SEC v Jarkesy: The Past, Present, and Future of Administrative Adjudication

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In any other Term, *SEC v. Jarkesy* would have been the big blockbuster in administrative law.[1] During the 2023–24 Term, of course, a different decision involved the demise of *Chevron* deference, which ranks among the most important changes not just in "admin law," but in the entire history of American jurisprudence.[2]

Despite having been overshadowed in its own field within days of publication, *SEC v. Jarkesy* carries generational significance. The decision will alter agency enforcement from the course it has run for nearly a half century. This article explains the case, its historical context, and what's next.

A Very Brief History of Regulatory Penalties

SEC v. Jarkesy marks an inflection point in the history of American regulation. To properly describe the case, therefore, we must start at the beginning.

Agencies have operated in-house tribunals since the dawn of the administrative state. Through adjudication, agencies render regulatory policy much like courts find the common law: Individual actions engender rule-like orders, which in turn govern the behavior of regulated entities.[3]

The Federal Trade Commission (FTC), for example, was established in 1914 to regulate "unfair methods of competition."[4] In 1938, Congress

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[1] *See* SEC v. Jarkesy, 144 S. Ct. 2117 (2024).

[2] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[3] For a nice explanation of how agencies render policy through adjudication, see Roger Nober, *Regulation by Adjudication*, Regul. Stud. Ctr. (Mar. 20, 2024), https://regulatorystudies.columbian.gwu.edu/regulation-adjudication.

[4] *See* Federal Trade Commission Act, Pub. L. No. 63-203, ch. 311, 38 Stat. 717 (1914).

added the regulation of "unfair or deceptive acts or practices" to the FTC's mandate.[5] To this day, the agency gives meaning to these nebulous phrases through case-by-case adjudicative proceedings. In finding that a particular business committed an "unfair method of competition," or an "unfair or deceptive act or practice," the agency telegraphs to everyone that these behaviors will not be tolerated. Thus, rules are made.

At first, in the late 19th century, federal courts reviewed agency orders without any bias. By the early 20th century, however, courts pivoted to the "judicial review" model of regulatory oversight, which is characterized by deference to agency decisionmaking and fact-finding.[6]

Today, every significant regulatory agency can access an in-house tribunal for regulatory enforcement. Those in-house tribunals are subject to deferential judicial oversight, as they were a century ago. While agencies have always operated adjudicative systems, the stakes changed dramatically in the decades preceding the Roberts Court. The key development was the onset of pocketbook punishments.

On June 26, 2024—the day before *Jarkesy* came down—the leading sanction in administrative enforcement was the civil money penalty. In 2022, federal regulatory agencies sought civil money penalties in 69 percent of enforcement actions, totaling $6,897,533,973 in exactions.[7] Despite its present-day prevalence, this punishment was a latecomer in the 150-year history of the administrative state.[8] For about a century, until the 1970s, domestic regulatory agencies were limited to two types of *non*monetary sanctions: (1) the suspension or revocation of a government-granted license or subsidy; and (2) injunctive-type relief, the most common being the cease-and-desist order.[9]

There were exceptions, to be sure, but they serve only to prove the general rule. Money penalties have been available since the

[5] *See* Pub. L. No. 75-447, ch. 49, § 3, 52 Stat. 111 (1938).

[6] *See generally* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939 (2011).

[7] *See* Will Yeatman & Keelyn Gallagher, *The Rise of Money Sanctions in Federal Agency Adjudication*, 76 Admin. L. Rev. (forthcoming 2024).

[8] I'm taking the establishment of the Interstate Commerce Commission, in 1887, as the starting date of the administrative state.

[9] *See* Yeatman & Gallagher, *supra* note 7, at Part II.B.

19th century to agency tribunals operating within certain policy areas: immigration, taxation, and customs. Unlike other regulations, this special troika involves the administration of functions that are central to sovereignty, such as raising revenue or regulating the cross-border flows of goods and people.[10] As early as 1909, the Supreme Court noted its "settled judicial construction" that these three weighty subjects are "matters exclusively within [Congress's] control."[11] Accordingly, the political branches may "impose appropriate obligations and sanction their enforcement by reasonable money penalties . . . without the necessity of invoking the judicial power."[12] But outside of immigration, taxation, and customs, Congress could not avoid "invoking the judicial power" to resolve legal controversies. This is why Congress harbored "constitutional doubts" about the administrative imposition of money penalties at economic regulatory agencies, as noted by an influential 1941 report on administrative law.[13]

For most of the 20th century, these "constitutional doubts" kept Congress from empowering domestic regulatory agencies to pursue money penalties through adjudication. Eventually, however, these doubts would wane. Evolving legislative intentions provided the impetus for change. Initially, in the 19th century, federal regulation focused on the channels and instrumentalities of interstate commerce, such as waterways and railroads. Then, during the Progressive and New Deal eras, the federal government took to regulating entire industries. Next, starting in the 1960s, the administrative state subsumed social and behavioral matters, such as environmental quality and occupational health.[14] As Congress's regulatory ambition grew, lawmakers took on a greater willingness to test novel agency authorities.

[10] There were other important differences. For example, these early penalties (in immigration, taxation, and customs) were fixed and in rem, whereas today's penalties are variable and in personam). *See id.* at Part II.C.

[11] Oceanic Steam Nav. Co. v. Stranahan, 214 U.S. 320, 339 (1909).

[12] *Id.*

[13] Robert H. Jackson, Final Rep. of the Att'y Gen.'s Comm. on Admin. Proc., S. Doc. No. 8, at 147 (77th Cong., 1st Sess. 1941).

[14] This is the standard retelling of how federal regulation has evolved. Of course, it's a simplification.

Finally, in 1970, Congress for the first time passed an express authorization for the administrative imposition of civil money penalties through a domestic regulatory agency that was *not* involved in immigration, taxation, or customs. The Occupational Safety and Health Act of 1970 (OSHA) established an adjudicative system to impose money penalties for workplace safety violations.[15] After the Supreme Court upheld the OSHA penalties against a Seventh Amendment challenge (more on that consequential case later), the rise of administrative money sanctions really took off.[16] Congress interpreted the Court's decision as a green light. What followed was a sustained period of penalty creation. Over the next 33 years, Congress passed 172 authorizations for domestic regulatory agencies to pursue civil money penalties through their in-house proceedings, for a total of at least 188 in the U.S. Code (none of which existed before 1970).[17]

Congress further increased or expanded the scope of these penalties another 72 times through legislative amendments.[18] For example, the maximum penalty established by the Occupational Safety and Health Act was originally $10,000 (about $53,000 in today's dollars).[19] Currently, the statutory maximum is set at $70,000, but that's misleading.[20] Congress requires the Labor Department to increase its penalties to account for inflation, so the actual present-day maximum penalty is $161,323.[21]

The evolution of the Securities and Exchange Commission (SEC) provides another example, one that is germane to the discussion of *Jarkesy*. For the first four decades of its existence, the agency's tribunals were limited to *non*monetary sanctions—primarily the suspension or revocation of registrations to do business in the securities industry. This changed only in 1990, when Congress empowered the SEC to seek civil money penalties of up to $725,000 through

[15] *See* Pub. L. No. 91-596, 84 Stat. 1590 (1970); *see also* 29 U.S.C. § 659 (enforcement procedures); 29 U.S.C. § 666 (establishing penalties).

[16] Atlas Roofing Co. v. OSHRC, 430 US 442 (1977).

[17] *See* Yeatman & Gallagher, *Money Sanctions*, *supra* note 7, at Part III.A.

[18] *Id.*

[19] *See* Pub. L. No. 91–596, § 17, 84 Stat. 1606 (1970).

[20] *See* Federal Civil Penalties Inflation Adjustment Act Improvements Act, Pub. L. No. 114-74, tit. VII, § 701 (2015) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990) (codified in a note to 28 U.S.C. § 2461).

[21] *See* 89 Fed. Reg. 1810, 1817 (Jan. 11, 2024).

agency adjudication.[22] Although the statutory maximum remains at $725,000 per violation, the real-world maximum is $1,152,314 when accounting for congressional directives on inflation.[23] At first, the SEC's administrative money penalties reached only registered entities. However, the 2010 Dodd-Frank Act expanded the jurisdiction of SEC adjudicators, such that the agency could proceed administratively with civil money penalties against "any person," including non-registered brokers and investment advisors.[24]

Enter George Jarkesy

Among the first wave of post–Dodd-Frank defendants at the SEC was George Jarkesy. Shortly after that statute's passage, the SEC's enforcement division began a two-year investigation of Jarkesy and his investing advisor businesses.[25] In March 2013, the SEC formally accused him of securities fraud and commenced enforcement proceedings.[26] Agency prosecutors sought the highest allowable tier of civil money penalty, among other sanctions.

Before the Dodd-Frank Act, the SEC's tribunal would have lacked jurisdiction to impose a penalty on an *un*registered investment adviser like Jarkesy. But after Dodd-Frank, the agency could pursue such penalties against *anyone* through its own in-house proceedings. Alternatively, the agency could bring the same action in federal court. Congress left it entirely up to the agency to decide in which forum it wished to file its enforcement actions involving money penalties.

[22] *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, tit. II, § 202, 104 Stat. 937 (2002) (amending Securities and Exchange Act of 1934 by inserting section 21B).

[23] *See* SEC, *Inflation Adjustments to the Civil Monetary Penalties Administered by the Securities and Exchange Commission (as of January 15, 2024)*, available at https://www.sec.gov/enforce/civil-penalties-inflation-adjustments (last accessed Mar. 27, 2024, at 6:12AM).

[24] *See* Dodd-Frank Act, Pub. L. No. 111–203, tit. VII, § 773, tit. IX, § 929P(a)(2), 124 Stat. 1802, 1863 (2010) (extending civil money penalty sanction to subjects of cease-and-desist orders, which had been made applicable to "any person" for violations of "any provision") (codified at 15 U.S.C. § 78u–2(a)(2)).

[25] *See* Admin. Proc. File No. 3-15255, Div.'s Response to Respondents' Objections, at 33 (SEC Enforcement Division, Dec. 14, 2018) (describing investigation).

[26] *See* Admin. Proc. File No. 3-15255, Ord. Instituting Proc. (SEC, Mar. 22, 2013).

By delegating to the SEC the choice of where to file its enforcement actions, the Dodd-Frank Act "effectively gave the [agency] the power to decide which defendants should receive *certain legal processes* (those accompanying Article III proceedings) and which should not."[27] If, for whatever reason, the SEC chooses to proceed with a civil penalty action in federal court, then the defendant has recourse to the safeguards provided by the Federal Rules of Evidence and the Federal Rules of Civil Procedure. In federal court, the defendant also has the right to demand that a jury determine the facts. Perhaps most importantly, "a life-tenured, salary-protected Article III judge presides."[28]

"Things look very different in agency proceedings," as Justice Neil Gorsuch observed in a *Jarkesy* concurrence.[29] Instead of uniform standards of procedure and evidence, the SEC's tribunals are governed by the agency's house rules.[30] Instead of an impartial judge and a jury of peers, the SEC's political leadership (or its employees) serve as both the judge and the jury in administrative proceedings. A 2015 *Wall Street Journal* report quoted a retired SEC administrative law judge as saying that the agency's judges were forced to operate from the perspective that the "burden [is] on the people . . . accused to show that they didn't do what the agency said they did" instead of being presumed innocent.[31]

At the SEC's home court, Jarkesy was given the full benefit of administrative "justice." To comply with its obligation to provide exculpatory evidence gathered during its investigation, the SEC inundated the defense with "between 15 and 25 million pages of information."[32] The proceeding lasted seven years. Jarkesy's initial judge, an agency employee, sided with the government in a recommended decision.[33] His ultimate judge was the five-member Commission—the same entity that approved the charges against him.[34] In a 2020 order, the SEC

[27] Jarkesy v. SEC, 34 F.4th 446, 462 (5th Cir. 2022).

[28] SEC v. Jarkesy, 144 S. Ct. 2117, 2125 (2024)

[29] *See id.* at 2141 (Gorsuch, J., concurring).

[30] The SEC's Rules of Practice are codified at 17 C.F.R. §§ 201.100–900.

[31] Jean Eaglesham, *SEC Wins with In-House Judges*, Wall St. J. (May 6, 2015), https://tinyurl.com/y2h3a7pk.

[32] *Jarkesy*, 144 S. Ct. at 2141 (Gorsuch, J., concurring).

[33] Admin. Proc. File No. 3-15255, Initial Decision Release No. 693 (SEC, Oct. 17, 2014).

[34] Admin. Proc. File No. 3-15255, Release Nos. 10834, 89775, 5572, 34003 (SEC, Sept. 4, 2020).

found Jarkesy liable for securities fraud and imposed a civil penalty of $300,000, among other sanctions.[35]

Jarkesy petitioned for judicial review in the Fifth Circuit. A divided panel of that court granted the petition and vacated the final order. The panel's majority identified "three independent constitutional defects: (1) Petitioners were deprived of their constitutional right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power; and (3) statutory removal restrictions on SEC ALJs [administrative law judges] violate Article II."[36]

The SEC petitioned for *certiorari*, seeking review on all three of the Fifth Circuit's constitutional holdings. The Supreme Court granted the agency's petition. During oral argument, the Justices seemed to focus on the jury trial question, to the exclusion of the other two constitutional questions. In late June, the Court issued its decision. As presaged by the hearing, the six-Justice majority addressed only the Seventh Amendment question, affirming the court below.

Unpacking *Jarkesy*

Before unpacking *SEC v. Jarkesy*, we must establish the jurisprudential context. That legal backstory begins with the Court's crucial role in bringing about the rise of money sanctions at agency tribunals.

Again, Congress did not expressly authorize administrative money penalties until 1970, with the Occupational Safety and Health Act. It took seven years for the Supreme Court to hear a constitutional challenge to this novel regime. In that case, *Atlas Roofing v. Occupational Safety & Health Review Commission*, the Court sustained the statute. As previously discussed, *Atlas Roofing* galvanized Congress to legislate more of these sanctions into existence. Over the ensuing decades, civil money penalties became the leading sanction for administrative enforcement.

[35] The Commission also directed Jarkesy to cease and desist committing or causing violations of the antifraud provisions, ordered him to disgorge earnings from his business, and prohibited him from participating in the securities industry and in offerings of penny stocks.

[36] Jarkesy v. SEC, 34 F.4th 446, 451 (5th Cir. 2022).

Atlas Roofing involved a Seventh Amendment challenge to the administrative imposition of money penalties for workplace safety violations. The Seventh Amendment guarantees "the right of trial by jury" in "Suits at common law," and the petitioners argued they were denied this jury right.[37] In considering their claim, the Court cast aside its prevailing Seventh Amendment framework, which asked whether the underlying action is "analogous" to common-law causes of action ordinarily decided in English law courts in the late 18th century.[38] Rather than working through the existing doctrinal test, the Court in *Atlas Roofing* established an exception. For controversies involving "public rights," the jury right did not apply, "even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law instead of an administrative agency."[39]

It was the breadth of this constitutional carveout that led to the rise of money sanctions in federal agency adjudication. According to *Atlas Roofing*, Congress creates "public rights" whenever it establishes "new statutory obligations" enforced by the government "in its sovereign capacity."[40] Repeatedly, the Court indicated that Congress has the discretion to decide whether the Seventh Amendment applies, simply by choosing which forum hears the case.[41] The obvious problem with this conception of public rights is that it is capacious enough to subsume agency enforcement for *any* regulatory regime. Naturally, that's how Congress construed the case.

From the start, the "public rights" exception to the Seventh Amendment created controversy. Scholars have been overwhelmingly, perhaps uniformly, critical of the constitutional jurisprudence set forth in *Atlas Roofing*.[42]

[37] U.S. CONST. amend. VII.

[38] Curtis v. Loether, 415 U.S. 189, 195 (1974).

[39] Atlas Roofing Co. v. OSHRC, 430 US 442, 455 (1977).

[40] *Id.* at 450; *see also id.* at 458.

[41] *See, e.g.*, *id.* at 455 ("Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation . . ."); *id.* at 460 ("We cannot conclude that the Amendment rendered Congress powerless—when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate—to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law—such as an administrative agency—in which facts are not found by juries.").

[42] *See Jarkesy*, 144 S. Ct. at 2138 n.4 (citing to critical literature).

And the Supreme Court further complicated matters with its avowedly "confusing precedents."[43] Twelve years after *Atlas Roofing*, the Court seemed to contradict itself on the scope of the public rights exception. That case, *Granfinanciera, SA v. Nordberg*, pertained to (non–Article III) bankruptcy courts.[44] The controversy arose in a bankruptcy proceeding after the trustee sued a third party (the petitioner) to recover an allegedly fraudulent monetary transfer by the debtor.[45] The third party's request for a jury trial was denied by the bankruptcy court, the district court, and the Eleventh Circuit. On *certiorari*, the question presented was whether the Seventh Amendment permitted Congress to assign actions to recover a money judgement for fraudulent conveyance to a bankruptcy Court, where there is no jury right.

Ultimately, the *Granfinanciera* Court determined that the disputed action was a "matter[] of private rather than public right," such that the Seventh Amendment applied.[46] In reaching this conclusion, the Court apparently reinterpreted the public rights doctrine. I say "apparently" because the Court's message was unclear—at least it was until *SEC v. Jarkesy* came down last Term.

On public rights, the *Granfinanciera* Court majority struck a tone at odds with the Court's posture in *Atlas Roofing*. The tension with its precedent was so great that Justice Byron White dissented to object that *Granfinanciera* "can be read as overruling or severely limiting the relevant portions of" *Atlas Roofing* (which he had authored).[47]

The key difference was how the two decisions dealt with legislative intent. *Atlas Roofing* oozed deference for Congress; the Court was unwilling to accept "that the [Seventh] Amendment rendered Congress powerless."[48] In *Granfinanciera*, the Court replaced deference with skepticism. Throughout the controlling opinion, the majority evinced a suspicion that Congress might "conjure away" or "eviscerate" the Seventh Amendment "merely by relabeling the cause of

[43] Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985) (internal quotation marks omitted).

[44] Granfinanciera, SA v. Nordberg, 492 U.S. 33 (1989).

[45] *Id.* at 36 (explaining case history).

[46] *Id.* at 56.

[47] *Id.* at 71 n.1 (White, J., dissenting).

[48] Atlas Roofing Co. v. OSHRC, 430 US 442, 460 (1977).

action to which it attaches and placing exclusive jurisdiction in an administrative agency."[49] Justice White took note of this shift in his dissent, accusing the majority of "blithely ignoring the relevance of the forum Congress has designated to hear this action" and instead focusing only on the nature of the claim.[50]

The *Granfinanciera* Court approvingly quoted *Atlas Roofing* for the proposition that "public rights" arise when Congress "create[s] a new cause of action . . . unknown to the common law."[51] But after introducing this "decisive" criterion, the *Granfinancieria* majority proceeded to give this formulation an entirely different meaning. In *Atlas Roofing*, the Court had reasoned that a novel statutory suit is "unknown to the common law" simply because it is new.[52] In *Granfinanciera*, by contrast, the majority took "unknown to the common law" to mean that the underlying action is not "legal in nature."[53] Because actions for fraudulent conveyance are "quintessentially suits at common law," the Court in *Granfinanciera* determined that the Seventh Amendment right attached to the bankruptcy proceedings.

Atlas Roofing and *Granfinancieria* present competing interpretations of public rights. Under *Atlas Roofing*, a cause of action could be assigned to a jury-less agency tribunal, if that's what Congress wanted, period. *Granfinanciera* put forth a much narrower conception of the public rights exception. Under the reasoning of that case, the public rights exception applies only if the underlying suit is entirely "unknown to the common law," meaning that the substance of the claim has no analogous action at the common law in the late 18th century.

The problem was that *Granfinanciera* departed from *Atlas Roofing* without saying as much. Far from addressing the conspicuous

[49] *Granfinanciera*, 492 U.S. at 52.

[50] *Id.* at 81 (White, J., dissenting).

[51] *Id.* at 60 (majority opinion) (internal quotation marks omitted).

[52] *Atlas Roofing*, 430 U.S. at 450 ("Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred."); *see id.* at 455 ("In sum, the cases discussed above stand clearly for the proposition that when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible[.]").

[53] *Granfinanciera*, 492 U.S. at 53.

conflict between the two cases, *Granfinanciera* expressly affirmed *Atlas Roofing*.[54] The *Granfinanciera* majority even expanded the *Atlas Roofing* holding by clarifying that the government does *not* have to be a party in a dispute for the public rights exception to apply.[55] Relatedly, the absence of the government as a party in *Granfinanciera* provided a way to distinguish it from *Atlas Roofing*, where the agency was in a prosecuting role.

The upshot is there was no way to tell how the two cases related to one another. As Richard Pierce explained in his administrative law treatise,

> After *Granfinanciera*, the Court could take any of several directions. It could extend the majority's reasoning to invalidate agency adjudication of numerous classes of disputes that agencies long have resolved without juries . . . Or it could return to the pragmatic test urged by the dissenting justices and adopted by a unanimous Court in *Atlas Roofing*[.][56]

For decades, the contradiction persisted, in large part because more than 90 percent of money penalty actions end in settlement.[57] Article III courts, therefore, rarely had an opportunity to scrutinize the constitutional propriety of these proceedings.

At last, in *SEC v. Jarkesy*, the Court resolved the matter: "*Granfinanciera* effectively decides this case."[58] The Court definitively clarified that, in identifying public rights, "what matters is the substance of the action, not where Congress has assigned it."[59] This is true, the Court said, "[e]ven when an action originate[s] in a newly fashioned regulatory scheme."[60]

After waxing eloquent about the jury right ("the glory of the English law"), the *Jarkesy* Court then minimized the public rights exception, which "is, after all, an *exception*."[61] The Court identified six

[54] *Id.* at 51 (stating that "[w]e adhere to that general teaching" of *Atlas Roofing*).

[55] *Id.* at 53–54.

[56] Richard Pierce, Administrative Law Treatise § 2.8 (4th ed. 2002).

[57] *See* Yeatman & Gallagher, *supra* note 7, at Part V.

[58] *Jarkesy*, 144 S. Ct. at 2135.

[59] *Id.*

[60] *Id.* (internal quotation marks omitted).

[61] *Id.* at 2134 (emphasis in original).

areas of sovereignty-heavy subjects—including immigration, taxation, and customs—that "historically could have been determined exclusively by [the executive and legislative] branches," with "[n]o involvement by an Article III court in the initial adjudication."[62] These were public rights. Beyond these "historic categories," the Court called for judicial scrutiny ("close attention") to ensure that the public rights exception does not "swallow the rule."[63] Even where the exception seemingly applied, "the presumption is in favor of Article III courts."[64]

The *Jarkesy* Court described *Atlas Roofing*'s take on public rights as "circular."[65] Moreover, the Court allowed for the possibility that its precedents might have "effectively overruled" *Atlas Roofing*.[66] In short, *Jarkesy* does everything short of putting a little red flag next to *Atlas Roofing* in Westlaw. Still, the Court didn't upset its precedent. Instead, the *Jarkesy* Court, as in *Granfinancieria*, implicitly eviscerated *Atlas Roofing* by interpreting the phrase "unknown to the common law" to mean only those actions that are dissimilar in "substance" and "nature" from common-law suits.[67] Again, *Atlas Roofing* had taken "unknown to the common law" to mean whatever actions Congress assigned to an administrative tribunal. Because fraud is known to the common law, *Atlas Roofing* "does not control."[68]

Doctrinally, *Jarkesy* blessed the Fifth Circuit's two-part test for discerning whether the Seventh Amendment extends to a non–Article III adjudicative proceeding. At step one, the courts should ask whether the action "implicates" the Seventh Amendment.[69] Here, the Court tells us that the remedy is the paramount consideration; presumably, all civil money penalties meet this test and "implicate" the jury right.[70]

[62] *Id.* at 2132; *see generally id.* at 2131–34 (discussing six categories of historical "public rights.").

[63] *Id.* at 2134.

[64] *Id.* (quotations and citations omitted).

[65] *Id.* at 2139.

[66] *Id.* at 2137 & n.3.

[67] *Id.* at 2135.

[68] *Id.* at 2137.

[69] *Id.* at 2127 ("The threshold issue is whether this action implicates the Seventh Amendment.").

[70] *Id.* at 2129 ("In this case, the remedy is all but dispositive.").

At step two, courts inquire whether the public rights exception applies. After *Jarkesy*, this test is to be applied narrowly. Outside of the six "historical categories" identified by the Court, public rights apparently are limited to actions that "bring no common law soil with them."[71]

What's Next?

So, how will *SEC v. Jarkesy* affect agency adjudication?

Most directly, the decision will preclude the SEC from employing its in-house proceedings to prosecute fraud-based claims for money penalties. It's unclear how this holding will affect the SEC's operations. The *Jarkesy* Court characterized the alleged fraud at issue in the case as knowing or reckless misstatements, but the SEC's conception of "securities fraud" is so broad that it includes some violations that do not include a false statement. This "could lead to a parsing of fraud allegations in SEC actions, depending on whether they are based on a misstatement or otherwise covered by the securities laws."[72]

Of course, the SEC is not the only agency that punishes fraud-based violations with the administrative imposition of money penalties. The Commodity Futures Trading Commission,[73] the Consumer Financial Protection Bureau,[74] and the Federal Energy Regulatory Commission (FERC)[75] all have the authority to pursue money penalties, in-house, for regulatory violations that are analogous to, if not "quintessentially," common-law fraud.

Apart from fraud-based actions, *SEC v. Jarkesy* casts a constitutional pall over *all* money penalty proceedings. As explained previously, *Atlas Roofing* ushered in tremendous change at the administrative state. Now that *Atlas Roofing* has been severely diminished, it stands to reason that there will be ramifications in how agencies adjudicate. Many open questions remain. For example, in parsing public

[71] *Id.* at 2137.

[72] *See* David. R. Fredrickson, *What Happens to the SEC's Proceedings after* Jarkesy?, Bloomberg L. (Apr. 2024), https://tinyurl.com/49mj3mtd.

[73] *See* 7 U.S.C. § 6b (any fraudulent or deceptive practices).

[74] *See* 12 U.S.C. § 5536(a)(1)(B) ("any unfair, deceptive, or abusive act or practice").

[75] *See* Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 315, 1284, 119 Stat. 691, 979 (2005) (amending Natural Gas Act and Federal Power Act to empower FERC to police market manipulation).

rights, an essential factor is whether the "nature" or "substance" of the underlying claim is comparable to an action at common law or at equity at the founding. What happens when there is evidence on both sides? *Jarkesy* provided no express guidance, though the Court seemed to establish a presumption against finding new public rights outside of the six "historical categories." For now, these sorts of questions will percolate.

Beyond civil money penalties, the next frontier of Seventh Amendment scrutiny is likely to involve the administrative imposition of remedies derived from the law of restitution. A handful of agencies, including the SEC, have statutory authority to exact restitution or "disgorgement" from defendants. Jarkesy, for example, was subject to a $600,000 disgorgement order, in addition to the $300,000 civil money penalty. In 2022, agencies collected $3,546,558,822.18 in such sanctions.[76] Arguably, these penalties are punitive and, therefore, "implicate" the Seventh Amendment.[77] If so, then the next question (after *Jarkesy*) is whether actions underlying this restitutionary relief are in the "nature" of a common-law suit, or if they more closely resemble a suit at equity. That question will determine whether the public rights exception applies. Keep an eye on this space.

We should be clear about the practical consequences. Regardless of where civil money penalty suits are brought—agency tribunal or federal court—these actions settle more than 90 percent of the time.[78] For all intents and purposes, therefore, the practical effect of *Jarkesy* will be to influence settlement negotiations. This was also the case for *Atlas Roofing*, in the opposite direction. The important effect of potential penalties on settlement negotiations was recognized in an influential 1972 report by the Administrative Conference of the U.S. ("ACUS"), which advocated for greater use of agency tribunals

[76] *See* Yeatman & Gallagher, *supra* note 7, at Part III.B (discussing rise of administrative remedies supposedly modeled on the law of restitution); *see also id.* at Part V (presenting results of survey).

[77] *See* Kokesh v. SEC, 581 U.S. 455, 457 (2017) (finding that an SEC disgorgement order was a "penalty" under the Administrative Procedure Act's statute of limitations).

[78] In 1972, agencies had to bring virtually all their civil money penalty actions in federal court and settled "well over 90%" of these cases. *See* Harvey J. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, in 2 Recommendations and Reps. of the Admin. Conf. of the U.S. 896, 919 (1972). A recent survey of administrative money penalties performed by this author found that 92 percent of such actions settle.

for money penalty proceedings. Back then, agencies generally had to prevail in an original action in an Article III Court before they could impose such penalties, and the parties settled "well over 90% of [these] cases."[79] ACUS objected not to the fact that almost all these suits settled; rather, ACUS bemoaned the "inferior" quality of these settlements.[80] According to the ACUS report, "regulatory needs are being sacrificed for what is collectable."[81] To increase the agency's hand at the bargaining table, ACUS recommended that Congress empower administrative tribunals to impose civil money penalties, subject to deferential judicial review.[82] In sum, the primary effect of *Atlas Roofing* was to enhance the government's negotiating leverage, while the primary effect of *Jarkesy* will be to give a greater hand to regulatory defendants at the settlement table.

Conclusion: Politics? Or History?

Predictably, the commentariat has presented *Jarkesy* through a political lens.[83] We're told that the Court's conservative majority acted like conservatives. Of course, it's a bit silly to purport that there is a partisan divide regarding the right to a jury, which seems as bipartisan as apple pie. More to the point, attributing *Jarkesy* to the Justices' politics is historically illiterate. Rather than animating "conservative" values, the *Jarkesy* decision is best viewed as a belated judicial check on increasing agency power. For decades preceding the Roberts Court, Congress pushed the envelope of the agencies' sanctioning authority. Finally, Congress pushed too far. Seen in this light, *SEC v. Jarkesy* is less about the Justices' politics, and more about our dynamic system of checks and balances.

[79] *Id.* at 919.

[80] *See id.* at 900, 921.

[81] *Id.* at 900, 921.

[82] *Id.* at 930.

[83] *See, e.g.*, Justin Jouvenal et al., *In Conservative Win, Supreme Court Limits Use of SEC In-House Tribunals*, Wash. Post (June 27, 2024), https://tinyurl.com/6efrw5jp. Noah Rosenblum, *The Case That Could Destroy the Government*, The Atl. (Nov. 27, 2023), https://tinyurl.com/yeyvzh2j (presenting Jarkesy in political terms).