# ARTICLES

## A Historical Case for a Robust but Non-Remedial Seventh Amendment

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ABSTRACT

*In* SEC *v.* Jarkesy*, the Supreme Court rightly held that the Seventh Amendment required a jury trial for a case fundamentally similar to common law fraud, and it rightly limited the scope of the "public rights" exception to the Seventh Amendment. Grounded in historical and originalist methods, this essay makes four suggestions to continue along the same lines as* Jarkesy*:*

1. *Continuing a more robust enforcement of the right to a jury trial, the courts should eliminate the "public rights" exception to the Seventh Amendment, which does not appear to have an original historical grounding in the Seventh Amendment. The "public rights" exception seems to have been a pragmatic spill-over from Article III "judicial power" jurisprudence, where it also has limited support in original public meaning.*
2. *Relatedly, the courts should more informally enforce Article III "judicial power," which has a more ambiguous original public meaning. If the courts de-emphasize Article III's "private rights" protections, then the counterbalance from a "public rights" exception would be less necessary, and thus it would be possible to abandon the dubious public rights/private rights distinction entirely.*
3. *As these questions are more a matter of an individual right to a jury than a structural separation-of-powers matter, individual waiver of the Seventh Amendment right would be* more *valid.*
4. *Whereas* Jarkesy *focused on both substance and remedy in interpreting "the common law," the scope of the "common law" should be based on the substance (the right, the wrong, or the duty), and not the remedy.*

*The overall result would be a Seventh Amendment jurisprudence and an Article III "judicial power" jurisprudence more consistent with original public meaning, but also unlikely to lead to an originalist revolution overturning significant institutions of the administrative state.*

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In *Jarkesy*, the Roberts Court rightly held that the Seventh Amendment required a jury trial for a case fundamentally similar to common law fraud, and it rightly limited the scope of the "public rights" exception to the Seventh Amendment.[1] The Supreme Court was right to emphasize the Seventh Amendment, the clarity of its text, and the breadth of the right to a jury as a matter of original public meaning.[2] Chief Justice Roberts captured the common law, common sense of the Seventh Amendment case: "The SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury."[3]

The *Jarkesy* Court was also right to de-emphasize the confusing and generally unnecessary "public rights" exception and the related Article III "public"/"private" jurisprudence.[4] It also correctly avoided the anti-historical presidential removal argument[5] and the non-delegation question that were less relevant in this

1. SEC v. Jarkesy, 603 U.S. 109, 140 (2024).
2. *Id*. at 121.
3. *Id*. at 120.
4. *Id*. at 127.
5. For a concise review of the recent literature on the weakness of the originalist evidence for the unitary executive theory, see generally Jed Handelsman Shugerman, *The Ebb, Flow, and Twilight of Presidential Removal*, 49 ADMIN. & REGUL. L. NEWS 6 (Spring 2024) [hereinafter Shugerman, *Presidential Removal*]; JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018) [hereinafter GIENAPP, *The Second Creation*]; Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding*, 63 AM. J. LEGAL HIST. 229 (2023) [hereinafter Gienapp, *Removal*]; Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist*

case. Chief Justice Roberts wisely repeated the longstanding concerns about the clarity of the "public rights"/"private rights" distinction that developed from the Article III "judicial power" precedents.[6]

Past precedents and federal courts scholars have treated Article III as the starting point of the analysis, and then they turn to the Seventh Amendment as secondary or even as a redundant afterthought.[7] Instead, courts should lead with the Seventh Amendment analysis and downplay its formalistic enforcement of separation-of-powers doctrine under Article III. *Jarkesy* was an important step towards re-focusing on the Seventh Amendment.

This symposium essay suggests that the Supreme Court should take four next steps in light of its own reasoning. First, the judiciary should continue a more robust enforcement of the Seventh Amendment right to a jury trial. As part of that stronger protection, the Supreme Court should drop the "public rights" exception to the Seventh Amendment, which seems to be a confusing spill-over from the Article III precedents. The Seventh Amendment's text and original public meaning are clear enough in protecting a right to a jury trial in the context of the common law tradition, and it is unclear why there should be exceptions—especially exceptions that are fuzzy, subjective, and incoherent. The Seventh Amendment

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Argument for Independent Agencies, 96 NOTRE DAME L. REV. 1 (2020); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129 (2022); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175 (2021); Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404 (2023); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 J. CONST. L. 323 (2016); *See also* Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 UNIV. PA. L. REV. 753 (2023); Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022); Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 FORDHAM L. REV 2085 (2021); Jed Handelsman Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J. L. & HUMANS. 125 (2022); Jed Handelsman Shugerman, *Venality: A Strangely Practical History of Unremovable Offices and Limited Executive Power*, 100 NOTRE DAME L. REV 213 (2024).

6. *Jarkesy*, 603 U.S. at 127, 132.

7. Sotomayor wrote in her *Jarkesy* dissent: "Although this case involves a Seventh Amendment challenge, the principal question at issue is one rooted in Article III and the separation of powers." *Id.* at 171, 173 (Sotomayor, S., Dissenting). Soon after, Justice Sotomayor cited William Baude on a similar point. *Id.* (citing William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1571 (2020)). William Baude has argued that:

> Instead of getting distracted by the widespread use of adjudicative *procedures*, one should instead ask what *power* is at issue. This also provides a better way to approach Article III and its exceptions. Rather than asking about exceptions to the exclusivity of Article III, one should start by recognizing that Article III is exclusive at what it does — which is to vest "the judicial power of the United States . . . So when confronted with a non–Article III tribunal, Article III prompts two questions about it. First, with what kind of power has this body been vested? Second, what does that power permit that body to do? . . . The foregoing analysis suggests that the *Oil States* approach is basically right. The Article III analysis should be conducted first, on its own. And then (with the exception of territorial courts) if the non– Article III adjudication is permissible, the Seventh Amendment should be ignored.

Baude, *supra*, at 1520, 1571. *See also* Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non– Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 433 (1995).

and Article III defend different interests (individual rights vs. structural interests and separationism). While those interests overlap, there is little textual or historical reason to import an Article III "public rights" exception to override the individual rights that the Seventh Amendment expanded, after the original 1787 structure was found wanting.

A second step is a more historically grounded counterbalance: Courts should decrease the enforcement of Article III "judicial power." Relatedly, if the "private rights" protections are de-emphasized, then it would be less necessary to manufacture an exception to that rule for "public rights."

A third step also balances the more robust enforcement of Seventh Amendment by correcting for an overreach in *Jarkesy*. Whereas *Jarkesy* focused on both substance and remedy in interpreting "the common law," the scope of the "common law" should be based on the substance (the right, the wrong, or the duty), and not the remedy. The Supreme Court's focus on remedies seems to stretch or conflict with the original public meaning of the Seventh Amendment. *Jarkesy* is an illustrative example of a substantive overlap (the overlapping definition of fraud between the statute and the common law) and of an overbroad interpretation of remedies (civil monetary fines). On balance, these changes would lead incrementally to more robust protections of the right to a jury trial and more limits on non-Article III adjudication.

Finally, as these questions are more a matter of an individual right to a jury than a structural separation-of-powers matter, individual waiver of the Seventh Amendment right would be *more* valid.[8] This expanded waiver rule would be more historically grounded, more coherent, and more manageable, without overturning too many precedents.

The Seventh Amendment's text and context are relatively clear, while the Article III "public rights" jurisprudence is a mess, as the *Jarkesy* Court acknowledged, more or less.[9] Many scholars across the ideological spectrum have agreed.[10] Chief

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8. *See Wellness Int'l Network Ltd. v. Sharif*, 575 U.S. 665 (2015). When the question is separation of powers, rather than the Seventh Amendment individual right, Justice Sotomayor's majority opinion recognized a balancing test that limited waiver, and in dissent, Roberts and Scalia rejected the notion that individuals could waive structural protections of the separation of powers.

9. *See Jarkesy*, 603 U.S. at 131 ("This is an 'area of frequently arcane distinctions and confusing precedents.'. . . The Court "has not 'definitively explained' the distinction between public and private rights," and we do not claim to do so today.") (quoting Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 584 U. S. 325, 334 (2018)); *See also* Stern v. Marshall, 564 U.S. 462, 488 (2011) ("not been entirely consistent"); *Oil States*, 584 U. S. at 334 ("This Court has not 'definitively explained' the distinction between public and private rights, and its precedents applying the public-rights doctrine have 'not been entirely consistent.").

10. Scholars have described it as "almost wholly open-ended and amorphous" and "verg[ing] on the incoherent." Baude, *Adjudication Outside Article III*, at 1519 (citing Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 917 (1988); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L. J. 197, 208–09 (1983); Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 600 (1985); Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1639 n.270 (2006)); Fallon, *supra*, at 931; Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607,

Justice Roberts also acknowledged that this exception "has no textual basis in the Constitution and must therefore derive instead from background legal principles."[11] One take-away from *Jarkesy* seems to be that the Seventh Amendment will be enforced more robustly while Article III "judicial power" takes more of a backseat. This essay supports such a shift in emphasis, and it also suggests an extension of these critiques: Abandon the Seventh Amendment's "public rights" exception entirely.

The "public rights" exception first developed in the Supreme Court's nineteenth-century Article III "judicial power" cases to establish practical limits on the scope of Article III and to allow Congress to create alternative fora for adjudication, especially in broader domains of public regulation and public benefits.[12] First, this essay questions the "public rights" exception and its originalist basis, but it still supports this exception to Article III because the originalist basis for a broad and formal scope of "judicial power" is also weak. If the originalist evidence on both sides is weak, the Article III "public rights" precedents should stand, both as a matter of *stare decisis* (and insufficient historical evidence to justify overturning those precedents) and as a long-standing common-sense doctrinal check against the over-enforcement of Article III judicial power.

However, it was a category error to import the Article III "public rights" exception into Seventh Amendment jurisprudence. Article III and the Seventh Amendment have overlapping purposes, but they are not identical, and in fact, they have conflicting purposes: the original public meaning of the right to a jury was, in part, to protect individual rights *from Article III judges*.[13] "Public rights" make more sense as a matter of the separation of powers, carving out a domain for Congress and the executive, while protecting judicial control over its traditional domain of private rights. But the Seventh Amendment was added to protect individual rights against the federal government more broadly—against Congress, against executive officials, and against Article III judges, too. The Supreme Court (and some academics) have treated Article III and the Seventh Amendment as parallel and coterminous, and that conflation is the category error.[14] As I will suggest below, individual rights are arguably even more endangered in "public rights" cases before public officials, whether executive or

638 (2002) (critiquing the public rights exception as "an ill-defined category"); Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L. J. 233, 236–37 (1990); *see also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, TAN 90–92 (1983); RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 354 (7th ed. 2015) ("Despite its historical lineage, the public rights category has never received a canonical formulation."); Kent Barnett, *Due Process for Article III—Rethinking* Murray's Lessee, 26 GEO. MASON L. REV. 677, 677–78 (2019).

11. *Jarkesy*, 603 U.S. at 131.

12. *See infra* Part II.

13. *See infra* Part I for evidence of Anti-Federalists' concerns about the powers of life-time federal judges.

14. *See infra* Part II.

judicial. If government officials have a political stake in disputes over "public rights," an individual right to a jury of non-official peers is more vital, not less.

As part of the critique of the Supreme Court's confusing over-enforcement of Article III separationism, this essay also identifies three ironies, paradoxes, or inconsistencies, based on some originalist observations:

First, the "public rights" exception is inconsistent with the specific original arguments for the right to a jury trial and with the broader Founding principles of protecting individual rights against government abuses. Why should an individual defendant receive less procedural protection, whether that means a less independent judge or less of a right to a jury trial when the dispute is characterized as a "public right"? When a dispute is over "public rights," it is more likely that the government has a stronger interest in the case, whether it is formally a party or not, and/or there is broader popular political interest on the "public side" and against the individual defendant. If the original public meaning of separation of powers, Article III judicial independence, and the Bill of Rights is to protect individual rights against abuses of power by government officials and factions, then when a right is more broadly "public," an individual arguably should receive more protection —not less. In the very least, the "public"/"private" distinction seems to be a flawed stand-in for other functional intuitions about relative burdens and the stakes of regulation (e.g., public benefits vs. civil or criminal penalties). Arguably those factors are more coherent and relevant. The recently departed Henry Monaghan famously critiqued the "public/private rights" jurisprudence, and then concluded: "the central constitutional problem is that of vindicating the values of limited government, [and] our tradition is that the court's role is simply to keep the administrative agencies within the boundaries of delegated power."[15] Focusing on limited government and individual rights is more coherent and originalist than the arbitrary distinction between "public" and "private."

Second, there is an irony of the Supreme Court exercising activist judicial power to enforce Article III "judicial power." Not only is the "public rights"/"private rights" distinction unclear, the original public meaning of "judicial power" was also unclear, especially in terms of any fixed, formal category. There is little evidence to support such a formalistic approach to separating judicial power from executive, and a more informal approach is more appropriate. The Seventh Amendment thus has a stronger historical foundation than the formalist Article III jurisprudence. Moreover, as many scholars have already demonstrated, while the power of judicial review was well-established at the Founding, an originalist approach to judicial review should be more restrained and cautious.[16]

Part I offers an account of the Seventh Amendment's original public meaning, with which *Jarkesy* is consistent. Part II questions the originalist basis for the "public rights" exception, which originated as a doctrinal mitigation of Article III

15. Monaghan, *supra* note 10, at 7.

16. *See, e.g.*, Derek A. Webb, *The Lost History of Judicial Restraint*, 100 NOTRE DAME L. REV. 289 (2024).

"judicial power" formalism and judicial activism, and then spilled over to the Seventh Amendment. Part III highlights the irony of the public rights exception: If protecting individual rights is the purpose of either the Seventh Amendment or Article III, then if the public's interest is more salient, the risk to the individual is greater, not less. Part IV summarizes the ahistorical problem of interpreting "judicial power" as a clear, formal, fixed category, when it was originally ambiguous. Part V focuses on the problem of interpreting the Seventh Amendment to protect not only the substantive rights, but also to limit the scope of remedies; hence, the title of this article emphasizes a "substantive" Seventh Amendment, without also interpreting the Seventh Amendment to narrow administrative remedies.

## I. THE ORIGINALIST APPROACH TO THE SEVENTH AMENDMENT

The *Jarkesy* Court got the law and the history right: The Seventh Amendment basis for a right to a jury trial is more grounded in original public meaning and more manageable as a legal matter, whereas the Article III "public"/"private" distinction is confusing and less workable.[17]

The strongest parts of the majority opinion and Justice Gorsuch's concurrence—and the weakest part of Justice Sotomayor's dissent—are on the original public meaning of the Seventh Amendment. Justice Sotomayor attempted a cramped textual reading of the amendment.[18] Here is the text, as a reminder:

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

In 1977, the Supreme Court interpreted "suits at common law" narrowly and hyper-textually (and as we shall see, out of context of the Seventh Amendment's original public meaning). In *Atlas Roofing*, a case about OSHA regulations, Justice Byron White concluded that OSHA had created new public rights for workers, not old common law rights, and that executive-branch adjudications of new "public rights" were not "Suits at common law" covered by the Seventh Amendment.[19] Relying on *Atlas Roofing*, the Biden administration had argued that administrative proceedings are not "Suits," so that all Congress has to do to circumvent the Seventh Amendment is to convert the substance of common law litigation into an agency action.[20] In her *Jarkesy* dissent, Justice Sotomayor also cited *Atlas Roofing* and repeated this narrow interpretation of the Seventh Amendment's text by focusing on a narrow reading of the word "Suits":

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17. *Jarkesy*, 603 U.S. at 130–35.
18. *Id.* at 171–173 (Sotomayor, J., dissenting).
19. Atlas Roofing Co. v. Occupational Safety and Health Rev. Comm'n, 430 U.S. 442 (1977).
20. *Jarkesy*, 603 U.S. at 152 (Gorsuch, J., concurring) (citing Brief for Petitioner at 21).

> As to the text, the Amendment is limited to "Suits at common law." That means two things. First, that the right applies only in judicial proceedings. The term "suit," after all, refers to "the prosecution of some demand in a Court of justice," or a "proceeding in a court of justice."[21]

Here we have a good example of how originalism is not the same thing as "textualism" or "strict constructionism." The text was an ambiguous shorthand for a broader purpose. A narrow literalist reading would erase the fundamental principles memorialized by the text, and it would allow Congress to circumvent those principles simply by turning a common law rule into legislation.

Chief Justice Roberts and Justice Gorsuch both laid out the originalist evidence. This evidence also weighs against a "public rights" exception to the Seventh Amendment, but Chief Justice Roberts did not entertain that broader challenge.

Both Chief Justice Roberts and Justice Gorsuch recounted how Parliament and British colonial administrators dodged American juries by redirecting enforcement to admiralty, vice admiralty, and chancery courts, which did not use juries.[22] Americans condemned the subversion of their traditional right to a jury in resolutions, in the First Continental Congress, and in the Declaration of Independence.[23] As Bernard Bailyn has explained, colonial governors in the 1860s exploited their appointment powers for patronage, especially to "'prerogative' courts composed not of juries but of single judges whose posts were 'political offices in the hands of the royal governors, to be bestowed upon deserving friends and supporters.'"[24] Bailyn quoted several sources indicating that juries were protections from politically biased judges.[25] Thus, a right to a jury trial was not understood to be the same as the interest in protecting judicial power; a jury was a protection from judicial power. Thus, the historical context of Article III and the Seventh Amendment show that they each protected different interests, even if they also overlap.

In the *Federalist Papers*, Hamilton conceded that the "most success[ful]" challenge to the proposed Constitution was its "*want of a . . . provision* for the trial by

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21. *Id.* at 171 (Sotomayor, J., dissenting) (citations omitted). Sotomayor also offered confusing references to precedents: "Consistent with that understanding, this Court has held repeatedly that 'the Seventh Amendment is not applicable to administrative proceedings.'" *Id.* (citing Tull v. United States, 481 U.S. 412, 418, n. 4 (1987)).

22. *Jarkesy* at 121, 146–147.

23. *See* RESOLUTIONS OF THE STAMP ACT CONGRESS, Art. VIII (Oct. 19, 1765); JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 69 (W. Ford ed. 1774); THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776); *see also Jarkesy*, 603 U.S. at 121 (Gorsuch, J., concurring) (citing E. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 347, 355 (1967)); CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 19 (1960); David S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764–1776*, 16 WM. & MARY Q. 459, 468 (1959).

24. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 108 (1967) (citing CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 125–126 (1960)).

25. *Id.*

jury in civil cases."[26] The evidence from the Ratification debates shows the Framers, recognizing the British problem of forum diversion, specifically worried about governmental enforcement and redirection of cases to non-judicial fora. In the Virginia ratifying convention, James Monroe warned of the dangerous loss of the right to a jury trial in a tax dispute between an individual and the federal government—the kind of dispute that would be covered by the modern "public rights" exception to undermine the right that Monroe wanted to protect.[27] In 1787, "Democratic Federalist" raised fears of abuses by non-judicial officers (what we would call "executive" today), such as military officers, constables, and "excise or revenue officers."[28] As amici noted, "[t]he reference to 'excise or revenue officers' makes clear that civil cases between citizens and the federal government were on the author's mind."[29] The reference to constables, excise and revenue officers, and military officers also indicates that their concerns were not limited to "suits" in "courts of justice" and "judicial proceedings," but to all kinds of official enforcements. Just as the British had redirected enforcement from common law courts and juries, Anti-Federalists protested that Congress could create complex "federal processes" that would curtail individual rights.[30]

The right to a jury trial is also a check on all government officials, whether judges or executive officials in administrative agencies:

> [I]n such cases, a trial by jury would be our safest resource, heavy damages would at once punish the offender, and deter others from committing the same: but what satisfaction can we expect from a lordly court of justice, always ready to protect the officers of government against the weak and helpless citizen . . .? What refuge shall we then have to shelter us from the iron hand of arbitrary power?[31]

Juries checked the power of corrupt judges.[32] The Seventh Amendment and Article III judicial power work together as checks on the scope of congressional power and executive agency adjudication, but the Seventh Amendment is also a check on Article III judges. Most importantly for the future of agency adjudication, this history makes it clear that the Seventh Amendment protects the

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26. THE FEDERALIST NO. 83 (Alexander Hamilton); *see also* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 539–540 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1888).

27. Brief of Constitutional Originalists Edwin Meese III, Steven G. Calabresi, and Garry S. Lawson as Amici Curiae in Support of Respondents at 9, SEC v. Jarkesy, 603 U.S. 109 (2024) (No. 22-859).

28. *See* Letter from a Democratic Federalist (Oct. 17, 1787), *in* 5 THE FOUNDERS CONSTITUTION 354 (Philip B. Kurland & Ralph Lerner eds. 1987).

29. Meese, *supra* note 27, at 9.

30. *See* Letter from a Federal Farmer (Jan. 20, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST 328 (Herbert J. Storing ed., 1981).

31. Letter from a Democratic Federalist (Oct. 17, 1787), *in* 5 THE FOUNDERS CONSTITUTION 355 (Philip B. Kurland & Ralph Lerner eds., 1987).

32. *See* A Farmer, Md. Gazette (March 21, 1788), *in* 5 THE COMPLETE ANTI-FEDERALIST 36, 37–40 (Herbert J. Storing ed., 1981).

substance of common law rights and duties, and not just common law process; and that it applies to common law rights and duties, whether public or private.

## II. WHAT IS THE ORIGINALIST BASIS FOR THE "PUBLIC RIGHTS" EXCEPTION?

Chief Justice Roberts in *Jarkesy* followed the rule that, even if a case implicates the Seventh Amendment, there is still an exception to the Seventh Amendment's individual rights protections if the case relates to the same "public rights" under the Article III precedents.[33] In the end, the majority rightly found that the public rights exception did not apply in *Jarkesy*.[34] However, more generally, the public rights exception should not cross over from Article III to the Seventh Amendment to create an exception to the individual right to a jury trial. This doctrinal spill-over is a category error. In the future, the Court should drop this exception entirely.

In *Jarkesy*, Chief Justice Roberts offered an example of how this exception spills over from Article III to the Seventh Amendment:

> Since this case does implicate the Seventh Amendment, we next consider whether the "public rights" exception to Article III jurisdiction applies. This exception has been held to permit Congress to assign certain matters to agencies for adjudication even though such proceedings would not afford the right to a jury trial.[35]

This approach assumes that the Seventh Amendment right to a jury and Article III "judicial power" are coterminous and parallel. Of course, they overlap, but their purposes are not the same. Part I offered evidence from Anti-Federalists who argued for an individual's right to a jury as a bulwark against the abuses of federal judges, as well as the abuses of legislative and executive power. These arguments form a background understanding for the ten amendments drafted by the First Congress and then ratified by the states. It is a category error to apply the exceptions to Article III as exceptions to the Seventh Amendment without pausing to consider the Seventh Amendment's different context and purposes. Article III "judicial power" first and foremost serves to protect checks and balances, the separation of powers, and judicial independence. Those purposes indirectly protect individual rights, but Article III judicial power can also be a threat to individual rights, as Anti-Federalists warned.[36] The Seventh Amendment more directly protects individual rights from the federal government across all three of its branches.

The text and history of the Seventh Amendment indicates that when the substance of a dispute is grounded in the common law, an individual has a right to a jury trial. What is the textual or historical basis for exceptions to that right? As

33. SEC v. Jarkesy, 603 U.S. 109, 127–34 (2024).
34. *Id*. at 121, 136, 140–41.
35. *Id*. at 120.
36. *See supra* Part I.

discussed below, federal courts had good reason to develop a "public rights" exception to Article III "judicial power," because some early state constitutions (and then the federal Constitution) had more or less created the notion of "judicial power" as a third power on par with legislative and executive powers. Six states had adopted a "separation of powers" clause between 1776-1780, but the federal Convention in 1787 did not.[37] The First Congress even proposed an explicit separation-of-powers amendment, but it was rejected partly because members thought it would contradict the Constitution's mixed structure of checks and balances.[38] Even an explicit clause does not necessarily mean a concept must be enforced formally, because an explicit clause can still be too ambiguous to be applied formally. If there is no text at all, and its absence is conspicuous, it is even more difficult to interpret an inference formally. It thus makes more sense to interpret Article III "judicial power" more functionally, with more space for checks and balances than strict separationism, and with more room for construction and development by precedents over time.

However, the text and context of the Seventh Amendment are more clear and thus less functional and flexible. In the functional domain of separation of powers and of checks and balances, and in the context of the open-ended term "judicial power," functionalist exceptions like "public rights" are more legitimate. The "public rights" exception does not need a strong foundation in original public meaning because the precise scope of Article III "judicial power" does not have its own strong foundation in original public meaning. The Framers knew what judging was, but the lines between judging and executing were especially unclear. By contrast, the Seventh Amendment, while not crystal clear in its text and context, is still more concrete and historically grounded than "judicial power." In Article III jurisprudence, it may have been appropriate to carve out "public rights" exceptions even without much historical or originalist evidence, but under the Seventh Amendment, those historical questions are more crucial.

What, then, is the historical basis for a "public rights" exception, for either the Seventh Amendment or for Article III? The foundational precedent on "public rights" was *Murray's Lessee v. Hoboken Land & Improvement* in 1856, and while it included seven pages on eighteenth-century English procedure, that history related more to concepts of "due process," and that section of the opinion did not use the word "public" at all.[39]

Legal scholarship on Article III indicates that early nineteenth-century courts developed the "public rights" doctrine, and they do not offer much evidence, if any, from the eighteenth century for this terminology.[40] Contemporary federal

37. *See* Shugerman, *Venality*, *supra* note 5, at 231; Shugerman, *Vesting*, *supra* note 5, at 1503.

38. *See* Shugerman, *Vesting*, *supra* note 5, at 1503–04; Shugerman, *Indecisions of 1789*, *supra* note 5, at 798–99.

39. *See* 59 U.S. at 272, 276–82.

40. *See, e.g.*, Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. PENN. L. REV. 1429; Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?,*

courts scholars point to Gordon Young's research as "seminal,"[41] and Young indicated that the doctrine evolved after 1789.[42] In Young's 107-page genealogy, the only source he cited from before 1789 did not use the term "public rights," but instead, "affected with the public interest," in a posthumous publication of Lord Hale's writings, with no argument that this source shaped the understanding of Article III.[43]

Thomas Lee and John Golden's recent articles and their amicus brief filed in *Jarkesy* offer more eighteenth-century historical evidence. Their 2022 article has a helpful ten-page section on the Ratification debates, providing context about the scope of judicial power, but no examples of the word "public" (let alone "public rights") being used in association with those concerns.[44] Perhaps "public rights" is, in retrospect, a helpful way to reflect Ratification-era concerns, but it seems under-inclusive and over-inclusive, and it is difficult to argue that the category reflected an original public meaning if the Framers and Ratifiers did not even use the word "public" in those debates. Their follow-up 2023 article refers to *Murray's Lessee*, the 1856 case, as "the birth of the public rights doctrine."[45] They point to eighteenth-century practices as a background that can fit under a category or umbrella later named "public rights," but again, there is no suggestion that the term or doctrine was established by the late eighteenth century.

Golden and Lee filed an amicus brief in *Jarkesy* responding to the Fifth Circuit's reliance on Blackstone in its ruling in favor of the Seventh Amendment right to a jury and against applying the public-rights exception to the SEC's fraud enforcement. Arguing that the Fifth Circuit misconstrued Blackstone, they sought to clarify that "Blackstone distinguished between 'private wrongs' to be adjudicated by the Court of King's Bench and 'public wrongs,' a category that included offenses adjudicated by commissioners or justices of the peace without a jury."[46] They were rebutting the Fifth Circuit more than they were making their own independent argument from Blackstone, but their interpretation suggests an intriguing possibility that the public rights doctrine could have an originalist basis from Blackstone. Blackstone connected the "private wrongs" and "public wrongs" categories in the terms of "private rights" and "public rights":

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102 MICH. L. REV. 689 (2004) (discussing the distinction's relevance to traditional ideas about the proper parties to lawsuits); Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L. J. 1015 (2006) (discussing the distinction's relevance to constitutional limits on "retroactive" legislation); John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143 (2019).

41. *See* Nelson, *Vested Rights, supra* note 40, at 1431 n.5.

42. *See* Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765 (1986).

43. *See id.* at 807.

44. *See* John M. Golden & Thomas H. Lee, *Federalism, Private Rights, and Article III Adjudication*, 108 VA. L. REV. 1547, 1574–84 (2022).

45. John M. Golden & Thomas H. Lee, *Congressional Power, Public Rights, and Non-Article III Adjudication*, 98 NOTRE DAME L. REV. 1113, 1138 (2023).

46. *See* Brief for John M. Golden and Thomas H. Lee as Amicus Curiae, SEC v. Jarkesy, 603 U.S. 109 (2024) (No. 22-859) at 6.

> Blackstone explained that "private wrongs" "are an infringement or privation of the private or civil rights belonging to individuals," whereas "public wrongs" "are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*." 3 Blackstone, supra at *2 (emphasis in original).[47]

Golden and Lee continued later:

> Indeed, consistent with this Court's later-articulated public-rights doctrine, in Volume IV's chapter 20 "Of Summary Convictions," Blackstone explicitly observed that commissioners and justices of the peace may, without trial by jury, adjudicate various matters of public right. See 4 William Blackstone, Commentaries on the Laws of England *277–78 (1769). Such matters included "all trials of offences and frauds contrary to the laws of the excise, and other branches of the revenue." Id. at 278 (emphasis in original). Blackstone's recognition that the legislature may provide for adjudication of government revenue cases by commissioners and justices of the peace acting without the benefit of a jury foreshadowed this Court's decision in *Murray's Lessee v. Hoboken Land Improvement Co*., 59 U.S. 272 (1856), the foundational private-rights/public-rights precedent in the United States. *Murray's Lessee* involved the execution of a distress warrant "issued by the solicitor of the treasury" against the property of a former customs collector. Id. at 274.[48]

This historical background is an important starting point for an originalist basis for the "public rights" doctrine. At this stage, one could make a case that a public rights exception is a valid limit to enforcing Article III's "judicial power," because "judicial power" is already murky; thus a murky rule deserves to be balanced by a murky exception. However, the point is that both are so fuzzy in terms of historical basis and doctrinal coherence that both should be downplayed.

Article I and Article III already grant Congress powers to legislate substance and jurisdiction to shape and limit judicial power.[49] Based on the originalist evidence, "judicial power" seems to be an informal, inchoate concept. The evidence from Blackstone about "public wrongs" and "public rights" is additional evidence that "judicial power" was still developing during the Ratification debates, and today's judges should be careful about interpreting it too strictly and defending Article III powers too aggressively.

However, it is unclear if this evidence from Blackstone is solid enough as original public meaning limiting the scope of the Seventh Amendment's clearer right to a jury. First, Blackstone's distinction might be unnecessary or redundant, because his "private wrongs" might already fit under "the common law," and his

47. *Id*. at 7.

48. *Id*. at 6–7.

49. *See, e.g*., U.S. Const. Art. III, § 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

"public wrongs" might be non-common law. If Blackstone's descriptions of "private wrongs" fit the common law, then it is unclear how it would affect the Seventh Amendment, because its text already limits the amendment to the common law. If "private wrongs" are common law, and "public wrongs" are not, then the text "common law" is a sufficient distinction to cover "private wrongs" and exclude "public wrongs." The concepts of "public wrongs" and "public rights" are redundant and unnecessary if the text "common law" already excludes them from the Seventh Amendment's scope.

In other words: If the substance in any particular case fits into the category of a "public wrong" or a "public right," it is not covered by the Seventh Amendment's text anyway, so there is no need for an exception if it is already not covered by the "common law" rule.

This distinction might help in interpreting Article III "judicial power," but it seems less relevant in interpreting the Seventh Amendment. The courts have treated "the common law," "public right," and "private wrong" as close enough of an overlap that separate analysis is often unnecessary. In *Stern v. Marshall*, the Supreme Court acknowledged: "If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory."[50] Again, why get caught up in the slippery "public"/"private" distinction if the category "common law" already does enough of this work?

A second problem relates to theories of originalism. When the First Congress and the states ratified the Seventh Amendment, did they think they were also ratifying a technical and lawyerly distinction between "public rights" and "private rights"? Two more recent schools of originalist thought, "original methods originalism" (associated with John McGinnis and Michael Rappaport)[51] and "original law originalism" (associated with Stephen Sachs and William Baude)[52] might support a close reading of Blackstone or other treatises on such lawyerly distinctions, but the text of the Seventh Amendment seems to have sent a broader and clearer message to the public: If the action is based in "the common law," the jury right attaches.

A third problem is something I have identified as "Heads I Win, Tails You Lose" originalism. Here is how I described it recently in my article "Venality":

> Sometimes originalists claim continuity of the British practice (e.g., the unitary executive scholars treating royal powers as a model), but sometimes originalists claim discontinuity (e.g., rejecting parliamentary supremacy in favor of constitutional supremacy, the separation of powers, and nondelegation; British colonial abuses being rejected in favor of a Bill of Rights, like the Roberts

50. SEC v. Jarkesy, 603 U.S. 109, 111–12 (2024).

51. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 Nw. U. L. Rev. 751 (2009).

52. *See* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809 (2019).

> Court's recent originalist arguments for expanding the Seventh Amendment right to a civil jury; or the republican rejection of royalism). . .
> How do we know when the British practice was a model or an antimodel? This uncertainty leads to inconsistencies which can be called "heads-I-win, tails-you-lose originalism." These "British Backdrop" arguments are an example of "heads I win, tails you lose." On the one hand, the unitary theorists point to an English practice as a model: the Crown removing officers as evidence of a default rule of "executive power." When critics offer counterevidence that Parliament often protected offices as a contrary default rule of legislative control, unitary theorists, on the other hand, dismiss those examples as mere exceptions that prove the rule: Parliament had to act in order to change the default rule, a royal "executive power" of removal, and the Americans rejected England's parliamentary supremacy. Why is the British executive the relevant default rule, and why is legislation the alien or rejected exception? Why don't these examples from Parliament count as evidence of a traditional "legislative power" to protect offices, which Article I vested in Congress?[53]

The Seventh Amendment is a good example of British practice as both the model and the anti-model: The English had established the right to a jury from "time immemorial" (the medieval period),[54] but arguably, they also eroded it in the eighteenth century. Blackstone may have been recording both the right and the watering-down of that right. How do we know if the American Framers of the Seventh Amendment endorsed that erosion that Blackstone described as the non-jury enforcement of public rights and public wrongs?

The British colonial administration's violations were the anti-model inspiring the Seventh Amendment. Would other backsliding, eroding, redirecting and non-jury exceptions also be problematic? Blackstone is a relevant source for understanding "the common law," but evidence from the American side of the Atlantic is even more weighty in terms of American original public meaning—and the American sources do not seem to support such a distinction and exception. Moreover, the text appears to be written so broadly that it also seems not to countenance such an exception. In the end, Golden and Lee's historical evidence is more powerful when interpreting the relatively informal, inchoate, flexible meaning of Article III "judicial power," but at this stage, less compelling for more formal meaning of the Seventh Amendment right to a jury.

## III. THE "PUBLIC RIGHTS" EXCEPTION CONFLICTS WITH BROADER CONSTITUTIONAL PURPOSES OF CHECKING AGAINST GOVERNMENTAL ABUSE

The Seventh Amendment's original meaning and Founding principles also counsel in favor of ending the "public rights" exception. Why should an individual defendant receive less procedural protection, whether that means a less independent judge or less of a right to a jury trial, when the dispute is characterized as

53. Shugerman, *Venality*, *supra* note 5, at 228.
54. *See, e.g.*, J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 72-73 (2002).

a "public right"? Justice Sotomayor noted that "the [exception's] heartland consists of claims belonging to the Government." But this begs the question: Why should "in-house" adjudications provide less protection to individual defendants? Would not the "in-house-ness" of an adjudication, if you will, be more problematic, not less?

To the contrary: When a dispute is over "public rights," it is more likely that the government has a stronger interest in the case—whether it is formally a party or not—and/or there is broader popular political interest on the "public side" and against the individual defendant. As one of the amicus briefs argued:

> [I]t is suggested that in public-rights cases, where the federal government is a party, an individual is less in need of a civil jury than the individual is when involved in litigation with another private party. This argument is ludicrous on its face. The federal government employs hundreds of thousands of lawyers, and it has an annual budget of $1.7 trillion in 2023. *See Discretionary Spending in Fiscal Year 2022*, Congressional Budget Office (Mar. 28, 2023). Surely, the protection of civil jury trial is *more* necessary when the federal government brings a lawsuit than when a private person does so. The founding generation would have laughed at (or perhaps revolted against) this argument.[55]

Moreover, the APA regards a more "in-house-ed" and unseparated arrangement as problematic, and thus the APA created more separation of functions within adjudication.[56] Henry Monaghan was right about his critique of the "public/private" jurisprudence, that it loses sight of the purposes of limiting government and checking agencies.[57] An agency judging its own cases internally raises concerns about fairness, similar to Sir Edward Coke's warning in *Bonham's Case* about one being a "judge of his own cause." If the original public meaning of separation of powers, Article III judicial independence, and the Bill of Rights is to protect individual rights against abuses of power by government officials and factions, then when a right is more broadly "public," an individual arguably should receive more protection—not less.

In oral argument, Chief Justice Roberts provided a good hypothetical indicating such concerns if Congress diverted medical malpractice cases into

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55. *See* Meese, *supra* note 27, at 14.

56. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 555(d) ("The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision.").

57. Monaghan, *supra* note 10.

administrative adjudications.[58] As the government made its basic argument that "public rights are matters between the government and the public," Chief Justice Roberts asked:

> . . .[W]hat about healthcare? The government's involved in the healthcare sector. Could the – an agency determine that the cost of medical malpractice claims throughout healthcare, not just the particular aspect which the government's participating in, interferes with what they're trying to accomplish in the healthcare system, and so the subject of medical malpractice will be handled by a government agency, an expert agency, to reduce the costs of the benefit of healthcare that the government provides? No court, no jury?. . . [T]his is a government decision that they want that public benefit to be available more economically, more efficiently. Yes, it has private rights in it. The people who are injured have a right, I guess, to pursue the people who injured them. But it's also a public right. And – and how are we supposed to decide which of those two parameters prevails?[59]

Chief Justice Roberts's main question was about the problem of distinguishing between "public" and "private" in any statute that shifted a common law question to an agency adjudication, because public and private overlap. But let's take this hypothetical further to see why "public rights" might need protection just as much as "private rights." As the federal government has taken a bigger role in administering health, federal officials (e.g., administrators of Medicare, Medicaid, Veterans Affairs etc. who are trying to control costs) might try to reduce medical malpractice claims to lower their overhead. It is not hard to imagine a statute that might move medical malpractice claims against federally-administered or federally-supported hospitals to an agency within Health and Human Services, and it is not hard to imagine that HHS would have an interest in ruling against plaintiffs' claims of negligence. The federal government would have moved a common law right to sue for negligence from a court to an agency, and from judge-and-jury to an administrative officer like an ALJ. The Seventh Amendment was originally adopted to protect common law rights from being transferred away from juries.

If one understands the principle of the Seventh Amendment's right to a jury is to protect individual rights against government abuse, the publicness of a right means government's political or fiscal interest in the publicness of a right is a reason to protect the individual right to a jury trial *more, not less*.

The Seventh Amendment is a constraint on the government when it pursues enforcement actions or defends against civil claims, so that it may "not borrow its cause of action from the common law."[60] In other words, federal law may not replace and displace common law rights and duties with administrative

58. Transcript of Oral Argument, SEC v. Jarkesy, 603 U.S. 109 (No. 22-859), at 9–10.
59. *Id.*
60. *Jarkesy*, 603 U.S. at 136.

proceedings. The *Jarkesy* majority affirmed an earlier precedent, *Atlas Roofing Co.*, that limited the reach of the Seventh Amendment, because the Occupational Safety and Health Act's regulations were sufficiently "novel" and different from tort law's negligence standards.[61] Similarly, workers compensation claims should not raise a problem under the Seventh Amendment. In *Crowell v. Benson* in 1932, the Supreme Court ruled that a federal workers compensation statute did not violate the Seventh Amendment, and it relied mostly on the public rights exception.[62] Even if one sets aside that exception entirely, *Crowell* should still have the same result under *Jarkesy*'s rule to compare the statute to the common law. The *Crowell* majority had emphasized that the statute awarded compensation "without fault."[63] In other words, no-fault workers compensation regimes are different from the common law in the domain of employee vs. employer cases. So long as workplace safety statutes and workers compensation schemes do not borrow from negligence or common law causes of action, they do not violate the Seventh Amendment.[64]

Justice Sotomayor rightly observed the problem with the exception:

> It is not clear what else, if anything, might qualify as a public right, or what is even left of the doctrine after today's opinion. Rather than recognize the long-settled principle that a statutory right belonging to the Government in its sovereign capacity falls within the public-rights exception to Article III, the majority opts for a "we know it when we see it" formulation.[65]

Justice Sotomayor's solution—to broaden the exception—creates more problems, but at least she is right that the "public rights" exception is even fuzzier now. It was never clear nor grounded in stable original public meaning. Moreover, as I have argued here, the exception is ironically backwards on protecting individual rights: When individuals go up against the government, or when the government comes down on individuals, the individuals may have the proverbial deck stacked against them within an agency proceeding, relative to a jury. Individuals generally need their right to a jury more in a "public rights" context not less.

Instead of Justice Sotomayor's call to strengthen the exception, the Roberts Court should extend its logic from *Jarkesy* and just end the "public rights" exception for both the Seventh Amendment *and* Article III.

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61. *Id.* at 136–37 (citing *Atlas Roofing Co. v. Occupational Safety Health Rev. Comm'n*, 430 U.S. 442, 447, 461 (1977)).

62. Crowell v. Benson, 285 U.S. 22, 50–51 (1932).

63. *Id.* at 56.

64. One might suggest an analogy or a borrowing from vicarious liability or *respondeat superior*, but the premise of *vicarious* liability is a suit by a *non*-employee. Workers compensation schemes are novel circumventions of common law contract law, such as the fellow-servant rule.

65. *Jarkesy*, 603 U.S. at 187 (Sotomayor, J., dissenting).

## IV. THE RELATED PROBLEMS WITH ARTICLE III "JUDICIAL POWER" AND PUBLIC VS. PRIVATE RIGHTS

The *Jarkesy* majority rightly emphasized the Seventh Amendment, rather than Article III "judicial power." The Roberts Court would be wise to follow this caution about structural separation of powers in the future, because the past is so fuzzy on these structural arguments.

In a separate article and chapter in my forthcoming book, my historical research shows that the term "judicial power" was a relatively novel category in 1787—so novel that it was broadly under-determined, ambiguous, and open-ended. Judges were widely understood to be executive officials. In sum: over time, the English system focused on separating the legislative power from the executive power as a binary,[66] but executive power mixed together various functions, including adjudication and law interpretation. Historians have concluded that, until the late 1700s, "the judicial function was commonly described as an aspect of execution of the laws."[67] At a critical moment towards the end of the Constitutional Convention, Gouverneur Morris, one of the most significant designers of the singular presidency, observed that "the Judiciary . . . was part of the Executive."[68] The Ratification debates offered similar statements.[69]

It is fair to say that the early state constitutions and the Philadelphia Convention were turning points in separating "judicial power" from "executive power." Even though a few English lawyers and treatise writers in the seventeenth century had referred to a distinct "judicial power," they seem to have been outliers whose notions never found general usage and faded from memory.[70] Eighteenth-century

66. *See* Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 214-15 (1997) (citing M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 23, 44, 62 (1967)); *see also* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 151–52 (1969); Malcolm P. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 419 (1935).

67. Stewart Jay, *Sevants of Monarchs and Lords: The Advisory Role of Early English Judges*, 38 AM. J. LEGAL HIST. 117, 158 (1994); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 67 n.267 (2001) (citing GWYN, MEANING at 5) ("Since the concept of executive power had traditionally included judicial functions, many writings of this era use the term "executor" to include judges.").

68. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 299 (Max Farrand ed., 1911) ("Mr. Govr. Morris, suggested the expedient of an absolute negative in the Executive. He could not agree that the Judiciary which was part of the Executive, should be bound to say that a direct violation of the Constitution was law.").

69. Mortenson quotes Federal Farmer, "Letter XV to the Republican," (May 2, 1788), 20 DHRC at 1043 ("The business of the judicial department is, properly speaking, judicial in part, in part executive, done by judges and juries, by certain recording and executive officers, as clerks, sheriffs, &c. they are all properly limbs, or parts, of the judicial courts, and have it in charge, faithfully to decide upon, and execute the laws, in judicial cases. . .."). Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PENN. L. REV. 1269, 1313 n.219 (2020).

70. *See* Max Radin, *The Doctrine of the Separation of Powers in Seventeenth Century Controversies*, 86 U. PENN. L. REV. 842 (1938).

English treatises and dictionaries almost never referred to "judicial power" as a category, or even a term.[71]

The state constitutions of 1776-1780 and then the federal Constitution adopted the category "judicial power" separate from "executive power" as an innovation, an inchoate term without a solid background meaning. This context suggests not a fixed or formal doctrine, but a novel structure for future Congresses, Presidents, and judges to work out the contours, boundaries, rules, and structures. Precedents are relevant, but informal interpretation is more consistent with the original ambiguities in this historical context.[72] The Framers did not include an explicit separation-of-powers clause, even though six state constitutions had already adopted them.[73] The Constitution reflected more of a mix of overlapping powers (legislation and presentment/veto, Senate control over treaties and executive and judicial appointments, congressional control over declaring war and Article III jurisdiction, etc.).

I am not denying that the Framers separated legislative, executive, and judicial powers. However, the theory had only recently emerged in loose, vague, and conflicting forms, and the traditional English system of checks-and-balances was more salient and more reflective of the Constitution's structure. The separation between legislative and executive power was more established, but there is little evidence of a consensus in favor of strict formalism, and there is even less evidence of a distinct "judicial power" that was formally separate from executive power.

The bottom line is the Seventh Amendment's original purpose and original meaning are more solid and clear than the original meaning of Article III "judicial power," and the *Jarkesy* majority wisely was headed in a more reliable direction by applying the Seventh Amendment more robustly and formally, while de-emphasizing the Article III jurisprudence. It should continue on that path of re-balancing and emphasis, but it should be careful in how it emphasizes the Seventh Amendment. As the next part explains, the Roberts Court over-protected common law remedies, whereas it should focus more on protecting common law substance, such as the core rights and duties.

## V. PROTECT COMMON LAW SUBSTANCE, NOT REMEDIES

One last suggestion is that the Seventh Amendment protects the substance of common law rights and duties, but not common law "remedies." A focus on remedies leads to overly broad protections.

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71. *See* Beau Baumann & Jed Handelsman Shugerman, *Quasi-Judicial: A History and Tradition*, 127 COLUM. L. REV (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5858002; *see also* Jed H. Shugerman, *Freehold Offices vs. 'Despotic Displacement': Why Article II 'Executive Power' Did Not Include Removal* (Research Paper no. 4521119, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521119.

72. Baumann & Shugerman, *Quasi-Judicial*, *supra* note 71.

73. *Id.*; *see also* Shugerman, *Venality*, *supra* note 5, at 231; Shugerman, *Vesting*, *supra* note 5, at 1503–04; Shugerman, *Indecisions of 1789*, *supra* note 5, at 798–99.

The Supreme Court has overemphasized remedies in its Seventh Amendment jurisprudence for decades: a false dichotomy of damages as "law," injunctive relief as "equity." Starting in 1974, the Supreme Court established its Seventh Amendment two-part test on right and remedy: 1) compare the *right* in the case in question to eighteenth-century English forms of action and observe if that form of action was at law or in equity; 2) determine whether the *remedy* in the case in question is legal or equitable in nature.[74]

All four opinions in *Chauffers*, a 1990 decision – Justice Marshall's majority, Justice Stevens's concurrence, Justice Brennan's concurrence, and Justice Kennedy's dissent – focused on this approach to remedies.[75] Justice Brennan went the furthest by suggesting that the remedy should be the only part of the analysis, and the substantive right should be irrelevant:

> I think it is time we dispense with it altogether. I would decide Seventh Amendment questions on the basis of the relief sought. . . . I believe that our insistence that the jury trial right hinges in part on a comparison of the substantive right at issue to forms of action used in English courts 200 years ago needlessly convolutes our Seventh Amendment jurisprudence . . . . there remains little purpose to our rattling through dusty attics of ancient writs. The time has come to borrow William of Occam's razor and sever this [rights-analysis] portion of our analysis.[76]

Brennan claimed that the Supreme Court had been placing greater weight on the remedy for years, and he argued that it was time to look *only* at the remedy and to abandon the analysis of rights and analogies entirely.[77] This approach may be simpler and easier for judges who do not want to be bothered rattling through dusty attics of history and constitutional context.

The problem is that the simple solution is not what the Founders understood the Seventh Amendment to protect: the substance of rights, not the largely irrelevant question of which remedies.

In *Jarkesy*, Chief Justice Roberts revived Justice Brennan's anti-originalism and a focus on the easier but historically irrelevant remedy question. His analysis of the statute and the common law could have stopped at the similarity of the definition of fraud. However, Chief Justice Roberts went further in examining the remedy:

> A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment. And while courts of equity could order a defendant to

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

75. Chauffeurs, Teamsters and Helpers, Local 391 v. Terry, 494 U.S. 558 (1990).

76. *Id.* at 574-75 (Brennan, J., concurring).

77. *Id.* (citing Granfinanciera, S. A. v. Nordberg, 492 U.S. 33, 42 (1989); Tull v. United States, 481 U.S. 412, 421 (1987); Curtis v. Loether, 415 U. S. at 196).

> return unjustly obtained funds, only courts of law issued monetary penalties to "punish culpable individuals." Applying these principles, we have recognized that "civil penalt[ies are] a type of remedy at common law that could only be enforced in courts of law.[78]

Chief Justice Roberts is partly right, but only in terms of a simple dichotomy: civil penalties are more associated with the common law than with equity. The problem is that, from historical accounts, it appears that civil monetary penalties were also part of a mix of English enforcement models outside the common law and without juries.

On the one hand, Holdsworth defined fines, at least in the medieval period, as remedies in court, by leave of courts, "upon certain terms approved by the court."[79] On the other hand, in the early modern period, Holdsworth reports of "informers" (deputized private citizens) suing for harms to the public to win civil monetary penalties (based on statutes, not the common law) before justices of the peace (who were not formally common law judges and sometimes needed juries, but often did not).[80]

The following account of the justice of the peace is not intended to be a complete, definitive account of justices of the peace or of whether these powers were part of the original public meaning of "common law" in America circa 1789 –91, as the Seventh Amendment was drafted and ratified. Are justices of the peace part of the "English common law"? In one context, yes, if one interprets "common law" as an English tradition of law enforcement and jurisdiction. But not in the more specific context of the Seventh Amendment "suits at common law," as opposed to equity, admiralty, and (here's the rub) *other kinds of English justice and law enforcement, including local administrative enforcement*.

Justices of the peace historically had more of a role in criminal law (hence, maintaining "the peace"), but over time, they had an increasingly administrative role.[81] It appears they empaneled juries in criminal cases, but it appears they did not need juries in other cases when they convened in panels of two or three.[82] They were not common law judges themselves. They were "subjected to the control of the courts of common law by means of the prerogative writs,"[83] and they were also under the control of other bodies like the court of Star Chamber and Lord Chancellor. By the sixteenth century, justices of the peace could "fine for non-attendance at church."[84] Justices of the peace also had civil jurisdiction over master-servant and master-apprentice cases,[85] could "assess and levy rates" on

78. *Jarkesy*, 603 U.S. at 123.
79. W.S. HOLDSWORTH, 3 A HISTORY OF ENGLISH LAW 236 (1923).
80. W.S. HOLDSWORTH, 4 A HISTORY OF ENGLISH LAW 357 (1924).
81. *Id*. at 134.
82. *Id*. at 134, 137–38.
83. W.S. HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW 297 (1922); *see also* Baumann & Shugerman, *Quasi-Judicial*, *supra* note 71.
84. W.S. HOLDSWORTH, 4 A HISTORY OF ENGLISH LAW 140 (1924).
85. *Id*. at 139.

local officials who "made default,"[86] and enforced "the assize of fuel" and other statutes regulating trade,[87] all of which also sound a lot like imposing civil monetary fines or penalties. Two justices of the peace presiding together had significant administrative powers, including "assessing rates to relieve poor parishes," making regulations during plagues, and "assessing liability of the hundred [a unit of local governance] for robberies therein committed."[88] Holdsworth went on to list a series of other local powers, and it appears that they would have had some power to enforce these powers with fines or penalties, too. In quarter sessions, justices of the peace presided with juries, but otherwise, it seems that they often did not need juries to impose fines or penalties.[89] And as time passed, it appears they had increasing administrative powers in quarter sessions without a jury.[90]

Justices of the peace are a notoriously confusing office that do not fit neatly in our modern categories or separations of powers—which is a problem for originalists who cite English practices to support American formal doctrines of strict separation. The justice of the peace is the cautionary tale against formal separationism. If digging just a little into the history of the justice of the peace raises such questions about non-common law officers who could impose monetary fines, imagine if one starts to research the many other administrative officers in the English system. The more specific point on the Seventh Amendment is that the current historical assumption that "civil monetary fines and penalties" were solely a common law remedy appears to be wrong.

Other historical accounts should also lead to similar questions, doubts, and further research. Nicholas Parrillo's outstanding book *Against the Profit Motive* documents a history of fees and bounties, as well as fines, throughout English and American administration, outside the common law.[91] That story is further substantiated in my work on venality and in my article "Quasi-Judicial: A History and Tradition" with Beau Baumann on administrative adjudication without juries.[92] Once one goes beyond the simple law/equity dichotomy, then one can see civil penalties as a common feature of Anglo-American administrative enforcement, rather than a hallmark of the common law and only the common law. Thus, it is more accurate to take Chief Justice Roberts's passage and re-write it accordingly:

> Both courts of law and English administrative officials could issue monetary penalties. Civil penalties are a type of remedy that could be enforced under the common law and issued by administrative officials outside the courts.

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86. *Id*. at 141.
87. *Id*. at 140.
88. *Id*. at 142.
89. *Id*. at 142–43.
90. *Id*. at 144.
91. *See* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 (2013).
92. *See generally* Shugerman, *Venality*, *supra* note 5; Baumann & Shugerman, *Quasi-Judicial*, *supra* note 71.

Or at the very least, there is solid reason to question the historical claim that civil penalties were exclusively a feature of the common law. Is there any evidence, as a matter of original public meaning, that "the common law" in the Seventh Amendment went beyond the substantive rights and duties of the common, and ventured into something as broad and technical as "remedies"? The historical burden is on those who claim judicial power to enforce the Seventh Amendment, and there is good reason to doubt Chief Justice Roberts's assertion about remedies and to doubt such a broad rule whenever such a standard remedy of civil penalties is invoked.

## CONCLUSION

To recap, this essay makes four suggestions after *Jarkesy*:

1. Following *Jarkesy*, the judiciary should continue a more robust enforcement of the Seventh Amendment right to a jury trial. The courts should eliminate the "public rights" exception to the Seventh Amendment, which does not appear to have an original link to the Seventh Amendment. The "public rights" exception seems to have been a pragmatic spill-over from Article III "judicial power" jurisprudence, where it also has limited support in original public meaning.
2. Relatedly, the courts should more informally enforce Article III "judicial power," which has a more ambiguous original public meaning. If the courts de-emphasize Article III's "private rights" protections, then the counterbalance from a "public rights" exception would be less necessary, and thus it would be possible to abandon the dubious public rights/private rights distinction entirely. The original public meaning of checks-and-balances supports a more modest functional approach to the separation of powers.
3. As these questions are more a matter of an individual right to a jury than a structural separation-of-powers matter, individual waiver of the Seventh Amendment right would be *more* valid.
4. Whereas *Jarkesy* focused on both substance and remedy in interpreting "the common law," the scope of the "common law" should be based on the substance (the right, the wrong, or the duty), and not the remedy.

These changes would not lead to a revolution. A few old precedents might come out differently. For example, by dropping the "public rights" exception entirely, *CFTC v. Schor* would have a different result, one that is more protective of the Seventh Amendment. On the other side, *Tull* and similar cases would no longer focus on the remedy in applying the Seventh Amendment to new statutory regimes. And this individual rights approach means that waiver is more appropriate—and helps strike a balance of the various interests. The overall result seems to be a Seventh Amendment jurisprudence and an Article III jurisprudence that are more consistent with original public meaning, and also unlikely to lead to originalist revolution over the administrative state.