Reconciling *Jarkesy* and *Silver Moss*: Rethinking Civil Tax Fraud Penalties in the Administrative State[*]

In the summer of 2024, the Supreme Court reined in the power of the administrative state in a series of cases. In one such case, SEC v. Jarkesy, *the Supreme Court limited the federal agencies' adjudicatory power to "private rights" claims—common-law-analogous actions where the remedy is traditionally obtained in a court of law. The Court ruled that such issues must be tried by an Article III judge because Congress may not assign the adjudication of private-rights claims to an Article I tribunal. Several news and law firm articles anticipated the impact of* Jarkesy *to be sweeping across federal agencies, including the Internal Revenue Service ("IRS"). However, the actual extent of* Jarkesy*'s application to non-SEC adjudications remains unsettled, as reflected in the Tax Court's recent reviewed opinion in* Silver Moss Properties v. Commissioner, *which held that the civil fraud penalty does not trigger the Seventh Amendment and that taxation falls squarely within the public rights exception. This Comment attempts to contribute to this developing body of law by exploring the application of* Jarkesy *on fraudulent tax filing civil penalties.*

Unlike the securities enforcement action against a private individual in SEC v. Jarkesy, *federal tax enforcement operates within the sovereign's authority to assess and collect revenue. The United States Tax Court relied on this framework in* Silver Moss *to conclude that tax fraud cases fall within the public-rights exception and, therefore, do not trigger the Seventh Amendment. However, when the government seeks civil penalties for violations labeled "fraud," the proceeding begins to resemble a common-law action. This conflict creates a constitutional tension between the sovereign-rights rationale underlying tax adjudication and modern jurisprudence focusing on the common-law character of punitive civil penalties. Thus, this Comment argues that the constitutional tension between* Jarkesy *and* Silver Moss *is best addressed by eliminating the use of punitive civil penalties in tax fraud and negligence cases, rather than by forcing these penalties to continue in an ill-fitting adjudicatory framework.*

This Comment further argues that the impact of Jarkesy *should extend beyond federal agencies like the IRS to also impact state agencies like the North Carolina Department of Revenue. To be sure, the Seventh Amendment has never been incorporated to the states. However, several states, including North Carolina, have adopted comparable provisions in their own state constitutions to protect the taxpayers' right to a jury trial. Applying the reasoning in* Jarkesy, *the right*

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to a jury trial embodied in North Carolina's constitution raises similar concerns for the NCDOR, thus pushing the state tax agencies to similarly remove punitive civil tax fraud penalties.

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INTRODUCTION

Silver Moss Properties v. Commissioner[1] was the United States Tax Court's response to the potential implications of *SEC v. Jarkesy*[2] for federal tax penalties. In *Silver Moss*, the Tax Court held that it may adjudicate civil tax fraud penalties under I.R.C. § 6663(a) without recognizing a taxpayer's right to a jury trial.[3] In a reviewed opinion by the full court, the court concluded that the civil fraud

1. Silver Moss Props., LLC v. Comm'r, No. 10646-21, 165 T.C. No. 3, slip op. at 1 (Aug. 21, 2025).
2. SEC v. Jarkesy, 144 S. Ct. 2117 (2024).
3. *Silver Moss Props.*, 165 T.C. No. 3, slip op. at 1.

penalties fall within the "public rights" exception—that is, the narrow category of issues Congress may constitutionally assign to non–Article III courts—and that the Seventh Amendment "does not apply to suits against the sovereign."[4] The ruling directly addressed and firmly rejected the taxpayer litigant's reliance on the Supreme Court's landmark decision in *Jarkesy*, which held that Congress may not assign the adjudication of private-right claims to an administrative tribunal by requiring the payment of administrative fraud penalties as a condition precedent to bringing suit in an Article III court.[5] The tension between *Jarkesy*—holding that civil fraud penalties are quintessentially legal in nature and therefore may not be withdrawn from an Article III court—and *Silver Moss*—reasserting the pre–New Deal understanding that tax penalties are a "public-rights" issue that falls under the sovereign's power to collect revenue—demonstrates the need to properly identify the type of right tax fraud violates and the original intent behind imposition of civil penalties.

Reframed in the 1938 case *Helvering v. Mitchell*[6] as a "safeguard for the protection of the revenue,"[7] civil penalties have since reverted to be punitive and operate without the procedural protections afforded in an Article III court.[8] However, the expertise, consistency, and efficiency of the Tax Court should not be overlooked and clearly provide reasons for taxpayers to bring tax-related suits to the specialized Tax Court.[9] Thus, this Comment argues that, to reconcile the *Mitchell* framework of civil penalties and the importance of the Tax Court deciding cases, the civil penalties themselves—specifically, the fraud penalty under § 6663 and the failure-to-file negligence penalties under § 6651—should be eliminated.

The analysis proceeds in five parts. Part I examines the civil fraud penalty within the evolution of the public-rights doctrine and the administrative state. Part II demonstrates that the imposition of civil fraud penalty under § 6663 no longer serves a defensible remedial or deterrent function as it was intended in *Mitchell*. Part III evaluates the procedural and institutional considerations of litigating in the Tax Court. Part IV proposes the repeal of civil penalties on common-law tax violations. Finally, Part V explores the broader implications of adjudicatory framework demanded by *Jarkesy* as it applies to other Internal

4. *Id.* at 1–2. This opinion was reviewed by the full Tax Court with Urda, C.J., and Kerrigan, Buch, Nega, Ashford, Copeland, Jones, Toro, Greaves, Marshall, Weiler, Way, Landy, Arbeit, Guider, Jenkins, and Fung, JJ., joining the opinion written by Pugh, J. *Id.* at 2.

5. *Jarkesy*, 144 S. Ct. at 2139.

6. Helvering v. Mitchell, 303 U.S. 391 (1938).

7. *Id.* at 401. In an Article III court, there are life-tenured judges protected from political pressure, the availability of jury trials when required, and application of the Federal Rules of Evidence and Civil Procedure. *Jarkesy*, 144 S. Ct. at 2125.

8. *See infra* Part II.

9. *See infra* Section III.A.

Revenue Codes, state-level revenue agencies—specifically the North Carolina Department of Revenue ("NCDOR"), and other federal agencies.

I. PRIVATE RIGHTS, PUBLIC RIGHTS, AND THE EVOLUTION OF CIVIL FRAUD PENALTIES

A. *Private Rights Versus Public Rights*

The constitutional distinction between private rights and public rights is central to the issue of Article III adjudication.[10] It determines not only whether Congress may assign a matter to a specialized Article I court, but also serves as a condition precedent to whether the identification of "suits at common law" for the Seventh Amendment analysis is necessarily implicated.[11] The classification of a claim as a private versus public right turns on the nature of the cause of action and the historical role of common-law courts in adjudicating similar disputes.[12]

Private rights generally encompass an individual's common-law rights in property, bodily integrity, and contract enforcement.[13] A suit that is in the nature of an action at common law is therefore presumptively a private-rights claim.[14] The Supreme Court has reaffirmed that when a cause of action resembles a suit at common law and seeks a primarily legal remedy—namely, monetary relief—the claim constitutes a private right.[15] Thus, these types of claims fall within the exclusive domain of Article III courts, and Congress may not withdraw them from Article III courts by assigning them to an Article I tribunal.[16]

By contrast, public rights prior to the nineteenth century broadly included "constitutional or statutory claims asserted in the perceived public interest against government or regulated parties,"[17] allowing the Congress to assign adjudication to a non–Article III court because the matter has been "historically determined by the executive and legislative branches."[18] However, the Supreme Court has since consistently characterized public rights as a "narrow exception"

10. *See* John M. Golden & Thomas H. Lee, *Federalism, Private Rights & Article III Adjudication*, 108 VA. L. REV. 1547, 1547 (2022).

11. *See Jarkesy*, 144 S. Ct. at 2135.

12. *See id.* at 2132, 2139.

13. Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1020 (2006).

14. *Jarkesy*, 144 S. Ct. at 2132.

15. *Id.* at 2129; Stern v. Marshall, 564 U.S. 462, 484 (2011).

16. *See* Golden & Lee, *supra* note 10, at 1547.

17. Woolhandler, *supra* note 13, at 1020.

18. *Jarkesy*, 144 S. Ct. at 2132.

to the broad domain of Article III courts over common-law claims.[19] These exceptions include (1) collection of revenue, (2) foreign commerce, (3) immigration, (4) relations with Native American tribes, (5) the administration of public lands, (6) the granting of public benefits, (7) pensions, (8) patent rights, and (9) bankruptcy claims "closely intertwined" with the bankruptcy regime.[20]

Further, even with the public rights exception granted by the Congress, "if a suit is in the nature of an action at common law, then the matter presumptively concerns private rights and adjudication by an Art. III court is mandatory."[21] This way, the Seventh Amendment also extends to specific statutory claims that are "legal in nature"[22] and prohibits Congress from withdrawing the court's jurisdiction over a suit that is common-law in nature.[23]

This private-public rights framework provides the foundation for evaluating civil tax fraud penalties. Whether Congress may constitutionally assign these penalties to the United States Tax Court depends not on administrative convenience, but on whether the penalties reflect a traditional common-law issue, such as intentional fraud and punitive monetary sanctions.

B. *Civil Fraud Penalties from* Jarkesy *to* Silver Moss

The civil fraud penalty under § 6663 applies when a taxpayer underpays taxes and the IRS proves that some portion of the underpayment is due to fraud—an intentional attempt to evade tax.[24] This penalty is best understood in light of the evolution of the public-rights doctrine and the administrative state. *Jarkesy* and *Silver Moss* together highlight the shifting boundary between private and public rights, the historical justification for administrative adjudication, and the constitutional tension that surrounds civil penalties arising out of common-law issues, such as fraud.

In *SEC v. Jarkesy*, the Supreme Court analyzed whether the Seventh Amendment allows the SEC to force respondents in securities fraud suits to defend themselves before an administrative law judge ("ALJ"), instead of a jury in an Article III court.[25] In its analysis, the Court highlighted the Seventh Amendment's requirement that all suits concerning private rights be tried by

19. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63–64, 67–71 (1982); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 54–55 (1989); Stern v. Marshall, 564 U.S. 462, 485–88 (2011).

20. *Jarkesy*, 144 S. Ct. at 2132–33, 2135. Some scholars argue that taxation, rather than collection of revenue, falls under a public rights exception. *See, e.g.*, Woolhandler, *supra* note 13, at 1020.

21. *Jarkesy*, 144 S. Ct. at 2132 (citing *Stern*, 564 U.S. at 484); *see also* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

22. *Jarkesy*, 144 S. Ct. at 2128.

23. *Murray's Lessee*, 59 U.S. (18 How.) at 284.

24. 26 U.S.C. §§ 6663, 7206.

25. *Jarkesy*, 144 S. Ct. at 2125.

an Article III court unless a "public right" exception applies.[26] To determine whether a suit concerned a private right, the Court considered "whether the cause of action resembles common-law causes of action, and whether the remedy is the sort that was traditionally obtained in a court of law" and determined that the suit in *Jarkesy* concerned a private right.[27]

The cause of action—the violation of anti-fraud provisions[28]—resembled a common fraud action, which the Court described to be a "quintessential[] suit at common law."[29] Even if the case were viewed as a civil-penalties suit, such suits have been historically tried in common-law courts.[30] The remedy further reinforced the conclusion that the suit involved a private right as it required payment of a fine in addition to the disgorging of earnings gained by the violation, demonstrating the punitive nature of the monetary penalties.[31]

The suit in *Jarkesy* also did not fall within the "public rights" narrow exceptions outlined by the Congress.[32] Even if the Court had held the claim in *Jarkesy* to be within the scope of the "public rights" exception, the Court may have considered the Seventh Amendment to be implicated due to the common-law nature of a fraud action.[33]

The decision in *Jarkesy*, therefore, centered its Seventh Amendment analysis around two considerations: (1) the presence of a quintessential common-law issue—"fraud"—and punitive monetary sanctions render a proceeding to be legal in nature; and (2) administrative convenience cannot alter a private-right dispute into a public-right exception. With these principles in the background, the Tax Court responded the following year in *Silver Moss Properties v. Commissioner*, directly addressing the question of whether the IRS

26. *Id.* at 2132. The "public rights" exception allows no involvement by an Article III court for the initial adjudication because the matter has been "historically . . . determined . . . by the executive and legislative branches," regardless of whether the matter seemed to implicate a need for judicial authority. *Id.*

27. *Id.* at 2122.

28. *Id.* at 2120–21.

29. *Id.* at 2123 (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 56 (1989)).

30. *Id.* at 2145; *see id.* at 2129–31 (discussing civil penalties).

31. *Id.* at 2129 (explaining that punitive civil penalties are "a type of remedy at common law that could only be enforced in courts of law"). Of the two factors, the type of remedy holds more weight than the cause of action, so the civil penalties remedy was "all but dispositive" in this case. *Id.* at 2122 ("Of these factors, the remedy is the more important.").

32. *Id.* at 2127. The list included (1) collection of revenue, (2) foreign commerce, (3) immigration, (4) relations with Native American tribes, (5) the administration of public lands, (6) the granting of public benefits, (7) pensions, (8) patent rights, and (9) bankruptcy claims "closely intertwined" with the bankruptcy regime. *Id.* at 2132–33, 2135.

33. Justice Gorsuch argues in his concurrence in *Jarkesy* that all rights are private rights, thus all claims must have the opportunity to be tried by an Article III court. *Id.* at 2139–50 (Gorsuch, J., concurring).

could continue to impose the civil fraud penalty under § 6663(a), limiting taxpayer's access to a jury trial.[34]

In *Silver Moss*, the Tax Court held unanimously that the IRS could continue to impose such penalties.[35] It reasoned that the Seventh Amendment does not apply to suits against the sovereign unless Congress explicitly consents and that tax fraud penalties fall within the "public rights" exception of matters that have been historically adjudicated without juries.[36] Citing *Mitchell* and *Murray's Lessee v. Hoboken Land & Improvement Co.*,[37] the Tax Court reasoned that fraud penalties are inherent to the government's power to collect revenue and have been historically handled by administrative officials rather than juries.[38]

However, *Murray's Lessee* does not necessarily support the conclusion that modern civil fraud penalties may be adjudicated by non–Article III courts. In that case, the Court upheld a summary process allowing the Treasury to recover withheld public funds from a customs collector, but the warrant only compelled the customs collector to give back the withheld sum and not more.[39] This case is inapposite from the civil penalty imposed by I.R.C. § 6663(a), which further burdens the respondent with a significant penalty in addition to the amount originally due. Moreover, the case in *Murray's Lessee* didn't specify a claim of "fraudulent" activity.[40] The Court in *Jarkesy* interpreted the statutory use of the word "fraud" to demonstrate Congress's intent to incorporate common-law fraud prohibitions.[41] Similarly, I.R.C. § 6663(a) uses the word "fraud" or "fraudulent" to describe the type of activity the provision attempts to inhibit. Thus, the summary revenue proceedings upheld in *Murray's Lessee* do not justify the assignment of tax fraud cases to the Tax Court.

Nonetheless, the *Silver Moss* decision was ultimately correct in distinguishing the Tax Court's adjudicatory authority from the *Jarkesy* holding by distinguishing fraud "against the sovereign" from fraud "among private parties."[42] In upholding the civil fraud penalty on this basis, however, the court implicitly embraced a broad conception of the public-rights doctrine, viewing tax penalty enforcement as an extension of sovereign right, rather than an

34. Silver Moss Props., LLC v. Comm'r, No. 10646-21, 165 T.C. No. 3, slip op. at 1 (Aug 21, 2025).

35. *Id.* at 1.

36. *Id.* at 10.

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

38. *Silver Moss Props.*, 165 T.C. No. 3, slip op. at 10.

39. *Murray's Lessee*, 59 U.S. (18 How.) at 274–75.

40. *Id.*

41. SEC v. Jarkesy, 144 S. Ct. 2117, 2122 (2024) ("By using 'fraud' and other common law terms of art when it drafted the federal securities laws, Congress incorporated common law fraud prohibitions into those laws.").

42. *Id.*

exercise of core Article III judicial power.[43] This reasoning expands the public rights doctrine beyond *Murray's Lessee*, extending the sovereign's authority from mere revenue collection to the enforcement of civil penalties.[44]

By contrast, modern jurisprudence narrowed the public-rights exception and highlighted the functional equivalence between agency enforcement actions and common-law claims.[45] For example, in *Tull v. United States*,[46] the Supreme Court held that when Congress creates statutory causes of action that mirror common-law suits—especially those seeking a punitive monetary penalty—the Seventh Amendment's jury trial right attaches, regardless of administrative convenience.[47] This modern Seventh Amendment jurisprudence's emphasis on substance over form was reinforced by *Jarkesy*.[48] Although sovereign immunity principles justify treating tax enforcement as a public-rights matter for purposes of Article III adjudication, they do not necessarily resolve whether punitive tax penalties in cases involving fraud actions must still be subject to the Seventh Amendment's jury-trial guarantee.

II. LOSS OF THE CIVIL FRAUD PENALTY'S ORIGINAL FUNCTION

In understanding whether punitive tax penalties should exist, it is necessary to examine the historical rationale underlying the civil fraud penalty itself. Since *Mitchell*—the case in which the Supreme Court upheld the civil fraud penalty on the ground that it was "remedial" rather than punitive—the civil fraud penalty under § 6663 has been justified as a way to protect revenue by reimbursing the government for the administrative costs incurred in investigating and collecting taxes involved in fraud.[49] The rationale in *Mitchell* reflected the limited enforcement capacity of the pre–New Deal administrative state that allowed the Court to view such penalties merely as a fiscal tool. However, now that the IRS wields expansive investigatory power, sophisticated information systems, and several accuracy-related penalties, the *Mitchell* rationale no longer aligns with the current administrative reality.[50]

43. *See* Caleb Nelson, *Did I Get Public Rights Wrong?*, 112 VA. L. REV. (forthcoming 2026) (manuscript at 3) (on file with the North Carolina Law Review).

44. *See supra* note 38 and accompanying text.

45. *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 488–91 (2011); *Jarkesy*, 144 S. Ct. at 2132–33, 2135; *see also* Golden & Lee, *supra* note 10, at 1553–54.

46. Tull v. United States, 481 U.S. 412 (1987).

47. *Id.* at 422–23. *But see* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 49 (1989) ("Unless Congress may and has permissibly withdrawn jurisdiction over that action by courts of law and assigned it exclusively to non–Article III tribunals sitting without juries, the Seventh Amendment guarantees petitioners a jury trial upon request.").

48. *See supra* notes 25–35 and accompanying text.

49. Helvering v. Mitchell, 303 U.S. 391, 400–01 (1938).

50. *See* 26 U.S.C. § 7608 (authorizing internal revenue enforcement officers to investigate and enforce the criminal provisions of the Internal Revenue Code ("IRC")).

Currently, if 26 U.S.C. § 6663(a) is violated, "an amount equal to 75% of the portion of the underpayment which is attributable to fraud" would be added to the taxpayer's payment as a penalty in addition to the tax that was originally due.[51] This seventy-five percent civil fraud penalty is not calculated based on an actual monetary injury suffered by the Treasury in administering the investigation, undercutting the argument that the penalty functions to mitigate associated administrative costs.[52] Moreover, since the 1930s when *Mitchell* was decided, technological advancements have significantly reduced the administrative cost of investigation.[53] The government also already receives restitution of the tax deficiency, plus statutory interest designed to reflect the time value of money.[54] Therefore, the seventy-five percent penalty mainly serves a punitive purpose rather than a compensatory one as originally intended to mitigate administrative cost.

The issue of a penalty effectively serving as a punishment is exacerbated by the structure of Tax Court adjudication. If a person violates civil anti-fraud tax provisions and takes no additional action, the case by default goes through the Tax Court—a non–Article III court—where an Article I judge adjudicates.[55] Although the IRS informs the taxpayers that they "have the right to take [their] case to court,"[56] it also states that they can take the case to either the district court or the U.S. Court of Federal Claims "generally only after you have fully paid the amount [due] and timely filed a claim for refund with the IRS."[57] The IRS also uses the term "prepayment forum" to describe the Tax Court because its jurisdiction depends on the issuance of a notice of deficiency.[58] Even if the Article III court determines that the defendant is not liable for tax fraud and the penalty is refunded, the injury would have already been inflicted: the loss

51. *See, e.g.*, 26 U.S.C § 6663(a); IRM 9.4.2 (June 23, 2025), https://www.irs.gov/irm/part9/irm_09-004-002 [https://perma.cc/S6D4-3CB5]; *Accuracy-Related Penalty*, IRS, https://www.irs.gov/payments/accuracy-related-penalty [https://perma.cc/8AXU-3RB8] (last updated Apr. 16, 2025).

52. Both the statutory text and the IRS Internal Revenue Manual lack explanation for their basis in the seventy-five percent penalty. 26 U.S.C § 6663(a); IRM 9.5.13 (Aug. 25, 2025), https://www.irs.gov/irm/part9/irm_09-005-013 [https://perma.cc/7WMX-37CA].

53. *See* Jay A. Soled & Leslie Book, *Transformative Technology and Shortening the Statute of Limitations Applicable to Taxpayers*, 60 RICHMOND L. REV. (forthcoming 2026) (manuscript at 19–20) (on file with the North Carolina Law Review) ("[As of 2024,] over 90 percent of all individual tax returns are filed electronically and over five billion tax information returns are annually electronically submitted. The task of organizing and inputting tax data no longer takes many months—this process has been reduced to a few days.").

54. *See* 26 U.S.C. § 6601.

55. *See* IRS, YOUR APPEALS RIGHTS AND HOW TO PREPARE A PROTEST IF YOU DISAGREE 2 (2021).

56. *Id.*

57. *Id.*

58. *Id.* at 5–6.

of money, opportunity cost, and potential interest that may have accrued during judicial review by an Article III court.

This structure may promote administrative efficiency but creates an unintentional inequity in the injury caused by the punitive effect of civil fraud penalties because the "penalty payment first" rule effectively conditions the taxpayer's exercise of their Seventh Amendment right to jury trial on their financial means. Thus, at the superficial level, the civil fraud penalty may be a mere financial sanction, but it effectively operates as a deterrent to judicial access based on the taxpayer's financial stability.

Some may argue that pre-payment of penalties mirrors security requirements on defendants in tort cases, such as a bond or escrow deposit. However, appeal bonds are imposed only when the tort defendant's underlying liability has already been established by an original judgment and serve to both prevent the defendant from dissipating assets and to secure the full judgment amount from insolvency while the case is on appeal.[59] By contrast, in tax disputes, the taxpayer's liability and any associated penalty remain entirely unadjudicated at the time of prepayment. Thus, there is no guarantee that the amount to be paid as penalty would be significant enough to raise such a concern in tax cases because the taxpayer's liability remains uncertain. Even if the taxpayer's liability was somehow definite, the additional penalty imposed on top of the original underpayment amount should not be calculated into pre-payment penalty. Conditioning judicial access on prepayment of penalties alters the character of jury trial from a right to a conditional benefit, monetizing the Constitution's procedural guarantees.

Therefore, § 6663 no longer serves its intended purpose of compensating the government or deterring fraud. It now mainly serves as a punishment under the guise of remediation, and its enforcement through a non–Article III forum worsens constitutional and practical inequities.

III. LITIGATING IN THE TAX COURT

A. *The Benefits of Specialized Courts*

1. Expertise of the Tax Court

Tax law is notoriously complex; even the Taxpayer Advocate Service ("TAS"), an organization within the IRS, identifies the complexity of the tax

59. *See* Doug Rendleman, *A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform*, 39 AKRON L. REV. 1089, 1097 (2006); Courvoisier v. Harley Davidson of Trenton, Inc., 742 A.2d 542, 544–45 (N.J. 1999).

code as the most serious problem facing taxpayers.[60] Fortunately, because the Tax Court adjudicates these issues every day, its judges possess an unparalleled subject-matter knowledge that neither lay juries nor generalist Article III judges can match.[61] Due to their expertise, Tax Court judges are also uniquely equipped to consider the unintended consequences of a given interpretation elsewhere in the tax system.[62] As the Tax Court's expertise on tax is widely recognized,[63] taxpayers are incentivized to take their complicated tax issues to the Tax Court rather than to district court for a jury trial.[64] Empirical evidence reflects this preference, showing that taxpayers were more than twice as likely to choose the Tax Court over the district court, especially for tax-shelter and tax-protester cases, including tax fraud.[65]

Concerns about the jury's competence in understanding and evaluating complex tax cases further underscores the value of the Tax Court's expertise.[66] Jurors have been found to have questionable proficiency as factfinders in challenging cases, ignoring complicated and technical evidence[67] and struggling

60. TAXPAYER ADVOCATE SERVICE, 2012 ANNUAL REPORT TO CONGRESS 3 (2012), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/Most-Serious-Problems-Tax-Code-Complexity.pdf [https://perma.cc/2MSS-TLWW].

61. Andre L. Smith, *Deferential Review of Tax Court Decisions of Law: Promoting Expertise, Uniformity, and Impartiality*, 58 TAX L. 361, 401 (2005) ("The inculcation and immersion of the Tax Court as a whole in the ongoing tax process ensures that its judges are cognizant and expert on new laws . . . more so, certainly, than a generalist judge . . . .").

62. *Id.* ("As it relates to tax adjudication, Tax Court judges are better able than are generalists to consider whether a given interpretation relating to a discrete area of tax law will have unwanted consequences elsewhere in the tax system.").

63. *See, e.g.*, Comm'r v. Idaho Power Co., 418 U.S. 1, 19 (1974) (Douglas, J., dissenting) ("[T]he Tax Court['s] expertise is well recognized."); *see also* Merkel v. Comm'r, 192 F.3d 844, 847 (9th Cir. 1999) ("[T]he Tax Court has special expertise in the field . . . .").

64. *See Choice of Forum*, BEN-COHEN L. FIRM, https://www.lataxattorney.com/choice-of-forum.html [https://perma.cc/TG5P-8Z6Z] (recommending the U.S. Tax Court as the forum of choice for it "only hears tax cases, and therefore, its judges have more tax experience than those of the US Court of Federal Claims or US District Courts").

65. *See* Robert M. Howard, *Comparing the Decision Making of Specialized Courts and General Courts: An Exploration of Tax Decisions*, 26 JUST. SYS. J. 135, 144 (2005) ("[M]ore than twice as many tax-shelter and tax-protester cases are heard in the tax court (21 percent) than in the district court (10 percent)."). Tax shelter cases are exceptionally difficult because of the fine line between legitimate "tax planning" and unacceptable "tax shelters." JOINT COMM. ON TAX'N, BACKGROUND AND PRESENT LAW RELATING TO TAX SHELTERS 2 (2002). Tax fraud cases are also exceptionally complex due to lack of record keeping. Marcus Schoenfeld, *A Critique of the Internal Revenue Service's Refusal To Disclose How It "Determined" a Tax Deficiency, and of the Tax Court's Acquiescence with This View*, 33 IND. L. REV. 517, 517–18 (2000); *see also* Richard Z. Steinhaus, *Fraud Cases in the Tax Court*, 68 DICK. L. REV. 125, 134 (1964) ("The Commissioner assumes a most difficult burden in proving fraudulent evasion of tax.").

66. *See* Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 LAW & CONTEMP. PROBS. 177, 178 (1989) [hereinafter Hans, *Jury's Response*].

67. *See id.* at 177 ("[J]urors without the experience and knowledge necessary to evaluate complicated medical and technical evidence simply choose to ignore it.").

to understanding legal instructions.[68] Considering that juries on complex and lengthy trials tend to be less educated on interpreting specialized evidence than administrative judges,[69] it is reasonable to assume that juries may have difficulty comprehending and competently evaluating evidence in cases involving elaborate statutes that even experts acknowledge are too difficult to read and understand.[70] Specifically for tax law violations, federal courts also recognize the exceptional challenge laypeople face in comprehending tax laws compared to other areas of law.[71]

Thus, the unmatched subject-matter expertise of the Tax Court's judges and the uncertainty of juries' proficiency in reviewing complex tax issues both highlight the importance of the Tax Court in adjudicating tax disputes.

2. Procedural Flexibility

Another benefit of litigating in the Tax Court is its procedural flexibility, especially for the large number of pro se petitioners. The majority of cases petitioned to the Tax Court involve taxpayers who appear before the court without a legal representative.[72] These litigants made up about eighty-nine percent of cases petitioned to the Tax Court in 2024 and averaged about eighty-five percent of such cases over the past ten years.[73] Self-represented taxpayers are often unfamiliar with various federal rules of evidence and procedure.[74] For these taxpayers, the Tax Court's relaxed proceedings may be beneficial.[75] Additionally, Tax Court judges are familiar with pro se petitioners, so they

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68. *Id.* at 185 ("[J]ury researchers are nearly unanimous in giving the jury poor marks for its understanding of legal instructions.").

69. *Id.* at 190.

70. Victor Thuronyi, *Should the IRC Be Redrafted?*, TAX NOTES (May 31, 2021), https://www.taxnotes.com/featured-analysis/should-irc-be-redrafted/2021/05/28/5s7tf [https://perma.cc/243Q-GZKN] ("[E]ven for most tax professionals, the IRC has become too difficult to read."); Brian T. Hobson, *Criminal Tax Defense—Ignorance of the Law and* Cheek v. United States, ODOM, DAVIS & HOBSON (Feb. 08, 2018), https://www.wendellodom.com/criminal-tax-defense-cheek-v-united-states/ [https://perma.cc/PMJ6-ZWKC] ("[T]he IRC is one of the most difficult areas of . . . law for a layman to understand. Most non-specialists can comprehend the elements of murder, . . . however, the thousands of pages included in the IRC involve complex language that is subject to multiple interpretations.").

71. *See* Mark C. Winings, *Ignorance Is Bliss, Especially for the Tax Evader*, 84 J. CRIM. L. & CRIMINOLOGY 575, 575–76 (1993); *see also* Cheek v. United States, 498 U.S. 192, 192 (1991) (accepting ignorance as a defense in criminal tax cases, a defense normally not viable in other criminal cases).

72. TAXPAYER ADVOC. SERV., 2024 ANNUAL REPORT TO CONGRESS 165 (2024), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/12/ARC24_MostLitigatedIssues.pdf [https://perma.cc/8P8F-HE88].

73. *Id.* at 165–66.

74. *Id.* at 166.

75. *See* Keith Fogg & Caitlin Hird, *Pro Se Precedent in the U.S. Tax Court: A Case for Amicus Briefs*, 23 HOU. BUS. & TAX L.J. 1, 47 n.260 (2022) ("The small tax case procedure was created in 1969 allowing Tax Court petitioners the opportunity for a relaxed proceeding which usually has somewhat relaxed rules of evidence and no post-trial briefs.").

often proactively connect them with representatives or clinics that can help them.[76] These procedural accommodations make the Tax Court particularly accessible and advantageous for pro se petitioners over Article III courts.

B. *The Importance of an Article III Adjudication*

In contrast, a layperson may benefit from the option of being judged by other laypeople who can empathize with the situation they are in. Appealing to the emotions of jurors is a powerful tool that attorneys employ to receive favorable verdicts.[77] This tactic is most effective when a defense attorney triggers jurors' empathy, making them more sympathetic toward the defendant.[78] To have empathy, a juror must "identify[] with [the defendant's] feelings, volitions, or ideas . . . [because the defendant's] experiences, values, and appearance are similar to [their] own."[79] Since individuals are more likely to be viewed as the underdog in a legal battle with a large governmental agency that is already disliked by the general public,[80] the opportunity to have a jury trial provides a special benefit, especially when some scholars argue that the Tax Court is biased in favor of the IRS.[81]

In addition, the current system, which forces the litigant to pay for the constitutional right to a jury trial, disproportionately impacts average American litigants. With more than one in four Americans having savings below $1,000, individual litigants are less likely to have sufficient funds to afford to exercise their right to a jury trial.[82] It naturally follows that these litigants would not have the funds to utilize options like the tax litigation bond that requires more

76. *Id.* at 34.

77. *See* Stephanie B. Goldberg, *Fault Lines*, 80 A.B.A. J. 40, 41 (1994) (quoting John Leo: "In highly publicized trials now, the defense attorney has the same function as 'Oprah'—to create and enlarge pools of sympathy for the beleaguered and allegedly victimized underdog.").

78. Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 900 (1996) ("Empathy with a defendant can move a jury toward leniency.").

79. *Id.*

80. *See* Drew DeSilver, *IRS Among Least-Popular Federal Agencies*, PEW RSCH. CTR. (May 16, 2013), https://www.pewresearch.org/short-reads/2013/05/16/irs-among-least-popular-federal-agencies/ [https://perma.cc/RVV2-28CY].

81. *See* Howard, *supra* note 65, at 138 ("These differential rates have led some scholars to argue that the tax court is biased in favor of the agency.").

82. Jamela Adam & Michael Benninger, *American Savings by Generation: How Balances and Goals Vary by Age*, FORBES (Aug. 15, 2024), https://www.forbes.com/advisor/banking/savings/average-american-savings/ [https://perma.cc/3W2H-2FHR] ("More than one in four Americans (28%) have savings below $1,000.").

money up front than the regular penalty.[83] Lastly, most laypeople would not even be aware that such options exist.[84]

Therefore, while there are several benefits to litigating in the Tax Court, the current system unfairly burdens the average individual respondent's right to a jury trial by imposing a penalty that works as a barrier and deprives them of the freedom to choose their forum.

IV. ALTERNATIVES AND RECOMMENDATION

A. *Jury Trials by the Non–Article III Courts*

While simply allowing the Tax Court to utilize juries may seem like an easy solution at first glance, this would be an unconstitutional delegation of judicial power. In *Commodity Futures Trading Commission v. Schor*,[85] the Court outlined a four-factor balancing test to determine the constitutionality of a delegation of specific adjudicatory authority to an agency.[86]

First, the delegation must still reserve "essential attributes of judicial power" to Article III courts, mainly the power of judicial review.[87] Here, allowing jury trials by a non–Article III court does not necessarily exclude the possibility of judicial review of the jury trial by an Article III court. However, courts may consider this barrier to limit the power of judicial review because of the high threshold required to overturn jury verdicts and the historical reluctance of reviewing courts to overturn such decisions.[88] Thus, although jury trials by non–Article III judges would not be a complete violation of the first factor, they would diminish the "essential attributes of judicial power."

Second, the non–Article III courts may not exercise "all ordinary powers of district courts," including the power to preside over jury trials.[89] Since the Tax Court administering jury trials would be an extraordinary power assigned only to Article III courts, this would be a direct violation of the second *Schor* factor.

83. I.R.C. § 7485(a)(1) (outlining that the Tax Court may require a bond at an amount up to twice the disputed tax deficiency, including any interest and penalties).

84. *See* Heather M. Field, *A Taxonomy for Tax Loopholes*, 55 HOU. L. REV. 545, 557 (2018) ("[O]nly wealthy individuals and large corporations have sufficient income or assets to take advantage of the law.").

85. 478 U.S. 833 (1986).

86. *Id.* at 851.

87. *Id.*

88. Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 246 (1989) ("[T]he appellate courts would overturn such jury verdicts only in rare and extreme cases."). *See generally id.* at 246–53 (describing the high threshold required to overturn jury verdicts).

89. *Schor*, 478 U.S. at 853 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982)).

Third, the nature and importance of the right adjudicated by the non–Article III court should concern a public right or—if a private right—should not involve a significant amount of aggregate litigation.[90] Since the premise of *Jarkesy* was that the issue of fraud is a quintessential common-law claim, allowing jury trials at the Tax Court would continue the adjudication of private right matters by non–Article III courts. However, it may be argued that the expanded public-right doctrine in *Silver Moss*, through sovereign immunity, negates this factor.[91] Thus, this factor does not conclusively resolve whether the third factor is violated.

Fourth, the Congress's intention behind the allocation of the adjudicatory power should not be to infringe upon the power of the judicial branch.[92] As this "solution" is hypothetical, proper statutory analysis is not feasible. However, even assuming this factor passes, delegating the power to preside over jury trials to non–Article III judges likely presents substantial constitutional difficulties over other *Schor* factors.

While the Court in *Schor* never specified the exact number of factors that the delegation must violate to fail the test,[93] the violation of two out of four factors has been held sufficient to constitute an unconstitutional delegation of judicial power.[94] Although there is only one clear violation, the analysis reveals significant constitutional concerns. Therefore, allowing non–Article III judges to preside over jury trials for fraudulent tax filings is unlikely to be a viable solution to the issue of Seventh Amendment rights for Tax Court litigants.

B. *Redirecting All Tax Fraud Cases to Article III Courts*

Another possibility would be to redirect all civil tax fraud adjudications brought to a non–Article III court to Article III courts.[95] There are certain benefits to redirecting these cases to Article III courts. First, Article III judges are less likely to be biased by their own ideology in their ruling than administrative law judges.[96] Due to the nature of the Article III courts and their

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90. *See id.* at 853–54.

91. *See supra* notes 42–44 and accompanying text.

92. *See Schor*, 478 U.S. at 854–56.

93. The Court only noted that no one single factor is dispositive. *Id.* at 851 ("[W]e have weighed a number of factors, none of which has been deemed determinative.").

94. *See, e.g.*, *N. Pipeline*, 458 U.S. at 71, 84–87 (explaining how the establishment of bankruptcy courts by the Bankruptcy Act of 1978 usurped "essential attributes of the judicial power" from district courts and required adjudication over non-public rights).

95. In this Comment, "quintessential tort" cases refer to private rights actions with claims that are legal in nature and seek traditional legal remedies, as defined in *Jarkesy*. *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2129 (2024).

96. *See* Howard, *supra* note 65, at 141 ("[The district court's] reliance on outside interpretation will restrict the use of ideology in the rulings by the district court judges. Tax court judges' expertise, and the concomitant lack of reliance on others, means that the tax court judges have greater freedom to use their ideology in their rulings.").

judges' role as generalists, district court judges "rely more on litigants lawyers, the IRS, and other courts for the meaning and proper construction of the Internal Revenue Code," which forces them to limit the extent to which their ideology impacts their rulings.[97] Additionally, adjudicating tax cases in federal district court could lessen the discrepancy between corporations and individuals and maximize the options available to litigants because they will both have the district court as the only available forum where a § 7485 bond is not available.[98]

However, the effect of such change on the Article III docket may do more harm than good to the judicial system as a whole. One of the main reasons why non–Article III courts are established is to control the workload that Article III courts would otherwise have to handle.[99] If all civil tax fraud cases were pushed to Article III courts, there could be a sudden surge in Article III courts' caseloads.[100] As these courts are already experiencing large amounts of cases with dockets constantly backed up, assigning all Article I civil tax fraud adjudications to Article III courts would cause additional delays and problems for not only civil fraudulent tax filing litigants, but also for all other litigants on the Article III docket.[101] Therefore, redirecting all civil tax fraud cases to Article III courts would likely be infeasible.

C. *Amending the Statutes*

Instead of making changes to the judicial system, amending the substantive statutes themselves could be a viable option. Given that the Court in *Jarkesy* highlighted the significance of the use of the word "fraud" in I.R.C. § 6663, removing that word from the statute may help to avert falling within a private right issue.[102] However, there is no guarantee that courts interpreting the revised statute would view it as a sufficient change if the substance of the statute still implies the common-law tort fraud.[103]

97. *Id.*

98. If the specific state has a similar bond, this may no longer be applicable. However, in North Carolina, there is no such bond available at the district court level. *See generally* N.C. GEN. STAT. §§ 105-1 to 105-604 (referencing a stay bond only once in the North Carolina tax code in § 105-345.3 for the postponement of a Property Tax Commission action).

99. *See* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 329 (1991) ("[C]aseload pressures on the federal courts have led to renewed interest in creating or expanding specialized courts to relieve the crush.").

100. *See* Leandra Lederman, *(Un)appealing Deference to the Tax Court*, 63 Duke L.J. 1835, 1836 (2014) ("[T]he Tax Court is the trial court of choice for over 95 percent of litigated federal tax cases.").

101. *See The Need for Additional Judgeships: Litigants Suffer When Cases Linger*, U.S. CTS.: NEWS (Nov. 18, 2024), https://www.uscourts.gov/data-news/judiciary-news/2024/11/18/need-additional-judgeships-litigants-suffer-when-cases-linger [https://perma.cc/4S2J-98CA].

102. *See* SEC v. Jarkesy, 114 S. Ct. 2117, 1230 (2024).

103. Statutory analysis requires the examination of its history. *See, e.g.*, Fischer v. United States, 144 S. Ct. 2176, 2180–81 (2024) (looking to Congress's legislative response to the Enron accounting scandal for the history of the provision after finding ambiguity with the text).

D. *Removing the Payment Requirement To Take the Case to an Article III Court*

As an alternative, the agencies could simply remove the payment requirement to move the case to an Article III court, eliminating the barrier for litigants to exercise their right to a jury trial. Removing the payment requirement would eliminate the obstacle that, under the current system, mainly individual respondents must overcome.[104] This proposal will allow the freedom for all litigants to choose the forum that will hear their case.[105]

Moreover, this solution avoids some of the concerns raised by the other proposals. Unlike proposals A and B, discussed *supra*, this change would not raise separation of powers concerns. Congress, or the North Carolina General Assembly, would be working squarely within their power to legislate.[106] Also, removing the payment requirement will not substantively change the nature or the scope of the right in the way that amending the statutes would.[107] Most importantly, as this change would remove the unfair burden that disproportionately affects individual, non-high-net-worth respondents, it would help to promote a more equitable adjudication of tax cases.[108]

At initial glance, removing the payment requirement seems to be the simplest solution because it would resolve the main issue of limiting the right to a jury trial without triggering other concerns raised by the other proposals. However, this proposal fails to sufficiently resolve the tension between *Jarkesy* and *Silver Moss* over the private versus public right distinction, leaving more to be desired for an ideal solution.

As an alternative, it is possible to supplement amending the statutes or removing the payment requirement as standalone solutions. The combination of these two options will tackle the issue of the court's determination of a private right on both sides: (1) the nature and scope of the right, and (2) the type of remedy.[109] By combining the solutions, amending the statutes can mitigate the nature and scope of the right issue,[110] and removing the payment requirement can alleviate concerns about the type of remedy.[111] This proposal seems to be the most reasonable option that doesn't run into the significant constitutional or administrability problems posed by the other two alternatives.

104. *See supra* notes 82–84 and accompanying text.

105. *See supra* Section III.B.

106. U.S. CONST. art. 1, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."); *Legislative Branch*, NC.GOV, https://www.nc.gov/your-government/legislative [https://perma.cc/5JJ7-T28N] ("The Legislative Branch makes laws for North Carolina. It is made up of the Senate and the House of Representatives, which together are known as the General Assembly.").

107. *See supra* Section IV.C.

108. *See supra* notes 82–84 and accompanying text.

109. *See supra* text accompanying note 27.

110. *See supra* Section IV.C.

111. *See supra* note 31 and accompanying text.

V. THE BROADER IMPLICATIONS OF THE SEVENTH AMENDMENT RIGHT

A. *Other Statutes in the Tax Code*

Beyond 26 U.S.C § 6663(a), 26 U.S.C. § 6651(f) also directly addresses issues of tax fraud.[112] While 26 U.S.C. § 6633(a) specifically covers fraudulent underpayment, 26 U.S.C. § 6651(f) covers fraudulent failure to file a return, both specifically using the word "fraud" or "fraudulent."[113] If 26 U.S.C. § 6651(f) is violated, between fifteen to seventy-five percent of the required tax would be imposed as penalty.[114]

As *Jarkesy* did not limit its holding to statues that include "fraud," the impact of the ruling is far reaching. In addition to the anti-fraud provisions in the Internal Revenue Code, there is another quintessential tort doctrine that is relevant in tax law: negligence.[115] Section 6662 of the Tax Code covers negligence-related violations that lead to penalty.[116] This law imposes an accuracy-related penalty on an underpayment of tax that is attributable to (a) negligence or disregard of rules or regulations, (b) any substantial understatement of income tax, (c) any substantial valuation misstatement, (d) any substantial overstatement of pension liabilities, or (e) any substantial estate or gift tax understatement.[117] If a taxpayer violates this law, in addition to the amount they owe, they have to pay "an amount equal to 20 percent of the portion of the underpayment."[118]

The reasoning in *Jarkesy* applies equally to § 6662 and the fraudulent tax filing statutes. Like the fraudulent tax filing statute, § 6662 explicitly uses the word "negligence," which is a common-law tort.[119] *Jarkesy* emphasized the significance of using the same word as the one used at common law, so a reviewing court would likely interpret the use of "negligence" in § 6662 to raise private right concerns.[120] They also bear similarities in the remedy provided by

112. S*ee* 26 U.S.C. § 6651(f). While 26 U.S.C. § 6700(a)(2)(A) also address civil fraud, it only applies to tax shelters and isn't the main statute concerning fraud. *See id.* § 6700(a)(2)(A) (describing the elements of a fraudulent tax filing violation); *id.* § 6663(a) (imposing a civil penalty on violations of fraudulent tax filings).

113. *Id.* § 6663(a); *id.* § 6651(f).

114. *Id.* § 6651(f).

115. *See generally Accuracy-Related Penalty*, *supra* note 51 (outlining the penalty for negligence in tax filing).

116. 26 U.S.C. § 6662.

117. Treas. Reg. § 1.6662-1 (as amended in 1995).

118. 26 U.S.C. § 6662(a).

119. *Id.* § 6662(b)(1), (c); *Negligence*, CORN. L. SCH. LEGAL INFO. INST.: WEX LEGAL ENCYCLOPEDIA, https://www.law.cornell.edu/wex/negligence [https://perma.cc/6YTH-YMMP] ("Negligence is a foundational concept of tort law.").

120. SEC v. Jarkesy, 114 S. Ct. 2117, 2122 (2024) ("By using 'fraud' and other common law terms of art when it drafted the federal securities laws, Congress incorporated common law fraud prohibitions into those laws.").

the statute—a civil penalty—which was the decisive factor in the Court's holding in *Jarkesy* that the anti-fraud securities law was indeed a private right issue.[121] Thus, like the fraudulent tax filing statute, § 6662 would also fail the test outlined in *Jarkesy* on both the nature and scope of the issue and the type of remedy provided.

Therefore, it is possible that upholding the imposition of civil penalties on all tax cases may have a far-reaching impact on the enforcement of the Tax Code, going beyond the civil fraudulent tax filings.

B. *Right to a Jury Trial in North Carolina*

1. The Analysis of the North Carolina Constitution

Although the Seventh Amendment right guaranteed by the federal Constitution has never been incorporated against the states through the Fourteenth Amendment, the right to jury trial in civil cases is protected by the majority of the states' constitutions, including that of North Carolina.[122]

The North Carolina Constitution clearly acknowledges the importance of jury trials in civil cases and upholds that right as inviolable.[123] The right itself is outlined in Article IV, Section 13(1) of the North Carolina Constitution, which states that there shall be only "one form of action [within the state] for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action, and in which there shall be a right to have issues of fact tried before a jury."[124] The application of the North Carolina right to a jury trial in Article I is similar to that of the Seventh Amendment, applied "only where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted."[125]

However, Article IV, Section 3 states, "The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice." This section seems to allow the General Assembly to determine cases that can bypass the right to a jury trial in state regulatory cases as they see fit. However, the constitutional avoidance

121. *See supra* Part II; 26 U.S.C. § 6662(a).

122. Eric J. Hamilton, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 852 (2013); *see also* N.C. CONST. art. IV, § 13(1).

123. N.C. CONST. art. I, § 25 ("In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.").

124. *Id.* art. IV, § 13(1).

125. Kiser v. Kiser, 325 N.C. 502, 507, 385 S.E.2d 487, 490 (1989). *Kiser* is still applied to jury trial cases with the most recent case citing it in 2022. *See* Brown v. Caruso Homes Inc., No. COA22-226, 2022 WL 4841692, at *1, *2 (Oct. 4, 2022).

doctrine forces this section of the North Carolina Constitution to be interpreted in a way that doesn't conflict with Article IV, Section 13(1).[126]

In North Carolina, the constitutional avoidance doctrine has been recognized and applied not only in cases involving a conflict between a statute and the United States Constitution, but also in cases where there is a conflict between a state statute and its own state constitution.[127] The constitutional avoidance canon requires that "[w]here one of two reasonable constructions will raise a serious constitutional question, the construction which avoids the question should be adopted,"[128] but does not determine whether a statute is constitutional.[129] Since Congress would have to enact legislation to specify the duties and powers of agencies—including their adjudicatory powers—constitutional avoidance requires the agencies' adjudicatory power to be limited to public rights and not private rights.

Looking at the text of the North Carolina Constitution broadly, it is evident that the Supreme Court of North Carolina will likely interpret the conflict in this way to ensure that the right to a jury trial in civil cases is protected. Article IV, Section 13(2) highlights the importance the state constitution attributes to the right of trial by jury by saying:

> The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court; [however], [n]o rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury.[130]

Using the phrase "substantive rights" in the same line as "the right of trial by jury" indicates that the right of trial by jury is seen as a substantive right by the framers of the constitution. The repetition of the right of trial by jury as a substantive right in the state constitution[131] and the strong language of "shall be . . . but one form" in Article IV, Section 13(1) further emphasize the significance the drafters of the constitution accorded to the right of trial by jury in civil cases.[132] This textual analysis highlights the parallel between the state and federal constitutions in their protection of jury trial rights.

126. *See In re* Arthur, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977).

127. *See, e.g.*, JVC Enters., L.L.C. v. City of Concord, 269 N.C. App. 13, 19–20, 837 S.E.2d 206, 211 (2019), *rev'd on other grounds*, JVC Enters., L.L.C. v. City of Concord, 376 N.C. 782, 855 S.E.2d 158 (2021) (applying the doctrine of constitutional avoidance to interpret a state statute in a way that wouldn't conflict with the state constitution); N.C. State Bd. of Educ. v. State, 371 N.C. 170, 180, 814 S.E.2d 67, 74–75 (2018) (acknowledging the constitutional avoidance doctrine in resolving a potential conflict between a state statute and the Constitution of North Carolina).

128. *In re Arthur*, 291 N.C. at 642, 231 S.E.2d at 616.

129. *See, e.g.*, Delconte v. State, 313 N.C. 384, 402, 329 S.E.2d 636, 647 (1985).

130. N.C. CONST. art. IV, § 13(2).

131. *See id.* art. IV, § 13(1)–(2).

132. *Id.* art. IV, § 13(1).

2. NCDOR Tax Penalty Similarities to the IRS Tax Penalty

Although the Seventh Amendment does not apply to the states, many state constitutions—including that of North Carolina—contain comparable jury-trial right provisions. These provisions raise similar constitutional concerns for state tax enforcement.

While the IRS handles the federal collection of revenue through taxation, NCDOR is the agency that regulates state and local taxes in North Carolina. And like the federal anti-fraudulent tax filing provisions found in the United States tax code, General Statute of North Carolina § 105-236(a)(6) covers fraudulent tax filings at the state level.[133] It states: "If there is a deficiency or delinquency in payment of any tax because of fraud with intent to evade the tax, the Secretary shall assess a penalty equal to fifty percent (50%) of the total deficiency."[134] Similar to the federal statutes, N.C. Gen. Stat. § 105-236(a)(6) imposes a serious penalty in addition to the amount initially due.[135] Also, just like the federal anti-fraudulent tax filing provisions, the North Carolina statute entails the quintessential common-law action of fraud and explicitly uses the word "fraud" in its definition.[136]

The judicial procedure following a violation of the North Carolina statute also resembles its federal counterparts. When an individual or an entity violates the statute, an ALJ adjudicates the case and provides a judgment before the respondent can appeal to the district court for judicial review.[137] Also, once the respondent has been found liable by an administrative judge, the penalty and any interest—including the additional fifty percent—must be paid before the case be heard by an Article IV judge.[138] Due to the similarities in the state and federal judicial procedures, the issue of injury before adjudication in a common-law court is also mirrored at the state level.

3. North Carolina's Persuasive Lockstep Approach

In considering federal interpretations of analogous constitutional provisions, North Carolina state courts generally use a persuasive lockstep approach.[139] Under this approach, the state courts "acknowledge[] federal

133. N.C. GEN. STAT. § 105-236(a)(6).

134. *Id.*

135. *See id.*; 26 U.S.C § 6663(a); *id.* § 6651(f).

136. N.C. GEN. STAT. § 105-236(a)(6).

137. *See Resolving Disputes About Your Taxes*, N.C. DEP'T REVENUE, https://www.ncdor.gov/taxes-forms/information-tax-professionals/appeals-process/resolving-disputes-about-your-taxes [https://perma.cc/R29Q-3KDB].

138. *See id.*

139. Molly S. Petrey & Christopher A. Brook, State v. Carter *and the North Carolina Exclusionary Rule*, 100 N.C. L. REV. F. 1, 9 (2021); *see* James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1316 (1989).

precedent as persuasive but reserve[] the right to deviate from it."[140] While many critique the lockstep approach of following the federal precedent for being contrary to federalism, there are benefits to this approach recognized by its champions.[141] Most notably, lockstep promotes consistency and predictability by adhering to a well-developed and extensively analyzed body of doctrine.[142] While North Carolina state courts have historically decided otherwise in some cases,[143] an underlying idea is that people should receive no lesser rights than the parallel federal provision.[144]

As argued below, the North Carolina Constitution constrains the NCDOR's civil enforcement authority in a similar manner as the Seventh Amendment and its application does with respect to federal agencies.[145] Applying the similar constitutional analysis to N.C. Gen. Stat. § 105-236(a)(6), the NCDOR should also revise its adjudicatory procedure to allow the respondents the right to a jury trial because the state statute involves a private right claim that should be adjudicated by a judicial court.[146] The remedy is also a civil penalty that is unavoidable and goes beyond the restoration of the underpayment amount.[147] The similarities between the state and federal provisions in their text and history signals a potential for lockstep.

In applying the persuasive lockstep approach, the North Carolina state courts maintain the authority to interpret the state constitution separately from their federal analogs.[148] In this case, however, doing so would cause state citizens' rights to fall below those afforded by the parallel federal provision. Following the Supreme Court of North Carolina's prior decision to uphold

140. Petrey & Brook, *supra* note 139, at 11.

141. *See, e.g.*, Michael L. Smith, *Species of State Constitutional Lockstepping*, 71 VILL. L. REV. (forthcoming 2026) (manuscript at 55) (on file with the North Carolina Law Review).

142. *Id.* (manuscript at 13). Also, in comparison to state constitutional jurisprudence, there is significantly more commentary on U.S. Supreme Court–established doctrines. *Id.*

143. *See, e.g.*, State v. Carter, 322 N.C. 709, 723, 370 S.E.2d 553, 561 (1988), *superseded by statute*, An Act to Provide for the Adoption of the Good Faith Exception to the Exclusionary Rule into State Law, ch. 6, §§ 1–2, 2011 N.C. Sess. Laws 10, 10–11 (codified at N.C. GEN. STAT. § 15A-974), *as recognized in*, State v. Rogers, 388 N.C. 453, 920 S.E.2d 775 (2025). *Carter* declined to adopt the federal good-faith exception when interpreting a provision in the state constitution analogous to the federal Fourth Amendment, a decision explicitly rejected by both the state legislature and the *Rogers* court. *Rogers*, 388 N.C. at 464, 478, 920 S.E.2d at 784, 793 ("The decision in *Carter* left our state's exclusionary rule and good faith exception jurisprudence muddled and confused, engendering much legal debate. . . . We have already determined that the federal good faith exception applies here. Therefore, our state good faith exception, being equivalent to the federal good faith exception, also applies."). In other contexts, the Supreme Court of North Carolina has applied a lockstep approach. *See, e.g.*, State v. Petersilie, 334 N.C. 169, 183–85, 432 S.E.2d 832, 840–42 (1993).

144. Stephenson v. Bartlett, 355 N.C. 354, 381 n.6, 562 S.E.2d 377, 395 n.6 (2002) (citing *Carter*, 322 N.C. at 713, 370 S.E.2d at 555).

145. *See supra* Section V.C.

146. *See supra* text accompanying notes 88–89.

147. *See supra* text accompanying notes 67, 85.

148. Petrey & Brook, *supra* note 139, at 11.

rights at least to the level guaranteed by parallel federal provisions, lockstep approach should trigger the constitutional right to a jury trial in North Carolina civil tax fraud cases. Thus, the decision in *Jarkesy* should be interpreted to apply to state agencies' imposition of punitive monetary fines in adjudications of fraud in North Carolina.

C. *Other States and Agencies*

Although the Seventh Amendment right to a jury trial hasn't been incorporated to the states, the majority of the states (forty-seven out of fifty states) have provisions in their own state constitutions that protect the right to a jury trial in civil cases, mimicking the federal Seventh Amendment.[149] Although individual analyses of their constitutions—and other provisions within them that could be at conflict—are necessary, it is possible that the effect of *Jarkesy* may be influential on several states across the country as lockstep interpretation is a common approach to constitutional analogs in state courts.[150] The fact that the majority of the states have adopted provisions in their state constitutions that protect the civil jury trial right simply raises the question of how many more states are likewise theoretically influenced by *Jarkesy*.

Regardless of *Jarkesy*'s reach on state revenue agencies, other federal agencies have already fallen under scrutiny in the wake of the *Jarkesy* decision.[151] One such agency is the Federal Deposit Insurance Corporation ("FDIC").[152] Cornelius Burgess, a former bank CEO who was investigated for "allegedly using bank funds for personal expenses," made an argument in a Fifth Circuit case against the FDIC that resembled the argument in *Jarkesy*.[153] His case was on pause as the Fifth Circuit waited to see *Jarkesy* unfold and resumed with the court requesting supplemental briefs from both parties regarding *Jarkesy*'s application to their case.[154] In his brief, Burgess continued to argue the violation

149. Hamilton, *supra* note 122, at 855.

150. When a provision within a state's constitution has a conflict with the civil jury right, similar to how it does in the Constitution of North Carolina, it would require application of constitutional avoidance to resolve. Depending on the state's precedent in resolving the conflict between state constitutional provisions, constitutional avoidance may or may not apply the same way as it did in North Carolina.

151. *See, e.g.*, Katryna Perera, *FDIC Case Belongs in Fed. Court After* Jarkesy*, 5th Cir. Told*, LAW360 (Jan. 16, 2025), https://www.law360.com/articles/2284903/fdic-case-belongs-in-fed-court-after-jarkesy-5th-circ-told [https://perma.cc/AY9G-SJC3 (staff-uploaded, dark archive)]; Samuel B. Boxerman, Jack Raffetto, Timothy K. Webster & Lauren E. DeCarlo, Jarkesy*'s Potential Implications for EPA Administrative Proceedings*, SIDLEY (July 10, 2024), https://environmentalenergybrief.sidley.com/2024/07/10/jarkesys-potential-implications-for-epa-administrative-proceedings/ [https://perma.cc/VNJ4-RND3].

152. Elizabeth B. Wydra, Brianne J. Gorod & Smita Ghosh, *Corporate Accountability:* Burgess v. Whang, CONST. ACCOUNTABILITY CTR., https://www.theusconstitution.org/litigation/burgess-v-whang/ [https://perma.cc/7582-9Z4Y]; Perera, *supra* note 151.

153. Wydra et al., *supra* note 152.

154. Perera, *supra* note 151.

of his Seventh Amendment right and that the FDIC, in an attempt to avoid the Seventh Amendment issue, changed its argument to contend that the issue at hand is a "public rights" exception.[155]

Moreover, the Court in *Jarkesy* directly cited *Tull*, a case in which the Court held that certain civil penalties under the Clean Water Act[156] must be decided by a jury.[157] This reference to the *Tull* decision implicates the potential impact *Jarkesy* could have on the Environmental Protection Agency as the administrative agency that also adjudicates punitive monetary fines using internal ALJs.[158]

CONCLUSION

It is undeniable that the Tax Court offers significant advantages to many petitioners. However, these benefits do not negate the deeper constitutional and equity concerns raised by a civil fraud penalty that restricts taxpayers' right to choose their forum. A reasonable and effective first step in addressing these concerns would be to eliminate the pre-payment requirement that poses an unequitable barrier in forum selection. Ultimately, the current framework that is rooted in an overbroad understanding of public rights and increasingly punitive remedies requires reconsideration.

As a matter of principle, fraudulent tax filing cases should not be systematically removed from Article III courts through the imposition of punitive civil penalties. Implications of *Jarkesy* may also extend beyond federal tax enforcement to state administrative regimes. Although the Seventh Amendment has not been incorporated against the states, many state constitutions—including that of North Carolina—contain similar jury trial guarantees. Based on how closely each state interprets those provisions relative to its federal counterpart, the impact could be significant. As every citizen interacts with the tax system, the potential reach of these constitutional questions discussed in this Comment may be more consequential to everyday American citizens than the securities violation issue in *Jarkesy*.

If courts continue to expand the punitive function of civil tax penalties while preserving administrative adjudication, the constitutional tension highlighted by *Jarkesy* and *Silver Moss* will only intensify. Eliminating punitive civil tax penalties, therefore, offers the most coherent way to preserve both the

155. *Id.*

156. Clean Water Act, ch. 758, 62 Stat. 1155 (1948) (codified as amended in scattered sections of 33 U.S.C.).

157. Boxerman et al., *supra* note 151.

158. *Filings, Procedures, Orders and Decisions of EPA's Administrative Law Judges*, EPA (Dec. 10, 2025), https://www.epa.gov/alj [https://perma.cc/C6T6-UDKN] ("The Administrative Law Judges (ALJs) conduct hearings and render decisions in proceedings between the EPA and individuals, businesses, and other entities who the EPA has charged with violating an environmental law.").

institutional benefits of the Tax Court and the constitutional boundaries governing administrative adjudication in the federal tax system.

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