s limitations period.” *Id.* at 1642 n.3.

142. *United States v. Rapower–3, LLC*, 294 F. Supp. 3d 1238, 1241–42 (D. Utah 2018).

143. *Id.* at 1241 (denying right to jury trial on the basis of long-standing precedent categorizing disgorgement as equitable remedy incidental to injunctive relief).

144. 137 S. Ct. 429 (2016).

infringement claim under the Patent Act.¹⁴⁵ The Solicitor General argued that a jury should determine the article of manufacture and the amount of any disgorged profits and that the defendant should bear the burden of proof. This high-stakes litigation centered much attention on the remedies provision of the statute authorizing a disgorgement award for the design-patent infringer's "total profit."¹⁴⁶ The Court analyzed whether to measure the disgorgement award based on Samsung's profits for its smartphone devices as a whole versus only profits associated with individual components.¹⁴⁷ The Supreme Court adopted a component-level interpretation advanced by the infringer Samsung because components are "articles of manufacture" (even if not sold separately to consumers), but that the whole device is also an "article of manufacture."¹⁴⁸ Citing the lack of "adequate briefing by the parties,"¹⁴⁹ the Court failed to resolve the proper measure for a judge or a jury to use. Instead, the Court left the issue for resolution by the Federal Circuit. Patent law scholars have raised concerns over the Supreme Court's holding and the merits of the Solicitor General's contentions regarding the classification of the remedy as legal.¹⁵⁰ Other patent law scholars wholly objected to the application of an all-profits-disgorgement remedy as absurd and draconian.¹⁵¹

If common-law based cause of action seeks a disgorgement remedy, then the law-equity classification of disgorgement is an open question in some circumstances and clearer in others. For example, if the underlying claim is for breach of fiduciary duty, the claim is equitable and often the remedies sought

145. *Id.*

146. *Id.* at 431 (examining 35 U.S.C. § 289 (2012)).

147. *Id.* A cell phone screen is an example of a component.

148. *Id.* at 436 ("[T]he term 'article of manufacture' is broad enough to embrace both a product sold to a consumer and a component of that product, whether sold separately or not. Thus, reading 'article of manufacture' in § 289 to cover only an end product sold to a consumer gives too narrow a meaning to the phrase.").

149. *Id.* ("We decline to lay out a test for the first step of the § 289 damages inquiry in the absence of adequate briefing by the parties.").

150. See Pamela Samuelson & Mark Gergen, *The Disgorgement Remedy of Design Patent Law*, 108 CALIF. L. REV. (forthcoming 2020) (exploring the proper scope of the disgorgement remedy in design patent law). A historical survey of pre-statute claims for infringers' profits, including patent and copyright claims, would likely reveal a mixture of approaches including some courts treating the remedy as legal. Such results, if demonstrated, would complicate efforts to convince the Supreme Court to deem the modern remedy equitable as a matter of constitutional interpretation unless the Court shifts its test for resolving the law-equity issue away from the historical focus.

151. Brief Amici Curiae of 37 Intellectual Property Professors in Support of Petition for Certiorari at 2, 9, *Samsung Elecs. Co. v. Apple Inc.*, 137 S. Ct. 429 (2016) (No. 15-777). Others also opposed an all-profit disgorgement award and noted such negatives as the major ramifications on the patent industry. Brief of Systems, Inc. as Amicus Curiae in Support of Petitioners at 2, *Samsung Elecs. Co.*, 137 S. Ct. 429 (No. 15-777).

are identifiably equitable such as a constructive trust or an injunction. But, however, what if the cause of action is legal but the remedy is equitable? Confusion abounds because some courts in fiduciary breach cases claim to award “damages” or abandon the equitable accounting of profits frame for the term disgorgement.¹⁵² If, instead, the claim is opportunistic breach of contract seeking disgorgement, the issue is an open question.¹⁵³ Recall that restitution remedies can be equitable (constructive trust) or legal (quantum meruit or quantum valebant).¹⁵⁴ Courts have granted constitutional jury trial rights in cases seeking restitution-based remedies under the frames of quasi-contract, legal restitution, and freestanding unjust enrichment for quantum meruit or quantum valebant.¹⁵⁵ Further, when analyzing the Seventh Amendment constitutional right to a jury trial, the Supreme Court has conducted separate analysis of both the claim and the remedy sought with modern jurisprudence focusing on the history rather than the function of the remedy.¹⁵⁶ If one party requests a jury trial, and the other opposes it, the court would likely focus on historical analysis of the claim and the remedy to make the determination.¹⁵⁷ If, as this Article suggests, Congress passes legislation authorizing litigation and providing for disgorgement relief, Congress would be free to extend a right to a jury trial regardless of classification because the constitutional right is a floor rather than a ceiling. It is more likely that Congress would be silent,¹⁵⁸ which would leave the jury trial question to the courts.

152. Bray, *Fiduciary Remedies*, *supra* note 106, at 465.

153. For indications of the complexity, a draft version of the Restatement noted that it would be a serious mistake to treat the new disgorgement for opportunistic breach section as equitable. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. e (AM. LAW INST., Tentative Draft No. 7, 2010). The final version of the Restatement, however, is silent on the proper classification. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 4 cmt. e.

154. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4.

155. *See, e.g.*, SEC v. Lipson, 278 F.3d 656, 662–63 (7th Cir. 2002) (restitution as both a legal and equitable remedy); Roberts v. Sears, Roebuck & Co., 617 F.2d 460, 465 (7th Cir. 1980) (restitution of disgorgement of unjust enrichment as equitable remedy); First Nat’l Bank of DeWitt v. Cruthis, 203 S.W.3d 88, 94 (Ark. 2005) (unjust enrichment after alleged breach of implied contract as equitable cause of action).

156. Samuel L. Bray, *Equity and the Seventh Amendment* (Notre Dame Legal Studies Paper No. 1852, 2019), <https://ssrn.com/abstract=3237907> [<https://perma.cc/H9V6-PFKA>].

157. *See, e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 351–53 (1998) (analyzing whether the claim and the remedy were historically treated as legal or equitable); Markman v. Westview Instruments, Inc., 517 U.S. 370, 376–84 (1996) (analyzing whether patent claim construction was historically a matter for the judge or jury).

158. *See, e.g.*, Castrol, Inc. v. Pennzoil Quaker State Co., 169 F. Supp. 2d 332, 344 (D.N.J. 2001) (“A plain reading of the Lanham Act remedy section unqualifiedly weighs against Pennzoil’s

An equitable frame would be best because judges rather than juries could shape the relief while balancing the delicate interests at stake in suits leveled against sitting government officials. For example, constitutional or federal statute violations may lead to equitable relief along with ancillary remedies against government officials despite claims of sovereign immunity.¹⁵⁹ Equitable relief is prospective and, if in the form of disgorgement rather than injunctive relief, is less disruptive to delicate separation-of-powers and federalism balances. Such suits are grounded on civil rights legislation that expressly authorizes suing state government actors.¹⁶⁰ The Emoluments lawsuits generally rest on a theory of the Executive's official conduct violating the Emoluments Clauses of the Constitution. These lawsuits are not based on civil rights violations, so the traditional, express pathway to federal court litigation is lacking.¹⁶¹ Advocates of the Emoluments litigation maintain that an implied right of action exists, but this point is vigorously contested.¹⁶² Explicit statutory authorization, as proposed below, would alleviate much of this tension.

interpretation that they are entitled to a jury trial on the disgorgement of profits issue. . . . Furthermore, the language of this section makes no mention of a trial by jury.”)

159. *Hutto v. Finney*, 437 U.S. 678, 697–99 (1978) (attorney fees); *Ex parte Young*, 209 U.S. 123, 162–63 (1908) (injunctive relief).

160. *See, e.g.*, 42 U.S.C. § 1983 (2012).

161. *See* Josh Blackman & Seth Tillman, *The Emoluments Clauses Litigation, Part 8: There is No Cause of Action for a Suit Against the President in his Individual Capacity for Purported Violations of the Emoluments Clauses*, VOLOKH CONSPIRACY (Feb. 8, 2018, 3:04 PM), <https://reason.com/volokh/2018/02/08/the-emoluments-clauses-litigation-part-8> [<https://perma.cc/5RDT-MXTM>].

162. *Id.*

B. *Disgorgement as the Proper Remedy for Emoluments Violations*

If a federal officer receives an emolument that is unconstitutional, it is by definition an unjust benefit. Disgorgement is particularly suited to remedy that wrong.¹⁶³ It centers on defendant's wrongful gain rather than plaintiff's loss. Ideally, disgorgement harmonizes the imbalance of gain by depriving the wrongdoer of profits to the point of lawfulness. However, if the gains are given to one who should have been entitled to make them, then the court restores a just equilibrium.¹⁶⁴

But, who should have the right to remedy this wrong? Should the remedy be attainable by private plaintiffs or the government treasury itself? An analogy to the *cy près* doctrine—allowing the judge to discern *as near as possible* in whom the remedy should lie—from charitable trust law might be a helpful path for determining a worthy recipient.¹⁶⁵ Depending upon the category of emoluments, not all of the potential plaintiffs in the pending cases have a right to make the profits. A competing hotel may have that right and thus rerouting the gain to such plaintiffs attains proper equilibrium between wrongdoer and victim. If the theory of litigation is on behalf of the government or the people, placing the gain in the government's hands is more of a distributive choice than a rebalancing or a restoration. It would not be a restoration because the gain does not constitute money previously belonging to, or expected to be gained by, the plaintiff. Again, though disgorgement serves to force defendant to give up wrongful gain, it does not require that the money first resided in the plaintiff's possession or potential possession.¹⁶⁶ But power to recover such gains and deter corruption should lie in the government because the gain is achieved by virtue of the official's government position.¹⁶⁷

163. If a court authorizes a disgorgement remedy, it may be necessary to reach the government officer's personal account where such assets may lie. For an argument that any disgorgement or constructive trust remedy in the emolument context necessitates suing the President in his personal rather than official capacity, see Motion for Leave to File Brief of Scholar Seth Barrett Tillman and Judicial Education Project as *Amici Curiae* in Support of Neither Party with Respect to Motion to Dismiss on Behalf of Defendant in His Individual Capacity at 14–15, *District of Columbia v. Trump*, 291 F. Supp. 3d 725 (D. Md. 2018) (No. 8:17-cv-01596-PJM).

164. As discussed below, *infra* note 208 and accompanying text, Aristotle would be pleased with this use of restitution to restore justice.

165. I.R.S., *The Cy Pres Doctrine: State Law and the Dissolution of Charities* (1981), <https://www.irs.gov/pub/irs-tege/eotopice81.pdf> [<https://perma.cc/4CXX-DDX6>].

166. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (AM. LAW INST. 2011).

167. I.R.S., *supra* note 165; see *Jersey City v. Hague*, 115 A.2d 8, 14 (N.J. 1955) (endorsing city's implied power to sue for restitution to recover money that officials allegedly extorted from city

The Supreme Court recently endorsed a disgorgement remedy for opportunistic breach of contract in an interstate water-compact case.¹⁶⁸ Though the setting is distinct, the underlying logic is relevant in the potential use of a disgorgement remedy against a federal officer. The Court noted: “And whatever is true of a private contract action, the case for disgorgement becomes still stronger when one State gambles with another State’s rights to a scarce natural resource.”¹⁶⁹ Endorsing the remedy of disgorgement, the Court sought to serve at least two goals: stability and deterrence.¹⁷⁰ The stability interest included the law of contracts as well as the allocation of water resources under such compacts.¹⁷¹

Emoluments raise a strong deterrence interest as well as a desire for stability. Addressing an emoluments violation is not as simple as remedying a breach of contract. But if an emolument is deemed unlawful, it is a breach of trust. If foreign governments are attempting to curry favor, disgorgement would restabilize proper relations and demonstrate the wrongfulness of the attempt.

The fact that disgorgement often exceeds compensation is more troublesome in private breach of contracts settings where compensation is the conventional remedy and goal. Surpassing compensation is more familiar and palatable where there is a high desire to prevent the unjust enrichment, especially when coupled with a possible breach of other duties.¹⁷²

Some scholars claim that disgorgement punishes. If calibrated properly to the profit wrongfully obtained,¹⁷³ disgorgement simply undoes that improper

employees and relying on a House of Lords example focusing not on the government’s loss but instead on the wrongdoer’s gain by misuse of its position).

168. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015).

169. *Id.* at 1057.

170. *Id.* (“[T]his Court may order disgorgement of gains, if needed to stabilize a compact and deter future breaches, when a State has demonstrated reckless disregard of another, more vulnerable State’s rights under that instrument.”).

171. *Id.*

172. *See infra* Section III.A.

173. Consider, for example, the Supreme Court’s reasoning in *Snepp v. United States*, 444 U.S. 507 (1980). The Court authorized a constructive trust remedy over ex-Central Intelligence Agent’s wrongful profits earned from a book published without prepublication clearance, though not containing classified information. *Id.* at 511, 515. The Court viewed the behavior as a fiduciary breach warranting the imposition of a constructive trust over his book publication royalties. *Id.* at 515. Scholars, myself included, have criticized the reasoning in *Snepp*. *See, e.g.*, Caprice L. Roberts, *Supreme Disgorgement*, 68 FLA. L. REV. 1413, 1419 n.25 (2016); Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1034 n.34 (2011). *Snepp* violated his contractual duty but did not breach his fiduciary duty because he did not publish classified information. *Snepp*, 444 U.S. 509–10. It is also less than clear that defendant profited from property belonging to the government. *See id.* at 508–09. Further, the Court did not analyze how to trace the wrongful profits versus the

gain. It does not also then treble or otherwise multiply the award to punish defendant.¹⁷⁴ It only strips away the gain that would be unjust to retain. Disgorgement does take gain that defendant had no right to make. This serves to deter and prevent unjust enrichment and conscious advantage-taking.

Does service of a deterrence function automatically convert the remedy to a punitive one? If crafted to vindicate a public interest and punish a wrongdoer, then definitely yes. Is it possible, however, to exceed compensation in order to deter but not punish a defendant who consciously takes without asking? That is the goal of restitution.

profits Snepp had every right to make. *See id.* at 507, 515–16. If, for example, Snepp had to surrender all royalties from his book, the remedy neither calibrates to which parts of the book were as a result of classified information nor which parts Snepp earned through his own untainted merit. If one reimagines the wrong as an opportunistic breach of contract where the breach is failure to ask permission in advance, a disgorgement of all profits thus wrongfully made may be warranted. *See* RESTATEMENT (THIRD) OF UNJUST ENRICHMENT AND RESTITUTION § 39, cmt. d, illus. 4 & Reporter’s Note d (AM. LAW. INST. 2011). A complete strip of profits (or imposition of a constructive trust over all of profits earned), however, runs the risk of overreaching if the real intent is to punish bluntly. The lower court suggested punitive damages would have been a preferable route. *Snepp*, 444 U.S. at 510. The comparable, famous case of the Commonwealth, *Attorney Gen. v. Blake*, [2001] 1 AC 268 (H.L.) (Eng.), fares a bit better due to tighter reasoning, though *Blake* is not without its critics. *See, e.g.*, JAMES EDELMAN, GAIN-BASED DAMAGES: CONTRACT, TORT, EQUITY AND INTELLECTUAL PROPERTY 149 (2002); Mitchell McInnes, *Disgorgement for Breach of Contract: The Search for a Principled Relationship*, in UNJUST ENRICHMENT AND THE LAW OF CONTRACT 225, 241 (E.J.H. Schrage ed., 2001); Hanoch Dagan, *Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory*, 1 THEORETICAL INQUIRIES IN L. 115, 117, n.7 (2000); Robert Stevens, *Damages and the Right to Performance: A Golden Victory or Not*, in EXPLORING CONTRACT LAW (Jason W. Neyers, Richard Bronaugh, & Stephen G.A. Pitel eds., 2009) (maintaining that *Blake* invented the disgorgement remedy though lacking precedent); *see also* John D. McCamus, *Disgorgement for Breach of Contract: A Comparative Perspective*, 36 LOY. L.A. L. REV. 943, 943 (2003).

174. Congress could draft legislation with additional remedial functions to address punitive goals. *See, e.g.*, 18 U.S.C. § 1964 (2012) (providing for recovery of “threefold the damages” sustained and costs). If labeled punitive, however, other consequences may arise such as tax implications. DOBBS & ROBERTS, *supra* note 109, at 324 n.449 (explaining the taxable nature of punitive versus compensatory awards).

Economic theory¹⁷⁵ poses a counterargument that a disgorgement remedy may exceed the goal of optimal deterrence.¹⁷⁶ The theory of deterrence asks: what is the least quotient of remedy that can achieve deterrence?¹⁷⁷ To go beyond that amount would be overkill. Thus, if compensation will do, then disgorgement might be excessive in achieving a partial deterrence goal. An optimal deterrence theory might dictate that the cost of deterrence not exceed the cost of the action being deterred. These points are worth considering, though disgorgement should be able to overcome the challenge for at least some of the possible emolument violations.

Disgorgement should be available, if not preferred, for three reasons. First, a lesser remedy such as compensation may be unattainable and undesirable given that emoluments violations most often do not cause commensurate loss to putative plaintiffs. The exception would be competitor hotels; however, those losses may suffer from proof problems such as causation.¹⁷⁸ Second, restitution-based remedies such as disgorgement should not punish if applied properly to the offensive behavior and measured correctly. It is true that proper application and measurement will require finesse, but it is worth pursuing. Appropriately attained disgorgement would not punish and ideally would not over-deter. The reply to that assertion is that disgorgement achieves complete deterrence because it strips all gain.¹⁷⁹ To a law-and-economics advocate

175. Consideration of this counterargument is part of this Article's effort to increase dialogue between remedies scholars and law and economic theorists, as there is much insight to be gained even if the two groups at times operate with distinct value choices in mind. For a thoughtful treatment on why this dialogue is important, see Samuel L. Bray, *Remedies, Meet Economics; Economics, Meet Remedies*, 38 OXFORD J. LEGAL STUD. 71 (2018) (noting the startling lack of conversation, detailing the dangers of misconceptions, and suggesting deeper collaboration between the two fields).

176. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 160–63 (1987); cf. Huang, *supra* note 135, at 1599–601 (noting that disgorging net gain does not force defendant to suffer a loss, permitting defendant to break even). Professor Huang argues that using disgorgement as a remedy some of the time may emulate the incentives of applying other compensatory remedies all of the time. *Id.* at 1599, 1605. He posits that this flexibility may be helpful when harm is difficult to measure. *Id.* at 1599–601, 1621–24. In contractual cases, the expectation remedy may lead to over-reliance by the nonbreaching party; whereas, disgorgement may cause the breaching party to over-rely. Yehonatan Givati & Yotam Kaplan, *Over-Reliance Under Contractual Disgorgement*, 20 AM. L. & ECON. REV. 82 (2018).

177. See, e.g., Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79 (1982); Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143 (1989). *But cf.* Cass R. Sunstein, David Schkade, & Daniel Kahneman, *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237 (2000) (offering two studies to demonstrate that people do not believe in optimal deterrence).

178. See *supra* Section II.C.1.

179. Complete deterrence's purpose is to ensure defendant never chooses the wrongful behavior. See, e.g., Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 421 (1998); Catherine M. Sharkey, *Economic Analysis of Punitive Damages: Theory, Empirics, and*

complete deterrence is not preferable to optimal, partial deterrence. It simply goes farther than necessary to achieve the desired goal of deterrence. If calibrated correctly, it is possible not to strip all gain, though in practice achieving this goal may be difficult. To attempt the achievement, the factfinder would need to discern which part of the gain is unjust. Did defendant contribute lawfully to the creation of profit in such a way that justifies retention of some part of the enrichment? Third, for some disgorgement may be preferable because optimal deterrence is not as important as preventing the unjust enrichment or eliminating corruption, especially where the enrichment occurs from conscious-advantage taking without asking or in reckless disregard of the interests of others or a paramount public interest. This feature is especially true where an injunction would have been warranted *ex ante*, but it becomes too late to achieve it. For example, the Foreign Emoluments Clause's requirement of congressional consent is a constitutionally mandated permission lever, but it may be too late to stop the objectionable conduct. Accordingly, if one took without asking, disgorgement would be the proper remedy.

Ample precedent exists for using disgorgement as a powerful remedy for federal statutory violations.¹⁸⁰ It is true that disgorgement is not always deemed an option for violation of certain federal laws. For example, disgorgement is no longer available as a remedy for utility patent infringement due to the Supreme Court's interpretation of statutory amendments regarding the law-equity divide.¹⁸¹ For emoluments, Congress ideally would authorize disgorgement, identify proper plaintiffs, and clarify the law-equity distinction for the purposes of jury trial rights and applicable defenses. Even in the absence of any statutory authorization, disgorgement of unjust enrichment is a viable emoluments remedy under the common law.

Doctrine, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 486, 489 (Jennifer Arlen ed., 2013) (“The primary goal of gain elimination is the complete deterrence of socially unproductive activities . . .”).

180. See, e.g., *Porter v. Warner Holding Co.*, 328 U.S. 395, 398–99 (1946) (disgorging profits gained from federal statutory violation).

181. Caprice L. Roberts, *The Case for Restitution and Unjust Enrichment Remedies in Patent Law*, 14 LEWIS & CLARK L. REV. 653, 665–89 (2010) (criticizing the Court's determination that disgorgement is not an available remedy under the revised statute).

C. Unjust Enrichment and Emoluments

The Restatement (Third) of Restitution and Unjust Enrichment sets forth the basic liability for unjust enrichment in the first section: “A person who is unjustly enriched at the expense of another is subject to liability in restitution.”¹⁸² The phrase “at the expense of another,” does not require a loss by plaintiff, but instead means “‘in violation of the other’s legally protected rights,’ without the need to show that the claimant has suffered a loss.”¹⁸³ This feature of unjust enrichment renders a claim that should not fail even though plaintiff cannot allege loss.¹⁸⁴

A critical feature of unjust enrichment and disgorgement in particular is that they are not designed to compensate plaintiff. Though recovery may exceed compensation, the purpose is not to punish. Instead, restitution remedies like disgorgement are meant to strip defendant’s unjust enrichment and deter conscious advantage-taking.

Two specific sections of the Restatement have particular relevance with respect to possible emoluments. The first involves fiduciary or confidential relations.¹⁸⁵ Another covers interference with other protected interests.¹⁸⁶

182. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. LAW INST. 2011).

183. *Id.* § 1, cmt. a.

184. Brief of Restitution and Remedies Scholars as Amici Curiae in Support of Respondent at 2, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339).

185. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43:

A person who obtains a benefit

(a) in breach of a fiduciary duty,

(b) in breach of an equivalent duty imposed by a relation of trust and confidence, or

(c) in consequence of another’s breach of such a duty,

is liable in restitution to the person to whom the duty is owed.

186. *Id.* § 44:

(1) A person who obtains a benefit by conscious interference with a claimant’s legally protected interests (or in consequence of such interference by another) is liable in restitution as necessary to prevent unjust enrichment, unless competing legal objectives make such liability inappropriate.

(2) For purposes of subsection (1), interference with legally protected interests includes conduct that is tortious, or that violates another legal duty or prohibition (other than a duty imposed by contract), if the conduct constitutes an actionable wrong to the claimant.

(3) Restitution by the rule of this section will be limited or denied

(a) if the court would refuse to enjoin the interference, assuming timely application and an absence of procedural or administrative obstacles;

(b) to the extent it would result in an inappropriate windfall to the claimant, or would otherwise be inequitable in a particular case;

(c) if the benefit derived from the interference cannot be adequately measured;

Under a fiduciary theory, additional support may exist in the Constitution's Take Care Clause: "he shall take Care that the Laws be faithfully executed . . ." ¹⁸⁷ Other scholars have articulated this as a substantive theory. ¹⁸⁸ Disgorgement is also suggested as one of the possible remedies. ¹⁸⁹

To the extent a contractual relationship exists in the first instance between a plaintiff and the government official in question, then it is also worth considering whether there is an opportunistic breach of contract that warrants disgorgement of profits. ¹⁹⁰ For example, the American Law Institute suggests reconceptualizing *Snepp* ¹⁹¹ as an opportunistic breach of contract to disgorge wrongful gains, ¹⁹² access to the remedy reframed as disgorgement thus requires an opportunistic breach of contract. An opportunistic breach theory against any government official depends on the wording of relevant contracts with a focus on any clauses on exclusivity or covenants regarding loyalty and confidentiality.

IV. REMEDYING EMOLUMENTS VIOLATIONS

A. Whistleblower Legislation

1. Congress's Power to Legislate Against Emoluments

The Foreign Emoluments Clause does not expressly grant authority to Congress to regulate against emoluments. ¹⁹³ Congress possesses the power,

or

(d) if allowance of the claim would conflict with liabilities or penalties for the interference provided by other law.

187. U.S. CONST. art. II, § 3.

188. See Leib & Shugerman, *supra* note 106, at 485 (advancing a theory of fiduciary constitutionalism).

189. *Id.* at 487 ("Public fiduciary duties, then, can have straightforward (and literal) juridical applications with fairly conventional remedies one would see in the private law: constructive trusts, accounting, injunctions, and damages with a view to disgorgement."). The listed remedies are prevalent in public and private litigation. A minor clarification: disgorgement as this Article proposes it would be linked to restitution and unjust enrichment and therefore would not constitute a type of damages, neither compensatory nor punitive damages.

190. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39.

191. *Snepp v. United States*, 444 U.S. 507 (1980); see also *supra* note 173 (analyzing *Snepp* and listing sources critical of its reasoning).

192. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39, cmt. d, illus. 4 & reporter's note d; see also Nicholas W. Sage, *Disgorgement: From Property to Contract*, 66 U. TORONTO L.J. 244, 259 (2016) (analogizing to breach of negative covenant cases).

193. U.S. CONST. art. I, § 9, cl. 8.

however, as a matter of implication via the constitutional phrase “without the Consent of the Congress.”¹⁹⁴ The invocation of congressional consent suggests Congress prospectively could regulate law within its consent power. This dynamic is comparable to congressional assent to state compacts.¹⁹⁵

By analogy to compact power,¹⁹⁶ Congress possesses the power to legislate regarding emoluments violations and proper remedies. With respect to compacts, Congress can pass legislation incident to its compact power. A variety of cases explore the parameters of the compact power.¹⁹⁷ The power to legislate is broad, though the remedial provisions may abuse that power if, for example, the encroachment on state sovereignty is excessive.¹⁹⁸ For emoluments legislation, this limitation is not a concern because the exercise of power would be on the federal level. Boundaries, if any, would arise by virtue of separation-of-powers concerns rather than federalism constraints. Because the Constitution gives Congress explicit power to consent to emoluments,

194. *Id.* Litigation over a presidential attempt to block congressional oversight subpoenas sheds light on the breadth of Congress’s powers in this arena:

Courts have grappled for more than a century with the question of the scope of Congress’s investigative power. The binding principle that emerges from these judicial decisions is that courts must presume Congress is acting in furtherance of its constitutional responsibility to legislate and must defer to congressional judgments about what Congress needs to carry out that purpose. To be sure, there are limits on Congress’s investigative authority. But those limits do not substantially constrain Congress. So long as Congress investigates on a subject matter on which ‘legislation could be had,’ Congress acts as contemplated by Article I of the Constitution.

Applying those principles here compels the conclusion that President Trump cannot block the subpoena. . . . According to the Oversight Committee, it believes that the requested records will aid its consideration of strengthening ethics and disclosure laws, as well as amending the penalties for violating such laws. The Committee also says that the records will assist in monitoring the President’s compliance with the Foreign Emoluments Clause. These are facially valid legislative purposes Accordingly, the court will enter judgment in favor of the Oversight Committee.

Trump v. Comm. on Oversight and Reform, 380 F. Supp. 3d 76, 82–83 (D.D.C. 2019).

195. An example of state compacts requiring congressional approval is interstate water-rights compacts. *See, e.g.*, *The Republican River Compact*. Pub. L. No. 78-60, 57 Stat. 86 (1943).

196. U.S. CONST. art. I, § 10, cl. 3. (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . .”).

197. *See, e.g.*, *Kansas v. Nebraska*, 135 S. Ct. 1042, 1057 (2015) (interstate water-rights compact); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (tribe and state compact on gaming activities); *New York v. United States*, 505 U.S. 144, 151–52 (1992) (regional waste compact).

198. *New York v. United States*, 505 U.S. at 186–88 (severing unconstitutional legislative incentive essentially mandating state action in specific ways).

Congress should possess the power to regulate emoluments. Indeed, Congress has already passed legislation under an implied emoluments power.¹⁹⁹

It may be preferable that Congress rather than private litigants sets the policies and boundaries of emoluments. Congress could consider which individuals or entities should garner a right to sue, but it may determine the core of the interest is the government itself. Yet the government likely needs to uncover hidden information to assess possible violations. Whistleblowers, in the form of government officials or private confidants, may strike an ideal balance. They possess inside information and a statute could provide the government incentive to obtain information it might not otherwise obtain. The information gathering and sharing incentive also aids political remedies of citizens who cannot sue because they raise only generalized grievances; they do have a right to vote out an elected government official but cannot effectively do so without greater accountability. A whistleblower statute would aid accountability by bringing concealed information into the public arena.

Regardless of whom Congress may determine is the preferred litigant to right such wrongs, disgorgement is the best path to protect any such right. To best protect the right, Congress is best suited to determine materiality thresholds and the contours of emoluments strike the public trust and fidelity of government. Once those boundaries are set, Congress also should consider the remedies best designed to undo and deter the precise harms.

Several avenues exist to provide relief for constitutional emoluments violations. Congress could use its power to establish a private right of action.²⁰⁰ It could further provide a catalogue of preferred remedies and the goals to be served. Alternatively, Congress could designate, but limit, remedies to the federal government.²⁰¹ Without legislative action or guidance, lawyers would

199. For example, in 1966, Congress authorized in the Foreign Gifts and Decorations Act a general statutory consent to the acceptance of specific minimal gifts and other tangible gifts and decorations. Foreign Gifts and Decorations Act of 1966, Pub. L. No. 89-673, 80 Stat. 952 (1966). Congress later clarified exceptions in the Foreign Relations Authorization Act. Foreign Relations Authorization Act, Fiscal Year 1978, P.L. 95-105, 91 Stat. 862 (codified as amended at 5 U.S.C. § 7342 (2011)). Prior to 1966, Congress often passed legislation explicitly approving a foreign gift or decoration. See JACK MASKELL, CONG. RESEARCH SERV., R43660, THE RECEIPT OF GIFTS BY FEDERAL EMPLOYEES IN THE EXECUTIVE BRANCH 7 (2014) (citing CLARENCE CANNON, 7 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1889 (1935); S. REP. NO. 89-1160 (1966); CONSTITUTION – JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES § 145; H.R. REP. NO. 89-2052 (1966)).

200. See *infra* Section IV.A.2.

201. See *infra* Section IV.A.2.

be wise to consider incorporating into their complaints a common law unjust enrichment claim for a restitutionary disgorgement remedy.²⁰²

2. Legislating an Emoluments Disgorgement Remedy

If the government were to craft such emoluments legislation, it should include a restitutionary disgorgement remedy. This scheme would prevent unjust enrichment and deter corruption. If Congress were to regulate in this arena, it should consider private rights of action and whistleblower options. Creating particularized liability would alleviate the temptation for generalized grievance litigation. Congress should also use the opportunity to legislate the preferred remedy that would best serve the interests at stake and deter potentially egregious behavior.

At minimum, Congress could pass legislation that creates a private right to sue for aggrieved persons. For example, Washington D.C. hotel owners who lost typical customers who opted to stay at the President's hotel instead. Private law will shape public law. A congressional statute gives a political branch the opportunity to help shape the boundaries. Congress need not go the full distance of the constitutional grant, but it could weigh in regarding desired bounds. It could draw the line between speculative claims of prospective customers and claims exhibiting a reasonable likelihood of such customers but for the Executive's competing property. Regarding the remedy, Congress could utilize other methods of damages than disgorgement such as actual damages or statutory damages, but disgorgement would best serve the goals of undoing and deterring unjust enrichment. Actual damages would be difficult to prove, but if proven would serve a pure compensation function. Statutory damages would eliminate the proof problem but likely attempt to approximate plaintiff's loss rather than defendant's wrongful gains.

An alternative proposed legislation scheme could model the False Claims Act,²⁰³ which authorizes *qui tam* suits brought by a whistleblower on behalf of the government.²⁰⁴ The False Claims Act gives the government an option to enter the litigation or simply await partial recovery upon a whistleblower's successful suit.²⁰⁵ Congress could create a similar scheme for those that come forward with particular information of unlawful conduct by a federal government officer. The statute would define the parameters of eligible

202. See *infra* Section IV.B.

203. 31 U.S.C. §§ 3729–33 (2012).

204. United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1152 n.2 (3d Cir. 1991) (explaining “‘*qui tam*’ is taken from the Latin expression *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning ‘who brings the action for the king as well as for himself’”); see also WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 160 (Oxford, Clarendon Press 1768).

205. 31 U.S.C. §§ 3729–30 (2012).

whistleblowers and the percentage of recovery, but such a suit would be on behalf of the government. This method may be preferable because it protects the public interest and, by disgorging wrongful profits, it shifts those gains to the government and deters future unjust gains. The whistleblower would receive some portion as an incentive to serve as a private attorney general.

In the past, the White House has sought governmental advice in compliance with governmental ethics regulations. The Office of Government Ethics, however, does not cover and cannot enforce emoluments without congressional authorization.²⁰⁶ Congress could create a role for the Office of Government Ethics²⁰⁷ or determine that other entities are better suited to carry forward governmental aims of anti-corruption, anti-self-dealing, accountability, and fidelity to the country and the office.

A possible criticism of the proposed legislative-remedial path is that restitution should not be used to give a plaintiff (the government or the whistleblower) something to which they had no preexisting or future right to have. It is not the government's profit to make. These are profits no government officer or entity should make. So, unlike the False Claims Act, which in essence returns defrauded monies to the government, disgorgement of emoluments may give to the government money it never had and never would have had. An emoluments restitutionary recovery would rarely if ever constitute a windfall given the rarity of such violations and the relative amount of money compared to the overall federal budget.

If, however, we view the unlawful behavior as a breach of fiduciary trust or parallel to an opportunistic breach of contract, then disgorgement still merits serious consideration. Modern restitution law has evolved from simple restoration of property to the undoing of any enrichment one lacks justification to retain. Aristotle advocated that such imbalances to society's just equilibrium cannot be sustained.²⁰⁸ The restitution remedy of disgorgement ensures that a

206. The mission of the Office (OGE) is to “[p]rovide overall leadership and oversight of the executive branch ethics program designed to prevent and resolve conflicts of interest,” but it does “not handle complaints of misconduct, nor does OGE have investigative or prosecutorial authority. OGE’s mission is one of prevention.” *Mission and Responsibilities*, UNITED STATES OFFICE OF GOV’T ETHICS, <https://www.oge.gov/web/oge.nsf/Mission%20and%20Responsibilities> [<https://perma.cc/4LYD-SP2E>] (last visited Oct. 12, 2019).

207. BRENNAN CTR. FOR JUSTICE, PROPOSALS FOR REFORM: NATIONAL TASK FORCE ON RULE OF LAW AND DEMOCRACY 6 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_TaskForceReport_2018_09.pdf [<https://perma.cc/E42D-AZPR>].

208. ARISTOTLE, THE NICOMACHEAN ETHICS 86–88 (David Ross trans., Oxford University Press 2009); cf. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 56 (1936) (applying Aristotelean theory to show how the restitution interest provides

wrongdoer is unable to retain profits that are kept without legal justification or otherwise violative.

Another point of consideration is whether Congress or the courts should resolve which profits are traceable to the violation. Should a government officer be able to keep any profits made? As a matter of policy, Congress would be wise to determine if the emoluments prohibitions should constitute a flat ban in which case all profits constituting wrongful emoluments would be recoverable. Still there may be issues if blended profits exist, and Congress could determine which party bears the burden of either proving causation versus warranting an offset for efforts to make any lawful portion of the gains. Disgorgement of profits for certain intellectual property violations would offer insights into statutory issues Congress should consider and perhaps resolve.²⁰⁹

B. *Failsafe of Unjust Enrichment as a Common Law Claim*

Without congressional legislation, unjust enrichment law can provide avenues to recovery. As a matter of best practices, congressional involvement would be beneficial to help set the policy parameters of unconstitutional emoluments. If Congress is unable to accomplish this goal, private and public litigants would be wise to study the common law of unjust enrichment and restitution. As outlined in this Article,²¹⁰ the Restatement (Third) of Restitution and Unjust Enrichment provides many avenues to address wrongdoing that often may fall between the cracks of other bodies of law.

Unjust enrichment can serve as the basis of a freestanding cause of action or its theory can provide the foundation for restitutionary remedies that attach to other substantive bodies of law such as breaches of fiduciary duties. As a freestanding matter, one has no right to retain benefits without legal justification or in violation of any other legal duty. Private corners of the law may provide helpful resolutions to breaches of gray or overlapping areas of the law that existing remedies either fail to capture or address inadequately for protection of the rights and their attendant goals. Regardless of the path, the

greater justification for relief, but doing so in a binary relationship setting where “A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.”). Modern restitution law does not require that B lose something that A gains; rather, it is enough that B has gained something B has no right to retain and thus should disgorge. I argue that it is more important to see the basis for the disgorgement remedy, then determine whether B is the proper plaintiff under the instant conception of an unjust enrichment theory for disgorging unlawful emoluments.

209. See *supra* notes 142–49 and accompanying text (discussing difficult issues in unclear boundaries to disgorgement in design-patent legislation and litigation).

210. See *supra* Section III.C (outlining possible relevant sections of the Restatement to emolument concerns).

restitutionary remedy of disgorgement of wrongful gains is a remedy that would undo the unjust enrichment, prevent opportunism and corruption, and deter future temptations for accepting and hiding questionable emoluments.

V. CONCLUSION

Whatever the precise parameters of unlawful emoluments, proof may show that certain emoluments represent benefits unjustly derived from a person's service to the public. If so, their receipt should be deterred. If received by a covered government actor, emoluments constitute unjust enrichment and are violative of the Constitution. A powerful remedy should lie. The ideal remedy to rectify the harm is disgorgement of improper gains. This Article articulates why disgorgement will best serve desired goals such as anti-corruption and anti-self-dealing. Pending emoluments lawsuits continue to face constitutional hurdles and may not be the best route to shaping the contours of the right and ensuring application of ideal remedies that serve the underlying goals. This Article proposes legislation to ensure a clear path to the restitutionary remedy of disgorgement when violations of the Emoluments Clauses arise.