

Waiver of the Seventh Amendment (and Other Constitutional Rights) After *SEC v. Jarkesy*

JASON MAZZONE*

TABLE OF CONTENTS

INTRODUCTION	471
I. JURIES ACCORDING TO <i>JARKESY</i>	473
II. WAIVER OF THE SEVENTH AMENDMENT AND POSSIBLE LIMITS	479
A. <i>Pre-Trial Settlement of Federal Court Actions</i>	479
B. <i>Bench Trials in Federal Court Actions</i>	480
C. <i>Administrative Adjudication</i>	481
D. <i>Administrative Settlement</i>	484
E. <i>The Seventh Amendment and the Unconstitutional Conditions Doctrine</i>	487
III. WAIVER RECONSIDERED	491
A. <i>Doctrinal Tweaks</i>	491
B. <i>The Seventh Amendment Jury Trial Right—and the Sixth</i>	492
C. <i>Harmonization</i>	499
CONCLUSION	501

INTRODUCTION

SEC v. Jarkesy holds that under the Seventh Amendment there is a right to a jury trial when the Securities and Exchange Commission (SEC) brings a securities fraud enforcement action with civil penalties.¹ If the Supreme Court really means to move such actions from adjudication before an agency tribunal to adjudication by a jury in federal court, it will soon confront the question of whether and how defendants may waive the Seventh Amendment right that *Jarkesy* recognizes and celebrates. With *Jarkesy* on the books, the SEC is likely to seek to keep in place in-house adjudication of most, or perhaps all, securities fraud

* Albert E. Jenner, Jr. Professor of Law and Director, Program in Constitutional Theory, History and Law, University of Illinois Urbana-Champaign. © 2026, Jason Mazzone.

1. 603 U.S. 109, 120 (2024).

claims by creating incentives for respondents/defendants² to give up their jury rights and proceed entirely through an agency process. Specifically, the SEC will (and does already) negotiate settlements of securities claims before they even make it to court, and (after *Jarkesy*) offer defendants the prospect of reduced fines and other penalties if they agree in advance to an agency process. Courts have long recognized in a variety of other contexts that the right to a jury like other trial rights may be waived so long as the waiver is “knowing and voluntary.”³ Parties in civil cases—whether they involve the government or not—routinely give up their right to a jury trial by settling their disputes or by having them resolved by bench trial, arbitration, or another non-jury process. Further, most criminal prosecutions are resolved through a guilty plea (that waives the Sixth Amendment trial right) secured through a plea bargain in which the defendant receives a lesser punishment than would likely result following conviction after trial. If, after *Jarkesy*, the Court’s approach to waiver of trial rights in other contexts simply extends unchanged to civil claims brought by the SEC—or, looking down the road, other federal agencies—there are likely to be very few such claims actually decided by juries in federal court. Indeed, there are likely to be few such cases that make it to court at all.

Yet there is some reason to think that with respect to agency claims the Court will be less inclined than it has so far been in other contexts to allow the government to negotiate a waiver of the right to trial. *Jarkesy*, like *Loper Bright* decided the same term,⁴ reflects the Court’s broader skepticism of a powerful administrative state and particularly of agencies displacing judicial authority. The Court might, therefore, develop new doctrinal rules—perhaps by drawing upon the doctrine of unconstitutional conditions—which limit the ability of the SEC and other agencies to negotiate waiver of the jury trial right that *Jarkesy* recognizes, and particularly of waivers that prevent actions that agencies initiate from ever reaching a federal court. In other words, skepticism of agency power might well counteract the Court’s willingness in other contexts to permit negotiated waiver of the right to a jury trial. *Jarkesy*, then, could be a tipping point.

This essay explores limits the Court might impose on the ability of federal agencies to secure waiver of the right to a jury trial and assesses the implications for agency adjudication, for waiver of trial rights in other contexts, and for waiver

2. If an action is brought in an administrative proceeding, the target of the action is a respondent. If the action is brought as a lawsuit in federal district court, the target is a defendant. For ease of reference, in the remainder of the essay I’ll use the term, defendant, rather than switch between defendant and respondent or use the more clunky designation of respondent/defendant.

3. See *Parke v. Raley*, 506 U.S. 20, 28 (1992) (Sixth Amendment right to a jury trial); *K.M.C. Co. v. Irving Tr. Co.*, 757 F.2d 752, 756 (6th Cir. 1985) (Seventh Amendment right to a jury trial).

4. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412–13 (2024) (overruling *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to hold that because courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, they need not, and under the Administrative Procedure Act may not, defer to an agency’s interpretation of the law simply because a statute is ambiguous).

of constitutional rights more generally. In so doing, the essay considers *Jarkesy's* potential to unsettle or produce a rethinking of longstanding rules that treat certain constitutional rights—including the right to a jury trial—as in the hands of individual rights-holders to exercise or bargain away as they please. Specifically, the Court, applying the doctrine of unconstitutional conditions, has barred government from offering benefits (or relief from a burden) to those who agree to give up certain constitutional rights. But the Court has not viewed the right to a jury trial to trigger scrutiny under the doctrine. The Court's permissive approach to negotiated waiver of the right to jury trial (especially in criminal cases) has long puzzled commentators, given the Court's insistence in a variety of cases that with respect to other rights it is unconstitutional for the government to condition a benefit on waiver of the right. *Jarkesy* might well be the case that ultimately leads the Court to account for its differential treatment of the right to a jury trial or to forge a more coherent approach to the question of whether and when constitutional rights may be used as negotiating chips in making deals with the government.

Part I sets the stage by presenting the account of juries advanced in the *Jarkesy* litigation and in the Court's decision as in significant tension with the modern reality that rights to jury trials are routinely bargained away such that juries—despite their historical significance—today play only a minimal role in our legal system. With that background, Part II explores the various ways in which after *Jarkesy*, defendants in SEC enforcement (or other agency) actions might waive—and, more importantly, be enticed by the government to waive—the right to a jury trial and it discusses possible limits to those forms of waiver in light of existing doctrine governing bargaining around and alienation of constitutional rights. Part III considers ways in which the Court, committed to juries and skeptical of agency adjudication, might in the future put a brake on government-induced waivers of the right to jury trial in agency enforcement actions. From there, it explores some implications for the waiver of trial rights in other contexts and waiver of constitutional rights more generally.

I. JURIES ACCORDING TO *JARKESY*

Jarkesy is from another time. The case makes it sound as though juries and jury trials, historically prevalent and significant, are a normal feature of the American legal system today rather than, as is the reality, the exception to the means by which cases are resolved. Consider some statistics. In the twelve-month period ending September 30, 2023, the federal district courts resolved 293,677 civil cases.⁵ During this period, the active and senior Article III judges conducted 3,303 civil trials, of which 1,273 trials were jury trials.⁶ Among the federal districts, the highest number of civil jury trials in 2023—95 trials—took place in the

5. See *U.S. District Courts — Judicial Business 2023*, U.S. COURTS, <https://www.uscourts.gov/data-news/reports/statistical-reports/judicial-business-united-states/judicial-business-2023/us-district-courts-judicial-business-2023> [https://perma.cc/JP7N-TTG5].

6. See *id.*

Central District of California;⁷ that works out to fewer than four trials per active district court judge.⁸ Jury trials in federal criminal cases are comparably rare.⁹

Jarkesy sounds otherwise. George R. Jarkesy's arguments,¹⁰ both to the U.S. Court of Appeals for the Fifth Circuit and to the Supreme Court, advance the notion that a ruling in his favor will mean that, going forward, juries will be the entities that resolve enforcement actions brought by the SEC. With one exception (discussed below), the amicus briefs to the Court convey a similar impression. The *Jarkesy* majority opinion, by Chief Justice Roberts, and the concurring opinion, by Justice Gorsuch, also involve an out-of-touch account of the role that juries actually play today. Juries did not decide many SEC enforcement actions before *Jarkesy* and they won't be deciding many after *Jarkesy* either. In its antebellum vision of juries as the embodiment of popular rule and a protection against government power, the entire *Jarkesy* case is strikingly disconnected from the modern reality that whatever the scope of the right to a jury trial, that right is routinely—indeed it is usually—waived.

Start with Jarkesy's own arguments. Over and over, Jarkesy's briefs to the Fifth Circuit¹¹ and to the Supreme Court¹² emphasize the constitutional significance of

7. See Table T-1—U.S. District Courts—Trials Statistical Tables For The Federal Judiciary (December 31, 2023), U.S. COURTS, <https://www.uscourts.gov/data-news/data-tables/2023/12/31/statistical-tables-federal-judiciary/t-1> [<https://perma.cc/3UMW-DB5U>] (providing a breakdown of the number of jury and non-jury trials by district court in 2023).

8. There are 28 active district court judges in the Central District of California. See *Annual Report of Caseload Statistics*, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA, 2 (2023), https://www.cacd.uscourts.gov/sites/default/files/documents/CACD_FY2023_Annual_Report.pdf [<https://perma.cc/V7UV-54C9>]; see also *id.* at 18 (reporting 104 civil jury trials before district and magistrate judges in 2023).

9. See *infra* notes 72-74 and accompanying text.

10. The case involved an SEC action against George R. Jarkesy and Patriot28, a firm that Jarkesy created and managed. See *SEC v. Jarkesy*, 603 U.S. 109, 118 (2024).

11. See Brief for Petitioners at 7-8, *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *aff'd*, 603 U.S. 109 (2024) (No. 20-61007), 2021 WL 1044807, at *10 (“A fundamental component of the Anglo-American civil justice system for five hundred years, eighteenth-century Americans viewed civil juries as a critical check on government power.”); *id.* at 9 (“Ratification almost failed in a number of states due to the lack of a civil jury guarantee in the Constitution, the Anti-Federalists arguing that the new Supreme Court’s appellate jurisdiction in law and fact would serve to abolish civil juries. It was only the Federalists’ agreement to pass a bill of rights for ratification at the first session of Congress specifically containing a civil jury trial right that convinced the recalcitrant states to approve the Constitution.”) (footnotes omitted); *id.* at 18 n.46 (“Application of the ‘public rights’ doctrine to eliminate Seventh Amendment rights, where the government is prosecuting a claim against a citizen, is inimical to the very purpose of the jury trial right - meant to act as a citizen safeguard against government tyranny.”).

12. See Brief for Respondents at 9, *SEC v. Jarkesy*, 603 U.S. 109 (2024) (No. 22-859), 2023 WL 6881790, at *9 (“One of the primary flashpoints of revolutionary fervor in the 1770’s was the recent British diversion of such claims for prosecution in jury-less vice-admiralty courts. The draft constitution’s omission of a common law jury trial right was the primary objection that nearly scuttled ratification. The Anti-Federalists carried the day in pushing through the Seventh Amendment, in large part to assure that the government could not put citizens to trial for penalties without the intervention of a jury.”); *id.* at 13 (“The Founders would be mystified to discover that something called the ‘public rights doctrine’ could someday be deployed to erase the jury trial guarantee they enshrined in the Seventh Amendment, following a bruising battle for ratification of the Constitution that hinged in no small part on the universal principle that civil juries were necessary for the avoidance of tyranny.”); *id.*

juries as a foundational check on government and an essential safeguard of liberty. Jarkesy's briefs say nothing—not a word—about the possibility of waiving the right to a jury trial and at times suggest a jury trial is the *only* legitimate means by which disputes may be resolved.¹³ To be sure, in his briefing, Jarkesy argues that the constitutional problem of in-house adjudication was that he was denied his *right* to a jury trial, either by Congress¹⁴ or the SEC¹⁵ (or both),¹⁶ and, alternatively, that the SEC, but not he, was able to *choose* the forum.¹⁷ But these hints at choice do not add up to a recognition that jury rights are waivable and are generally waived. So, too, the various amicus briefs in support of Jarkesy celebrate the jury and treat it as an inevitable component of modern adjudication.¹⁸ Just one of those briefs, that of the Chamber

(“So profound was the acrimony over taxation-without-representation and the parliamentary ruse to circumvent jury trial rights that these issues precipitated street protests, riots, denunciations by colonial legislative bodies, and the first assembly of colonies to devise a coordinated opposition.”); *id.* at 18 (“Threats to civil and criminal jury trial rights—especially in these government enforcement actions—would continue to unify the colonies and galvanize opposition to British abuses in the run-up to the Revolution.”); *id.* at 22 (“[T]he requisite nine states ratified the new Constitution, but only because most of the states had attached proposed amendments to their respective resolutions—including a civil jury trial right—that the Federalists had committed to take up at the first session of Congress.”).

13. *See, e.g., id.* at 8 (“[T]he Seventh Amendment *forbids* the adjudication of the securities acts’ anti-fraud provisions in the SEC’s in-house courts.”) (emphasis added).

14. *See* Brief for Petitioners at 5, *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) (No. 20-61007), 2021 WL 1044807, at *9 (“Congress may not strip a citizen of his Seventh Amendment rights by assignment of such claims to an agency’s internal tribunals.”), *aff d.*, 603 U.S. 109 (2024).

15. *See id.* at 1 (“At the SEC’s unilateral whim, Jarkesy was stripped of his right to a jury trial or to a real Article III judge, and endured a serpentine administrative process that finally ended in 2020 with substantial penalties and lifetime bars.”).

16. *See id.* at 7 (“Neither Congress nor a prosecuting executive agency is constitutionally empowered to vanquish a citizen’s Seventh Amendment rights in an action for legal remedies well known to the common law. But Dodd-Frank § 929P(a) did just that, purporting to vest the SEC with unilateral (and unreviewable) authority to pursue its penalty action against Jarkesy as an administrative proceeding, stripping him of any right to have a jury decide his guilt or innocence (and his Article III right to a trial before an independent, life-tenured judge.”).

17. *See id.* at 46 n.103 (“The Due Process Clause also prohibits the unequal treatment of parties in litigation—especially where one party is denied a fundamental right. That the SEC as plaintiff can choose whether to avail itself of a jury determination, while the agency’s defendant cannot, creates an extreme asymmetry between the procedural rights of the parties that cannot be reconciled with the equal protection or due process guarantees of the Fifth Amendment. *See, e.g., Wardius v. Oregon*, 412 U.S. 470, 475 (1973) (lack of procedural reciprocity between government and citizen is ‘fundamentally unfair’ and interferes with the defendant’s ability to secure a fair trial.”).

18. *See, e.g.,* Brief of Const. Originalists Edwin Meese III, Steven G. Calabresi, & Garry S. Lawson As Amici Curiae in Support of Respondents at 15, *SEC v. Jarkesy*, 603 U.S. 109 (2024) (No. 22-859), 2023 WL 6974396, at *9 (“[A]n SEC law-enforcement action cannot under any circumstances, under any criteria, be tried by the SEC except before a jury and an Article III judge with tenure during good behavior and an irreducible salary. This principle is a bedrock premise of ‘due process of law.’”); *id.* (“The SEC cannot ‘be the judge in its own cause.’ . . . SEC prosecutors and ALJs . . . cannot both prosecute and adjudicate the fact of liability in a case like that of respondents, regardless of the criteria for making that supposed choice.”); Brief of Institute for Justice et al. as Amici Curiae Supporting Respondents at 4, *SEC v. Jarkesy*, 603 U.S. 109 (2024) (No. 22-859), 2023 WL 6974392, at *5 (“This Court’s cases confirm that fines must be imposed in real courts, where the right to trial by jury can be preserved.”); *id.* at 20 (“This historical approach supports a blanket rule: Actions to impose monetary penalties require a jury trial.”); Brief of State of West Virginia & 17 Other States as Amici Curiae Supporting Respondents at 5, *SEC v. Jarkesy*, 603 U.S. 109 (2024) (No. 22-859), 2023 WL 6974422, at

of Commerce, discusses in any detail waiving the Seventh Amendment right. We'll return to that brief in a moment.

Chief Justice Roberts's majority opinion in *Jarkesy* depicts juries as central to our constitutional scheme. "The right to trial by jury," Roberts writes, "is 'of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right' has always been and 'should be scrutinized with the utmost care.'"¹⁹ There is no recognition at all in Roberts's opinion that jury rights are routinely waived, such that jury trials are, today, a rare occurrence. Instead, Roberts writes as though cases that fall within the jurisdiction of federal courts are necessarily resolved there with a jury trial. "The SEC's antifraud provisions replicate common law claims," Roberts writes, "and it is well established that common law claims *must* be heard by a jury."²⁰ That cannot be true. Common law claims are routinely not heard by juries. There is no must about it. Elsewhere, rejecting the government's argument that the public rights exception to the Seventh Amendment applied to the claims at issue, Roberts writes that "[o]nce . . . a suit 'is brought within the bounds of federal jurisdiction,' an Article III court must decide it, with a jury if the Seventh Amendment applies."²¹ That principle, Roberts explains, is "critical to maintaining the proper role of the Judiciary in the Constitution" and safeguarding liberty because "as Alexander Hamilton wrote in *The Federalist Papers*, 'there is no liberty if the power of judging be not separated from the legislative and executive powers.'"²² Again, though, most cases brought in federal court are *not* resolved by a jury even when there is a right to have one. Invoking Hamilton does not alter the reality that federal cases get resolved every day with no jury at all.

*8 ("Claims for civil penalties under the securities statutes are like claims traditionally brought at common law, so they need to be brought in Article III courts."); Brief of David Julian as Amici Curiae Supporting Respondents at 9, *SEC v. Jarkesy*, 603 U.S. 109 (2024) (No. 22-859), 2023 WL 6974425, at *8 ("Congress May Not Assign A Civil Money Penalty Proceeding For Fraud To An Administrative Forum Without The Benefit Of A Jury Trial"); Brief of Cato Institute as Amici Curiae Supporting Respondents at 16, *SEC v. Jarkesy*, 603 U.S. 109 (2024) (No. 22-859), 2023 WL 6976162, at *10 ("Once a defendant reaches the adjudicative stage, SEC administrative proceedings deny defendants a trial before a petit jury - the constitutional requirement for adjudicating private rights."); Brief of Advancing American Freedom et al. as Amici Curiae Supporting Respondents at 3, *SEC v. Jarkesy*, 603 U.S. 109 (2024) (No. 22-859), 2023 WL 7041861, at *5 ("The constitutional separation of powers was not an accident. It was designed by the Framers of the Constitution to ensure that the federal government, which exists to protect individual rights, would not become a source of those rights' violation. The Constitution's structures are not suggestions or guidelines. They are rules those who govern must follow. The SEC's adjudication of cases before its own administrative law judges . . . undermines that structure by violating the distribution of powers among the three branches and thus is illegal."); Brief of Competitive Enterprise Institute as Amici Curiae Supporting Respondents at 11, *SEC v. Jarkesy*, 603 U.S. 109 (2024) (No. 22-859), 2023 WL 6940980, at *7 ("Any claim of monetary damages should be presumed to require a jury.").

19. *SEC v. Jarkesy*, 603 U.S. 109, 121 (2024) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

20. *Id.* at 120 (emphasis added).

21. *Id.* at 127 (quoting *Stern v. Marshall*, 564 U.S. 462, 484 (2011)).

22. *Id.* (quoting *THE FEDERALIST* NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (internal quotation marks omitted).

Justice Gorsuch’s concurring opinion in *Jarkesy* sounds an even stronger and—in light of modern practices—stranger ode to the jury. In Gorsuch’s view, the case was not merely about the Seventh Amendment because it “operates together with Article III and the Due Process Clause” to “vindicate the Constitution’s promise of a ‘fair trial in a fair tribunal.’”²³ In a lengthy discussion, Gorsuch compares modern SEC administrative proceedings to colonial practices of “steer[ing] enforcement actions out of local courts and into vice-admiralty tribunals” and thus away from juries. “The abuses of these courts,” Gorsuch explains, “featured prominently in the calls for revolution,”²⁴ such that “[w]hen the smoke settled, the American people went to great lengths to prevent a backslide toward anything like the vice-admiralty courts”²⁵ by adopting Article III and soon thereafter the Fifth and Seventh Amendments. The history is correct, of course. But our system long ago abandoned the role that juries played in the post-revolutionary period; neither a comparison to the vice-admiralty tribunals nor an emphasis of the interlocking nature of Article III, the Due Process Clause and the Seventh Amendment alters that fact. Similarly naïve is the panel decision by the Fifth Circuit: though laudatory of the historical role of the jury it, too, offers no recognition that in modern times juries actually resolve very few disputes.²⁶

Amidst all of the talk in the *Jarkesy* case of colonial abuses, revolutionary responses, and the foundational role of juries, the U.S. Chamber of Commerce, in its amicus brief, provides the sole reality check. Two paragraphs in the Chamber’s brief, under the heading “Respondents May Choose Whether To Invoke Their Right To A Trial By Jury Or Whether To Waive It,” make the key point that everyone else seemed to forget:

Although Respondents have a constitutional right to a civil jury, that does not mean that administrative agencies may never adjudicate claims implicating private rights. Rather, the target of an administrative proceeding has the right to demand a trial by jury in an Article III court or to waive that right (knowingly and voluntarily) and have the matter heard before an . . . [Administrative Law Judge (ALJ)] in an agency tribunal. *See Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848-49 (1986); *Seaboard Lumber Co. v. United*

23. *Id.* at 141 (Gorsuch, J., concurring) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

24. *Id.* at 147.

25. *Id.* at 148.

26. *See Jarkesy v. SEC*, 34 F.4th 446, 451 (5th Cir. 2022) (“The Seventh Amendment guarantees Petitioners a jury trial because the SEC’s enforcement action is akin to traditional actions at law to which the jury-trial right attaches.”), *aff’d*, 603 U.S. 109 (2024); *id.* (“Thomas Jefferson identified the jury ‘as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution.’ . . . And John Adams called trial by jury (along with popular elections) ‘the heart and lungs of liberty.’”); *id.* at 451-52 (“Civil juries in particular have long served as a critical check on government power. So precious were civil juries at the time of the Founding that the Constitution likely would not have been ratified absent assurance that the institution would be protected expressly by amendment.”); *id.* at 452 (“Trial by jury therefore is a ‘fundamental’ component of our legal system ‘and remains one of our most vital barriers to governmental arbitrariness.’” (quoting *Reid v. Covert*, 354 U.S. 1, 9-10 (1957))).

States, 903 F.2d 1560, 1563 (Fed. Cir. 1990) (“The Supreme Court has long recognized that a private litigant may waive its right to a jury and to an Article III court in civil cases.”). Just like a target may “choose to submit his case to a magistrate, arbitrator, or other non-Article III tribunal,” *In re Clay*, 35 F.3d 190, 196 (5th Cir. 1994), the target may choose to proceed before an SEC ALJ.

Here, then, Respondents could have knowingly and voluntarily elected to try the matter before the SEC’s administrative tribunal. See *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 668-69 (2015). But Respondents did not do so. They instead objected to the agency proceeding and invoked their right to a trial by jury. . . . Consequently, the Seventh Amendment requires the SEC to convince a jury of Respondents’ peers to enforce a monetary penalty against them.²⁷

These two paragraphs—not Jarkesy’s own voluminous submissions, not the opinions of the judges or the Justices, not the potted writings of the other amici—reflect the realities of modern adjudication, in which the right to a jury trial does not mean—indeed, is unlikely to mean—that a jury trial will actually occur before a case is resolved and liability is determined. As the Chamber’s brief makes clear, our legal system operates on the premise that the right to a jury trial is waivable²⁸ and is usually waived. Indeed, waivability is the engine that makes our modern legal system run: absent a massive expansion of the number of judges, courthouses, and other resources, the federal courts could not conduct jury trials in every case or even in most cases in which a right to a jury trial exists.

Once agency enforcement of federal law is situated within the context of the modern legal system rather than in the bygone era that *Jarkesy* depicts, the central constitutional question is no longer how to bring the jury of 1791 into agency-initiated actions. Instead, the central question, when the federal government brings a claim, is what limits, if any, there are to the ability of defendants to forego Seventh Amendment rights and, in particular, what limits there are to the power of the government to offer incentives to persuade defendants to give up a jury trial in favor of some other mechanism to resolve the dispute. *Jarkesy* fails even to recognize the issue. The next Part takes it up.

27. Brief of Chamber of Commerce et al. as Amici Curiae Supporting Respondents at 21-22, SEC v. Jarkesy, 603 U.S. 109 (2024) (No. 22-859), 2023 WL 7041859, at *12; see also *id.* at 4 (“[T]he SEC here did precisely what the Seventh Amendment said could not be done. That is, it imposed civil penalties upon Respondents without affording them the opportunity for the judgment of a jury of their peers. It is for Respondents—not the SEC—to choose whether a jury or an administrative law judge . . . should decide their fate.”) (emphasis added). Another amicus hints, as did Jarkesy, at waiver by pointing to an asymmetry. See Brief of New Civil Liberties Alliance as Amici Curiae Supporting Respondents at 12, SEC v. Jarkesy, 603 U.S. 109 (2024) (No. 22-859), 2023 WL 6974421, at *7 (“Worse still, federal securities law operates in a blatantly discriminatory manner: it denies enforcement targets the option of choosing a jury trial while granting that very same option to SEC. The Seventh Amendment prohibits the federal government from dispensing a valued constitutional right in such an unequal manner.”).

28. See Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 656 (1963) (“[T]he constitutional guaranty of jury trial . . . has been uniformly construed as a right which may be waived by the parties.”).

II. WAIVER OF THE SEVENTH AMENDMENT AND POSSIBLE LIMITS

After *Jarkesy*, there are a variety of ways in which defendants in SEC enforcement actions might give up the right to a jury trial. Some forms of waiver will involve stronger coercion by the government than will others. Most forms of waiver, including those in which the government brings significant pressure to bear, appear easily permissible under existing law. Others, perhaps, invite new questions about limits to negotiated waivers of Seventh Amendment rights. This Part identifies and discusses the various possibilities.

A. Pre-Trial Settlement of Federal Court Actions

Most civil cases settle. Indeed, settlement is very much encouraged in the modern legal system. Parties that settle a civil case give up their right to a jury trial. Before *Jarkesy*, the SEC settled most of the civil actions it initiated by consent decree in which the defendant accepts the imposition of financial and other penalties but neither admits nor denies the SEC's allegations.²⁹ After *Jarkesy*, many—perhaps most—of the actions the SEC brings in federal district court will also result in pre-trial settlement with the defendant, therefore, waiving the Seventh Amendment right that *Jarkesy* recognizes.

There is no reason to imagine that, as a general matter, just because the plaintiff is the SEC the defendant cannot elect to settle the action and forego a jury trial. Indeed, it would be very odd to think that a civil case, including when the government is the plaintiff, cannot be settled and must proceed to trial if the parties have reached a resolution that they agree is in each of their best interest. Among other things, it would seem very difficult to force unwilling parties in a civil case to come to court to present evidence before a jury.

Some defendants will settle SEC actions before trial solely because they recognize that the risk of an adverse jury verdict is high, and they calculate that it makes sense—financially and reputationally—to avoid a full-blown trial. For other defendants—perhaps those with deeper pockets or those that perceive a higher chance of a favorable jury verdict—settlement will require the government to provide some additional tangible benefits. These might take the form of a dismissal of certain claims, a lower financial penalty than that sought at trial, or a narrowing or elimination of injunctive relief.

Just as settlement is routine in civil cases, settlement in which *both* sides agree to less than they might achieve were they to prevail at trial is common. If plaintiffs were somehow prevented from giving up the claims and remedies they seek at the time of filing an action, civil cases would be much harder to settle. So, too, many cases would not settle if defendants were somehow barred from agreeing, in the absence of a jury verdict, to bear a penalty. There is no sensible reason to think, as a general matter, that, after *Jarkesy*, in SEC actions the defendant may waive the right to a jury trial but that the government may not in exchange give

29. See Danne L. Johnson, *SEC Settlement: Agency Self-Interest or Public Interest*, 12 FORDHAM J. CORP. & FIN. L. 627, 647 (2007) (reporting a settlement rate of over 90% in SEC enforcement actions).

any concessions to the defendant. Accordingly, after *Jarkesy*, the SEC is likely to do what it was already doing in actions it brought (or threatened to bring) in federal district court: negotiate a settlement with the defendant in which the defendant foregoes a jury trial in exchange for a more favorable outcome than an adverse verdict and ensuing penalty would entail.

B. Bench Trials in Federal Court Actions

A second form of waiver of the Seventh Amendment right in SEC actions in federal district court also seems unobjectionable: foregoing trial by jury in favor of a bench trial before the district judge. Parties in civil cases in federal court are permitted to waive their right to a jury trial and opt for a bench trial in which the judge serves instead as fact-finder and issues the verdict.³⁰ In general, courts have held that waiver of a jury trial in favor of a bench trial must be “knowing” and “intentional.”³¹ But the requirement is less stringent than it might sound. Waiver of a jury in favor of a judge can occur by signing a contract in advance of any dispute actually arising³² or just by participating in a bench trial without voicing an objection.³³ More generally, under the federal rules, parties must affirmatively

30. See FED. R. CIV. P. 38 (providing that “[o]n any issue triable of right by a jury, a party may demand a jury trial by [taking specified steps]” and that “[a] party waives a jury trial unless its demand is properly served and filed.”); FED. R. CIV. P. 39 (“When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless: (1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or (2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.”).

31. See, e.g., *Nat’l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (holding that lessee had not waived right to jury trial by signing a contract in which “waiver clause was set deeply and inconspicuously” and stating, “[i]t is elementary that the Seventh Amendment right to a jury is fundamental and that its protection can only be relinquished knowingly and intentionally.”).

32. See, e.g., *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc.*, 500 F.3d 171, 188 (2d Cir. 2007) (“Although the right [to a civil jury trial] is fundamental and a presumption exists against its waiver, a contractual waiver [here, in favor of a bench trial] is enforceable if it is made knowingly, intentionally, and voluntarily.”); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832–33 (4th Cir. 1986) (in finding that equipment lessees had waived their right to a jury trial in favor of a bench trial, explaining that “[t]he seventh amendment right is of course a fundamental one, but it is one that can be knowingly and intentionally waived by contract” and that “[w]here waiver is claimed under a contract executed before litigation is contemplated . . . the party seeking enforcement of the waiver must prove that consent was both voluntary and informed.”); *Great Earth Int’l Franchising Corp. v. Milks Dev.*, 311 F. Supp. 2d 419, 437 (S.D.N.Y. 2004) (rejecting plaintiff’s demand for a jury trial and proceeding to a bench trial and stating, “A contractual waiver of a jury trial is enforceable.”); *Phoenix Leasing Inc. v. Sure Broad., Inc.*, 843 F. Supp. 1379, 1384 (D. Nev. 1994) (“Although the right to jury trial in civil cases tried before federal courts is a constitutionally protected right, it may be waived by a contract knowingly and voluntarily executed.”) *aff’d*, 89 F.3d 846 (9th Cir. 1996); *Nat’l Westminster Bank v. Ross*, 130 B.R. 656, 666–67 (S.D.N.Y. 1991) (“New York courts have consistently upheld jury trial waiver provisions In fact, the Court cannot find a single reported New York decision in which a court refused to enforce a jury trial waiver provision in a bank loan agreement or guarantee, and the parties alert the Court to none.”), *aff’d sub nom. Yaeger v. Nat’l Westminster*, 962 F.2d 1 (2d Cir. 1992).

33. See, e.g., *Robinson v. Johnson*, 449 F. App’x 205, 207 (3d Cir. 2011) (holding that civil plaintiff’s participation without objection in a bench trial waived the Seventh Amendment right to a jury trial); *In re City of Philadelphia Litig.*, 158 F.3d 723, 727 (3d Cir. 1998) (“[W]e hold today that where a party has made a general demand for a jury trial and the court subsequently determines that a certain

demand a jury trial—in other words, invoke their right to one—and if they do not, the judge may hear the case.³⁴ Bench trials, then, are an unremarkable alternative to the jury that *Jarkesy* elevates and celebrates. Indeed, there are far more bench trials in federal court today than there are jury trials.³⁵ Again, there seems little reason to imagine that a defendant in an SEC (or other agency) enforcement action would somehow be prevented from opting for trial, if trial is to occur, before a district court judge rather than before a jury.

C. Administrative Adjudication

The two preceding forms of waiver of the Seventh Amendment involve actions the SEC brings in federal district court. From one perspective—perhaps that of Justice Gorsuch in his concurring opinion in *Jarkesy*—the fact that an action even *is* in federal district court is reason to cheer even if, ultimately, no jury trial occurs. Yet it would be wrong to imagine that after *Jarkesy* the SEC is inevitably required to bring enforcement actions in federal district court whenever the Seventh Amendment right applies. A function of *Jarkesy*'s failure to recognize that the Seventh Amendment is routinely waived is that the decision imposes no prohibition or limitation on the defendant in an SEC action from *agreeing* to have the matter decided in an administrative proceeding rather than in federal district court. That is, *Jarkesy* would not seem to bar the SEC from offering the defendant a *choice* between an administrative proceeding and a judicial proceeding. And if that's true, the SEC would seem also free to offer the defendant some incentive to keep the matter out of court. In the end, then, *Jarkesy* stands for the proposition that the defendant has a *right* to a jury trial in federal district court. But that right, in the modern context, is waivable, and (absent some future curtailment by the Court) waiver could well take the form of consent to an in-house proceeding.

If this sounds inconsistent with, an evasion even of, the *Jarkesy* decision, it is helpful to keep in focus the modern law's strong commitment, in various

issue will be determined non-jury, it is incumbent upon that party to timely lodge a specific objection in order to preserve any Seventh Amendment jury trial right he may have with respect to that issue.”); *White v. McGinnis*, 903 F.2d 699, 703 (9th Cir. 1990) (en banc) (“[K]nowing participation in a bench trial without objection is sufficient to constitute a jury waiver.”); *Flemming ex rel. Est. of Fleming v. Air Sunshine, Inc.*, 311 F.3d 282, 290 (3d Cir. 2002) (“We have joined other courts of appeals in establishing that an intentional relinquishment of the right to a jury trial is not required for waiver.”); *In re City of Philadelphia Litig.*, 158 F.3d 723, 726 (3d Cir. 1998) (holding that right to jury trial may be waived by “inaction or acquiescence”); *Wilcher v. City of Wilmington*, 139 F.3d 366, 379 (3d Cir. 1998) (noting that “once a party makes a timely demand for a jury trial, that party subsequently waives that right when it participates in a bench trial without objection”). *But see Solis v. Cnty. of Los Angeles*, 514 F.3d 946, 956 (9th Cir. 2008) (“Not every participation in a bench trial constitutes consent to the waiver of a jury trial, however. When a party participates in the bench trial ordered by the trial court while continuing to demand a jury trial, his ‘continuing objection’ is ‘sufficient to preserve his right to appeal the denial of his request for a jury.’ . . . Reluctant participation in a bench trial does not waive one’s Seventh Amendment right to a jury trial.”) (citations omitted).

34. See FED. R. CIV. P. 38(d) (“A party waives a jury trial unless its demand is properly served and filed.”); FED. R. CIV. P. 39(b) (“Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.”).

35. See *supra* notes 5-9 and accompanying text.

domains, to individual control over the Seventh Amendment and other trial rights. Consider, for example, arbitration. The Federal Arbitration Act of 1925 (FAA) provides that “written provision . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³⁶ As such, the Act adopts a “federal policy favoring arbitration.”³⁷ Consistent with this understanding, the Court has repeatedly held that the FAA preempts state laws that prohibit or limit so-called mandatory arbitration agreements;³⁸ that enforcement of arbitration agreements extends equally to statutory rights,³⁹ at least where the arbitral forum is adequate to protect them;⁴⁰ and that such agreements are valid also when located within government

36. 9 U.S.C. § 2 (2000).

37. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA specifies some limitations to arbitrable claims. *See* 9 U.S.C. § 1 (providing that “nothing [in the FAA] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”). In other specific contexts, Congress has by statute limited use of so-called mandatory arbitration agreements. Two examples are the Motor Vehicle Franchise Contract Arbitration Fairness Act and the Military Lending Act. *See* 15 U.S.C. § 1226(a)(2) (“Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.”); 10 U.S.C.A. § 987(f) (“No agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member [of the armed forces] or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made.”).

38. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding provision of the California Franchise Investment Law, as interpreted by the state supreme court, requiring judicial consideration of claims under the act, violates the Supremacy Clause and explaining that “[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding that FAA preempts state law bar on certain class action waivers in consumer contracts); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (holding that FAA preempts Alabama statute prohibiting mandatory pre-dispute arbitration clauses).

39. *See Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226–27 (1987) (stating “the Arbitration Act . . . mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act’s mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue” and holding that claims brought under section 10(b) of the Securities Exchange Act of 1934 and under the Racketeer Influenced and Corrupt Organizations Act must be arbitrated in accordance with the terms of an arbitration agreement). *Cf. Wilko v. Swan*, 346 U.S. 427, 437-38 (1953) (holding that a pre-dispute agreement could not be enforced to compel arbitration of a claim under section 12(2) of the Securities Act of 1933); *McMahon*, 482 U.S. at 228-29, 233 (explaining that “[t]he conclusion in *Wilko* was expressly based on the Court’s belief that a judicial forum was needed to protect the substantive rights created by the Securities Act” and therefore that “*Wilko* must be understood . . . as holding that the plaintiff’s waiver of the right to select the judicial forum . . . was unenforceable only because arbitration was judged inadequate to enforce the statutory rights created by § 12(2)” and observing that “[e]ven if *Wilko*’s assumptions regarding arbitration were valid at the time *Wilko* was decided, most certainly they do not hold true today for arbitration procedures subject to the SEC’s oversight authority.”).

40. The Court has explained that “federal statutory claims may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum.” *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002). In that respect, the Court has observed that “[b]y

contracts.⁴¹ Agreeing to arbitration, of course, means waiving any Seventh Amendment right to a jury trial. Courts, viewing the right as one that can be freely given away, have no trouble with that outcome.⁴² Indeed, as scholars (and sometimes courts) have observed, the FAA's contractual standard for the validity of an agreement to arbitrate—manifestation of mutual consent—is actually *more*

agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), and that "so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quotation omitted). Based on this language, some lower courts have held certain provisions of arbitration agreements—such as those specifying maximum damages or purporting to eliminate certain claims—unenforceable. *See, e.g., Morrison v. Cir. City Stores, Inc.*, 317 F.3d 646, 670 (6th Cir. 2003) (holding that a limitation on remedies provision in an arbitration agreement "undermines both the remedial and deterrent principles of Title VII" and was therefore unenforceable).

41. *See, e.g., United States v. Wunderlich*, 342 U.S. 98, 100 (1951) ("Respondents were not compelled or coerced into making the contract [with the government]. It was a voluntary undertaking on their part. As competent parties they have contracted for the settlement of disputes in an arbitral manner."); *United States v. Mooman*, 338 U.S. 457, 462 (1950) (holding valid a provision in federal government construction contract that decision of the Secretary of War or his representative on question of whether work demanded of contractor was outside contract requirements shall be final and binding upon the parties and explaining that "[i]f parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government."); *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1564 (Fed. Cir. 1990) (holding that contractors, in signing government contract with clause mandating dispute resolution under the Contract Disputes Act, had waived any right to a trial on a government counterclaim and explaining that "voluntary waiver of both Article III and Seventh Amendment rights, as a matter of both private or government contract law, suffers from no inherent constitutional or legal infirmity. . . . [B]y the permissible terms in its contracts, the government did not have to litigate the merits of such claim against a contractor, either as to entitlement or amount, in an Article III court before a jury.").

42. *See, e.g., Janiga v. Questar Cap. Corp.*, 615 F.3d 735, 743 (7th Cir. 2010) ("Janiga . . . argues that the Seventh Amendment bars arbitration. But that argument proves much too much; parties are entitled to opt in a contract for an alternative method of dispute resolution that involves neither courts nor juries. That is implicit in any arbitration agreement. Here there is more: the plain language of the contract includes an express waiver of the right to a jury trial, and we uphold such waivers even in form contracts."); *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002) ("By agreeing to arbitration, Appellants have necessarily waived the following: (1) their right to a judicial forum; and (2) their corresponding right to a jury trial."); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (rejecting argument that absence of express jury waiver provision rendered arbitration clause unenforceable in that "[T]he loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.") (citation omitted); *Sydnor v. Consec Fin. Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) ("It is clear that a party may waive her right to adjudicate disputes in a judicial forum. Similarly, the right to a jury trial attaches in the context of judicial proceedings after it is determined that litigation should proceed before a court. Thus, the 'loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.'" (citation omitted); *Geldermann, Inc. v. CFTC*, 836 F.2d 310, 323 (7th Cir. 1987) (explaining that where the parties have consented to arbitration, "the Seventh Amendment simply does not apply"); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832–33 (4th Cir. 1986) ("The seventh amendment right is of course a fundamental one, but it is one that can be knowingly and intentionally waived by contract. Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed."); *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1471 (N.D. Ill. 1997) ("The Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes.").

relaxed than the oft-stated requirement that a waiver of the Seventh Amendment right be knowing and voluntary.⁴³ If parties may so easily give up a jury trial and have their disputes resolved instead by an arbitrator, they surely can agree, even after *Jarkesy*, to resolution by an agency process.

D. Administrative Settlement

When we shift from courts and juries back to the agency setting, a familiar theme reemerges. Just as the SEC settles most cases it brings in federal district court, SEC enforcement actions in administrative proceedings have generally been resolved by settlement.⁴⁴ That, too, is likely to remain the case after *Jarkesy*. Again, because the Court was fixated on the world of 1791, *Jarkesy* puts no limits on in-house processes that lead to settlement. It is possible that in the future the Court will announce some such limits but until it does so, the SEC appears free to bring and settle actions entirely within the agency, just as it did before the *Jarkesy* decision.

Here, some empirical evidence is worth highlighting. Studies have demonstrated that following the expansion of agency adjudication with the Dodd-Frank Act in 2010, settlement rates in SEC enforcement actions sharply increased,⁴⁵ with a notable uptick in the filing of settled actions in the agency setting.⁴⁶ In his study of SEC enforcement actions against public companies during the fiscal years 2010 through 2018, Professor Rosenfeld reports:

43. See, e.g., *Tracinda Corp. v. Daimler Chrysler AG*, 502 F.3d 212, 223 (3d Cir. 2007) (“Considering that the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate, and that the submission of a case to arbitration involves a greater compromise of procedural protections than does the waiver of the right to trial by jury, some commentators consider it curious that courts apply a presumption in favor of an arbitration clause but against a mere jury waiver provision.”); Steven Becker, *Arbitration as Seventh Amendment Waiver: A New Angle for Consumer Advocates?*, 36 LOY. CONSUMER L. REV. 1, 4 (2023) (“The knowing and voluntary test required for constitutional waivers is significantly more demanding than the standard imposed by ordinary contract principles.”); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to A Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 710 (2001) (“The contrast between the jury trial waiver cases and the arbitration cases is stark. [A]lthough clauses mandating arbitration inherently eliminate the jury trial, courts are not applying the jury trial waiver analysis in the arbitration context. Instead of demonstrating a reluctance to find waiver of a jury trial, courts chant the mantra that arbitration is favored. Rather than using the knowing, voluntary and intelligent waiver standard, most courts interpreting arbitration clauses look only at whether, according to traditional objective contract principles, the contract includes an arbitration provision. The degree of conspicuousness, negotiability, bargaining power disparity, and other individualized factors are not typically deemed important in arbitration. In addition, the burden of proof is often placed on the party opposing arbitration, rather than on the party defending the waiver.”).

44. See David Rosenfeld, *Civil Penalties Against Public Companies in SEC Enforcement Actions: An Empirical Analysis*, 22 U. PENN. J. BUS. L. 135, 189 (2019).

45. See Eric Helland & George Vojta, *Legal Outcomes and Home-Court Advantage: Evidence from the SEC’s Shift to Administrative Courts*, 66 J. L. & ECON. 797 (2023) (reporting that following Dodd-Frank, respondents are more likely to settle and are also more likely to be subjected to non-monetary penalties).

46. See Urska Velikonja, *Securities Settlements in the Shadows*, 126 YALE L. J. F. 124 (2016) (reporting that before Dodd-Frank, 40% of settlements were filed in agency proceedings but after Dodd-Frank the figure increased to 80%).

[T]he overwhelming majority of actions against public companies in the Dataset were filed as settled actions, and at least since 2014 the overwhelming majority of those settled actions have been in administrative proceedings rather than federal court actions. For the five fiscal years from 2014 to 2018, the SEC brought a total of 360 actions involving one or more public companies; 346, or 96.1%, of these were brought as settled actions, and 315 or 91% of the settled actions were brought as administrative proceedings. Overall, a total of 318 of the 360 matters in this time frame were brought as administrative proceedings and all but 3 of those were brought as settled actions. In FYs 2017 and 2018, the last years for which data is available, the SEC brought 136 cases against public companies; 133 or 97.79% were brought as settled actions, and 118 of the 133 (or 88.72%) were brought as administrative proceedings.⁴⁷

Professor Rosenfeld rightly warns that criticisms that in litigated actions the procedures of agency adjudication, including because there is no right to a jury, give the SEC an advantage “obscure a deeper point: the SEC’s administrative turn is even more prominent with respect to settled actions than it is with respect to litigated ones.”⁴⁸

The shift that Professor Rosenfeld identifies matters because there are important differences between settlement of SEC actions in administrative proceedings and of actions brought in federal district court. With respect to agency proceedings, the Enforcement Division presents the proposed settlement to the Commissioners, who then vote on whether to accept it.⁴⁹ Settlement agreements in administrative actions routinely preclude judicial review of the settlement.⁵⁰ Even if the settlement agreement does not itself bar the defendant in an SEC action from seeking judicial review, “[n]either the Enforcement Division nor the defendant has any incentive to appeal the settlement, so no third party ever formally reviews it.”⁵¹ By contrast, settlement

47. David Rosenfeld, *Civil Penalties Against Public Companies in SEC Enforcement Actions: An Empirical Analysis*, 22 U. PENN. J. BUS. L. 135, 189 (2019).

48. *Id.*

49. Velikonja, *supra* note 46, at 128.

50. *See id.* Although *Jarkesy* concerns just the SEC, it is useful to keep in mind the practices of other federal agencies that bring enforcement actions. Consider, then, the practices of the Consumer Financial Protection Bureau (CFPB). The CFPB’s Rules of Practice for Adjudication Proceedings provide that “any respondent in an adjudication proceeding instituted under this part, may, at any time, propose in writing an offer of settlement.” 12 CFR §1081.120(a). In addition, the rules provide:

By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer:

- (i) All hearings pursuant to the statutory provisions under which the proceeding has been instituted;
- (ii) The filing of proposed findings of fact and conclusions of law;
- (iii) Proceedings before, and preliminary findings and conclusions by, a hearing officer;
- (iv) All post-hearing procedures; [and]
- (v) Judicial review by any court.

Id. §1081.120(c)(3).

51. Velikonja, *supra* note 46, at 128.

of a matter filed in federal district court requires the approval of the court.⁵² On occasion, judges have rejected proposed settlements in SEC actions.⁵³

Settlement, particularly in the context of an administrative proceeding without any third-party review, may allow agencies to obtain concessions they could not or not easily achieve from full-blown litigation. (Among the controversial elements of SEC settlements is a so-called “gag” requirement that the settling defendant agree never to publicly contest the SEC’s allegations against it, including in cases where the defendant does not admit it engaged in the conduct alleged.)⁵⁴ Indeed, just one year before *Jarkesy*, Justice Gorsuch observed in the consolidated cases of *Axon v. FTC* and *SEC v. Cochran* that “the bulk of agency cases settle” and that because “few can outlast or outspend the federal government,” agencies “sometimes use this as leverage to extract settlement terms they could not lawfully obtain any other way.”⁵⁵ Gorsuch did not, however, suggest then that settlement is therefore impermissible. Nor did he revisit the reality of settlement practices in his concurring opinion in *Jarkesy*.

At the end of the day, *Jarkesy*, for all of its attention to government overreaching, is likely to have little impact on the prevalence of agency settlements or on the terms of settlements that are reached, particularly those reached entirely within the province of an agency. True, after *Jarkesy*, some defendants will force an action into federal district court or perhaps obtain in-house concessions by

52. See, e.g., *SEC v. Citigroup Glob. Mkts. Inc.*, 752 F.3d 285, 294 (2d Cir. 2014) (discussing the role of a federal district court in reviewing a proposed settlement in an SEC fraud action and stating that “the proper standard for reviewing a proposed consent judgment involving an enforcement agency requires that the district court determine whether the proposed consent decree is fair and reasonable, with the additional requirement that the public interest would not be disserved, in the event that the consent decree includes injunctive relief. Absent a substantial basis in the record for concluding that the proposed consent decree does not meet these requirements, the district court is required to enter the order [approving the settlement and resolving the case].”)

53. See, e.g., *SEC v. Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011) (rejecting settlement in securities fraud case and directing parties to proceed to trial and explaining that “the Court is forced to conclude that a proposed Consent Judgment that asks the Court to impose substantial injunctive relief, enforced by the Court’s own contempt power, on the basis of allegations unsupported by any proven or acknowledged facts whatsoever, is neither reasonable, nor fair, nor adequate, nor in the public interest.”), *vacated*, 752 F.3d 285, 298 (2d Cir. 2014).

54. The requirement follows a regulation the SEC issued in 1972, providing:

The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings. In this regard, the Commission believes that a refusal to admit the allegations is equivalent to a denial, unless the defendant or respondent states that he neither admits nor denies the allegations.

17 C.F.R. § 202.5(e). Judge Rakoff has criticized the SEC for imposing gag restrictions. See *SEC v. Vitesse Semiconductor Corp.*, 711 F. Supp. 2d 304, 309 (2011) (“[H]ere an agency of the United States is saying in effect, ‘Although we claim that these defendants have done terrible things, they refuse to admit it and we do not propose to prove it, but will simply resort to gagging their right to deny it.’”).

55. *Axon Enter., Inc. v. Fed. Trade Comm’n*, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring).

threatening to do so. In some instances, the scrutiny of a judge—or the risk thereof—might be enough to temper government excesses. But these possibilities are far removed from *Jarkesy's* depiction of juries as standing between a defendant and the power of the government.

E. The Seventh Amendment and the Unconstitutional Conditions Doctrine

The preceding forms of waiver of the Seventh Amendment appear uncontroversial from the perspective that the right to a jury trial is one that individuals may elect to forego. It is, however, possible to imagine *some* limitations on the waiver of the Seventh Amendment, and in particular on the power of the government to produce a waiver. So far, the forms of waiver considered have involved an individual decision on the part of the defendant in an SEC (or other agency) enforcement action to forego a civil jury trial. From the SEC's perspective, that might suffice. In most, if not all, actions, the SEC can likely offer incentives sufficiently attractive for defendants to elect to give up the jury trial right that *Jarkesy* recognizes. True, there will be some defendants who will not be motivated to forego their day in court before a jury. But even before *Jarkesy*, the SEC litigated in district court some actions. It is not as though the SEC would be at sea if in the future a small—as is likely—number of defendants insist on that route.

Imagine, though, that the SEC decides it is undesirable for control over whether or not there is a jury trial in an enforcement action to depend, ultimately, upon the choice of the defendant—and that, accordingly, a stronger means to keep actions out of court is needed. Perhaps so many defendants insist on exercising their *Jarkesy* right and proceeding before a jury that the SEC's resources are stretched thin. Perhaps, armed with the *Jarkesy* right to a jury trial, the concessions the SEC must make in order for defendants to settle or have a matter resolved in an agency process are too great. Perhaps there emerges a large number of cases in which there are no concessions the SEC is positioned to offer and the SEC is in court more often than it would like to be. Imagine, then, that the SEC seeks assistance from Congress to restore the pre-*Jarkesy* baseline in which control over the forum is firmly in the hands of the government and not the defendant.

Congress is obviously bound by *Jarkesy*, and so it cannot just mandate a return to the pre-*Jarkesy* arrangement in which the SEC decided whether a matter would be resolved within the agency or in district court with the possibility of a jury trial. But if the government may offer individuals a benefit in exchange for waiving their right to a jury trial, Congress might extend out that principle with a statutory reform that produces waiver across the board. Consider, for example, that Congress amends the statutory scheme to provide that as a condition of trading securities in the United States, traders must agree to give up any right to a jury trial in an SEC civil enforcement action. Superficially, the arrangement seems similar to those already discussed. Nobody is being forced to waive the right to a jury trial. Rather, the government is offering a benefit—take it or leave it—to those who give up the right, namely the ability to engage in trading of securities.

Inasmuch as the government could prohibit trading of securities entirely, here, it is opening the market solely to those who agree to the condition offered; those who elect to enter the market have waived their Seventh Amendment right and done so knowingly and voluntarily. If (as discussed above) the government is permitted to offer an incentive to those individuals and individual entities it has determined are in violation of the securities law to forego a jury trial, may the government also extract a waiver *in advance* from all public traders, effective should the government, down the road, decide to bring a claim?

Many observers would think there is a difference between the decision by an individual or an individual entity to forego a jury trial at the time of an enforcement action and Congress conditioning, across-the-board, participation in the securities market on a jury waiver. For one thing, there are different baselines. The prospective market participant—the trader—hasn't done anything wrong and isn't facing any penalty under the securities laws. In addition, waiver presupposes an element of choice, as reflected in the doctrinal requirement that the waiver be knowing and voluntary. Staying out of the market would not seem to be a meaningful alternative to giving up the Seventh Amendment right in advance of any enforcement action. In other words, it is hard to see what knowing and voluntary choice has actually been made if in order to trade securities at all the jury trial right must be waived at the outset. Moreover, there is a relevant difference in terms of benefits exchanged. In a settlement with the government, the defendant agrees to forego trial in exchange for reduced liability and so is better off compared to defendants who go to trial and lose. The government accepts the lesser penalty, but it too benefits by avoiding the costs and risks that a trial would entail. If waiver becomes a condition of trading, no individual trader receives any benefit compared to any other. More importantly, the government has not given up anything to achieve the windfall of no jury trials.

In light of such differences, we might shift focus from the doctrine of voluntary waiver to that of unconstitutional conditions. The latter doctrine reflects the understanding that there are limits to the ability of the government to offer benefits in exchange for a relinquishment of constitutional rights. According to the doctrine of unconstitutional conditions,

even though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests. . . . This would allow the government to produce a result that it could not command directly.⁵⁶

The doctrine of unconstitutional conditions rejects the notion that the government's power to grant a benefit inevitably includes the lesser power to attach any

56. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quotation and alteration omitted).

conditions at all to receiving that benefit. Instead, under the doctrine of unconstitutional conditions, even if the government may decide whether to grant or withhold a benefit, the government may not generally condition benefits on the recipients' agreement to surrender their constitutional rights in exchange. Applying the doctrine, the Supreme Court has invalidated a wide range of government efforts to compel individuals to forego constitutional rights—and particularly First Amendment rights—as the price for receiving governmental benefits. These include public employment conditioned on political affiliation,⁵⁷ associational ties,⁵⁸ or speech;⁵⁹ property tax exemptions conditioned on taking a loyalty oath,⁶⁰ building permits conditioned on the property owner granting a public easement to a portion of the property;⁶¹ subsidies to the press conditioned on content;⁶² legal-services funding conditioned on refraining from challenging welfare laws;⁶³ and professional licenses conditioned on political affiliation.⁶⁴ In invalidating conditional benefits, the Court has insisted that it makes no difference whether the benefit received is a right or a privilege: whether an individual would otherwise be entitled to something, or whether the government is providing a discretionary benefit that it does not have to give at all, is of no significance.⁶⁵ Nor does it matter if the benefit simply comes in the form of relief from some burden.⁶⁶

To be sure, not *all* conditions involving constitutional rights are unconstitutional conditions; the Court has upheld certain government benefits that come

57. See *Elrod v. Burns*, 427 U.S. 347 (1976) (holding unconstitutional the actions of a Democratic sheriff who discharged public employees, such as security officers, because they were not Democrats); See also *Branti v. Finkel*, 445 U.S. 507 (1980) (holding unconstitutional the actions of a Democratic county public defender in discharging assistant public defenders because they were Republican).

58. See *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 929 (2018) (holding that the First Amendment bars the government from compelling nonconsenting public-sector employees to pay agency fees to subsidize union activity); See also *Shelton v. Tucker*, 364 U.S. 479 (1960) (holding unconstitutional an Arkansas statute requiring teachers employed in a state-supported school or college to file an annual affidavit listing every organization to which they belonged or contributed during the preceding five years).

59. See *Perry*, 408 U.S. at 593 (holding that a professor at a state college could not be denied renewal of his employment contract on the ground that he had criticized the policies of the college administration).

60. See *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958).

61. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

62. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

63. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

64. See *Schwartz v. Bd. of Bar Exam'rs.*, 353 U.S. 232, 246-46 (1957) (holding that the state may not deny bar admission solely on the basis of past membership in the Communist Party).

65. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

66. See *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981) (“Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief . . . a burden upon religion exists.”); *Sherbert*, 374 U.S. at 405 (“[C]onditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms.”).

with conditions attached.⁶⁷ Nonetheless, the doctrine of unconstitutional conditions has been used to invalidate a variety of governmental efforts to entice individuals to waive their rights as a condition of receiving a benefit. But therein lies the rub. The doctrine of unconstitutional conditions is notoriously murky. Because the Court, in different cases, has articulated different motivating concerns, the scope of the doctrine and its applicability to particular problems remain uncertain.⁶⁸ While scholars have sought to impose coherence upon the doctrine by emphasizing and shoring up core elements such as governmental coercion,⁶⁹ there remain significant questions about when the doctrine should be invoked (and when courts will invoke it) so as to invalidate deals with the government in which individual rights are exchanged for a governmental benefit. Put differently, the line between deals subject to the doctrine of voluntary (and thus permissible) waiver of rights and deals that implicate the doctrine of unconstitutional conditions is quite uncertain.

Return to our proposed federal statute requiring securities traders to give up the right to a jury trial in all SEC enforcement actions. It is possible, but not certain, that courts would apply the unconstitutional conditions doctrine and invalidate such a statute. In other words, it is possible, but not certain, that courts would view the proposed across-the-board statutory arrangement to differ sufficiently from cases involving individualized negotiation such that the unconstitutional conditions framework is triggered. Accordingly, even a very strong commitment to the idea that the Seventh Amendment right may be bargained away could yield if the deal is such that it is not meaningful to view it as one involving a voluntary choice.

Of course, even if courts were to view the hypothetical trading statute as raising an unconstitutional conditions problem, there are alternative statutes that Congress might enact and that courts would view simply to involve a voluntary waiver of the jury right. That one statute crosses the line does not preclude Congress from taking a step back and still giving the SEC substantial control over the forum in which enforcement actions are brought. For example, rather than

67. See, e.g., *Regan v. Tax'n with Representation*, 461 U.S. 540, 550 (1983) (upholding a provision of the Internal Revenue Code denying tax-exempt status to charitable organizations engaged in lobbying and rejecting application of unconstitutional conditions doctrine because "Congress has merely refused to pay for the lobbying out of public monies."); *Rust v. Sullivan*, 500 U.S. 173, 176 (1991) (upholding regulations of the Department of Health and Human Services prohibiting family-planning clinics from using funds under Title X of the federal Public Services Health Act in programs involving abortion counseling or referral and explaining that there is no unconstitutional conditions problem because "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized.").

68. See Richard A. Epstein & Stephen L. Carter, *The Supreme Court, 1987 Term*, 102 HARV. L. REV. 4, 10–11 (1988) ("It roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others.").

69. See, e.g., Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1301 (1984) (distinguishing (impermissible) threats from (permissible) offers).

condition market participation on waiver of the right to a jury trial, Congress might specify, as a statutory matter, that the *penalties* for violating the securities laws depend upon the forum in which the violation is determined to have occurred. Under such a statute, defendants who consent to an administrative hearing will be subject to lower penalties than are defendants who exercise their right to a jury trial and go to court. Again, perhaps courts would apply the unconstitutional conditions doctrine to invalidate the statute (such that Congress would need to try something else). But courts might instead view this alternative statute as merely a codification of a permissible practice in individual cases—in which a defendant, by negotiation with the SEC, agrees to forego a jury in exchange for a reduced penalty—and thus just a permissible regularization of the principle of choice.

To summarize, the weight that *Jarkesy* gives juries is in significant tension with the understanding that the Seventh Amendment right may be freely waived. It is possible to imagine some outer limits to the commitment, reflected in longstanding case law and modern practice, to waivability such that certain governmental inducements to waiver trigger application of the unconstitutional conditions doctrine. In general, though, under existing law and practice, and after *Jarkesy*, federal agencies have significant ability in civil enforcement actions to produce a waiver of the right to a jury trial by promising a more favorable resolution of the matter. Unless the Court, in the future, revisits and sets some limits on waiver of the Seventh Amendment right, *Jarkesy* is likely of little practical significance. Part III explores the prospects for doctrinal innovation to make *Jarkesy* more consequential.

III. WAIVER RECONSIDERED

Here is a likely scenario: after *Jarkesy*, the SEC, in most of its enforcement actions, negotiates waiver of the Seventh Amendment right such that few jury trials occur. If the Court, committed to juries and skeptical of agency adjudication, is inclined to put a brake on government-induced waivers of the right to jury trial in agency actions, what limits are feasible? This Part takes up that question.

A. Doctrinal Tweaks

Let's imagine that a case reaches the Court presenting the question of whether, in light of *Jarkesy*, it is constitutionally permissible for the SEC, in a securities fraud action, to agree to dismiss certain charges and to reduce the penalty sought if the defendant agrees to give up the Seventh Amendment jury trial right *Jarkesy* recognizes and have the matter resolved instead in an agency proceeding. Let's imagine also that a majority of the justices believe such arrangements too easily allow the government to displace the Seventh Amendment right that *Jarkesy* recognizes—with all of the costs the *Jarkesy* majority identified—and that some limits are needed. Let's imagine further that the Court understands that it would be problematic to impose limits that broadly displace the ability of parties to settle cases. In other words, the doctrine of waiver might productively be tweaked but it should not be overhauled.

One possibility (of likely many others) is that the Court holds that an individual (or individual entity) may elect to forego the right to a jury trial in an enforcement action

and agree to an agency process so long as—consistent with established waiver doctrine—that choice is made knowingly and voluntarily. Under that standard, the Court holds, an agency is prohibited from dropping charges or seeking a lower penalty if the defendant agrees to an agency process. In other words, the agency is prohibited from bringing claims or seeking penalties in court with a jury trial that it would not have sought had the defendant agreed to the agency process. The holding in this scenario is limited in two important respects. First, it does not affect settlement: the agency may continue to offer a more favorable deal to those who settle an enforcement action. Second, the holding only pertains to civil enforcement actions brought by a federal government agency. Indeed, the Court explains, it is precisely *because* the government is complainant that the announced limit on waiver of the Seventh Amendment right is necessary. Consistent with the concerns expressed in *Jarkesy*, the Court says, left unchecked, the government has near-unlimited resources that enable it to produce a waiver of the Seventh Amendment right in most actions, and the waiver that results allows the agency initiating the action also to resolve it on the agency’s own preferred terms. Under those circumstances, the Court concludes, the requirement that a waiver be knowing and voluntary necessitates dulling the government’s bargaining tools. In sum, the doctrinal tweak does not apply generally to civil cases but only to agency enforcement actions.

B. *The Seventh Amendment Jury Trial Right—and the Sixth*

The proposal is a tweak not a revolution. It responds to the particular problem of the power of the government in civil actions the government itself initiates and it does so not by requiring a jury trial in all such actions, but by limiting the ability of the government to impose costs on those who insist on trial. The problem, of course, is that even if the Court is able to cabin a Seventh Amendment holding to the set of civil actions that agencies bring, it will be exceedingly hard to distinguish those actions—and thus separate the doctrinal tweak—from criminal cases and the Sixth Amendment right to a jury trial. If *Jarkesy* ever leads to limits on agency deal-making in civil actions, it is hard to see how it would not likewise lead to limits on prosecutorial deal-making in criminal matters.

In a broad sense, the Sixth Amendment and Seventh Amendment rights to a jury trial are governed by similar doctrinal approaches. As with the Seventh Amendment in civil cases, the Court has long recognized that criminal defendants may waive their Sixth Amendment right to a jury trial so long as the waiver is knowing and voluntary.⁷⁰ Indeed, the Court has acknowledged that the modern criminal justice system is “a system of pleas, not a system of trials.”⁷¹ Through

70. *See, e.g., Patton v. United States*, 281 U.S. 276, 299 (1930) (“Since . . . the right to a jury trial may be waived . . . the court has authority in the exercise of a sound discretion to accept the waiver, and, as a necessary corollary, to proceed to the trial and determination of the case with a reduced number or without a jury.”), *abrogated by Williams v. Fla.*, 399 U.S. 78 (1970).

71. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *See also id.* (observing that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”).

plea bargaining, criminal defendants routinely make deals with the government in which they waive their right to a jury trial—along with the attendant right to confront witnesses and the privilege against self-incrimination—in exchange for reduced sentences, dismissal of certain charges, or other benefits. Accordingly, most criminal convictions involve guilty pleas, resulting from plea bargains, rather than trials.⁷² During the 12-month period ending in September 2023, federal district courts resolved criminal prosecutions against 72,255 defendants: 65,743 of these defendants (91 percent) were convicted, with 64,166 of them pleading guilty.⁷³ During this same period, of the 7,233 criminal trials in federal district court, just 1,764 were jury trials.⁷⁴

In the context of criminal prosecutions, the Court’s “background presumption” is that “legal rights . . . are subject to waiver by voluntary agreement of the parties.”⁷⁵ The Court does not consider plea bargains—although involving a waiver in exchange for a benefit—to raise a problem of unconstitutional conditions.⁷⁶ Instead, the Court emphasizes the interests of defendants and prosecutors alike in resolving criminal cases without trial, the defendant’s autonomy,⁷⁷ and the social

72. Scholars have explored at length the rise of plea bargaining and the concomitant decline in criminal trials. *See, e.g.*, GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2000).

73. U.S. Courts, Judicial Business of the United States Courts, “U.S. District Courts — Judicial Business 2023,” <https://www.uscourts.gov/data-news/reports/statistical-reports/judicial-business-united-states/judicial-business-2023/us-district-courts-judicial-business-2023> [<https://perma.cc/6JPG-ZLA3>].

74. *Id.*; *See also* U.S. Courts, Judicial Business of the United States Courts, Statistical Tables for the Federal Judiciary - December 2023, T-1, “Civil and Criminal Trials Completed,” <https://www.uscourts.gov/data-news/data-tables/2023/12/31/statistical-tables-federal-judiciary/t-1> [<https://perma.cc/CDJ9-5RAQ>] (providing a breakdown of the number of jury and non-jury trials by district court in 2023); *See also* U.S. Sentencing Comm’n, 2023 Sourcebooks of Federal Sentencing Statistics tbl. 11, <https://www.uscourts.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table11.pdf> [<https://perma.cc/Z4N4-HVZB>] (reporting that in the federal system, 62,300 (or 97.2%) of the 64,124 individuals sentenced in a criminal case in fiscal year 2023 pled guilty); Jed. S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS, Nov. 20, 2014 (“In 2013, while 8 percent of all federal criminal charges were dismissed (either because of a mistake in fact or law or because the defendant had decided to cooperate), more than 97 percent of the remainder were resolved through plea bargains, and fewer than 3 percent went to trial. The plea bargains largely determined the sentences imposed.”); John D. King, *Juries, Democracy, and Petty Crime*, 24 U. PA. J. CONST. L. 817, 832–33 (2022) (“Although the total number of federal criminal defendants more than doubled between 1962 and 2002, the number of federal criminal trials fell substantially over the same period. Juries decided 8.2% of federal criminal cases in 1962 but only 2.04% of federal criminal cases in 2015. During the last four decades of the twentieth century, the number of federal district court judges doubled, even while the trial rate fell by 30%. Today fewer than 3% of criminal convictions in federal court are obtained by trial. Never before have juries played such a diminished role in deciding criminal cases.”) (footnotes omitted).

75. *United States v. Mezzanatto*, 513 U.S. 196, 203 (1995).

76. *See, e.g.*, *Corbitt v. New Jersey*, 439 U.S. 212, 218–19 (1978) (“[T]here is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. The plea may obtain for the defendant the possibility or certainty not only of a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty, but also of a lesser penalty than required to be imposed after a guilty verdict by a jury.”) (quotation, alterations, citations, and footnotes omitted).

77. *See, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an

benefits in the efficient resolution of criminal cases⁷⁸ without the enormous costs trials involve.⁷⁹

The Court thus views plea bargains as just a form of contract in which the parties voluntarily agree to a deal that confers mutual benefits.⁸⁰ Under this approach, “plea agreements are neither constitutionally compelled nor prohibited; they are consistent with the requirements of voluntariness and intelligence—because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange.”⁸¹ As with many contractual agreements, some pressure—here to give up constitutional rights—is just a natural part of the negotiation.⁸² In

agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is patently unconstitutional. But in the ‘give-and-take’ of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.” (quotation and citations omitted).

78. See *Blackledge v. Allison*, 431 U.S. 63, 71 (1977):

Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.

Id. (footnote omitted).

79. See *Santobello v. New York*, 404 U.S. 257, 260 (1971) (“The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called ‘plea bargaining,’ is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”).

80. See, e.g., *Brady v. United States*, 397 U.S. 742, 751–52 (1970):

The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant’s guilt or in which there is substantial doubt that the State can sustain its burden of proof. It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.

Id. (footnotes omitted).

81. *Ricketts v. Adamson*, 483 U.S. 1, 9 n.5 (1987) (quotations and citation omitted).

82. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government may encourage a guilty plea by offering substantial benefits in return for the plea. While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant’s assertion of his trial rights, the imposition of

making this assessment, the Court takes the view that prosecutors generally act fairly.⁸³ Accordingly, the Court has explained that “[a] plea of guilty entered by one fully aware of the direct consequences of the plea is voluntary in a constitutional sense unless induced by threats, misrepresentation, or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business.”⁸⁴

In our system of plea bargaining, prosecutors—rather than judges or juries—play the central role in determining the fate of defendants.⁸⁵ At the federal level, that is, an executive agency—the Department of Justice (DOJ)—and not the judiciary is the main actor.⁸⁶ In other words, the criminal justice system operates

these difficult choices is an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas.”) (quotation omitted).

83. See *Mezzanatto*, 513 U.S. at 210 (“The mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether. Rather, tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty. Thus, although some waiver agreements may not be the product of an informed and voluntary decision, this possibility does not justify invalidating all such agreements.”) (quotations, citations, and alterations omitted).

84. *Bousley v. United States*, 523 U.S. 614, 619 (1998) (quotations, citations, and alterations omitted).

85. Plea-bargaining may include charge bargains (involving dismissal of charges or the substitution of a lesser offense); sentence bargains (involving a lowering of the sentence sought); and fact bargains (in which the parties agree to a factual record, for example, the quantity of a contraband substance, so as to limit the possible punishment). See Brandon L. Garrett et al., *Open Prosecution*, 75 STAN. L. REV. 1365, 1378 (2023).

86. See Jed S. Rakoff, *Frye and Lafler: Bearers of Mixed Messages*, 122 YALE L.J. ONLINE 25, 25–26 (2012) (“Beginning in the 1960s . . . Congress and most state legislatures . . . decreed that those convicted of crimes would serve ever-longer prison sentences. . . . Faced with the knowledge that their clients, if convicted after trial, would be sentenced to very long periods of incarceration, prudent defense counsel increasingly sought to negotiate plea bargains that would allow their clients to obtain lower sentences by pleading guilty to lesser counts or narrower charges, or in exchange for other sentencing concessions. The direct result was to increase greatly the percentage of criminal cases resolved by guilty pleas; . . . [t]he indirect results were to move primary responsibility for sentencing from the courts to the prosecutors and, concomitantly, to move the locus of the resolution of most criminal cases from the public forum of the courtroom to the private venue of the prosecutor’s office. This shift to a criminal justice system operating largely behind closed doors is both inconsistent with the traditions of a free society and an invitation for abuse.”); Rakoff, *supra* note 74 (“[O]ur criminal justice system is almost exclusively a system of plea bargaining, negotiated behind closed doors and with no judicial oversight. The outcome is very largely determined by the prosecutor alone.”); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123–24 (1998) (“[S]ociety is not relying on the judiciary to decide guilt in these cases [in which defendants plead guilty]. The substantive evaluation of the evidence and assessment of the defendant’s responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor Because our governing ideology does not admit that prosecutors adjudicate guilt and set punishments, the procedures by which they do so are neither formally regulated nor invariably followed.”); Richard Lorren Jolly, *Expanding the Search for America’s Missing Jury*, 116 MICH. L. REV. 925, 938 (2018) (comparing the rise of plea-bargaining to the rise of private procedural ordering in civil cases and writing that “[b]y allowing parties to channel their disputes to external forums in the case of arbitration and to use only those public resources they desire in the case of civil and criminal private procedural ordering, resource-starved courts are able to handle heavy caseloads. Courts have explicitly approved of these new procedures for their ability to help manage dockets”).

largely as an *administrative*—rather than judicial—process.⁸⁷ “[F]or most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor, who acts essentially in an inquisitorial mode.”⁸⁸ Commentators have offered different views about the fairness and costs and benefits the modern shift from trial to plea-bargaining entails⁸⁹

87. See Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403–04 (2003):

[T]he essence of this practice [of plea-bargaining], and what radically distinguishes it from the adversarial litigation model embodied in textbooks, criminal procedure rules, and the popular imagination, is that the prosecutor, rather than a judge or jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed). Potential defenses are presented by the defendant and his counsel not in a court, but to a prosecutor, who assesses their factual accuracy and likely persuasiveness to a hypothetical judge or jury, and then decides the charge of which the defendant should be adjudged guilty. Mitigating information, similarly, is argued not to the judge, but to the prosecutor, who decides what sentence the defendant should be given in exchange for his plea. . . . [T]he defining characteristic of the existing “plea bargaining” system is that it is an informal, administrative, inquisitorial process of adjudication, internal to the prosecutor’s office—in absolute distinction from a model of adversarial determination of fact and law before a neutral judicial decision maker.

88. Lynch, *supra* note 86, at 2120.

89. See, e.g., Carissa Bryne Hessick, *Punishment Without Trial: Why Plea Bargaining is a Bad Deal* (2021) (“By abandoning trials and embracing negotiation as the process for our criminal justice system, we have given up on the search for truth itself. As a result, we can’t rely on a defendant’s conviction to tell us what actually happened: the defendant may have committed a much more serious crime, or he may have committed no crime at all.”); RICHARD H. LIPPKE, *THE ETHICS OF PLEA BARGAINING* (2011) (exploring various ethical considerations raised by plea bargaining); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (discussing structural distortions—agency costs; attorney competence, compensation, and workloads; resources; sentencing and bail rules; and information deficits—and psychological biases and heuristics that skew bargaining outcomes, and exploring possible reforms); Robert E. Scott William, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1967 (1992) (“In contract terms, plea bargains do not amount to duress; they are not, in general, unconscionable; they do not have the key characteristics of slavery contracts; and they are distributionally fairer than the likely alternative. Given the range of areas where our legal system tolerates (indeed, subsidizes) consensual allocation, it is hard to argue that contract is impermissible here.”); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979 (1992) (“[P]lea bargaining seriously impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent.”); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 660 (1981) (“[N]either a guilty-plea defendant’s possibly repentant state of mind nor the economic benefit that he may confer upon the state can justify the imposition of a less severe sentence than the one that he would have received had he exercised the right to trial.”); Frank H. Easterbrook, *Plea Bargaining As Compromise*, 101 YALE L.J. 1969, 1975 (1992) (“Black markets are better than no markets. . . . Settlements of civil cases make both sides better off; settlements of criminal cases do so too. Defendants have many procedural and substantive rights. By pleading guilty, they sell these rights to the prosecutor, receiving concessions they esteem more highly than the rights surrendered. . . . so plea bargaining helps defendants. Forcing them to use their rights at trial means compelling them to take the risk of conviction or acquittal; risk-averse persons prefer a certain but small punishment to a chancy but large one. Defendants also get the process over sooner, and solvent ones save the expense of trial. Compromise also benefits prosecutors and society at large. In purchasing procedural entitlements with lower sentences, prosecutors buy that most valuable commodity, time. With time they can prosecute more criminals . . . The ratio of prosecutions (and convictions) to crimes would be extremely low if compromises were forbidden.”); Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to*

and there have been various proposals for reform.⁹⁰

Judges do, of course, play a role in the resolution of criminal cases even if juries typically do not: judges decide whether to accept a defendant's guilty plea and enter a conviction and they impose the sentence.⁹¹ But if the jury's role is nonexistent, the judge's role is highly constrained. In determining whether to accept a plea, the judge's principal task is to determine whether the defendant is acting voluntarily; it is rare for a judge to reject a guilty plea under this standard.⁹² In imposing a sentence, judges have independent authority (they are not parties to the plea bargain) but are nonetheless highly constrained because the offenses

Preventive Justice and Hybrid-Inquisitorialism, 57 WM. & MARY L. REV. 1505, 1519 (2016) (“[P]lea bargaining often results in ‘inaccurate’ punishment of the guilty, at least when measured on the retributive metric. Of at least equivalent concern is the fact, confirmed through both field and laboratory research, that the combination of uncertain trial outcomes and enticing plea offers leads innocent people to plead guilty. When clearly innocent people are found guilty because the prosecutor is able to offer them a Hobson’s choice, both the procedural and substantive tenets of criminal justice are victims.”) (footnotes omitted); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12-13 (1978) (“Plea bargaining, like torture, is coercive.”); Jeffrey Bellin, *Plea Bargaining’s Uncertainty Problem*, 101 TEX. L. REV. 539, 574 (2023) (identifying uncertainty on the part of the defendant— about whether there would be a conviction after a trial and what the sentence would be and therefore in evaluating the plea offer—as the principal problem of plea bargaining); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 878 (1995) (“[T]he prosecutor’s one-sided control of plea bargaining impacts poorer defendants to a greater extent than it impacts wealthier defendants.”); Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 994 (2021) (describing plea bargaining as involving a “trial penalty” and explaining that “[a]nalysis of the average sentences received by those who plead guilty and those who go to trial on particular charges suggests that defendants are frequently penalized for exercising their Sixth Amendment right to trial and that the penalty can be significant.”).

90. See H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 86–89 (2011) (summarizing reform proposals).

91. FED. R. CRIM. P. 11(b)(2)–(3) (providing that “[b]efore accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)” and that “before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.”); See *North Carolina v. Alford*, 400 U.S. 25, 38 n.10–11 (1970).

92. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1033 (2006) (“[T]he current individual rights approach to plea bargaining has done nothing to prevent the executive’s accumulation of judicial power. A court merely asks whether a plea in a given case is knowing and voluntary. For most defendants, the deal offered by the government will likely be in their interests, so they are accepting the plea knowingly and voluntarily.”); Lynch, *supra* note 86, at 2122 (“Formally, of course, any determination of culpability occurs in court, even in cases disposed of without trial. The court enters a judgment based on the defendant’s judicial admission of guilt in a plea of guilty. Sometimes this plea follows a fairly extensive course of judicial proceedings—indictment, discovery, motion practice, even evidentiary hearings by the court—but in many cases it occurs at the very outset of the formal process. In a substantial number of cases, the judicial ‘process’ consists of the simultaneous filing of a criminal charge by the prosecutor (often by means of a prosecutor’s ‘information’ rather than an indictment, with the defendant waiving the submission of the evidence and charge to a grand jury) and admission of guilt by the defendant. The charging document may be quite skeletal, the defendant’s account of his guilty actions brief, and the judicial inquiry concerned more with whether the defendant is of sound mind and understands the consequences of what he is doing than with the accuracy of the facts to which he is attesting.”).

charged by the prosecutor and pled to by the defendant have been negotiated in advance.⁹³

These aspects of the criminal justice system are worth rehearsing because they help make an important point. Our modern system of criminal justice is considerably *more* agency-driven and *more* agency-friendly than is the process of SEC adjudication that the *Jarkesy* Court deemed constitutionally problematic. That is, the government, when it conducts plea negotiations and secures settlement of criminal cases, operates with *fewer* constraints and under *less* oversight than characterize adjudications by the SEC and other agencies under the regulatory framework of the federal Administrative Procedure Act.⁹⁴ Even as potential penalties in the criminal system are more severe than those available under civil statutes, agency processes in the criminal context—the negotiation of a plea and settlement on a penalty—are not governed by the sort of extensive regulations and oversight mechanisms that apply to civil agency processes.⁹⁵ As Professor Barkow explains:

Because of the operation of a broad federal criminal code and prosecutors' leverage over plea bargaining, the only process—judicial or otherwise—that most defendants receive comes from prosecutors. In the course of reaching a negotiated disposition, the prosecutor acts as the administrative decision-maker who determines, in the first instance, whether an accused will be subject

93. See Rakoff, *supra* note 74 (“[T]he system of plea bargains dictated by prosecutors is the product of largely secret negotiations behind closed doors in the prosecutor’s office, and is subject to almost no review, either internally or by the courts. Such a secretive system inevitably invites arbitrary results.”).

94. See Barkow, *supra* note 92, at 995–97 (writing that “[F]ederal prosecutors face no restrictions on their powers that are comparable to the complex code of conduct and organizational design established by the APA. . . . [I]n the very area in which state power is most threatening—where it can lock away someone for years and impose the stigma of criminal punishment—institutional protections are currently at their weakest. . . . Trials come at a high cost for individual defendants—prosecutors threaten longer sentences—and most individual defendants (even some who are innocent) are unwilling to take the chance of losing at trial. As a result, there is a systemic failing in which prosecutors make the key decisions in criminal matters without a judicial check and without any of the structural and procedural protections that govern other executive agencies.”); Rakoff, *supra* note 74 (“As for the suggestion . . . that this is the equivalent of a regulatory process, that too is a myth: for, quite aside from the imbalance of power, there are no written regulations controlling the prosecutor’s exercise of his charging power and no established or meaningful process for appealing his exercise of that power. The result is that, of the 2.2 million Americans now in prison—an appalling number in its own right—well over two million are there as a result of plea bargains dictated by the government’s prosecutors, who effectively dictate the sentences as well.”).

95. See Barkow, *supra* note 94, at 1022–23 (explaining that “[a]gencies conducting formal adjudications must obey various structural rules designed to ensure impartiality” and noting that “[t]he individual at the agency who presides at the hearing must be impartial and must be separated from individuals at the agency who perform investigative and prosecutorial functions;” that “the agency’s decision must be based on the evidence in the record;” that “[a]ll agency proceedings—formal or informal, rulemaking or adjudication—are subject to extensive judicial review;” and that “[a]gencies must give reasons if they change course from case to case.”); See also Garrett et al., *supra* note 85, at 1372 (“Despite data collection’s ability to promote transparency and internal accountability, data relevant to prosecution and plea-bargaining outcomes are often not collected, making prosecutors’ offices outliers among executive agencies generally, and within the criminal system specifically.”).

to social sanction, and if so, how much punishment will be imposed. Despite the significance of prosecutorial power, prosecutors operate with little oversight or regulation. The same prosecutor who investigates a case can make the final determination about what plea to accept. There is therefore no structural separation of adjudicative and executive power, and defendants have no right to a formal process or internal appeal within the agency. In addition, in the course of bargaining with a defendant over charges, the prosecutor can engage in *ex parte* contacts with the police and investigators, and the defendant need not be given access to the information on which the prosecutor relies—that is, the prosecutor’s evidence of the defendant’s guilt. . . . [A] prosecutor’s charging and plea bargaining decisions are largely off limits from judicial review.⁹⁶

Indeed, many of the specific concerns the *Jarkesy* majority and concurring opinions raise about agency adjudication in civil enforcement actions—government agents exercising too much power; defendants operating at a disadvantage; the lack of meaningful oversight by a neutral judge; an asymmetry of information; a lack of public accountability; the more severe impact on those who lack resources; the displacement of judicial authority in favor of executive power; and the loss of a jury as a check on government action—are the very concerns commentators (and some judges) have long raised about our modern system of criminal justice in which plea bargaining is dominant. The *Jarkesy* Court’s “outward and obsessive concern about the consolidation of power in administrative agencies” becomes very hard to square with the Court’s lack of concern with the “largely stealth accumulation of adjudicative and executive powers in the prosecutor’s office.”⁹⁷ Indeed, the concerns that animate *Jarkesy* would seem to have even *greater* force when it comes to criminal punishment being worked out in an agency setting with few, if any, regulatory constraints.

All of this has implications for the prospects of a doctrinal tweak limiting the ability of agencies to secure waiver of the Seventh Amendment right after *Jarkesy*. It would seem quite implausible to say that there are Seventh Amendment limits to the deals the SEC seeks to make with civil defendants but no comparable Sixth Amendment limits to deals that the DOJ seeks to make with criminal defendants. If government inducements are constrained in the context of civil charges and civil penalties, it is hard to see how constraints and their motivating concerns would not extend also to the criminal context.

C. Harmonization

Given the difficulty in threading the doctrinal needle, the Court might prefer *Jarkesy* to have little practical effect than to disrupt the present ability of prosecutors to conduct plea bargaining and secure criminal convictions without trial. Alternatively, harmonization might be achieved by setting some new, even

96. Barkow, *supra* note 92, at 1024–25 (footnotes omitted).

97. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 887 (2009).

modest, limits on government efforts to produce waiver of the Sixth and Seventh Amendment rights alike. Commentators have criticized the Court for its disinclination to consider plea bargaining under the unconstitutional conditions framework.⁹⁸ Perhaps, though, that doctrine is just too clunky a tool. Instead, in light of our modern practices of settlement and resolution in forums other than courts and with attention also to the motivating rationale of *Jarkesy*, we might usefully begin by giving greater force, in both the civil and criminal context, to the oft-recited requirement that a waiver of the jury right, including when made in exchange for a government-supplied benefit, be knowing and voluntary. One possible limit in agency actions has already been discussed: no concessions to defendants who agree to an in-house proceeding. Other possibilities exist as well, for both civil agency enforcement actions and federal criminal cases. For example, we might develop useful mechanisms in both contexts that provide a stronger role for judges or other third parties in the negotiation and settlement process,⁹⁹ provide for more searching scrutiny by judges of deals reached,¹⁰⁰ create jury-like panels to review settlement terms and outcomes in individual cases,¹⁰¹ enhance disclosure of the evidentiary basis for the government's case,¹⁰² require collection and

98. See Barkow, *supra* note 92, at 1045–46 (“[I]n a departure from its unconstitutional conditions jurisprudence, the Court allows prosecutors to condition sentencing or charging deals on the waiver of constitutional trial rights”); Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 577 (2012) (“[T]he waiver and forfeiture of procedural rights by criminal defendants tends to be discussed without even reference to the doctrine of unconstitutional conditions.”); Kay L. Levine et al., *The Unconstitutional Conditions Vacuum in Criminal Procedure*, 133 YALE L.J. 1401, 1451, 1471 (2024) (writing that “[p]lea bargaining raises especially serious unconstitutional condition concerns” but that there is an “absence of unconstitutional conditions terms in the plea bargaining setting” and concluding that “[t]he doctrine is a selective shield, not the broad protector of constitutional rights that the Court purports to embrace,” that “offering the doctrine’s protection on this selective basis cannot be justified by pointing to the features of the legal system in which it operates” and that “[b]y applying the shield of the unconstitutional conditions doctrine to protect property rights and other forms of wealth but denying it to those facing criminal charges, the Supreme Court has abdicated its responsibility to protect both large portions of the Constitution and large portions of the population from the coercive exercise of governmental power.”); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 832 (2003) (“The Supreme Court does not view plea bargains to raise a problem of unconstitutional conditions. When dealing with plea bargains, the Court takes the view that conditional benefits are permissible.”).

99. See, e.g., Rakoff, *supra* note 74 (advocating a greater role for judges in the plea-bargaining process).

100. See Levine et al., *supra* note 98, at 1479–80 (advocating a process by which a court, attentive to the risk of coercion and government overreaching, scrutinizes plea deals); Slobogin, *supra* note 89, at 1521 (advocating the development of a preventively-oriented, hybrid-inquisitorial regime in which, among other things, judges would play an active role in assessing the bargain).

101. See, e.g., Mazzone, *supra* note 98, at 874–77 (proposing plea panels to review plea bargains).

102. See Bibas, *supra* note 89, at 2531 (advocating development of discovery mechanisms in plea bargaining to allow defendants to make more informed choices and explaining that “wide disparities or variations in each party’s information threaten equity and fairness.”).

publication of data concerning governmental deals and outcomes across cases,¹⁰³ and provide for audits of government practices.¹⁰⁴ There are likely other ways to pursue useful forms of harmony with respect to waiver of the Sixth and Seventh Amendment jury trial rights, whether as a stand-alone project after *Jarkesy* or part of a much-needed effort to bring a coherent framework to bear on questions of waiver and government bargains across all constitutional rights.¹⁰⁵

CONCLUSION

Jarkesy's account of civil juries has historical force but not modern relevance. It is impossible to think meaningfully about the nature of the Seventh Amendment right to a civil jury without recognizing that our contemporary legal system is one that not only permits but encourages waiver of that right and of other trial rights as well. *Jarkesy's* future significance depends upon a willingness to revisit the current freewheeling approach to waiver of the right to a civil jury trial. That, however, cannot easily be done without also revisiting waiver of the Sixth Amendment right to a criminal jury. Any effort to distinguish juries in federal agency enforcement actions from juries in federal criminal prosecutions is likely to generate confusion rather than clarity on the issue of bargaining with constitutional rights.

103. See, e.g., Garrett et al., *supra* note 85, at 1414–23 (identifying various benefits of “open prosecution” in which prosecutors collect and make available data concerning plea negotiations and outcomes).

104. See, e.g., Caldwell, *supra* note 90, at 92–96 (proposing audit teams to review prosecutorial practices for overcharging and coercion in plea bargaining).

105. For one preliminary effort, see Mazzone, *supra* note 98, at 856–78.