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Jarkesy and the End of Political Adjudication

Daniel Kelly, Former Justice of the Wisconsin Supreme Court

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Jarkesy And the End of Political Adjudication

By Daniel Kelly

Daniel Kelly served as a Justice on the Wisconsin Supreme Court from 2016 to 2020. He is Senior Litigation Counsel at the New Civil Liberties Alliance. The views expressed in the article are his own and are not necessarily those of the NCLA.

Executive Summary:

The U.S. Supreme Court must finish the good work it began in *Jarksey* by recognizing that our Constitution prevents the government from pursuing American citizens in any fora but the ones it prescribes. This is so because the separation of powers requires it, the public rights doctrine is inherently incapable of reliably assigning trials to the proper forum, and anything other than constitutional fidelity on this subject compromises the judicial power and denies due process of law to targets of enforcement actions.

> "To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. *Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.*"
>
> *— Speiser v. Randall, 357 U.S. 513, 520 (1958).*

> "[T]here is no liberty if the power of judging be not separated from the legislative and executive powers."
>
> — The Federalist No. 78

I. Introduction

The Constitution commits the "Judicial Power of the United States"—all of it—to the Supreme Court and such inferior courts as Congress establishes.[1] The whole point of walling off the judicial power from the other two branches is to ensure that cases are decided with as little political influence as humanly possible.

The need for that insulation applies to the facts of a case just as much as it does to the law. Perhaps even more so. Yet Congress has, with respect to certain types of cases, transferred the judicial power to conduct a trial—facts and law alike—to the President and his employees. And it has done so in the class of cases most singularly susceptible to politicization: Administrative agency civil enforcement actions against American citizens ("enforcement actions").[2]

For this class of cases, Congress has often dispensed with Article III trial courts in favor of tribunals in which the President's employees simultaneously act as one of the parties, the prosecutor, the judge, *and the adjudicator of the facts*. These are the political

courts, and they are unknown to the Constitution.

It is a commonplace that the separation of powers is essential to the faithful application of the law. But as the *Speiser* Court comment above suggests, it is no less critical to the raw material on which the law is supposed to act: the facts.

Having a neutral magistrate apply the law is cold comfort when a politically motivated authority gets to refine that raw material into a finished and authoritative product that the judiciary, except in the rarest of cases, is compelled to accept.

The Court has most frequently justified this transfer of judicial power to the political courts under the rubric of the "public rights" doctrine, the continued existence of which (at least with respect to enforcement actions) is perplexing for many reasons, including the Court's acknowledgement that it has nothing to do with the text of our Constitution,[3] it lacks an ascertainable definition,[4] and it hasn't been clearly understood by the Court itself.[5]

But worse, there have been times the Court has not even bothered referring to this sketchy doctrine to force litigants into a political court. Sometimes, it has just said it is more efficient and institutionally beneficial to do so.

Recently, however, the Supreme Court took an important step toward repatriating the judicial power it has helped emigrate to the executive branch.

In *SEC v. Jarkesy* it ruled that when the SEC pursues enforcement actions for which there is a common-law analog, it must proceed in a real court, not its own political court. The ruling was a welcome reaffirmation that the separation of powers exists not simply as a means of organizing the exercise of governmental authority, but as the primary means of protecting our liberties even at the cost of efficiency or other practical interests.[6]

Jarkesy, however, said nothing about enforcement actions that don't have an 18th-century antecedent. But these trials, too, must be conducted in Article III courts, and they are the subject of this paper.

For the reasons discussed below, the Court must finish its good work by recognizing that our Constitution prevents the government from pursuing American citizens in any fora but the ones it prescribes. This is so because (1) the separation of powers requires it, (2) the public rights doctrine is inherently incapable of reliably assigning trials to the proper forum, and (3) anything other than constitutional fidelity on this subject compromises the judicial power and denies due process of law to targets of enforcement actions.

II. A Tale of Powers Separated by Time

The separation of powers has become so well-accepted that it is tempting to slide past it with a perfunctory nod while hurrying to derivative arguments. But the genius behind this arrangement has a great deal to tell us about why the advent of political courts cannot be a matter of constitutional indifference.

The division of governmental power into the several branches was a reflection of the Framers' deep understanding of both human nature and the distinctive attributes of the powers they were assigning. The result is a structure that respects the strengths and weaknesses of human nature and uses them to solidify the officeholders' commitment

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to properly discharging the responsibilities entrusted to them.

The Constitution's text makes the exercise of legislative, executive, and judicial power exclusive to each of the corresponding branches. But this is not an arbitrary assignment, it is instead a classic example of form following function, as I explain below.

My account of this concept won't introduce anything new to those already familiar with the basic idea. But it will, I trust, present it in a way that spotlights why the Constitution does not give political courts the power to adjudicate either law or facts.

Quite often, when called upon to describe the proper role and function of the judiciary, I have turned to an illustration that juxtaposes the third branch against the other two in temporal terms.

A timeline, in its most basic form, has three segments—future, present, and past. The correlation between these segments and the functions of the three great repositories of vested authority is so complete that any mismatch is either addressed by the Constitution's text itself or is sufficiently minor that it isn't instructive.

As described below, the legislature takes for itself the future, the executive the present, and—of particular interest here—the judiciary the past.

To the legislature is given the responsibility to make our laws, an inherently forward-looking task. It peers into the largely opaque unknown to consider what may be needful to promote human flourishing going forward. And, consistent with its future-tense duties, the measures it adopts govern our behavior tomorrow, and all succeeding days until the legislature chooses to repeal, amend, or supersede them.

By virtue of the work assigned to it, the legislature is, rightly, a political department. This is so because the input on which it acts comprises the competing desires, interests, hopes, values, fears, and priorities of over 300 million people—that is to say, "politics." The discretion it enjoys in addressing itself to that input is as broad as that of the people from whom it derives its authority.

So, the legislature may choose any constitutionally compliant path forward for which there is consensus amongst the members. The legislature's peculiar power is to distill that process and input into an Act of Congress. Due attention to politics during this process is not just acceptable, but essential.

In nautical terms, it is both the wind that provides motive force to the work, as well as the rudder that guides it. Because politics suffuses the legislature, the Constitution provides an equally political method of selecting its members. Thus, by tying legislators' professional fortunes to their constituents' interest in what the law ought to be, the Constitution created a home for the (ideally) healthy expression of politics that is firmly anchored in the concerns of the future.

The sum of the jurist's duty and responsibility is to accurately excavate the facts and law as they existed at the relevant moment in time, and render a decision, enforceable by and against the parties to the dispute, on what the latter says about the former.

To the executive, the Constitution grants matters of the present. Its unique duty is to implement, today and every tomorrow as it becomes today, the work of the legislature.

This duty is almost entirely derivative of the legislative product. Aside from his role as commander-in-chief and the nominating/appointing authority for certain federal offices, his duty can be almost entirely expressed in the present-tense charge to "take Care that the Laws be faithfully executed ... ."[7] This does not entail the unbounded discretion of the first branch, but discretion nonetheless inheres in the manner the executive implements the laws.

His remit is not as broad as the legislature's because both the Constitution and the legislature's work cabin his exercise of discretion. Nonetheless, he, too, must account for the country's potent mix of demands. He just does so within a narrower scope of latitude. But within that scope, political input plays a vital role in informing and guiding the choices he makes in the discharge of his duties.

In recognition of the political input necessary to the job, the Constitution prescribes a political process for selecting the executive and making him politically accountable for his tenure.

Finally, the judiciary is responsible for the past. And as far as politics is concerned, that changes everything. Politics has no place in the exercise of the judicial power. It's not just that it *shouldn't* have a place. It's that, as a functional matter, it *cannot* have a place. Indeed, it is fair to say that a jurist who allows politics to influence his work is, to that extent, no longer exercising judicial power at all. Here's why.

The work of the judiciary is a lot like an archeological dig. An archeologist's goal is to discover what was—not what he wishes the past to have been, but what it objectively was as evidenced by the physical objects that are his particular field of study. The entirety of his attention is on carefully exposing artifacts in the dig site that will build a picture of life at a specific point in the past.

And, as especially relevant here, he brings nothing but his expertise and his tools to the site. This is important because, should he accidentally contaminate the site with today's detritus, his work would no longer reflect what was, but would instead produce a useless chimerical confusion of relevant and irrelevant material.

Worse, if he intentionally smuggles modern items into the site and passes them off as historical objects, he would be a fraud, not an archeologist.

The judiciary approaches its work the same way. It focuses intently on what has been, and searches assiduously for two types of artifacts in the slice of history presented by the case under consideration.

The first is the law that existed at the time the facts of the case took place. This is necessary because the legislature is constantly at work, so the law that exists today may not be the same as the law the court is called upon to apply in reaching its judgment.

The other artifacts that necessarily capture the court's attention are, well, facts. To reach a valid judgment, the court must know what, as an objective matter, happened in the dispute between the litigating parties.

In discharging his responsibilities, the jurist, just like the archeologist, must be extraordinarily careful that he not contaminate the record with considerations that are not historically contemporaneous.

The sum of his duty and responsibility is to accurately excavate the facts and law as they existed at the relevant moment in time, and render a decision, enforceable by and against the parties to the dispute, on what the latter says about the former. This, in short, is the judicial power.[8]

This is why politics not only should not but cannot have anything to do with the exercise of judicial power. Politics exhausts its office in determining what ought to be. What laws ought to govern our actions in the future? How ought the existing laws be implemented today? But when we reach the past, the segment of the timeline committed to the judiciary, we find that the power of politics is wholly and completely spent.

The past is impervious to its "oughtness." Politics cannot change in even the most insignificant detail what was. One may bombard the past with all one's desires, interests, hopes, values, fears, and priorities—all the things that together comprise politics—and yet the past will not yield even the least of one's desiderata.

One may combine one's politics with those of all the rest of the country and with them assail the past, but it will still accomplish nothing. There is no changing history's narrative, nor may one disturb the laws as they existed in the telling of that tale. The things that were are implacable, and there has yet to be invented either a device or a concept that can unsettle them.

For this reason, politics has no work to do in the judicial realm. Not because we have chosen to forbid it, but because it can gain no purchase on the judicial power—even if we desperately wished it could.

This does not mean, however, that the judicial power is safe from such influence. The Framers knew that politics, public accolades, personal interest, and a host of other irrelevant considerations would constantly threaten to lure jurists away from the artifacts they found in the dig site. So, they vested the judicial power in a branch where its practitioners would be protected by lifetime tenure and an irreducible salary.

Although these buffers won't entirely mute the temptation to stray—jurists are human, after all—they at least protect against the loss of position or income if the judicial power produces a result that offends political sensibilities.

This is why the Constitution vests the exercise of judicial power exclusively in the judiciary. It is the only branch of government that was designed from the ground up to reflect and embody the unique characteristics of this type of power. Its past tense orientation and removal from the political realm are the attributes essential to preserving its legitimate function.

Without those attributes, the "judicial power" would become just raw power. And when exercised in the past-tense, raw power is definitionally tyrannical.

But then came the "public rights" doctrine. If politics can't insert itself into the genetic structure of the adjudicative process or practice, it can do the next best thing—move the locus of its operation to a forum where those in authority might be willing to abandon its archeological aspect in favor of more political considerations.

This is the legacy of the public rights doctrine. It has taken a necessarily past-tense process, in which politics can play no role, and assigned it instead to a present-tense branch of government that is, as a structural matter, both politically motivated and accountable.

III. The Unorthodox "Public Rights" Doctrine

The public rights doctrine is a flawed instrument that routinely assigns trials to the wrong branch of government.

The Constitution places the judicial power in Article III courts not as an indifferently prudential matter, but as a mandatory category. The public rights doctrine, however, seems to exist for no other purpose than confounding that arrangement.

The stakes in determining whether this "seeming" refers to something illusory or real could not be higher. At issue is whether American citizens are entitled to trial in a court recognized by the Constitution or instead must submit to a political tribunal with no constitutional pedigree. In this section, I'll address how this doctrine mishandles judicial power to the detriment of those targeted by the federal government in enforcement actions.

Most commentators pin the American genesis of the public rights doctrine on the Supreme Court's decision in *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272 (1855). Doing so gives the doctrine an undeserved patina of antiquity, however, inasmuch as the Court's cryptic pronouncement on the subject was dictum.

Nonetheless, I'll start here because it contains the doctrine's basic formulation (such as it is)—a formulation that has persisted with few changes from that point to the present, even as the understanding of its reach has dramatically broadened.

After discussing Congress's ability to prevent the judiciary from hearing an otherwise justiciable case or controversy through the simple expedient of not waiving sovereign immunity, *Murray's Lessee* says:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there 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.[9]

Without more attention to what comprises a "public right" it was perhaps inevitable that this doctrine would metastasize out of control.

These two sentences have caused serious confusion about the separation of powers and the right to trial in a constitutionally prescribed forum. I'll address just two of the formulation's problems that have been most responsible for this confusion.

A. Destined to Metastasize

Without more attention to what comprises a "public right" it was perhaps inevitable that this doctrine would metastasize out of control. The two sentences didn't provide enough substance to even determine which stated the rule and which the exception.

This matters a great deal to those facing enforcement actions because a rule represents the norm; it is the default position a court will take absent a showing that an exception applies. If the second sentence states the rule, many more Americans will face enforcement actions in political courts than if the first sentence contains the rule.

But here, at the advent of the public rights doctrine, it isn't possible to determine which sentence does which job because *Murray's Lessee* didn't define the term "public rights."

Although the *Jarkesy* Court said the second sentence is the exception, that exception has been swallowing the rule for most of the last 90 years. The exception's expansion really got underway in *Crowell v. Benson* when the Court took a stab at defining "public rights." It did so in sweeping fashion, asserting that they comprise all matters that "arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[10] This is broad enough to encompass literally any interaction whatsoever between citizens and their government when it acts *qua* government.

But not even that broad definition sufficiently conveys what the Court has believed the doctrine's reach to be. *Crowell* asserted that Congress may assign the trial of even private rights to political courts.

It admitted that the matter under consideration "d[id] not fall within the categories just described [public rights], but is one of private right, that is, of the liability of one individual to another under the law as defined."[11] It said Congress may nonetheless assign the trial of such matters to the political courts if the interests of efficiency and expediency justify it: "To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."[12]

The Court revisited the doctrine's breadth in *Atlas Roofing Co., Inc. v. OSHA Rev. Comm'n,*[13] where it observed that "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."

Congress may add or subtract statutory obligations, but it cannot will away the necessity of judicial power for the trial of alleged violations.

That's just another way of saying that Congress may subject Americans to enforcement actions in political courts whenever it is expedient.

It may do this, the Court said, even when the Seventh Amendment gives the defendant a right to trial by jury. So long as the matter falls under the "public rights" umbrella (as evidenced by the existence of a statute addressing the subject matter), "the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible."[14]

It's really a matter of practicality, rather than the Constitution's text: "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."[15]

The Court went even further in *Thomas v. Union Carbide Agr. Prod. Co.*,[16] holding that Congress may withdraw trials from the government entirely and may instead consign litigants to binding private arbitration.

It based this conclusion, at least in part, on "[t]he enduring lesson of *Crowell* . . . that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."[17] That "practical attention" included the observation that "the Court has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts."[18]

Anyway, the Court observed, "[m]any matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts."[19] Restricting Congress's ability to deprive litigants of Article III's protections, the Court concluded, "would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme."[20]

Experimenting with vested powers is, apparently, more important than the concerns that led the Framers to categorically restrict judicial power to Article III tribunals.

If Article III requires trials in one forum, but the doctrine lets Congress assign them elsewhere, and on such constitutionally irrelevant considerations as efficiency and experimentation, then it must be said that the doctrine is not a guide to understanding what the Constitution requires, but a substitute.

Consequently, at least until *Jarkesy*, it is apparent that this exception to Article III jurisdiction had largely swallowed the rule.

B. Of Schrodinger's Cat and Jurisprudence

One might, perhaps, defend the doctrine on the ground that it allows assignment of only *trials* of enforcement actions to political courts while leaving appellate courts free to address the law (but not the facts) on a petition for judicial review.

But that just highlights the doctrine's other inherent flaw—an assumption about the nature of enforcement actions that is more fit for the world of physics than jurisprudence.

In quantum mechanics it is said that something can exist in multiple states simultaneously (superposition), resolving into one of them only once observed. Think Schrodinger's cat.

The Court, unfortunately, has treated public rights cases in much the same way. While the idea of superposition is surely helpful in the realm of physics, it produces nothing but trouble in the jurisprudential world.

The superposition of public rights cases is the result of removing the *Murray's Lessee* formulation of the doctrine from its context. Recall that the Court said "there 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."[21]

This almost certainly was largely a recognition that there are some disputes involving the government that by their nature are justiciable, but which Congress may keep from the courts by refusing to waive sovereign immunity.[22]

Later courts, however, dropped the constricting context, which produced the superposition-type uncertainty about the nature of public rights cases: They have all the attributes necessary to make them fit for trial in an Article III court, but they are simultaneously susceptible of a political court's authoritative resolution without the exercise of judicial power. And that allowed Congress to assign the trial of such matters to either type of court depending on the considerations discussed above.

But this "superposition" is untenable. The proposition founders on Article III's exclusivity, both as it relates to who may wield the power as well as the subject on which the judicial power may operate. With respect to the first point, Article III vests the judicial power, and only the judicial power, in the courts it describes (as discussed above).

With respect to the second point, the Constitution does not allow the judiciary to apply itself to just any dispute—there must be a "case" or "controversy" in which a party has standing to sue.[23] But upon satisfaction of that requirement, the judicial power (as relevant here) extends to *all* cases that arise under the Constitution or the laws of the United States. And Congress can neither add to nor subtract from that quantum of jurisdiction.

So, if federal district courts have authority to conduct the trial of enforcement actions, it must mean at least the following two things. First, it means the judicial power *must* reach such actions (because they arise under federal law). And second, it means the courts are necessarily wielding judicial power when trying such cases because they have nothing else at their disposal. In terms of the superposition of the nature of enforcement actions, this is one of the states the Court says they occupy.

The other state in which such actions are supposed to simultaneously exist is the one that makes them suitable for resolution in political courts. Because these tribunals are part of the executive branch, they may exercise only such authority as Article II provides. Which is to say that the trial of enforcement actions may take place in political courts, consistently with constitutional requirements, only if their disposition doesn't engage the judicial power of Article III.

When political courts and Article III courts conduct the trial of these matters, they are doing the exact same thing—trying the facts of the case and applying the law to the result for the purpose of adjudicating the rights of the contending parties.

So, the Court's post-*Murray's Lessee* expression of the public rights doctrine means that such trials both do and do not involve the exercise of judicial power. It is only when Congress resolves this superposition by assigning the matter to one branch or the other that we can finally observe which state it occupies in the real world. If assigned to the judicial branch, the trial involves the exercise of judicial power. But if assigned to a political court, the exact same function *doesn't* involve judicial power.

And that's a problem. There are only two real possibilities for the Court's understanding of the public rights doctrine. The first is that it believes enforcement actions really are in a state of superposition until congressional assignment. Nature may be tolerant of such superpositions, but the Constitution isn't. Congress may add or subtract statutory obligations, but it cannot will away the necessity of judicial power for the trial of alleged violations.

The second possibility is that the Court believes Congress may legitimately choose between political and Article III courts for the trial of enforcement actions because the definition of "the judicial power" is branch dependent. That is to say, the power in question is determined by the identity of the branch using it, not the nature of the power.

So, for example, when a district court tries an enforcement action, a branch-dependent approach would say it is engaging the judicial power simply by virtue of the fact that it is an Article III forum. Similarly, when a political court does the exact same thing, it is using executive power for no reason other than that it is an Article II tribunal.

But this approach to the definition of the vested powers is no definition at all. It is nothing more than an assertion that the powers divided by the Constitution may be traded amongst the branches as they may see fit.

Neither of these explanations is satisfactory. Perhaps that's why the Court ultimately chose to deal with this Gordian knot by simply confessing a separation of powers violation.

In *Commodity Futures Trading Comm'n v. Schor*,[24] the Court said the principles governing assignment of trials to the political courts are not to be found in the Constitution's text, but in practical considerations. "[I]n reviewing Article III challenges," the Court opined, "we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."[25]

To keep the chain of accountability intact, political courts' decisions must be reviewable by, ultimately, those who are immediately answerable to the President.

These factors include the alleged malleability of the Constitution's vesting clauses. The Court said it will consider "the extent to which the essential attributes of judicial power are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts . . ., and the concerns that drove Congress to depart from the requirements of Article III."[26]

If we take the Court's statement at face value, it is first and foremost an admission that the Constitution's text does not bind either Congress or the judiciary. After that, the scope of judicial power the political courts may use is just a matter of degree. The Court is concerned with the *extent* to which Congress reassigns judicial power, not the simple fact that it has occurred. And it is willing to bless the rearrangement based on the strength of Congress's interest in abandoning constitutional requirements.

* * *

The public rights doctrine may commend itself to some for allowing an allegedly more efficient and practical distribution of judicial power, but it has resulted in an arrangement that is at odds with the genius of the Constitution's separation of powers.

Bogged down in its "practical" considerations, the Court has failed to account for the inherent incompatibility between the nature of judicial power and the place and function of politics. Putting the present-tense, politically accountable branch of government to work in the archeological dig site is just begging for the very thing the Framers went to such great lengths to prevent: the insertion of politics into a definitionally apolitical function. This is much more than a merely academic concern; it presents grave threats to the rule of law.

IV. The Perils of Political Courts

It has been said "it is axiomatic that a fair trial in a fair tribunal" is the hallmark of our justice system.[27] Adjudication of enforcement actions in political courts misses both those marks.

The tribunal is not fair because, by design, its decisions must be acceptable to a political authority. And the trial is not fair because the judge is hired and paid by one of the parties to the dispute, who is also—by design—the political authority to whom the results must be acceptable.

So, what could possibly go wrong? At the very least, the following.

A. Political Courts, Political Results

The Framers were so worried about political influence on the exercise of judicial power that they were even concerned about the method of just *staffing* the courts:

> Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence. If the power of making them was committed either to the Exec-

There can be no "fair trial" when the Executive pursues enforcement actions in political courts because it is both the prosecuting party as well as the judge who will decide whether its case against the target succeeds.

> utive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws."[28]

The public rights doctrine dismisses this concern without a thought—and then amplifies it by an order of magnitude. It not only allows the President to appoint the judges of political courts, it makes them wholly owned subsidiaries of the Executive Branch.

Calling these tribunals "political" is not necessarily pejorative. It is simply a description of what they inevitably must be. They are political because of where they reside and to whom they must answer. Here's why.

In our form of government, "[t]he entire executive Power belongs to the President alone."[29] However, the Framers understood that "no single person could fulfill that responsibility" all by himself.[30]

Instead, they "expected that the President would rely on subordinate officers for assistance,"[31] for whom Article II § 2 of the Constitution gives the President appointment authority. That includes the judges of the political courts.

With the appointment of such officers comes mandatory accountability. Although others may help carry the President's burden, decision-making within the Executive Branch must be ultimately traceable to the President himself: "The President is responsible for the actions of the Executive Branch and cannot delegate that ultimate responsibility or the active obligation to supervise that goes with it."[32]

Ensuring that the President does not absolve himself of this responsibility is accomplished by maintaining "a clear and effective chain of command down from the President, on whom all the people vote."[33] In this way, Madison explained, "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."[34] It is only through that dependence that the officers' exercise of executive "power acquires its legitimacy and accountability to the public."[35]

That is as true for judges of the political courts as it is for any other officer. To keep the chain of accountability intact, political courts' decisions must be reviewable by, ultimately, those who are immediately answerable to the President. This is necessary because "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch."[36] "Principal officers" are those at the high-

est reaches of the federal government with the most direct connection to the President inasmuch as they must be "appointed by Presidential nomination with the advice and consent of the Senate."[37] And the occupants of such offices are dismissible at the President's discretion, a power he must have so it may fairly be said he is responsible for his officers' actions and decisions.

So, responsibility for the work of political courts must extend all the way up to the biggest political lightning rod in the country.

This accountability isn't just a formality; the President's removal power means that, functionally, the political courts' decisions are subject to the will of someone whose constitutionally prescribed arena is political, not judicial. That is to say, a political court's decisions must conform to the present-tense concerns of a branch of government that has no structural protections—zero—against political influence.

Consequently, it is a constitutional *obligation* that those decisions answer to the judgment of politically motivated actors. If there is a break in the chain of accountability, there would be an Appointments Clause violation because the President would no longer be "the one who decides whether [the judges] are abusing their offices or neglecting their duties."[38] Nor could he "ensure that the laws are faithfully executed, nor be held responsible for a [judge's] breach of faith."[39]

A "fair tribunal" is one in which the judge is bound by oath and structure to do the archeological work of the past-tense branch of government with zero political accountability. Or, as the Supreme Court has said, "[a] Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government."[40]

A political court is not just dominated by one of those other branches, it *is* one of those other branches. It fails as a "fair tribunal" not because of personal shortcomings in those who staff it, but because a present-tense, politically accountable branch of government is structurally incapable of reliably exercising the past-tense, apolitical power the Constitution vested in the judiciary.

B. Nemo Judex Causa Sua

There can be no "fair trial" when the Executive pursues enforcement actions in political courts because it is both the prosecuting party as well as the judge who will decide whether its case against the target succeeds. If that seems a little odd, it might be because it violates one of the oldest maxims known to justice: *Nemo judex causa sua*—no one may be the judge of his own cause.

We have known the rationale behind this principle for literally the entire existence of our form of government. It's what prompted Madison to write, in support of the proposed Constitution, that a jurist's "interest [in the case] would certainly bias his judgment, and, not improbably, corrupt his integrity."[41]

The Court knows that allowing such bias causes a failure of due process: "Every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law."[42]

This is not a quaint theory unfit for a modern government. As recently as 2016, the Supreme Court acknowledged that "an un-

constitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."[43]

That, of course, is exactly what happens in political courts. The judges of such tribunals depend on the Executive's sufferance for their continued position and pay, and we know that "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will."[44]

So, the Executive directly controls the will of the prosecutor even as it indirectly controls the will of the judge. As a result, those who fill these roles are, even though different individuals, the same person for purposes of this irreducible aspect of justice.

The Court has not explained why, with respect to enforcement actions, we can simply whisk away these eminently justifiable concerns.

Are we to suppose that judges of political courts have a superhuman ability to resist the temptations that threaten the integrity of judges outside the Executive Branch? *Nemo judex causa sua* stands as a rebuke against the public rights doctrine whenever it allows a political court to conduct the trial of an enforcement action against an American citizen.

There can be no "fair trial" when the Executive serves as both the prosecuting party and the judge.

V. The End of Political Adjudication?

The end of political adjudication is not here yet, but perhaps the beginning of the end is. "The public rights exception is, after all, an *exception*," the *Jarkesy* Court said.[45]

The "rule" to which this is an exception is, of course, the Article III provision that cases and controversies are to be tried in federal courts. *Jarkesy*'s observation is a welcome, if cautious, step toward repatriating the exercise of judicial power to the judicial branch. But this is still an assertion that a judicially created doctrine with no textual foundation can excuse Congress from complying with the rule's constitutional text.

Further, at the same time it said the doctrine is an exception it analyzed the case as though the *rule* was the exception. In doing so, it effectively requires the defendant to prove his right to trial in an Article III court instead of requiring the government to prove its case fits within the doctrine.

As a result, the Court only recaptured its authority over those enforcement actions based on federal laws with an 18th century common law analog. It left the rest in the hands of political courts.

Whenever the Court addresses a public rights question, it almost always appends a disclaimer to the effect that "[t]he Court has not definitively explained the distinction between public and private rights, and we do not claim to do so today."[46]

And then, as it did in *Jarkesy*, it embarks on an in-depth exploration of what it means to be a private right, a process that involves carefully examining whether the cause of action "is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,"[47] and that reaches such a granular level that it distinguishes between legal and equitable remedies in aid of properly classifying the action's taxonomy. But that is what one does if the constitutional requirement is the exception, not the public rights doctrine.

The *Jarkesy* Court's failure to practice what it preached in this respect is already being replicated in lower courts. A brace of recent Circuit Court opinions demonstrate that jurists are paying more attention to what the Supreme Court *did* rather than listening to what it said.[48]

The courts in both *AT&T* and *Axalta* focused their analyses not on whether the regulatory scheme at issue fit the "public rights" exception, but instead on whether the parties could prove the rule's applicability by tracing the regulation's heritage back to an 18th century common law cause of action.

The juxtaposition of these cases is particularly enlightening because they demonstrate that placing the burden of proof on the proponent of the rule instead of the proponent of the exception can be outcome determinative.

In *AT&T*, the Fifth Circuit addressed an FCC order finding that AT&T had mishandled customer information in violation of the Telecommunications Act. The implementing regulations, in relevant part, imposed on telecommunication service providers the duty to "take reasonable measures to discover and protect against attempts to gain unauthorized access to" such information.[49]

The FCC's order said AT&T's safeguards against intrusions were inadequate and, therefore, it had "unreasonably failed to protect customer data."[50] The structure of the court's analysis tracked that of *Jarkesy* by putting the burden on the proponent of the rule to prove that the regulatory requirements were sufficiently reminiscent of ancient common law claims to warrant access to an Article III court.

The FCC disclaimed any relationship between "reasonableness" and the tort of negligence, but the court said this "is a staple of the common law."[51] The key, it concluded, is that the regulatory scheme "targets the same basic conduct as the common law claim."[52]

So, AT&T was able to successfully draw a line connecting the Telecommunications Act to an 18th century common law cause of action and therefore won its right to an Article III court. But as the beneficiary of the rule, it should not have had to bear the burden of proving that linkage.

Bearing that burden in the Third Circuit resulted in the denial of Axalta's right to have its case tried in a federal court.

As in *Jarkesy* and *AT&T*, the *Axalta* court required the regulated party to prove a taxonomic relationship between the common law and the regulatory scheme at issue—here, the transportation of hazardous materials.

Even though a negligence cause of action in this context would target the "same basic conduct" as the regulations—packaging the shipped product in a manner that didn't prevent spillage—the court found no common law pedigree. And that doomed Axalta's bid for the constitutionally required forum. Not because the government proved the exception, but because it said Axalta didn't prove what is supposed to be the default rule: trial in a federal court.

So, although *Jarkesy* recognized the constitutional rule that cases and controversies are supposed to be tried in federal court, its treatment of the relationship between the rule and the exception has led lower courts to improperly place the burden on the enforcement action's target to prove its ap-

plication. This in turn will mean that many cases that belong in an Article III court will still be assigned to political courts.

In the end, though, the analytical framework isn't the real culprit. The problem is that the Supreme Court still recognizes an anti-textual doctrine of dubious origin that allows political courts to exercise the judicial power of the United States.

More fundamentally, therefore, the Court should stop looking to what the courts at Westminster were doing in 1789 to determine where the judicial power belongs.

There are many things we share with the British, including common law principles. But the separation of powers and a wholly independent judiciary is not part of that shared heritage, and the common law has very little to say about it.

We didn't adopt the Constitution to institutionalize the British arrangement of powers. We *rejected* it. We even called out the lack of judicial independence as one of our revolution-justifying grievances, complaining that the king had "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."[53]

Having won independence, the Framers operationalized their insistence on judicial independence by categorically assigning the judicial power to a branch where its practitioners would be entirely insulated from the executive. And in advocating adoption of the Constitution, one of the Framers' key arguments was that the judicial power would be separated from the legislative and executive powers because, they explained, "there is no liberty if the power of judging be not separated from the legislative and executive powers."[54]

All of that—the grievance, the constitutional text, the arguments for ratification—are all set to naught if we brush past them in favor of the practices of Westminster's courts.

British history cannot tell us which of the branches may conduct the trial of enforcement actions, and we should stop asking it for an answer it isn't equipped to provide. We may as well define the scope of the President's power by reference to what George III was doing in St. James's Palace circa 1789.

Our Constitution places the trial of enforcement actions in Article III tribunals. If, notwithstanding *our* history, there is authority that excuses Congress from compliance with the Constitution's demands, the government must present a more convincing case than "that's how they did it in England."

Jarkesy sets the Court back on the right path. But we won't know if that path leads to the end of political adjudication until it addresses enforcement actions based on statutes that don't have an 18th century antecedent.

VI. Conclusion

The public rights doctrine comprises a collection of "arcane distinctions and confusing precedents" because the Supreme Court has been trying to justify the creation of a parallel court system inside the Executive Branch.

It's a bad fit, and always will be, because that branch is fundamentally at odds, both structurally and by disposition, with the judicial power's past-tense focus and operation. The Court should reassert its authority over the trial of *all* enforcement actions, not just those with a common law heritage.

Endnotes

1. U.S. Const. Art. III § 1.

2. It has done so for other types of cases as well, but this paper will focus on enforcement actions because they present the constitutional infirmities of this practice most vividly.

3. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2134 (2024) (The public rights doctrine "has no textual basis in the Constitution."

4. "The distinction between public rights and private rights has not been definitively explained in our precedents." *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) (plurality opinion).

5. "An absolute construction of Article III is not possible in this area of frequently arcane distinctions and confusing precedents." *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 583 (1985) (cleaned up).

6. "The purpose of the separation and equilibration of powers in general . . . was not merely to assure effective government but to preserve individual freedom." *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting).

7. U.S. Const. Art. II § 3.

8. This does not account, of course, for the role of juries, which, in constitutionally defined circumstances, try the facts instead of the judge.

9. 59 U.S. at 284.

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

11. Id. at 51.

12. Id. at 46.

13. 430 U.S. 442, 450 (1977).

14. Id. at 450.

15. Id. at 455.

16. 473 U.S. 568, 586 (1985).

17. Id. at 587.

18. Id. at 583.

19. Id.

20. Id. at 594.

21. *Murray's Lessee*, 59 U.S. at 284.

22. That, at least, was Justice Scalia's understanding. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 at 67-68 (1989) (Scalia, J., concurring).

23. "Article III, of course, gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 154–55 (1990).

24. 478 U.S. 833 (1986).

25. Id. at 851.

26. Id. (cleaned up).

27. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (cleaned up).

28. The Federalist No. 78, p. 471 (C. Rossiter ed. 1961)

29. *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197, 213 (2020).

30. Id. at 204 (cleaned up).

31. Id.

32. *United States v. Arthrex, Inc.*, 594 U.S. 1, 11 (2021) (cleaned up).

33. Id.

34. 1 Annals of Cong. 499 (1789).

35. *Arthrex*, 594 U.S. at 11 (cleaned up).

36. Id. at 23.

37. *Edmond v. United States*, 520 U.S. 651, 663 (1997).

38. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496 (2010).

39. Id.

40. *U.S. v. Will*, 449 U.S. 200, 217–218 (1980).

41. The Federalist No. 10, at 79.

42. *In re Murchison*, 349 U.S. 133, 136 (1955).

43. *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016).

44. The Federalist No. 79, p. 472.

45. 144 S. Ct. at 2134.

46. *Jarkesy*, 144 S. Ct. at 2133 (cleaned up).

47. Id. at 2132 (cleaned up).

48. *See AT&T, Inc. v. FCC*, 135 F.4th 230, 232 (5th Cir. 2025); *Axalta Coating Sys. LLC v. FAA*, No. 23-2376, 2025 WL 1934352 (3d Cir. July 15, 2025).

49. 47 C.F.R. § 64.2010(a).

50. *AT&T*, 135 F.4th at 237.

51. *Id.*

52. *Id.* at 238 (cleaned up).

53. Declaration of Independence.

54. The Federalist No. 78, p. 466.