

FEDERAL STATUTES AND REGULATION

Administrative Law — Separation of Powers — Public Rights Doctrine — SEC v. Jarkesy

The expansion of the administrative state since the New Deal has raised significant questions about the relationship between the three branches of government.¹ A “question go[ing] to the heart of the modern administrative state” is how to differentiate between matters within the judicial province and matters that may be subject to administrative adjudication.² In searching for an answer, the Supreme Court has turned to the public rights doctrine,³ under which “[t]he political branches [may] control[] purely public rights,” but the judicial branch must step in for private rights.⁴ Last Term, in *SEC v. Jarkesy*,⁵ the Court held that the administrative adjudication of a securities fraud action seeking civil penalties did not fit the public rights exception, violating the defendants’ Seventh Amendment jury-trial right.⁶ The Court’s reasoning adhered to its recent trend of looking at legislative novelty to delineate the bounds of each branch’s authority.⁷ By continuing this trend in *Jarkesy*, however, the Court subjected its public rights jurisprudence to the same pitfalls that have characterized other separation-of-powers cases: The Court upset longstanding assumptions about institutional arrangements and aggrandized itself at the expense of the other branches.

The SEC enforces the antifraud provisions of the Securities Act of 1933,⁸ the Securities Exchange Act of 1934,⁹ and the Investment Advisers Act of 1940,¹⁰ which target fraud in the securities markets.¹¹ It may choose to bring an enforcement action under these provisions in either of two forums: within its own tribunal or in federal court.¹² Pre-*Jarkesy*, the SEC could obtain civil penalties in both forums, but its in-house

¹ See Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 17–28 (2017).

² Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 563 (2007).

³ See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

⁴ Nelson, *supra* note 2, at 572.

⁵ 144 S. Ct. 2117 (2024).

⁶ See *id.* at 2124–25, 2131.

⁷ See generally Note, *The Presumption Against Novelty in the Roberts Court’s Separation-of-Powers Case Law*, 137 HARV. L. REV. 2034 (2024) (arguing that the Roberts Court has adopted a presumption against novel statutes and regulations in the separation-of-powers context).

⁸ 15 U.S.C. §§ 77a–77aa; *id.* § 77q(a).

⁹ *Id.* §§ 78a–78rr; *id.* § 78j(b).

¹⁰ *Id.* §§ 80b-1 to -21; *id.* § 80b-6.

¹¹ *Jarkesy*, 144 S. Ct. at 2125.

¹² *Id.*

tribunal does not include a jury.¹³ Rather, the Commission presides over the adjudication and acts as factfinder for all claims.¹⁴

Between 2007 and 2009, George Jarkesy, Jr., and Patriot28, LLC, (Jarkesy) launched two hedge funds.¹⁵ In 2013, the SEC's Division of Enforcement — its prosecutorial arm — initiated an enforcement action against Jarkesy in its administrative tribunal under the antifraud provisions.¹⁶ Jarkesy alleged several constitutional defects.¹⁷ In 2014, an administrative law judge (ALJ) rejected these allegations and held Jarkesy liable for securities fraud, levying a civil penalty against him.¹⁸ Jarkesy appealed the decision to the Commission and sought its reversal on various constitutional grounds.¹⁹ First, he argued that the Commission's selection of the administrative forum involved a standardless use of delegated legislative power, violating the separation of powers.²⁰ Second, he argued that the SEC ALJs' dual for-cause removal protections violated the separation of powers.²¹ Finally, Jarkesy argued that the imposition of civil penalties in the administrative forum violated his Seventh Amendment right to a jury trial.²² The Commission affirmed the ALJ's decision, determining that the constitutional defenses lacked merit.²³ Jarkesy petitioned the Fifth Circuit to review the Commission's decision.²⁴

¹³ *Id.* at 2125–26. Prior to the Great Recession, the SEC could seek civil penalties only in federal court. *See id.* at 2126.

¹⁴ *Id.* at 2125. The Commission may delegate these functions to an administrative law judge (ALJ), with the right to review the ALJ's actions. 15 U.S.C. § 78d-1.

¹⁵ John Thomas Cap. Mgmt. Grp. LLC, Securities Act Release No. 9396, Exchange Act Release No. 69208, Investment Advisers Act Release No. 3571, Investment Company Act Release No. 30435, 2013 WL 1180836, at *1 (Mar. 22, 2013).

¹⁶ *See id.* at *1, *12–13.

¹⁷ Respondents' Post-Hearing Memorandum of Law at 13–25, John Thomas Cap. Mgmt. Grp. LLC, No. 3-15255 (ALJ May 28, 2014).

¹⁸ John Thomas Cap. Mgmt. Grp. LLC, Release No. 693, 2014 WL 5304908, at *2–6, *33 (ALJ Oct. 17, 2014).

¹⁹ Petition for Review at 2–17, John Thomas Cap. Mgmt. Grp. LLC, No. 3-15255 (Nov. 7, 2014).

²⁰ Respondents' Opening Brief at 8–12, John Thomas Cap. Mgmt. Grp. LLC, No. 3-15255 (Jan. 14, 2015).

²¹ Respondents' Reply to Division's Response to Objections to Administrative Proceeding at 3–4, John Thomas Cap. Mgmt. Grp. LLC, No. 3-15255 (Dec. 17, 2018). SEC ALJs can be removed by SEC Commissioners only for good cause, as determined by the Merit Systems Protection Board (MSPB). *See id.* The Commissioners and MSPB members, in turn, can be removed only for good cause by the President. *See id.*

²² Respondents' Opening Brief, *supra* note 20, at 19–21. The Seventh Amendment guarantees that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” U.S. CONST. amend. VII.

²³ *See* John Thomas Cap. Mgmt. Grp. LLC, Securities Act Release No. 10834, Exchange Act Release No. 89775, Investment Advisers Act Release No. 5572, Investment Company Act Release No. 34003, 2020 WL 5291417, at *2, *25–27 (Sept. 4, 2020).

²⁴ Petition for Review at 1, *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) (No. 20-61007).

The Fifth Circuit granted the petition for review and reversed.²⁵ Writing for the panel, Judge Elrod²⁶ held that the SEC deprived Jarkesy of his Seventh Amendment jury-trial right.²⁷ Applying a two-part test fashioned from *Granfinanciera, S.A. v. Nordberg*,²⁸ Judge Elrod first determined that the Seventh Amendment right attached to the action because the SEC sought to recover civil penalties, which mirror “traditional actions in debt.”²⁹ Next, she concluded that the public rights exception, under which matters of public right may be assigned to agency adjudications without contravening the Seventh Amendment,³⁰ did not apply. Specifically, Judge Elrod pointed to the resemblance between securities fraud and common law fraud to decide that the former is not “unknown to the common law” and thus does not focus on public rights.³¹ Judge Elrod then addressed the other constitutional errors at play: She held that Congress violated Article I by delegating to the SEC the legislative power to assign matters to agency adjudication without providing “an intelligible principle by which to exercise that power.”³² She also concluded that SEC ALJs’ removal protections violated Article II under *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.³³ In dissent, Judge Davis argued there were no constitutional infirmities plaguing the SEC’s administrative proceedings.³⁴

The Supreme Court affirmed.³⁵ Writing for a 6–3 majority, Chief Justice Roberts³⁶ held that securities fraud actions pursuing civil penalties require a jury trial in an Article III court.³⁷ Following the two-step approach applied by the Fifth Circuit, the Court first explained that the Seventh Amendment embraces statutory claims that are “legal in nature”³⁸ — determined by “the cause of action and the remedy it provides.”³⁹ For the Court, the latter consideration was nearly “dispositive” for the SEC’s enforcement action seeking civil penalties.⁴⁰ The remedial scheme of the antifraud provisions imposes monetary damages to deter

²⁵ *Jarkesy*, 34 F.4th at 466.

²⁶ Judge Elrod was joined by Judge Oldham.

²⁷ *Jarkesy*, 34 F.4th at 451.

²⁸ 492 U.S. 33 (1989); see *Jarkesy*, 34 F.4th at 453.

²⁹ *Jarkesy*, 34 F.4th at 454.

³⁰ *Id.* at 453 (quoting *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 450 (1977)).

³¹ *Id.* at 455.

³² *Id.* at 462; see *id.* at 460–63.

³³ 561 U.S. 477 (2010) (holding that the Public Company Accounting Oversight Board’s dual for-cause removal protections were unconstitutional, *id.* at 492); *Jarkesy*, 34 F.4th at 463–65.

³⁴ See *Jarkesy*, 34 F.4th at 466 (Davis, J., dissenting).

³⁵ *Jarkesy*, 144 S. Ct. at 2139.

³⁶ Chief Justice Roberts was joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett.

³⁷ *Jarkesy*, 144 S. Ct. at 2131. The Court did not reach the other constitutional issues because it resolved the case based on the Seventh Amendment claim. *Id.* at 2127–28.

³⁸ *Id.* at 2128 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)).

³⁹ *Id.* at 2129.

⁴⁰ *Id.*

and punish rather than to “restore the status quo”; thus, the claims are legal and not equitable.⁴¹ The “cause of action” consideration validated this conclusion: The Court analogized the securities fraud action to common law fraud and observed a “close relationship” between the two, confirming that the suit implicated the Seventh Amendment.⁴²

Since the jury-trial right attached, the Court turned to the public rights exception. It continued its analogy to common law fraud to determine that the exception did not encompass the securities fraud action.⁴³ The Court clarified that matters “in the nature of an action at common law” are “presum[ed to] concern[] private rights” and require Article III adjudication,⁴⁴ while matters that “historically could have been determined exclusively by [the executive and legislative] branches” constitute public rights and may be adjudicated outside of Article III courts.⁴⁵ Of the few historically established categories of public rights, securities fraud did not fit.⁴⁶ Instead, the Court concluded that the same principles in *Granfinanciera*, which held that fraudulent conveyance actions under the Bankruptcy Code⁴⁷ did not comprise public rights because they were “quintessentially suits at common law” and were not “closely intertwined’ with the bankruptcy regime,”⁴⁸ controlled here.⁴⁹

The Court rejected the SEC’s attempts to distinguish *Granfinanciera*. The SEC emphasized that the securities fraud action was brought by the government itself and arose from new statutory duties under a new statutory scheme.⁵⁰ The Court responded that “what matters is the substance of the suit, not . . . who brings it[] or how it is labeled.”⁵¹ It also dismissed the SEC’s reliance on *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*,⁵² differentiating that case from the securities fraud action at bar based on the degree to which the Court perceived the relevant claim to resemble a common law action.⁵³

⁴¹ *Id.* at 2129–30 (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)).

⁴² *Id.* at 2130–31.

⁴³ *Id.* at 2131, 2136.

⁴⁴ *Id.* at 2132 (citing *Stern v. Marshall*, 564 U.S. 462, 484 (2011)).

⁴⁵ *Id.* (alteration in original) (quoting *Stern*, 564 U.S. at 493).

⁴⁶ *See id.* at 2132–34. For example, these historical categories include “the administration of public lands and the granting of public benefits such as payments to veterans.” *Id.* at 2133 (citation omitted) (citing *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

⁴⁷ 11 U.S.C. §§ 101–1532.

⁴⁸ *Jarkesy*, 144 S. Ct. at 2135 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54, 56 (1989)).

⁴⁹ *Id.* at 2135–36.

⁵⁰ *Id.* at 2136 (citing Brief for Petitioner at 21, *Jarkesy*, 144 S. Ct. 2177 (No. 22-859)).

⁵¹ *Id.* (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982) (plurality opinion)).

⁵² 430 U.S. 442 (1977) (holding that the government may, under the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended in scattered sections of the U.S. Code), impose civil penalties in an administrative forum — without a jury trial — on employers maintaining unsafe working conditions, *see Atlas Roofing*, 430 U.S. at 445, 460–61).

⁵³ *Jarkesy*, 144 S. Ct. at 2137.

Specifically, the Occupational Safety and Health Act of 1970's⁵⁴ (OSHA) workplace safety standards — the actions at issue in *Atlas Roofing* — were “self-consciously novel” and did not trace back to the common law; thus, the civil-penalty adjudications under OSHA involved public rights and could be assigned to an administrative forum consistent with the Seventh Amendment.⁵⁵ That same conclusion did not hold with the securities fraud action echoing the common law.⁵⁶

Justice Gorsuch concurred.⁵⁷ He highlighted that Article III,⁵⁸ the Seventh Amendment, and the Due Process Clause of the Fifth Amendment⁵⁹ together compelled the Court's decision.⁶⁰ First, Article III judges must decide the securities fraud action because it, “from its nature, is the subject of a suit at the common law” and thus falls within judicial cognizance.⁶¹ Second, the action must be subject to jury trial under the Seventh Amendment because its roots lie in the common law.⁶² And third, the action must be adjudicated consistent with traditional judicial process under the Due Process Clause because it would deprive defendants of property.⁶³ Justice Gorsuch praised the Court's “return . . . to a more traditional understanding of public rights” grounded in historical practice that vindicates the protections afforded by these three constitutional provisions.⁶⁴

Justice Sotomayor dissented.⁶⁵ She reframed the threshold question to “whether Congress can assign a particular matter to a non–Article III factfinder”⁶⁶ — the answer to which depends on the distinction between public and private rights.⁶⁷ Justice Sotomayor defined the “heartland” of public rights as “claims belonging to the Government.”⁶⁸ For her, *Atlas Roofing* offered an on-point example of that definition.⁶⁹ She stressed the similarities between the regulatory scheme in *Atlas Roofing*

⁵⁴ Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended in scattered sections of the U.S. Code).

⁵⁵ *Jarkesy*, 144 S. Ct. at 2137 (quoting *Atlas Roofing*, 430 U.S. at 445, 461).

⁵⁶ *Id.* at 2137–38.

⁵⁷ Justice Gorsuch was joined by Justice Thomas.

⁵⁸ Article III guarantees that the “[t]he judicial power” shall be exercised by salary-protected judges with life tenure. U.S. CONST. art. III, § 1.

⁵⁹ The Fifth Amendment's Due Process Clause provides that the government may not deprive a person of “life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

⁶⁰ *Jarkesy*, 144 S. Ct. at 2140 (Gorsuch, J., concurring).

⁶¹ *Id.* at 2145 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856); *Stern v. Marshall*, 564 U.S. 462, 484 (2011)).

⁶² *Id.*

⁶³ *Id.* at 2145–46 (quoting U.S. CONST. amend. V; 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783, at 661 (Boston, Hilliard, Gray & Co. 1883)).

⁶⁴ *Id.* at 2149; *see id.* at 2149–50.

⁶⁵ Justice Sotomayor was joined by Justices Kagan and Jackson.

⁶⁶ *Jarkesy*, 144 S. Ct. at 2158 (Sotomayor, J., dissenting). She explained that the Seventh Amendment “right applies only in judicial proceedings,” not administrative proceedings. *Id.* at 2157.

⁶⁷ *Id.* at 2158 (citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)).

⁶⁸ *Id.* at 2159; *see also id.* at 2159–61 (examining the history of the public rights doctrine).

⁶⁹ *See id.* at 2161.

and the regulatory scheme for the securities fraud action,⁷⁰ emphasizing that both suits “involve[d] the Government acting in its sovereign capacity to bring a statutory claim on behalf of the United States.”⁷¹ In turn, she rebuked the Court for its inapposite reliance on *Tull v. United States*⁷² and *Granfinanciera*, arguing that the Court “elide[d] the critical distinction[s] between those cases and this one.”⁷³ *Tull* involved an Article III tribunal rather than an administrative tribunal.⁷⁴ And *Granfinanciera* involved a private dispute rather than a dispute regarding governmental rights.⁷⁵ Thus, only *Atlas Roofing* actually controlled,⁷⁶ meaning Congress could assign the securities fraud adjudication to an administrative forum.⁷⁷ Justice Sotomayor warned that the Court’s improper departure from this precedent — or the Court’s “power grab”⁷⁸ — would lead to further neutering of the administrative state.⁷⁹

The Court’s decision involves yet another attempt to navigate a notoriously difficult doctrine.⁸⁰ From its birth in *Murray’s Lessee v. Hoboken Land & Improvement Co.*,⁸¹ the public rights doctrine has evaded definition.⁸² And although the Court disclaimed “definitively explain[ing]”⁸³ public rights in *Jarkesy*, it offered a different doctrinal refinement: The Court incorporated its public rights jurisprudence within an ongoing trend of judicial skepticism toward novelty. The *Jarkesy* Court’s focus on novelty — in the form of a searching inquiry into whether Congress assigned a claim traditionally resolved by the judiciary to an administrative tribunal, thereby creating a novel allocation of power between the three branches — ultimately allowed it to disrupt longstanding expectations regarding the scope of the public rights doctrine and to wrest power away from its coordinate branches.

⁷⁰ *Id.* at 2162–63.

⁷¹ *Id.* at 2163.

⁷² 481 U.S. 412 (1987) (holding that the Seventh Amendment right to a jury trial applied in an action seeking civil penalties in federal court under the Clean Water Act, *id.* at 414, 425).

⁷³ *Jarkesy*, 144 S. Ct. at 2166 (Sotomayor, J., dissenting).

⁷⁴ *Id.* at 2167.

⁷⁵ *Id.* at 2169.

⁷⁶ *Id.* at 2171.

⁷⁷ *See id.* at 2172.

⁷⁸ *Id.* at 2175.

⁷⁹ *See id.* at 2173–74.

⁸⁰ *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *IND. L.J.* 233, 239 (1990) (“The Supreme Court opinions devoted to the subject of the validity of legislative and administrative tribunals are as troubled, arcane, confused and confusing as could be imagined.”).

⁸¹ 59 U.S. (18 How.) 272 (1856).

⁸² *See* Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor*, 35 *BUFF. L. REV.* 765, 793 (1986) (noting that Justice Curtis “[gave] no clear formula for determining what . . . falls into the [public rights] category” in *Murray’s Lessee*).

⁸³ *Jarkesy*, 144 S. Ct. at 2133 (quoting *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018)).

In recent years, the Court has treated “legislative novelty [as] a mark against a law’s constitutionality.”⁸⁴ This skepticism of legislative novelty has, in particular, pervaded its separation-of-powers cases: From decisions involving the presidential removal power to standing to the major questions doctrine, the Court has invoked antinovelty rhetoric to delimit the legislative, executive, and judicial powers.⁸⁵ In line with the current Court’s trend of “plac[ing] a premium on the past,”⁸⁶ antinovelty has essentially frozen the authority of each branch of government based on historical practice. It has worked to “prevent ordinary and legitimate congressional innovation”⁸⁷ straying from that historical practice. Thus, antinovelty’s reference to history has furthered “an agenda of scaling back the federal government’s authority” after the expansion of the administrative state over the past century.⁸⁸ The Court’s reasoning in *Jarkesy* adds the public rights exception to the separation-of-powers decisions undergirded by these antinovelty principles.

More specifically, the crux of the disagreement between the majority and the dissent in *Jarkesy* was the controlling precedent.⁸⁹ To prevail, the majority needed to distinguish *Atlas Roofing* even though “[t]hat case presented the same question as this one.”⁹⁰ The relevant distinction arose in the form of novelty — whether Congress’s allocation of a statutory claim to a non–Article III forum was a novel withdrawal from the Article III judicial power. The majority stressed that OSHA’s occupational and safety health standards were entirely new.⁹¹ They did not “bring [any] common law soil with them.”⁹² Admittedly, the majority may appear to have channeled *pronovelty* rhetoric, ostensibly favoring Congress’s authorization of administrative adjudication for novel causes of action. But its reasoning adhered to the principles underlying antinovelty: The majority fixed each branch’s constitutional authority in historical practice and rejected any novel divisions of that authority.⁹³ Because civil-penalty adjudications under OSHA “had never been brought in an Article III court,”⁹⁴ Congress did not alter the separation-

⁸⁴ Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1415 (2017).

⁸⁵ Note, *supra* note 7, at 2040–48.

⁸⁶ Litman, *supra* note 84, at 1425; see also Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 6 (2020) (explaining that a “central development” in the Roberts Court’s administrative law jurisprudence “is an increased historical focus”).

⁸⁷ Litman, *supra* note 84, at 1491.

⁸⁸ *Id.* at 1425.

⁸⁹ Compare *Jarkesy*, 144 S. Ct. at 2134–36 (reasoning that *Granfinanciera* controlled the case), with *id.* at 2162–63 (Sotomayor, J., dissenting) (reasoning that *Atlas Roofing* controlled the case).

⁹⁰ *Id.* at 2161 (Sotomayor, J., dissenting).

⁹¹ *Id.* at 2137 (majority opinion).

⁹² *Id.* (citing *United States v. Hansen*, 143 S. Ct. 1932, 1944 (2023)).

⁹³ See *id.* at 2139 (“[T]he Seventh Amendment does apply to novel statutory regimes, so long as the claims are akin to common law claims.” (citing *Tull v. United States*, 481 U.S. 412, 421–23 (1987))).

⁹⁴ *Id.*

of-powers balance by assigning them to an administrative tribunal;⁹⁵ however, the assignment of civil-penalty adjudications under the anti-fraud provisions *would* alter that balance by shifting purview over common law descendants from the judicial to the executive branch.⁹⁶

On the majority's view, therefore, antinovelty shapes the public rights doctrine. The constitutional inquiry looks to whether Congress's assignment of a statutory claim to an administrative tribunal is novel because Article III courts have traditionally resolved that kind of claim. The more novel the assignment, the more constitutionally suspect.⁹⁷ The version of antinovelty harnessed in *Jarkesy*, which looks for common law analogues to congressional actions, is uniquely tailored to cases implicating Article III. The Court applied this version in *TransUnion LLC v. Ramirez*,⁹⁸ where it required statutory injuries to have "a close historical or common-law analogue" for Congress to confer Article III standing on plaintiffs.⁹⁹ Logically, in the Article III context, antinovelty must focus on the kind of claims historically heard by Article III courts to identify novel reallocations from the judicial power. That logic also manifested in the *Jarkesy* Court's definition of public rights, which was based on certain historically established exceptions to the common law claims belonging to Article III courts.¹⁰⁰ For the Court, a departure from that historical practice was a cause for constitutional concern.¹⁰¹

The implications of the Court's antinovelty rhetoric in *Jarkesy* mirror those that have been recognized in other separation-of-powers cases: It "produces results that are themselves quite novel" and "aggrandizes the judiciary."¹⁰² First, in deploying language on novelty, the Court's decision deviated from "liquidated understandings about the separation of powers."¹⁰³ Its decision upended the status quo. The federal government, after all, has long assumed that civil-penalty adjudications may constitutionally proceed in administrative tribunals.¹⁰⁴ Therefore, "Congress has enacted countless new statutes in the past 50 years that have empowered federal agencies to impose civil penalties for statutory violations," including in administrative proceedings.¹⁰⁵ Despite the

⁹⁵ See *id.* at 2137.

⁹⁶ See *id.* at 2138.

⁹⁷ Cf. *id.* at 2147 (Gorsuch, J., concurring) (noting that Article III courts generally adjudicated civil-penalty actions for securities fraud "as recently as 2010"); *supra* note 13.

⁹⁸ 141 S. Ct. 2190 (2021).

⁹⁹ *Id.* at 2200, 2204 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)).

¹⁰⁰ *Jarkesy*, 144 S. Ct. at 2132–33.

¹⁰¹ See *id.* at 2133–34.

¹⁰² Note, *supra* note 7, at 2035.

¹⁰³ *Id.* at 2048.

¹⁰⁴ *Jarkesy*, 144 S. Ct. at 2173 (Sotomayor, J., dissenting).

¹⁰⁵ *Id.* (citing Paul R. Verkuil et al., *The Federal Administrative Judiciary*, in 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 777, 861 & nn.350–51 (1992)).

decision in *Jarkesy*, this assumption has not been misplaced; rather, it has logically followed from the Court’s precedents.

Pre-*Jarkesy*, the Court’s precedents on the public rights exception allowed civil claims to which the government was a party to be brought in non–Article III forums.¹⁰⁶ Nearly a century ago, in *Crowell v. Benson*,¹⁰⁷ the Court distinguished “cases of private right and those which arise between the Government and persons subject to its authority.”¹⁰⁸ Fifty years later, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,¹⁰⁹ the Court refused to concretely differentiate between public and private rights because “it suffice[d] to observe that a matter of public rights must at a minimum arise ‘between the government and others.’”¹¹⁰ And, most recently, in *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*,¹¹¹ the Court drew upon these precedents to emphasize that public rights extend to matters in which the government is a party.¹¹² The *Jarkesy* Court, by requiring that the securities enforcement action be adjudicated in an Article III court, ignored decades of precedent, honing in on the novelty of the separation-of-powers balance instead. It thus reworked the relationship between the three branches of government in a manner that strays from historical practice and thereby created a “novel and unexpected result[.]”¹¹³

Second, the Court’s focus on novelty has “aggrandize[d] judicial policymaking power at the political branches’ expense.”¹¹⁴ Its decision effectively carves out an expanded class of administrative claims and reassigns them to Article III courts for adjudication.¹¹⁵ But, as always, the level of generality problem arises: “[T]here does not seem to be a good — or at least consistent — way to select a level of generality at which to describe the past practices and a current statute.”¹¹⁶ Instead, the Court forces rights lying with the government to be funneled through Article III courts according to its own conception of novelty. The majority in *Jarkesy*, for example, characterized securities fraud actions as common law descendants¹¹⁷ — rendering their adjudication in administrative tribunals to be a novel redistribution of authority — and

¹⁰⁶ Kent Barnett, *Due Process for Article III — Rethinking Murray’s Lessee*, 26 GEO. MASON L. REV. 677, 678 (2019) (“[I]n the decades since its inception, . . . [t]he public-rights exception came to stand for, at least, those matters in which the government was a party . . .”).

¹⁰⁷ 285 U.S. 22 (1932).

¹⁰⁸ *Id.* at 50.

¹⁰⁹ 458 U.S. 50 (1982).

¹¹⁰ *Id.* at 69 (plurality opinion) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

¹¹¹ 138 S. Ct. 1365 (2018).

¹¹² *Id.* at 1373.

¹¹³ Note, *supra* note 7, at 2036.

¹¹⁴ *Id.* at 2048.

¹¹⁵ See Keith Bradley, *Supreme Court’s Jarkesy Ruling Upends SEC Enforcement Practices*, BLOOMBERG L. (July 2, 2024, 4:30 AM), <https://news.bloomberglaw.com/us-law-week/supreme-courts-jarkesy-ruling-upends-sec-enforcement-practices> [<https://perma.cc/S2WS-7PWD>].

¹¹⁶ Litman, *supra* note 84, at 1483.

¹¹⁷ *Jarkesy*, 144 S. Ct. at 2130–31.

thereby arrogated power to itself by weakening the administrative state. This characterization is not completely obvious, however. As the dissent observed, the Court had previously considered a “virtually indistinguishable” statutory scheme and deemed it unrelated to the common law.¹¹⁸ The Court thus wielded its discretion to draw an arbitrary line between novel and not novel. It prohibited Congress from exercising its own judgment about the benefits that may accompany administrative adjudications, curbing Congress’s ability to address “the ever-increasing and evolving problems faced by our society.”¹¹⁹ The Court’s reliance on novelty thus allowed unelected judges to substitute their own policy preferences for those of the democratically elected branches.

The amount of power that the Court has accorded itself cannot be emphasized enough. The *Jarkesy* decision left open important questions about the future of public rights.¹²⁰ It did not address whether administrative agencies may adjudicate claims that do not pursue civil penalties but other remedies, such as disgorgement. Nor did it discuss whether its decision is cabined to the SEC’s antifraud provisions or extends to other agencies. Will suits brought by the Department of Labor for the unlawful withholding of wages under the Fair Labor Standards Act, which are based on common law breach of contract claims, need to be adjudicated in Article III courts?¹²¹ What about FTC suits for unfair or deceptive trade practices, which may arguably resemble common law fraud and deceit claims?¹²² Or EPA suits for hazardous air pollution under the Clean Air Act, which are conceivably akin to common law nuisance claims?¹²³ The answers to these questions will affect how Congress and the Executive address harms to the public, yet they depend on the Court’s arbitrary distinctions between novel and not novel.

At bottom, the Court has continued to empower the judiciary at the expense of its coordinate branches by extending antinovelt rhetoric into the domain of public rights. It has positioned itself as the ultimate arbiter of our constitutional system and, in turn, recast the longstanding balance associated with that system. The Court has thus “elevat[ed] the judiciary *above* the separation of powers,” ignoring that it “is a

¹¹⁸ *Id.* at 2163 (Sotomayor, J., dissenting).

¹¹⁹ *Id.* at 2175.

¹²⁰ See James Fallows Tierney, *Jarkesy’s First-Order Consequences*, YALE J. ON REGUL.: NOTICE & COMMENT (July 3, 2024), <https://www.yalejreg.com/nc/jarkesys-first-order-consequences-james-fallows-tierney> [<https://perma.cc/3HP3-3VD8>].

¹²¹ See *Su v. Los Cocos Mexican Rest., Inc.*, No. 22-1004, 2023 WL 8005032, at *11–13 (D. Kan. Nov. 17, 2023).

¹²² *But see Meta Platforms, Inc. v. FTC*, No. 23-3562, 2024 WL 1121424, at *17–19 (D.D.C. Mar. 15, 2024).

¹²³ *Cf. Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415 (2011) (holding that the Clean Air Act “displace[s]” certain “federal common-law public nuisance claims”).

participant in the Constitution’s separation-of-powers system” as well.¹²⁴ These observations about the Court are not new, but the last Term has particularly showcased the Court’s usurpation of power. From *Loper Bright Enterprises v. Raimondo*¹²⁵ to *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*,¹²⁶ the Court has repeatedly reallocated authority to itself while shortchanging the Executive. Its decision in *Jarkesy* represents yet another step in that judicial project to hobble the administrative state — all behind the façade of novelty.

¹²⁴ Allen Sumrall & Beau J. Baumann, *Jarkesy and Judicial Aggrandizement*, YALE J. ON REGUL.: NOTICE & COMMENT (June 28, 2024), <https://www.yalejreg.com/nc/ijarkesy-i-and-judicial-aggrandizement-by-allen-sumrall-and-beau-j-baumann> [<https://perma.cc/64C6-P4MG>].

¹²⁵ 144 S. Ct. 2244 (2024) (overruling *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), thereby requiring courts to “exercise their independent judgment in deciding whether an agency has acted within its statutory authority,” *Loper Bright*, 144 S. Ct. at 2273).

¹²⁶ 144 S. Ct. 2440 (2024) (holding that the statute of limitations for Administrative Procedure Act challenges begins to run when “the plaintiff is injured by final agency action” rather than when the relevant rule is finalized, *id.* at 2460).