THE RISE OF MONEY SANCTIONS IN FEDERAL AGENCY ADJUDICATION

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This article evaluates the history of sanctions in adjudicative enforcement proceedings conducted by federal regulatory agencies, subject to deferential judicial review. Today, the leading remedies for administrative enforcement actions are two types of pocketbook punishments—either civil money penalties or relief borrowed from the law of restitution. In 2022, the surveyed agencies sought such sanctions in 70% of enforcement actions, accounting for $10,444,092,795 in punitive exactions across 1,329 administrative proceedings. Despite their contemporary salience, these sanctions are relatively new in administrative law. Congress did not authorize the first such penalty until 1970 and, since then, has enacted at least 188 authorizations for agencies to seek civil money penalties through adjudication, and another seven express provisions for disgorgement or restitution. Through legislative amendments, Congress further increased these penalties, or expanded their scope, another seventy-two times. After reviewing the nonmonetary sanctions that agencies used for enforcement before 1970, this article employs two original datasets involving nineteen federal agencies to describe and assess the rise of money sanctions in administrative adjudications over the past half-century.

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INTRODUCTION

In *Securities & Exchange Commission v. Jarkesy*,[1] the Supreme Court held that the Seventh Amendment entitles the defendant to a jury trial when the agency seeks civil penalties for securities fraud. The case will alter regulatory enforcement from the course it has run for nearly a half-century. This article explains the historical context.

Although agencies have sought individualized sanctions through adjudication since the dawn of the administrative state, the stakes have changed dramatically over time. Before 1970, Congress limited domestic regulatory agencies to non-monetary sanctions. Since then, Congress passed at least 188 express statutory authorizations for agency tribunals to adjudicate civil money penalty cases, subject to deferential judicial review.[2] In addition, Congress passed seven authorizations for agencies to impose "disgorgement" or "restitution" awards through adjudication. Congress further increased or expanded these penalties seventy-two times through legislative amendments.[3] In 2022, agencies sought money sanctions in 70% of enforcement actions surveyed by this article, totaling $10,444,092,795 across 1,329 cases.[4] None of this authority existed until 1970—almost a quarter-century *after* the passage of the "quasi-constitution of the administrative state," the Administrative Procedure Act (APA).[5] In only a few

1. 144 S. Ct. 2117 (2024).
2. *See infra* Chart 1 (showing statutory authorizations).
3. *See infra* Part IV.
4. *See infra* Part IV.
5. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. § 500 *et seq.*); *see also* Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 734 (2021).

decades, pocketbook penalties became the leading enforcement sanction in administrative proceedings.

Part I describes the nonmonetary penalties employed by agency tribunals for much of the twentieth century, such as cease-and-desist orders or the suspension of a government-issued license. We also discuss an exception to the general rule against money penalties in administrative settings. Since the eighteenth century, courts upheld administrative fines in a narrow class of issues, including immigration, taxes, and customs, that could be conclusively determined by the political branches.

Next, in Part II, we trace the rise of two types of money sanctions—civil money penalties and restitutionary relief—at agency tribunals over the past half-century. The Supreme Court played an important part in this history. In 1977, the Court upheld Congress's first statutory authorization for the true administrative imposition of civil money penalties. Until then, Congress had only experimented in this space; after that decision, Congress went on a sustained period of penalty creation.

Part III describes the methodology behind the two datasets that inform this article. The first dataset collects statutory authorizations for nineteen domestic regulatory agencies to seek money sanctions in their in-house courts, subject to deferential judicial review; the second dataset surveys enforcement at these agencies in 2022. Part IV presents the results of our data analysis, the highlights of which were presented earlier in this Introduction. In Part V, we discuss the results of this article. The first section assesses the rise of civil money penalties, concluding that today's sanctions risk overenforcement. The second section turns to evaluating regulatory restitution—here, we are critical of the capacious discretion wielded by agency tribunals, which exists at the fringe of the judicial power. In the last section of Part VI, we discuss *Jarkesy* and its effect on adjudicative regimes. *Jarkesy* calls into question many, if not most, civil money penalties routinely imposed by agencies through adjudication. The decision's effects on regulatory restitution are less apparent. To the extent a restitutionary award is punitive, *Jarkesy* indicates that the Seventh Amendment applies.

I. ADMINISTRATIVE ENFORCEMENT THROUGH THE LATE 1960S

In early 1939, President Franklin Roosevelt directed Attorney General Frank Murphy to survey administrative policymaking, with an eye to reform.[6] Two years later, the Attorney General's Committee on Administrative Procedure (the Committee) released its report,[7] which proved central to

6. *See* Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 224–25 (1986).

7. *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) [hereinafter AG Committee Final Report].

the deliberations that led to the APA in 1946.[8] In its report, the Committee broached the possibility of agencies seeking money penalties through adjudication; however, the Committee cautioned that the agency decisions should be reviewed by a federal court "de novo," without judicial deference, "[i]n order to resolve any doubts concerning the constitutionality of the procedure."[9]

Although the Committee declined to elaborate on these constitutional "doubts," the Seventh Amendment presented an obvious uncertainty.[10] Since the Founding, the federal judiciary has "followed [the] English common law in treating the civil penalty suit as a particular type of an action in debt, requiring a jury trial."[11] Given that money penalty actions triggered the Seventh Amendment right in Article III courts, neither the Committee nor Congress could be sure that the jury right did not also extend to administrative courts.[12]

Whether due to said constitutional "doubts" or political headwinds, for much of the twentieth century, Congress generally did not authorize the administrative imposition of money penalties. This part first explains the nonmonetary sanctions that prevailed at agency tribunals during this era. We then discuss a narrow class of cases, involving certain issue areas relating to sovereignty, that served as an exception to the Congress's general aversion to authorizing agency tribunals to adjudicate money penalty cases.

A. Nonmonetary Sanctions through the 1960s

This section describes the two types of nonmonetary sanctions that agencies could pursue through adjudication before money penalties became available starting in the 1970s. The first type of nonmonetary sanctions is related to licensing regimes, and the penalty could not exceed the revocation or denial of the license. The second category involved injunctive-type relief.

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8. *See Administrative Procedure Act*, ADMIN. CONF. OF THE U.S. WIKI, https://sourcebook.acus.gov/wiki/Administrative_Procedure_Act/view [https://perma.cc/J4LB-7SVX] (last visited Oct. 23, 2024) ("The legislative history of the [Administrative Procedure Act (APA)] begins with the Final Report of the Attorney General's Committee on Administrative Procedure (1941).").

9. *See* AG Committee Final Report, *supra* note 77, at 147 (addressing the prospect of civil money penalties at the Bureau of Marine Inspection and Navigation).

10. *See* U.S. CONST. amend. VII.

11. Tull v. United States, 481 U.S. 412, 418 (1987).

12. Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 460–61 (1977).

1. Licensing Schemes

A license is a government-conferred authorization to operate a business or otherwise engage in some prohibited activity.[13] The licensing concept goes by many names, including "registration,"[14] "charter,"[15] or "certificate."[16] Under these regulatory schemes, Congress exercises its interstate commerce power to prohibit an entire sector of economic activity, and the only way for an individual to engage in that activity is to receive an agency's permission.[17]

Congress established the first federal licensing regime with the National Bank Act of 1864, which authorized the Office of the Comptroller of the Currency (OCC) to charter federal banks.[18] However, the agency could not revoke a bank's charter through administrative means. To do so, the OCC had to commence a civil action in federal court, as remains true today.[19]

The first modern federal licensing regime was established by the Warehouse Act of 1916 and empowered the Department of Agriculture (USDA) to regulate grain storage.[20] Over the ensuing two decades, Congress created

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13. *See, e.g.*, *Governmental and Private Licensing*, STIMMEL, STIMMEL & ROESER (Oct. 23, 2024), https://www.stimmel-law.com/en/articles/governmental-and-private-licensing [https://perma.cc/AE93-RNAS].

14. The Securities and Exchange Commission (SEC) operates a registration-type regime, as discussed in this section.

15. The Office of the Comptroller of the Currency charters federally regulated banks. *Who We Are*, OFF. OF THE COMPTROLLER OF CURRENCY, U.S. DEP'T OF TREASURY, https://www.occ.gov/about/who-we-are/index-who-we-are.html [https://perma.cc/9FQN-NYMD] (last visited Oct. 23, 2024).

16. The Federal Energy Regulatory Commission (FERC) grants certificates authorizing the operation of interstate electric or gas transmission. *Overview of FERC*, FERC https://www.ferc.gov/what-ferc/overview-ferc [https://perma.cc/FFU4-7YQ6] (last visited Oct. 23, 2024).

17. *See* U.S. CONST. art. I, § 8, cl. 3; Trinity Methodist Church, S. v. Fed. Radio Comm'n, 62 F.2d 850, 852 (D.C. Cir. 1932) ("It is too late now to contend that Congress may not regulate, and, in some instances, deny, the facilities of interstate commerce to a business or occupation which it deems inimical to the public welfare or contrary to the public interest."); *see also* Charles V. Koons, *Growth of Federal Licensing*, 24 GEO. L.J. 293, 295–96 (1936) ("The Supreme Court has laid down the general principle that the right to regulate is the right to license, where the license is a reasonable means for the accomplishment of the purposes of the regulation.").

18. *See* Act of June 3, 1864, ch. 106, § 17, 13 Stat. 99, 104.

19. *See id.* § 53, 13 Stat. at 116; *see also* 12 U.S.C. § 93(a).

20. *See* Pub. L. No. 64-190, §§ 4, 7, 12, 39 Stat. 446, 487–88 (authorizing the Secretary of Agriculture to issue and suspend or revoke licenses to operators of grain warehouses).

licensing schemes for the meatpacking industry,[21] the fruit and vegetable industry,[22] the issuance of securities,[23] and the operation of securities and futures exchanges.[24] Beyond strict economic regulation, certain licensing regimes further served to manage scarcity. For example, Congress created the Federal Power Commission to license hydropower operators[25] and the Federal Radio Commission to allocate radio spectrum.[26]

To effectuate regulatory policy, agencies condition the license on the licensee's assent to behavioral controls, set forth by statute or regulation.[27] These conditions, in turn, are enforced through administrative adjudication. Any resultant sanction could not exceed the scope of the privilege—meaning the suspension or revocation of the underlying license, registration, or certificate. In 1931, a federal district court neatly summarized how these programs advance regulatory aims:

> The withdrawal of a license or suspension from registration is merely the withdrawal of a government permit to engage in a business in which the licensee has no inherent right to engage, but in which he may participate only upon compliance with the conditions imposed by the government. If the government has the right to supervise the business, it may fix the conditions upon which parties may engage therein, and may . . . withdraw such permission when satisfied that the conditions are being violated.[28]

Of course, revoking one's right to do business can be an economic death sentence. Due to the severity of this sanction, nascent licensing regimes faced Sixth Amendment scrutiny in the first part of the twentieth century. Such challenges invariably failed, albeit for different reasons. Some courts resorted to first principles, reasoning that the power to revoke a license is incidental

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21. Packers and Stockyards Act, Pub. L. No. 67-51, § 303, 42 Stat. 159, 163 (1921) (requiring registration for any "market agency" or "dealer" doing business at any stockyard).

22. *See* Perishable Agricultural Commodities Act, Pub. L. No. 71-325, § 3, 46 Stat. 531, 533 (1930) (codified at 7 U.S.C. 499a *et seq.*) (establishing licensing regimes).

23. *See* Securities Act of 1933, Pub. L. No. 73-22, §§ 6, 8, 48 Stat. 74, 78.

24. *See* Grain Futures Act, Pub. L. No. 67-331, § 6, 42 Stat. 998, 1001–02 (1922) (establishing licensing regime for futures markets); Securities Exchange Act of 1934, Pub. L. No. 73-291, § 6, 48 Stat. 881, 885–886 (establishing licensing regime for stock exchanges).

25. *See* Federal Power Act, Pub. L. No. 66-280, §§ 4(e), 6, 41 Stat. 1063, 1065, 1067 (1920).

26. *See* Federal Communications Act, Pub. L. No. 416-73, §§ 301, 307, 48 Stat. 1081, 1083 (1934).

27. *See* Lillian R. Altree, *Administrative Sanctions: Regulation and Adjudication*, 16 STAN. L. REV. 630, 636 (1964) ("The regulatory element of the license inheres in the fact that it is a permit to operate upon future conduct in accordance with the previously articulated standards.").

28. Farmers' Livestock Comm'n Co. v. United States, 54 F.2d 375, 378 (E.D. Ill. 1931).

to the power to grant it.[29] Other courts took a more purposive approach, glossing over the punitive aspect of a license revocation, and instead emphasizing the sanction's role in furthering the "regulatory" purpose of the scheme.[30]

2. *Injunctive-Type Relief*

Besides the license-based penalties discussed above, the other type of nonmonetary sanctions involved injunctive relief. The most common example, then and now, is the cease-and-desist order, which is modeled on the mandatory injunction. Less often, Congress has authorized agencies to require affirmative action akin to a positive injunction. As with equitable relief in the courts, these injunctive-type remedies did not involve money payments—with one exception. In 1935, Congress empowered the National Labor Relations Board to order the reinstatement of unlawfully discharged employees with backpay. This example and its idiosyncrasies are discussed at the end of this section.

a. *Cease-and-Desist Orders*

Administrative cease-and-desist orders are analogous to prohibitory injunctions at equity.[31] Both command someone to stop doing something.

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29. *See id.* at 378 ("If the government has the right to supervise the business, it may fix the conditions upon which parties may engage therein, and may, without the intervention of a jury, withdraw such permission when satisfied that the conditions are being violated."); *see also* Bd. of Trade of Chi. v. Wallace, 67 F.2d 402, 407 (7th Cir. 1933) ("Granted the constitutional power to designate boards of trade as contract markets upon application by the boards, we perceive no reason why Congress might not properly lodge with some instrumentality the power to suspend or revoke such designation upon sufficient cause . . . .").

30. *See* L.P. Stewart & Bros. v. Bowles, 322 U.S. 398, 404 (1944) (reasoning that an order to suspend rations to violators of a wartime quota regime is not a punishment, but rather is part of implementing an administrative rationing scheme); Nichols & Co. v. Sec'y of Agric., 131 F.2d 651, 659 (1st Cir. 1942) ("We believe that suspension of a registrant is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act."); Wright v. SEC, 112 F.2d 89, 94 (2d Cir. 1940) ("Since the purpose of the [expulsion] order is remedial, not penal, there is no basis for the contention that . . . violation of the statute must be proved beyond a reasonable doubt."); *cf.* Helvering v. Mitchell, 303 U.S. 391, 399 (1938) ("Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted.").

31. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 553 (2016) ("An injunction is a remedy prohibiting the defendant from taking certain actions (a 'prohibitory injunction') or requiring the defendant to take certain actions (a 'mandatory injunction'). . . . It is the most common equitable remedy in the United States.").

Cease-and-desist orders have long been a leading remedy in agency adjudications. Under the Interstate Commerce Act of 1887, Congress authorized the Interstate Commerce Commission (ICC) to give railroads "notice" to "cease and desist" from violating the Act's requirements.[32] However, to enforce its directives, the ICC had to petition a court for an injunction requiring compliance with the agency's order.[33] Such an injunctive order, if issued, would be backed by the court's authority to punish contempt.[34] As a practical matter, no sanctions could be imposed until the respondent had engaged in their third regulatory violation. First, proof of violation of the statute was needed to secure the cease-and-desist notice; second, proof of violation of the cease-and-desist notice was a condition for the court's enforcement order; and third, proof of subsequent violation of the court's enforcement order was a condition for a contempt sanction.[35]

This redundant process is indicative of the lengths to which Congress went to deny any semblance of finality to ICC cease-and-desist orders. At that time, during the late nineteenth century, judges and legal academics were uncomfortable with the idea that anyone but courts could resolve legal controversies.[36] Faced with a judicial encroachment claim against the Interstate Commerce Act, a federal circuit court in 1889 conceded that the ICC "possesses and exercises certain powers and functions resembling those conferred upon and exercised by regular courts," yet the court did not find a violation of Article III, because the agency's orders are "neither final nor conclusive."[37]

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32. *See* Interstate Commerce Act, Pub. L. No. 49-104, § 15, 24 Stat. 379, 384 (1887).

33. *See id.* § 16, 24 Stat. at 385.

34. *See* Judiciary Act of 1789, ch. 20 § 17, 1 Stat. 73, 83 (conferring power on all courts of the United States "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same"); *see also* Bray, *supra* note 31, at 547 ("[I]t is blackletter law in perhaps every American jurisdiction that equitable remedies are enforceable with contempt but legal remedies are not."); Bray, *supra* note 31, at 565–67 (explaining use of contempt proceedings to enforce equitable remedies).

35. *See* Thomas E. Kauper, *Cease and Desist: The History, Effect, and Scope of Clayton Act Orders of the Federal Trade Commission*, 66 MICH. L. REV. 1095, 1099 (1968) (describing the "three bites at the apple" procedure for administrative enforcement at the Federal Trade Commission (FTC), which was the same as the pre-Hepburn Act Interstate Commerce Commission (ICC)).

36. *See, e.g.*, Martin B. Louis, *The Scope and Enforcement of Robinson-Patman Act Cease and Desist Orders*, 10 VILL. L. REV. 457, 459 n.19 (1965) (providing scholarly support for the proposition that administrative finality "conjured up a host of constitutional difficulties"); *cf.* Chi., Milwaukee & St. Paul Ry. v. Minn. R.R. & Warehouse Comm'n, 134 U.S. 418, 457 (1890) (holding a state law, which accorded finality to a state agency's rate orders, to be a violation of constitutional due process because it replaces judicial process with "absolute finality" of administrative action).

37. Ky. & Ind. Bridge Co. v. Louisville & Nashville R.R., 37 F. 567, 612 (C.C.D. Ky. 1889).

In 1906, however, Congress amended the Interstate Commerce Act by passing the Hepburn Act, which reflected a radical rethinking of railroad regulation.[38] Under the Hepburn Act, the ICC gained authority to "order" a railroad to cease and desist charging unreasonable rates,[39] and also the power to prescribe future rates.[40] Crucially, Congress made these rate orders legally binding unless appealed by the regulated party within thirty days.[41]

Once final, ICC orders were backed by civil penalties of up to $5,000 per violation—although, to be clear, actions for these penalties could be brought only in court by the Department of Justice (DOJ), on referral from the agency.[42] Through this combination of finality and civil liability for money penalties (for subsequent violations), a subset of ICC orders became functionally self-executing.[43] By "self-executing," we mean that the regulated entity had to either comply or appeal; otherwise, any subsequent violation could incur a DOJ suit for a steep civil money penalty. Before the Hepburn Act, the regulated entity was under no compulsion to abide by the ICC's orders until the agency commenced an original action seeking an enforcement order in the three-step process described above.

38. *See* Hepburn Act, Pub. L. No. 59-337, 34 Stat. 584 (1906).

39. *See id.* § 4, 34 Stat. at 589 (amending Interstate Commerce Act § 15).

40. *See id.* (amending Interstate Commerce Act § 15 to give prospective ratemaking authority to the ICC).

41. *See id.* (amending Interstate Commerce Act § 15 to make prospective rate orders final for two years unless appealed).

42. *See id.* § 5, 34 Stat. at 591 (1906) (amending Interstate Commerce Act § 16 to make violations of rate orders punishable by a civil money penalty of up to $5,000 per violation).

43. Notably, the Hepburn Act's self-executing scheme applied only to ratemaking. To enforce its other (non-ratemaking) mandates, the ICC still had to apply to a circuit court at equity for an injunction requiring compliance. *See id.* (amending Interstate Commerce Act § 16 to require judicial enforcement actions for "other orders"). Congress maintained this distinction until 1920, when Congress extended finality to all ICC orders except for reparations. *See* Transportation Act, Pub. L. No. 66-152, 41 Stat. 492 (1920) (extending monetary sanctions to violations of all orders and also eliminating the tenth paragraph of the prior act, which had required a judicial enforcement decree for "other orders" than ratemaking orders). It is unclear why Congress maintained this distinction. A possible answer is that courts cannot set rates, as ratemaking is a legislative power. *See, e.g.*, Prentis v. Atl. Coast Line, 211 U.S. 210 (1908) (holding that the establishment of a future rate by a public utility commission was a legislative act and not a judicial one); ICC v. Cincinnati, New Orleans & Tex. Pac. Ry., 167 U.S. 479 (1897) (holding the same); *see also* Note, *The Function in Rate Making of Administrative and Judicial Bodies*, 37 HARV. L. REV. 366, 366–67 (1924) ("Thus it is well settled that fixing a general rate is legislative at least to the extent that courts will not act in the absence of a mandatory statute."). Perhaps Congress believed that ratemaking, due to its legislative character, presented less of a threat of judicial encroachment.

With the Federal Trade Commission Act of 1914, Congress premised an entire antitrust scheme's enforcement on the cease-and-desist sanction.[44] If the Federal Trade Commission (FTC) believed that any person engaged in "unfair methods of competition," the agency could serve on that person a complaint, stating the charges and naming a time and place for a hearing to contest the allegation.[45] After the hearing, if the FTC believed a violation had occurred, the agency could issue an order requiring the respondent to cease and desist from its anticompetitive behavior.[46] However, the FTC's cease-and-desist orders were not self-executing in the manner described above; instead, the agency had to seek an enforcement order in an original action (the same pre-Hepburn Act enforcement process at the ICC).[47]

The next step in the evolution of administrative cease-and-desist authority occurred in 1921 when Congress passed the Packers and Stockyards Act, which established a comprehensive regulatory program for the meatpacking industry.[48] This marked the first time Congress empowered a licensing agency to impose cease-and-desist orders through adjudication.[49] If not appealed, these orders became legally binding thirty days after their issuance, and the agency could punish any subsequent violation by seeking a civil money penalty action in federal court.[50] Thus, USDA's orders became self-executing, meaning that regulated entities had to either accept or appeal the agency's order.[51]

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44. *See* Pub. L. No. 63-203, 38 Stat. 717.

45. *See id.* § 5, 38 Stat. at 719.

46. *See id.* at 719–20.

47. *See id.* at 720 (setting forth enforcement procedure).

48. Pub. L. No. 67-51, 42 Stat. 159 (1921). The purpose of the Packers and Stockyards Act was to regulate the meat industry like a public utility. For some industry participants, including stockyards, the Act delegated ratemaking authority to the Agriculture Department. For others, such as dealers, the Act operated as a licensing regime. And for others still, including packers, the Act did not require registration, but still provided for regulation. *See id.* §§ 303, 306, 310, 401, 42 Stat. at 163–68.

49. *See id.* § 203(b), 42 Stat. at 161 (cease-and-desist orders for violations by registered packers); *id.* § 310(b), 42 Stat. at 166 (cease-and-desist orders for stockyards from continuing to charge unreasonable rates); *id.* § 312(b), 42 Stat. at 167 (cease-and-desist orders for stockyards, market agencies, and dealers from engaging in any "unfair, unjustly discriminatory, or deceptive practice").

50. *See id.* § 205, 42 Stat. at 163 (establishing finality of orders regarding "packers," backed by a civil penalty for noncompliance of up to $10,000); *id.* §§ 313–14, 42 Stat. at 167 (establishing finality of orders regarding stockyards, (registered) market agencies, and (registered) dealers, backed by a civil penalty for noncompliance of up to $500).

51. We could find no discussion in the legislative history, nor in the scholarship from the period, indicating that Congress deliberated on the constitutional implications of the cease-and-desist authorities established by the Packers and Stockyards Act. While the Act faced

With the Wheeler-Lea Act of 1938,[52] Congress broadened the FTC's regulatory mandate beyond antitrust to police "unfair or deceptive acts or practices."[53] Yet the Act also overhauled the FTC's enforcement authority by according finality to the agency's cease-and-desist orders, backed by the threat of DOJ suit for civil penalties. Thus, effectively rendering the agency's orders self-executing.[54]

Soon after the Wheeler-Lea Amendments, the Tenth Circuit heard a constitutional challenge to the statute's finality provisions.[55] The petitioners had argued that the FTC's authority to resolve adversarial controversies with self-executing orders encroaches on the Article III judicial power.[56] In siding with the government, the court reasoned that the change from non-self-executing to self-executing orders "relates solely to the remedy of the Government for its enforcement [and] it does not transform the order into the equivalent of a legislative act or a judgment or decree of a court . . . ."[57] The Tenth Circuit's curt dismissal of the encroachment claim reflects a sharp departure in judicial tone from fifty years prior, when the absence of administrative finality had proved pivotal to judicial acceptance of the administrative state's first adjudicative program.[58]

In this manner, self-executing cease-and-desist orders became the norm. In 1952, Congress supplemented the Federal Communication Commission's

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multiple constitutional challenges, we could find no jurisprudence regarding the finality of the agency's orders.

52. *See* Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111 (1938); *see also* Louis, *supra* note 36, at 460 n.28 (recounting how the FTC repeatedly asked Congress for cease-and-desist authority equal to that exercised by the National Labor Relations Board (NLRB)); Vern Countryman, *The Federal Trade Commission and the Courts [Part 1]*, 17 WASH. L. REV. & ST. B.J. 1, 13–14 (1942).

53. *See* § 5, 52 Stat. at 111 (1938) (extending the FTC's regulatory mandate beyond "unfair methods of competition" to include "unfair or deceptive acts or practices").

54. FTC orders became self-executing through the same mechanism we described above under the Hepburn Act and the Packers and Stockyards Act—namely, a combination of administrative finality backed by a cause of action for the Justice Department to pursue penalties for noncompliance. *See id.* § 3, 52 Stat. at 112 (making FTC orders final unless appealed within 60 days); *id.* § 3, 52 Stat. at 114 (establishing penalty for noncompliance up to $5,000 per violation).

55. Ostler Candy Co. v. FTC, 106 F.2d 962, 964 (10th Cir. 1939).

56. *See id.* at 964.

57. *Id.*; *see also* Nat'l Candy Co. v. FTC, 104 F.2d 999, 1004 (7th Cir. 1939) (reaching same holding).

58. *See* Ky. & Ind. Bridge Co. v. Louisville & Nashville R.R., 37 F. 567, 612–13 (C.C.D. Ky. 1889) (upholding the Interstate Commerce Act of 1887).

(FCC's) licensing power with such sanctioning authority.[59] The banking regulators followed suit in 1966.[60] As did the Commodities Exchange Authority (the precursor agency of the Commodity Futures Trading Commission) two years later.[61]

b. Affirmative Orders

Cease-and-desist orders, as with prohibitory injunctions, are negative commands, in that they direct someone to stop doing something. Less commonly, Congress has authorized agencies to impose affirmative orders requiring someone to perform some positive act; here, the judicial analog is the mandatory injunction.[62]

At equity, the mandatory injunction "is of relatively infrequent use [and] may be defined as [an order] which commands the doing of some positive act by the defendant."[63] In common law legal systems, affirmative injunctions have long been viewed with skepticism, and "[a]t one time it was supposed that the court would not issue mandatory injunctions at all."[64] Well into the twentieth century, certain states barred on their use.[65] Even today, courts continue to treat mandatory injunctive relief as necessitating greater precautions than prohibitive relief.[66]

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59. Communications Act Amendments, Pub. L. No. 82-554, § 10, 66 Stat. 711, 716–17 (1952) (amending § 312(b) into Communications Act of 1934).

60. Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 202, 80 Stat. 1028, 1046 (amending § 8 of the Federal Deposit Insurance Corporation Act). *See generally* Kyle Guse, *The Financial Institution Reform, Recovery and Enforcement Act of 1989 and its Spiegel Amendment: Identifying the Limits of Cease-and-Desist Authority*, 32 SANTA CLARA L. REV. 911 (1992) (detailing the statute's cease-and-desist authorities).

61. Commodity Exchange Act Amendments, Pub. L. No. 90-258, § 17, 82 Stat. 26, 31 (1968) (amending § 6 of Commodity Exchange Act).

62. Nat'l Compressed Steel Corp. v. Unified Gov't of Wyandotte Cnty., 38 P.3d 723, 729 (Kan. 2002) ("An injunction is an equitable remedy designed to prevent irreparable injury by prohibiting or commanding certain acts."); Audenreid v. Phila. & Reading R.R., 68 Pa. 370, 375 (1871) ("All injunctions are generally processes of mere restraint; yet final injunctions may certainly go beyond this and command acts to be done or undone. They are then termed mandatory.").

63. THOMAS C. SPELLING & JAMES HAMILTON LEWIS, A TREATISE ON THE LAW GOVERNING INJUNCTIONS § 22 (1926).

64. *See* Smith v. Smith, 20 Eq. 500, 504 (1875) (discussing history of mandatory injunction).

65. *See, e.g.*, Ga. Power Co. v. City of Rome, 157 S.E. 283 (Ga. 1931) (involving a controversy over statutory ban on positive injunctions).

66. For example, several circuits disfavor preliminary injunctive relief requiring affirmative action by the defendant. *See, e.g.*, Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH

Affirmative injunctions, therefore, exist at the outskirts of the judicial power, which explains why Congress historically has been reluctant to empower agencies to seek these sorts of sanctions through administrative adjudication. One example is the Securities and Exchange Act of 1934,[67] which authorized the Securities and Exchange Commission (SEC) to order national exchanges to expel members for regulatory violations.[68] Scholars at the time called this "a novel and unusual sanction for the enforcement of a federal statute."[69] In 1940, the Second Circuit upheld this provision from constitutional attack, reasoning "the purpose of the order is remedial, not penal . . . ."[70]

Another example is the Clayton Act of 1914,[71] which delegated to the FTC express authority to require any party to an anticompetitive merger to "divest itself of the stock held."[72] Notably, the Supreme Court policed this authority closely, and "[a] series of decisions prior to 1950 established that the Commission's remedial powers . . . did not coincide with those of a court of equity."[73]

A third example of an affirmative injunction was the National Labor Relations Board (NLRB)'s authority to order an employer to reinstate employees (with backpay). Below, we elaborate on this controversial sanction.

In sum, Congress rarely has authorized agencies to seek affirmative injunctions through adjudication (compared to the frequency of negative injunctions in this setting). This disparity tracks how these authorities are

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& Co., 571 F.3d 873, 879 (9th Cir. 2009) (first alteration omitted) (internal quotation marks omitted) (citation omitted) ("A mandatory injunction goes well beyond simply maintaining the status quo pendente lite [and] is particularly disfavored."); Schrier v. Univ. of Colo., 427 F.3d 1253, 1259 (10th Cir. 2005) (citation omitted) (identifying mandatory preliminary injunctions as being "specifically disfavored").

67. Pub. L. No. 73-291, 48 Stat. 881, 898.

68. *See id.*; *see also* James Landis, *Significance of Administrative Commissions in the Growth of the Law*, 12 IND. L.J. 471, 475 (1937) ("For example, the [SEC] is armed with sanctions never possessed by courts, but commonly vested in the governing boards of stock exchanges, such, for instance, as suspending and expelling members from exchanges or suspending securities from being traded in on exchanges.").

69. *See* Roland L. Redmond, *The Securities Exchange Act of 1934: An Experiment in Administrative Law*, 47 YALE L.J. 622, 636 (1938); *id.* at 635–36 (cataloging eight exercises of suspension authority by the SEC since the statute was enacted); *see also* Frederick F. Blachly & Miriam E. Oatman, *Federal Statutory Administrative Orders*, 25 IOWA L. REV. 582, 605 (1940) (describing SEC suspension orders).

70. Wright v. SEC, 112 F.2d 89, 94 (2d Cir. 1940).

71. Pub. L. No. 63-212, 38 Stat. 730 (1914).

72. *See id.* § 11, 38 Stat. at 735.

73. *See* William T. Kerr, *Divestiture of Illegally Held Assets: Observations on Its Scope, Objective, and Limitations*, 64 MICH. L. REV. 1574, 1576 (1966).

exercised in the courts, where affirmative injunctions are infrequent relative to negative injunctions.

c. NLRB Reinstatement and Backpay Orders

With the National Labor Relations Act of 1935,[74] Congress created a statutory right to bargain collectively.[75] For enforcement, the Act established the NLRB and empowered the agency to root out "unfair labor practices," a term of art to describe actions that undermine the right to organize.[76] A common unfair labor practice, then and now, is for the employer to fire an employee for union activity. As a remedy, the statute authorized the NLRB to take "affirmative action, including reinstatement of employees with or without back pay."[77] These orders were effectively self-executing.[78]

The National Labor Relations Act raised novel constitutional issues, as it was uncertain if requiring payment of back wages amounted to an *in personam* money judgment necessitating a jury trial under the Seventh Amendment. Two years after the Act's passage, the Supreme Court took up the jury question in *NLRB v. Jones & Laughlin Steel*.[79]

In finding that the Constitution does not require a jury trial for a NLRB backpay order, the Court relied on a doctrine, known as "equitable cleanup," which had evolved in the American-English legal tradition prior to the merger of law and equity.[80] Where "the equitable jurisdiction of the court has properly been invoked," the cleanup doctrine permitted that court "to decide all relevant matters in dispute and to award complete relief," including relief, such as money payments, that otherwise "might be conferred by a court of

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74. Pub. L. No. 74-198, § 10, 49 Stat. 449, 453.

75. *Id.*

76. *Id.* § 8, 49 Stat. at 452.

77. *Id.* § 10(c), 49 Stat. at 454. *See generally* Casimir W. Ruszkowski, Note, *Back Pay Orders under the National Labor Relations Act*, 48 YALE L.J. 1265 (1939) (describing authorities to order affirmative action).

78. NLRB orders did not automatically become final, but courts could not stay NLRB orders, meaning that back pay could accrue from the date of the order. *See* § 10, 49 Stat. at 455 (establishing a general prohibition on judicial or administrative stays of NLRB due to enforcement proceedings or judicial review). In 1947, Congress amended the National Labor Relations Act to go final after twenty days of issuance. *See* Labor Management Relations Act, Pub. L. No. 80-10, § 101, 61 Stat. 136, 147 (1947).

79. 301 U.S. 1, 48 (1937).

80. *Id.* at 48; *see also* Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 360 (2003) (describing historical roots of doctrine); Fleming James, Jr., *Right to Jury Trial in Civil Actions*, 72 YALE L.J. 655, 658–59 (1963) (describing same). *See generally* A. Leo Levin, *Equitable "Clean Up" and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320 (1951) (providing a comprehensive analysis of doctrine of equitable cleanup).

law."[81] For equitable cleanup to apply, the non-equitable relief had to be an "adjunct to" the equitable relief. In *Jones & Laughlin Steel*, the Court reasoned that the primary remedy sought by the agency—the reinstatement of the illegally discharged employee—is an affirmative injunction, while the award of back pay, in turn, is derivative of the reinstatement order. Because the monetary relief is "an incident to equitable relief," the doctrine of equitable cleanup applied, and the Seventh Amendment "has no application."[82]

The Court could have ended its analysis there and sustained the statute. But the opinion continues with a second justification for its Seventh Amendment holding, this one without precedent:

> The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.[83]

This statement is perhaps dicta, and it is certainly confusing.[84] Was the Court announcing the Seventh Amendment does not apply where Congress regulates through administrative adjudication? Or was the Court making a narrow point about how the right to a jury trial is inapplicable where the backpay award is tightly coupled with equitable relief (i.e., reinstatement)? If the former, the Court made no mention of how its new principle interacted with prevailing Seventh Amendment doctrine, which, then as now, focuses on whether the underlying action is analogous to an action at law in 1791.[85] Regardless of what the Court meant with the second part of its Seventh Amendment reasoning in *Jones & Laughlin Steel*, this part of the opinion would come to have an outsized effect on administrative law.

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81. Porter v. Warner Holding Co., 328 U.S. 395, 399 (1946).

82. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937). *But see* Dairy Queen v. Wood, 369 U.S. 469, 470–71 (1962) (rolling back the doctrine of equitable cleanup); John E. Sanchez, *Jury Trials in Hybrid and Non-Hybrid Actions: The Equitable Clean-up Doctrine in the Guise of Inseparability and Other Analytical Problems*, 38 DEPAUL L. REV. 627, 646, 646 n.109 (1989) ("*Dairy Queen* implicitly overruled that portion of *NLRB v. Jones & Laughlin Steel Corp*. . . . .").

83. *Jones & Laughlin Steel*, 301 U.S. at 48–49.

84. *See* Steven R. Gilford, *The Constitutional Rights to Trial by Jury and Administrative Imposition of Money Penalties*, 1976 DUKE L.J. 723, 761 (1976) ("The difficulty with *Jones & Laughlin* is that the scope of its holding is unclear.").

85. *See* Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 418–19 (1995) (discussing confusion over this part of *Jones & Laughlin Steel* holding).

3. Exceptions

When discussing agency adjudication, this article speaks only to those proceedings where the agency's decision is subject to limited judicial review.[86] To the extent agency tribunals could impose money judgments before 1970, these proceedings did not receive deference from the courts. For example, ratemaking agencies could adjudicate "reparations" cases to remediate the ill effects of unjust rates, but a judicial order was needed for enforcement, and the agencies' decisions were statutorily entitled to mere prima facie evidentiary force in court.[87] Some agencies could "assess" civil money penalties, but courts reviewed these assessments de novo.[88]

Yet for a small class of regulatory regimes, adjudicative orders imposing money penalties always enjoyed deferential judicial review. Since at least the nineteenth century, Congress has created, and the Supreme Court upheld, the imposition of such sanctions in programs pertaining to immigration, taxation, and customs. The remainder of this section explains why these regimes escaped the constitutional "doubts" that otherwise precluded broader use of these money sanctions until the 1970s.

First, these early penalties were fixed by Congress and triggered automatically upon finding a violation.[89] As a result, these regimes involved comparatively little adjudicative discretion relative to today's regimes, where agency tribunals both decide liability and determine the amount to be exacted.

The second important distinction is that these early administrative money penalties involved *in rem* proceedings.[90] This point was well made by Third

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86. *See* 5 U.S.C. § 706(2)€ (setting forth substantial evidence "scope of review" for administrative fact-finding); *see also* United States v. Mead Corp., 533 U.S. 218, 219 (2001) ("Thus, the overwhelming number of cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.").

87. *See* Perishable Agricultural Commodities Act, Pub. L. No. 71-325, § 7(b), 46 Stat. 531, 535 (1930); Packers and Stockyards Act, Pub. L. No. 67-51, § 309(f), 42 Stat. 159, 166 (1921); Hepburn Act, Pub. L. No. 59-337, § 5, 34 Stat. 584, 590 (1906); *see also* Dalmas H. Nelson, *Administrative Blackmail: The Remission of Penalties*, 4 W. POL. Q. 610, 610–11 (1951) (arguing that reparations actions—claims for damages based on rates charged in the past—were regarded as implicating private rights and hence as necessitating full judicial determination).

88. *See* Nelson, *supra* note 87, at 610–11 ("Usually . . . an independent, original court proceeding is necessary to enforce collection of the penalty; the administration simply notifies the offender of his violation, attempts to get him to pay voluntarily, and resorts to prosecution if he does not.").

89. *See* Helvering v. Mitchell, 303 U.S. 391, 395 (1938) (penalty fixed at "50 per centum of the total amount of the deficiency . . . ."); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 334 (1909) (penalty fixed at $100); Bartlett v. Kane, 57 U.S. 263, 268 (1853) (penalty fixed at 20% of appraised value).

90. *See* Frank Irey Jr., Inc. v. Occup. Safety & Health Rev. Comm'n, 519 F.2d 1200, 1207 (3d Cir. 1974) (Gibbons, J., dissenting).

Circuit Judge Joseph Gibbons in a thoughtful dissent to *Frank Irey, Jr., Inc. v. Occupational Safety & Health Review Commission*,[91] one of the two cases reviewed by the Supreme Court in *Atlas Roofing*. In customs law, for example, "exactions could be collected by detaining the vessels or the goods."[92] In immigration law, "the basic enforcement mechanism" involved "the imposition of duties upon owners and masters of vessels, enforceable by detaining the vessel."[93] Judge Gibbons further described the "essentially in rem nature of the tax collection machinery."[94] His ultimate point was that in rem proceedings, unlike in personam proceedings, "do not present a seventh amendment problem."[95]

Finally, scholars of the period recognized that the political branches had greater "freedom and finality of governmental action" in certain policy areas relating to "the maintenance of the national existence[,]" such as raising revenue and managing borders.[96] So did the Supreme Court. As early as 1909, the Court noted its "settled judicial construction" that there are certain policy areas, including immigration, taxation, and customs, where Congress is "legislating as to matters exclusively within its control," in which agencies may "impose appropriate obligations and sanction their enforcement by reasonable money penalties . . . without the necessity of invoking the judicial power."[97] Yet outside of these special areas, Congress cannot avoid invoking the judicial power to resolve legal controversies involving money judgments.

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91. 519 F.2d 1200.

92. *Id.* at 1208 (Gibbons, J., dissenting).

93. *Id.* at 1210 (Gibbons, J., dissenting).

94. *Id.* at 1213 (Gibbons, J., dissenting).

95. *Id.* at 1212 (Gibbons, J., dissenting).

96. *See* JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 26 n.47, 28 n.49 (1927) (grouping immigration and revenue measures as among a class of powers that are distinct from the promotion of welfare); ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 5 (1904) (performing a similar grouping).

97. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909); *see also id.* (specifying that this judicial restraint applies not only to immigration, but also to "tariff" and "taxation"); *cf.* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889) (indicating that immigration policy is immune from judicial scrutiny); Passavant v. United States, 148 U.S. 214, 220 (1893) ("In the tariff legislation of the government, congress has generally adopted means and methods for a speedy and equitable adjustment of the question as to the market value of imported articles, without allowing an appeal to the courts to review the decision reached."); Cheatham v. United States, 92 U.S. 85, 88 (1875) (characterizing "the revenue measures of every civilized government" as being without "resort . . . to the courts . . . .").

II. ADMINISTRATIVE ENFORCEMENT SINCE THE 1970S

Before 1970, domestic regulatory agencies could not adjudicate money penalty cases. Today, however, money sanctions are the most prominent enforcement remedy in administrative proceedings and, in 2022, were sought in 70% of enforcement actions, resulting in $10,444,092,795 of exactions across 1,329 enforcement cases.[98] This part describes the onset of money sanctions in agency adjudications over the past half-century. We address two types of pecuniary penalties. The first is the civil money penalty; the second involves remedies based on the law of restitution.

A. The Rise of Civil Money Penalties

In its seminal 1941 report, the Attorney General's Committee on Administrative Procedure pointed to constitutional "doubts" about agencies seeking money penalties in their in-house courts.[99] With time, these doubts waned.

Legislative intentions evolved. Initially, in the nineteenth century, federal regulation focused on the channels and instrumentalities of interstate commerce, such as waterways and railroads.[100] Then, during the Progressive and New Deal eras, the federal government took to regulating entire industries.[101] Finally, starting in the 1960s, the administrative state subsumed social and quality-of-life matters, such as environmental quality and occupational health. Thus, the administrative state has evolved to "touch[] almost every aspect of daily life."[102] As Congress's regulatory ambition grew, lawmakers took on a greater willingness to test novel agency authorities.

Within this historical context, Congress started experimenting with money penalties at agency tribunals. In 1969, Congress amended the Federal Home Loan Bank Act[103] to enhance the regulatory powers of the Federal Home Loan Bank Board.[104] Although the statute was somewhat ambiguous, the agency interpreted its new mandate to authorize civil money penalties through administrative adjudication, subject to deferential judicial

98. *See infra* Part IV.

99. *See* AG Committee Final Report, *supra* note 7, at 147.

100. *See* Gibbons v. Ogden, 22 U.S. 186, 215 (1824) (upholding Congress's power to regulate riverine navigation under the Commerce Clause).

101. *See supra* Part I.

102. City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (citing Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010)).

103. 12 U.S.C. §§ 1421–1449 (1964).

104. *See* Act of Dec. 23, 1969, Pub. L. No. 91-151, 83 Stat. 371.

review.[105] The Board, however, never tested its interpretation in court.[106]

A year later, in 1970, Congress passed the Occupational Safety and Health Act,[107] which—for the first time—unequivocally established a system for agency adjudication of civil money penalty cases at a domestic regulatory agency. To enforce the workplace safety rules it wrote, the Occupational Safety and Health Administration (OSHA), within the Department of Labor (DOL), was authorized to seek substantial money penalties through administrative adjudication.[108]

Still, it remained an open question whether this novel scheme would survive judicial scrutiny under the Seventh Amendment. While such legal challenges wended their way through the federal courts, Congress was parsimonious in this space and authorized few civil money penalties in administrative settings.[109]

It was only after 1977, when the Supreme Court sustained the Occupational Safety and Health Act from a pair of consolidated Seventh Amendment challenges in *Atlas Roofing*, that the rise of money penalties really took off.[110] Congress took the Court's decision as a green light, and what followed was a sustained period of penalty creation. Over the next thirty-three years, Congress passed 172 authorizations for domestic regulatory agencies to pursue civil money penalties through their in-house proceedings.[111]

Besides burgeoning in number, administrative money penalties expanded in other ways. Through legislative amendment, Congress further increased

105. *See* Harvey J. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, *in* 2 RECOMMENDATIONS & REPORTS OF THE ADMIN. CONF. OF THE U.S. 896, 952 n.5 (1972) [hereinafter ACUS Report] (setting forth how the Federal Home Loan Bank Act interpreted the 1969 amendment to authorize the administrative imposition of money penalties, subject to arbitrary and capricious judicial review).

106. *See* Frank Irey Jr., Inc. v. Occup. Safety & Health Rev. Comm'n, 519 F.2d 1200, 1214 n.10 (3d Cir. 1974) (Gibbons, J., dissenting) ("[C]ounsel for the [Federal Home Loan Bank Board] reported that 'there has never been a court appeal' . . . .") (citing ACUS Report 948–52, Appendix A (1972)). In 1978, Congress folded the Federal Home Loan Bank Board and dispersed its authorities to other agencies, primarily the (newly created) Office of Thrift Supervision (OTS).

107. *See* Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590.

108. *See* 29 U.S.C. § 659 (establishing enforcement procedures); *id.* § 666 (establishing penalties).

109. From 1971 to 1977, Congress legislated fifteen civil money penalty provisions.

110. Atlas Roofing, Co. v. Occupational Health & Safety Rev. Comm'n, 430 U.S. 442 (1977).

111. *See* Appendix A *infra* note 158 (listing statutory authorizations). *See generally infra* Part IV.

or expanded the scope of these penalties another seventy-two times. In 1977, for example, when the Supreme Court decided *Atlas Roofing*, the maximum penalty established by the Occupational Safety and Health Act was $10,000 (about $53,000 in today's dollars).[112] Today, the statutory maximum currently is set at $70,000, but Congress requires DOL to increase its penalties to account for inflation,[113] so the actual present-day maximum penalty is $161,323.[114]

A similar story unfolded at the banking agencies.[115] In 1978, Congress set the original penalty at $1,000 per violation (about $4,900 in today's dollars).[116] In 1989, Congress increased the penalty maximum by an order of magnitude to $1,000,000.[117] Due to congressionally mandated inflation adjustments, the actual penalty is $2,449,575.[118]

As stakes inflated, jurisdiction broadened. In 1990, for example, Congress empowered the Securities and Exchange Commission (SEC) to seek civil money penalties of up to $500,000 through agency adjudication; however, the jurisdiction of SEC courts extended only to registered entities and their institutional associates.[119] Today, the agency can seek penalties against "any person" for violating "any provision" of the Securities and Exchange Act.[120] And while

112. *See* § 17, 84 Stat. at 1607.

113. *See* Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599–601 (amending the Federal Civil Penalties Inflation Adjustment Act of 1990) (codified in a note to 28 U.S.C. § 2461).

114. *See* Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2024, 89 Fed. Reg. 1,810, 1,817 (Jan. 11, 2024).

115. In 1978, the banking regulators included the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the Federal Reserve, and the OTS. Subsequently, the OTS went defunct, and its functions are now performed by the OCC and the since-created National Credit Union Administration. *See* International Banking Act of 1978, Pub. L. No. 95-369, 96 Stat. 607 (creating authority for and describing agencies to regulate banking). *See generally* Will Kenton, *Office of Thrift Supervision: What it is, How it Works,* INVESTOPEDIA (Apr. 28, 2022), https://www.investopedia.com/terms/o/ots.asp [https://perma.cc/BV83-XZVT] (describing the history of the OTS and its merger with other federal agencies).

116. *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 107(e)(1), 92 Stat. 3641, 3660 (codified at 12 U.S.C. § 1818(i)).

117. *See* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 907(a)(D), 103 Stat. 462, 462–63; *see also* Daniel B. Gail & Joseph J. Norton, *The Financial Institutions Reform, Recovery and Enforcement Act of 1989: Dealing with the Regulators*, 107 BANKING L.J. 196, 218–19 (1990) (describing enforcement provisions).

118. *See, e.g.*, Maximum Civil Penalties Table, 89 Fed. Reg. 2,114, 2,115 Table 1 (Jan. 12, 2024).

119. *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, § 202, 104 Stat. 931, 937 (amending Securities and Exchange Act of 1934 by inserting § 21B).

120. *See* Dodd-Frank Act, Pub. L. No. 111-203, §§ 773, 929P(a)(2), 124 Stat. 1802, 1863 (2010)

the statutory maximum remains at $500,000 per violation, the actual per violation total is $1,152,314, when accounting for congressional directives on inflation.[121]

At the Environmental Protection Agency (EPA), we see the same evolution toward larger penalties and broader applicability. Under the 1970 Clean Air Act,[122] if EPA wanted to pursue civil money penalties for a violation, it had to first refer the matter to the Attorney General for a civil action in federal court.[123] In 1977, Congress amended the Clean Air Act to authorize civil money penalties in EPA adjudications, but the scheme was highly constrained, as penalties applied solely to owners of large emissions sources, and they could not be punished for past conduct, but instead only for violations of an EPA cease-and-desist order.[124] In 1990, Congress overhauled this enforcement regime into its present-day form.[125] Presently, the Clean Air Act authorizes EPA to seek penalties against "[a]ny person" for up to $25,000 per violation day, capped at $200,000.[126] Again, Congress directed that these penalties be adjusted for inflation, so the actual penalties are for up to $55,808 per violation day, capped at $446,456.[127]

The pattern of penalty growth played out at other agencies, including the Federal Energy Regulatory Commission,[128] the Department of Health and Human Services,[129] and others.[130]

(extending civil money penalty sanction to subjects of cease-and-desist orders, which had been made applicable to "any person" for violations of "any provision") (codified at 15 U.S.C. § 78u–2(a)(2)).

121. *See SEC Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission*, SEC, https://www.sec.gov/enforce/civil-penalties-inflation-adjustments [https://perma.cc/7X6Z-VYQL] (Jan. 15, 2024).

122. *See* Clean Air Amendments of 1970, Pub. L. No. 91-604, § 7(a)(1), 84 Stat. 1676, 1694 (amending § 205 of the Clean Air Act).

123. *See id.* § 12(a), 84 Stat. at 1707 (redesignating § 305).

124. *See* Clear Air Act Amendments of 1977, Pub. L. No. 95-95, § 118, 91 Stat. 685, 714–15 (codified at 42 U.S.C. § 7420(a), (d)).

125. *See* Act of Nov. 15, 1990, Pub. L. No. 101-549, § 701, 104 Stat. 2399, 2672 (codified at 42 U.S.C. § 7413(d)).

126. *See id.* § 205, 104 Stat. at 2508–9 (codified at 42 U.S.C. § 7413(d)).

127. *See* Civil Monetary Penalty Inflation Adjustment, 88 Fed. Reg. 986, 988–89 (Jan. 6, 2023) (to be codified at 40 C.F.R. pt. 19).

128. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1284(e)(2), 119 Stat. 594, 980 (increasing maximum penalty at 16 U.S.C. § 825o–1(b) from $10,000 per violation to $1,000,000 per violation).

129. *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-19, § 231(c), 110 Stat. 1936, 2013 (increasing the per violation maximum penalty under 42 U.S.C. § 1320a–7a(a) from $2,000 to $10,000); Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4304(b)(2)(A), 111 Stat. 251, 383 (increasing same penalty from $10,000 to $50,000); Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 50412(a)(1)(A)(iii), 132 Stat. 64, 220 (increasing same penalty from $50,000 to $100,000).

130. *See* Futures Trading Practices Act of 1992, Pub. L. No. 102-546, § 212(c)(1), 106 Stat. 3590, 3609 (increasing CFTC maximum civil money penalty at 7 U.S.C. § 13a–1(d) from $100,000 per

Established by the 2010 Dodd-Frank Act, the Consumer Financial Protection Bureau (CFPB) reflects the apotheosis of agency power to pursue civil money penalties. Not only did Congress authorize the CFPB to impose penalties up $1,406,728 per day (accounting for mandatory inflation adjustments),[131] but the statute further empowers the agency to commence a civil action to collect prosecution costs (rather than having to work through DOJ for a collection action in court, as is the case with every other agency).[132]

To be clear, the rise of civil money penalties in administrative adjudication did not come at the expense of the nonmonetary sanctions agencies had relied on before 1970. Instead, Congress overlaid the new money penalties onto existing remedial structures, meaning that most agencies can pursue both monetary and nonmonetary sanctions in the same administrative proceeding.

B. *The Rise of Regulatory Restitution*

Since the 1970s, concomitant with the rise of civil money penalties as an administrative sanction, agencies came into a new class of remedial authority—what this article calls "regulatory restitution." With this phrase, we are referring to implied or express statutory authorizations for agencies to adjudicate monetary sanctions borrowed (sometimes nominally[133]) from the law of unjust enrichment. In 2022, agencies achieved $3,546,558,822 in such relief across 98 administrative proceedings.

As a legal concept, restitution is best defined in relation to damages in civil law. Whereas damages compensate victims for their losses, restitution is measured by the wrongdoer's gains.[134] This article uses "disgorgement" interchangeably with restitution, which is common practice in contemporary jurisprudence and scholarship.[135]

In the late 1970s, agencies started seeking restitutionary relief through administrative proceedings. The Federal Energy Regulatory Commission

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violation to $500,000 per violation); Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 13103(a)(2), 122 Stat. 923, 1433 (increasing same penalty maximum to $1,000,000 per violation).

131. *See* 12 U.S.C. § 5565(a); *see also* Civil Penalty Inflation Adjustments, 89 Fed. Reg. 1,787, 1,788 (Jan. 11, 2024) (to be codified at 12 C.F.R. pt. 1083).

132. *See* 12 U.S.C. § 5565.

133. *See infra* Part IV.

134. *See* Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1589 (2002) (identifying the "consensus" view of restitution: "if liability is based on unjust enrichment, and the remedy is measured by the defendant's gain rather than the plaintiff's loss, then the remedy is appropriately called restitution").

135. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. a (AM. L. INST. 2010) ("Restitution measured by the defendant's wrongful gain is frequently called 'disgorgement.'").

(FERC), for example, asserted the authority to order energy companies to disgorge unjust rates.[136] FERC claimed (and continues to claim) this restitutionary power flows from its statutory mandate to ensure "just and reasonable" rates among licensees.[137]

The banking regulators are another example.[138] In 1978, Congress empowered the banking agencies to take "affirmative action" against bank employees through administrative means.[139] The agencies interpreted their new sanctioning authority to order employees to disgorge any unjust gains to the bank.[140] After courts started pushing back,[141] Congress responded in 1989

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136. *See* Gulf Oil Corp. v. Fed. Power Comm'n, 563 F.2d 588, 606–08 (3d Cir. 1977) (upholding administrative "refunds"); *see also* S. Cal. Edison Co. v. FERC, 805 F.2d 1068, 1071–72 (D.C. Cir. 1986) (upholding the FERC decision to require public utility to refund to its customers overcharges resulting from its failure to pass through refunds received from its fuel suppliers, as required by utility's tariff); Consol. Gas Transmission Corp. v. FERC, 771 F.2d 1536, 1550–51 (D.C. Cir. 1985) (upholding the FERC decision to require liquefied natural gas facility to refund monies collected in violation of its tariff); E. Tenn. Nat. Gas Co. v. FERC, 631 F.2d 794, 799–800 (D.C. Cir. 1980) (upholding FERC decision to require pipeline to refund to its customers).

137. *See* Joseph T. Kelliher, *Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission*, 26 ENERGY L.J. 1, 2–3 (2005); *see also* Brian M. Zimmet, *FERC's Authority to Impose Monetary Remedies for Federal Power Act and Natural Gas Act Violations: An Analysis*, 57 ADMIN. L. REV. 543, 544 (2005).

138. The Federal Reserve Board (FRB) is the primary regulator for bank holding companies, the FDIC is the primary regulatory for state banks with deposits, and the OCC is the primary regulatory for nationally chartered banks. Formerly, the OTS regulated savings and loans, but the OTS is now defunct. Its duties are now shared by the OCC and the National Credit Union Administration (NCUA). *See* FRB, THE FED EXPLAINED: WHAT THE CENTRAL BANK DOES 62–83 (11th ed. 2021) (outlining FRB's supervisory and regulatory roles in relation to financial institutions and activities); *Financial Institution Lists*, OCC, https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists/index-financial-institution-lists.html (last visited Nov. 3, 2024) (listing regulatory bodies for credit unions and state banks); Kenton, *supra* note 115.

139. *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 107(a)(1), 92 Stat. 3641, 3649–50 (amending § 8(b) of the Federal Deposit Insurance Act) (codified as amended at 12 U.S.C. § 1818(b)); *see also* John D. Hawke, Jr., *Assuring Safety and Soundness: The Role of the Enforcement Process*, 5 ANN. REV. BANKING L. 167, 168 (1986) (discussing amendment).

140. *See* del Junco v. Conover, 682 F.2d 1338, 1342–44 (9th Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983) (upholding restitutionary relief awarded through administrative adjudication); First Nat'l Bank of Eden v. U.S. Dep't of the Treasury, 568 F.2d 610, 611 (8th Cir. 1978) (per curiam).

141. *See* Larimore v. Comptroller of Currency, 789 F.2d 1244, 1250, 1256 (7th Cir. 1986) (denying restitutionary relief through administrative adjudication); Citizens State Bank of Marshfield v. FDIC, 751 F.2d 209, 217–19 (8th Cir. 1984).

by expressly authorizing the banking agencies to seek administrative "restitution" against banks *and* their employees.[142] A year later, Congress similarly empowered the SEC to adjudicate "disgorgement."[143]

With the 2010 Dodd-Frank Act, two more agencies gained express authority to seek regulatory restitution through agency adjudication.[144] The statute empowers the CFTC to "require restitution to customers of damages proximately caused by violations of the person";[145] already, that agency could bring such actions in court. To the newly created CFPB, Congress delegated an unprecedented range of remedial power, including authorizations to adjudicate "restitution," "disgorgement," "refund of moneys," "rescission," and "reformation."[146]

Regulatory restitution at the FTC is *sui generis*, in that the agency often achieves significant disgorgement awards in its in-house courts, despite lacking statutory authority to do so. In the Federal Trade Commission Act (as amended),[147] Congress authorized the FTC to remedy an "unfair or deceptive act or practice" by providing "redress injury to consumers," including through the "refund of money or return of property," but the agency can pursue this relief only in court, and only after the agency has already imposed a cease-and-desist order for said conduct.[148] Despite these statutory limitations, the agency often settles its cease-and-desist proceedings for millions of dollars in restitution—in effect, resolving future potential "redress" actions against the regulated party.[149]

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142. *See* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 902(a), 103 Stat. 183, 450 (codified as amended at 12 U.S.C. § 1818(b)(6)); *see also* Gail & Norton, *supra* note 117, at 212–13 (explaining how this amendment was "intended to override the Seventh Circuit decision in *Larimore v. Comptroller of the Currency* and clear up the 'confusion' that some in Congress believed existed . . . due to that case").

143. *See* Securities Enforcement Remedies & Penny Stock Reform Act of 1990, Pub. L. No. 101-429, §§ 102, 202(a)–03, 301, 401, 104 Stat. 931, 933, 935, 937–38, 940–41, 943, 946–47 (amending disgorgement authority into Securities Act, Securities Exchange Act, Investment Company Act, and Investment Adviser Act) (codified as amended at 15 U.S.C. §§ 77h-1(e), 78u-2(e)).

144. *See* Dodd-Frank Act, Pub. L. No. 111-203 §§ 744, 1011(a), 1055(a), 124 Stat. 1376, 1735, 1964, 2029–30 (2010) (codified as amended at 12 U.S.C. § 5565(a)(2)) (creating the Consumer Financial Protection Bureau (CFPB) and granting the CFPB and the CFTC authority to seek restitutionary relief).

145. 7 U.S.C. § 9(10)(D).

146. *See* § 1055, 124 Stat. at 2029–30.

147. 15 U.S.C. §§ 57a–57b.

148. *Id.* § 57b.

149. *See* Daniel Kaufman, *FTC Reviews Fashion Nova – Review Suppression Leads to Double Trouble*, BAKERHOSTETLER LLP (Jan. 26, 2022), https://www.adttorneyslawblog.com/blogs/ftc-reviews-fashion-nova-review-suppression-leads-to-double-trouble/ [https://perma.cc/4L5P-L2S5].

In sum, at least seven agencies currently hold express authority to seek "restitution" and/or "disgorgement" through administrative adjudications, subject to limited judicial review: the SEC, CFTC, CFPB, and the four banking agencies.[150] Another agency, FERC, construes its enabling acts to confer implicit authority to impose regulatory restitution. And one agency, the FTC, has no authority to order restitution through adjudication, but nonetheless routinely reaches restitutionary settlements in administrative proceedings.

III. METHODOLOGY

This article is informed by two original and related datasets. The first is a survey of administrative enforcement through adjudication in 2022. This survey is modeled on two studies from the 1970s by the Administrative Conference of the United States (ACUS).[151] Our survey relies on publicly available data, whereas ACUS studies employed questionnaires to learn about agency sanctions.[152] As a result, our survey is limited to those agencies that make their adjudicative decisions publicly available. A handful of significant regulatory agencies, including the Federal Aviation Administration, the National Transportation Safety Board, and the Food & Drug Administration, do not maintain a public docket, meaning they were not included in this analysis.[153]

Of those agencies that make their dockets publicly available, this survey includes only domestic regulatory agencies, a phrase that is best defined by what it is not—namely, any agency involving foreign policy, such as the Federal Maritime Commission, the International Trade Commission, or DOJ's immigration regime. We also include only agencies in the executive branch of government, meaning we exclude "Article I" courts, such as the Court of Appeals for Veterans Claims, the Court of Appeals for the Armed Forces, and the Tax Court.[154]

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150. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-297, FINANCIAL INSTITUTIONS: FINES, PENALTIES, AND FORFEITURES FOR VIOLATIONS OF FINANCIAL CRIMES AND SANCTIONS REQUIREMENTS 6, 23 n.50 (2016) (identifying the four banking regulators as the FRB, OCC, FDIC, and NCUA).

151. *See generally* ACUS Report, *supra* note 105; Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435 (1979) (reprinting a study commissioned by ACUS).

152. *See* ACUS Report, *supra* note 105, at 948–49; Diver, *supra* note 151, at 1445 (describing methodology).

153. *See* STONE WASHINGTON & RYAN YOUNG, COMPETITIVE ENT. INST., CONFLICT OF JUSTICE: MAKING THE CASE FOR ADMINISTRATIVE LAW COURT REFORM 4 (2023), https://cei.org/studies/conflict-of-justice/ [https://perma.cc/26BJ-67VQ] (identifying which agencies make their dockets publicly available).

154. *See* 10 U.S.C. § 941 (U.S. Court of Appeals for the Armed Forces); 26 U.S.C. § 7441 (U.S. Tax Court); 38 U.S.C. § 7251 (U.S. Court of Appeals for Veterans Claims).

This article focuses on regulatory enforcement, meaning cases where the agency prosecutes a regulatory violation and seeks a sanction that makes the alleged wrongdoer worse off relative to the status quo. Enforcement is only a subset—albeit a substantial one—of adjudication at domestic regulatory agencies, and this paper does not analyze non-enforcement actions, such as ratemaking cases, inter partes disputes, or the administration of government benefits.

Finally, this paper's survey of regulatory enforcement in 2022 is limited to agency adjudications that comply with the APA's requirements for "on the record" proceedings typically tried before an Administrative Law Judge (ALJ).[155] Only settlements and ALJ dispositions are collected; the survey does not include appellate review of ALJ initial decisions.[156]

Ultimately, this survey includes nineteen domestic regulatory agencies. Seventeen of these agencies operate comparatively small caseloads, which permits case-specific data collection.[157] For these agencies, the survey includes the following variables for each administrative proceeding:

- case name;
- docket number;
- description of the allegations;
- date of disposition;
- administrative process; and
- sanction.

Four of the above variables are self-explanatory: case name, description of allegations, docket number, and date of disposition. "Administrative process" refers to the procedure the agency used to dispose of the case. Possible

155. *See* 5 U.S.C. § 554, 556–57. Because we focus on administrative law judges' (ALJs') "on the record" proceedings, we omit analysis of the more than 10,000 non-ALJ adjudicators. *See* Kent H. Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 50 (2018) (discussing non-ALJ enforcement regimes).

156. *See generally* CHRISTOPHER J. WALKER & MATTHEW LEE WIENER, AGENCY APPELLATE SYSTEMS (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-report-agency-appellate-systems [https://perma.cc/77KA-4D6E] (surveying appellate review in federal administrative adjudications).

157. These agencies are: (1) the Consumer Financial Protection Bureau; (2) Commodity Futures Trading Commission; (3) Environmental Protection Agency; (4) Federal Communications Commission; (5) Federal Deposit Insurance Corporation; (6) Federal Reserve; (7) Federal Energy Regulatory Commission; (8) Federal Trade Commission; (9) Department of Health and Human Services; (10) Department of Housing and Urban Development; (11) Interior Department; (12) Labor Department; (13) National Credit Union Administration; (14) Office of the Comptroller of the Currency; (15) Post Office; (16) Securities and Exchange Commission; and (17) Department of Agriculture.

administrative procedures include:

- "on the record" hearings;
- summary judgment;
- defaults/dismissals;
- paper hearings; or
- settlements.

"Remedy" refers to the sanction sought by the agency in any enforcement case. One case can have more than one type of penalty. Possible sanctions include:

- civil monetary penalties;
- restitutionary relief (statutory "restitution" or "disgorgement");
- administrative sanctions (including license suspension or revocation, administrative censure); or,
- other injunctive relief (including cease-and-desist orders and prospective bans on employment).

A case-by-case review was infeasible for two agencies with high-volume dockets—the Occupational Safety and Health Review Commission and the Mine Safety and Health Review Commission. For these two agencies, this paper instead relies on publicly available aggregate data. Notably, the two high-caseload agencies are also the only two "split-function" programs, where prosecution and judging are siloed in different agencies.

The second original dataset builds off the first. For each of the nineteen domestic regulatory agencies, the authors collected all statutory authorizations for the agency to pursue civil money penalties, "restitution," or "disgorgement" through administrative adjudication, subject to deferential judicial review. For each authorization, this statutory survey includes:

- any subsequent amendments;
- the year of enactment (including amendments);
- the maximum statutory penalty amount (including amendments); and,
- the maximum penalty amount adjusted for inflation in compliance with congressional directives (including amendments).

Data was collected in 2023 and tabulated on Excel files. The data is made available in the appendices.[158]

158. To access this tabulation of data, which is as current as of the publication of this article, see William Yeatman & Keelyn Gallagher, Appendix A: List of Statutes that established or increased a Civil Monetary Penalty Regime (2024), https://perma.cc/PM2X-X9J2 [hereinafter Appendix A].

IV. RESULTS

Money sanctions—either civil money penalties or restitutionary relief—were involved in 70% of enforcement actions adjudicated by the surveyed agencies in 2023. The total monetary exactions for 2022 amounted to $10,444,092,795 across 1,329 cases. This total includes $6,897,533,973 in civil money penalties (in 1,308 cases), and $3,546,558,822 in "restitution" or "disgorgement" (in 98 cases).[159] About 95% of the value of these money sanctions were adjudicated at three agencies: SEC, CFPB, and CFTC.

Regarding administrative procedure, the key result is the prevalence of settlements. In proceedings where civil money penalties were at stake, agencies settled 93% of cases. In proceedings involving restitution or disgorgement, agencies settled 96% of cases.[160] These settlement figures reflect conservative estimates, as at least two significant domestic regulatory agencies publish their ALJ decisions but not their settlements, and only the former was included in this study.[161]

For the two agencies with high caseloads, we did not collect granular data but instead relied on an aggregate analysis based on public data. In 2022, OSHA brought 1,546 penalty proceedings before the Occupational Safety and Review Commission Health Review Commission, although agency ALJs conducted only twenty-four hearings, indicating that these actions settle at about the same rate as at other agencies (about 95% of cases).[162] We could not find estimates of the dollar value of the penalties.

That year, the Mine Safety and Health Administration brought 1,968 penalty actions before the Mine Safety and Health Review Commission.[163] More granular data for these proceedings was unavailable, but the agency previously reported to Congress that 94% of its ALJ dispositions do not

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159. In seventy-seven cases, the agencies pursued both sanctions, meaning there was overlap in the totals for the two categories.

160. In five cases before the OCC, the restitutionary relief was an order for the regulated entity to pay disgorgement that had already been ordered by a court. We did not include these court-ordered exactions in our tabulation.

161. The two agencies that do not publish settlements are the Department of the Interior and the Department of Health and Human Services.

162. *See* Letter from Cynthia L. Atwood, OSHRC Chairman, Occupational Safety & Health Review Commission, to the President Transmitting OSHRC FY 2022 Performance and Accountability Report (Nov. 15, 2022) (stating that 91% of 1,546 ALJ dispositions involved settlements); *see also* U.S. OCCUPATIONAL SAFETY & HEALTH REV. COMM'N, FY2022 PERFORMANCE AND ACCOUNTABILITY REPORT 10 (2022) (stating there were twenty-four ALJ hearings in FY22).

163. *See* FED. MINE SAFETY & HEALTH REV. COMM'N, PERFORMANCE & ACCOUNTABILITY REPORT FY2022 9 (2022).

involve a hearing.[164] Again, we could not identify estimates of the dollar value of these penalties.

Across all nineteen surveyed agencies, the U.S. Code currently includes at least 188 express authorizations to adjudicate money penalties, subject to deferential judicial review. Although all these provisions were enacted into law since 1970, certain historical trends are evident. Before the Supreme Court decided *Atlas Roofing* in 1977, Congress created very few such penalties (sixteen statutory penalty provisions in seven years). After *Atlas Roofing*, Congress started a period of sustained penalty-creation, which lasted until the Dodd-Frank Act in 2010. During this period (from 1977 to 2010), Congress passed 172 express statutory provisions authorizing agencies to adjudicate civil money penalties, or about 92% of the current total (172 of 188). Since the Dodd-Frank Act, Congress has not established a new civil money penalty for the nineteen surveyed agencies. The post-Dodd-Frank lull is unprecedented: Congress has never gone this long without legislating a new penalty for the surveyed agencies.

Congress further amended these penalties seventy-two times, either to increase the penalty maximum (sixty times) or expand the penalties' jurisdiction (twelve times). These amendments are part of a clear shift over time toward higher penalty maximums. From 1970 to 1979, about 98% of these civil money penalties were capped at less than $100,000 per violation, and about sixty-nine were capped below $10,000 per violation. Of the total civil money penalties passed since then (192 statutory provisions in total), 47% have maximums of more than $100,000 per violation, and 34% have maximums above $1,000,000 per violation.

164. *See* FED. MINE SAFETY & HEALTH REV. COMM'N & THE U.S. DEP'T OF LAB., JOINT REPORT ON BACKLOG REDUCTION 9 (2015).

TABLES AND CHARTS

Table 1.a: Civil Monetary Penalty (CMP) Cases (2022) Part I

Agency	Total Count	Enforcement Count	CMP Case Count	% Cases with CMP	Total CMP Ordered
CFPB	12	12	12	100.0%	$1,917,100,000.00
CFTC	43	43	39	90.7%	$1,614,665,628.81
EPA	781	780	760	97.4%	$39,250,030.72
FCC	19	19	14	73.7%	$2,683,400.00
FDIC	69	69	27	39.1%	$1,612,850.00
Fed	34	34	10	29.4%	$31,450,400.00
FERC	75	8	6	75.0%	$5,943,000.00
HHS	208	173	55	31.8%	$4,533,871.00
HUD	67	67	60	89.6%	$22,461,252.00
DOI	21	5	2	40.0%	$945,440.00
DOL	138	138	90	65.2%	$1,864,967.08
OCC	47	47	28	59.6%	$213,287,456.00
SEC	467	467	186	39.8%	$3,039,957,725.52
USDA	36	35	19	54.3%	$1,777,952.25
Grand Total	**2017**	**1897**	**1308**	**69.0%**	**$6,897,533,973.38**

Table 1.b: Civil Monetary Penalty (CMP) Cases (2022) Part II

Agency	Administrative Process				
	Default/ Dismissed	**Full Hearing**	**Paper Hearing**	**Settled**	**Summary Judgment**
CFPB				12	
CFTC				39	
EPA		1		759	
FCC				14	
FDIC		1		26	
Fed		1		9	
FERC				6	
HHS	2	3	43		7
HUD	1	3		55	1
DOI		1			1
DOL	2	14		71	3
OCC		5		22	1
SEC				186	
USDA	9			10	
Grand Total	**14**	**29**	**43**	**1209**	**13**

Table 2.a: Restitution (Rest.) (2022) Part I

Agency	Total Count	Enforce-ment Count	Rest. Case Count	% Cases with Rest.	Total Rest. Ordered
CFPB	12	12	7	58.33%	$2,163,565,989.37
CFTC	43	43	8	18.60%	$324,896,222.23
FERC	75	8	8	100.00%	$28,675,210.60
FTC	26	26	5	19.23%	$68,269,109.00
OCC	47	47	5	10.64%	$ -
SEC	467	467	68	14.56%	$980,348,076.58
Grand Total	**670**	**603**	**101**	**36.89%**	**$3,565,754,607.78**

Table 2.b: Restitution (Rest.) (2022) Part II

Agency	Administrative Process				
	Default/ Dismissed	Full Hearing	Paper Hearing	Settled	Summary Judgment
CFPB				7	
CFTC				8	
FERC				8	
FTC				5	
OCC				5	
SEC				68	
Grand Total	**0**	**0**	**0**	**101**	**0**

Chart 1: Statutory Authorizations for Agencies to Seek Civil Money Penalties Through Adjudication, Subject to Deferential Judicial Review

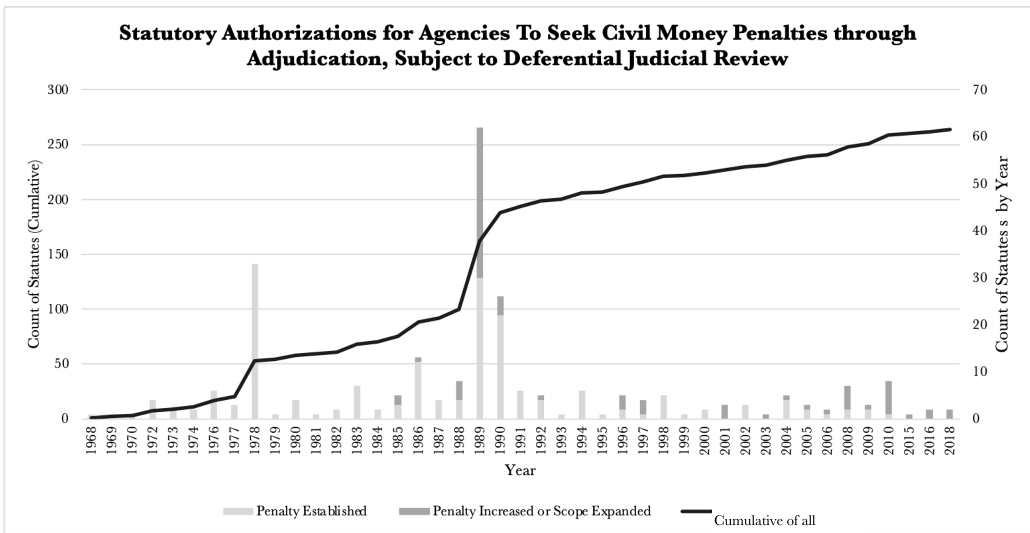


Chart 2: Distribution of Statutory Penalty Maximum 1970–1979

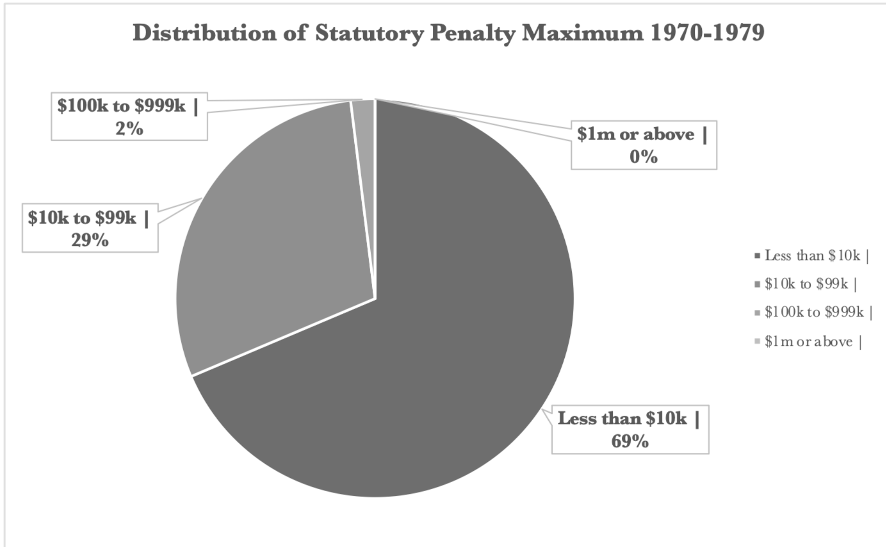


Chart 3: Distribution of Statutory Penalty Maximum 1980–1989

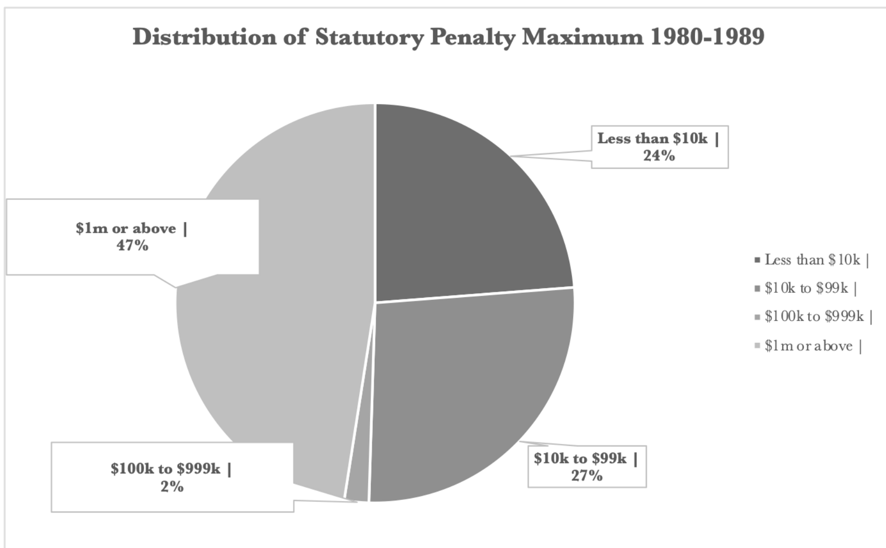


Chart 4: Distribution of Statutory Penalty Maximum 1990–1999

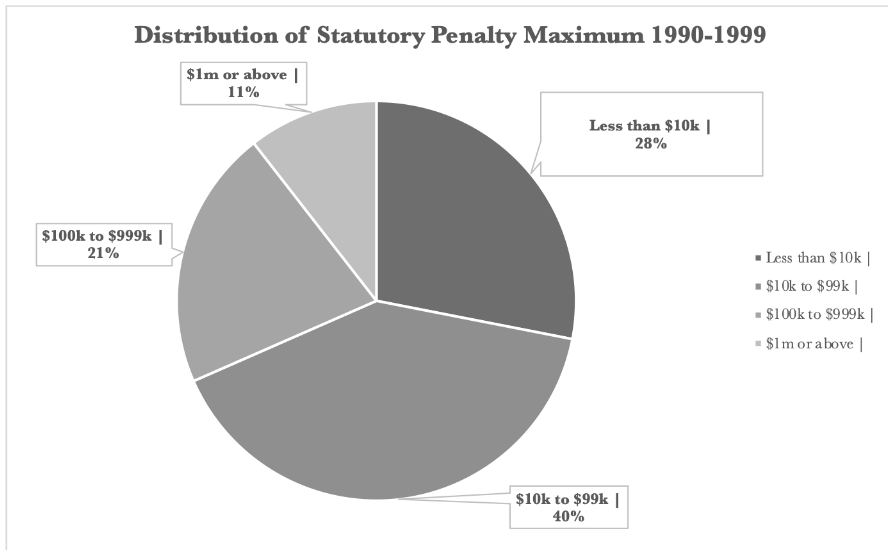
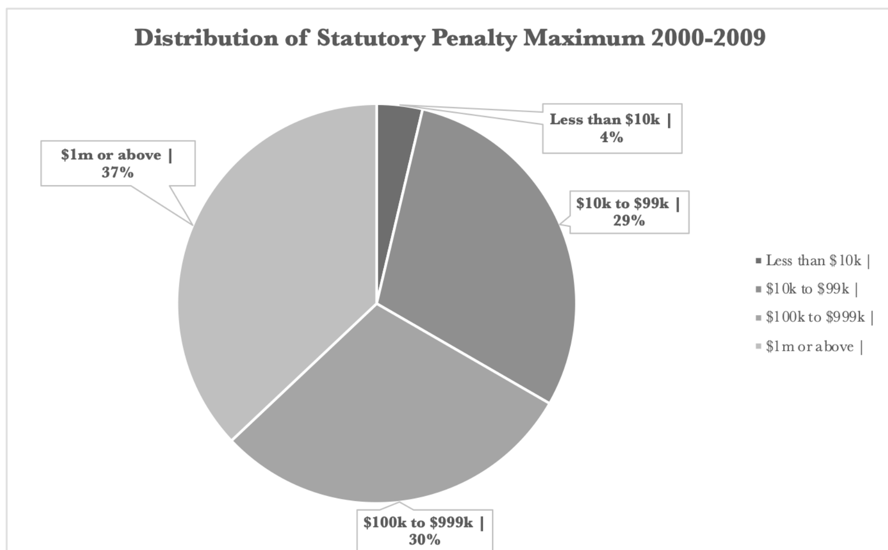


Chart 5: Distribution of Statutory Penalty Maximum 2000–2009



V. DISCUSSION

This article shows how enforcement remedies have evolved at agency adjudications. Until 1970, sanctions at domestic regulatory tribunals were nonmonetary; since then, money penalties have assumed preeminence in administrative enforcement. In this part, we evaluate these changes. We first assess the rise of civil money penalties, concluding that today's penalties far exceed what original proponents of this agency authority recommended, resulting in likely overenforcement. Turning to regulatory restitution, we are critical of the capacious discretion wielded by agency tribunals, which exists at the penumbral fringes of the judicial power. Finally, we revisit the constitutional "doubts" that had kept money sanctions out of agency adjudication for much of the twentieth century, now that these penalties are central to administrative enforcement.

A. Assessing the Rise of Civil Money Penalties

To assess the onset of civil money penalties in agency adjudication over the past half-century, we look to the arguments made fifty years ago by scholars in support of such sanctions.

Particularly influential was a 1972 study and recommendation by ACUS.[165] At the time, agencies generally had to be successful in either an original action to collect or on de novo judicial review before imposing a civil money penalty.[166] The problem, according to ACUS, was DOJ, which frequently declined to carry these suits because the penalties were too small to justify the expense of a trial.[167] Agencies, therefore, settled "well over 90%" of these cases.[168] Although "[s]ettlements are not wrong, per se[,]" ACUS questioned the "quality" of the settlements that were being reached.[169] In fact, ACUS's "most significant finding" was that "settlements reached under the present system are, as a rule, substantially inferior to those that would occur under an administrative imposition scheme."[170]

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165. *See* ACUS Report, *supra* note 105, at 896.

166. *See* ACUS Report, *supra* note 105, at 899 ("The vast majority of agencies must be successful in a de novo adjudication in federal district court (whether or not an administrative proceeding has previously occurred) before a civil money penalty may be imposed.") (emphasis omitted)).

167. *See* ACUS Report, *supra* note 105, at 900 (explaining the "Department of Justice has been an 'immovable roadblock'" in bringing collection actions because it must "conserve scant resources and to provide a shield for the courts").

168. *See* ACUS Report, *supra* note 105, at 919.

169. *See* ACUS Report, *supra* note 105, at 899 (emphasis omitted).

170. *See* ACUS Report, *supra* note 105, at 899.

As a solution, ACUS urged Congress to adopt the "true administrative imposition" of civil money penalties, meaning that the "agency's decision is subject to only limited judicial review."[171] Under its preferred framework, ACUS expected settlements "at about the same rate as they take place at an agency level now."[172] Instead, settlements would become "fairer, not fewer."[173]

In calling for "fairer" outcomes, ACUS was speaking to the leverage exercised by the two parties—the government and the defendant—in settlement negotiations attendant to any enforcement action. Under the prevailing de novo framework of the early 1970s, ACUS believed that the government had too little leverage, which led to "inferior" settlements. According to the ACUS report, "regulatory needs are being sacrificed for what is collectable . . . ."[174] By switching to a deferential framework, ACUS intended to increase the government's hand at the bargaining table and thereby increase the "quality" of settlements (presumably by exacting greater sums from the alleged wrongdoers).[175]

Over the ensuing decades, the "true administrative imposition" of money penalties became standard practice, as discussed above. Just as ACUS predicted, settlements for money penalty actions continue today "at about the same rate" (>90%) as they did in 1972 under the de novo framework. Although no fewer, it is highly questionable whether these settlements are "fairer," and that is because present-day penalties are very different from what ACUS had contemplated.

In its 1972 recommendation, ACUS identified several "factors whose presence tends to commend the imposition of civil money penalties by agencies themselves."[176] Two of these factors flowed directly from the primary conclusion of the ACUS report—that DOJ refused to prosecute high-volume/low-dollar penalties, leading to suboptimal settlements. Accordingly, ACUS argued its recommendation best suits agencies with "a large volume of cases" involving "relatively small" penalties.[177] Besides penalty size and caseload, the third crucial factor was the availability of more potent sanctions, such as the revocation of a license to do business.[178] The upshot is that

171. *See* ACUS Report, *supra* note 105, at 907.

172. *See* ACUS Report, *supra* note 105, at 931.

173. *See* ACUS Report, *supra* note 105, at 932.

174. *See* ACUS Report, *supra* note 105, at 921.

175. *See* ACUS Report, *supra* note 105, at 921.

176. *See* ACUS Report, *supra* note 105, at 932 (quoting ACUS Recommendation 72-6 itself).

177. *See* ACUS Report, *supra* note 105, at 932–33.

178. *See* ACUS Report, *supra* note 105, at 898 ("[A]gency administrators often voice frustration at having to render harsh 'all or nothing decisions' . . . when enforcement needs would best be served by . . . a more flexible response.").

ACUS's recommendation was aimed at a certain class of adjudications involving cases from *high-volume* dockets, with *low-stakes* penalties, and occurring primarily in *licensing* regimes.

While Congress never strictly adhered to ACUS's advice,[179] lawmakers initially refrained from contravening all three ACUS "factors" in the same regime. This would change over the ensuing decades, as Congress turned to penalties that comprehensively conflicted with ACUS's recommendations.

From the start, Congress rarely limited administrative money penalties to high-caseload programs. Of the 188 express statutory authorizations for the administrative imposition of civil money penalties, only two involve regimes with what we deemed to be high-volume dockets.

Over time, Congress steadily expanded the scope of licensing regimes to reach non-licensees.[180] In 1990, for example, Congress extended the jurisdiction of the SEC's in-house tribunals to "any person[,]" but the agency could pursue only a cease-and-desist order.[181] In 2010, the agency gained authority to administratively impose a civil money penalty on "any person." In 1992, FERC's jurisdiction extended to "any person."[182] The banking regulators and the CFTC are other licensing agencies that can sanction non-licensees.[183]

Finally, penalties have ballooned. When ACUS recommended the "true administration imposition" of money penalties in 1972, ACUS envisioned "relatively small" stakes.[184] ACUS further identified a threshold of $5,000, below which ACUS presumed agency adjudication.[185] While ACUS did not rule out the potential utility of larger penalties, its $5,000 figure still provides a useful referent. Adjusted for inflation, that is about $37,500 in today's dollars.

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179. For example, Congress's first such authorization—the Occupational Health and Safety Act—involved high caseloads and relatively small penalties, but it was not a licensing regime, so the civil money penalty was the most potent sanction available.

180. *See supra* Part II.A.

181. *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (codified at 15 U.S.C. § 77h-l(a) (Securities Act); 15 U.S.C. § 78u-3(a) (Securities Exchange Act); 15 U.S.C. § 80a-I (Investment Company Act); and 15 U.S.C. § 80b-9(d) (Investment Advisers Act)).

182. *See* Energy Policy Act of 1992, Pub. L. No. 102-486, § 725(b), 106 Stat. 2776, 2920 (codified at 16 U.S.C. § 825o–1) (amending Federal Power Act); Pub. L. No. 109-58, § 314(b)(1)(B), 119 Stat. 594, 691 (2005) (codified at 15 U.S.C. § 717t–1) (amending Natural Gas Act).

183. *See* 7 U.S.C. § 9(1) (Commodity Futures Trading Commission); 12 U.S.C. § 1813(u) (defining "institution-affiliated party" as "any director, officer, employee, or controlling stockholder (other than a bank holding company or savings and loan holding company) of, or agent for, an insured depository institution"); 12 U.S.C. § 1818(j) (subjecting institution-affiliated parties to civil money penalties).

184. *See* ACUS Report, *supra* note 105, at 899.

185. *See* ACUS Recommendation 72-6, *as quoted in* ACUS Report, *supra* note 105, at 932–33.

Today, even accounting for inflationary adjustments required by law, only 67 of 188 statutory penalties are capped at below $37,500, which is less than the number of penalties (seventy-three) with maximums set at or above $1,000,000.

Instead of low-dollar penalties in licensing regimes with high caseloads—as ACUS recommended—most penalties today are the opposite. When, in 1972, ACUS advised Congress to adopt the "true administrative imposition" of civil money penalties, its concern related to regulatory under-enforcement. Using the same criteria employed then, ACUS's concern today should be over-enforcement.

B. Assessing the Rise of Regulatory Restitution

In 2022, agencies exacted $3,546,558,822 in statutory "disgorgement" or "restitution" through administrative proceedings. In awarding this relief, agencies exercise an incongruous delegation that is incompatible with elemental limits on administrative authority.

Federal agencies are "creatures of Congress[,]"[186] and have "literally . . . no power to act . . . unless and until Congress confers power upon [them]."[187] As the Supreme Court recently cautioned, "enabling legislation is generally not an open book to which the agency [may] add pages and change the plot line."[188]

Judges, on the other hand, exercise an altogether different—and far less constrained—authority when crafting remedies. Unlike agencies, which cannot act beyond a statute, "federal courts may assume that Congress implicitly authorized them to award any appropriate remedy [for statutory violations], including equitable relief pursuant to traditional principles[,]" even where the statute does not provide a remedy.[189] Unless Congress specifies otherwise, equitable relief under the traditional principles is available to remediate statutory violations (for which a cause of action is available). Famously, critics have analogized the courts' broad remedial discretion to "palm-tree justice," meaning the judge "metaphorically sit[s] under a tree to make rulings based on common sense rather than legal principles or rules."[190]

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186. City of Arlington v. FCC, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting).

187. La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986).

188. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quotations and citations omitted).

189. Michael T. Morely, *The Federal Equity Power*, 59 B.C. L. REV. 217, 277 (2018); *see also* Bell v. Hood, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."); Caprice Roberts, *Statutory Interpretation and Agency Disgorgement Power*, 96 ST. JOHN'S L. REV. 2, 253 (2022) (discussing federal courts' "significant latitude to craft remedies and ensure justice is done").

190. *See* Roberts, *supra* note 189, at 245 n.7 (quoting *Palm Tree Justice*, AUSTRALIAN L. DICTIONARY (1st ed. 2010)); *see also* Roberts, *supra* note 189, at 245 n.7 (quoting Barry

Even by the "palm-tree justice" standards of equity, regulatory restitution involves an unusual degree of remedial latitude. For example, agencies have exacted disgorgement awards despite lacking any identifiable victims.[191] Agencies also have imposed restitution through joint-and-several liability, which is otherwise generally unavailable under equitable principles.[192] Perhaps the most crucial difference relates to the calculation of these awards. Under the traditional rules of equity, plaintiffs must establish a causal link between the disgorged funds and the defendant's breach of duty;[193] however, agencies apply the more forgiving "reasonable approximation" standard for calculating restitutionary relief.[194] These tweaks result in a different kind of equity that is even more freewheeling.

Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law*, 36 TUL. L. REV. 605, 607 (1962) (describing and criticizing attorneys' distrust of and disdain for "palm-tree justice")).

191. *See, e.g.*, Tenaris S.A., Securities Exchange Act Release No. 95030, File No. 3-20875, at 5 (June 2, 2022) ("[I]n these circumstances, distributing [$53.1 million in] disgorged funds to the United States Treasury is the most equitable alternative."); Fashion Nova, LLC, F.T.C. No. C-4759, at 6 (Mar. 18, 2022) (settling for a $4.2 million payment to government); JPMorgan Chase & Co., CFTC No. 20-69, at 14, 16 (Sept. 29, 2020) (settling for restitution ($311,737,008) and disgorgement ($172,034,790) awards, payable to government).

192. Glencore Int'l AG, CFTC No. 22-16, at 19 (May 24, 2022) (settling $320 million disgorgement liability jointly and severally, paid to government); Integrity Advance, LLC, CFTC No. 2015-CFPB-0029, document 309 (Jan. 8, 2021) (imposing joint-and-several liability for $28 million restitution order, calculated by the Administrative Law Judge under the reasonable approximation framework).

193. *See* SEC v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("Since disgorgement primarily serves to prevent unjust enrichment, the court may exercise its equitable power only over property causally related to the wrongdoing.").

194. The SEC pioneered the "reasonable approximation" framework in court in the late 1980s. *See, e.g.*, *id.* at 1231–32. If the agency demonstrates such an "approximation" between the wrongdoing and the disgorged funds, then the burden of production shifts to the defendant to "clearly . . . demonstrate that the disgorgement figure [is] not a reasonable approximation." *See id.* at 1232. Federal courts then applied the standard to other agency regulatory contexts, and today it is the consensus approach for reviewing agency requests for restitutionary relief. *See, e.g.*, FTC v. Moses, 913 F.3d 297, 310 (2d Cir. 2019) (employing framework); CFPB v. Gordon, 819 F.3d 1179, 1195 (9th Cir. 2016) (employing framework); CFPB v. Sidoti, 178 F.3d 1132, 1138 (11th Cir. 1999); *see also* Cox Prentiss, *Public Compensation for Public Enforcement,* 39 YALE J. ON REGUL. 61, 95–96 (2022) (discussing entrenchment of reasonable approximation framework in this context). The framework has been adopted by agency tribunals for calculating restitutionary relief in enforcement actions. *See, e.g.*, Montford & Co., Investment Advisers Act of 1940, No. 3-14536, 2014 SEC LEXIS 1529, at *54 (May 2, 2014) ("[D]isgorgement 'need only be a reasonable approximation of profits causally connected to the violation.'"); Barclays Bank, PLC, 144 FERC ¶ 61,041 at P 83 (2013) ("[D]isgorgement need only be a reasonable approximation of profits causally connected to the violation.").

Agencies are statutory creatures; judicial remedies are not.[195] There is, accordingly, a "core tension" whenever Congress empowers administrative agencies with a court's equitable discretion to design sanctions.[196] Agency adjudicators exercise a highly anomalous discretion whenever they "interpret" the extent of their statutory authority to exact "disgorgement" or "restitution" from regulatory wrongdoers. This discretion coexists uneasily with the principal tenet of administrative law that agencies are limited by statute.

C. *Assessing* SEC v. Jarkesy

Last term, in *SEC v. Jarkesy*, the Supreme Court held that the Seventh Amendment entitles defendants to a jury trial when the SEC seeks civil money penalties in enforcement proceedings. *Jarkesy* is an inflection point in the history of administrative adjudication, in that it ends the rise of money sanctions at agency tribunals. This section describes the case's doctrinal context, reasoning, and practical effect.

1. From Atlas Roofing *to* Jarkesy

In 2020, after a seven-year administrative proceeding, the SEC found George Jarkesy liable for securities fraud and imposed a civil penalty of $300,000, among other sanctions. On judicial review, a divided Fifth Circuit panel vacated the final order.[197] The panel's majority identified "three independent constitutional defects: (1) Petitioners were deprived of their constitutional right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power; and (3) statutory removal restrictions on SEC ALJs violate Article II."[198] The SEC sought certiorari, and the Supreme Court granted the agency's petition. By a 6–3 vote, the Court affirmed the court below on the Seventh Amendment claim, leaving the other two constitutional claims unaddressed.

In finding that the jury right applied to SEC proceedings, the *Jarkesy* Court effectively overturned *Atlas Roofing*, the case that had ushered in the rise of money sanctions at agency tribunals. Again, in *Atlas Roofing*, the Court heard a Seventh Amendment challenge to the first express statutory authorization for a domestic regulatory agency to adjudicate civil money penalty cases. Rather than working through the existing doctrinal test, the Court

195. *See* Roberts, *supra* note 189, at 253.

196. *See* Roberts, *supra* note 189, at 253.

197. *See* Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022).

198. *See id.* at 451.

established an exception to the jury right.[199] For controversies involving "public rights," the jury right did not apply, "even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency."[200] According to *Atlas Roofing*, Congress creates "public rights" whenever it establishes "new statutory obligations" enforced by the government "in its sovereign capacity."[201] Repeatedly, the Court indicated that Congress has the discretion to decide whether the Seventh Amendment applies, simply by choosing which forum hears the case.[202] The breadth of this constitutional carveout invited Congress to pass more of these penalties, as discussed above.

Twelve years after *Atlas Roofing*, in *Granfinanciera, S.A. v. Nordberg*,[203] the Court seemed to contradict itself on the public rights exception. *Granfinanciera* involved a controversy at a (non-Article III) bankruptcy court, in which a trustee sued a third party (the petitioner) to recover an allegedly fraudulent monetary transfer by the debtor.[204] The third party's request for a jury trial was denied by the bankruptcy court, the district court, and the Eleventh Circuit.[205] On certiorari, the question presented was whether the Seventh Amendment permitted Congress to assign actions to recover a money judgment for fraudulent conveyance to a bankruptcy Court, where there is no jury right.[206] Ultimately, the *Granfinanciera* Court determined that the disputed action was a "matter[] of private rather than public right," such that the Seventh Amendment applied.[207]

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199. Under the then-prevailing Seventh Amendment framework, the Court asked whether the underlying action is analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century. *See* Curtis v. Loether, 415 U.S. 189, 196 (1974).

200. *See* Atlas Roofing, Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 455 (1977).

201. *See id.* at 450, 458.

202. *See id.* at 455 ("Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation . . . .").

> We cannot conclude that the Amendment rendered Congress powerless—when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate—to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law—such as an administrative agency—in which facts are not found by juries.

Id. at 460.

203. 492 U.S. 33 (1989).

204. *See id.* at 36–38 (giving case backstory).

205. *Id.* at 37.

206. *Id.* at 36.

207. *See id.* at 56.

On doctrine, *Granfinanciera* struck a tone at odds with *Atlas Roofing*. The key difference was how the two decisions dealt with legislative intent. *Atlas Roofing* oozed deference for Congress; there, the Court was unwilling to accept "that the [Seventh] Amendment rendered Congress powerless."[208] In *Granfinanciera*, the Court replaced deference with the suspicion that Congress might "conjure away" or "eviscerate" the Seventh Amendment "merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency."[209] Justice Byron White took note of this shift in his dissent, accusing the majority of "blithely ignoring the relevance of the forum Congress has designated to hear this action" and instead focusing only on the nature of the claim.[210] According to Justice White, *Granfinanciera* "can be read as overruling or severely limiting the relevant portions of" *Atlas Roofing*.[211]

Although *Granfinanciera* quoted *Atlas Roofing* for the proposition that "public rights" arise when Congress creates a new cause of action "unknown to the common law," the Court gave this formulation an entirely different meaning.[212] In *Atlas Roofing*, the Court had reasoned that a novel statutory suit is "unknown to the common law" simply because it is new.[213] In *Granfinanciera*, by contrast, the majority took "unknown to the common law" to mean that the underlying action is not "legal in nature."[214] Because actions for fraudulent conveyance "are quintessentially suits at common law," the Court in *Granfinanciera* determined that the Seventh Amendment right attached to the bankruptcy proceedings.[215]

Clearly, *Atlas Roofing* and *Granfinanciera* present competing interpretations of public rights.[216] The problem was that *Granfinanciera* departed from *Atlas*

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208. *See* Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 460 (1977).

209. *Granfinanciera*, 492 U.S. at 52, 61.

210. *Id*. at 81 (White, J., dissenting).

211. *Id.* at 71 n.1 (White, J., dissenting).

212. *See id.* at 60 (quoting *Atlas Roofing*, 430 U.S. at 461).

213. *See Atlas Roofing*, 430 U.S. at 450 ("Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred."); *id.* at 455 ("In sum, the cases discussed above stand clearly for the proposition that when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible . . . .").

214. *See Granfinanciera*, 492 U.S. at 53, 60.

215. *See id.* at 56.

216. Justice Byron White, who authored *Atlas Roofing*, dissented in *Granfinanciera* and observed that the latter "can be read as overruling or severely limiting the relevant portions of" the former. *Id.* at 71 n.1.

Roofing without saying as much. Far from addressing the conspicuous conflict between the two cases, *Granfinanciera* expressly affirmed *Atlas Roofing*.[217] The *Granfinanciera* majority even expanded the *Atlas Roofing* holding by clarifying that the government does not have to be a party in a dispute for the public rights exception to apply.[218] Relatedly, the absence of the government as a party in *Granfinanciera* provided a way to distinguish it from *Atlas Roofing*, where the agency was in a prosecuting role. There was no way to tell how the two cases related to one another. [219]

In *Jarkesy*, the Court decided between the conflicting precedents: "*Granfinanciera* effectively decides this case."[220] According to *Jarkesy*, "what matters" for identifying public rights "is the substance of the action, not where Congress has assigned it."[221] Where the suit's "substance" entails "traditional legal claims," the controversy "must be decided by courts."[222] This is true "[e]ven when an action originate[s] in a newly fashioned regulatory scheme."[223]

In *Jarkesy*, the Court minimized the public rights exception to the Seventh Amendment, which "is, after all, an *exception*."[224] The Court identified six areas of sovereignty-heavy subjects—including immigration, taxation, and customs—that "historically could have been determined exclusively by [the executive and legislative] branches," with "[n]o involvement by an Article III court in the initial adjudication . . . ."[225] These were public rights. Beyond these "historical practices," the Court called for judicial scrutiny ("close attention") to ensure that the public rights exception does not "swallow the rule."[226] Even where the exception seemingly applied, "the presumption is in favor of Article III courts."[227] As in *Granfinanciera*, the *Jarkesy* Court

217. *See id.* at 51 (stating that "[w]e adhere to that general teaching" of *Atlas Roofing*).

218. *See id.* at 53–55.

219. 1 RICHARD J. PIERCE, JR., ADMIN. L. TREATISE § 2.8, at 124–27 (4th ed. 2002) (noting that, after *Granfinanfiera*, the Court could either "extend" that holding or "return to . . . *Atlas Roofing*").

220. *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2135 (2024); *see also id.* at 2134 ("This is not the first time we have considered whether the Seventh Amendment guarantees the right to a jury trial 'in the face of Congress' decision to allow a non-Article III tribunal to adjudicate' a statutory 'fraud claim.' . . . . We did so in *Granfinanciera*, and the principles identified in that case largely resolve this one.") (citations omitted).

221. *See id.* at 2135.

222. *See id.* (cleaned up).

223. *See id.*

224. *See id.* at 2134 (emphasis in original).

225. *See id.* at 2132; *id.* at 2131–34 (discussing six categories of historical public rights).

226. *See id.* at 2134.

227. *See id*. (citations omitted).

repeatedly expressed its suspicion that, absent robust judicial oversight, Congress might "conjure away the Seventh Amendment" by assigning legal claims to agency tribunals.[228] More generally, the majority seemed skeptical of the public rights doctrine per se, observing it "has no textual basis in the Constitution."[229] Ultimately, *Jarkesy* held that the public rights exception does not extend to "traditional legal claims" like securities fraud.[230]

Jarkesy, like *Granfinanciera*, is incompatible with *Atlas Roofing*, but the Court again did not overturn its precedent. Rather, the majority reasoned that, unlike securities fraud, the workplace safety standards at issue in *Atlas Roofing* were unknown to the common law.[231] Otherwise, the controlling opinion in *Jarkesy* expressed skepticism, if not hostility, towards *Atlas Roofing*, which indicates that the current Court does not understand *Atlas Roofing* to extend much beyond the specific regime at issue in that case.[232]

2. Jarkesy*'s Effect on Civil Money Penalties*

Atlas Roofing ushered in tremendous change at the administrative state by encouraging Congress to pass more administrative money penalties.[233] *Jarkesy* will prove at least as consequential.

At the outset, we should be clear about the real-world impact for defendants. Regardless of where civil money penalty actions are brought—in an agency tribunal or federal court—they typically result in a negotiated settlement.[234] In the early 1970s, the original impetus for administrative money penalties was that agencies were reaching "inferior" settlements in federal

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228. *See id.* at 2136 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989)); *id.* at 2139 (warning that, under the dissent's approach, "evading the Seventh Amendment would become nothing more than a game, where the Government need only identify some slight advantage to the public from agency adjudication to strip its target of the protections of the Seventh Amendment").

229. *See id.* at 2134 ("The public rights exception is, after all, an *exception.*") (emphasis in original).

230. *See id.* at 2137.

231. *See id.* at 2138–39.

232. *See id.* at 2138–39 ("Even as *Atlas Roofing* invoked the public rights exception, the definition it offered of the exception was circular."); *id.* at 2138 n.4 (identifying *Atlas Roofing* as a "departure from our legal traditions" and citing critical scholarship); *id.* at 2138 ("The dissent chants '*Atlas Roofing*' like a mantra, but no matter how many times it repeats those words, it cannot give *Atlas Roofing* substance that it lacks.").

233. *See id.* at 2132–34.

234. In the early 1970s, when agencies had to go to court to pursue civil money penalties, more than 90% of these cases settled. *See* ACUS Report, *supra* note 105, at 899. In this study, we found that 93% of civil money penalty proceedings and 96% of restitutionary proceedings settled.

court.[235] To enhance the agencies' hand in settlement discussions, scholars advocated for the administrative imposition of money penalties. By calling these penalties into question, the primary practical effect of *Jarkesy* is to shift leverage from the government to defendants at the bargaining table.

Still, it is uncertain how many regimes will be affected. Most directly, the decision will prevent the SEC from employing its in-house tribunals in contested enforcement proceedings for fraud-based claims involving money penalties. However, the scope of "securities fraud" is unclear. The *Jarkesy* Court characterized the alleged fraud at issue in the case as knowing or reckless misstatements, but the SEC's conception of "securities fraud" is so broad that it includes some violations that do not include a false statement, which "could lead to a parsing of fraud allegations in SEC actions, depending on whether they are based on a misstatement or otherwise covered by the securities laws."[236]

Of course, the SEC is not the only agency that punishes fraud-based violations with the administrative imposition of money penalties. The CFTC, for example, can impose civil money penalties against "any person" who uses or attempts to use "any manipulative or deceptive device or contrivance."[237] And the CFPB can penalize any "deceptive" acts by any covered entity, or any person who assists in such a violation.[238] Some agencies have already reacted to *Jarkesy* by dropping civil money penalties for fraud-like violations in contested administrative proceedings. FERC, for example, terminated proceedings in a market manipulation case against a major gas company.[239] And the FDIC abandoned civil money penalties in an administrative proceeding against a former banking executive for allegedly fraudulent loan activity.[240]

More broadly, *Jarkesy* indicates that the current Court will narrowly construe administrative exceptions to the Seventh Amendment. The Court's skepticism of public rights casts a constitutional pall over all money penalty

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235. *See* ACUS Report, *supra* note 105, at 921.

236. *See* David Fredrickson, *What Happens to the SEC's Administrative Proceedings after Jarkesy?*, BLOOMBERG L. (Apr. 2024), https://www.bloomberglaw.com/document/XA90QHA8000000 [https://perma.cc/R2MR-HVRH].

237. *See* 7 U.S.C. § 9(1).

238. *See* 12 U.S.C. § 5536(a)(1)(B).

239. *See* Mosby G. Perrow & Michael D. Farber, *Following* Jarkesy*, FERC Signals Sea Change in Enforcement*, VAN NESS FELDMAN LLP (Sept. 20, 2024), https://www.vnf.com/following-jarkesy-ferc-signals-sea-change-in-enforcement [https://perma.cc/GL55-3JAU].

240. *See* John L. Culhane, Jr., *Following Defendant Challenges FDIC Enforcement Proceeding, Citing* Jarkesy, CONSUMER FIN. MONITOR (Sept. 3, 2024), https://www.consumerfinancemonitor.com/2024/09/03/defendant-challenges-fdic-enforcement-proceeding-citing-jarkesy/ [https://perma.cc/F2UW-QPHG].

proceedings that do not implicate either the six "historical practices" identified in *Jarkesy*, or the specific regime at issue in *Atlas Roofing*. For example, the USDA responded to *Jarkesy* by effectively dropping civil money penalties from a contested enforcement proceeding under the Horse Protection Act.[241] The agency did so by amending its administrative complaint to seek only $10 in penalties, which falls below the $20 threshold established by the Seventh Amendment.[242] The USDA's caution is especially notable because the alleged violation, under the Horse Protection Act, bears no similarity to common law fraud and, therefore, falls outside the immediate context of *Jarkesy*.[243] This suggests some agencies are adopting a broad reading of *Jarkesy*'s preclusive effect.

Many significant questions remain unanswered. One such open matter pertains to the breadth of the "historical" public rights identified in *Jarkesy*, including revenue collection, tariffs, immigration, Indian relations, public lands, and public benefits.[244] For example, multiple regulatory regimes touch upon immigration, but they do so to varying degrees. Based on the precedents employed in *Jarkesy*, the cross-border flow of immigrants falls within the public rights doctrine.[245] Yet some regulatory regimes implicate immigration despite being far removed from the border. DOL, for example, may impose civil money penalties to enforce regulations requiring domestic employers to provide immigrants with the same working conditions as U.S. workers.[246] Does the agency's secondary role in immigration suffice to qualify for the special status that the Court historically has given to this realm of policy? On this question, *Jarkesy* is silent.

Another major unresolved issue relates to licensing programs. In *Jarkesy*, the Court reviewed a civil money penalty imposed on an unregistered (unlicensed) investment advisor.[247] It is unclear whether the Court would have

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241. *See* Defendants' Combined Reply in Support of Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), or in the Alternative, for Summary Judgment, and Response in Opposition to Plaintiff's Cross Motion for Summary Judgment, Manis v. U.S. Dep't of Agric., No. 24-cv-175 (M.D.N.C. Aug. 5, 2024) (attaching amended administrative complaint as Exhibit A).

242. *See* U.S. CONST. amend. VII (limiting right to cases where "the value in controversy shall exceed twenty dollars").

243. The Horse Protection Act protects horses from physical abuse known by prohibiting sored horses from travelling to or participating in shows. *See* 15 U.S.C. §§ 1821, 1825, et seq.

244. *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2132–34 (2024).

245. *See id.* at 2132–33 (discussing Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909), which involved a money penalty on a steamship company for transporting immigrants with infectious diseases).

246. *See* 8 U.S.C. § 1182(n)(1).

247. *See Jarkesy*, 144 S. Ct. at 2126 (explaining how the SEC came into the authority to prosecute unregistered entities in administrative proceedings).

reached the same result had Mr. Jarkesy been a registered entity. Some scholars have argued that these regimes pertain to public rights because licenses are created and granted by the government.[248] Others have argued that a regulated entity, by applying for a license, may waive its constitutional right to a jury.[249] A deeper analysis of these matters is beyond the scope of this article. Suffice it to say here, licensing programs raise difficult questions in this context.

For now, agencies seem to be adopting a cautious approach to *Jarkesy* by taking civil money penalties off the table in contested administrative actions. Only time will tell the full ramifications of this historic decision, as many open questions remain to percolate.

3. Jarkesy*'s Effect on Regulatory Restitution*

The Seventh Amendment applies only to "[s]uits at common law," and the Supreme Court has interpreted this phrase to exclude cases "where equitable rights alone were recognized, and equitable remedies were administered."[250] Civil money penalties are definitively legal,[251] and the only question for a Seventh Amendment analysis is whether the public rights exception applies. But restitutionary relief may be either legal or equitable.[252] If the latter, there is no need to proceed to a "public rights" analysis.

The Supreme Court has yet to squarely take on the question of whether a defendant has a Seventh Amendment right in an agency's civil suit to recover statutory "restitution" (or "disgorgement").[253] The answer likely depends on the nature of the alleged violation, due to restitution's roots in both common

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248. *See* John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 196–99 (2019).

249. *See* Alex Platt, *Registration as Consent: Patching* Jarkey*'s Hole in SEC Enforcement*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 20, 2024), https://www.yalejreg.com/nc/registration-as-consent-patching-jarkesys-hole-in-sec-enforcement-by-alex-platt/ [https://perma.cc/U25B-ZT5F].

250. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 348 (1998) (quoting Parsons v. Bedford, 3 Pet. 433, 447 (1830)).

251. *See* Tull v. United States, 481 U.S. at 424–25 (citation omitted); *see also* Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) ("[W]e . . . ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.").

252. *See* Great-West Life & Annuity Ins. v. Knudson, 534 U.S. 204, 212 (2002) ("In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity.").

253. It bears noting that the overwhelming majority of civil suits settle, and, of the adversarial cases, most disgorgement actions involve civil money penalties, so the jury rights were preserved regardless. *See, e.g.*, Kokesh v. SEC, 137 S. Ct. 1635, 1641 (2017) (noting petitioner's trial).

law and equity. At the Founding, restitutionary actions seeking a money judgment generally were asserted at law, based on several counts of general assumpsit (an implied or express promise to pay for a benefit).[254] However, equity courts had primary jurisdiction over breaches of fiduciary duty and employed restitutionary liability in this context.[255] Regulatory restitution, therefore, may be categorized as either legal or equitable relief, depending on the violation. After *Jarkesy*, however, it is unclear whether these historical comparisons carry much, if any, significance; instead, the paramount concern seems to be whether the sanction is punitive.

As the Supreme Court explained in *Jarkesy*, "[t]he Seventh Amendment extends to a particular statutory claim if the claim is 'legal in nature.'"[256] To determine if a suit is "legal in nature," the Court directed courts "to consider the cause of action and the remedy it provides."[257] Of the two, the remedy is the "more important" consideration.[258] When looking at remedies, the Court clarified that the key factor is whether the sanction is designed to punish or deter the wrongdoer, or, on the other hand, solely to "restore the status quo."[259]

In many instances, regulatory restitution appears punitive, indicating it is legal in nature and, therefore, should trigger the right to a jury (unless the public rights exception applies). For example, restitutionary awards sometimes go to victims, but often they go to the U.S. Treasury, just like a civil money penalty.[260] In *Kokesh v. SEC*, a unanimous Supreme Court reasoned that "SEC disgorgement is imposed for punitive purposes" in finding that a $34 million order was a "penalty" under a statute of limitations.[261]

254. *See* Murphy, *supra* note 134, at 1606–07, 1599–1600 (identifying "common counts in general assumpsit," including "action for money had and received," "action for money paid," "quantum meruit, and quantum valebat"); *see also Knudson*, 534 U.S. at 213 (explaining restitution's legal roots "derived from the common writ of assumpsit").

255. *See* Francesco A. DeLuca, *Sheathing Restitution's Dagger Under the Securities Acts: Why Federal Courts are Powerless to Order Disgorgement in SEC Enforcement Proceedings*, 33 REV. BANKING & FIN. L. 899, 930–31 (2014); Murphy, *supra* note 134, at 1603.

256. SEC v. Jarkesy, 144 S. Ct. 2117, 2128 (2024) (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989)).

257. *Id*. at 2129 (citing Tull v. United States, 481 U.S. 412, 421 (1987)).

258. *Id*. (quoting *Tull*, 481 U.S. at 421).

259. *Id*. (quoting *Tull*, 481 U.S. at 422).

260. *See, e.g.*, Tenaris S.A., Securities Exchange Act Release No. 95030, File No. 3-20875, at 5 (June 2, 2022) ("[I]n these circumstances, distributing [$53.1 million in] disgorged funds to the United States Treasury is the most equitable alternative."); Fashion Nova, LLC, F.T.C. No. C-4759, at 6 (Mar. 18, 2022) (settling for a $4.2 million payment to government); JPMorgan Chase & Co., CFTC No. 20-69, at 14, 16 (Sept. 29, 2020) (settling for restitution ($311,737,008) and disgorgement ($172,034,790) awards, payable to government).

261. *See* Kokesh v. SEC, 137 S. Ct. 1635, 1643–44 (2017).

Congress ignored this law-equity distinction when authorizing agencies to pursue "restitution" or "disgorgement" in various enabling acts. Instead of tailoring regulatory restitution to violations involving a fiduciary breach, Congress categorically authorized agency tribunals to recover unjust gains, regardless of the nature of the underlying wrongdoing. In the typical authorization, the agency may seek money judgments for unjust gains resulting from the contravention of "any" regulation.[262]

In practice, agency tribunals make no inquiry into whether the restitutionary relief before them is legal or equitable for Seventh Amendment purposes.[263] Due to the prevalence of settlements,[264] courts rarely reach this question, although at least one federal circuit court judge has raised an eyebrow at the CFPB's apparent conflation of legal and equitable remedies in its administrative proceedings.[265]

Of course, determining whether the suit is "legal in nature" is only step one of the inquiry. If a particular restitutionary proceeding were sufficiently legal in nature to trigger Seventh Amendment protections, then the question would turn to whether that action falls within the "public rights" exception to the jury right—as interpreted by *Jarkesy*.

CONCLUSION

This article provides the historical context for understanding seismic changes wrought by *SEC v. Jarkesy*. Money sanctions are relatively new in the history of the administrative state. For most of the twentieth century, agencies could employ their in-house tribunals only to impose nonmonetary sanctions. In the early 1970s, however, Congress started experimenting with the administrative imposition of pocketbook punishments, and the practice truly took off after the Supreme Court's decision in *Atlas Roofing*. By 2022, money sanctions had become the leading punishment for administrative

262. *See, e.g.*, 12 U.S.C. § 5565(a)–(b) (authorizing restitutionary relief in any Consumer Financial Protection Bureau "adjudication proceeding brought under Federal consumer financial law"); 15 U.S.C. § 78u-2(e) (authorizing disgorgement awards "in any proceeding" which can be brought for any violation of the Securities and Exchange Act of 1934).

263. None of the orders reviewed in this Article discussed the law-equity dichotomy. *See e.g.*, *In re* Richard Neal & Golden Signals, LLC, Order Instituting Proceedings Pursuant to Section 6(c) and 6(d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, CFTC No. 22-11, 2022 WL 596093 (Feb. 23, 2022).

264. In 2022, the surveyed agencies exacted $3,546,558,822 in restitutionary awards, of which 100% resulted from settlement.

265. *See* Integrity Advance, LLC v. CFPB, 48 F.4th 1161, 1178 (10th Cir. 2022) (Philips, J., concurring) (expressing concern for "allowing the Bureau to obtain 'legal restitution' in an administrative forum raises Seventh Amendment concerns").

enforcement. But the rise of money sanctions came to a halt last term in *Jarkesy*. Although *Jarkesy*'s full impact is as yet undetermined, the decision casts constitutional doubt on these penalties in administrative settings.