After *Jarkesy*: Toward a Theory of our Independent Judiciary and the Original Model of Adjudication Inside Article III

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INTRODUCTION

The independence of the judiciary, rule of law, and trial by jury are hard won treasures of the American legal order. Over the course of centuries, the English people developed the common law and its courts. The power and independence of these courts have faced perennial challenges—from the King's prerogative tribunals during the seventeenth century to juryless vice-admiralty tribunals in the years preceding the American Revolution. In response to these extra-legal encroachments on the rule of law, the American Founders enacted Article III of the United States Constitution, the Due Process Clause, and the Seventh Amendment. But these constitutional protections face a renewed threat in the rise of the administrative state and its neo-prerogative tribunals.

This article defends the original model of adjudication inside Article III created by Article III, the Due Process Clause, and the Seventh Amendment.[1] Article III vests the judicial power of the United States in the federal courts. The judicial power is the power to issue binding judgments pursuant to standing law in cases and controversies within the court's jurisdiction.[2] Only an exercise of the judicial power can deprive an individual of their private rights to life, liberty, and property.[3] Therefore, whether a matter constitutionally requires adjudication inside Article III often turns on the nature of the right in question.[4] Matters of private right—life, liberty, and property—require an exercise of the judicial power.[5] By

1. *A Note on Methodology*: This article employs Originalism. "Originalism is usually called a theory of interpretation, a particular way to read a text. Best understood, though, originalism is much more than that. It's a theory of our law: a particular way to understand where our law comes from, what it requires, and how it can be changed." Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL'Y 817, 818 (2015). Originalism provides a definition of our law: our law today "happens to consist of" the original law, the founders' law, plus "lawful changes made along the way." *Id.* at 819. This version of Originalism—Original-Law Originalism—holds that "the key standard for interpreting" any provision of the Constitution is that the provision enacts the legal rule "it enacted at the Founding" or time of enactment, plus any lawful changes made along the way. *See* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 817 (2022); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990) (explaining that originalism requires neutrality in the derivation, definition, and application of legal rules). This article applies Original-Law Originalism. It will trace the origins of the original legal rules enacted by Article III, the Due Process Clause, and the Seventh Amendment, the unlawful changes made to those legal rules by the modern administrative state, the current state of the law given SEC v. Jarkesy, 603 U.S. 109 (2024), and four steps the Court should take to restore the original law of Article III, Due Process, and the Seventh Amendment.

2. William Baude, *The Judgment Power*, 96 GEO. L. J. 1807, 1811 (2008).

3. William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1522, 1541–47 (2020).

4. *Jarkesy*, 603 U.S. at 127–28 (explaining "matters concerning private rights may not be removed from Article III courts" because private rights are "made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'"); *see also* Axon Enter., Inc. v. Fed. Trade Comm'n, 598 U.S. 175, 203 (2023) (Thomas, J., concurring) ("In sum, whether any form of administrative adjudication is constitutionally permissible likely turns on the nature of the right in question. If private rights are at stake, the Constitution likely requires plenary Article III adjudication. Conversely, if privileges or public rights are at stake, Congress likely can foreclose judicial review at will.").

5. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566–72 (2007).

contrast, matters of public right—government benefits or privileges—do not.[6] In the course of exercising the judicial power, courts must interpret and apply the relevant law.[7] It is in the process of interpreting the law that a court performs its duty of judicial review to invalidate a law that violates the Constitution.[8] Importantly, Article III vests "one subset of one kind of power — the judicial power of the United States" rather than the judicial power of any other government.[9]

In sum, the judicial power of the United States is the power to bind parties through judgments pursuant to law in cases and controversies where the court has jurisdiction, in the course of which the court has a duty to interpret and apply the law and must nullify any law that violates the Constitution. Only an exercise of the judicial power can authorize a deprivation of private rights—and that power—all of it—is vested in the Article III courts.

The Due Process Clause and the Seventh Amendment work in conjunction with Article III to reinforce the constitutional framework for adjudication inside Article III. The Due Process Clause confirms that before an individual can be deprived of their private rights to life, liberty, or property, the individual must receive judicial process and a judgment from a court of law.[10] And once a matter is subject to Article III and due process of law, the Seventh Amendment attaches to suits at common law valued above twenty dollars. A suit is at common law if it is legal in nature, and a suit is legal in nature if it presents a legal right, a wrong, and a legal remedy.[11] The presumption is in favor of trial by jury, except in cases

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6. *Id.*

7. *Id.;* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

8. Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 SUP. CT. ECON. REV. 115, 138 (2004); *see also* Federalist 78 (Alexander Hamilton) ("[I]n other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. . . . and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter rather than the former."); *Marbury*, 5 U.S. at 180 ("Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.").

9. Baude, *supra* note 3, at 1521.

10. *See, e.g.,* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L. J. 1672, 1679, 1807 (2012).

11. *Cf.* Parsons v. Bedford, 28 U.S. 433, 441, 446–47 (1830) (per Story, J.) (defining suits at common law as those involving legal rights and remedies); SEC v. Jarkesy, 603 U.S. 109, 122–23 (2024) (directing "courts to consider the cause of action" and remedy "[t]o determine whether a suit is legal in nature[.]"); Samuel Bray, *Equity, Law and the Seventh Amendment*, 100 Tex. L. Rev. 467, 484, 498 (2022) (explaining the distinction between "claims" and "remedies" is "anachronistic"); Jonathan H. Adler, *Standing Without Injury*, 59 WAKE FOREST L. REV. 1, 22 (2024) (defining a case at law as whenever a legal right has been violated and the law authorizes a legal remedy); *see also* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 532–36 (2016) (explaining that the line between law and equity in the context of remedies is valid and useful); Brief of Amicus Curiae Professor Ilan Wurman in Support of Neither Party, Securities and Exchange Commission v. George R. Jarkesy, et al. at 28 ("The key distinction between law and equity is that legal remedies do not require

that are in equity or admiralty.[12] The original legal rules enacted by these three provisions—Article III, Due Process of Law, and the Seventh Amendment—form the original model for adjudication inside Article III.

Since the turn of the century and rise of the administrative state, the independent judiciary and private rights of the American people face a renewed threat in the return of prerogative tribunals and vice-admiralty jurisdiction in the development of adjudication by administrative agencies. Within the American executive branch, administrative tribunals have emerged that exercise the judicial power—issuing binding legal judgments that deprive individual Americans of their lives, liberties, and properties outside of Article III and its procedural protections with no right to trial by jury.

In *SEC v. Jarkesy*, the Supreme Court began to pare back these administrative tribunals. The Court heard a challenge to the Securities and Exchange Commission's juryless, in-house administrative prosecution of George Jarkesy for alleged securities fraud and civil money penalties of $300,000. The Court held a suit prosecuting securities fraud for civil money penalties was a suit at common law to which the right to trial by jury applied. In checking administrative overreach, Chief Justice John Roberts recognized the constitutional injustice of administrative tribunals that "concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch. . . . the very opposite of the separation of powers that the Constitution demands."[13]

The Court got the law right in *Jarkesy*—and it should build on the decision going forward. This article proposes four steps to restore the original legal rules enacted by the Seventh Amendment, Article III, and Due Process of Law.

First, the Seventh Amendment enacts a simple rule: a suit at common law consists of a legal right, a wrong, and a legal remedy. A suit at common law presumptively receives trial by jury, except for cases in equity, admiralty, or maritime.[14]

Second, the Court should clarify the distinction between private and public rights.[15] Private rights are natural rights that belong to individuals, classically denominated life, liberty, and property. Public rights belong to the public or to the government; paradigmatic examples are welfare benefits or public privileges. Otherwise, public rights are limited to narrowly drawn historic exceptions: the disposition of public lands and public funds, customs, immigration, political decisions within public use takings, and summary mechanisms for collecting tax revenue.

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the defendant to do anything: the defendant can merely pay, or if the defendant does not pay, the sheriff can attach defendant's property and obtain the money sufficient for the judgment. Equitable remedies operate on the body of the defendant—compelling defendants to take action (or inaction).").

12. *Parsons*, 28 U.S. at 441, 446–47 (explaining that suits at common law were a catch-all for suits in contradistinction to equity, admiralty, and maritime); Bray, *supra* note 11, at 484.

13. *Jarkesy*, 603 U.S. at 140.

14. *Infra* pp. 18-22.

15. *Infra* pp. 22-27.

Third, the Court should reverse the order of analysis and first decide if a case concerns private or public rights—which determines if a case requires adjudication inside Article III pursuant to due process of law—and then determine if the suit is legal in nature—which determines whether a jury is required under the Seventh Amendment.[16]

Fourth, the Court should more fully define the Article III judicial power.[17] The original law of the judicial power is the power to issue binding judgments pursuant to applicable law when the court has jurisdiction, and only an exercise of the judicial power can deprive an individual of life, liberty, or property. It is part and parcel of the judicial power for courts to interpret the law and exercise the duty of judicial review to void any statute that violates the Constitution. The Due Process Clause reinforces that individuals cannot be deprived of their private rights to life, liberty, or property except by judicial process pursuant to a valid exercise of the judicial power according to standing law. If the Court takes these four steps, it will restore the original model of adjudication inside Article III.

This article proceeds in three parts. First, a brief history of the separation of the judicial power from the executive and the development of the American Judiciary.[18] This section explores the historic conflicts between the common-law courts and executive tribunals. Second, a summary of *SEC v. Jarkesy*, which checks the power of a juryless executive tribunal.[19] The third section articulates four steps the Supreme Court can take post-*Jarkesy* to fully restore the original legal rule structure of the independent judiciary and adjudication inside Article III to prevent the administrative adjudication of life, liberty, and property outside of Article III.[20]

I. THE HISTORICAL ORIGINS OF THE INDEPENDENT JUDICIARY

Throughout Anglo-American legal history, the judiciary has labored for independence. In the sixteenth and seventeenth centuries, the common-law courts wrangled with the Crown and its prerogative tribunals for independence and the rule of law. In the years leading up to the American Revolution, the colonists resisted English vice-admiralty courts that tried them outside the common law and without juries. And in America today, those who adhere to the original law of the Constitution contend with juryless administrative tribunals that exercise the judicial power outside the bounds of Article III. In each contest, devotees of the law have taken a stand against extra-legal adjudication to defend the rights of the people and rule of law.

A. Common Law Courts versus Prerogative Tribunals

The common law of England developed over centuries from its origins in the local courts of the Anglo-Saxon shires to the rise of centralized administration

16. *Infra* pp. 27-29.
17. *Infra* pp. 29-32.
18. *Infra* pp. 5-11.
19. *Infra* pp. 11-17.
20. *Infra* pp. 17-32.

following the Norman Invasion of 1066.[21] Common-law judges began as servants of the Crown. They heard cases pertaining to the King's lands (property law) and the King's peace (criminal law).[22] The common law developed central courts in Westminster and circuit courts in the countryside.[23] These common-law courts gradually developed the law of the land—the laws and customs of England—to which they were bound in their adjudications.[24] This law of the land included the main elements of modern judicial process: "the development of substantive common law; a highly formalized process for initiating, hearing and trying cases; a class of professionals who represented clients before these courts; a system of record keeping, and a judicial establishment known for its competence and expertise."[25] By the end of the medieval period, the common-law courts, having been under the Crown, began to gain independence.[26]

In contrast to common-law courts, the Crown developed a separate legal system of prerogative courts, most notoriously Star Chamber and High Commission, that acted outside the common law.[27] Prerogative courts were staffed by Crown officers that did not hold common-law judgeships.[28] These "prerogative courts" were not bound by the rules of the common law and they did not employ juries.[29] For example, Star Chamber prosecuted political crimes committed against the Crown with expedited proceedings tried "by affidavit and interrogation rather than by jury," and it could use torture to extract confessions.[30] The Court of High Commission could force a person to testify against himself in opposition to the common-law privilege against self-incrimination.[31]

The law courts' began to rebuke prerogative-court abuses and other aggrandized exertions of power by the Crown initiating the separation of the judicial power from the executive.[32] In fact, the origins of an independent judicial power begin with the common-law judges asserting that they alone exercised the power to decide law cases and the King could not review their judgments.[33]

A crucial flashpoint in separating the judicial power from the executive flared up in the famous showdown between King James I and Sir Edward Coke.[34] In the midst of a jurisdictional power struggle between the common-law courts and prerogative tribunals, the King called the common-law judges and ecclesiastics to

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21. Stephen B. Presser, Jamil S. Zainaldin, Law and Jurisprudence in American History: Cases and Materials, 1–5 (8th ed. 2019).
22. *See id*. at 1–2.
23. *Id*. at 3.
24. Phillip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 143–148 (2014).
25. Presser, *supra* note 21, at 3.
26. Baude, *supra* note 2, at 1838.
27. Hamburger, *supra* note 24, at 134–39.
28. *Id*. at 147–48.
29. *Id*. at 147, 149.
30. Presser, *supra* note 21, at 8–9.
31. *Id*. at 8.
32. Baude, *supra* note 2, at 1838.
33. *Id*.
34. Presser, *supra* note 21, at 8.

his Palace at Whitehall to adjudge the legality of High Commission.[35] Lord Coke spoke for the common-law courts, arguing that any and all temporal matters must be adjudged by common-law courts.[36] The King and his ministers argued that the King may decide any case in his royal person because "Judges are but delegates of the King, and the King may take what causes he shall please from the determination of the Judges and may determine them himself."[37] To which Judge Coke replied that only common-law judges had power to render legal judgments. The King protested and stated he would "ever protect the common law," to which Coke rejoined, "[t]he common law ... protecteth the King."[38] "A traitorous speech!" shouted King James, shaking his fist at Judge Coke.[39] But Coke stood his ground and held that cases must be decided not by the King's natural reason but by "the artificial Reason and Judgment of Law,"[40] for "the King should not be under man, but under God and the Laws."[41]

Lord Coke's view ultimately prevailed. By the late 1600s, Parliament had abolished prerogative tribunals.[42] The abolition of the prerogative courts paved the way towards the supremacy of the law and independence of the law courts. It also helped to establish the right to trial by jury as one of the most celebrated rights at common law.[43]

B. Colonial Courts versus Vice-Admiralty Tribunals

In America, the colonists faced their own contest for the rule of law and common-law courts against extra-legal tribunals. But the American scene pitted common-law courts and juries against juryless vice-admiralty tribunals.

In 1735, a New York jury rendered a "not guilty" verdict in favor of John Peter Zenger for "seditious libel" against New York's royal governor. Thereafter, American colonists began to utilize common-law juries to resist the enforcement of English orders.[44] Juries refused to convict colonists for smuggling. In response, English officials began circumventing colonial courts and expanding the jurisdiction of juryless vice-admiralty courts.[45]

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35. Catherine Drinker Bowen, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE, 302 (1956).

36. *Id*. at 303.

37. *Id*. at 303–04.

38. *Id*. at 304.

39. *Id*.

40. Allen D. Boyer, SIR EDWARD COKE AND THE ELIZABETHAN AGE 83–107 (2003) (explaining Coke's theory of law as "Artificial Reason").

41. *Id*. at 305.

42. *Id*.

43. Hamburger, *supra* note 24, at 149.

44. Jennifer Walker Elrod, *W(h)ither the Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 WASH. & LEE L. REV. 3, 6–7 (2011); *see also* Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault of the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1296 (1978) ("Often colonial juries found no violation justifying forfeiture even though the evidence was clear; eventually the problem became too great to be ignored.").

45. Elrod, *supra* note 44, at 7; Kirst, *supra* note 44, at 1296 ("The English solution [to recalcitrant colonial juries] was to place such cases under the jurisdiction of the expanded system of vice admiralty courts in which jury trial was not used.").

In the vice-admiralty courts, American colonists fell subject to the same power of prerogative tribunals that Sir Edward Coke had resisted in the previous century. "[V]ice-admiralty courts began in the Colonies as rough equivalents of English courts of admiralty."[46] The judges served at the pleasure of the royal administration, used civil law process rather than common law process, and did not employ juries.[47]

A pivotal moment in the colonists' battle with the vice-admiralty courts featured John Adams representing John Hancock in his vice-admiralty trial for illegal smuggling. Adams had long chaffed at the abuses of vice-admiralty, decrying the "alarming extension" of admiralty jurisdiction, which he called "the most grievous innovation of all" for denying Americans their rights to due process and trial by jury.[48] So, when the King's officials seized Hancock's sloop *Liberty* and its cargo, John Adams lept to his compatriot's defense.[49] In the courtroom, Adams concentrated his fire on the expansion of admiralty jurisdiction.[50] The Act inflicted penalties treble the value of the smuggled cargo and these penalties and forfeitures are "to be heard and try'd.—how?" asked John Adams, "[n]ot by a Jury, not by the Law of the Land," "but by the civil law before a single judge, contrary to the will of the ancient barons who, in similar circumstances, had answered in one voice: 'We will not that the laws of England be changed, which of old have been used and approved.'"[51] In fact, the same offenses in Great Britain were prosecuted, sued for, and recovered through common-law process, but Americans were subjected to vice-admiralty.[52] To wit, Adams tore into the court's evidence and witness examination, denouncing the court's mixed-up use of civil and common law, such that no one could tell what rules governed.[53] Impressed by Mr. Adams, the judge issued an interlocutory decree pronouncing the Crown's method of examination improper.[54]

Adams' opposition to England's abuses of American rights through juryless vice-admiralty courts featured prominently in the colonists calls for revolution. The First Continental Congress condemned Parliament for "extending the jurisdiction of courts of admiralty," making colonial judges "dependent on the Crown," and demanded respect for the "great and inestimable privilege of being tried by their peers of the vicinage, according to the [common] law."[55] Two years later, the Declaration of Independence itself admonished the King for "ma[king] Judges

46. SEC v. Jarkesy, 603 U.S. 109, 146 (2024) (Gorsuch, J., concurring).
47. *Id*. at 146–47.
48. David S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America*, 1764–1776, 16 THE WM. AND MARY QUARTERLY 459, 467 (1959).
49. *Id*. at 478–79.
50. *Id*. at 479–80.
51. *Id*. at 480.
52. *Id*.
53. *Id*. at 481.
54. *Id*.
55. Declaration and Resolves of the First Continental Congress, Oct. 14, 1774, in 1 Journals of the Continental Congress, 1774–1789, at 68–69 (W. Ford 1904 ed.).

dependent on his Will alone," and "depriving us in many cases, of the benefits of Trial by Jury."[56] The American Revolution and its overthrow of British rule ended the expansive reign of vice-admiralty tribunals and paved the way for a constitutional restoration to regain the Americans' rights to common-law judges, legal process, and trial by jury.

C. Article III Courts versus Administrative Tribunals

The Constitution, and after ratification, the Bill of Rights, enshrined protections against the return of prerogative tribunals and vice-admiralty courts by guaranteeing judicial independence, judicial process, and the right to trial by jury. The framers' first solution emerged from the Philadelphia Convention with a written constitution —Article III—and its creation of an independent judiciary with tenure-and-salary protected judges vested with the judicial power.[57] But the Antifederalists were concerned that Article III's protections for judicial independence were not enough and objected to the absence of express protection for the civil right to trial by jury.[58] In response to these objections, the First Congress, led by James Madison, enacted the Bill of Rights, which reinforced Article III's independent judiciary with the Due Process Clause and protections for the civil jury trial under the Seventh Amendment.[59]

These three provisions enact the rule structure for adjudication inside Article III. The judicial power is vested in one supreme Court and inferior courts created by Congress. The judicial power is the power to issue binding judgments pursuant to law in cases where the court has jurisdiction.[60] Only an exercise of the judicial power can authorize a deprivation of an individual's private rights to life, liberty, or property.[61] The Due Process Clause affirms that an individual can be deprived of their private rights to life, liberty, or property only through judicial process, which includes an exercise of the judicial power.[62] And the Seventh Amendment preserves the right to trial by jury for suits at common law, which means any suit

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56. DECLARATION OF INDEPENDENCE paras. 11, 22 (U.S. 1776).

57. Baude, *supra* note 3, at 1515.

58. SEC v. Jarkesy, 603 U.S. 109, 148–49 (2024) (Gorsuch, J., concurring).

59. *Id*. at 149–50.

60. Baude, *supra* note 2, at 1811.

61. Baude, *supra* note 3, at 1542; *see generally* Nathan S. Chapman and Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012) (arguing due process of law reinforces the judicial power, which alone can act retrospectively and specifically to deprive individuals of their vested rights to life, liberty, and property); Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 BYU L. REV. 611, 624–26 (2018) (arguing the principle of legality is baked into the separation of powers and reinforced by the due process of law and the principle of legality is implicated when a case "involve[s] the deprivation of legally protected [private] rights to life, liberty, or property."); Gary S. Lawson, *Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1247 (1994) (observing that "the Article III inquiry" might "merge[] with questions of due process: if the government is depriving a citizen of 'life, liberty, or property,' it generally must do so by judicial process, which in the federal system requires an Article III court; but if it is denying a citizen . . . a mere privilege, it can do so by purely executive action").

62. Baude, *supra* note 2, at 1811.

presenting a legal right, a wrong, and a legal remedy is legal in nature and the right to trial by jury applies.[63]

Today, the original framework for adjudication inside Article III is displaced in large measure by the administrative model of adjudication.[64] This model gives agencies power to adjudicate cases in-house and to issue binding judgments concerning private rights. In administrative cases, an executive agency tribunal effectively steps into the shoes of the Article III trial court.[65] The agency can impose orders and penalties on private parties and adjudicate cases before their own in-house administrative law judges (ALJs).[66] ALJs work for the same agency that is prosecuting and adjudicating the case. In addition, the ALJ presides over a process that lacks many traditional common-law protections. In an administrative hearing, the accused has no general right to discovery, the rules of evidence, including the prohibition on hearsay, are relaxed, and a litigant's ability to obtain subpoenas and depositions is limited. Finally, administrative process does not provide any opportunity for trial by jury.

The agency's decision is only then subject to deferential review by an Article III court.[67] For example, administrative review schemes often require the reviewing court to treat agency findings of fact as "conclusive" so long as they are "supported by substantial evidence," a highly deferential standard of review.[68] The reviewing court also cannot take its own evidence—it can only remand the case to the agency for further proceedings, again with no Article III judge or jury.[69] In sum, the administrative system of adjudication short circuits the original model of adjudication and judicial review offered by the Constitution.

The Supreme Court's precedents sanctioning this system of administrative adjudication are antithetical to the original design of Article III. The major error in the Court's precedent is its confused and undefined doctrine on the distinction

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63. *Cf.* Parsons v. Bedford, 28 U.S. 433, 441, 446–47 (1830) (defining suits at common law, which receive trial by jury, as those involving legal rights and remedies); Adler, *supra* note 11, at 22 (defining a case at law as whenever a legal right has been violated and the law authorizes a legal remedy); *Jarkesy*, 603 U.S. at 122–23 (directing "courts to consider the cause of action" and remedy "[t]o determine whether a suit is legal in nature[.]"); Bray, *supra* note 11, at 484, 498 (explaining the distinction between "claims" and "remedies" is "anachronistic"); *see also* Bray, *supra* note 11, at 532–36 (explaining that the line between law and equity in the context of remedies is valid and useful); Wurman, *supra* note 11, at 28 ("The key distinction between law and equity is that legal remedies do not require the defendant to do anything: the defendant can merely pay, or if the defendant does not pay, the sheriff can attach defendant's property and obtain the money sufficient for the judgment. Equitable remedies operate on the body of the defendant—compelling defendants to take action (or inaction).").

64. *Jarkesy*, 603 U.S. at 141 (Gorsuch, J., concurring); *see also* Axon Enter., Inc. v. Fed. Trade Comm'n, 598 U.S. 175, 200 (2023) (Thomas, J., concurring); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 965, 979 (2011).

65. *Axon*, 598 U.S. at 185 ("The agency effectively fills in for the district court, with the court of appeals providing judicial review.").

66. *Axon*, 598 U.S. at 196–97 (Thomas, J., concurring).

67. *Id.* at 200.

68. 15 U.S.C. § 78y(a)(4); 15 U.S.C. § 45(c) ("if supported by evidence").

69. 15 U.S.C. § 78y(a)(5); 15 U.S.C. § 45(c); *Axon*, 598 U.S. at 202 (Thomas, J., concurring).

between private and public rights. Two cases form the high-water mark of this precedential error. First, *Crowell v. Benson*,[70] which unconstitutionally authorized the administrative adjudication of private rights. Second, *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*,[71] which unconstitutionally permitted the administrative adjudication of civil money penalties without a jury. But in *SEC v. Jarkesy*,[72] the Court cuts a course correction, a return to the original understanding of the Seventh Amendment and, by extension, the original model of adjudication inside Article III.

II. THE SECURITIES AND EXCHANGE COMMISSION VERSUS MR. GEORGE JARKESY

In *SEC v. Jarkesy*, the Supreme Court held the agency's in-house adjudication violated the Seventh Amendment. Mr. Jarkesy owned and managed two investment funds, and the SEC prosecuted him in-house for allegations of fraud. The SEC also sought civil money penalties and obtained a victory in its administrative tribunal. Jarkesy appealed and the Fifth Circuit reversed the agency. The Supreme Court then reviewed the case. It decided the case on Seventh Amendment grounds and restated a two-part test for determining whether a suit is at common law and therefore requires a jury trial. *Jarkesy* got the law right, but there are remaining steps to be taken in future cases to completely restore the original law of adjudication inside Article III.

A. Tell Me the Facts

Between 2007 and 2010, George Jarkesy launched two investment funds.[73] He also managed Patriot28, the funds' investment adviser.[74]

In 2011, the SEC launched an investigation into Jarkesy and Patriot28 for securities fraud.[75] The SEC then initiated an enforcement action in its own, in-house administrative tribunal.[76]

The SEC's principal mandate is to enforce securities laws. It can enforce these laws through one of two options: (1) an administrative in-house adjudication or (2) a suit in federal court.[77] The SEC's choice of forum (in-house vs. federal court) changes the procedural protections available to the defendant and the remedies available to the SEC.[78]

70. 285 U.S. 22 (1932).
71. 430 U.S. 442 (1977).
72. 603 U.S. 109 (2024).
73. *Id.* at 118.
74. *Id.*
75. *Id.*
76. *Id.* at 119.
77. *Id.* at 116.
78. *Id.* at 116–17.

Ordinarily, a defendant receives greater procedural protections in federal court.[79] A life-tenured, salary-protected Article III judge presides.[80] The litigation is governed by the Federal Rules of Evidence and the ordinary rules of discovery.[81] For legal claims, a jury finds the facts and renders a verdict.[82]

By contrast, in the SEC's administrative tribunal there are no judges and no juries.[83] The SEC's enforcement division prosecutes the case while the Securities and Exchange Commission itself presides and finds facts.[84] The Commission can delegate its role as judge and factfinder to a Commission member or an ALJ who then presides.[85] The Commission or delegee decides discovery disputes and the SEC's Rules of Practice govern.[86] The Federal Rules of Evidence do not apply. Rather, the Commission or delegee determines the permissible evidence and may admit hearsay and other testimony that would be inadmissible in federal court.[87]

Judicial review of SEC's in-house adjudication is limited.[88] When a Commission member or an ALJ presides, the full Commission can review the official's findings and conclusions, but it does not have to.[89] A litigant may seek judicial review in an Article III court of appeals, but review is deferential. A reviewing court must treat the agency's factual findings as "conclusive" if sufficiently supported by the record, even if the findings rest on evidence inadmissible in federal court.[90]

In its enforcement action against Jarkesy and Patriot28, the SEC chose to pursue civil penalties. Historically, the SEC could obtain civil penalties only in federal court. But in 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[91] This Act made the SEC's authority to seek civil penalties in administrative proceedings "coextensive" with its authority in federal court.[92] The SEC can fine up to $725,000 per violation and may levy penalties even when no investor has suffered any financial loss.[93]

The SEC prosecuted Jarkesy and Patriot28 for violating the antifraud provisions of the securities laws. The SEC prosecuted Jarkesy and Patriot28 for three reasons: (1) misrepresenting investment strategies, (2) "lying about the identity

79. *Id*. at 116–17.
80. *Id*. at 117.
81. *Id*. at 116.
82. *Id*.
83. *See id*. at 117–18.
84. *See id*. at 116–17.
85. *Id*. at 117.
86. *Id*.
87. *Id*.
88. *Id*.
89. *See* 17 C.F.R. § 201.360; 15 U.S.C. § 78d0-1.
90. *Jarkesy*, 603 U.S. at 117.
91. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o).
92. *Jarkesy*, 603 U.S. at 118.
93. *Id*. at 118.

of the funds' auditor and prime broker, and (3) . . . inflating the funds' claimed value so that Jarkesy and Patriot28 could collect larger management fees."[94]

The SEC issued its final order in 2020.[95] That order levied a civil penalty of $300,000 against Jarkesy and Patriot28, directed them to cease and desist violating the antifraud provisions of the Securities Act, the Securities Exchange Act, and the Investment Advisers Act, ordered disgorgement, and prohibited Jarkesy from participating in the securities industry and in offerings of penny stocks.[96]

Jarkesy sought review in the Fifth Circuit.[97] The Court held the SEC's in-house administrative adjudication unconstitutional.

B. What's at Issue?

The Supreme Court then took up the case on just one issue: Does the Seventh Amendment guarantee the defendant a jury trial when the SEC seeks civil money penalties?[98]

C. The Holding

The Court answered yes. It held that when the SEC seeks civil money penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial.[99]

D. What was the Court's Analysis?

The Court's Seventh Amendment analysis proceeded in two parts. First, does the Seventh Amendment apply? Second, does the public-rights exception apply? In answering each question, the Court followed the analysis set forth in *Granfinanciera* and *Tull*.[100]

The Court held the Seventh Amendment applied and the public-rights exception did not. First, the Court held the Seventh Amendment applied because "[t]he SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury."[101] Second, the Court held the public-rights exception did not apply because the suit did not fall into "any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury."[102] Accordingly, the SEC's in-house adjudication violated the Seventh Amendment, and a jury was required.

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94. *Id.* at 118–19.
95. *Id.* at 119.
96. *Id.* at 119.
97. *Id.* at 119–20.
98. *Id.* at 120.
99. *Id.*
100. *Id.* at 120; Tull v. United States, 481 U.S. 412 (1987); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989).
101. *Jarkesy*, 603 U.S. at 120.
102. *Id.*

The Seventh Amendment guarantees that in "[s]uits at common law, . . . the right of trial by jury shall be preserved."[103] The Court noted the Amendment is not limited to the "common-law forms of action recognized" at ratification.[104] Instead, it embraces all lawsuits not of equity or admiralty.[105]

In other words, the Seventh Amendment extends to all claims that are "legal in nature."[106] A claim's legal nature turns on two considerations: (1) the remedy and (2) the cause of action.[107] Whether the claim is statutory or not does not affect the analysis.[108] Jarkesy's claim was legal in nature because the remedy for civil money penalties is legal and the cause of action for federal securities fraud is analogous to common-law fraud.

The Court first analyzed the remedy.[109] It held the remedy was most important and "all but dispositive" in Jarkesy's case.[110] The SEC sought civil money penalties, "the prototypical common law remedy."[111] The Court noted the difference between legal and equitable money remedies. Money penalties designed to punish or deter are legal but those designed to restore the status quo are equitable.[112] The civil money penalties in Jarkesy's case were punitive, "a type of remedy at common law that could only be enforced in courts of law."[113] The Court held that the civil penalties exacted by the SEC "are designed to punish and deter, not to compensate"; therefore, Jarkesy's suit implicated the Seventh Amendment.[114]

The Court then analyzed the cause of action, finding a close relationship between common law fraud and securities fraud.[115] Both claims "target the same basic conduct: misrepresenting or concealing material facts."[116] Congress deliberately used fraud and other common law terms of art in the securities laws.[117] "Congress's decision to draw upon common law fraud created an enduring link between federal securities fraud and its common law 'ancestor.'"[118] When a statute transplants common-law terms, "the old soil comes with it," which embeds common-law doctrines in the securities laws.[119] Although securities fraud and common law fraud are

103. *Id*. at 122.
104. *Id*.
105. *Id*.
106. *Id*.; Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989).
107. *Jarkesy*, 603 U.S. at 122–23.
108. *Id*. at 135.
109. *Id*. at 122–23.
110. *Id*. at 123.
111. *Id*. at 123.
112. *Id*.
113. *Id*. The Court also noted that actions to recover civil penalties are analogous to actions in debt at common law. *Id*. at 122 ("'Actions by the Government to recover civil penalties under statutory provisions,' were 'historically [] viewed as [a] type of action in debt requiring trial by jury.'").
114. *Id*. at 125.
115. *Id*.
116. *Id*.
117. *Id*.
118. *Id*. (quoting Foster v. Wilson, 504 F.3d 1046, 1050 (9th Cir. 2007)).
119. *Id*. (quoting United States v. Hansen, 599 U.S. 762, 778 (2023)).

different in some respects, they share a close commonality, which confirms that the cause of action for SEC securities fraud is "legal in nature."[120]

The Court then addressed the public-rights exception and held it did not apply. The Court explained that the public-rights exception is a narrow exception to adjudication inside Article III and the presumption is in favor of Article III courts.[121] "If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights . . . ."[122] Because private rights are "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," private-rights matters cannot be removed from Article III courts.[123]

By contrast, cases concerning public rights were historically determined exclusively by the executive and legislative branches and did not require an exercise of the judicial power.[124] But the public-rights precedent is confused. The Court admitted it "has not definitively explained the distinction between public and private rights, and [it] d[id] not claim to do so" in *Jarkesy*.[125]

The public-rights exception originated in 1856 with the Court's decision in *Murray's Lessee*.[126] There, the Court held the summary collection of revenue from a tax collector was a public right. The Court has since applied the doctrine to the foreign importation of goods,[127] to immigration,[128] tariffs,[129] relations with Indian tribes,[130], the administration of public lands,[131] and the granting of public benefits such as payments to veterans,[132] pensions,[133] and patent rights.[134] Although the public-rights exception has not been fully explained, the Court has made clear it is an exception that cannot swallow the rule.[135] The presumption is in favor of private rights and adjudication inside Article III.

Jarkesy's case did not fit any public-rights category. It made no difference that Congress assigned the action to an administrative agency nor that the Government was a party. Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal."[136] If the action is legal in nature, it does not matter if it originates in statute or if the United

120. *Id.* at 126 (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989)).
121. *Id.* at 132.
122. *Id.* at 128.
123. *Id.* at 127–28 (quoting Stern v. Marshall, 564 U.S. 462, 484 (2011)).
124. *Id.* at 128.
125. *Id.* at 130–31 (internal quotation marks omitted).
126. Den *ex dem.* Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 284 (1855).
127. Oceanic Steam Navigation Co. v. Stanahan, 214 U.S. 320, 339–340 (1909).
128. *Id.* at 339–340.
129. *Ex Parte* Bakelite Corporation, 279 U.S. 438, 446 (1929).
130. *See* United States v. Jicarilla Apache Nation, 564 U.S. 162, 174 (2011).
131. Crowell v. Benson, 285 U.S. 22, 51 (1932).
132. *Id.*
133. *Id.*
134. United States v. Duell, 172 U.S. 576, 582–582 (1899).
135. SEC v. Jarkesy, 603 U.S. 109, 132 (2024).
136. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 52 (1989).

States is a party: "[W]hat matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled."[137]

Finally, the Government's invocation of *Atlas Roofing* was to no avail.[138] *Atlas Roofing* involved occupational health and safety standards.[139] Such standards took "no common law soil with them" but instead resembled a building code.[140] *Atlas Roofing* did not apply the public-rights exception to common law or traditional legal claims. It did not extend to civil penalty suits for fraud.[141] Law courts had always handled fraud claims.[142] Therefore, the Court held that "[a] defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator."[143]

III. THE RETURN OF ORIGINALISM: FOUR STEPS FROM *JARKESY* TO THE ORIGINAL MODEL OF ADJUDICATION INSIDE ARTICLE III

While *Jarkesy* got the law right, this article recommends four steps the Supreme Court should take in future cases to completely restore the original model of adjudication inside Article III.

First, the Court should refine its test for determining if a case presents a suit at common law under the Seventh Amendment and receives trial by jury. The test should consist of a rule, a presumption, and exceptions. If the suit presents a legal right, a wrong, and a legal remedy, it is a suit at common law and receives trial by jury. The presumption is in favor of trial by jury with a narrow exception for cases in equity or admiralty.

Second, the Court should clarify and completely define the distinction between private and public rights. Private rights are individual rights to life, liberty, and property. Public rights are things owned by the government or public, most notably government benefits and privileges. Public rights are a narrow category of matters, historically grounded in the law, that do not fall within the definition of private rights: the disposition of public lands, funds from the public treasury, customs, immigration, political decisions within public use takings, and summary mechanism for collecting tax revenue.

Third, the Court should not assess the public-rights doctrine as an exception to the Seventh Amendment; instead, the Court should first decide whether a matter concerns private or public rights because that question goes to whether the matter must be adjudicated inside Article III in the first place. If the matter concerns private rights, the rights-holder must receive an Article III court and due process of law because only an exercise of the judicial power can authorize a deprivation of

137. *Jarkesy*, 603 U.S. at 135.
138. *Id.* at 136.
139. *Id.*
140. *Id.* at 137.
141. *Id.* at 136.
142. *Id.* at 140.
143. *Id.*

private rights. If the matter concerns public rights, Congress can assign its adjudication outside Article III.

Fourth, the Court should accurately define the judicial power and its relation to due process of law, which will explain why private rights must be decided in an Article III court. The judicial power is the power to issue binding judgments on cases and controversies within the court's jurisdiction. In the course of exercising this power, courts must find and apply the relevant law. Only an exercise of the judicial power can deprive an individual of their private rights to life, liberty, and property. Accordingly, the nature of the right at issue often determines whether a matter constitutionally requires adjudication inside Article III. Matters of private right—life, liberty, property—require an exercise of the judicial power. By contrast, matters of public right—government benefits or privileges—do not. Courts perform their duty to say what the law is incidentally to the power to decide on the private rights disputes of individuals in cases and controversies. It is in the process of saying what the law is that a court can perform the duty of judicial review to invalidate a law that violates the Constitution. Importantly, Article III vests "one subset of one kind of power — the judicial power of the United States" rather than the judicial power of any other government.[144] That power is then vested in one Supreme Court and any inferior courts Congress decides to create—staffed by independent judge's guarded with life-tenure and salary protection. In short, the judicial power of the United States is the power to bind parties through judgments and to authorize the deprivation of private rights and that power—all of it—is vested in the Article III courts.[145]

A. Refine the Test: A Rule, Presumption, and Exception for the Seventh Amendment

The Seventh Amendment states: "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."[146]

In *Jarkesy*, the Court defined a suit at common law as extending to any claim that is "legal in nature," "embrace[ing] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume."[147] And the Court restated its two-part test to determine whether a suit is legal in nature.[148] First, is the remedy legal?[149] Second, is the cause of action at common law?[150]

144. Baude, *supra* note 3, at 1521.
145. Baude, *supra* note 3, at 1522; Baude, *supra* note 2, at 1809.
146. U.S. CONST. amend. VII.
147. *Jarkesy*, 603 U.S. at 122 (quoting Parsons v. Bedford, 28 U.S. 433, 447 (1830)).
148. *Id.* at 119.
149. *Id.* at 123.
150. *Id.* at 125.

The Court's test is "one step too many."[151] The two-part test should be reduced to a simple legal rule: a suit at common law—originally defined as a legal right, a wrong, and a legal remedy—presumptively receives a jury. This rule is consistent with the Court's longstanding focus on the legal nature of the suit.[152] The presumption is in favor of the right to trial by jury subject to a narrow, limited historic exception for cases in equity and admiralty.[153]

The current two-part test suffers from at least three defects.[154] First, the distinction between claims and remedies is anachronistic—at least for the distinction between law and equity.[155] That distinction did not exist at equity and therefore the two-part test "requires courts to ask historical questions that have no answer."[156] Second, the two-part test neglects the distinction between exclusive and concurrent jurisdiction, which is critical to determining whether something is a suit at common law.[157] Within equity, the "exclusive jurisdiction" pertained to "those areas where the courts of equity developed the entire field."[158] Examples include law of trusts, redemption of pledged assets, and undue influence.[159] "Outside the exclusive jurisdiction, courts of law and equity worked side by side"—i.e. they had "concurrent jurisdiction"—such that equity supplemented

151. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 19 (2022).

152. The Seventh Amendment "correctly interpreted . . . should be understood as limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law, and by the appropriate modes and proceedings of courts of law." Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1855). But not limited to only those suits that existed at common law in 1791; instead, it applies to all remedies that are legal in nature. Pernell v. Southall Realty Co., 416 U.S. 363, 375 (1974) (Seventh Amendment "require[s] trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty."). For example, "[t]he Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." Curtis v. Loether, 415 U.S. 189, 194–95 (1974) (reasoning that "[a] damage action under the statute sounds basically in tort-the statute merely defines a new legal duty and authorizes the court to compensate a plaintiff for the injury caused by the defendants' wrongful breach" such that "this cause of action is analogous to a number of tort actions recognized at common law." *See also* Chauffeurs, Teamsters & Helpers Loc. No. 391 v. Terry, 494 U.S. 558 (1990) (suit against union for back pay for breach of duty of fair representation is a suit for compensatory damages, hence plaintiff is entitled to a jury trial); Wooddell v. Int'l Bhd. of Elec. Workers Loc. 71, 502 U.S. 93 (1991) (similar suit against union for money damages entitles union member to jury trial; a claim for injunctive relief was incidental to the damages claim); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) (jury trial required for copyright action with close analog at common law, even though the relief sought is not actual damages but statutory damages based on what is "just").

153. "The [Seventh] Amendment therefore 'embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume.'" *Jarkesy*, 603 U.S. at 122 (citing Parsons v. Bedford, 28 U.S. 433, 446–47 (1830)).

154. Bray, *supra* note 11, at 484.

155. *Id*. at 484–87.

156. *Id*. at 484, 487–90.

157. *Id*. at 487–90.

158. *Id*. at 470.

159. *Id*.

the common law.[160] This jurisdiction included most of what is now known as tort and contract law.[161] Joseph Story adopted the distinction between the exclusive and concurrent jurisdictions as the organizing principle for his *Commentaries on Equity Jurisprudence*.[162] Third, equity's special procedures for class actions are elided by the two-part test.[163] "[E]quity developed special procedures for aggregating legal claims, including the class action," and "[s]uits using these procedures should not be treated as 'Suits at common law' for Seventh Amendment purposes."[164]

Accordingly, the traditional two-part test should be replaced by a rule, a presumption, and an exception.[165] The rule: any suit presenting a legal right, a wrong, and a legal remedy is a suit at common law and recieves trial by jury.[166] The presumption: a suit is presumptively at common law and requires trial by jury.[167] The exception: suits in equity or admiralty.[168] Further, suits in equity fall into three classes: (1) equity's exclusive jurisdiction, (2) suits with equitable remedies, and (3) suits that employ an equitable device for aggregating cases.[169]

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160. *Id*.; *see also* Tull v. United States, 481 U.S. 412, 425 (1987) ("[I]f a 'legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought.'" (quoting Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974))); Lytle v. Household Mfg., Inc., 494 U.S. 545, 550 (1990) ("When legal and equitable claims are joined in the same action, 'the right to jury trial on the legal claim, including all issues common to both claims, remains intact.'" (quoting *Curtis,* 415 U.S. at 196 n.11)); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 (1962) ("Since these issues are common with those upon which respondents' claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of respondents' equitable claims."); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510–11 (1959) ("[O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." (footnote omitted)).

161. Bray*, supra* note 11, at 470 n.16.

162. *Id*. at 470.

163. *Id*. at 494–97.

164. *Id*. at 484, 494–97.

165. The Court in *Bruen* adopted a similar rule, presumption, exception framework for the original meaning of the Second Amendment. *See* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 24 (2022) ("We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."); *id*. ("This Second Amendment standard accords with how we protect other constitutional rights.").

166. Parsons v. Bedford, 28 U.S. 433, 441, 446–47 (1830) (defining suits at common law as those involving legal rights and remedies); Adler, *supra* note 11, at 22 (defining a case at law as whenever a legal right has been violated and the law authorizes a legal remedy); SEC v. Jarkesy, 603 U.S. 109, 122–23 (2024) (directing "courts to consider the cause of action" and remedy "[t]o determine whether a suit is legal in nature[.]"); Bray, *supra* note 11, at 484, 498 (explaining the distinction between "claims" and "remedies" is "anachronistic"); *see also* Bray, *supra* note 11, at 532–36 (explaining that the line between law and equity in the context of remedies is valid and useful).

167. Bray*, supra* note 11, at 498.

168. "The [Seventh] Amendment therefore 'embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume.'" *Jarkesy*, 603 U.S. at 122 (citing Parsons, 28 U.S. at 446–47).

169. Bray, *supra* note 11, at 471.

The Rule. The legal nature of the right and remedy define a suit at common law.[170] In the words of Justice Joseph Story, a suit at common law referred to "not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined," and in which legal remedies were administered in "contradistinction" to suits in equity and admiralty.[171] And "[b]y common law, [the framers of the amendment] meant what the constitution denominated in the third article 'law;'"[172] "not the common law of any individual state, (for it probably differs in all), but [] the common law of England, the grand reservoir of all our jurisprudence."[173] This is what Chief Justice John Marshall recognized as "the substratum of our laws."[174] At common law, legal rights are the rights of persons and the rights of things, which are covered in Books I and II of Blackstone's Commentaries.[175] And wrongs to those rights[176] with the corresponding legal remedies together form the suit at common law.[177]

The nature of the remedy—legal or equitable—is essential to the Seventh Amendment's applicability. *Jarkesy* held the remedy "all but dispositive" in determining the application of the Seventh Amendment.[178] A remedy is legal if it does not require the defendant to do anything except, for example, pay a money judgment, "or if the defendant does not pay, the sheriff can attach defendant's property and obtain the money sufficient for the judgment."[179] By contrast, a remedy is equitable if it requires the defendant to take an action or forbids the defendant from taking an action, such as an injunction or disgorgement.[180] Moreover, legal remedies are generally punitive, whereas equitable remedies are restorative.[181] And those few legal remedies that do compel action are "narrower and more limited" in scope than equitable remedies, which compel action or inaction

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170. *See Parsons*, 28 U.S. at 441, 446–47 (defining suits at common law as those involving legal rights and remedies).

171. *See Parsons*, 28 U.S. at 446–47 (emphasis omitted); II J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1769, 535–36 (4th ed. 1873).

172. *Parsons*, 28 U.S. at 447 (emphasis omitted).

173. United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750).

174. United States v. Burr, 25 F. Cas. 55, 158 (C.C.D. Va. 1807) (No. 14,693).

175. 3 William Blackstone, Commentaries *2 (distinguishing between "*the rights of persons*," which "composed the first book of these commentaries," and "*the rights of things*," which "were the subject of the second book.").

176. *Id*. at *116 ("Now, as all wrong may be considered as merely a privation of right.").

177. *Id*. at *2 (The "employment in the present book" is "[t]o investigate [civil injuries to rights], with their legal remedies."); *see also id*. at *23 ("In all other cases it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."); Marbury v. Madison, 5 U.S. 137, 163 (1803) (quoting Blackstone on a right, wrong, and remedy "by suit or action at law").

178. SEC v. Jarkesy, 603 U.S. 109, 123 (2024).

179. Wurman, *supra* note 11, at 28.

180. *Id*.

181. *Jarkesy*, 603 U.S. at 123–25.

in a more "open-ended and less determinate fashion."[182] In short, a suit with a legal remedy is a suit at common law.[183]

The Presumption. A suit at common law presumptively receives trial by jury. The Seventh Amendment presumptively applies in all cases unless the case is within equity's exclusive jurisdiction or administers only equitable remedies, or is a case in admiralty or maritime.[184] In other words, outside of cases in equity or admiralty, cases are presumptively legal or suits at common law.[185] This follows from the long tradition of recognizing that the Seventh Amendment uses the term common law "in contradistinction to equity, and admiralty."[186] This presumption also accords with the historic principle, deeply rooted in our nation's legal history and tradition, "that law is primary and equity is secondary and exceptional."[187]

The Exceptions. The category of cases exempt from the Seventh Amendment is limited to equity, admiralty, and maritime. Equity is divided into three classes of cases:[188] (1) suits "in equity's exclusive jurisdiction (e.g., trust law);"[189] (2) suits with "an equitable remedy (e.g., injunction);"[190] (3) suits that employ "an equitable device for aggregating cases (e.g., class action)."[191] Otherwise, cases in equity's "concurrent" jurisdiction presumptively receive trial by jury.[192] The three equitable

182. Bray, *supra* note 11, at 562–63.

183. *See, e.g.*, Parsons v. Bedford, 28 U.S. 433, 446–47 (1830).

184. *Parsons*, 28 U.S. at 441, 446–47.

185. Suits at common law receive trial by jury with one narrow historic exception at law. Prerogative writs, such as the writ of mandamus, "were issued at common law but did not necessarily involve a jury." Bray, *supra* note 11, at 471. Because the right to trial by jury is "preserved" under the Seventh Amendment, trial by jury is required when and according to the rules of the common law at the time of the Seventh Amendment's enactment. *Cf.* Darrell A.H. Miller, *Text, History, Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L. J. 852, 875 (2013) (defining the original meaning of the word "Preserved"); *see also* Bray, *supra* note 11, at 474–75; Curtis v. Loether, 415 U.S. 189, 193 (1974) (("[T]he thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791."). The common-law rules in 1791 did not require a jury for prerogative writs, even though such writs were legal in nature; otherwise, all suits at common law receive trial by jury.

186. *Id.* at 441, 446; *see also* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 348 (1998) ("determin[ing] whether a statutory action is more analogous to cases tried in courts of law than to suits tried in courts of equity or admiralty"); Tull v. United States, 481 U.S. 412, 417 (1987); Cap. Traction Co. v. Hof, 174 U.S. 1, 13 (1899).

187. Bray, *supra* note 11, at 498.

188. Bray, *supra* note 11, at 497; *see also id.* at 471–72 (Three categories of cases that are not suits at common law: "(1) plaintiff's suit is in equity's exclusive jurisdiction; (2) plaintiff seeks an equitable remedy; and (3) plaintiff employs an equitable device for aggregating cases, such as interpleader or class action. Apart from these categories, there should be a presumption of a right to a jury trial. That presumption would be rebuttable, though in practice it would be rebutted only rarely.").

189. Bray, *supra* note 11, at 497.

190. *Id.*

191. *Id.*

192. *See* Tull v. United States, 481 U.S. 412, 425 (1987) ("[I]f a 'legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought.'" (quoting Curtis v. Loether, 415 U.S. 189, 196 n.11 (1974))); Lytle v. Household Mfg., Inc., 494 U.S. 545, 550 (1990) ("When legal and equitable claims are joined in the

exceptions limit the presumption of a jury trial to "non-class cases, outside of equity's exclusive jurisdiction, in which the plaintiff seeks a legal remedy."[193] This exception is consistent with the rule: suits that present a legal right, a wrong, and a legal remedy are suits at common law and the Seventh Amendment presumptively applies.

In short, the Seventh Amendment preserves the right to trial by jury in suits at common law. A suit at common law includes all suits that are legal in nature. A suit is legal in nature if it presents a legal right, a wrong, and a legal remedy. A suit is presumptively legal in nature and receives trial by jury. There is an exception for cases in equity, admiralty, and maritime. The equitable exception consists of three categories: (1) suits exclusively in equity, (2) suits for equitable remedies, and (3) suits employing an equitable device for aggregating cases. The Court should simplify its Seventh Amendment test down to this rule, presumption, and exception.

B. Clarify the Distinction: Private Rights and Public Rights

After its Seventh Amendment analysis, the Court in *Jarkesy* invoked the public-rights exception to the Seventh Amendment. Under that exception, Congress may assign a narrow class of matters—public rights—for adjudication outside Article III without a jury. Although the Court held the exception did not apply in *Jarkesy* and cabined its application to a discrete list of historic artifacts, the Court acknowledged that the public-rights exception has not been clearly explained.[194] The Court should clarify the distinction between private rights and public rights.

From the American Founding onward, American law has distinguished between private and public rights. Private rights are those rights a person owns in a state of nature, as modified by civil law, and are classically denominated life, liberty, and property.[195] "'[P]ublic rights' are rights belonging to the public or are entitlements private individuals can claim from the government," prime examples are public roads and welfare benefits.[196] As legal scholar Caleb Nelson has argued, "[i]nspired by Lockean political theory, [the Founders] distinguished . . . 'core' private rights (which Lockean tradition associated with the natural rights that individuals would enjoy even in the absence of political society) from [public rights,] mere 'privileges'

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same action, 'the right to jury trial on the legal claim, including all issues common to both claims, remains intact.'" (quoting *Curtis,* 415 U.S. at 196 n.11)).

193. Bray, *supra* note 11, at 500.

194. SEC v. Jarkesy, 603 U.S. 109, 130 (2024) ("Our opinions governing the public rights exception have not always spoken in precise terms."); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985) (The public rights exception is an "area of frequently arcane distinctions and confusing precedents."); Stern v. Marshall, 564 U.S. 462, 488 (2011) (The Court's "discussion of the public rights exception . . . has not been entirely consistent."); Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325, 334 (2018) (The Court "has not 'definitively explained' the distinction between public and private rights.").

195. Wurman, *supra* note 11, at 26–7.

196. *Id.* at 27.

or 'franchises' (which public authorities had created purely for reasons of public policy and which had no counterpart in the Lockean state of nature)."[197]

Private rights to life, liberty, and property, natural rights, are at the heart of the American legal order.[198] The great trilogy of natural rights are "(1) the 'right of personal security,' which encompassed 'a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation'; (2) the 'right of personal liberty,' which entailed freedom from 'imprisonment or restraint, unless by due course of law'; and (3) the 'right of private property,' which involved 'the free use, enjoyment, and disposal of all [one's] acquisitions, without any control or diminution, save only by the laws of the land.'"[199] The legal rights to person and property covered in the subsequent chapters and books of Blackstone bear a close and derivative relation to the private rights of life, liberty, and property. "Just as Locke had argued that the 'great and chief end' of government was to make individual life, liberty, and property more secure than they would be in the state of nature, Blackstone asserted that the maintenance and proper regulation of the 'absolute' rights of individuals was 'the first and primary end of human laws.'"[200]

Public rights are legal interests controlled by the public or not owned by an individual, most paradigmatically government benefits and privileges.[201] Other than benefits and privileges, public rights consist of a relatively finite list of matters: the disposition of public lands, funds from the public treasury, customs, immigration, political decisions within public use takings, and summary mechanisms for collecting tax revenue. Although a public right is denominated as a public right by original law (not policy or rationale), each of these categories has a historically defined legal rationale explaining why it is not a private right.

Public lands do not belong to individuals, they belong to the government. Therefore, their disposition does not require judicial review.[202] But once public lands vest in an individual, then only a court can lawfully authorize a deprivation of the individual's property.[203]

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197. Nelson, *supra* note 5, at 567.

198. *Id.* at 565–67.

199. *Id.* at 567.

200. *Id.*

201. *Id.* at 566–67.

202. *Id.* at 577–78; *see also* Burgess v. Gray, 57 U.S. 48, 62–63 (1854) ("Undoubtedly Congress may, if it thinks proper, grant a title in that form, and it has repeatedly done so."); Grignon's Lessee v. Astor, 43 U.S. 319, 344 (1844) (concluding that federal statute enacted in 1823 was "the direct grant of the fee which had been in the United States").

203. Nelson, *supra* note 5, at 578; United States v. Stone, 69 U.S. 525, 535 (1864) ("[a]s the Supreme Court put it, the cancellation of a land patent 'is a judicial act, and requires the judgment of a court.'"); *see also* Johnson v. Towsley, 80 U.S. 72, 83–87 (1871) (referring to courts' role "after the title had passed from the government, and the question became one of private right"); *cf.* Foster v. Shaw, *7 Serg. & Rawle* 156, 161 (Pa. 1821) (observing that state Board of Property "possesses no judicial power" and "has no legitimate power to vacate a patent, on the ground that it had been obtained by a forged conveyance").

The same is true for funds from the public treasury. The money belongs to the government and therefore does not involve vested private rights.[204] Of course, once the money (property, a private right) belongs to an individual, then an exercise of the judicial power is required to authorize a deprivation.

Customs and immigration both fall into a similar camp: goods and people coming into the country from outside the jurisdiction are not yet subject to the jurisdiction and therefore not subject to the judicial power of the United States.[205] In the words of Caleb Nelson as to customs, "federal statutes permitting the importation of goods from abroad were thought to create mere privileges rather than core private rights; so long as property remained outside the United States, no one had a vested right to import it."[206] Similarly, as to immigration matters, alien immigrants have no private right to enter the country and no private right to remain in the country; therefore, neither immigration nor deportation require judicial process.[207] "It followed that the power to expel aliens after entry, no less than the power to turn them away at the border, 'may be exercised entirely through executive officers' without the need for 'judicial trial or examination.'"[208]

There are certain political questions associated with eminent domain that concern public rights. The Court can adjudge if a taking is for a public use and if the compensation is just,[209] but "courts [cannot] second-guess the political branches' determinations about which parcel of property to take for that purpose or about whether the benefit to the public really justified the political branches' interference with private property."[210]

Finally, summary mechanisms for collecting tax revenue also fall into the box of public rights, rather than private rights.[211] The Court addressed the issue of taxation as a public right in *Murray's Lessee* and reaffirmed its holding in *Jarkesy*.[212]

There are two ways to understand the public-rights holding in *Murray's Lessee*. First, and most likely, *Murray's Lessee* involves "a temporary deprivation [of property] antecedent to judicial review."[213] The statute in *Murray's Lessee* allowed a

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204. "[C]laims against the public treasury 'do not require judicial determination.'" Nelson, *supra* note 5, at 582 (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451–53 (1929)).

205. Nelson, *supra* note 5, at 580–81.

206. *Id*. at 580.

207. *Id*. at 580–81 ("[T]he Court held that alien immigrants had no vested private right to enter the United States, and that they therefore had no right to 'judicial' determination of whether they satisfied the criteria that Congress had validly established for entry; instead, 'the final determination of those facts may be entrusted by Congress to executive officers.'" (quoting Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892))); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 723–24 (1893) (finding it "impossible to hold that a Chinese laborer acquired, under any of the treaties or acts of congress, any right . . . to be and remain in this country, except by the license, permission, and sufferance of congress, to be withdrawn, whenever, in its opinion, the public welfare might require it").

208. Nelson, *supra* note 5, at 581 (quoting *Fong Yue Ting,* 149 U.S. at 713–14, 728).

209. Of course, an individual can challenge a taking of their property under both the public use and just compensation clauses. Nelson, *supra* note 5, at 585–86.

210. *Id*. at 585.

211. *Id*. at 586–90.

212. SEC v. Jarkesy, 603 U.S. 109, 128 (2024).

213. Baude, *supra* note 3, at 1553; Kirst, *supra* note 44, 1317–20 (noting at common law the possibility of a common-law court and jury to challenge a tax arose after collection); *id*. at 1339.

property owner to sue in an Article III court "but the government could take the property first and did not have to wait for an adjudication unless the court issued an injunction."[214] As Professor William Baude explains, this reading of *Murray's Lessee* coincides with a well-established legal doctrine: law-enforcement officers' ability to make warrantless arrests.[215] An arrest—like the summary deprivation of property in *Murray's Lessee*—is a deprivation of liberty without judicial process but such warrantless arrests are followed by a judge who can adjudicate the arrest and deprivation.[216]

Second, one could also read *Murray's Lessee* as holding that tax collection is an exception to due process on historical grounds.[217] The Court explained that the distress procedures at issue in *Murray's Lessee* are similar to those long-employed in England and throughout the states and that such tax procedures "varied widely from the usual course of the common law on other subjects."[218] So taxation could just be a historic exception to adjudication inside Article III.

In short, the distinction between private and public rights is far simpler than Supreme Court precedent would have the law believe.[219] Private rights are life, liberty, and property. Public rights are government benefits and privileges. Otherwise, the historical categories of public rights are limited to the disposition of public lands, funds from the public treasury, customs, immigration, political decisions within public use takings, and summary deprivations for collecting tax revenue. Outside this narrow category of public-rights cases, the presumption is in favor of an Article III court with due process of law for any deprivation of life, liberty, or property.

Once the Court restores the original law of the Seventh Amendment and clarifies the distinction between private rights and public rights, *Atlas Roofing* must be overruled. *Atlas Roofing* allowed the administrative adjudication of punitive civil money penalties without a jury. But civil money penalties are a legal remedy—such suits require trial by jury under the Seventh Amendment. "The OSHA procedure [in *Atlas Roofing*] was neither in equity nor admiralty; therefore it had to be equivalent to 'a suit for a money judgment which is classically a suit at common law.'"[220]

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214. Baude, *supra* note 3, at 1551.

215. *Id.* at 1553.

216. *Id.* at 1553.

217. *Id.* at 1552–53.

218. *Id.* at 1552 (quoting Den *ex dem.* Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 278 (1855)).

219. *See generally* Transcript of Oral Argument at 127–28, SEC v. Jarkesy, 603 U.S. 109 (2024) (No. 22-859) ("JUSTICE ALITO: I know you think the public rights/private rights distinction is fuzzy, but do you think it's a difficult question whether customs duties are public rights or private rights – involve public rights or private rights? Same thing for immigration. Same thing[] for taxation. Same thing for Social Security. Same thing for the Postal Service. Do you think that's a tough question? MR. McCOLLOCH: No, Your Honor.").

220. *See* Kirst, *supra* note 44, at 1293 (quoting Atlas Roofing Co. v. Occupational Safety and Health Rev. Comm'n, 430 U.S. 442, 449 (1977)).

Moreover, *Atlas* confused civil penalty cases with traditional public-rights cases, such as tax collection.[221] To properly understand the Seventh Amendment, it is important to distinguish a penalty—which is a legal remedy requiring trial by jury—from a tax, which can be collected summarily.[222]

Atlas also misreads caselaw, overextending public-rights cases to consume the private-rights matter at issue in *Atlas*. First, *Atlas* cited tax, tax penalty, and customs-and-immigration cases—all public-rights cases—to justify the administrative adjudication of punitive civil penalties—a private right (property) and legal remedy.[223] *Atlas* relied on *Bartlett v. Kane*,[224] a tax case about customs duties—a classic public-rights case.[225] Then *Atlas* relied on *Oceanic*, a case about a penalty for transporting immigrants carrying diseases—immigration—another classic public-rights case.[226] The dicta in *Oceanic*, which correctly stated that tariffs, revenue, and taxation are public rights, then also listed "other subjects" and *Atlas* used that language to incorrectly extend the public-rights exception to money penalties.[227] More importantly, *Oceanic* involved a case at admiralty, so plainly not a suit at common law.[228] *Atlas* also cited *Murray's Lessee*, which is a case about the summary collection of taxes, not civil penalties.[229]

Second, *Atlas* cited dicta from several unrelated opinions.[230] *Block v. Hirsh*[231] established "only that Congress may constitutionally empower an agency to determine certain facts in an emergency," but a judicial proceeding was still required to force a party to act in accord with an agency finding.[232] *Block* does not support *Atlas*. *Crowell v. Benson*, although likely wrong on other grounds,[233] also does not support *Atlas*. *Crowell* involved private rights, not public rights, and it was an admiralty case.[234] *NLRB v. Jones & Laughlin Steel Corporation*[235] concerned a suit for reinstatement and back pay against an employer—both equitable remedies—therefore the Seventh Amendment would not apply.[236] When *Atlas* was decided, no other case "had upheld such administrative factfinding in a case

221. *Id*. at 1294, 1297.

222. Early federal statutes, including the first customs acts, made the distinction between a tax and a penalty. *Id*. at 1295.

223. *Id*. at 1287.

224. 57 U.S. 263 (1853).

225. Kirst, *supra* note 44, at 1297–98.

226. *Id*. at 1299.

227. *Id*. at 1299.

228. *Id*. at 1299.

229. *Id*. at 1300–01.

230. *Id*. at 1299–1300.

231. 256 U.S. 135 (1921).

232. Kirst, *supra* note 44, at 1308.

233. William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 2D 103, 108 n.34 (2016) (naming *Crowell v. Benson* as likely wrong because it authorized the "administrative adjudication of private rights").

234. Kirst, *supra* note 44, at 1308–09.

235. 301 U.S. 1 (1937).

236. Kirst, *supra* note 44, at 1310.

in which the government sought to exact money in a procedure analogous to that in OSHA."[237]

In short, *Atlas Roofing*'s approval of a juryless administrative adjudication of civil money penalties violates the Seventh Amendment and sanctions the adjudication of private rights outside of Article III. "Every historic[] exception to the Seventh Amendment listed in *Atlas*—equity, admiralty, tax collection, military justice, and condemnation—is an exception grounded in the specific history of each action at common law."[238] *Atlas* does not fit an exception; instead, *Atlas* fits the rule. A suit for civil money penalties threatens a deprivation of the private right to property, requiring an Article III court, and involves an adjudication of legal remedies, triggering the Seventh Amendment.

C. Reverse the Order of Operations: Analyze Article III and Due Process before the Seventh Amendment

The Court in *Jarkesy* considered "public rights" as an exception to the Seventh Amendment.[239] But there really is no public-rights exception to the Seventh Amendment. Instead, the distinction between private and public rights determines whether a matter belongs in Article III at all.[240] Accordingly, the Court should reverse the order of operations and assess the private rights versus public rights distinction to determine whether a matter belongs in Article III and receives due process of law before turning to the Seventh Amendment analysis.

Marbury v. Madison confirms that a violation of private rights is at the core of the judicial power and central to whether a matter must be adjudicated inside Article III.[241] In *Marbury*, before the Court exercised its province and duty to "say what the law is," it had to determine if William Marbury had a right and if that right had been violated.[242] Chief Justice John Marshall noted, "[t]he province of the court is, solely, to decide on the rights of individuals . . . ."[243] The Court distinguished those cases that concern the rights of individuals from those acts within the executive discretion that "are only politically examinable."[244] But when a Government officer "is directed by law to do a certain act affecting the absolute

237. *Id.* at 1311.

238. *Id.* at 1340.

239. SEC v. Jarkesy, 603 U.S. 109, 127 (2024).

240. *Jarkesy*, 603 U.S. at 127–28 (explaining "matters concerning private rights may not be removed from Article III courts" because private rights are "made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'"); *see also* Axon Enter., Inc. v. Fed. Trade Comm'n, 598 U.S. 175, 203 (2023) (Thomas, J., concurring) ("In sum, whether any form of administrative adjudication is constitutionally permissible likely turns on the nature of the right in question. If private rights are at stake, the Constitution likely requires plenary Article III adjudication. Conversely, if privileges or public rights are at stake, Congress likely can foreclose judicial review at will.").

241. Adler, *supra* note 11, at 9; *see also* F. Andrew Hessick, *Standing, Injury in Facts, and Private Rights*, 93 CORNELL L. REV. 275, 277, 285, 291 (2008).

242. Marbury v. Madison, 5 U.S. 137, 154, 177 (1803).

243. *Id.* at 170.

244. *Id.* at 166.

rights of individuals," then the Court is bound to its "duty of giving judgment."[245] In other words, when an individual's private rights are violated, a Court is duty bound to exercise the judicial power to render a judgment.

And in the Court's first statement on the distinction between private and public rights, it recognized private rights must be adjudicated inside Article III. *Murray's Lessee* explained the distinction between private rights, which must be subject to judicial determination, and public rights, "which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."[246] From *Murray's Lessee* to *Jarkesy*, the Supreme Court has "repeatedly explained that matters concerning private rights may not be removed from Article III courts."[247] Indeed, the distinction between private and public rights has always first and foremost been a question of whether a matter must be adjudicated in Article III.[248]

Murray's Lessee also recognized the connection between Article III's Vesting Clause and the Due Process Clause. Whether an officer unconstitutionally exercises judicial power outside Article III, the Court stated, "can best be considered under another inquiry . . . that the effect of the proceedings authorized by the act in question is to deprive the party, against whom the warrant issues, of his liberty and property, 'without due process of law;' and, therefore, is in conflict with the fifth article of the amendments of the constitution."[249] And this connection is obvious from the text of the Due Process Clause, which requires judicial process before an individual can be deprived of life, liberty, or property.[250] In short, because Article III and due process of law are mutually reinforcing, private rights to life, liberty, and property, must be adjudicated within Article III and receive due process of law.[251]

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245. *Id.* at 171.

246. Den *ex dem.* Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 284 (1855).

247. SEC v. Jarkesy, 603 U.S. 109, 127 (2024) (citing *Murray's Lessee*, 59 U.S. at 284; Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51–52 (1989); Stern v. Marshall, 564 U.S. 462, 484 (2011)).

248. *See, e.g.*, Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 584 U.S. 325, 334 (2018).

249. *Murray Lessee*, 59 U.S. at 275.

250. *See also* Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 331 (2022) (Thomas, J., concurring) ("Considerable historical evidence indicates that 'due process of law' merely required executive and judicial actors to comply with legislative enactments and **the common law** when depriving a person of life, liberty, or property. . . . Other sources . . . suggest that 'due process of law' prohibited legislatures 'from authorizing the deprivation of a person's life, liberty, or property without providing him **the customary procedures to which freemen were entitled by the old law of England**.'" (emphasis added) (quoting United States v. Vaello Madero, 596 U.S. 159, 168–89 (2022) (Thomas, J., concurring))).

251. *See, e.g.*, Baude, *supra* note 3, at 1541–1542 ("But one of the most fundamental requirements of the clause is one of form and legality — as a limit on the legislature's ability to dispense with the courts. Hence it has aptly been said that the Due Process Clause is an 'instantiation of separation of powers' and that '[d]ue process and Article III in this sense are fused at the hip.'" (citations omitted)); *see also* Lawson, *supra* note 61, at 630–31.

In sum, the distinction between private and public rights pertains to whether a matter belongs in Article III and receives due process of law in the first place. Properly understood, it is not an exception to the Seventh Amendment but a question antecedent to the Seventh Amendment analysis.

D. The Independent Judiciary: The Judicial Vesting Clause

In *Jarkesy*, the Supreme Court noted that liberty depends on the judicial power being separated "from the legislative and executive powers."[252] And therefore, matters of private right must be adjudicated inside Article III.[253] But the Court did not fully define the judicial power or explain why matters of private right must be adjudicated by an exercise of the judicial power. Indeed, the nature of the legal interest at stake—a private or public right—is downstream from what really determines if a case or controversy must be adjudicated in an Article III court—the original law of the judicial power.

The Supreme Court has not yet, but must, define the original law of the judicial power, which is the power (1) to issue binding judgments in cases and controversies, when the court has jurisdiction, (2) to interpret and apply the relevant law, and (3) to authorize deprivations of individual rights to life, liberty, or property.

Article III doesn't speak of private and public rights. Rather, it speaks in much simpler terms: "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[254] It vests the judicial power of the United States in the federal courts. It is the definition of the judicial power—or rule enacted by the text of Article III's Vesting Clause—that explains why the nature of the right often determines whether a matter belongs in Article III or can be adjudicated elsewhere.

This power, the judicial power—all of it—is vested in the Article III courts. "[T]his does not mean *some of* the [judicial] power, but *all of* the [judicial] power."[255] Thus, the test under Article III seems to be (1) does the adjudication concern the exercise of purely judicial power, and (2) does the adjudication deprive the Article III courts of exclusive control over the exercise of that power?[256] As the Supreme Court has recognized, the judicial vesting clause means the legislature and executive can "exercise no part of th[e] judicial power."[257] Nor could Congress "withdraw from judicial cognizance any matter which, from its nature, is the subject of a

252. *Jarkesy*, 603 U.S. at 127 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

253. *Id.*

254. U.S. CONST. Art. III, § 1.

255. *See* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting); *see also* Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 203–04 (2020).

256. *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).

257. Den *ex dem.* Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 275 (1855); *Ex Parte* Randolph, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (Marshall, C.J.) (explaining that executive officers are "incapable of exercising any portion of the judicial power, and the act which attempts to conffer it, is absolutely void.").

suit at the common law, or in equity, or admiralty"—the traditional scope of the "judicial Power."[258]

As noted above, the judicial power is the power to issue binding judgments on cases and controversies within the court's jurisdiction.[259] In the course of exercising this power, courts must find and apply the relevant law.[260] It is in this process of finding and applying the relevant law that a court must say what the law is and declare void any applicable law that violates the Constitution.[261] Only an exercise of the judicial power can deprive an individual of their life, liberty, and property—also denominated private rights.[262] Thus, the nature of the right in question often determines whether a matter constitutionally requires adjudication inside Article III.[263] Matters of private right—life, liberty, property—require an exercise of the judicial power.[264] By contrast, matters of public right—government benefits or privileges—do not.[265] Courts exercise the law finding and applying power—to say what the law is—incidentally to the power to decide on the private rights disputes of individuals in cases and controversies.[266] Importantly, Article III vests "one subset of one kind of power — the judicial power of the United States" rather than the judicial power of any other government.[267] That power is vested in one Supreme Court and any inferior courts Congress decides to create. In short, the judicial power of the United States is the power to bind parties through judgments and to authorize the deprivation of private rights and that power—all of it—is vested in the Article III courts.[268]

The judicial power vested by Article III is "the power to make authoritative and final judgments in individual cases," in which the court has jurisdiction.[269]

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258. *Murray's Lessee*, 59 U.S. at 284; *see* U.S. CONST. art. III, § 2.

259. Baude, *supra* note 2, at 1811.

260. Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 384–85 (2024) (quoting Alexander Hamilton, Chief Justice John Marshall, Justice Joseph Story, and others).

261. Barnett, *supra* note 8, at 138.

262. SEC v. Jarkesy, 603 U.S. 109, 127–28 (2024) (explaining "matters concerning private rights may not be removed from Article III courts" because private rights are "made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.'"); *see also* Axon Enter., Inc. v. Fed. Trade Comm'n, 598 U.S. 175, 203 (2023) (Thomas, J., concurring) ("In sum, whether any form of administrative adjudication is constitutionally permissible likely turns on the nature of the right in question. If private rights are at stake, the Constitution likely requires plenary Article III adjudication. Conversely, if privileges or public rights are at stake, Congress likely can foreclose judicial review at will.").

263. *Id.*

264. *Jarkesy*, 603 U.S. at 127–28 (explaining that private rights require an Article III court but public rights do not); *see also* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L. J. 1672 (2012) (explaining that due process of law reinforces the separation of powers and that only an exercise of the judicial power could deprive an individual of their rights to life, liberty, and property).

265. *Jarkesy*, 603 U.S. at 128.

266. *See* Chapman & McConnell, *supra* note 10, at 1679.

267. Baude, *supra* note 3, at 1521.

268. Baude, *supra* note 3, at 1522; Baude, *supra* note 2, at 1809.

269. Baude, *supra* note 2, at 1809, 1815; Hayburn's Case, 2 Dall. 409, 410 (1792) (the Court stated that "its judgments (for its opinions are its judgments)" cannot be "revised and controlled by the legislature, [or]

Alexander Hamilton said it famously in Federalist 78, the judicial power is "neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[270] But a judgment is only enforceable if the court has jurisdiction.[271] In the course of exercising the judgment power, "the judicial department [must] say what the law is."[272] As Hamilton explained, "[t]he interpretation of the laws is the proper and peculiar province of the courts."[273] Part and parcel of this power, is the power of judicial review to determine if a law conflicts with the Constitution and to declare the law void if it does.[274] And at the core of the judicial power is the disposition of private rights to life, liberty, and property.[275]

Founding-era sources support the centrality of life, liberty, and property to the judicial power and due process of law. St. George Tucker, the American Blackstone, a leading founding-era legal treatise writer explained that the judicial power "extends to every supposable case which can affect the life, liberty, or property of the citizens of America under the authority of the federal constitution, and laws."[276] Tucker's invocation of "life, liberty, or property" directly connects Article III, due process of law, and private rights. Tucker then described the judiciary as "that department of the government to whom the protection of the rights of the individual is by the constitution especially confided."[277] Further, the respected judge and legal commentator Thomas Cooley, stated "to adjudicate upon, and protect, the rights and interests of individual

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by an officer in the executive department" because "[s]uch revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important principle which is so strictly observed by the constitution of the United States."); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995) (The judicial power is "the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a "judicial Power" is one to render dispositive judgments.'" (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RSRV. L. REV. 905, 926 (1989))).

270. THE FEDERALIST NO. 78 (Alexander Hamilton).

271. Baude, *supra* note 2, at 1815–1831.

272. Marbury v. Madison, 5 U.S. 137, 177 (1803).

273. THE FEDERALIST NO. 78 (Alexander Hamilton).

274. THE FEDERALIST NO. 78 (Alexander Hamilton) ("It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."); *Marbury*, 5 U.S. at 180 ("[A] law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."); *see generally* Barnett, *supra* note 8, at 115–138.

275. Baude, *supra* note 3, at 1522, 1541–47; *see also* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 711 (2015) (Thomas, J., dissenting) ("Disposition of private rights to life, liberty, and property falls within the core of the judicial power, whereas disposition of public rights does not.").

276. 1 St. George Tucker, Blackstone's Commentaries app. D at 354 (1803).

277. *E.g.*, *id*. at 140, 357.

citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department."[278] Other early federal courts held likewise.[279]

The Due Process Clause confirms the original law of the judicial power.[280] As Professors Chapman and McConnell summarized, "due process consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law. It entailed an exercise of what came to be known as the judicial power to interpret and apply standing law to a specific legal dispute."[281] In other words, the original meaning of due process of law guaranteed an exercise of the judicial power—a judgment and application of existing law—before an individual could be deprived of their life, liberty, or property—private rights.[282] Then due process requires an individual receive traditional judicial process before being deprived of life, liberty, or property.[283] It "ensured that the executive would not be able unilaterally to deprive persons within the nation of their rights of life, liberty, or property except as provided by common law or statute and as adjudicated by independent judicial bodies."[284] In this way, the original meaning of due process reinforces the original meaning of the judicial power and adjudication inside Article III.[285]

CONCLUSION

The Independent Judiciary is an essential guarantor of individual liberty and the rule of law. The Supreme Court got the law right in *Jarkesy*, but work remains to restore the original model of adjudication inside Article III. The Court must restore the original law of Article III, especially its vesting clause, the Due Process Clause, and the Seventh Amendment. In so doing, it will move toward restoring the original legal rule structure of our independent judiciary.

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278. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 91 (Boston, Little, Brown & Co. 1868).

279. *See, e.g.*, Nelson, *supra* note 5, at 569 n.40, 574 n.55.

280. Lawson, *supra* note 61, at 1247 (observing that "the Article III inquiry" might "merge[] with questions of due process: if the government is depriving a citizen of 'life, liberty, or property,' it generally must do so by judicial process, which in the federal system requires an Article III court; but if it is denying a citizen . . . a mere privilege, it can do so by purely executive action").

281. Chapman & McConnell, *supra* note 10, at 1679.

282. *Id.* at 1766; *see also* Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 851 (2020) (citing anti-slavery constitutional thinkers who confirm due process requires trial by jury and a judgment from a court before a deprivation of liberty).

283. Nelson, *supra* note 5, at 569 n.42.

284. Chapman & McConnell, *supra* note 10, at 1807.

285. *See, e.g,* Lawson, *supra* note 61, at 1247 (observing that "the Article III inquiry" might "merge[] with questions of due process: if the government is depriving a citizen of 'life, liberty, or property,' it generally must do so by judicial process, which in the federal system requires an Article III court; but if it is denying a citizen . . . a mere privilege, it can do so by purely executive action"); *see also* McConnell & Chapman, *supra* note 10, at 1807.