

UNCONSTITUTIONAL CONDITIONS AND THE DOCTRINE OF PUBLIC RIGHTS

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The Supreme Court is in the throes of a public rights counterrevolution. The public rights doctrine is an “exception” to the requirements of Article III and the Seventh Amendment that allows certain matters to be adjudicated in administrative tribunals. The modern Court has begun to narrow the scope of the doctrine by looking to history and tradition. Yet despite the Court’s turn to history, its cases remain puzzling. The Court has struggled to explain why certain categories of what seem to be private rights—regulatory penalties in the immigration or trade context, for example—are within the scope of the public rights exception. There is an answer: the Supreme Court’s cases involve two doctrines, not one. The public rights doctrine applies only to genuinely public rights: public benefits disputes which have never required court adjudication. Many of the Court’s cases, however, involve the doctrine of unconstitutional conditions: they involve not public rights as such, but rather Congress’s ability to require forgoing a private right as a condition of enjoying a public right.

The unconstitutional conditions doctrine provides that Congress may require forgoing private rights as a condition of receiving public benefits if doing so is germane to the public benefit and the condition is not coercive, leaving the individual a genuine choice. The doctrine is disfavored and conditions must be rigorously examined. An unconstitutional conditions analysis, however, explains why Congress can often permit without judicial process the imposition of fines if the only consequence is loss of a public privilege, while it cannot forgo Seventh Amendment and Article III rights before imposing regulatory penalties more generally. It explains why Congress can subject banks and their officers to administrative cease-and-desist authority as a condition of receiving federal insurance funds, but cannot subject their officers to retrospective punishments. And it can even explain the Supreme Court’s foundational nineteenth century case about public rights. Untangling the public rights and unconstitutional conditions doctrines clarifies much that is confusing about the historic and modern cases, and can help guide the lower courts in the numerous cases now confronting them in which both public and private rights are at issue.

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INTRODUCTION

Consider three cases, recently decided or litigated in the circuit courts. The Federal Aviation Administration (FAA) approves the decision of an administrative law judge (ALJ) to impose a \$1,900 civil penalty on a paint supplier for a knowing violation of FAA's Hazardous Materials Regulations after the supplier failed properly to secure flammable paint that was shipped by air.¹ Relying on dueling precedents from the Supreme Court, the Third Circuit holds that the imposition of such a fine by an administrative tribunal is permissible under the "public rights" doctrine because the detailed regulations have no common law history, even though a civil money penalty is a prototypical common law remedy requiring a jury² and the case arises under

1. *Axalta Coating Sys. LLC v. FAA*, 144 F.4th 467, 471 (3d Cir. 2025).

2. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."); *SEC v. Jarkesy*,

the laws of the United States such that Article III of the Constitution would seem to apply.³

A farm operation in New Jersey hires dozens of laborers through the nonimmigrant visa program to do seasonal work.⁴ The program is jointly administered by the Department of Labor (DOL) and the Department of Homeland Security (DHS).⁵ DOL finds that the farm has breached numerous provisions in its contracts with the foreign laborers and violated several related department regulations regarding the program.⁶ The department imposes hundreds of thousands of dollars in civil penalties and orders back-pay to the seasonal workers.⁷ The Third Circuit concludes that such matters cannot be adjudicated in an administrative tribunal under the public rights doctrine because the breach of contract claims involve private rights. The case must instead be adjudicated in an Article III court, even though immigration is a public right.⁸

Wells Fargo is implicated in a scandal involving the opening of fake customer accounts to give the impression of more sales, which might improve the bank's stock.⁹ The bank settles with customers who may have been charged unnecessary account fees, but the Office of the Comptroller of the Currency (OCC) also goes after the bank.¹⁰ OCC uses its authority to regulate and punish "unsafe or unsound practices in conducting the business of [a] depository institution,"¹¹ authority enacted to help minimize risk to the federal deposit insurance program. OCC imposes a \$10 million civil money penalty against a group risk officer and prohibits her from ever again participating in the banking industry.¹² Does the case involve "public rights" because of the statute's

144 S. Ct. 2117, 2127 (2024) (holding that administrative enforcement actions that "replicate common law" claims implicate the Seventh Amendment); *Tull v. United States*, 481 U.S. 412, 416–17 (1987) (resolving a circuit split and holding that a jury trial is necessary when the action is "analogous to 'Suits at common law'").

3. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .").

4. *Sun Valley Orchards, LLC v. U.S. Dep't of Lab.*, 148 F.4th 121, 124 (3d Cir. 2025).

5. *Id.*

6. *Id.* at 125–26.

7. *Id.* at 126.

8. *Id.* at 128.

9. Final Brief of Petitioner Claudia Russ Anderson at 5, *Russ Anderson v. Off. of the Comptroller of the Currency*, No. 25-1079 (8th Cir. Sep. 10, 2025) [hereinafter Final Brief].

10. *Id.* at 6–7.

11. 12 U.S.C. § 1818(a)(2)(A).

12. Final Brief, *supra* note 9, at 7–8.

original connection to federal insurance funds, or “private rights” because the group risk officer’s liberty and property are at stake.¹³

What these cases have in common is they involve both private rights and public rights, raising the question whether they fall within the public rights “exception” to Article III and the Seventh Amendment or rather must be heard in Article III courts, with juries available in appropriate cases. Other recent cases in the circuit courts have raised similar questions with both types of rights present.¹⁴ The Supreme Court’s current doctrine has left lower courts grasping for answers in such cases implicating both types. The Court sometimes allows the administrative prosecution of civil penalties,¹⁵ and sometimes it does not.¹⁶ It sometimes allows administrative resolution of disputes between two private parties,¹⁷ and it sometimes does not.¹⁸ The Court has candidly observed that its cases in this field “do not admit of easy synthesis.”¹⁹

The Supreme Court’s most recent statement on the matter has created puzzles of its own. In *SEC v. Jarkesy*,²⁰ the Court addressed whether the Securities and Exchange Commission could prosecute in its own tribunals

13. See *id.* at 12. The present author served as counsel to Ms. Russ Anderson in her petition for review of the administrative orders. The OCC settled the case prior to a judicial resolution.

14. See, e.g., *AT&T, Inc. v. FCC*, 149 F.4th 491, 494 (5th Cir. 2025) (holding civil penalty against AT&T for breaches of privacy and violations of FCC regulations to be private rights that must be adjudicated in Article III courts). For references to several of the 38 district and appellate court decisions involving the *Jarkesy* decision, see Robert Iafolla, *Agencies Avoid Disaster After High Court’s In-House Judge Ruling*, BLOOMBERG L. (Nov. 19, 2025, at 05:19 ET), <https://news.bloomberglaw.com/daily-labor-report/agencies-avoid-disaster-after-high-courts-in-house-judge-ruling> [<https://perma.cc/FXS9-YTZJ>].

15. See, e.g., *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442, 447, 449–50 (1977); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 335 (1909); *Passavant v. United States*, 148 U.S. 214, 219 (1893).

16. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2127 (2024).

17. *CFTC v. Schor*, 478 U.S. 833, 844 (1986); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29 (1937); *Crowell v. Benson*, 285 U.S. 22, 45, 50–51 (1932). In *Crowell*, the Supreme Court described the right at issue as a “private” right but nevertheless permitted agency factfinding. *Crowell*, 285 U.S. at 50. The distinction between public rights under their most expansive conception after the New Deal, and private rights that may nevertheless be adjudicated in an administrative tribunal, is a fine one and perhaps not particularly observed by the Court. This Article shall refer to “private” and “public” rights strictly on the basis of the nature of the right at issue. As shall become clear, some of the Court’s “public rights” cases really involve private rights, although the Court describes them as public rights. These are cases to which the unconstitutional conditions doctrine applies.

18. *Stern v. Marshall*, 564 U.S. 462, 482, 484 (2011); *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 36 (1989); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982).

19. *Schor*, 478 U.S. at 847; *N. Pipeline*, 458 U.S. at 91 (Rehnquist, J., concurring).

20. 144 S. Ct. 2117 (2024).

violations of the securities laws and seek civil money penalties.²¹ The Supreme Court first held that the money penalties are prototypical common law remedies that implicate the Seventh Amendment.²² Depriving one of private property to the tune of hundreds of thousands or millions of dollars is clearly a matter of private right. The Court nevertheless proceeded to examine whether the public rights “exception” applied.²³ It concluded that because actions for securities fraud “trace[] their ancestry to the common law,”²⁴ the public rights doctrine was inapplicable. In contrast, the Court’s prior decision in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*²⁵ involved a detailed safety and health code for workplaces unknown to the common law and therefore an administratively imposed civil penalty was permissible.²⁶ The Court also observed that exceptions under the public rights doctrine, at least in one context, “flowed from centuries-old rules.”²⁷ Justice Gorsuch stated more generally that “public rights are a narrow class defined and limited by history” with “a serious and unbroken historical pedigree.”²⁸

The case, although it clarified the direction of the modern doctrine, remains somewhat perplexing. As Judge Stephanos Bibas recently articulated in the case involving spilled paint, what are courts to do with “new” statutory causes of action like those in *Atlas Roofing*, but to which no historical public rights exception applies?²⁹ Article III would seem to require hearing such cases in courts because they arise under the “Laws” of the United States.³⁰ And if there is no historical exception, then there is no carveout to the applicability of Article III. The *Jarkesy* decision seems to require prioritizing the inquiry into the ancestry of the cause of action, but doing so alone seems inconsistent with the text of Article III and the historical pedigree normally required of public rights.

Another puzzle: If the Seventh Amendment is implicated because a suit at common law is at issue—a private right is at stake—does that not resolve the whole matter? Why is an inquiry into the public rights exception necessary? How can a case be both about a private right, the adjudication of which would ordinarily require a jury, and also a public right, the adjudication of which does

21. *Id.* at 2127.

22. *Id.* at 2127–30.

23. *Id.* at 2131–39.

24. *Id.* at 2137.

25. 430 U.S. 442 (1977).

26. *Jarkesy*, 144 S. Ct. at 2136–37; *Atlas Roofing*, 430 U.S. at 447.

27. *Jarkesy*, 144 S. Ct. at 2133–34.

28. *Id.* at 2146–47 (Gorsuch, J., concurring).

29. See *Axalta Coating Sys. LLC v. FAA*, 144 F.4th 467, 471 (3d Cir. 2025).

30. U.S. CONST. art. III, § 2.

not require a court and therefore necessarily does not require a jury? The problem might be generalized by the following observation from Caleb Nelson:

The problem with this way of talking is that the distinction between public and private rights is a way of classifying legal interests, not entire cases. In *Atlas Roofing*, for instance, public rights were indeed at stake on one side—but because the government was imposing monetary sanctions, private property rights were at stake on the other side. A case that pits public rights against private rights is no more a “public rights case” than it is a “private rights case,” and the idea that it must be classified as one or the other is bound to make the traditional doctrine seem hopeless.³¹

There may be a solution that cuts the Gordian knot: the doctrine of unconstitutional conditions. This doctrine applies in a variety of contexts and generally provides that Congress may condition the receipt of a public benefit—a public right—on forgoing a private right, including constitutional rights.³² This statement may seem surprising because the Supreme Court has sometimes declared that the nub of the doctrine is that the government may *not* do precisely that.³³ Yet such statements are not faithful to the numerous cases allowing the government to condition benefits; the running thread, as shall be explained, is germaneness and coerciveness. Thus, for example, government employees lose certain First Amendment rights because neutrality among government workers is germane and closely connected to the purpose of public employment, which is a public benefit and therefore a public right.³⁴ In the 1970s, the Supreme Court upheld the conditioning of welfare benefits on the recipients’ forgoing Fourth Amendment rights, specifically on their agreeing to welfare searches of their homes.³⁵ And the state’s greater power to deny a building permit to preserve the public right of ocean access includes some degree of lesser power to grant the permit on the condition of granting public access without compensation under the Fifth Amendment.³⁶

To be sure, the doctrine is disfavored and any conditions must be strictly examined for the two relevant criteria.³⁷ And often the Supreme Court does

31. Caleb Nelson, *Vested Rights, “Franchises,” and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1437 (2021) [hereinafter Nelson, *Vested Rights*].

32. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

33. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 583 (1972) (similar).

34. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 78 (1947); *Broadrick v. Oklahoma*, 413 U.S. 601, 616–17 (1973); 5 U.S.C. §§ 7321–26.

35. *Wyman v. James*, 400 U.S. 309, 317–18 (1971).

36. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836–37 (1987). As will be discussed further, the Court held 5–4 that the easement condition was not constitutional, but a majority clearly thought some degree of intrusion without compensation would be justified.

37. See *id.*; *Wyman*, 400 U.S. at 317–18; *supra* note 33.

not use the term “unconstitutional conditions” when deciding such cases. But the permissibility of germane and non-coercive conditions on public benefits explains the basic structure of many of these cases, a structure applicable to many public rights cases in the administrative context as well. The three cases with which this analysis opened all involved both private rights (e.g., a financial penalty, a prohibition order, a contractual dispute) and public rights (air travel, federal insurance, immigration). The question becomes whether the government may condition the receipt of some public benefit or the enjoyment of a public right on the condition that the individual forgo certain constitutional rights: namely, the right to an Article III court and a Seventh Amendment jury.

Applying this framework has the potential to clarify much of the existing confusion. It has the potential to explain why, for example, the Supreme Court has upheld the contemporaneous imposition of fines in the immigration and customs context to induce efficient regulatory performance. The contemporaneous imposition of fines increases administrative efficiency, and the only consequence for failure to pay was the loss of the public privilege. Forgoing the Seventh Amendment and Article III rights in the event of the imposition of such fines was, therefore, germane to the program. Retrospective enforcement actions to assess whether wrongdoing has occurred, and which impose punishment irrespective of whether the public right continues to be granted or is denied, would necessarily not be germane and would go beyond the scope of the doctrine. The framework can also explain why banks and their officers may be subjected via administrative proceedings to cease-and-desist orders and perhaps officer removal provisions as a condition of receiving federal deposit insurance, while they cannot be subjected in such tribunals to retrospective punishments entirely independently of whether the public benefits continue or cease.³⁸

The unconstitutional conditions framework can also clarify other confusing aspects of doctrine. It can explain why an inquiry into both the Seventh Amendment and public rights is necessary: because even if the jury right applies, it could still be the case that Congress can condition the enjoyment of a public right on forgoing that private right. The framework might also explain the Supreme Court’s foundational public rights case from the nineteenth century—a case that has otherwise perplexed scholars.³⁹ And, perhaps most pressingly, the framework can resolve cases where both private and public rights are at issue and which the Supreme Court of the United States has agreed to hear.⁴⁰

38. See *infra* Part III.A.

39. See *infra* Part II.A.1.

40. *FCC v. AT&T, Inc.*, 146 S. Ct. 1418, 1431–32 (2026). The Supreme Court resolved the case on the ground that the statute contemplates that the private party does not have to pay

The remainder of the argument proceeds as follows. Part I briefly introduces the theory of both public rights and unconstitutional conditions.⁴¹ Part II moves from theory to “practice”: it reveals how the unconstitutional conditions doctrine explains many of the historic public rights cases and can also inform the analysis of more modern ones. In particular, this Part shows that the doctrine explains all the leading public rights cases up until 1938,⁴² and it explains why the *Atlas Roofing* decision from 1977 was a constitutional innovation.⁴³ It describes the Court’s recent counterrevolution, and how the Court has insufficiently appreciated the structure of the pre-1977 (or pre-1938) cases. Part III tentatively applies the doctrine to several cases recently decided or pending in the circuits. The analysis demonstrates that the unconstitutional conditions doctrine can resolve many of the doctrine’s puzzles and answer many open questions.

I. THEORY

A. *Public Rights*

The Constitution provides that the federal judicial power extends “to all Cases, in Law and Equity, arising under . . . the Laws of the United States.”⁴⁴ The Seventh Amendment provides that for suits at common law, “the right of trial by jury shall be preserved.”⁴⁵ And yet in a series of cases, the Supreme Court has approved administrative adjudications without federal courts and without juries even though the governing law is one “of the United States” and

the fine until after an enforcement action in District Court. The Court has since granted certiorari in the Third Circuit Department of Labor case mentioned above. *U.S. Dep’t of Lab. v. Sun Valley Orchards, LLC*, No. 25-966, 2026 WL 1127242, at *1 (U.S. Apr. 27, 2026).

41. See *infra* Part I. The present author has written about both before, but in a different context. On public rights, see generally Ilan Wurman, *Reconstructing Reconstruction-Era Rights*, 109 VA. L. REV. 885 (2023) [hereinafter Wurman, *Reconstruction-Era Rights*] (explaining relevance of public rights to claims under Article IV of the Constitution and the Fourteenth Amendment) and Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735 (2022) [hereinafter Wurman, *Nonexclusive Functions*] (deploying doctrine as example of “nonexclusive functions” that can be reached by exercises of multiple vested powers). On the doctrine of unconstitutional conditions, see generally Ilan Wurman, Note, *Drug Testing Welfare Recipients as a Constitutional Condition*, 65 STAN. L. REV. 1153 (2013) [hereinafter Wurman, *Drug Testing*] (deploying unconstitutional conditions to resolve several puzzles in Fourth Amendment doctrine).

42. See *infra* Part II.A, and particularly Part II.A.5 for the 1938 innovation.

43. See *infra* Part II.B.2.

44. U.S. CONST. art. III, § 2, cl. 1.

45. U.S. CONST. amend. VII.

even where, had the case been in court, a jury would have been required.⁴⁶ These cases constitute the “public rights” doctrine, which the Court has held to be an “exception” to Article III and the Seventh Amendment.⁴⁷

The Supreme Court introduced the distinction between public and private rights into the caselaw in 1856:

[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.⁴⁸

The Court identified a category of “private rights” cases, which are the kinds of suits that would have been brought in common law, equity, or admiralty courts, and a separate category of “public rights” cases that are amenable to judicial resolution but the resolution of which Congress may also assign elsewhere.

At the most basic level, private rights are natural rights belonging to the individual, which exist antecedent to civil society, and depend in no way on the government.⁴⁹ These are the rights to life, liberty, and property that the government cannot take away without due process of law.⁵⁰ The government cannot deprive someone of life or property, nor incarcerate anyone, without court proceedings.⁵¹ Any suit to deprive someone of such rights would arise

46. See *infra* Parts II.A & II.B.2.

47. For the Court’s most recent statement, see *SEC v. Jarkesy*, 144 S. Ct. 2117, 2138–39 (2024).

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

49. On the importance of such rights that exist independent of government and their relation to due process, see, for example, Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3, 16 (1983). On the source of these rights in the state of nature, see, for example, WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 117–41 (1765), particularly page 119, which explains that these rights “would belong to their persons merely in a state of nature, and which every man is [e]ntitled to enjoy whether out of society or in it.”

50. U.S. CONST. amend. V (“[N]or [shall any person] be deprived of life, liberty, or property, without due process of law.”).

51. See Nelson, *Vested Rights*, *supra* note 31, at 1434 (“In general, neither ‘legislative’ nor ‘executive’ power was capable of acting directly upon vested rights and legally divesting them (or authoritatively declaring that they had been divested in the past). Thus, only a court—a body with ‘judicial’ power—could validly adjudge someone guilty of a crime and sentence

under the laws of the United States and would be in their nature suits at common law, equity, or admiralty, requiring Article III adjudications with a jury right in appropriate cases.⁵²

The private rights category also includes disputes between two private parties involving their legal relations—as the Supreme Court has said, “the liability of one individual to another under the law as defined.”⁵³ A court is required to declare or adjust any relative liberty or property rights. Thus, for example, a court is required to declare that the property of one actually belongs to another under existing law, or that a contract has been breached and performance due.⁵⁴ The right to property, and the liberty to contract, are natural rights that preexist civil society.⁵⁵ Such cases arise either under the laws of the United States, or the federal judicial power extends to such cases by virtue of diversity jurisdiction. And appropriate cases would be suits at common law to which the Seventh Amendment jury right applies.⁵⁶

Public rights, in contrast, generally fall into two overlapping categories. The first includes rights that do not exist in the state of nature. These are rights—or privileges or benefits, to be more precise—that only exist by virtue of government grace or largesse. Public employment is one example. Public welfare benefits are another: there is no public treasury in the state of nature, and certainly no private right to access welfare benefits derived from that treasury.⁵⁷ In the antebellum period, welfare benefits were not considered

him to pay a fine, to serve a term in prison, or to be executed. Likewise, if someone claimed to be the owner of the type of legal interests that counted as vested rights to property, only a court could declare authoritatively (in a way that would have preclusive effects in later litigation) that the property actually belonged to someone else.” (footnote omitted).

52. See *id.*; see also U.S. CONST. art. III, § 2 cl. 1; *id.* amend. VII.

53. *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

54. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52–53, 87 (1982) (such cases must be heard in Article III courts); see also *Stern v. Marshall*, 564 U.S. 462, 485–88, 503 (2011) (similar).

55. See *N. Pipeline*, 458 U.S. at 69–72; see also, e.g., BLACKSTONE, *supra* note 49, at 117–41. The Court has recognized that such contract and property disputes between two private parties are matters of private right.

56. See, e.g., *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 41 (1989) (jury right applies to cases “legal” in nature, even if modified by statute).

57. See Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 565–86 (2007) [hereinafter Nelson, *Adjudication*] (generally describing distinction and its importance to separation of powers); John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 160–79 (2019) (relying on Nelson and describing a similar system). Ann Woolhandler discussed the distinction and its applicability to retroactivity questions in Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015 (2006). Some

fundamental, private rights under Article IV, Section 2, which requires a state to confer those civil rights on citizens of other states that it confers on its own.⁵⁸ Rather, they were public privileges that could be limited to the local citizens paying into the treasury for their support.⁵⁹

This reasoning applies to other resources held by the government, such as public lands. Although there is a private right to land ownership, there is no private right to land the government owns for the benefit of all in common. The distribution of such land is in its nature like a welfare benefit. Once such lands or benefits are distributed, however, those benefits operate just as do private rights and thus vest in the individual receiving them.⁶⁰ Another example is patent rights. There is no right in the state of nature to exclude others from the use of knowledge or discoveries.⁶¹

A second category of public rights is common and limited natural resources and public highways.⁶² Access to these rights does, in a sense, exist in the state of nature. One can freely travel on roads and rivers in the state of nature. One can freely fish in the common lakes. One can—if one has the technology—freely access the airwaves or airspace. But unlike the general right to acquire property or to engage in locomotion or to enter into contracts, such rights belong to all in common in a narrower geographic sense. All equally have a right to access the common highways and rivers. All equally have a right to access the common fisheries. All equally have a right to access the airwaves. In their nature these rights are limited because not all can access them at the same time or without depletion. That is what

of the above discussion, and other parts of this Article, were published in the form of a brief amicus curiae prior to final publication. See Brief of Amicus Curiae Professor Ilan Wurman in Support of Neither Party, *FCC v. AT&T, Inc.*, No. 25-406 (U.S. Feb. 16, 2026).

58. U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); *Lemmon v. People*, 20 N.Y. 562, 608 (1860) (“[T]he meaning is, that in a given State, every citizen of every other State shall have the same privileges and immunities—that is, the same rights—which the citizens of that State possess.”). There is some confusing terminology at play: the “privileges and immunities” or “privileges or immunities” of citizenship, U.S. CONST. amend. XIV, § 1, are not “public privileges” or “public rights” but rather fundamental civil rights—that is, private rights in the sense of the private-public distinction. See Wurman, *Reconstruction-Era Rights*, *supra* note 41, at 889.

59. Wurman, *Reconstruction-Era Rights*, *supra* note 41, at 924–25, 928.

60. Thus, for example, the validity of a land grant can be challenged in a private dispute between two claimants to the same land. See, e.g., *Burfenning v. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U.S. 321 (1896).

61. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365 (2018).

62. Wurman, *Reconstruction-Era Rights*, *supra* note 41, at 921.

makes them “public rights” subject at all times to control by the whole.⁶³ In the antebellum period, such common resources could be reserved to a state’s own citizens under Article IV.⁶⁴

Professor Nelson, one of the nation’s foremost authorities on public rights, has described the distinction as follows.⁶⁵ He explains that in the antebellum period, “core private rights” were “legal entitlements that belonged to discrete individuals (rather than the public as a whole) and that were considered ‘rights’” and not “mere ‘privileges.’”⁶⁶ In contrast, public rights belonged to the people as a whole, and typically included “proprietary rights held by government on behalf of the people, such as the title to public lands or the ownership of funds in the public treasury” and collective rights such as the “rights to sail on public waters or to use public roads.”⁶⁷ John Harrison describes these rights as “ownership-type interests of the government or the public at large which were administered by the government.”⁶⁸ Professor Nelson further describes a category of “privileges” or “franchises” which “could operate just like private rights,”⁶⁹ but which “originated with the state rather than the individual.”⁷⁰ As noted, certain public rights and privileges could become core private rights, as when a grant of public land vested in a private individual.⁷¹

The public rights doctrine, properly so called, is not truly an exception to Article III. If the public rights doctrine were limited to public benefits, natural resources, and rights of way shared in common—traditional public rights—sovereign immunity would bar any lawsuit over access.⁷² If a plaintiff claimed that a public benefit or access to a public right had been wrongfully denied, there would be no mechanism to sue. Without the sovereign’s consent to suit, there would be no defendant and therefore no “Case” or “Controversy” for a court to resolve.⁷³ Without a “Case” or a “Suit,” neither Article III nor the Seventh Amendment would apply.⁷⁴ The sovereign’s power

63. On this rationale for treating the airwaves as a public right, see Harrison, *supra* note 57, at 181–82.

64. Wurman, *Reconstruction-Era Rights*, *supra* note 41, at 922.

65. This paragraph is also found in Wurman, *Nonexclusive Functions*, *supra* note 41, at 761–62.

66. Nelson, *Adjudication*, *supra* note 57, at 565.

67. *Id.* at 566.

68. Harrison, *supra* note 57, at 160.

69. Nelson, *Adjudication*, *supra* note 57, at 567, 578; Harrison, *supra* note 57, at 167.

70. Nelson, *Adjudication*, *supra* note 57, at 567–68; Woolhandler, *supra* note 57, at 1022.

71. Nelson, *Adjudication*, *supra* note 57, at 578.

72. *Id.* at 572.

73. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1587 (2002).

74. U.S. CONST. art. III, § 2 (the federal judicial power extends to certain “Cases” and “Controversies”); *id.* amend. VII (the civil jury trial right applies to “Suits at common law”).

to deny consent further implies the power to decide such matters by private bill or to delegate adjudication exclusively to the executive branch.

The Supreme Court relied on sovereign immunity in part to justify its foundational public rights case in the nineteenth century,⁷⁵ and at times it has used it to justify the doctrine in the modern era.⁷⁶ Another scholar has put the argument somewhat differently, although it gets at the same idea: “The reason that classic public rights cases could traditionally be adjudicated in the political branches is that they did not involve the deprivation of life, liberty, or property, and so they did not require judicial process.”⁷⁷ Matters that do not involve the life, liberty, or property of the subject are necessarily against the government, which suits sovereign immunity would bar without the government’s consent.

Other theories have been used to justify the public rights doctrine—but such justifications appear to be attempts to solve the puzzle that many of the Court’s cases involve *private* rights, too. In *Jarkesy*, Justice Gorsuch canvassed several of the theories.⁷⁸ One possibility is that “ancient practical considerations” justify these cases.⁷⁹ Others theorize about a “core” of judicial power.⁸⁰ Justices Gorsuch and Thomas, for their part, homed in on “a serious and unbroken historical pedigree.”⁸¹ There are other theories besides.⁸² As Part II will demonstrate, what actually seems to explain the cases is the

75. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283–84 (1856) (observing that “both the marshal and the government are exempt from suit, for anything done by the former in obedience to legal process, still, congress may provide by law, that both, or either, shall, in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity and abide by its determination,” and noting that resolution of public right “depends upon the will of congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful”).

76. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982) (observing that the doctrine permitting certain cases to be adjudicated in legislative courts “may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued”).

77. William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1547 (2020).

78. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2146 (2024) (Gorsuch, J., concurring).

79. *Id.*

80. *Id.*

81. *Id.* at 2147.

82. Baude, *supra* note 77, at 1546–47 (“[T]he cases have variously looked to whether the government was a party to the controversy, whether the matter ‘historically could have been determined exclusively’ by the political branches, and whether the rights at issue came from federal statutory law.”) (first citing *Crowell v. Benson*, 285 U.S. 22, 50 (1932); then citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67–68 (1982) (plurality opinion); and then citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593–94 (1985)).

traditional one—public privileges are by definition subject to sovereign immunity—with the doctrine of unconstitutional conditions in those cases involving both a private and a public right.⁸³

B. *Unconstitutional Conditions*

Kathleen Sullivan has provided what is still considered one of the definitive accounts of the unconstitutional conditions doctrine.⁸⁴ The doctrine arises when the government offers a benefit that it is “permitted but not compelled to provide”—such as direct subsidies,” other welfare benefits, or public employment, for example—“on condition that the recipient perform or forgo an activity over which he has autonomous choice and which ‘a preferred constitutional right normally protects from government interference.’”⁸⁵

The doctrine applies in a variety of contexts not at issue here; for example, the doctrine applies to the question of whether Congress can condition the receipt of federal funds on states’ forgoing regulatory autonomy. In *South Dakota v. Dole*,⁸⁶ the Supreme Court upheld Congress’s conditioning the receipt of a portion of federal highway funds on the states’ increasing their legal drinking age.⁸⁷ The theory is that the state has no right to the federal funding—it is a privilege the government can grant or deny at its pleasure—and so it can condition receipt of the privilege on the state’s forgoing some regulatory autonomy with which the federal government could not directly interfere.⁸⁸

The unconstitutional conditions doctrine has featured in many individual rights cases, of particular relevance here. One example is the question whether the government can condition public employment, which is a public privilege, on employees’ forgoing First Amendment rights to engage in partisan political activity.⁸⁹ Another is whether Congress can condition the receipt of welfare benefits on recipients’ forgoing Fourth Amendment rights, specifically on their agreeing to welfare searches of their homes.⁹⁰ A third is whether a state’s greater power to deny a building permit to preserve the public right of ocean access includes the lesser power to grant the permit on the condition of creating a public easement of sorts without compensation

83. See *infra* Part II.A.

84. See Sullivan, *supra* note 32; Baude, *supra* note 77, at 1579 n. 472.

85. This sentence is taken from Wurman, *Drug Testing*, *supra* note 41, at 1177 (quoting Sullivan, *supra* note 32, at 1421–27).

86. 483 U.S. 203 (1987).

87. *Id.* at 211–12.

88. *Id.* at 206–07.

89. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 100–01 (1947); *Broadrick v. Oklahoma*, 413 U.S. 601, 616–17 (1973); 5 U.S.C. §§ 7321–26.

90. *Wyman v. James*, 400 U.S. 309, 317–18 (1971).

under the Fifth Amendment.⁹¹ All of these problems have the same basic structure. The question is whether the government may condition the receipt of a public privilege or benefit to which there is no entitlement in the first place (federal highway funds, government employment, welfare benefits, obstructing public access to a common resource) on the recipient's forgoing what otherwise would be constitutionally protected autonomy (the right to regulate the drinking age, to engage in partisan political activities, to enjoy privacy in the home, to prevent public access to one's property).

A few characteristics of the doctrine are important. First, the Supreme Court does not often use the language of unconstitutional conditions, but the idea is present. With respect to public employment, for example, the Court has held that "as a condition to continued employment," the government may impose restrictions on commercial and speech activities for the "efficiency and integrity" of the public service.⁹² Justice Holmes famously put it the following way when he was on the Supreme Judicial Court of Massachusetts: a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."⁹³ In the home welfare search context, the Court has held that no search takes place within the meaning of the Fourth Amendment because "[i]f consent to the visitation is withheld, no visitation takes place" because the aid "never begins or merely ceases."⁹⁴ "The only consequence of [a] refusal is that the payment of benefits ceases," which "is no different than if she had exercised a similar negative choice initially and refrained from applying for [welfare] benefits."⁹⁵ In the property rights context, the Court has held that where "requiring uncompensated conveyance of [an] easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome."⁹⁶

Second, the most central question in an unconstitutional conditions problem is whether the condition is "germane" to the program.⁹⁷ In the federalism context, the Court has explained that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"⁹⁸ The Court described this condition as

91. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836–37 (1987).

92. *Ex parte Curtis*, 106 U.S. 371, 373–75 (1882).

93. *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

94. *Wyman*, 400 U.S. at 317–18.

95. *Id.* at 325. The Court again did not use the phrase "unconstitutional conditions" doctrine, but the doctrine seems clearly applicable. See *Wurman, Drug Testing*, *supra* note 41, at 1186.

96. *Nollan*, 483 U.S. at 834.

97. See *Sullivan*, *supra* note 32, at 1457.

98. *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

“germaneness.”⁹⁹ In the public employment and First Amendment cases, the Court focused on the importance of efficiency, integrity, and neutrality among government servants and has held that this is a legitimate and just “purpose” of legislation relating to such employment.¹⁰⁰ In the welfare search context, the Court has explained that the state has an “appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses.”¹⁰¹ Home visits are also central to the “service” and “rehabilitative” orientation of the program.¹⁰²

In *Nollan v. California Coastal Commission*,¹⁰³ Justice Scalia wrote an opinion for the Court that explained the elements of the doctrine and particularly the importance of germaneness.¹⁰⁴ The Court concluded that “a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.”¹⁰⁵ The question in the case was what conditions the commission could place on a building permit to ensure public beach access.¹⁰⁶ If a:

condition . . . would have protected the public’s ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. . . . [T]he . . . power to forbid construction of the house in order to protect the public’s view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.¹⁰⁷

The problem in *Nollan* was that the Court thought the condition at issue “utterly fails to further the end advanced as the justification for the prohibition,” and “the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was.”¹⁰⁸ The condition must “serve[] the same governmental purpose as the development ban.”¹⁰⁹

99. *Id.* at 208 n.3.

100. *Ex parte Curtis*, 106 U.S. 371, 373 (1882); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 96–98 (1947).

101. *Wyman v. James*, 400 U.S. 309, 318–19 (1971).

102. *Id.* at 319–20.

103. 483 U.S. 825 (1987).

104. *Id.* at 831–37.

105. *Id.* at 836.

106. *Id.* at 827–28, 830–31.

107. *Id.* at 836.

108. *Id.* at 837.

109. *Id.*

Professor Sullivan, citing Robert Hale, explained the germaneness principle that emerged out of corporate privileges cases similarly:

[T]he greater power to deny for a good reason includes the lesser power to condition for the same reason, but government cannot impose a condition for a reason not germane to one that would have justified denial. For example, a state could constitutionally make acceptance of common carrier liability the price paid by a trucker for permission to use the highways if the condition served to conserve the highways—a purpose that would have justified exclusion of private truckers altogether—but not if it functioned simply to protect existing carriers from competition.¹¹⁰

Importantly, germaneness makes sense as the defining characteristic of the doctrine in part because that is the criterion by which one can judge whether Congress's actions are within its constitutionally enumerated power. The first eight amendments, as is well known, are carveouts from what otherwise might be within Congress's enumerated powers. Finding a condition "germane" to a public program despite these prohibitions is another way of saying that the condition is within Congress's relevant power—e.g., over commerce, taxes—and thus falls outside the prohibition. If a condition is not germane—suppose Congress conditioned welfare benefits on voting for a particular political party—that would not be within Congress's power (to spend for the general welfare) but rather an impermissible attempt to regulate beyond that power.

Third, the condition must not be unduly coercive; it must leave the recipient with a genuine choice whether to accept or refuse. This condition is less discussed. In the federalism cases, the Court's "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" ¹¹¹ Losing a mere five percent of the state's federal highway funds was held not to be coercive, leaving the state a genuine choice to forgo the funds and maintain its lower drinking age.¹¹² On the other hand, threatening a state with a loss of its entire Medicaid funding unless it agreed to administer an expanded program for the government was a "gun to the head."¹¹³ The coerciveness requirement seems also to relate to a question of enumerated powers. If a condition is coercive—no reasonable entity or individual would refuse the offered benefit or risk the loss of that benefit—then the aim would

110. Sullivan, *supra* note 32, at 1460–61 (discussing Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 348–52 (1935)); see also Wurman, *Drug Testing*, *supra* note 41, at 1178–79.

111. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

112. *Id.*

113. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012).

be not a sensible administration of the public benefit program but rather the condition itself, which the Constitution would otherwise forbid.

The fourth and final point is that the doctrine is disfavored. Although the government can impose conditions that trench on constitutional rights if non-coercive and germane to a public benefit or privilege, it has generally become disfavored to burden constitutional rights in this manner. Thus the Court has “unequivocally rejected,” or purported to, the suggestion that “teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work.”¹¹⁴ Holmes’s dictum about having no constitutional right to be a policeman is generally derided.¹¹⁵ That does not alter the reality, however, that the “State has interests as an employer in regulating the speech of its employees” and the Court therefore balances the competing interests.¹¹⁶ Indeed, the doctrine is so disfavored that it is often said that the rule is the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interest[].”¹¹⁷ Yet the Court routinely approves precisely such conditions—so long as they are germane and not coercive.¹¹⁸

II. PRACTICE

This Part aims to establish that many of the Court’s public rights cases involve unconstitutional conditions problems. That is, they involve both private and public rights. The Court has not self-consciously addressed these cases under this framework, although in the nineteenth century it nearly did so.¹¹⁹ The framework nevertheless explains what occurs. The first question is whether a public right is at issue. If not, there is no need for further analysis; if a public right is involved, and that is all that is involved, then there is no question the matter can be determined exclusively in the executive branch. Sovereign immunity would, without the sovereign’s consent, bar any action claiming that a public benefit or privilege had been wrongfully denied. Yet many of the Court’s

114. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.* 205, 391 U.S. 563, 568 (1968).

115. *Sullivan*, *supra* note 32, at 1459 n.192.

116. *Pickering*, 391 U.S. at 568.

117. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

118. Nevertheless, the Court has not been consistent. Professor Caleb Nelson writes, “the fact that this label has been around for a long time does not mean that people agree about which conditions are unconstitutional under which circumstances,” and the Court has been “wonderfully inconsistent” on the topic. Nelson, *Vested Rights*, *supra* note 31, at 1539 (partly quoting Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 374 (1995)).

119. See *infra* text accompanying notes 172–175.

cases involve both types of rights. Perhaps this is not surprising. Such are the most likely cases to arise given the relative clarity of the principles at play when only private rights or only public rights are involved.

Part II.A describes several of the Court's nineteenth and early twentieth-century cases and argues that they are explicable under the doctrine of unconstitutional conditions. Indeed, the Court's foundational public rights case has perplexed scholars.¹²⁰ That is because that case could easily be conceived as a case about private rights. The unconstitutional conditions doctrine might be an alternative way to frame it. Part II.B describes the Court's expansion of the public rights doctrine starting in the New Deal era. It argues that the unconstitutional conditions and public rights frameworks were arguably first abandoned only in 1938, and were certainly abandoned in the 1977 innovation that was *Atlas Roofing*.¹²¹ These cases cannot be explained under either the public rights doctrine or the doctrine of unconstitutional conditions—they involve only private rights and assigning such matters to administrative tribunals can only be justified on nonoriginalist grounds.¹²² Part II.C describes the Court's incipient counterrevolution, but argues that this counterrevolution is muddled somewhat by a misapprehension of what came before the revolution.

A. *The Early Cases*

1. *Murray's Lessee*

*Murray's Lessee v. Hoboken Land & Improvement Co.*¹²³ is famous for being the Supreme Court's first pronouncement on the "public rights" doctrine.¹²⁴ It

120. Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277, 277 (2022) (discussing that "both scholars and the Supreme Court have long struggled to define [the] distinction" between "private rights" and "public rights").

121. See *infra* Part II.B.2; see also *infra* Part II.A.5.

122. Originalists examine text, structure, intent, and early historical practice to ascertain the likely original meaning, or the range of plausible meanings, of a particular constitutional provision. See, e.g., ILAN WURMAN, *A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM* 18–20 (2017); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1298–301 (2019). The argument presented here is doctrinal: it explains what goes on in the relevant cases and provides a powerful analytical framework. It does, however, have the virtue of being consistent with originalism for the reasons noted previously. Forgoing what otherwise would be constitutional rights is consistent with the Constitution if the condition is germane and non-coercive, and therefore the condition would fall within the scope of Congress's relevant power.

123. 59 U.S. (18 How.) 272 (1856).

124. *Id.* at 284; Ablavsky, *supra* note 120, at 277 (referring to *Murray's Lessee* as the case "that inaugurated the public-rights doctrine").

was in that case that the Supreme Court explained that matters of common law, equity, or admiralty required judicial process, but matters of “public rights” were amenable either to judicial resolution or to resolution in the political branches.¹²⁵ The case, however, seems puzzling because it also involved the private rights of an individual, Samuel Swartwout.

Swartwout was the collector of the customs for the port of New York, a plum government position.¹²⁶ At the time, customs collectors kept all customs revenues and had to remit them to the U.S. government periodically.¹²⁷ Swartwout was audited in 1838 and it was discovered that he owed the government, and likely embezzled, the then-astonishing sum of \$1.3 million.¹²⁸ Pursuant to statute, the government issued a “distress warrant” and seized Swartwout’s property to satisfy the debt.¹²⁹ The statute permitted the debtor to bring a judicial proceeding, but not before the government had sought to collect the debt unless a bond were posted; and in any event the Court suggested that even post-hoc judicial review may not have been constitutionally required.¹³⁰ The Court upheld the scheme.¹³¹

The Court addressed the Article III and Fifth Amendment due process arguments together. Focusing on due process, the Court first looked:

to those settled usages and modes of proceeding existing in the common and [statute] law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.¹³²

It observed that “there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues.”¹³³ “[F]ew governments,” the Court noted, “do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land,” and “[i]mperative necessity has forced a distinction between such claims and all others.”¹³⁴

125. *Murray’s Lessee*, 59 U.S. at 284.

126. *Id.* at 275.

127. *Id.* at 281.

128. *Id.* at 275.

129. *Id.* at 274.

130. *Id.* at 281–84.

131. *Id.* at 284.

132. *Id.* at 277.

133. *Id.*

134. *Id.* at 282.

As to Article III, the Court distinguished between private and public rights, but why the distress warrant was a matter of public right is somewhat unclear. “[T]he action of the executive power in issuing the warrant” was “passed under the powers to collect and disburse the revenue granted by the constitution,” and “is conclusive evidence of the facts recited in it.”¹³⁵ Further, the government had sovereign immunity: any claim by the collector against the government would be barred unless the sovereign consented.¹³⁶ It seems obvious that the setting up of a scheme for the collection of revenues is a public right, as is the right to be employed by the government as a collector. That does not quite address, however, whether and why the government may proceed against the collector’s private property without judicial process.

Conventional accounts recognize that the case can easily be conceived as one involving private rights. What if Swartwout had not in fact embezzled millions? The government would then seem to have deprived him of his private property without a jury, without a court, and apparently “without due process of law.”¹³⁷ This has led William Baude, for example, to argue that *Murray’s Lessee* “belongs in a different category” than the public rights category.¹³⁸ The case is instead about a “temporary, prejudicial deprivation of property,” justified only on the ground that “the subject has diminished interests in their life, liberty, or property.”¹³⁹ Baude writes that “it is hard to describe [the] case as one where there is no deprivation at all,” but the “form[] of adjudication is permissible precisely because it is a traditional exception to the traditional rule that due process is judicial process.”¹⁴⁰

True enough, the Court’s explanation is insufficient. As noted, public employment and access to public funds are public rights; it does not follow that the government may seize the private property of one of its employees without due process of law, and without a court and jury. Yet Baude’s explanation depends on an ad hoc exception—rooted in history, to be sure—to the requirements of these constitutional guarantees. The unconstitutional conditions doctrine may provide a more satisfying explanation.

135. *Id.* at 285.

136. *Id.* (“[T]hough no suit can be brought against the United States without the consent of [C]ongress, yet [C]ongress may consent to have a suit brought, to try the question whether the collector be indebted, that being a subject capable of judicial determination, and may empower a court to act on that determination, and restrain the levy of the warrant of distress within the limits of the debt judicially found to exist.”).

137. U.S. CONST. amend. V.

138. Baude, *supra* note 77, at 1546.

139. *Id.* at 1548.

140. *Id.*

Had Swartwout been denied either employment or access to public funds, no one would dispute that he had been denied a public right, privilege, or benefit. No one would dispute that sovereign immunity would bar an action against the government claiming that Swartwout had been wrongfully denied employment or access to the public funds. The question thus becomes whether, as a condition of granting either or both, Congress may require its customs official to forgo ordinary judicial procedures in the event there is suspicion of embezzlement. The longstanding tradition and history of such conditions demonstrate its germaneness. As the Court observed, “few governments” could permit such claims “to become subjects of judicial controversy”; “[i]mperative necessity has forced a distinction between such claims and all others.”¹⁴¹ No one has a right to serve as a customs officer. And it seems obviously germane to require some guarantees that government funds will be safe in the officer’s hands.¹⁴²

This analysis may not fit perfectly, however. Ordinarily, the only thing denied in an unconstitutional conditions case is the public benefit itself. That is, one who receives a public privilege or enjoys a public right can refuse the condition and simply lose the privilege.¹⁴³ Here, it could certainly be argued that Swartwout was deprived of more than merely the government privilege. But that is not a necessary understanding of the situation. Although the distress warrant permitted the attachment and sale of Swartwout’s private property, it was merely in satisfaction of the debt he owed the government. By hypothesis, he was still in possession of public funds and was therefore enjoying a public right. At any time, Swartwout could have given up the “public right” in his possession—the public funds—and his other property would not be attached. He could avoid the interference with any constitutional protections for his property if he simply gave up his public privileges.

2. *Customs Penalties*

In a series of turn-of-the-century cases, the Supreme Court upheld the imposition of regulatory fines without Article III courts and without juries, notwithstanding the apparent requirements of the respective constitutional provisions. These cases are also explicable under the doctrine of unconstitutional conditions.

141. *Murray’s Lessee*, 59 U.S. at 282.

142. The doctrine of unconstitutional conditions might explain the other “exception” to traditional due process that Baude includes along with *Murray’s Lessee*, namely military justice. See Baude, *supra* note 77, at 1548–51. There is no right to serve in the military; it is a public right akin to any other public employment. It could be argued that it is a constitutional condition to require members to forgo ordinary judicial process as a condition of military service. That would not be a satisfying solution, however, with military conscription.

143. As will be established in Parts II.A.2–3, *infra*.

The appraisal of imports has long been held to be a public right. As early as 1822, the Circuit Court for the District of Massachusetts confronted arguments against the constitutionality of a customs law making executive appraisals of imported goods final and conclusive.¹⁴⁴ The collector also had the obligation to impose *additional* duties as penalties if the declared value understated the actual value (as determined by appraisal) by a certain percentage.¹⁴⁵ Daniel Webster made a series of constitutional arguments against the scheme, although his arguments may be lost to history.¹⁴⁶ Justice Story gestured to Webster's "ingeniously . . . urged" arguments but dispatched them with a short statement.¹⁴⁷ Justice Story wrote:

as congress has the constitutional power "to lay and collect taxes and duties," and "to regulate commerce with foreign nations," it possesses the incidental right to prescribe the manner, in which the duties shall be levied, and the value of the goods shall be ascertained, and the conditions upon which the importation shall be permitted.¹⁴⁸

"It might, therefore, direct, if such should be its pleasure, that all ad valorem duties should be ascertained by appraisement, as the condition upon which alone the importation of goods should be allowed."¹⁴⁹

The thrust of the argument seems to be that there is no right to engage in foreign commerce, but rather that foreign commerce is a privilege. Why this should be so under the general theory of public rights is a bit unclear. Trade is a private right that does not depend on the existence of government. Foreign trade, however, presupposes the existence of nations that (of course) do not exist in the state of nature. Foreign commerce also implicates foreign policy and thus the interests of all in common in a way that traditional private rights do not. Additionally, the act of determining the value of goods is not an inherently judicial act; there is, in fact, no reason to think courts or juries are particularly well suited to the task. Justice Story did not elaborate any of this, but the Supreme Court has consistently upheld Congress's power to assign all matters respecting customs duties to the final and conclusive authority

144. See *Tappan v. United States*, 23 F. Cas. 690, 691–94 (C.C.D. Mass. 1822).

145. See *id.* at 693–94.

146. The present author and the librarians at the University of Minnesota reached out to the archivists of both the District Court and Circuit Court, and although numerous documents from the case existed, Webster's briefing appears not to have been preserved.

147. *Tappan*, 23 F. Cas. at 691.

148. *Id.*

149. *Id.*

of the customs collectors.¹⁵⁰ Other cases affirmed time and again that there is no “vested right” to engage in foreign commerce.¹⁵¹

In *Passavant v. United States*,¹⁵² and a few earlier cases,¹⁵³ the Court more explicitly addressed the question of “penalty” duties. *Passavant* appeared to involve the constitutional question because the importer argued it was entitled to judicial review of the appraisal decision and the consequences thereof, including the imposition of the penalty.¹⁵⁴ The Court explained that the government’s tariff legislation provided “for a speedy and equitable adjustment” of the value, and if judicial review were available “the prompt and regular collection of the government’s revenues would be seriously obstructed and interfered with.”¹⁵⁵ Judicial review would unfold years after the goods had left the government’s possession.¹⁵⁶

As for the additional penalty, the Court explained that such additional duties “are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud.”¹⁵⁷ “They are designed to discourage undervaluation upon imported merchandise,” the Court added, “and to prevent efforts to escape the legal rates of duty.”¹⁵⁸ Whether designated a duty or a “penalty,” Congress had the power to authorize its imposition, the Court held, because it “was a legal incident to the finding of a dutiable value in excess of the entry value to the extent provided by the statute.”¹⁵⁹

The penalty scheme could be classified as entirely one of public right. After all, if the appraisal is not judicially reviewable because that involves a

150. *Rankin v. Hoyt*, 45 U.S. (4 How.) 327, 331–35 (1846); *Bartlett v. Kane*, 57 U.S. (16 How.) 263, 270–71 (1853); *Sampson v. Peaslee*, 61 U.S. (20 How.) 571, 580 (1857); *Hilton v. Merritt*, 110 U.S. 97, 104–05 (1884).

151. See, e.g., *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904) (“As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised.”); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 335 (1909) (quoting same).

152. 148 U.S. 214 (1893).

153. *Bartlett*, 57 U.S. at 270; *Sampson*, 61 U.S. at 580.

154. *Passavant*, 148 U.S. at 222.

155. *Id.* at 220.

156. *Bartlett*, 57 U.S. at 272–73 (“Every importer might feel justified in disputing the accuracy of the judgment of the appraisers, and claim to make proof before a jury, months and even years after the article has been withdrawn from the control of the government, and when the knowledge of the transaction has faded from the memories of its officers.”).

157. *Passavant*, 148 U.S. at 221 (quoting *Bartlett*, 57 U.S. at 274).

158. *Id.*

159. *Id.* at 222.

public right, then the penalty duties follow automatically from the difference between that nonreviewable appraisal and the declared value. There is no room for judicial interposition—in the absence of fraud or other misconduct on the part of the officers, for which judicial review was in fact made available¹⁶⁰—because the penalty would follow automatically.

In another sense, however, it seems clear that a private right is involved. It is admitted that the penalty is imposed for violation of law.¹⁶¹ It is a punishment and does not have to be paid upon any other imported goods. The imposition on the importer's private rights, however, can be seen as a constitutional condition to the privilege of importing the goods. On the assumption that foreign commerce is a public right, the question would be whether as a condition of enjoying that right, importers can be made to sacrifice a portion of their private rights. The answer is yes, if the condition is germane. If the reason for the condition would justify prohibiting the importation altogether, then it is a constitutional condition.

It seems clear that dishonesty on the part of the importer or failing to pay proper duties would be grounds to prohibit importation altogether and that, as a consequence, a lesser condition permitting importation on forgoing any Article III or jury rights should the collectors find discrepancies. All of the Court's observations regarding the necessity of an efficient means of revenue collection and the difficulty of holding on to imported goods for years while judicial review unfolds would support the conclusion of germaneness.

Even more importantly, the *only* consequence for failing to pay the duty was losing a public right, namely, the right to import the goods into the United States. There was no consequence other than the goods could not be unloaded without paying the additional duty.¹⁶² Hence the condition was directly connected to the continued enjoyment of a public right. The Supreme Court confirmed this understanding in 1915. The reason penalties and assessments could be paid without a proper judicial proceeding, and that the question was an "administrative matter," was because "the assessment is *in rem* and against the foreign goods which are sought to be entered."¹⁶³ This was a "limited administrative power to make a *quasi-judgment in rem*, against goods in possession."¹⁶⁴ The Court rejected the proposition—as a statutory matter but with constitutional overtones—that the government could,

160. *Id.* at 214–15.

161. *Id.* at 221–22.

162. For the relevant provision, see Act of June 10, 1890, 26 Stat. 131, 134–35 (1890). Indeed, if the undervaluation was by over forty percent, the goods could be seized, but the collector would still have to bring an action for fraud.

163. *United States v. Sherman & Sons Co.*, 237 U.S. 146, 153 (1915).

164. *Id.* at 155.

without a proper judicial trial, seek to collect new amounts after making allegations of fraud well after the goods were imported.¹⁶⁵

In sum, if the penalty had been imposed *irrespective of* the right to import the goods, that would have raised a thornier constitutional problem. All penalties, even those independently enforceable, surely deter wrongdoing, and in this case would have deterred the importer from providing a false value. But once the goods are forfeited, there is no longer any reason to impose the penalty. Any imposed penalty would no longer be germane to the purpose of the public benefit. The individual would have forfeited the public benefit and the public would have reclaimed it. A condition on the exercise of a privilege must terminate with the privilege; otherwise the condition itself would be the regulation. And Congress could certainly not generally provide that penalties for violations of law be paid without courts or juries.

3. *Immigration Penalties*

The Court's subsequent language in the immigration context evokes the unconstitutional conditions doctrine more explicitly. Immigration is a classic public right: there is no private right to enter into any country one pleases.¹⁶⁶ In *Oceanic Steam Navigation Co. v. Stranahan*,¹⁶⁷ a case of tremendous importance because it is frequently cited and was distinguished in the Supreme Court's most recent public rights case,¹⁶⁸ the Supreme Court addressed the constitutionality of a money penalty imposed for bringing in immigrants with "loathsome" or contagious diseases that could have been detected at the port of departure.¹⁶⁹ The determination of the customs and immigration officials at the port of entry was exclusive of judicial review and therefore conclusive.¹⁷⁰ Critically, however, the only consequence for failing to pay the penalty was the loss of the public privilege: no clearance papers would be given to any vessel from the company while the fines remained unpaid.¹⁷¹

165. *Id.* at 156–58.

166. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 967–70 (1988); *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1318 (1983) (noting the rights-privileges distinction as applied to these cases).

167. 214 U.S. 320 (1909).

168. *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2132–33 (2024).

169. *Oceanic Steam*, 214 U.S. at 330.

170. *Id.* at 333.

171. *Id.* at 332. John Harrison has discussed the case similarly though without the unconstitutional conditions framing. *See* Harrison, *supra* note 57, at 182–83. As Professor Harrison explains, "clearance was very valuable to the steamship company, so it had strong incentives to pay the penalty." *Id.* "[C]learance was a privilege, not a right," and therefore Congress "could create

The Court did not use the term “unconstitutional conditions doctrine,” but its language is rooted unmistakably in that idea. The Court stated: “We think . . . the power to refuse clearance to vessels was lodged for the express purpose of causing both the imposition of the exaction and its collection to be acts of administrative competency, not requiring a resort to judicial power for their enforcement.”¹⁷² This passage can have no other meaning than the greater power to deny a public right altogether—clearance for vessels bringing in immigrants—must necessarily include the lesser power to condition such clearance, which condition advances a purpose that would constitute permissible grounds to deny the public right altogether. Here, the permissible reason is to ensure “efficient performance” of a legitimate regulatory obligation to prevent the introduction of diseases.¹⁷³

The Court stated later in its opinion that because of the “absolute power of Congress over the right to bring aliens into the United States,” it would be “constitutional if it forbade the introduction of aliens afflicted with contagious diseases, and,” therefore so too is it constitutional to “impose[] upon every vessel bringing them in, as a condition of the right to do so, a penalty for every alien brought to the United States afflicted with the prohibited disease, wholly without reference to when and where the disease originated.”¹⁷⁴ That is classic germaneness analysis: the greater power to deny for a good reason includes a lesser power to condition for the same reason. The Court then reemphasized the

a form of executive adjudication by conditioning a benefit on compliance with the result of that adjudication.” *Id.* at 183. Professor Harrison also has a broad conception of public rights: anything that Congress can prohibit, it can prohibit and create carveouts with licenses, which are public privileges. *Id.* at 197–98. If otherwise private activity can be converted into a public right in this manner, not much space is left for the unconstitutional conditions doctrine.

Indeed, Professor Harrison rejects the unconstitutional conditions doctrine in this context because, he argues, there are no “core private rights” that must be heard by Article III courts. “Article III does not create any right to a judicial determination that is independent of the arrangement of rights established by the primary law,” Harrison writes. “If a private person and the government enter into a transaction that is otherwise permissible given Congress’s enumerated powers and the affirmative limits on them besides Article III, the role of the federal courts will reflect the result of that transaction.” *Id.* at 210–11. The present author disagrees with Professor Harrison that any private right can be converted to a public right in this manner by virtue of congressional power. It seems to the author that Professor Harrison conflates Congress’s power to *regulate* (and even to prohibit) the exercise of private rights with the question of what are private rights as opposed to public rights.

Professor Nelson writes in the context of franchises that the implications of the unconstitutional conditions doctrine is an open question. Nelson, *Vested Rights*, *supra* note 31, at 1539–43.

172. *Oceanic Steam*, 214 U.S. at 333.

173. *Id.* at 337.

174. *Id.* at 342.

consequence of failing to pay the penalty—the loss of a public right—and its connection to administrative competence: Congress’s “complete administrative control over the granting or refusal of a clearance also leaves no doubt of the right to endow administrative officers with discretion to refuse to perform the administrative act of granting a clearance as a means of enforcing the penalty which there was lawful authority to impose.”¹⁷⁵

The various opinions in the Supreme Court’s recent *Jarkesy* decision do not sufficiently appreciate the nature of this important precedent. Justice Sotomayor, in dissent, wrote that *Oceanic Steam* stands for the proposition that Congress may generally assign to the executive adjudications of “civil-penalty claims brought by the Government” to enforce statutory prohibitions within Congress’s power to enact.¹⁷⁶ That interpretation is overbroad: the only consequence for failure to pay the penalty was loss of a public privilege. It was not a “civil penalty” in the more common sense of a penalty enforceable regardless of whether the public right continues to be granted. The Court in *Oceanic Steam* even distinguished the penalty in that case from “infamous punishment at hard labor, or by confiscating . . . property.”¹⁷⁷

Justice Gorsuch, in concurrence, focused on Congress’s “long-recognized and extensive authority over the field of immigration,” a subject “peculiarly” within Congress’s authority.¹⁷⁸ But of course, Congress’s power over interstate commerce is no less peculiarly within its authority (even if its power might not be exclusive).¹⁷⁹ The majority, for its part, similarly argued that Congress’s power over foreign commerce and immigration was “so total” as to permit the penalties.¹⁸⁰ Again, it is hard to understand why Congress’s other enumerated powers are not similarly “total.” The unconstitutional conditions framing—Congress’s greater power to grant or deny a public privilege (or public right) includes the power to condition continued enjoyment of that privilege on any good reason that would justify the denial in the first place—is more faithful to the turn-of-the-century Court’s analysis. And the most crucial part of the Court’s analysis was that the matters were brought within administrative competence because the only consequence for failing to pay the penalties was loss of the public privilege.

175. *Id.* at 343.

176. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2160 (2024) (Sotomayor, J., dissenting).

177. *Oceanic Steam*, 214 U.S. at 336.

178. *Jarkesy*, 144 S. Ct. at 2151 (Gorsuch, J., concurring).

179. For the argument that the interstate commerce power is exclusive, albeit the power was originally understood to be far narrower than it has been interpreted in modern times, see ILAN WURMAN, *THE CONSTITUTION OF 1789: A NEW INTRODUCTION* 252 (2026).

180. *Jarkesy*, 144 S. Ct. at 2132–33 n.1.

4. *The Mails*

Another, perhaps obvious, example of the unconstitutional conditions doctrine involves the privilege of using the mails. “In many respects, the traditional view was that access to the mail was a ‘privilege[,]’ and therefore ‘[t]he legislative body in thus establishing a postal service may annex such conditions to it as it chooses.’”¹⁸¹ In one case arguably involving private rights, the Public Clearing House argued it was unconstitutional for the local postmaster to detain its mail, label it as fraudulent, deny it “registered” letter privileges, and deny it use of a money order.¹⁸² The Clearing House argued the process was unconstitutional because the statute “provide[d] no judicial hearing upon the question of illegality.”¹⁸³

The Court made quick work of the argument, citing among other cases *Murray’s Lessee*. “It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department,” the Court observed.¹⁸⁴ “If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the government.”¹⁸⁵ Addressing the related claim about the confiscation of the money order, the Court stated that the seizure was not a confiscation but merely “a refusal to extend the facilities of the Post Office Department to the final delivery of the letter.”¹⁸⁶ Because Congress could have authorized the postmaster “to decline to receive the letter at all if its forbidden character were known to him,” this power “attends [the letter] at every step[,] from its first deposit in the mail to its final delivery to the addressee,” and at any time “the Government may then act and refuse to consummate the transaction” when its character becomes apparent.¹⁸⁷ The greater power to deny for a good reason includes the lesser power to accept on conditions that advance that same reason—including a non-judicial determination that the relevant laws or regulations had been violated.¹⁸⁸

181. Baude, *supra* note 77, at 1545 (first quoting *Ex parte Jackson*, 96 U.S. 727, 732 (1877) (argument of counsel); and then quoting *Pub. Clearing House v. Coyne*, 194 U.S. 497, 506 (1904)).

182. *Pub. Clearing House*, 194 U.S. at 498.

183. *Id.* at 508.

184. *Id.*

185. *Id.* at 509.

186. *Id.* at 511.

187. *Id.*

188. Despite the Court’s discussion of private rights in this case, the case can be conceived as entirely one of public rights, i.e., determining whether one is entitled to access a public right.

5. *Public Revenue: Taxation and Tort*

Two further categories of public rights cases that also involve private rights are taxation and government torts. Both relate to the public revenue, access to which is a public right shared by all in common. (*Murray's Lessee* can thus fall within this category, too.) Taxation and torts committed by government officers take on the cast of a private right or a public right depending on the perspective. From the perspective of a taxpayer who believes taxes have been wrongfully collected, she has lost her private property. From the perspective of a tort victim, her private rights are at stake too; had a private party been the defendant, there would be no question she would have a cause of action at law. From the government's perspective, however, both situations involve access to and payments from the public treasury and therefore public rights. What is more, sovereign immunity would bar the action. For better or worse, and if for no other reason than the sovereign immunity rationale, such cases have always been understood to involve public rather than private rights.¹⁸⁹

In *Helvering v. Mitchell*,¹⁹⁰ the Supreme Court considered also the imposition of a tax penalty in addition to a tax deficiency. This situation does not have the structure of an unconstitutional conditions problem: the individual is liable for both the tax and the penalty no matter what. There is no "public right" that is being conditioned. This does suggest that a tax penalty, to be imposed finally and conclusively, requires an Article III court and jury. The Supreme Court, however, permitted the adjudication of the penalty within the administrative agency.¹⁹¹ It did not do much analysis other than to say that the various "Additions to the Tax" imposed as penalties for deficiencies, negligence, fraud, and so forth, "were intended by Congress as civil incidents of the assessment and collection of the income tax."¹⁹² The Court presumed that because the additional tax penalties were civil rather than criminal, "the determination of the facts upon which liability is based may be by an administrative agency instead of a jury."¹⁹³

It is possible to interpret the penalties as "Additions to the Tax," as the Supreme Court noted,¹⁹⁴ in which case they would be just another tax

189. See, e.g., *Phillips v. Comm'r*, 283 U.S. 589, 592 (1931) (collecting corporate tax deficiency from stockholder of corporation after dissolution was a public right); *Old Colony Trust Co. v. Comm'r*, 279 U.S. 716, 723 (1929) (finding that agency determinations as to facts underlying tax were final and conclusive); *Cheatham v. United States*, 92 U.S. 85, 85–90 (1875) (same). On the government's waiver of sovereign immunity in tort cases, see the Federal Tort Claims Act, 28 U.S.C. § 2671.

190. 303 U.S. 391 (1938).

191. *Id.* at 405.

192. *Id.*

193. *Id.* at 402.

194. *Id.* at 405.

liability, the collection of which is a public right. *Helvering* is not therefore an unconstitutional conditions case, but neither is it precedent for the proposition that civil penalties may be imposed generally by administrative agencies. Such penalties, thus far according to the historical cases, can be imposed only as a germane condition to the continued receipt of some public privilege or if the additional exactions can be interpreted as part of the public right itself (as in the case of taxation).

In *Helvering* itself, however, the penalty was fifty percent of the original tax, and the government would have had to satisfy itself that the taxpayer intended to defraud the government and to evade the tax.¹⁹⁵ It is difficult to escape the conclusion that this amount was not in fact merely an additional tax but a severe penalty, the consequences of which went beyond merely losing some access to a public right. Although generally Congress might authorize the administrative collection of small “additional taxes” for divergences between the disclosed amounts and the actual tax—just like it can impose additional “duties” for discrepancies between an invoice and the actual value of an imported good—at some point it becomes implausible to describe the collection as that of a tax. If it is truly a penalty, whether criminal or civil, and the failure to pay leads to consequences beyond merely losing a public right, that would seem to be a matter of purely private right not germane to the receipt of any benefit and therefore to require an Article III court and a jury.

Assuming this analysis is correct, it appears that it was not until *Helvering* in 1938 that the Supreme Court first upheld an administrative money penalty imposed outside the unconstitutional conditions framework. Because taxation is a classic public right, however, the *Helvering* decision on its own would not be very strong precedent for administrative imposition of money penalties more generally.

B. *The Revolution*

1. *Private Rights*

Through the first decade or two of the twentieth century, the Supreme Court’s public rights doctrine had a coherence to it. Matters entirely of public right—admission and exclusion decisions, land grants, customs duties—could be determined exclusively within the executive branch. Where a private right interrelated with a public right, such as collectors possessing government funds, as in *Murray’s Lessee*, or money penalties to induce efficient performance of regulatory obligations on pain of losing a public privilege, as

195. *Id.* at 392, 401.

in *Passavant* and *Oceanic Steam*, the Court's decisions largely seem consistent with the unconstitutional conditions doctrine.¹⁹⁶ In the taxing and tort context, the nature of the right had an irreducible duality, and the rights were treated as public rights. The only case in which the Supreme Court seemed to go beyond this duality was the imposition of severe penalties for tax wrongdoing, and that case came late in the day, in 1938.¹⁹⁷

The Supreme Court's modern private and public rights cases are categorically different from these older precedents. In the seminal 1932 case *Crowell v. Benson*,¹⁹⁸ the Supreme Court openly recognized that the matter in question was one of "private rights." The case involved a federal workers' compensation scheme for injuries to employees on navigable waters; the scheme replaced what would be the governing rules of admiralty.¹⁹⁹ Cases in admiralty were, according to *Murray's Lessee*, traditional private rights cases that could not be assigned to an administrative tribunal.²⁰⁰ Moreover, such a case "does not fall within the categories" of public rights, the Court recognized, "but is one of private right, that is, of the liability of one individual to another under the law as defined."²⁰¹

The Court nevertheless approved the administrative adjudication of factual findings, analogizing the role of the administrative tribunal to that of a jury or special masters or commissioners, suggesting that judges need not find facts even in ordinary judicial cases.²⁰² The Court recognized that the reports of special masters were "essentially of an advisory nature," but that "it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law."²⁰³ So long as questions of law, "jurisdictional facts," and "constitutional rights" remain in the courts for decision, the "essential attributes of the judicial power" are maintained.²⁰⁴

Crowell is not directly relevant to the question of public rights because it acknowledged the matter at hand was one of private rights. It thus presents a different line of doctrine. *Crowell* is also limited to cases in which the jury trial right does not apply. After all, the only reason the parties in *Crowell* were

196. See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 274 (1856); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 343 (1909); *Passavant v. United States*, 148 U.S. 214, 220 (1893).

197. *Helvering*, 303 U.S. at 405.

198. 285 U.S. 22 (1932).

199. *Id.* at 37–42.

200. *Murray's Lessee*, 59 U.S. at 274.

201. *Crowell*, 285 U.S. at 51.

202. *Id.*

203. *Id.*

204. *Id.* at 51–52, 60–63.

not entitled to a jury was because admiralty courts did not empanel juries.²⁰⁵ There is much to disagree with *Crowell* on originalist grounds, but such disagreement has nothing to do with the doctrine of public rights. We need not consider the case further.

The seminal case *NLRB v. Jones & Laughlin Steel Corp.*²⁰⁶ is similar in this respect. The Court upheld the National Labor Relations Act under the Commerce Clause.²⁰⁷ The case clearly involved private rights—“the liability of one individual to another under the law as defined.”²⁰⁸ Much like *Crowell*, it involved the employer-employee relationship under new obligations created by federal statute.²⁰⁹ The Court held that no jury right attached because the principal relief was equitable, namely the reinstatement of employees; the Seventh Amendment “has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law.”²¹⁰ Whether right or wrong on the merits of the Seventh Amendment question, *Jones & Laughlin* is therefore properly understood as a private rights case, but one in which the jury trial right does not attach. For that reason, it is governed by *Crowell* and the theory that the administrative tribunal is an adjunct of the judiciary. That may be wrong, but again it has nothing to do with the doctrine of public rights.

2. Public Rights Expansion

Atlas Roofing,²¹¹ decided in 1977, was, until the *Jarke* decision, the seminal modern case on public rights. There is no question that the relief in that case, as a suit for money damages for violation of law, was not equitable. Nor was it an admiralty case. It involved violations of workplace safety regulations.²¹² Suits for money penalties for violation of law involve deprivation of property, and therefore private rights, and historically would have required a jury.²¹³ It therefore involved a private right and yet, because of the applicability of the jury right, the *Crowell* and *Jones & Laughlin* line of cases was inapplicable. The only appropriate “adjunct” was a jury.

205. *Id.* at 45.

206. 301 U.S. 1 (1937).

207. *Id.* at 30–32.

208. *Crowell*, 285 U.S. at 51.

209. See *Jones & Laughlin*, 301 U.S. at 30–32; see also *Crowell*, 285 U.S. at 36–65.

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

211. *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442 (1977).

212. *Id.* at 442.

213. *Tull v. United States*, 481 U.S. 412, 427 (1987) (holding that suits for civil money penalties in federal court required juries).

The Supreme Court nevertheless sustained the regulatory scheme the only way it could: by labeling the case one of public rights. “[I]n cases in which ‘public rights’ are being litigated”—that is, “in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact”—the Court concluded that “the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.”²¹⁴ “Congress has often created new statutory obligations,” the Court added, “provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred.”²¹⁵ Both statements are true but inapplicable. It is true that public rights cases never required judicial process and therefore required neither an Article III court nor a jury. And Congress has created new statutory obligations, such as in *Passavant* and *Oceanic Steam*, and appended civil penalties.²¹⁶ But such penalties were an incident of a public rights regime and the only consequence for failing to pay the fine was loss of the public privilege.

The statute in *Atlas Roofing* was an innovation. The initial question is whether the regulatory scheme to which the money penalties were appended was one of public rights. *Atlas Roofing* involved traditional private rights: the rights to operate a private business, to hire workers, and the tort obligations of employer to employee.²¹⁷ These rights exist antecedent to government, sovereign immunity does not apply, and the common law governed the relevant rights and relations. The imposition of money penalties without courts and juries cannot be understood as a condition on the receipt of some public benefit. There is no public benefit involved. The case involved private rights and only private rights.

The cases the Court cited were inapposite. The Court cited *Crowell* and *Jones & Laughlin*,²¹⁸ which involved private rights but no juries because they were governed by admiralty or equity. The Court cited *Murray’s Lessee* and *Oceanic Steam*.²¹⁹ Both involved public rights and, at most, the doctrine of unconstitutional conditions. The only plausible precedent for its decision that the Court cited was *Helvering v. Mitchell*,²²⁰ which was probably wrongly

214. *Atlas Roofing*, 430 U.S. at 450.

215. *Id.*

216. See *Passavant v. United States*, 148 U.S. 214 (1893); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909); *supra* Parts II.A.2–3.

217. *Atlas Roofing*, 430 U.S. at 447, 450.

218. *Id.* at 452–55.

219. *Id.* at 450–51.

220. *Id.* at 451.

decided on the question of tax penalty but at least involved the public revenue, a genuine public right.²²¹

C. Counterrevolution

1. Patents

1977 was a watershed in the Court's expansion of the public rights doctrine. Since the Court's decision that year in *Atlas Roofing*, Congress has made robust use of administrative money penalties in a variety of regulatory contexts.²²² The Supreme Court recently inaugurated something of a counterrevolution in *Jarkesy*, discussed presently. Prior to the *Jarkesy* decision, however, the Supreme Court decided an important case involving patents.²²³ The unconstitutional conditions doctrine did *not* apply to that case, and it is important to understand why. The dispute was over whether the right at issue was private or public. One could reasonably disagree about the conclusion, but so long as the right was one or the other, the unconstitutional conditions doctrine would not have come into play.²²⁴

221. The Court also cited *Block v. Hirsh*, 256 U.S. 135 (1921), which seems totally inapposite. The case involved a congressional law for the District of Columbia prospectively regulating rental leases, authorizing tenants to remain on the premises after the expiration of leases at the option of the tenant on the same terms as the existing lease, unless modified by a commission. *Id.* at 153–54. This was a prospective regulation of landlord-tenant relations, a delegation of legislative power perhaps but not of judicial power. *Id.* at 154. It does not seem to have been disputed that if the landlord was entitled to possession under the law, whether the common law or the regulations of the commission, a jury could have been empaneled to try any factual questions. *Id.* at 153–54.

222. See, e.g., 12 U.S.C. § 1818(i)(2) (money penalties on banks and affiliated persons); 49 U.S.C. § 5123(a), (d) (money penalties for improperly transporting hazardous materials).

223. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1370 (2018).

224. In *Oil States*, the Court upheld congressional legislation creating an executive-branch system for the review of patents. There is no question that the initial *grant* of a patent is an administrative function; patents are public rights, not private rights. The parties all agreed with this proposition. *Id.* at 1373. For the Court's precedents, see *id.* There is neither a right nor a possibility to prevent other individuals in the state of nature from making use of knowledge. Of course, the inventor does not have to disclose the invention. But the agreement to disclose in exchange for government enforcement of a temporary but exclusive right to use the technology is a public benefit conferred by the sovereign's grace and therefore a public right.

The only difficult question in *Oil States* was whether once the executive branch had granted a patent, the patent right became *vested* in the private individual such that a subsequent deprivation of that right—the cancellation of that patent—involved private rights and thus

2. Jarkesy

The Court's latest word on the public rights doctrine can now be seen in a new light. In *Jarkesy*, the SEC prosecuted an administrative enforcement action against George Jarkesy for alleged securities fraud.²²⁵ The statutory prohibitions related to obtaining money or property by means of untrue statements, omissions of material fact, or other fraudulent acts.²²⁶ The SEC sought and obtained a \$300,000 penalty.²²⁷

The Court began with the Seventh Amendment question. Because civil money penalties were a "prototypical common law remedy," the jury right attached.²²⁸ The Court then proceeded to address the public rights doctrine.²²⁹ The majority concluded that it did not apply because the anti-fraud securities laws "target the same basic conduct as common law fraud, employ the same terms of art, and operate pursuant to similar legal principles."²³⁰ The laws "traced their ancestry to the common law."²³¹ The Court distinguished *Atlas Roofing* on the ground that the laws and regulations at issue there

required courts and juries. As noted previously, many public benefits become vested private rights. Once a welfare check is deposited, it becomes private property. Once a land grant is conferred, that too becomes private property. Any disputes over the land often involve third party claims and are reviewed by courts, which can also decide on the validity of the government grant. The Court concluded, however, that unlike land grants, which are a one-time conferral of a public right, the right to exclude is an ongoing privilege conferred by the government. The government can therefore cancel the privilege at any time. *Id.* at 1376 n.3.

The dissent pointed to numerous cases suggesting that once a patent had been granted, it was understood to be a vested private right. *Id.* at 1383–84 (Gorsuch, J., dissenting). For example, the Supreme Court had previously held that after the government "grants a patent the grantee is entitled to it *as a matter of right*, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor." *Id.* at 1384 (quoting *James v. Campbell*, 104 U.S. 356, 358 (1882)). Chief Justice Marshall argued patents were "inchoate property" vested in the individual "from the moment of invention." *Id.* (quoting *Evans v. Jordan*, 8 F. Cas. 872, 873 (No. 4,564) (C.C.D. Va. 1813)). In the words of one judge, inventors "hol[d] a property in [their] invention[s] by as good a title as the farmer holds his farm and flock." *Id.* (quoting *Hovey v. Henry*, 12 F. Cas. 603, 604 (No. 6,742) (C.C.D. Mass. 1846)) (alteration in original). Professor Caleb Nelson has recently written that public franchises, including patent grants, became the vested private property of the individual at least in the absence of a clear and unequivocal reversion clause. Nelson, *Vested Rights*, *supra* note 31.

225. SEC v. Jarkesy, 144 S. Ct. 2117, 2124 (2024).

226. *Id.* at 2125.

227. *Id.* at 2126–27.

228. *Id.* at 2129.

229. *Id.* at 2131–39.

230. *Id.* at 2136.

231. *Id.* at 2137.

“resembled a detailed building code” and did not “borrow” the cause of action from the common law.²³²

As noted previously, the *Jarkesy* decision leaves many open questions. It did not overturn *Atlas Roofing*, even though that case did not involve any traditional public right. Whether the common law governed the conduct in question is of course indicative of a private right, but it is not a necessary criterion. As the Court said in *Crowell*, the source of law is immaterial to the nature of the right.²³³ The Court was relatedly unclear about whether a public right must be rooted in longstanding history and tradition, and what to do with the gap created by new statutory causes of action that do not fall under any longstanding public rights exception. The relationship of the two parts of the opinion to each other is also somewhat murky. It could be argued that the Seventh Amendment claim should have resolved the Article III claim because administrative agencies do not empanel juries—only courts do.

The unconstitutional conditions doctrine can clarify at least that part of the analysis in *Jarkesy*. Even if the Seventh Amendment were otherwise implicated, it could be constitutional to condition the enjoyment of a public right on forgoing the Seventh Amendment right. Because the public rights doctrine did not apply at all, however, the unconstitutional conditions doctrine did not, either. The matter was entirely one of private right, rather than one of both private and public rights.

As also noted, the Court did not sufficiently appreciate the nature of the leading precedent, *Oceanic Steam Navigation Co. v. Stranahan*.²³⁴ The dissent argued that case stood for the proposition that Congress can generally provide for administrative imposition of monetary penalties for violations of regulations.²³⁵ The majority argued the case stood for the proposition that immigration was uniquely within Congress’s total control.²³⁶ Neither is entirely correct. The case stood for the proposition that fines could be imposed administratively on pain of losing a public right and if germane to that public right.

III. FURTHER APPLICATIONS

Further applications of the framework need not be belabored. A short discussion of the three cases with which the analysis opened, along with another example arising out of the Fifth Circuit, will suffice to establish that application

232. *Id.*

233. *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (private rights involve “the liability of one individual to another under the law as defined”).

234. *See supra* Part II.A.3.

235. *Jarkesy*, 144 S. Ct. at 2155 (Sotomayor, J., dissenting).

236. *Id.* at 2132–33 (majority opinion).

of the unconstitutional conditions doctrine can resolve much of the confusion in the circuit courts.

As an initial matter, it is helpful to consider whether the Court's two-pronged inquiry in *Jarkey* should be taken in reverse order. Had the Court started with the public rights analysis, it could have ended the analysis upon reaching its conclusion that the securities laws involved private not public rights. That is because without a public right, the unconstitutional conditions analysis necessarily does not apply. If violations of securities laws involve private rights, that is all one needs to know.

Only if a court concludes that a public right is at issue must the court then ask whether private rights are also at stake. A money penalty is such a right. The further question would then be whether adjudicating the penalty in a non-Article III tribunal is a condition on the continued receipt of the public right. If the penalty is enforceable irrespective of any loss of public privileges, that would go beyond the scope of the unconstitutional conditions doctrine; such penalties would not be germane to the continued receipt of the public benefit. And, finally, even if the only consequence of a failure to submit to a non-Article III tribunal is loss of a public privilege, the condition requiring such submission might theoretically fail to meet the germaneness rule. How the coerciveness factor plays into the analysis must also be considered.

A. *Banking Insurance*

In 1933, Congress created federal deposit insurance to guarantee customer deposits up to a certain amount per depositor.²³⁷ The receipt of federal insurance is a classic public benefit and therefore a public right. The 1933 law also introduced into federal law the concept of "unsound or unsafe" banks, a term that originated in state statutes that authorized bank examiners to seize the assets of banks in unsafe conditions.²³⁸ In 1966, Congress empowered the relevant regulatory agency to issue cease-and-desist orders to insured banks.²³⁹ The regulatory authorities could also remove officers from particular banking institutions.²⁴⁰ The member of Congress spearheading the legislation explained, "The

237. Banking Act of 1933, ch. 89, 48 Stat. 162 (1933).

238. See, e.g., *Cosmopolitan Tr. Co. v. Mitchell*, 136 N.E. 403, 405 (Mass. 1922) (statute grants "power of inquiry into" a bank's "unsound or unsafe condition"); *Power v. Chillingworth*, 113 So. 280, 281 (Fla. 1927) (comptroller may take charge of any bank or banker who "is in an unsound or threatened condition because of illegal or unsafe investments"); *In re Murray Hill Bank*, 47 N.E. 298, 300 (N.Y. 1897) (superintendent may take possession of any "bank or individual banker" who "is in an unsound or unsafe condition to do banking business").

239. See Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 101(d)(2)(A), 80 Stat. 1028, 1029.

240. *Id.* § 101(a)(4)(A), 80 Stat. 1028, 1030.

cease and desist power and the very limited officer removal power represent flexible, intermediate supervisory tools to be used short of the last resort of insurance termination.”²⁴¹ “[I]t should be clear to all that the cease-and-desist powers and management removal powers . . . relate strictly to the insurance risk and to assure the public of sound banking facilities.”²⁴²

The unconstitutional conditions doctrine suggests these are almost certainly constitutional conditions on the receipt of insurance funds. Congress does not need to grant such a public privilege to banks; nor are banks required to accept such insurance.²⁴³ The insurance program is therefore a public right. The condition did, however, involve private rights. The practice of banking was a common law right. It “is very clear that at common law,” the Supreme Court has held, “the right of banking in all of its ramifications, belonged to individual citizens; and might be exercised by them at their pleasure.”²⁴⁴ These banks were also free to engage in interstate commerce.²⁴⁵ The common law also governed the obligations of bank directors and officers.²⁴⁶ And, of course, the banks have a private right to contract with whomever they choose.²⁴⁷

241. 112 CONG. REC. 24,984 (1966) (statement of Rep. Patman).

242. *Id.*

243. *Bd. of Governors of Fed. Res. Sys. v. First Lincolnwood Corp.*, 439 U.S. 234, 251–52 (1978).

244. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 595–96 (1839).

245. *Id.* at 590–91; *see also* *Marquette Nat’l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 317 (1978) (citing several antebellum state cases for the proposition that there was a robust “interstate loan market”). Bray Hammond, the foremost authority on the history of banking in the United States, writes that borrowing was a right at common law; the first banks in England were private; the first bank in the colonies was established by private subscribers; the first bank national in scope was the Bank of North America, which operated as a private concern until 1929; and the first banks in the states were privately funded and several operated without being incorporated. BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 4, 24, 42, 51, 60–69, 606, 618 (1957).

246. *See, e.g.,* *Briggs v. Spaulding*, 141 U.S. 132, 165 (1891) (agreeing with receiver that under the common law “directors must exercise ordinary care and prudence in the administration of the affairs of a bank.”); *Ackerman v. Halsey*, 37 N.J. Eq. 356, 364 (Ch. 1883) (directors of national banks “bound in the management of the affairs of the corporation to use reasonable diligence and prudence, such as men usually exercise in the management of their own affairs of a similar nature”); *Brinkerhoff v. Bostwick*, 88 N.Y. 52, 60–62 (1882) (holding state courts had “concurrent jurisdiction” over national banks because “[t]he right of action” was not “derived from the act of Congress, but depends upon general principles of equity” or upon causes of action for “negligence”); *Warner v. Penoyer*, 91 F. 587, 590–92 (2d Cir. 1898) (stating the general rule that directors of a national bank must exercise “ordinary prudence” and had a “duty of general supervision”).

247. *Allgeyer v. Louisiana*, 165 U.S. 578, 590 (1897) (quoting *Butchers’ Union Slaughterhouse & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746 (1884)).

The question thus becomes, under the unconstitutional conditions doctrine, whether the government can require forgoing these private rights as a condition of receiving federal insurance funds. Article III is implicated because an adjudication that a bank or its officers had acted negligently would, as noted above, historically have been adjudicated in a court. The bank is also being deprived of its liberty of contract—not to mention the individual officer is being deprived of his employment. A member of Congress expressed concerns over giving the regulatory authorities such officer-removal powers because it will give them “power of life and death over an individual’s reputation,” a power “ordinarily reserved to a court of law.”²⁴⁸ Yet if such powers are truly intended to ensure the safety of insurance funds, such that the continuation of the practices of employment in question would be grounds to deny the insurance funds in the first place, then Congress can condition the receipt of the funds for the same reason. Certainly if the only consequence is the loss of insurance funds, the conditions would be constitutional under a standard unconstitutional conditions analysis.

The year after *Atlas Roofing*, Congress permitted the regulatory authorities to impose money penalties for violations of the banking laws and for engaging in unsafe or unsound practices.²⁴⁹ Even more recently, Congress granted the agencies power to impose industrywide prohibitions, whereas previously the officer-removal power was limited to employment at the particular institution in question.²⁵⁰ There is a much more serious question as to whether these penalties and prohibitions are constitutional conditions. As for money penalties imposed on banks, it may very well be the case that they would prefer to pay such penalties to keep their federal insurance funds. The situation is thus like *Passavant* and *Oceanic Steam*.²⁵¹ Requiring a bank to forgo its right to an Article III adjudication and Seventh Amendment jury could certainly be germane if it induces regulatory compliance.

To the extent such penalties are independently enforceable irrespective of the status of federal insurance funds, those penalties, however, would involve only the private rights of the banks. The only precedent for making such penalties independently enforceable is *Helvering*, the tax penalty case that came late in the day and was probably wrongly decided. Requiring banking institutions to forgo their Article III and Seventh Amendment rights in retrospective enforcement actions, where insurance funds are not or no longer

248. 112 CONG. REC. 24,988 (1966).

249. Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641.

250. Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, 120 Stat. 1966.

251. See *Passavant v. United States*, 148 U.S. 214 (1893); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

at risk, would not qualify under the unconstitutional conditions doctrine because only private rights are at stake.

That analysis is even clearer for individual bank officers and directors. Their right to pursue employment in a bank is a private right.²⁵² They do not receive insurance of any kind. Any regulatory penalty that is imposed upon them would be a matter of purely private right. Such penalties would seem improper under either the public rights doctrine or the unconstitutional conditions doctrine.

B. *Foreign Labor*

In one of the Third Circuit cases mentioned in the introduction, DOL imposed regulatory penalties for violations of regulations governing a foreign laborer program and ordered backpay for violation of contracts with the foreign laborers.²⁵³ As should now be relatively clear, both the imposition of the fine and the contract dispute are matters of private right. Immigration, however, is a public right. The case would thus seem to be governed by the unconstitutional conditions doctrine.

The Third Circuit quite correctly observed that “DOL has *some* authority to proceed in a non-Article III tribunal does not give it carte blanche to do so for *all* violations.”²⁵⁴ The court was also correct to observe that the case was in its nature like a “suit for breach of contract, which would have traditionally been heard in common law courts.”²⁵⁵ And it was correct that the penalties were common law remedies. The government, for its part, was also correct that “immigration is traditionally a matter of public rights,” over which the government has “plenary power.”²⁵⁶ The court responded, however, that DOL’s “labor certification regulations do not directly address the admission and exclusion of aliens.”²⁵⁷

The unconstitutional conditions framework advances the conversation in two ways. To the extent the failure to pay the backpay and the regulatory penalty would lead only to the loss of privileges under the program—the loss of the right to hire foreign workers—it would fit the mold of typical constitutional conditions. If the backpay dispute and the regulatory penalty are independently enforceable—the company has to pay it whether or not the company is permitted to

252. David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J.F. 287, 287 (2016).

253. *Sun Valley Orchards, LLC v. U.S. Dep’t of Lab.*, 148 F.4th 121 (3d Cir. 2025).

254. *Id.* at 131.

255. *Id.* at 129.

256. *Id.* at 129–30.

257. *Id.* at 130–31.

continue participating in the public rights program—then it would be a matter of purely private right.²⁵⁸

The private dispute between employer and employee is more complicated because the *employee's* private contract rights are at issue. Thus, requiring adjudication of the matter is unlikely to meet the unconstitutional conditions test. Supposing the agency adjudicated the matter, the employer could always refuse to abide by its determination. It could lose access to the public benefit—the benefit of the immigration program—but the employee would then still have a contract claim. The structure of the dispute suggests an Article III court may be required for a conclusive resolution of the claims.

C. *Regulatory Penalties in Other Public Rights Schemes*

One of the more common post-*Jarkey* issues is monetary penalties within public rights schemes. These constitute the most obvious context in which the unconstitutional conditions framework applies, as it did in the *Passavant* and *Oceanic Steam* precedents. In these cases, the coerciveness of the consequences may become an important factor, although the conclusions presented here on this question are tentative.

1. *FAA Penalties*

In the other Third Circuit case noted in the introduction, recall that FAA's ALJ imposed a modest \$1,900 civil penalty on a paint supplier for a knowing violation of FAA's Hazardous Materials Regulations after the supplier failed properly to secure flammable paint that was shipped by air.²⁵⁹ The Third Circuit held that the imposition of such a fine by an administrative tribunal is permissible under the "public rights" doctrine because the detailed regulations have no common law history, even though a civil money penalty is a prototypical common law remedy.²⁶⁰ That is, it analogized the case to *Atlas Roofing*. Judge Bibas rightly questioned whether *Atlas Roofing* is good law,

258. As this Article goes to press, the Supreme Court is poised to hear this case. See *supra* note 40 and accompanying text. One question is whether the statute authorizes such money penalties. Under the regulation, the DOL penalties are independently enforceable. 29 C.F.R. § 501.16(a)(1). The statute authorizes the Secretary "to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section." 8 U.S.C. § 1188(g)(2). To the extent the statute authorizes independently enforceable penalties, it would be unconstitutional under the framework proposed here.

259. *Axalta Coating Sys. LLC v. FAA*, 144 F.4th 467, 471 (3d Cir. 2025).

260. *Id.* at 475–77.

representing as it does a “new” statutory scheme but one to which the public rights exception historically did not apply.²⁶¹

In this case, however, the public rights exception likely applied. That is because the right to travel using the channels of interstate commerce—the public highways, waterways, and airspace—is a historic public right. It is a right all share in common.²⁶² Indeed, one’s actions on the public rights-of-way, including in the airspace, necessarily affect everyone else’s use and enjoyment of the public right. Air travel is a public right, not a private right.

The next question would be whether the modest money penalty—a private right—was a germane condition. A few observations here are warranted. The first is that the fine was independently enforceable. Any fine imposed under the statute or the regulations is collectible in an enforcement action.²⁶³ That immediately makes the case one of *private rights*; the unconstitutional conditions doctrine does not apply because if the receipt, continued enjoyment, or loss of a public privilege is not at issue, then the condition is necessarily not germane. Imposing a fine that is independently enforceable in this context is no different than punishing someone for defrauding a welfare program. A public right is involved, but the suit is in its nature one about private rights: whether someone should be punished for violation of the law. It simply does not matter whether the laws that were violated involved private or public rights.

The statute also provides, however, that one consequence of failing to pay the penalty is loss of the public right—that is, the loss of the right to use the airspace and air travel to transport hazardous goods.²⁶⁴ In the absence of the independent enforcement mechanism, would the penalty then be a constitutional condition?

The germaneness of the penalty does not seem materially different than the germaneness of the penalties in *Passavant* or *Oceanic Steam*. The coerciveness factor requires further consideration. In *Passavant*, the only consequence for failure to pay was the inability to import the goods in question.²⁶⁵ In *Oceanic Steam*, the only consequence was loss of the right to bring the vessel into port.²⁶⁶ It should be sufficiently obvious that denying someone the right

261. *Id.* at 483–84 (Bibas, J., concurring).

262. *See supra* notes 62–64 and accompanying text.

263. 49 U.S.C. § 5123(a), (d).

264. As noted, the statute permits a civil action to collect the money penalties. *Id.* The amount and appropriateness of the fine are not subject to review. *Id.* § 5123(d). This would seem to violate the Seventh Amendment as articulated by the framework proposed here. The statute *also* provides, however, that the public privilege (to transport hazardous materials by air) is to be denied for nonpayment of the penalties. *Id.* § 5123(i).

265. *Passavant v. United States*, 148 U.S. 214, 221–22 (1893) (upholding assessment and collection of additional customs duties on imported goods).

266. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 329, 332 (1909).

to *future* air travel for their business would be far more of a “gun to the head.” Would anyone in the modern era refuse to pay a modest sum if the consequence of doing so is the loss of air travel? It is hard to imagine anyone having a genuine “choice” in the matter. On the other hand, air travel need not be generally denied; it could be denied for that particular business, and is in fact limited by statute to the transportation of hazardous materials.²⁶⁷ That does not seem unduly coercive.

2. *FCC Forfeitures*

Applying the *Jarkesy* decision, the Fifth Circuit recently held that Article III and the Seventh Amendment applied to a civil monetary penalty against AT&T for violations of section 222 of the Telecommunications Act.²⁶⁸ The Supreme Court recently reversed, holding that the statute was constitutional because the fines could not be imposed without an enforcement action in District Court in which a jury would be available.²⁶⁹ It is nevertheless instructive to analyze the case under the unconstitutional conditions framework.

Under the relevant provision of the statute, telecommunications carriers had an obligation to protect the confidentiality of “customer proprietary network information,” and could not “use, disclose, or permit access to” such information except as necessary to provide telecommunications services.²⁷⁰ Commission regulations further provided that carriers “must take reasonable measures to discover and protect against attempts to gain unauthorized access to” such information.²⁷¹

The Fifth Circuit concluded that the public rights exception did not apply because “[n]egligence claims against common carriers have been routinely adjudicated in state and federal courts.”²⁷² It held that “the section 222 action is analogous to common law negligence” because, among other things, it “punishes carriers for failing to take reasonable measures to protect

267. 49 U.S.C. § 5123(i).

268. *AT&T, Inc. v. FCC*, 149 F.4th 491, 498, 502–03 (5th Cir. 2025).

269. *FCC v. AT&T, Inc.*, 146 S. Ct. 1418, 1431–32 (2026). The statutes provided “[t]hat any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo.” 47 U.S.C. § 504(a). On the other hand, this provision cross references another that provides, “the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.” *Id.* § 503(b)(3)(B). Because of how the case was briefed and argued, it does not appear that the Supreme Court was aware of this inconsistency in the statute. It made no mention of this latter provision.

270. *AT&T*, 149 F.4th at 494 (quoting 47 U.S.C. § 222(a), (c)(1)).

271. *Id.* (quoting 47 C.F.R. § 64.2010(a)).

272. *Id.* at 501.

customers' personal data.”²⁷³ The action “target[s] the same basic conduct” as the common law negligence claim.²⁷⁴ “[T]he statutory action need not be ‘identical’ to a common law analogue,” but must merely have a “close relationship” to it.²⁷⁵

As with the Third Circuit case, the Fifth Circuit can be forgiven for proceeding along these lines of analysis because that is what was required by the *Jarkesy* and *Atlas Roofing* decisions. A properly originalist analysis, however, which would account for the unconstitutional conditions doctrine, would proceed along different lines of inquiry. Access to the broadcasting spectrum, including the mobile phone network, is a classic public right.²⁷⁶ The question, then, is not whether the violations of which AT&T had been accused had common law analogues—they did—but whether imposing the penalties for an administrative finding of such violations was a germane condition to the continued receipt of a public benefit.

As with FAA penalties, the FCC penalties under the existing statute are independently enforceable.²⁷⁷ For that reason, they would not be germane. Assuming that Congress revised the statute to provide that the failure to pay would result in loss of the relevant license, then it would fit under the unconstitutional conditions framework. The consequences to AT&T for losing its license would of course be dire—it would end its business—such that it would necessarily pay the fine. Still, as with all such public rights, no one has a right to access the common resources (including the airwaves). It is a privilege. On that reasoning, however, the coerciveness analysis would never do any work in this context. One might argue that the penalty should be perhaps a temporary loss of the privilege, or some other limitation on the privilege, rather than a complete loss of the privilege; otherwise, it is too coercive.

The Fifth Circuit case raises one final issue of germaneness. The penalty imposed was \$57 million.²⁷⁸ The penalty may have been nothing but punishment. Obviously, all penalties are germane in the sense that they all induce regulatory compliance.²⁷⁹ And surely the greater the threat, the greater the inducement. Theoretically, there may come a point where the penalty is

273. *Id.* at 498–99.

274. *Id.* at 499 (quoting *SEC v. Jarkesy*, 144 S. Ct. 2117, 2130 (2024)).

275. *Id.* (quoting *Jarkesy*, 144 S. Ct. at 2131).

276. *Cf., e.g., Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388–89 (1969) (“If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same ‘right’ to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves . . . Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations.”).

277. 47 U.S.C. § 503(b).

278. *AT&T, Inc.*, 149 F.4th at 503.

279. *See id.* at 498 (discussing the purpose of the penalties).

so high that the public privilege would always be given up—and then the coercive factor would again come into play because there would be no genuine choice. Here, however, the concern is somewhat different. The penalty was imposed for failure to protect consumers' privacy, but there was no apparent connection between the amount imposed and any particular harm to customers or to the cost of remedying the breaches. If the penalty is unconnected with the reason for its imposition, that is at least some argument against its germaneness.

CONCLUSION

The application of the doctrine to the examples just discussed is tentative. These examples all suggest, however, that these (and many other) post-*Jarquesy* cases in the lower courts involve both private and public rights. This dual nature of the cases has confused the courts that have addressed them—as that dual nature appears to have confused the Supreme Court in *Jarquesy* itself and to have confused its interpretation of the prior *Oceanic Steam* precedent. These cases all have the structure of unconstitutional conditions cases and should be analyzed as such.

The unconstitutional conditions framework explains all the relevant public rights precedents until 1938. Certainly, this framework reveals why the 1977 case of *Atlas Roofing* was a constitutional innovation. The Supreme Court has begun to roll back that innovation, but without a clear picture of precisely what the innovation was. The doctrine of unconstitutional conditions must be recovered if the Court is to understand the pre-New Deal regime.