
**THE MAGNA CARTA, *JARKESY*, AND THE
CONSTITUTIONAL JURY REQUIREMENT IN CRIME-
BASED DEPORTATION**

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INTRODUCTION

“No free man is to be taken, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.”¹

This passage was the precursor and the foundation for the creation of the jury trial in both British and American law. By the time of the Founding, juries were considered one of the most important protections against tyranny and oppression. In 1771, John Adams wrote about its importance in his diary,² and the British erosion of its protection for the colonists became a reason for revolt.³ Later, when Alexander Hamilton argued for the exclusion of specific Constitutional language preserving juries for civil trials in *The Federalist* No. 83,⁴ he was eventually overruled and the Seventh Amendment was added to the Bill of Rights. Many of the sanctions for which the Magna Carta mandated a “judgement of . . . peers” are familiar: arrest, imprisonment and even the loss of property.⁵ What may have escaped notice, however, was the inclusion of exile. Deportation, the closest modern parallel to exile, is imposed on tens of thousands of people on an annual basis in the United States,⁶ and yet none of the deportees have had the opportunity to have their peers pass judgement before ordering their removal from the United States.

The traditional use and demarcation of trial roles have been that judges decide the law, while juries decide the facts in a legal trial.⁷ At the same time, the importance of juries to the founding generation, and the protection they afforded against tyranny were not based on its fact-finding prowess. Rather, it was precisely because juries represented the community that they could protect against tyranny. Juries operate to “guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a

¹ MAGNA CARTA Ch. 39 (1215), *reprinted and translated in* J.C. HOLT, MAGNA CARTA 389 (3d ed. 2015).

² Founders Online, *Adams’ Diary Notes on the Right of Juries*, NATIONAL ARCHIVES (Feb. 12, 1771), <https://founders.archives.gov/documents/Adams/05-01-02-0005-0005-0004> [<https://perma.cc/D8ZT-TNLA>] (last visited Sept. 5, 2025).

³ For instance, the British Parliament passed the Stamp Act in 1765 requiring colonists to pay a tax, but those accused of violating the act were not entitled to a jury trial. *The Stamp Act*, 1765, GILDER LEHRMAN INST. AM. HIST. <https://www.gilderlehrman.org/history-resources/spotlight-primary-source/stamp-act-1765> [<https://perma.cc/YP29-4LWP>] (last visited Sept. 5, 2025).

⁴ THE FEDERALIST NO. 83 (Alexander Hamilton).

⁵ MAGNA CARTA Ch. 39, *supra* note 1.

⁶ Press Release, Deportation in the U.S. Interior: New explainer Examines ICE Arrest and Removal Operations within U.S. Communities, Migration Policy Institute (Feb. 4, 2025), <https://www.migrationpolicy.org/news/deportation-us-interior-explainer-latest-unauthorized-estimates> (noting an average of 38,000 ICE deportations in fiscal years 2021-2024).

⁷ *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.”⁸

Critiques of deportation law in the United States have typically focused on its disproportionate harshness and have argued that deportation decisions should require a proportionality review under the Eighth Amendment,⁹ while others have argued against its arbitrary imposition.¹⁰ And critics who have focused on crime-based deportations have called it absurd,¹¹ unjustified to prioritize,¹² and racialized.¹³

Arguments for the use of a jury in the deportation process are not new. In 2013, Professor Morales advocated for the use of juries as a policy reform when making deportation decisions for those in the country without authorization.¹⁴ He proposed using juries to decide legalization claims for law-abiding, undocumented people.¹⁵ In his view, juries could help “break” the political cycle between enforcement-heavy periods and more lax phases of border control policy.¹⁶

The advantage of using juries to make deportation decisions is not limited to deciding the fate of those here without durable legal status. Rather, juries may be uniquely situated to address the difficulty in making deportation decisions for those who are convicted of crimes in the United States. Crime-based deportation has to wrestle with questions of harm proportionality, the strength of community ties, the existence or lack of rehabilitation, and more abstract and difficult-to-quantify questions of membership. Modern crime-based deportation laws and procedures strip away most discretion, and what discretion does exist is wielded by executive hearing officers.¹⁷ The law’s granting of power to individual

⁸ *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (citing *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968)).

⁹ See Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 417-18 (2012) (noting that removal orders are punitive enough to warrant proportionality review, similar to criminal sentencing and punitive damages).

¹⁰ See Shalini Bhargava Ray, *Immigration Law’s Arbitrariness Problem*, 121 COLUM. L. REV. 2049, 2054 (2021) (arguing that shadow sanctions in immigration lack transparency and consistency).

¹¹ See Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2079-80 (2017) (critiquing the conviction-based removal system for producing arbitrary and absurd outcomes).

¹² See David K. Hausman, *The Unexamined Law of Deportation*, 110 GEO. L.J. 973, 997 (2022) (questioning why non-citizens should face harsher consequences than citizens for same conduct).

¹³ See Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 173 (2018).

¹⁴ Daniel I. Morales, *It’s Time for an Immigration Jury*, 108 NW. U. L. REV. 36, 38 (2013).

¹⁵ *Id.* at 43.

¹⁶ *Id.* at 36 (suggesting that juries disrupt cycles of harsh enforcement and mass amnesty by embedding community decision making into immigration policy).

¹⁷ See, e.g., Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INTEREST L.J. 243 (2010); see also Kate M. Manuel &

officials to control and decide questions that could lead to potential lifetime exile from one's family and community was one of the reasons that President Truman vetoed the 1952 Immigration and Nationality Act ("INA"). He objected, noting that the proposed legislation "empower[ed] minor immigration and consular officials to act as prosecutor, judge and jury in determining whether acts constituting a crime have been committed."¹⁸ A jury could address many of the critiques against crime-based deportations, but it may be unreasonable to think that Congress could make these policy changes given the fraught political tensions and the stigma attached to not just non-citizens, but criminal non-citizens. What if the Magna Carta and the Framers had already made this decision for us? What if the Seventh Amendment, a tool that the modern Supreme Court has utilized to help protect against the potential harms of agency adjudications that result in punishment, could provide some relief to one of the largest administrative adjudicatory systems within the U.S. government?¹⁹

There are several possible reasons why the use of juries may have been neglected when it came to deportations. First, as a rule, deportations were handled by the states from the Founding Era and did not take on a federal character until after the Civil War.²⁰ The Seventh Amendment has never been incorporated, and therefore does not apply to states.²¹ Second, the Supreme Court, when initially describing deportation and its legal purpose in 1893, refused to recognize it as punishment and thereby rejected application of any constitutional criminal procedural protections typically afforded to criminal defendants.²² When the Court ruled that deportation was a civil process, it separated it from banishment and transportation.²³ Finally, the deportation process was created by Congress and is administered by federal agencies,²⁴ a scenario assumed to preclude it from qualifying as a suit at common law. However, the Supreme Court's recent decision in *SEC v. Jarkesy*²⁵ provides

Michael John Garcia, CONG. RSCH. SERV., R43782, EXECUTIVE DISCRETION AS TO IMMIGRATION: LEGAL OVERVIEW 13-14 (Nov. 10, 2014), https://tracreports.org/tracker/dynadata/2014_11/R43782.pdf [<https://perma.cc/34SW-AJG5>].

¹⁸ Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, 1 PUB. PAPERS 441, 441-44 (June 25, 1952).

¹⁹ U.S. CONST. amend. VII.

²⁰ Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1878 (1993).

²¹ See generally *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916).

²² *Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893).

²³ *Id.* (explaining that deportation is not imposed as punishment but reflects state's decision to exclude non-citizen based on public welfare concerns).

²⁴ See generally 8 U.S.C. § 1227.

²⁵ 144 S. Ct. 2117 (2024).

good reason to revisit these assumptions and explore whether the use of juries may not only be a good idea,²⁶ but perhaps a constitutional requirement.²⁷

The Seventh Amendment right to a jury trial was not meant to apply to all civil trials. Instead, as the text explained, it was to apply to “suits at common law.”²⁸ What *Jarkesy* clarifies, however, is that the question about whether a suit is of common law turns on whether the claim could be heard by an English court of “equity” or of “law.”²⁹ Courts of equity were empowered to enforce equitable relief, but courts of law could be used to punish wrongdoers.³⁰ For the *Jarkesy* case, because the Securities and Exchange Commission (“SEC”) sought civil penalties to punish those it brought suit against rather than to “restore the status quo,” the Seventh Amendment and its right to a jury is implicated.³¹

Provided that deportation is a civil process, the constitutionally relevant question is whether crime-based deportation is seeking to punish (even if civilly). And if so, does a jury need to be involved? Part I discusses the *Jarkesy* decision and how the Supreme Court focused its analysis on the punitive nature of the civil penalties imposed. Part II describes how crime-based deportation, even if a “civil” process, is nonetheless a punitive sanction that implicates the Seventh Amendment. Part III finally addresses *Jarkesy*’s citation to immigration as one of the public rights exceptions and argues that the exception does not apply to deportation.

I. *SEC v. JARKESY* AND CIVIL PENALTIES DESIGNED TO PUNISH

In *SEC v. Jarkesy*, the Supreme Court held that the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against a person for securities fraud.³² The case arose when the SEC investigated an investment fund manager for securities fraud.³³ The SEC accused the manager of misleading investors.³⁴ Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), the SEC adjudicated the matter itself rather than in federal court.³⁵ Ultimately, the SEC levied a civil penalty of

²⁶ Morales, *supra* note 14, at 44.

²⁷ See HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* 5 (2017) (explaining how early state-level deportation practices entrenched the plenary power doctrine that limited constitutional protections for noncitizens facing exclusion).

²⁸ U.S. CONST. amend. VII, cl. 1.

²⁹ *Jarkesy*, 144 S. Ct. at 2144 (Gorsuch, J., concurring).

³⁰ *Id.* at 2129.

³¹ *Id.* at 2122.

³² *Id.* at 2121.

³³ *Id.* at 2126-27.

³⁴ *Id.* (noting that SEC alleged violation of antifraud provisions of Securities Act of 1933 (“Securities Act”), Securities Exchange Act of 1934 (“Exchange Act”), and Investment Advisers Act of 1940 (“Advisers Act”).

³⁵ *Id.* For the relevant statutory provisions, see Dodd-Frank Act § 929P(a), 124 Stat. 1862-64 (codified in relevant part as amended at 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80b-3(i)(1)).

\$300,000 against the manager.³⁶ The manager appealed the SEC's decision to the Fifth Circuit.³⁷ A divided panel vacated the SEC order on various constitutional grounds, concluding, *inter alia*, that the Seventh Amendment required the action to be tried before a jury.³⁸ On appeal, the Supreme Court agreed.³⁹

Following the approach set forth in *Granfinanciera, S.A. v. Nordberg*⁴⁰ and *Tull v. United States*,⁴¹ the Court first addressed the threshold question of whether the Seventh Amendment applied in this context.⁴² The Court rejected the government's contention that because Congress created a statutory scheme that used administrative adjudication, it would necessarily place it outside the Seventh Amendment's reach.⁴³ Instead, the Court focused on the purpose of the civil penalties authorized by the statute, finding that because they were at least in part designed to be punitive, rather than remedial, the Seventh Amendment was implicated.⁴⁴ While the Court emphasized that the punitive nature of the penalties was the more important factor, it went on to compare the nature of the action.⁴⁵ The Court found that securities law antifraud provisions replicated common-law fraud, which also provided support for implicating the Seventh Amendment.⁴⁶

The Court next considered whether the public rights exception to Article III jurisdiction applied.⁴⁷ This exception has been "held to permit Congress to assign certain matters to agencies for adjudication even though such proceedings would not afford the right to a jury trial."⁴⁸ One of the public rights exceptions that the Court cited involved "immigration matters" with a citation to a case from the early nineteenth century regarding steamships.⁴⁹ The Court concluded that

³⁶ *Jarkesy*, 144 S. Ct. at 2127.

³⁷ See generally *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *aff'd*, 144 S. Ct. 2117 (2024).

³⁸ Applying a two-part test from *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), the Fifth Circuit held that the agency's decision to adjudicate the matter in-house violated the investment manager's Seventh Amendment right to a jury trial. *Jarkesy*, 34 F.4th at 453-59 (holding that Seventh Amendment right to jury trial was triggered because antifraud claims resembled traditional legal actions, and agency adjudication was improper since public rights exception did not apply).

³⁹ *Jarkesy*, 144 S. Ct. at 2127.

⁴⁰ *Granfinanciera*, 492 U.S. at 36.

⁴¹ 481 U.S. 412, 417 (1987).

⁴² *Jarkesy*, 144 S. Ct. at 2127.

⁴³ *Id.* at 2131-35.

⁴⁴ *Id.* at 2129-30.

⁴⁵ *Id.* at 2130-31.

⁴⁶ *Id.*

⁴⁷ *Id.* at 2131.

⁴⁸ *Id.* at 2127.

⁴⁹ *Id.* at 2132. See generally *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909) (upholding the federal government's authority to exclude non-citizens under immigration laws without judicial review, emphasizing the plenary power doctrine).

the SEC's adjudication of securities fraud did not apply as a public rights exception because the action did not fall within a distinctive area involving certain governmental prerogatives.⁵⁰ Finding that the Seventh Amendment applied, the Court held a jury was required.⁵¹

A. *The Seventh Amendment Applies to "Legal" Rather than "Equitable" Claims*

Noting that the Seventh Amendment guarantees that in "[s]uits at common law, . . . the right of trial by jury shall be preserved," the Court highlighted that the right is not limited to the "'common-law forms of action recognized' when the Seventh Amendment was ratified."⁵² This is because the Framers decision to use the term "common law" in the Amendment "in contradistinction to equity, and admiralty, and maritime jurisprudence."⁵³ Thus, the Amendment "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume."⁵⁴ In other words, the Seventh Amendment embraces "legal" claims that, at common law, could be decided only by courts of law rather than by courts of equity or admiralty.⁵⁵ To determine whether a suit is legal in nature, the Court noted that it considers the cause of action and the remedy it provides.⁵⁶ Since some causes of action sound in both law and equity, the remedy is the "more important" consideration.⁵⁷

B. *The Punitive Nature of Civil Penalties Is Key to Determining Whether They Are Legal or Equitable*

The Court found the punitive nature of the remedy dispositive.⁵⁸ The SEC sought civil penalties in the form of monetary relief for the investment manager's alleged fraud.⁵⁹ The Court noted that "[w]hile monetary relief could be either legal or equitable, money damages [were] the prototypical common law remedy."⁶⁰ To determine whether a remedy is legal or equitable, the Court explained that courts must ascertain whether the remedy is "designed to punish

⁵⁰ *Id.* at 2134-36.

⁵¹ *Id.* at 2139.

⁵² *Id.* at 2128 (quoting *Curtis v. Loether*, 415 U.S. 189, 193 (1974)).

⁵³ *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830).

⁵⁴ *Id.* at 447.

⁵⁵ *Jarkesy*, 144 S. Ct. at 2128-29 (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989), for the proposition that the Seventh Amendment extends to claims that are "legal in nature," and *Tull v. United States*, 481 U.S. 412, 422 (1987), for the proposition that "civil penal[ies are] a type of remedy at common law that could only be enforced in courts of law").

⁵⁶ *Id.* at 2129 (discussing its analysis in *Tull*).

⁵⁷ *Tull*, 481 U.S. at 418-21.

⁵⁸ *Jarkesy*, 144 S. Ct. at 2129.

⁵⁹ *Id.* at 2126.

⁶⁰ *Id.* at 2129 (citing *Mertens v. Hewitt Associates*, 508 U.S. 248, 255 (1993)).

or deter the wrongdoer, or, on the other hand, solely to ‘restore the status quo.’”⁶¹ As the Court explained in *Austin v. United States*,⁶² “a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment.”⁶³ The Court noted that while courts of equity historically “could order a defendant to return unjustly obtained funds, only courts of law issued monetary penalties to ‘punish culpable individuals.’”⁶⁴ Thus, “civil penalt[ies are] a type of remedy at common law that could only be enforced in courts of law.”⁶⁵ The conditions enumerated in federal securities law governed the availability of civil penalties concern “culpability, deterrence, and recidivism.”⁶⁶ Because they “tie the availability of civil penalties to the perceived need to punish the defendant rather than to restore the victim,” the Court concluded that “such considerations are legal rather than equitable.”⁶⁷

The Court reasoned that the same was true of the criteria that determine the size of the available remedy.⁶⁸ The Court noted that “[v]iolating a federal securities law or regulation exposes a defendant to a first tier penalty.”⁶⁹ If the violation involved fraud, deceit, manipulation, or deliberate or reckless disregard for regulatory requirements, then a “second tier,” higher penalty could be ordered.⁷⁰ Finally, if a violation “resulted in substantial gains to the defendant or losses to another, or created a ‘significant risk’ of the latter, the defendant is subject to a third, [highest] tier penalty.”⁷¹ Like the considerations that determine the availability of civil penalties, the Court reasoned that the criteria that divide these tiers were also legal in nature because each tier conditions the available penalty on the defendants culpability and the need for deterrence, rather than the size of the harm that must be remedied. Because the analysis did not consider restoration of the status quo, the Court concluded that the civil penalties in question were designed to be punitive rather than equitable.⁷²

In sum, because the civil penalties were designed to punish and deter rather than compensate, the Court concluded that they were the “type of remedy at common law that could only be enforced in courts of law.”⁷³ Therefore, the Court concluded that the suit implicated the Seventh Amendment right and that

⁶¹ *Id.* (quoting *Tull*, 481 U.S. at 422).

⁶² 509 U.S. 602 (1993).

⁶³ *Id.* at 610 (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)).

⁶⁴ *Jarkesy*, 144 S. Ct. at 2129 (quoting *Tull*, 481 U.S. at 422).

⁶⁵ *Tull*, 481 U.S. at 422.

⁶⁶ *Jarkesy*, 144 S. Ct. at 2129; see 15 U.S.C. §§ 78u-2, 80b-3(i)(3).

⁶⁷ *Jarkesy*, 144 S. Ct. at 2129.

⁶⁸ *Id.* (describing how the Securities Act, Exchange Act, and Advisers Act create a three-tier system for assessing civil penalties); see 15 U.S.C. §§ 77h-1(g)(2), 78u-2(b), 80b-3(i)(2).

⁶⁹ *Jarkesy*, 144 S. Ct. at 2129.

⁷⁰ *Id.*

⁷¹ *Id.* at 2129-30.

⁷² *Id.* at 2130.

⁷³ *Id.* (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)).

the defendant was entitled to a jury on these claims, unless the public rights exception applied.⁷⁴

C. *The Similarity Between a Cause of Action and its Common-Law Analogue Affirms Seventh Amendment Applicability*

While the punitive nature of the penalties clearly decided the issue, the Court also noted that “[t]he close relationship between the causes of action and . . . common law fraud confirm[ed its] conclusion.”⁷⁵ The Court noted that both the causes of action and common-law fraud “target the same basic conduct: misrepresenting or concealing material facts.”⁷⁶ The Court explained that when Congress deliberately uses “fraud” or other common-law terms of art in statutes, it incorporates elements of common law into federal statutory law.⁷⁷ The Court reasoned that such a decision by Congress to “draw upon common law fraud [in the statute] created an enduring link between federal securities fraud and its common law ‘ancestor.’”⁷⁸ As the Court put it in *United States v. Hansen*,⁷⁹ “when Congress transplants a common-law term, the ‘old soil’ comes with it.”⁸⁰ The Court noted that consequently, its precedents often considered common-law fraud principles when interpreting federal securities law.⁸¹

However, the Court clarified that statutory implication of common-law elements does not require the statutory claim and common-law claim to be identical.⁸² For example, the Court noted that federal securities fraud is in some respects narrower and in some respects broader than common-law fraud.⁸³ Federal securities fraud is narrower such that it does not “convert every common-law fraud that happens to involve securities into a violation,” but rather targets certain subject matter and certain disclosures.⁸⁴ In other respects, federal securities fraud is broader such that it employs the “burden of proof typical in civil cases, while its common-law analogue traditionally used a more stringent standard.”⁸⁵ Additionally, the Court noted that “[c]ourts have also not typically interpreted federal securities fraud to require a showing of harm to be actionable by the SEC.”⁸⁶ Nevertheless, the Court concluded that the close relationship

⁷⁴ *Id.* at 2131.

⁷⁵ *Id.* at 2130.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* (citing *Foster v. Wilson*, 504 F.3d 1046, 1050 (9th Cir. 2007)).

⁷⁹ 143 S. Ct. 1932 (2023).

⁸⁰ *Id.* at 1934 (quoting *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019)).

⁸¹ *Jarkesy*, 144 S. Ct. at 2130-31.

⁸² *Id.* at 2131.

⁸³ *Id.*

⁸⁴ *Id.* (quoting *SEC v. Zandford*, 535 U.S. 813, 820 (2002)).

⁸⁵ *Id.* (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-90 (1983)).

⁸⁶ *Id.* (citing *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985); *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 779 (5th Cir. 2017)).

between federal securities fraud and common law fraud confirmed that the action was “legal in nature.”⁸⁷

D. *The “Public Rights” Exception*

Once the Court determined that the Seventh Amendment applied due to the punitive nature of the SEC’s civil penalties and the antifraud provision’s similarity with common-law fraud, it turned to whether the public rights exception applied.⁸⁸ Where the exception applies, Congress may authorize an agency to decide certain matters without violating the Seventh Amendment.⁸⁹ Here, the Court held the SEC’s civil penalty action did not fall within the exception; therefore, Congress could not avoid a jury trial by permitting adjudication by an administrative tribunal.⁹⁰

The Court began by distinguishing between private rights, which must be heard by a jury if the Seventh Amendment applies,⁹¹ and public rights, which involve a class of cases historically deemed to fall within the exclusive jurisdiction of the executive and legislative branches.⁹² The Court noted that a hallmark for determining if a suit concerns private rights is whether it “is made of ‘the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.’”⁹³ If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an executive agency is impermissible.⁹⁴ Indeed, invoking separation of powers principles, the Court emphasized that the 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.’”⁹⁵ Thus, “once such a suit ‘is brought within the bounds of federal jurisdiction,’ an Article III court must decide it, with a jury if the Seventh Amendment applies.”⁹⁶ Accordingly, the Court has repeatedly held that matters concerning private rights may not be removed from Article III courts.⁹⁷

⁸⁷ *Id.* (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Stern v. Marshall*, 564 U.S. 462, 484 (2011).

⁹² *Jarkesy*, 144 S. Ct. at 2132 (citing *Stern*, 564 U.S. at 483).

⁹³ *Id.* (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment)).

⁹⁴ *Id.* (citing *Stern*, 564 U.S. at 484).

⁹⁵ *Id.* at 2131 (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)). According to the Court, such “propositions are critical to maintaining the proper role of the Judiciary in the Constitution: ‘Under “the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government” adopted in the Constitution, “the judicial Power of the United States”’ cannot be shared with the other branches.” *Id.* (quoting *United States v. Nixon*, 418 U.S. 683, 704 (1974)).

⁹⁶ *Id.* (quoting *Stern*, 564 U.S. at 484).

⁹⁷ *Id.*

However, the Court acknowledged another class of cases that historically fell under the exclusive jurisdiction of the executive and legislative branches.⁹⁸ In contrast to common-law claims, the Court has permitted an initial adjudication by a non-Article III administrative tribunal. Enter the public rights exception. The Court acknowledged that it “has not ‘definitively explained’ the distinction between public and private rights,” and affirmatively disclaimed any attempt to do so in *Jarkesy*.⁹⁹

Nevertheless, the Court emphasized the importance of evaluating the legal basis for applying the doctrine with great care.¹⁰⁰ The Court emphasized that the public rights exception is an *exception* with no textual basis in the Constitution.¹⁰¹ Therefore, it must, according to the Court, derive justification from background legal principles.¹⁰² As such, the Court noted that careful, case-by-case evaluation of the exception was necessary.¹⁰³ Without such close attention to the basis for each asserted application of the doctrine, the Court reasoned, the exception “would swallow the rule.”¹⁰⁴ The Court recognized that its precedent imply a presumption against applying the public rights exception.¹⁰⁵ Additionally, the Court cautioned that “practical” considerations alone could not justify extending the scope of the public rights exception.¹⁰⁶

The first case to recognize the public rights exception was *Murray’s Lessee*,¹⁰⁷ which upheld the government’s authority to issue a warrant of distress to recover public funds from a delinquent customs collector without judicial involvement.¹⁰⁸ Similarly, in *Ex parte Bakelite Corp.*,¹⁰⁹ the Court upheld legislation empowering the President to impose tariffs or exclude goods to counteract unfair foreign competition.¹¹⁰ The Court has since held that certain other historic categories of adjudications fall within the exception, including relations with Indian tribes,¹¹¹ the administration of public lands,¹¹² and the

⁹⁸ *Id.* at 2132 (citing *Stern*, 564 U.S. at 493).

⁹⁹ *Id.* at 2133 (quoting *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018)).

¹⁰⁰ *Id.* at 2133-34.

¹⁰¹ *Id.* at 2134.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (citing *Stern v. Marshall*, 564 U.S. 462, 501 (2011)).

¹⁰⁷ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

¹⁰⁸ *Id.* at 272-82 (explaining that summary proceedings to compel revenue officers to remit public money had long been used prior to the Founding).

¹⁰⁹ 279 U.S. 438 (1929).

¹¹⁰ *Id.* at 446-61 (reasoning that tariff regulation fell within political branches’ traditional authority and thus outside Article III’s judicial power).

¹¹¹ See *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011).

¹¹² *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

granting of public benefits such as payments to veterans,¹¹³ pensions,¹¹⁴ and patent rights.¹¹⁵

The Court in the past declared that the public rights exception to the Seventh Amendment applies to immigration proceedings.¹¹⁶ Nonetheless, as we argue in Part III, crime-based deportations should be treated differently and the normal justifications for the public rights exception should not apply.

II. THE PUNITIVE NATURE OF DEPORTATIONS BASED ON CRIMES

Deportation is a government sanction; like a monetary fine, it can serve different governmental purposes based on the circumstances in which it is used. Deportations may serve a more “equitable” purpose when those being deported fail to maintain lawful status or were not legally allowed to enter the country in the first place.¹¹⁷ However, when deportation is used as a form of punishment to condemn the actions or behavior of people, then it is retributive. For example, deporting those who commit crimes *after* arrival in the United States serves a retributive purpose and thus implicates the Seventh Amendment.

When the Supreme Court in *Fong Yue Ting v. United States*¹¹⁸ decided that deportation was a “civil” process that would not afford deportees the various constitutional protections given to criminal defendants, the federal deportation system was in its infancy, and it predated statutes authorizing deportation for criminal convictions.¹¹⁹ The *Fong Yue Ting* Court examined a violation of registration provisions that targeted Chinese laborers inside the United States.¹²⁰ In doing so, the Court described how international law at the time differentiated between “transportation,” “extradition,” “banishment,” and “deportation.”¹²¹ Key to the Court in 1893 was the distinction between transportation and deportation. For the Court, transportation was a “way of punishment of one convicted of an offense against the laws of the country,” while deportation was a “removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated.”¹²² The people facing deportation in *Fong Yue Ting* had not violated any law, criminal or civil, other than the immigration requirement that

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *United States v. Duell*, 172 U.S. 576, 582-83 (1899).

¹¹⁶ *See generally* *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

¹¹⁷ *See* 8 U.S.C. § 1227(a)(1)(A)-(D).

¹¹⁸ 149 U.S. 698 (1893).

¹¹⁹ *See id.* at 729-30. Importantly, there were “exclusionary” grounds for suspected criminal activity such as prostitution which was part of the Page Act, but those laws were not targeting activity done after arriving the United States, nor did they require any criminal conviction established by a court of law. *See* Virginia Loh-Hagan, Jing Kwoh, Jayson Chang & Pat Kwoh, *Excluded from History: The Page Act of 1875*, 86 Soc. EDUC. 73, 74 (2022).

¹²⁰ *Fong Yue Ting*, 149 U.S. at 726.

¹²¹ *Id.* at 708-09.

¹²² *Id.* at 707-09.

demanded proper documentation specifically for the Chinese.¹²³ When the Court refused to extend criminal procedural protections to deportees, it analyzed deportation as removal for a failure to comply with certain qualifications (in this case, registration), rather than as a punishment. This distinction made sense when deportation was based on a failure to register or have proper documentation, but it became harder to extend when deportation later became based on a criminal conviction.

A. *The 1917 Immigration Act Made Deportation Part of Criminal Punishment for Non-Citizens*

Decades after *Fong Yue Ting*, Congress added deportation as a consequence of violating criminal statutes for non-citizens. The Immigration Act of 1917 was the first *federal* statute that allowed for deportation of non-citizens convicted of a crime in the United States.¹²⁴ Congress had debated the question of adding these provisions for several years before the enactment of the Immigration Act. Congressional debates in 1908 and 1910 involved fierce disagreement between legislators. Some were concerned that deportation for committing crimes constituted what the *Fong Yue Ting* Court described as “transportation,” which led to arguments about whether such deportations violated the Eighth Amendment’s provision against Cruel and Unusual Punishment¹²⁵ and the Ex Post Facto Clause.¹²⁶ Others found it unjust to deport people who had lived in the United States for several years, even after they were convicted of a crime.¹²⁷

¹²³ *Id.* at 731.

¹²⁴ Immigration Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874, 889-90 (1917) (requiring deportation of any non-citizen sentenced to prison for a year or more or convicted of a crime “involving moral turpitude” within five years of entering the United States).

¹²⁵ See 42 CONG. REC. 2755 (1908) (statement of Rep. Adolph J. Sabath) (“Surely the deportation and separation forever from those nearest and dearest to him of a person for any minor offense which we constitute or call a felony is so cruel and unusual a punishment as to come clearly within the purview of [the Eighth Amendment] of the Federal Constitution.”).

¹²⁶ For the various legislators who viewed deportation due to post-entry criminal convictions as punishment, the Ex Post Facto Clause presented a significant issue. For example, Representative Sabath expressed concern in 1908, and again in 1910 (this time joined by Representatives Gustav Küstermann and Joseph O’Connell), that noncitizens would be deportable based on criminal convictions obtained before the enactment of a new immigration law. See *id.* (“I am quite satisfied that this bill, besides being essentially cruel in its effects, is also clearly unconstitutional. It conflicts with section 9 of Article I of the Constitution, which provides that ‘no bill of attainder or ex post facto law shall be passed.’ The bill provides that ‘any alien who is now under sentence because of conviction of a felony shall at the expiration of his sentence be taken into custody and returned to the country whence he came.’”); H.R. REP. NO. 61-404, pt. 2 (1910) (“[The post-entry crime bill] prejudices and affects the offender because of his past misdeeds for which he is already serving his sentence. This proviso in said bill is clearly retroactive. The cardinal rule in law applicable in this instance is that laws must be prospective.”).

¹²⁷ See *Restriction of Immigration: Hearing on H.R. 10384 Before the H. Comm. on Immigr. & Naturalization*, 64th Cong. 15, 13-14 (1916) [hereinafter *Immigration Hearings*] (statement of Rep. Adolph J. Sabath, Member, H. Comm. on Immigr. & Naturalization) (“A

After intense discussion, the final form of the Act created deportation consequences for criminal conduct but key provisions were created to address concerns over harsh consequences. First, deportations for criminal convictions could only occur within the first five years of admission into the United States.¹²⁸ Long-time residents who were convicted long after their arrival could not be deported because, as one legislator put it, long-time residents who were convicted of such crimes were “our criminal[s].”¹²⁹ Second, the criminal grounds of removal were based on “crime[s] involving moral turpitude,” a phrase that referred to a failure of moral character.¹³⁰ Third, trial courts were given the option to prevent unduly severe consequences by issuing a Judicial Recommendation Against Deportation (“JRAD”).¹³¹ JRADs allowed a criminal judge to issue a recommendation during sentencing against deportation for a person who would otherwise qualify for deportation under the statute.¹³² This recommendation was binding on federal immigration officials and the criminal defendant would avoid deportation should the sentencing judge determine that deportation was too severe a consequence for the crime involved.¹³³ Fourth, the Act did not authorize deportation for anyone who received a pardon for their criminal conviction.¹³⁴

great many people who have been here a great many years can not [sic] due to unfortunate conditions that exist, become citizens. Meanwhile they might have been married; they might have an American wife, a woman who has been born here, and they might have two or three children.”); 53 CONG. REC. 5165-72 (1916) (demonstrating that Congress seemingly presumed that non-citizens developed genuine connections to the United States within five-year time period).

¹²⁸ Immigration Act of 1917 § 19.

¹²⁹ See *Immigration Hearings*, *supra* note 127, at 15 (statement of Rep. Riley J. Wilson, Member, H. Comm. on Immigr. & Naturalization) (asserting that an immigrant who comes “with a good record, with good purposes and good intentions, and makes good when he arrives here” should not be deported because of criminal activity committed post-entry because that immigrant “might be our criminal, and it might not be just fair to deport him”); see also 42 CONG. REC. 2752-53 (1908) (indicating that Congress was not readily willing to deport non-citizens who committed felonies in the United States, as doing so would “add punishment after the sentence of law has been complied with”).

¹³⁰ Immigration Act of 1917 § 19.

¹³¹ For a discussion on how the language from the 1917 Act became a specific form of relief and then later abandoned in immigration law, see generally Marisa A. Marinelli, *Crimes and Punishment of the Alien: The Judicial Recommendation Against Deportation*, 14 HOFSTRA L. REV. 357 (1986); and Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 36 (2015).

¹³² Immigration Act of 1917 § 19 (“[N]or shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act.”).

¹³³ *Id.*

¹³⁴ *Id.*

The JRAD process especially highlighted the integration of deportation and the criminal system. JRAD required a mini-sentencing hearing for deportation. Despite creating a federal deportation process, the JRAD provision made the sentencing judge, federal or state, the decisionmaker in determining whether a person's conviction would lead to their deportation. When a criminal court judge sentenced an individual defendant whose crime would otherwise trigger deportation, the court was empowered to issue a recommendation that was nearly always binding on federal immigration officials.¹³⁵ Accordingly, the process nominally created a "default" of deportation, but it afforded defendants the ability to seek relief from the criminal court, rather than federal agencies.¹³⁶ The JRAD process functioned as follows: "At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation 'that such alien shall not be deported.'"¹³⁷ This recommendation effectively bound "the Executive to prevent deportation; the statute was 'consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation.'"¹³⁸

Though JRAD apparently offered an exception to default deportation, failure to properly seek such an avenue was viewed by federal courts as impacting the criminal right to effective assistance. Because "seeking a JRAD was 'part of the sentencing' process,"¹³⁹ the Second Circuit "held that the Sixth Amendment right to effective assistance of counsel applies to a JRAD request or lack thereof."¹⁴⁰ Just as defendants could argue for lower sentences, they could also argue to their sentencing judges that their crimes did not outweigh their connections to the United States, and therefore deportation was unjustified. By granting discretion as to JRAD's application to the same court (federal or state) that decided the criminal punishment for the defendant, Congress made deportations an integral component of criminal punishment.¹⁴¹

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Padilla v. Kentucky*, 559 U.S. 356, 361 (2010) (quoting Immigration Act of 1917 § 19).

¹³⁸ *Id.* at 362 (quoting *Janvier v. United States*, 793 F.2d 449, 452 (2d Cir. 1986)).

¹³⁹ *Id.* at 363 (quoting *Janvier*, 793 F.2d at 452).

¹⁴⁰ *Id.* (citing *Janvier*, 793 F.2d at 449).

¹⁴¹ Further to this point, at multiple hearings and debates during this period, legislators expressed the view that deportation based on post-entry criminal conduct amounted to punishment. See 42 CONG. REC. 2752, 2752 (1908) (statement of Rep. Michael Driscoll) ("[I]t is a punishment to deport a man . . ."); *id.* at 2754 (statement of Rep. James Mann) ("[Congress] ought [not] to . . . permit [a noncitizen] to be taken away as an additional penalty for a crime he may have committed . . ."); *Hearings Relative to the Dillingham Bill, S. 3175, to Regulate the Immigration of Aliens to and the Residence of Aliens in the United States: Hearing Before the H. Comm. on Immigr. & Naturalization*, 62nd Cong. 44 (1912) (statement of Rep. John Burnett, Chairman, H. Comm. on Immigr. & Naturalization) ("[O]ne of the worst punishments that could be inflicted on people of some countries . . . would be that of being sent back to his country, and the very threat hung over the man of that kind of deportation would be as powerful a stimulus to good citizenship and obedience to the law as anything

Congress, during a tough-on-crime period, eliminated much of the available for discretion for crime-based removal from the late 1980s until a pair of laws in 1996. The Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRAIRA”) made deportation (and detention while deciding deportation) automatic and mandatory following certain criminal convictions, stripping people of their immigration status without any possibility for recourse.¹⁴² The statutory phrase “aggravated felonies” was introduced in 1988 and further expanded upon in the Immigration Act of 1990 (“IMMACT 90”).¹⁴³ By the late 1990s, as a result of immigration bills such as AEDPA and IIRAIRA, convictions for *certain* crimes bypassed considerations beyond the mere existence of a conviction. Convictions for crimes categorized as “aggravated felonies” precluded relief from removal and mandated removal orders mandatory, eliminating discretion from both sentencing judges and immigration officials.¹⁴⁴ JRADs were abandoned by 1990 in IMMACT 90, and aggravated felonies, unlike “crimes involving moral turpitude,” were now defined with specificity by statute.

The consequences of a conviction for an “aggravated felony” as defined by INA 101(a)(43)¹⁴⁵ have been described as an “immigration law death penalty.”¹⁴⁶ Once convicted of an “aggravated felony,” non-citizens can no longer ask for waivers of deportation, such as Cancellation of Removal under INA 240A(a) or 212(h).¹⁴⁷ They are provided no forum where they could argue that their equities outweigh their crime, and that they deserve to stay in the United States—regardless of length of residency or strength of family ties. Thus, if a non-citizen is convicted of an “aggravated felony,” which need not be a

else.”); *id.* (statement of Aaron W. Levy, National Liberal Immigration League) (“[I]n principle there ought [not] to be any objection to holding over the man who desires to become a citizen of this country some threat of punishment in case he does not demean himself properly.”).

¹⁴² Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, §§ 439-40, 110 Stat. 1214, 1276-77 (1996) (codified as amended in scattered sections of 8 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 305, 110 Stat. 3009-546, 3009-597 to -98 (codified as amended in 8 U.S.C. § 1231) (1996). *See generally id.* §§ 342, 344, 347-48, 350 (revising exclusion and deportation grounds).

¹⁴³ Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (1990) (codified as amended in 8 U.S.C. § 1101(a)(43)).

¹⁴⁴ 8 U.S.C. §§ 1158(b)(2)(B), 1229b(a)(3), 1229b(b)(1)(C) (rendering people ineligible for relief from deportation for having aggravated felony convictions); *see also* SARAH TOSH, THE IMMIGRATION LAW DEATH PENALTY: AGGRAVATED FELONIES, DEPORTATION, AND LEGAL RESISTANCE 1-20, 42-70 (2023) (discussing history of aggravated felony provisions and their overuse in immigration court).

¹⁴⁵ 8 U.S.C. § 1101(a)(43).

¹⁴⁶ *See generally* TOSH, *supra* note 144.

¹⁴⁷ 8 U.S.C. §§ 1229b(a)(3), 1182(h).

felony under either a state or federal definition, then they cannot prevent the loss of their immigration status or the entry of a removal order.¹⁴⁸

B. *Although Crime Based Deportation Does Not Qualify as Criminal Punishment, the Supreme Court Has Extended Similar Protections*

The Supreme Court solidified the classification of deportation as a civil penalty when, in 1924, it refused to apply the Ex Post Facto Clause to deportations based on criminal convictions.¹⁴⁹ In *Mahler*, the Court considered a challenge to a deportation based on convictions of the Selective Service and Espionage Acts of 1917.¹⁵⁰ In 1920, Congress enacted a new statute expanding deportable offenses to include violations of the Selective Service and Espionage Acts.¹⁵¹ In June 1921, the Government moved to deport a group of people who were convicted in 1918 of Selective Service Act and Espionage Act violations.¹⁵² The deportees argued that they could not be deported because their convictions had occurred in 1918—when their criminal convictions could not lead to deportation, and a retroactive application of the 1920 deportation grounds would violate the Ex Post Facto Clause.¹⁵³ They also argued that the 1920 Act was impermissibly vague, granting discretion to officials and thereby violating the Fifth Amendment guarantee of due process.¹⁵⁴ The Supreme Court rejected the challenge and ruled that because deportation had been established as a non-criminal penalty in *Fong Yue Ting*, the retroactive application of the 1920 law could not violate the Ex Post Facto Clause.¹⁵⁵ The Court also rejected the claim that the newly created deportation grounds were too “vague or uncertain,” finding that the vagueness doctrine had been applied to criminal statutes in the past and the deportation statutes need not be held to the same standard.¹⁵⁶ The Court’s main holding in *Mahler* is still good law; but nonetheless, the Court has since implemented rulings that have impacted the practical logistics of this holding.

¹⁴⁸ This is almost universally true, though there are perhaps limited exceptions that are extremely rare, such as unadjusted refugees, or those able to “adjust” with some waivers. *See, e.g.*, 8 U.S.C. § 1159; *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding that non-citizens whose convictions were obtained through plea agreements remain retroactively eligible for waiver of deportation under repealed statute). And while it is true that an aggravated felony does not bar relief, such as the withholding of removal under INA 241(b)(3), 8 U.S.C. § 1231(b)(3), or Convention Against Torture relief, 8 C.F.R. § 241.4(b)(3), an aggravated felony conviction still requires the loss of lawful permanent resident status and an entry of a removal order. Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 369 (2012).

¹⁴⁹ *See Mahler v. Eby*, 264 U.S. 32, 39 (1924).

¹⁵⁰ *Id.* at 33-34.

¹⁵¹ *Id.* at 36-37.

¹⁵² *Id.* at 35-36.

¹⁵³ *Id.* at 39.

¹⁵⁴ *Id.* at 37.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 40-41.

In *Lehman v. Carson*,¹⁵⁷ a decision that followed the *Mahler* holding, Justice Black expressed discomfort with the wholesale rejection of crime-based deportation as punishment and invited the Court to reconsider its insistence that deportation was outside the scope of the Ex Post Facto Clause:

To banish them from home, family, and adopted country is punishment of the most drastic kind whether done at the time when they were convicted or later. I think that this Court should reconsider the application of the ex post facto clause with a view to applying it in a way that more effectively protects individuals from new or additional burdens, penalties, or punishments retrospectively imposed by Congress.¹⁵⁸

While the Court has not revisited its holding in *Mahler*, its recognition of the punitive effects of deportation has nonetheless led the Court to fold in some of the criminal protections that it previously denied in *Mahler*, using the Due Process Clause.

For instance, in *Immigration and Naturalization Service v. St. Cyr*,¹⁵⁹ the Court ruled that a retroactive change to the availability of relief from deportation for those with certain criminal convictions would violate the norm that “individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”¹⁶⁰ In refusing to read AEDPA and IIRAIRA as fully rescinding relief for those who committed aggravated felonies prior to the legislation’s enactment, the Court cautioned that retroactive changes to the law may be used as a “means of retribution against unpopular groups or individuals.”¹⁶¹ While the Court did not directly refer to the Ex Post Facto Clause, the Court’s stated justifications for avoiding retroactive applications, such as notice, the inability to conform behavior, and threats to unpopular groups, have consistently been described as justifications for the Ex Post Facto Clause since the Founding Era.¹⁶² The movement towards infusing deportations—especially those based on criminal convictions—with criminal protections continued.

The *Mahler* Court had rejected a void-for-vagueness challenge to the 1920 statute, noting that prior applications of the doctrine were limited to criminal

¹⁵⁷ 353 U.S. 685 (1957).

¹⁵⁸ *Id.* at 691 (Black, J., concurring).

¹⁵⁹ 533 U.S. 289 (2001).

¹⁶⁰ *Id.* at 316 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994)).

¹⁶¹ *Id.* at 315.

¹⁶² See THE FEDERALIST NO. 44 (James Madison) (explaining that the prohibition on ex post facto laws prevents arbitrary or vindictive legislation by forbidding retroactive criminal laws that punish conduct not illegal when committed); THE FEDERALIST NO. 84 (Alexander Hamilton) (explaining that prohibiting ex post facto laws is a fundamental protection ensuring individuals are not punished under retroactive or unjust criminal statutes); see also *Beazell v. Ohio*, 269 U.S. 167, 170 (1925) (underscoring that ex post facto laws unfairly transform lawful acts into crimes or worsen punishment); *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) (noting that ex post facto laws undermine fair notice and inviting arbitrary legislation).

statutes.¹⁶³ Nonetheless, the Supreme Court recently applied the void-for-vagueness doctrine to a deportation statute that required deportation for those who were convicted of a “crime of violence” under the definition as used in 18 U.S.C. § 16(b).¹⁶⁴ The government asked the Court to use a more lax version of the void-for-vagueness doctrine, arguing that “[t]he removal of an alien is a civil matter.”¹⁶⁵ Therefore, according to the government’s logic, “the need for clarity is not so strong; even a law too vague to support a conviction or sentence may be good enough to sustain a deportation order.”¹⁶⁶ The Supreme Court rejected this argument, stating “[t]o the contrary, this Court has reiterated that deportation is ‘a particularly severe penalty,’ which may be of greater concern to a convicted alien than ‘any potential jail sentence.’”¹⁶⁷ Further, the Court remarked that “as federal immigration law increasingly hinged deportation orders on prior convictions, removal proceedings became ever more ‘intimately related to the criminal process.’”¹⁶⁸ In other words, the punitive aspect of deportation, even if a civil sanction, still required a stringent application of the void-for-vagueness doctrine. The Court struck down the use of 18 U.S.C. § 16(b) to define a deportable conviction.

Long before affirming that the void-for-vagueness doctrine may apply to deportation statutes, the Court had begun to import other considerations meant to offset harsh punishments from criminal law. Professor Markowitz has described this slow adoption of “criminal” protections into the civil process of deportation, culminating in the *Padilla v. Kentucky*¹⁶⁹ decision recognizing that deportation is not a purely civil or purely criminal process.¹⁷⁰ Instead, he describes it as a type of hybrid that requires an evaluation of what procedural protections apply.¹⁷¹ It is the recognition that when deportation is used in a retributive manner, it may trigger the necessity for certain procedural protections.

The Rule of Lenity, for example, is a means of statutory interpretation of criminal laws and is as old as the construction of statutes itself.¹⁷² The Rule of Lenity requires courts interpreting an ambiguous criminal statute to read the

¹⁶³ *Mahler v. Eby*, 264 U.S. 32, 41 (1924).

¹⁶⁴ *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1210 (2018).

¹⁶⁵ *Id.* at 1212-13.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1213 (quoting *Jae Lee v. United States*, 582 U.S. 357, 370 (2017)).

¹⁶⁸ *Id.* (quoting *Chaidez v. United States*, 568 U.S. 342, 352 (2013)).

¹⁶⁹ 559 US 356 (2010).

¹⁷⁰ Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1301 (2011) (characterizing deportation as “liv[ing] in the netherworld in between” civil and criminal).

¹⁷¹ *Id.* at 1307 (proposing that courts first ask whether the interests behind a given procedural right apply in deportation, then assess whether the nature of the proceedings justifies applying criminal-type protections).

¹⁷² *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

statute in a way that favors leniency for criminal defendants.¹⁷³ Its application in the criminal context has been long and varied, mentioned as an ancient rule by Justice Marshall in 1820,¹⁷⁴ and more recently by Justice Barrett in interpreting the Computer Fraud and Abuse Act in 2021.¹⁷⁵ Despite its criminal law origins, the Rule of Lenity has been consistently applied by the Supreme Court to deportation statutes starting in 1948 with *Fong Haw Tan v. Phelan*,¹⁷⁶ continuing in 1987 with *INS v. Cardoza-Fonseca*,¹⁷⁷ and in 2004 with *Leocal v. Ashcroft*,¹⁷⁸ and most recently in 2010 with *Carachuri-Rosendo v. Holder*,¹⁷⁹ where the Court explained, “ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen’s favor.”¹⁸⁰ Where the Court has applied the Rule of Lenity to deportation, it has done so in the context of crime based deportation. Civil applications of the Rule of Lenity have not been limited to deportation. It has also been used to interpret tax provisions,¹⁸¹ civil application of the Hobbs Act,¹⁸² and certain areas of employment law.¹⁸³ The common thread in all of these cases is that the Rule of Lenity was applied to civil *penalties* or *sanctions*. Whether in civil or criminal contexts, the Rule of Lenity exists to ensure that ambiguous statutes are interpreted to give lenity when a *penalty* or *sanction* may be levied against a person by the government. Deportation may not be a *criminal* punishment, but it is certainly a penalty issued by the federal government and thus subject to the Rule of Lenity—bringing it, we argue, within the protection of the Seventh Amendment.

III. CRIME BASED DEPORTATION SHOULD NOT IMPLICATE THE PUBLIC RIGHTS EXCEPTION

Since the Magna Carta, a jury was required not just for deprivation of property or liberty, but also when the King wanted to banish or exile a person.¹⁸⁴ It is likely that an English nobleman from the thirteenth century would find it objectionable that thousands of people could be exiled, sometimes from their childhood homes, without the opportunity to have a jury of their peers be

¹⁷³ See Maciej Hulicki & Melanie Reid, *The Rule of Lenity as a Disruptor*, 113 J. CRIM. L. & CRIMINOLOGY 803, 807 (2024).

¹⁷⁴ See *Wiltberger*, 18 U.S. (5 Wheat.) at 96.

¹⁷⁵ *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021).

¹⁷⁶ 333 U.S. 6, 9-10 (1948).

¹⁷⁷ 480 U.S. 421, 449-50 (1987).

¹⁷⁸ 543 U.S. 1, 11-12 (2004).

¹⁷⁹ 560 U.S. 563, 581-82 (2010).

¹⁸⁰ *Id.* at 581 (quoting *Leocal*, 543 U.S. at 11 n.8).

¹⁸¹ See *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992).

¹⁸² See *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 408-09 (2003).

¹⁸³ See *Crandon v. United States*, 494 U.S. 152, 158 (1990).

¹⁸⁴ MAGNA CARTA Ch. 39, *supra* note 1; Walter Clark, *Magna Carta and Trial by Jury*, 2 N.C. L. REV. 1, 4 (1923).

involved. An unexamined and casual citation to “immigration” as a field should not be enough to dispense with a core fundamental protection.

Jarkesy represents the Supreme Court’s important attempt to clarify and tighten its Seventh Amendment jurisprudence in the administrative law context. While the Court extolled the expansive right to a jury guaranteed by the Seventh Amendment, and emphasized the narrow exceptional nature of public rights doctrine, it still summarily attempted to pigeonhole immigration proceedings into the narrow, a textual exception.¹⁸⁵ However, application of the public rights exception to *all* deportation proceedings is doctrinally inconsistent. Certain criminal deportations must fall outside the narrow boundaries of the public rights exception, thus entitling some non-citizens to a Seventh Amendment jury trial.

As elucidated in *Jarkesy*, the Seventh Amendment jury right applies to civil cases where a legal—as opposed to equitable—remedy is sought.¹⁸⁶ Civil penalties with punitive intent are quintessentially such remedies. The Supreme Court has also recognized limited, narrow exceptions for certain administrative proceedings involving public rights, traditionally falling within the purview of the executive and legislative branches.¹⁸⁷ The Court posits that Congress’s plenary power over immigration shields all removal proceedings from full constitutional due process behind the cloak of the public rights exception.¹⁸⁸ Criminal deportation, however, represents a unique case that deserves closer scrutiny.

A. *Deportation vs. Exclusion*

Despite the majority’s analogy in *Fong Yue Ting* that deportation should not be treated any differently from exclusion, both precedent and Congressional actions have shown that many of the concerns from *Fong Yue Ting*’s dissent were considerably prescient. Justice Field who had authored the majority decision in *Chan Chae Ping v. United States*,¹⁸⁹ which *Fong Yue Ting* relied heavily on, dissented in *Fong Yue Ting* and instead decried the majority’s analysis when he wrote:

If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; . . . if a banishment of this sort be not a punishment, and among the severest of punishments, it would be difficult to imagine a doom to which the name can be applied. And, if it be a punishment, it will

¹⁸⁵ See *SEC v. Jarkesy*, 144 S. Ct. 2117, 2132 (2024).

¹⁸⁶ *Id.* at 2129-30.

¹⁸⁷ *Id.* at 2127.

¹⁸⁸ *Id.* at 2132-33.

¹⁸⁹ 130 U.S. 581 (1889).

remain to be inquired whether it can be constitutionally inflicted, on mere suspicion, by the single will of the executive magistrate, on persons convicted of no personal offense against the laws of the land, nor involved in any offense against the law of nations, charged on the foreign state of which they are members.¹⁹⁰

For Justice Field, the retributive nature of deportation was clear and profound. Even if the overall classification of a “civil” rather than penal nature is preserved, it is difficult to argue with the stakes at issue and how the rights at stake were rights that existed outside of government creation.

While exclusion (preventing initial entry) has long been considered a sovereign prerogative with minimal due process requirements, deportation differs fundamentally, especially when based on a criminal conviction. The basis for congressional plenary power over immigration has been justified by its inheritance of some of the sovereign prerogatives enjoyed by the English monarchs at common law.¹⁹¹ Since Blackstone, there has been a belief that, in common-law England, the sovereign held unquestioned authority to exclude or prevent the entry of individuals into the realm without any criminal process.¹⁹² However, when it comes to the power to expel non-citizens who were already within England, there is some theoretical debate.¹⁹³ Specifically, scholars have

¹⁹⁰ *Fong Yue Ting v. United States*, 149 U.S. 698, 749 (1893) (Field, J., dissenting).

¹⁹¹ Markowitz, *supra* note 170, at 1309. Nonetheless, there was significant debate over whether the English Monarchy even possessed such a power without Parliament during the Founding Era, prompting Parliament to pass the Aliens Act of 1793. While some Crown lawyers in the late eighteenth century believed the King had such a power, it has been used so sparingly that at least one lawyer, Serjeant Hill, believed that the King’s deportation and exclusion power only existed over citizens of states that England was at war with. This uncertainty resulted in Parliament passing an Act that gave such powers to the King in 1793. See J.R. DINWIDDY, *RADICALISM AND REFORM IN BRITAIN, 1780-1850*, at 149 (1968); Public Act, 33 George III, c. 4 (1793).

¹⁹² Markowitz, *supra* note 170, at 1309 (citing 1 WILLIAM BLACKSTONE, *COMMENTARIES* *259-60 (“[Foreigners] are under the king’s protection; though liable to be sent home whenever the king sees occasion.”)). Blackstone makes it clear that those who may be sent home “whenever the king sees occasion [sic]” applies to admission of strangers who come spontaneously. How the King’s prerogative applied to denizens is less clear. To be sure, Blackstone later remarks that the Magna Carta protects the right of foreign merchants to enter and pass through England freely. *Id.* at 260-61.

¹⁹³ Markowitz, *supra* note 170, at 1309; see also W. F. Craies, *The Right of Aliens to Enter British Territory*, 6 L.Q. REV. 27, 35 (1890) (“England was a complete asylum to the foreigner who did not offend against its laws”); *On the Alien Bill*, 42 EDINBURGH REV. 99, 100, 114 (1825) (arguing that “expulsion” is a “punishment on conviction in a court of justice, for certain offenses, where a natural-born subject might be left to work out his penalty at home” and that the “punishment” must be subject to the “severe and odious necessity of criminal law”). Notably, the text of the Magna Carta itself provides some support for this view insofar as it guarantees that “[n]o freeman shall be . . . exiled, . . . but by the lawful judgment of his peers, or by the law of the land.” MAGNA CARTA Ch. 39, *supra* note 1.

questioned whether this power could be exercised through civil administrative means or whether it required the formalities of criminal process.¹⁹⁴

In practical terms, though, the historical record is clear: expulsion was consistently carried out as a form of criminal punishment in England, applying to both citizens and noncitizens alike, starting as early as the thirteenth century.¹⁹⁵ Initially, this form of expulsion was known as the “abjuration of the realm”—a penalty that required individuals to leave the kingdom.¹⁹⁶ Over time, this evolved into the practice of “transportation,” where individuals were exiled, primarily to the American colonies.¹⁹⁷

Even in the American colonies, the prevailing method by which citizens and non-citizens were deported was through the criminal punishment of banishment.¹⁹⁸ Historical examples both in common-law England and the American colonies used banishment as a criminal punishment.¹⁹⁹ As a form of criminal punishment, these sentences were carried out by the different courts of law in England and not courts of equity.

B. *Private Rights Entanglement*

Criminal deportation proceedings frequently involve determinations about underlying private rights, including family relationships, property ownership, and established community ties.

Historically, as Professor Caleb Nelson has pointed out, the concept of public rights refers to those rights created by the government, which have no direct counterpart in the “state of nature” as envisioned by John Locke.²⁰⁰ To put it simply, public rights are privileges that exist because of government action—like public roads, for instance. In a state of nature, without a government, no one has a right to government-run roads. These are benefits that the government bestows, but which do not exist as natural entitlements.

On the other hand, private rights are rooted in the natural rights that individuals would have even in the absence of any formal government. These rights—such as life, liberty, and property—exist inherently, independent of the government. Congress did not create them; they were in place before the United States itself came into being.²⁰¹

The Constitution draws a clear distinction in how the government can treat these two categories of rights. The government can deprive individuals of public

¹⁹⁴ See Markowitz, *supra* note 170, at 1309.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1309-10.

²⁰⁰ Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 567 (2007) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *129).

²⁰¹ *Id.*; see also John Locke, SECOND TREATISE OF GOVERNMENT §§ 4-6 (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

rights without any judicial process—if Congress or the political branches decide to alter or withdraw a public benefit, they can do so without judicial oversight.²⁰² However, the deprivation of private rights—those fundamental rights tied to life, liberty, and property—requires judicial process.²⁰³ This distinction is rooted in several key constitutional principles.

First, Article III of the Constitution vests the “judicial power” of the United States in the Supreme Court and the lower federal courts.²⁰⁴ The essence of judicial power lies in the ability to bind parties and authorize the deprivation of private rights. The executive branch does not possess this power; it is granted only executive power under Article II.²⁰⁵ This means that under the Constitution’s structural framework, the executive branch cannot unilaterally strip individuals of their vested property rights without judicial involvement.

Second, the Due Process Clauses of the Constitution make it clear that neither the federal nor the state governments can deprive a person of life, liberty, or property without “due process of law.”²⁰⁶ The notion of due process has always implied that the government cannot act arbitrarily; it requires that the deprivation of rights be carried out according to established rules, independent of executive will, and typically through a judgment by an impartial magistrate. While the precise contours of due process may evolve, its core requirement is that the government must follow established legal procedures before depriving a person of their private rights. Because the Seventh Amendment has not been incorporated under the Fourteenth Amendment, a jury trial is not seen as a core “due process” requirement that would otherwise apply to states.

When the government—through a criminal deportation proceeding—strips a noncitizen of a vested status and removes them from the United States, it does more than simply revoke a visa it previously granted. Depending on the nature of the visa and the amount of time the non-citizen has resided in the United States, other private rights may have entangled themselves with—and arguably changed the nature of—the purportedly public right of residency granted through a visa or particular status.²⁰⁷

²⁰² *Atlas Roofing Co. v. Occupational Safety and Health Rev. Comm’n*, 430 U.S. 442, 454-55 (1977).

²⁰³ *Id.* at 460-61.

²⁰⁴ U.S. CONST. art. III, § 1.

²⁰⁵ *See id.*; U.S. CONST. art. II.

²⁰⁶ U.S. CONST. amend. V, *id.* amend. XIV, § 1.

²⁰⁷ For example, lawful permanent residents (“LPRs”) may accept an offer of employment without special restrictions, own property, receive financial assistance at public colleges and universities, and join the Armed Forces. They also may apply to become U.S. citizens if they meet certain eligibility requirements. *See Citizenship Resource Center*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/citizenship/learn-about-citizenship/citizenship-and-naturalization/i-am-a-lawful-permanent-resident-of-5-years> [https://perma.cc/Q4RA-UN8B] (last visited Sept. 5, 2025). While Congress may have plenary power of the circumstances for which it grants LPR status, revoking it could impinge a non-citizen’s private right to freely pursue their chosen profession, pursue an education, or raise their children.

CONCLUSION

The Magna Carta's guarantee that no free person shall be exiled except by the "lawful judgment of his peers, or by the law of the land" has never been respected by the federal government in the United States.²⁰⁸ Instead of jury trials, the United States has employed a framework of federal agency adjudications that has endured since the late nineteenth century. However, the Supreme Court's recent decision in *SEC v. Jarkesy* provides an opportunity to revisit whether the Magna Carta's jury requirement may be appropriate for a process that, as the Supreme Court has described, may lead to the loss of "all that makes life worth living."²⁰⁹

The retributive nature of crime based deportation meets the punitive—and therefore common-law requirement—for the Seventh Amendment jury trial. Under English common law, banishment for crimes was undoubtedly criminal punishment and required juries, but the American legal system's choice to label deportation as a civil process does not mean the use of juries should be ignored. Like the civil penalties at issue in *Jarkesy*, deportation serves a primarily retributive rather than remedial purpose when applied to those who commit crimes after lawful admission to the United States. Although the Supreme Court and federal judiciary have maintained that deportation is a civil process, no matter how harsh it may be, there is little question that deportations, especially for longtime residents who commit crimes, serve a retributive purpose. The Supreme Court has increasingly acknowledged crime-based removal's punitive character and extended various criminal procedural protections through due process, including the void-for-vagueness doctrine and the Rule of Lenity. The Court's recognition that deportation is "intimately related to the criminal process" suggests that the artificial distinction between civil and criminal proceedings should not preclude the protection of a jury trial.²¹⁰

Moreover, the public rights exception to the Seventh Amendment should not automatically apply to all immigration proceedings, or even all forms of deportation. Criminal deportation implicates fundamental rights—including family integrity, property ownership, and community ties—that exist independent of government action. These cases bear little resemblance to the narrow historical categories that traditionally fell within executive and legislative authority without judicial involvement.

Ultimately, providing jury trials in criminal deportation cases would align our legal system with the original understanding of the Seventh Amendment and the Magna Carta's protection against exile without judgment by one's peers. It would recognize that when the government seeks to punish individuals through deportation based on criminal conduct, the community should have a voice in determining whether such a severe sanction is warranted. As deportation

²⁰⁸ MAGNA CARTA Ch. 39, *supra* note 1.

²⁰⁹ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

²¹⁰ *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

increasingly functions as a form of punishment, the constitutional requirement for jury trials should follow, regardless of the formal civil/criminal distinction.