

## COMMENT

### ***SECURITIES & EXCHANGE COMMISSION V. JARKESY AND THE DEMISE OF THE PUBLIC RIGHTS DOCTRINE***

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In *Securities & Exchange Commission v. Jarkesy*, the U.S. Supreme Court ruled that the Seventh Amendment did not allow the Securities & Exchange Commission (SEC) to assess civil penalties via administrative adjudication without a jury trial. In so ruling, the Court rejected the SEC's claim that the public rights exception applied to permit the SEC to bypass the Seventh Amendment. The Court purported to distinguish *Jarkesy* from *Atlas Roofing*, in which the Court had applied its most expansive interpretation of the public rights doctrine by permitting an agency to assess civil penalties under the rationale that the agency had brought the action under a statutory claim.

This Comment explores the history of the public rights doctrine since its origin in the mid-nineteenth century. This Comment describes three principal themes: the Court's gradual restriction of the public rights doctrine over the past few decades, the Court's separation-of-powers jurisprudence in other analogous areas of the law, and the limitations the Court has imposed on *stare decisis*. All three of these factors indicate that the Court, without explicitly overruling *Atlas Roofing*, has limited the holding of that case to such an extent that no clear rationale can justify it. The public rights doctrine, therefore, is no longer practically viable. This Comment concludes that the Court will likely entirely reject the public rights doctrine in the near future.

While the public rights doctrine itself is a niche area of the law, the Court's rejection of its prior, more permissive attitude toward agency adjudication signals that litigants challenging executive agency action will have a better chance of bringing their cases in federal court with the advantage of a jury. The Court's treatment of the public rights doctrine in *Jarkesy* exemplifies the methodology the Court may apply in other areas of the law to restrict the scope of other doctrines, especially those it considers to be incompatible with a formalist separation-of-powers jurisprudence.

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## INTRODUCTION

The United States Supreme Court's public rights jurisprudence has been an area of "frequently arcane distinctions and confusing precedents."<sup>1</sup> Starting in the mid-nineteenth century with the case *Murray's Lessee v. Hoboken Land & Improvement Co.*,<sup>2</sup> the Court has held that certain types of cases fall under the "public rights" exception, meaning that the Constitution does not require them to be adjudicated in an Article III court with the accompanying Seventh Amendment right to a jury trial.<sup>3</sup> Moving into the twentieth century, the Court continued to apply the doctrine in other areas where it determined that Congress had the constitutional authority to assign the adjudication of those matters to

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1. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment).

2. 59 U.S. (18 How.) 272 (1856).

3. *Id.* at 284; U.S. CONST. amend. VII.

non-Article III courts.<sup>4</sup> The Court reached the “high-water mark”<sup>5</sup> of the public rights doctrine when it held in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*<sup>6</sup> that Congress had the power to assign certain claims to be adjudicated in a non-Article III forum where the Seventh Amendment did not apply, even in cases where the Seventh Amendment would apply if the case had been brought in front of an Article III court.<sup>7</sup>

After the Court decided *Atlas Roofing*, the Court began to restrict the scope of the public rights exception. In *Granfinanciera, S.A. v. Nordberg*,<sup>8</sup> the Court limited the *Atlas Roofing* holding to such an extent that Justice Byron White suggested that *Atlas Roofing* might have been overruled.<sup>9</sup> Most recently, in *Securities & Exchange Commission v. Jarkesy*,<sup>10</sup> the Court addressed the adjudicatory procedures of the Securities & Exchange Commission (SEC) in which administrative law judges presided over hearings involving statutorily created fraud claims that were closely analogous to common law fraud claims.<sup>11</sup> The Court concluded that these procedures violated the Seventh Amendment’s constitutional guarantee of a jury trial<sup>12</sup> and found that the “public rights” exception did not apply.<sup>13</sup> But the Court expressly declined to define the public rights exception.<sup>14</sup>

The dissent in *Jarkesy* claimed that the majority had abandoned the precedent of *Atlas Roofing*.<sup>15</sup> Although the *Jarkesy* Court purported to distinguish the securities fraud claims in that case from the statutory claims at issue in *Atlas*,<sup>16</sup> the *Jarkesy* decision leaves a lingering question as to whether *Atlas Roofing*’s holding remains intact. This question is all the more salient given the fact that the *Jarkesy* Court explicitly relied on *Granfinanciera*.<sup>17</sup> The Court did not explicitly overrule *Atlas Roofing* or any other of its prior cases that upheld a more expansive application of

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4. *See, e.g., Crowell v. Benson*, 285 U.S. 22, 51 (1932) (“Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.”).

5. *Sec. & Exch. Comm’n v. Jarkesy*, 144 S. Ct. 2117, 2148 (2024).

6. 430 U.S. 442 (1977).

7. *Id.* at 455.

8. 492 U.S. 33 (1989).

9. *Id.* at 71 (White, J., dissenting).

10. 144 S. Ct. 2117 (2024).

11. *Id.* at 2125–27.

12. *Id.* at 2139.

13. *Id.* at 2131.

14. *Id.* at 2133.

15. *Id.* at 2162 (Sotomayor, J., dissenting).

16. *Id.* at 2139.

17. *Id.* at 2134–35.

the public rights exception. However, the trajectory of the Court's public rights jurisprudence since *Atlas Roofing*, including the *Jarkesy* decision, indicates that the Court will eventually abrogate the public rights doctrine.

Regarding the public rights doctrine, the Court has followed a pattern similar to the one it followed leading up to its decision in *Loper Bright Enterprises v. Raimondo*,<sup>18</sup> which overturned the *Chevron* deference doctrine that had required federal courts to defer to administrative interpretations of ambiguous statutes.<sup>19</sup> This Comment will track the public rights jurisprudence of the Supreme Court and the inconsistencies it has demonstrated over time. The *Jarkesy* decision is part of a broader trend in the current Court's jurisprudence to revisit longstanding doctrines the Court considers incompatible with constitutional principles, especially the separation of powers, Article III jurisdiction, and due process.

Part I provides an overview of the Court's major public rights cases from *Murray's Lessee* to *Jarkesy* and shows that the public rights doctrine reached its zenith in *Atlas Roofing* but has steadily receded since then. Part II argues that the jurisprudence of the Justices comprising the *Jarkesy* majority, especially Justice Gorsuch and Justice Thomas, does not favor the public rights doctrine, and that certain recent cases of the Court indicate how the Court is likely to either explicitly overturn *Atlas Roofing* or at least narrow the public rights doctrine into oblivion. This Comment concludes that the trajectory of both the Court's public rights jurisprudence since *Granfinanciera* and its broader non-public rights jurisprudence, including *Loper Bright*, foreshadow the abrogation of the public rights doctrine.

## I. EVOLUTION OF THE PUBLIC RIGHTS DOCTRINE

The evolution of the public rights doctrine comprises three main phases. The first phase starts with the seminal case of *Murray's Lessee*, in which the Court first uses the expression "public rights," and which later cases cite to in their discussion of the doctrine.<sup>20</sup> The second phase begins with the *Atlas Roofing* decision and witnesses the expansion of the public rights doctrine to its maximum scope, allowing administrative adjudication even in cases where the Seventh Amendment would have required a jury trial had the claim been brought in federal court.<sup>21</sup> The

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18. 144 S. Ct. 2244 (2024).

19. *Id.* at 2273.

20. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

21. *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 455 (1977).

third and final phase begins with *Tull v. United States*<sup>22</sup> and is characterized by the gradual restriction of the public rights doctrine culminating in *Jarkesy*.

*A. The Origins: Murray's Lessee and the Early Twentieth-Century Cases*

The first mention of the public rights doctrine appears in *Murray's Lessee*.<sup>23</sup> In that case, the Court held that an executive branch agency had the power to collect revenue via summary proceedings outside an Article III court.<sup>24</sup> The Court distinguished two classes of cases.<sup>25</sup> The first class involved private rights, which “from [their] nature, [are] the subject[s] of a suit at the common law, or in equity, or admiralty.”<sup>26</sup> The second class involved public rights, which “[C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.”<sup>27</sup> Although the Seventh Amendment would normally require a jury trial in a proceeding involving the deprivation of property, this requirement did not apply to cases involving public rights.<sup>28</sup> The Court upheld the government’s authority to bring the case before a non-Article III tribunal.<sup>29</sup>

Following *Murray's Lessee*, the Court continued to apply the public rights doctrine in other areas over which it determined that Congress had exclusive authority. In *Oceanic Steam Navigation Co. v. Stranahan*,<sup>30</sup> the Court addressed Congress’s authority to enforce immigration laws by authorizing administrative agencies to exact penalties without judicial process.<sup>31</sup> The Court held that Congress had the power to authorize the Secretary of Commerce and Labor to exact fines from ship owners who imported immigrants afflicted with contagious diseases.<sup>32</sup> Furthermore, the Court held that such practices did not violate the Constitution because they stemmed from Congress’s constitutional authority to regulate foreign commerce and immigration.<sup>33</sup> Since these were matters entirely

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22. 481 U.S. 412 (1987).

23. *Murray's Lessee*, 59 U.S. (18 How.) at 284.

24. *Id.* at 279–80.

25. *See id.* at 284.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 280–81.

30. 214 U.S. 320 (1909).

31. *Id.* at 329–30.

32. *Id.* at 334.

33. *Id.* at 340 (“[I]f Congress has deemed it necessary to impose particular restrictions on the coming in of aliens, and to sanction such prohibitions by penalties enforceable by administrative authority, it follows that the constitutional right of Congress

within Congress's purview, Congress could "giv[e] to executive officers the power to enforce such penalties without the necessity of invoking the judicial power."<sup>34</sup> The Court based its holding on prior cases and on long-standing practice.<sup>35</sup> The Court rejected the proposition that judicial oversight was necessary in all proceedings involving the collection of penalties.<sup>36</sup>

In *Crowell v. Benson*,<sup>37</sup> the Court addressed the claim of a government agency commissioner who was suing a maritime employer under federal law on behalf of an employee for damages incurred from an injury.<sup>38</sup> The employer challenged the federal law—which permitted adjudication of these claims via administrative workmen's compensation proceedings—as unconstitutional for violating due process, the Seventh Amendment, Article III, and the Fourth Amendment.<sup>39</sup> The Court discussed the cases defining the public rights doctrine and determined that the case before it involved private rights because the matter was between two individuals, notwithstanding the fact that the government was bringing the suit on behalf of one of the parties.<sup>40</sup> Moreover, the Court commented that, while cases arising under common law had enjoyed a right to a jury trial, those arising under equity and admiralty had a tradition of allowing matters of fact to be determined by commissioners.<sup>41</sup> Since the case before the court was one of admiralty, the use of an administrative tribunal did not violate the Seventh Amendment.<sup>42</sup> The Court explained that the fact-finding function of the administrative tribunal remained subject to the authority of the federal court, and thus the assignment did not violate Article III jurisdiction.<sup>43</sup>

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to enact such legislation is the sole measure by which its validity is to be determined by the courts.").

34. *Id.* at 339.

35. *Id.*

36. *Id.* at 338.

37. 285 U.S. 22 (1932).

38. *Id.* at 36–37.

39. *Id.* at 37.

40. *Id.* at 50–51.

41. *Id.* at 51–52 (“In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages. While the reports of masters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law, and the parties have no right to demand that the court shall redetermine the facts thus found.” (footnote omitted)).

42. *Id.* at 45.

43. *Id.* at 61 (“[T]he proceedings of such masters and commissioners are always subject to the direction of the court and their reports are essentially advisory . . .”).

*B. The “High-Water Mark”:* Atlas Roofing and Schor

In *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, the Court addressed the application of the Occupational Safety and Health Act (OSH Act), passed by Congress in 1970.<sup>44</sup> The Act created remedies that included civil penalties assessed against employers by the Occupational Safety and Health Review Commission via an administrative proceeding without a jury trial.<sup>45</sup> The petitioner brought suit contending that the adjudication by administrative agencies of cases involving civil penalties violated the Seventh Amendment right to a jury trial.<sup>46</sup>

The Court held that the Seventh Amendment did not pose an obstacle to agency adjudication of cases in which “the [g]overnment sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact.”<sup>47</sup> The Court referenced *Murray’s Lessee* and emphasized that such adjudication was only permitted in the case of these public, statutorily created rights and that “[w]holly private tort, contract, and property cases, as well as a vast range of other cases, [we]re not at all implicated.”<sup>48</sup> The Court mentioned the burden on federal courts that a failure to allow administrative adjudication would create.<sup>49</sup>

In *Commodity Futures Trading Commission v. Schor*,<sup>50</sup> the Court addressed a claim under the Commodity Exchange Act (CEA).<sup>51</sup> The CEA provided that claims for violations of the CEA could be brought before the Commodity Futures Trading Commission (CFTC).<sup>52</sup> Schor brought a claim against Conti, a commodity futures broker, under the CEA.<sup>53</sup> Conti counterclaimed under state law.<sup>54</sup> Schor argued that the CFTC did not have authority to adjudicate the claims.<sup>55</sup> The CFTC

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44. 430 U.S. 442, 445 (1977).

45. *Id.* at 446–47.

46. *Id.* at 448.

47. *Id.* at 450.

48. *Id.* at 457–58.

49. *Id.* at 455 (“Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field.”). *But cf. Sec. & Exch. Comm’n v. Jarkesy*, 144 S. Ct. 2117, 2139 (2024) (“[E]ffects like increasing efficiency and reducing public costs are not enough to trigger the exception.”); *id.* at 2149–50 (Gorsuch, J., concurring) (listing several cases addressing various constitutional rights and holding that a purported increase in efficiency does not justify a denial of those rights).

50. 478 U.S. 833 (1986).

51. *Id.* at 837.

52. *Id.* at 836.

53. *Id.* at 837.

54. *Id.* at 837–38.

55. *Id.* at 838.

rejected Schor's argument, and Schor appealed to the D.C. Circuit.<sup>56</sup> The D.C. Circuit held that the agency's adjudication of state law counterclaims would raise constitutional concerns.<sup>57</sup> To avoid those concerns, the court interpreted the statute to allow the agency to decide only the issues arising directly under the federal statute.<sup>58</sup> The court reversed the CFTC, finding that Conti's counterclaims did not raise issues under the CEA and therefore the CFTC did not have the authority to adjudicate those claims.<sup>59</sup>

The Supreme Court reversed the D.C. Circuit, noting that clear evidence of congressional intent indicated that the purpose of the statute was to allow the CFTC to adjudicate claims similar to those at issue, and therefore, the D.C. Circuit's interpretation was impermissible.<sup>60</sup> The Court then addressed the question of whether the statute was constitutional in light of Article III.<sup>61</sup> The Court emphasized that the analysis of Article III's scope needed to be determined by a focus on the purpose of the statute rather than on a "doctrinaire reliance on formal categories."<sup>62</sup>

The Court determined that while enforcing a strict view of the separation of powers to prevent agency adjudication of state law claims might provide greater doctrinal coherence, such a constraint would burden the ability of Congress to take decisive action.<sup>63</sup> Rather, the Court adopted a pragmatic inquiry as to the level of intrusion by the executive branch upon the judiciary.<sup>64</sup> Under that analysis, the Court found that the statutory scheme in question was permissible.<sup>65</sup> Turning to the public-private rights distinction, the Court again adopted a pragmatic approach and found that allowing agency adjudication of private rights did not create "a substantial threat to the separation of powers."<sup>66</sup>

### *C. The Court Walks Back the Public Rights Doctrine*

Following *Atlas Roofing* and *Schor*, the Court began to apply a less pragmatic and more technical approach to the application of the public

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56. *Id.*

57. *Id.* at 839.

58. *Id.*

59. *Id.* at 839–40.

60. *Id.* at 841.

61. *Id.* at 847.

62. *Id.* at 847–48 (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985)).

63. *Id.* at 851.

64. *Id.*

65. *Id.* at 851–52.

66. *Id.* at 854.

rights doctrine.<sup>67</sup> In *Tull v. United States*, the government sued a real estate developer for violating the Clean Water Act.<sup>68</sup> To determine whether the petitioner had a right to a jury trial, the Court laid out a two-part test. First, it compared the claims at issue with eighteenth-century English common law claims and inquired whether the cause of action was more analogous to claims tried at courts of law or at courts of equity.<sup>69</sup> It then asked whether the remedy itself was legal or equitable.<sup>70</sup> The Court emphasized, however, that the second inquiry was more critical in answering the question of whether a jury trial was required.<sup>71</sup> Although the government attempted to characterize the civil penalties at issue as equitable remedies, the Court disagreed and considered them to be legal in nature.<sup>72</sup> As a result, the Seventh Amendment applied.<sup>73</sup>

In *Granfinanciera, S.A. v. Nordberg*, the Court addressed the issue of whether a bankruptcy judge had improperly denied a party accused of fraud a jury trial.<sup>74</sup> The Court, applying the two-part analysis from *Tull* to determine first whether the cause of action was analogous to either a legal or an equitable claim under English common law, held that the claims were sufficiently analogous to traditional common-law fraud claims to be considered legal, rather than equitable.<sup>75</sup> The Court drew a connection between the question of whether there was a Seventh Amendment right to a jury trial and the question of whether the matter could be assigned to a non-Article III court.<sup>76</sup> Both of these inquiries depended on whether the cause of action involved “public rights.”<sup>77</sup> For a statutory right to be subject to adjudication by a non-Article III court, the matter must be closely related to a regulatory scheme within Congress’s power to enact, or it must be a right asserted either by the federal government or against it.<sup>78</sup> The Court reaffirmed its holding from a prior case that it was not necessary for the government to be a party to

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67. *Schor* was decided in July 1986. Justice Scalia joined the Supreme Court in September of the same year. Maira Garcia & Amisha Padnani, *Justice Antonin Scalia: His Life and Career*, N.Y. TIMES (Feb. 14, 2016), <https://www.nytimes.com/interactive/2016/02/14/us/scalia-timeline-listy.html>.

68. 481 U.S. 412, 414 (1987).

69. *Id.* at 417.

70. *Id.* at 417–18.

71. *Id.* at 421.

72. *Id.* at 422 (“Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity.”).

73. *Id.* at 425.

74. 492 U.S. 33, 37 (1989).

75. *Id.* at 46–48.

76. *Id.* at 53.

77. *Id.* at 54.

78. *Id.* at 54–55.

the suit in order for the public rights doctrine to apply.<sup>79</sup> Applying this framework, the Court ruled that the instant matter was not one of public right and that a Seventh Amendment jury right was applicable.<sup>80</sup>

Justice Scalia, concurring in the judgment, took issue with the Court's holding that the public rights exception did not require the presence of the government as a party to the suit.<sup>81</sup> He interpreted the historical rationale of the public rights doctrine, going back to *Murray's Lessee*, to be tied to the government's waiver of sovereign immunity in consenting to be sued.<sup>82</sup> In his view, the government must be implicated as a party for the doctrine to apply.<sup>83</sup> He denounced the Court's decisions in *Union Carbide*<sup>84</sup> and *Schor* as having abandoned that fundamental nexus.<sup>85</sup>

In *Stern v. Marshall*,<sup>86</sup> the Court examined whether a federal statute authorized bankruptcy courts to adjudicate certain "core proceedings" and, if it did, whether that authority violated Article III by intruding on the constitutional prerogatives of federal courts.<sup>87</sup> The Court explained that "core proceedings" in the context of bankruptcy are those in which the bankruptcy court has the authority to enter final judgment.<sup>88</sup> In a noncore proceeding, by contrast, a bankruptcy judge's authority is limited to "submit[ing] proposed findings of fact and conclusions of law to the district court."<sup>89</sup> The Court found that the tortious interference counterclaim at issue in *Stern* fell under one of the statutorily defined categories of core proceedings.<sup>90</sup> As a result, the statute in question did allow the bankruptcy courts to adjudicate the claim at issue in the case.<sup>91</sup> However, the Court found that such an exercise of jurisdiction was unconstitutional.<sup>92</sup> The Court rejected the notion that the adjudication of

79. *Id.* at 54 (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586 (1985); *id.* at 596–99 (Brennan, J., concurring in the judgment)).

80. *Id.* at 64.

81. *Id.* at 65 (Scalia, J., concurring in part and in the judgment).

82. *Id.* at 67–69 (Scalia, J., concurring in part and in the judgment); *see also Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 716 (2015) (Thomas, J., dissenting) (agreeing with Justice Scalia's view).

83. *Granfinanciera*, 492 U.S. at 65 (Scalia, J., concurring in part and in the judgment).

84. *Union Carbide*, 473 U.S. at 586 (holding that the right to an Article III forum is not absolute, even without the government as a party).

85. *Granfinanciera*, 492 U.S. at 70 (Scalia, J., concurring in part and in the judgment).

86. 564 U.S. 462 (2011).

87. *Id.* at 469, 471.

88. *Id.* at 471.

89. *Id.*

90. *Id.* at 475.

91. *Id.* at 478.

92. *Id.* at 482.

the counterclaim fell under the public rights exception.<sup>93</sup> The claim was not part of the historical class of claims that could be adjudicated by non-Article III courts.<sup>94</sup> It was also not part of a federal statutory scheme.<sup>95</sup> The Court also rejected the argument that the bankruptcy courts were adjuncts of the federal district courts, similar to the agencies in *Crowell v. Benson*.<sup>96</sup> The Court insisted on the importance of enforcing Article III jurisdiction even in areas where a deviation from the Constitution's literal requirements would seem to be of no great consequence.<sup>97</sup>

In *Securities & Exchange Commission v. Jarkesy*, the Court addressed a claim initiated by the SEC for securities fraud.<sup>98</sup> The Court, as in previous cases, examined whether the Seventh Amendment right to a jury trial applied.<sup>99</sup> The Court began its analysis of the Seventh Amendment question by determining that the remedy of civil penalties would historically have been assigned exclusively to courts of law, rather than courts of equity.<sup>100</sup> The Court relied on its holding in *Granfinanciera*, saying that it “largely resolve[d]” the instant case.<sup>101</sup> The mere fact that Congress had assigned a certain class of claims to administrative agencies for adjudication was not enough to overcome the Seventh Amendment right to a jury trial if the claim at issue was a traditional common law claim.<sup>102</sup> As such, “the remedy [was] all but dispositive” in favor of the right to a jury trial.<sup>103</sup>

Having resolved the Seventh Amendment question, the Court turned to the question of whether the public rights exception applied.<sup>104</sup> The Court surveyed the historical application of the public rights doctrine, explaining that it applied to matters that could be resolved by the legislative and executive branches.<sup>105</sup> The Court also admitted that its jurisprudence in that area had “not always spoken in precise terms” and expressly disclaimed any pretension of articulating a clear rationale for the public rights doctrine.<sup>106</sup>

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93. *Id.* at 488.

94. *Id.* at 493.

95. *Id.*

96. *Id.* at 500.

97. *Id.* at 502–03.

98. 144 S. Ct. 2117, 2127 (2024).

99. *Id.* at 2125.

100. *Id.* at 2129.

101. *Id.* at 2134.

102. *Id.* at 2136.

103. *Id.* at 2129–30.

104. *Id.* at 2131.

105. *Id.* at 2132–33.

106. *Id.* at 2133.

The Court pointed out that the doctrine did not have a constitutional base, but “derive[d] instead from background legal principles.”<sup>107</sup> The Court took care to emphasize that its previous decisions applying the public rights doctrine had always carefully examined “the basis for . . . the exception,” to prevent the exception from “swallow[ing] the rule” and to safeguard the constitutional protections of Article III jurisdiction.<sup>108</sup> Responding to the dissent’s objections, the Court made clear that mere efficiency was not a sufficient justification to apply the doctrine.<sup>109</sup>

The Court also distinguished *Atlas Roofing* by pointing out that the claims at issue in that case had been part of a novel statutory scheme and therefore were not part of the common law tradition.<sup>110</sup> Although the claims before the Court in *Jarkesy* had been brought under a federal statute, they were similar enough to common law fraud claims to be entitled to Article III adjudication with the attendant Seventh Amendment right to a jury trial.<sup>111</sup> The Court relied on its decision in *Tull*, which held that common law claims were still subject to the Seventh Amendment even when they were part of a statutory scheme.<sup>112</sup> The Court then concluded that the public rights exception did not apply.<sup>113</sup>

Justice Gorsuch, in a concurrence, emphasized that the result reached in the case followed not only from the Court’s precedent, but from structural protections in the Constitution itself.<sup>114</sup> He explained how the Seventh Amendment, Article III, and the Due Process Clause taken together require a jury trial in federal court for the common law claims at issue.<sup>115</sup> Turning to the question of the public rights exception, Gorsuch inquired as to what rationale formed the basis for the exception.<sup>116</sup> While he declined to specify an exact definition of the exception, Gorsuch assured that it could only apply in cases that enjoyed “a serious and unbroken historical pedigree.”<sup>117</sup> Notably, the use of non-Article III courts to adjudicate matters involving the collection of customs, which had been at issue in *Murray’s Lessee*, was an example of the proper invocation of the public rights exception.<sup>118</sup> Throughout the twentieth century, however, the exception was gradually expanded to an extent

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107. *Id.* at 2134.

108. *Id.*

109. *Id.* at 2139.

110. *Id.* at 2137.

111. *Id.* at 2138.

112. *Id.* at 2139 (citing *Tull v. United States*, 481 U.S. 412, 421–23 (1987)).

113. *Id.* at 2127.

114. *Id.* at 2140 (Gorsuch, J., concurring).

115. *Id.* (Gorsuch, J., concurring).

116. *Id.* at 2146–47 (Gorsuch, J., concurring).

117. *See id.* (Gorsuch, J., concurring).

118. *Id.* at 2147 (Gorsuch, J., concurring).

incompatible with an original justifiable rationale.<sup>119</sup> This process culminated in *Atlas Roofing*, but the Court then began to walk back the broad understanding that it had applied in that case.<sup>120</sup>

The *Jarkesy* decision was, in Gorsuch's view, a return to a public rights jurisprudence in harmony with the constitutional protections afforded by Article III and the Seventh Amendment.<sup>121</sup> While the majority opinion asserted that its decision did not conflict with *Atlas Roofing*,<sup>122</sup> Justice Gorsuch's concurrence suggested otherwise. In his view, *Atlas Roofing*'s conception of both the public rights doctrine and the Seventh Amendment jury trial right was "difficult to square with precedent and original meaning."<sup>123</sup> *Atlas Roofing*'s analysis of the public rights doctrine had been rejected by the Court in subsequent cases.<sup>124</sup>

## II. THE SUPREME COURT WILL REJECT THE PUBLIC RIGHTS DOCTRINE

The Court will reject the public rights doctrine for three principal reasons. First, the Court's approach to the public rights doctrine in recent cases parallels the way that the Court has "acutely distinguished," rather than overturned, certain other precedents.<sup>125</sup> Second, insofar as the public rights doctrine remains viable, it conflicts with the jurisprudence of a majority of the members of the Court as expressed both in *Jarkesy* and in other recent cases, notably, *Loper Bright*. Finally, stare decisis considerations will not prevent the Court from abrogating the public rights doctrine because the public rights doctrine meets the criteria the Court has laid out for overturning precedent.

### *A. The Court has Already Begun to Restrict the Scope of the Public Rights Doctrine*

The Court's cases on the public rights doctrine after *Atlas Roofing* have expressed a restricted view of the public rights doctrine. In

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119. *Id.* at 2147–49 (Gorsuch, J., concurring).

120. *Id.* at 2148–49 (Gorsuch, J., concurring).

121. *Id.* at 2149 (Gorsuch, J., concurring).

122. *Id.* at 2139.

123. *Id.* at 2153 (Gorsuch, J., concurring).

124. *Id.* at 2154 (Gorsuch, J., concurring).

125. *Atlas Roofing* explained that Congress had created the statute under which the government had brought the claims against the petitioner pursuant to its power under the Interstate Commerce Clause. *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 456 (1977); see U.S. CONST., art. I, § 8, cl. 3. One could argue that the Court's reluctance to embrace a broad reading of the public rights doctrine has a parallel to its historic shift in refusing to apply the Interstate Commerce Clause in *United States v. Lopez*, 514 U.S. 549, 566–68 (1995).

particular, *Granfinanciera* and *Jarkesy* held that the doctrine could not apply to traditional legal claims that were entitled to a trial in federal court.<sup>126</sup> This approach differs from the holding in *Atlas Roofing*, which allowed claims to be adjudicated without a jury even when those same claims would have demanded a jury in federal court.<sup>127</sup>

The Court has modified the public rights doctrine by changing the requirements for the doctrine to apply. This judicial technique is a form of “obstructing precedent,” or changing a doctrine without explicitly overruling a prior case.<sup>128</sup> The particular form of obstructing precedent that the Court has used vis-à-vis the public rights doctrine is “acutely distinguishing,” in which the Court adds to the conditions necessary to achieve a legal result.<sup>129</sup>

### 1. The Court Has Progressively Limited the Scope of the Public Rights Doctrine After *Atlas Roofing*

The fact that the Court has already taken significant steps toward restricting the application of the public rights doctrine indicates that the Court will discard the doctrine entirely.<sup>130</sup> While the Court had already suggested that it would lean this way in *Tull*, the first major step in this direction was *Granfinanciera*.<sup>131</sup> Although *Granfinanciera* did not purport to overrule *Atlas Roofing*, the case was a turning point in the restriction of the doctrine’s scope, to such an extent that Justice White, dissenting in *Granfinanciera*, said that it may well have abrogated *Atlas Roofing*.<sup>132</sup> *Granfinanciera* limited the scope of *Atlas Roofing*’s reasoning by holding that the Seventh Amendment’s guarantee of the right to a jury trial could not be overcome by the mere fact that Congress had assigned the claim to an agency.<sup>133</sup>

The holding of *Granfinanciera* implicitly repudiates the reasoning in *Atlas Roofing*. *Atlas Roofing* held that Congress could assign a cause to an agency “even if the Seventh Amendment would have required a jury

126. *Jarkesy*, 144 S. Ct. at 2136 (“Congress cannot ‘conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal.’” (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989))).

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

128. Bill Watson, *Obstructing Precedent*, 119 NW. U. L. REV. 259, 274 (2024).

129. See *infra* Section II.A.2.

130. James Fallows Tierney, *Jarkesy’s Stakes for the SEC*, 74 DUKE L.J. 1851, 1865 (2025) (“History suggests *Atlas Roofing* is teed up for future overruling.”).

131. See *Jarkesy*, 144 S. Ct. at 2127.

132. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 79 (1989) (White, J., dissenting) (“Perhaps . . . *Atlas Roofing* is no longer good law after today’s decision.”).

133. See *id.* at 53 (“Unless a legal cause of action involves ‘public rights,’ Congress may not deprive parties litigating over such a right of the Seventh Amendment’s guarantee to a jury trial.”).

8where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency.”<sup>134</sup> But the logic of *Granfinanciera* indicates that if a claim would have required a jury in federal court, then it would have required Article III adjudication in the first place.<sup>135</sup>

*Jarkesy* went a step further than *Granfinanciera*. *Granfinanciera* had said that while Congress cannot simply assign common law claims to an administrative tribunal, it can assign novel statutory claims “closely *analogous* to common-law claims.”<sup>136</sup> *Jarkesy*, however, held that a statutory claim sufficiently similar to a common law claim was entitled to the protections of the Seventh Amendment right to a jury trial and Article III jurisdiction.<sup>137</sup>

## 2. The Court’s Approach to the Public Rights Doctrine After *Atlas Roofing* Parallels the Way the Court Has “Acutely Distinguished” Certain Cases to Restrict the Scope of Other Doctrines

The gradual departure of the Court’s jurisprudence from its holding in *Atlas Roofing* is similar to the approach it has adopted in preparing to overrule other doctrines.<sup>138</sup> As an example, the Court’s jurisprudence regarding federal court deference to executive agency statutory interpretation (*Chevron* deference) in the decade or so leading up to its decision in *Loper Bright* presents parallels to the *Jarkesy* Court’s approach to narrowing the scope of a doctrine and preparing to entirely overrule it.<sup>139</sup> Some scholars have commented that the Court engages in “stealth overruling,” *i.e.*, that instead of explicitly overruling a case, the Court chips away at the doctrinal basis for the case’s holding until it has no meaningful application.<sup>140</sup>

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134. *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 455 (1977).

135. *Granfinanciera*, 492 U.S. at 53 (“Indeed, our decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal.”).

136. *Id.* at 52.

137. *Sec. & Exch. Comm’n v. Jarkesy*, 144 S. Ct. 2117, 2135 (2024) (“[W]hat matters is the substance of the action, not where Congress has assigned it.”).

138. See, e.g., Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 16 (2010).

139. See *infra* Section II.C (discussing the stare decisis parallels between the public rights doctrine and *Chevron* deference).

140. Friedman, *supra* note 138, at 6–8.

Professor Bill Watson provides a nuanced discussion of the various approaches a court may adopt with regard to precedent.<sup>141</sup> He distinguishes overruling a precedent, which involves “removing its holding from the law altogether,” from “limiting a precedent to restrict its practical effect,” which he terms “obstructing.”<sup>142</sup> Obstruction occurs when a court addresses a substantially similar case as a previous court but “weight[s] values or purposes differently.”<sup>143</sup> Watson enumerates and describes four means of obstructing precedent: acutely distinguishing, undercutting, revising, and ignoring.<sup>144</sup>

First, a court can “acutely distinguish[]” a prior case by adding to the conditions that triggered its holding a fact or set of facts not in the present case.<sup>145</sup> According to Watson, this generally occurs when the Court disagrees with the rationale that supports the holding of the precedent case.<sup>146</sup> Watson provides *Bivens*<sup>147</sup> and *Egbert*<sup>148</sup> as examples.<sup>149</sup> The precedent case, *Bivens*, held that “if a federal official violates a plaintiff’s constitutional rights and Congress has created no other remedy, then the plaintiff has a claim for damages.”<sup>150</sup> In *Egbert*, the Supreme Court “acutely distinguished” *Bivens* by adding to the *Bivens* test the requirement that “there [be] no reason to think that Congress is better suited than judges to decide whether a damages remedy should be available.”<sup>151</sup> The effect of *Egbert* was to make the *Bivens* test apply to a smaller range of cases.<sup>152</sup>

A second type of obstruction is what Watson calls “undercutting,” which occurs when the court addresses a similar, though not identical, set of facts as in the precedent case, but reaches a different result.<sup>153</sup> Watson provides *Oklahoma v. Castro-Huerta*<sup>154</sup> and *McGirt v. Oklahoma*<sup>155</sup> as examples.<sup>156</sup> *McGirt* held that part of the state of

141. See generally Watson, *supra* note 128 (providing a taxonomy of methods by which courts may address precedent).

142. *Id.* at 279.

143. *Id.* at 291.

144. *Id.* at 281.

145. *Id.* at 282.

146. *Id.*

147. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

148. *Egbert v. Boule*, 142 S. Ct. 1793 (2022).

149. See Watson, *supra* note 128, at 274.

150. Watson, *supra* note 128, at 262.

151. *Id.* at 284 (emphasis omitted).

152. *Id.*

153. *Id.* at 286.

154. 142 S. Ct. 2486 (2022).

155. 140 S. Ct. 2452 (2020).

156. See Watson, *supra* note 128, at 288–89.

Oklahoma was an Indian reservation.<sup>157</sup> The *McGirt* opinion implied that its holding “would prevent Oklahoma from prosecuting crimes against Indians on the reservation.”<sup>158</sup> In *Castro-Huerta*, however, the Court reached the contrary conclusion, allowing Oklahoma to “prosecute crimes by non-Indians against Indians on reservation land.”<sup>159</sup> *Castro-Huerta* “undercut” *McGirt* by declining to extend its reasoning to reach a consequence that would seem to flow logically from it.<sup>160</sup>

A third method of obstruction is revising precedent, which involves a holding that reaches the same result as a precedent, but that the court justifies on the basis of different facts.<sup>161</sup> Watson provides *MacPherson v. Buick Motor Co.*<sup>162</sup> as an example of revising precedent.<sup>163</sup> The court held that Buick was liable to a plaintiff injured in an accident on a negligence theory rather than on a privity-of-contract theory, which had previously been the legal basis for similar cases.<sup>164</sup> Although the court reached the same result—that the defendant manufacturer of a vehicle was liable for defects—it did so based on a different rationale.<sup>165</sup>

The final method of obstructing precedent is by ignoring it.<sup>166</sup> This means simply that a court rules on a case that would apparently be governed by precedent without addressing the precedent and instead reaching a new holding.<sup>167</sup> Watson gives *Kennedy v. Bremerton School District*<sup>168</sup> as an example, in which the Supreme Court announced that a three-factor test for the application of the Establishment Clause articulated in *Lemon v. Kurtzman*<sup>169</sup> had “been abandoned,” although not formally overruled.<sup>170</sup> *Kennedy* was decided after many other cases which had simply declined to apply the *Lemon* test.<sup>171</sup>

An application of Watson’s framework to the Court’s treatment of the public rights doctrine in *Granfinanciera* and *Jarkesy* reveals that “acutely distinguishing” is the form of obstruction that most accurately describes the Court’s approach. The Court did not “undercut” *Atlas Roofing*, because both *Granfinanciera* and *Jarkesy* presented the same

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157. Watson, *supra* note 128, at 288.

158. *Id.* at 289.

159. Watson, *supra* note 128, at 288–89.

160. *Id.*

161. *Id.* at 289.

162. 111 N.E. 1050 (N.Y. 1916).

163. *See* Watson, *supra* note 128, at 290–91.

164. Watson, *supra* note 128, at 291.

165. *Id.*

166. *Id.* at 293.

167. *Id.* at 293–94.

168. 142 S. Ct. 2407 (2022).

169. 403 U.S. 602 (1971).

170. Watson, *supra* note 128, at 296–97 (cleaned up).

171. *Id.* at 297.

question as *Atlas Roofing*: whether the defendant in a suit for civil penalties was entitled to a jury trial.<sup>172</sup> In *Atlas Roofing*, the Court addressed the OSH Act, which allowed the federal government to assess civil penalties for employer violations of workplace safety regulations.<sup>173</sup> In *Granfinanciera*, the claims at issue were under federal bankruptcy law, which did not explicitly include a right to a jury trial.<sup>174</sup> The claims in *Jarkesy* dealt with federal securities fraud law, which the Court determined was similar enough to common law fraud claims to warrant adjudication in federal court with a jury trial.<sup>175</sup> Therefore, the Court did not “undercut” *Atlas Roofing*.

The Court in *Jarkesy* did not revise precedent. Revising precedent requires that a court reach the same result as a previous case, but on the basis of different facts.<sup>176</sup> The Court in *Jarkesy* did not reach the same result as in *Atlas Roofing*. *Atlas Roofing* held that the public rights doctrine did apply to the adjudication of statutory OSH Act claims and that the Seventh Amendment did not demand a jury trial.<sup>177</sup> *Jarkesy*, on the other hand, held that the doctrine did not apply to the adjudication of the statutory fraud claims brought by the SEC.<sup>178</sup> As a result, the Seventh Amendment required a jury trial.<sup>179</sup> Therefore, the Court in *Jarkesy* did not revise its prior holding in *Atlas Roofing* regarding the public rights doctrine.

The Court has not ignored *Atlas Roofing*. Both *Granfinanciera* and *Jarkesy* grappled with *Atlas Roofing* and made an effort to distinguish it. *Granfinanciera* claimed that it did not depart from *Atlas Roofing*, but rather “adhere[d] to [*Atlas Roofing*’s] general teaching” that administrative adjudication was permissible only in cases involving public rights.<sup>180</sup> *Jarkesy* distinguished *Atlas Roofing* on the basis that the statutory fraud claims in that case did not originate from the common law, but arose from Congress’s intent to create a wholly novel claim.<sup>181</sup> Therefore, the Court has not ignored *Atlas Roofing*.

“Acutely distinguishing” is the method most suited to classifying the Court’s treatment of *Atlas Roofing*. Under *Atlas Roofing*, the public

172. See *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 444 (1977).

173. *Id.* at 445.

174. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 37 (1989).

175. *Sec. & Exch. Comm’n v. Jarkesy*, 144 S. Ct. 2117, 2130–31 (2024) (“Congress’s decision to draw upon common law fraud created an enduring link between federal securities fraud and its common law ancestor.” (cleaned up)).

176. See Watson, *supra* note 128, at 289.

177. *Atlas Roofing*, 430 U.S. at 449–50.

178. *Jarkesy*, 144 S. Ct. at 2131.

179. *Id.*

180. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 (1989).

181. *Jarkesy*, 144 S. Ct. at 2137.

rights doctrine applied to a claim if the government in its sovereign capacity brought the claim, the claim was for civil penalties, and the claim had been statutorily created by Congress and assigned to an administrative agency.<sup>182</sup> *Granfinanciera* “acutely distinguished” *Atlas Roofing* by adding to the list of elements—or modifying one of the existing elements—so that the statutory claim at issue must be *novel*, without a common law predecessor.<sup>183</sup> Congress could not simply reassign a common law claim to an agency and avoid the restrictions of the Seventh Amendment.<sup>184</sup> An increase in efficiency was not an adequate reason to remove a claim from an Article III forum to an administrative one.<sup>185</sup>

*Granfinanciera* thereby reduced the applicability of *Atlas Roofing*’s holding to a smaller universe of cases.<sup>186</sup> At the same time, *Granfinanciera* potentially expanded the public rights doctrine by removing the requirement, stated by *Atlas Roofing*, that the government must be a party to the suit.<sup>187</sup> Justice Scalia noted this in his concurrence and called out the Court for eliminating that element.<sup>188</sup>

The Court in *Jarkesy* reaffirmed *Granfinanciera*’s holding that claims that were legal in nature cannot be brought before an administrative tribunal without a jury trial right.<sup>189</sup> The Court likewise “acutely distinguished” *Atlas Roofing* by emphasizing that those statutory claims “br[ought] no common law soil with them.”<sup>190</sup> The *Jarkesy* Court’s emphasis on the novelty of the statutory claims in *Atlas Roofing* follows *Granfinanciera*’s holding that the public rights doctrine did not apply to traditional legal claims.<sup>191</sup>

The fact that *Granfinanciera* and *Jarkesy* “acutely distinguished” *Atlas Roofing* is more apparent by contrasting those cases with the two possible alternatives: (1) that they had overruled *Atlas Roofing*; or (2) that they had ruled that the Seventh Amendment did not require a jury trial in the bankruptcy or securities fraud controversies that they respectively addressed. First, *Granfinanciera* or *Jarkesy* could have held

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182. *Atlas Roofing*, 430 U.S. at 450.

183. *Granfinanciera*, 492 U.S. at 60–61 (“This purely taxonomic change cannot alter our Seventh Amendment analysis. Congress cannot eliminate a party’s Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.”); see Watson, *supra* note 128, at 282.

184. See *Granfinanciera*, 492 U.S. at 63.

185. *Id.*

186. See Watson, *supra* note 128, at 282.

187. *Granfinanciera*, 492 U.S. at 53–54.

188. *Id.* at 65 (Scalia, J., concurring in part and in the judgment).

189. *Sec. & Exch. Comm’n v. Jarkesy*, 144 S. Ct. 2117, 2135–36 (2024).

190. *Id.* at 2137.

191. See *id.* at 2135–36.

that *Atlas Roofing's* holding had been erroneous because the agency in that case had exercised the judicial power of the United States and that the novel statutory origins of the claims at issue were irrelevant to the application of the Seventh Amendment.

Second, they could have applied the public rights doctrine to the issues before them. *Granfinanciera* could have held that it applied to the bankruptcy claims at issue. *Granfinanciera* expanded the public rights doctrine in one sense by holding that the government did not need to be a party to the suit.<sup>192</sup> If the *Granfinanciera* Court had not added the element that the claims at issue must be entirely novel, it could have held that the public rights doctrine applied. *Jarkesy* likewise could have applied the public rights doctrine on the basis that the statutory fraud claims it addressed were part of a statutory scheme by which Congress had assigned the adjudication of such rights to an agency. Furthermore, *Jarkesy* would not have needed to rely on *Granfinanciera's* addition that the government need not be a party to the suit, since the government brought the claims in *Jarkesy*.

*B. The Public Rights Doctrine Is Inconsistent with the Prior  
Jurisprudence of Jarkesy's Majority Justices*

The jurisprudence of the *Jarkesy* majority, as expressed both in *Jarkesy* and in other cases by members of the *Jarkesy* majority, is at odds with the rationale underlying the public rights doctrine. The majority opinion in *Jarkesy* discussed the history of the Court's cases that have applied the public rights doctrine and their surrounding contexts.<sup>193</sup> Among the potential justifications for the doctrine that the Court enumerated were the collection of revenue, immigration, and other matters that fall under the plenary control of Congress.<sup>194</sup> While the Court in *Jarkesy* did not question any of these previous cases,<sup>195</sup> these potential justifications are inconsistent with the current Court's jurisprudence. There are two ways the Court could reject the public rights doctrine based on the doctrinal views of the current majority.

First, the Court could hold that summary proceedings such as those in *Murray's Lessee* violate the separation of powers, by analogy to the Court's reasoning in *Loper Bright*. Justice Gorsuch's concurrence in *Jarkesy* explained that the public rights exception applied in *Murray's Lessee* due to Congress's power to collect revenue.<sup>196</sup> Although neither the *Jarkesy* majority nor Gorsuch's concurrence explicitly questioned the

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192. *Granfinanciera*, 492 U.S. at 54.

193. *See Jarkesy*, 144 S. Ct. at 2132–33.

194. *Id.*

195. *See id.*

196. *Id.* at 2146–47 (Gorsuch, J., concurring).

application of the public rights doctrine in *Murray's Lessee*, Gorsuch's concurrence in *Jarkesy* and his concurrence in another case, *Culley v. Marshall*,<sup>197</sup> both include reasoning that provides a basis for doing so.<sup>198</sup> If summary proceedings for the collection of revenue belonged to Congress, as the Court in *Murray's Lessee* pointed out,<sup>199</sup> then they should not have been brought in federal court in the first place.

Alternatively, the Court could hold that the premise of *Murray's Lessee* was mistaken in assuming that Congress had discretion over whether or not to assign the collection of revenue to the judicial branch. Under this view, summary proceedings outside the judiciary would violate due process. The Court could justify such a holding on the basis that due process requires adjudication in an Article III court and the Seventh Amendment requires a jury trial in cases of deprivation of property.

#### 1. The Court Could Rely on a Separation-of-Powers Jurisprudence to Reject the Public Rights Doctrine

Justice Sotomayor's dissent in *Jarkesy*, joined by Justice Kagan and Justice Jackson, argued that the Court's holding was effectively a power grab by the judicial branch that deprived executive agencies of the ability to adjudicate matters that Congress had assigned to them.<sup>200</sup> However, a future rejection by the Court of the public rights doctrine on the basis of a rigid separation-of-powers jurisprudence might in fact guard against the consequences predicted by the dissent. Although much of the discussion in *Jarkesy*—concerning the separation of powers and its relation to agency adjudication—centers on the executive branch's encroachment on the judicial branch,<sup>201</sup> a consequence of abrogating the public rights doctrine would actually be to limit the judiciary itself.

The Court in *Murray's Lessee* explained that the collection of revenue was a matter within Congress's control.<sup>202</sup> Although it was not purely a judicial matter by nature, it could be presented as a justiciable controversy.<sup>203</sup> Because no initial obligation existed to bring the matter in federal court, when Congress assigned it for adjudication there,

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197. 144 S. Ct. 1142 (2024).

198. See *infra* Section II.B.2.

199. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 281 (1856).

200. *Jarkesy*, 144 S. Ct. at 2175 (Sotomayor, J., dissenting).

201. See *id.* at 2139.

202. *Murray's Lessee*, 59 U.S. (18 How.) at 281.

203. See *id.* at 282–83.

the Seventh Amendment did not require a jury trial because the matter was not “a judicial controversy, essentially” or inherently.<sup>204</sup>

The idea that Congress could assign matters over which it had constitutional authority to the judiciary raises a question of the separation of powers. The Court’s cases addressing the separation of powers demonstrate that the constitutional assignments of power to the three branches are inviolable.<sup>205</sup> Justice Thomas, concurring in *Loper Bright*, stated that one of the crucial factors in overturning *Chevron* was that requiring courts to defer to the interpretations of administrative agencies violated the separation of powers.<sup>206</sup> In his view, *Chevron* deference expanded the power of the executive branch beyond its constitutionally assigned scope and simultaneously intruded upon the prerogatives of the judicial branch.<sup>207</sup>

Justice Thomas’s argument that *Chevron* deference violates the separation of powers applies equally to administrative agencies’ ability to adjudicate matters belonging to the judicial branch; in fact, the rationale applies *a fortiori* to agency adjudication. He correctly noted that *Chevron* deference unconstitutionally required federal courts to relinquish their constitutional prerogative of interpreting statutes to executive agencies, since the judicial power resides in the courts and the function of the executive is to enforce, not interpret, the law.<sup>208</sup> *Chevron* deference merely required that federal courts interpreting statutes defer to the executive agencies’ interpretations.<sup>209</sup> But *Jarkesy* deals not only with the agencies’ interpretations, but their initial adjudication of the controversy itself.<sup>210</sup> When agencies adjudicate matters belonging to the judiciary, they exercise powers of a different branch of government in violation of the principle of separation of powers.<sup>211</sup>

The same separation-of-powers rationale used to invalidate the executive branch’s adjudication of matters belonging to the judicial branch in cases such as *Loper Bright* could also be applied to prevent the judiciary from adjudicating matters that the Constitution assigns to the

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204. See *id.* at 283–84.

205. See, e.g., *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 68 (2015) (Thomas, J., concurring in the judgment) (“When the [g]overnment is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it.”); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2274 (2024) (Thomas, J., concurring).

206. *Loper Bright*, 144 S. Ct. at 2273–74 (Thomas, J., concurring).

207. *Id.* at 2274 (Thomas, J., concurring).

208. *Id.* at 2274–75 (Thomas, J., concurring).

209. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), overruled by, *Loper Bright*, 144 S. Ct. 2244.

210. See *Sec. & Exch. Comm’n v. Jarkesy*, 144 S. Ct. 2117, 2127 (2024).

211. *Loper Bright*, 144 S. Ct. at 2275 (Thomas, J., concurring).

other branches.<sup>212</sup> This would mean that the collection of revenue at issue in *Murray's Lessee* would be a matter exclusively for the legislative branch upon which the judiciary could not intrude. Therefore, a robust enforcement of the boundaries between the branches based on the separation of powers would in fact provide a barrier against the judiciary's adjudication of claims that fall under the exclusive province of the legislative or executive branches.

## 2. *Jarkesy's* Holding on Due Process and the Seizure of Property Weighs Against Preserving the Public Rights Doctrine

Alternatively, the Court could reject the public rights doctrine by adopting a restricted view of the governmental right to seize property. This rationale would apply both to the summary proceedings that appear in many of the landmark cases explicitly invoking the public rights doctrine as well as in cases where civil forfeitures are at issue.<sup>213</sup> Justice Gorsuch's concerns about due process in his *Jarkesy* concurrence are parallel to similar concerns raised in his concurrence, joined by Justice Thomas, in *Culley v. Marshall*.

In *Culley*, the Court addressed the question of whether due process mandated a preliminary hearing in the context of forfeitures.<sup>214</sup> The Court held that the Constitution only required a timely hearing, but not a preliminary hearing.<sup>215</sup> Gorsuch explained how the Fifth Amendment's requirement that the government not deprive individuals of "life, liberty, or property, without due process of law"<sup>216</sup> raised concerns about the constitutionality of summary forfeiture proceedings.<sup>217</sup> He found a justification in historical practice.<sup>218</sup>

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212. See *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 68 (2015) (Thomas, J., concurring in the judgment). *But cf. Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) ("[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.").

213. See generally Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446 (2016) (discussing the relationship between civil forfeitures and the Due Process Clause).

214. *Culley v. Marshall*, 144 S. Ct. 1142, 1146 (2024).

215. *Id.*

216. U.S. CONST. amend. V.

217. *Culley*, 144 S. Ct. at 1155 (Gorsuch, J., concurring).

218. Compare *id.* (Gorsuch, J., concurring) (explaining that civil forfeiture procedures do not violate due process because they have historical roots), with *Sec. & Exch. Comm'n v. Jarkesy*, 144 S. Ct. 2117, 2147 (2024) (arguing the same with regard to non-Article III adjudication).

The Constitution had tolerated civil forfeitures in three contexts: admiralty, customs, and revenue law.<sup>219</sup> Gorsuch was careful, however, to specify that these cases were exceptions to the general rule that due process required a judicial determination prior to the deprivation of property.<sup>220</sup> He went further by explaining that these exceptions may have been due to context-specific reasons; for example, cases of admiralty allowed summary forfeiture proceedings because of the difficulty of seizing the property in question otherwise.<sup>221</sup>

At the same time, Gorsuch pointed out that even these exceptions were often subject to mitigation to temper the severity of what seemed uncomfortably close to a due process violation.<sup>222</sup> Gorsuch expressed doubts about “whether, and to what extent, contemporary civil forfeiture practices can be squared with the Constitution's promise of due process.”<sup>223</sup> Gorsuch's discussion indicates that he is reluctant to extend exceptions to the Due Process Clause any further than traceable historical precedent allows. His search for a justification for those exceptions suggests that he would be open to eliminating the historically approved exceptions if no compelling justification were present or if the historical justifications ceased to exist.<sup>224</sup>

Justice Thomas, dissenting in *Wellness International Network, Ltd. v. Sharif*,<sup>225</sup> described a distinction between public and private rights following the tradition of Blackstone and Locke.<sup>226</sup> Private rights, also known as absolute rights, concern life, liberty, and property and belong to people as individuals, regardless of their incorporation into a community.<sup>227</sup> Public rights, in contrast, pertain to the community as a whole and affect individuals insofar as they form part of that community.<sup>228</sup> The adjudication of private rights is the province of Article

219. *Culley*, 144 S. Ct. at 1156 (Gorsuch, J., concurring).

220. *Id.* (Gorsuch, J., concurring).

221. *Id.* (Gorsuch, J., concurring); *cf. Jarkesy*, 144 S. Ct. at 2147–49 (Gorsuch, J., concurring) (offering a series of possible explanations for the public rights exception).

222. *See Culley*, 144 S. Ct. at 1157 (Gorsuch, J., concurring).

223. *Id.* at 1153; *see also id.* at 1158 (Gorsuch, J. concurring) (“But perhaps it is past time for this Court to examine more fully whether and to what degree contemporary civil forfeiture practices align with that rule and those exceptions.”).

224. *Compare Jarkesy*, 144 S. Ct. at 2146 (Gorsuch, J., concurring) (speculating that “ancient practical considerations” may have justified the public rights doctrine), *with id.* at 2134 (“We have never embraced the proposition that ‘practical’ considerations alone can justify extending the scope of the public rights exception to such matters.”).

225. 575 U.S. 665 (2015).

226. *Id.* at 713–14 (Thomas, J., dissenting).

227. *Id.* at 713 (Thomas, J., dissenting).

228. *Id.* at 714 (Thomas, J., dissenting).

III courts.<sup>229</sup> This distinction may explain how public rights could be adjudicated in a non-Article III court.<sup>230</sup> Thomas suggested that the wording of *Murray's Lessee* may have caused confusion regarding the distinction between the two classes of rights.<sup>231</sup>

Although both *Jarkesy* and *Culley* recognized a historical tradition for certain exceptions to the normal requirements of due process, the Court will likely reject even those exceptions as inconsistent with constitutional principles. As the Court explains in *Jarkesy*, efficiency does not justify overriding constitutional protections.<sup>232</sup> Justice Gorsuch's comments in *Culley* and in *Jarkesy* follow a similar pattern to his views on *Chevron* deference and how that doctrine evolved over time. This indicates that the majority in *Jarkesy* will likely reject the type of reasoning in cases such as *Stranahan* because they fail to provide any justification for the deprivation of property without a jury trial other than Congress's power to regulate immigration.<sup>233</sup>

According to the Court's holding in *Granfinanciera*, Congress's power to regulate a particular matter is not sufficient to overcome the Seventh Amendment if the dispute arising from the matter is legal (as opposed to equitable) in nature.<sup>234</sup> Similar to the forfeitures in *Culley* and the revenue collection in *Murray's Lessee*, the civil penalties at issue in *Stranahan* involved due process concerns. The Court will not apply the public rights exception merely on the theory that Congress has authority to regulate the matter at issue.

### *C. Stare Decisis Considerations Will Not Prevent the Majority of the Current Court from Abrogating the Public Rights Doctrine*

The Court will likely apply the same reasoning to abrogate the public rights doctrine as it has used in cases such as *Loper Bright* to justify overturning precedent. The Court in *Loper Bright* held that stare decisis was not an "inexorable command" and that competing interests might

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229. *Id.* at 717 (Thomas, J., dissenting) ("A return to the historical understanding of 'public rights,' however, would lead to the conclusion that the inalienable core of the judicial power vested by Article III in the federal courts is the power to adjudicate private rights disputes." (emphasis omitted)).

230. *Id.* at 714 (Thomas, J., dissenting) ("If 'public rights' were not thought to fall within the core of the judicial power, then that could explain why Congress would be able to perform or authorize non-Article III adjudications of public rights without transgressing Article III's Vesting Clause.").

231. *Id.* at 715–16 (Thomas, J., dissenting).

232. *Sec. & Exch. Comm'n v. Jarkesy*, 144 S. Ct. 2117, 2139 (2024).

233. *See Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 343 (1909).

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

overcome precedent.<sup>235</sup> It also declared that stare decisis is weakest with regard to constitutional interpretation.<sup>236</sup> The Court laid out three factors for determining whether stare decisis prohibits overruling a prior decision: “the quality of the precedent’s reasoning, the workability of the rule it established, . . . and reliance on the decision.”<sup>237</sup> The Court determined that these three factors weighed against upholding judicial deference to administrative agencies’ interpretations of ambiguous statutes.<sup>238</sup>

As in *Loper Bright* with regard to the *Chevron* doctrine, the majority of the current Court is likely to find that these three factors do not support maintaining the public rights doctrine. First, the public rights doctrine, to the extent that it can be defined, diverges from the generally applicable requirement of Article III adjudication with no justification other than historical practice. It is, like the *Chevron* doctrine, a “rule in search of a justification.”<sup>239</sup> Second, the public rights doctrine is unworkable because the vagueness and inconsistency with which courts have applied it render it unclear for courts and litigants alike. Finally, the public rights doctrine does not create a genuine reliance interest because the Court has not held that the doctrine applies in many years, and the lack of clarity and certainty behind it means that Congress in particular cannot rely on it to enact laws that allow non-Article III adjudication.

The Court will likely reject the public rights doctrine based on the quality of its reasoning. The cases upholding the public rights doctrine have justified it based on Congress’s power over the collection of revenue, immigration, and other matters.<sup>240</sup> But these cases have failed to recognize that Congress’s power over these matters does not give it license to intrude upon the functions of the judiciary in violation of the separation of powers.<sup>241</sup> Nor can federal statutes authorizing summary proceedings overcome the constitutional protections against the deprivation of property without due process of law, which implicates Article III adjudication and the Seventh Amendment right to a jury

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235. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2270 (2024); accord *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (“[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision . . . .” (emphasis omitted)).

236. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2177 (2019). The issue of whether the public rights doctrine applies is a question of constitutional interpretation because it relates to both Article III and the Seventh Amendment of the United States Constitution. See *Jarkesy*, 144 S. Ct. at 2127.

237. *Loper Bright*, 144 S. Ct. at 2270 (cleaned up).

238. *Id.*

239. *Id.*

240. *Jarkesy*, 144 S. Ct. at 2133–34.

241. *Id.* at 2139 (“[W]e have explained that the public rights exception does not apply automatically whenever Congress assigns a matter to an agency for adjudication.” (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52 (1989))).

trial.<sup>242</sup> Additionally, the *Atlas Roofing* Court’s attempt to define public rights was circular, as the *Jarkesy* Court recognized.<sup>243</sup> Furthermore, the fact that the Court itself has repeatedly stated that the law of public rights is unclear and confusing further supports the proposition that the doctrine lacks consistent reasoning.<sup>244</sup>

The Court will also likely find the doctrine unworkable. In *Loper Bright*, the Court explained how *Chevron* deference was unworkable because its vagueness and subjectivity led to unpredictable and inconsistent application of the doctrine.<sup>245</sup> The *Loper Bright* Court discussed how *Chevron* deference focused on whether a statute was ambiguous.<sup>246</sup> The problem with *Chevron*, according to the Court, was that the test of “ambiguity” was too subjective and did not provide a clear guideline for courts to follow when determining whether a given statute was ambiguous or not.<sup>247</sup> The Court had therefore needed to revisit the subject repeatedly in the years following the *Chevron* decision to attempt to address the uncertainties arising from it.<sup>248</sup>

In cases following *Chevron*, the Court limited the application of *Chevron* in various ways.<sup>249</sup> The Court held that *Chevron* deference only applied when an agency exercised authority granted to it by Congress for the purpose of making rules.<sup>250</sup> The Court also refused to defer to an agency’s interpretation when the agency did not follow correct procedures<sup>251</sup> or when the issue involved major questions of political or

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242. *Id.* at 2140, 2145 (Gorsuch, J., concurring).

243. *Id.* at 2138–39 (“[T]he definition [the *Atlas Roofing* Court] offered of the exception was circular. The exception applied, the Court said, ‘in cases in which ‘public rights’ are being litigated—*e.g.*, cases in which the [g]overnment sues in its sovereign capacity to enforce public rights created by statutes.’” (quoting *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 450 (1977))).

244. *See, e.g., id.* at 2133 (“Our opinions governing the public rights exception have not always spoken in precise terms.”); *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (“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.’” (citation omitted)).

245. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2270–71 (2024).

246. *Id.* at 2270.

247. *Id.*

248. *Id.* at 2271.

249. *Id.* at 2268.

250. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (“We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”).

251. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016) (“But *Chevron* deference is not warranted where the regulation is ‘procedurally defective’—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation.” (citation omitted)).

economic significance.<sup>252</sup> This “byzantine set of preconditions and exceptions” led the Court in *Loper Bright* to ultimately conclude that the doctrine was unworkable.<sup>253</sup>

Like the *Chevron* deference doctrine, the public rights doctrine has created confusion due to the inconsistent manner in which the Court has attempted to apply it.<sup>254</sup> In *Atlas Roofing*, the Court said that Congress had the power to create new statutory rights that could be adjudicated by an administrative tribunal even if the same right litigated before an Article III court would have been entitled to a jury trial.<sup>255</sup> In *Granfinanciera*, the Court clarified that Congress could not create a public right out of a claim that by its nature warranted Article III adjudication,<sup>256</sup> while Justice Scalia in a concurrence departed from the majority by affirming that the government had to be a party to the litigation for the public rights doctrine to apply.<sup>257</sup> In *Jarkesy*, the Court itself said that its precedent has not always been clear.<sup>258</sup> The disagreement among the Justices who have addressed the matter in the aforementioned cases demonstrates the amorphous nature of the doctrine and the difficulty inherent in the task of delimiting its application.

The Court will hold that the public rights doctrine does not create a reliance interest. The Court has held that a reliance interest is less likely when previous Supreme Court decisions have cast doubt on a doctrine. In *Janus v. American Federation of State, County, & Municipal Employees, Council 31*,<sup>259</sup> the Court overturned a previous decision, *Abood v. Detroit Board of Education*,<sup>260</sup> and held that the First Amendment prohibited states from exacting agency fees from nonconsenting public sector employees.<sup>261</sup>

The Court held that *stare decisis* considerations did not counsel against overturning *Abood* because, among other reasons, the Court in *Harris v. Quinn*<sup>262</sup> had previously addressed the question of whether

252. See *King v. Burwell*, 576 U.S. 473, 485–86 (2015).

253. *Loper Bright*, 144 S. Ct. at 2269–70.

254. *Sec. & Exch. Comm’n v. Jarkesy*, 144 S. Ct. 2117, 2133 (2024) (“[The public rights doctrine] is an ‘area of frequently arcane distinctions and confusing precedents.’” (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985))).

255. *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 455 (1977).

256. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51, 53 (1989).

257. *Id.* at 65 (Scalia, J., concurring in part and in the judgment).

258. *Jarkesy*, 144 S. Ct. at 2133.

259. 138 S. Ct. 2448 (2018).

260. 431 U.S. 209 (1977), *overruled by*, *Janus*, 138 S. Ct. 2448.

261. *Janus*, 138 S. Ct. at 2478.

262. 573 U.S. 616 (2014).

*Abood* should be overruled.<sup>263</sup> The Court did not overrule *Abood* in that case, but nonetheless pointed out its flaws.<sup>264</sup> After *Harris*, the Court granted certiorari to a request to overrule *Abood* in *Friedrichs v. California Teachers Association*.<sup>265</sup> The Court affirmed the lower court's judgment applying *Abood* by an evenly divided vote.<sup>266</sup> This split of the Court's members was enough to put the public on notice that the constitutionality of *Abood*'s holding was in question.<sup>267</sup> Therefore, *Abood*'s holding supported no meaningful reliance interest by the time *Janus* was decided four years after *Harris*.

Regarding the public rights doctrine, there is even less of a justifiable reliance interest to oppose overturning precedent than there was at issue in *Janus*. After all, the decisions leading up to *Janus* did not overturn *Abood* but merely described its foundations as "questionable."<sup>268</sup> With regard to the public rights doctrine, however, the Court has substantially reduced the scope of the doctrine from its "high-water mark" in *Atlas Roofing*.<sup>269</sup> *Granfinanciera*'s holding prevented Congress from assigning any claims that were private rights by their nature to administrative adjudication.<sup>270</sup>

Justice White's comments in his *Granfinanciera* dissent that *Atlas Roofing* was maybe "no longer good law"<sup>271</sup> indicated that the Court was shifting away from the highly deferential view toward agency adjudication that it had articulated in *Atlas Roofing* and that it was beginning to limit agency adjudicatory authority based on the constitutional restraints imposed by Article III and the Seventh Amendment. In *Jarkesy*, the Court reaffirmed *Granfinanciera*'s holding and at the same time expressed its doubts regarding any clear constitutional justification of the public rights doctrine.<sup>272</sup> The Court's comments and the holdings of *Granfinanciera* and *Jarkesy* provide notice to the public that the foundations of the public rights exception are questionable and susceptible to being overturned. If the Court repudiates the public rights exception in the future, there will be no concern that the public did not have reason to be on notice that such an outcome was predictable.

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263. *See Janus*, 138 S. Ct. at 2478–79.

264. *Id.* at 2484.

265. 578 U.S. 1 (2016), *cert. granted*, 576 U.S. 1082 (2016).

266. *Friedrichs*, 578 U.S. at 3.

267. *See id.*

268. *See, e.g., Harris*, 573 U.S. at 645–46.

269. *Sec. & Exch. Comm'n v. Jarkesy*, 144 S. Ct. 2117, 2148–49 (2024) (Gorsuch, J., concurring).

270. *See id.* at 2149 (Gorsuch, J., concurring).

271. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 79 (1989) (White, J., dissenting).

272. *Jarkesy*, 144 S. Ct. at 2134–36.

Furthermore, since the Court's jurisprudence has been inconsistent, lower courts, Congress, and administrative agencies will not be able to know whether a specific matter can be adjudicated by an agency.<sup>273</sup> Given the Court's reticence to clearly define the scope of the doctrine, agencies are not likely to stake their hopes on the Court upholding any agency adjudication on the basis of the public rights doctrine. In any case, they would not be justified in doing so. The Court's criteria for upholding precedent based on *stare decisis*, like its treatment of the public rights doctrine in recent decades and the jurisprudence of a majority of its members, indicate that the Court will likely abrogate the public rights doctrine.

#### CONCLUSION

Since *Atlas Roofing*, the Court's cases addressing the public rights doctrine have consistently declined to invoke the doctrine to justify agency adjudication and have moved steadily in the direction of limiting the doctrine's reach. *Granfinanciera* took a significant step in the direction of limiting *Atlas Roofing* by holding that litigants bringing common law claims that were legal in nature had a constitutional right to both a jury trial under the Seventh Amendment and Article III adjudication, although Congress could create new statutory claims analogous to common law claims and assign those to administrative tribunals. *Jarkesy* further restricted *Atlas Roofing*'s holding when it said that Congress could not merely relabel a common law claim in order to assign it for non-Article III adjudication.

This trend in the restriction of the scope of the public rights doctrine in favor of the Seventh Amendment and Article III adjudication will likely continue. Furthermore, the writings of the current majority, especially Justice Gorsuch and Justice Thomas, indicate that the principles upon which the public rights doctrine is based are antithetical to their jurisprudence. Their views on the due process requirements for civil forfeitures and core private rights indicate that they are doubtful about the constitutionality of even the historically accepted applications of the public rights doctrine. Finally, the Court's criteria for overturning precedent, as laid out in cases such as *Loper Bright*, favor a prediction that the Court will not consider *stare decisis* an obstacle to abrogating the public rights doctrine.

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273. Cf. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2253 (2024) (“[I]t is hard to see how anyone[—Congress included—]could reasonably expect a court to rely on *Chevron* in any particular case . . .”).