

## AGENCY FINANCE IN THE AGE OF EXECUTIVE GOVERNMENT

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### INTRODUCTION

The rise of “executive government” has prompted a great deal of public debate and scholarly theorizing.<sup>1</sup> This Article examines one aspect of that very large subject: agency budgets or, more precisely, *revenues*. The inquiry, we suggest, merits attention beyond a narrow circle of public finance scholars. Approaching the administrative state from its most pedestrian front opens a window both into its actual operation and constitutional rule of law questions.

The notion that monetary and other tangible incentives shape the contours of public administration is in many ways foundational to the American experiment. Our system of “checks and balances” is a system of incentives. The written Constitution is unequivocal, indeed emphatic, in committing fiscal powers to Congress and in withholding them from the executive, the better to safeguard the separation of powers.<sup>2</sup> And in several clauses, the Constitution specifies with precision who can and must be paid what and by whom.<sup>3</sup>

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<sup>1</sup> For a small sampling of the burgeoning literature, see ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2011); Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016); Christopher DeMuth Sr., *Can the Administrative State be Tamed?*, 8 J. L. ANALYSIS 121 (2016); Abbe Gluck et. al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015); Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501 (2015); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>2</sup> See U.S. CONST. art. I, § 8, cl. 1–2 (providing Congress with power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . .” and “[t]o borrow Money on the credit of the United States.”); U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”).

<sup>3</sup> See U.S. CONST. art. I, § 6, cl. 1 (“The Senators and Representatives shall receive a Compensation for their Services . . . paid out of the Treasury of the United States.”); U.S. CONST. art. II, § 1, cl. 7 (“The President shall . . . receive . . . a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other

The idea that money matters for administration is equally foundational to the modern public choice and public finance literature. The late William Niskanen, by way of prominent example, proposed an elegant model of bureaucratic agencies as budget maximizers.<sup>4</sup> While few contemporary scholars defend the Niskanen model in its simple, original form,<sup>5</sup> three of its assumptions are shared by a great many scholars: (1) consistent with Madisonian intuitions, administrative agencies are empire-builders;<sup>6</sup> (2) budgets (fiscal resources) are *among* the things agencies seek to maximize—even if their utility functions are a great deal more complicated than the highly stylized Niskanen model would suggest;<sup>7</sup> and (3) the budgetary maximand for regulatory agencies is *legislative appropriations*.<sup>8</sup> Conversely, appropriations are one of the principal means through which Congress controls and directs agencies—ex ante through budgetary appropriations; ex post through “riders” and earmarks; or by signaling.<sup>9</sup>

That third assumption maps common intuitions about the ordinary operation of government, as well as the constitutional text: the power of the purse belongs to Congress. Congress must appropriate funds for all public expenditures.<sup>10</sup> And with some exceptions, government agencies may not raise or spend funds that have not been appropriated.<sup>11</sup> Two ancient statutes, the Miscellaneous Receipts Act and the Anti-Deficiency Act, enshrine this general regime.<sup>12</sup> Increasingly, however, the picture is at war with reality. To an unprecedented extent, regulatory agencies rely on non-appropriated funds

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Emolument from the United States, or any of them.”); U.S. CONST. art. III, § 1 (“The Judges . . . shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

<sup>4</sup> William A. Niskanen, *Nonmarket Decision Making: The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 293, 293–97 (1968).

<sup>5</sup> See Richard E. Wagner, *Remembering Bill Niskanen: Pursuing Economics As a Public Science in the Service of Liberty*, 153 PUB. CHOICE 1, 5 (2012).

<sup>6</sup> See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 917 (2005).

<sup>7</sup> See André Blais & Stéphane Dion, *Are Bureaucrats Budget Maximizers? The Niskanen Model & Its Critics*, 22 POLITY 657, 659–60 (1990).

<sup>8</sup> See *id.* at 658 (observing that even critics of Niskanen’s budget-maximizing model have acknowledged that bureaucrats try to increase their budgets).

<sup>9</sup> See Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733, 1739–40 (2013); Matthew D. McCubbins et. al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 443 (1989).

<sup>10</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>11</sup> The exceptions are “revolving fund” or “non-appropriated fund institutions” (“NAFI’s”). These institutions are beyond our purview. For very brief discussion see *infra* notes 37–43 and accompanying text.

<sup>12</sup> See Miscellaneous Receipts Act of 1849, 31 U.S.C. § 3302(b) (2012) (providing that an agent of the U.S. “receiving money for the Government from any source” must deposit the funds into the general Treasury.); Anti-Deficiency Act of 1905, 31 U.S.C. §§ 1341(a)(1)(A) (2012) (making it unlawful for a federal agency to “make or authorize an expenditure or obligation exceeding an amount available in an appropriation.”); see also Kate Stith, *Congress’ Power of the Purse*, 97 YALE L. J. 1343, 1363–77 (1988).

for their ordinary operations. Many have become self-financing; some have become profit centers for wider executive exertions and even for Congress itself.<sup>13</sup> Correspondingly, the general assumption that Congress will jealously guard the powers of the purse as its ultimate means of checking and balancing the executive has become open to serious doubt: in many respects, those powers have fallen into disuse.<sup>14</sup>

This Article sketches the parameters of agency self-finance and offers several suggestive examples. It is sketchy and suggestive because of the paucity of publicly available data. Neither the Office of Management and Budget, the Department of the Treasury, the enforcement agencies, nor Congress publishes—or evidently even compiles—systematic accounts of agency revenue raising and the uses made of such funds. Thus, one purpose of this Article is simply to identify the phenomenon and call for greater official documentation and transparency. However, lack of comprehensive data notwithstanding, the existing evidence warrants serious speculation on questions of cause and consequence.

What drives the trend toward agency self-financing? The most tempting answer is public indebtedness. The federal budget consists mostly of transfer payments, interest payments on the debt, and payments for a minimum level of national defense<sup>15</sup>—expenditures that are effectively untouchable. Thus, whatever budget discipline can be had must fall on “discretionary” spending, including payments for the ordinary operations of government.<sup>16</sup> Congress may find the benefits of agency contributions worth the costs of giving up a degree of appropriations control.

There is something to this. But the explanation is a bit unsatisfactory. Foremost, tendencies toward off-budget agency finance date back some four decades, and they show no obvious correspondence to economic conditions or budget cycles.<sup>17</sup> This Article suggests instead that the growth of off-budget finance reflects a pervasive, secular trend to executive government.

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<sup>13</sup> See Margaret H. Lemos & Max Minzner, *For Profit Public Enforcement*, 127 HARV. L. REV. 853, 874 (2014) (detailing the profits that the DOJ, HHS, and Treasury have made which supplemented their own budgets as well as the budget of Congress).

<sup>14</sup> See Christopher DeMuth Sr., *Our Voracious Executive Branch*, THE WEEKLY STANDARD, June 27, 2016, <http://www.weeklystandard.com/our-voracious-executive-branch/article/2002875>; Christopher DeMuth Sr., *A Constitutional Congress?*, THE WEEKLY STANDARD, Oct. 27, 2014, <http://www.weeklystandard.com/a-constitutional-congress/article/816392>; Christopher DeMuth Sr., *Congress Incongruous*, LIBERTY LAW FORUM (August 3, 2015), <http://www.libertylawsite.org/liberty-forum/congress-incongruous/>.

<sup>15</sup> See *Policy Basics: Where Do Our Federal Tax Dollars Go?*, CTR. ON BUDGET & POL’Y PRIORITIES 1–3 (Mar. 4, 2016), <http://www.cbpp.org/research/federal-budget/policy-basics-where-do-our-federal-tax-dollars-go>.

<sup>16</sup> See *Policy Basics: Non-Defense Discretionary Programs*, CTR. ON BUDGET & POL’Y PRIORITIES 1 (Feb. 18, 2016), <http://www.cbpp.org/research/policy-basics-non-defense-discretionary-programs>.

<sup>17</sup> See, e.g., U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS: FINANCES OF SPECIAL DISTRICT GOVERNMENT: 2002 xii (2005) (showing that the number of special government districts, a type of self-financing government agency, has grown continuously from 1967 to 2002).

About the existence of that trend, there is not the slightest doubt. A large body of scholarship has described it, discussed its causes and effects, and traced its implications for administrative law and doctrine.<sup>18</sup> Approaching the subject through the lens of agency finance—more specifically, the agencies’ growing ability to combine regulatory mandates and enforcement with the powers of outright taxing and spending—may help to enrich understanding of the phenomena in three respects.

First, the inquiry can yield useful empirical data. Dollars can be counted for purposes of comparing agencies, programs, and trends over time. To be sure, scholars have also tallied and analyzed the cost of regulation, the numbers of pages and rulemaking notices in the Federal Register, the ratio of agency regulations to statutory law, and even sub-regulatory devices such as “interpretive guidelines,” “Dear Colleague” letters to regulated parties, or “Frequently Asked Questions” bulletins and online postings.<sup>19</sup> But each of those figures is a proxy and, while compiled with increasing sophistication,<sup>20</sup> involves intractable problems of measurement and interpretation. And although dollars, too, are a proxy—an agency such as the EPA with a relatively small budget can command vastly greater private resources through rulemaking—the unit of measurement is relatively unproblematic. Furthermore, dollars have proven a pretty good proxy. A longstanding program of analyzing agency budgets by form of regulation (economic, social, financial, etc.) has yielded many useful insights.<sup>21</sup>

Second, the inquiry opens a perspective on the administrative state in actual operation, as distinct from its appearance in agency pronouncements, court decisions, and law reviews and textbooks with their heavy emphasis on doctrine. Scholars have lamented the increased disconnect between administrative law and practice.<sup>22</sup> Examples include the once rare, now common practice of multi-agency rulemakings,<sup>23</sup> the emergence of special status agencies, such as the IRS and the Federal Reserve Board, as regulatory agencies

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<sup>18</sup> See generally sources cited *supra* note 1.

<sup>19</sup> See, e.g., CLYDE WAYNE CREWS JR., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 2–4 (2016) (estimating the annual cost of regulatory compliance and economic costs at \$1.88 trillion annually).

<sup>20</sup> The latest and most ambitious effort is the RegData program of the Mercatus Center at George Mason University, which analyzes regulatory text and counts numbers of binding constraints or restrictions. See Omar Al-Ubaydli & Patrick A. McLaughlin, *RegData: A Numerical Database on Industry-Specific Regulations For All United States Industries and Federal Regulations, 1997–2012*, REG. & GOVERNANCE, 1–2 (2015).

<sup>21</sup> See SUSAN DUDLEY & MELINDA WARREN, REGULATORS’ BUDGET FROM EISENHOWER TO OBAMA: AN ANALYSIS OF THE U.S. BUDGET FOR FISCAL YEARS 1960 TO 2017 2 (2016), [https://wc.wustl.edu/files/wc/imce/2017\\_regulators\\_budget\\_05-17-2016.pdf](https://wc.wustl.edu/files/wc/imce/2017_regulators_budget_05-17-2016.pdf).

<sup>22</sup> See e.g., Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1139–40 (2014); Gluck et. al., *supra* note 1, at 1792; Greve & Parrish, *supra* note 1, at 501.

<sup>23</sup> See Farber & O’Connell, *supra* note 22, at 1155–57.

and federalism architects;<sup>24</sup> the proliferation of novel forms of administrative practice in the financial regulatory sector;<sup>25</sup> “regulation by threat”;<sup>26</sup> the implementation of public law through second-order private agreements;<sup>27</sup> and “cooperative” federal-state regulation achieved through comprehensive settlements in the shadow of the law and, sometimes, in a virtually law-free zone.<sup>28</sup> Agency self-finance should be added to the growing list of practices for which the existing *corpus juris* is inadequate to the realities of administrative practice.

Third, and relatedly, agency self-finance bears on many of the central themes of administrative and constitutional law: delegation and the separation of powers, congressional oversight, agency independence, the choice between rulemaking and enforcement or adjudication, and judicial review. In many of these domains, the debate over the administrative state and its law has become excessively abstract and formalistic. By way of prominent, highly germane example, the perennial controversy over “independent” administrative agencies continues to revolve around the President’s removal powers—an important aspect of agency design and operation, to be sure, but not the only feature of administrative governance that commands attention.<sup>29</sup>

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<sup>24</sup> Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack Of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1729 n.6 (2006).

<sup>25</sup> Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 691–92 (2013); Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship between Administrative Law and Financial Regulation*, 78 LAW & CONTEMP. PROBS. 129, 146 (2015).

<sup>26</sup> See Rachele Holmes Perkins, *The Threat of Law: Regulatory Blackmail or an Answer to Congressional Gridlock?* 1, 3 (George Mason Univ. Legal Studies Research Paper Series, Working Draft No. LS 16-17, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2764374](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764374).

<sup>27</sup> See Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2040–41 (2005).

<sup>28</sup> See, e.g., U.S. CHAMBER OF COMMERCE, A REPORT ON SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS 3 (2013), <https://www.uschamber.com/sites/default/files/documents/files/SUEANDSETTLEREREPORT-Final.pdf>.

<sup>29</sup> See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16–17 (2010) (criticizing the “obsessive focus on removal as the touchstone of independence . . .”). For a rare plea to integrate budgetary arrangements into a separation-of-powers analysis see generally Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy With Removal Protection*, 125 HARV. L. REV. 1822 (2012).

The case law reflects an even starker disconnect between questions of agency finance and formal analysis. The law on “non-appropriated” agency finance is almost exclusively the law of the Federal Circuit; conversely, standard separation-of-powers analysis ignores agencies’ budget authority and focuses single-mindedly on appointment or removal powers. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499–504 (2010). The disconnect reflects the dynamics of litigation. Litigants have no reason to bring unpromising claims; courts will not address claims that have not been brought. Here and in other dimensions of the administrative state, improvement must come from scholars rather than practitioners.

While money may not change *everything*,<sup>30</sup> following its trail is generally a sound practice in private affairs and, in public affairs, a matter of considerable and indeed constitutional concern.<sup>31</sup> In this light, a focus on agency budgets may pay dividends in understanding not only the actual operation of the administrative state but also its constitutional contours.

Part I of this Article describes an increasingly common form of agency fiscal independence: delegated tax powers. Part II discusses the rapidly growing practice of government finance through agency policing, enforcement, and “settlements.” Part III offers some tentative thoughts on the origins and consequences of off-budget agency finance.

## I. EXECUTIVE TAXING AND SPENDING<sup>32</sup>

The federal government collects most of its revenue through explicit statutory taxes: individual and corporate income taxes, payroll taxes for Social Security and Medicare, estate and gift taxes, customs duties, and an array of excise taxes.<sup>33</sup> But executive agencies also raise revenue from license fees, royalties, proceeds from public lands, the sale of ordinary goods and services, and legal fines and settlements.<sup>34</sup> Some of that revenue comes from proprietary government activities that could as well be performed by for-profit private firms, such as military post exchanges (“PXs”) and the U.S. Mint.<sup>35</sup> Additional revenue comes from a wide range of user fees for using national

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<sup>30</sup> *But see* CINDY LAUPER, *Money Changes Everything, on SHE’S SO UNUSUAL* (Portrait Records 1983).

<sup>31</sup> *Cf.* U.S. CONST. art. I, § 9, cl. 7 (“[A] regular Statement and Account of Receipts and Expenditures of all public Money shall be published from time to time.”).

<sup>32</sup> Portions of this section draw on Christopher C. DeMuth Sr., *Agency Taxation*, ENGAGE, July 2015, at 4, <http://www.fed-soc.org/publications/detail/agency-taxation>.

<sup>33</sup> Over the past ten years, explicit statutory taxes comprised between 64% (2010) and 79% (2005) of the federal government’s annual revenues. *See* U.S. DEP’T OF THE TREASURY, BUREAU OF THE FISCAL SERV., COMBINED STATEMENT OF RECEIPTS, OUTLAYS, AND BALANCES tbl.A (2010), <https://www.fiscal.treasury.gov/fsreports/rpt/combStmt/cs2010/rta.pdf>; U.S. DEP’T OF THE TREASURY, BUREAU OF THE FISCAL SERV., COMBINED STATEMENT OF RECEIPTS, OUTLAYS, AND BALANCES tbl.A (2005), <https://www.fiscal.treasury.gov/fsreports/rpt/combStmt/cs2005/rta.pdf> (compiled tax data for fiscal years 1998-2015 on file with the authors). In addition to funding sources mentioned in the text, the Treasury also receives funds from interest on federal accounts, gifts and donations, civil forfeitures, realization on “loans and investments,” and intra-budgetary receipts. *See* U.S. DEP’T OF THE TREASURY, BUREAU OF THE FISCAL SERV., COMBINED STATEMENT OF RECEIPTS, OUTLAYS, AND BALANCES tbl.A (2015), <https://www.fiscal.treasury.gov/fsreports/rpt/combStmt/cs2015/rta.pdf> [hereinafter 2015 COMBINED STATEMENT OF RECEIPTS].

<sup>34</sup> *See generally* 2015 COMBINED STATEMENT OF RECEIPTS, *supra* note 33, at tbl. A.

<sup>35</sup> *Exchange Quick Facts*, ARMY & AIR FORCE EXCH. SERV., <http://www.aafes.com/about-exchange/exchange-quick-facts/> (last visited November 8, 2016). *But see* Kellie Lunney, *Senators Push Back on Plan to Privatize Some Military Commissaries*, GOV’T EXEC. (June 8, 2015), <http://www.govexec.com/defense/2015/06/senators-push-back-plan-privatize-some-military-commissaries/114679/>.

parks and applying for licenses, permits, visas, patents, and regulatory approvals.<sup>36</sup>

On the spending side of the ledger, the constitutional rule that moneys may not be spent except through congressional appropriations admits of many exceptions, most of them linked to these non-tax revenues.<sup>37</sup> Nonappropriated Fund Instrumentalities (“NAFIs”) are moneymaking, self-financing enterprises that are managed by federal employees and treated as government entities for most legal purposes, including procurement, contracting, and liability.<sup>38</sup> NAFIs include numerous organizations devoted to meeting the needs of military service members and their families: PXs, gyms, clubs, and sports leagues to name a few.<sup>39</sup> Outside of the military, NAFIs range from the Federal Reserve System and the Federal Deposit Insurance Corporation to the Graduate School of the U.S. Department of Agriculture.<sup>40</sup> User fees charged by regular federal agencies are either remitted to the Treasury or held by the agencies; when held by the agencies, expenditure of these funds may or may not be subject to appropriations.<sup>41</sup> The device of the “revolving fund” permits agencies to continuously collect user fees and spend them on specified purposes, thereby establishing “permanent indefinite appropriations.”<sup>42</sup> Revolving funds are increasingly used to permit regulatory and enforcement

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<sup>36</sup> For a review of fee-funded programs and the design of user fees collected as a part of the federal budget (amounting to nearly \$300 billion in 2012), see generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-820, FEDERAL USER FEES: FEE DESIGN OPTIONS AND IMPLICATIONS FOR MANAGING REVENUE INSTABILITY (2013), <http://www.gao.gov/assets/660/658359.pdf>.

<sup>37</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, OFFICE OF THE GEN. COUNSEL, GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW: VOLUME III 12-85–12-140 (revolving funds), 12-140–12-196 (user fees), 15-226–15-277 (NAFIs) (2008), <http://www.gao.gov/assets/210/203470.pdf>. About 70 percent of federal spending is now “entitlements” such as Social Security, Medicare, and food stamps, where spending is a function of statutory formulas rather than annual appropriations. See *Where Do Our Federal Tax Dollars Go?*, CTR. ON BUDGET & POLICY PRIORITIES (Mar. 4, 2016), <http://www.cbpp.org/sites/default/files/atoms/files/4-14-08tax.pdf>. Our concern here is with that portion of the remaining “discretionary” expenditures that have also escaped the need for appropriations.

<sup>38</sup> See generally Daniel S. Herzfeld, *NAFI Doctrine No More—The Federal Circuit’s Slattery v. U.S. Ends the Non-Appropriated Funds Instrumentality Doctrine As We Know It*, 53 GOV'T CONTRACTOR ¶ 157 (2011); Alexa M. Strear, *The Evisceration of the NAFI Doctrine*, 21 FED. CIR. B. J. 725 (2011).

<sup>39</sup> See Stephen E. Castlen, *Let the Good Times Role: Morale, Welfare, and Recreation Operations*, DEP'T ARMY: ARMY LAW., June 1996, at 3, 5.

<sup>40</sup> See *Slattery v. U.S.*, 635 F.3d 1298, 1315 (2011) (discussing the FDIC's status as a NAFI); *Texas State Bank v. U.S.*, 60 Fed. Cl. 815, 820 (2004) (holding that the Federal Reserve is a NAFI). The USDA Graduate School was a NAFI up until 2009, when it split from its affiliation with the federal government to become a private institution. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-5, USDA GRADUATE SCHOOL: REVENUE REPORTING NEEDS TO BE IMPROVED 1 (2001), <http://www.gao.gov/assets/240/232899.pdf>; *About Graduate School USA*, GRADUATE SCH. USA, <http://www.graduateschool.edu/content/about-us> (last visited Nov. 8, 2016).

<sup>41</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, OFFICE OF THE GEN. COUNSEL, GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW: VOLUME III 12-85–12-86 (2008), <http://www.gao.gov/assets/210/203470.pdf>.

<sup>42</sup> *Id.* at 12-86–12-88.

agencies to use fines and settlements to operate their own spending programs.<sup>43</sup>

These forms of executive self-financing are only roughly defined and accounted for. No one knows how many NAFIs exist.<sup>44</sup> Similarly, Congress's policy of making non-NAFI regulatory agencies self-financing through user fees and other devices, an effort that began in earnest under the Reagan administration,<sup>45</sup> appears to have outstripped the legislature's monitoring capacity. Consider the Customs and Immigration Service (CIS), which processes and adjudicates immigrant applications for green cards (lawful permanent resident status), work permits, naturalization, and dozens of subsidiary classifications.<sup>46</sup> Through a series of incremental steps culminating in the 2002 "homeland security" legislation following the 9/11 terrorist attacks, Congress directed that the CIS cover essentially its entire budget through application fees.<sup>47</sup> This means, for example, that the \$985 filing fee for a green card covers not only the CIS's review and processing costs, but also a share of its activities that do not generate revenue, such as adjudication and asylum applications. The CIS does not have a formal revolving fund—it has requested one—but retains fee revenues in its own account and maintains that account over time to cover essentially its entire budget without congressional appropriations.<sup>48</sup> The agency's special status came to light in November 2014, in the wake of President Obama's executive revision of statutory immigration policies that many in Congress opposed on constitutional or policy grounds or both.<sup>49</sup> Shortly after the President announced his actions, opponents announced that they would countermand them with a rider to the CIS's

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<sup>43</sup> See *infra* notes 169–174 and accompanying text.

<sup>44</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-97, *FEDERALLY CREATED ENTITIES: AN OVERVIEW OF KEY ATTRIBUTES* 16–17 (2009) <http://www.gao.gov/assets/300/297944.pdf>.

<sup>45</sup> See, e.g., Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) § 7005, 49 U.S.C. § 60301 (2012) (establishing "user fee" finance for pipeline safety programs administered by U.S. Department of Transportation); Omnibus Budget Reconciliation Act of 1986 § 3401, 42 U.S.C. § 7178 (2012) (entire regulatory budget of the Federal Energy Regulatory Commission (FERC)).

<sup>46</sup> *What We Do*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/about-us/what-we-do> (last visited Nov. 8, 2016).

<sup>47</sup> See *About Us*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/aboutus> (last visited Nov. 8, 2016), ("USCIS is funded primarily by immigration and naturalization benefit fees charged to applications and petitioners.").

<sup>48</sup> See WILLIAM A. KANDEL, CONG. RESEARCH SERV., IN10233, *USCIS FUNDING AND ACCOUNTABILITY TO CONGRESS* (2015), <https://www.fas.org/sgp/crs/homesecc/IN10233.pdf>; U.S. DEP'T OF HOMELAND SEC., *BUDGET-IN-BRIEF: FISCAL YEAR 2016 95-97*, [http://www.dhs.gov/sites/default/files/publications/FY\\_2016\\_DHS\\_Budget\\_in\\_Brief.pdf](http://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf) (last visited Nov. 8, 2016).

<sup>49</sup> Presidential Memorandum on Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century, 79 Fed. Reg. 70,769, 70,769–70 (Nov. 21, 2014); Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES (Nov. 20, 2014), <http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html>.



appropriations for the coming year.<sup>50</sup> A few days later came the embarrassed retraction: staffers had discovered that USCIS is self-funded and financially independent of Congress.<sup>51</sup>

The fact that many in Congress were unaware that an agency as important as the CIS was not dependent on congressional appropriations illustrates both the increasing informality of federal taxing and spending and Congress's loss of interest in using its power of the purse over the evolution of policy. Consistent with that pattern, Congress has increasingly empowered agencies to calculate and impose outright taxes—charges unrelated to any service provided<sup>52</sup>—and to exercise wide discretion in how the revenues are spent. Examples of such delegated taxing power include the Federal Communication Commission's ("FCC") "universal service" fees and the Public Company Accounting Oversight Board's ("PCAOB") annual assessments on audited companies.<sup>53</sup> A more peculiar case is the financing of the Consumer Financial Protection Bureau ("CFPB") through transfers from Federal Reserve revenues.<sup>54</sup>

#### A. *The FCC's Universal Service Program*

The Telecommunications Act of 1996 authorizes the FCC to set and collect taxes for promoting "universal service" and gives the FCC wide discretion to determine whom to tax, at what rate to tax, and how to spend the

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<sup>50</sup> See, e.g., Press Release, Congressman Steve King, We are Headed for a Constitutional Crisis if President Grants Amnesty (Nov. 13, 2014), <https://steveking.house.gov/media-center/press-releases/king-we-are-headed-for-a-constitutional-crisis-if-president-grants>; Press Release, U.S. Senator Jeff Sessions, Time to Stand Strong for the American People (Nov. 20, 2014), <http://www.sessions.senate.gov/public/index.cfm/news-releases?ID=A913472F-0EEA-48A2-9272-18F8482C47E5>.

<sup>51</sup> See 8 U.S.C. § 1356 (2012); Rebecca Shabad, *House GOP Panel: Defunding Immigration Order 'Impossible'*, THE HILL (Nov. 20, 2015), <http://thehill.com/policy/finance/224837-appropriations-panel-defunding-immigration-order-impossible>.

<sup>52</sup> The distinction is not always entirely clear. The Independent Offices Appropriation Act (IOAA), 31 U.S.C. § 9701 (2012), allows agencies to collect fees based on "(A) the costs to the Government; (B) the value of the service or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts." 31 U.S.C. § 9701(b)(2) (2012). In two decisions, the U.S. Supreme Court construed the statute narrowly so as to avoid constitutional questions that might arise over a delegation of tax authority: *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342 (1974); *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345, 351 (1974) (invalidating fees calculated to inure to the benefit of the public at large). However, the IOAA is a default statute: it governs unless an agency's organic statute provides otherwise. Congress may call something a "fee" when it is plainly a tax on non-regulated parties, see *infra* note 71–77 and accompanying text (discussing PCAOB's "accounting support fee"), and it may (within uncertain limits) delegate its authority to tax. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 222–23 (1989).

<sup>53</sup> See, e.g., FED. COMM'NS COMM'N, CONSUMER GUIDE: UNIVERSAL SERVICE SUPPORT MECHANISMS 1 (2015); 2014 PUB. CO. ACCOUNTING OVERSIGHT BD. ANN. REP. 1, 23, <https://pcaob.us.org/About/Administration/Documents/Annual%20Reports/2014.pdf>.

<sup>54</sup> See DeMuth, *supra* note 32, at 4.

revenues.<sup>55</sup> The FCC's annual operating budget of about \$500 million is covered entirely by a combination of the agency's licensing and other fees and a share of the net proceeds from its spectrum auction programs. However, those expenditures remain subject to annual appropriations by Congress in response to FCC budget requests.<sup>56</sup> In contrast, the universal service program is administered for the FCC by a subsidiary nonprofit corporation, the Universal Service Administrative Company, whose revenues and expenditures are independent of annual budget requests and congressional appropriations.<sup>57</sup>

Prior to the 1996 Telecommunications Act, Congress had sought to ensure "universal" telecommunications service through a complex system of cross-subsidies among service providers.<sup>58</sup> In substance, the FCC permitted AT&T to maintain a long-distance monopoly in exchange for supporting local carriers, and local carriers in turn charged rates that favored residential over business customers and rural over urban customers.<sup>59</sup> Then, recognizing that telecommunication markets had become naturally competitive, Congress replaced regulatory cross-subsidies with direct subsidies for certain groups and financed them through the universal service fee ("USF").<sup>60</sup> The contribution is a tax in all but name. It has no relation to any benefit conferred by the FCC; instead, it is based on the agency's self-determined funding needs for its subsidy schemes.<sup>61</sup> The FCC collects the tax on the interstate and international revenues of landline and wireless telecommunications companies, cable companies that provide voice service, and paging service companies.<sup>62</sup> The providers, in turn, pass the assessments on to their customers.<sup>63</sup> The tax is much higher than the 3 percent statutory federal excise tax on telephone service, and the FCC adjusts it each quarter to keep pace with its program

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<sup>55</sup> Phil Weiser, *Paradigm Changes in Telecommunications Regulation*, 71 U. COLO. L. REV. 819, 824 (2000) (noting that Congress "did not provide much guidance as to exactly how it should be implemented" and instead "handed the ball to the FCC, mandating that the FCC work with a Joint Federal-State Board . . . to figure it out.").

<sup>56</sup> See DeMuth, *supra* note 32, at 4.

<sup>57</sup> *Id.*

<sup>58</sup> Eli M. Noam, *Will Universal Service and Common Carriage Survive the Telecommunications Act of 1996?*, 97 COLUM. L. REV. 955, 956 (1997).

<sup>59</sup> *Id.* at 957.

<sup>60</sup> 47 U.S.C. § 254 (2012).

<sup>61</sup> Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 273 (2005).

<sup>62</sup> Proposed regulations on § 254 are ambiguous on extending the fee to ISPs. See Federal Comm'n's Comm'n, FCC 15-71, Second Further Notice of Proposed Rulemaking, 27-28 (June 22, 2015) (seeking comment on whether to amend FCC regulations to include "broadband" as a supported "telecommunications service").

<sup>63</sup> See, e.g., *In re Federal-State Joint Board on Universal Service*, 17 FCC Rcd. 24,952, 24,974-83 (2002) (acknowledging that carriers simply pass along universal service fees to their customers).

spending.<sup>64</sup> In recent years the tax rate has ranged from 15.7 percent in Q3 2014 to 18.2 percent in Q1 2016.<sup>65</sup> The revenues amounted to \$8.7 billion in 2015.<sup>66</sup>

The FCC spends those revenues on grant programs for landline, wireless, broadband, and Wi-Fi equipment; services for schools, libraries, and rural health care facilities; and rate-subsidies for low-income and rural customers.<sup>67</sup> For example, the FCC's "Lifeline" program—one of four broad program funded through the USF—provides a free basic wireless phone or landline installation and free basic telephone service (250 minutes per month) to about twelve million low-income customers, at a cost of \$1.6 billion annually.<sup>68</sup> The programs have been widely criticized as ineffective and scandal-prone, with very high administrative costs to boot.<sup>69</sup>

### B. *The Public Company Accounting Oversight Board*

The Sarbanes-Oxley Act of 2002 established the PCAOB to regulate accounting firms that audit public companies (i.e., companies that issue publicly-traded stock) and broker-dealers in public stocks.<sup>70</sup> The PCAOB's annual budget of about \$250 million is funded almost entirely by its own tax, which it calls an "accounting support fee," on the equity capital or net asset value of public companies and broker-dealers.<sup>71</sup> The PCAOB establishes its operating budget for the year, subtracts a small sum from the annual fees it

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<sup>64</sup> See e.g., Fed. Commc'ns Comm'n, DA 15-1412, Proposed First Quarter 2016 Universal Service Contribution Factor (Dec. 11, 2015); Fed. Commc'ns Comm'n, DA 14-812, Proposed Third Quarter 2014 Universal Service Contribution Factor (June 12, 2014).

<sup>65</sup> Fed. Commc'ns Comm'n, DA 15-1412, Proposed First Quarter 2016 Universal Service Contribution Factor (Dec. 11, 2015); Fed. Commc'ns Comm'n, DA 14-812, Proposed Third Quarter 2014 Universal Service Contribution Factor (June 12, 2014).

<sup>66</sup> UNIV. SERV. ADMIN. CO., BUILDING THE FOUNDATION: 2015 ANNUAL REPORT 24 (2015), [http://www.usac.org/\\_res/documents/about/pdf/annual-reports/usac-annual-report-2015.pdf](http://www.usac.org/_res/documents/about/pdf/annual-reports/usac-annual-report-2015.pdf).

<sup>67</sup> See DeMuth, *supra* note 32, at 4.

<sup>68</sup> In May 2015, FCC Chairman Tom Wheeler announced plans to expand the Lifeline program to cover Internet broadband as well as telephone service. See Press Release, Fed. Commc'ns Comm'n, Statement of FCC Chairman Tom Wheeler Regarding Lifeline and Link Up Reform and Modernization (May 28, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-71A2.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-71A2.pdf); Rebecca R. Ruiz, *F.C.C. Chief Seeks Broadband Plan to Aid the Poor*, N.Y. TIMES, (May 28, 2015), <http://www.nytimes.com/2015/05/28/business/fcc-chief-seeks-broadband-plan-to-aid-the-poor.html>.

<sup>69</sup> See, e.g., Krotozynski, *supra* note 61, at 297 (describing segments of the program as dismal failures and the costs of administering the system as "staggering"). The Commission has acknowledged those problems but nonetheless, over the strenuous dissents of two Commissioners, decided to "modernize" the program and to extend it to broadband providers. Fed. Commc'ns Comm'n, FCC 16-38, Third Report and Order, Further Report and Order, and Order on Reconsideration 5-16 (Apr. 27, 2016).

<sup>70</sup> DeMuth, *supra* note 32, at 4.

<sup>71</sup> *Id.*

collects from the accounting firms it regulates (about \$1.6 million), and assigns the remaining value to public companies and broker-dealers on a pro rata basis according to their size as measured by equity capital or net asset value.<sup>72</sup> Additionally, the PCAOB exempts smaller public companies from its tax, and it typically funds part of each year's budget from carryover tax and fee revenues from prior years.<sup>73</sup> Most recently, in 2015, the total accounting support fee was \$226.6 million where approximately \$199.1 million was allocated to public companies and \$27.5 million was allocated to broker-dealers.<sup>74</sup>

The PCAOB, like the FCC's Universal Service Administrative Company, is a 501(c)(3) (nonprofit) subsidiary of a regulatory agency—here, the Securities and Exchange Commission (“SEC”).<sup>75</sup> And though the SEC must approve the Board's annual budget, the PCAOB is itself entirely independent of congressional appropriations. This is made explicit in the Sarbanes-Oxley Act, which contains several provisions emphasizing that the PCAOB is independent of Congress and that its revenues are not “monies of the United States.”<sup>76</sup> Even so, the Board's taxes and accounting regulations are federally enforced legal obligations.<sup>77</sup>

### C. *The Consumer Financial Protection Bureau*

The CFPB, established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,<sup>78</sup> enjoys a different form of self-financing. The CFPB is funded by a draw—up to a statutory cap—from the revenues of the Federal Reserve System (“The Fed”).<sup>79</sup> The Fed's revenues come from fees on private banks and earnings from open market operations. The Fed covers its own operating budget, along with other expected expenses, from the bank fees and remits the remainder to the Treasury.<sup>80</sup> The CFPB's budget, like that of the Fed, is entirely independent of congressional appropriations, but is

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Press Release, Pub. Co. Accounting Oversight Bd., PCAOB Approves 2015 Budget & 2014-2018 Strategic Plan (Nov. 25, 2014), [http://pcaobus.org/News/Releases/Pages/11252014\\_Budget\\_Meeting.aspx](http://pcaobus.org/News/Releases/Pages/11252014_Budget_Meeting.aspx).

<sup>75</sup> See DeMuth, *supra* note 32, at 4.

<sup>76</sup> See, e.g., 15 U.S.C. § 7219(c)(1) (2012) (“Accounting support fees and other receipts of the Board . . . shall not be considered public monies of the United States.”).

<sup>77</sup> See DeMuth, *supra* note 32, at 4.

<sup>78</sup> *Id.*

<sup>79</sup> 12 U.S.C. § 5497(a) (2012).

<sup>80</sup> A recent statutory amendment, contained in the 2015 highway act, limits the Federal Reserve's retained revenues to \$10 billion. Highway and Transportation Funding Act of 2015, Pub. L. No. 114-94, § 32202, 129 Stat. 1739, 1739 (2015).

capped at 12 percent of the Fed's operating budget.<sup>81</sup> Currently the Fed's expenses total almost \$5.5 billion while the CFPB's budget is about \$500 million.<sup>82</sup>

## II. FOR-PROFIT LAW ENFORCEMENT

For-profit law enforcement, meaning an enforcement system that permits enforcers to keep all or part of the proceeds of the action, has a long and storied history in the United States. The obvious argument in favor of for-profit enforcement is the creation of individual and agency incentives: to the extent that enforcers may "eat what they kill," they will be more aggressive. The argument against it is the fiendish difficulty of creating the right set of economic incentives to generate an optimal level of enforcement and deterrence.<sup>83</sup> Since the turn of the nineteenth century, the general (though not unbroken) practice in the United States has been to permit *private* enforcers, including so-called *qui tam* plaintiffs, to sue for profit while prohibiting *public* enforcers from doing the same.<sup>84</sup> Among the most common arrangements is to provide that all monies collected in the process of public enforcement must be deposited in the general treasury.<sup>85</sup>

Over the last few decades, this general understanding has eroded. One observes a pronounced trend toward a merging of private and public enforcement agencies and their functions.<sup>86</sup> Private individuals and organizations

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<sup>81</sup> 12 U.S.C. § 5497(a)(2) (2012).

<sup>82</sup> See BD. OF GOVERNORS OF THE FED. RESERVE, 101ST ANNUAL REPORT 2014 402–03 (2015), <http://www.federalreserve.gov/publications/annual-report/files/2014-annual-report.pdf>; CONSUMER FIN. PROT. BUREAU, THE CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN REPORT 13 (2015), [http://files.consumerfinance.gov/f/201502\\_cfpb\\_report\\_strategic-plan-budget-and-performance-plan\\_FY2014-2016.pdf](http://files.consumerfinance.gov/f/201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf).

<sup>83</sup> The canonical article is Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (private incentives may easily generate under- or over-enforcement).

<sup>84</sup> See, e.g., Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 31–33 (2002).

<sup>85</sup> Miscellaneous Receipts Act, 31 U.S.C. § 3302(b) (2006) (subject to a few enumerated exceptions, "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.") Most state codes contain similar provisions. See, e.g., 820 ILCS 405/2100 (2013) ("All moneys...shall be paid or turned over to the Department and held by the Director, as ex-officio custodian of the clearing account . . .").

<sup>86</sup> See, e.g., David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689, 1753 (2013) ("[M]uch of the existing theoretical literature treats public and private enforcement as pure substitutes and a binary choice . . . [,] many of our most consequential regulatory regimes have evolved into hybrids of public and private enforcement in which multiple enforcers . . . operate and interact within complex 'ecologies of enforcement.'") (footnote omitted); Margaret H. Lemos & Max Minzner, *For-*

have been motivated to act as “private attorneys general.”<sup>87</sup> At the same time, public enforcers at all levels of government have come to behave more and more like private profit-maximizers. While individual *officers* are still prohibited from benefitting directly from their enforcement activities, numerous public *agencies* have gained a stake in maximizing the financial proceeds of their enforcement activities.<sup>88</sup> Somewhat perplexingly, these tendencies have been accompanied by a proliferation of criminal provisions of an open-ended nature, especially in the area of “economic” crimes: fraud, misappropriation, misrepresentation, violations of fiduciary duties, failure to provide “honest services,” “corruption,” and mail fraud.<sup>89</sup> Many of these violations are loosely defined and carry draconian penalties.<sup>90</sup> According to the traditional understanding, the fact that statutes of this nature are easily over-enforced was a potent argument for public enforcement discretion that would be (1) bounded by the enforcers’ need to obtain legislative appropriations and (2) guided by public-regarding considerations, including a concern for possible miscarriages of justice.<sup>91</sup> Just the opposite has happened.

#### A. *Examples of For-Profit Law Enforcement*

The tendencies just described appear to be independent of partisan politics, political fluctuations, and economic and fiscal circumstances. Instead they are a secular trend, observable at all levels of government—local, state, and federal.

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*Profit Public Enforcement*, 127 HARV. L. REV. 853, 862–63 (2014); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 489 (2012); see also sources cited *supra* notes 65–66, 68.

<sup>87</sup> SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 62 (2010); Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TULANE L. REV. 339, 340 (1990).

<sup>88</sup> Farhang, *supra* note 87, at 61. A comprehensive theory of agencies’ enforcement choices would have to address the incentives of *individual* enforcers as well as institutional incentives. That inquiry, though, is beyond the scope of this essay.

<sup>89</sup> See, e.g., Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 PENN. ST. L. REV. 625, 633–35 (2007) (documenting the trend toward overlap of criminal and civil suits brought by private parties). The U.S. Supreme Court has repeatedly voiced concerns over the aggressive enforcement of open-ended and excessively broad criminal provisions. On some occasions it has sought to provide a check through limiting constructions or (as dissenting and concurring justices argued) artful re-writes of the statutory language. See, e.g., *Yates v. U.S.*, 135 S.Ct. 1074, 1090–91 (2014) (Kagan, J. dissenting) (disputing the majority’s interpretation that 18 U.S.C. §1519’s prohibition on tampering with “any record, document, or tangible object” can be interpreted to mean anything other than “an object that’s tangible”); *Skilling v. U.S.*, 561 U.S. 358, 403 (2010) (holding the proscriptions of fraudulent deprivations of “the intangible right of honest services” in 18 U.S.C. § 1346 (2012) covers bribery and kickback schemes).

<sup>90</sup> Finegan, *supra* note 89, at 636.

<sup>91</sup> William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 36-37 (1975).

## 1. Ferguson 2015

After the shooting of a black man by a white police officer, race riots broke out in the predominantly black neighborhood of Ferguson, Missouri.<sup>92</sup> One official report found the shooting to be an act of self-defense and cleared the officer of any misconduct.<sup>93</sup> Another report found that the local police department had for many years issued citations and collected fines for traffic violations and other petty—and often non-existent—offenses, in an obvious effort to bolster its budget.<sup>94</sup> The department's oppressive campaign, the report concluded, was a principal cause of high levels of distrust and mutual hostility between the police force and the local population.<sup>95</sup>

## 2. Speed Traps for the Twenty-First Century

The deployment of automated cameras for policing traffic violations—the running of stop lights and speeding—in major cities has clearly been motivated by revenue-raising as well as safety considerations, with revenue raising predominating in at least some cases.<sup>96</sup> Among the allegations bolstering such a claim are: (1) that cameras are positioned at tempting rather than dangerous intersections;<sup>97</sup> (2) that they are combined with lowered speed limits

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<sup>92</sup> Monica Davey et. al, *Missouri Tries Another Idea: Call in National Guard*, N.Y. TIMES (Aug. 18, 2014), <http://www.nytimes.com/2014/08/19/us/ferguson-missouri-protests.html>.

<sup>93</sup> DEP'T OF JUSTICE, MEMORANDUM: DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARRIN WILSON 7, 12 (2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj\\_report\\_on\\_shooting\\_of\\_michael\\_brown\\_1.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf).

<sup>94</sup> DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 13 (2015), [http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson_police_department_report.pdf).

<sup>95</sup> *Id.* at 5.

<sup>96</sup> Matthew S. Maisel, *Slave to the Traffic Light: A Road Map to Red Light Camera Legal Issues*, 10 RUTGERS J. L. & PUB. POL'Y 401, 410 (2013); Paul McNaughton, *Photo Enforcement Programs: Are They Permissible Under the United States Constitution?*, 43 J. MARSHALL L. REV. 463, 465 (2010).

<sup>97</sup> See David Kidwell & Abraham Epton, *Red Light Verdict Casts Harsh Light On Rationale for Red Light Cameras*, CHI. TRIB., (Jan. 30, 2016), <http://www.chicagotribune.com/news/watchdog/red-light/ct-chicago-red-light-cameras-met-0131-20160129-story.html>.

on routes traveled by suburban commuters,<sup>98</sup> and (3) that the duration of yellow light periods have been shortened.<sup>99</sup> The Chicago photo-enforcement scandal has been particularly nasty and therefore well documented.<sup>100</sup>

### 3. State Attorneys General

Beginning in the 1980s, state attorneys general have played a pioneering role in the practice of for-profit law enforcement. Most of them are specifically exempt from state miscellaneous receipts laws. They may “eat what [they] kill” and have acted accordingly;<sup>101</sup> their offices have become significant profit centers for state legislators.<sup>102</sup>

The single most consequential enforcement action to date is the 1998 Multistate Settlement Agreement (“MSA”) between the attorneys general, major tobacco manufacturers, and private plaintiffs’ attorneys. In a settlement of class actions brought by all states in cooperation with private attorneys, the manufacturers agreed to pay over \$250 billion over a period of twenty-five years (thereafter, the MSA is to run in perpetuity).<sup>103</sup> While the agreement supposedly settled claims against the manufacturers for past misconduct—specifically, the costs that manufacturers’ products allegedly inflicted on the states’ Medicaid programs—the payments are calculated on the basis of *future* tobacco sales; and the agreement is cleverly structured to ensure that virtually the entire cost of the settlement falls on consumers.<sup>104</sup> In

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<sup>98</sup> See Fredrick Kunkle, *Good News: Red-Light-Camera Tickets Decline In D.C. Bad News: It’s Still A Lot Of Money*, WASH. POST (Sept. 7, 2016), [https://www.washingtonpost.com/news/tripping/wp/2016/09/07/good-news-red-light-camera-tickets-decline-in-d-c-bad-news-its-still-a-lot-of-money/?postshare=4751473243285296&tid=ss\\_tw](https://www.washingtonpost.com/news/tripping/wp/2016/09/07/good-news-red-light-camera-tickets-decline-in-d-c-bad-news-its-still-a-lot-of-money/?postshare=4751473243285296&tid=ss_tw).

<sup>99</sup> See David Kidwell, *Experts: Chicago’s Short Yellow Light Times, Red Light Cameras a Risky Mix*, CHI. TRIB. (Dec. 23, 2014), <http://www.chicagotribune.com/news/watchdog/redlight/ct-yellow-light-timing-met-20141223-story.html>; Kirstin Cole, *Red Light Cameras May Be Causing More Harm Than Good in New York City*, PIX11 (Nov. 19, 2015), <http://pix11.com/2015/11/19/red-light-cameras-may-be-causing-more-harm-than-good-in-new-york-city/>.

<sup>100</sup> See *How the Red Light Scandal Unfolded*, CHI. TRIB., <http://graphics.chicagotribune.com/news/local/red-light-timeline> (last visited Nov. 8, 2016); David Kidwell, *How Chicago’s Red Light Ticketing Turned Yellow Lights Into Cash*, CHI. TRIB. (Oct. 12, 2014), <http://www.chicagotribune.com/news/ct-red-light-camera-yellow-light-1012-20141012-story.html>.

<sup>101</sup> Lemos & Minzner, *supra* note 86, at 866.

<sup>102</sup> *Id.* at 855.

<sup>103</sup> See NAT’L ASS’N OF ATTORNEYS GEN., MASTER SETTLEMENT AGREEMENT 42–43 (1998), [http://www.naag.org/naag/about\\_naag/naag-center-for-tobacco-and-public-health/master-settlement-agreement/master-settlement-agreement-msa.php](http://www.naag.org/naag/about_naag/naag-center-for-tobacco-and-public-health/master-settlement-agreement/master-settlement-agreement-msa.php); Frank Sloan & Lindsey Chepke, *Litigation, Settlement, and the Public Welfare: Lessons From the Master Settlement Agreement*, 17 WIDENER L. REV. 159, 161 (2011).

<sup>104</sup> Sloan & Chepke, *supra* note 103, at 204, 224.



effect, the MSA imposed a national excise tax on tobacco products. No legislator at any level of government ever voted for it.<sup>105</sup>

The MSA has since served as a model for multi-state enforcement campaigns against pharmaceutical manufacturers, financial companies, and other corporate targets.<sup>106</sup> Increasingly, moreover, state attorneys general sue not on the state's behalf, but in so-called "mass actions" on behalf of citizens alleged to have been victimized by corporate misconduct.<sup>107</sup> Very often, those victims cannot be identified, or their individual damages cannot be assessed, without incurring inordinate administrative costs.<sup>108</sup> In such scenarios, the law permits so-called *cy-près* distributions, meaning a disposition that approximates the intended beneficiaries' interests as closely as possible.<sup>109</sup> In practice, that circle has proven quite wide. *Cy-près* beneficiaries have included advocacy groups, shell entities created by the defendant corporation for its own benefit, and the prosecuting attorneys' associates.<sup>110</sup>

#### 4. Asset Forfeiture

Beginning in the 1970s, Congress and state legislatures incentivized public agencies to conduct a "war on drugs" by means of asset forfeiture, meaning the pre-trial and pre-conviction seizure of assets from suspected violators.<sup>111</sup> Initially limited to drugs and drug paraphernalia, the statutes soon came to cover the instruments and the proceeds of suspected drug trade, from cars to cash.<sup>112</sup> In 1984, Congress authorized the Department of Justice ("DOJ") to keep the proceeds of asset forfeiture for its own use.<sup>113</sup> Subsequently, the legislature enacted a "fair share" statute authorizing the DOJ to

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<sup>105</sup> For a full account of the MSA's origins, structure, and implications *see generally* MARTHA A. DERTHICK, *UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS* (3d ed. 2012).

<sup>106</sup> *See generally* PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* (2015) (providing data and comprehensive analysis).

<sup>107</sup> Lemos, *supra* note 86, 489–90. Attorney General-led mass actions have gained particular importance because unlike private mass actions, they are not subject to the limitations and removal provisions of the Class Action Fairness Act. *See Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S.Ct. 736, 739 (2014).

<sup>108</sup> Lemos, *supra* note 86, at 495.

<sup>109</sup> Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL L. REV. 97, 118 (2014).

<sup>110</sup> *Customer's Shortchanged? Oversight of the Justice Department's Mortgage Lending Settlements: Hearing before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 76–78 (2015) (Testimony of Theodore H. Frank), [http://judiciary.house.gov/\\_cache/files/d5be7358-cc2e-4c0f-94c1-e677994b856a/114-16-93280.pdf](http://judiciary.house.gov/_cache/files/d5be7358-cc2e-4c0f-94c1-e677994b856a/114-16-93280.pdf).

<sup>111</sup> Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 79 (1996).

<sup>112</sup> *Id.* at 79–80.

<sup>113</sup> Lemos & Minzner, *supra* note 86, at 868.

share the proceeds of asset forfeitures for federal crimes with the local authorities that made the seizure.<sup>114</sup> Empirical and econometric studies have shown that the “war on drugs” has been driven by executive as well as legislative budgetary considerations.<sup>115</sup> The “fair share” program proved sufficiently lucrative to spawn a cottage industry of consulting firms.<sup>116</sup> Operating under black-ops names, these firms instruct law enforcement agencies in the interception of “suspicious” vehicles and drivers and in the circumvention of constitutional rules against warrantless searches and seizures.<sup>117</sup>

## 5. Corporate Crime

The single largest venue of for-profit law enforcement is corporate crime and misconduct. Unlike many other legal systems, U.S. law permits enforcers to prosecute corporations rather than—or in addition to—their individual officers or employees.<sup>118</sup> Over the past decade or so, such prosecutions have become increasingly common. Professor Brandon L. Garrett’s widely cited study, *Too Big to Jail*, counts 2,262 prosecutions from 2001–2012, with a pronounced upward trend.<sup>119</sup> Fines and other payments recovered in these actions have risen even more dramatically. Average payments have risen largely due to an explosion of very high-end settlements, often exceeding \$1 billion.<sup>120</sup>

A common, highly controversial practice in this area is the settlement of criminal investigations through Deferred Prosecution Agreements

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<sup>114</sup> 21 U.S.C. § 881(e)(1)(A) (2012).

<sup>115</sup> See Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2135 (2007) (showing that budget authorities cut appropriations in response to law enforcement seizures and that law enforcement increases forfeiture activity as a result); Eric D. Blumenson & Eva S. Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 CHI. L. REV. 35, 51 (1998); John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 179 (2001). Courts have also noted the phenomenon. See, e.g., *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 n.2 (1993) (“The extent of the Government’s financial stake in drug forfeiture is apparent from a 1990 memo, in which the Attorney General urged the United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice’s annual budget target: . . . ‘Failure to achieve the \$470 million projection would expose the Department’s forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.’” (alteration in original) (quoting U.S. Dep’t of Justice, *Administrative Issues*, 38 U.S. ATT’Y BULL. 163, 180 (1990))).

<sup>116</sup> Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>.

<sup>117</sup> *Id.*

<sup>118</sup> *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494–95 (1908).

<sup>119</sup> BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* 301 (2014).

<sup>120</sup> *Id.* at 294.

(“DPAs”) or Non-Prosecution Agreements (“NPAs”).<sup>121</sup> The first such agreement was reported in 1994; since then, the practice has spread.<sup>122</sup> Appendix 1 provides an annual count of such settlements and their aggregate amounts for the years 2001–2014 based on Professor Garrett’s data and a partially overlapping count and analysis by the law firm of Gibson, Dunn & Crutcher LLP.<sup>123</sup> We caution that the data are somewhat impressionistic. While a court must approve DPAs,<sup>124</sup> NPAs require no such approval;<sup>125</sup> and no official count appears available from any government source. The settlement volume is likewise a matter of conjecture, as is the distribution of the funds. Many settlements are wholly undisclosed and confidential; others disclose aggregate figures in the form of self-serving press releases.

These cautions acknowledged, and a large year-to-year variance notwithstanding, there is no mistaking the overall trend: beginning in 2004 or thereabouts, both the number and the settlement amounts of DPAs and NPAs increased substantially.<sup>126</sup>

#### B. *Corporate Prosecutions: Some (Cautious) Observations and Interpretation*

The forgoing examples provide a sense of movement toward for-profit law enforcement at all levels of government and in a wide range of venues and institutional settings. The remainder of this Section dives deeper into federally led criminal and civil actions against large corporations. The Section first presents some empirical data, then turns to salient features that bear on the central theme of agency finance: (1) the rising tide of such prosecution and monetized settlements; (2) the apparent focus on economic sectors with intense financial and regulatory relationships with the government; (3) the pattern of consistent legislative support for expanding the practice; (4) a pronounced tendency toward “presidentialism”; and (5) a startling lack of public accountability at all stages of the proceedings, including the disposition of funds.

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<sup>121</sup> Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 538 (2015).

<sup>122</sup> *Id.* at 544 n.35.

<sup>123</sup> See *infra* Appendix 1.

<sup>124</sup> Without such approval DPA’s would violate the Speedy Trial Act. 18 U.S.C. § 3161 (2012). “Approval” means a rubberstamp, usually on the day of submission to the court. There appear to be only two reported decisions and opinions scrutinizing a DPA: *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 165 (D.D.C. 2015); *vacated and remanded*, *United States v. Fokker Servs. B.V.*, 818 F.3d 733 (D.C. Cir. 2016); *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at \*1 (E.D.N.Y. July 1, 2013).

<sup>125</sup> Alexander & Cohen, *supra* note 121, at 545.

<sup>126</sup> *Id.* at 541.

## 1. Monetized Law Enforcement

Professor Garrett's study of corporate criminal prosecutions over the 2001–2012 period marshals impressive evidence of the sharp increase in such prosecutions, aggregate fines collected, and settlement volume.<sup>127</sup> However, as the author explains, the study does not provide a full picture of the landscape.<sup>128</sup> The study does not include state prosecutions. Nor does it include civil proceedings brought by federal agencies (such as the SEC), government tort actions for natural resource damages that are well nigh indistinguishable from fines,<sup>129</sup> or *qui tam* actions.<sup>130</sup> Finally, the author's data cannot provide a full picture of the financial transfers. As already noted, settlements are frequently confidential. Publicly advertised settlement values often differ wildly from actual and actually paid amounts, and the payment streams to different federal agencies, states, private parties, and *qui tam* plaintiffs are difficult to trace.<sup>131</sup>

For somewhat closer observation, this Article homes in on one specific subset of settlements: civil and criminal settlements for \$100 million or more with commercial and investment banks, involving one or more federal agency (often in league with state attorneys general) from 2000 through late 2015. A summary, based on agency press releases and news reports as well as Professor Garrett's posted data on criminal settlements, is presented at Appendix 2. As one would expect, the sample is dominated by the legal sequela of the 2008 financial collapse. There were few big-money bank settlements of any kind before 2009. Thereafter, several cases involved municipal bond underwriting (designated "Muni Bid-Rigging"),<sup>132</sup> violations of U.S. trade embargos (designated "IEEP Laundering"),<sup>133</sup> and tax and securities fraud.<sup>134</sup> From 2010 onward, the number and size of settlements increased dramatically, and the picture is dominated by allegations of conduct said to have contributed to the 2008 financial collapse—inadequate disclosure of the

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<sup>127</sup> GARRETT, *supra* note 119, at 292–95.

<sup>128</sup> *Id.* at 7–8, 291–92.

<sup>129</sup> See Karen Bradshaw, *Settling for Natural Resource Damages*, 40 HARV. ENVTL. L. REV. 211, 212, 244 n.148 (2016). While most damages settlements and awards are fairly small, they include settlements over the Exxon Valdez (\$680 million) and the BP Deepwater Horizon (\$8.1 billion). *Id.*

<sup>130</sup> For empirics, see Engstrom, *supra* note 86, at 1716.

<sup>131</sup> Several reasons account for this phenomenon. Fines and settlement payments may never be collected. See Ross & Pritkin, *infra* note 193, at 468. In many instances, both the prosecutors and the settling firm have reputational incentives to exaggerate the settlement amounts. Settlements often contain figures that are based on outer-bounds estimates of parties entitled to restitution, and they may contain terms that permit the settling corporation to minimize the actual value of the settlement. See, e.g., Sean Higgins, *Obama's Big Bank 'Slush Fund'*, WASH. EXAMINER (Jan. 18, 2016), <http://www.washingtonexaminer.com/obamas-big-bank-slush-fund/article/2580431>.

<sup>132</sup> See *infra* Appendix 2.

<sup>133</sup> See *infra* Appendix 2.

<sup>134</sup> See *infra* Appendix 2.

risks of banks' residential mortgages and mortgage-back securities ("MBS") sold to private purchasers, government agencies, and the government-sponsored enterprises Fannie Mae and Freddie Mac (in federal conservatorship at the time of the settlements);<sup>135</sup> "inadequate internal procedures" and documentation for processing mortgage originations and foreclosures;<sup>136</sup> and LIBOR rate-fixing.<sup>137</sup> Government press releases accompanying these settlements often characterized them as punishment for conduct that had contributed to the 2008 "mortgage meltdown."<sup>138</sup>

Where did the money go? The lion's share of settlement proceeds was remitted directly or indirectly to the U.S. Treasury.<sup>139</sup> However, substantial sums were paid to Fannie and Freddie, the Federal Housing Administration, and what Appendix 2 refers to as the "Other Fed" category: the Federal Reserve, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation; and nearly \$7.8 billion was divided among various groups of state attorneys general.<sup>140</sup> The single largest settlement category, "Restitution" (\$44.75 billion), is something of a hodge-podge, and a highly intriguing one. It includes sums paid directly by settling banks to designated parties in restitution for harms resulting from the conduct in question; sums paid to the Justice Department, SEC, or state attorneys general for distribution (through mechanisms such as the SEC's "Fair Fund"<sup>141</sup>) to groups described with more or less specificity in press releases and court documents; and funding of non-

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<sup>135</sup> GARRETT, *supra* note 119, at 259.

<sup>136</sup> *Id.* at 9.

<sup>137</sup> *Id.* at 256. Our sample omits several settlements related to the 2008 collapse with independent securities broker/dealers (i.e., unaffiliated with a commercial or investment bank) and other entities, including a February 2015 settlement with Standard & Poor's for allegedly misrepresenting the risks of MBSs and related securities in its securities ratings. Press Release, Dep't of Justice, Justice Department and State Partners Secure \$1.375 Billion Settlement with S&P for Defrauding Investors in the Lead Up to the Financial Crisis (Feb. 3, 2015), <https://www.justice.gov/opa/pr/justice-department-and-state-partners-secure-1375-billion-settlement-sp-defrauding-investors>. Of that \$1.375 billion settlement, \$687.5 million went to the federal government and \$687.5 million was divided among 19 states and the District of Columbia. *Id.*

<sup>138</sup> See, e.g., Press Release, Dep't of Justice, Goldman Sachs Agrees to Pay More than \$5 Billion in Connection with Its Sale of Residential Mortgage Backed Securities (Apr. 11, 2016), <https://www.justice.gov/opa/pr/goldman-sachs-agrees-pay-more-5-billion-connection-its-sale-residential-mortgage-backed>; Press Release, Dep't of Justice, Wells Fargo Bank Agrees to Pay \$1.2 Billion for Improper Mortgage Lending Practices (Apr. 8, 2016), <https://www.justice.gov/opa/pr/wells-fargo-bank-agrees-pay-12-billion-improper-mortgage-lending-practices>; Press Release, Dep't of Justice, Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to & During the Financial Crisis (Aug. 21, 2014), <https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>.

<sup>139</sup> See *infra* Appendix 2.

<sup>140</sup> See *infra* Appendix 2.

<sup>141</sup> See Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 333 (2015).

profit groups for causes related (sometimes only tangentially) to the alleged misconduct.<sup>142</sup>

The most thoroughly documented agreement appears to be the \$25 billion “National Mortgage Settlement” in February 2012, involving five leading banks that allegedly followed questionable mortgage loan servicing and foreclosure practices.<sup>143</sup> The \$23.75 billion portion of the settlement in the “Restitution” category of Appendix 2 includes \$3 billion of bank refinancings for mortgages of borrowers who were delinquent in their payments or whose homes had fallen in value to less than the principal due.<sup>144</sup> Another \$7 billion was dedicated to bank “consumer relief” for certain mortgage borrowers who were unemployed or in military service plus additional, somewhat mysterious categories such as “anti-blight activities.”<sup>145</sup> “Restitution” further included a government-administered \$1.5 billion “payment fund” for borrowers whose mortgages had been foreclosed upon.<sup>146</sup> Approximately \$2.5 billion was distributed by state attorneys general to hundreds of state and local agencies and non-profit organizations.<sup>147</sup> The settlement documents and press coverage were much less precise about the sums collected by government agencies for their own accounts. It appears that \$912 million was retained by federal agencies, with most of it deposited in the FHA’s capital fund.<sup>148</sup> Additionally, approximately \$350 million was divided among state attorneys general and associations of state regulatory agencies.<sup>149</sup>

A comparison between the post-2008 pattern and responses to earlier financial crises suggests a progressive substitution of corporate prosecutions-for-money in lieu of prosecution of individuals. One of the principal public responses to the savings and loan crisis of the 1980s was a raft of prosecutions of individual wrongdoers.<sup>150</sup> The response to the 2001 market crash brought high-profile prosecutions of corporate executives and the federal

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<sup>142</sup> See *infra* Appendix 2.

<sup>143</sup> For a detailed summary of the settlement, see *National Mortgage Settlement Summary*, NAT’L COUNCIL OF STATE LEGISLATURES (Sept. 4, 2013), <http://www.ncsl.org/research/financial-services-and-commerce/national-mortgage-settlement-summary.aspx>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *National Mortgage Settlement Summary*, NAT’L COUNCIL OF STATE LEGISLATURES (Sept. 4, 2013), <http://www.ncsl.org/research/financial-services-and-commerce/national-mortgage-settlement-summary.aspx>.

<sup>150</sup> See Bruce A. Green, *After the Fall: The Criminal Law Enforcement Response to the S&L Crisis*, 59 FORDHAM L. REV. S155, S156 (1991) (describing congressional adoption of laws “designed to facilitate the investigation and prosecution of individuals who committed crimes against financial institutions.”).

prosecution of Arthur Anderson that destroyed the firm.<sup>151</sup> Beyond prosecutions, though, the 2001 crisis also produced high-value settlements—foremost, an April 2003 settlement with ten leading banks and securities dealers over conflicts-of-interest between their securities research advisors and securities underwriting.<sup>152</sup> It included \$387.5 million for “a fund to benefit consumers of the firms,” \$432.5 million to be spent by the firms on securities research by independent firms, and \$80 million to “fund and promote investor education.”<sup>153</sup> Another \$487.5 million was divided among state attorneys general.<sup>154</sup> That agreement seems to have served as the template for the post-2008 settlements. Still, the 2008 response differs in two respects: it was led by federal rather than state agencies, and it appears to have been entirely money-driven, to the virtual exclusion of individual prosecutions.<sup>155</sup>

The progression from criminal law enforcement to monetized settlements may have a legal explanation, such as the difficulty of obtaining individual convictions or differential evidence of actual wrongdoing. It may have a political explanation, such as partisan control of federal agencies and state attorneys general offices or the financial institutions’ lobbying clout and personal connections. However, the progression is also consistent with an agency-centered theory of non-appropriated budget maximization. While we cannot defend that theory against its rivals with any great confidence, it remains among the plausible candidates.

## 2. Government Relations

Our sample of corporate prosecutions is hardly representative. It is dominated by a crisis that cost the federal government hundreds of billions of dollars, that many political leaders and legislators had attributed to “greed on Wall Street,” and that led to insistent demands for criminal punishment of the evildoers.<sup>156</sup> Moreover, the government’s relationship with the financial

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<sup>151</sup> The Supreme Court eventually overturned that conviction in a unanimous decision. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005).

<sup>152</sup> See Press Release, Sec. & Exch. Comm’n., Ten of Nation’s Top Investment Firms Settle Enforcement Actions Involving Conflicts of Interest Between Research & Investment Banking (Apr. 28, 2003) <https://www.sec.gov/news/press/2003-54.htm>.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> In September 2015, Deputy Attorney General Sally Q. Yates announced new guidelines for prosecuting individual executives in addition to extracting settlements from their firms. Although she emphasized the importance of prosecuting executives to “protect our financial system,” the guidelines apply to all cases involving corporate criminal allegations. See U.S. Dep’t of Justice, MEMORANDUM OF THE DEPUTY ATTORNEY GENERAL: INDIVIDUAL ACCOUNTABILITY FOR CORPORATE WRONGDOING (Sept. 9, 2015), <http://www.justice.gov/dag/file/769036/download> (accessed Jan. 16, 2016). We are not aware of any systematic study of the Department’s enforcement policies since.

<sup>156</sup> See, e.g., *The Cost of the Crisis*, BETTER MARKETS (July 20, 2015), <https://www.bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf>.

sector is uniquely intense, intimate, and co-dependent. The federal government regulates, subsidizes, supervises, and insures the banks. It operates a national bank that collaborates continuously with private banks in the conduct of monetary policy and other matters.<sup>157</sup> The U.S. Treasury and other agencies also collaborate continuously with the banks in borrowing and repaying vast sums for financing the government's own operations as well as a range of private activities, especially residential mortgages, student loans, and sales of American products to foreign purchasers.<sup>158</sup> State and municipal governments do many of these things as well. Billions of dollars move back and forth between the government and private commercial and investment banks every week, and their top executives also move back and forth regularly.<sup>159</sup> Moreover, in the years preceding the 2008 financial collapse federal agencies, including regulatory agencies, had been avid promoters of highly leveraged, loosely secured mortgage lending and of the explosive growth of MBS markets.<sup>160</sup> So it is easy to imagine that the huge bank settlements of the past five years, whatever the legal merits of the individual cases, were to some degree transactional—a squaring-up of accounts in one line of a financial partnership that had gone terribly awry.

That said, available data suggest that a comprehensive tabulation of the past two decades' large legal settlements would reveal that they are *not* targeted at a single industry, are *not* a “crisis response” phenomenon, and are *not* a response to a sudden outbreak of corporate greed and criminality. Professor Garrett's much larger set of criminal prosecutions is dominated by pharmaceutical companies and violators of antitrust statutes and the Foreign Corrupt Practices Act.<sup>161</sup> Available data for prosecutions under the False Claims Act show the same pattern, as does a separate, though partially overlapping data series on settlements with pharmaceutical companies.<sup>162</sup> Similarly, data on joint state prosecutions fail to demonstrate any crisis response pattern or a preoccupation with the financial sector. Pharmaceutical firm settlements rank ahead of all other targets at 20.5 percent, followed by banks and insurers at 10.9 percent combined.<sup>163</sup>

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<sup>157</sup> See Troy S. Brown, *Legal Political Moral Hazard: Does the Dodd-Frank Act End Too Big To Fail?* 3 ALA. C.R. & C.L. L. REV. 1, 59 (2012).

<sup>158</sup> Lawrence G. Baxter, *Betting Big: Value, Caution and Accountability in an Era of Large Banks and Complex Finance*, 31 REV. BANKING & FIN. L. 765, 818-19 (2012).

<sup>159</sup> *Id.*; Daniel Indivigilo, *Why Is the Path From Wall Street to Washington So Well-Trodden?*, ATLANTIC (Jan. 4, 2011), <http://www.theatlantic.com/business/archive/2011/01/why-is-the-path-from-wall-street-to-washington-so-well-trodden/68874>; Katy Burne, *Fed Tightens Rules Addressing Alleged “Revolving Door” With Wall Street*, WALL STREET J. (Nov. 18, 2016), <http://www.wsj.com/articles/fed-tightens-rules-addressing-alleged-revolving-door-with-wall-street-1479488428>.

<sup>160</sup> See Brown, *supra* note 157, at 8–10.

<sup>161</sup> GARRETT, *supra* note 119, at 295.

<sup>162</sup> Sammy Almashat & Sidney Wolfe, *Pharmaceutical Industry: Criminal and Civil Penalties: An Update*, PUB. CITIZEN 36 (Sept. 27, 2012), <https://www.citizen.org/documents/2073.pdf>.

<sup>163</sup> Nolette, *supra* note 106 at 25.



Large civil and criminal settlements have one thing in common: overwhelmingly, they involve firms with substantial long-term relationships with federal and state governments. Banking and finance are but the most extreme example of a model of regulation and a pattern of intimate government-corporate relations that also applies to pharmaceuticals, defense and aerospace, health care and medical insurance, automobiles, telecommunications, and energy.<sup>164</sup> In all those sectors, the corporatist partnerships have prompted public discontent and political agitation over “crony capitalism.”<sup>165</sup> Politics demands some form of sanction; and yet the partnership must continue. Financial settlements may be one way of accommodating those rival imperatives.

### 3. Congressional Support

Public prosecutors appear to have been quite creative in devising novel instruments to monetize criminal enforcement; the prolonged boom market in DPAs and NPAs is an example.<sup>166</sup> For the most part, though, it is difficult to portray the phenomenon as a prosecutorial rampage: it has occurred with the full support of Congress (and for that matter of state legislatures). For example, statutes enacted in hasty response to crisis events or newspaper headlines routinely expand definitions of corporate misconduct, increase penalties, and facilitate prosecutions.<sup>167</sup> Congressional hearings routinely urge greater prosecutorial zeal; occasionally, they serve to generate information and even predicate acts for prosecutions.<sup>168</sup>

Among the robust indicators of congressional support is the creation of “revolving funds.”<sup>169</sup> Such funds permit agencies to keep the proceeds of their enforcement activities, in whole or in part, instead of depositing them, as ordinarily required, in the U.S. Treasury. One previously mentioned fund supports the DOJ’s asset forfeiture program,<sup>170</sup> another, the DOJ’s enforcement of the False Claims Act.<sup>171</sup> Another fund, created in 1996, is the Health Care Fraud and Abuse Control Program, jointly administered by the Department

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<sup>164</sup> Of course these sectors amount to a large share of the economy as a whole. Our prediction is that their share of settlements will be even larger (and that the also large retail grocery sector will appear only in an occasional antitrust proceeding, if at all).

<sup>165</sup> See generally Jonathan R. Macey, *Crony Capitalism: Right Here, Right Now*, 37 HARV. J.L. & PUB. POL’Y 5 (2014).

<sup>166</sup> ANTHONY S. BARKOW & RACHEL E. BARKOW, PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 4 (2011).

<sup>167</sup> See Peter J. Henning, *A New Crime for Corporate Misconduct?*, 84 MISS. L.J. 43, 52–53 (2014).

<sup>168</sup> GARRETT, *supra* note 119, at 45–46.

<sup>169</sup> See *supra* Part I.

<sup>170</sup> The Department’s Asset Forfeiture Fund consists of “all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice.” 28 U.S.C. § 524(c)(4)(A) (2012).

<sup>171</sup> 31 U.S.C. § 3730(d) (2012); 18 U.S.C. § 981(e) (2012).

of Justice and the Department of Health and Human Services.<sup>172</sup> Yet another is the CFPB's Civil Penalty Fund: under Title X of the Dodd-Frank Act, the Bureau may keep the proceeds of its enforcement activities for its own use or the benefit of certain third parties.<sup>173</sup> As previously mentioned, the SEC "Fair Fund" was established by the Sarbanes-Oxley Act of 2002 to permit the agency to distribute civil penalties to defrauded investors at its discretion.<sup>174</sup> As those varied examples suggest, congressional support for monetized law enforcement has enjoyed bipartisan support for a considerable period of time.

#### 4. Presidential Enforcement

Legal scholars and political scientists have consistently found a tendency toward executive government; and within the executive, a shift of authority from routinized administration to political decision-making from line administrators to heads of departments and the White House.<sup>175</sup> Corporate crime enforcement reflects the same tendency. In the "big" cases, the sums are simply too large, the targets are too prominent and well connected, and the economic and political ramifications are too significant to be left to line prosecutors. A JP Morgan settlement was agreed upon in a meeting between the bank's chief executive, Jamie Dimon, and the Attorney General of the United States.<sup>176</sup> BP's first "settlement" of the Deepwater Horizon oil spill, in the amount of \$20 *billion*, was memorialized in a wholly novel legal form—a joint press release with the White House.<sup>177</sup>

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<sup>172</sup> 42 U.S.C. § 1320a-7c (2012); see *Health Care Fraud and Abuse Control Program Report*, OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://oig.hhs.gov/reports-and-publications/hcfac/> (reporting amounts deposited into the Medicare Trust Fund, where most years have seen deposits of over \$1 billion) (last visited Nov. 9, 2016). The annual reports highlight the numbers, and — more recently — calculate and emphasize the "Return-on-Investment (ROI)" of the Health Care Fraud and Abuse Control Program, which created the fund. *Id.* In 2012, the agencies reported that "for every dollar spent on health care-related fraud and abuse investigations in the last three years, the government recovered \$7.90." Lemos & Minzner, *supra* note 86, at 874.

<sup>173</sup> 12 U.S.C. § 5497(d) (2012).

<sup>174</sup> Velinkonja, *supra* note 141, at 333–34.

<sup>175</sup> *E.g.*, Kagan, *supra* note 1, *passim*; Thomas Gais & James Fossett, *Federalism and the Executive Branch*, in *THE EXECUTIVE BRANCH* 486, 498 (Joel D. Aberbach & Mark A. Peterson eds., 2005).

<sup>176</sup> David Henry & David Ingram, *JPMorgan's Dimon Meets with U.S. Attorney General Holder*, REUTERS (Sept. 26, 2013), <http://www.reuters.com/article/us-jpmorgan-probes-holder-idUSBRE98P0N W20130926>).

<sup>177</sup> Press Release, President Barack Obama, The White House, Statement by the President After Meeting with BP Execs. (June 16, 2010), <https://www.whitehouse.gov/the-press-office/statement-president-after-meeting-with-bp-executives>). We put "settlement" in quotes because the agreement settled nothing at all. In particular, it provided BP with no protection against legal proceedings by multiple parties. *Id.*

Perhaps, the trend toward “presidential” government is better described as a trend toward *political* administration. It does not signal greater centralization. Rather, as noted, agencies at all levels of government seem emboldened to press their enforcement authority. In a very real sense, they compete in the enforcement market for targets and revenues: a phenomenon that has necessitated many multi-agency settlements. *Within* each agency, however, decision-making authority has migrated upward to elected and other political officials.

## 5. Oversight

Corporate prosecutions are very poorly monitored by outside actors at all stages: investigation, indictment, settlement, and remedies. Congressional oversight has been sporadic at best, and one may reasonably doubt whether Congress can police settlement authority, once it has been conferred, in an effective fashion.<sup>178</sup> Judicial oversight is equally haphazard. Some settlements receive judicial sanction; others do not. Even where judicial approval is obtained, review is highly perfunctory even when potent criminal charges are settled for a relative pittance and the defendants obtain immunity from prosecution. In one highly noted case, when a district judge insisted that the parties show some evidence to the effect that the settlement was not mere collusion, an appellate court reversed the holding.<sup>179</sup> Similarly, in a broadly worded opinion, the D.C. Circuit reversed a district court’s attempt to subject a Deferred Prosecution Agreement to judicial scrutiny.<sup>180</sup>

Outside monitoring is yet more perfunctory at the remedies stage. In major cases, settlements often contain provisions for what, in an adjudicatory setting, would be called conduct remedies—foremost, corporate compliance programs.<sup>181</sup> Other settlements contain elaborate, very expensive programs

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<sup>178</sup> Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 32, *passim* (2009).

<sup>179</sup> SEC v. Citigroup Global Mkts., Inc., 673 F.3d 158, 163–65 (2d Cir. 2012), *rev’g* 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011) (rejecting a proposed Consent Order that imposed “substantial injunctive relief” because it is neither “reasonable, nor fair, nor adequate, nor in the public interest.”).

<sup>180</sup> United States v. Fokker Servs. B.V., 818 F.3d 733, 750 (D.C. Cir. 2016).

<sup>181</sup> See, e.g. Press Release, Dep’t of Justice, Office of Publ. Affairs, Credit Suisse Agrees to Forfeit \$536 Million in Connection with Violations of the International Emergency Economic Powers Act and New York State Law (Dec. 16, 2009), <https://www.justice.gov/opa/pr/credit-suisse-agrees-forfeit-536-million-connection-violations-international-emergency>.

for restitution or compensation for the supposed victims of the alleged misconduct, such as mortgage debtors or student borrowers.<sup>182</sup> Studies have consistently found such arrangements to be very poorly monitored,<sup>183</sup> for the obvious reason that neither party to the agreement has much of a stake in its success.<sup>184</sup> Courts have better things to do with their time. To date, legislators have largely made do with requesting the occasional Government Accountability Office (“GAO”) report.<sup>185</sup>

A bit more surprisingly, while the urge to monetize corporate investigations appears to be strong and getting stronger, there’s no telling where the money went<sup>186</sup> or, indeed, whether it is paid in the first place. The collection rate for payments to many federal agencies is in the single digits.<sup>187</sup> Revolving fund collections are probably more substantial,<sup>188</sup> however, in the absence of any robust evidence, it is difficult to be confident about the magnitude. Congress, for its part, has legislated regular reporting requirements for revolving funds.<sup>189</sup> However, the agencies do not report collection ratios. For enforcement proceeds collected outside of revolving funds, data is only partially available, mostly from private watchdog groups or agency press releases.<sup>190</sup>

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<sup>182</sup> See, e.g., Press Release, Dep’t of Justice, Office of Pub. Affairs, Federal Government and State Attorneys General Reach \$25 Billion with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing & Foreclosure Abuses (Feb. 9, 2012), <https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest>.

<sup>183</sup> GARRETT *supra* note 119, at 172–95.

<sup>184</sup> To our minds, it is not entirely clear what “success” might mean in this context. The overarching goal of compliance programs is to change the “corporate culture.” See, e.g., FREDERICK D. LIPMAN & L. KEITH LIPMAN, CORPORATE GOVERNANCE BEST PRACTICES: STRATEGIES FOR PUBLIC, PRIVATE, AND NOT-FOR-PROFIT ORGANIZATIONS 54–55 (2006); Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 689–95 (2008) (discussing corporate compliance programs and their emphasis on corporate culture). However, it is exceedingly difficult to operationalize such an objective, and harder yet to translate it into practice. A financial firm’s agreement to hire 1,000 additional compliance officers—all of whom are a raw net cost—may in fact enhance the organizational stature and dominance of the traders and dealmakers: profits and rents must be earned before they can be dissipated. Thus, compliance and monitoring are bound to turn into bureaucratic bean-counting exercises: monitors hired, meetings conducted, reports produced. We know of no systematic study of the issue; however, the basic intuitions are straightforward.

<sup>185</sup> See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 10-110, CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS (Jan. 8, 2010), <http://www.gao.gov/assets/300/299781.pdf>.

<sup>186</sup> Cf. ROBERT PALMER, *Simply Irresistible*, on HEAVY NOVA (EMI, Manhattan 1988).

<sup>187</sup> See Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL’Y REV. 453, 473–76 (2011). Under-collection on that scale is difficult to square with a deterrence theory of public prosecution. Lemos & Minzer, *supra* note 86, at 883–85.

<sup>188</sup> Lemos & Minzner, *supra* note 86, at 872–73. The obvious reason for this surmise is that those proceeds—unlike funds remitted to the Treasury—redound to the enforcing agency’s own benefit.

<sup>189</sup> See, e.g., 44 U.S.C. § 309(d) (2012).

<sup>190</sup> Lemos & Minzner, *supra* note 86, at 880–81.

## III. OFF-BUDGET AGENCY FINANCE: QUESTIONS AND SPECULATIONS

The first, obvious conclusion from the preceding discussion is that better data is needed, both for reasons of good government and for purposes of legal and policy analysis. Obtaining such data for the federal government, let alone states, would exceed the capacity of individual scholars or research teams. Most likely, it would require a congressional mandate compelling the executive to collect systematic revenue and expenditure data from and across a multitude of agencies. The Treasury and the Office of Management and Budget, as well as the GAO, Congressional Budget Office, and Congressional Research Service, need to get on the case. The dearth of information is itself revealing. While no one set out to create an entire system of independent agency finance, we are moving impressively in that direction. In order to understand why it is happening and what might be done about it, particulars and patterns of what has transpired must be brought to light.

A second, more tentative conclusion is that some doctrines of administrative law may need revisiting. For instance, the constitutional rule of congressional delegation of *regulatory* authority is that Congress must provide an “intelligible principle,” a requirement that has not been found wanting in any Supreme Court case since 1935.<sup>191</sup> Among the proffered reasons for that permissive approach is the alleged impossibility of identifying judicially manageable standards to distinguish permissible from excessive delegations.<sup>192</sup> Do the Constitution’s clear textual assignments of taxing and appropriation powers counsel a different, more stringent and formalistic approach with respect to Congress’s powers of the purse? The Supreme Court’s and the appellate courts’ general answer has been “no”; here as with regulatory delegations, the constraints on Congress are vanishingly weak.<sup>193</sup> What, though, of an agency that is vouchsafed expansive rulemaking authority *combined with* its own taxing and spending authorities—and perhaps also, as with the CFPB, protections against presidential removal of the principal officers?<sup>194</sup> Even if each device is constitutional on its own, might combining all

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<sup>191</sup> See, e.g., *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *Yakus v. United States*, 321 U.S. 414, 452 (1944) (distinguishing, and arguably overruling *sub silentio*, the non-delegation principle articulated in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935)).

<sup>192</sup> See, e.g., Jenny Neeley, *Over The Line: Homeland Security’s Unconstitutional Authority to Waive all Legal Requirements for the Purpose of Building Border Infrastructure*, 1 ARIZ. J. ENVTL. L. & POL’Y 139, 154 (2011).

<sup>193</sup> See, e.g., *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 212 (1989); *Rural Cellular Ass’n v. FCC*, 685 F.3d 1083, 1090-92 (D.C. Cir. 2012); *Tex Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 426–28 (5th Cir. 1999), *cert. denied*, 530 U.S. 1210, 1223 (2000), and *cert. dismissed*, 531 U.S. 975 (2000).

<sup>194</sup> See Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy With Removal Protection*, 125 HARV. L. REV. 1822, 1843 (2012) (“[T]he appropriateness of combining self-funding with removal protection for various types of agency deserves more analysis and should be a topic for future scholarly debate.”).

of them produce such comprehensive executive autonomy as to counsel a different answer, and suggest a judicially manageable one?<sup>195</sup>

This Article's third and grandest conclusion is that agency taxation and for-profit enforcement does indeed belong in the larger discussions of the rise of executive government. The appearance of *self-financing* executive government challenges earlier explanations of the phenomenon and might lead to a fuller explanation. Theorizing has tended to focus either on the incentives and behavior of the Congress and its members, or on the incentives and behavior of agencies and their officials. Congress's handing agencies taxing and spending powers along with lawmaking power demands that the two be considered together. As it happens, each of the authors of this Article has written separately on the two subjects, in ways that could lead to an integrated approach.

One of the authors, Christopher DeMuth, has linked the rise of executive government and the corresponding decline of Congress to growing affluence and education and advances in information and communication technologies.<sup>196</sup> He argues that these developments, by greatly increasing political participation and reducing political transactions costs, have transformed both sides of the market for government policy.<sup>197</sup> On the demand side, an enormous array of discrete interest groups can now organize effectively to lobby for government interventions.<sup>198</sup> On the supply side, politics has become entrepreneurial and specialized: candidates, legislators, and officials can now work directly with interest and ideological support groups, bypassing the party and congressional hierarchies that previously controlled and limited the political agenda.<sup>199</sup> But Congress itself—with its ungainly decision-making procedures and innumerable conflicts among representatives of diverse localities, interests, and values—is institutionally incapable of managing the resulting profusion of policy demands. Its solution is to delegate lawmaking to administrative agencies that possess the advantages of hierarchy and specialization that Congress lacks; agencies can deploy modern technology much more efficiently in managing the “stakeholder communities” engaged

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<sup>195</sup> For a suggestion that the answer may be “yes,” see *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010); *Ass'n of American R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013) (“[J]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute.”) *vacated and remanded on other grounds*, 135 S. Ct. 1225 (2015). In a recent decision, a panel of the D.C. Circuit Court of Appeals has found the CFPB Director's removal protection unconstitutional on just these grounds. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), *vacated and remanded* *PHH Corp. v. Consumer Fin. Prot. Bureau*, No. 15-1177, 2017 U.S. App. LEXIS 2733 (D.C. Cir., Feb. 16, 2017). The CFPB's tax-free finance was not at issue in the panel's decision and opinion.

<sup>196</sup> See DeMuth, *supra* note 1, at 157–62; see also sources cited *supra* note 14.

<sup>197</sup> DeMuth, *supra* note 1, at 158–69.

<sup>198</sup> *Id.* at 160.

<sup>199</sup> *Id.* at 159.

in each policy field, and can be multiplied essentially without limit.<sup>200</sup> In this view, Congress has evolved from lawmaker into enabler of executive government. Its institutional function is to establish semi-autonomous special-purpose governments, while its individual members pursue their electoral careers as official lobbyists of those governments on behalf of narrow interest groups and broad ideological or partisan causes.

This construct is, at least on the surface, highly pertinent to the emergence of agency taxation and for-profit enforcement. It suggests that, at variance with the longstanding view of many scholars, legislators might not distinguish sharply between delegating lawmaking and delegating taxing and spending.<sup>201</sup> The established analysis is that legislators (1) vote for broadly popular causes such as clean air, safe products, and honest finance; (2) leave the real, contentious policy choices to the agencies—while “stacking the deck” in favor of certain interest groups through administrative procedures and standards of judicial review; and (3) maintain at least a modicum of control over agency choices through the “power of the purse”—budgeting, appropriations, and appropriation riders.<sup>202</sup> In this view, legislators have simply discovered a new means of muddling political accountability. But if legislators are instead pioneering a new form of specialized, atomized government to accommodate the demands of specialized, atomized modern politics, then they might find it advantageous to delegate financial power along with lawmaking power. After all, taxing and spending can be as contentious, and as problematic for collective congressional choice, as fashioning rules for private conduct. And agency regulation, from setting telephone and electricity prices to setting pollution and energy standards, has always involved implicit taxing of some groups for the benefit of others—so why not give the agencies explicit taxing and spending power as well?

The other author, Michael Greve, has proffered, though with no great confidence, a public choice explanation for the ascent of for-profit government.<sup>203</sup> As suggested earlier, for-profit government appears particularly prevalent in industry sectors that are highly concentrated and only nominally private—and, moreover or perhaps therefore, are characterized by very high

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<sup>200</sup> *Id.* at 160.

<sup>201</sup> See James W. Colliton, *Standards, Rules and the Decline of the Courts in the Law of Taxation*, 99 DICK. L. REV. 265, 273 (1995) (stating that Congress has chosen not to delegate legislative power in tax law). *But see* Daniel Hemel, *The President's Power to Tax*, 102 CORNELL L. REV. (forthcoming 2017). (arguing that Congress has often delegated decisions over the tax base, though not tax rates).

<sup>202</sup> A good discussion of this literature by three of its leading authors is in McNollgast (Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast), *The Political Economy of Law*, in HANDBOOK OF LAW AND ECONOMICS 1651, 1702–16 (A. Mitchell Polinsky & Steven Shavell eds., 2007). See also sources cited *infra* note 212.

<sup>203</sup> Michael S. Greve, *The Rise of Adversarial Corporatism*, LIBR. L. & LIBERTY (July 1, 2014), <http://www.libertylawsite.org/liberty-forum/the-rise-of-adversarial-corporatism/>.

rates of return: pharmaceutical and health care companies, “systemically important” banks and other financial firms, and defense contractors.<sup>204</sup> Returns in these industries probably include substantial rents from government regulation and private-public partnerships.<sup>205</sup> At the same time, relatedly or not, those same industries are viewed with considerable suspicion on the Right as well as the Left, as exemplars of “crony capitalism” or “government for Wall Street.”<sup>206</sup> Congress could respond by adopting more efficient rules to govern the industries, or by appropriating the rents through taxation. Unable to do either, Congress resorts to the second-best means of empowering the executive to confiscate the rents and to distribute them, haphazardly and more or less, to the kinds of constituencies Congress might service if it still had the capacity. The system converges on an “adversarial corporatism”: an unholy matrimony between the state and industry, made no better by a bilateral show of enmity. That view makes a lot of empirical evidence “fit”—but only at the federal and perhaps the state level. (For-profit government at a local level appears mostly a matter of exploiting local citizens with inadequate tax capacity or political resources, especially minorities.) Moreover, it threatens to collapse into the “explanation” that Congress is impotent and the executive runs the show.

Conceivably, these two conceptions could be combined into a single account that links the electoral incentives of legislators to the organizational incentives of capaciously endowed special-purpose agencies. We cannot move from speculation to hypothesis without first knowing more about the provenance, dynamics, and residual congressional oversight of agency taxation, for-profit enforcement, and expenditure of the proceeds. We can, however, suggest several paths of analysis.

To begin with legislative incentives and behavior: why would Congress delegate taxing and spending authority along with regulatory authority? The examples this Article has offered counsel caution with respect to any global answer. The FCC universal service program looks like a path dependency story: instead of yanking established but increasingly infeasible telecom cross-subsidies into the appropriations process—as it did with small-community airline service when it abolished airline regulation in the late 1970s—Congress authorized the FCC to continue them on its own by direct and explicit means.<sup>207</sup> The PCAOB was part of a hastily enacted statute that packaged previously rejected proposals, sight unseen, into a single “reform” initiative.<sup>208</sup> Neither of these innovations appears to have been subject to any

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204 *Id.*

205 *Id.*

206 *Id.*

207 Alexander J. Gonzales, *Administrative Law*, 32 TEX. TECH L. REV. 439, 482 (2001).

208 Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1555 (2004).



serious congressional debate.<sup>209</sup> The CFPB and its financing structure was the product of a Congress and administration under the control of a single party, determined to insulate the newly created agency against interference by a president *or a future Congress* under the control of the other party.<sup>210</sup> That decision has the makings of a public choice story: a momentary partisan majority “stacks the deck” in favor of its interest-group coalition, more thoroughly than the mere jiggering of administrative procedures could do, at the cost of weakening future Congress’s power of the purse over its handiwork. But it seems not to extend to other mentioned examples, and the creation of revolving enforcement funds has been a similarly haphazard affair. It is difficult to identify any common theme across all of the cases analyzed beyond Congress’s disregard for its long-term institutional interests.

As noted earlier, standard explanations of that pattern turn on asymmetric incentives between Congress as an institution and those of its individual members. Congress as an “it,” the theory goes, cheerfully delegates lawmaking power because individual legislators (or committees) stand to gain by first voting for aspirational statutes and, down the road, complaining over agency abuse and overreach or, alternatively, about sloth and capture, and by performing services for favored constituencies.<sup>211</sup> On that theory, though, broad delegations of lawmaking or waiver authority should go hand-in-hand with increased congressional vigilance with respect to the means of backstopping agencies—foremost, budgetary means.<sup>212</sup> Delegations of tax authority and self-funding mechanisms that disconnect agencies from the appropriations process seem to cut in the opposite direction. They suggest that a Congress that surrenders its lawmaking authority will eventually surrender other authorities as well, including even the means of agency control. Then again, it may be that Congress delegates revenue-generating authority to agencies for its own purposes, with an expectation that the agencies will in fact heed those purposes, and with a full intent of ensuring compliance: how much have you collected for us, lately? What looks at first sight like another delegation may in fact be an affirmative command to generate revenue, with Congress rewarding agencies with greater regulatory and spending autonomy as compensation for undertaking the politically unpleasant task of revenue raising through explicit tax programs or targeted fines and settlements.

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<sup>209</sup> Diligent research failed to uncover any evidence of serious congressional consideration of the point at issue. Non-results are available from the authors.

<sup>210</sup> Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy With Removal Protection*, 125 HARV. L. REV. 1822, 1840–41 (2012)

<sup>211</sup> Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1477–84 (2015).

<sup>212</sup> Cf., e.g., Michael M. Ting, *The ‘Power of the Purse’ and Its Implications For Bureaucratic Policy-Making*, 106 PUB. CHOICE 243 (2001); Bruce Yandle, *Regulators, Legislators and Budget Manipulation*, 56 PUB. CHOICE 167, 178 (1988) (describing the budget as “the most effective sanction” for influencing agencies).

## CONCLUSION

Returning to where this Article began: how would the incentives and behavior of agencies be affected by possession of independent sources of revenue, freedom from regular appropriations, and attendant discretion over the levels and objects of taxing and spending? Unlike tax collectors in the early days of the republic,<sup>213</sup> the officers of modern agencies are salaried employees and may not work on commission. And unlike true profit-maximizing private attorneys, public prosecutors may not reap direct, overt financial gains from their activities. What exactly, then, *do* they maximize in pursuing big financial penalties and crafting their own tax and spending programs?

Political scientists have developed a large, frequently sophisticated literature on this subject. That literature would surely benefit from incorporating the new factors-of-production of agency self-finance, especially if the factors were quantified with better empirics than currently exist. For example, one prominent school of thought contends that agencies seek to maximize *reputational* values as a means of enhancing their autonomy and keeping their critics at bay.<sup>214</sup> Are agencies discovering that imposing monetary penalties and allocating the proceeds are superior (or complementary) to jail terms and enhanced regulatory oversight in promoting reputation and autonomy? Perhaps settlements and disbursements are means of maintaining an equilibrium of costs and benefits among different agency stakeholders (with the costs falling as much as possible on those who are not immediate, knowledgeable stakeholders, *i.e.* the shareholders and customers rather than managers of regulated firms).<sup>215</sup> Or perhaps settlements are put options on favorable regulatory treatment going forward. Questions such as these deserve systematic study.

Beyond that, “reputation” and “autonomy” are instrumental to pursuing—what, and for whom? Billion-dollar settlements may be a *bona fide* regulatory tool, superior to *ex ante* regulation in achieving statutory goals. On the other hand, it may be that the executive state is seizing additional power from Congress rather than serving as its agent in accommodating modern politics. That is, the executive may be discovering that it is superior at taxing and spending as well as at writing rules—and is running off with the

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<sup>213</sup> See JERRY MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF ADMINISTRATIVE LAW* 34–38, 44–45 (2012).

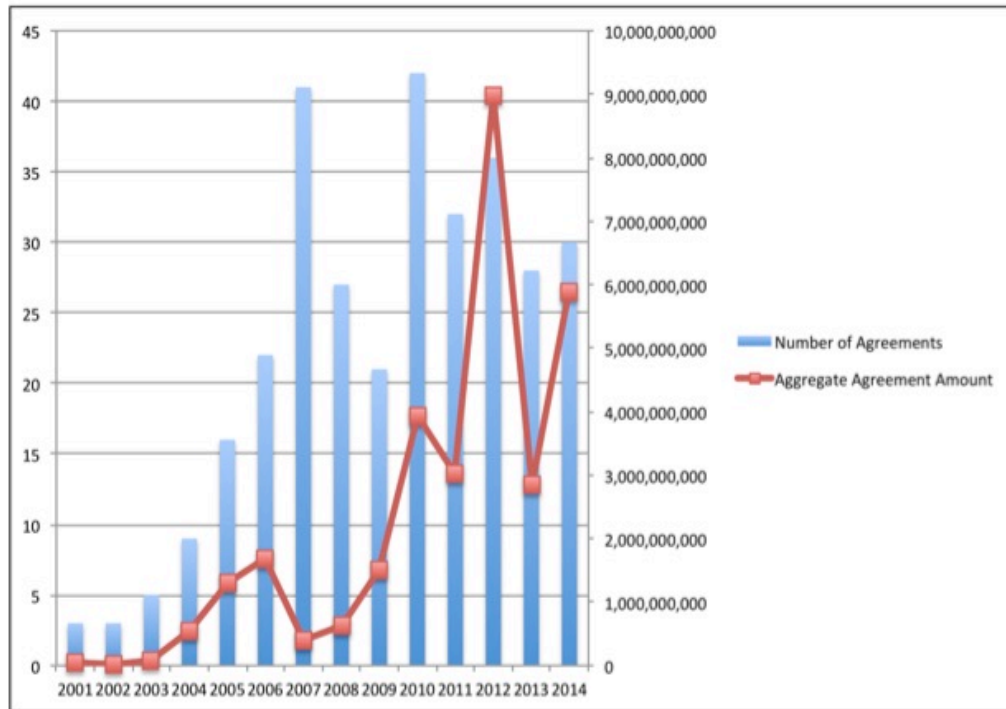
<sup>214</sup> See Daniel P. Carpenter, *THE FORGING OF BUREAUCRATIC AUTONOMY* (2001); Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 780–81 (2010); Jason A. MacDonald & William W. Franko Jr., *Bureaucratic Capacity and Bureaucratic Discretion: Does Congress Tie Policy Authority to Performance?*, 35 AM. POL. RES. 790, 792 (2007); and Patrick S. Roberts, *FEMA and the Prospects for Reputation-Based Autonomy*, 20 STUD. AM. POL. DEV. 57, 81–83 (2006).

<sup>215</sup> As first modeled in Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & ECON. 211, 212 (1976).

proceeds to build independent empires while Congress is institutionally incapable, or disinclined, to mount effective resistance. Whatever the explanation, legislative and executive means and ends need to be integrated.

These are urgent questions. Large numbers of American citizens have come to suspect that the administrative state has jumped the constitutional levees, that it is no longer administering on their behalf, and that it has regressed into a racket for the wealthy and well-connected. Law and scholarship need to catch up.

Appendix 1<sup>216</sup>  
 Non-Prosecution and Deferred Prosecution Agreements, 2001-2014



<sup>216</sup> 2014 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs), GIBSON DUNN & CRUTCHER, LLP 18–22 (Jan. 6, 2015), <http://www.gibsondunn.com/publications/documents/2014-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf>; 2013 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs), GIBSON DUNN & CRUTCHER, LLP 14–18 (Jan. 7, 2014), <http://www.gibsondunn.com/publications/documents/2013-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf>

Appendix 2  
\$100 Million+ Bank Settlements, 2000-2015 (\$000s)

Bank	Date	Treasury	FHA	Fan/Fred	SEC	Other Fed	States	Restitution	Conduct
PNC Financial	6/1/03	25,000						90,000	Earnings Management
Bear Stearns, Citigroup, eight others	10/31/03						487,500	900,000	Research Conflicts
BAWAG P.S.K. (Austrian Trade Unions)	6/1/06							337,500	Securities Fraud
Lloyds TSB Bank	1/1/09	175,000					175,000		IEEP Laundering
UBS AG	2/18/09	580,000			200,000				Tax Fraud
JP Morgan	11/4/09				25,000		50,000	647,000	Jefferson County Fraud
Credit Suisse AG	12/1/09	268,000					268,000		IEEP Laundering
Bank of America	2/4/10							150,000	Merger Disclosure
State Street	2/4/10				58,000			255,000	MBS Disclosure
Wachovia	3/1/10	160,000							IEEP Laundering
Goldman Sachs	7/15/10	300,000						250,000	MBS Disclosure
Barclays Bank	8/16/10	149,000					149,000		IEEP Laundering
Bank of America	12/7/10	25,000					4,500	107,800	Muni Bid-Rigging
Deutsche Bank AG	12/21/10	553,633							Tax Fraud
UBS AG	4/1/11	22,000					91,000	47,200	Muni Bid-Rigging
JP Morgan	6/21/11	27,730						125,870	MBS Disclosure
Morgan Keegan (Regions Bank)	6/22/11							200,000	MBS Disclosure
JPMorgan	7/1/11	50,000				35,000	9,500	133,700	Muni Bid-Rigging
Citigroup	10/19/11							285,000	MBS Disclosure
Wachovia (Wells Fargo)	12/1/11	8,900				20,000	4,250	115,300	Muni Bid-Rigging
National Mortgage Settlement—BoA, JPM, WF, Citi, Ally-GMAC	2/9/12		750,000			162,000	358,600	23,750,000	Mortgage Practices
Citigroup	2/17/12		158,300						FHA Insurance Claims
Flagstar Bank	2/24/12		132,800						FHA Insurance Claims
Deutsche Bank AG	5/10/12		202,000						FHA Insurance Claims
Barclays Bank PLC	6/1/12	360,000							LIBOR Manipulation
ING Bank N.V.	6/1/12	309,000					309,500		IEEP Laundering
Mizuho Securities USA	7/18/12	127,500							IEEP Laundering
JP Morgan	11/16/12							296,900	MBS Disclosure
Credit Suisse	11/16/12							120,000	MBS Disclosure
HSBC Bank USA	12/1/12	1,256,000				665,000			IEEP Laundering
Standard Chartered Bank	12/1/12	227,000							IEEP Laundering
UBS AG	12/1/12	1,200,000							LIBOR Manipulation
Bank of America	1/8/13			11,650,000					MBS Disclosure
Rabobank	1/29/13	800,000							LIBOR Manipulation
Royal Bank of Scotland	2/1/13	475,000							LIBOR Manipulation
Royal Bank of Scotland	11/7/13							150,000	MBS Disclosure
JP Morgan	11/19/13	2,000,000	4,000,000			1,915,400	1,066,000	4,000,000	MBS Disclosure
JPMorgan	1/1/14							1,700,000	Internal Controls (Madoff)
JP Morgan	2/4/14		614,000						Mortgage Disclosure
Morgan Stanley	2/7/14			1,250,000					MBS Disclosure
Bank of America	3/25/14			9,300,000					MBS Disclosure
Credit Suisse	5/19/14	1,800,000			196,000	100,000	715,000		Tax Fraud
BNP Paribas	6/30/14	6,733,600					2,240,000		IEEP Laundering
Sun Trust	6/17/14		418,000			10,000		540,000	Mortgage Practices
Lloyds Banking Group plc	7/1/14	191,000							LIBOR Manipulation
Sun Trust	7/1/14	16,000		10,000				294,000	MBS Disclosure
Citigroup	7/14/14	4,000,000				208,250	291,750	2,500,000	MBS Disclosure
Morgan Stanley	7/24/14							275,000	MBS Disclosure
Standard Chartered Bank	8/20/14	300,000							Internal Controls
Bank of America	8/21/14	6,636,000				2,031,000	943,000	7,000,000	MBS Disclosure
Bank Leumi Group (Bank Leumi le-Israel B.M.)	12/1/14	270,000							Tax Fraud
Morgan Stanley	2/25/15	2,600,000							MBS Disclosure
Commerzbank AG	3/1/15	263,000						300,000	IEEP Laundering
Deutsche Bank AG	4/1/15	1,575,000						600,000	LIBOR Manipulation
Citigroup	8/17/15							180,000	Securities Fraud
<b>Totals:</b>		<b>33,458,363</b>	<b>6,275,100</b>	<b>22,210,000</b>	<b>479,000</b>	<b>5,146,650</b>	<b>7,762,600</b>	<b>44,750,070</b>	<b>120,081,783</b>
<b>Totals from 2008 Financial Collapse:</b>		<b>20,180,730</b>	<b>6,275,100</b>	<b>22,210,000</b>	<b>58,000</b>	<b>4,326,650</b>	<b>3,259,350</b>	<b>41,891,770</b>	<b>98,201,600</b>

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