Jarkesy v. SEC: A Case That May Change America

It seems that the federal administrative agencies are besieged by constitutional attacks on all sides. That the administrative-state cases — plural — changing America will arise sooner or later has been in little doubt. The fact that the issues would arise in a single case was not on anyone's radar. However, this is precisely what has happened.

The prerogatives the agencies have often assumed they have are under a scrutinizing microscope. To illustrate, agencies often are alleged: (1) to claim too much — and the wrong kind of — deference where the interpretations of statutes are at stake; (2) to so claim where the interpretations of their own regulations are at issue; (3) to have usurped the prerogative of law-making — a power the Constitution vests exclusively in Congress, not the Executive; and (4) to try and penalize private entities through agency proceedings, notably by foregoing the structural advantages that a jury trial would afford them in an Article III court — as most federal courts are.

A serious, concentrated attack on agencies was ossified by the U.S. Court of Appeals for the Fifth Circuit when, on May 18, 2022, it decided *Jarkesy v. Sec. & Exch. Comm'n*.[1] In a remarkable opinion, a 2-1 panel of the Fifth Circuit held that the Securities and Exchange Commission (SEC) or actions related to it violated the Constitution in the following ways: (a) by trying private entities through "in-house" agency proceedings for alleged violations of federal law, in spite of the Seventh Amendment's Jury Trial Clause; (b) by devising laws in pursuance of a congressional delegation that lacked an intelligible principle, in violation of the Constitution's separation of powers and the Legislative Vesting Clause; and (c) by having Administrative Law Judges (ALJs) who could not be removed by the president, despite the Take Care Clause of Article II, try the petitioners for securities law violations.

The SEC accused Petitioner George R. Jarkesy, a hedge fund operator, and Petitioner Patriot28, an investment adviser, of securities fraud. Notably, "the agency charged that petitioners [had]: (1) misrepresented who served as the prime broker and as the auditor; (2) misrepresented the funds' investment parameters and safeguards; and (3) overvalued the funds' assets to increase the fees that they could charge investors."[2]

The SEC "often acts as both prosecutor and judge, and its decisions have broad consequences for personal liberty and property," asserted Judge Jennifer Elrod's opinion for the divided panel.[3] That, she deduced, flies in the face of "the Constitution," which "constrains the SEC's powers by protecting individual rights and the prerogatives of the other branches of government."[4] This axiom guided the court in deciding the three core questions before it.

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[1] 34 F.4th 446, 449 (2022).
[2] According to the SEC, petitioners had committed fraud under three federal statutes: the Securities Act, the Securities Exchange Act, and the Advisers Act.
[3] 34 F.4th at 449.
[4] *Id*.

Securities Fraud Defendants Are Entitled to a Jury Trial Under the Seventh Amendment

First, the Seventh Amendment right to a jury trial, the Fifth Circuit determined, applied to the securities-fraud actions of which petitioners had been accused. These actions were "akin to" the traditional actions at common law to which the jury-trial right attached at the time of the Seventh Amendment's ratification. "Fraud prosecutions," the panel observed, "were regularly brought in English courts at common law."[5] In addition, the court noted that under Supreme Court precedent, "actions seeking civil penalties are akin to special types of actions in debt from early in our nation's history which were distinctly legal claims."[6] All this amounted to the realization, in the panel's view, that "'[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law.'"[7]

The Fifth Circuit saw it fit to expound on, and delineate, a concept of public rights that did not swallow the Seventh Amendment jury trial right wholesale. Although the Supreme Court has taken great pains to explicate what a public right is, *i.e.*, what claims Congress may reserve for agency adjudication, it can prove difficult in certain cases. The first step of this public-rights inquiry is whether a petitioner's claims arise "at common law." Next, a court must assess whether, even when a claim so arises, Congress may designate it for agency adjudication — without the benefit of a jury's consideration. What does a court consider in deciding whether Congress gets to bypass a jury? It assesses: (1) whether "Congress 'creat[ed] a new cause of action, and remedies therefor, unknown to the common law,' because traditional rights and remedies were inadequate to cope with a manifest public problem"; and (2) whether jury trials would "go far to dismantle the statutory scheme" or "impede swift resolution" of the claims created by statute.[8]

Even though some "elements of the action brought by the SEC against petitioners [we]re more equitable in nature, ... the Seventh Amendment," said the panel, "applies to proceedings that involve a mix of legal and equitable claims—the facts relevant to the legal claims should be adjudicated by a jury, even if those facts relate to equitable claims too."[9] The Fifth Circuit noted that historically, "fraud actions under the securities statutes echo actions that historically have been available under the common law."[10] Unsurprisingly, it is by applying common-law principles that the Supreme Court has "interpret[ed] fraud and misrepresentation under securities statutes."[11]

Next, the panel held that jury trials would not "go far to dismantle the statutory scheme" or "impede swift resolution" of the statutory claims. Securities fraud enforcement

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[5] *See id.* at 453 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *42 (articulating that common-law courts could exercise jurisdiction over "actions on the case which allege any falsity or fraud; all of which savour of a criminal nature, although the action is brought for a civil remedy; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party")).
[6] *Id*. at 454 (quoting *Tull v. United States*, 481 U.S. 412, 418—19 (1987)).
[7] *Id*. (quoting *Tull*, 481 U.S. at 422).
[8] *Id*. at 453.
[9] *Id*. at 454.
[10] *Id*. at 455.
[11] *Id*. (citing *Omnicare, Inc. v. Laborers Dist. Council Indus. Pension Fund*, 575 U.S. 175, 191 (2015); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 343–44 (2005); *SEC v. Cap. Gains Rsch. Bureau*, 375 U.S. 180, 192—95 (1963)).

actions are not the sort that are uniquely suited for agency adjudication.[12] Petitioners had the right for a jury to adjudicate the facts underlying any potential fraud liability that justifies penalties. And because those facts would potentially support not only the civil penalties sought by the SEC, but the injunctive remedies as well, petitioners had a Seventh Amendment right to a jury trial for the liability-determination portion of their case. Therefore, the SEC's judgment against petitioners was vacated by the Court of Appeals.

The crucial backstory is that this case sets it up for the Supreme Court to eventually move closer to Justice Thomas' conception of public and private rights. Focused on historic understanding during the Founding era, Justice Thomas has articulated that the Article III judicial power and the Seventh Amendment recognized that property, contractual, and tortious rights at common law actually are private rights — the kind of rights that an Article III court, sitting with a jury, gets to decide. Congress may not just designate that right away to the agencies for their adjudication. Bankruptcy rights, under Justice Thomas' historically-oriented view, are "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789" — thus, they are private rights.[13] This is not a limitless view, however. And its exceptions are part of the framework. Patents, Justice Thomas also has articulated, count as public franchises — as far as *inter partes* review by the Patent and Trademark Office is concerned — because they are "benefits" accorded by Congress in exchange for such review; patents do not qualify as private rights.[14] And where the statutory definition of a concept has departed from the common-law definition, it also does not count as a private right.[15]

Given the Supreme Court's recent inclination to walk away from judicially-fashioned practical tests paying insufficient heed to the original meaning or understanding — last term's Second Amendment opinion stands as an obvious example[16] — it may well vindicate Justice Thomas' historically-grounded test. Under that test, much of the adjudicative power today claimed by federal agencies will drain away and be diverted to Article III courts.

This Congressional Delegation to the SEC Violated the Separation of Powers

Next, the Fifth Circuit held that Congress, in violation of the separation of powers, has delegated legislative power to the SEC without any intelligible principle when "it gave the SEC the unfettered authority to choose whether to bring enforcement actions in Article III courts or within the agency."[17]

The court started out by observing that "the People did not vest all governmental power in one person or entity. It separated the power among the legislative, executive, and judicial branches."[18] Indeed, "the power to assign disputes to agency adjudication is 'peculiarly within the authority of the legislative department,'" the Fifth Circuit panel

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[12] *See id*. at 455—57.
[13] *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment)); *see also Wellness Intern. Network, Ltd. v. Sharif*, 575 U.S. 665, 718 (2015) (Thomas, J., dissenting).
[14] *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1373—74, 1377 (2018).
[15] *See Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1623 (2020) (Thomas, J., concurring).
[16] *See New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).
[17] 34 F.4th at 459.
[18] *Id*.

noted.[19] Congress, by enacting the Dodd-Frank Act, "gave the SEC the power to bring securities fraud actions for monetary penalties within the agency instead of in an Article III court whenever the SEC in its unfettered discretion decides to do so."[20] Therefore, Congress "gave the SEC the ability to determine which subjects of its enforcement actions are entitled to Article III proceedings with a jury trial, and which are not. That," concluded the Fifth Circuit, "was a delegation of legislative power."[21]

Nor had Congress "provide[d] the SEC with an intelligible principle by which to exercise that power."[22] That "the Supreme Court has not in the past several decades held that Congress failed to provide a requisite intelligible principle" should not, the Fifth Circuit stated, necessarily stop the Court of Appeals from doing so now.[23] That was because here, "Congress [had] offered" the SEC — or indeed the people of this nation — "*no guidance* whatsoever."[24] Interestingly, "[e]ven the SEC" had conceded "that Congress ha[d] given it exclusive authority and absolute discretion to decide whether to bring securities fraud enforcement actions within the agency instead of in an Article III court."[25] This "total absence of guidance [wa]s impermissible under the Constitution," according to the Fifth Circuit.[26] As a result, on this ground too, the Court of Appeals vacated the SEC's judgment.

Non-delegation is the next frontier in constitutional law. It actually once was the prevailing constitutional law. It is very much on the Supreme Court's radar, a fact of which the Fifth Circuit acutely is aware. Under the non-delegation view of the separation of powers under our Constitution, Congress is not permitted to delegate the law-making to anyone — including to the Executive). To that end, Justice Gorsuch observed in *Gundy v. United States* that "[t]he Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty."[27] And in his words, "the framers understood [the constitutionally-endowed legislative power] to mean the power to adopt generally applicable rules of conduct governing future actions by private persons — the power to "'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' or the power to 'prescribe general rules for the government of society.'"[28]

Proponents of restoring the non-delegation principle often point out that the Supreme Court has held that "Congress" may not "abdicate or … transfer to others the essential legislative functions with which it is thus vested."[29] Even with legislative acquiescence, they contend, the President may not create policies that are akin to laws.[30] As far as they are concerned, "it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign

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[19] *Id*. at 461.
[20] *Id*.
[21] *Id*.
[22] *Id*. at 462.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] 139 S. Ct. 2116, 2131 (2019) (dissenting opinion).
[28] *Id*. at 2133 (Gorsuch, J., dissenting) (quoting The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton), and *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810)).
[29] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–30 (1935).
[30] *See Paul v. United States*, 140 S. Ct. 342 (Kavanaugh, J., respecting denial of certiorari); *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in judgment); *id*. (Gorsuch, J., dissenting).

others the responsibility of adopting legislation to realize its goals."[31] By ratifying the Constitution, "after all, the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement."[32] In the Supreme Court's own words, Congress is not permitted to "delegate ... powers which are strictly and exclusively legislative."[33]

Proponents of this outlook would contend that legislative and executive collusion in camouflaging authoritative laws as "pen-and-phone regulations" does not somehow convert their essential character and immunize them from invalidation by the courts because the Executive is engaged in law-making.[34] Those proponents might not win all they seek to conquer, but they are on track to win a great deal in the coming decades. And given congressional gridlock as well as the federal Legislature's reluctance to make risky moves and take unpopular votes, much of the administrative state — and the doings or expectations so long associated with it — might be on their way out. Businesses and individuals would generally benefit from this restoration of the original constitutional balance because Members of Congress, in lieu of nameless, faceless bureaucrats, are going to be more hesitant to impose onerous burdens and obligations on the governed. They will have to face the voters. The line of accountability that the Wilsonian and New Deal epochs diluted and attenuated may become emblazoned again.[35]

At the heart of this new — and old, orthodox — constitutional equation will be the deduction that even if it be true that each governmental decision boils essentially down to a technical, scientific calculus implicating tradeoffs, cost and benefit analyses, and risk assessments, a decision that independent agency technocrats make better than politicians do, our Constitution's separation of powers and the Legislative Vesting Clause requires that Congress — and only that branch of the government — make these authoritative calls.

In the Enlightenment philosopher John Locke's — he was vital in influencing the Framers of our Constitution as to the separation of powers that today is viewed as quintessentially American[36] — memorable words:

> The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in

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[31] *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).
[32] *Id*. (Gorsuch, J., dissenting).
[33] *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42—43 (1825).
[34] *West Virginia v. EPA*, 142 S. Ct. 2587, 2626 (2022) (Gorsuch, J., concurring).
[35] *See Cochran v. SEC*, 20 F.4th 194, 218 (5th Cir. 2021) (Oldham, J., concurring) ("Wilson's 'new constitution' would ditch the Founders' tripartite system and their checks and balances for a 'more efficient separation of politics and administration, which w[ould] enable the bureaucracy to tend to the details of administering progress without being encumbered by the inefficiencies of politics.'") (quoting RONALD J. PESTRITTO, WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM 227 (2005))), *cert. granted sub nom.*, *SEC v. Cochran*, No. 21-1239, 2022 WL 1528373 (U.S. May 16, 2022); *see also id*. ("Wilson's goal was to completely separate 'the province of constitutional law' from 'the province of administrative function.'") (quoting PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 464 (2014)); *see also Jarkesy*, 34 F.4th at 459—60.
[36] *See*, *e.g.*, *Jarkesy*, 34 F.4th at 449; Michael Morley, Note: *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109, 122 (2002).

> whose hands that shall be. And when the people have said we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorised to make laws for them.[37]

The delegee itself may not delegate, is the source of this principle. According to Justice Gorsuch, the Framers "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty."[38] And it was a tendency to which they were likely to yield with great frequency because an "excess of law-making" was, as the framers themselves put it, a malaise "to which our governments are most liable."[39] It was a view to which James Madison might have acceded, for it was he who stated that "[t[he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[40]

There were other reasons to insist that law-making — "the greatest of the[] [governmental] powers"[41] — be done by those elected to act as legislators: Members of Congress. "[P]romot[ing] deliberation" was one such reason.[42] As Alexander Hamilton stated: "The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it;" and "the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest."[43]

The belief that only a complex, reticulated process — one respectful of minorities — could generate legislation was another reason. "Because men are not angels and majorities can threaten minority rights, the framers insisted on a legislature composed of different bodies subject to different electorates as a means of ensuring that any new law would have to secure the approval of a supermajority of the people's representatives."[44] A third reason was maintaining accountability, for "by directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow."[45] "[C]umbersome" or not, "[t]his process … ensures that the People can be heard and that their representatives have deliberated before the strong hand of the federal government raises to change the rights and responsibilities attendant to our public life."[46]

In sum, "[w]ithout the involvement of representatives from across the country or the demands of bicameralism and presentment" — the process by which a bill is approved by both Houses of Congress before being submitted to the President for the latter's signature — the Framers believed that "legislation would risk becoming nothing more than

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[37] Locke, Second Treatise § 141, at 71.
[38] *Gundy*, 139 S. Ct. at 2134 (dissenting opinion) (citing THE FEDERALIST No. 48, at 309–312 (J. Madison)).
[39] THE FEDERALIST No. 62, at 378.
[40] *See* THE FEDERALIST No. 47.
[41] *Jarkesy*, 34 F.4th at 459.
[42] *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).
[43] THE FEDERALIST No. 73, at 443.
[44] *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting) (cleaned up).
[45] *Id*. (Gorsuch, J., dissenting).
[46] *Jarkesy*, 34 F.4th at 459—60.

the will of the current President."[47] In the Fifth Circuit's view, the ratifying generation of the original Constitution already had weighed the costs and benefits of having an elected President unilaterally make policies governing our country *vis-à-vis* two Chambers of Congress do the law-making; and our Constitution decidedly chose the latter.[48] And the Court of Appeals found itself powerless to alter that choice. Moreover, "if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice."[49]

But, as most non-delegationists would acknowledge, there is a world of difference between the delegation of the law-making power and the execution of laws already made. In Justice Scalia's words:

> The whole theory of *lawful* congressional 'delegation' is not that Congress is sometimes too busy or too divided, and can therefore assign its responsibility of making law to someone else, but rather that a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be.[50]

Justice Scalia was resting on the shoulders of giants when he said this. In fact, almost a century before Justice Scalia, the first Justice Harlan had stated — in a majority opinion no less:

> 'The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter, no valid objection can be made.'[51]

The non-delegation principle is already making waves at the Supreme Court. Two examples should be illustrative. First, the Supreme Court's most recent direct brush with non-delegation, in fact, occurred in *Gundy* three Terms ago. There, the federal Sex Offender Registration and Notification Act (SORNA) had empowered the Attorney General to decide whether a certain category of sex offenders got a lighter sentence or not. An eight-member court sat to decide the case.[52]

Four members of the court — Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor — would have held that SORNA provides enough of an intelligible principle to survive a separation of powers challenge. Justice Alito provided a fifth vote to

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[47] *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).
[48] *Jarkesy*, 34 F.4th at 459—60 (citing Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1017 (2006). ("[T]he Framers weighed the need for federal government efficiency against the potential for abuse and came out heavily in favor of limiting federal government power over crime.")).
[49] *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).
[50] *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (dissenting opinion).
[51] *Field v. Clark*, 143 U.S. 649, 693—94 (1892) (quoting *Cincinnati, W. & Z. R. Co. v. Comm'rs of Clinton Cty.*, 1 Ohio St. 77, 88—89 (1852)).
[52] Justice Kavanaugh was recused from the case.

uphold the delegation only because, in his view, "it would [have] be[en] freakish to single out the provision at issue here for special treatment."[53] He added that "If a majority of this Court were willing to [restore the non-delegation principle,] I would support that effort."[54] But Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented. He would have invalidated that particular congressional delegation to the Executive — for separation-of-powers reasons earlier interspersed throughout this article. There may now be a majority on the Supreme Court for this view — or its close approximation.

Next, the court decided *West Virginia v. EPA* in late June 2022.[55] A 6-3 Supreme Court held that despite a "plausible textual basis," a statute enacted by Congress will not be deemed to have made a delegation on a major policy matter to the Executive unless the Legislature has spoken adequately clearly and explicitly on it.[56] The separation of powers — particularly, echoes of non-delegation — demanded this clear-statement rule.[57] And the court seriously enforced it. This is not to say that this interpretive principle known as the Major Questions Doctrine (MQD) is without any detractors, some of whom might ask why only major questions are subjected to this clear-statement rule since the separation of powers applies to all policy questions that count as law-making.[58]

It is to say, however, that the strides the Supreme Court has made toward enforcing this non-delegation-derived clear-statement rule might make it relatively easy for it to one day soon say that bringing back non-delegation's crux would amount to a small change, not an upheaval in the way that agencies operate. *Stare decisis*, the principle of respecting precedent — with caveat — would take a far less skeptical view of such an approach.

In any event, the Fifth Circuit was not yet fully done with its trifecta of a decision in *Jarkesy*.

The Constitution's Take Care Clause Entitles the President to Fire the SEC ALJs

Finally, the Court of Appeals held that the Take Care Clause in Article II of the Constitution[59] "guarantees the President a certain degree of control over executive officers; the President must have adequate power over officers' appointment and removal."[60] Why? Because "[o]nly then can the People, to whom the President is directly accountable, vicariously exercise authority over high-ranking executive officials."[61] The logic was simple, in the Fifth Circuit's view: Should "principal officers" be unable to "intervene in their inferior officers' actions except in rare cases," then it is manifest that "the President lacks the control necessary to ensure that the laws are faithfully

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[53] 139 S. Ct. 2131 (Alito, J., concurring in judgment).
[54] *Id*. (Alito, J., concurring in judgment).
[55] 142 S. Ct. 2587. Taft attorneys have already explained the import of *West Virginia v. EPA*.
[56] *Id*. at 2609.
[57] This is not unique to agency power. In fact, clear-statement rules derived from constitutional principles apply to interpreting legislation involving retroactive liability, sovereign immunity, and federalism (and perhaps more issues). *See id.* at 2616—17, 2619, 2621 (Gorsuch, J., concurring).
[58] *See*, *e.g.*, Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J. L. & PUB. POL'Y 463, 466, 495—513 (2021).
[59] U.S. Const. art. II, § 3.
[60] 34 F.4th at 463.
[61] *Id*.

executed."[62]

Relying on the Supreme Court's 2018 decision in *Lucia v. SEC*,[63] the Fifth Circuit determined that the "SEC ALJs exercise considerable power over administrative case records by controlling the presentation and admission of evidence; they may punish contemptuous conduct; and often their decisions are final and binding."[64] But federal law provides that "SEC ALJs may be removed by the Commission only for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing before the Board."[65] In turn, the President may fire the SEC Commissioners, but only if there is good cause for him to do so.[66]

This meant that the "*two* layers of insulation impede[] the President's power to remove ALJs based on their exercise of the discretion granted to them."[67] According to the Fifth Circuit, then, the SEC ALJ scheme precludes the President from ensuring the laws are faithfully executed — and this contravened his Article II prerogatives and responsibilities under the Constitution. The panel noted that "[i]f principal officers," such as SEC Commissioners, "cannot intervene in their inferior officers' actions except in rare cases, the President lacks the control necessary to ensure that the laws are faithfully executed."[68] Since "SEC ALJs are 'inferior officers'" under *Lucia*, "they are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions."[69]

The Take Care Clause's original meaning means that the President has both the power and the duty to execute the laws of the land.[70] Supreme Court decisions and commentators have so confirmed.[71] And several derivative concepts reinforce this view — giving him the essential power to remove officials who neglect the existing laws, whether those laws impose burdens or obligations on some or exempt others.

First, under this view, the Supreme Court has stated that the President ordinarily retains "the [constitutional] authority to remove those who assist him in carrying out his duties."[72] Absent the power to fire those officials, "the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."[73] In fact, "[t]he President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the [Supreme Court's] landmark decision *Myers v. United*

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[62] *Id*.
[63] 138 S. Ct. 2044.
[64] 34 F.4th at 464 (quoting *Lucia*, 138 S. Ct. at 2053—54).
[65] *Id*. (cleaned up).
[66] *See id*.
[67] *Id*. at 465 (emphasis added).
[68] *Id*. at 464.
[69] *Id*.
[70] *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 118 (2020) [MCCONNELL, PRESIDENT, NOT KING].
[71] *See*, *e.g.*, *United States v. Valenzuela-Bernal*, 458 U.S. 858, 863 (1982) ("The Constitution imposes on the President the duty to take Care that the Laws be faithfully executed.") (cleaned up); *Myers v. United States*, 272 U.S. 52, 117 (1926) (noting Presidential "duty expressly declared in the third section of the article to take care that the laws be faithfully executed.") (cleaned up); Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1911 (2014) ("To be sure, the President has the duty to take care that the laws be faithfully executed.").
[72] *Free Enterprise Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477, 513—14 (2010).
[73] *Id*. at 514.

States, 272 U.S. 52 (1926)."[74] The limited exceptions to *Myers* that the court had once approved, it has since declined to extend.[75] As discussed below, other precepts at the heart of how the President's Take Care Clause duties and prerogatives work justify, in the Supreme Court's eyes, the President's removal authority.

Second, the President is not free to disregard laws that meet with his disapprobation and must hold accountable anyone in the Executive Branch who says, or acts, otherwise. Known in Stuart England as the "dispensing power" (or "suspending power"), the erstwhile concept of the Executive's ignoring unfavorable laws irked the American colonists and Englishmen alike.[76] This abuse, in part, led to the Glorious Revolution and the accession of William and Mary to the English throne — and the English Bill of Rights of 1689 promptly vanquished this power once assumed by the Crown.[77] Thus energetically incorporating the separation of powers into our Constitution, the framers insisted on the President's power to not just follow the law but to ensure that it gets followed by the community.[78] None of this would be possible if the President could not run the Executive Branch to ensure the faithful execution of the laws.

All this tracks the early 19th century views of Justice Joseph Story, who observed that the President's structural duty is to do his part in ensuring the laws are followed:

> [T]he duty imposed upon [the President] to take care, that the laws be faithfully executed, follows out the strong injunctions of his oath of office, that he will 'preserve, protect, and defend the constitution.' The great object of the executive department is to accomplish this purpose; and without it, be the form of government whatever it may, it will be utterly worthless for offence, or defence; for the redress of grievances, or the protection of rights; for the happiness, or good order, or safety of the people.[79]

Third, it has been the longstanding view — since no later than 1890 in a Supreme Court decision known as *In re Neagle* — that the Take Care Clause enables the President to do what he deems appropriate to execute a command that is statutory and/or is treaty-based or one that comes from "the rights, duties, and obligations growing out of the

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[74] *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191—92 (2020).
[75] *See id.* at 2192; *see also id*. ("In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), we held that Congress could create expert agencies led by a group of principal officers removable by the President only for good cause. And in *United States v. Perkins*, 116 U.S. 483 (1886), and *Morrison v. Olson*, 487 U.S. 654 (1988), we held that Congress could provide tenure protections to certain inferior officers with narrowly defined duties.")
[76] *See*, *e.g.*, MCCONNELL, PRESIDENT, NOT KING, *supra*, at 116; Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 691 (2014); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 805—07 (2013).
[77] *See* The Bill of Rights, 1 W. & M., c. 2 (1689); Delahunty & Yoo, *Dream On*, *supra*, at 807.
[78] *See*, *e.g.*, *Texas v. United States*, 524 F. Supp. 3d 598, 649 (S.D. Tex. 2021); MICHAEL STOKES PAULSEN, ET AL., THE CONSTITUTION OF THE UNITED STATES 317 (Robert C. Clark et al. eds., 2d ed. 2013).
[79] COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 316 (Quid Pro Brooks 2013) (1833); *see also* Randy Barnett & Evan Bernick, *The Letter & The Spirit: A Unified Theory of Originalism*, 107 Geo. L. J. 1, 20—21 (2018) (articulating that the Executive is constitutionally "bound by fiduciary duties to honor the law, ... remain loyal to the public interest, ... and account for violations of these duties."); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 148—49 (2d ed. 1829) (noting the President's "duty" to enforce the laws).

Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."[80] The Supreme Court in *Neagle* held that the Attorney General's appointee, a deputy marshal in California, assigned to protect Justice Field when riding circuit had the right to kill a man who had posed an imminent threat to Field's life even though this deputy marshal was not statutorily authorized to protect the Justice.[81] If the power did not come from a statute, it had to come from something higher — the Constitution. And here it came, in the Supreme Court's view, from the Constitution's Take Care Clause.

As the court in *Neagle* deduced, Justice Field's functioning as a judge without being attacked or killed was necessary for the constitutional scheme of dispensing with judgments in a timely manner, and it fell to the President to take care that this aspect of the rule of law was discharged.[82] The court thus reasoned that because "the judicial [branch] is the weakest [among the branches] for the purposes of self-protection and for the enforcement of the powers which it exercises," "[t]he ministerial officers through whom its commands must be executed [and whose protections judges need] are marshals of the United States" reposed within the Executive Branch.[83] On this basis, the deputy marshal's habeas petition was deemed to be successful. He went free because of the Take Care Clause.

Quite simply, *Neagle* appeared to say that the Take Care Clause empowered the President to execute all of his legal obligations, such as "mak[ing] an order for the protection of the mail and of the persons and lives of its carriers;"[84] "plac[ing] guards upon the public territory to protect [federally owned] timber;"[85] or suing to "set aside a patent which had been issued for a large body of valuable land, on the ground that it was obtained from the government by fraud."[86] The Take Care Clause serves as a bridge between the President and his legal duty. Without the power of removal of those entrusted to carry out the laws, this argument runs, the President cannot really administer the laws or take care that they are executed. Since the President is entrusted to ensure the laws are faithfully executed, he surely is empowered to fire those who, in his judgment, impede that endeavor. Otherwise, the Presidential duty to serve as the Chief Executive would come to naught.

That Presidential legal duty is viewed as a *sine qua non* for the Take Care Clause to authorize the pertinent Presidential conduct. And to the *Jarkesy* court, the Executive duty to administer the securities statutes meant that he had to have the power to remove the SEC ALJs. There is no reason that this does not apply to all statutes the federal agencies, writ large, enforce since, after all, the Take Care Clause applies to the Presidential duty to execute all the laws. Consequently, the President may use this power to meet a legal obligation — executing all laws — that he already possesses.

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As a result, the Fifth Circuit deemed the SEC's actions to have been unlawful. It

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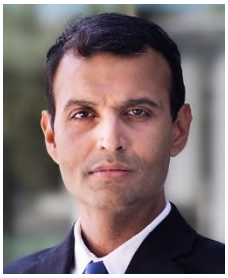
[80] 135 U.S. 1, 63—64.
[81] *See id.*
[82] *See id.* at 63.
[83] *Id*.
[84] *Id*. at 65.
[85] *Id*. at 65—66 (discussing *Wells v. Nickles*, 104 U.S. 444 (1881)).
[86] *Id*. at 66—67 (discussing *United States v. San Jacinto Tin Co*., 125 U.S. 273 (1888)).

granted Jarkesy's petition for review, vacated the SEC's decision; and remanded the matter for further proceedings. The import of the Fifth Circuit's trifecta decision is clear, not only for the SEC but for federal agencies generally: As long as this decision stands, the SEC may not function as it has become accustomed to functioning.

To recap, the Fifth Circuit's Seventh Amendment determination reallocates the SEC-designated power to try the accused for many violations to the federal courts. It applies to numerous federal agencies. The Court of Appeals' non-delegation holding strips the SEC, and similarly-positioned agencies, from acting pursuant to congressional guidance that is written in invisible ink. And lastly, the Executive's newfound ability to remove, or at least to have an easier time in removing, agency officials who once were doubly insulated from being let go will change agency culture nationwide. Agency officials may become more sensitive to the voices of the people and to the officials elected by them.

Judge W. Eugene Davis dissented from each of the majority's determinations and would have left undisturbed the SEC's judgment. The federal government sought to have the full Fifth Circuit hear this case *en banc*. But a 10-6 court denied the government's petition for rehearing *en banc*. Speaking for the *en banc* dissenters, Judge Catharina Haynes largely would have echoed Judge Davis's views. The federal government may well appeal the Fifth Circuit's judgment to the Supreme Court. As things currently stand, the federal administrative state never will again be the same.

Taft Author



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