DON'T TREAD ON MI: HOW THE COURTS AT WESTMINSTER IN 1789 AFFECT MICHIGAN HEARING PROCEDURES TODAY

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I. INTRODUCTION

In February 1776, during the lead up to the American Revolutionary War, Continental Congressman Christopher Gadsden first presented a yellow-background flag, featuring a coiled snake—a nod to Benjamin Franklin's "Join, or Die" cartoon—and the words "Don't Tread on Me," to the Provincial Congress of South Carolina.[1] The flag became an icon of the War, symbolizing defiant resistance to British rule and serving as a warning against oppression.[2] Two hundred and fifty years later, however, while British rule has been eliminated, British law and the Westminster courts still impact the United States today.[3] Consistent with Article III, the Seventh Amendment, and the Fourteenth Amendment of the Constitution, the Supreme Court recently decided to eliminate intra-agency administrative proceedings for causes of action that were common law actions traditionally tried by English courts prior to the United States' founding in *Securities & Exchange Commission v. Jarkesy*.[4] The implications of *Jarkesy* are still largely unknown, but, since its announcement, there has been concern over how much it will burden administrative hearing procedures.[5]

Currently, there are approximately 441 administrative agencies in the federal government[6] and approximately 12 agencies in Michigan's government.[7] Since their creation, however, there have been multiple challenges to the legality of administrative agencies and their authority.[8] At the federal level, the Supreme Court's deference to agency action has shifted from being flexible under the *Skidmore* doctrine (from 1944 to 1984), to almost entirely deferential under the

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[1] Adam Volle, *Gadsden flag*, BRITANNICA.COM (Sept. 10, 2024), https://www.britannica.com/topic/Gadsden-flag [https://perma.cc/5SUW-8BLL] (last visited Apr. 13, 2025).

[2] *Id.*

[3] *See generally* discussion Part II, *infra*.

[4] Sec. & Exch. Comm'n v. Jarkesy, 144 S. Ct. 2117 (2024); *see also* discussion Part II, Section A.3, *infra*.

[5] Jarkesy, 144 S. Ct. at 2155 (Sotomayor, J., dissenting) (warning that the decision would have major implications as Congress "has enacted more than 200 statutes authorizing dozens of agencies to impose civil penalties"); *see also U.S. Supreme Court's* Jarkesy *Decision Imperils FERC's Use of In-House Hearings to Impose Civil Penalties*, Regulatory Litigation Update, SIDLEY AUSTIN LLP (July 2, 2024), https://www.sidley.com/en/insights/newsupdates/2024/07/us-supreme-courts-jarkesy-decision-imperils-fercs-use-of-inhouse-hearings-to-impose-civil-penalties [https://perma.cc/MR4U-S5MJ].

[6] *Agencies*, FED. REG., https://www.federalregister.gov/agencies [https://perma.cc/JY8W-GTKU] (last visited Mar. 7, 2025).

[7] *The U.S. and its Government,* Michigan, USA.GOV, https://www.usa.gov/states/michigan [https://perma.cc/SUP7-3LDU] (last visited Mar. 7, 2025).

[8] *See generally* discussion Part II, *infra*.

Chevron doctrine (from 1984 to 2024), and now, under *Loper Bright* (from 2024 to present), almost entirely up to the reviewing court's discretion.[9] Michigan's administrative caselaw is markedly less developed, and the Constitutional concerns addressed in the *Jarkesy* majority opinion do not apply to the states.[10] However, the Michigan Supreme Court has followed the federal lead in the past, despite nothing binding it to the federal rule.[11] Therefore, the *Jarkesy* opinion could trickle down into Michigan law and limit administrative hearing procedures to non-common law causes of action.

First, this Note reviews the history of federal administrative authority, beginning with the creation of agencies in the U.S. Congress, then discussing the Supreme Court's shift in deference over time leading up to the *Jarkesy* decision.[12] Next, this Note discusses *Jarkesy* and its immediate implications on federal administrative hearing procedures, tying in other Constitutional limitations on administrative authority, such as Article III, the Seventh Amendment, and the Due Process Clauses.[13] Then, this Note reviews Michigan administrative hearing procedures and their creation by the State legislature.[14] This Note then analyzes the potential impacts of the *Jarkesy* decision on Michigan administrative hearing procedures.[15] The Note argues that, although Michigan does not need to follow the federal rule in *Jarkesy* because the Seventh Amendment does not apply to State law, the principles of Due Process, which are part of Michigan law, and the State's history of following federal standards even when doing so is not required, Michigan may adopt the rule in *Jarksey* as the law of its land. By doing so, Michigan will dramatically limit the authority of Administrative Law Judges to impose civil penalties (i.e., money) in administrative proceedings.[16]

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[9] *Compare* Skidmore v. Swift & Co., 323 U.S. 134 (1944), *with* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024), *and* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

[10] *Compare* discussion Part II, Section C.1, *infra*, *with* Jarkesy, 144 S. Ct. at 2127-29; *see also* U.S. CONST. amend. VII (applying solely to the federal government).

[11] When the U.S. Supreme Court decides a federal question that relates *only* to the federal government (such as standing), state supreme courts are not required to adopt the same standard. *But see* Lee v. Macomb Cnty. Bd. of Comm'rs, 464 Mich. 726 (2001), *overruled by* Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349 (2010) (adopting the federal standing test in *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992), as Michigan's standing test).

[12] *See* discussion Part II, Sections A.1-A.2.

[13] *See* discussion Part II, Section B.

[14] *See* discussion Part II, Section C.

[15] *See* discussion Part III, Section A.

[16] *Id.*

II. BACKGROUND

A. History of Federal Administrative Authority

1. Administrative Procedures Act

Though they have no formal basis in the Constitution, administrative agencies are intimately comingled in the three branches of federal government.[17] Administrative agencies act with quasi-judicial, -legislative, and -executive authority to regulate many different areas of public policy.[18] The modern version of federal administrative agencies took form during the New Deal Era of legislation with the passage of the Administrative Procedures Act[19] (APA) in 1946 after "long-term efforts to regulate the decision-making of administrative agencies" by both Congressional Democrats and Republicans.[20] Over time, through modifications of the original APA and many Supreme Court decisions, the APA has considerably evolved.[21]

The APA regulates the authority of administrative agencies by classifying the types of agency action and decision-making regularly used by administrative offices.[22] The Act requires procedures to safeguard individual freedoms, namely that the government provides Due Process when interfering with a person's "life, liberty, or property."[23] Generally, administrative agencies interpret statutes, promulgate rules, and enforce rules.[24] The APA sets out basic requirements of all administrative agencies in these quasi-judicial, -legislative, and -executive functions.[25] The adjudication of disputes concerning agency actions are usually

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[17] *See* U.S. CONST. (no articles or amendments mention or authorize administrative agencies).

[18] *See generally* Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENVTL. L. REV. 207 (2016).

[19] Administrative Procedures Act, 5 U.S.C. §§ 500-596.

[20] Elias, *supra* note 18, at 208.

[21] *See generally Administrative Procedure Act, U.S.C.A. Popular Name Table for Acts of Congress*, WESTLAW.COM, https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1002887&cite=I0179F3D0CF-C511DEA64BC-13F4D131DCF&refType=LQ&transitionType=Default&contextData=(sc.Default)&originationContext=popularname [https://perma.cc/W2DJ-BGVC] (last visited Mar. 13, 2025) (showing the APA has been amended 16 times since its enactment in 1946); *see also* Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733 (2021) (describing the history of APA amendments and developments in the law).

[22] 5 U.S.C. § 553.

[23] U.S. CONST. amend. V; *see also* 5 U.S.C. §§ 554, 556-557.

[24] *See* 5 U.S.C. §§ 556-557.

[25] For example: (1) 5 U.S.C. § 554(b) requires notice for agency actions, with some reply from interested or affected parties; (2) 5 U.S.C. § 555(b) allows for the intervention of similarly interested

handled within the agency itself in either a formal or informal proceeding.[26] The APA only prescribes a formal adjudication procedure for "every case of adjudication *required by statute* to be determined on the record after opportunity for an agency hearing."[27] As such, whether formal or informal adjudication, disputes over these interpretations, rules, and their enforcements may be required to be brought before an Administrative Law Judge (ALJ) in an administrative hearing before they can be challenged in federal court before an Article III federal judge.[28]

Aside from Article III and Due Process, the other Constitutional limitation working in the background of ALJ authority and intra-agency administrative proceedings is the Seventh Amendment's guarantee of a right to an Article III jury trial for all civil causes of action that were "[s]uits at common law."[29] At the time of America's founding, the right to a trial by jury in civil matters was under threat by the King of England; this was one of the largest grievances that prompted the American Revolution.[30] The Seventh Amendment preserves this right, subject only to two requirements: that the amount in controversy "exceed twenty dollars," and that the matter concern a "[s]uit[] at common law," or, as it has been recognized, a cause of action "tried by the courts at Westminster in 1789."[31] By its terms, the Seventh Amendment does not preserve a civil jury trial right in an Article III court

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persons in a current administrative matter; (3) 5 U.S.C. §§ 554(c) and 556(c)(6) allow for settlement; and (4) 5 U.S.C. §§ 571-583 provide for voluntary Alternative Dispute Resolution. §§ 534(b), 555(b), 554(c), 556(c)(6).

[26] *See* 5 U.S.C. §§ 556-557.

[27] 5 U.S.C. § 554(a) (emphasis added). Older Supreme Court precedent required the exact phrasing of "on the record" in the authorizing statute for formal adjudication. *Compare* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 238 (1973), *with* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972), *and* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 417 (1971); *see also* John F. Stanley, *The "Magic Words" of 554: A New Test for Formal Adjudication under the Administrative Procedure Act*, 56 HASTINGS L.J. 1067 (2005) (describing history of rule and circuit splits).

[28] *See generally* Peter A. Devlin, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 N.Y.U. L. REV. 1234 (2018) (discussing the federal doctrine of exhaustion of administrative remedies). Also of note, the term 'Article III' references Article III of the U.S. Constitution, which establishes federal judges and the federal courts. *See generally* U.S. CONST. art. III. As discussed throughout this Note, Article III judges are appointed by the President, confirmed by the Senate, and have lifetime tenure, subject to impeachment by the House of Representatives and conviction by the Senate. *Id.*; *see also* discussion Parts II-IV, *infra*.

[29] U.S. CONST. amend. VII.

[30] *See*, *e.g.*, Richard S. Arnold, *Trial by Jury: The Constitutional Right to A Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 13-14 (1993).

[31] U.S. CONST. amend. VII; *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *379 (calling the English civil jury trial right "the glory of the English law"); N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring) (recognizing the courts in 1789 in Westminster, England, as the 'common law' courts for Seventh Amendment purposes).

for non-common law causes of action (those newly created causes of action created by Congress).[32] Therefore, through the APA, ALJs have the authority to adjudicate *newly created* causes of action in intra-agency administrative proceedings.[33]

ALJs function in much the same way as Article III federal judges but are distinguishable by several characteristics.[34] First, ALJs are not appointed for life terms by the President and confirmed by the Senate like Article III judges.[35] Instead, ALJs are appointed by the agency's director or commission and serve for as long as the agency desires.[36] Second, while ALJs are considered independent officers of an agency, they are in fact agency employees, whereas Article III judges are truly independent of the executive and legislative branches.[37] Third, ALJs operate under the assumption that the challenged agency action is valid or permissible, so long as there is some substantive reason for implementation.[38] This assumption does not consider the very real possibility that an agency has overstepped and regulated beyond the authorizing statute(s).

These differences, though unsuspecting on their face, and the Constitutional limitations working in the background are the substantive reasons why the scope of ALJ authority and intra-agency administrative proceedings have become increasingly limited.[39]

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[32] U.S. CONST. amend. VII; *but see* discussion Part II, Section B.

[33] *See* Administrative Procedures Act, 5 U.S.C. §§ 556-557; *but see* Part II, Section B. Additionally, consistent with Sec. & Exch. Comm'n v. Jarskey, 144 S. Ct. 2117 (2024), it is important to note that ALJ's may adjudicate *suits at common law*, so long as a litigant is afforded a procedural opportunity to have their case heard in an Article III jury trial.

[34] U.S. CONST. art. II, § 2, cl. 2.

[35] U.S. CONST. art. III, §§ 1-2.

[36] *See* 5 U.S.C. § 3105.

[37] *Id.*; *supra* note 19.

[38] Agency actions are permissible, so long as they are supported by 'substantial evidence.' 5 U.S.C. § 706(2)(E). However, 'substantial evidence' is not a high bar for an agency to reach, as the Supreme Court has said it must only be "more than a mere scintilla." Consol. Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 217 (1938).

[39] *See* Thomas P. Gies, *From the Administrative State to the Wild West? What Employers Should Know About the Shifting Administrative Law Landscape*, CROWELL & MORING LLP (Aug. 16, 2024), https://www.crowell.com/print/v2/content/96022/from-the-administrative-state-to-the-wild-west-what-employers-should-know-about-the-shifting-administrative-law-landscape.pdf [https://perma.cc/Y962-MBYZ] ("Over the past several years, federal courts have increasingly questioned the authority of administrative law judges").

2. Administrative Deference

For much of their history, Article III courts reviewed an administrative agency's interpretation of its authorizing statute on a deferential basis.[40] Prior to the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[41] Article III judges grappled with the issue of whether, and to what extent, federal courts should interpret statutes granting administrative authority.[42] In particular, when Congress's grant of authority was silent or ambiguous, Article III judges were uncomfortably positioned to decide intra-government grants of authority in very technical industries in which they are not experts.[43] This recurring issue influenced the concept of administrative deference by Article III courts in the majority of statutory interpretation cases.[44]

Facing an influx of federal cases in 1984, the Supreme Court decided *Chevron* and established that, when Article III courts review an administrative agency's understanding of a silent or ambiguous authorizing statute, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[45] This decision birthed the so-called *Chevron* doctrine, which instructed Article III courts to leave their statutory interpretation hats at the metaphorical courthouse door when reviewing agency actions.[46] This standard provided great insulation and security over the decisions made by ALJs, as an agency's ALJ would take the agency's interpretation of the authorizing statute as *prima facie* valid and provide a disposition that a reviewing court would defer to (barring an agency's arbitrary and capricious interpretation of the law).[47]

In June 2024, the Supreme Court completely overturned the deferential standard established under *Chevron* in *Loper Bright Enterprises v. Raimondo*.[48] There, the Court considered 40 years of *Chevron*-deference precedent and concluded that "*Chevron* has thus become an impediment, rather than an aid, to

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[40] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

[41] *Id.*

[42] *Id.* at 844 n.14.

[43] *Id.* at 865.

[44] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 1001 (2017) ("the cost-benefit analysis of different interpretive methodologies weighs so heavily in favor of judicial deference that the twentieth-century abandonment of the traditional canons should be viewed as a net positive.").

[45] *Chevron*, 467 U.S. at 843; *see also Chevron*, 467 U.S. at 843 n.11 (permissible interpretation does not mean 'best' or the same one a reviewing court would have formulated).

[46] *Chevron*, 467 U.S. at 843 (cited as authority in over 19,000 cases on Westlaw).

[47] *See Chevron*, 467 U.S. at 843; *see also* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[48] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

accomplishing the basic judicial task of 'say[ing] what the law is.'"[49] *Loper Bright* returned statutory interpretation regarding agency authority to Article III courts, thereby removing some of the insulation and security over ALJ decisions and shifting back to the *de novo* standard of review.[50]

Not all agency deference has been abolished since *Loper Bright*, however, as the *Skidmore* doctrine resurfaced in *Jarkesy*, eliminating the strict deference to agency statutory interpretation under *Chevron* and returning to a more flexible standard of review.[51] Chief Justice John Roberts, writing for the majority in *Loper Bright*,[52] explained that the Court's 1944 holding in *Skidmore v. Swift & Co.*[53] compels a reviewing Article III court to consider "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control" when interpreting an authorizing statute.[54] In essence, the agency gets the deference for which it can effectively argue.[55] Still, the deference afforded to administrative agencies and, therefore, their ALJs, have been restricted significantly.[56]

The full weight of *Loper Bright* remains to be experienced, but many scholars believe the impact will be less consequential than a complete flooding of the federal courts' dockets.[57] Nonetheless, the record of the Supreme Court since *Chevron* has been to limit the authority conferred upon ALJs by Congress.[58]

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[49] *Id.* at 2271 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

[50] *See* Holy Trinity Church v. United States, 143 U.S. 457 (1892) (discussing the Court's different methods of statutory interpretation).

[51] *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944) (establishing the *Skidmore* doctrine).

[52] Loper Bright, 144 S. Ct. 2244.

[53] 323 U.S. at 134.

[54] *Id.* at 140.

[55] This simplification owes its existence to Noah D. Hall, Professor of Law, Wayne State University Law School, and Director of Scholarship, Great Lakes Environmental Law Center; J.D., University of Michigan Law School, 1998; B.S., University of Michigan School of Natural Resources & Environment, 1995. More expansively, *Skidmore* indicates that a court should consider the agency's interpretation of its potential authorizing statute: "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

[56] *Compare Skidmore*, 323 U.S. at 134, *with Chevron*, 467 U.S. at 837, *and* Loper Bright, 144 S. Ct. at 2244.

[57] *Compare* Chris S. Leason & Liam Vega Martin, *Supreme Court Overrules Chevron*, 54 ENV'T. L. REP. 10731 (2024), *with* United States v. Mead Corp., 533 U.S. 218, 261 (2001) (Scalia, J., dissenting) (arguing that if a then-future court overturns *Chevron*, its "consequences will be enormous, and almost uniformly bad.").

[58] *See* discussion Part II, Section A.3.

3. Due Process Requirements Pre-Jarkesy

Another limiting factor on ALJ authority since the passage of the APA is the Court's ever-changing understanding of the Due Process Clause.[59] Particularly in the context of administrative hearing procedures, the Court has held varying opinions on what is Constitutionally required prior to *Jarkesy*.[60]

One of the more notable checks on administrative authority under the guise of Due Process came in the 1970 Supreme Court decision *Goldberg v. Kelly*, where the Court reviewed a New York ALJ's decision to terminate a welfare recipient's benefits.[61] This deprivation of property occurred prior to notice and an opportunity to be heard in the form of an evidentiary hearing.[62] The Court emphatically held that this was a Due Process violation, especially given the nature of the deprivation: "the crucial factor in this context […] is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live."[63] Following *Goldberg*, there was an unanswered question of to what extent an administrative agency's tribunal proceedings needed to mirror that of Article III court proceedings.

Not long after *Goldberg*, in 1976, the Supreme Court revisited Due Process requirements in administrative hearing procedures in *Matthews v. Eldridge*.[64] In that case, a similarly situated defendant that received income from the Social Security Administration had their benefits revoked by an ALJ.[65] The defendant sued on the ground that the administrative hearing procedure was insufficient to guarantee his Due Process rights.[66] The majority decided against requiring a fundamentally similar procedure to Article III proceedings and supported ALJ authority, stating: "The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances."[67] The Court qualified its prior holding in *Goldberg* and adopted a balancing test to determine whether an administrative procedure meets the constitutional guarantees of the Due Process Clause.[68] The test required a consideration of three factors: (1) the private interest at stake; (2) weighing the risk

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[59] U.S. CONST. amends. V, XIV.

[60] Sec. & Exch. Comm'n v. Jarskey, 144 S. Ct. 2117 (2024).

[61] Goldberg v. Kelly, 397 U.S. 254, 255-57 (1970).

[62] *Id.* at 256; *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

[63] *Goldberg*, 397 U.S. at 264 (emphasis added).

[64] Mathews v. Eldridge, 424 U.S. 319 (1976).

[65] *Id.* at 324.

[66] *Id.* at 324-25.

[67] *Id.* at 348.

[68] *See id.* at 335.

of erroneously depriving an individual of said interest with alternative procedures; and (3) the financial and administrative costs associated with the alternative procedures."[69]

By its terms, *Matthews* was a victory for ALJs. The decision reaffirmed trust in the administrative hearings process, despite varying from Article III judicial procedure.[70] Thereafter, a pair of subsequent cases in the realm of academic administrative adjudication[71] further supported the autonomy of administrative agencies to construct administrative adjudication procedure conducive to their fields.[72]

In *Board of Curators of University of Missouri v. Horowitz*, the Supreme Court held that a formal hearing prior to the dismissal of a student for academic reasons is not required by the Due Process Clause, as such evaluations of students differ significantly from the judicial and administrative fact-finding proceedings that typically merit a full hearing.[73] Similarly, the Seventh Circuit adopted a balancing test favoring deference to administrative judicial process in *Osteen v. Henley*.[74] That court held that, to determine what process is due in a student disciplinary hearing, one must consider "the cost of the additional procedure sought, the risk of error if it is withheld, and the consequences of error to the person seeking the procedure."[75] These cases further protect administrative authority to determine for themselves the appropriate, efficient means of adjudicating their disputes.

The general trend among the Supreme Court until *Jarkesy*[76] was to defer the rules of an agency's administrative hearings procedure to the agencies themselves, allowing for atypical approaches to claim resolution if a particular agency compelled it.[77] Moreover, there was a common fact pattern among these intra-agency proceedings: the agency conducting the investigation was the same agency conducting the adjudication.[78] Cases like *Matthews* and *Horowitz* make no issue of

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[69] *Id.*

[70] *Compare* 5 U.S.C. §§ 556-557, *with* Fed. R. Civ. P.

[71] Of note, academic administrative hearings are not "agencies" in the traditional sense, but they implicate Due Process protections in that they are public institutions (government-created, -managed, and -funded) depriving a citizen of their liberty or property. *See* U.S. CONST. amends. V, XIV. Nevertheless, they are "administrative" in nature, and these cases are telling of what is permissible in administrative adjudications according to the Supreme Court.

[72] Bd. of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978); Osteen v. Henley, 13 F.3d 221 (7th Cir. 1993).

[73] Horowitz, 435 U.S. at 89-90.

[74] Osteen, 13 F.3d at 226.

[75] *Id.* at 226.

[76] *Jarkesy* was decided in June of 2024. 144 S. Ct. 2117.

[77] *See* discussion Part II, Section A.

[78] *See Matthews*, 424 U.S. at 324-25, *and Horowitz*, 435 U.S. at 81-82.

this fact and do not critique the practice on Due Process grounds.[79] However, after years of kicking this can down the road, the Court in *Jarkesy* wholesale admonishes intra-agency administrative proceedings for causes of action that were tried at common law.[80]

B. Jarkesy *and Resulting Implications on ALJ Authority*

Perhaps the most extensive restriction on ALJ authority came just one day prior to the Supreme Court's publishing of *Loper Bright* in *Securities & Exchange Commission v. Jarkesy*,[81] which curtailed Due Process[82] arguments against ALJs and newly implicated the Seventh Amendment's right to a jury trial in common law causes of action.[83]

Following "the Wall Street Crash of 1929, Congress passed a suite of laws designed to combat securities fraud," which, up to the decision date of *Jarkesy*, were treated as a novel cause of action.[84] The laws, which often overlapped with one another, concerned securities trading and registering securities with the Securities and Exchange Commission (SEC).[85] Specifically, the Court reviewed three antifraud provisions: Section 17(a) of the Securities Act, Section 10(b) of the Securities Exchange Act, and Section 206 of the Investment Advisers Act.[86] However, the issue before the Court was not whether these securities laws themselves were permissible.[87] Rather, the Court decided whether the SEC was permitted to adjudicate cases brought pursuant to these laws *internally* before an SEC ALJ, rather than a federal district court jury.[88] In *Jarkesy*, the SEC was seeking to impose civil penalties for securities fraud against Patriot28, LLC, an investment firm, and its manager, George Jarkesy, Jr., for allegedly

> misle[ading] investors in at least three ways: (1) by misrepresenting the investment strategies that Jarkesy and Patriot28 employed, (2) by lying about the identity of the funds' auditor and prime broker,

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[79] *Id.*

[80] *Jarkesy*, 144 S. Ct. at 2136.

[81] 144 S. Ct. 2117 (2024).

[82] *See* discussion Part II, Section A.1.

[83] U.S. CONST. amend. VII.

[84] *Jarkesy*, 144 S. Ct. at 2125.

[85] *Id.*

[86] *Id.*; 15 U.S.C. § 77q(a)(2); 17 C.F.R. § 240.10b-5 (2023) (promulgated pursuant to 15 U.S.C. § 78j(b)0); 17 C.F.R. §§ 275.206(4)-8(a)(1), (2) (promulgated pursuant to 15 U.S.C. § 80b-6(4)).

[87] *Jarkesy*, 144 S. Ct. at 2127.

[88] *Id.*

> and (3) by inflating the funds' claimed value so that Jarkesy and Patriot28 could collect larger management fees.[89]

Yet, rather than bring the matter before a federal district court, the SEC opted to bring the action in its own tribunal pursuant to enabling provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[90]

After a full internal SEC proceeding, the presiding ALJ—acting as both the finder of fact and law—applied the above-mentioned law, found in favor of the SEC, and issued a civil penalty of $300,000.00 against Jarkesy and Patriot28.[91] Jarkesy and Patriot28 petitioned for judicial review of the proceeding, and the Supreme Court granted the Petition for Certiorari.[92] Rather than uphold the decision of the ALJ or critique the agency's interpretation of the authorizing statutes, the Supreme Court vacated the ALJ's final order on the grounds that Congress violated the Seventh Amendment's guarantee of a civil jury trial for common law causes of action when it attempted to restrict the authority to adjudicate securities fraud claims to intra-agency SEC proceedings.[93] The Court reasoned that these claims and their remedies too closely resemble "a type of remedy at common law that could only be enforced in courts of law."[94]

Writing for the majority, Chief Justice John Roberts explained that the Seventh Amendment entitles a defendant to a jury trial when an administrative agency seeks to impose civil penalties for charges that strongly resemble claims of common law fraud.[95] Even beyond that, the decision emphasizes that "[t]he Constitution prohibits Congress from 'withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law,'"[96] and all "matters concerning private rights may not be removed from Article III courts."[97]

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[89] *Jarkesy*, 144 S. Ct. at 2126.

[90] Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80b-3(i)(1), *invalidated in part by* Sec. & Exch. Comm'n v. Jarkesy, 144 S. Ct. 2117 (2024). The Dodd-Frank Act was signed into law in 2010 in response to the financial crisis of 2008, but it included last-minute additions and was fraught with oversights and errors. *See Oversight of Dodd-Frank Act Implementation*, HOUSE COMM. ON FIN. SERVS., https://financialservices.house.gov/dodd-frank/ [https://perma.cc/26W2-JQ3Q] (last visited Mar. 7, 2025).

[91] *Jarkesy*, 144 S. Ct. at 2127.

[92] *Id.*

[93] *Id.* at 2131.

[94] *Id.* at 2129 (citing Tull v. United States, 481 U.S. 412, 422 (1987)) (internal quotation marks omitted).

[95] *Id.* at 2130-32.

[96] *Id.* at 2131 (citing Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. 272, 284 (1855)).

[97] *Jarkesy*, 144 S. Ct. at 2132.

In essence, if a suit "is *made of 'the stuff* of the traditional actions at common law tried by the courts at Westminster in 1789,'"[98] then it concerns private rights and must be tried in an Article III court with the full Constitutional guarantees of the Seventh Amendment.[99]

Jarkesy's attack on ALJ authority is three-fold, as the concurring opinion claims that together: (1) the Seventh Amendment, (2) Article III, and (3) the Due Process Clauses *require* a jury trial and conventional civil litigation before the government can deprive a citizen of money.[100] Further, Justice Neil Gorsuch, concurring in the opinion with Justice Clarence Thomas, described ALJ proceedings as a procedural hellscape prejudiced against defendants:

> Things look very different in agency proceedings. The…defendant enjoys no general right to discovery. Though ALJs enjoy the power to issue subpoenas on the request of litigants…they "often decline to issue [them] or choose to significantly narrow their scope," Oral depositions are capped at five, with another two if the ALJ grants permission. In some cases, an administrative trial must take place as soon as 1 month after service of the charges, and that hearing must follow within 10 months in even the most complex matters. The rules of evidence, including

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[98] Here, the Court is saying that the fact that "securities" in "securities fraud" did not exist in 1789 is not determinative. Rather, *Jarkesy* holds that "fraud" is what is determinative, and "fraud" was clearly a cause of action at common law. *See* Jarkesy, 144 S. Ct. at 2130 ("Congress's decision to draw upon common law fraud created an enduring link between federal securities fraud and its common law ancestor.") (citation and internal quotation marks omitted).

[99] *Id*. at 2132 (quoting N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring)) (emphasis added). Moreover, the reference to "private rights" is in alternative to "public rights," for which there is an exception from the Seventh Amendment's right to a civil jury trial. *See* Atlas Roofing Co., Inc. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 455 (1977) ("when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment[]"). The analysis of this exception is beyond the scope of this Note's discission. However, it is worth noting that the "public rights" exception in *Atlas Roofing* relies on a new cause of action and new remedies sought, both unknown to the common law. *See id.* at 461.

[100] *Jarkesy*, 144 S. Ct. at 1240 (Gorsuch, J., concurring).

> their prohibition against hearsay, do not apply with the same rigor they do in [an Article III] court.[101]

Far from complimenting ALJs, the Court—at least the concurring Justices—took an axe to the legitimacy of federal ALJs in administrative judicial proceedings on multiple fronts.[102]

C. State Administrative Agency Authority

1. Michigan

Unlike at the federal level, Michigan administrative agencies are explicitly authorized in the 1963 State Constitution, which empowers the Michigan Legislature to allocate by law "[a]ll executive and administrative offices, agencies and instrumentalities [within] the executive branch of state government and...[prescribe]...their respective functions, powers and duties."[103] Michigan administrative agencies act similarly to federal administrative agencies with quasi-judicial, -legislative, and -executive authority in regulating, rulemaking, and adjudicating State matters under the authority granted to them by the State Legislature.[104] Moreover, the Michigan Administrative Procedures Act of 1969[105] (MAPA) creates similar procedures for agencies and the promulgation of rules as the federal counterpart.[106]

In Michigan, hearings for contested administrative rulings are generally not conducted within the respective agency that issued the ruling. Instead, they are held before an ALJ within an overarching agency called the Michigan Office of Administrative Hearings and Rules (MOAHR).[107] MOAHR also oversees the administrative rulemaking for all State departments.[108]

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[101] *Jarkesy*, 144 S. Ct. at 2141 (Gorsuch, J., concurring) (quoting Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 68 (2016); 17 C.F.R. §§ 201.230(b)(3), 201.231(a), 201.230) (internal citations omitted)).

[102] *Jarkesy*,144 S. Ct. at 2140-54.

[103] MICH. CONST. of 1963, art. V, § 2.

[104] *See* Union Carbide Corp. v. Pub. Serv. Comm'n, 431 Mich. 135 (1988).

[105] Administrative Procedures Act of 1969, MICH. COMP. LAWS §§ 24.201-24.328 (2024).

[106] Administrative Procedures Act, 5 U.S.C. §§ 550-596.

[107] *Department of Environment, Great Lakes, and Energy*, DEP'T OF LICENSING & REG. AFFS., https://www.michigan.gov/lara/bureau-list/moahr/regulatory/egle [https://perma.cc/2V2H-H5DP] (last visited Jan. 30, 2025).

[108] *LARA Bureaus*, DEP'T OF LICENSING & REG. AFFS., https://www.michigan.gov/lara/bureau-list/moahr/regulatory/egle [https://perma.cc/4CUR-GTXZ] (last visited Jan. 30, 2025); *see also* Katie Wienczewski, *Administrative Rulemaking: Providing the detail and substance in Michigan Law*, 100 MICH. B.J. 24 (Dec. 2021).

The standard rulemaking process begins with the relevant Michigan agency submitting a request for rulemaking to MOAHR.[109] This submission includes the statutory authority for the rule, the focus of the rule, and the decision record to date.[110] Then, after the request is approved, the agency drafts a copy of the proposed rules and submits them to MOAHR.[111] MOAHR then reviews the proposed rules, confirms they are within the respective agency's statutory authority, and may edit them before giving their approval.[112] Once the proposed rules are approved, the agency submits a regulatory impact statement and cost-benefit analysis report to MOAHR.[113] After these reports are approved, the agency gives proper notice to the public and holds a hearing for written or verbal comment.[114] Finally, these comments and the entire record of the rulemaking process are sent to the Joint Committee on Administrative Rules, a bipartisan State legislative committee, which may object to the rule, propose its amendment, or accept it as submitted.[115]

While they have concurrent jurisdiction with ALJs, Michigan courts have employed the doctrines of Primary Jurisdiction[116] and Exhaustion[117] to ensure a matter is held before a State agency first, with all applicable appeals processes conducted thereafter, before being eligible for review by a Circuit Court. Michigan courts have also followed what was once the federal lead in *Chevron*[118] by upholding a State agency's authority under the authorizing statute with a deferential tone.[119] That being said, like in federal courts, Michigan must comply with the requisite Due Process requirements of the U.S. Constitution, as well as the requirements of its own Constitution.[120] Therefore, Michigan courts have upheld administrative proceedings that are drastically different from their judicial proceedings.[121]

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[109] MICH. COMP. LAWS § 24.239.

[110] *Id.*

[111] MICH. COMP. LAWS § 24.239(a).

[112] MICH. COMP. LAWS §§ 24.234, 24.236.

[113] MICH. COMP. LAWS § 24.245(3).

[114] MICH. COMP. LAWS §§ 24.239(a), 24.242, 24.245.

[115] *See generally* MICH. COMP. LAWS § 24.245.

[116] *See* Cherry Growers, Inc. v. Agric. Mktg. & Bargaining Bd., 240 Mich. App. 153, 162 (2000).

[117] MICH. COMP. LAWS § 24.301 (2024); *see also* Peter A. Devlin, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 N.Y.U. L. REV. 1234 (2018) (discussing the doctrine of Exhaustion of Administrative Remedies).

[118] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

[119] *See* McKibbin v. Michigan Corp. & Sec. Comm'n, 369 Mich. 69 (1963); *see also* William C. Fulkerson, Dennis J. Donohue, *The Basics: A practical introduction to administrative law in Michigan*, 81 MICH. B.J. 13 (Jan. 2002).

[120] U.S. CONST. amends. V, XIV; MICH. CONST. of 1963, art. 1, § 17.

[121] *See* Sponick v. City of Detroit Police Dep't, 49 Mich. App. 162 (1973) (the Detroit Police Department's disciplinary board's hearings are "not a trial and, therefore, need not comply with all

Michigan differs from the federal jurisdiction because the Michigan Constitution lacks its own version of the Seventh Amendment.[122] Notably, Michigan's Constitution guarantees that "[t]he right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law."[123] This guarantee makes no mention of the common law, the courts at Westminster, or any citizen's private rights.[124] In this sense, there is a reasonable suspicion over whether the Supreme Court's ruling in *Jarkesy* will have any impact whatsoever on Michigan's treatment of ALJs. However, there are legal and practical arguments both for and against an adoption of the Court's policy.[125]

III. ANALYSIS

A. Potential Impacts on Michigan Administrative Hearing Procedures

With the Supreme Court's decision in *Jarkesy* and, thus, a change in federal administrative law, it remains unclear whether Michigan's legislature or the Michigan Supreme Court will adopt the federal law as its own. For some of Michigan's administrative agencies, there is an overlap of authority conferred to the Michigan ALJs from both federal and Michigan law.[126] This section will use Michigan's environmental protection agency, the Michigan Department of

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the rules of evidence and procedure applicable to a trial" despite their impact on police officers; only need to comply with "rudimentary due process").

[122] *Compare* U.S. CONST. amend. VII, *with* MICH. CONST. of 1963, art. 1, § 14.

[123] MICH. CONST. of 1963, art. 1, § 14.

[124] *See id.*; *see also* Sec. & Exch. Comm'n v. Jarskey, 144 S. Ct. 2117 (2024). Indeed, at least one Michigan court has ruled in similar fashion to Jarkesy, holding that "where the Legislature has created new public rights and remedies, the Legislature does not violate the Seventh Amendment of the United States Constitution by delegating the enforcement of the new rights and remedies to an administrative tribunal." Tomlin v. Dep't of Soc. Servs., 154 Mich. App. 675, 689 (1986) (citing Atlas Roofing Co., Inc. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442 (1977)).

[125] *See* discussion Part III.

[126] *See generally APPENDIX E – SUMMARY OF FEDERAL AND STATE LAWS AND RULES*, DEP'T OF ENV'T, GREAT LAKES, & ENERGY, https://www.michigan.gov/egle/-/media/Project/Websites/egle/Documents/Regulatory-Assistance/Guidebooks/MI-Guide-to-Environmental-Regulations/MI-Guide-Environmental-Regulations-Appendix-E.pdf [https://perma.cc/S5VG-JDRJ] (last visited Apr. 13, 2025); *but see Local Protection of Inland Lakes*, DEP'T OF ENV'T, GREAT LAKES, & ENERGY, https://www.michigan.gov/egle/about/organization/water-resources/inland-lakes-and-streams/local-protection-of-inland-lakes [https://perma.cc/GT5A-QFAP] (last visited Feb. 14, 2025) ("not all aspects or features of [the environment] are regulated under state or federal laws.").

Environment, Great Lakes, and Energy (EGLE),[127] as the vessel for analyzing how the *Jarkesy* decision impacts Michigan administrative agencies, as this agency receives its authority to enforce environmental regulations from both State and federal acts.[128]

EGLE oversees multiple areas of the environment, including air quality, drinking water, geological resources, climate, energy, and the Great Lakes.[129] Each of these agencies[130] monitors pollution for their respective division and has a different set of standards/procedures for ensuring compliance or levying fines, drawing on both federal and State authority.[131] Yet, in every case, pollution is the subject of the regulation, and violations are often met with monetary fines.[132] If the Michigan legislature or Michigan Supreme Court adopt the federal rule in *Jarkesy,* the decision could limit Michigan ALJ authority based on three factors: (1) the common law interpretation of 'pollution,' (2) Michigan's history of adopting federal constitutional standards as its own, or (3)

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[127] *See Environment, Great Lakes, and Energy*, DEP'T OF ENV'T, GREAT LAKES, & ENERGY, https://www.michigan.gov/egle [https://perma.cc/J2AS-ELDS] (last visited Feb. 13, 2025).

[128] The name of this administrative agency was changed from "the Michigan Department of Environmental Quality" (MDEQ) to "the Michigan Department of Environment, Great Lakes, and Energy" in February of 2019 by Michigan Governor Gretchen Whitmer. *See* Mich. Exec. Order No. 2019-06 (2019), https://www.michigan.gov/whitmer/news/state-orders-and-directives/2019/02/20/executive-order-2019-6 [https://perma.cc/NU7K-GJKX]; *see also About us*, DEP'T OF ENV'T, GREAT LAKES, & ENERGY, https://www.michigan.gov/egle/about [https://perma.cc/9CPQ-UY3C] (last visited Feb. 13, 2025).

[129] *See About us*, *supra* note 129.

[130] *Compare* 5 U.S.C. § 551(a) ("'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency"), *with* 12 U.S.C. § 1441a-3 ("'governmental agency' means any agency or entity of the Federal Government or a State or local government"), MICH. COMP. LAWS § 24.203(2) ("'[a]gency' means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action"), *and Agency*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/agency [https://perma.cc/S4DS-R7UW] (last visited Mar. 7, 2025) (an 'agency' is "an administrative division (as of a government)"). For the purposes of this Note, "agency" means any government department, state or federal, responsible for carrying out an administrative duty as prescribed by the legislature.

[131] *Policies and procedures*, DEP'T OF ENV'T, GREAT LAKES, & ENERGY, https://www.michigan.gov/egle/regulatory-assistance/regulations/policies [https://perma.cc/6MMX-WW6M] (last visited Feb. 13, 2025); *see also Services we provide*, DEP'T OF ENV'T, GREAT LAKES, & ENERGY, & ENERGY, https://www.michigan.gov/egle/public/services [https://perma.cc/RHQ9-32UY] (last visited Feb. 14, 2025).

[132] *See Pollution Prevention*, DEP'T OF ENV'T, GREAT LAKES, & ENERGY, https://www.michigan.gov/egle/about/organization/materials-management/pollution-prevention [https://perma.cc/37NL-LBWT] (last visited Feb. 13, 2025) ("EGLE strives to promote healthy communities, economic growth, and environmental sustainability through *pollution* prevention" (emphasis added)).

Due Process concerns for any U.S. jurisdiction.[133]

1. Common Law Interpretation of Pollution

Pollution, like securities fraud, has its roots in the common law. The essence of the Supreme Court's reasoning for limiting the authority of ALJs to impose civil penalties in administrative proceedings pursuant to the Seventh Amendment was that the federal securities fraud claim resembled common law fraud.[134] Though it did not explicitly mention other common law causes of action that would require an Article III judge, the Court in *Jarkesy* explained that a modern cause of action which closely resembles one of "the traditional actions at common law tried by the courts at Westminster in 1789" require a jury trial before an Article III judge.[135]

Pollution is one such action at common law.[136] Under common law, 'trespass' was defined as "an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property", and 'nuisance' was "anything that worketh hurt, inconvenience, or damage."[137] In the same sense, pollution has been seen as both common law trespass or common law nuisance.[138] Because of this, consistent with the holding of *Jarkesy*, federal ALJs may not be able to adjudicate claims over fines that the Environmental Protection Agency (EPA) is hoping to levy against violators of environmental regulations.[139] This may have an impact beyond just the federal jurisdiction of the EPA, however, as EGLE works directly with the EPA to ensure compliance with applicable federal regulations in the shared jurisdictions of federal and State waters.[140] Even without a direct adoption of the rule in *Jarkesy*, Michigan could

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[133] *See* discussion Part III, Sections A.1-A.3.

[134] Sec. & Exch. Comm'n v. Jarskey, 144 S. Ct. 2117, 2130-31 (2024); *see also* Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. 272, 284 (1855).

[135] *Jarkesy*, 144 S. Ct. at 128 (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U. S. 50, 90 (1982) (Rehnquist, J., concurring in the judgment)).

[136] *See* Richard A. Epstein, *From Common Law to Environmental Protection: How the Modern Environmental Movement Has Lost Its Way*, 23 SUP. CT. ECON. REV. 141 (2015) (describing the origins of pollution as common-law nuisance); *see also* Anthony Z. Roisman & Alexander Wolff, *Trespass by Pollution: Remedy by Mandatory Injunction*, 21 FORDHAM ENVTL. L. REV. 157 (2010) (describing pollution as common-law trespass).

[137] 3 WILLIAM BLACKSTONE, COMMENTARIES *209, *216.

[138] Epstein, *supra* note 137; Roisman & Wolff, *supra* note 137.

[139] *See Basic Information on Enforcement*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/enforcement/basic-information-enforcement [https://perma.cc/DQJ6-9373] (last visited Feb. 13, 2025) ("administrative action by EPA or a state agency may be in the form of...[monetary]...penalties").

[140] *See Compliance and Enforcement*, DEP'T OF ENV'T, GREAT LAKES, & ENERGY, https://www.michigan.gov/egle/about/featured/benton-harbor/compliance-enforcement [https://perma.cc/8QHQ-HXVT] (last visited Feb. 13, 2025) ("EGLE monitors the compliance of

experience a chilling effect on its ability to enforce federal EPA regulations in its shared jurisdiction with the federal government, as pollution claims (and the fines the EPA hopes to impose) would have to be heard before an Article III judge in a federal jury trial.[141]

If the Michigan legislature or the Michigan Supreme Court chooses to adopt the perspective of the Supreme Court in *Jarkesy* at the state level, it is possible that the nature of environmental cases as common law causes of action may prohibit Michigan ALJs from imposing civil penalties.[142]

2. Michigan's History

Aside from the potential issues involved with concurrent federal and State jurisdiction, the Michigan Supreme Court may choose to adopt the holding in *Jarkesy* as its own, despite not having a provision of its Constitution that mirrors the Seventh Amendment in the U.S. Constitution.[143]

Adopting the federal standard in place of one required by its own State Constitution is not a new idea for the Michigan Supreme Court.[144] Michigan previously adopted[145] the federal standing test established in *Lujan v. Defenders of Wildlife* as its own, despite not having the same constitutional requirements.[146] At the federal level, Article III of the U.S. Constitution limits judicial review to "cases" and "controversies."[147] This limitation is the backbone of the federal standing doctrine articulated by Justice Antonin Scalia in *Lujan*.[148] Michigan has no such constitutional requirement, but the Michigan Supreme Court nonetheless emphasized the importance of the policy rationales behind the federal standing test

community water supplies with the Michigan Safe Drinking Act and other applicable federal/state regulations") ("EGLE engages in activities like joint site inspections with the U.S. Environmental Protection Agency"); *see also About Us*, DEP'T OF ENV'T, GREAT LAKES, & ENERGY, https://www.michigan.gov/egle/about [https://perma.cc/9CPQ-UY3C] (last visited Feb. 13, 2025) ("EGLE employs more than 1,500 scientists, engineers, geologists, toxicologists, inspectors, technicians, managers, biologists and support staff across the state.").

[141] *Id.* ("When EGLE determines that a [person] has failed to comply with legal requirements under our jurisdiction, the Department takes enforcement action.").

[142] *See* discussion Part III, Section A.2.

[143] *Compare* U.S. CONST. amend. VII, *with* MICH. CONST. of 1963.

[144] *See generally* Joseph E. Quandt, et al., *The Shifting Sands of "Citizen Suit" Standing After Cleveland Cliffs*, 84 MICH. B.J. 32 (November 2005).

[145] Lee v. Macomb Cnty. Bd. of Comm'rs, 464 Mich. 726 (2001), *overruled by* Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349 (2010).

[146] Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

[147] U.S. CONST. art. III, § 2.

[148] *Lujan*, 504 U.S. 555, 576 (1992).

and adopted it as the law of the State in 2001.[149] The federal standing test was the law used by Michigan courts for 10 years,[150] and it was reaffirmed when the Michigan Supreme Court revisited the issue in 2004.[151] Eventually, after changes on the bench provided new perspectives to the court,[152] the Michigan Supreme Court overruled its prior decisions on standing in 2010 and held that "Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing."[153]

Similarly, though there is not a constitutional requirement for doing so,[154] the Michigan Supreme Court could adopt the holding of *Jarkesy* for all the policy implications behind the federal decision.[155]

3. Due Process Issues

Unlike the Seventh Amendment[156] and Article III,[157] Due Process applies to both the federal government and the States through the Fourteenth Amendment, which restates the federal protections guaranteed under the Fifth Amendment.[158] Moreover, Michigan's Constitution also explicitly protects for Due Process, stating that "[n]o person shall...be deprived of life, liberty or property, without due process of law."[159] The concurring opinion[160] in *Jarkesy* stated that civil penalties imposed by ALJs are partially unconstitutional due to the Due Process requirements

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[149] Lee, 464 Mich. at 737 ("Concern with maintaining the separation of powers, as in the federal courts, has caused this Court over the years to be vigilant in preventing the judiciary from usurping the powers of the political branches.").

[150] Kenneth Charette, *Standing Alone?: The Michigan Supreme Court, the Lansing Decision, and the Liberalization of the Standing Doctrine*, 116 PENN ST. L. REV. 199 (2011) (full account of the Michigan Supreme Court's use of the federal standing test).

[151] Nat'l Wildlife Fed'n v. Cleveland Cliffs Iron Co., 471 Mich. 608 (2004), *overruled by* Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349 (2010).

[152] *See JUSTICES OF THE MICHIGAN SUPREME COURT, 1836-2015*, https://www.legislature.mi.gov/(S(tjgnbqwhmohm52gl4knwid5s))/documents/2015-2016/michiganmanual/2015-MM-P0367-p0368.pdf [https://perma.cc/6K87-52MG] (last visited Feb. 14, 2025) (lists names and terms of Michigan Supreme Court justices from 1986 to 2015).

[153] Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349, 372 (2010).

[154] *See generally* MICH. CONST. of 1963.

[155] Sec. & Exch. Comm'n v. Jarskey, 144 S. Ct. 2117, 2127-28 (2024).

[156] U.S. CONST. amend. VII.

[157] U.S. CONST. art. III.

[158] *Compare* U.S. CONST. amend. V, *with* U.S. CONST. amend. XIV; *see also* Mathews v. Eldridge, 424 U.S. 319 (1976).

[159] MICH. CONST. of 1963, art. 1, § 17. This provision's identical language has existed in Michigan's Constitution since 1850, prior to the U.S. Congress's passage of the Fourteenth Amendment in 1866. *See* MICH. CONST. of 1850, art. VI, § 32.

[160] *Jarkesy*, 144 S. Ct. at 2140.

of the Fifth and Fourteenth Amendments.[161] Regardless of the Michigan Supreme Court's thoughts on adopting the rule as its own for policy reasons,[162] it may be Constitutionally bound by Due Process to restrict the authority of an ALJ.[163]

Importantly, the restriction on ALJ authority in *Jarkesy* was officially because of Seventh Amendment requirements.[164] Only the concurring opinion states that Due Process is inherently implicated with ALJs; therefore, only the Seventh Amendment is directly implicated in the holding of *Jarkesy*, and the Fifth and Fourteenth Amendments are not.[165] However, the concurring opinion is telling of the perspective of the justices on the Supreme Court, and it is possible that, in the future, another case similar to Mr. Jarkesy's may be brought solely on Due Process grounds.[166]

The concurring opinion is, at least, effective at reminding the Michigan legislature and the Michigan Supreme Court of public policy reasons behind adopting a *Jarkesy*-like approach in Michigan. It is probable that a Michigan action may be brought on Due Process grounds that would restrict Michigan ALJs from imposing civil penalties in an administrative proceeding. Especially if the fallout from *Jarkesy* spurs public discourse on Due Process rights, the Michigan Supreme Court or the Michigan Legislature could seek to codify the essential holding of *Jarkesy* into Michigan law.[167] With many reasons for doing so, Michigan may adopt the federal holding of *Jarkesy* as its own.

IV. CONCLUSION

Administrative agencies, at both the federal and state level, are the regulating arms of government for day-to-day life.[168] They function in similar ways to all three branches of government and derive their authority from founding

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[161] U.S. CONST. amend. V, XIV.

[162] As it did in Lee v. Macomb Cnty. Bd. of Comm'rs, 464 Mich. 726 (2001), *overruled by* Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349 (2010).

[163] *See* In re Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

[164] *Jarkesy*, 144 S. Ct. at 2128.

[165] *Id.* at 2140.

[166] *See id.*; *see also* In re Murchison, 349 U.S. 133 (1955).

[167] *See*, *e.g.*, STATE OF MICH., EXEC. OFFICE, EXEC. DIRECT. NO. 2020-59, Temporary requirement to suspend activities that are not necessary to sustain or protect life -RESCINDED (2020).

[168] *See generally* discussion Part II, *supra*.

documents, acts of the legislature, and judicial opinion.[169] Yet, these agencies are not without limitations.[170]

At the federal level, the record of the Supreme Court has shown varying deference to administrative agencies.[171] Most recently, the Court's ruling in *Loper Bright* has eliminated *Chevron* deference and required judicial statutory interpretation.[172] Moreover, under *Jarkesy*, administrative hearing procedures have been curtailed, as causes of action—even if they are a modern creation—that resemble common law causes of action may not be tried in a tribunal other than an Article III court.[173] This is because of protections afforded under the Seventh Amendment, the Due Process Clause of the Fifth Amendment, and Article III of the U.S. Constitution.[174]

In Michigan, administrative agencies are explicitly authorized in the Michigan Constitution.[175] The Seventh Amendment, the Fifth Amendment, and Article III of the U.S. Constitution do not apply to Michigan law.[176] However, Michigan is bound by the identical Due Process Clause in the Fourteenth Amendment to the U.S. Constitution, and it also has a Due Process protection in its own Constitution.[177] Michigan also has a history of adopting the federal standard of review even when it is not required to do so.[178] Though it is uncertain what will happen, Michigan may very well adopt the Supreme Court's holding in *Jarkesy* and rule that its own administrative agencies may not deprive a person of their life, liberty, or property for causes of action that resemble suits at common law.[179] The English courts at Westminster in 1789 may affect Michigan hearing procedures today.

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[169] *See generally* Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENVTL. L. REV. 207 (2016); *see also* Union Carbide Corp. v. Pub. Serv. Comm'n, 431 Mich. 135 (1988), *and* MICH. CONST. of 1963, art. V, § 2.

[170] *See generally* discussion Part II, *supra*.

[171] *See* discussion Part II, Section A, *supra*.

[172] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

[173] Sec. & Exch. Comm'n v. Jarkesy, 144 S. Ct. 2117 (2024).

[174] U.S. CONST. amends. VII, V; U.S. CONST. art. III.

[175] MICH. CONST. of 1963, art. V, § 2.

[176] Sec. & Exch. Comm'n v. Jarkesy, 144 S. Ct. 2117 (2024).

[177] *Compare* U.S. CONST. amend. V, *with* U.S. CONST. amend. XIV; Mich. Const. of 1963, art. 1, § 17.

[178] *See* Lee v. Macomb Cnty. Bd. of Comm'rs, 464 Mich. 726 (2001), *overruled by* Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ., 487 Mich. 349 (2010); *see also* Kenneth Charette, *Standing Alone?: The Michigan Supreme Court, the Lansing Decision, and the Liberalization of the Standing Doctrine*, 116 PENN ST. L. REV. 199 (2011).

[179] *See* discussion Part III, *supra*.