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I. INTRODUCTION: CAN A STATUTE DETERMINE THE SCOPE OF A CONSTITUTIONAL RIGHT?

When Grizzly Bear No. 257 met its 7-mm match in the Taylors Creek-Lightning Fork drainage outside of Big Sky, Montana, only Mr. and Mrs. Paul Normand Clavette were there to see it. After some persistent investigation by the U.S. Fish and Wildlife Service, Clavette admitted killing the bear. He knew that he had committed a crime. He also knew that some dollar value must be attached to it; he offered to compensate the State of Montana, provided he could have the bear’s hide for a rug. He later discovered that he could be sentenced to pay a fine up to $25,000 — and he would not get the rug. Since the maximum possible prison sentence was only six months, however, he was denied a jury trial.

2. See id. at 49.
3. See id. at 61, 178-79.
4. See id. at 62. Clavette was charged under 16 U.S.C. §§ 1538(a)(1)(G) and 1540(b)(1) (1994) with unlawfully killing a threatened species, a criminal violation of the Endangered Species Act. The Ninth Circuit called Clavette’s offense a violation of “Interior Department regulations.” See Clavette, 135 F.3d at 1310-11. This is clearly erroneous; 16 U.S.C. § 3 (1994), cited by the court, see id. at 1311 & n.21, applies to regulations promulgated by the Secretary of the Interior, whereas Clavette’s offense is defined directly by Congress. The court’s error probably comes from its reading of United States v. Nachtigal, 507 U.S. 1 (1993), a case originating in the Ninth Circuit which involved a true Interior Department regulation against driving under the influence in Yosemite National Park. Unfortunately, this is not the only instance in which this court and others appear to read the law from previous judicial decisions rather than from the United States Code. See infra notes 15, 149, 167.
5. See United States v. Clavette, No. MCR-96-001-BU (D. Mont. Apr. 4, 1996) (order denying jury trial) [hereinafter Order of Apr. 4, 1996]; id., (June 5, 1996) (second order denying jury trial) [hereinafter Order of June 5, 1996]. Clavette made a perfunctory motion for a jury trial after District Court Judge Paul Hatfield scheduled the case for bench trial; the Government responded with a thorough brief, and the motion was denied. See Order of Apr. 4, 1996, at 1. On Clavette’s second motion for jury trial, the Government stipulated that it would not seek a fine in excess of $10,000. The district court noted the stipulation in its second denial of jury trial. See Order of June 5, 1996, at 1. Clavette was tried, convicted, and sentenced to pay a fine of $2,000, to pay $6,250 restitution to the United States Fish and Wildlife Service, and to conform to certain standard and special conditions of probation for a period of three years. See United States v. Clavette, No. MCR-96-001-BU (D. Mont. Jan. 13, 1997), slip op. at 2-3.
As a matter of constitutional doctrine, a criminal defendant is not entitled to trial by jury under Article III or the Sixth Amendment if he is charged with a petty offense. The United States Supreme Court has held that an offense punishable by a prison term of six months or less is presumed to be petty. To date, the Court has not identified any factor sufficient to overcome this presumption. However, a fine alone, even where no prison term is possible, can trigger the jury right. Where a fine is combined with a maximum six-month term of imprisonment, the Court has yet to decide how high the fine must be to rebut the increasingly strong presumption against jury trial.

Blanton v. City of North Las Vegas declares the current test for the jury right for offenses involving imprisonment of six months or less to be "whether the additional penalties clearly reflect a legislative determination of seriousness." In applica-

8. The Court does not allow probationary penalties, even including residence in a "community correctional facility" for five years, to trigger the jury right under the Constitution. See United States v. Nachtigal, 507 U.S. 1, 5 n.*, 5-6 (1993) (per curiam). The Court has also rejected the argument that the penalties for two or more petty offenses should be combined to determine the defendant's entitlement to jury trial. See Lewis v. United States, 518 U.S. 322, 325, 330 (1996). In Lewis, the Court expressly discussed "aggregate" offenses, though only two were charged. The Court's manner of dealing with the issue suggests that three or four or ten or a hundred petty offenses would still not add up to one serious offense capable of triggering the jury right. The Orwellian whiff of the decision is diffused by the dissenters in the case — Justices Stevens and Ginsburg — and especially by the concurring opinion of Justices Kennedy and Breyer. See Lewis, 518 U.S. at 330-342.
9. Readers may be relieved to know that the Constitution will guarantee a jury trial for any offense punishable by a fine of $52 million. See United Mine Workers v. Bagwell, 512 U.S. 821 (1994) (reversing conviction and remanding for jury trial of a criminal contempt charge).
10. Several commentators have noticed the shrinking scope of the jury right. See, e.g., Ann Hopkins, Mens Rea and the Right to Trial by Jury, 76 CAL. L. REV. 391 (1988); George Kaye, Petty Offenders Have No Peers!, 26 U. CHI. L. REV. 245 (1959); Timothy Lynch, Rethinking the Petty Offense Doctrine, 4 KAN. J.L. & PUB. POL'Y 7 (Fall 1994); Colleen P. Murphy, The Narrowing of the Entitlement to Jury Trial, 97 WIS. L. REV. 133 (1997). These authors have not, however, given the Court a theoretically coherent way to stop the shrinkage; this Comment attempts to do that. For insight analyses of the philosophical and political value of the jury, see JEFFREY ABRAMSON, WE, THE JURY (1994); Laurie L. Levenson, Change of Venue and the Role of the Criminal Jury, 66 S. CAL. L. REV. 1533, 1556-59 (1993).
12. Blanton, 489 U.S. at 543. All authorities agree the maximum punishment to which the defendant may be subjected, not the actual punishment imposed, is the determining factor. See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968). Contempt cases are categorically excepted from this rule; there, the punishment ultimately imposed determines the
tion, this test has focused exclusively on the penalties authorized by the statute defining the offense in order to discover the "reflection" of the legislature's evaluation of the offense's character. But what if the legislature evaluates offenses as petty or serious in some other statute? 18 U.S.C. § 19 defines a petty offense as one entailing a maximum fine for individuals of $5,000 or $10,000 for organizations.\textsuperscript{13} The pertinent legislative history since 1984 clearly reveals Congress' intent that fines over those levels should trigger the jury right.\textsuperscript{14}

Yet the Supreme Court has not discussed the statute since 1975.\textsuperscript{15} Since \textit{Blanton}, only the circuit and district courts have bothered much with Congress' definition, and most courts have taken the Supreme Court's silence as an indication that the statute has no application to the jury right, even in cases decided under federal law.\textsuperscript{16} The Montana district court stood on this defendant's right to jury trial. See Bloom v. Illinois, 391 U.S. 194 (1968). Because the Government's stipulation to seek a fine of $10,000 or less still exceeded the $5,000 threshold in 18 U.S.C. § 19 (1994), it will not be discussed here. The only located published decision to deny jury trial on the basis of a stipulation to seek a fine no greater than $5,000 is a decision in Bankruptcy Court. See \textit{In re Shirley}, 184 B.R. 613 (N.D. Ga. 1995); see also infra note 146. At least one circuit holds that jury trial may be denied to a defendant whom the court declares will not receive a sentence greater than six months. See United States v. Bencheck, 926 F.2d 1512 (10th Cir. 1991).


ground when it denied Clavette’s motion for a jury trial. Similarly, defendants charged with violating the Free Access to Clinic Entrances Act, punishable by up to six months in jail and a fine up to $10,000, have been denied trial by jury in the circuit courts. Clavette’s case, then, squarely presents two questions which federal judges have little guidance in answering: where the maximum prison term is six months, does a $25,000 fine clearly reflect the legislature’s determination that the offense is serious? And does 18 U.S.C. § 19 have any bearing on the measurement of seriousness?

In addition to these very practical issues, the uncertain application of 18 U.S.C. § 19 to the petty offense doctrine presents interesting theoretical questions concerning the new textualism. Normally, statutory interpretation can be sharply distinguished from constitutional interpretation. In the petty

19. See, e.g., Soderna, 82 F.3d at 1379 (asserting that 18 U.S.C. § 19 does not determine the constitutional right to jury trial); Unterburger, 97 F.3d at 1415-16 (following Soderna). But see Lucero, 895 F. Supp. at 1420 & n.1 (holding statutory definition of petty offenses at 18 U.S.C. § 19 favors granting constitutional right to jury trial for defendants accused of violating Free Access to Clinic Entrances Act).
20. At oral argument in United States v. Clavette, the Ninth Circuit panel’s questions to both attorneys and the panel’s own comments were, inevitably, speculative. The panel noted that a $25,000 fine might deprive a defendant’s children of a college education or cause him to lose his home. The subjectivity of this approach is the logical result of the courts’ disregard of 18 U.S.C. § 19. In Clavette, the Ninth Circuit was forced to decide whether the United States Supreme Court would consider a $25,000 fine reflective of the legislature’s determination of seriousness, not whether Congress authorized a $25,000 fine because it considered the offense serious.
21. Congress distinguishes between individual and organizational defendants; $5,000 is the limit for an individual’s petty offense, $10,000 for an organization’s. For convenience, the $5,000 figure will be used throughout this comment, except where clarity or history requires a distinction.
22. The term and its range of meanings are taken from William N. Eskridge, The New Textualism, 37 U.C.L.A. L. REV. 621 (1990) [hereinafter Eskridge, New Textualism]. Traditionally, the Supreme Court consults committee reports and other legislative materials to confirm its interpretation of federal statutes; plain language prevails unless legislative history contradicts it. See id. at 626. A strict new textualist will not turn to legislative history unless a statute is patently absurd when viewed in the context of other statutes, previous judicial interpretations, and traditional canons of construction. See id. at 655. For a new textualist, plain language controls to an even greater degree than in the traditional approach. The leading figures associated with the new textualism are Justice Scalia of the United States Supreme Court and Judge Easterbrook of the Seventh Circuit Court of Appeals.
23. Professor Eskridge’s article, for example, deals only with statutory interpretation, and constitutional doctrine and statutory interpretation occupy two entirely different schools of thought, with different scholars leading the field in each category. Furthermore, as Professor Eskridge points out, the new textualists restrict or alto-
offense doctrine, constitutional and statutory interpretation intersect.\textsuperscript{24} The constitutional doctrine does not require the Court to invoke a statute,\textsuperscript{25} but it does require the Court to gauge the legislature’s determination of seriousness. 18 U.S.C. § 19 does not refer to the jury right, but it does use a term developed by the courts — “petty.” Moreover, the legislative history is clearly and exclusively concerned with the jury question. Is there a point, then, where a statute must be interpreted to give meaning to a constitutional provision?

Part II of this Comment investigates the historical jurisprudence of the Supreme Court on the petty offense doctrine and explores the role of legislatures in defining which offenses may be tried without a jury and which require trial by jury. Part III demonstrates the slow process by which the broad role properly allocated to the legislature in the constitutional test for the jury right has been usurped by the judiciary, concluding that contemporary courts overemphasize the term of imprisonment in distinguishing petty from serious cases. Part IV analyzes the statutes and legislative history accompanying 18 U.S.C. § 19, demonstrating Congress’ intent to grant the jury right to defendants subject to fines over $5,000. Part V proposes a few solutions to the arbitrary and subjective nature of courts’ determinations of the jury right under the current constitutional test.

\textsuperscript{24} Typically, statutes meet the Constitution when the constitutional validity of a statute is in question; if the statute is not clearly unconstitutional, a court will give the statute whatever interpretation is consistent with the Constitution. See, e.g., United States v. Lopez, 514 U.S. 549, 562 (1995). In that sort of case, however, the meaning of constitutional provisions is not filled in or even influenced by the statute in question. The petty offense doctrine, by contrast, applies legislative evaluations of seriousness to determine whether the Constitution entitles a defendant to a jury trial.

\textsuperscript{25} Because the petty offense doctrine is judicially created, the judiciary might be excused for assuming it is none of the legislature’s business. A legislature could not, for example, pass a law mandating bench trial for all drug offenses, because the Constitution, according to the doctrine, requires jury trial for all serious crimes. See Callan v. Wilson, 127 U.S. 540 (1888); Duncan v. Louisiana, 391 U.S. 145 (1968). Furthermore, it is up to the Court to say what the Constitution requires. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Nonetheless, the petty offense doctrine itself insists that the legislature ought to have direct, not merely “reflective,” influence in deciding which offenses must be tried by jury and which may be tried without one.
II. THE SUPREME COURT'S HISTORICAL JURISPRUDENCE ON THE PETTY OFFENSE DOCTRINE

Unique among constitutional doctrines of interpretation, the petty offense doctrine calls for direct legislative involvement in the determination of a criminal defendant's constitutional right to trial by jury. Under the weight of other rules of construction which are the sole province of the judiciary, courts seem to have tuned out the call of this doctrine. A look at the birth of the doctrine and at the legislature's historical authority to define the scope of the jury right reveals a coherent, workable rule in the Supreme Court's early cases. Courts should simply toe the line at which the Constitution limits legislatures' power to deny jury trial; legislatures' definitions of petty offenses should have direct bearing on the courts' obligation to grant jury trial under the Constitution.

A. The Birth of the Petty Offense Doctrine: Callan v. Wilson (1888)

The plain language of the jury clauses of the Constitution and the Sixth Amendment is unequivocal and categorical. Article III of the Constitution states "[t]he trial of all Crimes, except in cases of Impeachment, shall be by Jury . . . ."26 The Sixth Amendment requires that "[i]n 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 . . . ."27 David Dudley Field, the great nineteenth-century jurist, derided the suggestion that the Framers did not mean exactly what they said:

The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has often been invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right — one of the most valuable in a free country — is preserved to every one accused of crime . . . . The sixth amendment affirms that [right in] language broad enough to embrace all persons and cases . . . who [are] subject to indictment or pre-

27. U.S. CONST. amend. VI.
sentiment [under] the fifth [amendment].

Despite such oratorical flair, in Field's time and long after, state legislatures were under no obligation to respect the jury right; the Constitution constrained only the power of the federal government. In fact, even under the due process, privileges and immunities, and equal protection clauses of the Fourteenth Amendment, the Supreme Court did not believe that state legislatures were obligated to provide for jury trial at all. In *Walker v. Sauvinet*, the Supreme Court held that a state might abolish jury trial altogether. In *Missouri v. Lewis*, the Supreme Court, albeit in dicta, did not even blink at the proposition that a state might abolish jury trial in one district while guaranteeing it in another. And in *Natal v. Louisiana*, the Court gave short shrift to Natal's demand for a jury when a municipal ordinance subjected him to a $25 penalty for operating a private market within six blocks of a public market:

The case is too plain for discussion. By the law of Louisiana, as in states where the common law prevails, the regulation and control of markets . . . are matters of municipal police, and may be intrusted by the legislature to a city council, to be exercised as in its discretion the public health and convenience may require.

Until 1968, when Gary Duncan's weightier complaint against

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28. *Ex parte Milligan*, 71 U.S. 2, 122-23 (1866). The ellipses and bracketed words delete references to exceptions provided in the Fifth Amendment for cases involving military personnel.

29. 92 U.S. 90 (1875).

30. "The States, so far as [the seventh] amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship . . . ." *Walker*, 92 U.S. at 92. Though *Walker* is a civil contempt case, it was cited along with criminal contempt and ordinary criminal cases discussing the jury issue. See also *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (citing *Walker* for the proposition, in dicta, that trial by jury might be abolished by a state).

31. 101 U.S. 22 (1879).

32. See *Lewis*, 101 U.S. at 31-32. The issue in the case was whether the State of Missouri could condition appeals to the Missouri Supreme Court from the St. Louis Court of Appeals on the amount in controversy or the presence of a state constitutional question. Residents who appealed from other districts in the state could appeal to the Missouri Supreme Court on any issue. The United States Supreme Court upheld Missouri's unique arrangement. See *id.* at 33.

33. 139 U.S. 621 (1891).

34. *Natal*, 139 U.S. at 623-24. Here, the phrase "states where the common law prevails" merely marks the difference between Louisiana's legal history and that of the rest of the states.
Louisiana moved the Court to incorporate the Sixth Amendment jury provision upon the states, the Court placed no limits on state legislative powers where the jury right was concerned.

If the states were not obliged to provide jury trial for citizens under their legislative authority, was the federal government obliged to provide jury trial for the few citizens living under its exclusive authority in the District of Columbia? Twenty-two years after Field sang the praises of the jury right, James C. Callan appeared before the Supreme Court after the police court of the District of Columbia denied him a jury trial. He was charged by information with conspiracy, convicted by the police court judge, and sentenced to pay a fine of $25; he refused to do so and was jailed for thirty days. The government argued that the Constitution's broad, liberal language did not protect residents of the District of Columbia but only residents of the states. The Constitution, under this argument, did not mean literally "all crimes," but only "whatever crimes occur within the states." Since Callan's crime did not occur in a state, the government argued, the Constitution would not protect him against Congress' exercise of its legislative powers. The Supreme Court rejected this proposition, using language broader than its opinions in Walker or Lewis might suggest:

There is nothing in the history of the constitution, or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of any of the constitutional guaranties of life, liberty, and property; especially of the privilege of trial by jury in criminal cases.

The Court refused to allow the police court to impose a meager thirty-day sentence and stood firm on Callan's constitutional jury right.

35. See Duncan v. Louisiana, 391 U.S. 145 (1968); see also infra Part III.A.
37. See supra pp. 5-6.
38. See Callan, 127 U.S. at 547.
39. Callan and several compatriots, under the name 'Sanctuary Washington Musical Assembly,' a branch of the Knights of Labor, leaned on a few other musicians who were uncooperative when the Assembly suggested each of them should contribute $25 to the general fund. See id. at 540.
40. See id.
41. See id. at 548.
42. See Walker v. Sauvinet, 92 U.S. 90 (1875); Missouri v. Lewis, 101 U.S. 22 (1879); see also supra p. 6.
43. Callan, 127 U.S. at 550.
44. The government also argued that Callan's jury right was not violated be-
The *Callan* opinion, though, granted the federal government its broader argument: that the Constitution did not mean *every* crime when it said “all crimes.” The Court merely shifted its inquiry to the word “crimes.” “The word ‘crime,’ in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character.”

To figure out which crime was which, the Court would consult the common law. Thus, *Callan* restricts the scope of the jury clauses even while emphasizing the historical and constitutional sanctity of the jury right. The petty offense doctrine, announced for the first time in 1888, denies jury trial for crimes that were not tried by a jury at common law.

Despite some persuasive arguments challenging the legitimacy of interpreting the Constitution in light of the common law, and arguments challenging the legitimacy of the petty offense doctrine specifically, a doctrine that has stood for so

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cause he was entitled to a jury on appeal to the supreme court of the District. See *Callan*, 127 U.S. at 556-57. (Callan did appeal, but he withdrew his appeal before it could be heard by a jury.) See *id.* at 540. This argument too the Court rejected, quoting a long passage from a decision by Justice Blatchford of the Southern District of New York. That decision refused a warrant authorizing the extradition of Charles Dana, publisher of the *New York Times*, to the District of Columbia on a libel charge, on the ground that extradition would deprive Dana of his constitutional right to a jury. The court insisted Dana was entitled to be tried and acquitted by a jury in the first instance and should not have to wait for an acquittal by an appellate jury. See *In re Dana*, 6 F. Cas. 1140, 1141-42 (C.C.S.D.N.Y. 1873) (No. 3,554), quoted in *Callan*, 127 U.S. at 554.

45. *Callan*, 127 U.S. at 549.

46. See *id.*

47. The Court couched its decision in concessions:

Without further reference to the authorities, and conceding that there is a class of petty or minor offenses not usually embraced in public criminal statutes, and not of the class or grade triable common law [sic] by a jury, and which, if committed in this District, may, under the authority of Congress, be tried by the court and without a jury, we are of opinion that the offense with which the appellant is charged does not belong to that class. . . . When, therefore, the appellant was brought before the supreme court of the District, and the fact was disclosed that he had been adjudged guilty of the crime of conspiracy . . . without ever having been tried by a jury, he should have been restored to his liberty.

48. James Madison opposed a constitutional provision which would have adopted the common law wholesale, on the ground that the common law would import “a thousand heterogeneous & antirepublican doctrines.” Letter from James Madison to George Washington (Oct. 18, 1787), in 10 THE PAPERS OF JAMES MADISON 197 (1977).

49. As one modern commentator has asked, “If the delegates at the Philadelphia Convention wanted to close a loophole in the common-law right to a jury trial,
long will almost certainly not be reconsidered by the Court today. Consequently, the following exploration of the doctrine's history will focus on a previously unremarked theme in its development after Callan: the role of the legislature in defining petty offenses, both at common law and under the Constitution.

B. Common Law Petty Offenses and Legislative Authority

When Justice Harlan announced the petty offense doctrine in the Callan opinion, the offense's status at common law was the only criterion he proposed to differentiate petty from serious offenses. Once he had done a little more research, Justice Harlan realized that the only offenses tried without a jury at common law were those the legislature singled out to be so tried. The common law presumed a right to trial by jury, and only a statute of Parliament could rebut the presumption.

Justice Harlan's second thoughts appeared in his dissenting opinion in Schick v. United States, where he questioned whether a defendant and the government could agree to waive the jury right, since the constitutional requirement of trial by jury did not apply in all cases. The majority found no reason even to raise such a question: "[w]e entertain no doubt that the parties could rightfully make such a waiver and the judgments are in no way invalidated thereby." Citing Blackstone's re-
marks on the word "crime," the majority concluded that the linguistic revision between Article III's "all crimes" and the Sixth Amendment's "all criminal offenses" made the petty offense doctrine "obvious," that is, made it obvious that low-grade crimes need not be tried by juries. Moreover, the majority refused to dignify Schick's transgression with the name of "criminal offense." Schick had merely committed an "offense." Therefore, the Sixth Amendment jury clause was not binding on him or the government, and the two could legitimately agree to a bench trial. The majority thus grounded its entire discussion on the assertion that the petty offense doctrine was "obvious."

But for Justice Harlan, the real question was whether there should be any such thing as an exclusively judicial petty offense doctrine in the first place. Harlan's dissent argued that the legislature's decision should be paramount:

I assert, with confidence, that no precedent can be found at common law for the trial by the court, without a jury, of any crimes except those described . . . as minor or petty offenses involved in the internal police of the state, and those could be tried . . . without the intervention of a jury, only when thereunto authorized by an act of Parliament. Except in cases of contempt, the common law, Blackstone says, was a stranger to the summary proceedings authorized by acts of Parliament. . . . I am not aware of, nor has there been cited, any case in England in which, after Magna Charta, and prior to the adoption of our Constitution, a court, tribunal, officer, or commissioner has, without a jury, even in the case of a petty offense, determined the question of crime or no crime, when the defendant pleaded not guilty, unless the authority to do so was expressly conferred by an act of Parliament.

55. See Schick, 195 U.S. at 69-70.
56. Some circuits relied on Schick to hold that defendants could not waive the jury right if they were accused of a serious offense. See, e.g., Coates v. United States, 290 F. 134 (4th Cir. 1923); Low v. United States, 169 F. 86 (6th Cir. 1909); Dickinson v. United States, 159 F. 801 (1st Cir. 1908). This rule controlled in these circuits until the Supreme Court decided that the line between petty and serious offenses (wherever it might be), or that between felonies and misdemeanors, should not prevent a defendant accused of a serious offense from waiving his right to jury trial. See Patton v. United States, 281 U.S. 276 (1930), overruled on other grounds by Williams v. Florida, 399 U.S. 78 (1970).
57. See Schick, 195 U.S. at 67. A later case, Singer v. United States, confirmed that both parties must agree to waive jury trial if the offense is serious enough to require jury trial under the Constitution and if the defendant gives no reason for waiving jury trial other than saving time. See 380 U.S. 24 (1965).
58. Schick, 195 U.S. at 80 (Harlan, J., dissenting) (citing 4 WILLIAM
Legislative authorization for a court to try an offense without a jury was a jurisdictional prerequisite at common law. Hence, it made no sense to speak of waiver of jury trial apart from an express Congressional provision for waiver. A mere pact between a prosecutor and a defendant could not confer jurisdiction upon a court to try the matter any more than an assumption of jurisdiction by a panel of laypersons could. If the Court was going to follow the common law in deciding the jury issue, it had first to presume that jury trial was required; only if Congress specifically provided for bench trial of the offense could that procedure be used, and even then, the power of Congress was limited by the Constitution. The Court's real role was to draw the constitutional line beyond which Congress had to allow trial by jury.

The Schick majority sought to respect common law precedent on the petty offense doctrine; Justice Harlan, in dissent, insisted that the majority failed to do so. If Justice Harlan was right, Clavette wields a historical entitlement to invoke 18 U.S.C. § 19 as the legislature's demarcation between serious and petty offenses. Was Justice Harlan's thesis correct? Did the Schick majority fail to realize the direct role of the legislature in defining petty offenses at common law?

The answer is suggested in an influential article co-authored by Felix Frankfurter and Thomas G. Corcoran. Frankfurter

BLACKSTONE, COMMENTARIES *280) (emphases added).

59. See id. at 81 (Harlan, J., dissenting).

60. See id.

61. Many years later, Justice Frankfurter referred to Justice Harlan as an "eccentric exception" among the forty-three justices who had sat on the Court since the passage of the Fourteenth Amendment (see Adamson v. California, 332 U.S. 46, 62 (1947)), because Justice Harlan was the only one who believed it wholly incorporated the first eight provisions of the Bill of Rights upon the States. Justice Frankfurter's observation is qualified by Justice Black's thoroughly researched dissent in the same case. See id. at 68 (Black, J., dissenting); see also id. at 92-123 (demonstrating in appendix that the framers of the Fourteenth Amendment intended wholly to incorporate the first eight provisions of the Bill of Rights upon the States and resisting the majority's selective incorporation). In the jury right context, Justice Frankfurter's reasons for thinking Justice Harlan eccentric are probably best illustrated by Justice Harlan's dissent in Maxwell v. Dow, 176 U.S. 581 (1900), where he invokes the sanctity of the jury at common law and the privileges and immunities clause of the Fourteenth Amendment to contest the majority's conclusion that State juries may be composed of eight persons without infringing on constitutional privileges and immunities. See id. at 605-17.

62. Frankfurter & Corcoran, supra note 49. The Supreme Court has relied on the article in opinions dealing with the petty offense doctrine. See, e.g., District of Columbia v. Clawans, 300 U.S. 617, 624 n.1 (1937); Duncan v. Louisiana, 391 U.S. 354 [Vol. 59]

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and Corcoran were not looking for the common law role of the legislature in defining petty offenses, but they found it. Frankfurter and Corcoran assumed the Constitution demanded a certain minimal liberalism where the jury right was concerned, and they assumed Congress wanted to narrow the jury right as far as possible: "[t]o what extent, if at all, may Congress under the Federal Constitution adopt . . . [bench trial] procedure . . . ?"63 This, at least, was their concern in the article’s main text. But the clearest message of their research surfaces in the appendices. The appendices attempt to list each offense that was tried without a jury in the colonial and revolutionary eras in New York, Pennsylvania, Maryland, and Virginia. Hundreds of offenses are listed.64 The study provides strong historical evidence that the

145, 159 & n.31 (1968).
63. Frankfurter & Corcoran, supra note 49, at 920.
64. These examples were selected to demonstrate the general framework of the legislation in each of the four represented colonies and to give a small flavor of the particular offenses tried without a jury:

1 Colonial Laws of New York 174 (1685). Swearing. 1s. or if unable to pay, 3 hours in stocks or public whipping for children; single justice or mayor. See Frankfurter & Corcoran, supra note 49, at 984.
1785 Laws, c. 81. Firing guns for New Year’s celebration. 40s. or in default, 1 month; half to informer, half to poor; single justice. See Frankfurter & Corcoran, supra note 49, at 988.
1 Maryland Archives, Proceedings and Acts of the Assembly of Maryland 52 (1638). An Act for the Authority of the Justices of the Peace. "[T]he offences following in this Act may be heard and determined by the Lieutenant Generall for the time being or by any one of the Councill or by any one haveing Commission for the peace under the great Seal of this Province and the offender may be convicted by the view or hearing of the Judge or confession of the Offender or Evidence of the fact or by the testimony of one witnesse to which purport every of the said Judges aforenamed shall have power by vertue of this Act . . . and to commit any offender to prison till he submit himself to good order or find Security for his good appearance and to take and demand recognisances to that purpose and to keep a Record of all fines and sentences . . . ."

The above Act enumerated the following offenses as punishable by Justices of the Peace:

1. Threatening to harm the person or goods of another . . .
2. Residing among Indians without the consent of the Lord Proprietary . . .
3. Swearing . . .
4. Drunkenness . . .
5. Fornication . . .
6. Adultery . . .
7. Refusal properly to care for servants . . .
8. Refusal of servants to perform lawful command . . .
9. Labor on Sabbath or other holy days . . .
10. Eating flesh in Lent or on other days forbidden by English law . . .
legislature both defined the offense and set out the manner of its trial if the offense was to be prosecuted without a jury. Hence, Justice Harlan's dissent in *Schick* appears to be correct: at common law, offenses were probably tried by jury unless the legislature expressly authorized bench trial.

Moreover, contrary to the Supreme Court's exclusive focus today on the statute defining the offense, legislative authorization for trial without a jury was occasionally codified in a different statute. In Pennsylvania, for instance, the provincial assembly authorized justices of the peace to try offenses punishable by fines up to 20 shillings, from 1700-1735, and then by fines up to 5 pounds, beginning in 1735-36. In 1779, the state legislature authorized bench trials for offenses entailing fines up to 50 pounds; two years later, it revoked that authority. Another, more modest proposal in 1784 gave justices of the peace jurisdiction to try offenses entailing fines up to 10 pounds in fines. That authorization too was revoked in 1785, then reinstated with the qualification that a defendant might appeal an assessment of fine or imposition of prison time to a court where he would be entitled to a jury. Congress' statutory scheme today mirrors Pennsylvania's 1785 scheme. Congress' statutes defining offenses contain no legislative evaluation of the penalty authorized; petty offenses are identified at 18 U.S.C. § 19.

C. A Rule from the Early Decisions: The Court Prevents Congress from Denying the Jury Right in Serious Cases

Except for *Schick*, where the majority found no federal statute authorizing bench trial but granted it anyway, all of the Supreme Court's early decisions under the petty offense doctrine

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11. Raising an alarm without cause by shooting of guns . . . .
12. Fishing with seines or other unlawful nets . . . .
29 Car. 2, Act 5. Justice of peace getting drunk on court day so as to be incapable of sitting; 500 pounds tobacco for first offense, 1,000 for second, and 2,000 and loss of office for third; imposed by the other members of the county court. See Frankfurter & Corcoran, *supra* note 49, at 1015.
66. See id.
67. See id. at 996.
68. See id.
69. See id.
70. See id.
71. See id.
recognize the principle that only a legislative act can rebut the common law presumption for jury trial. For example, in Walker,\textsuperscript{72} Lewis,\textsuperscript{73} and Natal,\textsuperscript{74} the three early cases concerning state statutes, the Court acknowledged the authority of state legislatures to decide which offenses should be tried by jury and which by a judge. In the three cases that originated in the District of Columbia,\textsuperscript{75} Congress' municipal regulations were measured against the jury clauses of the Constitution to determine whether legislative restriction of the jury right had gone too far. In each case, the court presumed the legislature had the authority to deny jury trial unless the common law had expanded the jury right. Nonetheless, the common law presumption was destroyed in Schick, because the majority opinion did not take up Justice Harlan's challenge to show a common law crime which was tried summarily without Parliament's authorization. Instead, the Court approved of trial without jury — by, one should remember, the defendant's and government's voluntary waiver of jury trial — even though no federal statute authorized bench trial.

Fortunately, Schick's unwitting destruction of the common law presumption for jury trial was not harmful. The District of Columbia's municipal regulations still confined the Court to its proper, organic role in the petty offense doctrine. Congress provided for jury trial if "according to the Constitution of the United States, the accused would be entitled to a jury trial."\textsuperscript{76} If the Constitution did not entitle the defendant to a jury trial, neither would Congress, "unless, in cases where the fine or penalty may be more than $300 or imprisonment more than ninety days, the accused shall demand a trial by jury."\textsuperscript{77} In other words, for cases where Parliament had authorized bench trial and where the penalty was less than $300 or ninety days, Congress acquiesced with the Court in denying jury trial. Interpreting these municipal regulations, the Court had to decide whether a particular offense was serious enough to require jury trial even though Congress had authorized bench trial.

\textsuperscript{72} Walker v. Sauvinet, 92 U.S. 90 (1875).
\textsuperscript{73} Missouri v. Lewis, 101 U.S. 22 (1879).
\textsuperscript{74} Natal v. Louisiana, 139 U.S. 621 (1891).
\textsuperscript{76} D.C. Mun. Regs. tit. 18, § 165 (1930).
\textsuperscript{77} D.C. Mun. Regs. tit. 18, § 165 (1930).
For instance, in District of Columbia v. Colts, the Court considered whether reckless driving, punishable by a fine of $25 to $100 and by imprisonment for ten to thirty days, required jury trial even though the penalties clearly fell below the line at which Congress granted jury trial. The Court held that Congress could not authorize summary prosecution for reckless driving offenses because the common law had required jury trial "when horses, instead of gasoline, constituted the motive power."

Likewise, when Ethel Clawans was prosecuted for selling the unused portions of railway tickets without a license, the Court had to decide whether she was entitled to a jury even though the maximum penalty was a fine up to $300 and up to ninety days in jail, short of the municipal regulations' entitlement to jury trial. Citing Blackstone, Paley, and a treatise on municipal corporations, the Court held that the offense did not require jury trial at common law. But this did not end the Court's inquiry:

This Court has refused to foreclose consideration of the severity of the penalty as an element to be considered in determining whether a statutory offense, in other respects trivial and not a crime at common law, must be deemed so serious as to be comparable with common-law crimes, and thus to entitle the accused to the benefit of a jury trial prescribed by the Constitution.

If the penalty was severe enough, the Court would invoke the Constitution to prevent Congress from denying jury trial. In both Colts and Clawans — indeed, in all of the early cases — the Court plays precisely the role it ought to play, the role of watchdog over Congress' denials of jury trial.

78. 282 U.S. 63 (1930).
79. D.C. Mun. Regs. tit. 6, § 246(c) (1930).
80. See Colts, 282 U.S. at 73. The Court implies both that reckless driving was an indictable offense at common law and that indictable offenses required jury trial. See id. at 73 (citing State v. Rodgers, 102 A. 433 (N.J. 1917)).
82. See D.C. Mun. Regs. tit. 18, § 165 (1930).
83. See Clawans, 300 U.S. at 624 n.1.
84. See id. at 624-25.
85. Id. at 625 (citing Schick v. United States, 195 U.S. 65 (1904)).
86. Even in Schick, the Court played this role. There was no statute authorizing trial without jury, and the Court (mistakenly, as Justice Harlan argues) reversed the common law presumption for jury trial. Beyond that point, however, the Court continued its inquiry by asking whether common law would have required jury trial and whether the punishment was light or severe. See United States v. Schick, 195
In these early days of the petty offense doctrine, then, the Court never had to guess, as all courts must today, whether the legislature which defined the offense thought it was a serious one. At $300 and/or ninety days, Congress had clearly indicated which offenses were serious and which petty for purposes of the federal jury right. The Court only had to decide when to confer the jury right despite Congress’ denial of it. To make that decision, the Court asked whether Parliament, at common law, authorized trial without jury for the particular offense; and, beyond that, it inquired whether the penalty was so serious that the Constitution required trial by jury, regardless of the offense’s status at common law and even in the face of legislative denial of jury trial. The common law presumption for jury trial and for legislative input into the determination of the jury right, though weakly articulated, was fully intact when the Court, satisfied with its work, put the petty offense doctrine on the shelf in 1937.

III. THE PERVERSION OF THE PETTY OFFENSE DOCTRINE: JUDICIAL USURPATION OF LEGISLATIVE COMPETENCE

Never having spelled out the proper role of the legislature in the petty offense doctrine, the Supreme Court, after Clawans in 1937, did not hear a case involving the doctrine for twenty-eight years. When the doctrine surfaced again, two circumstances overwhelmed it. First, from 1965 to 1975, the Court considered the doctrine in only two unique contexts: criminal contempt and incorporation of the Sixth Amendment upon the States. Second, as the Court moved through these cases, it became careless with its citations. After 1975, the Court did not deal with the petty offense doctrine until 1989, in Blanton v. City of North Las Ve-

87. Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989). Much has been made of the difficulty of comparing common law offenses to contemporary ones. See, e.g., id. at 541 & n.5 (citing Landry v. Hoepfner, 840 F.2d 1201, 1209-10 (8th Cir. 1988) (en banc), cert. denied, 489 U.S. 1083 (1989)). Under the analysis presented in this Comment, that problem is resolved by contemporary legislative evaluations of various penalties’ seriousness.


89. See District of Columbia v. Clawans, 300 U.S. 617 (1937).
When the Court established the Blanton presumption against jury trial for offenses authorizing prison terms of six months or less, it relied on careless citations in its 1965-1975 decisions. These decisions, in turn, result in grave contemporary affronts to Congress' definition of petty offenses in 18 U.S.C. § 19. Since Blanton, the Seventh, Eleventh, and Ninth Circuit Courts of Appeals have held that fines of $10,000 or even $25,000 do not clearly indicate that the offense is serious enough to trigger the jury right, even though Congress' definition of petty offenses encompasses fines only up to $5,000.

A. Criminal Contempt and Careless Citation, 1965-1975

After a hiatus of twenty-eight years, the Supreme Court took up the petty offense doctrine in the midst of special circumstances that eventually proved disastrous for its development. Each case in this period concerned either criminal contempt, where the legislature has no role in evaluating the offense, or the incorporation doctrine, where the Court compelled state legislatures to respect the Sixth Amendment and the common law boundaries of the jury right. As a result, from 1965 to 1975, the Court built up a body of case law on the petty offense doctrine—eight cases in ten years—in which legislative authority held a precarious position. Though almost all of the cases acknowledge legislative authority, the Court's careful reasoning processes are soon truncated by careless citation. In fact, this era culminates in Muniz v. Hoffman, a decision the circuit courts take as license to ignore Congress' definition of petty offenses.

With the exception of Muniz, the opinions written in this era demonstrate remarkable deference to the legislative role in evaluating offenses as petty or serious for the purposes of the constitutional right to jury trial. Even in the contempt cases, where

91. See 18 U.S.C. §§ 401, 402 (1994). Criminal contempt is a statutorily recognized crime, but the legislature makes no provision for its trial or punishment; it merely confers jurisdiction on the courts. The initiation of the charge and the penalty are entirely within the discretion of the contemned and sentencing courts. And, usually, the contemned and sentencing judge are one and the same. But see, e.g., Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (remanding for trial by a different judge after contemned judge sentenced three contemnors to eleven to twenty-two years, seven to fourteen years, and six to twelve years for, among other things, threatening his life). The offense is therefore practically the exclusive province of the judiciary, and to develop the petty offense doctrine in the context of such an offense invites judicial usurpation of the legislature's role.
92. 422 U.S. 454 (1975). See infra notes 115-130 and accompanying text.
the statute defining the offense contains no penalty range, the Court seeks out the legislature’s evaluation of the penalty actually imposed by looking at Congress’ definition of petty offenses. The Court’s first consideration of the petty offense doctrine in the context of contempt, Cheff v. Schnackenberg, relied on Congress’ definition: “[a]ccording to 18 U.S.C. § 1 (1964 ed.), ‘(a)ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months’ is a ‘petty offense.'” In the absence of a compelling argument for treating contempt as if it were always serious enough to require jury trial, the Court respected Congress’ definition and denied Cheff a jury trial.

Unfortunately, the Cheff Court went on to say that their decision left an open question as to whether contempts punished by more than six months’ imprisonment could be tried without a jury:

At the same time, we recognize that by limiting our opinion to those cases where a sentence not exceeding six months is imposed we leave the federal courts at sea in instances involving greater sentences. Effective administration compels us to express a view on that point. Therefore, in the exercise of the Court’s supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof.

This is where the unique nature of criminal contempt confuses the jury right issue. Are the federal courts left “at sea” because Congress’ definition of petty offenses does not apply in contempt cases? Or are they at sea because Congress’ definition is not constitutionally effective in any case?

94. Cheff, 384 U.S. at 379.
95. See United States v. Barnett, 376 U.S. 681 (1964). In Barnett, the Court determined that no constitutional right to jury trial attached to criminal contempt sui generis. See id. at 692. It noted, however, that the severity of the penalty actually imposed might confer the constitutional jury right. See id. at 694-95 n.12. Cheff sought a decision on that issue, and the Court invoked the petty offense doctrine to deny Cheff a jury trial because he was sentenced to only six months. See Cheff, 384 U.S. at 380.
96. See id.
97. Id.
The Court's next three decisions\(^9\) — all issued on May 20, 1968 — did not confront the question directly, but *Duncan v. Louisiana*,\(^9\) the leading case, indicates that legislative evaluations of the penalty are a crucial component in the constitutional determination of the right to jury trial. These three decisions impose upon the states the common law requirement for jury trial in cases involving certain offenses or punishments. The *Duncan* Court held that "a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense."\(^{100}\) The Court did not say just when the Constitution required jury trial. It simply concluded that the Constitution required jury trial of offenses punishable by a prison term of two years, and that Duncan, who could have received two years, was therefore entitled to a jury trial.\(^{101}\) To reach that decision, the Court looked to Congress' definition of petty offenses at 18 U.S.C. § 1(3) and to the states' constitutions and statutory schemes, all but one of which — Louisiana's — guaranteed jury trial for all crimes punishable by more than one year in jail.\(^{102}\)

Similarly, in *Bloom v. Illinois*,\(^{103}\) another contempt case, the Court preserved the subtle but crucial distinction between the penalty itself and the legislatures' evaluations of the penalty. The rule of the case refers to the absence of a legislatively prescribed penalty: "When the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look to the penalty actually imposed as the best evidence of the seriousness of the offense."\(^{104}\) The rule fits the case; the contemnor was sentenced

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99. Gary Duncan, a nineteen-year-old African-American man, was charged with battery for slapping the elbow of a white boy while steering his two young cousins away from a fight with three more white boys. See *Duncan*, 391 U.S. at 147. Battery was punishable by two years' imprisonment. See *La. Rev. Stat. Ann.* § 14:35 (West 1950).

100. *Duncan*, 391 U.S. at 162 (emphasis added).

101. See *id.* at 162.

102. See *id.* at 161. At the time of the *Duncan* decision, the Louisiana Constitution granted a right to jury trial only in cases where hard labor or the death penalty could be imposed. See *La. Const.* art. VII, § 41 (1921).


104. *Bloom*, 391 U.S. at 211.
to two years, the Court relied on *Duncan* to say two years' imprisonment required jury trial, and *Duncan* cited the collective evaluation of the state and federal legislatures to hold that a possible two-year sentence triggered the Constitution's jury clauses. Unfortunately, the reasoning was too far removed from the "plain language" of the *Bloom* decision to be picked up by courts citing it in the future. Courts cite *Bloom* primarily to establish that contempt cannot be punished by serious criminal penalties unless the defendant is granted a jury trial. 105

The same fate—careless citation—befell *Frank v. United States*, 106 the case most articulately expressing the legislative role in evaluating offenses as petty or serious and thus in determining the jury right under the Constitution. The phrase most often cited from the *Frank* opinion is the observation that the legislature "include[s] within the definition of the crime itself a judgment about the seriousness of the offense," 107 that is, the maximum authorized penalty. The quotation, or a close paraphrase, appears in four of the Supreme Court's five petty offense decisions following *Frank*. But it is not the holding in the case; its only function in the opinion is to distinguish contempt from the ordinary criminal prosecution for an offense and penalty defined by the legislature. Even worse, courts citing this phrase fail to acknowledge that a crucial citation to *Duncan* accompanies it: "a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense." 108 Citing this phrase from *Frank* without the accompanying *Duncan* citation cuts off the Court's recognition of legislative authority to decide which offenses are serious and which are petty.

In contrast to this most-cited phrase, the whole of the *Frank* opinion relies entirely on statutes indicating whether Congress evaluated the penalty imposed on Frank as serious or petty.


Frank was sentenced to a three-year term of probation for criminal contempt. The Court reasoned that he was not constitutionally entitled to a jury trial, because Congress had not determined that a probationary sentence was a serious punishment:

Congress, in making the probation statute applicable to "any offense not punishable by death or life imprisonment," clearly made it apply to petty, as well as more serious, offenses. In so doing, it did not indicate that the additional penalty of a term of probation was to place otherwise petty offenses in the "serious" category. In other words, Congress decided that petty offenses may be punished by any combination of penalties authorized by 18 U.S.C. § 1 and 18 U.S.C. § 3651. Therefore, the maximum penalty authorized in petty offense cases is not simply six months' imprisonment and a $500 fine. A petty offender may be placed on probation for up to five years and, if the terms of probation are violated, he may then be imprisoned for six months.¹⁰⁹

Throughout the opinion, the Frank Court repeatedly referred to legislative indications of pettiness and seriousness: "[n]umerous federal and state statutory schemes allow significant periods of probation to be imposed for otherwise petty offenses;"¹¹⁰ "[i]n noncontempt cases, Congress has not viewed the possibility of five years' probation as onerous enough to make an otherwise petty offense 'serious.' This Court is ill-equipped to make a contrary determination for contempt cases;"¹¹¹ and, in the holding, "Petitioner's sentence is within the limits of the congressional definition of petty offenses. Accordingly, it was not error to deny him a jury trial."¹¹²

Even the dissenting opinion of Chief Justice Warren involves the construction of Congress' definition of petty offenses. First, he argues, Congress' failure to mention probation in its definition of petty offenses does not necessarily mean that Congress


¹¹⁰. Frank, 395 U.S. at 150.

¹¹¹. Id. at 151-52.

¹¹². Id. at 152.
considered probation appropriate only for petty offenses. Congress might have intended the addition of probation to make an otherwise petty offense into a serious one:

There simply is no indication in the statute itself or in its legislative history that 18 U.S.C. § 3651 was intended to modify, complement, add to, or even relate to the petty offense definition, or any definition, in 18 U.S.C. § 1. . . . More importantly, however, there is every indication that Congress affirmatively determined that probation should not affect its earlier definitions by making probation freely available to virtually all crimes — including most felonies not thereby rendered “petty” because of probation’s imposition.

Second, Chief Justice Warren invoked the Court’s proper judicial role under the petty offense doctrine. That Congress evaluates an offense or penalty as petty is not constitutionally conclusive; Congress’ power to deny jury trial is still limited by the judiciary’s interpretation of the Constitution’s jury clauses:

[Even if Congress did “add” probation to the “petty” offense definition, the expanded definition would not necessarily be as binding on us as the Court seems to suggest. . . . We cannot, it seems to me, place unlimited reliance on legislative definitions and “existing . . . practices in the Nation” and thereby allow Congress and the States to rewrite the Sixth Amendment of the Constitution by simply terming “petty” any offense regardless of the underlying sentence.]

Clearly, though Frank is most often cited to focus judicial attention exclusively on the statute defining the offense, the opinion actually gives its full attention to other statutes that indicate whether Congress evaluates the authorized penalty as serious or petty.

113. Id. at 156 (Warren, C.J., dissenting).
114. Id. (Warren, C.J., dissenting). Chief Justice Warren also expressed concern over the petty offense doctrine itself; he was sure it would be used to “hamstring[] protest groups” who exercised their constitutional right to be heard. His fears may have been well-grounded. See, for instance, United States v. Musser, 873 F.2d 1513 (D.C. Cir. 1989), decided just after Blanton v. City of North Las Vegas, 489 U.S. 538 (1989). Musser, participating in an antinuclear demonstration, was charged with having an unattended sign in Lafayette Park, across the street from the White House. See 36 C.F.R. § 7.96(g)(5)(x)(B)(2) (1986). He was convicted on evidence tending to show he was slightly more than three feet away from the sign for thirty seconds to one minute. He was subject to a penalty of six months’ imprisonment and/or $500.

Injudicious citation practices, however, eventually pushed the legislature out of the petty offense doctrine altogether. In a 1975 decision, Muniz v. Hoffman, the central question was whether Congress, when it amended certain provisions which both authorized injunctions against labor unions and granted jury trial to persons accused of violating the injunctions, intended to revoke the statutory jury right. The Court held that Congress did revoke the previous grant of jury trial, and the union therefore was not statutorily entitled to jury trial. As a backup argument, the union had also pled its constitutional right to jury trial. At the end of the primary question of statutory construction, the Court had to decide whether the Constitution required jury trial for a 13,000-member union facing a $10,000 fine.

Oddly, the Court did not attempt to assess the seriousness of the offense, as its previous cases had done. Instead, it treated the union's constitutional entitlement as if it had something to do with the "seriousness of the risk and the extent of the possible deprivation" the fine would impose. The Court admitted it had, in the past, looked to "the relevant rules and practices followed by the federal and state regimes, including the definition of petty offenses under 18 U.S.C. § 1(3)." However, disturbed by the prospect of applying Congress' $500 limit to

115. 422 U.S. 454 (1975). To do the Court justice, Congress had been asleep at the switch for forty-five years when Muniz was decided. The amount of fine in the definition of petty offenses had not been changed since 1930; it was still $500. See Pub. L. 71-548, 46 Stat. 1029, 1030 (1930).

116. See Muniz, 422 U.S. at 461.

117. See id. at 474 (18 U.S.C. § 3692 "does not provide for trial by jury in contempt proceedings brought to enforce an injunction issued at the behest of the [National Labor Relations] Board in a labor dispute arising under the Labor Management Relations Act").

118. See id. at 477.

119. Focus on the seriousness of the offense is established in the very first petty offense case, where a $25 fine or a thirty-day prison term were not the deciding factor; the charge, conspiracy, was the deciding factor. See Callan v. Wilson, 127 U.S. 540, 555-57 (1888); see also supra notes 36-47 and accompanying text. The seriousness of the offense remains the crucial factor even today. The Blanton test asks whether the additional penalties are so severe as to indicate that Congress considered the offense serious. See Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989).

120. See Muniz, 422 U.S. at 477.

121. Muniz, 422 U.S. at 476.

122. From 1930 to 1984, Congress' definition of petty offenses set the limit for a
require jury trial for a wealthy union, the Court went on to contrast a fine, innocuous in this context, with the different sort of deprivation imposed by a prison sentence:

[In referring to [Congress'] definition, the Court accorded it no talismanic significance. . . . It is one thing to hold that deprivation of an individual's liberty should not be imposed without the protections of a jury trial, but it is quite another to suggest that, regardless of the circumstances, a jury is required where any fine greater than $500 is contemplated. From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fine are intrinsically different. . . . This union . . . collects dues from some 13,000 persons . . . .]

The Court's emphasis on the "intrinsic" seriousness of prison is out of place — labor unions cannot go to prison. If one analyzes the matter by looking at the seriousness of the deprivation, however, the question is whether the fine is so high that it is equivalent to six months' imprisonment. Yet the Court has also said "imprisonment and fine are intrinsically different." How, then, can the seriousness of the deprivation suffered under each form of punishment be compared?

The confusion inherent in this analysis stems from the Muniz Court's careless string-citation of previous cases. The Court "capsuled" the very complicated and careful reasoning processes articulated in Cheff, Duncan, Bloom, Frank, and three other cases into four discrete propositions, each concerning only the special situation of contempt cases. Perhaps the Court did not intend for its holding to be extended to noncontempt cases or to cases involving individual defendants. Perhaps the Court was simply affronted by the claim that a


123. See Muniz, 422 U.S. at 477.

124. Justice Black notes in his dissent that Muniz, an officer of the union who received a sentence of one year's probation, did not raise the constitutional issue in his appeal but stood on his statutory argument. See id. at 457, 479 n.4 (Black, J., dissenting).

125. See id. at 475.


127. See Muniz, 422 U.S. at 475-76.
large labor union, which could collect less than eighty cents from each of its members to pay its $10,000 fine, was constitutionally entitled to a jury trial.

In any case, the lack of guidance that the Ninth Circuit panel faced in *United States v. Clavette* originates here. The *Muniz* Court single-handedly pushed Congress out of the role, once so carefully reserved, of defining which offenses are serious and which are petty. *Muniz* is now cited as license to ignore Congress' definition of petty offenses whenever a court does not feel morally compelled to go to the trouble of providing jury trial. After *Muniz*, district and circuit courts displayed considerable confusion over the significance of Congress' definition, and the Court has done nothing since 1975 to dispel the impression that the definition does not command respect. Nonetheless, in the next decision concerning the petty offense doctrine, *Blanton v. City of North Las Vegas*, the Court acknowledged the legislature's authority to evaluate offenses as petty or serious and to grant or deny jury trial accordingly.

128. See supra note 20.

129. Ironically, the Ninth Circuit Court of Appeals, where *Muniz* originated and where the union was first denied a jury trial, followed 18 U.S.C. § 1(3) perhaps more scrupulously than any other circuit after the Supreme Court affirmed the Ninth Circuit in discounting the statutory definition. See, e.g., *United States v. Hamdan*, 552 F.2d 276 (9th Cir. 1977) (finding a $1,000 fine serious); *United States v. Craner*, 652 F.2d 23 (9th Cir. 1981) (finding DUI in Yosemite National Park a serious offense because Secretary of Interior imposed greatest penalty possible under his authority, six months' imprisonment and/or $500); *Rife v. Godbehere*, 814 F.2d 563, amended by 825 F.2d 185 (9th Cir. 1987) (finding $1,000 fine serious); *United States v. Nachtigal*, 953 F.2d 1389 (9th Cir. 1992) (unpublished table decision) (relying on *Craner* to confirm that DUI in Yosemite National Park is serious offense), overruled by 507 U.S. 1 (1993) (per curiam).

130. See, e.g., *Douglass v. First Nat'l Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1976) (accepting 18 U.S.C. § 1(3) as the best guide to a contemnor's entitlement to jury trial until the Supreme Court clarifies *Muniz* and revising contemnor's sentence downward from $5,000 to $500); *Richmond Black Police Officers' Assoc. v. City of Richmond*, 548 F.2d 123 (4th Cir. 1977) (limiting *Muniz* to its constitutional ground and finding no statute entitling contemnors to jury trial where fines ranged from $250 to $500); *United States v. Hamdan*, 552 F.2d 276 (9th Cir. 1977) (holding it "not unrealistic" to assume that a fine of $500 is a serious matter for all individuals); *Girard v. Goins*, 575 F.2d 160 (8th Cir. 1978) (discussing *Muniz*, *Hamdan*, and *Douglass* and finally holding that contemnors' fines ranging from $2,500 to $10,000 entitled them to jury trial); *United States v. Craner*, 652 F.2d 23 (9th Cir. 1981) (citing *Muniz* for the proposition that 18 U.S.C. § 1(3) does not end the jury right inquiry because the constitutional right does not depend on Congressional largesse and granting jury trial to defendant charged with driving under the influence in Yosemite National Park), disapproved in *United States v. Nachtigal*, 507 U.S. 1 (1993) (per curiam).

B. The Blanton Presumption

Even in the face of the Muniz Court’s flouting of legislative authority, the present-day Court has consistently, if implicitly, acknowledged the role of the legislature in evaluating offenses as petty or serious. In Blanton, now the leading case on the jury right, the Court bowed to the authority of the legislature of the State of Nevada:

The maximum authorized prison sentence for first-time DUI offenders does not exceed six months. A presumption therefore exists that the Nevada Legislature views DUI as a “petty” offense for purposes of the Sixth Amendment. Considering the additional statutory penalties as well, we do not believe that the Nevada Legislature has clearly indicated that DUI is a “serious” offense.\(^{132}\)

This statement would be peculiar indeed were it not for the unique nature of the petty offense doctrine. Ordinarily, of course, it is not up to the Supreme Court to interpret the expressions of state legislatures; nor is it up to state legislatures to determine the scope of the United States Constitution for their citizens—not, at least, since Duncan incorporated the Sixth Amendment jury right upon the states.\(^{133}\) But where the petty offense doctrine is concerned, no court can proceed without first ascertaining the relevant legislature’s evaluation of the offense in question. Beyond that point, of course, a court may hold that a defendant is entitled to a jury trial because the penalties imposed are so severe that the Constitution overrides the legislature’s evaluation. In Blanton, the Court did nothing more than follow those principles.

Still, the taint of the Muniz decision remains. The Blanton Court emphasized the prison term authorized for the offense and suggested that a court may examine the penalty in isolation from the rest of the statutory scheme:

Penalties such as probation or a fine may engender “a significant infringement of personal freedom”... but they cannot approximate in severity the loss of liberty that a prison term entails. Indeed, because incarceration is an “intrinsically different” form of punishment... it is the most powerful indication whether an offense is “serious.”\(^{134}\)

\(^{132}\) Blanton, 489 U.S. at 543-44.
\(^{133}\) See Duncan v. Louisiana, 391 U.S. 145 (1968).
\(^{134}\) Blanton, 489 U.S. at 542 (citations to Frank and Muniz omitted).
Hence, the "Blanton presumption" allows a court to deny jury trial if the offense is punishable by a maximum prison term of six months or less. A defendant can rebut the presumption only if he can convince the court that other penalties, in addition to the maximum prison term, are so severe as to indicate that the legislature, in defining and authorizing such penalties for the offense, considered the offense "serious." The Court acknowledged the standard was loose, but thought it would result in jury trial "in the rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless 'do not puncture the 6-month incarceration line.'" Blanton was subject to a prison term of only six months or less or, as an alternative to prison, forty-eight hours' community service while dressed in special clothing designating him as a DUI offender; a fine of up to $1,000; and special conditions of probation, including an educational course on alcohol abuse and loss of his license for ninety days. His vulnerability to these weighty penalties did not entitle him to jury trial because, according to the Court, they did not clearly reflect a legislative determination that the offense was serious.

Although the theoretical orientation of the Blanton opinion strongly favors legislative influence in questioning whether an offense is serious, the Court does not appear to search for any Nevada statute defining petty offenses; the Court looks only

134. Id. at 543.
136. See id. at 540-41.
137. With the sole exception of Blanton's $1,000 fine, the territory covered in Blanton had already been mapped in Baldwin v. New York, 399 U.S. 66 (1970) (plurality opinion), and United States v. Frank, 395 U.S. 147 (1969). The Baldwin Court held a sentence of more than six months' imprisonment "sufficiently severe by itself" to require jury trial. Baldwin, 399 U.S. at 69 n.6. The Frank Court held a probationary sentence of three years petty for jury-right purposes. See Frank, 395 U.S. at 151-52. Except for the fine, the penalties at issue in Blanton were no different in substance from those in Baldwin or Frank. Furthermore, in Baldwin and Frank, the Court grounded its reasoning on legislative evaluations of seriousness. See Baldwin, 399 U.S. at 70-72; Frank, 395 U.S. at 150-52, 156; see also supra Part III.A.
138. In fact, the Nevada legislature does not define petty offenses. But see Nev. Rev. Stat. § 193.120 (1987) (defining a "misdemeanor" as "[e]very crime punishable by a fine of not more than $1,000, or by imprisonment in a county jail for not more than 6 months" [emphasis added]). In Hudson v. City of Las Vegas, 409 P.2d 245 (Nev. 1965), the Nevada Supreme Court held a Nevada "misdemeanor" to be equivalent to a "petty offense" for the purposes of the Nevada Constitution's provision guaranteeing jury trial. See id. at 248; see also Nev. Const. art. I, § 3. The court pointed out that offenses triable without a jury at common law were triable without a jury in Nevada. See Hudson, 409 P.2d at 246. Next, in State v. Smith, 672 P.2d 631 (Nev. 1983), the Nevada Supreme Court took "offenses triable without a jury at com-
at the statute defining the offense. In the lower courts, Blanton apparently pled the wrong statute. He asked them to decide the constitutionality of a statute authorizing summary prosecutions in municipal court, while Las Vegas and North Las Vegas are incorporated cities and thus governed by different statutes. The Nevada Supreme Court, apparently not briefed on the proper role of the legislature in evaluating offenses and penalties, treated Blanton’s mistake as dispositive of his constitutional challenge to the municipal regulations. It decided Blanton’s constitutional entitlement to jury trial without reference to any statute other than the one defining the offense. Thus, the Blanton opinion leaves open the question of the application of legislative evaluations of penalties, including 18 U.S.C. § 19 or any other statute defining petty offenses, to the courts’ constitutional determinations of the jury right. In fact, the United States Supreme Court noted that Blanton’s fine fell well within Congress’ most recent definition of petty offenses, even though the federal definition was not binding on Nevada.

Even more intriguing, the Court cited the wrong statute when it called attention to Congress’ definition. Noting the repeal of 18 U.S.C. § 1(3), the Court seemed to cast about for some indication of the highest fine Congress would impose in conjunction with a maximum prison term of six months. It located that fine, $5,000, not in 18 U.S.C. § 19, but in § 3571(b)(6). This section failed to reveal to the Court that some offenses authorize prison terms of only six months but still carry a maximum fine over $5,000. For example, unlawfully killing a threatened species is punishable by six months and/or a fine of up to $25,000. Moreover, the Court turned to this sec-

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140. See, e.g., id. at 499 & n.7; see also Nev. Rev. Stat. § 484.379 (1987) (defining the offense of driving under the influence).
141. See Blanton, 489 U.S. at 545 n.11.
142. See id.
143. See id.
tion only because it mistakenly thought "Congress no longer defines offenses as 'petty.'"

C. Contemporary Affronts to 18 U.S.C. § 19

Subsequent decisions in at least three circuit courts have read Blanton as if it required the court simply to examine the authorized penalties through the lens of its own conscience to determine whether the penalties "reflect" the legislature's determination that the offense is serious. These courts have not considered 18 U.S.C. § 19 as a component of defendants' constitutional entitlement to jury trial; they have considered only whether Congress' definition of petty offenses amounts to a statutory entitlement. Consequently, the Eleventh and Seventh Circuits have denied jury trial even where the maximum authorized fine for an individual is $10,000. The Ninth Circuit followed suit with a $25,000 fine. Each court considered 18 U.S.C. § 19 only as a statute irrelevant to the scope of the jury right under the Constitution, not as a statute indicating a legislative determination that the offense is "serious."

145. Blanton, 489 U.S. at 545 n.11.
148. See United States v. Clavette, 135 F.3d 1308 (9th Cir. 1998).
149. Indeed, the Ninth Circuit followed the United States Supreme Court in locating Congress' definition of petty offenses at 18 U.S.C. § 1(3), strongly suggesting

https://scholarship.law.umt.edu/mlr/vol59/iss2/7
A trio of Seventh Circuit cases, all decided by Judges Posner and Flaum, carves out this position. First, in \textit{United States v. Kozel},\footnote{908 F.2d 205 (7th Cir. 1990).} a contempt case, the attorney-defendant argued that the monetary value of his sentence — pro bono service in five criminal cases within two years — exceeded the $5,000 limit for petty offenses set out in 18 U.S.C. § 19. The Seventh Circuit dismissed this argument by citing Muniz’s phrase, “Congress’ definition has no talismanic significance,”\footnote{Muniz, 422 U.S. at 477, cited in Kozel, 908 F.2d at 207.} and by finding Kozel’s sentence more akin to probation or work release than to a fine.\footnote{See Kozel, 908 F.2d at 207.} Next, in \textit{Hatch v. Stadtmueller},\footnote{41 F.3d 1510 (7th Cir. 1994) (unpublished table decision). The statute in question in Hatch was the Free Access to Clinic Entrances Act, 18 U.S.C. § 248 (1994).} the court found the defendant’s constitutional entitlement to a jury trial, where she was subject to a maximum fine of $10,000, was not so obvious that automatically reversible error would result from continuing with bench trial below. Her petition for mandamus relief was therefore denied. Finally, in \textit{United States v. Soderna},\footnote{82 F.3d 1370 (7th Cir.), cert. denied sub nom. Hatch v. United States, 117 S. Ct. 507 (1996).} a divided court applied the reasoning of Kozel to hold that a defendant charged with a first-time offense of blocking the entrance to an abortion clinic — punishable by up to six months and $10,000 — was not entitled to jury trial.\footnote{See Soderna, 82 F.3d at 1377-79.} The Soderna majority noted that it had been shown nothing in the text or history of the statute defining the offense that suggested the statute was intended to confer the right to jury trial.\footnote{See id. at 1377.} The majority also compared the six-month/$10,000 authorized penalty to the penalty in question in \textit{Blanton}, six months and/or $1,000 plus various other sanctions.\footnote{See supra Part III.B.} According to Judges Posner and Flaum: \footnote{See supra Part III.B.}
If careful attention is paid to the word "clearly" in the... passage that we quoted [i.e., penalties other than imprisonment must be "so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one," Blanton, 489 U.S. at 543], it is apparent that even though the maximum fine is higher in the present case than it was in Blanton it is not so much higher as to make clear that Congress considered a first-time blockade of an abortion clinic a serious offense.\textsuperscript{158}

The court acknowledged that a fine of $10,000 is "higher" than a fine of $1,000, but decided it is not all that much higher; besides, the court added, 18 U.S.C. § 19 allows an organization to be fined $10,000 without jury trial, and "many individuals have more money than organizations."\textsuperscript{159} The court adduced no evidence that the individual on trial had more money than most organizations. There was no evidence of how much money "most" individuals or organizations have. There was not even any argument from the court that its best guess as to the relative amounts of money possessed by many individuals and most organizations was constitutionally more significant than Congress' definition of petty offenses.\textsuperscript{160}

Judges Posner and Flaum may be right, if courts must be prohibited from reading 18 U.S.C. § 19 as Congress' indication that offenses punishable by fines over $5,000 are serious. Maybe a $10,000 fine is not "clearly" serious if a $1,000 fine is not. But clarity is best served by using 18 U.S.C. § 19 as the legislature's definition of which offenses are serious and which are not. In fact, the dissenting judge analyzed the entire issue in almost exactly the way this comment suggests.\textsuperscript{161} Judge Kanne concluded:

\textsuperscript{158} Soderna, 82 F.3d at 1378.

\textsuperscript{159} Id. at 1379.

\textsuperscript{160} The Soderna court found it difficult to believe that "the difference in resources between individuals and organizations has constitutional significance." Soderna, 82 F.3d at 1379. This difference certainly seemed to have constitutional significance in the eyes of the Muniz Court. See Muniz v. Hoffman, 422 U.S. 454 (1975); see also supra Part III.A.

\textsuperscript{161} Judge Kanne's dissent does not articulate the petty offense doctrine's historical call for legislative involvement; nor does it consider and reject other possible interpretations of the statute. It simply states that the court must respect the legislature's determination of seriousness and that it is safer to apply the statutory definition of petty offenses than to scan one's conscience to decide whether the legislature considered the offense "serious." See Soderna, 82 F.3d at 1387 (Kanne, J., dissenting).
This holding misconstrues relevant Supreme Court precedent and disregards objective evidence of Congress’ express intent. To consider such a crime petty and deny defendants charged with it the right to trial by jury, as the majority does today, is to contravene Supreme Court instruction by substituting a judicial determination as to seriousness for that of Congress.\textsuperscript{162}

Nor did Judge Kanne’s dissent dissuade the Eleventh Circuit from following the \textit{Soderna} majority in \textit{United States v. Unterburger}.\textsuperscript{163} Judge Hatfield, the district judge who denied Clavette a jury trial, stood on persuasive authority from two circuit courts.\textsuperscript{164} And, if the Ninth Circuit looked for Supreme Court authority to consider 18 U.S.C. \textsection 19 in determining Clavette’s jury right, it certainly did not find any. Since the \textit{Blanton} decision, the Supreme Court has lost track of Congress’ definition of petty offenses. Not only is the definition not cited in two post-\textit{Blanton} cases discussing petty offenses,\textsuperscript{165} but the Supreme Court’s most recent mention of the definition, the 1993 decision \textit{United Mine Workers v. Bagwell},\textsuperscript{166} incorrectly locates it at 18 U.S.C. \textsection 1(3).\textsuperscript{167} How much respect could the Court have for Congress’ definition?

\section*{IV. The Legislature’s Determination of Seriousness: Can a Statute Be Meaningless?}

Congress defines offenses not in terms of their seriousness but in terms of their pettiness:

As used in this title, the term “petty offense” means a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than the amount set

\begin{footnotes}
\footnotetext[162]{Id. at 1380, 1387 (Kanne, J., dissenting).}
\footnotetext[163]{See \textit{United States v. Unterburger}, 97 F.3d 1413 (11th Cir. 1996) (following \textit{Soderna} without mentioning Judge Kanne’s dissent and denying jury trial to defendants subject to a maximum fine of $10,000).}
\footnotetext[164]{See \textit{United States v. Clavette}, No. MCR-96-001-BU, Order of Apr. 4, 1996, at 1, and Order of June 5, 1996, at 1.}
\footnotetext[165]{See \textit{United States v. Nachtigal}, 507 U.S. 1 (1993) (per curiam) (denying jury trial to defendant subject to prison terms of up to six months and up to five years’ residence in a community correctional facility); \textit{Lewis v. United States}, 518 U.S. 322 (1996) (denying jury trial to defendant charged with two petty offenses, each punishable by up to six months’ imprisonment).}
\footnotetext[166]{512 U.S. 821 (1994).}
\footnotetext[167]{See \textit{Bagwell}, 512 U.S. at 837 n.5. The Ninth Circuit followed the Supreme Court’s citation to \textsection 1(3) in \textit{Clavette}. See \textit{Clavette}, 135 F.3d 1308, 1310 & n.14 (9th Cir. 1998).}
\end{footnotes}
forth for such an offense in section 3571(b)(6) or (7) in the case of an individual [$5,000] or section 3571(c)(6) or (7) in the case of an organization [$10,000].

The meaning of the words is not mysterious, but their application is not clear. The statute certainly says nothing about jury trial, but why does Congress define petty offenses? Does Congress contemplate "serious" as the opposite of "petty"? Is its choice of the word "petty" a coincidence? One can move in two directions to answer this question: horizontally, into the statute's contemporary context, and vertically, into the statute's history.

A. The Statute's Contemporary Context: Petty Offenses in the United States Code

The contemporary context of the statute includes its current and entire version, analogous provisions and their current judicial interpretations, and at least some of the canons of statutory construction. Only if that analysis yields no unambiguous meaning will the new textualist turn to legislative history. In this case, a strictly horizontal analysis must be further confined


169. It is not clear whether this is a permissible question for a new textualist to ask. One parodic example of 'plain language' interpretation demonstrates that it might be a good idea to ask why a legislature enacts a particular statute, since no legislature can make the precise applications of its intent perfectly clear. See Regina v. Ojibway, 8 Crim. L.Q. (Ontario) 137 (1965-66) (holding that a pony saddled with a down pillow is a "small bird" for purposes of Canada's Small Birds Act), quoted in United States v. Byrnes, 644 F.2d 107, 112 n.9 (2d Cir. 1981).

170. A strict new textualist would presume, "by a benign fiction," Congress' awareness of "the surrounding body of law into which the provision must be integrated." See Eskridge, New Textualism, supra note 22, at 679. Not only is this benign fiction potentially false in any case, but, in the case of 18 U.S.C. § 19, the presumption begs the fundamental question: into which body of law is the statute to be integrated?

171. These terms are taken from William N. Eskridge, Interpreting Legislative Inaction, 87 MICH. L. REV. 67, 116, 120, 122-25 (1988); see also Eskridge, New Textualism, supra note 22, at 678-69. A vertical analysis explores committee reports, hearings, floor debates, and so forth. A horizontal analysis examines the entire contemporary statutory context, including related statutes, the canons of construction, and judicial precedents construing the statute in question and/or its related statutes. See id. at 674-75. New textualists are primarily concerned with horizontal analysis, deploying vertical analysis only when a statute remains meaningless or ambiguous after thorough horizontal scrutiny. See id. at 674-76.

172. Professor Eskridge points out that some new textualists, particularly Justice Scalia, appear to "like" some canons more than others and have yet to explain their preferences. See id. at 674-76.
to title 18, because the definition pertains only to "this title." Since the implementation of the Sentencing Guidelines — which exclude from their scope any Class B or C misdemeanor and any infraction, regardless of the maximum authorized fine or prison term — only three sections of title 18 use Congress' definition of petty offenses without expanding or restricting it.

These three sections, however, deal only with sentencing for offenses not covered by the Guidelines; section 19, by contrast, must have a more general application, because it appears among the general provisions of chapter 1. Section 19 must stand on the


174. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.9 (West 1998).


176. Strictly speaking, the Rules of Criminal Procedure, and certainly the Rules of Evidence, fall outside title 18, but they refer to "petty offenses" and/or Congress' definition at 18 U.S.C. § 19. See, e.g., FED. R. EVID. 1101(e) (1994) (Federal Rules of Evidence apply to trial of misdemeanors and other petty offenses in magistrate courts unless the rules governing trials by magistrates make other provisions for the introduction of evidence); FED. R. CRIM. P. 54(b)(4) and (e) (1994) (misdemeanors and other petty offenses, as defined in 18 U.S.C. § 19, are governed by Rule 58); FED. R. CRIM. P. 58(a)(3) (1994) (defining "petty offenses for which . . . no sentence of imprisonment will be imposed" in relation to 18 U.S.C. § 19); FED. R. CRIM. P. 58(a)(1)-(3) (1994) (Rule 58 governs misdemeanors and other petty offenses if sentence of imprisonment is possible); and FED. R. CRIM. P. 58(b)(2)(F) (1994) (magistrate judge must inform defendant of right to jury trial unless offense is petty). Read in conjunction with FED. R. CRIM. P. 54(b)(4), this last provision seems clearly to indicate that an offense falling outside Congress' definition must be tried by jury.

177. Several provisions in title 18 refer to the definition at § 19 in order to expand or restrict the variety of offenses falling within the definition. See, e.g., 18 U.S.C. §§ 3156(b)(2), 3172(2) (1994) (as amended by Pub. L. No. 98-473, § 223(h), (j) (1984)) (defining "offense" as used in pertinent sections as any offense except a Class B or C misdemeanor or an infraction); 18 U.S.C. § 3401(b) (1994) (defendant in magistrate court may elect trial by district court unless charged with a petty offense which is a Class B motor vehicle misdemeanor, a Class C misdemeanor, or an infraction). Moreover, most appearances of the phrase "petty offense" are applicable only to offenses committed before November 1, 1987, the date on which the Sentencing Guidelines went into effect. See, e.g., 18 U.S.C. § 3006A(a)(1)(A), (2)(A) (1982) (providing for representation by counsel of any person charged with a felony or misdemeanor or other than a petty offense).
same footing as the provisions surrounding it. If the definition pertained only to sentencing, it 'plainly' would have been codified in chapter 207, with the other sentencing provisions.178

Horizontal analysis, then, does not plumb the full meaning of 18 U.S.C. § 19. Clearly, Congress considers Class B or C misdemeanors punishable by a fine higher than $5,000 to be equivalent to Class A misdemeanors for sentencing purposes. Yet, because Congress codified its definition in chapter 1, sentencing cannot be the only application envisioned for the section. A quick glance at Congress' recodification of its definition of petty offenses in 1987 dispels any remaining doubt; Congress chose to keep its definition in chapter 1, among provisions of general import, while reconstructing sentencing provisions later in the Code.179 Unfortunately, no application more general than sentencing appears on the face of the statute. Its meaning, then, must be sought elsewhere.

B. The Statute's History: Congressional Intent to Indicate Its Determination of Seriousness

Failing horizontal coherence, the only remaining option is to delve into the vertical plane of legislative history. Setting aside (arguendo) the earliest history of the statute as "stale,"180 committee reports from 1984, 1987, and 1988 all demonstrate Congress' awareness that the word "serious" is the constitutional

178. Still, the scope of the three sections dealing with magistrates' sentencing powers is telling: in each instance, an offense which falls outside Congress' definition must be handled by the sentencing court in exactly the same manner as a Class A misdemeanor or a felony. For example, 18 U.S.C. § 3553(b) requires courts, in sentencing defendants convicted of offenses falling outside the Guidelines, to consider the same principles that drive the Guidelines, unless the defendant is convicted of a petty offense. 18 U.S.C. § 3561(a)(3) allows the sentencing court to impose probation only if every offense for which the defendant is sentenced to imprisonment is a petty offense. 18 U.S.C. § 3583(b)(3) allows supervised release for up to one year if the defendant is convicted of a misdemeanor other than a petty offense. In each of these provisions, a Class A misdemeanor and an offense punishable by a fine which exceeds $5,000 for an individual are treated identically.


180. Congress first enacted 18 U.S.C. § 1(3) in 1930, setting the limit on fines imposed for a petty offense at $500. See Pub. L. 71-548, 46 Stat. 1029, 1030 (1930). Fifty-four years later, Congress finally revised that amount to $5,000 to account for the rather dramatic change in the value of money: "If a $500 fine for an individual was 'petty' in 1930, when the per capita disposable income was $599 [citation omitted], then $5,000 is 'petty' today, when the per capita disposable income is $9,969 [citation omitted]." H.R. REP. No. 98-906, at 19, reprinted in 1984 U.S.C.C.A.N. 5433, 5451.

https://scholarship.law.umt.edu/mlr/vol59/iss2/7
opposite of the word "petty" and Congress' intent that courts should consider its definition in determining a defendant's jury right. Congress even took some suggestions for its definition from judicial decisions on the jury right, particularly *Muniz v. Hoffman*,\(^\text{181}\) the decision which has been so influential in getting the statute ignored. In the Criminal Fines Enforcement Act of 1984,\(^\text{182}\) Congress cited *Muniz* as authority for increasing its $500 fine limit for petty offenses, in place since 1930; the Court, Congress said, found "no talismanic significance in the amount."\(^\text{183}\) Moreover, Congress for the first time distinguished between fine levels for petty offenses committed by individuals and those committed by organizations. And, as the upper limit for organizations' petty offenses, Congress chose $10,000, the fine levied against the union in *Muniz*.

Congress also considered a markedly higher ceiling: $80,000. Immediately following its citation of *Muniz*, the House Report mentioned *United States v. Troxler Hosiery Co., Inc.*,\(^\text{184}\) where the Fourth Circuit Court of Appeals found an $80,000 fine petty for purposes of the jury right. This too was a criminal contempt case, and $80,000 was Troxler's potential profit from shipping highly flammable sleepwear, previously seized by the court, out of the court's jurisdiction to Venezuela for sale to consumers there. The House Report does not comment on the fine itself. Yet, less than two years later, Congress enacted its new definition of petty offenses. The citation of *Troxler Hosiery* in the report implies that Congress limited organizations' fines for petty offenses to $10,000, knowing it was giving broader scope to the jury right than some courts had been willing to do.

That Congress fully intended to take a position on the scope of the jury right is demonstrated by its reference to the constitutional significance of the line between serious and petty offenses:

There is, as a matter of constitutional law, no right to a jury

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183. The text of the House Report said the Court found no such significance in the amount. See H.R. Rep. No. 98-906, at 19, reprinted in U.S.C.C.A.N. 5433, 5452. The Court actually said it found no such significance in the definition. See Muniz, 422 U.S. at 477.
trial for a petty offense. See, e.g., Frank v. United States, 395 U.S. 147 (1969). The courts have based their determination of whether an offense is petty on the severity of the maximum punishment authorized, Duncan v. Louisiana, 391 U.S. 145, 159 (1968), or if the statute defining the offense does not specify the punishment — e.g., 18 U.S.C. § 401 (criminal contempt of court) — on the actual punishment imposed, Bloom v. Illinois, 391 U.S. 194, 211 (1968). Since the Constitution does not explicitly define what is petty, the courts have had to look elsewhere to determine whether a punishment, authorized or imposed, is petty or serious. In “the interests of uniformity, objectivity, and practical judicial administration,” the courts have therefore looked to 18 U.S.C. § 1 “as the monetary measure of a serious offense for the purposes of the right to jury trial.” United States v. Hamdan, 552 F.2d 276, 280 (9th Cir. 1977). 185

Congress recognized, then, the constitutional significance of the petty offense doctrine. It sought to limit the free play of judicial discretion where the jury right was concerned, it took responsibility for updating the demarcating line, and it clearly explained what it was doing.

The history of Congress’ attention to the definition, in addition to its explanations of its actions in various reports, confirm that it took its own definitional task seriously. To begin with, Congress updated the fine in the Criminal Fine Enforcement Act of 1984, 186 but the Sentencing Reform Act of 1984 repealed 18 U.S.C. § 1 as of November 1, 1987. To keep the definition in effect, Congress passed the Criminal Fine Improvements Act of 1987, creating a new section under Chapter 1 of title 18, § 19, and transferring the definition to that location. 187 But even that did not take care of the problem, because the 1987 Act defined petty offenses as Class B or Class C misdemeanors or infractions. These classes of offenses were defined in 18 U.S.C. § 3559(a) in terms of the maximum authorized term of imprisonment. Thus, the 1987 Act neglected to provide a specific monetary definition of petty offenses as the 1984 Act had done. This neglect was troublesome enough to provoke yet another amendment in 1988. Once again, Congress related the amendment’s

purpose to the petty offense doctrine, and once again it chose a $5,000 ceiling for individuals and $10,000 for organizations.\textsuperscript{188}

Unfortunately, the syntax of the House and Senate reports on the 1988 amendment is confused and contorted where it should be clearest. For instance, the fourth sentence in this passage from the House of Representatives’ report on the bill is confusing:

The significance of the label “petty offense” is that the constitutional right to a jury trial does not apply if a person is charged with a petty offense. The term “petty offense” is presently defined by 18 U.S.C. 19 to be a “class B misdemeanor, a class C misdemeanor, or an infraction.” The terms “class B misdemeanor,” “class C misdemeanor,” and “infraction” are in turn defined at 18 U.S.C. 3559(a) by the maximum term of imprisonment that can be imposed. Thus, it is possible for an offense carrying a maximum term of imprisonment of 5 days, an infraction under 18 U.S.C. 3559(a)(1)(I), to have a fine so substantial that the offense would not be a “petty offense” for the purpose of the exception to the right of a jury trial.\textsuperscript{189}

Read in context, surely that fourth sentence means to say it is possible for even an infraction to entail a substantial fine and still be petty in the sense of falling outside the scope of the right to jury trial. This interpretation is supported by the report’s very next paragraph:

Section 7089(a) [of the bill] modifies the definition of “petty offense” in 18 U.S.C. 19 by providing that a petty offense cannot call for a fine in excess of $5,000 for an individual and $10,000 for an organization, the maximum fine levels set forth in 18 U.S.C. 3571(b)(6) and (7).\textsuperscript{190}

The amendment remedies the situation by triggering the right to jury trial at $5,000 for an individual or $10,000 for an organization. One might seek corroboration from the Senate report on the same bill, but the second sentence of this passage is daunting:

For many cases the maximums set forth in 18 U.S.C. 3571(b)(6) or (7) and (c)(6) or (7) — $5,000 for an individual and $10,000 for an organization — would operate to set a constitutionally permissible limit for petty offenses. However, the 1987 definition of petty offense inadvertently included a class of offenses

\textsuperscript{188.} See 134 CONG. REC. 13,787 (1988); 134 CONG. REC. 33,301 (1988).
\textsuperscript{189.} 134 CONG. REC. 33,301 (1988).
\textsuperscript{190.} Id.
which may be petty for constitutional purposes even though they are Class B or C misdemeanors or infractions as classified by 18 U.S.C. 3559: offenses punishable by six months' or less imprisonment which, by the terms of the statutes setting forth such offenses, carry a higher maximum fine than the $5,000 or $10,000 levels provided for in [section 3571]. The higher amount would be the lawful maximum for these offenses. . . .

The amendments made by this section [of the bill] cure this problem by redefining the term petty offense to include only Class B and C misdemeanors and infractions for which the applicable amount is no greater than the specific dollar levels set forth for such offenses in 18 U.S.C. 3571(b) (6) or (7) and (c)(6) or (7).¹⁹¹

Here, the second sentence is barely intelligible. Again, however, read in context, the amendment is intended to trigger the jury right at $5,000 for individuals and $10,000 for organizations, even if the charge is only a Class B or C misdemeanor or an infraction.

Under this reading, the first sentence's phrase "[f]or many cases" refers to the multitude of Class B and C misdemeanors entailing fines of $5,000 or lower. Offenses below Class A misdemeanors entail maximum prison time of six months or less.¹⁹² But some Class B or C misdemeanors — illegally taking a threatened species, for example — entail fines as high as $25,000.¹⁹³ In the 1987 amendment of 18 U.S.C. § 19, these offenses were inadvertently included in Congress' definition of petty offenses, because in 1987 Congress defined petty offenses as all Class B or C misdemeanors or infractions. The 1988 amendment attempts to ascertain that only those Class B or C misdemeanors or infractions entailing a maximum fine of $5,000 are considered petty offenses.

C. Congress' Definition of Petty Offenses Clearly Applies to the Jury Right: Why Do Courts Refuse to Use It?

Despite their overall awkwardness, there is only one coherent interpretation of these reports. There simply is no reason to enact 18 U.S.C. § 19 in the first place, much less to amend it

¹⁹¹ 134 CONG. REC. 13,787.
twice in the next four years, unless Congress intended that an offense punishable by a fine over $5,000 (or $10,000 if committed by an organization) should entitle a defendant to trial by jury.

Why, then, have the courts so often failed to give Congress' definition the respect usually given valid exercises of legislative powers? One plausible reason is the fifty-four year lapse in Congress' definition. Before Congress raised the ceiling, more than one court correctly called attention to the absurdity of drawing mid-1970's lines in 1930 dollars.\textsuperscript{194} Congress has done nothing since 1988 to address the nature of this problem, though it would be a simple matter to index the fine for inflation and thus protect against such absurdity in the future. Another plausible reason is that the parties involved in the pivotal cases have not phrased the issue so as to suit the Court's tests.

A more intriguing possibility is that the courts simply do not believe that Congress' definition of petty offenses is a constitutionally effective exercise of its legislative powers. The petty offense doctrine, after all, is a judicially created one. Moreover, it addresses a question of constitutional interpretation, and direct legislative answers to such questions appear out of place. Given the historical development of the petty offense doctrine, however, the courts should readily consider a legislative definition of petty offenses to be directly applicable to their determination of the jury right under the Constitution.

\section*{V. Legislative and Judicial Solutions}

Adopting the approach of this Comment requires no leap of faith or departure from precedent. To begin with, the courts can simply begin to honor the common law authority of the legislature to define which offenses are serious and which petty. In the case of federal offenses, Congress' definition of petty offenses, not merely judges' perceptions of the gravity of the penalty in the statute defining the offense, should be taken as the decisive factor in determining whether a particular defendant is entitled to a jury trial. As a second step, the courts should fulfill their obligation to measure Congress' determination against the common-law requirements and against the "existing laws and practices in the Nation"\textsuperscript{195} to ensure that Congress' definition does not deny the jury right where the Constitution demands it.

\textsuperscript{194} See, e.g., Hoffman v. International Longshoremen's and Warehousemen's Union, 492 F.2d 929, 937 n.9 (9th Cir. 1974).

If the administrability of an increase in the number of jury trials should become a concern, courts might follow a rule like that announced in *Scott v. Illinois*.\(^\text{196}\) In *Scott*, the Supreme Court held that no indigent defendant may be sentenced to any prison term unless counsel is appointed. Under the *Scott* rule, a judge may choose, at arraignment, not to appoint counsel for an indigent defendant; if the judge makes that choice, however, she cannot impose any prison term if the defendant is found guilty. The judge's choice not to appoint counsel therefore trims her jurisdiction over the defendant. Similarly, a judge's choice to deny jury trial might trim her jurisdiction where maximum penalties are concerned. Even though the statute defining a particular offense authorizes six months' imprisonment and a fine of $25,000, for example, denial of jury trial would curtail the maximum penalty to six months and/or $5,000.

Legislatures, on the other hand, can avoid the inconvenience of amending the fine level appropriate for petty offenses simply by indexing maximum fines for inflation. Congress could easily avoid the farce of leaving a dollar-level fine unchanged for fifty-four years. Additionally, if Congress' objective is to trigger the jury right at six months and/or $5,000, as it said in 1984, 1987, and 1988, it must act to preserve the integrity of its definition of petty offenses. Congress might consider amendments requiring, for example, that only a certain term of probation may be imposed for petty offenses,\(^\text{197}\) or that the penalties attached to multiple charges must be aggregated to determine a defendant's right to jury trial.\(^\text{198}\) Under the analysis presented here, such amendments would not constitute legislative usurpation of judicial authority, because the petty offense doctrine explicitly calls for the legislature's evaluation of the seriousness of the penalties it authorizes. If the Court's role is confined to policing the minimum constitutional protection of the jury right, Congress may expand the scope of the right as it wishes.

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\(^{198}\) This would obviate the Supreme Court's ruling in *Lewis v. United States*, 518 U.S. 322 (1996).
VI. CONCLUSION

Historical jurisprudence on the petty offense doctrine consistently seeks out the legislature’s evaluation of the seriousness of any given offense. Article III and the Sixth Amendment of the Constitution confer the jury right only for the trial of serious crimes, but it is up to the legislature to say which crimes are serious and which are petty. While the Supreme Court has never repudiated the legislature’s role, its opinions have given rise to the assumption that only the statute defining the offense is relevant. Consequently, courts scrutinize the penalty in that statute to discern its “reflection” of the legislature’s determination of seriousness, and reflection becomes speculation. Congress has taken great pains to update, re-enact, and amend its definition of petty offenses to inform the judiciary that it considers serious those offenses for which it authorizes penalties in excess of its definition. 18 U.S.C. § 19 provides an objective definition that can simplify the courts’ work, and it is historically entitled to the courts’ respect.

Extrapolating from the analysis in this Comment, in a given case, federal or state, a court should determine the defendant’s entitlement to jury trial under the United States Constitution in two steps. First, the court should consult both the statute defining the offense and any catch-all statutes, such as a definition of petty or serious offenses, to glean the legislature’s evaluation of the seriousness of the offense. If the legislature considers the offense serious, the court’s analysis is complete, and it must grant the defendant a jury trial. But if the legislature considers the offense petty, or if the legislature’s evaluation remains unclear, the court must go on to consider whether previous judicial decisions or the clear majority of other legislatures have declared the offense serious in light of its attached penalties. For instance, any offense punishable by more than six months’ imprisonment is serious, even if the legislature calls the offense petty and seeks to deny jury trials. Similarly, a legislature might authorize a fine of $25,000 and define petty offenses as those entailing fines of less than $50,000; however, the offense is still serious and still requires jury trial if the clear majority of other legislatures grant jury trial for offenses punishable by more than $5,000.

Clavette’s case presents a relatively straightforward applica-

tion of this analysis. The maximum authorized fine for the offense of killing a grizzly bear is $25,000, well over the $5,000 limit prescribed in Congress’ definition of petty offenses. He is therefore entitled to a jury trial under the federal Constitution. Clavette’s story about how he came to shoot the bear may be patently absurd. But where Congress has authorized such a high fine, the absurdity of the story is clearly for a jury to decide.

200. Clavette’s own wife told a federal wildlife agent that the whole incident began when her husband fired a warning shot at a bear which appeared across a small creek from their camp. The bear retreated about ten feet but then stopped. Clavette tried to throw to the bear the heart and lungs of the moose he was skinning, but he dropped them. See Tr. at 209-10; see also supra note 1. At that point, she said, the bear began to move off down the creek; her husband advanced on the bear and shot it. See Tr. at 209-10. Needless to say, this is not exactly the same story Mrs. Clavette told the judge; she told the judge there were two bears, that the second bear charged her husband at a dead run, see id. at 121, and that her husband stopped it cold with a single bullet at 50 feet, see id. at 122, 128, 152. The forensic evidence in the case was also compelling. See, e.g., id. at 10, 36, 43-44, and 212-13.