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David C. Vladeck
A.B. Chettle, Jr., Professor of Law, Georgetown University Law Center

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I. INTRODUCTION

For most of its century-long history, the Federal Trade Commission ("FTC" or "Commission") lacked the authority to go directly to court to stop scams and compel wrongdoers to give up their ill-gotten gains. The Commission's only enforcement tool was a "cease and desist" order, issued after an administrative hearing and Commission review, and, in many cases, after judicial review.[1] When a company violated a cease and desist order, the FTC could ask the Attorney General to bring suit to challenge *violations* of the order, but it could not obtain any redress for consumers injured by the initial violation of law. In other words, scammers could escape with the fruits of their violation, making the initial violation of the Federal Trade Commission Act ("Act") profitable.

By 1973, Congress decided it was time to give the FTC enforcement tools like those it had granted other consumer protection agencies.[2] Congress amended Section 13 of the Act to add a provision authorizing the FTC to file enforcement actions alleging violations of the Act in federal court.[3] Under the amended provision, the FTC could file such actions directly in district court without first conducting administrative proceedings.[4]

Section 13(b) empowers courts to issue temporary restraining orders and preliminary injunctions, and, "in proper cases," allows the FTC to "seek . . . a permanent injunction."[5] Until 2019, courts uniformly held that this grant of injunctive authority encompassed a broad range of equitable remedies, thereby permitting district courts to order asset freezes, the appointment of receivers, and, at the end of the case, compensatory relief to

* David C. Vladeck is the A.B. Chettle, Jr., Professor of Law, Georgetown University Law Center. Professor Vladeck served as the Director, Bureau of Consumer Protection, Federal Trade Commission (2009–2012). This article is dedicated to my friend and colleague, Richard Cordray, who has devoted his inspiring career to fighting for fairness in the marketplace and to the extraordinary staff of the FTC's Bureau of Consumer Protection, who work tirelessly to protect consumers from unfair and deceptive acts and practices. And thanks to the editors and staff of the *Montana Law Review* for their assistance.

1. 15 U.S.C § 45(b) (2018) (amended 1973).
2. *See*, *e.g.*, Kokesh v. SEC, 137 S.Ct. 1635, 1639–41 (2017) (describing enforcement authority of the Securities and Exchange Commission).
3. 15 U.S.C. § 53(b).
4. *Id.*
5. *Id.*

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injured consumers.[6] Over a nearly forty-year span, each of the eight Circuit courts to consider the issue ruled that Section 13(b) empowers the FTC to invoke principles of equity to provide compensatory and ancillary relief.[7] In each of the cases heard by the circuit courts on this issue, not a single circuit judge dissented.[8] And through several enactments post-dating Section 13(b)'s enactment, Congress has strengthened the FTC's ability to obtain consumer redress, thus effectively ratifying the court rulings on the FTC's right to obtain restitution.[9]

Looming in the background, however, was a movement in the Supreme Court to narrow the scope of equitable remedies. In a series of opinions written by Justice Scalia, the Court slowly eroded its longstanding view that equity was a flexible doctrine adaptable to evolving norms, ensuring that courts could effectively remedy wrongdoing.[10] The Court instead retrenched this doctrine, leaving only the equitable remedies that could have been imposed at the time of the American Revolution.[11] Put more bluntly, the only equitable remedies that are still available to federal courts are remedies that could be imposed if, but only if, an English Chancery court could have imposed them in the mid-eighteenth century.[12] No longer can equity be used to provide remedies to newly emerging challenges. Equity is now stuck in time. The task for formulating remedies to emerging challenges, the Court has ruled, is up to Congress, not the courts.[13] Until recently, however, the cases that signal this retrenchment involved private-party litigation—not enforcement actions brought by federal consumer protection agencies. Government cases were thus spared this newly constrained view of equitable authority.

6. FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1112–13 (9th Cir. 1982); FTC v. Amy Travel Servs., Inc., 875 F.2d 564 (7th Cir. 1989); FTC v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991); FTC v. Gem Merch. Corp., 87 F.3d 466 (11th Cir. 1996); FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); FTC v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 14–15 (1st Cir. 2010); FTC v. Bronson Partners, LLC, 654 F.3d 359 (2d Cir. 2011); FTC v. Ross, 743 F.3d 886 (4th Cir. 2014). *Cf.* FTC v. Southwest Sunsites, Inc., 665 F.2d 711,717–24 (5th Cir. 1982) (holding that courts may impose equitable remedies under Section 13(b) but reserving the compensatory redress question). District courts in two of the remaining circuits—the D.C. and Fifth Circuits—have reached the same conclusion. *See*, *e.g.*, FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999); FTC v. Kennedy, 574 F. Supp. 2d 714, 724 (S.D. Tex. 2008).

7. *Id.*

8. *Id.*

9. *See*, *e.g.*, Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 12, 108 Stat. 1961 (1994) (expanding the venue and service of process provisions of Section 13 to enable the Commission to bring a single lawsuit against all defendants involved in an illegal transaction).

10. *See*, *e.g.*, Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318–19 (1999).

11. *Id*.

12. *Id.*

13. *Id.*

The gulf between government and private-party cases was narrowed in 2017, when the Supreme Court in *Kokesh v. SEC* applied many of the limits on equity developed in private-party cases to SEC enforcement actions.[14] In *Kokesh*, the Court held that, when the SEC seeks disgorgement of ill-gotten gains but does not intend to return money to injured investors, the disgorgement is a "penalty" subject to a five-year statute of limitations for government cases imposing civil penalties.[15]

The Court clarified that ruling in *Liu v. SEC*.[16] On one hand, the Court in *Liu* held that a disgorgement award in an SEC civil enforcement action that does not exceed a wrongdoer's net profits *and* that is awarded for victims is permissible as equitable relief under the Securities Exchange Act.[17] The Court thus upheld the right of the SEC to seek *compensatory* disgorgement, which augers well for the FTC's redress program.[18] On the other hand, the Court found that actions for disgorgement solely to strip the wrongdoer of ill-gotten gains were not authorized under the relevant statutes because they did not lie in equity, as construed by the Court.[19]

It did not take long for the Supreme Court's message limiting equitable relief in SEC enforcement cases to percolate down to the lower courts and be applied to other federal enforcement agencies. After *Kokesh* was decided, Ninth Circuit Judges O'Scannlain and Bea specially concurred in *FTC v. AMG Capital Management, LLC*[20] arguing that, although the Ninth Circuit had repeatedly ruled—consistent with the precedent in the circuits—that Section 13(b) of the Act authorized courts to award compensatory redress, that "interpretation [was] no longer tenable" in light of *Kokesh*.[21] Soon thereafter, and while *Liu* was pending before the Supreme Court, the Seventh Circuit overturned its own longstanding precedent to find that Section 13(b) did not authorize the FTC to seek compensatory redress.[22]

In the wake of *Kokesh* and *Liu*, the Supreme Court granted certiorari in both the Seventh and Ninth Circuit cases to consider whether Section 13(b)'s broad grant of injunctive authority empowers the FTC to seek compensatory redress. This Article explains why the Supreme Court should uphold the FTC's Section 13(b) authority, especially considering its ruling in *Liu* that compensatory redress is an equitable remedy. But given the Court's

14. Kokesh v. SEC, 137 S.Ct. 1635, 1642–44 (2017).
15. *Id.* at 1644.
16. 140 S. Ct. 1936 (2020).
17. *Id.* at 1940.
18. *Id.* at 1940–42.
19. *Id.* at 1948.
20. 910 F.3d 417 (9th Cir. 2018).
21. *Id.* at 429 (O'Scannlain, J., with Bea, J., specially concurring).
22. FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 767 (7th Cir. 2019).

narrowing view of the scope of equity power, there is a risk the Court may impose limits on the FTC's redress power or find that Section 13(b) does authorize equitable remedies, thus opening the floodgates to scammers.[23]

This Article proceeds in five parts. First, it explores the erosion of equity authority in United States federal courts. Next, it explains why the Court should uphold the FTC's authority under Section 13(b) to seek compensatory redress. Third, it suggests that, in grappling with the scope of the FTC's redress authority, the Court may have to confront the reality that some of the limitations implied by the Court in *Liu* about the scope of equity authority are problematic and in tension with the Constitution's declaration that the "judicial Power shall extend to all Cases, in Law *and Equity*."[24] Fourth, it suggests that the Court may use *AMG Capital Management* to revisit the approach it took in *Kokesh*, which did not differentiate the scope of equity when the government seeks equitable relief from private-party cases. But as the Supreme Court has often emphasized, when the government seeks relief, "the public interest is involved in a proceeding of this nature, [and] those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake."[25] And, finally, the Article ends with a postscript, added after the Supreme Court heard argument in *AMG Capital Management*. The postscript points out the limits of Supreme Court arguments in the time of a pandemic and urges that, rather than await the Supreme Court's ruling, Congress should resolve this issue once and for all, by reenacting Section 13(b) to give explicit redress authority to the FTC.

II. The Retrenchment of Equity in Federal Courts

There is no question that the framers of the Constitution intended federal courts to have broad equitable authority. Equity formed a core component of America's legal heritage; English colonial courts heard cases sounding in both law and equity, as did state courts after America severed its ties to England.[26] Equity jurisdiction is at the heart of the Constitution's delega-

23. After the appointment of Justice Amy Coney Barrett, the Court severed the *Credit Bureau Center* case and scheduled argument only in *AMG Capital Management*, which was argued on January 13, 2021.

24. U.S. Const. art. III, § 2, cl. 1 (emphasis added).

25. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (citing Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937)).

26. The Federalist Papers anticipated Article III's jurisdictional grant over cases in equity by explaining that federal courts need the power to fairly adjudicate cases otherwise within their jurisdiction that involve "ingredients of fraud, accident, trust, or hardship." Alexander Hamilton, *The Federalist No. 80*, *in* The Federalist (Jacob E. Cooke ed., Wesleyan U. Press 1961); *see also* Alexander Hamilton, *The Federalist No. 83*, *in* The Federalist (Jacob E. Cooke ed., Wesleyan U. Press 1961) (identifying New York, New Jersey, Maryland, Virginia, and South Carolina as having separate chancery courts).

tion of power to the federal courts. Article III states that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution."[27] In the Judiciary Act of 1789 (the first Judiciary Act creating the Supreme Court and lower federal courts), Congress "extend[ed]" the equity power to cases "between Citizens of different States,"[28] thereby ensuring that the equity power encompassed the two principal bases for subject matter jurisdiction—*i.e*., federal question and diversity jurisdiction.[29]

Equity jurisdiction and remedial authority have always been available in federal courts. Section 11 of the Judiciary Act of 1789 authorized federal courts to exercise original jurisdiction over actions in equity involving claims of $500 or more if diversity among the parties was maintained.[30] And until the 1938 merger of law and equity in the federal courts, separate rules existed governing actions under equity; Rule 2 of the Federal Rules of Civil Procedure memorializes the 1938 merger by stating that "[t]here is one form of action – the civil action."[31] Many of the Supreme Court's major early rulings involved questions of equitable jurisdiction or equitable remedies.[32]

But for the past three decades, the federal court's equity authority has been under assault. In a series of five to four rulings, the Court, led by Justice Scalia, has sought to cabin the reach of equity, thereby limiting the non-statutory relief federal courts may impose.[33]

Justice Scalia fired the opening salvo in *Mertens v. Hewitt Associates*,[34] which arose from an action brought by retirees of Kaiser Steel who

27. U.S. CONST. art. III, § 2, cl. 1.

28. *Id.*

29. Section 16 of the Judiciary Act of 1789 went on to differentiate equitable cases from cases involving "legal" issues, stating that "suits in equity shall not be sustained in . . . courts of the United States, in any case where a plain, adequate and complete remedy may be had at law." Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 82 (1789).

30. 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3503 (3d ed. 2018).

31. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922–26 (1987).

32. *See*, *e.g.*, Osborn v. Bank of the U.S., 22 U.S. 738, 869–70 (1824); Ex Parte Young, 209 U.S.123 (1908). It appears the first time the United States Supreme Court addressed the requirements for injunctive relief in federal court was in *Georgia v. Brailsford*, a case arising under state law. 2 U.S. 402 (1792). The Justices filed seriatim opinions, but each rested his analysis—without citation—on traditional equitable principles. *See, e.g., id.* at 405 (Johnson, J., dissenting).

33. Equitable authority goes beyond remedy and covers subject matter jurisdiction as well. Equitable rights of action, including mandamus and challenges to *ultra vires* state action, also have a storied historical pedigree in United States law. After all, the claim in *Marbury v. Madison* was a mandamus action to compel James Madison, the Secretary of State, to give Mr. Marbury, the Justice of the Peace, commission to which he claimed he was entitled. Although not directly relevant to this essay, the attacks on equity have also included attacks on equitable rights of action. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see also* Armstrong v. Exceptional Child Center, Inc., 135 S. Ct. 1378 (2015).

34. 508 U.S. 248 (1993).

participated in the company's retirement plan.[35] The retirees sued the plan's actuary, Hewitt Associates, for failing to ensure that Kaiser Steel adequately funded the plan.[36] The government eventually terminated the underfunded plan, leaving the retirees with payments substantially below what the plan promised.[37] The question for the Court was whether the Employee Retirement Income Security Act of 1974 ("ERISA") authorized the suit under a provision that permitted plan participants to sue "(A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) *to obtain other appropriate equitable relief* (i) to redress such violations . . . ."[38] Justice Scalia's majority opinion rejected the retirees' claim that the statute's invocation of equity permitted their action to proceed. Justice Scalia made clear that when a court of equity properly exercises its power to enjoin, it may invoke "all relief available" in equity. But he contrasted that broad grant of authority with the more restrictive power to grant "equitable relief," which implied only those remedies that were typically available in equity.[39] That characterization doomed plaintiffs' legal claim, because, as Justice Scalia explained, the relief sought by the retirees was not "a remedy traditionally viewed as 'equitable,' such as injunction or restitution."[40]

Justice Scalia's majority opinion acknowledged that "[i]t is true that, at common law, the courts of equity had exclusive jurisdiction of virtually all actions by beneficiaries for breach of trust," and "[i]t is also true that money damages were available in those courts against the trustee" and "third persons who knowingly participated in the trustee's breach."[41] Further, he accepted the Solicitor General's argument that the Court's interpretation of ERISA "leaves beneficiaries like petitioner with *less* protection than existed before ERISA, thus contradicting ERISA's basic goal of 'promot[ing] the interests of employees and their beneficiaries in employee benefit plans.' "[42] Despite these indications of the equitable nature of the action and the relief plaintiffs' sought, Justice Scalia maintained that implementing broad rules of equity would serve to significantly expand the remedies Congress intended to create through ERISA in a manner that would be at odds with the statute's text.[43]

35. *Id.* at 250.
36. *Id.*
37. *Id.*
38. *Id.* at 253 (quoting 29 U.S.C. § 1132(a)(3)) (emphasis added)).
39. *Id.* at 253–54.
40. *Id.* at 255.
41. *Id.* at 256.
42. *Id.* at 261.
43. *Id.* at 257–59. *See also* Grupo Mexicano Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318–19 (1999) (quoting 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2941 (2d ed. 1995)) (The Supreme Court has declared that "[t]he substantive prereq-

Unpersuaded by Justice Scalia's textual argument, Justice White penned a strong dissent, joined by Chief Justice Rehnquist and Justices Stevens and O'Connor.[44] The dissenters rejected Justice Scalia's reading of the statute because they found "it is entirely reasonable" to construe the statute's reference to " 'appropriate equitable relief' to encompass what was equity's routine remedy for such breaches—a compensatory monetary award calculated to make the victims whole."[45] Justice White also pointed out that "[the retirees'] reading would accord with the established equitable remedies available under the common law of trusts, to which Congress has directed us in construing ERISA, and with Congress' primary goal in enacting the statute, the protection of beneficiaries' financial security against corrupt or inept plan mismanagement."[46] And, he chided the majority's ruling as "perverse" because it imposes the "entirely needless result of construing ERISA so as to *deprive* beneficiaries of remedies they enjoyed prior to the statute's enactment."[47]

Next came the Court's splintered opinion in *Grupo Mexicano Desarrollo S.A. v. Alliance Bond Fund, Inc.*[48] Although the facts of the case are complicated, the legal issue was straightforward: whether Alliance Bond Fund, Inc. ("Alliance Bond"), as a purchaser of unsecured notes guaranteed by the issuing company and its subsidiaries, Grupo Mexicano Desarrollo S.A. ("Grupo Mexicano"), could obtain a preliminary injunction forbidding Grupo Mexicano from transferring its assets to other parties.[49] This kind of preliminary injunctive relief is commonplace. It is often called an "asset freeze" because it preserves the *status quo* and ensures that a wrongdoer does not dissipate assets before the plaintiff can obtain a final judgment.[50] There was no dispute that Grupo Mexicano was bankrupt and was distributing its remaining assets inequitably, to the detriment of the plaintiff.[51]

Even though preliminary injunctions to stop the dissipation of contested assets are often entered by federal courts, Justice Scalia, again writing for the five to four majority, held the lower court's issuance of the preliminary injunction freezing Grupo Mexicano's assets exceeded the court's equitable power, not because the Rules of Civil Procedure forbade it

uisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction.")

44. *Mertens*, 508 U.S. at 263–64 (White, J., with Rehnquist, C.J., Stevens and O'Connor, JJ., dissenting).

45. *Id.* at 266–67.

46. *Id.* at 274.

47. *Id.*

48. 527 U.S. 308 (1999).

49. *Id.* at 310–12.

50. *Id.* at 339–42 (Ginsburg, J., with Stevens, Souter, and Breyer, JJ., concurring in part, dissenting in part).

51. *Id.* at 311–12 (majority opinion).

(Rule 65(a) authorizes such injunctions), but because the English Chancery Courts would not have issued prejudgment remedies in a case of this kind "at the time of the separation of the two countries."[52] In responding to the dissent's point that the equitable power has always been flexible to adapt to emerging exigencies, Justice Scalia is emphatic, stating that "[t]his expansive view of equity must be rejected."[53] He cites several Supreme Court cases that denied equitable relief of the kind at issue in *Grupo Mexicano,* adding that "[w]hen there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than we both to perceive them and to design the appropriate remedy."[54]

Justice Ginsburg's dissent is equally emphatic. It argues that the majority:

> relies on an unjustifiably static conception of equity jurisdiction. From the beginning, we have defined the scope of federal equity in relation to the *principles* of equity existing at the separation of this country from England . . . [and] we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary Chancellor.[55]

To make her point, Justice Ginsburg cites a century of Supreme Court cases holding that equity jurisdiction is flexible and evolves along with societal and business norms. Justice Ginsburg begins her history lesson with *Seymour v. Freer*,[56] which held "a court of equity ha[s] unquestionable authority to apply its flexible and comprehensive jurisdiction in such a manner as might be necessary to the right administration of justice between the parties."[57] Next, she discusses *Union Pacific Railway Company v. Chicago, Rock Island & Pacific Railway Company*,[58] which drove home that it "must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them."[59] She then arrives at more modern cases, like the oft-cited *Hecht Company v. Bowles*,[60] which emphasized that "[f]lexibility rather than rigidity has distinguished" federal equity jurisdiction.[61] Justice Ginsberg uses these cases to demon-

52. *Id.* at 318–19, 332–33.
53. *Id.* at 321.
54. *Id.* at 322.
55. *Id.* at 336 (Ginsburg, J., with Stevens, Souter, and Breyer, JJ., concurring in part, dissenting in part).
56. 75 U.S. 202 (1868).
57. *Grupo Mexicano*, 527 U.S. at 336 (quoting *Seymour*, 75 U.S. at 218) (Ginsburg, J., with Stevens, Souter, and Breyer, JJ., concurring in part, dissenting in part).
58. 163 U.S. 564 (1896).
59. *Grupo Mexicano*, 527 U.S. at 337 (quoting *Union Pacific*, 163 U.S. at 600–601) (Ginsburg, J., with Stevens, Souter, and Breyer, JJ., concurring in part, dissenting in part).
60. 321 U.S. 321 (1944).
61. *Grupo Mexicano*, 527 U.S. at 336 (quoting *Hecht Co.*, 321 U.S. at 329) (Ginsburg, J., with Stevens, Souter, and Breyer, JJ., concurring in part, dissenting in part).

strate how Justice Scalia's depiction of history does not tell the full story. In particular, Justice Ginsberg highlights that the kind of asset dissipation alleged in *Grupo Mexicano* is enabled by modern technology and thus would likely not have arisen before America's break with England.[62]

Notwithstanding the forceful dissents of Justice White and Justice Ginsburg, Justice Scalia's view of equity has won out. In *Great-Western Life & Annuity Insurance Company v. Knudson*,[63] he was once again able to assemble a bare majority to hold that the right of action provision in ERISA that authorizes private parties to file civil actions for injunctions or "other appropriate equitable relief"[64] did not authorize an action for restitution by retirees against their retirement plan. His majority opinion reasoned that, because the plaintiffs' claims hinged on contract violations, the remedies the plaintiffs sought had to be characterized as legal in nature.[65] Once again, Justice Ginsburg, joined by three of her colleagues, registered a stern dissent.[66]

To be sure, the Court has followed Justice Scalia's path limiting equitable remedies and imposing significant constraints on equitable rights of action.[67] The cases discussed above, however, are particularly salient here because, in each case, the Court refused to endorse an equitable remedy, such as restitution, recission, or an asset freeze, despite strong equitable arguments to do so—arguments that would have carried the day only a decade or two earlier.[68]

The reverberations of Justice Scalia's opinions in these private-party cases have recently had an impact on enforcement cases by government consumer protection agencies—the Securities and Exchange Commission and the Federal Trade Commission—in which the Commissions seek court orders requiring the defendant to disgorge money illegally acquired from investors or consumers.

The first and most consequential reverberation was the Court's ruling in *Kokesh*, which critics of the FTC's enforcement program thought would

62. *Id.* at 337–39.

63. 534 U.S. 204 (2002).

64. *Id.* at 209–10; 29 U.S.C. § 1132(a)(3) (2018).

65. *Great-W. Life*, 534 U.S. at 210.

66. *Id.* at 224 (Ginsburg, J., with Stevens, Souter, and Breyer, JJ., dissenting).

67. *See, e.g.*, Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 327–28 (2015) (holding that § 30(A) of the Medicaid Act implicitly precludes equitable relief).

68. *See*, *e.g.*, Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 544 (1987) (holding that a federal court may issue a statutory injunction only when it is warranted under the traditional requirements for injunctive relief, unless there exists a "clear indication . . . that Congress intended to deny federal district courts their traditional equitable discretion"); Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982) (holding that "a major departure from the long tradition of equity practice should not be lightly implied").

usher in the demise of the FTC's redress authority.[69] *Kokesh* addressed whether 28 U.S.C. § 2462, the general five-year statute of limitations for government imposed "civil penalties," applied to a monetary judgment under the Securities Exchange Act, where, among other factors, the disgorged funds are routinely dispersed to the Treasury and not injured investors.[70] The Court answered that question in the affirmative.[71] The Court's rationale was that equitable doctrines like disgorgement and restitution required the return of the funds to those injured, and so non-compensatory disgorgements are a sanction or penalty outside the sphere of equity.[72]

Kokesh's conclusion that non-compensatory disgorgement is a "penalty" is open to question. Mr. Kokesh, after all, had no legal entitlement to the money he swindled out of investors. If A borrows a friend's car on the pretext that he needs to make a quick trip to the store, but keeps the car, would it be a "penalty" for a court to force A to return the car? I doubt it. A has no legal entitlement to the car, just as Kokesh had no legal entitlement to the money he scammed from investors. A disgorgement order that returns him to the *status quo ante* does not *penalize* him, it simply strips him of ill-gotten gains. On the other hand, the imposition of a civil *penalty*, or indeed even damages, would require him to pay a sum above and beyond what he unlawfully acquired.

While *Kokesh* did not resolve whether the SEC was empowered to seek non-compensatory disgorgement, it held that non-compensatory disgorgement is a penalty for the purpose of Section 2462. As a result, the SEC may only disgorge ill-gotten gains obtained during the five-year period that precedes the SEC's filing of an enforcement action.[73] That limitation applies no matter how effectively the wrongdoer conceals illegal activity and no matter when the SEC discovers the wrongdoing.[74] As a result, the ruling in *Kokesh* is a bonanza for scam artists. Mr. Kokesh retained nearly 30 million dollars he bilked from investors—a result hard to square with principles of equity.[75] Equally troubling, the Court's ruling significantly curtailed enforcement remedies that lower courts had uniformly held were available to the SEC as a matter of equitable authority.[76]

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69. M. Sean Royall, Richard H. Cunningham & Ashley Rogers, *Are Disgorgement's Days Numbered?* Kokesh v. SEC *May Foreshadow Curtailment of the FTC's Authority to Obtain Monetary Relief*, 32 ANTITRUST 94, 99 (2018).

70. Kokesh v. SEC, 137 S. Ct. 1635, 1639, 1644 (2017).

71. *Id.* at 1639, 1643–44.

72. *Id.* at 1639, 1644–45.

73. *Id.* at 1639, 1645.

74. *Id.*

75. *Id.* at 1641–42.

76. *See generally* Urska Velikonja, *Public Enforcement After* Kokesh*: Evidence from SEC Actions*, 108 GEO. L. J. 389 (2019).

Kokesh set out a three-part test: (a) a disgorgement order is a penalty when it addresses wrongs to the public, not individuals; (b) a disgorgement order imposed for deterrence and not compensatory relief is also a penalty; and (c) a disgorgement order is a penalty unless it is targeted for compensatory purposes.[77] But the Court did not address, let alone resolve, the anterior question: whether courts empowered to impose equitable remedies may be constrained to award only compensatory relief and not disgorgement for public purposes—a question separate from the statute of limitations issue in *Kokesh*.[78]

There were three hints in *Kokesh*, however, that the Court did not intend its ruling to reach quite that far. First, the Court included a disclaimer in its opinion, explaining that "[n]othing 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."[79] The Court seldom seeks to confine its opinions in this way. Second, the Court focused on the fact that the SEC was only seeking disgorgement, not to perform redress and return ill-gotten gains to consumers, but for deterrence purposes alone, and thus the money recovered would go to the Treasury.[80] The Court made clear that, because SEC disgorgement orders were used for deterrence and not compensation, those orders were more akin to a penalty than compensation.[81] And third, *Kokesh* involved a statute of limitations question, not the right of the SEC to seek disgorgement.[82] The question was not *whether* the SEC could seek disgorgement, the Court assumed that it plainly had the right to do so. Instead, the question was *how much* disgorgement the SEC could seek given the five-year statute of limitations.[83] Whether courts may impose equitable monetary relief was neither presented nor answered.

Unsurprisingly, *Kokesh* had significant influence on lower courts, and that influence was particularly consequential to enforcement actions brought by the FTC. The first salvo against the FTC's use of Section 13(b) to force the return of ill-gotten gains to scammed consumers was a special concurrence by Ninth Circuit Judges O'Scannlain and Bea in *AMG Capital Management*.[84] Although Judge O'Scannlain wrote the majority opinion upholding the restitution order issued by the district court under Section 13(b), and although the Ninth Circuit had repeatedly ruled—consistent with

77. *Kokesh*, 137 S. Ct. at 1643–44.
78. Velikonja, *supra* note 76. R
79. *Kokesh*, 137 S. Ct. at 1642 n.3.
80. *Id.* at 1643–44.
81. *Id.*
82. *Id.* at 1639, 1642 n.3.
83. *Id.* at 1640–41.
84. 910 F.3d 417 (9th Cir. 2018).

the precedent in every circuit to consider the issue—that Section 13(b) of the Act authorized courts to award compensatory redress, he argued that the Ninth Circuit's "interpretation [was] no longer tenable" given *Kokesh*.[85] Judge O'Scannlain pinned his argument on text of Section 13(b), which uses the word "injunction."[86] He argued that restitutionary awards are legal remedies, not injunctions, and therefore, the text of Section 13(b) itself refuted the Ninth Circuit's prior precedent.[87]

Not surprisingly, Judge O'Scannlain relied heavily on *Kokesh* in his argument and claimed, wrongly in my view, that post-*Kokesh* "restitution under § 13(b) would appear to be a penalty—not a form of equitable relief," even where the ill-gotten gains were returned to injured consumers.[88] Judge O'Scannlain also pointed out that after Congress amended the Act to add Section 13(b), it soon added a separate provision, Section 19, to authorize courts to order relief, including damages (a remedy available at law, not equity), against (a) parties who violate an FTC rule or (b) parties whose violations of Section 5 result in a cease and desist order involving a practice that "a reasonable man would have known under the circumstances was dishonest or fraudulent."[89] Judge O'Scannlain's view is that Congress intended that, to the extent the FTC sought restitution, it would have to do so through the laborious process set out in Section 19.[90] His opinion, however, failed to grapple with Section 19's preservation of remedies provision, 15 U.S.C. 57b(e), which says "[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law."

Soon thereafter, the Seventh Circuit, in a panel ruling, overturned its own longstanding precedent and held that Section 13(b) did not authorize compensatory redress.[91] Judge Syke's majority opinion began its analysis of Section 13(b) with this declaration: "[w]e start with the obvious: Restitution isn't an injunction."[92] Beyond her skepticism that Section 13(b)'s authorization of injunctive relief permitted any form of restitution or rescission, she voiced the same argument Judge O'Scannlain made that Congress intended Section 19, not Section 13(b), to provide a mechanism to restore ill-gotten gains to injured consumers.[93] She also cited Congress's addition

85. *Id.* at 429 (O'Scannlain, J., with Bea, J., specially concurring).
86. *Id.* at 430.
87. *Id.* at 433–34.
88. *Id.*
89. *Id.* at 431–32; 15 U.S.C. § 57b(a)(2) (2018).
90. *AMG Capital Mgmt.*, 910 F.3d at 431–32 (O'Scannlain, J., with Bea, J., specially concurring).
91. FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 767 (7th Cir. 2019).
92. *Id.* at 771.
93. *Id.* at 773–74.

of Section 5(*l*) to the Act, but that section authorizes the FTC to seek redress for violations of FTC orders, not for the violation that gave rise to the order, leaving scammed consumers without redress.[94]

The bulk of the opinion, however, focused less on the Act and more on the Supreme Court's seismic shift of equity jurisprudence. Judge Sykes argued that the Court's doctrinal shift makes clear that the Seventh Circuit's prior decisions cannot stand the test of time.[95] She claimed that the Supreme Court's decision in *Meghrig*—issued 23 years earlier—"displaces the rationale of our precedent," and that "[s]ince *Meghrig*, the [Supreme] Court has adhered to [a] more limited understanding of judicially implied remedies."[96] She reasoned that "[w]hatever strength" the Supreme Court's prior cases in "*Porter* and *Mitchell* retain, *Meghrig* clarifies that they cannot be used as . . . a license to categorically recognize all ancillary forms of equitable relief without a close analysis of statutory text and structure."[97]

Chief Judge Wood, joined by Judges Rovner and Hamilton, dissented from the denial of rehearing *en banc*.[98] Judge Wood opened her opinion by emphasizing the majority's error in declaring that an order mandating restitution cannot be an injunction.[99] As Judge Wood put it:

> [n]othing whatever in section 13(b) deletes from the list of possible affirmative acts that an injunction may include an order requiring the enjoined party to return ill-gotten gains, or to pay money into a court escrow account, or otherwise to turn over property. That should be enough by itself to show the error in the path the majority has taken.[100]

Judge Wood similarly dismissed the majority's claim that the availability of other means of redress demonstrates Section 13(b) may not be used for restitution, noting that the "majority has not pointed to any case in which the Supreme Court has said that a federal agency must avoid one type of remedial authority it holds and instead use a different type. That, effectively, is what the majority has done here . . . ."[101] She then explained that the shifts in the Court's doctrine on equity are irrelevant here,[102] concluding as follows:

> [t]he FTC Act spells out a finely crafted system of enforcement powers and remedies. The majority's interpretation upends what the agency and Congress have understood to be the *status quo* for thirty years, and in so doing

94. *Id.* at 773.
95. *Id.* at 782.
96. *Id.* at 776–81.
97. *Id.* at 782.
98. *Id.* at 786 (Wood, C.J., with Rovner and Hamilton, JJ., dissenting from the denial of rehearing *en banc*).
99. *Id.* at 786–87.
100. *Id.* at 787.
101. *Id.* at 788.
102. *Id.* at 789–97.

grants a needless measure of impunity to brazen scammers like the defendant in this case.[103]

Petitions for certiorari were filed in both cases, but the Court held those petitions because of *Liu*, a case that presented the unanswered question in *Kokesh*: namely whether district courts may order disgorgement in SEC actions seeking "equitable relief," meaning compensatory restitution, where the ill-gotten gains would be returned to injured investors.[104] The Court's analysis in *Liu* began with an acknowledgement of the post-Scalia vision of equity, with the Court stating, "[i]n interpreting statutes . . . that provide for 'equitable relief,' this Court analyzes whether a particular remedy falls into 'those categories of relief that were *typically* available in equity.' "[105] The *Liu* Court held that the SEC may, in fact, bring actions for compensatory redress, but with a couple of important caveats. The Court began by acknowledging that "[e]quity courts have routinely deprived wrongdoers of their net profits from unlawful activity."[106] But the Court also made clear that, in most cases, courts "restricted awards to net profits from wrongdoing after deducting legitimate expenses," unless the "entire profit of a business or undertaking" is the result of "wrongful activity."[107]

But *Liu* did not stake out the parameters of that category, let alone clarify whether the kind of illegal scams the FTC and SEC shut down would qualify. Nor did it address whether a suit for disgorgement is "equitable" if, notwithstanding an agency's intent to distribute the ill-gotten gains to injured consumers, it cannot do so, because the victims cannot be located or the proceeds are too meager to make redress possible. However, *Liu* did clarify that the SEC may not use its equity authority to bring disgorgement actions designed simply to force the surrender of ill-gotten gains, a limitation on the SEC's authority that the pre-Scalia conception of equity would not have imposed.[108]

Most important for the purpose of this essay, nothing in the *Liu* decision helped clarify the question raised by the Seventh Circuit's ruling in the *Credit Bureau Center* case, or the separate opinion filed by Judges O'Scannlain and Bea in the *AMG Capital Management* case. It was therefore no surprise that, at the end of the 2019 Term, the Court granted certiorari in both cases.

103. *Id.* at 797 (emphasis added).

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

105. *Id.* at 1942 (quoting Mertens v. Hewitt Assoc., 508 U.S. 248, 256 (1993)).

106. *Id.* at 1942.

107. *Id.* at 1945–46.

108. *Id.*

III. Section 13(b) Authorizes the FTC to Seek Restitution

A. The History of FTC's Enforcement Powers

The FTC's mission is spelled out in Section 5 of the Act and prohibits "[u]nfair methods of competition," "unfair or deceptive acts or practices" in or affecting commerce, and "direct[s]" the Commission to "prevent" such conduct.[109] Before 1973, the FTC could enforce the Act's prohibitions solely through administrative proceedings, and the only remedies the Commission could impose were forward-looking cease and desist orders.[110] The FTC lacked authority under Section 5 to order interim injunctive relief (such as an asset freeze), to compel the return of money illegally obtained, or to impose civil penalties. As the *Heater* court characterized the Act before the 1973 amendments:

> Under the present design of the Act, those sufficiently unscrupulous or reckless to engage in conduct clearly forbidden by the Act may do so until a cease and desist order is entered, escaping with the fruits of the violation. In many situations . . . a violation of the Act may be quite profitable.[111]

Congress took two steps in 1973 to provide the FTC more robust enforcement mechanisms. First, Congress added Section 13(b) to the Act to authorize the Commission to file cases alleging violations of Section 5 directly in district court.[112] Section 13(b) empowers courts to issue temporary restraining orders and preliminary injunctions, and "in proper cases, the [FTC] may seek, and after proper proof, the court may issue, a permanent injunction."[113] This grant of injunctive authority has long been understood to encompass a broad range of equitable remedies, thereby permitting a district court to order asset freezes, the appointment of receivers, and compensatory relief to injured consumers.[114]

Second, Congress amended Section 5(*l*) of the Act to authorize the Commission to ask the Attorney General to challenge violations of its cease and desist orders in district court.[115] If the FTC can prove a violation of its order, district courts may impose civil penalties and "mandatory injunctions and such other and further equitable relief as they deem appropriate"

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109. 15 U.S.C. § 45(a) (2018).

110. *See* Heater v. FTC, 503 F.2d 321, 321–22 (9th Cir. 1974).

111. *Id.* at 325 n.16.

112. 15 U.S.C. § 53(b) (2018) (amended 1973); *see also* S. Rep. No. 93-151, at 30–31 (1973); Stephen Calkins, *Civil Monetary Remedies Available to Federal Antitrust Enforcers*, 40 U.S.F. L. Rev. 567, 578–84 (2006).

113. 15 U.S.C. § 53(b).

114. *See*, *e.g.*, FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1432 (11th Cir. 1984) (holding that district courts have the "inherent power of a court of equity to grant ancillary relief, including freezing assets and appointing a Receiver, as an incident to [their] express statutory authority to issue a permanent injunction under Section 13 of the Federal Trade Commission Act.").

115. 15 U.S.C. § 45(*l*).

against the violating party.[116] These remedies, however, do not provide redress to consumers injured by the violation giving rise to the FTC's order.

Because of that gap, and in direct response to the ruling in *Heater*, in 1975, Congress amended the Act to add Section 19.[117] That provision authorizes courts to order relief against (a) parties who violate an FTC rule or (b) parties whose violations of Section 5 result in a cease and desist order involving a practice that "a reasonable man would have known under the circumstances was dishonest or fraudulent."[118] In order violation cases, courts may impose "damages."[119] Congress was careful to ensure that Section 19 added to, not superseded or displaced, remedies available under Sections 5(*l*) or 13(b). In fact, Congress specified that Section 19's remedies are "in addition to, and not in lieu of, any other remedy or right of action" available to the Commission.[120]

Congress's specification is important because Section 19 fills a void that Sections 5(*l*) and 13(b) left open. Neither Section 5(*l*) nor 13(b) authorize redress for consumers injured in cases giving rise to a Commission cease and desist order; and Section 13(b) provides for only equitable relief, not damages. Section 19 ensures the FTC can obtain redress, including damages, for these injured consumers without regard to whether it proceeds administratively under Section 5 or brings an enforcement action under Section 13(b).[121] Congress understood that cease and desist orders are integral to the FTC's policy-making function.[122] As Congress anticipated, the FTC continues to bring cases administratively, particularly when it seeks to flesh out legal standards or develop emerging policies.[123] Section 19 enables the FTC to use its administrative process to develop policy and, when appropriate, to go to court to seek redress as well as damages for the violation of a cease and desist order or FTC rule.

Congress's ongoing commitment to ensure the FTC may obtain compensatory relief in appropriate cases is reflected in two amendments that post-date the addition of Section 19. In 1994, Congress amended the Act to expand the venue and service of process provisions of Section 13(b) so the Commission could bring a single lawsuit against all defendants involved in

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116. *Id.*

117. Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. 93-637, § 206(a), 88 Stat. 2201 (1975); *see also* 15 U.S.C. § 57b.

118. 15 U.S.C. § 57b.

119. *Id.*

120. *Id.* § 57b(e).

121. H.R. REP. NO. 93-1606, at 42 (1975) (Conf. Rep.).

122. S. REP. NO. 93-151, at 30–31 (1973).

123. *See*, *e.g.*, In re POM Wonderful, LLC, 155 F.T.C. 1 (F.T.C. 2013), *aff'd as modified*, 777 F.3d 478 (D.C. Cir. 2015) (FTC order clarifying policy on health claim substantiation).

an illegal transaction, even if they do not all reside in the same district.[124] The Senate Report recognized that, pursuant to Section 13(b), "[t]he FTC can go into court ex parte to obtain an order freezing assets, *and is also able to obtain consumer redress*."[125] Congress thus understood that Section 13(b) encompasses compensatory remedies. This same understanding is reflected in Congress's 2006 amendment to the Act, which enables the Commission to work more effectively with its international counterparts.[126] Under the 2006 amendment, The Safe Web Act added a new subsection to Section 5—Section 5(a)(4)(B)—which provides that "[a]ll remedies available to the Commission with respect to unfair and deceptive acts and practices shall be available for acts and practices described in this paragraph, *including restitution* to domestic or foreign victims."[127]

As this history shows—at least since the enactment of Section 13(b)—Congress has sought to ensure the FTC has authority to bring enforcement actions compelling the return of illegally acquired money to injured consumers. By 1994, and surely by 2006, Congress understood that courts had uniformly interpreted Section 13(b) to authorize claims for compensatory relief. "If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . a later version of that act perpetuating the wording is presumed to carry forward that interpretation."[128] Had Congress been dissatisfied with court rulings awarding consumer redress under Section 13(b), it could have restricted the remedies available under Section 13(b) rather than incorporate the full breadth of these remedies, as consistently applied by courts, into new provisions in Section 5.[129]

124. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 10, 108 Stat 1691 (1994).

125. S. Rep. No. 103-130, at 15–16 (1993) (emphasis added).

126. *See* U.S. Safe Web Act of 2006, Pub. L. No. 109-455, § 3, 120 Stat 3372 (2006).

127. 15 U.S.C. § 45(a)(4)(B) (2018) (amended 1973) (emphasis added).

128. Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 322 (2012).

129. FTC enforcement cases have returned billions of dollars to millions of consumers. *See*, *e.g.*, *Federal Judge Approves FTC Order for Owners of Certain Volkswagen, Audi, and Porsche 3.0 Liter "Clean" Diesels to Receive Refunds*, Fed. Trade Comm'n (May 17, 2017), https://perma.cc/QSQ9-J39L ($11 billion) (last visited Dec. 2, 2020); *FTC Returns Nearly $108 Million to 450,000 Homeowners Overcharged by Countrywide for Loan Servicing Fees*, Fed. Trade Comm'n (July 20, 2011), https://perma.cc/3AA9-7WDK ($108 million to 450,000 homeowners) (last visited Dec. 2, 2020); *FTC Sends Checks to Nearly 350,000 Victims of Herbalife's Multi-Level Marketing Scheme*, Fed. Trade Comm'n (Jan. 10, 2017), https://perma.cc/MJY3-C9W3 ($200 million to 350,000 people who lost money running Herbalife businesses) (last visited Dec. 2, 2020); MoneyGram Refunds, Fed. Trade Comm'n (Nov. 2018), https://perma.cc/658T-V6QV ($125 million to people who lost money in scams) (last visited Dec. 2, 2020). *See also 2018 Annual Report on Refunds*, Fed. Trade Comm'n (Feb. 2019), https://perma.cc/F24Y-88MV (last visited Dec. 2, 2020).

B. *Courts Have Historically Held that Section 13(b) Authorizes Compensatory Relief*

Since Section 13(b)'s enactment, defendants have challenged the authority of courts to order compensatory relief. Even so, until the Seventh Circuit's ruling in *Credit Bureau Center*,[130] *every* court to consider the issue had rejected these challenges, including the Seventh Circuit, and no circuit judge dissented.[131] The first circuit court to rule was the Ninth. It held in *FTC v. H.N. Singer, Inc.*[132] that compensatory relief is available in Section 13(b) cases.[133] *Singer*, like the seven circuits that followed, anchored its ruling on the decisions in *Porter* and *Mitchell v. Robert DeMario Jewelry, Inc.*,[134] which held that equitable power is inherent in the grant of injunctive authority to a government agency.[135] For that reason, until the Seventh Circuit's recent ruling, courts had uniformly held that Section 13(b), which authorizes injunctions, permits courts to order equitable relief, including compensatory redress, in FTC enforcement cases.[136]

Porter held the Emergency Price Control Act of 1942, which authorized the Administrator of the Office of Price Administration to seek a "permanent or temporary injunction, restraining order, or other order," empowered district courts to order not only prospective injunctive relief but also to compel the return of illegally exacted rents.[137] As the *Porter* Court explained, "[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."[138] The Court then added:

130. 937 F.3d 764 (7th Cir. 2019).
131. *See infra* note 136. R
132. 668 F.2d 1107 (9th Cir. 1982).
133. *Id.* at 1113.
134. 361 U.S. 288 (1960).
135. *Id.* at 291.
136. FTC v. Amy Travel Servs., Inc., 875 F.2d 564, 572 (7th Cir. 1989); FTC v. Sec. Rare Coin and Bullion Corp., 931 F.2d 1312, 1314–15 (8th Cir. 1991); FTC v. Gem Merch. Corp., 87 F.3d 466, 468 (11th Cir. 1996); FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); FTC v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 15 (1st Cir. 2010); FTC v. Bronson Partners, LLC, 654 F.3d 359, 363 (2d Cir. 2011); FTC v. Ross, 743 F.3d 886, 891 (4th Cir. 2014). District courts in three of the remaining circuits—the D.C., Third and Fifth Circuits—have reached the same conclusion. *See*, *e.g.*, FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 36–37 (D.D.C. 1999); In re Nat'l Credit Mgmt. Grp., LLC, 21 F. Supp. 2d 424, 462 (D.N.J. 1998); FTC v. Kennedy, 574 F. Supp. 2d 714, 724 (S.D. Tex. 2008). Interpreting Section 13(b)'s grant of injunctive authority to carry with it the power to order monetary relief tracks rulings under other regulatory statutes that confer injunctive authority much like that in Section 13(b). *See*, *e.g.*, United States v. Rx Depot, Inc., 438 F.3d 1052, 1053–1054 (10th Cir. 2006) (Federal Food, Drug and Cosmetics Act); United States v. Lane Labs-USA, Inc., 427 F.3d 219, 223 (3d Cir. 2005) (same); CFTC v. Co Petro Mktg. Grp., 680 F.2d 573, 583 (9th Cir. 1982) (Commodity Exchange Act); ICC v. B & T Transp. Co., 613 F.2d 1182, 1186 (1st Cir. 1980) (Motor Carrier Act).
137. 328 U.S. 395, 399 (1946).
138. *Id.* at 398.

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.[139]

Turning to compensatory redress, the Court held the "comprehensiveness of this equitable jurisdiction" encompasses the authority to require the reimbursement of unlawful rents.[140] Restitution, the Court observed, is "within the highest tradition of a court of equity."[141] The Court also emphasized that, because "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."[142] The Court added "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."[143]

In *Mitchell*, the Court relied on its ruling in *Porter* to hold that the Fair Labor Standards Act, which authorizes district courts to "restrain violations" of the Act,[144] empowers courts to award back-pay to employees who have been unlawfully discharged.[145] In response to the employer's argument that an order compelling back pay would be a penalty and thus beyond the court's equitable power, the Court held "the public remedy is not thereby rendered punitive, where the measure of reimbursement is compensatory only."[146] The Court also echoed *Porter*: "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."[147]

The principle announced in *Porter* and reaffirmed in *Mitchell* that "the comprehensiveness of [the district court's] equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command"

139. *Id*.
140. *Id.* at 398–99.
141. *Id.* at 402.
142. *Id.* at 398.
143. *Id.* at 399 (*Porter* added that its judgment could also be supported by the "other order" language in the Emergency Price Control Act. *Id*. The Court in *Mitchell* found that the "other order" holding was independent of its holding on the equitable nature of the relief, which was based on "the language of the statute" that provided "affirmative confirmation of the power to order reimbursement." 361 U.S. at 291. The Court's reference to "complete relief" in *Porter* is important because equity courts had the authority, when necessary, to order legal relief in the form of money damages to ensure that the plaintiff was provided "complete relief." 328 U.S. at 399.).
144. 29 U.S.C. § 217 (2018).
145. 361 U.S. at 296.
146. *Id.* at 293.
147. *Id.* at 291–92.

applies with full force to actions brought under Section 13(b).[148] Until *Kokesh*, every court to consider the question relied on *Porter* and *Mitchell* to hold that Section 13(b) authorizes courts to order compensatory relief.

C. The Attacks on Section 13(b) are Misguided

The Seventh Circuit has held, and Judge O'Scannlain has maintained, that Section 13(b) does not authorize the FTC to obtain compensatory redress. Instead, they contend that other provisions of the Act, namely Section 5(*l*) and Section 19, are the exclusive avenues for redress available to the FTC. But such an interpretation of the Act makes little sense. It would return the FTC to the pre-Section 13(b) days—when fraudsters and scam artists would get at least one free bite at the apple—because these provisions may be invoked only after the FTC completes administrative proceedings and judicial review is exhausted or in one of the few cases involving violations of substantive FTC rules.[149]

As noted above, Section 5(*l*) provides the FTC a means for obtaining redress only when a company or individual violates an existing FTC order. For that reason, Section 5(*l*) cannot provide redress for a violation of Section 5 of the Act or any other law the FTC enforces. The suggestion that Congress intended Section 5(*l*) to be the FTC's front-line remedial authority is implausible; it would mean that Congress thought it was acceptable for scammers to keep their ill-gotten gains, so long as they stopped their unlawful conduct after the FTC ordered them to cease and desist.

The argument regarding Section 19, showcased by Judge O'Scannlain and the Seventh Circuit's *Credit Bureau Center* ruling, is equally unpersuasive. Section 19 authorizes district courts to entertain suits brought by the Commission to seek monetary relief in cases that have been litigated to final judgment administratively—a process that can takes years.[150] Under

148. *Id.* at 291 (quoting *Porter*, 328 U.S. at 398).

149. Section 13(b) critics argue that, notwithstanding their claim that Section 13(b) does not carry with it the right to order equitable remedies, the FTC may seek an asset freeze under Section 13(b) to prevent asset dissipation during an administrative proceeding. Putting aside the incoherence of the argument, the claim has serious practical limitations. To obtain an asset freeze, the FTC must file a complaint in district court and overcome the high bar of showing that preliminary injunctive relief is warranted—a showing that requires the FTC to put forward evidence that it has a strong likelihood of prevailing on the merits, even though, under the critics' theory, the district court may not resolve the merits question because of the ongoing administrative proceedings. In other words, that approach requires the FTC to conduct parallel litigation in two different fora. Congress's goal in Section 13(b) was to facilitate consumer protection cases, not to make the FTC prove its case twice, or to drain its resources. S. REP. NO. 93-151, at 30–31 (1973).

150. Section 19 also authorizes the FTC to bring rule violation cases in district court. But Section 19 does not explicitly confer injunctive authority on the court, and because rule violation cases are ordinarily brought under Section 13(b), rule violation cases usually allege jurisdiction under both Section 13(b) and Section 19. *See, e.g.*, Complaint at 9, ¶¶ 32–33, United States v. ICONIX Brand Group, Inc., 1:09-

Section 19, redress is available when the FTC "satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent."[151] If so, the court may award "such relief as the court finds necessary to redress injury to consumers," including the "refund of money or return of property," and even the "payment of damages,"[152] traditionally a remedy available at law and not at equity.

As is apparent, Section 13(b) and Section 19 serve wholly different purposes. Section 19 authorizes district court jurisdiction in cases that seek redress where the case has been litigated administratively and judicial review of the FTC's cease and desist order is final. Without Section 19, the FTC could never seek redress in administrative cases, which would be a significant disincentive for the FTC to proceed administratively. In contrast, Section 13(b) authorizes the FTC to go to court immediately and to return ill-gotten gains to consumers as swiftly as possible. Since its only function is to obtain redress, Section 19 has a short, three-year statute of limitations; in contrast, there is no statute of limitations under Section 13(b). Finally, Section 19 only permits legal relief, including "damages." Section 19 does not permit injunctive relief because Section 19's predicate is that there is already an FTC cease and desist order in place.[153]

Congress enacted Section 19 to enhance the Commission's authority against rule violators and targets of administrative proceedings. But there is no indication that Congress intended Section 19 to limit the pre-existing authority of the Commission—and of the courts—under Section 13(b). To

cv-08864 (S.D.N.Y. Oct. 20, 2009), https://perma.cc/B4QP-F2EZ (using Sections 5 and 19 to charge violations of, among other things, the Children's Online Privacy Protection Act). It is also important to note that, because the FTC does not have general notice and comment rulemaking under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, most of the rules it promulgates are rules to implement statutes that separately provide the Commission with APA rulemaking authority. As a result, rule violations are not rare, but they make up a small percentage of the Commission's 13(b) cases.

151. 15 U.S.C. § 57b(a)(2) (2018). Section 19 requires the FTC to prove scienter—that is a knowing violation of the law—because it authorizes damages as well as equitable redress. There is no parallel requirement in administrative proceedings under Section 5. Accordingly, in a Section 19 case, the FTC would have to prove an element not subject to proof in the administrative proceedings, namely that the defendant knew, or should have known, that the act constituting the violation was unlawful. That burden is generally easily met, but it does require further proceedings. *See*, *e.g.*, FTC v. Figgie Int'l, Inc., 994 F.2d 595 (9th Cir. 1993).

152. 15 U.S.C. § 57b(a)(2).

153. *Id.* §§ 57b(a)(2), (b) & (d). Although some lawyers conflate "damages" with equitable monetary relief, the terms are not interchangeable and there are important distinctions between the two forms of remedies. An authorization to award damages permits a court to order far more sweeping relief than simply the return of ill-gotten gains. Damages may include prejudgment interest, pain and suffering, loss of opportunity, and other consequential injuries unavailable in equity. *See generally* FAA v. Cooper, 566 U.S. 284, 293–97 (2012) (discussing scope of damages in several contexts). FTC redress orders are a far cry from the "make whole" relief available as damages; they simply return consumers to, at best, the *status quo ante*, and generally far less than the consumer loss.

emphasize that point, Congress specified that "[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law."[154] Thus, the argument that Congress enacted Section 19 to serve as the sole vehicle for monetary relief, deliberately leaving courts powerless to award consumer redress in cases brought under Section 13(b), is far-fetched.[155]

For that reason, it is hardly surprising that neither Judge O'Scannlain nor the Seventh Circuit furnish a reason Congress would want to provide a range of remedies, including monetary relief and "damages" in the subset of cases in which the FTC has already obtained administrative orders, but deny any monetary redress in the mine run of Section 13(b) cases decided by judges. Indeed, where there is ongoing financial harm to consumers, the Commission ordinarily brings those cases under Section 13(b) so it can get interim injunctive relief to stop the harm from continuing during the litigation, and, later, as the case progresses, it can seek an order requiring restitution to injured consumers.[156]

But under Judge O'Scannlain and the Seventh Circuit's Section 19 theory, the FTC has at best a Hobson's choice: it can bring an enforcement case under Section 13(b) and get interim relief, but if the FTC follows this path, it cannot seek redress and the defendant gets to keep his ill-gotten gains. Under this theory, Section 13(b) is merely a tool to stop ongoing fraud. On the other hand, if disgorgement is the FTC's primary goal, it must proceed administratively under Section 5, issue a cease and desist order, and wait until the defendant exhausts judicial review of the FTC's order, all the while forgoing interim relief in the hope that someday the Commission might obtain a disgorgement order, assuming there are proceeds left to disgorge. While the idea that Congress intended to put the Commission to this Hobson's choice is unthinkable, these remain the Commission's only options under the reading of the Act championed by Judge O'Scannlain and the Seventh Circuit.

Equally problematic are the justifications offered for restricting the scope of Section 13(b). The first claim by Judge O'Scannlain and the Seventh Circuit in *Credit Bureau Center*, namely that "[r]estitution isn't an injunction," is off target.[157] As Judge Wood's dissent makes clear, an in-

154. *See* 15 U.S.C. § 57b(e).

155. *See*, *e.g.*, FTC v. Ross, 743 F.3d 886, 891 (4th Cir. 2014) (and cases cited therein); FTC v. Gem Merch. Corp., 87 F.3d 466, 469–70 (11th Cir. 1996).

156. Calkins, *supra* note 112, at 568, 581 & nn. 64–66 (summarizing the applicable legislative history).

157. FTC v. Credit Bureau Ctr., 937 F.3d 764, 771 (7th Cir. 2019).

junction is a court order requiring a party to take action or to refrain from acting.[158] There is no reason why an order requiring restitution or disgorgement is not an injunction.[159] On the contrary, the Supreme Court has emphasized that "[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."[160] An order requiring the defendant to return illegally acquired gains is an injunction, just as an order of divestiture is an injunction because it seeks to return the parties to the *status quo ante*.[161]

The Seventh Circuit's claim that *Meghrig v. KFC Western, Inc.*[162] "displaces the rationale" of *Porter* and *Mitchell* also misses the mark.[163] The Court has never signaled that *Porter* and *Mitchell* should be limited; in fact, *Kokesh* cites *Porter* approvingly to contrast cases involving traditional compensatory relief with SEC non-compensatory disgorgement.[164] Nor does *Meghrig* "displace[ ]" *Porter* and *Mitchell*'s rationale, as the Seventh Circuit contends. As noted, *Meghrig* held that the citizen-suit provision of the Resource Conservation and Recovery Act of 1976 ("RCRA") does not authorize a private party to recover the costs of a past clean-up of toxic waste.[165] The Court was careful to not frame its decision as a departure from *Porter*. Rather, the Court found that Congress, in RCRA and related legislation, did not intend to permit private citizens to recover past clean-up costs—an intent that may "restrict[ ] the court's jurisdiction in equity."[166] Although RCRA undoubtedly reduced the scope of equity power, it did not cast doubt on, distinguish, or let alone "displace" *Porter*.

Moreover, none of the cases *Credit Bureau Center* characterizes as applications of *Meghrig* undermine *Porter*. Once again, these are cases where the Court found that Congress intended to limit courts' equity jurisdiction. For example, in *Miller v. French*,[167] Congress's intent " 'to displace courts' traditional equitable authority" by making an automatic stay provi-

158. *Id.* at 787.

159. *Id.*

160. Porter v. Warner Holding Co., 328 U.S. 395, 399 (1946); *see also* Mertens v. Hewitt Assoc., 508 U.S. 248, 255 (1993) (Scalia, J.) (restitution is a "remedy traditionally viewed as 'equitable' ").

161. *See* California v. Am. Stores Co., 495 U.S. 271, 275 (1990) ("divestiture is a form of injunctive relief"); Schine Chain Theaters, Inc. v. United States, 334 U.S. 110, 128 (1948) ("[l]ike restitution [divestiture] merely deprives a defendant of the gains from his wrongful conduct" and is "an essential feature" of injunction decrees for violations of the Sherman Act).

162. 516 U.S. 479 (1996).

163. *Credit Bureau Ctr.*, 937 F.3d at 776.

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

165. *Meghrig*, 516 U.S. at 488.

166. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).

167. 530 U.S. 327, 340–41 (2000).

sion mandatory was "unmistakable."[168] None of the three cases the Seventh Circuit cites as cementing the *Meghrig* regime even mentions *Meghrig*.[169]

Judge O'Scannlain's reliance on *Great-West Life* is similarly misplaced for two reasons. For one, *Great-West Life* is an *application* of *Porter*, which recognized that when Congress specifies the remedies available under the statute, it may explicitly "or by a necessary and inescapable inference" restrict other, equitable remedies.[170] In *Great-West Life*, the Court construed the statutory provisions of ERISA, which set out a detailed set of remedies, thus concluding that Congress limited courts' powers in equity.[171] As for the second reason, *Great-West Life* involved a provision in ERISA authorizing private parties to file civil actions seeking injunctions or "other appropriate equitable relief."[172] The question was whether Congress intended "equitable relief" to include the petitioners' claim for *contractual* remedies, which are "legal," not "equitable," in nature, and the Court declined to read the statute so broadly. Unlike the relief sought in *Great-West Life*, the compensatory relief the FTC seeks through Section 13(b) enforcement actions "lies within [courts'] equitable jurisdiction," not contract law,[173] and Congress has expressed no intention in the Act to limit the equitable powers of courts in Section 13(b) cases.

There are two other arguments that further bolster the FTC's position, neither of which was meaningfully answered by Judge O'Scannlain or the Seventh Circuit. First, as the Supreme Court recently reiterated: "[i]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'"[174] "Congress legislates against the backdrop of existing law."[175] When Congress adopted Section 13(b) in 1973, the Supreme Court's decisions in *Porter* and *Mitchell* established that a grant of injunctive authority carried with it the authority to seek equitable relief.

Second, this is a classic case for application of the ratification canon. Under the ratification canon, Congress "ratifies" uniform rulings by lower courts when it amends or re-enacts a statute.[176] As noted above, Congress

168. *Id.*

169. *Id.*; *see also* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320 (2015); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

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

171. Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209–10 (2002).

172. 29 U.S.C. § 1132(a)(3) (2018).

173. *Porter*, 328 U.S. at 402.

174. New Prime, Inc. v. Oliveria, 139 S. Ct. 532, 539 (2019).

175. Parker Drilling Mgmt. Servs., Ltd. v. Newton, 139 S.Ct. 1881, 1890 (2019).

176. When Congress amends a statute without altering text that a growing body of cases has uniformly interpreted, it is appropriate to infer "that the construction adopted by the courts has been acceptable to the legislative arm of the government." Manhattan Properties, Inc. v. Irving Trust Co., 291 U.S. 320, 336 (1934); *see also* SCALIA & GARNER, *supra* note 128, at 322 (when a statute "has been given a R

amended the Act several times after the 1973 enactment of Section 13(b).[177] At least twice, Congress demonstrated that it was aware of the uniform and widespread precedent holding that Section 13(b) authorized courts require restitution but made no effort to rein in Section 13(b).[178] When Congress amended Section 13(b) in 1994 to expand Section 13(b)'s venue provisions and authorize nation-wide service of process, Congress could have, *but did not*, alter the permanent injunction clause.[179] The Senate Report notes that Section 13(b) "authorizes the FTC to file suit to enjoin any violation of the FTC [Act]" and "obtain consumer redress" and explains that the expansion of venue and service of process provisions specific to Section 13(b) were intended to "assist the FTC in its overall efforts."[180]

Congress next amended the Act in 2006, at a time when courts, including eight circuits, had recognized that Section 13(b)'s authority encompasses monetary relief, thereby giving the FTC authority to protect consumers in international commerce.[181] That authority included "[a]ll remedies available to the Commission . . . *including restitution* to domestic or foreign victims."[182] Again, if Congress was concerned about the FTC's use of Section 13(b) to obtain restitution, it would not have remained silent on that issue.

The Seventh Circuit's strained reading of the Act, if adopted, would inevitably give scammers "at least on[e] free shot at violating" the Act.[183] As described above, Congress gave the FTC the choice of enforcing the Act through administrative proceedings or by filing actions in court. Each avenue has its benefits. But the only viable way for the FTC to obtain redress for injured consumers in cases involving scams and fraud is through an action filed in district court under Section 13(b). Otherwise, compensation is limited to cases in which there has been a violation of a substantive FTC rule under Section 19 or following lengthy administrative proceedings, by which time any assets would likely have been dissipated. For these reasons, I doubt that the Court will hold the FTC lacks authority to seek compensatory redress in Section 13(b) cases.

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uniform interpretation by inferior courts * * *, a later version of that act perpetuating the wording is presumed to carry forward that interpretation.") As noted earlier, Congress has twice amended the Act after courts uniformly interpreted Section 13(b) to confer authority for courts to enter equitable relief.

177. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 10, 108 Stat 1691 (1994); U.S. Safe Web Act of 2006, Pub. L. No. 109-455, § 3, 120 Stat 3372 (2006).

178. *Id.*

179. *See* Pub. L. No. 103-312, § 10 (1994).

180. S. Rep. No. 103-130, at 15–16 (1993); *see*, *e.g.*, Texas Dept. of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2520 (2015).

181. Pub. L. No. 109-455, § 3 (2006) (codified at 15 U.S.C. § 45(a)(4)).

182. *Id.*

183. *See* FTC v. Bronson Partners, LLC, 654 F.3d 359, 366 n.3 (2d Cir. 2011).

IV. The Partial Resurrection of Equity?

Having gone out on a limb in forecasting that the Supreme Court will uphold the FTC's use of Section 13(b) in cases where the Commission seeks compensatory redress, I want to make another prediction on a question that the Court may decide not to reach—but should. The question is what should courts do when compensatory redress, although sought in good faith by the FTC or one of its sister enforcement agencies, is unavailable, either because the amounts recovered from the defendant are too meager to pay for the cost of returning funds to consumers, or because the agency cannot identify consumers who were scammed.

While these situations are not uncommon, they may pose a Hobson's choice for lower courts, which currently lack guidance on the issue. And this is not an idle question. The Court in *Liu* understood this possibility, but explicitly declined to opine on the issue:

> The parties have not identified authorities revealing what traditional equitable principles govern when, for instance, *the wrongdoer's profits* cannot practically be disbursed to the victims. But we need not address the issue here. The parties do not identify a specific order in this case directing any proceeds to the Treasury.[184]

So courts and enforcement agencies need to wait until this question reaches the Supreme Court? Cases like *AMG Capital Management*, as well as *Kokesh* and *Liu*, provide a sufficient grounding for the Court to consider the question, especially since the question is a legal one.

Recall that in *Kokesh*, the Court's ruling that the SEC could not force disgorgement of unlawfully obtained funds for a period exceeding five years left Mr. Kokesh with a fortune of other people's money.[185] One would hope that the Court was not happy with that outcome, even though the Court's ruling made it inevitable that Kokesh would walk away with his fortune intact. But because the Court construed the applicable statute of limitations to exclude only *compensatory* disgorgement, the Court had little choice but to apply the five-year statute of limitations for penalties imposed by federal agencies to the non-compensatory disgorgement order against Kokesh.[186] As a result, Kokesh's disgorgement order compelled him to return less than three million dollars, but he managed to keep 30 million dollars scammed from investors beyond the statute of limitations—facts that, to the Court's credit, it acknowledged.[187] Given the disposition in *Liu*, it is also unclear whether Mr. and Mrs. Liu will be subject to a disgorgement order. The Court remanded the case to the district court to decide that ques-

184. Liu v. SEC, 140 S. Ct. 1936, 1948–49 (2020) (emphasis added).
185. *Cf.* Louis D. Brandeis, Other People's Money and How the Bankers Use It (1914).
186. *See* 28 U.S.C. § 2462 (2018); Kokesh v. SEC, 137 S. Ct. 1635, 1644 (2017).
187. *Kokesh*, 137 S. Ct. at 1641.

tion, a decision which may be academic because the couple has fled to China.[188]

To be sure, there is a clear difference between the FTC cases I am concerned about and *Kokesh* and *Liu*. To start, the Court's focus on the "the wrongdoer's *profits*" in *Liu* suggests that the Court's concern centers on disgorgement of *profits based on* money illegally acquired, not only the money illegally acquired.[189] The FTC rarely, if ever, files an enforcement action that seeks non-compensatory disgorgement or seeks *profits* over and above the amount taken from consumers. To the contrary, the measure of redress in FTC cases is consumer loss.[190] In contrast, the SEC's enforcement action against Kokesh sought civil monetary penalties, disgorgement, and an injunction barring Kokesh from violating securities laws in the future.[191] The SEC did not anticipate returning any of the money disgorged from Mr. Kokesh to injured investors. For that reason, the question I want to explore remains unanswered by the Court. Indeed, there is no hint in the Court's opinions in *Kokesh* and *Liu* about how the Court would answer the question of what a district court should do when an enforcement agency aims for compensatory redress but cannot do so. As noted above, the Court in *Liu* recognized that possibility but refrained from addressing it.

The answer that the Court should give in *AMG Capital Management*, however, is this: so long as the Commission files a case that could prompt compensatory redress, the Commission should retain its right to seek redress, and the district court should retain its authority to impose a restitutionary award, even if it turns out that redress is unavailable. There are three reasons why this answer is supported by the injunction-conferring authority of Section 13(b) and by Congress's oft-expressed sentiment that the core goal of the Act is to "prevent" unfair or deceptive acts or practices.

First, equity does not favor wrongdoers. As *Porter* and *Mitchell* make clear, Congress's authorization in Section 13(b) for courts to enter injunctive relief confers broad equitable authority on courts entertaining FTC enforcement cases. The central goal of equity is to ensure that wrongdoers do not profit from their illegal deeds.[192] The inability of the FTC to locate the victims of a scam or find sufficient assets to fund a redress program surely should not mean the wrongdoer gets to keep his ill-gotten gains. If someone takes $10 from someone else under false pretenses, it is hard to understand why a court order forcing the wrongdoer to disgorge the $10 is a "penalty." After all, the wrongdoer has no legal entitlement to that money. Taking

188. *Liu*, 140 S. Ct. at 1947 n. 4.
189. *Id.* at 1940.
190. *See*, *e.g.*, FTC v. Bronson Partners, LLC, 654 F.3d 359 (2d Cir. 2011).
191. *Kokesh*, 137 S. Ct. at 1641.
192. *See*, *e.g.*, Tull v. United States, 481 U.S. 412, 423–25 (1987).

disgorgement off the table eliminates the possibility of deterrence and, when restitution is infeasible, gives scammers an undeserved windfall.

Second, although the *Liu* Court discounted this point, the Court has never abandoned its view that, where "the public interest is involved," a court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake."[193] This doctrine is still a viable one, as underscored by the Court's recent reliance on *Porter* in *Liu*, as well as Justice Thomas's invocation of it in his concurring opinion in *Kansas v. Nebraska*.[194] There, Justice Thomas took the point a step further, noting that, in *Porter*, "the Court recognized a public interest in the enforcement of a federal administrative scheme," and observed that "Congress had made a 'declaration of public interest and policy which should be persuasive in inducing courts to give relief.' "[195] So too here. Congress has emphatically declared the importance of the FTC "prevent[ing]" deceptive and unfair conduct in the marketplace.[196] That is the core mandate of Section 5 of the Act. As a result, Congress's post-1973 enactments were intended to arm the FTC with sufficient enforcement authority to carry forward that goal. Nothing would more effectively undermine the FTC's ability to fulfill Congress's goal than letting wrongdoers keep their ill-gotten gains. That would return the FTC to the pre-*Heater* days when willful violations of the Act were often profitable.

It also bears emphasis that disgorgement, even for restitutionary purposes, is a distinctly public-regarding remedy, available only to government entities seeking to enforce explicit statutory provisions. To be sure, courts often analogize disgorgement to the "ancient remedies of accounting, constructive trust, and restitution," but they also recognize that disgorgement is distinguishable from those "analogous forms of relief" in the crucial respect that, where disgorgement is sought, it is the government, not the victim of the wrongdoing, who seeks to recover the defendant's unlawful gains.[197] As noted earlier, however, that distinction cuts in the FTC's favor. After all, even Justice Scalia took the view that "courts of equity will go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."[198]

Third, in every one of the post-Scalia equity cases discussed above, including *Kokesh* and *Liu*, the Court limited the reach of equitable authority on textual grounds. That is, the Court held that the statute authorizing the

193. Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946).
194. 574 U.S. 445, 455–57 (2015); *id.*, 574 U.S. at 479 (Thomas, J., concurring).
195. *Id.* at 479 (quoting Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 552 (1937)).
196. 15 U.S.C. § 45(a) (2018).
197. *See* FTC v. Bronson Partners, LLC, 654 F.3d 359, 372–73 (2d Cir. 2011).
198. Grupo Mexicano Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 326 (1999); *see also* Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002).

agency action at issue either superseded or was incompatible with the concurrent exercise of equity authority. That reasoning, of course, was at the heart of the Seventh Circuit's decision in *Credit Bureau Center*. But as discussed above, and as driven home by Chief Judge Wood's forceful dissent in that case, that reasoning is unsound both because it misconstrues the text of the Act and because it disregards Congress's clear command in Section 13(b) and the other provisions Congress has added to the Act since 1973 to ensure that the FTC can root out, and deter, fraud and scams. Denying the Commission authority to seek disgorgement when the FTC seeks compensatory redress, but cannot feasibly carry out redress, would stand the consumer protection purpose of the Act on its head.

V. Postscript

Although this Article was drafted in the summer of 2020, by the time this Article is in print the Court may have decided the *AMG Capital Management* case, which was argued on January 13, 2021. Having the benefit of hearing the argument, I have a few additional thoughts to add.

First, the Court's current practice of hearing argument by telephone and limiting each Justice to two minutes and forty seconds of questioning is injuring the quality of argument before the Court. There is no opportunity for Justices to follow up on questions partially answered and little room for advocates to give full answers to complex questions. Even worse, there is simply no time for the give and take between the Justices and counsel that helps clarify the advocate's position. Arguing before the Supreme Court is challenging even in the best of times and now it is much more so.

There are consequences to the present constraints on arguments before the Court that may influence the outcome in *AMG Capital Management*. Several questions were posed that, due to time constraints, were never really answered. For example, Justice Thomas asked the FTC's lawyer to "explain why the Commission chooses to use Section 13 rather than Section 19."[199] This seems like a simple question; however, the answer is complicated. But because of time limitations, the FTC lawyer was able only to make one point, namely that Section 13(b) is used in cases where it does not take a lot of Commission expertise to explain why a particular act is deceptive.[200] That is, "when the Commission feels that it doesn't need to expound on the—the meaning and boundaries of the Act, it can bring cases under Section 13."[201] Justice Kagan later returned to this question, driving home

199. Transcript of Oral Argument at 36, AMG Capital Management, LLC v. FTC, https://perma.cc/5WCR-RWB7 (U.S. Jan. 13, 2021) (No. 19-508).
200. *Id.* at 36.
201. *Id.* at 37.

the apparent incongruity under Section 19 that requires "a repeated violation" and "a certain kind of mens rea and so forth" to receive redress in Section 19 cases.[202] But once again, because of time constraints, the FTC's lawyer did not point out that Section 19 permits not just restitution, which restores the wrongdoer to the *status quo ante*, but also *damages,* which is a form of penalty.

Justice Breyer, who is an expert on administrative law, asked whether the FTC was bringing cases under Section 13(b) that should be brought before the Commission to allow it to articulate legal standards providing guidance to the industry.[203] The FTC's lawyer tried to give a short answer, explaining that the FTC does not bring cases under 13(b) unless there is substantial Commission precedent on the issue.[204] The FTC's basic mission, as Justice Breyer rightly noted, is to police the marketplace by giving businesses clear guidance about what constitutes a deceptive or unfair business practice.[205] No one disputes that clear guidance should proceed an enforcement case; indeed, due process requires prior notice. On the other hand, Section 13(b) authorizes the Commission to go straight to court where the Commission has already established guidance. After all, Congress enacted Section 13(b) to ensure that "Commission resources will be better utilized and cases can be disposed of more efficiently" where it can take the mine run of cases directly to court.[206]

The one case Justice Breyer focused his attention on, *FTC v. Skechers U.S.A., Inc.*, is a case I worked on at the FTC. Skechers was selling "toning shoes" and making specific and strong claims that using Skechers shoes would tone muscles and promote toning muscles, weight loss, and cardiovascular health. Skechers' marketing campaign, bolstered by Kim Kardashian and Brooke Burke, was highly effective. Indeed, Kim Kardashian's 2011 Super Bowl ad, showing her dumping her personal trainer for a pair of Shape-ups, has been viewed millions of times.[207]

Under longstanding and settled FTC law, when an advertiser makes explicit claims about weight loss or fitness, the advertiser must have substantiation for the claims before the claims are made.[208] The FTC has set

202. *Id.* at 46.

203. *See generally* Transcript of Oral Argument, *supra* note 199. **R**

204. *Id.*

205. *Id.*

206. S. REP. NO. 93-151, at 30–31 (1973).

207. It was, at the time, the most watched advertisement in television history. *See* Skechers Shape-ups 2011 Super Bowl Commercial (Fox television broadcast Feb. 6, 2011), available at https://perma.cc/8ZWQ-MTSK.

208. *See* Federal Trade Commission, *FTC Policy Statement Regarding Advertising Substantiation*, FTC.GOV (Nov. 23, 1984), https://perma.cc/W8YT-DTEH; *see also* Federal Trade Commission, *Health Claims*, FTC.GOV, https://perma.cc/6T4S-AKN8 (last visited Feb. 5, 2021) (indexing the more than 200 health claim advertising substantiation cases the FTC has brought; dozens of guidance documents, clos-

out in detail what constitutes adequate substantiation. Skechers advertised its toning shoes based on an endorsement from Dr. Steven Gautreau, a chiropractor, who touted the shoes based on the results of an "independent" clinical study he conducted that compared the shoes' benefits to those provided by regular fitness shoes.[209] Skechers' toning shoes, of course, came out on top. But his study did not, in fact, come close to producing the results claimed in the ads. Indeed, there was no evidence the shoes conferred any of the advertised benefits.[210] Making matters worse, Skechers failed to disclose that Dr. Gautreau was married to a Skechers marketing executive, and that Skechers paid Dr. Gautreau to conduct the study.[211] Not surprisingly, given Skechers' inability to produce evidence to substantiate its claims, it settled rather than go to trial.[212]

At around the same time, the FTC brought an administrative action against POM Wonderful for falsely advertising that consuming POM's pomegranate juices and dietary supplements would prevent, reduce the risk of, and/or treat heart disease, prostate cancer, and erectile dysfunction.[213] Unlike Skechers, POM sponsored several randomized and controlled trials on its products by reputable scientists and touted the results of those studies in the company's advertisements.[214] After a close look at the studies, however, the FTC concluded that POM had cherry-picked data that did not represent the broader findings of the studies.[215] But, in contrast to weight loss and toning claims made by Skechers—claims the FTC had challenged hundreds of times before—there was limited FTC guidance on how to substantiate disease prevention and treatment claims for foods and food-derivative products. For that reason, the Commission proceeded administratively, and in so doing, established important precedents that give notice to other advertisers about what constitutes adequate substantiation for food products making prevention, treatment, and cure claims.

ing letters, Federal Register Notice, and other Commission statements regarding the substantiation of health claims).

209. *See* Federal Trade Commission, *Sketchers* [sic] *Will Pay $40 Million to Settle FTC Charges That It Deceived Consumers with Ads for "Toning Shoes"*, FTC.Gov (May 16, 2012), https://perma.cc/4PYJ-DGXR [hereinafter *Skechers Press Release*].

210. In fact, it turned out that the Skechers shoes were harmful. *See, e.g.*, Orly Avitzur, M.D., *Skechers Shape-Ups: A Wobbly Experience*, Consumer Reports (Aug. 5, 2010, 06:08 AM), https://perma.cc/5JCF-K6BS.

211. *Skechers Press Release*, *supra* note 209.

212. *Id.*

213. *See* Federal Trade Commission, *FTC Commissioners Uphold Trial Judge Decision that POM Wonderful, LLC; Stewart and Lynda Resnick; Others Deceptively Advertised Pomegranate Products by Making Unsupported Health Claims*, FTC.gov (Jan. 16, 2013), https://perma.cc/AZ83-53NX.

214. *Id.*

215. *Id.*

The contrast between how the FTC handled the *Skechers* and *POM Wonderful* cases would have helped answer Justice Breyer's important question. The FTC had given ample guidance to companies that sold their products based on weight loss and toning claims; that was not true for the claims POM made. And the arc of the litigation in *POM Wonderful* would have shown Justice Breyer that the FTC takes providing guidance seriously. The case was filed in September 2011, resolved by an Administrative Law Judge in 2012 in an over 300-page decision after an extensive trial with dozens of witnesses and hundreds of exhibits, upheld by the Commission in 2013, affirmed in most respects by the D.C. Circuit in 2015, and denied *certiorari* by the Supreme Court in 2016.[216] The Commission's decision in *POM Wonderful*, as modified by the D.C. Circuit, is an exemplar of the guidance Justice Breyer thinks the FTC should provide. But the FTC cannot routinely allocate the considerable resources it spent on *POM Wonderful*. The FTC cannot muster the resources it spent on *POM Wonderful* in every case.

The point, of course, is that, notwithstanding the five-year commitment in the *POM Wonderful* litigation, the Commission brought that case administratively to do what Justice Breyer correctly thinks the Commission should do, namely give industries the guidance they need to comply with the Act. To answer Justice Breyer's question, though, would have taken a several minutes—minutes unavailable to counsel.

Will the pitfalls of Supreme Court advocacy in the time of a pandemic influence the outcome of *AMG Capital Management*? I hope not. Every question asked in the argument was on target; the Justices had done their homework, as had the advocates. However, the truncated process left me wondering whether the incomplete answers given by time-limited counsel will result in an outcome that will have enormous consequences for the FTC and for consumers who fall victim to scam artists. I suspect not. One telling exchange during the argument was when Justice Alito pointed out that around a half a billion dollars had already been returned to scammed consumers and asked AMG's counsel: "If we rule in your favor, what will happen with respect to those individuals? Will they be required to return that money?"[217] AMG's counsel responded by saying:

> I honestly don't know. I would be surprised if—if that is the result. One option would perhaps be for—the Commission would have to repay us out of—out of the federal Judgment Fund, which, you know, is a reservoir that exists for paying liabilities of the United States. I suppose it would be up to

216. FTC v. POM Wonderful, LLC, 155 F.T.C. 1 (F.T.C. 2013), *aff'd as modified*, 777 F.3d 48 (D.C. Cir. 2015), *cert. denied*, 136 S.Ct. 1839 (2016).

217. Transcript of Oral Argument, *supra* note 199, at 12.

the Commission to decide whether the United States bears the burden of its error.[218]

I think AMG's counsel answered that question as forthrightly as he could, but I think that if there is a tiebreaker in this case, the Court will be hard-pressed to require individuals exploited by AMG's payday lending scam to return the money, let alone require the government to refund a half-billion dollars in scammed money. My view is that Congress, not the Court, ought to resolve this issue. The fact that the issue is before the Court shows that the question is a difficult one, but at the root of this case, it is a question of policy. Congress can once again ratify the decisions it has made in the past that Section 13(b) amplifies the FTC's enforcement efforts and authorizes compensatory restitution both to protect scammed consumers and to deter fraud. Where, as in *POM Wonderful*, when the FTC needs to provide guidance to the marketplace, the FTC will continue to use its administrative process to do just that. Until 2019, for four decades the circuit courts uniformly held that Section 13(b)'s broad grant of injunctive authority carries with it the power to order compensatory redress. For four decades, Congress has consistently approved the FTC's use of Section 13(b) to obtain compensatory redress and amended the FTC to facilitate redress cases. The argument on the other side distills down to the proposition that Congress did not understand the law it enacted in 1973 and that every circuit judge to sit on the pre-2019 cases upholding the FTC's position on Section 13(b) failed to see the limits AMG is asking the Court to impose. Congress should act now, not because I think the Court will err, but because the risk of the Court doing so, no matter how slight, poses serious risks to the marketplace and to consumers.

218. *Id.* at 12–13.