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## Supreme Disgorgement

Caprice Roberts

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## SUPREME DISGORGEMENT

*Caprice L. Roberts*\*

### Abstract

Disgorgement of a defendant's wrongful gains is an ancient remedy. It applies across a spectrum of contexts—from trademark infringement to fiduciary duties, from common law to statutes, from public to private law. This remedy is not regarded as quintessential in American contract law, but that is changing. My earlier work, as cited by the Supreme Court, predicted this shift based upon a new rule in the *Restatement (Third) of Restitution and Unjust Enrichment*. The rule operationalizes disgorgement of profits for opportunistic breaches of contract. This new conceptualization of precedent authorizes a gain-based remedy that exceeds the compensation goals of contract law's preferred, default remedy of expectancy damages.

This remedy is bold and will affect the law of contracts, remedies, and restitution. I show, in a companion article, how state and federal courts resolve novel disgorgement requests for breach of contract claims. This Essay examines an unusual endorsement of disgorgement by the Supreme Court, sitting in original jurisdiction over the breach of a water-rights compact between states. Harnessing broad powers of equity jurisdiction, the Court adopts a \$1.8 million disgorgement award exceeding compensation. It strips part of a defendant's profits and stacks on a compensatory award for losses sustained. Relying on the Restatement (much to Justice Scalia's chagrin), the Court permits disgorgement to deter a defendant from knowingly exposing a plaintiff to a substantial risk of breach. The Court's provocative application offers a lens through which to explore broader questions: whether, when, and how the disgorgement remedy should apply to breach of contracts, whether public or private. This Essay concludes that disgorgement is a valuable remedy for breach of contract but that judges must exercise reasoned discretion, by applying disgorgement to proper facts and by using restraint in tying the measurement to causation. The inclusion of disgorgement in the stable of remedies broadens the scope of contract law to include inquiries and features typically associated with tort law. As in all of my remedies

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\* Professor of Law, Savannah Law School. For pushing my thinking on remedies, restitution, and disgorgement, much gratitude to Andrew Kull, Doug Laycock, Lionel Smith, Candace Kovacic-Fleischer, Colleen Murphy, Daniel Friedmann, Eoin O'Dell, Mel Eisenberg, and the late Peter Birks. For thoughtful feedback on this work, the author thanks Doug Rendleman, Samuel Bray, Yehuda Adar, Moshe Gelbard, David Capper, Paul Zwier, Judd Sneirson, and Andrew Wright. This Essay also benefitted from dialogue during the International Remedies Forum held at the Université Paris-Dauphine, June 16–17, 2015, and from productive dialogue with the faculty of West Virginia University College of Law, as well as the Savannah Law School faculty.

work, this Essay argues that remedies shape rights—here, granting the remedy of disgorgement expands the shape of the underlying contract right in both public and private law.

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“‘[I]t is important that water flows down the river, not just money.’ Accordingly, this Court may order disgorgement of gains, if needed to stabilize a compact and deter future breaches, when a State has demonstrated reckless disregard of another, more vulnerable State’s rights under that instrument.”<sup>1</sup>

INTRODUCTION

In 2015, the Supreme Court of the United States decided a sleeper case, *Kansas v. Nebraska*,<sup>2</sup> over shared water resources allocated per state agreement.<sup>3</sup> In a split opinion,<sup>4</sup> the Court resolved the controversy in favor of Kansas, ordering Nebraska to pay a \$1.8 million disgorgement award in addition to compensatory relief.<sup>5</sup> This case has meaningful

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1. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1057 (2015) (citation omitted) (quoting Transcript of Oral Argument at 24, *Kansas*, 135 S. Ct. 1042 (No. 126), 2014 WL 5398224).

2. 135 S. Ct. 1042 (2015).

3. *Id.* at 1048–49.

4. *Id.* at 1048 (ruling 6–3 on two issues—the grant of partial disgorgement and the denial of injunctive relief, and ruling 5–4 on reformation of accounting procedures).

5. *Id.* at 1051–52. State agreements over water rights require federal congressional approval, which converts the agreement into a compact, here the Republican River Basin Compact

implications for the law of contracts, remedies, and restitution. The Court authorizes a partial disgorgement for knowing breach of the relevant quasi-public agreements, denies injunctive relief, and modifies the water-allocation accounting procedures.<sup>6</sup> Two vigorous dissenting opinions cite to one of my restitution articles for the prediction that the *Restatement (Third) of Restitution and Unjust Enrichment*'s section on disgorgement for opportunistic breaches of contract would extend traditional contract doctrine.<sup>7</sup> Though I stand by my prediction, I reject the notion that the extension of conventional contract doctrine is unwarranted, especially under the proper circumstances. The Supreme Court's treatment provides a ripe opportunity for reexamination of when disgorgement should lie for breaches of promises.

This Essay offers four takeaways from the Supreme Court's ruling: (1) in the law-equity determination, equity is presumed; (2) disgorgement beyond compensation is warranted to deter and to afford more complete relief; (3) knowing satisfies the requisite intent for disgorgement; and (4) the insufficiency of other remedies justifies the reach to disgorgement. The Court emphasizes the public nature of the case, thus preserving questions of whether the Court's logic applies to private litigants seeking disgorgement relief. Its interpretative analysis and rationale, although coupled with the extreme dissatisfaction of dissenting voices on the Court, provide plenty of ammunition to fuel further scholarly debate and attract the attention of lawyers seeking disgorgement in private contract disputes. This Essay adds to my body of work on disgorgement by clarifying the contours of *Kansas v. Nebraska* and examining its ramifications for the law of contracts, remedies, and restitution.

## I. THE DISGORGEMENT REMEDY

Disgorgement is a bold, powerful remedy emerging as a novel expansion of American contract law. The remedy is not new, but its application in the context of contractual breach is burgeoning. My larger body of work maintains that remedies shape rights. Disgorgement

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("Compact"). See *id.* at 1063. This Compact operated without incident for decades until a dispute arose, motivating Kansas to file an original cause of action in the Supreme Court. *Id.* at 1049. The Court referred the case to a Special Master for findings and recommendations. *Id.* at 1051. This resulted in a settlement agreement which, along with the Compact, is the subject of the controversy explored in this Essay.

6. *Id.* at 1049.

7. *Id.* at 1064 (Scalia, J., concurring in part and dissenting in part) (stating that section 39 of the *Restatement (Third) of Restitution* "constitutes a 'novel extension' of the law that finds little if any support in case law" (quoting Caprice L. Roberts, *Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 *LOY. L.A. L. REV.* 131, 134 (2008))); *id.* at 1068–69 (Thomas, J., concurring in part and dissenting in part) (same).

exemplifies this thesis. Disgorgement of a contract breacher's profits not only adds an alternative remedy to the traditional stable but also pushes the boundary of the underlying right and expands the contours of breach. Ultimately, disgorgement grounded in unjust enrichment offers a compelling rationale for expansion of contract law's base, as long as principled discretion guides the application and scope of the remedy.

To disgorge—to strip another of ill-gotten gains<sup>8</sup>—is not a novel concept. In fact, it is an ancient remedy rooted in restitution.<sup>9</sup> Disgorgement of a wrongdoer's profits exists across varied causes of actions<sup>10</sup> as well as continents.<sup>11</sup> Historically, however, disgorgement has held no favor in conventional contract doctrine.<sup>12</sup> The geography of contract remedy, much like a tectonic plate, is slowly but inexorably shifting.

Remedies—and more specifically restitution-based remedies—captivate the imagination because they exist at the crossroads of other bodies of law. This potential to bridge conventional doctrinal boundaries commands close attention. Disgorgement in particular warrants deeper analysis as it advances its unjust enrichment roots in novel contexts. One

8. See LEGAL INFO. INST., *Disgorgement*, WEX, <https://www.law.cornell.edu/wex/disgorgement> (last visited July 31, 2016) (defining “disgorgement” as “a remedy requiring a party who profits from illegal or wrongful acts to give up any profits he or she made as a result of his or her illegal or wrongful conduct”).

9. See, e.g., William W. Goodrich, *Restitution—A Modern Application of an Ancient Remedy*, 9 FOOD, DRUG & COSM. L.J. 565, 566–67, 569 (1954) (advocating that federal district courts order “predatory entrepreneur[s]” to disgorge “unlawful gains” incident to the ancient doctrine of restitution stemming from Pomponius’s second-century pronouncement: “For this by nature is equitable, that no one be made richer through another’s loss”).

10. American courts utilize the disgorgement remedy in both common law and statutory contexts across a broad spectrum of breaches, for example, fiduciary duty, confidential information copyright, trademark, antitrust, and securities violations. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (AM. LAW INST. 2011) (sanctioning a restitutionary disgorgement remedy to disgorge gains from a “conscious wrongdoer”).

11. See, e.g., ERNEST WEINRIB, *CORRECTIVE JUSTICE* 158 (2012) (examining whether corrective justice goals were met in cases sanctioning disgorgement in Israel and in England). *But cf.* *Acme Mills & Elevator Co. v. Johnson*, 133 S.W. 784, 786 (Ky. 1911) (denying expectancy damages [time of breach minus contract price, which would have mimicked disgorgement of profits] despite the defendant’s breach by selling to a third party at a higher price than the contract price, because the plaintiff should have covered on the market at the time and place of delivery for less than the contract price and thus “benefited” by the breach).

12. See Steve Thel & Peter Siegelman, *You Do Have to Keep Your Promises: A Disgorgement Theory of Contract Remedies*, 52 WM. & MARY L. REV. 1181, 1181, 1184 (2011) (acknowledging the stronghold of conventional wisdom “universally accepted by scholars” of contract law’s Holmesian premise, with its default of the expectation remedy and omission of disgorgement). *But see id.* at 1184–85 (asserting that the conventional view “is radically wrong . . . across a wide range of circumstances” and that “standard contract doctrines *do* in fact require” people to keep their promises, or to disgorge their entire profit if they do not (emphasis added)).

such context is American contract law. Disgorgement furthers the deterrence of unjust enrichment. Its manner of prevention—stripping the wrongdoer of profit—draws contract law closer to tort goals. It also exists at the intersection of law and equity. If the doctrine and goals are clear, a restitution-based disgorgement remedy is a worthy addition to contract breach’s traditional arsenal of monetary relief, including expectation damages, reliance damages, and restitution.

Why is there no history of disgorgement for breaches of contract? Conventional wisdom sets forth countless doctrines that leave little room for disgorgement: contract remedy may only compensate a plaintiff for her loss,<sup>13</sup> contract law does not punish,<sup>14</sup> and efficient breaches<sup>15</sup> grease the wheels of (Pareto’s)<sup>16</sup> commerce.<sup>17</sup> The *Restatement (Second) of Contracts* did not sanction a disgorgement remedy for breach of contracts.<sup>18</sup> This was not a historical accident but likely a purposeful omission.<sup>19</sup> Yet facts involving breach of contract have continued to give rise to an intuitive need for disgorgement, thereby providing an avenue for legal evolution.

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13. See Roberts, *supra* note 7, at 149–50.

14. *Id.* at 148–49.

15. The doctrine of efficient breach encourages breach of contract where one party will profit more through breach, including the cost of paying damages, than through performance of its contractual promise. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (8th ed. 2010).

16. A Pareto improvement is possible if at least one person is better off while another is no worse off; the move is efficient until there is no move that improves one’s lot without depleting another’s, reaching Pareto optimality. See *Pareto Optimality*, BLACK’S LAW DICTIONARY (10th ed. 2014). Pareto efficiency may be easier said than done. For a provocative critique of Pareto optimality that takes seriously Ronald Coase’s transaction costs, see generally Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991). For an explanation of Coase’s theorem, see generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

17. Roberts, *supra* note 7, at 158.

18. RESTATEMENT (SECOND) OF CONTRACTS § 344 (AM. LAW INST. 1981) (listing available remedies with no mention of disgorgement).

19. Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559, 560–61 (2006) (discussing Allen Farnsworth’s—as the Reporter for much of the *Restatement (Second) of Contracts*—intentional omission of disgorgement as a viable breach of contract remedy from section 344’s exclusive catalog of remedies); see also *id.* at 561 (noting Professor Farnsworth’s normative opposition to the disgorgement interest in contract law, as evidenced in his leading article, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339 (1985)).

The *Restatement (Third) of Restitution and Unjust Enrichment* pushed disgorgement through the tiny crack in the door.<sup>20</sup> Specifically, the *Restatement (Third) of Restitution* approved a disgorgement of the wrongdoer's profit from an *opportunistic breach of contract*<sup>21</sup> where (i) the breach is deliberate, (ii) damages afford inadequate protection for the plaintiff's contractual entitlement, and (iii) the breach is profitable.<sup>22</sup> This section had little historical precedent in U.S. contract law.<sup>23</sup> The limited citations stem from a few cases.<sup>24</sup> Those cases, however, did not forge a

20. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (AM. LAW INST. 2011). More than a decade in the making, the *Restatement (Third) of Restitution* is impressive for its breadth across a host of doctrinal fields and its refinement of the substantive and remedial law of unjust enrichment and restitution.

21. Opportunism is not an element of the section, but rather a rhetorical device in the title as well as discussed in comments as a conscious advantage taking of another without permission. *See id.* § 39 cmt. b.

22. *Id.* § 39.

23. Conventional wisdom relied upon the Fuller and Perdue tri-part classification of monetary remedies for breach of contract: expectancy, reliance, and restitution. *See* L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52, 56 (1936). The restitution interest for breach of contract typically constituted a return of money paid (money had and received) or reasonable value for goods delivered (quantum valebant) or for services rendered (quantum meruit). RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 49. Restitution viewed more broadly includes other remedial forms including disgorgement of a defendant's profits to undo unjust enrichment. *See id.* § 51. In recent years, casebook treatment has acknowledged that, although a gain-based remedy is unlikely for "mere breach of contract," certain circumstances may enable a plaintiff to strip a defendant of profits pursuant to the disgorgement remedy. Compare the recent edition of JOHN P. DAWSON ET AL., *CONTRACTS: CASES AND COMMENT* 118 (10th ed. 2013) (exploring a disgorgement remedy alternative, including a pro-disgorgement precedent as a principal case, *Watson v. Cal-Three, LLC*, 254 P.3d 1189, 1194–95 (Colo. App. 2011), which quotes prominently *EarthInfo, Inc. v. Hydrosphere Res. Consultants, Inc.*, 900 P.2d 113, 119 (Colo. 1995) (en banc) ("If . . . the [contract breaching party's] wrongdoing is intentional or substantial, or there are no other means of measuring the wrongdoer's enrichment, recovery of [the breaching party's] profits may be granted.")), with prior editions, for example, JOHN P. DAWSON ET AL., *CONTRACTS: CASES AND COMMENT* xl, 934–36, 945 (9th ed. 2008) (no inclusion of *EarthInfo* in the table of contents and no mention of disgorgement in the index, including no entry for disgorgement under "damages," "equitable remedies," "remedies" or "restitution").

24. *See, e.g.*, *Laurin v. DeCarolus Constr. Co.*, 363 N.E.2d 675, 679 (Mass. 1977) (awarding a gain-based theory of recovery for breach of contract). The *Restatement (Third) of Restitution* recognizes the essential newness of the section authorizing disgorgement for opportunistic breaches of contract. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. II, ch. 4, introductory note. The Reporter asserted the disgorgement provision is justified based on a few foundational cases coupled with the rising tide of scholarly voices in favor of the remedy's recognition. *Id.* reporter's note a.

clear pathway regarding the cause of action,<sup>25</sup> the remedy,<sup>26</sup> or its contours.

This Essay examines the Supreme Court's recent endorsement of the disgorgement remedy in a breach of contract setting.<sup>27</sup> Lower courts, state and federal, have begun applying disgorgement to certain contractual breaches.<sup>28</sup> Those cases raise a host of questions about the law-equity divide, the intent required, and the reach of the remedy. Now, the Supreme Court speaks to endorse section 39 of the *Restatement (Third)*

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25. See *Snepp v. United States*, 444 U.S. 507, 515–16 (1980) (authorizing an equitable constructive-trust remedy in favor of the government over ex-CIA agent's book profits). Though *Snepp* permitted the government to disgorge the defendant's gains through a constructive trust, the Supreme Court failed to articulate the exact right the remedy vindicated. See, e.g., Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1034 n.34 (2011) (criticizing the Court's lack of explanation, if not logic, for its right-to-remedy link). Professor Nicholas Sage draws the connection the Court failed to show in that he views *Snepp* (as well as its British counterpart, *Attorney General v. Blake* [2001] 1 A.C. 268 (H.L.)) as using a disgorgement-type remedy, in the form of constructive trust over unauthorized profit, for breach of a negative covenant:

The promisee has the right that the promisor not perform *any* instance of the relevant type of act. Therefore, when the promisor performs an instance of the act, it is clear that *the promisee's rights and the promisor's profitable action coincide*. The profitable action is contrary to the promisee's rights, and disgorgement may be available.

Nicholas W. Sage, *Disgorgement: From Property to Contract*, 66 U. TORONTO L.J. 244, 259 (2016) (second emphasis added) (tying *Snepp*, *Blake*, and other negative covenant cases to the above-quoted analysis and in particular to Professor Sage's thesis that a contract disgorgement remedy is available only to the extent the defendant's profitable action contravenes the plaintiff's right). *Snepp* violated the government's contractual right, but *Snepp*'s profitable action may not have contravened that right. *Snepp* claimed the government admitted that his book contained no classified information, yet the Court could permit disgorgement of profits for *Snepp*'s breach of the negative covenant requiring prepublication clearance. The Court, however, did not trace the profit to the wrong: Thus, one could argue that the government was not entitled to earn the profit that *Snepp* made unless *Snepp* profited from publishing classified information.

26. See *Laurin*, 363 N.E.2d at 677.

27. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015).

28. See, e.g., *Hicks v. DLC, Inc.*, No. CJ-2009-02805, 2013 WL 3722308 (D. Okla. June 19, 2013) (declining disgorgement for breach of professional covenant not to compete); *Watson v. Cal-Three, LLC*, 254 P.3d 1189 (Colo. App. 2011) (finding an award of disgorgement an appropriate remedy for a bad-faith, deliberate breach by a profiting loan guarantor); Motion to Reconsider, *Alaska Rent-A-Car, Inc. v. Cendent Corp.*, No. 303CV00029, 2008 WL 6582579 (D. Alaska Oct. 22, 2008) (seeking reconsideration of the court's finding of insufficient proof of opportunism for a contractual disgorgement remedy). Disgorgement for breach of contract is on the rise and may be a logical extension of the reasons underlying proprietary disgorgement awards. See Sage, *supra* note 25, at 272 (arguing that his "new account of disgorgement . . . reveals that, in the emerging body of cases awarding or denying disgorgement for breach of contract, courts are maintaining an approach that has all along been implicit in their resolution of at least some cases of proprietary disgorgement").



of *Restitution*'s disgorgement remedy for a breach of contract. For a variety of reasons, however, the reach of the Court's endorsement is unclear. The quasi-public nature of the contract and related settlement agreement likely cloud the applicability of section 39 to generic contract claims.<sup>29</sup> Such contracts technically morph into compacts because the Constitution requires that Congress approve agreements between states.<sup>30</sup> The limits on the holding include a law-equity distinction and the effects of the public context on the requisite intent to trigger access to disgorgement. The case may pose more questions than answers, especially for breach of purely private agreements.

The ruling's import is difficult to predict not simply because of the uniqueness of the case, but also given the Court's track record. Specifically, the Court has a tortured history with restitution (and with several lines of remedies cases more broadly).<sup>31</sup> Despite the complex terrain, the Court's disgorgement ruling will add to what I have described as the restitution revival in the United States. Love or hate the ruling, it will be cited and debated, and courts may well look to its teachings for relevant extensions or limitations in private law. All of which will be fruitful for the law of restitution, contracts, and remedies.

Contracts, remedies, and restitution scholars should look forward to seeing how this story unfolds. My continued prediction, as well as normative desire, is for a principled expansion of the body of contract law—one that honors the goal of preventing unjust enrichment by authorizing what may be the only meaningful remedy for specific instances of that wrong.

## II. SUPREMELY DISGORGED AS A MATTER OF ORIGINAL JURISDICTION

*Kansas v. Nebraska* will not generate as much buzz as controversial constitutional cases. As with any good sleeper, however, its effect may be profound. It arises as a matter of original jurisdiction,<sup>32</sup> which is an

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29. See *Kansas*, 135 S. Ct. at 1058, 1062–63.

30. *Id.* at 1049.

31. I plan to compile these remedies errors in a forthcoming manuscript, *The Supreme Court—Wrong on Remedies*. See DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES—CASES & MATERIALS 493–94 (8th ed. 2011) (describing several myths and misstatements in judicial opinions regarding restitution); Doug Rendleman, *Remedies—A Guide for the Perplexed*, 57 ST. LOUIS U. L.J. 567, 567 (2013) (noting that when the Court “deals with a federal issue in Remedies, the Court has been at best confusing, as in contempt, and at worst, wrongheaded and regressive, as in punitive damages” (footnote omitted)); Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 73, 76–77, 80 (2008) (accord with respect to the Supreme Court's misguided, rigid, and inaccurate treatment of equitable considerations for injunctions).

32. See U.S. CONST. art. III, § 2. For a critical examination of the history of original jurisdiction over state-party cases and the need for its continuation and expansion, see generally

increasingly rare avenue onto the Supreme Court's docket.<sup>33</sup> It is a dispute over exceeding the allocation of water rights, pursuant to both an interstate agreement and a related settlement agreement.<sup>34</sup> Both the basis of jurisdiction and the nature of the suit raise special considerations for the proceeding and its potential effect.

### A. *Original Jurisdiction and Equity*

Three main paths to the U.S. Supreme Court exist, the first of which is least used: (1) original jurisdiction, (2) review of a final judgment from the highest court of a state, and (3) review of a final judgment of a U.S. Court of Appeals.<sup>35</sup> The exercise of original jurisdiction is rare.<sup>36</sup> It involves cases initiated in the Supreme Court.<sup>37</sup> Accordingly, the nature of the proceeding is unusual because the standard operation of the Court is overwhelmingly in its appellate, rather than its trial, capacity.<sup>38</sup>

The rarity of the exercise stems from the limited scope of original jurisdiction. Jurisdictional power arises from Article III, which states, "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction."<sup>39</sup> Article III's grant of original jurisdiction is supported by statutory authority as well.<sup>40</sup> The statute provides, in

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James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction*, 82 CALIF. L. REV. 555 (1994).

33. Though the Court possesses original jurisdiction over disputes between states, the Court has prudentially narrowed its jurisdiction over such cases under an appropriateness doctrine in which the Court evaluates the "seriousness and dignity of the claim[s]" and the availability of alternative forums and may decline jurisdiction to preserve its resources to resolve appeals involving federal questions. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); see Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185, 187 (1993) ("The Founders may well have anticipated that original jurisdiction cases would be a major part of the Supreme Court's workload. In fact, such cases have always been relatively few in number.").

34. *Kansas*, 135 S. Ct. at 1048.

35. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 695 (6th ed. 2012).

36. Gary S. Gildin, *The Supreme Court's Legislative Agenda to Free Government from Accountability for Constitutional Deprivations*, 114 PA. ST. L. REV. 1333, 1337 (2010).

37. *Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "original jurisdiction" as "a court's power to hear and decide a matter before any other court can review the matter").

38. For a general discussion of the division of labor among the federal courts (also versus state courts) and the nature of the Supreme Court's original jurisdiction, see Chapters 1 & 12 of MICHAEL P. ALLEN, MICHAEL FINCH & CAPRICE L. ROBERTS, *FEDERAL COURTS—CONTEXT, CASES, AND PROBLEMS* 1–28, 851–56 (2d ed. 2015).

39. U.S. CONST. art. III, § 2.

40. 28 U.S.C. § 1251(a) (2012). This statutory authorization is superfluous, given the Supreme Court's interpretation of Article III as self-executing, and thus directly vests original jurisdiction. See, e.g., *Arizona v. California*, 373 U.S. 546, 564 (1963); *Wisconsin v. Pelican Ins.*

relevant part, “The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.”<sup>41</sup> Congress cannot expand the constitutional jurisdictional grant,<sup>42</sup> rather, the list in Article III poses a ceiling of original jurisdiction for the Supreme Court.<sup>43</sup> Further, Congress cannot reduce the Court’s original jurisdiction, given the self-executing nature of Article III, which imbues the Court with original jurisdiction to “hear the cases despite the absence of statutory authority.”<sup>44</sup>

Cases of original jurisdiction require the Supreme Court to function as a trial court.<sup>45</sup> In reality, the Court is not equipped to operate smoothly as a trial court.<sup>46</sup> Putting it bluntly, “[t]he Supreme Court lacks the time and resources to function effectively as a court of original jurisdiction.”<sup>47</sup> Early in the Court’s history, it intimated that the Article III category of original versus appellate jurisdiction is distinct.<sup>48</sup> Before long, the Court altered course and ruled the Court could hear appeals of cases with the characteristics listed in the original jurisdiction clause.<sup>49</sup> The Court signaled to Congress to grant concurrent jurisdiction over original jurisdiction matters to state and lower federal courts.<sup>50</sup> The Court desired congressional relief from the burden of having to be the court of first

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Co., 127 U.S. 265, 300 (1888); *Kentucky v. Dennison*, 65 U.S. 66, 98 (1860); *see also* CHEMERINSKY, *supra* note 35, at 696 (asserting, and citing, the same).

41. 28 U.S.C. § 1251(a). The remainder of the statute provides:

- (b) The Supreme Court shall have original but not exclusive jurisdiction of:
  - (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;
  - (2) All controversies between the United States and a State;
  - (3) All actions or proceedings by a State against citizens of another State or against aliens.

*Id.* § 1251(b).

42. *See Marbury v. Madison*, 5 U.S. 137 (1803) (invalidating, as an unconstitutional expansion of Article III’s grant of original jurisdiction, the Judiciary Act of 1789’s authorization of original jurisdiction over cases in which petitioner requests from the Supreme Court a writ of mandamus against a federal government officer); *see also* ALLEN, FINCH & ROBERTS, *supra* note 38, at 854 (discussing this aspect of *Marbury*).

43. CHEMERINSKY, *supra* note 35, at 177–78; *see also* ALLEN, FINCH & ROBERTS, *supra* note 38, at 166 fig. 3–1 (depicting Professor Chemerinsky’s floor-ceiling concept in a visual figure).

44. CHEMERINSKY, *supra* note 35, at 696 (asserting that congressional “subtractions [from original jurisdiction] are irrelevant”).

45. *See supra* note 39 and accompanying text.

46. ALLEN, FINCH & ROBERTS, *supra* note 38, at 855.

47. CHEMERINSKY, *supra* note 35, at 697.

48. *Id.* at 696–97 (interpreting *Marbury*).

49. *Id.*; *Cohens v. Virginia*, 19 U.S. 264, 392–405 (1821).

50. *See, e.g., California v. Arizona*, 440 U.S. 59, 65 (1979); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930); *see also* CHEMERINSKY, *supra* note 35, at 697.

impression for all Article III original jurisdiction cases, and Congress listened.<sup>51</sup> Accordingly, parties hardly ever seek original jurisdiction in the Court, and, when they do, the Court can exercise discretion to command that the case be refiled in state or lower federal court if concurrent jurisdiction lies.<sup>52</sup> According to the Court, it may abdicate jurisdiction to secure the highest level of the Court's "effective functioning" within the whole federal judicial system.<sup>53</sup>

Thus, the cases that the Court keeps on its original jurisdiction docket are rare indeed. The Court's docket houses only a few such cases in any given year.<sup>54</sup> Further, the Court increasingly utilizes Special Masters, who handle trials on the merits and then issue findings of fact and recommendations to the Court for its rulings.<sup>55</sup> Both the Court and the Special Masters, acting in the Court's stead, operate under notions of equity stemming from the history of original jurisdiction cases.<sup>56</sup>

All of this means such proceedings are unusual in both nature and frequency, and they likely involve heavy doses of discretion. This Essay embraces equitable discretion, as long as the Court exercises principled discretion in its reasoning and is supported by the Special Master. Here, the relevant Article III language is: "those [cases] in which a state shall be a party."<sup>57</sup> It turns out suits between two states is the only class of cases for which the Supreme Court *must* exercise its original jurisdiction.<sup>58</sup> Thus, "it is hardly surprising that virtually all that are decided as a matter of original jurisdiction arise from actions between two or more states."<sup>59</sup> Alexander Hamilton rightly predicted that the point of such jurisdiction likely was to empower the Court to resolve boundary disputes between states.<sup>60</sup> Similar cases of original jurisdiction for the Court involve state-to-state disputes over water rights, including cases regarding proper water allocation from interstate rivers.<sup>61</sup> Such is the dispute in *Kansas v. Nebraska*.

51. The current iteration of concurrent jurisdiction is 28 U.S.C. § 1251(b) (2012).

52. CHEMERINSKY, *supra* note 35, at 697.

53. *Texas v. New Mexico*, 462 U.S. 554, 570 (1983).

54. CHEMERINSKY, *supra* note 35, at 698.

55. *See infra* note 71 (outlining the role, as well as scholarly criticism of the use, of Special Masters).

56. *See infra* Section II.C (examining the Court's classification of the case as equitable as a matter of its tradition of original jurisdiction).

57. U.S. CONST. art. III, § 2.

58. CHEMERINSKY, *supra* note 35, at 698.

59. *Id.* (citing CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* 192 (1988)).

60. *Id.* (citing *THE FEDERALIST* NO. 80, at 477–78 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

61. *Id.* at 699; *see, e.g., Colorado v. New Mexico*, 467 U.S. 310, 312 (1984); *Nebraska v. Wyoming*, 325 U.S. 589, 591 (1945); *see also Ohio v. Kentucky*, 410 U.S. 641, 642 (1973) (river boundary dispute); *Missouri v. Illinois*, 180 U.S. 208, 228 (1901) (interstate water pollution dispute).

### B. *The Extraordinary Ruling in Kansas v. Nebraska*

In *Kansas v. Nebraska*, the Supreme Court endorses a disgorgement remedy, ordering Nebraska to disgorge \$1.8 million of its profits for breaching its water-rights compact with the state of Kansas.<sup>62</sup> Justice Kagan delivered the opinion of the Court.<sup>63</sup> Justices Thomas and Scalia wrote separate largely dissenting opinions,<sup>64</sup> primarily charging the Court with exceeding its equitable powers by following the *Restatement (Third) of Restitution* and creating a “‘novel extension’ of the law that finds little if any support in case law.”<sup>65</sup>

The dispute stemmed from an agreement among Kansas, Nebraska, and Colorado over water rights to the “‘virgin water supply originating’ in the Republican River Basin.”<sup>66</sup> Congress approved the agreement, the Republican River Compact, in 1943.<sup>67</sup> Each signatory state received an annual water allocation, which included the counting of groundwater pumping depletions to the Basin’s stream flow.<sup>68</sup> “All was smooth sailing

62. 135 S. Ct. 1042, 1049–51, 1064 (2015).

63. *Id.* at 1048.

64. *Id.* at 1064 (Scalia, J., concurring in part and dissenting in part) (writing separately to highlight the “questionable value” of Restatements that go beyond describing the law and to advise caution when using); *id.* at 1064–65, 1067 (Thomas, J., concurring in part and dissenting in part). The reason for Justice Thomas’s concurrence primarily regards the Court’s denial of injunctive relief, as the Special Master recommended, and the Court’s finding that Nebraska acted knowingly rather than deliberately. *Id.* at 1064–65.

65. *Id.* at 1064 (Scalia, J., concurring in part and dissenting in part) (quoting Roberts, *supra* note 7, at 134); *see also id.* at 1064–69 (Thomas, J., concurring in part and dissenting in part) (quoting Roberts, *supra* note 7, at 134). Justices Scalia and Thomas rip my prediction from its context. In the cited article (which is one in a line of related articles), I do argue that restitutionary disgorgement extends conventional contract boundaries, but I advocate that disgorgement remedies and unjust enrichment principles would foster an environment in which actors operate conscientiously to mitigate avoidable consequences. Further, my foundational article on the novel nature of extending a disgorgement remedy to opportunistic contract breaches concluded: “But, in the end, a Trojan horse is a bad thing only if you want the Greeks to lose.” Caprice Roberts, *Restitutionary Disgorgement as a Moral Compass for Breach of Contract*, 77 U. CIN. L. REV. 991, 1026 (2009).

66. *Kansas*, 135 S. Ct. at 1049 (explaining further the Compact’s definition of virgin river supply as “‘the water supply within the Basin,’ in both the River and its tributaries, ‘undepleted by the activities of man’”).

67. *Id.*

68. *Id.* at 1049–50. A Ground Water Atlas for Kansas-Nebraska-Missouri (rather than Colorado) explains:

The major rivers that drain these States are the Niobrara, the Platte, the Kansas, the Arkansas, and the Missouri; the Mississippi River is the eastern boundary of the area. These rivers supply water for many uses but ground water is the source of slightly more than one-half of the total water withdrawn for all uses within the three-State area.

for decades . . . .”<sup>69</sup> Then, in 1998, Kansas complained to the Supreme Court in an original action that Nebraska’s increased pumping of groundwater exceeded the agreement.<sup>70</sup> The Court appointed a Special Master,<sup>71</sup> who agreed with Kansas’s factual interpretation—a determination with which the Court summarily agreed.<sup>72</sup> Upon remand, the dispute resulted in negotiations to agree on the best method of measurement and accounting.<sup>73</sup> Ultimately, the discussions resulted in a 2002 settlement agreement.<sup>74</sup>

By 2007, both states had concerns about the operation of the settlement agreement’s parameters.<sup>75</sup> Kansas claimed that, during the 2005–2006 accounting period, Nebraska “substantially exceeded” the proper allocation of water.<sup>76</sup> Pursuant to the settlement agreement, the states entered into non-binding arbitration, which proved fruitless.<sup>77</sup> Kansas next sought monetary and injunctive relief in the Supreme Court, which again referred the case to a Special Master.<sup>78</sup>

For two years, the Special Master heard evidence and legal arguments regarding Nebraska’s alleged breach and ultimately issued his report and

JAMES A. MILLER & CYNTHIA L. APPEL, U.S. GEOLOGICAL SURVEY, GROUND WATER ATLAS OF THE UNITED STATES: SEGMENT 3, at D2 (1997), <http://pubs.usgs.gov/ha/730d/report.pdf>.

69. *Kansas*, 135 S. Ct. at 1049.

70. *Id.* at 1049–50.

71. *Id.* at 1050. The Supreme Court using Special Masters is common in its exercise of original jurisdiction, but it is not without controversy. See generally Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court’s Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 627 (2002) (exploring the expanding role of the Supreme Court’s use of Special Masters and suggesting reforms). The increase of use and expansion of the scope of power of Special Masters warrant close attention:

The Court delegates many of its trial functions to Special Masters, who are neither elected nor appointed by an elected body . . . . [T]he Court has delegated greater pockets of its fact-finding and its legal decision-making authority in original jurisdiction cases to Special Masters, who sometimes have little or no judicial experience and who embark on their duties with limited guidance or oversight from the Court.

*Id.* at 627–28.

72. *Kansas*, 135 S. Ct. at 1050.

73. *Id.*

74. *Id.* The settlement agreement “charged Nebraska for its depletion of the Basin’s stream flow due to groundwater pumping—an amount the State had not previously counted toward its allotment,” but provided a multi-year averaging system to allow Nebraska sufficient time to achieve the required reductions. *Id.* at 1054.

75. *Id.* at 1050.

76. *Id.*

77. *Id.* at 1050–51.

78. *Id.* at 1051.

recommendations.<sup>79</sup> The report concluded that “Nebraska had ‘knowingly failed’ to comply with the Compact in the 2005–2006 accounting period, by consuming 70,869 acre-feet of water in excess of its prescribed share.”<sup>80</sup> He recommended compensatory relief and disgorgement to remedy the breach, but denied Kansas’s requested injunctive relief.<sup>81</sup> The proposed award included \$3.7 million to Kansas for its loss and an additional \$1.8 million in partial disgorgement of Nebraska’s profits from the breach.<sup>82</sup> Both Kansas and Nebraska filed exceptions to the report.<sup>83</sup>

Nebraska disagreed with the finding of “knowing” breach as well as the recommendation in favor of partial disgorgement.<sup>84</sup> Meanwhile, Kansas pressed its case for a larger disgorgement and injunctive relief, and objected to Nebraska’s suggested revision to the Accounting Procedures.<sup>85</sup> The Supreme Court gave the Special Master’s factual findings “respect and a tacit presumption of correctness,” but independently reviewed the record, assuming “the ultimate responsibility for deciding” all issues.<sup>86</sup> Ultimately, the Court adopted the Special Master’s recommendations and (i) ordered partial disgorgement of \$1.8 million,<sup>87</sup> (ii) denied injunctive relief,<sup>88</sup> and (iii) revised the accounting procedures to conform to the parties’ agreements.<sup>89</sup>

### C. *The Equitable Side of the Law-Equity Divide*

Disgorgement never solidified as a pure equitable or legal remedy. Rulings are inconsistent given the functional appearance of disgorgement as a monetary award. The *Restatement (Third) of Restitution* classifies

79. *Id.*

80. *Id.*

81. *Id.* Kansas requested injunctive relief ordering Nebraska to follow the Compact and settlement, which would then lead to contempt sanctions for future noncompliance. *Id.* at 1059. The Special Master did recommend revised accounting procedures pursuant to Nebraska’s demand that it not be charged for “‘imported water’—that is, water farmers bring into the area (usually for irrigation) that eventually seeps into the Republican River.” *Id.* at 1050.

82. *Id.* at 1051.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* (quoting *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984)).

87. *Id.* at 1051, 1064.

88. *Id.* at 1051, 1059.

89. *Id.* at 1051, 1063–64 (acknowledging some lament about the parties’ inability to resolve this essentially agreement-interpretation dispute but ultimately amending the accounting procedures to “no longer charge Nebraska for imported water”). *But see id.* at 1065 (Thomas, J., concurring in part and dissenting in part) (asserting that the majority “invents a new theory of contract reformation to rewrite the agreed-upon terms of that contract”).

the disgorgement remedy as legal.<sup>90</sup> Most courts, however, view disgorgement as equitable given its historical affiliation with the equitable remedy of accounting.<sup>91</sup>

In *Kansas v. Nebraska*, the Court reinforced the equity classification because the Court began with the premise that it was operating in equity incident to its original jurisdiction,<sup>92</sup> stemming explicitly from the Constitution.<sup>93</sup> Without examining the remedies at issue, the Supreme Court declared that it operated in equity by nature of the jurisdiction for the controversy. It pronounced: “Proceedings under that grant of jurisdiction are ‘basically equitable in nature.’”<sup>94</sup> The rationale was that such jurisdiction authorizes a role different from the Court’s role in private controversies, where instead the Court acts as a diplomatic settlement authority to resolve disputes between two sovereigns.<sup>95</sup>

Given the special nature of this role, the Court may craft the process and relief to “best promote the purposes of justice.”<sup>96</sup> The Court bolstered the “essentially equitable character of [its] charge” based on the subject matter of the Compact and the settlement agreement—rights to an interstate waterway—as well as the Compact’s heightened status of federal law.<sup>97</sup> Without the power of one state to resort to war between another, the state is left with the judicial power to halt the “inequitable taking of water” by utilizing the Court’s “equitable apportionment power.”<sup>98</sup>

Though this equitable posture is flexible, the Court is not without admitted limits. In fashioning a remedy designed to stop abuse, the Court must fairly and consistently interpret the Compact and its express terms.<sup>99</sup> No sooner did the Court explain the boundaries than it reiterated the expanse of its power in this public versus pure private sphere: both broader and more flexible in the public realm, especially when using equity power to render complete justice.<sup>100</sup>

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90. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT II 4 Intro. Note (AM. LAW INST. 2011).

91. See, e.g., Thel & Siegelman, *supra* note 12, at 1201 (equating disgorgement to the ancillary equitable remedy of accounting of profits rooted in restitution keyed to the defendant’s gain rather than damages tied to compensating the plaintiff’s loss).

92. 135 S. Ct. at 1051.

93. U.S. CONST. art. III, § 2.

94. 135 S. Ct. at 1051 (quoting *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973)).

95. *Id.* at 1051–52.

96. *Id.* at 1052 (quoting *Kentucky v. Dennison*, 65 U.S. 66, 98 (1861)).

97. *Id.* at 1052–53.

98. *Id.* at 1052.

99. *Id.* at 1052 & n.4 (“Far from claiming the power to alter a compact to fit our own views of fairness, we insist only upon broad remedial authority to enforce the Compact’s terms and deter future violations.”).

100. *Id.* at 1053 (citing a string of cases about the broad equitable powers to further the public interest). The dissent critiques the Court for applying precedents regarding sovereign rather than



The equitable classification, as it applies to disgorgement, is not wholly consistent with other Supreme Court cases, which treat restitution inconsistently and sometimes incorrectly.<sup>101</sup> Some of the confusion stems from using equity interchangeably with notions of justice and fairness. Genuine confusion persists because restitution can be legal, equitable, and sometimes both.<sup>102</sup> On that basis, an argument can be made for categorizing disgorgement as legal.<sup>103</sup> The distinction matters because of the Seventh Amendment right (and comparable state constitutional rights) to a jury trial.<sup>104</sup> Under a functional remedies test,<sup>105</sup> some may see disgorgement as appearing aligned with monetarily relief and thus legal. However, given the basis for original jurisdiction as well as the history of the disgorgement remedy, others may focus on the history of the cause of action to support the equitable frame, as Justice Thomas did in *Feltner v. Columbia Pictures Television, Inc.*<sup>106</sup>

For now, equity it is. As such, the constitutional right to a jury trial does not extend to contract-based disgorgement claims. Further, an equitable classification brings with it language of discretion and creativity to render full relief. Equitable fashioning of relief may bypass traditional limitations on the right and the remedy.

water rights. *Id.* at 1066 (Thomas, J., concurring in part and dissenting in part). The majority retorts that the Framers purposefully required congressional approval of such compacts and that this “choice means that the judicial authority we have recognized to give effect to, and remedy violations of, federal law fully attends a compact.” *Id.* at 1053 n.5 (majority opinion).

101. Roberts, *supra* note 25, at 1039 n.69 (providing examples of Supreme Court cases conflating legal and equitable restitution as well as restitution and damages).

102. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4(1) (AM. LAW INST. 2011) (“Liabilities and remedies within the law of restitution and unjust enrichment may have originated in law, in equity, or in a combination of the two.”).

103. See Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1, 12 (2013).

104. U.S. CONST. amend. VII (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.”); see, e.g., FLA. CONST. art. I, § 22.

105. Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1422–23 (2015) (explaining that a more functional analysis of the jury trial right examines the remedy sought rather than legal history). This test, popular among remedies scholars, would simply analyze the form of relief: money (in rem relief) versus an order operating on the defendant (in personam). *Id.* at 1423. That said, no solution is perfect, as many remedies historically categorized as legal or at-law remedies are non-monetary—including the writ of mandamus, replevin, and habeas corpus. See Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 593 (2016) (“Not all remedies that compel action or inaction are within the system [of equitable remedies], for mandamus, habeas, replevin, and ejectment are classically legal remedies.”).

106. 523 U.S. 340, 347–55 (1998); see Roberts, *supra* note 25, at 1030–32 (examining the elusive nature of the merger of law and equity given the constitutional right to a jury trial, especially for extensions of ancient remedies to evolving conceptions of wrongs within the hybrid context of contracts and restitution at the borderland of torts).

### D. *Assessing Intent: Knowing Breach Suffices*

Conventional contract wisdom, per Justice Holmes, reinforces freedom of contract because it includes an option to perform or breach if a party is prepared to pay the consequences: “The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else.”<sup>107</sup> Also, under American law’s traditional approach, breach of contract is a strict liability action.<sup>108</sup> The question is whether a defendant breached—not why or how.<sup>109</sup>

Nebraska conceded breach and the corresponding compensatory harm.<sup>110</sup> Ordinarily, this would be the end of the road, whether for a breach of contract or even for a breach of compact claim. But Kansas argued that the Court should award disgorgement pursuant to restitution principles.<sup>111</sup> The Special Master and the Court agreed.<sup>112</sup> The ruling is controversial in two respects: (i) it assesses intent,<sup>113</sup> deeming a knowing breach sufficient, and (ii) it exceeds compensatory relief by permitting disgorgement.

Nebraska specifically admitted that it exceeded its allotted apportionment of water rights under the Compact by approximately seventeen percent.<sup>114</sup> It denied, however, that it engaged in wrongful behavior in terms of the Special Master’s finding of intent: knowing

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107. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897); see Roberts, *supra* note 7 (examining whether a restitutionary disgorgement remedy for opportunistic breach of contract is compatible with conventional contract doctrines such as the Holmesian choice principle). Justice Holmes’s normative intent is debatable, though one plausible extension of the logic lays the foundation for encouraging efficient breach. Efficient breach proponents favor contract doctrine that promotes efficient breach, while others maintain efficient breach is so “very rare” as to be “largely a red herring.” Thel & Siegelman, *supra* note 12, at 1187.

108. Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 FORDHAM L. REV. 3013, 3016–17 (2007).

109. For a provocative argument that willful breach cases exist but that focus should not be on injury, but rather on whether the promise was one undertaken *ex ante*, with an understanding that one would not breach and therefore should be more authentically treated as breaches to be prevented or deterred, see generally Steve Thel & Peter Siegelman, *Willfulness Versus Expectation: A Promisor-Based Defense of Willful Breach Doctrine*, 107 MICH. L. REV. 1517, 1518 (2009).

110. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1049 (2015).

111. *Id.*

112. *Id.*

113. To be clear, contract law conventionally does not focus on intent regarding breaches, though it considers intent with respect to other limited facets of contract doctrine such as: good faith, mitigation, material breach, and more. See, e.g., U.C.C. § 1-304 (AM. LAW INST. & UNIF. LAW COMM’N 1977) (imposing a good-faith obligation in performance and enforcement of agreements); *Rockingham Cty. v. Luten Bridge Co.*, 35 F.2d 301, 308 (4th Cir. 1929) (applying a duty of mitigation on a nonbreaching party to halt avoidable damages); *Wood v. Lucy*, 118 N.E. 214, 214 (N.Y. 1917) (implying a duty of good faith into an exclusive agency contract).

114. *Kansas*, 135 S. Ct. at 1053.

breach.<sup>115</sup> Nebraska further argued that additional recovery in the form of disgorgement could not stand, though it conceded compensatory harm in the amount of \$3.7 million for Kansas's losses.<sup>116</sup>

The Court rejected all of Nebraska's contentions regarding these points. Regarding intent, the Court endorsed the Special Master's finding, noting ample support in the record: "Nebraska failed to put in place adequate mechanisms for staying within its allotment in the face of a known substantial risk that it would otherwise violate Kansas's rights."<sup>117</sup> Notably, the Court remarked that the evidence showed Nebraska's efforts were "too late" and "too little."<sup>118</sup> Nebraska, according to the Court, could see the writing on the wall: anticipating breach, and acting with that knowledge, "Nebraska began purchasing its farmers' rights to surface water in order to mitigate its anticipated breach."<sup>119</sup> Nebraska knew of the likelihood of breach from the moment of the settlement agreement's execution, but proceeded regardless "straight toward a Compact violation."<sup>120</sup> Accordingly, the Court adopted the Special Master's conclusion on Nebraska's intent: it "knowingly exposed Kansas to a substantial risk" of yielding less than the Compact apportioned, and thus Nebraska "knowingly failed" to comport with the settlement agreement's obligations.<sup>121</sup> The Court also endorsed the Special Master's finding of "reckless indifference" to compliance, or in the Court's own characterization: "Nebraska recklessly gambled with Kansas's rights, consciously disregarding a substantial probability that its actions would deprive Kansas of the water to which it was entitled."<sup>122</sup>

The Court's framing is intriguing because, much like disgorgement for opportunistic breach of contract in the *Restatement (Third) of Restitution*, the framing relies upon words of intent more familiar in the torts arena: recklessness and conscious disregard for the rights of another. The comments to the *Restatement (Third) of Restitution* describe the type of opportunistic breach required for disgorgement as "conscious

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115. *Id.* at 1054. Nebraska maintains that it "could not have known" about its earlier noncompliance and that it took "persistent and earnest" steps to comply. *Id.*

116. *Id.* at 1053.

117. *Id.* at 1054. In fact, Nebraska's "overuse of Republican River water actually rose significantly from 2003 through 2005, making compliance at the eventual day of reckoning ever more difficult to achieve." *Id.* at 1055.

118. *Id.*

119. *Id.* This effort to mitigate, however, "fell woefully short" in the Special Master's opinion. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 1056.

advantage-taking.”<sup>123</sup> In contractual contexts, the wrong being committed must be something more than simple breach of a promise. Rather, in determining whether disgorgement is appropriate, a court must also look to the method of the breach—the how and the why. It is the lack of correlation of the traditional remedies to this type of wrong that inspires the Court to permit an extra-compensatory disgorgement award.

#### E. *Exceeding Compensation but Detering Opportunism*

The Court approved the Special Master’s recommendation for partial disgorgement of Nebraska’s profits.<sup>124</sup> The ruling relied on extensive evidence from which the Special Master justified extra-compensatory relief. In particular, the Special Master found that the excess acre-foot of water was “substantially more valuable” on Nebraska’s farmland than on Kansas’s and thus that Nebraska’s “reward for breaching” far exceeded—“likely by more than several multiples”—Kansas’s loss.<sup>125</sup> As a result, the Special Master ordered, and the Court approved, Nebraska to disgorge part of its gain in the amount of \$1.8 million.<sup>126</sup> The recommendation noted the broad remedial authority in state-to-state disputes over federal law, here the Compact.<sup>127</sup>

Again, Nebraska asserted error based on its asserted lack of deliberateness.<sup>128</sup> For support, Nebraska invoked the *Restatement (Third) of Restitution*’s authorization of disgorgement for opportunistic breaches of contract only on a finding of a deliberate act.<sup>129</sup> Nebraska further maintained that the Special Master’s finding of “knowing” action did not rise to the level of showing that Nebraska officials “deliberately set out to violate the Compact.”<sup>130</sup>

The Court roundly rejected Nebraska’s position as “fail[ing] to come to terms with what the [Special] Master properly understood as the wrongful nature of Nebraska’s conduct.”<sup>131</sup> In a twist of argument, the Court then used the *Restatement (Third) of Restitution* to refute Nebraska’s theory that “knowingly” falls too short of deliberateness:

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123. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. b (AM. LAW INST. 2011) (“In countering this form of opportunism, the rule of § 39 reinforces the contractual position of the vulnerable party and condemns a form of conscious advantage-taking that is the equivalent, in the contractual context, of an intentional and profitable tort.”).

124. *Kansas*, 135 S. Ct. at 1049.

125. *Id.* at 1056.

126. *Id.* at 1056–58.

127. *Id.* at 1056.

128. *Id.*

129. *Id.* (“[A] deliberate breach of contract results in profit to the defaulting promisor.” (quoting RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT section 39(1))).

130. *Id.*

131. *Id.*

“And indeed, the very Restatement Nebraska relies on treats the two similarly. It assimilates ‘deliberate[ness]’ to ‘conscious wrongdoing,’ which it defines as acting (as Nebraska did) ‘despite a known risk that the conduct . . . violates [another’s] rights.’”<sup>132</sup>

This reasoning follows the logic of the *Restatement (Third) of Restitution* for awarding disgorgement for certain types of breaches: those that involve conscious wrongdoing by proceeding in the face of a known risk of breach. Still, the Court’s holding is not a straightforward application of the *Restatement (Third) of Restitution*, because of the non-private contract law setting. To be clear, the Court cabined its interpretation with a turn of phrase, “And whatever is true of a private contract action”<sup>133</sup>—leaving application to private contracts an open question. It then pivoted to the public nature of the dispute, the rights at stake, and the type of breach. The Court bolstered its grounds by highlighting the heightened justification for the relief—“the case for disgorgement becomes still stronger when one State gambles with another State’s rights to a scarce natural resource.”<sup>134</sup> Ultimately, the Court deemed the order of partial disgorgement of Nebraska’s gains “fair and equitable” in order “to stabilize a compact and deter future breaches,” as Kansas proved Nebraska’s “reckless disregard” of Kansas’s rights under the Compact and the settlement agreement.<sup>135</sup>

The Court also struck a blow to the Holmesian principle and efficient breach theory as they operate within conventional contract doctrine.<sup>136</sup> By finding the water more valuable to Nebraska’s farmland than Kansas’s, the Court noted the reality under conventional doctrine means “Nebraska can take water that under the Compact should go to Kansas, pay Kansas actual damages, and still come out ahead.”<sup>137</sup> Accordingly, the Court reasoned the traditional doctrine, coupled with Nebraska’s “favorable position,” created “a recipe for breach” that “Nebraska took full advantage of” to exceed its allowance.<sup>138</sup> The Court would not let this result stand, despite the fact that the disgorgement award would exceed

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132. *Id.* at 1056–57 (quoting RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 39 cmt. f, 51(3)(b)) (alterations in original). Further, the Court notes that the *Restatement (Third) of Restitution* instead distinguishes inadvertent behavior (not like Nebraska’s) from deliberateness. *Id.* at 1057.

133. *Id.*

134. *Id.*

135. *Id.*

136. *But cf.* Thel & Siegelman, *supra* note 12, at 1202 (“Disgorgement remedies will likely have only second-order effects on the incidence of efficient nonperformance of contracts, although they will of course alter the distribution of gains that result when a better alternative to performing arises.”).

137. *Kansas*, 135 S. Ct. at 1057.

138. *Id.*

compensatory goals. The Court justified its ruling on three principles: reinforcing legal obligations,<sup>139</sup> deterring future breaches, and advancing effective administration of the Compact.<sup>140</sup>

Assuming Nebraska had the ability to put the water allocated for Kansas to better use, the question becomes—Should the law encourage the breach? As a matter of economic efficiency, Nebraska’s use of Kansas’s water allocation benefitted more people than Kansas’s use of the water would have. Per Pareto,<sup>141</sup> Nebraska would be better off (as would those benefitting from the crops Nebraska grew as a result) and Kansas would be no worse off. This argument assumes that Nebraska would compensate Kansas for its loss.<sup>142</sup> Now recall that Nebraska conceded compensatory damages.<sup>143</sup> Should compensatory damages for Kansas’s losses resulting from Nebraska’s breach suffice? The Court said no. It then authorized disgorgement to service other goals.<sup>144</sup>

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139. During a faculty colloquium at West Virginia University College of Law, Professor James Friedberg suggested this argument harkens the Roman concept of *pacta sunt servanda*—agreements are to be kept—that remains relevant in international law and, more generally, in civil law jurisdictions (including Louisiana). See Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT’L L. 775, 775 (1959) (“Few rules for the ordering of Society have such a deep moral and religious influence as the principle of the sanctity of contracts: *Pacta sunt servanda*. . . . The juridical sense of the Romans recognized that a well-regulated trade was possible only if contracts were kept. Then, as earlier, contracts were considered as being under Divine protection.”); see also Roberts, *supra* note 7 (examining moral influences supporting a restitutionary disgorgement remedy). For a discussion of the meaning of *pacta sunt servanda*, see Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT’L L. 405 (1994); Josef L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 AM. J. INT’L L. 180 (1945); and Malcolm P. Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783 (1941). For a productive discussion of Louisiana’s impossibility excuse to contracts, see Charles Tabor, *Dusting off the Code: Using History to Find Equity in Louisiana Contract Law*, 68 LA. L. REV. 549, 553 (2008) (“This strict adherence to contractual terms is the product of centuries of legal development and is also called *pacta sunt servanda* (‘contracts must be honored’).”). Compare Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 722–26 (2007) (arguing that contract law diverges from morality in that it defaults to an expectation remedy rather than specific performance and places the duty of mitigation on the nonbreaching party), with Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 4–5 (2007) (debunking the foil of instrumental theorists against whom Professor Shiffrin pushes that “invoke far too crude a conception of morality”—doggedly keeping bargains—as opposed to reality of promising as “a human institution—albeit a moral one—in which human beings invoke mutual trust and mutual respect to accomplish the human purposes of one or both of them”).

140. *Kansas*, 135 S. Ct. at 1064.

141. See *supra* note 16.

142. A Kaldor–Hicks improvement extends Pareto efficiency for reallocation even if the better-off party could only hypothetically compensate the worse-off party. See generally John Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696 (1939); Nicholas Kaldor, *Welfare Propositions in Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939).

143. *Kansas*, 135 S. Ct. at 1049.

144. *Id.* at 1064.

Regardless of the Court's justifications, is the award of disgorgement duplicative when granted in addition to compensatory damages? This restitution-based remedy, as supported by the *Restatement (Third) of Restitution*, permits "disgorgement of profits [a]s an alternative to liability for contract damages measured by injury to the promisee."<sup>145</sup> Accordingly, it is extraordinary for a plaintiff to receive both compensatory damages and disgorgement of part of a defendant's gains beyond the injury. Therefore, although it disavows punishment, disgorgement moves beyond compensation to deterrence.

The availability of disgorgement, as envisioned by the American Law Institute, would encourage a party contemplating breach to think twice and consider negotiating with the other party before breaching.<sup>146</sup> Accordingly, before the Court's *Kansas v. Nebraska* ruling, Nebraska calculated the risk and chose the efficiency of breach because the benefits outweighed the anticipated, traditional liability: it prepared to pay only compensatory harm. And away it breached, prepared to defend against litigation if need be. Conventional wisdom would have yielded a purely compensatory award without disgorgement. In that universe, the breach would have been efficient: Nebraska would have profited nicely, compensated Kansas, and put the water to better use.

Yet a disgorgement ruling does not mean that efficient breach must be erased. Not every breach is alike. Even efficient breaches vary.<sup>147</sup> Nor is

145. *Watson v. Cal-Three, LLC*, 254 P.3d 1189, 1195 (Colo. App. 2011). Conventional adherents of contract doctrine may view disgorgement as unnecessary given other equitable remedies, but in some breaches injunctive, specific performance, and other ancillary equitable relief may be unattainable due to timing or other functional barriers.

146. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 cmt. b (AM. LAW INST. 2011) ("The opportunistic calculation in either setting is that the wrongdoer's anticipated liability in damages is less than the anticipated cost of the entitlement, were it to be purchased from the claimant in a voluntary transaction. Restitution (through the disgorgement remedy) seeks to defeat this calculation, reducing the likelihood that the conscious disregard of another's entitlement can be more advantageous than its negotiated acquisition.").

147. See Gregory Klass, *The Rules of the Game and the Morality of Efficient Breach*, 29 YALE J.L. & HUMAN. (forthcoming 2016) (manuscript at 1), <http://ssrn.com/abstract=2734272> (arguing for a nuanced theory of efficient breach in which "some breaches are good things, and . . . contract remedies are designed to encourage them," while remedies should deter other breaches, even though efficient, because the breach is contrary to the parties' understanding from the beginning). Professor Klass analogizes subclasses of efficient breach to Jean Renoir's 1939 film, *La Règle du Jeu* [The Rules of the Game] about French norms regarding the permissibility of marital promiscuity as long as it is properly done. *Id.* (manuscript at 2). He differentiates breaches between sophisticated parties that understand the nature of the game and will take care of themselves versus those who do not understand or wish to be bound by the rules of efficient breach. *Id.* (manuscript at 36). For sophisticated parties who contemplate the possibility and desirability of breach from the start, they enter contracts anticipating and even permitting certain breaches. *Id.* (manuscript at 12). The core notion of efficient breach is that payment of damages negates the broken promise. *Id.* (manuscript at 29). Further, sophisticated bargainers can handle

disgorgement available or proper for every breach of contract, efficient or not. Disgorgement makes profiting more difficult because the breaching party risks losing all profit, and thus disgorgement alters incentives.<sup>148</sup> Still the availability of disgorgement may simply reallocate the resource and force profit sharing *if the breaching party opts to negotiate in advance*. For example, after the Court's *Kansas v. Nebraska* ruling, with its grant of compensation plus partial disgorgement, a party like Nebraska would be wise to negotiate *ex ante* with Kansas—at the time of contract or in advance of breach—to alter the Compact allocation (and related settlement agreement) based upon its argument for a more beneficial allocation of resources. At the front end, a party like Kansas might have incentives to negotiate reasonably because disgorgement as a remedy is still developing. Even if precedent authorizing disgorgement exists, the hurdles to obtaining a grant of disgorgement at all (including a possible inadequacy showing and meeting intent thresholds) are real.

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the risks, calibrate consideration, and avoid opportunism. *Id.* (manuscript at 36). Alternatively, one-sided opportunism between unequal bargainers involves one party who purposely takes advantage of the other's weakness such that the breach redistributes gains to himself without increasing the gains of both parties. *Id.* (manuscript at 18) (noting that for such conscious advantage taking “we might as well throw the book at [him]” (alteration in original) (quoting RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 105 (3d ed. 1986))). As an example, Professor Klass offers *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962), in which the breaching party removed minimal coal from the Peevyhouse farm, but rerouted a creek onto the property to mine elsewhere. Professor Klass suggests the court capped damages at \$300 diminution in value to show the disjoint between the parties' views about contract performance: the Peevyhouses thought the contract equaled a commitment to perform rather than a choice to perform or pay damages, while Garland likely believed the parties contemplated the choice. *Id.* (manuscript at 36–38). His argument poses an interesting interpretation, though the *Peevyhouse* court confronted a statutory cap on damages, which would apply to sophisticated and unsophisticated parties alike. In sum, Professor Klass maintains “the principles that support efficient breach also entail that there are right and wrong ways to efficiently breach a contract.” *Id.* (manuscript at 18).

148. *Id.* (manuscript at 9) (“The art of cheating . . . is the taking of calculated risks. The sophisticated cheater weighs the possible gains of a transgression against the penalties should she be caught, and transgresses only when doing so is a good bet.”). Consider Judge Posner's prediction of potential recalibration of incentives after an equitable injunctive award permanently enforces an exclusivity clause in a lease where landlord agreed not to lease to a competitor pharmacy. If damages to the original pharmacy are smaller than the gain to the landlord from also leasing to the second pharmacy in the same mall property, “then there must be a price for dissolving the injunction that will make both parties better off.” *Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273, 275, 278–79 (7th Cir. 1992) (affirming permanent injunction, while theorizing efficient maneuvers available even *ex post*).



### F. *Inadequacy Revisited*

The concept of inadequacy of legal remedies is a waning historical barrier to equitable relief.<sup>149</sup> Although the *Restatement (Third) of Restitution* abandons the inadequacy requirement for all restitution remedies,<sup>150</sup> the disgorgement provision uses insufficiency language that evokes the concept of inadequacy. The Court addressed this issue in a footnote about ensuring future compliance and implicitly tracked the *Restatement (Third) of Restitution*'s requirement that available remedies be insufficient to protect a plaintiff's entitlement.<sup>151</sup> The Court explained the barriers to specific performance involving water, which include feasibility issues and tricky questions about delivery, timing, and location.<sup>152</sup> Though the Court did not cite the *Restatement (Third) of Restitution* here, or use words of inadequacy or insufficiency,<sup>153</sup> the Court appeared to find strength in the imperfection of a specific performance award (and presumably viewed such an award as similarly warranted when more feasible and manageable). The Court did not, however, appear to view this inadequacy step as a requirement to awarding disgorgement relief. In conclusion on this point, the Court simply stated the Special Master properly "found another way of preventing knowing misbehavior."<sup>154</sup> The Court also eventually adopted the denial of injunctive relief, given insufficient evidence of the "cognizable danger of recurrent violation,"<sup>155</sup> but noted that in the event of further breach, Nebraska "may again be subject to disgorgement of gains—either in part or in full, as the equities warrant."<sup>156</sup> A deterrent effect indeed.

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149. See DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 4–5 (1991); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 694 (1990). See generally Bray, *supra* note 105 (discussing the requirement of a plaintiff to show that legal remedies are inadequate to receive an equitable remedy).

150. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4. See also Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929, 931 (2012) (noting the *Restatement (Third)* "explicitly stat[es] that no remedy for unjust enrichment requires a showing that legal remedies are inadequate").

151. See *Kansas v. Nebraska*, 135 S. Ct. 1042, 1057 n.8 (2015).

152. *Id.*

153. See *id.*

154. *Id.*

155. *Id.* at 1059 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

156. *Id.* The Court acknowledged the powerful effect of an order of disgorgement coupled with a threat of future disgorgement orders: "That, we trust, will adequately guard against Nebraska's repeating its former practices." *Id.* This sentiment expresses why a simple compensatory award would not have sufficed in the Court's eyes.

### G. *Measuring Disgorgement*

This Essay argues in favor of building a road to disgorgement for breach of contract in both the public and private sphere. Unfortunately, in *Kansas v. Nebraska*, the Special Master did not elaborate on the selection of the ultimate number, \$1.8 million, which stripped from Nebraska part but not all its profits from breach.<sup>157</sup> Because the Court exercised an unrefined approach to measuring the remedy, its endorsement of the recommended award sends an imperfect signal to other courts about the utility of disgorgement. The Court simply approved a partial-disgorgement award that appeared to be somewhat at the Special Master's whim. It is unclear if the shortcoming is based on a lack of explanation or a lack of evidentiary basis. For the equitable principles behind disgorgement to maintain credibility, it is essential that judicial opinions advancing disgorgement provide reasoned elaboration and causally link the remedy amount to the harm caused and the right breached.

If Nebraska thought the disgorgement award unjustified as inapplicable and too high, Kansas responded by asserting the award was too low to encourage future compliance.<sup>158</sup> The Court reinforced its power to fashion partial disgorgement relief pursuant to a flexible balancing of hardships,<sup>159</sup> but it quickly rejected Kansas's attempts to get to a higher number. Here, the Court ruled, the "relatively small disgorgement award suffices" based on Nebraska's ameliorative and compliant efforts after the 2006 breach.<sup>160</sup> The Court did express some frustration with the Special Master's lack of explanation<sup>161</sup> but in the end approved the \$1.8 million disgorgement order even while acknowledging its arguably "random" selection.<sup>162</sup>

This arguable randomness inadequately guides other courts' exercise of discretion. The opinion also lacks any meaningful causation analysis. In other words, if Nebraska wrongfully took advantage of Kansas by seizing an opportunity to profit that Kansas had the right to take, why should Kansas not receive more? The irony is that if Kansas had received

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157. *See id.*

158. *Id.* at 1056–58. Kansas acknowledged that the Court could choose a "fair point" between disgorging all profits versus no profits based on the totality of circumstances. *Id.* at 1058.

159. *Id.*

160. *Id.*

161. *Id.* at 1059 ("Truth be told, we cannot be sure why the [Special] Master selected the exact number he did . . . rather than a little more or a little less. The Master's Report, in this single respect, contains less explanation than we might like. But then again, any hard number reflecting a balance of equities can seem random in a certain light—as Kansas's own briefs, with their ever-fluctuating ideas for a disgorgement award, amply attest.").

162. *Id.*

its entitlement—a full allocation of its water rights—Kansas’s farmland would have been less viable and thus presumably less profitable. Thus, the Special Master likely used silence to mask what was in fact his gut assessment of what seemed like a fair number based on wrongdoing, deterrence, and fairness. Justice Thomas, dissenting in part, lambasted the Court for condoning an arbitrary outcome resulting from a lack of reasonable certainty, for its failure to establish an “articulable relationship to Nebraska’s profits,” and for its consideration of irrelevant factors such as transaction costs.<sup>163</sup> Nebraska earned its profits. How much of that profit is attributable to Nebraska’s skills and contributions, which ordinarily would offset a disgorgement award? The Court is left with the fact of the Special Master’s partial disgorgement award without the benefit of its calculus or reasoning. Unfortunately, the Court’s track record on thoughtful restitution, causation, and contribution analysis is also dim.<sup>164</sup>

### III. RAMIFICATIONS FROM PUBLIC TO PRIVATE LAW

A treacherous legal landscape results when the Court ventures into remedies territory, even when the Court attempts to limit the reach of its holdings. Future litigants will naturally deploy precedent in service of their own ends, and the Court has left room for future litigants to address the applicability of disgorgement for private breach of contract claims.

What does the Court’s endorsement of a partial disgorgement order say about extending restitutionary gain-based relief for generally similar breaches of contract, even those involving purely private agreements? If one listens to the words of limitation, the Court repeatedly emphasizes both the public nature of the dispute and the equities inherent in the Court’s exercise of original jurisdiction over a dispute between sovereign states. Even though the dissenters used, for their own anti-disgorgement ends, my prior prediction about the *Restatement (Third) of Restitution’s* “novel extension” of *conventional* contract boundaries to include disgorgement grounded in unjust enrichment, I am inclined to predict again that the Court’s opinion in *Kansas v. Nebraska* will be cited to

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163. *Id.* at 1070–71 (Thomas, J., concurring in part and dissenting in part).

164. *See, e.g.,* *Snepp v. United States*, 444 U.S. 507, 511, 515 (1980) (awarding a constructive trust over all profits for failure to seek pre-publication clearance to check for classified materials, even though the book in fact contained no classified information); *see also* Mark P. Gergen, *Causation in Disgorgement*, 92 B.U. L. REV. 827, 827–28, 833–35 (2012) (critiquing the *Restatement (Third) of Restitution’s* focus on justice and fairness, conflating the factual causation determination rather than providing real guidance for identifying gains legally attributable to the breach for disgorgement purposes, especially if the goal is deterrence: why “allow a wrongdoer to escape legal responsibility for a loss that would normally result from his wrongful conduct on the ground that another fortuitous event prevented the loss from occurring”).

support plaintiffs' claims for disgorgement awards in private disputes.

The Court's reasoning is both bold and potentially narrow. It is bold for endorsing a disgorgement award at all and for permitting a partial award that is arguably arbitrary.<sup>165</sup> But it could have narrow precedential value because the Court repeatedly noted the special, public nature of the dispute and the import of its related original, equitable jurisdiction. According to Justice Thomas, the controversy "is, in essence, a contract dispute" warranting application of "ordinary principles of contract law."<sup>166</sup> He charges that the Court exceeded its power and misapplied precedent: "Invoking equitable powers, without equitable principles, the majority ignores the principles of contract law that we have traditionally applied to compact disputes between sovereign States."<sup>167</sup> More specifically, the dissenters further would reject any disgorgement order as "not available for a nondeliberate breach of a contract."<sup>168</sup> Though the dissenters also warned against relying on the *Restatement (Third) of Restitution*, the Court forged ahead. I anticipate the ruling in *Kansas v. Nebraska* will filter into contract law jurisprudence notwithstanding the language of limitation.

As a result, both the majority and the two primary dissents extensively discuss the *Restatement (Third) of Restitution* section 39, "Profit from Opportunistic Breach." Scholars and other courts continue to debate the proper scope of application of disgorgement to contractual relief,<sup>169</sup> including the requisite intent for opportunism. The Court has provided, even as simply persuasive fodder, an interpretative gloss to the reach of disgorgement within at least the compact context and perhaps beyond. Ironically, while lamenting the Court's endorsement of the *Restatement (Third) of Restitution's* "proposed remedy" as "sheer novelty," the dissenters build a bridge that makes the Court's reasoning relevant to private breaches of contract.<sup>170</sup> Though the disgorgement remedy broadens the horizons of America's conventional contracts landscape, it

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165. *Kansas*, 135 S. Ct. at 1065 (Thomas, J., concurring in part and dissenting in part).

166. *Id.* In asserting that private contract law applies instead of federal equity jurisprudence, Justice Thomas emphasizes: (i) "[a]n interstate compact, though provided for in the Constitution, and ratified by Congress, is nonetheless essentially a contract between the signatory States" and (ii) "a legal settlement agreement is a contract." *Id.* (quoting *Oklahoma v. New Mexico*, 501 U.S. 221, 242 (1991) (Rehnquist, C.J., concurring in part and dissenting in part)).

167. *Id.*

168. *Id.* at 1067 (acknowledging some Supreme Court precedent for disgorgement awards in compact disputes, but "only for the most culpable breaches"—deliberate ones); see *id.* at 1068 (noting that disgorgement of profits is "extraordinary" because it goes beyond compensation and "is not generally an available remedy for breach of contract").

169. See, e.g., Eisenberg, *supra* note 19, at 562; Sage, *supra* note 25, at 258–63; Thel & Siegelman, *supra* note 12, at 1185.

170. See *Kansas*, 135 S. Ct. at 1069 (Thomas, J., concurring in part and dissenting in part) ("In any event, § 39 opines that disgorgement should be available only when a party *deliberately* breaches a contract. This makes sense.").

is by no means a sheer novelty. At least not anymore. Disgorgement is a powerful remedial alternative when warranted by the circumstances of the breach. With the Court's advancement of restitution goals and endorsement of disgorgement with arguable application to private contracts, the seeds of future litigation and scholarship will grow.

#### CONCLUSION

The inclusion of disgorgement in the *Restatement (Third) of Restitution*, as an alternative remedy for opportunistic breach of contract, broadens the landscape of conventional American contract doctrine. Of course, most breaches of contract will not be opportunistic, and courts, with the guidance of the *Restatement (Third) of Restitution*, need to delineate carefully the proper boundaries and reach of disgorgement's application. The rationale for disgorgement is in tension with some of the principles behind conventional contract doctrine, such as the compensation norm, strict liability, the choice principle, and efficient breach of contract. The goals of prevention of unjust enrichment and deterrence of conscious advantage taking, however, warrant judicial receptivity to disgorgement as an alternative remedy for certain breaches of contract. The Supreme Court's treatment, though limited by the public features of the contract, inclines toward receptivity to restitution-based disgorgement as a breach of contract remedy. It further shows the type of wrongful behavior and remedial inadequacy that justify gain-based relief. The dissenters articulate the traditional fears about venturing into extra-compensatory waters. The concerns are real and must be met by reasoned elaboration of the grounds that warrant the extension to gain-based relief and apportion such relief within its causal limits. With continued dialogue and principled reasoning, the Court's embrace of disgorgement is a step in the right direction for American contract law.