

Defining The Public-Rights Exception After *Jarkesy*

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ABSTRACT

For decades the U.S. Supreme Court has acknowledged that it has no definition of the public-rights exception. Recent cases, culminating in SEC v. Jarkesy, reflect a clear sense that the public-rights exception veered off path in the twentieth century and that it is time to rein it in. The Jarkesy Court recognized that the political branches cannot invoke the public-rights exception to circumvent the American people’s right to judicial process when their life, liberty, or property is at stake. But the Court has not given any theoretical basis for the exception’s existence and has declined even to say what public rights are. Doctrinally, no one knows where the exception’s boundaries lie—or even what the exception fundamentally is.

But the constitutional text and history is simple and uncontested. Scholars across the spectrum agree that as a matter of text and history, the Constitution generally prohibits the government from depriving Americans of property rights outside judicial process. Properly understood, the public-rights exception simply observes that the Constitution permits extrajudicial adjudication when depriving a person of a right held by the public, e.g., the right to use a public road. The real public-rights exception is in no tension with the due process clauses or the vesting clauses’ separation of powers, all of which protect the right to judicial process in no uncertain terms. And as Justice Brett Kavanaugh has observed, existing Supreme Court precedent already contains the infrastructure for full implementation of the original understanding.

Practitioners should press this uncontested original understanding. The Supreme Court has asked litigants to advance arguments that are theoretically robust, and the Court has made clear that new doctrinal rules must be rooted in text and history. The originalist account of the public-rights exception is theoretically full, straightforward, undisputed, and supported by existing Supreme Court precedent. It should be briefed and fully adopted.

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INTRODUCTION

Under its original understanding, the Constitution generally prohibits the government from depriving Americans of life, liberty, or property outside judicial process. The Constitution’s due process clauses prohibit government from depriving individuals of life, liberty, or property without due process of law. And the vesting clauses allow only the federal courts to exercise the judicial power of the United States. No one contests this original understanding.

But through a perversion of the public-rights exception, the United States government has at times asserted that it *may* deprive Americans of property outside

judicial process so long as the government is pursuing a sufficiently important interest. In the 2024 landmark case *SEC v. Jarkesy*, for example, the SEC asserted that the public-rights exception allowed it to impose a \$300,000 civil money penalty on an American citizen through an adjudication before its own in-house tribunal. That assertion has no basis in text and history.

Under the uncontested and intuitive historical definition, public rights are rights belonging to the public (such as the right to use a public road). These rights are conferred by government rather than by nature. The public-rights exception, properly conceived, simply observes that the government may deprive Americans of these public rights without judicial process. No one has the right to use government-operated roads in a state of nature with no government, and what the political branches give they may take away. It is as simple as that. And there is no real dispute about this in the academy.

Nonetheless, the Supreme Court's public-rights doctrine is confused, as it has often acknowledged, and the SEC's effort to thwart uncontested original meaning leaned heavily on that doctrinal confusion. The *Jarkesy* Court observed that the Supreme Court has never defined or theorized the public-rights doctrine, and declined to do so in the case before it. But the *Jarkesy* Court rejected the SEC's position, and with a sweeping holding reaffirmed that civil money penalties can be enforced only with judicial process.

After *Jarkesy*, practitioners should press the Constitution's clear original understanding and should avoid perpetuating the confusion introduced by twentieth-century cases. The *Jarkesy* majority indicated that doctrinal rules concerning the public-rights exception must be rooted in constitutional text and ratification-era history. As Justice Brett Kavanaugh wrote in a different 2024 case, constitutional text and history should exert a "gravitational pull" on a court's interpretation of precedent.

That pull should be particularly strong in cases involving the Constitution's judicial-process protections both because the text and history is so clear and because no settled precedent stands in its way. Indeed, as Justice Kavanaugh observed at oral argument in *Jarkesy*, the Court's existing precedent already contains the infrastructure for implementing original understanding. Because the public-rights exception currently is undefined, and because everyone agrees about its original understanding, litigants and courts should simply advance the uncontested original understanding.

Full adoption of the original understanding will have several important but unsurprising implications, some of which have gone largely unnoticed in *Jarkesy*'s aftermath.

First, as its name suggests, public rights are rights that belong to the public—not the government. Properly understood, the public-rights exception simply observes that the government may deprive an American of a public right, such as the right to use a particular public road, without judicial process. It is an exception to the rule that judicial process is required before the government can deprive an American of a right. The exception exists because public rights do not exist in a

state of nature—rather, they are created by government. Similarly, the government may deprive Americans of government benefits without judicial process because government benefits are matters of government largesse that do not exist in a state of nature. When a public right or a government benefit is involved, the government is granting or withholding something as a matter of government prerogative.

The public-rights exception, therefore, does not refer to any “rights” held by the government. At the founding, governments generally were not understood to hold rights at all, and courts did not mention any government “rights” when developing the public-rights exception in the nineteenth century.

So the question concerns the *deprivation*, not the government interest being pursued. Even the weightiest government interest does not allow it to deprive Americans of life, liberty, or property outside judicial process. That is most obvious from focusing on the frontend of “life, liberty, or property.” No one would ever suggest that the government’s interest in prosecuting crime allows it to prosecute criminals in an administrative tribunal with no judicial process—even though the government interest being pursued is undoubtedly weighty. The same is true for the backend of “life, liberty, or property.” The sole question is whether the right at stake is conferred by government or by nature.

Second, and relatedly, whether there is a common-law analogue for the government’s cause of action has little relevance. As a matter of text and history, whether an executive adjudication is constitutionally permissible turns entirely on whether the adjudication involves executive power or judicial power. Because a deprivation of life, liberty, or property quintessentially involves judicial power, a defendant in such an adjudication need not additionally show that the adjudication is analogous to some kind of eighteenth-century lawsuit. As the Supreme Court held in *Jarkesy*, civil money penalties are “a type of remedy available only in law courts,” full stop, and that is because they deprive the defendant of property.

Third, because after *Jarkesy* the government may no longer use an undefined “public rights” concept as a talisman to circumvent judicial process, *Jarkesy* has implications for equitable remedies no less than legal remedies. Although *Jarkesy* was pleaded as a Seventh Amendment case, the right to judicial process is also protected by the due process clauses and the vesting clauses’ separation of powers, as Justice Neil Gorsuch highlighted in a concurrence and the majority seemed to recognize. And while the Seventh Amendment applies only to suits at law, Article III provides that the judicial power of the United States shall extend to “all Cases” “in Law and Equity” arising under federal law. Indeed, in the Supreme Court’s seminal case on the public-rights exception, *Murray’s Lessee*, the Court explained that Congress cannot withhold judicial process for suits “in equity.”

Because the public-rights exception is what has shielded adjudications involving equitable remedies from Article III, the exception’s doctrinal movement toward text and history raises questions about what equitable claims an agency can seek through administrative adjudication. When it comes to the Constitution’s judicial-process mandate, the real inquiry moving forward is not whether the suit is

legal or equitable; the inquiry is whether a federal agency is exercising executive power or judicial power.

Fourth, as the *Jarkesy* Court appeared to recognize, the Constitution’s judicial-process protections are not satisfied by backend judicial review of agency adjudication that deprives a person of life, liberty, or property. Under text, history, and precedent, judicial review must come first—Congress cannot convert administrative agencies into de facto trial courts. The executive may make executive determinations however it wishes, including through agency adjudication, but the executive must go through the courts to obtain a deprivation of life, liberty, or property.

Fifth, the Constitution’s judicial-process protections apply against the states with respect to life, liberty, and property. While the Supreme Court hasn’t incorporated the Seventh Amendment against the states, the Fourteenth Amendment’s Due Process Clause does apply against the states and is enforceable federal law. As for state law, nearly every state constitution protects the civil jury-trial right, and every state separates governmental powers.

Part I of this Article examines the text and history of the Constitution’s judicial-process protections. Part II examines the Supreme Court’s public-rights doctrine. Part III argues that practitioners should press the Constitution’s uncontested original understanding. Part IV examines implications of that original understanding.

I. THE ORIGINAL UNDERSTANDING OF THE CONSTITUTION’S JUDICIAL-PROCESS PROTECTIONS

The term “public rights” has often been invoked by litigants and judges who are unable or unwilling to define the term, but applying the term requires an understanding of what it actually means.

Historically, public rights are rights held by the public. They are created by the government and have no counterpart in the Lockean state of nature.¹ Public roads are an example—no one has a right to government-operated roads in a state of nature that has no government.² Similarly, the government sometimes creates benefits or privileges that no one has a right to absent government. As the *Jarkesy* Court noted, “the granting of public benefits” “fall[s] within the exception” to the Constitution’s judicial-process requirements.³

Private rights, in contrast, are those associated with the natural rights that individuals would enjoy even in the absence of political society.⁴ The quintessential examples are life, liberty, and property—Congress did not create those rights; they existed before Congress existed.

Under our Constitution, the government may deprive Americans of *public* rights (or government benefits) without judicial process—what the political

1. See Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 567 (2007) (quoting William Blackstone).

2. See *id.* at 566.

3. SEC v. *Jarkesy*, 603 U.S. 109, 112 (2024).

4. Nelson, *supra* note 1, at 567.

branches give, the political branches may take away. But the government may deprive Americans of *private* rights only with judicial process. As a matter of text and history, this is uncontested.

A. Text

Multiple provisions of the Constitution protect the right to judicial process.

First, Article III vests the “judicial power” “of the United States” in the Supreme Court and the lower federal courts.⁵ “Article III protects liberty.”⁶ To “ensure against tyranny,” the Framers “provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct.”⁷ The core of the judicial power is “the power to bind parties and to authorize the deprivation of private rights.”⁸ Under the Constitution’s vesting clauses, therefore, unilateral executive action cannot deprive Americans of natural rights.

Second, the Constitution’s due process clauses provide that the federal and state governments may deprive persons of “life, liberty, and property” only with “due process of law.”⁹ Due process “has always been the insistence that the executive . . . deprive persons of rights only in accordance with settled rules independent of executive will, in accordance with a judgment by an independent magistrate.”¹⁰ Whatever due process’s precise definition, it undoubtedly requires judicial process—the executive branch cannot unilaterally deprive persons of life, liberty, or property.¹¹

Third, the Seventh Amendment provides that “[i]n Suits at common law,” “the right of trial by jury shall be preserved.”¹² The Supreme Court has interpreted that language to mean what it says: the Amendment “require[s] a jury trial on the merits” in “actions that are analogous to ‘Suits at common law.’”¹³

B. History

Both “[p]rior to the enactment of the Seventh Amendment” and “[a]fter the adoption of the Seventh Amendment,” Anglo-American courts “treat[ed] the civil penalty suit” as an action in debt “requiring a jury trial.”¹⁴

5. U.S. CONST. art. III, § 1.

6. *Stern v. Marshall*, 564 U.S. 462, 483 (2011).

7. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982).

8. William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1513–14 (2020).

9. U.S. CONST. art. V, amend. XIV, § 1.

10. Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 YALE L.J. 1672, 1681 (2012).

11. *See, e.g., id.* at 1679 (“From at least the middle of the fourteenth century” onward, “due process consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law.”).

12. U.S. CONST. amend. VII.

13. *See Tull v. United States*, 481 U.S. 412, 417, 418–19, 422 (1987).

14. *Id.* at 418; *see also id.* at 418–19 (actions by the Government to recover civil penalties “under statutory provisions” have historically always “requir[ed] trial by jury”); *id.* at 422 (“A civil penalty was a type of remedy at common law that could only be enforced in courts of law.”).

Seventh Amendment aside, moreover, scholars such as Professor Caleb Nelson have demonstrated that adjudication of private rights—most paradigmatically the rights to life, liberty, and property—was historically understood as an inherently judicial power outside political prerogative. Founding-era Americans, in the tradition of John Locke, understood private rights as “associated with the natural rights that individuals would enjoy even in the absence of political society.”¹⁵ William Blackstone identified the private rights to life, liberty, and property as “absolute” rights, i.e., rights that “appertain and belong to particular men . . . merely as individuals.”¹⁶ These rights stood “on a special plane”—the protection of absolute rights, according to Blackstone, was “the first and primary end of human laws.”¹⁷ Public rights, by contrast, were rights that “public authorities had created” for reasons of public policy and “which had no counterpart in the Lockean state of nature.”¹⁸

Historically, only “judicial” power could “authoritatively determine individualized adjudicative facts in a way that bound core private rights.”¹⁹ And federal agencies do not exercise judicial power. As the Supreme Court recently put it, while agencies “make rules” and “conduct adjudications” and “have done so since the beginning of the Republic,” these activities “are exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power.’”²⁰ The public-rights exception, accordingly, is grounded in a “historically recognized” distinction between matters that “could be conclusively determined by the Executive and Legislative Branches” and matters that “are inherently judicial.”²¹ The exception, in other words, is limited to “certain prerogatives” that are “reserved to the political Branches.”²²

The distinction between public and private rights “is a way of classifying legal interests,” therefore, not “entire cases.”²³ When the government prosecutes crime,

15. Nelson, *supra* note 1, at 567.

16. 4 WILLIAM BLACKSTONE, COMMENTARIES 123.

17. Nelson, *supra* note 1, at 567 (quoting Blackstone).

18. *Id.*

19. *Id.* at 604–05; *see also id.* at 562 (“Generations of Americans assumed that once core private rights had vested in a particular individual, the allied requirements of due process and separation of powers protected them against many forms of interference by the political branches.”); 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES, App. 357 (1803) (the judiciary is “that department of the government to whom the protection of the rights of the individual is by the constitution especially confided”).

20. *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 305 n.4 (2013) (quoting Art. II, § 1, cl. 1); *see also, e.g., Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C.J.) (those whose “offices are held at the pleasure of the president . . . are, consequently, incapable of exercising any portion of the judicial power”); *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 696 (2015) (Roberts, C.J., dissenting) (“Preserving the separation of powers is one of this Court’s most weighty responsibilities.”).

21. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982). While the lead *Northern Pipeline* opinion was joined by only a plurality of justices, “a full Court agreed on the [pertinent] points.” *Stern v. Marshall*, 564 U.S. 462, 486 n.5 (2011).

22. *Northern Pipeline*, 458 U.S. at 67.

23. Caleb Nelson, *Vested Rights, “Franchises,” and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1437 (2021).

for example, there are weighty public interests on one side of the *v.*, but on the other side is a private right. Historically, the “mere fact that public rights were at stake on [one] side did not open the door to nonjudicial adjudication.”²⁴

Professor Will Baude has explained why adjudication outside Article III is sometimes permissible.²⁵ Article III vests only the “judicial power of the United States” in the Supreme Court and any lower federal courts.²⁶ Not all exercises of judicial power are exercises of the United States’ judicial power—states and territorial courts, for example, exercise the judicial power of their respective states and territories. And because adjudication is simply a particular process for reaching a decision, some adjudications do not involve any judicial power at all. A parent utilizing a court-like adjudicative process to resolve a dispute between children has not exercised judicial power. Congress and the White House, likewise, can use adjudicative processes to reach decisions within their constitutional discretion. When they use adjudication in that way, they are exercising legislative or executive power, not judicial power. The key, as Professor Baude explains, is to focus on the *power* being exerted rather than the *process* by which it is exerted.²⁷ And at its core, judicial power is “the power to bind parties and to authorize the deprivation of private rights.”²⁸ The public-rights doctrine, then, simply “describes a set of adjudications that are permissible because they are a form of executive power and usually do not involve the deprivation of life, liberty, or property.”²⁹

* * *

Scholars across the ideological spectrum agree about these textual and historical points. For example, in a 2023 Yale Law Journal article otherwise supporting executive adjudication of private rights, Professors Adam B. Cox and Emma

24. Nelson, *supra* note 1, at 604–05; *see also, e.g.*, *Newland v. Marsh*, 19 Ill. 376, 383 (1857) (“The legislative power . . . cannot directly reach the property or vested rights of the citizen, by providing for their forfeiture or transfer to another, without trial and judgment in the courts; for to do so, would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislature”); *Gaines v. Gaines*, 48 Ky. 295, 301 (1848) (describing the judiciary as “the tribunal appointed by the Constitution and the law, for the ascertainment of private rights and the redress of private wrongs”); *State v. Hawkins*, 5 N.E. 228, 232 (1886) (“[P]ower to hear and determine rights of property and of person between private parties is judicial, and can only be conferred on the courts”); T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 175 (1868) (explaining that only the judicial power was thought capable of disposing of private rights); *Cohen v. Wright*, 22 Cal. 293, 318 (1863) (“The terms ‘due process of law’ have a distinct legal signification, clearly securing to every person . . . a judicial trial . . . before he can be deprived of life, liberty, or property.”).

25. Baude, *supra* note 8, at 1514.

26. U.S. CONST. art III, § 1.

27. *See id.* at 1513 (“Article III’s vesting of the judicial power is not about the process of adjudication” but rather “the substance of judicial power.”); *see also* *Ex parte Bakelite Corp.*, 279 U.S. 438, 459 (1929) (“[W]hether a court is of one class or the other depends [not] on the intention of Congress [but] the power under which the court was created and in the jurisdiction conferred.”).

28. Baude, *supra* note 8, at 1513–14.

29. *Id.* at 1536; *see also id.* at 1547 (“The reason that classic public rights cases could traditionally be adjudicated in the political branches is that they did not involve the deprivation of life, liberty, or property, and so they did not require judicial process.”).

Kaufman observed that “Founding Era lawyers would have been shocked to learn that the government could take a person’s recognized due-process rights without a trial before an Article III tribunal.”³⁰ And while Professor Gregory Ablavsky tried to unsettle the consensus in a 2022 Stanford Law Review article, his effort only highlights that there is no real debate on the issue. He argued that in the mid-nineteenth century, the government could deprive individuals of what he calls *imperfect* vested property rights without judicial process, but he agrees with every other scholar that perfect and vested property rights—the ordinary kind—“could be challenged only in court.”³¹ No one has seriously contested Professor Nelson’s account.³²

II. THE SUPREME COURT’S PUBLIC-RIGHTS DOCTRINE

In the main, the Supreme Court has implemented the Constitution’s text and history. The Court has been unable to define or theorize the doctrine, and on occasion has strayed from text and history in favor of government efficiency and practical consequences. But especially after the 2024 *Jarkesy* decision, those outlier cases are not good law. As it stands today, the Court’s precedent is clear that the government generally cannot deprive Americans of life, liberty, or property without judicial process. And as Justice Kavanaugh has observed, the Court’s doctrinal statements about the public-rights exception lay a firm foundation for full implementation of the Constitution’s text and history.

A. Overview

The Court’s longstanding precedent establishes that “only” controversies in the public-rights category “may be removed from Art[icle] III courts and

30. Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1794–95 (2023).

31. Gregory Ablavsky, *Getting Public Rights Wrong*, 74 STAN. L. REV. 277, 317 (2022). Professor Ablavsky’s article concerns land claims of individuals who claimed title based on the law of a prior government such as Mexico or Spain. Ablavsky asserts that “Congress and the Supreme Court repeatedly drew a sharp distinction between perfect titles—that is, where the [land] grants had been completed—and the imperfect titles where some further governmental act was required before the claimant enjoyed complete ownership.” *Id.* at 315–16. While “the perfect titles became yet another complete land title within the United States” upon cession, holders of imperfect titles possessed only “the same right after cession as before: an inchoate property right that required some further act of the government to be perfected—that is, to ripen into a complete, legal title.” *Id.* at 316. “[U]ntil these rights had been perfected, the formal legal title remained in the United States.” *Id.* “While perfect title could be challenged only in court, Congress enjoyed nearly unchecked authority to resolve *imperfect* claims.” *Id.* at 317; *see also id.* at 316 (the Supreme Court reasoned that “the political branches, and especially Congress, had full discretion to determine when, and how, these rights could become complete titles to land”).

At most, then, Ablavsky demonstrates that the political branches could unilaterally deprive individuals of certain property interests in which “formal legal title remained in the United States.” *Id.* at 316. That does nothing to upset Professor Nelson’s account of original understanding. *See* Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735, 815 (2022) (“the distinction Ablavsky draws . . . tracks [Caleb Nelson’s] dichotomy exactly”); Ann Woolhandler & Michael G. Collins, *The Public/Private Rights Critics*, 99 NOTRE DAME L. REV. 1779, 1785 (2024) (“perhaps [Professor Ablavsky] should have left ‘Getting Public Rights Wrong’ out of his title” since his article “reinforces” Nelson’s dichotomy).

32. Rather than examine text or ratification-era history, dissenters often cite court cases from many decades after 1789 and 1791 that do not purport to provide evidence of original meaning.

delegated to . . . administrative agencies.”³³ Congress, the Court has explained, “lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury.”³⁴

And the Court generally has recognized that the public-rights exception asks about the deprivation, not the public interest being pursued. It is only when Congress “creates” a “statutory *right*”—not an obligation—that Congress may provide that those “seeking to vindicate that right” must do so in executive adjudication.³⁵ That is, when “it depends upon the will of congress” whether a “remedy” “shall be allowed at all,” Congress can “limit the extent to which a judicial forum [is] available.”³⁶ An extrajudicial *deprivation* of life, liberty, or property is unlawful no matter how worthy the government objective.³⁷

Supreme Court precedent reflects Professor Baude’s observation that the executive branch may make executive determinations through agency adjudication but may not exercise judicial power by adjudicating the deprivation of life, liberty, or property. The public-rights exception clarifies that Article III does not apply to matters “which arise[s] between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.”³⁸ The legislature or executive, for example, may give “advisory decisions” in proceedings that are “not cases or controversies within the meaning of Article III, but are merely in aid of legislative or executive action.”³⁹ At bottom, the “understanding of [the Supreme Court’s] cases” is that the public-rights doctrine extends “only to matters that historically could have been determined exclusively by” “the executive or legislative departments.”⁴⁰

As Justice Kavanaugh observed at oral argument in *Jarkesy*, this precedent “suggests a line that may track the Due Process Clause between benefits and penalties.”⁴¹ Americans cannot complain about the government’s use of executive

33. *N. Pipeline Constr. v. Marathon Pipe Line*, 458 U.S. 50, 70 (1982) (plurality) (emphasis omitted); *see also, e.g., Stern v. Marshall*, 564 U.S. 462, 489 (2011) (citing *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856)).

34. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51–52 (1989).

35. *Northern Pipeline*, 458 U.S. at 83 (emphasis added); *see also, e.g., Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 593–94 (1985) (holding that Congress may “create” a new public “right”).

36. *Stern*, 564 U.S. at 489 (quoting *Murray’s Lessee*, 18 How. at 284); *see also id.* (the “point of *Murray’s Lessee*” was “simply that Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all”).

37. *See Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (unconstitutional statutes are unconstitutional no matter how “efficient, convenient, and useful in facilitating functions of government”); *id.* at 727 (“The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.”); *id.* at 721–22 (it is necessary to endure the “conflicts, confusion, and discordance” that separation of powers may at times generate “[in order] to secure liberty”); *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 709 (2015) (Thomas, J., dissenting) (“Our Constitution is not a matter of convenience, to be invoked when we feel uncomfortable with some Government action and cast aside when we do not.”).

38. *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

39. *Ex parte Bakelite Corp.*, 279 U.S. 438, 450 (1929).

40. *Northern Pipeline*, 458 U.S. at 68.

41. Transcript of Oral Argument at 69–70, *SEC v. Jarkesy*, 603 U.S. 109 (2024) (No. 22-859).

adjudication when they seek to vindicate a right or benefit they would never hold in a state of nature in the first place. The Supreme Court has held, for example, that the Patent Trial and Appeal Board may adjudicate certain patent rights on the ground that the rights were created by, and may be revoked by, the political branches.⁴² By contrast, the rights to life, liberty, and property are quintessential natural rights. Congress did not “create” them;⁴³ they existed before Congress existed.

B. *Atlas Roofing*

In its 1977 *Atlas Roofing* decision, the Court drifted from text and history. The opinion’s author believed that “Article III . . . must be balanced against . . . legislative responsibilities.”⁴⁴ The Court, accordingly, invoked the public-rights doctrine to approve adjudication of OSHA civil penalties in an administrative tribunal “supplying speedy and expert resolutions of the issues involved.”⁴⁵ The Court invoked “the practical limitations of a jury trial” and its “functional [in]compatibility” with administrative proceedings,⁴⁶ and concluded that Congress need not “choke the already crowded federal courts with new types of litigation,” but rather may “commit[] [them] to administrative agencies with special competence in the relevant field.”⁴⁷ In short, as it later recognized, the Court focused on “the practical effect” of statutory law and “the concerns that drove Congress” to “depart from the requirements of Article III.”⁴⁸

But *Atlas Roofing* faced severe and sustained scholarly criticism across the ideological spectrum,⁴⁹ and a few years after *Atlas Roofing* the Court arguably “overrule[d] or severely limit[ed]” it.⁵⁰ In *Granfinanciera v. Nordberg*, the Court rejected *Atlas Roofing*’s assertion that the Seventh Amendment “does not apply when Congress assigns the adjudication of [certain] rights to specialized tribunals

42. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 335 (2018) (patent rights do not exist in a state of nature but rather are “take[n] from the public” and “bestow[ed] upon the patentee” through “statute law”); *see also id.* at 353 (Gorsuch, J., and Roberts, C.J., dissenting) (arguing that the public-rights doctrine did not apply because “American patent holders . . . were thought to hold a property in their inventions by as good a title as the farmer holds his farm and flock,” and “just as with farm and flock, it was widely accepted that the government could divest patent owners of their rights only through proceedings before independent judges”).

43. *Northern Pipeline*, 458 U.S. at 83.

44. *Northern Pipeline*, 458 U.S. at 113 (White, J., dissenting).

45. *Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 461 (1977).

46. *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) (describing *Atlas Roofing*).

47. *Atlas Roofing*, 430 U.S. at 455.

48. *CFTC v. Schor*, 478 U.S. 833, 851 (1986).

49. *See SEC v. Jarkesy*, 603 U.S. 109, 139 n.4 (2024) (citing commentary criticizing *Atlas Roofing*). For example, Professor Martin Redish wrote that *Atlas Roofing* is “indefensible” “as a matter of Seventh Amendment construction.” Martin H. Redish & Daniel La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 408–09 (1995). The Court’s “abandonment of a constitutional right,” “for no other reason than the Court’s deference to the conclusion of the majoritarian branches that enforcement of that right would be politically or socially difficult or inconvenient,” was “wholly unprincipled.” *Id.* at 411. “[N]othing in the text, structure, or history of the Seventh Amendment provides any basis on which to permit reliance on . . . a social balancing process. *Id.*”

50. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 71 n.1 (1989) (White, J., dissenting).

where juries have no place.”⁵¹ Dissenting, *Atlas Roofing*’s author suggested that *Atlas Roofing* “is no longer good law after today’s decision.”⁵²

C. *Jarkesy*

In *SEC v. Jarkesy*, the Supreme Court held that a defendant in a securities fraud suit has the right to be tried by a jury in an Article III court. The case arose when the SEC alleged that Jarkesy violated various securities laws, held an adjudication before its own in-house tribunal, found Jarkesy liable, and imposed a \$300,000 civil money penalty. Jarkesy sued in federal court, arguing that the SEC violated the Seventh Amendment.

The Supreme Court agreed with Jarkesy, concluding that the proceeding was a suit at common law and that the public-rights doctrine did not apply. The Court focused largely on the remedy—the civil penalties remedy, the Court emphasized, can “only be enforced in courts of law.”⁵³ Three justices dissented, arguing that the public-rights doctrine allows Congress to “create statutory obligations” entitling the government to civil penalties and “assign their enforcement” to executive adjudication.⁵⁴

1. The Government’s Position

In *Jarkesy*, the SEC’s main argument was that the public-rights doctrine applied, but it had no theory of what the public-rights doctrine actually is. The SEC invoked *Atlas Roofing*, but that case “left the term ‘public rights’ undefined.”⁵⁵ And rather than advancing a definition of its own, the SEC asked the Court to refrain from “explain[ing] the distinction between public and private rights” at all.⁵⁶

The untheorized rule of decision that the SEC did advance, moreover, was obviously wrong. The SEC asserted that Congress can override the Constitution’s judicial-process protections whenever it creates “new statutory obligations.”⁵⁷ But that proved far too much—the creation of new statutory obligations cannot possibly be sufficient to trigger the public rights doctrine because all agree that “the public rights doctrine does not extend to any criminal matters.”⁵⁸ No one would argue that judicial process is unnecessary whenever Congress creates new statutory felonies. When it comes to criminal prosecution, everyone recognizes that no matter how salutary the government objective, it is the deprivation that matters. The same is true for the backend of “life, liberty, or property.”

51. *Id.* at 81.

52. *Id.* at 79.

53. *Jarkesy*, 603 U.S. at 125.

54. *Id.* at 168 (Sotomayor, J., dissenting).

55. *Granfinanciera*, 492 U.S. at 51 n.8.

56. Brief for Petitioner at 21, *Jarkesy*, 603 U.S. 109 (No. 22-859).

57. *Id.* at 21, 23–24.

58. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 n.24 (1982).

2. The *Jarkesy* Opinion

The Supreme Court rejected the government's position, concluded that the public-rights doctrine was inapplicable, and held that *Jarkesy* is "entitled to a jury trial in an Article III court."⁵⁹ The Court stated that the public-rights doctrine is "an *exception*" to the constitutional norm that "has no textual basis."⁶⁰ And "what matters," the Court explained, is "the substance of the action, not where Congress has assigned it."⁶¹ The SEC's claims were "traditional legal claims" because they sought civil penalties—a remedy that can "only be enforced in courts of law."⁶² The public-rights exception applies only when the government is acting on one of its "governmental prerogatives."⁶³

The dissent, on the other hand, concluded that "a statutory right belonging to the Government in its sovereign capacity" falls within the public-rights exception.⁶⁴ For the dissent, then, the public rights doctrine asks about the *government's* "rights," not the citizen's.⁶⁵ And whether a defendant receives judicial process is entirely up to Congress: the only question is "[w]hether Congress assigned the Government's sovereign rights to civil penalties to a non-Article III [adjudicator]."⁶⁶ In a concurring opinion, Justice Gorsuch called this "astonishing."⁶⁷ The dissent's view, Justice Gorsuch observed, is that the Constitution "imposes *no* limits" on the government's power to seek civil penalties outside Article III.⁶⁸

The dissent did not attempt to reconcile its conception of public rights with the Constitution's text or ratification-era history. And the dissent offered no original-understanding defense for its assertion that the public-rights doctrine concerns the government's "rights."⁶⁹ Instead, the dissent relied exclusively on precedent, focusing foremost on *Atlas Roofing*. The majority criticized the dissent for creating a rule based "not in the constitutional text (where it would find no foothold), nor in the ratification history (where again it would find no support)."⁷⁰

While the majority declined to formally overrule *Atlas Roofing*, it did not leave the case upright. The majority observed that "*Granfinanciera* might have overruled *Atlas Roofing*," at least "the author of *Atlas Roofing* certainly

59. SEC v. *Jarkesy*, 603 U.S. 109, 140 (2024).

60. *Id.* at 131.

61. *Id.* at 134.

62. *Id.* at 135.

63. *Id.* at 120.

64. *Id.* at 187 (Sotomayor, J., dissenting).

65. The dissent attempted to distinguish criminal prosecution on the ground that Article III requires a jury for criminal trials, *id.* at 193 n.9, but that requirement only reinforces the point that the public-rights doctrine asks about the deprivation, not the government interest.

66. *Id.* at 187.

67. *Id.* at 159 (Gorsuch, J., concurring).

68. *Id.* at 159–60.

69. At the founding, "rights" usually belonged to individuals, whereas governments usually were understood to hold certain "powers." See *infra* text accompanying notes 93–95. The dissent did not explain why the public-rights doctrine nevertheless concerns what the government may lose rather than what the citizen may lose.

70. *Jarkesy*, 603 U.S. at 131 n.2.

thought . . . so.”⁷¹ It called *Atlas Roofing*’s definition of public rights “circular,” noting that *Atlas Roofing* said the public-rights doctrine applies “in cases in which ‘public rights’ are being litigated” such as cases in which the government “enforce[s] public rights.”⁷² And it asserted that *Atlas Roofing* “represents a departure from our legal traditions.”⁷³ The dissent noted that the majority left open the possibility that *Atlas Roofing* was overruled in the 1980s, and rather than contesting that assertion, the majority doubled down by noting that *Atlas Roofing*’s author himself “certainly thought” it was overruled in the 1980s.⁷⁴

3. *FCC v. AT&T*

In June 2026, the Supreme Court decided *FCC v. AT&T, Inc.*, a Seventh Amendment challenge to forfeiture orders issued by the Federal Communications Commission.⁷⁵ The Commission had issued orders “determin[ing]” that AT&T and Verizon were liable for penalties of roughly \$57 million and \$47 million, respectively, and the carriers argued that adjudicating those penalties without a jury violated the Seventh Amendment.⁷⁶ The Court sustained the Commission’s scheme, but on a ground that reaffirms *Jarkesy*’s holding: a forfeiture order “did not create an obligation to pay.”⁷⁷ Under the Communications Act, the government can collect a forfeiture only by suing in federal court, where the statute guarantees “a trial *de novo*”—a proceeding in which “it is as if the Commission never found any facts at all.”⁷⁸ As the Court put it, “[b]efore a regulated party can be made to pay, the jury gets the last word.”⁷⁹

The Court reaffirmed *Jarkesy*, and confirmed this Article’s reading of it. In *Jarkesy*, the SEC’s penalties “were immediately enforceable,” so “the ultimate determination of the facts giving rise to the obligation to pay rested not with a jury, but with the SEC alone.”⁸⁰ An FCC forfeiture order, by contrast, “is simply the Commission’s own determination.”⁸¹ The government, in short, may not conclusively adjudicate a deprivation of property outside the courts; it may only decide, as an executive matter, to pursue one there.

* * *

Jarkesy leaves no doubt that the government generally cannot deprive Americans of rights through agency adjudication and the public-rights exception will apply only

71. *Id.* at 136 n.3.

72. *Id.* at 139.

73. *Id.* at 138 n.4.

74. *Id.* at 136 n.3.

75. *FCC v. AT&T, Inc.*, No. 25-406, slip op. (U.S. June 4, 2026). The Court decided the case together with *Verizon Communications, Inc. v. FCC*, No. 25-567.

76. *Id.* at 2, 5.

77. *Id.* at 7.

78. *Id.* at 3, 8 (quoting 47 U.S.C. § 504(a)).

79. *Id.* at 8.

80. *Id.* at 10.

81. *Id.* at 9.

in narrow circumstances. But the *Jarkesy* Court observed that the Supreme Court “has not definitively explained the distinction between public and private rights,” and declined to “do so today.”⁸² In future cases, the Court should begin to do what it has put off and definitively explain the public-rights exception. It should start by defining its terms. If the Court roots its doctrine in text and history, that will not be hard to do.

III. PRACTITIONERS SHOULD PRESS THE CONSTITUTION’S UNCONTESTED ORIGINAL UNDERSTANDING

In *Haaland v. Brackeen*, decided in 2023, the Supreme Court acknowledged that its doctrine in a different area of law was “confus[ed],” and that it had decided cases “without specifying” doctrinal parameters.⁸³ But while recognizing that “our case law puts petitioners in a difficult spot,” the Court criticized the petitioners for failing to “offer a theory for rationalizing this body of law.”⁸⁴ Litigants should avoid that mistake in public-rights cases.

The theory litigants should advance is the uncontested original meaning of the public-rights exception and the Constitutional provisions it implicates. That is true because it fully “rationalize[s] [the] body of law,”⁸⁵ and more importantly because it is the Law of the Land. As the *Jarkesy* Court indicated, a proposed doctrinal rule for the public-rights exception must be rooted “in the constitutional text . . . [and] in the ratification history.”⁸⁶ Practitioners should focus on sources that “shed light on the meaning of the Constitution.”⁸⁷

Justice Brett Kavanaugh elaborated the point in a 2024 concurring opinion, arguing that text and history should always exert a “gravitational pull” on the interpretation of precedent.⁸⁸ The “first and most important rule in constitutional interpretation,” Justice Kavanaugh explained, is “to heed the text—that is, the actual words of the Constitution.”⁸⁹ The Constitution’s text, after all, is the “‘Law of the Land.’”⁹⁰ Even when the courts have developed “extensive bodies of precedent,” “text and history still matter a great deal.”⁹¹ When determining “how broadly or narrowly to read a precedent,” or “whether to extend, limit, or narrow a precedent,”

82. *Id.* at 131 (cleaned).

83. *Haaland v. Brackeen*, 599 U.S. 255, 279 (2023).

84. *Id.*

85. *Id.*

86. *Jarkesy*, 603 U.S. at 131 n.2. Twentieth-century cases, of course, are not ratification history. *See United States v. Rahimi*, 602 U.S. 680, 737–38 (2024) (Barrett, J., concurring) (“[F]or an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law. History (or tradition) that long postdates ratification does not serve that function.”).

87. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 273 (2022).

88. *Rahimi*, 602 U.S. at 730 (Kavanaugh, J., concurring); *see also* Michael Showalter, *Jarkesy and Gravitational Pull: The Supreme Court’s Approach to Precedent and Its Implications*, HARV. J.L. & PUB. POL’Y PER CURIAM, Summer 2024, at 1, <https://tinyurl.com/5y53ba3r> [<https://perma.cc/KK59-LM3E>].

89. *Rahimi*, 602 U.S. at 715 (Kavanaugh, J., concurring).

90. *Id.* (quoting U.S. CONST. art. VI).

91. *Id.* at 730.

courts should consider “how the precedent squares with the Constitution’s text and history.”⁹² Courts should resolve questions about a precedent’s scope “in light of and in the direction of” that text and history.⁹³

Here the task is easy because text and history offer an undisputed definition of public rights and no precedent stands in the way. As discussed, precedent does not contain any definition of public rights at all, much less one contrary to text and history. And in both *Jarkesy* and the 2011 *Stern v. Marshall* case, as Justice Kavanaugh noted, the Court reiterated the longstanding test that “suggests a line that may track the Due Process Clause between benefits and penalties,” i.e., the Constitution’s uncontested original understanding.⁹⁴

Litigants should also emphasize that the government has never offered any competing account of the public-rights exception’s original meaning. Indeed, the government has never offered any definition of the public-rights exception at all.⁹⁵ There is only one “theory for rationalizing this body of law” on the table, and it is the theory of original meaning.

IV. IMPLICATIONS

In virtually every case involving the public-rights exception, the Supreme Court has remarked that its jurisprudence is deeply confused. In 1985, the Court noted that the public-rights doctrine is an “area of frequently arcane distinctions and confusing precedents.”⁹⁶ In 2018, the Court quoted a 1982 case for the observation that it has never “definitively explained” the doctrine.⁹⁷ In 2011, the Court recognized that its precedents applying the public-rights doctrine have “not been entirely consistent.”⁹⁸ In 2024, the Court noted that its cases concerning the public-rights doctrine “have not always spoken in precise terms.”⁹⁹ Full reinstallation of the uncontested original meaning of the Constitution’s text will sweep away this confusion and the Court’s inability to define its core terms.

The original meaning has several implications. Contrary to scaremongering, the Constitution’s original meaning does not mean that the government cannot prosecute criminals or recover from lawbreakers. It merely means that the government must honor the Constitution’s process protections when doing so.

92. *Id.*

93. *Id.*; See also Hon. Amul Thapar, *The 2024 Joseph Story Distinguished Lecture: Why Originalist Courts Need Originalist Classrooms*, The Heritage Foundation (Oct. 23, 2024), [youtube.com/watch?v=L_r8kPzO2Y](https://www.youtube.com/watch?v=L_r8kPzO2Y) [<https://perma.cc/9CVA-3F5F>] (“far too many lawyers do not recognize the originalist arguments . . . that are available to their client”).

94. Tr. of Oral Arg. at 70, *SEC v. Jarkesy*, No. 22-859 (Nov. 29, 2023).

95. See *supra* Part II.C.1.

96. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985).

97. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 334 (2018).

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

99. *SEC v. Jarkesy*, 603 U.S. 109, 130 (2024).

A. *The Public-Rights Exception Concerns the Deprivation*

Much of the confusion about the public-rights doctrine stems from the lack of a definition for the term “public rights.” As a matter of text and history, the definition is simple and intuitive: public rights are rights held by the public. And the public-rights exception applies to deprivations of those public rights. It’s as simple as that. Recognizing the historical definition alone resolves most of the controversy surrounding the public-rights exception.

So the public-rights exception simply asks what is being taken from the defendant—the government interest being pursued, the adjudication’s subject matter, and the existence of analogous suits at common-law are all beside the point.

1. The Government Interest Is Not the Inquiry

In recent years, the U.S. government has advanced a completely different, untheorized version of the public-rights exception. The government has argued that the public-rights exception applies whenever the government is pursuing an important interest.¹⁰⁰ But the public-rights exception refers to the public’s rights, not any government “rights” or interests. That explains why the government may not prosecute criminal defendants through administrative adjudication even though it is pursuing an important public interest.

Indeed, under our Constitution the government generally is not thought to hold rights against the people; rather, the people hold rights against the government.¹⁰¹ The federal government possesses powers granted to it in the U.S. Constitution, while the people possess rights that they may assert as limits on government power. For example, the Constitution vests all granted legislative “Powers” in Congress, while protecting the people’s “right” against unreasonable searches and seizures.¹⁰² As the founding generation generally understood it, when the government acts in pursuit of the public interest, it is exercising its powers, not “rights.” The Seventh Amendment and due process clauses, accordingly, protect individual rights against government power.¹⁰³

2. The Subject Matter Is Not the Inquiry

Because the public-rights inquiry ultimately concerns the deprivation, the subject matter involved is not decisive. Since *Jarkesy*, some litigants and courts have erroneously focused on the subject matter of the suit, suggesting that certain subject matter automatically falls within the public-rights category. The Sixth Circuit,

100. See, e.g., *supra* Part II.C.1 (discussing SEC’s position in *Jarkesy*).

101. See, e.g., U.S. CONST. amend. X (implying that the Constitution delegates certain “powers” to the U.S. government); *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) (U.S. government is “one of enumerated powers”).

102. U.S. CONST. art. I, § 1; *id.* amend. IV; see also, e.g., Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 256 (1983) (James Madison believed that “individual rights and governmental powers composed two mutually exclusive and collectively exhaustive categories”).

103. See also *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (“Article III protects liberty.”).

for example, recently stated without explanation that immigration—the entire field, apparently—is a “matter concerning public rights.”¹⁰⁴

That is obviously wrong—the government cannot prosecute a criminal defendant in an administrative tribunal on the ground that the subject matter at issue concerns immigration. The Sixth Circuit’s formulation also has no plausible definition of the term “public rights”—if one asked the Sixth Circuit panel what right is necessarily held by the public in all immigration cases, there would be no theoretically coherent answer. There is no colorable basis for asserting that the Constitution *sub silentio* exempts entire categories of subject matter from Article III, the due process clauses, and the Seventh Amendment.

Rather, the plausible basis for the Supreme Court’s conclusion that certain immigration cases fall outside the Constitution’s judicial-process protections is that the Court determined in 1892 that “immigrants had no vested private right to enter the United States.”¹⁰⁵ Because the Court determined that there is no natural right to enter the United States, these immigrants “had no right to ‘judicial’ determination of whether they satisfied the criteria that Congress had validly established for entry.”¹⁰⁶ Rather, the Court concluded, “the final determination of those facts may be entrusted by Congress to executive officers.”¹⁰⁷ Accepting *arguendo* the Court’s premise that there is no natural right to enter the United States, the Court’s holding perfectly tracks the original understanding.

3. The Existence of Common-Law Analogues Is Not the Inquiry

After *Jarkesy* the U.S. government has continued to argue that the public-rights exception applies whenever the government’s cause of action does not parallel a common-law cause of action.¹⁰⁸ But that is wrong both as a matter of text and history and as a matter of precedent.

Text and history. Because the public-rights exception applies only when the government seeks to deprive an American of a public right, whether there exists a common-law action analogous to the government’s cause of action is not the question. Properly understood, the public-rights exception solely examines the remedy sought. If the government seeks to deprive an American of life, liberty, or property, judicial process is required.

104. *Elgebaly v. Garland*, 109 F.4th 426, 437 (6th Cir. 2024).

105. Nelson, *supra* note 1, at 580 (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 659–60 (1892)); see also LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 31 (1995) (observing that the Supreme Court concluded that “[i]mmigrants applying for admission . . . sought a privilege, not a right”).

106. Nelson, *supra* note 1, at 580 (citing *Nishimura Ekiu*).

107. *Nishimura Ekiu*, 142 U.S. at 660.

108. See *e.g.*, Brief for Respondents at 26, *AT&T Inc. v. FCC*, 2024 WL 4370608 (5th Cir. 2024) (No. 24-60223) (“Even if the statutory enforcement process used by the Commission had, in fact, denied AT&T a jury trial, there still would be no constitutional violation because the Seventh Amendment does not apply to Section 222, which has no analogue at common law.”).

Precedent. *Jarkesy* implements the uncontested text and history by holding that civil money penalties are “a type of remedy available only in law courts.”¹⁰⁹ Period. The Court added that the cause of action in that case resembled a common-law cause of action, but it made clear that the civil-penalties remedy was sufficient to trigger the Constitution’s judicial-process requirements. In dismissing the SEC’s argument that the public-rights exception applied, the Court noted that the cause of action was modeled on common-law fraud “and” that the civil-penalty remedy is “available only in law courts.”¹¹⁰ The Court noted in the public-rights section of its opinion that “traditional legal claims” must be decided by courts—“whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears.”¹¹¹ Because the civil-penalties remedy is per se a traditional legal claim available only in law courts, it is not available through executive adjudication.

B. Equitable Claims May Require Judicial Process Too

Because the government may no longer use an undefined “public rights” concept as a talisman to circumvent judicial process, *Jarkesy* has implications for equitable remedies no less than legal remedies. While *Jarkesy* was pleaded as a Seventh Amendment case, the Court recognized that the public-rights doctrine is an “exception to Article III jurisdiction” as well.¹¹² That is, the public-rights doctrine is trans-clausal. When the exception applies, executive adjudication is permissible notwithstanding Article III, the due process clauses, and the Seventh Amendment. But as discussed, each of those clauses generally requires judicial process. Justice Gorsuch highlighted this in a *Jarkesy* concurrence, observing that the Seventh Amendment “operates together with Article III and the Due Process Clause of the Fifth Amendment to limit how the government may go about depriving an individual of life, liberty, or property.”¹¹³

Because the Seventh Amendment applies only to suits at law, and *Jarkesy* was pleaded as a Seventh Amendment case, since *Jarkesy* was decided litigants and courts have given much attention to whether various suits are legal or equitable. The U.S. government has repeatedly argued in various cases that *Jarkesy* does not apply because the government seeks only equitable remedies.¹¹⁴ In a recent Third Circuit argument, one judge noted that he was “flummoxed” about whether

109. SEC v. *Jarkesy*, 603 U.S. 109, 136 (2024); see also, e.g., *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (“Petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money—relief that was not typically available in equity.”).

110. *Jarkesy*, 603 U.S. at 136.

111. *Id.* at 133.

112. *Id.* at 120.

113. *Id.* at 141 (Gorsuch, J., concurring).

114. See, e.g., Brief of FTC, *FTC v. Intuit*, (5th Cir. 2024) (No. 24-60040) (“Here, the FTC imposed an injunctive remedy that was unavailable at common law and does not implicate the Seventh Amendment.”); Brief of NLRB at 48, *Space Exploration Technologies Corp. v. NLRB*, 2024 WL

the claims at issue were legal or equitable.¹¹⁵ In a Fifth Circuit appeal, for one more example, the parties focused on the Seventh Amendment and whether the agency proceeding involved legal or equitable claims.¹¹⁶

But this focus on the Seventh Amendment and the law/equity distinction overlooks that under Article III the judicial power of the United States extends to “all Cases” “in Law and Equity” arising under federal law. As the *Jarkesy* Court observed, when a suit “is brought within the bounds of federal jurisdiction,” an Article III court “must decide it,” though “with a jury” only “if” the Seventh Amendment applies.¹¹⁷ The clear implication is that Article III adjudication sometimes is the only avenue for claims to which the Seventh Amendment does not apply. Justice Amy Coney Barrett highlighted this during the *Jarkesy* oral argument, noting that the government “expressed concern that the Court, in deciding the Seventh Amendment question in [Jarkesy’s] favor, might actually limit the ability of agencies to get equitable remedies.”¹¹⁸

The Supreme Court emphasized that the Constitution’s judicial-process protections reach equitable claims in *Murray’s Lessee*, its seminal public-rights case decided in 1856. “To avoid misconstruction upon so grave a subject,” the Court explained that the public-rights doctrine does not allow Congress to “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.”¹¹⁹ Whether the suit was “at the common law” or “in equity” made no difference. What mattered was whether the suit sought a deprivation of “public rights,” because if “it depends upon the will of [C]ongress whether a remedy in the courts shall be allowed at all,” then Congress “may regulate [the remedy] and prescribe such rules of determination as [Congress] may think just and needful.”¹²⁰ That is precisely Professor Nelson’s understanding of the public-rights exception, reflecting the Constitution’s text and history.

So moving forward, while the Seventh Amendment inquiry will continue to ask whether the suit is legal or equitable, the question whether judicial process is required turns on whether the government is exercising executive power or judicial power.

4279237 (5th Cir. 2024) (No. 24-40315) (“SpaceX . . . cannot establish a valid Seventh Amendment claim; the underlying ULP adjudication is not ‘legal in nature.’”).

115. See Daniel Weissner, *In Starbucks case, US judges ‘flummoxed’ over NLRB’s enforcement powers*, REUTERS (Sept. 18, 2024), tinyurl.com/4x344eyu [<https://perma.cc/6WWQ-P2J5>].

116. See Brief of Appellant at *3, *Space Exploration Technologies Corp. v. NLRB*, 2024 WL 3550219 (5th Cir. 2024) (No. 24-40315).

117. *Jarkesy*, 603 U.S. at 127.

118. Transcript of Oral Argument at 142, *Jarkesy*, 603 U.S. 109 (No. 22-859); see also Amit R. Vora, *The Overlooked Equitable Path to Article III*, YALE J. REG.: NOTICE & COMMENT BLOG (Sept. 25, 2025), tinyurl.com/32am5bfy [<https://perma.cc/6TMA-6UDC>].

119. *Murray’s Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1856).

120. *Id.*

C. Backend Judicial Review Does Not Satisfy the Constitution

At times the government has argued that it may deprive Americans of private rights so long as an Article III court reviews the order as if the agency were a trial court.¹²¹ In an influential article on the development of this appellate-review model of agency adjudication, Professor Thomas Merrill traced the emergence of the appellate-review model to the passage of the Hepburn Act in 1906.¹²²

But the Constitution does not allow Congress to convert federal agencies into de facto district courts by granting administrative tribunals the power of judicial adjudication with an actual federal court sitting as a court of appeal. The Executive Branch may use administrative adjudication to determine whether to prosecute a defendant—that is an executive determination.¹²³ But the Executive Branch may not itself bind the defendant when private rights are involved.¹²⁴

The appellate-review model proves far too much. A federal district court, all would agree, exercises judicial power when it decides a suit involving solely a pure question of law—even though its conclusions will be reviewed de novo on any appeal. That principle applies no less to agency adjudications—an agency’s exercise of judicial power does not become an exercise of executive power merely because its decision is subject to de novo review by an Article III court. But under the appellate-review model’s logic, a tribunal adjudicating a deprivation of private right has exercised only executive power so long as judicial appeal is available. That cannot possibly be right with respect to district courts, and it is not right with respect to agencies either.

The appellate-review model proves too much also because, as Professor Nelson has observed, its logic would permit Congress to establish an administrative tribunal to conduct the initial adjudication of all prosecutions for federal

121. See e.g., Transcript of Oral Argument at 42, *Jarkesy*, 603 U.S. 109 (No. 22-859) (United States attorney arguing that the Due Process Clause requires “judicial review of the agency’s actions at the back end” without identifying any basis in text or history for that assertion).

122. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 953 (2011); see also Woolhandler, *supra* note 31, at 1785–1791 (discussing Merrill’s article).

123. In *FCC v. AT&T, Inc.*, the Supreme Court sustained the FCC’s forfeiture orders by characterizing them in exactly these terms: an order “is simply the Commission’s own determination,” and its “only legal effect is to enable the Department of Justice to file a suit.” No. 25-406, slip op. at 9 (U.S. June 4, 2026). A forfeiture order is a “prerequisite[] to suit” analogous to an EEOC right-to-sue letter—an executive step that binds no one. *Id.* at 10–11.

124. See Baude, *supra* note 8, at 1513–14 (the core of the judicial power is the power to bind parties and to authorize the deprivation of private rights). The government has cited *Executive Benefits Insurance Agency v. Arkison*, 573 U.S. 25 (2014) to assert the contrary, *AT&T, Inc.*, Forfeiture Order ¶ 69 n.225, FCC 24-40 (rel. Apr. 29, 2024), but *Arkison* concerned whether a bankruptcy court may enter “proposed findings of fact and conclusions of law” that are not final and do not bind anyone. 573 U.S. at 28 (emphasis added). That is a far cry from a final order that commands a company to promptly pay the government a dollar amount. See *FCC v. AT&T, Inc.*, No. 25-406, slip op. at 7, 9 (U.S. June 4, 2026) (upholding FCC orders on the ground that they “did not create an obligation to pay” and that their “only legal effect is to enable the Department of Justice to file a suit” in which a jury makes the ultimate determination *de novo*).

crimes.¹²⁵ That would be all the more egregious with a deferential standard of review, but it is obviously impermissible with even de novo review. The executive cannot convict Americans of crimes on the ground that judicial review is forthcoming, all agree, but the appellate-review model has no logical explanation for why that is.

Perhaps most importantly, moreover, defenders of the appellate-review model have identified no basis in text or ratification-era history for their assertion that backend judicial review satisfies the Constitution.¹²⁶ As noted, the leading scholar of the appellate-review model dates the practice to 1906. And the text-and-history inquiry, as Justice Amy Coney Barrett has explained, concerns “the history surrounding the ratification of the text.”¹²⁷ Because 1906 “long postdates ratification,” the appellate-review model’s emergence around that time has little relevance to the text-and-history inquiry.¹²⁸

The appellate-review model also fails under Supreme Court precedent. In *Jarkesy*, “[j]udicial review [was] available once the [administrative] proceedings . . . concluded.”¹²⁹ But that did not save the proceeding. The Court explained that matters concerning private rights “may not be removed from Article III courts.”¹³⁰ “Once . . . a suit is brought within the bounds of federal jurisdiction,” the Court stated, “an Article III court must decide it.”¹³¹ And when there is a deprivation of life, liberty, or property, an Article III court must decide it from the start. For common-law claims, the Court explained, “involvement by an Article III court *in the initial adjudication* is necessary.”¹³² The Court reached the same conclusion four decades prior, explaining that private rights cannot be “relegated as an initial matter to administrative adjudication.”¹³³

125. Nelson, *supra* note 1, at 618.

126. See *AT&T, Inc. v. FCC*, 135 F.4th 230, 242 (5th Cir. 2025) (“The Commission cites no authority supporting the proposition that the constitutional guarantee of a jury trial is honored by a trial occurring after an agency has already found the facts, interpreted the law, adjudged guilt, and levied punishment.”), *withdrawn and superseded on denial of reh’g en banc*, 149 F.4th 491 (5th Cir. 2025), *rev’d and remanded sub nom.* *FCC v. AT&T, Inc.*, No. 25-406, slip op. (U.S. June 4, 2026). The Supreme Court reversed on the ground that the FCC’s orders find no facts and adjudge no guilt in any binding sense: the government may collect only through a § 504 trial de novo, in which “it is as if the Commission never found any facts at all.” Slip op. at 8. The Court relied on twentieth-century precedent sustaining non-binding preliminary findings subject to de novo jury determination, see *id.* at 6–7; it identified no ratification-era history endorsing backend review of a binding deprivation.

127. *United States v. Rahimi*, 602 U.S. 680, 737 (2024) (Barrett, J., concurring).

128. *Id.*

129. *SEC v. Jarkesy*, 603 U.S. 109, 117 (2024).

130. *Id.* at 127.

131. *Id.*

132. *Id.* at 128; see also *id.* at 168 (Sotomayor, J., dissenting) (observing that the majority held that “Congress cannot assign a certain public-rights matter *for initial adjudication* to the Executive because it must come only to the judiciary” (emphasis added)).

133. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 854 (1986).

D. The Constitution's Judicial-Process Protection Applies Against the States

Because *Jarkesy* was pleaded as a Seventh Amendment case and the Supreme Court has not held that the Fourteenth Amendment incorporates the Seventh Amendment against the states,¹³⁴ some have wondered whether the Constitution's judicial-process protections apply against the states.

They do. The Fourteenth Amendment provides that "[n]o state" shall deprive any person of "life, liberty, or property, without due process of law." As discussed, that means as a matter of federal law, state governments may not deprive Americans of private rights absent judicial process.

CONCLUSION

As a matter of text and history, the question whether the government may deprive Americans of property rights through executive adjudication is easy. No one seriously disputes that Article III, the due process clauses, and the Seventh Amendment all require judicial process before the government may deprive an American of life, liberty, or property. Some have nevertheless argued that as a matter of precedent, the public-rights exception allows extrajudicial deprivations of property when the government is pursuing an important interest, or when the government's cause of action has no common-law analogue, or when there is backend judicial review. But text and history emphatically reject those propositions: a government attempt to deprive an American of property is precisely the kind of proceeding that the Constitution's judicial-process protections most target, and the public-rights exception plainly does not apply in such instances.

So despite decades of doctrinal confusion about the public-rights exception, the text and history surrounding that doctrine is simple and uncontested. Practitioners should urge the courts to adopt the doctrine's original understanding in full.

134. See *Thomas v. Humboldt Cnty.*, 607 U.S. ____ (2025) (Gorsuch, J., respecting the denial of certiorari).