JARKESY AND GRAVITATIONAL PULL: THE SUPREME COURT'S APPROACH TO PRECEDENT AND ITS IMPLICATIONS

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INTRODUCTION

In a June 2024 concurring opinion, U.S. Supreme Court Justice Brett Kavanaugh argued that text and history should exert a "gravitational pull" on the interpretation of precedent. The majority opinion he joined in *SEC v. Jarkesy*, decided a week later, provides an illustration.

Jarkesy was a battle of text and history versus mixed precedent. The question presented was whether the SEC could assess civil money penalties against Jarkesy through administrative adjudication without judicial process. The majority held that it could not. A dissent emphasized that *Atlas Roofing*, a 1977 case, sustained OSHA civil money penalties imposed through administrative adjudication. But the dissent made no argument from text or ratification-era history—because no plausible text-and-history defense of *Atlas Roofing* exists. Scholars across the spectrum agree that as a matter of text and history, the Constitution prohibits the government from depriving Americans of vested property rights outside judicial process (with possible rare and isolated exceptions). So the majority declined to give *Atlas Roofing* the broader reading advocated by the dissent. Under the gravitational-pull principle, when original understanding points a certain direction, misaligned doctrine should be pulled back toward it.

This essay examines the Supreme Court's gravitational-pull approach in *Jarkesy* and discusses its implications for other constitutional provisions. The Court's doctrine in various other areas contains statements that the current Court likely considers indefensible as a matter of text and history. The Court likely will be slow to overrule precedent in these areas—as Justice Neil Gorsuch recently observed, the current Court overrules precedent only about half as often as the Warren Court and Burger Court did. But the Court likely will continue to pull its jurisprudence toward original understanding, particularly when it believes that a precedent's misalignment with original understanding is obvious.

I. THE GRAVITATIONAL-PULL PRINCIPLE

Justice Kavanaugh's gravitational-pull principle stems from his conception of the judicial role. Concurring in *United States v. Rahimi*, Justice Kavanaugh wrote that the "first and most important rule in constitutional interpretation" is "to heed the text—that is, the actual words of

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the Constitution."[1] The text of the Constitution, after all, is the "'Law of the Land.'"[2] Judges should interpret the text "according to its ordinary meaning as originally understood."[3] In doing so, Justice Kavanaugh continued, courts should "respect precedent" given that "[t]he 'judicial power' established in Article III incorporates the principle of *stare decisis*."[4]

But even when the courts have developed "extensive bodies of precedent," Justice Kavanaugh wrote, "text and history still matter a great deal."[5] When determining "how broadly or narrowly to read a precedent," or "whether to extend, limit, or narrow a precedent," courts should consider "how the precedent squares with the Constitution's text and history."[6] Courts should resolve questions about a precedent's scope "in light of and in the direction of" that text and history.[7] In other words, text and history should exert a "gravitational pull" on the court's interpretation of precedent.[8]

II. SEC v. JARKESY

A week later, the Supreme Court applied the gravitational-pull principle in *SEC v. Jarkesy*—a case that involved mixed precedent, some of which clearly is inconsistent with text and history. The Court held that a defendant in a securities-fraud suit has the right to be tried by a jury in an Article III court. The case arose when the SEC alleged that Jarkesy violated various securities laws, held an adjudication before its own in-house tribunal, found Jarkesy liable, and imposed a $300,000 civil money penalty. Jarkesy sued in federal court, arguing that the SEC violated the Seventh Amendment, which provides that in "[s]uits at common law, . . . the right of trial by jury shall be preserved."

The Supreme Court agreed with Jarkesy, concluding that the proceeding was a suit at common law and that the public-rights doctrine (which in exceptional cases allows for adjudication outside Article III) did not apply. The Court focused largely on the remedy—the civil penalties remedy, the Court emphasized, can "only be enforced in courts of law."[9] Three justices dissented, arguing that the public-rights doctrine allows Congress to "create statutory obligations" entitling the government to civil penalties and "assign their enforcement" to executive adjudication.[10]

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[1] United States v. Rahimi, slip op. 1, No. 22-915 (June 21, 2024) (Kavanaugh, J., concurring).

[2] *Id.* at 2 (quoting Article VI).

[3] *Id*.

[4] *Id.* at 17.

[5] *Id*.

[6] *Id*.

[7] *Id*. at 18.

[8] *Id*. at 17. Several originalist scholars have advanced this idea in recent years. *E.g.*, J. Joel Alicea, *An Originalist Victory*, City Journal (June 24, 2022), tinyurl.com/3z3ps3rx; Lee J. Strang, *A Three-Step Program for Originalism*, Public Discourse (June 12, 2022), tinyurl.com/yc2b96bm; Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411 (2013); Josh Blackman, *Originalism's Gravitational Pull Toward Original Meaning*, tinyurl.com/2mcp6t3e (Nov. 18, 2012).

[9] SEC v. Jarkesy, slip op. 21, No. 22-859 (June 27, 2024).

[10] *Id.* (Sotomayor, J., dissenting), slip op. 2.

Text and history clearly favored the majority. Scholars across the ideological spectrum agree that the public-rights doctrine historically asks about the deprivation rather than the government interest being pursued. Under the original understanding, the government may not deprive Americans of vested property rights absent judicial process.

But precedent was mixed. While the Court had largely hewed to the historical understanding, the *Jarkesy* dissent relied heavily on *Atlas Roofing*, a 1977 case that upheld certain civil penalties imposed by OSHA without judicial process. That case arguably had been implicitly overruled or limited by later cases, but it had never been explicitly overruled.

A. Text and History

Historically, as Caleb Nelson has shown, public rights are rights created by the government that have no counterpart in the Lockean state of nature.[11] Public roads are an example—no one has a right to government-operated roads in a state of nature that has no government. Similarly, the government sometimes creates benefits or privileges that no one has a natural right to. Private rights, in contrast, are those associated with the natural rights that individuals would enjoy even in the absence of political society.[12] The paradigmatic examples are life, liberty, and property—Congress did not create those rights; they existed before Congress existed.

Under our Constitution, the government may deprive Americans of *public* rights without judicial process—what the political branches give, the political branches may take away. But the government may deprive Americans of *private* rights only with judicial process. That is evident from multiple provisions of the Constitution.

First, Article III vests the "judicial power" "of the United States" in the Supreme Court and the lower federal courts. And the core of the judicial power is the power to bind parties and to authorize the deprivation of private rights.[13] The executive does not hold that power; Article II grants the executive only executive power.[14] Under the Constitution's vesting clauses, therefore, unilateral executive action cannot deprive Americans of vested property rights.

Second, the Constitution's due process clauses provide that the federal and state governments may deprive persons of "life, liberty, and property" only with "due process of law." Due process "has always been the insistence that the executive . . . deprive persons of rights only in accordance with settled rules independent of executive will, in accordance with a judgment by an independent magistrate."[15] Whatever due process's precise definition, it definitely requires some kind of judicial process—the executive branch cannot unilaterally deprive persons of life, liberty, or property.[16]

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[11] *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 567 (2007) (citing William Blackstone).

[12] *See id.*

[13] *See* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1513–14 (2020).

[14] *See id.* at 1541 ("The predominant principle of executive action is that it cannot deprive people of life, liberty, or property without judicial process.").

[15] Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 YALE L.J. 1672, 1681 (2012).

[16] *See, e.g.*, *id.* at 1679 ("From at least the middle of the fourteenth century" onward, "due process consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law.").

Third, the Seventh Amendment provides that "[i]n Suits at common law," "the right of trial by jury shall be preserved." Because suits imposing civil penalties are suits at common law, they require a jury trial.[17]

Scholars across the ideological spectrum agree about these textual and historical points. In a prominent article otherwise supporting the *Jarkesy* dissent's position, for example, Adam B. Cox & Emma Kaufman observed that "Founding Era lawyers would have been shocked to learn that the government could take a person's recognized due-process rights without a trial before an Article III tribunal."[18] And while Gregory Ablavsky tried to unsettle the consensus in a recent article, his effort only highlights that there is no real debate on the issue. He argues that in the mid-nineteenth century the government could deprive individuals of what he calls *imperfect* vested property rights without judicial process, but agrees with every other scholar that perfect and vested property rights—the ordinary kind—"could be challenged only in court."[19] No one has seriously contested Nelson's account.[20]

As a matter of text and history, then, the question whether *Jarkesy* concerned public or private rights was among the easiest in the Supreme Court's history. To recap, public rights are those the government may take away as a matter of prerogative without judicial process. And it has always been understood—and enshrined in the Constitution's text—that the government may *not* take away a person's "life, liberty, or property" by prerogative. After all, those rights precede government; they exist in a state of nature. The founding generation understood that only through exercise of "judicial power" with "due process of law" could the government deprive a person of a property right. Because the SEC sought to deprive Jarkesy of a property right, the proceeding concerned private rights and required the concomitant constitutional protections. As a matter of text and history, it was as simple as that.

B. Precedent

For the most part, the Supreme Court has heeded the Constitution's text in this area. Its longstanding precedent establishes that "only" controversies in the public-rights category "may be removed from Art[icle] III courts and delegated to . . . administrative agencies."[21] Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to

[17] *See* Tull v. United States, 481 U.S. 412, 418–19, 422 (1987).

[18] *The Adjudicative State*, 132 YALE L.J. 1769, 1794–95 (2023).

[19] *Getting Public Rights Wrong*, 74 STAN. L. REV. 277, 317 (2022); *see also* Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735, 763 n.136 (2022) ("[T]he distinction Ablavsky draws . . . tracks [Nelson's] dichotomy exactly."). Ablavsky says that for the imperfect land claims he discusses, "the formal legal title remained in the United States." 74 STAN. L. REV. at 316. That is not true, of course, of the property at issue when the government seeks civil penalties.

[20] Arguably, there were two or three isolated quasi-exceptions to the rule in the eighteenth and nineteenth centuries. *See* Baude, *supra* note 13, at 1548–53 (discussing military adjudication and tax collection and explaining why they were thought to involve executive power); Nelson, *supra* note 11, at 585–590 (discussing eminent domain and tax collection); SEC v. Jarkesy, slip op. 15, No. 22-859 (June 27, 2024) (discussing "unbroken tradition" "long predating the founding" related to tax collection). But *Jarkesy* implicated none of them.

[21] Northern Pipeline Construction v. Marathon Pipe Line, 458 U.S. 50, 70 (1982) (plurality) (emphasis omitted); *see also, e.g.*, Stern v. Marshall, 564 U.S. 462, 489 (2011) (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1856)).

a trial by jury."[22] And the Court generally has recognized that the public-rights doctrine asks about the deprivation, not the public interest being pursued. It is only when Congress "creates" a "statutory *right*"—not an obligation—that Congress may provide that those "seeking to vindicate that right" must do so in executive adjudication.[23] That is, when "it depends upon the will of congress" whether a "remedy" "shall be allowed at all," Congress can "limit the extent to which a judicial forum [is] available."[24]

In its 1977 *Atlas Roofing* decision, however, the Court drifted from text and history. The opinion's author believed that "Article III . . . must be balanced against . . . legislative responsibilities."[25] The Court, accordingly, invoked the public-rights doctrine to approve adjudication of OSHA civil penalties in an administrative tribunal "supplying speedy and expert resolutions of the issues involved."[26] The Court invoked "the practical limitations of a jury trial" and its "functional [in]compatibility" with administrative proceedings,[27] and concluded that Congress need not "choke the already crowded federal courts with new types of litigation," but rather may "commit[] [them] to administrative agencies with special competence in the relevant field."[28] In short, as it later recognized, the Court focused on "the practical effect" of statutory law and "the concerns that drove Congress" to "depart from the requirements of Article III."[29]

Atlas Roofing faced severe and sustained scholarly criticism across the ideological spectrum. For example, prominent scholar Martin Redish wrote that *Atlas Roofing* is "indefensible" "as a matter of Seventh Amendment construction."[30] The Court's "abandonment of a constitutional right," "for no other reason than the Court's deference to the conclusion of the majoritarian branches that enforcement of that right would be politically or socially difficult or inconvenient," was "wholly unprincipled."[31] "[N]othing in the text, structure, or history of the Seventh Amendment provides any basis on which to permit reliance on . . . a social balancing process."[32]

A few years after *Atlas Roofing*, the Court arguably "overrule[d] or severely limit[ed]" it.[33] In *Granfinanciera v. Nordberg*, the Court rejected *Atlas Roofing*'s assertion that the Seventh Amendment "does not apply when Congress assigns the adjudication of [certain] rights to

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[22] Granfinanciera S.A. v. Nordberg, 492 U.S. 33, 51–52 (1989).

[23] *Id.* at 83 (emphasis added); *see also, e.g.*, Thomas v. Union Carbide Agric. Prods., 473 U.S. 568, 593–94 (1985) (holding that Congress may "create" a new public "right").

[24] *Stern*, 564 U.S. at 489.

[25] *Northern Pipeline*, 458 U.S. at 113 (White, J., dissenting).

[26] Atlas Roofing v. OSHA, 430 U.S. 442, 461 (1977).

[27] Tull v. United States, 481 U.S. 412, 418 n.4 (1987) (describing *Atlas Roofing*).

[28] *Atlas Roofing*, 430 U.S. at 455.

[29] CFTC v. Schor, 478 U.S. 833, 851 (1986).

[30] Martin Redish & Daniel La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 408–09 (1995); *see also, e.g.*, Vikram Amar, *Implementing an Historical Version of the Jury in an Age of Administrative Factfinding and Sentencing Guidelines*, 47 S. TEX. L. REV. 291, 298 (2005) (criticizing *Atlas Roofing*).

[31] Redish & La Fave, *supra* note 30, at 409–11.

[32] *Id.* at 411.

[33] Granfinanciera S.A. v. Nordberg, 492 U.S. 33, 71 n.1 (1989) (White, J., dissenting).

specialized tribunals where juries have no place."[34] Dissenting, *Atlas Roofing*'s author suggested that *Atlas Roofing* "is no longer good law after today's decision."[35] And by the time *Jarkesy* was litigated, several decades of more recent public-rights cases had consistently looked to text and history.[36]

C. The SEC's Position In Jarkesy

In *Jarkesy*, the SEC's main argument was that the public-rights doctrine applied, but it had no theory of what the public-rights doctrine actually is. The SEC invoked *Atlas Roofing*, but that case "left the term 'public rights' undefined."[37] And rather than advancing a definition of its own, the SEC asked the Court to refrain from "explain[ing] the distinction between public and private rights" at all.[38]

The untheorized rule of decision that the SEC did advance, moreover, was obviously wrong. The SEC asserted that Congress can override the Constitution's judicial-process protections whenever it creates "new statutory obligations."[39] But that proved far too much—the creation of new statutory obligations cannot possibly be sufficient to trigger the public-rights doctrine because all agree that "the public-rights doctrine does not extend to any criminal matters."[40] No one would argue that judicial process is unnecessary whenever Congress creates new statutory felonies. When it comes to criminal prosecution, everyone recognizes that no matter how salutary the government objective, it is the deprivation that matters. The same is true for the backend of "life, liberty, or property."

D. The Jarkesy Opinion

The Supreme Court held that Jarkesy is "entitled to a jury trial in an Article III court," concluding that the public-rights doctrine was inapplicable.[41] The Court stated that the public-rights doctrine is "an *exception*" to the constitutional norm that "has no textual basis."[42] And "what matters," the Court explained, is "the substance of the action, not where Congress has assigned it."[43] The SEC's claims were "traditional legal claims" because they sought civil penalties—a remedy that can "only be enforced in courts of law."[44] The majority distinguished

[34] *Id.* at 81.
[35] *Id.* at 79.
[36] *E.g.*, Northern Pipeline Construction v. Marathon Pipe Line, 458 U.S. 50, 74 (1982) ("[O]ur precedents" are "rooted in history and the Constitution."); Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 584 U.S. 325, 334 (2018) (examining the history of the patent right); *id.* at 1381–85 (Gorsuch, J., dissenting) (same).
[37] *Granfinanciera*, 492 U.S. at 51 n.8.
[38] Brief for the Petitioner at 21, SEC v. Jarkesy, No. 22-859 (Aug. 28, 2023).
[39] *Id.* at 21, 23–24.
[40] *Northern Pipeline*, 458 U.S. at 70 n.24.
[41] SEC v. Jarkesy, slip op. 27, No. 22-859 (June 27, 2024).
[42] *Id.* at 17.
[43] *Id.* at 21.
[44] *Id.*

Atlas Roofing on the ground that the statute in that case "did not borrow its cause of action from the common law" but rather "resembled a detailed building code."[45]

The dissent concluded that "a statutory right belonging to the Government in its sovereign capacity" falls within the public-rights exception.[46] For the dissent, then, the public-rights doctrine asks about the *government's* "rights," not the citizen's.[47] And whether a defendant receives judicial process is entirely up to Congress: the only question is "[w]hether Congress assigned the Government's sovereign rights to civil penalties to a non-Article III [adjudicator]."[48] In a concurring opinion, Justice Gorsuch called this "astonishing."[49] The dissent's view, Justice Gorsuch observed, is that the Constitution "imposes *no* limits" on the government's power to seek civil penalties outside Article III.[50]

The dissent did not attempt to reconcile its conception of public rights with the Constitution's text or ratification-era history. And the dissent offered no original-understanding defense for its assertion that the public-rights doctrine concerns the government's "rights."[51] Instead, the dissent relied exclusively on precedent, focusing foremost on *Atlas Roofing*. The majority criticized the dissent for creating a rule based "not in the constitutional text (where it would find no foothold), nor in the ratification history (where again it would find no support)."[52]

While the majority declined to formally overrule *Atlas Roofing*, it did not leave the case upright. The majority observed that "*Granfinanciera* might have overruled *Atlas Roofing*," at least "the author of *Atlas Roofing* certainly thought . . . so."[53] It called *Atlas Roofing*'s definition of public rights "circular," noting that *Atlas Roofing* said the public-rights doctrine applies "in cases in which 'public rights' are being litigated" such as cases in which the government "enforce[s] public rights."[54] And it asserted that *Atlas Roofing* "represents a departure from our legal traditions."[55]

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[45] *Id.* at 23.

[46] *Jarkesy* (Sotomayor, J., dissenting), slip op. 21.

[47] The dissent attempted to distinguish criminal prosecution on the ground that Article III requires a jury for criminal trials, *id.* at 28 n.9, but that requirement only reinforces the point that the public-rights doctrine asks about the deprivation, not the government interest.

[48] *Id.* at 22.

[49] *Jarkesy* (Gorsuch, J., concurring), slip op. 20.

[50] *Id.* at 20.

[51] At the founding, "rights" usually belonged to individuals, whereas governments usually were understood to hold certain "powers." *Compare, e.g.*, U.S. CONST. art. I, § 1 (vesting all granted legislative "Powers" in Congress), *with* U.S. CONST. amend. IV (protecting the people's "right" against unreasonable searches and seizures). *See also, e.g.*, Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 256 (1983) (Madison believed that "individual rights and governmental powers composed two mutually exclusive and collectively exhaustive categories"). And the Seventh Amendment and Due Process Clause protect individual rights *against* government power. *See also* Stern v. Marshall, 564 U.S. 462, 483 (2011) ("Article III protects liberty."). The dissent did not explain why the public-rights doctrine nevertheless concerns what the government may lose rather than what the citizen may lose.

[52] *Jarkesy*, slip op. 17 n.2.

[53] *Id.* at 23 n.3.

[54] *Id.* at 26.

[55] *Id.* at 25 n.4.

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Jarkesy employs Justice Kavanaugh's gravitational-pull principle. The majority plainly considered *Atlas Roofing* indefensible as a matter of original understanding. The dissent advanced no text-and-history defense of the decision, and scholars haven't either. The majority therefore declined to give *Atlas Roofing* the broader reading the dissent proposed.

III. IMPLICATIONS FOR OTHER CONSTITUTIONAL QUESTIONS

The current Supreme Court is by no means quick to overrule or limit precedent—it actually appears slower to overrule precedent now than in the past. As Justice Gorsuch recently observed, the current Court is overruling only about half as many prior decisions per term as the Warren Court and the Burger Court did.[56]

But in recent years the Court has been willing to narrow (or occasionally overrule) precedent that it perceives as plainly inconsistent with original understanding. The more indefensible a precedent is as a matter of text and history, the more vulnerable it is. Stare decisis, the Court observed in 2020, "isn't supposed to be the art of methodically ignoring what everyone knows to be true."[57] To this Court, a "demonstrably" or "egregiously" wrong precedent is categorically different from a precedent whose correctness is reasonably contestable.[58] When the current Court believes that a precedent cannot be seriously defended as a matter of text and history, it is unlikely to extend or broadly read that precedent.

Atlas Roofing is not the only case with doctrinal statements that the current Court likely considers indefensible as a matter of text and history. For example, in 1983 the Court wrote: "The Court balance[s] the language of the Contracts Clause against the State's interest in exercising its police power."[59] In 2004 the Court wrote that Congress's legislative power in military and foreign affairs rests in part "not upon affirmative grants of the Constitution" but "upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government."[60] In 1988 the Court wrote that the U.S. Sentencing Commission "does not exercise judicial power" but may nevertheless be placed "within the Judicial Branch."[61] In 2012 the Court summarized previous cases as holding that "the power of Congress over interstate commerce is not confined to the

[56] Loper Bright Enterprises v. Raimondo, slip op. 9 (Gorsuch, J., concurring) (No. 22-451) (June 28, 2024).

[57] Ramos v. Louisiana, 590 U.S. 83, 105 (2020).

[58] Gamble v. United States, 587 U.S. 678, 711 (2019) (Thomas, J., concurring); *Ramos*, 590 U.S. at 121 (Kavanaugh, J., concurring in part); *see also, e.g.*, Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 219 (2022) (overruling *Roe v. Wade* on the belief that it was "far outside the bounds of any reasonable interpretation" of the constitutional text and citing a scholar reflecting that while he supported *Roe*'s outcome politically he believed that *Roe* was "not constitutional law" and gave "almost no sense of an obligation to try to be").

[59] Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 410 (1983).

[60] United States v. Lara, 541 U.S. 193 (2004) (internal quotation marks omitted).

[61] Mistretta v. United States, 488 U.S. 361, 384–85 (1988). Justice Antonin Scalia pointed out in dissent that "the Sentencing Commission's labors . . . have the force and effect of laws," *id.* at 413—the Sentencing Commission clearly was exercising power of the United States of some kind.

regulation of commerce among the states," even though the Interstate Commerce Clause says that "Congress shall have Power To . . . regulate Commerce . . . among the several States."[62]

The current Court likely considers these statements indefensible as a matter of text and history. All nine justices believe that the Court may not "balance" the Constitution's text against something else. The justices likely believe that the notion of inherent preconstitutional Congressional power cannot be squared with the Article I Vesting Clause and the Tenth Amendment. The justices likely believe that an entity exercising nonjudicial power of the United States cannot be placed in the judicial branch. And whatever the proper scope of the Interstate Commerce Clause, the justices likely believe that their doctrine cannot properly be formulated as a quotation of the Constitution's text with a "not" in front.

That is not to say that the Court will likely uproot its jurisprudence in any of these areas or others. Gravitational pull is just pull. But given that these doctrinal statements and certain others seem severely misaligned with the Court's views about its interpretive obligations, *Jarkesy* probably will not be the last case in which the Court pulls precedent back toward the best reading of the "Law of the Land."

[62] NFIB v. Sebelius, 567 U.S. 519 (2012); U.S. CONST. art. I, § 8.