NOTE

POST-*JARKESY* ADMINISTRATIVE JURY IN NLRB

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INTRODUCTION

The 2023–2024 Supreme Court term marks a watershed moment in American administrative law. In a trilogy of pivotal rulings—*Loper Bright Enterprises v. Raimondo*, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, and *SEC v. Jarkesy*—the Court decisively curtailed longstanding doctrinal foundations supporting agency autonomy.[1] While *Loper Bright* garnered national attention for its explicit repudiation

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1 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024); SEC v. Jarkesy, 144 S. Ct. 2117 (2024).

of *Chevron* deference and *Corner Post* opened federal courts to pre-enforcement challenges of agency rules long considered settled, it is *Jarkesy* that arguably delivers the most profound challenge to the administrative state.[2] By recognizing that the Seventh Amendment guarantees a jury trial in agency enforcement actions seeking civil penalties, the Court destabilized the adjudicative mechanisms upon which many agencies, including the National Labor Relations Board ("NLRB," "the Board"), have long relied. Already, *Jarkesy* has generated legal uncertainty surrounding the constitutional validity of agency proceedings in which legal remedies are pursued through non-Article III forums.[3] Corporate defendants are invoking the *Jarkesy* decision in agency enforcement actions, with varying results in different federal courts.[4]

The doctrinal framework set forth in *Jarkesy* is fractured and leaves a significant doctrinal gap by refusing to address how Article III fits into the majority framework. In a reversal of decades of precedent, the majority did not anchor their reasoning in a traditional forum-dependent view, where proper assignment of adjudicatory authority to a non-Article III forum under the Public Rights Doctrine ("PRD") ended the Seventh Amendment inquiry on whether the jury

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2 *See, e.g.*, Cary Coglianese, *The Supreme Court's Judicial Earthquake Will Shake the Administrative State*, Barron's (July 2, 2024), https://www.barrons.com/articles/supreme-court-decision-chevron-administrative-state-a3fcb801 [https://perma.cc/QZU8-QKTE]; Matthew Lee Wiener, *What is Left of Agency Adjudication After* Jarkesy*?*, The Regul. Rev. (July 29, 2024), https://www.theregreview.org/2024/07/29/wiener-what-is-left-of-agency-adjudication-after-jarkesy/ [https://perma.cc/DR6E-4ZJU]; Kate Shaw, *The Imperial Supreme Court*, N.Y. Times (June 29, 2024), https://www.nytimes.com/2024/06/29/opinion/supreme-court-chevron-loper.html [https://perma.cc/ZV6P-SXM2]; Alan B. Morrison, *Supreme Court Needlessly Expands U.S. Statute of Limitations*, The Regul. Rev. (July 30, 2024), https://www.theregreview.org/2024/07/30/morrison-supreme-court-needlessly-expands-u-s-statute-of-limitations/ [https://perma.cc/XMM2-V7QJ].

3 *See, e.g.*, Samantha Kingsbury, *EnforceMintz—Could the Supreme Court's Decision in* Jarkesy *Mean the End to HHS Civil Monetary Penalty Authorities as We Know Them?*, JD Supra (Jan. 17, 2025), https://www.jdsupra.com/legalnews/enforcemintz-could-the-supreme-court-s-3213256/ [https://perma.cc/74QN-WV49].

4 *See, e.g.*, AT&T, Inc. v. FCC, 149 F.4th 491, 494 (5th Cir. 2025) (applying *Jarkesy* to find that the FCC forfeiture order for mishandling of consumer data is a remedy-in-law that requires a jury trial); CBW Bank v. FDIC, 769 F. Supp. 3d 1204, 1206–07 (D. Kan. 2025) (holding that a bank challenging FDIC proceedings based on *Jarkesy* has to bring the case to the circuit court); YAPP USA Auto. Sys., Inc. v. NLRB, 748 F. Supp. 3d 497, 515 (E.D. Mich. 2024) (noting that an NLRB remedy is equitable in nature and, as such, does not implicate *Jarkesy*).

trial is necessary.[5] The Court's majority opinion foregrounds the applicability of the Seventh Amendment as a threshold inquiry, emphasizing the legal nature of the remedy sought and the analogical closeness of the statutory cause of action to common law fraud.[6] The majority opinion further narrows the scope of the PRD, limiting its reach to historical exceptions such as revenue collection and public benefits.[7] In so doing, the Court gestures toward, but does not conclusively adopt, two different frameworks: one in which the Seventh Amendment requirement conclusively bars agency adjudication, requiring an Article III forum (the "jury-dependent" view), and one in which the Seventh Amendment does not deprive agencies of adjudicatory authority, but instead requires them to integrate a jury trial into their proceedings (the "independent" view).[8]

Despite Justice Gorsuch's seeming endorsement of the jury-dependent conception, Article III's meaning, based on the Madisonian Compromise that empowered Congress not to establish any lower federal courts, suggests that even when the Seventh Amendment applies, there is no corresponding Article III right to a federal forum.[9] The majority's silence on the Article III issue, coupled with its reliance on *Granfinanciera*—a case that arguably embodies an "independent" view of jury rights—has left lower courts and commentators without clear guidance on how to reconcile jury rights with administrative adjudication.[10] What is clear, however, is that *Jarkesy* invites a fundamental reconsideration of administrative enforcement when legal remedies are at issue.

Few agencies are more exposed to this doctrinal upheaval than the NLRB. As the primary enforcer of the National Labor Relations Act ("NLRA"), the Board has historically exercised its authority through adjudication, not rulemaking. This procedural posture renders it particularly vulnerable under a post-*Jarkesy*

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5 *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53–54 (1989) ("[If] Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.").

6 *Jarkesy*, 144 S. Ct. at 2129–30.

7 *Id.* at 2132–34.

8 *See* Note, *Unlinking the Seventh Amendment and Article III*, 138 Harv. L. Rev. 588, 589–90 (2024).

9 *See infra* subpart II.B.

10 *See Jarkesy*, 144 S. Ct. at 2139 ("In addition, we have explained that the public rights exception does not apply automatically whenever Congress assigns a matter to an agency for adjudication." (citing *Granfinanciera*, 492 U.S. at 52)).

regime. Unlike agencies that have shifted toward prospective policymaking through notice-and-comment procedures, the NLRB remains a paradigmatic adjudicative body, resolving unfair labor practice ("ULP") charges through trial-like proceedings before administrative law judges.[11] The ineffectiveness of the Board's remedy, largely limited to back-pay, reinstatement, and notice posting, has led to limited employer compliance and sustained criticism.[12] Recent efforts to expand the Board's remedial authority, most notably through the *Thryv* decision, have introduced monetary awards for direct and foreseeable harms suffered by employees, a remedial innovation that arguably crosses the line from equitable restitution to legal damages.[13] Consequently, under the analytic framework articulated in *Jarkesy*, such remedies may implicate the Seventh Amendment.[14]

This Note argues that the questions posed by *Jarkesy* are not merely abstract or theoretical; they demand immediate institutional responses from Congress and federal agencies. The central inquiry is no longer whether the Seventh Amendment applies to administrative enforcement, but how agencies should structure their proceedings in light of that applicability. Specifically, this Note seeks to explore the following: Can an administrative agency convene a jury within its own adjudicatory framework? At what stage of the administrative process should a jury be impaneled? And what institutional models, drawn from history or comparative practice, offer viable pathways for harmonizing the imperatives of efficient enforcement with the constitutional mandates of jury trial rights?[15]

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11 NLRB v. Bell Aerospace Co., 416 U.S. 267, 291–94 (1974) (noting the Board's discretion in choosing adjudication or rulemaking, citing *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)).

12 *See, e.g.*, Matt Bruenig, *The NLRB Can't Punish Employers Strongly Enough*, Jacobin (Feb. 19, 2025), https://jacobin.com/2025/02/nlrb-labor-law-compliance-backlogs [https://perma.cc/PX9D-BWSM] (arguing a lack of NLRB remedial authority led to non-compliance amid underfunding of the agency, and that a legislative solution to enhance the Board's remedy is the only solution); Kristin Toussaint, *For Years, the NLRB Has Been Too Toothless to Enforce Labor Laws. Is That Finally Changing?*, Fast Co. (Apr. 12, 2024), https://www.fastcompany.com/91090679/nlrb-unfair-labor-practices-labor-laws [https://perma.cc/P8BG-WSTK]; Jody Calemine, *Remedying Employers' Unlawful Refusal to Bargain*, The Century Found. (Jan. 22, 2024), https://tcf.org/content/commentary/remedying-employers-unlawful-refusal-to-bargain/ [https://perma.cc/DW5D-RAA9] (pointing to the limited nature of notice posting and order to bargain as a remedy for the employer's failure to bargain in good faith).

13 Thryv, Inc., 372 NLRB No. 22, 2022 WL 17974951 (Dec. 13, 2022), *vacated in part*, 102 F.4th 727 (5th Cir. 2024).

14 *See infra* subpart II.A.

15 *See infra* subpart III.A.

The analysis proceeds in three Parts. First, the Note untangles the doctrinal implications of *Jarkesy*, placing it in the context of the Court's broader skepticism of administrative power and contrasting its emerging view with the earlier forum-based view. Second, it considers the application of *Jarkesy* to the NLRB, emphasizing the Board's structural reliance on adjudication, its historically limited remedies, and the constitutional vulnerability of its recent expansionary initiatives. In this Part, it also evaluates the practical and normative deficiencies of rulemaking as an alternative and proposes instead a turn toward integrating juries within administrative procedures. It points to the benefits of potentially integrating a jury into the agency proceeding, the hollowness of business enthusiasm for jury trial, and the real benefit of providing procedural protections that legitimize stronger remedial authority of the Board. Finally, the Note explores institutional models for embedding juries into administrative adjudication, including the historical special jury, appellate jury mechanisms, and hybridized procedural frameworks that could align administrative practice with constitutional requirements.

Already, courts have begun applying *Jarkesy* to question the legality of expanded remedies in NLRB proceedings.[16] The presence of a circuit split on the *Thryv* remedy and the emergence of judicial dissents invoking *Jarkesy* in the labor law context illustrate that the implications of *Jarkesy* are neither remote nor speculative. As the constitutional architecture of administrative adjudication continues to shift, the NLRB must now confront the necessity of procedural innovation. This Note seeks to contribute to that project.

I
JARKESY, SEVENTH AMENDMENT, ARTICLE III, PRD, FITTING IN THE PUZZLE PIECES

The current Court's administrative law jurisprudence stands in stark contrast to conservative stalwart Justice Scalia's historical embrace of the administrative state in his academic and judicial contributions.[17] The Roberts Court has embraced limitations on the administrative state in two distinct ways: by seeking to substantively narrow the scope of agency

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16 *See* Int'l Union of Operating Eng'rs, Loc. 39 v. NLRB, 155 F.4th 1023, 1063–66 (9th Cir. 2025) (Bumatay, J., dissenting in part).

17 *See* C. Boyden Gray, *On Justice Scalia's Contributions to Administrative Law*, 41 ADMIN. & REGUL. L. NEWS 4, 4 (2016).

authority and by imposing procedural requirements that deter agency action. In that sense, decisions like *Loper Bright*, *West Virginia v. EPA*, and *Biden v. Nebraska* reflect substantive limitations on agency reach, enabling courts to invalidate agency actions based on de novo interpretations of the law.[18] On the procedural front, cases like *Corner Post* and *Ohio v. EPA* represent efforts to constrain agencies through procedural means, either by invalidating actions due to procedural infirmities or by loosening procedural restrictions against pre-enforcement challenges.[19] In this light, the Court's current approach may be seen as echoing Judge Leventhal's earlier efforts to scrutinize the administrative state through substantive and procedural "hard-look" review, which established heightened judicial oversight and enabled the invalidation of agency actions that failed to meet extra-textual, judicially imposed procedural standards.[20] *Jarkesy*'s placement within this dual line of cases limiting administrative action remains uncertain, as (1) the scope of the Seventh Amendment requirement, (2) its relationship to the Article III forum, and (3) the remaining scope of the PRD all remain unresolved.

A. Article III, Seventh Amendment, and PRD

In *SEC v. Jarkesy*'s majority opinion, the Court ruled that a defendant facing civil penalties in SEC enforcement proceedings is entitled to a jury trial under the Seventh Amendment.[21] The Court's ruling places much of its precedent on the assignment of adjudicatory authority to non-Article III forums, the applicability of the Seventh Amendment in these proceedings, and the scope of the Public Rights Doctrine (PRD) on shaky ground. The Court has historically allowed adjudication of

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18 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022) (invoking major questions doctrine to invalidate EPA regulations); Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023) (employing major questions doctrine to strike down student loan forgiveness program).

19 Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440 (2024); Ohio v. EPA, 144 S. Ct. 2040, 2055 n.11 (2024) (holding that the agency's failure to fully address public comments on why smaller scale implementation is not viable was likely arbitrary and capricious).

20 *See* Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 Sup. Ct. Rev. 177, 181 & n.16 (contemporary treatment). *But cf.* Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, Inc., 435 U.S. 519, 546–47 (1978); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009) (declining to endorse more stringent form of review).

21 *See generally* SEC v. Jarkesy, 144 S. Ct. 2117 (2024).

statutorily created rights in a non-Article III administrative forum under the PRD.[22] Unlike the "suit[s] at the common law," which Congress cannot withdraw from an Article III forum,[23] the PRD implicates matters "arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it."[24] These PRD exceptions have implicated the administration of public lands, the granting of public benefits, patent rights, and the enforcement of complex administrative regulatory schemes, and they have often involved the government as a party.[25] The applicability of the Seventh Amendment to a non-Article III forum has followed similar patterns of analysis.

Under the Seventh Amendment, "[i]n Suits at common law, . . . the right of trial by jury shall be preserved . . . ."[26] The word "preserved" has been interpreted to mean the preservation of the jury right as it existed in 1791, requiring the court to engage in an "archaeological" inquiry into whether the suit in question would have been adjudicated in the court of law at Westminster or in a chancery court.[27] As the *Jarkesy* Court succinctly put it, if the remedy and/or the cause of action is analogous to the common law—"made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789'"—the plaintiff can invoke their Seventh Amendment right.[28] From this background, the Court has historically upheld the non-applicability of the Seventh Amendment in non-Article III proceedings on the basis that the cases are not "suits at common law." The language used in *NLRB v.*

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22 *See* Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 455 (1977) ("[T]he cases discussed above stand clearly for the proposition that when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency . . . .").

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

24 Crowell v. Benson, 285 U.S. 22, 50 (1932) (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).

25 *See Murray's Lessee*, 59 U.S. at 284 (public land); *Crowell*, 285 U.S. at 50 (public benefits); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589 (1985) (part of complex regulatory scheme); Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325, 329 (2018) (patent right).

26 U.S. Const. amend. VII.

27 Martin H. Redish & Samy Abdelsalam, *The Seventh Amendment Right to Jury Trial in the Administrative State: Recognizing the Dangers of the Constitutional Moment*, 99 Notre Dame L. Rev. 1743, 1748–49 (2024).

28 SEC v. Jarkesy, 144 S. Ct. 2117, 2132 (2024) (quoting Stern v. Marshall, 564 U.S. 462, 484 (2011)).

Jones & Laughlin Steel Corp., which upheld the Wagner Act, is instructive.[29]

The Court more explicitly spelled out the connection between the non-applicability of the Seventh Amendment and the proper assignment of adjudicatory authority to a non-Article III forum under the PRD in later cases. In *Atlas Roofing*, which upheld civil penalties imposed by the Occupational Safety and Health Review Commission without a jury, the Court explicitly tied the non-applicability of Article III, the Seventh Amendment, and the PRD by flatly stating that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'"[30] Relying on *Atlas Roofing*, the Court in *Granfinanciera* elucidated an authoritative interpretation: if there is a proper assignment of "the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder."[31] The Court has thus historically endorsed a forum-dependent view of the applicability of the Seventh Amendment. If the Court finds that the adjudicatory authority is properly assigned to an Article III forum, there is no need to engage in a separate Seventh Amendment analysis, as they do not pose an "independent bar." As such, the PRD's role is to immunize administrative adjudication from an Article III challenge, which in turn confirms the non-applicability of the Seventh Amendment. This forum-dependent view is seemingly rejected and turned upside down in the *Jarkesy* decision.

B. *SEC v. Jarkesy*

George Jarkesy, a conservative radio host and hedge fund manager, was charged with securities fraud by the Securities and Exchange Commission ("SEC") in 2013.[32] The SEC chose to pursue the case through administrative adjudication rather than through federal court, which the agency

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29 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48–49 (1937) ("The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. . . . The contention under the Seventh Amendment is without merit.").

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

31 Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53–54 (1989).

32 *Jarkesy*, 144 S. Ct. at 2124.

was authorized to do pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.[33] The SEC's final order, affirming the ALJ's decision, imposed a $300,000 civil penalty.[34] The Fifth Circuit ruled against the SEC on three different bases: (1) Congress improperly delegated legislative power by giving the agency discretion to choose between agency adjudication or an Article III court; (2) the SEC ALJs' removal protections violated the Article II "Take Care" Clause; and (3) the SEC's imposition of civil penalties violated the Seventh Amendment.[35] The Supreme Court affirmed the Fifth Circuit's ruling in a 6-3 decision solely on the Seventh Amendment ground, without addressing the non-delegation or removal protection issues.[36]

In a majority decision authored by Chief Justice Roberts, the Court took the peculiar step of engaging in an extensive Seventh Amendment analysis, despite the subsidiary role that analysis had played under the forum-dependent view the Court had endorsed in the past. The *Jarkesy* Court characterized the questions presented as (1) whether the action implicated the Seventh Amendment at all, and if so, (2) whether the Public Rights Doctrine (PRD) applied, thereby allowing for assignment of adjudication to the SEC even though it would not afford the right to a jury trial.[37] Rather than resolving the Article III questions first through application of PRD jurisprudence, the majority opinion chose to ask whether the Seventh Amendment applied, found that it did, and then engaged in a truncated PRD inquiry, reading the "public rights exception" narrowly and finding it inapplicable.[38]

First, in addressing whether the Seventh Amendment applies in the SEC enforcement action, the majority focused on the remedy sought as being "all but dispositive."[39] In this case, the penalty sought by the SEC sounds in law, not in equity, meaning it is intended to punish and deter rather than to make whole the injured party.[40] In addition, the SEC's

33 Dodd-Frank Wall Street Reform and Consumer Protection Act § 929P(a)(1), 15 U.S.C. § 77h-1(g).

34 *Jarkesy*, 144 S. Ct. at 2127.

35 Jarkesy v. SEC, 34 F.4th 446, 451–59, 459–63, 463–65 (5th Cir. 2022), *aff'd*, 144 S. Ct. 2117 (2024).

36 *Jarkesy*, 144 S. Ct. at 2127–28.

37 *Id.*

38 *See id.* at 2128–39.

39 *Id.* at 2129.

40 *Id.*

cause of action is akin to common law fraud.[41] These two bases, though the Court emphasized that the remedy is more important, render the case a "suit[] at common law," requiring Seventh Amendment protection.[42] Once the Court determined that the Seventh Amendment is applicable, it moved onto whether the PRD can fend off the jury trial requirement. It characterized public rights narrowly, identifying pre-New Deal historical bases for the PRD (revenue collection, foreign commerce, tariffs, relations with Indian tribes, administration of public lands, and granting of public benefits) and emphasizing that "[t]he public rights exception is, after all, an *exception*."[43] In the majority's narrow conception of the PRD, "[i]f a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory."[44] The passage hints at the majority's possible endorsement of a jury-dependent conception of the assignment of adjudicatory authority to a non-Article III forum. If the Seventh Amendment right is triggered, an Article III forum is mandatory, except for in a very narrow set of historical "public rights exception[s]."[45] Furthermore, a "common law" cause of action can be read broadly to encompass any cases in which the remedy sought is in law and not in equity.

Justice Gorsuch's concurrence, joined by Justice Thomas, more explicitly endorsed the jury-dependent conception of the Article III-Seventh Amendment relationship. While the majority did not explicitly address the assignment of adjudicatory authority to a non-Article III forum, Justice Gorsuch highlighted the relevance of Article III and the Due Process Clause of the Fifth Amendment in conjunction with the Seventh Amendment to ensure a "fair trial in a fair tribunal."[46] Justice Gorsuch further endorsed a broad conception of "suit[s] at the common law" in both the Article III and Seventh Amendment contexts by arguing that the civil penalties provision alone is enough to trigger the Seventh Amendment and Article III requirements.[47]

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41 *Id.* at 2130.

42 *Id.* at 2135.

43 *Id.* at 2133–34.

44 *Id.* at 2132.

45 *Id.* at 2133.

46 *Id.* at 2140 (Gorsuch, J., concurring) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

47 *Id.* at 2145 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856)) ("Nor does it make a difference whether

Finally, a limited understanding of the PRD is endorsed on the basis that "limited areas" have historical pedigrees, but outside of those the Court "ha[s] no license to deprive the American people of their constitutional right to an independent judge, to a jury of their peers, or to the procedural protections at trial that due process normally demands."[48]

The jury-dependent view that the majority hints at and that Justice Gorsuch endorses in his concurrence presents a dire threat to the existing scheme of agency adjudication. As Justice Sotomayor pointed out in her dissent, unlike the SEC, both the Occupational Safety and Health Review Commission and the Federal Mine Safety and Health Review Commission must deal with the fact that their organic statutes do not authorize federal court jurisdiction, effectively eliminating civil penalties from the toolkits of these adjudicatory agencies.[49] Relying on the Court's precedents like *Atlas Roofing* and *Granfinanciera*, Justice Sotomayor restated the forum-dependent view, stating that the "critical issue" is "whether Congress can assign a particular matter to a non-Article III factfinder."[50] A broad reading of the case, endorsing the jury-dependent view, would mean "the constitutionality of hundreds of statutes may now be in peril, and dozens of agencies could be stripped of their power to enforce laws enacted by Congress."[51]

The *Jarkesy* majority, while rejecting the traditional forum-dependent view that the Court had endorsed as recently as 2018,[52] does not explicitly endorse an alternative view. The majority hints at, and Justice Gorsuch in his concurrence endorses, a jury-dependent view. Another possible interpretation of the majority opinion can be gleaned from the majority's reliance on the *Granfinanciera* decision. That case concerned whether the Seventh Amendment right applies in an action for fraudulent conveyance brought in bankruptcy court, a

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we think of the SEC's action here as a civil-penalties suit or something akin to a traditional fraud claim: At the founding, both kinds of actions were tried in common-law courts.").

48 *Id.* at 2149.

49 *Id.* at 2173–74 (Sotomayor, J., dissenting) (listing, among others, the Occupational Safety and Health Review Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, and the Department of Agriculture).

50 *Id.* at 2158.

51 *Id.* at 2174.

52 *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325, 345 (2018) (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53–54 (1989)).

non-Article III forum.[53] In referencing *Granfinanciera*, the *Jarkesy* Court characterized the case as addressing "whether the Seventh Amendment guarantees the right to a jury trial 'in the face of Congress' decision to allow a non-Article III tribunal to adjudicate' a statutory 'fraud claim.'"[54] According to the majority, *Granfinanciera* "effectively decides th[e] case."[55] Seemingly, this would mean that the Court endorses the applicability of the Seventh Amendment in a non-Article III forum. This view could be characterized as an "independent" view, in contrast to the now-disfavored forum-dependent view and the competing jury-dependent view.[56] The issue with this interpretation, despite the *Jarkesy* Court's endorsement of *Granfinanciera*, is the fact that, like in *Jarkesy*, the Court did not consider whether the action comported with Article III.[57] Furthermore, the *Granfinanciera* Court's language that the non-applicability of the Seventh Amendment and the assignment of adjudicatory authority to a non-Article III forum "requires the same answer" muddies the waters.[58]

Nevertheless, a strong constitutional argument can be made in favor of the independent view. Before the rise of the Public Rights Doctrine (PRD) as the dominant framework for explaining the proper assignment of adjudicatory authority to a non-Article III forum, courts routinely relied on appellate review models to uphold administrative adjudication, viewing appellate review by an Article III court as resolving the constitutional problem.[59] The Court did not directly address the Article III question in *Jarkesy*, but the validity of the appellate review model rests on the bedrock constitutional principle of the Madisonian Compromise. If Article III, together with the Seventh Amendment, entitles individuals to an independent judge who will preside over a jury trial, as Justice Gorsuch contends, where does agency adjudication fit in?[60] The simple

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53 *Granfinanciera*, 492 U.S. at 36.

54 *Jarkesy*, 144 S. Ct. at 2134 (quoting *Granfinanciera*, 492 U.S. at 37, 50).

55 *Id.* at 2135.

56 *See* Note, *supra* note 8, at 602–07.

57 *Granfinanciera*, 492 U.S. at 64.

58 *Id.* at 53. For criticism of the *Granfinanciera* Court's language, see Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1094 (1999) ("The outcome of *Granfinanciera* . . . belies [its] language.").

59 *See generally* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011).

60 *Jarkesy*, 144 S. Ct. at 2140 (Gorsuch, J., concurring).

answer is that Article III does not guarantee a federal forum in the first instance. Viewed through a minimalist lens, Article III requires only three things: (1) the establishment of a Supreme Court, (2) staffed by judges with life tenure, who (3) exercise original jurisdiction over a narrow set of cases and appellate jurisdiction over others.[61] As Professor Richard H. Fallon, Jr., contends, Article III is indifferent to whether cases within the Supreme Court's appellate jurisdiction originate in a state court, a legislative court, or an administrative agency, so long as Congress so provides.[62] Indeed, under the Madisonian Compromise, the creation of lower federal courts was not constitutionally required.[63] If Congress wanted, it could strip federal court jurisdiction from the field of administrative law in its entirety.[64] While the appellate review model may not suffice to defeat a Seventh Amendment challenge, the historical pedigree and constitutional principles underlying it make it likely that "disentanglement" of Article III and the Seventh Amendment will emerge as the likely outcome of the *Jarkesy* decision.

Whether the Court settles on a "jury-dependent" view or an "independent" view of Article III and the Seventh Amendment, agencies will have to contend with either substantial limitations on the scope of their activities, limiting remedies under the "jury-dependent" view, or will need to find a way to comply with procedural requirements under the "independent" view. The next Part considers the *Jarkesy* decision's implications for NLRB adjudication, its applicability, and how the agency can potentially comply with the Court's requirements, especially under the "independent view," where the administrative agency can still retain adjudicatory authority as long as Seventh Amendment requirement is met.

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61 *See* U.S. Const. art. III, §§ 1–2.

62 Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 938–39 (1988).

63 *See* William Baude et al., Hart and Wechsler's the Federal Courts and the Federal System 9–10 (8th ed. 2025) ("According to Madison, . . . 'there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them.'").

64 *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) ("We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.").

II
NLRB Adjudication: Issues, Reforms, Relevance of *Jarkesy*

The NLRB, as the federal enforcement agency of the NLRA, is facing significant institutional challenges in the wake of the *Jarkesy* decision.[65] The Board is unique: unlike many other agencies, the NLRB develops its law of unfair labor practices through case-by-case adjudication, not through legislative rulemaking.[66] The Board's reliance on adjudication instead of rulemaking has been a source of criticism, but as subpart II.C will explore, there are both pragmatic and normative reasons why rulemaking is not an appropriate means to effectuate federal labor policy.[67] A broad reading of *Jarkesy*'s Seventh Amendment requirement and a narrow reading of the PRD could seriously restrict the agency's enforcement capabilities, especially given that the Board's and NLRA's lack of remedial options is already considered a major factor in employer non-compliance with labor law.[68]

A. NLRB Remedies, *Thryv*

The Board, operating in an area of law that is subject to significant political pressure and frequent adversity, has faced repeated legal attacks challenging the constitutionality of the removal protections for Board members and Administrative Law Judges ("ALJs").[69] *Jarkesy* has added another source of ammunition for litigants seeking to avoid penalties for violating the NLRA. So far, arguments that defendants in NLRB adjudicatory proceedings are entitled to a jury trial have not met with much success. The main issue of contention hinges on (1) whether the empowered make-whole remedy under the *Thryv* decision constitutes a civil penalty and (2) whether, if

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65 *See, e.g.*, Int'l Union of Operating Eng'rs, Loc. 39 v. NLRB, 155 F.4th 1023 (9th Cir. 2025); NLRB v. Starbucks Corp., 125 F.4th 78 (3d Cir. 2024); Nexstar Media, Inc. Grp. v. NLRB, 746 F. Supp. 3d 464 (N.D. Ohio 2024); YAPP USA Auto. Sys., Inc. v. NLRB, 748 F. Supp. 3d 497, 514 (E.D. Mich. 2024).

66 *See* Stephen G. Breyer et al., Administrative Law and Regulatory Policy: Problems, Text, and Cases 465 (9th ed. 2022).

67 *See infra* subpart II.C.

68 *See supra* note 12.

69 *See generally* Parker Purifoy & Robert Iafolla, *Amazon, SpaceX Cases Against NLRB Meet Skeptical Fifth Cir.*, Bloomberg L. (Nov. 18, 2024), https://news.bloomberglaw.com/daily-labor-report/fifth-circuit-questions-amazons-jurisdiction-move-in-nlrb-suit [https://perma.cc/9KZW-AU2A]; Trump v. Wilcox, 145 S. Ct. 1415 (2025) (staying the D.C. Circuit's temporary restraining order to reinstate Board Member Gwynne Wilcox after Trump fired her on January 27, 2025).

the NLRB imposes a civil penalty, the case will fall outside the "public rights" exception by resembling an analogous common law right of action.[70] A circuit split over the *Thryv* remedy and a dissent in *International Union of Operating Engineers, Local 39 v. NLRB* invoking the *Jarkesy* analysis underscore the Board's constitutional vulnerability.

In considering whether the suit in question is "legal in nature," thus requiring Seventh Amendment protection, the *Jarkesy* Court placed significant emphasis on the remedy rather than the cause of action.[71] The Court first analyzed the remedial measure and determined that the civil penalty imposed by the SEC was "punitive" in nature, making it a "type of remedy at common law that could only be enforced in courts of law."[72] It then moved on to "confirm[]" this conclusion by comparing the SEC's cause of action to common law fraud, noting that it "target[ed] the same basic conduct as common law fraud, employ[ed] the same terms of art, and operate[d] pursuant to similar legal principles."[73]

The *Jarkesy* Court borrowed the analytic framework from *Tull*, with its lack of consideration for equitable determinations, its focus on retribution and deterrence, and its emphasis on culpability rather than the size of the damage, all of which tilted the analysis toward finding the SEC's remedy to be legal in nature.[74] In general, the Board's awarding of money damages, such as backpay, is characterized as equitable in nature.[75] However, even strictly remedial backpay does not serve

70 *See generally* Casey Warren Baker, Marjorie McInerney & Kevin G. Knotts, *More Questions than Answers: NLRB Enforcement Actions in a Post-*Jarkesy *World*, A.B.A. (Oct. 14, 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-october/nlrb-enforcement-actions-post-jarkesy-world/ [https://perma.cc/68MB-257E].

71 *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2129 (2024) ("Since some causes of action sound in both law and equity, we concluded that the remedy was the 'more important' consideration." (quoting Tull v. United States, 481 U.S. 412, 421 (1987))).

72 *Id.* at 2129–30 (quoting *Tull*, 481 U.S. at 422).

73 *Id.* at 2131, 2136.

74 *See Tull*, 481 U.S. at 422–23 (finding legal penalty on the basis of flat $10,000 fine, congressional record showing a focus on deterrence, and prior violations leading to tougher sanctions); *Jarkesy*, 144 S. Ct. at 2129–30 (finding legal penalty on the basis of concern for culpability, deterrence, and recidivism; tiered penalties scaling with culpability; and no requirement to compensate the injured stockholders).

75 *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937).

solely a remedial purpose, as the award often functions as a deterrent against wrongful conduct.[76]

Briefly addressing the second prong of *Jarkesy*'s Seventh Amendment inquiry, the cause of action provided under the NLRA is "one unknown to the common law."[77] The closest historical precedent to a ULP cause of action would resemble criminal conspiracy, used in England and the early Republic to penalize the remnants of medieval guilds and early efforts at union organizing.[78] However, it is unclear whether these prosecutions were based on common law principles or statutory prohibitions against entering into agreements "for advancing their Wages or for lessening their usual Hours of Work."[79] Beyond these ambiguities, the leading early American case on criminal conspiracy against a union, *Commonwealth v. Hunt*, expressly rejected the English common law doctrine of criminal conspiracy, stating that it had "never been adopted here."[80]

Thus, unlike the clear parallel between common law fraud and the SEC's statutory fraud action, connecting the common law concept of criminal conspiracy—arguably not even a true common law cause of action—to modern ULPs would be a strained and difficult fit. Nevertheless, the *Jarkesy* Court explicitly privileged the legal nature of the remedy over historical resemblance to a common law cause of action. This is the area where *Jarkesy* decision further comes into conflict with recent developments in Board law. Under the Biden presidency, the Board has sought to provide the "full panoply of remedies" to victims of unlawful labor practices ("ULPs"), including awards of consequential damages suffered as a direct and foreseeable result of an employer's ULP.[81]

The *Thryv* decision was the outcome of the Board's effort. In *Thryv*, the NLRB expanded the traditional make-whole remedy applied by the Board to include "all direct or foreseeable pecuniary harms" resulting from an employer's unfair labor

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76 *See* NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 265 (1969); *see also* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 153 (2002) (Breyer, J., dissenting).

77 *Jones & Laughlin*, 301 U.S. at 48.

78 *See* R v. Journeymen-Taylors of Cambridge (1721) 88 Eng. Rep. 9; 8 Mod. 10 (finding Journeymen Tailors guilty of criminal conspiracy for attempting to set a higher wage).

79 Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 403–04 (1922).

80 Commonwealth v. Hunt, 45 Mass. 111, 115 (1842).

81 NLRB OFF. OF THE GEN. COUNS., MEMORANDUM GC 21-06, SEEKING FULL REMEDIES (2021).

practice.[82] Under the NLRA, the Board can order the "reinstatement of employees with or without backpay, as will effectuate the policies of" the Act.[83] While courts have generally recognized that the Board has broad discretion in fashioning remedies, the Board has historically stuck to its traditional equitable remedy, under which an employee harmed by an unfair labor practice receives backpay for wages lost due to termination or other adverse employment actions.[84] This broader conception of the make-whole remedy in *Thryv* was intentionally framed to avoid comparisons to tort penalties at common law, with the Board carefully emphasizing that these damages should not be construed as consequential damages.[85] Although the *Thryv* decision responded to longstanding criticism about the Board's lack of robust remedial authority for punishment and deterrence, the Board has consistently articulated the enhanced *Thryv* remedy within the statutory language of the make-whole relief authorized under section 10(c) of the NLRA.[86] But as the dissenting Board members to the *Thryv* decision have noted, allowing collection of "all direct or foreseeable pecuniary harm[]" doesn't distinguish the remedy from consequential damage in tort, and in fact may "go well beyond tort law."[87]

The status of the PRD after *Jarkesy* remains uncertain. As the Court acknowledged, this is an "area of frequently arcane distinctions and confusing precedents," and the Court declined to offer a definitive interpretation.[88] While the Court did not overturn *Atlas Roofing*, it cabined the case to the facts,[89] suggesting that the Court's narrow and disfavored conception of the PRD—as "an exception . . . [that] has no textual basis in the Constitution" and requires strong historical grounding to

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82 Thryv, Inc., 372 NLRB No. 22, 2022 WL 17974951, at *14 (Dec. 13, 2022), *vacated in part*, 102 F.4th 727 (5th Cir. 2024).

83 29 U.S.C. § 160(c).

84 *See* NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969). *But see* Starbucks Corp. v. McKinney, 144 S. Ct. 1570, 1579 (2024) (requiring NLRB to follow traditional four-factor test in order to invoke § 10(j) injunctive relief).

85 *Thryv*, 2022 WL 17974951, at *14 ("Accordingly, we stress today that the Board is not instituting a policy or practice of awarding consequential damages, a legal term of art more suited for the common law of torts and contracts.").

86 *See id.*

87 *Id.* at *25, *27 (Kaplan & Ring, Members, concurring in part and dissenting in part).

88 SEC v. Jarkesy, 144 S. Ct. 2117, 2133 (2024) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583 (1985)).

89 *Id.* at 2138 ("The reasoning of *Atlas Roofing* cannot support any broader rule.").

apply—may now be the rule.[90] If that is the case, the Board will not be able to rely on the PRD to exempt its proceedings from Seventh Amendment jury trial requirements.

Federal circuit courts have reviewed NLRB enforcement actions applying the *Thryv* remedy in the post-*Jarkesy* landscape. The Third and Ninth Circuits came out with a different determination, resulting in a circuit split on whether the *Thryv* remedy is proper. While majority opinion in both circuits did not apply *Jarkesy* framework, Judge Bumatay's dissent in the Ninth Circuit judgment upholding the *Thryv* remedy presents a significant application of *Jarkesy* decision in the NLRA context. Under the NLRA, for the Board to enforce its order, it must petition the circuit court to do so, allowing for appellate review.[91]

In *NLRB v. Starbucks Corporation*, the Third Circuit considered challenges to the *Thryv* remedy under statutory interpretation and Seventh Amendment grounds.[92] The Third Circuit was skeptical of the Board's claim that the *Thryv* remedy is equitable in nature. By ordering Starbucks to pay for "any direct or foreseeable pecuniary harms," the Board ordered a compensatory damage, a remedy at law, not an equitable relief authorized under section 10(c) of NLRA.[93] The Third Circuit did not consider the Seventh Amendment challenge, adhering to the constitutional avoidance doctrine, but the court's determination that the *Thryv* remedy is a remedy in law would have been sufficient to trigger the *Jarkesy* inquiry.[94]

In *International Union of Operating Engineers, Local 39 v. NLRB*, the Ninth Circuit reached a different conclusion on the *Thryv* question, upholding the remedy as statutorily authorized.[95] The majority emphasized the "considerable deference" owed to the Board in crafting remedies that effectuate the policies of the Act.[96] It concluded that the *Thryv* remedy is remedial in nature, does not award sums "larger than the amount

90 *Id.* at 2132, 2134 (emphasis omitted) ("Such matters 'historically could have been determined exclusively by [the executive and legislative] branches . . . .'" (alteration in original) (quoting Stern v. Marshall, 564 U.S. 462, 493 (2011))); *id.* at 2147 (Gorsuch, J., concurring) ("[T]raditionally recognized public rights have at least one feature in common: a serious and unbroken historical pedigree." (citing Culley v. Marshall, 144 S. Ct. 1142, 1155–56 (2024) (Gorsuch, J., concurring))).

91 29 U.S.C. § 160(e)–(f).

92 125 F.4th 78, 95 (3d Cir. 2024).

93 *Id.* at 96–97.

94 *Id.* at 97.

95 155 F.4th 1023, 1050 (9th Cir. 2025).

96 *Id.* (quoting King Soopers, Inc. v. NLRB, 859 F.3d 23, 37 (D.C. Cir. 2017)).

necessary to reimburse actual monetary loss sustained or even anticipated by the plaintiff," and therefore is not akin to tort damages.[97] The majority declined to consider the Seventh Amendment challenge under *Jarkesy*, finding it barred for failure to preserve the issue.[98] In contrast, the dissent offered the first circuit-level treatment of the *Thryv* remedy under the *Jarkesy* framework. The dissent argued that the *Thryv* remedy constitutes consequential or foreseeable damages, which are legal in nature.[99] It further connected the unfair labor practice ("ULP") cause of action to the common law tort of wrongful termination in violation of public policy.[100] Although the dissent conceded that the two claims do not "perfect[ly] overlap," it emphasized that the similarities reflect the basic "legal" nature of the claim.[101] Even putting aside the imperfect fit, the dissent stressed that the remedy alone may suffice to trigger the Seventh Amendment right to a jury trial.[102] Once the jury trial right is triggered, the dissent interpreted *Jarkesy* to narrowly limit the PRD to "'centuries-old,' 'background legal principles,'" a category that does not encompass the NLRA.[103] These decisions signal that any effort to develop labor law at the Board or congressional level, particularly efforts aimed at expanding the right to organize or strengthening enforcement mechanisms, must now contend with the Seventh Amendment requirements and carefully navigate the constraints imposed by the *Jarkesy* decision.

B. NLRB Adjudication vs. Rulemaking

The limitation of the Board's adjudicatory authority poses a dual threat for the NLRB. Not only does *Jarkesy* limit the Board's effort to expand its remedies, but it also restricts the

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97 *Id.* at 1051 (emphasis omitted) (quoting United States v. Burke, 504 U.S. 229, 235 (1992)).

98 *Id.* at 1047 n.10.

99 *Id.* at 1063 (Bumatay, J., dissenting in part).

100 *Id.* at 1065. ULPs under the NLRA cover acts much broader than just termination of employment. They do not share terms of art, nor is the common law tort of wrongful termination in violation of public policy incorporated into the NLRA. *Cf.* SEC v. Jarkesy, 144 S. Ct. 2117, 2130 (2024) (noting that "Congress incorporated prohibitions from common law fraud into federal securities law" in deciding that penalties imposed by the SEC were legal in nature). In fact, the tort is historically newer than the NLRA. *See generally* Joseph R. Grodin, *Past, Present, and Future in Wrongful Termination Law*, 6 LAB. LAW. 97 (1990).

101 155 F.4th at 1066 (Bumatay, J., dissenting in part).

102 *Id.* at 1063.

103 *Id.* at 1066 (quoting *Jarkesy*, 144 S. Ct. at 2134).

Board's ability to influence labor law through adjudication. Since its founding in 1935, the Board has almost exclusively used adjudication to develop labor law, despite calls from commentators, including Supreme Court Justices, to employ rulemaking.[104] Proponents of rulemaking have pointed to how the prospective nature of rulemaking comports with the due process rights of regulated parties, how the notice-and-comment rulemaking procedure benefits from greater public participation, and how rulemaking enjoys greater clarity and stability, thereby improving the Board's legitimacy.[105] The Board's reliance on adjudication exposes it more severely to the potential application of *Jarkesy* compared to other agencies that do not rely so heavily on adjudication. The agency will, at minimum, face higher administrative costs from having to account for jury trials, or, at worst, will have to choose between limiting its remedial options or losing the ability to exercise adjudicatory authority in that area of labor law. Faced with the choice between embracing jury trials and adopting rulemaking, the easier option seems to be reliance on rulemaking. The Board can issue rules to develop labor law, and if a stronger remedial option is required, the Board can litigate these cases in federal court with a jury.[106] Whether the Board embraces rulemaking or jury trials, either solution will require an amendment to the NLRA if the Seventh Amendment requirement attaches. With that in mind, the Board's recent attempt at rulemaking suggests that embracing jury trials may be a better solution for the agency.

The Board, under the Obama presidency, embarked on an ambitious rulemaking project, the first time it had engaged in rulemaking since 1987, when the Board promulgated a rule

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104 *See, e.g.*, Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 149, 170 (1986); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 779 (1969) (Douglas, J., dissenting) ("Rule making is no cure-all; but it does force important issues into full public display and in that sense makes for more responsible administrative action."); NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) ("[T]here may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act . . . .").

105 *See* Berg, *supra* note 104, at 170; Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Exile: Problems With Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2016, 2078–79 (2009). *But see* Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 399 (1995).

106 Such an option would require amending the NLRA. *See Jarkesy*, 144 S. Ct. at 2174 (Sotomayor, J., dissenting) ("For those and countless other agencies, all the majority can say is tough luck; get a new statute from Congress.").

governing bargaining unit determination in the health care context.[107] The 2010 rule that requires employers to post a notice regarding employees' rights under the NLRA[108] was overturned in a series of lawsuits in the Fourth Circuit and the D.C. Circuit.[109] The Fourth Circuit ruled that the Board exceeded its rulemaking authority by creating a new ULP for failure to put up a notice, and it could not make a rule to prevent the commission of existing ULPs.[110] The Board's rulemaking authority is "expressly reactive."[111] The D.C. Circuit struck down the rule on the violation of the NLRA's employee free speech right, under section 8(c) of the NLRA.[112] The Board ultimately withdrew the rule, requesting voluntary compliance from employers regarding rights notice.[113]

Another more recent attempt at NLRB rulemaking, spanning across three administrations, was the effort to enshrine the joint-employer doctrine through rulemaking. A joint-employer rule governs the duty to collectively bargain when multiple entities qualify as an employer for the same group of employees.[114] In its 2015 adjudication under the Obama administration, the Board overturned the prevailing rule. The new rule lessened the burden of establishing joint-employer status by shifting from requiring direct and actual control over employees' essential terms and conditions to allowing indirect and reserved control to be sufficient.[115] Under the Trump administration, the Board issued a new rule that restored the pre-*Browning-Ferris* standard, making it more difficult to establish joint employer status.[116] However, amidst a legal challenge by unions[117] and a

107 The rule was upheld in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991).

108 Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54006 (Aug. 30, 2011).

109 Chamber of Com. v. NLRB, 721 F.3d 152 (4th Cir. 2013); Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013).

110 *Chamber of Com.*, 721 F.3d at 154.

111 *Id.* at 162.

112 *Nat'l Ass'n of Mfrs.*, 717 F.3d at 954, 964.

113 Press Release, NLRB Off. of Pub. Affs., The NLRB's Notice Posting Rule (Jan. 6, 2014), http://www.nlrb.gov/news-outreach/news-story/the-nlrbs-notice-posting-rule [https://perma.cc/D9H4-28V9].

114 *See* Chamber of Com. v. NLRB, 723 F. Supp. 3d 498, 503 (E.D. Tex. 2024).

115 Browning-Ferris Indus. of Cal., Inc., 362 NLRB 1599, 1614 (2015), *aff'd in part, rev'd in part*, 911 F.3d 1195 (D.C. Cir. 2018).

116 Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11184 (Feb. 26, 2020).

117 *See* Complaint for Declaratory Judgment & Injunctive Relief at 2, Serv. Emps. Int'l Union v. NLRB, No. 21-cv-02443 (D.D.C. Sep. 17, 2021).

change in administration, the Trump-era rule was replaced by a new rule that restored the *Browning-Ferris* standard.[118] The Biden-era rule faced stringent opposition from business interests and conservative lawmakers. The Republican Appropriations Bill for 2024 included a rider to prevent the NLRB from implementing the new joint-employer rule,[119] and Congress passed a resolution blocking the adoption of the rule under the Congressional Review Act, which was vetoed by President Biden.[120] The Biden-era rule was struck down by the Eastern District of Texas, which ruled that the Board's failure to justify why it chose to promulgate a new rule instead of withdrawing the Trump rule was arbitrary and capricious.[121] After the district court ruling, the Board eventually withdrew their appeal,[122] and the standing Trump-era rule is now poised to be challenged by a union.[123]

The NLRB's failed rulemaking efforts underscore the political volatility of labor law and the judicial hostility toward the Board's policies, and render rulemaking ineffective at achieving the benefits it purports to give.[124] Well-funded pro-business groups like the Chamber of Commerce of the United States could easily challenge a Board rule in a forum of their choosing, as in *Chamber of Commerce v. NLRB* in the Eastern District of Texas, where the appeal would have gone to the hostile Fifth

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118 Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946 (Oct. 27, 2023).

119 Press Release, Appropriations Comm. Democrats, House Republican Funding Bill Kicks Teachers Out of Classrooms, Takes Away Job Opportunities, and Harms Women and Children (July 13, 2023), https://democrats-appropriations.house.gov/news/press-releases/house-republican-funding-bill-kicks-teachers-out-of-classrooms-takes-away-job [https://perma.cc/22CT-VV5T].

120 Diego Areas Munhoz, *Biden Vetoes Resolution to Block Labor Board Joint Employer Rule*, Bloomberg L. (May 3, 2024), https://news.bloomberglaw.com/daily-labor-report/biden-vetoes-resolution-to-block-labor-board-joint-employer-rule [https://perma.cc/GH2F-MFML].

121 *See* Chamber of Com. v. NLRB, 723 F. Supp. 3d 498, 517–19 (E.D. Tex. 2024).

122 Robert Iafolla, *Labor Board Abandons Bid to Revive Joint Employer Regulation*, Bloomberg L. (July 19, 2024), https://news.bloomberglaw.com/daily-labor-report/labor-board-abandons-bid-to-revive-joint-employer-regulation [https://perma.cc/SN8R-QE52].

123 *See* Tim Ryan, *Revived Suit Could Spur NLRB Joint Employer Rule Change*, Law360 (Mar. 20, 2025), https://www.law360.com/employment-authority/articles/2313542 [https://perma.cc/TFL9-V6K7].

124 *See* Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 Emory L.J. 1469, 1492–93 (2015) (finding difficulty in rulemaking based on two Obama-era rulemaking effort).

Circuit.[125] Unlike in each circuit-level enforcement decision, where relatively little rides on the outcome, under rulemaking, the agency is effectively at the mercy of the injunctive authority of the most conservative district and circuit court judges, who harbor no sympathy for the statutory goals embodied in the NLRA.[126] Beyond judicial skepticism, the rulemaking effort did not engender Board legitimacy and in fact exposed the Board to congressional scrutiny and public criticism.[127] The dizzying flip-flopping of the joint-employer rule, poised to continue ten years after the initial adjudication, has shown that rulemaking cannot ensure the stability of Board rules when political shifts in administration result in an almost complete change in agency priorities.[128] In short, rulemaking is not a viable path to sidestep the Seventh Amendment constraints imposed by *Jarkesy*. A more promising route lies in integrating jury trials into the administrative process.

C. Value of Jury in NLRB Proceedings

In its numerous *amici* to the Supreme Court, pro-business and right-wing organizations characterized the Seventh Amendment right in *Jarkesy* as "indispensable to liberty," critical for "almost all exercises of judicial power," and "the constitutional

125 *See, e.g.*, John Fry, *Tracking Attacks on the NLRB: SpaceX Secures Preliminary Injunctions Against NLRB*, OnLabor (July 15, 2024), https://onlabor.org/spacex-secures-preliminary-injunctions-against-nlrb/ [https://perma.cc/NSK5-K9Z9] (surveying employer preliminary injunctions in the Southern and Western District of Texas, that, like in the *Chamber of Commerce* case, were within the Fifth Circuit).

126 *See* Flynn, *supra* note 105, at 443–45 (pointing to "marked lack of judicial enthusiasm" toward the agency and endorsing Board's "veiled policymaking" through adjudication, exposing the agency to less judicial interference).

127 *See, e.g.*, Peter Schaumber, *The NLRB's Unlawful Rule*, Nat'l Rev. (Sep. 2, 2011), http://www.nationalreview.com/article/276116/nlrbs-unlawful-rule-peter-schaumber [https://perma.cc/9XDG-38E9] (calling the notice posting rule "an unwarranted usurpation of congressional authority"); *Who's the Labor Radical Now?*, Wall St. J. (May 6, 2024), https://www.wsj.com/opinion/joe-biden-joint-employer-labor-rule-national-labor-relations-board-franchisers-business-fafe8529 [https://perma.cc/Z4JP-4YDH] (denouncing President Biden's veto of "bipartisan" resolution repealing joint-employer rule); *The Facts on Biden's Anti-Freedom, Anti-Growth Joint Employer Rule*, Comm. on Educ. & Workforce: E&W Blog (Jan. 12, 2024), https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=409984 [https://perma.cc/N8RG-DHB6].

128 *See* Thomas M. Stanek, James G. Otovic & Zachary V. Zagger, *Rescinded Guidance: Unpacking NLRB Acting General Counsel Cowen's Policy Overhaul*, Ogletree Deakins (Mar. 17, 2025), https://ogletree.com/insights-resources/blog-posts/rescinded-guidance-unpacking-nlrb-acting-general-counsel-cowens-policy-overhaul/ [https://perma.cc/2YLP-95RL] (reporting near-complete recission of Biden-era NLRB General Counsel's memo setting the Board policy and goals).

gold standard for adjudicating private rights."[129] Despite the effusive praise of jury trial from the business community, corporate defendants have not been the biggest fans of jury trial, arguing that juries are emotional, biased, unpredictable, pro-plaintiff, unable to understand complex facts, and prone to imposing unreasonable awards.[130] This phenomenon is neither novel nor likely to disappear any time soon; Professor Suja A. Thomas identified the generally corresponding pro- and anti-jury attitude in Supreme Court jurisprudence with a corresponding "alliance between the bar and corporate interests" to weaken jury authority.[131] Widespread usage of mandatory arbitration clauses in a host of contractual obligations, from streaming subscriptions to employment agreements, shows that corporations do not prefer jury trials.[132] Corporate litigants prefer arbitration over public trials to avoid "excessive or emotionally driven jury awards," retain the ability to control the arbitrator's qualifications, and hold confidential proceedings.[133] The corporate interests' love for the jury trial is limited to the possibility that it may defang the agency action that targets the corporate malfeasance that sounds in common law, while still shielding historical exceptions like review of public benefits or deportation proceedings, where corporate interests are not implicated.[134]

The introduction of jury trial is unlikely to result in a meaningfully large number of jury trials in an agency proceeding. Despite the Seventh Amendment enshrining jury rights, less than 1% of civil cases filed in federal court are resolved

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129 Richard Frankel, *Corporate Exceptionalism: What's Behind the Business Community's Newfound Love of Jury Trials*, 34 Widener Commonwealth L. Rev. 115, 123–28 (2025) (collecting quotes from pro-business groups in the *SEC v. Jarkesy* case, providing "full-throated defense of the right to a jury").

130 *Id.* at 129–30; Valerie P. Hans, Business on Trial: The Civil Jury and Corporate Responsibility 12–14 (2000).

131 Suja A. Thomas, The Missing American Jury 93–96 (2016).

132 *See, e.g.*, Rachel Reed, *Does Signing Up for Disney+ Mean You Can Never Sue the Walt Disney Company?*, Harv. L. Today (Aug. 19, 2024), https://hls.harvard.edu/today/does-signing-up-for-disney-mean-you-can-never-sue-the-walt-disney-company/ [https://perma.cc/4932-XKL2]; Mark Goldstein & Carew S. Bartley, *Workplace Arbitration Agreements: Where We Are and Where We're Going*, Reuters (Aug. 15, 2022), https://www.reuters.com/legal/legalindustry/workplace-arbitration-agreements-where-we-are-where-were-going-2022-08-15/ [https://perma.cc/773X-MNY3].

133 Frankel, *supra* note 129, at 137 (quoting Douglas Shontz, Fred Kipperman & Vanessa Soma, RAND Inst. for Civ. Just., Business-to-Business Arbitration in the United States: Perceptions of Corporate Counsel 15 (2011)).

134 *Id.* at 142; *see also* Elgebaly v. Garland, 109 F.4th 426, 437–38 (6th Cir. 2024) (holding *Jarkesy* challenge inapplicable in immigration context).

in a jury trial.[135] In an NLRB context, introduction of jury trial would change cost calculations, but it will not move the needle much; over 96% of meritorious ULP charges end in settlement,[136] with complaints issued for just 3% of cases, a first step toward adjudication by the ALJ.[137] Furthermore, in 2024, only fifty-one cases reached the circuit court enforcement review, representing less than 0.002% of ULP charges the Board received in 2024.[138] As long as jury trial is provided within the agency proceeding, allowing the agency to pursue legal remedies, agency adjudication will not end, as administrative tribunals still offer savings in cost and time.[139] More than anything, providing jury trial will give the agency opportunity to pursue more aggressive remedies to ensure employer compliance to NLRA, be they within the bounds of the NLRA like *Thryv*, or more aggressive civil penalties—e.g., treble damages, the consequential damages proposed by NLRA reform attempts under the Protecting the Right to Organize Act.[140] The increased sanction would likely result in heightened compliance with the NLRA, but also fewer instances of full jury trial as employers would readily settle rather than face the full penalty.[141] A serious effort at integrating jury trial in an agency proceeding is probably the last thing a corporate interest would like to see, ever more reason to try it.

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135 Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, JUDICATURE, Winter 2017, at 26, 29.

136 Off. of Pub. Affs., *Acting General Counsel Statement on Potential State Legislation Regulating Private Sector Labor Relations*, NLRB (Aug. 15, 2025), https://www.nlrb.gov/news-outreach/news-story/acting-general-counsel-statement-on-potential-state-legislation-regulating [https://perma.cc/UY6S-8F3C].

137 *See Unfair Labor Practice Charges Filed Each Year*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-charges [http://perma.cc/B5RD-ELTM] (last visited Jan. 15, 2026) (listing 635 complaints out of 21,300 ULP charges in 2024).

138 *Appellate Court Decisions (10 Years)*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/litigation/appellate-court [https://perma.cc/6S57-34ZK] (last visited Jan. 15, 2026).

139 *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 865 (1986) (Brennan, J., dissenting) ("If the administrative . . . proceeding is so much more convenient and efficient than litigation in federal district court that abrogation of Article III's commands is warranted, it seems to me that complainants would rarely, if ever, choose to go to district court in the first instance.").

140 *See, e.g.*, Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 109 (2021) (providing for $50,000 civil penalties per ULP, with $100,000 for those resulting in employee termination or "serious economic harm.").

141 *See* Richard Lorren Jolly, *The Administrative State's Jury Problem*, 98 WASH. L. REV. 1187, 1250–51 (2023) (speculating how heightened sanctions for violation of agency rule would function as a penalty default rule).

III
Appellate Jury, Administrative Jury, Special Jury

The independent view of the Seventh Amendment[142] creates a conceptual dilemma. If matters are properly assigned to a non-Article III tribunal, but the Seventh Amendment's requirement for a jury trial is triggered, what would be the proper structure for such a jury trial? Post-*Granfinanciera* reforms offer one way of approaching the issue.[143] Congress authorized the bankruptcy court to conduct jury trials under 28 U.S.C. § 157(e) in 1994 but required designation from the district court (often through local court rules) and the express consent of all parties.[144] Jury trials in bankruptcy court, however, are exceedingly rare; in an informal poll conducted in the Ninth Circuit by a sitting bankruptcy judge, only "[s]everal" judges reported that they had ever come close to holding a jury trial, with only one judge reporting a successful jury trial resulting in judgment.[145] The practice of jury trials in bankruptcy court offers a glimpse into the challenges that might arise were one to attempt operating a jury system within an administrative tribunal. Bankruptcy courts do not maintain a jury pool, nor do they have the physical facilities (i.e., jury box, jury deliberating room, etc.) necessary to summon and accommodate jurors.[146] On these and all other logistical and procedural matters, a bankruptcy court must rely entirely on district court staff.[147] Practical obstacles, including high settlement rates, logistical complexities in coordinating with district court staff, and the requirement of consent from all parties, make jury trials in bankruptcy court a rare and administratively burdensome event.[148] In envisioning a jury trial in NLRB proceedings that comports with constitutional requirements, these substantive practical issues, drawn from the bankruptcy courts' experience, will also have to be considered.

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142 *See supra* subpart I.B.

143 *See* 28 U.S.C. § 157(e).

144 *See, e.g.*, S.D.N.Y. Loc. Bankr. R. 9015-1.

145 Dan Collins, *Jury Trials in Bankruptcy Court?*, Ninth Jud. Cir. Hist. Soc'y 1 (Feb. 15, 2024), https://www.njchs.org/wp-content/uploads/Collins-Jury-Trials-in-Bankruptcy-Court-1.pdf [https://perma.cc/QL88-23VH]. As of 2023, there were sixty-nine bankruptcy judges in the Ninth Circuit. *2023 Annual Report*, U.S. Cts. for the Ninth Cir., https://www.ca9.uscourts.gov/annual-reports/ [https://perma.cc/2HB7-LRBK] (last visited Aug. 20, 2025).

146 Collins, *supra* note 145, at 5.

147 *Id.*

148 *See id.*

In this Part, the Note presents a model that integrates jury trials into NLRB proceedings. First, juries could be introduced at the circuit court review stage of the Board's order under 29 U.S.C. § 160(f). Although jury trials at the circuit court level may seem alien, the historical precedent of expert juries in the early Republic at the Supreme Court level, as well as the modern practice of appointing special masters in cases where the Court exercises original jurisdiction demonstrate that appellate courts can still serve as sites of factfinding. Second, juries could be introduced at the Board review stage, after initial ALJ adjudication but before enforcement review. Jury trials at this stage would likely require some form of consent from the litigants, though it may not be constitutionally required. By structuring appellate jury trials to provide for the Seventh Amendment right, the agency would offer litigants the option to pursue a jury trial with consent at the agency level. Juries would be able to determine facts de novo or with some assigned evidentiary weight and would be convened only when the ALJ determines that a civil penalty is appropriate. The Board could rely on the historical practice of special juries to limit the administrative burden of conducting a jury trial and, by working with the circuit courts to provide expert juries, the Board and the courts could strengthen their collaborative relationship.

A. Jury at the Circuit Court Review

Under 29 U.S.C. § 160(e) and (f), the Board and the defendant may respectively request an enforcement order or seek review of a final Board order in any federal court of appeals.[149] In channeling the review of Board decisions to the circuit courts, Congress intended the NLRA to serve as a comprehensive statute governing the disposition and review of unfair labor practice charges, with a particular emphasis on the speedy resolution of judicial proceedings.[150] Although Congress may not have contemplated it at the time, funneling review to the federal circuit courts also serves a practical function for the Board by reducing the danger of forum shopping, a problem that has become evident in the NLRB's rulemaking context.[151]

At first glance, conducting a jury trial in a federal appeals court seems almost oxymoronic. However, in any Board

[149] 29 U.S.C. § 160(e)–(f).

[150] *See* NLRB v. United Food & Com. Workers Union, Loc. 23, 484 U.S. 112, 131–32 (1987).

[151] *See supra* subpart II.B.

administrative proceeding, a circuit court's review of agency action will represent the first time the case falls within the purview of the Article III judicial power.[152] Historically, requiring the involvement of a jury trial upon the direct appeal of an executive decision was a common practice. Under the Bankruptcy Act of 1800, the initial distribution of estates was determined by a commissioner, but any factual disputes could be reviewed through a jury trial at the district court.[153] This structure of "jury review" was also prominent in pre-New Deal administrative proceedings. Under the 1889 Act, determinations by the Interstate Commerce Commission ("ICC") regarding liability and damage awards could be enforced in court, where a jury trial could be demanded.[154] This structure was upheld by the Supreme Court, which held that allowing initial administrative findings to serve as prima facie evidence for a jury "does not abridge the right of trial by jury . . . [n]or does it in any wise work a denial of due process of law."[155] While the court could rebut the agency's finding of fact, the primary benefit of the "prima facie" provision was to prevent the court from engaging in outright judicial policymaking, providing a valuable reprieve for agencies during the *Lochner* era.[156] A similar structure appeared in the Communications Act of 1934, under which monetary sanctions imposed by the FCC could be enforced through suits in district court, where the Commission's findings served as prima facie evidence.[157]

When Seventh Amendment requirements are triggered, Board proceedings can function as a "preliminary, nonbinding" adjudication. In such cases, a jury trial may be held in an Article III court without violating the Seventh Amendment merely because of the delay in reaching the jury or because the process allows for advance exploration of the evidence to be introduced.[158] *Ex parte Peterson* is instructive on this point: the Supreme Court held that the Seventh Amendment does not bar the use of an auditor or factfinder, so long as a subsequent jury review is available, even if the jury accords the preliminary

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152 *See* 29 U.S.C. § 160(e)–(f).

153 Bankruptcy Act of 1800, ch. 19, §§ 2, 6, 15, 2 Stat. 19, 21–23, 25–26 (repealed 1803).

154 Act of Mar. 2, 1889, ch. 382, § 5, 25 Stat. 855, 860–61 (repealed 1995).

155 Meeker v. Lehigh Valley R.R. Co., 236 U.S. 412, 430 (1915).

156 *See* Merrill, *supra* note 59, at 950 n.41 (collecting Supreme Court cases instructing courts to remand to the ICC).

157 Communications Act of 1934, ch. 652, §§ 401–407, 48 Stat. 1064, 1092–96.

158 *See Ex parte* Peterson, 253 U.S. 300, 310 (1920).

findings some degree of deference.[159] This supports the possibility of "appellate jury" review occurring not de novo, but with a higher level of factual deference. However, the current deferential "substantial evidence" standard applied to agency factfinding may require downward adjustment to enable meaningful jury review. Notably, the case establishing that standard was interpreting the Administrative Procedure Act and the specific language of the NLRA, rather than the Seventh Amendment.[160] Even if the agency's factual findings are reviewed de novo by the jury, it is likely that practical difficulties of conducting evidentiary hearing at a circuit court level would result in agency factfinding being accorded some level of practical deference.[161] A proposed NLRA reform, in addition to directing cases that require a remedy-in-law to a jury trial at a circuit court, can establish that the factual findings of the agency enjoy a less deferential standard to allow for a more effective jury function.

What would a jury trial at the circuit court level look like? The presence of a jury or a jury-like factfinding institution in an appellate court is not without precedent—in cases where the Supreme Court exercises original jurisdiction, the Court often appoints special masters to assist with factfinding.[162] How, then, could a circuit court reconcile the constitutional requirement of a jury trial with its acknowledged limitations in conducting factfinding?[163] The amended NLRA could permit challenges to NLRB orders to be brought in district courts, allowing for de novo jury trials in a familiar trial court setting. However, there is a functionalist argument for retaining circuit court review: the Board has a practical interest in minimizing forum shopping and avoiding prolonged litigation, especially given its existing backlog of cases.[164] Under the proposed

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159 *See id.* at 309–11.

160 *See* Universal Camera Corp. v. NLRB., 340 U.S. 474, 490–91 (1951).

161 *See* FED. R. CIV. P. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to."); Lochlan F. Shelfer, Note, *Special Juries in the Supreme Court*, 123 YALE L.J. 208, 234 & n.174 (2013) (collecting instances of Supreme Court Justices asserting de novo review of special masters' findings).

162 *See* Maryland v. Louisiana, 451 U.S. 725, 734 (1981) ("[A]s is usual, we appointed a Special Master to facilitate handling of the suit.").

163 *See* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 498 (1971).

164 NLRB OFF. OF THE GEN. COUNS., MEMORANDUM GC 24-03, REPORT ON THE MIDWINTER MEETING OF THE PRACTICE AND PROCEDURE UNDER THE NATIONAL LABOR RELATIONS ACT COMMITTEE OF THE AMERICAN BAR ASSOCIATION LABOR AND EMPLOYMENT LAW SECTION 4–5 (2024) (showing that it takes on average 448 days from a case to go from initial filing of charges to the Board decision, which could be appealed).

special jury model outlined in the next subpart, the agency could benefit from enhanced cooperation between the courts and the agency.

B. Historical Special Jury

Under the Seventh Amendment, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[165] As previously noted, the interpretation of this amendment has taken on a distinctly originalist tone, exemplified by the *Jarkesy* Court's reference to the courts at Westminster in 1789.[166] This approach is not novel. In the 1935 *Dimick v. Schiedt* case, the Court looked back to "the appropriate rules of the common law established . . . in 1791."[167] Similarly, the two-part test established by the Court in *Markman v. Westview Instruments, Inc.* is closely aligned with the historical analysis applied in *Jarkesy*.[168] For agencies and lawmakers seeking to uphold the Seventh Amendment while preserving agency adjudication, it may be worth considering various forms of jury trials as they existed in the late eighteenth-century Anglo-American legal tradition. One such model is the "special jury" of merchants used by Lord Mansfield, Chief Justice of the King's Bench from 1756 to 1788, which could serve as a valuable source of inspiration.[169]

The institution became widely used, as noted by Blackstone: "Special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders . . . ."[170] Names of potential jurors—often merchants—were kept in a book. When a special jury was needed, forty-eight "qualified" jurors were selected, and each party was allowed to strike names until the required number of

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165 U.S. Const. amend. VII.

166 SEC v. Jarkesy, 144 S. Ct. 2117, 2147 (2024).

167 293 U.S. 474, 476 (1935).

168 517 U.S. 370, 376 (1996) ("[W]e ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was. If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." (citations omitted)).

169 *See generally* Shelfer, *supra* note 161, at 211, 214–19 (proposing institution of special juries at a Supreme Court level for consistency with historical practice while feasible for the Court).

170 3 William Blackstone, Commentaries *357–58.

jurors remained.[171] The popularity of the special jury reached its peak in the late eighteenth and early nineteenth centuries, due in large part to Lord Mansfield's enthusiastic use of the practice.[172]

In the late eighteenth-century English courts, special juries served a dual function. First, they acted as sophisticated factfinders, capable of grasping the complex factual issues common in commercial cases. Second, they advised the court on prevailing mercantile customs, which judges could then incorporate into the common law.[173] While judges retained the discretion to adopt or reject these customs, the insights provided by special juries were a valuable resource in shaping judicial decisions.[174] This role was especially significant given that, prior to the eighteenth century, mercantile law largely developed within arbitration settings, which were overseen by merchant judges and juries without the involvement or oversight of common law courts.[175]

The special jury system spread quickly across the Atlantic to the American colonies. It was especially prevalent in New York, where complex commercial cases were common, but it was also practiced in South Carolina, Pennsylvania, Georgia, Massachusetts, and Virginia.[176] Edmund Randolph, serving on the Committee of Detail during the Constitutional Convention of 1787, proposed that the Supreme Court convene a "special jury of the most respectable merchants and farmers" to determine the wages of senators.[177] By 1791, special juries were commonplace in colonial America and well known to both the drafters of the Constitution and practitioners of the colonial common law system. The Supreme Court itself likely impaneled expert juries in the three jury trials it conducted between 1794 and 1797: *Brailsford v. Georgia*, *Oswald v. New York*, and *Cutting v. South Carolina*.[178]

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171 James Oldham, *Special Juries in England: Nineteenth Century Usage and Reform*, 8 J. LEGAL HIST. 148, 153 (1987). In an 1817 example, 499 names were listed on the jury list, with 477 of them being merchants. *Id.* at 150.

172 James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 140 n.13 (1983).

173 Shelfer, *supra* note 161, at 214–15.

174 *Id.* at 217.

175 *See generally* William C. Jones, *An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States*, 25 U. CHI. L. REV. 445 (1958).

176 Shelfer, *supra* note 161, at 218–19.

177 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 142 (Max Farrand ed., 1911).

178 *See* Shelfer, *supra* note 161, at 231–32.

There is much in this historical practice that aligns with modern agency procedure. Special juries were appointed to help courts assess complex factual issues and interpret informal mercantile law that judges were not well-versed in. These juries were granted a degree of deference both as factfinders and, to a limited extent, as law-finders. Similarly, impaneling an expert jury during circuit court review could help address structural limitations while allowing courts to benefit from specialized expertise. To be consistent with common law traditions, the use of such a special jury would require adherence to certain procedural safeguards. Jurors would need to be selected from a preapproved list, with both parties participating equally in the "struck jury" selection process, and all jurors would be sworn in under oath.[179] The struck procedure is already familiar in the labor law field, where it is a common method for selecting arbitrators in labor arbitration.[180] This procedural parallel further supports the practicality of adapting the special jury model to modern administrative or judicial contexts.

Circuit court practices may vary, but each circuit could maintain a list of eligible individuals for service in special jury proceedings supplied by the NLRB. Similar to the historical merchant juries under common law, this list could include former administrative law judges, labor arbitrators, labor law professors, and practicing labor attorneys without any conflicts of interest. In keeping with the traditional struck jury method, both the court and the parties would strike names from the list until a qualified special jury is formed for the case. This process would be significantly less burdensome than conducting a full civil jury trial and would enable courts to satisfy Seventh Amendment jury trial requirements without undermining their ability to develop labor law or advance their institutional objectives. In this regard, a special jury alternative offers a practical, historically grounded, and procedurally efficient solution to modern adjudicatory challenges. The agency's involvement in the jury selection process also opens up the possibility of holding a jury trial at the agency level. By playing a role in forming a special jury of experts, the agency could incorporate jury-based adjudication into its own processes, allowing for

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179 *Id.* at 240.

180 *See* Daniel A. Platt, *A Look Inside Strike Lists and How Arbitrators Are Selected*, DAILY J. (May 1, 2024), https://www.dailyjournal.com/article/378334-a-look-inside-strike-lists-and-how-arbitrators-are-selected [https://perma.cc/78KT-UZW8].

Seventh Amendment protections while still maintaining control over the factual determinations.

C. Jury at the Board Review

Under the Federal Rules of Civil Procedure, a party may waive the right to a jury trial.[181] Similarly, the consent of the litigating parties allows non-Article III adjudicators to issue binding decisions without adhering to the procedural requirements of Article III courts.[182] As the Supreme Court explained in *Wellness International Network, Ltd. v. Sharif*, "'[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights'—such as the right to a jury—'that dictate the procedures by which civil and criminal matters must be tried.'"[183]

Just as corporate defendants often prefer arbitration outside Article III courts, agencies could offer regulated parties the option to request a jury trial during Board review proceedings.[184] This stage, where both factual and legal determinations by the ALJ are reviewed de novo, provides a natural procedural point for conducting a jury trial within the agency structure.[185] After the ALJ issues a preliminary remedy, the Board could offer the regulated party a jury trial, and if accepted, impanel a special jury. This approach would satisfy Seventh Amendment requirements and eliminate the difficulty of conducting a jury trial during circuit court enforcement review, which is procedurally remote from the factfinding stage.

Providing a jury trial at the agency level, with the regulated party's consent, would preserve both the party's procedural rights and the agency's adjudicative efficiency. This model contrasts with the "consent regime" proposed by Professor Richard

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181 FED. R. CIV. P. 38(d).

182 *See* F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 717–18 (2018) (reviewing consent-based non-Article III adjudication case law).

183 575 U.S. 665, 675 (2015) (alteration in original) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848–49 (1986)). The Court's conception of waivability of "impartial and independent federal adjudication" weighs in favor of an independent view, against a jurisdictional role Article III plays in jury dependent model. Parties cannot consent-away Article III jurisdiction. *See Schor*, 478 U.S. at 851; *see also* Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832 (4th Cir. 1986) ("The [S]eventh [A]mendment right is of course a fundamental one, but it is one that can be knowingly and intentionally waived by contract.").

184 *See supra* subpart II.C.

185 *See* 29 U.S.C. § 160(d).

Frankel, which would require regulated parties to waive their jury trial rights as a condition of operating within a regulated space.[186] In the NLRA context, where jurisdiction effectively covers all private employers, such a regime would be impractical and constitutionally problematic.[187]

Conclusion

The *Jarkesy* decision casts significant doubt on the viability of administrative adjudication when it involves remedies in law, particularly civil penalties, and introduces serious constitutional scrutiny under the Seventh Amendment. For the NLRB, an agency historically reliant on adjudication and limited in its remedial authority, this presents a dual crisis. The agency's current enforcement model, particularly the enhanced *Thryv* remedy, may not withstand a constitutional challenge in its existing form. At the same time, the NLRB's past failures in rulemaking, shaped by political volatility and judicial hostility, show that a turn toward prospective policymaking will not meaningfully strengthen labor law or improve compliance.

Given these constraints, the agency should consider direct incorporation of jury trials into its adjudicatory structure. Historical practice supports the use of special juries and appellate juries as a means of fulfilling the Seventh Amendment rights while preserving the agency's role in fact development and legal interpretation. This approach would require statutory amendments, but it offers a path forward that avoids the pitfalls of both weakened adjudication and ineffective rulemaking. If the Court's direction in *Jarkesy* becomes doctrine, the choice for agencies like the NLRB will no longer be between rulemaking and adjudication, but between finding ways to accommodate the jury or ceding enforcement authority altogether. The reform of the ninety-year-old NLRA has been an enduring project for the labor movement over the last several decades.[188]

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186 *See* Frankel, *supra* note 129, at 150–53.

187 *See, e.g.*, Carolina Supplies & Cement Co., 122 NLRB 88, 89 (1958) (announcing the Board will assert jurisdiction over retail enterprises with gross annual revenues of at least $500,000); Siemons Mailing Serv., 122 NLRB 81, 85 (1958) (announcing the Board will assert jurisdiction over non-retail enterprises with direct and indirect outflows or inflows of at least $50,000).

188 *See, e.g.*, Jonathan F. Harris & Dylan Holmes, *The "Protecting the Right to Organize" Act and the Radical Roots of Labor Law Reform*, Hum. Rts., Oct. 2023, at 26; Jerry M. Cutler, *Proposed Expansion of the NLRB's Remedial Authority*, A.B.A. (Dec. 3, 2021), https://www.americanbar.org/groups/litigation/resources/

With further limitations on NLRB enforcement authority due to the *Jarkesy* decision on the horizon, the labor movement must meet this challenge head on. Incorporating jury trial within an agency proceeding will place enhanced remedies proposed by the Protecting the Right to Organize Act on a much stronger legal basis. If federal labor law and its enforcement through a federal agency are no longer viable, held captive by a conservative judiciary and entrenched business interests, the labor movement will have to find a path forward outside of the federal administrative adjudicatory model to vindicate labor rights for workers.[189]

newsletters/employment-labor-relations/proposed-expansion-nlrbs-remedial-authority/ [https://perma.cc/L9YA-PLLB].

189 *See generally* Alvin A. Velazquez, *The Death of Labor Law and the Rebirth of the Labor Movement*, 67 B.C. L. Rev. (forthcoming 2026) (arguing dismantling of the NLRA structure gives opportunity for disruption in status quo, focusing on state and local level reforms).