

NOTES

UNLINKING THE SEVENTH AMENDMENT AND ARTICLE III

The Seventh Amendment stands on uneasy footing outside of Article III courts. Over 150 years of case law confirm that proposition.¹ And *SEC v. Jarkesy*² does, too. For even as the *Jarkesy* Court stressed that the forum where a case is brought has no bearing on Seventh Amendment rights,³ it still relied on the public rights doctrine (PRD) — a Seventh Amendment exception⁴ that applies only outside Article III.⁵ But while it has long been apparent that the Seventh Amendment, Article III, and the PRD are somehow intertwined, it's unclear precisely how or why.⁶ After *Jarkesy*, it's time to decide.

The PRD arose as an Article III doctrine.⁷ Article III of the U.S. Constitution vests “[t]he judicial Power of the United States” in the federal courts,⁸ and that judicial power can be neither wielded nor encroached upon by the political branches.⁹ This simple construction, however, belies significant complexity at the margins. The executive and legislative branches frequently interpret the law, apply law to fact, and adjudicate disputes in forums that look quite a lot like courts, but which are staffed by political officials rather than by Article III judges.¹⁰ These borderlands between judging and executing, or judging and legislating, are the heartland of the PRD. Put simply, the PRD provides an exception under which public rights cases can be adjudicated in non-Article III tribunals without violating Article III or the separation of powers.¹¹

¹ See *infra* section II.A, pp. 596–97.

² 144 S. Ct. 2117 (2024).

³ *Id.* at 2135 (“[W]hat matters is the substance of the action, not where Congress has assigned it.” (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989))).

⁴ Whether one sees the PRD as an Article III or a Seventh Amendment exception, in practical effect, it acts as an exception to both. See, e.g., *id.* at 2131–39 (applying the PRD to Seventh Amendment challenge).

⁵ See Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1098 (1999).

⁶ See *id.* at 1092 (“While the Court has always approved of jury-less adjudication in administrative agencies, the rationale for such adjudication has been difficult to pin down.”); Richard Loren Jolly, *The Administrative State’s Jury Problem*, 98 WASH. L. REV. 1187, 1192 (2023) (describing the Court as having never “fully explore[d] the connection between” the Seventh Amendment and Article III).

⁷ See generally Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 951–69 (1988) (examining various strands of the PRD).

⁸ U.S. CONST. art. III, § 1.

⁹ Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 988 (2011).

¹⁰ See Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 264 (1990).

¹¹ *SEC v. Jarkesy*, 144 S. Ct. 2117, 2158 (2024) (Sotomayor, J., dissenting).

The Seventh Amendment, on the other hand, is quite distinct from Article III. The Seventh Amendment was ratified in 1791 as part of the Bill of Rights,¹² and it “preserve[s]” an individual’s right to a jury trial in “Suits at common law.”¹³ While this jury trial guarantee does not have an obvious dependence on the forum where an action is brought,¹⁴ the Supreme Court has consistently analyzed Seventh Amendment challenges differently for non–Article III tribunals than for Article III courts.¹⁵ The connection between the Seventh Amendment and Article III, however, has not been clearly explained by the Court.¹⁶

Two explanations of the relationship between these provisions have arisen to fill this gap. Under the first — which this Note refers to as the “forum-dependent” view — the Seventh Amendment simply does not apply outside Article III courts.¹⁷ Under the second — which is referred to as the “independent” view — the Seventh Amendment is independent from Article III, and the PRD is both an Article III *and* a Seventh Amendment exception.¹⁸ To date, it has been largely unnecessary to reconcile the forum-dependent and independent views of the Seventh Amendment because they often¹⁹ come out the same way: Where non–Article III adjudication is permissible, Seventh Amendment challenges usually fail, either (1) because the Seventh Amendment is forum dependent and does not apply or (2) because the PRD provides an exception to both Article III and the Seventh Amendment.²⁰ In either case, no jury would be required.

¹² Jolly, *supra* note 6, at 1202 n.100.

¹³ U.S. CONST. amend. VII.

¹⁴ Sward, *supra* note 5, at 1139.

¹⁵ See *infra* section II.A, pp. 596–97; Sward, *supra* note 5, at 1092; see also Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1037 (1994) (describing Seventh Amendment protections for common law claims as “virtually destroyed” in Article I courts).

¹⁶ See Jolly, *supra* note 6, at 1192.

¹⁷ See, e.g., William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1571 (2020) (“[I]f . . . non–Article III adjudication is permissible, the Seventh Amendment should be ignored.”); Transcript of Oral Argument at 31, SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (No. 22-859), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-859_n758.pdf [<https://perma.cc/7U7A-U7W7>] (“[T]he Seventh Amendment depends on the forum.”); *Jarkesy*, 144 S. Ct. at 2157 (Sotomayor, J., dissenting).

¹⁸ See, e.g., Richard H. Fallon, Jr., *Non–Article III Federal Tribunals: An Essay on the Relation Between Theory and Practice*, 99 NOTRE DAME L. REV. 1691, 1704 n.84 (2024) (“[T]he same public rights doctrine provides an exception to both the Seventh Amendment’s jury trial requirement and Article III’s requirement that federal adjudicators must enjoy tenure and salary protections.”); Klein, *supra* note 15, at 1028–29; Mark I. Greenberg, Comment, *The Right to Jury Trial in Non–Article III Courts and Administrative Agencies After Granfinanciera v Nordberg*, 1990 U. CHI. LEGAL F. 479, 480, 506.

¹⁹ A prominent exception arose in the bankruptcy context and is discussed *infra* section II.B, pp. 597–98.

²⁰ Compare *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (rejecting Seventh Amendment challenge as “resolve[d]” by Article III analysis), with *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 460–61 (1977) (holding the PRD satisfied as applied to Seventh Amendment challenge).

Jarkesy brings new urgency to the resolution of this question. *Jarkesy* has been described by some as “earthshattering,”²¹ and yet others have characterized it as likely to change relatively little.²² These different perspectives might well rest on divergent conceptions of the fit between the Seventh Amendment and Article III. At oral argument, several Justices questioned Article III’s relevance to the Seventh Amendment,²³ and that issue later formed a critical point of disagreement between the majority and the dissent.²⁴ This shows not only a lack of consensus among the Justices regarding how these provisions relate, but also that such differences could be outcome determinative. What’s more, the majority opinion in *Jarkesy* can be read as endorsing yet another view of the PRD, under which the permissibility of non–Article III adjudication might depend on whether a jury trial right would attach under the Seventh Amendment.²⁵ This view — which will be referred to as the “jury-dependent” view — essentially flips the forum-dependent view on its head: rather than the Seventh Amendment depending on the forum, non–Article III adjudication would depend on the Seventh Amendment. Such an approach could lead to more divergent outcomes²⁶ and bring further confusion and frustration to an area of law already described as “muddle[d],”²⁷ “convoluted,”²⁸ and “constitutionally groundless.”²⁹

This Note seeks to bring some clarity to this morass of doctrine at the intersection of Article III, the PRD, and the Seventh Amendment. And it argues that it is not too late to choose a path that is constitutionally justifiable and aligned with precedent. This Note proceeds in three parts. First, it provides background on Article III and the Seventh Amendment. Second, it examines three views of the relationship between those provisions: the forum-dependent view, the independent view, and a possible jury-dependent view hinted at in *Jarkesy*. Finally, it examines the advantages and drawbacks of the approaches it defines, ultimately concluding that the independent view would be the most defensible and least disruptive option moving forward.

²¹ *Jarkesy*, 144 S. Ct. at 2174 (Sotomayor, J., dissenting).

²² See Mark Tushnet, *Today’s Supreme Court and the Administrative State*, BALKINIZATION (July 9, 2024, 1:37 PM), <https://balkin.blogspot.com/2024/07/todays-supreme-court-and-administrative.html> [<https://perma.cc/62PG-5YU9>] (describing *Jarkesy* as not likely to implicate “a great deal of the work of the modern administrative state”).

²³ See Transcript of Oral Argument, *supra* note 17, at 30–34, 48.

²⁴ Compare *Jarkesy*, 144 S. Ct. at 2127 (“This case poses a straightforward question: whether the Seventh Amendment entitles a defendant to a jury trial . . .”), with *id.* at 2157 (Sotomayor, J., dissenting) (“Although this case involves a Seventh Amendment challenge, the principal question at issue is one rooted in Article III . . .”).

²⁵ See *infra* p. 600.

²⁶ See *infra* p. 600.

²⁷ Sward, *supra* note 5, at 1108 n.368.

²⁸ Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1125 (2022).

²⁹ Jolly, *supra* note 6, at 1191.

I. BACKGROUND ON ARTICLE III AND THE SEVENTH AMENDMENT

“Well, I — I don’t understand why you keep shifting to Article III. I mean, the question before us is the Seventh Amendment . . .”

— Justice Alito, *SEC v. Jarkesy* oral argument³⁰

A. Article III and the Public Rights Doctrine

A hallmark of Article III, which vests “[t]he judicial Power of the United States” in the federal courts,³¹ is independence: By providing judges with tenure and compensation protections,³² Article III “[i]nsulates the judiciary from the vicissitudes of politics,”³³ which serves separation of powers and individual liberty values.³⁴ Because those goals would be undermined if Congress could assign the judicial function to political actors without such independence,³⁵ Congress may not “confer the Government’s ‘judicial Power’ on entities outside Article III.”³⁶

Yet Congress has assigned certain matters to non–Article III tribunals, to adjudicators and executive officers without life tenure, since the Founding era.³⁷ And that practice has been repeatedly blessed by the Supreme Court.³⁸ Given this historical pedigree, courts and commentators agree that some “exceptions”³⁹ to Article III adjudication are

³⁰ Transcript of Oral Argument, *supra* note 17, at 48.

³¹ U.S. CONST. art. III, § 1.

³² *See id.*

³³ Abraham G. Gerges, Justice, N.Y. Sup. Ct., Additional Remarks at The Brooklyn Women’s Bar Association Symposium: Independence Under Siege: Unbridled Criticism of Judges and Prosecutors (Nov. 21, 1996), in 5 J.L. & POL’Y 541, 541 (1997).

³⁴ *See* Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 848 (1986); THE FEDERALIST NO. 81, at 482 (Alexander Hamilton) (Clinton Rossiter ed., 2003); THE FEDERALIST NO. 78, *supra*, at 465 (Alexander Hamilton).

³⁵ *See* Baude, *supra* note 17, at 1515.

³⁶ *Stern v. Marshall*, 564 U.S. 462, 484 (2011).

³⁷ *See* Baude, *supra* note 17, at 1513; *Freytag v. Comm’r*, 501 U.S. 868, 909 (1991) (Scalia, J., concurring in part and concurring in the judgment) (noting the 1791 U.S. Comptroller’s authority to decide appeals of “all claims concerning the settlement of accounts” (quoting Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 238 (1989))); *see also id.* (describing Congress’s “wide discretion to assign” matters to non–Article III tribunals as “unremarkable” (quoting *id.* at 889 (majority opinion))).

³⁸ *See, e.g.,* *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 541–46 (1828) (Marshall, C.J.) (rejecting constitutional challenge to non–Article III territorial court); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 281–86 (1856) (permitting non–Article III adjudication of case involving public right); *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373–75 (2018) (same).

³⁹ The PRD has been referred to as both a “doctrine” and an “exception.” *Compare Oil States*, 138 S. Ct. at 1373 (doctrine), *with SEC v. Jarkesy*, 144 S. Ct. 2117, 2127 (2024) (exception). This Note defaults to “doctrine,” as some public rights actions, such as those that can be deemed executive, *see infra* note 150, would not seem to require an exception to be resolved by that branch.

permissible.⁴⁰ But there is significant divergence regarding where and how to draw the line between matters that may be resolved in non-Article III tribunals and those that require resolution by an Article III court.⁴¹ Some judges draw this line by allowing non-Article III adjudication for a handful of historical exceptions, including territorial courts, military tribunals, and tribunals that adjudicate cases involving “public rights.”⁴²

Of these, public rights cases are the most elusive, with boundaries that have escaped precise definition for more than a century.⁴³ For even where semi-concrete categories of public rights emerge from the PRD case law,⁴⁴ they often rely on inconsistent justifications. For example, claims against the United States are one type of “public right,” and their exception from Article III is often justified on the ground that Congress may condition its waiver of sovereign immunity by consenting to suit only in a non-Article III tribunal.⁴⁵ Others have suggested that public rights implicate political questions that do not require an exercise of the Article III judicial power.⁴⁶ This Note does not seek to concretely define the bounds of this complex doctrine; it instead simply acknowledges that the PRD takes many forms⁴⁷ and otherwise accepts the *Jarkesy* Court’s definition of public rights as matters that “historically could have been determined exclusively by [the executive and legislative] branches.”⁴⁸

Finally, it’s important to emphasize that the PRD is not the only basis on which non-Article III adjudication may be justified. Territorial courts and courts-martial are two Article III exceptions that do not rely

⁴⁰ Sward, *supra* note 5, at 1040; see *Jarkesy*, 144 S. Ct. at 2132–34.

⁴¹ Fallon, *supra* note 18, at 1696–719 (describing the Supreme Court’s shifting jurisprudence on the permissible scope of non-Article III adjudication).

⁴² *Id.* at 1692. This “formalist” approach stands in contrast with the Supreme Court’s more functionalist precedents in this area. See *id.* at 1696–719.

⁴³ See *Oil States*, 138 S. Ct. at 1373 (“This Court has not ‘definitively explained’ the distinction between public and private rights . . .” (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) (plurality opinion))).

⁴⁴ See, e.g., Jack M. Beermann, *Administrative Adjudication and Adjudicators*, 26 GEO. MASON L. REV. 861, 881–84 (2019) (describing “six categories of public rights cases,” *id.* at 881); Sward, *supra* note 5, at 1073–81 (three PRD categories).

⁴⁵ See Beermann, *supra* note 44, at 881; see also *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

⁴⁶ See Sward, *supra* note 5, at 1065; Note, *Political Questions, Public Rights, and Sovereign Immunity*, 130 HARV. L. REV. 723, 733–36 (2016).

⁴⁷ One formulation describes the “core” of the PRD as comprised of “three main classes of cases”: (1) “claims against the United States” for benefits, money, or land (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929)); (2) disputes involving “coercive governmental conduct”; and (3) “immigration cases,” over which the political branches have plenary control. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 354 (7th ed. 2015); see, e.g., *United States v. Coe*, 155 U.S. 76, 85 (1894) (land claim); *United States v. Duell*, 172 U.S. 576, 582–83 (1899) (patent); *Murray’s Lessee*, 59 U.S. (18 How.) at 284–85 (seizure); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (fine); *Fong Yue Ting v. United States*, 149 U.S. 698, 730–31 (1893) (immigration).

⁴⁸ *SEC v. Jarkesy*, 144 S. Ct. 2117, 2132 (2024) (alteration in original) (quoting *Stern v. Marshall*, 564 U.S. 462, 493 (2011)).

on the PRD.⁴⁹ And while *private* rights require Article III resolution as a general rule,⁵⁰ the Supreme Court has recognized exceptions to that rule — at times premised on a functional balancing test,⁵¹ but more often on some combination of waiver or consent,⁵² the adjunct model,⁵³ or appellate review.⁵⁴ (Though the Supreme Court has sometimes analyzed such cases under the public rights framework,⁵⁵ non-Article III adjudication of private rights can be traced to a different line of cases and are treated as distinct for purposes of this Note.⁵⁶) Even where these exceptions might be satisfied, Congress’s authority to place private rights beyond the reach of Article III courts is limited, particularly when those rights are based in common law claims.⁵⁷

B. The Seventh Amendment

The Seventh Amendment “preserve[s]” the right to a jury trial in “Suits at common law.”⁵⁸ Because it uses the word “preserve[.],” the Seventh Amendment has been interpreted to protect the jury trial right as it existed when the amendment was ratified in 1791.⁵⁹ At that time,

⁴⁹ See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64–67 (1982) (plurality opinion).

⁵⁰ See *Jarkesy*, 144 S. Ct. at 2132 (“If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory.” (citing *Stern*, 564 U.S. at 484)).

⁵¹ See, e.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986); see *Sward*, *supra* note 5, at 1071 (describing balancing test as perhaps supplementing the PRD to allow non-Article III adjudication of private rights).

⁵² E.g., *Schor*, 478 U.S. at 849 (waiver of individual interest in Article III adjudication); *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 674 (2015) (same).

⁵³ See, e.g., *Crowell v. Benson*, 285 U.S. 22, 51–54 (1932) (analogizing administrative factfinding to special masters, though noting the court retained “full authority . . . to deal with matters of law,” *id.* at 54); *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 450 n.7 (1977) (“[T]his Court has accepted factfinding by an administrative agency . . . only as an adjunct to an Art. III court . . .”).

⁵⁴ The premise of the appellate review theory is that “adequately searching appellate review” by an Article III court may “satisfy the requirements of article III.” Fallon, *supra* note 7, at 918. See generally *id.* (advocating for appellate review theory); Merrill, *supra* note 9 (exploring origins of appellate review model).

⁵⁵ See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (describing liability between private parties under a federal statutory scheme as “not a purely ‘private’ right, but bear[ing] many of the characteristics of a ‘public’ right”).

⁵⁶ See *Crowell*, 285 U.S. at 54 (permitting non-Article III adjudication despite concluding that the matter did “not fall within the categories [of public rights] . . . described,” but instead was “one of private right,” *id.* at 51); Fallon, *supra* note 7, at 923–24 (noting that “*Crowell* went beyond previous cases” in “the domain of private rights,” *id.* at 924). This view is admittedly at odds with that of judges who would limit non-Article III adjudication to only territorial courts, courts-martial, and public rights cases. See *supra* note 42 and accompanying text.

⁵⁷ See, e.g., *Schor*, 478 U.S. at 852 (concluding that the “essential attributes of judicial power” were left to Article III courts); Beermann, *supra* note 44, at 890 (“The Court has been careful to set conditions on administrative adjudication of [certain private rights] claims . . . so it does not threaten the domain of the Article III courts or deprive people of their right to an Article III tribunal.”).

⁵⁸ U.S. CONST. amend. VII.

⁵⁹ Jolly, *supra* note 6, at 1204.

actions could be brought in one of two tribunals: either in a court of law, where juries were empaneled, or in a court of equity, where they were not.⁶⁰ The modern Seventh Amendment test thus seeks to answer a binary question: Would the action have been brought in a court of law or a court of equity in 1791?⁶¹ A jury trial right attaches only if the answer is the former.⁶²

Courts use a two-part test to determine whether a given claim is legal or equitable for Seventh Amendment purposes. First, they consider whether historical analogues of the claim would have been treated as legal or equitable in 1791.⁶³ Second, they ask whether the remedies sought are “legal or equitable in nature.”⁶⁴ Because “some causes of action sound in both law and equity,” the remedies prong is “more important” than the historical analogues prong.⁶⁵ This means that even claims with an equitable analogue or no historical analogue can trigger a jury trial right when legal remedies are sought.⁶⁶ The Seventh Amendment thus extends in effect to all legal claims; it is not limited to those that existed “at common law” as the amendment’s text might suggest.⁶⁷

Though the Seventh Amendment does not on its face depend on the forum where an action is brought,⁶⁸ the Supreme Court has frequently deviated from the above analysis for non–Article III tribunals — often either disposing of Seventh Amendment challenges out of hand⁶⁹ or instead adding a third prong that asks whether the PRD would permit juryless adjudication notwithstanding an action’s legal nature.⁷⁰ These

⁶⁰ *Id.* at 1203.

⁶¹ *Tull v. United States*, 481 U.S. 412, 417 (1987).

⁶² *Id.*

⁶³ *Id.* (citing *Pernell v. Southall Realty*, 416 U.S. 363, 378 (1974); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477 (1962)). For example, actions in debt are traditionally legal, while nuisance actions were historically brought in equity. *See id.* at 418–20.

⁶⁴ *Id.* at 417–18 (citing *Curtis v. Loether*, 415 U.S. 189, 196 (1974); *Ross v. Bernhard*, 396 U.S. 531, 542 (1970)). Civil penalties are often considered legal, while disgorgement, restitution, and injunctive relief are considered equitable. *See id.* at 422–25.

⁶⁵ *SEC v. Jarkesy*, 144 S. Ct. 2117, 2129 (2024) (quoting *Tull*, 481 U.S. at 421).

⁶⁶ *See Tull*, 481 U.S. at 420–21 (conceding the claim “resemble[d]” an equitable action, *id.* at 420, but describing “the relief sought” as the “[m]ore important” inquiry, *id.* at 421 (second alteration in original) (quoting *Curtis*, 415 U.S. at 196)); *Curtis*, 415 U.S. at 193–94 (rejecting inapplicability of Seventh Amendment to “new causes of action,” *id.* at 193).

⁶⁷ Compare U.S. CONST. amend. VII (“In Suits at common law, . . . the right of trial by jury shall be preserved . . .”), with *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830) (“By *common law*, [the Framers] meant . . . not merely suits, which the *common law* recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained . . .”).

⁶⁸ 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, 409 (1995) (“[T]here is absolutely no legitimate, principled basis on which to conclude that a jury trial right is somehow inapplicable to [non–Article III] proceedings.”). But see Brief for the Petitioner at 20, *Jarkesy*, 144 S. Ct. 2117 (No. 22-859) (arguing PRD cases are not “Suits” under the Seventh Amendment).

⁶⁹ E.g., *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 286 (1856).

⁷⁰ E.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51–64 (1989).

two approaches form the basis of the forum-dependent and independent views of the PRD and are detailed in the next Part.

II. THREE VIEWS OF THE SEVENTH AMENDMENT AND ARTICLE III

The Seventh Amendment and Article III frequently travel in lock-step: Where non-Article III adjudication is permissible, typically no jury is required. Yet despite this close connection, the Article III and Seventh Amendment analyses are clearly distinct.⁷¹ Article III bars non-Article III adjudication unless some exception applies, while the Seventh Amendment “preserve[s]” the jury trial right in legal suits. To illustrate the overlap between these provisions, this Part maps several decisions to their Article III and Seventh Amendment holdings. It then outlines the origins of the forum-dependent and independent views of the Seventh Amendment before moving to an analysis of *Jarkesy*, where the Supreme Court hinted at a possible third, jury-dependent view.

Table 1: Article III and Seventh Amendment Holdings⁷²

	ART. III NOT REQUIRED	ART. III REQUIRED (OR USED)
JURY NOT REQUIRED	<i>Stranahan</i> * ⁷³ (legal) <i>Jones & Laughlin</i> ⁷⁴ <i>Murray’s Lessee</i> ⁷⁵ (legal) <i>Atlas Roofing</i> * ⁷⁶ (legal) <i>Oil States</i> ⁷⁷ (legal)	Actions seeking equitable remedies ⁷⁸
JURY REQUIRED	<i>Granfinanciera</i> * ⁷⁹	<i>Tull</i> * ⁸⁰ <i>Stern</i> * ⁸¹ <i>Jarkesy</i> * ⁸²

⁷¹ Sward, *supra* note 5, at 1099.

⁷² In cases marked with an asterisk, only Article III or the Seventh Amendment were at issue.

⁷³ *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909). *The Seventh Amendment was not addressed in *Stranahan*.

⁷⁴ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁷⁵ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

⁷⁶ *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442 (1977). *Article III was not at issue in this case.

⁷⁷ *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365 (2018).

⁷⁸ See, e.g., *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 94–97 (2d Cir. 1978) (holding that no jury trial right attached where SEC sought equitable remedies in an Article III court).

⁷⁹ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). *Article III was not at issue. *Id.* at 64.

⁸⁰ *Tull v. United States*, 481 U.S. 412 (1987). **Tull* was filed in an Article III court. *Id.* at 415.

⁸¹ *Stern v. Marshall*, 564 U.S. 462 (2011). *The Seventh Amendment was not at issue in *Stern*, but the case involved claims for damages, *id.* at 470, which implicate the Seventh Amendment, see *SEC v. Jarkesy*, 144 S. Ct. 2117, 2129–30 (2024) (citing, *inter alia*, *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993)).

⁸² *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024). *No Article III challenge was brought in *Jarkesy*, but the Court held that Article III adjudication was required. See *id.* at 2139.

This table shows that Article III and the Seventh Amendment often converge: All legal claims in the top-left quadrant would give rise to a jury trial right in an Article III court but did not (or presumably would not) in a non-Article III forum. It also shows, however, that those provisions may diverge: If the Seventh Amendment flowed inexorably from Article III, *Granfinanciera* would be inexplicable. Finally, this table serves as a baseline against which to measure the potential ramifications of adopting different views of the Seventh Amendment and Article III.

A. Origins of the Forum-Dependent View

The forum-dependent view of the Seventh Amendment — under which the Seventh Amendment is understood not to apply in non-Article III tribunals — is rooted in well over a century of case law. Seventh Amendment challenges to non-Article III proceedings are as old as the PRD itself, and from the beginning, the Supreme Court has often simply disposed of such challenges after finding Article III satisfied. Consider the 1856 case *Murray's Lessee v. Hoboken Land & Improvement Co.*,⁸³ in which the Federal Treasury Department had, without the aid of a jury or an Article III court, seized the property of an employee whose accounts had been found severely delinquent.⁸⁴ The plaintiffs challenged the validity of that seizure on both Article III and Seventh Amendment grounds.⁸⁵ In deciding for the Treasury, the Court focused almost exclusively on Article III;⁸⁶ after finding that Article satisfied, the Court stated simply: “This renders the other questions proposed immaterial, and no answer need be returned thereto.”⁸⁷

Similarly conclusory disposals of Seventh Amendment challenges were common in the cases that followed. In *Block v. Hirsh*,⁸⁸ *Oceanic Steam Navigation Co. v. Stranahan*,⁸⁹ and *McElrath v. United States*,⁹⁰ the Court said that the Seventh Amendment either did not apply⁹¹ or else “amount[ed] to little”⁹² where matters could be resolved without an exercise of judicial power. And where these cases had implied that the Seventh Amendment’s application might depend on the forum, later cases would make that principle explicit. In 1974, the Supreme Court described its decision in *NLRB v. Jones & Laughlin Steel Corp.*⁹³ as “stand[ing] for the proposition that the Seventh Amendment is generally

⁸³ 59 U.S. (18 How.) 272 (1856). *Murray's Lessee* is often cited as the PRD’s source. See, e.g., Sward, *supra* note 5, at 1064.

⁸⁴ *Murray's Lessee*, 59 U.S. (18 How.) at 273–76.

⁸⁵ *Id.* at 273.

⁸⁶ See *id.* at 275–86.

⁸⁷ *Id.* at 286.

⁸⁸ 256 U.S. 135 (1921).

⁸⁹ 214 U.S. 320 (1909).

⁹⁰ 102 U.S. 426 (1880).

⁹¹ *Id.* at 440.

⁹² *Hirsh*, 256 U.S. at 158.

⁹³ 301 U.S. 1 (1937).

inapplicable in administrative proceedings.”⁹⁴ That sentiment was echoed in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*,⁹⁵ where the Court stated that “the right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved.”⁹⁶ These cases have been read for the proposition that the Seventh Amendment is forum dependent and does not apply outside Article III⁹⁷ — a view the Supreme Court seemed to endorse as recently as 2018.⁹⁸

B. Origins of the Independent View

The independent view of the Seventh Amendment — under which the Seventh Amendment operates independently from Article III — can be traced to the Supreme Court’s 1988 decision in *Granfinanciera, S.A. v. Nordberg*.⁹⁹ *Granfinanciera* began in a non-Article III bankruptcy court, where the bankruptcy trustee brought fraudulent conveyance claims¹⁰⁰ against third parties who had not made claims against the bankruptcy estate.¹⁰¹ The third parties requested a jury trial, which the bankruptcy judge denied.¹⁰² The Supreme Court ultimately reversed, holding that the Seventh Amendment guaranteed a jury trial right.¹⁰³ By holding that the parties were entitled to a jury even though they were in a non-Article III bankruptcy court,¹⁰⁴ *Granfinanciera* seemed to say that the Seventh Amendment *does* apply in non-Article III tribunals¹⁰⁵ — and thus, that it is not forum dependent after all.

Given the *Granfinanciera* Court’s application of the Seventh Amendment to a non-Article III action, one might wonder why the Seventh Amendment’s independence from Article III isn’t an open-and-shut case after *Granfinanciera*.¹⁰⁶ The reason is that *Granfinanciera* was itself quite ambiguous on this point. For one, the *Granfinanciera* Court stated that the Seventh Amendment and Article III “require[] the

⁹⁴ *Curtis v. Loether*, 415 U.S. 189, 194 (1974).

⁹⁵ 430 U.S. 442 (1977).

⁹⁶ *Id.* at 460–61.

⁹⁷ See *id.* at 451–55 (relying on, inter alia, *Jones & Laughlin*, *Hirsh*, and *Stranahan* in concluding that actions may be assigned to agencies without a jury).

⁹⁸ See *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018); *Baude*, *supra* note 17, at 1571.

⁹⁹ 492 U.S. 33 (1989).

¹⁰⁰ Fraudulent conveyance actions are traditional common law claims. *Id.* at 43.

¹⁰¹ *Id.* at 36, 48.

¹⁰² *Id.* at 37.

¹⁰³ *Id.* at 64–65.

¹⁰⁴ *Id.* at 64; see also *Sward*, *supra* note 5, at 1098.

¹⁰⁵ See *Greenberg*, *supra* note 18, at 480 (“[T]he Court held in *Granfinanciera v. Nordberg* that in bankruptcy courts the Seventh Amendment applies . . . [T]his principle appears applicable . . . to all administrative agencies . . .”).

¹⁰⁶ See, e.g., Transcript of Oral Argument, *supra* note 17, at 20 (Justice Gorsuch noting that *Granfinanciera* “said the Seventh Amendment applied . . . in a non-Article III tribunal”).

same answer.”¹⁰⁷ This language is difficult to explain if the Seventh Amendment is independent from Article III, and it seems to contradict the Court’s holding: If Article III and the Seventh Amendment “require[] the same answer,” how would the claims at issue trigger a jury trial right but not violate Article III?¹⁰⁸ Second, and relatedly, the *Granfinanciera* Court did not say whether the action comported with Article III because the parties did not argue that issue before the Court.¹⁰⁹ Had they, the Court might have held that Article III adjudication was required¹¹⁰ — in which case, the Seventh Amendment would have continued to look a bit forum dependent after all. All told, *Granfinanciera* left commentators scratching their heads regarding the relationship between the Seventh Amendment, Article III, and the PRD.¹¹¹

C. A Third Approach? Jarkesy and the Jury-Dependent View

In 2011, the SEC launched an investigation into George Jarkesy and Patriot28 (together, “Jarkesy”) for potential securities fraud violations.¹¹² A non-Article III administrative law judge (ALJ) at the SEC ultimately concluded that Jarkesy had committed securities fraud.¹¹³ The Commission affirmed that determination, barred Mr. Jarkesy from certain securities activities, and imposed \$300,000 in civil penalties and \$685,000 in disgorgement.¹¹⁴ Jarkesy appealed the SEC’s decision to the Fifth Circuit, which found in his favor on three constitutional challenges, including that the SEC action violated Jarkesy’s Seventh Amendment rights.¹¹⁵

Consider for a moment how the two views of the Seventh Amendment described above might have been applied. Under the forum-dependent view, a judge would first ask whether non-Article III adjudication of the SEC action was permissible; if it was, the Seventh

¹⁰⁷ *Granfinanciera*, 492 U.S. at 53.

¹⁰⁸ See Sward, *supra* note 5, at 1094 (“The outcome of *Granfinanciera* . . . belies [its] language.”); see also *id.* n.296 (“If a jury is required, and if the Seventh Amendment and Article III require the same analysis, it would seem that an Article III court is required as well.”).

¹⁰⁹ *Granfinanciera*, 492 U.S. at 64; Sward, *supra* note 5, at 1096 n.310 (“The Article III issue was not argued before the Supreme Court in *Granfinanciera*, so the absence of a decision on the matter is not determinative.”).

¹¹⁰ The Supreme Court later held that similar claims required Article III adjudication. See *Stern v. Marshall*, 564 U.S. 462, 503 (2011); *id.* at 495 (characterizing *Stern*’s common law claim as “the very type of claim” that was at issue in *Granfinanciera*).

¹¹¹ See *supra* note 108; see also Redish & La Fave, *supra* note 68, at 420–21 (describing the application of the PRD to Seventh Amendment challenges as “puzzling”); *id.* at 426 (“[Q]uestions . . . remain as to why . . . the Seventh Amendment right [in *Granfinanciera*] in any way turned on the public or private nature of the right . . .”).

¹¹² *Jarkesy v. SEC*, 34 F.4th 446, 450 (5th Cir. 2022). Mr. Jarkesy managed two hedge funds with roughly \$24 million in assets; Patriot28 acted as his investment adviser. *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 450–51. The other challenges were that (1) the tenure protections for SEC ALJs violated Article II and (2) the authority given to the SEC to determine whether to bring enforcement actions in administrative or Article III tribunals violated the nondelegation doctrine. *Id.* at 451, 459.

Amendment challenge would fail.¹¹⁶ Under the independent view, a judge would likely begin with the two-part Seventh Amendment test as the Court did in *Granfinanciera* and then turn to the PRD to determine whether an exception to the jury trial right would apply.¹¹⁷ On first read, *Jarkesy* appears to track the independent view: As in *Granfinanciera*, the *Jarkesy* Court applied a two-part framework, beginning with the Seventh Amendment before turning to the PRD.¹¹⁸ The Court's PRD analysis, however, suggested a possible third view of that doctrine.

The *Jarkesy* Court began its PRD analysis by setting forth background principles regarding the application of the PRD — namely, that a suit “in the nature of an action at common law”¹¹⁹ must be resolved by an Article III court unless it falls within a historical PRD exception.¹²⁰ After outlining those principles, however, the Court devoted relatively little text to applying them to the facts of *Jarkesy*.¹²¹ In five short sentences, the majority appeared to more or less restate its prior Seventh Amendment analysis as though it were dispositive for purposes of Article III, reasoning that, because the SEC action sought legal penalties and was analogous to common law fraud,¹²² it involved a “matter[] of private rather than public right”¹²³ and therefore could not be “with-draw[n] . . . from judicial cognizance.”¹²⁴

¹¹⁶ See Baude, *supra* note 17, at 1571.

¹¹⁷ See *Granfinanciera*, S.A. v. Nordberg, 492 U.S. 33, 42, 51 (1989).

¹¹⁸ See SEC v. Jarkesy, 144 S. Ct. 2117, 2128, 2131 (2024).

¹¹⁹ *Id.* at 2132 (citing *Stern v. Marshall*, 564 U.S. 462, 484 (2011)). The Court suggested that “traditional legal claims” are in the nature of common law actions, *id.* at 2136 (quoting *Granfinanciera*, 492 U.S. at 52), while public rights cases, *id.* at 2135, and “cause[s] of action . . . unknown to the common law,” *id.* at 2137 (quoting *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 461 (1977)), which “bring no common law soil with them,” are not, *id.* (citing *United States v. Hansen*, 143 S. Ct. 1932, 1944 (2023)).

¹²⁰ *Id.* at 2132–33 (discussing several PRD cases and listing five “historic categories of adjudications [that] fall within the exception,” *id.* at 2133, including tribal relations (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011)), public lands administration (citing *Crowell v. Benson*, 285 U.S. 22, 51 (1932)), and “the granting of public benefits,” including payments to veterans, pensions (citing *Crowell*, 285 U.S. at 51), and patent rights (citing *United States v. Duell*, 172 U.S. 576, 582–83 (1899))).

¹²¹ Compare *id.* at 2131–34 (outlining background PRD principles), and *id.* at 2134–35 (describing *Granfinanciera*), and *id.* at 2136–39 (distinguishing *Atlas Roofing*), with *id.* at 2136 (applying PRD to facts of *Jarkesy* and rejecting SEC’s arguments regarding scope of the PRD).

¹²² Compare *id.* at 2136 (noting SEC fraud actions (1) “target the same basic conduct as common law fraud, employ the same terms of art, and operate pursuant to similar legal principles” (citing *id.* at 2129–31) and (2) impose “civil penalties, a punitive remedy that . . . ‘could only be enforced in courts of law’” (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987))), with *Tull*, 481 U.S. at 417–18 (describing Seventh Amendment factors as (1) historical analogue and (2) nature of the remedy).

¹²³ *Jarkesy*, 144 S. Ct. at 2136 (alteration in original) (quoting *Granfinanciera*, 492 U.S. at 56).

¹²⁴ *Id.* (quoting *Stern*, 564 U.S. at 484). The Court distinguished *Atlas Roofing* on similar grounds, emphasizing that the *Atlas Roofing* claims were “unknown to the common law,” while the claims in *Jarkesy* were not. *Id.* at 2138 (quoting *Atlas Roofing*, 430 U.S. at 461).

This reasoning is a bit puzzling. By relying on what appear to be Seventh Amendment factors in its Article III analysis,¹²⁵ the *Jarkesy* Court seemed to suggest that non–Article III adjudication is not permissible if a jury trial right would attach under the Seventh Amendment. If that’s correct, then *Jarkesy* can be read as endorsing a third, jury-dependent view of Article III, under which the Seventh Amendment informs whether an action can be assigned to a non–Article III tribunal. Various statements throughout the Court’s opinion appeared to support that view,¹²⁶ and already *Jarkesy* has been invoked in legal challenges to argue that Article III adjudication is required if a jury trial right would attach.¹²⁷ That said, it is too early to know how *Jarkesy* will be applied in practice, and the decision could be interpreted in various ways. The next Part examines two possible readings of a jury-dependent view following *Jarkesy*.

III. ANALYSIS OF THE THREE VIEWS OF THE SEVENTH AMENDMENT AND ARTICLE III

The relationship between the Seventh Amendment and Article III was unquestionably muddy pre-*Jarkesy*.¹²⁸ But still, the two dominant views of that relationship were similar enough in effect that leading scholars could read the Court as having endorsed either.¹²⁹ Post-*Jarkesy*, that relative equilibrium may not last. From the beginning, the PRD has extended to cases that would have triggered a jury trial right if brought in an Article III court.¹³⁰ If *Jarkesy* is read as endorsing a jury-dependent approach to Article III, new cases may splinter off from those precedents, leading to more divergent outcomes.

It is not too late to harmonize the Seventh Amendment, Article III, and the PRD — not just with one another, but also with precedent and constitutional principles. This Part examines each of the three views, ultimately concluding that the independent view would be on balance

¹²⁵ Indeed, in its PRD analysis, the *Jarkesy* Court cited to its earlier Seventh Amendment discussion. See *id.* at 2136 (citing *id.* at 2129–31).

¹²⁶ See, e.g., *id.* at 2135 (“[T]raditional legal claims’ must be decided by courts . . .” (alteration in original) (quoting *Granfinanciera*, 492 U.S. at 52)); *id.* (“*Granfinanciera* effectively decides this case.”); *id.* at 2129 (“In this case, the remedy is all but dispositive.”). Because Article III was not at issue in *Granfinanciera*, see *supra* note 79, the Court’s reliance on it in *Jarkesy* seems to suggest that claims that are “legal” for *Seventh Amendment* purposes require Article III adjudication.

¹²⁷ See, e.g., Amazon’s Complaint and Application for Declaratory and Injunctive Relief ¶ 61, *Amazon.com Servs. LLC v. NLRB*, No. 24-cv-01000 (W.D. Tex. filed Sept. 5, 2024) (suggesting that if “Amazon is entitled to a jury trial[,] . . . ‘an Article III court must decide’” the case (quoting *Jarkesy*, 144 S. Ct. at 2131)); Complaint for Declaratory and Injunctive Relief ¶ 91, *Yapp USA Auto. Sys., Inc. v. NLRB*, No. 24-cv-12173 (E.D. Mich. filed Aug. 19, 2024) (same).

¹²⁸ Sward, *supra* note 5, at 1096; Jolly, *supra* note 6, at 1191.

¹²⁹ Compare Baude, *supra* note 17, at 1571 (forum dependence), with Fallon, *supra* note 18, at 1704 n.84 (independence).

¹³⁰ See Brief for the Petitioner, *supra* note 68, at 22–23 (collecting cases upholding non–Article III imposition of penalties and fines).

the most constitutionally justifiable and least disruptive option moving forward.

A. Analysis of Path One: Forum Dependence

The advantages of the forum-dependent view are its consistency with PRD precedent and that its adoption would only minimally disrupt the status quo.¹³¹ Its disadvantages are its weak basis in constitutional principles and its apparent rejection by the *Jarkesy* Court.

The principal advantage of the forum-dependent view is that it has unquestionably deep roots in precedent. The Supreme Court has implied that the Seventh Amendment is subordinate to Article III for well over a century,¹³² and it seemed to state as much outright for almost fifty years.¹³³ Where 169 years of practice appear to point in the same direction, one might hesitate before setting those precedents aside — either because that practice provides evidence of constitutional meaning or because that meaning has become liquidated over time.¹³⁴ And precisely because this view is consistent with significant amounts of case law, its adoption would not be terribly disruptive: Of those cases mapped in Table 1, only *Granfinanciera* would be displaced, as juries would never be required in non–Article III forums.¹³⁵

Notwithstanding this long history, however, those who have interrogated the constitutional justifications for a forum-dependent view have often found such justifications wanting.¹³⁶ Scholars have considered and rejected the following explanations for why the Seventh Amendment would apply only in Article III courts: that actions in non–Article III tribunals are not “Suits at common law”¹³⁷ and therefore do not fall

¹³¹ Substantial disruption to settled practice may weigh against adoption of a particular approach regardless of whether one favors the status quo. See Fallon, *supra* note 7, at 920–21 (discussing the value of comporting with entrenched practice).

¹³² See *supra* section II.A, pp. 596–97; *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 286 (1856).

¹³³ See *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (“[O]ur rejection of Oil States’ Article III challenge also resolves its Seventh Amendment challenge.” (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53–54 (1989); *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 450–55 (1977))).

¹³⁴ See *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (“‘Long settled and established practice’ may have ‘great weight in a proper interpretation of constitutional provisions.’” (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929))); Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1771–74 (2015).

¹³⁵ It’s worth noting, however, that overturning *Granfinanciera* would not be without impact. The decision is frequently cited in the context of jury challenges in bankruptcy proceedings. See, e.g., *Ben Cooper, Inc. v. Ins. Co. of Pa. (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1401 (2d Cir. 1990); *Guertin v. Guertin (In re Guertin)*, 2024 WL 3402592, at *3 (Bankr. N.D. Okla. July 12, 2024).

¹³⁶ See, e.g., Sward, *supra* note 5, at 1099 (“[T]he tests for determining the constitutionality of a non–Article III court are not appropriate for determining the constitutionality of jury-less adjudication.”); Redish & La Fave, *supra* note 68, at 430; Jolly, *supra* note 6, at 1191; Colleen P. Murphy, Note, *Article III Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions*, 95 YALE L.J. 1459, 1465 (1986).

¹³⁷ U.S. CONST. amend. VII.

within the text of the Seventh Amendment;¹³⁸ that non–Article III actions are inherently equitable;¹³⁹ that the Seventh Amendment does not apply when “public” rights are at issue;¹⁴⁰ or that a forum-dependent approach is justified by appellate review,¹⁴¹ waiver or consent,¹⁴² or functionalism.¹⁴³ For decades, scholars have seemed largely to conclude that the Seventh Amendment’s text admits of no distinction between forums,¹⁴⁴ that its ratification history counsels suspicion of such an approach,¹⁴⁵ and further, that *Granfinanciera* seemed to foreclose that the Seventh Amendment does not apply outside Article III.¹⁴⁶

On its own, this lack of consensus regarding a constitutional justification for the forum-dependent view does not necessarily close the door on its adoption; one could still accept it either as simply poorly understood or as a mere anomaly of history.¹⁴⁷ The trouble, however, is that *Jarkesy* outright rejected that the Seventh Amendment’s application depends on the forum: Chief Justice Roberts stressed that “what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled.”¹⁴⁸ *Jarkesy* thus significantly weakened the forum-dependent view’s main advantage: its apparent endorsement by the Court.

B. Analysis of Path Two: Independence

The advantages of the independent view of the Seventh Amendment are numerous: It can be reconciled with PRD precedent and constitutional principles, and it offers a minimally disruptive framework for

¹³⁸ See, e.g., Murphy, *supra* note 136, at 1466; Redish & La Fave, *supra* note 68, at 432–37. *But see* Transcript of Oral Argument, *supra* note 17, at 20 (SEC counsel arguing that “an administrative proceeding . . . [is] not a suit at common law”).

¹³⁹ See Redish & La Fave, *supra* note 68, at 434–37.

¹⁴⁰ See, e.g., *id.* at 421; Sward, *supra* note 5, at 1106 (reasoning that, because public rights claims implicate the Seventh Amendment when brought in Article III courts, the jury right does not seem to depend on a claim’s public or private nature (citing *Tull v. United States*, 481 U.S. 412, 425 (1987))).

¹⁴¹ See Sward, *supra* note 5, at 1107 (“Even if Article III review is a satisfactory means of preserving Article III values, that solution simply does not vindicate . . . Seventh Amendment values . . .”).

¹⁴² See, e.g., *id.* at 1116 (noting waiver’s “limited utility in justifying non-Article III adjudication”).

¹⁴³ See Redish & La Fave, *supra* note 68, at 446–50; Murphy, *supra* note 136, at 1465–66.

¹⁴⁴ See, e.g., Sward, *supra* note 5, at 1091, 1100; Jolly, *supra* note 6, at 1229.

¹⁴⁵ See, e.g., Murphy, *supra* note 136, at 1465 n.34; Sward, *supra* note 5, at 1102–03.

¹⁴⁶ See Greenberg, *supra* note 18, at 480; Sward, *supra* note 5, at 1098. These arguments are convincing, though they seem at times to presume that the Seventh Amendment’s forum dependence is justifiable only if a single explanation applies across the board. For a discussion advocating for combining several such justifications, see *infra* pp. 603–06.

¹⁴⁷ Indeed, the Supreme Court has often suggested it was doing just that. See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality opinion) (seeking to confine public rights to “three narrow situations . . . interpreted in light of . . . historical context”); *SEC v. Jarkesy*, 144 S. Ct. 2117, 2134 (2024) (noting the PRD “has no textual basis in the Constitution and must therefore derive instead from background legal principles”).

¹⁴⁸ *Jarkesy*, 144 S. Ct. at 2136 (citing *N. Pipeline*, 458 U.S. at 69 n.23).

preserving Seventh Amendment rights outside Article III. To examine these effects, it's necessary first to have a shared conception of how the independent Seventh Amendment could operate in practice. This section begins by laying out one such view.

Section II.B described the seeming inconsistencies at the heart of *Granfinanciera* — namely, how it could be possible for Article III and the Seventh Amendment to be independent and yet still to require the “same answer.”¹⁴⁹ This Note posits that the answer to this puzzle lies in the independence not just of the Seventh Amendment from Article III, but also the PRD from other, non-PRD exceptions. Let's begin with the PRD. Several scholars have argued that most, if not all, actions involving “public rights” are essentially executive in nature.¹⁵⁰ Viewed through this lens,¹⁵¹ it is easy to conceive of the PRD as an independent exception to both Article III and the Seventh Amendment. Just as, for example, the executive imposition of fines does not fall within Article III's exclusive “judicial Power,”¹⁵² neither would imposing such fines constitute a “Suit[] at common law” under the Seventh Amendment.¹⁵³ So understood, the same PRD test would apply independently to both Article III and the Seventh Amendment and thus would require the “same answer.”¹⁵⁴ In other cases, non-Article III adjudication might instead be premised on non-PRD grounds such as waiver or consent, appellate review, or the adjunct model.¹⁵⁵ It is uncontroversial that some of those grounds justify abrogation of the Seventh Amendment.

¹⁴⁹ See *supra* notes 106–11 and accompanying text.

¹⁵⁰ See, e.g., Glicksman & Levy, *supra* note 28, at 1151–55 (“[M]ost administrative adjudication involves the exercise of executive power to vindicate public rights” *Id.* at 1155.); Baude, *supra* note 17, at 1536 (“[T]he so-called ‘public rights’ doctrine really describes a set of adjudications that are permissible because they are a form of executive power”).

¹⁵¹ While an executive power theory of the PRD may not account for all iterations of that doctrine, for purposes of this Note, it provides a useful shorthand to illustrate one layer of congruence between Article III and the Seventh Amendment.

¹⁵² U.S. CONST. art. III, § 1. See *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 338–39 (1909) (rejecting the argument that the Executive may not impose a fine, “penalty[,] or punishment” without “resorting to the judicial power,” *id.* at 338); *Freytag v. Comm’r*, 501 U.S. 868, 909 (1991) (Scalia, J., concurring in part and concurring in the judgment) (stating that legislative tribunals “exercise the executive power, not the judicial power of the United States”).

¹⁵³ U.S. CONST. amend. VII; see Baude, *supra* note 17, at 1571 (explaining that most non-Article III tribunals are “executive branch agencies” that “do not exercise judicial power,” and “[i]t is therefore not natural to refer to matters in those so-called courts as ‘Suits at common law’ to which the Seventh Amendment applies”); Jolly, *supra* note 6, at 1221 (“[W]hen the executive branch wants to determine to whom a patent should be awarded[,] . . . it need not rely on Article III courts or juries.”).

¹⁵⁴ This explanation can also be squared with *Granfinanciera*. There, the Court suggested that Article III and the Seventh Amendment only require “the same answer” in cases involving “statutory cause[s] of action.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989). If one assumes that statutory causes of action are more likely to implicate public rights, it follows that Article III and the Seventh Amendment require the same answer when the basis for non-Article III adjudication is the PRD.

¹⁵⁵ See *supra* pp. 592–93 (introducing these grounds and stating this Note’s presumption that non-Article III adjudication may be justified on such non-PRD bases).

For example, a litigant may waive their right to a jury trial,¹⁵⁶ and the Seventh Amendment permits non-jury factfinding in certain circumstances.¹⁵⁷ In such cases, Article III and the Seventh Amendment might require “the same answer” simply because the same justifications satisfy each.

In other cases, the Article III and Seventh Amendment outcomes might diverge. For example, where non-Article III adjudication rests on a basis that does not apply to the Seventh Amendment, such as appellate review¹⁵⁸ or partial consent, a matter might permissibly be assigned to a non-Article III tribunal but still trigger a jury trial right. Consider *Granfinanciera* as an illustration of partial consent. There, the bankruptcy trustee could be presumed to have consented to the bankruptcy court’s jurisdiction and to waiving his Seventh Amendment rights by filing an action in the bankruptcy court.¹⁵⁹ In contrast, the third parties did not file claims against the estate, but were drawn into the bankruptcy action when the trustee filed a complaint against them.¹⁶⁰ In their responses to the complaint, however, the third parties requested a jury trial but do not appear to have objected to the bankruptcy court’s resolution of the claims.¹⁶¹ At that point, one could presume that the parties consented to non-Article III adjudication, but not to waiving their Seventh Amendment rights. An independent approach to the Seventh Amendment would allow for such divergence.

By rooting the Seventh Amendment directly in the several grounds that would justify its abrogation, the independent view sidesteps some of the constitutional concerns that troubled scholars with respect to the forum-dependent view. For example, one scholar seemed to dismiss waiver as a justification for the Seventh Amendment’s forum dependence in part because waiver “has its limits with respect to non-Article III adjudication.”¹⁶² In other words, because waiver cannot justify all instances of non-Article III adjudication, it seems inadequate to explain why the Seventh Amendment would be forum dependent in all

¹⁵⁶ Sward, *supra* note 5, at 1117 (citing *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968); *United States v. Moore*, 340 U.S. 616, 621 (1951)).

¹⁵⁷ See, e.g., *id.* at 1046 (noting that magistrate and bankruptcy judges may conduct jury trials with party consent); *Ex parte Peterson*, 253 U.S. 300, 309–10 (1920) (holding that Seventh Amendment does not bar use of auditor as factfinder). Note, however, that this approach may also require review by a jury or Article III court. *Id.* at 310–11.

¹⁵⁸ While de novo review by an Article III judge might cure separation of powers concerns, it would not seem to address a Seventh Amendment issue unless a jury trial were guaranteed on review. Sward, *supra* note 5, at 1107.

¹⁵⁹ See Greenberg, *supra* note 18, at 506 (“[I]n any case in which litigants waive their personal rights under Article III by voluntarily submitting to the jurisdiction of an agency, any Seventh Amendment rights are arguably waived if the chosen forum does not make provision for jury trials.”); *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 674 (2015) (“[L]itigants may validly consent to adjudication by bankruptcy courts.”).

¹⁶⁰ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 36, 48 (1989).

¹⁶¹ *Id.* at 37.

¹⁶² Sward, *supra* note 5, at 1115.

circumstances.¹⁶³ The independent approach to the Seventh Amendment does not require that there be a uniform explanation for why the Seventh Amendment does not apply in non–Article III tribunals, but instead allows that Amendment to rise or fall on its own merits.

An initial review of the case law suggests that this model is consistent with how many cases have been decided in practice; it seems that no case in Table 1 would need to shift under this framework.¹⁶⁴ If it's correct that this approach is consistent with precedent, it follows that its adoption would also be minimally disruptive. Many actions in non–Article III tribunals should be able to proceed without a jury because many of the justifications for non–Article III adjudication extend to the Seventh Amendment as well. And where Article III and the Seventh Amendment might diverge — as, for example, in *Granfinanciera* — those cases could proceed in an Article III court, or Congress could consider alternative solutions to satisfy the Seventh Amendment. For example, Professor Richard Lorren Jolly argues that juries could be empaneled in administrative tribunals with claimant consent,¹⁶⁵ or upon de novo review in an Article III court,¹⁶⁶ and that neither approach would significantly upset the status quo.¹⁶⁷ These solutions would also preserve maximum flexibility for parties, who may prefer to proceed in a non–Article III tribunal rather than in an Article III court.¹⁶⁸

¹⁶³ Other scholars have similarly rejected waiver as an underinclusive explanation for forum dependence. See Redish & La Fave, *supra* note 68, at 437–42; *id.* at 437–38 (describing the “conditional waiver” justification as resting on the assumption that “Congress [can] condition the receipt of a public right on the recipient’s implicit agreement to waive either adjudication of that right in an Article III forum, the right to jury trial, or both,” but rejecting that rationale as “completely irrelevant” to “case[s] in which the government is seeking to impose a *burden* or *penalty* . . . rather than providing a *benefit*,” *id.* at 438). The central issues for these scholars thus often seem to be rooted in forum dependence itself, rather than the inadequacy of the particular justifications.

¹⁶⁴ *Murray’s Lessee* and *Atlas Roofing* were decided under the PRD, see *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856); *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 460–61 (1977), *Stranahan* can be viewed as a PRD case involving executive action, see *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909), *Jones & Laughlin* can be understood as a PRD case or as involving equitable remedies, see *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48–49 (1937); Sward, *supra* note 5, at 1092 n.277 (describing *Jones & Laughlin* as justifiable under the PRD), and *Oil States* was a PRD case, see *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1378 (2018), that can also be understood as grounded in consent, see *id.* at 1377 & n.4 (suggesting “inter partes review” might be a “condition[]” of accessing a patent, *id.* at 1377). See also generally Alexander I. Platt, *Registration as Consent: Patching Jarkesy’s Hole in SEC Enforcement*, 100 NOTRE DAME L. REV. REFLECTION (forthcoming 2024) (analyzing registration and consent as a cure to the jury trial challenge in *Jarkesy*).

¹⁶⁵ Jolly, *supra* note 6, at 1227–35.

¹⁶⁶ *Id.* at 1235–47.

¹⁶⁷ *Id.* at 1247–53 (“Fortunately, the integration of juries is likely to have limited impact on administrative work” *Id.* at 1247.); *id.* at 1235–47 (outlining “general historical practice,” *id.* at 1236, of providing a jury “on appeal or through collateral attack,” *id.* at 1235).

¹⁶⁸ Litigation in Article III tribunals can be more time-consuming and costly than administrative actions, see *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850 (1986) (describing

The pitfall of this model is simply that it does not align with what the Court has long seemed to say: that Article III and the Seventh Amendment require the “same answer.”¹⁶⁹ But given *Jarkesy*’s renunciation of forum dependence, there may not be an option on the table that does not conflict in some way with prior statements by the Court. This drawback thus appears to have little weight, particularly considering the benefits of this model — not least of all the clarity it would provide to judges and litigants moving forward.

C. Analysis of Path Three: Jury Dependence

A jury-dependent approach to Article III might be more protective of Seventh Amendment rights, but it would not be worth its cost. One analyst has predicted that *Jarkesy* could be “a significant factor in a future market crash,”¹⁷⁰ and Justice Sotomayor warned that *Jarkesy* will imperil over 200 statutes and the enforcement actions of “dozens of agencies.”¹⁷¹ *Jarkesy*’s ultimate ramifications might hinge, however, on how the doctrine develops from here. For while some have read *Jarkesy* as potentially establishing a bright-line rule under which all actions for civil penalties require Article III adjudication,¹⁷² it is not quite clear on what grounds such a rule would be justified. This section explores two possible explanations for how the Seventh Amendment might be seen to factor into the analysis.

One way to understand the relevance of civil penalties to the Article III determination is to read *Jarkesy* as having endorsed true jury dependence: Namely, all actions that trigger the Seventh Amendment, including those for civil penalties, require resolution by an Article III

administrative resolution as “quicker and less expensive”), and just as litigants generally may consent to arbitration, so too might they wish to consent to administrative adjudication. See Jolly, *supra* note 6, at 1249–50.

¹⁶⁹ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989). But see Sward, *supra* note 5, at 1094 (noting *Granfinanciera* “belie[d] this language” even as it reaffirmed it); *supra* note 154.

¹⁷⁰ See Paul Griffin, *Will a Market Crash One Day Be Pinned on the Supreme Court? An Accounting Expert Explains Why Recent Rulings Have Him Worried*, THE CONVERSATION (July 12, 2024, 8:31 AM), <https://theconversation.com/will-a-market-crash-one-day-be-pinned-on-the-supreme-court-an-accounting-expert-explains-why-recent-rulings-have-him-worried-234450> [<https://perma.cc/N462-YBHQ>] (discussing *Jarkesy* and the overruling of *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

¹⁷¹ SEC v. *Jarkesy*, 144 S. Ct. 2117, 2155 (2024) (Sotomayor, J., dissenting).

¹⁷² See Matthew Lee Wiener, Opinion, *What Is Left of Agency Adjudication After Jarkesy?*, THE REG. REV. (July 29, 2024), <https://www.theregreview.org/2024/07/29/wiener-what-is-left-of-agency-adjudication-after-jarkesy> [<https://perma.cc/T7YV-T8WV>] (“Undoubtedly, *Jarkesy* will render unconstitutional some agencies’ statutory authority to remedy regulatory violations by imposing civil penalties in administrative proceedings.”); see also Jeremy J. Broggi et al., *Supreme Court Holds that Federal Agencies May Seek Punitive Money Penalties Only Before a Jury*, WILEY (July 10, 2024), <https://www.wiley.law/alert-Supreme-Court-Holds-That-Federal-Agencies-May-Seek-Punitive-Money-Penalties-Only-Before-A-Jury> [<https://perma.cc/GV5A-YSKZ>] (“The opinion suggests that civil money penalties are punitive by nature, and that punitive money penalties require Article III process and a jury trial.”).

court. *Jarkesy* at times seemed to endorse this view,¹⁷³ and scholars have argued that it would be constitutionally principled to conceive of the Seventh Amendment as a constraint on Congress's power over the courts.¹⁷⁴ The problem with this explanation, however, is that it is flatly inconsistent with not only *Atlas Roofing*,¹⁷⁵ but also a longstanding line of cases involving the collection of taxes and fines.¹⁷⁶ And while one could distinguish those precedents by reasoning that they fell within the PRD¹⁷⁷ while *Jarkesy* did not, that reasoning renders it unclear whether the Seventh Amendment does any work in the analysis. If a claim does not fall within an Article III exception like the PRD, would it not presumably require Article III adjudication regardless of the remedies sought?¹⁷⁸ In short, if civil penalties can sometimes be sought in non-Article III tribunals, the Seventh Amendment would not seem to directly control the Article III outcome.

A second option would be to read *Jarkesy* as endorsing not jury dependence, but jury adjacence: Perhaps Article III simply weighs considerations that are *similar* to the Seventh Amendment factors.¹⁷⁹ This explanation is facially appealing as potentially justified by Article III case law and the text of the Seventh Amendment. After all, the Seventh Amendment applies to "Suits at common law,"¹⁸⁰ and *Jarkesy* emphasized that suits "in the nature of an action at common law"¹⁸¹ require Article III adjudication. One might expect that these provisions' shared concern for "common law" actions might result in similar analyses. But in practice, the case law has been quite distinct in its treatment of common law suits in each context. Article III is concerned with common law actions because they are "*quintessentially*" private,¹⁸² and thus

¹⁷³ See *supra* note 126.

¹⁷⁴ See, e.g., Sward, *supra* note 5, at 1043 (noting the Seventh Amendment could provide "an independent check on Congress's power to assign adjudication to [non-Article III] courts"); Suja A. Thomas, *A Limitation on Congress: "In Suits at Common Law,"* 71 OHIO ST. L.J. 1071, 1108 (2010).

¹⁷⁵ See *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 444 (1977) (civil penalties).

¹⁷⁶ See Brief for the Petitioner, *supra* note 68, at 20–23 (collecting cases, including *Stranahan*); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (fine).

¹⁷⁷ The *Jarkesy* Court declined to explicitly overrule *Atlas Roofing* as a PRD precedent, see SEC v. *Jarkesy*, 144 S. Ct. 2117, 2137 & n.3 (2024), and listed *Stranahan* as among the historical "class[es] of cases" that involve public rights, see *id.* at 2132.

¹⁷⁸ One explanation could be that the nature of the remedy itself affects the permissibility of non-Article III adjudication. See generally, e.g., Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007) (arguing for PRD framework under which Article III adjudication is required for deprivations of "life, physical liberty, or traditional forms of property," *id.* at 559). While such an approach would justify an emphasis on remedy in the Article III analysis, the focus of this Note is not the scope of the PRD, but the relevance of the Seventh Amendment to the Article III determination. Unless the Seventh Amendment informs the determination of the public or private nature of a right, this framework does not appear to bear on that question.

¹⁷⁹ See *supra* note 122 and accompanying text.

¹⁸⁰ U.S. CONST. amend. VII.

¹⁸¹ *Jarkesy*, 144 S. Ct. at 2132.

¹⁸² *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989) (emphasis added).

require close scrutiny if they are to be removed from Article III. The Seventh Amendment, in contrast, is explicitly *not* confined to common law suits, but applies to all legal actions, including those that everyone agrees did not exist at common law.¹⁸³ In other words, the Seventh Amendment's definition of "common law" is broader: "[N]ovel" actions that "bring no common law soil with them"¹⁸⁴ might be legal for Seventh Amendment purposes but not require Article III adjudication under *Jarkesy*.¹⁸⁵

Under either approach, the Seventh Amendment alone does not appear to supply a sound basis for determining the constitutionality of non-Article III adjudication. Perhaps for that reason, at least one scholar has wondered whether it is possible to limit *Jarkesy* to civil penalties at all, or whether *Jarkesy*'s vision of the PRD may impact actions for equitable remedies as well.¹⁸⁶ Either way, absent firmer constitutional grounding, adoption of the jury-dependent view would simply add to the "various formulations"¹⁸⁷ of the PRD while amplifying the worst of its features: confusion and unworkability.¹⁸⁸

CONCLUSION

The nature of the Seventh Amendment's relationship to Article III has been a puzzle for decades.¹⁸⁹ Prior to *Jarkesy*, two views of that relationship seemed to dominate. Under the first, the Seventh Amendment was understood to be forum dependent, simply not applying outside Article III courts. Under the second, the Seventh Amendment was understood to be independent from Article III, with the PRD applying separately to both. *Jarkesy* scattered the playing field even more by seeming to conflate Article III and the Seventh Amendment without clarifying which should lead, which should follow, and how civil penalties fit into the picture. At best, this will lead to further confusion as judges seek to apply *Jarkesy*. Or worse, *Jarkesy* could be understood to

¹⁸³ See *Jarkesy*, 144 S. Ct. at 2139 ("[T]he Seventh Amendment does apply to novel statutory regimes" (citing *Tull v. United States*, 481 U.S. 412, 421–23 (1987))); *Curtis v. Loether*, 415 U.S. 189, 193–94 (1974).

¹⁸⁴ *Jarkesy*, 144 S. Ct. at 2137 (citing *United States v. Hansen*, 143 S. Ct. 1932, 1944 (2023)).

¹⁸⁵ See *id.* (distinguishing *Atlas Roofing* on the basis of its novelty). Admittedly, it is not clear whether anything remains of *Atlas Roofing* after *Jarkesy*. See *id.* & n.3 ("not reach[ing]" the question of whether *Atlas Roofing* had been "effectively overruled," *id.* at 2137). Either way, importing the Seventh Amendment's definition of "common law" to Article III risks expanding the latter to require Article III resolution of all legal claims. That would be a major shift from Table 1, where several such claims were adjudicated in non-Article III tribunals. And while it again might be possible to distinguish those cases under the PRD, if an action's common law nature is intended to define whether it is public to begin with, see *id.* at 2132, this analysis could become somewhat circular.

¹⁸⁶ See Wiener, *supra* note 172.

¹⁸⁷ *Stern v. Marshall*, 564 U.S. 462, 488 (2011).

¹⁸⁸ See Sward, *supra* note 5, at 1043 ("[T]he Court's Article III jurisprudence is incomplete, inconsistent, and, at times, nearly incomprehensible."); Jolly, *supra* note 6, at 1191 ("To say that the case law in this area is tangled would be an understatement.").

¹⁸⁹ See, e.g., Sward, *supra* note 5, at 1098; Redish & La Fave, *supra* note 68, at 420–21.

endorse a third, jury-dependent framework, under which non–Article III adjudication is impermissible if the Seventh Amendment might apply.

The ultimate reach of *Jarkesy* may well depend on how judges resolve the relationship between the Seventh Amendment and Article III going forward. It may not be too late to reconcile constitutional principles with longstanding practice under the independent view of the Seventh Amendment. To do so, however, judges should unlink the Seventh Amendment from Article III, not wind them up further still.