REGISTRATION AS CONSENT: PATCHING *JARKESY*'S HOLE IN SEC ENFORCEMENT

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In SEC v. Jarkesy*, the Supreme Court held that whenever the SEC seeks to impose monetary penalties on enforcement targets for securities fraud, it must proceed in federal court and not its own administrative forum. Many observers predict this will significantly impact SEC enforcement.*

But not necessarily. A simple legal patch might repair the hole Jarkesy *opened up: parties who register with the SEC may thereby* consent *to its administrative jurisdiction. (Because Jarkesy and the funds he managed were not registered, his case did not resolve the issue.)*

This Essay shows how registration may constitute consent to SEC administrative adjudication. Drawing on Supreme Court precedent on consent to otherwise unconstitutional adjudications, I show how SEC registrants either already have consented to SEC administrative adjudication or could easily be deemed to have done so by issuing new interpretive guidance or amending a few regulatory forms.

If accepted, this constitutional consent argument would substantially insulate SEC enforcement from Jarkesy*'s impact. I review all 1,481 actions the SEC brought in fiscal years 2021 and 2023 and find that only five percent of original enforcement actions involved administrative proceedings against unregistered parties for fraud-related misconduct seeking monetary penalties. Limiting* Jarkesy *to unregistered persons would allow SEC enforcement to proceed virtually unchanged.*

The *Notre Dame Law Review* has not independently reviewed the data and analyses described in this Essay.

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INTRODUCTION

In *SEC v. Jarkesy*, the Supreme Court held that whenever the SEC seeks to impose monetary penalties on enforcement targets for securities fraud, it must proceed in federal court and not its own administrative forum.[1]

Many observers predict this will significantly impair SEC enforcement. The SEC itself predicted that the holding would be "highly consequential, calling into question longstanding practices at the SEC."[2] The North American Securities Administrators Association suggested that it threatened the SEC's ability "to efficiently deter, prevent, and punish fraud that harms investors and undermines the integrity of the markets."[3]

One defense firm predicted the holding could "severely limit the SEC's ability to quickly resolve enforcement actions."[4] Attorneys for a leading plaintiffs' firm suggested the holding could "disable . . . one of the major enforcement mechanisms targeting securities fraud in the United States."[5]

Vox ran a piece claiming that it could "destroy the federal government's power to enforce key laws preventing companies from deceiving investors."[6] Professor Richard Epstein suggested it could produce a "huge transformation" in SEC enforcement,[7] and his New York University colleague Professor Melissa Murray stated, "[I]f Jarkesy wins, it will make it harder to enforce security laws."[8]

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1 SEC v. Jarkesy, 144 S. Ct. 2117, 2139 (2024).

2 Petition for a Writ of Certiorari at 9, *Jarkesy*, 144 S. Ct. 2117 (No. 22-859).

3 *See* Brief of the North American Securities Administrators Association, Inc., as Amicus Curiae in Support of Petitioner at 32, *Jarkesy*, 144 S. Ct. 2117 (No. 22-859).

4 Natalie A. Napierala, *Supreme Court Plays Its Cards on Constitutionality of SEC In-House Court Actions*, CARLTON FIELDS (Sept. 28, 2023), https://www.carltonfields.com/insights/expect-focus/2023/supreme-court-plays-its-cards-on-constitutionality [https://perma.cc/3QAG-GRRX].

5 Jonathan D. Uslaner & Chloe Jasper, *SEC Administrative Enforcement Process Called into Question, Highlighting Importance of Private Actions*, REUTERS (Nov. 16, 2023, 12:14 PM EST), https://www.reuters.com/legal/legalindustry/sec-administrative-enforcement-process-called-into-question-highlighting-2023-11-16/ [https://perma.cc/YYT8-U9X5] (giving analysis of attorneys at Bernstein Litowitz Berger & Grossmann LLP).

6 Ian Millhiser, *A Wild New Court Decision Would Blow Up Much of the Government's Ability to Operate*, VOX (May 19, 2022, 4:10 PM EDT), https://www.vox.com/2022/5/19/23130569/jarkesy-fifth-circuit-sec [https://perma.cc/HE3Q-KK4A] (discussing the Fifth Circuit's opinion).

7 The Justice Insiders, *SEC Plays Chicken with* Jarkesy, HUSCH BLACKWELL, at 12:20–40 (Oct. 16, 2023), https://www.huschblackwell.com/newsandinsights/the-justice-insiders-sec-plays-chicken-with-jarkesy (statement of Richard Epstein).

8 Strict Scrutiny, *A Deregulatory Sh*t Show Waiting to Happen*, CROOKED MEDIA, at 26:50–27:10 (Nov. 27, 2023), https://www.crooked.com/podcast/a-deregulatory-sht-show-waiting-to-happen/.

But not necessarily. A legal patch might repair the hole *Jarkesy* opened: parties who register with the SEC may thereby *consent* to its administrative jurisdiction.

Unlike many targets of SEC enforcement, the litigants in *Jarkesy* were *not* registered with the Commission. "Registration" is the licensing system for the securities industry; under the federal laws and rules that the SEC administers, it is unlawful to engage in certain lines of securities business without registering.[9]

Registrants take on a host of burdens in exchange for the license to conduct business and, after *Jarkesy*, it may be reasonably argued that one of those burdens is exposure to the SEC's administrative jurisdiction. The Court has held that parties may consent to otherwise unconstitutional adjudications through compulsory registration regimes.[10] SEC registration similarly may already constitute *consent* to adjudication that would otherwise be unconstitutional.[11] And even if the existing registration system doesn't quite sufficiently do this, the SEC could quickly adopt some new interpretive guidance or amend a few forms to make it so.[12]

If accepted, this constitutional consent argument might go a long way toward insulating SEC enforcement from the impact of *Jarkesy*. A review of every case the SEC brought in fiscal years 2021 and 2023 reveals that only about five percent or less of the agency's original enforcement actions were administrative proceedings against unregistered parties for fraud-related misconduct seeking monetary penalties. Limiting *Jarkesy* to unregistered persons would allow SEC enforcement to proceed virtually unchanged.[13]

Before 2010, Congress had never given the SEC authority to seek monetary penalties in administrative proceedings from unregistered parties.[14] Although the historical practice of reserving the SEC's administrative jurisdiction for registered parties has been recognized,[15]

9 For a brief introduction to SEC registration, see *infra* Section III.A.

10 *See infra* Part II.

11 *See infra* Part III.

12 *See infra* note 111 (listing forms).

13 *See infra* Part IV.

14 Brief for Respondents at 2–3, SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (No. 22-859). Even after 2010, the SEC adopted a formal policy of generally reserving the administrative forum for *registered* parties. *See* SEC. & EXCH. COMM'N, DIVISION OF ENFORCEMENT APPROACH TO FORUM SELECTION IN CONTESTED ACTIONS 2 (2015).

15 *E.g.*, Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315, 317 (2017); Linda D. Jellum & Moses M. Tincher, *The Shadow of* Free Enterprise*: The Unconstitutionality of the Securities & Exchange Commission's Administrative Law Judges*, 70 SMU L. REV. 3, 5, 10–11 (2017); Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85

and some (including myself) have suggested that SEC registration *may* constitute a form of consent to administrative adjudication,[16] I believe this Essay provides the first sustained legal argument that the historical practice was not merely a matter of policy discretion but was, in effect, the legislative crystallization of a constitutional mandate.[17] This Essay is also first to actually estimate the consequences of this "registration-as-consent" argument on the SEC's enforcement docket.

Jarkesy himself played up his unregistered status at earlier stages of litigation,[18] but never actually argued that registration constituted

FORDHAM L. REV. 1143, 1146 n.11 (2016); Ryan Jones, Comment, *The Fight Over Home Court: An Analysis of the SEC's Increased Use of Administrative Proceedings*, 68 SMU L. REV. 507, 516 (2015); Thomas Glassman, *Ice Skating Up* Hill*: Constitutional Challenges to SEC Administrative Proceedings*, 16 J. BUS. & SEC. L. 47, 52 (2015); Alexander I. Platt, *SEC Administrative Proceedings: Backlash and Reform*, 71 BUS. LAW. 1, 7 (2015).

16 *E.g.*, Platt, *supra* note 15, at 18 (predicting that unregistered SEC enforcement targets "may argue that unregistered persons have not consented to the agency's jurisdiction" and speculating that this "may well ultimately be sufficient to distinguish these proceedings from 'public rights' adjudications that the Court has upheld in the past"); Stephen J. Choi & A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REGUL. 1, 6 (2017) (suggesting, in passing, that Congress's longstanding practice of reserving SEC administrative proceedings to registered parties was rooted in the "fiction" that "the regulated entity had consented to oversight by the agency, including administrative enforcement actions, when it registered to do business in that regulated industry," but providing no analysis or evidence in support of that claim); David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1201–04 (2016) (discussing a possible due process challenge rooted in the "lack of consent" to administrative adjudications by unregistered persons, *id.* at 1201, but suggesting that "it is unlikely that even a consent-based theory of a due process violation, with a bit of separation-of-powers concerns thrown in, would be something sustainable for any defendants—and it certainly could not work for many of them," *id.* at 1204). For decades, commentators have suggested that deficits with administrative proceedings could be cured by giving respondents the "right to remove" SEC actions to federal court, since, under such a system, those who decline to do so would thereby have "consented" to the SEC's administrative jurisdiction. *See* Transcript of Oral Argument at 136, *Jarkesy*, 144 S. Ct. 2117 (No. 22-859); Christopher J. Walker & David Zaring, *The Right to Remove in Agency Adjudication*, 85 OHIO ST. L.J. 1, 13 (2024); Brief of Amici Curiae the Chamber of Commerce of the United States et al. at 21, *Jarkesy*, 144 S. Ct. 2117 (No. 22-859); Grundfest, *supra* note 15, at 1184; U.S. CHAMBER OF COM., EXAMINING U.S. SECURITIES AND EXCHANGE COMMISSION ENFORCEMENT: RECOMMENDATIONS ON CURRENT PROCESSES AND PRACTICES 20 (2015); Comm. on Fed. Regul. of Sec., *Report of Task Force on the SEC Administrative Law Judge Process*, 47 BUS. LAW. 1731, 1736 (1992).

17 The question is whether the pre-Dodd-Frank status quo was in fact constitutionally mandated, not whether Congress necessarily understood it as such. My brief review of the legislative history of various statutes expanding the SEC's administrative authority from the 1980s through Dodd-Frank did not reveal any evidence as to whether Congress understood registered persons to have consented to SEC's administrative jurisdiction.

18 *See* Brief for Petitioners at 7 n.12, Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022) (No. 20-61007) ("As a non-registered party, Jarkesy had not implicitly consented to the agency's jury-less administrative adjudication apparatus."); Respondents' Opening Brief at 21, John

consent, and dropped the point altogether in his Supreme Court filings.[19]

This Essay presents a novel precedential argument and shows how, if accepted, it would curtail *Jarkesy*'s impact on SEC enforcement.[20] My analysis is focused on the impact on SEC enforcement, not other agencies who may be affected by *Jarkesy*, although agencies with similar licensing/registration regimes may well take advantage of the same "consent" based argument.[21]

Since an earlier draft of this paper was posted to the Social Science Research Network in February 2024 and the Court's decision in *Jarkesy* was issued in June 2024, a small number of legal academics[22] and lawyers[23] have taken up the argument presented here. The Financial

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Thomas Cap. Mgmt. Grp. LLC, Securities Act Release No. 10834, Exchange Act Release No. 89775, Investment Advisers Act Release No. 5572, 2020 WL 5291417 (Sept. 4, 2020) (No. 3-15255) ("Dodd-Frank transformed the SEC administrative enforcement program for *ordinary, unregistered persons* like Respondents." (emphasis added)); *see also* John Thomas Cap. Mgmt. Grp. LLC, Securities Act Release No. 10834, Exchange Act Release No. 89775, Investment Advisers Act Release No. 5572, 2020 WL 5291417, at *27 (Sept. 4, 2020) ("Respondents argue that the provisions of the Dodd-Frank Act that authorize the imposition of civil penalties against unregistered persons in administrative proceedings violate their Seventh Amendment right to a jury trial."), *vacated*, *Jarkesy*, 34 F.4th 446, *aff'd*, 144 S. Ct. 2117 (2024).

19 Jarkesy's Supreme Court brief notes that Dodd-Frank broke with past practice by exposing unregistered parties to administratively imposed monetary penalties and notes that Jarkesy was not registered, but never connects his unregistered status to his Seventh Amendment argument. Brief for Respondents, *supra* note 14, at 2–4. Once the Court took up Jarkesy's case, his legal strategy may have shifted away from merely trying to win the case to seeking the broadest possible holding on the Seventh Amendment issue. Jarkesy's lawyers might have believed that an opinion from the Court that relied on Jarkesy's unregistered status would reach less broadly than one that was silent on this issue.

20 I do not assess the costs and benefits of administrative enforcement or constitutional restrictions.

21 *Cf.* Blake Emerson, *Vindicating Public Rights*, 26 U. PA. J. CONST. L. 1424, 1426 & n.9 (2024) (listing several other agencies with adjudicatory authority that might be "at risk" if the Court adopted the Fifth Circuit's Seventh Amendment holding).

22 *See* John M. Golden, *SEC Adjudication of Securities Fraud Held Unconstitutional*, REGUL. REV. (July 30, 2024), https://www.theregreview.org/2024/07/30/golden-sec-adjudication-of-securities-fraud-held-unconstitutional/ [https://perma.cc/6TWK-9H7Q] ("[T]here might even be a residual question about the extent to which the *Jarkesy* holding applies to registered, as opposed to unregistered, entities."); Stephen L. Carter, *The Supreme Court Just Decided the SEC Has Too Much Power*, BLOOMBERG (June 27, 2024, 2:15 PM EDT), https://www.bloomberg.com/opinion/articles/2024-06-27/in-sec-ruling-supreme-court-chips-away-at-administrative-state [https://perma.cc/9U9G-A4VT] ("Nothing in Chief Justice John Roberts's majority opinion disturbs the SEC's longstanding authority to go after *registered* investment advisers before its own administrative law judges rather than in federal court.").

23 Matthew D. Levitt & Patrick E. McDonough, *Supreme Court in* Jarkesy *Limits the SEC's Powers to Use In-House Administrative Courts*, MINTZ (June 28, 2024), https://www.mintz.com

Industry Regulatory Authority (FINRA) invoked the "registration as consent" argument to beat back a *Jarkesy* challenge.[24]

This Essay proceeds in four parts. Part I reviews Jarkesy's successful constitutional challenge to SEC enforcement. Part II reviews precedents on consent to otherwise unconstitutional adjudications. Part III argues that, after *Jarkesy*, SEC registration might constitute consent to jurisdiction in the SEC's administrative forum. Part IV reassesses the impact of *Jarkesy* in light of this argument through an examination of the SEC's fiscal year 2021 and fiscal year 2023 enforcement docket.

I. Jarkesy's Constitutional Challenge to SEC Enforcement

Over a decade ago, the SEC filed an administrative enforcement action against George Jarkesy,[25] alleging that he engaged in securities fraud while managing a pair of hedge funds.[26] Following an evidentiary hearing, an Administrative Law Judge (ALJ) found Jarkesy liable on these charges.[27] Among other sanctions, the ALJ ordered him to

/insights-center/viewpoints/2301/2024-06-28-supreme-court-jarkesy-limits-secs-powers-use-house [https://perma.cc/Q44M-CR7R] ("The [*Jarkesy*] decision leaves open several questions: . . . To what extent will the SEC continue to bring administrative actions against *registered* investment advisers (Patriot28 was an unregistered adviser) and other regulated registrants like broker-dealers and transfer agents?" (emphasis added)). *Cf. Supreme Court Holds the Seventh Amendment Entitles a Defendant to a Jury Trial when the SEC Seeks Civil Penalties for Securities Fraud*, Gibson Dunn (June 27, 2024), https://www.gibsondunn.com/supreme-court-holds-seventh-amendment-entitles-defendant-to-jury-trial-when-sec-seeks-civil-penalties-for-securities-fraud/ [https://perma.cc/F5LJ-PCCU] ("The decision will also likely impact how the SEC settles enforcement actions with *unregistered* parties . . . at least for violations that resemble traditional common-law actions." (emphasis added)).

24 Opposition to Plaintiff's Motion for Preliminary Injunction at 17, Blankenship v. Fin. Indus. Regul. Auth., Inc., No. 24-3003, 2024 WL 4043442 (E.D. Pa. Sept. 4, 2024) ("Plaintiff affirmatively registered with FINRA as a securities broker in 1997 and has maintained that registration over the ensuing 27 years during his association with multiple FINRA member firms. In so doing, Plaintiff knowingly relinquished any right he might otherwise have had to defend himself against FINRA's allegations before a jury in federal court." (citation omitted) (citing CFTC v. Schor, 478 U.S. 833, 848 (1986))). The district court rejected the challenge on other grounds. *Blankenship*, 2024 WL 4043442, at *3.

25 Pronounced JAR-kuh-see (rhyming with "pharmacy"). Oral Argument at 1:13:50–1:14:05, SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (No. 22-859), https://www.supremecourt.gov/oral_arguments/audio/2023/22-859.

26 *See* Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b)(4), 15(b)(6) and 21C of the Securities Exchange Act of 1934, Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 and Section 9(b) of the Investment Company Act of 1940 and Notice of Hearing at 2, John Thomas Cap. Mgmt. Grp. LLC, Securities Act Release No. 9396, Securities Exchange Act Release No. 69208, Investment Advisers Act Release No. 3571, Investment Company Act Release No. 30435, 2014 WL 5304908 (ALJ Oct. 17, 2014) (No. 3-15255).

27 *John Thomas*, 2014 WL 5304908, at *1.

pay a civil monetary penalty.[28] Jarkesy appealed the decision to the full Commission, which affirmed the ALJ.[29]

Throughout the process, Jarkesy also asserted a host of constitutional challenges to the proceedings.[30] The ALJ and the Commission rejected all these arguments,[31] but Jarkesy found a more receptive audience when he sought review in the Fifth Circuit.

The appellate court held that the SEC's proceedings violated Jarkesy's constitutional right to a jury trial.[32] The court explained that the SEC's action seeking civil monetary penalties was "akin" to the "traditional actions in debt" from "early in our nation's history which were distinctly legal claims,"[33] and that the securities fraud violations the SEC alleged were "not new actions unknown to the common law" but were rather akin to fraud actions that common law courts have heard "for centuries."[34]

After the SEC's petition for rehearing en banc was denied,[35] the Supreme Court granted certiorari.[36]

In June 2024, the Supreme Court affirmed the Fifth Circuit, holding that when the SEC seeks monetary penalties in an action alleging securities fraud, it must proceed in federal court, not in its own home forum.[37]

II. CONSENT TO OTHERWISE UNCONSTITUTIONAL ADJUDICATIONS

Conventional wisdom is that this holding will significantly impact SEC enforcement.[38] But the impact may be limited by the fact that

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28 *Id.*

29 John Thomas Cap. Mgmt. Grp. LLC, Securities Act Release No. 10834, Exchange Act Release No. 89775, Investment Advisers Act Release No. 5572, 2020 WL 5291417, at *1–2 (Sept. 4, 2020), *vacated*, Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), *aff'd*, 144 S. Ct. 2117 (2024).

30 *E.g.*, Answer & Affirmative Defenses of John Thomas Capital Management LLC d/b/a Patriot28 LLC & George R. Jarkesy, Jr. at 9, *John Thomas*, 2014 WL 5304908.

31 *John Thomas*, 2014 WL 5304908, at *4–6; *John Thomas*, 2020 WL 5291417, at *27–28. Jarkesy is one of many SEC targets to raise constitutional challenges to administrative proceedings. For key judicial opinions addressing these challenges, see *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *SEC v. Cochran*, 143 S. Ct. 890 (2023); and *Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015), *vacated*, 825 F.3d 1236 (11th Cir. 2016). For academic discussions, see Zaring, *supra* note 16; Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45 (2016); Jellum & Tincher, *supra* note 15; Glassman, *supra* note 15; Jones, *supra* note 15; Platt, *supra* note 15; and Velikonja, *supra* note 15, at 328–30.

32 *See Jarkesy*, 34 F.4th at 451–59.

33 *Id.* at 454.

34 *Id.* at 455.

35 Jarkesy v. SEC, 51 F.4th 644, 644 (5th Cir. 2022) (per curiam).

36 SEC v. Jarkesy, 143 S. Ct. 2688 (2023) (mem.).

37 SEC v. Jarkesy, 144 S. Ct. 2117, 2136, 2139 (2024).

38 *See supra* text accompanying notes 2–8.

neither Jarkesy nor the hedge funds he managed were registered with the SEC. The following Part will explain how SEC registration may constitute "consent" to otherwise unconstitutional administrative adjudication.[39] This Part first synthesizes relevant precedent on consent to otherwise unconstitutional adjudications.

Four principles tie this jurisprudence together. First, consent need not be express and instead may be implied from parties' conduct. Second, consent must be "knowing," but constructive knowledge of operative law is sufficient. Third, consent must be "voluntary," but only in a weak, formalistic sense; a "choice" to engage in a regulated business is sufficient. Fourth, consent trumps structural considerations like separation of powers or federalism that might weigh against permitting the adjudication.

A. *Consent to Non–Article III Adjudications*

The Court has relied on "consent" to reject numerous challenges to non–Article III adjudication.[40] These cases have been analyzed, criticized, and reconstructed many times.[41] My analysis is narrowly focused on deriving principles from these cases relevant to the question of whether SEC registration might constitute consent to otherwise unconstitutional adjudication. I discuss four key principles that emerge from these cases.

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39 *See infra* Part III.

40 The cases analyzed in this Section address the boundaries of Article III of the Constitution, which provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. Jarkesy's argument arises under the Seventh Amendment, which provides that "[i]n Suits at common law, . . . the right of trial by jury shall be preserved." *Id.* amend. VII. My argument would resolve both: if registration constitutes consent to non–Article III adjudication, it also constitutes a waiver of the right to jury trial. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1379 (2018) ("[W]hen Congress properly assigns a matter to adjudication in a non–Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'" (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53–54 (1989))).

41 *See, e.g.*, John M. Golden & Thomas H. Lee, *Federalism, Private Rights, and Article III Adjudication*, 108 VA. L. REV. 1547, 1605–10 (2022); F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715 (2018); William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1555–57 (2020); Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1158 & nn.346–47 (2022); Lindsey D. Simon, *Claim Preclusion and the Problem of Fictional Consent*, 41 CARDOZO L. REV. 2561 (2020); John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143 (2019); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 605–09 (2007).

1. Implied

Where a party has *expressly* consented to non–Article III jurisdiction, this is constitutionally binding. For instance, a contractual agreement to arbitrate disputes is accepted as a valid waiver of the constitutional right to an Article III forum.[42]

However, constitutional consent need not be express. As the Court recently explained, "Nothing in the Constitution requires that consent to adjudication by a [non–Article III forum] be express."[43]

For instance, in *CFTC v. Schor*, the Court upheld the administrative adjudication of a broker's common law counterclaims filed against a customer, where the customer had elected to initiate the action in the administrative forum rather than in Article III court.[44] Per the Court, the customer's *action* in filing the suit itself constituted an effective waiver of his constitutional right to an Article III proceeding, and no separate express waiver was required.[45]

2. Knowing

Regardless of whether it is express or implied, the Court has held that consent must also be "knowing."[46] However, the precedents make clear that the requisite knowledge may be constructive rather than actual, and that a party may be charged with knowledge of relevant law or regulations.

For instance, in *Schor*, the Court held that a party's decision to proceed against a defendant in an administrative forum constituted consent to have a counterclaim adjudicated in the same forum because he had "full knowledge" at the time of filing that the administrative forum would exercise jurisdiction over the counterclaim.[47] The "full knowledge" here was based on the party's constructive knowledge of CFTC regulations, which stated that the administrative forum would

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42 *See* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 674 (2015) ("[D]uring the early years of the Republic, federal courts, with the consent of the litigants, regularly referred adjudication of entire disputes to non–Article III referees, masters, or arbitrators, for entry of final judgment in accordance with the referee's report." (quoting Ralph Brubaker, *The Constitutionality of Litigant Consent to Non–Article III Bankruptcy Adjudications*, BANKR. L. LETTER, Dec. 2015, at 1, 6)).

43 *Id.* at 683 (holding that a bankruptcy court could constitutionally adjudicate a bankruptcy creditor's adversary claim seeking a common law claim if the debtor impliedly consented to having that claim heard in that non–Article III forum).

44 *See* CFTC v. Schor, 478 U.S. 833, 849 (1986).

45 *See id.* The Court also found an express waiver in the case. *Id.* ("Schor expressly demanded that Conti proceed on its counterclaim in the reparations proceeding rather than before the District Court . . . .").

46 *Wellness*, 575 U.S. at 685.

47 *Schor*, 478 U.S. at 850.

adjudicate "all counterclaims 'aris[ing] out of the same transaction or occurrence or series of transactions or occurrences set forth in the complaint.'"[48]

3. Voluntary

In addition to "knowing," consent must also be *voluntary*.[49] However, even relatively coercive situations may qualify as "voluntary" if the Court can identify some theoretical choice made by the party along the way.

In *Thomas v. Union Carbide Agricultural Products Co.*, the Court upheld a mandatory arbitration provision of the federal pesticide regulatory scheme in part by characterizing participation in the broader regime as "voluntary."[50] The regime required that before selling any pesticide, manufacturers had to register the pesticide with a federal agency[51] and also share research data regarding "the product's health, safety, and environmental effects."[52] In exercising its mandate, the federal agency used this commercial data in ways that sometimes advantaged competitors, which led the original data submitter to suffer harms.[53] Congress set up a mandatory arbitration regime to handle these disputes, requiring that these claims be resolved *outside* of Article III courts.[54]

The *Thomas* Court rejected the argument that this regime violated Article III primarily because the underlying claims implicated "public rights," and thus did not trigger the Article III requirement in the first place.[55] But the Court also relied on the voluntariness of the underlying regime, explaining that "Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among *voluntary* participants in the program without providing an Article III adjudication."[56]

This characterization of the regime as "voluntary" is quite a stretch, given that anyone selling pesticides was *legally required* to

48 *Id.* (alteration in original) (quoting 41 Fed. Reg. 3995 (codified at 17 C.F.R. § 12.23(b)(2) (1983))).

49 *Wellness*, 575 U.S. at 685; *see also Schor*, 478 U.S. at 850 (emphasizing that the consenting party "had the option of having the common law counterclaim against him adjudicated in a federal Article III court, but . . . *chose* to avail himself of the quicker and less expensive procedure Congress had provided him" (emphasis added)).

50 *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589 (1985).

51 Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1984) (discussing same regime).

52 *Thomas*, 473 U.S. at 571.

53 *See id.* at 571–72.

54 *See id.* at 573.

55 *See id.* at 589.

56 *Id.* (emphasis added).

participate. Participation was therefore "voluntary" only in that a person had a choice of whether or not to engage in the pesticide business in the first place. Once that decision was made, there was nothing voluntary about the consent to the arbitration regime. *Thomas* therefore sets a generous outer boundary for what kinds of consent may count as "voluntary" for purposes of validating otherwise unconstitutional adjudications.[57]

As one commentator noted, this aspect of the *Thomas* holding raised some doubt on the viability of the "unconstitutional conditions" doctrine in this domain.[58]

Those doubts were compounded in *Schor*, where the litigant invoked the unconstitutional conditions doctrine to try to avoid the effects of consent he had given to otherwise unconstitutional adjudication[59]—again to no avail.[60]

4. "Structural" Constraints

Back in 1986, the Court emphasized that an individual's consent to non–Article III adjudication may not always be sufficient to authorize non–Article III adjudication.[61] In some cases, the Court indicated, other "structural" values may bar the adjudication even where such consent was present.[62] Although the Court relied on consent to validate the adjudication in that case, it emphasized that a party's consent might fail to authorize a non–Article III adjudication that "impermissibly threatens the institutional integrity of the Judicial Branch."[63]

But by 2015, "structural" limits to consent's domain seem to have eroded, if not vanished entirely. In *Wellness*, those concerns migrated from the majority opinion down to the dissent.[64] According to one

57 Bankruptcy proceedings appear to be an exception. The Court has twice held that "the notion of 'consent' does not apply in bankruptcy proceedings as it might in other contexts" because a party who hopes to recover from the debtor has no other option but to proceed in the non–Article III forum. *See* Stern v. Marshall, 564 U.S. 462, 493 n.8 (2011); Granfinanciera v. Nordberg, 492 U.S. 33, 59 n.14 (1989) ("Parallel reasoning [to *Schor*] is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims.").

58 Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 991 n.414 (1988).

59 *See* Brief for Respondent at *40 n.31, CFTC v. Schor, 478 U.S. 833 (1986) (No. 85-621), 1985 WL 669415.

60 *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 506 n.79 (1987).

61 *See* CFTC v. Schor, 478 U.S. 833, 850–51 (1986).

62 *See id.*

63 *See id.* at 851.

64 *See* Baude, *supra* note 41, at 1556–57.

commentator, *Wellness* "strongly suggested that consent alone would suffice" to authorize non–Article III adjudications.[65]

B. Consent to Personal Jurisdiction

Consent has also shaped other areas of constitutional procedural jurisprudence. A 2023 personal jurisdiction decision, *Mallory v. Norfolk Southern Railway Co.*,[66] involving consent by *registration* is particularly relevant here.

Mallory involved a workers' compensation claim brought in Pennsylvania courts by Richard Mallory against his former employer, Norfolk Southern Railway.[67] Because Mallory's complaint alleged injuries arising exclusively in Ohio and Virginia, and Norfolk was incorporated and headquartered in Virginia, Norfolk argued that "any effort by a Pennsylvania court to exercise personal jurisdiction over it would offend the Due Process Clause of the Fourteenth Amendment."[68] In the parlance of personal jurisdiction precedent, Norfolk lacked the "minimum contacts" with Pennsylvania necessary to authorize that state to constitutionally exercise personal jurisdiction over it.[69]

Mallory argued that, minimum contacts or not, Norfolk had *waived* its due process rights and *consented* to general personal jurisdiction in Pennsylvania courts by registering to do business in that state.[70] Pennsylvania law provides that a foreign corporation (like Norfolk) "may not do business in this Commonwealth until it registers" with the State.[71] Norfolk, which conducted business in the state,[72] complied and registered.[73] Although nothing in the registration forms Norfolk filed said anything about personal jurisdiction,[74] Pennsylvania's jurisdiction statute did; it stated that "qualification as a foreign corporation" in the state "shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person," such that "any cause of action may be asserted

65 *See* Hessick, *supra* note 41, at 729.
66 Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023).
67 *See id.* at 2032.
68 *Id.* at 2033.
69 *See id.* at 2033; *id.* at 2041 n.8 (Gorsuch, J., plurality opinion).
70 *See id.* at 2033 (majority opinion).
71 15 PA. STAT. AND CONS. STAT. ANN. § 411(a) (West 2024).
72 *See Mallory*, 143 S. Ct. at 2037 (majority opinion).
73 *Id.*
74 Joint Appendix at 1–7, *Mallory*, 143 S. Ct. 2028 (No. 21-1168); *see also Mallory*, 143 S. Ct. at 2057 (Barrett, J., dissenting) ("If registration were actual consent, one would expect to see some mention of jurisdiction in Norfolk Southern's registration paperwork—which is instead wholly silent on the matter.").

against [it]."[75] Thus, according to Mallory, Norfolk's registration constituted consent to jurisdiction and a waiver of any constitutional due process rights that might otherwise have allowed it to avoid being sued in Pennsylvania courts.

Norfolk challenged the constitutionality of Pennsylvania's mandatory registration regime, arguing that the Due Process Clause prohibits a state from requiring an out-of-state corporation to consent to personal jurisdiction to do business there.[76]

The Court rejected Norfolk's challenge, holding that states may constitutionally compel foreign corporations to waive their due process rights and submit to general personal jurisdiction in the state's courts on all cases as a condition for doing business in the state.[77] Although *Mallory* concerns due process, the opinion resonates with all four principles derived in the Article III consent jurisprudence outlined above. Although one part of Justice Gorsuch's opinion carried only a four-Justice plurality, both that opinion and Justice Alito's separate opinion concurring in the judgment embraced the consent-based reasoning that is my focus here.[78]

1. Implied

Mallory follows the Article III consent cases in recognizing *implied* consent to an otherwise unconstitutional adjudication. None of the registration documents Norfolk submitted to Pennsylvania said anything about jurisdiction.[79] But for the Court, the absence of express consent was no obstacle because it held that by taking the action of registration, Norfolk *impliedly* consented to personal jurisdiction.[80] As the Court explained, there is no "'magic words' requirement" for consent to personal jurisdiction.[81]

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75 42 PA. STAT. AND CONS. STAT. ANN. § 5301(a)–(b) (West 2024).

76 *See Mallory*, 143 S. Ct. at 2033 (majority opinion).

77 *See id.* at 2032; *id.* at 2038–45 (Gorsuch, J., plurality opinion); *id.* at 2047 (Alito, J., concurring) (agreeing with majority's holding on this point). *But see id.* at 2051–55 (flagging possibility that such statutes may violate the dormant Commerce Clause).

78 *Compare, e.g.*, *id.* at 2039 (Gorsuch, J., plurality opinion) (distinguishing the Court's minimum contacts precedents on the grounds that consent was absent in those cases), *with id.* at 2051 (Alito, J., concurring in part and concurring in the judgment) (emphasizing that the Court "never" strikes down a State's assertion of personal jurisdiction as unconstitutional "when the defendant had consented to jurisdiction in the forum State").

79 Joint Appendix, *supra* note 74, at 1–7; *see also Mallory*, 143 S. Ct. at 2057 (Barrett, J., dissenting).

80 *See Mallory*, 143 S. Ct. at 2044 (Gorsuch, J., plurality opinion); *id.* at 2047 (Alito, J., concurring in part and concurring in the judgment).

81 *Id.* at 2038 n.5 (majority opinion).

2. Knowing

Mallory also follows the Article III consent cases in recognizing that the "knowing" requirement can be satisfied by constructive knowledge of the law. Here, Norfolk was charged with knowledge of the Pennsylvania jurisdiction statute at the time it registered.[82]

3. Voluntary

Mallory also reinforces the loose conception of "voluntariness" used in some Article III jurisprudence. Justice Gorsuch's plurality opinion noted that Norfolk made a *choice* to accept the bargain offered by the state statute at issue; it chose to obtain "the right to do business in-state in return for agreeing to answer any suit against it."[83] The plurality emphasized that Norfolk "appreciated the jurisdictional consequences attending these actions and proceeded anyway, presumably because it thought the benefits outweighed the costs."[84] Justice Alito's concurrence similarly characterized Norfolk as "voluntarily" waiving its due process rights by "consent[ing] to jurisdiction in the forum State."[85]

But Norfolk's only "choice" was whether to engage in business in the state of Pennsylvania. Once it decided to do so, Norfolk had to check its constitutional rights at the state line. Norfolk argued that this scheme violated the "unconstitutional-conditions doctrine," which "bars the government from 'deny[ing] a benefit to a person because he exercises a constitutional right.'"[86] But for the *Mallory* Court, Norfolk's "choice" to do business in Pennsylvania was good enough to

82 *E.g.*, *id.* at 2057 (Barrett, J., dissenting) (summarizing majority opinion: "[e]veryone is charged with knowledge of the law, so corporations are on notice of the deal").

83 *See id.* at 2041 (Gorsuch, J., plurality opinion); *id.* at 2057 (Barrett, J., dissenting); *see also id.* at 2046 (Jackson, J., concurring) ("Having made *the choice* to register and do business in Pennsylvania despite the jurisdictional consequences (and having thereby voluntarily relinquished the due process rights our general-jurisdiction precedents afford), Norfolk Southern cannot be heard to complain that its due process rights are violated by having to defend itself in Pennsylvania's courts." (emphasis added)).

84 *Id.* at 2043 (Gorsuch, J., plurality opinion); *see also id.* at 2045 (Jackson, J., concurring) (emphasizing that, under the Court's personal jurisdiction precedents, a defendant may waive due process rights by "*voluntarily* invoke[ing] certain benefits from a State that are conditioned on submitting to the State's jurisdiction" (emphasis added)).

85 *Id.* at 2051 (Alito, J., concurring in part and concurring in the judgment).

86 Respondent's Brief at 24, *Mallory*, 143 S. Ct. 2028 (No. 21-1168) (alteration in original) (quoting Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013)).

characterize Norfolk's consent to an otherwise unconstitutional adjudication as "voluntary."[87]

4. "Structural" Constraints

Finally, *Mallory* also follows the recent direction of Article III cases in elevating an individual party's consent over "structural" considerations. In resisting jurisdiction, Norfolk appealed to considerations of federalism, arguing that "the Due Process Clause separately prohibits one State from infringing on the sovereignty of another State through exorbitant claims of personal jurisdiction."[88] Although the plurality conceded that Norfolk was "half right" in raising these concerns, it rejected Norfolk's argument because personal jurisdiction was "a *personal* defense that may be waived or forfeited."[89] Justice Alito agreed, writing that "the Due Process Clause confers a right on person[s]," and so "[i]f a person voluntarily waives that right, that choice should be honored."[90]

* * *

In the two lines of cases explored above, the Justices have relied on "consent" to authorize otherwise unconstitutional adjudications. The next Part draws on the principles established by these cases to predict whether a court may hold, after *Jarkesy*, that registration with the SEC constitutes consent to that agency's administrative jurisdiction.

III. SEC Registration as Consent to Administrative Adjudication

Jarkesy's unregistered status made his case an especially attractive vehicle to test the outer boundaries of Article III (and the Seventh Amendment) in the context of SEC enforcement. If the government can deny this guy his constitutional rights, what's to stop it from denying yours or mine?[91]

87 *But see Mallory*, 143 S. Ct. at 2064 (Barrett, J., dissenting) ("[N]othing about that registration is 'voluntary.'").

88 *Id.* at 2043 (Gorsuch, J., plurality opinion).

89 *Id.*

90 *Id.* at 2051 (Alito, J., concurring in part and concurring in the judgment) (first alteration in original). Justice Alito wrote separately to suggest that the Dormany Commerce Clause may present a structural restriction. *Id.* at 2051–54. As federalism is not directly implicated by *Jarkesy*, I leave this question to the side here.

91 *Cf.* Brief of the Cato Institute as Amicus Curiae in Support of Respondents, SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (No. 22-859) ("[Dodd-Frank] purported to empower the SEC to impose harsh quasi-criminal sanctions against *any private citizen* through its own administrative adjudications with only limited, after-the-fact review by a federal court of appeals." (emphasis added)).

But Jarkesy's unregistered status means his case did not resolve the constitutional status of registration—specifically, whether it constitutes *consent* to administrative adjudication in that forum.

This Part suggests it might. Section A provides a brief overview of SEC registration. Section B applies the principles derived above from the Court's consent jurisprudence to the question.

A. *SEC Registration*

"Registration" is the SEC's licensing system for the securities industry. Across a host of domains, the securities laws require individuals and firms to "register" with the Commission before they conduct certain securities-related business.[92] SEC registration involves a similar bargain as the regimes addressed in *Mallory* and *Thomas*: in exchange for the license to conduct business, registered parties (registrants) take on a host of obligations, including periodic disclosures, exposure to government inspections and examinations, substantive compliance requirements, heightened liability exposure, and restrictions on conduct.

Also like those other cases, the SEC's statutes expressly provide for a specific form of adjudication—namely, SEC administrative proceedings. However, unlike those cases, the operative statutes here provide for administrative adjudication *across the board*, not as a condition of registration.

For instance, before a company may offer or sell its shares to the public (aka conduct an "IPO" or initial public offering), it must first file a "registration statement" with the SEC.[93] By "registering" its securities, the firm takes on a host of new regulatory obligations, including the obligation to produce extensive public disclosures at the end of every quarter and year;[94] detailed rules regarding corporate voting,[95]

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92 *E.g.*, 15 U.S.C. § 77e (2018) (registration of public securities offerings); *id.* § 78f (registration of national securities exchanges); *id.* § 78k-1(b) (amended 2022) (registration of securities information processors); *id.* § 78*l*(b) (registration of securities listed on national exchanges); *id.* § 78*l*(g) (registration of securities of certain issuers); *id.* § 78o(a)(1) (registration of brokers and dealers); *id.* § 78o-3 (registration of national securities associations); *id.* § 78o-4(a) (registration of municipal advisors) (amended 2022); *id.* § 78o-5(a) (registration of government securities brokers and dealers); *id.* § 78o-7 (amended 2022) (registration of nationally recognized statistical rating organizations); *id.* § 78o-10(a)(1) (registration of securities-based swap dealers); *id.* § 78q-1(b) (amended 2022) (registration of clearing agencies); *id.* § 78q-1(c) (amended 2022) (registration of transfer agents); *id.* § 80a-8 (amended 2022) (registration of investment companies); *id.* § 80b-3 (registration of investment advisers).

93 *Id.* § 77e(c).

94 *Id.* § 78m (amended 2022).

95 *Id.* § 78n-1.

tender offers,[96] internal controls,[97] stock ownership and trading by insiders,[98] board composition,[99] and accounting practices;[100] and liability exposure from a host of public and private causes of action available only against registrants.[101]

As the company takes on these heightened regulatory responsibilities, it is on notice that the Commission possesses statutory authority to impose civil monetary penalties via administrative proceedings against "any person" who violates any of its statutes or regulations,[102] including various prohibitions on fraudulent conduct.[103]

The same structure applies in the context of investment advisers like the hedge fund Jarkesy ran. All investment advisers are required to register with the Commission unless they fit into one of the exemptions laid out in the statute.[104] At the time of his alleged misconduct, Jarkesy's hedge fund was lawfully unregistered because it fit into the SEC's "private adviser exemption"—available for advisers who managed fewer than fifteen distinct funds.[105] That exemption was subsequently eliminated.[106] As in the context of IPO companies, an adviser who registers acquires a license to operate its business in exchange for taking on a host of regulatory burdens, such as extensive periodic disclosure obligations[107]; restrictions on incentive compensation arrangements[108]; heightened obligations to safeguard client assets[109]; and more.

Again, as the adviser takes on these heightened regulatory responsibilities that come with registration, it is on notice that the Commission possesses statutory authority to impose civil monetary penalties via administrative proceedings against "any person" who violates any of its statutes or regulations,[110] including various prohibitions on fraudulent conduct.[111]

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96 *Id.* § 78n(e).
97 *Id.* § 78m(b).
98 *Id.* § 78p.
99 *Id.* § 80a-16.
100 *Id.* § 78j-1.
101 *Id.* §§ 77h(d)–(e), 77k, 77*l*(a).
102 *Id.* §§ 77h-1(a), 77h-1(g), 78u-2(a).
103 *E.g.*, *id.* § 78j.
104 *Id.* § 80b-3(a)–(b).
105 *See* Goldstein v. SEC, 451 F.3d 873, 876 (D.C. Cir. 2006); Jarkesy v. SEC, 34 F.4th 446, 450 (2022) (noting that Jarkesy established two funds).
106 *See* 15 U.S.C. § 80b-3(b).
107 *See id.* § 80b-4 (amended 2022).
108 *See id.* § 80b-5(a).
109 *See id.* § 80b-18b.
110 *See id.* § 80b-3(i)(1)(A).
111 *See, e.g.*, *id.* §§ 80b-6, 80b-7.

These are just two of many examples of how registration operates in the securities regulation space.

B. SEC Registration as Consent

Viewed in light of the precedents described above, I believe there is a reasonable argument that registration does constitute consent to SEC administrative adjudication. Even if the current regulatory framework does *not* already give rise to consent, the SEC could easily adopt new interpretive guidance and/or amend the forms[112] registrants use to register (and periodically maintain their registration) to indicate explicitly that registering (or maintaining registration) constitutes consent to administrative adjudication for the registrant and associated parties.[113]

1. Implied

SEC registrants do not expressly consent to non–Article III adjudication. Nothing in the registration filings themselves indicates that registrants are waiving any right to Article III adjudication.[114]

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112 *See, e.g.*, SEC. & EXCH. COMM'N, FORM BD (Jan. 2008) (registration form for broker-dealers); SEC. & EXCH. COMM'N, FORM S-1 (July 2024) (registration form for initial public securities offerings); SEC. & EXCH. COMM'N, FORM N-1A (Dec. 2024) (registration form for investment companies); SEC. & EXCH. COMM'N, FORM ADV (Aug. 2022) (registration form for investment advisers); SEC. & EXCH. COMM'N, FORM 1 (Feb. 1999) (registration form for national securities exchanges); SEC. & EXCH. COMM'N, FORM 10 (Feb. 2021) (registration form for securities under section 12(b) or section 12(g) of the Exchange Act); SEC. & EXCH. COMM'N, FORM 18 (Jan. 2007) (registration form for securities of foreign governments); SEC. & EXCH. COMM'N, FORM CA-1 (Dec. 2024) (registration form for clearing agencies); SEC. & EXCH. COMM'N, FORM F-1 (July 2024) (registration form for foreign private issuers); SEC. & EXCH. COMM'N, FORM MA (Apr. 2014) (registration form for municipal advisors); SEC. & EXCH. COMM'N, FORM SBSE (Sept. 2019) (registration form for securities-based swap dealers); SEC. & EXCH. COMM'N, FORM TA-1 (Dec. 2006) (registration form for transfer agents); SEC. & EXCH. COMM'N, FORM NRSRO (Apr. 2015) (registration form for nationally recognized statistical rating organizations).

113 The SEC has administrative authority to do this. First, Congress authorized the SEC to exercise administrative jurisdiction over *all* parties, which entails an authorization for the SEC to exercise this jurisdiction over at least registered parties. *See* 15 U.S.C. § 77h-1(a), (g)(1); § 78u-2(a)(1); § 80b-3(i)(1)(A); § 80a-9(d)(1)(A) (2018). Second, Congress authorized the SEC to administer the various registration systems detailed above, which includes the authorization to create and occasionally revise the initial registration forms and periodic filing forms. *See supra* Section III.A. Third, Congress authorized the SEC to adopt rules and regulations necessary to effectuate the provisions of the securities laws. 15 U.S.C. § 77s(a) (2018) (amended 2022); *id.* § 78w(a); *id.* § 80a-37(a); *id.* § 80b-11(a).

114 *See supra* note 112 (collecting forms).

But under the Court's consent jurisprudence, express consent is not required.[115] For instance, although Norfolk's registration form did not indicate anything about personal jurisdiction in Pennsylvania courts, the *Mallory* Court had no problem construing Norfolk's *action* of registration as impliedly consenting to such jurisdiction in that context.[116] The same may be true for SEC registration.

And if the SEC amends the forms registrants use to register (and periodically maintain their registration) to indicate explicitly that registering (or maintaining registration) constitutes consent to administrative adjudication for the registrant and associated parties, consent would then be *express*, not merely implied.

2. Knowing

The Court's consent precedent demonstrates that a party's constructive knowledge of the applicable law is sufficient to satisfy the "knowing" requirement, at least where the underlying law indicates that consent is a consequence of registration.[117]

Here, however, the underlying law does *not* make consent to the SEC's administrative jurisdiction a condition of registration—at least not on its face. Instead, the operative provisions purport to make administrative jurisdiction attach to *all* parties, regardless of registration status.

But statutes have to be read in their full context, including relevant judicial precedents.[118] After *Jarkesy*, a prospective SEC registrant will understand that the statutory provisions authorizing administrative adjudications against all parties are *inoperative* for unregistered persons (like Jarkesy), but not necessarily for registered ones. Such a prospective registrant (or a registrant contemplating whether to stay registered) will therefore reasonably understand that the decision to register (or stay registered) *may well* constitute consent to otherwise unconstitutional administrative adjudication.

The SEC could also adopt new interpretive guidance explicitly stating that its interpretation of the relevant statutory provisions in the

115 *See, e.g.*, Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 683 (2015) ("Nothing in the Constitution requires that consent to adjudication by a [non–Article III forum] be express."); Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2038 n.5 (2023) (holding that there is no "'magic words' requirement" for consent to personal jurisdiction).

116 *Mallory*, 143 S. Ct. at 2037.

117 *See* CFTC v. Schor, 478 U.S. 833, 850 (1986); *Mallory*, 143 S. Ct. at 2057 (Barrett, J., dissenting).

118 *See* Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting *any precedents* or authorities that inform the analysis." (emphasis added)).

wake of *Jarkesy* is that the act of registration (or maintaining registration) constitutes consent to administrative adjudication.

Or, if the SEC amends the forms registrants use to register (and periodically maintain their registration) to indicate explicitly that registering (or maintaining registration) constitutes consent to administrative adjudication for the registrant and associated parties, consent would then be based on *actual* knowledge, not merely *constructive* knowledge.

3. Voluntary

For many, registration with the SEC is not a meaningful choice because it is unlawful to operate certain securities businesses without doing so.[119] Even in lines of business where it is possible to operate without registration, transitioning from registered to nonregistered (e.g., "going private") can be too complex and costly to be a realistic option.

But, again, the lack of any meaningful choice surrounding registration is not necessarily an obstacle to the constitutional validity of the consent in this context. The Court's consent precedents reviewed above seem to suggest that this type of coerced "choice" is sufficient "voluntariness."[120]

4. "Structural" Constraints

Finally, even accepting that registration does constitute consent to SEC's administrative jurisdiction, one might wonder whether such consent is nevertheless insufficient to legitimate this exercise of judicial power by the executive branch.

Once again, however, these "structural" objections have been raised and summarily rejected in previous consent cases. Where parties consent, that's the end of it.[121]

* * *

There is a reasonable argument that parties who register with the SEC thereby consent to its administrative jurisdiction. Even if the current registration system falls short of this result, the SEC could easily achieve it by amending the forms registrants use to register (and

119 *See* Choi & Pritchard, *supra* note 16, at 6 (noting that the historical practice of subjecting broker-dealers to SEC administrative proceedings was based on the fiction that these actors had consented to administrative jurisdiction by registering and emphasizing that such "'choice' was illusory since Congress made it illegal to act as a broker-dealer without registering").

120 *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589 (1985); *Mallory*, 143 S. Ct. at 2046 (Jackson, J., concurring).

121 *See supra* subsection II.A.4.

periodically maintain their registration) to indicate explicitly that registering (or maintaining registration) constitutes consent to administrative adjudication for the registrant and associated parties.

The next Part considers the impact this constitutional consent argument might have on the SEC's enforcement docket.

IV. REASSESSING *JARKESY*'S IMPACT ON SEC ENFORCEMENT

If a subsequent court decides that parties who register with the SEC effectively *waive* their right to object to SEC administrative jurisdiction, what impact would this narrowed version of *Jarkesy* have on SEC enforcement?

I screened all 1,481 enforcement actions filed by the SEC in fiscal years 2021 and 2023[122] for cases that meet all five of the following criteria:

1. Administrative Actions. The SEC brings enforcement actions in federal courts and in its own administrative forum. Because the *Jarkesy* decision affects only administrative actions, I screened out any federal court cases. (I assumed *Jarkesy* would have no impact on cases the SEC was *already* bringing in federal court.)

2. Original actions. Some of the administrative actions the SEC brings are "follow-on" actions—the SEC is seeking to bar or suspend individuals from certain functions in the securities markets based on criminal convictions, civil injunctions, or other orders.[123] *Jarkesy* seems unlikely to affect those cases, so I screened them out of the analysis here. I also followed the SEC's own practice and left out "delinquent filing" cases here.

3. Fraud-related violations. Only some of the claims the SEC brings involve allegations of fraud or fraud-related claims.[124] I assumed for this analysis that the constitutional right recognized by *Jarkesy* will attach only to SEC claims that are fraud-related,[125] and screened out all

122 The second year reflects the most recent data available. The first year comes before the Fifth Circuit *Jarkesy* decision, and so avoids any possible issues arising from the SEC changing its behavior in response to that decision. Both years are long enough after Dodd-Frank to have fully internalized the changes of that law. The first year is also helpfully split across two different presidential/SEC administrations.

123 *See* Press Release, Sec. & Exch. Comm'n, SEC Announces Enforcement Results for Fiscal Year 2023 (Nov. 14, 2023), https://www.sec.gov/newsroom/press-releases/2023-234 [https://perma.cc/7KYG-R4Y5].

124 *See* Transcript of Oral Argument, *supra* note 16, at 106 (statement of S. Michael McColloch, counsel for respondents) ("95 percent of what's in the securities acts are not traditional common law claims.").

125 This is a limitation of the analysis presented, but an unavoidable one. By its terms, the *Jarkesy* holding extends beyond fraud to any other administrative claims for monetary penalties with a sufficiently strong common law analogue, but it remains to be seen which, if any, other SEC claims will meet this test.

non-fraud-related cases here. I took a capacious view of which actions are "fraud-related," including both classic fraud (materially misleading misrepresentations and omissions) and other cases where the SEC relied on an antifraud statute or rule.[126]

4. *Civil penalties.* The SEC seeks a variety of remedies in administrative cases.[127] Because the constitutional right recognized by *Jarkesy* attaches only to civil monetary penalties, I screened out cases that do not implicate these penalties. In the small number of cases that were filed without a settlement, I counted the case as a "penalty" case if the Order Instituting Proceedings mentions the possibility of imposing a penalty, regardless of whether a penalty was ever subsequently imposed.

5. *Unregistered respondents.* As argued in the prior Part, it is possible that respondents who are registered with the SEC (or associated with someone who is registered) either have already consented to or could easily be made to consent to the SEC's administrative jurisdiction and therefore have waived any constitutional right to avoid that jurisdiction they might otherwise have under *Jarkesy*. To focus on cases that might be affected by this narrower reading of *Jarkesy*, I screened for cases involving respondents who are either themselves registered or associated with a registered entity. I focused exclusively on SEC registration: if a party is registered with, for instance, the Public Company Accounting Oversight Board, Financial Crimes Enforcement Network, the Commodity Futures Trading Commission, state regulators, and/or foreign regulators, but *not* the SEC, they are counted as "unregistered" for purposes of this analysis. In cases with multiple respondents, I counted the case as an "unregistered" case if there was at least one respondent who is neither registered nor associated with any registered entity.

The results are presented in Table 1.

Table 1: Estimating *Jarkesy*'s Impact

	FY 2021	FY 2023
Original enforcement actions[128]	434	501

126 *See* Transcript of Oral Argument, *supra* note 16, at 106–07 ("Justice Barrett: So insider trading, can that go to the administrative agency, or does that have to go— Mr. McColloch: Insider trading is—is prosecuted under the traditional fraud claims. Again, the fraud sections in 10b-5 are . . . drawn largely from what was . . . common law fraud . . . .").

Time will tell if there are other SEC claims that overlap enough with common law era actions to also trigger Article III and Seventh Amendment rights.

127 *See generally* James Fallows Tierney, *Reconsidering Securities Industry Bars*, 29 STAN. J.L. BUS. & FIN. 134 (2024).

128 This includes both federal court and administrative actions but excludes follow-on actions and delinquent filings. *See supra* text accompanying notes 122–24. The *total* number

Standard version of *Jarkesy*'s impact (administrative + fraud + penalties)	109 (25%)	88 (18%)
Narrow version of *Jarkesy*'s impact (administrative + fraud + penalties + unregistered)	21 (5%)	18 (4%)

The bottom line is that for both FY 2021 and FY 2023, only a very small proportion of SEC enforcement would have been affected by the narrower reading of *Jarkesy* offered above. Out of the 434 original actions SEC filed in FY 2021, *only twenty-one* (five percent) were administrative actions against unregistered respondents for fraud-related conduct seeking monetary penalties.[129] Similarly, out of the 501 original actions the SEC filed in FY 2023, only eighteen (four percent) were administrative actions based on fraud-related misconduct seeking monetary penalties against unregistered respondents.[130]

Most of the cases (twenty-one out of thirty-nine) that would still have been impacted by *Jarkesy* even under my narrowed reading involve unregistered securities offerings.[131] The remainder comprises

of actions is 784 (FY 2023) and 697 (FY 2021). The number of original *administrative* enforcement actions is 270 (FY 2023) and 208 (FY 2021).

129 This includes two cases where the SEC's order did not provide enough information to determine whether or not the person was associated with a registered entity. *See* Alexander, Exchange Act Release No. 92474, 2021 WL 3128185 (July 23, 2021); Kha, Exchange Act Release No. 92475, 2021 WL 3128186 (July 23, 2021).

130 As others have recognized, the nature of the "impact" that *Jarkesy* would have even on these cases is often overstated. Because the overwhelming majority of SEC cases are settled before they are filed, establishing a constitutional right to federal court would lend some additional bargaining power to the respondents in these cases, but would not necessarily cause these actions to be actually litigated in federal court. *Cf.* Adam S. Aderton, Michael J. Gottlieb, A. Kristina Littman, Michael S. Schachter, Mark T. Stancil, Robert B. Stebbins & William J. Stellmach, *The* Jarkesy *Decision and the Future of Administrative Proceedings*, WILLKIE FARR & GALLAGHER LLP (July 1, 2024), https://complianceconcourse.willkie.com/articles/the-jarkesy-decision-and-the-future-of-administrative-proceedings/ [https://perma.cc/3EFE-8JKC].

131 The eleven FY 2021 cases are Wireline, Inc., Securities Act Release No. 10920, 2021 WL 146462 (Jan. 15, 2021); Ettro Cap. Mgmt. Corp., Securities Act Release No. 10932, Exchange Act Release No. 91325, Investment Advisers Act Release No. 5697, Investment Company Act Release No. 34222, 2021 WL 965043 (Mar. 15, 2021); Drever, Securities Act Release No. 10941, 2021 WL 1812072 (May 5, 2021); Loci, Inc., Securities Act Release No. 10950, Exchange Act Release No. 92215, 2021 WL 2554441 (June 22, 2021); Gateway One Lending & Fin., LLC, Securities Act Release No. 10951, 2021 WL 2635945 (June 24, 2021); Davner, Securities Act Release No. 10952, Exchange Act Release No. 92286, 2021 WL 2665760 (June 29, 2021); Blockchain Credit Partners, Securities Act Release No. 10961, Exchange Act Release No. 92588, 2021 WL 3470599 (Aug. 6, 2021); Egan, Securities Act Release No. 10971, Exchange Act Release No. 92805, Investment Advisers Act Release No. 5838, Investment Company Act Release No. 34368, 2021 WL 3860240 (Aug. 30, 2021);

cases involving insider trading by individuals not affiliated with any registered entity (seven);[132] fraud by a private company in the course of a an acquisition (one)[133]; fraud by unregistered investment advisers (five)[134] (three of whom were state-registered[135]); fraudulent unregistered broker-dealer activities (one);[136] market manipulation by an

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Arbuckle, Securities Act Release No. 10969, Exchange Act Release No. 92803, Investment Advisers Act Release No. 5835, Investment Company Act Release No. 34367, 2021 WL 3860236 (Aug. 30, 2021); Divel, Securities Act Release No. 10974, 2021 WL 4031172 (Sept. 2, 2021); and Resolute Cap. Partners Ltd, LLC, Securities Act Release No. 10987, Exchange Act Release No. 93124, Investment Advisers Act Release No. 5872, Investment Company Act Release No. 34382, 2021 WL 4354679 (Sept. 24, 2021).

The ten FY 2023 cases are Pierce, Securities Act Release No. 11157, 2023 WL 2069917 (Feb. 17, 2023); Up, Global SEZC, Securities Act Release No. 11179, Exchange Act Release No. 97401, 2023 WL 3151902 (Apr. 28, 2023); White, Securities Act Release No. 11219, Exchange Act Release No. 98065, Accounting and Auditing Enforcement Act Release No. 4435, 2023 WL 5015173 (Aug. 7, 2023); Jumani, Securities Act Release No. 11195, Exchange Act Release No. 97543, 2023 WL 3611828 (May 22, 2023); Legacy Hosp. II, LLC, Securities Act Release No. 11227, 2023 WL 5530029 (Aug. 28, 2023); Prime Grp. Holdings, LLC, Securities Act Release No. 11228, 2023 SEC LEXIS 2257 (Sept. 5, 2023); Orvidas, Securities Act Release No. 11231, Exchange Act Release No. 98323, 2023 WL 5830483 (Sept. 8, 2023); YieldStreet Inc., Securities Act Release No. 11230, Investment Advisers Act Release No. 6414, 2023 WL 5936678 (Sept. 12, 2023); Hightimes Holding Corp., Securities Act Release No. 11243, Exchange Act Release No. 98574, 2023 WL 6307214 (Sept. 27, 2023); and Cloudastructure, Inc., Securities Act Release No. 11244, Exchange Act Release No. 98575, 2023 WL 6307216 (Sept. 27, 2023).

132 The four FY 2021 cases are Gad, Exchange Act Release No. 92305, 2021 WL 2725256 (June 30, 2021); Guido, Exchange Act Release No. 92306, 2021 WL 2725463 (June 30, 2021); *Alexander*, 2021 WL 3128185; and *Kha*, 2021 WL 3128186.

The three FY 2023 cases are Mueller, Exchange Act Release No. 96243, 2022 WL 16710000 (Nov. 4, 2022); Herschaft, Exchange Act Release No. 96776, 2023 WL 1255987 (Jan. 30, 2023); and Dobberfuhl, Exchange Act Release No. 97499, 2023 WL 3451947 (May 12, 2023).

133 Momentus, Securities Ac Release No. 99688, Exchange Act Release No. 92391, 2021 WL 2953701 (July 13, 2021).

134 Sadek, Investment Advisers Act Release No. 5707, 2021 WL 1139295 (Mar. 24, 2021); Dobrovodsky, Securities Act Release No. 10970, Exchange Act Release No. 92804, Investment Advisers Act Release No. 5837, 2021 WL 3860238 (Aug. 30, 2021); GlennCap LLC, Securities Act Release No. 11234, Exchange Act Release No. 98392, Investment Advisers Act Release No. 6422, Investment Company Act Release No. 34997, 2023 WL 6036825 (Sept. 14, 2023); Reiner, Securities Act Release No. 11237, Exchange Act Release No. 98432, Investment Advisers Act Release No. 6425, Investment Company Act Release No. 34999, 2023 WL 6125302 (Sept. 19, 2023); Theorem Fund Servs., LLC, Securities Act Release No. 11218, Investment Advisers Act Release No. 6367, 2023 WL 5015104 (Aug. 7, 2023).

135 Sadek, 2021 WL 1139295, at *1; Dobrovodsky, 2021 WL 3860238, at *2; GlennCap LLC, 2023 WL 6036825, at *2.

136 Nat'l Tr. & Fiduciary Servs. Co., Securities Act Release No. 11146, Exchange Act Release No. 96668, Investment Company Act Release No. 6218, 2023 WL 246857 (Jan. 17, 2023).

unlicensed day trader (one);[137] and fraud by other market intermediaries (three).[138]

By contrast, if registration is *not* consent, the impact of *Jarkesy* will be much greater. Dropping the fifth criterion ("unregistered" respondents only) and expanding the pool to registered respondents would dramatically increase the total number of impacted cases to eighteen percent and twenty-five percent of the SEC's original enforcement docket for FY 2023 and FY 2021, respectively.[139]

In sum, the scope of *Jarkesy*'s impact on SEC enforcement may be very substantially altered by the legal argument, presented above, that registration constitutes consent.

CONCLUSION

Reading the commentary on the case, one might conclude that *Jarkesy* either restored fundamental individual rights and reined in an oppressive and unaccountable administrative state, or else represents the culmination of an antidemocratic assault on government by big business to eliminate the capacity to pursue any socially beneficial economic regulation.

But it might not end up being either one of those things. The force of *Jarkesy*'s blow may be substantially cushioned by another line of the Court's jurisprudence—elevating the role of "consent" in legitimating otherwise unconstitutional adjudications.

137 Xie, Securities Act Release No. 10989, Exchange Act Release No 93131, 2021 WL 4452967 (Sept. 27, 2021).

138 App Annie, Inc., Exchange Act Release No. 92975, 2021 WL 4202225 (Sept. 14, 2021) (analyst); Bloomberg Fin. L.P., Securities Act Release No. 11150, 2023 WL 369464 (Jan. 23, 2023); S&P Dow Jones Indices LLC, Securities Act Release No. 10943, 2021 WL 1966288 (May 17, 2021) (index provider). Index providers are not required to be registered with the SEC, but this may change. *See* Request for Comment on Certain Information Providers Acting as Investment Advisers, Investment Advisers Act Release No. 6050, Investment Company Act Release No. 34618, 87 Fed. Reg. 37254, 37257 (June 22, 2022) (seeking public comment on whether to change this).

139 Of the 209 original administrative enforcement actions filed in FY 2021, 119 were fraud-related, 196 sought or imposed a monetary penalty, and 42 targeted respondents who were neither registered nor associated with a registered entity. Of the 270 original administrative enforcement actions filed in FY 2023, 99 were fraud-related, 244 sought or imposed a monetary penalty, and 66 targeted respondents who were neither registered nor associated with a registered entity.