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2019 UT __

IN THE

SUPREME COURT OF THE STATE OF UTAH

SOUTH SALT LAKE CITY,
Appellee,

v.

SANTIAGO STEVEN MAESE,
Appellant.

No. 20160646
Filed: **48 HR REVIEW: due Thursday, Sep 19 at 1 pm**

On Certification from the Court of Appeals

Third District, Salt Lake
The Honorable Judge Randall N. Skanchy
No. 155900019

Attorneys:
Marcus Gilson, David Lassetter, South Salt Lake City, for appellee

Santiago Steven Maese, pro se

JUSTICE PEARCE authored the opinion of the Court in which JUSTICE HIMONAS and JUSTICE PETERSEN joined.

ASSOCIATE CHIEF JUSTICE LEE authored a concurring opinion in which CHIEF JUSTICE DURRANT joined.

JUSTICE PEARCE, opinion of the Court:

INTRODUCTION

¶1 Santiago Steven Maese has been charged with two violations of the traffic code and wants a jury to decide his case. Both the justice court and the district court rejected Maese's jury demand. Maese argues that the Utah Constitution guarantees the right to a jury trial in all cases, even minor traffic infractions. He therefore contends that Utah Code section 77-1-6(2)(e) and Utah Rule of Criminal Procedure 17(d), which provide that a jury is not available in a trial for an infraction, are unconstitutional.

¶2 Article I, section 12 of the Utah Constitution provides the right to a jury trial in "criminal prosecutions." But when the people of Utah adopted our constitution, there existed a category of criminal trials that were tried to a judge. Although it is difficult to peer back more than one hundred years and know with great certainty the parameters of what did and did not trigger a jury trial in 1895, we know that shortly after statehood, juries were not available for some minor offenses that carried penalties of incarceration for fewer than thirty days and/or a small fine. While we leave open the possibility that future cases and additional historical evidence might provide us the opportunity to refine our understanding of the scope and limitations of the right to a jury trial, we conclude that the Utah Constitution does not guarantee Maese a jury trial for his traffic violations. We affirm the district court.

BACKGROUND

¶3 A Utah Highway Patrol Trooper observed Maese cross the double white lines of the HOV lane on I-15 and cross several lanes of traffic while failing to signal for at least two seconds. South Salt Lake City (City) subsequently charged Maese in justice court with failure to signal for two seconds and failure to obey traffic control devices. UTAH CODE §§ 41-6a-304, –804(1)(b) (2013). At that time, the Utah Code classified these offenses as class C misdemeanors.[1]

¶4 At the arraignment hearing the City amended both charges to infractions, thereby depriving him of a jury trial. Maese moved to dismiss the information charging him with infractions. He argued that the prosecutor did not have the authority to amend the charges from misdemeanors to infractions, and that Utah's Constitution ensured a right to a jury trial in all criminal prosecutions, including those for infractions.

¶5 The justice court denied Maese's motion to dismiss and request for a jury trial. The justice court convicted Maese of both charges and imposed a $240 fine.

¶6 Maese appealed his conviction. In the trial de novo in the district court, Maese once again moved for a jury trial. And again Maese argued that the Utah Constitution guarantees defendants,

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[1] The Legislature reclassified both of these offenses as infractions in 2015. 2015 Utah Laws, 2268, 2280–81. When the City charged Maese, an infraction was punishable by a fine, forfeiture, disqualification, or any combination of these penalties. UTAH CODE § 76-3-205 (2013).

including those charged with infractions, a jury. The district court denied his motion and convicted him on both charges.

¶7 Maese appeals.

ISSUES AND STANDARDS OF REVIEW

¶8 Maese raises two meaty issues. First, Maese argues that the Utah Constitution's Separation of Powers Clause prevented the City from amending the charges against him from misdemeanors to infractions because the Utah Code designated them as misdemeanors. This presents a question of law that we review for correctness. *See State v. Hernandez*, 2011 UT 70, ¶ 3, 268 P.3d 822. When addressing a challenge to the constitutionality of a statute, "we presume the statute to be constitutional, resolving any reasonable doubts in favor of constitutionality." *Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 30, 144 P.3d 1109 (citation omitted).

¶9 Before we reach that question, however, we need to address the City's contention that we lack jurisdiction to hear Maese's argument. The City argues we cannot address the question because Utah Code section 78A-7-118(8) limits appeals from justice court to a trial de novo in district court unless the district court rules on the constitutionality of a statute or ordinance. Questions concerning our jurisdiction are questions of law that we review for correctness. *Ameritemps, Inc. v. Utah Labor Comm'n*, 2007 UT 8, ¶ 6, 152 P.3d 298.

¶10 Second, Maese posits that Utah Code section 77-1-6(2)(e) and Utah Rule of Criminal Procedure 17(d) are unconstitutional because they deny him the jury trial promised by article I, sections 10 and 12 of the Utah Constitution. "We presume the statute is constitutional, and we 'resolve any reasonable doubts in favor of constitutionality.'" *Brown v. Cox*, 2017 UT 3, ¶ 11, 387 P.3d 1040 (citation omitted). "Whether a statute is constitutional presents a question of law," *id.*, that we review for correctness, *see Hernandez*, 2011 UT 70, ¶ 3.

ANALYSIS

I. We Lack Jurisdiction to Hear Maese's Challenge to the Prosecutorial Practice of Amending Misdemeanor Charges to Infractions

¶11 Maese first argues that prosecutors violate the Utah Constitution when they charge as an infraction a crime the

Legislature designates as a misdemeanor.[2] Maese avers that because "only the legislature can define crimes and their penalties," prosecutors act outside their constitutional authority when they assign a lesser penalty to charged conduct. Maese contends that "no statement of law or legal principle" permits prosecutors to exercise the legislative power of "designat[ing] an offense's penalty."[3]

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[2] Maese contends that this practice violates article V, section 1 of the Utah Constitution, which provides,

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

[3] Maese argues that both the Utah Code and the Utah Rules of Criminal Procedure prohibit reducing the level of an offense prior to conviction where lesser-included offenses do not exist. This argument would come into play only if we were to determine that the prosecutor could not constitutionally amend a misdemeanor to an infraction. Because we lack jurisdiction to decide that threshold question—as it does not involve the challenge to the constitutionality of a statute—we cannot reach this dependent argument. *See* UTAH CODE § 78A-7-118(8).

Maese also argues that a court has no subject matter jurisdiction over an offense not listed in the Utah Code, and that therefore the court was required to dismiss the action. He contends that Utah Rule of Criminal Procedure 25, which provides that "[t]he court shall dismiss the information or indictment when: . . . [t]he court is without jurisdiction," requires trial courts to dismiss the prosecution of a "nonexistent crime." *See* UTAH R. CRIM. P. 25(b)(4). He then claims that because the code contains no infraction covering the failure to obey traffic control devices, that crime must be non-existent. By the logic of Maese's argument, a court would lack jurisdiction over a crime where the information omitted or added an element. While these might be errors to be corrected, they are not jurisdictional defects that rob the court of the ability to hear the matter. The justice court has jurisdiction to hear both class C misdemeanors and infractions, and therefore possessed subject matter jurisdiction over Maese's case. *See* UTAH CODE § 78A-7-106(1).

(continued . . .)

¶12 Maese raises an intriguing question that we do not have jurisdiction to address. The City rightly points to the jurisdictional limits Utah Code section 78A-7-118(8) imposes on us. That section allows a defendant to appeal the decision of a district court's review of a justice court matter only when the district court rules on the constitutionality of a statute or ordinance. UTAH CODE § 78A-7-118(8) ("The decision of the district court [on appeal from the justice court] is final and may not be appealed unless the district court rules on the constitutionality of a statute or ordinance.").

¶13 Maese does not challenge a statute that permits prosecutors to do what the City did here: amend charges to lower the level of the charged crime. Indeed, it does not appear that this practice enjoys any statutory authorization whatsoever. So Maese is left challenging a practice that is apparently justified by notions of prosecutorial discretion.[4] Because Maese does not challenge the constitutionality of a statute or ordinance, we do not have jurisdiction over this issue on direct appeal.

¶14 This does not mean, however, that Maese—or someone in his position—is without a mechanism to press that argument. As the court of appeals has recognized, a petition for extraordinary relief under Utah Rule of Civil Procedure 65B can be the procedurally correct avenue to challenge an alleged violation that occurred in justice court that does not involve the constitutionality of a statute or ordinance. *See Smith v. Hruby-Mills*, 2016 UT App 159, ¶¶ 5–6, 380 P.3d 349; *Vorher v. Henriod*, 2011 UT App 199, ¶¶ 7–8, 262 P.3d 42; *see also* UTAH R. CIV. P. 65B. Because Maese has not petitioned for a writ for extraordinary relief, we cannot address his argument without

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We stress, however, that this should not be read as an endorsement of the prosecutorial practice Maese challenges. We have not yet been properly presented with an appropriate opportunity to consider whether Utah law permits prosecutors to avoid jury trials (and potentially cause indigent defendants to lose their publicly provided counsel) by charging misdemeanors as infractions.

[4] Others have similarly questioned whether prosecutors can properly amend misdemeanor offenses to infractions and have argued that the practice deprives individuals of their rights to counsel and jury. *See, e.g.*, Samuel P. Newton, Teresa L. Welch & Neal G. Hamilton, *No Justice in Utah's Justice Courts: Constitutional Issues, Systemic Problems, and the Failure to Protect Defendants in Utah's Infamous Local Courts,* 2012 UTAH L. REV. ONLAW 27, 45–48 (2012).

running afoul of the statute limiting our jurisdiction over justice court appeals.

II. The Utah Constitution Does Not Guarantee a Jury Trial for Maese's Traffic Violations

¶15 Maese next argues that "any Utah statute or procedural rule denying the right of a jury trial in prosecutions for infractions is unconstitutional." Specifically, he argues that Utah Code section 77-1-6(2)(e) and Utah Rule of Criminal Procedure 17(d) are unconstitutional because they exclude infractions from the right to a jury trial.

¶16 Utah Code section 77-1-6 lists the rights of defendants and includes among them that "[n]o person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate." UTAH CODE § 77-1-6(2)(e). Utah Rule of Criminal Procedure 17(d) states "No jury shall be allowed in the trial of an infraction." Maese contends that this statute and rule do not comply with the requirements set forth in article I, section 12 of the Utah Constitution.

¶17 Article I, section 12 of the Utah Constitution provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury." Maese argues that the meaning of this section is plain in that it "guarantees the right to jury trials in *all* criminal cases, including prosecutions for infractions."[5]

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[5] Maese also contends that article I, section 10 guarantees the right to a jury trial in all criminal prosecutions. That section provides that "[i]n capital cases the right of trial by jury shall remain inviolate." UTAH CONST. art. I, § 10. "The word 'inviolate' . . . was intended to provide for the continued use of the common law jury composed of twelve persons who could convict only by a unanimous verdict." *Int'l Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc.*, 626 P.2d 418, 420 (Utah 1981). The rest of section 10 specifies the constitutional floor for the size of juries, dictates when verdicts require unanimity, and addresses other matters pertaining to jury trials. *See* UTAH CONST. art. I, § 10. Meanwhile section 12 provides the operative language governing the right for a jury trial in a criminal prosecution. As we reckoned in *International Harvester*,

> [T]he constitutional designation of the number of jurors to be used in courts of original jurisdiction and in

(continued . . .)

¶18 When we interpret constitutional language, we start with the meaning of the text as understood when it was adopted. *See Zimmerman v. Univ. of Utah*, 2018 UT 1, ¶ 25, 417 P.3d 78; *Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶¶ 67, 96, 416 P.3d 663; *Am. Bush v. City of South Salt Lake*, 2006 UT 40, ¶¶ 10, 16, 140 P.3d 1235. "[I]n interpreting the Utah Constitution, prior case law guides us to analyze its text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting." *Am. Bush*, 2006 UT 40, ¶ 12.

¶19 There is no magic formula for this analysis—different sources will be more or less persuasive depending on the constitutional question and the content of those sources. *See State v. Tiedemann*, 2007 UT 49, ¶ 37, 162 P.3d 1106. ("[W]e reject the State's suggestion in its brief that there is a formula of some kind for adequate framing and briefing of state constitutional issues."). We use these sources to discern the original public meaning of the text. *Neese*, 2017 UT 89, ¶ 67 ("[T]his court should look to the original meaning of the Utah Constitution when properly confronted with constitutional issues."); *Am. Bush*, 2006 UT 40, ¶ 12 ("The goal of this analysis is to discern the intent and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect.").[6]

> courts of inferior jurisdiction [provided in section 10] presupposes the existence of the basic right itself. It is not plausible that the framers would mandate the number of jurors to be used in a jury, and the number of jurors required to return a verdict, without intending to secure the basic right itself.

626 P.2d at 420. In other words, section 12 is the provision that secures that basic right of a jury in criminal prosecutions. This is the crucial language to assess whether the Utah Constitution guarantees the right to a jury trial for the traffic violations for which Maese was convicted. Accordingly, we focus on the meaning of section 12 of article I of the Utah Constitution.

[6] While we have at times used language of "intent" in discussing our constitutional interpretation analysis, our focus is on the objective original public meaning of the text, not the intent of those who wrote it. *See Neese v. Utah Bd. of Pardons & Parole*, 2017 UT 89, ¶ 95, 416 P.3d 663 ("[O]riginalist inquiry must focus on ascertaining the 'original public meaning' of the constitutional text."); *id.* ¶¶ 95–

(continued . . .)

¶20 When we examine the historical record to help us understand the original public meaning of the text, we must resist the temptation to place "undue reliance on arguments based primarily upon the zeitgeist." *State v. Tulley*, 2018 UT 35, ¶ 82, 428 P.3d 1005 (citation omitted) (internal quotation marks omitted). Otherwise, we risk "converting the historical record into a type of Rorschach test where we only see what we are already inclined to see." *Id.* (citation omitted) (internal quotation marks omitted). Merely "asserting one, likely true, fact about Utah history and letting the historical analysis flow from that single fact" is not a recipe for sound constitutional interpretation. *Id.* (citation omitted) (internal quotation marks omitted).

A. The Text of Article I, Section 12 Does Not Directly Speak to Whether There is a Right to a Jury Trial for a Traffic Infraction

¶21 Our task is to understand what "criminal prosecutions" meant to those who voted to approve the Utah Constitution[7] and

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100 (discussing the goals and methods of originalism steeped in original public meaning). Evidence of framers' intent can inform our understanding of the text's meaning, but it is only a means to this end, not an end in itself. The original public meaning focus of our constitutional inquiry is consistent with the "predominant originalist theory," which requires seekers of the original meaning to "interpret the Constitution according to how the words of the document would have been understood by a competent and reasonable speaker of the language at the time of the document's enactment." John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 761 (2009). "[T]he new originalism is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted." Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609 (2004).

[7] Although we have spoken of this in terms of those who voted to approve, that phrase must mean more than our seeking the understanding of just the 31,305 men who approved our constitution (7,687 voted to reject). *See* JEAN BICKMORE WHITE, CHARTER FOR STATEHOOD: THE STORY OF UTAH'S STATE CONSTITUTION 87 (1996) (tallying the votes for and against ratification of the Utah Constitution). So while we speak in terms of the understanding of those who approved the Utah Constitution, that is shorthand for (continued . . .)

whether those voters would have understood that they were guaranteeing a jury trial to every person in every circumstance under which they would be hauled into court.[8]

¶22 Maese uses *Salt Lake City v. Ohms*, to assert that "if [a] constitutional provision is clear, then extraneous or contemporaneous construction may not be resorted to." 881 P.2d 844, 850 n.14 (Utah 1994) (citation omitted) (internal quotation marks omitted). At the same time, Maese also refers to our language in *American Bush* that courts should analyze "text, historical evidence of the state of the law when [the constitution] was drafted, and Utah's particular traditions at the time of drafting." 2006 UT 40, ¶ 12. And this reflects the sometimes contradictory manner in which we have spoken about constitutional analysis.

¶23 We attempted to clarify some of this confusion in *In re Young*, 1999 UT 6, 976 P.2d 581. There we stated:

> [Appellant argues] that we should limit ourselves to the plain language of the constitution and that we should therefore not consider the history of [the relevant constitutional provision]. But the plain language is of marginal help on this question. And in such circumstances, we have rejected any such rigid rule of constitutional interpretation. In *Society of Separationists v. Whitehead*, 870 P.2d 916 (Utah 1993), we made it plain that in interpreting the constitution, we consider all relevant factors, including the language, other provisions in the constitution that may bear on the matter, historical materials, and policy. *See id.* at 920–21, 921 n. 6. Our primary search is for intent and purpose. Consistent with this view, this court has a

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what the general public understanding was at the time of statehood. For example, in this matter, if we had the personal journal of a woman who complained of her inability to obtain a jury trial, we would not ignore it simply because it was penned by someone who was prohibited from voting on the constitution.

[8] We are focusing today on the meaning of "criminal prosecutions" in article I, section 12 within the context of the right to a jury trial. A number of other rights are secured in that section for criminal defendants, *see* UTAH CONST. art. I, section 12, and nothing that we hold today is intended to apply to the scope or meaning of those other rights.

> very long history of interpreting constitutional provisions in light of their historical background and the then-contemporary understanding of what they were to accomplish. This case, like many others, proves the wisdom of the axiom that "[a] page of history is worth a volume of logic." *Society of Separationists*, 870 P.2d at 921.

Id. ¶ 15. (footnote omitted). Thus, although the text is generally the best place to look for understanding, historical sources can be essential to our effort to discern and confirm the original public meaning of the language. Although the text's plain language may begin and end the analysis, unlike contract interpretation, constitutional inquiry does not require us to find a textual ambiguity before we turn to those other sources. Where doubt exists about the constitution's meaning, we can and should consider all relevant materials. Often that will require a "deep immersion in the shared linguistic, political, and legal presuppositions and understandings of the ratification era." *Neese*, 2017 UT 89, ¶ 98.

¶24 Maese nevertheless argues that the constitutional inquiry is simple because the constitutional language alone answers the question. Maese quotes article I, section 12 of the Utah Constitution, "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury." Maese then paraphrases this language as "guarantee[ing] the right of a jury trial in all criminal prosecutions."

¶25 In response, the City analogizes to the United States Constitution to argue that despite plain language suggesting otherwise, the Utah Constitution excludes some class of petty offenses from the right to a jury trial. The City focuses on the parallel language of the Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI. The City argues that the "language of the Sixth Amendment . . . is as broad, if not broader, than the analogous provisions of the Utah Constitution." And the City notes that "[d]espite [the] plain language that may suggest that any accused is guaranteed the right to a trial by jury under the [federal] Constitution in every circumstance, modern Sixth Amendment case law limits that right to offenses carrying at least six months of possible incarceration." This inspires the City to argue the phrase "criminal prosecutions" in the Utah Constitution implicitly excludes

at least some petty offenses,[9] because the federal constitution does so.

¶26 The City dangles a tempting argument. If the language of our constitution resembles that of its federal counterpart, and if the federal counterpart does not provide a jury trial for petty offenses, then it stands to reason that our state constitution would similarly not permit a jury trial in all cases.

¶27 But we cannot accept the City's invitation to interpret our constitution in lockstep with the federal and skip an analysis of our own state constitution. We have recognized that even when the text of our constitution is identical to its federal counterpart, "we do not presume that federal court interpretations of federal constitutional provisions control the meaning of identical provisions in the Utah Constitution." *State v. Briggs*, 2008 UT 83, ¶ 24, 199 P.3d 935. "In fact, we have not hesitated to interpret the provisions of the Utah Constitution to provide more expansive protections than similar federal provisions where appropriate." *Id.; see also Tiedemann*, 2007 UT 49, ¶ 37 ("There is no presumption that federal construction of similar language is correct.").[10]

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[9] The City suggests the Utah Constitution does not preserve a right to jury trial for infractions, "the extreme low end of the range" of petty offenses. *See infra* ¶ 70 n.23.

[10] At times, we conclude that when a legislative body (such as the people creating a constitution) uses language copied from another source, they intended to not only adopt that language, but to import the "cluster of ideas" that surrounds that language. *See, e.g.*, *Utah State Tax Comm'n v. See's Candies, Inc.*, 2018 UT 57, ¶¶ 43–45, 435 P.3d 147 (citation omitted). We do this most frequently when the imported term is a term of art. *See id.* ¶ 43.

The record currently before us does not permit us to conclude that the Utah Constitution uses the phrase "criminal prosecutions" as a term of art. "Criminal prosecution" does not appear to have any fixed meaning; nearly every state that has addressed the question of the scope of the jury trial has struggled with the meaning of "criminal prosecution," and those jurisdictions have arrived at a variety of conclusions. *See infra* ¶¶ 40-44. And, as discussed below, *infra* ¶ 31, there is no evidence from the Utah Constitutional Convention that the framers intended to use the phrase "criminal prosecution" as a term of art.

¶28 We start by acknowledging that the plain language of the Utah Constitution does not answer the question. The text does not tell us what the people of Utah would have understood to be a "criminal prosecution" that would trigger the right to a jury trial. We therefore examine the historical record for evidence of what the people of Utah would have understood to be a "criminal prosecution" that would trigger the right to a jury trial.

¶29 When we look to the historical record, we hope that it resembles a Norman Rockwell painting—a poignant, straightforward, and easy to interpret representation. But frequently it does not. In some cases, like this one, the historical record is more like a Jackson Pollock. And we find ourselves staring at the canvas in hopes of finding some unifying theme. After studying the colors and lines of the historical record, we find evidence that suggests a narrative.

B. Delegates to the Utah Constitutional Convention Appeared to Hold Jury Trials in High Regard, but Did Not Discuss the Specific Scope of the Right to a Jury Trial in Criminal Cases

¶30 The delegates to the 1895 Constitutional Convention never specifically discussed the breadth of the jury trial right.[11] The closest comment comes from Delegate David Evans Jr., who stated, "[W]e are maintaining the right of trial by jury for any person charged with a crime." 1 *Official Report of the Proceedings and Debates of the Convention* 258 (Salt Lake City, Star Printing Co. 1898) [hereinafter *Proceedings*]. This quote still leaves us questioning what the original understanding of a "crime" was, however. And the delegates to the convention did not discuss the meaning of a "crime," a "criminal prosecution," or otherwise discuss the parameters of the right to trial by jury they sought to maintain.

¶31 The delegates did, however, speak loftily about the importance of juries in our legal system. Delegate Varian commented, "I want the trial by jury to remain inviolate[,] . . . but when you come to a trial jury, that last safeguard, that last barrier, that has always stood and always will, I believe, between the people

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[11] We note that this was the 1895 Constitutional Convention to distinguish it from the six previous conventions and meetings of the territorial legislature to draft proposed constitutions (1856, 1862, 1867, 1872, 1882, and 1887). *See* Paul Wake, Comment, *Fu[nd]amental Principles, Individual Rights, and Free Government: Do Utahns Remember How to Be Free?*, 1996 UTAH L. REV. 661, 671–86.

and oppression, . . . we should act slowly, and wait, I think, long before we invade in the slightest degree or particular." *Id.* at 261. Delegate Bowdle opined:

> I claim that a man's liberty is not in jeopardy only when the doors of the penitentiary may stand before him, or when his life is at stake. His reputation might be just as sacred, or more sacred than his life. I believe that when a man is on trial for any crime he should have a fair and impartial trial by a jury . . . .

Id. at 291–92.

¶32 Most of the debate focused on the appropriate size of juries in different courts and whether unanimity would be required. *See, e.g.*, *id.* at 258–62, 286–97, 306–12, 492–95. For example, the delegates engaged in the following discussion:

> Mr. Evans (Weber): Then, there is another class of jurors in courts of inferior jurisdiction. A jury shall consist of three men in both civil and criminal cases.
>
> Mr. Eldredge: What courts are those?
>
> Mr. Evans (Weber): Justices of the peace. All three of these men must concur and give a unanimous verdict, in criminal cases, but in civil cases two of them can render a verdict.

Id. at 493.

¶33 The debates therefore fail to speak directly to the question of the meaning of "criminal prosecutions" and accordingly when a jury would be available. Nor did the framers reference the federal counterpart or express any intent that the state standard should track the federal. But the discussions make plain that the framers highly valued the right to a jury trial and anticipated that it would play a crucial role in preserving the liberty interests of the people of Utah.

C. The Framers Drafted Our Constitution Against a Legal Backdrop Where the Federal, and Some State, Constitutions Did Not Guarantee a Jury Trial for All Offenses

¶34 Although the framers did not debate the scope of the jury trial during the Constitutional Convention, they toiled in a legal environment where it was largely understood that a jury would not be available for all offenses. Significantly, when the framers met in the Salt Lake City and County Building to draft our constitution, the federal constitution had been interpreted to exclude certain "petty" offenses from the jury trial right.

¶35 The United States Supreme Court first examined the scope of the federal right to a jury trial in a criminal prosecution in *Callan v. Wilson*, 127 U.S. 540 (1888), which was decided seven years before the 1895 Convention. There, the Court analyzed whether a conviction of conspiracy and a sentence of a twenty-five dollar fine, or upon default of the fine, thirty days of imprisonment, could be imposed without the protections of a jury trial. *Id.* at 540–43 (synopsis). Callan contended that "the prosecution against him was a 'criminal prosecution,' in which he was entitled by the sixth amendment to a speedy and public trial by an impartial jury," and also raised arguments under Article III of the United States Constitution and the Fifth Amendment. *Id.* at 547–48.

¶36 The Court first analyzed the meaning of "crime" as used in Article III[12] and in the context of the phrase "criminal prosecution" in the Sixth Amendment[13]:

> The word 'crime[,]' in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the constitution to hold that no prosecution for a misdemeanor is a prosecution for a 'crime' within the meaning of the third article, or a 'criminal prosecution' within the meaning of the sixth amendment.

Id. at 549. The Sixth Amendment's "enumeration . . . of the rights of the accused in criminal prosecutions[] is to be taken as a declaration of what those [common law] rules were," that Article III guaranteed.

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[12] U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .").

[13] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

Id. The Court therefore interpreted "crime" in Article III and "criminal prosecution" in the Sixth Amendment as consistent with each other and determined that they were to be read consistent with the meaning that they had at common law. *Id.*

¶37 The Court recognized that many state courts had "adjudged cases, arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate," and had concluded that "there are certain minor or petty offenses that may be proceeded against summarily, and without a jury." *Id.* at 552–53 (discussing *In re Glenn*, 54 Md. 572, 600, 605 (1880); *McGear v. Woodruff,* 33 N.J.L. 213, 216, 217 (1868); *Byers v. Commonwealth*, 42 Pa. 89, 94 (1862); *State v. Conlin,* 27 Vt. 318, 323 (1855); *Williams v. City Council of Augusta*, 4 Ga. 509 (1848)). The Court then quoted at length a treatise which summarized the approach taken by many state courts—prosecuting "[v]iolations of municipal by-laws[,] . . . which relate to acts and omissions that are not embraced in the general criminal legislation of the state, . . . in a summary manner" without a trial by jury. *Callan*, 127 U.S. at 553 (citing 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 433 (3d ed. 1881)).

¶38 The Court then recognized that "there is a class of petty or minor offenses not usually embraced in public criminal statutes, and not of the class or grade triable [under] common law by a jury." *Callan*, 127 U.S. at 555. But conspiracy—"by no means a petty or trivial offense"—was not such an offense that could be proceeded against summarily under common law. *Id.* at 555, 557. The Court, after reviewing authorities that described conspiracy at common law, described it as an "offense of a grave character, affecting the public at large." *Id.* at 555–56. Therefore, the federal constitution entitled a person charged with participating in a conspiracy to a jury trial. *Id.* at 556.

¶39 The Court then concluded that "[e]xcept in that class or grade of offenses called 'petty offenses,' which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guaranty of an impartial jury to the accused in a criminal prosecution" secures the right to a jury trial. *Id.* at 557. While *Callan* did not further define these "petty offenses" to which the right to a jury trial did not attach, *Callan* instructed that there existed *some* types of offenses to which the right to a jury trial would not attach, notwithstanding the federal constitution's seemingly much broader language.

¶40 State supreme courts have reasoned similarly. In *McInerney v. City of Denver*, for example, the Colorado Supreme Court

recognized that violations of municipal ordinances were distinct from those of state statutes and therefore did not trigger the right to a jury trial. 29 P. 516, 519–20 (Colo. 1892), *abrogated on other grounds by Waller v. Florida*, 397 U.S. 387, 391 n.3 (1970) and *by statute as recognized by Scanlon v. City of Denver*, 88 P. 156 (Colo. 1906). Citing numerous cases that reached the same conclusion, the court highlighted that "the provisions of the constitution relating to trial by jury . . . were adopted with reference to the procedure heretofore generally existing in this country. If, in a given class of offenses, trials without a jury were formerly the prevailing rule, this rule is not changed by the constitution." 29 P. at 519 (citing *City of Greeley v. Hamman*, 20 P. 1 (Colo. 1888); *Hill v. Mayor of Dalton*, 72 Ga. 314, 319 (1884); *Floyd v. Comm'rs of Eatonton*, 14 Ga. 354, 356 (1853); *Williams*, 4 Ga. at 509; *Ward v. Farwell*, 97 Ill. 593 (1881); *State ex. rel. Curtis, Co. v. City of Topeka*, 12 P. 310 (Kan. 1886); *In re Glenn*, 54 Md. at 572; *Shafer v. Mumma*, 17 Md. 331 (1861); *Ex parte Kiburg*, 10 Mo. App. 442, 447 (1881); *Howe v. Treasurer of Plainfield*, 37 N.J.L. 145 (1874); *McGear*, 33 N.J.L. at 215; *People v. McCarthy*, 45 How. Pr. 97 (N.Y. 1873); *Inwood v. State*, 42 Ohio St. 186 (1884)). And therefore, the proper question of whether the right to a jury trial attaches to the prosecution of a certain offense, depends upon whether "the offense charged belong[s] to a class of offenses that were usually proceeded against summarily" at common law. *McInerney*, 29 P. at 519–20. The court noted authorities that led it "to the conclusion that, both in this [country] and in England, the transgression of municipal regulations, enacted under the police power . . . had, for more than a century prior to the adoption of our constitution, been generally prosecuted without a jury." *Id.* at 519 (citing *Floyd*, 14 Ga. at 356; *Williams*, 4 Ga. at 509; *Topeka*, 12 P. at 310; *State v. Noble*, 20 La. Ann. 325 (1868); *In re Glenn*, 54 Md. at 572; *Shafer*, 17 Md. at 331; *State v. Lee*, 13 N.W. 913 (Minn. 1882); *Ex parte Hollwedell*, 74 Mo. 395, 400 (1881); *Ex parte Kiburg*, 10 Mo. App. at 447; *Howe*, 37 N.J.L. at 145; *McGear*, 33 N.J. L. at 215; *State v. Sly*, 4 Or. 277 (1872); *Byers*, 42 Pa. at 89; *Conlin*, 27 Vt. at 318).

¶41 The Colorado court then resolved that newly created offenses were "covered by constitutional guaranties relating to trial by jury" if the offense in question belonged to a class of offenses that were triable by jury prior to the adoption of the constitution. *McInerney*, 29 P. at 519–20.[14] The court concluded that the violation

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[14] The Colorado Supreme Court used a hypothetical to illustrate this analysis:

(continued . . .)

of the municipal ordinance at issue—keeping a dramshop open beyond permissible hours—"unquestionably belongs to the class of petty offenses against local police regulations that were not generally triable by jury before the adoption of our constitution." *Id.* at 520.

¶42 The absence of a more defined articulation of a "petty offense" in *Callan* and state supreme court cases reflects the historical complexity of the right to a jury trial. As Felix Frankfurter and Thomas G. Corcoran note in their article on petty offenses, at common law, "[t]here was no unifying consideration as to the type of criminal offense subjected to summary trial nor any uniformity in

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> Suppose, . . . a city coun[cil] ordains that to deposit banana peels on the sidewalk shall be an offense punishable by a fine of five dollars, or, upon second conviction, by two days' imprisonment in the city jail, must we declare that the constitutional right to a trial by jury attaches simply because the specific act was not noticed, and hence not punished summarily, before the constitution?

McInerney, 29 P. at 520. "[T]hough a particular offense may have been unknown to the common or statutory law before the adoption of our constitution, yet, if it clearly belongs to a class of offenses that were theretofore not triable by jury, the constitutional guaranties relating to jury trial do not apply." *Id.*

The proper disposal of banana peels may have been motivated by something more than academic interest. An 1888 article from South Dakota's *The Canton Advocate* recounted that:

> Quite a comical incident in [town square] amused lookers-on the other day. A well-known gentleman, quite prominent in the temperance work, was proceeding hurriedly along when he stepped upon a banana peel, which "like death, levels all ranks," and out from a parcel which he was carrying shot a bottle of brandy. . . .

He Lost His Secret, THE CANTON ADVOCATE, Jan. 5, 1888, at 3, https://www.newspapers.com/image/174503066/.

Utahns were also apparently concerned with banana peels left on sidewalks. The Ogden Daily Junction opined that one should never "laugh at the misfortune of others, save in the case of a man who is trying to stand on a banana peel on the sidewalk." *Hardly Ever*, OGDEN DAILY JUNCTION, June 8, 1879, at 3, https://newspapers.lib.utah.edu/details?id=23766239.

the number of magistrates before whom the various offenses were tried." Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 927 (1926).[15] Frankfurter and Corcoran continued, "Although the great majority of instances were aptly characterized as 'petty' violations, some bordered closely on serious felonies and were punished with appropriate severity." *Id.* at 927 (footnote omitted). They explained that the "controlling factor seems less the intrinsic gravity of the offense, judged by its danger to the community, than the desire for a swift and convenient remedy." *Id.*

¶43 Frankfurter and Corcoran further discuss the "striking . . . great volume of offenses" that were prosecuted without a jury at common law. *Id.* at 928. And while the majority of penalties imposed for these petty offenses were minor, the English parliament imposed more serious punishments such as hefty fines, imprisonment, hard labor, and even corporal punishment. *Id.* at 931–32. All the American colonies, to some extent, carried on the practice of summary jurisdiction for minor crimes while modifying the practice to fit each colony. *Id.* at 935–37. And several states later traced their practice of summary jurisdiction back to English common law as the Supreme Court recognized in *Callan v. Wilson*. *See id.* at 951 n.179, 952–62 (discussing *In re Glenn*, 54 Md. at 600, 605; *McGear*, 33 N.J.L. at 216; *Byers*, 42 Pa. at 94); *see also Callan*, 127 U.S. at 552–53 (discussing same). The common law tradition of prosecuting "petty offenses" without a jury trial evidently reverberated through the development of state and federal constitutional rights, even as states modified the

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[15] We register the critiques George Kaye levels at Frankfurter and Corcoran. George Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959). Generally, Kaye agrees that the "[e]xistence of summary trials in England and the colonies is indisputable. However, it is not a necessary implication of this summary practice that our [federal] Constitutional language fails to embrace the less serious offenses." *Id.* at 246 (footnote omitted). And Kaye draws attention to historical and legal evidence that undercuts Frankfurter and Corcoran's characterizations of the practice of summary jurisdiction in England and the colonies, and the meaning of the relevant federal constitutional language. *Id.* at 248–68. Still, we conclude that the broad strokes of what Frankfurter and Corcoran discuss—that early state and federal constitutional law was informed by traditions of English common law, albeit with their own variations—provide a helpful summary of the origins of the right to a jury trial.

scope of the right to a jury trial. "The core of the problem," as Frankfurter and Corcoran note, "turns on what are 'petty offenses.'" *Petty Federal Offenses*, 39 HARV. L. REV. at 979.

¶44 And while that question has proven difficult to answer with certainty,[16] it is beyond debate that at the time the framers were drafting the Utah Constitution, the United States Supreme Court and other state supreme courts recognized that, despite the seemingly sweeping constitutional language, *some* classes of offenses were not included in the right to a jury trial.

D. The 1898 Code Provides Evidence of When a Defendant Would be Entitled to a Jury Trial

¶45 We turn next to the code that the Utah Legislature adopted in 1898. The 1898 Code holds particular significance because it was the first effort to codify the law after adoption of our constitution. Shortly after statehood, Governor Heber M. Wells—the former temporary secretary of the Utah Constitutional Convention—appointed a commission to propose the first state code. *Proceedings*, *supra* ¶ 30, at 12 ("Mr. Wells was unanimously elected to the position [of temporary secretary]."); Richard W. Young, Grant H. Smith & William A. Lee, *Preface* to UTAH REV. STAT., at (iii) (1898) (indicating

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[16] The Supreme Court did not define petty offenses with greater specificity until 1937 when the Court concluded that an offense with a penalty of ninety days of imprisonment constituted a petty offense. *District of Columbia v. Clawans*, 300 U.S. 617, 626 (1937). And finally, in 1966, the Court defined petty offenses in the way that still persists in the federal system. *Cheff v. Schnackenberg*, 384 U.S. 373, 379–80 (1966) (plurality opinion). There, the Court referred to the congressional definition of petty offenses, "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months is a petty offense," to establish the presumptive line between those trials to which the right to a jury attaches and those to which it does not. *Id.* at 379–80 (citation omitted) (internal quotation marks omitted). *Cheff* and the cases that followed increasingly focused on the penalty that could be imposed upon conviction, instead of the nature of the offense and whether the offense historically triggered the right to a jury trial. *See* Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133, 135–50 (discussing the development of Supreme Court jurisprudence on the right to a jury trial in criminal cases). This development came long after the enactment of the Utah Constitution, however, and does not assist in our interpretation of the state constitution.

the appointment of the commission to propose the state code). The commission worked for eight months and presented a bill to the Legislature that would enact the first Utah State Code. *Preface* to UTAH REV. STAT., at (iii), (iv). The Legislature passed the bill into law, substantially as prepared, during the 1897 legislative session with an effective date of January 1, 1898. *Id.* at (iv).

¶46 Thus, certain provisions of the 1898 Code, having been drafted in 1896 and approved in 1897, can provide persuasive evidence about what the people of Utah would have understood our state constitution to mean.[17] As we read the 1898 Code, we do not expect to find a perfect enshrinement of constitutional principles or a dictionary of constitutional terms. After all, even the first Legislature could have enacted an unconstitutional law or decided to provide statutory protections broader than those they placed in the constitution. But the code may help us understand the contemporaneous public meaning of certain constitutional terms and concepts. The question before us provides a good example: knowing what cases the 1896 Utah Legislature thought would be tried to a jury can inform our thinking about what the people of Utah would have understood the constitution to mean when it refers to the "criminal prosecutions" for which a jury is guaranteed.

¶47 The 1898 Utah Criminal Code defined a crime as "an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction," punishment by "death," "imprisonment," "fine," "removal from office," or "disqualification to hold and enjoy any office of honor, trust, or profit in this state." *Id.* § 4061. The code classified a crime as either a felony or a misdemeanor. *Id.* § 4062. A felony was defined as "a crime which is or may be punishable with death, or by imprisonment in the state prison." *Id.* § 4063. "Every other crime" was a misdemeanor. *Id*. Unless otherwise prescribed, a misdemeanor was "punishable by imprisonment in a county jail not exceeding six months, or by a fine in any sum less than three hundred dollars, or by both." *Id.* § 4065.

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[17] Thirteen of the sixty-three representatives in the first Utah Legislature of statehood (1896) had served as delegates in the 1895 Constitutional Convention. *Compare* WHITE, *supra* ¶ 21 n.7, at 107–22, *with Legislators By Year (1896-current): Year 1896*, UTAH STATE LEGISLATURE, https://le.utah.gov/asp/roster/roster.asp?year=1896 (last visited Sept. 10, 2019).

¶48 The code also defined offenses that would be punished by a fine alone. *See, e.g.*, *id.* § 4369 ("Butcher failing to keep record"); *id.* § 4475 ("Fraud in packing merchandise, etc."); *Id.* § 4487 ("High hats to be removed at theatre, etc."). But even for those crimes ostensibly punishable by only a fine, the 1898 Code permitted a judge to impose "imprison[ment] at hard labor until such fine, or such fine and costs are paid, in the proportion of one day's imprisonment for every dollar of the fine and costs." *Id.* § 5155. Therefore, at the time of statehood, all crimes carried the possibility of imprisonment.[18] *See id.*

¶49 And it appears that state law permitted a defendant to request a jury trial in the prosecution of any crime in the state code. The 1898 Code stated that "[n]o person shall be convicted of a public offense unless by the verdict of a jury, . . . or upon a plea of guilty, . . . or upon a judgment of a court for a public offense not amounting to [a] felony, a jury having been waived." *Id.* § 4516.

¶50 Newspapers from the early days of statehood confirm that defendants were granted jury trials for a wide variety of crimes. In his brief, Maese provided three newspaper articles close in time to statehood where individuals charged with seemingly minor offenses received jury trials.[19] During oral argument, both Maese and the City

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[18] While the phrase "imprisoned at hard labor" eludes a clear definition in the historical record, every case we have identified where this sentence was imposed suggests that the individual was in fact imprisoned in jail, or prison, or otherwise in custody. *See, e.g.*, *In re Lewis*, 41 P. 1077 (Utah 1893) (petitioner pleaded guilty to petit larceny and was sentenced to, among other things, six months of "imprison[ment] at labor in the county jail"); *Ex parte Smith*, 92 P.2d 1098, 1100 (Utah 1939) (quoting municipalities' statutory authority to commit an individual to county jail or prison as "a punishment or in default of the payment of a fine, or fine and costs, [and who] shall be required to work for the city at such labor as his strength will permit not exceeding eight hours in each working day"). Therefore, we understand that the language in section 5155 that permitted a judge to order "imprisonment at hard labor," permitted the judge to order imprisonment as we understand it today—in custody.

[19] Maese attached newspaper articles describing jury trials for: (1) laboring on a Sunday; (2) selling alcohol to a minor; and (3) selling fruit on railroad company land without permission. *Sabbath-Breaking*, PROVO DAILY ENQUIRER, Apr. 18, 1891, at 2, https://newspapers.lib.utah.edu/details?id=1438989 ("A man was

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commented that neither had unearthed evidence of a court denying a defendant's request for a jury trial during the territorial period. In our own review of newspapers from the time, we found no conflicting evidence. Defendants routinely requested and received jury trials for minor offenses—including those that the code designated as punishable only by a fine.[20]

¶51 If that were the entirety of what the 1898 Code told us about the availability of the jury, we could readily conclude that Maese is correct and that a jury was available in all criminal prosecutions. But the 1898 Code contains a wrinkle.

¶52 Section 241 of the 1898 Code stated that:

> All actions before a city justice arising under the city ordinances shall be tried and determined by such justice without the intervention of a jury, except in

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. . . charged with desecrating the Sabbath by well-digging. He was tried by a jury and found guilty, and . . . [the judge] impose[d] a fine of one dollar! The Ordinance says the fine shall be not less than five dollars."); *Whisky on Top*, PROVO DAILY ENQUIRER, Feb. 27, 1891, at 4, https://newspapers.lib.utah.edu/details?id=1436287 (reporting on "the case of . . . Frank Knight," prosecuted for "selling liquor to minors," and noting that the jury returned a verdict of not guilty); *Jury Disagrees*, BOX ELDER NEWS J., July 29, 1915, at 4, https://newspapers.lib.utah.edu/details?id=300011 ("The defendants were arrested for peddling fruit at the . . . [r]ailroad station in violation of . . . [the] City Ordinance," which provided that punishment for the offense would be "'a fine of not less than five nor more than one hundred dollars for each offense.' The defendants demanded a jury trial and four citizens were secured . . . .").

[20] *See, e.g.*, *First District Court at Provo*, SALT LAKE TRIB., Mar. 14, 1890, at 5, https://newspapers.lib.utah.edu/details?id=12418914 ("In the case of Provo City vs. R.S. Hines, charged with violating the Sunday liquor ordinance, the jury brought in a verdict of not guilty."); *id.* ("In the case of Pleasant Grove vs. Joshua Holman, charged with keeping a dog without a collar, the jury returned a verdict of not guilty."); *Liquor Selling in Provo City*, TERRITORIAL ENQUIRER, Sept. 28, 1881, at 3, https://newspapers.lib.utah.edu/details?id=1429199 ("On Friday last, in his charge to the jury in the case of Provo city vs. R. S. Hines, Judge Emerson practically sustained the city ordinance restraining and regulating the sale of distilled liquors in this city . . . .").

> cases where imprisonment for a longer period than thirty days is made a part of the penalty, or where the maximum fine may exceed fifty dollars.

¶53 In other words, in the year after statehood, the drafters of Utah's first Criminal Code (some of whom had been delegates at the 1895 Constitutional Convention), implicitly recognized that the right to a jury trial did not attach to certain prosecutions.[21] Those accused

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[21] This wrinkle contains its own potential wrinkle. It appears that there may have existed a possibility that a defendant convicted of an offense without a jury trial, pursuant to section 241, might nevertheless have received a jury trial on appeal. Under the 1898 Code, a defendant convicted in city justice court could appeal that judgment "to the district court of the county, in the manner provided by law for appeals from justices' courts in similar cases." UTAH REV. STAT. § 240 (1898). An appeal from a justice court judgment, "duly perfected[,] transfer[red] the action to the district court for trial anew." *Id.* § 5165. Those appeals would occur "with such limitations and restrictions as are or may be provided by law," *id.* § 671, and in nearly every respect, the district court proceeding would "be the same as in criminal actions originally commenced in the district court, and judgment" would be "rendered and carried into effect accordingly." *Id.* § 5167. In addition, we find examples in our case law from the years following statehood demonstrating that an appellate proceeding in the district court could include trial by jury. *See, e.g.*, *State v. Briggs*, 146 P. 261 (Utah 1915); *Salina City v. Lewis*, 172 P. 286 (Utah 1918). But it appears that in those cases the defendant would have been, at least arguably, entitled to a jury in the justice court. In *Briggs*, the defendant was charged under the state code. 146 P. at 261. In *Lewis*, the defendant faced up to six months incarceration and up to a $299 fine. 127 P. at 287. And it is unclear whether the defendants in those cases received a justice court jury trial. *See Briggs*, 146 P. at 261; *Lewis*, 172 P. at 287. The record before us does not permit us to definitively conclude how these cases proceeded, so we cannot rule out the potential that a jury trial could be had on appeal although, in the original city justice court proceeding, a jury was unavailable.

The parties have not briefed this question, and in a future case, we might be presented with a more developed historical record on this point. We would note, however, that article 1, section 12's structure suggests that the right to a jury trial is a separate right from the right to an appeal. That section sets forth a litany of rights to

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of violating municipal ordinances where the penalty was less than a month's imprisonment or where the fine was less than fifty dollars would not receive a jury. This suggests that the people of Utah understood that article I, section 12 did not guarantee a jury to defendants facing prosecution for some category of violations.

E. The Principle Contained in Section 241, Exempting Certain Minor Offenses from the Right to a Jury Trial, Has Persisted in Utah Law From 1898 to the Present

¶54 The statutory exemption of certain minor criminal offenses from the right to a jury trial—first enacted by section 241—has continued to be part of Utah law from 1898 to today. Section 241 remained in the Criminal Code unchanged until 1915, when the Legislature made a non-substantive amendment to the statute. 1915 Utah Laws 154 ("All actions before a city or town justice arising under the city or town ordinance shall be tried and determined by such justice without the intervention of [a] jury, except in cases where imprisonment for a longer period than thirty days is made a part of the penalty, or where the maximum fine may exceed $50."). In other words, within twenty years of statehood, the Legislature revisited this provision, but did not adjust the exception to the availability of a jury. Although far from definitive, it does suggest that the Legislature did not spot a constitutional infirmity that it needed to correct.

¶55 In 1919, the Legislature enacted another small change to this statutory provision. 1919 Utah Laws 63. And by 1933, the Legislature had revisited the provision a third time, again with little substantive alteration. UTAH REV. STAT. § 20-5-7 (1933). The 1953 Utah Code shows that this provision was still in place and that the Legislature had made an additional minor change to the statute. UTAH CODE § 78-4-18 (1953). The Legislature therefore revisited the provision and made non-substantive clarifying amendments several times during the early to mid-twentieth century. But it never modified the substance of the exception.

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which an accused is entitled in criminal prosecutions, including the right to "a speedy public trial by an impartial jury," before then providing for "the right to appeal in all cases." UTAH CONST. art. I, § 12. At first blush, we would be reluctant to conflate these rights absent compelling historical evidence that this is how the people of Utah would have understood those rights to operate.

¶56 The first substantive change occurred in 1983. The Utah Legislature amended the statute to provide that jury trials would be available for the prosecution of municipal ordinances if there was a possibility of *any* imprisonment—a change from the thirty days of imprisonment that had been the law since 1898. 1983 Utah Laws 395; *see also* UTAH CODE § 78-4-19 (1986 Supp.) ("All criminal actions before a circuit court arising under city ordinances shall be tried and determined without the intervention of a jury, except in cases where imprisonment may be made a part of the penalty.").

¶57 This change aligned the statute with the then-recent modifications to the Utah Code of Criminal Procedure and the newly created Utah Rules of Criminal Procedure that excluded infractions from the right to a jury trial.[22] *Compare* UTAH CODE § 77-1-8(6) (1978) ("In criminal prosecutions, the defendant is entitled to . . . have a speedy public trial by an impartial jury."), *with* UTAH CODE § 77-1-6(2)(e) (1980); 1980 Utah Laws 114 ("No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate."), *and* UTAH R. CRIM. P. 17(d) (1980) ("No jury shall be allowed in the trial of an infraction."). Because an infraction carries no prison term under Utah law, *see West Valley City v. McDonald*, 948 P.2d 371, 375 (Utah Ct. App. 1997), the 1983 change to section 78-4-19 brought the code into a consistent line of excluding jury trials only when imprisonment was off the table. In 1992, section 78-4-19 was repealed. 1992 Utah Laws 817; *see also* UTAH CODE § 78-4-19 (1992) ("Repealed").

¶58 Accordingly, we can see that the exception to the otherwise broad right to a jury criminal trial enacted in 1898 has remained in the Utah Code for more than 120 years. And, more importantly, the legislative changes closest in time to the enactment of our constitution did not question the propriety of that exception.

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[22] Provisions governing criminal procedure had previously existed as part of the code. JESSICA C. VAN BUREN, MARI J.F. CHENEY, & MARSHA C. THOMAS, UTAH LEGAL RESEARCH ch. 6 § 2.4, 57–58 (William S. Hein & Co., Inc. 2011) (citation omitted). In 1975, the Judicial Council supplemented those statutes with their own rules pursuant to the rulemaking authority granted by the Legislature in 1973. *Id.* (citation omitted). In 1980, the Legislature first promulgated the formal rules of criminal procedure. *Id.* (citation omitted); *see also* UTAH R. CRIM. P. 1(c) ("These rules shall take effect on July 1, 1980.").

F. Other States Almost Consistently Conclude that the Phrase "Criminal Prosecutions" Does Not Include All Criminal Trials for Purposes of the Right to a Jury Trial

¶59 When interpreting our constitution, we have, at times, found it useful to examine sister state law. While the reasoning of other jurisdictions does not determine the conclusions we draw about our own state constitution, we take comfort in knowing that most jurisdictions generally understand that some class of minor criminal offenses does not warrant a jury trial under their respective constitutions.

¶60 Some states interpret their constitutions either in lockstep with the federal constitution or by employing an analysis that resembles the federal approach. The Colorado Supreme Court, for example, concluded that the language in its constitution, providing the right to a jury trial in "criminal prosecutions" and in "criminal cases," did not extend the right to a jury trial to petty offenses. *Austin v. City & Cty. of Denver*, 462 P.2d 600, 602, 604 (Colo. 1969) (en banc). The court borrowed reasoning from the United States Supreme Court's jurisprudence to determine whether an offense is serious, and warrants a jury trial, or is petty, and does not. *Id.* at 603–04 (discussing *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

¶61 Hawaii similarly refers to the federal standard in analyzing the right to a jury trial under its constitution. *State v. Ford*, 929 P.2d 78, 81–82 (Haw. 1996). Hawaii's constitution provides the right to trial by jury "[i]n all criminal prosecutions." HAW. CONST. art. I, § 14. The Hawaii Supreme Court held that "[f]ollowing federal jurisprudence, . . . a defendant charged with a petty crime does not have a constitutional right to a jury trial." *Ford*, 929 P.2d at 81 (citation omitted) (internal quotation marks omitted). Under Hawaiian law, however, courts determine whether an offense is serious or petty by analyzing three factors: "(1) treatment of the offense at common law; (2) the gravity of the offense; and (3) the authorized penalty." *Id.* at 82 (quoting *State v. Lindsey*, 883 P.2d 83, 84 (Haw. 1994)).

¶62 Some jurisdictions conclude their constitutions guarantee juries when there is a possibility of incarceration. For example, the Idaho Supreme Court interpreted the language of its state constitution, "[t]he right of trial by jury shall remain inviolate," IDAHO CONST. art. I, § 7, to require a jury trial whenever the possible sanction includes imprisonment. *State v. Bennion*, 730 P.2d 952, 964 (Idaho 1986). To arrive at this conclusion, the Idaho Supreme Court examined Idaho's history and concluded that "every indication from the law of 1890 and from the deliberations of the constitutional

convention points to there being a right to a jury trial in every extant criminal action," with the possible exception of contempt and removal from office proceedings. *Id.* at 962. "Taking into account the universal right under territorial law to a jury trial whenever imprisonment threatened, the fact that imprisonment distinguishes criminal sanction, and the ardent desire of the Framers to interpose juries on the road to the prison cell," the Idaho Supreme Court concluded that their constitution "guarantees a jury trial whenever the possible sanction includes imprisonment." *Id.* at 964.

¶63 The West Virginia Supreme Court similarly interpreted the relevant provision of its constitution, "[t]rials of crimes, and of misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men," W. VA. CONST. art. 3, § 14, to provide "the right to a jury trial" based upon "the gravity of the offense," concluding that "[a]n appropriate yardstick to measure the gravity of the offense is whether the Legislature has provided for possible incarceration." *Gapp v. Friddle*, 382 S.E.2d 568, 570 (W. Va. 1989) (per curiam). "If it has," the court stated, "the right to a jury trial attaches as soon as the defendant is charged." *Id.* at 570 & n.6 (leaving open the possibility that "a criminal statute prescribing only a fine may nonetheless create an offense grave enough to invoke the guarantee" to a jury trial provided in the state constitution).

¶64 And some jurisdictions conclude that there is no constitutional right to a jury trial for regulatory offenses and focus on distinguishing between offenses that are regulatory and those that are criminal. For example, the Oregon Constitution provides, "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury . . . ." OR. CONST. art. I, § 11. When interpreting that language, the Oregon Supreme Court identified five factors to consider when determining whether an offense is a "criminal prosecution" under their constitution: the type of offense (including whether it "involve[s] traditional elements of mens rea"), penalty, collateral consequences, punitive significance, and arrest and detention. *Brown v. Multnomah Cty. Dist. Ct.*, 570 P.2d 52, 57–60 (Or. 1977) (en banc).

¶65 The Alaska Supreme Court interpreted the language "all criminal prosecutions," ALASKA CONST. art. 1, § 11, by distinguishing between "criminal prosecutions" and regulatory offenses, concluding its constitution did not guarantee a jury trial for the latter. *Baker v. City of Fairbanks*, 471 P.2d 386, 397 & n.17, 402–03 (Alaska 1970). The Alaska Supreme Court distinguished between offenses which may result in imprisonment, loss of a valuable license, or which "connote criminal conduct in the traditional sense

of the term," and those "relatively innocuous offenses" such as "wrongful parking," "minor traffic violations," and "violations which relate to the regulation of property, sanitation, building codes, fire codes, and other legal measures which can be considered regulatory rather than criminal in their thrust, so long as incarceration is not one of the possible modes of punishment." *Id.* at 402.

¶66 Other states look to see whether the offense was the type of offense triable by a jury at the time of the adoption of their constitutions. For example, the Connecticut Supreme Court has interpreted the state's constitutional language, "[t]he right of trial by jury shall remain inviolate," CONN. CONST. art. I, § 19, to require a jury trial if "the issue raised in the action is substantially of the same nature or is such an issue as prior to 1818 would have been triable to a jury." *Swanson v. Boschen,* 120 A.2d 546, 549 (Conn. 1956).

¶67 While many of the analyses that our companion courts have undertaken do not focus on the original public understanding of their constitutions at the time of their adoptions, those decisions paint a consistent picture that most jurisdictions recognize that the constitutional right to a jury trial does not include *some* class of minor offenses.

G. Focusing on the Potential for Imprisonment Best Comports with What We Understand to be the Original Public Meaning of the Utah Constitution

¶68 This history teaches us a couple of lessons. First, the delegates at the Utah Constitution spoke to the importance of juries in our legal system. Second, since statehood, Utah statutes have always exempted some minor class of crimes from the right to a jury trial. Third, the exemption of certain minor offenses is consistent with the contemporaneous decisions of the United States Supreme Court and the supreme courts of many sister states.

¶69 In light of this history, we can confidently conclude that at the time of statehood, the people of Utah would have understood that the trials for violations of certain minor offenses were not "criminal prosecutions" for which the Utah Constitution guaranteed a jury.

¶70 The trick, however, is trying to wring from the historical record *exactly* what kind of criminal trials were not included in

article 1, section 12's guarantee.[23] It appears that we could interpret section 241 of the 1898 Code as evidence of one of three different lines that distinguish a criminal trial that triggers the right to a jury trial from one that does not. First, we could focus on municipal offenses—since those were the ones exempted by section 241 in 1898. Second, we could analyze whether the crime could be deemed a regulatory offense—as most municipal ordinances at the time of statehood addressed regulatory crimes and not the broader set of crimes that they address today. Third, we could instead focus on the type or severity of punishment for the offense.

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[23] The City offers two arguments about how we might draw this line. First, the City argues that because the early statutes made no "mention of offenses classified as infractions," prosecuting an infraction "was not an action cognizable at law when the Utah Constitution was adopted." Therefore, reasons the City, the Utah Constitution does not preserve a right to a jury trial for an infraction prosecution.

The City's argument erroneously relies on the label we attach to a crime. Under the City's logic, the state could deny defendants a right to jury trial in burglary cases by simply designating burglary as an infraction. Or the state could invent an entirely new designation that did not exist at statehood, shift existing crimes into that designation, and circumvent the jury trial right.

Second, the City argues that because there was no crime at statehood analogous to a traffic offense, there is no constitutionally guaranteed jury trial for a traffic offense.

The City's arguments misunderstand the way we apply constitutional guarantees. The Utah Constitution enshrines principles, not application of those principles. To say that there is no right to a jury trial on a vehicular offense because there were no automobile offenses in the code at the time of statehood is tantamount to saying that there can be no jury trial in any case involving a computer crime because there were no computers at the time of statehood. The proper inquiry focuses on what principle the constitution encapsulates and how that principle should apply.

As a coda to our reaction to the City's argument, we would also note that at the time of statehood, there were a number of crimes detailed in the code that are analogous to modern traffic violations, for which a defendant would have received a jury trial. *See, e.g.*, UTAH REV. STAT. § 1139 (1898) ("Obstructions and injuries to highways"); *id.* § 1143 ("Teams passing each other"); *id.* § 4296 ("Racing on highways").

¶71 We recognize that none of these paths is perfect and each would be susceptible to a critique that we are ignoring something in the historical record that suggests an alternate outcome.[24] But this is because the historical and legal records are imperfect. It would be unsatisfactory to conclude that because we cannot find an answer beyond critique, the constitutional language must mean nothing, or that it can mean whatever we want it to mean. When we reach this point in our analysis, we are required to interpret the constitutional language in the best fashion we can and leave open the possibility for further refinement if we are later presented with additional evidence of the original understanding of the constitutional provision.

¶72 As noted above, we could draw the line at municipal offenses. And as set forth below, during Utah's territorial and early statehood eras, municipal ordinances appeared to focus their attention exclusively on regulatory offenses: offenses that were aimed at protecting the public health and safety and did not involve moral delinquency.[25] The historical record demonstrates this

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[24] As the United States Supreme Court stated in *Duncan v. Louisiana*;

> Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case it is necessary to draw a line in the spectrum of crime, separating petty from serious infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little.

391 U.S. 145, 160–61 (1968).

[25] Black's Law Dictionary defines a public-welfare offense as "[a] minor offense that does not involve moral delinquency and is prohibited only to secure the effective regulation of conduct in the interest of the community. [ ]An example is driving a car with one brake-light missing. [ ]Also termed . . . regulatory offense." *Offense:*

(continued . . .)

attention on regulatory offenses, even though municipalities had the power to regulate more broadly.[26]

¶73 For example, some municipal ordinances focused on sanitation regulations. *See, e.g.*, Salt Lake County, Utah, Ordinance Establishing Sanitary Rules for Salt Lake County (July 1, 1896). Municipal ordinances also addressed health regulations. *See, e.g.*, Salt Lake County, Utah, Ordinance Regulating Quarant[in]ing Proceedings in Con[n]ection with Contagious and Infectious Disease (Dec. 4, 1900). Others regulated safety concerns. *See, e.g.*, Salt Lake County, Utah, Ordinance Regulating the Keeping and Storing of Explosives Within the Limits of Salt Lake County, and Outside the Limits of Incorporated Cities and Towns Therein (Apr. 25, 1904). Utah municipalities also focused their attention on alcohol

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public-welfare offense, BLACK'S LAW DICTIONARY, (11th ed. 2019) (emphasis omitted). Black's Law Dictionary defines a regulatory offense as "[a] statutory crime, as opposed to a common-law crime" and references a public welfare offense. *Offense: regulatory offense*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[26] UTAH REV. STAT. § 206:88 (1907) (providing that the city council has the power "[t]o pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or for discharging all powers and duties conferred by this title, and such as are necessary and proper to provide for the safety, and preserve the health, and promote the prosperity, improve the morals, peace, good order, comfort, and convenience of the city and the inhabitants thereof, and for the protection of property therein; . . . *provided*, that the punishment of any offense shall be by a fine in any sum less than $300, or by imprisonment not to exceed six months, or by both such fine and imprisonment."); *Am. Fork City v. Charlier*, 134 P. 739, 741 (Utah 1913) ("The overwhelming weight of authority in this country is to the effect that, where such power is conferred upon municipalities, they may prohibit and punish the same acts that are prohibited and punished by the state laws, and may impose the same penalties imposed by the state laws, if within the jurisdiction of the municipal courts."); *Salt Lake City v. Howe*, 106 P. 705, 707 (Utah 1910) ("In the first place the Legislature could confer police powers upon the municipality over subjects within the provisions of existing state laws, and authorize it, by ordinance, to prohibit and punish acts which are also prohibited and punishable as misdemeanors under the general statutes of the state.").

regulation. *See, e.g.*, *supra* n.19; *see also Tooele City v. Hoffman*, 134 P. 558, 559 (Utah 1913) (addressing arguments made by a defendant convicted of selling intoxicating liquors in violation of a city ordinance).

¶74 Municipal ordinances also regulated traffic and cars. *See, e.g.*, Salt Lake County, Utah, Ordinance Prohibiting the Running of Automobiles, Motor Cars and Motor Cycles Over and Upon Public Highways in Salt Lake County, State of Utah, at a Speed in Excess of Fifteen Miles Per Hour (Aug. 7, 1907). And municipal ordinances regulated the licensing of different trades. *See, e.g.*, Salt Lake County, Utah, Ordinance Licensing and Regulating the Operation and Maintenance of Pool and Billiard Rooms in Salt Lake County (May 23, 1910).[27]

¶75 In other words, in Utah, municipal ordinances were historically focused on regulatory and public welfare offenses,[28]

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[27] Emblematic of the challenges inherent in the originalist inquiry, records of territorial municipal ordinances were inaccessible in the Utah State Archives and it is not readily apparent where they might be found, if they can be found at all. The Salt Lake County Archives, for example, retains ordinances from 1898. These are the oldest we could find, and we rely on them here as examples of what ordinances then addressed. We also relied on newspaper reporting to provide snapshots of the prosecutions for ordinance violations during the territorial era. But we again stress that we are not historians and that we might have the opportunity to refine our understanding based upon additional historical research.

[28] In other jurisdictions, as well, municipal ordinances historically focused exclusively on regulatory offenses. And for this reason, some jurisdictions have concluded that violations of municipal ordinances were not crimes for the purpose of the right to a jury trial. *See* 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 432 (3d ed. 1881) ("Offences against ordinances properly made in virtue of the implied or incidental power of the corporation, or in the exercise of its legitimate police authority for the preservation of the peace, good order, safety, and health of the place, and which relate to minor accts and matters not embraced in the public criminal statutes of the state, are not usually or properly regarded as *criminal*, and hence need not necessarily be . . . tried by a jury.") (citing cases); 9A MCQUILLIN: MUN. CORP. § 27:42 (3d ed. 2019) ("Violations of municipal police regulations are not usually regarded as crimes as that term is used in our law.") (listing

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although they had the power to regulate more broadly. *Supra* ¶ 72 n.26. Today, municipalities retain the ability to regulate to the extent of their power. *See* UTAH CODE § 10-8-84. (providing that municipalities may "pass all ordinances and rules, and make all regulations, not repugnant to law, . . . as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, and convenience of the city and its inhabitants, and for the protection of property in the city"). City ordinances can criminalize the same conduct as a state statute, so long as the ordinances do not conflict with a state statute. *Redwood Gym v. Salt Lake Cty. Comm'n*, 624 P.2d 1138, 1144 (Utah 1981) ("[L]ocal governments may legislate by ordinance in areas previously dealt with by state legislation, provided the ordinance in no way conflicts with existing state law . . . .").

¶76 Thus, while municipal ordinances appeared to focus on public welfare regulations at the time of statehood, they regulate much more broadly today and may sanction the same conduct as the state code. If we were to draw a line that juries are available for violations of state statutes, but not municipal ordinances, the right to a jury for the exact same conduct could be tried to either a jury or a judge depending on whether that defendant is charged with violating the state statute or the parallel municipal ordinance.

¶77 The only clue in the historical record that suggests that this is the principle the Utah Constitution was intended to enshrine is the evidence that municipalities had the authority to regulate the same conduct as the state statutes, so long as not in conflict. *See* UTAH COMP. LAWS § 206 (1907). But as we have recognized before, "asserting one, likely true, fact about Utah history and letting the historical analysis flow from that single fact" is not the recipe for sound constitutional interpretation. *State v. Tulley*, 2018 UT 35, ¶ 82, 428 P.3d 1005 (citation omitted) (internal quotation marks omitted). Future cases may be able to further illuminate the historical record. But on the record currently before us, we cannot conclude that the right to a jury was intended to rise or fall on whether the prosecution was for an offense defined by state law or one defined by municipal ordinance.

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jurisdictions that do not treat municipal ordinance violations as crimes).

¶78 To solve that concern, we could recognize that at the time of statehood, municipal ordinances were primarily regulatory and interpret our constitution to not extend the right to a jury for the prosecution of regulatory offenses. Several of our fellow supreme courts have interpreted their constitutions along these lines and consequently, have dedicated much thinking to how to properly define a regulatory offense.

¶79 A rule that focuses exclusively on the nature of an offense as regulatory or not is a poor fit in the context of our constitutional and statutory history. Such a rule would not account for the fact that section 241 of the 1898 Code did not simply exclude municipal ordinances—and therefore indirectly regulatory offenses—from the jury trial. And drawing a bright line between regulatory and non-regulatory offenses ignores that the earliest state codes also regulated public welfare offenses in a way that overlapped with the municipal ordinances. *Compare* UTAH REV. STAT. § 4278 (1898) (prohibiting the maintenance of "a pest house, etc., at or near city or town" as well as any "place for persons affected with contagious or infectious diseases"), *and id.* § 4296 ("Racing on highways"), *with* Salt Lake County, Utah, Ordinance Regulating Quarant[in]ing Proceedings in Con[n]ection with Contagious and Infectious Disease" (Dec. 4, 1900), *and* Salt Lake County, Utah, Ordinance Prohibiting the Running of Automobiles, Motor Cars and Motor Cycles Over and Upon Public Highways in Salt Lake County, State of Utah, at a Speed in Excess of Fifteen Miles Per Hour (Aug. 7, 1907).

¶80 Because the prosecution of a violation of a regulatory offense listed in the state code would have necessitated a jury trial, whether an offense is regulatory does not appear to be the constitutional principle enshrined in article I, section 12. And we anticipate that focusing on whether or not an offense is regulatory for purposes of the right to a jury trial would lead to uncertainty in the law while courts slowly sorted out which crimes should or should not be deemed regulatory. Therefore, using either ordinances or regulatory offenses is an awkward fit at best.

¶81 A third alternative would focus on the potential penalty. As explored above, section 241 of the 1898 Code denied a jury trial in

prosecutions of municipal ordinances when the potential for incarceration was less than a month.[29]

¶82 Although we are relying on indirect evidence that the potential for incarceration of longer than a month is what the people of Utah understood to guarantee the right to a jury trial, we can take some comfort in the fact that the cases exempting petty crimes from the jury trial right recognize that the practice of exempting some minor crimes from the right to trial by jury existed at common law. *See, e.g.*, *Callan v. Wilson*, 127 U.S. 540, 550–54, 557 (1888); *see also supra* ¶¶ 59–67; *see generally* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 980 (1926) ("Both in England and in the colonies a clear and unbroken practice . . . emerges for two centuries preceding the Constitution. Many offenses were customarily tried solely by magistrates.").

¶83 And that, coupled with the line drawing in the 1898 Code allow us to conclude that the people of Utah at the time of statehood would have understood that if a defendant in a criminal prosecution faced less than a month's incarceration, she was not entitled to a trial by jury.[30] Moreover, focusing the inquiry on the potential punishment the offense carries creates a functional test that honors the constitutional language and our understanding of our history.[31]

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[29] Section 241 also denied the right to a jury trial in cases where the fine that could be levied was less than fifty dollars. We do not focus on this, however, because Maese raises no specific argument that his fine is the reason that the constitution guarantees him a jury trial. Without specific argument from him—nor a response from the City—we are not well positioned here to determine what amount of potential fine Utahns in 1895 would have understood warranted the right to a jury trial under the Utah Constitution. We therefore leave open the question of what amount of fine would bring a criminal trial within the meaning of a "criminal prosecution" for the purpose of the right to jury trial in article I, section 12.

[30] And while not dispositive, we see some persuasive value in recognizing that from 1898 to the present, Utah law has consistently denied a jury for certain minor offenses. *Compare* UTAH REV. STAT. § 241 (1898), *with* UTAH CODE § 77-1-8(6), *and* UTAH R. CRIM. P. 17(d); *supra* ¶¶ 54–58.

[31] In a separate opinion, Justice Lee sees no "adequate basis in the originalist record" to conclude that section 241 speaks to the

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¶84 We therefore conclude that the Utah Constitution's guarantee of a jury trial does not extend to prosecutions where the maximum sanction is thirty or fewer days incarceration and/or a minor financial penalty.[32]

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constitutional right to a jury trial. *Infra* ¶ 94. And he opines that this does not tell us "anything useful" about the public understanding of the Utah Constitution. *Id.* ¶ 91. We disagree. Although not conclusive about the meaning of our constitution, the statute is near contemporaneous evidence of what cases the people of Utah thought would be tried to a jury. A number of the legislators who voted on the statute were the same men who crafted the constitution.

We acknowledge that it is fair to question, as Justice Lee does, whether the first Utah Legislature might have enacted a jury trial right broader than that the Utah Constitution guarantees. But there is a persuasive inference that the Utah Legislature was acting in conformance with the public understanding of the scope of the right contained in the document they had drafted just months before. This is an inference that is not contradicted by anything in the record.

While we recognize that additional evidence might come to light that would cause us to revisit this conclusion, if this record is insufficient to permit us to interpret our constitution using an originalist approach, it is difficult to imagine what, given what is available to us from the time of statehood, would ever allow us to opine. Indeed, if the evidence this opinion describes is insufficient, originalist inquiry risks becoming a fruitless exercise where a combination of the presumption of constitutionality and the imprecisions in the historical record persistently frustrate our ability to interpret the Utah Constitution. And originalism could become a type of one-way ratchet that uses a murky historical record to "de-constitutionalize" previously recognized rights but imposes a near-impossible bar on those trying to give meaning to state constitutional guarantees.

[32] To be clear, we do not intend to suggest that the 1898 Code can always serve as a Rosetta Stone for understanding our constitution. The persuasive value of the code will wax and wane depending on the constitutional provision at issue and the other evidence available about the public understanding of that provision. And we reiterate our caution that it is frequently unhelpful to base an argument on "one, likely true, fact" and then let "the historical analysis flow" from the single data point. *State v. Tulley*, 2018 UT 35, ¶ 82, 428 P.3d 1005 (2018) (citation omitted) (internal quotation marks omitted). In

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¶85 In comparison to this complex history, the analysis of Maese's claim is simple. Maese faced no risk of imprisonment, therefore the Utah Constitution did not guarantee him a jury.[33] The district court did not err in denying him a jury trial. And, as applied to Maese, Utah Code section 77-1-6(2)(e) and Utah Rule of Criminal Procedure 17(d), which provide that there is no right to a jury trial for the prosecution of an infraction, do not violate the Utah Constitution.

CONCLUSION

¶86 The Utah Constitution's language, the debate at the Constitutional Convention, the first state code, historical evidence, and evidence from other jurisdictions all indicate that at the time of statehood, the public would have understood that some class of minor offenses did not trigger the right to a jury trial under article I, section 12. We conclude that the Utah Constitution guarantees the right to a jury trial for crimes that are punishable by more than thirty days of imprisonment and/or carry the possibility of a substantial

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this context, that means that a party will often need to do more than argue that because the 1898 Code contained a certain provision or term, related provisions of the Utah Constitution must have an identical meaning. Counsel would do well to explain how those statutory provisions can help us understand the public meaning of specific constitutional language.

[33] We understand that some might perceive incongruity with the result we reach today and the holding of *Simler v. Chilel*, 2016 UT 23, 379 P.3d 1195. There, we recognized that small claims cases were cognizable at law at the time of the adoption of the Utah Constitution. *Id.* ¶¶ 16–17. Accordingly, the Utah Constitution guaranteed a right to a jury trial for all small claims cases. *Id.* Here, we conclude that the Utah Constitution does not guarantee a jury trial for all criminal trials. The reasoning of both *Simler* and the holding today is grounded in our constitution and statutes from the territorial period and early statehood. *See id.* ¶¶ 14–16 & n.4. In *Simler*, there was statutory evidence that "jury demands in small claims justice courts were explicitly provided for in Utah's statutes for over a century." *Id.* ¶ 17. Here, we have statutory evidence dating from 1898 that criminal defendants could not demand a jury trial if prosecuted under a municipal offense punishable by less than thirty days imprisonment or less than a fifty dollar fine.

financial penalty. We affirm the district court's denial of Maese's request for a jury trial.

ASSOCIATE CHIEF JUSTICE LEE, concurring in part and concurring in the judgment:

¶87 The majority opinion is a model of originalist analysis on a range of important questions. In rejecting Santiago Maese's assertion of a state constitutional right to a jury trial on a traffic infraction, the court presents persuasive grounds for crediting the "original public meaning" of the Utah Constitution as the basis for our decision. *Supra* ¶ 19. And it proceeds to outline a careful, sophisticated methodology for assessing such meaning—an approach that appropriately frames the relationship between original intent and original meaning, *supra* ¶ 19 n.6, helpfully identifies the "public" whose meaning we seek, *supra* ¶ 21 n.7, and carefully sifts through relevant historical material to show that the generation of the framing of the Utah Constitution would not have viewed a mere charge on an infraction (which carries no potential term of incarceration) to give rise to a right to a jury trial, *supra* ¶¶ 34–44.

¶88 I concur wholeheartedly in the above-noted aspects of the majority opinion, and commend Justice Pearce for the laboring oar he has taken in cementing these refinements in our jurisprudence. I write separately, however, because I disagree with the specific line established by the court in reaching its holding. I see no basis for the decision to establish conclusively that the "potential for incarceration of longer than a month is what the people of Utah understood to guarantee the right to a jury trial." *Supra* ¶ 82. I would instead hold only that Maese has failed to carry his burden of establishing a constitutional right to a jury trial for an offense (here, an infraction) for which there is no risk of incarceration.

¶89 This is a conclusion amply supported by the extensive historical material presented in the majority opinion—material that shows quite clearly that the original meaning of the jury guarantee in the Utah Constitution did not establish a jury trial for all offenses. *Supra* ¶¶ 34–53. And Maese has not overcome the presumption of constitutionality to establish that a traffic infraction would have been entitled to a jury trial. *See supra* ¶¶ 34–53.[34] I see no reason to tread

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[34] *See also Callan v. Wilson*, 127 U.S. 540, 555 (1888) ("[T]here is a class of petty or minor offenses not usually embraced in public criminal statutes, and not of the class or grade triable [under] (continued . . .)

any further in our disposition of this case. We can simply hold that Maese has not overcome his burden of proving that an offense like a mere infraction, which carries no risk of incarceration, triggers a right to a jury trial. And we can reserve for a future case—a case in which the matter is squarely presented—a decision on the question of what precise term of incarceration may trigger a constitutional right to a jury trial.

¶90 The majority's basis for the one-month standard is a provision of the 1898 Utah Code—Utah Revised Statutes section 241—which provided for a bench trial for offenses triggering a term of incarceration of less than thirty days. *See supra* ¶¶ 70, 82–84. I agree that this provision has some salience in informing the public understanding of the legal right to a jury trial at the time of the ratification of the Utah Constitution. In light of section 241 and other cited statutory provisions, I can see a basis for the conclusion that "the people of Utah at the time of statehood would have understood that if a defendant in a criminal prosecution faced less than a month's incarceration, she was not entitled to a trial by jury." *Supra* ¶ 83. That is fine as far as it goes. But the majority's public understanding is not tied to a *constitutional* right to a jury trial. It is tied only to a *statutory* provision. And the majority is making the leap that the public would have viewed the scope of the *statutory* right to a jury trial to be the same as the underlying *constitutional* right. That may not follow.

¶91 The 1898 Legislature could have been establishing a statutory jury trial right that exceeded the constitutional floor. If so, the majority may be right that the public would have viewed the right to a jury trial to be triggered by a charged offense with a "potential for incarceration of longer than a month." *Supra* ¶ 82. But that would not tell us anything useful about the public understanding of the Utah Constitution. It would just tell us about the public understanding of the state code.

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common law by a jury . . . ."); *id.* at 552 (recognizing that many state courts had "adjudged cases, arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate," and had concluded that "there are certain minor or petty offenses that may be proceeded against summarily, and without a jury"); Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 928 (1926) (noting there was a "striking . . . volume of offenses" prosecuted without a jury at the time of the founding).

¶92 The Legislature, alternatively, may have inadvertently been seeking to drop below the floor—in violation of the founding document. That Legislature was not immune from constitutional violations.[35] And that is another ground for doubting the constitutional significance of the statutory evidence cited by the majority.

¶93 The majority acknowledges these problems. It openly concedes that "even the first Legislature could have enacted an unconstitutional law or decided to provide statutory protections broader than those they placed in the Constitution." *Supra* ¶ 46. Despite these broad concessions, the majority pivots quickly to the contradictory assertion that the enactments of the first Legislature nonetheless "help us understand the contemporaneous public meaning of certain constitutional terms and concepts." *Supra* ¶ 46. The logic of this pivot is nowhere explained. And I cannot accept it. "[K]nowing what cases the 1896 Utah Legislature thought would be tried to a jury" does not tell us "what the people of Utah would have understood *the constitution* to mean when it refers to the 'criminal prosecutions' for which a jury is guaranteed.'" *Supra* ¶ 46 (emphasis added). The terms of the 1898 Code do not tell us what the Legislature thought the Utah Constitution required; they tell us only what the Utah Legislature decided to require as an exercise of its legislative authority. And since the Legislature could have been aiming above the constitutional floor, the terms of the statute are not helpful as "indirect evidence" of the public understanding of the constitutional right to a jury trial. *Supra* ¶ 82.

¶94 The majority cements in place a one-month standard on the ground that this is a "functional test" that is more workable than other possible standards rejected by the court (as to whether an offense is a "municipal" or "regulatory" offense, for example). *Supra* ¶¶ 77, 79. I agree with the court's rejection of these alternative standards. But I see no logical reason to establish a one-month incarceration standard as the basis for resolving this case, just as I see no adequate basis in the originalist record for the conclusion that the public understanding of the *constitutional* right to a jury trial would

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[35] *See Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 678 (1970) ("[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence . . . ."); *Marbury v. Madison*, 5 U.S. 137, 138 (1803) (finding that a provision of the Judiciary Act of 1789 violated article III of the United States Constitution).

have been dictated by the *statutory* standard established by the Utah Legislature in the 1898 Code.

¶95 I would simply hold that Maese has failed to carry his burden of establishing a right to a jury trial for a traffic infraction, an offense that carries no risk of incarceration.[36] And I would reserve for another day—a case in which this precise question is presented—a decision on whether an offense carrying a short term of incarceration may trigger such a right.

¶96 The majority objects to my approach on the ground that it renders the originalist inquiry a "fruitless exercise where a combination of the presumption of constitutionality and the imprecisions in the historical record persistently frustrate our ability to interpret the Utah Constitution." *Supra* ¶ 83 n.31. This is problematic, in the majority's view, because it allows originalism to use a "murky historical record" as a "one-way ratchet" that refuses to establish a constitutional right. *Id.* I am puzzled by this response. The cited effect of the presumption of constitutionality is not a bug in my application of this legal tool; it is the standard feature of such a presumption. If a party seeking to challenge the constitutionality of a law enacted by the representatives of the people fails to provide a sufficient basis for the establishment of a clear constitutional standard, then the presumption of constitutionality kicks in. The whole point of that presumption is to preserve the law as enacted by the people in the face of only a "murky" basis for setting it aside.[37]

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[36] *See Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 920 (Utah 1993) ("We therefore restate the burden to be met by one who challenges an enactment on constitutional grounds: The act is presumed valid, and we resolve any reasonable doubts in favor of constitutionality."); *see also Univ. of Utah v. Shurtleff*, 2006 UT 51, ¶ 30, 144 P.3d 1109 ("[W]e presume [] statute[s] to be constitutional, resolving any reasonable doubts in favor of constitutionality." (citation omitted)).

[37] These premises are rooted in fundamental principles of separation of powers. They trace to the founding, *see* THE FEDERALIST No. 78, at 474 (Garry Wills ed., 1982) (noting that the law of "superior obligation and validity"—the Constitution—will override a statute only in the event of an "irreconcileable [sic] variance" between the two); *id.* at 476 (explaining that the presumption ensures that judges—who are *not* accountable to the people—do not "substitut[e] their pleasure to that of the legislative body"), and have

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¶97 And the record here is concededly murky. The majority concedes as much by hedging its reliance on the 1898 Code with a series of caveats: (a) the terms of the code will not "always serve as a Rosetta Stone for understanding our constitution"; (b) the "persuasive value" of the code "will wax and wane depending on the constitutional provision at issue and the other evidence available about the public understanding of that provision"; (c) "a party will often need to do more than argue that because the 1898 Code contained a certain provision or term, related provisions of the Utah Constitution must have an identical meaning"; and (d) "[c]ounsel would do well to explain how those statutory provisions can help us understand the public meaning of specific constitutional language." *Supra* ¶ 84 n.32. These and other concerns are more than a sufficient basis for the conclusion that there is ample doubt about the precise line envisioned by the constitutional guarantee of a right to a jury trial in "criminal prosecutions." With this in mind, we can properly conclude that Maese has not carried his burden of proving that the Utah Legislature infringed his constitutional rights in denying him a jury trial on a charge of a traffic infraction carrying no risk of incarceration. In my view, however, there is no basis for the additional conclusion that the constitutional standard should depend in all future cases on whether a defendant is subject to a one-month (or more) term of incarceration.

¶98 My proposed application of the presumption of constitutionality does not render originalism a "one-way ratchet" in

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been reaffirmed in contemporary jurisprudence, *see United States v. Morrison*, 529 U.S. 598, 607 (2000) (stating that the refusal to invalidate a democratically enacted law except upon a "plain showing" of unconstitutionality accords "[d]ue respect for the decisions of a coordinate branch of Government"); *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (noting that the presumption of constitutionality, dating "from the early days of the Republic," requires courts to respect the decisions of the people's representatives in Congress in acting "within its sphere of power and responsibilities," particularly given that Congress itself "has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution"); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 916 (1995) (Thomas, J., dissenting) (asserting that we should decline to "invalidate the decisions of a State or its people" in the "absence of evidence" of the precise meaning of a provision of the Constitution).

every case. It just recognizes that the historical record here is insufficient to draw the line proposed by the majority.

¶99 The majority complains that if the record in this case "is insufficient to permit us to interpret our constitution using an originalist approach, it is difficult to imagine what . . . would ever allow us to opine." *Supra* ¶ 83 n.31. That makes little sense to me. Again, the historical record here is strikingly scant. The majority's caveats concede the problem. And the problem is highlighted by the acknowledgement that the line drawn by the 1898 Code could be either above or below the constitutional floor. *See supra* ¶ 46. If in fact the 1898 Code is no Rosetta Stone, and a party "need[s] to do more" than cite its provisions, then Maese has failed to carry his burden of proof on the precise constitutional line to be drawn in our resolution of this case. *Supra* ¶ 84 n.32. That is the ground on which I would decide this case.

¶100 We can resolve the constitutional uncertainty conceded by the majority by falling back on the longstanding notion of a presumption of constitutionality. *See supra* ¶ 96 n.37. Doing so is not a "frustrat[ion] [of] our ability to interpret the Utah Constitution." *Supra* ¶ 83 n.31. It is an affirmation of a longstanding tenet of originalism—the presumption of constitutionality, which is deeply embedded in our law. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140–146 (1893) (establishing the historical basis for the rule requiring the judiciary to defer to the Legislature and uphold legislation unless it clearly contravenes the constitution); PHILIP HAMBURGER, LAW & JUDICIAL DUTY 309–16 (2008) (suggesting that at the time of the Framing, judges were to follow a law unless it created a "manifest contradiction" with a higher law). Maese bears the burden of overcoming this presumption. And his failure to do so is a basis for a ruling against him.