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THE SEVENTH AMENDMENT RIGHT TO JURY TRIAL IN THE ADMINISTRATIVE STATE: RECOGNIZING THE DANGERS OF THE CONSTITUTIONAL MOMENT

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INTRODUCTION

The Supreme Court has vigorously expanded and protected the Seventh Amendment right to jury trial over the years. In fact, some scholars have even suggested that the Court has gone much too far in this area of constitutional law.[1] This goal was achieved in a series of landmark rulings that cemented the Court's clear preference for the expansion of the Seventh Amendment jury trial right in various forms of litigation. However, the Supreme Court has unambiguously refused to recognize these same constitutional protections when the adjudication takes place in a non–Article III setting, rather than in an Article III federal court. It has done so despite the absence of anything approaching a coherent explanation for such a stark dichotomy. Our goal in this Article is to explore the basis for this as yet unexplained dichotomy and to explain why it is unjustifiable as a matter of constitutional theory or logic.

It is appropriate to begin the analysis with the text of the Seventh Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[2]

Because of the text's use of the word "preserved," the Court has, quite reasonably, traditionally invoked a historical form of analysis: Where litigants would have had the option of a jury trial in civil cases in England in 1791 (the year of the amendment's adoption as part of

1 *See, e.g.*, David L. Shapiro & Daniel R. Coquillette, Comment, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442 (1971).

2 U.S. CONST. amend. VII.

the Bill of Rights), they have a constitutional right to jury trial in civil suits today. Where a jury trial would not have been available at the same point in history, no constitutional right to it exists today.[3]

To be sure, the Court has often faced great difficulties, first in determining as an archaeological matter whether such a right in fact existed, as well as in translating modern causes of action into a historical framework.[4] The process has been difficult, to say the least. But when there is doubt, the Court has been quick to give the benefit of that doubt to recognition of the jury trial right—or at least it has done so for suits brought in the Article III courts. Our analysis will demonstrate that at its core, the Court's distinction between Article III and non–Article III adjudications can be reduced to nothing more than a form of naked functionalism, even though the text of the relevant constitutional protection authorizes no such functionalist qualification. While the Court has sought to justify the dichotomy on some vague precept known as the "public rights" doctrine,[5] it has never even attempted to explain the logical relevance of that doctrine to its conclusion that the Seventh Amendment is inapplicable to administrative adjudication. Moreover, that doctrine—in and of itself a questionable and illogical theory[6]—had never had any relevance to the Seventh Amendment until the Court's sudden and unexplained linkage of the two in 1977.[7] Thus, the only conclusion one can reasonably reach is that the Court's approach is grounded ultimately in the implicit premise that adoption of the New Deal in the mid-twentieth century has transformed the DNA of constitutional analysis to justify that transformative event's creation of the modern administrative state, despite the highly questionable constitutional implications of a number of that development's elements.[8]

One prominent constitutional scholar has sought to legitimize this constitutional transformation through resort to a strange and controversial analytical model he describes as the "constitutional moment."[9] In this Article, we plan to establish two important points: (1) there exists no principled mode of analysis of the Seventh Amendment right to jury trial that justifies the Court's categorical dichotomy

3 *See* Dimick v. Schiedt, 293 U.S. 474, 487 (1935); discussion *infra* Section I.B.

4 *See* discussion *infra* Section I.B.

5 Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 450 (1977); *see* discussion *infra* subsection I.C.3.

6 Martin H. Redish & Austin Piatt, *Cutting the Gordian Knot: Legislative Courts and Due Process*, 99 IND. L.J. 675, 678 (2024).

7 *See Atlas Roofing*, 430 U.S. at 455.

8 *See* discussion *infra* Part II.

9 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 307 (1991); *see* discussion *infra* Part II.

between Article III and non–Article III forums for purposes of the right's applicability, and (2) while the theory of the "constitutional moment" would in fact justify the Court's insulation of the administrative state from Seventh Amendment applicability, reliance on such a theory as a basis for concluding that New Deal measures are somehow insulated from serious constitutional challenges is as dangerous and misguided as any constitutional analytical mode in our nation's history. It must therefore be explicitly and categorically rejected by both scholars and jurists. We conclude, however, that while the Court has not expressly relied on the constitutional-moment theory of constitutional analysis, its vague and unsupported exclusion of the Seventh Amendment right from administrative adjudication amounts to implicit reliance on just such a theory. It is only by open rejection of the dangerous functionalism inherent in the view that the New Deal legally altered our constitutional framework that we can recognize the intellectually flawed rationale for the Court's failure to acknowledge the Seventh Amendment's relevance to administrative adjudication.

The Supreme Court may well be in the process of reconsidering its approach to the applicability of the Seventh Amendment to administrative adjudication. In *Jarkesy v. SEC*,[10] the Fifth Circuit court of appeals surprisingly departed from the traditional judicial acceptance of the categorical exclusion of the Seventh Amendment from the non–Article III adjudicatory process. That court held that, at least in certain situations, the Seventh Amendment does in fact require the option of a jury trial.[11] The Supreme Court granted certiorari[12] and heard oral argument this past fall.[13] Now that the Supreme Court has affirmed the Fifth Circuit's conclusion, we are likely to see a dramatic alteration in controlling constitutional doctrine. In this Article, we provide a cogent defense of the Fifth Circuit's conclusion—a defense that court itself failed to provide.[14]

This Article is divided into two major Parts. Part I provides a description and analysis of the development of Seventh Amendment caselaw. The Part also explores how the public rights doctrine has been interwoven as its own unique Seventh Amendment pathway.

The second Part explains and critiques Professor Bruce Ackerman's theory of the constitutional moment, which we deem to lie at the heart of the modern Supreme Court's rejection of the Seventh Amendment's applicability to the administrative adjudicatory process.

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10 34 F.4th 446 (5th Cir. 2022), *aff'd*, 144 S. Ct. 2117 (2024).

11 *Id.* at 465.

12 SEC v. Jarkesy, 143 S. Ct. 2688 (2023) (mem.).

13 Transcript of Oral Argument at 1, *Jarkesy*, 144 S. Ct. 2117 (No. 22-859).

14 In fairness to the Fifth Circuit, it obviously was hamstrung by precedent in a way we, thankfully, are not.

I. THE SEVENTH AMENDMENT AND ADMINISTRATIVE ADJUDICATION: WHERE WE HAVE BEEN AND WHERE WE ARE GOING

A. The Potential Impact of Jarkesy v. SEC*: An Introduction*

The Supreme Court will soon reconsider what role (if any) the Seventh Amendment is to play in the administrative adjudicatory process—a role that has been nonexistent for many decades. The Court recently heard an appeal from a 2022 Fifth Circuit case dealing with the administrative enforcement abilities of the Securities and Exchange Commission (SEC) to determine whether or not a jury trial right in such a matter is constitutionally mandated by the Seventh Amendment. The case, *SEC v. Jarkesy*,[15] has the potential to dramatically reshape the legal landscape and the fundamental structure of the administrative state, a structure that has continued to expand in power and size since the early days of the New Deal.[16] The Fifth Circuit in *Jarkesy* decided not to follow the traditionally accepted doctrinal approach of excluding the jury trial right from administrative adjudication, holding that, at least under certain circumstances (situations in which the SEC has adjudicated parallel actions in federal court), the Seventh Amendment right applies, even though the matter is the subject of administrative adjudication.[17] The Supreme Court will soon determine if it will follow the Fifth Circuit down this revolutionary legal pathway or stay true to its decades of public rights holdings and precedents in these types of Seventh Amendment cases.

In order to understand the potential ramifications for the Seventh Amendment's role in administrative adjudication that the Supreme Court will be considering in its forthcoming *Jarkesy* decision, an examination of how we have arrived at this point is necessary. To do so, we must first explain the baseline of the Seventh Amendment—i.e., its established doctrinal scope in its traditional context of judicial adjudication in the Article III federal courts.[18] After explaining the basic elements of that traditional role, we will demonstrate its stark contrast with how the Supreme Court has all but categorically excluded the Seventh Amendment from administrative adjudication, even when such

15 144 S. Ct. 2117.

16 *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

17 *See infra* subsection I.D.2.

18 It should be noted that because the Seventh Amendment is one of the very few provisions of the Bill of Rights that has not been incorporated through the Fourteenth Amendment's Due Process Clause to apply to the states, the amendment has force only in the federal courts.

adjudication directly parallels the types of adjudications in the federal courts.

B. The Seventh Amendment and the Growth of the Jury Trial Right in the Article III Courts

The Seventh Amendment was included in the Bill of Rights because the Anti-Federalists, who were generally very wary of a strong federal judicial system composed of judges insulated from potential political pressures, were afraid that judges would wield too much power.[19] A right to jury trial was therefore needed, even in civil cases, in order to dilute their authority and control. The Seventh Amendment therefore dictates that the right to jury trial in civil cases shall be "preserved," meaning, the Supreme Court has held, that where a party had the option of a jury trial in civil cases in England in 1791 (the year the Bill of Rights was ratified), it would possess a constitutionally guaranteed right to a jury in the future.[20] However, where no such option existed in 1791 England, no litigant would have a constitutional right to jury trial (though Congress could choose to legislatively provide such a right). Historically, a civil jury was available in suits at law (meaning those brought in the English law courts), while a jury was unavailable in suits in equity.[21] Hence the constitutional right turned on whether a current suit would have been historically deemed one at law or one in equity. For the most part, that distinction turned on the relief sought: Where solely damages were sought, the case was deemed one at law.[22] But where the remedy at law was inadequate and equitable relief was necessary—e.g., injunctions or specific performance—the suit had to be heard in equity.[23] However, the dichotomy was not always so easy: a number of procedural devices had been created by and employed exclusively in equity courts, regardless of what relief was sought.[24]

Numerous problems have plagued application of the Seventh Amendment in the modern context. For one thing, courts have suffered from a serious archaeological problem. The distinction between law and equity was often a fluid one, and attempting to produce a

19 *See* STEVEN GOW CALABRESI & GARY LAWSON, THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA 149–54 (2020); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 292–96 (1966).

20 *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, 412 (1995).

21 *Id.* at 413.

22 *Id.*

23 *Id.* at 416.

24 *Id.* at 414.

photographic reproduction of that division as of one particular point in time (1791) has on occasion been extremely difficult. Equally problematic has been the translational difficulty: many modern causes of action did not exist in 1791, and translating these modern suits into comparable actions in 1791 has not always been an easy task.

The first issue, naturally, is whether the amendment even had applicability to suits that did not exist in 1791. It would have been at least a plausible solution to construe the word "preserved" to mean that the right to civil jury trial is constitutionally guaranteed only in suits that actually existed in 1791. But while this was arguably a reasonable interpretive option, it is not the one the Supreme Court chose. Rather, early on, in the decision of *Parsons v. Bedford*,[25] the famed jurist Justice Story, speaking for the Court, held that the constitutional issue in suits which did not exist in 1791 was, had this particular suit existed in that year, in which court system would it have been adjudicated. If the court were to determine that the suit would have been heard at law, the jury trial right would apply. However, were the court to determine that the suit would have been adjudicated in the courts of equity, no jury trial right would apply today.[26] The *Parsons* Court's approach to this translational difficulty has frequently resulted in modern confusion and controversy.[27] But even after the law and equity courts were merged at the federal level into a single court system in 1938,[28] the availability of the constitutional right to a civil jury turned on an inquiry into and an analogy to historical practices of 1791 in England, when two separate court systems existed.

In the mid-twentieth century, the Supreme Court began measuring the adequacy of the available remedy at law not by historical standards but rather in accordance with modern legal remedies. In its important decision in *Beacon Theatres, Inc. v. Westover*, the Supreme Court held that in mixed cases of law and equity, the role of equity was to be determined by reference to the adequacy of the remedies at law now

25 28 U.S. (3 Pet.) 433, 446–47 (1830).

26 *Id.* ("When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By *common law*, they meant what the constitution denominated in the third article 'law[';] not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit.").

27 *See, e.g.*, Chauffeurs, Teamsters & Helpers Loc. No. 391 v. Terry, 494 U.S. 558 (1990).

28 This was done through the promulgation of the Federal Rules of Civil Procedure.

available and not limited to those available in 1791.[29] Because modern legal remedies are often far more elaborate than those that existed at the time of the amendment's enactment, the result of this decision was to expand the scope of the jury trial right to include many situations to which it historically did not apply. In its subsequent decision in *Dairy Queen, Inc. v. Wood*, the Court effectively abandoned the long-standing "clean-up" doctrine,[30] which historically extended equity jurisdiction to include resolution of legal matters deemed incidental to resolution of primarily equitable matters. The result was to expand the jury trial right to include situations which never existed at the time of the Seventh Amendment's adoption. In *Ross v. Bernhard*, the Court extended the jury trial right to derivative suits when the relief sought, standing alone, would historically have been characterized as legal.[31] It so held, even though historically *all* derivative actions were deemed equitable (and therefore carried no right to jury trial), regardless of the relief sought.[32] When viewed together, these three decisions significantly expanded the scope of the jury trial right in suits in federal court beyond its reach in 1791, which is the historical measuring point for the right's existence.

Moreover, in the context of Article III court adjudication the Court has refused to balance the Seventh Amendment right against arguably competing interests, such as the interest in enforcing civil rights statutes.[33] For example, in *Curtis v. Loether*[34] the Court stated:

> We are not oblivious to the force of petitioner's policy arguments. Jury trials may delay to some extent the disposition of Title VIII damages actions. . . . We recognize, too, the possibility that jury prejudice may deprive a victim of discrimination of the verdict to which he or she is entitled. . . . *More fundamentally, however, these considerations are insufficient to overcome the clear command of the Seventh Amendment.*[35]

This, then, is the baseline of Seventh Amendment interpretation for Article III courts: a modernizing approach which recognizes the applicability of the constitutional right to jury trial in numerous situations where it would not have applied in 1791 and in suits for causes of action which themselves did not exist in 1791, plus a refusal to take into account even arguably strong competing counter considerations in deciding whether the right exists. It would be difficult to

29 359 U.S. 500, 509 (1959).
30 *See* 369 U.S. 469, 470 (1962).
31 396 U.S. 531, 542 (1970).
32 *Id.* at 534.
33 *E.g.*, 42 U.S.C. § 2000 (2018).
34 415 U.S. 189 (1974).
35 *Id.* at 198 (emphasis added).

characterize the Court's Seventh Amendment doctrine in Article III federal courts as anything but quite vigorous.

In stark contrast to such a vigorous—indeed, arguably expansive—approach to the Seventh Amendment right to a civil jury when suits are brought in Article III federal courts, the Court has, with equal vigor, in the overwhelming number of situations, refused to recognize a jury trial right when the adjudication takes place in an administrative setting. This is so even in cases where the right would unambiguously exist were the very same suit brought in federal court.[36]

C. The Seventh Amendment Right in Administrative Adjudications

1. The Striking Contrast Between Judicial and Administrative Adjudication for Seventh Amendment Purposes

By its terms, the Seventh Amendment right to civil jury trial applies in "Suits" at common law.[37] It is reasonable to consider any adversary proceeding concerning the adjudication of legal rights asserted by one party against another before an adjudicator who will resolve the disputed claim to be a "suit." Under Justice Story's universally employed approach adopted in *Parsons*, the question a court must ask in order to determine whether the Seventh Amendment right is triggered in the adjudication of a newly created cause of action is whether, had the claim existed in 1791, it would have been adjudicated in courts of law.[38] To be sure, much of what modern administrative agencies do—for example, the promulgation of statutory regulations—has nothing to do with performance of the adjudicatory function. But it is certainly true that federal agencies often perform a classic adjudicatory function, whether it is resolving disputes between private parties (as in the case of NLRB rulings in unfair labor practice disputes) or suits for imposition of penalties by the agency itself against private parties. In both of these contexts in Article III courts—damages or penalties—the Court has held that the right to jury trial is triggered.[39]

Yet in the context of most administrative adjudications, the Court has categorically excluded the right to jury trial. This is so, despite the Court's vigorous—indeed, expansive—construction of the jury trial right in the context of Article III court adjudication.[40] The Court has

36 *See infra* subsection I.C.1.

37 U.S. CONST. amend. VII.

38 Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–47 (1830).

39 *See supra* Section I.B; *infra* text accompanying notes 86–90.

40 We acknowledge that in one instance, the Court appeared to rely on a form of naked functionalism as a rationale for denying the assertion of a right to jury trial, even in the context of Article III court adjudication. *See* Katchen v. Landy, 382 U.S. 323, 336–40

reached this conclusion by resort to two methods: (1) explicit balancing and (2) puzzling and cryptic doctrines which historically were never applied in the Seventh Amendment context and which—without logic or reason—have the impact of insulating the overwhelming number of administrative adjudications from the Seventh Amendment's reach.

2. Balancing the Seventh Amendment Right in the Context of Administrative Adjudication

During the height of the New Deal, the Supreme Court openly balanced away the Seventh Amendment right to jury trial in a suit between two private parties, which historically would have been a suit at law, for no reason other than that the case was being adjudicated in an administrative agency. The case was *NLRB v. Jones & Laughlin Steel Corp.*[41] There the Court rejected a Seventh Amendment challenge to congressional investment in the NLRB of the authority to determine, in the context of an adversary adjudication, whether an employer had committed an unfair labor practice in accordance with the dictates of the National Labor Relations Act.[42] The Court's easiest answer to this challenge—though unfortunately it was not the only one upon which it relied—was that even had the suit been adjudicated in a federal court, there would have been no right to jury trial.[43] The primary relief sought, reinstatement, was equitable, and any damages being sought were merely incidental to that equitable relief.[44] As such, the case fell within the so-called "clean-up" doctrine, which dictated that an equity

(1966). However, for two reasons, the reach of that decision is limited. First, the case involved the arguably unique context of bankruptcy, which is historically equitable. *Id.* at 327. Second, the denial of a jury trial in that context could just as easily have been grounded in a principled historical analysis, relying on the use of the long-established clean-up doctrine. While that doctrine had been rejected four years earlier in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470 (1962), in the unique context of *Katchen*, involving, were a jury trial right to be recognized, the risk of two different proceedings with all their accompanying burdens and inconvenience which for the most part no longer existed in the merged system of adjudication in the Article III federal courts, the historical justification for invocation of the clean-up doctrine remained applicable. Thus, in the relatively rare situation in which preconstitutional practice considered functionalist considerations in determining the scope of the jury trial right, incorporating those same functionalist considerations in modern Seventh Amendment practice represents a wholly principled approach to implementation of the Seventh Amendment's directive that the jury trial right be "preserved." To the extent the decision is properly deemed to be a functionalist aberration from the mostly expansive approach to the jury trial right invoked in Article III court adjudication, it represents the exception that proves the rule.

41 301 U.S. 1 (1937).

42 *See id.* at 48; 29 U.S.C. §§ 151–169 (2018).

43 *See NLRB*, 301 U.S. at 48.

44 *See id.*

court could resolve the entire matter.[45] However, the Court went further, noting that "[t]he 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."[46] Neither point, however, justifies finding an exception to the Seventh Amendment. That the *suit* itself was unknown at common law, of course, makes no difference unless the Court were to overrule the venerable precedent of *Parsons v. Bedford*,[47] which, it should be recalled, held that when a suit that did not exist at common law is created, the question to be asked for purposes of the jury trial right is where the suit would have been adjudicated had it existed in 1791.[48] That the "proceeding" is "one unknown to the common law" also is unpersuasive. The "proceeding" isn't the point; it is a "suit," and had the suit existed, its requirement of a jury trial would have turned on whether or not the issue was one historically determined in the courts of law. If the answer is yes, then long-established Supreme Court precedent dictates that the litigants possess the right to jury trial. To focus on whether the "proceeding" existed at common law represents an open invitation to Congress, when it wishes to circumvent the constitutional right to jury trial, to create a new adjudicatory avenue to perform the exact same adjudicatory function that an Article III federal court would have otherwise performed. To allow Congress to somehow employ a process equivalent to alchemy to magically create an entirely new adjudicative body would permit Congress to circumvent the Seventh Amendment right any time it wishes to do so.

Second, the Court never explains the relevance of the fact that the proceeding is statutorily created to the issue of the jury trial right. After all, the Article III federal courts themselves,[49] as well as their jurisdiction,[50] are created by Congress through the enactment of statutes. This makes federal court adjudication also a "statutory proceeding." That fact, however, has absolutely no relevance to the question of whether the adjudication requires that the litigants possess a right to jury trial.

It was in the much later decision in *Curtis v. Loether*[51]—ironically, the very decision that steadfastly refused to render the Seventh

45 *See id.*

46 *Id.*

47 28 U.S. (3 Pet.) 433 (1830).

48 *Id.* at 446–47.

49 *See* U.S. CONST. art. III, § 1 (providing that there shall be such inferior federal courts "as the Congress may from time to time ordain and establish").

50 *See, e.g.*, 28 U.S.C. § 1331 (2018) (federal question jurisdiction); *id.* § 1332 (diversity jurisdiction).

51 415 U.S. 189 (1974).

Amendment right to jury trial vulnerable to overruling on the basis of a process of pragmatic balancing[52]—that the Court explicitly characterized *Jones & Laughlin* as a decision which relied on just such pragmatic balancing. The Court in *Curtis* distinguished *Jones & Laughlin* on the grounds that it was a case in which use of a jury trial would have been "incompatible" with the congressionally created administrative scheme.[53] The conclusion may well be correct: the administrative process relies on the expertise of elite social engineers, and use of a civil jury to determine the facts could reasonably be deemed inconsistent with such a process. But there is nothing in the text or history of the Seventh Amendment that would support a judicial ability to abandon the right due to its use being inconvenient or even burdensome.[54] To be sure, there are certain constitutional rights where such pragmatic balancing has been employed—for example, the Due Process Clauses of the Fifth and Fourteenth Amendments[55] or the First Amendment right of free expression.[56] But the texts of both are either historically susceptible to such pragmatic balancing (in the case of due process) or sufficiently linguistically ambiguous as to permit some flexibility (after all, "freedom of speech" is not a self-defining term, and it has all sorts of historical baggage). But while the Seventh Amendment may suffer from significant problems of *application*, its textual directive could not be clearer: the right to jury trial is to be "preserved." Nothing in its text authorizes Congress to exempt adversary adjudications from that right when Congress deems such a right to be inconvenient or burdensome. For the Court to condone such naked deferential functionalism in the face of congressional directives explicitly limiting the jury trial right constitutes a blatant and dangerous violation of the foundational precepts of separation of powers. While the Constitution's Framers deemed the creation of a bill of rights unnecessary, the state ratifying conventions considered such a document essential and, in turn, deemed a right to jury trial in civil cases to be equally essential. One need not be an originalist, however, to want to enforce that judgment, for the Framers of the Bill of Rights could not have been clearer in the Seventh Amendment's text that the right is not subject to

52 *See supra* text accompanying notes 34–35.

53 *Curtis*, 415 U.S. at 194.

54 In controversial footnote 10 in its decision in *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970), the Court included as one of three factors relevant to a determination of the existence of a jury trial right "the practical abilities and limitations of juries." The one source the Court cited in support provides absolutely no support for such a conclusion. *Compare id.*, *with* Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963).

55 U.S. CONST. amends. V, XIV.

56 *Id.* amend. I.

abandonment or circumvention merely because use of the jury is found to be inconvenient or inconsistent with congressional goals.[57]

Presumably much, if not all, of the Court's goal of deference to Congress could arguably be achieved in a far more principled manner were the Court simply to overrule *Parsons v. Bedford*. In doing so, the Court would free all post-1791 causes of action—whether adjudicated in an Article III court or an administrative agency—from Seventh Amendment control. One could of course debate whether such a step is either advisable or appropriate. Surely it would do much more than the Court would want it to, given how protective of the Seventh Amendment right the Court has been when a suit is in an Article III federal court. But absent an overruling of *Parsons*, the Court appears to be swimming halfway across a river, completely deferring to congressional judgment as to the enforcement of a countermajoritarian constitutional right.

There does exist one method by which the Court at least purports to clothe its naked deferential functionalism with something approaching principled analysis: the so-called "public rights" doctrine. Careful analysis of that doctrine, however, establishes all too clearly that the doctrine's use in the Seventh Amendment context amounts to little more than an elaborate way of implementing naked functionalist balancing. The doctrine is bizarre even in its original context of justifying Congress's use of non–Article III courts.[58] But even if one were to suspend disbelief on that specific issue, the Court's sudden and totally unexplained reliance on the doctrine in 1977 to justify the categorical revocation of Seventh Amendment rights is far more mystifying. It is thus to an analysis of the public rights doctrine as a justification for excluding the Seventh Amendment right in the context of administrative adjudication that we now turn.

3. The Public Rights Doctrine's Application to the Seventh Amendment

The public rights doctrine dictates that while "private" rights must be adjudicated by Article III courts, "public" rights may be adjudicated either by Article III or non–Article III federal courts.[59] How one

57 For the most part, questions about the jury's intellectual limitations have played no role in Seventh Amendment interpretation. *See supra* note 54. The one historical exception was an action for an accounting, where historically the difficulty of the accounting could render a case equitable, rather than legal. *But see* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962) (holding that the authorization of the appointment of a master under Federal Rule of Civil Procedure 53(b) rendered that historical practice incredibly rare).

58 *See generally* Redish & Piatt, *supra* note 6.

59 *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Crowell v. Benson, 285 U.S. 22 (1932). As Justice Brennan, in his opinion announcing the

defines the concept of public rights, however, is the subject of some dispute. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, Justice Brennan, in an opinion announcing the judgment of the Court, wrote that "a matter of public rights must at a minimum arise 'between the government and others.'"[60] But at no point did Justice Brennan—or any other Justice—ever fully explain the logic underlying the doctrine.[61] To be fair to Justice Brennan, it must be noted that he did provide at least brief elaboration. He wrote:

> [I]t is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges. . . . *[W]ith respect to congressionally created rights*, some factual determinations may be made by a specialized factfinding tribunal designed by Congress, without constitutional bar.[62]

If one reads Justice Brennan's statement that public rights must at a minimum arise between the government and others through the lens of this subsequent sentence, the rationale of the doctrine becomes clear. Since Congress need not have created the statutory right in the first place, it can logically take the "lesser" step of creating the right with "strings attached." Those "strings" could include the condition that individual disputes over the right could be transferred from an Article III forum to a non–Article III forum. There are numerous dangerous fallacies in this supposed logic.[63] But most important for present purposes is the far more troubling problem of the Supreme Court's sudden and unexplained reliance in 1977 on a doctrine about the choice of adjudicatory forum as a basis for the categorical exclusion of the Seventh Amendment right to jury trial.

In *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*,[64] the Court, in an opinion by Justice White, rejected a Seventh Amendment challenge to the Occupational Safety and Health Act of 1970.[65] The statute authorized a federal agency to inspect private

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judgment of the Court in *Northern Pipeline*, wrote, "[t]he distinction between public rights and private rights has not been definitively explained in our precedents." 458 U.S. at 69.

60 458 U.S. at 69 (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).

61 Shockingly, the origin of the doctrine was an 1856 Supreme Court decision that created the doctrine in an almost offhand manner without the slightest explanation of a rationale. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856) (holding—in a conclusory manner—that public rights cases are not inherently judicial and therefore need not be adjudicated in an Article III court).

62 *N. Pipeline*, 458 U.S. at 80–81 (emphasis added).

63 For a detailed explanation of these fallacies, see generally Redish & Piatt, *supra* note 6.

64 430 U.S. 442 (1977).

65 *Id.* at 461.

workplaces and impose civil penalties for violations of federally established standards for health and safety.[66] Justice White's rejection of the Seventh Amendment challenge was grounded squarely in the public rights doctrine. In his words,

> At least in cases in which "public rights" are being litigated—*e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.[67]

No further explanation or elaboration on such a radical application of the public rights doctrine was provided. Thus, much like the Delphic oracle, Justice White left his audience the task of deciphering his cryptic statement.

The one thing that is clear is that his conclusion cannot be justified on the basis of the same rationale employed by Justice Brennan in *Northern Pipeline* to justify the public rights doctrine's application to the congressional choice of forum. There, it should be recalled, Justice Brennan seemed to be using a form of the "greater includes the lesser" logic: because Congress did not have to give a statutory right to individuals in the first place, it logically can take the lesser step of giving the right with limitations.[68] But in cases such as *Atlas Roofing*, applying the same logic would be to channel the Mad Hatter from *Alice in Wonderland*: the government did not have to impose this regulatory burden on private individuals; therefore government can take the "lesser" step of imposing the regulatory burden with limitations attached. This, of course, is absolute nonsense; it would be difficult to imagine a more absurd form of upside-down reasoning.[69] Thus, to be charitable, we must presume that Justice White had some other basis for seeing a connection between congressional power to revoke the right to jury trial and the adjudication of a public right. There appear to be two possibilities: (1) when the federal government sues in its "sovereign capacity," it possesses the power of a "sovereign," which enables it to revoke a well-established, constitutionally guaranteed protection of a civil right, or (2) Congress has power to establish administrative forms of adjudication, and a jury trial would be "incompatible" with such an adjudicatory process. Neither rationale, however, makes the slightest

66 29 U.S.C. §§ 651–678 (2018).

67 *Atlas Roofing*, 430 U.S. at 450.

68 *See supra* text accompanying notes 62–63.

69 The same logical flaw, it should be noted, applies to the *Jarkesy* case, where the party seeking to assert the jury trial right was being sued by the government. *See* discussion *infra* Section I.D.

bit of sense. More ominously, both rationales would establish dangerous constitutional precepts which threaten to undermine the entire basis of American constitutional democracy.

As to the first rationale: nothing could be more inconsistent with the foundational precepts of the constitutional democratic order than the dictate that because the federal government is "sovereign," it has power to bulldoze explicitly granted protections of the Bill of Rights whenever it finds it convenient to do so. Of course, just the opposite is true: Bill of Rights protections were inserted for the very purpose of *restraining* governmental power. This is especially important when the adjudicators themselves, unlike Article III federal judges, are not prophylactically insulated from the federal executive branch bringing the proceeding. The American governmental system is grounded in precepts of adversary democracy, which is premised on inherent mistrust of all branches of government.[70] It was just such concerns that drove the state ratifying conventions to demand constitutional protection of the right to jury trial.[71]

As to the second rationale: this reasoning amounts to nothing more than naked functionalism—the very approach that Justice White himself employed in his dissent in the *Northern Pipeline* case to justify the use of non–Article III adjudicators.[72] As already explained,[73] by its terms the Seventh Amendment authorizes recognition of no pragmatically grounded exceptions to the historical provision of a jury trial. Moreover, as already noted,[74] historically, in all but one instance, the capabilities of juries had no relevance to the shaping of the right.[75] Thus, to hold that an unambiguous constitutional directive is somehow rendered inapplicable for no reason other than the fact that the government finds invocation of such a right inconvenient would undoubtedly render vulnerable our entire constitutional democratic system. When the dust settles, then, reliance on the public rights doctrine as a supposedly principled basis for justifying rejection of the Seventh Amendment right to jury trial amounts to placing lipstick on a pig. Once it is deconstructed, the doctrine amounts to nothing more than

70 *See generally* MARTIN H. REDISH, DUE PROCESS AS AMERICAN DEMOCRACY (2024) [hereinafter REDISH, DUE PROCESS]; MARTIN H. REDISH, THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY (2013).

71 *See supra* text accompanying notes 19–20.

72 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 113–15 (1982) (White, J., dissenting).

73 See *supra* note 40.

74 *See supra* note 57.

75 This is so, despite Justice White's wholly unsupported assertion to the contrary in his controversial footnote 10 in *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970). *See supra* note 54.

use of a principled label to hide naked, extraconstitutional functionalism.

The simplest and most devastating problem with the Court's current approach is that it creates for Congress a loophole large enough to drive a truck through: any time Congress wishes to circumvent the constitutional right to jury trial in a suit involving statutorily enacted directives because of the inconvenience involved, it may simply place the adjudication in a non–Article III body, rather than in an Article III court. Surely, constitutional rights should not be placed in such a precarious position.

In the end, the defense of the Seventh Amendment dichotomy between adjudication in Article III courts and non–Article III administrative adjudications comes down to the following: (1) because the work of administrative agencies is so important to the nation's welfare, interference with the administrative process is to be avoided, and (2) recognition of litigants' Seventh Amendment right to jury trial in the administrative process could substantially disrupt that process's effectiveness. Acceptance of such blatant, unrestrained pragmatism in the construction of constitutional rights whose text does not lend itself to such an interpretation could prove very dangerous.

D. Jarkesy *and the Public Rights Doctrine*

Now that we have explained the public rights doctrine and the Court's reliance on it to justify its all but categorical exclusion of the Seventh Amendment from the process of administrative adjudication, it is appropriate to reconsider the Fifth Circuit's highly controversial decision imposing severe constitutional restrictions on administrative adjudication. It is difficult to reach any conclusion other than that that court blatantly ignored controlling Supreme Court precedent. The Fifth Circuit turned the public rights doctrine on its head with its decision in *Jarkesy*. Confronting head-on decades of Supreme Court precedent, the Fifth Circuit held that the petitioners, who were being sued by the SEC in an administrative proceeding, had a Seventh Amendment right to jury trial to determine the facts underlying any of the potential fraud liability alleged against them by the SEC.[76]

A thorough examination of *Jarkesy* is necessary to understand the potential implications of this decision. The Supreme Court recently

76 Jarkesy v. SEC, 34 F.4th 446, 465 (5th Cir. 2022), *aff'd*, 144 S. Ct. 2117 (2024). We should emphasize that, as our entire analysis that preceded this discussion of *Jarkesy* made very clear, we very much agree with the court's conclusion. Our point here, however, is that unlike scholars, a federal court of appeals is bound by controlling Supreme Court precedent, which is unambiguously contrary to the Fifth Circuit's conclusion on the issue of the Seventh Amendment's relevance to administrative adjudications.

issued its opinion in *Jarkesy*, analyzed in the Addendum.[77] Nevertheless, our scholarly analysis of the constitutional role of the Seventh Amendment right to jury trial in the administrative process, we believe, stands on its own as a normatively sound, and constitutionally superior, approach to the question.

1. The Facts of *Jarkesy*

George Jarkesy established two hedge funds and selected Patriot28, LLC, as the funds' adviser.[78] In 2013, the SEC brought an agency enforcement action alleging that Jarkesy and Patriot28 had committed securities fraud by overvaluing assets and making misrepresentations regarding the fund.[79] Following an evidentiary hearing, an administrative law judge (ALJ) of the SEC concluded that Jarkesy and Patriot28 had committed securities fraud.[80] The SEC affirmed the ALJ's decision, ordered Jarkesy and Patriot28 to cease and desist from violating any more securities laws, and imposed a $300,000 civil penalty.[81] The SEC also ordered Patriot28 to return about $685,000 in illegally acquired gains and prohibited Jarkesy from engaging in certain activities in the securities industry.[82] Jarkesy and Patriot28 petitioned for review of the SEC's decision to the Fifth Circuit court of appeals. Several constitutional issues arose in the case.[83] The primary issue for this Article is that the SEC proceedings deprived them of their Seventh Amendment right to jury trial.[84] The main crux of the argument is that the SEC's use of in-house administrative law judges to seek civil penalties is a direct violation of the constitutional protections of the Seventh Amendment. Jarkesy argued that his claims arose at common law and that the public rights doctrine should not preclude his right to jury trial in this case.[85]

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77 *Infra* p. 1776.

78 *Jarkesy*, 34 F.4th at 450.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 The Supreme Court granted certiorari on three constitutional issues: (1) the Seventh Amendment's applicability to administrative adjudications; (2) the relevance of the nondelegation doctrine; and (3) the question of whether use of administrative law judges who may only be removed for cause violates the unitary executive directive of separation of powers. *See* SEC v. Jarkesy, 143 S. Ct. 2688 (2023) (mem.); Petition for a Writ of Certiorari at I, *Jarkesy*, 143 S. Ct. 2688 (No. 22-859). In this Article we consider only the first issue.

84 The second major issue in the case was whether or not the Dodd-Frank Act unconstitutionally delegated Congress's legislative power to the SEC by giving the SEC an unrestricted ability to choose whether to bring enforcement actions in federal courts or within the agency. *Jarkesy*, 34 F.4th at 455.

85 *Id.*

2. The *Jarkesy* Court's Seventh Amendment Holding

In a major shift from established public rights doctrine precedents, the Fifth Circuit held that

> Petitioners had the right for a jury to adjudicate the facts underlying any potential fraud liability that justifies penalties. And because those facts would potentially support not only the civil penalties sought by the SEC, but the injunctive remedies as well, Petitioners had a Seventh Amendment right to a jury trial for the liability-determination portion of their case.[86]

To reach this conclusion, the court employed a two-step analysis, first determining that the claim arose at common law under the Seventh Amendment as established in *Tull v. United States*[87] and then that the Supreme Court's public rights cases did not permit the agency adjudication in this case to occur without a jury trial right.[88] Regarding the Supreme Court's holding in *Tull v. United States* that the Seventh Amendment right applied to civil suits seeking governmentally imposed penalties, the court held:

> The rights that the SEC sought to vindicate in its enforcement action here arise "at common law" under the Seventh Amendment. Fraud prosecutions were regularly brought in English courts at common law. *See* 3 William Blackstone, Commentaries on the Laws of England *42 (explaining the common-law courts' jurisdiction over "actions on the case which allege any falsity or fraud; all of which savour of a criminal nature, although the action is brought

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86 *Id.* at 457. The issue of whether, even assuming the Seventh Amendment right applied in the SEC administrative proceeding, that right would apply to resolution of the issue of injunctive relief as well as resolution of the penalties is beyond the scope of this Article. However, it should be noted that if a jury were initially to determine the facts relevant to the award of penalties, it is certainly possible that many of those factual questions would also be relevant to the issues necessary to resolution of the issue of injunctive relief. As such, the jury's factual determinations would likely collaterally estop any overlapping factual determinations.

87 481 U.S. 412, 422 (1987) (holding that civil penalties are a type of remedy at common law that could only be enforced by courts of law).

88 *Jarkesy*, 34 F.4th at 453; *see also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 64 (1989) (holding that the Seventh Amendment entitles a defendant in a fraudulent conveyance action brought for a bankrupt estate to a jury trial unless the claim was brought against the debtor in a bankruptcy court). In *Granfinanciera*, the Supreme Court left unresolved "whether the Seventh Amendment or Article III allows jury trials . . . to be held before non–Article III bankruptcy judges . . . ." *Id.* In 1994 Congress enacted the Bankruptcy Reform Act of 1994, which authorized the non–Article III bankruptcy judge to conduct jury trials (where constitutionally applicable) "if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties." Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, 4117 (codified at 28 U.S.C. § 157(e)). Thus, presumably with congressional authorization, non–Article III administrative adjudicators could preside over civil jury trials.

> for a civil remedy; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party"). And even more pointedly, the Supreme Court has held that actions seeking civil penalties are akin to special types of actions in debt from early in our nation's history which were distinctly legal claims. *Tull*, 481 U.S. at 418–19, 107 S.Ct. 1831. Thus, "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Id.* at 422, 107 S.Ct. 1831.
>
> Applying that principle, the Court in *Tull* held that the right to a jury trial applied to an action brought by an agency seeking civil penalties for violations of the Clean Water Act. *Id.* at 425, 107 S.Ct. 1831. Likewise here, the actions the SEC brought seeking civil penalties under securities statutes are akin to those same traditional actions in debt. Under the Seventh Amendment, both as originally understood and as interpreted by the Supreme Court, the jury-trial right applies to the penalties action the SEC brought in this case.[89]

While, as we have argued, this analysis has a legitimate legal basis and foundation under the historical test of the Seventh Amendment,[90] the Fifth Circuit has clearly adopted a path starkly different from the one unambiguously dictated by Supreme Court precedents.

Although the Fifth Circuit reached the correct conclusion, its analysis justifying that conclusion is questionable. Rather than relying on *Parsons v. Bedford* for the proposition that the Seventh Amendment right is triggered any time a "suit" would have been heard at law had it existed in 1791, the court relied on the fact that the kinds of securities fraud cases involved in *Jarkesy* are not "uniquely" suited to administrative adjudication, meaning that under controlling statutory provisions the SEC was empowered to enforce these cases both administratively and judicially.[91] Thus, the court seems to suggest that where the SEC is statutorily required to pursue its enforcement powers solely through resort to an administrative proceeding, it would somehow not be controlled by the Seventh Amendment right. As our analysis has shown,[92] however, proper translation of historical practice into modern procedure dictates recognition of the jury trial right in any instance in which the "suit" is one at common law, regardless of the forum. Nothing in the Seventh Amendment confines application of the right to Article III proceedings. More importantly, recognition of a non–Article III loophole would allow Congress to circumvent the jury trial right any time it wished to do so, simply by transferring what amounts to a traditional adjudication at law to an alternative forum. Nevertheless, one can, we

89 *Jarkesy*, 34 F.4th at 453–54.

90 *See supra* Sections I.A–I.B.

91 *Jarkesy*, 34 F.4th at 456.

92 *See supra* Sections I.A–I.B.

suppose, applaud the Fifth Circuit's recognition of the relevance of the Seventh Amendment right to jury trial to the administrative adjudicatory process.

E. The Legal and Practical Implications of Applying the Seventh Amendment in Administrative Adjudication

Now that the Supreme Court has held that the Seventh Amendment applies to the administrative process, the legal and practical implications turn largely—not exclusively—on the actions (or inaction) of Congress. As the statutes regulating administrative action currently stand, agencies are not authorized to conduct jury trials. As the example of the bankruptcy courts demonstrates,[93] where Congress legislatively authorizes such a procedure in the course of non–Article III adjudication, it is constitutionally permissible. But were Congress not to take such legislative action, in matters where the Seventh Amendment would dictate a litigant's right to jury trial, there could be no conclusion other than that the administrative agency would be required to seek to enforce its claim in an Article III court. Of course, in instances where Congress has not authorized such an enforcement mechanism, the agency could simply not do anything. Thus, it is almost certain that Congress would have to take *some* legislative action, one way or another.

It should be emphasized, however, that application of the Seventh Amendment does not automatically lead to recognition of a litigant's right to jury trial. It should be recalled that by its terms, the amendment merely references English judicial practice in 1791.[94] At that time, matters heard in the equity courts did not allow a jury trial.[95] It was only in suits brought in the law courts that litigants possessed such a right.[96] Thus, where the remedy which the agency is seeking could historically have been brought solely in courts of equity—for example, injunctive relief, awards of back pay, or disgorgement[97]—the Seventh Amendment would not provide a litigant with a constitutionally guaranteed right to jury trial. Presumably, then, in such instances agency practice could proceed in the same manner in which it traditionally has operated. However, where an agency seeks solely to impose fines,

93 *See infra* notes 103–110 and accompanying text.

94 *See* discussion *supra* Section I.B.

95 It should be noted that on occasion, equity courts employed advisory juries. However, juries with decisional power were rarely employed. *See* M.T. Van Hecke, *Trial by Jury in Equity Cases*, 31 N.C. L. REV. 157, 157–58 (1953).

96 *See* Suja A. Thomas, *A Limitation on Congress: "In Suits at Common Law,"* 71 OHIO ST. L.J. 1071, 1073–74 (2010).

97 *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 553 & n.103 (2016).

under the Supreme Court's decision in *Tull v. United States*[98] a litigant does in fact have a constitutional right to jury trial as to determination of the basic facts, though not as to the size of the fines. Absent congressional authorization for agencies to conduct jury trials, then, they would be forced to proceed in the Article III federal courts, assuming they were legislatively authorized to do so.

It is not uncommon, however, for situations to arise in which an agency is seeking *both* equitable *and* legal relief. Indeed, *Jarkesy* was just such a situation: the SEC sought both disgorgement (appropriately deemed equitable) and fines (at least partially legal).[99] Under current Supreme Court doctrine, it is generally the case that where equitable and legal relief are both sought in the same suit, the right to jury trial takes precedence.[100] However, a possible complication may arise because of the so-called "clean-up" doctrine, which historically permitted courts of equity in cases in which the primary relief sought was equitable to also adjudicate incidental claims seeking legal relief.[101] The theory behind this doctrine was that where the legal relief was truly incidental, it should not be necessary for the litigants to have to incur the inconvenience of restarting the litigation.[102]

In *Dairy Queen, Inc. v. Wood*,[103] the Supreme Court rejected the concept of the clean-up doctrine. Justice Black, writing for the Court, denied that such a doctrine existed in the federal courts[104]—highly ironic, since just four years later the Supreme Court expressly relied on this doctrine in the special case of bankruptcy adjudication.[105] But it is surely reasonable to reject the doctrine's modern application in Article III court adjudication, because the reason that legal relief has to start up a new, separate legal proceeding seeking incidental legal relief in a law court no longer existed because since the merger of the law and equity courts in the federal courts in 1938 the very same court would be deciding both legal and equitable issues. A situation in which two separate adjudicators—one equitable and one legal—still exists, however, might well trigger the same pragmatic interests in avoiding unnecessary burdens which existed in 1791.

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98 481 U.S. 412 (1987).

99 *See* Jarkesy v. SEC, 34 F.4th 446, 450 (5th Cir. 2022), *aff'd*, 144 S. Ct. 2117 (2024).

100 *See* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510–11 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 (1962); Ross v. Bernhard, 396 U.S. 531, 542–43 (1970).

101 *See* A. Leo Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320, 320 (1951); Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 497 (1975).

102 *See* Redish, *supra* note 101, at 498.

103 369 U.S. 469.

104 *See id.* at 470.

105 *See* Katchen v. Landy, 382 U.S. 323, 339–40 (1966); *see also supra* note 40.

This is largely what happened in the Court's 1966 decision in *Katchen v. Landy*.[106] There the primary proceeding was a bankruptcy adjudication—a bankruptcy distribution, which is wholly equitable.[107] The trustee in bankruptcy filed a counterclaim against one of the claimants seeking a voidable preference, relief presumed to be legal.[108] The Court, in an opinion by Justice White, invoked the clean-up doctrine.[109] To be sure, Justice White relied heavily on the congressional interest in quick adjudication of bankruptcy proceedings.[110] But a far more principled rationale would have been that unlike most suits brought in the Article III federal courts, in the bankruptcy context adjudication of the distinct voidable preference proceeding with a jury trial would require a distinct proceeding, with all the accompanying costs and burdens. Arguably this proceeding is viewed as a classic historical example of traditional equitable jurisdiction, where no jury would be either required or permitted.

The administrative adjudicatory context could arguably be deemed a parallel situation to that in *Katchen*. Where the administrative body is permitted to adjudicate only matters involving equitable relief, and purely legal matters would normally have to be adjudicated in the Article III courts where the Seventh Amendment's requirement of a jury trial right could be enforced, the situation could be deemed analogous to the historical context of separate equity and law adjudicators. In such a situation, similar to that in *Katchen*, in order to avoid the burdens of two separate adjudicatory proceedings, the equity adjudicator—i.e., the administrative agency—could be constitutionally permitted to resolve *both* equitable *and* legal matters. If the clean-up doctrine were to be invoked in such cases, the administrative agency could continue its current practice of adjudicating all matters, whether legal or equitable relief was involved. Thus, where the SEC seeks primarily disgorgement with incidental award of fines, the very proceeding in *Jarkesy* could possibly still be adjudicated fully in the agency without any jury trial.

Of course, the logic of the clean-up doctrine would apply only when the accompanying legal relief is deemed "incidental"—hardly a self-defining term. Where significant accompanying fines are sought, it might be difficult to characterize that relief in this manner. That, however, would have to be made as a case-by-case determination. We include discussion of the possible relevance of the clean-up doctrine

106 *See Katchen*, 382 U.S. 323.
107 *Id.* at 327.
108 *Id.* at 325, 336.
109 *Id.* at 339–40.
110 *Id.* at 328–29.

simply to speculate about how a post-Seventh Amendment world would function in the operation of administrative agencies.

F. The Due Process Implications of the Right to Jury Trial in Administrative Adjudication

While many argue that the right to jury trial is especially inappropriate in the context of administrative adjudication, ironically the exact opposite argument may be fashioned—namely, that the right to jury trial is especially important in the administrative adjudicatory context. The Due Process Clauses of both the Fifth and Fourteenth Amendments[111] have been construed to require a neutral adjudicator.[112] This means that fairness dictates that adjudicators may not have personal interests which may distract them from neutrality in resolving the disputes before them.[113] While the Supreme Court has not been especially vigilant in enforcing this guarantee, especially in the administrative context,[114] there are serious concerns about the true neutrality of administrative adjudicators. Initially, while they may currently be removed only for cause,[115] they lack the prophylactic protections afforded to Article III judges, designed to insulate them from even the possibility of employment pressures.[116] More important are the possible associative and dissociative influences which may—if only subconsciously—undermine true neutrality in decisionmaking. By this we mean that because administrative law judges are employed by the particular agency in question, it would not be surprising if many of them felt special allegiance to the agency for which they work and/or simultaneous distaste for the parties regulated by the agency whom the agency has accused of wrongdoing.[117] And while review is theoretically available in the federal courts, the depth and intensity of that review is severely limited by statute.[118]

Even if we are to assume—as the current Supreme Court clearly does—that these concerns about neutrality fail to rise to the level of actual due process violations, the fact remains that they are serious concerns which are irrelevant in the context of adjudication in

111 U.S. CONST. amends. V, XIV, § 1.

112 *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 523, 535 (1927).

113 *See, e.g.*, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986).

114 *See, e.g.*, Withrow v. Larkin, 421 U.S. 35, 58 (1975).

115 5 U.S.C. § 7521(a) (2018).

116 U.S. CONST. art. III, § 1 (guaranteeing lifetime tenure and protection against salary reduction).

117 *See* Martin H. Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State*, 94 NOTRE DAME L. REV. 297, 307 (2018). *See generally* REDISH, DUE PROCESS, *supra* note 70.

118 5 U.S.C. § 704 (2018).

Article III courts. It should therefore be remembered that one of the primary reasons that the right to jury trial in civil cases was so important to so many at the time of the Constitution's ratification was the need to check the adjudicators, even those protected by Article III's guarantees of salary and tenure.[119] By that reasoning, the need for the use of a jury as a check on the adjudicator should be deemed even more important in the context of administrative adjudication.

II. THE SEVENTH AMENDMENT, THE ADMINISTRATIVE PROCESS, AND THE "CONSTITUTIONAL MOMENT"

A. The Theory of the Constitutional Moment and the Seventh Amendment

It is certainly true that the public rights doctrine finds its origins in Supreme Court decisions handed down prior to President Franklin Roosevelt's New Deal, the point in our political history at which the administrative state took on its modern gigantic status.[120] But it was not until 1977—long after the modern administrative state had taken shape—that the Supreme Court, suddenly and without explanation, applied that doctrine to constitutionally justify the complete absence of the Seventh Amendment jury trial right in suits which, if heard in Article III courts, would undoubtedly have triggered that right.[121] Prior to 1977 but after the New Deal's creation, the Court's rationale for not applying the Seventh Amendment in the context of administrative adjudications had been more openly grounded in the simple "incompatib[ility]" between the jury trial right and the administrative process.[122] This was so, even though nothing in the text or history of the Seventh Amendment authorized use of a pragmatic exception to the jury trial right.[123]

While the Supreme Court has never openly embraced the theory (as we shall see, for good reason), Professor Bruce Ackerman years ago developed a rationale for the magical disappearance of any and all constitutional limitations on the post–New Deal administrative process.[124] He described this sleight-of-hand form of alchemy as the theory of the

119 *See, e.g.*, THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION, OF THE STATE OF PENNSYLVANIA, TO THEIR CONSTITUENTS 3 (Philadelphia, E. Oswald 1787).

120 *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856); Crowell v. Benson, 285 U.S. 22, 50 (1932).

121 *See supra* text accompanying notes 64–67.

122 Curtis v. Loether, 415 U.S. 189, 194 (1974); *see supra* text accompanying notes 50–52.

123 *See supra* text accompanying notes 54–57.

124 ACKERMAN, *supra* note 9.

"constitutional moment."[125] When all of the claptrap about public rights and the Seventh Amendment is torn away (treatment that it so richly deserves), the Supreme Court's decision to insulate administrative suits from the Seventh Amendment's annoying reach amounts to something very like Professor Ackerman's very troubling theory. In brief, Professor Ackerman posits that at certain points in both our history and our future, without any formal legal action, the public reaches a normative political consensus that the Constitution has been altered.[126] To be sure, there thankfully have not been many of these instances of mysterious constitutional transformation. In fact, Professor Ackerman seems to have found only two, which—we are sure, only coincidentally—happen to be politically very liberal: the New Deal and the 1964 Civil Rights Act.[127] One could certainly debate the latter example, given that, as most eighth graders know, an act of Congress can be superseded at any point by a repealing act of a subsequent Congress and therefore lacks the trumping status of a constitutional directive. But for present purposes we are concerned solely with the theory that the New Deal, even though it was purely legislative, somehow constituted a constitutional sea change. This world-changing change affected many areas of law. But for now, we are concerned only with its apparent insulation of the administrative process from close constitutional perusal from the Seventh Amendment's perspective. Such a critical analysis is important, not because any court has in fact openly relied on Professor Ackerman's strange theory as a sort of constitutional vaccination for the administrative process. Our point, rather, is that while no one discussing the Seventh Amendment and administrative adjudication has openly utilized Ackerman's theory, the nakedly pragmatic grounding of the all-but-categorical exclusion of the Seventh Amendment in this context amounts to the equivalent of his rationale. By obliterating the constitutional legitimacy of what purports to be the only principled rationale for such naked, countertextual functionalism, we hope to be able to expose this approach for what it is: an effective selective repeal of an unambiguous constitutional protection of an individual right for no reason other than that enforcement of that right is either inconvenient or politically or ideologically harmful. Once we go down that road, constitutional interpretation will have been transformed into a Hobbesian state of nature, in which life is nasty, brutish, and short.[128] For then whoever is in power can openly

125 *Id.* at 267.

126 *Id.* at 268.

127 *Id.* at 267–69; BRUCE ACKERMAN, REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW 22, 387–97 (2019).

128 *See generally* THOMAS HOBBES, LEVIATHAN 86–90 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

and blatantly transform constitutional text and structure into literally anything they ideologically want it to be.

To be sure, there are numerous points in our constitutional history where the Supreme Court has done something approaching just that. But that does not make it legitimate. More importantly, acceptance of Professor Ackerman's theory—channeled through interpretation of the Seventh Amendment—would free the Court from even having to develop a textual disguise for its conclusions. After all, all the Court would have to say is that there was some sort of constitutional moment which rendered the explicit words and purposes of the Constitution's text wholly irrelevant. In this Section, we first explain Professor Ackerman's theory as well as his rationale for its adoption. We then explain both how seriously flawed his theory is in so many ways and the frightening dangers to our constitutional democracy were it to be accepted.

B. Professor Ackerman's Theory of the Constitutional Moment

The New Deal, the Roosevelt administration's response to the financial calamity and destitution of the Great Depression and the failed economic policies of the 1920s, spurred changes in American government policy and societal expectations that are still with us today. Not only did the American people come to rely on the new governmental programs and agencies such as Social Security, Civilian Conservation, and Civil Works, among others, but acts of Congress such as the National Labor Relations Act, the Securities Act, and the Emergency Banking Act changed the economic face of the nation and led to a massive expansion in the administrative state that still exists today.[129] Much has been made of the societal and political impact of the New Deal; some scholars argue that this time period was a "constitutional moment" that served as a period of "higher lawmaking" that fundamentally changed America's constitutional and political structure,[130] while others argue that this era represents the beginning of a judicial shift away from proper constitutional interpretation of agency power and toward the tragedies of "naked functionalism."[131] The New Deal ultimately represents a sea change in American judicial and political history, and the shift in administrative jurisprudence following the

129 *See* Lawson, *supra* note 16, at 1232.

130 ACKERMAN, *supra* note 9, at 266–70.

131 *See* MARTIN H. REDISH, JUDICIAL INDEPENDENCE AND THE AMERICAN CONSTITUTION: A DEMOCRATIC PARADOX 14 (2017).

"switch in time that saved nine"[132] and the emphasis on the public rights doctrine[133] poses significant questions about the legal future of due process rights via both the Seventh Amendment and our broader constitutional framework. The New Deal changed America forever, and the effects on due process and the right to a neutral adjudicator in agency proceedings are still being sorted out by the courts to this day.[134]

If one examines the text of the Constitution carefully, one finds only one explicit reference to the method of altering the document. That appears in Article V. The provision establishes two required steps for amending the Constitution: (1) it must be proposed by two-thirds of both houses of Congress or, on the application of two-thirds of all state legislatures, by a convention called to propose amendments, and (2) the amendments must be ratified by three-fourths of all state legislatures.[135] It is obvious that the process is most arduous—demanding something approaching a national consensus to amend the Constitution. It is undoubtedly for that reason that the Constitution has been formally amended a mere twenty-seven times.

To be sure, the Supreme Court's controlling interpretation of numerous provisions has changed over the years, as any first-year law student could tell us. But in the large majority of cases, at least, when the Court does so, it usually feels at least some responsibility to ground its interpretation in the broadly framed language of the text, which often—though not always—lends itself to a variety of linguistically plausible interpretations. In the relatively rare instances in which the Court has cavalierly ignored controlling text, it has left itself vulnerable to justified criticism.

At least in those situations somehow found to be covered by one of Professor Ackerman's constitutional moments, however, he would have the Court blissfully freed from the supposedly unduly arduous effort to ground its decisions in at least a linguistically plausible construction of the Constitution's actual words. Instead, his theory posits that certain moments of "higher lawmaking" catch the attention of the public and somehow lead to transformational electoral outcomes that reshape the face of the Constitution.[136] This is because, according to

132 *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (a landmark case where the Court abandoned the *Lochner* era and became more receptive to President Roosevelt's policies in the face of threats to expand the size of the Court).

133 Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 450 (1977).

134 *See, e.g.*, Jarkesy v. SEC, 34 F.4th 446, 456 (5th Cir. 2022), *aff'd*, 144 S. Ct. 2117 (2024).

135 U.S. CONST. art. V.

136 ACKERMAN, *supra* note 9, at 270, 266–94; *see supra* text accompanying note 9.

Professor Ackerman, America is a "dualist democracy" where frequent periods of "normal politics" give way to these higher political moments in history.[137] In effect, Ackerman is arguing that at certain points, lightning strikes, the heavens open, the nation's citizens hold hands from coast to coast, sing "Kumbaya," and miraculously the Constitution is changed. Of course, how one determines whether such moments have actually occurred is often subject to debate. Indeed, even if one were to assume the validity of Professor Ackerman's theory as a matter of abstract constitutional interpretation, there are many issues of legitimate debate as to whether the particular moments ordained by Ackerman actually qualify as such.[138] But more fundamentally, his entire theory is fraught with serious flaws. Indeed, his theory ignores, and therefore dangerously undermines, the entire framework of our nation's constitutional democracy.

We readily plead guilty to the charge that we are mercilessly mocking Professor Ackerman's theory. In our defense, we plead that we do so in order to hide our fear of his proposal with sarcasm. His theory is riddled with serious holes on every level. Professor Ackerman disregards the established framework of our democratic system. He does so by blatantly ignoring constitutional text, the inherently countermajoritarian nature of our systems, and the frightening vagaries in his proposed standard.

1. The Framework of Our Nation's Constitutional Democracy

It should not be necessary, at this point in our nation's history, to describe the basics of our constitutional democratic structure. Sadly, Professor Ackerman makes such an effort required. We have a constitutional democracy: the default position is a sometimes-strained form of representative government, where at some level most social and political decisions are made by those who are representative of and accountable to the electorate. However, in a form of democratic paradox,[139] our nation adopted a written, mandatory countermajoritarian Constitution, which is designed to guarantee the continuation of democracy by constraining it. It is for that very reason that the Framers were so careful to provide a detailed supermajoritarian framework for the formal change of that document. At the same time, in many instances in the text they employed broadly phrased language which permitted the evolution of the constitutional directives—confined by the

137 ACKERMAN, *supra* note 9, at 31–32 (emphasis omitted).

138 *See e.g.*, Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 764–66 (1992) (book review).

139 *See generally* REDISH, *supra* note 131.

outer linguistic limits of the document's text—to meet changing conditions. In this manner, the document was designed to serve as a truly *constitutive* document—one designed to last for centuries. As Chief Justice John Marshall cautioned early in the nation's history in one of the nation's most famous decisions, "[W]e must never forget, that it is a *constitution* we are expounding."[140] Nevertheless, the insulated, unrepresentative Supreme Court's only portfolio—its only source of legitimate authority—in expounding the Constitution is to tie itself, in some manner, to the text. Admittedly, the Court has often construed its function far too broadly. But ultimately, it has—either directly or indirectly—grounded its decisions in some manner in the document's text. Absent such grounding, the decisions of the unrepresentative, unaccountable Justices are nothing more than the edicts of philosopher-kings.

2. Professor Ackerman's Abandonment of Constitutional Democracy

In a bizarre way, Professor Ackerman employs a strange version of majoritarianism as a means of unduly empowering the unrepresentative and unaccountable Supreme Court with ultimate nakedly political power. On the one hand, Professor Ackerman purports to be shaping a theory of stark majoritarianism. He ties the alteration in the countermajoritarian Constitution to a type of supermajoritarianism. He does so by choosing as his touch point for such constitutional change a finding of nationwide consensus that such changes be made. But, as already noted, there is no easy way to make such a determination: How can we possibly determine when such a consensus has actually been reached? Indeed, if it has in fact been reached, then why has the process of amendment dictated in Article V not already been followed to make the constitutional change in question? After all, while Article V does require compliance with an elaborate supermajoritarian process, if we truly have reached the pervasive political consensus which Professor Ackerman presumably requires, shouldn't it be easy to achieve the change through the constitutionally prescribed process for constitutional change? Yet if so, then there would of course be no need to resort to the constitutional moment theory in the first place.

The issue, of course, will always come down to this: Who possesses the power to determine whether a constitutional moment has in fact taken place? We suppose that we could vest the final say in Professor Ackerman himself. He is, after all, the father of the whole theory. But no one lives forever, so what would happen after Professor Ackerman passes on? Can he designate in his will the name of another legal

140 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

academic to take his place as ultimate decisionmaker? But given that Ackerman has no legal or political status in the nation's government, we doubt that the nation would cede that power to him. Thus, the answer to the question of exactly who in our government would get to make the final, unreviewable determination as to when a constitutional moment has in fact taken place should be obvious. It is of course the unaccountable and unrepresentative Supreme Court. It is, after all, the Court that has the final say as to the meaning of the Constitution; nothing and no one, short of a constitutional amendment, can overrule it.[141] So at least as a descriptive, if not a normative, matter, the answer has to be the Court. Consider the odd situation that results: the only branch of the federal government fully insulated from political accountability gets the final say as to when the political winds have sufficiently changed to infer a national consensus that the Constitution has in fact been altered. In the spirit of "be careful what you wish for," while Professor Ackerman sees the New Deal and the Civil Rights Act of 1964 as the two primary (if not only) constitutional moments,[142] the largely conservative Supreme Court might well determine that the election of Donald Trump, who proclaimed himself to seek to serve as a dictator on day one,[143] amounts to a constitutional moment transforming our constitutional democracy into a dictatorship. Many of us might well believe the Justices to be dead wrong in their assessment, but who would have the power to overrule their decision? This is exactly what could flow from empowering the one branch of the federal government least likely to know whether the required national consensus has been reached to make the determination that the required national consensus has been reached.

But the Supreme Court has instead found a way to acquire the very power Professor Ackerman would be forced to vest in it in a far more indirect and sinister manner. Instead of openly proclaiming its determination that a constitutional moment fundamentally altering the DNA of the Constitution has in fact taken place, the Court has on occasion chosen to ignore foundational constitutional limits by relying on nakedly unprincipled "constructions" of the text, or even worse, on wholly nontextual, supposedly principled judge-made doctrines designed to constrain constitutional directives deemed to be inconvenient or burdensome to governmental power. The public rights doctrine's application to curb the reach of the Seventh Amendment's right to jury trial—a right deemed by many of the state ratifying

141 *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958).

142 *See supra* note 127 and accompanying text.

143 *See* Mariana Alfaro, *Trump Says He Wouldn't Be a Dictator 'Except for Day One,'* WASH. POST (Dec. 6, 2023, 9:49 AM), https://www.washingtonpost.com/politics/2023/12/06/trump-dictator-day-one-hannity/ [https://perma.cc/9K22-LEF6].

conventions to be foundational to the preservation of democracy—renders the Court's approach wholly countertextual.

Why, then, do we spend so much space critiquing a broad theory of constitutional analysis, untied in any specific way to the Seventh Amendment, which is, after all, the primary subject of this Article? The answer is this: because we believe that under all the superficial smoke and mirrors of the public rights doctrine, the Court's all-but-categorical refusal to recognize a right to jury trial in the administrative process for suits which undoubtedly would have been subject to a jury trial right had they existed at common law in England in 1791—the clearly understood standard for recognition of a jury trial right today—relies on a similar view of constitutional interpretation. The Court has employed this countertextual approach, we believe, for reasons dangerously close to a form of Professor Ackerman's theory of the constitutional moment: the New Deal has fundamentally altered the DNA of the Constitution. Indeed, the Court's express reliance on the "incompatibility" of the jury trial right with the administrative process when nothing in the Seventh Amendment provides the right turns on some measure of practical incompatibility and thus constitutes a concession that the Court is simply deferring to the practical needs of the New Deal. Thus, when it comes to the Court's approach to the Seventh Amendment in the context of administrative adjudication, in everything but name the Court has adopted Professor Ackerman's theory of the constitutional moment: the New Deal constituted a sea change in the framework of constitutional rights or at least those which would interfere with the operation of agencies which owe their existence or their modern legacy to the New Deal. This is no way to run a constitution—or, at least, *our* Constitution.

CONCLUSION

Even in the context of Article III court adjudication, the Seventh Amendment right to jury trial in civil cases has long been the subject of serious debate. While the civil jury has certainly had its advocates,[144] for years it has been criticized on a variety of grounds: juries are generally incompetent to resolve factual disputes, use of juries is time consuming and expensive, and jurors are often prejudiced.[145] The fact remains, however, that juries can appropriately be viewed as a form of check on judicial misdeeds, much as many of the Framers argued.

144 *See, e.g.*, Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964).

145 *See* Redish, *supra* note 101, at 502–07. Historically, Judge Jerome Frank was perhaps the major critic of the use of juries in civil cases. *See* JEROME FRANK, LAW AND THE MODERN MIND 183–99 (Routledge 2009) (1930).

More important than all this are the following facts: (1) the Seventh Amendment is unambiguously a part of the Constitution, which can be repealed only through the complex supermajoritarian process laid out in Article V; (2) under long-established Supreme Court precedent, the word "preserved" in the provision's text is defined by asking whether, had the "suit" in question arisen in 1791 in England, it would have been adjudicated in courts of law, where the option of a jury trial was required; (3) nothing in the amendment's language confines its reach to suits in Article III courts; (4) adversary proceedings between the government and private individuals or entities inescapably constitute "suits" for purposes of the Seventh Amendment; (5) once all of the superficially seductive, supposedly principled justifications for excluding the jury trial right from adversary proceedings in administrative agencies are deconstructed, the only real defense of this conclusion is that a jury trial is "incompatible" with the very nature of the work done by administrative agencies; and (6) nothing in the amendment's text or history (with the one narrow exception of an accounting)[146] authorizes widespread exceptions to its reach on grounds of naked functionalism.

Constitutional rights are often burdensome and inconvenient for government. But the entire framework of our constitutional democracy dictates that we are not permitted to ignore constitutional rights simply by governmental decree short of adherence to Article V's clearly delineated amendment process. And this is so, even when many citizens wish for the removal or limitation of those rights. To those who believe that such a form of Professor Ackerman's theory of the constitutional moment should be deemed to exist, we have a warning: be careful what you wish for. Supporters of Senator Joe McCarthy in the 1950s could have argued that the period should have been deemed a constitutional moment, effectively repealing First Amendment rights of Communists. Were Donald Trump to win the 2024 election by a wide margin, his supporters might reasonably claim that his victory, despite his declaring his desire to be a dictator, constituted a constitutional moment repealing separation of powers and the right to vote. The point, simply, is that once we go down the constitutional moment road, literally nothing in the Constitution is safe from repeal by the whims of powerful majorities. And the Seventh Amendment right is as much a part of the United States Constitution as any other provision of the Bill of Rights. Therefore, naked functionalism must be

146 *See, e.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (indicating that an accounting, a practice analogous to historical practices in 1791, is an exception to the broad commands of the Seventh Amendment).

categorically rejected as a justification for excluding the Seventh Amendment from the administrative process.

ADDENDUM

As this Article went to press, the Supreme Court issued its decision in the *Jarkesy* case.[147] The majority's bottom line was roughly similar to what we have advocated in this Article. The Court held that the Seventh Amendment right to civil jury trial applies to the SEC's proceeding against Jarkesy,[148] even though the proceeding was to take place as part of the administrative process, and that the public rights doctrine fails to insulate the proceeding from the Amendment's reach.[149]

Knowing the Court's holding, however, only scratches the surface of the decision; to focus solely on the holding is to ignore the serious problems that lie at the core of the Court's opinion. What the Court *should* have done was simply to recognize the dangerous and illogical foundations of the public rights doctrine in general and its application to the Seventh Amendment in particular, and categorically abolish it. At the very least, the Court should have explained that whatever the public rights doctrine's validity in other contexts, prior to the Court's dangerous and misguided decision in *Atlas Roofing*[150] that doctrine had never been applied to the Seventh Amendment and had no logical or historical relevance in that context. But for whatever reason, instead of decisively choosing a path very different from the one laid out by established doctrine, the Court attempted to squeeze its decision within the framework of existing precedents. In so doing, the Court left the law in a state of woeful confusion and even invited dramatic and unjustified extension of existing (misguided) doctrine.

The Court's first, but by no means only, mistake was to attempt to rationalize its holding as merely a straightforward application of its decision in *Granfinanciera, S.A. v. Nordberg*.[151] But this is squeezing a square peg into a round hole. In that case, the Court held that one who is sued by a trustee in bankruptcy for the fraudulent transfer of money, who has not submitted a claim against the bankrupt estate, possesses a constitutional right to jury trial.[152] This was because the trustee's cause of action involved a private right and was a legal claim that

147 SEC v. Jarkesy, 144 S. Ct. 2117(2024).

148 *Id.* at 2127; *see* U.S. CONST. amend. VII.

149 *Jarkesy*, 144 S. Ct. at 2127–28.

150 Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442 (1977); *see supra* text accompanying notes 64–69.

151 492 U.S. 33 (1989); *see Jarkesy*, 144 S. Ct. at 2134–36.

152 *Granfinanciera*, 492 U.S. at 36.

prior to 1791 would have been a suit at law, rather than in equity.[153] There were, then, two necessary conditions for the Court's conclusion that the right to jury trial applies in the non–Article III adjudicatory context: first, the claim being adjudicated must assert a private right—a traditional common-law right or dispute between two private parties—and second, it must be a claim that historically would have been heard at law, rather than in equity. The Court in *Jarkesy* believed that the facts of that case fell directly within *Granfinanciera*'s framework, but nothing could be further from the truth. First, *Jarkesy* did not involve a private right, because unlike *Granfinaciera*, the decision did not involve a suit between two private parties. *Atlas Roofing*'s definition of public rights included "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact . . . ."[154] While that description of public rights does not cover the right asserted in *Granfinaciera*, it most certainly does apply to the suit in *Jarkesy*: the case involved a suit by the Government in its sovereign capacity to enforce public rights created by congressional statutes.[155]

Second, while in *Granfinaciera* the right involved a private claim that historically existed at common law, the suit in *Jarkesy*—a suit by the Government to impose a penalty on a party for engaging in fraud against private individuals—never existed at common law. To be sure, the *Jarkesy* Court was correct that private claims seeking damages for fraud existed at common law. But that was by no means the situation in *Jarkesy*, where it was the Government, acting in its sovereign capacity, that sought to impose a penalty (not private damages) against the offender. In short, the presence of the Government, acting in its sovereign capacity, as a party to a case was the essence of a public right. Because that was the situation in *Jarkesy*, but not in *Granfinaciera*, the two cases are easily distinguishable.

Equally unjustified was the *Jarkesy* Court's effort to distinguish, rather than overrule, *Atlas Roofing*. The Court deemed the two cases distinguishable, because while the fraud claim asserted in *Jarkesy* existed at common law (even though it actually did not, for reasons just explained), the statute being enforced in *Atlas Roofing* did not exist at common law.[156] But such a distinction reveals the Court's ignorance of how the existence of a Seventh Amendment right is determined. This failure is, to say the least, puzzling, since the current method of determining the distinction comes directly from numerous Supreme

153 *Id.* at 46–47, 55–56.

154 *Atlas Roofing*, 430 U.S. at 450.

155 *Jarkesy*, 144 S. Ct. at 2126–27.

156 *Id.* at 2138–29.

Court opinions.[157] Early in the nation's history, Justice Story, speaking for the Court in *Parsons v. Bedford*, held that the mere fact that a claim had not existed at common law did not prevent the Seventh Amendment right from being triggered.[158] Rather, a court was to ask, *had* the right existed at common law, would it have been heard at law (where the jury trial right applied) or in equity (where the right did not apply).[159] Thus, the mere fact that a claim did not exist at common law has never prevented the Seventh Amendment right from being triggered.[160] Far more modern decisions have made clear that the law-equity dichotomy is to be determined primarily, if not exclusively, by *the remedy sought*. Under the Court's decision in *Tull v. United States*,[161] "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law."[162] As modern doctrine makes plain, the fact that a civil fraud claim may have existed at common law is wholly irrelevant to the Seventh Amendment issue. Both *Jarkesy* and *Atlas Roofing* were cases involving an attempt to enforce a civil penalty. Thus, but for the possible relevance of the public rights exception, the Seventh Amendment right applied in both contexts.

We recognize the Court's commendable desire not to dramatically alter or overrule existing doctrine. But to disingenuously camouflage what amounts to such a total break with existing doctrine as merely an application of that doctrine does the nation no favors.[163] In *Jarkesy*, the Court was correct in finding the Seventh Amendment right to be triggered in a governmental suit seeking to impose a civil penalty, even though the proceeding in question takes place not in a court of law but rather in an administrative proceeding. However in doing so, it should have proudly emphasized, not attempted to hide, its dramatic departure from misguided preexisting practice.

157 *See, e.g.*, Chauffeurs, Teamsters & Helpers Loc. No. 391 v. Terry, 494 U.S. 558, 570–74 (1990); Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).

158 28 U.S. (3 Pet.) 433, 447 (1830).

159 *Id.*

160 *See, e.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510–511 (1959) (jury trial right applies in antitrust suits, even though such claims did not exist at common law).

161 481 U.S. 412 (1987).

162 *Id.* at 422.

163 This analysis, while purporting to uphold existing doctrine, is nothing more than the Court cloaking its obstruction of precedent. *Cf.* Bill Watson, *Obstructing Precedent*, 119 NW. U. L. REV. (forthcoming 2024).