BETWEEN CONTRACT AND COMMAND: RETHINKING FINRA'S ENFORCEMENT REGIME IN A POST-*CHEVRON* ERA

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I. INTRODUCTION

In a post-*Chevron* world, the constitutional limits of regulatory bodies' enforcement powers have become highly contested.[1] Under the *Chevron* doctrine, precedent required courts to give agencies deference in interpreting ambiguous statutes in the absence of clear legislative statements or intentions from Congress, as long as their rulemaking was reasonable.[2] However, with the doctrine's fall, legal scrutiny of these bodies has increased in fields ranging from employment to healthcare.[3] This growing criticism shows that the administrative state is increasingly perceived as a "fourth branch" of government violating the Constitution's tripartite design and thus requires restraint.[4] More recently, the scrutiny has reached quasi-private organizations, raising difficult questions about how constitutional doctrines apply to organizations that sit between private contract and public power. Critics often conflate these entities with public agencies, applying constitutional frameworks without accounting for the legal distinctions attached to their private status and thus mischaracterizing or ignoring the source of their authority and the contractual nature of their governance. A quasi-private body recently finding itself in hot water is the Financial Industry Regulatory Authority, otherwise known as FINRA, which is a key self-regulatory organization (SRO) in the securities industry.

This article focuses on the legal challenges confronting FINRA and its enforcement structure. It addresses whether FINRA's enforcement powers remain constitutional in light of recent Supreme Court decisions addressing the Appointments Clause, the private non-delegation doctrine, and the Seventh Amendment. This article will examine whether FINRA's private status, along with its voluntary membership, provide sufficient justification to uphold its enforcement powers. This article argues that FINRA's corporate status and consensual

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[1] *See* Jory Heckman, *Agencies 'Knew This Was Coming.' What Does — and Doesn't — Change After Supreme Court's Chevron Ruling*, FED. NEWS NETWORK (July 8, 2024, 6:55 PM), https://federalnewsnetwork.com/agency-oversight/2024/07/agencies-knew-this-was-coming-what-does-and-doesnt-change-after-supreme-courts-chevron-ruling/ [https://perma.cc/FKS5-YZ5J].

[2] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

[3] *See* Robert Lafolla, *GOP-Picked Judges Take Hard Line on Regulations Post-Chevron*, BLOOMBERG LAW (Sept. 4, 2024, 5:05 AM), https://news.bloomberglaw.com/daily-labor-report/gop-picked-judges-take-hard-line-on-rules-after-chevrons-demise [https://perma.cc/BD8J-EGYW].

[4] *See* Bijal Shah, *The President's Fourth Branch?*, 92 FORDHAM L. REV. 499, 502–03 (2023); *see also* Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 2 (1994) (noting Justice Jackson's coining of the term "fourth branch" in reference to the administrative state).

framework distinguish it from traditional administrative agencies and the legal attacks they face.

These unique characteristics provide a strong contractual basis for upholding the internal governance elements of its enforcement power under constitutional scrutiny, specifically regarding member broker firms that voluntarily accept its jurisdiction through the application process. On the other hand, this article asserts that when FINRA exercises quasi-governmental power—particularly when enforcing federal securities laws against non-members or imposing severe penalties like expulsion from the industry—its actions should be subject to de novo review by the Securities and Exchange Commission (SEC) or an Article III court, given the significant due process concerns and potential market effects of these decisions. Both FINRA's voluntary framework and its exercise of quasi-governmental power are addressed in the analysis section of this article, while subsection B analyzes the interplay between Appointments Clause concerns and the private nondelegation doctrine. Subsection C explores the Seventh Amendment concerns present.

II. BACKGROUND

A. Origins of Self-Regulation: The New York Stock Exchange and the Buttonwood Agreement

Before addressing the origins of FINRA as an SRO, we must discuss the history of self-regulation in the securities industry. This self-regulation dates back to the establishment of the New York Stock Exchange Board, now known as the New York Stock Exchange (NYSE), through the Buttonwood Agreement of 1792.[5] This agreement outlined a pledge by twenty-four stockbrokers to trade exclusively with one another and set a minimum commission of a quarter percent, which facilitated trading among trusted parties and transformed the securities industry.[6] In 1817, the Board, composed of almost thirty brokers at the time, adopted a constitution governing the admission of new members and brokers' conduct in business dealings.[7] To promote accountability, they regulated conduct by imposing fines on and excluding those who disobeyed.[8]

As the Board grew and trading volumes increased, the Board further formalized governing rules and its membership processes, allowing it to maintain

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[5] *See The History of NYSE*, NYSE, https://www.nyse.com/history-of-nyse [https://perma.cc/6LY3-A8Z6] (last visited Dec. 2, 2024).

[6] *See id.*

[7] Stuart Banner, *The Origin of the New York Stock Exchange, 1791-1860*, 27 J. LEGAL STUD. 113, 115 (1998).

[8] *See The History of NYSE*, *supra* note 5.

a superior reputation in securities trading while other exchanges failed.[9] In the 1820s and 1830s, while most trading still took place outside of the Board in brokers' offices, on the streets, and in coffeehouses, New York courts considered the Board as providing the most important evidence of stock prices.[10] This reputation gave the Board significant influence over price setting in New York, and by the 1860s, across the entire country.[11]

B. The Promise and Perils of Self-Regulation

Brokers had strong incentives to uphold the Board's credibility.[12] Misconduct by individual brokers often came at the direct expense of their customers, damaging the profession's overall reputation.[13] This reputational damage made investors reluctant to pay higher prices for brokers' services, as they struggled to distinguish trustworthy brokers and bad actors due to information asymmetry.[14] To maintain premium fees and ensure the exchange's liquidity, reputable brokers had a vested interest in supporting a system that adopted and enforced rules benefiting investors.[15] However, this self-policing system also gave established brokers and larger firms the power to reduce competition by imposing costs and lobbying to create barriers to entry for smaller brokers.[16] While incentives to regulate fellow brokers align in the securities industry in ways they do not in other industries,[17] their limitations became evident after the market crash of 1929, which Franklin D. Roosevelt attributed to rampant speculation in securities.[18]

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[9] *See* William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 CORNELL L. REV. 1, 15 (2013).

[10] Banner, *supra* note 7, at 118.

[11] *Id.* at 119.

[12] *See* Birdthistle & Henderson, *supra* note 9, at 8–12; *see also* Paul G. Mahoney, *The Exchange as Regulator*, 83 VA. L. REV. 1453, 1457–59 (1997).

[13] *See* Birdthistle & Henderson, *supra* note 9, at 10–12.

[14] *See id.* at 8–9 (applying George A. Akerlof's "lemons" problem model of information asymmetry to broker-investor relationships, explaining that investors have difficulty in distinguishing between "good" and "bad" brokers because brokers provide an intangible service and are better positioned to assess the value of securities, leading investors to lower their compensation for brokerage services or overall limiting their participation in securities transactions in the presence of bad actors exploiting informational advantages); *see also* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

[15] *See* Birdthistle & Henderson, *supra* note 9, at 8–12; *see also* Mahoney, *supra* note 12, at 1457.

[16] *See* Birdthistle & Henderson, *supra* note 9, at 10.

[17] *See id.* at 10–11.

[18] *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 76 (3d ed. 2003).

Although debate continues over the primary cause of the crash, it is widely accepted that speculation, coupled with a lack of market safeguards such as minimum margin requirements, was at least one of the contributing factors.[19] Speculation is the practice of making high-risk transactions in trying to profit from short-term price fluctuations and leverage in securities.[20] The role of leverage—borrowing money from brokers to invest more while providing only a part of the stock's price as deposit—is well documented.[21] Trading on margin, which meant using securities as collateral for broker loans, became highly popular before the crash, as investors could gain significantly more from any increases in stock prices by investing more without fully paying for the stocks upfront.[22]

This practice was expanded after the Federal Reserve eased monetary policy in 1927 by cutting interest rates, with the New York Federal Reserve Bank lowering the re-discount rate from 4% to 3.5%.[23] Lower borrowing costs further encouraged banks, corporations, and brokers to issue these loans, as increased demand allowed banks to earn interest and brokers to profit from commissions on each trade.[24] However, the drawbacks of this practice became evident when the Federal Reserve tightened monetary policy beginning in the summer of 1928 and again in August 1929,[25] causing banks and brokerage firms to raise minimum margin

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[19] *See* JOHN KENNETH GALBRAITH, THE GREAT CRASH 1929, 9–27 (Time Inc. ed. 1962) (examining the unchecked optimism that contributed to the speculative frenzy grasping Wall Street before the crash and the extension of credit in the form of broker's loans that contributed to investors' extremely leveraged position); *see also* Mahoney, *supra* note 12, at 1470–75 (arguing that Congress lacked sufficient evidence to substantiate the claims of widespread market manipulation and overestimated its extent); *see generally* Karol Jan Borowiecki et al., *The Great Margin Call: The Role of Leverage in the 1929 Wall Street Crash*, 76 ECON. HIST. REV. 807 (2023) (emphasizing the role of leverage and margin lending in the market crash of 1929).

[20] James Chen, *Understanding Speculation: High-Risk Trading With Reward Potential*, INVESTOPEDIA (last updated August 26, 2025), https://www.investopedia.com/terms/s/speculation.asp# [https://perma.cc/9S4N-6QMC].

[21] *See* Borowiecki et. al., *supra* note 19, at 808–16.

[22] GALBRAITH, *supra* note 19, at 9–27.

[23] *Id.* at 15.

[24] *See id.* at 9–27; *see also Loose Money*, HIGHER ROCK EDUC., https://www.higherrockeducation.org/glossary-of-terms/loose-money [https://perma.cc/V82V-786V] (last visited Feb. 24, 2025); *see generally* Lynn A. Stout, *Are Stock Markets Costly Casinos? Disagreement, Market Failure, and Securities Regulation*, 81 VA. L. REV. 613, 641–43 (1995) (explaining conflicts of interest that arise between brokers and investors in the commission-based stock trading system).

[25] Timothy Cogley, *Monetary Policy and the Great Crash of 1929: A Bursting Bubble or Collapsing Fundamentals?*, FEDERAL RESERVE BANK OF SAN FRANCISCO (Mar. 26, 1999), https://www.frbsf.org/research-and-insights/publications/economic-letter/1999/03/monetary-policy-and-the-great-crash-of-1929-a-bursting-bubble-or-collapsing-fundamentals/ [https://perma.cc/E4F3-L5P5].

requirements.[26] As stock values fell below maintenance margin requirements, brokers issued margin calls or demands for additional deposits to address risks of non-repayment.[27] If investors could not meet these margin calls by adding more funds, brokers were forced to liquidate the stocks to cover the margin loans, which triggered a sell-off and a feedback loop of falling stock prices.[28] In the early 1920s, these loans ranged from one to one and a half billion dollars, and by the end of 1928, this number had ballooned to six billion dollars.[29] The sheer magnitude of margin lending can be shown by this change in volume of margin loans in the market.[30]

In response to the crash and the perceived failures of exchange regulation, stemming from conflicts of interest and inaction among speculative practices, the government created the SEC under the Securities and Exchange Act of 1934, introducing federal oversight to supplement existing private regulations.[31]After the creation of the SEC, Congress passed the Maloney Act Amendments in 1938 to set up an SRO for the oversight of the previously unregulated over-the-counter securities market.[32] The SEC approved the National Association of Securities Dealers (NASD) as an SRO for this purpose.[33] The SEC regulated the national securities market in cooperation with NASD and NYSE for the next several decades. Because of the many crises and scandals during this time, SEC authority over the SROs gradually expanded.[34]

C. The Formation of FINRA and its Governance Structure

Despite these reforms, commentators criticized the system's fragmented and overlapping regulations, which increased confusion and costs for dual-member firms regulated by both NASD and NYSE.[35] On July 30, 2007, after SEC approval, the NASD and NYSE consolidated their regulatory arms to maintain the

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[26] *See* Borowiecki et al., *supra* note 19, at 819.

[27] *See* GALBRAITH, *supra* note 19, at 9–27.

[28] *See id.*; *see also* Borowiecki et al., *supra* note 19, at 814–15.

[29] GALBRAITH, *supra* note 19, at 26.

[30] *Id.* at 25.

[31] *See* Birdthistle & Henderson, *supra* note 9, at 16; *see also* Lynn A. Stout, *supra* note 24, at 641–43.

[32] Birdthistle & Henderson, *supra* note 9, at 17.

[33] *Id.*

[34] *Id.* at 17–20.

[35] Mary L. Schapiro, *Testimony Before the Committee on Banking, Housing and Urban Affairs Hearing on Consolidation of NASD and the Regulatory Functions of the NYSE: Working Towards Improved Regulation*, FINRA (May 17, 2007), https://www.finra.org/media-center/speeches-testimony/testimony-senate-banking-committee-hearing-regulatory-consolidation [https://perma.cc/477T-UTV4].

competitive edge of the American securities market and enable faster responses to rapid changes.[36] Notably, this merger aimed to streamline regulation and increase efficiency, with the support of the Securities Industry Association.[37] However, NASD members who were not dual members filed a class action lawsuit to stop the consolidation, focusing on financial and governance terms they perceived as unfavorable rather than questioning the overall wisdom of the merger.[38] The Second Circuit ultimately dismissed the lawsuit,[39] and a majority of NASD members approved the bylaw amendments, paving the way for the creation of FINRA.[40]

Although FINRA is a not-for-profit SRO subject to the SEC's supervision, it operates as a private Delaware corporation subject to its own by-laws and rules.[41] As an SRO, FINRA must comply with SEC rules, enforce U.S. securities laws against its members, and submit any proposed rules or amendments to existing rules to the SEC for its approval.[42] The SEC also has the power to nullify, delete, and edit FINRA's current rules.[43] Further, FINRA's enforcement or disciplinary proceeding results are subject to de novo SEC review.[44] As such, the SEC maintains thorough oversight over FINRA. However, FINRA is not funded by any taxpayer

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[36] Nancy Condon & Herb Perone, *NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority,* FINRA (July 30, 2007), https://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Sacks_FINRA.pdf [https://perma.cc/GXF5-LK93].

[37] Mary L. Schapiro, *supra* note 35.

[38] Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc., 560 F.3d 118, 119–21 (2d Cir. 2009).

[39] *Id.* at 126.

[40] *See NASD Members OK Changes for Regulatory Consolidation*, REUTERS (Aug. 9, 2007, 5:10 PM), https://www.reuters.com/article/business/nasd-members-ok-changes-for-regulatory-consolidation-idUSN21390422 [https://perma.cc/PF53-BXMP] (indicating 64% of voting members approved the bylaw changes).

[41] *How FINRA Serves Investors and Members*, FINRA, https://www.finra.org/about/how-finra-serves-investors-and-members [https://perma.cc/C5BU-DBBR] (last visited Dec. 4, 2024); *About FINRA*, FINRA, https://www.finra.org/about [https://perma.cc/WFU9-9XYX] (last visited Dec. 4, 2024); *see also Restated Certificate of Incorporation of Financial Industry Regulatory Authority, Inc.*, FINRA, https://www.finra.org/rules-guidance/rulebooks/corporate-organization/restated-certificate-incorporation-financial [https://perma.cc/KSM3-EENC] (last visited Feb. 14, 2025).

[42] GUY P. LANDER, *U.S. Securities Law for International Financial Transactions and Capital Markets* § 13:238 (2d ed.), Westlaw (database updated 2024). https://1.next.westlaw.com/Document/I586a36a1862511dc87cd89e82a914295/View/FullText.html?transitionType=Default&contextData=%28sc.Default%29.

[43] *Id.*

[44] *Id.*

dollars.[45] Member broker-dealers primarily fund it through industry fees.[46] To become FINRA members, brokers must apply through their New Member Applications process and explicitly agree to abide by their rules and regulations.[47]

FINRA's Board of Governors conducts management of its operations.[48] The Board includes ten industry members, eleven public members, and the Chief Executive Officer.[49] Industry firm representatives within specific categories elect industry members: three small firm governors, one mid-size governor, and three large firm governors.[50] This proportional voting system seeks to ensure fair representation and allows member firms to engage in governance. Public governors who have no ties to the securities industry, on the other hand, maintain fair governance by mitigating the potential for industry cartelization.[51] Additionally, a robust committee structure facilitates input from members on rulemaking proposals.[52] FINRA's Department of Enforcement brings disciplinary actions, and the Office of Hearing Officers, an impartial and independent office from the rest of FINRA's departments, adjudicates these cases.[53] For instance, FINRA may sanction member firms with fines, suspensions, censures, cease and desist orders, expulsions from membership, and, in other cases, it may order disgorgement or restitution to harmed investors.[54] FINRA may order an individual to be barred from associating with any FINRA member firm as well.[55]

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[45] *Financial Reports and Policies*, FINRA, https://www.finra.org/about/annual-reports [https://perma.cc/S8QB-GQ8P] (last visited Jan. 25, 2025).

[46] *FINRA Annual Budget Summary and Financial Principles*, FINRA, https://www.finra.org/about/finra-360/progress-report/annual-budget-summary-financial-principles [https://perma.cc/H53J-KXYJ] (last visited Dec. 4, 2024).

[47] *What It Means to Be Regulated by FINRA*, FINRA (April 22, 2024), https://www.finra.org/investors/insights/regulated-by-FINRA [https://perma.cc/9Z8Z-AVSW].

[48] *FINRA Board of Governors*, FINRA, https://www.finra.org/about/governance/finra-board-governors [https://perma.cc/J2HN-8S5H] (last visited Dec. 4, 2024).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Governance*, FINRA, https://www.finra.org/about/governance [https://perma.cc/W69C-LKSV] (last visited Dec. 4, 2024).

[53] *Guide to the Disciplinary Hearing Process*, FINRA, https://www.finra.org/rules-guidance/adjudication-decisions/office-hearing-officers-oho/hearing-process [https://perma.cc/PW7B-9BM3] (last visited Dec. 5, 2024).

[54] *Enforcement*, FINRA, https://www.finra.org/rules-guidance/enforcement [https://perma.cc/3J8M-2M7B] (last visited Oct. 5, 2025); *see also FINRA Disciplinary Actions: What They Are and How To Avoid Them*, INNREG (Aug. 18, 2025), https://www.innreg.com/blog/finra-disciplinary-actions [https://perma.cc/LM6C-66AT] [hereinafter *FINRA Disciplinary Actions*].

[55] *See Enforcement*, *supra* note 54; *see FINRA Disciplinary Actions*, *supra* note 54.

D. An Uncertain Future: Current Constitutional Challenges to FINRA's Authority

Various constitutional doctrines, recently applied by the Supreme Court to limit federal agencies' power, motivate current legal attacks against FINRA. Among these, *Alpine Securities Corporation v. FINRA* stands out as a key case in the D.C. Circuit, raising some of the most pressing and relevant legal questions regarding FINRA's authority.[56] The D.C. Circuit Court of Appeals granted Alpine, a securities broker-dealer, an emergency injunction halting its expulsion from FINRA while the expedited proceeding concluded, and the SEC reviewed the final decision.[57]

This dispute began when FINRA issued a cease-and-desist order against Alpine for violating its internal rules regarding fees and misappropriating customer property.[58] Alpine responded by filing a lawsuit in district court, challenging FINRA's constitutional status on grounds of violating the private nondelegation doctrine, the Appointments Clause, and Due Process.[59] While that case was pending, FINRA determined that Alpine violated the cease-and-desist order and began an expedited proceeding to expel Alpine from FINRA membership.[60] Alpine then sought a preliminary injunction against the expedited proceeding in the district court, arguing that the proceeding afforded by FINRA did not comport with the private nondelegation doctrine nor the Appointments Clause, which the district court denied.[61] The D.C. Circuit Court of Appeals reversed this order in part, holding that FINRA's decision could not be enforced until either the SEC reviewed the expulsion or Alpine's window to seek SEC review had expired.[62] In the context of the expedited proceeding, the court held that FINRA denied Alpine governmental review before a decision that could fundamentally alter, or even end, its ability to stay in business, thus implicating the private nondelegation doctrine, which prohibits Congress from delegating its legislative powers to private entities that lack accountability to the electorate.[63]

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[56] Alpine Sec. Corp. v. Fin. Indus. Regul. Auth., Inc., 121 F.4th 1314 (D.C. Cir. 2024); *see also* Alpine Sec. Corp. v. Fin. Indus. Regul. Auth., 137 HARV. L. REV. 1042 (2024).

[57] *Id.* at 1330–31.

[58] *Id.* at 1318, 1322–23.

[59] *Id.* at 1318.

[60] *Id.* at 1319.

[61] *Id.*

[62] *Alpine*, 121 F.4th at 1319, 1330.

[63] *Id.* at 1330–32.

III. ANALYSIS

Although the D.C. Circuit's ruling was narrowly focused on the question of Alpine's entitlement to a preliminary injunction against its expedited expulsion, Judge Walker's partial concurrence and dissent went further, offering broad constitutional concerns regarding FINRA's entire enforcement regime.[64] His critique suggests that FINRA's structure could be fundamentally flawed, alluding to future challenges to its regulatory authority.[65] The article proceeds in three sections: first, a detailed look at Judge Walker's dissent and his concerns about FINRA's quasi-governmental powers; second, a discussion of Appointments Clause issues and the private nondelegation doctrine in light of important Supreme Court precedent and FINRA's private status; and third, an investigation of Seventh Amendment limits on FINRA's enforcement authority and potential safeguards to ensure constitutional compliance.

A. Judge Walker's Dissent: A Closer Look

Judge Walker discussed how FINRA's hearing officers likely wield significant executive power akin to that of the SEC administrative law judges (ALJs), which were held in *Lucia v. SEC* to function as "Officers of the United States" that must be appointed under the Appointments Clause.[66] Per the Appointments Clause, Officers of the United States must be appointed by the President with Senate confirmation, while Congress may provide for inferior officers to be appointed by the President, courts, or heads of departments.[67]

Unlike the majority, Judge Walker did not cabin his reasoning to apply only in the context of FINRA's expulsions resulting from the expedited process. On the contrary, Judge Walker attacked FINRA's powers to investigate, prosecute, and adjudicate member firms as an unconstitutional use of significant executive authority.[68] He argued that requiring the appointment of SEC's ALJs to adhere to the Appointments Clause while imposing less strict restrictions on FINRA's "nearly identical" private hearing officers would create an unreasonable loophole, allowing delegation of executive power to unaccountable private entities without important safeguards.[69] According to Judge Walker, this would constitute a violation of the non-delegation doctrine by FINRA.[70]

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[64] *Id.* at 1338–51.
[65] *Id.*
[66] *See* Lucia v. Sec. & Exch. Comm'n, 585 U.S. 237 (2018).
[67] *See* U.S. Const. art. II, § 2, cl. 2.
[68] *Alpine*, 121 F.4th at 1338.
[69] *Id.* at 1345.
[70] *Id*.

However, Judge Walker's dissent conflates the private non-delegation doctrine with the exercise of significant executive power concerns embedded in the Appointments Clause, making it unclear whether the issue with FINRA lies in its private status or quasi-governmental functions. His dissent interprets separation of powers principles too rigidly. Similarly, the characterization of FINRA's power to investigate, prosecute, and adjudicate as an exclusively executive function disregards the reality that numerous private organizations exercise similar powers to regulate their members.

For example, trade associations like the National Association of Realtors and the American Institute of Architects regulate and discipline realtors and architects, respectively.[71] Additionally, as discussed in the background section of this article, stock exchanges have historically policed their own members. That said, Judge Walker raises valid questions about the constitutionality of FINRA's structure. This article will continue the analysis by examining the doctrines raised by Judge Walker.

B. Appointments Clause Concerns vs. The Private Nondelegation Doctrine

Judge Walker relies on several Supreme Court cases to argue that FINRA is acting contrary to separation of powers principles embedded in the Appointment Clause. However, these precedents require closer investigation before drawing definitive parallels. It is important to note that *Buckley v. Valeo*,[72] *Freytag v. Commissioner*,[73] and *Lucia v. SEC*[74] all concerned organizations created by statute—the Federal Election Commission, the U.S. Tax Court, and the SEC, respectively.

To begin, the first requirement for a position to qualify as an office established by law is discussed in *United States v. Germaine*.[75] In that case, the Court investigated whether a surgeon appointed by the Commissioner of Pensions to medically examine pension claimants qualified as an officer within the meaning of the Appointments Clause or merely acted as an employee. It held the surgeon

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[71] *NAR's Professional Standards Committee: Its Role in Code Interpretation and Code Enforcement*, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/about-nar/policies/professional-standards-and-code-of-ethics/nars-professional-standards-committee-its-role-in-code-interpretation-and-code-enforcement [https://perma.cc/T9FM-E9DF] (last visited Jan. 27, 2025); *Non-Discrimination, Anti-Harassment, & Complaint Policy*, AM. INST. OF ARCHITECTS, https://www.aia.org/about-aia/professional-standards/non-discrimination-anti-harassment-and-complaint-policy [https://perma.cc/N8RP-BUSC] (last visited Jan. 27, 2025).

[72] Buckley v. Valeo, 424 U.S. 1 (1976).

[73] Freytag v. C.I.R., 501 U.S. 868 (1991).

[74] Lucia v. Sec. Exch. Comm'n, 585 U.S. 237 (2018).

[75] U.S. v. Germaine, 99 U.S. 508, 511–12 (1878).

was operating as an employee because his duties were occasional and temporary, not continuing or permanent.[76] The Court reasoned this because he performed duties only as needed, received no regular appropriation for his compensation, and lacked ongoing responsibilities.[77] The Court clarified that inferior officers must occupy a continuing position established by law and exercise significant executive authority.[78]

Building on this foundation, in *Buckley v. Valeo*, the Supreme Court scrutinized the method of appointing commissioners to the Federal Election Commission. The Court held that the Federal Election Campaign Act gave the Commission powers that could only be exercised by "Officers of the United States," who must be properly appointed in accordance with the Appointments Clause.[79] However, the Court found that Congress improperly appointed the commissioners in this case.[80] The Court distinguished between legislative and investigative powers, which Congress could delegate without having to comport with the Appointments Clause, from enforcement and rulemaking powers, here granted to the commissioners, which it could not delegate because they were executive in nature.[81]

Similarly, *Freytag v. Commissioner of Internal Revenue,* 501 U.S. 868 (1991), involved an office created by statute. Here, the Court ruled that special trial judges (STJs) of the U.S. Tax Court are inferior officers, not employees, because their positions involved significant discretion, including presiding over hearings, ruling on evidence, and drafting proposed findings and opinions.[82] Further, the Court found that the appointment of STJs by the Chief Judge of the Tax Court complied with the Clause because it is an Article I court, encompassed within the "courts of law" language.[83] The Court rejected the argument that STJs should be considered employees, reasoning that the their office was established by law and their duties and discretion, as specified by statute, warranted officer status.[84] The Court distinguished STJs from Special Masters, who served on a "temporary, episodic basis," whose positions were not established by law, and whose duties and functions were not delineated by statute.[85]

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[76] *Id.* at 511.
[77] *Id.* at 512.
[78] *Id.* at 511.
[79] Buckley v. Valeo, 424 U.S. 1, 126, 140 (1976).
[80] *Id.*
[81] *Id.* at 137–39.
[82] Freytag v. C.I.R., 501 U.S. 868, 881 (1991).
[83] *Id.* at 887–92.
[84] *Id.* at 880–83.
[85] *Id.* at 881–82.

Likewise, in *Lucia v. SEC*, the Court held that SEC's administrative law judges (ALJs) are "Officers of the United States," because they exercise significant authority, similar to the Tax Court STJs in *Freytag*, and were improperly appointed by SEC staff.[86] The Court noted that the ALJs held a continuing office established by law, a point on which all parties agreed.[87] Although an amicus argued that SEC ALJs were mere employees since they lacked deference from the SEC, the Court rejected this, noting that deference is not material to the Appointments Clause analysis and that, in practice, the SEC often deferred to ALJ fact-finding.[88] Moreover, the SEC could decline to review an ALJs proposed findings of fact and legal conclusions, allowing them to become final[89] and giving SEC ALJs even more independence than STJs in *Freytag*, whose findings always required review by Tax Court judges before being adopted or rejected.[90]

By contrast, unlike the offices examined in cases like *Buckley*, *Freytag*, and *Lucia*, FINRA is not a statute's creation. It is a private corporation, incorporated in Delaware through a private merger and registered with the SEC. As a private entity, its authority stems not from a statutory grant by Congress, but rather from the consent of its members. As previously discussed, FINRA's members must go through a comprehensive application process to join, which includes agreeing to abide by its rules and submitting to its jurisdiction and disciplinary authority through Forms U-4 and BD.[91] This voluntary agreement sharply contrasts with the statutory frameworks appearing in the cases cited above. In *Buckley*, for instance, the commissioners served within a governmental agency, the Federal Election Commission, which was established by the Federal Election Campaign Act Amendments of 1974.[92] *Freytag* involved the U.S. Tax Court, created by a statute, and the position of Special Trial Judges, whose roles were also defined by statute.[93] *Lucia* involved a similarly structured statutory agency and position.[94] Although FINRA hearing officers' positions may be continuous, neither their roles nor their duties are defined by statute. Instead, they are appointed privately pursuant to FINRA's internal structure, making their roles distinctly different—and far from

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[86] Lucia v. Sec. Exch. Comm'n, 585 U.S. 237, 241 (2018).

[87] *Id.* at 247.

[88] *Id.* at 249.

[89] *Id.*

[90] Freytag v. C.I.R., 501 U.S. 868, 873–74 (1991).

[91] *See* Fin. Indus. Regul. Auth., *Form U4: Uniform Application for Securities Industry Registration or Transfer* (2009), https://www.finra.org/sites/default/files/form-u4.pdf [https://perma.cc/UW5C-ND9F]; U.S. Sec. & Exch. Comm'n, *Form BD: Uniform Application for Broker-Dealer Registration*, https://www.sec.gov/about/forms/formbd.pdf [https://perma.cc/C4F9-ASAZ].

[92] S. 3044, 93d Cong. (1974).

[93] 26 U.S.C. § 7443A.

[94] 15 U.S.C. § 78d; 15 U.S.C. § 78d-1.

identical—to those in the cases cited by Judge Walker. Importantly, FINRA is not funded by taxpayer dollars at all. In *Germaine*, the Court explained that Appointments Clause claims require that an office be established by law, a principle reiterated in *Freytag* and *Lucia*, and considered regular compensation appointments as one of the key factors.[95]

Another instructive case is *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[96] where the Court found that PCAOB's structure did not properly comply with the Clause. PCAOB was similarly created by the Sarbanes-Oxley Act of 2002 to regulate the accounting industry more strictly. Although Congress attempted to establish the PCAOB as a private, non-profit corporation, the statute granted it significant regulatory authority. The Court noted that the PCAOB was modeled after private self-regulatory organizations in the securities industry, but with key differences: it was government-created, and its members were appointed by government officials.[97] The Court held that the PCAOB's dual for-cause removal protections, where PCAOB members could be removed only for cause by the SEC, and SEC commissioners could be removed only for cause by the President, violated separation of powers principles by insulating them from presidential oversight.[98] This distinction reinforces the argument that FINRA should not be held to the same Appointments Clause constraints as PCAOB. Unlike PCAOB, FINRA was not created by Congress, does not derive authority from a statutory office, and operates based on the consent of its members. As such, holding FINRA to the same constitutional standard would be inconsistent with the Court's reasoning in *Free Enterprise Fund*.

Ultimately, the legal issue boils down to whether FINRA is acting as a private entity or as an extension of the government. While FINRA shares legitimate interests with all private organizations in regulating admission to its membership and disciplining members, these interests are also evident in the historical precedent of self-regulation within the securities industry, particularly the stock exchanges. When FINRA enforces internal rules against its own members, this qualifies as an exercise of private regulation that should be upheld. This relationship between the regulator and the regulated is in essence contractual, as members voluntarily agreed to comply with FINRA's rules and regulations. This is analogous to the enforcement of arbitration clauses in contracts, which are upheld even though they involve adjudicatory powers.[99] In both examples, the parties have voluntarily

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[95] Germaine, 99 U.S. 508 at 512.

[96] 561 U.S. 477 (2010).

[97] *Id.* at 485.

[98] *Id.* at 492–93.

[99] *See e.g.*, AT&T Mobility LLC. v. Concepcion, 563 U.S. 333 (2011) (holding that the Federal Arbitration Act preempted state laws prohibiting arbitration agreements which limited class actions, and, when discussing the purpose and principles of the FAA, stating that "courts

submitted themselves to a resolution in a private forum, whether within an arbitrator's authority or a private organization's jurisdiction, through contract.[100] Thus, the authority to discipline members according to internal rules should be analyzed as an aspect of contractual relationship rather than an exercise of governmental power.

With this context in mind, *Alpine Securities v. FINRA* is not the correct case to resolve the broader question of whether FINRA exercises quasi-governmental authority and, if so, whether that authority is consistent with constitutional protections. The opinion addresses FINRA's enforcement of its own rules regarding fees and the proper handling of customer property by members firms, which are actions that, in this context, reflect its role as a private institution.[101] Moreover, these types of decisions are subject to de novo review by the SEC, a governmental agency that is responsive to constitutional demands. The core issue in *Alpine*, however, was the constitutionality of the expedited process itself, as the expulsion would not be stayed during the proceedings, potentially exposing Alpine to financial ruin in the interim.[102]

Nevertheless, outside the limits of this decision, FINRA evidently acts in a quasi-governmental capacity when it enforces federal securities laws against members and non-members alike. While FINRA was not created by statute, the Securities Exchange Act of 1934 permits the SEC to delegate certain enforcement powers to it. The 1983 Amendment also effectively made SRO membership mandatory for nearly all broker-dealers.[103] While the statute does not name FINRA specifically and refers only to self-regulatory organizations, it is nonetheless problematic that FINRA is in practice the only SRO that broker-dealers can join for industry exposure. These legal developments have placed FINRA in a position where it increasingly finds itself wearing a governmental hat and exercising executive power as Judge Walker suggests.

A more accurate question than the Appointments Clause issue, however, is whether Congress has delegated too much governmental authority to FINRA without sufficient oversight, giving it unchecked power. The SEC oversees

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must place arbitration agreements on an equal footing with other contracts, Buckeye Check Cashing, Inc. v. Cardegna, 546 U. S. 440, 443 (2006), and enforce them according to their terms, Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U. S. 468, 478 (1989)").

[100] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (enforcing arbitration agreements contained in registration forms with the exchanges as binding contracts under the FAA since they did not fall under the "contracts of employment" exception, showing that parties may voluntarily submit disputes to a private forum and that agreements in securities registration forms are treated as contracts).

[101] Alpine, 121 F.4th at 1318, 1322–23.

[102] *Id.* at 1326–28, 1331.

[103] 15 U.S.C. § 78o(b)(9) (2018).

FINRA's rulemaking, as FINRA cannot implement a new rule without SEC approval. The SEC may also require FINRA to produce reports and periodically investigate its processes.[104] Still, there may be circumstances where greater governmental supervision may be warranted, particularly when FINRA is enforcing federal securities laws against non-members and imposing severe sanctions like expulsions and suspensions. In such cases, it may be prudent for FINRA to relinquish some of its enforcement power and refer those matters to entities bound by constitutional standards, especially given the severity of these sanctions and their impact on a firm's ability to stay in business. Disciplining broker-dealers in this manner may have broad effects on market resilience and stability, implicating a uniquely governmental interest in maintaining a fair and orderly market.

To avoid triggering private nondelegation issues, FINRA hearing officers may opt for performing a ministerial role in these types of cases, focusing on limited tasks such as gathering evidence, facilitating discovery, conducting preliminary proceedings, and submitting proposed reports to either the SEC, which complies with Appointments Clause requirements, or Article III courts, which are best positioned to handle matters with unique due process concerns.

C. Seventh Amendment Limits on FINRA

Another case that emphasizes the constitutional questions for FINRA's enforcement regime, but which was not directly at issue in *Alpine*, is *SEC v. Jarkesy*.[105]. While a comprehensive analysis of *Jarkesy* is beyond the scope of this article, its holding is directly relevant in evaluating whether FINRA's enforcement powers remain constitutional. In *SEC v. Jarkesy*, the Supreme Court held that when the SEC seeks civil penalties for securities fraud, it cannot only rely on its in-house adjudication system involving ALJs, as the Seventh Amendment entitles defendants to a jury trial in Article III courts.[106] The Court reasoned that the civil penalties involved are punitive and that the securities fraud provisions closely resemble traditional common law fraud actions, which makes them legal in nature and therefore "suits at common law" protected by the Seventh Amendment.[107] Further, the Court found that securities fraud claims do not qualify for the "public rights" exception, which would allow adjudication outside Article III courts.[108]

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[104] *SEC Oversight: SEC Has Taken Steps to Strengthen Its Oversight of FINRA, but Opportunities Exist to Improve Its SRO Oversight Program*, U.S. GOV'T ACCOUNTABILITY OFF.(Nov. 12, 2024), https://www.gao.gov/products/gao-25-107723 [https://perma.cc/7RS3-6JPP].

[105] 144 S. Ct. 2117 (2024).

[106] *Id.* at 2127.

[107] *Id.*

[108] *Id.*

The implications of *Jarkesy* may mean that FINRA will need to comply with Seventh Amendment demands when civil penalties for securities fraud are involved. These cases should be forwarded to Article III courts, with FINRA's role limited to submitting proposed findings and recommendations. It would then be up to the courts to either adopt or reject those findings as the tax judges did in *Freytag*. Alternatively, FINRA may argue that applying to join FINRA inherently waives its members' Seventh Amendment rights, or it may seek to address these concerns by incorporating an express jury trial waiver provision into its membership application forms. Whether such arguments are entertained or waivers are upheld remains uncertain. Regardless, FINRA stands to benefit from enhancing transparency during the application process to ensure that applicants are fully informed of their rights and obligations when joining.

IV. CONCLUSION

In conclusion, the intersection of *Jarkesy*, *Alpine*, and FINRA's changing role presents a need to rethink the balance between self-regulation and constitutional accountability in securities regulation. Since FINRA functions within a gray area that merges private supervision with public consequences, both courts and Congress must consider if its structure and delegated powers align with applicable constitutional requirements. However, they must do so while recognizing the historical role of self-regulation in the securities industry and the contractual or corporate foundation of FINRA's governance. Striking this balance requires acknowledging the tension in FINRA's dual identity, which may justify different levels of constitutional scrutiny, if any, depending on the nature of the power it is exercising in any given case.