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## Statutory Interpretation and Agency Disgorgement Power

Caprice L. Roberts

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## STATUTORY INTERPRETATION AND AGENCY DISGORGEMENT POWER

Caprice Roberts<sup>†</sup>

*That is the Island of the Sirens. Circe warned me to steer clear of it, for the Sirens are beautiful but deadly.*

*They sit beside the ocean, combing their long golden hair and singing to passing sailors. But anyone who hears their song is bewitched by its sweetness, and they are drawn to that island like iron to a magnet. And their ship smashes upon rocks as sharp as spears. And those sailors join the many victims of the Sirens in a meadow filled with skeletons.*

~ THE ODYSSEY, HOMER

### *Abstract*

What happens when obstacles foreclose claims and threaten to leave parties without adequate relief? Or, when the cause of action escapes conventional classification? Or, when Supreme Court decisions frustrate private litigation causing pressure for public enforcement by agencies? Or, when individuals engage in novel forms of wrongdoing that the law may fail to reach? It becomes hard to resist the siren call of equity and its powerful remedies. This trend includes sweeping national injunctions, constructive trusts, and more. Disgorgement is also one such remedy, and its popularity is rising in terms of private and public applications and challenges. It is a gain-based profits remedy rooted in both restitution law and equity power. My earlier work focused on private law implications of this powerful form of relief, including its ability to fill gaps between common law causes of action. That research identified dangers including exceeding unjust enrichment's purpose by punishing without punitive power and without proper procedural guards. Without restraint, the remedy threatens to destroy. With restraint, disgorgement holds promise for capturing unjust gains and deterring egregious wrongs.

In this work, I draw lessons from public law applications of disgorgement. Imprecise statutory language leaves space for agency discretion. Administrative agencies have increasingly sought this remedy to right alleged wrongs. It is a formidable

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administrative agency weapon. The allure of disgorgement, coupled with alternative administrative obstacles, has caused several agencies, including the Securities and Exchange Commission (“SEC”) and the Federal Trade Commission (“FTC”), to creep beyond their agency power. Potential agency creep occurs when the agency exceeds its statutory authority on the scope of conduct covered and the bounds of the remedy, in either the type or the severity of relief. Without sufficient checks on the agency, enforcement power expands. The Supreme Court has taken interest by granting certiorari in a series of cases implicating disgorgement relief and agency power.

This article explores these cases and underlying statutes. It examines the Supreme Court’s efforts to endorse but rein in certain agency powers and remedies. Meanwhile other agencies continue to pursue disgorgement aggressively under parallel statutory language that may draw future challenges. Supreme Court limits on various agencies’ disgorgement power are piecemeal. Substantively, some of the Court’s reasoning belies equity principles and fails to honor statutory purposes aimed at empowering agencies to vindicate rights. Such catalysts will likely lead to incomplete, and potentially flawed, legislative reforms. Ultimately, I argue that this interbranch process and dialogue serves valuable separation-of-powers purposes and, ideally, should help refine remedial goals and enforcement tools. Each branch must heed the interbranch signals to avoid overreach and impose its own scrutiny and limits, while also aiming to conform to substantive contours of restitution law. The catch is to ensure that such developments do not sever disgorgement’s foundational ties to unjust enrichment and to ensure it fits within modern and historic equity.

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## INTRODUCTION

In recent decades, the Supreme Court has showed enhanced interest in equitable principles and remedies.<sup>1</sup> What began as periodic cases featuring one jurist's idiosyncratic and sometimes misguided interpretations<sup>2</sup> has manifested a broader, significant trend. A consequential theme emerges across varied cases: a revival in the Court's emphasis on the jurisprudence of equitable remedies. The Court's recent and current docket continues this momentum. Scholars are tracking the developments and advocating for a system of equity;<sup>3</sup> focusing on historical constraints and federal equity power;<sup>4</sup> and generating a restitution revival.<sup>5</sup>

What happens when obstacles foreclose claims and threaten to leave parties without adequate relief? Or, when the cause of action escapes conventional classification?

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<sup>1</sup> See, e.g., *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1344, 1347 (2021) (equitable remedy of disgorgement); *Liu v. SEC*, 140 S. Ct. 1936, 1949–50 (2020) (tailoring the SEC's equitable disgorgement remedy); *Kansas v. Nebraska*, 574 U.S. 445, 453–56 (2015) (exercising original jurisdiction over state water compacts, clarifying the equitable nature of its disgorgement award, and approving a \$1.8 million disgorgement for opportunistic breach); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 28–29 (2008) (tightening equitable analysis required for preliminary injunctions); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (distinguishing legal restitution from equitable restitution in ERISA context); *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 324–27 (1999) (ruling district judge lacked equitable power to issue an asset-freeze injunction because such power exceeded historical uses of equity jurisdiction); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391–92 (2006) (clarifying factors required for permanent injunctions and eschewing categorical presumptions in patent infringement injunction cases); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347–55 (1998) (determining whether a constitutional right to a jury trial exists for statutory damages for copyright violations).

<sup>2</sup> Justice Clarence Thomas penned several remedies-centric decisions and developed a remedies jurisprudence focused first and foremost on history. See, e.g., *eBay Inc.*, 547 U.S. at 390–91; *Feltner*, 523 U.S. at 354–55. This jurisprudence has garnered much criticism. See, e.g., Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 73, 76–77, 80 (2007) (critiquing the Court's mischaracterization of equitable injunctive analysis).

<sup>3</sup> Samuel Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1044 (2015) (emphasizing the unexpected and startling nature of the revival); Samuel Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 530 (2016).

<sup>4</sup> Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1, 1 (forthcoming 2023) (noting this renewed interest in equity is a trend that shows no signs of waning).

<sup>5</sup> Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1029 (2011) (predicting a restitution revival in the United States in terms of cases and scholarship); see Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929, 929 (2012) (book review) (recognizing the reinvigorated dedication by the American Law Institute and the Reporter Andrew Kull in the successful completion of RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (AM. LAW INST. 2011) as the source of restitution revival). This success is notable given that the second restatement floundered: the American Law Institute abandoned the project in 1985 after a five-year effort by Professor William F. Young of Columbia Law School despite starting with luminaries such as John Dawson, Dan Dobbs, Allan Farnsworth, Ellen Peters, Michael Traynor, John Wade, Charles Allen Wright, and John Frank. See Andrew Kull, *The Three Restatements of Restitution*, 68 WASH. & LEE L. REV. 867, 873–74 (2011). Scholarly interest and litigation increased given this project's refinement, including dramatic developments since the first restatement in 1927. *But cf.* Chaim Saiman, *Restitution in America: Why the US Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEGAL STUD. 99, 99 (2008) (lamenting the modern lack of theoretical rigor in restitution jurisprudence in the United States versus Oxbridge and the rest of the Commonwealth countries).

Or, when Supreme Court decisions frustrate private litigation causing pressure for public enforcement by agencies? Or, when individuals engage in novel forms of wrongdoing that the law may fail to reach? It becomes hard to resist the siren call of equity and its powerful remedies. This trend includes sweeping national injunctions, constructive trusts, and more. Disgorgement is also one such remedy, and its popularity is rising in terms of private and public applications and challenges. It is a gain-based profits remedy rooted in both restitution law and equity power. My earlier work focused on private law implications of this powerful form of relief, including its ability to fill gaps between common law causes of action. That research identified dangers including exceeding unjust enrichment's purpose by punishing without punitive power and without proper procedural guards. Without restraint, the remedy threatens to destroy. With restraint, disgorgement holds promise for capturing unjust gains and deterring egregious wrongs.

Of course, equity doesn't hold allure for all. Or, more specifically, skepticism and misunderstanding surrounds equitable remedies, equitable defenses, and enduring equitable principles.<sup>6</sup> Equity at its worst risks being unbounded, arbitrary, unpredictable, and unfair.<sup>7</sup> However, development of equity and corrective measures introduces limits to address equity's primary flaws.<sup>8</sup> Modern skepticism about equity is likely more about disinterest than opposition to equitable principles. Disinterest stems from assumed irrelevance of equity in modern civil litigation because of the almost total elimination of separate courts of equity in the United States.<sup>9</sup> Procedural reforms streamlined civil procedure to merge law and equity.<sup>10</sup> A common misperception is that the erasure of separate courts and the procedural merger of law and equity means that equity has vanished. This myth leads to an assumption that there is no need to understand equity,<sup>11</sup> but this logic is wrong. The law-equity distinction remains critical in the determination of rights to a jury trial versus discretionary judge-based determinations. Equitable defenses remain a part of a modern equitable system. They also continue to thrive as shields from equitable remedies. Some advocate complete fusion of equity into law for a

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<sup>6</sup> This article's discussion of equity does not include the substantive branch of equity such as trusts. The primary focus is equitable remedies, though even that exploration implicates equitable defenses and broader equitable principles.

<sup>7</sup> Historic equity relied on ad-hoc judicial decisionmaking, which is sometimes pejoratively described as "palm-tree justice," with "the judge metaphorically sitting under a tree to make rulings based on common sense rather than legal principles or rules." *Palm tree justice*, AUSTRALIAN LAW DICTIONARY (1st ed. 2010). Palm-tree justice connotes a fear of unbounded discretion. Barry Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law*, 36 TUL. L. REV. 605, 607 (1962) (describing and criticizing attorneys' distrust of and disdain for 'palm-tree justice'). See also *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 335 (1982) (Stevens, J., dissenting) (warning of inherent dangers in arbitrary and whimsical decisions when "the Court unnecessarily and casually substitutes the chancellor's clumsy foot for the rule of law.").

<sup>8</sup> F.W. MAITLAND, *EQUITY: A COURSE OF LECTURES* 14, 17–18 (A.H. Chaytor & W.J. Whittaker eds. 2d ed. 1969); S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 94–95 (2d ed. 1981); Gallogly, *supra* note 4, at 27–31 (providing a well-researched compendium of the historical development and evolution of equity from conscience-based equity to precedent-based equity).

<sup>9</sup> Only Delaware retains its Court of Chancery.

<sup>10</sup> The Federal Rules of Civil Procedure merged law and equity in 1938. See Fed. R. Civ. P. 2 advisory committee's notes to 2007 amendment.

<sup>11</sup> See DOUG RENDLEMAN & CAPRICE L. ROBERTS, *REMEDIES: CASES AND MATERIALS* 539–46 (9th ed. 2018) (cataloguing myths about unjust enrichment and equity).

more functional and less anachronistic legal system.<sup>12</sup> Still, the import of equity remains. Modern equity is on the rise, and it is ripe for continued refinement.

Fortunately, modern equity has generated scholarly attention. More attention remains vital. Remedies scholarship is indispensable because remedies demonstrate which cognizable injuries merit relief at all and to what extent. Further, the scope of remedies shapes substantive rights, and the ultimate remedy delivered speaks volumes about the functionality of our justice system. Scholars must also analyze remedies issues because Supreme Court remedies jurisprudence is notoriously problematic.<sup>13</sup> This problem regarding equitable remedies and unjust enrichment law is deep, as is widespread misunderstanding in the United States across the bench and bar about basic doctrines and innerworkings.<sup>14</sup>

Remedies touches at least one extremely hot topic. Much scholarly ink has spilled on the national injunction.<sup>15</sup> This attention is well placed given the scope of the equitable relief and, very often, the core constitutional rights at stake. Not to mention the related hot topic of major remedies determinations that occur as part of the Supreme Court's shadow docket, which also sparks important analysis.<sup>16</sup> There has also been a notable

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<sup>12</sup> See generally DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991) (advocating for total assimilation of law and equity).

<sup>13</sup> Doug Rendleman, *Remedies: A Guide for the Perplexed*, 57 ST. LOUIS U. L.J. 567, 567 (2013) (lamenting the tortured, confusing, wrong, and regressive nature of Supreme Court opinions across remedies including restitution, contempt, and punitive damages).

<sup>14</sup> RENDLEMAN & ROBERTS, *supra* note 11, at 406–08, 520–22, 539–46, 565, 581–83 (demonstrating profound confusion and misunderstanding on the law-equity divide, restitution, unjust enrichment, quasi-contract, and constructive trusts; and recommending restitution reform begin with education); see *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222–24 (2004) (Ginsburg, J., concurring) (lamenting that the Supreme Court's remedies and restitution jurisprudence was so profoundly mistaken and so injurious to plaintiffs that either the Court or Congress should start over from the beginning to design a coherent remedies structure for ERISA); see also John H. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1317 (2003) (tracing misconceptions from the initial misinterpretations through the Supreme Court's ERISA progeny).

<sup>15</sup> See, e.g., Doug Rendleman, *Preserving the Nationwide National Injunction to Stop Illegal Executive Branch Activity*, 91 COLO. L. REV. 887, 889 (2020); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 481 (2017); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 620 (2017); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924, 926–27 (2020); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 56 (2017); Portia Pedro, *Toward Establishing a Pre-Extinction Definition of "Nationwide Injunctions,"* 91 U. COLO. L. REV. 847, 873, 883 (2020) (emphasizing the costs to marginalized communities injured by Article II actors if proceduralists and remedies scholars fail to frame the nationwide injunction debate in a conceptual framework); Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 977 (2020).

<sup>16</sup> Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 124–25, 149, 159 (2019) (exposing the substantial volume of orders and summary decisions issued by the Supreme Court without full briefing and oral argument and highlighting this approach's potential for grave consequences on rights and remedies); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 1 (2015) (characterizing Supreme Court consideration of orders and summary decisions as a shadow docket).

resurgence of interest in injunctive relief more generally<sup>17</sup> and valuable contributions on equitable contempt powers.<sup>18</sup> Yet, it is often in the quiet corners of the law where important shifts and deprivations occur. Too few scholars examine the less provocative, but extremely potent, equitable uses of remedies such as disgorgement.

Disgorgement is an ancient remedy.<sup>19</sup> It has been a staple of courts of equity<sup>20</sup> that “routinely deprived wrongdoers of their net profits from unlawful activity.”<sup>21</sup> Unfortunately, the naming conventions for disgorgement have not been uniform.<sup>22</sup> Over centuries, various names and labels developed such as accounting, accounting for profits, profits, and restitution. Complexity has caused lawyers, students, and judges to conflate disgorgement with constructive trusts<sup>23</sup> as well as contract expectation damages.<sup>24</sup>

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<sup>17</sup> See, e.g., Pamela Samelson, *Withholding Injunctions in Copyright Cases: The Impact of eBay*, 63 WILLIAM & MARY L. REV. 773, 823–55 (2022) (arguing that *eBay*’s insistence on a four-factor test, though roundly criticized by scholars, has had positive effects on the exercise of equitable discretion in copyright infringement cases because, post-*eBay*, judges abandoned categorical grants of injunction in favor of tailored analysis); Tomás Gómez-Arostegui & Sean Bottomley, *The Traditional Burdens for Final Injunctions in Patent Cases c.1789 and Some Modern Implications*, 71 CASE W. RESV. L. REV. 403, 403 (2020) (examining final injunction requirements of irreparable injury and inadequacy of legal remedies given traditional principles of equity); Mark Gergen, John Golden, & Henry Smith, *The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 205 (2012) (regretting *eBay*’s unintended upending of longstanding equitable considerations and presumptions normatively worth keeping); Doug Rendleman, *The Trial Judge’s Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 76–77, 94, 96 (2008) (critiquing the *eBay* decision for declaring “tradition” as it announced a new four-factor test and arguing that the factors should be affirmative defenses, placing the pleading and proof burdens on the defendant).

<sup>18</sup> See generally DOUG RENDLEMAN, *COMPLEX LITIGATION: INJUNCTIONS, STRUCTURAL REMEDIES, AND CONTEMPT* (2010); Doug Rendleman, *Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor*, 48 WASH. & LEE L. REV. 185, 216 (1991).

<sup>19</sup> DAN B. DOBBS & CAPRICE L. ROBERTS, *LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* § 4.3(5) 415 (3d ed. 2018) (summarizing the history of accounting for profits and its tie to the disgorgement remedy).

<sup>20</sup> *Liu v. SEC*, 140 S. Ct. 1936, 1943 (2020) (endorsing disgorgement as a “mainstay of equity courts” to strip wrongdoers of their unlawful profits) (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398–99 (1946)).

<sup>21</sup> *Id.* at 1942.

<sup>22</sup> *Id.* at 1942–43 (“Compare, e.g., 1 D. Dobbs, *Law of Remedies* § 4.3(5), p. 611 (1993) (‘Accounting holds the defendant liable for his profits’), with *id.*, § 4.1(1), at 555 (referring to ‘restitution’ as the relief that ‘measures the remedy by the defendant’s gain and seeks to force disgorgement of that gain’); see also *Restatement (Third) of Restitution and Unjust Enrichment* § 51, Comment a, p. 204 [2011] . . . (‘Restitution measured by the defendant’s wrongful gain is frequently called “disgorgement.” Other cases refer to an “accounting” or an “accounting for profits”’); 1 J. Pomeroy, *Equity Jurisprudence* § 101, p. 112 (4th ed. 1918) (describing an accounting as an equitable remedy . . . .)’); see also DOBBS & ROBERTS, *supra* note 19, at 418 (‘Restitution remedies that pursue this object [eliminating wrongful profit while avoiding a penalty] are often called ‘disgorgement’ or ‘accounting.’”).

<sup>23</sup> *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 39 cmt. d, illus. 4 & Reporter’s note d (AM. L. INST. 2011) (recasting the Supreme Court’s constructive trust remedy on a flawed fiduciary duty theory in *Snepp v. United States*, 444 U.S. 507 (1980), as a disgorgement award for opportunistic breach of contract because Snepp, the ex-CIA agent, published a tell-all without government preclearance as required by contract and Snepp’s conduct was deliberate, profitable, and rendered the government inadequately protected).

<sup>24</sup> See *Roth v. Speck*, 126 A.2d 153, 155–56 (D.C. 1956) (reversing nominal damages award to employer who failed to prove expectancy damages of lost plaintiff’s profits with a reasonable degree of certainty, and then permitting expectancy damages for breach of exclusive term contract by exceptionally talented hair stylist to be measured by defendant employee’s gain from new employment).



Several significant scholarly treatments of disgorgement exist. Each of these important works focuses on disgorgement applications within distinct subjects such as patents,<sup>25</sup>

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<sup>25</sup> Pamela Samuelson & Mark P. Gergen, *The Disgorgement Remedy of Design Patent Law*, 108 CAL. L. REV. 183, 185–86 (2020) (warning against a total-profits remedy and instead arguing for application of causation and apportionment limits on restitutionary disgorgement awards in design patent cases and showing the equitable nature of the remedy in this context); Sarah Burstein, *The ‘Article of Manufacture’ Today*, 31 HARV. J. L. & TECH. 781, 784 (2018) (advocating the historical meaning of the phrase “article of manufacture,” which would lessen the in terrorem—threat—value of partial design patents and avoid windfalls); Caprice L. Roberts, *The Case for Restitution and Unjust Enrichment Remedies in Patent Law*, 14 LEWIS & CLARK L. REV. 653, 665, 667–69 (2010) (criticizing the Supreme Court’s reasons for excluding disgorgement as an available remedy for utility patent infringements under the revised patent statute); see also Pamela Samuelson, *Disgorgement of Infringer Profits as an Equitable Remedy*, PATENTLY-O BLOG (April 24, 2020), <https://patentlyo.com/patent/2020/04/d disgorgement-infringer-equitable.html>; Caprice L. Roberts, *Calibrating the Disgorgement Remedy for Design Patent Law*, LEX JOTWELL (June 25, 2019), <https://lex.jotwell.com/calibrating-the-disgorgement-remedy-for-design-patent-law/> (reviewing Samuelson & Gergen, *supra* note 25). Scholars have extended lessons drawn from disgorgement in design patent law and sought to unify treatment of the disgorgement remedy across significant intellectual property regimes—trademark, trade secrecy, copyright, design patent, and utility patent. Pamela Samuelson, John Golden & Mark P. Gergen, *Recalibrating the Disgorgement Remedy in Intellectual Property Cases*, 100 B.U. L. REV. 1999, 2005 (2020) (examining primary intellectual property structure and approaches to disgorgement and, ultimately, suggesting how courts can effectuate more consistent disgorgement awards while staying within statutory limits of each intellectual property regime, within restitutionary doctrines, and fostering the overarching goals of intellectual property law).

privacy,<sup>26</sup> private contracts,<sup>27</sup> public contracts,<sup>28</sup> emoluments,<sup>29</sup> antitrust,<sup>30</sup> or securities.<sup>31</sup> None has sought to examine the power, risks, and lessons of equitable disgorgement across agencies to glean how to balance executive agency enforcement goals, congressional control, and judicial equity power within the bounds of unjust enrichment law. Until now.

In this work, I draw lessons from public law applications of disgorgement. Imprecise statutory language leaves space for agency discretion. Administrative agencies have increasingly sought this remedy to right alleged wrongs. It is a formidable administrative agency weapon. The allure of disgorgement, coupled with alternative administrative obstacles, has caused several agencies, including the Securities and

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<sup>26</sup> Bernard Chao, *Privacy Losses as Wrongful Gains*, 106 IOWA L. REV. 555, 557 (2020) (advocating disgorgement for unjust enrichment in privacy law); see also Caprice Roberts, *Wrongful Gain from Data Breaches*, JOTWELL (April 21, 2020) (reviewing Chao, *Privacy Losses as Wrongful Gains*), <https://lex.jotwell.com/wrongful-gains-from-data-breaches/>.

<sup>27</sup> See generally Caprice L. Roberts, *Restitutory Disgorgement as a Moral Compass of Breach of Contract*, 77 U. CIN. L. REV. 991 (2009); Caprice L. Roberts, *A Commonwealth of Perspective on Restitutory Disgorgement for Breach of Contract*, 65 WASH. & LEE L. REV. 945 (2008); Caprice L. Roberts, *Restitutory Disgorgement for Opportunistic Breach of Contract and Mitigation Damages*, 42 LOY. L.A. L. REV. 131 (2008); Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559 (2006) (advancing the disgorgement interest as within contract law's goals); Sidney W. DeLong, *The Efficiency of a Disgorgement as a Remedy for Breach of Contract*, 22 IND. L. REV. 737 (1989) (questioning disgorgement as fitting contract law goals such as efficiency); E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1341, 1392 (1985) (disapproving disgorgement of defendant's gains as a valid remedy for contract law as antithetical to contract's essential aim: compensation of plaintiff's loss).

<sup>28</sup> See generally Caprice L. Roberts, *Supreme Disgorgement*, 68 FLA. L. REV. 1413 (2016) (arguing that the Supreme Court's endorsement of disgorgement of defendant's profits as a valid contract remedy for opportunistic breach of an interstate water compact would resonate from public to private law).

<sup>29</sup> See generally Caprice L. Roberts, *Disgorging Emoluments*, 103 MARQUETTE L. REV. 1 (2019) (proposing restitutory disgorgement as an ideal remedy to undo any unjust emoluments). The Constitution does not include a remedy for violation of the emoluments clauses. See Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 691 n.212 (2017) (noting the Comptroller General admitted that the Foreign Emoluments Clause fails to specify any remedy for violations).

<sup>30</sup> See, e.g., Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79, 79, 89, 95 (2009) (Asking, "[m]ore provocatively, given the growing obstacles to private and class action damage suits and the frequent ineffectiveness of behavioral and structural remedies for monopolization, is it time for disgorgement to assume center stage as an antitrust remedy?" and concluding disgorgement offers a potential cure for government enforcement of antitrust violations by helping to deter and "depriv[e] the antitrust wrongdoer of its illicit loot."); Alden F. Abbott, *FTC Monetary Remedies Policy and the Limits of Antitrust*, ANTITRUST SOURCE, Dec. 2012, art. 2, at 1; David K. Park & Richard Wolfram, *The FTC's Use of Disgorgement in Antitrust Actions Threatens to Undermine the Efficient Enforcement of Federal Antitrust Law*, ANTITRUST SOURCE, Sept. 2002, art. 5, at 1; Joshua D. Wright, Commissioner, Fed. Trade Comm'n, Remarks at the 18th Annual Competition Law and Policy Workshop European University Institute Department of Law (July 19, 2013), at 4, [https://www.ftc.gov/sites/default/files/documents/public\\_statements/federal-trade-commission-monetary-remedies/130719monetaryremedies.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-monetary-remedies/130719monetaryremedies.pdf).

<sup>31</sup> See, e.g., Theresa Gabaldon, *Equity, Punishment, and the Company You Keep: Discerning A Disgorgement Remedy Under the Federal Securities Laws*, 105 CORNELL L. REV. 1611, 1680 (2020) (arguing that "it would be wrongheaded to rely on historic practices of equity as conclusive proof of modern statutory meaning in the presence of strongly conflicting evidence."); Karen E. Woody, *"Declinations with Disgorgement" in FCPA Enforcement*, 51 U. MICH. J. L. REFORM 269, 293 (2018).

Exchange Commission (“SEC”) and the Federal Trade Commission (“FTC”), to creep beyond their agency power. Potential agency creep occurs when the agency exceeds its statutory authority on the scope of conduct covered and the bounds of the remedy, in either the type or the severity of relief. Without sufficient checks on the agency, enforcement power expands. The Supreme Court has taken interest by granting certiorari in a series of cases implicating disgorgement relief and agency power.

This article explores these cases and underlying statutes. It examines the Supreme Court’s efforts to endorse but rein in certain agency powers and remedies. Meanwhile other agencies continue to pursue disgorgement aggressively under parallel statutory language that may draw future challenges. Supreme Court limits on various agencies’ disgorgement power are piecemeal. Substantively, some of the Court’s reasoning belies equity principles and fails to honor statutory purposes aimed at empowering agencies to vindicate rights. Such catalysts will likely lead to incomplete, and potentially flawed, legislative reforms. Ultimately, I argue that this interbranch process and dialogue serves valuable separation-of-powers purposes and, ideally, should help refine remedial goals and enforcement tools. Each branch must heed the interbranch signals to avoid overreach and impose its own scrutiny and limits, while also aiming to conform to substantive contours of restitution law. The catch is to ensure that such developments do not sever disgorgement’s foundational ties to unjust enrichment and to ensure it fits within modern and historic equity.

This article progresses in four parts. Part I situates the debate in the context of imprecise statutory language and agency overreach in the pursuit of bold remedies like disgorgement. Part II details four agencies’—the SEC, Federal Trade Commission (“FTC”), Food and Drug Administration (“FDA”), Commodity Futures Trading Commission (“CFTC”)—quest to disgorge wrongdoers’ gains. It also shows the Supreme Court’s recent interest in confining agency overreach with respect to remedy power. Specifically, the Court has limited, but approved, the SEC’s efforts to disgorge gains. This part compares the SEC approach with the Court’s rebuke of the FTC’s disgorgement pursuits as beyond statutory bounds. Lastly, Part II previews FDA and CFTC disgorgement maneuvers and evaluates the likelihood of triggering Supreme Court review. Part III offers an approach for balancing agency prerogatives, congressional directives, and judicial equity power. In Part III, I argue that all three approaches require internal restraint as well as recalibration based on signals from intrabranched dialogue. The conclusion, Part IV, offers a path forward. It suggests calibrating separation-of-powers tension to honor agency goals and facilitate thoughtful exercises of equitable discretion guided by the principles of unjust enrichment. Without restraint, equity will fail to live up to its promise. It will not serve enforcers. It will not reach victims of opportunism. And it will not deter wrongdoers. This article seeks to ensure equitable disgorgement survives as a powerful enforcement tool for agencies to undo unjust profits, but not punish actors.

## I. STATUTORY AMBIGUITY AND AGENCY CREEP

In empowering executive agencies to pursue remedies,<sup>32</sup> Congress has not always spoken consistently.<sup>33</sup> And perhaps remedial variation is appropriate, even desirable, depending on the goals of a particular agency. Agencies and their authorizing statutes have distinct goals and objectives. Congress may intentionally yield discretion to agencies and judges to finetune remedies. Regardless, enforcement remedies should align with an agency's mandate. Some asymmetry is inevitable in practice if not in text.

But this statutory disharmony, intentional or not, is partially obviated by two principles. First, an agency over time will seek to incrementally increase its power.<sup>34</sup> The agency will act in a manner it believes to be consistent with congressional intent, but nonetheless inconsistent with the letter of its authorizing statute.<sup>35</sup> Second, courts have historically exercised wide authority in crafting and ordering remedies. As such, an agency's attempts to enlarge its authority will often appear justifiable when characterized instead as a court employing its traditionally broad remedial authority.<sup>36</sup>

So, a core tension exists. On one hand, agencies are creatures of statute and are permitted to do no more than what Congress has empowered them to do.<sup>37</sup> On the other, courts enjoy significant latitude to craft remedies and ensure justice is done.<sup>38</sup> A certain level of tension can be productive, though it comes with costs. Thus, when agencies gradually increase their authority and push the boundaries of enforcement, they will often find purchase in the courts, to a point.

Eventually, appellate courts constrain agency creep. Since 2020, the Supreme Court has fired a warning shot to the SEC<sup>39</sup> and rejected outright the FTC's principal and

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<sup>32</sup> This article focuses on agency pursuit of judicial remedies rather than administrative remedies, though future works may apply the themes of this article to administrative applications.

<sup>33</sup> Compare authorizations under utility patent statutory provisions, 35 U.S.C. §§ 284–85, by which the Court has interpreted statutory amendments to eliminate equitable disgorgement relief, with trademark, copyright, and design-patent authorizations. *See generally* Caprice L. Roberts, *The Case for Restitution and Unjust Enrichment Remedies in Patent Law*, 14 LEWIS & CLARK L. REV. 653 (2010) (lamenting the Court's misinterpretation of statutory amendments to the Patent Act to erase the availability of disgorgement for utility patents, despite its availability for all parallel intellectual property violations); *see* Aro Mfg. Co. Inc. v. Convertible Top Replacement Co., 377 U.S. 476, 505 (1964) (interpreting amendments to eliminate power to seek disgorgement for utility patent violations). For intellectual property statutes authorizing disgorgement, *see*, for example, 17 U.S.C. § 504(b) (2006) (copyright); 15 U.S.C. § 1117(a) (trademark); 35 U.S.C. § 289 (design patents).

<sup>34</sup> *See, e.g.*, Jacob S. Hacker, Paul Pierson & Kathleen Thelen, *Drift and Conversion: Hidden Faces of Institutional Change* (Am. Political Sci. Ass'n Meeting Paper, 1, 4–5, 9, 13, Aug. 2013), <https://ssrn.com/abstract=2303593>.

<sup>35</sup> *Id.* at 2, 8–10, 14–15.

<sup>36</sup> *See, e.g.*, Porter v. Warner Holding Co., 328 U.S. 395, 397–98 (1946) (explaining and employing the court's broad equitable powers to fashion complete relief: here, restitution sought by the Administrator of the Office of Price Administration, despite the lack of explicit statutory authorization for the restitutionary remedy in the Emergency Price Control Act).

<sup>37</sup> Liu v. SEC, 140 S. Ct. 1936, 1951 (2020).

<sup>38</sup> *Id.* at 1946–47.

<sup>39</sup> *Id.* at 1950.

extratextual enforcement remedy of restitution.<sup>40</sup> In the aftermath, the FTC has withdrawn cases with massive disgorgement awards and urged Congress to reaffirm the breadth of the agency's equity powers to include restitution and disgorgement authority.<sup>41</sup> The FTC has made direct pleas across a spectrum of its enforcement cases that will suffer without disgorgement power. For example: "Congress should act quickly to restore . . . the Commission's ability to return to consumers money lost due to illegal anticompetitive behavior by pharmaceutical companies."<sup>42</sup>

Congressional support for explicitly authorizing the FTC disgorgement remedy appears to exist, as legislative efforts are percolating.<sup>43</sup> Such reform would reinstate agency power as exercised prior to the Supreme Court's rebuke. The House of Representatives passed such a bill,<sup>44</sup> and the Senate should consider the merits of such restorative legislation. At the end of this article, an Addendum provides summaries of proposed legislative amendments and details the text of the passed House version as a legislative sample, as well as a Senate version that stalled in committee.<sup>45</sup> In sum, the House bill corrects course as follows: (i) specifies that the FTC may pursue past wrongs; (ii) empowers the FTC to seek equitable relief; (iii) authorizes the FTC to seek permanent injunctions or *other equitable relief*; (iv) enumerates restitution and disgorgement as relief that may be sought by the FTC and ordered by the courts; (v) establishes a ten-year statute of limitations; and (vi) specifies that restitutionary disgorgement calculations must be net—rather than gross—profits.<sup>46</sup> The Senate version streamlines the language and refines labels. In an ideal world, Congress would consider trans-substantive remedies language to apply across like legislation. Further, such language should clarify congressional intent to grant federal courts the full range of equitable power to be exercised within precedential requirements. Such power should include all forms of equitable remedy and the discretion to tailor such relief. Then, Congress would not need to give each separate possible equitable remedy, while running a real risk of accidentally omitting one (such as, here, constructive trust) and while inadvertently mischaracterizing other core principles (such as labeling restitutionary disgorgement as compensating for plaintiff's loss rather than stripping defendant's wrongful gains). Still, the proposed reform provisions demonstrate tangible legislative efforts by both houses to be responsive to the Supreme Court in *Liu*,<sup>47</sup> while also correcting the Supreme Court's removal of

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<sup>40</sup> *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1351 (2021) (rebuking the FTC's enforcement authority to seek disgorgement as restitution ancillary to equitable injunctive power).

<sup>41</sup> See, e.g., *Federal Trade Commission Withdraws Remaining Case against AbbVie after Supreme Court Decision Strips Consumers of Relief*, FTC (July 30, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-withdraws-remaining-case-against-abbvie-after-supreme-court-decision> (announcing the withdrawal of a \$493.7 million disgorgement award case that "highlights the pressing need for legislation reinstating the FTC's authority to seek equitable monetary relief for consumers in competition cases.").

<sup>42</sup> *Id.*

<sup>43</sup> Consumer Protection and Recovery Act, H.R. 2668, 117th Cong. (2021). The House of Representatives passed this bill July 20, 2021. No action yet in the Senate.

<sup>44</sup> *Id.*

<sup>45</sup> See *infra* ADDENDUM: LEGISLATIVE REFORM EFFORTS (examining and tracking the language of the bill passed by the House, and proposed—though stalled—in the Senate, to cure *AMG*'s rebuke of the FTC's disgorgement power and align with *Liu*'s parameters).

<sup>46</sup> Consumer Protection and Recovery Act, H.R. 2668, 117 Cong., 1st Sess. (2021).

<sup>47</sup> *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020).

disgorgement power from the FTC in *AMG*.<sup>48</sup> Legislative focus on correcting the Supreme Court's textualism and stilted interpretations in this arena causes Congress to err on the side of greater specificity and examples of equitable remedies. Though both reform efforts are imperfect, they would correct course and improve the remedial landscape for the better. So far, the Senate has yet to pass the House version or to push out of committee the Senate's improved version authorizing disgorgement power for the FTC since *AMG*. Ideally, the exact contours of any ultimate legislation from both houses of Congress would conform to the Supreme Court's refinement of agency disgorgement remedies to restitution's boundaries set forth in the SEC cases.<sup>49</sup> It remains to be seen, however, if Congress will refine its equitable remedies' commands and clarify agency limits as it reaffirms historical applications.

This interbranch dialogue, while often frustrating the law of remedies, is perhaps an unavoidable exercise of the separation of powers. So long as that is the case, other agencies may soon find themselves defending their enforcement authority. This article examines the interplay of agency disgorgement dreams in the face of congressional ambiguity and increasing judicial pressure for statutory and agency refinement. Normatively, Congress would explicitly grant agencies flexibility to pursue and mold equitable remedies that both serve statutory and regulatory goals, while honoring equitable principles of complete relief. This all centers around equity and its restitutionary goal of undoing unjust enrichment within prescribed limits that avoid punishment and windfalls. This article asserts that closer inspection of these machinations will reveal the ideal methods for balancing the powers and meting out justice in critical spheres of federal agency enforcement.

## II. AGENCY DISGORGEMENT AND SUPREME COURT REVIEW

The administrative state has continued to grow in size and power.<sup>50</sup> Scholars have targeted the power of agencies, articulated limits,<sup>51</sup> and critiqued the level of judicial deference for agency interpretations of statutes and agency regulations.<sup>52</sup> Increasingly, the Supreme Court has shown interest in cases that clarify its jurisprudence on judicial deference to administrative agencies with a wing of the Court focused on circumscribing

<sup>48</sup> *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1351 (2021).

<sup>49</sup> *Liu*, 140 S. Ct. at 1946–47, 1949–50; *Kokesh v. SEC*, 137 S. Ct. 1635, 1639, 1645 (2017).

<sup>50</sup> See PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW* 23, 31 (3d ed. 2011) (laying foundation for the study of separation of powers with the rising influence of administrative agencies); PETER J. SMITH, *LEGISLATION AND REGULATION—A CONTEMPORARY APPROACH* 400 (2021) (discussing the significant growth of the administrative state under President Franklin D. Roosevelt).

<sup>51</sup> See, e.g., Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 *YALE L.J.* 1399, 1402 (2000) (showing the development of a new delegation doctrine focused on agency limits on its exercise of delegated authority and arguing such a doctrine advances “rule of law, accountability, public responsiveness, and individual liberty”).

<sup>52</sup> See, e.g., Jonathan H. Adler, *Defensive Crouch Administrativism*, Notice & Comment Blog, *YALE J. REG.* (April 22, 2021) (“The administrative state is under siege.”) (evaluating, in a series of posts and a published review, Cass R. Sunstein & Adrian Vermeule’s, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 71–77 (2020)), <https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-09/>. For suggested administrative reforms focused on modernizing administrative adjudication, see generally Christopher J. Walker, *A Reform Agenda for Administrative Adjudication*, 44 *REG.* 30 (2021).

agency power generally.<sup>53</sup> All of this tightening in the administrative space fits within the broader context of the modern Supreme Court's increased formalism coupled with a hostility to litigation.<sup>54</sup> For example, the Court has heightened requirements<sup>55</sup> and sometimes foreclosed<sup>56</sup> private actions for certain types of relief. And, now more than ever, the Court has its sights set on framing judicial equity power.

This article focuses on four agencies—the SEC, FTC, FDA, and CFTC—and their quest to disgorge wrongdoers' gains. It shows the Supreme Court's recent interest in confining agency overreach with respect to remedy power. The reason for this focus is the intensity of disgorgement pursuits by each of these agencies and the current limits arising from judicial review, with more limits becoming likely. Specifically, the Court has limited, but approved, the SEC's efforts to disgorge gains.<sup>57</sup> Part II of this article compares the SEC's approach with the Court's rebuke of the FTC's disgorgement pursuits as beyond statutory bounds. Lastly, Part II previews FDA and CFTC disgorgement maneuvers and evaluates the likelihood of triggering Supreme Court review.

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<sup>53</sup> See *West Va. v. EPA*, 597 U.S. \_\_\_, 2022 WL 2347278 (June 30, 2022) (circumscribing agency power and clarifying the presumption of congressional intent to reserve major policy decisions for itself rather than leaving discretion to agencies such as the EPA on issues like limiting emissions at existing power plants via pivoting to cleaner sources); see also Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Judge Kavanaugh, Chevron Deference, and the Supreme Court*, REG. REV. (Sept. 3, 2018) (predicting that Justice Brett Kavanaugh might find support from several of his Supreme Court colleagues—including Chief Justice John Roberts and Justices Samuel Alito, Clarence Thomas, and Neil Gorsuch—for narrowing judicial deference to agency interpretations of statutes as well as agency interpretations of their own regulations), <https://www.theregreview.org/2018/09/03/barnett-boyd-walker-kavanaugh-chevron-deference-supreme-court/>. But cf. Lisa Schultz Bressman & Kevin M. Stack, *Chevron is a Phoenix*, 74 VAND. L. REV. 465, 466 (2021) (“The Court can try to kill *Chevron*, but it will rise from the ashes like a phoenix.”); Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1615–16 (2019).

<sup>54</sup> Andrew M. Siegel, *Notes Towards an Alternative Vision of the Judicial Role*, 32 SEATTLE UNIV. L. REV. 511, 511–12 (2009) (lamenting the hostility to litigation, insistence on formalism, and constriction of remedies approaches of Chief Justice John Roberts and former Chief Justice William Rehnquist); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1108 (2006); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 224 (2003); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 UNIV. CHI. SUP. CT. REV. 343, 343 (2002).

<sup>55</sup> See, e.g., *Spokeo, Inc. v. Robins*, 578 U.S. 330, 342 (2016) (requiring concrete harm rather than a technical statutory violation to satisfy Article III's injury-in-fact prong of constitutional standing); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342–43 (2005) (increasing the pleading requirements for establishing loss causation in securities fraud cases); *Ashcroft v. Iqbal*, 556 U.S. 662, 681–83 (2009) (holding that a mere “plausible inference” is insufficient to show “unconstitutional discrimination” and a pleading must contain a “factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind.”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57, 570 (2007) (dismissing the complaint because the plaintiff's “naked assertion of conspiracy” failed to cross “the line from conceivable to plausible”); see also A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 445 (2013).

<sup>56</sup> See, e.g., *FAA v. Cooper*, 566 U.S. 284, 298–99, 301 (2012) (excluding nonpecuniary damages like emotional distress claims from cognizable Privacy Act violations based on statutory interpretation that limits the statute's requirement of “actual damages” to “proven pecuniary or economic harm” and not intangible, non-pecuniary injuries).

<sup>57</sup> *Liu v. SEC*, 140 S. Ct. 1936, 1954 (2020) (Thomas, J., dissenting).

### A. Agency Disgorgement Garnering Supreme Court Review

Both the SEC and FTC became ensnared in Supreme Court review. Overall, the SEC has fared better than the FTC, but only after a forced recalibration back to the confines of unjust enrichment.<sup>58</sup> The two paths show how the respective agencies flexed their enforcement power by interpreting imprecise statutory language to reach enforcement goals. Despite decades of success, a collision course arose between escalating agency disgorgement enforcement strategies and renewed interest in judicial oversight of agencies. Below are how these tensions erupted, culminated, and resolved.

#### 1. Securities & Exchange Commission

The securities laws grant the SEC wide investigatory and enforcement powers.<sup>59</sup> Initially, the only statutory remedy available to the SEC in an enforcement action was an injunction.<sup>60</sup> With time, the SEC began seeking judicial enforcement of remedies beyond injunctive relief.<sup>61</sup> In *Texas Gulf Sulphur*, the Second Circuit first recognized the SEC's authority to obtain restitution, so that defendants could not retain "the gains of their wrongful conduct."<sup>62</sup>

Now, an array of both monetary and non-monetary remedies is available to the SEC. The SEC's non-monetary remedies include undertakings,<sup>63</sup> conduct-based injunctions,<sup>64</sup> bars,<sup>65</sup> and suspensions.<sup>66</sup> In addition, there are two forms of monetary relief available to the SEC: penalties and disgorgement. In 1990, Congress enacted the Securities Enforcement Remedies and Penny Stock Reform Act,<sup>67</sup> which permits the Commission *in administrative proceedings* to seek civil penalties as well as disgorgement.<sup>68</sup> The 2002 passage of Sarbanes-Oxley included an authorization to the Commission, *in civil actions brought in district court*, to seek penalties as well as "any equitable relief that may be appropriate or necessary for the benefit of investors."<sup>69</sup>

The SEC now regularly seeks disgorgement in district court pursuant to its authority to obtain "equitable relief." But it is axiomatic that an equitable remedy cannot

<sup>58</sup> See *id.* at 1940 (majority opinion).

<sup>59</sup> See *SEC v. Materia*, 745 F.2d 197, 200 (2d Cir. 1984) ("The sweeping mandate manifest in the securities laws would be all but meaningless were it not for the broad investigatory and enforcement powers created under the statutory scheme.").

<sup>60</sup> See 1 T. HAZEN, LAW OF SECURITIES REGULATION § 1.4[6], 33–34 (7th ed. rev. 2016).

<sup>61</sup> See *SEC v. Tex. Gulf Sulphur Co.*, 312 F. Supp. 77, 90 (S.D.N.Y. 1970), *aff'd in part, rev'd in part*, 446 F.2d 1301 (2d Cir. 1971).

<sup>62</sup> *Tex. Gulf*, 446 F.2d at 1308.

<sup>63</sup> 15 U.S.C. § 78u(d)(5); 15 U.S.C. §§ 78o(b)(4), (6), & 78u–3(a).

<sup>64</sup> *Id.*

<sup>65</sup> 15 U.S.C. § 78u(d)(2).

<sup>66</sup> *Id.*

<sup>67</sup> 15 U.S.C. § 77t(d).

<sup>68</sup> 15 U.S.C. § 77h–1(e) ("In any cease-and-desist proceeding . . . the Commission may enter an order requiring accounting and disgorgement, including reasonable interest.").

<sup>69</sup> 15 U.S.C. § 78u(d)(5) ("In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.").



punish. Ever since the first district court recognized the SEC's authority to seek disgorgement in *Texas Gulf Sulphur*, alleged wrongdoers have argued that the remedy is a penalty.<sup>70</sup> Whether SEC disgorgement functions as a penalty for determining the applicable statute of limitations was at issue in *Kokesh v. SEC*.<sup>71</sup> Kokesh, the owner of two investment firms, misappropriated client funds for fourteen years before the SEC sued him in district court.<sup>72</sup> Kokesh argued that SEC disgorgement constituted a penalty,<sup>73</sup> and consequently that 28 U.S.C. § 2462, a catchall five-year statute of limitations for federal civil penalties, should apply, effectively shielding nine years of his fraudulent conduct.<sup>74</sup>

The Court agreed with Kokesh, highlighting two aspects of SEC disgorgement that were typical of penalties, rather than equitable remedies.<sup>75</sup> First, the SEC seeks disgorgement to remedy a violation of public laws. Second, the SEC uses disgorgement as a deterrent, a function federal courts have repeatedly emphasized.<sup>76</sup> While the deterrent function of disgorgement comports with the law of unjust enrichment and restitution, punishment does not.

If disgorgement is a penalty, then the SEC would apparently lack authority to obtain it. As previously noted, while the SEC may seek disgorgement in administrative actions,<sup>77</sup> its remedies in district court consist only of civil penalties and “equitable relief.”<sup>78</sup> But the Court, in a now infamous footnote, sought to disclaim any implication that it was opining on the SEC's authority to seek disgorgement.<sup>79</sup> Rather, as the Court emphasized, it was only answering “whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period.”<sup>80</sup>

Naturally, this disclaimer about the scope of *Kokesh* only fueled speculation that the Court was eager to strike down the SEC's disgorgement power in its entirety. It did not take long for such a challenge. In *Liu v. SEC*,<sup>81</sup> the Supreme Court upheld the SEC's

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<sup>70</sup> David Levintow, *Down, but Not Out: After Liu, Disgorgement Challenges for the SEC in FCPA Enforcement*, 28 PIABA B.J. 179, 184, 191 (2021) (exploring SEC enforcement authority considering enforcement goals and Supreme Court disgorgement jurisprudence).

<sup>71</sup> 137 S. Ct. 1635, 1639 (2017).

<sup>72</sup> *Id.* at 1641.

<sup>73</sup> *Id.* The United States Court of Appeals for the Tenth Circuit rejected this argument and ruled that the SEC's disgorgement remedy, as well as the injunction against Kokesh, were merely remedial relief rather than a penalty or forfeiture under § 2462, and thus neither were subject to the five-year limitations period for penalties. *See SEC v. Kokesh*, 834 F.3d 1158, 1167 (10th Cir. 2016).

<sup>74</sup> *Kokesh*, 137 S. Ct. at 1641.

<sup>75</sup> *Id.* at 1644.

<sup>76</sup> *See, e.g., SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997) (“The primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains.”); *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996) (“The primary purpose of disgorgement . . . is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws.”); *SEC v. Rind*, 991 F.2d 1486, 1490 (9th Cir. 1993) (“The theory behind [disgorgement] . . . is deterrence and not compensation.”).

<sup>77</sup> 15 U.S.C. § 77h–1.

<sup>78</sup> 15 U.S.C. § 78u(d)(3), (5).

<sup>79</sup> *Kokesh*, 137 S. Ct. at 1642 n.3.

<sup>80</sup> *Id.*

<sup>81</sup> 140 S. Ct. 1936, 1940 (2020).

authority to seek disgorgement. But the Court outlined several principles of disgorgement that, when ignored by the SEC, would transform the remedy from an equitable one into a penalty.<sup>82</sup>

First, the Court noted that the SEC returns only a small percentage of disgorged funds to harmed investors, a practice incompatible with both traditional disgorgement and the premise of § 78u(d)(5), that equitable relief could be sought “for the benefit of investors.”<sup>83</sup> The Court explained that the Commission “must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains. To hold otherwise would render meaningless the latter part of § 78u(d)(5).”<sup>84</sup> The Court’s emphasis on the SEC’s efforts to return disgorgement awards to victims of fraud is consistent with the doctrinal goals of unjust enrichment law.

Second, the SEC regularly seeks to impose joint and several disgorgement liability on wrongdoers for benefits that are obtained by their affiliates.<sup>85</sup> The SEC’s practice runs counter to the traditional rule of disgorgement that defendants are only responsible for the profits they personally obtain. Except in circumstances where defendants are engaged in “concerted wrongdoing,” the imposition of joint and several liability risks transforming “any equitable profits-focused remedy into a penalty.”<sup>86</sup>

And third, the SEC often did not permit defendants to deduct legitimate business expenses when calculating a disgorgement award.<sup>87</sup> Contrary to this practice, the Court declared that net profits, not gross profits, are the correct measure of disgorgement.<sup>88</sup> This limit also comports with unjust enrichment law.<sup>89</sup> Unless the entire business operation is fraudulent or the business expenses are mere illicit gains under another name, declining to account for expenses pushes disgorgement beyond the limits of traditional equity practice.<sup>90</sup>

So, while the SEC’s disgorgement authority was left intact, it was watered down. In the aftermath of *Liu*, Congress moved swiftly to affirm (or re-affirm) the SEC’s

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<sup>82</sup> *Id.* at 1941.

<sup>83</sup> *Id.* at 1947.

<sup>84</sup> *Id.* at 1948.

<sup>85</sup> *Id.* at 1949. This practice most commonly occurs with enforcement actions targeting insider trading. *See, e.g.*, SEC v. Contorinis, 743 F.3d 296, 302 (2d Cir. 2014); SEC v. Whittemore, 659 F.3d 1, 10 (D.C. Cir. 2011); SEC v. Clark, 915 F. 2d 439, 454 (9th Cir. 1990).

<sup>86</sup> *Liu*, 140 S. Ct. at 1949.

<sup>87</sup> *Id.* at 1949–50.

<sup>88</sup> *Id.* at 1947.

<sup>89</sup> Brief of Remedies and Restitution Scholars as Amici Curiae at \*9, *Liu v. SEC*, 140 S. Ct. 1936 (2020) (No. 18-1501) (arguing for net profits as appropriate for disgorgement relief aligned with the restitution interest).

<sup>90</sup> *Liu*, 140 S. Ct. at 1950. For an exploration of the *Liu* holding and broader implications, listen to a conversation (occurring prior to the Court’s ruling in *AMG*) with Andrew Kull, Doug Laycock, and Caprice Roberts. *Reasonably Speaking Podcast, Disgorgement or Accounting of Profits? An Analysis of Liu v. SEC*, AMERICAN LAW INSTITUTE, <https://www.ali.org/news/podcast/episode/liu-v-sec/> (last visited Jan. 29, 2022).

authority to seek disgorgement.<sup>91</sup> And while the SEC has continued to zealously pursue disgorgement, courts have been mindful of *Liu*'s dictates.<sup>92</sup> But in the ensuing months, the Supreme Court took a more aggressive stance towards FTC disgorgement.

## 2. Federal Trade Commission

The FTC, tasked with preventing anticompetitive, fraudulent, and deceptive business practices, can opt for one of two enforcement avenues—administrative or judicial. Under Section 5 of the FTC Act, the agency may challenge an act or practice it considers to be unfair or deceptive in an administrative proceeding.<sup>93</sup> These proceedings take place before an administrative law judge (“A.L.J.”), and if the A.L.J. determines that the practice is unfair or deceptive, the FTC issues a cease-and-desist order to the defendant.<sup>94</sup> Later, if the defendant knowingly violates the cease-and-desist order, the FTC may impose penalties against the defendant.<sup>95</sup> Even if the defendant does not violate the order, the FTC may still be able to obtain monetary redress under Section 19 by filing a complaint in district court and proving that the conduct was of the sort that “a reasonable man would have known under the circumstances was dishonest or fraudulent.”<sup>96</sup>

This is a time-consuming and uncertain route to victim compensation. It first requires an administrative proceeding, the finding of which is appealable. Then, it requires either another administrative proceeding (if the FTC believes the defendant has knowingly violated the order) or a subsequent action in district court (if the FTC believes the conduct was obviously fraudulent). Under this approach, consumers who have suffered pecuniary harm from deceptive conduct would likely have to wait years to obtain recompense, and then only if the perpetrator violated a cease-and-desist order or engaged in objectively fraudulent conduct. These obstacles likely led the FTC to develop a better route to a desirable remedy.

Alternatively, Section 13(b) of the FTC Act permits the agency to directly file for an injunction in district court, with no requirement of a prior administrative proceeding. In a 13(b) action, the Court may “in proper cases” grant a “permanent injunction.”<sup>97</sup> The simplicity of this enforcement route proved attractive to the FTC and, beginning in the 1970s, the agency began to use Section 13(b) to seek monetary relief along with a permanent injunction.<sup>98</sup> Consistent results and fewer administrative hurdles increased agency path dependency on Section 13(b) over time. In fiscal year 2019, the FTC obtained

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<sup>91</sup> David Levintow, *Sorry, but the NDAA did not just redefine disgorgement*, THE FCPA BLOG (Feb. 23, 2021, 7:48 AM), <https://fcpcbog.com/2021/02/23/sorry-but-the-ndaa-did-not-just-redefine-disgorgement/>.

<sup>92</sup> *See, e.g.*, *United States SEC v. Yang*, 824 F. App'x 445, 447 (9th Cir. 2020) (reversing disgorgement award where district court imposed joint and several disgorgement liability without justifying how such an order comported with *Liu*).

<sup>93</sup> 15 U.S.C. § 45(b).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* § 45(l).

<sup>96</sup> 15 U.S.C. § 57b(a)(2).

<sup>97</sup> 15 U.S.C. § 53(b).

<sup>98</sup> *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1346 (2021).

81 permanent injunctions, compared to issuing only 21 administrative orders.<sup>99</sup> Since 2016, FTC actions under Section 13(b) generated \$11.2 billion in compensation for defrauded consumers.<sup>100</sup>

Defendants challenged the FTC's growing practice of bypassing the administrative process, but courts mostly affirmed the agency's authority to seek disgorgement under Section 13(b).<sup>101</sup> Then came AMG, a firm owned by Scott Tucker, payday lender of Netflix's *Dirty Money* fame.<sup>102</sup> As viewers of the series may recall, Tucker's firm provided consumer loans that contained fine print stating that the loan would be automatically renewed unless the borrower affirmatively opted out. "Between 2008 and 2012, [AMG] . . . made more than 5 million payday loans," and the fine print generated "more than \$1.3 billion in deceptive charges."<sup>103</sup>

The FTC opted for the judicial route over the administrative, suing AMG under Section 13(b) in district court and seeking both an injunction and disgorgement.<sup>104</sup> The district court awarded the injunction as well as a staggering \$1.27 billion in restitution and disgorgement.<sup>105</sup> The Ninth Circuit, pointing to its own precedent, affirmed.<sup>106</sup> Before the Supreme Court, AMG argued that Section 13(b) of the FTC Act, which expressly authorizes injunctions, is limited to just that, and does not encompass other forms of equitable relief such as disgorgement.<sup>107</sup> During oral argument, several justices, including Justice Breyer, expressed concerns about the agency's potential for abuse by bypassing Section 5 with Section 13.<sup>108</sup>

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<sup>99</sup> See FTC, FISCAL YEAR 2021 CONGRESSIONAL BUDGET JUSTIFICATION (Feb. 10, 2020) [https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy\\_2021\\_cbj\\_final.pdf](https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf).

<sup>100</sup> Press Release, FTC, *Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in AMG Capital Management LLC v. FTC* (Apr. 22, 2021), <https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us> (hereinafter "April 2021 FTC Press Release").

<sup>101</sup> See *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112–13 (9th Cir. 1982); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432, 1434 (11th Cir. 1984) (per curiam); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314–15 (8th Cir. 1991); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011); *FTC v. Ross*, 743 F.3d 886, 890–92 (4th Cir. 2014). *But see* *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019) (overruling the authorization of disgorgement in *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571–72 (7th Cir. 1989)).

<sup>102</sup> *Dirty Money: Payday* (Netflix Jan. 26, 2018).

<sup>103</sup> *AMG*, 141 S. Ct. at 1345.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *FTC v. AMG Cap. Mgmt., LLC*, 910 F.3d 417, 426–28 (9th Cir. 2018) ("We have repeatedly held that § 13 'empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution.'") (quoting *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016)).

<sup>107</sup> *AMG*, 141 S. Ct. at 1345.

<sup>108</sup> See, e.g., Transcript of Oral Argument at 37–39, *AMG Cap. Mgmt., LLC v. FTC*, 2021 WL 134136 (2021) (No. 19-508); Ronald Mann, *Argument Analysis: Justices Doubt FTC's Authority to Compel Monetary Relief*, SCOTUSBLOG (Jan. 14, 2021, 3:16 PM), <https://www.scotusblog.com/2021/01/argument-analysis-justices-doubt-ftcs-authority-to-compel-monetary-relief/> (predicting defeat for the FTC based on the justices' skeptical reception and noting that "[i]f you're arguing on behalf of a federal regulatory agency's authority to protect consumers from

In *AMG v. FTC*,<sup>109</sup> the Supreme Court unanimously rejected the FTC’s practice of seeking restitution and disgorgement pursuant to its § 13(b) authority to obtain “permanent injunction[s]” in “proper cases.”<sup>110</sup> In an opinion authored by Justice Breyer, the Court grounded its decision in several considerations. First, the Court looked to the plain text of the statute, observing that “[a]n injunction is not the same as an award of equitable monetary relief.”<sup>111</sup> In addition, since Section 13(b) permits the FTC to obtain an injunction when a defendant “is violating, or is about to violate” the FTC Act, the Court concluded that the provision was designed to operate prospectively, not retrospectively to compensate past consumer harm.<sup>112</sup> While these observations possess logic in a strictly literal sense, they are in tension with a court’s traditional equitable authority to order monetary redress, such as restitution, along with an injunction in order to achieve complete relief.<sup>113</sup>

Second, the Court recognized that to permit such an unlimited reading of Section 13(b) would render Sections 5 and 19 superfluous.<sup>114</sup> Although Sections 5 and 19 permit the FTC to obtain monetary relief, they require the agency to first conduct an administrative proceeding. Moreover, monetary relief under Section 5 further requires a knowing violation of a cease-and-desist order, while Section 19 requires that the conduct be obviously deceptive or fraudulent. The Court found it “highly unlikely” that Congress would authorize the FTC to obtain monetary relief in such a limited and conditional manner in Sections 5 and 19 if it had already allowed the agency to seek monetary relief without restraint in Section 13(b).<sup>115</sup>

In its conclusion, the Court advised that if the FTC finds the administrative enforcement route too cumbersome, it is “free to ask Congress to grant it further remedial authority.”<sup>116</sup> The Court’s overly narrow reading of the statutory language is “taunting Congress . . . to express itself more clearly.”<sup>117</sup> Without wasting any time, the FTC has

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businesses and Justice Stephen Breyer sets his face against you, then chances are your day is not going well.”).

<sup>109</sup> *AMG*, 141 S. Ct. at 1344.

<sup>110</sup> 15 U.S.C. § 53(b).

<sup>111</sup> *AMG*, 141 S.Ct. at 1347.

<sup>112</sup> *Id.* at 1348.

<sup>113</sup> See Brief of Amici Curiae Remedies, Restitution, Antitrust, and Intellectual Property Law Scholars in Support of Respondent, *AMG v. FTC*, 141 S. Ct. 1341 (2021) (No. 19-508) (drafted by Phillip Malone & Caprice Roberts) (urging that the longstanding history of injunctive power necessarily includes the ancillary power for a court also to order restitutionary disgorgement of a defendant’s ill-gotten gains, among other forms of equitable monetary relief.), available at: <https://ssrn.com/abstract=3763256>.

<sup>114</sup> *AMG*, 141 S. Ct. at 1349.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1352.

<sup>117</sup> Gabaldon, *supra* note 31, at 1680 (predicting the possibility of an extreme hypertextualist majority after *Kokesh* could push Congress into even more explicitly authorizing disgorgement in the Securities and Exchange Act).

asked,<sup>118</sup> and Congress appears ready to answer.<sup>119</sup> Should Congress expressly authorize the FTC’s disgorgement authority in subsequent legislation, it will place a powerful arrow back in the agency’s quiver.<sup>120</sup>

Without such an FTC arrow, state attorneys general may rush to fill the void by bringing their own disgorgement suits. This avenue has proven successful so far for the New York attorney (joined by several others) that garnered a controversial, “nationwide” disgorgement remedy to redress anti-competitive conduct.<sup>121</sup> The United States Court for the Southern District of New York permitted state attorneys general, under a relevant New York statute, to obtain disgorgement of defendant’s net profits attributable to all its United States sales.<sup>122</sup> This state approach raises concerns of duplication and potential of overreach both in scope and amount of relief—issues that caused the Supreme Court to rein in disgorgement by the SEC in *Liu*.<sup>123</sup> Accordingly, state attorneys general are well-poised to step into the shoes of federal agencies, such as the FTC here, and seek larger deterrent and restitutionary disgorgement awards; however, this method will raise a host of parallel issues that might have been better resolved on a federal interbranch level.

### *B. Agency Disgorgement Risking Supreme Court Review*

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<sup>118</sup> See April 2021 FTC Press Release, *supra* note 100 (“With this ruling, the Court has deprived the FTC of the strongest tool we had to help consumers when they need it most. We urge Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole.”).

<sup>119</sup> The U.S. House of Representatives passed an amendment to the Federal Trade Commission Act in 2021. See H.R. 2668, 117th Cong. (2021). The agency, and the potential for a Section 13(b) fix, received bipartisan support in preceding Senate and House hearings. See generally *Strengthening the Federal Trade Commission’s Authority to Protect Consumers: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 117th Cong. (2021) (statement of Sen. Maria Cantwell, Chairman, S. Comm. On Com., Sci., and Transp.) (discussing that the agency, and the potential for a Section 13(b) fix, received bipartisan support in the preceding Senate and House hearings); *Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic, Hearing Before the Subcomm. on Consumer Protection and Commerce of the H. Comm. on Energy and Commerce*, 117th Cong. 3 (2021) (statement of Hon. Jan Schakowsky) (same). The U.S. Senate has not yet taken up the bill.

<sup>120</sup> April 2021 FTC Press Release, *supra* note 100 (“Over the past four decades, the Commission has relied on Section 13(b) of the Federal Trade Commission Act to secure billions of dollars in relief for consumers in a wide variety of cases, including telemarketing fraud, anticompetitive pharmaceutical practices, data security and privacy, scams that target seniors and veterans, and deceptive business practices, among many others. More recently, in the wake of the [COVID-19] pandemic, the FTC has used Section 13(b) to take action against entities operating COVID-related scams. Section 13(b) enforcement cases have resulted in the return of billions of dollars to consumers targeted by a wide variety of illegal scams and anticompetitive practices, including \$11.2 billion in refunds to consumers during just the past five years.”).

<sup>121</sup> *FTC v. Vyera Pharms., LLC*, No. 20-cv-00706-DLC, 2021 WL 4392481, at \*5 (S.D.N.Y. Sept. 24, 2021), [https://fingfx.thomsonreuters.com/gfx/legaldocs/zdvxodjgopx/FTC%20et%20al%20v%20Vyera%20Pharmaceuticals%20et%20al%20decision%20\(1\).pdf](https://fingfx.thomsonreuters.com/gfx/legaldocs/zdvxodjgopx/FTC%20et%20al%20v%20Vyera%20Pharmaceuticals%20et%20al%20decision%20(1).pdf).

<sup>122</sup> *Id.* at \*16.

<sup>123</sup> *Liu v. SEC*, 140 S. Ct. 1936, 1943–44 (2020) (explaining that, while a “profit-based measure of unjust enrichment” is consistent with the foundational principle that “[i]t would be inequitable that [a wrongdoer] should make a profit out of his own wrong,” equity courts long “recognized the countervailing equitable principle that the wrongdoer should not be punished ‘by pay[ing] more than a fair compensation to the person wronged’” and that “[w]hile equity courts did not limit profits remedies to particular types of cases, they did circumscribe the award in multiple ways to avoid transforming it into a penalty outside their equitable powers” (internal citations omitted)).

The *AMG* and *Liu* decisions represent two reminders to Congress in a long series of reminders to Congress that ambiguous drafting does not serve the regulated community well and often invites agency overreach. Further, congressional inaction in the face of agency overreach is an insufficient basis<sup>124</sup> upon which to uphold extratextual agency powers. In any event, other federal agencies that routinely seek disgorgement of ill-gotten gains, such as the FDA and CFTC, are now on notice. The Supreme Court is willing, if not eager, to check an agency's enforcement actions if exercised in a manner arguably inconsistent with its statutory scheme, even if wholly consistent with the statute's objectives.

Other agencies, including the Consumer Financial Protection Bureau ("CFPB") and Federal Energy Regulatory Commission ("FERC"), also pursue disgorgement against alleged wrongdoers. This article focuses on the FDA and the FTC for two reasons. First, they seek and obtain disgorgement with greater frequency than other federal agencies.<sup>125</sup> Second, they have, at times, obtained enormous disgorgement awards.<sup>126</sup> Thus, the FDA and CFTC appear to be the federal agencies most likely to face a challenge to their disgorgement authority in the near future.

### 1. Food & Drug Administration

The FDA derives its authority from the Federal Food, Drug and Cosmetic Act ("FDCA").<sup>127</sup> Broadly speaking, the FDA is responsible for ensuring the safety, efficacy, and security of drugs, biological products, medical devices, food items, cosmetics, and products that emit radiation.<sup>128</sup> To effectuate these goals, a variety of acts are prohibited, including adulteration of products, misbranding, and denying FDA officials access to records or facilities.<sup>129</sup> The FDA is granted a panoply of statutory sanctions, including warning letters, seizures, mandatory recalls of medical devices, injunctions, criminal prosecution, and civil penalties.<sup>130</sup> From 1938—when the FDCA was passed—until 1997, the FDA sought neither disgorgement nor restitution.<sup>131</sup> Unlike the CEA, which authorizes the CFTC to seek injunctions and disgorgement, in the FDCA, the *district courts* are empowered to "restrain violations" of section 331.<sup>132</sup>

Though the FDCA does not explicitly authorize restitution, the Third, Sixth and Tenth Circuits have concluded that such specificity is not required when the equitable

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<sup>124</sup> *AMG*, 141 S. Ct. at 1351.

<sup>125</sup> In 2016, the CFTC filed sixty-eight enforcement actions, reporting "\$543 million in restitution and disgorgement orders." Press Release, CFTC, CFTC Releases Annual Enforcement Results for Fiscal Year 2016 (Nov. 21, 2016), <https://www.cftc.gov/PressRoom/PressReleases/7488-16>.

<sup>126</sup> See, e.g., Jeffrey N. Gibbs & John R. Fleder, *Can FDA Seek Restitution or Disgorgement?*, 58 FOOD & DRUG L.J. 129, 129 (2003) (reporting that, as of 2003, the FDA, with DOJ support, had collected hundreds of millions of dollars using theories of restitution and disgorgement of ill-gotten profits).

<sup>127</sup> See generally 21 U.S.C. § 301.

<sup>128</sup> *Id.*

<sup>129</sup> See generally 21 U.S.C. § 331.

<sup>130</sup> 21 U.S.C. §§ 332–37, 360h(e).

<sup>131</sup> Jeffrey N. Gibbs, *Disgorgement and Restitution*, REGUL. AFFS. FOCUS, Feb. 2006, at 34.

<sup>132</sup> 21 U.S.C. § 332.

powers of a district court are invoked.<sup>133</sup> Yet, the Ninth Circuit in *United States v. Parkinson* concluded that the FDCA does not permit restitution.<sup>134</sup> *Parkinson* is arguably no longer good law since it was decided four years prior to *Mitchell*.<sup>135</sup> Even so, FDA disgorgement is a remedy that has not been uniformly embraced by the courts.

Moreover, even after *Porter* and *Mitchell*, federal district courts have still occasionally declined to authorize equitable relief not enumerated in the FDCA.<sup>136</sup> While the FDA may request a recall of a drug product, the voluntary nature of such a process has led several courts to decline to order one.<sup>137</sup> Since the FDA can seize and permanently enjoin the sale of an adulterated or misbranded product, some courts have considered the additional remedy of disgorgement as unnecessary to effectuate the purposes of the FDCA and, therefore, punitive.<sup>138</sup>

Suffice it to say that FDA disgorgement has been both a recent and inconsistent practice. Courts have employed various methods of measurement for their disgorgement orders.<sup>139</sup> Other courts that have ordered disgorgement have nonetheless noted that perhaps Congress or the Supreme Court “should draw finer lines around a court’s authority to fashion specific remedies within a broad statutory grant of equitable power.”<sup>140</sup> If the FDA pursues an aggressive disgorgement posture, the FDA’s use of disgorgement would be ripe for Supreme Court review.

## 2. Commodity Futures Trading Commission

The CFTC derives its authority from The Commodity Exchange Act (“CEA”).<sup>141</sup> Passed in 1936, the CEA regulates the trading of commodity futures in the United States.<sup>142</sup> The CFTC has exclusive authority to enforce the CEA.<sup>143</sup> Formerly, the CEA did not include an explicit grant of disgorgement authority, though some courts, looking to

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<sup>133</sup> See, e.g., *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1061, (10th Cir. 2006); *United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 223 (3d Cir. 2005); *United States v. Universal Mgmt. Servs.*, 191 F.3d 750, 761–62 (6th Cir. 1999).

<sup>134</sup> 240 F.2d 918, 922 (9th Cir. 1956) (“The use of the extraordinary remedies of equity in governmental litigation should never be permitted by the courts unless clearly authorized by the statute in express terms . . . [t]he collection of moneys not held in trust or . . . without detailed means outlined for disbursement to persons supposed to have paid them constitutes a penalty for violation of a regulation.”).

<sup>135</sup> See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291–92 (1960) (“When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.”).

<sup>136</sup> Cf. *Rx Depot, Inc.*, 438 F.3d at 1061.

<sup>137</sup> See *United States v. Superpharm Corp.*, 530 F. Supp. 408, 410 (E.D.N.Y. 1981); *United States v. C.E.B. Prods., Inc.*, 380 F. Supp. 664, 668 (N.D. Ill. 1974).

<sup>138</sup> See *United States v. Ten Cartons*, 888 F. Supp. 381, 404 (E.D.N.Y. 1995).

<sup>139</sup> *United States v. Universal Mgmt. Servs.*, 191 F.3d 750, 764 (6th Cir. 1999) (measuring restitution by consumers’ losses, while noting the defendant “should not have his expenses covered by consumers . . . [T]he district court should have the discretion in a case such as this to make the consumers whole rather than allow the illegal activities to stand uncorrected to the consumer’s detriment.”).

<sup>140</sup> *United States v. Lane Labs U.S.A., Inc.*, 427 F.3d 219, 236 (3d Cir. 2005).

<sup>141</sup> See generally 7 U.S.C. §§ 1–27f.

<sup>142</sup> 7 U.S.C. § 1.

<sup>143</sup> 7 U.S.C. § 2(a)(1)(A).



the practice of the SEC and *Porter*, concluded that disgorgement was appropriate ancillary relief under the CEA.<sup>144</sup>

Congress increased the CFTC's enforcement authority in 2010.<sup>145</sup> The CEA now explicitly authorizes the CFTC to seek disgorgement and restitution.<sup>146</sup> The provision provides that “[i]n any action brought under this section, the Commission may seek, and the court may impose, on a proper showing, on any person found in the action to have committed any violation, *equitable remedies*, including—

- (A) restitution to persons who have sustained losses proximately caused by such violation (in the amount of such losses); and
- (B) disgorgement of gains received in connection with such violation.<sup>147</sup>

There are two remedies available to the CFTC in § 13a-1(d)(3): restitution and disgorgement. The CFTC obtained \$674 million in disgorgement and restitution in fiscal year 2020. Of this total, nearly \$485 million came from one enforcement action against JPMorgan.

In this context, restitution is typically measured by the amount invested by customers less refunds made by the defendant.<sup>148</sup> Disgorgement, on the other hand, is measured by a defendant's ill-gotten gains.<sup>149</sup> A primary difference between the two remedies is that the CFTC must demonstrate proximate causation when it seeks restitution, but not disgorgement.<sup>150</sup>

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<sup>144</sup> CFTC v. Brit. Am. Commodity Options Corp., 788 F.2d 92, 94 (2d Cir. 1986) (“Disgorgement not only deprives the wrongdoer of benefits derived from unlawful conduct, but it also effectuates the purpose underlying the Commodities Exchange Act—protection of the investor.”); CFTC v. Hunt, 591 F.2d 1211, 1223 (7th Cir. 1979).

<sup>145</sup> See Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 § 744 (2020) (“the Commission *may* seek, and the courts *may* impose”) (emphasis added).

<sup>146</sup> 7 U.S.C. § 13a-1(d)(3).

<sup>147</sup> *Id.*

<sup>148</sup> For general applications of restitution, see CFTC v. Rosenberg, 85 F. Supp. 2d 424, 455 (D.N.J. 2000); CFTC v. Marquis Fin. Mgmt. Sys., No. Civ. A. 03-74206, 2005 WL 3752232, at \*9 (E.D. Mich. June 8, 2005). For application of restitution that deducts refunds completed by defendants, see CFTC v. World-Wide Currency Servs., Corp., No. Civ.A. 03-80032, 2004 WL 1918793, at \*6 (S.D. Fla. Aug. 5, 2004).

<sup>149</sup> CFTC v. Heffernan, Civil Action No. 4:04-23302-TLW-TER, 2007 U.S. Dist. LEXIS 103597, at \*7 (D.S.C. July 25, 2007).

<sup>150</sup> CFTC v. S. Tr. Metals, Inc., 894 F.3d 1313, 1329–31 (11th Cir. 2018).

The CFTC's equitable remedies may not be used punitively.<sup>151</sup> But, pre-*Liu*, courts erroneously calculated disgorgement in such a way as to render the remedy punitive.<sup>152</sup> Others have awarded disgorgement in a conclusory fashion.<sup>153</sup>

Like the SEC, the CFTC need only provide a reasonable approximation of a defendant's ill-gotten gains.<sup>154</sup> But some courts have characterized disgorgement calculations as one of their discretionary functions.<sup>155</sup> In any event, once this calculation is made, the burden shifts to the defendant to demonstrate that the approximation is not reasonable.<sup>156</sup> Moreover, this authority has been interpreted to permit "disgorgement not just of specific, identifiable funds the violator has yet to dissipate but 'of gains received in connection with such violation.'"<sup>157</sup> And while some courts have held CFTC disgorgement actions to the five-year statute of limitations in § 2462, the statute at issue in *Kokesh*,<sup>158</sup> this practice has not been consistent.<sup>159</sup>

### 3. Relative Risk of Overreach and Supreme Court Review

Other agencies should heed the lessons learned from the SEC and FTC's experience. In analyzing other agency enforcement efforts in pursuit of disgorgement, this article has focused on two additional agencies, the FDA and CFTC, to assess respective risks of judicial review and glean further lessons.

FDA disgorgement runs a higher risk of Supreme Court review than CFTC disgorgement. Of the two agencies, FDA disgorgement appears more vulnerable, particularly after *AMG*. The CFTC has express authority to seek disgorgement, so challenges to that agency's practice would instead focus on the commission's execution of the remedy's parameters. Such applications and lower court interpretations exceed traditional unjust enrichment limits on the scope of disgorgement. While a *Liu*-like

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<sup>151</sup> CFTC v. Sidoti, 178 F.3d 1132, 1138 (11th Cir. 1999) (concluding it was abuse of discretion for trial court to not limit the "period of disgorgement to the period of time as to which the district court received evidence of fraud"); see also CFTC v. Carnegie Trading Grp., Ltd., 450 F. Supp. 2d 788, 807 (N.D. Ohio 2006) ("The Court declines to order disgorgement for any period where no wrongdoing occurred.").

<sup>152</sup> See CFTC v. S. Tr. Metals, Inc., 391 F. Supp. 3d 1167, 1174 (S.D. Fla. 2019) (declaring that "defendants in a disgorgement action are not entitled to deduct costs associated with committing their illegal acts."); CFTC v. Dinar Corp., No. 1:15-cv-538-ALB, 2020 WL 762539, at \*3 (M.D. Ala. Feb. 14, 2020).

<sup>153</sup> See CFTC v. Sarvey, No. 08 C 192, 2012 WL 426746, at \*5-6 (N.D. Ill. Feb. 10, 2012) (awarding disgorgement equal to gross profits with no discussion of deductions and simply noting that "[t]here is no basis to permit" [the defendant] "to benefit from his illegal trades").

<sup>154</sup> See *id.*

<sup>155</sup> CFTC v. Trinity Fin. Grp., Inc., No. 92-6832, 1997 WL 820970, at \*33 (S.D. Fla. Sep. 29, 1997) ("The Court has broad discretion . . . in calculating the sum to be disgorged.").

<sup>156</sup> CFTC v. Tayeh, 848 Fed. Appx. 827, 828 (11th Cir. 2021).

<sup>157</sup> CFTC v. Reisinger, No. 11-CV-08567, 2017 WL 4164197, at \*6 (N.D. Ill. Sep. 19, 2017) (alteration in original).

<sup>158</sup> CFTC v. Tunney & Assocs., P.C., No. 13 cv 2919, 2013 WL 4565690, at \*2 (N.D. Ill. Aug. 21, 2013) ("CFTC concedes that section 2462 would bar some of its claims, but for the tolling agreement entered by the parties.").

<sup>159</sup> See *Reisinger*, 2017 WL 4164197, at \*6.

decision for the CFTC would not be out of question, there is little risk the agency's disgorgement power would be struck down in its entirety.<sup>160</sup>

The FDA, however, is more similarly situated to the FTC. The relevant provision of the FDCA looks more similar to the language of Section 13(b) of the FTC Act than Section 78u-d(5) of the Exchange Act. The FTC Act permits the FTC to obtain in proper circumstances "a permanent injunction."<sup>161</sup> The FDCA permits a court to "restrain violations" of the Act.<sup>162</sup> A reviewing court would likely conclude that to restrain a violation is "not the same as an award of equitable monetary relief."<sup>163</sup> Moreover, the term "restrain" suggests that the provision is designed to operate concurrent with or antecedent to a violation, much like the language in the FTC Act permitting a permanent injunction when a defendant "is violating, or is about to violate" the Act.<sup>164</sup> The FDA cannot restrain a violation that has already occurred. It can only remedy a past violation. But of course, the relevant term in the FDCA is restrain, not remedy.

#### BALANCING AGENCY ROLE, CONGRESSIONAL CONTROL, AND JUDICIAL EQUITY POWER

Balancing power requires internal and external restraints. The wise exercise of judicial power and restraint is key to both the fair administration of justice as well as respect for the rule of law.<sup>165</sup> The same is true for executive agencies, and it is important for the legislative branch as it delegates rulemaking authority to agencies and authorizes related agency enforcement powers.<sup>166</sup> This includes self-restraint as well as interbranch checks.

The three branches of government have boundaries that each branch must interpret, and each should operate in a correlative fashion. Agencies must exercise power as constrained by statute, but where statutory language invites discretion, agencies should exercise principled discretion by weighing purposivism and agency prerogatives against anticipated arguments of overreach. Given their advocacy role, agencies naturally will seek to maximize recovery at the least administrative cost.<sup>167</sup> Still, agencies should exercise enforcement discretion and consider when the pursuit of disgorging profits may stretch the substantive law too far or fail due process concerns. Congress should consider the whole of equitable jurisprudence and analyze comparative statutory language before

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<sup>160</sup> The Supreme Court denied a petition of writ of certiorari that challenged the CFTC's anti-fraud enforcement in a case against Monex Deposit Company seeking disgorgement of ill-gotten gains. *Monex Deposit Co. v. CFTC*, 931 F.3d 966 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 158 (2020).

<sup>161</sup> 15 U.S.C. § 53(b).

<sup>162</sup> 21 U.S.C. § 332(a).

<sup>163</sup> *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1347 (2021).

<sup>164</sup> *Id.* at 1348.

<sup>165</sup> Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 580 (2007) (theorizing internal and external restraints on judicial power with an emphasis on contextual and merits-based analysis rather than quantitative conclusions based on overly reductive labels).

<sup>166</sup> See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581 (1984).

<sup>167</sup> *Id.* at 663.

finalizing remedy language in agency enforcement legislation. The judiciary must operate within the bounds of statutory confines, precedent, equity, and unjust enrichment.

Each branch actor plays its role, which is at times a dysfunctional and unsatisfying dance, but the tension can be healthy and the iterative process productive. For example, negative rulings on agency remedial enforcement power such as *AMG* may cause the agency to lose in the short term, but an agency such as the FTC may encounter long term gains. The Court clips an administrative agency's wings based on its interpretation of statutory bounds.<sup>168</sup> The agency must retract its now unauthorized use of remedial power. It may—and here, the FTC did—simultaneously call to the legislature for more explicit authorization so the agency could resume disgorging as it had done for four decades. But this iterative process may benefit the agency and its constituents in the long run, especially if Congress reforms the remedies provisions to fit broader aims. As any of the actors seeks to assert power, keep a close watch for changes to unjust enrichment doctrinal underpinnings because the temptation to overreach with equity is strong.

### A. Agency Power and Limits

Agency interpretation and advocacy efforts should be refined to the purpose of the operative statute empowering agency rulemaking and enforcement. Each agency will have its own myriad of goals to foster. Further, the agency's frame with respect to constituencies may vary. For example, compare the FTC, which explicitly protects consumers and thus seeks to deliver disgorgement remedies to consumer victims,<sup>169</sup> with the FDA's multi-prong mission, which protects consumers and public health by providing regulated products.<sup>170</sup>

If delegated power is too unbounded,<sup>171</sup> perhaps overzealousness in agency enforcement of remedies may raise concerns parallel to non-delegation principles.<sup>172</sup> The classic conception of non-delegation applies when Congress improperly delegates its law-making function. Here, agencies are interpreting statutes that are, at least at first blush, arguably ambiguous in the remedies available at the enforcement phase.<sup>173</sup> Should non-

<sup>168</sup> See *id.* at 591.

<sup>169</sup> FTC's stated mission is consumer forward with a limit of avoiding undue burdens on legitimate business activities: "Protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity." FEDERAL TRADE COMMISSION, ABOUT THE FTC—OUR MISSION, <https://www.ftc.gov/about-ftc> (last visited September 19, 2022).

<sup>170</sup> FDA, *Mission*, <https://www.fda.gov/about-fda/what-we-do> (Mar. 28, 2018) (listing additional roles such as regulating tobacco products; advancing public health by helping to speed effective, safe, affordable innovations; educating the public on "accurate, science-based information;" ensuring food safety). The Office of Regulatory Affairs declares its core goals: "Protect consumers/patients and enhance public health by ensuring timely access to safe, quality FDA-regulated products." FDA, *Forward/Vision/Mission/Values to the Investigations Operations Manual, Foreword 2022*, <https://www.fda.gov/media/83196/download>.

<sup>171</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring) (explaining the unconstitutionality of "unconfined and vagrant" power delegated to the executive given the unbounded discretion).

<sup>172</sup> See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 241 (2001).

<sup>173</sup> Sunstein, *supra* note 172, at 329.

delegation or deference principles apply to interpretations of remedial provisions? Agency interpretation of statutory remedy authorizations may impact policy-making functions. Moreover, the ambiguous and imprecise drafting of the remedy provisions creates space in which an agency may feel compelled to fill in the gaps.

The counterargument is that the relevant space here is not in the rulemaking and adjudicative process when agencies enforce in federal district courts. Accordingly, agency enforcement of remedies is not law-making. Further, if Congress has not created ambiguity to show its intent to delegate, agencies need to follow the clear command of the statutes and not go beyond the power given. To exceed the scope of power given by Congress, agencies engage in ultra vires actions that courts should restrain as abuses of power.<sup>174</sup> Still, at the front end, these agencies believed and argued that the statutes provided the power exercised or, at least, created ambiguity for agency discretion to select and seek the appropriate type of equitable remedy.

Neither the SEC nor the FTC, however, made any *Chevron*<sup>175</sup> style argument for deference to agency interpretation of ambiguous statutory provisions,<sup>176</sup> nor did the Supreme Court address the dispositive issues from a *Chevron* lens.<sup>177</sup> Even if *Chevron* deference were the proper frame, “the Court frequently finds clarity in ambiguity in order to deprive an agency of discretion.”<sup>178</sup>

Ideally, even without the applicability of the *Chevron* boundary, each agency would receive greater remedial direction from Congress in the statutory grant of authority.<sup>179</sup> Each agency should supply limits to its own discretion.<sup>180</sup>

### *B. Congressional Control and Diligence*

Greater legislative precision and care are needed with respect to remedies provisions. When drafting new legislation or reforms, Congress should consult remedies scholars and other subject matter experts. It should compare remedies provisions across agencies with an eye towards consistent use and definition of equity’s terms of art. This comparative study<sup>181</sup> would also foster conscious decisionmaking when providing an agency with fewer equitable powers than another agency. The more comparable the

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<sup>174</sup> See *id.* at 318.

<sup>175</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837, 865 (1984) (implementing a two-step process—statutory ambiguity and agency interpretive reasonableness in filling the gaps—for determining when federal courts should defer to agency interpretations of statutory terms).

<sup>176</sup> See generally Brief for Respondent, *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021) (No.19-508), 2020 WL 7093938; Brief for Respondent, *Liu v. SEC*, 140 S. Ct. 1936 (2020) (No.18-1501), 2020 WL 257572.

<sup>177</sup> Neither *Liu* nor *AMG* cite or discuss *Chevron*.

<sup>178</sup> Bressman, *supra* note 51, at 1411 (noting that the Supreme Court may find clarity where it is lacking as part of non-delegation review and effectively block the delegation of policy-making authority).

<sup>179</sup> See *infra* Part III.B.

<sup>180</sup> Bressman, *supra* note 51, at 1415 (“The newly emerging delegation doctrine requires administrative agencies to issue rules containing reasonable limits on their discretion in exchange for broad grants of regulatory authority.”).

<sup>181</sup> The Office of Legislative Counsel in the Senate and the House could bolster these efforts as part of its review.

agency, the more comparable the remedial power should be unless reasons for departure exist.

Congressional roundtable sessions provide another avenue for information gathering that could prove useful in deepening understanding of the relevant remedial choices and consequences. In arenas where agency overreach is a concern, congressional oversight hearings could inquire as to the strategy and fit with statutory purpose of agency action. Congress is familiar with that path, but it could add investigation as a tool for agencies to serve unjust enrichment goals and equitable principles rather than punitive ones. Further, Congress could pressure agencies about path dependence on routes that are pursued due to ease rather than appropriateness, at the expense of due process concerns.

Of course, legislative compromise will affect any final language, but the more knowledge the better. Congress should also exercise restraint when carving apart remedies that classically flow together. For example, if the *AMG* Court is correct that Congress intended to disconnect equitable disgorgement from injunctive power, such a decision would need extra attention and explanation given the longstanding equitable practice of judges issuing disgorgement as ancillary to injunctive relief.<sup>182</sup>

Congress must calibrate reforms within judicial limits, unjust enrichment principles, and agency purpose. To the extent that discretion is inherent in a statutory grant of a panel of equitable enforcement remedies, Congress should develop intelligible principles keyed to remedies considerations to guide the agency.

### *C. Equity Power and Judicial Restraint*

The judicial branch and the Supreme Court need to appropriately cabin their exercise of power when interpreting agencies' remedies. The Supreme Court, specifically, is subject to criticism for its jurisprudential shifts that may align with partisan views.<sup>183</sup> Other substantive criticisms include that the Court has focused on formalism at the expense of contextualism.<sup>184</sup> Another critique centered on the Court's *AMG* opinion is that the Court is eroding equity.<sup>185</sup> Whether one accepts such premises and conclusions, judicial norms and boundaries remain worthy goals. The following are several bounds that ideally constrain judges when interpreting agency remedial powers in the context of equity.

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<sup>182</sup> See Brief of Amici Curiae Remedies, Restitution, Antitrust, and Intellectual Property Law Scholars in Support of Respondent at 6, *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021) (No. 19-508), 2020 WL 7315820 at \*6.

<sup>183</sup> ERIC J. SEGALL, *SUPREME MYTHS 1* (2012) (arguing that the Supreme Court is not a court).

<sup>184</sup> See, e.g., Henry E. Smith, *Equity as Meta-Law*, 130 *YALE L.J.* 1050, 1137 (2021) (castigating the Court's new equity jurisprudence).

<sup>185</sup> See, e.g., David C. Vladeck, *The Erosion of Equity and the Attack on the FTC's Redress Authority*, 82 *MONT. L. REV.* 159, 160–62 (2021) (lamenting that federal equity is frozen, and its power atrophying); Gabaldon, *supra* note 31, at 1650 (expressing shock about the fixation on equity at the founding).

i. Bounded by statutory language, precedent, and canons

The judicial branch must faithfully interpret statutory language and address the arguments properly posed. Federal courts are bounded by Article III requirements such as standing.<sup>186</sup> Also pursuant to Article III, federal judicial actors operate with awareness of congressional control over lower federal court jurisdiction and legislative ability to create exceptions and regulations on Supreme Court appellate jurisdiction. Any judicial interpretation also occurs in the context of a host of other constraints.

For starters, courts must interpret the statutory language with cognizance of congressional authority to set the scope of agency power. Though there are varied methods of statutory interpretation, all methods engage in some level of emphasis on the text itself and the text in statutory context. Not all judges interpret statutes with purposivism tools, but purpose should, and often does, inform every interpretation even if it does not serve as the driving force.<sup>187</sup>

Another constraint on judicial statutory interpretation is precedent<sup>188</sup> and coherence with connected cases.<sup>189</sup> Although precedent will not stop a court from proceeding in a different direction, the decision and its reasoning can be examined, critiqued, and judged by later jurists, critics, and the public.<sup>190</sup>

Judicial canons of construction are tricky because they are manipulable.<sup>191</sup> Reasons are hidden or camouflaged.<sup>192</sup> Still, canons serve as rationales for constraint, and the more judges explain their reasoning, the more ably various audiences can evaluate the persuasiveness of their logic. Without traction, weak arguments eventually die.

This article will not convince readers of the operational effectiveness of constraints in the real world. All the actors discussed are human and thus often fall short of requirements and aspirations. This Part will continue, as a normative matter, the advocacy of restraint on every actor who must balance branch goals against such limits. Good-faith actors remain the goal.

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<sup>186</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>187</sup> See Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1278 (2020) (arguing even the Roberts Court's textualist justices apply traditional purposivist analysis).

<sup>188</sup> See generally Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 588 (1987). (discussing the constraining impact of "forward-looking" precedent).

<sup>189</sup> See Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 542 (1982) (envisioning judges as serial authors in a chain novel).

<sup>190</sup> Schauer, *supra* note 188, at 581.

<sup>191</sup> To examine use and relative weight of the canons, see Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 995 (2013). See also Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 987–88 (2016) (finding that both textualist and purposivist canons are susceptible to "dueling").

<sup>192</sup> Krishnakumar, *Backdoor Purposivism*, *supra* note 187, at 1304 ("The textualist and textualist-leaning Justices, by contrast, tended not to expressly invoke purpose or intent but, rather, engaged in oblique purposive analysis and deductions through other interpretive tools.").

## ii. Bounded by principles of equity

When Congress includes equitable remedies and equitable powers, such remedial statutory language “brings the old soil with it.”<sup>193</sup> The Supreme Court has emphasized this principle as critical in statutory interpretation of agency enforcement powers: “When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic of equity to provide complete relief in light of the statutory purposes.”<sup>194</sup> The import is that equitable remedies, defenses, principles, and precedent constitute a system that should not be severed inadvertently or without explanation. Absent a clear congressional command, comprehensive judicial equity power must not be limited.<sup>195</sup> Rather, the “full scope” of equitable remedial power remains intact including the authority to secure complete justice.<sup>196</sup>

To what extent do federal courts maintain certain inherent equity powers? Is some part of federal equity power irremovable by statute? Conventional wisdom is that the question in the agency disgorgement enforcement cases is whether the agency had the power to seek the equitable remedy of disgorgement at all and in the ways measured.<sup>197</sup> But is there an irreducible minimum of Article III equity power in federal courts? Further, if the judiciary explicitly possesses injunctive power, such power cannot exist divorced from the soil of equity. The broader one conceives of such equity power, there is even more reason for federal courts to exercise restraint.

These principles should affect legislative efforts, but regardless, must be in the minds of judges when interpreting statutes authorizing equitable remedies. One equitable remedy, like disgorgement of profits, cannot be properly understood in isolation. Again, the Court has made ahistorical decisions that confound scholars, disrupt the coherence of equitable remedies as a system, and all too often, leave worthy litigants without a remedy.<sup>198</sup>

## iii. Bounded by doctrines of unjust enrichment

Disgorgement of profits, whether by private litigants or government enforcers, must keep in conformity with the boundaries of unjust enrichment law. It must seek to

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<sup>193</sup> *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019); see also Gallogly, *supra* note 4, at 53.

<sup>194</sup> *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291–92 (1960) (considering equitable remedies sought by the Secretary of Labor under the Fair Labor Standards Act, 29 U.S.C. § 203).

<sup>195</sup> See *id.* at 291 (“[T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.”) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

<sup>196</sup> *Id.* (“The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.”) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

<sup>197</sup> *CFTC v. Heffernan*, No. 4:04-23302, 2007 U.S. Dist. LEXIS 103597, at \*6–7 (D.S.C. July 25, 2007).

<sup>198</sup> See Rendleman, *supra* note 13 and accompanying text.



undo unjust gain and deter opportunism,<sup>199</sup> but it must not punish. To avoid punishment, a disgorgement award should tether to net, rather than gross, profits, permit offsets for justifiably earned enrichment, and connect causal links.<sup>200</sup>

#### IV. CONCLUSION

Recent court rulings are misguided as a matter of interpreting remedies law, but I argue they are unavoidable and appropriate as a matter of federal courts jurisprudence and statutory interpretation. Anemic remedies are the result of poor statutory wording that thwarts purposivism. Although the Supreme Court exacerbates by applying overly rigid interpretations, Congress can use its power to (re)institute the power. The hope is that Congress uses its authority to refine the remedy rather than misstate its foundations and intended reach.

Lessons of this inquiry should prove useful to other agencies. The proposed balancing should apply in other contexts, across agencies, and to enforcement efforts via other remedies. Of course, lingering questions provide fertile territory for continued exploration in future works.

For now, the power of equitable remedies at the margins of the law will continue to entice agency enforcers and draw the ire of those seeking more restrained agency behavior, narrower statutory interpretation, and more confined relief. The prescription is for agencies to follow the lure of equity with care by seeking disgorgement in worthy cases and incorporating limits as informed by signals from the judicial and legislative branches. This balancing must stay aligned with the twin goals of restitutionary disgorgement: undo unjust enrichment and deter conscious wrongdoing. The key with any siren—such as equity—is to draw inspiration from its beauty without permitting greed for its potential unlimited ends to devour the ultimate goal of one’s odyssey.

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<sup>199</sup> For a provocative argument about the import of having disgorgement in the arsenal of remedial options to serve deterrence goals, see Bert I. Huang, *The Equipose Effect*, 116 COLUM. L. REV. 1595, 1595 (2016).

<sup>200</sup> DOBBS & ROBERTS, *supra* note 19, at 418 (“Generally, ‘the unjust enrichment of a conscious wrongdoer, or of a defaulting fiduciary without regard to notice or fault, is the net profit attributable to the underlying wrong. The object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty.’”).

## ADDENDUM LEGISLATIVE REFORM EFFORTS

This addendum summarizes key reforms to the language of 15 U.S.C. § 53 proposed in the U.S. House of Representatives and Senate, and provides the statutory language as amended. The House passed 17 H.R. 2668 on July 20, 2021. An alternative version in the Senate, 117 S.R. 4145, stalled in committee as of May 11, 2022.

### SUMMARY OF HOUSE VERSION

The House's amended language introduces the following components:

1. **Retroactivity.** Specifies that the Commission may pursue past wrongdoing, not merely concurrent or future wrongdoing. *See* 15 U.S.C. § 53(b)(1).
2. **Codification of equitable remedies.** Empowers the Commission to seek equitable relief under subsection (e). *See* 15 U.S.C. § 53(e)(1)–(2).
  - a. **Restitution** for losses;
  - b. **Disgorgement** of any unjust enrichment obtained from a violation.
3. **Time limitations.** Establishes a statute of limitations of 10 years. *See* 15 U.S.C. § 53(e)(3)(A).
4. **Permanent injunctions.** Authorizes the Commission to seek a permanent injunction or *other equitable relief*. *See* matter after 15 U.S.C. § 53(b)(2); (e).

Note: Permanent injunctions are explicitly authorized in the current statutory text. *See* 15 U.S.C. § 53(b) flush text following paragraph (2) (“Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.”)
5. **Defined scope of equitable remedies as nonpunitive.** Specifies that restitution and disgorgement calculations must be net rather than gross profits. *See* 53(e)(3)(B); *Liu v. SEC*, 140 S. Ct. 1936 (2020). This prevents equitable relief's misapplication to punish. *Cf. Kokesh v. SEC*, 137 S. Ct. 1635 (2017).
6. **Technical amendment to 15 U.S.C. § 56.** Deletion of “relating to injunctive relief” from 15 U.S.C. § 56(a)(2)(A).

## HOUSE VERSION

The language below incorporates the amendments proposed in 117 H.R. 2668. Added language appears in bold typeface, and deleted language appears in strikethrough typeface.

### 15 U.S. Code § 53 | False advertisements; injunctions and restraining orders

(a) POWER OF COMMISSION; JURISDICTION OF COURTS

Whenever the Commission has reason to believe—

- (1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and
- (2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(b) TEMPORARY RESTRAINING ORDERS; PRELIMINARY INJUNCTIONS

Whenever the Commission has reason to believe—

- (1) that any person, partnership, or corporation **has violated**, is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
- (2) ~~that~~ **that either (A)** the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become ~~final~~ **final; or (B) the permanent enjoining thereof or the ordering of equitable relief under subsection (e)**, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States ~~to enjoin any such act or practice.~~ **In a suit under paragraph (2)(A), upon** ~~Upon~~ a proper showing that,

weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted ~~without bond~~: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in **a suit under paragraph (2)(B)** ~~proper~~ **proper** ~~cases~~ the Commission may seek, and after proper proof, the court may issue, a permanent ~~injunction~~ **injunction, equitable relief under subsection (e), or such other relief as the court determines to be just and proper, including temporary or preliminary equitable relief. Any suit under this subsection** ~~Any suit~~ may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. ~~In any suit under this section~~ **In any such suit**, process may be served on any person, partnership, or corporation wherever it may be found.

(c) SERVICE OF PROCESS; PROOF OF SERVICE

\* \* \*

(d) EXCEPTION OF PERIODICAL PUBLICATIONS

\* \* \*

**(e) EQUITABLE RELIEF.—**

- (1) RESTITUTION; CONTRACT RESCISSION AND REFORMATION; REFUNDS; RETURN OF PROPERTY.—** In a suit brought under subsection **(b)(2)(B)**, the Commission may seek, and the court may order, with respect to the violation that gives rise to the suit, restitution for losses, rescission or reformation of contracts, refund of money, or return of property.
- (2) DISGORGEMENT.—**In a suit brought under subsection **(b)(2)(B)**, the Commission may seek, and the court may order, disgorgement of any unjust enrichment that a person, partnership, or corporation obtained as a result of the violation that gives rise to the suit.
- (3) CALCULATION.—**Any amount that a person, partnership, or corporation is ordered to pay under paragraph (2) with respect to a violation shall be offset by any amount such

**person, partnership, or corporation is ordered to pay, and the value of any property such person, partnership, or corporation is ordered to return, under paragraph (1) with respect to such violation.**

**(3) LIMITATIONS PERIOD.—**

**(A) IN GENERAL.—A Court may not order equitable relief under this subsection with respect to any violation occurring before the period that begins on the date that is 10 years before the date on which the Commission files the suit in which such relief is sought.**

**(B) CALCULATION.—For purposes of calculating the beginning of the period described in subparagraph (A), any time during which an individual against which the equitable relief is sought is outside of the United States shall not be counted.**

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## SUMMARY OF SENATE VERSION

The Senate's amended language introduces the following components:

1. **Retroactivity.** The inclusion of “has violated” in 15 U.S.C. § 53(b)(1) authorizes the FTC to enforce against a party that has violated the law, regardless of whether that party is currently or will imminently violate the law. *See* 15 U.S.C. § 53(b)(1).
2. **Codification of equitable remedies.** *See* 15 U.S.C. § 53(b)(2)(B) (proposed language) (“the permanent enjoining thereof or the ordering of an equitable remedy under subsection (e)”); *see also* proposed subsection (e).
  - a. **Restitution**, including:
    - i. “restitution for consumer loss resulting from [violation of the law]” 15 U.S.C. § 53(e)(1)(a)(i).
    - ii. “recession or reformation of contracts” 15 U.S.C. § 53(e)(1)(a)(ii).
    - iii. “the refund of money or return of property” 15 U.S.C. § 53(e)(1)(a)(iii).
  - b. **Disgorgement.** *See* 15 U.S.C. § 53(e)(2).
3. **Time limitations.** Issuance and calculation of equitable remedies are limited to ten years prior to the filing of the Commission’s suit (excluding time a person was outside the United States).
4. **Permanent injunctions.** Amendments to 15 U.S.C. § 53(b)(2) authorizes the FTC to seek, and the court to grant, permanent injunctions immediately.

Note: Permanent injunctions are explicitly authorized in the current statutory text. *See* 15 U.S.C. § 53(b) flush text following paragraph (2) (“Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.”)
5. **Defined scope of equitable remedies as nonpunitive.** Specifies that restitution and disgorgement calculations must be net rather than gross profits. *See* 53(e)(3)(B); *Liu v. SEC*, 140 S. Ct. 1936 (2020). This prevents equitable relief’s misapplication to punish. *Cf. Kokesh v. SEC*, 137 S. Ct. 1635 (2017).
6. **Technical amendments to 15 U.S.C. § 56.** Deletion of “relating to injunctive relief” from 15 U.S.C. § 56(a)(2)(A), and deletion of “relating to consumer redress” from 15 U.S.C. § 56(a)(2)(B). These technical amendments also reduce surplusage and correct a scrivener’s error (“subpoena” is misspelled in the current statute).

## SENATE VERSION

The language below incorporates the amendments proposed in 117 S.R. 4145. Added language appears in bold typeface, and deleted language appears in strikethrough typeface.

**15 U.S.C. § 53 | False advertisements; injunctions and restraining orders**

## (a) POWER OF COMMISSION; JURISDICTION OF COURTS

Whenever the Commission has reason to believe—

- (1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and
- (2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

## (b) TEMPORARY RESTRAINING ORDERS; PRELIMINARY INJUNCTIONS

Whenever the Commission has reason to believe—

- (1) that any person, partnership, or corporation **has violated**, is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
- (2) that **either**

**(A)** the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the

Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, **or**

**(B) the permanent enjoining thereof or the ordering of an equitable remedy under subsection (e)** would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to ~~enjoin any such act or practice~~ **obtain such injunction or remedy. In a case brought under paragraph (2)(A),** Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, ~~such action~~ a **temporary restraining order or preliminary injunction** would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted ~~without bond~~: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That ~~in proper cases the Commission may seek~~ **That in a case brought under paragraph (2)(B), and after proper proof and upon a showing that a permanent injunction or equitable remedy under subsection (e) would be in the public interest,** the court may issue, a permanent injunction, **an equitable remedy under subsection (e), or any other relief as the court determines to be just and proper, including temporary or preliminary equitable relief.** Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any **such** suit ~~under this section,~~ process may be served on any person, partnership, or corporation wherever it may be found.

(c) SERVICE OF PROCESS; PROOF OF SERVICE

\* \* \*

(d) EXCEPTION OF PERIODICAL PUBLICATIONS

\* \* \*

**(e) EQUITABLE REMEDIES.—**

**(1) RESTITUTION; CONTRACT RESCISSION AND REFORMATION.—**

**(A) IN GENERAL.—In a suit brought under subsection (b)(2)(B) with respect to a violation of a provision of law**



**enforced by the Commission, the Commission may seek, and the court may order—**

- (i) restitution for consumer loss resulting from such violation;**
- (ii) rescission or reformation of contracts; and**
- (iii) the refund of money or return of property.**

**(B) LIMITATIONS PERIOD.—Relief under this paragraph shall not be available for a claim arising more than 10 years before the filing of the Commission's suit under subsection (b)(2)(B) with respect to the violation that gave rise to the claim.**

**(2) DISGORGEMENT.—**

**(A) IN GENERAL.—In a suit brought under subsection (b)(2)(B) with respect to a violation of a provision of law enforced by the Commission, the Commission may seek, and the court may order, disgorgement of any unjust enrichment that a person, partnership, or corporation obtained as a result of that violation.**

**(B) CALCULATION.—Any disgorgement that is ordered with respect to a person, partnership, or corporation under subparagraph (A) shall be offset by any amount of restitution that the person, partnership, or corporation is ordered to pay under paragraph (1).**

**(C) LIMITATIONS PERIOD.—Disgorgement under this paragraph shall be limited to any unjust enrichment a person, partnership, or corporation obtained in the 10 years preceding the filing of the Commission's suit under subsection (b)(2)(B) with respect to the violation that resulted in such unjust enrichment.**

**(3) CALCULATION OF LIMITATIONS PERIODS.—For purposes of calculating any limitations period with respect to a claim for relief under paragraph (1) or a disgorgement order under paragraph (2), any time in which a person, partnership, or corporation against which such relief or order is sought is outside the United States shall not be counted for purposes of calculating such period.**

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