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ARTICLES

THE ORIGINAL MEANING OF "EMOLUMENTS" IN THE CONSTITUTION

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This Article explores the original meaning of the word "Emolument(s)" in the Constitution. It identifies four common definitions in founding-era political discourse. It places the constitutional use within its context as part of a larger reform movement in Britain and America and as driven by other historical events. The Article examines how the word was employed in contemporaneous reform measures, in official congressional and state documents, in the constitutional debates, and in the constitutional text.

The author concludes that the three appearances of "emoluments" in the Constitution had a common

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Two scholars who began with different leanings on the emolument issue both encouraged me to investigate it objectively and report the results. They are Seth Barrett Tillman, Lecturer in Law, Maynooth University, Ireland, and David Kopel, Research Director of the Independence Institute and adjunct Professor of Law, the University of Denver. I thank them for their encouragement and regular feedback.

I am also grateful to Linda Frey, Professor of History, The University of Montana, and Marsha Frey, Professor of History, Kansas State University, for assisting my understanding of eighteenth-century diplomatic gift-giving practices.

meaning, which was "compensation with financial value, received by reason of public employment."

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I. INTRODUCTION: THE RISKS OF RIDING ONE HORSE TOO FAR[1]

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[1] Bibliographical footnote. This note collects certain sources cited more than once:

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Medio tutissimus ibis.

— Ovid, per Gouverneur Morris[2]

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THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed. 1901) (three volumes) [hereinafter ELLIOT'S DEBATES] (Note: The debates that took place on Monday, June 16 and Tuesday, June 17, 1788, are erroneously reported on pages 410 and 452 of volume three as having took place on Monday, June 14 and Tuesday, June 15, 1788, respectively. This Article will cite the correct date in the following manner: for example, "June 15, 1788" will be cited as "June 1[7], 1788.");

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Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013);

R.K. WEBB, MODERN ENGLAND: FROM THE EIGHTEENTH CENTURY TO THE PRESENT (2d ed. 1980).

[2] "You are safest if you go down the middle." PUBLIUS OVIDIUS NASO ("OVID"), METAMORPHOSES, Lib. ii, line 137—*quoted without attribution in* Letter from Gouverneur Morris to James LaCaze (Feb. 21, 1788), *in* 16 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 1, at 171. Morris repeated the line on other occasions as well, e.g., Letter from Gouverneur Morris to Lewis B. Sturges (Nov. 1, 1814), *in* 7 JOHN C. HAMILTON, HISTORY OF

The term "emolument" or its plural form appears three times in the Constitution.[3] During most of our history, the emoluments provisions have received little scholarly attention, but at the time of this writing, a controversy[4] is raging among commentators[5] over the original meaning[6] of "Emoluments" in one of these provisions, the Foreign Emoluments Clause.[7]

THE REPUBLIC OF THE UNITED STATES OF AMERICA, AS TRACED IN THE WRITINGS OF ALEXANDER HAMILTON AND OF HIS CONTEMPORARIES 853 (1865).

Gouverneur Morris was, of course, the chief draftsman of the final version of the Constitution. THEODORE ROOSEVELT, GOUVERNEUR MORRIS 317 (John T. Morse, Jr. ed., 1916). The document's majestic style is his.

[3] U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."); U.S. CONST. art. I, § 9, cl. 8 ("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."); U.S. CONST. art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased 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.").

[4] Research into founding-era questions amid a controversy of this nature is not normally my practice because of the risk that bias may influence the results. I attempt to avoid bias when investigating questions of constitutional meaning:

> Among other academics, law professors are notorious for writing works of special pleading (i.e., works promoting a pre-fixed conclusion) and calling them "scholarship"—a practice I actively resisted during my long career in legal academia.

NATELSON, ORIGINAL CONSTITUTION, *supra* note 1, at xvi.

In this case, the controversy involves the conduct of a president. Perhaps it may reassure some to disclose that I did not vote for any of the three leading candidates for president in 2016—Republican, Democrat, or Libertarian. In any event, this Article's findings should be judged on the merits, not for its political implications.

[5] *E.g.*, John Mikhail, *A Note on the Original Meaning of "Emolument*," BALKINIZATION (Jan. 18, 2017), https://balkin.blogspot.com/2017/01/a-note-on-original-meaning-of-emolument.html; 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/; Joshua Matz & Laurence H. Tribe, *President Trump Has No Defense Under the Foreign Emoluments Clause*, ACS BLOG (Jan. 24, 2017), http://www.acslaw.org/acsblog/president-trump-has-no-defense-under-the-foreign-emoluments-clause.

[6] For purposes of this Article, the "original meaning" of a word in the Constitution is how an objective, informed observer would have understood that word, as used in the Constitution, during the period of its ratification (September 17, 1787 to May 29, 1790). Modern commentators generally fix on original meaning as a central factor in constitutional

For example, former Ambassador Norman Eisen, Professor Richard W. Painter, and Professor Laurence Tribe argue that President Donald J. Trump, whose businesses enter into contracts with foreign governments, appears to be on a collision course with the Foreign Emoluments Clause,[8] because "the best reading of the Clause covers even ordinary, fair market value transactions that result in any economic profit or benefit to the federal officeholder."[9]

The Eisen-Painter-Tribe paper does not so much explore independently the meaning of "emolument" as rely on the work of others. Perhaps their most important source is a widely-noted 2009 article by Professor Zephyr Teachout.[10] In this article, Professor Teachout contends that the "Framers were obsessed with corruption,"[11] that much of the Constitution was written to

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construction, although the interpretive standard applied during the founding era looked first to the ratifiers' subjective understanding, defaulting to objective meaning only when evidence of subjective intent was incoherent or unrecoverable. *See* Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1305 (2007) ("Where subjective understanding was not retrievable, the preferred substitute was original public meaning.").

[7] U.S. CONST. art. I, § 9, cl. 8.

[8] Eisen, Painter & Tribe, *supra* note 1, at 13.

[9] *Id.* at 11.

[10] Teachout, *Anti-Corruption*, *supra* note 1.

[11] *Id.* at 348. *See also id.* at 347 ("[A]ll [delegates to the 1787 convention] shared a general obsession with corruption."); *id.* at 352 ("The Framers [were] obsessed with stopping [corruption] from happening . . . ."); *id.* at 373 ("Perhaps you are now persuaded that the Framers were centrally focused on corruption, but you might still wonder about the object of this obsession."); *id.* at 404 ("[T]he same level of obsession . . . ."); *id.* at 405 ("The Framers' obsession with . . . political corruption . . . ."); *id.* at 406 ("[T]he founders' political corruption obsession . . . ."). And my favorite: "Through the reading of the old texts, the founder's obsession with corruption is obvious." *Id.* at 351 n.45.

It is inappropriate, even for a trained mental health professional, to diagnose people we have not examined—indeed, have never met—particularly in scholarly literature. This is true *a fortiori* when those people lived two centuries ago. In any event, the founders' compromises among values suggests they were *not* obsessed. *See infra passim*. Of course, they were *deeply concerned* about corruption, as about several other issues.

While I am piling on, I should mention that Professor Teachout's article is characterized by other slips of the kind common in modern legal scholarship, such as ignorance of the founders' *second* language. Professor Teachout writes, "Corruption derives from the Latin *corrumpero*: to break up, to spoil. *Rumpo* means 'to break, to shatter, to burst open, destroy, violate,' and *co* means 'with,'—instead of two things breaking apart (*dirumpo*), or one thing breaking open (*erumpo*) . . . ." Teachout, *AntiCorruption*, *supra* note 1, at 346–47.

Actually, there is no Latin verb "corrumpero." Nor is the verb she means (*corrumpo*) as

obviate or control corruption, and that an "anti-corruption" principle ought to be recognized as a constitutional value of first rank, much as the principle of separation of powers is recognized. Professor Teachout further contends that the anti-corruption principle should be "given independent weight . . . in deciding difficult questions concerning how we govern ourselves,"[12] and that it should be treated as an "evolving standard"[13] balanced against other constitutional values—one strong enough that sometimes it overrides values expressly stated.[14] Of course, the presence of such a powerful principle would suggest that we ought to construe the emoluments clauses, and therefore the word "Emolument," as widely as reasonably possible. Subsequently, Eisen, Painter, Tribe, and Teachout announced their alliance in a joint lawsuit against the Trump administration on "emoluments" grounds.[15]

Professor Teachout's conclusion is well-grounded insofar as she maintains that the founders strongly opposed "corruption." Most of them favored applying fiduciary ("public trust") standards to government when practicable.[16] The rub arises from riding one

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starkly different in meaning from *dirumpo* as she says. *Erumpo* is better defined as breaking out or causing to burst forth. In any event, it would have been sufficient, although hardly necessary, to point out simply that *corrumpo* commonly meant "I corrupt." On these definitions, see CHARLTON T. LEWIS, A LATIN DICTIONARY 474, 585, 658 (1879).

The late Forrest McDonald, possibly our most prominent contemporary constitutional historian, noted the importance of a basic knowledge of Latin in founding-era research. FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION, at xi (1985). In my view, the decline in Latin studies has had much more deleterious effects on constitutional scholarship than it had on Professor Teachout's argument. *Cf.* CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS 12–13 (1995) (documenting the pervasive effect of Greco-Roman literature, and particularly the Latin language, on the founding generation).

[12] Teachout, *Anti-Corruption*, *supra* note 1, at 342.

[13] *Id.* at 382.

[14] Thus, Professor Teachout argues that the anti-corruption principle should be balanced against First Amendment values although the First Amendment appears explicitly in the Constitution and the anti-corruption principle does not. *Id.* at 345.

[15] Eric Lipton & Adam Liptak, *Foreign Payments to Trump Firms Violate Constitution, Suit Will Claim*, N.Y. TIMES (Jan. 22, 2017), https://www.nytimes.com/2017/01/22/us/politics/trump-foreign-payments-constitution-lawsuit.html.

[16] I have written extensively on the issue. *See* Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1178 (2004) [hereinafter Natelson, *Public Trust*] (asserting that the Constitution must be interpreted in light of its "general purposes," one of which is "to erect a government in which public officials would be bound by fiduciary duties to honor the law"); *see generally* Robert G. Natelson, *Judicial Review of Special Interest*

horse too far: The fiduciary ideal was a top-tier value among the constitution-makers, but it shared the top tier with at least four others: republican government (including citizen control), effective government, the natural rights of individuals, and decentralization (federalism and local and individual autonomy).[17]

Not surprisingly, these values often pointed in opposite directions and sometimes they conflicted. When this happened, the founders did *not* respond, "Oh, well, fiduciary government (or "anti-corruption") is Number One with us, so we'll disregard the others." Rather, they balanced competing values to reach the best compromise they could. The written Constitution was the product of this process, and the final document crystalized the results. It is unfaithful to the Constitution for us to re-balance what the framers and ratifiers have already adjusted.

That the anti-corruption principle was only one of several competing values behind the emoluments provisions was demonstrated by John F. O'Connor in a 1995 article[18] the Eisen-Painter-Tribe-Teachout team failed to mention. Mr. O'Connor showed that, in drafting one of the provisions, the framers gave considerable weight to the value of decentralization and the concomitant need to control the size of the central bureaucracy.[19] Mr. O'Connor may have overstated his case, but his evidence is inconsistent with the conclusion that anti-corruption was the only relevant value among the framers.

Thus far, there have been two responses to the Eisen-Painter-Tribe-Teachout position. First, President Trump's legal counsel issued a "white paper" arguing that the constitutional meaning of "emoluments" does not extend to ordinary fair market

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Spending: The General Welfare Clause and the Fiduciary Law of the Founders, 11 TEX. REV. L. & POL. 239 (2007); Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003). Professor Teachout cited the last. Teachout, *Anti-Corruption*, *supra* note 1, at 375 n.164. I have since co-authored another article on the subject: Gary Lawson, Robert G. Natelson & Guy Seidman, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014).

[17] *See* NATELSON, THE ORIGINAL CONSTITUTION, *supra* note 1, at 8–18 (listing natural rights, effective government, republican government, decentralized government, and fiduciary government).

[18] O'Connor, *supra* note 1.

[19] *Id.* at 164–67 (discussing the framers' concern that the national government's power would increasingly expand through the creation of unnecessary federal offices and salaries).

transactions.[20] The white paper purports to apply the Constitution's original meaning as its touchstone, but cites relatively few founding era sources.[21] Second, in a forthcoming article, Professor Andy S. Grewal argues that "Emolument" in the Foreign Emoluments Clause refers only to benefits received by reason of office.[22] However, Professor Grewal relies primarily on post-founding materials.[23]

This Article examines the meaning of the term "emolument" as the Constitution's ratifiers would have understood it—not only in the Foreign Emoluments Clause but in all of its constitutional usages. The first step is to identify definitions of the word employed in official British and American founding-era discourse. It turns out that there were four principal definitions, as well as some variations on those four. All four were quite common, and therefore are reasonable candidates for consideration as the constitutional meaning.

To ascertain more precisely which definition(s) the ratifiers understood to be the constitutional meaning, this Article examines successively four kinds of evidence: (1) other enactments that, like the Constitution's emoluments provisions, grew out of the wider contemporaneous government reform movement in Britain and America, (2) the records of the Constitutional Convention, (3) the records of the ratification debates, and (4) the Constitution's language in its larger context.

This Article relies only on evidence arising before May 29, 1790, the day the thirteenth state, Rhode Island, approved the Constitution.[24] Constitutional writers frequently cite later

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[20] SHERI DILLON ET AL., MORGAN, LEWIS & BOCKIUS LLP, WHITE PAPER: CONFLICTS OF INTEREST AND THE PRESIDENT (Jan. 11, 2017), https://assets.documentcloud.org/documents/3280261/MLB-White-Paper-1-10-Pm.pdf.

[21] *See id.* at 5–6 (arguing that a broad interpretation of the Foreign Emoluments Clause is not based on the Constitution's original public meaning, but rather "on more subjective conceptions of the policies behind the Clause").

[22] Grewal, *supra* note 1 (manuscript at 4) (referring to "emolument" as "office-related compensation").

[23] He offers a citation to *The Federalist* and a few to the records of the Constitutional Convention, and refers to some additional originalist work. *Id.* (manuscript 4–7).

[24] Ratification of the Constitution, by the Convention of the State of Rhode-Island and Providence Plantations (May 29, 1790), *reprinted in* 2 DOCUMENTARY HISTORY OF THE CONST., *supra* note 1, at 310–20.

material as probative of original meaning, but this represents the historical error of *anachronism*, because material arising after May 29, 1790, could not have been in the contemplation of the ratifiers.

A word on terminology: Nomenclature for the three constitutional provisions considered in this Article is not standardized. For the sake of clarity, I have adopted the following terminology:

* When all three provisions are referred to, they are called the "emoluments provisions";
* The phrase *Congressional Emoluments Clause* applies to all of Article I, Section 6, Clause 2, including the portion sometimes called the Disqualification Clause;
* The *Foreign Emoluments Clause* is Article I, Section 9, Clause 8, including the ban on titles of nobility;
* Article II, Section 1, Clause 7, including the portion addressing presidential compensation, is labeled the *Presidential Emoluments Clause*.

Finally: The Foreign Emoluments Clause applies only to a person "holding an[ ] Office of Profit or Trust under" the United States.[25] There is a scholarly dispute over whether the President is an "officer under the United States." Professor Seth Barrett Tillman argues that the phrase "Office . . . under" is a specialized one (different, for example, from "officer *of*"[26]), and encompasses appointed but not elected officials.[27] In my view, he is clearly

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[25] U.S. CONST. art. I, § 9 cl. 8.

[26] *See* Tillman, *supra* note 1, at 193–95 (discussing whether United States Senators are "Officers of the United States" under the Impeachment Clause of Article II, Section 4 of the Constitution).

[27] *Id.* at 186 (arguing that the Constitution's language and structure indicate that federal elected officials are not included in the scope of the Foreign Emoluments Clause).

When arguing for exclusion of the president, Professor Tillman records that in 1792 Alexander Hamilton, at the direction of Congress, made a list of all "officers under," and omitted the President and Vice President, in circumstances where oversight was improbable. *Id.* at 186–87. In addition, Professor Tillman reminds us that President George Washington retained gifts from foreign officials without seeking congressional permission and without

correct that "officers under" do not include members of Congress.[28] Whether he is correct to exclude the President is the subject of sharp disagreement,[29] and this Article takes no stand on the issue.

II. DEFINITIONS OF "EMOLUMENT" IN EIGHTEENTH-CENTURY POLITICAL DISCOURSE

At the time of the founding, the word "emolument" was used in official discourse in different ways with different meanings. A review of British parliamentary and American legislative records discloses four major definitions. All four were very common, and

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raising controversy, although the gifts were widely reported. *Id.* at 188–89. The first presents were a picture of, and key to, the Bastille, proffered by the Marquis de Lafayette. Letter from Lafayette to George Washington (Mar. 17, 1790), *in* 4 CORRESPONDENCE OF THE AMERICAN REVOLUTION 322 (Jared Sparks ed., 1853). Another present was a print depicting Louis XVI, set in an ornate frame. Letter from George Washington to Jean-Baptiste, chevalier de Ternant (Dec. 22, 1791), *in* 31 THE WRITINGS OF GEORGE WASHINGTON 448 (John C. Fitzpatrick ed., Gov't Printing Office 1939) (accepting the present).

Professor Tillman is in good company in contending that the President is not an "officer under." When Antonin Scalia was an assistant attorney general, he wrote a memorandum concluding that the President is not within the Constitution's definition of "officer." Memorandum from Antonin Scalia, Assistant Attorney Gen., Office of Legal Counsel, to Kenneth A. Lazarus, Assoc. Counsel to the President (Dec. 16, 1974) ("[W]hen the word 'officer' is used in the Constitution, it invariably refers to someone *other than* the President or Vice President.").

[28] Examining the subject is beyond the scope of this Article. One reason, however, is that the phrase "Office[s] . . . under the United States" almost certainly derives from "office[s] under the Crown," a category that did not include members of Parliament. *See* DE LOLME, *supra* note 1, at 98 ("[I]f any Member [of Parliament] accepts an office under the Crown . . . his seat becomes void . . . ."); 1 WILLIAM BLACKSTONE, COMMENTARIES *170 (similar statement). Nor were state legislators included under analogous phrases in early state constitutions. *See, e.g.*, N.J. CONST. of 1776, art. XX ("[No] person or persons possessed of any post of profit *under the government* . . . shall be entitled to a seat in the Assembly . . . ." (emphasis added)).

[29] Those arguing for inclusion of the President point out that during the Virginia ratifying convention Edmund Randolph, who led the pro-Constitution forces at that gathering, represented that the President was covered by the Clause. *See* Eisen, Painter & Tribe, *supra* note 1, at 5 (reporting Randolph's speech to the Virginia ratifying convention at 3 ELLIOT'S DEBATES, *supra* note 1, at 486 (June 1[7], 1788)). They also raise some structural arguments. Eisen, Painter & Tribe, *supra* note 1, at 8–9.

They might also have relied on a speech by George Mason to the Virginia ratifying convention in which he apparently assumes that the Foreign Emoluments Clause applies to the president), 3 ELLIOT'S DEBATES, *supra* note 1, at 484 (June 1[7], 1788) and countered the weight of the gifts to Washington with the developments discussed *infra* Part V.B.

the same document might contain more than one.[30] There also were variations within the principal four; they illustrate how inexact the word could be.

A. DEFINITION NO. 1: FRINGE BENEFITS OF FINANCIAL VALUE BY REASON OF PUBLIC EMPLOYMENT

Perhaps the most frequent meaning in political discourse was also the narrowest. We shall call this *Definition No. 1*. In this sense, "emoluments" referred specifically to benefits in money or in other items of financial value, other than periodic pay (salary), received solely by reason of a public civil or military position. This meaning was signaled by phrases such as "the pay . . . in addition to the Emoluments,"[31] and "the emoluments but not the pay of said rank,"[32] and "Salaries and Emoluments appertaining to . . . the said Offices . . . ."[33]

Today we might call Definition No. 1 emoluments "fringe benefits."[34] In the eighteenth century, they were labeled as *perquisites*: They included fees charged by public officers for particular services,[35] free supplies,[36] soldiers' right to forage[37] and

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[30] *See, e.g.*, 4 CONN. RECORDS, *supra* note 1, at 38 (Jan. 10, 1782) ("Pay and all other Emoluments" and "Same pay and emoluments").

[31] 19 MASS. RESOLVES, *supra* note 1, at 535 (Sept. 2, 1776).

[32] 33 J. CONT. CONG., *supra* note 1, at 437 (July 30, 1787). *See also* 22 J. CONT. CONG., *supra* note 1, at 398 (July 18, 1782) ("[H]is emoluments and one half of his pay be suspended . . . ."); 21 J. CONT. CONG., *supra* note 1, at 1079 (Oct. 29, 1781) ("[H]is request for pay cannot be complied with, and that all the emoluments he derives from the United States are to cease . . . .").

Separately listing pay from emoluments is exceedingly common in the record. *See, e.g.*, 5 CONN. RECORDS, *supra* note 1, at 207 (Oct. 9, 1783) ("Pay and emolument"); DEL. COUNCIL MINUTES, *supra* note 1, at 906 (Jan. 15, 1785) ("pay and emoluments"); 23 J. CONT. CONG., *supra* note 1, at 541 (Sept. 3, 1782) (repeating the phrase "pay and emoluments" three times on a single page).

[33] The East India Company Act 1784, 24 Geo. 3 c. 25, § 40.

[34] *See, e.g.*, *Fringe Benefit*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("A benefit (other than direct salary or compensation) received by an employee from an employer . . . .").

[35] *E.g.*, 1782–83 MASS. ACTS, *supra* note 1, at 240 (July 4, 1782) ("[T]he fees of that office are to be considered as the only emolument annexed thereto."); 15 N.C. RECORDS, *supra* note 1, at 681 (Nov. 28, 1773) (referring to the fees collected by the Naval Office as its "emoluments"); PA. ELEVENTH GEN. ASSEMBLY MINUTES, *supra* note 1, at 63 (Dec. 5, 1786) ("[T]he emoluments arising from fees and perquisites"); VA. H.D. JOUR., *supra* note 1, at 34–35 (Nov. 24, 1784) (listing emoluments from fees).

to receive depreciation notes,[38] and seamens' shares from ship captures.[39] Sometimes perquisites were financed by the public treasury, as in the case of military supplies. In other cases the funds came from elsewhere, as was true of fees and the booty from captures. Definition No. 1 excluded benefits not financial or convertible to money, such as "advantages," "authorities," and "powers." If these were not excluded explicitly, they were listed separately.[40]

A notable instance of Definition No. 1 was the use of "emolument" by the Massachusetts legislature in its 1786 "Address to the People."[41] Part of this *Address* discussed the salaries and emoluments of state officers before and after the Revolution. For example, the *Address* reported that before the Revolution the colonial governor received a salary of £1,300 and the emoluments of the use of a house and garden, certain fees for registration under the provincial seal, "one third part of all seizures, and prizes . . . and other emoluments."[42] The emoluments amounted to £1,000 per annum, resulting in a total yearly compensation of £2,300.[43] Since the Revolution, the emoluments of the governor, and of some other officers, including

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[36] *E.g.*, VA. H.D. JOUR., *supra* note 1, at 102 (Dec. 22, 1779) ("[T]he emoluments of drawing in certain proportions monthly, rum, sugar, tea, coffee, candles, soap, and wood . . . exclusive of their pay.").

[37] 33 J. CONT. CONG., *supra* note 1, at 437 (July 30, 1787) ("[T]he additional emoluments of forage and subsistence . . . .").

[38] PA. NINTH GEN. ASSEMBLY MINUTES, *supra* note 1, at 232–33 (Mar. 21, 1785) ("depreciation and other emoluments"). Depreciation was extra pay to offset currency inflation. *See* Revolutionary War Records Overview, PENNSYLVANIA HISTORICAL AND MUSEUM COMMISSION, http://www.phmc.pa.gov/Archieves/Research-Online/Pages/Revolutionary-War.aspx (last visited Sept. 17, 2017) ("To make amends for . . . depreciation, [certain soldiers were] awarded a substantial sum in Depreciation Pay Certificates . . . .").

[39] 8 N.H. STATE DOCS., *supra* note 1, at 323 (Sept. 6, 1776) ("[T]heir wages to continue besides the Emolument of Captures . . . .").

[40] *See, e.g.*, 5 CONN. RECORDS, *supra* note 1, at 72 (Jan. 8, 1783) ("the Same Advantages and emoluments"); 5 *id.* at 398 (May 13, 1784) ("cloathed with the same Powers and entituled to the same emoluments"); 12 N.C. RECORDS, *supra* note 1, at 190, 357 (Dec. 9, 1777) ("powers, authorities and emoluments"); 19 *id.* at 691 (June 1, 1784) ("Commissions, pay and emoluments"); 20 J. CONT. CONG., *supra* note 1, at 765 (July 18, 1781) ("[T]he authorities, powers, privileges and emoluments to the several officers . . . .").

[41] 1786–87 MASS. ACTS, *supra* note 1, at 142 (Nov. 12, 1786).

[42] 1786–87 *id.* at 151.

[43] *Id.*

the commonwealth treasurer and secretary, had been abolished and replaced with fixed salaries.[44]

Variations on Definition No. 1 might exclude, at least implicitly, certain non-salary items, generally identified by separate enumeration. Exclusions by separate listing are found for food and other supplies,[45] bounties,[46] advances and reimbursement for expenses,[47] and fees and other items.[48] An item that might be listed separately was “wages”[49]—that is, pay given for actual work done as opposed to “salaries,” which were payable on a periodic, predictable basis.[50] Exclusion from the definition of “emolument” could be signaled by express exclusion or by separate enumeration.

B. DEFINITION NO. 2: ALL COMPENSATION OF FINANCIAL VALUE BY REASON OF PUBLIC EMPLOYMENT

The second definition of “emoluments” referred to compensation, in money or in items of financial value, paid solely by reason of a public military or civil position. *Definition No. 2*

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[44] 1786–87 *id.* at 152–53.

[45] *See, e.g.*, 2 CONN. RECORDS, *supra* note 1, at 452 (Jan. 6, 1780) (listing supplies separate from emoluments); 3 *id.* at 175, 569 (Oct. 12, 1780) (listing wages, refreshments, and family supports separate from emoluments); DEL. COUNCIL MINUTES, *supra* note 1, at 669 (Nov. 8, 1780) (itemizing rations and pay separate from emoluments).

[46] *See, e.g.*, 9 J. CONT. CONG., *supra* note 1, at 986 (Dec. 2, 1777) (“Pay, Bounties and Emoluments”); 2 CONN. RECORDS, *supra* note 1, at 236 (Apr. 7, 1779) (referring to military “bounty, pay, wages and emoluments”); 3 *id.* at 121 (June 30, 1780) (“premia [bounties], pay and emoluments”); DEL. COUNCIL MINUTES, *supra* note 1, at 807 (Feb. 4, 1783) (itemizing “rewards” separately).

[47] *See, e.g.*, 17 J. CONT. CONG., *supra* note 1, at 541 (June 21, 1780) (“Mr. Dohrman wishes for no salary or emolument for his services, but simply a repayment of his advances . . . .”); 1 FARRAND’S RECORDS, *supra* note 1, at 89 (June 2, 1787) (Robert Yates) (“President Franklin moved . . . that the executive should receive no salary, stipend or emolument for the devotion of his time to the public services, but that his expenses should be paid.” (emphasis omitted)).

[48] *See, e.g.*, 23 Geo. 3 c. 50, §§ 12, 21 (1783) (itemizing privileges, profits, and emoluments separately).

[49] *See, e.g.*, 2 CONN. RECORDS, *supra* note 1, at 236 (Apr. 7, 1779) (listing wages separately: “pay, wages and emoluments”). *Cf.* 31 J. CONT. CONG., *supra* note 1, at 909 (Oct. 23, 1786) (listing a postmaster’s compensation for extra services separately from “the emoluments of his Office”).

[50] *See* MASS. CONST. of 1780, pt. 2, ch. 2, § 1, art. XIII (providing for the governor’s salary “of a fixed and permanent value”).

thus encompassed everything in Definition No. 1 plus the kind of periodic government pay often denominated "salary."

Definition No. 2 was signaled by phrases such as "pay and other emoluments,"[51] "salary and other emoluments,"[52] and "bounties, wages, and all other emoluments."[53] Like Definition No. 1, it excluded non-financial benefits such as powers, authorities, and privileges,[54] and it was inexact: some items might be excluded, either expressly or by separate enumeration.[55]

C. DEFINITION NO. 3: PROCEEDS OF FINANCIAL VALUE FROM GAINFUL ACTIVITY

Definition No. 3 encompassed the proceeds with financial value from gainful activity of any kind, whether or not the activity was government employment. This meaning is probably closest to that of the Latin predecessor, *emolumentum*.[56] It appeared in the

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[51] *See, e.g.*, 4 CONN. RECORDS, *supra* note 1, at 38 (Jan. 10, 1782) ("Pay and all other Emoluments"); JOURNAL OF THE HOUSE OF REPRESENTATIVES OF SOUTH CAROLINA, JANUARY 8, 1782—FEBRUARY 26, 1782 46 (A.S. Salley, Jr. ed., 1916) (Feb. 3, 1782) ("the same pay and other emoluments"); VA. H.D. JOUR., *supra* note 1, at 102 (Dec. 22, 1779) ("Pay and other emoluments"); PA. ELEVENTH GEN. ASSEMBLY MINUTES, *supra* note 1, at 31 (Nov. 11, 1786) ("half pay . . . together with the other emoluments"); 14 J. CONT. CONG., *supra* note 1, at 644 (May 26, 1779) ("without pay or any other emolument whatever"); 8 N.H. STATE DOCS., *supra* note 1, at 857 (Apr. 25, 1780) (including in emoluments "pay, cloathing, [and] depreciation").

[52] *Cf.* 24 J. CONT. CONG., *supra* note 1, at 335 (May 8, 1783) ("no salary or other emolument").

[53] 8 N.H. STATE DOCS., *supra* note 1, at 512 (Mar. 20, 1777).

Other apparent examples of Definition No. 2 include "any Office of publick Trust or Emolument," 23 Geo. 3 c. 18, § 16 (1783); "office of emolument," An Act for establishing the Mode and Conditions of surveying and granting the vacant Lands within this State, S.C. Pub. L. No. 1320, § 16 (Mar. 21, 1784); and "clothing, bounty or other emoluments, either in land or money," VA. SEN. JOUR., *supra* note 1, at 47 (Nov. 26, 1779); VA. H.D. JOUR., *supra* note 1, at 71 (Nov. 26, 1779).

[54] *E.g.*, 13 N.C. RECORDS, *supra* note 1, at 108 (reproducing a judge's commission, reciting separately powers, authorities, privileges, and emoluments).

[55] *E.g.*, 23 Geo. 3 c. 50, § 12 (1783) (replacing previous emoluments of office with new ones and providing that "no Fee, Perquisite, Emolument, or Reward whatsoever (other than and except the Salaries and Allowances herein-after mentioned), shall be taken in the said Office"). *Cf.* 25 Geo. 3 c. 19, §§ 1, 2, 4 (1786) (itemizing "Fees, Gratuities, Perquisites, and Emoluments"); 26 Geo. 3 c. 66 (1786) (same); 21 MASS. RESOLVES, *supra* note 1, at 411 (1779–1780) (listing donations and gratuities separately from emoluments).

[56] CHARLTON T. LEWIS, A LATIN DICTIONARY 643 (1879) (defining *emolumentum* as "1. A striving for success, i.e. *effort*, *exertion*, *labor* . . . B. a *work*, a *building*, etc. . . . II. The attainment of success, i.e. *gain*, *profit*, *advantage*, *benefit*" (italics in original)).

context of leasing,[57] agriculture,[58] a market,[59] and other business or trade.[60] It could even refer to financial benefits to the government from regulation of trade.[61]

When employed in connection with public office, Definition No. 3 could refer to personally benefiting from the office in an improper way.[62] Money earned improperly in the public sector, or either properly or improperly in the private sector, was called "private emolument."[63]

Definition No. 3 encompassed proceeds of financial value, not intangibles. It did not include, for example, benefits from a business or trade such as freedom or pride of ownership.[64] As was

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[57] *E.g.*, The Clergy Residences Repair Act 1780, 21 Geo. 3 c. 66 (referring to "Tithes, Rents and, other Profits and Emoluments"); 14 N.C. RECORDS, *supra* note 1, at 346 (1779) (referring to the emoluments from leasing land); VA. H.D. JOUR., *supra* note 1, at 10 (Nov. 21, 1781) ("rent or other emolument"); *id.* at 10 (May 17, 1783) ("let out to great emolument, upon building leases").

[58] *E.g.*, 16 N.C. RECORDS, *supra* note 1, at 733 (Jan. 28, 1783) (referring to the emoluments from husbandry).

[59] *E.g.*, 21 Geo. 3 c. 47, § 29 (1781) (referring to the emoluments of a market).

[60] *E.g.*, 2 CONN. RECORDS, *supra* note 1, at 156–57 (Oct. 21, 1778) (referring to the "benefits, privileges and emoluments" of a sturgeon fishery); MD. H.D. JOUR., *supra* note 1, at 74 (Jan. 3, 1781) (referring to profits of speculation); 20 MASS. RESOLVES, *supra* note 1, at 236 (1777–1778) (referring to the "emolument" earned for selling gunpowder); 1786–87 MASS. ACTS, *supra* note 1, at 586 (referring to emoluments from a ferry business); An Ordinance for the better establishing of Huger's Ferry on the Congaree River, S.C. Pub. L. No. 1519 (Feb. 27, 1788) (same); N.J. GEN. ASSEMBLY JOUR., *supra* note 1, at 14 (Nov. 3, 1779) (referring to the injustice of allowing a state to dispose of Crown lands "for its own private Emolument"); PA. TENTH GEN. ASSEMBLY MINUTES, *supra* note 1, at 166 (Feb. 25, 1786) (referring to emoluments from a manufacturing business); 9 R.I. RECORDS, *supra* note 1, at 726 (Oct. 6, 1783) (referring to the emoluments from a smallpox inoculation business).

[61] *See, e.g.*, 21 N.H. STATE PAPERS, *supra* note 1, at 871 (June 23, 1785) ("[A]ll the fees profits and emoluments, arising from such regulations of Trade and Treaties of Commerce . . . ."). It is clear that this passage contemplates only financial items, because they were to be for "the sole use of discharging the public debt." *Id.*

[62] *E.g.*, 1784–85 MASS. ACTS, *supra* note 1, at 316–17 (referring to sheriffs retaining public money "for their own emolument").

[63] 1 CONN. RECORDS, *supra* note 1, at 546 (Feb. 12, 1778) (reciting that a person improperly withdrew public money "for his own private emolument"); MD. H.D. JOUR., *supra* note 1, at 122 (Apr. 19, 1780) (referring to "a pernicious practice of employing public money to private emolument"). *Cf.* 20 MASS. RESOLVES, *supra* note 1, at 704 (1778–79) (partially excusing a charitable, but illegal, action on the grounds that it was "not for any private emolument"); 14 N.C. RECORDS, *supra* note 1, at 651 (Sept. 25, 1780) (disclaiming any goal of private emolument in providing clothing to troops).

[64] Hence, in William Davie's law license, his "priviledges" were listed separately from his "emoluments." 15 N.C. RECORDS, *supra* note 1, at 386 (Mar. 24, 1780).

true of Definitions No. 1 and 2, this usage was subject to variations: Individual items might be excluded or enumerated separately,[65] and it could refer to proceeds either before[66] or after[67] expenses.

D. DEFINITION NO. 4: ALL BENEFITS OR ADVANTAGES

Definition No. 4 represented the primary dictionary meaning of "emolument," and therefore may have been the most common meaning in general discourse. Contemporaneous English dictionaries defined the word as "profit," "gain," "benefit," or "advantage," apparently whether or not pecuniary.[68] Definition No. 4 also appeared in official discourse. Illustrative is the final

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[65] *E.g.*, 21 Geo. 3 c. 47, § 29 (1781) (listing "Profits" and "Advantages" from a market separately from its "Emoluments"); 21 N.H. STATE PAPERS, *supra* note 1, at 871 (June 23, 1785) ("all the fees profits and emoluments, arising from such regulations of Trade and Treaties of Commerce").

[66] *E.g.*, 6 J. CONT. CONG., *supra* note 1, at 1077–78 (July 26, 1776) ("The emoluments of the trade are not a compensation for the expense of donations.").

[67] 11 PENNSYLVANIA ARCHIVES 563 (Samuel Hazard ed., 1855) (complaining that the proceeds of an auctioneer business were not meeting expenses and therefore not "yielding any Emolument").

[68] I examined ten general-purpose eighteenth-century dictionaries, as follows. All are unpaginated:

FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY (1765) (defining "Emolument" as "profit; gain, or advantage");

1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775) ("An advantage, a profit");

NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (25th ed. 1783) ("advantage, profit");

FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY (1772) ("profit, gain, or advantage");

JAMES BUCHANAN, A NEW ENGLISH DICTIONARY (1757) ("Benefit or advantage");

ALEXANDER DONALDSON & JOHN REID, AN UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1763) ("profit; advantage; gain");

1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (8th ed. 1786) ("Profit; advantage");

WILLIAM KENRICK, A NEW DICTIONARY OF THE ENGLISH LANGUAGE (1773) ("Profit; advantage");

WILLIAM PERRY, ROYAL STANDARD ENGLISH DICTIONARY (1st American ed. 1788) ("advantage, profit");

THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789) ("Profit, advantage").

("Olive Branch"[69]) petition to the Crown from the Continental Congress: "to share in the blessings of peace, and the emoluments of victory and conquest."[70] By this meaning, one might refer to the public emolument of a state or a people as a synonym for the general welfare.[71]

III. THE EMOLUMENTS PROVISIONS IN THE CONTEXT OF 1780S ANGLO-AMERICAN POLITICAL REFORM

My impression from the foregoing survey is that in official discourse (as opposed to general discourse), Definition No. 1 was the most common use and Definition No. 4 the least. But the appearance of all four was sufficiently common that none can be ruled out as the constitutional meaning without further investigation. This Part begins our examination of the surrounding circumstances in which the constitutional language was adopted.

Fortunately, the Constitution's emoluments provisions were not written in a vacuum. Americans had been British subjects until only eleven years before the Constitution was written, and even in 1787 they were part of the same linguistic and social community. The Constitution's emoluments provisions reflect that fact: Those provisions arose within a common Anglo-American government reform movement.[72]

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[69] *See* Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1143 (2016) (referring to the petition of July 8, 1775, as the "Olive Branch Petition").

[70] 2 J. CONT. CONG., *supra* note 1, at 159 (July 8, 1775).

[71] For other appearances of Definition No. 4 in official discourse, see 8 N.H. STATE DOCS., *supra* note 1, at 729 (Nov. 22, 1777) (referring to shirkers' "inglorious ease and emolument"); N.J. GEN. ASSEMBLY JOUR., *supra* note 1, at 11 (Sept. 13, 1776) ("the true Emolument of that State"); *id.* at 133 (May 28, 1777) (recommending sequestration of criminals "for the publick Emolument"); MD. SEN. JOUR., *supra* note 1, at 10 (Nov. 27, 1782) ("for the public emolument"); *id.* at 28 (Dec. 14, 1778) (referring to legislators' privilege and exemptions as emoluments); 14 N.C. RECORDS, *supra* note 1, at 346 (1779) ("the good & emolument of the State"); 16 *id.* at 573 (Mar. 30 1782) ("the Emolument of this State"); VA. H.D. JOUR., *supra* note 1, at 80 (Jan. 2, 1781) ("for the general emolument").

Professor Grewal, apparently relying on a modern version of the *Oxford English Dictionary*, asserts that Definition No. 4 was merely a "secondary dictionary definition." Grewal, *supra* note 1 (manuscript at 3). This was obviously not the case.

[72] WEBB, *supra* note 1, at 95 ("Revolution in America and reconstruction in Ireland were of a piece with reform in England."). On the English reform movement generally, see *id.* at 94–104.

British subjects of liberal sentiment, both in Britain and in colonial North America, had long complained about government "corruption." The term did not signify merely, or even primarily, illegal behavior. It was a concept akin to breach of fiduciary duty.[73] The abuse most commonly attacked was the practice of the Crown and presiding ministries of winning support in the House of Commons by granting Members of Parliament (and their family members and associates) offices, pensions, contracts, and other benefits. Reform of that abuse had begun well before Independence. In 1765, when William Blackstone published the first volume of his *Commentaries*, he could report some disqualifications from service in the House of Commons:

> [N]o persons concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury, nor any of the officers following [providing a list], nor any persons that hold any new office under the crown created since 1705, are capable of being elected members. . . . [N]o person having a pension under the crown during pleasure, or for any term of years, is capable of being elected. . . . [I]f any member accepts an office under the crown, except an officer in the army or navy accepting a new commission, his seat is void; but such member is capable of being re-elected.[74]

Nevertheless, political Whigs, such as the American founders, recognized that the law still left many opportunities for corruption. During the Constitutional Convention, for example, Benjamin Franklin commented on the disuse of the royal veto by observing that, "[t]he bribes and emoluments now given to the members of

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[73] *See* Natelson, *Public Trust*, *supra* note 16, at 1150–54 (discussing the duty of government officials to act impartially lest be accused of "corruption," which was deemed to be a violation of the public trust).

[74] 1 WILLIAM BLACKSTONE, COMMENTARIES *169–70. *See also* DE LOLME, *supra* note 1, at 98 (similarly summarizing the law).

parliament rendered it unnecessary, everything being done according to the will of the Ministers."[75]

Another target of the reform movement was the practice of public officers receiving fees and other Definition No. 1 emoluments. Professor John R. Breihan describes the situation in Britain:

> Fees and other non-salary payments were familiar forms of official emolument in the eighteenth century. Especially in the older departments, the ubiquitous fees were a more important source of income for public officials than their salaries. . . . Fees, gratuities, poundages, and a luxuriant variety of other official perquisites were, therefore, cultivated assiduously in almost every government department. They were sometimes collected directly from members of the public, sometimes from other public offices, and sometimes from a department's own funds. There was no limit on the exploitation of these additional sources of income, and notorious cases existed in which they had grown to immense size.
>
> Even when their accumulation was less spectacular, fees and other irregular forms of emolument hindered efficient administration by subverting official discipline and petrifying office routines. . . . There was a more sinister aspect to fees paid directly by the public: they sometimes constituted part of a private bargain between interested individuals and government officials, in which the public service was sacrificed. The customs fees provided the greatest scope for this abuse. They varied from port to port and were seldom regularly established or even written down. They were thus subject to negotiation, and merchants hired special brokers to strike bargains with the customs men at the best possible rates. Customs officials, whose salaries were low, were

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[75] 1 FARRAND'S RECORDS, *supra* note 1, at 99 (June 4, 1787) (James Madison); *see also id.* at 387 (June 23, 1787) (James Madison) (recording that George Mason "enlarged on the abuses & corruption in the British Parliament, connected with the appointment of its members").

> dependent upon their fee incomes and obviously easy subjects for hard-bargaining brokers who might agree to pay the fees only if the assessment of duty was lowered. Nor were fees the only irregular emoluments about which administrative objections could be raised.[76]

The reader will notice that the fees and other emoluments Professor Breihan identifies as grievance were all of the Definition No. 1 variety—fringe benefits earned by reason of government employment. The initial justification for emolument reform was economy—that is, reducing the cost of government. Debate on the subject was ignited on February 8, 1780, by presentation to the House of Commons of a "Petition of the Gentlemen, Clergy, and Freeholders of the County of York," which complained of "a large addition to the national debt, a heavy accumulation of taxes, a rapid decline of the trade, manufactures, and land-rents of the kingdom."[77] The petition argued "that rigid frugality is now indispensibly necessary in every department of the state," and asked Parliament "to reduce all exorbitant emoluments; to rescind and abolish all sinecure places and unmerited pensions . . . ."[78]

Three days later, Edmund Burke delivered his famous speech on "Economical Reformation,"[79] in which he offered a plan for "a considerable reduction of improper expence . . . ."[80] Burke had a wider vision as well:

> [T]he reduction of that corrupt influence, which is itself the perennial spring of all prodigality, and of all disorder; which loads us, more than millions of debt; which takes away vigour from our arms, wisdom from our councils, and every shadow of authority and credit from the most venerable parts of our constitution.[81]

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[76] Breihan, *supra* note 1, at 60–61.
[77] 20 COBBETT, *supra* note 1, at 1371.
[78] 20 *id.* at 1373–74.
[79] 21 *id.* at 1–72.
[80] 21 *id.* at 1.
[81] 21 *id.* at 2.

In other words, Burke believed that corruption was worth addressing for reasons other than thrift. But this did not alter the fact that the specific grievances arose from emoluments received by reason of government service, not from officials' outside interests.

Reform became more feasible following the collapse of Lord North's Tory cabinet in 1782, and it continued, with the interruption of the Napoleonic Wars, for decades.[82] Several times during the 1780s Parliament ordered inquiries into the salaries and emoluments granted to persons on the civil list (executive bureaucracy),[83] and it established a "commission on fees."[84] Also during this period, Parliament limited government expenses for pensions,[85] abolished certain offices because "the Emoluments arising from [them had] become excessive,"[86] prohibited justices of the peace from profiting on jail construction contracts,[87] and banned Members of Parliament from contracting with the government.[88] Furthermore, Parliament adopted legislation substituting fixed salaries for many traditional emoluments of office—employing "emoluments" in its Definition No. 1 sense.[89]

Consistent with the English political temper, these reforms were moderate rather than radical: In the words of Professor Robert K. Webb, "One might say that there were reformers aplenty but no radicals . . . ."[90] One reform provided compensation to many officials who lost emoluments.[91] Another permitted Members of Parliament to hold stock in a corporation contracting with the

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[82] *See generally* Breihan, *supra* note 1 (exploring economic reform beginning in the early 1780s).

[83] *See, e.g.*, The East India Company Act 1784, 24 Geo. 3 c. 25, § 40; 25 Geo. 3 c. 52 (1785); 26 Geo. 3 c. 66 (1786); 29 Geo. 3 c. 64 (1789).

[84] Breihan, *supra* note 1, at 59.

[85] 22 Geo. 3 c. 22 § 17 (1782) (limiting any one pension to £300, and the amount granted annually to £600).

[86] 23 Geo. 3 c. 82, § 1 (1783).

[87] 24 Geo. 3 c. 54, § 19 (1784).

[88] 22 Geo. 3 c. 45, § 3 (1782).

[89] *See* 23 Geo. 3 c. 50, § 12 (1783); 23 Geo. 3 c. 82, § 5 (1783). *See also* WEBB, *supra* note 1, at 98, 102–03 (describing various reforms, including substitution of salaries for fees).

[90] WEBB, *supra* note 1, at 104.

[91] 25 Geo. 3 c. 52, §§ 3, 6 (1785) (providing compensation for persons who lost emolument due to parliamentary legislation).

government if the corporation had ten or more shareholders.[92] An important anti-emolument measure retained the "Privileges, Profits, or Emoluments" for certain military officers.[93] The reform fervor was tempered by other values.

In America, reform sometimes anticipated the British and sometimes imitated them, but the changes in both countries were of the same general quality. Parliament previously had made some progress toward eliminating dual office holding,[94] but the newly-independent American states made more. The state constitutions of Maryland, New Jersey, Pennsylvania, and Virginia flatly barred certain state officials from holding any other office.[95] North Carolina and New Hampshire barred certain officials from a broad array of offices.[96] The 1778 South Carolina Constitution prohibited state officials from simultaneously holding office under Congress or any other state.[97] The South Carolina legislature complemented this by forbidding its state surveyor general from filling "any other place or office of emolument" under

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[92] 22 Geo. 3 c. 45, § 3 (1782).

[93] 23 Geo. 3 c. 50, § 21 (1783).

[94] *See* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1056 (1994) (noting that the Regency Act of 1705 restricted Members of Parliament from also serving as the King's ministers by requiring that they resign their legislative seats and stand for reelection, "thus affording the electorate the opportunity to refuse the presence of the King's ministers in Parliament").

[95] MD. CONST. of 1776, Declaration of Rights, art. XXX ("No Chancellor ought to hold any other office, civil or military . . . "); N.J. CONST. of 1776, art. XX ("[No] person or persons possessed of any post of profit under the government, other than Justices of the Peace, shall be entitled to a seat in the Assembly . . . ."); PA. CONST. of 1776, Plan or Frame of Government, § 7 (restricting members of the house of representatives from holding any other office, except in the militia, while serving as a representative); VA. CONST. of 1776, Constitution or Form of Government, para. 13 (prohibiting officers "holding lucrative offices" from "being elected members of either house of assembly, or the privy council").

[96] N.C. CONST. of 1776, Constitution or Form of Government, arts. XXVI–XXX (barring treasurers, officers in the army or navy, members of the Council of State, certain judges, the Secretary of State, Attorney General and Clerk of any court of record from holding a seat in the state legislature); N.H. CONST. of 1784, pt. II (barring certain officers from taking a seat in "Senate or House of Representatives, or Council" concurrently with their respective offices").

[97] S.C. CONST. of 1778, art. VII.

the United States or the state.[98] New Hampshire disqualified college instructors and professors from the legislature.[99]

Several states enacted measures designed to prevent one government from "corrupting" another. The Maryland constitution prohibited the acceptance of "any present from any foreign prince or state, or from the United States, or any of them, without the approbation of this State"[100]—a predecessor of the Foreign and Presidential Emoluments Clauses. Similarly, the Rhode Island legislature forbade the state's congressional delegates from holding or receiving "any emolument" from federal office—another predecessor of the Presidential Emoluments Clause.[101]

In 1785 the Pennsylvania legislature imitated two parliamentary enactments of the previous year by ordering a review of its "civil lists" to determine where emoluments could be reduced[102] and by banning "private emoluments" in administration of jails.[103] Other states adopted measures mandating adequate salaries for officials[104] and explicitly substituting salaries for "emoluments" previously enjoyed.[105]

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[98] An Act for establishing the Mode and Conditions of surveying and granting the vacant Lands within this State, S.C. Pub. L. No. 1320, § 16 (1784).

[99] N.H. CONST. of 1784, pt. II ("No person holding the office of . . . Professor or Instructor of any College . . . shall . . . have a seat in [the legislature].").

[100] MD. CONST. of 1776, art. XXXII.

[101] *See Report of the Committee appealed by the General Assembly to draft instructions for the Delegates in Congress*, *in* 9 R.I. RECORDS, *supra* note 1, at 612 (1782) (forbidding the state's delegates from accepting "any post or place of profit under Congress . . . nor receive any emolument from any such office, held by another").

[102] PA. TENTH GEN. ASSEMBLY MINUTES, *supra* note 1, at 38 (Nov. 12, 1785); *id.* at 130 (Dec. 23, 1785); *id.* at 152 (Dec. 26, 1785).

[103] PA. NINTH GEN. ASSEMBLY MINUTES, *supra* note 1, at 129 (Feb. 9, 1785).

[104] *E.g.*, DEL. CONST. of 1776, art. VII ("A president or chief magistrate shall be chosen [and a]n adequate but moderate salary shall be settled on him during his continuance in office."); N.C. CONST. of 1776, Constitution or Form of Government, art. XXI ("[T]he Governor, Judges of the Supreme Court of Law and Equity, Judges of Admiralty, and Attorney-General, shall have adequate salaries during their continuance in office."); S.C. CONST. of 1778, at XXXVII ("[A]dequate yearly salaries be allowed to the public officers of this State, and be fixed by law."); VA. CONST. of 1776, Constitution or Form of Government, para. 13 ("These officers shall have fixed and adequate salaries . . . .").

[105] *E.g.*, MASS. CONST. of 1780, pt. 2, ch. II, § 1, art. XIII:

> As the public good requires that the governor should not be under the undue influence of any of the members of the general court, by a dependence on them for his support; that he should, in all cases, act with freedom for the benefit of the public; that he should not have his attention

The same reform movement extended to the Continental and Confederation Congresses. The 1776 Maryland Constitution had prohibited officers from receiving "any present from any foreign prince or state" without official consent,[106] but the Articles of Confederation (ratified in 1781) went further:

> nor shall any person holding any office of profit or trust under the united states, or any of them, accept any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the united states in congress assembled, or any of them, grant any title of nobility.[107]

This provision barred American officials from benefitting from the common diplomatic practice whereby countries hosting foreign diplomats sought to win them over by granting the diplomats pensions, tangible gifts, and titles of honor and nobility.

The Articles also provided that no "person, being a delegate, be capable of holding any office under the united states, for which he, or another for his benefit, receives any salary, fees or emolument of any kind."[108] When Congress created an agent of marine (naval

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> necessarily diverted from that object to his private concerns; and that he should maintain the dignity of the commonwealth in the character of its chief magistrate, it is necessary that he should have an honorable stated salary, of a fixed and permanent value, amply sufficient for those purposes, and established by standing laws; and it shall be among the first acts of the general court, after the commencement of this constitution, to establish such salary by law accordingly.
>
> Permanent and honorable salaries shall also be established by law for the justices of the supreme judicial court.
>
> And if it shall be found that any of the salaries aforesaid, so established, are insufficient, they shall, from time to time, be enlarged, as the general court shall judge proper.

MD. CONST. of 1776, art. XXX (authorizing salaries for the chancellor and judges and providing that they not "receive fees or perquisites of any kind"); PA. CONST. of 1776, Plan or Frame of Government, § 26 (providing that judicial officers "shall be paid an adequate but moderate compensation" but may not receive fees in excess of those allowed by law). *See also Address to the People*, 1786–87 MASS. ACTS, *supra* note 1, at 151–53 (outlining the extent of recent reform).

[106] MD. CONST. of 1776, art. XXXII.

[107] ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.

[108] *Id.* art. V, para. 2.

secretary) it provided that he was to enjoy only a fixed salary and "no other fee or emolument whatever for his services in that office."[109]

At this point, it is worth underscoring two aspects of the Anglo-American reform movement. First, the "emoluments" that were the focus of the movement were those received by reason of public office—fees, bounties, and the like. Complaints about Definition No. 3 and No. 4 emoluments do not appear. Reformers sought to save public money by trimming excessive Definition No. 1 emoluments, and they sought to make the government fairer and more effective by shifting compensation away from Definition No. 1 emoluments to salary.

Second, American reforms, like those in Britain,[110] were limited and nuanced, showing a balancing of values. The constitutions of Vermont,[111] and Pennsylvania,[112] for example, barred lawmakers from some offices, but not from all. The New York constitution prohibited some dual office holding, but the limits were carefully worked out.[113] The 1778 South Carolina Constitution, following previous British practice,[114] permitted some initially-prohibited officials to win legislative seats by being re-elected after taking

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[109] 20 J. CONT. CONG., *supra* note 1, at 766 n.1 (July 18, 1781).

[110] *See supra* notes 90–93 and accompanying text.

[111] VT. CONST. of 1786, Plan or Frame of Government, art. XXIII ("No person in this State shall be capable of holding or exercising more than one of the following offices at the same time, viz. Governor, Lieutenant-Governor, Judge of the Supreme Court, Treasurer of the State, member of the Council, member of the General Assembly, Surveyor-General, or Sheriff.").

[112] PA. CONST. of 1776, § 19 Plan or Frame of Government (barring members of the general assembly and congressional delegates from the supreme executive council), § 23 (barring supreme court justices from the general assembly, executive council, and the Continental Congress).

[113] N.Y. CONST. of 1777, art. xxv:

> [T]he chancellor and judges of the supreme court shall not at the same time hold any other office, excepting that of Delegate to the General Congress, upon special occasions . . . the first Judges of the county courts in the several counties shall not at the same time hold any other office, excepting that of Senator or Delegate to the General Congress. But if the chancellor or either of the said judges be elected or appointed to any other office, excepting as is before excepted, it shall be at his option in which to serve.

[114] *See supra* note 94 (discussing the Regency Act of 1705).

their offices.[115] Even Georgia[116] and New Jersey,[117] which had some of the most comprehensive disqualifications for legislative service, exempted justices of the peace. At the congressional level, the Articles of Confederation barred congressional delegates from federal office, but did not extend the ban to state office.[118]

The same moderation characterized American salary and emolument reform. The Massachusetts legislature replaced the governor's emoluments with a salary, but left untouched the system by which the lieutenant governor was compensated with Definition No. 1 emoluments in lieu of salary.[119] It was proposed that Congress prohibit Robert Morris as agent of marine from receiving emoluments in addition to salary,[120] but there is no

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[115] S.C. CONST. of 1778, art. XX. The entire passage was worth quoting, as showing the effects of careful balancing:

> [I]f any member of the senate or house of representatives shall accept any place of emolument, or any commission (except in the militia, or commission of the peace, and except as is excepted in the tenth article,) he shall vacate his seat, and there shall thereupon be a new election, but he shall not be disqualified from serving upon being re-elected, unless he is appointed secretary of the State, a commissioner of the Treasury, an Officer of the Customs, Register of Mesne Conveyances, a Clerk of either of the Courts of justice, Sheriff, Powder-reviewer, Clerk of the Senate, House of Representatives or Privy Council, Surveyor General, or Commissary of Military stores, which officers are hereby declared disqualified from being members either of the senate or house of representatives.

[116] GA. CONST. of 1777, art. XVII:

> No person bearing any post of profit under this State, or any person bearing any military commission under this or any other State or States, except officers of the militia, shall be elected a representative. And if any representative shall be appointed to any place of profit or military commission, which he shall accept, his seat shall immediately become vacant, and he shall be incapable of reelection whilst holding such office.
>
> *By this article it is not to be understood that the office of a justice of the peace is a post of profit.* (emphasis added.)

[117] N.J. CONST. of 1776, art. XX ("[No] person or persons possessed of any post of profit under the government, *other than Justices of the Peace*, shall be entitled to a seat in the Assembly . . . ." (emphasis added)).

[118] ARTICLES OF CONFEDERATION of 1781, art. V, paras. 1, 2.

[119] *Address to the People*, 1786–87 MASS. ACTS, *supra* note 1, at 151.

[120] *See* 20 J. CONT. CONG., *supra* note 1, at 766 n.1 (reproducing resolution in the writing of Theodorick Bland; it is unclear whether this was the resolution as finally adopted).

evidence that this was understood to impact Morris' commercial interests.[121]

IV. THE DRAFTING OF THE EMOLUMENTS PROVISIONS

As noted in Part III, a motivating reason for parliamentary anti-corruption measures was financial: Both citizens and the government found it expensive to pay for emoluments derived from public office. John F. O'Connor has documented a comparable motivation among delegates to the Constitutional Convention: to control the size of the federal bureaucracy.[122]

Hence, it should be no surprise that the references to "emoluments" in the convention records[123] are almost exclusively to emoluments by reason of public office. Counting draft proposals but excluding reproductions of the Constitution in its committee of style and final forms, "emolument(s)" appears thirty-one times. The meaning of a few appearances is uncertain.[124] Definition No. 3 is entirely unrepresented, and Definition No. 4, if present, is rare.[125] All other uses fit within Definitions No. 1[126] or, more commonly, within Definition No. 2.[127]

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[121] These were extensive. *See* Benjamin H. Newcomb, *Morris, Robert (1735—1806), Financier and Revolutionary Politician in America*, *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, http://www.oxforddnb.com/view/article/68634.

[122] O'Connor, *supra* note 1, at 164–66 (collecting relevant quotations from the convention).

[123] That is, the first and second volumes of FARRAND'S RECORDS, *supra* note 1.

[124] *See, e.g.*, 1 FARRAND'S RECORDS, *supra* note 1, at 99 (June 4, 1787) (James Madison) ("[t]he bribes and emoluments now given to the members of parliament"); 1 *id.* at 392 (June 23, 1787) (Robert Yates) (reporting John Rutledge as stating, "No person ought to come to the legislature with an eye to his own emolument in any shape"); 2 *id.* at 284 (Aug. 14, 1787) (James Madison) (reporting speech by John Francis Mercer stating, "the rulers being few can & will draw emoluments for themselves from the many").

[125] Definition No. 4 *may* appear in 2 FARRAND'S RECORDS, *supra* note 1, at 407 (Aug. 24, 1787) (James McHenry) (reporting Gouverneur Morris as stating that the president "will for peace and emolument to himself and friends agree to acts that will encrease the power and agrandize the bodies which elect him").

[126] *See, e.g.*, 1 FARRAND'S RECORDS, *supra* note 1, at 89 (June 2, 1787) (Robert Yates) (reporting Benjamin Franklin as stating that the president "should receive no salary, stipend or emolument for the devotion of his time to the public services, but that his expenses should be paid" (emphasis omitted)); 2 *id*. at 284 (Aug. 14, 1787) (James Madison) (reporting a motion by Charles Pinckney referring to "office . . . for which they or any of others for their benefit receive any salary, fees, or emoluments of any kind").

[127] *See, e.g.*, 1 *id.* at 138 (June 6, 1787) (James Madison) (reporting Madison as stating, "[the president] would not possess those great emoluments from his station" as enjoyed by

The framers' interest in preventing the central government from becoming too big, powerful, and expensive was largely a product of (most of) the delegates' appreciation for the value of *decentralization*—not just "states' rights," but also the power of local communities and of individuals to govern themselves. This value argued for rules restricting federal power and expenditures and for creating disincentives for more bureaucracy.[128]

Yet, like Edmund Burke, most delegates appreciated the independent value of minimizing "corruption"—or, more precisely, self-dealing—from foreign[129] or special interest influence. Doing so served the fiduciary ideal: Officials should work principally for the people, not for themselves. The fiduciary ideal argued for inserting into the Constitution strict rules of "public trust," such as bans on legislative and dual office holding, fixed salaries and exclusion of Definition No. 1 emoluments, and prohibitions on outside income.

The fiduciary interest usually did not conflict with decentralization, but sometimes it did. For example, the fiduciary interest might justify imposing "public trust" standards on the states—and, indeed, the framers did insert a few provisions to that effect.[130] But they stopped well short of regulating the subject comprehensively. Indeed, they removed a restriction on the states that had appeared in the foreign emolument provision in the Articles.[131] Similarly, the fiduciary interest might argue for granting the federal government power to regulate all activities with interstate implications, but the framers reserved governance

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the British king); 1 *id.* at 198 (June 11, 1787) (James Madison) (reporting Franklin as referring to "emolument" of British "public officers, Civil & military"); 1 *id.* at 386 (June 23, 1787) (James Madison) (reporting Madison as referring to the emoluments of office); 2 *id.* at 291–92 (Aug. 14, 1787) (James Madison) (reporting Roger Sherman moving for congressional salaries of "5 dollars per day [and] any further emoluments [are] to be added by the States"); 2 *id.* at 335 (Aug. 20, 1787) (Journal) ("office of trust or emolument").

[128] *See* O'Connor, *supra* note 1, at 166–67 ("The debates [at the Constitutional Convention] demonstrate . . . that . . . the overriding purpose of the Emoluments Clause was to restrain the inevitable growth of the national government through the means of reducing Congress's incentive to create lucrative federal offices.").

[129] 1 FARRAND'S RECORDS, *supra* note 1, at 285 (June 18, 1787) (James Madison) (reporting Alexander Hamilton's warning of foreign "honors & emoluments").

[130] *See* U.S. CONST. art. I, § 10, cl. 1 (banning, for example, ex post facto laws and laws impairing the obligation of contracts).

[131] *See infra* notes 167–68 and accompanying text.

of many such activities to the states or to local or individual control.[132]

A third value in play at the convention was "energy in government"—that is, effective government. For government to be effective, capable people must find federal service attractive. As Alexander Hamilton said, it was necessary to "induce the sacrifices of private affairs which an acceptance of public trust would require, so . . . as to ensure the services of the best Citizens."[133] Capable people were often ambitious in the good sense of the word. They wanted to achieve great things, win popular approbation, and advance in rank.[134]

The founders believed that many or most of the "best Citizens" would have proven their mettle in the private sector. Most of the convention delegates, for example, had their feet planted firmly in the real world. George Washington was a successful military officer, planter and land speculator.[135] Robert Morris, the Confederation secretary of finance and agent of marine,[136] had been a highly prosperous merchant.[137] Nathaniel Gorham, the convention's chairman of the committee of the whole and former president of Congress, was a successful merchant.[138] James Madison, like Thomas Jefferson[139] (who was not a delegate), was a tobacco farmer.[140] Benjamin Franklin had made a fortune as a

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[132] *See* Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHN'S L. REV. 789, 841–45 (2006) (explaining that in some instances the framers provided for state governance of activities with significant interstate externalities).

[133] 1 FARRAND'S RECORDS, *supra* note 1, at 290 (June 18, 1787) (James Madison).

[134] *See id.* at 387 (June 23, 1787) (James Madison) (reporting George Mason as advocating for the encouragement of "[g]enius & virtue" in the legislative service by expanding eligibility for office).

[135] *See* Charles Royster, *Washington, George (1732–1799), Revolutionary Army Officer and President of the United States of America*, *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, http://www.oxforddnb.com/view/article/61288.

[136] *See* 2 THE PAPERS OF ROBERT MORRIS, 1781–1784, at 216 (E. James Ferguson ed., 1975).

[137] *See* Newcomb, *supra* note 121.

[138] *See* Benjamin H. Newcomb, *Gorham, Nathaniel (1738–1796), Merchant and Revolutionary Politician in America*, *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, http://www.oxforddnb.com/view/article/68599.

[139] *See* PAUL WILSTACH, JEFFERSON AND MONTICELLO 118 (1925) ("Jefferson . . . taxed his soil heavily for corn and tobacco.").

[140] *See* GAILLARD HUNT, THE LIFE OF JAMES MADISON 375 (1902) ("Madison . . . was a careful and progressive farmer [and] [t]he main source of income from his farms was from tobacco.").

printer.[141] Several leading framers—among them, Oliver Ellsworth, Edmund Randolph, John Rutledge, John Dickinson, Luther Martin, and James Wilson—were among their respective states' premier lawyers.[142]

For individuals like these to consider federal service, they had to be assured it would not ruin them. Further, they had to be assured that there would be no unnecessary obstructions in the way of advancing to higher office—from a post in Congress, for example, to a top position in the cabinet or to the presidency.

Such considerations could conflict with the values of fiduciary government and decentralization. A wealthy merchant might be an asset to Congress even if his attention was occasionally diverted from federal affairs to his own private concerns. Giving a president enough power to "make a difference" might impinge on prerogatives that the states, communities, or individuals considered their own. The framers weighed these factors; they did not automatically grant any of them supreme priority.[143] As a result, the reforms in the Constitution, like the "anti-corruption" reforms in Britain, in the states, and in the former Congress, were products of balancing competing values.

The drafting of the Congressional Emoluments Clause demonstrates the process quite clearly. On its face the Clause looks like a compromise among values, and James Madison confirmed that it was.[144] In fact, it was Madison's proposal to

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[141] *See* J.A. Leo Lemay, *Franklin, Benjamin (1706–1790), Natural Philosopher, Writer, and Revolutionary Politician in America*, *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY http://www.oxforddnb.com/view/article/52466.

[142] *See* Natelson, *Public Trust*, *supra* note 16, at 1124–25 (providing a list of the lawyers present at the Constitutional Convention and describing their roles in the ratifying process).

[143] *See supra* note 17 and accompanying text.

[144] 1 FARRAND'S RECORDS, *supra* note 1, at 388 (June 23, 1787) (James Madison) ("Mr. Madison had been led to this motion as a middle ground between an eligibility in all cases, and an absolute disqualification."). That the Congressional Emoluments Clause was the product of several competing values is not a new insight. *See To Reduce the Compensation of the Office of Attorney General: Hearing on S. 2673 Before the S. Comm. on the Judiciary*, 93d Cong. 54 (1973) (statement of Professor William Van Alstyne) (arguing that the Emoluments Clause was designed to allow Members of Congress to be appointed to an office that has not been made more attractive either by that member or their colleagues, yet "forbid a Member of Congress from benefitting from any subsequent increase in the emoluments of the office"). In the same hearing, Professor Philip Kurland argued that the principal purpose of the Clause was to "prevent Congress from [enacting] special legislation

thread down the middle between permitting members of Congress to be appointed to any office and banning them from all office:

> He supposed that the unnecessary creation of offices, and increase of salaries, were the evils most experienced, [i.e., supporting decentralization] & that if the door was shut [against] them, it might properly be left open for the [appointment] of members to other offices as an [encouragment] to the Legislative service [i.e., supporting effective government].[145]

In debate over this proposal, John Rutledge and George Mason argued for stricter standards on "corruption" grounds, and Mason questioned whether stricter standards would deter good people from public service.[146] Wilson's argument for Madison's proposal is a specimen of weighing the fiduciary and decentralization interests against the need for attracting capable people:[147]

> The proper cure he said for corruption in the Legislature was to take from it the power of appointing to offices. One branch of corruption would indeed remain, that of creating unnecessary offices, or

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for the benefit of one of its own Members," *id.* at 6, but I have not been able to locate founding-era support for this statement.

[145] 1 FARRAND'S RECORDS, *supra* note 1, at 386 (June 23, 1787) (James Madison).

[146] 1 *id.* at 386–87 (June 23, 1787) (James Madison):

> Mr. Rutlidge [sic], was for preserving the Legislature as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of its corruption.
>
> Mr. Mason. The motion of <my colleague> is but a partial remedy for the evil. He appealed to <him> as a witness of the shameful partiality of the Legislature of Virginia to its own members. He enlarged on the abuses & corruption in the British Parliament, connected with the appointment of its members. He [could] not suppose that a sufficient number of Citizens could not be found who would be ready, without the inducement of eligibility to offices, to undertake the Legislative service. Genius & virtue it may be said, ought to be encouraged. Genius, for aught he knew, might, but that virtue should be encouraged by such a species of venality, was an idea, that at least had the merit of being new. (alterations in original) (footnotes omitted).

[147] *See* 1 *id.* at 388 (reporting Madison as stating, "The question was not to be viewed on one side only. The advantages & disadvantages on both ought to be fairly compared.").

> granting unnecesary [sic] salaries, and for that the amendment would be a proper remedy. He animadverted on the impropriety of stigmatizing with the name of venality the laudable ambition of rising into the honorable offices of the Government; an ambition most likely to be felt in the early & most incorrupt period of life, & which all wise & free [governments] had deemed it sound policy, to cherish, not to check. The members of the Legislature have perhaps the hardest & least profitable task of any who engage in the service of the state. Ought this merit to be made a disqualification?[148]

On that day, Madison's motion was defeated, but debate continued,[149] and, of course, his proposal later became part of the final Constitution.[150]

The finished language of the Congressional Emoluments Clause promotes the fiduciary ideal by preventing Congress from enriching present offices or creating new ones for its members. It accommodates ambition by permitting members to be appointed to other offices. It also creates a disincentive for expansion of the federal government.[151] It is the classic compromise among values: It furthers all of them to a certain extent, but satisfies none of them perfectly.

Even reform provisions seemingly very straightforward were products of compromise. Here is the Judicial Compensation Clause:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a

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[148] 1 *id.* at 387 (June 23, 1787) (James Madison); *see also* 1 *id.* at 388 (reporting Madison as stating, "the backwardness of the best citizens to engage in the legislative service gave but too great success to unfit characters").

[149] 2 *id.* at 489–92 (Sept. 3, 1787) (James Madison).

[150] *See* 1 *id.* at 386 (showing Madison's proposal); U.S. CONST. art. I, § 6, cl. 2 (showing the incorporation of Madison's proposal into the United States Constitution).

[151] *See* O'Connor, *supra* note 1, at 166–67, 171–72 (explaining how the disincentive works).

> Compensation, which shall not be diminished during their Continuance in Office.[152]

The fact that Congress cannot reduce judicial compensation is designed to preserve independence from the legislature—a fiduciary value. But unlike some other fixed salary provisions adopted during the 1780s, this one does not eliminate emoluments such as court fees.[153] The framers knew that the inducement of court fees might attract better men to serve as judges, and in any event, court fees were probably too pervasive and widely-accepted to be abolished.

The prohibition on members of Congress serving in any "Office under . . . the United States"[154] also seems straightforward. However, the framers confined its scope by rejecting a ban on serving in *state* office.[155] The framers reached this decision on

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[152] U.S. CONST. art. III, § 1.

[153] Professor James Pfander argues that Article III prohibited fees paid to federal judges by implication because "[t]he word 'compensation' is broad enough to encompass all forms of judicial pay, including both salaries and fees (and other emoluments of office)," and Article III's no-diminution and "stated Times" provisions implicitly preclude fees. James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 4, 14–15 (2008).

As is true of many contentions about the Constitution found in law reviews, this one seems be based on inadequate consideration of the text and of founding era records and, perhaps, from underestimating the drafting skills of the framers.

First, there are other uses of "Compensation" in the original Constitution. The provision for congressional compensation is coupled with a restriction on one of the traditional fringe benefits of legislative service—the ability to move into offices newly rendered more lucrative. U.S. CONST. art. I, § 6. More telling is the provision of "Compensation" for the President. Like judicial compensation, the President's compensation was to be payable at "stated Times," and it was even more fixed than judicial compensation. Yet the framers chose to add explicit prohibitions against emoluments in the case of the President, U.S. CONST. art. II, § 1, cl. 8, while omitting them in the case of the judiciary. There is no evidence the difference in treatment was accidental.

Second, the best evidence of constitutional meaning, aside from the text, are discussions during the ratification debates. Those debates seem to contain no representations or arguments that the Constitution would abolish fees paid to judges. Yet judicial fees were widespread and the transatlantic interest in emolument reform was significant. If Article III abolished judicial fees, certainly someone would have said so.

The bottom line is that the term "Compensation" in Articles I, II, and III means "salary." It does not include fringe benefits, which the framers dealt with separately.

[154] U.S. CONST. art. I, § 6, cl. 2.

[155] 1 FARRAND'S RECORDS, *supra* note 1, at 386 (June 23, 1787) (James Madison).

explicit balancing grounds.[156] The disqualification was the subject of debate even as to *federal* office. Gouverneur Morris pointed out that in time of war the federal government might need to recruit members of Congress with military experience.[157] For this reason, the subclause on appointing members of Congress to office restricted only appointment to *civil* office.[158]

Much the same was true of the ban on additional emoluments in the Presidential Emoluments Clause.[159] Although the ban was added to the compensation feature without debate, the divided vote (7–4)[160] suggests competing values were at stake. This is further implied by the fact that it differed substantially from its predecessor in the Maryland constitution. The Maryland provision applied to all persons "in public trust";[161] the federal Constitution's provision applied only to the President. The Constitution prohibited no other officer, not even the Vice President, from receiving emoluments from individual states, and if the Constitution prohibited federal emoluments for any other officials, it did so only implicitly.[162] Moreover, the Maryland predecessor

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[156] *See* 1 *id.*:

> Genl. Pinkney moves to strike out the ineligibility of members of the 1st. branch to offices established "by a particular State." He argued from the inconveniency to which such a restriction would expose both the members of the 1st. branch, and the States wishing for their services; from the smallness of the object to be attained by the restriction.

[157] 2 *id.* at 286 (Aug. 14, 1787) (James Madison).

[158] U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office . . . .").

[159] U.S. CONST. art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased 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.").

[160] 2 FARRAND'S RECORDS, *supra* note 1, at 626 (Sept. 15, 1787) (James Madison):

> Mr. Rutlidge and Docr Franklin moved to annex to the end paragraph 7. sect. 1. art II—"and he (the President) shall not receive, within that period, any other emolument from the U. S. or any of them." on which question
>
> N—H. ay—Mas. ay. Ct. no. N. J. no. Pa ay. Del. no. Md. ay— Va. ay. N. C. no. S—C. ay. Geo—ay. [Ayes—7; noes—4.].

[161] MD. CONST. of 1776, Declaration of Rights, art. XXXII ("[N]or ought any person in public trust, to receive any present from the United States, or any of them, without the approbation of this State.").

[162] One might interpret Article I, Section 6, Clause 1 ("The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by law. . . .") to imply a similar limitation because of the language "ascertained by law," but this is not an easy

allowed the state to waive the ban; the Presidential Emoluments Clause did not permit any waiver at all.

The motion to add the Foreign Emoluments Clause to the Constitution was offered on August 23, 1787, by Charles Pinckney of South Carolina, and apparently passed without debate or dissent.[163] No later debate is recorded on the subject. Yet further investigation reveals that this Clause, too, must have been the subject of a tug-of-war, because it underwent significant editing, both before it was presented as a motion, and after.

The version initially passed by the Convention differed in two respects from its predecessor in the Articles of Confederation.[164] First, a variation on the consent proviso in the Maryland constitution's original version[165] was reinserted: Congress would be able to authorize an officer to retain a present, emolument, office, or title. This reinsertion may have been the result of struggles American diplomats faced when offered the presents then customary in international practice.[166]

Second, the phrase from the Articles, "holding any office of profit or trust under the United States, *or any of them*"[167] was altered to omit "or any of them." In other words, unlike the provision in the Articles, the Constitution's Foreign Emoluments

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construction. Recall that Roger Sherman favored subsidizing congressional salaries with additional state payments. 2 FARRAND'S RECORDS, *supra* note 1, at 291–92 (Aug. 14, 1787) (James Madison) (reporting Roger Sherman moving for congressional salaries of "5 dollars per day [and] any further emoluments [are] to be added by the States"). Sherman was a moderate who tended to be near the center of convention sentiment, and he was one of the three Connecticut delegates who brokered several important compromises. Harold E. Selesky, *Sherman, Roger (1721–1793), Merchant and Revolutionary Politician in America*, *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, http://www.oxforddnd.com/view/printable/68744.

[163] 2 FARRAND'S RECORDS, *supra* note 1, at 381 (Aug. 23, 1787) (Journal), 389 (Aug. 23, 1787) (James Madison).

[164] *See supra* notes 106–07 and accompanying text.

[165] MD. CONST. of 1776, Declaration of Rights, art. XXXII ("without the approbation of this State").

[166] *See generally* Davis, *supra* note 1 (discussing the problems). Note, however, that Davis makes two errors in this article: He attributes the convention motion to insert the Foreign Emoluments Clause to C.C. Pinckney instead of Charles Pinckney, *id.* at 378, and he seems unaware that the Articles also contained a ban on foreign gifts, stating that there was "no constitutional provision standing in their way," *id.* at 379. *See also infra* Part V.B.

[167] ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1 (emphasis added).

Clause would regulate only federal, not state, functionaries.[168] This may reflect an understanding that under the Constitution the states would not be deeply involved in foreign policy—but this had been the same understanding when the Articles were drafted. More likely, it was a concession to a competing value. The fiduciary ideal might demand that state conduct of this kind be regulated, but the value of decentralization argued against it.[169]

The Pinckney resolution was to undergo another change after initial approval. As first passed, the resolution enumerated the interdicted items as follows: "any present, emolument, office or title of any kind whatever."[170] As in the Articles, there was no comma after "title."[171] This implied that the phrase "of any kind whatever" modified only the noun "title." In September 1787, the Committee of Style reported the penultimate drafts of the Constitution, of which the convention records contain two copies. One copy has no comma after "Title," but the other does.[172] What is more important is that the final Constitution features a comma in that location,[173] thereby implying that "of any kind whatever" modifies "present," "Emolument," and "Office" as well as "Title." This seems a small change, but it has some interpretive implications explored in Part VI.

In sum, the process of crafting the emoluments provisions was one of weighing values in competition with each other, compromising, fine-tuning, and drafting a carefully nuanced text. The very nature of the process was such that no one value was served completely. In other words, the framers crafted provisions

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[168] Although Professor Teachout has suggested that the amended provision might still apply to state officers, Teachout, *Gifts*, *supra* note 1, at 36–37, the nature of the deletion renders this highly unlikely. To her credit, she concedes that deleting state officers "is arguably a better reading." *Id.* at 37.

[169] *See* NATELSON, ORIGINAL CONSTITUTION, *supra* note 1, at 16–17 (noting that the founders recognized that decentralization was important to the notion that "public office was a public trust").

[170] 2 FARRAND'S RECORDS, *supra* note 1, at 389.

[171] ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1 ("any present, emolument, office or title of any kind whatever").

[172] *Compare* 2 FARRAND'S RECORDS, *supra* note 1, at 572 (Sept. 10, 1787) (Committee of Style) (no comma), *with* 1 *id.* at 596 (Sept. 12, 1787) (Committee of Style) (with a comma).

[173] U.S. CONST. art. I, § 9, cl. 8 ("any present, Emolument, Office, or Title, of any kind whatever").

that left some problems unsolved in order to achieve other goals.[174] It follows that it is interpretative error to construe the emoluments provisions to achieve as much "anti-corruption" as possible, or that we should, without proper constitutional amendment, attempt to re-weigh what the framers so carefully balanced.

V. THE RATIFICATION ERA

A. THE RATIFICATION DEBATES

The ratification era extended from September 17, 1787, when the proposed Constitution was complete and became public, until Rhode Island approved the document on May 29, 1790. For purposes of interpreting the meaning of "emolument," by far the most important events during this period were the debates over the Constitution in public and in the state conventions.

The records of these debates, like the records of the framing convention, show participants uttering "emoluments" almost entirely in the sense of Definitions No. 1 and 2.[175] The ratification records further confirm that the emoluments provisions were sculpted to serve competing values. At the Virginia ratifying convention, Federalist floor leader Edmund Randolph cited the Foreign Emoluments Clause as a protection against corruption: He

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[174] Professor Grewal writes, "[T]he Framers may have drafted each emoluments clause to address their principal concerns, without attempting to guard against corruption of every type imaginable." Grewal, *supra* note 1 (manuscript at 9). As this review shows, there is no "may" about it.

[175] *E.g.*, 2 ELLIOT'S DEBATES, *supra* note 1, at 523 (Dec. 11, 1787) (reporting James Wilson as telling the Pennsylvania ratifying convention, "Is there an office from which any one set of men whatsoever are excluded? . . . And are the places of honor and emoluments confined to a few?"); 3 *id.* at 323 (June 12, 1788) (reporting Patrick Henry as telling the Virginia ratifying convention, "On the other hand, there are rich, fat, federal emoluments. Your rich, snug, fine, fat, federal officers—the number of collectors of taxes and excises—will outnumber any thing from the states."); 3 *id.* at 405 (June 14, 1778) (reporting Henry Lee of Westmoreland as telling the same convention, "That the price will be so high, that they will fix themselves comfortably in office, and, by their power and extravagant emoluments, ruin us."); Philo-Publius [William Duer], *Essay I*, *in* FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS 1787–1788, at 109, 110–11 (Colleen A. Sheehan & Gary L. McDowell eds., 1998) (suggesting that state officials under the constitution may suffer reduction in salary and therefore "loss of official importance or pecuniary emolument"); *cf.* 3 ELLIOT'S DEBATES, *supra* note 1, at 258 (June 11 1788) (reproducing speech of James Madison at the Virginia ratifying convention referring to "gifts and emoluments").

endeavored to show that permitting the president to run for re-election posed no danger of foreign influence.[176] At the Massachusetts ratifying convention, another Federalist leader, Christopher Gore, cited the Congressional Emoluments Clause as a protection against an overly-large federal government:

> The senators and representatives, during the time for which they shall be elected, are incapable of holding any office which shall be created, or the emoluments thereof be increased, during such time. This is taking from candidates every lure to office, and from the administrators of the government every temptation to create or increase emoluments to such degree as shall be burdensome to their constituents.[177]

The Federalists emphasized the importance of encouraging the best people to hold office, and claimed the emoluments provisions were drafted to allow that.[178] At the Virginia convention, Madison said the Congressional Emoluments Clause

> was thought to be a mean between two extremes. It guards against abuse by taking away the inducement to create new offices, or increase the emolument of old offices; and it gives [members of Congress] an opportunity of enjoying, in common with other citizens, any of the existing offices which they may be capable of executing. To have precluded them from this, would have been to exclude them from a common privilege to

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[176] 3 ELLIOT'S DEBATES *supra* note 1, at 486 (June 1[7], 1788).

[177] 2 *id.* at 65 (Jan. 22, 1787); *see also* 2 *id.* at 475 (Dec. 4, 1787) (reporting speech of James Wilson to the Pennsylvania ratifying convention); 3 *id.* at 370 (June 14, 1788) (reporting James Madison as telling the Virginia ratifying convention, "It was conceived that the great danger was in creating new offices, which would increase the burdens of the people . . . .").

[178] *E.g.*, 3 *id.* at 373 (June 14, 1788) (reporting James Madison as telling the Virginia ratifying convention, "It is impolitic to exclude from the service of his country, in any office, the man who may be most capable of discharging its duties, when they are most wanting."); A Citizen of New Haven [Roger Sherman], *Letter I*, *in* FRIENDS OF THE CONSTITUTION, *supra* note 175, at 263–64 ("There are some offices which a member of congress may be best qualified to fill . . . .").

> which every citizen is entitled, and to prevent those who had served their country with the greatest fidelity and ability from being on a par with their fellow-citizens. I think it as well guarded as reason requires; more so than the constitution of any other nation.[179]

Many speakers, while recognizing that the emoluments provisions were compromises, thought those compromises were not optimal. James Wilson supported the Constitution, but implicitly criticized its failure to bar federal office holders (rather than solely the President) from state emoluments.[180] Antifederalists such as George Mason disagreed with the proviso allowing Congress to consent to foreign emoluments.[181] Several state conventions recommended amendments deleting the congressional consent term.[182] George Mason, Patrick Henry, and William Grayson objected to the fact that members of Congress were disqualified

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[179] 3 ELLIOT'S DEBATES, *supra* note 1, at 370 (June 14, 1788) (reporting speech by James Madison at the Virginia ratifying convention); *see also* 3 *id.* (reporting speech by George Nicholas at the same convention).

Another value not discussed in the text, but highly important to the founders, was preservation of natural rights. This interest made at least one appearance in the debates over the emoluments provisions. *See, e.g.*, 3 *id.* at 465 (June 1[7], 1788) (reporting Edmund Randolph as telling the Virginia ratifying convention regarding the Foreign Emoluments Clause, "This restriction is provided to prevent corruption. All men have a natural inherent right of receiving emoluments from any one, unless they be restrained by the regulations of the community.").

[180] 2 *id.* at 463–64 (June 1[7], 1788). After reciting the Congressional Emoluments Clause, Wilson said:

> But there is no similar security against state influence, as a representative may enjoy places, and even sinecures, under the state governments. On which side is the door most open to *corruption*? If a person in the legislature is to be influenced by an office, the general government can give him none unless he vacate his seat. When the influence of office comes from the state government, he can retain his seat and salary too.

2 *id.*

[181] Letter from George Mason to Thomas Jefferson (May 26, 1788), *in* 18 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 1, at 79–80.

[182] *See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 1, at 657 (June 27, 1788) (reproducing proposed Virginia amendment: "That no man or set of men are entitled to separate or exclusive pubic emoluments or privileges from the community . . . ."); 2 DOCUMENTARY HISTORY OF THE CONST., *supra* note 1, at 190–203 (July 26, 1788) (reproducing proposed New York amendments, showing omission of the congressional consent term); 2 *id.* at 310–20 (May 29, 1790) (reproducing proposed Rhode Island amendments, showing omission of the term).

only from appointment to offices created whose emoluments were increased during their terms. Mason, Henry, and Grayson would have extended the disqualification to all federal offices.[183] Some Antifederalists contended that emoluments language was insufficient to prevent creation of an overly-large federal government.[184]

Perhaps at the suggestion of the Antifederalist who wrote under the signature of the "Federal Farmer,"[185] the Virginia convention proposed an amendment copied from its state constitution:[186]

> That no man or set of men are entitled to exclusive or separate public emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of magistrate, legislator or judge, or any other public office to be hereditary."[187]

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[183] *See* 3 ELLIOT'S DEBATES *supra* note 1, at 368–69 (June 28, 1788) (reproducing speech of Patrick Henry to the Virginia ratifying convention, in which Henry expressed concern that, by the words of the Clause, members of Congress could accept offices that were "not created during the time for which he is elected" nor did not have its emoluments increased during such time); 3 *id.* at 371–72 (June 28, 1788) (reporting remarks by William Grayson to the same, proposing an amendment that "prohibit[ed] any senator or representative from being appointed to any office during the time for which he was elected, and by fixing their emoluments"); 3 *id.* at 263 (June 21, 1788) (reproducing speech by George Mason to the same, in which Mason considered the Clause to be "no restraint at all").

[184] For example, Matthew Locke at the North Carolina ratifying convention stated:

> The advantages of the impost he considered as of little consequence, as he thought all the money raised that way, and more, would be swept away by courtly parade—the emoluments of the President, and other members of the government, the Supreme Court, &c. These expenses would double the impost, in his opinion. They would render the states bankrupt. The imposts, he imagined, would be inconsiderable.

4 ELLIOT'S DEBATES, *supra* note 1, at 239.

[185] Federal Farmer, *Letter VI* (Dec. 25, 1787), *in* 20 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 1, at 979, 984–86 (listing among the "unalienable or fundamental rights in the United States. . . . No emoluments, except for actual service").

[186] VA. CONST. of 1776, Bill of Rights, § 4 ("That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.").

[187] 18 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 1, at 201 (June 27, 1788).

The North Carolina convention, whose state constitution contained similar language,[188] followed suit.[189] These proposals seem to have been little more than a reaffirmation of the Constitution's ban on titles of nobility, but the Antifederalists deemed that even a slight shift in constitutional emphasis might be helpful.

B. A NOTE ON DIPLOMATIC PRACTICE

Although the ratification debates provide better evidence of the Constitution's original meaning, a practice under the Confederation's foreign emoluments provision may shed additional light on that meaning. This practice began before the ratification era and continued throughout.

The drafting of the Articles of Confederation was finished in 1777 and Congress began conforming its procedures to them, even though they did not become formally effective until March 1, 1781.[190] The Articles flatly forbade any federal or state officer from accepting any "present" from a foreign government. There was no express provision for congressional waiver.[191]

However, from the time when American diplomats set foot on European soil, they had to struggle with the fact that gift-giving by host governments to foreign officials was an established feature of

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[188] N.C. CONST. of 1776, Declaration of Rights, § 3 ("That no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services."). The Pennsylvania constitution contained somewhat similar language, with the word "emoluments" apparently being used in its Definition No. 4 sense. PA. CONST. of 1776, Declaration of Rights, § 5 ("That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community . . . .").

[189] *See* 18 DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* note 1, at 314 (reproducing North Carolina's Declaration of Rights, Aug. 1, 1788, of which Section 4 uses identical language to Virginia's proposed amendment, *supra* note 187 and accompanying text); 4 ELLIOT'S DEBATES, *supra* note 1, at 249–50 (Aug. 1, 1788) (reproducing North Carolina's proposed amendments to the Constitution, which were repealed).

[190] Gregory E. Maggs, *A Concise Guide to the Articles of Confederation As A Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 403 (2017) ("The drafting of the Articles of Confederation took place between July 1775 and November 1777 . . . [and] the Articles were not ratified until March 1, 1781.").

[191] ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.

international protocol,[192] and that one who rejected a gift risked insulting the host.[193] Furthermore, American diplomats were expected to bestow gratuities on court officials, and the resources for these gratuities usually derived from presents received from the host government.[194]

In the face of this reality, some Americans felt forced to ignore the ban on "presents" from foreign governments. Not only did American diplomats of relatively easy virtue, such as Benjamin Franklin, accept these gifts, but so also did those of the strictest probity, such as John Adams and John Jay.[195] After initially refusing a substantial present from the French king, Thomas Jefferson accepted it so he could pay two court officials the amount customarily due to them. Perhaps that was the best decision under the circumstances, but Jefferson kept the entire transaction secret—and realized a substantial profit.[196]

Not many people would have known of cases in which American diplomats accepted gifts without submission to Congress, so those cases have little value as evidence of the Constitution's original public meaning. A more public alternative, however, was to request congressional waiver. Arthur Lee took this course when he returned from negotiating the American-France Alliance in 1778, along with Benjamin Franklin and Silas Deane.[197] How

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[192] Letter from William Temple Franklin to Thomas Jefferson (Apr. 27, 1790), *in* 16 THE PAPERS OF THOMAS JEFFERSON 364–66 (Julian P. Boyd ed., 1961) (describing this practice as "an establish'd Custom"). The writer was Benjamin Franklin's grandson. *See* Letter to William Temple Franklin from Benjamin Franklin (Sept. 22, 1776), *in* 6 THE WRITINGS OF BENJAMIN FRANKLIN 468–69 (Albert H. Smyth ed., 1970) (referring to William Franklin as his "Grandson").

William Franklin's assessment is confirmed by Professor Linda Frey, a scholar of eighteenth-century Europe. Telephone Interview with Linda Frey, Professor of History, Univ. of Mont. (Jan. 30, 2017). She adds that while the signing of treaties and a diplomat's departure were important gift-giving opportunities, the mutual grant of presents as a "lubricant" could occur throughout the diplomat's sojourn, assuming relations remained amicable.

[193] *See generally* Davis, *supra* note 1.

[194] *See* Letter from William Temple Franklin to Thomas Jefferson (Apr. 27, 1790), *in* 16 THE PAPERS OF THOMAS JEFFERSON, *supra* note 192, at 364–66.

[195] Thomas Jefferson, Notes of Presents Given to American Diplomats by Foreign Governments (1791), *in* 16 THE PAPERS OF THOMAS JEFFERSON, *supra* note 192, at 366–67 (listing recipients as Benjamin Franklin, Silas Deane, Arthur Lee, John Jay, and himself).

[196] *See* Davis, *supra* note 1, at 386–88.

[197] *See id.* at 379–80.

Congress responded to his submission is evidence of how it construed the Articles: Congress told Lee to keep the gift.[198]

Professor Teachout maintains that after this incident congressional approval was part of the accepted meaning of the foreign emoluments provision in the Articles.[199] Her conclusion is supported by Jefferson who wrote the (self-serving) statement that congressional approval of Lee's gift had "formed the subsequent rule."[200] Whether or not this was technically true, the practice would have suggested to the public that the strictures on receipts of items from foreign governments should be construed narrowly, at least in the diplomatic context.

VI. APPLYING THE BACKGROUND TO THE CONSTITUTION'S TEXT

The Constitution's emolument provisions arose out of a wider reform movement in Britain and in what had been British North America.[201] A leading motivation for reform, although not the only motivation, was controlling the financial burden of government.[202] The "emoluments" of concern were, therefore, those obtained by reason of public employment. In both Britain and America, the reform movement produced moderate legislation, the product of compromise among competing values.[203] The Constitution's emoluments provisions were similarly the result of compromise among competing values.[204] During the ratification debates, the Constitution's advocates promoted the emoluments provisions by reference to different values, and they represented the text as the product of compromise. The Constitution's opponents complained principally that the compromises were not optimal.[205]

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[198] Thomas Jefferson, Notes of Presents Given to American Diplomats by Foreign Governments (1791), *in* THE PAPERS OF THOMAS JEFFERSON, *supra* note 192, at 366 ("Dr. Lee on his return consulted Congress whether he should return the [gold snuff box]. They decided negatively . . . .").

[199] Teachout, *Anti-Corruption*, *supra* note 1, at 361–62.

[200] Thomas Jefferson, Notes of Presents Given to American Diplomats by Foreign Governments (1791), *in* 16 THE PAPERS OF THOMAS JEFFERSON, *supra* note 192, at 366.

[201] *See supra* Part III.

[202] *See, e.g.*, *supra* pp. 22–23, 27, 30, 42.

[203] *See supra* Part III.

[204] *See supra* Part IV.

[205] *See supra* pp. 41–42.

These background facts create a presupposition that the Constitution employed the word "emolument" in either its Definition No. 1 or Definition No. 2 sense. We now turn again to the constitutional text to see how well that presupposition works.

The Congressional Emoluments Clause states in part:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. . . .
>
> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.[206]

The Clause provides for a fixed salary and bars members of Congress from "holding any Office under the United States"—both familiar features of contemporaneous reform measures. The Clause also prohibits appointment of members of Congress to offices created or "the Emoluments whereof shall have been encreased" during the member's current term. The word "whereof" renders it certain that the "Emoluments" mentioned are those received by reason of office. Thus, the meaning of the word must fall within Definition No. 1 or No. 2.

If "Emoluments" is read in its Definition No. 1 sense, a Senator or Representative could not be appointed to an office if its perquisites had been augmented, but could be appointed if the salary had been raised. If "Emoluments" is read in its Definition No. 2 sense, a Senator or Representative could not be appointed to an office if either kind of compensation had been increased.

Definition No. 2 would better serve the "anti-corruption" goal, but because this provision was a compromise among competing

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[206] U.S. CONST. art. I, § 6.

values, we should not automatically construe an emoluments provision in the strongest way possible. Rather, each provision should be construed as it was designed—that is, to serve more than one competing value. In this instance, the competing values were deterring corruption, constraining creation of offices, and permitting members of Congress to strive for promotion.[207]

If Definition No. 1 were applied, worthy ambition could be accommodated. The goal of constraining government growth would be served somewhat by the ban on appointment to new offices. But the fiduciary/anti-corruption value would hardly be served at all: In a desire to promote a favored member's ambition for a lucrative appointment, Congress could leave fringe benefits untouched while lavishly increasing the salary. It appears, therefore, that only Definition No. 2 promotes, at least in part, all three values. That this is the preferable interpretive choice is confirmed by the fact that Definition No. 2 was the most common sense of "emolument" during the constitutional debates.[208]

Let us now test the presupposition against the Presidential Emoluments Clause:

> The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased 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.[209]

This provision also fits squarely within the contemporaneous reform tradition. The president is to receive a fixed salary to replace "Emolument[s]"—presumably, given the context and the history, emoluments "by reason of office." The Clause also prevents states from subsidizing the compensation of the chief federal magistrate. It descends from, but also differs from, the provision in the 1776 Maryland Constitution preventing state

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[207] *See supra* Parts III, IV.
[208] *See supra* note 127 and accompanying text.
[209] U.S. CONST. art. II, § 1, cl. 7.

officials from receiving "present[s]" from other states.[210] The effect in the U.S. Constitution was to ban, as to the President, the practice by which states sometimes granted extra emoluments to persons serving under the United States.[211]

Emoluments by reason of office are the usual kind bestowed by a state or federal government on an officer. Of course, a government can bestow a Definition No. 4 emolument that does not fit within Definitions No. 1, No. 2, or No. 3. Police protection is an example. But an interpretation that is merely possible rather than certain is, as Madison said, "triable by its consequences."[212] It is unlikely this Clause was intended to prevent a president from receiving police protection for property in his home state.

Might the word "Emolument" in the Presidential Emoluments Clause comprehend state payments by reason of the president's business interests (Definition No. 3)? We again consider the consequences.

State law in Maryland, Virginia, and North Carolina required each tobacco grower to deliver his product to a state warehouse for inspection and storage. In exchange, officials issued a warehouse receipt known as a "tobacco note." Tobacco notes were negotiable as currency and were commonly used as cash.[213] They certainly qualified as a Definition No. 3 emolument.

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[210] MD. CONST. of 1776 Declaration of Rights, art. XXXII.

[211] *E.g.*, 1785 Md. Laws, Ch. 17, cls. 3–4 (granting a "donation" to certain military officers by which the state governor had power to "draw orders on the treasurer of the western shore, for a sum of money equal to half their respective pays . . . and not in bar or in lieu of any advantage or emolument which they, or either of them, may be entitled to receive from the United States").

[212] 1 ANNALS OF CONG. 1946 (1791) (reporting Rep. James Madison as stating, "Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences.").

[213] *See The Growing of Tobacco*, *from "American Husbandry*,*" in* 9 ENGLISH HISTORICAL DOCUMENTS: AMERICAN COLONIAL DOCUMENTS TO 1776, at 329, 330 (Merrill Jensen ed., 1969) (describing the state inspection program and the issuance by the state of tobacco notes, used as currency); Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL'Y 1017, 1037, 1046 (2008) (discussing the use of tobacco notes as money).

These inspection programs were recognized by the constitutional text. U.S. CONST. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such

When the Constitution was ratified everyone knew that tobacco growers were likely future candidates for the presidency—among them, Patrick Henry,[214] Thomas Jefferson,[215] and James Madison.[216] (Washington grew grain.[217]) A Definition No. 3 interpretation of the Presidential Emoluments Clause would require any Virginia, Maryland, or North Carolina tobacco grower elected president to sell or fallow his land before serving as president. Similarly, any business person who happened to sell a significant amount of product to a state government—furniture, for example—might have to abandon his business to serve as president. Such crippling disqualifications would be utterly inconsistent with the founders' desire to attract private sector talent to the nation's top office.[218]

So the only real issue for the Presidential Emoluments Clause is whether Definition No. 1 or Definition No. 2 applies. A case can be made for Definition No. 1, because of the close affinity of this provision with those of other reform-era salary measures. However, several considerations argue for a wider meaning. First, the Clause is directed not only at federal emoluments, but also at state supplements. If Definition No. 1 were applied, a state might be able to evade the provision by rendering its subsidy regular and denominating it a "salary." This would gut the anti-corruption effect of the state ban. The usage in the constitutional debates

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Laws shall be subject to the Revision and Controul of the Congress.").

[214] GEORGE MORGAN, THE TRUE PATRICK HENRY 41 (1907) (describing Patrick Henry as a farmer of "wheat, corn, oats, and tobacco").

[215] *See supra* note 139 and accompanying text.

[216] *See supra* note 140 and accompanying text.

[217] *See* Cecil Wall, *George Washington: Country Gentleman*, 43 AGRIC. HIST. 5, 5 (1969) (stating that, although Washington initially grew tobacco, after realizing that tobacco was poorly adapted to the Mount Vernon soil, he came to "rely[ ] chiefly on grain for income").

[218] Post-ratification evidence of original meaning is generally not very probative, but it is notable that when Thomas Jefferson and James Madison entered the presidency, there was no outcry to the effect that they were receiving unconstitutional emoluments from tobacco notes. As Virginia tobacco farmers, they were required to deliver their product to state warehouses for inspection; the inspection receipts or "tobacco notes" could be used as currency. *See* Natelson, *Paper Money*, *supra* note 213, at 1046 & n.178. For a detailed description of Virginia's tobacco laws, see GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 326–42 (1736). The tobacco inspection laws, including provisions for receipts, were reenacted by the Virginia legislature in 1792. *See* A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA ch. 135 (1794).

also argues for Definition No. 2, as does the presumption that the meaning of "emoluments" in this place is the same as in the Congressional Emoluments Clause.

Ultimately, though, it probably does not matter whether one applies Definition No. 1 or No. 2 to the Presidential Emoluments Clause. A federal payment in addition to salary is a Definition No. 1 emolument. A regular state payment, however denominated, still could be classified within Definition No. 1 because it would be paid in addition to the president's official salary.

The final, and presently most controversial, emoluments provision is the Foreign Emoluments Clause:

> 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.[219]

The ban on titles of nobility served a dual purpose. It assured that the United States would be a democratic republic like ancient Athens,[220] rather than an aristocratic republic such as the republics of Rome, Venice, or the United Provinces of the Netherlands. This ban fit nicely with the remainder of the Clause, because governments sometimes honored foreign officials by conferring titles of nobility upon them.[221] The Clause as a whole prevented the United States from granting such honors and it barred U.S. officials from accepting them. The latter portion of the Clause prohibited persons "holding any Office . . . under" the United States from accepting benefits from a foreign government.

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[219] U.S. CONST. art. I, § 9, cl. 8.

[220] *See* John R. Dos Passos, *Citizenship in A Federation*, 23 YALE L.J. 479, 487–88 (1914) ("In Athens, citizenship was the only title of nobility existing—the citizens were marked men and honored and esteemed as the governors of that small democracy. . . . But citizenship in Athens was no more noble or important than it is here in our Republic . . . ." (emphasis omitted)).

[221] For example, the Emperor Leopold I of the Holy Roman Empire conferred on John Churchill, the first Duke of Marlborough of England, the title of "Prince of Mindelheim" in gratitude for the victory at Blenheim. *See generally* Peter Barber, *Marlborough As Imperial Prince, 1704–1717*, 8 BRIT. LIBR. J. 46 (1982).

seems to have encompassed all appointed legislative, executive, and judicial offices, and likely the President and Vice President as well.[222]

Our presupposition is that "Emolument" has a Definition No. 2 meaning. Is there good evidence to contradict that presupposition?

We can readily take Definition No. 4 off the table. Definition No. 4 would forbid an American diplomat living abroad from accepting police protection or the other benefits of effective and orderly government. John Adams would have been in violation of the Articles of Confederation's foreign emoluments clause during the 1780s just by being present in the Netherlands.[223] Moreover, applying Definition No. 4 violates the constructional preference against surplusage, because of the separate enumeration of "present," "Office," and "Title"—all emoluments under Definition No. 4. In this instance, the force of the rule against surplusage is strengthened by the fact that this enumeration was not adopted hastily or thoughtlessly: It had originated in the 1776 Maryland Constitution,[224] gestated several years in the Articles,[225] and was modified as to capitalization and punctuation at the framing convention.[226]

The disqualification of Definition No. 4 has negative implications for Definition No. 3. As discussed earlier,[227] the convention's addition of a comma after "Title" implies that the phrase "of any kind whatever" modifies the entire enumeration of interdicted items, including "Emolument." In the absence of Definition No. 4's disqualification, this would suggest that "Emolument" is to be taken in its widest sense. But to avoid superfluous text and absurd results, we must rule out Definition No. 4. This changes the meaning of "any . . . Emolument . . . of any

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[222] *See supra* notes 27–29 and accompanying text (outlining several stances taken by drafters and historians).

[223] *See* Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801, 824–25 (2011) (discussing John Adams' efforts to obtain loans from and negotiate a treaty with the Dutch in the early-1780s).

[224] MD. CONST. of 1776, Declaration of Rights, art. XXXII.

[225] ARTICLES OF CONFEDERATION of 1781, art. VI, para. 1.

[226] *See supra* note 172 and accompanying text (discussing the addition of a comma).

[227] *See supra* p. 38.

kind whatever" to "any Emolument of any kind whatever *that is still within the restricted definition of 'Emolument' we are using*." It is much as if I said, "My cat is not picky. She'll eat any mouse of any kind whatever." What I am trying to say, of course, is my cat will eat "any mouse of any kind whatever—within the restrictive definition of 'mouse' we are thinking of—that is, a type of rodent." I do *not* mean she will eat a computer mouse. In the same way, the Clause must mean "any Emolument of any kind whatever within the Constitution's understood meaning of 'Emolument.' "

Could that understood meaning have been Definition No. 3? We have seen in our discussion of the other emoluments provisions that it was not. Once again, we can try a possible interpretation by its consequences. Consider the consequences of barring any U.S. employee from receiving the benefits of business dealings with a foreign government without congressional consent. Doing so would have rendered it unconstitutional for almost any government employee to purchase the debt securities of foreign governments. It would have barred anyone from selling goods abroad where they might be purchased by a foreign government. It would have prevented an official from purchasing land from an Indian tribe if that tribe were recognized as a foreign nation.[228] It would have discouraged public service by imposing crippling burdens on people involved in foreign commerce (and who necessarily engaged in transactions with foreign governments), such as the Confederation Secretary of Finance, Robert Morris.[229] Such an interpretation would have repelled some of the very people the Constitution-makers wanted to attract to government service.

Justice Oliver Wendell Holmes Jr. once pointed out that a page of history can be worth a volume of logic,[230] so let us move away from legal logic-chopping and counter-factuals to some actual history. The Constitution's emoluments provisions arose out of a reform movement that addressed benefits payable by reason of

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[228] On founding-era views of Indian sovereignty and "nationhood," see Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 258–59, 264–65 (2007).

[229] *See supra* note 121 and accompanying text.

[230] N.Y. Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921).

government employment.[231] Measures enacted during that reform movement, including the Constitution's emolument provisions, were the products of careful balancing of competing values. The foreign emoluments clause of the Articles of Confederation had been construed narrowly.[232] Known cases of real abuse had included (1) Charles II's secret acceptance of cash from Louis XIV in transactions related to the Treaty of Dover (a "present");[233] (2) the practice of customs officials extracting fees from foreign governments for harbor services ("Emoluments");[234] and (3) the practice of governments granting "Offices" or "Titles" to show appreciation to foreign officials.[235] All these abuses involved items received by reason of office. I know of no historical incidents that would have induced the founders to apply a construction that included honest business transactions or other Definition No. 3 emoluments.

We are left with the question of whether Definition No. 1 or No. 2 applies to the Foreign Emoluments Clause. As in the case of the Congressional Emoluments and the Presidential Emoluments Clause, the better argument is for Definition No. 2, both because of the frequency of its use during the constitutional debates and because employing Definition No. 1 might impair the fiduciary purpose of the Clause—not merely somewhat (which is acceptable) but radically (which is not).

VII. CONCLUSION

During the founding-era, there were at least four different meanings of "emolument" current in official government discourse. All four included some variations. All four were very widely used, and none can be dismissed as unusual or idiosyncratic. The first encompassed only fringe benefits with financial value received by reason of public office—fees, bounties, supplies, and so forth. The second encompassed all compensation with financial value

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[231] *See supra* Part III.

[232] *See supra* Section V.B.

[233] *See* WALTER PHELPS HALL & ROBERT GREENHALGH ALBION, A HISTORY OF ENGLAND AND THE BRITISH EMPIRE 386 (2d ed. 1946).

[234] *See supra* text accompanying 76 (describing the practice in Britain).

[235] *See supra* note 221 and accompanying text.

received by reason of public office—that is to say, both fringe benefits and regular pay (salary). A third added all proceeds with financial value from gainful activity. The broadest included benefits of all kinds. Study of background circumstances is necessary to understand which definition (or definitions) the Constitution adopted.

The Constitution's emoluments provisions were part of a wider "Whig" reform movement. During the 1780s, this movement won significant victories in both Britain and America, notably replacing fringe benefits (emoluments in the narrowest sense) with fixed salaries. The emoluments targeted were those received by reason of government employment. The reform measures produced were moderate: They reflected a balancing of values.

The discussion of emoluments in the constitutional debates focused on those received by reason of public office, particularly those in the second definition. The core values at play in those debates were fiduciary government (anti-corruption), decentralization (state, local, and individual autonomy), and effective government. Most of the founders subscribed to the fiduciary ideal and to the cause of limited government. On the other hand, they also recognized that effective government required attracting desirable candidates to federal service. Such candidates were likely to have commercial, agricultural, or other business interests. That the founders sought to encourage active members of the private sector to public service provides further support for the Constitution's emoluments provisions applying only to those emoluments received by reason of office.

As to the provision most controversial today, the Foreign Emoluments Clause, additional factors confirming this conclusion derive from rules of legal construction, the historical events that necessitated the Clause, the lack of historical events suggesting a broader interpretation, and the fact that it was literally impossible to apply the fourth definition to any office holder who served abroad. In addition, the third definition would have rendered it difficult to obtain the services of the capable people the founders wanted to attract to federal employment. Such people had served without relevant complaint under the similar provision in the Articles of Confederation, so there was little reason to believe they could not do so under the Constitution.

Thus, the word "emolument(s)" in the Constitution meant compensation with financial value, received by reason of public office. As between the two definitions that reflect that meaning, the more likely is the broader one—that is to say, *all* compensation with financial value received by reason of public office, including salary and fringe benefits. Proceeds from unrelated market transactions were outside the scope of the term.