UPDATING THE FEDERAL AGENCY ENFORCEMENT PLAYBOOK

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Introduction

Multinational technology companies—including Amazon, Apple, Facebook, and Google—are leading news headlines for potentially anticompetitive behavior.[1] If anticompetitive behavior is found, then agencies may seek and courts will craft an appropriate remedy for the harm.[2] Remedies can be legal or equitable. While legal remedies tend to be formulaic, equitable remedies allow for significantly more discretion and creativity—providing the wielder of equity with a powerful tool against defendants.[3] The proposed remedies for "Big Tech" are far ranging and include equitable monetary

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1 *See, e.g.*, Shirin Ghaffary & Jason Del Rey, *The Big Tech Antitrust Report Has One Big Conclusion: Amazon, Apple, Facebook, and Google Are Anti-Competitive*, Vox (Oct. 6, 2020), https://www.vox.com/recode/2020/10/6/21505027/congress-big-tech-antitrust-report-facebook-google-amazon-apple-mark-zuckerberg-jeff-bezos-tim-cook.

2 For instance, in the prominent antitrust case *United States v. Microsoft Corp.*, the district court ordered a breakup of Microsoft, the appellate court sought a lesser antitrust remedy, and Microsoft ultimately settled with the government by allowing greater third-party interoperability with its products. 253 F.3d 34, 46 (D.C. Cir. 2001); Stipulation of Settlement, United States v. Microsoft, No. 98-1232 (D.D.C. Nov. 6, 2001). Critics on both sides continue to question the effectiveness of the remedy prescribed to restore competition. *See, e.g.*, David Balto, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 Antitrust L.J. 1113, 1116 (2005); Kenneth G. Elzinga, David S. Evans & Albert L. Nichols, United States v. Microsoft*: Remedy or Malady?*, 9 Geo. Mason L. Rev. 633, 634 (2001).

3 *See* Restatement (Third) of Restitution and Unjust Enrichment § 1 (Am. L. Inst. 2011).

relief, such as disgorgement and restitution.[4] Selecting one remedy over another could reshape industries and tangibly impact our daily lives.[5]

The relationship between courts and agencies plays an important role in the assignment of remedies. The "classic vision of lawmaking" focuses on a bill that becomes a law; however, the interpretation and implementation of statutes by courts and agencies provide most of the detail in federal law.[6] Recent federal court cases suggest a new trend in the relationship between courts and agencies when interpreting statutes. Federal courts appear to be sharpening the distinction between law and equity when interpreting statutes, in order to limit agency enforcement powers.

Recent federal court cases concerning the Securities and Exchange Commission (SEC) and Federal Trade Commission (FTC) demonstrate this new relationship between the courts' insistence on equitable principles and the agencies' enforcement powers. For instance, in *Liu v. SEC*,[7] the Supreme Court limited SEC enforcement powers by holding the agency accountable to traditional principles of equity,[8] and similar implications arose for the FTC. In this respect, the FTC provides an interesting case study: the FTC's use of equitable remedies grew into a powerful tool to secure some of the agency's most significant settlements,[9] until federal courts stepped in to limit the FTC's arsenal of equitable remedies. For example, the Court unanimously

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4 *See, e.g.*, Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 2(a) (2021) (listing remedies such as behavioral relief, structural relief, civil penalties, private damages, and equitable monetary relief).

5 *See, e.g.*, *Stacking the Tech: Has Google Harmed Competition in Online Advertising?: Hearing Before the S. Subcomm. on Antitrust, Competition Pol'y, and Consumer Rts.*, 116th Cong. 2:39:53 (2020) (statements of David Dinielli, Adam Heimlich, Carl Szabo) (responding to Senator Amy Klobuchar's question: "What do you think would be the best way to fix [anticompetitive behavior]?"), https://www.c-span.org/video/?475763-1/google-search-function-competition. The proposed remedies cover great range. *Id.*

6 JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION & REGULATION 2 (3d ed. 2017).

7 Liu v. SEC, 140 S. Ct. 1936, 1955–56 (2020) (outlining three limiting principles on the SEC's use of disgorgement).

8 Congress amended section 21(d) of the Securities Exchange Act of 1934 to codify the SEC's power to obtain disgorgement. National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6501, 134 Stat. 3388 (2021). Congress passed the amendment in January 2021 as a direct response to *Liu v. SEC*, 140 S. Ct. 1936 (2020), and *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). *Id.* The amendment "leave[s] open several questions, including the extent to which the new statutory disgorgement framework supplants the requirements for disgorgement outlined in *Liu*." Matthew T. Martens et al., *Congress Amends Exchange Act, Expanding SEC Enforcement Power*, WILMERHALE (Jan. 4, 2021), https://www.wilmerhale.com/en/insights/client-alerts/20210104-congress-amends-exchange-act-expanding-sec-enforcement-power.

9 For example, in the FTC's appellate brief for *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3d Cir. 2019), the FTC noted that section 13(b) was key to resolving the Volkswagen emissions scandal, in which the FTC secured an over $8 billion settlement. In *Shire*, the district court limited the FTC's use of section 13(b) in such a way that the FTC's appellate brief acknowledged would preclude the FTC from obtaining the same relief if the Volkswagen litigation were to happen today. Brief of the Federal Trade Commission and

curtailed section 13(b) of the FTC Act[10] in *AMG Capital Management, LLC v. FTC*,[11] returning the remedy in question to a traditional equitable category.

Section 13(b) expressly authorizes the FTC to seek permanent injunctions, but other equitable remedies—namely disgorgement and restitution—are not mentioned.[12] Nevertheless, the FTC has read section 13(b) in an increasingly expansive manner over the past four decades to secure large monetary remedies.[13] While the FTC's expansive use of section 13(b) has long been in debate,[14] a circuit split recently occurred: the Ninth Circuit affirmed a broad reading of section 13(b), while the Third and Seventh Circuits overruled longstanding precedent by holding that the FTC cannot obtain monetary relief under section 13(b). Against the backdrop of this circuit split, the Supreme Court decided the future of section 13(b) in *AMG Capital*, holding that the express right to obtain an injunction does not provide the FTC with the authority to obtain monetary relief.[15] The Court's interpretation of the FTC Act is instructive to the interpretation of other statutes, as the Court generally is applying an increasingly textualist approach to statutory interpretation.[16]

This Note explores the relationship between equitable remedies and agency enforcement powers, arguing that federal courts are increasingly distinguishing between law and equity in remedies to impose limits on agency enforcement powers. Part I tracks factors driving the FTC's broad reading of section 13(b) until *AMG Capital*.[17] Part II analyzes developments in the SEC with a focus on *Liu* and suggest that federal courts are returning to traditional categories of equitable remedies. Part III concludes with two trends in determining the scope of agency enforcement powers. First, federal courts

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Appendix Volume 1 (Pages A1–A 16) at 36–37, *Shire ViroPharma*, 917 F.3d 147 (No. 18-1807), 2018 WL 3103438, at *36–37.

10 15 U.S.C. § 53(b) (2018).

11 141 S. Ct. 1341 (2021) (holding that section 13(b) does not authorize equitable monetary relief).

12 Section 19 of the FTC Act also allows the FTC to obtain equitable restitution. However, this provision is less popular because the agency must first meet other requirements to invoke equitable restitution, creating a more complicated process than that required by section 13(b). *See* Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1142–44 (1992).

13 Balto, *supra* note 2, at 1113–14.

14 *Cf.* Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 661 (1978).

15 *AMG Capital*, 141 S. Ct. 1341.

16 *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 265 & n.1 (2020).

17 See also the FTC's request to Congress to codify the agency's interpretation of section 13(b) to include monetary relief. Letter from Joseph J. Simons, Chairman, FTC, Noah Joshua Philips, Comm'r, FTC, Rohit Chorpa, Comm'r, FTC, Rebecca Kelly Slaughter, Comm'r FTC & Christine S. Wilson, Comm'r, FTC, to Frank Pallone, Jr., Chairman, Comm. on Energy & Com., Greg Walden, Ranking Member, Comm. on Energy & Com., Roger Wicker, Chairman, Comm. on Com., Sci. & Transp. & Marie Cantwell, Ranking Member, Comm. on Com., Sci. & Transp. (Oct. 22, 2020) [hereinafter FTC Letter to Chairmen].

are requiring agencies to show that their use of equitable remedies conforms with traditional principles of equity. And second, the reading of statutes in light of traditional equitable principles restrains agency overreach while preserving the administrative state, reflecting a "neoclassical"[18] approach to administrative law.

I. Evolution of FTC Enforcement Powers

Part I provides an overview of FTC enforcement powers and tracks the evolution of section 13(b) of the FTC Act. Section I.A looks at the introduction of section 13(b) and the use of disgorgement in consumer protection and competition cases. Section I.B traces the FTC's growing reliance on section 13(b) in the past forty years, with an inflection point in 2012 when the FTC started reading section 13(b) even more broadly and began seeking equitable monetary remedies in more antitrust cases.[19] Section I.C assesses recent federal court cases that created circuit splits and overturned longstanding precedent to cabin the FTC's discretion in pursuing equitable monetary relief.

A. *Introduction to Equitable Remedies*

The distinction between equitable and legal remedies carries important consequences.[20] This distinction originated from the different courts that emerged in England, which set the stage for the modern remedies toolkit.[21] Equity courts developed to provide adequate relief in the cases where courts of law failed to do so.[22] Equitable relief was more difficult to obtain than a legal remedy because equitable relief required a showing of no adequate remedy at law.[23] Although the courts of law and equity have largely merged,

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18 *See* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 884 (2020). This Note draws on the understanding of "neoclassical" provided in Pojanowski's framework for administrative law to describe the federal courts' response to agency overreach. The neoclassical alternative:

> identifies and offers a tentative defense of an approach that returns to a more formalist, classical understanding of law and its supremacy. This approach accounts for, and embraces, much of the recent criticism of administrative law doctrine, while also explaining why those worries need not entail that courts police the details of regulatory policy or single-handedly undo the administrative state Congress has constructed.

Id. at 856–57.

19 Gerald A. Stein, *Understanding the FTC's Monetary Equitable Remedies Under Section 13(b) for Antitrust Violations*, 34 ANTITRUST 59, 59 (2019).

20 Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 544–50 (2016).

21 R.P. MEAGHER, W.M.C. GUMMOW & J.R.F. LEHANE, EQUITY DOCTRINES AND REMEDIES 3–69 (3d ed. 1992).

22 *See generally* SIR JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 105–24 (5th ed 2019) (tracing the historical development of the Court of Chancery and equity).

23 *Id.*

this division still pervades the modern system of remedies.[24] Among other functions, the law-equity distinction in remedies acts as a safeguard against opportunism and an overbroad reading of what constitutes an equitable remedy.[25] Equitable remedies are relevant to determining the scope of agency enforcement powers because classifying a remedy as equitable triggers "special doctrines" that agencies must conform to.[26]

The FTC Act lays the foundation for the agency's enforcement powers. For brief background, the FTC's law enforcement authority[27] covers consumer protection and antitrust laws.[28] After the FTC completes an investigation, the agency can seek an enforcement action using an administrative or judicial process.[29] Section 13(b) of the FTC Act authorizes the FTC to seek preliminary and permanent injunctions—subcategories of equitable remedies—in judicial proceedings. The FTC broadly construes its equitable powers under section 13(b). In consumer protection cases, the FTC can seek a permanent injunction to block unfair or deceptive practices, impose monetary equitable relief to address past violations, and obtain preliminary injunctions or temporary restraining orders to freeze assets so that monetary equitable relief can be obtained at a later date.[30] In antitrust cases, the FTC typically seeks preliminary injunctions to halt mergers or acquisitions while FTC administrative proceedings are pending.[31] The FTC also has used section 13(b) to obtain other equitable remedies that are not explicitly mentioned in the statute, including disgorgement and restitution.[32]

Section 13(b) of the FTC Act increased agency enforcement powers by authorizing the FTC to seek and obtain permanent injunctions.[33] Congress introduced section 13(b) in 1973 as a response to the perception of the FTC's limited authority to go after anticompetitive mergers.[34] Although section 13(b) was added in the context of competition cases, the FTC began using section 13(b) for consumer protection cases as a hook to obtain monetary equitable remedies.[35] In 1975, Congress amended the FTC Act, adding

24 For instance, suits in equity do not come with a right to a jury trial. *See* U.S. CONST. amend. VII.

25 Bray, *supra* note 20, at 553–58, 563–72.

26 *Id.* at 544–45 (providing a list of such special doctrines).

27 The FTC holds investigative, law enforcement, and rulemaking authority. *See generally* John B. Daish, *The Federal Trade Commission*, 24 YALE L.J. 43, 49 (1914–1915).

28 *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (last updated Oct. 2019).

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*; *see, e.g.*, FTC v. Cephalon, Inc., 100 F. Supp. 3d 433, 437–41 (E.D. Pa. 2015); FTC v. Mylan Lab'ys, Inc., 62 F. Supp. 2d 25, 35–37 (D.D.C. 1999).

33 15 U.S.C. § 53(b) (2018).

34 J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L.J. 1, 3 (2013).

35 *Id.* at 4.

monetary relief to the FTC's enforcement toolkit to help the agency combat fraud in consumer protection cases.[36] In addition, Congress allowed the FTC to obtain monetary relief but limited this power to two specific conditions, provided in section 19[37] and section 5(m)(1)(B).[38] However, both sections failed to combat fraud, due to the inability of courts to order redress before the money was out of reach.[39] The FTC needed a workaround to freeze the assets in time, so the agency returned to section 13(b).

B. Growing Reliance on Equitable Remedies

The use of section 13(b) to obtain equitable remedies (including disgorgement and restitution) has turned into a powerful tool to secure some of the FTC's most significant settlements. In particular, *FTC v. H.N. Singer, Inc.*[40] and the withdrawal of the agency's internal policy guidance contributed to section 13(b)'s development into such a powerful tool. *Singer* broadened FTC enforcement powers, greatly expanding the scope of equitable relief. In *Singer*, the Ninth Circuit accepted the FTC's argument that because section 13(b) permits permanent injunctions, the statute also "by implication gives the court authority to afford all necessary ancillary relief," including restitution.[41] Indeed, the *Singer* court held that section 13(b) provides the authority "to grant any ancillary relief necessary to accomplish complete justice."[42] Such authority is not expressly provided in section 13(b), but the Ninth Circuit allowed the FTC to successfully argue that the statute provides this authority by implication.

The withdrawal of the FTC's internal policy guidance—the 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases ("MER Policy Statement")—in 2012 marked another expansion of the agency's enforcement powers through section 13(b).[43] While the MER Policy State-

36 *Id.* at 2.

37 *Id.* (explaining that this section allows the agency "to seek consumer redress in federal court after an administrative proceeding to determine whether a violation had occurred, but only for practices that a reasonable person would have known were 'dishonest or fraudulent'" (quoting 15 U.S.C. § 57b (2018))).

38 *Id.* (explaining that this section allows the FTC "to obtain civil penalties when a company engaged in an act or practice that the Commission had previously determined, in a litigated proceeding, was unfair or deceptive, but again only if the company had actual knowledge of that determination"). See also FTC Commissioner Rohit Chopra's recently released paper arguing to "resurrect one of the key authorities abandoned in the 1980s: Section 5(m)(1)(B) of the FTC Act, the Penalty Offense Authority." Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 U. PA. L. REV. (forthcoming 2021) (manuscript at 2), https://ssrn.com/abstract=3721256.

39 *Id.*

40 668 F.2d 1107 (9th Cir. 1982).

41 *Id.* at 1112.

42 *Id.* at 1113.

43 Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820 (Aug. 4, 2003); Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47,070 (Aug. 7, 2012). Former

ment was in effect, disgorgement was not a "routine" remedy for antitrust cases.[44] The agency only sought disgorgement and restitution in "exceptional" competition cases.[45] And when the FTC did deem a case "exceptional," the agency followed three guiding factors: "(1) whether 'the underlying violation is clear'; (2) whether there is a 'reasonable basis for calculating the amount of the remedial payment'; and (3) 'the value of seeking monetary relief' as compared to 'any other remedies available,' including private actions and criminal proceedings."[46] The FTC only brought two cases under section 13(b) while the MER Policy Statement was in effect for nine years.[47] Following the withdrawal of the MER Policy Statement, the FTC brought more cases—six in six years.[48]

The FTC justified the withdrawal of the MER Policy Statement and its increased reliance on section 13(b),[49] but others voiced concern. Upon withdrawing the statement, the FTC noted that the MER Policy Statement "create[d] an overly restrictive view of the Commission's options for equitable remedies."[50] In addition, the FTC stated that the MER Policy Statement "chilled the pursuit of monetary remedies," and that the agency's "prosecutorial discretion" was sufficient to decide when disgorgement was appropriate.[51] The FTC rejected the MER Policy Statement's three guiding principles, reasoning: the first and second factors were not needed because the "rarity or clarity of the violation is not an element considered by the courts in disgorgement requests," and therefore the FTC did not need a

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Acting Chairman Maureen Ohlhausen dissented from the decision to withdraw the statement. *See id.* at 47,071 (Statement of Commissioner Ohlhausen, Dissenting from the Decision to Withdraw (July 31, 2012)). Ohlhausen later explained that the lack of policy guidance created "a dramatic uptick in the agency's pursuit of monetary equitable relief." MAUREEN K. OHLHAUSEN, COMM'R, FED. TRADE COMM'N., DOLLARS, DOCTRINE, AND DAMAGE CONTROL: HOW DISGORGEMENT AFFECTS THE FTC'S ANTITRUST MISSION 1 (2016).

44 Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. at 45,821.

45 *Id.* (explaining that if the case was not "exceptional," then the agency "rel[ied] primarily on more familiar, prospective remedies").

46 Stein, *supra* note 19, at 60 (quoting Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. at 45,821).

47 *Id.* Stein divides the FTC's history of enforcement powers into three time periods based on this policy statement: "(1) from 1973 to the 2003 Policy Statement; (2) from the 2003 Policy Statement to the 2012 Withdrawal; and (3) post-2012 Withdrawal." *Id.* During the first time period (1973–2003), the FTC only brought two actions for equitable remedies. *Id.*

48 *Id.*

49 Notice of Withdrawal of Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. at 47,070 (Aug. 7, 2012) (Statement of the Commission (July 13, 2012)).

50 *Id.* at 47,070. The FTC continued: "while disgorgement and restitution are not appropriate in all [antitrust] cases, we do not believe they should apply only in 'exceptional cases.'" *Id.* at 47,071 (quoting Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. at 45,821).

51 *Id.*

"heightened standard for disgorgement" in antitrust cases.[52] The third factor also was not needed, according to the FTC, because "whether there are alternative plaintiffs that may seek or are seeking monetary relief is relevant in this context, but it is not dispositive."[53] Many critiqued the withdrawal of the MER Policy Statement, including FTC Commissioner Ohlhausen who warned that the withdrawal could lead the FTC to seek disgorgement in cases where it is not actually merited.[54] This concern served as an accurate prediction, as federal courts stepped in to limit FTC enforcement powers.

C. Court-Imposed Limits on Equitable Remedies

The FTC's reliance on such broad enforcement powers was largely unquestioned until 2019. Recent federal court cases mark this shift. First, in *FTC v. Shire ViroPharma, Inc.*, the Third Circuit limited a timing element related to section 13(b).[55] Prior to *Shire*, the FTC could seek equitable monetary remedies whether there was an ongoing, pending, or stale violation to satisfy section 13(b)'s "about to violate the law" requirement. *Shire* limited this to only ongoing or impending violations.[56] Specifically, since the FTC waited about five years after Shire's wrongful conduct ceased to file a complaint, the court held that the defendant was not violating the law when the FTC brought an action.[57] FTC commissioners argued that the court's interpretation was overly restrictive because the agency could no longer remedy past harms, nor obtain injunctions in situations where there was a reasonable likelihood that the defendant would resume such violations.[58] On balance, this decision does not only limit the cases that the FTC can bring in the first place, but the decision will also likely impede upon FTC enforcement powers by placing the FTC in a weaker bargaining position when seeking settlements with defendants.[59] *Shire* set the stage for federal courts to start limiting the FTC's interpretation of section 13(b).

Second, *FTC v. AbbVie Inc.* further limited the FTC's interpretation of section 13(b). The Third Circuit held that section 13(b) does not authorize disgorgement as a remedy, reversing the district court's disgorgement penalty of $448 million.[60] The court noted: "Injunctive relief constitutes a distinct type of equitable relief; it is not an umbrella term that encompasses

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52 *Id.*

53 *Id.*

54 *Id.* at (Statement of Commissioner Ohlhausen, Dissenting from the Decision to Withdraw (July 31, 2012)).

55 917 F.3d 147 (3d Cir. 2019). This case concerns antitrust violations, but the holding of the case applies to consumer protection cases as well.

56 *Id.* at 159.

57 *Id.* at 160.

58 FTC Letter to Chairmen, *supra* note 17.

59 *Id.* For instance, defendants may be less motivated to enter a settlement with the FTC, since simply pausing an unlawful activity may allow the defendant to circumvent the FTC. *Id.*

60 FTC v. AbbVie Inc., 976 F.3d 327, 374 (3d Cir. 2020).

restitution or disgorgement."[61] The court also stated that disgorgement "deprives a wrongdoer of *past* gains," whereas injunctions are forward-looking.[62] Thus, allowing disgorgement would be inconsistent with the "about to violate the law" requirement that was affirmed in *Shire*. *AbbVie* limited the FTC's interpretation of section 13(b) by stating that a subcategory of equitable relief (injunctive relief) does not imply other subcategories of equitable relief (restitution and disgorgement).

Third, in *FTC v. Credit Bureau Center, LLC*, the Seventh Circuit issued an opinion consistent with *AbbVie*, holding that the FTC cannot seek restitution from defendants in federal court under section 13(b).[63] Although section 13(b) expressly authorizes the FTC to seek a permanent injunction, there is no mention of monetary relief. Nevertheless, courts had previously read "injunctions" broadly in section 13(b) to *imply* other equitable remedies, such as restitution and disgorgement for monetary relief.[64] The Seventh Circuit overturned its precedent, explaining that an "implied restitution remedy doesn't sit comfortably with the text of section 13(b)."[65] In particular, the Seventh Circuit highlighted Supreme Court precedent, noting the Court's instruction to "consider whether an implied equitable remedy is compatible with a statute's express remedial scheme" and "not to assume that a statute with 'elaborate enforcement provisions' implicitly authorizes other remedies."[66] Accordingly, the Seventh Circuit stated that the FTC Act does contain remedial provisions that explicitly reference restitution; however, section 13(b) does not explicitly reference such remedial provisions and, thus, reading an implied restitution would make the other provisions "largely pointless."[67] The Seventh Circuit, therefore, applied a stricter textualist interpretation to section 13(b) and overturned its own longstanding precedent.[68]

As a result, the Seventh Circuit in *Credit Bureau Center*, along with the Third Circuit in *AbbVie*, created a circuit split with the Ninth Circuit that was

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61 *Id.* at 376 (quoting Owner-Operator Indep. Drivers Ass'n v. Landstar Sys., Inc., 622 F.3d 1307, 1324 (11th Cir. 2010)).

62 *Id.*

63 FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 783 (7th Cir. 2019).

64 Many courts supported this broad implied reading from the Supreme Court's 1946 decision in *Porter v. Warner Holding Co.*, which held that a different federal statute's express mention of "permanent or temporary injunction, restraining order, or other order" allowed district courts to use "all . . . inherent equitable powers," including monetary remedies like restitution. 328 U.S. 395, 397–98 (1946) (quoting Emergency Price Control Act of 1942, ch. 26, § 205(a), 56 Stat. 23, 33); *see also U.S. Supreme Court to Weigh FTC Restitution Authority*, GIBSON DUNN (July 13, 2020), https://www.gibsondunn.com/us-supreme-court-to-weigh-ftc-restitution-authority/.

65 *Credit Bureau Ctr.*, 937 F.3d at 772.

66 *Id.* at 767 (quoting Meghrig v. KFC W., Inc., 516 U.S. 479, 487 (1996)).

67 *Id.* at 774.

68 *See Statutory Interpretation—Stare Decisis—Seventh Circuit Uses Methodological Stare Decisis to Reverse Substantive Precedent*—FTC v. Credit Bureau Center, LLC, 937 F.3d 764 (7th Cir. 2019), 133 HARV. L. REV. 1444, 1444 (2020).

addressed by the Supreme Court in *AMG Capital*.[69] In 2018, the Ninth Circuit in *AMG Capital* held the opposite of *Credit Bureau Center*: section 13(b) does authorize monetary relief.[70] Following the Court's grant of certiorari, FTC General Counsel Alden F. Abbott issued a statement of confidence in the FTC's expansive reading of section 13(b).[71] However, others expressed concern.[72] Such concern was rightly placed. In 2021, the *AMG Capital* Court unanimously held that section 13(b) does not authorize equitable monetary relief, reasoning that "to read those words as allowing what they do not say" would result in "read[ing] the words as going well beyond the provision's subject matter."[73] Indeed, "that reading would allow a small statutory tail to wag a very large dog."[74] Thus, the Court limited the agency's interpretation of injunctions by realigning the remedy with traditional equitable categories.

II. Returning to Traditional Categories of Equitable Remedies

Part II assesses the Supreme Court's review of SEC enforcement powers, which serves as an indicator of the likely review that other agencies may undergo. Section II.A analyzes the Court's recent decision in *Liu*, arguing that both the majority and dissent indicate a return to traditional categories of equity. Section II.B draws on that analysis to assess the application of *Liu*'s reasoning in *AMG Capital* and the implications for agency enforcement powers.

A. *Protean Character of Disgorgement*

The Securities Exchange Act ("Exchange Act") authorizes SEC enforcement powers. One year after its enactment, the statute was amended to "punish securities fraud through administrative and civil proceedings."[75]

69 The Supreme Court consolidated *Credit Bureau Center* with *AMG Capital* in the summer of 2020 to address whether the FTC Act authorizes the FTC to seek restitution. However, the Court took back the grant of certiorari from *Credit Bureau Center*. *See Credit Bureau Ctr.*, 937 F.3d 764, *cert. vacated*, 141 S. Ct. 194 (2020).

70 *AMG Cap. Mgmt.*, 910 F.3d 417, 427–28 (9th Cir. 2018).

71 Peter Kaplan, *Statement of FTC General Counsel Alden F. Abbott Regarding Supreme Court Orders Granting Review of Two FTC Matters*, FED. TRADE COMM'N (July 9, 2020), https://www.ftc.gov/news-events/press-releases/2020/07/statement-ftc-general-counsel-abbott-regarding-supreme-court. "We look forward to proving to the Supreme Court that the FTC Act empowers us to fully protect consumers by ensuring that money unlawfully taken from them is rightfully returned." *Id.*

72 *Oral Statement of FTC Comm'r Christine S. Wilson Before the H. Comm. on Energy and Com. Subcomm. on Consumer Protection and Com.*, 116th Cong. (May 8, 2019), https://www.ftc.gov/system/files/documents/public_statements/1519254/commissioner_wilson_may_2019_ec_opening.pdf. Following the *Liu* decision discussed in Part II, the FTC commissioners even coauthored a letter to Congress, asking for legislation that would "restore Section 13(b) to the way it has operated for four decades." FTC Letter to Chairmen, *supra* note 17, at 4.

73 AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1348 (2021).

74 *Id.*

75 Liu v. SEC, 140 S. Ct. 1936, 1940 (2020).

Accordingly, the SEC's statutory framework distinguishes between administrative and civil proceedings.[76] In administrative proceedings, the Exchange Act authorizes the SEC to specifically seek "disgorgement" according to 15 U.S.C. § 77h-1(e). However, in civil proceedings, the Exchange Act broadly authorizes the SEC to seek "equitable relief," according to 15 U.S.C. § 78u(d)(5). Although no statute authorizes the SEC to seek disgorgement in civil proceedings, disgorgement has been one of the SEC's most powerful enforcement tools,[77] and the SEC has frequently relied on disgorgement in enforcement cases. For instance, just over the course of one year, the SEC obtained $1.101 billion in civil penalties—and about triple that amount in disgorgement of ill-gotten gains.[78] Recently, however, SEC disgorgement has been called into question. Congress had not defined "equitable relief," and recent cases have considered whether and in what form "disgorgement" may be permitted by "equitable relief" in judicial proceedings.

The guiding inquiry for what constitutes "equitable relief" is whether the remedy in question falls into "those categories of relief that were *typically* available in equity."[79] More specifically, to determine the particular remedy's "availab[ility] in equity," courts look at the remedies that were available "before law and equity merged," in the days of "the divided bench."[80] In other words, the question is whether a particular remedy is one "traditionally viewed as 'equitable.'"[81] Equity can sweep in a wide breadth of remedies; thus, the interpretation of "equitable relief" as including only traditional equitable remedies serves as a safeguard against the flexibility within equity. While the doctrine of equity evolves with time, the requirement of traditional equitable remedies prevents courts from improvising to the point of arbitrariness in the name of fairness, or from indulging in a "freewheeling power" to create new equitable remedies.[82] The Court's emphasis on traditional equitable remedies indicates that the Court "decisively rejected an alternative—and far broader and more malleable—understanding of the term."[83] In addition, the Court's narrow inquiry when interpreting "equitable relief" in the Exchange Act reflects Congress's use of "equitable relief" as an "unmis-

76 *See generally* Comment, *Equitable Remedies in SEC Enforcement Actions*, 123 U. PA. L. REV. 1188 (1975).

77 *See generally* Greg Andres, Robert Cohen & Paul Nathanson, *Supreme Court Review of SEC's Authority to Seek Disgorgement*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 21, 2019), https://corpgov.law.harvard.edu/2019/11/21/supreme-court-review-of-secs-authority-to-seek-disgorgement/ (noting that disgorgement is the "SEC's largest financial remedy").

78 U.S. SEC. & EXCH. COMM'N, DIVISION OF ENFORCEMENT: 2019 ANNUAL REPORT 16 (2019).

79 *Liu*, 140 S. Ct. at 1942 (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993)).

80 Brief of *Amici Curiae* Law Professors in Support of Petitioners at 4, *Liu*, 140 S. Ct. 1936 (No. 18-1501), 2019 WL 7209871, at *4 (quoting U.S. Airways, Inc. v. McCutchen, 569 U.S. 88, 94–95 (2013)).

81 *Id.* at 4 (quoting *Mertens*, 508 U.S. at 255).

82 Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).

83 Brief of *Amici Curiae* Law Professors in Support of Petitioners, *supra* note 80, at 5.

takably technical term[ ]."[84] Therefore, the analysis of whether the SEC's authorizing statute permits a certain remedy turns on whether that particular remedy can be classified as a traditional equitable remedy.

Scholars and practitioners disagree on disgorgement's definition and roots, and the history of SEC disgorgement reflects many of these different characterizations.[85] Such different characterizations of disgorgement include: a profits-recovery principle that is a feature of different equitable remedies, a parallel remedy to accounting for profits, a synonym for restitution, an umbrella term for equitable restitution remedies, and a distinct equitable remedy.[86] Disgorgement, in essence, deprives wrongdoers of their gains from unlawful activity so that wrongdoers do not benefit from their wrongdoing.[87] This profits-recovery principle harkens back to equity courts and has gone by different names throughout history,[88] including accounting for profits[89] and restitution.[90] Pre-1938 patent cases sought "accounting," which the Court "described as an equitable remedy requiring disgorgement of ill-gotten profits."[91] Although the petitioners in *Liu* tried to distinguish accounting from disgorgement by claiming that accounting requires a breach of trust or fiduciary duty, the Court made clear that equity courts did

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84 Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1014 (2015).

85 *Liu*, 140 S. Ct. at 1951 (Thomas, J., dissenting) ("[I]t is not even clear what 'disgorgement' means."). The term "disgorgement" only started appearing in legal publications, such as dictionaries and restatements, in the twentieth century. *Id.*; *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(4) (AM. L. INST. 2011) ("[T]he unjust enrichment of a conscious wrongdoer, or of a defaulting fiduciary without regard to notice or fault, is the net profit attributable to the underlying wrong. The object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty. Restitution remedies that pursue this object are often called 'disgorgement' or 'accounting.'"). This suggests synonymy between disgorgement and accounting. *But see* Brief of Amici Curiae Law Professors in Support of Petitioners, *supra* note 80, at 21 n.11 ("[T]here is no systematic attempt in Chapter 7 [of the aforementioned *Restatement*] to distinguish with precision the legal and equitable aspects of the various remedies described." (first alteration in original) (quoting RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. a (AM. L. INST. 2011))).

86 *See generally* DAN B. DOBBS, 1 DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION (2d ed. 1993); 2 DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION (2d ed. 1993); DAN B. DOBBS, 3 DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION (2d ed. 1993).

87 *Liu*, 140 S. Ct. at 1943 (citing Root v. Ry. Co., 105 U.S. 189, 207 (1882)).

88 Brief of Remedies and Restitution Scholars as Amici Curiae in Support of Neither Side at 25–26, *Liu*, 140 S. Ct. 1936 (No. 18-1501), 2019 WL 7372925, at *25–26 (arguing that disgorgement has a history to equity courts because "accounting for profits was an equitable remedy to recover the gains from wrongful acts, and a general grant of equitable jurisdiction authorized courts to award it").

89 "Accounting for profits" is also sometimes referred to as "accounting."

90 1 DOBBS, *supra* note 86, § 4.3(5), at 611.

91 *Liu*, 140 S. Ct. at 1944 (citing SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 964 (2017)).

not require such trust or relationship[92]—affirming parallels between accounting and disgorgement.[93] In 1971, the SEC started pursuing "restitution" to "depriv[e]" a wrongdoer of "the gains of . . . wrongful conduct,"[94] and the SEC rebranded "restitution" to "disgorgement" in the 1970s[95]—suggesting the synonymy of "restitution" and "disgorgement" at that time.[96] Therefore, although accounting for profits and restitution are terms that existed in equity courts, "disgorgement" appeared as a new term in remedies just in the second half of the twentieth century.[97] This new term (disgorgement) started replacing the established terms (accounting for profits and restitution) in SEC actions.

SEC disgorgement assumed a "protean character,"[98] as the agency increasingly departed from the equitable principles underlying the established terms.[99] What is in a name?[100] The "novelty of the term introduce[d] conceptual space" between traditional equitable remedies and the SEC's new remedy.[101] Such conceptual space allowed the SEC to justify proceeds of fraud going to the government instead of the victims,[102] or to blur the law-equity distinction because disgorgement had no direct historical ties to either the court of law or equity.[103] The SEC's "protean" version of disgorgement grew into a powerful remedial tool,[104] as the SEC used disgorgement as a

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92 *Id.* ("Contrary to petitioners' argument, equity courts did not limit this remedy to cases involving a breach of trust or of fiduciary duty.").

93 *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(4) (AM. L. INST. 2011) ("Restitution remedies" that seek "to eliminate profit from wrongdoing . . . are often called 'disgorgement' or 'accounting.'").

94 *Liu*, 140 S. Ct. at 1940, 1952 (alteration in original) (quoting SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1307–08 (2d Cir. 1971)).

95 *See* SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1105 (2d Cir. 1972).

96 Agencies started referring to "disgorgement" as a remedy in the 1960s. *See* NLRB v. Loc. 176, 276 F.2d 583, 586 (1st Cir. 1960) (describing disgorgement as the "remedy of disgorgement of dues").

97 Brief of *Amici Curiae* Law Professors in Support of Petitioners, *supra* note 80, at 22; George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 FORDHAM J. CORP. & FIN. L. 1, 49 (2007). *But see* Brief of Remedies and Restitution Scholars as Amici Curiae in Support of Neither Side, *supra* note 88, at 4 (noting that although SEC disgorgement is a relatively new term, disgorgement generally has long equity roots).

98 *Liu*, 140 S. Ct. at 1943 (quoting Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 668 n.1 (2014)).

99 Brief of *Amici Curiae* Law Professors in Support of Petitioners, *supra* note 80, at 25 (noting that the agency's use of new, instead of established, terminology "press[ed] a fuzzy and non-technical term into service at the expense of a number of more precise and technical terms with well-understood legal meanings").

100 *See* WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2, l. 43.

101 Brief of *Amici Curiae* Law Professors in Support of Petitioners, *supra* note 80, at 22–23.

102 *Id.* at 23.

103 *Id.*

104 At the height of the SEC's broad reading of disgorgement in *SEC v. Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014), the Second Circuit held that the defendant must disgorge not

tool to punish wrongdoers and to deter potential wrongdoers from violating securities laws.[105]

The SEC used the new term to sidestep the constraints of equity in three main ways: (1) returning the proceeds of fraud to the government, instead of the victims; (2) imposing joint and several liability on defendants, instead of holding defendants individually liable; and (3) refusing to deduct legitimate expenses from the proceeds of fraud.[106] In the SEC's *Liu* brief, the SEC argued that Congress implicitly supports the agency's use of disgorgement, even when the agency sidesteps such equitable principles because the SEC's authorizing statute explicitly allows "disgorgement" in administrative proceedings.[107] However, the Court noted that the reference to "disgorgement" in other statutes does "not expand the contours of that term beyond . . . a limit established by longstanding principles of equity."[108] While the SEC expanded disgorgement by sidestepping equitable principles, the *Liu* Court clarified that the remedy must conform to traditional equitable principles.

B. *Disgorgement as a Traditional Equitable Remedy*

The *Liu* Court, following the trend set forth in *Kokesh*,[109] limited SEC disgorgement, and by extension, the scope of SEC enforcement powers. In 2017, the Court in *Kokesh* held that disgorgement functions as a "penalty"—but only in the context of the applicable statute of limitations, 28 U.S.C. § 2462.[110] The *Kokesh* Court provided a narrow holding of its assessment of disgorgement by refusing to address whether "equitable relief" under section 78u(d)(5) includes disgorgement.[111] In 2020, the Court answered this question in *Liu*, holding that "equitable relief" does permit disgorgement.[112] However, the Court also limited the scope of disgorgement by setting out equitable principles that disgorgement must conform to: (1) the proceeds of fraud must be returned to the victims, rather than the government; (2) joint and several liability cannot be imposed; and (3) legitimate expenses must be

only his ill-gotten profits, but also "the benefit that accrue[d] to third parties." *Id.* In this case, disgorgement was "used to recover funds the defendant never had and profits he never received." Brief of *Amici Curiae* Law Professors in Support of Petitioners, *supra* note 80, at 25.

105 Kokesh v. SEC, 137 S. Ct. 1635, 1644 (2017).

106 *See* Liu v. SEC., 140 S. Ct. 1936, 1947–50 (2020).

107 *See* Brief for the Respondent at 13–21, *Liu*, 140 S. Ct. 1936 (No. 18-1501), 2020 WL 257572, at *13–21.

108 *Liu*, 140 S. Ct. at 1947.

109 *See generally* Daniel B. Listwa & Charles Seidell, Note, *Penalties in Equity: Disgorgement after* Kokesh v. SEC, 35 YALE J. ON REGUL. 667 (2018).

110 *Kokesh*, 137 S. Ct. at 1645.

111 *See id.*; *see also* Steven Peikin, Co-Dir., Div. of Enf't, Sec. & Exch. Comm'n, Remedies and Relief in SEC Enforcement Actions (Oct. 3, 2018) (emphasizing that this decision still has great impact even with this limited holding, considering that the SEC is unable to seek about $800 million per year in potential disgorgement cases).

112 *Liu*, 140 S. Ct. at 1946.

deducted from the disgorgement award, defined as net profit of the fraud.[113] By adding these three principles, *Liu* modified SEC disgorgement to conform with traditional concepts of equity.

These limits on SEC disgorgement mark a return to traditional categories of equity. In particular, the *Liu* principles indicate a return to traditional equitable remedies and reinforce a central feature of traditional equitable remedies: equity does not punish.[114] The first limiting principle in *Liu*—proceeds of fraud must be returned to victims—is an equitable restitution remedy called a constructive trust. Prior to *Liu*, the proceeds of fraud were deposited in the U.S. Department of the Treasury. The SEC defended this practice by arguing that the purpose of depriving wrongdoers of their profits is to make sure that wrongdoers do not profit from their illegal activity, rather than attempt to provide restitution to victims. However, the SEC statute specifically limits "equitable relief" to that which "may be appropriate or necessary for the benefit of investors."[115] Accordingly, the applicable statute directs the SEC to not only deprive wrongdoers of their profits, but also to provide restitution to victims—a hallmark of constructive trusts. A constructive trust applies "when 'money or property identified as belonging in good conscience to the plaintiff' can be 'traced to particular funds or property in the defendant's possession.'"[116] Tracing "allows the plaintiff to follow an asset through changes in form or changes in putative ownership," which "grant[s] the plaintiff an interest in particular property that has been wrongfully diverted."[117] Therefore, tracing, ensures that the defendant is not punished. Overall, the first limiting principle in *Liu* reinforces the no-punishment principle of equity and returns SEC disgorgement to a traditional equitable remedy called a constructive trust.

The second limiting principle in *Liu*—joint and several liability cannot be imposed—marks a return to equitable limitations on collective liability. Prior to *Liu*, the SEC required all defendants who received ill-gotten profits, including those who may be jointly and severally liable, to disgorge those profits. The prohibition of joint and several liability marks a realignment with equity courts. Although the *Liu* Court did not categorically take away collective liability,[118] the Court did clarify that the remedy should not impugn multiple defendants simply to punish those defendants. This principle reflects a maxim of equity that equity acts in personam.[119] Therefore,

113 *Id.* at 1047–50.

114 Brief of *Amici Curiae* Law Professors in Support of Petitioners, *supra* note 80, at 8–16.

115 15 U.S.C. § 78u(d)(5) (2018).

116 Brief of *Amici Curiae* Law Professors in Support of Petitioners, *supra* note 80, at 18 (quoting Great-W. Life & Annuity Ins. v. Knudson, 534 U.S. 204, 213 (2002)).

117 *Id.*

118 *Liu*, 140 S. Ct. at 1949 (explaining that even common law may impose liability for defendants acting in concert and that there is a "wide spectrum of relationships between participants and beneficiaries of unlawful schemes").

119 Howard L. Oleck, *Maxims of Equity Reappraised*, 6 RUTGERS L. REV. 528, 531 (1952).

the second limiting principle in *Liu* also reinforces the no-punishment principle of equity.

The third limiting principle in *Liu*—legitimate expenses must be deducted from the disgorgement award—is characteristic of a traditional restitution remedy: accounting for profits. Prior to *Liu*, the SEC typically did not deduct legitimate expenses from the disgorgement award, since such expenses were used to further illegal conduct.[120] However, post-*Liu*, only net profit (as opposed to gross receipts) of the fraud can be disgorged, and legitimate expenses must be deducted from the net profit.[121] Moving forward, SEC staff will have to "look behind the numbers and make assessments relating to . . . what constitutes net profits."[122] This limiting principle functions like accounting for profits, in which the accounting "requires the disloyal trustee to turn over actual net profits to his beneficiary."[123] Further, "there is a strict 'no profit' rule for trustees" because the trustee acts as "a good trustee . . . is already required to do."[124] Indeed, "accounting does not punish the wrongdoer."[125] Therefore, the third limiting principle in *Liu* similarly reinforces the no-punishment principle of equity and returns SEC disgorgement to a traditional equitable remedy called accounting for profits.

Although *Liu* limited SEC disgorgement, the decision was still a favorable outcome for the SEC.[126] The Court could have held that the SEC does not have authority to seek disgorgement at all in judicial proceedings; instead, the Court affirmed that SEC disgorgement can be considered an equitable remedy. The impact of *Liu* will depend on how lower courts interpret the three limiting principles on SEC disgorgement. Each of the three principles contains areas of ambiguity for lower courts to continue allowing the SEC to test the bounds of equity: (1) the proceeds of fraud must be returned to victims—however, the Court does not specify what to do in situations in which returning the award to the victim is not feasible; (2) joint and several liability cannot be imposed—however, collective liability remains an

120 *Liu*, 140 S. Ct. at 1950 (noting that the district court similarly refused to deduct expenses based on this theory, and the Supreme Court overruled that decision).

121 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(4) (AM. L. INST. 2011) (confirming that wrongdoer's net profits should only be calculated).

122 Veronica E. Callahan et al., *Supreme Court Upholds—but Also Limits—SEC Disgorgement Authority*, ARNOLD & PORTER (June 24, 2020), https://www.arnoldporter.com/en/perspectives/publications/2020/06/supreme-court-upholds-sec-disgorgement-authority. This calculation of net profits "likely will be a factor in settlement negotiations as well as contested proceedings." *Id.*

123 Brief of *Amici Curiae* Law Professors in Support of Petitioners, *supra* note 80, at 17.

124 *Id.* The *Restatement* also makes clear that accounting for profits does not require a constructive trust. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 & cmt. b. (AM. L. INST. 2011).

125 Brief of *Amici Curiae* Law Professors in Support of Petitioners, *supra* note 80, at 17 ("A plaintiff can recover only the defendant's actual profits—not whatever gross revenues were derived from the wrongdoing, and not any punitive enhancement. Thus, the defendant is generally entitled to an offset compensating him for the costs he incurred." (citations omitted)).

126 *See U.S. Supreme Court to Weigh FTC Restitution Authority*, *supra* note 64.

option;[127] and (3) legitimate expenses must be deducted from the net profits of the fraud[128]—however, there is uncertainty in which expenses might be sufficiently "wholly fraudulent" to constitute "legitimate" expenses.[129] If lower courts accept arguments based on these areas of ambiguity within the three limiting principles, the SEC is more likely to retain a remedy that resembles its pre-*Liu* version of disgorgement. In particular, lower courts can read the areas of ambiguity broadly and continue granting the SEC broad enforcement powers. But if lower courts strictly adhere to the limiting principles and thus close off the areas of ambiguity, courts will effectively remove SEC disgorgement from the agency's remedial toolkit—as Justice Thomas argues for in his dissent in *Liu*.[130]

If lower courts fully and consistently apply *Liu*'s limiting principles on SEC disgorgement, then disgorgement would effectively function as an umbrella of existing traditional equitable remedies. In essence, the traits that made SEC disgorgement inconsistent with traditional equitable principles would be rectified. First, SEC disgorgement was previously criticized for being a "20th-century invention" without a direct historical lineage to equity courts;[131] however, disgorgement that fully conforms to *Liu*'s limiting principles would not have this problem because the limited version of disgorgement would be a conglomeration of traditional equitable remedies, namely constructive trusts and accounting for profits. Second, SEC disgorgement previously did not have "well-understood contours;"[132] however, disgorgement that conforms to *Liu*'s limiting principles would regain structure. Finally, SEC disgorgement previously violated the no-punishment principle of equity; however, disgorgement that conforms to *Liu*'s limiting principles would abide by the no-punishment rule because of the safeguards within the three limiting principles. Before the SEC expanded disgorgement, the rem-

127 *See* SEC v. Smith, No. 20-1056, 2020 WL 6712257, at *3 (C.D. Cal. Oct. 19, 2020) (post-*Liu* case decided by the district court in California, holding in favor of the SEC and concluding that the "[d]efendants shall be held jointly and severally liable for disgorgement because they acted in concert to perpetrate the fraudulent scheme" in a post-*Liu* case).

128 Liu v. SEC*: Supreme Court Affirms SEC's Disgorgement Authority but Imposes Limitations*, White & Case (June 24, 2020), https://www.whitecase.com/publications/alert/liu-v-sec-supreme-court-affirms-secs-disgorgement-authority-imposes-limitations ("[D]isgorgement could be considerably reduced if no net profit was made on the illegal activity, affording defendants a strong argument for lowering disgorgement amounts.").

129 Liu v. SEC, 140 S. Ct. 1936, 1950 (2020); *see also* SEC v. Mizrahi, No. 19-2284, 2020 WL 6114913, at *3–4 (C.D. Cal. Oct. 5, 2020) (illustrating the different types of transactions that defendant wanted to include as "legitimate expenses," in a post-*Liu* case, but the district court in California rejected, holding that the SEC correctly calculated net profits and correctly deducted legitimate expenses).

130 In his dissent in *Liu*, Justice Thomas argued there should be a clean break and disgorgement should be categorically removed from the SEC's remedial toolbox, since disgorgement is not a traditional form of equitable relief.

131 *Liu*, 140 S. Ct. at 1951 (Thomas, J., dissenting).

132 Brief of *Amici Curiae* Law Professors in Support of Petitioners, *supra* note 80, at 19–20.

edy largely existed in a limited form—merely an "umbrella" of existing traditional equitable remedies.[133] While "this understanding that 'disgorgement' was simply an umbrella term ha[d] faded away" for some time,[134] *Liu* suggests the Court is returning to such an understanding of disgorgement.

Overall, the *Liu* Court affirmed the SEC's ability to continue seeking disgorgement, while insisting upon categories of traditional equitable remedies. The Court's decision to permit disgorgement, rather than categorically remove it from the enforcement toolkit, is significant because disgorgement allows an agency to seek redress on behalf of private plaintiffs, resulting in the SEC retaining the right to bring the suit in the first place. At the same time, *Liu*'s limiting principles markedly return the Court's rhetoric to traditional equitable remedies. While the scope of SEC disgorgement will ultimately depend on whether lower courts interpret *Liu* more in line with the majority or the dissent,[135] there seems to be a return in the Court's reasoning toward traditional equitable remedies in both the majority and dissent.

C. Implications for Agency Enforcement Powers

Liu's implications on agency enforcement powers can already be seen in the FTC. *Liu* limits FTC enforcement powers in several ways. *Liu*'s first limiting principle suggests the FTC will have to reimburse funds to consumers, rather than continuing its practice of depositing funds with the Treasury. *Liu*'s second limiting principle suggests the FTC will no longer be able to impugn multiple defendants using joint and several liability, marking the end of a common practice by the FTC.[136] And *Liu*'s third limiting principle overturns *FTC v. Commerce Planet, Inc.*, in which the court held that unjust gains are "measured by the defendant's net revenues."[137] Moving forward, the FTC will likely have to measure such ill-gotten profits on net profit.

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133 *Id.* at 24 (explaining that disgorgement is not really a remedy, but rather an "umbrella term for a number of remedies").

> The disgorgement remedy is effected through the equitable remedies of constructive trust, tracing, and accounting; requiring the fiduciary to indemnify the agent for losses; setting aside an improper transaction or objectionable act; granting injunctive and declaratory relief; and awarding prejudgment interest. Each of these remedies is designed to deprive the fiduciary of all gains resulting from her wrongful conduct.

Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1051 n.14 (1991).

134 Brief of *Amici Curiae* Law Professors in Support of Petitioners, *supra* note 80, at 24; *see also* Samuel L. Bray, *Remedies, Meet Economics; Economics, Meet Remedies*, 38 OXFORD J. LEGAL STUD. 71, 87–89 (2018).

135 *E.g.*, SEC v. Janus Spectrum LLC, 811 F. App'x 432, 434 (9th Cir. 2020) (mem.) (remanding to make sure that the district court walks through all limiting principles). However, there are not enough cases yet to indicate which way courts will lean.

136 Mark Hopson, Benjamin Mundel & Lucas Croslow, *3 Ways High Court's* Liu v. SEC *Ruling Curtails FTC Authority*, SIDLEY (July 14, 2020), https://www.sidley.com/-/media/publications/law3603-ways-high-courts-liu-v-sec-ruling-curtails-ftc-authority.pdf?la=en.

137 815 F.3d 593, 603 (9th Cir. 2016).

Furthermore, *Liu*'s emphasis on traditional equitable principles when assessing remedies can be seen in *AMG Capital*. The SEC statute authorizes a whole category (equitable relief), whereas the FTC Act only authorizes a subcategory of equitable relief (injunctions). This distinction seems key. In *Liu*, the protean nature of disgorgement provided ambiguity that the majority opinion could have used to continue allowing disgorgement to exist in its overstretched form or completely remove it from the SEC's remedial toolkit. Yet the majority ultimately preserved the SEC's ability to obtain disgorgement and tamed disgorgement into a subcategory of equitable relief. In this respect, the FTC's statutory framework for equitable remedies is different than that of the SEC. The FTC's enabling statute only allows the agency to enforce injunctions, a specific subcategory of equitable remedies. Previous courts have read the subcategory of injunction to imply a whole other subcategory of monetary relief.[138] However, the Court's reasoning in *Liu* and *AMG Capital* suggests that such broad powers will no longer be condoned as courts are holding agency enforcement powers accountable to traditional equitable categories.

III. Trends Shaping Agency Enforcement Powers

Drawing on the previous analysis of recent changes in FTC and SEC enforcement authority, Part III assesses two trends in determining the scope of agency enforcement powers. First, courts appear to be using traditional equitable principles as an interpretive tool to assess the scope of agency enforcement powers. And second, the law-equity distinction allows courts to both curtail agency discretion and preserve the administrative state, reflecting a neoclassical approach to administrative law.

A. *Distinction Between Law and Equity*

The FTC and SEC cases demonstrate that the law-equity distinction in remedies remains consequential. On one hand, law and equity have merged in most areas of the law, and remedies scholars generally view the distinction as "outmoded."[139] However, this Note illustrates that the law-equity distinction in remedies does have analytical value in the present, and that this distinction captures a unique set of "differences in policy" that are not necessarily reflected when remedies are divided in different ways, such as monetary and nonmonetary remedies.[140] For instance, the division of remedies into legal and equitable halves reveals a trend toward shaping monetary remedies to conform with equitable principles. Further, the law-equity distinction emphasizes that the agencies here are not asking for the creation of

138 *See, e.g.*, FTC v. Credit Bureau Ctr., 937 F.3d 764, 786, 787 (7th Cir. 2019) (Wood, C.J., dissenting) (arguing that injunctions are broad by definition and can sweep in a number of ancillary remedies).

139 Bray, *supra* note 20, at 532, 534 (citing scholars that view the law-equity distinction as lacking utility and ultimately arguing that the distinction does merit value).

140 *Id.* at 535 (emphasizing that the law-equity distinction remains important).

completely *new* equitable remedies in district courts—indeed, the agencies have been seeking and obtaining the equitable remedies in question for at least thirty years. Rather, recent SEC and FTC cases demonstrate a new challenge for agencies to show that the remedies they have been obtaining are, in fact, allowed as *traditional* equitable remedies. Thus, the key question is whether these remedies can be squared with the courts' renewed focus on equity.

To make these remedies consistent with equity, federal courts are clarifying equitable principles. In *Liu*, the Supreme Court laid out three principles to ensure a foundational distinction between law and equity: equity does not punish. Expanding upon *Kokesh*, *Liu* made clear that agencies cannot impose penalties when seeking equitable remedies.[141] Indeed, the Court's limitations on disgorgement brings disgorgement in line with other equitable restitution remedies that "contain[ ] built-in limitations that are calibrated to avoid punishing the defendant."[142] Similarly, lower courts have been using equitable principles to address agency discretion, as demonstrated by the reasoning in *Shire*.[143] The Third Circuit's tightening of the time limit for equitable remedies in *Shire* reflects an equitable principle of a stricter mootness requirement.[144] Although the Third Circuit did not explicitly call this an equitable principle like the Court did when clarifying equitable principles in *Liu*, the Third Circuit similarly seems to be effectively limiting agency discretion by clarifying traditional equitable principles. And finally, when an agency's interpretation of a remedy is too inconsistent with traditional equitable categories to be reined in through the application of equitable principles as in *AMG Capital*, the Court seems willing to step in and close off the agency's access to certain equitable remedies.

Further, courts' limiting of agency overreach suggests an underlying equitable principle at work in the background—equity follows the law.[145] Courts appear to be skeptical of the scope of agency powers,[146] especially when an agency overreaches and exploits the agency's statutory authority. As the maxim "equity follows the law" suggests, equity should follow the statute

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

142 Brief of *Amici Curiae* Law Professors in Support of Petitioners, *supra* note 80, at 3.

143 FTC v. Shire ViroPharma, Inc., 917 F.3d 147, 153–61 (3d Cir. 2019).

144 Bray, *supra* note 20, at 545 (explaining that the "claim for equitable relief is subject to a stricter *ripeness* requirement" (emphasis added)). Mootness similarly seems subject to a stricter equitable requirement, as courts are especially sensitive to equitable mootness' potential intrusiveness and demands on courts. *See* Search Mkt. Direct, Inc. v. Jubber (*In re Paige*), 584 F.3d 1327, 1339 (10th Cir. 2009) (providing six factors to consider whether there is equitable mootness).

145 Meagher et al., *supra* note 21, at 73–76.

146 *See generally* Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47, 47 (1969) ("The history of criticism of the Federal Trade Commission is almost as interesting as the history of the agency itself."). See also some of the Justices' expressed concern that federal agencies are acting beyond their statutory powers. Transcript of Oral Argument at 9, 31, 52, Kokesh v. SEC, 137 S. Ct. 1635 (2017) (No. 16-529), 2017 WL 1399509, at *9, *31, *52.

that lays out the agency's authority, and equity should not overstep those bounds. Adopting this maxim for the administrative state, recent federal courts' reasoning suggests a new maxim emerging: "equity abhors overreach"[147]—if it looks like an agency is exploiting its statutory authority to do more than the statute allows, then courts are especially watchful of equitable remedies.

B. "Neoclassical" Approach to Assessing Agency Discretion

The federal courts' insistence on traditional equitable principles to cabin agency overreach reflects a neoclassical approach to administrative law.[148] For example, during the *Kokesh* oral argument, Justices revealed skepticism that the SEC authorizing statute permits disgorgement.[149] Justice Sotomayor questioned the "authority" for the "basis of disgorgement."[150] Similarly, Chief Justice Roberts noted that "the SEC devised this remedy or relied on this remedy without any support from Congress."[151] Justice Gorsuch even stated that "there's no statute governing" disgorgement, and "[w]e're just making it up."[152] Given such skepticism of disgorgement, one might have expected the Justices to join Justice Thomas's dissent in *Liu*. Nevertheless, the majority in *Liu* held that the statute permits disgorgement. Instead of categorically removing disgorgement from the agency's toolkit, the majority in *Liu* cabined the remedy with equitable principles.[153] Like the Supreme Court in *Liu*, the Third Circuit opted for a neoclassical approach in *Shire*. The Third Circuit read the authorizing statute more narrowly than the agency but cabined only part of the agency's discretion. The court limited the acceptable time frame for the FTC to bring an action, but deliberately did not define what constitutes the "about to violate the law" requirement, leaving an area of ambiguity that preserves some of the FTC's flexibility in interpreting section 13(b).[154] Indeed, the court's invocation of equitable principles, yet deliberate retention of areas of ambiguity within those principles, reveals a particularly measured response to agency overreach that both seeks to cabin and preserve agency discretion.

Given that agency enforcement powers were largely unchallenged for the past thirty years, this invites the question why there is now an impulse to

147 Telephone Interview with Samuel L. Bray, Professor of Law, Notre Dame Law School (Dec. 7, 2020) (on file with author).

148 *See generally* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003) (discussing how courts have used flexible equitable remedial discretion of the federal courts). While Levin addresses "equitable balancing" in a survey of cases, this Note argues that federal courts are using equitable principles as a targeted tool to strategically shape agency enforcement powers.

149 Transcript of Oral Argument, *supra* note 146, at 9, 31, 52.

150 *Id.* at 9.

151 *Id.* at 31.

152 *Id.* at 52; *see also U.S. Supreme Court to Weigh FTC Restitution Authority*, *supra* note 64.

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

154 *See* FTC v. Shire ViroPharma, Inc., 917 F.3d 147, 159 (3d Cir. 2019).

distinguish between law and equity in remedies when evaluating agency statutes. There are several potential factors animating the courts' simultaneous willingness to cabin and commitment to preserve agency enforcement discretion.[155] First, as Justice Kagan declared "we're all textualists now,"[156] federal courts may be less willing to draw larger implications from the plain meaning of the statute. Such an emphasis on textualism may no longer be consistent with the agencies' formerly broad readings of their authorizing statutes. Second, federal courts may be wary of imposing overly strict limitations on federal agencies that would incentivize agencies to move their litigation to state and multistate enforcement actions. Also, federal courts may be hesitant to encourage increased litigation in administrative (instead of judicial) courts, given the potential skepticism underlying administrative law judges—specifically those appointed outside of Article II.[157] Finally, federal courts may be differentiating between government plaintiffs and private plaintiffs.[158] For instance, courts may have been sympathetic toward government plaintiffs that act in the public interest to correct wrongs, motivating a broad reading of implied rights of action in statutes.[159] Such sympathy may have been offset by a concern for whether both litigants are on equal footing. For instance, there may be unfairness in giving agencies large remedial powers when those agencies are also a litigant. On balance, while all of these factors are likely in play, they do not seem to fully account for the recent shift in federal courts' approach to cabining agency discretion.

The underlying factor driving the return to traditional equitable principles appears to be a result of the courts' effort to preserve yet cabin powerful agencies—reflecting a neoclassical alternative to evaluating agency enforcement powers. Professor Pojanowski notes that the neoclassical approach is "a recognition of the hierarchy of statutory law over judicial doctrine."[160] A recognition of this hierarchy seems present in the Supreme Court's willingness to overturn longstanding precedent by adhering to a textualist reading of the FTC's authorizing statute in *AMG Capital*, as well as in the Court's

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155 *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 462–502 (1989) (providing a catalogue of interpretive principles for the regulatory state).

156 Harvard Law School, *The 2015 Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=DPEtszFT0Tg.

157 *See* Lucia v. SEC, 138 S. Ct. 2044, 2053–56 (2018) (holding that SEC administrative law judges were unconstitutionally appointed).

158 See the dissent in *Credit Bureau Center* distinguishing the case from *Meghrig v. KFC W., Inc.*, 516 U.S. 479 (1996), based on *Credit Bureau Center* involving a government plaintiff and *Meghrig* involving a private plaintiff. FTC v. Credit Bureau Ctr., 937 F.3d 764, 792–94 (7th Cir. 2019) (Wood, C.J., dissenting).

159 See Justice Kennedy's concurrence in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395–97 (2006), encouraging courts to consider the technology that the patent covers, so that injunctions are not used merely to obtain exorbitant licensing fees or condone other bad behavior. This suggests that courts consider the end goal of the remedy, and similar reasoning may be at play here.

160 Pojanowski, *supra* note 18, at 857.

willingness to follow a textualist reading of the SEC's authorizing statute in *Liu*. A neoclassical approach allows federal courts to guide an agency's statutory interpretation in traditional ways that equity would permit; indeed, this approach allows courts to avoid stripping agencies of certain powers by declaring them unconstitutional or beyond the statute.[161] Accordingly, federal courts both preserve the administrative state and use the legal-equity distinction in remedies to foreclose the abuse of agency enforcement powers, in an effort to create a "more appealing allocation of responsibilities between courts and agencies" characteristic of neoclassical administrative law.[162]

To do this, courts are using traditional equitable principles to reject judicial deference on legal questions, while still respecting the agencies' policy choices. Indeed, Professor Pojanowski describes neoclassical administrative law as an approach that "rejects judicial deference on legal questions while respecting the policy choices that agencies legislate in the discretionary space Congress has given them."[163] Defining what counts as a remedy in the statute or clarifying the contours of that remedy is a legal question. Because remedies are a matter of law, courts appear willing to weigh in heavily and clarify the enabling statutes. Specifically, courts are clarifying that agency discretion should be channeled through traditional equitable principles. In other words, federal courts are instructing agencies to not simply conduct a plain textual analysis of the applicable statute; rather, agencies must read the enabling statutes in light of traditional equitable principles. Agencies retain discretion—however, that discretion is confined to traditional equitable principles.

Courts also seem to consider whether there are centralized guidelines or processes by which agencies seek and obtain equitable remedies. For instance, the FTC's MER Policy Statement represented an era in FTC history where the agency self-imposed limitations on its discretion. The MER Policy Statement featured three factors to determine whether it was appropriate for the FTC to pursue an equitable remedy. These self-imposed equitable principles reduced agency discretion, protecting against the abuse of equitable remedies. The withdrawal of these self-imposed limitations marked an inflection point in the history of the FTC's use of section 13(b) during which the agency flexibly interpreted its own statute and aggressively litigated equitable remedies in federal courts, spurring federal courts to step in and limit agency enforcement power. Similarly, during the *Kokesh* oral argument, Justice Kagan suggested that the SEC could have itself created at least some gui-

161 *Cf.* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). *But see* Daniel Mach, Comment, *Rules Without Reasons: The Diminishing Role of Statutory Policy and Equitable Discretion in the Law of NEPA Remedies*, 35 HARV. ENV'T L. REV. 205, 243 (2011) (highlighting a "conflict of policies: administrative law urges deference to agencies, while equitable doctrine supports deference to trial court discretion"). *See generally* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998).

162 Pojanowski, *supra* note 18, at 857.

163 *Id.*

dance for when to use disgorgement.[164] For instance, courts may be less likely to step in if such a broad remedy is not applied depending solely on the person in charge of the agency at the time.[165] This suggests that agencies may create self-limiting guidelines to seek and obtain equitable remedies that are more favorable to them than those imposed upon them by federal courts as a rebuke for their overreach.

Conclusion

This Note has argued that the Supreme Court is updating the scope of agency enforcement powers according to two broader trends in its jurisprudence: first, its increasing law-equity distinction in remedies, and second, its neoclassical approach to administrative law by insisting on equitable principles to both cabin agency power and preserve the administrative state. While the SEC's expansive reading of "equitable relief" to obtain disgorgement was rarely challenged for thirty years, the Court severely narrowed SEC discretion in *Kokesh* and *Liu*. The Court cabined SEC discretion by clarifying that traditional equitable principles constrain what the SEC may seek in federal courts. Likewise, the FTC's broad discretion in using restitution and disgorgement continued unabated for the past four decades, until the Third and Seventh Circuit limited FTC discretion in using these particular equitable remedies. In *AMG Capital*, the Court similarly favored a traditional understanding of equitable remedies and, thus, held that the FTC overstepped the bounds of equity in pursuing restitution and disgorgement. In both the SEC and FTC cases, federal courts appear willing to limit agency enforcement powers, but also hesitant to categorically take away certain remedies from an agency's toolkit. The courts' insistence on traditional equitable principles to curtail agency overreach reflects a neoclassical alternative to administrative law that cabins agency power while preserving the administrative state. The federal courts' treatment of SEC and FTC statutes is instructive of the courts' approach to agency discretion and interpretation of statutes generally, particularly given the Court's increasing move toward textualism.

164 Transcript of Oral Argument, *supra* note 146, at 30.

165 *Cf.* United States v. Mead Corp., 533 U.S. 218, 260 (2001) (Scalia, J., dissenting) (noting that the distinction between an officer versus head of the agency factors into the interpretation question).