Textualism on Trial: Article III’s Jury Trial Provision, the 'Petty Offense' Exception, and Other Departures from Clear Constitutional Text

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ARTICLE

TEXTUALISM ON TRIAL: ARTICLE III'S JURY TRIAL PROVISION, THE "PETTY OFFENSE" EXCEPTION, AND OTHER DEPARTURES FROM CLEAR CONSTITUTIONAL TEXT

Stephen A. Siegel*

ABSTRACT

Can anything be constitutional that violates clear and concrete commands contained in the Constitution? Most constitutional theorists say "No." As much as they disagree on how to interpret the Constitution's vague clauses, they agree that nothing can justify a departure from the Constitution's many rule-like directives. As Randy Barnett has recently quipped: "To remain faithful to the Constitution . . . we must never forget it is a text we are expounding."

Nevertheless, constitutional practice gives a different answer. On the one hand, there are "constitutional workarounds," which Mark Tushnet describes as instances where "[f]inding some constitutional text obstructing our ability to reach a desired goal, we work around that text using other texts—and do so without (obviously) distorting the tools we use." On the other hand, there the writings of other scholars who, in the course of investigating particular constitutional clauses and controversies, discuss constitutional doctrines or governmental practices that they say violate clear

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and concrete constitutional text without a workaround to provide cover.

This Article explores and supplements these many scholarly claims. It contends that our constitutional tradition contains an array of doctrines and practices that depart from clear and specific constitutional rules. Constitutional praxis evidently has different norms, and teaches different lessons, from constitutional theory.

This Article supports its contention in two ways. First, it discusses a variety of constitutional doctrines and governmental practices that other commentators have already noted as conflicting with clear constitutional text. Second, it provides a thorough study of a well-known and important constitutional doctrine that is not generally recognized as a departure from the Constitution's clear requirements. The example is the petty crime exception to the right to jury trial.

The Constitution enshrines the right to jury trial in Article III, § 2, which peremptorily commands that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.” However, according to the petty crime exception, defendants facing no more than six months in jail, or a fine of no more than $500, have no right to a jury trial. The petty crime exception, at least at first blush, appears to depart from the Constitution's literal requirement of jury trial for “all Crimes.” The full argument is more complex, but it reaches the same conclusion.

In addition, in its initial analysis of Article III's jury provision, this Article employs the interpretive approach of modern textualism. Only after a textualist analysis is complete are the alternative interpretive norms of originalism and living constitutionalism brought into the discussion. Because of the varying results produced by these three interpretive modes, this Article, in the process of establishing that the petty crime exception is a departure from a clear and concrete constitutional command, provides a telling example of the extent to which the varying interpretive norms of textualism, originalism, and living constitutionalism have shaped our constitutional development.
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I. INTRODUCTION

Although constitutional scholars disagree widely on how to interpret the Constitution's vague clauses, most agree that when the Constitution's text is rule-like, clear, and specific—as it frequently is—nothing can justify a departure from the text's explicit command. A stock example is the requirement that the President shall "have attained to the Age of thirty five Years." Fidelity to concrete constitutional text is, it seems, a touchstone of our constitutional tradition.

This touchstone is in tension with Mark Tushnet's recent discussion of "constitutional workarounds," which he describes as instances where "[f]inding some constitutional text obstructing our ability to reach a desired goal, we work around that text using other texts—and do so without (obviously) distorting the tools we use." Adopting NAFTA as a statute rather than a treaty is one example; schemes to elect the President by a national

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3. See, e.g., STRAUSS, supra note 1, at 99–114 (explaining adherence to specific text); Jack Balkin, Abortion and Original Meaning, 24 CONST. COMMENT. 291, 305 (2007) ("When the text is relatively rule-like, concrete and specific, the underlying principles cannot override the textual command."); Randy Barnett, Constitutional Cliches, 36 CAP. U. L. REV. 493, 503 (2008) (quoting former Attorney General Edwin Meese III as saying, "[w]here the language of the Constitution is specific, it must be obeyed" (alteration in original)); Randy Barnett, Underlying Principles, 24 CONST. COMMENT. 405, 412–14 (2007) ("A resort to underlying principles is sometimes needed to discern the original meaning of the text but cannot be used to contradict or change that meaning."); Manning, supra note 2, at 1665 ("[W]hen the Court confronts a precise and detailed constitutional text, it should adhere closely to the prescribed [words] rather than stretch or contract the text in light of the apparent ratio legis."); Richard A. Posner, In Defense of Looseness: The Supreme Court and Gun Control, THE NEW REPUBLIC, Aug. 27, 2008, at 32, 32–33 (advocating a "flexible" approach to constitutional interpretation "so far as the text permits").

4. U.S. CONST. art. II, § 1; Balkin, supra note 3, at 305; Manning, supra note 2, at 1708 n.162 (citing other scholars who use this example). But see Anthony D'Amato, Aspects of Deconstruction: The "Easy Case" of the Under-Aged President, 84 NW. U. L. REV. 250, 251, 255–56 (1990) (providing arguments to support electing an underage president and citing other scholars who have made comparable arguments).


6. See id. at 1502–03 (describing the process in which NAFTA was adopted).
popular majority is another. The implication of Professor Tushnet's argument is that when there is a felt need, our fidelity to constitutional text lasts only until we can think up a way to circumvent it with a wink, a nod, and a minimally plausible interpretation of other clauses.

This touchstone is also in tension with the writings of other scholars who, in the course of investigating particular constitutional clauses and controversies, discuss constitutional doctrines and governmental practices that they say violate clear and concrete constitutional text without a workaround to provide cover. Curiously, the scholarly analyses of these putative departures have made almost no impression on our politico-legal culture's cognitive map, even though a fair number of them were undertaken by well-regarded scholars and involve high-profile controversies.

This Article resolves the tension by contending that our constitutional tradition countenances a variety of doctrines and government practices that depart from clear and concrete constitutional command without the cover of a workaround. Evidently, constitutional praxis has different norms, and teaches different lessons, from constitutional theory. Departures from clear constitutional text are an unexplored facet of our constitutional tradition that raise challenging questions about constitutional theory and practice.

This Article supports its contention in two ways. First, it focuses attention on the number and variety of constitutional doctrines and governmental practices that other commentators and jurists have already noted as conflicting with clear constitutional text. Second, it provides a thorough study of an

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7. See id. at 1500–01 (providing examples of state statutes which award the state's electoral vote to the presidential candidate who wins the national popular vote).
8. See id. at 1510 (illustrating the different ways constitutional workarounds are utilized).
9. By government practices, I mean actions by the political branches that have not been subject to Supreme Court review. When a government practice has been reviewed and upheld, I will speak of it as constitutional doctrine or constitutional law. My terminology follows a convention, reflected in the protorealist writings of John Chipman Gray, that "the Law is made up of the rules for decision which the courts lay down." JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 121 (2d ed. 1921). Although the convention is dated, it is useful in this Article in distinguishing between actions of the political and judicial branches.
10. See infra Part II.
12. See infra text accompanying notes 18–38, 58–79.
13. By jurists, I mean Justices of the Supreme Court and judges of all lower courts.
important example that is not generally recognized as a departure from the Constitution's clear requirements. The example is the petty crime exception to the right to jury trial.

The Constitution enshrines the right to jury trial in Article III, § 2, which peremptorily commands that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."\(^\text{14}\) However, according to the petty crime exception, defendants facing no more than six months in jail, or a fine of no more than $500, have no right to a jury trial.\(^\text{15}\) The petty crime exception, at least at first blush, appears to depart from the Constitution's literal requirement of jury trial for "all Crimes." The full argument is more complex, but it reaches the same conclusion.

My analysis of the petty crime exception and other departures from clear constitutional text proceeds as follows: Part II draws from prior scholarship to reveal the array of constitutional doctrines and governmental practices that other commentators have already said depart from clear and specific constitutional commands. The discussion in Part II is meant to be suggestive. By bringing together what other commentators have noticed, but treated as singular and deviant, Part II seeks to show that there are credible grounds for suspecting that our constitutional tradition includes a fair number of departures from clear constitutional mandate. This alone should give pause to the general belief that we always valorize fidelity to constitutional text.

Part III is meant to be definitive, to demonstrate that the petty crime exception to the Constitution's right to jury trial is a departure from clear and concrete constitutional command. The discussion begins, in Part III.A, by describing the Supreme Court precedents that established the petty offense exception. Part III.A reveals, on the one hand, the egregious shortcomings of those opinions' analyses while, on the other hand, also showing

\(^{14}\) U.S. CONST. art. III, § 2. Although many commentators ground the right to jury trial in the Sixth Amendment, see infra note 139, what the Sixth Amendment does is guarantee particular facets of the right established by Article III, § 2. See Callan v. Wilson, 127 U.S. 540, 549–50 (1888) (describing the Sixth Amendment as an "enumeration . . . of the rights of the accused in criminal prosecutions" as guaranteed by Article III); Stephen Siegel, The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning, 52 SANTA CLARA L. REV. 373, 383–84 (2012) (discussing the relationship between Article III, § 2 and the Sixth Amendment). Even if the Sixth Amendment were the source of the jury trial right, nothing in this Article's analysis would change because the Sixth Amendment is also peremptory. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

\(^{15}\) See infra notes 296, 300 and accompanying text (discussing the scope of the petty crime exception).
that if Article III's jury mandate is read as an isolated text, it is ambiguous and might countenance an exception for petty crime.

Part III.B, however, sets Article III's jury provision in its context by reading the Constitution of 1789 and Bill of Rights as a whole. Reading Article III's jury trial mandate in context clarifies its ambiguity and shows that it does not contemplate any exceptions other than the expressly stated exclusion of impeachments. Part III.C looks beyond the Founding documents' “four corners” to consider whether evidence from outside the Founding documents' text alters the conclusion that Article III's jury trial provision does not license a petty crime exception. Part IV discusses why contemporary constitutional law permits a petty crime exception even though it violates the Constitution's clear and specific command.

Unless a legal text, when read in isolation and in context, is crystal clear, determining what it means is a complex task. This is so, in part, because of the welter of interpretive techniques recognized by contemporary legal culture.16 Because, as Part III.A shows, Article III's jury trial mandate is ambiguous when read in isolation, choices must be made about interpretive stance. This Article, in its initial explanation of Article III's jury provision, employs the interpretive approach of modern textualism. Textualism is chosen because it is most focused on, and has developed the most nuanced approach to, determining if a text has a clear semantic meaning.17 Only after the textualist analysis is complete are the alternative interpretive norms of originalism and living constitutionalism brought into the discussion. Because

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Other approaches, because they have less faith in the existence or normative relevance of semantic meaning, find ambiguity more easily and move far more quickly to considerations of authorial purpose as shown by nontextual evidence or desirable public policy. See John Manning, The New Purposivism, 2011 SUP. CT. REV. 113, 174–75 (contrasting “traditional purposivists” and textualists' attitudes toward sources of “semantic meaning”); Manning, supra note 16, passim (contrasting purposivists' and textualists' interpretive norms); Lawrence C. Marshall, Fighting the Words of the Eleventh Amendment, 102 HARV. L. REV. 1342, 1345 (1989) (contrasting textualists and originalists' use of “plain meaning” and “history”).
of the varying results produced by these three interpretive modes, this Article, in the process of establishing that the petty crime exception is a departure from a clear and concrete constitutional command, sheds light on the degree to which our constitutional tradition reflects the interpretive norms of textualism, originalism, and living constitutionalism.

Thus, this Article not only establishes that some of our constitutional law and governmental practices depart from the Constitution's clear and specific requirements, but it also provides a telling example of the extent to which the varying interpretive norms of textualism, originalism, and living constitutionalism have shaped constitutional development.

II. DEPARTURES FROM CLEAR AND CONCRETE CONSTITUTIONAL TEXT ALREADY DISCUSSED IN CASES AND THE SCHOLARLY LITERATURE: AN OVERVIEW

A. The Eleventh Amendment and State Sovereign Immunity

The jurisprudence of the Eleventh Amendment is the most well-known and widely discussed example of constitutional interpretation departing from precise constitutional text. The problem, of course, is that although the Eleventh Amendment literally prohibits only suits in federal court against a state by citizens of another state or subjects of a foreign state, the Court has extended it to include lawsuits filed by a state's own citizens, by federal corporations and administrative agencies, by Native American tribes, and by foreign nations. In addition, although the Eleventh Amendment's text denies federal courts all "Judicial power" to hear cases in "law or equity," the Court, on the one hand, says the Amendment also governs admiralty cases and, on the other hand, allows suits against a state to proceed in law, equity, and admiralty if a state consents. Finally, the Court has held the Amendment applies to suits filed in state, as well as in federal, court.

18. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

19. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.1, at 405–06 (5th ed. 2007); Manning, supra note 2, at 1666.


In making these extensions, commentators agree that “the Supreme Court has basically ignored the Eleventh Amendment’s language” and “relied on the Amendment’s perceived background purpose to establish broad state sovereign immunity that goes well beyond its carefully drawn text.” Indeed, for many commentators, it is “difficult to think of any other facet of the Constitution with respect to which the Court has reached results so obviously inconsistent with the words used by the framers.

Recognizing the truth of the commentators’ remarks, the Court has expanded the basis for its state sovereign immunity rulings to encompass the “bounds of Article III” and “presupposition[s] of our constitutional structure.” “Behind the words of the constitutional provisions,” the Court says, “are postulates which limit and control.”

The Court’s expansion of the grounds for state sovereign immunity does not entirely defend Eleventh Amendment jurisprudence from the charge that it deviates from clear and specific constitutional text. Despite the expansion, on many occasions the Court has written opinions that locate state sovereign immunity “in the Eleventh Amendment itself,” as if the immunity principle were not separate but “folded into the eleventh amendment itself.” At other times, the Court has relied

22. Laurence H. Tribe, How to Violate the Constitution Without Really Trying, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 98, 101 n.11 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998). The quote continues “...and construed the amendment as embodying or exemplifying the concept of state sovereign immunity.” Id.

23. Manning, supra note 2, at 1666.

24. Marshall, supra note 17, at 1345; see also Akhil Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1475 (1987) (“If the Eleventh Amendment was meant to enshrine [state sovereign immunity] ... it was abysmally drafted. ... [T]he limitations in the text... are inexplicable if we assume (as does the Court) that the Amendment’s purpose was to secure general immunity.”); Bradford R. Clark, The Eleventh Amendment and the Nature of the Union, 123 HARV. L. REV. 1817, 1819 (2010) (“Most courts and commentators regard the [Eleventh] Amendment as either grossly under—or over—inclusive.”); Field, supra note 20, at 516 (“The eleventh amendment is universally taken not to mean what it says.”); Frederick Schauer, Easy Cases, 58 S. CAL. L. REV. 399, 423–24 (1985) (using the Eleventh Amendment to illustrate the claim that “language, even when clear, does not control [judicial] behavior”).


28. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-25, at 523 n.21 (3d ed. 1999).

29. Manning, supra note 2, at 1683–84 n.77 (quoting David Shapiro, The Supreme Court, 1983 Term—Comment: Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 HARV. L. REV. 61, 71 (1984)).
on the Eleventh Amendment in opinions that shift equivocally among the Eleventh Amendment, the Article III, and the "constitutional framework" rationales for immunity doctrine.\textsuperscript{31} That this body of doctrine is generally named for the Eleventh Amendment,\textsuperscript{32} and in treatises is treated in chapters on the Eleventh Amendment, reflects how the Court generally has discussed the topic.\textsuperscript{33}

Moreover, even if the Court were firmly and fully to commit itself to the view that state sovereign immunity was grounded not in the Eleventh Amendment but in either Article III or constitutional structure, the general point being made here would not lose its significance.\textsuperscript{34} Even if superseded, it is important that for over a century the Court relied on unwritten "postulates which limit and control,"\textsuperscript{35} to interpret the Eleventh Amendment in ways that departed from its text.

In addition, to the extent the Court relocates the source of the immunity principle in either Article III or constitutional structure it is only shifting the debate on deviations from constitutional text from the Eleventh Amendment to Article III.\textsuperscript{36} Article III expressly

\begin{itemize}
\item \textsuperscript{31} Compare, e.g., Blatchford, 501 U.S. at 779 ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . . ."), with Fed. Mar. Comm'n, 535 U.S. at 780-81 ("[T]he Eleventh Amendment would not have limited the otherwise clear grant of jurisdiction in Article III to hear controversies 'between a State . . . and foreign States.' But we held that it did."); see also Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 65-67 (1996) ("For over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment.").
\item \textsuperscript{32} Compare this to the law of intergovernmental tax immunities, which the Court always said arose from no specific constitutional clause and, therefore, was not named after a particular constitutional text. See, e.g., Evans v. Gore, 253 U.S. 245, 255 (1920) (stating that intergovernmental tax immunities are not based "on any express prohibition in the Constitution, for there is none; but all recognized and gave effect to a prohibition implied from the independence of the States within their own spheres").
\item \textsuperscript{33} See, e.g., CHEMERINSKY, supra note 19, §§ 7.1–7, at 405–78; JAMES PFANDER, PRINCIPLES OF FEDERAL JURISDICTION §§ 7.4.1–.5, at 179–200 (2006); TRIBE, supra note 28, §§ 3-25 to -27, at 519–66.
\item \textsuperscript{34} Steven Menashi, Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity, 84 NOTRE DAME L. REV. 1135, 1141, 1150, 1176 (2009) (locating sovereign immunity in Article III).
\item \textsuperscript{36} Katherine Florey, Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine, 92 CALIF. L. REV. 1375, 1394 (2004); Marshall, supra note 17, at 1347 ("[I]t cannot seriously be suggested that article III . . . lends support to the Court's creation of a constitutional doctrine of state sovereign immunity that extends beyond the narrow dictates of the eleventh amendment."); Menashi, supra note 34, at 1135, 1141, 1150, 1176 (locating state sovereign immunity in Article III). The Eleventh Amendment plays a role as evidence on both sides of the Article
extends federal judicial power to all the areas that state sovereign immunity doctrine is said to bar. The debate about Article III and state sovereign immunity, which in many ways is a replay of debates involving the Eleventh Amendment, is beyond the scope of this short subsection which draws from the scholarly literature to show that there are credible grounds for suspecting that in interpreting the Eleventh Amendment our constitutional law departs from the Constitution's precisely written text.

B. The Incompatibility Clause and Members of Congress Serving in the Armed Forces Reserve

According to Article I's Incompatibility Clause "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." Yet over the last half-century, many members of Congress have served simultaneously in Congress and as officers in the armed forces reserve. Not limited to ceremonial occasions or two-weeks-a-year active duty training, in one instance a Senator's armed forces reserve service involved deciding cases as a Judge on the United

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37. Compare, e.g., Hans v. Louisiana, 134 U.S. 1, 10–11 (1890) (holding that the passage of Eleventh Amendment supports constitutionalizing the principle of state sovereign immunity), with Manning, supra note 2, at 1722–50 (arguing that the Eleventh Amendment has a "negative implication" that bars locating state sovereign immunity in Article III).

38. See supra note 36.


States Air Force Court of Criminal Appeals. His dual service ended when the nation’s highest military court ruled that holding both offices simultaneously violated the Incompatibility Clause.

The court’s ruling was limited to the Senator’s service as a military judge and did not discuss the general issue of members of Congress’s other forms of service in the armed forces reserve. The court’s ruling did, however, provoke a law student to research the general issue and write an extended Note on it. After a thorough analysis, the Note concluded that appointing members of Congress to the armed forces reserve “violates the clear text of the Constitution.”

C. The Twenty-First Amendment’s Second Section and the Dormant Commerce Clause

The Twenty-first Amendment’s second section modifies the impact of the first section’s repeal of Prohibition by providing that: “The transportation or importation into any State . . . for

42. Id. at 3–4 (limiting Lane’s standing to challenging the Senator’s service as a military judge).
43. Id. at 6–7.
44. Shaw, supra note 40, at 1740.
45. Id. at 1741–56, 1762–66 (referring to and quoting the Incompatibility Clause). Michael Dorf wrote a blog comment on the same case that said appointing members of Congress to the armed forces reserve did not violate the Incompatibility Clause. His argument rested on the “practical” and “functional” consideration that “military service by members of Congress—even if only through the Standby Reserve—can help ensure that they will contemplate the consequences of war directly, rather than merely for others.” Michael C. Dorf, The Nation’s Top Military Court Rules that a Senator Cannot Wear Two Hats: Does the Ruling Call into Question Reserve Duty by Members of Congress?, FINDLAW’S WRIT (Sept. 25, 2006), http://wriz.news.findlaw.com/dorf/20060925.html. Dorf’s answer may be a correct interpretation of the Constitution under a Dworkian “best reading” approach. The question in this Article is limited to considering what the Constitution says when interpreted by textualist norms.

A key move in Dorf’s analysis was his claim that the Incompatibility Clause was ambiguous. But it was his Dworkian approach that created the ambiguity; it was an ambiguity a textualist would not recognize. See infra text accompanying notes 108–21 (discussing textualism and ambiguity). The far more textualist analysis of the Lane majority and the student Note are sufficient to establish a strong probability that—from a textualist perspective—when members of Congress serve as officers in the armed forces reserve, they engage in a governmental practice that violates the Incompatibility Clause’s clear and concrete constitutional rule. Lane, 64 M.J. at 6–7; Shaw, supra note 40, at 1741 (referring to and quoting the Incompatibility Clause). As the Lane case and the student Note show, from a textualist perspective, this is a debatable conclusion, for they discuss arguments pro and con. But, as previously stated, for introductory purposes all I am seeking to establish is the reasonable probability that our constitutional tradition does not always follow clear and concrete constitutional text.
delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. Yet in a line of cases dating back to the 1960s, the Supreme Court has continually compelled states to permit “intoxicating liquors” to be imported into a state “in violation of the laws thereof” when the state law prohibiting importation violates the dormant Commerce Clause’s antidiscrimination principle.

This line of decisions is grounded in the Court’s view of the Twenty-first Amendment’s legislative history. According to the Court, the legislative history shows “[t]he aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor,” and was not meant to “give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.”

The Supreme Court’s reading of the Twenty-first Amendment’s long and intricate legislative history may or may not be correct. A significant minority of the Court disagrees with it. But whether right or wrong, the Court’s interpretation

48. Granholm, 544 U.S. at 476–93 (explicating the decision in terms of the Amendment’s “history” with no analysis of the text).
49. Id. at 484.
50. Id. at 484–85. In making this ruling, the Granholm majority overruled not only the views of a four-Justice minority, but also rulings of Justices who sat on the Court from 1934 to 1964. Id. at 495 & n.2, 497, 515–17 (Stevens & Thomas, JJ., dissenting).
51. The legislative history ran back for twenty years, covering the enactment of two statutes, many judicial opinions, as well as drafts of, and debates on, the Amendment itself. Granholm, 544 U.S. at 461–62, 476–86 (detailing the complicated history); 324 Liquor Corp. v. Duffy, 479 U.S. 335, 354–56 (1987) (O’Connor, J., dissenting) (same). As usual, scholars differ as to whether the Court’s understanding is correct. My impression is that more scholars favor the Court’s view than not. See, e.g., Asheesh Agarwal & Todd Zywicki, The Original Meaning of the 21st Amendment, 8 GREEN BAG 2d 137, 141 (2005) (agreeing with the Court’s view); Banner, supra note 47, at 278–82 (same). But see Barbara K. Bucholtz, Destabilized Doctrine at the End of the Rehnquist Era and the Business Related Cases in Its Final Term, 41 TULSA L. REV. 219, 235 (2005) (disagreeing with the Court’s view); David S. Versfelt, Note, The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors, 75 COLUM. L. REV. 1578, 1579–81, 1610 (1975) (arguing that the legislative history is unclear).
52. Granholm, 544 U.S. at 496–97, 503–14 (Stevens & Thomas, JJ., dissenting); Hostetter, 377 U.S. at 336–40 (Black, J., dissenting). Justice Black’s discussion of the legislative history of Article XXI, § 2 is particularly interesting as he was on the Senate floor and cites remarks he then made. Id. at 337 n.2.
of the second section reflects a "purposive," rather than a textualist, technique. In this regard, it is important to note that the Court does not pretend to ground itself in the Amendment's text. In addition, Justices Black and Thomas, two of the Court's most consistently textualist Justices, have always been among the dissenters. In their view, subjecting state liquor control laws to the Commerce Clause's antidiscrimination principle violates "the plain meaning" of the Amendment's second section, and "would involve not a construction of the Amendment, but a rewriting of it."

D. The Presentment Clause and Constitutional Amendments

Finally, consider whether the process by which amendments to the Constitution have been adopted complies with the Constitution's textual requirements. Article I's Presentment Clause mandates that: "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States . . . ."

Yet even though all of the twenty-seven amendments that have been added to the Constitution since 1789 began as

53. On the contrast between purposive and textualist interpretive norms, see infra text accompanying notes 326–27 (discussing how originalism, unlike textualism, sometimes allows for a less text-centric and more purposive construction of the Constitution).

54. Granholm, 544 U.S. at 484–85; see also infra note 57.

55. See Granholm, 544 U.S. at 497 (Thomas, J., dissenting); Hostetter, 377 U.S. at 334 (Black, J., dissenting).

56. Granholm, 544 U.S. at 514 (Thomas, J., dissenting).

57. Hostetter, 377 U.S. at 335 (Black, J., dissenting) (quoting State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936)). The Court itself used to agree with this view. Before switching, in the 1960s, to the current purposive approach, the Court thought the section's language was so clear that it refused to inquire into its legislative history. See Young's Mkt. Co., 299 U.S. at 63–64. At that time, it also thought that subjecting state liquor laws to the dormant Commerce Clause "would involve not a construction of the Amendment, but a rewriting of it." Id. at 62. It should be evident, that what Justices Black and Thomas are doing is carrying forward the Court's seminal precedents on the relation between the dormant Commerce Clause and the Twenty-first Amendment. See Jason E. Prince, Note, New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-First Amendment, 79 NOTRE DAME L. REV. 1563, 1581–87 (2004) (discussing the early precedents). But see Jonathan M. Rotter & Joshua S. Stambaugh, What's Left of the Twenty-First Amendment?, 6 CARDozo PUB. L. POLY & ETHICs J. 601, 604–11 (2008) (discussing two contrasting readings of the section's text). The Granholm line of decisions reflects the Court having to choose between effectuating the Amendment's purpose or its text. When confronting such a choice, the Court usually has chosen the Constitution's purpose. See infra text accompanying note 331.

congressional proposals for which a “concurrence” of both the House and Senate was “necessary,” only one of them—the Thirteenth Amendment—was ever presented to the President for his approval.\(^59\)

Constitutional scholars as distinguished as Charles Black, Edward Corwin, and David Currie have criticized nonpresentment of constitutional amendments as a departure from the Presentment Clause’s “sweeping language”\(^60\) that “speaks plainly to a bedrock procedural point”\(^61\) with “clarity . . . [that] cannot be made brighter.”\(^62\)

Nonetheless, in 1798, when litigants sought to have the Eleventh Amendment voided on the ground that it had not been presented to the President for his signature, a unanimous Supreme Court upheld the Amendment’s validity.\(^63\) The pressure on the Court to uphold it must have been intense. The Eleventh Amendment was widely popular,\(^64\) it was directed against a controversial Supreme Court ruling,\(^65\) the Executive Branch had

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61. Black, Correspondence, supra note 60, at 899.

62. Id.; see also Black, Amending the Constitution, supra note 60, at 206 (describing nonpresentment as “disregard of an unmistakably clear constitutional command”).


64. The Eleventh Amendment was proposed and ratified by three-quarters of the states less than one year after final judgment was entered in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). JOHN ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 19–20 (1987).

65. The Amendment overturned Chisholm, which permitted states to be sued without their consent by citizens of other states for debts owed to those citizens. Hollingsworth, 3 U.S. (3 Dall.) at 378, 380–82.
proclaimed the Amendment's ratification just one month before,\textsuperscript{66} and a ruling against its validity would have also invalidated the ten amendments that comprised the Bill of Rights because they, too, had never been laid before the President for his approval.\textsuperscript{67} 

The result was that one day after oral argument the Court issued a per curiam ruling that offered no rationale for concluding that the Amendment was "constitutionally adopted."\textsuperscript{68} The only clue we have to the Court's thinking is a comment Justice Chase made during oral argument: "The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution."\textsuperscript{69} 

Over the years commentators and members of Congress in formal debate have attempted to supply reasons for the Court's judgment.\textsuperscript{70} The explanation with the strongest textual basis reflects Justice Chase's comment. It is that Article V creates an entirely separate procedure for the adoption of amendments that is distinct from the normal lawmaking process\textsuperscript{71} and which, in express terms, names only "Congress" as the agent to set it in motion.\textsuperscript{72} 

This textual rationale for reconciling the clash between the Presentment Clause and historic practices under Article V falls short because it conflicts with the interpretation of other constitutional provisions. Like Article V, Article IV designates "Congress" as the recipient of additional powers distinct from the

\textsuperscript{66.} CURRIE, supra note 60, at 20. For reasons that have never become clear, the Executive Branch delayed proclaiming the Amendment for three years after ratification was complete. ORTH, supra note 64, at 20. 

\textsuperscript{67.} CURRIE, supra note 60, at 22. The Annals of Congress do not record any discussion in the first Congress of why the President's approval was not sought. DAVID CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 115 (1997). 

\textsuperscript{68.} Hollingsworth, 3 U.S. (3 Dall.) at 378–82. 

\textsuperscript{69.} Id. at 381 n.*. 


\textsuperscript{71.} S. REP. NO. 92-336, at 12–14 (1971) (saying that the congressional practice limits requirement for Presidential approval to two-House concurrences that have the force of law); CURRIE, supra note 60, at 22; see also INS v. Chadha, 462 U.S. 919, 955 n.21 (1983) (mentioning supermajority-passage requirement and ratification by the states as additional protections). 

\textsuperscript{72.} Cf. Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76 (2000) (interpreting strictly Article II's provision for appointing Presidential electors as the state "Legislature" directs to constrain how the state allocates power on the subject); Hawke v. Smith, 253 U.S. 221, 229–31 (1920) (holding that in ratification process "legislature" means "legislature" and cannot be by referendum).
lawmaking powers established in Article I.\textsuperscript{73} One example is the power to admit new states.\textsuperscript{74} From the very first admission of a new state, Vermont, in 1791,\textsuperscript{76} every state admission bill has been presented to the President.\textsuperscript{76} Presentment is evidently considered a necessary part of the state admission process because presidents have vetoed several state admission bills and, when congressional override votes failed, the states were not considered admitted.\textsuperscript{77}

Given the textual similarity of the state admission and constitutional amendment provisions,\textsuperscript{78} there is evident inconsistency in applying the Presentment Clause to Congress's Article IV power to admit new states and not applying it to Congress's Article V power to propose amendments. One of them should qualify as an example of a governmental practice that departs from the Constitution's text. According to Charles Black, "if plain words can have

73. Compare U.S. Const. art. V (empowering Congress to propose constitutional amendments), with U.S. Const. art. IV (articulating Congress's ability to admit new states into the Union), and U.S. Const. art. I, § 8 (enumerating Congress's lawmaking powers).

74. U.S. Const. art. IV, § 3 ("New States may be admitted by the Congress into this Union . . ."). The State Admission Clause is only one of several clauses in which "Congress" is expressly named as holding a designated power, and none of them have been exempted from the Presentment Clause's requirements. See, e.g., U.S. Const. art. III, § 3 (defining treason); U.S. Const. art. IV (discussing rules for territories and property). Thus, Article V is the only place where "Congress" means only Congress.

Despite the generality of my point here, I focus on the State Admission Clause because it is the most likely clause not to be thought of as what Justice Chase called "ordinary cases of legislation." See supra text accompanying note 69 (quoting Justice Chase in Hollingsworth).

75. Currie, supra note 67, at 100.

76. See, e.g., An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, 73 Stat. 4 (1959) (signed by President Dwight D. Eisenhower); An Act for the Admission of Kansas into the Union, 12 Stat. 126 (1861) (signed by President James Buchanan); An Act for the Admission of the State of California into the Union, 9 Stat. 452 (1850) (signed by President Millard Fillmore); An Act to Extend the Laws of the United States over the State of Texas, and for Other Purposes, 9 Stat. 1 (1845) (signed by President James K. Polk).

77. See Xi Wang, Black Suffrage and the Redefinition of American Freedom, 1860–1870, 17 Cardozo L. Rev. 2153, 2204–05 (1996) (discussing President Johnson's veto of the Colorado admission bill which was not overridden); President Vetoes the Statehood Bill, N.Y. Times, Aug. 16, 1911, at 3 (reporting on President Taft's veto of resolution admitting New Mexico and Arizona). President Johnson also vetoed Nebraska's admission, but Nebraska was admitted because the congressional override vote was successful. Wang, supra, at 2204–05.

78. Compare U.S. Const. art. IV, § 3 ("New States may be admitted by the Congress into this Union . . ."). with U.S. Const. art. V ("The Congress, whenever two thirds of both houses shall deem it necessary . . ."). That Congress's decision under Article V requires a supermajority should not matter to the textual argument because the President's veto message may change the views of members of Congress. See, e.g., Currie, supra note 60, at 21–22.
plain meaning” it should be the nonpresentment of constitutional amendments. 79

These examples, and the examples contained in the notes to this paragraph, show that the political branches are responsible for some of the putative departures from specific constitutional requirements; 80 that the judiciary is responsible for others; 81 and that sometimes responsibility is

79. Black, Correspondence, supra note 60, at 899.

80. There are many departures for which political branches are responsible. See, e.g., MARGO J. ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 149–58 (1988) (discussing Congress’s failure to reapportion the House of Representatives after the 1920 Census); COMM’N ON CIA ACTIVITIES WITHIN THE U.S., REPORT TO THE PRESIDENT, 14–15 (1975) (recommending that the CIA budget should be made public, to some extent, in light of art. I, § 9, cl. 7 of the Constitution); Zechariah Chafee, Jr., Congressional Reapportionment, 42 HARV. L. REV. 1015, 1017–20 (1929) (discussing the legal consequences of Congress’s failure to reapportion after the 1920 census); George Zuckerman, A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment, 30 FORDHAM L. REV. 93, 93–95, 124 (1961) (discussing Congress’s decades long refusal to reduce congressional representation of states that massively disenfranchised male African-Americans despite constitutional text requiring such reduction “in the proportion which the number of such [disenfranchised] male citizens shall bear to the whole number of male citizens . . . in such State”); Douglas Elliott, Note, Cloak and Ledger, Is CIA Funding Constitutional?, 2 HASTINGS CONST. L.Q. 717, 743–48 (1975) (arguing that the CIA’s secret funding violates art. I, § 9, cl. 7’s requirement that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time”); Note, The CIA’s Secret Funding and the Constitution, 84 YALE L.J. 608 (1975) (same); supra text accompanying notes 39–45 (discussing the Incompatibility Clause).

81. There are several departures for which the judiciary is responsible. See, e.g., Siegel, supra note 14, at 374–78 (discussing the “jury waiver” exception to Article III’s jury trial requirement); supra text accompanying notes 18–36, 46–57 (discussing U.S. CONST. amends. XI, XXI). The Court’s current interpretation of the Contract Clause may be another, depending on whether that clause is viewed as a precise limitation. See Richard A. Epstein, Toward a Revitalization of the Contract Clause, 51 U. CHI. L. REV. 703, 735–47 (1984) (discussing the impact of Blaisdell and subsequent cases on Contract Clause analysis); Rebecca M. Kahan, Comment, Constitutional Stretch, Snap-Back, and Sag: Why Blaisdell was a Harsher Blow to Liberty than Korematsu, 99 NW. U. L. REV. 1279, 1305–07 (2005) (discussing the further development of Blaisdell beyond the limits of the “emergency doctrine”). For an example of historical interest because it has been overruled, see Evans v. Gore, which held that the Sixteenth Amendment’s authorization of taxation “from whatever source derived” does not include the income federal judges derive from their employment. Evans v. Gore, 253 U.S. 245, 260–64 (1920), overruled by O’Malley v. Woodrough, 307 U.S. 277 (1939); see also Charles Clark, Further Limitation Upon Federal Income Taxation, 30 YALE L.J. 75, 76–79 (1920) (criticizing Evans for departing from the Sixteenth Amendment’s “plain language,” “ordinary meaning,” and “all-inclusive words”).

The Yale Comment, supra, is signed “C.E.C.” I attribute it to Professor Charles Edward Clark because he was writing on income taxation at the time. See Charles E. Clark, Eisner v. Macomber and Some Problems of Income Taxation, 29 YALE L.J. 735 (1919); Charles E. Clark, Federal Income Tax. By George E. Holmes, 32 YALE L.J. 749, 750 (1923) (book review) (reviewing a book on federal income taxation in which Clark, speaking for himself, says Evans reached “what is thought to be an
shared. These examples also show that most, but not all, of the departures occur when the Court follows what it conceives to be the Constitution makers’ purposes rather than the fair meaning of the words with which they expressed themselves. Finally, these examples, given their extent and their scholarly support, show that there are credible grounds for suspecting that our constitutional law includes a variety of departures from clear constitutional text.

In the remainder of this Article, I turn from suggesting that our constitutional tradition includes departures from clear, concrete, and rule-like constitutional text to establishing that the petty offense exception to Article III’s jury trial mandate is one of them.

III. ARTICLE III’S JURY TRIAL MANDATE AND THE PETTY CRIME EXCEPTION

A. The Supreme Court Precedents that Established the Petty Offense Exception to Article III’s Jury Trial Mandate

Supreme Court precedents on the petty offense exception trace back to two late nineteenth and early twentieth century
cases, Callan v. Wilson and Schick v. United States. Callan introduced the petty offense exception into constitutional law when, in the course of discussing Article III's jury trial requirement, it asserted that the word "crime" has an "extended sense" and a "limited sense" and explained that in the extended sense "the word 'crime,' . . . comprehends every violation of public law" while in the limited sense "it embraces [only] offences of a serious or atrocious character." Having made this assertion, the Court assumed throughout the remainder of the opinion that the word "crime" in Article III's jury trial provision was used in its "limited" sense, and therefore, the right of jury trial was limited to prosecutions for serious crimes.

In making these assertions, the Callan Court drew from its general knowledge of the common law and interpreted Article III's jury trial mandate in that "light." Reading the norms of the common law into constitutional provisions was a standard interpretive technique in the nineteenth century, and it is indisputable that the common law did not require jury trial for

84. Callan v. Wilson, 127 U.S. 540, 549, 555–57 (1888). Callan involved a challenge to legislation authorizing summary trials in Washington, D.C.'s Police Court. Id. at 540–41, 550–52. Washington's Police Court had been established in 1870 and its juryless proceedings were immediately embroiled in litigation. See An Act to Establish a Police Court for the District of Columbia, and for Other Purposes, ch. 133, § 3 (June 17, 1870), 16 Stat. 153, 154 (1871); In re Cross, 20 F. 824, 824, 826 (C.D. Md. 1884) (refusing to remove defendant from New York to Washington, D.C., for Police Court trial because the Constitution mandates a jury trial for the crime with which he was charged and Police Court trials have no jury); In re Dana, 6 F. Cas. 1140, 1141–42 (S.D.N.Y. 1873) (No. 3,554) (same); J.A.C. Grant, Waiver of Jury Trial in Felony Cases, 20 CALIF. L. REV. 132, 148 (1931) (recounting course of legislation and litigation over District's Police Court).

85. Schick v. United States, 195 U.S. 65, 66 (1904). Schick involved a prosecution for violating federal oleomargarine regulations in which, without any congressional legislation authorizing the procedure, the prosecutor and the defendant agreed to waive a jury and have a bench trial. Id. at 67. After being convicted, the defendant limited his appeal to challenging the constitutionality of the federal oleomargarine labeling law. Id. Neither side challenged the consensual jury waiver. Id. The Supreme Court raised the issue of whether federal law permitted a bench trial and asked for briefs. Id. Both the government's and the defendant's briefs asserted "that the waiver of a jury did not invalidate the proceedings." Id. The Court upheld Schick's jury waiver on the grounds that juries were not required for the prosecution of petty crime. Id. at 69–72. Schick was also a first step towards the Court's permitting jury waiver for prosecutions of serious crime. See Patton v. United States 281 U.S. 276, 298–99 (1930) (relying on Schick to show that jury waiver does not need congressional authorization).

86. Callan, 127 U.S. at 549.

87. Id. at 549–56.

88. Id. at 549.

every criminal offense. Still Callan’s discussion of the subject was surprisingly off-hand for such a significant and seminal ruling. The Court made its assertions without any analysis or reference to any specific authority. Callan certainly was not a thorough consideration of the subject.

Despite the thin discussion, Callan’s recognition of a petty offense exception to Article III’s jury trial mandate was reaffirmed when the issue returned to the Court, sixteen years later, in Schick v. United States. Schick firmly grafted the petty crime exception into constitutional law both by treating Callan as authoritative and by providing support for its assertions and assumptions. To support the claim that the word “crime” had a broad and a narrow meaning, the Schick court quoted the “definition of the word ‘crimes,’” found in Blackstone’s Commentaries. According to Blackstone,

A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms; though in common usage the word “crimes” is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of “misdemeanors” only.

Having documented from an authoritative, widely-read

90. See infra text accompanying notes 244–93.
91. See Callan, 127 U.S. at 549 (discussing the issue without reference to any authority or evidence).
92. The Court’s comments may have been so cursorily made because they were destined to be dicta given the case’s ultimate ruling, which was that regardless of how petty offenses might be treated, Callan was charged with a serious offense requiring jury trial. Id. at 555.

Also, the Callan Court had several other novel and difficult issues before it, including whether Article III’s jury provision applied to Washington, D.C., id. at 548–49; whether Callan’s offense was serious or petty (assuming the dichotomy mattered), id. at 555–57; and whether a right of appeal for a de novo jury trial sufficiently protected the Constitution’s jury trial guarantee, id. at 551–55. Before Callan, some states had held that an appeal for a trial de novo before a jury satisfied the state’s jury trial mandate.

In addition, by the late nineteenth century the possibility that the word “crime” had a broad and a narrow meaning was common knowledge because many state courts had recognized a petty offense exception to their states’ constitutions’ clauses guaranteeing the right to jury trial. Id. at 551–55.
93. Schick, 195 U.S. at 66.
94. Id. at 70.
95. Id. at 69–70.
96. Id. (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769)).
Founding-era source that the word "crime" had two meanings,\textsuperscript{97} the \textit{Schick} Court turned to supporting the conclusion that the narrow definition was the one borne by Article III's jury requirement by analyzing one piece of evidence—a bit of redrafting that occurred when the Constitutional Convention considered the Committee of Detail's proposed draft of Article III.\textsuperscript{98} The Court's discussion of the Convention's action, in its entirety, is:

In the light of [Blackstone's] definition we can appreciate the action of the convention which framed the Constitution. In the draft of that instrument, as reported by the committee of five, the language was "the trial of all criminal offenses . . . shall be by jury," but by unanimous vote it was amended so as to read "the trial of all crimes." The significance of this change cannot be misunderstood. If the language had remained "criminal offenses," it might have been contended that it meant all offenses of a criminal nature, petty as well as serious; but when the change was made from "criminal offenses" to "crimes," and made in the light of the popular understanding of the meaning of the word "crimes," as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses.\textsuperscript{99}

With these words, the petty offense exception to Article III's jury trial mandate became a permanent feature of constitutional law. Although \textit{Callan} and \textit{Schick} left it to future cases to define the scope of the petty offense exception to

\textsuperscript{97} \textit{Id.} (describing Blackstone's \textit{Commentaries}).

\textsuperscript{98} \textit{Id.} at 70 (referring to the "Committee of Detail" by its alternate name, "the committee of five").

\textsuperscript{99} \textit{Id.} The \textit{Schick} Court provided no citation for its description of Article III, § 2's drafting process. Since the material appears in \textit{Callan v. Wilson}, 127 U.S. 540, 550 (1888), with a citation to "1 Elliott's [sic] Deb., 2d ed., 229," and "Id. [at] 270," I presume \textit{Elliott's Debates} was the source from which the \textit{Schick} Court drew its information. (Note: I am quoting from the U.S. Reports. Westlaw incorrectly transcribes the pages cited by the \textit{Callan} Court as "262" and "300.")

The Committee of Five is better known as the Committee of Detail. William Ewald, \textit{The Committee of Detail}, 28 CONST. COMMENT. 197, 202 (2012). It was the Committee that turned the twenty-four resolutions adopted by the Convention into a first draft of the Constitution. \textit{Id.} at 203, 216. I critique the \textit{Schick} Court's use of the material from \textit{Elliott's Debates}. \textit{See infra} text accompanying notes 164–91.

It should be noted that although the \textit{Callan} Court quotes the material in \textit{Elliott's Debates}, it uses the material for an entirely different point and does not make the argument the \textit{Schick} Court does. The \textit{Callan} Court quoted the material in the course of deciding that Article III's jury trial mandate applied to Washington, D.C. \textit{Callan}, 127 U.S. at 549–50.
Article III’s jury trial mandate,\textsuperscript{100} no subsequent Court has questioned its existence.\textsuperscript{101}

Nonetheless, if \textit{Callan} and \textit{Schick} established the petty offense exception, they did so through analyses that every approach to constitutional interpretation must pronounce “unsatisfactory.” In both cases, the discussion starts off perfectly well. \textit{Callan}’s implicit reference to the common law, and \textit{Schick}’s quotation from Blackstone, deftly establish that at the Founding the word “crime” had a broad and narrow meaning.\textsuperscript{102} Especially given the popularity and authoritativeness of Blackstone’s \textit{Commentaries}, the quotation set out in \textit{Schick} is sufficient for this purpose and all that was necessary to open up the possibility that when used in Article III, the word “crimes” carried its narrow meaning and limited the right of jury trial to prosecutions for serious crimes.\textsuperscript{103}

Having properly opened up the possibility that the word “crimes” in Article III meant only “offenses . . . of a deeper and more atrocious dye,”\textsuperscript{104} the problem with \textit{Callan}’s assertions and \textit{Schick}’s analysis is how the Court attempted to establish that the narrow meaning of the word “crimes” was the Constitution’s meaning. Subsequent sections of this Article will critique \textit{Callan}’s understanding of the common law\textsuperscript{105} and \textit{Schick}’s analysis of the Convention’s redrafting of Article III, § 2.\textsuperscript{106} More generally, however, the opinions’ shortcomings stem from the wealth of evidence the Court did not consider. The evidence not considered includes the rest of the text of the Constitution; discussions of jury trial during the ratification campaign; the right to jury trial as discussed in other passages in Blackstone’s \textit{Commentaries} and in other authoritative and well-known Founding-era texts; and English, colonial, and Founding-era criminal trial practices.\textsuperscript{107}

It is to a consideration of this neglected evidence, as well as to a proper analysis of the evidence the \textit{Callan} and \textit{Schick} Courts did

\begin{footnotes}
\item[100.] See \textit{infra} text accompanying notes 296, 300 (discussing scope of petty offense exception).
\item[101.] Since the \textit{Schick} decision, only Justices Butler, McReynolds and Black have voiced objection to the petty offense exception. See \textit{infra} text accompanying notes 144–45, 355–58 (discussing their dissents).
\item[102.] See \textit{Schick}, 195 U.S. at 69–70 (quoting 4 BLACKSTONE, supra note 96, at 5); \textit{Callan}, 127 U.S. at 549.
\item[103.] See \textit{Schick}, 195 U.S. at 70.
\item[104.] \textit{Id.} at 69–70 (quoting 4 BLACKSTONE, supra note 96, at 5).
\item[105.] See \textit{infra} text accompanying notes 294–98.
\item[106.] See \textit{infra} text accompanying notes 164–91.
\item[107.] See \textit{Callan}, 127 U.S. at 550–55 (not drawing from these sources).
\end{footnotes}
consider, that I now turn. The discussion assumes that in the Founding era anyone writing or reading the proposed Constitution and Bill of Rights would know that the word "crimes" had a dual signification and, therefore, was inherently ambiguous. The issue to be explored is: By the interpretive norms of modern textualism, does the word "Crimes" in Article III, § 2's peremptory command that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury" encompass all crimes or only all serious crimes?

B. A Textualist Critique of the Petty Offense Exception from Evidence Within the "Four Corners" of the Constitution of 1789 and the Bill of Rights

In agreement with modern language philosophy, modern textualists believe that "words have no natural meanings" and "that language is intelligible only by virtue of a community's shared conventions for understanding words in context." Grounded in these assumptions, in documentary interpretation modern textualists seek the text's "semantic meaning" understood as "how 'a skilled, objectively-reasonable user of words' would have understood the [document's] text in context." Context may be sought in many places: standard and specialized dictionaries, technical and colloquial usage, canons of

108. See, e.g., In re Erickson, 815 F.2d 1090, 1092–93 (7th Cir. 1987) (citing scholarship on Wittgenstein for the proposition that a word's meaning depends on "how it will be interpreted by the audience to whom the word is addressed"), Manning, supra note 16, at 79 n.29 (citing Wittgenstein and Judge Easterbrook discussing Wittgenstein and Hans-Georg Gadamer).


110. Manning, supra note 16, at 79; see also, e.g., Deal v. United States, 508 U.S. 129, 132 (1993) (Scalia, J.) ("[I]t is a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.").

111. See, e.g., Manning, supra note 16, at 77, 87 (noting that textualists interpret a text according to its "semantic detail" rather than the lawmakers' policy preferences). Manning says that the lawmakers' policy preferences may be considered in the process of clarifying the meaning of an ambiguous text, but not to depart from a text with clear semantic import. Id. at 75–76.

112. Id. (quoting Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 HARV. J.L. & PUB. POL'y 59, 65 (1988)) ("Textualists give precedence to semantic context—evidence that goes to the way a reasonable person would use language under the circumstances.").

113. Id. at 92; Samuel A. Thumma & Jeffrey L. Kirchmeier, The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries, 47 BUFF. L. REV. 227, 262–63, 279 (1999) (discussing the Court's increased use of dictionaries, including specialized dictionaries, as the Court became more textualist).

114. Manning, supra note 16, at 89.
construction and rules of clear statement, even intuitions about the lawmakers' policy preferences. In determining the meaning of a text, modern textualists spread a wider net and apply their methodology with greater flexibility and nuance than their textualist predecessors in the late nineteenth and early twentieth centuries. Modern textualists criticize their predecessors for too often confining the search for a document's "plain meaning" to the document's "four corners" and speaking as if clear statutes required no interpretation at all. Nonetheless, in interpreting a document, modern textualists still believe the document itself, considered as a whole, is among the premier places in which to search for semantic clues to the meaning of a word, phrase, or clause within it. And if construing the document clarifies any ambiguity that initially may have existed, textualists say the search for meaning should not go any further.

Accordingly, a textualist interpretation, and perhaps any interpretation, of Article III, § 2's command that "[t]he Trial of all Crimes... shall be by Jury" should begin with a consideration of the five additional occasions in which the Constitution of 1789 and the Bill of Rights employ the word "crime." If the other appearances of the word "crime" fairly resolve whether the word "Crimes" in Article III's jury trial mandate has a broad or narrow meaning, a textualist investigation should end there.

One of the additional appearances of the word "crime" in the Constitution occurs in Article III's venue clause, which immediately follows the jury trial mandate. Article III's jury trial mandate and

115. Id. at 82, 92.
116. Id. at 82.
117. Id. at 79.
118. See id. at 79, 82–83 (internal quotation marks removed); see also Manning, supra note 2, at 1708.
119. Manning, supra note 2, at 1708 n.161.
121. See infra text accompanying note 152 (quoting Justice Thomas).
122. U.S. CONST. art. II, § 4; U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. art. IV, § 2, cl. 2; U.S. CONST. amend. V; U.S. CONST. amend. VI.
123. See infra text accompanying note 151–52.
the venue requirement are neighboring provisions; they take up all of Article III, § 2's third clause. Most significantly, the jury trial mandate and the venue provision comprise one continuous thought. Set out in its entirety, Article III, § 2, cl. 3 says:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Later in this analysis, I will show that reading Article III's jury trial requirement in tandem with the neighboring venue clause refutes the Schick Court's use of the Convention's drafting process to claim the Framers intended the word "crime" in the jury trial mandate to exclude minor and trivial offenses. At this point, setting the jury trial mandate in its immediate context—as part of a larger thought about criminal trial procedure—the goal of the analysis is to show the impossibility of reading the word "crime" in the jury trial mandate clause in its narrow sense (at least by textualist norms).

Common experience and textualist presumption concur that when a word appears multiple times in the same sentence it generally bears the same meaning in all its appearances. In Article III, there is no textual evidence that the word "crime" changes its meaning as it moves from the jury mandate clause to the venue clause. Indeed, the textual evidence is quite the opposite. This is because the venue clause does not just use the word "Crimes," it employs the phrase "said Crimes," which explicitly adopts by reference whatever meaning the word "Crimes" had in the jury mandate provision.

Thus, the grammar of Article III, § 2, cl. 3 requires that the word "crime" have an identical meaning in each of its appearances. Yet if the word "crime" in the venue clause excludes petty offenses, the following would result: The federal government, when prosecuting defendants for serious offenses, would have to try them in the states where the crimes occurred.

124. U.S. CONST. art III, § 2, cl. 3.
125. See infra text accompanying notes 175–93.
126. Siegel, supra note 120, at 343 (citing, inter alia, Brown v. Gardner, 513 U.S. 115, 118 (1994)). Professor Siegel cautions against turning the presumption into an invariable rule. Id. at 341. I would, too. I simply treat it as a strong presumption that requires persuasive reasons to bar its application, especially when the repetition is in the same sentence.
but when prosecuting defendants for petty offenses the federal government could locate the trials anywhere it chose, no matter how distant.

Avoiding absurdity is a standard textualist technique for choosing between alternate interpretations of a word. The absurdity that follows from giving the word “crime” a narrow meaning in the venue clause is so glaring that it should settle that the word “crime” in the venue clause carries the broad, all-encompassing meaning. Since every appearance of the word “crime” in the sentence normally would bear the same meaning, the word “crime” in the jury trial provision should also carry the broad meaning. By this textualist analysis, the word “Crimes” in Article III’s jury mandate clause must be said to encompass all “Crimes,” whether major or minor.

A consideration of the four remaining constitutional provisions that employ the word “crime” provides additional textual evidence that the word carries the broad meaning in all its appearances in Article III. In two of the clauses, the word “crime” is expressly modified to indicate that not all violations of the law were meant to be covered. This is evidence that when the Framers intended to restrict the scope of the word “crime,” they indicated it through textual modification.


129. For an additional argument drawn from the text of Article III, § 2 itself, see infra note 149, which discusses the express exclusion of impeachment trials.


In the two other clauses, the word “crime” is unmodified and in both those clauses it bears its broad, all-encompassing meaning. One of those provisions, Article IV’s Extradition Clause, requires extradition “on Demand” of any “Person charged... with Treason, Felony or other Crime.” The Supreme Court has always said that the word “crime” in the Extradition Clause applies to every violation of the law. The initial decision construing the word “crime” broadly in the Extradition Clause dates from 1860 and that interpretation was settled law when the Court first turned to define the word “crime” in Article III’s second section.

The other occurrence of the unmodified word “crime” is in the Sixth Amendment. The Sixth Amendment, which supplements Article III’s right to jury trial by protecting eight distinct trial-related rights, says:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

In the Sixth Amendment, the words “criminal prosecutions” and “crime” clearly are the adjectival and noun forms of the same word. Both forms of the word should have the same scope,
whether it be broad or narrow. The Supreme Court has consistently adopted the broad meaning for these words and has held that the petty offense exception has no application to the rights contained in the Sixth Amendment.\textsuperscript{138}

In other words, the only trial-related right for which the Supreme Court has said there is a petty offense exception is the right to a jury trial itself provided by Article III.\textsuperscript{139} Although the word “crime” appears four times in the Constitution of 1789 and Bill of Rights outside of Article III, § 2 and twice within it, the jury trial mandate is the only clause in which the word “crime” is said to bear a narrow meaning.\textsuperscript{140}

A final intratextual point: Although the Seventh Amendment regulates civil rather than criminal trials, it is informative to compare the scope of the Seventh Amendment’s civil jury requirement with the scope of Article III’s criminal jury provision. The Seventh Amendment mandates jury trial in common law suits “where the value in question shall exceed...

\textsuperscript{138}  Timothy Lynch, \textit{Rethinking the Petty Offense Doctrine}, 4 KAN. J.L. & PUB. POL'Y  7, 11–12 (1994). The vicinage provision might be said to be an exception to this remark, but only because there is no Supreme Court decision on the subject. Although there is no case law on whether the petty offense exception applies to the vicinage provision, it is difficult to imagine that it does for the same reason discussed with regard to Article III’s venue provision. See id. at 13; supra text accompanying notes 126–28. If the petty offense exception did apply, then the federal government would have to empanel a jury from the “district where the crime was committed” when prosecuting serious crimes but would not have to for petty offense prosecutions. Lynch, supra, at 12. This is a rather counterintuitive result.

The definitions of venue and vicinage frequently are confused. See William Wirt Blume, \textit{The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue}, 43 Mich. L. Rev. 59, 60 (1944) (“Venue... means the place of trial. Vicinage means, not the place of trial, but the place from which the jury must be summoned.”).

\textsuperscript{139}  Although it is incorrect, it is customary today to speak of the jury trial right as being grounded in the Sixth Amendment. See Albright v. Oliver, 510 U.S. 266, 273 (1994) (saying the “Sixth Amendment right to jury trial” was extended to the states in Duncan v. Louisiana, 391 U.S. 145 (1968)); Singer v. United States, 380 U.S. 24, 25 (1965) (speaking of a “constitutional right, guaranteed by Art. III, § 2, and the Sixth Amendment, to a trial by jury”); WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 22.1, at 1069 (5th ed. 2009) (discussing the Sixth Amendment right to jury trial); Sanjay Chhablani, \textit{Disentangling the Sixth Amendment}, 11 U. Pa. J. Const. L. 487, 505–06, 511–12 (2009) (same); Grant, supra note 84, at 147 (same); Matthew Ford, Comment, \textit{Criminal Forfeiture and the Sixth Amendment’s Right to Jury Trial Post-Booker}, 101 Nw. U. L. Rev. 1371, 1377 (2007) (same). Article III imposes the jury trial requirement. The Sixth Amendment’s draftsmanship reflects the belief that it is only detailing the content of the jury trial right provided for in Article III. See, e.g., Callan v. Wilson, 127 U.S. 540, 549–50 (1888) (noting that the Sixth Amendment details, and neither expands nor contracts, Article III’s jury trial requirement).

\textsuperscript{140}  See U.S. Const. art. II, § 4; U.S. Const. art. III, § 2, cl. 3; U.S. Const. art. IV, § 2, cl. 2; U.S. Const. amend. V; U.S. Const. amend. VI.
twenty dollars."\textsuperscript{141} Even in 1791, twenty dollars was a relatively minor amount.\textsuperscript{142} Yet the Seventh Amendment’s twenty-dollar requirement has always been enforced as written.\textsuperscript{143} The paucity of the amount at which the civil jury right attaches convinced Justices Butler and McReynolds to dissent from the first Supreme Court case that actually upheld a summary proceeding under the petty offense exception.\textsuperscript{144} Given that the defendant was sentenced to 90 days in jail and a $300 fine, Justices Butler and McReynolds said:

In a suit at common law to recover above $20.00, a jury trial is assured. And to us, it seems improbable that while providing for this protection in such a trifling matter the framers of the Constitution intended that it might be denied where imprisonment for a considerable time or liability for fifteen times $20.00 confronts the accused.\textsuperscript{145}

Read in isolation, the word “Crimes” in Article III, § 2’s jury trial mandate is ambiguous. From reading Blackstone, or from common knowledge of the common law, “a reasonable user of language,”\textsuperscript{146} at the Founding or today, would know “crime” had a broad meaning encompassing “every offense, from the highest to the lowest”\textsuperscript{147} or a narrow meaning embracing only a class of offenses “of a deeper and more atrocious dye.”\textsuperscript{148}

\begin{thebibliography}{99}
\bibitem{141} U.S. CONST. amend. VII.
\bibitem{144} District of Columbia v. Clawans, 300 U.S. 617, 663–34 (1937) (Butler & McReynolds, JJ., dissenting). Justices Butler and McReynolds concurred in the part of the judgment overturning the conviction based on denial of the right of cross-examination. Before Clawans, the Supreme Court had either said there was a petty offense exception but found that the charge at bar was serious or upheld the defendant’s conviction after he had waived jury trial of an offense that was petty. See, e.g., Callan, 195 U.S. at 555 (holding that Callan was not charged with a petty crime). Clawans was the first conviction upheld for a petty offense where Congress mandated a bench trial.
\bibitem{145} Clawans, 300 U.S. at 633–34 (Butler & McReynolds, JJ., dissenting).
\bibitem{146} Manning, supra note 16, at 81.
\bibitem{148} 4 BLACKSTONE, supra note 96, at 5.
\end{thebibliography}
However, reading § 2's jury trial provision in context, whether that context be the remainder of § 2's third clause, or the rest of the Constitution of 1789 and Bill of Rights, resolves the ambiguity. Every other time the document refers to "crime" it either asserts the broad meaning or expressly modifies the words to mean something narrower. Reading Article III, § 2's third clause as a whole, and reading the Constitution of 1789 and Bill of Rights as a whole, suggests to a "reasonable user of language" that when the Constitution says that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," it unambiguously means all criminal infractions, of whatever grade, high or low.

For textualists, the investigation should conclude with the determination that the word "Crimes" in Article III's jury trial mandate clause unambiguously carries its broad meaning when read in its documentary setting. It is true that modern textualists regularly consult evidence outside a document's "four corners" and, on appropriate occasions, even consider the purposes legislation may have been adopted to promote. But textualists do so only when an initially ambiguous text remains ambiguous after it is construed as discrete text within a larger whole. As Justice Thomas has written, in discussing statutory interpretation:

149. The word "Crimes" in Article III's jury trial mandate is modified by the express exclusion of impeachment trials. See supra text accompanying note 14 (quoting U.S. Const. art. III, § 2). This reinforces the conclusion that the word "Crimes" includes all violations of law. Article III, § 2's express exclusion of impeachment trials brings the maxim expressio unius est exclusio alterius into play. According to this maxim, because the word "Crimes" in Article III's jury trial mandate is expressly modified to exclude impeachment trials it necessarily includes all other trials. I do not emphasize this argument because textualists regard the probative force of the expressio unius canon as weak. See Manning, supra note 2, at 1724. Still, the expressio unius canon does have some "resolving significance." Id. at 1724–25 (using the expressio unius canon); Manning, supra note 16, at 93 (same).


151. In Deal v. United States, 508 U.S. 129 (1993), Justice Scalia dealt with a situation, albeit in a statute, similar to the interpretive problem raised by Article III's jury provision. The statute used a word that was "facially ambiguous" because it had multiple meanings. Deal, 508 U.S. at 131. Scalia agreed that the word was ambiguous when read in "isolation," but held that "all but one of the meanings ... [was] eliminated" when the word was read in the context of the remainder of the statute. Id. at 131–33.

Justice Thomas recently quoted Deal approvingly when he faced a similar problem interpreting the inherently ambiguous word "now." "[T]he susceptibility of the word 'now' to alternative meanings does not render the word ... whenever it is used, ambiguous," he said, and "[h]ere, the statutory context makes clear that 'now' does not mean 'now or hereafter' or 'at the time of application.'" Carcieri v. Salazar, 555 U.S. 379, 391 (2009) (quoting Deal, 508 U.S. at 131–33).
In interpreting a statute a court should always turn first to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." Nonetheless, in the next section, I proceed to consider what a modern textualist would conclude if it were appropriate to consider evidence outside the Constitution's text.

C. A Textualist Critique of the Petty Offense Exception from Evidence Dehors the Constitution's Text

Given that the Constitution, when read as a whole, clarifies the ambiguity that arises when Article III's jury trial mandate is read in isolation, a textualist should not consider any evidence from beyond the "four corners" of the document. Nonetheless, when construed through a textualist metric, the extratextual evidence also supports concluding that the word "Crimes" carries a broad meaning encompassing all criminal prosecutions.

When the Supreme Court ruled that Article III's jury trial mandate used the word "Crimes" in its narrow sense it did look at evidence from outside the Constitution's text. In Callan v. Wilson, the Court considered common law trial practices; in Schick v. United States, the Court reviewed the drafting process that shaped the provision at the Constitutional Convention. Unfortunately, the Court drew the wrong conclusion from its foray into the extratextual evidence.

As the following sections show, the Court considered only a small part the extratextual evidence available for scrutiny, and in any event, it misconstrued the evidence it did study. The discussion of all the extratextual evidence is best organized into separate considerations of evidence from the Constitutional Convention; the ratification campaign; a

154. See supra text accompanying notes 88-90.
156. See supra text accompanying notes 98-99.
complete reading of Blackstone's *Commentaries*; and trial practices contemporaneous with the Constitution's adoption.

1. **The Constitutional Convention.** The Convention spent only part of one day on Article III's jury trial provision. As reported in *Elliot's Debates*, the source from which the Supreme Court drew when it considered the drafting process in *Schick v. United States*, the Committee of Detail proposed a jury trial mandate clause that said "the trial of all criminal offences . . . shall be by jury," and the Convention amended it to read "[t]he trial of all crimes . . . shall be by jury."

According to the *Schick* Court, the "obvious" and unmistakable "intent" of the "change . . . from 'criminal offenses' to 'crimes'" was "to exclude from the constitutional requirement of a jury the trial of petty criminal offenses." Despite the certitude with which the Court expressed itself, the events at the Convention do not support the inference the Court drew. In addition, a textualist should not consider this event for a reason beyond the fact that Article III, § 2's jury trial mandate is unambiguous when the Constitution is read as a whole.

a. **A Textualist Should Not Consider the Convention's Redrafting of the Committee of Detail's Proposed Text.** *Elliot's Debates* is one of a number of sources that, by covering the Convention's daily meetings, discloses vital parts of the Constitution's legislative history. Modern textualism has no general bar against studying the Constitutional Convention for the light it may shed on constitutional meaning. Although modern textualists strenuously oppose the use of legislative history in statutory construction, their

157. See 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 270–72 (2d ed. 1836) (showing that the jury provision was one of several matters dealt with on August 28, 1787).

158. Id. at 229, 270.

159. *Schick*, 195 U.S. at 70. Although the *Schick* Court provided no citation for its description of Article III, § 2's drafting process, I explain, supra note 99, why I trace it to Elliot's Debates.

160. 1 ELLIOT, supra note 157, at 229; see supra text accompanying note 99 (quoting *Schick*, 195 U.S. at 70).

161. 1 ELLIOT, supra note 157, at 270; see supra text accompanying note 99 (quoting *Schick*, 195 U.S. at 70).

162. *Schick*, 195 U.S. at 70.

163. See infra text accompanying notes 164–91.

opposition to considering the Constitution’s legislative history is less complete.\(^{165}\) There is, they say, a limited purpose for which it is permissible to explore the Convention’s “secret deliberations.”\(^{116}\) On the one hand, it is not proper to discuss the Constitution’s drafting process for what it shows about the draftsmen’s subjective intent; on the other hand, it is proper to mine that data for evidence concerning how a provision might be read by the ratifying public.\(^{167}\) The Constitution’s drafting process, textualists say, is one of many windows into “the way informed eighteenth-century Americans understood and used the language of the Constitution”\(^{168}\) and on occasion it provides “presumptive evidence of the general understanding at the time of the language used.”\(^{169}\)

Thus the reason a textualist should not consider the Convention’s redrafting of the Committee of Detail’s proposed jury trial requirement in Article III is that this particular change, if it reveals anything,\(^{170}\) only reveals what the Convention might have thought about the meaning of the two different clauses. The redrafting provided no useful information to the ratifying public about the meaning of the word “Crimes” in Article III, §2 because the public had not seen the Committee of Detail’s original draft. Unaware of the change, all the ratifying public saw was a provision with the word “crimes,” a word that is inherently ambiguous.\(^{171}\) If the Convention’s redrafting changed words that clearly indicated all violations of the law (“criminal offenses”) to words that

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167. Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution’s Secret Drafting History, 91 GEO. L.J. 1113, 1186–89 (2003) (approving the use of the Convention’s discussion on a variety of grounds); Manning, supra note 166, at 144 (accepting the use of the Convention’s discussion when it sheds “light” on “the way in which members of the founding generation understood particular legal terms or concepts used in the Constitution”); John F. Manning, Textualism and the Equity of the Statute, 101 COLUM. L. REV. 1, 60 n.237 (2001) (same).


169. Id. (quoting James Madison).

170. See infra text accompanying notes 179–91 (discussing what the redrafting shows).

171. Lynch, supra note 138, at 12 (presenting the same argument).
might indicate only serious infractions ("crimes"), it is a change the ratifying public would not have known about and, therefore, could not have considered in determining the meaning of Article III, § 2. This is an instance in which the Constitution’s "secret legislative history" does not shed light on the document’s original public meaning. For that reason, this particular event at the Convention is not evidence a textualist should consider.

b. The Inference the Supreme Court Drew From the Convention’s Redrafting of the Committee of Detail’s Proposed Text is Wrong on the Merits. Even if it were appropriate for textualists to consider the Convention’s rewrite of the Committee of Detail’s proposed text, the Schick Court’s argument fails because it is wrong on the merits. The Schick Court’s assertion that the Convention’s shift in word choice from “criminal offenses” to “crimes” makes the Framers’ intent “obvious” simply is not so. The shift may have been a meaningless switch from the adjectival form of the word “crime” to its noun form. Indeed, there is convincing evidence that this is what James Madison and the other Framers thought. There is also convincing evidence that members of the ratifying public, had they known of the Convention’s action, would also have understood the word shift as a grammatical rather than a substantive change.

Elliot’s Debates is a compendium of various primary sources concerning the Constitution’s drafting and ratification.

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172. Kesavan & Paulsen, supra note 167, at 1114.
173. Professor Manning discusses a similarly inappropriate use of the Constitution’s legislative history. Manning, supra note 166, at 144–45 (discussing changes made by the Committee of Style).
174. The Schick Court may well have considered their argument appropriate because their style of originalism was focused on the Framers’ intent rather than the public’s understanding or the document’s original public meaning.
175. See supra text accompanying note 99 (quoting Schick v. United States, 195 U.S. 65, 70 (1904)).
177. Under modern textualist norms, what the Framers thought is irrelevant except as evidence of what an informed reader of their time might have thought.
178. The Schick Court surely was aware of the evidence I am about to discuss concerning Madison and the other Framers because it is discussed in the Callan case. See Callan v. Wilson, 127 U.S. 540, 550 (1888) (citing 3 The Papers of James Madison 1441 (1841)). The Court may also have been aware of the evidence concerning the ratifiers because it appears in Elliot’s Debates and in The Federalist No. 83. 1 Elliot, supra note 157, at 229, 270; The Federalist No. 83, at 496 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
The part of Elliot's Debates that reveals the Convention's rewrite of the Committee of Detail's proposed jury mandate provision is a reprint of the Convention's Journal for August 28, 1787. As is typical for legislative journals, the Journal of the Constitutional Convention is a bare-bones record of motions and votes. It is entirely bereft of discussion or rationale. The Journal for August 28 records nothing more than the Convention's change in the Committee of Detail's word choice.

James Madison's Notes of Debate in the Federal Convention of 1787, a source the Schick Court did not consider, also covers the events of August 28 but provides an explanation for the Convention's action. Madison's Notes concurs with Elliot's Debates in saying that the Committee of Detail proposed a jury trial mandate providing: "The trial of all criminal offenses (except in cases of impeachment) shall be in the state where they shall be committed, and shall be by jury."

Madison's Notes and Elliot's Debates further concur that the Convention unanimously adopted an amendment that changed the proposed provision by rearranging its clauses and adding important new matter, so that it read:

The trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, then the trial shall be at such place or places as the legislature may direct.

179. 1 ELLIOT, supra note 157, at 120, 270.
180. Id. at 270.
181. Id.
182. Madison's Notes have been published in various editions. I have used the version published in 1-2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) [hereinafter RECORDS], where they are separated into coverage of each day's activities and published along with other records that relate to that day.
183. 2 RECORDS, supra note 182, at 438.
184. 1 ELLIOT, supra note 157, at 229, 270 (reprinting the Convention's Journal); 2 RECORDS, supra note 182, at 187, 438 (contrasting Madison's Notes version of the Committee's proposal, which differs from Elliot's Debates' version only in having a semicolon rather than a comma before the jury clause and some differences in capitalization).
185. 1 ELLIOT, supra note 157, at 270 (reprinting the Convention Journal); 2 RECORDS, supra note 182, at 438 (contrasting Madison's Notes version of the Amendment, which differs from Elliot's Debates' version of the amended proposal in that Farrand places a comma rather than a semicolon after the word "jury" and adds some capitalization).
But unlike Elliot’s Debates, Madison’s Notes reports a reason for the change: “The object of this amendment was to provide for trial by jury of offences committed out of any State.”

Thus, according to Madison’s Notes, in rewriting the text that became Article III, § 2’s jury trial mandate, the Convention meant to expand the right of jury trial’s geographic scope. Madison does not, in any way, suggest an intent to change the scope of the provision from one that applied to “all criminal offenses” to one that applied only to the subset of “offenses . . . of a deeper and more atrocious dye.” Most likely, Madison (and his fellow delegates) thought the change from “all criminal offenses,” which was in the Committee of Detail’s draft, to “all crimes,” which was the Convention’s preferred locution, was a meaningless change in the word’s grammatical form.

Madison’s Notes strongly support concluding that the Framers did not intend their amendment to convey the narrow definition of the word “crime” in the Constitution’s jury trial mandate. Madison’s Notes supports concluding that the Framers and other “ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time [it was] adopted” would have understood the jury mandate’s final agreed upon phrase (“all crimes”) to be synonymous with the phrase the Framers had deleted (“all criminal offenses”), especially when read in context, as part of Article III, § 2 and the rest of the Constitution.

This conclusion, well supported as it already is, will be further strengthened by the discussion in the following section of evidence from the ratification campaign that the Supreme Court also failed to consider in the Callan and Schick precedents. Among other things, the material will show that not only James Madison, but Alexander Hamilton, James Iredell, and Edmund Pendleton thought the terms “all criminal causes” and all “criminal cases” were synonymous with the
phrase “all Crimes” in Article III, § 2’s jury trial mandate.\textsuperscript{192} At the least, what has been said so far is sufficient to show that the Supreme Court certainly was wrong to assert that when the Convention changed the phrase “all criminal offenses” to “all crimes” the Convention’s “obvious... intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses.”\textsuperscript{193}

2. The Ratification Campaign. During the ratification campaign, what the new plan of government portended for the future of jury trial was among the most discussed parts of the Constitution. Jury trial was a widely praised institution in Founding-era America. As Alexander Hamilton famously observed in \textit{The Federalist No. 83}: “The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury.”\textsuperscript{194} The importance and popularity of jury trial led opponents of the Constitution to criticize relentlessly its jury trial provisions for not going far enough. According to the opponents, Article III, § 2’s jury trial mandate was defective because it was insufficiently detailed and did not extend to civil suits. Antifederalists feared the Constitution promised an empty right because Article III specified the necessity of jury trial for “all Crimes” without detailing the content of that right.\textsuperscript{195} In response to these fears, the Federalists promised, the First Congress proposed, and the states adopted the Sixth and Seventh Amendments, the former specifying a wide array of criminal-trial-related rights,\textsuperscript{196} and the latter guaranteeing a jury trial in civil suits involving more than twenty dollars.\textsuperscript{197}

In other words, although jury trial was widely discussed during the ratification process, the scope of Article III, § 2’s jury trial requirement was not a subject of controversy or extended discussion. On a few occasions, however, the scope of the criminal jury mandate was mentioned in passing as part of an argument concerning Article III, § 2’s lack of detail or the

\textsuperscript{192} \textit{See infra} text accompanying notes 199–216 (discussing Hamilton, Iredell, and Pendleton).
\textsuperscript{193} \textit{Schick}, 195 U.S. at 70.
\textsuperscript{194} \textit{The Federalist No. 83, supra note 178, at 499.}
\textsuperscript{195} \textit{Schick}, 195 U.S. at 78. Trials might not be speedy, not permit confrontation, and not allow counsel. \textit{See id.}
\textsuperscript{196} U.S. CONST. amend. VI (specifying, \textit{inter alia}, that criminal trials be speedy and public and that defendants have the right of counsel and confrontation).
\textsuperscript{197} U.S. CONST. amend. VII (also barring judicial reexamination of a jury's factual determinations).
proposed Constitution’s failure to provide for juries in civil trials. The remarks made on those occasions support the conclusion that there were no exceptions, other than impeachment, to the scope of the phrase “all Crimes.”

The most famous and widely noted ratification campaign commentary shedding light on the scope of the criminal jury guarantee is The Federalist No. 83. In that essay, Alexander Hamilton discussed the proposed Constitution’s lack of a jury trial guarantee in civil cases which, he said, had given rise to the “disingenuous” claim that by not guaranteeing civil jury trials, the proposed Constitution abolished them. At the core of his response, just after acknowledging that “if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone,” Hamilton paused to reassure his readers that “[i]n regard to criminal causes, is abridged by the express injunction of trial by jury in all such cases.

Philadelphia convention delegate, and future Supreme Court Justice, James Iredell, speaking at the North Carolina ratification convention, took a different tack in reassuring the ratifiers that the absence of a civil jury provision was not a reason to vote against ratification. Civil jury requirements differed from state to state, he said; there was no “one rule that would be pleasing to all the states.” For this reason, it was better to allow Congress discretion to decide which practices to adopt, to change them “when found injudicious,” and to allow the “favorite method” to emerge over time. “Congress,” he assured the delegates, “would [not] dare to deprive the people of this valuable privilege.”

But in making these remarks, Iredell, like Hamilton, reminded his audience that the new government’s obligation to employ juries

198. See supra note 149 (noting the express exclusion of impeachment trials); infra text accompanying notes 199–215 (discussing the commentary regarding the scope of the criminal trial guarantee).


200. THE FEDERALIST NO. 83, supra note 178, at 495.

201. Id. at 496.

202. Id. at 496–97 (describing Article III, § 2’s jury trial mandate as “[t]he specification of an obligation to try all criminal causes in a particular mode”).

203. 4 ELLIOT, supra note 157, at 145.

204. Id.

205. Id.
to try criminal cases was absolute. On that subject, all he said was: "The greatest danger from ambition is in criminal cases. But here they have no option. The trial must be by jury in the state wherein the offence is committed." To similar effect are the remarks made at Virginia's ratification convention by Edmund Pendleton, who was the Virginia convention's President as well as the President of the state's Supreme Court of Appeals. As part of a long speech reviewing all of Article III, Pendleton's opinion of § 2's jury provision was that [It] secures two important points in criminal cases—1st, that the trial shall be by jury; 2d, that it shall be in the state where the offence is committed. . . . We have this security—that our citizens shall not be carried out of state, and that no other trial can be substituted for that by jury.

In contrast to the remarks just reviewed, which suggest that at least "some of the framers apparently believed that the Constitution designated trial by jury as the exclusive method of determining guilt," there are no ratification campaign comments suggesting that Article III's jury mandate was less than all encompassing. Although silence is always difficult to interpret, Antifederalist silence on the question supports the conclusion that no exceptions were expected. Although the Founding era certainly distinguished between minor offenses and offenses of a more "atrocious dye," the boundary between them was quite vague. The Antifederalists were quite inventive in finding arguments against ratification. They are not likely to have missed the opportunity to assert that the national government might define the contours of a petty offense

206. Id.
207. 3 ELLIOT, supra note 157, at 1 (describing Pendleton as President of the Virginia Ratification Convention).
208. YALE BIOGRAPHICAL, supra note 81, at 422 (providing a biographical entry on Edmund Pendleton).
209. 3 ELLIOT, supra note 157, at 517-21 (noting at the end of these four pages that Pendleton "made many other remarks" which were too indistinct to be recorded).
210. Id. at 520-21.
211. Singer v. United States, 380 U.S. 24, 31 (1964) (discussing Hamilton's, Iredell's, and Pendleton's comments as part of a consideration of whether a defendant has a constitutional right to insist on a bench trial). The Supreme Court's comment here includes petty crimes because the Court later begins its discussion of the Schick case by saying "however." Id. at 32.
212. Lynch, supra note 138, at 12.
213. See supra text accompanying note 96 (quoting Blackstone).
214. See infra text accompanying notes 245-309.
215. See, e.g., supra text accompanying notes 199-206 (fearing that civil juries would be abolished); infra note 216 (fearing that the Pope could become President).
exception so generously that it improperly enlarged its power to subject citizens to summary criminal trials.\footnote{216} The Antifederalists' failure to raise the possibility of an abusively defined petty offense exception suggests they did not read Article III, §2 to allow any such exception at all.

3. A Complete Reading of Blackstone's Commentaries. The Schick Court was quite right to rely on Blackstone's Commentaries to establish that at the Founding the word "crime" had two possible meanings, one broadly encompassing all criminal offenses and another consisting of a narrower set of only the more serious violations of law. As the Court noted, the Founding generation "accepted" Blackstone's Commentaries "as the most satisfactory exposition of the common law" and purchased so many copies "that undoubtedly the framers of the Constitution were familiar with it."\footnote{217} Most everything Blackstone said in his Commentaries was part of the Framers' and ratifiers' store of knowledge and appropriate to consider in recovering how the Founding-era public would understand the Constitution. A fuller familiarity with Blackstone is quite problematic for a textualist claim that Article III's jury trial mandate countenances a petty crime exception.

With its more complete knowledge of the Commentaries, the Founding generation would know not just the page where the broad and narrow definition of the word "crime" appears,\footnote{218} but also Blackstone's extended discussions extensively praising civil and criminal jury trial while bitterly criticizing all instances in which eighteenth-century English law mandated bench trials.\footnote{219}

Reading the Commentaries' complete treatment of jury trial and its alternatives would show the Constitution's Framers and ratifiers that Blackstone, like the Founders, admired jury trial, praising it as "the glory of the English

\footnote{216} Consider that the Antifederalists not only worried that the details of jury trial would be filled in abusively, see Siegel, supra note 14, at 383 & n.46, or that jury trial in civil suits might be prohibited, see supra text accompanying notes 199–206, but that, without a religious test, the Pope might be elected President. \textit{See, e.g.}, 4 ELLIOT, supra note 157, at 193–96 (remarks of Iredell, discussing the Constitution's ban of religious tests and mentioning the arguments of an antiratification pamphlet).

\footnote{217} Schick v. United States, 195 U.S. 65, 69 (1904).

\footnote{218} My claim relies on a sufficient number of politically-active Framers or ratifiers having read all of Blackstone's discussion of jury trial, not having read all of Blackstone's Commentaries.

\footnote{219} \textit{See} 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379 (1768) (discussing civil jury and alternatives); 4 BLACKSTONE, supra note 96, at 343–44 (discussing criminal jury and alternatives).
and "the grand bulwark of [every Englishman's] liberties." In addition, a full reading of the Commentaries would show the Founding generation that as important as jury trial was in civil suits, in Blackstone's view, it was even more important in criminal prosecutions "since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property."

Finally, a complete reading of the Commentaries would show the Framers and ratifiers that English criminal procedure included a longstanding and growing incidence of summary proceedings that Blackstone "deplored" and advised against continuing. Blackstone knew of summary proceedings and put his prestige against them.

In the fourth book of the Commentaries, Blackstone dealt at length with English summary proceedings in a chapter entitled "Of Summary Convictions" and briefly in another chapter, "Of Trial, and Conviction." These chapters were a counterpoint to his discussion of the criminal jury trial. In these pages, Blackstone acknowledges that summary proceedings may have been introduced with the best of intentions as an "institution designed professedly for the greater ease of the subject, by doing him speedy justice, and by not harassing [sic] the freeholders with frequent and troublesome attendances to try every minute offence." Yet despite

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220. 3 BLACKSTONE, supra note 219, at 279 (calling jury trial "the most transcendent privilege which any subject can enjoy"). These comments were made in reference to the civil jury, but Blackstone incorporates them by reference in his discussion of the criminal jury and says jury trial is even more important in criminal proceedings. 4 BLACKSTONE, supra note 96, at 343.

221. 4 BLACKSTONE, supra note 96, at 343 (calling the criminal jury a "strong... barrier... between the liberties of the people, and the prerogative of the Crown").

222. Id.


224. Criticism of English law from Blackstone was very unusual and, if only for that reason, would stand out and be taken seriously. Id. (referring to Blackstone as the "high priest of the obsolete [English] common law"); see Albert W. Alschuler, Rediscovering Blackstone, 145 U. PA. L. REV. 1, 18 n.102 (1996) (commenting that the "criticism" of Blackstone for excessively praising the common law "is largely justified").

225. 4 BLACKSTONE, supra note 96, at 277–85.

226. Id. at 336, 342–57.

227. Id. at 277–78. Depending on whether the word "professedly" means "explicitly" or "pretextually," Blackstone's remark may be simply descriptive or uncharacteristically sarcastic.
good intentions, Blackstone decried the intrusion of nonjury trials, usually conducted by revenue officers or Justices of the Peace, as an "arbitrary method[] of trial"\textsuperscript{228} premised on "acts of parliament,"\textsuperscript{229} in which the "accused is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge."\textsuperscript{220} Summary proceedings, Blackstone said, were "stranger[s]" to the common law,\textsuperscript{231} and after describing their "mischievous effects,"\textsuperscript{232} he observed: "[F]rom these ill consequences we may collect the prudent foresight of our antient [sic] lawgivers, who suffered neither the property nor the punishment of the subject to be determined by the opinion of any one or two men."

Finally, Blackstone concluded his general discussion of the criminal jury trial by referencing summary proceedings in a \textit{cri de coeur} that the Founding generation certainly knew and may well have taken to heart:

[The liberties of England cannot but subsist, so long as this palladium [jury trial] remains sacred and inviolate, not only from open attacks (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial [summary proceedings], by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads

\textsuperscript{228} \textit{Id.} at 278, 343–44 (referring to summary proceedings as an "arbitrary jurisdiction"); Frankfurter & Corcoran, \textit{supra} note 223, at 933 (saying Blackstone "deplored the growth of [summary] practice").

\textsuperscript{229} 4 BLACKSTONE, \textit{supra} note 96, at 277.

\textsuperscript{230} \textit{Id.}

\textsuperscript{231} \textit{Id.} Blackstone divided summary proceedings into three heads: prosecutions for violation of the revenue laws brought before revenue officers; prosecutions for a great variety of offenses brought before Justices of the Peace (JPs); and contempt of court proceedings brought before the common law judges on their own motion. \textit{Id.} at 278–79, 284. Contempt of court proceedings were based on the common law. \textit{Id.} at 277. Nonetheless, Blackstone includes summary contempt of court proceedings in his general condemnation of juryless trial processes. \textit{Id.} at 284–85.

\textsuperscript{232} \textit{Id.} at 278.

\textsuperscript{233} \textit{Id.} at 279. Blackstone continues: "[W]e may also observe the necessity of not deviating any farther from our antient [sic] constitution, by ordaining new penalties to be inflicted upon summary convictions." \textit{Id.} at 344 (raising concerns about the rise of trials by magistrates and the disuse of juries).
upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern. 234

Thus, Blackstone was familiar with the fact that Parliament had empowered Justices of the Peace, acting without juries, to try a "vast variety" of criminal offenses. 235 He "deplored the growth of this practice" and warned his readers that "if a check be not timely given" it would "threaten the disuse of our admirable and truly English trial by jury." 236

If, as the Schick Court said, the Founding generation "accepted" Blackstone's Commentaries "as the most satisfactory exposition of the common law of England" and purchased so many copies "that undoubtedly the framers of the Constitution were familiar with it," Blackstone's remarks on summary proceedings in England certainly give additional force to the argument that Antifederalists would have objected strenuously had they any expectation the proposed Constitution allowed Congress power to legislate as Parliament had. 237 As I noted earlier, even if the new national government were hemmed in by a constitutional requirement mandating jury trial for serious offenses, if the Antifederalists thought Article III's jury trial mandate permitted a vaguely defined and possibly expandable exception for minor crimes, they would have added that charge to their long list of complaints about the proposed Constitution's putative guarantee of jury trial. 238

Moreover, Blackstone's cri de coeur over the harms posed by summary proceedings and Parliament's increasingly frequent resort to them would have been well known. Even if summary proceedings were "convenient" for adjudicating the most minor infractions, the history of English trial practice, as recounted by Blackstone, showed the tendency of a national legislature to "increase and spread" it improperly from "trifles" to "questions of

234. Id. at 343–44.
235. Id. at 278.
236. What they were will be discussed. See infra notes 244–91 and accompanying text (discussing the variety of criminal offenses justices were empowered to decide summarily).
237. Frankfurter & Corcoran, supra note 223, at 933.
238. 4 BLACKSTONE, supra note 96, at 278.
240. See supra text accompanying notes 194–216.
241. See supra text accompanying notes 213–16.
242. 4 BLACKSTONE, supra note 96, at 344 (emphasis omitted).
the most momentous concern.\textsuperscript{243} Blackstone's concerns provide some understanding for why the Founding generation might have wanted to entirely prohibit the new, fairly remote, and untested national government from instituting summary trials. With Blackstone's concerns in mind, the Founding generation might well have written and read Article III, § 2's criminal jury mandate to be the absolute ban it literally purports to be.

4. English, Colonial, and Founding-Era Criminal Trial Practices. If Blackstone's disparaging and concerned comments on English summary proceedings lend support to the conclusion that the Constitution may have been meant by the Framers, and read by the ratifying public, to preclude all nonjury-criminal trials, the Commentaries also provide an entry point for developing the one body of evidence that might support the Supreme Court's claim that Article III's jury trial provision has a petty crime exception. That body of evidence involves a study of criminal trial practices in England, the colonies, and Founding-era America.\textsuperscript{244}

As stated in the previous section, Blackstone's Commentaries show that summary criminal trials were a longstanding and increasingly frequent facet of English criminal jurisprudence, albeit imposed by statute rather than common law.\textsuperscript{245} Although Blackstone's discussion surely would have been sufficient to make the Founders aware that in the mother country a plethora of criminal offenses were subject to juryless trials, there were plenty of other texts, such as Richard Burn's popular practice manual for Justices of the Peace,\textsuperscript{246} or the many printed editions of English statutes,\textsuperscript{247} in which they would have

\textsuperscript{243} Id.

\textsuperscript{244} The Supreme Court may have had this body of evidence in mind when it asserted, in \textit{Callan v. Wilson}, that the common law supported reading a petty crime exception into Article III's jury provision. \textit{Callan v. Wilson}, 127 U.S. 540, 549-50 (1888) (making the assertion without any specific supporting citation).

\textsuperscript{245} See supra text accompanying notes 222-38.

\textsuperscript{246} See, e.g., 4 \textsc{Blackstone}, supra note 96, at 278 (citing to Burn and [William] Lambard, the author of \textit{Eirenarcha: Or of the Office of Justice of the Peace}); Frankfurter & Corcoran, supra note 223, at 928-34 (discussing material on summary proceedings in \textsc{Matthew Bacon, A New Abridgment of the Law} (3d ed. 1768) and \textsc{Richard Burn, The Justice of the Peace and Parish Officer} (13th ed. 1776)). Burn's manual for JPs was first published in 1755 and went through multiple editions before 1789. There also were multiple abridgments of Burn's manual, some of which were printed in Boston in 1773, New York in 1788, and Philadelphia in 1792. Bacon's \textit{Abridgment} went through multiple editions before 1789. Lambard's \textit{Eirenarcha} was published in 1581. See \textsc{William Lambard, Eirenarcha: Or of the Office of the Justices of Peace} (1st ed. 1581).

\textsuperscript{247} See, e.g., Frankfurter & Corcoran, supra note 223, at 928-34 & nn.37-51 & 68-79 (citing numerous English statutes passed before 1789).
found the same information. All these books reinforce Blackstone's assertion that summary proceedings grounded in Parliamentary statutes were used extensively in England. Matthew Bacon, in *A New Abridgment of the Law*, said power to try summarily certain offenses “given to Justices of the Peace by particular Statutes is so various, and extends to such a Multiplicity of Cases, that it were endless to endeavor to enumerate them.” A reader of the thirteenth edition of Burn's *Justice of the Peace manual*, which was published in 1776, would have found “[n]early two thousand closely-packed pages... devoted largely to the law of [the Justices'] summary jurisdiction.”

Of equal importance, the Constitution's Framers and ratifiers did not need English law books to inform them that summary proceedings were an important part of the new nation's legal tradition. Summary proceedings were a part of everyday life in the former colonies and in the newly independent states. Imitating Parliament, colonial legislatures had authorized summary proceedings before Justices of the Peace for numerous offenses and, in the early Republic, state legislatures continued the practice. The Founding generation knew of juryless criminal trials from their own law books and their own experience. They knew that if the federal government had no power to try crime through summary proceedings, it would be the only government in the common law world to which that power was denied.

In addition, shortly after the Constitution went into effect, federal territorial legislatures began authorizing Justices of the Peace to summarily try a variety of offenses, particularly when


249. *Id.* at 928–29.

250. *Id.* at 936–65 (reviewing statutes providing for summary criminal trials in Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, and Virginia when they were colonies and states); *see also* Bruce Smith, *A New Verdict on Criminal Jury Trial in Antebellum America* 25–28 (unpublished manuscript) (on file with the Author) (providing an intensive study of New York).

251. Frankfurter & Corcoran, *supra* note 223, at 936–65 (describing a variety of summary proceeding offenses in the most populous colonies).

252. *Id.* at 938–65 (reviewing numerous colonial and early state statutes providing for summary trials).

253. *See, e.g.*, 2 *Pope's Digest* 72 (Francis S. Philbrick ed., 1940) (1807 law of the Illinois Territory empowering JPs to summarily “hear and determine... petit crimes and misdemeanors” punishable by fines less than $3); *id.* at 105–06 (1814 act empowering JPs to summarily punish contempt of court); *The Laws of the Indiana Territory* 1801–1809, at 223 (Frances S. Philbrick ed., 1930) (1807 law authorizing JPs to punish summarily “petit crimes and misdemeanors” punished by a fine of $3 or less); *id.* at 224
the crime was committed within the Justices' "presence, or view." Because the law establishing the District of Columbia provided that Maryland and Virginia law would continue to apply to the area those states had ceded to the national government, Justices of the Peace in the nascent federal District came to exercise the same extensive summary jurisdiction that Maryland and Virginia Justices of the Peace exercised under the statutes of their respective states.

(same law authorizing JPs to punish summarily "[a]ll assaults and batteries, that are not of a high and aggravated nature"); id. at 242 (assault and battery may be punished with fines up to $100); id. at 118–19, 368 (1805 and 1807 laws authorizing JPs to punish summarily public "profane swearing and other disorderly behaviour" with fines between $3 and $10); THE LAWS OF THE ILLINOIS TERRITORY 1809–1818, at 28–29 (Francis Philbrick ed., 1950) (1809 law outlawing gambling and empowering JPs to summarily try offenders and impose a $20 fine upon conviction); THE LAWS OF THE NORTHWEST TERRITORY 1788–1800, at 6 (Theodore Calvin Pease ed., 1925) (1788 law authorizing JPs to punish summarily "petit crimes and misdemeanours" punished by a fine of $3 or less); id. at 20 (1788 law authorizing JPs to summarily punish public drunkenness); id. at 151 (1795 law authorizing JPs to summarily try thefts of property valued at less than five shillings and subjecting anyone convicted to a public whipping or $3 fine); id. at 297 (1798 law authorizing JPs to try summarily "all assaults and batteries that are not of a high and aggravated nature" and impose "such fine as is by the statute laws of the Territory provided;" earlier statutes had authorized fines of up to $100 for assault and battery); id. at 377–83 (1799 law empowering all judges and JPs to summarily punish profanity, public drunkenness and other acts of vice and immorality). Many of the laws enacted by the Indiana and Illinois territories trace back to laws adopted by the Northwest Territory in the 1790s.

254. 2 POPE'S DIGEST, supra note 253, at 73; see also THE LAWS OF THE INDIANA TERRITORY, supra note 253, at 224, 369 (1807 laws authorizing JPs to immediately convict "without further examination" all who commit minor misdemeanors in their "presence, or view"); id. at 287 (same for selling liquor to slaves); id. at 368–69 (same for public drunkenness); THE LAWS OF THE NORTHWEST TERRITORY, supra note 253, at 6 (1788 law authorizing JPs to "sentence . . . without further examination" all who commit minor misdemeanors "whenever the crime shall be committed in his . . . presence or view"); 2 POPE'S DIGEST, supra note 253, at 389 (1807 act authorizing summary punishment of inn-keepers selling liquor to "servant or slaves" when there is a "credible witness[,] or upon the view of any justice"). The Illinois law regarding selling liquor to servants or slaves traces back to a 1799 law of the Northwest Territory. THE LAWS OF THE NORTHWEST TERRITORY, supra note 253, at 196.


256. Id. § 11, 2 Stat. at 107. Section 11 of the Act authorized the JPs to continue exercising their jurisdiction over "whatever relates to the conservation of the peace." Id. Although Section 5 of the Act gave the circuit court cognizance of all "crimes and offenses," id. § 5, 2 Stat. at 106, it is likely that grant was limited to offenses contained in the federal statute book, not the offenses committed to JPs under Maryland or Virginia law. See Stettinius v. United States, 22 F. Cas. 1322 (C.D.C. 1839) (No. 13,387) (mentioning the D.C. JPs' "summary jurisdiction . . . which . . . from the necessity of the times is continually increasing"); Charles Bundy, A History of the Office of Justice of the Peace in the District of Columbia, 5 RECORDS COLUM. HIST. SOCY 259, 268 (1902) (saying at the outset the Washington Justice of the Peace "was the most widely known local officer" with a criminal jurisdiction over "whatever relate[d] to the conservation of the peace" (internal quotation marks omitted)).
That summary proceedings were widely employed in England, the colonies, and the new states, both before and after the Constitution was adopted, strongly implies that similar proceedings would be permissible under the national charter. However, the inference is not unclouded. Despite the actions of territorial legislatures, the national Congress never adopted legislation authorizing summary trials for any federal criminal offense committed within the territory of the states or on the High Seas. This is true even though some early federal crimes were fairly minor. It is especially telling that even though in England criminal prosecutions for revenue law violations were subject to juryless trials, Congress never attempted to claim that power when enforcing federal revenue laws. Early federal judges spoke as if "the Constitution made trial by jury the only permissible method of trial." Given Blackstone's well-known comments about summary proceedings' baleful consequences, as well as his concerns about the tendency for that arbitrary mode of trial to be so "far extended" that it "threaten[ed] the disuse of...jury trial," it is quite possible that Founding-era Americans thought summary proceedings were appropriate for states but not for the more remote and less trusted national government. This possibility is supported by the fact that during the ratification campaign major Framers, without provoking any contradiction by the Antifederalists, said the Constitution's criminal procedure provisions contemplated only jury trials.

257. This Comment is based on a thorough study of the Federal Statutes at Large from the 1789 to 1860, for which I thank Richard Nowak, '10 University of Illinois College of Law.

258. An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 5, 1 Stat. 112, 113 (1790) (offense: rescue of body ordered for dissection post execution; penalty: prison not exceeding twelve months and fine not exceeding $100); id. § 22, 1 Stat. at 117 (offense: obstruction of process; penalty: prison not exceeding twelve months and fine not exceeding $300); id. § 23, at 117 (offense: rescue of person before conviction for crime punishable by death; penalty: prison not exceeding twelve months and fine not exceeding $500).

259. 4 BLACKSTONE, supra note 96, at 278.

260. Crimes against the federal revenue were tried as any other crime under the Judiciary Act. There also was civil enforcement, which was subject to the Seventh Amendment jury provision. See, e.g., Collection Act of 1789, §§ 12, 34–35, 1 Stat. 39, 46–47 (1789); Adam Kurland, First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction, 45 EMORY L.J. 1, 56–57 n.195 (1996) (citing several federal revenue statutes, including the Collection Act of 1789).

261. Singer v. United States, 380 U.S. 24, 31 (1965) (citing the views of Justice Story and several appellate courts); Siegel, supra note 14, at 386–89.

262. 4 BLACKSTONE, supra note 96, at 278.

263. See supra text accompanying notes 194–216.
Furthermore, any approach to constitutional interpretation that relies on English, colonial, and early Republic trial practices and legislation regarding summary criminal trials to establish an exception to Article III's jury mandate faces the problem that the evidence points to an exception of vast scope.\textsuperscript{264} Summary proceedings were used in England, the colonies, and the newly independent states to try offenses that were far more serious, both in terms of the gravity of the crime and the severity of the punishment, than the Supreme Court's conception of the petty offense exception has ever permitted.\textsuperscript{265} In eighteenth-century England and colonial America, summary proceedings were limited neither to the trial of minor crimes nor to offenses punished by minor penalties.\textsuperscript{266} Offenses such as arson of a house at night,\textsuperscript{267} harboring deserters from military service,\textsuperscript{268} smuggling,\textsuperscript{269} bribery of excise officials,\textsuperscript{270} fencing stolen arms,\textsuperscript{271} petit larceny,\textsuperscript{272} passing counterfeit currency,\textsuperscript{273} assault and battery,\textsuperscript{274} selling liquor to Native Americans,\textsuperscript{275} and carrying concealed weapons\textsuperscript{276} were subject to trial without jury.\textsuperscript{277} Fines imposed in summary proceedings frequently were as

\textsuperscript{264} Kaye, \emph{supra} note 176, at 247. The examples in this paragraph are from Frankfurter & Corcoran, \emph{supra} note 223, at 934–68, which studies the most populous seven colonies: Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, and Virginia.

\textsuperscript{265} See infra text accompanying notes 336–54 (discussing evolution of Supreme Court's definition of petty offense); see also Kaye, \emph{supra} note 176, at 247–48 (making a similar point with regard to the early Supreme Court precedents and Frankfurter and Corcoran's suggested approach).

\textsuperscript{266} Frankfurter & Corcoran, \emph{supra} note 223, at 930–68; Kaye, \emph{supra} note 176, at 247–48.

\textsuperscript{267} Frankfurter & Corcoran, \emph{supra} note 223, at 927 n.34 (England).

\textsuperscript{268} \textit{Id.} at 940 (Massachusetts).

\textsuperscript{269} \textit{Id.} at 928 (England).

\textsuperscript{270} \textit{Id.} at 930–31 (England).

\textsuperscript{271} \textit{Id.} at 940 (Massachusetts).

\textsuperscript{272} \textit{Id.} at 945–46, 955 (New York and Pennsylvania); Smith, \emph{supra} note 250, at 25–26 (New York). Bruce Smith also notes that New York allowed larcenies up to £5, and malicious trespass causing damage up to £10, to be summarily tried even though England required indictment and jury trial for those offenses. \textit{Id.} at 26–27.

\textsuperscript{273} Smith, \emph{supra} note 250, at 26 (New York) ("uttering counterfeit currency").

\textsuperscript{274} Frankfurter & Corcoran, \emph{supra} note 223, at 948 (New York).

\textsuperscript{275} \textit{Id.} at 943, 945, 949 (Connecticut, New York, and New Jersey). If selling liquor to Native Americans does not sound particularly heinous, consider that one of the statutes was enacted by New York during the French and Indian War. \textit{Id.} at 946 n.145.

\textsuperscript{276} \textit{Id.} at 949.

\textsuperscript{277} Smith, \emph{supra} note 250, at 23–28 (discussing New York).
high as £20, and they sometimes ranged up to £40, £50, £100, and even £500. Other penalties sometimes included imprisonment from six months to a year and a half at hard labor, transportation to the colonies for seven years, and severe whipping. In the early Republic, Pennsylvania imposed a £30 fine for "harboring a deserter from a French ship," Maryland levied £50 and £100 pound fines for obstructing harbors, and New York fined unlicensed taverns £100 and punished "[o]btaining money by false pretenses" with up to thirty-nine lashes. Presumably, New York's 1772 statute authorizing a summary trial and a £500 fine for operating a lottery remained in effect after the Revolution. Private enforcement of criminal statutes through qui tam proceedings with large monetary recoveries were also tried without a jury.

Ironically, the very passage in Blackstone's Commentaries relied on by the Supreme Court in creating the petty crime exception concurs with this evidence by suggesting that if there is a petty crime exception, it encompasses a broader class of offenses than the Supreme Court has ever permitted. The Commentaries text quoted by the Court in Schick v.

278. Frankfurter & Corcoran, supra note 223, at 932 n.65, 939–40 (England and Massachusetts). Twenty pounds was quite the penalty in the cash-strapped colonies. Twenty pounds in 1770 is the equivalent of £2,160 (using the retail price index) or £30,100 (using the average earnings method) in 2010. Lawrence H. Officer & Samuel H. Williamson, Purchasing Power of British Pounds from 1245 to Present, MEASURINGWORTH, http://www.measuringworth.com/ppoweruk/ (last visited Sept. 15, 2013); see supra note 142 (detailing additional methods of calculating present value of eighteenth-century monetary amounts and acknowledging the speculative nature of such calculations).

279. Frankfurter & Corcoran, supra note 223, at 959 (Maryland).

280. Id. at 931, 946, 960 (England, New York, and Maryland).

281. Id. at 927 n.34, 931–32 (England).

282. Id. at 931, 984 (England and New York).

283. Id. at 927 n.34, 931, 946 (England and New York); see also id. at 931 (in England, confinement at hard labor until a £500 fine is paid).

284. Id. at 927 n.34 (England).

285. Id. at 932, 938–39, 947, 959, 963 (England, Massachusetts, New York, Maryland, and Virginia).

286. Id. at 956.

287. Id. at 960.

288. Id. at 947.

289. Id. New York tried petit larceny, which was a felony at common law, without a jury. See 4 BLACKSTONE, supra note 96, at 95, 97 (describing petit larceny as a felony although it is not subject to capital punishment); Smith, supra note 250, at 39 & n.107.

290. Frankfurter & Corcoran, supra note 223, at 984.

United States\textsuperscript{292} says the broad definition of "the word 'crimes'" encompasses "both crimes and misdemeanors," while the narrow definition excludes "smaller faults and omissions of less consequence [which] are comprised under the gentler name of 'misdemeanors' only."\textsuperscript{293} An implication of Blackstone's discussion is if the Framers and ratifiers relied on Blackstone for their understanding of the narrow definition of the word "crimes," they would understand petty crimes as encompassing all misdemeanors. The serious crime/petty crime dichotomy, then, would track the line between felonies and misdemeanors and no misdemeanor defendants would have a right to jury trial.

Whether the Founding generation relied on Blackstone or Founding-era trial practice for its notion of the scope of petty offenses, the petty offense exception to Article III's jury trial mandate would be significantly broader than the Supreme Court has ever allowed. From the very first case, \textit{Callan v. Wilson},\textsuperscript{294} the Supreme Court has made clear that "serious" crime, and therefore the Constitution's jury trial mandate, "embraces as well some classes of misdemeanors."\textsuperscript{295} The Supreme Court has struggled to define the line between petty and serious crimes, and over time the definition, as well as the approach to defining it, has changed.\textsuperscript{296}

\begin{itemize}
  \item \textsuperscript{292} Schick v. United States, 195 U.S. 65, 69–71 (1904); see supra text accompanying note 96 (quoting the passage).
  \item \textsuperscript{293} Schick, 195 U.S. at 69–71 (quoting Blackstone's \textit{Commentaries}). Blackstone says that under the broad definition "crimes and misdemeanors...are mere synonymous terms" denoting any "act committed, or omitted, in violation of a public law." \textit{Id.} at 69 (quoting Blackstone's \textit{Commentaries}).
  \item \textsuperscript{294} Callan v. Wilson, 127 U.S. 540 (1888).
  \item \textsuperscript{295} \textit{Id.} at 549.
  \item \textsuperscript{296} The Court's initial approach involved an attempt to determine and apply a set of abstract principles that captured the essential nature of the low-level crimes that did not require jury trial at the Founding. 3 Orfield, supra note 132, § 23:7–8, at 9–13 (describing the Supreme Court's initial approach to the petty/serious crime distinction); Frankfurter & Corcoran, supra note 223, at 980–81 (mentioning factors such as lack of moral stigma, relatively light punishment, gravity of harm); Comment, \textit{The Petty Offense Category and Trial by Jury}, 40 \textit{Yale L.J.} 1303, 1306 (1930) (describing a "flexible test" based on the "moral nature" of the offense and "severity of the penalty"); Daniel A. Klein, Annotation, Distinction Between "Petty" and "Serious" Offenses for Purposes of Federal Constitutional Right to Trial by Jury—Supreme Court Cases, 103 L. Ed. 2d 1000, 1003 n.9 (1991) (saying old test asked if offense involved "moral delinquency," was "malum in se," or "triable by a jury at common law"); see, e.g., District of Columbia v. Clawans, 300 U.S. 617, 624–31 (1937) (holding that a ninety-day sentence for selling secondhand clothing without a license was permissible without a jury trial). In the early 1970s, the Court shifted toward employing more objective criteria based on the size of the fine and jail term. See Blanton v. City of N. Las Vegas, 489 U.S. 538, 541–42 (1989) (discussing how the Court examines the length of the prison term or the seriousness of the punishment to determine the need for a jury trial); Baldwin v. New York, 399 U.S. 66, 68–69 (1970) (noting that if the possible punishment is more than six months in jail, the crime is serious); see also Wayne R. LaFave, Jerold H. Israel & Nancy J.
What the line has been, and the sources for it, will be considered subsequently. At this point, suffice it to say that by “petty” crime, the Supreme Court has always meant something narrower than the meaning suggested by Blackstone’s Commentaries, and far narrower than the meaning suggested by English, colonial, and Founding-era criminal trial practice. At present, the Supreme Court confines petty crimes to offenses that carry a punishment of six months or less in jail or a fine of $500 or less. Neither historic practice nor Blackstone’s Commentaries support defining petty offenses that narrowly.

Moreover, a further analysis of Founding-era texts and practices argues for a broader rollback of modern jury trial rights than has been suggested so far. In the early Republic, not only did summary trials flourish, they did so even in the four states—Virginia, Pennsylvania, Delaware, and Maryland—that had constitutions expressly guaranteeing jury trial “in all criminal prosecutions.” The fact that four states permitted an extensive

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297. See infra text accompanying notes 335–54 (analyzing how the Supreme Court has handled petty offense cases throughout U.S. history).

298. Thus, the alternative definitions of the word “crime” supplied by Blackstone’s authoritative Commentaries may be said to prove too much because they suggest a class of permissible nonjury trials far broader than the Supreme Court has ever allowed. See infra text accompanying note 96 (quoting the passage).

299. See Frankfurter & Corcoran, supra note 223, at 924–28, 933, 936 (discussing the expansive summary proceedings during the English, colonial, and Founding eras).

300. See Blanton, 489 U.S. at 541–42 (articulating that a defendant is entitled to a jury trial if the prison term is greater than six months); Baldwin, 399 U.S. at 68–69 (holding that an offense is not petty if it carries a prison sentence of more than six months); see also Kaye, supra note 176, at 247–48 (making a similar point with regard to the early Supreme Court precedents and Frankfurter and Corcoran’s suggested approach).

Colonial and early Republic legislation and trial practice also call into question the Supreme Court’s decision in its seminal petty crime case, Callan v. Wilson, that Article III’s jury trial mandate is not satisfied by a summary trial with a right to appeal for a retrial before a court that acts with a jury. Callan, 127 U.S. at 550–55. There are many instances of colonial and early Republic legislation providing for a summary trial with a right to appeal for a trial de novo in a court that acts with a jury. See, e.g., Frankfurter & Corcoran, supra note 223, at 927, 939, 942, 951, 955, 996 (examples from England, Massachusetts, Connecticut, New Jersey, and Pennsylvania); Smith, supra note 250, at 46–51 (New York).

301. See Kaye, supra note 176, at 252–54 (Delaware, Pennsylvania, and Maryland); id. at 264 n.233 (quoting Virginia’s constitution as saying “in all capital or criminal prosecutions”). Although I derive my information from Kaye, supra note 176, at 248–57, I draw a different argument from it. I do not adopt Kaye’s claim that in the early Republic if a constitution was adopted by the state legislature rather than the people it was not binding on the legislature. Id. at 251–54 (describing constitutions that were not submitted for popular ratification but were interpreted to contain petty offense exceptions).
array of summary trials under constitutional provisions guaranteeing jury trial "in all criminal prosecutions" is evidence that the phrase "all Crimes"\textsuperscript{302} in Article III's jury trial mandate countenances an extensive petty offense exception.\textsuperscript{303}

Nonetheless, the implication of finding summary criminal trials in these four states might be said to prove too much. Since Sixth Amendment rights arise "[i]n all criminal prosecutions,"\textsuperscript{304} this evidence would import the same extensive petty offense exception into such Sixth Amendment rights as the right to a "speedy" or "public" trial; the right to counsel and confrontation; and the right to be "informed of the nature and cause of the accusation."\textsuperscript{305} Especially so, since it is commonly said that James Madison derived the provisions of the Sixth Amendment from Virginia's jury guarantee.\textsuperscript{306} Moreover, because the Fifth Amendment's prohibition of compulsory self-incrimination turns on the phrase "in any criminal case,"\textsuperscript{307} this line of argument also implies that defendants charged with petty offenses could be compelled to testify against themselves.\textsuperscript{308}

In sum, if modern textualists were to look beyond the Constitution's text, they would find evidence in Blackstone's...
Commentaries, the Constitutional Convention, and the ratification campaign supporting the conclusion that there is no petty offense exception to Article III, § 2's jury trial mandate. At the same time, they would find—in Blackstone's and other commentators' writing, as well as in English, colonial, and Founding-era criminal trial practice—substantial evidence supporting the conclusion that, if there is a petty offense exception, it is an exception of far greater scope and breathtaking depth than has ever been suggested in the century and a quarter since the Supreme Court's seminal ruling in Callan v. Wilson. What textualists would not find is a petty offense exception consonant with the one we have today or have ever had.

IV. WHY DO WE HAVE A PETTY OFFENSE EXCEPTION TO ARTICLE III'S JURY TRIAL MANDATE?—OF TEXTUALISM, ORIGINALISM, AND THE LIVING CONSTITUTION

The question of summary criminal trials first arose in the Supreme Court case Callan v. Wilson a century after the Constitution's adoption. Although Callan was a case of first impression, the Court asserted the existence of a petty offense exception with only the vaguest gesture to what it said was the common law tradition, but which is more accurately described as a tradition of Parliamentary intrusion into the common law requirement of jury trial. The offhand treatment of the issue continued when the question returned to the Court in Schick v. United States. Then the Court decided the issue with a citation to Callan and a discussion of the Constitutional Convention that was remarkably superficial and fallacious.

The Court's casual treatment of the issue in Callan and Schick suggests that the outcome was a foregone conclusion, resting not in close legal analysis but in long-historical experience, common sense, and social necessity. Critics of the petty offense exception have always thought so. In 1905, a Note writer in the Columbia Law Review, after reviewing the shortcomings of the Schick Court's opinion, opined:

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310. Id. at 541, 543.
311. Id. at 549–50.
312. See supra text accompanying notes 225–38 (confirming that summary proceedings were introduced by Parliament for JPs and commissioners of the revenue).
314. See supra text accompanying notes 93–99, 175–93 (quoting the Schick Court's discussion of the Constitutional Convention and critiquing its analysis).
The courts have been much pressed by practical considerations. The very great inconvenience of requiring trial by jury for trivial offences and the long acquiescence in summary convictions and the consequent "revolution[...]"... which would follow a declaration of a universal right of trial by jury, are considerations of very great weight, and it is these considerations which are perhaps a warrant for the result reached in the [Schick] case.\(^{315}\)

When the Court returned to the petty offense issue in 1937, the dissenting Justices in District of Columbia v. Clawans\(^{316}\) suggested that "[i]n view of the opinion just announced," with its "questionable precedents" and "uncertain reasoning," the "Constitutional guarantee[]" of jury trial had just been "subordinated to convenience."\(^{317}\)

As these dissenters said, the petty offense exception may comport with the Court's understanding of "practical considerations\(^{318}\) and "convenience,"\(^{319}\) but in taking its stand, the Court may have believed it was adopting the views of the Founding generation. Given the existence of summary trials before, during, and after the Founding, even under state constitutional and federal statutory provisions guaranteeing jury trial "in all criminal prosecutions,"\(^{320}\) it would be reasonable to conclude that the Founding generation expected there to be a petty offense exception to Article III's jury trial provision.\(^{321}\) In the 1920s, this was the conclusion Felix Frankfurter and Thomas Corcoran drew from their exhaustive study of the history of summary proceedings from medieval times to the end of the

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\(^{315}\) Note, 5 COLUM. L. REV. 48, 50 (1905).


\(^{317}\) Id. at 634; see also Baldwin v. New York, 399 U.S. 66, 75 (1970) (Black, J., concurring) (criticizing the petty offense exception for "weighing the advantages to the defendant against the administrative inconvenience to the State inherent in a jury trial"); Kaye, supra note 176, at 268–69 (quoting and criticizing a state court opinion which articulated a policy justification for the petty crime exception).

\(^{318}\) See supra text accompanying note 315.

\(^{319}\) See supra text accompanying note 317.

\(^{320}\) See Kaye, supra note 176, at 252–54 (quoting the Delaware, Pennsylvania, and Maryland Constitutions); supra text accompanying note 301.

\(^{321}\) Cf. Argersinger v. Hamlin, 407 U.S. 25, 30 (1972) (saying the petty crime exception to the jury trial right rests on "historical support"); In re Dana, 6 F. Cas. 1140, 1141–42 (S.D.N.Y. 1873) (No. 3,554) (suggesting there is a petty crime exception because some offenses were "at the time of the adoption of the constitution[] triable without a jury").
nineteenth century. In their view, observing that nonjury trials for “petty” offenses had been...the accepted doctrine of the colonies and thereafter in the states, which drew the scope and limit of the jury trial vouchsafed by their bills of right not from the varying phraseologies in which the jury requirement was expressed, but from the common stock of colonial experience.

Apparently, the federal territorial governments exercised their legislative authority with a similar interpretive approach to the national Constitution and did so without any complaint or challenge from their citizens or interdiction by Congress. The expectation that there would be summary trials for some offenses under the new Constitution was so strong that there is no known protest from any summarily convicted defendant.

In other words, just because the petty offense exception does not follow from a textualist reading of Article III, § 2 does not mean the Court, in Callan and Schick, was reading its policy preferences into the Constitution. Despite the shallow analysis, the Court's interpretive technique and the results reached reflect a jurisprudence of originalism.

Textualism and originalism are related approaches to constitutional interpretation, but they have important differences. Not all, but many strands of originalism allow for a

322. Frankfurter & Corcoran, supra note 223, at 933, 938–65.
323. Id. at 969. See also id. at 968, where they say:

As Englishmen, they had lived under a law which withdrew a vast range of misconduct from the judgment of the jury. As colonists, they had studied law-books which recognized serious limits on jury trials and had lived under a system of law which gave their magistrates enough summary power to make “the man in the street” as well as the lawyer aware of its significance. As citizens of the new states, they had enshrined trial by jury in their bills of rights and deemed the continued practice of summary power of their magistrate in minor offenses consistent with these new constitutional guaranties.

324. Congress reserved the power to disallow territorial laws. See An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, as adapted by An Act to Provide for the Government of the Territory North-West of the River Ohio, 1 Stat. 50, 51 n.a (1789) (transmittal of territorial laws every six months); see also An Act for the Government of the Territory of the United States, South of the River Ohio, ch. 14, 1 Stat. 123 (1790) (same); 4 TERRITORIAL PAPERS OF THE UNITED STATES 385, 399–400 (Clarence Edwin Carter ed., 1936) (transmittal of territorial enactments).
325. See Frankfurter & Corcoran, supra note 223, at 937 (noting that the use of summary procedures went unchallenged).
less text-centric, and more purposive, construction of the Constitution when there is sufficient evidence to suggest that a less text-dominated interpretation is necessary to effectuate the Founding generation’s understanding of the organic law they adopted or the purpose for which they adopted a particular provision.\footnote{327}

The English and colonial tradition of summary trials, and the Founding generation’s experience with them, would seem to provide sufficient evidence to support the petty offense exception as an originalist interpretation of Article III’s jury mandate.\footnote{328} That, at least, was the position taken throughout the nineteenth century by many state courts in discussing their state constitutions.\footnote{329} The only lower federal courts to consider the question took this position, too.\footnote{330} The \textit{Callan} Court, with is

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There are many examples of situations where originalism and textualism lead to disparate results. \textit{See} Gary Lawson, \textit{Territorial Governments and the Limits of Formalism}, 78 CALIF. L. REV. 853, 856–57, 861–72 (1990) (contrasting interpretations of the constitution’s application to federal territories); Manning, \textit{supra} note 2, at 1728–43, 1748–50 (discussing the Eleventh Amendment); Marshall, \textit{supra} note 17, at 1342, 1345–49 (discussing the Eleventh Amendment and Article III); Siegel, \textit{supra} note 14, at 376–78 (discussing the jury waiver exception to Article III’s jury trial requirement); \textit{supra} text accompanying notes 63–69, 83 (discussing \textit{Hollingsworth}, which examines the constitutional amendment exception to the Presentment Clause).

\footnote{328.} This is true even though the evidence is somewhat clouded. \textit{See} \textit{supra} text accompanying notes 194–216, 225–38 (discussing counter-evidence from Blackstone’s \textit{Commentaries} and the Founding-era).


\footnote{330.} \textit{In re Dana}, 6 F. Cas. 1140, 1142 (S.D.N.Y. 1873) (No. 3,554) (suggesting there is a petty crime exception because some offenses were “at the time of the adoption of the
reliance on general knowledge, and the Schick Court, with its discussion of the Constitutional Convention, may well have been employing an originalist interpretive technique. As recent scholarship has argued, nineteenth and early twentieth-century constitutional interpretation was dominated by a purposive rather than a textualist jurisprudence.\textsuperscript{331}

Even though originalism may account for the existence of the petty offense exception, originalism cannot account for its scope. The present rule is that no offense is petty if it may possibly be punished by more than six months incarceration or a fine of more than five hundred dollars.\textsuperscript{332} This rule confines petty offenses far more stringently than English, colonial, or Founding-era summary trial practice would suggest.\textsuperscript{333} As early as the Supreme Court's first discussion of the petty offense exception in Callan v. Wilson,\textsuperscript{334} the Court signaled that the scope of the petty offense exception was narrower than the scope permitted by Anglo-American legal history.\textsuperscript{335}

In the early twentieth century, the Court interpreted Callan as adopting a conception of petty offense that focused "primarily upon the nature of the offense."\textsuperscript{336} This approach, commentators observed,
allowed contemporary views to be smuggled into a formally historical analysis. In 1937, in District of Columbia v. Clawans, the Court shifted to the current system of defining petty offenses by focusing on the amount of punishment imposed. In shifting to the current system, the Court openly acknowledged that commonly accepted views of the severity of punishment . . . may become so modified that a penalty once thought to be mild may come to be regarded as so harsh as to call for the jury trial, which the Constitution prescribes, in some cases which were triable without a jury when the Constitution was adopted.

Since the 1930s, the Court has become even more explicit that the scope of the petty offense exception, although taking into account Founding-era practices, ultimately reflects "contemporary standards in this country."

The rationale the Court has adopted for justifying the petty offense exception underscores its non-originalist approach to determining the petty offense's contemporary scope. With a pinpoint citation to the page in Weems v. United States where the Court announced an evolving approach to the Eighth Amendment's concept of "cruel and unusual punishment[,] the

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Vegas, 489 U.S. 538 (1988) (No. 87-1437), 1988 WL 1026099, at *6-7, *9-10 (recounting development of Court's definition of petty offense). This was a fair reading of Callan. See Callan, 127 U.S. at 555–56 (presenting an analysis centered on "the nature of the crime of conspiracy at common law").

337. See The Petty Offense Category and Trial by Jury, supra note 296, at 1307–09 (discussing Colts); see also Note, supra note 315, at 48 (discussing Schick).


339. Id. The Court continued elaborating this point by saying that community standards, illustrated by objective standards such as contemporary legislation, should guide judicial decision-making in this area. Id. at 628.

340. See Duncan v. Louisiana, 391 U.S. 145, 161–62 (1968) (analyzing eighteenth-century crimes in America that are triable without a jury); Clawans, 300 U.S. 625–27 (looking at the petty offenses standard during the adoption of the Constitution).

341. Duncan, 391 U.S. at 161–62; see also Blanton, 489 U.S. at 541–42 (describing the Court's approach in recent years); Baldwin v. New York, 399 U.S. 66, 70–73 (1970) (comparing petty offense limitations in the eighteenth century and current limitations). The Court also considers a conviction's collateral consequences. See Blanton, 489 U.S. at 542 (looking at other penalties associated with the underlying offense). The emphasis, however, is on the severity of the sentence itself.

342. Clawans, 300 U.S. at 627 (citing Weems v. United States, 217 U.S. 349, 373 (1910)). The passage from Weems is quoted infra text accompanying note 345.

343. Weems, 217 U.S. at 373.

Clawans Court showed that it was developing the petty offense exception according to Weems's theory that:

Legislation, both statutory and constitutional, is enacted... from an experience of evils, but its general language should not... be necessarily confined to the form that evil has heretofore taken. Time works changes, brings into existence new conditions and purposes... [A] principle to be vital must be capable of wider application than the mischief which gave it birth... In the application of a constitution... our contemplation cannot be only for what has been but of what may be.\textsuperscript{345}

The connection the Clawans Court saw between the petty offense exception and Eighth Amendment jurisprudence was not unique. It had been anticipated a decade earlier by Frankfurter and Corcoran in their influential article on the petty offense exception.\textsuperscript{346} In that article Frankfurter and Corcoran relied on Weems for their claim that, with regard to the petty offense exception, "[i]t belittles the Constitution to crystallize it by the caprice of some statute which expressed the limit of punishment meted out in 1789 through summary procedure."\textsuperscript{347}

\textsuperscript{345} Weems, 217 U.S. at 373. Weems was the first Supreme Court case striking down a punishment as excessive rather than barbaric. Thinking it was a break from the Constitution's original meaning, the Court justified its departure by adopting the view that the clause was "progressive." Id. at 378; see Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CALIF. L. REV. 839, 843 (1969) (saying that the dissenters in Weems wanted to keep the original meaning of the clause); John F. Stinneford, Rethinking Proportionality Under the Cruel and Unusual Punishments Clause, 97 VA. L. REV. 899, 910 n.38, 914, 971 (2011) (quoting Weems for the proposition that the clause is progressive).

\textsuperscript{346} I previously described Frankfurter and Corcoran's article as "exhaustive," supra text accompanying note 322, and have drawn from it frequently. See, e.g., supra notes 246–50, 264–91 (citing Frankfurter and Corcoran's article). The article's influence is illustrated 1) by the fact that the Supreme Court adopted the article's suggested approach to the petty offense exception, see Haar v. Hanrahan, 708 F.2d 1547, 1549 (10th Cir. 1983) (observing that the Duncan Court adopted the approach suggested by Frankfurter and Corcoran), 2) by the fact that George Kaye's protest against the petty crime exception is as much directed at Frankfurter and Corcoran's article as against the Court, see Kaye, supra note 176, passim (citing Frankfurter and Corcoran's article), and 3) by the Supreme Court's use of the article in discussing the petty crime exception's scope, see Cheff v. Schnackenberg, 384 U.S. 373, 390 n.7 (1966) (same). Frankfurter and Corcoran's conception of the petty offense exception not only built on the Court's initial articulation of the petty offense exception but also crystallized it and gave it future direction.

\textsuperscript{347} Frankfurter & Corcoran, supra note 223, at 981. Frankfurter and Corcoran prominently cite and quote Weems at the beginning and end of their article as part of their argument for an evolutionary approach to the petty offense exception. See id. at 922 n.12, 982 n.280 (citing Weems). Weems taught them that

while the Constitution was written in 1787, it was not written for 1787... Historic continuity in constitutional construction does not necessarily mean historic stereotype in application. To what extent respect
A connection to the Eighth Amendment jurisprudence was also anticipated by the New Jersey Supreme Court in justifying an evolutionary approach to that state's petty offense exception. According to the New Jersey high court: "It must, of course, be assumed that the punishment for such a petty and trivial offense will also be comparatively petty and trivial, otherwise it would violate another provision of the state Constitution, which prohibits cruel and unusual punishments."\(^\text{348}\)

In suggesting that punishments for petty offenses must "bear [a] proper relation to the seriousness of the offense,"\(^\text{349}\) the New Jersey Court was pointing to a "proportionality principle"\(^\text{350}\) as inherent in the concept of "cruel and unusual punishment[]."\(^\text{351}\)

Given the extensive scope for punishments inflicted by Justices of the Peace following English, colonial, and Founding-era summary trials, the difficulty that originalism has in accounting for the scope of the petty offense exception is tellingly illustrated by the fact that many originalists unhesitatingly declare that, as originally understood, the Eighth Amendment had no proportionality principle.\(^\text{352}\)

Without an evolving notion of the scope of the petty offense exception, modern legislatures could empower judges to summarily try historically trivial offenses and, upon conviction, impose punishments far beyond the six months in jail and a five-hundred-dollar fine that is the limit the Supreme Court now allows for juryless trials. The current limit on the scope of petty offenses must be seen as an example of the Supreme Court Justices reading evolving views of sound for continuity demands adherence to merely what was, involves the art of adjudication—raises those questions of more or less that ultimately decide cases.

\(\text{Id. at 922.}\)

\(\text{348. Katz v. Eldredge, 117 A. 841, 852 (N.J. 1922).}\)

\(\text{349. Id. at 852.}\)

\(\text{350. See infra note 352 (discussing whether the Eighth Amendment contains a proportionality principle).}\)

\(\text{351. U.S. CONST. amend. VIII.}\)

\(\text{352. See Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) (stating that the Eighth Amendment does not have a proportionality principle); id. at 32 (Thomas, J., concurring) (agreeing with Justice Scalia); Harmelin v. Michigan, 501 U.S. 957, 966–87 (1991) (Scalia, J., with Rehnquist, C.J., joining) (suggesting there is no proportionality principle for the cruel and unusual punishment clauses). Scholars support Scalia and Thomas on this point. See Laurence Claus, The Antidisrimination Eighth Amendment, 28 HARV. J.L. & PUB. POLY 119, 159 (2004) (agreeing with Scalia that a plausible originalist interpretation of the Eighth Amendment is that it does not have a proportionality principle); Note, The Eighth Amendment, Proportionality, and the Changing Meaning of Punishments, 122 HARV. L. REV. 960, 965–72 (2009) (saying Scalia is historically accurate and citing other scholars). But see Stinneford, supra note 345, at 899, 926–61 (saying the Eighth Amendment was originally meant to bar both barbaric and disproportionate punishments).}\)
constitutional policy into the Constitution. It is an example of living constitutionalism.

V. CONCLUSION

When the Supreme Court, in 1970, in search of “objective criteria” finally adopted the current rule that all crimes punishable by more than six months in jail were serious offenses, Justice Hugo Black took the occasion to protest not only the new bright-line rule but also the petty offense exception’s very existence and the Court’s entire interpretive technique. The Constitution, he said, “guarantees a jury trial... for ‘all crimes’” without a “hint of any difference between ‘petty’ offenses and ‘serious’ offenses.” The petty offense exception arose when “this Court, without the necessity of an amendment pursuant to Article V, decided that ‘all crimes’ did not mean ‘all crimes,’ but meant only ‘all serious crimes.’” And the latest ruling meant that:

Today... the Court would judicially amend that judicial amendment and substitute the phrase “all crimes in which punishment for more than six months is authorized.”... Such constitutional adjudication, whether framed in terms of “fundamental fairness,” “balancing,” or “shocking the conscience,” amounts in every case to little more than judicial mutilation of our written Constitution.

Modern textualists should agree with these remarks, written by the Court’s first textual-originalist Justice. The little doubt that may exist points only to the possibility that, by textualist norms, the Constitution may be read to recognize a petty offense exception that permits far greater punishments than the Court has ever contemplated for summary convictions and denies all

354. Id. at 69. In Baldwin, the Court specifically rejected “draw[ing] the line between ‘petty’ and ‘serious’ to coincide with the line between misdemeanor and felony.” Id. at 69–70.
355. Id. at 74–76 (Black, J., concurring).
356. Id.
357. Id. at 75.
358. Id.
360. See supra text accompanying notes 264–309.
trial-related rights to defendants charged with petty crimes.\textsuperscript{361} The current law, which recognizes a severely limited petty crime exception while guaranteeing petty offenders all trial-related rights except the right to a jury trial, cannot be said to be consistent with textualist jurisprudence.

By textualist norms, or the norms of any other interpretive technique, the petty offense exception is a departure from clear and concrete constitutional text. It is brought about, in part, by our constitutional tradition's preference for implementing the purposes the Founding generation had in framing the Constitution rather than the text with which they expressed themselves.\textsuperscript{362} It is also brought about, in part, by our constitutional tradition's unacknowledged preference for a living constitution, a constitution that reflects evolving norms of proper constitutional policy and practical convenience.\textsuperscript{363} Since summary trials in the Northwest Territories and Washington, D.C. trace back to the Founding era,\textsuperscript{364} it is fair to say that departures from clear and concrete constitutional text trace back to the Founding.\textsuperscript{365} The growing popularity of textualist interpretive technique in twenty-first-century America is not a reassertion of traditional constitutional values. It is, rather ironically, another expression of living constitutionalism.

\textsuperscript{361} See supra text accompanying notes 301-08 (discussing how the narrow view of crimes could be applied to the Sixth Amendment).

\textsuperscript{362} See supra text accompanying note 331 (stating that traditional constitutional interpretation was mostly purposive).

\textsuperscript{363} See supra text accompanying notes 335–51 (describing how contemporary views have been intertwined in the Court's analysis).

\textsuperscript{364} See supra text accompanying notes 253–56.

\textsuperscript{365} Because it is likely that there were summary trials in the Northwest Territories on March 4, 1789, or soon thereafter, see supra text accompanying notes 253–56, we may say that departures from clear constitutional text trace back to the very day the Constitution took effect. This makes the petty offense exception the oldest departure from clear constitutional text, beating out the nonpresentment of constitutional amendments by six-and-a-half months. See supra text accompanying notes 58–83; see also S. JOURNAL, 1st Cong., 1st Sess. 88 (1789) (requesting the President to transmit proposed constitutional amendments to the states but not asking for his signature); 1 ANNALS OF CONG. 948 (1789) (Joseph Gales ed., 1834) (same).