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The Supreme Court's Opinion in SEC v. Jarkesy Has the Potential to Be Extremely Destructive

Richard J. Pierce Jr
George Washington University Law School, rpierce@law.gwu.edu

Abstract

In this essay, Professor Pierce describes the legal framework within which the Supreme Court decided whether an agency could adjudicate a class of disputes prior to its 2024 opinion in SEC. v Jarkesy and then explains why the reasoning in *Jarkesy* has the potential to require federal courts to adjudicate many thousands of regulatory disputes that they lack the expertise and resources to adjudicate in a competent manner.

The Supreme Court's Opinion in SEC v. Jarkesy Has the Potential to Be Extremely Destructive

Richard J. Pierce. Jr.[1]

In SEC v. Jarkesy,[2] a six-Justice majority held that the Securities & Exchange Commission (SEC) cannot adjudicate securities fraud disputes because the Seventh Amendment right to jury trial applies to those disputes. That holding is not likely to have any significant effect. SEC relied on courts to adjudicate securities fraud cases until Congress authorized it to use its own in-house adjudication process for that purpose in 2010.[3]

While the holding in *Jarkesy* is not important, the reasoning the majority used to decide the case can have catastrophic effects on hundreds of regulatory regimes administered by dozens of agencies. To explain why *Jarkesy* has that potential, I will begin by describing the legal framework in which the Court has decided whether agencies can adjudicate disputes.

I. The Legal Framework

An agency cannot adjudicate a class of disputes if the Constitution requires that they be adjudicated by an Article III court. That is the first decision that a court must make in deciding whether the Constitution permits Congress to authorize an agency to adjudicate a class of disputes. The Seventh Amendment applies only to a subset of cases that must be

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[1] Lyle T. Alverson Professor of Law, George Washington University.
[2] 144 S.Ct. 2117 (2024).
[3] Id. at 2126.

adjudicated by an Article III court. If the moving party seeks a legal remedy, the Article III court must convene a jury and assign it the task of resolving contested issues of fact. If the moving party seeks an equitable remedy, the Article III court can decide the case in a bench trial.

The *Jarkesy* majority decided that the Seventh Amendment applied to the case because of the remedy that the SEC sought. In the words of the majority:

> In this case, the remedy sought is all but dispositive. For respondents' alleged fraud, the SEC seeks civil penalties, a form of monetary relief. While monetary relief can be legal or equitable, money damages are the prototypical common law remedy. We have recognized that civil penalties are a type of remedy at common law that could only be enforced by a court of law.[4]

I will not discuss the applicability of the Seventh Amendment right to jury trial to securities fraud cases. To understand why that part of the majority's opinion is dubious, I refer readers to the critique of the opinion by my colleague Renee Lerner, the nation's leading expert on the history of the institution of the jury trial.[5]

My focus is on the reasoning that the majority used to decide that Congress cannot authorize an agency, rather than an Article III court, to adjudicate securities fraud disputes. For that purpose, the Court has long distinguished between public rights disputes and private rights disputes. Only an Article III court can decide a private right dispute, but Congress can authorize an agency to decide a public right dispute.

The starting point for deciding whether a dispute involves private rights or public rights is historical. If a dispute involves a cause of action that could have been adjudicated by a court of law in 1789, it is a private rights dispute. If the dispute involves a statutory cause of action that did not exist in 1789, it is a public rights dispute. The history of the cause of action has never been dispositive, however. The Court has always recognized

[4] Id. at 2129.
[5] See Renee Lerner, Complexity and the Seventh Amendment (forthcoming in Geo. J.L.& P.P. in 2025).

that Congress can redefine a class of private rights disputes as public rights disputes that can be adjudicated by an agency in some circumstances.

As someone who has been teaching and writing about this line of cases for almost fifty years,[6] I can attest to the accuracy of the *Jarkesy* majority's characterization of the relevant precedents:

> Our opinions governing the public rights exception have not always spoken in precise terms. This is an area of frequently arcane exceptions and confusing precedents. The Court has not definitively explained the distinction between public and private rights, and we do not claim to do so today.[7]

The majority's characterization of the reasoning in the cases is accurate, but there is a clear pattern in the results of the cases. When the question is whether Congress can authorize a bankruptcy court to adjudicate a class of disputes that a court could adjudicate in 1789, the answer is always no.[8] When the question is whether Congress can authorize an agency to adjudicate a class of disputes that a court could adjudicate in 1789, the answer is always yes.[9]

Thus, in its 1977 opinion in Atlas Roofing v. OSHA,[10] the Court held that Congress can authorize the Occupational Health and Safety Administration (OSHA) to decide whether to impose a civil penalty on a firm that allegedly violated OSHA rules. In its 1985 opinion in Thomas v. Union Carbide,[11] the Court upheld the decision of the Environmental Protection Administration (EPA) to require a firm that wants to rely on another firm's studies to support its application for a permit to submit to binding arbitration, rather than an Article III court, the question of how much

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[6] See, e.g., Kristin Hickman & Richard Pierce, Administrative Law Treatise §2.13 (6th ed. 2019).; Richard Pierce. Administrative Law: Concepts and Insights §2B (4th ed. 2025); Kristin Hickman, Richard Pierce & Chris Walker, Federal Administrative Law: Cases and Materials §2B (4th ed. 2023).

[7] 144 S.Ct. at 2133.

[8] E.g., Stern v. Marshall, 564 U.S. 462 (2011); Granfinanciara v. Nordberg, 492 U.S. 33 (1989): Northern Pipeline Co. Marathon Pipeline Co., 458 U.S. 50 (1982).

[9] E.g., CFTC v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide, 473 U.S. 568 (1985); Atlas Roofing Co. v. OSHA, 430 U.S. 472 (1977); Crowell v. Benson, 285 U.S. 22 (1932).

[10] 430 U.S. 472.

[11] 473 U.S. 568.

compensation the second firm is required to pay the first firm for the use of its studies. In its 1986 decision in CFTC v. Schor,[12] the Court held that Congress can authorize the Commodity Futures Trading Commission (CFTC) to adjudicate common law counterclaims when the CFTC alleges that a firm violated the CFTC's rules.

The Court explained the difference between its decisions in cases involving bankruptcy courts and its decisions in cases involving agencies in its 2011 opinion in Stern v. Marshall. It referred to cases like *Union Carbide* and *Schor* as illustrations of the public rights exception to the general principle that causes of action that could be adjudicated by courts in 1789 are private rights disputes that can only be adjudicated by an Article III court. Congress can reallocate responsibility to adjudicate a class of private rights disputes from Article III courts to agencies in some important circumstances. Congress can convert causes of action from private rights to public rights in "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority."[13]

The description of the public rights exception in Stern v. Marshall reflected the Supreme Court's traditional respect for the legislative branch. If Congress decides that it is important to pursuit of the objectives of a regulatory statute to empower an agency to adjudicate common law causes of action that are closely related to the statutory causes of action that Congress has authorized the agency to adjudicate, the Court will respect that decision.

II. The Chief Justice Loses Respect for the Legislative Branch

The author of the opinion in Stern v. Marshall was Chief Justice Roberts. At some point between 2011 and 2024, however, the Chief Justice apparently lost his respect for the legislative branch. His reasoning in *Jarkesy* is inconsistent with the Court's holdings in *Atlas Roofing*, *Schor*, and *Union Carbide.* It is obviously inconsistent with his explicit recognition

[12] 478 U.S. 833.
[13] 564 U.S. at 490-91.

of the power of Congress to redefine a private right as a public right that can be adjudicated by an agency in Stern v. Marshall.

In his opinion in *Jarkesy*, the Chief Justice inexplicably ignored the Court's decisions in *Union Carbide* and *Schor*, as well as his characterization of those decisions in Stern v. Marshall. He begrudgingly acknowledged the existence of the Court's unanimous decision in *Atlas Roofing*. He distinguished it from *Jarkesy* by characterizing the cause of action in *Atlas Roofing* as unrelated to any common law cause of action that existed in 1789: "Unlike the claims in . . . this action, the OSH Act did not borrow its cause of action from the common law."[14]

The Chief Justice recognized that the cause of action that the SEC was adjudicating in *Jarkesy* was not identical to any common law cause of action that could have been adjudicated in 1789.[15] He recognized that it was both narrower and broader than any pre-existing common law cause of action. Yet, he concluded that it was a private right because it "traced [its] ancestry to the common law."[16]

After expanding significantly the circumstances in which a statutory cause of action qualifies as a common law cause of action, the Chief Justice concluded that: "When a matter from its nature, is the subject of a suit at common law, Congress may not withdraw it from judicial cognizance."[17] Gone into thin air was the respect for the power of Congress to redefine even a pure common law cause of action as a public rights dispute suitable for resolution by an agency that the Chief Justice recognized in his opinion in Stern v. Marshall.

III. The Reasoning in the Opinion Will Have Massive Effects

The Chief Justice's transfer of power from the legislative branch to the judicial branch in *Jarkesy* has the potential to have massive effects. Congress has enacted over 200 statutes in which it has authorized over a dozen regulatory agencies to adjudicate disputes.[18] A high proportion of the

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[14] 144 S.Ct. at 2137.
[15] Id. at 2131.
[16] Id. at 2137.
[17] Id. at 2139.

statutory causes of action that Congress has authorized agencies to adjudicate “trace their ancestry to the common law.” Under the reasoning in *Jarkesy*, those hundreds of statutory causes of action can only be adjudicated by Article III courts.

The facts of *Schor* illustrate the extraordinary breadth of the Chief Justice’s reasoning in *Jarkesy.* CFTC sought to impose penalties on Schor for allegedly violating agency rules. Schor did not dispute CFTC’s authority to adjudicate that statutory cause of action. When Schor filed a counterclaim based on a common law cause of action for breach of contract, CPSC asserted jurisdiction to adjudicate both the statutory cause of action and the common law counterclaim. The Supreme Court concluded that Congress had authorized CPSC to adjudicate both the statutory cause of action and the common law counterclaim and it upheld that broad grant of power.[19]

If the Court had applied the reasoning in *Jarkesy* to the facts of *Schor*, it would have held that CFTC not only lacked the power to adjudicate common law counterclaims but that it also lacked the power to adjudicate the statutory cause of action that CFTC initiated against Schor.

When Congress enacted the Commodities Exchange Act, it was aware of the common law causes of action for breach of contract and fraud that participants in commodities futures markets could use to protect themselves. It did not ignore those common law causes of action. It concluded that they were inadequate and ineffective, as they were being applied by courts.[20] Congress concluded that an agency with expertise in the manner in which commodity futures markets function and the power to issue rules would be far more effective in protecting participants in the commodities future market.

As was true with the congressional decision to create the SEC to regulate securities markets, Congress built on the relevant common law

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[18] Id. at 2155, 2173 (dissenting opinion of Justice Sotomayor). See also Paul Verkuil, Dan Gifford, Charles Koch, Richard Pierce & Jeff Lubbers, Administrative Conference of the United States, Recommendations and Reports, The Federal Administrative Judiciary 861 (1992).
[19] 478 U.S. at 857-58.
[20] Id. at 836-37.

causes of action to create an expert agency that could particularize the rules governing the behavior of the participants in the market for commodities futures. Such an agency would be far more effective in creating and enforcing relevant market norms than common law courts that know nothing about the performance of commodities futures markets.

Congress also knew that an agency-administered legal regime would be far more predictable than a common law regime implemented by generalist judges and juries. That predictability would enhance the fundamental fairness of the legal regime by providing market participants with clear notice of the rules applicable to their conduct. Congress also recognized that an agency can create a legal regime that is more consistent nationally and over time than a common law legal regime.

It made sense for Congress to assign the agency that was responsible for regulating the commodities futures markets responsibility to adjudicate the many disputes that inevitably would arise with respect to compliance with the rules that the agency issued. Congress could be confident that the procedures that the agency uses to issue the rules applicable to participants in commodities future markets and the procedures that the agency uses to adjudicate disputes with respect to the meaning and application of those rules would be fair to all market participants.

Congress created both the procedures for agency rulemaking and the procedures for agency adjudication by unanimous vote of both Houses of Congress when it enacted the Administrative Procedure Act (APA) in 1946.[21] The Supreme Court has repeatedly praised those rules and characterized them as a codification of the principles of due process.[22]

Congress was also aware that the APA gave courts responsibility to review all agency rules and adjudicatory decisions to ensure that agencies comply with the procedures required by the APA, that agencies make all decisions based on adequate evidence and reasons, that agencies act

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[21] 5 U.S.C. §§551 et seq.. For the history of the APA see Hickman & Pierce, supra. n. 6, at §1.4.

[22] E.g., Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953); Wong Yang Sun v. MeGrath, 339 U.S. 33 (1950).

within the boundaries Congress created by statute, and that agency decision making is consistent over time and among market participants.[23]

Congress used a similar reasoning process in hundreds of other contexts for many decades. In almost every case, Congress built a regulatory system implemented by an agency with relevant expertise on a common law foundation. Each of those carefully crafted regulatory regimes is in grave jeopardy if the Court continues to apply to them the reasoning in the majority opinion in *Jarkesy*.

The ubiquitous "just and reasonable" standard that many agencies are required to apply in adjudications provides another illustration of this common congressional practice. The just and reasonable standard has a rich history in the common law.[24] British courts applied it to innkeepers based on a natural monopoly rationale. In the days of horses and buggies, there was often only one inn on a segment of a highway that could provide food and shelter for travelers. If a traveler believed that he was overcharged by the innkeeper, he could go to court and try to persuade the court to order the inn to provide a refund because it charged a price that was not just and reasonable.

The common law just and reasonable standard crossed the Atlantic with the British and was applied initially by colonial courts and eventually by state courts. When railroads arrived in the nineteenth century, state courts applied the just and reasonable standard to railroads based on the same natural monopoly rationale. State legislatures quickly concluded that this judicially administered common law method of regulating railroads produced unsatisfactory results. Generalist judges were incapable of applying the common law standard in an informed and uniform manner.

State legislatures responded to this problem by creating regulatory agencies, variously named Railroad Commissions, Corporation Commissions or Public Service Commissions.[25] These agencies were

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[23] See 5 U.S.C. §§701-706. See generally, Hickman & Pierce, supra n. 6, at chapters 10-11. The Supreme Court has repeatedly emphasized the duty of agencies to maintain consistency with respect to the rules and policies that they adopt and apply. E.g., Encino Motorcars v. Navarro, 579 U.S. 211, 222 (2016).

[24] Scofield v. Lake Shore & M.S. Ry. Co., 3 N.E. 907, 929 (Ohio 1885). See also Adelbert Moot, Railway Rate Regulation, 19 Harv. L. Rev. 487 (1906).

staffed by experts in the accounting principles applicable to the process of regulating rail rates. They were instructed to apply the common law just and reasonable standard in the process of determining the rates that railroads were permitted to charge.

As rail transport increasingly occurred across state lines, state agencies lost the power to regulate rail rates. Congress concluded that it needed to create an agency that would have the power to set rates applicable to interstate rail transport. In 1887, it enacted the Interstate Commerce Act to create the Interstate Commerce Commission (ICC).[26] Congress instructed the ICC to use the common law just and reasonable standard to determine the rates that railroads could charge for interstate transportation of goods and services. Over the next century Congress enacted many new regulatory statutes, including the Federal Power Act[27] and the Natural Gas Act,[28] and instructed agencies to apply the common law just and reasonable standard to determine the rates that can be charged by the firms that are subject to each statute.

No one has ever challenged the constitutionality of any of these statutes as a violation of Article III or the Seventh Amendment. Yet under the reasoning in *Jarkesy*, they are clearly unconstitutional. Each authorizes an agency to adjudicate disputes by applying a common law standard that was applied by courts in 1789.

The Supreme Court did not merely acquiesce in the routine congressional practice of creating agencies and instructing them to adjudicate cases by applying a common law standard, it created and applied a doctrine that specifically instructs courts to respect those decisions. In 1907, the Court announced and applied the primary jurisdiction doctrine.[29]

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[25] Atchison, Topeka & Sante Fe R.R. Co. v. Denver & New Orleans R.R. Co., 110 U.S. 667, 678-79 (1884).
[26] 34 Stat. 379 (1887).
[27] 16 U.S.C. §824d.
[28] 15 U.S.C. §717.
[29] Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 425 (1907)

A court must apply that doctrine any time that a case cannot be adjudicated without knowing the answer to a question that is within the primary jurisdiction of a regulatory agency. Thus, for instance, if a shipper of goods filed a breach of contract action alleging that a railroad had overcharged it, the decision of the court was necessarily dependent on the lawfulness of the rate that the railroad charged. In that constantly recurring situation, a court was required to stay its decision-making process until the Interstate Commerce Commission determined the just and reasonable rate applicable to the transaction.

The Supreme Court repeatedly invoked and applied the primary jurisdiction doctrine in many contexts.[30] The court explained that it was essential to ensure that the just and reasonable standard and other common law standards were being applied in a nationwide uniform manner through application of the agency's expertise in the areas in which It regulated.[31]

Conclusion

Unless the Supreme Court clarifies its opinion in *Jarkesy* soon, the many lower court judges who are hostile to regulatory agencies will apply its reasoning as the basis to hold scores of regulatory regimes unconstitutional. By holding that regulatory agencies cannot adjudicate scores of statutory causes of action that "trace their ancestry to" common law causes of action, courts will force federal courts to undertake a massive task that they are ill-equipped to perform effectively. They will have to adjudicate tens of thousands of regulatory disputes every year. I doubt that is what the Court intended.

The Court can avoid this awful unintended result by granting certiorari in one of the many cases that are being brought in which parties that lost in an agency adjudication now argue that Congress lacked the power to authorize the agency to adjudicate statutory causes of action that "trace

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[30] E.g., Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973).
[31] E.g., U.S. v. Western Pacific RR Co. 352 U.S. 59 (1956). See generally Hickman & Pierce, supra n. 6 at ch. 16.

their ancestry to" common law causes of action. The Court should then clarify its reasoning in *Jarkesy* in two ways.

First, the Court should hold that the starting point for determining whether a class of regulatory adjudications involves private rights is whether the statutory cause of action is identical to a common law cause of action. The vague "trace their ancestry to" common law causes of action standard that the Court adopted in *Jarkesy* will sweep scores of statutory causes of action that agencies now adjudicate into the initial presumptive category of private rights of actions.

Second, the Court should reaffirm its longstanding respect for the discretion of the legislative branch to reallocate authority to adjudicate some private rights disputes from article III courts to agencies. The Court should reaffirm the wise statement of principles in its opinion in Stern v. Marshall. Congress can reallocate responsibility to adjudicate a class of private rights disputes to an agency when "the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority."[32]

[32] 540 U.S. at 490-91.