Note

Penalties in Equity: Disgorgement After *Kokesh v. SEC*

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This Note defends the SEC's statutory authority to seek judicial disgorgement. In Kokesh v. SEC*, the Supreme Court held that judicial disgorgement brought by the SEC constitutes a penalty for the purpose of the five-year statute of limitations in 28 U.S.C. § 2462. In the following months, scholars and practitioners—and at least one putative class action—have argued that this opinion spells the end for judicial disgorgement. Their reasoning is simple: disgorgement is a penalty; there are no penalties in equity; SEC disgorgement is authorized by a statutory grant of equity jurisdiction; therefore, SEC disgorgement is not authorized. This Note refutes the premise that there are no penalties in equity by looking at the Court's precedents and general approach to equitable remedies. Further, it offers an affirmative defense of the SEC's authority to seek judicial disgorgement by pointing to congressional ratification. Next, the Note argues that* Kokesh *should be understood as a warning shot, directing the SEC to pull back its overly aggressive utilization of disgorgement. This Note concludes that the lesson ought to be heeded by similarly situated agencies as well—particularly the Federal Trade Commission.*

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Introduction

"Congress does not hide elephants in mouseholes," Judge Wilson explained.[1] "The question before this Court is if the Supreme Court does."[2] The elusive elephant in this metaphor is the fate of the U.S. Securities and Exchange Commission (SEC)'s authority to seek disgorgement, an equitable remedy that orders an offender to give up all profits earned through some illicit act.[3] The mousehole is a footnote—footnote three—of a recent Supreme Court opinion, *Kokesh v. SEC*.[4] In that case, the Supreme Court held that 28 U.S.C. § 2462, a five-year statute of limitations on any civil fine or penalty, applies to "claims for disgorgement imposed as a sanction for violating a federal securities law."[5] The logic in *Kokesh* implies that § 2462's statute of limitations should apply to any agency's use of disgorgement, not just the SEC's.[6] This holding is significant in itself, as a variety of agencies have sought disgorgement under their equitable

1. SEC v. Jammin Java Corp., No. 2:15-cv-08921 SVW (MRWx), 2017 WL 4286180, at *2 (C.D. Cal. Sept. 14, 2017) (quoting Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001)).

2. *Id.*

3. *See* BLACK'S LAW DICTIONARY 568 (10th ed. 2014).

4. Kokesh v. SEC, 137 S. Ct. 1635, 1642 n.3 (2017).

5. *Id.* at 1639.

6. Commentators have begun to reach this conclusion with regards to several other agencies and practice areas. *See, e.g.*, Theodore R. Flo, *Supreme Court's* Kokesh v. SEC *Ruling Limits CFPB Disgorgement*, CONSUMER FIN. MONITOR (June 7, 2017), http://www.consumerfinancemonitor.com/2017/06/07/supreme-courts-kokesh-v-sec-ruling-limits-cfpb-disgorgement [http://perma.cc/DRR4-6BNH]; *see also* Jennifer M. Thomas & Gugan Kaur, *Supreme Court Ruling on SEC Statute of Limitations May Affect Other Agencies' Pursuit of Disgorgement*, FDA L. BLOG (June 15, 2017), http://www.fdalawblog.net/fda_law_blog_hyman_phelps/2017/06/supreme-court-ruling-on-sec-statute-of-limitations-may-affect-other-agencies-pursuit-of-disgorgement.html [http://perma.cc/U57U-3HKB] (discussing the opinion's implications beyond the statute of limitations for other agencies).

authority in order to remove incentives for illegal behavior that would exist if wrongdoers were allowed to keep their ill-gotten profits.[7]

But it was not this holding that has sent defendants on their big-game hunt. Rather, it was the text of *Kokesh*'s footnote three, which stated that the opinion should not be read as validating disgorgement.[8] The Justices have previously warned against reading into such disclaimers,[9] but court watchers are apparently undeterred. Many practitioners and some scholars have suggested that this terse footnote spells the end for the SEC's use of disgorgement.[10] Some defendants have already put forth some of these arguments in courts, challenging the disgorgement authority of both the SEC and the FTC, although without success so far.[11] Notably, a class action complaint was recently filed against the SEC alleging the invalidity of disgorgement.[12] Responding to these challengers, this Note explains that concerns about disgorgement's future availability to agencies are largely overblown.

Essentially, these disgorgement doomsayers—including Craig Jalbert, the lead plaintiff in the putative class action[13]—begin with a single premise: a remedy cannot be both equitable and a penalty.[14] This premise leads to a syllogism: remedies are either penalties or equitable, but not both; the Supreme Court held that disgorgement is a penalty; thus, disgorgement is not a proper equitable remedy.[15] This argument cuts to the heart of the SEC's authority to seek disgorgement in federal courts. A court of appeals first held that the SEC

7. *See, e.g.*, Complaint, United States v. Accolade Constr. Grp. Inc., No. 15 Civ. 5855 (May 23, 2017 S.D.N.Y.).

8. *Kokesh*, 137 S. Ct. at 1642 n.3 ("Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context.").

9. *See* Zubik v. Burwell, 136 S. Ct. 1557, 1561 (2016) (Sotomayor, J., concurring) (directing lower courts not to "construe" the Court's "explicit disclaimer[s]" "as signals of where this Court stands" and criticizing courts for "ignor[ing] those instruction" in the past).

10. For this argument by scholars, see, for example, Samuel Bray, *Equity at the Supreme Court*, WASH. POST: VOLOKH CONSPIRACY (June 10, 2017), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/10/equity-at-the-supreme-court [http://perma.cc/43GX-2YNH]; and Stephen M. Bainbridge, Kokesh *Footnote 3 Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases* (UCLA School of Law, Law-Econ. Research Paper No. 17-12, 2017), http://ssrn.com/abstract=2992719 [http://perma.cc/SY3A-EYU6]. For practitioners, see, for example, Robert Anello, *Chronicle of Disgorgement's Death Foretold:* Kokesh v. SEC, FORBES (July 11, 2017 5:53 PM), http://www.forbes.com/sites/insider/2017/07/11/chronicle-of-disgorgements-death-foretold-kokesh-v-sec/2/#345602059cf9 [http://perma.cc/V3YE-4Q7Z]; and Maranda Fritz & Brian Steinwascher, *Demise of Disgorgement?* Kokesh *and* Honeycutt *in Tandem*, LAW360 (June 3, 2017), http://www.law360.com/articles/939021/demise-of-disgorgement-kokesh-and-honeycutt-in-tandem [http://perma.cc/64XQ-3UK7].

11. *See, e.g.*, SEC v. Jammin Java Corp., No. 2:15-cv-08921 SVW (MRWx), 2017 WL 4286180, at *2 (C.D. Cal. Sept. 14, 2017).

12. Class Action Complaint, Jalbert v. SEC, No. 1:17-cv-12103 (D. Mass. Oct. 26, 2017).

13. *See id.* at 1-2.

14. Bray, *supra* note 10.

15. *See id.*

could seek judicial disgorgement in *Texas Gulf Sulphur* in 1971.[16] The court invoked well-established Supreme Court precedents,[17] including *Porter v. Warner Holding Co.*, which held that when a statute allows courts to issue injunctions, "all the inherent equitable powers of the [court] are available for the proper and complete exercise of that jurisdiction."[18] Since the securities exchange laws explicitly authorize injunctions as a remedy for violations,[19] the court in *Texas Gulf Sulphur* reasoned that the statutory scheme necessarily granted courts the full range of equitable remedies.[20] Jalbert and other critics of the SEC's use of disgorgement assume that the categories "penalty" and "equitable remedy" are mutually exclusive—thus, if they can show that disgorgement is a penalty, it cannot be an equitable remedy, and it does not become available to the courts merely by a statutory grant of injunctive authority.

The critics' argument draws support from case law. In *Texas Gulf Sulphur* itself, the court seemed to cabin its holding: "[T]he SEC may seek other than injunctive relief in order to effectuate the purposes of the Act, *so long as* such relief is remedial relief and *is not a penalty assessment*."[21] And in *Great West Life & Annuity Ins. Co. v. Knudson*, the Supreme Court explained that "'[e]quitable' relief must mean something less than all relief,"[22] implying that there must exist at least some remedies which do not follow on the coattails of injunctive authority. The Court provided an example of a nonequitable remedy in *Tull v. United States*, holding that civil penalties are not available as a remedy to courts sitting in equity.[23] The argument, then—though one we dispute—is that if disgorgement is a civil remedy and a penalty, then it is a civil penalty; and if disgorgement is a civil penalty, then it is not available to courts without some statutory grant, because it does not follow from courts' injunctive authority.

With agency use of disgorgement on the line, the stakes of this argument are enormous. Disgorgement is an important tool used by several federal agencies, which rely on it to remove incentives to break the law. The Federal Trade Commission (FTC), for example, seeks injunctive relief in cases involving unfair or deceptive trade practices.[24] The FTC's use of disgorgement appears to

16. SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301 (2d Cir. 1971).

17. *See id.* at 1307 (citing Mitchell v. Robert DeMario Jewelry, 361 U.S. 288 (1960); United States v. Moore, 340 U.S. 616 (1951); Porter v. Warner Holding Co., 328 U.S. 395 (1946)).

18. *Porter*, 328 U.S. at 398.

19. 15 U.S.C. § 78u(d)(1) (2012).

20. *Tex. Gulf Sulphur*, 446 F.2d at 1308-09 (emphasis added).

21. *Id.* at 1309.

22. 534 U.S. 204, 209 (2002) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 258 n.8 (1993)).

23. 481 U.S. 412, 422 (1987).

24. *See, e.g.*, FTC v. BurnLounge, Inc., 584 Fed. App'x. 315 (9th Cir. 2014). While the FTC is authorized to seek "the refund of money or return of property, [or] the payment of damages" to redress unfair or deceptive trade practices, 15 U.S.C. § 57b(b), the FTC has also sought disgorgement under its 15 U.S.C. § 53(b) authority in cases involving false advertisement (which does not specifically authorize disgorgement). *See, e.g.*, *BurnLounge*, 584 Fed. App'x. at 317.

be penal in character, based on the criteria set out in *Kokesh*.[25] It is employed in the public interest,[26] is punitive (in the sense that its primary purpose is deterrence),[27] and is not purely compensatory.[28] The same is true for many other agencies.[29] And, unlike the SEC, which is authorized to pursue civil penalties for violations of securities laws,[30] some agencies have no recourse to any formal legal remedy as they seek to implement their substantive statutes. Given the numerous practitioners who have expressed the view that *Kokesh* spells the end of disgorgement, litigation attacking all of these agencies is certainly in the works. In fact, a number of defendants have already raised these sorts of argument against the FTC.[31]

The facile argument that "there are no penalties in equity" would thus be hugely disruptive to the administrative state—potentially barring a favorite tool. But for all its alluring simplicity, we contend that it is unpersuasive. This Note sets out the argument that agencies, such as the SEC and the FTC, are authorized to seek judicial disgorgement and that *Kokesh* does not alter this conclusion. As we explain, the holding that disgorgement, as sought by the SEC, is a penalty for the purposes of § 2462's statute of limitations is consistent with earlier Court precedent that found disgorgement to be equitable. Further, Congress has affirmatively ratified, by statute, the SEC's authority to pursue disgorgement. That does not mean, however, that *Kokesh* does not have broader implications for the SEC and the administrative state. This Note argues that Kokesh should be understood as a warning shot, directing the SEC to pull back its overly aggressive utilization of disgorgement. This lesson ought to be heeded by similarly situated agencies as well—particularly the Federal Trade Commission.

Part I provides a brief background on the history of the SEC's use of disgorgement and the overall stakes of associated with the potential loss of this tool. Part II turns to Supreme Court's precedents discussing disgorgement. These precedents establish that there is no inherent contradiction in disgorgement's

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25. M. Sean Royall & Richard H. Cunningham, *Will "*Kokesh v. SEC*" Put a Kink in the Federal Trade Commission's Disgorgement Hose?*, WLF LEGAL PULSE (July 10, 2017), http://wlflegalpulse.com/2017/07/10/will-kokesh-v-sec-put-a-kink-in-the-federal-trade-commissions-disgorgement-hose [http://perma.cc/8NQT-PEV2].

26. FTC v. Bronson Partners, LLC., 654 F.3d 359, 372-73 (2d Cir. 2011)

27. *See Policy Statement on Monetary Equitable Remedies*, FED. TRADE COMMISSION (July 31, 2003), http://www.ftc.gov/public-statements/2003/07/policy-statement-monetary-equitable-remedies-including-particular [http://perma.cc/SWK9-WP9W].

28. FTC v. Febre, 128 F.3d 530, 537 (7th Cir. 1997).

29. *See, e.g.*, CFPB v. Gordon, 819 F.3d 1179 (9th Cir. 2016) (discussing the CFPB); Commodity Futures Trading Comm'n v. Sidoti, 178 F.3d 1132 (11th Cir. 1999) (discussing the CFTC); United States v. Universal Mgmt. Servs., 191 F.3d 750 (6th Cir. 1999) (discussing the FDA); United States v. Local 1804-1, Nos. 90 Civ. 0963, 90 Civ. 5618, 1993 WL 77319 (S.D.N.Y. Mar. 15, 1003) (discussing the Department of Justice).

30. 15 U.S.C. § 77t(d) (2018); *see also* 12 U.S.C. § 5564(a) (2018) (authorizing the CFPB to impose civil penalties).

31. *See* FTC v. Credit Bureau Ctr., LLC, No. 17 C 194, 2018 WL 482076 (N.D. Ill. Jan. 14 2018); FTC v. J. William Enters., No. 6:16–cv–2123–Orl–31DCI, 2017 WL 4776669 (M.D. Fla. Oct. 23, 2017).

status as a penalty and an equitable remedy—in fact, the Court has explicitly referred to the remedy as being both penal and equitable. While *Kokesh* defines ancillary restrictions on the use of disgorgement that flow from a statute, it is only by incorrectly conflating contexts and senses of "penalty" that critics conclude that agency disgorgement will soon be no more. This undermines one of the premises of the syllogism on which commentators have relied to conclude that *Kokesh* spells the end for judicial disgorgement. Part II continues by rebutting a related but distinct argument: that the Court's precedents establish that equitable remedies must be compensatory. By refuting each of these arguments, we show that nothing in the doctrine is incompatible with the determination that disgorgement is an equitable remedy.

After establishing that the Supreme Court's caselaw does not preclude characterizing disgorgement as an equitable remedy, Part III lays out an affirmative argument that the SEC is authorized to seek judicial disgorgement. We analyze the SEC's substantive statutes in light of the Court's equity doctrine, showing how Congress has explicitly ratified the use of disgorgement. When considered in relation to the Court's broader framework for addressing the boundaries of equity in the context of statutory enactments, this congressional ratification ought to be dispositive.

Part IV explores a previously unrecognized theme underlying the decision in *Kokesh*: discomfort with the SEC's aggressive enforcement posture, and particularly the Agency's use of disgorgement. While *Kokesh* should not be read as undermining the SEC's authority to seek disgorgement in general, the Court's language does suggest certain significant limitations. To understand the imposition of these limitations, it is necessary to contextualize *Kokesh* within a larger narrative of the Court's efforts to police the SEC. Once placed in this broader context, it becomes clear, we argue, that the Agency should implement guidance on its use of disgorgement that reflects the restrictions implied by the Court. Part V then turns to the implications of *Kokesh* for the FTC, noting that parallel concerns regarding the agency's recent aggressive expansion of its use of disgorgement make it a potential target for future judicially-imposed restraints.

I. An Overview of Disgorgement

As an initial matter, it is worth briefly discussing how and why disgorgement became a central component of the SEC's enforcement regime. This Part begins by tracing disgorgement's history. But a consideration of the rise of disgorgement does far more than just provide background—it sheds light on the stakes of the post-*Kokesh* debates over disgorgement's equitable characteristics. The SEC came to rely on disgorgement largely for its flexibility as a law enforcement tool. Disgorgement allows the Agency to precisely tailor a remedy appropriate to the offense in a way that civil penalties often cannot. And judicial disgorgement, in particular, allows the SEC to seek punishments backed by the independence and authority of Article III courts. History reveals that the SEC would not be just as well-off without disgorgement. And in addition to the SEC, disgorgement plays an important role in the law enforcement regimes at other agencies, some of which lack these alternatives. Removal of disgorgement from the package of equitable remedies would have wide-ranging consequences for the administrative state as we know it.

A. The History of SEC Judicial Disgorgement

Fraud and abuse in the securities industry became an especially pressing concern for Americans after they contributed to the 1929 stock market crash.[32] In the wake of the Great Depression, Congress passed a series of laws to ensure that "the highest ethical standards prevail in every facet of the securities industry."[33] One of these laws, the Securities Exchange Act of 1934, created the SEC. For nearly the first four decades of its existence, the only remedy the SEC routinely sought under the Act was injunctive relief—the only form of relief explicitly provided for in its substantive statute.[34]

In the early 1970s, the SEC began to ask courts to grant disgorgement or restitution ancillary to injunctive relief.[35] The Commission's experience had shown that injunctive relief did little to dissuade offenders from the often-lucrative violation of securities law.[36] Thus, the SEC urged the district court in *Texas Gulf Sulphur* "to provide a remedy which, in accord with the congressional purpose of the 1934 Act, [would] protect the investing public by providing an effective deterrent to future violations."[37] The district court obliged, and the Second Circuit affirmed its authority to do so.[38] The circuit court relied on Supreme Court precedent which provided that statutory grants of injunctive authority enable district courts to employ the full range of equitable remedies ancillary to an injunction.[39] The Act's grant of injunctive authority, coupled with Supreme Court precedent declining to "infer from the [Act] a purpose to circumscribe the courts' power to grant appropriate remedies,"[40] led the court to

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32. *Cf.* Kokesh v. SEC, 137 S. Ct. 1635, 1639-40 (2017) (discussing the history of securities regulation).

33. *Id.* at 1640 (internal quotation marks omitted) (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186-87 (1963)).

34. *Id.*

35. *Id.*

36. *See* Edmund B. Frost, *SEC Enforcement of the Rule 10b-5 Duty to Disclose Material Information—Remedies and the* Texas Gulf Sulphur *Case*, 65 MICH. L. REV. 944, 962-66 (1967).

37. SEC v. Tex. Gulf Sulphur Co., 312 F. Supp. 77, 92 (S.D.N.Y. 1970), *aff'd in part*, 446 F.2d 1301 (2d Cir. 1971).

38. *Tex. Gulf Sulphur*, 446 F.2d 1301.

39. *Id.* at 1307-08. Among those cases that the circuit court relied on are *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288 (1960); *United States v. Moore*, 340 U.S. 616 (1951); and *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

40. Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 391 (1970).

conclude that the statutory scheme at the time authorized grants of disgorgement as an equitable remedy.

The SEC eagerly embraced its newfound authority to rid violators of their ill-gotten gains.[41] Indeed "[d]isgorgement has become the routine remedy for a securities enforcement action. If a person is found in violation and has profited from the illicit transaction, courts generally order the disgorgement of those profits."[42] Superinjunctive remedies became so central to the SEC's enforcement regime that Congress explicitly gave the SEC the ability to seek civil penalties in district court proceedings and disgorgement in administrative proceedings in 1990.[43] Additionally, Congress eliminated the need for the SEC to rely on courts' ancillary equitable powers when it amended the Exchange Act to allow the SEC to "seek . . . any equitable relief that may be appropriate or necessary for the benefit of investors."[44] Despite the fact that neither of these statutes expressly authorizes judicial disgorgement, "[t]he legislative histories of both laws demonstrate that, because *Texas Gulf Sulphur* confirmed that disgorgement was part of a federal court's inherent equitable powers, Congress did not see a need to provide federal courts with express authority to order disgorgement."[45]

The Commission clearly understood their statutory scheme to permit courts' grants of disgorgement, as it has significantly expanded the scope of its disgorgement actions in the last few decades.[46] In *SEC v. Contorinis*, for example, the Second Circuit upheld an order requiring disgorgement of profits earned by a fund of which the defendant was a manager—which went well beyond the defendant's personal gains.[47] And in *SEC v. Whittemore*, the Commission successfully held a defendant jointly and severally liable for a pump-and-dump scheme, even though he shared in the profits with other perpetrators of the fraud.[48] Disgorgement accounts for a tremendous amount of the money recovered each year by the SEC—in 2016, the Commission brought

41. Dixie L. Johnson et al., *King & Spalding Discusses Potential Effects of SEC Disgorgement as a Penalty*, COLUM. L. SCH.: BLUE SKY BLOG (June 21, 2017), http://clsbluesky.law.columbia.edu/2017/06/21/king-spalding-discusses-potential-effects-of-sec-disgorgement-as-penalty [http://perma.cc/637E-DLUM].

42. SEC v. Pardue, 367 F. Supp. 2d 773, 778 (E.D. Pa. 2005). As an empirical matter, the SEC's use of disgorgement, as well as the amounts received in disgorgement actions, increased significantly in the years following the passage of the Dodd Frank Act. *See* Stephen J. Choi & A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. 1, 1, 24 tbl.4 (2017).

43. Johnson et al., *supra* note 41; *see* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (codified at 15 U.S.C. § 77t(d) (2018)).

44. 15 U.S.C. § 78u(d)(5) (2012); *see also* Johnson et al., *supra* note 41 (discussing the SEC's authority to seek disgorgement).

45. Johnson et al., *supra* note 41.

46. *Id.*

47. 743 F.3d 296 (2014).

48. 659 F.3d 1 (D.C. Cir. 2011).

in nearly $3 billion in disgorgement payments, more than double what it collected in other types of penalties.[49]

B. The Stakes of Agency Judicial Disgorgement

The outsized importance of disgorgement in the SEC's enforcement regime raises some questions. First, why does the SEC not just rely on civil penalties, which are explicitly authorized by statute? The answer to this question can be found in the SEC's brief in *Kokesh*: the SEC views civil penalties and disgorgement as two completely different tools, suited to two different ends. The brief emphasizes that "disgorgement will sometimes be inappropriate even when a securities-law violation has been proved."[50] And while both remedies seek to disincentivize violations, civil penalties are not flexible enough to meet the SEC's needs.[51] Penalties may be too harsh in cases where offenders earn negligible profits or commit less odious violations. They may also be too lax when profits from violations significantly exceed the statutory caps on penalties.[52] Because it is the Commission's job to combat an ever-evolving evil, it makes sense that the SEC feels that it needs flexible tools.

Another reasonable question is why the SEC does not rely more often on administrative disgorgement when it has explicit statutory authority to do so. It is not obvious that increased handling of these matters through SEC administrative actions is a better outcome. While most cases settle, not all do. In a world where the SEC already is "facing heavy criticism for using administrative proceedings to benefit from its purported 'home court' advantage,"[53] it is easy to imagine why the SEC might think that justice is better accomplished when enforcement is pursued in an independent, Article III court. Moreover, the very authority of SEC administrative law judges (ALJs), on which administrative remedies rely, is under attack.[54] In January of 2018, the Supreme Court granted certiorari in *Lucia v. SEC*,[55] a case which presents the question of "[w]hether administrative law judges of the Securities and Exchange

49. Hazel Bradford, *SEC Disgorgement Practices Challenged in Lawsuit*, PENSIONS & INV. (Oct. 27, 2017, 4:14 PM), http://www.pionline.com/article/20171027/ONLINE/171029833/sec-disgorgement-practices-challenged-in-lawsuit [http://perma.cc/6L33-NDSA].

50. Brief for Respondent at 17, Kokesh v. SEC, 137 S. Ct. 1635 (2017) (No. 16-529).

51. *Id.* at 18.

52. Indeed, when Congress passed the Insider Trading Sanctions Act of 1984, it "was concerned that '[d]isgorgement of illegal profits . . . merely restores a defendant to his original position without extracting a real penalty for his illegal behavior.'" *Id.* at 22-23 (alteration in original) (quoting H.R. Rep. No. 355, 98th Cong., 1st Sess. 7 (1983)).

53. Johnson et al., *supra* note 41.

54. *Id; see also* Marty Lederman, *Mystery and Audacity in* Lucia, 36 YALE J. ON REG.: NOTICE & COMMENT (Apr. 16, 2018) (Noting that some have characterized the *Lucia* petitioners' challenge as a battle to "rein in a set of adjudicators who have become beholden to their agency's regulators.").

55. *Miscellaneous Orders*, U.S. SUP. CT. (Jan. 12, 2018), http://www.supremecourt.gov/orders/courtorders/011218zr_3d9g.pdf [http://perma.cc/RQL9-BNAM].

Commission are Officers of the United States within the meaning of the Appointments Clause."[56] If the Justices answer in the affirmative, then the constitutionality of the SEC's administrative regime could be called into question. Given this potential uncertainty, it is understandable that the SEC might prefer to pursue enforcement before an institution whose authority is enshrined in the Constitution (and avoid potentially making the SEC's legitimacy crisis even worse).[57]

Still, if one does not share the SEC's assumptions and concerns, it is easy to dismiss the potential loss of disgorgement as nondisruptive. Indeed, critics of SEC judicial disgorgement have gone as far as to argue that its loss "would not raise an alarm in the realm of SEC enforcement."[58] This argument discounts the SEC's arguments and assumes that enforcement would be just as effective if the SEC relied on administrative disgorgement and other criminal and civil remedies.[59] Even if this were so, this argument risks understating the potentially enormous impact of a decision removing the SEC's authority to seek judicial disgorgement. The Supreme Court has made clear that the test for whether a remedy is equitable is whether that remedy was *historically* equitable.[60] If the Court were to hold that the SEC did not have the power to seek disgorgement as part of the package of equitable remedies, it would likely do so by holding that disgorgement is not historically equitable. Such a discussion would not be limited to the securities context. Thus, a decision eliminating the SEC's disgorgement authority would likely undermine other agencies' authority to seek disgorgement as well. And there are many agencies who rely on disgorgement to enforce their substantive statutes that, unlike the SEC, have far sparser alternative remedies to fall back on.

An illustrative example of the important role that equitable disgorgement plays in agency enforcement can be found in a recent case in the Southern District of New York: *United States v. Accolade*.[61] In *Accolade*, the U.S. Attorney's Office for the Southern District of New York, on behalf of the Environmental Protection Agency (EPA), filed suit alleging violation of the

56. Petition for Writ of Certiorari at i, Lucia v. SEC (2017) (No. 17-130).

57. While the recent litigation in *Lucia* explains why the SEC is not content to abandon disgorgement going forward, the recency of the grant of certiorari might call into question whether the legitimacy of SEC ALJs was a motivating factor for past action. Still, it is quite possible that the SEC was aware of the possibility of *Lucia*-like challenges when it acted in the past. The litigation in *Lucia* itself has been ongoing for more than five years now and draws heavily on a decades-old Supreme Court opinion, *Freytag v. Comm'r*, 501 U.S. 868 (1991). *See* Petition for Writ of Certiorari, Lucia v. SEC (2017) (No. 17-130).

58. Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, HARV. BUS. L. REV. ONLINE 12 (2013), http://www.hblr.org/wp-content/uploads/2013/11/Ryan__The-Equity-Fa%C3%A7ade-of-SEC-Disgorgement.pdf [http://perma.cc/4U63-VYC8].

59. *Id.*

60. *See infra* Part III. Since *Kokesh* did not do such a historical inquiry, it is difficult to imagine that it spells the end of disgorgement, absent some further proclamation from the Supreme Court—regardless of what one thinks of footnote 3.

61. United States v. Accolade Constr. Grp., Inc., No. 15 Civ. 5855, 2017 WL 2271462 (S.D.N.Y. May 23, 2017).

EPA's Renovation, Repair, and Painting Rule (RRP Rule).[62] The RRP Rule was promulgated under the Toxic Substances Control Act (TSCA) and prescribes conduct for firms involved in demolitions that could cause the release of lead into the environment.[63] The Government alleged that Accolade repeatedly violated the RRP Rule in its work, as shown by evidence collected by EPA inspectors.[64]

The Government sought only equitable remedies in its complaint.[65] Pursuant to TSCA, the complaint requested several injunctions and disgorgement "of all proceeds that [Accolade] received in connection with its unlawful renovation activities."[66] While TSCA does provide for the award of civil penalties in an administrative hearing,[67] the remedies available when the EPA decides to enforce TSCA through litigation are limited to equitable remedies.[68] When the Government challenged Accolade's request for a jury trial on the grounds that there is no Seventh Amendment right to a jury trial when only equitable remedies are on the table,[69] the court agreed, holding not only that disgorgement was equitable in nature, but also that that disgorgement was available as an ancillary remedy when the EPA seeks injunctions under TSCA.[70] The case settled before trial, with Accolade agreeing to pay $58,000 in disgorgement.[71]

Disgorgement played a crucial role in *Accolade* and will continue to play an important role in EPA enforcement of the RRP. Consider the incentives for a demolition and repair company under TSCA if only injunctive relief is available. Compliance with the RRP Rule would presumably make work more expensive than it would otherwise be. In such a situation, firms are incentivized to violate the rule until they are enjoined from doing so, since such a strategy maximizes the money saved during the period in which the firm is noncompliant. Without fines or disgorgement, the Government would be limited to playing a futile game of whack-a-mole, trying to enjoin firm after firm. The SEC, on the other hand, is

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62. *Manhattan U.S. Attorney and EPA Announce Lawsuit Against Accolade Construction Group Inc, for Violating Lead Paint Safety Rules*, U.S. ATT'Y'S OFF. (July 27, 2015), http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-epa-announce-lawsuit-against-accolade-construction-group-inc [http://perma.cc/V7Y8-LFEC]; *see also* Complaint, United States v. Accolade Constr. Grp., No. 15 Civ. 5855 (July 27, 2015 S.D.N.Y.), 2017 WL 2271462.

63. *See* 40 C.F.R. § 745, Subpart E (2017).

64. Complaint at 6-8, *Accolade*, No. 15 Civ. 5855.

65. *Id.* at 13-17.

66. Complaint at 15, *Accolade*, No. 15 Civ. 5855.

67. 15 U.S.C. § 2615 (2012).

68. 15 U.S.C. §§ 2616, 2689 (2018).

69. Memorandum of Law in Support of Plaintiff's Motion To Strike Defendant's Jury Demand at 2, *Accolade*, No. 15 Civ. 5855.

70. United States v. Accolade Constr. Grp., Inc., 15 Civ. 5855, 2017 WL 2271462, at *2 (S.D.N.Y. May 23, 2017).

71. *Manhattan U.S. Attorney Announces Consent Decree with Accolade Construction Group Inc., for Violating Lead Paint Safety Rules*, U.S. ATT'Y'S OFF. (Aug. 17, 2017), http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-consent-decree-accolade-construction-group-inc [http://perma.cc/NF9H-HGQG].

authorized to seek civil penalties. While disgorgement may be a replaceable part of the SEC's practice, the same is simply not true for every agency and every statute.

Disgorgement plays an important role in other law enforcement contexts as well. The Federal Trade Commission, for example, often pursues equitable relief when policing unfair or deceptive trade practices.[72] The FTC's use of disgorgement has many of the punitive hallmarks identified in *Kokesh*.[73] It is employed in the public interest,[74] is punitive,[75] and is not purely compensatory.[76] This application would almost surely be barred by any opinion using the logic of *Kokesh* to eliminate SEC disgorgement. The same is true for the Department of Justice's use of disgorgement in the Civil RICO context,[77] the Consumer Financial Protection Bureau's enforcement of consumer financial law,[78] the CFTC's enforcement of commodities trading law,[79] the FTC's enforcement of antitrust laws,[80] and the FDA's enforcement of the Food, Drug, and Cosmetic Act.[81] The total loss of disgorgement as an equitable remedy would shock the administrative state and potentially cripple agencies' ability to enforce the law.

But, as mentioned before, *Kokesh* did not eliminate the SEC's authority to seek disgorgement—nothing in the argument or its structure furnished the historical information required to move disgorgement from equitable to legal.[82] In fact, *Kokesh*'s ruling that disgorgement can be a penalty is wholly consistent with decades of established precedent.

As Part II explains, the Court's precedent has established the remedy's equitable nature in a manner that is not undercut by the Court's characterization of disgorgement in *Kokesh*.

72. *See, e.g.*, FTC v. BurnLounge, Inc., 584 Fed. App'x. 315 (9th Cir. 2014). While the FTC is authorized to seek "the refund of money or return of property, [or] the payment of damages" to redress unfair or deceptive trade practices 15 U.S.C. § 57b(b) (2018), the FTC has also sought disgorgement under its 15 U.S.C. § 53(b) authority in cases involving false advertisement (which does not specifically authorize disgorgement). *See, e.g.*, *BurnLounge*, 584 Fed. App'x. at 317.

73. M. Sean Royall, *Antitrust & Competition Policy—Federal Trade Commission*, WLF LEGAL PULSE (July 10, 2017), http://wlflegalpulse.com/2017/07/10/will-kokesh-v-sec-put-a-kink-in-the-federal-trade-commissions-disgorgement-hose [http://perma.cc/8NQT-PEV2].

74. FTC v. Bronson Partners, LLC., 654 F.3d 359, 372-73 (2d Cir. 2011).

75. *See Policy Statement on Monetary Equitable Remedies—Including in Particular Disgorgement and Restitution*, FTC (July 21, 2003) [hereinafter 2003 Policy Statement], http://www.ftc.gov/public-statements/2003/07/policy-statement-monetary-equitable-remedies-including-particular [http://perma.cc/6JGM-JQEQ].

76. FTC v. Febre, 128 F.3d 530, 537 (7th Cir. 1997).

77. *See, e.g.*, United States v. Local 1804-1, Nos. 90 Civ. 0963, 90 Civ. 5618, 1993 WL 77319 (S.D.N.Y. Mar. 15).

78. *See, e.g.*, Commodity Futures Trading Comm'n v. Sidoti, 178 F.3d 1132 (11th Cir. 1999).

79. *See, e.g.*, CFPB v. Gordon, 819 F.3d 1179 (9th Cir. 2016).

80. *See, e.g.*, United States v. Morgan Stanley, 881 F. Supp. 2d 563 (S.D.N.Y 2012).

81. *See, e.g.*, United States v. Universal Mgmt. Servs., 191 F.3d 750 (6th Cir. 1999).

82. *See supra* note 60 and accompanying text.

II. Disgorgement Is a Penalty and a Remedy in Equity

Despite the prognostication of those saying that the Court's recognition of SEC disgorgement as a penalty is incompatible with its status as a remedy in equity, the Court has held otherwise. As this Part details, an analysis of the Court's doctrine strongly supports the claim that disgorgement is an equitable remedy. The Court has recognized that "penalty" is "a term of varying and uncertain meaning."[83] That is, what may be labeled a penalty for one purpose may be construed differently in other contexts. As the *Kokesh* opinion recognizes, even a private action for restitution—which the *Kokesh* Court implies is a proto-typical equitable action—may be labeled penal in some circumstances.[84] It is, therefore, inappropriate to assume that what is a "penalty" for the purposes of § 2462 is also as "civil penalty" as it was understood by the Court in *Tull v. United States*, and thus unavailable in equity.[85]

A. There Are Penalties in Equity

The decision in *Tull* provides strong reasons to reject not only that conflation of "penalty" and "civil penalty," but also the broader contention that disgorgement is not an equitable remedy. In *Tull*, the Court decided whether the Seventh Amendment guarantees a jury trial to determine liability in actions by the Government seeking civil penalties and injunctive relief under the Clean Water Act. In arguing that a jury trial was not necessary, the Government sought to analogize the civil penalties to the equitable remedy of disgorgement.

Justice Brennan, writing for the Court, rejected this argument, offering an explanation of direct relevance to the issues raised by *Kokesh*. First, Justice Brennan agreed with the Government that "disgorgement of improper profits [is] traditionally considered an equitable remedy."[86] He elaborated by explaining that a "court in equity was empowered to provide monetary awards that were incidental to or intertwined with injunctive relief."[87] Second, he noted that "[a]n action for disgorgement of improper profits is, however, a poor analogy" for the sorts of civil penalties imposed by § 1319(d) of the Clean Water Act.[88] The reason, he explained, is that disgorgement is "a more limited form of *penalty* than a civil fine."[89] In contrast to a civil penalty, which may be set at whatever

83. Life & Cas. Ins. Co. of Tenn. v. McCray, 291 U.S. 566, 574 (1934).

84. Kokesh v. SEC, 137 S. Ct. 1635, 1642 (2017) (citing Huntington v. Attrill, 146 U.S. 657, 667 (1892)).

85. Tull v. United States, 481 U.S. 412 (1987).

86. *Id.* at 424.

87. *Id.*

88. *Id.*

89. *Id.* (emphasis added).

value Congress determines,[90] disgorgement is "limited to the restoration of the status quo."[91]

Justice Brennan's argument is consistent both with the determination that disgorgement is equitable in nature and the holding in *Kokesh*. The *Kokesh* Court adopted a broad definition of "penalty" as "a 'punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws.'"[92] This definition, the Court said, gives rise to two principles that guide the construal of the word "penalty" in § 2462: a sanction is a penalty if (1) the "wrong sought to be redressed is a wrong to the public" as opposed to a "wrong to the individual"; and (2) the sanction "is sought 'for the purposes of punishment, and to deter others from offending in like manner'—as opposed to compensating a victim for his loss."[93] The Court sharply qualified the second principle, explaining that something may be both compensatory and a penalty, since "sanctions frequently serve more than one purpose."[94]

The *Tull* Court did not dispute that disgorgement would have been available to the Government as a possible remedy. Instead, the Court dealt with the Government's disgorgement comparison by noting that the Government did not, in fact, seek anything remotely like disgorgement.[95] It is true that the district court's calculation of the damages (multiplying profit per lot by the number of lots)[96] resembled disgorgement. But what matters for the Seventh Amendment analysis at issue in *Tull* is not which remedies were *awarded*, but which remedies were *sought*.[97] The opinion strongly implies the order would have been granted if the Government had confined the remedies sought in *Tull* to an injunction and disgorgement of profits.

The *Kokesh* criteria for penalties would have been met if the Government had merely sought disgorgement of profits in *Tull*. First, the conduct of the *Tull* defendants was a "wrong to the public."[98] Justice Brennan provided a detailed comparison of the facts in *Tull* to the public nuisance doctrine.[99] Throughout, the Court's working definition of a public nuisance was "an act or omission which obstructs or causes inconvenience or damage *to the public*."[100] Second, the public nature of the offense means that if the Government had sought only

90. *See id.* at 422.
91. *Id.* at 424.
92. *Kokesh*, 137 S. Ct. at 1642 (quoting Huntington v. Attril, 146 U.S. 657, 667 (1892)).
93. *Id.* (quoting *Huntington*, at 667, 668).
94. *Id.* at 1645 (quoting Austin v. United States, 509 U.S. 602, 610 (1993)).
95. *Tull*, 481 U.S. at 424.
96. *Id.* at 415-16.
97. *Id.* at 417-18 ("[W]e examine the remedy *sought* and determine whether it is legal or equitable in nature." (emphasis added)).
98. Kokesh v. SEC, 137 S. Ct. 1635, 1642 (2017).
99. *See Tull*, 481 U.S. at 420-24.
100. *Id.* at 420 (emphasis added) (quoting W. PROSSER, LAW OF TORTS 583 (4th ed. 1971)).

disgorgement, it would not have been compensatory.[101] And finally, the district court implied that disgorgement would serve the aims of retribution and deterrence, in addition to restitution. In particular, it responded to statutory instructions to consider these diverse aims by constructing a remedy identical in effect to disgorgement.[102] Disgorgement for the conduct at issue in *Tull*, then, would be both presumably permissible (as an equitable remedy) *and* penal under the criteria laid out in *Kokesh*.

Reading *Tull* and *Kokesh* together, a consistent principle can be derived: while disgorgement is a penalty because it is sought for a violation of a public law and with the intention to punish the wrongdoer, it remains equitable in nature so long as the goal of restoring the status quo retains priority. Determining that such priority is maintained requires not a search into the subjective intentions of the court or the agency, but rather a confirmation that the amount disgorged is capped at the actual amount of improper profits obtained through the illicit action.

B. Disgorgement Can Be Equitable and "Noncompensatory"

While *Tull* suggests that the "no penalties in equity" argument is unlikely to succeed, some might read the Court's cases as indicating that SEC disgorgement cannot be equitable as long as it is noncompensatory. In fact, the *Jalbert* complaint advances this idea, which suggests that disgorgement is most problematic where noncompensatory.[103] The strongest argument that disgorgement must be compensatory—and one that is absent in the *Jalbert* complaint—is that the language in *Tull* suggests disgorgement must be restitutional in nature. While Justice Brennan in *Tull* emphasized that disgorgement must be "limited to the restoration of the status quo" to be equitable, he also referred to disgorgement as "a remedy only for restitution."[104] In the next line, he quoted *Porter v. Warner Holding Co.* for the proposition that "[r]estitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.'"[105]

Such language might lead one to conclude that the sort of action the Court recognizes as both equitable and statutorily authorized by the Clean Water Act is inapposite to the type of disgorgement at issue in *Kokesh*, since, as Justice Sotomayor noted, "in many cases, SEC disgorgement is not compensatory."[106] As she explained, "the disgorged profits are paid to the district court, and it is

101. *See infra* note 116 and accompanying text.

102. *Id.* at 415-16, 422 (discussing the resemblance of the remedy imposed to disgorgement and outlining the relevant statutory criteria).

103. Class Action Complaint at 10, Jalbert v. SEC, No. 1:17-cv-12103 (D. Mass. Oct. 26, 2017).

104. Tull v. United States, 481 U.S. 412, 424 (1987).

105. *Id.* (quoting Porter v. Warner Holding Co., 338 U.S. 395, 402 (1946)).

106. *Kokesh*, 137 S. Ct. at 1644.

'within the court's discretion to determine how and to whom the money will be distributed.'"[107] While the disgorged funds are often paid to victims, some are dispersed to the U.S. Treasury. A careful analysis, however, reveals that *Tull* and *Porter* do not make compensation a necessary element of equitable relief.

As a formal matter, the principle derived from *Tull* does not require that SEC disgorgement be "compensatory" in order to be equitable. So long as it remains limited to "restoring the status quo"—that is, capped at actual profits—then it remains equitable.[108] More problematic might be the implication that disgorgement also be limited to "ordering the return of that which rightfully belongs to the purchaser or tenant."[109] One reading of this line suggests that disgorgement must be tied to particular claims for restitution. Such an understanding, however, is unsupported by *Porter v. Warner Holding Co.*,[110] the case that first recognized disgorgement as an equitable remedy and from which the quoted line originates.

In *Porter*, the Court explicitly offers "two theories" for finding disgorgement to be within the equity jurisdiction given to the district court by the Emergency Price Control Act,[111] either of which, the Court says, would be sufficient on its own.[112] Under the first theory, disgorgement is justified as a means of deciding all the various restitution claims that could otherwise be brought as independent suits.[113] Such a justification is in tension with the sort of "noncompensatory" disgorgement discussed by the Court in *Kokesh*. The second theory, however, perfectly aligns with SEC disgorgement. Under the second theory, disgorgement derives not from the accumulation of private claims, but rather from Congress's understanding that by leaving courts with the ability to "adapt[] appropriate equitable remedies to specific situations," courts will be able "to protect the public interest" and "enforce compliance with the Act."[114] Noting that "[f]uture compliance may be more definitely assured if one is compelled to restore one's illegal gains," the Court determined that the type of disgorgement sought by the Administrator of the Office of Price Administration is thus authorized by the grant of equity jurisdiction to the district court.

In light of this second theory, it would be wrong to equate *Porter* with the proposition that disgorgement is only proper if the profits are returned to victims.

107. *Id.* (quoting SEC v. Fischbach Corp., 133 F.3d 170, 175 (2d Cir. 1997)).

108. *Tull*, 481 U.S. at 424 (quoting *Porter*, 328 U.S. at 402).

109. *Id.*

110. 328 U.S. 395 (1946).

111. The case involved a company that was charging rents on apartments in excess of those permitted by the rent regulations issued under the Emergency Price Control Act. The Administrator of the Office of Price Administration brought an action to restrain the company from continuing to exceed the regulated price ceiling, invoking the provision of the Act authorizing the Administrator to apply "to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision," including "a permanent or temporary injunction, restraining order, or other order." *Id.* at 346 (quoting the Emergency Price Control Act, 77 Cong. Ch. 2656, § 925(a), 56 Stat. 23, 33 (1942)).

112. *Porter*, 328 U.S. at 399.

113. *Id.*

114. *Id.* at 400.

Further, it is clear that the *Tull* Court did not intend to cite it as such, as the sort of disgorgement sought by the EPA in *Tull* would not have been compensatory either. As already discussed, the Court in *Tull* acknowledged that disgorgement could have been sought under the Clean Water Act. The Court clearly implied that the disgorgement that could have been sought would be for whatever profits the defendant earned through filling in the properties at issue in violation of the Clean Water Act's prohibition on filling material into wetlands adjacent to navigable waters.[115] There is no particular victim to whom the unlawful profits can be returned for such a violation. Thus, it is most likely that the profits would have been dispersed into the Treasury. In fact, in at least some modern EPA disgorgement cases, it has been the practice of the Government to direct disgorged profits to the Treasury.[116]

For these reasons, the action in *Kokesh* fits very closely with the theories of disgorgement presented in both *Tull* and *Porter*. These cases, read together, reinforce that idea that disgorgement is an appropriate remedy in equity so long as its priority is restoring the status quo, regardless of penal or noncompensatory nature. As such, the "no penalties in equity" challenge is largely without support in the doctrine.

One response to the foregoing argument is that it invokes reasoning that appears, arguably, as dicta in opinions that are decades old. Defining both what constitutes dicta and assessing dicta's precedential relevance raises questions that are perhaps unresolvable,[117] but it is true that the modern Court could distance itself from the analysis offered above without fully overruling either *Porter* or *Tull*. *Porter*'s language suggesting that a noncompensatory remedy could be equitable involved the direct restitution of excessive rents to those that paid them.[118] And *Tull*, while acknowledging disgorgement as both a penalty and an equitable remedy, ultimately found the remedy at issue to be a civil penalty.[119] Thus, one might reasonably assert that the full force of stare decisis does not apply here.

While that may be true, it does not undermine the core of this Note's argument, which is that the current state of the doctrine does not support the "no penalties in equity" line of argument. Rather, a stable and coherent case law has developed around the concept of disgorgement that acknowledges both its equitable and penal characteristics. *Kokesh*, as this Note has shown, is consistent

115. *See Tull*, 481 U.S. at 423 ("In the present case, for instance, the District Court acknowledged that petitioner received no profits from filling in properties in Mire Pond and Eel Creek, but still imposed a $35,000 fine. Thus, the District Court intended not simply to disgorge profits but also to impose punishment." (citation omitted)).

116. *See, e.g.*, Consent Decree at 15-16, United States v. Accolade Constr. Grp., No. 15 Civ. 5855 (S.D.N.Y. Sept. 27, 2017). That this is the modern practice suggests, but does not confirm, that the same practice was employed two decades ago.

117. *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 991-94 (2005) (summarizing issues with distinguishing holdings from dicta).

118. *See* Porter v. Warner Holding Co., 328 U.S. 395, 396 (1946).

119. *See Tull*, 481 U.S. at 424.

with this case law. Once placed in this context, the argument that claims to invalidate SEC disgorgement merely by pointing to the language of *Kokesh* is revealed to be facile. The case law that provides the background to any modern evaluation of disgorgement is fully compatible with an interpretation of the SEC's statutory grant that includes the authority to pursue disgorgement. We next offer such an interpretation.

III. The Affirmative Case for SEC Disgorgement

This Note has so far provided reasons to doubt the doomsayers who claim that the Court is preparing to remove disgorgement from the set of tools available to agencies authorized to seek equitable remedies. Since precedent establishes that penalties with the factors identified in *Kokesh* can still be equitable, the sky is not falling for disgorgement. Still, while the *Tull* Court said that disgorgement is equitable, the statement is, arguably, in dicta. It remains to make an affirmative argument that the SEC is statutorily authorized to seek disgorgement under its equitable authority. In contrast to Part II, this Part does not only argue that the Court's doctrine is compatible with the SEC pursuing judicial disgorgement. Rather, it argues that that such disgorgement has been affirmatively authorized by statute.

This Part addresses the affirmative case by first explicating the broader framework of the Court's doctrine on equitable remedies. The Court understands a grant of equitable jurisdiction within a statutory scheme as generating a presumption that the bounds of the available remedies are to be set through analogical reasoning rooted in the historical principles of equity. But analogy on its own does not determine the meaning of a statutory provision. The presumption must be weighed against other signals of legislative intent. After setting out the general framework for how these different aspects of interpretation interact, this Part examines the strong evidence that Congress has ratified the SEC's pursuit of judicial disgorgement. This congressional endorsement of SEC disgorgement provides convincing support that the remedy is statutorily authorized.

A. The Court's Doctrine on the Boundaries of Equity

While *Tull* and *Porter* arguably endorsed the equitable bona fides of disgorgement, some might argue that intervening opinions have inaugurated a new, more originalist method of reasoning about equity that limits those cases' precedential relevance.[120] This Section argues that such an interpretation of

120. *See, e.g.*, Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1014 (2015); Randolph J. Haines, *The Conservative Assault on Federal Equity*, 99 AM. BANKR. L.J. 451, 457-59 (2014); Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 34 (2004). Note that this originalism is not of the textualist sort, as there is no text guiding these originalist determinations. Instead, it is a "functionalist originalism" that seeks to limit the power of the courts to the

modern equity doctrine assumes more has changed than is true. A more careful look at the Court's methodology reveals a continued commitment to a dynamic, if interstitial approach to equity. Under this flexible approach, which combines historical analysis with statutory interpretation, the SEC is authorized to seek judicial disgorgement.

1. The Search for Equity in Historical Analogies

Although references to cases "in equity" can be found in documents as old and foundational as the Constitution[121] and the Judiciary Act of 1798,[122] neither Congress nor the courts have ever provided a firm definition of what "in equity" means.[123] Instead, the Supreme Court has consistently looked to history for inspiration. In *Atlas Life Insurance Co. v. W.I. Southern, Inc.*, the Court explained that the jurisdiction "to entertain suits in equity is an authority to administer in equity suits the *principles of the system of judicial remedies* which has been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."[124]

The operative word in this flexible definition is "principles," implying a method of reasoning akin to the measured and thoughtful development of common law. Such development, in fact, characterized the history of equity, which "grew interstitially, to fill in the gaps of substantive common law . . . and to provide a broader array of remedies."[125]

This typical approach—dynamic, yet historically bound—is reflected in *Tull*. Justice Brennan began his analysis of whether civil penalties could be equitable by "compar[ing] the statutory action to the 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity."[126] But, in making that comparison, the Court made a point to specify that it need not engage in "an 'abstruse historical' search for the nearest 18th-century analog."[127] Instead, the Court "reiterate[d] [its] previously expressed view that characterizing the relief sought" through a method of historical, analogical reasoning is the ultimate goal.[128]

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functional equivalent of the power held by eighteenth-century courts—an instance of "originalism without text." *See* Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156 (2017).

121. U.S. CONST. art. III, § 2, cl. 1.

122. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73; 28 U.S.C. § 41(1) (2018).

123. Richard H.W. Maloy, *Expansive Equity Jurisprudence: A Court Divided*, 40 SUFFOLK U. L. REV. 641, 641 (2006).

124. 306 U.S. 563, 568 (1939).

125. Stephen N. Subrin*, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 920 (1987).

126. Tull v. United States, 481 U.S. 412, 417 (1987).

127. *Id.* at 421 (citing Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970)).

128. *Id.* (citing Curtis v. Loether, 415 U.S. 189, 196 (1974)).

2. Analogy or Identity?

The skepticism implied by the Court that one can fruitfully engage in such an "abstruse historical" inquiry is justified. As some scholars have pointed out, equity has a long history, full of contradictory determinations, essentially making any claim to what was or was not allowed by equity inherently questionable.[129] Still, the sort of analogical thinking alluded to through the Court's various opinions admits degrees of deference to the past; and some, most notably Justice Ginsburg, have pointed to more recent opinions as inaugurating a level of deference to the past so severe so as to render equity "frozen in time."[130]

The case towards which Justice Ginsburg addressed her criticisms was *Grupo Mexicano*, which involved a Mexican holding company near insolvency that allegedly transferred a number of its assets to escape the claims of its international bondholders.[131] A group of bondholders sued in federal court and sought, in addition to damages, a preliminary injunction freeing unrelated assets that the company would likely need to satisfy a monetary judgment.[132] Writing for a divided Court, Justice Scalia concluded that this sort of injunction was beyond the authority of the district court since such remedies were unknown to equity in 1789.[133]

To look toward history is, of course, not new. But Justice Scalia demanded something more stringent than analogy, asking instead "whether the relief respondents requested here *was* traditionally accorded by courts of equity."[134] While the analysis that followed did entertain a proposition from the Government's amicus brief that the sort of preliminary injunction sought was analogous to certain applications of a "creditor's bill," Justice Scalia essentially required not analogy but identity.[135] He rejected the Government's suggestion on the basis that it would require the Court to "speculate upon" whether the present case would have qualified for the particular relevant exceptions allegedly available in equity.[136]

Justice Scalia also explicitly rejected the approach defended by Justice Ginsburg's dissent, which argued for a more flexible approach to equity.[137] In a dissent emphasizing "principles" and "aims," Justice Ginsburg championed a "dynamic equity jurisprudence" and argued that, in contrast to other "contemporary adaptations of equitable remedies," the injunction sought in the

129. *See* Bray, *supra* note 120, at 1016-17; *see also* Martin Krygier, *Law as Tradition*, 5 L. & PHIL. 237, 242 (1986) ("[T]he past speaks with many voices.").

130. Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 334 (2004).

131. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308 (1999).

132. *Id.* at 312.

133. *Id.* at 333.

134. *Id.* at 319 (emphasis added).

135. *Id.* at 320-21.

136. *Id.*

137. *Id.* at 321-22.

case "was a modest measure."[138] Pointing to various earlier decisions, Justice Ginsburg noted that the majority's static conception of equity broke with past precedent.[139] The Court's apparent rejection of the more dynamic approach to equity is particularly problematic given the second theory of disgorgement offered in *Porter*, which relies heavily on broader considerations of congressional purpose.[140] A shift toward a strictly historical approach would seem to cast the value of that precedent in doubt.

3. Analogy Plus Principles of Statutory Interpretation

A broader review of Justice Scalia's argument as well as subsequent opinions of the Court reveals this concern to be unfounded. First, even in Justice Scalia's *Grupo* opinion, he hedged on the frozen nature of equity, acknowledging that "equity is flexible."[141] Further, in building his allegedly "historical" account of equity in 1789, Justice Scalia relied heavily on the Court's own opinions from the nineteenth and twentieth centuries.[142] While Samuel Bray has referred to this move as the construction of an "artificial history,"[143] it can more accurately be described as the standard precedential reasoning that typifies the Court's jurisprudence.

The survival of the dynamic approach to equity to which Justice Ginsburg referred can be more vividly and relevantly seen in *McCutchen*, the latest in a line of cases interpreting the ERISA's statutory provisions that grant courts authority to issue injunctions and "other appropriate equitable relief."[144] The case is of particular relevance because, unlike in *Grupo Mexicano*, the equity power utilized by the district court in both the ERISA and SEC disgorgement context is linked to a specific statutory grant. As a result, the resolution of what sort of equity powers are authorized is more plainly a question of interpretation—in contrast to the methodology in *Grupo Mexicano*, which treats equity as "an independent body of law that is binding . . . of its own force."[145]

The statutory origins of the equity authorization recommend a mode of interpretation that treats phrases like "equitable relief" or "in equity" as one would any other piece of statutory language.[146] The Court's statutory

138. *Id.* at 336-37 (Ginsburg, J., dissenting).

139. *Id.*

140. Porter v. Warner Holding Co., 328 U.S. 395, 399 (1946).

141. *Grupo Mexicano*, 527 U.S. at 322.

142. *Id.* at 320 (citing various nineteenth and twentieth century cases on the availability of a creditor's bill in equity case).

143. *See* Bray, *supra* note 120, at 1018.

144. U.S. Airways, Inc. v. McCutchen, 569 U.S. 88 (2013) (interpreting 29 U.S.C. § 1132(a)(3) (2018)).

145. Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 220 (2018).

146. Note, however, that while Congress's intention is the decisive factor for determining what remedies were included within a grant of "equitable remedies," the Court ultimately decides whether a suit is "at common law" for the purpose of the Seventh Amendment. *See* Thompson v. Cent. Ohio R.R. Co., 73 U.S. (6 Wall.) 134 (1868).

interpretation methodology is typified by the use of "canons of statutory interpretation," various rules and presumptions for construing the meaning of the text.[147] One important set of canons resembles the Court's approach to equity in general. These are the "common law canons," which are grounded in the presumption "in favor of following common law usage where Congress has employed words or phrases with well-settled common law traditions."[148] But, as Justice Scalia and Bryan Garner, explained, "[n]o canon of interpretation is absolute," as "[e]ach may be overcome by the strength of differing principles that point in other directions."[149] Specifically, the Court has explained that a "statutory term" will not be "given its common-law meaning, when that meaning is . . . inconsistent with the statute's purpose."[150] Carrying this methodology over to equity, the Court would be expected to interpret authorizations of equitable remedies in a statute by considering both the historical understanding of the terms *and* other factors, such as precedent and the greater statutory scheme.[151]

This multi-factor approach is evident in *McCutchen*, leading to a much more dynamic and purpose-driven approach to equity than is suggested by Justice Scalia's static conception in *Grupo Mexicano*. Writing for the Court, Justice Kagan joined "historical analysis" with a consideration of ERISA's "statutory scheme" to reject the argument that an equitable doctrine meant to prevent unjust enrichment could override the terms of an ERISA plan.[152] However, while the Court determined that "equitable rules" could not "trump" the statutory plan, it also said that they may be considered in "properly construing" what the statute demands.[153] Through an analysis that considered the "rationale" of a particular equitable remedy, the Court essentially delivered the same result as if it had not rejected the argument based on unjust enrichment.[154] *McCutchen* quite plainly embodies the dynamic and principles-driven approach to equity that has long typified the Court's methodology.

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147. *See generally* WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION (2016) (providing an overview of the Court's use of canons in statutory interpretation).

148. *Id.* at 431.

149. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 59 (2012).

150. Taylor v. United States, 495 U.S. 575, 594 (1990).

151. This interpretive methodology of weighing substantive presumptions—such as the content of equity—against indicators of congressional intent can be cognized in different ways. One theory understands statutory interpretation as being governed by its own common law, formed in the shadow of policy considerations. This "common law of statutory interpretation" is "comparable to, for example, the common law of contracts, which has developed its own interpretive regimes." Daniel B. Listwa, Comment, *Uncovering the Codifier's Canon: How Codification Informs Interpretation*, 127 YALE L.J. 464, 470-71 (2017). On a more practical level, this system had been described as governed by "clear statement rules," which are presumptions that can be displaced by clear statements of congressional intent. These rules function like default rules in contracts, helping to fill gaps in the drafting. Clear statement rules are discussed further in the next Section.

152. US Airways, Inc. v. McCutchen, 569 U.S. 88, 100 (2013).

153. *Id.* at 101.

154. *Id.* at 105.

The Court, in other words, has not eschewed reliance on past opinions in favor of novel, historical investigations into the courts of 1798, nor has it abandoned the dynamic approach toward equity that has long characterized its decisions. Thus, it would be mistaken to assume that the Court in analyzing SEC disgorgement would toss out precedents like *Tull* and *Porter*. It is much more likely that the Court will engage in a mode of interpretation that considers these precedents in light of the statutory scheme and other markers of statutory meaning. As outlined in the next Section, such an analysis affirms the authorization of SEC disgorgement, for Congress has implicitly ratified the SEC's ability to seek disgorgement in court, most pointedly in the Sarbanes-Oxley Act and the Dodd-Frank Act. The Court would certainly consider this fact very persuasive if not dispositive.

B. Statutory History Supports SEC Disgorgement in Court

The previous Section argued that the Court would not turn merely to an originalist, historical analysis in addressing the question of whether the SEC may pursue judicial disgorgement. Rather, it will give weight to both its own precedent and the relevant statutory scheme. As Part II argued, the Court's precedent already lays out a strong case in favor of finding disgorgement to be an equitable remedy. For this reason, the historical bounds of equity generate only weak presumptive weight against the more inclusive statutory authorization explicated here. This Section turns to that statutory context, which provides the strongest support for the contention that SEC disgorgement is authorized.

The substantive statutes enforced by the SEC provide persuasive evidence in favor of judicial disgorgement. In *Tull*, the Court recognized that disgorgement under the Clean Water Act would have been authorized through a provision allowing courts to impose equitable remedies.[155] The authorization of disgorgement in the SEC context is far less oblique. In *Texas Gulf Sulphur*, the Second Circuit relied on the grant of general equity power to the district court in § 27 of the Securities Exchange Act of 1934 (SEA).[156] By the 1980s, congressional documents recognized this power, with one House report specifically stating that "the Commission may request that the court order certain equitable relief, such as the disgorgement (giving up) of illegal profits."[157] This understanding guided subsequent amendments to the SEC's power, including the

155. The Clean Water Act provided separately for both civil penalties under § 1319(d) and injunctive relief under § 1319(b). The Court acknowledged that a "court in equity was empowered to provide monetary awards that were incidental to or intertwined with injunctive relief," and thus agreed that "§ 1319(b), which authorizes injunctive relief, provides jurisdiction for monetary relief in equity." Tull v. United States, 481 U.S. 412, 425 (1987).

156. SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1307 (2d Cir. 1971).

157. H. REP. No. 98-355, at 7 (1983).

grant of authority to the SEC to seek disgorgement in administrative proceedings.[158]

More recently, Congress ratified the SEC's authority to seek judicial disgorgement in the text of the Sarbanes-Oxley Act (SOX), which explicitly acknowledges the remedy's availability.[159] Section 308 of SOX specifically discusses adding civil penalties to "disgorgement funds," which the Act describes as the funds created through a "judicial or administrative action" in which "the Commission obtains an order requiring disgorgement."[160] These provisions are an unambiguous statutory ratification of SEC's authority to seek disgorgement in court. SOX also gave authority for "any equitable relief that may be appropriate or necessary for the benefit of investors"[161]—a legislative action seen as intended to remove lingering doubts about disgorgement's legitimacy.[162]

Further support is provided by the Dodd-Frank Act, which both implicitly recognizes the SEC's ability to pursue a noncompensatory form of disgorgement and explicitly authorizes disgorgement for violations of the Commodity Exchange Act. Although it applies to the Commodity Futures Trading Commission (CFTC) and not the SEC, the amendment to the Commodity Exchange Act makes fully unambiguous Congress's intention that disgorgement be a part of a court's equitable jurisdiction.[163] The statute specifies that "the Commission may seek, and the court may impose . . . equitable remedies including . . . disgorgement of gains received in connection with [a] violation."[164] Further, the statutory text strongly suggests that disgorgement need not be compensatory, as it separately authorizes "restitution to persons who have sustained losses proximately caused by such violation," as distinct from disgorgement.[165] Similar language appears in the section of the statute delineating the relief available to the Consumer Finance Protection Bureau, where it authorizes disgorgement alongside such distinct remedies as restitution, refunds, and payment of damages.[166] These authorizations of disgorgement as an

158. S. REP. 101-337, at 10 (1990) ("The SEC's primary statutory remedy for securities law violations has been the civil injunction, together with such ancillary relief (especially disgorgement . . .).").

159. Sarbanes-Oxley Act of 2002, Pub. L. 107-204 § 308, 116 Stat. 779 (describing funds created through a "judicial or administrative action" in which "the Commission obtains an order requiring disgorgement").

160. *Id.* § 308.

161. Sarbanes-Oxley Act § 305(b), 15 U.S.C. § 78u(d)(5) (2012).

162. Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 BUS. LAW 317, 326 (2008).

163. Note that a district court recently relied on this explicit authorization to reject a challenge, based on footnote three of *Kokesh*, that the CFTC may not pursue disgorgement. CFTC v. Reisinger, No. 11-CV-08567, 2017 WL 4164197 at *4 (N.D. Ill. Sept. 19, 2017).

164. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 743, 124 Stat. 1376, 1735 (2010) (codified at 7 U.S.C. § 13a-1(d)(3) (2018)).

165. *Id.*

166. *Id.* § 1055 (codified at 12 U.S.C. § 5565(a)(2) (2018)).

equitable and noncompensatory remedy clearly evidence a congressional expectation that the SEC be able to seek a similar remedy.

The Dodd-Frank Act's discussion of the SEC's ability to pursue disgorgement reinforces this expectation. For example, the Act establishes the "Investor Protection Fund" to pay awards to whistleblowers and fund specified activities of the Commission's Inspector General.[167] In discussing sources the SEC can use to support this Fund, the Act identifies "any monetary sanction added to a disgorgement fund . . . that is not distributed to the victims."[168] This language implies that not all disgorgement need be compensatory. This statutory reference to the SEC's use of disgorgement should be read in conjunction with the Act's explicit authorization of the CFTC to seek disgorgement, which it refers to as an equitable remedy, and the similar authorization granted to the CFPB. Together, they reveal a congressional expectation that the SEC already possesses the authority to exercise the disgorgement remedy.

The statutory context makes plain that Congress has crafted the securities-law statutes with the understanding the SEC could seek disgorgement. The Court has consistently held that such a subsequent congressional ratification of a particular interpretation of the text is both relevant and persuasive.[169] For example, in *Brown & Williamson Tobacco*, the Court determined that Congress did not intend for tobacco to be within the FDA's jurisdiction as a drug—despite clearly falling within the relevant statute's definition of "drug"—because Congress had developed a separate statutory scheme for tobacco that presumed the FDA did not have jurisdiction.[170] This case presents the opposite fact pattern, with the statutory grant baked into the SEC's own substantive statutes.[171] Accordingly, *Brown & Williamson Tobacco* provides a strong precedent in favor of implied authorization.[172] In other words, by the Court's interpretive methodology, Congress has statutorily ratified the SEC's authority to pursue judicial disgorgement.

Given the strength of the evidence in favor of Congress's intention to authorize the SEC to pursue judicial disgorgement, the Court could only decide to hold disgorgement unavailable if it were willing to do so in the face of congressional intent. Rarely does the Court intentionally defy congressional

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167. *Id.* § 922 (codified at 5 U.S.C. § 706(g)(2) (2012)).

168. *Id.* (codified at 5 U.S.C. § 706(3)(A)(iii) (2012)).

169. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000); Babbitt v. Sweet Home Chap. of Cmtys. for a Great Or., 515 U.S. 687, 697 (1995).

170. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 144.

171. In fact, more than simply presuming disgorgement, Congress has affirmatively included language in the statute endorsing both the SEC's ability to pursue disgorgement and the remedy's status as equitable. This distinction is significant given the Supreme Court's discomfort with assuming Congress is aware of lower court—as opposed to Supreme Court—interpretations. *See* Lightfoot v. Cendant Mortg. Corp., 137 S. Ct. 553, 563 (2017). That said, even in the absence of the sort of express language found here, the Court has given significant weight to unbroken lines of lower court decisions when inferring congressional acquiescence. ESKRIDGE, *supra* note 147, at 422.

172. *See* ESKRIDGE, *supra* note 147, at 422.

expectations when interpreting a statute. When the Court does defy expectation, it generally does so through "clear statement rules." Where the Court has introduced some substantive policy presumption, it will read statutes as consistent with that presumption unless there is a "clear statement" on the face of the statute rebutting the presumption.[173] For example, in *EEOC v. Arabian American Oil Co.*, the Court interpreted Title VII—despite its broad wording—such that it did not prohibit U.S. companies from discriminating against minorities employed outside of the territorial jurisdiction, because the statute did not clearly rebut the presumption against the extraterritorial effect of statutes.[174] One could point to the Court's doctrine regarding equity as evidencing a presumption that equity is limited by historical analogy. As such, the Court might demand that any congressional attempt to expand the boundaries of "equitable remedies" be through a clear statement. Arguably, one could read *McCutchen* as reflecting such a clear statement rule. There the Court held that the traditional boundaries of equity applied to the ERISA plan in question absent explicit terms to the contrary.[175]

What constitutes a sufficiently "clear statement" is hard to predict. Generally, the clarity of the statement must be weighed against the strength of the presumption.[176] Sometimes that means eminently clear statements are found to be insufficient. For example, in *Japan Whaling Ass'n v. American Cetacean Society*, the Court held that the Secretary of Commerce was not required to certify Japan's whaling practices as an apparent violation of international agreements.[177] The Court pointed to the language of the statute, which required certification of practices that "diminish[ed] the effectiveness of an international fishery conservation program."[178] This language of "diminish[ed] effectiveness," the Court concluded, was not specific enough to rebut the strong, constitutionally-derived presumption that the executive branch enjoys wide discretion in foreign affairs.[179] The Court was willing to invoke a strained interpretation, which did not accord with legislative history,[180] in order to

173. William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 n.4 (1992).

174. EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); *see also id.* at 615-16 (discussing the case).

175. The context in *McCutchen* was somewhat different from the usual application of a clear statement rule. The Court invoked equity in order to inform its interpretation of the ERISA plan's reimbursement plan, stating that it would assume that equity doctrine provides the default absent language to the contrary. *See* US Airways, Inc. v. McCutchen, 569 U.S. 88, 103 (2013). This is the application of the rule to reconstruct the intent of the parties that negotiated the ERISA plan, as opposed to the intent of Congress.

176. Eskridge & Frickey, *supra* note 173, at 617-19.

177. 478 U.S. 221 (1986).

178. 22 U.S.C. § 1978(a)(1) (2018).

179. *Japan Whaling*, 478 U.S. at 232-33.

180. *See id.* at 247-48 (Marshall, J., dissenting).

maintain what it took to be an important substantive policy—the President's supremacy in foreign affairs.[181]

Admittedly, Congress's ratification of SEC disgorgement through SOX and Dodd-Frank does not constitute the most explicit form of legislative action. It could have, for example, enacted language paralleling the sections of the Dodd-Frank Act that authorize the CFPB and CFTC to use disgorgement. It is conceivable that the Court would decline to follow congressional intention and instead uphold a more tenuous, such that the references to disgorgement merely evidence an intention to regulate how disgorgement operates *if* it is part of a court's historical equitable jurisdiction. But such a text-distorting interpretation would only be justified by a strong, countervailing substantive presumption—one akin to the constitutionally motivated presumption underlying *Japan Whaling*.[182] Such a presumption is simply not warranted in these circumstances.

The presumption that equitable remedies are limited to equity's historical scope does not have the constitutional valence of the substantive presumption underlying the most significant clear statement rules. Further, the Court's doctrine has already recognized that a noncompensatory form of disgorgement is compatible with the concept of equity.[183] In fact, recognizing the legitimacy of SEC disgorgement would be precisely the interstitial, statute-dependent sort of development that typifies the Court's approach to equity. Thus, one could not motivate a strong clear statement rule on the basis of the need to defend prudentially the coherency of equity as a body of law.

The strength of the statutory argument, when placed in context with the Court's flexible approach to equity and its past endorsements of disgorgement, makes clear why arguments that nothing exactly like disgorgement existed in 1789 should not succeed. For example, Francesco DeLuca has argued that none of the three historical analogues to disgorgement offered in *SEC v. Cavanagh*,[184] a leading Second Circuit precedent, is a perfect match.[185] To take just one example from the *Cavanagh* opinion that DeLuca discusses, accounting, a remedy "by which the chancery ordered an accounting of assets that wrongfully gained profits might be recovered,"[186] was only available in cases in which a fiduciary duty was breached—a set of cases narrower than those for which disgorgement is ordered.[187] While this example might suggest that disgorgement as we know it today did not exist, it does little to defeat the notion that disgorgement is aligned with the principles of equity. The Court does not demand

181. *See* Eskridge & Frickey, *supra* note 173, at 617.

182. 478 U.S. 221.

183. *See supra* Part II.

184. 445 F.3d 105 (2d Cir. 2006).

185. Francesco A. DeLuca, *Sheathing Restitution's Dagger Under the Securities Acts: Why Federal Courts Are Powerless to Order Disgorgement in SEC Enforcement Proceedings*, 33 REV. BANKING & FIN. L. 899, 913-20 (2014).

186. *Cavanagh*, 445 F.3d at 119.

187. DeLuca, *supra* note 185, at 915.

perfect analogies when shaping modern equity doctrine. Likewise, the imperfection of existing analogies does not justify defeating the plain meaning of congressionally enacted statutes.

The affirmative argument for SEC disgorgement is thus quite strong. As such, the Court should—and likely would—uphold that disgorgement represents an equitable and statutorily authorized remedy. But that does not imply that the SEC should not be concerned by *Kokesh*. The Court could confirm that the SEC has the authority to pursue disgorgement but deny that the sort of remedies that the SEC has been seeking—and calling disgorgement—can appropriately be labeled as such. Part IV explores this possibility, analyzing the limits to disgorgement suggested by the Court's decision in *Kokesh*.

IV. *Kokesh* as a Check on SEC Aggression

Litigation on the SEC's statutory authority to seek disgorgement has already begun, but, as argued in Parts II and III, this litigation in unlikely to result in the end of SEC disgorgement. More immediate will be *Kokesh*'s impact on the SEC's aggressive campaign to push the boundaries of how disgorgement is calculated. Although court watchers or practitioners have yet to discuss it, the dicta in *Kokesh* resolved a circuit split on an issue that was not even briefed: whether a defendant can be disgorged of illicit gains made by others based on the defendant's illicit actions. But rather than representing a mere instance of far reaching dicta, the Court's decision to address these questions ought to be understood in a broader institutional context. Specifically, the SEC should understand *Kokesh* to be a warning that its aggressive interpretation of its powers has exceeded the boundaries of deference.

A. The SEC's Nonacquiescence Before Kokesh

The dicta in question struck at the SEC's campaign to chip away at a decades old precedent. In a 1978 decision, *SEC v. Blatt*, the Fifth Circuit limited disgorgement in an SEC enforcement action to "the amount of the fee realized by each defendant for his assistance in executing the fraud."[188] In *Blatt*, two attorneys traded shares on the basis of inside information on behalf of their client.[189] While the client made significant profits from the deals, the attorneys received only a fee for the services.[190] The Fifth Circuit determined that in order to keep with the equitable goal of restitution, the two defendant-attorneys may not be disgorged of more than the fee they received for the transactions.[191]

In 2014, the SEC successfully persuaded the Second Circuit to reject the Fifth Circuit's interpretation of the contours of disgorgement. In *SEC v.*

188. 583 F.2d 1325, 1335 (5th Cir. 1978).
189. *Id.* at 1328.
190. *Id.* at 1335.
191. *Id.*

Contorinis, the Second Circuit upheld a trial court order requiring that the managing director of a hedge fund disgorge in excess of $7 million in unlawful profits.[192] This figure represented the entirety of the profits obtained by the fund as a result of the director's trading on material nonpublic information. The director only earned under half a million dollars on the trade personally.[193] In upholding this order, the Second Circuit panel acknowledged that its decision broke with at least some prior holdings, pointing specifically to *Blatt*'s limitation on disgorgement to a defendant's "personal gain."[194] Outweighing whatever persuasiveness the Fifth Circuit's opinion may have had, the court determined that so limiting disgorgement amounts "would run contrary to the equitable principles that the wrongdoer should bear the risk of any uncertainty affecting the amount of the remedy," explaining that limiting the disgorgement amount to direct pecuniary benefit would fail to capture what indirect or intangible benefits the defendant obtained.[195]

The decision in *Contorinis* vastly expanded the power of the SEC's disgorgement tool—an augmentation the SEC was quick to seize upon. In the months following the Second Circuit's decision in *Contorinis*, the SEC sought to apply its principle in a number of cases—most notably *SEC v. Megalli*.[196] Like *Contorinis*, *Megalli* involved a trader at a hedge fund who was found to have executed a trade on the basis of material nonpublic information, and also like in *Contorinis*, the SEC sought to disgorge from the trader not only his fee tied to the trade, but the entire fund's profits. What makes the case of interest, however, is that it was brought in the Northern District of Georgia—that is, in a district court residing in the Eleventh Circuit, which is bound by the precedents of the former Fifth Circuit.[197]

Puzzlingly, in the SEC's brief in support of its motion for summary judgment, the agency's discussion of the disgorgement remedy exclusively cited Second Circuit case law. Most significantly, it cited *Contorinis* for the proposition that the court has at its discretion the authority to disgorge the "profits generated for a fund for which a defendant directed illegal trades,"[198] but failed to address *Blatt*. Only when prompted by the defendant's brief did the SEC attempt to distinguish the earlier case, improbably stating that it stood "for the proposition that a defendant may not be required to disgorge funds unrelated to the fraud."[199] Unsurprisingly, the district judge rebuffed the SEC's bid to hold

192. 743 F.3d 296, 299 (2d Cir. 2014).

193. *Id.* at 300.

194. *Id.* at 305 n.5.

195. *Id.* at 306.

196. 157 F. Supp. 3d 1240 (N.D. Ga. 2015)

197. *See* Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

198. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 24, *Megalli*, 157 F. Supp. 3d 1240 (No. 1:13-CV-03783).

199. SEC's Reply to Defendant's Response to SEC's Motion for Summary Judgment at 15, *Megalli*, 157 F. Supp. 3d 1240 (No. 1:13-CV-03783).

Megalli responsible for the entire hedge fund's profits, finding the court to be bound by *Blatt*,[200] but the Agency continued to push. In response to the court's request for briefing on civil penalties, the SEC made plain its frustration with the judge for following her circuit's binding precedent, writing: "Yet the Court has decided that [Megalli] may not be ordered to pay [the full amount of the fund's profits]."[201] As a result, the SEC continued, "Defendant Megalli has avoided any meaningful disgorgement order."[202]

These statements reflect the aggressive posture the SEC has taken with regard to disgorgement power[203]—but more specifically they suggest a posture of nonacquiescence. In its usual application, nonacquiescence refers to agencies' selective refusal to conduct their own proceedings consistently with adverse rulings of federal courts of appeals.[204] The practice enables agencies to press forward their own statutory interpretations in the hope of finding sympathetic courts of appeal and, potentially, generating a circuit split that will be resolved in their favor by the Supreme Court. While some courts have expressed concern with the practice as bordering on lawlessness,[205] nonacquiescence has largely been tolerated on the view that an agency "may well not know which circuit's law will be applied on a petition for review."[206]

In *Megalli*, the SEC exhibited a different form of nonacquiescence, as it ignored an adverse court of appeal's ruling not in its internal proceedings, but in a district court. This type of nonacquiescence is not wholly unusual for the Agency. For example, in *Grayson-Robinson Stores, Inc. v. SEC*, the Second Circuit upheld a district court's rejection of the SEC's motion to force a debtor to refile a Chapter XI bankruptcy case under Chapter X.[207] After the Solicitor

200. SEC v. Megalli, 157 F. Supp. 3d 1240, 1254 (N.D. Ga. 2015).

201. Brief for the Plaintiff on Civil Penalties at 6, *Megalli*, 157 F. Supp. 3d 1240 (No. 1:13-CV-03783).

202. *Id.*

203. This aggressive use of disgorgement is consistent with the SEC's explicit position with regard to the use of monetary penalties. For example, in 2013, then-Chair Mary Jo White said, "we must make aggressive use of our existing penalty authority, recognizing that meaningful monetary penalties—whether against companies or individuals—play a very important role in a strong enforcement program." Mary Jo White, Chair, Sec. & Exch. Comm'n, Remarks at the Council of Institutional Investors Fall Conference in Chicago, IL: Deploying the Full Enforcement Arsenal (Sept. 26, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539841202 [http://perma.cc/NC83-6BAQ]. Around the same time, then-Director of Enforcement Andrew Ceresney asserted, "Monetary penalties speak very loudly and in a language any potential defendant understands . . . . Enforcement needs to be aggressive in our use of penalties." Jean Eaglesham, *SEC Ramps Up Fine Amounts to Deter Misconduct*, WALL ST. J. (Oct. 1, 2013), http://online.wsj.com/news/articles/SB10001424052702303918804579109554149460532 [http://perma.cc/9MPE-Z7NC].

204. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989).

205. *See, e.g.*, Borton, Inc. v. OSHRC, 734 F.2d 508, 510 (10th Cir. 1984); Yellow Taxi of Minn. v. NLRB, 721 F.2d 366, 382-83 (D.C. Cir. 1983); ITT World Commc'ns v. FCC, 635 F.2d 32, 43 (2d Cir. 1980).

206. Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1018 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017).

207. *See In re* Grayson-Robinson Stores, 320 F.2d 940 (2d Cir. 1963).

General refused to appeal to the Supreme Court, the SEC issued a "Statement of Nonacquiescence" and continued to pursue its interpretation of the relevant law.[208] Outside of the Second Circuit, the SEC pressed its interpretation in hopes of generating a circuit split. Inside the Second Circuit, it sought to chip away at *Grayson*, with an end towards limiting its precedential power to its specific facts.[209]

It is, of course, not unusual for a group to pursue litigation with an agenda toward moving the law in a different direction, but it takes on special significance when that group is an agency. Under the Supreme Court's deference regime, an agency generally receives deference for its interpretations of its organic statutes, but only to the extent to which the agency offers a thoughtful and convincing construction of the statutory scheme.[210] In the *Megalli* briefs, however, the SEC does not primarily communicate thoughtfulness or thoroughness in its consideration of the relevant law. Rather, it suggests—whether accurate or not—an agency interested in augmenting its power.

B. The Limits of Deference: The SEC's Pattern of Tension with the Court

In fact, the Supreme Court has exhibited concern with the SEC's efforts to expand the reach of securities law—a concern that has arguably resulted in the agency losing its claim to deference a number of times in the past. The development of insider trading law is illustrative of this trend. The SEC has long pressed the view that the "purpose of the law is to alleviate asymmetries in information between trading parties in order to promote 'fairness.'"[211] The Court has rejected the view in favor of a more limited interpretation of insider trading as intended not to achieve "fairness," but rather "to regulate the improper use of proprietary corporate information."[212] In explaining its reasons for not deferring to the Agency in its broader understanding of the law, the Court made clear its discomfort with granting expansive power to the SEC.

For example, in *Dirks v. SEC*, Justice Powell noted that the SEC had established a rule with "no limiting principle,"[213] creating a situation in which "market participants are forced to rely on the reasonableness of the SEC's litigation strategy."[214] Such an arrangement, Justice Powell continued, "can be

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208. Peter J. Rooney, *Nonacquiescence by the Securities and Exchange Commission: Its Relevance to the Nonacquiescence Debate*, 140 U. PA. L. REV. 1111, 1125 (1992).

209. *Id.* at 1126-28.

210. An interpretation offered in the context of litigation will generally receive *Skidmore* deference. *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). Under *Skidmore*, the interpretation will be weighed according to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

211. Jonathan R. Macey, *Beyond the Personal Benefit Test: The Economics of Tipping by Insiders*, 2 J.L. & PUB. AFF. 27, 30 (2017).

212. *Id.*

213. Dirks v. SEC, 463 U.S. 646, 664 (1983).

214. *Id.* at 664 n.24.

hazardous, as the facts of this case make plain."[215] That facts to which Justice Powell referred involved Raymond Dirks, a securities analyst, who "was the key player in exposing a large-scale fraud" perpetrated by an insurance holding company.[216] The SEC accused Dirks of insider trading for warning his clients to sell the company's stocks before the general public had learned of the fraud—even though, before notifying his clients, he had attempted to disclose publicly what he learned.[217] Faced with a case in which the SEC was seeking to punish the person who uncovered a major instance of fraud, the Court could not rely on the "reasonableness" of the Agency and, instead, drew a line sharply limiting what constitutes insider trading.[218]

Cases like *Dirks* reveal an important pattern in how the Court interacts with the SEC. If the Agency litigates in a manner that suggests it will not reasonably and thoughtfully set boundaries in how its exercises its broad authority, then the Court will step in to set those limits itself. Further, the Court will do so without giving deference,[219] potentially leading to a more restraining interpretation of the relevant authority than it otherwise would have if it trusted the agency to utilize its discretion responsibly.

It is in this context that *Kokesh* should be understood as a warning to the Agency.[220] By pursuing an aggressive posture in resistance to established precedent, the SEC undermined its claim to deference on the question of the limits of disgorgement power and invited the Court to intervene. The holding in *Kokesh*, which applied the five-year statute of limitation to disgorgement, represents such an intervention. But the dicta of Justice Sotomayor's unanimous opinion include further implied limitations. Most significant is the one already alluded to. Justice Sotomayor cites *Contorinis* disapprovingly and notes that the practice of disgorging profits gained by others "does not simply restore the status quo; it leaves the defendant worse off."[221] The implication is clear: since disgorgement is only statutorily authorized to the extent that it is equitable in

215. *Id.*

216. Linda Greenhouse, *Dirks Gets His Day in Court,* N.Y. TIMES (Mar. 22, 1983), http://www.nytimes.com/1983/03/22/business/dirks-gets-his-day-in-court.html [http://perma.cc/9ZN5-7LZF].

217. *Id.*

218. The line is delineated by the Personal Benefit Test. *See Dirks*, 463 U.S. at 667.

219. This lack of deference is particularly notable given that there is a colorable case to be made that the SEC should receive *Chevron* deference on this sort of question. *See* Steven J. Cleveland, *Resurrecting Deference to the Securities and Exchange Commission: Mark Cuban Trading on Inside Information*, 65 FLA. L. REV. 73, 85 (2013).

220. Another relevant piece of context is that *Kokesh* is not the first time the Supreme Court has rejected the SEC's interpretation of 28 U.S.C. § 2462 (2018). In *Gabelli v. SEC*, 568 U.S. 442, 448 (2013), the Court held that the five-year period for the government to bring an action for civil penalties begins to run when the fraud occurs, and not—as the SEC argued—when it is discovered. Professor Macey has characterized the opinion as a rebuke of the Agency's failure to act in a timely manner. Jonathan Macey, *Opinion Analysis: That Which Does Not Kill the SEC May Make the Agency Stronger*, SCOTUSBLOG (Feb. 28, 2013), http://www.scotusblog.com/2013/02/opinion-analysis-that-which-does-not-kill-the-sec-may-make-the-agency-stronger [http://perma.cc/DU8L-WDMK].

221. Kokesh v. SEC, 137 S. Ct. 1635, 1639 (2017).

nature,[222] it may only be used to achieve ends compatible with traditional equity powers—that is, to restore the status quo.

In essence, the Court has strongly signaled that *Blatt*, rather than *Contorinis*, correctly embodies the law.[223] The SEC has pressed that it needs the more expansive disgorgement authority recognized in *Contorinis* in order to disincentivize fraud by depriving the violator of the value of any intangible benefits received.[224] *Kokesh* thus suggests that the Court does not share the Agency's view that disgorgement should be a flexible remedy to be used by the agency as necessary to achieve deterrence. But a broader interpretation is also possible. Footnote Three is carefully and deliberately worded, denying any intention to ratify that the SEC can pursue judicial disgorgement or that "courts have properly applied disgorgement principles" in the SEC context.[225] Such cautious wording seems intended to send a signal to the Agency—namely, that the Court retains the ability to interpret the SEC's disgorgement authority in a very narrow way; it could even go so far as effectively eliminating the remedy by, for example, requiring that SEC disgorgement operate in a compensatory manner.[226] While the arguments presented in this Note suggest that such an interpretation would not be the most appropriate one given past precedent, the fact that the Court took pains not to ratify SEC disgorgement suggests that it was intentionally maintaining the option to undercut the Agency's authority.

What the Court intended to signal by such a move is an exercise in speculation. Viewed in the context of the SEC's decades of tension with the Court, however, one interpretation seems particularly likely: the Court is reminding the SEC that it can do more than merely police the Agency for its aggressive posture by setting boundaries; it can punish the SEC by effectively depriving it of its use of disgorgement. The SEC would be prudent to interpret this warning as a signal to the agency that it should be policing itself. That is, it should be more conservatively utilizing its disgorgement authority and should define clearer boundaries.

As a practical matter, the SEC would be prudent to issue guidance in light of *Kokesh* in which it sets out in relatively precise terms its policy for calculating disgorgement. In fact, during oral argument, Justice Kagan noted that she found

222. The SEC's authority to seek disgorgement is based on the claim that it is an equitable remedy and thus authorized by the general grant of equity jurisdiction to the district courts provided by Section 27 of the Securities Exchange Act of 1934. *See* SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir. 1971).

223. This is a point that seemed to go unnoticed in a recent Second Circuit opinion that upheld a disgorgement order for far more than the defendant's personal gains. SEC v. Metter, 706 F. App'x 699, 702-03 (2d Cir. 2017) (upholding an order of disgorgement equal to the total amount that "flowed into" the defendant's firm "as a result of the fraudulent scheme," and rejecting arguments that this exceeded the defendant's "personal enrichment").

224. *See* James Tyler Kirk, *Deranged Disgorgement*, 8 J. BUS. ENTREPRENEURSHIP & L. 131, 155 (2015).

225. *Kokesh*, 137 S. Ct. at 1642 n.3.

226. While such an interpretation would be in tension with past precedent, as explicated in Section II.B., the Court, of course, could set such precedent aside.

it "unusual that the SEC has not given some guidance to its enforcement department," expressing discomfort that "everything is sort of up to the particular person at the SEC who decides to bring such a case."[227] Any guidance issued by the Agency should limit the application of the penalty to doing no more than restoring the status quo. More particularly, it ought to make clear that only personal gains be included in the calculation and that serious "consideration" be given to "defendant's expenses that reduced the amount of illegal profit."[228] If the SEC introduced guidance with a considered explanation of disgorgement's statutory authorization, the Court would likely be reassured by this commitment to a more conservative posture and afford the SEC's interpretation significant deference.

In other words, the SEC ought to interpret *Kokesh* to suggest that its campaign of nonacquiescence has reached its end; the Agency should lessen the aggressiveness of its posture or risk a more dramatic repercussion—the effective loss of its authority to seek disgorgement. Adopting guidance would be an important first step. If the Court can be confident that the SEC will be responsible and restrained in its use of the remedy, it likely will not exercise the threat implicit in footnote three of *Kokesh*.

V. Disgorgement in the FTC Context

Thus far, this Note has focused on rebutting the contention that the SEC's use of disgorgement is not an equitable remedy. This discussion has been motivated, in part, by the concern that a total removal of disgorgement from the toolbox of equitable remedies would have a profound and detrimental impact on the ability of federal agencies to enforce their substantive statutes. But as discussed in Part III, the Court's jurisprudence on what remedies are authorized by a particular statutory grant of equity jurisdiction takes into account such context-specific factors as the general statutory scheme.

As a result, it is not necessarily the case that a decision with regard to whether the SEC can seek judicial disgorgement would settle questions relating to other agencies' authorization. For example, if the Court were to ground its upholding of SEC disgorgement in the subsequent congressional ratification theory outlined in Section III.B, then it would remain to be decided whether disgorgement is generally available to agencies under generic grants of equitable remedies. For this reason, individual analysis of each agency's use of judicial disgorgement is necessary.

This Part offers such an analysis for the FTC. There are several reasons why the FTC is an object of particular interest with regard to the question of disgorgement authority. First, disgorgement plays a particularly important role in the FTC's ability to achieve its antitrust ends. Second, much as the SEC's

227. Transcript of Oral Argument at 30, *Kokesh*, 137 S. Ct. 1635 (2017) (No. 16-529).
228. *Kokesh*, 137 S. Ct. at 1639.

aggressive posture with regard to its disgorgement authority has arguably invited rebuke from the Court,[229] recent developments in the FTC's policies on disgorgement present the specter of agency overreach. This suggests that FTC's disgorgement authority is particularly vulnerable. Concern over the FTC's future use of disgorgement seems warranted in light of the fact that the FTC was one of the first agencies whose authority was challenged after *Kokesh*.[230] While these early challenges have been unsuccessful, the lessons in Part III suggest that the FTC tread cautiously when considering more aggressive use of disgorgement.

A. The FTC's Historical Use of Disgorgement

A study of the FTC's use of disgorgement reveals two noteworthy similarities to SEC disgorgement. First, despite the fact that monetary remedies such as disgorgement and restitution are less commonly employed by the FTC, disgorgement plays an important role in FTC practice. Second, and more concerning, the FTC has been increasingly aggressive with its use of disgorgement over the last five years. These similarities should (and do) concern FTC officials and proponents of disgorgement as an antitrust remedy[231]—*Kokesh*'s warning, then, should be understood to extend beyond the SEC to the FTC's use of disgorgement to remedy antitrust violations.

1. The Role of Disgorgement in FTC Antitrust Enforcement

The FTC has long sought a variety of equitable remedies by virtue of its authority to seek injunctions under § 53(b).[232] Pursuant to the ancillary equitable authority that accompanies a statutory grant of injunction powers,[233] these remedies have included monetary remedies such as restitution and disgorgement.[234] The FTC historically used disgorgement as a remedy only

229. *See supra* Part III.

230. FTC v. Credit Bureau Ctr., No. 17 C 194, 2018 WL 482076 (N.D. Ill. Jan. 14, 2018); FTC v. J. William Enters., No. 6:16–cv–2123–Orl–31DCI, 2017 WL 4776669, at *2 (M.D. Fla. Oct. 23, 2017); *see also Client Alert: Reflections on* Kokesh v. SEC*: On the Lookout for "Elephants in Mouseholes"*, KING & SPALDING (Feb. 9, 2018), http://www.kslaw.com/attachments/000/005/640/original/ca020918.pdf [http://perma.cc/KG5T-B9P9] (discussing these challenges to the FTC's equitable authority).

231. *See, e.g.*, Benjamin Mundel & Lucas Croslow, *How* Kokesh *Will Impact the FTC and Other Agencies*, LAW360 (June 22, 2017, 10:28 AM), http://www.law360.com/articles/937090/how-kokesh-will-impact-the-ftc-and-other-agencies [http://perma.cc/DTV7-346U]; Royall, *supra* note 73.

232. 15 U.S.C. § 53(b) (2018) grants the FTC the authority to pursue permanent injunctions against the violators of any law enforced by the agency.

233. *See* Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (holding that when Congress invokes federal courts' equity jurisdiction in a statute, as when Congress allows injunctions, "all the inherent equitable powers of the [courts] are available for the proper and complete exercise of that jurisdiction").

234. *See* 2003 Policy Statement, *supra* note 75.

sparingly.[235] Between 1980 and 2002, the Agency sought disgorgement in only two cases.[236] In *Hearst Trust*, the FTC sought and the defendant stipulated to the disgorgement of $19 million in ill-gotten gains after the firm omitted important documents from its merger filing, which impeded the FTC's ability to evaluate the competitive effects of the merger.[237] And in *Mylan Laboratories*, the FTC sought and obtained disgorgement for an alleged conspiracy to monopolize the market for two anti-anxiety drugs.[238] The Agency sought disgorgement only twice more over the next decade.[239]

The FTC's cautious approach to disgorgement is well articulated in its 2003 policy statement concerning the use of monetary remedies.[240] The 2003 Policy Statement was adopted unanimously by the Committee after it solicited comments from practitioners and scholars, considered the existing jurisprudence and literature, and held public discussions.[241] Like the SEC and other agencies that use disgorgement, the FTC deployed disgorgement "to deprive a wrongdoer of his unjust enrichment" and to "'deter others' from future violations."[242] The availability of monetary remedies is important because "[t]he competition enforcement regime in the United States is multifaceted, and it is important and beneficial that there be a number of flexible tools, as well as a number of potential enforcers, available to address competitive problems in a particular case."[243] Despite the fact that the 2003 FTC did not consider disgorgement a "routine remed[y] for antitrust cases," it recognized that it can play an important role in fashioning remedies in "exceptional cases."[244] In *Hearst Trust*, for example, the FTC used disgorgement to alleviate the burden that would otherwise be placed on private plaintiffs seeking to be made whole.[245]

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235. Maureen K. Ohlhausen, *Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission*, FED. TRADE COMMISSION 2 (Apr. 20, 2016), http://www.ftc.gov/system/files/documents/public_statements/945623/160420dollarsdoctrinespeech.pdf [http://perma.cc/E6LA-G4B5].

236. *Id.*

237. Final Order and Stipulated Permanent Injunction, FTC v. Hearst Trust, No. 1:01CV00734 (D.D.C. Dec. 14, 2001).

238. Ohlhausen, *supra* note 235, at 3; *see* Amended Complaint, FTC v. Mylan Labs., Inc., No. 98-cv-03114 (D.D.C. Feb. 8, 1999); *FTC Reaches Record Financial Settlement to Settle Charges of Price-Fixing in Generic Drug Market*, FED. TRADE COMMISSION (Nov. 19, 2000), http://www.ftc.gov/news-events/press-releases/2000/11/ftc-reaches-record-financial-settlement-settle-charges-price [http://perma.cc/MDB6-AX2M].

239. *Id.* at 5; *see* FTC v. Lundbeck, Inc., 650 F.3d 1236 (8th Cir. 2011); Complaint, FTC v. Perrigo Co., No. 1:04CV01397 (D.D.C. Aug. 12, 2004).

240. 2003 Policy Statement, *supra* note 75.

241. Ohlhausen, *supra* note 235, at 4.

242. 2003 Policy Statement, *supra* note 75 (quoting SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989)).

243. *Id.*

244. *Id.*

245. *Id.* at n.14 ("For example, *Hearst* presented the somewhat unusual case of a consummated merger that had passed through the HSR review process. Absent FTC action, private plaintiffs would have faced the possibly discouraging prospect of not only having to prove a violation of Section 7 of the Clayton Act or Section 2 of the Sherman Act, but also, as a practical matter, needing to

More recent directives from the FTC have broken with the position the disgorgement is reserved for "exceptional cases."[246] In 2012, the FTC emphasized that "[b]ecause the ordinary purpose and effect of anticompetitive conduct is to enrich wrongdoers at the expense of consumers," disgorgement is an important remedy in antitrust enforcement and is consistent with the Commission's prior antitrust and consumer protection work—doubly so given the limits on the FTC's ability to seek disgorgement in other fora. The FTC is unable, for instance, to seek disgorgement in internal agency adjudications.[247] The Commission also suggested that the availability of a private remedy has increasingly been little consolation to injured consumers.[248]

While the Agency did not elaborate on the "increased burdens on plaintiff," it cited a recent article by Professor Einer Elhauge, suggesting the concerns the Commission had in mind.[249] Elhauge argues that, given developments in the antitrust jurisprudence, "the adequacy of private actions seems increasingly dubious, especially in monopolization cases."[250] Such cases often involve direct purchasers who pass on the costs of anticompetition downstream and who are often unwilling to sue.[251] The indirect, downstream purchasers typically lack standing to sue under the *Illinois Brick* doctrine, which held that only the direct purchaser has suffered an injury for the purposes of antitrust law.[252] Even when suit is possible by consumers, the consumers' individual stakes in the cases are often too low to support the cost of litigation.[253] This small-stakes problem is compounded by a recent trend of courts to bar class actions because the injuries in monopolization cases are too individualized.[254] And, finally, some unilateral antitrust violations are not covered by private rights of action but still fall within

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show a violation of the Hart-Scott-Rodino premerger notification rules to explain why the FTC took no action with respect to the merger.").

246. *Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases*, FED. TRADE COMMISSION (July 31, 2012) [hereinafter 2012 Withdrawal] ("Accordingly, while disgorgement and restitution are not appropriate in all cases, we do not believe they should apply only in 'exceptional cases,' as previously set out in the Policy Statement."), http://www.ftc.gov/system/files/documents/public_statements/296171/120731commstmt-monetaryremedies.pdf [http://perma.cc/VYH4-3L3V].

247. *Cf.* Ohlhausen, *supra* note 235, at 9-13 (discussing how a desire to pursue disgorgement has diverted cases that would normally be adjudicated by the FTC into federal courts).

248. 2012 Withdrawal, *supra* note 246, at 2-3 (noting that FTC judicial disgorgement is particularly important "[a]t a time when Supreme Court jurisprudence has increased burdens on plaintiffs").

249. *Id.* (citing Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79 (2009)).

250. Elhauge, *supra* note 249, at 83.

251. *Id.*

252. *Id.* (citing Illinois Brick Co. v. Illinois, 431 U.S. 720, 729 (1977)). *But see* John C. Brinkerhoff Jr., *Ropes of Sand: State Antitrust Statutes Bound by Their Original Scope*, 34 YALE J. ON REG. 353, 376 (2017) (noting that the majority of states have passed "*Illinois Brick* Repealers" to empower such suits under state antitrust statutes).

253. *Id.* at 83.

254. *Id.* at 83-84.

the FTC's jurisdiction.[255] These arguments support the position that disgorgement is a crucial piece in the FTC's antitrust enforcement puzzle, despite its historically infrequent use and the technical availability of private alternatives.

But while these arguments lend support to the view that disgorgement is sometimes appropriate in the antitrust context, they do not imply that the FTC should be unconstrained in its use of the remedy. As explained below, what is troubling about the FTC's developing policy stance with regard to disgorgement is not that it has indicated a greater willingness to seek the remedy, but rather that the agency has failed to articulate reasonable limits to its use—a problem similar to that which troubled the Court with regard to the SEC in *Kokesh*.

2. A Shift Toward Unconstrained Use of Disgorgement?

The FTC's position on disgorgement has been characterized by a problematic shift from restrained and transparent principles to an unconstrained assertion of authority. The FTC's now-withdrawn 2003 Policy Statement falls squarely into the mold of the guidance that the SEC ought to publish.[256] In that sense, it was a model of the sort of thoughtful and articulated position on the use of the remedy that reassures the Court that the agency can be trusted with the authority.

The statement announced a new, three-part approach to determining the kinds of cases in which the FTC would seek monetary remedies, including disgorgement. First, the Commission would "ordinarily seek monetary disgorgement only when the violation is clear," which is when "a reasonable party should expect that the conduct at issue would likely be found to be illegal."[257] This part of the FTC's approach was designed to limit the punitive nature of disgorgement by applying it only to those who could have reasonably anticipated it. By narrowing the application of disgorgement, the FTC limited the use of disgorgement to cases in which its deterrent effect would be strongest.[258] Second, the Commission would only seek disgorgement when there was a "reasonable basis for calculating the amount of the disgorgement . . . to be ordered."[259] And third, the FTC would consider disgorgement only when it anticipated that other remedies would be insufficient to accomplish fully the purposes of antitrust laws.[260]

255. *Id.* at 84. *Hearst Trust* may represent an example of this gap, reinforcing the importance of the availability of disgorgement in that case. *See* FTC v. Hearst Trust, No. 1:01CV00734 (D.D.C. Dec. 14, 2001).

256. *See supra* Section III.B.

257. 2003 Policy Statement, *supra* note 75.

258. *Id.*

259. *Id.*

260. *Id.*

This policy statement seems almost tailor-made to address the *Kokesh* Court's concerns with the SEC's aggressive use of disgorgement. The first factor caps the penal nature of disgorgement, ensuring that it is used only when it could have made a difference in the conduct. The second directly addresses the concern that disgorgement would be sought when the amount is unbounded or unrelated to the actual ill-gotten gains. And the third is a general promise that disgorgement will not displace the traditional remedies that the FTC had used for nearly a century to enforce antitrust laws. These factors should significantly ameliorate the concerns of the *Kokesh* Court; it appears that the 2003 FTC policy bears none of the aggressive hallmarks of SEC disgorgement that so worried the Justices.

In 2012, the FTC suddenly withdrew the 2003 Policy Statement.[261] The Commission argued that "the Policy Statement [had] chilled the pursuit of monetary remedies in the years since the statement's issuance."[262] Contrary to the FTC's prior practice, the 2012 Withdrawal noted that "competition cases may often be appropriate candidates for monetary equitable relief."[263] Unlike with the creation of the 2003 Policy Statement, the Commission rescinded the policy over the spirited dissent of one member and without soliciting public comment or discussion.[264] This change in direction puts the FTC firmly back into the unconstrained territory that so concerned the *Kokesh* Court. Then-Commissioner (and now Acting FTC Chairman) Maureen Ohlhausen dissented from the 2012 Withdrawal, characterizing the move as a naked desire to be less constrained.[265] And she noted that a newfound zeal for disgorgement had distorted the FTC's enforcement practices, shifting cases away from administrative resolution and into federal court and undermining the FTC's unique ability to shape antitrust law.[266]

The warping influence of unconstrained discretion to seek disgorgement is compounded by an increase in the frequency with which the FTC seeks disgorgement—in more than twice as many cases between 2012 and 2016 as in the three preceding decades.[267] More concerning still, Chairman Ohlhausen has noted a recent case in which the FTC sought disgorgement in which "there was no reasonable basis for calculating the amount of remedial payment."[268] Without the guarantee of the second prong in the 2003 Policy Statement's approach to disgorgement, there is no guarantee that the disgorgement sought will match (or even be related to) the amount of ill-gotten gains. Given that these concerns are

261. *See* 2012 Withdrawal, *supra* note 225.
262. *Id.*
263. *Id.*
264. Ohlhausen, *supra* note 234, at 6-7.
265. *Id.*
266. *Id.* at 9-13.
267. *Id.* at 7.
268. *Id.* at 8 (citing FTC v. Cardinal Health, Dissenting Statement of Commissioner Maureen K. Ohlhausen, at 2 (Apr. 17, 2015), http://www.ftc.gov/system/files/documents/public_statements/637761/150420cardinalhealthohlhausen.pdf [http://perma.cc/864U-GRDH]).

quite close to those that animated the *Kokesh* Court, continuing on this aggressive path risks judicial retaliation against the FTC.

B. The Affirmative Case for FTC Disgorgement

As discussed in the examination of *Kokesh* and the SEC's use of disgorgement, there is every reason to believe that disgorgement is a remedy available to courts sitting in equity. But, as noted above, the Court could also interpret statutory grants of equitable remedies as demanding more individualized analysis of whether a particular agency may seek judicial disgorgement. Section III.B put forward the argument that the SEC has been affirmatively authorized to seek disgorgement. This Section lays out an argument that the FTC's use of disgorgement is necessary for the agency to comply the mandates of its substantive statutes and the Court's jurisprudence.

As William Baxter, former Assistant Attorney General of the Justice Department's Antitrust Division, has noted, the Supreme Court has taken a "common law" approach to the development of antitrust law.[269] The two foundational antitrust statutes, the Sherman Act[270] and the Clayton Act,[271] were enacted in 1890 and 1914, respectively. Since then, Congress has made only minimal changes to the statutes.[272] Instead, the courts have been tasked with applying the broad statutory directives to diverse and evolving patterns of fact.[273] The Supreme Court itself has been explicit about this approach, noting that the Sherman Act "has a generality and adaptability comparable to that found to be desirable in constitutional provisions."[274] Indeed, the requirement that the courts apply century-old statutes to the dynamic business world has required the "common law" approach: "Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic

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269. William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1982); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 888 (2007) ("Yet the Sherman Act's use of 'restraint of trade' 'invokes the common law itself, . . . not merely the static content that the common law had assigned to the term in 1890." (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988))).

270. Sherman Act, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (2012)).

271. Clayton Act, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12-27 (2012)).

272. R. Hewitt Pate, *Antitrust Law in the U.S. Supreme Court*, U.S. DEP'T JUST. 1 (May 11, 2004), http://www.justice.gov/atr/file/517986/download [http://perma.cc/PH49-YERH].

273. *Id.*; *see also* Charles S. Dameron, Note, *Present at Antitrust's Creation: Consumer Welfare in the Sherman Act's State Statutory Forerunners*, 125 YALE L.J. 1072, 1075 (2016) ("[T]he judiciary enjoys an especially wide authority to fill statutory gaps when interpreting the Sherman Act due to the Act's ambiguous language, its constancy over time, and the fact-peculiar in light of many modern regulatory regimes-that Congress did not assign rulemaking authority to an administrative agency.").

274. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933).

conditions."[275] Further, this flexible approach to antitrust law is not limited to determining what constitutes unlawful restraints of trade. For example, the Court's understanding of the Sherman Act's relationship to state antitrust laws evolved considerably over time.[276] Thus, the Court's approach to the development of antitrust law generally has been characterized by its flexibility and the Court's willingness to adapt jurisprudence to meet the needs of the general aims and needs of competition statutes.

The flexible, goal-oriented tack that the Court takes with respect to antitrust law applies by logical necessity to antitrust remedies. The Supreme Court, in *United States v. Grinnell Corp.*, summarized its approach to fashioning remedies in antitrust cases: "We start from the premise that adequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act."[277] The *Grinnell* Court derives this principle from another case, *Schine Chain Theaters v. United States*,[278] in which the Court confirmed the FTC's statutory authority to seek divestiture under §13(b).[279]

Divestiture was authorized, the Court held, in part because it served to further the Act's goals by "depriv[ing] the antitrust defendants of the benefits of their conspiracy"[280]—the core function of disgorgement. Just two years after *Grinnell*, the Court emphatically noted that "[i]t is of course established that, in a § 2 case . . . it is the duty of the court to prescribe relief which will . . . deny to the defendant the fruits of its statutory violation."[281] And more directly, the Court has held that the FTC can seek and courts can order the divestiture of privately owned property "if the property was acquired . . . as a result of practices which constitute an unreasonable restraint of trade."[282] The Court's justification reflects the same need to correct incentives for which disgorgement is employed: "Otherwise, there would be reward from the conspiracy through retention of its fruits . . . . Its function includes undoing what the conspiracy achieved . . . . [T]he

275. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007); *see also* Baxter, *supra* note 269, at 666 ("[T]he common-law approach . . . permits the law to adapt to new learning without the trauma of refashioning more general rules that afflict statutory law.").

276. *See* Brinkerhoff, *supra* note 252, at 360.

277. 384 U.S. 563, 577 (1966).

278. 334 U.S. 110 (1948), *overruled on other grounds by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984).

279. *Id.* at 128 ("To require divestiture of theatres unlawfully acquired is not to add to the penalties that Congress has provided in the antitrust laws. Like restitution it merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project.").

280. *Id.*

281. United States v. United Shoe Mach. Corp., 391 U.S. 244, 250 (1968).

282. United States v. Paramount Pictures, 334 U.S. 131, 171 (1948).

requirement that the defendants restore what they unlawfully obtained is no more punishment than the familiar remedy of restitution."[283]

Scholars have noted that the language of this line of cases is potentially broad enough to directly authorize disgorgement.[284] Indeed, one reading of the cases in this Section yields the principle that the FTC may be *required* to seek disgorgement if doing so is the only way to "deprive the defendants of any of the benefits of the illegal conduct" (or achieve any other part of the *Grinnell* test).[285] If nonmonetary remedies, such as injunction or divestiture, were insufficient to deprive a violator of the fruits of his illicit conduct, the logic of *Grinnell* would mandate that the FTC seek and courts issue disgorgement of profits. The FTC's 2003 Policy Statement relied on *Grinnell* and *Schine Chain Theaters* in explaining that "[d]epriving the violator of any of the benefits of illegal conduct has long been accepted as an appropriate, indeed necessary, element of antitrust remedies."[286] There are many such corner-cases when the FTC's other remedies and private actions would fail to deprive a violator completely of the benefit of his illicit conduct. Such cases can arise when private action is blocked by statutes of limitations or misaligned market incentives, when individual injuries are insignificant (but the aggregate injury is large), or when direct purchasers do not sue.[287]

In cases such as these, the FTC is faced with a choice: seek monetary remedies or fail to accomplish a primary objective of antitrust enforcement by allowing violators to profit from misconduct.[288] The logical necessity of disgorgement as a remedy illustrates that it has been affirmatively authorized by the Supreme Court's interpretation of the antitrust statutes. Given the Court's efforts to construct an antitrust regime that satisfies the ends of promoting competition, the Court should give this consideration significant weight in determining whether the FTC has the authority to pursue disgorgement. How the Court would weigh those strong arguments in favor of disgorgement against the relative newness of the remedy is an open question, but the flexible, statute specific equity framework laid out in this Note suggests the power should, and likely would, be upheld.

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283. *Id.* at 171-72.

284. Elhauge, *supra* note 248, at 80 ("This language seems broad enough not only to authorize the government to bring antitrust claims seeking the disgorgement of any supracompetitive profits causally related to antitrust violations, but even to require doing so in any case where other remedies do not suffice to deprive a violator of all its illicit fruits."). Elhauge also relies on this line of cases to rebut any presumption that the infrequency with which the FTC employs disgorgement is rooted in insecurity about its justification to do so. *Id.* at 79.

285. United States v. Grinnell Corp., 384 U.S. 563, 577 (1966).

286. 2003 Policy Statement, *supra* note 75.

287. *Id.*

288. *Hearst* presents such a situation. Absent FTC action, plaintiffs would have faced insurmountable obstacles to recovery. *Id.* at n.14.

Conclusion

Despite all the prognostication, judicial disgorgement sought by the SEC is not going away. The *Kokesh* Court's determination that SEC disgorgement is a penalty for the purposes of § 2462's statute of limitations is consistent with earlier Court precedents that found disgorgement to be equitable. But *Kokesh* does have wider implications for the SEC and the administrative state writ large. For one, the SEC would be prudent to understand the wide-ranging dicta in the unanimous opinion as a signal that the Court is concerned with its aggressive utilization of disgorgement. As a first step towards assuaging the Court and earning its trust—and thus, importantly, its deference—the SEC should promulgate new, conservative guidance setting out the limits of disgorgement. Similarly, the FTC ought to consider returning to its earlier guidelines or promulgating new ones. Like the SEC, the FTC has aggressively utilized its disgorgement authority and—while there is a strong case to be made that the agency ought to retain that authority—*Kokesh* suggests that the Court is willing to impose discipline upon agency enforcement.