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The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning

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THE CONSTITUTION ON TRIAL: ARTICLE III’S JURY TRIAL PROVISION, ORIGINALISM, AND THE PROBLEM OF MOTIVATED REASONING

Stephen A. Siegel*

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INTRODUCTION

The disjunction between constitutional text and present-day federal trial practice could not be more pronounced. Article III, Section 2 of the Constitution mandates that “[t]he trial of all crimes, except in cases of impeachment, shall be by jury.” Yet in modern America not all federal criminal trials are by jury. If Article III’s command were taken literally, all federal criminal trials would involve juries and there would be no bench trials for criminal offenses. Yet in recent years, bench trials account for approximately 13.6% of federal felony prosecutions that go to trial, and 58% of all federal criminal

1. U.S. CONST. art. III, § 2, cl. 3.
2. This Article concerns only federal criminal trials in the civil justice system. Except for the discussion in note 104 this Article does not consider criminal-trial practice in the military and admiralty courts. See infra note 104. Nor does it discuss non-jury trials in the now abolished system of consular courts. See Reid v. Covert, 354 U.S. 1, 10–14 (1957) (discussing trial by jury in consular courts); id. at 86–87 (Clark, J., dissenting) (discussing the demise of consular courts). The disjunction between constitutional text and trial procedure in those courts will be the topic of a subsequent paper. This Article also does not consider federal criminal prosecutions which are resolved by guilty pleas. At present, approximately 85% of federal criminal convictions are secured by guilty pleas. See Table 4.2. Disposition of Criminal Cases Terminated, by Offense During October 1, 2006 – September 30, 2007, BUREAU JUST. STAT., http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2196 (last updated Oct. 21, 2010). It is generally accepted that guilty pleas obviate the need for a trial, and therefore, for a jury. See, e.g., Schick v. United States, 195 U.S. 65, 81–82 (1904) (Harlan, J., dissenting); West v. Gammon, 98 F. 426, 429 (6th Cir. 1899). In addition, guilty pleas were a recognized alternative to jury trial at common law. The interpretive convention that constitutional terms may be defined by the principles and practices of the English common law of 1789 supports permitting guilty pleas. See, e.g., Schick, 195 U.S. at 69 (saying “the Constitution . . . must be read in light of the common law”); Callan v. Wilson, 127 U.S. 540, 549 (1888) (stating and applying the convention to Article III’s jury trial provision); West, 98 F. at 428–29 (stating and applying the convention to guilty pleas). But see WILLIAM ATWELL, A TREATISE ON FEDERAL CRIMINAL LAW PROCEDURE 26–27 (3d ed. 1922) (arguing that “permitting pleas of guilty to be taken in felony cases” is unconstitutional); Laura I. Appleman, The Lost Meaning of the Jury Trial Right, 84 IND. L.J. 397, 398, 440, 446 (2009) (questioning the constitutionality of guilty pleas).
trials. Some of these bench trials occur because defendants have waived their right to a jury. Others occur because defendants are charged with what is regarded as a “petty” offense and the Supreme Court has held that Article III's jury trial mandate applies only to crimes that are “serious.”

For petty offenses, the federal government is free to allow or disallow jury trial as it sees fit regardless of the defendants’ wishes. In other words, the Supreme Court has read two exceptions into Article III’s absolute textual requirement.


4. I derive this figure by adding to the statistics on Table D-4, 2008 ANNUAL REPORT, supra note 3, at 244 tbl.D-4; the statistics on Table M-1A Class A Misdemeanor Defendants Disposed of by U.S. Magistrate Judges, by Type of Disposition; and Table M-2A Petty Offense Defendants Disposed of by U.S. Magistrate Judges, by Type of Disposition, id. at 358 tbl.M-1A, 364 tbl.M-2A. These additional trials are conducted by federal magistrates, not Article III judges. I include them because magistrate criminal trials are permissible only because of the petty crime and jury waiver exceptions discussed in this Article.


6. The line between “petty” and “serious” crime has varied over the years. Compare Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989) (offenses punishable by a maximum prison term of six months or a maximum fine of $500 are considered petty), with D.C. v. Claws, 300 U.S. 617, 625–26 (1937) (distinguishing petty from serious crime through complex balancing test), and Comment, The Petty Offense Category and Trial by Jury, 40 YALE L.J. 1303, 1306 (1931) (discussing the federal courts’ “flexible test”). Suffice it to say that the Supreme Court has always said that all felonies are “serious” offenses, while some misdemeanors are “serious” and others are “petty.” See, e.g., Callan v. Wilson, 127 U.S. 540, 549–50 (1888). The current line between petty and serious crime is defined by Blanton. Blanton, 489 U.S. at 543.

7. See, e.g., Timothy Lynch, Rethinking the Petty Offense Doctrine, 4 KAN. J. L. & PUB. POLY 7 (1994).

8. For convenience, I am considering only criminal prosecutions of civilians. There is no jury trial right in the military justice system. See Ex parte Quirin, 317 U.S. 1, 1–2 (1942). I believe, but will not demonstrate, that there is no textual warrant for the military trial exception. However, it so clearly comports with the unquestioned practice of military justice before, during, and after the Founding that it is proper to conclude that military trials were intended to be outside the scope of Article III, Section 2’s command. Although aspects of the military justice exception have evolved with
One of these exceptions, the petty offense exception, may be justified by English, colonial, and Founding-era practices.\textsuperscript{9} Before, during, and after the period of constitution-making, minor criminal offenses were subject to summary trial.\textsuperscript{10} Criminal procedure contemporary with the Founding strongly suggests that the Constitution was unlikely to require juries for every federal criminal prosecution no matter how trivial.\textsuperscript{11}

The second exception—for federal bench trials for serious criminal offenses when the defendant has waived his right to a jury—is another matter. Federal bench trials premised upon defendant’s jury waiver cannot be justified by constitutional text, common law history, or Founding-era practices.\textsuperscript{12} By the norms of any textualist or originalist jurisprudence, federal bench trials for serious crimes are unconstitutional even when defendants request them. They may be justified only by jurisprudences that allow for evolving principles and a “living constitution.”

Moreover, for one-hundred-forty years after the Founding, federal practice, professional opinion, and Supreme Court precedent agreed that bench trials for serious criminal

contemporary constitutional norms, the exception itself is consonant with Founding-era norms that have remained constant. See Reid v. Covert, 354 U.S. 1 (1957) (holding even when living overseas, civilian dependents of military personnel have a right to a jury trial). For many years criminal contempt of court was an additional exception to the jury trial requirement. This exception was grounded in common law tradition. See, e.g., Hollingsworth v. Duane, 12 F. Cas. 359, 364–65, 367 (C.C. Pa. 1801) (No. 6,616). Now criminal contempt convictions are subject to a jury trial requirement that is consonant with the rules that distinguish petty from serious crime. Stephen A. Siegel, Injunctions for Defamation, Juries, and the Clarifying Lens of 1868, 56 BUFF. L. REV. 655, 692–95, 732 n.422 (2008).

9. Whether these practices justify the petty offense exception depends on one’s jurisprudence. As I will discuss in a subsequent article, textualism may not find them sufficient.


11. I make this assertion with two caveats. First, there is some evidentiary basis for concluding that Article III’s jury trial provision was meant to enact an encompassing ban. Second, there is convincing evidence that the line now drawn between petty and serious offenses reflects contemporary policy views rather than Founding-era practices. These caveats will be the topic of a subsequent paper.

12. See infra text accompanying notes 24–69.
offenses were barred by Article III’s jury-trial mandate.\textsuperscript{13} Supreme Court Justice Samuel Miller, in his 1890 \textit{Lectures on the Constitution}, captured the uniform thinking of Founding era and nineteenth century American jurists when he said that “the language used in Article III is \textit{peremptory} that ‘the trial of all crimes, except in cases of impeachment, \textit{shall} be by jury.’ This language excludes other all modes, whether with or without consent of the party.”\textsuperscript{14}

Nonetheless, in \textit{Patton v. United States},\textsuperscript{15} decided in 1930, a unanimous Supreme Court declared federal bench trials constitutionally permissible.\textsuperscript{16} The author of the opinion, Justice George Sutherland, was second to none in his commitment to the view that the sole goal of constitutional interpretation is to maintain and effectuate the Constitution’s original meaning.\textsuperscript{17} Employing his originalist approach in \textit{Patton}, Sutherland maintained that defendants’ jury waiver and federal bench trials for serious offenses were consistent with Article III’s original understanding.\textsuperscript{18}

However, in \textit{Patton}, Justice Sutherland got his history wrong. Thus this Article joins the long list of books and articles questioning the Supreme Court’s use of history as a basis for its decisions.\textsuperscript{19} In addition, by studying how evolving

\textsuperscript{13} See infra text accompanying notes 70–104, 169–70.
\textsuperscript{14} \textsc{Samuel Miller}, \textit{Lectures on the Constitution of the United States} 500 (1891) (emphasis in original) (second emphasis added). Miller continued that “[a] party may, however, confess his guilt by a plea of guilty, and judgment may be passed upon that plea, yet if there is an issue of fact which has to be tried, that trial can only be by a jury.” \textit{Id.}; see also \textsc{William Handley, Jr.}, Some Observations on Waiver of Jury Trial in Criminal Cases, 1 TEX. L. & LEG. 45, 48 (1947) (saying Article III’s jury provision “would seem to be mandatory in nature and for many years were so construed by the federal courts”).
\textsuperscript{17} See infra text accompanying notes 183–91.
\textsuperscript{18} Since this Article’s focus is solely on jury waiver in prosecutions for “serious” crimes, from this point on the unmodified terms “offenses” and “crimes” should be understood to mean “serious offenses” and “serious crimes.” When it speaks of “petty” offenses, it will employ the adjective “petty.”
\textsuperscript{19} See, e.g., \textsc{Charles Miller}, \textit{The Supreme Court and the Uses of History} 68–69, 195–96 (1969) (explicating examples of the Court’s “misuse” of history); \textsc{Edward A. Purcell, Jr.}, \textsc{Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry} (2007); \textsc{Alfred Kelly}, \textit{Clio and the Court: An Illicit Love Affair}, 1965 SUP. CT. REV. 119 (1965);
principles of constitutional policy transformed the interpretation of Article III, Section 2's clear text, this Article reveals an important mechanism through which evolving principles of constitutional policy become the basis for constitutional law even in the hands of dedicated originalists:“motivated reasoning.”

This Article is a study of the problem that motivated reasoning presents for the practice of originalist jurisprudence, and to that extent, it is an argument for the desirability of a forthright jurisprudence of “living constitutionalism.”

Part I discusses the history of the “no-waiver” rule which the Patton case overturned. Part I demonstrates that constitutional text, common law tradition, early federal practice, Supreme Court precedent and nineteenth-century legal theory all support the conclusion that Article III’s jury provision established a per se rule banning bench trials regardless of defendants’ consent. It is written from the perspective of late-nineteenth and early-twentieth century lawyers and judges in order to establish both the original understanding of the Constitution on the subject of defendants’ jury waiver and adherence to that understanding throughout the nineteenth century.

Part II studies the first three decades of the twentieth century to show that although there were a few dissenting voices, the no-waiver rule remained solidly in place until the Patton decision. Part III discusses Patton and is divided into two sections. The first section analyzes Justice Sutherland’s opinion to show that its attempt to ground the constitutionality of federal bench trials in the Constitution’s


20. At least originalists on the bench, where despite teams of clerks there is less time for study and, despite life tenure, greater pressure not to follow the dictates of history even when they are discernible than there is among originalists in the legal academy.

original meaning is remarkably inadequate for establishing its revisionist claims. The second section accounts for Justice Sutherland's jejune opinion. After discussing social, legal, and historiographical developments in the 1920s, the second section portrays the *Patton* Court's departure from the clear command of the Constitution's text, tradition, and precedent not as bad-faith “result-oriented” jurisprudence but as an example of “motivated reasoning,” a largely unconscious and uncontrollable process.

Part IV concludes with the implications of this analysis for the debate between originalist and “living” constitutionalism. It argues that motivated reasoning is so endemic to lawyers and judges when they “do history” that it has jurisprudential ramifications in our increasingly originalist era. Historians have long questioned the Supreme Court's use of history.\(^{22}\) The psychological phenomenon of “motivated reasoning” provides an explanation for why the Justices will never be good historians and suggests that we should think long and hard before continuing our current embrace of Clio as the determining metric of contemporary government structure and civil liberties.

I. ARTICLE III'S JURY TRIAL MANDATE FROM THE FOUNDING TO 1900: THE NO-WAIVER RULE ESTABLISHED AND RESPECTED

The goal of this part is two-fold: to establish that the original meaning of Article III's jury trial mandate did not permit jury waiver, and that this “no-waiver” understanding was respected throughout the nineteenth and early twentieth century. This combined goal will be accomplished by discussing the law from the perspective of a late-nineteenth and early-twentieth century jurist because the ultimate purpose of this Article is to contrast what was believed to be true in 1900 with what came to be accepted in 1930. I am less interested in determining the Constitution’s “true” original meaning with respect to jury waiver, although I think I do that, than in illustrating how beliefs about original meaning change over time.

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A snapshot of constitutional law in 1900 shows that defendants who plead not guilty in federal criminal trials could not waive a jury trial. There was near universal agreement among late-nineteenth and early-twentieth century judges, lawyers and commentators that the no-waiver rule was fully justified by the Constitution’s text, English and colonial tradition, early federal practice, Supreme Court precedent, and legal theory.

A. The Constitution’s Text

To late-nineteenth and early-twentieth century jurists, Article III, Section 2 was an “explicit” and “peremptory” provision mandating “that in the trial of criminal causes other than impeachments a jury could not be dispensed with by consent of the accused or otherwise.” “The provisions of section 2 of article 3”, they said, “point out absolutely the tribunal which must dispose of the crimes to which they refer,” and that “tribunal . . . consists of a jury, and . . . a court . . . with a judge or judges.” Jury waiver was impossible because “no prosecuting officer nor any person accused, whether acting separately or by agreement, can substitute . . . another tribunal for that which the letter of the Constitution designates.” As future Supreme Court Justice Horace Lurton wrote when he was still an appellate court judge,

23. I use the word “crime” to denote “serious,” not “petty,” offenses. See cases cited supra notes 5–6 (discussing the distinction between serious and petty crime).

24. State v. Worden, 46 Conn. 349, 363–66 (1878) (distinguishing the state constitution’s jury provision from the federal constitution’s because of its differing drafting).

25. MILLER, supra note 14, at 500; see also Dickinson v. United States, 159 F. 801, 806 (1st Cir. 1908).

26. In re Staff, 23 N.W. 587, 589 (Wis. 1885) (distinguishing state constitutions from the federal constitution because of differing drafting); see also Note, Trial by Jury for Petty Offenses, 5 COLUM. L. REV. 48 (1905) (Article III, Section 2 “on its face, appears to be absolute, with the single mentioned exception”).

27. Dickinson, 159 F. at 806.

28. Id.; see also id. at 806–07 (“[T]he third article points out perfectly the elements of the tribunal authorized to proceed against persons accused of crimes like that before us, including equally the court, the judge and the jury . . . .”).

29. Id. at 806.
[Article III’s jury] provision is not one merely extending a privilege or guaranteeing a right. It is all that and more. The “trial” of every such crime “shall be by jury.” It goes to the constitution of the tribunal, and a “trial” for a “crime” which is not “by jury” is not a trial by any tribunal known to the Constitution.\(^{30}\)

According to Justice John Marshall Harlan, the near universally held view was that for serious crime:

Under the express words of Constitution . . . . [t]he court and the jury, not separately, but together, constitute the appointed tribunal which alone, under the law, can try the question of crime, the commission of which by the accused is put in issue by a plea of not guilty.\(^{31}\)

If anything in the Constitution’s text casts a shadow of a doubt on Justices Lurton’s and Harlan’s propositions, it came not from Article III but from the Sixth Amendment which declared that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where in the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.\(^{32}\)

By common agreement, the Sixth Amendment’s introductory clause was “permissive”\(^{33}\) and allowed waiver of many of the trial-related rights the amendment mentions.\(^{34}\)

\(^{30}\) Low v. United States, 169 F. 86, 90 (6th Cir. 1909); see also Miller, supra note 14, at 500 (quoting supra text accompanying note 14). The only pre-1900 source I have found that questions the no-waiver rule in federal prosecutions for serious crime is Belt v. United States, 4 App. D.C. 25 (D.C. Cir. 1894).

\(^{31}\) Schick v. United States, 195 U.S. 65, 82 (1904) (Harlan, J., dissenting). Justice Harlan dissent in Schick objected to the Court’s recognition of the petty offense exception. Id. Harlan read Article III’s absolute text to prohibit jury waiver for petty, as well as for serious, offenses. See id.

\(^{32}\) U.S. CONST. amend. VI.

\(^{33}\) Belt, 4 App. D.C. at 34; see also Low, 169 F. at 91 (discussing whether “verbiage” of the Sixth Amendment creates a waivable privilege). But see Rollin Perkins, Proposed Jury Changes in Criminal Cases (pt. 1), 16 IOWA L. REV. 20, 44 (1930) (noting that earlier in the nineteenth century it was common to read provisions similar to the Sixth Amendment as mandatory).

\(^{34}\) See, e.g., Schick, 195 U.S. at 71–72 (mentioning waivable Sixth
Many Gilded Age jurists thought the contrast between Article III’s peremptory, and the Sixth Amendment’s permissive, language created a tension between the two provisions. The tension stemmed from the fact that the Sixth Amendment customarily is read as guaranteeing the right to a jury trial as well as the trial’s accessory rights. Reading the Sixth Amendment this way left the Constitution with two potentially conflicting jury trial guarantees. The conflict is that Article III’s jury provision is drafted with “absolute” phrasing while the Sixth Amendment’s provision is embedded in language of personal privilege, which implies that it might be “enjoyed” or not at the defendant’s option. Gilded Age jurists thought that if the Constitution’s two criminal-jury-trial provisions were in tension, this might support an Amendment rights); Dickinson v. United States, 159 F. 801, 810–11 (1st Cir. 1908) (saying some Sixth Amendment rights are waivable and some are not); MILLER, supra note 14, at 499–500; James A. C. Grant, Waiver of Jury Trial in Felony Cases, 20 CALIF. L. REV. 132, 147 (1931) (saying the Sixth Amendment “merely” provides that “the accused shall enjoy the right to . . . trial by . . . jury”); Perkins, supra note 33, at 46 (contrasting Article III’s and the Sixth Amendment’s language).

35. It should be noted that some jurists thought the contrasting language provided additional intra-textual argument supporting the no-waiver understanding of Article III’s jury provision. See Belt, 4 App. D.C. at 34.

36. See, e.g., Albright v. Oliver, 510 U.S. 266, 273 (1994). “The Sixth Amendment right to jury trial” was extended to the states in Duncan v. Louisiana. Id. (citing Duncan v. Louisiana, 381 U.S. 145 (1965)). See also, e.g., WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 22.1, at 1069 (5th ed. 2009) (discussing the “Sixth Amendment right to jury trial”); Sanjay Chhablani, Disentangling the Sixth Amendment, 11 U. PA. J. CONST. L. 487, 505–06, 511–12 (2009); Matthew Ford, Comment, Criminal Forfeiture and the Sixth Amendment’s Right to Jury Trial Post-Booker, 101 NW. U. L. REV. 1371 (2007); Grant, supra note 34, at 147. By accessory rights I mean the adjunct rights, such as rights to counsel and confrontation that make a jury trial worth having.

37. I do not see the potential textual conflict. Historically, Article III created the right to jury trial and the Sixth Amendment specified some of its appurtenant rights. See infra text accompanying notes 42–46. This historical understanding comports with the way the Sixth Amendment is written. The Sixth Amendment reads simply as a specification of trial-related rights; the noun “trial” appears only as a referent for the adjectives “public,” and “speedy”; and the noun “jury” plays a similar role for the adjective “impartial.” The Sixth Amendment clearly assumes a right to jury trial, a drafting approach that made sense in 1791 given Article III’s explicit guarantee. I suspect the Sixth Amendment today is looked upon as a source of the trial right itself due to the belief, which is analytically incorrect, that for the Fourteenth Amendment to incorporate a trial guarantee against the states it must be in the Bill of Rights.

38. Note, supra note 26, at 48.

39. U.S. CONST. amend. VI (saying “the accused shall enjoy the right”).
argue that the Sixth Amendment's permissive declaration, being the later enactment, "must control, under the well-understood rule that the last expression of the will of the lawmaker prevails over an earlier one."\(^{40}\)

The suggestion that the Sixth Amendment was intended to supplant Article III's jury provision was raised and authoritatively rejected by the Supreme Court in 1888 in *Callan v. Wilson*.\(^{41}\) "There is no necessary conflict between [the two constitutional provisions],"\(^{42}\) Justice Harlan wrote on behalf of a unanimous Court. Article III guarantees trial by jury, without detailing the content of that right, Harlan noted.\(^{43}\) Therefore, "[T]he enumeration, in the sixth amendment, of the rights of the accused . . . is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the states to have in the supreme law of the land . . . a full and distinct recognition of those rules."\(^{44}\)

For Justice Harlan and the *Callan* Court, the absence of conflict between the Constitution's two criminal-jury trial provisions meant that Article III, with its mandatory language, was the dominant provision and the Sixth Amendment, with its more privilege-like phraseology, was adopted to define with greater specificity "the essential features of the trial required by § 2 of article 3."\(^{45}\) It was adopted not to weaken Article III's jury trial mandate but to elaborate it and quiet the Antifederalists' fears that, through lack of detail, Article III had enshrined an empty right.\(^{46}\) That a criminal defendant might waive some of his common law trial rights, as specified in the Sixth Amendment, did not in any way undercut Article III's absolute command that the

\(^{40}\) Schick v. United States, 195 U.S. 65, 68–69 (1904); Low v. United States, 169 F. 86, 91 (6th Cir. 1909); Dickinson v. United States, 159 F. 801, 810–11 (1st Cir. 1908); Grant, *supra* note 34, at 147 n.105 (citing material on the "clash of opinion regarding the effect of Amendment 6 on Article III, § 2").


\(^{42}\) *Id.* at 548.

\(^{43}\) *Id.*

\(^{44}\) *Id.* at 549–50; see also Schick, 195 U.S. at 78 (Harlan, J. dissenting); cf. Low, 169 F. at 91 (reviewing *Callan*).

\(^{45}\) Schick, 195 U.S. at 78.

\(^{46}\) *Id.* (mentioning concerns such as "secret" or "indefinitely postponed" trials); see also Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1197–98 (1991).
trial itself must be by jury.

By turning to well-known facts about the constitution’s ratification, Justice Harlan resolved the tension between the Constitution’s two criminal-trial provisions in a way that fully vindicated Article III’s peremptory command. Harlan’s position, and rationale, expressed the late-nineteenth and early-twentieth centuries’ understanding of the Sixth Amendment’s relation to Article III’s unwaivable jury-trial requirement.⁴⁷

B. Common Law Tradition

To interpret the Constitution, late-nineteenth and early-twentieth century jurists turned not only to the document’s text but also to common law tradition. The Constitution “must be read in light of the common law,”⁴⁸ they said, because “its provisions are framed in the language of the English common law”⁴⁹ and the common law “is the system from which our judicial ideas and legal definitions are derived.”⁵⁰ Moreover, the common law’s “principles and history . . . were familiarly known to the framers.”⁵¹

Gilded Age jurists thought common law principles and history unquestionably supported the no-waiver understanding of Article III’s peremptory text. According to the early common law, defendants in criminal proceedings could plead guilty,⁵² demand trial by battle,⁵³ choose a jury trial,⁵⁴

⁴⁷. See, e.g., Low, 169 F. at 91; Dickinson v. United States, 159 F. 801, 810–11 (1st Cir. 1908). Schick v. United States has dicta indicating that if there were a conflict between the two provisions, the Sixth Amendment would prevail in absence of common law considerations, but that observation had no influence given Callan’s determination that there was none. Schick, 195 U.S. at 68–70; see also, e.g., Low, 169 F. at 91; Dickinson, 159 F. at 810–11.
⁴⁸. Schick, 195 U.S. at 69.
⁴⁹. Id. (quoting Smith v. Alabama, 124 U.S. 465, 478 (1888)).
⁵⁰. Id. (quoting Moore v. United States, 91 U.S. 270, 274 (1875)).
⁵¹. Id. (quoting United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898)).
⁵⁴. BLACKSTONE, supra note 10, at *349–52; Erwin N. Griswold, The Historical Development of Waiver of Jury Trial in Criminal Cases, 20 VA. L.
or stand mute and be subject to *peine forte et dure* (which meant being crushed to death).\textsuperscript{55} By the late-eighteenth century, peine and forte had been abolished, and defendants who stood mute were considered to have pled guilty.\textsuperscript{56} Even though trial by battle remained an option for defendants being prosecuted privately through the appeal of felony proceeding,\textsuperscript{57} the battle-option was not permitted for the vast majority of defendants who were prosecuted through proceedings commenced by indictment or information.\textsuperscript{58} Thus by the late-eighteenth century, almost all English criminal defendants were limited to three choices: pleading guilty, refusing to plead and being considered guilty, or trial by jury.\textsuperscript{59}

In short, the doctrine of the English common law was that jury trials for criminal defendants were not mandatory. Defendants could choose among modes of trial and had to elect to “put [themselves] upon the country.”\textsuperscript{60} At no time prior to the Constitution’s adoption did defendants charged with felonies have the option of waiving a jury and being tried

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\textsuperscript{55} Langbein, *supra* note 52, at 268. The practice is detailed in *Gibert, 25 F. Cas. at 1304 (Story, J.).*

\textsuperscript{56} *Gibert, 25 F. Cas. at 1305; Griswold, *supra* note 54, at 657. The statute ending peine and forte and entering a guilty plea for mute defendants was passed by Parliament in 1772. Griswold, *supra* note 54, at 657 (citing Felony and Piracy Act, 1772, 12 Geo. 3, c. 20, § 1. (Eng.)).

\textsuperscript{57} *BLACKSTONE, supra* note 10, at *312–17, *346–47; William Riddell, *Appeal of Death and Its Abolition*, 24 MICH. L. REV. 786, 804–05 (1926). The right to demand trial by battle in response to a civil proceeding begun by a writ of right also survived. *See Riddell, supra*, at 803. Trial by battle in both actions was abolished by Parliament in 1819. *Id. at 808; 4 WILLIAM BLACKSTONE, COMMENTARIES 484, 494 n.11 (John McIntyre Cooley ed., 3d ed. 1884) (citing Appeal of Murder, etc., 1819, 59 Geo. 3, c. 46 (Eng.)).

\textsuperscript{58} *Gibert, 25 F. Cas. at 1305.

\textsuperscript{59} Parliament changed the law 1827 so that after that date defendants who refused to plead were considered to have plead not guilty. Frank Grinnell, *To What Extent Is the Right to Jury Trial Optional in Criminal Cases in Massachusetts*, 8 MASS. L.Q. (No. 5) 7, 47 (1923); Griswold, *supra* note 54, at 657 (citing Criminal Law Act, 1827, 7 & 8 Geo. 4, c. 28, § 2 (Eng.)).

\textsuperscript{60} *BLACKSTONE, supra* note 10, at *344. Blackstone explains the phrase by saying “the jury” is understood to be “country.” *Id.*
by the bench.  

The American colonies and the states in the early Republic generally followed English practice, with a few exceptions. According to Gilded Age and early-twentieth-century jurists, trial by battle was never introduced into America and refusals to plead were entered as a plea of “not guilty.” Peine and forte was not considered to have been introduced either, despite there having been a notorious instance of it during the Salem Witch hysteria. Although subsequent research has altered the picture somewhat, throughout the nineteenth- and early-twentieth- centuries, jurists were certain that according to colonial and Founding-era criminal procedure, defendants charged with serious offenses had only two choices: plead guilty or be tried by a jury. Bench trial predicated on defendant’s jury waiver was unknown in the early Republic.

61. Singer v. United States, 380 U.S. 24, 27–28 (1965); Dickinson v. United States, 159 F. 801, 805 (1st Cir. 1908) (discussing the constitutionality of a jury with less than twelve people); Susan C. Towne, The Historical Origins of Bench Trial for Serious Crime, 26 AM. J. LEGAL HIST. 123, 123 (1982); Recent Decisions, Power of Defendant on Trial for Penitentiary Offense to Waive a Jury Trial, 30 COLUM. L. REV. 1063, 1063 (1930). The jury waiver rule for misdemeanors is unclear. Dickinson, 159 F. at 805. The English procedure known as “submission” does not contradict my point as it was used exclusively for minor crimes. See Towne, supra, at 136. For a discussion of the English retreat from the no-waiver rule, see infra note 268.

62. Gibert, 25 F. Cas. at 1305.

63. Id.; see also Grinnell, supra note 59, at 47–48 (discussing colonial Massachusetts).

64. Gibert, 25 F. Cas. at 1305 (saying peine and forte was never introduced).


66. See infra text accompanying notes 324–96 (discussing subsequent research).

67. Towne, supra note 61, at 145. Towne’s conclusion and my discussion must be read with the understanding that jury trial rights did not attach to petty offenses, see supra text accompanying notes 6–7, and that the petty/serious offense boundary was more generous than it is today, see Frankfurter & Corcoran, supra note 10, at 922–65 (discussing petty offenses in eighteenth-century England and colonial America). See also supra note 6.
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C. Federal Practice and Supreme Court Precedent

Late-nineteenth and early-twentieth century jurists also found solid support for the no-waiver understanding of Article III's jury trial mandate in the unbroken history of federal practice and Supreme Court precedent.

As for early federal practice, the Supreme Court tells us that "[i]n no known federal criminal case in the period immediately following the adoption of the Constitution did a defendant claim that he had the right to insist upon a trial without a jury."68 Nor did an eighteenth- or nineteenth-century Congress ever adopt or even consider a statute allowing defendants to ask for a bench trial.69

In addition, the no-waiver rule reflects the way Supreme Court Justices read Article III, Section 2 throughout the nineteenth century. Perhaps because the Constitution's text and common-law tradition were so clear, there is almost no case law discussion of the issue before the last third of the nineteenth century. The sole exception was remarks made by Justice Joseph Story in the course of a trial he presided over while riding circuits. The proceeding,70 which involved the trial of the officers and crew of a Spanish schooner for piracy, was a major prosecution that implicated international affairs.71 When, after a fifteen-day trial,72 the jury found

69. Congress may well have thought that jury waiver was not permitted. Early federal legislation contemplated jury trial and made no provision for a bench trial for a defendant who preferred one. The earliest congressional statute authorizing jury waiver and bench trial was passed in 1892. It was limited to misdemeanors prosecuted in the Washington, D.C. Police Court. See Act of Mar. 3, 1891, ch. 536, 26 Stat. 848, §§ 1–2 (1891); Lester Orfield, Trial by Jury in Federal Criminal Procedure, 1962 DUKE L.J. 29, 59. At the very end of the nineteenth century, a few lower court judges began to express a contrary view. Belt contains the earliest expressions. See Belt, 4 App. D.C. at 33–34. See Orfield, supra, at 59–61 (discussing federal case law); infra text accompanying notes 155–69 (discussing the dissenting cases). I am speaking only about interpretations of the federal constitution. For early state court discussions of jury waiver as a matter of state constitutional law, see Cancemi v. People, 18 N.Y. 128, 134–39 (1858); Neales v. State, 10 Mo. 498, 500 (Mo. 1847)
71. Id. at 1289 n.2. The trial was celebrated enough for a stand-alone report to be published by CONG. STENOGRAPHER, A REPORT OF THE TRIAL OF PEDRO GIBERT (1834). Gibert is remembered mainly for Justice Story's ruling that the Fifth Amendment's Double Jeopardy Clause bars judges from granting a motion
some defendants guilty, their attorneys moved to arrest judgment and asked for a new trial.\textsuperscript{73} Among the attorneys’ objections was one faulting the proceedings because at the defendants’ arraignment, after they pled not guilty, “the clerk of the court . . . did not . . . ask the prisoners how they would be tried, so that they did not make the usual and common reply, ‘By God and the country.’ ”\textsuperscript{74} Instead, upon motion of the district attorney, the presiding judge immediately assigned a trial date.\textsuperscript{75}

The gist of the objection was that the arraignment had skipped the traditional step of allowing the defendants the choice of determining how they would be tried. At common law, where there were alternate modes of trial and painful consequences for choosing none of them, jury trials were improper without the defendant’s consent.\textsuperscript{76}

Justice Story easily rejected the objection. Even though years ago in England it would have been well-taken, in America the objection was anachronistic and trivial. “[I]n America,” he said, “the only trial since the first settlement of the country has always, in criminal cases, been by a jury; and could not be in any other manner.”\textsuperscript{77} Yet, because Gibert was a death penalty case, Story responded to this anachronistic objection with a learned and lengthy analysis\textsuperscript{78} in the course for a new trial “whether there be a verdict of acquittal or conviction.” Gibert, 25 F. Cas. at 1301. Story’s view was never the dominant federal view and was eventually rejected by the Supreme Court. See Green v. United States, 355 U.S. 184, 189 (1957) (discussing Gibert and its rejection); \emph{id.} at 199–205 (Frankfurter, J., dissenting); Note, \textit{Twice in Jeopardy}, 75 \textsc{Yale L.J.} 262, 264 n.6 (1965). Story thought the remedy for error at trial was for the judge to follow English practice and ask the President to pardon the defendant or mitigate his sentence. Gibert, 25 F. Cas. at 1297, 1302–03; see also Justin Curtis, \textit{The Meaning of Life (or Limb): An Originalist Proposal for Double Jeopardy Reform}, 41 \textit{U. Rich. L. Rev.} 991, 1016–19 (2007) (attributing to Gibert the view that Double Jeopardy applies only to capital offenses, which also did not win acceptance as federal law).

\textsuperscript{72} Gibert, 25 F. Cas. at 1287.
\textsuperscript{73} \textit{Id.} at 1284.
\textsuperscript{74} \textit{Id.} at 1303–04.
\textsuperscript{75} \textit{Id.} at 1304.
\textsuperscript{76} \textit{See supra} text accompanying notes 52–56.
\textsuperscript{77} Gibert, 25 F. Cas. at 1305.
\textsuperscript{78} \textit{Id.} at 1303. Story’s response took over 2700 words; it fills three large pages of the reports. \textit{Id.} at 1303–06. Perhaps Justice Story was also trying to show the fairness of the American legal system to foreigners who were going to be executed by it.
of which he asserted:

The constitution has expressly declared, “that the trial of all crimes . . . shall be by jury.” It is imperative upon the courts, and prisoners can be lawfully tried in no other manner.

. . . .

What is the reason . . . at the common law, of asking the prisoner how he will be tried? It is to ascertain whether he consents to a trial by jury . . . . I deem it a little short of an absurdity in the courts of the United States to call upon the prisoners, after they have pleaded guilty, to say how they will be tried, when the constitution and laws have peremptorily required the trial to be by jury. Suppose the prisoners had been asked, how they would be tried, and they had answered that they wished for no trial at all; must not the court have proceeded to try they upon the plea of not guilty? Suppose they had answered that they wished to be tried by the court, could the court have done otherwise than order a trial by jury? . . . The constitution decides how he shall be tried, independent of any election on his part.79

Admittedly, these remarks are dicta since they were not made in response to the question of whether a defendant in a federal criminal trial could waive his right to a jury trial and be tried solely by a judge. Nonetheless, courts and scholars have read them to stand for the proposition that Justice Story “did not admit the possibility of waiver of jury trial.”80

After the Civil War, commentary on jury waiver by Supreme Court Justices continued in the same vein as Justice Story’s in Gibert. But now the remarks were made in

79. Id. at 1305–06. Also relevant are Justice Story’s remarks concerning states which have constitutional provisions similar to Article III, Section 2:

It seems to me, that in all those states, where the constitution provides that the trial of all crimes shall be by jury, and the prisoner pleads not guilty, it is a mere mockery to ask him how he will be tried, for the constitution has already declared how it shall be.

Id. at 1305.

80. Orfield, supra note 69, at 56; see also Singer v. United States, 380 U.S. 24, 31 (1965) (“In . . . Gibert, . . . Story . . . indicated his view that the Constitution made trial by jury the only permissible method of trial.”); State v. Soper, 16 Me. 293, 297 (1839); Amar, supra note 46, at 1196 & n.290 (citing Gibert); Appleman, supra note 2, at 441 (“Justice Story . . . contended that jury trial was the only permissible method of trial.”).
opinions in which the Justices spoke for the Supreme Court. In 1874, in developing analogies supporting one of the early unconstitutional conditions decisions\(^8\) protecting out-of-state corporations from state laws requiring that they waive their right to remove cases to federal court when sued by in-state plaintiffs, Justice Ward Hunt approvingly cited the leading state court anti-jury waiver case in the course of saying:

A man may not barter away his life or his freedom, or his substantial rights. In a criminal case, he cannot, as was held in Cancemi's Case, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men.\(^8\)

Then in 1898, in Thompson v. Utah,\(^8\) Justice John Marshall Harlan asserted the no-waiver principle as a necessary support for the Supreme Court’s ruling that the Constitution’s jury trial mandate not only required twelve-person juries but also prevented defendants from consenting to trial by a smaller jury. In Thompson, the defendant was convicted of larceny in a Utah state court by a jury composed of eight men.\(^8\) Since Utah's constitution expressly authorized eight-person juries in all but capital cases,\(^8\) the Utah Supreme Court easily upheld Thompson’s conviction under Utah law.\(^8\)

Throughout the nineteenth century, a valid conviction under state law normally would have ended the matter.\(^8\)

\(^8\) Unconstitutional conditions arise when government conditions its extension of benefits on the waiver of a constitutional right. For discussions of the doctrine, see, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 534–36, 946–50 (2d ed. 2002).

\(^8\) Insurance Co. v. Morse, 87 U.S. 445, 451 (1874) (citation omitted). Cancemi v. People, 18 N.Y. 128 (1858) was a leading state court expression of the no-waiver principle.

\(^8\) Thompson v. Utah, 170 U.S. 343 (1898).

\(^8\) Id. at 344.


\(^8\) State v. Thompson, 50 P. 409, 410 (Utah 1897) (relying on Bates, 47 P. at 79 (quoting UTAH CONST. of 1896 art. I, § 10)).

\(^8\) See, e.g., Corrina Lain, Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution, 152 U. PA. L. REV. 1361, 1369–71 (2004) (saying before incorporation of the Bill of Rights state criminal defendants had no recourse to federal court); Anthony O'Rourke, The Political Economy of Criminal Procedure Litigation, 45 GA. L. REV. 721, 727 (2011) (saying prior to the 1920s it was not expected that the Supreme Court
The *Thompson* case, however, involved unique facts that allowed Thompson to raise an objection grounded in the federal Constitution’s Ex Post Facto Clause, which was one of the few rights provisions in the national charter that bound the states. The facts were that Utah became a state in 1896 and Thompson had committed his crime in 1895 when Utah was still a federal territory. At the time Thompson committed his crime, the federal Constitution’s jury provisions applied. Unlike the Utah constitution, the federal Constitution’s jury trial guarantee meant “a jury constituted, as it was at common law, of twelve persons, neither more nor less.” Given that Thompson’s right to a twelve-person jury was a “substantial right,” a “right that was regarded, at the time of the adoption of the constitution, as vital for the protection of life and liberty,” any material change in it was impermissibly ex post facto.

When Thompson’s case reached the United States Supreme Court, Utah attempted to defend against application of the Ex Post Facto Clause by arguing that Thompson had waived his federal jury trial right by not “object[ing] until after verdict, to a trial jury composed of eight persons.”

Justice Harlan’s response to Utah’s waiver argument was divided into four parts. First, he succinctly ruled that “[i]t is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt.” Then Justice Harlan supported his ruling by quoting at length from *Hopt v. Utah*, a decade old case that said the defendant’s right to be present at his trial is not waivable. The *Hopt* Court’s view, which was

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would review state criminal trials and develop doctrine to aid state court defendants).

88. U.S. CONST. art I, § 10, cl. 1 (“No state shall . . . pass any . . . ex post facto law . . . .”).
89. *Thompson*, 170 U.S. at 344.
90. *Id.* at 349.
91. *Id.* at 352. The Utah court had rejected Thompson’s Ex Post Facto argument because it incorrectly regarded jury trial as a changeable procedural right. *Thompson*, 50 P. at 410 (relying on *Bates*, 47 P. at 80–81).
93. *Id.*
95. *Id.* at 578–79. The specific facts of *Hopt* involved the defendant not
reasserted in Thompson, was that the pro-waiver argument:
necessarily proceeds upon the ground that [the defendant]
alone is concerned as to the mode by which he may be
deprived of his life or liberty, and the chief object of the
prosecution is to punish him for the crime charged . . . .
[However] the public has an interest in his life and liberty
. . . . That which the law makes essential in proceedings
involving the deprivation of life and liberty cannot be
dispensed with or affected by the consent of the accused,
much less by his mere failure, when on trial and in
custody, to object to unauthorized methods. The great end
of punishment is not the expiation of atonement of the
offense committed, but the prevention of future offenses of
the same kind. Such being the relation which the citizen
holds to the public, and the object of punishment for public
wrongs, . . . [i]f he be deprived of his life or liberty without
being so present, such deprivation would be without that
due process of law required by the constitution.96

After this telling quote, Justice Harlan connected Hopt to
Thompson by reasoning: “If one under trial for a felony . . .
could not legally consent that the trial proceed in his absence,
still less could he assent to be deprived of his liberty by a
tribunal not authorized by law to determine his guilt.”97 And
he concluded that “[i]n our opinion . . . the Constitution of the
United States gave the accused . . . the right to be tried by a
jury of twelve persons, and made it impossible to deprive him
of his liberty except by the unanimous verdict of such a
jury.”98

being present at voir dire. In the 1930s, Hopt was criticized as “dicta.” Snyder
v. Massachusetts, 291 U.S. 97, 118 n.2 (1934). This was just after Thompson
suffered a similar fate. See infra text accompanying notes 201–07. Hopt has
since been substantially cut back. Nancy Jean King, Priceless Process:
Nonnegotiable Features of Criminal Litigation, 47 UCLA L. REV. 113, 129 &
n.55 (1999). The demise of the rule against jury waiver recounted in this paper
was the leading edge of a general revision of thinking about waiver of the
Constitution’s trial-related rights. See id. at 125–32; infra text accompanying
notes 105–51.

96. Thompson, 170 U.S. at 354 (quoting Hopt, 110 U.S. at 579).

97. Id. at 354–55.

98. Id. at 355. In Hallinger v. Davis, 146 U.S. 314 (1892), the Court ruled
that where state law permitted jury waiver in state court prosecutions of state
crimes there is no violation of the Fourteenth Amendment’s Due Process
Clause. Thus in Thompson, the rule against jury waiver was only because of
Article III, Section 2 and the Sixth Amendment.
Even though Justice Harlan’s opinion in *Thompson* dealt with the problem of consent to a jury composed of less than twelve persons, it was understood by lower court judges to stand as well for the proposition that federal bench trials were unconstitutional. All early-twentieth century federal appellate courts that addressed or commented on the issue took that stance. So did several trial and territorial courts. These cases elaborated on *Thompson*’s “the public is interested” rationale and discussed why defendants could waive some constitutional rights, such as their right to a jury in civil cases, and their right to object to a juror’s impartiality, but not others. The future Supreme Court Justice Horace Lurton, while still a judge on the Sixth Circuit, touched on many of these issues when he wrote:

> The right to waive a right does not exist when the matter concerns the public as well as the individual . . . . Between the waiver of a jury in a civil case and its waiver in a trial for crime there are fundamental differences. The one involves only property rights of the parties, rights over which they have dominion. The other involves the liberty or life of the citizen. This is a matter over which the accused has not dominion. The state, the public, are concerned that neither shall be affected save by due process of law . . . . Undoubtedly the accused has a right to waive [also] everything which pertains to form and much which is of the structure of a trial. But he may not waive that which concerns both himself and the public, nor any matter which involves fundamentally the jurisdiction of the court. The jurisdiction of the court to pronounce a judgment or conviction for crime, when there has been a plea of not guilty, rests upon the foundation of a verdict by a jury.

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99. There was also some extension of the right. See, e.g., *Freeman v. United States*, 227 F. 732, 759–60 (2d Cir. 1915) (whole trial must be heard by same judge and same twelve jurors). One lower court went the opposite way but that court’s ruling pre-dated the *Thompson* decision. See supra notes 30, 69 (discussing *Belt v. United States*, 4 App. D.C. 25, 25 (D.C. Cir. 1894)).

100. *Coates v. United States*, 290 F. 134, 136 (4th Cir. 1923); *Blair v. United States*, 241 F. 217, 230 (9th Cir. 1917); *Low v. United States*, 169 F. 86, 90 (6th Cir. 1909); *Dickinson v. United States*, 159 F. 801, 804–12 (1st Cir. 1908).

101. *In re Virch*, 5 Alaska 500, 504–05 (D.C. Alaska 1916); *In re McQuown*, 91 P. 689, 689–90 (Okla Terr. 1907); see also *Orfield*, supra note 69, at 55–63 (for a review of relevant cases before and after *Thompson*).

To this, Judge William Putnam of the First Circuit added that the standard concern, in this formalist era, was that:

We have been unable to . . . frame any satisfactory rule by which, if waivers [to the number of jurors] can be sustained, the jury may not be made to consist of 1 man instead of 12. The legal mind involuntarily rejects a proposition that the jury might be so constituted constitutionally; and yet we are unable to determine at what point the weakening of the panel should stop unless it might by consent be reduced to a single individual . . . . except by the discretion of the judge; but, while, necessarily the discretion of the judge is often interposed in administering the civil law, and, to a certain extent the criminal law, it seems wholly inappropriate that it should be availed of in a matter of so grave a character as the construction and practical application of the Constitution of the United States. We are not able to accept a proposition of that kind.103

For late-nineteenth and early-twentieth century jurists the Constitution’s original meaning was clear. Common law tradition and Supreme Court precedent complemented Article III, Section 2’s absolute text. They all pointed to the conclusion that in federal court a jury waiver followed by bench trial could not be one of the defendant’s options. The trial of all serious crimes had to be by jury.104

103. *Dickinson*, 159 F. at 809; see also *William Atwell, A TREATISE ON FEDERAL CRIMINAL LAW PROCEDURE* 47 (1st ed. 1911) (similar argument). Judge Putnam also found no contradiction in allowing civil jury waiver and waiver of juror impartiality by observing that it was permitted by the common law and, therefore, was a facet of the jury right the Constitution-makers placed in the federal Constitution. *Dickinson*, 159 F. at 809.

104. I am speaking only of prosecutions that go to trial in the ordinary federal courts. Military courts are not subject to Article III’s mandate. Although in the nineteenth century, the exception for military trials was coupled with a weak textual argument, the view that the all-inclusive language of Article III was not intended to change common law practices is currently the primary support for the holding that there is no jury trial right for defendants in trials conducted by the military. See *Reid v. Covert*, 354 U.S. 1, 4–5, 50 (1957); *Ex parte Quirin*, 317 U.S. 1, 39–44 (1942) (relying on Revolutionary and Founding era practices); *Ex parte Milligan*, 71 U.S. 2, 123 (1866) (relying on inferences from the Fifth and Sixth Amendments); *Dynes v. Hoover*, 61 U.S. 65, 78 (1857) (relying on inferences from Article I, Section 8; Article II, Section 2; and the Eighth Amendment). Even though there is no jury trial right in civil admiralty suits, see *United States v. La Vengeance*, 3 U.S. 297 (1796) (no jury required in civil admiralty), there is a right to a jury in criminal admiralty prosecutions. This is because English admiralty courts, since the reign of Henry
D. Nineteenth-Century Constitutional Theory: Jury Trial as a Public Right

Although fully justified by constitutional text, history, and precedent, a criminal defendant’s inability to waive Article III’s jury trial mandate was more than a mere fact of American constitutional law brought about by some happenstance of legal history. It had widely-shared practical, political, and theoretical justifications. As with any central feature of a legal regime, it was supported by a host of overlapping justifications, of greater or lesser strength, that interconnected to build a structure of thought stronger and more resilient than any one of the individual strands.

While some of the justifications may not resonate with modern sensibilities, in the eighteenth and nineteenth centuries the no-waiver rule had a host of practical and theoretical supports. In colonial America, and perhaps in England as well, judges surely would not have been considered appropriate fact-finders and sole determiners of guilt or innocence. Because judicial tenure for “good behavior,” which was introduced into England in 1701, was never extended to the colonies, colonists tended to view their judges, who served “at the King’s pleasure,” with suspicion as agents of a remote government. In this environment, one can easily imagine the colonists’ distrust of the colonial judiciary being transferred over to the judges of the new and distant national government and even to the


105. There was a vogue in the late-nineteenth to early-twentieth centuries to trace facets of current law to anachronistic facets of medieval or ancient law. The rule against jury waiver was subject to this analysis by its opponents. See Dickinson, 159 F. at 820–21 (Aldrich, J., dissenting); infra text accompanying notes 305–12.

106. In addition, before the “lawyerization” of the criminal trial in the early-nineteenth century, judges may not have been seen as available to serve as fact-finder due to their role as advisor to the defendant and superintendent of the “altercation” between the defendant, victim, and witnesses. Langbein, supra note 52, at 264.

107. Siegel, supra note 8, at 699 n.241.

108. Langbein, supra note 52, at 269 (“crown hirelings”).
judges of their own state. As John Langbein has written, especially “[i]n America, where the judiciary’s association with the excesses of English colonial administration had led the framers to make jury trial a constitutional right, bench trial was all the harder to envision.”\textsuperscript{109} In addition, in a legal system in which every felony was a capital crime, judges might themselves wish to avoid being the sole person to determine whether defendants lived or died.\textsuperscript{110}

Finally, according to recent scholarship on the history of waiver of trial-related constitutional rights, the foundation of the Constitution’s unwaivable jury trial mandate follows from the fact that early America was a society in which rights typically were inalienable.\textsuperscript{111} Although communitarian and individualistic norms were intermixed, early America still gave greater prominence to communitarian premises in its public philosophy.\textsuperscript{112} It was also a more paternalistic society.\textsuperscript{113} In this society, rights tended to be conceived not as private possessions but as “public goods” valorized for protecting and promoting the public’s interest.\textsuperscript{114}

Specifically with regard to jury trial, the public’s interest was twofold. It was a means to protect defendants from overreaching officials,\textsuperscript{115} as well as an instrument of popular government serving a variety of related goals.\textsuperscript{116} Most specifically, as Jason Mazzone writes, “in the early years of the Republic, jurors looked much more like judges than they

\textsuperscript{109}. Id. (describing why England and America developed an adversary criminal process rather than one that was bench-centered).

\textsuperscript{110}. Alschuler, supra note 52, at 11; Langbein, supra note 52, at 270 (making the point in relation to politically controversial cases).


\textsuperscript{113}. King, supra note 95, at 121 (relating the “demise of paternalism” as a barrier to waiver to the “provision of defense counsel”).

\textsuperscript{114}. See id. at 120–21; Mazzone, supra note 111, at 850–55.

\textsuperscript{115}. Appleman, supra note 2, at 408; Mazzone, supra note 111, at 850–51.

\textsuperscript{116}. \textsc{Akhil Amar, The Constitution and Criminal Procedure: First Principles} 120–23 (1997); Appleman, supra note 2, at 408–39; Mazzone, supra note 111, at 851–52 (discussing jury trial and the Fifth Amendment Privilege against self-incrimination as public rights); see also King, supra note 95, at 126–29 (discussing the Sixth Amendment right of “presence” as a public right).
do today. Instead of simply deciding well-defined issues of fact, early juries also interpreted and applied the law.”

Thus through jury service, the local community effectively impressed its mores and norms into the criminal law.

If jury service enabled the local community to affect the law, it also allowed the law to affect the local community. Jury service was of public importance, in part, because it educated the populace. As stated in an article in the Washington Law Reporter in 1884, the jury was “a public school of the highest possible order for the training of good citizens.” These words were part of a stream of commentary on the value of jury service running from the Founding era Letters From A Federal Farmer, to Alexis de Tocqueville in the nineteenth century and, most recently, to Akhil Amar.

In addition, jury service was valued as “the democratic branch of the judiciary power.” At the Founding, a widely-shared political principle was that “the people” should participate directly in every branch of government. Indeed, both Thomas Jefferson and John Mercer, an anti-Federalist member of the Constitutional Convention, were of the view that popular participation in the judicial branch was “more

117. Mazzone, supra note 111, at 851.
118. AMAR, supra note 116, at 122–23 (discussing the role of “normative judgment” involved in jury service); Appleman, supra note 2, at 408–09 (saying jury service enabled the local community effectively “to both create and control . . . the substantive law”).
119. Perkins, supra note 33, at 25 n.33 (quoting Waiver of Juries in Criminal Cases, 12 WASH. L. REP. 456, 458 (1884) (reprinting an article by W.R. in the Chicago Legal News)).
120. AMAR, supra note 116, at 122 (quoting the Letters’ view that “[The people’s] situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the sentinels and guardians of each other”).
121. Mazzone, supra note 111, at 851 (“The jury is both the most effective way of establishing the people’s rule and the most efficient way of teaching them how to rule.” (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 276 (J.P. Mayer ed., George Lawrence trans., Perennial Library 1988) (1835))).
122. AMAR, supra note 116, at 122 (“Through jury service, citizens would learn their rights and duties, and actively participate in the governance of society.”).
123. Mazzone, supra note 111, at 851 (quoting Essays by a Farmer (pt. 4), MD. GAZETTE, Mar. 21, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST 36, 38 (Herbert J. Storing & Murray Dry eds., 1981)).
necessary than representatives in the legislature.” It was this sentiment that led Alexander Hamilton to famously say that although the “friends and adversaries” of the Constitution “concur . . . in the value they set upon the trial by jury,” the friends “regard it as a valuable safeguard to liberty,” while the adversaries “represent it as the very palladium of free government.”

Shaped by these precepts, nineteenth-century lawyers, judges, and commentators articulated two legal theories to explain why criminal defendants could not waive a jury trial. These two theories were so much a part of nineteenth-century thinking about juries that Supreme Court Justices, in the already quoted string of precedent on the no-waiver principle, stated them casually as the relevant ground norms.

One theory, known as the “public interest” or “public rights” theory, simply affirmed that “in criminal cases . . . there are more than personal interests involved[,] . . . [T]he rights and interests of the public are also concerned. Hence, the right of waiver is denied . . . .” As explained at greater length by a federal appellate court judge:

The right to waive a right does not exist when the matter concerns the public as well as the individual . . . [A] trial for crime . . . involves the liberty or life of the citizen. This is a matter over which the accused has not dominion. The state, the public, are concerned that neither shall be affected save by due process of law.


125. Mazzone, supra note 111, at 850 (quoting The Federalist No. 83, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

126. See supra text accompanying notes 14, 31, 82, 98.

127. JOHN PROFFATT, A TREATISE ON TRIAL BY JURY 157 (1877).

128. Low v. United States, 169 F. 86, 91–92 (6th Cir. 1909); see also Cancemi v. People, 18 N.Y. 128, 137 (1858) (“Criminal prosecutions involve public wrongs . . . which affect the whole community, considered as a community, in its social and aggregate capacity”) (internal quotations omitted); W. F. Elliott, Waiver of Constitutional Rights in Criminal Cases, 6 CRIM. L. MAG. 182, 182–83, 189–90 (1885) (saying, inter alia, “[t]he public as well as the individual have an interest in every criminal trial”); Waiver of Juries, supra note 119, at 457 (reprinting article from the Chicago Legal News) (jury is “a political institution . . . the strict maintenance of which society . . . has an interest which far transcends the
The other theory, known as the “jurisdiction” theory, asserted that when a constitution, whether federal or state, declared a jury trial right it established the jury as part of the frame of government. As stated in the leading antebellum precedent, “when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant.” A post-bellum case rendered the thought even more simply when it said: the defendant “has no power to consent to the creation of a new tribunal, unknown to the law, to try his offense.” So did Justice Harlan when, dissenting from the case that established the petty offense exception, he insisted that, “[u]nder the express words of [the] Constitution . . . [t]he court and the jury, not separately, but together, constitute the appointed tribunal which alone, under the law, can try the question of crime, the commission of which by the accused is put in issue by a plea of not guilty.” In other words, when the Constitution declared in Article III that “the trial of all crimes . . . shall be by jury,” it ordained that the only tribunal with lawful power to try a person accused of crime had to be composed of an Article III judge and a common law jury.

In truth, the “public interest” and “jurisdiction” theories expressed correlative understandings of the federal and state constitutions’ jury trial mandates. By either theory, jury

in importance that of the individual whose rights may come before it”).

129. Cancemi, 18 N.Y. at 138.
130. Territory of Montana v. Ah Wah, 1 P. 732, 734 (Mont. 1881); see also Territory of New Mexico v. Ortiz, 42 P. 87, 88 (N.M. 1895) (defendant “must be given trial before a tribunal known to the law—one having the power to declare his guilt”); Metzner v. State, 157 S.W. 69, 70 (Tenn. 1913) (saying trial by jury “is a matter of jurisdiction. Jurisdiction is conferred by law, and cannot be conferred by consent”); PROFFATT, supra note 127, at 155 (saying “the jury is a part of the administration of law, as much inherent to the court as any part of the tribunal” and “to dispense with a jury . . . was in reality constituting another tribunal than that established by law”). In Low, the court said that “[t]he jurisdiction of the court to pronounce a judgment or conviction for crime, when there has been a plea of not guilty, rests upon verdict by a jury.” Low, 169 F. at 92.

132. U.S. CONST. art. III, § 2, cl. 3.
133. Consider also how easily cases and commentators ran the two theories
trial was a right that governments could not deny and defendants could not waive. Jury trial protected the people as well as the defendant.

Like all theories, the “public rights” and “jurisdiction” theories had weaknesses and inconsistencies. Nevertheless, as is usual with widely-accepted theories, contemporaries thought the theories’ problems had sufficient answers. For example, in establishing the no-waiver rule for criminal trials, judges and commentators had to account for the fact that civil juries could be waived. The response stated in “public interest” theory terms was: civil suits involve property rights that are solely the concern of the parties and therefore properly under their dominion. After the no-waiver rule was established, its proponents needed to explain why some criminal trial rights, such as the rights of personal presence, confrontation, and a speedy trial, could be

See, e.g., Low, 169 F. at 91–92; Belt, 4 App. D.C. at 31–32; Elliott, supra note 128, at 189 (speaking of “where the matter is jurisdictional and affects the public”).


136. Schick, 195 U.S. at 96 (Harlan, J., dissenting) (distinguishing criminal from civil jury waiver by saying that criminal trials involve “things of more consequence to the public than property, the value of which is to be measured in money”); Low, 169 F. at 92 (waiver of civil jury allowed because they “involve[] only property rights . . . over which [the parties] have dominion”); Belt, 4 App. D.C. at 32 (civil jury waivable because civil cases involve private rights); Cancemi, 18 N.Y. at 136; THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 181 (1868) (waiver of constitutional rights are permissible when they are “designed for the protection solely of the property rights of the person”); Waiver of Juries, supra note 119, at 456–58. Civil jury waiver was also justified by history as it was permitted at common law. Dickinson v. United States, 159 F. 801, 807 (1st Cir. 1908).

137. King, supra note 95, at 127–29 (discussing the judicial retreat on protecting the defendant’s right to be present at his trial); Elliott, supra note 128, at 185–86.

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waived while the jury itself could not.140 Drawing from jurisdiction theory, the response was that although defendants could waive trial related rights that were “merely . . . formal”141 or “incidental,”142 they could not waive any that were “fundamental”143 or “essential.”144

Perhaps the most obvious inconsistency for both theories was that any defendant effectively waived a jury trial by pleading guilty.145 From the “public rights” theory came the answer that along with the defendant’s admission “the preliminary investigation of a grand jury . . . . is supposed to be a sufficient safeguard to the public interest.”146 Unsurprisingly, the “jurisdiction” theory reached the same result by pointing out that, “When the accused pleads guilty before a lawful tribunal he admits every material fact . . . and there is no issue to be tried; no facts are to be found; no trial occurs. After such a plea nothing remains to be done except that the court shall pronounce judgment . . . .”147 As Justice

139. Territory of New Mexico v. Ortiz, 42 P. 87, 88 (N.M. 1895) (distinguishing speedy trial waiver from jury waiver because the latter affects jurisdiction); Perkins, supra note 33, at 23 (mentioning waiver of “speedy trial by asking for a continuance”).

140. See generally Perkins, supra note 33, at 23–24 (list of waivable trial related rights).

141. Belt, 4 App. D.C. at 32; see also Cancemi, 18 N.Y. at 137–38 (consent permitted to “mere formal proceedings”).

142. Mattox v. United States, 156 U.S. 237, 243 (1895) (waiver permitted when trial-related right provides only an “incidental benefit” to the defendant); see also Dickinson v. United States, 159 F. 801, 816 (1st Cir. 1908) (Aldrich, J., dissenting) (contrasting waiving the “incidental” with the “fundamental”).

143. Belt, 4 App. D.C. at 32; see also Low v. United States, 169 F. 86, 92 (6th Cir. 1909) (no waiver of “any matter which involves fundamentally the jurisdiction of the court”); Dickinson, 159 F. at 816 (Aldrich, J., dissenting) (agreeing that “fundamental” aspects of the jury right cannot be waived).


145. It should be noted that guilty pleas were not so frequent in the nineteenth century so the inconsistency was not as noted. Guilty pleas, and awareness of the problem, dramatically increase in the twentieth century with the rise of plea bargaining. See Alschuler, supra note 52, at 5–6; John H. Langbein, On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial, 15 HARV. J.L. & PUB. POL’Y 119, 120 (1992); Langbein, supra note 52, at 288–70.

146. Cancemi, 18 N.Y. at 138.

147. Schick, 195 U.S. at 82 (Harlan, J., dissenting); see also West v. Gammon, 98 F. 426, 428–29 (6th Cir. 1899) (holding that guilty pleas do not
Harlan concluded, if due to a guilty plea there is no trial, there cannot be a violation of the Constitution’s requirement that “the trial of a crime shall be by jury.”

Legal theories never are airtight. Social, political and cultural factors, along with the theories’ basic logic, determine whether they are successful. In its consideration of waiver of trial-related rights, jurisprudence has moved beyond the “public interest” and “jurisdiction” theories, at least as originally stated. Nevertheless, throughout the nineteenth and early-twentieth centuries, they were widely accepted and are readily apparent in the case law and treatises. Although in the last third of the nineteenth century a few state courts and commentators began to criticize and even reject them, in 1900, and up through the 1920s, the “public interest” and “jurisdiction” theories provided the standard grounding for the criminal defendant’s inability to choose a bench trial when prosecuted for a serious offense.

II. DISSENTING VOICES IN THE EARLY TWENTIETH CENTURY

For late-nineteenth and early twentieth-century jurists, the Constitution’s text, common law tradition, Supreme Court precedent, and constitutional theory all clearly supported the no-waiver understanding of Article III, Section 2’s jury trial requirement. The Supreme Court’s ruling in Thompson v. Utah in 1898 was taken as settling the question.
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During the three decades following the Thompson decision there were only two dissenting voices in the federal judiciary. One was Frederick Brown, who sat on the District Court for the Territory of Alaska. Aware of the difficulty of “procuring a jury of twelve . . . in isolated places,” and thinking that defendants wished to avoid the consequent delay, Judge Brown suggested enlarging the petty offense exception to embrace all misdemeanors. Quoting Supreme Court precedent which said “[t]he law is a progressive science,” Brown argued that “[t]he determination of [a jury waiver] case requires the exercise of ‘practical common sense,’ the ‘rule of reason,’ freed from the trammels of the old common-law distinctions between the degrees of crimes as characterized hundreds of years ago under vastly different conditions.”

The other dissenting voice was Edgar Aldrich, a district court judge who wrote a long dissent while sitting on the circuit court panel that decided Dickinson v. United States.

154. See 3 LESTER B. ORFIELD, ORFIELD’S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES 43–46 (2d ed. 1986); Orfield, supra note 69, at 61–63 (discussing the cases decided between Schick and Patton). I do not consider Territory v. Soga decided by the Hawaiian Territory Court as contrary to my claim because I read that case to have determined the offense a petty crime. Territory v. Soga, 20 Haw. 71, 92–93 (1910) (saying the offense at bar was neither a felony nor infamous). Nor do I consider Queenan v. Oklahoma as departing from the rule of Thompson because that case involved a waiver of juror qualifications. See Queenan v. Oklahoma, 190 U.S. 548, 551 (1903). Belt v. United States does not conflict with my claim because, although Belt upheld jury waiver for misdemeanors, it was decided before Thompson. See Belt v. United States, 4 App. D.C. 25, 25 (D.C. Cir. 1894). Thompson implicitly overruled Belt. See Thompson, 170 U.S. 343.

155. But see In re Virch, 5 Alaska 500 (D.C. Alaska 1916) (another Alaskan territorial judge construing the petty offense exception narrowly). I derive Judge Brown’s first name from Michael Schwaiger’s Salmon, Sage-Brush, and Safaris: Alaska’s Territorial Judicial System and the Adventures of the Floating Court. Michael Schwaiger, Salmon, Sage-Brush, and Safaris: Alaska’s Territorial Judicial System and the Adventures of the Floating Court, 1901–1915, 26 ALASKA L. REV. 97, 98, 99 (2009). Although I am treating Judge Brown as a member of the federal judiciary, the point should be made that he was not an Article III judge and served at the pleasure of the President. Id. at 101 n.15.


157. Id. at 525 (quoting Holden v. Hardy, 169 U.S. 366, 385 (1898)).

158. Id. at 527.

Dickinson involved an appeal from a three-month long trial of two bank cashiers charged with misappropriating funds.\textsuperscript{160} During the trial two jurors were discharged, one for sickness and the other because of a death in his family.\textsuperscript{161} Each time a juror was dismissed, the defendants consented in writing to the trial’s continuation.\textsuperscript{162} After his conviction on a misdemeanor count for aiding and abetting the other cashier, Dickinson demanded a new trial on the ground that the verdict was not rendered “by a jury of twelve jurors, as required by the Constitution.”\textsuperscript{163}

Aldrich thought that the facts of Dickinson made an especially “strong” case for allowing waiver.\textsuperscript{164} But he defended the propriety of jury waiver more generally through an analysis that, like Judge Brown’s, broke with the formalist jurisprudence of his colleagues.\textsuperscript{165} Aldrich was attracted to the progressive jurisprudence of “Mr. Justice Holmes,” according to which “constitutional rights . . . are matters of degree, and constitutional provisions are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses.”\textsuperscript{166} By this balancing-of-interests approach to constitutional analysis:

The aim of the constitutional safeguards in question is a full, fair, and public trial, and one which shall reasonably and in all substantial ways safeguard the interests of the state and the life and liberty of accused parties. Whether the idea is expressed in words or not, as is done in some of the bills of rights and constitutions, a free and fair trial only means a trial as free and fair as the lot of humanity will admit.\textsuperscript{167}

\textsuperscript{160} Id. at 801–02 (majority opinion); id. at 812 (Aldrich, J., dissenting).
\textsuperscript{161} Id. at 812 (Aldrich, J., dissenting).
\textsuperscript{162} Id. at 804 (majority opinion).
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 813. Among the facts is the length of the trial, that the jury started off properly composed, that the charge was a misdemeanor, and that the defendant gave his explicit written consent.
\textsuperscript{165} See supra text accompanying note 103 (quoting the Dickinson majority).
\textsuperscript{166} Dickinson, 159 F. at 813 (Aldrich, J., dissenting) (quoting Justice Holmes’s remark).
\textsuperscript{167} Id.
The dissenting views of Judges Brown and Aldrich may have been prescient, but throughout the 1910s and 1920s they had traction neither with their fellow judges, nor with treatise writers whose specialty was federal criminal procedure. Federal criminal procedure treatises published during those decades agreed that “[o]ne accused of an infamous crime or felony cannot waive a trial by jury . . . even though the United States and the defendant consent thereto.” No treatise noticed Judge Brown’s opinion and the only treatise to mention Judge Aldrich’s dissent did so to criticize it. Throughout the 1920s, the dominant opinion remained as it had been in 1900: Article III mandated an unwaivable requirement that “the trial of all crimes . . . be by jury.”

III. THE OVERTHROW OF ARTICLE III’S JURY TRIAL MANDATE AND THE NO-WAIVER RULE IN 1930

A. The Patton Decision

From the Founding through the 1920s, constitutional text, precedent, and history were thought to support the rule that “in all but petty offenses jury trial was a constitutional imperative.” Yet, in 1930, this 140-year-old understanding was swept away in Patton v. United States. Patton involved
a felony trial that lasted for seven days.\textsuperscript{174} On the sixth day a juror was excused for “severe illness.”\textsuperscript{175} Rather than accept a mistrial, both the prosecution and defense consented to “waive all objections” and agreed to finish the trial with the eleven remaining jurors.\textsuperscript{176} After their conviction, the defendants appealed, arguing they “had no power to waive their constitutional right to a trial by a jury of twelve persons.”\textsuperscript{177}

Thus the issue in \textit{Patton}, if narrowly defined, was the constitutionality of consent to continuing a trial that began with a properly formed jury when a juror is excused for good cause during the trial.\textsuperscript{178} When, a dozen years later, \textit{Patton} was extended to a case involving complete jury waiver Justices Black, Douglas, and Murphy dissented on the ground that “there is a considerable practical difference between trial by eleven jurors, the situation in \textit{Patton} . . . and trial to the court, and practicality is a sturdy guide to the preservation of Constitutional guarantees.”\textsuperscript{179} The majority, however, treated conflict regarding the jury-waiver rule. Rather, the judges said they were “in doubt as to the law” because of defendants’ abilities to waive other constitutional rights, such as the right to a speedy trial, confrontation, and assistance of counsel. \textit{Patton} v. United States, 30 F.2d 1015, 1017 (8th Cir. 1929). That the Eighth Circuit could cite no conflicting case law indicates the circuit was forcing the issue and suggests that the Supreme Court, in accepting the question, may well have been reaching for it. Certification is generally a disfavored procedure for presenting issues to the Supreme Court. See \textit{EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 9.1 at} 597 (9th ed. 2007). \textit{Patton} arose during what was perhaps the only decade when it was somewhat popular. \textit{Id.} § 9.1, at 596–97 (giving statistics on certification petitions and grants); James Moore & Allan Vestal, \textit{Present and Potential Role of Certification in Federal Appellate Procedure}, 35 VA. L. REV. 1, 26 n.99 (1949).

\textsuperscript{174} \textit{Patton}, 281 U.S. at 286. The charge, conspiracy to bribe a prohibition agent, was the most minor grade of felony as it was punishable by one year in prison. \textit{See id.}

\textsuperscript{175} \textit{Id.}

\textsuperscript{176} \textit{Id.} at 286–87. Thus, the case was similar to \textit{Dickinson v. United States}. \textit{See} Dickinson v. United States, 159 F. 801, 801 (1st Cir. 1908) (discussed \textit{supra} text accompanying notes 159–67, except that it involved a felony rather than a misdemeanor).

\textsuperscript{177} \textit{Patton}, 281 U.S. at 287.

\textsuperscript{178} \textit{Id.} Appellate court precedent, albeit with a divided panel, permitted such a trial to continue with a replacement juror. \textit{Grove v. United States}, 3 F.2d 965 (4th Cir. 1925). \textit{In Grove}, the transcript of prior testimony was read to the reconstituted jury, and the witnesses vouched to their former testimony. The main issue was whether there was a confrontation clause violation. \textit{Id.} at 965.

\textsuperscript{179} \textit{Adams v. U.S. ex rel. McCann}, 317 U.S. 269, 286 (1942) (Murphy, J.,
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Patton as decisive and brushed the dissenters' view aside. 180

Whatever the merits of Patton's extension to complete rather than partial jury waiver, Patton surely announced a paradigm shift in the Supreme Court's approach to the criminal jury-trial-waiver issue and contains its fullest explication. 181 Patton also is the watershed case for the analysis of waiver of criminal trial-related rights in general. 182

Patton was written by Justice George Sutherland, a conservative Justice who believed the Court's proper role was to discover, articulate, and apply the principles of Anglo-American government that the Founding generation embedded in the Constitution when they wrote and adopted it. 183 Sutherland's dissent in the depression-era mortgage moratorium case, Home Building & Loan Association v. Blaisdell, 184 is an iconic statement of judicial commitment to an unchanging constitution. 185 In that dissent, Justice Sutherland insisted that "[a] provision of the Constitution . . . does not mean one thing at one time and an entirely different

dissenting); see also id. at 281 (Douglas, J., dissenting).
181. The circuit courts immediately cited Patton as deciding the complete waiver issue. See Ferracane v. United States, 47 F.2d 677, 679 (7th Cir. 1931) ("Since the Supreme Court decision in Patton . . . there is no longer any question of the right to waive"). Adams came to the Supreme Court because it involved the extreme situation of a jury waiver by a defendant who was not a lawyer and who was representing himself. See Adams, 317 U.S. at 270–71. He had, however, acted as a lawyer in various suits against the New York Stock Exchange, Better Business Bureau, and others. Id. These facts might make someone question the defendant's mental stability rather than deem him legally astute. Justice Frankfurter's opinion for the Court in Adams succinctly reiterates the "principle" of Patton and finds it decisive. Id. at 275.
182. See King, supra note 95, at 125–30 (shifts in doctrine regarding the defendant's right to jury waiver, presence, and limitations periods); Mazzone, supra note 111, at 849–55 (using jury waiver to explain and date the shift to a view that criminal-trial-related rights are "individualistic").
thing at another time.” In his view:

The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent of its framers and the people who adopted it. The necessities which gave rise to the provision, the controversies which preceded, as well as the conflicts of opinion which were settled by its adoption, are matters to be considered to enable us to arrive at a correct result. The history of the times, the state of things existing when the provision was framed and adopted should be looked to in order to ascertain the mischief and the remedy. As nearly as possible we should place ourselves in the condition of those who framed and adopted it. And, if the meaning be at all doubtful, the doubt should be resolved, wherever reasonably possible to do so, in a way to forward the evident purpose with which the provision was adopted.

Justice Sutherland’s originalism did not preclude all constitutional adaptation. Constitutional “provisions . . . are pliable,” he believed, “in the sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls with their meaning.” Nonetheless, outside of an Article V amendment, constitutional adaptivity was limited by the “meaning/application” dichotomy. For Sutherland, the

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186. Blaisdell, 290 U.S. at 448–49 (Sutherland, J., dissenting); see also id. at 449–53 (quoting other Justices and leading treatise writers).
187. Id. at 453 (citations omitted).
188. Id. at 451. Justice Sutherland’s most famous discussion of the meaning/application distinction is the landmark case upholding the constitutionality of zoning, where he said:

> While the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926); see also White, supra note 183, at 897–98 (explicating Justice Sutherland’s views on constitutional change).
190. By the “meaning/application” dichotomy I mean Justice Sutherland’s
Constitution’s “meaning is changeless; it is only [its] application which is extensible.”

Despite his jurisprudence, it was Justice Sutherland who gave an entirely new meaning to Article III’s jury clause. His *Patton* opinion illuminates how, even for a dedicated opponent of a “living Constitution,” evolving principles of constitutional policy may nevertheless alter the meaning of concrete and determinate constitutional text.

Justice Sutherland’s *Patton* opinion began with a reminder that was entirely consistent with common law tradition and Supreme Court precedent: that the three “essential elements” of a common law (and, therefore, constitutional) jury trial were 1) twelve men, 2) supervised and instructed by a judge, who 3) reach a unanimous verdict. Also, consistent with precedent and its formalist logic, Sutherland stated that if there is any variation in the number of jurors “it ceases to be [a constitutional] jury.” Subtracting one juror or eleven jurors was different only in the size of the “infraction” and “[i]t is not our province . . . [to] ignore the violation, if, in our opinion, it is not, relatively, as bad as it might have been.” Consistent with the views of Justices throughout the nineteenth century, Sutherland refused to separate the issue of partial from full waiver. Although *Patton* involved a verdict rendered by an eleven-person jury, Sutherland addressed the case as necessarily implicating the constitutionality of “complete waiver” followed by a bench trial.

In other words, in *Patton*, Justice Sutherland understood the issue of a short jury exactly as Justices had throughout
the nineteenth and early-twentieth centuries. He phrased the “crucial inquiry” as they had: was “the effect of the constitutional provisions in respect of trial by jury to establish a tribunal as part of the frame of government, or only to guarantee to the accused the right to such a trial?” Yet when Sutherland turned to analyze the issue, he immediately took a novel tack. With quick strokes, he dismissed all prior precedent on the subject as dicta, re-wrote the common law tradition, turned the relation between Article III’s and the Sixth Amendment’s jury provisions on its head, and concluded that the Framers’ had overstated their true intent in drafting Article III’s jury mandate.

1. Sutherland’s Discussion of Prior Precedent

Justice Sutherland’s treatment of prior precedent began by quoting the statement in Thompson v. Utah on which Patton “strongly relied” and which “if followed, would require” that Patton get a new trial because he had no power to consent to an eleven-person jury. That statement was Justice Harlan’s claim in Thompson that “it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt.”

Justice Harlan’s claim, which always had been taken as the core meaning of the case, was dismissed by Justice Sutherland as “an obiter dictum” because Thompson...
“involved the validity of a statute dispensing with the common-law jury of twelve” and a defendant who “had been silent only under constraint of the statute.”

Having swept Thompson aside as dictum, Justice Sutherland turned to discussing two of the federal appellate court precedents that, he acknowledged, had “definitively” held defendant jury waivers unconstitutional. One was Low v. United States, which Sutherland said was “entitled to great respect” because it was “rendered by Judge Lurton” who later joined the Supreme Court. But that was all Sutherland said about Low before moving on to the other case, Dickinson v. United States. He dwelt at length on Dickinson; it was the longest sustained discussion of his opinion. However, in discussing Dickinson, Sutherland spent less than a sentence describing the case’s facts and holding before launching into an extended set of quotations from Judge Aldrich’s long-neglected dissent, which he approvingly described as “scholarly and thoughtful.”

The language Justice Sutherland quoted from Aldrich’s dissent touched on a variety of points. It questioned the common sense of banning jury waiver by pointing out that defendants not only could waive most of their trial-related rights, such as witness confrontation, compulsory process for

206. Patton v. United States, 281 U.S. 276, 293 (1930). Justice Sutherland’s assertion that Thompson “had been silent only under constraint of the statute,” is not necessarily true. There is no evidence suggesting it. Thompson may just as well have been strategically biding his time, hoping for an acquittal.

207. Id. It should be noted that Harlan thought his remarks were holding, not dicta. See Schick, 195 U.S. at 84–85, 95 (Harlan, J., dissenting). Nonetheless, in the 1920s, Sutherland’s view that the question of jury waiver as open was not unique. See Frank Grinnell, To What Extent, If At All, Is the Right to Jury Trial Optional in Criminal Cases in the Federal Courts?, 9 MASS. L. QUART. (No. 4) 61, 61–62 (1924) (incorrectly saying there was no “direct decision . . . on the point in the lower Federal courts”); S. Chesterfield Oppenheim, Waiver of Trial by Jury in Criminal Cases, 25 MICH. L. REV. 695, 720–21 n.66 (1927) (saying Thompson involved an “implied” waiver).


211. Thompson, 159 F. at 801 (discussed supra text accompanying notes 159–67).

obtaining witnesses, and assistance of counsel, but also could obviate the whole trial by pleading guilty.\textsuperscript{213} It repeated Aldrich’s assertion that the English rule against waiver originated in a desire to protect the rights of the defendant’s family from the disinheriting effects of their kinsman’s felony conviction.\textsuperscript{214} It also reminded the reader that the “aim” of the Constitution’s jury trial provisions was a “trial as free and fair as the lot of humanity will admit.”\textsuperscript{215}

When written by Judge Aldrich, these comments were expressly grounded in Justice Holmes’s progressive constitutionalism and the conviction that constitutional arrangements properly changed with the times.\textsuperscript{216} Since such a view was anathema to Justice Sutherland,\textsuperscript{217} I suggest he used them for a different reason. Placed as they were at the end of Sutherland’s description of the relevant federal precedents and just before the beginning of his own analysis of the jury waiver issue, the purpose of the quoted language was ground-clearing. Like Aldrich, Sutherland thought prohibiting jury waiver was illogical, anachronistic and bad public policy,\textsuperscript{218} but the legal import of his policy views was the implication that for those reasons a rational Framer or ratifier would be unlikely to have constitutionalized the no-waiver rule.

This implication was critical to the success of Justice Sutherland’s analysis as the argument he was about to make affirming the constitutionality of jury waiver was extraordinarily weak. Not all, but much of the persuasive force of Sutherland’s argument came from his having established at the outset that the no-waiver rule was something a rational constitution-maker was unlikely to adopt. In essence, Sutherland’s description of federal precedent, with its dismissal of \textit{Thompson} and his emphasis on Aldrich’s \textit{Dickinson} dissent was a negative argument focused on undermining the no-waiver position in order to set it up for rejection on the most slender of grounds.

\textsuperscript{213} \textit{Id.} at 294–95.
\textsuperscript{214} \textit{Id.} at 296.
\textsuperscript{215} \textit{Id.} at 294.
\textsuperscript{216} \textit{See supra} text accompanying notes 165–67.
\textsuperscript{217} \textit{See supra} text accompanying notes 183–91.
\textsuperscript{218} \textit{See infra} text accompanying notes 304–20 (discussing Sutherland’s public policy argument).
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2. Sutherland’s Discussion of Extra-Textual Evidence

Justice Sutherland knew, indeed, he openly “conceded” in another part of the Patton opinion\(^{219}\) “that under the rule of the common law the accused was not permitted to waive trial by jury, as generally he was not permitted to waive any right which was intended for his protection.”\(^{220}\) Nevertheless, in his analysis of jury waiver’s constitutionality, Sutherland never mentioned that the no-waiver rule was the traditional common law rule. Instead he made two related assertions that, like a common law rule, would be considered an extra-textual proposition valuable for the light it shed on the Founders’ understanding of the Constitution’s text. Sutherland’s two assertions were: on the one hand, there was no evidence from England, the colonies, or Founding-era America that “trial by jury in criminal cases was regarded as a part of the structure of government,”\(^{221}\) while, on the other hand, there was evidence that jury trial “uniformly” was regarded as a “privilege of the accused.”\(^{222}\)

Justice Sutherland’s first assertion, even if it is taken narrowly to mean direct statements literally describing “the jury . . . as an integral and inseparable part of the court”\(^{223}\) is something of an overstatement.\(^{224}\) Nonetheless, given the general absence of Founding-era discussion of jury waiver, the assertion’s inaccuracy is minor and of no consequence for this critique.\(^{225}\) Its importance for Sutherland was that it

\(^{219}\) Sutherland mentioned the common law rule as part of his discussion of whether federal common law should allow jury waiver. See infra text accompanying notes 314–17.

\(^{220}\) Patton v. United States, 281 U.S. 276, 306 (1930) (discussing whether jury waiver is against public policy).

\(^{221}\) Id. at 296; see also id. at 297 (making the connection to Founding-era America). Throughout his analysis Sutherland uses the discourse of jurisdiction theory as his marker for the no-waiver position. Id. at 296–98; supra text accompanying notes 129–32 (saying jurisdiction theory includes the view that the jury is part of the “structure of government”).

\(^{222}\) Patton, 281 U.S. at 296.

\(^{223}\) Id. at 297.

\(^{224}\) See The Federalist No. 83, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing Article III’s jury mandate); Note, supra note 26, at 48–49 (discussing Hamilton’s and Madison’s views and Blackstone’s and Richard Burn’s criticism of summary proceedings).

\(^{225}\) The hotly discussed issue for the Constitution-makers was the existence of jury trial and the appurtenant rights that accompanied it. See infra text accompanying notes 41–44.
stood in contrast and gave determinative weight to his second assertion: that there was evidence that the Founding generation thought of jury trial as a waivable privilege.\textsuperscript{226} Unfortunately, Sutherland’s second assertion is also remarkably overstated if not entirely wrong.

The evidence Justice Sutherland proffered to support his second assertion consists entirely of two short quotes to show that at the Founding trial by jury was regarded as a “privilege of the accused” and not “as a part of the structure of government.”\textsuperscript{227} One quote, from Blackstone’s \textit{Commentaries},\textsuperscript{228} was a description of trial by jury as “‘the glory of the English law,’” and “‘the most transcendent privilege which any subject can enjoy.’”\textsuperscript{229} The other quote, from Justice Story’s \textit{Commentaries on the Constitution},\textsuperscript{230} stated, “[w]hen our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power.”\textsuperscript{231}

Of course, these two quotes are entirely inadequate to demonstrate Justice Sutherland’s proposition. In these snippets, Blackstone and Story describe jury trial not merely as a “privilege,” but as a “great privilege,” “the most transcendent privilege” and “the glory of English law.”\textsuperscript{232} Although Sutherland acknowledges the modifiers,\textsuperscript{233} he hones in solely on the word “privilege” to conclude that these two leading commentators thought jury trial was something “the accused . . . may forego at his election.”\textsuperscript{234}

\textsuperscript{226} \textit{Patton}, 281 U.S. at 296–98.
\textsuperscript{227} \textit{Id}. at 296. Throughout his brief analysis Sutherland used the discourse of jurisdiction theory as his marker for the no-waiver position. \textit{Id}. at 296–98; \textit{supra} text accompanying notes 129–32 (saying jurisdiction theory includes the view that the jury is part of the “structure of government”).
\textsuperscript{228} \textit{Patton}, 281 U.S. at 297.
\textsuperscript{229} \textit{Id}. at 297 (quoting 3 \textsc{Blackstone}, \textit{supra} note 54, at § 279).
\textsuperscript{230} \textit{Id}..
\textsuperscript{231} \textit{Id}. (quoting 2 \textsc{Joseph Story}, \textit{Commentaries on the Constitution} § 1779 (1833)) (emphasis in original) [Note: The passage Sutherland cites appears originally in 3 \textsc{Joseph Story}, \textit{Commentaries on the Constitution} § 1773, at 652 (1833). Sutherland may have miscited it or have been working from a different edition.]
\textsuperscript{232} \textit{Patton}, 281 U.S. at 297 (quoting Blackstone and Story).
\textsuperscript{233} \textit{Id}.
\textsuperscript{234} \textit{Id}. at 298.
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However, it was not proper for Sutherland to ignore the modifiers and encomiums that Blackstone and Story heaped upon jury trial. The encomiums have some tendency to indicate that Blackstone and Story thought of trial by jury as having public as well as private importance. Moreover, if we step back from the snippets themselves, we see that Blackstone, for example, opposed nonjury trials even for petty offenses because of their deleterious effect on the body politic and corrupting influence on the judges themselves.\(^{235}\)

The claim here is not that Blackstone thought of jury trial as unwaivable. It is an issue he never directly addressed. Rather, the claim is that Sutherland places far more weight on Blackstone’s use of the word “privilege” than that slender reed can bear.

In contrast, Sutherland is entirely wrong in his use of Story’s quote. No attempt to put Story’s prestige behind the waivable privilege understanding of jury trial can possibly succeed unless it contends with his famous disquisition on jury trial in United States v. Gibert.\(^{236}\) As Sutherland doubtlessly knew, in those remarks Story maintained that jury trial was “imperative upon the courts,” that “prisoners can be lawfully tried in no other manner,” and that “[t]he constitution decides how [a defendant] shall be tried, independent of any election on his part.”\(^{237}\) Story’s Gibert opinion surely indicates that someone may describe jury trial as a “privilege” yet think of it as a mandatory part of the tribunal established to determine a defendant’s guilt or innocence.

The quotes from Blackstone and Story are all the extratextual evidence Sutherland offered to show that the Founding generation regarded jury trial as a waivable “privilege of the accused” and not an unwaivable “part of the structure of government.”\(^{238}\) In fact, there was little to no discussion of jury waiver before or during the Founding era. While jury trial was a subject of much discussion in the

\(^{235}\) See BLACKSTONE, supra note 10, at *379–80. Of course, the context of Blackstone’s remarks was a discussion of compulsory, not elective, bench trials.

\(^{236}\) United States v. Gibert, 25 F. Cas. 1287 (C.C.D. Mass. 1834) (No. 15–204), discussed supra text accompanying notes 70–79.

\(^{237}\) Gibert, 25 F. Cas. at 1305–06.

\(^{238}\) Patton, 281 U.S. at 296.
eighteenth century, with some of it occurring at the Constitutional Convention and during the ratification campaign, the topic of defendant’s waiver was not among the subjects debated. Jury waiver simply was not an issue of the day.

Silence is notoriously difficult for a historian to interpret. Given the general inability of defendants to waive jury trial in England, the colonies, and the early Republic, silence should be taken as cutting in favor of the no-waiver position. Yet Sutherland felt justified in reaching the opposite conclusion because, Blackstone’s and Story’s descriptions of jury trial as a “valuable privilege” supposedly provided decisive evidence supporting the personal privilege (and therefore, pro-waiver) interpretation of Article III’s jury clause.

3. Sutherland’s Discussion of the Constitution’s Text

Justice Sutherland thought that his extra-textual argument made it “reasonable to conclude that the Framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused.” Yet, turning to the Constitution’s text, he claimed “[t]hat this was the purpose of the Third Article is rendered highly probable by a consideration of the form of expression used in the Sixth Amendment.”

As previously discussed, at least since the last quarter of the nineteenth century some reconciliation had always been thought necessary between Article III’s peremptory command that criminal trials “shall be by jury” and the Sixth Amendment’s softer language which speaks of jury trial as a “right” that “accused shall enjoy.” The authoritative reconciliation, given by Justice Harlan in Callan v. Wilson, was that the Sixth Amendment fleshed out the details of jury trial without compromising Article III’s

239. Id.
240. Id.
241. Id. at 297.
242. Id. at 297–98.
243. See supra text accompanying notes 32–40.
244. U.S. CONST. art. III, § 2.
245. U.S. CONST. amend. VI.
246. 127 U.S. 540 (1888).
mandatory command. Sutherland saw the Article III/Sixth Amendment relationship differently. Quoting Harlan’s determination that “[t]here is no necessary conflict” between the Constitution’s two jury provisions, Sutherland said this meant that “The first ten amendments and the original Constitution were substantially contemporaneous and should be construed in pari materia. So construed, the latter provision fairly may be regarded as reflecting the meaning of the former. In other words, the two provisions mean substantially the same thing.” But what Sutherland meant was that Article III took on the Sixth Amendment’s permissive coloration.

With regard to Article III, Section 2’s peremptory language, Sutherland thought his extra-textual and textual arguments combined to support the “reasonable inference” that in writing Article III “the concern of the framers was to make clear that the [defendant’s privilege] of jury trial should remain inviolable,” and to achieve that important “end no language was deemed too imperative.” In effect, Sutherland’s argument turned Harlan’s “no conflict” principle on its head by reading the Sixth Amendment as the dominant provision. Sutherland’s use of the Sixth Amendment to understand what the Framers meant by Article III’s jury trial clause supported a substantial departure from that Article’s absolute textual mandate. While Harlan’s position was grounded in well-known facts about the politics of the Founding era, Sutherland reached his conclusion without referring to a

247. See supra text accompanying notes 41–47.
249. Id. at 298 (italics in the original).
250. Id. (drawing the interaction between Article III and the Sixth Amendment the conclusion that “Article III . . . was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement”).
251. Id. at 297.
252. Sutherland’s use of the Sixth Amendment for this purpose may be regarded as violating a corollary of the “no conflict” principle that Sutherland claimed to respect. The corollary was that the Sixth Amendment “is not to be regarded as modifying or altering” Article III. Id. at 298. The art of Sutherland’s argument was that he could claim he was using the Sixth Amendment not to modify Article III, but to understand it.
shred of evidence from the Founding era other than the text of the Sixth Amendment and two short quotes from Blackstone and Story. Sutherland’s argument that the “no conflict” principle supported jury waiver was constructed entirely from these sources and a “reasonable inference” about why the Convention drafted Article III’s jury provision with language that was more peremptory than it was meant to be.

Taken at face value, a unanimous Supreme Court in 1930 constitutionalized a criminal defendant’s ability, when prosecuted for a serious offense, to waive trial by jury because that is what the Founding generation meant when, in 1789, it wrote “the trial of all crimes, except in cases of impeachment, shall be by jury.” According to the Court, speaking through Justice Sutherland, the Constitution’s text (the Sixth Amendment) and context (Blackstone’s and Story’s calling jury trial a “privilege”) pointed to the historically correct constitutional rule, a rule that redrafted Article III’s jury provision into something less than an absolute requirement in order to reflect the Founding generation’s true understanding. Sutherland’s startling conclusion was that the Framers had misdrafted Article III’s jury provision, overstating what they meant to say.

B. Accounting for the Patton Decision

Justice Sutherland’s opinion presents itself as a historical excavation. He writes as if considerations of public policy and evolving principles of constitutional law had nothing to do with it. Yet, Akhil Amar is restrained when he says, “None of the arguments in Patton v. United States survives close scrutiny.” There can be no doubt that

255. See supra text accompanying note 251 (quoting Sutherland). This is not the only time that an investigation of the constitutional draftsmen’s true intent has redrafted explicit constitutional text. The construction of the Twenty-First Amendment’s second section may be another. See, e.g., Granholm v. Heald, 544 U.S. 460 (2005); Laurence Tribe, How to Violate the Constitution Without Really Trying, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 98, 99 (William Eskridge & Sanford Levinson eds., 1998).
257. Amar, supra note 46, at 1197.
Patton’s historical analysis is remarkably wrong.\footnote{In addition to the shortcomings of Patton’s history, Patton may be unfortunate as a matter of constitutional theory and constitutional policy. As a matter of theory, there is a rising tide of criticism of Patton’s view of waiver of trial-related rights generally. See Appleman, supra note 2; King, supra note 95; Mazzone, supra note 111. In terms of policy, although I agree with Patton’s outcome—that is, permitting jury waiver (under living, not original, constitutional principles)—Patton contains dicta indicating that defendants should not be able to insist on one. In a development that can only be termed farcical, Sutherland concluded his Patton opinion with a paean to jury trial as “the normal . . . and preferable mode” of trial and a “right” that “must be jealously preserved,” by which he meant, in part, that “before any waiver can become effective, the consent of government counsel and the sanction of the court must be had.” Patton, 281 U.S. at 312. Due to these dicta, ever since Patton, a defendant who wants a bench trial needs to secure permission from his prosecutor. Singer v. United States, 380 U.S. 24, 34–35 (1965); Fred DeCicco, Waiver of Jury Trials in Federal Criminal Cases: A Reassessment of the “Prosecutorial Veto,” 51 FORDHAM L. REV. 1091 (1983); Adam Kurland, Providing a Federal Criminal Defendant With a Unilateral Right to a Bench Trial, 26 U.C. DAVIS L. REV. 309 (1993); Note, Inability to Waive Jury Trial in the Federal Courts, 60 NW. U. L. REV. 722 (1965). Rule 23 of the Federal Rules of Criminal Procedure codifies this understanding. FED. R. CRIM. P. 23.}

How do we account for Patton’s sudden break with a century and a half of constitutional tradition that itself reflected common law history, the Constitution’s text, and Founding era practice? Patton may well be an instance of result-driven jurisprudence, and, given Justice Sutherland’s legal philosophy, a paradigmatic example of what Andrew Koppelman has called “phony originalism.”\footnote{Andrew Koppelman, Phony Originalism and the Establishment Clause, 103 NW. U. L. REV. 727, 749 (2009) (defining “phony originalism” as an “originalism . . . which is opportunistically used to advance substantive positions that the judge[] finds congenial”).} Much of what follows will seem to be driving to that conclusion, but in the end, I suggest that Justice Sutherland, in the grip of “motivated reasoning,” may well have believed his implausible analysis.

My argument begins by describing the early-twentieth-century changes in the administration of criminal justice and related changes in social and legal thought that made the no-waiver rule an anachronistic and much criticized rule of public policy. It then establishes Justice Sutherland’s full agreement with his contemporaries’ criticism of the rule. Next, my argument describes an emergent body of historical scholarship that challenged the no-waiver rule’s claim to be the Founding generation’s intended rule. It concludes by
establishing that Justice Sutherland agreed with this new historical scholarship and argues that given the new history, Justice Sutherland could have ruled as he did and still felt he had complied with his originalist jurisprudential norms.

As a preliminary matter, it may be noted that Patton’s arguments and analysis should be understood as expressing the thinking of Justices Sutherland, Butler, McReynolds and Van Devanter, who together composed the Court’s conservative wing. Though the Patton decision was unanimous and there was no other opinion, Justices Brandeis, Holmes, and Stone are noted as concurring in the result only. Justice Sutherland’s opinion in Patton is a statement wholly reflecting his jurisprudence and the jurisprudence of his conservative colleagues, who presumably were equally originalist. In Patton, Sutherland’s analysis was unqualified by the need to attract the votes of Justices who might decide cases according to the norms of a “living Constitution.”

Nonetheless, despite Sutherland’s originalist jurisprudence, Patton clearly reflects evolving principles of constitutional law. Although constituting the jury as a necessary and unwaivable part of a criminal trial was the preferred public policy at the Founding, permitting jury waivers undoubtedly was the favored policy of the third decade of the twentieth century.

260. It is possible that the Patton opinion expressed only Sutherland’s views, as the modern practice of circulating opinions before their issuance was “informal and occasional before 1947.” See G. Edward White, The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy, 154 U. PA. L. REV. 1463, 1505 (2006).

261. Patton, 281 U.S. at 313. Chief Justice Hughes, the Court’s remaining progressive, joined the Court after Patton’s argument and did not participate in the decision. Id. Justice Sanford, who died a week and a half after Patton’s argument was reported as agreeing with “a disposition of the case in accordance with [the] opinion.” Sutherland’s opinion, released a month and a half later, did not have to reflect his views.

262. It is unfortunate that none of the concurring Justices chose to write out the rationale for their vote. It might have made an intriguing contrast to Sutherland’s opinion.
1. *Docket Overload and the Critique of Jury Trial in the 1920s*

From the Founding through the Civil War, jury trial was required in the prosecution of serious crime in all states except Maryland.263 By the turn of the twentieth century, only three more states had departed from that rule.264 As late as the 1920s, “the only alternative to a guilty plea in *most states* was a jury trial.”265 It was between 1925 and 1935 that the majority of the states reversed course and began to allow jury waiver in prosecution for serious crime.266

263. See Appleman, supra note 2, at 421–26, 439–40; Hon. Carroll T. Bond, *The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries*, 11 A.B.A. J. 699, 700–01 (1925); Griswold, supra note 54, at 667–69; King, supra note 95, at 125–26; Towne, supra note 61, at 149–52. Bruce Smith’s demonstration that in late-eighteenth and early-nineteenth-century New York bench trials were allowed for a wide variety of significant crime indicates that the boundary between “petty” and “serious” crime was not settled and encompassed more important crimes than the modern conception. Smith’s work should not be understood as suggesting that there was no requirement for jury trial for serious crimes. *See* Bruce P. Smith, *A New Verdict on Criminal Jury Trial in Antebellum America* (2007) (unpublished manuscript) (on file with the author) (studying New York’s increasing insistence on the norm and narrowing conception of the petty crime exception). Smith’s work suggests that at mid-century the no-waiver norm was more stringently conceived and enforced than it was at the Founding. This conclusion regarding the growth of the norm is also supported by the fact that most forthright and forceful nineteenth-century precedents on the jury trial requirement date from the 1840s and 1850s. *See*, e.g., Cancemi v. People, 18 N.Y. 128, 134–39 (1858); Neales v. State, 10 Mo. 498, 500 (1847).


265. Alschuler, supra note 52, at 33 (emphasis supplied); *see also* Abraham Goldberg, *Waiver of Jury in Felony Trials*, 28 MICH. L. REV. 163, 164 (1929) (a 1929 law review article listing only seven states that permit felony bench trials).

266. Alschuler, supra note 52, at 33 (saying jury waiver was “almost universally” adopted by 1935); King, supra note 95, at 127 (dating the general acceptance of jury waiver to the mid-1920s); Oppenheim, supra note 207, at 703 (upholding waiver is “a distinct tendency . . . in more recent years”); Recent Decisions, supra note 61, at 1064 (1930) (saying that permitting jury waiver was “[t]he trend of recent cases”). By 1947, all but seventeen states permitted bench trials in at least some felony cases. William Handley, Jr., *Some Observations on Waiver of Jury Trial in Criminal Cases*, 1 Tex. L. & Leg. 45, 54 (1947). A 1993 study found that only North Carolina still prohibited jury waiver in felony
movement to permitting jury waiver was a societal phenomenon.

The abrupt switch in state constitutional law—which was reflected, complemented and spurred on by the *Patton* decision—was decades in the making. Rather than resulting from anything new, it was like a dam bursting under the accumulating pressures of social, political, philosophical, and jurisprudential change. Opinion favoring the jury trial requirement had begun to shift in the last third of the nineteenth century. By the 1910s and 1920s, public and professional disenchantment with jury trial had reached flood tide. In those years, according to one contemporary...
commentator, “forward looking members of the Bar and of the laity” were so discontented with jury trial that they propounded suggestions that ran “from the one extreme of modification . . . to that of complete abolition.”

The primary cause of the avalanche of discontent with jury trial was that urbanization and industrialization, the rise of regulatory government, the advent of state and national prohibition, and a manifold increase both in the number of legislatively defined criminal offenses had dramatically increased the criminal caseload up to and beyond the point of docket overload. Court congestion meant delay that not only provoked public disrespect for the criminal justice system but also harmed unbailed defendants who languished in lengthy pre-trial detention. Docket overload set off a search for reforms aimed at “mak[ing] criminal procedure more adaptable to the prompt dispatch of business.”

In this context, proponents of abandoning the no-waiver rule for serious criminal offenses pitched their suggestion as a moderate and practical reform that effectively streamlined the criminal process. Bench trials, they said, reduced court congestion by permitting less complex and drawn out trial

by suggestions of reform, see Frankfurter & Corcoran, supra note 10, at 916–22; Oppenheim, supra note 207. Perkins traces disenchantment with jury trial among legal scholars to the early 1900s. Perkins, supra, at 223 n.131 (citing, inter alia, Alfred Coxe, The Trials of Jury Trials, 1 COLUM. L. REV. 286 (1901); Edson Sunderland, The Inefficiency of the American Jury, 13 MICH. L. REV. 302 (1915); G.H. Williams, Abolition of the Jury System, 20 N.J. L.J. 50 (1906)). I have found earlier expressions of dissatisfaction. See supra note 268 (citing BISHOP, supra note 268, and Elliott, supra note 128).

270. Goldberg, supra note 265, at 163.
271. See Frankfurter & Corcoran, supra note 10, at 976.
272. Alschuler, supra note 52, at 32.
273. Handley, supra note 266, at 45.
274. Alschuler, supra note 52, at 32.
275. See, e.g., Alschuler, supra note 52, at 32; Frankfurter & Corcoran, supra note 10, at 920, 976.
276. Oppenheim, supra note 207, at 695.
277. Grant, supra note 267, at 992; Perkins, supra note 269, at 224.
279. BODENHAME, supra note 264, at 85; Oppenheim, supra note 207, at 695–96 (general claim of bench trial’s greater efficiency); Petty Offense Category, supra note 6, at 1304 (“[E]xperience . . . goes far to justify [jury waiver] . . . at least on the ground of administrative expediency.”).
processes\textsuperscript{280} and by necessitating a “smaller number of new trials, appeals and reversals”\textsuperscript{281} due to their “greater security against error.”\textsuperscript{282}

Reduced court congestion was only one of a wide variety of benefits that early twentieth-century commentators expected to follow from permitting defendants to opt for a bench trial. As a more expeditious and less error-prone process, commentators said bench trials would reduce government budgets by reducing the financial cost of trial practice.\textsuperscript{283} Commentators also commended bench trials for their greater accuracy, due to their belief that factual determinations would be made by a judge’s “keen, critical, and trained mind.”\textsuperscript{284} This reform was especially important in cases where sensational newspaper reporting, the defendant’s prior record, or the racial or sexual nature of the offense had stirred up community prejudice.\textsuperscript{285} Not only were defendants thought to welcome the option of bench trial in such cases, but it was said that in every case, whether the defendant elected bench or jury trial, he was more likely to appreciate the trial process because it was chosen rather than imposed.\textsuperscript{286}

Legal commentators also recommended optional bench trials as a desirable means to stave off another recently arisen technique for avoiding the delay, expense, and hazard of mandatory jury trial: the plea bargain.\textsuperscript{287} Historians of plea bargaining agree that the same years that witnessed the demise of the no-waiver rule also witnessed the rise of plea

\begin{thebibliography}{99}
\bibitem{280} Grant, supra note 267, at 993.
\bibitem{281} Perkins, supra note 269, at 225.
\bibitem{282} Grant, supra note 267, at 993.
\bibitem{283} Id.; Perkins, supra note 269, at 225. Reducing expenses was especially appreciated with the advent of the Great Depression.
\bibitem{284} Grant, supra note 267, at 993; see also Oppenheim, supra note 207, at 714–15 (commenting on the judiciary’s “greater experience” and “integrity”).
\bibitem{285} Grant, supra note 267, at 993; Oppenheim, supra note 207, at 696, 714; Perkins, supra note 269, at 225; see also Handley, supra note 266, at 50–51 (later commentator making the same point). During the McCarthy era, scholars argued that criminal defendants should have a unilateral right to insist on a bench trial to avoid community prejudice. See Kurland, supra note 258, at 313 n.13.
\bibitem{286} Perkins, supra note 269, at 224 (speaking of jury trials).
\bibitem{287} Grant, supra note 267, at 994; Raymond Moley, The Vanishing Jury, 2 S. CAL. L. REV. 97, 127 (1928); Perkins, supra note 269, at 225–26.
\end{thebibliography}
bargaining. The growth and grudging acceptance of plea bargaining was a response to the same pressures that promoted the desire for jury waiver. Immersed in a society that was just emerging from regarding with alarm any jury trial avoidance technique other than a freely given guilty plea, some commentators recommended the option of bench trial for the “decided reduction in the growing practice of ‘bargaining for pleas.’”

The final practical reason advanced in support of departing from the no-waiver rule reflected class and ethnic prejudice of the governing elite. Urbanization and immigration from a diverse array of countries meant that jury panels were likely to be populated by an ethnically diverse group of laborers. As one commentator wrote, “A substantial reduction in the call for jury service might make it possible to improve very materially the quality of jurors chosen.”

Beyond the practical reasons, commentators in the 1920s argued for overturning the no-waiver rule on theoretical grounds. It is startling how completely the critical commentary published in the 1920s turned the prior analysis on its head to find sufficient the very arguments that before had been found insufficient. Now, for example, the ability of defendants to plead guilty was taken to completely undercut the no-waiver rule’s pretensions. S. Chesterfield Oppenheim, for example, before elaborating a variety of circumstances that might influence “innocent persons” to enter a plea of guilty, dismissed the claim that guilty pleas were different from jury waivers simply by asking rhetorically:

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288. See Alschuler, supra note 52, at 24–33; King, supra note 95, at 125–27.
289. Alschuler, supra note 52, at 6, 24–33; Albert Alschuler & Andrew Deiss, A Brief History of the Criminal Jury in the United States, 61 U. CHI. L. REV. 867, 924–25 (1994); King, supra note 95, at 125–27; Langbein, supra note 52, at 270 (linking plea bargaining with the slow emergence of, and judicial prejudice against, jury waiver); Mazzone, supra note 111, at 853–54 (linking attitudes towards plea bargaining and jury waiver).
290. Perkins, supra note 269, at 225–26; see also BODENHAMER, supra note 264, at 86–87 (discussing opposition to plea bargaining and its slow acceptance); Grant, Felony, supra note 267, at 994–95; Mazzone, supra note 111, at 852–54 (a contemporary analysis of the connection between plea bargaining and jury waiver); Moley, supra note 287, at 127.
291. Perkins, supra note 269, at 224.
If the public have an interest in the liberties of the individual to the extent of making a jury trial mandatory, is that interest less important when the accused elects to avoid any trial? Should the exercise of his will be ignored in the one case and respected in the other?292

The ability of defendants to waive so many other trial related rights, which before was explained by distinguishing between fundamental and incidental rights,293 now was seen as problematic. The dichotomization of rights into separate categories suddenly was less important than the fact that the Constitution referred to them all as rights. Therefore, the newly preferred argument was that “there is no reason why the right to trial by jury should be regarded as standing upon any different footing than other rights conferred by the Fifth, Sixth, and Seventh Amendments, which have been held to be waivable.”294

Even the very notion of a public interest separate from the sum of private interests came to be doubted. Jury waiver was reconceived as a question of public policy addressing whether “the welfare of the individual and the state demand a mandatory jury trial.”295 The answer to such a question, it was said, “depends upon a balancing of all [relevant] factors,”296 an activity which typically was more suited for legislatures than courts. Accordingly, “[t]he courts should be hesitant to invade the domain of [the legislature] by reading their predilections into the constitutional limitations governing the jury and thus to substitute their judgment for the judgment of the legislature concerning a function that is best expressed by enactment.”297

At bottom, the theoretical attack expressed a shift in the jurisprudential commitments of scholarly commentators from formalism to realism and sociological jurisprudence.298 More

292. Oppenheim, supra note 207, at 716; see also Patton v. United States, 281 U.S. 276, 305–06 (1930); Brief for the United States at 27, Patton, 281 U.S. at 276 (No. 53).
293. See supra text accompanying notes 142–43.
295. Oppenheim, supra note 207, at 713.
296. Id. at 712–13.
297. Id. at 713.
298. On the shift from formalism to sociological jurisprudence, see, e.g., MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1949); Julius Stone, Roscoe Pound and Sociological Jurisprudence,
generally, the theoretical argument against the traditional no-waiver rule reflected liberal individualism’s final triumph as the dominant national creed. This creational shift encouraged judges and commentators to interpret constitutional rights as individual privileges rather than collective rights. Indeed, in one illustrative aside, Rollin Perkins, whose critical analysis was more even-handed than most because it discussed strengths and weaknesses on both sides, could not help but demean the “citizen-training” branch of the old public interest theory by dismissing it with the wry comment that it was “perhaps the most unique suggestion along these lines.”

Due to this creational shift, the intellectual apparatus required to understand the traditional theoretical support for the no-waiver rule had vanished. One looks in vain through the critical literature of the 1920s for any notion that the “public interest” is something other than the sum of private interests. Indeed, the absence of any discussion of the “public interest” is among the most telling pieces of evidence of demonstrating the connection between the rise of liberal individualism and the demise of the no-waiver rule. The commentators in the 1920s lacked the intellectual framework to conceive the traditional and formerly dominant public interest theory as it had been—as a right protecting and valorizing the public’s participation in the administration of criminal justice.

Of course, the intellectual shift was not, all by itself, sufficient to undermine the theoretical foundations of the no-waiver rule. It worked in tandem with a host of social, professional, political, and experiential changes. In the late-eighteenth century, it is inconceivable that the following argument against the no-waiver rule would have been considered persuasive by much of the population:

78 Harv. L. Rev. 1578 (1965).
300. The shift regarding jury waiver was part of a general shift in the conceptualization of the Constitution’s procedural rights from “public good” to “privilege of an individual.” King, supra note 95, at 120.
301. See supra text accompanying notes 119–22.
302. Perkins, supra note 33, at 25 n.33. The “citizen training” rationale is discussed supra text accompanying notes 119–22.
Confidence in fairer treatment by the judge, based upon the high quality and integrity of the personnel of the judiciary, or the conviction that the greater responsibility of the judgeship and the greater dignity and permanence of the bench as compared with the fleeting character and irresponsibility of the jury will conduce to a more conscientious consideration of the case on its merits. Attitude of counsel may influence a choice made upon this ground.\textsuperscript{303}

In the 1920s, however, it was unanswerable.

2. \textit{Sutherland’s Agreement with the 1920s’ Critique of the No-Waiver Rule}

Justice Sutherland fully agreed with his contemporaries’ critique of the traditional no-waiver rule. Like his contemporaries, he was a strong proponent of permitting bench trials. Large sections of Sutherland’s \textit{Patton} opinion are occupied by lengthy quotes of other judges’ criticisms of the no-waiver rule, expressly adopting some and implicitly adopting others as his own.\textsuperscript{304} In addition, at times Sutherland spoke for himself.\textsuperscript{305} On these occasions, Sutherland pointed to the differences between the common law and modern criminal trial to show that although the no-waiver rule may have been appropriate in the past, it now was anachronistic. At common law, even though a guilty verdict frequently meant a death sentence,\textsuperscript{306} forfeiture of all inheritable property,\textsuperscript{307} or some other punishment “out of all proportion to the gravity of [the] crime,”\textsuperscript{308} common law procedural rules barred the accused from such basic protections as testifying on his own behalf or having a lawyer.\textsuperscript{309} In light of the panoply of rights that surround the modern trial process, Sutherland said, “the rule of the

\textsuperscript{303} Oppenheimer, \textit{supra} note 207, at 714–15.
\textsuperscript{304} \textit{Patton} v. United States, 281 U.S. 276, 294–96, 303–06, 307–09 (1930); \textit{supra} text accompanying notes 212–18 (discussing Judge Aldrich’s dissent). At times, Justice Sutherland expressed his agreement with the quoted passages sentiments. \textit{Id.} at 307. At other times he just said they were “thoughtful.” \textit{Id.} at 294–95.
\textsuperscript{305} \textit{Patton}, 281 U.S. at 294, 298–301, 305–07.
\textsuperscript{306} \textit{Id.} at 307 (quoting Hack v. State, 124 N.W. 492, 494 (Wis. 1910)).
\textsuperscript{307} \textit{Id.}
\textsuperscript{308} \textit{Id.} (quoting \textit{Hack}, 124 N.W. at 494).
\textsuperscript{309} \textit{Id.}
common law . . . was justified by conditions which no longer exist,"\textsuperscript{310} and "with their disappearance justification for the old rule no longer rests on a substantial basis."\textsuperscript{311}

Sutherland also pointed to the defendant’s power to "plead guilty and thus dispense with a trial altogether"\textsuperscript{312} as completely undercutting the no-waiver rule’s pretensions to be sensible public policy or theoretically coherent. In Sutherland’s view,

\begin{quote}
[If the state may interpose the claim of public interest between the accused and his desire to waive a jury trial, a fortiori it should be able to interpose a like claim between him and his determination to avoid any form of trial by admitting his guilt . . . . [P]ublic policy is not so inconsistent as to permit the accused to dispense with every form of trial by a plea of guilty, and yet forbid him to dispense with a particular form of trial by consent.\textsuperscript{313}
\end{quote}

Sutherland’s remarks negatively assessing the no-waiver rule on public policy and legal-theoretic grounds were not casual asides. In \textit{Patton}, the Court permitted jury waiver on its own authority because there was no congressional statute authorizing it.\textsuperscript{314} Therefore, in \textit{Patton}, after finding that Article III permitted jury waiver, Sutherland was required to go on and decide whether federal common law also permitted it.\textsuperscript{315} Due to \textit{Patton}’s legal context, Sutherland’s extended remarks on the no-waiver rule’s policy and theory were as central to the case’s ultimate outcome as his ruling on whether Article III permitted jury waiver.

It was in this latter part of the opinion that Sutherland discussed jury waiver from the standpoint of public policy and legal theory. It was also in this discussion that Sutherland flatly “conceded . . . that under the rule of the common law the accused was not permitted to waive trial by jury, as

\begin{footnotes}
\footnote{310. \textit{Id.} at 306; \textit{see also id.} at 307.}
\footnote{311. \textit{Id.} at 307.}
\footnote{312. \textit{Id.} at 305.}
\footnote{313. \textit{Id.} at 305–06. Sutherland also thought the defendant’s power to waive his other Sixth Amendment rights raised substantial questions about why he could not also waive a jury altogether. \textit{Id.} at 294–95 (quoting Judge Aldrich).}
\footnote{314. \textit{See Grant, supra} note 34, at 156 (saying that Congress should adopt a statute on the subject). All Justice Sutherland claimed in \textit{Patton} was that there was no statute “requiring jury trial.” \textit{Patton}, 281 U.S. at 299.}
\footnote{315. \textit{Patton}, 281 U.S. at 302–13.}
\end{footnotes}
generally he was not permitted to waive any right which was intended for his protection.”\textsuperscript{316} In light of the traditional rule, it was essential to \textit{Patton}’s outcome that Sutherland’s common law jurisprudence permitted judicial evolution of the law. Sutherland thought judicial evolution of the common law had to be legitimate because, on the one hand, the common law was based on the judiciary’s understanding of good public policy while, on the other hand, “[t]he public policy of one generation may not, under changed conditions, be the public policy of another.”\textsuperscript{317}

To Sutherland, the propriety of judicial changes in the common law followed from the fundamental precept that similar, but only similar, cases should be treated the same. If the conditions that justified applying a certain rule to a case changed, continuing to apply the rule would be treating dissimilar cases the same.\textsuperscript{318} Observing that conditions no longer supported the no-waiver rule,\textsuperscript{319} Sutherland concluded that it was entirely “contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly fails—\textit{cessante ratione legis, cessat ipsa lex.”}\textsuperscript{320}

In sum, it cannot be doubted that Sutherland agreed with his contemporaries that modern public policy and legal theory supported jury waiver and bench trial rather than the traditional no-waiver rule.

\textbf{3. The Historical Critique of the No-Waiver Rule}

Sutherland, of course, was quite aware that he viewed the propriety of common law evolution differently from and the propriety of constitutional evolution. Indeed, he included

\begin{itemize}
\item \textsuperscript{316} \textit{Id.} at 306.
\item \textsuperscript{317} \textit{Id.}
\item \textsuperscript{318} I see this as implicit in Sutherland’s remarks leading up to his quotation from the \textit{Reno Smelting Works} case. \textit{See id.} (quoting \textit{Reno Smelting Works v. Stevenson}, 21 P. 317, 320 (Nev. 1889)).
\item \textsuperscript{319} \textit{Id.} at 308.
\item \textsuperscript{320} \textit{Id.} at 306 (quoting \textit{Reno Smelting Works}, 21 P. at 320) (italics in original). Sutherland’s discussion, in \textit{Patton}, of common law evolution has become a leading precedent justifying a large number of judicial reforms of federal criminal procedure rules when they are based on common law rather than constitutional or statutory grounds. \textit{See, e.g.}, Funk v. United States, 290 U.S. 371, 381 (1933); United States v. Banks, 556 F.3d 967, 983 (9th Cir. 2009); United States v. Lutwak, 195 F.2d 748, 757 (7th Cir. 1952).
\end{itemize}
in his discussion of the federal common law a reminder that his analysis would be different if the no-waiver rested on either “constitutional or statutory provisions.” According to Sutherland’s jurisprudence, judges might create and change the common law, but they only applied and should never change the law as determined by legislatures or the sovereign people. Therefore, Sutherland’s rejection of the no-waiver rule’s policy and theoretical supports should not have been enough to lead him to reject it as the constitutionally required rule. For Sutherland to reject the no-waiver rule, something else was needed. And there was something else: In the 1920s, along with the wholesale rejection of the policy and theoretical support of the no-waiver rule, there emerged a body of historical scholarship that questioned the no-waiver rule’s claim to be the rule intended by the Founding generation.

This emergent body of scholarship assailed the historical bonafides of the no-waiver rule through two different lines of attack. One line focused on the well-known fact that jury trial was never the “exclusive mode of determining the fate of the accused” at common law. As discussed above, besides jury trial, defendants might choose trial by battle or refuse to plead and be crushed to death. To the historically-minded critics of the no-waiver rule, this meant that “in theory . . . jury trial . . . was volitional” and it “was in principle founded upon a choice.” The turn to criminal juries, they said, “came . . . gradually, and by way of the consent of the accused, willing or forced.”

323. The policy- and history-based attacks on the no-waiver rule were interconnected, at least as a matter of the sociology of the profession. Frank Grinnell, for example, who was a central mover in the development of the “new history” was a strong supporter of jury waiver and clearly developed the historical critique to further its chances for success. See infra text accompanying note 333.
324. Oppenheim, supra note 207, at 696.
325. See Grinnell, supra note 59, at 17–20; supra text accompanying notes 53–55.
326. Oppenheim, supra note 207, at 696.
327. Id. at 697.
328. Id. at 696 n.3 (quoting James Thayer).
century of this line of argument was, “There is nothing strange or new . . . in the idea that the defendant should choose the method of trial which he prefers. On the contrary, the theory of a choice was part of the origin of the institution.”

The other line of historical critique focused on jury trial practice in the American colonies. Historians had always taught that although the colonists based their legal system on “the mother country” they did this with “some variations.” In the 1920s, drawing on recently published archival material, Frank Washburn Grinnell asserted that a defendant’s jury-trial waiver was among the variations in Massachusetts. Judge Carroll Taney Bond did the same for Maryland.

Grinnell was a leader of the Massachusetts Bar in the first half of the twentieth century with a strong interest in both law reform and legal history. In addition to other forms of professional service, he helped found the Massachusetts Judicial Council, and was, for forty-five years, the Editor of the Massachusetts Law Quarterly. As the Quarterly’s Editor, Grinnell invited Judge Bond, who was a prominent, history-minded Baltimore judge, to write an article describing Maryland’s unique experience with bench trials. Bond’s article caught the profession’s attention and was republished in expanded form four years later in the

329. Grinnell, supra note 59, at 17.
330. Id. at 20.
331. See id.; Grinnell, supra note 207, at 66–67; Frank Grinnell, Election of Jury Trial in Criminal Cases in Colonial Massachusetts, 8 MASS. L. QUART. (No. 2) 106 (1922); infra text accompanying notes 341–66 (discussing Grinnell’s research).
332. Bond, supra note 263; Carroll T. Bond, The Maryland Practice of Allowing Defendants in Criminal Cases to Choose a Trial Before a Judge or a Jury Trial, 6 MASS. L. QUART. (No. 4) 89 (1921). Carroll Bond is discussed infra note 334.
333. For the remarks in this paragraph on Grinnell, see RICHARD HALE, JR. & FRANK WASHBURN GRINNELL, 76 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY, 3RD SERIES, 154 (1964); Obituary, Frank W. Grinnell, 1873–1964, 50 A.B.A. J. 587 (1964).
334. In 1924, Bond was promoted from the Baltimore court to the Maryland Court of Appeals and became its Chief Judge. He served in that capacity for twenty years until his death in 1944. Bond’s interest in history is illustrated by his book, CARROLL T. BOND, THE COURT OF APPEALS OF MARYLAND: A HISTORY (1928). On Grinnell’s invitation see Bond, Allowing Defendants, supra note 332, at 89.
Journal of the American Bar Association. Bond traced nonjury trial in colonial Maryland back to 1693. According to Bond, nonjury trial had “become a common method of trying misdemeanor cases” in Maryland by the mid-eighteenth century and by the century’s end it had been put on a secure statutory footing. Bond was circumspect in his claims, however. He clearly indicated that until 1823 jury waiver was “resorted to chiefly in minor cases” and only for misdemeanors. His moderate conclusion was merely that his findings “suggest the need of an investigation of facts before any statement is made that trial by jury in criminal cases was the only form known to the early American law. It is possible to assume too close an adherence to English practice in the colonies.”

Frank Grinnell’s findings were more startling. Drawing from the recently published Records of the Court of Assistants of the Colony of Massachusetts Bay, which covered the years 1673 to 1692, Grinnell showed “to the point of demonstration” that Bay colony defendants had the ability to choose between jury or bench trials even when prosecuted for such serious felonies as adultery, manslaughter, and treason. Drawing from additional sources Grinnell suggested that statutes authorizing this practice dated back

335. Bond, supra note 263, at 699.
336. Id. at 700.
337. Bond, supra note 263, at 700–01; Bond, Allowing Defendants, supra note 332, at 91–92.
338. Bond, supra note 263, at 701.
339. Id. at 699–701 (every reported instance is a misdemeanor); Bond, Allowing Defendants, supra note 332, at 91 (statutory authorization for misdemeanor trials).
341. 1–3 RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY (1901–28). Volume 1, which is the only volume referred to by Grinnell was published in 1901. See Harvard University, HOLLIS Catalogue Entry No. 001521139 (title search, last conducted on 11/30/2009). Volume 2, covering records from 1630 to 1644 was issued in 1904. See id. Volume 3, which was released in 1928 after Grinnell’s article was written, contains fragmentary records dating from 1642 to 1673. See id.
342. Grinnell, supra note 59, at 26 (citing only to Volume 1 and giving these years).
343. Id. at 29.
344. Id. at 26–30.
345. Id. at 20–26, 29–30.
to 1634. In sum, Grinnell’s findings were that seventeenth century colonial Massachusetts recognized defendants’ “right to a jury trial as an optional right” that permitted defendants to elect either trial by jury or the bench. In Massachusetts, bench trial practice was not only older than in Maryland, but wider in scope.

Massachusetts’ bench trial practice was not as continuous, however. Waiver-based bench trial for serious crime in colonial Massachusetts apparently ended in or shortly after 1685. The last example Grinnell found in the published Court of Assistants records was from 1685, although the Court’s records continued until 1692, the year the Court was dissolved. Grinnell knew of no later instance of any Massachusetts court conducting a waiver-based bench trial. Of course, Grinnell also knew that at the time he wrote no Massachusetts colonial court records later than 1692 had been published. Yet for a variety of reasons, such as changes in the wording of colonial statutes governing criminal procedure, he spurned explaining the disappearance of the bench trials in terms of the unavailability of

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346. Id. at 26. In at least some of his conclusions, Grinnell was following CHARLES HILKEY, LEGAL DEVELOPMENT IN COLONIAL MASSACHUSETTS, 1630–86 (1910). See Grinnell, supra note 59, at 26 (referring to Hilkey).
347. Grinnell, supra note 59, at 29 (emphasis in original).
348. Id. at 15, 26, 29.
349. Id. at 15.
350. Various dates are suggested by the sources, none later than 1694. See Commonwealth v. Rose, 153 N.E. 537, 540 (Mass. 1926) (from 1694 on, no record of bench trials); Towne, supra note 61, at 125 (saying last reported case is 1685). On p. 128, Towne gives 1695 as a date for a mention of bench trial, but that seems to be a misprint since the Court of Assistants was dissolved before then. Towne, supra note 61, at 128.
351. Grinnell does not date most of the cases he mentions. The last case he covers is “the case of William Coward,” which is on pp. 319–20 of Volume 1 of the Records of the Court of Assistants of the Colony of Massachusetts Bay. Grinnell, supra note 59, at 29. Coward’s case is on a later page than Joseph Holmes Sen & Jun’s case, which is the last case covered by Griswold and Towne. Griswold, supra note 54, at 663; Towne, supra note 61, at 125.
352. Towne, supra note 61, at 128 n.25 (court dissolved after 1691).
353. Grinnell, supra note 59, at 11–12.
354. Id. at 29.
355. Id. at 30, 32–33. Among Grinnell’s other reasons were the absence of waiver-based jury trials when published records began again in the early Republic era and the opinion, the opinion of the colonial and state bar, and the failure of defendants to request it. Id. at 11, 37.
archival evidence. Instead, he presciently gave an account that has withstood the subsequent publication of a fair amount of of eighteenth-century Massachusetts judicial records, and remains the accepted explanation to this day.

Grinnell’s explanation turned on the impact of England’s Glorious Revolution on Massachusetts. In the run up to the Revolution, one of James II’s arbitrary acts was to instigate judicial proceedings that in 1684 revoked the Colony of Massachusetts Bay’s charter and transferred the colony’s governance directly into his hands. After the revolutionary tumult subsided, England’s new regime reconstituted Massachusetts in 1692 by merging the formerly separate colonies of Massachusetts Bay, Plymouth, Maine, Nantucket, Martha’s Vineyard and parts of Nova Scotia into a new entity, the Province of Massachusetts Bay.

As a general matter, the Province government was more tightly bound to England’s imperial structure and more closely supervised by London than the colony had been. More than before, the Province’s governors were the Crown’s agents. As the Governors appointed provincial judges, the judges also were viewed as representing the imperial, rather than the local, government to a greater degree than before the Glorious Revolution. According to Grinnell, this shift in the locus of government affected the colonist’s perspective on juries and bench trials. “While they had their own judges under the colony,” he said,

356. For a contrasting example, see infra text accompanying notes 379–80 (discussing Erwin Griswold’s analysis).
357. See material cited infra note 391.
358. See Towne, supra note 61, at 128–29 (giving essentially the same analysis as Grinnell).
359. See Grinnell, supra note 59, at 30–33.
360. Grinnell, supra note 59, at 30; John Hassam, Account of the Early Suffolk Recorders, 12 PROC. MASS. HIST. SOCY 203, 234–36 (1899); Towne, supra note 61, at 128. The colony’s establishment of Harvard College was among the grounds for forfeiting its charter, for the colony had not been granted power to create a corporation.
they provided expressly for an optional right to jury trial and exercised it as such; but when they had judges under the Province Charter whom they thought would be under the influence of the crown they tried to emphasize their desire to have all questions of fact tried by juries . . . .

Indeed, the desire to emphasize the sanctity of jury trial was exacerbated by the developing conflict over the Privy Council’s policy of enforcing the trade laws in Admiralty courts where defendants had no right to jury trial. In this new era of less locally-identified government and Navigation Act enforcement, which lasted up to the Revolution, the colonists’ focus of concern was “with the question of a man’s right to a jury when he asked for it.” “[P]resumably nobody bothered about [the] question of any one’s wanting to waive a jury,” Grinnell concluded, and soon the “optional character of the right to a jury established . . . by the common law of Massachusetts in the colonial period” faded from “general knowledge.”

Given that both Judge Bond and Frank Grinnell were staunch supporters of reforming twentieth century law to permit a defendant’s jury waiver, their frank acknowledgment of the limits of their historical findings must be admired. Nonetheless, in the “criminal justice is in crisis” atmosphere of the 1920s, some reform-minded lawyers were far less circumspect when they drew from Bond’s and

363. Grinnell, supra note 59, at 32.
364. Id.
365. Id. at 33 (emphasis removed).
366. Id. Many factors contributed to the fading of the collective memory, including the fact that the 1641 Body of Liberties was never printed and the manuscript copies were lost. Id. One copy was discovered in the Boston library in 1843 and received its first printing at that time. Id. at 22.
367. Without detracting from Bond’s and Grinnell’s scholarly restraint, I must note that they had less need to overstate their conclusions. Bond was a judge in one of the few states where waiver-based jury trial was already allowed so his limited conclusion did not matter to practice in his own state. Grinnell thought his historical findings grounded an argument that defendant’s jury waiver was permitted by the current Massachusetts constitution. Basically, his contention was that optional jury trial was made a part of Massachusetts’s “fundamental” law shortly after the colony’s founding; under a strict interpretation of successive state constitutions, the optional right had never been repealed; and it had been preserved in the forms of trial procedure when defendants were asked, until 1835, how they wished to be tried. See Grinnell, supra note 59, at 12–14, 33–38, 49.
Grinnell’s work and the work of other historians. S. Chesterfield Oppenheim, for example, writing in the Michigan Law Review in 1927 claimed, “Researches in legal history have thrown grave doubt upon, if not dispelled, the traditional idea that a trial by jury in criminal prosecutions was intended as an exclusive mode of determining the fate of the accused.”\textsuperscript{368} And, as the fruits of historical research permeated the 1920s legal consciousness, commentators began to assert, without any need for citation, “From the traditional viewpoint, the jury has been regarded as the sole historical method of trial both in England and in colonial America. Legal research indicates, however, that an option was offered between waiver of jury and jury trial both in England and in colonial America.”\textsuperscript{369}

Perhaps the most egregious use of Bond’s and Grinnell’s research was made by Erwin Griswold when, as a young lawyer working in the Solicitor General’s Office,\textsuperscript{370} he wrote the historical section of the brief the United States submitted in the \textit{Patton} case.\textsuperscript{371} In the brief, Griswold
described Bond’s work on Maryland without mentioning, as Bond had,\(^\text{373}\) that all Maryland nonjury trials before the 1820s were for misdemeanors and “chiefly in minor cases.”\(^\text{374}\) Not only did he avoid explicitly stating the implicit limit on Maryland’s colonial bench-trial practice, but he concluded his discussion of Maryland with the observation that:

The Maryland practice since the eighteenth century has had a continuous development into the modern trial by the court. In the year 1923 over 90 per cent of all cases tried in the Criminal Court of Baltimore City were tried without a jury under this procedure which finds its origin quite definitely in the provincial practice.\(^\text{375}\)

To describe the singular history of Maryland bench trials as having a “continuous development” and an “origin . . . in provincial practice” is literally true. However, it masks the critically significant fact that Maryland’s experience with waiver-based bench trials did not involve felonies until almost forty years after the Founding.

As for Massachusetts, Griswold’s brief recounted in great detail the precedents Grinnell discussed in his 1923 article. Griswold’s account was “summarized from Mr. Grinnell’s article with a few additions.”\(^\text{376}\) Because all the additions were cases found in the Records of the Court of Assistants,\(^\text{377}\) none of them came from a period later than 1692.\(^\text{378}\) Thus
just like Grinnell, Griswold faced the problem of accounting for the apparent end of waiver-based bench trials at the end of the seventeenth century. But unlike Grinnell, Griswold did not tie the end of Massachusetts bench trials to the change from the Colony to the Province of Massachusetts Bay, nor mention that Grinnell had. Rather, Griswold embraced the explanation that Grinnell spurned. According to Griswold, the apparent end of Massachusetts bench trials after 1692 “may be explained by the fact that no records of criminal cases in this period have been printed, and is, no evidence that the practice did not continue.”

It is now seventy years after Griswold’s writing, and the subsequent publication of additional volumes of provincial Massachusetts court records has yet to support Griswold’s speculative explanation. Yet Griswold’s suggestion was plausible when it was made in 1930. Grinnell’s nuanced consideration of countervailing facts was not necessarily a more convincing account. This was especially so since Griswold’s claim that colonial archives had yet to be explored was complemented by new examples of jury waiver that he uncovered through “extended research” into the few published records of the rest of the colonies. Merely by reading the random assortment of existing published legal material from other colonies, Griswold discovered “examples of waiver of jury” in four more colonies as well as in colonial-era Vermont.

Going from the earliest and least important to the latest and most important findings, Griswold’s research found the

379. See supra text accompanying notes 359–66 (discussing Grinnell).
380. Brief for the United States, supra note 292, at 39; see also Griswold, supra note 54, at 663.
381. See, e.g., 1–16 PLYMOUTH COURT RECORDS, 1686–1859 (David Konig ed. 1978–82); JOSEPH SMITH, COLONIAL JUSTICE IN WESTERN MASSACHUSETTS, 1639–1702: THE PYNCHON COURT RECORD (1961); William Jeffrey, Early New England Court Records - A Bibliography of Published Materials, 1 AM. J. LEGAL HIST. 119, 127–40 (1957) (discussing Massachusetts). Manuscript records also have been made more accessible through the publication of finding guides.
382. See supra text accompanying notes 359–66 (discussing Grinnell).
383. Griswold, supra note 54, at 669.
384. Brief for the United States, supra note 292, at 34; see also id. at 42 (covering New Jersey even though it is not mentioned on Griswold’s list on the page cited).
following additional examples of jury waiver:

(a) New Hampshire - a 1679 statute that seemed to provide for waiver-based bench trial but which never went into force because it did not receive royal assent;\(^{385}\)

(b) Pennsylvania - one case dating from 1685 which involved a bench trial following a guilty plea;\(^{386}\)

(c) New Jersey - a 1738 statute “authorizing any two magistrates to try persons charged with larceny of goods under the value of twenty shillings” which remained in effect throughout the colonial era and into the nineteenth century;\(^{387}\)

(d) Vermont - one “trial held July 1, 1779 [that] was before the court without a jury;”\(^{388}\) and

(e) Connecticut - three criminal cases tried in the 1790s involving “serious crimes” which “allow[ed] a defendant to waive his right to trial by jury.”\(^{389}\)

From our perspective, Griswold’s additional findings may seem remarkably thin and insubstantial, perhaps because decades of additional colonial-record publishing and research has added very little to them.\(^{390}\) In addition, some of Griswold’s findings have been debunked.\(^{391}\) Given the

\(^{385}\) Id. at 40–41; see also Griswold, supra note 54, at 664.

\(^{386}\) Brief for the United States, supra note 292, at 46; see also Griswold, supra note 54, at 666. The proceeding in the Pennsylvania case mirrored the English practice of “submission,” which was permitted for trials of minor misdemeanors. See Bond, supra note 263, at 699–700 (discussing colonial Maryland’s submission practice); Griswold, supra note 54, at 658–59; Towne, supra note 61, at 136–38.

\(^{387}\) Brief for the United States, supra note 292, at 42; see also Griswold, supra note 54, at 666.

\(^{388}\) Brief for the United States, supra note 292, at 40; see also Griswold, supra note 54, at 664.

\(^{389}\) Brief for the United States, supra note 292, at 41; see also Griswold, supra note 54, at 665.

\(^{390}\) See, e.g., Towne, supra note 61, at 131 (additional colonial Connecticut statutes authorizing jury waiver which were limited to misdemeanors). A sense of the scope of colonial court records published since the 1930s may be seen by consulting Jeffrey, supra note 381; William Jeffrey, Early American Court Records - A Bibliography of Printed Materials: The Middle Colonies, 39 U. Cin. L. Rev. 685 (1970). The Internet has made even more material widely available. See Morris Cohen, Researching Legal History in the Digital Age, 99 L. Lib. J. 377 (2007).

\(^{391}\) See, e.g., Towne, supra note 61, at 133–34 (suggesting New Hampshire’s statute did not apply to criminal prosecutions); id. at 144 (saying New Jersey’s
limitation of Maryland’s bench trial practice to misdemeanors and the cessation of Massachusetts’s waiver-based bench trials at the end of the seventeenth century, Connecticut seems to be the only jurisdiction that permitted waiver-based bench trials for serious crimes during the Founding era.\textsuperscript{392}

Nevertheless, in 1930, Bond’s, Grinnell’s, and Griswold’s discoveries were new, exciting, and may reasonably have been thought to hold promise of more to come. This was especially so in light of how few colonial records had been printed and studied.\textsuperscript{393}

Griswold began the historical section of the government’s brief with the modestly suggestive caption: “Waiver of trial by jury, even in trials for serious offenses, was not unknown at the time of the adoption of the Constitution.”\textsuperscript{394} He ended the section, however, with a stronger statement. Given the existence of colonial-era bench trials:

\begin{quote}
Recognition of the right of waiver in cases where the defendant deemed it to be his interest so to do could not . . . have been regarded as inconsistent with the institution of trial by jury . . . . [T]he judicial history of the Colonies indicates that there was no sentiment against waiver of such a right. The practice of waiver being known, stronger language would have been used [in the Constitution] had there been any intention to preclude it.\textsuperscript{395}
\end{quote}

In contrast to the Government’s brief, which had historically-informed sections focused on colonial and Founding-era material, the defendant’s brief relied entirely on late-nineteenth and early-twentieth century federal statute “authorized a waiver of nonjury trial, rather than waiver of jury trial”); \textit{id.} (“not clear what [the] Vermont case represents”).

392. The Connecticut practice was a rarity and it ended by the turn of the nineteenth century. \textit{Id.} at 145. The results of twentieth-century research into the history of bench trial may be summarized as follows: in the seventeenth century, a few of the colonies permitted bench trials. \textit{See Singer v. United States}, 380 U.S. 24, 29–31 (1965); \textit{Towne}, \textit{supra} note 61, at 124–45. By the eighteenth century, bench trial practice survived in Connecticut, where it was a rarity, and in Maryland, where it was more frequent but confined to “misdemeanor cases.” \textit{See Singer}, 380 U.S. at 30 (no bench trial in Maryland in a “major case” until 1823); \textit{Towne}, \textit{supra} note 61, 131–32, 142.

393. \textit{See}, e.g., Brief for the United States, \textit{supra} note 292, at 33–34 (implicitly making this argument); Griswold, \textit{supra} note 54, at 669.


395. \textit{Id.} at 47.
precedents, state precedents, and two treatise writers.\textsuperscript{396} It contained no discussion of the English common law or of the colonial and Founding eras. Defendant’s counsel provided no history to counter Griswold’s, nor any analysis of Griswold’s sources to limit what he said. Defendant’s reliance on precedent was understandable; their failure to treat the issue historically was shortsighted.

\textbf{4. Sutherland’s Agreement with the Historical Critique of the No-Waiver Rule}

Before the \textit{Patton} litigation, Justice Sutherland may or may not have known about the 1920s historical critique of the no-waiver rule’s claim to be the intended rule of the Founding generation. If not, he certainly learned about it during the Supreme Court’s proceedings from the government’s oral argument\textsuperscript{397} as well from its brief.\textsuperscript{398} In deciding \textit{Patton}, Sutherland clearly expressed his agreement with the Government’s version of the no-waiver rule’s emergent history by noting, with words nearly identical to Griswold’s,\textsuperscript{399} that “in the Colonies such a waiver and trial by the court without a jury was by no means unknown, as the many references contained in the brief of the Solicitor General conclusively show.”\textsuperscript{400}

Sutherland made this remark during his discussion of whether the federal common law should permit jury waiver.\textsuperscript{401} He made it as his initial argument countering the force of his admission that jury waiver was not permitted at common law.\textsuperscript{402} It may be surprising that Sutherland had not mentioned the new historical findings earlier in his opinion as part of his analysis of jury waiver’s constitutionality.

\textsuperscript{396} See Brief of Appellants at ii, Patton v. United States, 281 U.S. 276 (1930) (No. 53) (Index to Authorities).
\textsuperscript{397} \textit{Patton}, 281 U.S. at 281–82 (argument of counsel). The pages of the U.S. Reports cited here, which contain the counsel’s argument, are omitted from Westlaw’s reproduction of the case report. See \textit{id.} at 276.
\textsuperscript{398} See supra text accompanying notes 373–95 (discussing the government’s argument).
\textsuperscript{399} See \textit{Patton}, 281 U.S. at 281 (argument of Solicitor General Hughes); supra text accompanying note 394 (discussing the government’s brief).
\textsuperscript{400} \textit{Patton}, 281 U.S. at 306.
\textsuperscript{401} See supra text accompanying note 317 (discussing Sutherland’s views on whether the federal common law should permit jury waiver).
\textsuperscript{402} \textit{Patton}, 281 U.S. at 306.
Perhaps Sutherland omitted mentioning them then because of limitations in the material originalists of his day thought appropriate evidence for constitutional argument. Until the modern originalist movement in the 1970s, originalist Justices generally drew their arguments from a limited array of sources, such as Madison’s notes, the Federalist papers, and treatises discussing the common law. They did not delve into Founding-era practices even when contemporaneous practice provided convincing evidence of the issue under consideration.  

Whatever reason Sutherland had for not mentioning the emergent history as part of his constitutional analysis, the question here is whether Sutherland knew and agreed with the 1920s historical critique of the no-waiver rule’s claim to be the Founding generation’s intended rule. There can be no doubt that he did. When Sutherland decided *Patton*, he had absorbed what Griswold wrote in the government’s brief and agreed that jury waiver was “by no means unknown” at the Founding.  

5. Sutherland’s *Patton* Opinion and Motivated Reasoning

The ultimate question is what influence the societal demand for jury waiver, the attack on the no-waiver rule’s claim to be a wise rule of contemporary public policy, the emergent body of historical scholarship questioning the no-waiver rule’s claim to be the Founding generation’s intended rule had on *Patton*’s ruling upholding jury waiver’s constitutionality. Given Sutherland’s originalist jurisprudence, only the historical critique should have had any influence. That critique, however, was only incipient. By

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403. The petty crime exception to Article III’s jury trial mandate is an illustrative example. *Compare* Schick v. United States, 195 U.S. 65, 70 (1904) (relying on Blackstone’s COMMENTARIES and Madison’s notes), and Callan v. Wilson, 127 U.S. 540, 549 (1888) (relying on Story’s COMMENTARIES ON THE CONSTITUTION and Madison’s notes), *with* Frankfurter & Corcoran, *supra* note 10, at 917 (passim) (showing common law practices evidencing the petty crime exception). Perhaps the material originalists like Sutherland relied on reflects their focus on Framer intent rather than on original understanding or original public meaning. Perhaps it reflects limitations in readily available material.


405. See *supra* text accompanying notes 183–91 (discussing Sutherland’s jurisprudence).
itself, the new historical information would likely have been insufficient to overturn the Constitution’s clear text and one-hundred-forty years of constitutional practice and precedent on the subject.

None of these developments when viewed in isolation should have been sufficient for Sutherland to reject the no-waiver rule. But all together—the social need and societal demand, the strong policy preference, and the new and suggestive history—may have had a synergy that was greater than any of its component parts. The new history may have provided an opening that allowed Sutherland with a complete sense of rectitude to find his, and his society’s, desired outcome in the Constitution’s original meaning. Sutherland’s Patton opinion was either an intellectually bankrupt, meretricious example of “phony originalism” or a classic example of the phenomenon psychologists call “motivated reasoning.”

Ultimately, there are no indubitable grounds for preferring one explanation for Sutherland’s judgment over the other. The remarkable weakness of his constitutional analysis suggests a result-oriented explanation. Yet, there are indicia of the influence of motivated reasoning. Due to these indicia, the motivated reasoning explanation will be explored because it paints more sympathetic portrait of Sutherland as a conscientious Justice while, at the same time, posing a more challenging problem for the practice of originalist jurisprudence.

a. Motivated Reasoning

Motivated reasoning is an umbrella term for a complex of psychological mechanisms that pervasively influences human reasoning, creating the tendency for individuals to utilize a variety of cognitive mechanisms to arrive, through a process of apparently unbiased reasoning, at the conclusion they privately desired to arrive at all along. That a preference

406. Koppelman, supra note 259, at 749. An example of what Koppelman describes as “phony originalism” is Justice Thomas’s selective citation to “the findings of originalist scholarship that support the result he is inclined to reach—sweeping contrary evidence under the rug—while claiming that he is merely following the intentions of the Framers.” Id. at 742–43.

407. Jon Hanson & Douglas Kysar, Taking Behavioralism Seriously: The
for a particular outcome unconsciously biases reasoning processes is such a wide-spread, habitual, and persistent human trait that observers suggest it is an “inherent” and “immutable characteristic of human nature” that serves a variety of important psychic functions. Motivated reasoning promotes psychological comfort by reducing dissonance among a person’s various beliefs and between what she desires and what she thinks is true and moral. Motivated reasoning also allows people to maintain a positive, consistent, up-right self-image while seeking what they want. Whatever its function, motivated reasoning is so strong, pervasive, and subtle that research shows that “even people’s sincere efforts to find the correct answer are biased by their predispositions.”

Among the biasing cognitive processes most associated with motivated reasoning are tendencies to:

(a) remember or look for evidence supporting the desired conclusion rather than rebutting evidence or evidence of disfavored outcomes,

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409. Hanson & Kysar, supra note 407, at 654; see also id. at 633 (“cognitive illusions,” which include motivated reasoning, affect the human reasoning process “with uncanny consistency and unflappable persistence”).

410. Kunda, supra note 21, at 483–85 (discussing “dissonance theory”).


(b) exaggerate the persuasiveness of evidence supporting the desired conclusion while minimizing the persuasiveness of evidence rebutting it or favoring other outcomes;\(^{415}\)

(c) require more proof of disfavored conclusions while requiring less proof of a favored outcome;\(^{416}\) and

(d) allocate the burden of proof to disfavored conclusions while granting a presumption of validity to the favored outcome.\(^{417}\)

In addition, the more one needs to make a decision under time pressure,\(^{418}\) initially favors a particular outcome,\(^{419}\) “faces weak consequences for being wrong,”\(^{420}\) or thinks an issue is important,\(^{421}\) difficult,\(^{422}\) or open,\(^{423}\) the more likely it

\(^{415}\) Madeline Fleisher, Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent, 60 Rut. L. Rev. 919, 964 (2008) (“The psychological concept of ‘motivated reasoning’ theorizes that people will perceive information supportive of their pre-existing beliefs as more legitimate than that contradicting their preferences”); Hanson & Kysar, supra note 407, at 646; Kunda, supra note 21, at 489–91.

\(^{416}\) Susan Bandes, Protecting the Innocent as the Primary Value of the Criminal Justice System, 7 Ohio St. J. Crim. L. 413, 420 (2009). As Anthony Page writes:

How then does motivated reasoning occur? Gilovich suggests that decision makers in fact ask a different question depending on how eager they are to reach a particular conclusion. “For desired conclusions . . . it is as if we ask ourselves ‘Can I believe this?’, but for unpalatable conclusions we ask, ‘Must I believe this?’” The legal analog would be that for desired conclusions one asks, “Could a reasonable person believe it?” whereas for undesirable conclusions one asks, “Would all reasonable people believe it?” The burden of persuasion is much lower for the first question.

Page, supra note 407, at 264.


\(^{418}\) Kunda, supra note 21, at 481; Glen Whitman & Roger Koppl, Rational Bias in Forensic Science, 9 Law, Probability & Risk 69, 84 (2010).

\(^{419}\) Kunda, supra note 21, at 492–93.

\(^{420}\) Whitman & Koppl, supra note 418, at 84.


\(^{422}\) Lawrence Baum, Judicial Specialization and the Adjudication of Immigration Cases, 59 Duke L.J. 1501, 1513 (2010).

\(^{423}\) Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the
is that motivated reasoning will control the judgment reached.

There are limits to motivated reasoning’s power and its distorting effect is subject to constraints. As Ziva Kunda writes, “[p]eople do not seem to be at liberty to conclude whatever they want to conclude;” 424 there must be sufficient grounds to “maintain an illusion of objectivity.” 425 The psychic goal is to appear open-minded, even-handed, and “rational” while so far as possible “construct[ing] a justification of [the] desired conclusion that would persuade a dispassionate observer.” 426 Due to the need to appear neutral, one of the most prominent constraints on motivated reasoning arises when a person knows that her conclusions and supporting arguments will be reviewed by others. 427 This knowledge heightens awareness that the reasons propounded must be stronger so they can be plausible to a variety of people with different preconceptions of their own. 428

Unfortunately, external review is not a satisfactory constraint for motivated reasoning. 429 Research also shows that thinking hard about an issue does not necessarily eliminate or moderate the biasing effect of motivated reasoning. 430 Indeed, there is evidence that “extensive processing caused by [the desire to be accurate] may facilitate the construction of justifications for desired conclusions. Thus people expecting to incur heavier costs if their desired beliefs turn about to be wrong may expend greater effort to justify these desired beliefs.” 431

In other words, although external review and deliberation over an issue may moderate the distortions of motivated reasoning, they may also exacerbate the problem by increasing the resources, effort, and creativity devoted to

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424. Kunda, supra note 21, at 482. For the material in this paragraph see also Furgeson et al., supra note 417, at 220; Kunda, supra note 21, at 482–83, 490; Page, supra note 407, at 264–65.
425. Kunda, supra note 21, at 483 (internal quotation marks removed).
426. Id. at 482–83; see also id. at 490.
427. Id. at 481.
428. Id. at 493.
429. Id. at 481, 493.
430. Id. at 493.
431. Id. at 487; see also id. at 490.
reaching decisions that are consistent with initial preferences. In the end, external review and self-reflection may lead not to compromise but to “to the solidifying (or ossifying) of individual opinion . . . [and] the polarization of group opinion.”

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b. Justice Sutherland’s Patton Opinion as an Example of Motivated Reasoning

Motivated reasoning already has been illustrated in this Article by the non-historian lawyers who exaggerated the implications of Bond’s and Grinnell’s work and felt comfortable asserting that the no-waiver rule’s historical foundations had been thoroughly repudiated.\[\text{433}\] Motivated reasoning also is illustrated by Patton’s favorable reception in the legal community and the absence of contemporary criticism of Sutherland’s constitutional analysis.\[\text{434}\] In a time when fidelity to the Constitution’s original meaning was still the dominant constitutional norm, it is telling that there was no public or scholarly claim that the case should have come out the other way, even by commentators who noted that Patton “reverses the doctrine of earlier Federal cases.”\[\text{435}\] Post-Patton, the conventional view seems to be that the Constitution’s criminal trial “provisions would seem to be mandatory in nature and for many years were so construed by the federal courts. However, the case of Patton v. United States . . . took the opposite view and dispelled any doubt that had previously existed.”\[\text{436}\]

\[\text{432.}\] Bandes, supra note 421, at 40.
\[\text{433.}\] See supra text accompanying notes 368–69 (discussing 1920s lawyers who opposed the no-waiver rule).
\[\text{434.}\] Grant, supra note 34, at 156 is the only critical commentary I have uncovered and he merely suggests the case’s “theory” is unsound and predicts that “common sense” will confine Patton’s ruling to the “waiver of one or two jurors and not a waiver of jury trial.” Grant’s prediction was wrong. See supra text accompanying note 180 (discussing Patton’s extension to complete waiver).
\[\text{435.}\] Recent Decisions, supra note 61, at 1064; see also Grant, supra note 34, at 149–53; Perkins, supra note 33, at 43–47. Grant did not hesitate to severely criticize Sutherland’s analysis of whether congressional statute granted trial courts authority to conduct bench trials. Grant, supra note 34, at 153–56. Yet Grant’s commentary on Sutherland’s constitutional analysis was a supportive “[t]his may be true enough.” Id. at 153.
\[\text{436.}\] Handley, supra note 266, at 48.
Perhaps the heights of motivated reasoning were reached by Erwin Griswold when, four years after the Patton decision, he turned the historical analysis he had written for the government's brief into a law review article.\textsuperscript{437} Although Griswold was now writing as a scholar rather than an advocate, the only new material he added to the brief was an acknowledgment that Patton “must have seemed to many like a departure from a position once thought well settled,”\textsuperscript{438} and a claim that the “ample evidence” contained in his article “furnish[es] a sure historical basis for the decision.”\textsuperscript{439} Without divulging his role in the litigation, Griswold assured his readers that the Patton decision “represent[ed] no departure from the Constitution as the framers intended it”\textsuperscript{440} and found “its sound basis, not only in the reasons advanced by the Court, but also in the history of the period when the Constitution was formulated.”\textsuperscript{441}

What about Sutherland? Having a marked policy preference favoring jury waiver,\textsuperscript{442} he may be described as highly motivated to rule that way. In addition, Sutherland could anticipate that there would be little criticism of his opinion should he find jury waiver constitutional because jury waiver was by far the more popular outcome.\textsuperscript{443} To the extent that criticism is a constraint on motivated reasoning, it would not be operative in this situation.

Still, Sutherland's conception of the judge’s role counseled against reading his policy preferences into the Constitution. Since he was an originalist, only his agreement with the no-waiver rule’s emergent history should have affected his judgment. But that history was only suggestive and Sutherland never expressly connected his belief that jury waiver “was by no means unknown”\textsuperscript{444} in the colonies and

\textsuperscript{437} Griswold, supra note 54; see also supra text accompanying notes 370–95 (discussing the government’s Patton brief).
\textsuperscript{438} Griswold, supra note 54, at 656.
\textsuperscript{439} Id.
\textsuperscript{440} Id.
\textsuperscript{441} Id.
\textsuperscript{442} See supra text accompanying notes 304–20.
\textsuperscript{443} Sutherland, of course, wrote many opinions that were criticized in his time. But I suspect those opinions, though criticized by many, had far more support than Patton would have had it come out the other way.
\textsuperscript{444} See supra text accompanying note 400.
early Republic with his constitutional analysis.\textsuperscript{445}

In light of the strength of Sutherland’s predisposition toward permitting jury waiver, studies of motivated reasoning suggest that it would take very little evidence to convince him, to make him sincerely believe, that jury waiver was the “intended” constitutional rule. Due to the biasing effect of motivated reasoning, it would have taken compelling evidence to overcome Sutherland’s natural tendency to (1) presume the pro-waiver position was constitutionally correct, (2) look for evidence favoring that position, and, finally, (3) exaggerate the significance of the evidence he found. This description of Sutherland’s natural inclination describes fairly well what the analysis above shows to have occurred in Sutherland’s opinion.

Sutherland’s constitutional analysis began with a discussion of prior precedent that was a negative argument focused on showing that the no-waiver position was unreasonable.\textsuperscript{446} The argument’s unstated purpose was to set up the pro-waiver position as the only position that a rational Framer or delegate to a ratifying convention could have held.

Sutherland short positive argument, which takes up only two pages in the United States Reports, shows that it did not take much evidence to convince him to rule in favor of jury waiver. All that was involved was Founding era silence, Blackstone’s and Story’s description of the defendant’s right of jury trial as a “privilege” and the more permissive draftsmanship of Sixth Amendment. Sutherland found that this woefully inadequate evidence was sufficient to place the burden of proof on those wishing to retain the no-waiver rule and made it “reasonable to conclude” that the Founders meant to establish jury trial as a waivable privilege in the absence of a statement that they wanted the no-waiver rule.\textsuperscript{447}

\textsuperscript{445}. The remark was made as part of Sutherland’s discussion of whether the no-waiver rule should be adopted as a matter of federal common law. Sutherland took up that discussion only after (and because) he had ruled that jury waiver was permitted by the Constitution.

\textsuperscript{446}. See supra text accompanying notes 200–08.

\textsuperscript{447}. Patton v. United States, 281 U.S. 276, 297 (1930) (Justice Sutherland suggesting Founding era silence on the question of jury waiver cuts against finding that rule was established by the Constitution).

\textsuperscript{448}. Id.
Together, Sutherland’s negative and positive arguments, which were deployed to support the remarkable conclusion that the Framer’s misdrafted Article III’s jury provision so that its words were more “imperative” than they meant, read as a textbook example of how Thomas Gilovich says motivated reasoning operates. “It is clear,” he says:

that we tend to use different criteria to evaluate propositions or conclusions we desire, and those we abhor.

For propositions we want to believe, we ask only that the evidence does not force us to believe otherwise—a rather easy standard to meet given the equivocal nature of much information . . . . For desired conclusions . . . it is as if we ask ourselves, “Can I believe this?”

Sutherland’s review of prior precedent in *Patton*, by showing that reasonable Framers would favor jury waiver, implicitly functioned to place a very light burden of proof on arguments favoring that outcome and a correspondingly heavy burden on the no-waiver principle by intimating that only irrational Framers would ordain such a rule. Sutherland’s positive argument expressly functioned the same way. Given the reduced burden of proof, Sutherland may have felt that it was met by the arguments he presented from Blackstone, Story, and the Sixth Amendment. Certainly, the newly discovered evidence, mined from colonial archives and compiled in Griswold’s brief showing that jury waiver “was by no means unknown” in the Colonies, was sufficient to allow the pro-jury waiver position to meet the “Can I believe this?” standard. Moreover, the emergent history was not only sufficient to meet the reduced standard, but it would do so with the added psychic benefit of demonstrating responsiveness to the latest trends in historical scholarship.

449. *See id.* (“The reasonable inference is that the concern of the framers of the Constitution was to make clear that the right of trial by jury should remain inviolable, to which end no language was deemed too imperative”).

450. *Gilovich*, *supra* note 407, at 83–84 (emphasis in original). Gilovich describes our approach to disfavored conclusions as “ask[ing] whether the evidence *compels* such a distasteful conclusion. . . . [I]t is as if we ask ourselves . . . “Must I believe this?” *Id.* at 84 (emphasis in original).

451. *See supra* text accompanying note 400 (quoting Justice Sutherland).
CONCLUSION

This Article has examined the legal world of which Justice Sutherland was a part when he decided Patton v. United States.\textsuperscript{452} It has shown that in the decade before Patton there was a felt need to streamline the federal criminal-trial process by reducing the frequency of jury trial.\textsuperscript{453} At the same time, there was a new trend in historical scholarship\textsuperscript{454} suggesting that prohibiting defendant’s jury waiver was not what the Founding generation intended when they wrote Article III’s peremptory command mandating that “all” federal criminal trials “shall be by jury.”\textsuperscript{455} In focusing on these developments, the immediate goal of this Article has been to put us in Justice Sutherland’s seat, to help us feel the pressures on him as he and his colleagues considered whether the traditional no-waiver rule was constitutionally required.

In addition, this Article has demonstrated the impact of motivated reasoning on historical scholarship and on the use lawyers and judges make of it.\textsuperscript{456} Motivated reasoning helps set the historians’ research agenda, influences the discovery and interpretation of evidence, and strongly affects the reception and use of historical scholarship by lawyers, judges, and the public.\textsuperscript{457}

These findings raise grave concerns about the viability of originalist jurisprudence as it is practiced by the bench and bar.\textsuperscript{458} Originalist jurisprudence is supposed to constrain judges, to make constitutional law a matter of empirical discovery rather than discretionary judgments that permit judges to read their own values into the Constitution.\textsuperscript{459} Yet, if judges constantly, even if unconsciously, read their predilections into the historical record, originalist practice

\textsuperscript{452} Patton v. United States, 281 U.S. 276, 276 (1930).
\textsuperscript{453} See supra text accompanying notes 263–303.
\textsuperscript{454} See supra text accompanying notes 323–95.
\textsuperscript{455} U.S. CONST. art. III, § 2.
\textsuperscript{456} See supra text accompanying notes 322–404, 433–50.
\textsuperscript{457} See supra text accompanying notes 434–36 (discussing the favorable response to Patton).
\textsuperscript{458} I make no criticism on originalist theory per se except to say that a legal theory that cannot be practiced properly is not a viable theory.
undermines the very reason originalist theory posits for its existence.\footnote{460}{See Richard Primus, 
\textit{Limits of Interpretivism}, 32 HARV. J.L. & PUB. POLY 169, 170–73 (2009) (discussing originalism’s inability to constrain judicial decisions).}

Moreover, if judges are reading their predilections into the Constitution, whether meretriciously or because of motivated reasoning, we have an evolving Constitution that changes as the judges and their values change. To the extent this evolution occurs under an originalist jurisprudence by which judges claim to discover how the Founding generation understood the Constitution’s text, our contemporary constitutionalism is in a situation that is similar to the predicament of private law jurisprudence at the end of the nineteenth century.


In other words, late-nineteenth century common law theorists acknowledged the inevitable evolutionary character
of private law. They recognized that private law changed along with social and economic development. Since most law was judge made, they recognized that over time judges changed the law with their rulings. Nonetheless, to cabin their admission, late-nineteenth century historical jurists insisted that common law evolution was slow, instinctive, and unconscious. Although common law evolution was observable in retrospect, they insisted that each generation could not see that it was departing from its past.

Modern law sprang into being when Progressive jurists such as Holmes and Roscoe Pound asked: if law is an evolving product of the human mind, why not make it conscious and subject it to rational debate, rather than to the happenstance of unconscious and haphazard decisionmaking? This is the burden of Holmes’s epoch-making essay, The Path of the Law, and Roscoe Pound’s seminal articles on Sociological

465. The remarks in this paragraph are drawn from the material cited in supra notes 461–63.

466. As Francis Wharton, one of the most prominent of these jurists wrote:

[T]he common law as a whole, while it moves, moves so slowly and unobservedly, that though it occupies in each generation a position different from what it occupied in a prior generation, at no particular time can it be spoken of as in motion. It is in this respect like a glacier which is congealed and yet flows . . . . While the law moves thus unobservedly—while new rules come into existence no knows how, and no one knows when—it moves in complex sympathy with the conscience and genius of the people from whom it emanates . . . . So arises the common law, which, from its very nature fluctuates instinctively with the people whose sense of right it expresses, and whose needs it meets. And no code that is not in like manner declaratory of the popular sense of right and need can stand.

FRANCIS WHARTON, COMMENTARIES ON LAW 99–100 (1884); see also Siegel, Wharton’s Orthodoxy, supra note 462, at 434–38 (analyzing Wharton’s remark).

467. Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457 (1897), reprinted in 110 HARV. L. REV. 991 (1997). In this essay, Holmes famously says:

The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal . . . . It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the
Jurisprudence.\footnote{468} For over one-hundred years we have lived with the recognition that the infusion of contemporary values into private law is inevitable and, if only for that reason, desirable. In light of that insight, we have developed private law jurisprudences that valorize legal change when it is the product of conscious and articulated reasons. Now that we know that evolution in public law is similarly inevitable, we must develop public law jurisprudences that embrace and grow from, rather than deny, the observation that the infusion of contemporary values into constitutional law is inevitable. Since we have a living constitution, it is better that the principles guiding its evolution be subject to open debate rather than adopted unconsciously or pretextually through decisions that falsely claim to be logical elaborations of principles adopted by the Constitution-makers of 1789.

\footnote{grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. Holmes, 1897, \textit{supra}, at 468.} 468. Roscoe Pound, \textit{The Scope and Purpose of Sociological Jurisprudence} (pts. 1–3), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140, 489 (1911–1912).