

# Justices' Separation-Of-Powers Revamp May Hit States Next

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*This article was originally published on [Law360](#) and is republished here with permission as it originally appeared on January 6, 2026.*

Trump v. Slaughter, **argued** before the [U.S. Supreme Court](#) in December, likely will put an end to the era of independent federal regulatory agencies.

Even if the court does not formally overrule the 90-year-old precedent allowing Congress to protect some agency heads from at-will removal, and even if one or two agencies maintain their independence, Slaughter is expected to be a blockbuster decision.

Slaughter will be only the latest in a series of major cases in which the Roberts court has reshaped the separation of powers and administrative law.

In the last three years alone, the court has **cast aside** the [Chevron](#) doctrine that previously governed judicial review of agencies' statutory interpretations,[1] **invited** district courts to enjoin ongoing agency proceedings when the respondent challenges the agency's structure or existence,[2] and **formally embraced** a new "major questions doctrine" that requires clear congressional authorization for agencies to take particularly consequential actions.[3]

Meanwhile, the court's interim docket points toward more significant changes to come — including new limits on the availability of judicial review under the Administrative Procedure Act.[4]

These pathbreaking cases are often described as part of a conservative project to rein in the federal administrative state that took shape during the Progressive and New Deal eras.

This characterization may not tell the whole story, but it is consistent with the fact that the court has reallocated government functions at the federal level, while largely ignoring their distribution in the states. That may soon change.

Although it had no immediate impact beyond the federal government, the high court's **2024 decision** in [U.S. Securities and Exchange Commission v. Jarkesy](#) laid the groundwork for the court to expand its separation-of-powers agenda to state and local government.[5]

And while Jarkesy's latent potential to disrupt state administrative law was little noticed at the time, Justice Neil Gorsuch recently charted the likely path forward in a statement concerning a denial of certiorari.

This article identifies steps that regulated parties and state and local governments alike can take now to anticipate Jarkesy's eventual application beyond the federal government.

## **SEC v. Jarkesy**

Jarkesy is one of the most significant Supreme Court decisions in generations concerning the allocation of adjudicative responsibility between federal agencies and the courts, and the decision reflects a significant break with precedent.

The line of cases leading up to Jarkesy draws both on Article III's vesting clause and on the Seventh Amendment's civil jury trial right to determine when Congress may permissibly assign claims to a federal agency for adjudication.

Together, these provisions have been construed to permit Congress to allocate to juryless, non-Article III tribunals adjudication of claims involving public rights rather than private rights.

But the dividing line between public and private rights has never been particularly stable. In its 1985 decision in *Thomas v. Union Carbide Agricultural Products Co.*, the court has described the public rights doctrine as an "area of frequently arcane distinctions and confusing precedents."<sup>[6]</sup>

One thing that had seemed clear enough until Jarkesy was that Congress could create new statutory obligations, impose civil penalties for their violation, and tap a federal agency to enforce the law in administrative proceedings where the fact-finding is done by an agency official.

This was so, a unanimous court had explained in 1977's *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, "even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned ... to a federal court of law instead of an administrative agency."<sup>[7]</sup>

*Atlas Roofing* acknowledged the public rights doctrine as a limit on the types of cases that Congress could allocate to administrative tribunals, but defined public rights broadly to include "cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."<sup>[8]</sup>

The workplace safety laws at issue in *Atlas Roofing* fit that description, and so would many other statutes allowing agency adjudication. In Jarkesy, the court considered whether the SEC could pursue civil penalties for securities fraud through administrative proceedings.

In a 6-3 opinion by the chief justice, the court's conservative justices concluded that the Seventh Amendment entitles targets of such SEC enforcement actions to a jury trial. The agency cannot force its targets to defend themselves before an administrative law judge or other agency official.

The court first addressed whether the SEC's enforcement action was legal in nature, and therefore implicated the Seventh Amendment. On this point, the court's analysis focused on the nature of the remedy sought — civil penalties — and the close relationship between securities fraud and common law fraud, rather than on the statutory nature of the SEC's cause of action.

Next, the court rejected the SEC's invocation of the public rights doctrine. Emphasizing that the doctrine is an exception to the default rule of Article III adjudication, the court found that the SEC's enforcement proceeding did not fall within any historically rooted category of public rights cases — e.g., revenue collection, customs enforcement, immigration, public lands, public benefits.

The court sharply distinguished, without expressly overruling, Atlas Roofing, while characterizing Atlas Roofing's broad formulation of the public rights doctrine as “a departure from our legal tradition.”[9]

Justice Gorsuch authored a concurring opinion, which Justice Clarence Thomas joined. The concurrence suggested that the court could just as easily have based its decision on Article III or the due process clause.

These constitutional provisions work together with the Seventh Amendment, Justice Gorsuch wrote, to guarantee that the SEC's targets can insist upon adjudication in a forum that includes a jury, an independent judge and traditional procedural safeguards.

Justice Sonia Sotomayor, dissenting for herself and Justices Elena Kagan and Ketanji Brown Jackson, criticized the majority for upending long-standing practice and precedent, including most notably Atlas Roofing.

Congress has relied on the court's precedents in enacting more than 200 statutes that collectively authorize dozens of federal agencies to assess civil penalties in administrative adjudications, the dissent noted, and had “no reason to anticipate the chaos [that the] majority would unleash after all these years.”[10]

Time will tell if Jarkey disrupts federal administrative adjudication as much as the dissent predicted.

The majority's opinion disclaimed any attempt to definitively explain the difference between public and private rights, and its decision to diverge from Atlas Roofing while declining to overrule it has led to uncertainty in the lower courts, including a [circuit split](#) that the government has petitioned the court to resolve by hearing *Federal Communications Commission v. AT&T Inc.*[11]

So far, lower courts generally have recognized that Jarkey's reach is not limited to actions seeking civil penalties for securities fraud. They have applied Jarkey to prohibit agencies' use of administrative proceedings to enforce consumer data privacy[12] and employment conditions,[13] and to seek back wages,[14] while further expansions of Jarkey continue to be litigated.

Regardless of Jarkey's eventual scope, federal agencies now must go to court in many cases that they previously pursued administratively. And in court, the fact-finding will be done by a jury, rather than by an administrative law judge or other agency personnel.

## Applying Jarkey to the States

Much of the early commentary on *Jarkesy* focused on the decision's disruption of administrative adjudication at the federal level, where its impact was immediate. Viewed this way, *Jarkesy* looks a lot like the court's other recent groundbreaking separation of powers and administrative law decisions.

Yet, unlike those other decisions, *Jarkesy* carries the potential to disrupt state administrative law. Until recently, that possibility has been often overlooked.

Key to understanding *Jarkesy*'s potential impact on the states is the legal hook on which the majority hung its decision. The Constitution's vesting clauses — which underlie many of the court's separation of powers decisions — apply exclusively to the federal government.[15]

That is likewise true for the Administrative Procedure Act, which drove the court's rejection of *Chevron* deference.[16] Supreme Court decisions applying these authorities do not bind the states, even if state courts may take cues from the Supreme Court in applying analogous provisions of state law.

The majority opinion in *Jarkesy* stands on different footing. Even though the concurring and dissenting opinions both suggested that the case might just as readily be understood as implicating Article III, the majority rested its decision on the Seventh Amendment alone. That framing opens the door to *Jarkesy*'s application to state and local government.

To be sure, the Supreme Court held more than a century ago that the Seventh Amendment's civil jury trial right is not enforceable against the states.[17] And for as long as that precedent holds, the Seventh Amendment has no more bearing on state administrative law than do the vesting clauses and the Administrative Procedure Act.

But there is reason to think that may change.

The precedent holding that the Seventh Amendment does not apply to the states long predates the era of selective incorporation of the Bill of Rights. Beginning in the 1960s, the Supreme Court has read the Fourteenth Amendment to make many rights applicable to the states.

That process has continued into the era of the Roberts court, which has incorporated the Second Amendment's right to bear arms, the Sixth Amendment's requirement of juror unanimity in criminal cases and the Eighth Amendment's excessive fines clause, overturning contrary precedent along the way.[18]

Today, the right to a civil jury trial is one of the few rights that remains unincorporated, and it is not hard to imagine the court incorporating the right in the near future. This term, however, the court passed up one opportunity to reconsider its incorporation.

The October [denial of certiorari](#) in *Thomas v. Humboldt County, California*, drew a statement from Justice Gorsuch, who wrote that *Thomas* was not the best vehicle for considering the issue, but that the court should confront the question soon.[19] Pointing to *Jarkesy*, he explained that nonincorporation of the Seventh Amendment creates “a two-tiered system of justice.”

He added, “When a federal agency accuses someone of fraud and seeks civil penalties, the Seventh Amendment guarantees that individual the right to have the case heard by a jury of his peers — not by other agency officials who work side by side with those bringing the charges.” Not so for the target of state and local enforcement actions.

That Justice Gorsuch would want to apply Jarkesy’s holding to state administrative enforcement is no surprise. After all, his concurrence in Jarkesy maintained that the due process clause — which already binds the states — provided an equally good doctrinal basis for deciding the case.

Whether or not a majority of the court ultimately backs incorporation of the Seventh Amendment — and with it, Jarkesy — parties to state and local regulatory proceedings continue to invoke their civil jury trial rights, and the number of possible vehicles for the court to take up the question continues to grow.

### **Anticipating Incorporation**

While the full implications of Jarkesy for state administrative adjudication unfold, regulated parties and regulators can act now to anticipate the decision’s eventual impacts.

Particularly after Justice Gorsuch’s statement in Thomas, targets of state administrative enforcement should evaluate whether to assert their jury trial rights either as a defense to the administrative proceeding, in the context of affirmative litigation to enjoin the administrative proceeding, or merely to preserve the argument for future litigation.

And they should consider invoking those rights under both the federal constitution and the relevant state constitution, which state courts may interpret to require at the state level what Jarkesy requires for the federal government.

Meanwhile, state legislators and regulators may seek to mitigate Jarkesy’s disruptive potential by ensuring that a jury trial is available — at least as an option — for claims that are legal in nature.

Making jury trials available under state law for statutory claims that are potentially within Jarkesy’s reach will reduce the risk that an entire statutory scheme later becomes unenforceable.

Congress may have had little reason to anticipate that Jarkesy would upend federal administrative adjudications, as Justice Sotomayor noted. But no one should be surprised if the Supreme Court takes its campaign to remake administrative law to the states. And there is time to prepare.

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[1] [Loper Bright Enters. v. Raimondo](#) , 603 U.S. 369 (2024).

[2] [Axon Enter. Inc. v. FTC](#) , 598 U.S. 175 (2023).

[3] [West Virginia v. EPA](#) , 597 U.S. 697 (2022).

[4] See, e.g., [Dep't of State v. AIDS Vaccine Advoc. Coal.](#) , No. 25A269, 2025 WL 2740571 (U.S. Sept. 26, 2025); [Nat'l Insts. of Health v. Am. Pub. Health Ass'n](#) , 145 S. Ct. 2658 (Aug. 21, 2025); [McMahon v. New York](#) , 145 S. Ct. 2643 (July 14, 2025).

[5] 603 U.S. 109 (2024).

[6] [Thomas v. Union Carbide Agric. Prods. Co.](#) , 473 U.S. 568, 583 (1985).

[7] 430 U.S. 442, 455 (1977).

[8] *Id.* at 450.

[9] *Jarkesy*, 603 U.S. at 138 n.4.

[10] *Id.* at 167-68 (Sotomayor, J., dissenting).

[11] Compare [AT&T Inc. v. FCC](#) , 149 F.4th 491, 503 (5th Cir. 2025), with [Verizon Comms. Inc. v. FCC](#) , 156 F.4th 86, 105-08 (2d Cir. 2025), and [Sprint Corp. v. FCC](#) , 151 F.4th 347, 359 n.2 (D.C. Cir. 2025).

[12] [AT&T Inc. v. FCC](#), 149 F.4th 491 (5th Cir. 2025).

[13] [Sun Valley Orchards LLC v. U.S. Dep't of Labor](#) , 148 F.4th 121 (3d Cir. 2025).

[14] *Id.*

[15] See, e.g., [Mayor of Philadelphia v. Educ. Equal. League](#) , 415 U.S. 605, 615 n.13 (1974); [Sweezy v. New Hampshire](#) , 354 U.S. 234, 255 (1957).

[16] See 5 U.S.C. § 551(1).

[17] [Minneapolis & St. Louis R.R. Co. v. Bombolis](#) , 241 U.S. 211 (1916).

[18] [Ramos v. Louisiana](#) , 590 U.S. 83 (2020); [Timbs v. Indiana](#) , 586 U.S. 146 (2019); [McDonald v. City of](#)

Chicago , 561 U.S. 742 (2010).

[19] No. 24-1180, 2025 WL 2906470 (U.S. Oct. 14, 2025).

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