

8-2014

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Recommended Citation

Dez, Jordan (2014) "Building the Canon of Utah Constitutional Law: Lessons from the Utah Public Interest Standing Doctrine," *Utah Law Review*: Vol. 2014 : No. 5 , Article 4.
Available at: <https://dc.law.utah.edu/ulr/vol2014/iss5/4>

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BUILDING THE CANON OF UTAH CONSTITUTIONAL LAW: LESSONS FROM THE UTAH PUBLIC INTEREST STANDING DOCTRINE

Jordan Dez*

I. INTRODUCTION

There exists an uneven dialogue between the Utah judiciary and the Utah bar on pleading under the Utah Constitution. While the bench encourages legal arguments based in the State Constitution,¹ members of Utah's legal community have noted challenges to succeeding on state constitutional claims.² When the bar tries to make a constitutional claim, there is little case law on which to base an argument,³ and when the Utah Constitution is pleaded, the court will often decide on other grounds.⁴ The bar should anticipate few cases to support a state constitutional proposition. However, in the interest of developing the Utah constitutional canon, advocates should not opt for a mere footnote to the one case remotely on point or undeveloped arguments relying on nothing more than the plain text of the Utah Constitution. Rather, the brief that gives modern and historical meaning to the text by using various interpretational tools that have been offered by the Utah Supreme Court not only has a good chance of being heard but also can push forward new state constitutional doctrine.

Since the 1970s, the Utah Supreme Court has given meaning to state constitutional provisions independent of the interpretations of their federal counterparts. This tradition is known as New Judicial Federalism⁵ and, consistent with this tradition, Utah courts have been departing from positions historically

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¹ *State v. Bobo*, 803 P.2d 1268, 1272 (Utah Ct. App. 1990) (“Until such time as attorneys heed the call of the appellate courts of this state to more fully brief and argue the applicability of the state constitution, we cannot meaningfully play our part in the judicial laboratory of autonomous state constitutional law development.” (citations omitted)), *overruled on other grounds by State v. Tiedemann*, 162 P.3d 1106 (Utah 2007); Christine M. Durham, *Employing the Utah Constitution in the Utah Courts*, UTAH B.J., Nov. 1989, at 25, 25–27.

² Paul Wake, *A Precious Birthright or Federal Porridge: Which Should Utah Lawyers Choose?*, UTAH B.J., Jan./Feb. 2007, at 27, 30 (“Sometimes, the Utah Supreme Court has talked a good talk about its willingness to interpret the Utah Constitution, and then resorted to the easy lockstep approach in interpreting the state’s constitution.”).

³ *See id.*

⁴ *See, e.g., Weber Cnty. v. Ogden Trece*, 321 P.3d 1067, 1071 (Utah 2013); *State v. Hoffmann*, 318 P.3d 225, 236–37 (Utah Ct. App. 2013).

⁵ Douglas S. Reed, *Twenty-Five Years after Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC’Y REV. 175, 176 (1998).

interpreted “lockstep”⁶ with the U.S. Constitution, in favor of a more “primacist”⁷ approach. When a state judiciary takes a primacist approach, they first turn to the state constitution to provide relief. If relief cannot be provided under the state constitution, they will then turn to the U.S. Constitution.⁸ Conversely, under a lockstep approach, the state judiciary will interpret the state constitutional provisions to mean the same as their federal counterparts.⁹ Under a third “interstitial” approach, a court will only turn to the state constitution if relief cannot be provided under the U.S. Constitution.¹⁰

One example of a Utah court’s early participation in New Judicial Federalism is the public interest standing doctrine, also known as “alternative standing.” In *Jenkins v. State*,¹¹ the Utah Supreme Court introduced the public interest standing doctrine into the Utah constitutional dialogue based solely on the respondent’s briefing grounded in sister state law.¹² Previously, standing had always been a question interpreted lockstep with the U.S. Constitution.¹³ But as judiciaries, including Utah’s, became more willing to depart from lockstep traditions, the stage was set for success under arguments based in the Utah Constitution.

Since the salad days of New Judicial Federalism and *Jenkins v. State*, the Utah constitutional record has developed, as have the tools for interpretation. This Note argues that although the current Utah Supreme Court will show more restraint than the *Jenkins v. State* court in adopting new doctrine, these developments have not altered the court’s continuing commitment to the primacist approach.¹⁴ The Utah Supreme Court will hear and rule on arguments based in the text of the Utah Constitution when they are developed beyond the plain dictionary meaning. The manner in which the court utilized constitutional interpretation to develop the Utah public interest standing doctrine and the Utah Supreme Court’s proposed methods of constitutional interpretation from *American Bush v. City of South Salt Lake*¹⁵

⁶ Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 839 & n.2 (2011).

⁷ *See id.* at 837.

⁸ *See id.*

⁹ *See id.* at 839 & n.2.

¹⁰ *Id.* at 837.

¹¹ 585 P.2d 442 (Utah 1978).

¹² *Id.* at 443 (citing State *ex rel. Seago v. Kirkpatrick*, 524 P.2d 975 (N.M. 1974)); *see also* Brief for Respondent-Plaintiff at 18–22, *Jenkins v. State*, 585 P.2d 442 (Utah 1978) (No. 17566) (relying on sister state law and an analogy to a Utah taxpayer standing case to argue for a more flexible standing doctrine).

¹³ *Cf. State v. Kallas*, 94 P.2d 414, 420 (Utah 1939) (“This court is committed to the rule that an attack on the validity of a statute cannot be made by parties whose interests have not been, and are not about to be, prejudiced by the operation of the statute.”).

¹⁴ The Utah Supreme Court is expressly primacist. *Am. Bush v. City of S. Salt Lake*, 140 P.3d 1235, 1239 (Utah 2006); *West v. Thomson Newspapers*, 872 P.2d 999, 1006 (Utah 1994); *Wake*, *supra* note 2, at 30; *see* Sinéad McLoughlin, Comment, *Choosing a “Primacy” Approach: Chief Justice Christine M. Durham Advocating States Rights in Our Federalist System*, 65 ALB. L. REV. 1161, 1162, 1169–79 (2002).

¹⁵ 140 P.3d 1235, 1239–53 (Utah 2006).

illuminate the historical developments in the Utah Supreme Court’s approach to state constitutional interpretation. Drawing from these developments, this Note outlines an approach that, if followed, will help practitioners build a more vigorous state constitutional canon as they raise arguments in a manner more likely to be well received by Utah courts. With this goal in mind, this Note will proceed as follows.

First, Part II examines the modern history of interpreting the Utah Constitution by reviewing the development of the public interest standing doctrine. This history frames the current direction of textual interpretation. The doctrine is evidence that the Utah Constitution is a vibrant and relevant document. Though it shows that the court may be more conservative in its departures from lockstep analysis, it is still willing to depart, particularly if the claims are based in well-substantiated textual arguments.

Part III, then, discusses what it takes to mount a constitutional argument in the Utah courts. Though “plain meaning” textual arguments are sufficient to persuade some members of the Utah Supreme Court,¹⁶ the strongest textual arguments should be supported with historical context that conveys the intent of the 1895 Utah voters and drafters of the Utah Constitution—that is, through an analysis of the text of the Utah Constitution, the constitutional traditions of sister states, and the society that adopted the Utah Constitution.

II. PUBLIC INTEREST STANDING DOCTRINE AND NEW JUDICIAL FEDERALISM

The public interest standing doctrine is consistent with the modern trend of state courts developing state constitutional doctrine independent of the federal analysis—even in the face of contrary precedent. This trend arguably began in 1977, when Justice William Brennan penned an article in the *Harvard Law Review* calling upon state courts to look to their own constitutions to protect individual liberties in the wake of the U.S. Supreme Court’s conservative approach to these protections.¹⁷ State courts responded positively to Justice Brennan’s call, beginning a trend referred to as New Judicial Federalism.¹⁸

¹⁶ *Id.* at 1264 (Durham, C.J., dissenting). *But see* *State v. Hoffmann*, 318 P.3d 225, 236–37 (Utah Ct. App. 2013) (“[S]tate constitutional analysis . . . limited to the truism that article I, section 14 may provide greater protections to Utah citizens than the Fourth Amendment’ fails to advance an adequate state constitutional analysis. . . . [Plaintiff’s brief] does not quote or analyze the constitutional text, which our supreme court has consistently held to be the starting point of state constitutional analysis. It does not discuss the original understanding of article I, section 14. And it does not discuss historical and textual evidence, sister state law, or policy arguments.” (quoting *State v. Worwood*, 164 P.3d 397, 405 (Utah 2007))).

¹⁷ JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 24 (2005) (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *HARV. L. REV.* 489, 503 (1977)); *see also* Milo Steven Marsden, Note, *The Utah Supreme Court and the Utah State*

The public interest standing doctrine entered the Utah constitutional dialogue in 1978, just a year after the publication of Justice Brennan's article.¹⁹ The doctrine expanded the state standing analysis, going against prior precedent that had interpreted standing as consistent with the Article III federal analysis.²⁰ The doctrine began as a footnote in *Jenkins v. State*,²¹ was then included as dicta in *Jenkins v. Swan*,²² and was later promoted to an alternative holding in *Utah Chapter of Sierra Club v. Utah Air Quality Board*²³ and *City of Grantsville v. Redevelopment Agency*.²⁴ In 2013, more than thirty years after its initial decision in *Jenkins v. State*, the Utah Supreme Court solidified its public interest standing doctrine in *Gregory v. Shurtleff*.²⁵ The journey, however, from *Jenkins v. State* to *Gregory v. Shurtleff* tracks the ebb and flow of the Utah court's participation in New Judicial Federalism, revealing a modern court that remains avowedly primacist, yet unwilling to make drastic departures from traditional interpretation.

A. The Doctrine

Lynn Jenkins was a Utah man with a penchant for initiating civil litigation *pro se*.²⁶ His lawsuits included claims alleging that public school teachers were infiltrating the legislature,²⁷ public officials were still practicing law,²⁸ and that he was taxed too much because of the large land holdings of local religious

Constitution, 1986 UTAH L. REV. 319, 320 (noting the trend toward state constitutional interpretation as a reaction to the more conservative Burger Court).

¹⁸ GARDNER, *supra* note 17, at 25.

¹⁹ *Jenkins v. State*, 585 P.2d 442, 443 (Utah 1978).

²⁰ *See id.* at 444 (Wilkins, J., concurring in part and dissenting in part) (“[Plaintiff] did not allege (or show) any direct interest or injury as a basis for commencing this action. In my opinion this is fatal.”); *Baird v. State*, 574 P.2d 713, 716 (Utah 1978) (“The general rule is applicable that a party having only such interest as the public generally cannot maintain an action. In order to pass upon the validity of a statute, the proceeding must be initiated by one whose special interest is affected, and it must be a civil or property right that is so affected.”); *State v. Kallas*, 94 P.2d 414, 420 (Utah 1939) (“This court is committed to the rule that an attack on the validity of a statute cannot be made by parties whose interests have not been, and are not about to be, prejudiced by the operation of the statute.”).

²¹ 585 P.2d at 443 & n.3 (citing *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975 (N.M. 1974)).

²² 675 P.2d 1145, 1149 (Utah 1983).

²³ 148 P.3d 960, 972 (Utah 2006).

²⁴ 233 P.3d 461, 467 (Utah 2010).

²⁵ 299 P.3d 1098, 1102–06 (Utah 2013).

²⁶ *See, e.g.*, *Jenkins v. MTGLQ Investors*, 218 F. App'x 719, 725 (10th Cir. 2007); *Jenkins v. Swan*, 675 P.2d 1145 (Utah 1983); *Jenkins v. Finlinson*, 607 P.2d 289 (Utah 1980); *Jenkins v. Bishop*, 589 P.2d 770 (Utah 1980); *Jenkins v. State*, 585 P.2d 442, 443 (Utah 1978).

²⁷ *Jenkins v. State*, 585 P.2d at 443.

²⁸ *Finlinson*, 607 P.2d at 290.

institutions.²⁹ Surely the framers and founders would expect a good citizen like Mr. Jenkins to grind his axe with the proper branch of government; however, rather than seek a remedy through the legislature or local government, Mr. Jenkins chose the expediency of the judiciary. Though perhaps Mr. Jenkins never got the justice he sought, and was eventually enjoined from bringing further suit without representation by counsel,³⁰ in parsing through his chaotic briefs to determine if he had standing, the Utah Court of Appeals initiated a modern doctrine of state constitutional jurisprudence: public interest standing.³¹

Under the case and controversy limitation of the U.S. Constitution,³² a party that brings suit must suffer individual injury before he or she has standing to file suit.³³ However, many state constitutions, including the Utah Constitution, are textually different from the U.S. Constitution in that they do not include the “case and controversy” language that moors the federal justiciability doctrines.³⁴

Under the modern Utah public interest standing doctrine, as stated in *Gregory*, if a party does not have “traditional standing,” which is coextensive with Article III analysis, a party may gain standing upon showing (1) the appropriate party has brought suit, and (2) the dispute raises an issue of significant public importance.³⁵ A party is an “appropriate party” to bring suit if (1) the party is competent to effectively assist the court in developing and reviewing the relevant legal and factual questions; (2) the issue is unlikely to be raised if the party is denied

²⁹ See *Swan*, 675 P.2d at 1153.

³⁰ *MTGLQ Investors*, 218 F. App’x at 725 (“Because we find this appeal frivolous and Mr. Jenkins’s pattern of litigation activity manifestly abusive, we conclude that filing restrictions are necessary.”).

³¹ *Jenkins v. State*, 585 P.2d at 443.

³² U.S. CONST. art. III, § 2, cl. 1.

³³ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

³⁴ Article VIII, section 1 of the Utah Constitution reads:

The judicial power of the state shall be vested in a Supreme Court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish. The Supreme Court, the district court, and such other courts designated by statute shall be courts of record. Courts not of record shall also be established by statute.

Article VIII, section 3 of the Utah Constitution reads:

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court’s jurisdiction or the complete determination of any cause.

³⁵ *Gregory v. Shurtleff*, 299 P.3d 1098, 1104 (Utah 2013) (citing *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 960, 972–73 (Utah 2006)).

standing; and (3) the issue is not more appropriately addressed by another branch of government.³⁶

B. Departing from a Lockstep Past

When attempting to argue under the Utah Constitution, there may be no precedent on which to base an argument, or the available case law may have historically interpreted the Utah Constitution lockstep with the U.S. Constitution.³⁷ However, the development of the public interest standing doctrine shows that the court is willing to depart from *stare decisis* if such an interpretation would conflict with a “correct” reading of the Constitution and further exemplifies the inherent challenges for the judiciary associated with the delicate balance between upsetting once settled law and providing independent meaning to the Utah Constitution.

Jenkins v. State was a departure from *stare decisis*. Prior to *Jenkins v. State*, Utah courts had interpreted standing lockstep with the federal analysis. After *Jenkins v. State*, the Utah Supreme Court adhered to the precedent created in that case. However, there is a back and forth, as seen in *Utah Transit Authority v. Local 382 of the Amalgamated Transit Union*³⁸ and *Gregory*, that shows evidence of a court that is willing to depart from *stare decisis* when adherence to old doctrine would lead to an “incorrect” interpretation. While *Utah Transit Authority* refused to extend the public interest standing doctrine and attempted to entirely repudiate the doctrine,³⁹ the *Gregory* court, in turn, refused to follow the precedent in *Utah Transit Authority*, and limited that case to a mootness distinction.⁴⁰

In *Utah Transit Authority*, the UTA brought an action against the transit union stemming from failed collective bargaining negotiations.⁴¹ Before the case reached the Utah Supreme Court, the parties negotiated an agreement but still sought review of the case to guide them in future negotiations.⁴² Both parties argued for an exception to the traditional mootness doctrine under a public interest exception.⁴³ The court refused to extend the exception to mootness and, in so doing, held the public interest standing doctrine to be unconstitutional.⁴⁴ The tools

³⁶ *Id.* at 1109–10 (citing *Sierra Club*, 148 P.3d at 972). The requirement of “the most appropriate party” became “an appropriate party” in *Cedar Mountain Environmental, Inc. v. Tooele County ex rel. Tooele County Commission*, 214 P.3d 95, 98 (2009).

³⁷ See GARDNER, *supra* note 17, at 49 (noting that when state courts attempt to interpret their own constitutions there may be no precedent on which to rely).

³⁸ 289 P.3d 582 (Utah 2012).

³⁹ *Id.* at 590.

⁴⁰ *Gregory*, 299 P.3d at 1119 (Lee, J., concurring in part and dissenting in part). The *Gregory* dissent relied on the reasoning in *Utah Transit Authority*, and encouraged the court to “repudiate our prior dicta” on public interest standing. See also *id.* at 1119–21.

⁴¹ *Utah Transit Auth.*, 289 P.3d at 584.

⁴² *Id.* at 585.

⁴³ *Id.*

⁴⁴ *Id.* at 590; see also *Gregory*, 299 P.3d at 1121–22 (“[T]he power we wield must be ‘judicial,’ we are foreclosed from making law or announcing our views in an advisory or

of interpretation used were the text of the Constitution, history from the Constitutional Convention, an inquiry into the processes of other states, and judicial traditions in Utah.

Justice Lee's dissent in *Gregory* follows the "model" set forth in *Utah Transit Authority*.⁴⁵ Justice Lee argued that standing is a constitutional requirement under the judicial power clause of the Utah Constitution, which reads that "[t]he judicial power of the state shall be vested in a Supreme Court."⁴⁶ Justice Lee used the history and intent of the framers to define the scope of judicial power.⁴⁷ Furthermore, Justice Lee contended that under the traditional standing analysis, the *Gregory* appellants did not have standing on either of their claims.⁴⁸ The dialogue between the *Gregory* dissent and majority evidences the tension between departing from *stare decisis* and giving new independent significance to state constitutional provisions. While the *Gregory* majority adheres to precedent that has been developed over a thirty-year period, the dissent builds on the precedent of *Utah Transit Authority*. All of these modern interpretations both adhere to some precedent, and depart from other precedent, all in search of the correct interpretation of the Utah Constitution.

Accordingly, the role of *stare decisis* in state constitutional interpretation may not be as strong as in other legal contexts.⁴⁹ The basic issue in this endeavor is whether the legitimacy of judicial review is threatened more by following a questionable precedent or by completely abandoning precedent in favor of a principle consistent with state constitutional interpretation. In his discussion of the role of precedent in constitutional interpretation, Justice Jack Landau of the Oregon Supreme Court notes that the process of giving independent significance to state constitutional provisions will often be offensive to *stare decisis* because it requires departing from prior holdings that assume the state and federal constitutions should be interpreted similarly.⁵⁰

Still, a balance must be struck between rejection of incorrect interpretations and judicial restraint. Professor Michael Paulsen argues that *stare decisis* is contrary to an originalist reading of a constitution.⁵¹ Even in the case where an interpretive theory gives a prior judiciary's interpretation the status of constitutional meaning, by the same logic, the current judiciary, tasked with interpreting the meaning of the law and constitution, should have complete power

other non-judicial posture. . . . [O]ur exercise of the judicial power must be in the context of the issuance of 'writs' or in our resolution of 'cases,' a formulation that implies a particular form for exercising the judicial power." (citations omitted)).

⁴⁵ *Gregory*, 299 P.3d at 1120.

⁴⁶ UTAH CONST. art. VIII, § 1.

⁴⁷ *Utah Transit Auth.*, 289 P.3d at 587.

⁴⁸ *Gregory*, 299 P.3d at 1132.

⁴⁹ Landau, *supra* note 6, at 838.

⁵⁰ *Id.* at 867.

⁵¹ See Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT 289, 292 (2005).

to overturn prior precedent.⁵² As such, Professor Paulsen asks the question, “Why last year’s judge and not this year’s judge?”⁵³

Though these commentaries are directed at federal constitutional interpretation, the criticisms gain even more traction in the state context where judiciaries are moving away from a lockstep approach and toward giving state constitutions independent significance, and the corpus of case law is in its nascent stage.⁵⁴ In the case of public interest standing, although the expressly primacist Utah Supreme Court⁵⁵ has been willing to depart from prior precedent, the departure is gradual and cautious. Under the public interest standing doctrine, only when “traditional” standing does not permit a plaintiff to litigate her claim will the court then look for alternative standing.⁵⁶ The dual nature of the doctrine—traditional analysis followed by alternative analysis—is distinct from the standing doctrines of other states and may signal the current court’s reticence to make drastic departures from a lockstep doctrine. Alternative standing creates an interesting paradox of state constitutional interpretation—it is primacist, meaning that the court starts with the Utah constitutional doctrine of “traditional” standing, but Utah’s traditional standing is the same as the federal standing doctrine. In a sense, this doctrine is interstitial—alternative standing will only be an option when standing is not granted under a traditional analysis. This doctrine evinces a court that is not brazen in its New Judicial Federalism but will gradually incorporate a new doctrine with a counterbalance of judicial restraint.

The history of the public interest standing doctrine reflects a more cautious shift in the Utah courts’ state constitutional jurisprudence. The doctrine first emerged in *Jenkins v. State*, where the court provided no explanation or justification for the doctrine, just a citation to a New Mexico case: “Appellants cite the usual rule that one must be personally adversely affected before he has standing to prosecute an action. While such is true, it is also true this Court may grant standing where matters of great public interest and societal impact are concerned.”⁵⁷ The concurrence in *Jenkins v. State* went into slightly more detail to justify the doctrine.⁵⁸ The justification provided by Justice Crockett was essentially

⁵² *E.g.*, *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983) (“[T]he inherent role of the judiciary [is] to interpret constitutional provisions.”).

⁵³ Paulsen, *supra* note 51, at 292 (emphasis removed).

⁵⁴ Landau, *supra* note 6, at 867, 869–70 (“The argument that precedent must give way to a correct interpretation of a constitution presupposes that an obviously ‘correct’ interpretation exists. I have no doubt that, in many cases, that is precisely the case. And, in such cases, if it can be shown that prior cases cannot be reconciled with the wording of the constitution properly considered in its context and in light of applicable rules of construction, the prior cases should be abandoned.”).

⁵⁵ *See supra* note 14 and accompanying text.

⁵⁶ *Gregory v. Shurtleff*, 299 P.3d 1098, 1103 (Utah 2013) (citing *Jenkins v. Swan*, 675 P.2d 1145, 1150 (Utah 1983)).

⁵⁷ *Jenkins v. State*, 585 P.2d 442, 443 (1978) (citing *State ex rel. Seago v. Kirkpatrick*, 524 P.2d 975 (N.M. 1974)).

⁵⁸ *See id.* (Crockett, J., concurring).

based in efficiency: “to avoid delays and minimize the time, effort and expense of further litigation.”⁵⁹

In his book on interpreting state constitutions, Professor James Gardner comments that opinions of this era were often “surprisingly perfunctory and contain[ed] little actual analysis or argument.”⁶⁰ Professor Gardner also notes that the history of state constitutional drafting “has proceeded mainly through a process of borrowing, swapping, and copying from somebody else’s constitution.”⁶¹ The origins of the public interest standing doctrine hail from this approach—“borrowing” from a New Mexico doctrine, with “surprisingly” little analysis.⁶²

Looking to sister state traditions persists as a viable tool to support a textual argument,⁶³ but it may not be given as much weight by the 2014 court as it was in *Jenkins v. State*. The *Utah Transit Authority* court looked to sister state constitutional law to justify Utah interpretations but used this tool in tandem with others.⁶⁴ In that case, the court noted that many other states have adopted constitutional provisions to allow for advisory opinions from the bench.⁶⁵ Utah was in good company with other states who had *prohibited* advisory opinions.⁶⁶ The *Utah Transit Authority* court found this to support the proposition that Utah was in the no-advisory-opinions camp, which was largely based on the framers’ statements during the debate of the Constitutional Convention that indicated they disapproved of the judiciary making advisory opinions.⁶⁷

C. The Restrained Judicial Federalism

Five years after the *Jenkins v. State* opinion, the court pulled back from its broad holding, changing the scope of the doctrine and its use of constitutional interpretation. In *Jenkins v. Swan*, the constitutional arguments for the public interest standing test were further elaborated and the doctrine subsequently limited. Justice Durham, writing for the court, begins her interpretation with the text of the

⁵⁹ *Id.* Though the Utah Supreme Court has used policy justifications for constitutional interpretation in the past, *see, e.g., Soc’y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921 n.6 (Utah 1993), this approach has since been limited by the Court to being employed only to discern intent of the founders and electorate, *Am. Bush v. City of S. Salt Lake*, 140 P.3d 1235, 1240 & n. 3 (Utah 2006).

⁶⁰ GARDNER, *supra* note 17, at 36.

⁶¹ *Id.* at 6.

⁶² *Jenkins v. State*, 585 P.2d at 443 (citing *Kirkpatrick*, 524 P.2d 975).

⁶³ *See, e.g., Am. Bush*, 140 P.3d at 1285 (Nehring, J., dissenting) (“By 1895, Utah’s debate over the wording of a criminal libel component of its constitution was a common, perhaps obligatory, item on the agenda of state constitutional conventions. A canvass of the constitutions of the fifty states shows that thirty-four expressly address criminal libel.”).

⁶⁴ *See Utah Transit Auth. v. Local 382 of the Amalgamated Transit Union*, 289 P.3d 582, 587–88 (Utah 2012).

⁶⁵ *Id.* at 587.

⁶⁶ *Id.*

⁶⁷ *See id.* at 587.

judicial power clause but then goes on to restrain the doctrine based on the traditions of the federal and state judiciaries:

Unlike the federal system, the judicial power of the state of Utah is not constitutionally restricted by the language of Article III of the United States Constitution requiring “cases” and “controversies,” since no similar requirement exists in the Utah Constitution. We previously have held that “this Court may grant standing where matters of great public interest and societal impact are concerned.” *Jenkins v. State*, Utah, 585 P.2d 442, 443 (1978) (footnote omitted). However, the requirement that the plaintiff have a personal stake in the outcome of a legal dispute is rooted in the historical and constitutional role of the judiciary in Utah.⁶⁸

The above interpretation is first based in a textual difference—the lack of the “case and controversy” language in article XIII of the Utah Constitution. Justice Durham relies on the precedent from *Jenkins v. State* but then looks to the historical traditions of the Utah judiciary to restrain the doctrine. Interestingly, the citation to the New Mexico case is omitted from the analysis, perhaps to draw attention away from the “sister state” nature of that interpretational tool. Also, in developing her arguments for the history and tradition of judicial power, Justice Durham looks to the mainstays of the federal standing analysis on injury to justify the court’s restriction of the doctrine.⁶⁹

Both the *Jenkins v. Swan* majority and, later, the *Gregory* dissent examine the historical understanding of “judicial power” to pull back from the broad holding in *Jenkins v. State*.⁷⁰ This analysis led the *Gregory* dissent to conclude that public interest standing is unconstitutional and the *Jenkins v. Swan* majority to limit the doctrine to an “alternative” standing—turning to it when “traditional” standing is not available or when there is an “interested party.”⁷¹

The alternative standing doctrine in Utah is distinct from other states that have seized the textual lack of case and controversy to broaden their standing doctrine. For example, the Michigan Supreme Court in *Lansing Schools Educational Association v. Lansing Board of Education*⁷² chose to reject its prior interpretation of standing as lockstep with the federal standing test in favor of a historical precedent that allowed for public interest standing.⁷³ In reaching its conclusion in

⁶⁸ *Jenkins v. Swan*, 675 P.2d 1145, 1149 (Utah 1983).

⁶⁹ *Id.* at 1148–50.

⁷⁰ *Id.* at 1149–51; *Gregory v. Shurtleff*, 299 P.3d 1098, 1122 (Utah 2013) (Lee, J., concurring in part and dissenting in part).

⁷¹ *Gregory*, 299 P.3d at 1121–22 (Lee, J., concurring in part and dissenting in part); *Swan*, 675 P.2d at 1149–51.

⁷² 792 N.W.2d 686 (Mich. 2010).

⁷³ *See id.* at 686–700; *see also* Kenneth Charette, *Standing Alone?: The Michigan Supreme Court, the Lansing Decision, and the Liberalization of the Standing Doctrine*, 116 PENN ST. L. REV. 199, 203, 206 (2011) (noting the *Lansing* court “held that in order to

Lansing, the Michigan Court overruled *Lee v. Macomb County Board of Commissioners*.⁷⁴ The *Lee* court had interpreted the relevant Michigan constitutional provisions on standing lockstep with the federal test.⁷⁵ In contrast, under the *Lansing* test, a plaintiff has standing to bring a suit if either (1) he or she has a specific legal cause of action, or (2) the trial court, in its discretion, believes the plaintiff to have standing for some other reason.⁷⁶ In so holding, the Michigan court did not even address its early nineteenth century standing jurisprudence that had limited the jurisdictional reach to deciding cases and controversies, foregoing a “historical” analysis of its centuries’ old lockstep tradition.⁷⁷

Michigan and Utah courts’ standing approach may reflect differences in constitutional allotment of power. By constitutional amendment, the Michigan judiciary can make advisory opinions, whereas in Utah the framers expressly withheld this power from the Utah judiciary.⁷⁸ Whatever the reason, although the Utah Supreme Court is willing to depart from *stare decisis*, it seems more inclined to do so at a gradual pace. The court will not make revolutions in its departure from precedent. It will instead ground its decisions in the traditions of the judiciary. The move away from precedent, however, can be done while wielding the interpretational tools that have been developed over the past thirty years. Although Utah’s standing analysis is not entirely distinct from its federal counterpart, it is evidence that the Utah judiciary will look to the Utah Constitution to provide relief. More importantly, the Utah judiciary is willing to depart from a historical lockstep analysis if prior precedent is contrary to a textual reading of the Utah Constitution.

III. UNDERSTANDING THE UTAH SUPREME COURT’S APPROACH TO STATE CONSTITUTIONAL INTERPRETATION

In order to succeed on Utah constitutional claims, it is essential to first turn to the guidance provided by the Utah Supreme Court. In *American Bush v. City of South Salt Lake*, Utah’s teaching case⁷⁹ on state constitutional interpretation, Chief

adhere to its historical precedent, it was necessary to abandon the federal test for standing and return to a set of prudential considerations”).

⁷⁴ *Lansing Sch. Educ. Ass’n*, 792 N.W.2d at 699.

⁷⁵ *Lee v. Macomb Cnty. Bd. of Comm’rs*, 629 N.W.2d 900, 907–08 (Mich. 2001), overruled by *Lansing Sch. Educ. Ass’n v. Lansing Bd. of Educ.*, 792 N.W.2d 686 (Mich. 2010).

⁷⁶ *Lansing Sch. Educ. Ass’n*, 792 N.W.2d at 699.

⁷⁷ *Id.*

⁷⁸ Justice Lee looked to the history of the Constitutional Convention in *Utah Transit Authority* to support the position that the Utah Constitution does not grant the judiciary the power to make advisory opinions. *Utah Transit Auth. v. Local 382 of the Amalgamated Transit Union*, 289 P.3d 582, 587 (Utah 2012).

⁷⁹ “In many states, there are opinions, ‘teaching cases,’ that set forth a general approach to state constitutional interpretation, together with a number of specific rules.”

Justice Durham, Justice Parrish, Justice Durrant, and Justice Nehring all wrote separate opinions outlining their individual approaches to interpreting the text of the Utah Constitution.⁸⁰ Justice Lee had not yet joined the court at the time of *American Bush*,⁸¹ but shared his views on Utah constitutional interpretation in the majority opinion that he authored in *Utah Transit Authority*⁸² and in his dissent in *Gregory*.⁸³

In *American Bush*, after losing in federal court, the owners of nude dancing establishments and lingerie shops challenged a city zoning ordinance on state constitutional grounds under article I protections of free speech and takings.⁸⁴ The justices took the time to address “the poverty of [] Utah case law” concerning the Utah Constitution by elaborating their individual approaches to state constitutional interpretation.⁸⁵ The *American Bush* court was required “to grapple with the difficult questions permeating the debate as to the proper method to follow when interpreting our state constitution.”⁸⁶ The four opinions in the *American Bush* decision give sophisticated analysis of the interplay between a plain meaning analysis of text and a textual analysis that is informed by the historical evidence of the intent of the drafters and voters who ratified the Constitution.

Although Chief Justice Durham’s dissent and concurrence applied a plain meaning analysis to article I of the Utah Constitution,⁸⁷ the majority took the approach that plain meaning must be informed by historical context.⁸⁸ Through an inquiry into the text itself, the state of the law on a national level—which is primarily an examination of sister state traditions, and an analysis of the legal traditions of Utah in 1895, the meaning intended by the voters and drafters of the Constitution can be divined. Though flexibility may bring into question the legitimacy of historical interpretation, it may also be a strong tool when advocating for a particular interpretation of the Utah Constitution. The history of voters’ intentions was determinative in *American Bush* and boiled down to nude dancing not being included in the public imagination of speech at the time of the

Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 193 (2002).

⁸⁰ See *Am. Bush v. City of S. Salt Lake*, 140 P.3d 1235, 1237, 1254, 1264, 1280 (Utah 2006). For another developed analysis of each of the *American Bush* opinions, see Evelyn J. Furse, *The Successful Creation of a Platform for Debate: Utah Chief Justice Christine M. Durham’s Legacy Embodied in American Bush v. City of South Salt Lake*, 75 ALB. L. REV. 1643 (2012).

⁸¹ *Judges Biographies*, UTAH COURTS, http://www.utcourts.gov/judgesbios/showGallery.asp?dist=10&ct_type=S, archived at <http://perma.cc/MT7Z-AGM9> (last visited June 26, 2014).

⁸² See 289 P.3d at 586–90.

⁸³ See 299 P.3d 1098, 1118–27 (Utah 2013).

⁸⁴ *Am. Bush*, 140 P.3d at 1238–39; UTAH CONST. art. 1 §§ 1, 7, 15.

⁸⁵ *Am. Bush*, 140 P.3d at 1239.

⁸⁶ *Id.* at 1255 (Durrant, J., concurring).

⁸⁷ *Id.* at 1260.

⁸⁸ *Id.* at 1239.

ratification.⁸⁹ In the absence of a rich constitutional record, such arguments can be influential in bringing a successful challenge under the Utah Constitution.

A. The Complications of Plain Meaning Analysis

In *American Bush*, Chief Justice Durham took a plain meaning approach to textual interpretation.⁹⁰ Under this approach, “[o]nly if the textual language is ambiguous or unclear should we look outside the words to external sources.”⁹¹ Under the established Utah doctrine of the plain meaning approach, the words of the Constitution must be given their “commonly understood meaning” if the text is not ambiguous.⁹² For example, the majority of the court in *Utah School Boards Association v. Utah State Board of Education*⁹³ took the plain meaning approach to interpreting the text of article X but looked to case law and legislative history following on the heels of the ratification of the Constitution to divine that plain meaning.⁹⁴

Chief Justice Durham’s plain meaning analysis in *American Bush*, however, looked more to a modern plain meaning to determine the use of the word “communicate” in article I of the Utah Constitution.⁹⁵ Chief Justice Durham cited to a 1995 edition of Webster’s Dictionary and also the comparison of the text with the language of the U.S. Constitution to determine the plain meaning of the word.⁹⁶ Justice Durrant, however, eschewed this particular approach to plain meaning interpretation in his concurrence.⁹⁷ He wrote that there are three approaches to the text of the Constitution: (1) the contemporary-context approach, (2) the subjective approach, and (3) the historical approach:

All three of these approaches ask the question “what does the provision mean?” The contemporary-context approach asks “what *should* the provision mean in the context of our modern values and attitudes?” The subjective approach asks “what *should* the provision mean according to the interpreting judge’s own personal values and attitudes?” The historical approach asks “what *did* this provision mean to those who drafted and ratified it?” While the answer to the first two questions would seem to be a moving target, the answer to the last one, at least in

⁸⁹ *Id.* at 1254.

⁹⁰ *Id.* at 1264 (Durham, C.J., concurring in part and dissenting in part).

⁹¹ *Id.* at 1266.

⁹² *Utah Sch. Bds. Ass’n v. Utah State Bd. of Educ.*, 17 P.3d 1125, 1129 (Utah 2001) (quoting *State v. Robertson*, 924 P.2d 889, 891 (Utah 1996)).

⁹³ *Id.*

⁹⁴ *Id.* at 1241–42.

⁹⁵ *Am. Bush*, 140 P.3d at 1266–67 (Durham, C.J., concurring in part and dissenting in part).

⁹⁶ *Id.*

⁹⁷ *Id.* at 1255–56 (Durrant, J., concurring).

theory, is fixed. . . . I believe that the appropriate question is the last one.⁹⁸

The majority opinion, authored by Justice Parrish, also takes the historical approach to plain meaning. For the majority, plain meaning must necessarily be informed by historical context.⁹⁹ Additionally, a plain meaning argument will not stand up on a meaning derived from the modern dictionary. Rather, advocates must prove that the meaning was plain to the drafters and voters of the Utah Constitution in 1895.

B. *Historical Evidence of Intent*

The *American Bush* majority put forward three steps to a contextual analysis of the Utah Constitution that will ultimately inform an interpretation of the intent of the drafters of the Constitution and the ratifying public: (1) analyze the text; (2) support the analysis with historical evidence of the state of the law when the Constitution was drafted and ratified; and (3) provide further context for a textual interpretation with Utah's particular legal traditions at the time of drafting, both common law and statutory.¹⁰⁰

1. *The Text*

Justice Parrish first looked to the text of the Utah Constitution as the “surest indication of the intent of its framers and the citizens of Utah who voted it into effect.”¹⁰¹ The majority reached the conclusion that article I, sections 1 and 15 were complementary provisions that should be read together.¹⁰² To reach this

⁹⁸ *Id.* at 1256.

⁹⁹ *Id.* at 1239 (majority opinion) (“While we first look to the text’s plain meaning, we recognize that constitutional ‘language . . . is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them.’ We thus inform our textual interpretation with historical evidence of the framers’ intent.” (citations omitted)).

¹⁰⁰ *Id.* at 1240. Justice Parrish patently rejected previous approaches to constitutional interpretation that considered policy arguments. *Id.* at 1240 n.3 (“We have intentionally excluded the consideration of policy arguments suggested by *Society of Separationists v. Whitehead*, 870 P.2d 916, 921 n.6 (Utah 1993).”).

¹⁰¹ *Id.* at 1241.

¹⁰² *Id.* at 1241–42 (“The framers of the Utah Constitution divided the freedom of speech guarantees into three distinct clauses. The first clause (the ‘liberty and responsibility clause’), contained in section 1 of the declaration of rights, defines the scope of the freedom of speech. *Id.* art. I, § 1. The second clause (the ‘governmental restriction clause’), contained in the first sentence of section 15, prohibits governmental actions that abridge or restrain those rights. *Id.* art. I, § 15. These first two clauses of general application function in concert; the first defines what is protected, while the second defines the limits of governmental action in relation to those protected activities. The third clause (the ‘criminal libel clause’), contained in the second sentence of section 15, illustrates the limits of

conclusion, Justice Parrish applied the “conventional method[] of constitutional interpretation” that reads other provisions dealing with the same topic to determine the meaning of a textual provision.¹⁰³ Like Chief Justice Durham, Justice Parrish also compared the text of the Utah Constitution to the U.S. Constitution, noting the lack of specific language in the latter.¹⁰⁴ After determining that the different constitutional provisions on speech are to be read together, Justice Parrish looked to the constitutional traditions of sister states in 1895 to discern the meaning of substantive provisions.

2. *Sister State Constitutional Traditions*

Appellant, American Bush, argued that article I of the Utah Constitution provided more protection for speech than the First Amendment of the U.S. Constitution.¹⁰⁵ In judging this proposition, Justice Parrish situated Utah within the history of speech clauses in sister states around the nation. She noted two distinct trends in state constitutional speech clauses. The first is from the colonies immediately after the Revolutionary War. At that time, states were basing their speech provisions on a series of letters by Trenchard and Gordon known as *Cato’s Letters*, “that argued for more extensive rights of expression without fear of government reprisal.”¹⁰⁶ The Utah speech clauses are not so expansive, however, for they contain language limiting speech by making individuals “responsible for the abuse” of the right.¹⁰⁷ The majority noted that this language derives from William Blackstone, whose philosophy on the press advocated for no restraint of publication but did provide punishment for abuses of liberty.¹⁰⁸ This argument is reinforced by a citation to a California case that is contemporaneous to the ratification of the Utah Constitution that attributes California’s similar constitutional language to Blackstone.¹⁰⁹ This deep look into the state of the law in 1895 led the majority to the general conclusion that Utah’s protection for speech is not necessarily more expansive than its federal counterpart because it contains limiting language that is not present in the U.S. Constitution.¹¹⁰

In contrast, in his dissent, Justice Nehring looked to the history of the press at the time of the Constitutional Convention, as well as the tradition of sister states and concluded that “[b]y 1895, Utah’s debate over the wording of a criminal libel component of its constitution was a common, perhaps obligatory, item on the

governmental action, and by inference the scope of individual freedoms, in the specific instance of criminal libel prosecutions.”).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1242–43.

¹⁰⁵ *Id.* at 1238–39.

¹⁰⁶ *Id.* at 1246.

¹⁰⁷ *Id.* at 1247.

¹⁰⁸ *Id.* at 1245.

¹⁰⁹ *Id.* at 1248 n.13.

¹¹⁰ *See id.* at 1248.

agenda of state constitutional conventions,” and did not signify a commitment to a Blackstonian constitutional agenda.¹¹¹

In addition to using sister state constitutions to contextualize the intent of the framers in 1895, sister state constitutional jurisprudence is also called upon when those courts interpret constitutional language similar to that of Utah. Justice Parrish cited Colorado, Indiana, and Tennessee case law that applied a similar textual approach to constitutional language similar to that of Utah and concluded that their states’ constitutions did not protect obscenity.¹¹² Conversely, Chief Justice Durham’s opinion cited to a modern case from Oregon that interpreted a speech clause similar to Utah’s to protect speech similar to that present in *American Bush*.¹¹³ Though looking to sister state interpretations does not lead to absolute results in textual interpretation, it does provide advocates with forty-nine different possible arguments to support a proposition.

3. *Historical Context of the Ratifying Society*

(a) *Voters’ Intentions*

Unlike the federal constitution, the electorate, not the drafters, ratified state constitutions.¹¹⁴ Therefore, in construing state constitutions, courts may look to the intention of the drafters and, more importantly, to the intentions of the voters¹¹⁵:

Through the process of voting for the constitution on November 5, 1895, the citizens of Utah circumscribed the limits beyond which their elected officials may not tread. As ‘[a]ll political power is inherent in the people,’ Utah Const. art. I, § 2, only Utah’s citizens themselves had the right to limit their own sovereign power to act through their elected officials. Judicial officers may not substitute their own wisdom for that of the people of Utah inasmuch as the citizens limited the actions of their elected officials in certain areas but left them free in other areas to exercise their judgment in representing their constituents. To do so would be to deny political powers to the citizens of Utah that they in their wisdom and judgment had retained for themselves.¹¹⁶

¹¹¹ *Id.* at 1285 (Nehring, J., dissenting).

¹¹² *Id.* at 1252 (majority opinion).

¹¹³ *Id.* at 1274 (Durham, C.J., concurring in part and dissenting in part).

¹¹⁴ Williams, *supra* note 79, at 194–96.

¹¹⁵ Landau, *supra* note 6, at 862–63 (“The authoritative character of state constitutions derives from their adoption by a vote of the people, not from the views of their drafters. Thus, it should be the views of the voters who adopted state constitutions that should be the focus of the interpretation of those documents. Evidence about what framers or drafters had in mind might be relevant; the framers were themselves voters, and their views might have been available to voters.” (citations omitted)).

¹¹⁶ *Am. Bush*, 140 P.3d at 1241 (citations omitted).

This is the driving force of Justice Parrish's opinion in *American Bush*. The court ultimately concluded that in light of the clear disapproval the people of Utah had for nude dancing at the time of the adoption of the Utah Constitution, nude dancing was not a form of expressive communication that the electorate intended to protect by means of article I of the Utah Constitution.¹¹⁷

Though it is often difficult to generalize what the entire group of voters is thinking when they ratify a constitution,¹¹⁸ the common law and statutes of 1895 provide "the clearest picture" of the intentions of the drafters and voters of the time.¹¹⁹ Justice Parrish cited to a statute that was enacted shortly after the Constitution was ratified that made "it a crime to 'employ any female to dance, promenade, or otherwise exhibit herself' in any 'saloon, dance cellar, or dance room, public garden, public highway, or in any place whatsoever, theatres excepted,' or for a female to engage in such activity."¹²⁰ Thus, the legislature elected by the ratifying public reaffirmed that it was within their power to prohibit nudity.¹²¹ In light of this evidence, the majority concluded that article I of the Utah Constitution was not intended to protect nude dancing.¹²²

(b) *The Utah Constitutional Convention*

When interpreting the Utah Constitution, the justices rely on the record from Utah's Constitutional Convention to varying degrees. For example, Justice Parrish considered the Constitutional Convention to be one source for identifying the meaning of constitutional provisions in *American Bush*.¹²³ But, she also noted that the record of discussion and vote counts did not convey the mindset of all the men that voted.¹²⁴ Specifically, Justice Parrish examined the debate and votes on two amendments that were proposed and rejected during the Convention.¹²⁵ The first proposed amendment she reviewed exemplified one of the weaknesses of reviewing the convention record, namely the frequent problem that vote counts and competing floor statements can be interpreted to support multiple conflicting

¹¹⁷ *Id.* at 1254.

¹¹⁸ These arguments do not always apply with equal force in the case of state constitutional interpretation because of the rich record of recent amendments and recorded intentions of the framers. Landau, *supra* note 6, at 862. For a good explanation of the history of the Utah Constitutional Convention and ratification process, see generally JEAN BICKMORE WHITE, CHARTER FOR STATEHOOD: THE STORY OF UTAH'S STATE CONSTITUTION (1996); see also Paul Wake, *Fundamental Principles, Individual Rights, and Free Government: Do Utahns Remember How to Be Free?*, 1996 UTAH L. REV. 661, 662.

¹¹⁹ *Am. Bush*, 140 P.3d at 1250.

¹²⁰ *Id.* at 1252 (citing Utah Rev. Stat. § 4244 (1898)).

¹²¹ *Id.*

¹²² *Id.*

¹²³ See *id.* at 1248–50.

¹²⁴ *Id.*

¹²⁵ *Id.*

conclusions.¹²⁶ The second proposed amendment was more susceptible to a single interpretation, but while Justice Parrish found it helpful in the analysis, it was by no means the main thrust of her opinion.¹²⁷

For Justice Lee, the intent of the drafters is central to the state constitutional inquiry. And to identify intent, Justice Lee turned to the Utah Constitutional Convention in his majority opinion in *Utah Transit Authority*:

During the course of the state's constitutional convention, delegate Thomas Maloney proposed an amendment to article VIII that would have expressly authorized the Utah Supreme Court to issue advisory opinions when requested by the governor or legislature. When questioned why he would propose such a clause, Maloney responded that it had "worked well" in other states (including Massachusetts, Maine, and Colorado) and that the legislature "may want an opinion" on matters of significance. Two other delegates voiced their objection to the proposed amendment, however, and it was roundly rejected by the body of the convention.¹²⁸

Based on these statements, Justice Lee later argued in his *Gregory* dissent that a constitutional amendment would be necessary to create the public interest standing doctrine.¹²⁹

By contrast, Justice Durham's majority opinion in *Gregory* did not address the framers' intentions,¹³⁰ nor did the historical cases that developed the public interest standing doctrine use this interpretational tool.¹³¹ The *Gregory* court instead responded:

At the state level, the recognition of an alternative form of standing is simply not the type of jurisprudential development which is predicated on explicit constitutional authorization. The dissent suggests that this

¹²⁶ *Id.* at 1248–49.

¹²⁷ *Id.* at 1250.

¹²⁸ *Utah Transit Auth. v. Local 382 of the Amalgamated Transit Union*, 289 P.3d 582, 587 (Utah 2012) (citations omitted).

¹²⁹ *Gregory v. Shurtleff*, 299 P.3d 1098, 1121 (Utah 2013).

¹³⁰ In response to the dissent's argument that the framers explicitly withheld the authority to issue advisory opinions, thus not intending public interest standing, Justice Durham responded for the majority with arguments grounded in sister state law:

We . . . align with the courts of numerous other states in determining that the lack of a "case or controversy" requirement in our state constitution permits the development of alternative, public-interest standing doctrines.

E.g. id. at 1105 n.9.

¹³¹ *See, e.g., Jenkins v. Swan*, 675 P.2d 1145 (Utah 1983).

court requires explicit textual authorization to articulate the scope of the judicial power to assess standing. We reject this view.¹³²

If intent can be surmised from the records of the Constitutional Convention, such intent would be helpful to an argument, but by no means necessary.

(c) *Jurisprudential Philosophy*

Although Justice Parrish does not give much weight to the “discussion” of the Constitutional Convention, the legal treatises that are referenced in the Constitutional Convention are cited throughout *American Bush*.¹³³ Particularly, Justice Nehring and Justice Parrish cite passages from Thomas Cooley to support the proposition that the Constitution is derived from natural law, or that the rights and powers of the Constitution existed before the document was created.

[A state constitution] is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience.¹³⁴

Justice Nehring inquires into the jurisprudential philosophies of the drafters to determine their intent.¹³⁵ Unlike the majority, Justice Nehring determines that the philosophy behind article I, section 15 of the Constitution and article I, section 1 was not Blackstonian. Rather, Justice Nehring capitalizes on the Thomas Cooley reference to a natural rights approach throughout the speech clauses:

I reach my conclusion, therefore, that the text and history of article I, section 1 and article I, section 15 manifest the intention of the framers to protect the expansive rights of expression inherent to every person, independent of governmental intrusions justified by Blackstonian philosophy or by extrapolation from the criminal libel provisions of article I, section 15. I am therefore convinced that the majority is wrong in concluding that the men who drafted and ratified the Utah Constitution intended the “responsibility for abuse” provision to empower the government to restrict “immoral” speech.¹³⁶

¹³² *Gregory*, 299 P.3d at 1105 n.9.

¹³³ *See, e.g.*, *Am. Bush v. City of S. Salt Lake*, 140 P.3d 1235, 1240–41 (Utah 2006).

¹³⁴ *Id.* at 1240 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 36–37 (Leonard W. Levy ed., Da Capo Press 1972) (1868)).

¹³⁵ *Id.* at 1282–83 (Nehring, J., dissenting).

¹³⁶ *Id.* at 1287.

From Justice Nehring's interpretation, as well as the majority's Blackstonian interpretation, we see that arguing the jurisprudential philosophies may also gain traction at the Utah Supreme Court. Like the play between voters' intention and drafters' intention, there is room here for advocates to move.

Also illuminating from Justice Nehring is that he ultimately yearns for the lockstep days:

If there is one other matter upon which the majority and the Chief Justice are in accord, it is in their dissatisfaction with federal First Amendment jurisprudence. I am far less troubled by it. In fact, I have come away from this appeal with a newfound sympathy for it. The attraction of the federal First Amendment approach may have more to do with my unease over the alternatives proposed by my colleagues I have, therefore, come to be convinced that there is merit in the federal "intermediate scrutiny" model and that we should incorporate it into our analytical approach to the regulation of free expression under the Utah Constitution.¹³⁷

It has also been posited that Justice Nehring has a more interstitial approach to constitutional interpretation.¹³⁸

The tools presented in *American Bush* are malleable. The sheer volume of approaches in the opinion substantiates the claim that a simple footnote to a plain meaning argument is not what the court is requesting. With this collection of interpretational tools, none is particularly essential to success. What will get the attention of the court is an argument using as many of these tools as possible.

IV. CONCLUSION

In the current era of Utah constitutional case law, the legal community will have to be creative—and even deviceful—to piece together compelling briefs to argue cases under the Utah Constitution. In contrast to the early days of New Judicial Federalism where the court introduced new interpretations into the Utah constitutional dialogue from nothing more than a party's citation to sister state law, sophisticated briefing is now necessary to succeed on a Utah Constitutional claim. Even where there is little case law or unfavorable prior precedents, practitioners may still find success by raising arguments grounded in the text of the Utah Constitution and supported by those sources the court has identified as useful for interpreting its text. The strongest textual arguments will be those supported by historical evidence of the intent of the 1895 Utah voters and drafters of the Utah Constitution, analysis of the constitutional traditions of sister states, and the history of the society that adopted the Utah Constitution.

¹³⁷ *Id.*

¹³⁸ See Furse, *supra* note 80, at 1655 (citing *Utah v. Robinson*, 254 P.3d 183, 186 n.14 (Utah 2011)).