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PARTY GAMES: THE SUPREME COURT'S 21ST CENTURY JURISPRUDENCE BY TELEPHONE

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ABSTRACT

This Article focuses on a recent Supreme Court decision dealing with the ability of the Securities and Exchange Commission to seek disgorgement of unlawfully obtained profits as a type of equitable remedy permitted by statute. In that decision, Liu v. SEC*, the Court continued to exhibit an unfortunate penchant demonstrated in a precursor case—*Kokesh v. SEC. *This is a predilection for jurisprudence by soundbite—the functional equivalent of Googling its own precedents for pithy quotes taken out of context from inapt cases. The results are, to put it politely, much like what you would expect from a rousing game of telephone.*

Party Games: The Supreme Court's 21st Century Jurisprudence by Telephone *builds on a thorough description of the SEC's disgorgement remedy (*Equity, Punishment, and the Company You Keep: Discerning a Disgorgement Remedy Under the Federal Securities Laws*) published by the author in the* Cornell Law Review *in 2020. The new Article focuses on jurisprudential method. It provides a bit of background on the SEC disgorgement remedy. The Article then briefly describes both* Kokesh *and* Liu*, and it introduces the tendency of courts and commentators to confuse the question of whether a remedy is equitable with whether it is punitive—a confusion showcased in* Liu. *After developing additional necessary context—just why*

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equity has limits at all—the Article turns to a more in-depth examination of the equitable vs. punitive question, making the point that it is exactly the wrong starting inquiry. In the process, it illustrates the folly of assuming that both common sense and context are irrelevant to legal analysis, that precedents are mix-and-match, and that precise usage of vocabulary just doesn't matter.

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I. INTRODUCTION

This Article focuses on a recent Supreme Court decision ostensibly clarifying the ability of the Securities and Exchange Commission ("SEC" or "Commission") to seek disgorgement of unlawfully obtained profits as a type of equitable remedy permitted by statute. In that decision, *Liu v. SEC*,[1] the Court continued to exhibit an unfortunate penchant demonstrated in a precursor case—*Kokesh v. SEC*.[2] This is a predilection for jurisprudence by soundbite—the functional equivalent of Googling its own precedents for pithy quotes taken out of context from inapt cases. The strung-together results are, to put it politely, much like what you would expect from a rousing game of telephone.

Part II of this Article provides background on the SEC disgorgement remedy. It then briefly describes both *Kokesh* and *Liu* before turning to an introduction of the mutual propensity of courts and commentators to confuse the question of whether a remedy is equitable with the question of whether it is punitive. This confusion was on full display in *Liu*. Part III examines why equity has limits at all. After developing this necessary context, the Article turns in Part IV to a more in-depth examination of the equitable versus punitive question, making the point that it is exactly the wrong starting inquiry. Part IV additionally illustrates the folly of assuming that both common sense and context are irrelevant to legal analysis, that precedents are mix-and-match, and that the precise usage of vocabulary does not matter.

Let the reader be warned before proceeding—for here be dragons[3]—about what this Article is *not*. It is not an attempt to determine whether the outcome in *Liu* was right or wrong (although some whiffs of opinion might be found wafting about). Neither is it an analysis of the extent of the Commission's ability to seek the remedy of disgorgement—that would be a different article.[4] Moreover, it is not an attempt to address what "equitable" should mean under the federal securities laws or otherwise.

1. 140 S. Ct. 1936 (2020).

2. 137 S. Ct. 1635 (2017).

3. *See* Robinson Meyer, *No Old Maps Actually Say 'Here Be Dragons': But an Ancient Globe Does*, ATLANTIC (Dec. 12, 2013), https://www.theatlantic.com/technology/archive/2013/12/no-old-maps-actually-say-here-be-dragons/282267/ (describing the 1510 Hunt-Lenox Globe, which applied the legend to the southeast coast of Asia).

4. *See* Theresa A. Gabaldon, *Equity, Punishment, and the Company You Keep: Discerning a Disgorgement Remedy Under the Federal Securities Laws*, 105 CORNELL L. REV. 1611, 1645–47 (2020) [hereinafter Gabaldon, *Equity & Punishment*] (describing the theories pursuant to which the Commission's authority to seek disgorgement could be upheld).

Instead, its purpose is to suggest that the Court and, to some extent, those who comment on and appear before it, need to hang up the phone and try to engage in more rigorous and contextualized analysis.

II. BACKGROUND

A. The SEC's Disgorgement Remedy

For more than five decades, the Securities and Exchange Commission has frequently, and very successfully, sought the remedy of disgorgement from violators of the federal securities laws.[5] In 2017, the last year entirely unaffected by the developments described below, the amount recovered was just under $3 billion.[6] By 2021, that figure had fallen, but still was a healthy $2.4 billion.[7]

The SEC's annual reports to Congress by themselves make it crystal clear that our legislators could not have been unaware of the Commission's longstanding use of the remedy. Moreover, multiple references to disgorgement throughout the federal securities laws establish that Congress was not only familiar with the remedy, but enthusiastically embraced it.[8]

Still, it was not until 2021 that disgorgement was expressly authorized by statute and assigned a bespoke statute of limitations. Before that time, the federal courts were on their own in determining whether 28 U.S.C. § 2462,[9] a generic five-year statute of limitations for "enforcement of any civil fine, penalty, or forfeiture," applied to the Commission's actions for disgorgement. Until the Supreme Court's decision in *Kokesh v. SEC*, this question fairly consistently was answered by categorizing disgorgement as an equitable, rather than a legal, remedy. [10] This was taken to mean that it was non-penal in character.[11]

5. *See, e.g.*, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 854 n.20 (2d Cir. 1968).

6. SEC, DIV. OF ENF'T, ANNUAL REPORT 7 (2017), https://www.sec.gov/files/enforcement-annual-report-2017.pdf.

7. *See* Press Release, SEC, SEC Announces Enforcement Results for FY 2021 (Nov. 18, 2021), https://www.sec.gov/news/press-release/2021-238.

8. *See* Gabaldon, *Equity & Punishment*, *supra* note 4, at 1630–43. 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. *Id.* There is even a statutory scheme dealing with the distribution of disgorged amounts to wronged investors. *Id.*

9. 28 U.S.C. § 2462.

10. *See, e.g.*, Riordan v. SEC, 627 F.3d 1230, 1234 (D.C. Cir. 2010); SEC v. Rind, 991 F.2d 1486, 1492–93 (9th Cir. 1993).

11. *See* cases cited *supra* note 10.

The result was to put the remedy outside of the reach of § 2462.[12] The characterization of disgorgement as equitable also brought it precisely within the bounds of an early 2000s statute authorizing the SEC to "seek all equitable remedies."[13]

While enjoying the warmth of the judicial incubator, a few niceties of the SEC disgorgement remedy were sketched in and then became distinct. Perhaps most important, defendants' gains, rather than plaintiffs' losses, were to be its measure (although the method of calculating those gains sometimes varied).[14] It also became settled that there was no requirement that any portion of the recovery had to be paid to victims as restitution.[15] The SEC was frank in acknowledging that the remedy was deterrent in nature and not intended to be compensatory.[16]

In addition, as noted above, the lower federal courts were fairly predictable in describing the disgorgement remedy as equitable in nature.[17] This characterization drove multiple conclusions. One of these was that disgorgement did not count as "jeopardy" for double jeopardy purposes.[18] Another was that because it was not an action "at law," it did not give rise to a right to trial by jury.[19] There also were non-constitutional consequences: an obligation to pay disgorgement at least

12. *See* cases cited *supra* note 10.

13. 15 U.S.C. § 78u(d)(5) ("In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.").

14. *See, e.g.*, Zacharias v. SEC, 569 F.3d 458, 471–73 (D.C. Cir. 2009).

15. *See* SEC v. Teo, 746 F.3d 90, 104 (3d Cir. 2014).

16. *See* Kokesh v. SEC, 137 S. Ct. 1635, 1643 (2017) ("As the Government concedes, '[w]hen the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties.'" (alteration in original)); *see also Rind*, 991 F.2d at 1491 ("[D]isgorgement actions further the Commission's public policy mission of protecting investors and safeguarding the integrity of the markets."); *Teo*, 746 F.3d at 102 (noting that "the SEC pursues its [disgorgement] claims 'independent of the claims of individual investors'" in order to "promot[e] economic and social policies" (quoting *Rind*, 991 F.2d at 1490)).

17. *See In re* Guy P. Riordan, Securities Act Release No. 9085, 2009 WL 4731397, at *20 (Dec. 11, 2009) ("Disgorgement is an equitable remedy designed to deprive wrongdoers of their unjust enrichment and to deter others from similar misconduct."); *see also* SEC v. Rind, No. 90-4361, 1991 WL 214267, at *2 (C.D. Cal. June 24, 1991) ("[Disgorgement] has historically only been available to courts of equity, used for the purpose not of remedying injury to a particular person but to prevent profiting from violation of law.").

18. *See, e.g.*, United States v. Bank, 965 F.3d 287, 291 (4th Cir. 2020).

19. *See, e.g.*, *Rind*, 991 F.2d at 1493; SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 94–96 (2d Cir. 1978).

arguably was discharged in bankruptcy,[20] it at least arguably was tax deductible,[21] and it clearly was enforceable by contempt sanctions.[22] In addition, because it was equitable, it was not a debt for purposes of the Federal Debt Collection Procedures Act.[23] All of these matters have now been cast into doubt.

Before continuing, it is worth a moment to note this Article's use of what is intended to be clarifying nomenclature. As it turns out, it is important to distinguish between two types of at least superficially related remedies. One involves payments to victims, reckoned by the extent of their injuries (what one might think of as "compensatory damages"). The other is measured by reference to the extent of the defendant's gains (what one might think of as "unjust enrichment"). Courts have recognized both types of measurement in a variety of situations, and frequently have employed the unitary term "restitution" for both.[24] To avoid confusion, this Article will use the term "restitution" to refer only to amounts paid or to be paid to injured parties, calculated by reference to the amount of plaintiff loss rather than by reference to the amount of defendant gain. The term "disgorgement" will be used to describe remedies calculated (even imprecisely) by reference to defendant gain, whether or not those amounts are paid to victims. When quoting or discussing congressional action or Supreme Court decisions, however, the actual language utilized by the relevant decision maker will be employed.

20. *See* SEC v. Huffman, 996 F.2d 800, 802 (5th Cir. 1993). *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).

21. *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/ [https://archive.nytimes.com/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* I.R.S. Gen. Couns. Mem. 201619008 (Jan. 29, 2016) (applying section prohibiting deductions for "any fine or similar penalty paid to a government for the violation of any law").

22. *Huffman*, 996 F.2d at 803; SEC v. Goldfarb, No. 11-00938, 2012 WL 2343668, at *6 (N.D. Cal. 2012). *But see* SEC v. New Futures Trading Int'l Corp., No. 11-cv-532, 2012 WL 1378558, at *2–3 (D.N.H. 2012).

23. *Huffman*, 996 F.2d at 803.

24. *See, e.g.*, Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002); *see also* discussion *infra* notes 125–144.

In 2021, in the wake of confusion created by an ominous footnote in *Kokesh v. SEC*,[25] Congress was prompted to, and did, adopt legislation specifically investing the Commission with the authority to seek "disgorgement." It did so without defining the term (although, begging the nice question of whether there even is such a thing as legislative intent,[26] most likely contemplating the usage for disgorgement adopted above).[27] The legislation also set forth a statute of limitations specifically designed for actions for disgorgement. It selected a different, and somewhat more generous, statute of limitations for "equitable remedies," which it also neglected to define.[28] These new statutes and the bafflements they add to an already confusing subject area certainly are worthy of discussion—just, as indicated above, in some other article. At the risk of redundancy, this one targets only the Supreme Court's

25. 137 S. Ct. 1635, 1642 n.3 (2017); *see also infra* note 33 and accompanying text.

26. It seems inescapably 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 certainly 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." Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930). There are, however, various ways of addressing the void. *See* Gabaldon, *Equity & Punishment*, *supra* note 4, at 1639–43 (examining various methods of addressing the issue of legislative intent).

27. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6501, 134 Stat. 3388, 4625–26 (amending the Securities Exchange Acts of 1934 and 1944). As amended, Section 21(d)(3)(A) of the Securities Exchange Act of 1934 now provides:

> (A) Authority of Commission
>
> Whenever it shall appear to the Commission that any person has violated any provision of this chapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 78u–3 of this title, other than by committing a violation subject to a penalty pursuant to section 78u–1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to—
>
> impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation; and
>
> require disgorgement under paragraph (7) of any unjust enrichment by the person who received such unjust enrichment as a result of such violation.

Securities Exchange Act of 1934 § 21(d)(3)(A), 15 U.S.C. § 78u(d)(3)(A). Section 21(d)(7) simply specifies that "[i]n any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement." *Id.* § 78u(d)(7).

28. 15 U.S.C. § 78u(d)(8) contains both statutes of limitation. In essence, it provides that disgorgement has a five-year statute of limitation unless scienter is involved, in which case the allowable period for bringing an action is ten years. *Id.* § 78u(d)(8)(A). Equitable remedies are given a flat period of ten years. *Id.* § 78u(d)(8)(B).

confounding approach to selecting and invoking its own precedents. This is an approach that, like the definition of disgorgement and the definition of equity, is entirely unaffected by the new legislation. Unlike the definitions that are missing in action, however, it is not something Congress ultimately can address. It is, quite simply, a problematic practice that, if left unchecked by the Court itself, could lead to confusion far afield from the SEC disgorgement remedy.

B. Kokesh v. SEC *and* Liu v. SEC

Kokesh v. SEC[29] was decided in 2017. It was a unanimous opinion in favor of appellant Charles Kokesh, determining that disgorgement actions brought by the Securities and Exchange Commission are penal, and thus, are subject to the statute of limitations imposed on civil fines, penalties, and forfeitures by 28 U.S.C. § 2462.[30] At 3,470 words, it was a relatively short opinion—the average Supreme Court opinion runs over 6,000 words.[31] It came, however, with a hefty price-tag for the government, which since the early 1970s had pursued the entirety of defendants' ill-gotten gains back through the mists of time.[32]

Even more troubling from the Commission's perspective was the fact that *Kokesh* had a delphic—and threatening—footnote hinting that the Court would, at some point, revisit the matter of whether the federal courts ever should order disgorgement in Securities Exchange Commission enforcement actions.[33] That footnote aside, the Court's reasoning that disgorgement was penal logically dictated that a

29. 137 S. Ct. 1635 (2017).

30. *Id.* at 1639.

31. *See* Adam Feldman, *Empirical SCOTUS: An Opinion Is Worth at Least a Thousand Words*, SCOTUSBLOG (Apr. 3, 2018, 12:03 PM), https://www.scotusblog.com/2018/04/empirical-scotus-an-opinion-is-worth-at-least-a-thousand-words/ (discussing average words in Supreme Court opinions as of 2018).

32. *See supra* notes 5–7.

33. *Kokesh*, 137 S. Ct. at 1642 n.3. The footnote 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.

Id. The lower federal courts immediately began 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*. *See, e.g.*, SEC v. Sample, No. 14-CV-1218, 2017 WL 5569873, at *2 (N.D. Tex. Nov. 20, 2017); SEC v. Jammin Java Corp., No. 15-cv-08921, 2017 WL 4286180, at *3 (C.D. Cal. Sept. 14, 2017), *aff'd*, SEC v. Weaver, 773 Fed. App'x 354 (9th Cir. 2019); CFTC v. Reisinger, No. 11-CV-08567, 2017 WL 4164197, at *3 (N.D. Ill. Sept. 19, 2017); FTC v. J. William Enters., 283 F. Supp. 3d 1259, 1262 (M.D. Fla. 2017).

disgorgement recovery also was a civil monetary penalty. This was something that previously was considered to be entirely different from disgorgement; in fact, the Commission regularly sought the two in tandem (a practice clearly encouraged by Congress).[34] Civil monetary penalties are expressly authorized by statute, but are subject to a statutory schedule that caps what the Commission can obtain.[35]

More generally foreboding, however, was the Court's broad—and flat—observation on the nature of deterrence: "Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because 'deterrence [is] not [a] legitimate nonpunitive governmental objectiv[e].'"[36] This soundbite, culled from earlier cases in which something substantially more subtle was going on, may echo throughout the federal law of crime and punishment, and, perhaps, in any other area in which the concepts of deterrence and/or punishment are relevant.[37]

Liu v. SEC[38] was the Court's second act in the drama spawned by disgorgement. It was an 8-1 opinion that sought to answer the question the Court had posed in *Kokesh*'s portentous footnote.[39] Defendants Charles Liu and Xin (Lisa) Wang had diverted to themselves millions of

34. According to the House Report on the legislation described in the following footnote, *see infra* note 35, the "authority to seek or impose substantial money penalties, *in addition to disgorgement of profits*, is necessary for the deterrence of securities law violations." H.R. REP. No. 101-616, at 17 (1990) (emphasis added).

35. Securities Enforcement Remedies and Penny Stock Reform (Remedies) Act of 1990 §§ 101, 202, 15 U.S.C. §§ 77t, 78u-2. In 1990, the SEC sought and obtained the ability to seek civil monetary penalties for any securities violation (it previously had been limited to seeking them in the context of inside trading). *Id.* §§ 77t, 78-2. The Remedies Act was sufficiently popular so as to pass by voice vote. *See S. 674 (101st): Securities Enforcement Remedies and Penny Stock Reform Act of 1990*, GOVTRACK, https://www.govtrack.us/congress/bills/101/s647 (last visited Nov. 16, 2022). Through the Remedies Act, the legislature added section 21(d)(3) to the Securities Exchange Act of 1934, specifying that the Commission had authority to bring actions for, and district courts had jurisdiction to order, civil penalties. *See* 15 U.S.C. § 78u(d). 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. *Id.* § 78u(d). The Commission promptly commenced the practice of seeking both disgorgement and civil penalties from the same defendants. *See, e.g.*, SEC v. Palmisano, 135 F.3d 860, 865–66 (2d Cir. 1998); SEC v. Moran, 944 F. Supp. 286, 294–96 (S.D.N.Y. 1996); SEC v. Chester Holdings, Ltd., 41 F. Supp. 2d 505, 528–30 (D.N.J. 1999).

36. *Kokesh*, 137 S. Ct. at 1643–44 (alterations in original) (quoting Bell v. Wolfish, 441 U.S. 520, 539 n.20 (1979)); *see also* United States v. Bajakajian, 524 U.S. 321, 329 (1998) ("Deterrence . . . has traditionally been viewed as a goal of punishment . . . .").

37. *See generally* Theresa A. Gabaldon, Jurisprudence by Soundbite: Why Fences Aren't Punishment (Aug. 26, 2022) (unpublished manuscript) (on file with author) (discussing the Supreme Court's jurisprudence on the meaning of punishment).

38. 140 S. Ct. 1936 (2020).

39. *Id.* at 1940.

dollars of investment funds intended for a cancer-treatment center.[40] Those funds had been solicited from Chinese nationals seeking U.S. residence visas under a program offering such visas to qualified investors in certain types of U.S. businesses.[41] According to the district court originally considering the case, the plan was consummately fraudulent: Liu and Wang never intended to actually operate a business, plotting all along to misappropriate the investors' money and use it for themselves.[42]

The majority opinion in *Liu* came in at 6,291 words—that is, significantly longer than *Kokesh* and in the average range for modern Supreme Court decisions.[43] Many of those words, however, consisted of string cites with brief parenthetical quotations. The decision seemed to be heavily influenced by an unacknowledged amicus brief ("Brief of Remedies and Restitution Scholars") filed by exasperated law professors chastising both the SEC and the defendants for their positions, and making it clear that they supported neither side.[44] The Commission had made the claim that its express statutory power to seek "equitable remedies" included the authority to seek disgorgement of a wrongdoer's gross profit, and to do so without respect to whether the amount recovered was returned to defrauded investors.[45] The Brief of Remedies and Restitution Scholars—and the Court—thought not.[46] The defendants had contended that, as a historical matter, no form of disgorgement could be classified as equitable.[47] The Brief of Remedies and Restitution Scholars—and the Court—once again thought not.[48]

The Court thus rebuffed both sides, ruling that disgorgement of net profits paid by the holders of those profits as compensation to particular

40. *Id.*
41. *Id.*
42. *See* SEC v. Liu, 262 F. Supp. 3d 957, 971 (C.D. Cal. 2017); *see also Liu*, 140 S. Ct. at 1941–42 (summarizing facts).
43. *See* Feldman, *supra* note 31.
44. *See* Brief of Remedies and Restitution Scholars as Amici Curiae in Support of Neither Side, Liu v. SEC, 140 S. Ct. 1936 (2020) (No. 18-1501) [hereinafter Brief of Remedies and Restitution Scholars], https://www.supremecourt.gov/DocketPDF/18/18-1501/126519/20191223115738971_18-1501%20Liu%20v%20SEC%20Restitution%20Scholars%20Brief.pdf.
45. *Liu*, 140 S. Ct. at 1947–50.
46. *Id.*
47. *Id.*
48. *Id.*

victims of wrongdoing[49] did fall within the historic umbrella of equity.[50] It noted, though, that equity courts "did circumscribe the award in multiple ways to avoid transforming it into a penalty outside their equitable powers."[51] The equitable methods of circumscription the Court described essentially were anticipated by the holding itself. First, disgorgement of gross, rather than net, profits was precluded.[52] Second, amounts disgorged must be destined to be paid to harmed victims.[53] Third, there generally could be no orders of joint and several liability.[54] In the course of its discussion, the Court categorically stated that "equity never 'lends its aid to enforce a forfeiture or penalty.'"[55]

Liu left open quite a few details, including exactly how its limitations would apply to the case's own facts. That was a matter not briefed by the parties and thus understandably left to the district court to which the case was returned. The Supreme Court did, however, make some suggestions, notably including the possibility that defendants Liu and Wang should be credited for any funds that they actually did spend for

49. *Id.* at 1935, 1941. That equitable disgorgement was to be solely for compensatory purposes is clear from *Liu*'s invocation of language from *Kokesh* about the reasons SEC disgorgement was punitive. *Id.* at 1941 ("[D]isgorgement is imposed as a consequence of violating public laws, it is assessed in part for punitive purposes, and in many cases, the award is not compensatory." (citing Kokesh v. SEC, 137 S. Ct. 1635, 1643–44 (2017))). *Liu* did varnish its analysis with the distraction of statutory language stating that equitable remedies were to be "for the benefit of investors." *Id.* at 1947 (citing 15 U.S.C. § 78u(d)(5)). The Court took this to mean specific investors, rather than investors in general. *See id.* at 1948. This is actually a little bit silly, since it would seem to preclude such things as "obey the law" injunctions.

50. *Id.* at 1941. This poses an interesting unnoted conflict with earlier cases indicating that compensatory remedies generally are legal and thus to be avoided by equity. Limiting disgorgement to a compensatory context seems to have been prompted by language in the relevant statute adverting to "the benefit of investors." 15 U.S.C. § 78u(d)(5). This is a nice concession that manifest legislative intent is important, but a little difficult to reconcile with the Court's purported interest in tapping into its equitable roots. It also is difficult to reconcile with the fact that, subsequent to the time that Congress authorized the SEC to seek "all equitable remedies," it also created a fund for the deposit of disgorgement awards not distributed to victims. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 922, 15 U.S.C. § 78u-6. As noted *supra* note 49, the conclusion that the "benefit to investors" language requires benefit to particular investors also leads to a complete logical disconnect when one thinks about injunctions against future violations of the law.

51. *Liu*, 140 S. Ct. at 1944.

52. *Id.* at 1937.

53. *Id.*

54. *Id.*

55. *Id.* at 1941 (quoting Marshall v. Vicksburg, 82 U.S. (15 Wall.) 146, 149 (1873)).

items related to cancer treatment.[56] This was intended to assure that their disgorgement would be of net, rather than gross, profits.[57]

Also left open—or at least unremarked upon—was the case's impact on *Kokesh*. Since the Court saw the Commission's enforcement authority as constrained by traditional limits on equity itself, and since it said that equity does not enforce penalties, it would seem that the SEC could not ever bring what the Court would view as a penal form of disgorgement. This would mean, of course, that the Commission could only bring non-penal forms. It therefore is difficult to see how a statute of limitations for fines, penalties, and forfeitures ever would apply to SEC disgorgement actions, although *Kokesh* had said that one did.[58] *Liu* did, however, resolve (probably not consciously) an issue noted above that was generated by *Kokesh*. If *Liu* indeed prohibits the Commission from bringing disgorgement actions the Court would view as penal, the possibility that disgorgement is a civil monetary penalty subject to statutory caps should vanish in the wind.[59]

Unfortunately, there are two larger difficulties presented by *Liu*. The first is that the decision solidifies a dichotomy that only dimly emerged in *Kokesh*. It now appears that compensatory remedies are to be classified as non-punitive, and non-compensatory remedies are to be classified as punitive. According to the Court, this puts non-compensatory remedies beyond the reach of equity jurisdiction.[60] This is distinctly odd, given that it turns on its head the practice, discussed below, of earlier courts sitting in equity.[61] Those courts regularly and specifically avoided compensatory remedies as unnecessarily duplicative of remedies available at common law.

Liu's second major difficulty, of course, is the one that is foreshadowed in the introduction to this Article and amplified in the material that follows. In concentrating attention on soundbites from earlier decisions, rather than on the entire precedents from which the soundbites derived, the Court managed to negate what the author regards as every day common sense.

56. *See id.* at 1950.

57. *Id.*

58. The 2021 statute previously discussed, *see supra* notes 25–28 and accompanying text, may or may not affect the SEC's ability to bring "penal" disgorgement actions, but it clearly does establish a relevant statute of limitations.

59. *See supra* notes 34–35 and accompanying text.

60. *See supra* notes 49–51 and accompanying text.

61. *See infra* notes 81–82.

C. Equity and Punishment

Immediately after the *Kokesh* opinion came down, commentators took inspiration from the footnote suggesting there might not be any legitimacy to the SEC disgorgement remedy.[62] Although the footnote gave no explanation for its warning, pundits devised one. They claimed that the case clearly established that disgorgement was not an equitable remedy. If it was not an equitable remedy, it could not be justified by the statutory language empowering the Commission to "seek all equitable remedies." In part, they took the position that disgorgement *per se* was not historically recognized at equity.[63] That statement is true, if one chooses to be a strict literalist: apparently the word "disgorgement" did not appear in published case law until the twentieth century.[64] Not stopping there, commentators claimed that "there are no penalties in equity."[65] This assertion is not true, even though there are snippets of cases—now including *Liu*—that say exactly that.[66]

It is fairly easy to counter the notion that "there are no penalties in equity,"[67] sometimes paraphrased as "equity cannot punish." Consider, after all, the longstanding power of courts of equity to issue contempt orders, which surely can be punitive.[68] The Judiciary Act of 1789

62. Stephen M. Bainbridge, Kokesh *Footnote 3 Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 WASH. U. J.L. & POL'Y 17, 26 (2018) (observing that equity cannot punish); *see* Samuel L. Bray, *Equity at the Supreme Court*, WASH. POST (June 10, 2017, 9:45 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/10/equity-at-the-supreme-court/?utm_term=.b27f569d9ef4 (stating there are no penalties in equity).

63. Bray, *supra* note 62.

64. Liu v. SEC, 140 S. Ct. at 1951 (Thomas, J., dissenting).

65. Bray, *supra* note 62.

66. *Liu*, 140 S. Ct. at 1941–42 (majority opinion); Brief for Petitioner at 21, *Liu*, 140 S. Ct. 1936 (No. 18-1501). As the petitioner's brief in *Liu* made clear, there were ample judicial quotes to buttress the conclusion; the following string citation gives just a sampling:

> *See, e.g.*, *Stevens v. Gladding*, 58 U.S. (17 How.) 447, 455 (1855) (refusing to enforce "bill for . . . penalties" as beyond "the usual and known jurisdiction exercised by courts of equity"); . . . ; *In re Westgate-California Corp.*, 642 F.2d 1174, 1178 (9th Cir. 1981) (noting "[t]he time-honored maxim that equity will not enforce a penalty"); *In re Tastyeast, Inc.*, 126 F.2d 879, 881 (3d Cir. 1942) ("[A] court of equity . . . will . . . not enforce a penalty."); *United States v. Bernard*, 202 F. 728, 732 (9th Cir. 1913) ("a court of equity . . . has no authority to assess exemplary damages"); *Stevens v. Cady*, 23 F. Cas. 8, 9 (C.C.D.R.I. 1854) (No. 13,395) ("a court of equity does not enforce forfeitures or penalties").

Id. As discussed in Part IV however, decontextualized snippets of language are not reliable authority.

67. *See* Bainbridge, *supra* note 62, at 25–26, 30.

68. Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L.Q. 1, 6 (1961). Civil contempt is generally characterized as coercive and remedial, rather than

("Judiciary Act") gave federal courts the "power . . . to *punish* by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."[69] Both courts of law and courts of equity already had claimed this power in England.[70] One may argue that punishment by contempt is more of an enforcement method than a judicial goal, but power is power nonetheless.

Of a piece, the "equity cannot punish" soundbite loses steam when paired with *Kokesh*'s punchline to the effect that deterrence is punishment. If, under *Kokesh*, deterrence is punitive, and, under *Liu*, equity cannot punish, what is to become of orders of injunctive relief?

To spare us, for the moment, the need to expand on these arguments, we can quite briskly extract guidance from straightforward historic sources. For instance, distinguished British jurist Lord Henry Homes Kames, writing in the eighteenth century, tells us in so many words that the then contemporary courts of equity recognized their own ability to inflict punishment. He devoted an entire chapter of his 1760 treatise, *Principles of Equity*, to the "[p]ower of a court of equity to inflict punishment," and to mitigate it.[71] This simply cannot be reconciled with the claim that "equity cannot punish."

The source of modern confusion about whether equitable remedies can be punitive seems to be a matter of playing telephone with a string of truncated authorities and emerging with entirely the wrong conclusion. This is the subject of Part IV. First, however, it is useful to recognize just why equitable remedies have limits at all.

III. THE BIGGER PICTURE

It may come as a surprise to those who do not much concern themselves with either the law of remedies or the law of federal courts, but those who indeed are concerned with those subjects care—deeply and perhaps even passionately—about *precisely* what the English Chancery was getting up to in 1789, contending that such history limits the remedies that the federal courts can grant in the twenty-first century and

punitive. *See* Uphaus v. Wyman, 360 U.S. 73, 76, 81 (1959) (referring to contempt as a civil remedy and rejecting the claim that it was such a cruel and unusual punishment as to constitute a denial of due process). Criminal contempt can be punitive and carries with it various due-process protections. *See* Cheff v. Schnackenberg, 384 U.S. 373, 377, 380 (1966) (discussing right to jury trial in cases of criminal contempt).

69. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (emphasis added).

70. Goldfarb, *supra* note 68, at 6.

71. LORD HENRY HOMES KAMES, PRINCIPLES OF EQUITY 229 (2d ed. 1767).

beyond. The bare bones of their concerns, which have been expanded upon at length in an avalanche of published articles,[72] are as follows.

A. The Judiciary Act of 1789

The Judiciary Act organized the federal courts and imbued them with the ability to exercise both legal and equitable authority.[73] This does not mean that federal courts simply can willy-nilly do as they please with respect to their selection of remedies. Instead, the authority of federal courts must be understood as subject to the principle that the federal government is one of limited powers. As a corollary, the prospect of expansive action by the federal judiciary strikes abject fear into at least some hearts.

An efficient explication of the concern in this area integrates—maybe even conflates—the concerns of separation of powers with the concerns of federalism. As readers almost certainly know, the federal government generally is said to be a government of powers that are limited but supreme.[74] The constitutionally mandated structure and process of its legislative branch[75] are designed to assure that those supreme powers are exercised by decision-makers who will be, in large part, concerned with, and responsive to, state and popular interests.[76] As a result, when potentially preemptive laws are enacted, it will (or should) be only after consideration of local wishes.

The federal judiciary is obviously not designed to be similarly responsive. If it were to undertake some sort of lawmaking expedition without a map from either the Constitution or the legislature, unchecked

72. *See, e.g.*, Note, *The Equitable Remedial Rights Doctrine: Past and Present*, 67 HARV. L. REV. 836, 836–37 (1954); Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 223–24 (2018).

73. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79.

74. *Id.*; *see also* 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); THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. 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."); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 70 (1988).

75. These processes include the bicameralism and presentment requirements established in Article I of the Constitution. U.S. CONST. art. I, § 7, cl. 2.

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

injuries to the self-determination of the states and/or the freedoms of their citizens could follow.[77] As a consequence, the principal role of the federal courts is limited to the interpretation and application of the United States Constitution, federal statutes, and federal administrative regulations.[78] Their ability to engage in common law-making thus is regarded as more-or-less circumscribed by the limited number of constitutionally indicated federal preserves (such as disputes involving the federal government).[79] Moreover, unless legislatively expanded, the inherent ability to do equity conferred by the Judiciary Act is cemented in eighteenth century concrete.[80]

One critical theoretical lynchpin, then, in understanding just what modern federal courts can do by reason of the Judiciary Act is recalling that equity traditionally was available only as needed to remedy the shortcomings of actions at law.[81] In the Supreme Court's words:

> This firm and indisputable doctrine of the English chancery has been recognized and declared by this court, in *Hipp v. Babin*, to be part of the system of equity jurisprudence administered by the

77. *See* John E. Nowak, *The Scope of Congressional 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.

78. *See generally* Theresa A. Gabaldon, *State Answers to Federal Questions: The Common Law of Federal Securities Regulation*, 20 J. CORP. L. 155 (1994) (discussing limits on the ability of federal courts to make common law).

79. *See id.* at 164; *see also* U.S. CONST. art. III, § 2, cl. 1. Article III extends the "judicial Power" to:

> [A]ll Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

80. For a description of the earliest uses of concrete and the distinction between concrete and cement, see Nick Gromicko & Kenton Shepard, *The History of Concrete*, INT'L ASS'N OF CERTIFIED HOME INSPECTORS, https://www.nachi.org/history-of-concrete.htm (last visited Nov. 16, 2022).

81. Root v. R.R., 105 U.S. 189, 212 (1881). For most readers, this probably came up in first year contracts class in a discussion of specific performance. *See* Richard Warner & Scott J. Burnham, *Specific Performance*, CTR. FOR COMPUTER-ASSISTED LEGAL INSTRUCTION, https://www.cali.org/lesson/745 (last visited Nov. 16, 2022).

> courts of the United States, founded not only upon the legislative declaration in the Judiciary Act of 1789, 'that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law,' but also upon the intrinsic distinctions between the different jurisdictions of law and equity.[82]

The federal system thus contemplates that relief available in 1789—or thereafter—by reason of statute or common law should not be duplicated by equity. There is, however, a notable exception when granting a legal remedy is incidental to granting "complete relief" in an action primarily sounding in equity.[83] None of this means, though (hang on here, folks), that a typically legal remedy could not be invoked in an equitable matter where a legal cause of action does not lie.[84] This is because it then does not overlap with legal relief after all.

To tease out just a bit further what may already be well-known and possibly even obvious: there is a distinction between equitable *causes of action* and equitable *remedies*, just as there is a distinction between legal causes of action and legal remedies.[85] Thus, a legal action for breach of contract has its roots in the legal doctrine of assumpsit, and its usual remedy is compensatory damages (the same type of remedy as for most non-intentional torts).[86] An action for specific performance is equitable

82. *Root*, 105 U.S. at 212 (citations omitted) (citing Hipp v. Babin, 60 U.S. (19 How.) 271, 277 (1856)); *see also* Boyle v. Zacharie, 31 U.S. (6 Pet.) 648, 654 (1832) ("[T]he settled doctrine of this court is, that the remedies in equity are to be administered . . . according to the practice of courts of equity . . . as contradistinguished from that of courts of law; subject, of course, to the provisions of the acts of congress.").

83. *See* Porter v. Warner Holding Co., 328 U.S. 395, 399 (1946); *see also infra* notes 100–11 and accompanying text.

84. *See, e.g.*, Veazie v. Williams, 49 U.S. (8 How.) 134 (1850); *see also infra* notes 96–98. This distinction might be meaningful for purposes of the Seventh Amendment's guarantee of a right to jury trial in actions at common law. *See infra* notes 164–75. However, it is a bit difficult to see how to apply it when a statute indicates how it can be breached and then grants the authority to seek specific remedies—which clearly are legal—and also to seek all equitable remedies. *See infra* notes 192–93 and accompanying text.

85. *Cf.* Tull v. United States, 481 U.S. 412, 417–19 (1987) ("First, we compare the statutory action to [eighteenth-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." (citations omitted)); *see also infra* notes 163–75.

86. Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002) (describing express and implied in fact promises as actionable under the common law writ of assumpsit); *see infra* notes 125–44 and accompanying text; *see also* CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 875 (9th ed. 2019) (describing "strong preference" for expectation damages).

and its usual remedy is an order that the contract be performed.[87] Similarly, actions for rescission of a contract originated in equity; the usual remedy is return of the parties to the *status quo ante*.[88] Still, in equitable actions for specific performance or rescission, there sometimes are circumstances in which a court finds the usual remedy unfair (a/k/a inequitable) and grants damages instead.[89]

B. Selected Subsequent Case Law

1. Those Happy Golden Years

There are a number of older cases that reflect a now unfashionable enthusiasm with respect to the ability of federal courts to do equity.[90] These notably include *Veazie v. Williams*[91] and *Porter v. Warner Holding Co.*[92]

a. *Veazie v. Williams*

Actions at law very often result in payments of money. As a result, it sometimes has been claimed that the ability of courts sitting in equity to order monetary payments was limited to (1) the return of specific money extracted from a victim, and (2) situations involving constructive trusts or accountings by breaching fiduciaries. Indeed, something very like this

87. *See* E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1149–56 (1970) (describing development of equitable action for specific performance).

88. *See* KNAPP ET AL., *supra* note 86, at 610 (describing equitable rescission in the context of fraud but noting later development of legal rescission).

89. *See Veazie*, 49 U.S. (8 How.) at 159–62; *see also infra* notes 96–98 and accompanying text.

90. *See Veazie*, 49 U.S. (8 How.) at 134; Porter v. Warner Holding Co., 328 U.S. 395 (1946). *But see* Kansas v. Nebraska, 574 U.S. 445 (2015). There, the Supreme Court was untethered by statute and reliant only on its constitutional original jurisdiction over interstate disputes. *Id.* at 453. That 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). *Id.* at 449–53. 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 manner as in its judgment will best promote the purposes of justice.'" *Id.* at 453–54 (citing Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1860)).

91. 49 U.S. (8 How.) 134 (1850).

92. 328 U.S. 395 (1946). *Kansas v. Nebraska* 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.'" 574 U.S. at 456 (quoting *Porter*, 328 U.S. at 398).

claim was advanced by the defendants in *Liu*.[93] This claim is clearly untrue, as *Liu* itself recognized in reliance on a line of patent infringement cases discussed in Part IV.[94] The patent cases actually manifested a great deal of early confusion about whether patent infringement led to the transmogrification of the infringer into a trustee for the patent holder, but there are other, clearer examples.[95]

One of these examples is provided by *Veazie v. Williams*, decided in 1850. There, the Court explained at rather great length just why, in an action for equitable rescission of a contract for the sale of real property, it was appropriate to order a wrongdoer to refund to the purchaser the difference between the amount paid for property and its actual value at the time of purchase.[96] The Court otherwise chose to leave the transaction intact.[97] This obviously had the effect of replicating legal damages for misrepresentation but was, according to the Court, necessary to accomplish equity between the parties when the property in question had declined in value through no fault of the defendant.[98]

Veazie was in no way featured in *Liu*, even though it is good authority for the ability of federal courts sitting in equity to order payments of money. This presumably is because it was directed to the issue of duplication of legal remedies, rather than to *Liu*'s punishment theme.

b. *Porter v. Warner Holding Co.*

Porter v. Warner Holding Co. was a 1946 case concerning a proceeding instigated by the Price Administrator under section 205(a) of

93. Brief for Petitioners, *supra* note 66, at 28–30; *see also, e.g.*, Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1, 11 (2013); Francesco A. DeLuca, Note, *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, 930–31 (2014).

94. Liu v. SEC, 140 S. Ct. 1936, 1944–46 (2020); *see also infra* notes 215–65 and accompanying text.

95. *See generally* KAMES, *supra* note 71. Lord Kames listed several eighteenth-century examples of equitable orders to pay money in other contexts. Such orders were issued to third parties participating in a fiduciary's breach. *Id.* at 232. Some men who had "debauched" women were ordered to pay. *Id.* at 251. Lord Kames also described the equitable obligation of owners of property to make restitution to ship captains for ransom paid for goods later lost at sea. *Id.* at 115–16. Presumably, this was equitable rather than a matter of common law recovery on assumpsit (an implied or express promise to pay for a benefit received) because the goods had been sent to Davy Jones's Locker, rather than delivered to their intended recipients. Thus, the ransom of the property in no way enriched its owners.

96. Veazie v. Williams, 49 U.S. (8 How.) 134, 159–61 (1850).

97. *Id.* at 161–62.

98. *Id.* at 159–60.

the Emergency Price Control Act of 1942.[99] That section authorized federal courts to enjoin violations of the Act and to issue orders requiring compliance.[100]

The issue in *Porter* was whether the district court had the authority under section 205(a) to order property owners to pay restitution of excess rents charged.[101] This called into question whether the defendants were required to pay restitution to aggrieved individuals who were able to bring legal actions for damages under section 205(e).[102] The principle that equity is only permissible where legal remedies are inadequate therefore was at stake and an obvious source of concern.[103]

The Court noted that jurisdiction under section 205(a) was indeed equitable—even though the word "equitable" did not appear in the statute—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."[104] It then observed 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."[105] After also observing that, in such an instance, a court's equitable jurisdiction is unrestrained "in the absence of a clear and valid legislative command," the Court easily came to the conclusion that the district court was able to compel restitution of amounts acquired in violation of the Emergency Price Control Act.[106]

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

100. Emergency Price Control Act of 1942 § 205(a), 50 U.S.C. § 901 (repealed 1956). The relevant language reads 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 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.

Id.

101. *Porter*, 328 U.S. at 396–97.

102. *Id.*

103. *Id.* at 398–400.

104. *Id.* at 398.

105. *Id.*

106. *Id.* The Court's rhetoric became even more fulsome:

> 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.'

It probably is important to recognize that the Court specifically determined that restitution could be considered an "equitable adjunct" to an injunction, because "[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."[107] 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."[108]

Although, as described below, the yippee ki yay days of equity are gone, *Porter* still stands as precedent for granting restitution to victims, and perhaps even for outright disgorgement of ill-gotten gains, at least if sought in tandem with injunctive relief. *Liu* recognized *Porter* as authority for two linked propositions. The first was that "'[o]nce [a District Court's] equity jurisdiction has been invoked' . . . 'a decree compelling one to disgorge profits . . . may properly be entered.'"[109] The other was that "[u]nless otherwise provided by statute, all . . . inherent equitable powers . . . are available for the proper and complete exercise of that jurisdiction."[110] *Liu* did not, however, concern itself with the manner in which the disgorgement remedy in *Porter* was calculated. There, the Court clearly contemplated a disgorgement measure of the defendant's illegal gross profits—which, on the facts, coincidentally equaled a restitutionary measure.[111]

2. The Scalia Era

By the time the very late twentieth century had arrived, judicial tastes had changed. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*,[112] represented the law of the land. It was followed, in quick succession, by *Great-West Life & Annuity Insurance Co. v. Knudson*.[113] Both opinions were authored by Justice Antonin Scalia.

Id. (quoting Brown v. Swann, 35 U.S. (10 Pet.) 497, 503 (1836)).

107. *Id.* at 399.

108. *Id.*

109. Liu v. SEC, 140 S. Ct. 1936, 1943 (2020) (second and fourth alterations in original) (quoting *Porter*, 328 U.S. at 398–99).

110. *Id.* at 1947 (alterations in original) (quoting *Porter*, 328 U.S. at 398).

111. *See Porter*, 328 U.S. at 400.

112. 527 U.S. 308 (1999).

113. 534 U.S. 204 (2002).

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

The majority opinion in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.* interpreted the Judiciary Act rather than the Emergency Price Control Act of 1942 or some other subject matter specific legislation.[114] Unlike *Porter*, the decision emphasized that the equitable jurisdiction generally conferred in 1789 "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."[115] In case that was not clear enough, the opinion repeated that "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."[116] For those who still might not be following, the Court added that "'[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."[117]

The Court in *Grupo Mexicano* determined that the district court did not have equitable authority under the Judiciary Act—sometimes referred to as "inherent authority"—to issue a preliminary injunction preventing disposition of assets pending the adjudication of a contract claim for money damages.[118] The reason, of course, was that such a remedy was not available in England in 1789.[119]

114. *Grupo Mexicano*, 527 U.S. at 318–19.

115. *Id.* at 318 (quoting Atlas Life Ins. Co. v. W. I. S., Inc., 306 U.S. 563, 568 (1939)).

116. *Id.* (citation omitted) (quoting ARMISTEAD M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928)).

117. *Id.* at 318–19 (citation omitted) (quoting CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2941, at 31 (2d ed. 1995)).

118. *Id.* at 333. A four-Justice minority including Justices Ginsburg and Breyer would "have defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England" rather than "limit[ing] federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor." *Id.* at 336 (Ginsburg, J., concurring in part, dissenting in part). 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." *Id.* at 336–37 (quoting Union Pac. Ry. Co. v. Chi., Rock Island & Pac. Ry. Co., 163 U.S. 564, 601 (1896)).

119. *Id.* at 332–33 (Scalia, J., majority opinion).

Grupo Mexicano raises and underscores the point that federal courts purportedly acting in equity must not only refrain from giving legal relief but also are hobbled by history when it comes to tailoring remedies to address the legal system's shortcomings—the original task for which equity was designed. They still can do only what they were doing in the late eighteenth century. Thus, even though injunctions generally were available in suits sounding in equity, and even to prevent post-judgment dispositions of property, they were not customarily available in a pre-judgment context and therefore they fall outside a federal court's equitable authority.[120]

The majority opinion in *Liu* did not acknowledge *Grupo Mexicano*, although the case does seem to suggest that the determination of whether a remedy is equitable depends on the context in which it is sought. Perhaps this is a return to the cause of action/remedy distinction drawn above, and perhaps it signals that both must be traditionally equitable, at least for Judiciary Act purposes.[121] This possibility might have been worth addressing, since the Court accepted an analogy to accounting for profits awards in patent infringement cases, a context far afield from SEC disgorgement.[122]

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

Of course, *Liu* was not a Judiciary Act case—it was a case about language in the Securities Exchange Act of 1934.[123] Perhaps, then, it is not at all surprising that the Court invoked a different modern era case about the limits of equity. As one commentator has said of *Great-West Life & Annuity Insurance Co. v. Knudson*,[124] the decision "articulated the Court's [then] 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."[125] For reasons that will become apparent, it was thought that *Great-West* well might dictate *Liu*'s outcome.[126]

120. *Id.*
121. *See supra* notes 85–89 and accompanying text.
122. *See Liu*, 140 S. Ct. at 1943–47; *supra* note 93 and accompanying text.
123. *Liu*, 140 S. Ct. at 1940.
124. 534 U.S. 204 (2002).
125. Ryan, *supra* note 93, at 4.
126. *See, e.g.*, Russell Ryan, Liu v. SEC *Offers Opportunity for Clarity in Disgorgement Law*, LAW360 (Apr. 16, 2020, 6:19 PM), https://www.law360.com/articles/1258122/liu-v-sec-offers-opportunity-for-clarity-in-disgorgement-law ("By reiterating [*Great-West*'s] point

In *Great-West*, decided just three years after *Grupo Mexicano*, the Court was called upon to determine whether the beneficiary of an insurance policy could be ordered to fulfill its contractual obligation to reimburse the issuer of the policy after the beneficiary had received claim-related payments from a third party.[127] The issuer's claim was for "equitable relief" as authorized by section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA").[128] 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."[129] For this announcement to be meaningful, one must take a moment to recall that equity possesses the recognized ability to grant legal remedies both (1) as an incidental matter, and (2) in equitable actions in contexts giving rise to no legal claim.[130] Thus, for equitable relief to be less than all relief, it necessarily was to be limited to "those categories of relief that were *typically* available in equity."[131] It could not include legal remedies, even if courts of equity sometimes did grant them, either incidentally or when a legal cause of action did not lie.[132]

Notwithstanding *Grupo Mexicano*'s emphasis on the state of equity at the time of the separation of England and the United States, Justice Scalia expressly disclaimed any need to make "antiquarian inquiry."[133] Instead, he said that a court rarely would need to do anything beyond consulting "standard current works," including treatises and restatements.[134] Relying on modern authorities, then, he ruled that the remedy sought was not a form of equitable "restitution."[135] He explained that the term sometimes is used—including in the then-current *Restatement of Restitution*—to refer to an equitable remedy, but sometimes it describes to a legal remedy.[136] According to Justice Scalia,[137]

explicitly in [*Liu*], the court might put an end to the SEC's historical tendency to demand disgorgement even against defendants who no longer possess the funds in question . . . .").

127. *Great-West*, 534 U.S. at 207.

128. *Id.* at 208; *see also* Employee Retirement Income Security Act (ERISA) of 1974 § 502(a)(3), 29 U.S.C. § 1132(a)(3).

129. *Great-West*, 534 U.S. at 209 (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 258, n.8 (1993)).

130. *See supra* notes 85–89 and accompanying text.

131. *Great-West*, 534 U.S at 210 (quoting *Mertens*, 508 U.S. at 256).

132. *See id.* at 209–10.

133. *Id.* at 217.

134. *Id.*

135. *Id.* at 218.

136. *Id.* at 212–13.

137. Note, however, that Lord Kames evidently would have disagreed. *See supra* note 95.

only claims for money based on the plaintiff's loss of particular traceable funds or property fall into the former category.[138] Claims based on "just grounds for recovering money to pay for some benefit the defendant had received from him" were based on express or implied promises to render compensation and thus actionable under the common law writ of assumpsit.[139] In the Court's view, then, *Great-West* simply had an express promise or contract claim on which a court in equity would not properly have acted.[140] This is an opportune moment to recall, once again, that equity is only supposed to step in when legal relief would not have sufficed.[141]

It might have been simpler for the Court in *Great-West* to have focused more overtly on the "no duplication of law" point and then stopped, because that point does seem so clearly correct. As it was, the Court's discussion provided ammunition for the argument that, outside of orders related to traceable funds, equity ordered monetary payments only in the case of a constructive trust or a fiduciary accounting.[142] Its footnote 2 did acknowledge that accounting for profits is a form of equitable restitution, noting 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.[143]

138. *Great-West*, 534 U.S. at 214.

139. *Id.* at 213 (quoting DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 571 (2d ed. 1993)). 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. *See generally* William Swadling, *The Fiction of the Constructive Trust*, 64 CURRENT LEGAL PROBS. 399 (2011) (discussing rationale for the imposition of constructive trusts).

140. 534 U.S. at 212–18.

141. *See supra* notes 81–89 and accompanying text.

142. *See supra* note 93 and accompanying text.

143. *Great*-West, 534 U.S. at 214 n.2. Pre-*Liu*, this might have refocused inquiry in the disgorgement setting so as to address the distinction between wrongdoers who are fiduciaries and those who are not. *See supra* note 93 and accompanying text. For instance, those guilty of inside trading generally 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. *See* THERESA A. GABALDON & CHRISTOPHER L. SAGERS, BUSINESS ORGANIZATIONS 371–72 (2d ed. 2019).

Before *Liu*, it was superficially quite easy to see how *Great-West* might map in the disgorgement/restitution context. If relief 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 of property based on a plaintiff's loss was equitable, but payment of money based on a defendant's unjust gain—sometimes called "restitution" but what this Article consistently refers to as "disgorgement"—was legal, and premised on an implied promise to pay, unless it involved payment by a defaulting fiduciary, in which case it was equitable after all. Moreover, return of money extracted by deceit generally would occur under the auspices of tort law as an action for misrepresentation.[144] This would seem to leave little room—or need—for equitable intervention.

To reiterate, the avenue of analysis just described was not the one chosen in *Liu*. As discussed below, that decision instead followed a line of cases granting private plaintiffs a profit-based remedy for patent infringement.[145] These were cases involving an accounting for profits ultimately deemed to be outside the fiduciary context, but still conceptually suitable for claiming the exception expressed in *Great-West*'s noteworthy footnote. The Court in *Liu* cited *Great-West*—very briefly—for three propositions. The first was that "[t]he 'basic contours of the term ["equitable"] are well known'" and can be discerned by consulting works on equity jurisprudence.[146] The second was that "'statutory reference[s]' to a remedy grounded in equity 'must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes.'"[147] The third was that "an 'accounting for profits' was historically a 'form of equitable restitution.'"[148] This quotation was from *Great-West*'s footnote 2. There was no specific attempt to reconcile *Liu*'s outcome with the legal restitution/equitable restitution distinction drawn in the earlier case, but it is clear that *Liu* sought to situate its remedy within footnote 2, which hinted at, but did not specifically require, a fiduciary relationship.[149]

144. 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. *See* Ryan, *supra* note 93, at 11. *But see infra* notes 266–303 (describing accounting for profits in fraud cases).

145. *See infra* notes 216–54 and accompanying text.

146. Liu v. SEC, 140 S. Ct. 1936, 1942 (2020) (first alteration in original) (quoting *Great-West*, 534 U.S. at 217).

147. *Id.* at 1947 (alteration in original) (quoting *Great-West*, 534 U.S. at 211 n.1).

148. *Id.* at 1943 (quoting *Great-West*, 534 U.S. at 214 n.2).

149. *See Great-West*, 534 U.S. at 214 n.2.

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

There is an interesting disconnect discernible between *Grupo Mexicano* and *Great-West*. The Court in *Great-West*, unlike the Court in *Grupo Mexicano*, did not suggest that something akin to time travel to the eighteenth century was required to ascertain the limits of equity. Although the Court itself did not overtly recognize the disconnect, once one does, it is possible to explain it.[150] The eighteenth century is important in interpreting the Judiciary Act because that is when it was enacted. It is not illogical, however, to think in more modern terms when interpreting later statutes.

In other words, the Judiciary Act's empowerment of the federal courts to do equity untethered to a more specific statutory prompt at least arguably can be taken as a short-hand legislative reference to a packet of limited remedies available in 1789 in a limited set of circumstances. That packet presumably can, however, be expanded as a matter of legislative will without giving offense to federalism. This expansion can occur either by identification of new circumstances in which the traditional remedies will apply or, presumably, by expansion of the remedies themselves. Thus, the ruminating court should ask whether ERISA, the Securities 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 should be assessed in terms of what courts of equity typically have done—short of invoking legal remedies in the name of complete relief or in the absence of a legal cause of action—both before and after 1789. This, according to Justice Scalia, can be ascertained by reference to "standard current works" rather than "antiquarian inquiry."[151]

One might—although probably should not—think to question whether, when a statute authorizes all equitable remedies for its breach, all commonly available equitable remedies should be available in reaction to just any breach, or whether their grant should be limited to the specific circumstances traditionally giving rise to an equitable cause of action. Recall that *Grupo Mexicano* refused to recognize, as an equitable remedy, injunctive relief in the specific context of preventing

150. *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1001–04 (2015) (providing an interesting alternative explanation and elaborating on the development of a theory of "an idealized history of equity that is well suited to judicial decisionmaking").

151. *Great-West*, 534 U.S. at 217.

disposition of assets pending resolution of a contract claim.[152] This was notwithstanding the generally, or typically, equitable nature of injunctions. *Grupo Mexicano*, however, involved a question of inherent authority under the Judiciary Act, not statutory authority conferred thereafter. Moreover, the very fact that a statute creates a new occasion for an equitable remedy to be invoked surely establishes that there should be no test based on the specific circumstances triggering the action. Were it otherwise, inherent authority under the Judiciary Act already would justify it.

All that noted, the notion of focus on what courts have generally done in the name of equity really does dovetail rather beautifully with modern day textualism. This should be no surprise, given that Justice Scalia was one of the best known textualists.[153] Textualists "typically refuse to treat legislative history as 'authoritative' evidence of legislative intent," and "choose the letter of the statutory text over its spirit."[154] The goal of the textualist judge in applying statutes thus is limited to deriving "[m]eaning . . . from the ring the words would have had to a skilled user of words *at the time*, thinking about the same problem."[155] This surely should mean that when one is deriving the meaning of "equity" in modern statutes, it is more appropriate to rely on Professor Dan Dobbs's well-known treatise on the law of remedies[156] than on whatever Lord Kames had to say about it. One does wonder whether it also would be prudent, in the context of a question presented under the federal securities laws, to take a dignified peek at what contemporary securities treatises might reveal about equitable remedies commonly applied in reaction to securities violations, but, you guessed it, that is a different article.[157]

152. *See supra* notes 118–19 and accompanying text.

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. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

155. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988) (emphasis added). The "textualism" versus "intentionalism and/or 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*, 30 CONST. COMMENT. 89, 94–95 (2015) (reviewing RICHARD ELKINS, THE NATURE OF LEGISLATIVE INTENT (2012)).

156. *See*, *e.g.*, *Great-West*, 534 U.S. at 211–13, 217 (citing DAN DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION (2d ed. 1993)).

157. *See* Gabaldon, *Equity and Punishment*, *supra* note 4, at 1668–70. In 2002, at the time Congress specifically recognized that the SEC had the authority to seek all equitable remedies, the suggestion in the text would "mean that Professor Louis Loss's treatise on

In any event, this train of thought essentially negates any need to scrounge through history for examples of courts of equity—like the Court in *Veazie v. Williams*[158]—exercising particular creativity in ordering monetary payments. This is because (1) such creativity was not really a matter of what appears to be "typical" for purposes of what one might refer to as the "typicality approach" espoused in *Great West*, and (2) obscure historical exercises appear to be out of line with a textualist approach.[159]

C. Recapitulation

The reader now is invited to ponder, just for a moment, something that was missing from the foregoing disquisition on the limits of equity. That something is a lot of talk about a need to avoid punishment. What was prominently featured instead was the stay on equity's hand imposed by the need to avoid replicating legal remedies for events that were actionable at law.[160] This would still, as a matter of inherent equitable authority under the Judiciary Act, permit granting what otherwise would be a legal remedy in the context of a matter not actionable at law.[161] It also permits granting legal remedies in primarily equitable matters in the name of complete relief. Those permissible legal remedies evidently do not, however, become "equitable remedies" for statutory purposes unless there is some sort of statutory countermand.[162]

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." *Id.* In 2002, Professor Loss's then current treatise devoted several pages to the subject of disgorgement, identifying it as equitable, tracing it back to its origins, and describing its subsequent uses. LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 982–85 (4th ed. 2001).

158. 494 U.S. 134 (1850); *see supra* notes 96–98 and accompanying text.

159. *See supra* notes 130–32 and accompanying text.

160. Legal remedies admittedly include punitive damages, but that should not shift focus from the main point.

161. Thus, for instance, awarding what essentially would be legal damages equal to the plaintiff's loss in an action for restitution of swindled money would be equivalent to a recovery under a legal action for misrepresentation. That would be duplicative, and therefore untoward. On the other hand, awarding unjust profit in a patent infringement case would not duplicate the appropriate legal damages in patent, which would be unpaid royalties. *See infra* note 229.

162. *See supra* notes 130–32.

IV. FURTHER REFLECTIONS ON EQUITY AND PUNISHMENT

This Article now returns to the false dichotomy between equity and punishment. It covers, first, the precedents most frequently (mis)invoked by commentators prior to the *Liu* case, and then plumbs *Liu*'s own precedents. After doing so, it critiques some of the aberrations from common sense clearly on display in *Liu*. It then moves on to make a few observations about the good company in which the *Liu* Court found itself.

A. Tull v. United States *and Its Precedents*

The trouble with the most oft-invoked precedents for the proposition that equity cannot punish is that they actually discuss monetary payments—some of them arguably punitive and some not—that very clearly are legal, not equitable, remedies. Many of the relevant authorities have to do with the Seventh Amendment's guarantee of a right to a jury in trials "at common law."[163] It is well established that, for this purpose, "common law" oxymoronically extends to causes of action created by statutes—which are analogized to common law actions in debt.[164] The existence of a right to jury trial "at common law," thus understood, is taken reciprocally to establish—by negative implication—that juries are not required in equitable proceedings.[165]

Tull v. United States[166] was a Seventh Amendment case. One of the post-*Kokesh* pundits claiming disgorgement was always penal and thus not ever equitable seemed to use *Tull* as authority, focusing on the Court's statement that "courts in equity refused to enforce such penalties."[167] The case actually did involve, in so many statutory words, a "penalty" for offenses under the Clean Water Act[168]—obviously a legal remedy and one (per the analogy to actions in debt) ordinarily triggering the right to a jury trial.[169] The Act specifically called for such a "penalty," but left the amount, subject to a cap, to the trial court.[170] The district court in *Tull*, sitting without a jury, determined liability and calculated

163. U.S. CONST. amend. VII.
164. Curtis v. Loether, 415 U.S. 189, 193 (1974).
165. *See generally* Annotation, *The Continuing Law-Equity Distinction*, JUSTIA US LAW, https://law.justia.com/constitution/us/amendment-07/06-continuing-law-equity-distinction.html (last visited Nov. 16, 2022) (annotating the Seventh Amendment with discussion of the legal/equity distinction).
166. 481 U.S. 412 (1987).
167. *Id.* at 424; *see also* Bray, *supra* note 62.
168. *Tull*, 481 U.S. at 414 (citing Clean Water Act, 33 U.S.C. § 1251).
169. *Id.* at 420–22.
170. *See id.* at 422.

the amount of the penalty the defendant developer was to pay by multiplying the number of lots sold in areas of illegal dumping times the developer's profit per lot.[171] This was not, as any kind of logical matter, the measure of the developer's gain from illegal dumping—that would be the amount saved by avoiding the costs of legal disposal. The *Tull* Court indeed observed that "courts in equity refused to enforce such penalties."[172] Thus, a jury trial was required.[173] In the course of its discussion, the Court actually rejected the government's attempt to analogize the trial court's remedy to an order of lost profits, saying, "[disgorgement] is a remedy only for restitution—*a more limited form of penalty* than a civil fine."[174] It also specifically distinguished the penalty in *Tull* from "equitable determinations, such as the profits gained from violations of the statute."[175]

The popularized "courts in equity refused to enforce such penalties" quotation in *Tull* was from a 1963 article in the *Yale Law Journal*[176] citing *Decorative Stone Co. v. Building Trades Council*.[177] This was a 1928 case in which the Second Circuit held that a court sitting in equity and thus without a jury could not, under the auspices of awarding "complete relief," add to injunctive relief a treble damages penalty called for by an anti-trust statute.[178] This makes sense from a Judiciary Act perspective and, of course, from a logical standpoint as well. After all, a treble damages penalty on top of injunctive relief can hardly be justified as "relief" at all. Whatever it is, it is something else.

Decorative Stone in turn cited three Supreme Court cases[179]: *City of Elizabeth v. Pavement Co.*,[180] *Stevens v. Gladding*,[181] and *Livingston v. Woodworth*.[182] *City of Elizabeth v. Pavement Co.* was an 1877 Supreme Court case describing the authority of a court of equity to order various

171. *Id.* at 415–16. The resulting amount was substantially less than the maximum amount that would have been permitted by statute. *See id.*

172. *Id.* at 424.

173. *Id.* at 425.

174. *Id.* (emphasis added).

175. *Id.* at 422.

176. *Id.* at 424 (quoting James Fleming, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 672 (1963)).

177. Fleming, Jr., *supra* note 176, at 672 n.89 (citing Decorative Stone Co. v. Building Trades Council, 23 F.2d 426, 427 (2d Cir. 1928)).

178. *Decorative Stone Co.*, 23 F.2d at 427–28 (citing Fleitmann v. Welsbach St. Lighting Co., 240 U.S. 27 (1916)).

179. *Id.* at 428.

180. 97 U.S. 126, 138 (1877).

181. 58 U.S. (17 How.) 447, 402–03 (1855).

182. 56 U.S. (15 How.) 546, 559–60 (1853).

remedies for breach of patent rights.[183] There, the "bill prayed a decree for damages and profits, but . . . the court below correctly held that a decree for profits alone could be rendered."[184] This doubtless is because damages were a legal remedy. *Stevens v. Gladding*, decided in 1855, simply determined that an accounting for profits was an appropriate supplement to an injunction against a copyright infringement even though a court sitting in equity could not award a statutory legal remedy.[185] An accounting for profits would be a non-legal remedy and would, in the circumstances, fall within the tent of complete relief, given that it was the only relief possible. *Livingston v. Woodworth*, an 1853 decision, found that a consent decree for "gains and profits" could be enforced only by an order for the amount gained by the defendant and not for the amount lost by the plaintiff.[186] This, again, would be a matter of avoiding duplication of legal relief.

Looking from the other end of the telephone line, three nineteenth-century cases *permitting* a court sitting in equity to order disgorgement of profits and refusing it the ability to order (among other things) *compensatory* damages were invoked in *Decorative Stone* as precedent for the notion that "complete relief" in equity could be taken too far.[187] *Decorative Stone*, holding that complete relief in equity did not extend to a statutorily authorized (and clearly legal) grant of treble damages, was invoked in a law review article for the proposition that courts of equity do not enforce awards of civil monetary penalties because they are legal, not equitable, remedies.[188] The article was cited by the Supreme Court in *Tull* for essentially the same proposition.[189] The disembodied quotation taken from *Tull* has signaled to modern commentators that "equity does not punish," rather than "equity generally does not provide legal remedies," which is something quite different, and not particularly remarkable, given that the original point of equity was to compensate for the inadequacies of actions at law.[190]

As noted above, the conclusion that equity cannot punish leads to mischief.[191] The mischief is exacerbated if one loses track of the only

183. *City of Elizabeth*, 97 U.S. at 138.
184. *Id.* at 138.
185. *See Stevens*, 58 U.S. (17 How.) at 455.
186. 56 U.S. at 559–60.
187. Decorative Stone Co. v. Building Trades Council, 23 F.2d 426, 427–428 (2d Cir. 1928).
188. *See id.*; Fleming Jr., *supra* note 176 at 672.
189. Tull v. United States, 481 U.S. 412, 414 (1987).
190. *See supra* notes 81–92 and accompanying text.
191. *See supra* notes 17–23 and accompanying text.

differences between legal and equitable proceedings that have continuing practical import. One—and by far the most important—is that if a proceeding is legal, there is a Seventh Amendment right to a jury trial, whereas if a proceeding is equitable, there is not.[192] The other, of course, is that Congress is rather fond of granting agencies, including the SEC, the power to seek specifically enumerated remedies (like civil monetary penalties, which are obviously legal in nature), as well as "all equitable remedies."[193] This may or may not be for the purpose of permitting such agencies to bring at least some actions without need for a jury. Nonetheless, at this point it becomes necessary in the name of statutory interpretation to—how should we put this?—interpret the statute. In doing so, probably some judges would be willing to contemplate legislative history, which sometimes can be quite revealing.[194] Others would restrict themselves to a textualist approach, as it appears was endorsed in *Great-West*.[195]

192. *See supra* notes 163–65 and accompanying text.

193. *See, e.g.*, 15 U.S.C. § 78u(3); *see generally* Daniel B. Listwa & Charles Seidel, *Penalties in Equity: Disgorgement After* Kokesh v. SEC, 35 YALE J. REG. 667 (2018) (discussing 15 U.S.C. § 53(b), § 78u(3), and similar statutes).

194. The legislative history for the Securities Law Enforcement Remedies Act of 1990 is particularly instructive with respect to congressional awareness and approval of the SEC disgorgement remedy. According to the House Report on that Act, "authority to seek or impose substantial money penalties, *in addition to the disgorgement of profits*, is necessary for the deterrence of securities law violations." H.R. REP. NO. 101-616, at 17 (1990) (emphasis added). The Senate Report went into a fairly vast amount of additional detail. S. REP. NO. 101-337, at 6–7 (1990). It makes for telling 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.

S. REP. NO. 101-337, at 6–7 (emphasis added) (footnote omitted); *see also* Gabaldon, *Equity and Punishment*, *supra* note 4, at 1630–39; Donna M. Nagy, *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 Donald 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. *See* Nagy, *supra*, at 910–11.

195. *See supra* notes 156–59.

In a nice bit of circularity, however, if one is interpreting a statute, "equitable remedies" authorized by statute really would seem to be legal remedies—although that detail does not matter one whit except for Seventh Amendment purposes.[196] In that context, one presumably should ask whether the equitable authority inherent under the Judiciary Act would support the grant of the remedy without any other statutory authorization: if so, no jury would be necessary. Of course, neither would the authorizing statute be necessary.

As a logical matter, it does seem that if a statute identifies the remedies usually available in equitable causes of action as also available in response to a breach of the relevant statute, that identification often would pioneer territory not claimed by equity in 1789. This apparently would give offense under *Grupo Mexicano* were it, rather than *Great-West*, to control.

The Seventh Amendment and its right to trial by jury in actions at law presents a different issue. If courts were to be punctilious in limiting equity for Seventh Amendment purposes only to instances in which *both* equitable causes of action *and* equitable remedies were available at the time of the Judiciary Act, many, if not most, statutory grants would fall short. It is clear, however, that for Seventh Amendment purposes the remedy prong is to overshadow the cause of action prong. 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 [eighteenth-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.[197]

This is a subject on which one might expand if this were an article about the Seventh Amendment—which it is not. *Teamsters* would not control non-Seventh Amendment cases, of course, but its reasoning nonetheless seems to contradict the Court's later holding in *Grupo Mexicano* that the specific context of a pre-judgment contract dispute

196. *See supra* notes 156–59.

197. Teamsters v. Terry, 494 U.S. 558, 565 (1990) (citation omitted) (quoting Tull v. United States, 481 U.S. 412, 417–418 (1987)).

precluded the federal courts from invoking their well-established ability to declare injunctive relief.[198]

B. Liu v. SEC *and Its Precedents*

Liu did not endorse the proposition that all disgorgement is penal and therefore beyond the jurisdiction of equity. It did, however, state early on (without citation at that point) that the "power to award 'equitable relief' . . . [is] a power that historically excludes punitive sanctions."[199] There followed a torrent of out-of-context and ill-examined snippets from a number of cases. The following discussion chronicles only a few.

First, though, it is worth a moment to recall exactly what it is that *Liu* sought to convey: (1) that "equity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy";[200] and (2) that "to avoid transforming an equitable remedy into a punitive sanction, courts restricted the remedy to an individual wrongdoer's net profits to be awarded for victims."[201]

1. *Marshall v. Vicksburg*

A page after its initial declaration that equitable relief historically excludes punitive sanctions, the *Liu* Court circled back to provide support for this proposition in the form of the following quote from *Marshall v. Vicksburg*[202]: "equity never 'lends its aid to enforce a forfeiture or penalty.'"[203] The quote was exact, of course, but overlooks some interesting—some might argue compelling—details. One was *Marshall*'s context, which simply involved enforcement of a contract.[204] The contract included a provision specifically calling for forfeiture of property, as well as other consequences, in the event of certain conduct by the defendant.[205] The lower court refused to enforce the forfeiture clause, but that aspect of the case was not appealed.[206] Thus, the Supreme Court was merely editorializing, inspired by (and citing) an earlier case involving a similar issue.

198. *See supra* notes 114–20 and accompanying text.
199. Liu v. SEC, 140 S. Ct. 1936, 1940 (2020).
200. *Id.* at 1942.
201. *Id.*
202. 82 U.S. (15 Wall.) 146 (1873).
203. *Liu*, 140 S. Ct. at 1941 (quoting *Marshall*, 82 U.S. (15 Wall.) at 149).
204. *Marshall*, 82 U.S. (15 Wall.) at 147.
205. *Id.*
206. *Id.*

The earlier case was *Livingston v. Tompkins*,[207] an 1820 decision in which the court declined to "lend its aid to devest an estate, for the breach of a condition subsequent."[208] More specifically, it said "[e]quity never decides on a *legal* forfeiture," noting that whether the breach of the condition had occurred was a legal matter and should be tried by a court of law.[209] The court also said:

> The right of the plaintiff ought to be clear and manifest, either from the record of the judgment of a Court, or from the concession of the defendant. There ought to be a defence [sic], and a final judgment, in the Court of New-Jersey, before the plaintiff can apply here.[210]

This is quite different from stating some high-minded principle that equity never punishes. This is made all the more plain by the court's obvious willingness to issue an injunction to enforce a contractual forfeiture if it were properly decreed by a court of law.[211]

Perhaps not incidentally, the context and further discussion in *Livingston* made it clear that the defendant was not responsible for the breach of the condition subsequent—in fact, the plaintiff was.[212] The court observed that to grant the plaintiff's request would work an "enormous injury" to, and a "monstrous forfeiture" by, the innocent defendant.[213] In other words, a court, sitting in equity, dragged its heels in enforcing what ultimately might turn out to be a legally impeccable, but unfair, forfeiture impacting an innocent. This is not obviously controlling precedent when the question becomes one of stripping a wrongdoer of ill-gotten gains. It could be similarly inapposite in determining when other types of orders might be made in the name of equity.

As noted above, the *Liu* Court did find that disgorgement could be equitable, provided that it was non-punitive, and indicated that failing to allow defendants to offset their revenues by their expenses would be punitive.[214] The Court drew almost exclusively on precedents from patent

207. 4 Johns. Ch. 415 (N.Y. Ch. 1820).
208. *Id.* at 415.
209. *Id.* at 424 (emphasis added).
210. *Id.* at 425.
211. *Id.* at 424.
212. *See id.* at 424–26.
213. *Id.* at 424.
214. Liu v. SEC, 140 S. Ct. 1936, 1940–41, 1946 (2020).

law in order to establish this proposition.[215] As detailed below, its method involved peppering its opinion with free-floating quotations obfuscating what might or might not be a proper outcome.

2. *Root v. Railway*

Root v. Railway[216] was one of several cases that the *Liu* Court briefly (and not at all controversially) cited for the proposition that "[i]t would be inequitable that [a wrongdoer] should make a profit out of his own wrong."[217] It also was one of several patent infringement cases used to establish that equitable orders to account for net profits were of long-standing, and traceable to English equity as it existed before 1789.[218]

Root's most critical role in *Liu*, however, was to repudiate the claim that, in equity, if a plaintiff was unable to establish ownership of specific funds in the hands of the defendant, an order to pay over money required a fiduciary relationship.[219] The authors of earlier patent infringement cases had been tempted into theorizing that a wrongdoer can be characterized as a constructive fiduciary holding the property of its victims.[220] This tantalizing prospect was specifically rejected in *Root*[221] in language quoted in *Liu*: "[i]t is nowhere said that the patentee's right to an account is based upon the idea that there is a fiduciary relation created between him and the wrong-doer by the fact of infringement."[222] *Root*, in language not mentioned in *Liu*, discussed statements in the earlier patent decisions that seemed to adopt precisely the theory that infringers became fiduciaries for patent holders, thereby "converting the infringer into a trustee for the patentee as regards the profits thus made."[223] *Root* explained that such language properly should be understood merely as saying that a return of profits measure was an acceptable equitable remedy if a court of equity *otherwise had jurisdiction* to grant an injunction, rescission, or the like.[224] This presumably would be because of equity's ability to decree complete relief.

Of course, if a statute authorizes the grant of equitable remedies in the event of its breach, jurisdiction over a cause of action is not any kind

215. *Id.* at 1944–46.
216. 105 U.S. 189 (1882).
217. *Liu*, S. Ct. at 1943 (second alteration in original) (quoting *Root*, 105 U.S. at 207).
218. *Root*, 105 U.S. at 212.
219. *See Liu*, 140 S. Ct. at 1946.
220. *See Root*, 105 U.S. at 212.
221. *Id.*
222. *See Liu*, 140 S. Ct. at 1944 (quoting *Root*, 105 U.S. at 214).
223. *Root*, 105 U.S. at 214; Packet Co. v. Sickles, 86 U.S. (19 Wall.) 611, 617–18 (1874).
224. *Root*, 105 U.S. at 214–16.

of issue whatsoever. If that statute specifies that particular legal remedies exist and also authorizes all equitable remedies, analysis seems to loop back to *Great West*.[225] Since courts of equity apparently could do almost anything in the name of complete relief, equitable authority probably should mean something less than all authority—unless, of course, Congress "intended" something else.[226] Making the argument that Congress probably did not intend anything particularly unusual or abstruse, however, is easier than making the argument that it did. Thus, it is quite plausible that incidentally ordered legal remedies to achieve complete relief in past equitable cases should not be included, nor should particularly creative remedies ordered in past equity cases. By contrast, "typical" equitable remedies for the legal wrongs listed in the statutes should.[227]

In any event, *Root* contained much more than *Liu* acknowledged (or presumably recognized). For instance, *Root*, like other early patent cases, went to pains to explain that equity is not supposed to duplicate legal remedies: it is supposed to be doing something different.[228] Given the generally compensatory aims of the legal system, an award of the defendant's net profits clearly was, indeed, something different. This undercuts—or is undercut by—the complete relief explanation suggested by *Root*, but you know what they say about consistency.

Root also stated that:

> Profits are not the primary or true criterion of damages for infringement in an action at law. That rule applies eminently and mainly to cases in equity, and is based on the idea that the infringer shall be converted into a trustee, as to those profits, for the owner of the patent which he infringes; a principle which it is very difficult to apply in a trial before a jury, but quite appropriate on a reference to a master, who can examine defendant's books and papers, and examine him on oath, as well as all his clerks and employés. On the other hand, we have repeatedly held that sales of licenses of machines, or of a royalty established, constitute the primary and true criterion of damages

225. *See supra* notes 123–41 and accompanying text.

226. *See* Boyle v. Zacharie, 31 U.S. (6 Pet.) 648, 654 (1832).

227. As long as one is looping, one might as well also revisit the discussion of the *Liu* Court's interest in the Exchange Act's allusion to the benefit of investors. If there is evidence Congress "intended" a deviation from a simple invocation of general types of remedy, the Court manifested an interest in paying attention in at least some form. *See supra* notes 26–27.

228. *Root*, 105 U.S. at 212.

> in the action at law. No doubt, in the absence of satisfactory evidence of either class in the forum to which it is most appropriate, the other may be resorted to as one of the elements on which the damages or the compensation may be ascertained.[229]

Root thus established that evidentiary difficulty demands flexibility in selecting the proper measure of recovery and contemplated that something other than a flat net profits rule could be applied.

The *Liu* Court also cited *Root* when it conceded a single instance in which gross, rather than net, profits might be an appropriate measure. That is "when the 'entire profit of a business or undertaking' results from the wrongful activity."[230] The Court did not acknowledge that in *Root* this observation was actually a follow-up to a description of how to calculate how much profit from an infringement was attributable to the infringement and how much should be credited to independent innovations.[231] *Root* in no way contemplated a situation in which part of unlawfully extracted capital was used for an activity that was essentially a cover-up, even though it was described by the defendants as a legitimate enterprise. After thus eliding, and perhaps even shading, *Root*'s meaning, the *Liu* Court continued to quote: "[i]n such cases . . . the defendant 'will not be allowed to diminish the show of profits by putting in unconscionable claims for personal services or other inequitable deductions.'"[232] Did the Court—either in *Liu* or in *Root*, or for that matter, in *Rubber Co. v. Goodyear*,[233] the case actually originating the quote—mean to suggest that unconscionable deductions *should* be considered when the whole profit is not attributed to the infringement? One thinks not. This underscores, once again, the possible consequences of a casual disregard for language and context.

The *Liu* Court's most serious omission with respect to *Root*, however, probably was its failure to acknowledge—or, possibly, even read—*Root*'s analysis of the earlier case of *Marsh v. Seymour*.[234] There, "Mr. Justice Clifford deliver[ed the] opinion, that 'damages of a compensatory character may be allowed to a complainant in an equity suit, where it appears that the business of the infringer was so improvidently conducted that it did not yield any substantial profits, as in the case

229. *Id.* at 199 (emphasis added) (quoting Burdell v. Denig, 92 U.S. 716, 720 (1875)).
230. Liu v. SEC, 140 S. Ct. 1936, 1945 (2020) (citing *Root*, 105 U.S. at 203).
231. *Root*, 105 U.S. at 202–03.
232. *Liu*, 140 S. Ct. at 1945 (quoting *Root*, 105 U.S. at 203).
233. 76 U.S. (9 Wall.) 788, 803–04 (1870).
234. 97 U.S. 348 (1877).

before the court.'"[235] This would seem to present a particularly compelling precedent for *Liu*—after all, the district court in *Liu* specifically found that no profits whatsoever were generated by the business that the defendants purported—but never planned—to run.[236]

3. *Rubber Co. v. Goodyear*, *Livingston v. Woodworth*, and *Littlefield v. Perry*

Citing *Rubber Co. v. Goodyear* (the original source of the "unconscionable deductions" quote attributed to *Root*),[237] the *Liu* Court observed that "courts limited awards to the net profits from wrongdoing, that is, 'the gain made upon any business or investment, when both the receipts and payments are taken into the account.'"[238] The Court then quoted *Livingston v. Woodworth* to explain that the purpose of this was to "avoid 'convert[ing] a court of equity into an instrument for the punishment of simple torts.'"[239]

When read carefully, it is clear that *Livingston*'s concern primarily was avoiding replication of legal relief. In *Livingston*, the language hijacked by *Liu* to decry the "punishment of simple torts" immediately followed the Court's scornful quotation of the lower court master's reasoning in support of his award of damages.[240] His observation was to the effect "[t]hat by the decision of the court they were trespassers and wrongdoers, in the legal sense of these words, and consequently in a position to be mulcted in damages greater than the profits they have actually received: the rule being not what benefit they have received, but what injury the plaintiffs have sustained."[241] Reckoning damages by reference to the plaintiff's injury, would, indeed, have had exactly the

235. *Root*, 105 U.S. at 203 (quoting *Marsh*, 97 U.S. at 360).

236. SEC v. Liu, No. 16-00974, 2021 WL 2374248, at *9 (C.D. Cal. June 7, 2021) ("Of course the companies incurred significant losses—Defendants looted them for their own personal gain until the companies had nothing. To do only what was necessary to keep up appearances that the project was moving forward, while funneling enormous sums of the money raised to himself, was the plan from the beginning—or at least very close to it . . . .").

237. *See Goodyear*, 76 U.S. (9 Wall.) at 803–04. Although the language of "unconscionable claims" comes from *Root*, the *Root* Court cited *Rubber Co. v. Goodyear* when carving out this exception. *See Root*, 105 U.S. at 203–04.

238. Liu v. SEC, 140 S. Ct. 1936, 1945 (2020).

239. *Id.* (alteration in original) (quoting Livingston v. Woodworth, 56 U.S. (15 How.) 546, 559 (1853)).

240. *Livingston*, 56 U.S. (15 How.) at 558–59.

241. *Id.* at 559.

same effect as a legal action's "punishment of [a] simple tort[]," [242] and is obviously something courts in equity generally would avoid.

Moreover, *Liu*'s invocation of the *Goodyear* case conveniently—or inconveniently, depending on one's point of view—ignores the fact that in *Goodyear*: "which was a bill for an injunction and account, a decree for [net profits] was rendered in favor of the complainants, which was affirmed on appeal." [243] Furthermore:

> 'The rule,' said Mr. Justice Swayne, delivering the opinion of the court, 'is founded in reason and justice. It compensates one party and punishes the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is that he shall not profit by his wrong. A more favorable rule would offer a premium to dishonesty and invite to aggression. The jurisdiction of equity is adequate to give the proper remedy, whatever phase the case may assume; and the severity of the decree may be increased or mitigated according to the complexion of the conduct of the offender.' [244]

This description of *Goodyear* is drawn from *Root v. Railway*, and once again emphasizes that equity was not somehow above punishment. It also manifests a willingness, shared in both *Root* and *Goodyear*, to vary the amount of a decree in appropriate circumstances, taking into account the "complexion" of the offender's conduct.

This manifest willingness to exhibit flexibility nicely, and not incidentally, complements *Littlefield v. Perry*, [245] yet another case profiled in *Root* but ignored in *Liu*. In *Littlefield*, the Court observed that "[p]rofits actually realized are usually, in a case like this, the measure of unliquidated damages. Circumstances may, however, arise which would justify the addition of interest *in order to give complete indemnity for losses* sustained by wilful infringements." [246]

It seems obvious then that, in *Liu*, the Court was sufficiently preoccupied with the mantra of "equity does not punish" that it did not take the time to address a few fairly simple points. One is that courts of equity actually *did* think their disgorgement orders were matters of punishment, and yet entirely fair game. Another is that, in the patent

242. *Id.*
243. Root v. Ry., 105 U.S. 189, 197 (1882).
244. *Id.* (emphasis added) (quoting Rubber Co. v. Goodyear, 76 U.S. (9 Wall.) 788, 804 (1870)).
245. 88 U.S. (21 Wall.) 205 (1874).
246. *Id.* at 230 (emphasis added).

infringement context, ordering defendants to disgorge profits typically would be substantially harsher than calling on them to answer in legal damages—which usually would simply be rendering unpaid royalties to the patent holder. After all, as *Root* recited, "we have repeatedly held that sales of licenses of machines, or of a royalty established, constitute the primary and true criterion of damages in the action at law."[247] Forcing the defendant to pay more in an equitable proceeding than the plaintiff could recover at law could, if one chose, be characterized as somewhat punitive, at least in a colloquial sense. By contrast, in the context of securities fraud, a net profits recovery generally will be less than compensatory damages. This is one, but only one, of the reasons that the patent analogy is inapt. The poorness of the fit will be further developed below.[248]

4. *Tilghman v. Proctor*

Skipping along its stepping-stone path of soundbites, the *Liu* Court cited *Tilghman v. Proctor*[249] for the "equitable principle that the wrongdoer should not be punished by 'pay[ing] more than a fair compensation to the person wronged.'"[250] *Tilghman*, however, contained much more than this cherry-picked quotation. Consider the following:

> The infringer is liable for actual, not for possible, gains. The profits, therefore, which he must account for, are not those which he might reasonably have made, but those which he did make, by the use of the plaintiff's invention; or, in other words, the fruits of the advantage which he derived from the use of that invention over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result. If there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits, and the plaintiff's only remedy is by an action at law for damages.[251]

So far so good, one might say, since no obvious conflict with *Liu* has yet quite reared its head above water level. The quotation does, however, make it clear what *Tilghman* actually meant to address when it

247. *Root*, 105 U.S. at 199.
248. *See infra* notes 255–57 and accompanying text.
249. 125 U.S. 136 (1888).
250. Liu v. SEC, 140 S. Ct. 1936, 1943 (2020) (alteration in original) (quoting *Tilghman*, 125 U.S. at 145–46).
251. *Tilghman*, 125 U.S. at 146.

expressed concern with avoiding punishment. It simply was rebutting the argument that the defendant could have been a more efficient infringer and should be charged as if he had been. Moreover, the quotation continues:

> But if the defendant gained an advantage by using the plaintiff's invention, that advantage is the measure of the profits to be accounted for, even if from other causes the business in which that invention was employed by the defendant did not result in profits. If, for example, the unauthorized use by the defendant of a patented process produced a definite saving in the cost of manufacture, he must account to the patentee for the amount so saved. This application or corollary of the general rule is as well established as the rule itself.[252]

This "advantage of wrongdoing" approach—which also was specifically endorsed by *Root*[253]—is rather different than a simple "receipts and payments" calculation. If translated into the context of securities fraud, the primary advantage of the wrongdoing actually would seem to be the ability to raise capital from those who would not have advanced funds had they known the truth of the defendants' plans to misapply them. Simply returning those funds well might be the perfect remedy given the obvious difficulty of determining an appropriate price discount for an investor's willingness to deal with fraudsters. Using return of funds as a starting (and perhaps ending) point would seem particularly apt since it appears to be universally recognized that ambiguity in an unjust enrichment calculation properly is resolved against the wrongdoer.[254]

C. A Brief Nod to Common Sense

This Article has noted the *Liu* Court's cheerful indifference to inconvenient portions of its precedents. There are a few more general points to be made about some of *Liu*'s choices.

252. *Id.*

253. Root v. Ry., 105 U.S. 189, 202 (1881) ("It is also clear that a patentee is entitled to recover the profits that have been actually realized from the use of his invention, although from other causes the general business of the defendant, in which the invention is employed, may not have resulted in profits,—as when it is shown that the use of his invention produced a definite saving in the process of a manufacture.").

254. *See, e.g.*, Rubber Co. v. Goodyear, 76 U.S. (9 Wall.) 788, 803–04 (1869); SEC v. First City Fin. Corp., 890 F.2d 1215, 1232 (D.C. Cir. 1989).

1. The Importance of Context

One fairly palpable critique foreshadowed above is that the patent infringement "net profits" cases were contextually inapt as precedents in a securities fraud case.[255] A net profits award makes perfect sense in the patent context, because it represents what the plaintiff patent holder would have made if it had engaged in the same use, incurring the same expenses. Rendering to the patent holder more than the patent holder could have made itself thus would seem to be a windfall inappropriate in an equitable determination. Observed through another prism, of course, a net profits award also typically should exceed what a compensatory award at law would be (which, as noted above, generally would consist of the royalties that should have been paid). This would not be the case when dealing with securities fraud.

By contrast, an analogy between patent infringers and defalcating fiduciaries making use of their beneficiaries' property is an obvious and sensible one.[256] In the fiduciary context, as in the infringement context, an offset for the expenses the beneficiaries would have incurred had they exploited their property themselves seems appropriate in the name of avoiding a windfall.

There is, however, no windfall in requiring the return of funds to bilked investors. Of course, bypassing the net profits method and applying the "advantage of wrongdoing" approach endorsed by *Tilghman*, as well as *Root*, does present a technical challenge. How does one value the savings achieved by raising capital under false pretenses? This is particularly true, one might think, in *Liu*'s actual situation, in which pricing would be greatly complicated by the investors' hopes of obtaining U.S. residence visas. In these circumstances, it seems that the mere fact that return of that capital might be equivalent to the legal remedy for

255. *See supra* notes 247–48.

256. *Root*, 105 U.S. at 199 ("Mr. Justice Miller said: 'The rule in suits in equity, of ascertaining by a reference to a master the profits which the defendant has made by the use of the plaintiff's invention, stands on a different principle. It is that of converting the infringer into a trustee for the patentee as regards the profits thus made; and the adjustment of these profits is subject to all the equitable considerations which are necessary to do complete justice between the parties, many of which would be inappropriate in a trial by jury. With these corrective powers in the hands of the Chancellor, the rule of assuming profits as the groundwork for estimating the compensation due from the infringer to the patentee has produced results calculated to suggest distrust of its universal application even in courts of equity.'" (quoting Packet Co. v. Sickles, 86 U.S. (19 Wall.) 611, 617–18 (1873)). Note, however, that *Root* ultimately rejected the notion that wrongdoers were converted into actual trustees. *See supra* notes 219–24 and accompanying text.

misrepresentation (much like the order in *Veazie v. Williams*, described above)[257] need not be dispositive.

One might counter that, in the case of capital received pursuant to misrepresentation, the capital providers could have expected no more than a share of net profits from the use of their money. Anything else sounds like a windfall. This disregards, however, the investors' interest in the return (or at least the protection) of their capital. The argument also substitutes the defendants' profits from use of money raised from investors for the "profit" made by the defendant in the capital-raising transaction itself. This is a bit odd, given that from the perspective of the federal securities laws it is the latter that involved the defendant's wrongful act. It is also perplexing from a basic accounting perspective, an idea that is worth additional unpacking.

2. The Importance of Using Terms with Precision (or, Let Us Hear from the Accountants)

In general, "profit" is the difference between revenue and expense.[258] While it is doubtlessly true that non-accountants might use "gross profit" as a synonym for revenue and "net profit" as a synonym for "profit," it also is true that capital raising transactions do not ever—that is, never, not ever—produce "profit." This is because both "expense" and "revenue" have reference to "delivering goods or services or carrying out activities constituting an entity's ongoing major or central operations."[259] When one speaks of a patent infringer, one is contemplating a business in which expenses[260] are incurred to produce revenue,[261] the net of which indeed is profit. When one speaks of a fiduciary making use of a beneficiary's property, one generally would be contemplating an enterprise in which expenses are incurred to produce revenue, the net of which is, again, profit. When one speaks of a capital-raising transaction, it would make sense to speak of net proceeds, which would be the difference between the

257. *See supra* notes 84, 96–98 and accompanying text.

258. LAWRENCE A. CUNNINGHAM, INTRODUCTORY ACCOUNTING, FINANCE AND AUDITING FOR LAWYERS 475 (5th ed. 2010) (defining "profit" as a "synonym for earnings or net income, each measures the difference between revenue and expense (including any gains or losses)").

259. *Id.* at 468, 477.

260. *Id.* at 468 (defining "expense" as a "decrease in equity from asset decreases or liability increases by virtue of delivering goods or services or carrying out activities constituting an entity's ongoing major or central operations").

261. *Id.* at 477 (defining "revenue" as an "increase in equity from asset increases and/or liability decreases by virtue of delivering goods or services or carrying out activities constituting an entity's ongoing major or central operations").

capital raised and the costs of the transaction (which might include such items as fees for underwriters, accountants, and attorneys).[262] It would not, however, be conceptually apt to talk about profit.

It is clear, however, that the *Liu* Court had in mind the difference between the capital raised (which was the amount originally sought by the Commission) and the amounts spent by the defendants for purposes of the putative business, saying "it suffices to note that some expenses from petitioners' scheme went toward lease payments and cancer-treatment equipment. Such items arguably have value independent of fueling a fraudulent scheme."[263]

On remand, the district court decided to deduct from the defendants' unlawful receipts the transactional costs incurred in the course of raising capital (which of course reduced net proceeds).[264] It also, as the Supreme Court suggested, deducted the defendants' lease payments and equipment expenditures (expenses of the putative business, which was never intended to have revenue), but it did so with obvious resentment:

> In conducting this difficult task, and taking heed of the Supreme Court's admonitions, the Court has chosen to take a very liberal approach, arguably unduly favorable to Liu and Wang, as to what constitutes a legitimate expense. . . . Defendants' entire scheme was to defraud investors. Barely any construction occurred on the proton therapy center because Defendants' plan was to misappropriate the investors' money and use it for themselves at the outset. It is difficult to consider money spent to rent land on which Defendants never actually planned to operate a proton therapy center as a legitimate expense. . . . Again, Defendants' scheme was fraudulent from the outset. However, in an abundance of caution, and in light of the Supreme Court's

262. *Net Proceeds*, FARFLEX, https://financial-dictionary.thefreedictionary.com/net+proceeds (last visited Nov. 16, 2022) ("The money one receives from a transaction after all commissions, fees, and related expenses."); DAVID L. SCOTT, WALL STREET WORDS: AN A TO Z GUIDE TO INVESTMENT TERMS FOR TODAY'S INVESTOR 245 (3d ed. 2003) (defining "net proceeds" as "[t]he revenues from the sale of an asset that have been reduced by commissions or other expenses directly related to the sale. Net proceeds from a security's sale are calculated by multiplying the security's price by the result derived from subtracting the brokerage commission and any taxes or other fees realized from the sale from the number of shares sold").

263. Liu v. SEC, 140 S. Ct. 1936, 1950 (2020).

264. SEC v. Liu, No. 16-00974, 2021 WL 2374248, at *5 (C.D. Cal. June 7, 2021).

> admonitions, the Court will deduct $3,105,809 as legitimate expenses.[265]

The lower court perhaps perceived that it was being prompted to mix the apples of capital formation with the oranges of business operation and recognized that the proposed recipe for fruit salad made little sense.

3. The Fraud Precedents

The introductory description of *Liu* in this Article observed that the case generally followed the template offered by an amicus brief—the Brief of Remedies and Restitution Scholars—filed by "exasperated law professors."[266] That brief introduced the patent line of cases relied upon by the Court, both for the proposition that equity traditionally had ordered the return of wrongful profits and for the proposition that the return should be of net, rather than gross, profits.[267] It did not take the step suggested in Section IV.C.1 of acknowledging the inaptness of the patent analogy. The Brief of Remedies and Restitution Scholars did, however, also submit a short account of a line of authorities that quite arguably would have been superior precedent. These were authorities relating to accounting for profits in the context of fraud. The Supreme Court evidently ignored the possibility that the relationship between the fraud of the prior authorities and the fraud of the case before the Court was closer than the relationship between patent infringement and fraud. It is possible the Court did so because, as presented in the Brief of Remedies and Restitution Scholars, the two lines pointed in the same direction. In fact, the two lines are not interchangeable—or, as put in this Article's Introduction, "mix-and-match."[268] This will be amplified below.

The Brief of Remedies and Restitution Scholars clearly stated that "[a]ccounting for profits also applies to fraud."[269] It observed that the *Restatement (Third) of the Law of Restitution and Unjust Enrichment* "lists specific claims to which the accounting remedy applies, and the first of these is fraud."[270] It also quoted Justice Story for the proposition that

265. *Id.* at *5–7.
266. *See supra* note 44 and accompanying text.
267. Brief of Remedies and Restitution Scholars, *supra* note 44, at 9–21.
268. *See supra* Part I.
269. Brief of Remedies and Restitution Scholars, *supra* note 44, at 19.
270. *Id.* (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 13, 51(1) (AM. L. INST. 2011)). This representation is true, of course, although arguably a bit misleading. According to Professor Douglas Laycock, one of the drafters and the signer of the Brief of Remedies and Restitution Scholars:

the "obligation to account in equity for rents and profits was a remedy available for fraud."[271] Justice Story stated:

> Other cases may be easily put, where a like remedial justice is administered in Equity. But in all these cases it will be found, that there is some peculiar equitable ground for interference; such as fraud, or accident, or mistake, the want of a discovery, some impediment at law, the existence of a constructive trust, or the necessity of interposing to prevent multiplicity of suits.[272]

This quotation, of course, did not establish how the rents and profits remedy was to be calculated in the context of fraud. For that, the Brief of Remedies and Restitution Scholars turned to a discussion of four cases.

The first of the four was *Dickson v. Patterson*,[273] an 1896 decision by the Supreme Court.[274] Plaintiff Dickson had agreed to provide the down payment for a large piece of property to be jointly owned with Defendant Patterson.[275] Patterson lied about the purchase price, as well as about the price for which the jointly owned property later was sold to a third party, and failed to reveal the fact that the third party who purchased the property from Dickson and Patterson immediately reconveyed it to

> The *Restatement (Third)* is written in plain English for lawyers in the twenty-first century. None of its rules are stated in terms of quasi-contract or the forms of action, and almost none are stated in terms of common law or equity. There is a clear explanation of restitution's separate roots both at law and in equity, correcting the common misconception that restitution is necessarily equitable, and explicitly stating that no remedy for unjust enrichment requires a showing that legal remedies are inadequate (§ 4). There is an overview of laches and the relevant statutes of limitation, which necessarily says that the applicable time limit in some jurisdictions may depend on the court's view of whether the claim arose at law or in equity (§ 70). More problematic, the Reporter could not find a way to restate the rights of bona fide purchasers for value without referring to "legal interest[s]" and "equitable interests" (§ 66). This distinction is mystifying to most contemporary lawyers, but the Reporter understands that it "may be unfamiliar" (§ 66 cmt. a), and he makes its meaning reasonably clear in the comments (§ 66 cmts. a, e). Apart from those three sections, the few references to common law or equity are brief and historical, and no legal rule is made to depend on distinctions between the two.

Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929, 931 (2012) (alteration in original). In other words, the Restatement is actually not very helpful in establishing disgorgement's equitable roots.

271. Brief of Remedies and Restitution Scholars, *supra* note 44, at 19.

272. *Id.* (citing JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 334 (1st ed. 1884)).

273. 160 U.S. 584 (1896).

274. Brief of Remedies and Restitution Scholars, *supra* note 44, at 20.

275. *Dickson*, 160 U.S. at 586.

Patterson.[276] After the reconveyance, Patterson subdivided the property and sold a few parcels, pocketing the proceeds.[277] The Court held that the appropriate remedies were two-fold. First, the sale to the third party and the subsequent reconveyance to Patterson were to be rescinded (an equitable remedy), leaving ownership (subject to the rights of innocent purchasers of subdivided parcels) in the original joint venturers.[278] Second, there was to be an accounting which would address the misstated original purchase price and require Patterson to surrender half of the proceeds from the sale of subdivided parcels, net of "any sums paid by him in discharge of taxes, or other charges upon the property."[279] This prompted the drafters of the Brief of Remedies and Restitution Scholars to state that "[t]he measure of recovery was net profits."[280]

Well, yes. But no. It is true that Defendant Patterson was entitled to credit in the accounting for property taxes and other charges on the property that he had paid.[281] These are costs that the joint venturers logically would have shared had their joint ownership been continuous. It thus makes perfect sense to consider them in the accounting. Essentially, this is the same result one would expect in a beneficiary's suit against a fiduciary making unauthorized use of the beneficiary's property—and in fact the joint venturers almost surely were in an actual fiduciary relationship.[282] One should not, however, lose track of the fact that Dickson also got back his interest in the property, subject only to the rights of innocent transferees.[283]

The second case described in the Brief of Remedies and Restitution Scholars was *Brooks v. Conston*,[284] a 1950 Pennsylvania case.[285] It presented less complicated facts than *Dickson*, involving "deceit intentionally and successfully practiced by Conston to induce plaintiffs to sell him their business for an unfair and inadequate consideration."[286] The *Brooks* plaintiffs—wife and husband—sought and were awarded rescission of the transaction.[287] They also were entitled to an equitable

276. *Id.* at 586–87.
277. *Id.* at 587.
278. *Id.* at 592.
279. *Id.*
280. Brief of Remedies and Restitution Scholars, *supra* note 44, at 20.
281. *Dickson*, 160 U.S. at 592.
282. *Cf.* Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928) (describing the fiduciary obligations of joint venturers).
283. *Dickson*, 160 U.S. at 592.
284. 72 A.2d 75 (Pa. 1950).
285. Brief of Remedies and Restitution Scholars, *supra* note 44, at 20.
286. *Brooks*, 72 A.2d at 77.
287. *Id.* at 77, 80.

accounting of Conston's profits from operating the business.[288] The Brief of Remedies and Restitution Scholars states that "[t]he measure of recovery was net profits."[289]

Well, yes. But no. The Brooks got their business back *and* got the defendant's net profits from operating it. These net profits are presumably the best surrogate for what the Brooks might have earned if they had owned the business continuously—but they did get the business back as well.

Lang v. Giraudo,[290] a 1942 decision hailing from Massachusetts, was the third case described in the Brief of Remedies and Restitution Scholars.[291] *Lang*, like *Brooks*, was more straightforward than *Dickson*, involving fraud in a single transaction—this time the sale of land.[292] Plaintiff Lang was permitted to rescind the transaction, getting back her property.[293] In addition, she was entitled to "profits from the property while it was wrongfully held by the defendant, or at the plaintiff's election with its fair rental value for that time."[294] These profits were to be offset by Defendant Giraudo's expenditures for taxes, payments on the mortgage she assumed from Lang, etc.—but not for additions or improvements.[295] This was a net profit calculation, of course, but it came on top of the requirement that Giraudo return Lang's property.[296]

Falk v. Hoffman,[297] a 1922 New York case, completed the Brief of Remedies and Restitution Scholars' discussion of accounting for profits in the context of fraud.[298] Fraud by two shareholders of a closely held corporation in purchasing the shares of a third holder gave rise to a right in that third holder—Plaintiff Falk—to rescind the transaction.[299] Because the defendants had sold Falk's shares, as well as their own, to a third party, Falk was entitled to a constructive trust over the proceeds—both securities and cash—received by the defendants from their sale of his shares.[300] This would be the case even if it allowed him to recover

288. *Id.* at 80.
289. Brief of Remedies and Restitution Scholars, *supra* note 44, at 20.
290. 40 N.E.2d 707 (Mass. 1942).
291. Brief of Remedies and Restitution Scholars, *supra* note 44, at 20–21.
292. *Lang*, 40 N.E.2d at 708.
293. *Id.* at 710.
294. *Id.* at 711.
295. *Id.*
296. *Id.*
297. 135 N.E. 243 (N.Y. 1922).
298. Brief of Remedies and Restitution Scholars, *supra* note 44, at 21.
299. *Falk*, 135 N.E. at 243.
300. *Id.* at 244.

more than the shares' actual value at the time they were sold.[301] There was no discussion in the decision of any need to net the proceeds.[302]

The moral of all four of the fraud cases portrayed in the Brief of Remedies and Restitution Scholars seems pretty clear. In equitable actions, defrauded plaintiffs are entitled to rescission and the return of what they gave up in a transaction, plus any amounts generated by the use of what they had surrendered. If one were using these cases to inform the outcome in *Liu*, the analogy seems obvious. The starting point is return of the victim's property. In *Liu*, this would be the amounts paid by the defrauded investors. If those amounts had generated profits for the defendants, a net profits calculation *on top of* the return of capital would be appropriate. There simply do not seem to be any precedents justifying some claim by a defendant that a rescissory remedy should be reduced by any net loss the defendant happened to incur. If there were such precedents, they essentially would establish that fraud, breach of fiduciary duty, or, for that matter, patent infringement, are, from an equitable standpoint, no-risk propositions.

Analysis of the fraud cases correlates well—and logically—with the accounting framework set out above. It also can be sensibly aligned with the patent cases. There is a difference between (1) the original "transaction" (which can be non-consensual in the case of patent infringement) in which the defendant acquires something belonging to the plaintiff, and (2) the subsequent use of that something. What the plaintiff gave up must be returned (in the patent line by the defendant's cessation of infringement). What was generated through use of the thing returned is measured in terms of net profit. To reiterate, permitting defendants to offset their obligation to return what the plaintiffs gave up with net losses would render wrongdoing a "can't lose" game. From this perspective, denying defendants the ability to have an offset for their losses is not punishment; it simply is something defendants have brought on themselves.[303]

D. It Is a Game That Anyone Can Play

The Supreme Court has not, so to speak, acted alone. As here and there noted above, there are lots of cases picking up and repeating decontextualized quotations about the mutually exclusive nature of

301. *Id.*

302. *See id.* at 243–44.

303. This is not an article about the meaning of punishment; if it were, it would acknowledge that the statement in the text smacks of deterrence and would then move on to make the case that not all deterrence is punitive. *See* Gabaldon, *supra* note 37, at 7–8.

equity and punishment. In addition, there are a number of eminent authorities who have drunk the Kool-Aid and echoed those quotes. For instance, the Brief of Remedies and Restitution Scholars fell prey to language in the *Tull* decision to the effect that "while a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties."[304]

To mildly belabor an additional example, there was a second amicus brief ("Second Amicus Brief") filed in *Liu* by a different group of remedies scholars.[305] It did not seem to have the same influence on the Court in *Liu* as the Brief of Remedies and Restitution Scholars.[306] The Second Amicus Brief took the position that the disgorgement order sought in *Liu* was not an equitable remedy for several reasons including its putatively punitive character.[307] It cited language from the *Tull* case quoted above,[308] and also stated that "[t]he maxim that equity does not punish is deeply rooted in the historical understanding of equity. Unlike courts of law, '[i]t is not the function of courts of equity to administer punishment.'"[309] This quotation was from *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R.*,[310] a Supreme Court case well-known to corporate law scholars.[311] It is taken from a footnote that, in its entirety, reads as follows:

> As Dean Pound stated in reply to a similar argument in [a previous case from Nebraska]:

304. Brief of Remedies and Restitution Scholars, *supra* note 44, at 13 (quoting Tull v. United States, 481 U.S. 412, 424 (1987)).

305. Brief of Amici Curiae Law Professors in Support of Petitioners, Liu v. SEC, 140 S. Ct. 1936 (2020) (No. 18-1501) [hereinafter Second Amicus Brief], https://www.supremecourt.gov/DocketPDF/18/18-1501/126646/20191223165329384_18-1501%20tsac%20Law%20Professors.pdf.

306. To be fair, there were a large number of other amicus briefs (including one joined by the author) that seemed to have little impact on the Court. *See* Liu v. Securities and Exchange Commission, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/liu-v-securities-and-exchange-commission/ (last visited Nov. 16, 2022).

307. Second Amicus Brief, *supra* note 305, at 1–2.

308. *See id.* at 8.

309. *Id.* (second alteration in original) (quoting Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R., 417 U.S. 703, 717 n.14 (1974)).

310. 417 U.S. at 703.

311. *See, e.g.*, Barbara E. Bruce, *Corporations—Mismanagement—Equitable Principles Applicable to the Issue of Standing*—Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co., 16 B.C. L. REV. 525 (1975) (discussing significance of case for shareholder derivative litigation).

> 'But it is said the defendant Barber, by reason of his delinquencies, is in no position to ask that the court look behind the corporation to the real and substantial parties in interest. . . . We do not think such a proposition can be maintained. It is not the function of courts of equity to administer punishment. When one person has wronged another in a matter within its jurisdiction, equity will spare no effort to redress the person injured, and will not suffer the wrongdoer to escape restitution to such person through any device or technicality. But this is because of its desire to right wrongs, not because of a desire to punish all wrongdoers. If a wrongdoer deserves to be punished, it does not follow that others are to be enriched at his expense by a court of equity. A plaintiff must recover on the strength of his own case, not on the weakness of the defendant's case. It is his right, not the defendant's wrong-doing, that is the basis of recovery. When it is disclosed that he has no standing in equity, the degree of wrong-doing of the defendant will not avail him.'[312]

This makes for a slightly different reading than the snippet quoted in the Second Amicus Brief. Granted, the original footnote does require an injury before giving a remedy. It goes on, however, to emphasize the need to give compensation (redress and restitution) to those who are indeed injured—which seems entirely unremarkable.

More important, the quotation from *Bangor Punta* appears in the context (there is that pesky word again) of a discussion of shareholder standing to sue. Vastly simplified, the argument in *Bangor Punta* was about whether a shareholder that paid fair value for almost 100% of the ownership of a corporation after managerial wrongdoing had occurred had standing to pursue an action against the alleged perpetrators under federal and state antitrust and securities laws, as well as under state common law.[313] The twist was that the shareholder did not bring a shareholder's derivative action. Instead, it was able to, and did, cause "BAR," the corporation it had purchased and then controlled,[314] to directly pursue its former managers, who undeniably had violated their duties to it. The footnote in which the cherry-picked quotation appears is appended to text that says:

312. *Bangor Punta*, 417 U.S. at 717 n.14 (quoting Home Fire Ins. Co. v. Barber, 93 N.W. 1024, 1035 (1903)).

313. *Id.* at 710–17.

314. The shareholder technically was the owner of only 99% of BAR's stock. *Id.* at 711.

> The Court of Appeals further stated that it was important to insure that petitioners would not be immune from liability for their wrongful conduct and noted that BAR's recovery would provide a needed deterrent to mismanagement of railroads. Our difficulty with this argument is that it proves too much. If deferrence [sic] were the only objective, then in logic any plaintiff willing to file a complaint would suffice. No injury or violation of a legal duty to the particular plaintiff would have to be alleged. The only prerequisite would be that the plaintiff agree to accept the recovery, lest the supposed wrongdoer be allowed to escape a reckoning. Suffice it to say that we have been referred to no authority which would support so novel a result, and we decline to adopt it.[315]

Ironically, although shareholder's derivative suits originated in equity,[316] and did so well after the Judiciary Act was enacted,[317] the claims made in *Bangor Punta* were being made directly by the injured corporation and were primarily statutory.[318] Thus, the words in its footnote really were not directed to the nature of equitable power at all. Instead, they were directed to the sense—or lack thereof—of permitting a predominantly legal suit to proceed when the real party in interest could not possibly have suffered any injury because it had not paid an inflated price for its shares.[319]

It is true, of course, that amicus briefs, unlike judicial decisions, have word limits, so any failure in the Brief of Remedies and Restitution Scholars or the Second Amicus Brief to address the context of chosen quotes perhaps can be both understood and excused. The problem with *Liu*, however, is that it, like the briefs alluded to above, reads as if it were prepared under word limits, and very strict ones at that.

315. *Id.* at 717.

316. *See* Note, *Right to Jury Trial in Shareholder Derivative Suits*, 1970 DUKE L.J. 1015, 1022.

317. *Id.* at 1015 n.5 ("Foss v. Horbottle, 67 Eng. Rep. 189, 203 (Ch. 1843), apparently was the first reported case to recognize the derivative suit as it is known today. The United States Supreme Court acknowledged the suit in 1855. Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1855). Earlier cases allowed shareholders' suits under a trust theory. *See* Robinson v. Smith, 3 Paige 221, 231, 233 (N.Y. Ch. 1832); Hichens v. Congreve, 38 Eng. Rep. 917, 922 (Ch. 1828).").

318. *Bangor Punta*, 417 U.S. at 705.

319. Interestingly, *Bangor Punta* might have made good authority for the *Liu* Court's requirement that amounts disgorged be returned to victims rather than retained by the government.

V. (AN OBVIOUS) CONCLUSION

Not to pussyfoot around, this Article does have a point—in fact it has two points, and they both are fairly simple.

The first is that it is simply wrongheaded and shortsighted to say that equity never punishes. *Liu*, however, would appear to enshrine this malapropos proposition more thoroughly in the canon than ever before. This is because earlier cases involved facts and provided explanations firmly linking what is admittedly loose language about avoiding punishment to the idea that courts of equity avoided the replication of actions and remedies available as a matter of law. By contrast, the conclusion that equity does not punish was facilitated in *Liu* only by a type of free-floating sloganeering that disregarded its own context, as well as that of prior decisions. The resulting soundbite simply flouted common sense. The Supreme Court is certainly capable of better, as it has exhibited that in many of the precedents from which *Liu* reaped its quotes.

The second point is related, but a bit larger. It is more than a little frightening to recognize that in this Google day and age it is all too easy to locate and harvest quotations that will support almost any outcome one chooses. It is not surprising to think that litigants, much more than amici, might easily be tempted into this very conduct. Notably, the Brief of Remedies and Restitution Scholars takes the Petitioner's Brief to task for this very thing.[320] For a court—especially the Supreme Court—to fail to grapple with that distinct possibility vis-à-vis both the briefs it receives and its own opinions promises a jurisprudence that almost inevitably will be flawed.

320. Brief of Remedies and Restitution Scholars, *supra* note 44, at 4, 22–26 (criticizing Brief for Petitioners, *supra* note 66).