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Theresa Gabaldon
George Washington University Law School, tgabaldon@law.gwu.edu

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Equity, Punishment, and the Company You Keep:

Discerning a Disgorgement Remedy under the Federal Securities Laws

Theresa A. Gabaldon

I. Introduction

Since its inception in 1934, the Securities and Exchange Commission (the "Commission" or the "SEC") has wielded statutory authority to seek injunctive relief for violations of the federal securities laws.[1] Since 1970 courts have, at the Commission's behest and without much analysis, ordered violators to disgorge profits – make that lots and lots of profits – gained in the course of their wrongdoing.[2] In some instances, the profits are returned to victims. In others, either because the victims are too many and too scattered or because the violation is a victimless one such as engaging in bribery, the ill-gotten gains are kept by the government. In either case, the existence of the disgorgement remedy has been regarded by the lower federal courts as well settled enough so as to result in SEC disgorgement recoveries of over $2.9 billion in 2017 alone.[3]

During the period that the Commission has successfully pursued disgorgement actions Congress has extended its enforcement authority several times.[4] The SEC now is specifically empowered to (among other things) seek to bar certain violators from serving in the financial industry, seek all equitable remedies, and, subject to stated caps, seek civil monetary penalties for violations of the laws it is charged with enforcing. Notably, it is typical for each legislative expansion of SEC authority to iterate that there is no intent to limit the Commission's power to pursue other remedies, ritually reciting something like "The actions authorized by this section

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[1] *See infra* notes 22-30 and accompanying text.
[2] *See infra* notes 35 and 54-84 and accompanying text.
[3] U.S. Securities and Exchange Commission Division of Enforcement, ANNUAL REPORT: A LOOK BACK AT FISCAL YEAR 2017, 7 https://www.sec.gov/files/enforcement-annual-report-2017.pdf.
[4] *See infra* notes 100-31 and accompanying text.

may be brought in addition to any other actions that the Commission . . . [is] entitled to bring."[5] Moreover, both legislative history and statutory wording have acknowledged the SEC's use of the disgorgement remedy and have specified how disgorged amounts are to be factored into other calculations, such as certain recoveries by private plaintiffs.[6] There even is a statutory scheme dealing with the distribution of disgorged amounts to wronged investors.[7]

Missing from the legislative tablet, however, is any explicit creation of the disgorgement remedy itself, much less any attempt to define its nature and parameters. It has fallen to the federal courts (and academics) to struggle with niceties like whether the amount to be paid pursuant to a disgorgement order can be discharged in bankruptcy,[8] whether a disgorgement order constitutes "jeopardy" for purposes of the Seventh Amendment,[9] whether actions for disgorgement give rise to the right of trial by jury,[10] and whether there is an applicable statute of limitations.[11] The last of these questions eventually resulted in a split among the Circuits and was resolved (in the affirmative) by the Supreme Court in *Kokesh v. SEC*.[12]

Although Congress has specified a statute of limitations for most of the remedies available to private plaintiffs under the federal securities laws,[13] it has tended to rely on catch-all provisions found elsewhere in the United States Code to provide limits for government enforcement actions. Thus, 28 U.S.C. §2462, which traces lineage from the 18th century, generally requires that "enforcement of any civil fine, penalty, or forfeiture," be "commenced

[5] Securities Exchange Act of 1934 §21A(d)(3), 15 U.S.C. §78u (2018) (relating to civil penalties for insider trading).
[6] *See infra* notes 105-06 and accompanying text.
[7] *See infra* notes 123-24 and accompanying text.
[8] *See infra* note 81 and accompanying text.
[9] *See infra* note 78 and accompanying text.
[10] *See infra* note 79 and accompanying text.
[11] *See infra* note 84 and accompanying text.
[12] Kokesh v. SEC, 137 S.Ct. 1635 (2017).
[13] *See*, *e.g.*, Securities Act of 1933 §13, 15 U.S.C. §77m (2018) (specifying statute of limitations for express private rights under that Act).

within five years from the date when the claim first accrued."[14] The federal courts easily concluded that this statute restrains the SEC's express statutory authority to seek civil monetary penalties; in 2013, the Supreme Court confirmed its applicability regardless of the time the claim was discovered.[15]

Left open until 2017, however, was the question whether disgorgement was a "fine, penalty, or forfeiture." The *Kokesh* case, noted above, held that it was a penalty, and thus subject to Section 2462.[16] Moreover, the case had one of *those* footnotes, suggesting that the threshold matter of whether courts should be ordering disgorgement in Securities Exchange Commission enforcement actions at all might be up for grabs.[17] The lower federal courts already are grappling with the fall-out as defendants in actions for disgorgement brought by the SEC and other agencies are making invocation of that issue *de rigueur*.[18]

This article first provides background on the judicial development of the SEC disgorgement remedy, up to and through *Kokesh*. It then examines the paralleling legislative developments, touching on the fraught subject of legislative history. After describing this necessary context, the article relies on it to illuminate a problem endemic to litigation about federal remedies. This has to do with the promiscuous use of the word "equitable," which appears to have greatly complicated any attempt to make sense of disgorgement. The confusion resulting from a sea of unexamined assumptions about "equity" that floats throughout the

[14] 28 U.S.C. §2462 (2010)

[15] Gabelli v. SEC, 133 S.Ct. 1216 (2013).

[16] *Kokesh*, 137 S.Ct. at 1639.

[17] *Kokesh*,137 S.Ct. at 1642, n. 3 reads as follows:

> Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context. The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to §2462's limitations period.

[18] *See*, *e.g.*, SEC v. Sample, 2017 WL 5569873 at *2 (N.D. Tx. Nov. 20, 2017); SEC v. Jammin Java Corp., 2017 WL 4286180 at *3 (C.D. Cal. Sept. 14, 2017); CFTC v. Reisinger, 2017 WL 4164197 at *1 (N.D. Ill. Sept. 19, 2017); FTC v. J. Williams Enterprises, LLC, 2017 WL 4776669 at *2 (M.D. Fla. Oct. 23, 2017).

relevant cases and commentary has obscured a central issue. This is the difference between whether a remedy exists and whether, if it does, there are constitutional consequences.[19] In the process of shedding light on this subject, this article also addresses more modest goals. It answers three specific questions. The first is whether a right to seek disgorgement could be said to exist as a function of the Commission's express authority to seek equitable remedies. The second is whether the SEC's right to seek disgorgement could be said to exist "at law." The third, which assumes an affirmative answer to both of the first two, is which of the two characterizations is more appropriate.

The article's conclusions as to these specific questions are as follow. First, SEC disgorgement should be recognized as an equitable remedy in most instances involving inside trading or similar fiduciary breach. Second, even if SEC disgorgement is not an equitable remedy, Congress has manifested sufficient recognition of the practice to render it authorized "at law": it is essentially an "Invisible Man" that can clearly be discerned against its statutory surroundings.[20] Third, the characterization as legal or equitable is really only important in determining whether the defendant has a right to jury trial. This is a question that will not be practically important if the Commission seeks some additional remedy that clearly carries the right, but in any event should be determined by Seventh Amendment precedents applied on a case by case basis.[21]

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[19] A companion article examines a second problem, equally endemic to securities enforcement litigation and exacerbated by *Kokesh*. This has to do with the definition of "punishment," "penal," and other variants in light of the extremely unfortunate tendency of courts to assume that context is irrelevant and that the precedents are mix-and -match. *See* Theresa A. Gabaldon, *Why Fences Aren't Punishment – and Why the Opinion in SEC v. Kokesh is a Crime* ("Gabaldon, *Fences*") (manuscript on file with the author).

[20] The "Invisible Man" referred to is the protagonist in the 1897 eponymous science fiction novel by H.G. Wells, not the 1952 work by Ralph Ellison. *See* H.G. WELLS, THE INVISIBLE MAN (1897).

[21] Thus, as Part IVC will make clear, where there is not some other right-to-jury-triggering remedy sought, the SEC presumably would prefer characterization of the remedy as equitable and the defendant would prefer characterization as legal. What may be more important, however, is whether disgorgement is regarded as punitive. That gives defendants an advantage as far as the statute of limitation is concerned, but would have disadvantages for

II. The History of SEC Disgorgement

A. Presaged by Injunctive Relief

The Securities and Exchange Commission was created by the Securities and Exchange Act of 1934 (the "Exchange Act" or "'34 Act").[22] It was given the authority to make certain examinations and issue certain orders in connection with the registration of securities under the Securities Act of 1933 (the "Securities Act" or "'33 Act").[23] With respect to fraud and other violations of the Securities Act, its enforcement authority was limited to referring matters to the Justice Department for criminal prosecution[24] and, under Section 20(b), to "bring[ing] an action in any district court of the United States, or United States court of any Territory, to enjoin such acts or practices . . .."[25] Its enforcement authority under Section 21(d) of the Exchange Act was identically modest.[26]

The Commission's authority to bring actions was matched with a declaration of the federal courts' jurisdiction to entertain them.[27] Section 22 of the Securities Act and Section 27 of the Exchange Act both provide that "[t]he district courts of the United States and United States courts of any Territory shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and . . .

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such matters as deductibility and indemnification, by insurance or otherwise. These matters are addressed in Part VC.

22 15 U.S.C. §78a *et seq.*

23 15 U.S.C. §77a *et seq.*, 77h (Section 8).

24 *Id.* at 77t(2) (Section 20(b)).

25 *Id.*

26 15 U.S.C. §78a *et seq.*, 78u (4). In its original numbering, the provision was §21(e). This article consistently employs current numbering.

27 The securities laws' statements of jurisdiction could be argued to be unnecessary, since they are in addition to the more general grant of 28 U.S.C. §1331, which provides that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Inclusion of the more specific subject matter statements may have been a way to avoid the then-applicable amount in controversy limitation that inhered in the more general grant. Alternately, they could represent an anticipatory response to the judicial tendency to construe legislative grants of jurisdiction narrowly. *See*, Louisville & Nashville Railroad Co. v. Mottley, 211 U.S. 149 (1908) (legislatively conferred jurisdiction over federal questions does not extend simply to foreseeable defenses); Strawbridge v. Curtis, 7 U.S. 267 (1806) (narrowly construing legislative grant of diversity jurisdiction).

of all suits in equity and actions at law brought to enforce any liability or duty created by this title."[28] Statements of jurisdiction are not necessarily regarded as giving rise to remedial power, however,[29] so more to the point is the fact that the provisions referred to above empowering the Commission to bring injunctive actions in federal district courts specifically directed that "upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond."[30] Since 1975, Section 21(e) of the '34 Act also has provided that "[u]pon application of the Commission the district courts of the United States . . . shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding . . . any person to comply with the provisions of this title, the rules, regulations, and orders thereunder . . .."[31] Notwithstanding the reference to "jurisdiction," Section 21(e) is grouped with other matters referred to as "authorit[ies]" and presumably should be understood in that sense, especially in light of the breadth of the preexisting jurisdictional grant in Section 27 encompassing all "suits in equity and actions at law."

Between 1934 and 1970 the federal courts frequently did grant injunctive relief in actions brought by the Commission.[32] The Commission also persuaded at least some courts to recognize their own ability to order ancillary relief in the form of court-appointed receivers in cases where

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[28] 15 U.S.C. §77a *et seq.*, 77v(1); 15 U.S.C. §78a *et seq.*, 78aa(1).

[29] *See* George W. Dent, *Ancillary Relief in Federal Securities Law: A Study in Federal Remedies*, 866 MINN. L. REV. 865, 892 at notes 121-22 (1983). For instance, in Touche Ross & Co. v. Redington, 442 U.S. 560 (1979), the Court clearly held that "Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act . . .." *Id.* at 577.

[30] 15 U.S.C. §77a *et seq.*, 77v(1); 15 U.S.C. §78a *et seq.*, 78aa(1).

[31] 15 U.S.C. §78a *et seq.*, 78u(5). By contrast, the '33 Act refers only to writs of mandamus to comply with the provisions of the title and the Commission's orders. 15 U.S.C. §77a *et seq.*, 77t(3) (Section 20(c)). Federal writs of mandamus have been abolished. *See* Dent, *supra* note 29, at 899, n. 150.

[32] *See* Daniel V. Listwa & Charles Seidell, *Penalties in Equity: Agency Use of Disgorgement After SEC v. Kokesh*, forthcoming in 35 YALE J. REG. 667, 673-75 (2018) (manuscript on file with the author); Edmund B. Frost, *SEC Enforcement of the Rule 10b-5 Duty to Disclose Material Information – Remedies and the* Texas Gulf Sulphur *Case*, 54 MICH. L. REV. 944, 962-66 (1967).

corporate assets would be jeopardized if left unprotected.[33] In several cases, the Commission also entered into voluntary consent arrangements pursuant to which defendants agreed to disgorge their ill-gotten gains in exchange for some reciprocal concession by the SEC.[34] A series of Supreme Court cases suggesting an expansive view of the federal courts' ability to fashion remedies not expressly delineated by statute, coupled with persuasive academic commentary, is said to have encouraged the Commission to expand its use of disgorgement and to aggressively seek it as an ancillary remedy in litigation.[35]

B. The Concept of Ancillary Remedies

The most notable of the Supreme Court cases supporting the authority of the district courts to grant disgorgement was *Porter v. Warner Holding Co.*[36] Exactly how the holding survives some of the Court's subsequent cases, discussed below,[37] is an open question, although it was cited in *Kokesh* for the proposition that restitution to injured parties is different in kind from penalties paid to the government.[38] In any event, its form of reasoning merits close attention.

Porter dealt with a proceeding initiated by the Price Administrator under § 205(a) of the Emergency Price Control Act. That section provided as follows:

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any

[33] Esbitt v. Dutch-American Mercantile Corp., 335 F.2d 141 (2d Cir. 1964); SEC v. Keller Corp., 323 F.2d 397 (7th Cir. 1963); Los Angeles Trust Deed & Mortgage Exchange v. SEC, 285 F.2d 162 (9th Cir.), cert. denied, 366 U.S. 919 (1961);SEC v. H.S. Simmons & Co., 190 F. Supp. 432 (S.D.N.Y. 1961); cf. SEC v. Quing N. Wong, 252 F. Supp. 608, 613 (D.P.R. 1968) (denying defendant's motion to dismiss portion of SEC's complaint seeking an accounting and restitution); SEC v. Bennett & Co., 207 F. Supp. 919 (D.N.J. 1962) (appointment of receiver denied as not necessary under the circumstances).

[34] *See, e.g.*, Ward La France Truck Company, 13 S.E.C. 373 (1943); SEC v. First Investment Co. of Concord, SEC Litigation Release No. 281 (June 20, 1945).

[35] *See* John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 1977 DUKE L.J. 641, 644-47 (1977).

[36] 328 U.S. 395 (1946).

[37] *See infra* notes 198-202 and 219-35 and accompanying text.

[38] *Kokesh*, 137 S.Ct. at 1644.

> provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.[39]

The question presented, necessitated by the principle that equity is only permissible where legal remedies are inadequate, was whether the district court had the authority under this section to order restitution of excess rents charged, notwithstanding the existence of § 205(e), which permitted aggrieved individuals to bring legal actions for damages.

The Court noted that jurisdiction under § 205(a) indeed was equitable and that, "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."[40] It went on to say that ". . . since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake."[41] It would be hard to overstate just how broadly and flexibly the Porter Court saw the federal equity power to be, but its rhapsody on the subject crescendoed with the observation that

> . . . the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."[42]

In other words, the Court found itself quite in the mood to conclude that a decree compelling restitution of amounts acquired in violation of the Emergency Price Control Act was proper.

Before doing so, however, the Court linked its conclusion to the language in § 205(a) authorizing "a permanent or temporary injunction, restraining order, *or other order*." (Emphasis

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[39] 50 U.S.C. §205(a).
[40] *Porter,* 328 U.S. at 398.
[41] *Id.*
[42] *Id.* at 398 (quoting Brown v. Swann, 10 Pet. 497, 503).

added.) According to *Porter*, “the term ‘other order’ contemplates a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion.”[43] The Court gave two reasons for characterizing an order for the restitution of illegal rents as a “proper ‘other order.’”

First, restitution could be considered an “equitable adjunct” to an injunction, for “[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.”[44] Even though such a decree could not be *independently* sought at equity if an adequate legal remedy existed, “where, as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law.”[45]

Second, restitution could be considered “an order appropriate and necessary to enforce compliance with the Act.” According to the Court, it would not be unreasonable to conclude that future compliance would be more likely if miscreants are compelled to restore their illegal gains;[46] moreover, “[w]hen the Administrator seeks restitution under § 205(a), . . . he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.”[47]

It must be noted again – as the Court pointed out in *Kokesh* – that *Porter* involved restitution to injured parties rather than disgorgement paid to the U.S. Treasury. (For purposes of clarity, this article consistently will use “restitution” to refer to amounts paid or to be paid to

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[43] *Id.* at 399.
[44] *Id.* at 399.
[45] *Id.* at 399.
[46] *Id* at 400.
[47] *Id.* at 402.

injured parties, calculated by reference to the amount of plaintiff loss rather than by reference to the amount of defendant gain. "Disgorgement" will refer to amounts calculated by reference to defendant gain, whether or not it is paid to injured parties. As elaborated below, the Restatement of Restitution uses the single term "restitution" for both.[48]) Still, *Porter*'s concern with assuring future compliance would seem to apply equally in the case of disgorgement. On the other hand, to the extent that the "equitable adjunct" or "ancillary remedy" theory goes to the ability to declare "complete relief," one might argue that disgorgement does not relieve anyone unless the amounts recovered actually are directed to victims. In some cases the amounts disgorged in actions by the Commission do go to relieve victims: in 2017, $1.07 billion was disbursed to investors.[49] Nonetheless, some amounts wind up in the federal treasury and the Commission has gone to some pains to point out that its purpose in seeking disgorgement is related to public, not private, interests.[50] The distinction between "restitution" and "disgorgement" for purposes of the "complete relief" argument therefore is somewhat blurred. This was not, however, a distinction that was in any way front and center when, as described in the next section, a court first ordered disgorgement at the SEC's request.

C. *SEC v. Texas Gulf Sulphur Co.*

The Second Circuit's opinion in *SEC v. Texas Gulf Sulphur Co.* is a casebook classic. It gives instruction on a number of matters, including the liability of insiders for dealing with their own companies and/or on public markets while at a material informational advantage and the liability of tippers for passing on information relied upon by others in making trades.[51] Lost in

[48] *See infra* note 223 and accompanying text.
[49] ANNUAL REPORT, *supra* note 3, at 3.
[50] *See*, *e.g.*, *Kokesh*, 137 S.Ct. at 1643 (quoting SEC's concession in its brief).
[51] 401 F.2d 833 (2d Cir. 1968). Also addressed are the liability of issuers for misrepresentations at times they are not buying or selling their own securities and the general standard for materiality.

the shuffle – or deliberately left on the editorial cutting-room floor – is discussion of the district court's ability to order the defendants to surrender their profits as requested by the SEC.[52]

As some readers will recall, Texas Gulf Sulphur Co. was engaged in mineral exploration and had located bountiful reserves in Canada. While negotiating for mining rights the company publicly denied the richness of the strikes. In the meantime, several well-informed insiders accepted stock options granted by a less-well-informed board, purchased stock and calls on the open market, and shared the non-public information with others who did likewise.[53] Liabilities established at the trial level were appealed to the Second Circuit, which overruled in small part, affirmed in large part, and remanded the matter to the Southern District of New York to determine the appropriate remedy.

The district court noted the (then) burgeoning judicial willingness to imply new remedies, including utilization of inherent equity power to grant relief ancillary to an injunction.[54] Relying primarily on secondary sources and citing *Porter* only in a footnote, it declared that the ancillary relief doctrine was "sufficiently well established to support the relief here sought by the SEC if the congressional purpose is effectuated by so doing."[55] Alternatively, it found that authority to strip the defendants of their profits was conferred by Section 27 of the 1934 Act, which provides, as noted above, for jurisdiction of "all suits in equity and actions at law" to enforce that Act.[56]

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[52] 312 F. Supp. 77, 91-94 (S.D.N.Y. 1970), aff'd in part and reversed in part on other grounds, 446 F.2d 1301 (2d Cir. 1972).
[53] *Id*. at 83.
[54] *Id.* at 91.
[55] *Id.*
[56] *Id.* The court also invoked J. I. Case Co. v. Borak, in which the Supreme Court, relying on Section 27 rather than on the ancillary relief doctrine, implied a private right of action under Section 14 of the Exchange Act. Also cited was Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 456 (1957), in which the Supreme Court held that the congressional grant of jurisdiction in Section 301(a) of the Labor Management Relations Act of 1947 "'authorize[d] federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements . . ..'"

On appeal, the Second Circuit affirmed, specifically relying on *Porter*.[57] The Second Circuit acknowledged that the amounts paid most likely would be given to Texas Gulf Sulphur, rather than contemporaneous traders, and noted that this result aligned with state law establishing that inside trading is an injury to the issuer.[58]

The defendants in *Texas Gulf Sulphur* included Darke, an insider who had bought securities himself and also recommended to others that they do so. Some of Darke's tippees passed the recommendation along to still others who traded.[59] In discussing the amount of Darke's monetary liability, the court noted that the Second Circuit had specifically ruled that his tipping was a violation of the Exchange Act. It therefore included in its order the profits gained by Darke's immediate tippees, but felt that was a "sufficient deterrent."[60] The Commission's request for the profits of the remote tippees thus was rejected. Although there was little else said about the matter in *Texas Gulf Sulphur*, it is worth noting that subsequent Supreme Court jurisprudence on insider trading consistently characterizes a tip as analogous to a trade followed by a gift of proceeds.[61] In this analysis, the tipper has personally benefited to the extent of the gift. This reconciles nicely with limiting disgorgement orders to an immediate tippee's profits – Darke presumably did intend something like a gift to his immediate tippees, but well may have been indifferent with respect to the fortunes of the subsequent generation of tip recipients.

The remedy for those insiders accepting stock options on the basis of their illicit informational asymmetry was simple (and in fact dictated by the first opinion of the Second

[57] Childers v. US, 442 F.2d 1301, 1307 (2d Cir. 1971).
[58] *Id.*, citing Diamond v. Oreamuno, 248 N.E. 2d 910, 912-13 (NY 1969). The Second Circuit also distinguished Beck v. SEC, 430 F.2d 673 (6th Cir. 1970), which held that, in the circumstances, an SEC-sought suspension was punitive rather than equitable.
[59] *Texas Gulf Sulphur Co.*, 312 F. Supp. at 83.
[60] *Id.* at 95.
[61] *See infra* note 337 and accompanying text.

Circuit) – cancellation of the options that had not already been surrendered.[62] The measure of payments required from each of the defendants found guilty of inside trading by reason of the open market purchase of stock was the difference between the price at which the defendant purchased it and its price on the date that the "news was widely disseminated by the news media and was available to the investing public . . .."[63] This amount was augmented by interest ordered from the date of dissemination. Interestingly, although four defendants were ordered to relinquish the amount of their profits (others had already voluntarily paid them over to the company), only one of those actually was enjoined from further violation of the Exchange Act.[64]

D. Subsequent Judicial Developments

Following the *Texas Gulf Sulphur* case, the Commission routinely began to seek similar orders in other insider trading cases, and expanded its requests for what widely became known as "disgorgement" into other contexts.[65] One logical expansion involved issuer violations of the federal securities laws by way of affirmative misrepresentation at the time of a sale of shares.[66] These bore an obvious similarity to insider trading transgressions insofar as gains by wrongdoers logically were linked to losses by trading partners, even though those partners might sometimes be difficult to identify and were not necessarily the recipients of the amounts disgorged. Eventually, however, it became clear that disgorgement would be sought in the case of virtually any securities violation, including those that had no obvious victims. Thus, for instance, the

[62] 401 F.2d at 856, 857.
[63] 312 F. Supp. at 93.
[64] 312 F. Supp. at 99.
[65] Jacqueline K. Chang, Kokesh v. SEC*: The Demise of Disgorgement*, 22 N.C. BANKING INST. 309, 310-11 (2018) (citing several congressional expansions of SEC disgorgement power); *See* Ellsworth, *supra* note 35, at 641-42 nn. 3-4 (1977) (citing line of case law indicating expansion of the disgorgement remedy).
[66] *See* SEC v. Quan, 817 F.3d 583, 594-95 (8th Cir. 2016) (holding disgorgement was an available remedy for false or misleading statements); S.E.C. v. Autocorp Equities, Inc., 292 F.Supp.2d 1310, 1330 (D. Utah 2003) (holding disgorgement was an available remedy for material misrepresentations as to value and authenticity of certificate of deposits).

Commission sought and obtained disgorgement orders in the case of violations of the Foreign Corrupt Practices Act provisions prohibiting bribery of foreign officials.[67] Although the amount of profit in those cases might be a bit difficult to determine, courts saw no reason to be particularly persnickety, and permitted the SEC to establish an "approximation" of the defendant's profit, leaving it to the defendant to show that the amount should be reduced.[68] Some defendants did successfully convince courts to reduce, or "offset" the amount to be disgorged by the expenses incurred in generating their ill-gotten gains;[69] some did not.[70]

During the early period of the remedy's development, the Commission consistently sought disgorgement as an adjunct to a request for injunction.[71] Courts initially relied on the "ancillary remedy" analysis, but came to simply refer to disgorgement as itself an "equitable"

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[67] *See, e.g.*, SEC v. Fiat S.P.A. & CNH Global N.V., SEC Litigation Release No. 20,835 (Dec. 22, 2008) (Fiat S.p.A. and CNH Global N.V. agreed to approximately $7.2 million in disgorgement as part of a total DPA settlement of approximately $17.8 million); SEC v. Siemens AG, SEC Litigation Release No. 20,829 (Dec. 15, 2008) (Siemens AG agreed to approximately $350 million in disgorgement as part of a total U.S. settlement of approximately $800 million); *In re* Faro Techs., Inc., SEC Administrative Proceeding File No. 3-13059 (June 5, 2008) (Faro Technologies, Inc., agreed to approximately $1.8 million in disgorgement as part of a total NPA settlement of approximately $2.9 million). Note, however, the argument of the Second Circuit in *Texas Gulf Sulphur*, 446 F.3d at 1306, that issuers employing wrongdoers experience reputational damage. Presumably, in the foreign corrupt practices area, harm to competitors also is foreseeable.

[68] *See*, *e.g.*, SEC v. Whittemore, 659 F.3d 1, 7 (D.C. Cir. 2011); SEC v. Happ, 392 F.3d 12, 31 (1st Cir. 2004); SEC v. First City Fin. Corp., 890 F.2d 1215, 1231-32 (D.C. Cir. 1989).

[69] *See* SEC v. Video Without Boundaries, Inc., 2010 WL 5790684 (S.D. Fla. Dec. 8, 2010); SEC v. Berlacher, 2010 WL 3566790 at 15 (E.D. Pa. Sept. 13, 2010); *SEC v. Shah*, 1993 WL 288285 (S.D.N.Y. July 28, 1993); SEC v. Thomas James Assocs., Inc., 738 F. Supp. 88 (W.D.N.Y. 1990).

[70] *See* SEC v. JT Wallenbrock & Assocs., 440 F.3d 1109 (9th Cir. 2006); SEC v. United Energy Partners, Inc., 2004 WL 315185 at 2 (5th Cir. Feb. 18, 2004), *cert. denied sub nom,* 543 U.S. 1034 (2004); SEC v. Calvo, 378 F.3d 1211 (11th Cir. 2004); SEC v. TLC Invs. & Trade Co., 179 F. Supp. 2d 1149 (C.D. Cal. 2001); SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1 (D.D.C. 1998); SEC v. Hughes Capital Corp., 917 F. Supp. 1080 (D.N.J. 1996); SEC v. Great Lakes Equities, 775 F. Supp. 211 (E.D. Mich. 1991); SEC v. United Monetary Servs., Inc., 1990 WL 91812 at 9 (S.D. Fla. May 18, 1990); SEC v. Benson, 657 F. Supp. 1122 (S.D.N.Y. 1986); SEC v. Blavin, 760 F.2d 706 (6th Cir. 1985); SEC v. World Gambling Corp., 555 F. Supp. 930 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1440 (2d Cir. 1983), *cert. dismissed*, 465 U.S. 1112 (1984); SEC v. Dimensional Entertainment Corp., 493 F. Supp. 1270 (S.D.N.Y.1980)*;* SEC v. R.J. Allen & Assocs., Inc., 386 F. Supp. 866 (S.D. Fla. 1974). There is an interesting debate about whether allowable expenses should be limited to the marginal cost of the illegal revenue or whether some portion of allocable business expenses might also be permitted as an offset. *Compare* SEC v. McCaskey, 2002 WL 850001 at *4 (S.D.N.Y. 2002) (holding brokerage fees should be distinguished from general business expenses, the latter which should not offset disgorgement) *with* SEC v. Video Without Boundaries, Inc., 2010 WL 5790684 (S.D. Fla. Dec. 8, 2010); SEC v. Thomas James Assocs., Inc., 738 F. Supp. 88, 94-95 (W.D.N.Y. 1990) (holding general business expenses as valid offsets to disgorgement).

[71] Edmund B. Frost, Comment, *SEC Enforcement of the Rule 10b-5 Duty to Disclose Material Information-Remedies and the Texas Gulf Sulphur Case*, 65 MICH. L. REV. 944, 946 (1967).

remedy that they assumed they were free to employ.[72] Thus, somewhere along the way, the Commission began to request disgorgement orders even in the complete absence of injunctive relief.[73] The amounts recovered became quite significant.[74] As further detailed in Part III of this article,[75] these developments were hardly state secrets. In fact, in 2008, the Supreme Court characterized SEC disgorgement recoveries as a reason to eschew recognizing a private right of action against peripheral participants in fraudulent schemes, noting that "[t]he [Commission's] enforcement power is not toothless. Since September 30, 2002, SEC enforcement actions have collected over $10 billion in disgorgement and penalties, much of it for distribution to injured investors."[76]

Also somewhere along the way, a few aspects of the SEC disgorgement remedy became more palpable. First, defendants' gains, rather than plaintiffs' losses, definitely were its measure (although the method of calculating those gains varied) and there was no requirement that any portion be paid to victims as restitution.[77] Second, the lower federal courts' resolute characterization of the remedy as equitable in nature had several consequences. Among other things, it was not "jeopardy" for double jeopardy purposes[78] and, because it was not an action "at law," it did not give rise to a right to trial by jury.[79] Similarly, it was not a debt for purposes of

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[72] Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 294-96 (1960).
[73] *See, e.g.*, Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946); *see also* J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).
[74] *See supra* note 3 and accompanying text. Interestingly, in cases involving breach of fiduciary duty, disgorgement orders can themselves be characterized as injunctive, given that fiduciaries profiting from use of a beneficiary's property (including confidences) have an affirmative duty to account for it. *See infra* note 225.
[75] *See infra* note 98-137 and accompanying text.
[76] Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc, 552 U.S. 148 (2008), citing SEC, 2007 PERFORMANCE AND ACCOUNTABILITY REPORT, p. 26, http://www.sec.gov/about/secpar2007.shtml (as visited Jan. 2, 2008, and available in Clerk of Court's case file).
[77] *See, e.g.*, Zacharias v. SEC, 569 F.3d 458, 471 (D.C. Cir. 2009).
[78] Hudson v. U.S., 522 U.S. 93 (1997).
[79] *See, e.g.*, SEC v. Rind, 991 F.2d 1486, 1493 (9th Cir. 1983); SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 94-96 (2d Cir. 1978).

the Federal Debt Collection Procedures Act,[80] at least arguably was discharged in bankruptcy,[81] at least arguably was tax deductible,[82] and clearly was enforceable by contempt sanctions.[83] Moreover, for most of its history it was not, according to most courts, subject to any statute of limitations.[84]

E. Kokesh v. SEC

1. Background[85]

Charles Kokesh owned and controlled two registered investment advisors that were the managing general partners of four limited partnerships (known as "business development companies") investing the funds of "tens of thousands" of small investors in start-up companies. Between 1995 and 2006, Kokesh managed to misappropriate $34.9 million from the business development companies. Some of the money went directly to support Kokesh and his private stable of 50-plus polo ponies and some was directed to satisfy expenses of his controlled investment advisors. The SEC brought a civil enforcement action in 2009, alleging violations of the Securities Exchange Act, the Investment Advisors Act, and the Investment Company Act; the jury found violations of all three.

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[80] SEC v. Huffman, 996 F.2d 800, 802-03 (5th Cir. 1993).

[81] *Id.* at 801. *But see* In re Telsey, 144 B.R. 563, 565 (Bankr. S.D. Fla. 1992) (holding it was a "fine, penalty, or forfeiture and thus not discharged).

[82] *See* Peter J. Henning, *Deducting the Costs of a Government Settlement*, N.Y. TIMES: DEALBOOK (Mar. 24, 2014, 1:17 PM), https://dealbook.nytimes.com/2014/03/24/deducting-the-costs-of-a-government-settlement/ (describing the disgorgement of a CEO's insider trading gains as "an equitable remedy" and, therefore, tax deductible); *see also* Robert W. Wood, *Insurance Industry Settlements Revive Old Questions: When Is a Payment a Nondeductible Penalty?*, 103 J. TAX'N 47, 48 (2005) ("Restitution (or disgorgement of profits) is generally deductible as a business expense.").*But see* Office of Chief Counsel, IRS, Memorandum, Section 162(f) and Disgorgement to the SEC, No. 201619008, at 9 (Jan. 29, 2016) (applying section prohibiting deductions for "any fine or similar penalty paid to a government for the violation of any law).

[83] *Huffman*, 996 F.2d at at 803; SEC v. Goldfarb, 2012 U.S. Dist. LEXIS 85628, at *10-17 (N.D. al. 2012). *But see* SEC v. New Futures Trading Int'l Corp., 2012 U.S. Disxt. LEXIS 55557, at *5-6 (D.N.H. 2012).

[84] *See, e.g.*, Riordan v. SEC, 627 F.3d 1230, 1234 (D.C. Cir. 2010); SEC v. Find, 991 F.2d 1486, 1492-93 (9th Cir., 1993).

[85] The factual background is based on the recitations in *Kokesh*, 137 S.Ct. at 1641, and the 10th Circuit decision at 834 F.3d 1158, 1160-62 (2016).

The United States District Court for the District of New Mexico, at the request of the SEC, ordered a civil monetary penalty of $2.4 million, based on Kokesh's conduct beginning in 2004. It also ordered disgorgement of $34,927,329 (plus prejudgment interest), representing the full amount misappropriated beginning in 1995. Both parties, as well as the court, recognized that the civil monetary penalty was subject to 28 U.S.C. § 2462, which, as noted above, requires that "enforcement of any civil fine, penalty, or forfeiture," be "commenced within five years from the date when the claim first accrued." Kokesh urged Section 2462's application to the disgorgement order as well, but the court followed 10th Circuit precedent in concluding that disgorgement is not a penalty subject to Section 2462 because it is not punitive; rather, it is remedial, returning the wrong-doer to the pre-wrongdoing status quo. This reasoning also had been found persuasive in earlier decisions of the D.C. and 1st Circuits as well as a plethora of district courts;[86] the only notable exception was the 11th Circuit's resolution of *SEC v. Graham*.[87]

On appeal, the 10th Circuit confirmed its earlier reasoning as to why disgorgement is non-punitive and also addressed Kokesh's claim that disgorgement is a forfeiture governed by Section 2462. It noted that in common parlance "forfeit" and "disgorge" may be used interchangeably, and that there are similarities in modern dictionary definitions of the terms.[88] It politely declined to follow the 11th Circuit, in *Graham*, in relying on those similarities to conclude disgorgement is a forfeiture under Section 2462.[89] Instead, the 10th Circuit plunged into a thicket of legal history and statutory interpretation, emerging with the conclusion that "forfeiture" should be understood by reference to Congressional understanding at the time of

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[86] *See, e.g.*, Zacharias v. SEC, 569 F.3d 458, 471 (D.C. Cir. 2009); SEC v. Banner Fund Intern., 211 F.3d 602, 617 (D.C. Cir. 2000); SEC v. Williams, 884 F.Supp. 28, 30, 31 (D. Mass. 1995); SEC v. Lorin, 869 F.Supp. 1117, 1122 (S.D.N.Y., 1994).
[87] SEC v. Graham, 823 F.3d 1357, 1363 (11th Cir. 2016) (reasoning disgorgement is a "forfeiture").
[88] SEC v. Kokesh, 834 F.3d 1158, 1165 (10th Cir. 2016).
[89] *Id.* at 1167.

enactment of Section 2462's precursor.[90] This understanding was that "forfeiture" means a "proceeding brought by the government *against property* that either facilitated a crime or was acquired as a result of criminal activity." (Emphasis added.)[91] The guilt or innocence of the property's owner is not dispositive. By contrast, modern disgorgement is an action for *money* brought against a *wrong-doer* and thus is not a "forfeiture."[92] This distinction is often referred to as the difference between proceeding *in rem* (against property) and proceeding *in personam* (against person).

2. The Opinion of the Supreme Court

As the result of the Supreme Court's opinion in *Kokesh*, the amount of the ordered disgorgement was trimmed dramatically, reaching only the ill-gotten gains obtained beginning in 2004. Justice Sotomayor's unanimously-ascribed opinion was quite straightforward. After acknowledging the purpose of the federal securities laws to "establish the highest ethical standards in all facets of the securities industry"[93] and summarizing the evolution of the commission's enforcement authority to include the ability (by statute) to pursue injunctive relief, the authority (judicially recognized) to seek disgorgement, and the ability (again by statute) to obtain civil monetary penalties, she reviewed the facts and history of the case.[94]

Five pages into the decision, Sotomayor (with citation) praised statutes of limitations as "vital to the welfare of society," quoted Section 2462, and announced the court's conclusion that SEC disgorgement constitutes a "penalty" for purposes of that section.[95] It is at that point that footnote 3 appears. It explains that the court is not opining on whether the federal courts have, in

[90] *Id.* at 1166.
[91] *Id.* at 1165, 1166.
[92] *Id.* at 1164-65.
[93] *Kokesh*, 137 S.Ct. at 1640.
[94] *Id.* at 1640-41.
[95] *Id.* at 1641, 1642

the first place, the authority to order disgorgement in SEC enforcement proceedings. Exactly why that might be an issue is the subject of Part IV of this article.[96] The reasoning that followed footnote 3 in support of the Court's conclusion that SEC disgorgement is a penalty relied almost exclusively on an invocation of soundbytes from the Court's own precedents. To some readers, this may pose an interesting contrast to the lower court opinions, which struggled mightily both with legal history and with nuances of statutory interpretation.[97] In any event, the Court's analysis of that matter is not necessary to a discussion of whether the disgorgement remedy has been congressionally countenanced.

III. Meanwhile, Back at the Ranch: Congressional Developments *vis a vis* SEC Enforcement Authority

Part II of this article portrayed the development of the SEC disgorgement remedy primarily as a function of judicial nurturing, now threatened by *Kokesh*. There is, however, more to the story. As noted above, the progress of the remedy was hardly a state secret – its growth was well known to Congress. This Part of the article will make the point that Congressional enthusiasm for disgorgement has been manifested in several ways. It will, as an initial matter, ignore the very nice issue of whether there is such a thing as legislative intent.[98] It will simply pretend that there is and that two of the places one can look to discern it are (1) the statutes themselves, and (2) the statute's accompanying legislative records. Section IIIA examines explicit statutory developments – what might be called "statutory history"[99] or the "statutory record." Section IIIB investigates the most relevant of the congressional records accompanying

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[96] *See infra* notes 162-340 and accompanying text.

[97] Those same readers also may be interested in the selectivity and persuasiveness of the precedents invoked – a matter examined more thoroughly in a companion work. See Gabaldon, *Fences*, *supra* note 19.

[98] *See* the discussion *infra* notes 139-61 and accompanying text.

[99] *See* Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1644 (2014).

those developments – what might be called "legislative history." Section IIIC returns to the question of which materials properly may be considered.

A. The Statutory Record

To recapitulate, cruising into the 1970s and toward the case of SEC v. Texas Gulf Sulphur, the Commission's only statutory enforcement authority was to seek injunctions against conduct violating the federal securities laws. Not too many years after *Texas Gulf Sulphur*, however, the Securities Reform Act of 1975 amended Section 21(e) of the Exchange Act to stipulate that, upon application of the Commission, district courts had jurisdiction to issue not only writs of mandamus (which previously were the only subject of the section), but also injunctions and orders commanding compliance with the Act and rules, regulations and orders thereunder.[100] According to one commentator "[t]he legislative history does not explain the addition, but it was probably a technical change to reflect the abolition of the writ of mandamus in federal practice."[101] Still, courts clearly already had authority under Section 21(d) to order injunctions, so if the change was to accomplish anything, it presumably would be the addition of "orders." As writs of mandamus were legal[102] and injunctions were equitable, the nature of "orders" is simply unrevealed by its statutory companions. Recall, however, that Porter v. Warner Holding Co. held a statutory reference to injunctions and "orders" justified non-injunctive orders, including a restitution decree.[103] It therefore seems clear that Section 21(d) could be read as authorizing the Commission to apply for orders that are other than injunctive – without, of course, indicating what those orders might be. This reading obviously would

[100] 15 U.S.C. §78u(5). Section 21(e) now also extends to injunctions and orders to comply with the rules of self-regulatory organizations, the Public Company Accounting Oversight Board, and the like.
[101] Dent, *supra* note 29, at n. 150.
[102] *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1000 (2015); John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUM. L. REV. 1317, 1353 (2003).
[103] *See supra* notes 36-47 and accompanying text.

comport with the canon of statutory construction mandating that words in a statute should not be regarded as mere surplusage.[104]

In the 1980s, public attention was captured by inside trading and Congressional attention was captured by the prospect of getting tough on it. Two statutory provisions relevant to the status of disgorgement were the result. One of these is Exchange Act Section 20A. That section created a private right of action for those trading contemporaneously with any person violating the '34 Act by purchasing or selling a security while in possession of material, nonpublic information. The amount to be recovered (which is to be shared by all those contemporaneous trading) is limited to "the profit gained or loss avoided in the transaction or transactions that are the subject of the violation."[105] The recovery "shall be diminished by the amounts, if any, that such person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission, in a proceeding brought under [Section 21(d) of this title relating to the same transaction or transactions."[106] At the time, of course, Section 21(d) expressly permitted the Commission only to seek injunctive relief and in no way mentioned the pursuit of disgorgement and/or monetary penalties. It would seem obvious, then, that Congress was both keenly aware of the Commission's practice of seeking disgorgement and regarded it as a matter of authorized injunctive relief, be it ancillary or otherwise. In any event, Section 20A went on to provide that it would not limit any other express or implied private right of action, nor any action by the Commission or the Attorney General.[107]

Also part of the decade's "getting tough on insider trading" campaign was the adoption of Section 21A, which for the first time authorized the Commission to seek "civil penalties." It was

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[104] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 174 (2012).
[105] Securities Exchange Act of 1934 §21A(b)(1), 15 U.S.C. §78t-1 (2018).
[106] Securities Exchange Act of 1934 §20A(b)(2), 15 U.S.C. §78t-1 (2018)
[107] Securities Exchange Act of 1934 §20A(d), (e), 15 U.S.C. §78t-1 (2018).

limited to the context of (1) those persons engaging in violations of the ’34 Act by trading while in possession of material non-public information or by communicating such information, and (2) those persons controlling primary violators. The amount of the penalty was to be determined by the court, but was “not to exceed three times the profit gained or loss avoided” as a result of the violation.[108] “Profit gained or loss avoided” was defined as “the difference between the purchase or sale price of the security and the value of that security as measured by the trading price of the security a reasonable period after public dissemination of the nonpublic information.”[109] This measure is, of course, not only logical but also the one approved by the court in *Texas Gulf Sulphur*.[110] A five-year statute of limitations was stipulated,[111] as was the non-exclusivity of the remedy: “The actions authorized by this section may be brought in addition to any other actions that the Commission or the Attorney General are entitled to bring.”[112]

In 1990, the SEC sought and obtained the ability to more generally seek civil monetary penalties. The Securities Enforcement Remedies and Penny Stock Reform Act[113] (the “Remedies Act”) thus added Exchange Act Section 21(d)(3),[114] specifying the Commission had authority to bring actions for, and district courts had jurisdiction to order, civil penalties. These penalties were to be capped by a sliding scale, in tiers by progressive culpability, or by “the gross amount of pecuniary gain” as a result of the defendant’s violation, whichever was greater.[115] The

[108] Securities Exchange Act of 1934 §21A(a)(2), 15 U.S.C. §78u-1 (2018).
[109] Securities Exchange Act of 1934 §21A(e), 15 U.S.C. §78u-1 (2018).
[110] Notably, although accounting purists might quibble about whether it ever is technically correct to use the term “profit” to refer to fross amounts, the Congressional definition clearly does not contemplate offsets for expenses. *See supra* note 63 and accompanying text.
[111] Securities Exchange Act of 1934 §21A(d)(5), 15 U.S.C. §78u-1 (2018).
[112] Securities Exchange Act of 1934 §21A(d)(3), 15 U.S.C. §78u-1 (2018).
[113] Pub. L. No. 101-429, secs. 101, 202 20(d), 21B, 104 Stat. 931, 937-38 (1990), codified in relevant part at 15 U.S.C. §77t, 78u-2. The Remedies Act was sufficiently popular so as to pass by voice vote. https://www.govtrack.us/congress/bills/101/s647.
[114] Securities Exchange Act of 1934 §21(d)(3), 15 U.S.C. §78u (2018).
[115] *Id.*

Commission promptly commenced the practice of seeking both disgorgement and civil penalties from the same defendants.[116]

The 1990 Remedies Act also expanded the Commission's authority to order certain remedies administratively. These included cease and desist orders[117] and, with respect to violations by regulated securities professionals, civil monetary penalties capped by a sliding scale without reference to pecuniary gain.[118] In addition, in any case in which a cease and desist order was issued *or* a civil monetary penalty was imposed, the Commission was specifically empowered to order accounting and disgorgement.[119] One commentator has argued that statutory recognition of the administrative disgorgement remedy conclusively establishes that the judicial remedy does not exist.[120] As another has stated (and as legislative history clearly shows), it simply was obvious that Congress believed that the Commission already was able to seek judicially ordered disgorgement as a matter of equity and sought to offer a parallel opportunity to act administratively.[121]

[116] *See*, *e.g.*, SEC v. Palmisano, 135 F.3d 860, 865-67 (2d Cir. 1998); SEC v. Moran, 944 F.Supp. 286, 294 (S.D.N.Y. 1996); SEC v. Chester Holdings, Ltd., 41 F.Supp. 2d 505, 528-30 (D. N.J. 1999).

[117] Securities Exchange Act of 1934 §21C, 15 U.S.C. §78u-3 (2018).

[118] Securities Exchange Act of 1934 §§21B(a) - (b), 15 U.S.C. §78u-2 (2018).

[119] Securities Exchange Act of 1934 §§21B(e), 15 U.S.C. §78u-2 (2018).

[120] Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE at *11 (2013).

[121] Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 BUS. LAW. 317, 321 (2008). *See also* the discussion of legislative history *infra* notes 132-38. Although one might think that the Commission then would prefer to proceed administratively to order disgorgement, this did not immediately turn out to be the case. Ryan, *supra* note 120, at n.12. Some of the reasons that could be ascribed include the fact that administrative disgorgement originally required coupling with a civil monetary penalty or cease and desist order. *See supra* note 119 and accompanying text. Moreover, although the SEC might order disgorgement, it has no way to enforce the order without repair to a court for an injunction. Dixie L. Johnson et al., *King & Spalding Discusses Potential Effects of SEC Disgorgement As a Penalty*, THE CLS BLUE SKY BLOG (June 21, 2017) [hereinafter King & Spalding], http://clsbluesky.law.columbia.edu/2017/06/21/king-spalding-discusses-potential-effects-of-sec-disgorgement-as-penalty/ (discussing the lack of express statutory authority regarding the SEC's authority to pursue disgorgement in federal court). In addition, contempt orders are reserved for violations of orders of courts, not those of administrative agencies, and only court orders have the collateral estoppel effect that might benefit private plaintiffs. Catherine E. Maxson, *The Applicability of Section 2462's Statute of Limitations to SEC Enforcement Suits in Light of the Remedies Act of 1990*, 94 MICH. L. REV. 512, 522-23 (1995). In recent years, however, a distinct uptick in use of the administrative enforcement route has been accompanied by a dramatic uptick in complaints about it (*see generally* David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155 (2016) (discussing

In the Private Securities Litigation Reform Act of 1995, the concept of Commission-sought and/or ordered disgorgement was further recognized in new Exchange Act Section 21(d)(4), which reads as follows:

> Prohibition of attorneys' fees paid from commission disgorgement funds. Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.[122]

Congress thus specifically recognized both the express authority of the SEC to obtain disgorgement in its own administrative proceedings and its ability to seek court-ordered disgorgement.

The Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley")[123] provided additional indicators of Congressional understanding of the existence of SEC disgorgement practices. Section 308(a) of Sarbanes-Oxley (which is not part of the Exchange Act) bore the heading "Civil Penalties Added to Disgorgement Funds for the Relief of Victims." It provided as follows:

> If in any judicial or administrative action brought by the Commission under the securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)) the Commission obtains an order requiring disgorgement against any person for a violation of such laws or the rules or regulations thereunder, or such person agrees in settlement of any such action to such disgorgement, and the Commission also obtains pursuant to such laws a civil penalty against such person, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of the disgorgement fund for the benefit of the victims of such violation.[124]

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various criticisms)), up to and including the contention (now confirmed by the Supreme Court) that the traditional method of appointing administrative law judges was unconstitutional. Lucia v. SEC, 138 S.Ct. 2044, 2060 (2018).

[122] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 757 (codified as amended in scattered sections of 15 U.S.C.).

[123] Sarbanes Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15, 18 U.S.C.). Sarbanes-Oxley was an enormously popular piece of legislation, passing 423-3 in the House and 99-0 in the Senate. https://www.govtrack.us/congress/votes/107-2002/s192.

[124] Sarbanes Oxley Act of 2002, §308(a), Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15, 18 U.S.C.). Section 308(a) was amended by the Dodd-Frank Act of 2010 to eliminate the requirement that civil penalties be paid to victims only if disgorgement also was ordered. It now reads as follows: (a) CIVIL PENALTIES TO BE USED FOR THE RELIEF OF VICTIMS.—

This is an obvious indication that Congress understood the Commission to have the authority to obtain disgorgement both administratively and by judicial order. It also makes the clear point that Congress regarded disgorgement as something *other* than a civil penalty. This point similarly was made by Section 308(c), which ordered the Commission to study and report on its previous five years of "proceedings to obtain civil penalties or disgorgements to identify areas where such proceedings may be utilized to . . . provide restitution for injured investors . . .."[125]

More generally, Sarbanes-Oxley added new Exchange Act Section 21(d)(5), which permits the Commission to seek, and any federal court to grant, "any equitable relief that may be appropriate or necessary for the benefit of investors." [126] One might (disingenuously) argue that the grant should be taken to reflect recognition that such authority did not previously exist. More plausibly, it might be taken to reflect a desire to make explicit something already regarded as implicit. Alternately, it may just reflect the same kind of Congressional chest-pounding that, in post-Enron roiling financial waters, led our courageous legislators also to include in Sarbanes-Oxley a provision specifying that securities fraud is illegal (as if there were not already several very well-known provisions to that effect). In any event, it is clear that if disgorgement indeed were an equitable remedy it now would be expressly authorized. Whether it is such a remedy is the subject of Part IVB(1) of this article.[127]

> If, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.

Dodd-Frank Wall Street Reform and Consumer Protection Act, sec. 929B, §308(a), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C.).

[125] Sarbanes-Oxley Act of 2002 §308(c), 18 U.S.C. §7246.

[126] Sarbanes-Oxley Act of 2002 §807, 18 U.S.C. §1348.

[127] *See infra* notes 183-271 and accompanying text.

Most recently, the Dodd-Frank Act of 2010 (“Dodd-Frank”) added new Exchange Act Section 21F.[128] That section created a scheme for the (pardon the expression) “incentivization” and protection of whistleblowers. As part of that scheme, whistleblowers meeting certain requirements may be awarded bounties for providing information leading to “monetary sanctions” in excess of $1,000,000.[129] “Monetary sanctions” means, “when used with respect to any judicial or administrative action,” “(A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and (B) any monies deposited into a disgorgement fund . . ..”[130] This also suggests that Congress understood the Commission to have the authority to obtain disgorgement both administratively and by judicial order, and regarded disgorgement as something other than a penalty.[131] One might argue that calling disgorgement a “monetary sanction” is just another way of saying it is a penalty, but given that interest also is a “monetary sanction,” it seems fair to conclude that “monetary sanction” is simply a defined term that is being used for purposes of convenience and might as well have been “dingus” or “frindle.” Raising these counterarguments, however, creates an occasion to point out that Congress, courts and commentators (including the author of this article) tend not to use such terms as “sanction” and “remedy” very carefully; as often as not they simply are attempting a short-hand for “the unpleasant legal consequence of taking an act.” Consider, for example, the use of “remedies” in the title of the 1990 Remedies Act to include a broad array of such consequences, some of which might be regarded as remedial and some of which are clearly punitive.

[128] Securities Exchange Act of 1934 §21F, 15 U.S.C. §78u-6 (2018).
[129] Securities Exchange Act of 1934 §21F(a)(1), 15 U.S.C. §78u-6 (2018).
[130] Securities Exchange Act of 1934 §21F(a)(4), 15 U.S.C. §78u-6 (2018).
[131] Notably, in another part of Dodd-Frank, Congress authorized the Commodities Futures Trading Commission to seek, and federal courts to grant, any equitable remedy, specifically including restitution and disgorgement. 7 U.S.C.A. §13a-1(d)(3). Yet another section similarly empowered the newly created Consumer Financial Protection Bureau. Dodd-Frank Wall Street Reform and Consumer Protection Act, §1055, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C.).

B. Legislative History and Legislative Intent

Warning: Contains explicit legislative history. Those sensitive should avert their eyes.

This section continues the assumption that legislative intent is a legitimate concern in determining statutory meaning. It turns from the explicit statutory breadcrumbs that lead to the common sense conclusion that Congress has approved the SEC's pursuit of disgorgement in the federal courts and examines legislative history writ more expansively.

In 1972, the Commission's Annual Reports to Congress began to disclose both that it regarded disgorgement as a part of its arsenal and that the purpose of disgorgement was deterrence rather than compensation for particular victims:

> The SEC's primary function is to protect the public from fraudulent and other unlawful practices and not to obtain damages for injured individuals. Thus, a request that disgorgement be required is predicated on the need to deprive defendants of profits derived by their unlawful conduct and to protect the public by deterring such conduct by others.[132]

The Commission subsequently has, on an annual basis, reported to Congress the amounts obtained through disgorgement, as well as the amounts obtained as civil penalties following their authorization, in 1990, by the Remedies Act.[133]

The legislative history for the Remedies Act is particularly instructive with respect to Congressional awareness of the SEC disgorgement remedy. According to the House Report on that Act, "authority to seek or impose substantial money penalties, *in addition to disgorgement of profits*, is necessary for the deterrence of securities law violations." (Emphasis added.)[134] The

[132] 38 SEC ANN. REP. 70 (1972).

[133] These reports may be found at https://www.sec.gov/reports?aId=edit-tid&year=All&field_article_sub_type_secart_value=Reports+and+Publications-AnnualReports&tid=39. Moreover, it responded to its Sarbanes-Oxley mandate to study and report to Congressional on its prior proceedings to obtain civil penalties or disgorgements with an extremely detailed report on disgorgement practices. https://www.sec.gov/news/studies/sox308creport.pdf.

[134] H.R. Rep. No. 101-616, 1384 (1990).

Senate Report went into a fairly vast amount of additional detail.[135] It makes for telling, if lengthy, reading:

> S. 647 represents another step in a process of strengthening the SEC's enforcement authority that began with passage of the Insider Trading Sanctions Act of 1984 (ITSA). That legislation, for the first time, gave the SEC the authority to seek civil money penalties for insider trading. *Prior to passage of ITSA, the principal remedy available to the SEC was an injunction against further securities law violations and disgorgement of unlawful profits.* Although an injunction subjects a defendant to possible criminal contempt proceedings if he violates the same law again, some critics have argued that an injunction serves only as a "slap on the wrist." It also has been argued that disgorgement of ill-gotten gains is an insufficient deterrent, because it merely restores a defendant to his original position, without extracting a cost for his illegal behavior. In a sense, prior to the enactment of ITSA, there was [no] financial "risk" to a person engaging in insider trading. If caught, the insider trader only had to surrender his ill-gotten gains. . . . (Emphasis added.) [136]

The authors of the report thus manifested their understanding that disgorgement was a remedy available to the SEC, both before and after the passage of ITSA. They also appear to endorse the views of the "critics" to whom they refer, indicating that disgorgement is an insufficient deterrent because it imposes no cost on the defendant.

The following passage also is telling:

> In a number of enforcement cases, the SEC successfully has urged courts to invoke their equitable powers to require that law violators "disgorge" the amounts by which they are unjustly enriched. A recent judicial decision clarified that the SEC may obtain this relief when there are violations of disclosure and filing requirements under the Federal securities laws. Nonetheless, disgorgement requires only that the law violator give up his unlawful gains and exacts no cost for his actions.[137]

The drafters thus exhibit recognition of the variety of contexts, including filing violations, in which courts already had been willing to order disgorgement.

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[135] S. REP. 101-337, S. Rep. No. 337, 101ST Cong., 2ND Sess. 1990, 1990 WL 263550 (Leg.Hist.) P.L. 101-429, THE SECURITIES LAW ENFORCEMENT REMEDIES ACT OF 1990.

[136] *Id.* at 6-7.

[137] *Id.* at 9-10.

Other legislative history recognizing the existence of the SEC disgorgement remedy can be found, and has been particularly well mustered by Professor Donna Nagy.[138] There is really no need to present it here. *If* one accepts legislative history as indicative of legislative intent, and *if* one cares about legislative intent in the first place, that intent with respect to SEC disgorgement is crystal clear from what already has been presented. Those "ifs" are the subject of the next section.

C. The Legitimacy of Inquiry into Legislative Intent

A boundless sea of law review pages has seen wave after battering wave of commentary on the interesting and intricate question of whether there is such a thing as legislative intent.[139] As a theoretical matter, it seems inescapably to be true that the subjective intent of multiple lawmakers is undiscoverable, and that the chances are high that as to any particular statute their intentions are either different or nonexistent. As Professor Max Radin stated in 1930, "a legislature has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs."[140] These arguments resonate even for legislation as popularly endorsed as the Remedies and Sarbanes-Oxley Acts (the former was approved by voice vote and the latter by votes of 423-3 in the House and 99-0 in the Senate).[141] They have been extended by more modern "public choice" or "social

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[138] *See* Donna Nagy in *The Statutory Authority for Court-Ordered Disgorgement in SEC Enforcement Actions*, 71 SMU L. REV. 895, 903 (2018). Professor Nagy's multiple sources include a colloquy between the Chair of the SEC and Senator Riegle on why it was not necessary for the Remedies Act to specify in the statutes that the new civil monetary penalty did not displace disgorgement.

[139] *See, e.g. See, e.g.* Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1021 (2017) (arguing the fictional nature of legislative intent leaves interpreters of legislation with little reason to care about the fine details about the legislative process); Lawrence M. Solan, *Private Language, Public Law: the Central Role of Legislative Intent In Statutory Interpretation,* 93 GEO. L.J. 427, 458 (2005) (using developments in linguistics, social and developmental psychology, and philosophy to defend the use of legislative intent in statutory interpretation).

[140] Max J. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).

[141] *See supra* notes 113 and 123 and accompanying text.

choice" theorists who contended that legislators act, not for shared public purposes, but in individual response to the influences of "rent seeking" special interests.[142]

Legal process theory nonetheless eventually "shifted the terrain [from legislative intent] to [legislative] 'purpose' because of realist critiques of 'intent.'"[143] It is said that current Supreme Court Justice Stephen Breyer is a primary proponent of "purposivism,"[144] and that "[p]urposivists have purportedly never seen legislative history that they did not like."[145] Without taking the time to work through the entire taxonomy, the types of legislative history that have been considered by courts over time and that seem to be acceptable to purposivists include statutory texts themselves,[146] statutory schemes,[147] the "equity of the statute,"[148] and evidence generated in the formal deliberative process, such as committee reports and executive messages.[149] In addition, courts sometimes have regarded as relevant to their inquiry the various historical and legal developments of which Congress fairly should be aware.[150] Rather clearly, purposivists would consider the matters discussed in Sections IIIA and IIIB of this article to be quite relevant in resolving the question of the existence of the SEC disgorgement remedy.

Since at least the 1980s, however, "textualism" has existed as a counterpoint to both intentionalism and purposivism. Textualists "typically refuse to treat legislative history as

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[142] *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 2-3 (2d ed. 1963); William Eskridge, *Politics Without Romance: Implications of Social Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 277 (1988); DANIEL A. FARBER & PHILIP FRICKEY, LAW AND PUBLIC CHOICE, 423-24 (1991); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986). For a specific invocation of public choice theory in the federal securities law context, *see* David D. Haddock & Jonathan R. Macey, *Regulation on Demand: A Private Interest Model With an Application to Insider Trading Regulation*, 20 J.L. & ECON. 311 (1987).
[143] Nourse, *supra* note 99, at 1617.
[144] *Id.* at 1645.
[145] *Id.* at 1645.
[146] *See, e.g.*, Western Union Tel. Co. v. Lenroot, 323 U.S. 490 (1945); Stainlock v. Mo Hock Ke Lock Po, 336 U.S. 368 (1949; Unexcelled Chemical Corp. v. United States, 345 U.S. 59 (1953).
[147] *See, e.g.*, J. I Case Co. v. Borak, 377 U.S. 426, 435 (1964); Touche Ross v. Redington, 442 U.S. 560, 571 (1979).
[148] *See, e.g.*, Ford Motor Credit Co. v. Cenance, 452 U.S. 155 (1981).
[149] *See generally* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION ch. 48 (Sands, 4th ed. 1985).
[150] *See, e.g.*, SEC v. W.J. Howey Co., 328 U.S. 293 (1946); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943).

'authoritative' evidence of legislative intent," and "choose the letter of the statutory text over its spirit."[151] The goal of the textualist judge in applying statutes thus is limited to deriving "meaning . . . from the ring the words would have had to a skilled user of words at the time, thinking about the same problem."[152] Former Supreme Court Justice Antonin Scalia was one of the best known textualists;[153] as documented below, at least three current members of the Court share and perhaps exaggerate his predilection. Presumably textualists would be rendered nauseous by the legislative history presented in Section IIIB, but the statutory scheme outlined in Section IIIA might be less unsettling. This article will argue (in fact, it seems to be doing so already) that even textualists properly could conclude that the composite of federal securities statutes discussed in Section IIIA adequately confirms the existence of an SEC disgorgement remedy. Before amplifying that argument, it is worth a moment to consider Supreme Court views on legislative history as of 2017-2018, as manifest in two opinions bearing on the federal securities laws.

The first, *Kokesh v. SEC*, mustered a unanimous opinion.[154] In that decision, described earlier in this article, Justice Sotomayor took a statute – the Section 2462 statute of limitations – and sought the meaning of the single term "penalty" exclusively among the Court's own precedents. She did invoke, in passing, the purpose of the federal securities laws, but once again relied solely on the Court's own precedents to establish just what that purpose was. She

[151] John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).
[152] Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988). The "textualism" v. "intentionalism/purposivism" wars have led to several interesting permutations. For instance, some commentators have sought to rehabilitate intentionalism, making the claim that legislative intent exists as a construct expressed through the final vote on a bill and thus should be determined without reference to legislative history. Hillel Y. Levin, *Intentionalism Justice Scalia Could Love* (reviewing RICHARD ELKINS, THE NATURE OF LEGISLATIVE INTENT (2012), 30 CONST. COMMENT. 89, 94-95 (2015).
[153] *See generally* Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857 (2017) (discussing the role of Justice Scalia in promoting textualism).
[154] *See supra* notes 93-97 and accompanying text.

otherwise found no occasion whatsoever to discuss the concepts of legislative history or legislative intent. This may be one reason why the opinion was so cleanly unanimous.

By contrast, *Digital Realty v. Somers*,[155] unanimously decided a few months after *Kokesh*, featured a majority opinion in which three Justices declined to join, notwithstanding concurrence in the result, and spawned two concurring ripostes on Justice Ginsburg's use of a Dodd-Frank Senate Report in support of the majority's conclusion. The issue in the case involved the meaning of "whistleblower," as used and defined in the Exchange Act. Justices Roberts, Kennedy, Breyer, Sotomayor, and Kagan evidently were undisturbed by invocation of the report in question, which was relied upon as an expression of the statute's purpose.[156] Justices Thomas, Alito, and Gorsuch, however, did a runner,[157] prompting a back-and-forth with Justices Sotomayor and Breyer, who filed their own concurrence. That concurrence joined the majority opinion and specifically extolled the praise of legislative history.[158] The exchange is well worth following.

First, consider the following statement by Justice Thomas (some citations and cross-references omitted), in which Justices Alito and Gorsuch joined:

> I join the Court's opinion only to the extent it relies on the text of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). . . . As the Court observes, this statutory definition "resolves the question before us." The Court goes on, however, to discuss the supposed "purpose" of the statute, which it primarily derives from a single Senate Report. Even assuming a majority of Congress read the Senate Report, agreed with it, and voted for Dodd-Frank with the same intent, "we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended." And "it would be a strange canon of statutory construction that would require Congress to state in committee reports . . . that which is obvious on the face of a statute." For these

[155] Digital Realty Trust, Inc. v. Somers, 138 S.Ct. 767 (2018).
[156] *Id.* at 782, 783.
[157] *Id.* at 783, 784
[158] *Id.* at 782-83.

> reasons, I am unable to join the portions of the Court's opinion that venture beyond the statutory text.[159]

This compares with the following comments by Justice Sotomayor, in which Justice Breyer joined (some citations and cross-references omitted):

> Committee reports, like the Senate Report the Court discusses here, are a particularly reliable source to which we can look to ensure our fidelity to Congress' intended meaning. "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" . . . It is . . . no surprise that legislative staffers view committee and conference reports as the most reliable type of legislative history. . . . Moreover, confirming our construction of a statute by considering reliable legislative history shows respect for and promotes comity with a coequal branch of Government. . . . For these reasons, I do not think it wise for judges to close their eyes to reliable legislative history — and the realities of how Members of Congress create and enact laws — when it is available.[160]

Justice Sotomayor annotated her concurrence with evidence that members of Congress themselves give import to legislative history.[161]

Having accomplished its mission of establishing that there are theoretical divides on the acceptable use of legislative history, as well as a continuing divide on the present day Supreme Court, this article will not purport to divine any novel insights into the matter. Instead, in the next Part it will turn to the topic of the various theories on which the existence of an SEC disgorgement remedy might be recognized.

IV. Footnote 3 and the Sticky Wicket of Power: Does the SEC Possess the Authority to Pursue, and the Courts the Power to Grant, the Remedy of Disgorgement?

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[159] *Digital Realty*, 138 S.Ct. at 784 (quoting Lawson v. FMR LLC, 571 U.S. 429, ___ (2014) (Scalia, J., concurring in part and concurring in judgment) and Harrison v. PPG Industries, Inc., 446 U.S. 578, 592 (1980)).

[160] *Digital Realty*, 138 S.Ct. at 782, 783 (quoting Garcia v. United States, 469 U.S. 70, 76 (1984) (in turn quoting Zuber v. Allen, 396 U.S. 168, 186 (1969))).

[161] *See*, *e.g.*, Hearings on the Nomination of Judge Antonin Scalia, To Be Associate Justice of the Supreme Court of the United States before the Senate Committee on the Judiciary, 99th Cong., 2d Sess., 65-66 (1986) (Sen. Charles E. Grassley) ("[A]s one who has served in Congress for 12 years, legislative history is very important to those of us here who want further detailed expression of that legislative intent").

Kokesh v. SEC reserved, in footnote 3, the questions "whether courts possess authority to order disgorgement in SEC enforcement proceedings" and "whether courts have properly applied disgorgement principles in this context."[162] The latter presumably goes to such matters as whether offsets for expenses should be allowed and whether tippers may be ordered to disgorge the profits obtained by their tippees. These are significant issues, but of course not as important as the first stated question. That question, which was phrased by Justice Sotomayor not as whether the SEC has the power to seek the remedy of disgorgement but as whether the courts have the authority to order it, is the subject of this Part. It is organized as follows. Section IVA suggests an easy way to resolve that the disgorgement remedy indeed exists. Section IVB assumes that, for whatever reason, the federal courts might decline to adopt the IVA approach, and significantly complicates matters. Section IVB(1) asks whether disgorgement fairly exists as an equitable remedy. Section IVB(2) follows to ask whether it exists as a legal remedy. Section IVC discusses the significance of the characterization as one or another. Section IVD recapitulates.

A. The Easy Way: Legislative Reenactment and the "Beyond Peradventure" Approach

In 1971, the Supreme Court first expressly addressed the existence of an implied private right of action under Exchange Act Section 10(b) and Rule 10b-5. Its approach was simple. The opinion in *Superintendent of Insurance of New York v. Bankers Life & Casualty Co.* merely cited Professor Louis Loss's well-known treatise on securities regulation for the proposition that "[i]t is now established that a private right of action is implied under § 10 (b)."[163] A few years later, in 1983, the Court in *Herman & MacLean v. Huddleston* noted that "a private right of action under § 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35

[162] 137 S.Ct. at 1642.

[163] 404 U.S. 6, 169 (1971), n.9, citing 6 L. LOSS, SECURITIES REGULATION 3869-3873 (1969); 3 L. LOSS, SECURITIES REGULATION 1763 et seq. (2d ed. 1961).

years. The existence of this implied remedy is simply beyond peradventure."[164] A footnote in *Herman & MacLean* recounted the history of the remedy, first recognized in 1946 and clearly flourishing in the federal courts both before and after the statement in the *Superintendent of Insurance* case referred to above.[165]

It would seem that this eminently sensible approach would work just as well in the context of the SEC disgorgement remedy, which has both been churning along in the federal courts for forty-eight years and making regular appearances in federal statutes since 1988.[166] Shouldn't it be easy peasy for the federal courts to simply acknowledge the common sense of the matter – the remedy exists and Congress clearly so desires? But no, that does seem too easy, given the ominous footnote 3 in *Kokesh*, the textualist predisposition of some Justices, and the fact that although the implied private right under Rule 10b-5 exists "beyond peradventure" the Supreme Court has worked hard in recent years to prevent its expansion.[167] It behooves proponents of the "beyond peradventure" approach to themselves work a little bit harder, first by beefing up the argument with a formal invocation of the legislative reenactment theory.

The legislative reenactment theory is a principle of statutory construction, the primary thrust of which is that when a reenacted statute fails to change the prevailing administrative or judicial interpretation of some earlier version of that statute, the interpretation is legislatively endorsed.[168] Congress is presumed generally to be aware of such interpretations,[169] and

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[164] Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983).
[165] *Id.* at 686, n. 10.
[166] *See supra* note 106 and accompanying text.
[167] *See*, *e.g.*, Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135 (2011) (liability under Rule 10b-5 for misleading statements attaches only to those with "ultimate control"); Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc. 552 U.S. 148 (2008) (limiting "scheme" liability under Rule 10b-5); Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) (no aiding and abetting liability to private plaintiffs under Rule 10b-5).
[168] *See*, *e.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 385-86 (1983); Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Curran, 456 U.S. 353, 378-79 (1982); Lorillard v. Pons, 434 U.S. 575, 580-81 (1978); *see also* 2B Sutherland, supra note 149, §49.09; Filiberto Agusti, *The Effect of Prior Judicial and Administrative Constructions*

reenactment of a statute after favorable discussion in committee hearings of a relevant interpretation logically conveys particularly strong indicia of approval.[170] There in fact was a time at which courts regarded legislative endorsement as more-or-less conclusive when repeated reenactments followed notorious interpretations.[171]

Of course, there also was a time at which people unflinchingly used words like "groovy," and that time is pretty well past. In 1994, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,[172] the majority of the Court acknowledged that "[w]hen Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language."[173] It then went on, however, to express the understanding that for legislative reenactment even to be considered, Congress must have reenacted the precise language a federal court seeks to interpret.[174] Absent that, the matter is not one of legislative reenactment, but one of possible legislative acquiescence.[175]

Legislative acquiescence is a weaker sibling of the legislative reenactment theory. Its thrust is that legislative inaction following a well-known course of statutory interpretation is regarded as some evidence that the legislature acquiesces in that interpretation. For instance, in the 1988 case of *Basic, Inc. v. Levinson*, the Supreme Court noted that '[j]udicial interpretation and application, legislative acquiescence and the passage of time have removed any doubt that a

on Codification of Pre-existing Federal Statutes: The Case of the Federal Securities Code, 15 HARV. J. ON LEGIS. 367 (1978).

[169] *See Curran*, 456 U.S. at 353.

[170] *Cf.* United States v. Federal Maritime Comm'n, 694 F.2d 793, 824 n.85 (D.C. Cir. 1982).

[171] *See, e.g.*, Wehrly v. United States, 808 F.2d 1311, 1315 (9th Cir. 1986); Ward v. Commissioner of IRS, 784 F.2d 1424, 1430 (9th Cir. 1986).

[172] Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).

[173] *Id.* at 185.

[174] *Id.* at 187.

[175] *Id.*

private cause of action exists for a violation of section 10(b) and Rule 10(b)-5."[176] In *Central Bank*, however, the Court's majority enthusiastically quoted an interim case for the proposition that

> It does not follow . . . that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is "impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation. . . . Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. . . . Congressional inaction cannot amend a duly enacted statute."[177]

Although some members of the Court – notably including Justices Ginsburg and Breyer – sometimes may still rely on legislative acquiescence arguments,[178] it is clear that others do not.

It does seem as though overt legislative action with respect to disgorgement goes beyond mere acquiescence and on to something like very active connivance, so perhaps a convincing argument straddling reenactment and acquiescence can be made. If so, it would not necessarily establish whether disgorgement is a legal or equitable remedy. Moreover, it seems possible that any Justice truly wedded to textualism might, if push came to shove, balk at endorsing even the reenactment theory if it were outcome determinative (in *Central Bank* it was not).[179] As argued below, however, such a Justice just possibly might be willing to regard an adoption of a new statute as re-rooting in modern times the commonly held understanding of the statute's words. That is part of a more complicated argument – one to which the article now turns.

B. The Hard Way

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[176] 485 U.S. 224, 230-31 (1988). *See also, e.g.*, Canada Packers, Ltd. v. Atchinson, T. & S.F. Ry., 385 U.S. 182, 186-87 (1966); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 84 (1932); 2B Sutherland, supra note 149, S 49.10. On the other hand, legislative inaction sometimes is called a "poor beacon to follow." American Trucking Ass'ns v. Atchinson, T. & S.F. Ry., 387 U.S. 397 (1967); *see also* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 181 (1975).

[177] *Central Bank of Denver, N.A.*, 511 U.S. at 1453, quoting Patterson v. McLean Credit Union, 491 U. S. 164, 175, n. 1 (1989).

[178] *See, e.g.*, Gustafson v. Alloyd Co., Inc. 513 U.S. 561, 584 (1995) (Justices Ginsburg and Breyer, dissenting).

[179] *See supra* notes 172-75 and accompanying text.

The introduction to this Part noted that Justice Sotomayor portrayed te possible non-existence of the SEC disgorgement remedy as an issue of judicial competenece. This observation is a wormhole into the universe of meanings for the word "equity" or its variant "equitable." As the reader proceeds it should be with one clear guideline: when Congress authorizes an agency to seek, and the courts to grant, equitable relief, the definition of "equitable" is a question of statutory meaning for purposes of the particular statute under consideration. The distinction between legal and equitable claims also is important for purposes of determining when a defendant has a Seventh Amendment right to trial by jury (legal claim, yes, equitable claim, no). This, however, is a matter of constitutional law, *not* an issue of a particular statute's meaning. For that purpose it is possible generally to observe that a claim is legal "if the underlying right derive[s] from a legal source – for example, the common law or a statute providing a legal right or obligation."[180] If it is based on historic equity practices, it is equitable.[181] Section IVB1 discusses the possibility that SEC disgorgement is an equitable remedy. Section IVB2 advances the suggestion that it could be regarded as a legal remedy notwithstanding the past tendency to characterize it as equitable. Section IVC investigates the consequences of classifying it one way or another.

1. Equity and Disgorgement

Let us first consider the proposition that disgorgement is an equitable remedy. In the words of Mr. Russell Ryan, a former Assistant Director of the SEC's Division of Enforcement,

> [E]ver since disgorgement was first accepted as a lawful remedy in SEC enforcement, the only plausible sources of authority cited to support it are either the courts' inherent power to grant equitable remedies ancillary to their explicit statutory power to grant injunctive relief or the recent statutory provision for "equitable relief" added by Sarbanes-Oxley. If

[180] Kristin A. Collins, *"A Consderable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249. 284 (2010).
[181] *Id.*

> and when disgorgement is not in fact an equitable remedy, neither source of lawful authority is available.[182]

Mr. Ryan is entirely correct that the equitable ancillary remedy theory initially was regarded as the source of authority for judicial orders of SEC disgorgement.[183] His observation also accurately reflects the fact that the Sarbanes-Oxley Act of 2002 authorized the SEC to seek, and the federal courts to grant, "any equitable relief that may be appropriate or necessary for the benefit of investors."[184] His conclusion that neither source of authority is available *if* disgorgement is not an equitable remedy thus is facially logical.[185] The remainder of Mr. Ryan's article is devoted to establishing that disgorgement indeed is not equitable in nature.[186] This article, by contrast, takes the positon that whether disgorgement is equitable depends on the nature of the alleged violation, and that even when it is not an equitable remedy it still exists as a legal remedy.

a. 1789 and All That

Upon reading the Supreme Court's conclusion in *Kokesh* that disgorgement is deterrent and therefore punitive, rather than remedial, one might jerk one's knee toward "Oh, then of course disgorgement is not equitable – punishment has never been a legitimate goal of equity, right?"[187] Not right, even though the Supreme Court itself has at times bought into that

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[182] Ryan, *supra* note 120.
[183] *See supra* note 54 and accompanying text.
[184] *See supra* notes 123-27 and accompanying text.
[185] There is at least one quibble with this reasoning, however, insofar as courts of equity have long regarded themselves as having the authority to grant legal remedies as an adjunct to achieve complete relief.
[186] *See also* 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 (2014) (coming to the same conclusion).
[187] *See* Stephen M. Bainbridge, Kokesh *Footnote 3 Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 WASH. U.J.L. & POL. 18, 26 (2018) (observing that equity cannot punish); Samuel L. Bray, *Equity at the Supreme Court*, WASH. POST: VOLOKH CONSPIRACY (June 10, 2017) (same). The illogic of the proposition appears as soon as one contemplates the power of courts of equity to issue contempt orders, which surely can be punitive. The Judiciary Act of 1789 gave federal courts "the power. . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any case or hearing before same . . .." This power had already

particular canard.[188] In fact, according to noted British jurist Lord Henry Homes Kames, writing in the 18th century, the historic courts of equity were totally cool with it. Well, perhaps he put it a bit differently, but he did devote an entire chapter of his treatise, *Principles of Equity*, to the "Power of a court of equity to inflict punishment, and to mitigate it."[189] The basis for the argument against the federal courts' ability to order disgorgement as a matter of equity is substantially more complicated, if a little weird to novices to the study of federal courts.

As it turns out, there are planets on which the inhabitants continue to care – deeply – about *exactly* what English Chancery was getting up to in 1789, taking the position that it limits the remedies that the SEC can seek and the federal courts can grant in the 21st century. The outlines of the larger argument about the ability of the federal courts to do equity, about which a number of articles have been written,[190] are as follow.

When the Judiciary Act organized the federal courts in 1789, it imbued them with the ability to exercise both legal and equitable authority.[191] Rather than being thought simply to convey that federal courts can do whatever the heck they think they want, remedy wise, this language is understood in light of the proposition that the federal government is one of limited powers, and that expansive action by the federal judiciary is particularly to be feared.

A brief explanation of the concern in this area economically conflates the concerns of separation of powers with those of federalism. As noted above, the federal government generally

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been claimed in England by both courts of law and courts of equity. Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L. Q. 1, 8 (1961). Note, too, the logical disconnect that would be created if one bought into both the conclusion that deterrence is punitive and that equity cannot punish. Whatever would become of injunctive relief? This argument is amplified in a companion article. *See* Gabaldon, *Fences*, *supra* note 19.

[188] *See* Tull v. U.S., 481 U.S. 412, 424-25 (1987), discussed *infra* at note 325 .

[189] LORD HENRY HOMES KAMES, PRINCIPLES OF EQUITY Book I Ch. 8 (1760).

[190] *See e.g.*, Harvard Law Review, *The Equitable Remedial Doctrine: Past and Now*, 67 HARV. L. REV. 836, 830 (1954); Michael T. Morley, *The Equity Power*, 59 B.C. L. REV. 217, 252 (2018).

[191] 1 Stat. 73, §11.

is viewed as one of limited but supreme powers.[192] The constitutionally established structure and process of its legislative arm[193] are designed to assure that those supreme powers are exercised in deliberate fashion by decision-makers responsive to state and popular interests.[194] Thus, where potentially preemptive laws are adopted, it should be only after consideration of local desires. The federal judiciary is in no way designed to be similarly responsive and, if initiating some sort of lawmaking process without either constitutional direction or legislative invitation, might pose a free-wheeling hazard to the self-determination of the states and the freedoms of their citizenry.[195] Thus, the ability of the federal courts to engage in common law-making (discussed in Section IVB(2)) is regarded as quite limited,[196] and its inherent ability to do equity is frozen in the amber of 1789.

b. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*

Admittedly, older cases such as *Porter v. Warner Holding Co.*, discussed above,[197] do not reflect much judicial diffidence with respect to the ability of federal courts to do equity. By 1999, the tide had distinctly turned, and *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond*

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[192] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"); Gregory v. Ashcroft 501 U.S. 452, 460-61 (1991); *see also* THE FEDERALIST NO. 45, at 313 (James Madison (J. Cooke ed., 1961) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite." *See generally* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L REV. 1 (1988).

[193] These processes include the bicameralism and presentment requirements established in Article I of the Constitution. U.S. CONST. at. 1, §7, cl. 2.

[194] *See*, *e.g.*, JESSE CHOPER, JUDICIAL REVIEW AND THE POLITICAL PROCESS 176-90 (1980); Herbert Wechsler, *The Political Safeguards of Federalsim: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

[195] *See* John E. Nowak, *The Scope of Constitutional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM L. REV. 1413, 1440-41 (1975); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 596-97 (1987).

[196] *See infra* notes 272-312; *see generally* Theresa A. Gabaldon, *State Answers to Federal Questions: The Common Law of Federal Securities Regulation*, 20 J. CORP. L. 155 (1994) ("Gabaldon, *State Answers*")(discussing limits on the ability of federal courts to make common law).

[197] *See supra* notes 36-49 and accompanying text.

Fund, Inc.,[198] reflected the law of the land. The majority opinion, authored by Justice Scalia and joined by current Justice Thomas (among others), had this to say (some citations omitted):

> The Judiciary Act of 1789 conferred on the federal courts jurisdiction over "all suits . . . in equity." We have long held that "[t]he 'jurisdiction' thus conferred . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." "Substantially, then, the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act." "[T]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief . . . depend on traditional principles of equity jurisdiction." We must ask, therefore, whether the relief respondents requested here was traditionally accorded by courts of equity.[199]

The majority concluded that the District Court in that case lacked the authority to issue a preliminary injunction preventing disposition of assets pending adjudication of a contract claim for money damages because such a remedy was not available in England in 1789.[200] A four-Justice minority including current Justices Ginsburg and Breyer would "have defined the scope of federal equity in relation to the *principles* of equity existing at the separation of the country from England" rather than "limit[ing] federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor."[201] The minority's justification of a "dynamic equity jurisprudence" lay in the "needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed."[202]

As it turns out, reasonable people have differed over whether disgorgement closely resembles some specific practice of 18th century Chancery. Purists – or, perchance, those who do not wish to see the SEC pursue disgorgement in federal courts – argue that orders to pay money

198 527 U.S. 308 (1999).
199 527 U.S. at 318-19 (quoting Atlas Life Ins. Co. v. W 1. Southern, Inc., 306 U. S. 563, 568 (1939), A. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928), and 11A C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE §2941, p. 31 (2d ed. 1995)).
200 527 U.S. at 333.
201 *Id.* at 336.
202 *Id.* (quoting Union Pacific R. Co. v. Chicago, R.I. & P.R. Co., 163 U.S. 564, 601 (1896)).

amounts rather than to return illegally obtained property or its specifically identified proceeds (what this article has referred to as "restitution") historically were legal remedies, not equitable matters.[203] Only in the instance of breaches of fiduciary duty was this not the rule.[204] On the other hand, the Second Circuit Court of Appeal, in *SEC v. Cavanagh*, applied the *Grupo Mexicana* test and found SEC disgorgement sufficiently similar to 18th century equitable remedies to be up to snuff.[205] It found analogies in accounting, constructive trust, and restitution, and invoked two 18th century English Chancery cases (as well as a few early American cases) as precedent.[206] At least one commentator on the case has found the analogies unconvincing and the precedents inapt, returning to the argument that "disgorgement [as opposed to restitution] . . . is available [as an equitable remedy] only when the defendant has breached an obligation of 'good faith or loyalty'"[207] – in gross terms, where there has been a breach of fiduciary duty. This is because both accounting and constructive trust were remedies traditionally applied only in the context of such a breach. It certainly is worth noting, then, and not just as an aside, that almost the entirety of insider trading jurisprudence is premised on breach of fiduciary duty or some similar duty of trust and confidence.[208] One might posit that even disgorgement naysayers could be coaxed to admit that the remedy might be available in that context. This proposition will be further explored in Part D below.[209]

[203] *See, e.g.*, Ryan, *supra* note 120, at *11; DeLuca, *supra* note 186, at 930-31.
[204] *See* DeLuca, *supra* note 186, at 930-31.
[205] 445 F.3d 105, 120 (2d Cir. 2006).
[206] *Id.* at 119-20.
[207] DeLuca, *supra* note 186, at 930-31 (quoting Sarah Worthington, *Reconsidering Disgorgement for Wrongs*, 62 MOD. L. REV. 218, 225 (1999).
[208] *See infra* notes 332-38 and accompanying text.
[209] *See infra* notes 329-40 and accompanying text.

It also is worth a moment to return to Lord Kames' 18th century treatise, cited above for the proposition that the punitive nature of a remedy does not mean that it cannot be equitable.[210] It now is examined for the proposition that equity sometimes ordered monetary payments by those other than fiduciaries. In fact, Lord Kames gives several examples of equity ordering monetary payments by persons not themselves owing a fiduciary duty to the payee.[211] It is important to note they are not presented by Lord Kames as categorical imperatives – equity at the time was not so constrained – although a few clearly did later coalesce into hard and fast rules. Lord Kames' examples included third parties knowingly participating in a fiduciary's breach,[212] parties to contracts with decedents made for third parties' benefits,[213] and men who have "debauched" women (presumably as a type of restitution for the taking of an intangible asset).[214] Perhaps most tellingly, as discussion in this article turns to the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*,[215] Lord Kames describes the equitable obligation of owners of property to make restitution to ship captains for ransom paid for goods later lost at sea.[216] Presumably, this was equitable rather than a matter of common law recovery on assumpsit (an implied or express promise to pay for a benefit) because the goods were recumbent in Davy Jones' Locker, rather than delivered to their intended recipients: thus, the ransom of the property in no way enriched its owners. The distinction between equitable and legal restitution is further amplified in the discussion of *Great-West* immediately below,[217] but

[210] *See supra* note 189 and accompanying text.
[211] Although Lord Kames was Scottish, his treatise relied on cases from both England and Scotland and he went to great pains to distinguish them when he thought the two countries differed. He mentioned no distinctions with respect to any of the matters discussed in the text of this article.
[212] KAMES, *supra* note 189, at 232.
[213] *Id.* at 279.
[214] *Id.*, at Extract 1st: 171-75.
[215] 534 U.S. 204 (2002).
[216] KAMES, *supra* note 189, at 3rd:1:184.
[217] *See infra* notes 219-35 and accompanying text.

this example reinforces the point that 18th century courts of equity did order money amounts to be paid by those other than breaching fiduciaries. This clearly was true even if the order did not relate to the proceeds of specific illegally obtained property.[218]

c. *Great-West Life & Annuity Insurance Co. v. Knudson*

Some commentators critical of the SEC disgorgement remedy do not focus much, if at all, on analysis of the Judiciary Act. Instead, they invoke the Supreme Court's reasoning in *Great-West Life & Annuity Insurance Co. v. Knudson*. As one such commentator described it, "*Great-West* articulated the Court's most recent and authoritative teaching on whether and under what circumstances a restitutionary remedy constitutes equitable relief, as opposed to legal relief, in the context of a federal statute that explicitly allows the former but not the latter."[219] This line of argument is directed foursquare at the 2002 Sarbanes-Oxley legislation authorizing the Commission to seek, and federal courts to grant, "any equitable relief that may be appropriate or necessary for the benefit of investors."

In *Great-West*, the Court was called upon to determine whether contractually called-for reimbursement for payments made by a third party to a beneficiary of an insurance plan was "equitable relief" as authorized by Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA). In the view of Justice Scalia, writing for the majority, ERISA's enforcement scheme was "carefully crafted" and "'[e]quitable' relief must mean something less than all relief.'"[220] Instead, it is limited to "those categories of relief that were typically available in equity. . . ."[221] Justice Scalia specifically discounted the need to make "antiquarian

[218] The case described by Lord Kames is probably the source for the now settled proposition that agents are entitled to indemnification for expenditures on a principal's behalf. *See* THERESA A. GABALDON & CHRISTOPHER L SAGERS, BUSINESS ORGANIZATIONS 139 (2d Edition 2019).
[219] Ryan, *supra* note 121, at *11.
[220] 534 U.S. at 209 (quoting Mertens v. Hewitt Associates, 508 U.S. 248, 258, n. 8 (1993).
[221] *Id.* at 214-15 (quoting *Mertens* at 256).

inquiry," however, saying that a court rarely would be called upon to do more than consult "standard current works" such as treatises and Restatements.[222] In reliance on those sources, he rebuffed the argument that the remedy sought was permissible as a form of "restitution," noting that the term sometimes is used – in the Restatement of Restitution and elsewhere – to describe an equitable remedy, but sometimes it refers to a legal remedy.[223] According to Justice Scalia (although Lord Kames might have disagreed), only claims based on title or right to particular funds or property – that is, claims based on the plaintiff's loss – fall into the former category.[224] Claims based on "just grounds to recover money to pay for some benefit the defendant had received from him" were based on express or implied promises and actionable under the common law writ of assumpsit.[225] In the Court's view, then, Great-West simply had an express promise (a/k/a contract) claim on which a court in equity would not properly have acted.[226]

It is easy, of course, to see how *Great-West* maps in the disgorgement context. If disgorgement is to be justified as an equitable remedy, it must be the type of relief typically available in equity. To the casual observer, the closest such remedy appears to be restitution. Restitution based on a plaintiff's loss of property was equitable, restitution based on a defendant's unjust gain (what this article consistently refers to as "disgorgement") was legal. If restitution that is not loss-of-property-based does not make it into equity's basket, that conclusion seems dispositive with respect to SEC disgorgement.[227]

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[222] *Id.*.

[223] *Id.* at 213.

[224] *Id.* at 214.

[225] *Id.* at 213. The bifurcation may seem odd, given that equity only was to step in where the common law failed and actions of assumpsit should also have sufficed in recovery of funds cases, but the rationale was that the equitable restitution action was a matter of constructive trust or accounting. This was something other than a matter of the defendant's liability, but instead a duty ordered to be performed.

[226] *Id.* at 212-13.

[227] *See* Ryan, *supra* note 121, at *11.

Great-West, however, had its own footnotes, and two of them are particularly, well, noteworthy. Footnote 2 recognizes that accounting for profits is a form of equitable restitution. It says that "[i]f, for example, a plaintiff is [the beneficial owner and therefore] entitled to a constructive trust on particular property held by the defendant he may also recover profits produced by the defendant's use of that property, even if he cannot identify a particular res containing the profits sought to be recovered."[228] This should refocus inquiry in the disgorgement setting on the distinction between wrongdoers who are fiduciaries and those who are not.[229] Most importantly, those guilty of inside trading often are misusing their beneficiaries' confidential information and one certainly would expect, as an equitable matter, to see them account for their profits from that misuse.[230]

Footnote 4 involves a fairly lengthy discussion of back pay in the context of Title VII of the Civil Rights Act of 1964.[231] The statutory language at issue stated that "the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate."[232] The *Great-West* Court, evidently not wishing to discredit an earlier decision,[233] conceded that back pay, albeit an order of monetary damages, could be regarded as an equitable remedy because, by statute, it had been made an "integral part" of equitable relief and was not itself a freestanding claim for money damages.[234] Presumably, this means that if Congress had at some point in so many words authorized the Commission to seek, and federal courts to grant, "injunctions, with or without disgorgement, and any other equitable

[228] *Great-West,* 534 U.S. at 214.
[229] *See supra* note 208 and accompanying text and *infra* notes 332-38 and accompanying text.
[230] *See* GABALDON & SAGERS, *supra* note 218, at 371-72.
[231] *Great-West*, 534 U.S. at 218.
[232] 42 U.S.C. §2000e-5(g)(1).
[233] The decision in question was Teamsters v. Terry, 494 U.S. 558 (1990).
[234] *Great-West*, 534 U.S. at 218.

relief," disgorgement could be regarded as "an integral part" of equitable relief, at least if sought in tandem with an injunction, and at least for the purposes of the statute in question.[235] The real point, however, is that Congress can expressly create any legal remedies it likes, so if it adequately has manifested intent a remedy exist, it really does not matter whether it is legal or equitable, other than for the constitutional purposes discussed in Part IVC of this article.

d. When *Grupo Mexicano* and When *Great-West*?

Before amplifying the proposition that SEC disgorgement actually is a legal remedy in at least some circumstances, there is an interesting distinction to be addressed. This is the contextual difference between *Grupo Mexicano* and *Great-West*. The Court in *Great-West*, unlike the Court in *Grupo Mexicano*, did not tell its readers that the clock stopped in 1789. Although the Court did not address the distinction in so many words, it can sensibly be explained.[236] The year 1789 may be critical when the meaning of the Judiciary Act is at issue, but logically it is not so when one is applying a subsequent statute. In other words, the Judiciary Act's empowerment of the federal courts to do equity untethered to a more specific statutory prompt can be taken as a short-hand legislative reference to a packet of limited remedies available in 1789 in a limited set of circumstances. The packet logically can be expanded as a matter of legislative will, either by identifying new circumstances in which the traditional remedies will apply or, presumably, by expanding the remedies themselves. Thus, the ruminating court should ask whether ERISA, the Exchange Act, or some other statute has accomplished such an expansion *for purposes of that statute*. References to equitable authority in this context need not be – and should not be – tied specifically to practices in 1789, but instead

[235] The Commission does not, however, always seek and/or obtain an injunction at the same time it seeks disgorgement. *See supra* notes 71-73 and accompanying text.

[236] Professor Samuel Bray, *supra* note 10, at 1001 *et seq.*, provides an alternative explanation, elaborating a theory of "an idealized history of equity that is well suited to judicial decisionmaking."

should be assessed in terms of the general type of thing courts of equity traditionally have done, which, according to Justice Scalia, can be ascertained by reference to "standard current sources" rather than "antiquarian inquiry."[237] This dovetails rather beautifully with a textualist's disposition to take "meaning . . . from the ring the words would have had to a skilled user of words at the time, thinking about the same problem,"[238] and it means that, when one is deriving the meaning of modern statutes it is more appropriate to rely on Professor Dan Dobbs[239] than on Lord Kames. Moreover, as *Great-West*'s footnote 4 suggests, with sufficient clarity a modern Congress can even manage to expand the judicial toolkit signaled by the word "equitable" by specifying additional acceptable types of relief.[240]

d. Other Precedents

i. Expansive Views on disgorgement: *Porter* and *Kansas*

Neither *Grupo Mexicano* nor *Great-West* involved disgorgement. Both manifested relatively much more interest in equitable purity than some of the Court's other precedents that actually are more apt. One of these is the *Porter* case discussed above, which examined the federal courts' ability to order restitution under the Emergency Price Control Act.[241] One might think that *Porter*'s enthusiastically expansive view of the power to do equity could not survive the later decisions, but this does not seem to be the case. It has been cited as good authority not only in *Kokesh* (for the proposition that courts may order restitution) but in the 2015 case of *Kansas v. Nebraska*, discussed below, in which the Court ordered outright disgorgement rather

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[237] *Great-West*, 534 U.S. at 217.
[238] Easterbrook, *supra* note 152, at 61.
[239] *See*, *e.g.*, 534 U.S. at 211, 212, 213, and 217 (citing DAN DOBBS, LAW OF REMEDIES (1993) and other modern sources).
[240] This will simply mean the "equitable" remedy is available, even though it likely to be regarded as "legal" for right to jury purposes as described *infra* at notes 318-26 and accompanying text.
[241] *See also* Veazie v. Williams, 49 U.S. 134 (1850) (restitution coupled with injunction ordered as a matter of equity in absence of any fiduciary relationship); James Boyce's Executors v. Grundy, 28 U.S. 210, 3 Pet. 210 (court's ability to do equity where legal remedy is available but incomplete); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940) (same in context of federal securities laws).

than restitution.[242] As Professor Nagy has observed, it may very well be the case that the *Porter-Kansas* line can be distinguished as involving the interests of the public, whereas *Grupo Mexicano* and *Great-West* involved interests that were purely private. [243]

Kansas v. Nebraska portrays a Supreme Court untethered by statute and reliant only on its constitutional original jurisdiction over inter-state disputes.[244] The case involved Nebraska's deliberate violation of a Congressionally approved water compact with Kansas; at issue was the permissibility of ordering disgorgement of profits clearly in excess of Kansas's losses (because water was more valuable in Nebraska). The Court noted that its jurisdiction in the matter was "basically equitable" and that "[i]n this singular sphere, 'the court may regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice.'"[245] It cited *Porter* for the proposition that "[w]hen federal law is at issue and 'the public interest is involved,' a federal court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'"[246] The Court concluded that it "may order disgorgement of gains, if needed to stabilize a compact and deter future breaches, when a State has demonstrated reckless disregard of another, more vulnerable State's rights . . ..."[247] The Restatement (Third) of Restitution and Unjust Enrichment figured prominently in the analysis, with the Court making use of Section 39, a provision commending disgorgement of ill-gotten profit as a remedy for deliberate breaches of contract.[248]

Interestingly, there was no mention whatsoever of the state of equity in 1789, or of the fact that breaches of contract were legal matters at the time of Our Founders. This is appropriate

[242] *See infra* notes 243-54 and accompanying text.
[243] Nagy, *supra* note 138, at 895.
[244] 135 S.Ct. 1042, 1051 (2015).
[245] *Id.* at 1051-52 (citing Kentucky v. Dennison, 24 How. 66, 98, 16 L.Ed. 717 (1861)).
[246] *Id.* at 1054, citing *Porter*, 328 U.S. at 398.
[247] *Id.* at 1057.
[248] *Id.* at 1056-57.

given that its source of authority is not the Judiciary Act and its hidebound distinctions, but rather its Article III authority over all controversies between states. In fact, although the Court described itself as acting in equity, it should not matter whether it was acting equitably or making common law, as it (1) was resolving a matter in which the ability of federal courts to make common law as well as to do equity is recognized[249] and (2) was addressing the rights and obligations of entities that have no rights under the Seventh Amendment (which, as discussed in Part IVC of this article, is the primary continuing significance of the equitable/legal distinction).[250] The case nonetheless is relevant insofar as it clearly does characterize disgorgement as an equitable remedy and one that is specifically approved where public interests are involved. This latter observation allows one to conclude that there is a clear and continuing tonal difference between the Court's public interest equitable remedy cases and its private interest equitable remedy cases – including *Mertens v. Hewitt Assoc.*, discussed below.[251]

Before turning to *Mertens*, however, the *Kansas* minority opinions (each concurring in part and dissenting in part) deserve a few honorable mentions. First, Chief Justice Roberts separately wrote to recognize the Court's authority to order disgorgement, but not when it ran contrary to the states' agreed upon accounting procedures.[252] Second, Justice Scalia separately observed that the Restatement provision relied upon by the majority clearly was not actually an accurate reflection of the state of the law, but was more along the lines of an academic suggestion.[253] Finally, Justice Thomas, joined by Justices Alito and Scalia and in part by Chief Justice Roberts, accepted the proposition that public interest would justify expansive use of

[249] *See infra* note 277 and accompanying text.
[250] *See infra* notes 313-28 and accompanying text.
[251] *See also Grupo Mexicano*, 527 U.S. at 326 (distinguishing public interest cases); U.S. v. First National City Bank, 379 U.S. 378 (1965) relying on public/private interest distinction); Virginia R. Co. v. Railway Employees, 300 U.S. 515 (1937) (same).
[252] 135 S.Ct. at 1064.
[253] *Id.*

federal equitable power when enforcement of a federal scheme is an issue, but felt that the converse should be true when all that is at stake is a dispute between two states.[254] The composite of majority and minority opinions does suggest that all of the Justices participating in *Kansas* could find their own precedent for the approval of disgorgement when a federal interest (presumably including the one in enforcing the federal securities laws) is at stake.

ii. A Clearly Restrictive View: *Mertens*

Moving once again back in time and swinging back in the direction of private interests and equitable purity is the case of *Mertens v. Hewitt Associates*.[255] This is another ERISA case, and one on which *Great-West* heavily relied. It recognized the traditional ability of courts of equity to grant legal remedies *in some circumstances*. These included a third party's knowing participation in a fiduciary breach (described, of course, by Lord Kames[256]). It concluded, however, that granting a modern court the power to declare equitable relief did not necessarily confer the ability to declare all those same legal remedies, even given the traditional enabling circumstances. Consider the following:

> At common law, however, there were many situations— not limited to those involving enforcement of a trust—in which an equity court could "establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." The term "equitable relief" can assuredly mean, as petitioners and the Solicitor General would have it, whatever relief a court of equity is empowered to provide in the particular case at issue. But . . . "equitable relief" can also refer to those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages). As memories of the divided bench, and familiarity with its technical refinements, recede further into the past, the former meaning becomes, perhaps, increasingly unlikely; *but it remains a question of interpretation in each case which meaning is intended*.
>
> In the context of the present statute, we think there can be no doubt. Since all relief available for breach of trust could be obtained from a court of equity, limiting the sort of

[254] *Id.* at 1074. The majority's counter was that the compact at issue had been Congressionally approved and thus was a matter of a federal scheme. *Id.* at 1053-54, note 5.
[255] 508 U.S. 248 (1993).
[256] *See supra* note 212 and accompanying text.

> relief obtainable under § 502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief not at all. (Emphasis added.) [257]

Given the grant of legal remedies for breach of some provisions of ERISA and only equitable remedies for others (including knowing participation in fiduciary breach), the Court elected the narrower of the meanings it discussed.

Of particular importance in thinking about SEC disgorgement is *Merten*'s observation with respect to the significance of the statutory scheme. The quotation above does say that which meaning of "equitable relief" is intended is "a question of interpretation in each case" – which evidently means the case of each statute invoking the term, since discussion at that point is focused exclusively on the statute rather than its application to the facts. With respect to ERISA, the Court commented that the "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'"[258] By contrast, it is fair to say that the federal securities enforcement scheme has not been all that carefully crafted. Rather, it more-or-less has metastasized in response to eruptions of financial scandals and crises, giving strong – perhaps indisputable – evidence that Congress indeed simply "forgot" to authorize disgorgement expressly.

iii. Antitrust and Other Cases

The Sherman Antitrust Act of 1890[259] grants federal district courts the "jurisdiction to prevent and restrain violations" of the Act and makes it the duty of U.S. Attorneys to "institute proceedings in equity to prevent and restrain such violations."[260] According to Professor Einer

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[257] *Mertens*, 508 U.S. at 257(quoting 1 J. POMEROY, EQUITY JURISPRUDENCE §181, p. 257 (5th ed. 1941)). It is worth noting that the Court was incorrect in its characterization of mandamus as equitable. *See* Bray, *supra* note 102, at 1000.

[258] *Id.* at 254 (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146-47 (1985)).

[259] 15 U.S.C. §§1-7 (1890).

[260] *Id.* §4.

Elhauge, "there is surprisingly little doubt that equitable antitrust remedies include requiring violators to disgorge any illegally obtained profits."[261] In *United States v. Paramount Pictures* the Court noted that, without disgorgement,

> there would be reward from the conspiracy through retention of its fruits. Hence the problem of the District Court does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy. Its function includes undoing what the conspiracy achieved . . . [T]he requirement that the defendants restore what they unlawfully obtained is no more punishment than the familiar remedy of restitution.[262]

Admittedly, *Paramount* was of the same generation as *Porter* – a sort of yippee-ki-yay high water mark with respect to judicial authority. Still, it was followed by other Supreme Court cases Professor Elhauge describes as "equally emphatic."[263] Of a piece, a number of lower court cases interpreting the Federal Trade Commission Act have, in applying a statute permitting only equitable remedies, freely ordered disgorgement.[264] Interestingly, at the time of his article, Professor Elhauge described disgorgement in the antitrust context as a remedy that was "seldom used."[265] His arguments about why this is the case center around the possible unfairness to the innocent shareholders of a corporation made subject to disgorgement – a scenario that also can arise in some SEC disgorgement contexts. In any event, it appears that the invocation of disgorgement in antitrust litigation subsequently has become much more prevalent.[266]

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[261] Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79, 79 (2009).

[262] 334 U.S. 131, at 171-72 (quoted by Elhauge, *supra* note 261, at 79-80). The disgorgement ordered was not, however, monetary.

[263] Elhauge, *supra* note 261, at 80.

[264] *See, e.g.*, FTC v. Monoz, 17 Fed, Appx. 624, 626 (9th Cir. 2001); FTC v. Febre, 128 F.3d 530 (7th Cir. 1997); FTC v. Gem Merch. Corp., 87 F.3d 446 (11th Cir. 1996); FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991); FTC v. Southwest Sunsites, Inc., 665 F.2d 711 (5th Cir. 1982).

[265] Elhauge, *supra* note 261, at 79.

[266] Listwa & Seidell, *supra* note 32, at 701.

There are several other areas in which various federal agency have sought and received disgorgement orders as part of their enforcement authority.[267] Thus, for instance, the EPA has obtained disgorgement of profits obtained in violation of the Toxic Substances Control Act, a statute limiting the agency to equitable remedies,[268] and the Department of Justice has obtained it under RICO.[269] These examples will not be further explored but are raised as an indication of the possible breadth of application of *Kokesh* and its effect on administrative activities beyond those of the SEC.[270]

e. Summation and Transition

This article takes the position that what "equitable" means in modern statutes should be assessed by modern standards. The true believers in 1789 nonetheless might take the position that the judicial ability to do equity must be narrowly construed to confer only the equitable powers known to the founders even when Congress specifically confers an expansion.[271] The punchline of this Part IVA, however, is that argument about whether disgorgement is or is not equitable simply may be unnecessary, given what seems to be the accepted wisdom that if the SEC or other governmental authority straightforwardly were empowered by Congress to seek disgorgement as a *legal* remedy, all would be clear sailing. Section IVB2 turns to the possibility that this is exactly what has occurred, concluding that where SEC disgorgement is not equitable

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[267] *Id.* at 14-17.

[268] *See* U.S. v. Accolade Const. Grp., Inc., 2017 WL 2271462 (S.D.N.Y. 2017). In *Accolade*, the court also denied the defendant any right to jury trial.

[269] *See*, *e.g.*, United States v. Local 1804-1, 1993 WL 77319 (S.D.N.Y. 1993).

[270] *See generally* Listwa & Seidell, *supra* note 32 (discussing possible consequences of *Kokesh* for administrative enforcement).

[271] This position might be based on the precise wording of Article III of the Constitution. U.S. CONST. art. III. In the case of both federal question and diversity jurisdiction references are to "all cases in law and equity" rather than to "all cases" or "all controversies." *See infra* note 277 and accompanying text. Focus on the Judiciary Act, rather than Article III, however, generally has meant that past inquiry is one into legislative intent (or, in the case of textualists, statutory meaning), rather than constitutional compulsion. This would be justified by the avoidance principle – the "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." United States v. Thirty-Seven Photographs, 402 U. S. 363, 369 (1971).

it nonetheless exists as a legal remedy. The ultimate importance of the distinction *once it is determined that the remedy exists* is the subject of Section IVC.

2. Law and Disgorgement

Mr. Ryan, alluded to above, opposed at length the existence of SEC disgorgement as a function of the Commission's authority to seek, and the federal courts' authority to do, equity.[272] He was rather pithier with respect to disgorgement as a legal matter:

> [W]henever disgorgement is legal rather than equitable, the SEC has no lawful power to seek it in federal court proceedings, and the courts have no lawful power to award it. Being purely a creature of statute, the SEC can lawfully seek in court only those remedies Congress has authorized it to seek, and disgorgement at law is not among those remedies. Likewise, being courts of limited jurisdiction, federal courts can lawfully impose only those remedies at law that Congress has authorized in the relevant statutes. . . .[273]

The basic beef, then, is that Congress hasn't said it so the courts can't do it, which leads us to an exegesis of hostility to judicial activism, briefly previewed above.[274] It presumably is precisely this hostility that would lead a court to eschew the "beyond peradventure" approach urged earlier in this article.[275]

a. The Nature of Federal Common Law

No constitutional or statutory provision generally grants to the federal courts the power to make common law.[276] Article III of the Constitution defines the jurisdiction of the federal judiciary by reference to certain listed subjects. These subjects include "all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," "Controversies to which the United States shall be a party," "all Cases in Law and Equity between Citizens of different States," "Controversies

[272] *See supra* notes 182-86 and accompanying text.
[273] Ryan, *supra* note 121, at *12.
[274] *See supra* notes 192-95 and accompanying text.
[275] *See supra* notes 163-79 and accompanying text.
[276] Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 899 (1986).

between two or more States," "all Cases of admiralty and maritime Jurisdiction," and "Cases affecting Ambassadors, other public Ministers and Consuls."[277] Federal courts clearly recognize distinctions in the precise character of their lawmaking abilities even as among these enumerated categories;[278] as noted above, grants of jurisdiction are said not necessarily to constitute enabling authority.[279] In recognized "enclaves" such as admiralty,[280] interstate disputes,[281] and international relations,[282] federal common law clearly can exist without specific grounding in federal statutes.[283] These are, not coincidentally, spheres in which courts regard state regulation as illicit.[284] By contrast, in the case of general federal question jurisdiction, Article III is regarded as not self-executing and thus requiring legislative invocation – in other words, a trigger such as the Judiciary Act, ERISA, or the federal securities laws.[285] Thus, in areas

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[277] U.S. CONST. art. III, §2.

[278] See Henry J. Friendly, *In Praise of Erie--And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 395-98 (1964); Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 799 (1957).

[279] *See supra* note 29 and accompanying text; *see also* Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41 (1981) (holding that the "vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate common law"); Mishkin, *supra* note 278, at 799; Field, *supra* note 276, at 915-19; Richard V. Stewart & Cass R. Sunstein, *Public Progress and Private Rights*, 95 HARV. L. REV. 1193, 1221 (1982).

[280] For amplification, see The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 454-56 (1851); Brainard Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158.

[281] *See* the discussion of Kansas v. Nebraska, *supra* notes 244-54.

[282] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425-27 (1964). There, the Supreme Court claimed indirect support from a variety of constitutional and statutory provisions. *Id.* at 427 n.25.

[283] A number of authorities have recognized the existence of traditional enclaves within which federal common law making is regarded as legitimate. *See, e.g.*, PAUL M. BATOR ET AL, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 770-829 (2d ed. 1973); Alfred Hill, *The Law Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1025 (1967); MARTIN H. REDISH, FEDERAL COURTS 362-423 (1983). The Supreme Court also seems to have acknowledged their existence. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426-27 (1964) (referring to "enclaves of federal judge-made law"); Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (concluding that absent congressional authorization, "federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases").

[284] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426-27 (1964) ("In these cases, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.").

[285] *See, e.g.*, David R. Dow, *Is the "Arising Under" Jurisdictional Grant in Article III Self-Executing?*, 25 WM. & MARY BILL RTS. J. 1, 2 (2016) ("Case law and scholarly commentary treat the language of Article III, Section 2 as

including the regulation of securities, the Supreme Court has indicated diffidence about federal, judge-made law,[286] fueling the claim that "extra-enclave" federal common law should be fashioned only in response to legislative invitation.[287] As suggested above in the context of federal equity jurisprudence, the justifications for this claim are at least two-fold, contemplating concern both with separation of powers and with federalism.[288] Whether either of these primary concerns rises to the level of constitutional compulsion is not clear.[289] At their least compelling, they nonetheless are serious questions of policy, the answers to which may be influenced by beliefs as to the goals of the Founders and the importance of attaining those goals.[290]

Although there was a time at which at least one scholar contended that "the concerns of separation and federalism are adequately served by a test requiring federal courts to point to the

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the outer boundary of what Congress may do, but Congress is regarded as having the power to do less – i.e., to vest less than the whole of Article III's "arising under" jurisdiction. (Citing various sources and then arguing to contrary.))

[286] One clear example is provided by Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 634-46 (1981) (holding that because unique federal interests are not at stake, and because Congress did not delegate the power, federal courts are unable to fashion a common law of contribution under federal statute). For discussion and criticism of the Court's diffidence, *see, e.g.*, Field, *supra* note 276, at 889-90 n.28, 892 n.39, 911- 12 n.140, 940 n.244; Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573, 600, 614-15 (1985); *see also* Kamen v. Kemper Fin. Servs. 500 U.S. 90, 104 (1991) (referring to limited interstitial mandate of federal courts); City of Milwaukee v. Illinois, 451 U.S. 304, 312-13 (1981) ("Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision."). For an older example, see United States v. Standard Oil Co., 332 U.S. 301 (1947) (declining to engage in lawmaking in an area of unique federal interest because federal fiscal implications are addressed more appropriately by the legislature). *But see* Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (creating a federal defense to product liability that otherwise would exist as a matter of state law).

[287] *See* Field, *supra* note 276, at 928 (taking the position that a source of authority must exist for any given federal common law rule); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 792-99 (1989) ("Redish, *Federal Common Law*") (discussing the limits of appropriate federal judicial authority). However, some demands for authorization are relatively flexible. Field, *supra* note 276, at 929 (characterizing the standard as "extremely flexible"). As one might expect, the Court's own sensitivity in demanding and detecting legislative invitations has varied from case to case. *Compare* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (citing a statute providing for federal jurisdiction over disputes concerning collective bargaining agreements as authorizing courts to develop a federal common law of labor contracts) and National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978) (stating that federal courts act as common law courts in antitrust decisions, "giving shape" to the "broad mandate" of statute) with Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) (finding no authority to fashion a common law of contribution under federal antitrust statutes).

[288] *See supra* at notes 11-96 and accompanying text; *see also* Gabaldon, *State Answers*, *supra* note 196, at 164-69.

[289] *See, e.g.*, Redish, *Federal Common Law*, *supra* note 287, at 766, 792.

[290] *E.g., compare* Field, *supra* note 2676, at 924-26, 931-32 with Redish, *Federal Common Law*, *supra* note 287, at 767.

Constitution or some congressional enactment as 'background,'"[291] most current commentators probably would doubt that this is just how the courts now see it themselves. Another approach, advanced decades ago and perhaps still conveying a practical composite of the type of things one sees many, if not most, federal judges actually doing, is an approach ceding to the federal judiciary only the power to make common law in the traditional enclaves and the power to engage in three more circumscribed activities.[292] The first activity comprehends judicial application of specific statutory language to a set of facts (which may call for what some refer to as traditional "interpretation" and/or "construction" and what textualists would call "deriving statutory meaning"). The second is the exercise of authority delegated by Congress. The third is "where not to decide the issue is effectively to decide," or where issues "not covered by [statutory] text *must* be resolved before the statute can be applied to matters clearly within its realm."[293] This "necessity" test would apply where, for instance, an express private right of action provided by statute exists without a stated statute of limitations.

There are, of course, more conservative tests, including one referred to as the "plain language" approach[294] – and if one simply chose to refer to it as "textualist," one probably could be excused. The plain language test of course permits application of statutes to facts, albeit without reference to legislative history. It also requires that delegation of authority to the judiciary be specific, but does permit it. It eschews, however, the "where not to decide is to decide" or "necessity" allée. The plain language test as thus described almost certainly is normative rather than descriptive of most actual judicial outcomes – but of course does describe the approach of judges who most fervently embrace textualism.

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[291] *See* Field, *supra* note 276, at 887.
[292] Redish, *Federal Common Law*, *supra* note 287, at 794.
[293] *Id.*
[294] *See* Gabaldon, *State Answers*, *supra* note 196, at 176-77.

b. Disgorgement as a Matter of Federal Common Law

How, then, would SEC disgorgement fare under these various approaches? Almost certainly it could exist in the eyes of any commentator looking for no more than "background." After all, those multifarious references to disgorgement sprinkled throughout federal securities legislation seem emphatically to be a background against which disgorgement can be discerned. In fact, the background is so pronounced as to suggest the metaphor of an Invisible Man identifiable by his clothing, hat and bandages. It clearly does exist, even though you could not see it but for the statutory company it keeps.

Neither does disgorgement fare too badly under the application/delegation/necessity approach. Reserving the "application of the statute" prong for analysis below in the context of the discussion of the plain language test, which shares it,[295] either delegation or necessity could justify recognition of SEC disgorgement. The tripartite approach is not particularly demanding of evidence of delegation – although criticism of utterly standardless delegation will be further examined below.[296] Thus, one might point to Exchange Act Section 21(e), the legislative grant of authority to issue writs of mandamus, injunctions, and orders, which has existed since 1975,[297] as delegating to the judiciary the ability to devise such remedies as they regard appropriate to bring about compliance with the '34 Act. That delegation is nicely unconstrained by the statutory company kept by the term "orders" since, as noted above, writs of mandamus were legal matters,[298] while injunctions are equitable. As post-1789 innovations, however, it seems that many, if not most, such "orders" necessarily would be legal.

[295] *See infra* notes 299-301 and accompanying text.
[296] *See infra* notes 302-12 and accompanying text.
[297] *See supra* note 31 and accompanying text.
[298] *See supra* note 102 and accompanying text.

Alternatively, one could argue that it is necessary to decide whether disgorgement exists before one can employ the various parts of the federal scheme describing how the process is to work. If this were the case, the necessity question presumably would be posed as whether the other parts of the scheme were enacted simply to erect a structure to be employed at such point in the future as Congress decided to recognize disgorgement specifically (not really very likely) or whether they channel an existing remedy (more practically plausible).

The plain language approach is more demanding of evidence of delegation than the tripartite approach, and also may criticize some delegations as too broad. As noted, the question of breadth of, or standards for, delegation is separately examined below.[299] At this point, however, full body contact with the "application of the statute" characterization comes into play. Reiterating that "plain language" and "textualism" approaches essentially conflate, let the readers return to the proposition that textualists, in applying statutes, simply look for their "meaning . . . from the ring the words would have had to a skilled user of words *at the time, thinking about the same problem*." (Emphasis added.) [300] At the time of Sarbanes-Oxley's addition to the Exchange Act of the ability to grant all "equitable" remedies, it is clear that skilled users referring to "equitable" remedies in the context of federal securities laws most definitely understood it to include disgorgement. Justice Scalia's analysis in *Great West* essentially would permit the "skilled users" test to be determined by reference to "standard current sources," rather than "antiquarian inquiry," which in 2002 should mean that Professor Louis Loss's treatise on securities regulation, relied upon two decades earlier by the Supreme Court in recognizing an implied private right under Rule 10b-5, would be at least as relevant as Professor Dan Dobbs' treatise on remedies. In 2002, Professor Loss's then current treatise devoted several pages to the

[299] *See infra* notes 302-12 and accompanying text.
[300] Easterbrook, *supra* note 152, at 61.

subject of disgorgement, tracing it back to its origin in *Texas Gul Sulphur* and describing its subsequent uses.[301]

c. A Sidebar on Delegation

Before undertaking the fairly light lifting necessary to articulate the effects of the legal/equitable distinction, a few words are merited on the question of standards of delegation, for, as noted, even textualists will permit delegation in some circumstances. Delegation issues most frequently present themselves in terms of "non-delegation theory." Non-delegation theory is based on the "Vesting Clause" of the Constitution,[302] which (surprise!) vests all legislative powers in Congress, and which generally is regarded as a requirement that Congress provide any delegee with an "intelligible principle" for exercising the delegated authority.[303] One might expect practitioners of textualism to be rather more demanding with respect to such principles, and it appears that they are.[304]

Although some commentators do not believe non-delegation theory should extend to the judiciary,[305] others argue that Supreme Court precedent has long recognized that it "applies to *any* delegate." (Emphasis in the original.) [306] Still, according to Professor Alexander Volokh, "when we talk about the proper scope of federal common law . . . we're also talking about the permissible scope of standardless congressional delegations to federal courts."[307] In his view, the Court also has recognized, for at least eighty years, "that the requirement of an intelligible

[301] LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 982 *et seq.* (4th ed. 2001).
[302] U.S. CONST. art. I, §1.
[303] *See* J.W. Hampton, Jr. & Co. v. United States, 276 394, 409 (1928).
[304] Alexander Volokh, *Judicial Non-delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L. J. 1391, 1418 (2017).
[305] *See*, *e.g.*, Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They are Wrong*, 21 CARDOZO L. REV. 415, 449 (1999); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1731 (2002).
[306] Volokh, *supra* note 304, at 1395. *See generally* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405 (2008).
[307] Volokh, *supra* note 304, at 1396.

principle is relaxed – or dropped entirely – when the delegate already has some inherent power over the subject matter."[308] He notes that some commentators, including himself, believe the intelligible principle requirement can be dispensed with when the delegee already has at least some inherent power over the subject matter.[309] In the case of federal courts, this would extend at least to "procedural rulemaking, *remedies*, or common lawmaking associated with statutes." (Emphasis added.)[310] In this view, a delegation of the ability to "order" whatever remedy a federal court chose in order to achieve compliance with federal securities laws could withstand scrutiny. As Professor Volokh notes, Justice Scalia himself recognized that statutory interpretation and procedural rulemaking do not "violate the non-delegation doctrine because they're 'ancillary' to courts' exercise of judicial power."[311] In light of his opinion in *Grupo Mexicano* it would be inapposite to extend Justice Scalia's view to the power to decree equitable remedies for constitutional purposes,[312] but perhaps not so problematic in the case of delegated authority to shape remedies that are legal for constitutional purposes.

C. The Difference Between Legal and Equitable Remedies – Or Which is Which, and Why?

So what, exactly, is the buzz? If the question is whether a judge does or does not have authority to order a particular remedy under a particular statute referring *only* to equitable remedies, concern with the equitable/legal distinction is (as exhaustively detailed above) warranted. If, on the other hand, it is clear that the remedy in question is authorized, one way or

[308] *Id.* at 1394.
[309] *Id.*
[310] *Id.* at 1395, citing, *e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 189 (1993); Lemos, *supra* note 306, at 416 n. 51, 440, 443, 473.
[311] Volokh, *supra* note 304, at 1396, citing Mistretta v, United States, 488 U.S. 361, 417 (Scalia J., dissenting).
[312] *See supra* notes 198-200 and accompanying text.

another, why would anyone still care about the distinction between law and equity, given that the two were merged in 1938?[313]

For years, it was thought that the importance of the distinction inhered in dragging along a presumed package of add-ons in the event an action is one or another. An earlier section of this article introduced a litany of disgorgement-related issues lower courts have been required to resolve. Many of them tended to be answered simply by characterizing disgorgement as equitable rather than legal, and then presuming that equitable actions are not punitive.[314] These included whether disgorgement was punishment for double jeopardy purposes, whether it was discharged in bankruptcy, whether it was tax deductible, and whether it was enforceable by contempt sanctions. For most of its history, courts also took its equitable status to preclude application of a statute of limitations. As the Supreme Court demonstrated in *Kokesh*, however, most of these matters actually should be resolved without bogging down on, or making assumptions about, equitable status. Thus, in *Kokesh* the matter properly before – and properly recognized by – the Court was whether disgorgement was a forfeiture or a penalty under Section 2462, not whether it was equitable. Similarly, for purposes of tax deductibility, bankruptcy, and insurability, the question generally should turn on the demands of public policy, not on whether the remedy is equitable. The answer to the double jeopardy issue should be reckoned by whether disgorgement is a form of punishment, not by whether it is equitable.[315] With respect to the question of enforcement by orders of contempt, the equitable v. legal distinction may still have salience, so there the question may (outside the pages of this article) persist.[316]

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[313] *See* https://www.fjc.gov/history/timeline/federal-rules-civil-procedure-merge-equity-and-common-law.
[314] *See supra* notes 187-89 and accompanying text.
[315] *See* Hudson v. U.S., 522 U.S. 93, 110 (1997) (reinstating a double jeopardy meaning limited to multiple criminal prosecutions).
[316] Courts have tended to accept that SEC disgorgement is essentially equitable, rather than the equivalent of a debt, and therefore is enforceable by contempt. *See, e.g.,* SEC v. Huffman, 996 F.2d 800, 803 (5th Cir. 1993); SEC v.

As it turns out, though, after the clutter is discarded the most significant consequence of the equitable/legal distinction is whether there is a right to trial by jury – recognized in the case of a legal remedy, but not in the case of an equitable one.[317] In the view of Professor Doug Rendleman (shared by the author of this article),

> As the profession learns that the legal-equitable distinction is not functional and no longer useful except for analyzing the constitutional right to a civil jury, it may replace the more general terms equitable jurisdiction and equitable remedy with the name of the particular remedy - injunction or specific performance. Except for the jury trial right, postmerger policymakers in legislatures and courts might omit the megaclassifications, legal and equitable, and decide questions like scope of review based on policies discrete to each subject. Characterization as legal or equitable, if necessary for one purpose, need not carry over to others.[318]

In some cases, even the jury trial distinction may not be a practical one. For instance, the SEC frequently seeks some remedy clearly giving right to a jury trial at the same time it seeks disgorgement.[319] As a matter of fact, it was a jury of Mr. Kokesh's (non-polo playing?) peers who convicted him of fraud under three different securities laws.[320] The distinction nonetheless is worth unpacking.

The Seventh Amendment guarantees a right to trial by jury in "suits at common law."[321] As Justice Story stated in 1830,

> The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By common law, [the Framers of the Amendment] meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . . In a just sense, the amendment then may

Goldfarb, 2012 U.S. Dist. LEXIS 85628 at *10-17 (N.D. Cal. 2012). *But see* SEC v. New Futures Trading Int'l Corp., 2012 U.S. Dist. LEXIS 55557 at *5-6 (D.N.H. 2012) (enforcement through contempt not appropriate).

[317] *See infra* notes 321-26 and accompanying text.

[318] Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642, 1648 (1992); *see also* Dennis J. Wiley, *Enforcing Recoupment Provisions After Great-West Life & Annuity Insurance Company v. Knudson: A Suggested Method of Analysis for Reviewing Courts*, 9 DEPAUL J. HEALTH CARE L. 1195, 1203 (2006) (noting that "relief may be categorized as equitable for one purpose and legal for another purpose").

[319] Actions for civil monetary penalties, for example, clearly confer a jury right.

[320] *See Kokesh*, 137 S.Ct. at 1641.

[321] U.S. CONST., amend. VII.

> well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.[322]

Curtis v. Loether is a more recent landmark addressing the right to jury trial in the context of a discrimination claim brought under Title VIII of the Civil Rights Act of 1964:

> The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time.[323]

Thus, the protections of the Seventh Amendment extend to all claims that were not, at the time of the founders, equitable or maritime in nature. As a later case read *Curtis*, "[t]his analysis applies not only to common-law forms of action, but also to causes of action created by congressional enactment."[324]

That later case, *Tull v. United States*, augmented the analysis in *Curtis*, at least for purposes of litigation about disgorgement. *Tull* involved the government's claim that a suit for civil penalties under the Clean Water Act essentially was "an action for disgorgement of improper profits, traditionally considered an equitable remedy." The remedy that had been ordered in that case was a fine determined by multiplying the number of lots sold in violation of the Act by the profit earned per lot. The Court reacted as follows:

> An action for disgorgement of improper profits is. . . a poor analogy. Such an action is a remedy only for restitution – a more limited form of penalty than a civil fine. Restitution is limited to "restoring the status quo and ordering the return of that which rightfully

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322 Parsons v. Bedford, 3 Pet. 433, 446-447 (1830).

323 Curtis v. Loether, 415 U.S. 189, 193 (1974). The viability of the remedy sought was not an issue in *Curtis* – the Court did not question Congress's ability to create it or the federal courts' authority to decree it – but it came with the right to jury trial because the type of remedy sought (compensatory and punitive damages) would not have been understood by the founders as equitable. Interestingly, in coming to its conclusion the Court went to pains to distinguish both the restitution recognized as equitable in *Porter* (s*ee supra* notes 36-47 and accompanying text) and (without expressing an opinion thereon) the lower courts' willingness to order, as an equitable matter, reinstatement and backpay under Title VII of the Civil Rights Act of 1964. *Curtis*, 415 U.S. at 196-97. These cases were not right to jury cases, but rather addressed the question of judicial authority to order particular remedies, so the Court in *Curtis* may have unnecessarily conflated constitutional and statutory meaning issues when it mentioned them at all.

324 481 U.S. 412, 414 (1987) quoting *Curtis*, 415 U.S. at 193.

> belongs to the purchaser or tenant." . . . [Section] 1319(d)'s concerns are by no means limited to restoration of the status quo.[325]

Given the SEC's bent for acknowledging that restitution is no more than a subsidiary purpose of its disgorgement remedy, *Tull* permits an argument that, as currently managed, at least some disgorgement actions require jury trials.

For Seventh Amendment purposes, there currently is a clear, two-step test for determining what is equitable. According to *Teamsters v. Terry*,

> To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought. "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." The second inquiry is the more important in our analysis.[326]

The Court clearly did not regard itself as bound by the *Terry* approach in either *Grupo Mexicano* or *Great-West* (although, in the latter, the case was discussed in a footnote and distinguished by the majority),[327] presumably because in those cases it simply was focusing on the meaning of statutes (the Judiciary Act and ERISA, respectively) and was indifferent to the jury trial issue. In a case raising both statutory meaning and jury trial questions it well might wind up recognizing that what was denominated "equitable" by statute sometimes really is "at law" for purposes of the Seventh Amendment.

Another and perhaps more helpful way to frame this argument is to say that statutes authorizing the seeking and granting of remedies properly should be understood as signaling the availability and shape of those remedies, not as actually determining whether they are equitable or legal in nature. This is because the significance of the difference inheres in their

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[325] *Id.* at 424 (quoting *Porter*, 328 U. S. at 402).
[326] 494 U.S. 558 (1990) (quoting *Tull*, 481 U.S. at 417-18 and citing Granfinanciera, S. A. v. Nordberg, 492 U. S. 33, 492 U. S. 42 (1989) for the proposition that the second inquiry is the more important).
[327] 524 U.S. at 218, discussed *supra* notes 231-34 and accompanying text.

constitutional distinctions, which should be beyond the ability of Congress to affect. Thus, a declaration along the lines that the federal courts have the ability to order "disgorgement and other equitable relief" or "all equitable relief, including disgorgement" presumably would mean that disgorgement could be ordered, even though it might or might not constitute a remedy qualifying as equitable for constitutional purposes. [328]

D. Recapitulation and Further Analysis

Let us note once again the following points, made in a slightly different order. First, Congress could expressly permit the SEC to pursue disgorgement as a legal matter. Second, it would not be too far-fetched for a court to heave a sigh and take the "beyond peradventure" approach, acknowledging that Congress has as good as done so. Third, since Congress in 2002 specifically authorized the Commission to seek all equitable relief, *Grupo Mexicano* and the Judiciary Act technically should be irrelevant – instead, it should be relevant to determine what skilled users in 2002 thought "equitable relief" to mean *in the context of securities regulation*, particularly in light of the chain of statutory breadcrumbs and cascade of court cases acknowledging existence of the remedy.[329] Fourth, although *Great-West* called for "equitable relief" to mean less than "all relief," the "skilled users at the time" approach would not extend to all relief even if it did pick up disgorgement; moreover, the federal securities laws lack the

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[328] In other words, if Congress had specified a disgorgement remedy without adverting to equity, it would simply go to the federal courts to decide its status for constitutional purposes. If it had expressly but mistakenly said "disgorgement and other equitable remedies" or "disgorgement as part of a court's equity power" it seems logical to recognize the remedy but again refer the matter of constitutional compliance to the federal courts. Although not completely apt, there is Supreme Court precedent addressing the transfer from equitable to legal in the context of mistaken filing of claims. In White v. Sparkill, a pre-merger case, the Court noted that the then applicable legal and equitable procedural rules "contemplate[d] that where what is really an action at law is erroneously begun as a suit in equity, the same may be transferred to the law side of the court and after appropriate amendments may be prosecuted to a judgment as if originally begun on the law side." 280 U.S. 500, 500 (1930).

On the other hand, perhaps one might be concerned that Congress wanted disgorgement to exist only if it could be administered without resort to a jury trial. Textualists, however, would not be interested in what Congress wanted, only in what it said to skilled users at the time.

[329] An argument might be made that Congress generally should be deemed to intend to use the word "equitable" consistently throughout the centuries but that would not seem to be be consistent with the "skilled users at the time" approach described by Easterbrook, *supra* note 152.

carefully crafted enforcement scheme *Mertens* and *Great-West* discovered in ERISA. Fifth, even if Congress denominated a remedy as equitable, that could not make it equitable for constitutional purposes; it will be equitable for constitutional purposes only if it is akin to a remedy available in English Chancery at the time of the founding. Sixth, whether a remedy is equitable for constitutional purposes primarily determines the existence of the Seventh Amendment right to trial (although assumptions about what equity means – *i.e.*, necessarily non-punitive in nature – have led to some confusion in the precedents).

Let us return, then, to what remedies were equitable at the time of the founders, a question as to which *Great West* is instructive. Recall that outside the context of fiduciary breach, recoveries based on the defendant's gain were matters of common law assumpsit whereas actions based on the plaintiff's loss were matters of equitable relief. This seems to delineate areas in which SEC disgorgement most clearly should survive, both as a matter of statutory meaning and for Seventh Amendment purposes. Most obviously, in those instances in which the Commission seeks restitution for victims – which in some cases it does – the remedy might survive as equitable.[330]

Almost as obviously, recall both that there are a number of securities violations that do involve fiduciary breach, and that equity did indeed move aggressively to require constructive trusts and accountings to prevent fiduciaries from benefitting from misuse (including any use that simply was unauthorized) of a beneficiary's property, including information. In this vein, let us recognize that Mr. Kokesh himself would have some accounting to do – he owned and

[330] Moreover, to the extent that the remedy is based on making victims whole, it seems clear that it would be entirely appropriate – and traditional – to preclude deduction of the defendant's expenses in calculating the appropriate amount to be disgorged.

controlled the general partners that embezzled limited partnership funds which was (you guessed it) a fiduciary breach (and a glaringly large one at that).[331]

More broadly, and as mentioned above, almost all insider trading cases involve breach of fiduciary duty. There are five main theories pursuant to which liability for inside trading is imposed.[332] Traditional insiders (like those in *SEC v. Texas Gulf Sulphur*) owe a duty not to use corporate information for their own purposes.[333] Temporary insiders – like lawyers – who are hired as agents owe the same.[334] Those liable under the "misappropriation" theory of insider trading are those who have used information taken in breach of a fiduciary "or similar duty of trust and confidence"[335] so perhaps this is an area where there might be a bit of slicing and dicing.[336] The liability of a tippee derives from fiduciary breach known to the tippee and has been analogized to a trade by the tipper followed by a gift of the proceeds.[337] This seems to be exactly the kind of liability that would have whetted the 18th century equitable appetite. On the other hand, liability under Rule 14e-3 for trading on material nonpublic information about tender offers turns simply on the source of the information (the target or would be acquirer) rather than

[331] Perhaps no article on a business subject involving fiduciary duty can truly be complete without quoting Meinhard v. Salmon on the subject of the duties of managing partners: Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. . . . Salmon had put himself in a position in which thought of self was to be renounced, however hard the abnegation. He was much more than a coadventurer. He was a managing coadventurer. For him and for those like him, the rule of undivided loyalty is relentless and supreme." 164 N.E. 545, 548 (N.Y. Ct. App. 1928).

[332] The text omits consideration of liability under Exchange Act Section 20A, 15 U.S.C. §t1, since that liability must be premised on a violation under one of the other insider trading theories. It also omits a new line of cases being pursued against hackers of material nonpublic information, premised on a theory of affirmative misrepresentation. *See*, *e.g.*, SEC v. Dorozhko, 574 F.3d 42 (2d Cir. 2009).

[333] *Texas Gulf Sulphur*, 401 F.2d at 848.

[334] U.S. v. O'Hagan, 521 U.S. 642, 653 (1997).

[335] *Id.* at 645.

[336] The Stop Trading on Congressional Knowledge Act §6, 5 U.S.C. §2105 (2012), stipulated that government employees are in positions of trust and confidence for this purpose, so perhaps they would be regarded as other than fiduciary. *See* GABALDON & SAGERS, *supra* note 218, at 557.

[337] Salman v. U.S., 137 S.Ct. 420, 428 (2016); Dirks v. SEC, 463 U.S. 646, 667 (1983).

on the existence of fiduciary relationships, and presumably would be excluded from the realm of traditional remedy.[338]

Another area in which it is clear that equity would act in the 18th century is with respect to ancillary legal relief. As noted above, in *Texas Gulf Sulphur* and since, the Commission often has sought disgorgement in the absence of injunctive relief. In those instances in which a request for injunctive relief is legitimately sought, with disgorgement truly appurtenant, a straight-faced argument does exist for recognition of the subsidiary remedy as historically equitable.

At the (100%) risk of extending an already long explication, a few words are in order on the subject of the recipient of disgorged funds, when it is not the U.S. Treasury. In some inside trading cases, as in *Texas Gulf Sulphur*, the recipient is the issuer of the traded securities. This is, of course, entirely appropriate as a matter of traditional equity, as the issuer generally is the wronged beneficiary owed an accounting. In others, it may be injured trading partners compensated for their losses,[339] in which case equitable restitution comes into play. In cases not involving inside traders but, say, misrepresentations by an issuer when buying or selling its own securities, restitution of victim's losses also would be a matter of traditional equity but could work injury to the issuer's innocent shareholders. This is one of the recurring problems when dealing with the punishment of entities.[340] It certainly is a matter a court might take into account in shaping an order, but is beyond the scope of this article.

V. Conclusions

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[338] 17 C.F.R. §240.14e-3.

[339] It may be true either that the contemporaneous traders were not owed a direct duty by the miscreant and/or might have difficulty establishing a causal relationship between the miscreant's trading and their own injury. The Court nonetheless has referred to such traders as "victims" of wrongdoing. *See, e.g.*, Chadbourne & Park LLP v. Troice, 134 S.Ct. 1058, 1067 (2014), citing U.S. v. O'Hagan, 562 U.S. 642, 655-56 (1997) (victims were "members of the investing public" harmed by the defendant's "gain[ing of an] advantageous market position" through insider trading).

[340] *See generally* Theresa A. Gabaldon, *Milberg Weiss: Of Studied Indifference and Dying of Shame*, 2 J. BUS. & TECH. L. 207 (2007) (describing considerations in corporate civil and criminal liability).

The established majority construction of the Judiciary Act essentially suggests that most progress in terms of response to modern conditions and needs must come in the form of "legal," rather than "equitable" developments.[341] This would seem to include the creation of new remedies and, to the limited extent mandated by *Teamsters v. Terry*, the identification of new triggers for the application of old ones. The concern thus manifest with constraining judicial activism may be sensible – or at any rate understandable – when what one is contemplating is preservation of what is perceived as a vital right to trial by jury. In other words, if either a new cause of action or a new remedy comes down the pike, perhaps it is best – or at any rate simplest – always to say that it is legal rather than equitable for Seventh Amendment purposes

Whether that logic needs to dictate the existence of remedies in the first place is an entirely different question. One of the central claims of this article is that, in the context of remedies, it would be wrongheaded to rely on historic practices of equity as conclusive proof of modern statutory meaning in the presence of strongly conflicting evidence. Even without reference to the type of legislative history Justices Thomas, Alito, and Gorsuch eschew, it is perfectly clear from the statutory structure of the Exchange Act that Congress thinks – assuming such a thing as Congressional thought – that the SEC disgorgement remedy exists. It is possible, of course, that if a hypertextualist majority of the Court were formed, it might choose the approach of taunting Congress to force it to express itself more clearly. If that were to happen, the issue essentially would be slammed back to the legislature to see if Wall Street would get a win. Almost certainly, the United States has not seen its last financial crisis and it is highly likely that a disgorgement remedy would be reinstated the next time our legislators feel called upon to pound their chests in outrage at financial fraud.

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[341] Note that this construction presumably would carry over to Article III of the Constitution if the occasion demanded it; *see supra* note271.

It does seem that – if Congress thinks – it thought disgorgement was equitable when it passed the Sarbanes-Oxley Act; after all, that is what everyone thought. No one, however, seems to have been thinking all that hard about what that meant, which essentially distills to the lack of a right to trial by jury. This should not be a matter that Congress can affect one way or another. Nonetheless, given the acknowledged post-Sarbanes-Oxley statutory authority of the federal courts to apply any equitable remedy in order to enforce the Exchange Act, it is still possible that hypertextualists could permit the disgorgement remedy to exist without any further expression of Congressional intent to the extent it is historically equitable. This article takes the position that whenever liability is premised on a breach of fiduciary duty, traditional equity would unflinchingly strip the defalcating fiduciary of profit, and do so without reference to victim loss. Thus, even the most conservative Justices should be willing to countenance the disgorgement remedy in at least that context.