THE SEC'S BLEAK HOUSE OF CARDS: SOME REFLECTIONS ON *JARKESY V. SEC* AND JUDICIAL DOCTRINE

MARGARET A. LITTLE*

> *"[I]f the various administrative bureaus and commissions . . . are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."*
>
> *-Jones v. SEC*[1]

* Margaret Little is Senior Litigation Counsel at the New Civil Liberties Alliance, a nonpartisan nonprofit public interest law firm founded by Professor Philip Hamburger to rein in the administrative state. NCLA represented Ray Lucia on remand from his victory at the Supreme Court and Michelle Cochran from district court to her recent victory at the United States Supreme Court. *Axon Enterprise, Inc. v. FTC*, 452 F. Supp. 3d 882 (D. Ariz. 2020), *aff'd*, 986 F.3d 1173 (9th Cir. 2021), *rev'd*, 143 S. Ct. 890 (2023), consolidated with *Cochran v. U.S. SEC*, No. 19-CV-066-A, 2019 WL 1359252 (N.D. Tex. Mar. 25, 2019), *aff'd in part, rev'd in part*, 20 F.4th 194 (5th Cir. 2021) (en banc), *aff'd sub nom.* Axon Enter., Inc. v. FTC, 143 S. Ct. 890 (2023), and was decided 9–0 on April 14, 2023. *Axon*, 143 S. Ct. 890. NCLA also filed an amicus brief at the Fifth Circuit in support of Mr. Jarkesy's appeal. The author thanks her colleagues Roey Goldstein, Russ Ryan, and Kara Rollins for their thoughtful contributions to this Essay. Any errors are hers alone.

1. 298 U.S. 1, 24–25 (1936).

INTRODUCTION

George Jarkesy, a private businessman who came into the Securities and Exchange Commission's (SEC) sights in 2013 after his businesses lost money in the 2008 recession, was trapped in SEC administrative proceedings for over a decade. He holds the unenviable distinction of having his name grace two dramatically divergent circuit court opinions, and his name will likely become shorthand for a future landmark Supreme Court opinion.

A two-judge panel majority on the Fifth Circuit Court of Appeals recently held in *Jarkesy v. SEC*[2]:

> (1) [T]he SEC's in-house adjudication of [Jarkesy's and his fund's] case violated their Seventh Amendment right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide an intelligible principle by which the SEC would exercise the delegated power, in violation of Article I's vesting of "all" legislative power in Congress; and (3) statutory removal restrictions on SEC ALJs violate the Take Care Clause of Article II.[3]

This has broad implications for administrative adjudication. If upheld, it means that not even Congress can strip Americans' jury trial rights when the case involves a potential deprivation of life, liberty, or property.[4] *Jarkesy II* applies the nondelegation doctrine for the first time in decades, holding that Congress failed to provide an intelligible principle to support the SEC's unilateral power to determine whether its targets will be tried in a separate branch of government before an impartial, unbiased judge in a proceeding that affords due process and equal protection of the

2. (*Jarkesy II*), 34 F.4th 446 (5th Cir. 2022) (Elrod, Oldham, JJ., in the majority and Davis, J., dissenting). The SEC petitioned for en banc reconsideration by the active judges of the Fifth Circuit; that petition was denied on October 21, 2022. Jarkesy v. SEC, 51 F.4th 644, 644 (5th Cir. 2022) (per curiam). The SEC has petitioned for certiorari, Petition for a Writ of Certiorari, SEC v. Jarkesy, No. 22-859 (U.S. Mar. 8, 2023); Jarkesy has filed a conditional cross petition on whether remand is appropriate under a statutory scheme that omits that option, Conditional Cross Petition for a Writ of Certiorari, Jarkesy v. SEC, No. 22-991 (U.S. Apr. 10, 2023).

3. *Jarkesy II*, 34 F.4th at 449.

4. *See generally* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1536 (2020) ("[T]he so-called 'public rights' doctrine really describes a set of adjudications that are permissible because they are a form of executive power and usually do not involve the deprivation of life, liberty, or property."). Justice Thomas's recent concurrence in *Axon/Cochran* questions whether agency adjudication of government claims where life, liberty, or property is at stake is permissible at all. *Axon*, 143 S. Ct. at 909–10 (Thomas, J., concurring) ("It may violate Article III by compelling the Judiciary to defer to administrative agencies regarding matters within the core of the Judicial Vesting Clause.").

law.[5] Or whether SEC targets must surrender those constitutional rights—solely at the agency's discretion—and be tried in an in-house court where the prosecutor is also their judge, as well as their first and final avenue of appeal on fact-finding.[6] Crucially, the SEC has a materially higher win rate in its in-house courts, whereas it wins only 61% of its federal court cases with jurors as the triers of fact.[7] Finally, *Jarkesy II* holds that SEC administrative law judges (ALJs) enjoy multiple layers of unconstitutional tenure protection from presidential control and accountability in violation of Article II's command that the President shall "take Care" that the laws be faithfully executed.[8]

Because these constitutional rights and structural protections essential to preserving liberty were placed in a *Constitution* that is supreme over mere statutes, Jarkesy's right to sue in federal court to vindicate these claims should have been uncontroversial. It was not. Indeed, before *Jarkesy II* was handed down, seven circuits in

5. *Jarkesy II*, 34 F.4th at 459–63.

6. *See id*. at 449–59 (recounting the SEC's enforcement mechanism and the Seventh Amendment issues present and rebutting the dissenting opinion on the issue of public versus private rights).

7. From October 2010 through March 2015, the SEC ruled in the agency's favor in 95% of appeals taken from ALJ decisions. *See* Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 48 (2016) ("The Commissioners decided in the agency's favor concerning 95% of appeals taken during the period October 2010 to March 2015."); *see also* Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015, 10:30 PM), https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803 [https://perma.cc/F9YU-RG4P] (noting that the SEC "prevails against around 90% of defendants when it sends cases to its administrative law judges"); Jenna Greene, *The SEC's on a Long Winning Streak*, NAT'L L.J. (Jan. 19, 2015, 12:00 AM), https://www.law.com/nationallawjournal/almID/1202715464297/ [https://perma.cc/GG5B-L9AH] ("The winning streak, which began in October 2013 and continues today, spans 219 decisions by the agency's administrative law judges, although three-quarters of the victories were by default.").

8. *Jarkesy II*, 34 F.4th at 463–65; U.S. CONST. art. II, § 3.

all—D.C.,[9] Second,[10] Fourth,[11] Seventh,[12] Ninth,[13] Eleventh,[14] and for a time the Fifth[15]—denied jurisdiction to hear such claims until after the completion of all administrative proceedings, thus paralyzing and ultimately denying SEC enforcement targets meaningful judicial review for up to a decade or more. Jarkesy himself was among those who lost everything while trapped in this administrative wasteland—his wealth, health, peace of mind, reputation, chosen profession, and any other employment lain waste.[16]

Jarkesy II should be celebrated, not only because it vindicates core constitutional rights and structural constitutional separations of power but also because it lays out how essential it is for these

9. *See* Jarkesy v. SEC (*Jarkesy I*), 803 F.3d 9, 12 (D.C. Cir. 2015) (affirming that "Congress, by establishing a detailed statutory scheme providing for an administrative proceeding before the Commission plus the prospect of judicial review in a court of appeals, implicitly precluded concurrent district-court jurisdiction over challenges like Jarkesy's").

10. *See* Tilton v. SEC, 824 F.3d 276, 279 (2d Cir. 2016) ("By enacting the SEC's comprehensive scheme of administrative and judicial review, Congress implicitly precluded federal district court jurisdiction over the appellants' constitutional challenge.").

11. *See* Bennett v. U.S. SEC, 844 F.3d 174, 176 (4th Cir. 2016) ("[W]e join the Second, Seventh, Eleventh, and D.C. Circuits that have addressed [whether the SEC's enforcement procedure is constitutional] . . . .").

12. *See* Bebo v. SEC, 799 F.3d 765, 767 (7th Cir. 2015) (affirming that "the administrative review scheme established by Congress stripped [the district court] of jurisdiction to hear this type of challenge").

13. *See* Axon Enter., Inc. v. FTC, 986 F.3d 1173, 1176–77 (9th Cir. 2021) (denying district court jurisdiction over similar constitutional objections to the Federal Trade Commission's (FTC) administrative adjudication scheme), *rev'd*, 143 S. Ct. 890 (2023).

14. *See* Hill v. SEC, 825 F.3d 1236, 1237 (11th Cir. 2016) (holding that the district court lacked jurisdiction to enjoin SEC proceedings because the Eleventh Circuit found that Congress likely "intended the respondents' claims to be resolved first in the administrative forum, not the district court").

15. Cochran v. U.S. SEC, 969 F.3d 507, 510 (5th Cir. 2020) (denying district court jurisdiction). The Fifth Circuit reheard *Cochran* en banc, and on December 13, 2021, the full court found jurisdiction in the district court for a challenge to SEC ALJs' removal protections. Cochran v. U.S. SEC, 20 F.4th 194, 197–98, 201 (5th Cir. 2021) (en banc), *aff'd sub nom.* Axon Enter., Inc. v. FTC 143 S. Ct. 890 (2023).

16. *See* Linda D. Jellum, Opinion, *Why the SEC Is Wrong About Implied Preclusion*, REGUL. REV. (Aug. 22, 2022) [hereinafter Jellum, *Why the SEC Is Wrong*], https://www.theregreview.org/2022/08/22/jellum-why-the-sec-is-wrong-about-implied-preclusion/ [https://perma.cc/RB9U-SHGZ] (observing that "[l]osing before the SEC would effectively end their careers because the appellate court does not automatically grant a stay of the SEC's orders . . . during appeals to federal court. And the SEC typically denies stay requests" and that "[t]he SEC has no expertise interpreting the U.S. Constitution" and arguing that "the SEC should not have the power to decide its own constitutionality. . . . Plaintiffs should not be dragged through years of litigation at the SEC before an Article III court can resolve their constitutional claims"). See generally Linda D. Jellum, *The SEC's Fight to Stop District Courts from Declaring Its Hearings Unconstitutional*, 101 TEXAS L. REV. 339 (2022) [hereinafter Jellum, *The SEC's Fight*], for a masterful and detailed analysis of how illogical and incorrectly reasoned appellate opinions have enabled the SEC to hold respondents captive in its unconstitutional in-house courts.

claims to be heard *before the constitutional deprivations take place*. Judicial review of these questions after years-long unconstitutional proceedings is worse than meaningless. It is also mystifying. After all, the Supreme Court had already *unanimously* ruled in 2010 that federal courts have jurisdiction to rule on unconstitutional layers of removal protection—even in a pre-enforcement posture—under the very same statutory scheme.[17] Claims that vindicate constitutional jury trial rights and who gets to decide whether you have them—you or your *prosecutor*—must be addressed before the in-house adjudication. Otherwise, the process inflicts years-long constitutional injury that is permanent and irremediable.

In *Federalist No. 78*, Alexander Hamilton stressed that the Constitution required not only an independent judiciary, but one that had the *courage* to protect liberty.[18] Judges, he said, have a "duty . . . to declare all acts contrary to the manifest tenor of the constitution void."[19] Without judges willing to do their duty, "all the reservations of particular rights or privileges would amount to nothing."[20]

I. JARKESY'S LONG ROAD TO FEDERAL COURT REVIEW

> And thus, through years and years, and lives and lives, everything goes on, constantly beginning over and over again, and nothing ever ends. And we can't get out of the suit on any terms, for we are made parties to it, and *must be* parties to it, whether we like it or not. But it won't do to think of it!
>
> -Charles Dickens, *Bleak House*[21]

The events underlying Jarkesy's enforcement action date back nearly sixteen years when, in 2007—just before the 2008 financial crisis—he founded John Thomas Capital Management Group (later Patriot 28) to manage several hedge fund investments.[22] The hedge-fund businesses did not fall under the licensing authority of the SEC, nor was Jarkesy ever a registered broker-

17. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 (2010). ("Petitioners' constitutional claims are also outside the Commission's competence and expertise.")

18. THE FEDERALIST NO. 78, at 406 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

19. *Id.* at 403.

20. *Id.*

21. CHARLES DICKENS, BLEAK HOUSE (1853), *reprinted in* 22 THE WORKS OF CHARLES DICKENS 7, 122 (Peter Fenelon Collier & Son 1900).

22. Jarkesy v. U.S. SEC, 48 F. Supp. 3d 32, 34 (D.D.C. 2014), *aff'd sub nom.* Jarkesy v. SEC, 803 F.3d 9 (D.C. Cir. 2015).

dealer or investment advisor.[23] He was a private business owner. The 2008 financial crisis left him and his company "battered" and he had not yet fully recovered by 2014.[24] In 2010, after a political demand for a crackdown on the financial industry, Congress passed legislation that for the first time extended the SEC's summary administrative process—which had originally been created in the Securities and Exchange Act of 1934[25] to address administrative registration of securities and the barring, suspension, or expulsion of regulated parties[26]—to unregulated entities and newly authorized the SEC to seek monetary penalties in administrative adjudications.[27]

On its own initiative, the SEC's New York office launched an investigation of Jarkesy and his fund in 2011.[28] In March 2013, after two years of non-public investigation, the SEC brought administrative proceedings against them alleging violations of the securities laws and seeking disgorgement of fees, lifetime securities-industry and officer-and-director bars, $100 million in penalties, and a cease and desist order.[29] The same day, the SEC issued a press release that cemented in the public mind the SEC's damning view of the case.[30]

23. SEC Investment Advisers Act Rule 203(m)-1, 17 C.F.R. § 275.203(m)-1(a) (2022). This "[p]rivate fund adviser exemption" was enacted at the same time as the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank) and exempted from registration an investment adviser who "(1) [a]cts solely as an investment adviser to one or more qualifying private funds; and (2) [m]anages private fund assets of less than $150 million." *Id.*

24. *Jarkesy*, 48 F. Supp. 3d at 34.

25. 15 U.S.C. § 78a.

26. *See, e.g.*, Jed S. Rakoff, Judge, U.S. Dist. Ct., S.D.N.Y., PLI Securities Regulation Institute Keynote Address: Is the S.E.C. Becoming a Law Unto Itself? 3 (Nov. 5, 2014) ("When the S.E.C. was first created in the 1930's . . . the only express provision for administrative hearings was to suspend or expel members or officers of national securities exchanges.").

27. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C. and 15 U.S.C.). Before 2010, in most instances, the SEC was not entitled to seek monetary penalties in administrative proceedings. *See* 15 U.S.C. § 77h-1 (2006) (describing the SEC's cease-and-desist proceedings and making no mention of monetary penalties). In 2010, Dodd–Frank newly extended authorization for the SEC to adjudicate alleged violations of the three securities statutes charged in this case and to seek monetary penalties. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act § 929P(a) (codified at 15 U.S.C. § 77h-1(g)) (granting the SEC authority to impose civil monetary penalties).

28. *See Jarkesy II*, 34 F.4th 446, 450 (5th Cir.), *reh'g en banc denied*, 51 F.4th 644 (5th Cir. 2022) (per curiam), *petition for cert. filed*, No. 22-859 (U.S. Mar. 8, 2023).

29. Complaint at 1–4, Jarkesy v. U.S. SEC, 48 F. Supp. 3d 32 (D.D.C. 2014) (No. 14-cv-00114) [hereinafter *Jarkesy* Complaint].

30. Press Release, SEC, SEC Charges Hedge Fund Manager and Brokerage CEO with Fraud (Mar. 22, 2013), https://www.sec.gov/news/press-release/2013-2013-46htm [https://perma.cc/86WC-ZZJW].

A. Pretrial in Absentia

Incredibly, in December 2013—a full two months before the first of Jarkesy's administrative hearings was scheduled to take place—the Commission's enforcement staff gave a privileged, ex parte presentation to the SEC Commissioners on his case.[31] Thereafter, the SEC issued an order (Order) containing factual "findings" including a formal legal finding that Jarkesy and Patriot 28 were guilty and liable for securities fraud—in advance of any adjudication and without permitting Jarkesy or his fund to present any evidence or defenses.[32] The Order does not say these are "allegations"; instead, it was published as an official opinion and agency conclusions finding respondents culpable.[33] Worse, the Commission published those findings in the official *SEC News Digest* as "findings," not "allegations."[34] Both the Order and the *News Digest* were widely reported to the public in advance of any hearing or trial or opportunity for respondents to be heard.

In response to that extraordinary Order, in January of 2014, invoking 28 U.S.C. § 1331 jurisdiction over "all civil actions arising under the Constitution," Jarkesy brought an action in District of Columbia District Court alleging that by prosecuting him in an administrative proceeding where the SEC had already issued and published an Order declaring him guilty prior to any hearing on the merits of the case, the SEC had denied him the rights of due process, jury trial, and equal protection and violated the Constitution's separation of powers.[35] The district court held that 15 U.S.C. § 78y(a)(1)'s provision for direct circuit court appeal after a final administrative order implicitly stripped district courts of federal question jurisdiction.[36] The D.C. Circuit (Srinivasan, Kavanaugh, and Randolph, JJ.) affirmed in *Jarkesy I*,[37] holding that Jarkesy "eventually" could obtain judicial review "when (and if)" the SEC ruled against him.[38] The panel "concluded that Congress,

31. *Jarkesy* Complaint, *supra* note 29, at 6, 10–12.

32. Order Making Findings, Exchange Act Release No. 70989, Investment Company Act Release No. 30818, 2013 WL 6327500 (Dec. 5, 2013).

33. *Id.*

34. *Commission Bars Anastasios "Tommy" Belesis and Imposes Additional Remedial Sanctions Against Belesis and John Thomas Financial, Inc.*, SEC NEWS DIG. (Dec. 5, 2013), https://www.sec.gov/news/digest/2013/dig120513.htm [https://perma.cc/B9Z6-8KFK].

35. *Jarkesy* Complaint, *supra* note 29, at 1–3.

36. Jarkesy v. U.S. SEC, 48 F. Supp. 3d 32, 37 (D.D.C. 2014), *aff'd sub nom.* Jarkesy v. SEC, 803 F.3d 9 (D.C. Cir. 2015).

37. Jarkesy v. SEC (*Jarkesy I*), 803 F.3d 9, 12 (D.C. Cir. 2015).

38. *Id.* at 12, 19.

by establishing a detailed statutory scheme providing for an administrative proceeding before the Commission plus the prospect of judicial review in a court of appeals, implicitly precluded concurrent district-court jurisdiction over challenges like Jarkesy's."[39]

Jarkesy was thus trapped in that "detailed statutory scheme" for the next seven years. After twelve hearing days conducted mostly in New York in early 2014, the SEC ALJ issued an initial decision on October 17, 2014.[40] The Commission granted an internal appeal that consumed nearly five years of deliberation before it resulted in a final order levying a civil penalty of $300,000, ordering disgorgement of roughly $685,000, and imposing career-destroying industry bars.[41] In the nearly ten years that have elapsed since he was initially charged by the SEC, Jarkesy has been unemployable in his chosen profession, and his bank and brokerage accounts have been closed, leaving his credit, reputation, and assets in ruins.[42] The SEC, enabled by the courts, was thus able to investigate, charge, prejudge, adjudicate, and punish Jarkesy as a single, unaccountable executive agency while blocking his ability to seek any judicial protection or oversight.

B. Other Challenges

Jarkesy was not alone in challenging the SEC's new power to charge unregulated parties and seek money damages in its in-house tribunals. Indeed, in the first case to consider the question of the SEC forum selection, *Gupta v. SEC*,[43] the judge found it "bizarre" that the SEC thought it could unilaterally try some defendants in Article III courts, while others had to endure the constitutional deprivations of an administrative proceeding.[44]

39. *Id.* at 12.

40. John Thomas Cap. Mgmt. Grp. LLC at 1–2, Initial Decision Release No. 693, 2014 WL 5304908, at *1 (ALJ Oct. 17, 2014).

41. John Thomas Cap. Mgmt. Grp. LLC at 1, Securities Act Release No. 10834, Exchange Act Release No. 89775, Investment Company Act Release No. 34003, 2020 WL 5291417, at *29 (Sept. 4, 2020).

42. Brief of Raymond J. Lucia, Sr., et al. as Amici Curiae Supporting Respondent at 2, SEC v. Cochran, 143 S. Ct. 890 (2023) (No. 21-1239).

43. 796 F. Supp. 2d 503 (S.D.N.Y. 2011).

44. *Gupta* was the first case challenge to reach the likelihood of success on the merits in district court. The SEC had pursued twenty-eight defendants from the same insider trading scheme in federal court, but it singled out one defendant for administrative proceedings "with not even a hint . . . as to why." *Id.* at 514. Pressed for a reason, the SEC pointed to only its plenary authority, a justification the court found "bizarre." Patricia

Judge Rakoff denied the SEC's motion to dismiss Gupta's federal court action, holding that Gupta's equal protection constitutional claim "easily" satisfied the Supreme Court's 2010 three-pronged test in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.[45] The court held that forcing Gupta's constitutional claim into the administrative forum (1) would deny him meaningful judicial review, (2) was beyond agency competence and expertise, and (3) was wholly collateral to the securities charges.[46] The SEC ultimately dismissed its administrative proceeding against Gupta in exchange for his agreement to dismiss his constitutional lawsuit.[47] The SEC reserved its ability to prosecute him in federal court, "which it did, obtaining a $13.9 million penalty against Gupta two years later."[48] Thus, the constitutional claims, "including [Gupta's] likely successful Equal Protection claim, were never decided."[49]

In 2015 and 2016, a cluster of cases followed *Gupta* in the district courts of four circuits.[50] The district courts found federal jurisdiction in five cases,[51] and of those cases that reached the

Hurtado, *Gupta Administrative Action by SEC Is 'Bizarre,' Judge Says*, BLOOMBERG (Mar. 16, 2011, 6:05 PM), https://www.bloomberg.com/news/articles/2011-03-16/galleon-case-judge-calls-bizarre-sec-decision-not-to-sue-insider-gupta [https://perma.cc/PDW4-LHRL]. Gupta won on both the jurisdiction to raise and the ability to raise his equal protection claim. *Gupta*, 796 F. Supp. 2d at 514.

45. 561 U.S. 477, 489 (2010).

46. *Gupta*, 796 F. Supp. 2d at 512–13. Judge Rakoff was applying a three-part judge-concocted test applied by the Supreme Court in *Free Enterprise Fund* for when a pre-enforcement action can be brought in Article III courts. *Id.* at 512 (quoting *Free Enterprise Fund*, 561 U.S. at 489). This is widely known as the *Thunder Basin* factors—after the case in which the test was first announced, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212–13 (1994). The systematic misapplication of those factors has put thousands of Americans in involuntary thrall to ALJ adjudications and this Essay will have more to say about such atextual, judge-made, multi-part tests!

47. Thomas Glassman, *Ice Skating Up* Hill*: Constitutional Challenges to SEC Administrative Proceedings*, 16 J. BUS. & SEC. L. 47, 73 (2015).

48. *Id.* (footnotes omitted).

49. *Id.*

50. Bebo v. SEC, No. 15-C-3, 2015 WL 905349 (E.D. Wis. Mar. 3, 2015), *aff'd*, 799 F.3d 765 (7th Cir. 2015); Gray Fin. Grp., Inc. v. SEC, 166 F. Supp. 3d 1335 (N.D. Ga. 2015), *vacated and remanded sub nom.* Hill v. SEC, 825 F.3d 1236 (11th Cir. 2016); Hill v. SEC, 114 F. Supp. 3d 1297 (N.D. Ga. 2015), *vacated and remanded*, 825 F.3d 1236 (11th Cir. 2016); Ironridge Glob. IV, Ltd. v. SEC, 146 F. Supp. 3d 1294 (N.D. Ga. 2015), *appeal dismissed*, No. 16-10205-EE, 2016 WL 11848845 (11th Cir. Sept. 27, 2016); Tilton v. SEC, No. 15-CV-2472, 2015 WL 4006165 (S.D.N.Y. June 30, 2015), *aff'd*, 824 F.3d 276 (2d Cir. 2016); Duka v. U.S. SEC, 103 F. Supp. 3d 382 (S.D.N.Y. 2015), *abrogated by Tilton*, 824 F.3d 276; Bennett v. U.S. SEC, 151 F. Supp. 3d 632 (D. Md. 2015), *aff'd*, 844 F.3d 174 (4th Cir. 2016); Gibson v. SEC, No. 19-cv-01014, 2019 WL 5698679 (N.D. Ga. May 8, 2019), *aff'd*, 795 F. App'x 753 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 1125 (2021).

51. *Gray Fin. Grp.*, 166 F. Supp. 3d at 1349; *Hill*, 114 F. Supp. 3d at 1310; *Ironridge*, 146 F. Supp. 3d at 1309; *Duka*, 103 F. Supp. 3d at 392; *Gupta*, 796 F. Supp. 2d at 508.

merits, four held that one or more of the constitutional claims should be heard in the district courts,[52] with only one judge recognizing jurisdiction but denying relief on the merits.[53] Five district courts dismissed the challenges for lack of jurisdiction: *Jarkesy*,[54] *Bebo*,[55] *Tilton*,[56] *Bennett*,[57] and *Gibson*.[58] A record of four courts finding jurisdiction at the district courts, with three courts favorably viewing the merits, is not a bad start for the vindication of these constitutional rights. So much for *Jarkesy II* being an outlier.[59]

But the circuits would have none of it. The Second,[60] Fourth,[61] Seventh,[62] Eleventh,[63] and D.C. Circuits[64] all bolted the courthouse doors, with only a lone—but exceptionally well-reasoned and carefully argued—dissent in *Tilton* by Second Circuit Judge Christopher Droney.[65] Again, this made no sense. In 2010, prior to any of these decisions, the Supreme Court had already unanimously found that district courts had jurisdiction to hear structural constitutional questions such as tenure protections in *Free Enterprise Fund* under the very same statutory scheme.

This circuit shutout had devastating consequences for these litigants. They were told that their constitutional rights, including those eventually heard by the Fifth Circuit in *Jarkesy II*, had to wait until *after* the unconstitutional adjudication had taken place. The *Tilton* dissenter observed:

> Forcing the appellants to await a final Commission order before they may assert their constitutional claim in a federal court means that by the time the day for judicial review comes, they

52. *Gray Fin. Grp.*, 166 F. Supp. 3d at 1355; *Hill*, 114 F. Supp. 3d at 1320; *Ironridge*, 146 F. Supp. 3d at 1318; *Gupta*, 796 F. Supp. 2d at 514.

53. *Duka*, 103 F. Supp. 3d at 396.

54. *See Jarkesy I*, 803 F.3d 9, 12, 19 (D.C. Cir. 2015) (affirming the district court's judgment that its jurisdiction was foreclosed).

55. 2015 WL 905349, at *4.

56. No. 15-CV-2472, 2015 WL 4006165, at *13 (S.D.N.Y. June 30, 2015).

57. 151 F. Supp. 3d 632, 645 (D. Md. 2015).

58. No. 19-cv-01014, 2019 WL 5698679, at *2 (N.D. Ga. May 8, 2019).

59. *See, e.g.*, Robert Kuttner, *Another Sweeping Far-Right Court Ruling*, AM. PROSPECT (May 20, 2022), https://prospect.org/blogs-and-newsletters/tap/another-sweeping-far-right-court-ruling/ [https://perma.cc/V78X-W72F] (calling *Jarkesy II* "an appellate ruling [that] seeks to destroy consumer and investor protection").

60. Tilton v. SEC, 824 F.3d 276, 279 (2d Cir. 2016).

61. Bennett v. U.S. SEC, 844 F.3d 174, 176 (4th Cir. 2016).

62. Bebo v. SEC, 799 F.3d 765, 767 (7th Cir. 2015).

63. Hill v. SEC, 825 F.3d 1236, 1252 (11th Cir. 2016).

64. *Jarkesy I*, 803 F.3d 9, 30 (D.C. Cir. 2015).

65. *See Tilton*, 824 F.3d at 292–99 (Droney, J., dissenting) (arguing that the "meaningful judicial review" prong outweighs other *Thunder Basin* factors).

> will already have suffered the injury that they are attempting to prevent. The majority finds that the "litigant's financial and emotional costs in litigating the initial proceeding are simply the price of participating in the American legal system," Majority Op. at 285, but the issue is less the costs and burden of litigation and more that the appellants are challenging the very existence of the ALJs as a part of the statutory scheme. The appellants seek to enjoin the SEC proceedings, but by the time that they access any judicial review, the proceedings will be complete, rendering the possibility of obtaining an injunction moot even if the final Commission order is vacated. . . . [F]or while there may be review, it cannot be considered truly "meaningful" at that point.[66]

As one commentator noted:

> What's curious about [the SEC's] argument is that the Supreme Court has already rejected it.
>
> . . . .
>
> . . . Judge Christopher Droney's opinion dissenting in *Tilton* illuminates a way forward for other courts not yet bound by vertical stare decisis . . . to follow. So, too, does the logic of putting substance before procedure to prevent unnecessary and unconstitutional proceedings.[67]

The defiance of on-point Supreme Court authority is mystifying. The illogic and injustice are palpable.

C. Then Along Came Lucia

Despite this five-circuit denial of access to federal courts, the ball game was not over. A relief pitcher was on his way by the name of Ray Lucia, an SEC target determined to vindicate his innocence no matter the cost—economic, human, or reputational. He did what the circuits insisted was required of all administratively charged SEC targets.[68] He had challenged the constitutionality of his ALJ through six brutal years in the administrative maze. That included the dissent of two of the five SEC Commissioners, who noted that the ALJ had made up the grounds for liability out of whole cloth—under the definition of "backtest" that he had found

66. *Id.* at 298.

67. Joel Nolette, *Post*-Lucia*, It's Déjà Vu with the SEC*, LAW360 (Apr. 22, 2019, 3:39 PM) (emphasis added) (footnote omitted), https://www.law360.com/articles/1151580/post-lucia-it-s-deja-vu-with-the-sec [https://perma.cc/S9Z8-N6ST].

68. *See* Raymond J. Lucia Cos. at 2–3, Exchange Act Release No. 75837, Investment Company Act Release No. 31806, 2015 WL 5172953, at *2 (Sept. 3, 2015) (imposing a litany of sanctions on Lucia).

that day—and further dissented because the Commission was not empowered to decide constitutional questions committed to the jurisdiction of Article III courts.[69] Though he lost at every juncture, in 2018, Lucia prevailed at the U.S. Supreme Court, which agreed that the SEC ALJs had not been constitutionally appointed.[70]

The Supreme Court's decision in *Lucia v. SEC*[71] was a game-changer for the Article II removal challenge in *Jarkesy II*, a point succinctly laid out by Professor Jonathan Adler:

> The Fifth Circuit's conclusion that the statutory limitation on the removal of SEC ALJs is unconstitutional is the strongest part of the [*Jarkesy*] opinion. The Supreme Court has made explicit that this is an open question, and relevant Supreme Court caselaw makes the conclusion that limiting removal of SEC ALJs is unconstitutional hard to resist. In *Lucia* the Court concluded that SEC ALJs are "officers" under Article II (albeit inferior officers), and in *Free Enterprise Fund v. PCAOB* the Court held that double-for-cause removal restrictions violate Article II. From this, the Fifth Circuit's conclusion easily follows.[72]

What is *not* well-understood is how insane it was for George Jarkesy to wait for four years after *Lucia* was decided to have his removal claim addressed by a federal court. *Lucia* was a missed opportunity to address not only SEC ALJs' lack of appointment but also their unconstitutional removal protections.[73] This is because, before *Lucia* was heard, the Solicitor General—on behalf of the government—had confessed error on the SEC ALJ's lack of appointment and further asked the Supreme Court to find that SEC ALJs enjoyed unconstitutional multiple layers of removal protection that were prohibited under the Supreme Court's

69. Statement, Daniel M. Gallagher & Michael S. Piwowar, Comm'rs, SEC, Opinion of Commissioner Gallagher and Commissioner Piwowar, Dissenting from the Opinion of the Commission (Oct. 2, 2015) [hereinafter Gallagher & Piwowar Dissent], https://www.sec.gov/news/statement/dissenting-opinion-gallagher-piwowar [https://perma.cc/8WDQ-SJ3X].

70. Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018). That merits ruling reaching constitutional claims vindicated the district courts in *Gupta*, *Hill*, *Gray Financial Group*, and *Ironridge*. *See supra* note 52 and accompanying text.

71. 138 S. Ct. 2044 (2018).

72. Jonathan H. Adler, *The Good, the Bad, and the Ugly of* Jarkesy v. SEC, REASON: VOLOKH CONSPIRACY (Aug. 17, 2022, 6:10 PM), https://reason.com/volokh/2022/08/17/the-good-the-bad-and-the-ugly-of-jarkesy-v-sec/ [https://perma.cc/D5L9-XKMJ].

73. *See* Raymond J. Lucia Cos. v. SEC, No. 18-cv-2692, 2019 WL 3997332, at *2 n.3 (S.D. Cal. Aug. 21, 2019) (challenging those removal protections).

directly-on-point *Free Enterprise Fund* decision.[74]

What did the *Lucia* Court do? It declined to hear the removal protections aspect of the challenge so that it could await lower courts' consideration of this point.[75] The majority opinion ordered that to cure the constitutional error, the SEC had to retry Lucia before a "properly appointed" ALJ "or the Commission itself."[76] But percolation on this issue was not needed! The Supreme Court had already decided in 2010 that any more than one level of tenure protection violated the law—and held that federal courts had jurisdiction to hear such claims—even in a pre-enforcement posture under the very same SEC statute, 15 U.S.C. § 78y.[77]

This point cannot be stressed too strongly: the government admitted it put Lucia through six years of lawless, soon-to-be-vacated proceedings and the Court allowed the SEC to require him *to do it all over again*. SEC targets would languish before still-unconstitutional ALJs and hope for a circuit split to percolate up for review on the removal question. Most galling of all, even if Lucia were to undergo this second, years-long challenge and vindicate the position *that all parties to his case admitted violates the Constitution*, his prize would be a retrial yet a third time before the only lawful administrative tribunals left—the Commission itself—or in the federal courts. That prospect would mean that Lucia had to spend up to twenty years of his life in serial administrative proceedings predestined to be vacated followed by parallel administrative and/or judicial proceedings to enjoin the madness.[78]

74. *See Lucia*, 138 S. Ct. at 2050 n.1 (outlining the Solicitor General's request); *id.* at 2057–58 (Breyer, J., concurring in the judgment in part and dissenting in part) (outlining the *Free Enterprise* framework).

75. *Id.* at 2050 n.1 (majority opinion).

76. *Id.* at 2055. Justice Kagan added that the SEC ALJ, Cameron Eliot, could not rehear Lucia's case. *Id.*

77. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484, 486–87, 490–91 (2010).

78. The way the scheme could have proceeded for Mr. Lucia is:

A. Administrative proceedings:

(1) before a still unconstitutionally appointed ALJ;
(2) with an appeal to the Commission, which affirms its ALJs 95% of the time;
(3) followed by an appeal at the circuit court level;
(4) possible en banc review;
(5) then, if lucky, another cert. petition to the U.S. Supreme Court.

B. Court Proceedings:

(1) Seek an injunction from a district court likely to deny it because of the

Faced with the prospect of years-long litigation, Lucia reluctantly threw in the towel and settled.[79] Because the SEC requires that everyone with whom it settles must agree to an SEC-drafted lifetime gag under which no allegation of the complaint can be publicly questioned, he was also silenced.[80] Decades of expanding administrative power and unconstitutional erosion of fundamental rights finally reached this *reductio ad absurdum*. No rational or constitutional system of justice would operate in this fashion.

The *Lucia* majority cannot plead inadvertence or accident here. Justice Breyer called out the problem with bullhorn clarity: removal was the "embedded constitutional question."[81] Driving the point home, he noted: "The same statute, the Administrative Procedure Act, that provides that the 'agency' will appoint its administrative law judges also protects the administrative law

Ninth Circuit roadblock;

(2) an application for stay or expedited appeal to the Ninth Circuit;

(3) an appeal at the Ninth Circuit, which has a two-year delay from filing to decision;

(4) a possible en banc at the Ninth Circuit, also notably delayed from filing to decision;

(5) if lucky, another cert. petition to the U.S. Supreme Court.

Part A would precede Part B under the dominant circuit rule. Or the proceedings could have been conducted on concurrent tracks. Either way, Lucia would be impoverished by a process that *is* the punishment. Remember, Lucia already underwent this course over the past six years. The rarely granted en banc step is worth including here, because the Supreme Court noted that no court had ruled on SEC ALJ removal restrictions. *Lucia*, 138 S. Ct. at 2050 n.1. Because a circuit split is often necessary to secure certiorari, en banc proceedings were likelier than usual. After all, Lucia had been granted en banc review at the D.C. Circuit on his original appeal of the administrative decision, which split 5–5, tie going to the prevailing party below, which not unsurprisingly was the government. *See* Raymond J. Lucia Cos. v. SEC, 868 F.3d 1021, 1021 (D.C. Cir. 2017) (per curiam) (outlining the split).

79. *See* Raymond J. Lucia Cos., Exchange Act Release No. 89078, Investment Company Act Release No. 33895, 2020 WL 3264213 (June 16, 2020) (outlining the settlement).

80. *See* 17 C.F.R. § 202.5(e) (outlining the settlement requirement).

81. *Lucia*, 138 S. Ct. at 2057 (Breyer, J., concurring in the judgment in part and dissenting in part). There, Justice Breyer states:

> I cannot answer the constitutional question that the majority answers without knowing the answer to a different, embedded constitutional question, which the Solicitor General urged us to answer in this case: the constitutionality of the statutory "for cause" removal protections that Congress provided for administrative law judges.
>
> . . . .
>
> . . . Because, in the Court's view, the relevant statutes (1) granted the Securities and Exchange Commissioners protection from removal without cause, (2) gave the Commissioners sole authority to remove Board members, and (3) protected Board members from removal without cause, the statutes provided Board members with two levels of protection from removal and consequently violated the Constitution.

Id. at 2057, 2059 (citing *Free Enter. Fund*, 561 U.S. at 495–98).

judges from removal without cause."[82] Ray Lucia had a here-and-now problem because any ALJ to which his case could be assigned was still unconstitutional. The call for percolation here amounted to judicial abdication.

II. DEFENDING *JARKESY*'S MAJORITY OPINION DECIDING THE MERITS

Jarkesy II is a landmark ruling by any estimation, breathing new life into constitutional jury trial and due process rights that had long been considered casualties of the vast administrative state.[83] Nondelegation had slipped into desuetude.[84] For eighty years, the Supreme Court turned away every opportunity to enforce the nondelegation doctrine, although stirrings of life were detectable in the Supreme Court's 2019 *Gundy v. United States*[85] decision. And much credit is due to the Supreme Court's ruling in 2018 in *Lucia*—the first spade essential to digging these enforcement targets out of the regulatory wasteland and the necessary predicate for the *Jarkesy II* decision on removal protections.[86] The *Lucia* Court's invitation for lower courts to issue decisions that would "percolate" also made it likely that some circuit would accept the invitation and join the district courts that recognized the merits of such claims.[87] *Jarkesy II* also parts ways with the usual judicial minimalism of deciding cases on a single dispositive ground—not three separate and independent constitutional rulings.[88]

Some media and academic reactions have been histrionic. *Vox* claimed that *Jarkesy II* "could destroy the federal government's

82. *Id.* at 2059.

83. *See, e.g.*, Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1311, 1341 (1978) (lamenting the erosion of the Seventh Amendment by administrative agencies); Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale for the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1037–38 (1994) (same).

84. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 377–402 (2014) (outlining subdelegation); Cass R. Sunstein, Foreword, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1182–83 (2018) (questioning the discretion given to administrative agencies).

85. 139 S. Ct. 2116, 2121 (2019) (holding that a delegation passed the nondelegation doctrine).

86. *See Jarkesy II*, 34 F.4th 446, 464 (5th Cir.) (discussing *Lucia*), *reh'g en banc denied*, 51 F.4th 644 (5th Cir. 2022) (per curiam), *petition for cert. filed*, No. 22-859 (U.S. Mar. 8, 2023).

87. *See supra* notes 43–53, 75 and accompanying text.

88. The panel majority stopped at three grounds, leaving Jarkesy's equal protection and due process claims of bias and prejudgment unruled upon. *Jarkesy II*, 34 F.4th at 465–66, 466 n.21.

power to enforce key laws" and "throw much of the federal government into chaos."[89] Senator Sheldon Whitehouse has tweeted that the decision is part of a "right-wing scheme."[90] Mainstream media portrays the decision as dismantling the SEC's entire enforcement apparatus with ripple effects that could spread across administrative enforcement schemes throughout the whole of the federal government. This is nonsense.[91]

Jarkesy II, properly understood, simply recognizes that constitutional imperatives trump statutes.[92] Moreover, it rests easily within recent Supreme Court precedents,[93] while concededly swimming against the tide of other circuit and some Supreme Court decisions that for too long have been willing to permit Congress to jettison constitutional liberties in service of the expansion of administrative power. Because of this decades-long erosion of constitutionalism, critics charge that earlier Supreme Court cases are in tension with the panel opinion—and that the *Jarkesy II* court overstepped on the jury trial and delegation holdings.[94] This Essay will engage those critiques by carefully examining what are claimed to be adverse precedents—many of which are so ambiguous or contradictory that they are cited by

89. Ian Millhiser, *A Wild New Court Decision Would Blow Up Much of the Government's Ability to Operate*, VOX (May 19, 2022, 4:10 PM), https://www.vox.com/2022/5/19/23130569/jarkesy-fifth-circuit-sec [https://perma.cc/7YAA-6UUM].

90. Sheldon Whitehouse (@SenWhitehouse), TWITTER (May 19, 2022, 2:18 PM), https://twitter.com/senwhitehouse/status/1527368186290577408 [https://web.archive.org/web/20220905121736/https://twitter.com/senwhitehouse/status/1527368186290577408].

91. *See, e.g.*, Alison Somin, Opinion, *No,* Jarkesy v. SEC *Won't End the Administrative State*, THE HILL (July 11, 2022, 7:00 AM), https://thehill.com/opinion/judiciary/3549629-no-jarkesy-v-sec-wont-end-the-administrative-state/ [https://perma.cc/4VMK-XANB] (responding to criticisms in the media).

92. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803) ("If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.").

93. *See Jarkesy II*, 34 F.4th at 460–61 (discussing the Supreme Court's "more recent formulations" of the nondelegation doctrine); Adler, *supra* note 72. Adler argues:

> The Fifth Circuit's conclusion that the statutory limitation on the removal of SEC ALJs is unconstitutional is the strongest part of the opinion. The Supreme Court has made explicit that this is an open question, and relevant Supreme Court caselaw makes the conclusion that limiting removal of SEC ALJs is unconstitutional hard to resist.

Id.

94. *See* Millhiser, *supra* note 89 (claiming that "it [*Jarkesy II*] could throw much of the federal government into chaos").

both the majority and the dissent,[95] a sure sign that some judicial housecleaning is in order.

A. Multiple Constitutional Grounds

Courts have a bias toward inaction that has contributed to the expansion of the administrative state.[96] This manifests in doctrines such as constitutional avoidance,[97] awaiting percolation on an issue, and deciding cases on the narrowest possible grounds.[98] As a general rule, this often makes sense—if a statute of limitations has run, there's no need for a court or the parties to waste resources on addressing the merits of the dispute.[99]

One of the more refreshing aspects of *Jarkesy II* is that it ruled on three independent constitutional questions. This is a feature, not a bug, because constitutional claims come before courts in a different posture. Federal court jurisdiction over constitutional questions granted by 28 U.S.C. § 1331 is mandatory, not optional. The obligation of federal courts "to *decide* cases within the scope of federal jurisdiction" is "virtually unflagging."[100] This especially includes "preventing entities from acting unconstitutionally"[101] and preventing ongoing or imminent violations of "separation-of-powers principles."[102] Such structural constitutional violations inflict a "'here-and-now' injury" that "can be remedied by a

95. *Compare Jarkesy II*, 34 F.4th at 453 (discussing *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977)), *with id.* at 466–72 (Davis, J., dissenting) (same).

96. *See* PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE 147–58 (2018) (outlining judicial decisions that contributed to administrative state power).

97. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts." (citing Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988))).

98. *See, e.g.*, Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.))).

99. *See* Elonis v. United States, 575 U.S. 723, 740–41 (2015) (deciding that negligence is not sufficient for liability under a criminal statute but not deciding whether "recklessness" is sufficient because recklessness was not briefed and was only minimally discussed at oral argument (citing Dep't of Treasury v. Fed. Lab. Rels. Auth., 494 U.S. 922, 933 (1990))).

100. Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 72, 77 (2013) (emphasis added) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

101. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001).

102. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 n.2 (2010) (quoting Brief for the United States at 22, *Free Enter. Fund*, 561 U.S. 477 (No. 08-861)).

court."[103] Indeed, the Supreme Court has specifically encouraged parties to bring structural separation-of-powers claims because keeping the branches of government within their constitutional guardrails is essential to liberty.[104]

One need only contemplate the cost to Ray Lucia of the Supreme Court not granting review on the removal question, a point conceded by the government, to appreciate why ruling on all grounds is to be desired.

B. Removal

Jarkesy II's holding on removal is airtight, for all the reasons mentioned in Professor Adler's discussion above. The government affirmatively argued that in *Lucia*.[105] *Free Enterprise Fund* unambiguously held that more than one layer of tenure protection is unconstitutional.[106]

Jarkesy II declines to address "whether vacating would be the appropriate remedy based on this [removal] error alone,"[107] citing *Collins v. Yellen*,[108] which, upon finding that removal restrictions

103. Seila Law v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2196 (2020) (quoting Bowsher v. Synar, 478 U.S. 714, 727 n.5 (1986)); *see also* Bond v. United States, 564 U.S. 211, 222 (2011) ("[I]ndividuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations.").

104. *See* Ryder v. United States, 515 U.S. 177, 186 (1995) (supporting a rule that "provides a suitable incentive to make [Appointments Clause] challenges"); Crowell v. Benson, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.").

105. Brief for the Respondent at 21, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130). The government noted that *Free Enterprise Fund* held that officers of the United States may not be insulated from presidential control by more than one layer of tenure protection, and it recognized that for SEC ALJs, "the statutory scheme provides for at least two, and potentially three, levels of protection against presidential removal authority." *Id.* at 19–20. "It is critically important," argued the government, that the Court address the removal issue along with the Appointments Clause issue. *Id.* at 21.

106. There, the Court stated:

> We are asked, however, to consider a new situation not yet encountered by the Court. The question is whether these separate layers of protection may be combined. May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?
>
> We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President.

Free Enter. Fund, 561 U.S. at 483–84.

107. 34 F.4th 446, 463 n.17 (5th Cir.) (citing Collins v. Yellen, 27 F.4th 1068, 1069 (5th Cir. 2022) (per curiam)), *reh'g en banc denied*, 51 F.4th 644 (5th Cir. 2022) (per curiam), *petition for cert. filed*, No. 22-859 (U.S. Mar. 8, 2023).

108. 27 F.4th 1068 (5th Cir. 2022) (per curiam).

applicable to the Director of the Federal Housing Finance Agency were unconstitutional, remanded to the district court to determine what remedy, if any, was appropriate in light of the Supreme Court's holding.[109] This uncertainty about remedy argues powerfully in favor of having removal challenges heard before the unconstitutional action takes place.

C. Jury Trial

> Equity sends questions to Law, Law sends questions back to Equity; Law finds it can't do this, Equity finds it can't do that; neither can so much as say it can't do anything, without this solicitor instructing and this counsel appearing for A, and that solicitor instructing and that counsel appearing for B; and so on through the whole alphabet . . . .
>
> -Charles Dickens, *Bleak House*[110]

What leaps out upon review of the case law is how strong the case is for the jury trial holding—no doubt because Judge Elrod has written extensively on the topic.[111] For years, agency power to prosecute Americans in Article I courts has gone largely unquestioned because of the 1977 Supreme Court ruling in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission.*[112] There, Congress created an entirely new regulatory scheme under the Occupational Safety and Health Act of 1970[113] imposing technical workplace safety standards *precisely because common law tort remedies had been deemed insufficient* to the task.[114] These included the power for the Department of Labor to issue citations that would then be adjudicated in a scheme that afforded no opportunity for a jury trial.[115] The Occupational Safety and Health Review Commission (OSHC) would adjudicate disputed abatement orders and impose penalties for regulatory violations unknown to the common law—even where no employee was injured, doing away with the common law requirement of harm.[116] Judicial review was confined to the circuit courts, with conclusive

109. *Id.* at 1068–69.
110. DICKENS, *supra* note 21, at 122.
111. *See, e.g.*, Jennifer Walker Elrod, Essay, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303 (2012) (lamenting that juries are used less and less).
112. 430 U.S. 442 (1977).
113. Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678).
114. *Atlas Roofing*, 430 U.S. at 444–45.
115. 29 U.S.C. §§ 659–660.
116. *Atlas Roofing*, 430 U.S. at 445.

fact-finding by the OSHC ALJ.[117] Confined to its context, *Atlas Roofing* has no bearing on George Jarkesy's administrative prosecution for civil fraud, which is a "suit at common law." At law, no one could force a factory to erect barriers or fail-safe devices to protect workers from dangerous work conditions.[118] Both the rationale and the strict liability penalties even where no one had been harmed were a new regime, indeed. The *Atlas Roofing* opinion was not ambiguous about confining its ruling to these new enforcement schemes unknown at common law—but it became far-too-often cited to erode or deny altogether Seventh Amendment protections.

Ten years later, the Supreme Court took a more careful look at regulatory enforcement actions that deprived litigants of jury trial rights. Cases including *Tull v. United States*[119] and *Granfinanciera, S.A. v. Nordberg*[120] restored vitality to the uncontroversial constitutional proposition that if a case includes at least one cause of action at common law under the Seventh Amendment, defendants are entitled to a jury trial—even when such a claim at law arose in the context of bankruptcy, a non-Article III court. As the Supreme Court held in *Granfinanciera*, Congress cannot circumvent Seventh Amendment jury trial rights simply by passing a statute that assigns common law legal claims to an administrative tribunal and thus calling it a public right.[121] *Granfinanciera* anticipates and answers this *ipse dixit* reasoning or "question-begging," as Judge Elrod calls it,[122] of the argument of Judge Davis's *Jarkesy* dissent.[123]

Despite all the hoopla about *Jarkesy II*, it is not an outlier with respect to securities law enforcement. The Fifth, Seventh, and Eighth Circuits and various district courts recognize that *Tull* provides a right to a jury trial: where "the SEC was seeking both

117. 29 U.S.C. § 660.

118. *See Atlas Roofing*, 430 U.S. at 444–45 (discussing Congress's findings of the inadequacy of existing statutory and common law remedies to protect employees from unsafe working conditions).

119. 481 U.S. 412, 427 (1987) ("[T]he Seventh Amendment required that petitioner's demand for a jury trial be granted to determine his liability . . . .").

120. 492 U.S. 33, 36 (1989) ("We hold that the Seventh Amendment entitles such a person to a trial by jury, notwithstanding Congress' designation of fraudulent conveyance actions as 'core proceedings' [under a statute].").

121. *Id.* at 54–55 ("If the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial.").

122. *Jarkesy II*, 34 F.4th 446, 457 (5th Cir.), *reh'g en banc denied*, 51 F.4th 644 (5th Cir. 2022) (per curiam), *petition for cert. filed*, No. 22-859 (U.S. Mar. 8, 2023).

123. *Id.* at 469 (Davis, J., dissenting).

legal and equitable relief . . . [the defendant] was entitled to and received a jury trial."[124]

Oil States Energy Services, LLC v. Greene's Energy Group, LLC[125] also did not affect this revitalization of jury trial rights. One can agree, or not, with the Court's approval of Congress's reassignment of patent invalidation proceedings from Article III courts to *inter partes* review by ALJs on the Patent Trial and Appeal Board (PTAB) within the Patent and Trademark Office (PTO), but the "public rights" doctrine originated out of and has long applied to rights that could be exercised by the government alone—such as the collection and disbursement of taxes[126] or the grant of a patent monopoly.[127] But a government suit brought for fraud is plainly *not* an action involving a person's right to a monopoly conferred by the government. The *Oil States* holding has no bearing on these agency enforcement actions for fraud.

Confining Article I court jurisdiction to applications for benefits (e.g., Social Security or veterans), licensure or registration as originally envisioned under 15 U.S.C. § 78y's scheme, grants of patents (*Oil States*), or entirely new causes of action unknown at common law (*Atlas Roofing*) would go a long

124. SEC v. Lipson, 278 F.3d 656, 662 (7th Cir. 2002) (first citing *Tull*, 481 U.S. at 425; then citing Senn v. United Dominion Indus., Inc., 951 F.2d 806, 813–14 (7th Cir. 1992); and then citing Hohmann v. Packard Instrument Co., 471 F.2d 815, 819 (7th Cir. 1973)); *see also* SEC v. Life Partners Holdings, Inc., 854 F.3d 765, 781 (5th Cir. 2017) (recognizing that defendants have a right to a jury trial on liability for civil penalties under the Securities Exchange Act (citing *Tull*, 481 U.S. at 425)); SEC v. Cap. Sols. Monthly Income Fund, LP, 818 F.3d 346, 348, 355 (8th Cir. 2016) (recognizing that defendants are entitled to a jury trial for liability under the securities laws).

125. 138 S. Ct. 1365, 1373 (2018) (preserving the Patent and Trademark Office's authority to reconsider patent grants without violating Article III).

126. *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284–85 (1856) (applying the public rights doctrine to a levy).

127. *Oil States*, 138 S. Ct. at 1373. I would argue that *Oil States* is wrong as a matter of law and of policy. A patent is a property right, so a federal court and a jury trial should be available to any patent holder where that property right is at stake. But a patent is still analytically something conferred by the government and thus is logically distinct from a coercive government action against someone for fraud and money damages. The reason why *Oil States* is terrible policy was recently proven by a Government Accountability Office study that reported that the majority of patent judges alter their rulings. U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-106121, PATENT TRIAL AND APPEAL BOARD: PRELIMINARY OBSERVATIONS ON OVERSIGHT OF JUDICIAL DECISION-MAKING i (2022) ("[T]he majority of judges GAO surveyed reported they experienced pressure to adhere to management comments and to change or modify an aspect of their decision for an America Invents Act (AIA) trial on challenges to the validity of issued patents."). This study confirms what everyone knows is the biggest problem with administrative adjudication—when your judge is employed by your prosecutor, due process and fair adjudication are the first casualties.

way to clarify Seventh Amendment doctrine.[128] The *Jarkesy II* dissent boldfaces "public rights" language from *Atlas Roofing* and *Crowell v. Benson*[129] that comes perilously close to extinguishing jury trial rights altogether in "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."[130] That language is so circular, overbroad, and undiscerning as to suggest that jury trial rights are at the mercy of the government whenever it wants to throw its weight around—because it is the government. Such a construction annihilates the essential role that jury rights play in protecting citizens from tyranny—the core reason abrogation of jury trial rights by the King appeared in the Declaration of Independence as a ground for revolution and protection of those rights appeared in the Constitution as a condition of ratification.[131] In any event, existing case law largely confines public rights to new statutory obligations, immigration, taxation, and government benefits, and it drives a stake in the heart of the bogeyman that *Jarkesy II* will dismantle the administrative state and put Social Security, veterans, and immigration ALJs out of work.

The Supreme Court would do well to hew its Seventh Amendment jurisprudence to better, brighter-line concepts. The *Jarkesy II* decision, far from "cut[ting] against applicable Supreme Court precedent on the applicability of the Seventh Amendment

128. *See, e.g.*, Kent Barnett, *Due Process for Article III—Rethinking* Murray's Lessee, 26 GEO. MASON L. REV. 677, 692 (2019) (describing the "public-rights exception" as a "doctrinal and theoretical mess"). The public rights doctrine has been denounced as "fundamentally incoherent" and "indefensible." 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, 428–29 (1995). The public rights doctrine is "mystifying," any logic reduced to a mere "tautology." N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 111, 113 (1982) (White, J., dissenting). As another Justice not known for analytical shyness observed, "[S]omething is seriously amiss with our jurisprudence in this area." Stern v. Marshall, 564 U.S. 462, 504 (2011) (Scalia, J., concurring).

129. 285 U.S. 22 (1932).

130. *Jarkesy II*, 34 F.4th 446, 467 (5th Cir.) (Davis, J., dissenting) (quoting Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 450 (1977)), *reh'g en banc denied*, 51 F.4th 644 (5th Cir. 2022) (per curiam), *petition for cert. filed*, No. 22-859 (U.S. Mar. 8, 2023).

131. Interpreting "public rights" to eliminate Seventh Amendment rights where the government is prosecutor is inimical to the very purpose of the Seventh Amendment to safeguard citizens from government tyranny. That construction of *Atlas Roofing* has drawn sharp criticism. Redish & La Fave, *supra* note 128, at 411 (arguing that use of public rights in this way "constitutes a wholly unprincipled judicial abandonment of a constitutional right, for no other reason than the Court's deference to the conclusion of the majoritarian branches that enforcement of that right would be politically or socially difficult or inconvenient"). Thankfully, *Tull* and subsequent Supreme Court decisions have retreated from such a counter-historical construction.

to agency proceedings involving 'public rights,'" as suggested by Jonathan Adler,[132] correctly restores jury trial protection to actions at law, while devising a multi-part test that accommodates existing precedent within which the circuits must navigate. Indeed, Justice Thomas's concurrence in *Axon/Cochran* explicitly argues that when "core private rights" of life, liberty, and property are at stake, "full Article III adjudication is likely required."[133]

The question should not be the casuist's inquiry, "Has the Supreme Court constricted jury trial rights in favor of administrative proceedings and how might this case be similar?" That kind of thinking has allowed *Atlas Roofing* to exert long-undeserved vitality outside the confines of its context.[134] The supreme law of the land says:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[135]

What Jarkesy faced was a suit by the government for fraud long known at common law. Long after *Atlas Roofing*, the Supreme Court in *Granfinanciera* held:

> Congress simply reclassified a pre-existing, common-law cause of action . . . . This purely taxonomic change cannot alter our Seventh Amendment analysis. Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action . . . and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.[136]

The *Jarkesy II* dissent offers virtually no reasoned argument to the contrary. The dissent does not seriously engage with the

132. Adler, *supra* note 72.

133. Axon Enter. Inc., v. FTC, 143 S. Ct. 890, 906–07 (2023) (Thomas, J., concurring). While Justice Thomas wrote separately, the majority opinion's reliance on *Thunder Basin* to reach its 9–0 unanimity, *e.g.*, *id.* at 906 (majority opinion), means that one cannot tell whether other Justices would join his view on the merits of Jarkesy's jury trial and other claims.

134. Justice White, who wrote for the Court in *Atlas Roofing*, later conceded that the Court had "overrul[ed] or severely limit[ed] the relevant portions" of *Atlas*. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 71 n.1 (1989) (White, J., dissenting).

135. U.S. CONST. amend. VII.

136. 492 U.S. at 60–61.

definitional question.[137] Instead, like all too many courts, it casts about for some case or doctrine that stands in the way of enforcing a jury trial right. This is surely the wrong approach when a constitutional liberty is at stake.

Yet another flaw in jury rights case law and commentary is the general silence on the Seventh Amendment's command that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Administrative adjudication schemes routinely defer to the ALJ's factfinding, which constrains circuit court review and often renders it virtually meaningless given the agency's ability to shape the facts without regard to federal rules of evidence and civil procedure crafted over centuries to ensure fair trials. Administrative rules that asymmetrically limit respondents' witnesses, discovery rights, and deadline extensions further allow agencies to assert control over the record. This punishing process would be both transparent and disturbing to a savvy fact-finding jury.

Too often—far too often—the inquiry is how we can save the status quo, which turns the judicial gaze backward to the slow erosion of civil liberties over the past eight decades. The only proper focus must be the text of the Constitution and what the statute enacted by Congress actually does. This undue attention to, and misconstruction and elevation of, precedent over constitutional text wrests hard-won civil liberties from Americans.

D. A Jury Trial Two-Step?

Judge Elrod crafts a multi-part test for jury rights:

> The analysis thus moves in two stages. First, a court must determine whether an action's claims arise "at common law" under the Seventh Amendment. Second, if the action involves common-law claims, a court must determine whether the Supreme Court's public-rights cases nonetheless permit Congress to assign it to agency adjudication without a jury trial. Here, the relevant considerations include: (1) whether "Congress 'creat[ed] a new cause of action, and remedies therefor, unknown to the common law,' because traditional rights and remedies were inadequate to cope with a manifest

137. *Jarkesy II*, 34 F.4th 446, 469 n.28 (5th Cir.) (Davis, J., dissenting), *reh'g en banc denied*, 51 F.4th 644 (5th Cir. 2022) (per curiam), *petition for cert. filed*, No. 22-859 (U.S. Mar. 8, 2023).

> public problem"; and (2) whether jury trials would "go far to dismantle the statutory scheme" or "impede swift resolution" of the claims created by statute.[138]

A good case could be made for eliminating step two of this judge-crafted, multi-part test, which often invites error over time.[139] The Seventh Amendment is a constitutional command preserving the right for distinct types of actions. Factoring in whether a jury trial would dismantle an agency scheme or impede an agency scheme's promise of swift resolution of a newly created cause of action invites what the Supreme Court in *Jones v. SEC*[140] called "petty encroachments."[141] Step one does all the work needed here. All too often, "considerations" morph into "conditions" that could defeat Seventh Amendment rights in the future. As noted in a different context, "multi-part tests are often subject to subjective and inconsistent application" and, in some cases, make "appellate review extremely difficult, and precedent of little value."[142]

138. *Id.* at 453 (majority opinion) (alteration in original) (citations omitted) (first quoting Tull v. United States, 481 U.S. 412, 417 (1987); and then quoting *Granfinanciera*, 492 U.S. at 60–61, 63 (quoting Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 454 n.11, 461 (1977))).

139. *Thunder Basin*'s multi-part test spawned much confusion and inconsistent holdings over seven circuits. No one could ever figure out whether all of the factors mattered, whether some mattered more than others, and what weight to give them when the factors pointed in opposite directions. By the time this doctrine reached the Northern District of Arizona in *Axon Enterprise, Inc. v. FTC*, 452 F. Supp. 3d 882 (D. Ariz. 2020), *aff'd*, 986 F.3d 1173 (9th Cir. 2021), *rev'd*, 143 S. Ct. 890 (2023), *Thunder Basin* had ascended into a "trilogy" of cases along with *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), and *Free Enterprise Fund*. *Axon*, 452 F. Supp. 3d at 888–91. Once a trilogy, *Thunder Basis* and *Elgin* served to knock the wits out of *Free Enterprise Fund*—the only relevant precedent. *See Axon*, 986 F.3d at 1183–84 (distinguishing *Axon* from *Elgin* and *Free Enterprise Fund*), *rev'd*, 143 S. Ct. 890 (2023). The Supreme Court recently sorted out this carnage in *Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890 (2023). It is noteworthy that, in the end, *Thunder Basin* took up only a few pages of the government's briefing—to the point where Justice Kagan asked the Deputy Solicitor General, "[D]o you think you lose under Thunder Basin?" Brief for the Federal Parties at 30–32, 35–36, *Axon*, 143 S. Ct. 890 (Nos. 21-86, 21-1239); Transcript of Oral Argument at 59, *Axon*, 143 S. Ct. 890 (No. 21-86); *see also* Jellum, *Why the SEC Is Wrong*, *supra* note 16 ("[T]he D.C. Circuit in [*Jarkesy I*] reversed the burden of proof, stating that the *plaintiff* must demonstrate 'a strong countervailing rationale' against implied preclusion. Besides misanalyzing the issue, the appellate courts have labored to resolve the litigation in the SEC's favor. At times, their reasoning has been almost nonsensical." (quoting *Jarkesy I*, 803 F.3d 9, 17 (D.C. Cir. 2015))). Thus do we consecrate and expand error. Thankfully, the Supreme Court correctly applied the *Thunder Basin* factors in *Axon*, affirming *Cochran* and overruling six circuit courts of appeals' misapplication of those factors in *Axon*, *Jarkesy I*, *Tilton*, *Bebo*, *Bennett*, and *Hill*. *See Axon*, 143 S. Ct. at 902–06 (applying the *Thunder Basin* factors).

140. 298 U.S. 1 (1936).

141. *Id.* at 24.

142. Doe v. Kamehameha Schs./Bernice Pauahi Bishop Est., 625 F.3d 1182, 1191 (9th Cir. 2010) (Reinhardt, J., dissenting from denial of rehearing en banc).

Far from "usurp[ing]" the Supreme Court's authority to reverse itself, as suggested by Professor Adler,[143] the *Jarkesy II* majority's two-part test bends over backwards to incorporate this unnecessary second step and is too accommodating and unquestioning of the facile reasoning behind decades of denial of jury trial rights.

The majority opinion's jury trial test in *Jarkesy II* would be better if it stopped at step one. The jury trial right was not conferred by the Founders unless it might dismantle some scheme cooked up by Congress or slow down whatever brand of justice might be part of that scheme. When, as here, the government is bringing a claim "at common law," that should end the inquiry. Not only is this a bright-line rule, it is what the Constitution requires. Lower courts are well within their hierarchical constraints to look at the text of the Seventh Amendment and effectuate it over any statutory scheme to the contrary. Further, the assumption that administrative proceedings are more efficient is a dangerous fiction that should be exposed and uprooted—the time to resolution of these administrative adjudications beggars belief.[144] And while jury trials do take a bit longer than bench trials, no matter. Jury trials protect our liberty.

E. Delegation

Jarkesy II's holding on nondelegation has drawn the most criticism:

> Petitioners next argue that Congress unconstitutionally delegated legislative power to the SEC when it gave the SEC the unfettered authority to choose whether to bring enforcement

143. *See* Adler, *supra* note 72 ("I think it's bad [form] from circuit courts to effectively usurp that authority, as I think the Fifth Circuit did here.").

144. If delay is the concern, jury trials cannot possibly be less efficient than these administrative adjudications. The median time from filing to case resolution in the Northern District of Texas is well under a year. *Statistics*, N. DIST. OF TEX., https://www.txnd.uscourts.gov/statistics [https://perma.cc/8A8V-NDPV]. The cases under discussion here run many years. *Jarkesy*—ten years, *Jarkesy II*, 34 F.4th 446, 450 (5th Cir.) (noting that the SEC's investigation began in 2011), *reh'g en banc denied*, 51 F.4th 644 (5th Cir. 2022) (per curiam), *petition for cert. filed*, No. 22-859 (U.S. Mar. 8, 2023); *Lucia*—six years, *compare* Lucia v. SEC, 138 S. Ct. 2044 (2018) (decided in 2018), *with* Raymond J. Lucia Cos. at 1–2, Initial Decision Release No. 495, 2013 WL 3379719, at *1 (ALJ July 8, 2013) (noting that the SEC instituted cease-and-desist proceedings in 2012); *Gibson*—seven years and counting, Christopher M. Gibson at 2, Initial Decision Release No. 1398, 2020 WL 1610855, at *2 (ALJ Mar. 24, 2020) ("The Commission initiated this proceeding in March 2016 . . . ."); *Cochran*—five and a half years, Cochran v. U.S. SEC, 20 F.4th 194, 198 (5th Cir. 2021) (en banc) (indicating that the SEC began proceedings in April of 2016), *aff'd sub nom.* Axon Enter., Inc. v. FTC, 143 S. Ct. 890 (2023).

> actions in Article III courts or within the agency. Because Congress gave the SEC a significant legislative power by failing to provide it with an intelligible principle to guide its use of the delegated power, we agree with Petitioners.[145]

Adler's (and others') critique has some heft, so I set it forth at some length:

> The delegated power at issue is the SEC's authority to make case-by-case decisions about how to enforce the securities laws against individual regulated entities. This is not legislative power. This is the sort of prosecutorial discretion that lies at the core of executive authority. And because this is not legislative power, no "intelligible principle" is required.[146]

He rejects the panel majority's argument on this point:

> The Fifth Circuit tries to parry this objection by claiming that power is "legislative" if it has "the purpose and [e]ffect of altering the legal rights, duties and relations of persons." But this doesn't do the work the Fifth Circuit wants it to. Jarkesy's rights in an Article III court and in an administrative proceeding are what they are under the Constitution and relevant statutes. The SEC did not alter these rights. It merely chose how to enforce the laws Congress enacted.
>
> . . . .
>
> The point here is that [t]he Fifth Circuit makes a fundamental category error when it characterizes the power at issue—the power to choose which method of enforcement to use in a given case involving a given regulated entity—as a legislative one. It is not, and the Fifth Circuit blundered when concluding otherwise.[147]

Assume that this is a categorical error. A delegation problem remains, and it is a serious one. As my colleague at NCLA Mark Chenoweth first pointed out to me a few years ago, Congress has re-assigned *judicial* power—a power it lacks altogether—to an enforcement scheme that combines executive power and judicial power in one branch of government. That it cannot do.[148] The Constitution requires that those powers reside in separate

145. *Jarkesy II*, 34 F.4th at 459.

146. Adler, *supra* note 72.

147. *Id.* (quoting *Jarkesy II*, 34 F.4th at 461).

148. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) ("Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." (first citing Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); and then citing Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948)))

branches of government.[149] Congress simply cannot shift judicial power from one branch of government to another—especially not to the prosecutor.[150] It has no judicial power to delegate at all.

This important recasting of how to think about nondelegation was recently articulated well in Judge Kevin Newsom's concurrence in *Ruiz v. U.S. Attorney General*[151] and deserves to be quoted at length:

> [F]or more than 200 years now, it has been "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). No need to gild that lily: A reading of [a statute of Congress] that would make the Attorney General's legal determinations "controlling" on reviewing courts would impermissibly divest the judiciary of its authority to "say what the law is"—and, in the doing, lodge that power in the executive. And it should go without saying that Congress can't mend that separation-of-powers breach simply by waving a wand and purporting to vest binding interpretive authority in the Executive Branch. In fact, to do so would be to commit the sin of *Hayburn's Case*, only in reverse. There, the Court held that Congress couldn't imbue judicial officers with executive authority because "neither the legislative nor the executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner." 2 U.S. (2 Dall.) 408, 410 (1792). In so holding, the Court explained that "the legislative, executive and judicial departments are each formed in a separate and independent manner . . . ." *Id.* Infusing the Executive Branch with judicial authority— . . . if it [would make] the Attorney General's legal determinations of law binding on courts—would be no less unconstitutional.
>
> Second, giving the Attorney General's legal determinations

149. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986) ("Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts . . . ." (alteration in original) (quoting Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting))).

150. This is why there must be judicial review at *some* stage in the process. And that *must* take place before any penalty is assigned. *See* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 220 (1994) (Scalia, J., concurring in part and concurring in the judgment) (finding preclusion of pre-enforcement judicial review constitutional "if judicial review *is* provided before a penalty" is imposed). Yet, SEC adjudications routinely assess penalties and object to any stay (not to mention that the expensive and time-consuming adjudications arguably constitute penalties in and of themselves). For this reason alone, the SEC ALJ adjudications violate the Constitution because the punishment is levied before the process is completed.

151. No. 22-10445, 2023 WL 3523070 (11th Cir. May 18, 2023).

> "controlling" force vis-à-vis reviewing courts would transgress the limits that Article III places on the activities of so-called non-Article-III tribunals. In *Stern v. Marshall*, for instance, the Supreme Court emphasized that "Article III could neither serve its purpose . . . nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." 564 U.S. 462, 484 (2011); *see also id.* at 483 ("[T]here is no liberty if the power of judging be not separated from the legislative and executive powers.") (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter, ed. 1961)).[152]

When looked at as a congressional reassignment of *judicial* power, done at the unfettered whim of the very powerful executive agency that is also—oops!—prosecuting you, this delegation problem comes into sharp focus. It is not just that there is no intelligible principle here. There is instead a huge principle at stake—the separation of powers—that cannot be undone by Congress, much less by unelected and unaccountable bureaucrats.

Professor Philip Hamburger puts his finger on the problem when he notes that the SEC's unilateral decision to try some of its targets before ALJs transforms Jarkesy's constitutional rights "into mere options."[153] What was once an inalienable right of citizens to be tried in a separate branch of government judged by a jury of their peers is now only an "option" exercisable *only by your prosecutor and opponent*. That can never be constitutional.

Faced with multiple structural and Seventh Amendment violations, the *Jarkesy II* court was right to address all of them—especially when those flaws will infect any further proceeding on remand. A piecemeal approach to constitutionalism is disastrous for enforcement targets, and deferred action on the legality of SEC ALJs through successive Supreme Court terms has also paralyzed the agency:

> And what about the remaining in-house cases that were forced to reboot after the Supreme Court's *Lucia* decision? Most are at least six years old by now. Nearly all were fully relitigated and briefed on appeal to the SEC commissioners well over a year

152. *Id.* at *11 (Newsom, J., concurring) (third, sixth, and seventh alterations in original) (citations modified).

153. Philip Hamburger, *The Administrative Evasion of Procedural Rights*, 11 N.Y.U. J.L. & LIBERTY 915, 916 (2018).

> ago—some of them two or three years ago. But the last time the commissioners decided one was November 2020.
>
> Since then, the SEC has obstinately refused to decide any of these cases, thereby indefinitely blocking litigants from appealing to real courts. Call it the SEC's version of the Hotel California: The accused can check out, but they can never leave.[154]

Dozens of individuals languish in these paralyzed proceedings with no end in sight.[155] A clearer denial of due process is hard to imagine.

F. A Jurisdictional Sidebar: Evolution of a Justice

In 2015, the mere existence of a "detailed statutory scheme" was enough in *Jarkesy I* to toss Jarkesy out of federal court.[156] Judge, now Justice, Kavanaugh signed on to that opinion even though it postdated *Free Enterprise Fund*'s 2010 holding that "constitutional claims are . . . outside the Commission's competence and expertise."[157] Indeed, as late as 2020—even after *Lucia* laid the constitutional predicate that SEC ALJs were subject to Article II requirements—a Fifth Circuit panel majority persisted in applying the doctrine of implied preclusion:

> This appeal is not about whether Cochran will have the opportunity to press her separation-of-powers claim. She will. It instead asks: Where and when?
>
> . . . .
>
> Cochran may raise her removal-power claim before the ALJ and, if she loses before the agency, in a court of appeals. She may even be able to get her claim all the way to the Supreme Court as Lucia did. But Cochran cannot circumvent the

154. Russell Ryan, Opinion, *The Dangers of the SEC's 'Hotel California' Docket*, LAW360 (Nov. 28, 2022, 6:55 PM) (emphasis added), https://www.law360.com/articles/1552039/the-dangers-of-the-sec-s-hotel-california-docket [https://perma.cc/WXN8-ZR78]. Ryan also observes:

> For decades, the SEC and other agencies have assured courts and litigants that the notoriously paltry due process protection they offer in their captive, home-court administrative tribunals is worth the deprivations because administrative adjudication is so much more streamlined and efficient, thereby producing prompt decisions. The SEC's Hotel California docket demonstrates exactly the opposite reality.

Id.

155. *See* Petition for a Writ of Mandamus to the U.S. Securities and Exchange Commission at 15–16, 16 n.8, *In re* Young, No. 23-20179 (5th Cir. Apr. 24, 2023) (noting the SEC's habit of pocket vetoing appeals).

156. 803 F.3d 9, 12 (D.C. Cir. 2015).

157. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 491 (2010).

> statutory review scheme by litigating it now in a federal trial court.[158]

Judge Haynes dissented in part[159] and eventually wrote the en banc majority opinion, which, along with its concurrence, courageously split from the law of six circuits.[160] When and where the claims can be raised is imperative. Otherwise, relief is available only after the constitutional injury has occurred.[161]

At least one legal publication has predicted that Justice Kavanaugh will feel compelled to stand by Judge Kavanaugh's earlier jurisdictional vote in *Jarkesy I*.[162] Several developments cast doubt on that prediction. In 2016, while still a circuit judge, Justice Kavanaugh wrote a powerful dissent raising serious concerns about the fairness of the SEC's administrative scheme in *Lorenzo v. SEC*.[163] There, the Commission substituted a *mens rea* version of the facts for the facts as found by the ALJ, which did not find scienter.[164] Then-Judge Kavanaugh added that this "agency-centric process is in some tension with Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment right to a jury trial in civil cases."[165] Judge Kavanaugh stressed that "the premise of *Crowell v. Benson* is that, putting aside any formal constitutional problems with the notion of administrative adjudication, the administrative

158. Cochran v. SEC, 969 F.3d 507, 511, 518 (5th Cir.), *vacated*, 978 F.3d 975 (5th Cir. 2020) (per curiam).

159. *Id.* at 518.

160. Cochran v. U.S. SEC, 20 F.4th 194 (5th Cir. 2021) (en banc). The correctness of the Fifth Circuit's jurisdictional decision was affirmed this term at the Supreme Court in the consolidated cases of *Axon/Cochran*. *See* Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 900 (2023) ("We now conclude that the review schemes set out in the Exchange Act and the FTC Act do not displace district court jurisdiction over Axon's and Cochran's far-reaching constitutional claims.").

161. *See* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 220 (1994) (Scalia, J., concurring in part and concurring in the judgment) (arguing that precluding pre-enforcement judicial review is constitutional only "if a summary penalty does not cause irreparable harm . . . or if judicial review *is* provided before a penalty for *non*compliance can be imposed").

162. *See* Jessica Corso, *Kavanaugh May Prove Unlikely SEC Ally in Accountant's Case*, LAW360 (Nov. 4, 2022, 5:57 PM), https://www.law360.com/articles/1545708/kavanaugh-may-prove-unlikely-sec-ally-in-accountant-s-case [https://perma.cc/G8G8-R9KF] (noting that then-Judge Kavanaugh joining the decision in *Jarkesy I* "could prove critical for the [SEC]" in *Axon/Cochran*).

163. 872 F.3d 578, 596–602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

164. *Id.* at 599 ("The majority opinion says that the facts found by the administrative law judge are not the right facts. Instead, in reaching its conclusion, the majority opinion relies on the SEC's alternative facts, which the SEC devised on its own without hearing from any witnesses.").

165. *Id.* at 602 (citing HAMBURGER, *supra* note 84, at 227–57).

adjudication process *will at least operate with efficiency and with fairness to the parties involved*."[166] Now that *Axon/Cochran* has been decided unanimously, all speculation is gone.

If *Jarkesy II* makes it to the Supreme Court, as has been predicted,[167] it will be Exhibit A negating any presumption of efficiency or fairness. When *Jarkesy I* denied jurisdiction, it held:

> The only independent harms Jarkesy will face as a result of his continuing to undergo the Commission proceeding are the burdens abided by any respondent in an enforcement proceeding . . . who must wait for vindication. The judicial system tolerates those harms, and they are insufficient for us to infer an exception to an otherwise exclusive scheme.[168]

But we now know that Jarkesy's administrative proceeding has been vacated on constitutional grounds that he raised in 2014—before the constitutional injury occurred. Even if he wins, he faces potential renewed prosecution *fourteen years* after the facts at issue, which began in 2007.

Why is the passage of time important? In 2014, then-Director of the SEC Enforcement Division Andrew Ceresney defended Dodd–Frank's expansion of an administrative scheme which denies jury trial and evidentiary and procedural protections afforded in Article III courts because it "produce[d] prompt decisions" from hearings "held promptly."[169] This promptness was important to all the parties because "[p]roof at trial rarely gets better for either side with age; memories fade and the evidence becomes stale."[170] Jarkesy's in-house proceeding took seven years to emerge from the administrative maw. In that proceeding, the agency had missed every deadline governing its conduct by many, many years.[171] The SEC's recent record of self-conferred extensions has no horizon

166. *Id.* (emphasis added).

167. *See* Bill Flook, *Beyond* Jarkesy*, SEC Administrative Proceedings Face Attacks on Multiple Fronts*, THOMPSON REUTERS (June 17, 2022), https://tax.thomsonreuters.com/news/beyond-jarkesy-sec-administrative-proceedings-face-attacks-on-multiple-fronts/ [https://perma.cc/Y7N5-PJLP] (reporting DLA Piper Partner Deborah Meshulam as saying, "I would be thinking very hard about an en-banc appeal possibly to be followed by certiorari").

168. *Jarkesy I*, 803 F.3d 9, 28 (D.C. Cir. 2015).

169. Andrew Ceresney, Dir., SEC Div. of Enf't, Remarks to the American Bar Association's Business Law Section Fall Meeting (Nov. 21, 2014), https://www.sec.gov/news/speech/2014-spch112114ac [https://perma.cc/TK3D-XUFM].

170. *Id.*

171. *See* John Thomas Cap. Mgmt. Grp. LLC at 39, Securities Act Release No. 10834, Exchange Act Release No. 89775, Investment Company Act Release No. 34003, 2020 WL 5291417, at *24 (Sept. 4, 2020) (outlining the delays).

in sight at all.[172]

G. The House of Cards Tumbles—The Control Deficiency

> The lawyers have twisted it into such a state of bedevilment that the original merits of the case have long disappeared from the face of the earth. . . . It's about nothing but Costs, now.
>
> -Charles Dickens, *Bleak House*[173]

Men are not angels, as the Founders well understood, and for exactly that reason, they separated the powers of government that now commingle in the toxic stew of agency adjudication. *Cochran* and *Jarkesy II* were and are at the top of any list of securities, constitutional, and administrative law cases to watch in 2023. In addition to making structural constitutional arguments, they have a second trait in common.

On April 5, 2022, the SEC filed a notice in *Jarkesy II*,[174] by then fully briefed and pending decision in the Fifth Circuit, and on April 8, it filed the same notice on the *Cochran* Supreme Court docket.[175] The SEC informed both courts that "administrative support personnel from Enforcement, who were responsible for maintaining Enforcement's case files, accessed [restricted] Adjudication memoranda via the Office of the Secretary's databases," adding that this had occurred as well in matters other than *Jarkesy II* and *Cochran*.[176] The SEC called this a "control deficiency."[177] The *Wall Street Journal* called it "improper" file sharing between enforcement and adjudicatory staff.[178] Glenn Harlan Reynolds blogged: "Understand: The 'prosecutors' at the SEC illegally accesssed [sic] files belonging to the 'judges.' This

172. *See supra* note 144.

173. DICKENS, *supra* note 21, at 121.

174. Letter from Daniel Aguilar, Counsel for SEC, to Lyle W. Cayce, Clerk of Ct., U.S. Ct. of Appeals for the Fifth Cir., Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022) (No. 20-61007) [hereinafter Aguilar Letter].

175. Letter from Elizabeth B. Prelogar, Solicitor Gen., Dep't of Just., to Scott S. Harris, Clerk, Sup. Ct. of the U.S., SEC v. Cochran, 143 S. Ct. 890 (2023) (No. 21-1239) [hereinafter Prelogar Letter].

176. *Id.*; Aguilar Letter, *supra* note 174. Both letters attached screenshots of an SEC statement containing the quoted material. Statement, SEC, Commission Statement Relating to Certain Administrative Adjudications (Apr. 5, 2022) [hereinafter Commission Statement], https://www.sec.gov/news/statement/commission-statement-relating-certain-administrative-adjudications [https://perma.cc/M4J2-TVWU].

177. Commission Statement, *supra* note 176.

178. Dave Michaels, *SEC Says Employees Improperly Accessed Privileged Legal Records*, WALL ST. J. (Apr. 6, 2022, 8:54 AM), https://www.wsj.com/articles/sec-says-employees-improperly-accessed-privileged-legal-records-11649205758 [https://perma.cc/HWQ8-R5PJ].

raises serious questions about the trustworthiness of the SEC, and demands an outside investigation with subpoena power."[179] This incident crystalizes the constitutional infirmity of the SEC's in-house tribunals: when the prosecutor and "judge" work for the same boss, there can be no due process.

Congress took immediate note, holding a hearing on oversight of the SEC's Division of Enforcement to which they summoned SEC Chairman Gary Gensler, who did not attend.[180] SEC Director Gurbir Grewal appeared instead. Grewal testified that "as soon as that breach was discovered, it was reported, and it was publicly reported."[181] But the *Wall Street Journal* reported that "[t]he SEC discovered the breach in the fall of 2021."[182] The first public disclosure was six months later, on April 5, 2022, when the SEC filed its statement in the *Jarkesy II* and *Cochran* dockets, of which the parties and their counsel had no advance notice. To this day, the SEC has flouted FOIA production. Both Jarkesy and Cochran have been forced to file federal lawsuits in which the SEC resists production of documents related to this disturbing "control deficiency."[183]

SEC ALJs have publicly boasted that they always find in favor of the agency.[184] One ALJ said she came under fire from the Chief ALJ for finding too often in favor of defendants, stating that "[s]he questioned my loyalty to the SEC" and adding that she "retired as a result of the criticism" for insufficient fealty.[185] A recent Government Accountability Office study found that most PTAB judges report they have felt pressure to alter rulings.[186]

Is it any wonder that grave concerns persist about an agency that combines investigatory, prosecutorial, adjudicative, and penalty-assessing power? A piecemeal approach to

179. Glenn Reynolds, *The SEC Needs a Special Counsel Investigation*, INSTAPUNDIT.COM (Apr. 14, 2022, 10:14 AM), https://instapundit.com/515245/ [https://perma.cc/W5B7-78VN].

180. *See Oversight of the SEC's Division of Enforcement: Hybrid Hearing Before the Subcomm. on Inv. Prot., Entrepreneurship, & Cap. Mkts. of the H. Comm. on Fin. Servs.*, 117th Cong. 3 (2022) (noting the absence of the SEC Chairman).

181. *Id.* at 9 (statement of Gurbir S. Grewal, Director, Division of Enforcement, SEC).

182. Michaels, *supra* note 178.

183. New C.L. All. v. SEC, No. 22-cv-03567 (D.D.C. filed Nov. 23, 2022); Jarkesy v. SEC, No. 22-cv-00405 (S.D. Tex. filed Nov. 23, 2022).

184. Jean Eaglesham, *Fairness of SEC Judges Is in Spotlight*, WALL ST. J. (Nov. 22, 2015, 9:25 PM), https://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970 [https://perma.cc/PFR7-XM5S].

185. Eaglesham, *supra* note 7.

186. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 127, at 15.

constitutionalism is disastrous for enforcement targets.

Critics of these recent Fifth Circuit decisions lament the fate of ALJs,[187] the vast majority of whom will continue to adjudicate benefits, immigration, and similar cases. No critic seems concerned about the thousands of people whom the SEC has subjected over the decades to administrative proceedings before in-house judges who were improperly appointed or are otherwise unconstitutional, who have no recourse because of the passage of time.[188]

H. We're Taking Our Ball and Going Home—SEC Dismisses All Its Cases

As this Article was going to press, the SEC dismissed all forty-two of its open administrative cases on the Commission's appellate docket from ALJ proceedings. First on that unprecedented list of mass dismissals? Michelle Cochran, who had fought for over four years to be able to challenge the constitutionality of her administrative adjudication in an Article III federal court *before* that constitutional injury took place. In April, just a few short weeks before this mass dismissal, the Supreme Court agreed with Cochran and ordered that her "'here-and-now injury' . . . is impossible to remedy once the proceeding is over" and must be heard in district court because "an illegitimate proceeding . . . cannot be undone."[189] Now that the SEC faces Article III court challenges (including three[190] already actively in court)—the fate of SEC administrative adjudication hung in the balance. Instead of facing those challenges, the SEC decided it was done playing and wanted to take its ball and go home.

These dismissals are an obvious and cynical ploy to preempt that hard-won right to judicial review that had been percolating through the federal circuits for over a decade by Jarkesy, Cochran, and many, many others. The pretext offered by the SEC—the

187. *See, e.g.*, Kuttner, *supra* note 59 (accusing the Fifth Circuit of an agenda focused on ending the administrative state).

188. *See* Mark Chenoweth, *Will Constitutional Defects with Administrative Law Judges Collapse the SEC's House of Cards?*, FORBES (Dec. 3, 2018, 3:35 PM), https://www.forbes.com/sites/markchenoweth/2018/12/03/will-constitutional-defects-with-administrative-law-judges-collapse-the-secs-house-of-cards/ [https://perma.cc/RTB9-KB74] (reflecting on the thousands of cases that have passed through ALJ hands).

189. Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 903–04 (2023).

190. SEC v. Cochran, 143 S. Ct. 890 (2023) (remanding Cochran's case to the Fifth Circuit for further proceedings); *In re* Young, No. 23-20179 (5th Cir. filed Apr. 24, 2023); Gibson v. SEC, No. 19-cv-01014, 2019 WL 5698679 (N.D. Ga. May 8, 2019).

widespread infection of "control deficiencies" by lower level staff in at least ninety cases—is a convenient, if embarrassing, way to keep what Justice Kagan called "fundamental, even existential" claims that "agencies, as currently structured, are unconstitutional in much of their work" out of the federal courts.[191] But the SEC did not dismiss Jarkesy's challenge, even though his case appears in the SEC's disclosure as the one SEC staff most actively intruded upon with control deficiencies.[192] If this misconduct justifies wiping the administrative docket clean, it makes no sense to treat George Jarkesy any differently than the more than ninety cases tainted by the SEC control deficiency. The same point applies to cases tainted by the control deficiency where there was a settlement or conviction.

This selective winnowing of cases to evade judicial review of agency adjudication leaves George Jarkesy as the standard-bearer for scores, if not hundreds, of Americans lost in the SEC Hotel California docket.[193] The SEC's attempt to nullify already-docketed cases headed to a (likely adverse to the SEC) judicial decision should alert the Supreme Court, as little else can, of the enormous power agencies have to manipulate which cases will ever reach the Court. These tactics make it all the more essential for courts to address all constitutional issues properly before them and not use piecemeal adjudication and percolation as justifications to slow-walk the restoration of these essential constitutional liberties.

III. THE TROUBLE WITH DOCTRINE

> [I]t is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community.
>
> -Alexander Hamilton, *Federalist No. 78*[194]

A. Dancing with Doctrine

Throughout these decade-long challenges to Dodd–Frank's

191. *Axon*, 143 S. Ct. at 897.

192. *See* SEC, Second Commission Statement Relating to Certain Administrative Adjudications, Exhibit 1 at 1–2 (June 2, 2023), https://www.sec.gov/files/second-commission-statement-relating-certain-administrative-adjudications-exhibit-1.pdf [https://perma.cc/M4ZG-XVXM] (indicating access by enforcement staff).

193. *See supra* note 154 and accompanying text.

194. THE FEDERALIST NO. 78, *supra* note 18, at 406 (Alexander Hamilton).

extension of unconstitutional administrative adjudication power over Americans charged in government enforcement proceedings, the judiciary has wrestled with a veritable hornbook of doctrines: implied preclusion, constitutional avoidance, constitutional minimalism, and public rights. Mootness and ripeness made cameo appearances, thankfully brief, to say nothing of *Thunder Basin* and its pesky, ill-defined multi-factor tests. As Justice Gorsuch compellingly argued in his separate opinion in *Axon/Cochran*, the *Thunder Basin* multistep exercise was unnecessary where the jurisdictional statutes plainly required federal courts to take jurisdiction and the '34 Act did nothing to displace that jurisdiction.[195] It is hard to disagree with Justice Gorsuch's separate opinion that where statutes are clear, courts should not resort to a judge-made test, especially given that *Axon/Cochran* overruled *six* circuits that had misapplied the three *Thunder Basin* factors. Indeed, this Essay has tried to show that none of these doctrines, fairly applied, oust jurisdiction or impair the merits or breadth of the Fifth Circuit's landmark decision in *Jarkesy II*.

Such doctrines and judge-made tests are malleable tools that can lead to great mischief. The hydra-headed multiplication of deference doctrines (*Chevron*, *Auer/Seminole Rock*, *Skidmore*, and *Stinson*, to name just a few) have all too often put a government-favoring thumb on the scales of justice that leave citizens to the unmediated mercy of their regulators. Courts must be skeptical in their creation or application of such doctrines and be unafraid to say when they do not apply or need to be revisited. Further, as the Fifth Circuit held en banc in *Cochran*, and the Supreme Court eventually *unanimously* agreed, nothing in the text or structure of the Securities Exchange Act strips jurisdiction from federal courts to hear these claims—explicitly or implicitly.[196] The Supreme Court already decided that question in *Free Enterprise Fund* in 2010, just at the same time that Dodd–Frank would seek to draw Americans into unconstitutional enforcement proceedings. The right case was at hand all along. Sad to say, Lucia, Jarkesy, and Cochran spent an unnecessary near-decade in impoverishing

195. *See Axon*, 143 S. Ct. at 911–12 (Gorsuch, J., concurring in the judgment) (arguing that the jurisdictional statute "is as clear as statutes get, and everyone agrees it encompasses the claims . . . Cochran and Axon seek to pursue" and criticizing the *Thunder Basin* test for nevertheless looking to implicit congressional intent).

196. Cochran v. U.S. SEC, 20 F.4th 194, 199–201 (5th Cir. 2021) (en banc), *aff'd sub nom.* Axon Enter., Inc. v. FTC, 143 S. Ct. 890 (2023).

darkness.

Justice Holmes famously said that "[t]he life of the law has not been logic: it has been experience."[197] In a twist on that notion, George Jarkesy, Ray Lucia, and Michelle Cochran's decades-long journey was a costly and cruel experience of dislodging illogic. Eventually, all nine Justices unanimously agreed that it made no sense to force Americans to endure an unconstitutional proceeding before they could challenge its constitutionality—overruling six circuit courts—restoring an important measure of logic to the rule of law.[198]

B. Regulation by Enforcement

Policymaking by adjudication in the absence of any rule has become the norm for the SEC. George Jarkesy's business was not subject to SEC regulation and its losses were not the result of the violation of any statute or regulation. Ray Lucia's prosecution was for violating a purported rule his ALJ's "majority opinion create[d] from whole cloth," where no one had ever claimed losses or damages at all from this made-up, retroactive violation.[199] More recently, the SEC has imperiously decided to regulate corporate board diversity while heralding the "flexibility" of such law-free regulation by flex of agency power.[200] The former chief of the SEC's Office of Internet Enforcement admits "litigation is precisely how securities regulation works. . . . The flexibility of SEC statutory weaponry is an SEC hallmark."[201] Current SEC chair Gary Gensler wholly subscribes to this capacious view: "Some market participants may call this 'regulation by enforcement.' I just call it 'enforcement.'"[202]

197. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Boston, Little, Brown, & Co. 1881).

198. Justice Kagan's crisp *Axon/Cochran* opinion turns on logic: "Yet a problem remains, stemming from the interaction between the alleged injury and the timing of review. . . . And—here is the rub—it is impossible to remedy once the proceeding is over . . . ." 143 S. Ct. at 903.

199. Gallagher & Piwowar Dissent, *supra* note 69.

200. *See* Order Approving Proposed Rule Changes, as Modified by Amendments No. 1, to Adopt Listing Rules Related to Board Diversity at 1, 39–47, 82, Release No. 34-92590 (Aug. 6, 2021) (approving the Nasdaq Stock Market's proposed changes to its listing rules to promote board diversity).

201. John Reed Stark, *Why "SEC Regulation by Enforcement" Is a Bogus Big Crypto Catchphrase*, LINKEDIN (Jan. 22, 2023), https://www.linkedin.com/pulse/why-sec-regulation-enforcement-bogus-big-crypto-john-reed-stark/ [https://perma.cc/L9VD-8XMU].

202. Gary Gensler, Chairman, SEC, Prepared Remarks at the Securities Enforcement

This lawlessness was predicted at the very time and in the very case that administrative lawbooks will tell you is the cradle of agency rule by enforcement, *SEC v. Chenery Corp.*[203] Justice Robert Jackson, a committed New Dealer and FDR appointee, wrote a stirring (and very darkly funny) dissent when the Court flipped a prior decision, *Chenery I*,[204] and thus conferred enduring judicial blessing on regulation by enforcement.[205] Stupefied by the flip, Justice Jackson asked incredulously, "Surely an administrative agency is not a law unto itself"[206] and noted that "the Court admits that there was no law prohibiting [the transactions] when they were made, or at any time thereafter."[207]

Mercilessly, Justice Jackson set out a bill of particulars of such lawless lawmaking:

- "It makes judicial review of administrative orders a hopeless formality for the litigant . . . ."
- "It reduces the judicial process . . . to a mere feint."
- It "put[s] most administrative orders over and above the law."
- It effectuates a personal deprivation of property, denying the owners the right to ownership and to exercise its privileges.
- It forces stock owners to surrender lawfully acquired property at less than its market value. "No such power has ever been confirmed in any administrative body."[208]

Justice Jackson warned that *Chenery II*'s flipped holding was unprecedented and profoundly dangerous:

> The Court's averment concerning this order, that "It is the type

Forum (Nov. 4, 2021), https://www.sec.gov/news/speech/gensler-securities-enforcement-forum-20211104 [https://perma.cc/H4X9-SSYB].

203. (*Chenery II*), 332 U.S. 194 (1947).

204. SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80 (1943). Justice Jackson's dissent in *Chenery II* is a masterpiece of devastating logic unrelentingly applied to absurd judicial "rationales" as opposed to reasoning. Exasperated, he says: "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" *Chenery II*, 332 U.S. at 214 (Jackson, J., dissenting).

205. *See Chenery II*, 332 U.S. at 196, 203, 207 (majority opinion) (holding that agencies can sometimes develop statutory standards on a case-by-case basis and upholding the SEC's administrative order, which it had held invalid in *Chenery I*).

206. *Id.* at 215 (Jackson, J., dissenting).

207. *Id.* at 216.

208. *Id.* at 210–12.

> of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process," is the first instance in which the administrative process is sustained by reliance on that disregard of law which enemies of the process have always alleged to be its principal evil. It is the first encouragement this Court has given to conscious lawlessness as a permissible rule of administrative action. This decision is an ominous one to those who believe that men should be governed by laws that they may ascertain and abide by, and which will guide the action of those in authority as well as of those who are subject to authority.[209]

Some or all of these prescient charges hold true for George Jarkesy, Ray Lucia, and the untold many Americans subjected to lawless administrative adjudication.

Alexander Hamilton predicted that over time, legislatures would invade constitutional separations of power and defeat or impair the liberties conferred by the Bill of Rights. The Founders knew how fragile these constructs of their political imagination were: Madison famously referred to the Constitution's separation of powers and the Bill of Rights as "parchment barriers," asking in *Federalist No. 48*, "Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?"[210] Madison promptly answered his own question with a glum description of contemporaneous end runs around state constitutional barriers in Pennsylvania that also serves as an even more venerable bill of particulars for George Jarkesy:

> [I]t appears that the constitution had been flagrantly violated by the legislature in a variety of important instances.
>
> . . . .
>
> *The constitutional trial by jury had been violated*; and *powers assumed which had not been delegated by the constitution.*
>
> . . . .
>
> . . . *[C]ases belonging to the judiciary department, frequently drawn within legislative cognizance and determination.*
>
> . . . [T]he greater part of them may be considered as the spontaneous shoots of an ill-constituted government.
>
> . . . .
>
> The conclusion which I am warranted in drawing from these

209. *Id.* at 217 (citation omitted) (quoting *id.* at 209 (majority opinion)).

210. THE FEDERALIST NO. 48, *supra* note 18, at 256 (James Madison).

> observations is, that a mere demarkation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.[211]

Breaking with other circuit courts to call the out-of-bounds on agency expansion of power is not easy. The *Jarkesy II* decision has been roundly criticized by those who oppose the principle that we live under a Constitution that enumerates and separates the powers of government—and confers jury trial rights and fact-finding by juries that Congress cannot invade. Unraveling the dense web of doctrine that trapped George Jarkesy and so many others in endless to-be-vacated administrative proceedings requires bold action. Judge Elrod displayed uncommon fortitude in defying decades of flawed doctrine and restoring the parchment barriers that protect and preserve our civil liberties.

211. *Id.* at 259–60 (emphasis added).