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Mormonism, Originalism, and Utah's Open Courts Clause

I. INTRODUCTION

Thirty-nine states' constitutions, including Utah's, have what is called an open courts or remedies clause.¹ Each state constitution words the clause somewhat differently,² but almost all of them say something similar to Utah's constitution: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay."³ State high courts interpret this clause differently, however,⁴ generally falling into one of two camps. Some courts interpret the clause to provide only procedural protections similar to those found in the due process clause of the United States Constitution. But others interpret the clause to also provide substantive protections, limiting the legislature's power to abrogate causes of action and remedies existing

1. Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1279 (1995). For a comprehensive list of each state's clause see *Judicial Administration: State Links*, NCSC, <http://www.ncsc.org/Topics/Judicial-Officers/Judicial-Administration/State-Links.aspx?cat=Constitutional%20Access%20to%20Justice%20Provisions> (last visited Oct. 2014).

2. Compare WASH. CONST. art. 1, § 10 ("Justice in all cases shall be administered openly, and without unnecessary delay."), with ILL. CONST. art. 1, § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.").

3. UTAH CONST. art. 1, § 11; see also ALA. CONST. art. 1, § 13; ARIZ. CONST. art. 2, § 11; ARK. CONST. art. 1, § 13; COLO. CONST. art. 2, § 6; CONN. CONST. art. 2, § 6; DEL. CONST. art. 1, § 9; IDAHO CONST. art. 1, § 18; ILL. CONST. art. 1, § 12; IND. CONST. art. 1, § 12; KY. CONST. § 14; LA. CONST. art. 1, § 22; ME. CONST. art. 1, § 19; MD. CONST. DEC. RIGHTS, art. 19; MASS. CONST. pt. 1, art. 11; MINN. CONST. art. 1, § 8; MISS. CONST. art. 3, § 24; MO. CONST. art. 1, § 14; MONT. CONST. art 2, § 16; NEB. CONST. art. 1, § 13; N.C. CONST. art. 1, § 18; N.D. CONST. art. 1, § 15; OHIO CONST. art. 1, § 15; OKLA. CONST. art. 2, § 6; PA. CONST. art. 1, § 11; S.D. CONST. art. 6, § 20; TENN. CONST. art. 1, § 19; TEX. CONST. art. 1, § 13; W. VA. CONST. art. 3, § 17; WYO. CONST. Art. 1, § 8.

4. David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1203-17 (1992) (discussing various rules and interpretations high courts have given in interpreting their open courts clause).

at the time of the state constitution's adoption.⁵ How a state interprets its open courts clause has a large effect on tort reform.⁶ It determines, for example, whether a doctor has to pay \$1.25 million or only \$250 thousand for negligently brain damaging a child.⁷ Some variations in interpretation can be traced back to the different wording of each state's open courts clause, but other variations cannot.⁸ Professor David Schuman suggests that each state look to its own history to determine the proper interpretation of its open courts clause.⁹ This Comment attempts to find the proper interpretation of Utah's open courts clause through a historical survey.

Currently, the Utah Supreme Court interprets its open courts clause to grant both procedural and substantive protections.¹⁰ This interpretation has brought the clause to the forefront of Utah's tort reform battle.¹¹ Plaintiffs have challenged, sometimes successfully, statutes of repose,¹² statutory caps on damages,¹³ governmental

5. *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1204 (Utah 1999) (Stewart, J., concurring).

6. Hoffman, *supra* note 1, at 1280 ("Since legislative tort reform efforts have intensified in recent years, the open courts clause has become an important weapon for litigants battling to restrain the legislature's power to modify common-law remedies."). Tort reform refers to legislative reform attempts by business to limit what is seen as overreaching by plaintiffs and trial attorneys. Examples of tort reform statutes include shorter statutes of limitation, statutes of repose, and caps on damages. To get a feel for the current tort reform war, see Jonathan D. Glater, *To the Trenches: The Tort War is Raging On*, N.Y. TIMES, Jun. 28, 2008, http://www.nytimes.com/2008/06/22/business/22tort.html?pagewanted=all&_r=0.

7. *See, e.g.*, *Judd v. Drezga*, 103 P.3d 135, 137–38 (Utah 2002).

8. Thomas R. Philips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1313 (2003).

9. Schuman, *supra* note 4, at 1220.

10. *Laney v. Fairview City*, 57 P.3d 1007, 1017 (Utah 2002).

11. Gordon L. Roberts & Sharrieff Shah, *What is Left of Berry v. Beech—The Utah Open Courts Jurisprudence?*, 2005 UTAH L. REV. 677, 677–80 (2005).

12. *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 683 (Utah 1985) (holding statute of repose unconstitutional under open courts clause); *Horton v. Goldminer's Daughter*, 785 P.2d 1087, 1094 (Utah 1989) (holding builders and architects statute of repose unconstitutional under open courts clause); *Sun Valley Water Beds of Utah v. Herm Hughs & Son, Inc.*, 782 P.2d 188, 194 (Utah 1989) (holding builders' and architects' statute of repose unconstitutional under open courts clause); *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1201 (Utah 1999) (holding builder's statute of repose as constitutional under open courts clause).

13. *Condemarin v. Univ. Hosp.*, 775 P.2d 348 (Utah 1989) (holding \$100,000 cap on damages unconstitutional after reviewing open courts clause in relation to equal protection and

immunity,¹⁴ the Wrongful Life Act,¹⁵ the Good Samaritan Act,¹⁶ and the abrogation of the cause of action for loss-of-consortium.¹⁷

The Utah Supreme Court gives a substantive interpretation to the open courts clause based on two historical assumptions: (1) Utah's founding generation adopted the clause to prevent big business from corrupting the legislature,¹⁸ and (2) Utah's founding generation understood the clause to protect all causes of action ever recognized in the state's history, including common-law causes of action.¹⁹ This Comment argues that the court's interpretation is wrong because the two historical assumptions this interpretation relies upon are false. Instead, Utah history shows that the proper interpretation of the open courts clause is procedural because that is the original meaning of the clause.²⁰

In Part II of this Comment, I briefly review the Utah Supreme Court's inquiries into the history of the open courts clause. I begin with *Berry v. Beech Aircraft Corp.*,²¹ the case establishing the court's two-pronged test, and finish with *Laney v. Fairview City*,²² the case where the court finally adopts a historical theory for its interpretation. Part III addresses and then rejects the two historical assumptions the court's interpretation relies upon. I address each assumption separately by first presenting evidence supporting the

due process clauses); *Judd v. Drezga*, 103 P.3d 135, 141 (Utah 2004) (holding statutory cap on damages as constitutional under open courts clause).

14. *Laney*, 57 P.3d at 1027 (holding Utah Governmental Immunity Act's redefinition of "governmental function" unconstitutional under open courts clause); *Debry v. Noble*, 889 P.2d 428, 442 (Utah 1995) (holding core governmental actions outside the protection of the open courts clause); *Ross v. Schackel*, 920 P.2d 1159, 1162–66 (Utah 1996) (holding action under Governmental Immunity Act as constitutional and outside the protection of the open courts clause); *Lyon v. Burton*, 5 P.3d 616, 628 (Utah 2000) (holding statutory cap and governmental immunity for firefighter as constitutional under open courts clause).

15. *Wood v. Univ. of Utah Med. Ctr.*, 67 P.3d 436, 443 (Utah 2002) (holding Utah's Wrongful Life statute constitutional under open courts clause).

16. *Hirpa v. IHC Hosp., Inc.*, 948 P.2d 785, 794 (Utah 1997) (holding Utah's Good Samaritan Act as constitutional under open courts clause).

17. *Cruz v. Wright*, 765 P.2d 869, 871 (Utah 1980) (holding statute abolishing loss-of-consortium cause of action as constitutional under open courts clause).

18. See *infra* notes 40–46 and accompanying text.

19. See *infra* note 29 and accompanying text.

20. In looking to the original meaning, this Article is not looking to the original intent of the drafters, so it will not address certain arguments in that regard.

21. *Berry v. Beech Aircraft Corp.*, 717 P.2d 670.

22. *Laney v. Fairview City*, 57 P.3d 1007 (Utah 2002).

assumption and then evidence opposing the assumption, evaluating the court's interpretation in the process. Evidence for both sides comes from the opinions of Utah Supreme Court justices, outside writings by scholars, and my own independent research. Part IV then addresses the proper interpretation of the open courts clause given Utah's founding generation's unique history and what they would have known about the clause. The evidence shows that Utah's founding generation would have understood the open courts clause to protect access to the courts, procedural due process rights, and vested rights. Part V concludes.

II. THE UTAH SUPREME COURT'S INTERPRETATION OF THE OPEN COURTS CLAUSE

The Utah Supreme Court's interpretation of the open courts clause relies on little historical research and questionable assumptions. Utah first entered the open courts clause debate in *Berry*, the case establishing the court's complex, two-pronged test.²³ *Berry* provided little, if any, evidence as to why the court's interpretation was in line with the clause's original public meaning. And subsequent cases did little to back up *Berry's* assumptions. It was not until *Laney*—decided seventeen years after *Berry*—that the court settled on a historical basis for its interpretation.

Berry dealt with the constitutionality of a statute of repose.²⁴ After the plaintiff's husband was killed in an airplane accident, she filed suit against both the owner of the plane and the manufacturer. But the statute of repose barred the claim against the manufacturer. Under the statute, claims had to be brought within ten years of the date of manufacture; however, the plaintiff's claims were brought twenty-three years after the date of manufacture.²⁵ The court concluded that the statute of repose violated both Utah's wrongful death clause and Utah's open courts clause.²⁶

Utah's open courts clause reads:

All courts shall be open, and *every person, for an injury done to him in his person, property or reputation, shall have remedy by due course*

23. Schuman, *supra* note 4, at 1215 (explaining *Berry's* "complex methodology").

24. *Berry*, 717 P.2d at 671–72.

25. *Id.*

26. *Id.* at 686.

of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.²⁷

To determine whether the remedies portion had been violated, the court fashioned a complex, two-pronged test by asking:²⁸ (1) Does the statute provide a substitute remedy of equal value? If yes, the statute does not violate the open courts clause. If no, the court moves to the second prong; (2) Is there is a clear social or economic evil? And is abrogation of the remedy or cause of action either an arbitrary or unreasonable means of eliminating that evil? If yes, the statute violates the clause and is unconstitutional. If no, the clause is satisfied.

In relying on this test, the court made a key but unexpressed assumption: that the word “injury” in the clause refers to all causes of action ever recognized in the state’s history, in particular common-law causes of action (“common law interpretation”).²⁹ Alternatively, “injury” could refer to all causes of action currently recognized by law—statute or common law (“current law interpretation”).³⁰ If the assumption in *Berry* is correct, the test is obviously necessary and certain types of injuries are protected regardless of the legislature’s recognition of them. But if the assumption in *Berry* is wrong, the test becomes wholly unnecessary. The only types of injuries protected are those defined by current law, including statutes and common-law rules not overridden by statute. No injury means no required remedy. And no required remedy means no need for questions about substitute remedies and sufficient justifications for eliminating remedies.³¹ Which interpretation, if

27. UTAH CONST. art 1, § 11 (emphasis added).

28. *Berry*, 717 P.2d at 680.

29. *Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1236 (Utah 1999) (Zimmerman, J., concurring).

30. *Id.* at 1237. A third alternative is to interpret “injury” to mean every injury—legal or not. But “[t]he law simply does not recognize that every harm suffered should be compensated. The principle *damnum absque injuria*, that there can be damage without the violation of a legal right, is too well established in our jurisprudence to give such an expansive interpretation to the obscure phrasing of the open courts provision.” *Id.* at 1236.

31. *Id.* at 1237–39 (explaining the result of current law interpretation of “injury”).

either, is correct? The answer depends on how Utah's founding generation would have interpreted the word "injury."³²

As stated before, *Berry* was based upon an unexpressed assumption. The court merely noted that the clause "originated with the Magna Carta and 'Sir Edward Coke's Gloss on Chapter 29.'"³³ But it inquired little, if at all, into the clause's original meaning to Utah's founding generation.

The Utah Supreme Court did not explore that question until after *Berry* was decided. It was not until *Ross v. Schackel* that the court's interpretation was challenged as being out of step with Utah's founding generation's interpretation.³⁴ The petitioner, Schackel, contended that the clause was meant to restrict only the judiciary, not the legislature, giving credence to the current law interpretation. Schackel based his claim on Utah history, which showed a political climate of distrust for courts at the time of the constitution's adoption. But the court ignored his contention holding it unnecessary to address because *Berry* actually supported Schackel's case.³⁵

Then, in *Craftsman*, one of *Berry*'s most loyal supporters,³⁶ Justice Zimmerman, changed his vote and concluded that *Berry* should be overturned.³⁷ Justice Zimmerman argued and provided evidence that Utah had "a history, prior to statehood, of abjuring the common law entirely,"³⁸ undermining the court's common-law interpretation. He pointed to two Utah territorial statutes that limited or abrogated the common law. Responding to Justice Zimmerman's claims, Justice Stewart wrote a concurrence countering that "[t]he warp and the woof of the law in the Territory was the common law."³⁹ He cited three Utah Territory Supreme Court cases which concluded that the common law had been adopted in the territory. He also noted that Utah adopted its

32. See *infra* text accompanying notes 44–46.

33. *Berry*, 717 P.2d at 674.

34. *Ross v. Schackel*, 920 P.2d 1159, 1162 (Utah 1996).

35. *Id.*

36. Roberts & Shah, *supra* note 11, at 688 (noting that Justice Zimmerman was a "strong advocate").

37. *Craftsman Builder's Supply, Inc. v. Better Mfg. Co.*, 974 P.2d 1194, 1224 (Utah 1999) (Zimmerman, J., concurring).

38. *Id.* at 1236.

39. *Id.* at 1210 (Stewart, J., concurring).

constitution during the progressive era when states were trying to curb legislative power because of political corruption by big business.⁴⁰ “[This corruption] no doubt influenced the Utah Framers,” Justice Stewart wrote.⁴¹ The debate between the two justices was relegated to separate concurring opinions.⁴² The court in *Craftsman* did not overturn *Berry* or decide what historical theory supported it. But Justice Stewart’s approach eventually won the day with the court.

In *Laney*, some seventeen years after *Berry*, the court adopted Justice Stewart’s historical theory to support its interpretation.⁴³ Writing for the majority, Justice Durham declared that “[c]onstitutional language must be viewed in context, meaning that its history and purpose must be considered in determining its meaning.”⁴⁴ In the case of the open courts clause, “[t]he constitution’s drafters understood that the normal political processes would not always protect the common law right of all citizens to obtain remedies for injuries.”⁴⁵ Thus, the history and purpose behind Utah’s open courts clause was to prevent “misuse of political influence by railroads and other corporate interests, who convinced [other] state legislators to favor private interests through legislative enactments.”⁴⁶

III. WHY THE UTAH SUPREME COURT’S INTERPRETATION IS WRONG

The Utah Supreme Court’s interpretation of the open courts clause relies upon two historical assumptions: (1) Utah’s founding generation adopted the clause to prevent special interests from corrupting the legislature, and (2) Utah’s founding generation believed the clause would have this effect because they gave a common-law interpretation to the clause. But historical research shows neither of these assumptions to be true. The first is unlikely. And the second is absurd.

40. *Id.* at 1208–09.

41. *Id.* at 1209.

42. *See id.*

43. *Laney v. Fairview City*, 57 P.3d 1007 (Utah 2002).

44. *Id.* at 1018.

45. *Id.* at 1019.

46. *Id.* at 1017.

A. The Special Interests Assumption

As will be shown, it is unlikely that Utah's founding generation adopted the open courts clause to stop special interests from corrupting the legislature. The only historical support for this assumption is that other states had these concerns and that Utah was aware of them. But Utahns trusted the legislature more than any other branch of government. Their reasons for restricting legislative power are much more nuanced than the court suggests. Further, the court offers no evidence directly linking the clause to Utahns' awareness of other states' concerns. In fact, these states—whose experiences Utahns were allegedly relying upon when adopting the clause—did not even rely on the open courts clause to resolve their own concerns; they adopted different clauses. Thus, it is more likely than not that Utahns adopted the clause for reasons other than to prevent special interests from corrupting the legislature.

1. The argument in support of the special interests assumption

The *Laney* court notes that Utah adopted its constitution during the progressive era.⁴⁷ In the United States, big business—railroads and mining corporations—exercised substantial political control over state legislatures.⁴⁸ Through that control, they were able to obtain special privileges and favorable laws.⁴⁹ As a result, citizens of states had grown to distrust their legislatures and sought to restrict their power when adopting new constitutions.⁵⁰ For example, in Kentucky's constitutional convention, one delegate is recorded as saying “the principal, if not the sole purpose of the constitution which we are here to frame, is to restrain [the Legislature's] will and restrict its authority.”⁵¹ Progressives “allied [themselves] with

47. See MARTIN B. HICKMAN, *THE UTAH CONSTITUTION: RETROSPECT AND PROSPECT* 18 (1969) (explaining that the progressive era influenced Utah's Labor Article).

48. *Craftsman*, 974 P.2d at 1208–09 (Stewart, J., concurring) (quoting Johnny J.S. Sorensen, Comment, *Adios Statute of Repose: A Temporary Aberration in Constitutional Interpretation*, 26 ARIZ. ST. L.J. 1101, 1107–08 (1994)).

49. *Id.*

50. *Id.*

51. *Perkins v. Ne. Log Homes*, 808 S.W.2d 809, 812 (Ky. 1991) (quoting Legislative Research Commission, Research Report No. 137, 161 (Jan. 1987)).

prolabor interests,”⁵² pushing constitutional delegates to grant greater protections for remedies and causes of action in states like Kentucky and Arizona.⁵³

The court argues that Utahns were aware of these problems and, through the constitution, went to work restricting their own legislature to prevent the abuses seen in other states.⁵⁴ For example, the court argues that Utah’s constitution prohibits “special laws . . . where general laws could apply, but went on to list eighteen specific cases where there should be no private or special laws (Art. VI, sec. 26).”⁵⁵ Numerous other sections restricted the legislature’s power as well.⁵⁶ Utah also did not adopt clauses found in other states’ constitutions that were more clearly procedural instead of substantive.⁵⁷ For example, Washington’s clause simply states that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.”⁵⁸ There is no guarantee of a remedy for every injury. Additionally, if the clause were viewed as providing only procedural protections, it “is redundant and mere surplusage—it has no constitutional role or function that is not already performed by [Utah’s due process clause].”⁵⁹ Thus, the court declares, it is obvious that “[Utah’s framers] did not intend to so limit the rights guaranteed to the citizens of Utah.”⁶⁰

52. *Craftsman*, 974 P.2d at 1208–09 (Stewart, J., concurring) (quoting Sorensen, *supra* note 48, at 1107–08).

53. *Laney v. Fairview City*, 57 P.3d 1007, 1017 (Utah 2002) (relying on the histories of Kentucky and Arizona as found in *Perkins*, 808 S.W.2d at 811–12, and *Kenyon v. Hammer*, 688 P.2d 961, 971–73 n.9 (Ariz. 1984), respectively).

54. *Laney*, 57 P.3d at 1017–19.

55. *Id.* at 1018 (quoting JEAN BICKMORE WHITE, CHARTER FOR STATEHOOD: THE STORY FOR UTAH’S STATE CONSTITUTION 46 (1996)).

56. *Id.*; *see also* UTAH CONST. art. 6, §§ 22, 28, art. 7, § 29, art. 16, § 5. The fact that some sections were drafted to restrict the legislature does not mean that all sections must be interpreted as broadly as possible to do the same. Instead, the legislature meant what is said (i.e. that the legislature should be restricted where the Constitution specifically says it should be).

57. *Id.* This argument follows from the “Modeled or Borrowed Statute Rule,” a textual interpretation tool used by courts. *See Zerbe v. State*, 578 P.2d 597 (ARK. 1978).

58. WASH. CONST. art. 1, § 10.

59. *Laney*, 57 P.3d at 1018; *see also infra* Part IV.B.

60. *Laney*, 57 P.3d at 1018.

2. *Why the special interests assumption proves unwarranted*

The court's reliance on other state histories⁶¹ hurts its theory more than it helps it. Kentucky is the perfect example. Kentucky first adopted its open courts clause in 1792 and readopted it in 1891.⁶² During the 1890 convention, Kentucky's delegates disagreed sharply on how sweeping the clause's protections were.⁶³ Delegate W.G. Bullitt wanted the convention to adopt⁶⁴ what is now section 242 of the Kentucky Constitution—providing that “corporations . . . invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed . . . according to the course of the common law.”⁶⁵ But delegate George Washington argued against the section, claiming it was duplicitous due to Kentucky's takings and open courts clauses.⁶⁶ He proclaimed:

For every “legal injury” there is a remedy. So that, not simply upon common law principles, but in virtue of [the open courts clause], there is a right of recovery The remedies now afforded seem to me to be ample therefore, [section 242] . . . seems to me to be uncalled for⁶⁷

Another delegate, J.F. Askew, responded by saying, “[F]or injuries recognized by law you now have your remedy; but I tell you he knows that the common law in this respect could be repealed by the Legislature. There is no principle in the common law made sacred by the Constitution.”⁶⁸ Bullitt later explained that Section 242 was necessary because:

In Kentucky, if an individual constructs on his own property things which would damage your property, you have a right of action at

61. *Id.* at 1017–19.

62. *Perkins v. Ne. Log Homes*, 808 S.W.2d 809, 811 (Ky. 1991).

63. 4 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT, ON THE EIGHTH DAY OF SEPTEMBER, 1890, TO ADOPT, AMEND OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 4725–27, 4743–44 (1890) [hereinafter KENTUCKY DEBATES].

64. *Id.* at 4723–61.

65. KY. CONST. § 242 (emphasis added).

66. KENTUCKY DEBATES, *supra* note 63, at 4725–27.

67. *Id.* at 4727.

68. *Id.*

common law; but if a railroad constructs those impediments that interfere with the right of enjoyment of you or your own land, you have not a right of action, because the Legislature has authorized the railroad to construct its bed in the way that it had been constructed.⁶⁹

In the end, the convention agreed with Bullitt and Askew and adopted section 242.⁷⁰ True, Kentucky and other states were attempting to restrict legislative power and prevent corruption by big business. But they were not confident that the open courts clause could achieve that goal. Instead, they chose to adopt other provisions to protect their rights.⁷¹ If states that were antagonistic towards legislatures did not believe open courts clauses could protect the common law, it is unlikely that Utah did.

Utahns' relationship with the legislature already differed from any other state. For nearly fifty years, Utahns' only friend in

69. *Id.* at 4743.

70. *Id.* at 4761.

71. *See, e.g.*, KY. CONST. § 54 (“The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.”); KY. CONST. § 196 (“No common carrier shall be permitted to contract for relief from its *common law* liability.”) (emphasis added); KY. CONST. § 242 (“Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them . . . [t]he amount of such damages shall, in all cases, be determined by a jury, according to the *course of the common law*.”) (emphasis added). The other state history the Court cites to is Arizona’s history. *Laney v. Fairview City*, 57 P.3d 1007, 1017 (Utah 2002) (citing *Kenyon v. Hammer*, 688 P.2d 961, 971–73 (1984)). But Arizona adopted more protective clauses as well. *See, e.g.*, ARIZ. CONST. art. 18, § 6 (“The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.”); ARIZ. CONST. art. 2, § 31 (“No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person.”); ARIZ. CONST. art. 18, § 3 (“It shall be unlawful for any person, company, association, or corporation to require of its servants or employees as a condition of their employment, or otherwise, any contract or agreement whereby such person, company, association, or corporation shall be released or discharged from liability or responsibility on account of personal injuries which may be received by such servants or employees while in the service or employment of such person, company, association, or corporation, by reason of the negligence of such person, company, association, corporation, or the agents or employees thereof; and any such contract or agreement if made, shall be null and void.”) (emphasis added). Kentucky interprets its open courts clause in conjunction with the other clauses in its constitution explicitly limiting the legislature’s power to abrogate the common law—clauses Utah did not adopt. It is also read in light of Kentucky’s founding generation’s disdain for its legislature—disdain that Utah did not have. *See Perkins v. Ne. Log Homes*, 808 S.W.2d 809, 811–12 (Ky. 1991).

government was the territorial legislature.⁷² “The territorial governors had been political [and federal] appointees, often poorly equipped to cope with the problems of governing. The federal judges were often hated and despised. The legislatures on the other hand had been the champions of the public will and had enjoyed public confidence.”⁷³ To the degree that Utahns did restrict their legislature, it was because of experiences borne in other states.⁷⁴ Unlike Kentucky, whose “sole purpose” in framing a constitution was to restrict the legislature,⁷⁵ Utah’s purpose was to attract outside capital, grow the economy, and become a “magnet for new enterprises.”⁷⁶ Thus, delegates were careful in framing their new constitution.

Utah’s delegates did not worry that special interests would use the legislature to avoid liability for injury. Delegate Ryan, after commenting on recent injuries in mines, stated that “some legislation in that direction would probably be all that would be necessary.”⁷⁷

The *Laney* court points out that Utah did not adopt a more limited open courts clause like Washington’s.⁷⁸ But what is more telling is that Utah did not adopt any of the clauses that would have provided real protection for remedies and causes of action, like the clauses from Wyoming⁷⁹ or Kentucky did.⁸⁰ “Delegates were given copies of all forty-four state constitutions, and they frequently

72. MARTIN BERKELEY HICKMAN, UTAH CONSTITUTIONAL LAW 74 (1954).

73. *Id.*

74. *Id.* at 74–75.

75. *See supra* note 51 and accompanying text.

76. Jean Bickmore White, *So Bright the Dream: Economic Prosperity and the Utah Constitutional Convention*, 63–4 U. HIST. QUARTERLY 320, 328 (Fall 1995).

77. 2 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MARCH, 1895, TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH 1047 (1898).

78. *Laney v. Fairview City*, 57 P.3d 1007, 1018 (Utah 2002).

79. *See, e.g.*, WYO. CONST. art. 9, § 4 (“For any injury to person or property caused by wilful [sic] failure to comply with the provisions of this article, or laws passed in pursuance hereof, a right of action shall accrue to the party injured, for the damage sustained thereby”) (emphasis added).

80. *See supra* note 71.

referred to them.”⁸¹ As a result, they most likely knew about these clauses, and they would have included them had they wanted to.

Furthermore, delegates knew how to protect causes of action. They did so when they approved Utah’s wrongful death clause, which stated that “[t]he right of action to recover damages for injuries resulting in death, shall never be abrogated.”⁸² But the delegates did not protect other causes of action.⁸³ Thus, it is unlikely Utah’s adoption of the open courts clause was part of its effort to restrict legislative power and prevent special interest corruption. To whatever extent the state was worried about big business escaping liability, this was limited to wrongful death actions.

B. The Common Law Assumption

The *Laney* court’s special interest assumption is even more incredible after considering the assumption it relies upon: that Utah’s founding generation gave a common-law interpretation to the open courts clause.⁸⁴ As will be shown below, the court offers no historical evidence for this assumption. The only supporting evidence is from Justice Stewart’s opinion in *Craftsman* and outside research by American history scholars—if the country as a whole gave a common-law interpretation to the clause, then arguably Utah may have as well. But even that evidence is merely circumstantial. A thorough review of Utah history shows that Utahns ignored, derided, and even attempted to abrogate the common law. Thus, the

81. White, *supra* note 76, at 322 n.3. Before 1895, Utah had already drafted several constitutions and had attempted statehood a number of times. “The draft constitutions of 1849, 1856, 1862, and 1869 are almost identical documents and all bear a striking resemblance to the Illinois constitution of 1812.” HICKMAN, *supra* note 47, at 13. The constitutions of 1872, 1882, and 1887 were taken principally from the Nevada constitution. *Id.* at 14–15. Utah’s open courts clause was most likely copied from the Connecticut constitution. See CONN. CONST. art. 1, § 10 (“All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”). But it was slightly changed during the convention debates to remove “sale” and add “unnecessary” to the last clause. 1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MARCH, 1895, TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH 304–06 (1898).

82. UTAH CONST. art. 16, § 5.

83. See UTAH CONST.

84. See *supra* Part III.A.

notion that they interpreted the open courts clause to protect the common law is not only improbable but absurd.

1. The argument in support of the common law assumption

Outside scholars note that the common law played a leading role in America's war for independence and served as a moral justification for the Revolution.⁸⁵ America's founding generation recognized that they were rebelling against Parliament's law,⁸⁶ but they believed themselves to be preserving an even older law—the common law.⁸⁷ “It was Parliament's attempts in 1760s and seventies, as Jefferson said, ‘to make law where they found none, and to submit us at one stroke to a whole system no particle of which has its [sic] foundation in the Common Law’ that Americans were resisting.”⁸⁸ In other words, Americans believed it was England who had rebelled against the law; not them. “[F]or example, in 1761, James Otis . . . argu[ed] that ‘writs of assistance’ (general search warrants) authorized by Britain's Navigation Act were unconstitutional because they violated the common law precept that ‘a man's house is his castle.’”⁸⁹ Otis was not alone in his belief that England had violated common-law rights. Indeed, “[t]he persistent appeals to the common law in the constitutional struggles leading up to the American Revolution ‘created a regard for its virtues that seems almost mystical.’”⁹⁰

Winning independence from England was only the beginning of America's struggle to preserve common-law rights. Immediately after the war, Americans began the work of drafting the first state constitutions.⁹¹ In writing their state constitutions, early legislatures granted themselves plenary power, believing they were different than

85. Ned Miltenberg, *The Revolutionary ‘Right to a Remedy,’* 34 TRIAL 48, 48–49 (Mar. 1998).

86. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787* 265 (1969).

87. Miltenberg, *supra* note 85, at 49.

88. WOOD, *supra* note 86, at 265.

89. Miltenberg, *supra* note 85, at 49 (citing 10 *THE WORKS OF JOHN ADAMS* 247–48 (Charles Francis Adams ed., 1856)).

90. *Id.* (internal quotation marks omitted) (quoting MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860* 4–5 (1977)).

91. *Id.* at 49–50.

the despots they saw as Parliament.⁹² But of course, it did not take long before early state legislatures began to abuse their new-found power.⁹³ They began to pass laws confiscating property, suspending creditor's rights, and staying and reversing court judgments.⁹⁴ "In fact, 'depriving people of common law causes of action for damages was not uncommon.' . . . In Vermont, for example, such legislative edicts eventually 'stopp[ed] nine-tenths of all causes [of action] in the state.'⁹⁵ In response to this legislative tyranny, early states went to work "revamp[ing] their state constitutions."⁹⁶ The result was a constitutional system of checks and balances, separation of powers, and guarantees of rights—one of which was the open courts clause.⁹⁷

It is possible then that the same feelings and political climate present during America's founding survived through the decades to Utah's founding. As evidence of Utahns' respect for the common law, Justice Stewart cites three Utah Territory Supreme Court cases⁹⁸—each stating that the common law was extended over the territory.⁹⁹ He also notes that many territorial supreme court cases applied common-law principles,¹⁰⁰ as well as the fact that Utah's Declaration of Rights cannot be understood without reference to its common-law heritage.¹⁰¹ As Justice Stewart so aptly put it, "The

92. *Id.* at 50.

93. *Id.*

94. *Id.*

95. *Id.* (first alteration in original) (citing WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 91–91 (1975)) (citing WOOD, *supra* note 86, at 407).

96. *Id.* at 51.

97. *Id.*

98. *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1209–10 (Utah 1999) (citing *Thomas v. Union Pac. R.R.*, 1 Utah 232, 234 (1875); *First Nat'l Bank of Utah v. Kinner*, 1 Utah 100, 107 (1873); *People v. Green*, 1 Utah 11, 13–14 (1876)).

99. *Thomas*, 1 Utah at 234 (1875) ("Although the Common Law has not been adopted in this Territory by any Statute, we entertain no doubt that it should be regarded as prevailing here . . ."); *First Nat. Bank of Utah*, 1 Utah at 107 ("They have tacitly agreed upon maxims and principles of the Common Law suited to their conditions and consistent with the Constitution and Laws of the United States, and they only wait recognition by the courts to become the Common Law of the Territory."); *Green*, 1 Utah at 13 ("[Common law] is most positively extended over the Territory of Utah by the express language of the Act of Congress providing a Territorial Government for Utah, approved September 9th, 1850 . . .").

100. *Craftsman*, 974 P.2d at 1210.

101. *Id.*

warp and the woof of the law in the Territory was the common law.”¹⁰²

2. *Why the common law assumption proves absurd*

But even if all the above evidence is taken as true, it does not prove that Utah’s founding generation understood the open courts clause to carry a common-law interpretation. First, it is far from clear as to whether America’s founding generation interpreted the clause in this way. And second, even if they did, Utah’s founding generation did not.

First, it is unlikely that America’s founding generation interpreted the open courts clauses to mean common-law injuries instead of legal injuries. The only evidence in support of the common-law interpretation is the general feelings of America’s populous.¹⁰³ There is no statement or writing directly linking the open courts clause to those feelings, let alone a common-law interpretation of the clause. True, America’s founding generation did attempt to prevent the abuses of England and early state legislatures. But many of those abuses are prevented by the separation of powers and contractual obligations clauses,¹⁰⁴ or even a “legal injury” interpretation of the open courts clause. Further, some states with open courts clauses have other constitutional clauses expressly allowing modification of the common law.¹⁰⁵ Delaware, the first state to ever adopt an open courts clause, is one of these states.¹⁰⁶ Delaware’s constitution declares that “[t]he common law . . . shall

102. *Id.*

103. *See infra* text accompanying notes 85–102.

104. Clauses like these resolve the problem of legislatures suspending or reversing court judgments and interfering with creditor’s rights. *See, e.g.*, PA. CONST. art. 9, § 17 (1790) (“That no ex post facto law, nor any law impairing contracts, shall be made.”); *Banesboro Borough v. Speice*, 40 Pa. Super. 609, 612 (1909) (“Retrospective laws may be supported when they impair no contract and disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair, and do not vary existing obligations contrary to their situation when entered into and when prosecuted”) (citation omitted).

105. W. VA. CONST. art. 11, § 8 (1863) (“Such parts of the common law . . . shall be and continue the law of this State until altered or repealed by the Legislature.”); WIS. CONST. art. 14, § 13 (1848) (“[T]he common law . . . shall be and continue part of the law of this state until altered or suspended by the legislature.”).

106. DEL. CONST. art. 25 (1776). *See also* Hoffman, *supra* note 1, at 1308 (explaining that author of first open courts provision was not trying to “limit the power of the legislature in prescribing remedies”).

remain in force, *unless [it] shall be altered by a future law of the legislature.*"¹⁰⁷ These clauses are in direct conflict with a common-law interpretation of the open courts clause. Given the lack of any direct evidence in support of the common-law interpretation, and the evidence against such an interpretation, it is more likely than not that America's founding generation did not interpret the open courts clauses to mean common-law injuries.

But even if America's founding generation gave a common-law-injuries interpretation to the open courts clause, Utah's founding generation did not. Utahns' interpretation of the open courts clause would have been similar to interpretations by nineteenth-century courts. But these interpretations in nineteenth-century case law are conflicting on whether open courts clauses protect common-law causes of action and remedies.¹⁰⁸

For example, in *Hotchkiss v. Porter*, the Connecticut Supreme Court chose one interpretation. The court dealt with a statute affecting the common-law cause of action for libel.¹⁰⁹ The trial court held that the act of 1855—declaring that “unless the plaintiff shall prove malice in fact he shall recover nothing but his actual damage”¹¹⁰—changed the common-law rule for collecting general damages.¹¹¹ But the Connecticut Supreme Court disagreed:

It is also recognized in the declaration of rights which is placed in the very front of the constitution of this state, and it is there provided that “every person, for an injury done him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.” This right, thus existing and thus secured, *legislative authority can not* [sic] *take away*, abridge or impair, and any attempt to do it will be inoperative and void.¹¹²

107. DEL. CONST. art. 25 (1776) (emphasis added).

108. Compare *Brown v. Board of Levee Comm'rs*, 50 Miss. 468, 480 (1874) (“The [due course of law] does not demand that the laws existing at any point of time shall be irrevocable, or that any forms of remedies shall necessarily continue.”), with *Thirteenth & Fifteenth St. Passenger Ry. Co. v. Boudrou*, 92 Pa. 475, 482 (1880) (“A [statutory] limitation of recovery to a sum less than the actual damage, is palpably in conflict with the right to a remedy by due course of law.”).

109. *Hotchkiss v. Porter*, 30 Conn. 414, 418 (1862) (emphasis added).

110. *Id.* at 419.

111. *Id.* at 416.

112. *Id.* at 418 (emphasis added).

The court interpreted the statute to conform to the common law.¹¹³ To interpret it otherwise would make it unconstitutional.¹¹⁴

Hotchkiss stands in stark contrast to *Templeton v. Linn County*. In *Templeton*, the plaintiff attempted to sue a county.¹¹⁵ But the territorial statute making the county liable had been repealed since the adoption of Oregon's constitution.¹¹⁶ The plaintiff argued "that by [the open courts clause], the legislature of the state was disabled from repealing said territorial statute without enacting another, which would be a substantial equivalent for the law as it then stood on that subject."¹¹⁷ But the Oregon Supreme Court disagreed, stating that "[a]s a proposition of constitutional law, [the plaintiff's] contention seems startling . . . no judicial authority was cited upon the argument in support of it, and . . . it may be safely assumed that none exists."¹¹⁸ The court held that Oregon's open courts clause protected only vested rights. Thus, the statute was constitutional.¹¹⁹

Nineteenth-century courts were not alone in their confusion. As already noted, delegates to the Kentucky Constitutional Convention also disagreed on the open courts clause's proper interpretation.¹²⁰ Whatever the clause's meaning was to America's founding generation, these examples show that Americans disagreed on its interpretation a century later. Thus, Utah's founding generation's understanding of the clause cannot be based upon America's founding generation's understanding of the clause. Instead, it must be determined from Utah's own history whether the clause carried the common-law interpretation's meaning. And as the argument below will show, Utah's history provides a second reason why the state did not adopt this meaning.

113. *See id.*

114. *Id.* 419–22.

115. *Templeton v. Linn County*, 29 P. 795, 795–96 (Or. 1892).

116. *Id.*

117. *Id.* at 796.

118. *Id.*

119. *Id.* at 797. Concurring with the court, Justice Bean noted that at the time of the constitution's adoption, a municipal corporation could be held liable by both common law and statutory law, *id.* (Bean, J., concurring), yet in *O'Harra v. City of Portland*, 3 Or. 525 (1869), the court upheld a statute exempting the city of Portland from liability. *Id.* He concluded that "[t]he provision of the constitution under consideration in [*Templeton*] does not seem to have been noticed or considered by the court in *O'Harra v. City of Portland*, but the result of that decision is fatal to plaintiff's contention here." *Id.*

120. *See supra* notes 62–71 and accompanying text.

Utah's unique history of opposing the common law sets it apart from every other state in the Union. This unique history is primarily due to Utah's Mormon history. Upon settling in Utah, the Mormon Church:

[P]erformed the full complement of governmental functions: from the granting of permission to engage in business, to the levying of taxes, the building of public roads and bridges, and the provision for the welfare of the needy; the definition and provision of punishment for a full schedule of crimes, ranging from adultery to trading with the Indians; the exercise of unlimited power to adjudicate in civil and criminal cases; the appointment of law enforcement and other officials; the creation of a militia.¹²¹

A few years later, Utahns established the State of Deseret, adopting "many of the enactments of the church-government" from before.¹²² The same occurred when Congress granted Utah territorial status: "the territorial legislature took over . . . [and] in turn, adopted all laws of Deseret."¹²³ Needless to say, the Church exercised enormous influence on civil life and the law.

Utahns view on law and its purposes did not match the common law's view. "[Mormons'] conception of law was not as a protector of private rights nor as a regulator of civil society. To them, individual rights were subordinate to the larger group goal . . . to build the 'Kingdom of God on Earth . . .'"¹²⁴ Laws "acquired legitimacy only when they" furthered that goal.¹²⁵ In the words of historian Edward W. Tullidge, "[The Mormons'] judicial economy was after the patterns of the New Testament rather than after the patterns of Blackstone."¹²⁶

As a result, Utahns ignored the common law for property rights. For example, early Church actions "amounted to an abrogation of the common law in regard to property and riparian water rights."¹²⁷

121. Orma Linford, *The Mormons, the Law, and the Territory of Utah*, 23 AM. J. LEGAL HIS. 213, 220 (July 1979).

122. *Id.* at 220–21.

123. *Id.* at 221.

124. *Id.* at 223.

125. *Id.*

126. *Id.* at 232.

127. *Id.* at 224.

Upon entering the valley, Brigham Young declared the “land law.”¹²⁸ Under that law, the Church granted each man a plot of land that, if not cared for, was taken away.¹²⁹ Utahns also made water and timber “community property.”¹³⁰ Indeed, “[f]ederal land policies were not enforced in Utah until 1869.”¹³¹

Utahns also ignored the common law in the field of criminal law. An example of this is demonstrated by Howard Egan’s trial.¹³² Egan was accused of murdering his wife’s lover. At common law, Egan was guilty of a “premeditated killing.”¹³³ But Egan’s representative, George A. Smith,¹³⁴ argued that “Egan’s action was justified under Utah’s ‘mountain common law.’”¹³⁵ The principle the court should apply, he argued, was that “[t]he man who seduces his neighbor’s wife must die, and her nearest relative must kill him!”¹³⁶ Smith’s argument was bolstered by a case from the previous year where a man, accused of a similar murder, was acquitted and his adulterous

128. *Id.* at 223.

129. *Id.*

130. *Id.* at 224.

131. *Id.* at 223.

132. Michael W. Homer, *The Judiciary and the Common Law in Utah, 1850-61*, 21 DIALOGUE: J. MORMON THOUGHT 97, 100 (Spring 1988).

133. *Id.*

134. Smith was not an attorney. Utahns disliked lawyers just as much as they disliked the common law and courts in general. Linford, *supra* note 121, at 228–30. It was said that some lawyers “returned to the East poorer lawyers than when they left—if such a thing is possible.” *Id.* at 230. This same attitude prevailed until after statehood. This is why Utah’s open courts clause, unlike any other state’s clause, says that “no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.” UTAH CONST. art. 1, § 11.

135. Homer, *supra* note 132. Smith’s reference to “mountain common law” may be related to Brigham Young’s teachings on the common law. See Linford, *supra* note 121, at 224–25 n.49. Young was once asked whether the Utah Territory had adopted the common law of England. Young responded that they had not. He explained:

We have a few Territorial laws, principally directory in their provisions and operation. And we have a *common law* which is written upon the tablets of the heart, and “printed on the inmost parts, whose executors and righteousness, and whose exactors are peace”; one of its golden precepts is “Do unto others as you would they should do unto you.” *This common law we seek to establish throughout the valleys of the mountains*; and shall continue our exertions for its adoption as long as we shall continue to exist upon the earth, until all nations shall bow in humble acquiescence [sic] thereto.

Id. at 224 (second emphasis added) (quoting 14 MILLENNIAL STAR, May 19, 1852, at 215).

136. Linford, *supra* note 121, at 224–25 n.49.

wife excommunicated.¹³⁷ The court rejected this argument but “agree[d] that the common law did not apply in Utah.”¹³⁸ Egan was later acquitted on different grounds. But the very next year, Utah’s territorial legislature passed a law justifying Egan’s actions.¹³⁹ Commenting on this same topic, Church leader Orson Pratt denounced the rest of the country that “recognized the common law and merely winked at adultery.”¹⁴⁰ Utahns were different, they were “governed by the laws of God and meted out Old Testament punishment for moral transgressions.”¹⁴¹

The common law was also rejected in “what was probably the first law school of the territory.”¹⁴² The school was organized by Judge Snow, one of the three territorial supreme court justices.¹⁴³ Snow taught that “they had ‘a right to make such laws as suited [their] own Convenience Notions and circumstances’ and that such laws could be enacted ‘without any regard to the Common Law of England or the laws which any of the states had adopted.’”¹⁴⁴

It did not take long, however, before Utahns stopped simply ignoring the common law and started fighting it. Two of the territory’s initial supreme court justices, non-Mormons, were forced to flee the state after a dispute with Brigham Young.¹⁴⁵ They later revealed that the Mormons were practicing polygamy—an act illegal at common law¹⁴⁶—and challenged Mormons to argue its legality in a “national forum.”¹⁴⁷ In response, Brigham Young went to the

137. Homer, *supra* note 132, at 100.

138. *Id.*

139. *Id.* at 101.

140. *Id.*

141. *Id.*

142. *Id.* at 100.

143. *Id.* The territorial supreme court was originally made up of three justices. But the two other justices, who were non-Mormons, “lasted only a little more than month before fleeing the Territory in fear of their lives.” Linford, *supra* note 121, at 222. *See also* Homer, *supra* note 132, at 98–99 (explaining in greater detail the two justices’ short stay and reasons for leaving).

144. Homer, *supra* note 132, at 100–01.

145. *See supra* note 143.

146. Homer, *supra* note 132, at 98 (“The common law provided that marriage while having a living husband or wife was a felony, and the second marriage was void.”) (citation omitted).

147. *Id.* at 101.

territorial legislature, asking them “to prohibit all judges from using common-law precedent.”¹⁴⁸ He proclaimed:

String a Judge, or Justice, of the legal mists and fog which surround him in this day and age, leave him no nook, or corner of precedent, *or common law ambiguous enactments*, the accumulation of ages, wherein to shelter, and it is my opinion, that unrighteous decisions would seldom be given.¹⁴⁹

The territorial legislature responded and, in 1854, passed a statute declaring as much:

[A]ll questions of law, the meaning of writings other than laws, and the admissibility of testimony, shall be decided by the Court; and *no laws or parts of laws shall be read, argued, cited, or adopted in any Court, during any trial, except those enacted by the Governor and Legislative Assembly of this Territory*, and those passed by the Congress of the United States when applicable; and no report, decision, or doings of any Court shall be read, argued, cited, or adopted as precedent in any other trial.¹⁵⁰

The First Presidency, the Church’s governing authority, followed up this legislation with a message to the Saints to “carry on all of their activities ‘without any contaminating influence of Gentile Amalgamation, laws and traditions.’”¹⁵¹ The First Presidency declared the common law to have no application in the Territory.¹⁵²

Soon thereafter, Utah’s newest chief justice, John Fitch Kinney,¹⁵³ a non-Mormon, held the territorial legislature’s statute illegal under the Organic Act—the law granting Utah territorial status.¹⁵⁴ “Mormons were furious.”¹⁵⁵ Church leaders quickly responded claiming that “Congress had given the legislature the

148. *Id.*

149. Linford, *supra* note 121, at 225 (emphasis added).

150. *Id.* (emphasis added).

151. Homer, *supra* note 132, at 102.

152. *Id.*

153. To learn more about Kinney, see Michael W. Homer, *The Federal Bench and Priesthood Authority: The Rise and Fall of John Fitch Kinney’s Early Relationship with the Mormons*, 13 J. MORMON HIS. 88 (1986).

154. Homer, *supra* note 132, at 102. The Organic Act granted the territorial supreme court and district courts “chancery as well as common law jurisdiction.” *Id.*

155. *Id.*

'privilege of excluding the common law at pleasure.'"¹⁵⁶ Heber C. Kimball went so far as to say that the federal judges "want all hell here."¹⁵⁷

In subsequent decisions, Kinney continued his campaign of forcing the common law on Utahns.¹⁵⁸ Ironically, Justice Stewart cites one of those decisions as evidence that the common law was the "warp and the woof of the law in the Territory."¹⁵⁹ But the territorial legislature disagreed. "[They] removed Kinney from the Salt Lake judicial district and assigned him to remote Carson Valley, later part of Nevada."¹⁶⁰ In response, Kinney complained to President James Buchanan.¹⁶¹ His "complaints helped convince [the President] to replace Young and send an army to Utah."¹⁶² The case Justice Stewart cites helped ignite the Utah War.

The battle over imposition of the common law continued for several more decades. Congress "prohibited bigamy in 1862 and polygamy" in the 1880s.¹⁶³ Federal officials sought to imprison Church authorities and attack Church finances. This was made possible after "the federal government bestowed unprecedented powers on its officials."¹⁶⁴ They even went so far as to ban Mormons from serving on juries. It was during this time period, that the territorial supreme court decided several other cases holding the common law applicable in the territory.¹⁶⁵ Thus, Justice Stewart was correct when he stated that "volumes of the Supreme Court Reports for the Territory of Utah are replete with the application of common law principles."¹⁶⁶ But those common law principles were not applied by Utahns; they were imposed by federally appointed judges.

156. *Id.* at 103.

157. *Id.*

158. *Id.* at 103–04.

159. *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1210 (Utah 1999) (Stewart, J., concurring) (citing *People v. Green*, 1 Utah 11, 13–14 (1876)).

160. *Homer*, *supra* note 132, at 104.

161. *Id.*

162. *Id.*

163. *Id.* at 107.

164. *Id.*

165. *Id.*

166. *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1210 (Utah 1999) (Stewart, J., concurring).

Even after the common law was forced upon Utahns, they did their best to limit its effects.¹⁶⁷ In 1882, the territorial legislature passed a statute stating, “Whenever there is any variance between the rules of equity and the rules of common law, in reference to the same matter, the rules of equity shall prevail.”¹⁶⁸ This statute was in line with Young’s earlier request to prohibit the common law. He said, “Let all of our laws have no other practice or rule of decision, save it be in the discretion vested in the bosom of the Court.”¹⁶⁹ Two years later, the territorial legislature also “declared that the common law rule that statutes in derogation of the common law shall be strictly construed had no application to the code of civil procedure.”¹⁷⁰

Utahns not only tried to limit the effects of the common law in court, they tried to avoid court altogether.¹⁷¹ “[Mormons] did not believe in going to law with one another. They took their cases to the ‘High Council’ and the courts of their bishops, or Ward Councils”¹⁷² These Church courts were not bound by the common law. In Church courts, “religious perspectives [were] determinative in conflicts arising out of contractual or tortious disputes.”¹⁷³ The more federal pressure increased, the “more developed” Church courts came to be.¹⁷⁴ The Church courts exercised exclusive jurisdiction over Mormons until as late as 1900.¹⁷⁵

167. Linford, *supra* note 121, at 227.

168. *Id.*

169. *Id.* at 225.

170. *Id.* at 227.

171. *See generally id.* at 230–33.

172. *Id.* at 232. “[Non-Mormons] occasionally took their civil claims to Church courts as well.” Robert E. Riggs, *Legal and Judicial History of the Church*, HAROLD B. LEE LIBRARY, http://eom.byu.edu/index.php/Legal_and_Judicial_History_of_the_Church (last updated 2014).

173. Edwin B. Firmage, *Religion & the Law: The Mormon Experience in the Nineteenth Century*, 12 CARDOZO L. REV. 765, 766 (1991). For more information on church courts, see *id.* at 788–98 (explaining church courts’ structure, jurisdiction, opposition to lawyers and technicalities, decisional standards, and substantive law). Church courts were also explained to Congress when Congress considered and rejected Utah’s 1887 application for statehood. UTAH STATEHOOD: REASONS WHY IT SHOULD NOT BE GRANTED 8–9 (1887).

174. Firmage, *supra* note 174, at 788.

175. *Id.* at 792. Any Mormon who went to civil court before a Church court was subject to church sanctions. *Id.*

It was not until after statehood, in 1898, that Utahns adopted the common law.¹⁷⁶ But even then, it was only adopted in “so far as it was not repugnant to, or in conflict with . . . the constitution or laws of [the] state.”¹⁷⁷ As Justice Zimmerman noted in *Craftsman*, “An interpretation of [the open courts clause] as constitutionalizing in 1896 the common law, which was not even qualifiedly made the law of the state until 1898, is inconsistent with this history.”¹⁷⁸ Through this statute, the legislature “*delegated* to state courts the authority to develop the common law.”¹⁷⁹ And what the legislature delegates, the legislature may take away.¹⁸⁰

Given Utahns animus against the common law before statehood, it seems doubtful that they would have either meant for or interpreted the open courts clause to protect common-law causes of action. The 1898 statute delegating the common law evidences Utahns’ belief that the common law’s development—including its abrogation—was ultimately in the hands of the legislature, not the judiciary. With the common-law assumption proven untrue, the court’s theory—that Utahns meant for the clause to limit legislative power and prevent special interest corruption—does not hold water. That being the case, the question then arises: What is the original meaning of the open courts clause?

IV. THE ORIGINAL MEANING OF UTAH’S OPEN COURTS CLAUSE

As shown below, when adopting the open courts clause, Utah’s founding generation most likely understood “injury” to mean causes of action currently recognized at law—giving the clause a more procedural interpretation. Such a reading fits the plain meaning of the clause and lines up with the history preceding the clause. Given that meaning, the clause protects three general rights: (1) access to

176. *Craftsman Builder’s Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1232–33 (Utah 1999) (Zimmerman, J., concurring).

177. *Id.* at 1232 (citing UTAH CODE ANN. § 68-3-1 (1998)).

178. *Id.* at 1233.

179. See Victor E. Schwartz et al., *Fostering Mutual Respect and Cooperation between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. VA. L. REV. 1, 11 (2000) (explaining how state legislatures enacted “reception statutes”) (emphasis in original).

180. *Id.* (“Many ‘reception statutes’ made clear, however, that the power to develop tort law that was delegated to the courts could be *retrieved* by the legislature at *any* time.”) (emphasis in original).

courts, (2) procedural due process, and (3) vested rights.¹⁸¹ Given Utahns' history, protection of these rights would have greatly concerned the state, unlike protection of common-law causes of action.

A. The Right to Access Courts

The right to access courts was likely the impetus of open courts clauses across the nation. The first clauses were adopted by colonial states shortly after the American Revolution.¹⁸² Their adoption was in response to England's abuses preceding the war.¹⁸³ For some time, colonists had complained about the Crown's interference with the judiciary and the judges' lack of independence.¹⁸⁴ This reached a tipping point with the Stamp Act, whose "effect was to close the courts to civil litigation altogether."¹⁸⁵ Many colonists refused to obey the order, including Thomas McKean, an author of the first open courts clause.¹⁸⁶

But not all of the colonies were so bold. "In Massachusetts, John Adams appeared before the Governor's Council to urge, albeit unsuccessfully, that the courts should be reopened in defiance of the Stamp Act."¹⁸⁷ For support, he cited the Magna Carta and Chapter 29 of Coke's Second Institute—the documents that originated the open courts clause.¹⁸⁸ "Magna Carta Chapter 40 provides: '*Nulli*

181. The last part of the clause would also protect the right to self-representation, but that is not addressed here.

182. *See, e.g.*, DEL. CONST. art. 1, § 9; MASS. CONST. part 1, art. 11.

183. *See* Hoffman, *supra* note 1, at 1303–05.

184. *Id.* at 1300–07. For example, colonists complained that the Act of Settlement—removing English judges' salaries from the Crown's control—did not extend to colonial judges. Similarly, they complained that their judges did not have tenure. *Id.* These complaints were eventually formalized in the Declaration of Independence, where Jefferson wrote that the King had "made judges dependent on his will alone, for tenure of their offices, and the amount and payment of their salaries." *Id.* (citing THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776)).

185. *Id.* at 1303.

186. "A Delaware judge at the time American courts were closed to civil litigation because of the Stamp Act, McKean most likely was responsible for inserting the open courts clause into the first bill of rights when he drafted the Delaware Declaration of Rights in 1776." *Id.* at 1298.

187. *Id.* at 1304.

188. *Id.* (emphasis in original).

vendemus, nulli negabimus, aut differemus, rectum aut justiciam.”¹⁸⁹ (‘To no one will we sell, to no one will we refuse or delay, right or justice.’) Expounding on this provision, Coke’s Second Institute states:

[E]very Subject of this Realm, for injury done to him in *bonis, terris, vel persona* [goods, lands, or person], by any other Subject, be he Ecclesiastical, or Temporal, Free, or Bond, Man, or Woman, Old, or Young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the Law, and have justice, and right for the injury done him, freely without sale, fully without any denial, and speedily without delay.¹⁹⁰

Thus, when the colonists were denied access to the courts, it was to these words that Adams cited, proclaiming “We deny no Man Justice, we delay no Man Justice.”¹⁹¹ The Stamp Act was eventually repealed. But its effects were not forgotten. The first states adopted open courts clauses patterned after Coke’s Second Institute, understanding those words to protect the right to access courts.¹⁹² Utah’s founding generation understood their clause to mean the same, as evidenced by the clause’s command that “[a]ll courts shall be open.”¹⁹³

189. *Id.* at 1286 n.38.

190. *Id.* at 1313 (citing SIR EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND* 55–56 (photo, reprint 1979) (1642)) (emphasis in original). For more information on Lord Coke’s inspiration for writing this provision see *id.* at 1292–96 (explaining Coke’s fight against the Crown for an independent judiciary).

191. *Id.* at 1304–05 (citing John Adams, *Argument before Governor Bernard and the Council in Favor of Opening the Courts* (Dec. 20, 1765), in 1 *PAPERS OF JOHN ADAMS* 152–53 (Robert J. Taylor et al. eds., 1977)).

192. See *id.* at 1299–1311 (explaining events leading up to the first open courts clause). Some early states expressly guaranteed the right to access courts. See, e.g., DEL. CONST. art. 1, § 9 (“All courts shall be open”). But other states, in concurrence with Adams, seem to have understood Coke’s words as already protecting that right. For example, the *Massachusetts Declaration of Rights*, authored by Adams himself, has no express right to open courts. MASS. CONST. part 1, art. 11 (“Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.”).

193. UTAH CONST. art. 1, § 11.

B. Due Process Rights

The first part of Utah's open court's clause guarantees access to courts. But access to courts alone was not enough. Utahns also wanted to protect their rights to remedies and procedural due process.¹⁹⁴ This reading is evidenced by the plain meaning of Utah's open courts clause, which commands that "every person . . . shall have remedy by due course of law." And as will be shown below, this reading is also supported by historical context and Utahns' adoption of similar wording after their struggles in Missouri.

Utahns' mindset cannot be understood without knowledge of their Mormon history. Mormons first arrived in Missouri in 1831, after Joseph Smith, the Mormon Prophet, received a revelation that they were to build Zion there.¹⁹⁵ Instead of finding Zion, they found opposition and hostility.¹⁹⁶ "The 'old settlers' were from a different background than the incoming [Mormons], and it was natural that cultural, political, religious, and economic differences arose."¹⁹⁷ These differences soon spilled over into mob violence.¹⁹⁸ The Mormons eventually fled the state to nearby Illinois and, from there, to Utah.¹⁹⁹ "Mormons tend to view the Missouri period from 1831-1839 as the darkest era in their church's history."²⁰⁰

One of the reasons the Missouri time period was so trying for the Mormons was their inability to obtain remedies and due process

194. Examples of such due process rights are given by Justice Zimmerman in *Craftsman*. He states that "barriers to the courthouse such as extremely high filing fees, extraordinarily short statutes of limitation, or arduous pretrial procedures" violate the open courts clause. The clause also "would not permit the courts or legislature to recognize a legal right . . . [while] entirely deny[ing] a remedy." *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1239 (Utah 1999) (Zimmerman, J., concurring).

195. Matthew Lund, *The Vox Populi is the Vox Dei: American Localism and the Mormon Expulsion from Jackson County, Missouri* 1 (2012) (unpublished M.A. thesis, Utah State University), available at <http://digitalcommons.usu.edu/etd/1240>.

196. *Id.*

197. CHURCH EDUCATIONAL SYSTEM, *CHURCH HISTORY IN THE FULLNESS OF TIMES: STUDENT MANUAL* 130 (2003), available at https://www.lds.org/bc/content/shared/content/english/pdf/language-materials/32502_eng.pdf?lang=eng.

198. One motive for the mob violence was Missourian's desire to obtain Mormon property. For more information, see Jeffrey N. Walker, *Mormon Land Rights in Caldwell and Daviess Counties and the Mormon Conflict of 1838: New Findings and New Understandings*, 47 *BYU STUDIES* 4 (2008).

199. See generally, CHURCH EDUCATIONAL SYSTEM, *supra* note 197.

200. Lund, *supra* note 195, at 1.

from Missouri courts. Missourians formed mobs to destroy Mormon property and violently forced them from the state. Despite Missouri courts being open, Mormons never obtained redress.²⁰¹ One such example was the mob attack on October 31, 1833.²⁰² A mob approached the home of Mormon leader David Whitmer. They “drew his wife out of the house by the hair and proceeded to throw down the house.”²⁰³ Mormon settlers were able to flee. But before they could, they were “whipt and beat, in a savage manner.”²⁰⁴ The mob ended up unroofing or destroying ten to twelve homes that night.²⁰⁵ The very next night, the mob returned to ransack more homes and stores.

[O]ne of [the mob members], Richard McCarty, was “caught in the act of throwing rocks in at the door, while the goods lay strung around him in the street. He was immediately taken before Samuel Weston, Esq. and a warrant requested . . . but his justiceship refused to do anything in the case, and M’Carty was then liberated.”²⁰⁶

State newspapers condemned the mob violence and subsequent refusal of the courts to grant redress.²⁰⁷ One newspaper, the *St. Louis Advocate*, argued that:

Whenever the [ordinary tribunals of] the country are found incompetent to preserve the supremacy of the laws, the peace and harmony of society . . . the Executive, as the [constant] guardian of the laws and rights of the citizens, is bound to interpose and check the evil.²⁰⁸

The governor did eventually deploy the militia in an effort to arrest and try those mob members accused of breaking the law.²⁰⁹ But it was to no avail. The judge adjourned the prosecutions concluding that “it was entirely unnecessary to investigate the

201. *Id.* at 2.

202. *Id.* at 73.

203. *Id.* (internal quotation marks omitted).

204. *Id.* at 74 (internal quotation marks omitted).

205. *Id.* at 73–74.

206. *Id.*

207. *Id.* at 82.

208. *Id.* at 83.

209. *Id.* at 90.

subject on the part of the State, as the jury were equally concerned [or involved] in the outrages committed.”²¹⁰

“Mormons continued to seek [redress] through civil suit.”²¹¹ The governor encouraged them, writing: “The laws are sufficient to afford a remedy for every injury of this kind.”²¹² Thus, Edward Partridge, a Mormon leader who had been assaulted by forty or more men, filed suit for \$50,000.²¹³ All of the defendants claimed self-defense, “alleging that Partridge ‘single-handedly had threatened each man “and would then and there have beat, bruised and ill treated” each one had they not defended themselves.”²¹⁴ In defending themselves, Partridge “became a little covered and besmeared with tar, pitch and feathers . . . doing no unnecessary damage to [him].”²¹⁵ The court found the defendants liable. But the judge only awarded Partridge “a peppercorn and one penny.”²¹⁶ Unable to obtain any redress in the courts, the Mormons were eventually forced to leave the state. Before they left, it was heard said by at least one judge “that there was no law for Mormons.”²¹⁷

It was during this time that the Mormons formally adopted a form of the open courts clause. Although many of the Mormons were in Missouri, church headquarters continued to be located in Kirtland, Ohio.²¹⁸ There, on August 17, 1835, an assembly of the Church gathered to formally accept a book of revelations titled the *Doctrine and Covenants*. The Church also voted on and approved an article titled *Of Governments and Laws in General*, which was

210. *Id.* at 90–91 (internal quotation marks omitted).

211. *Id.* at 91.

212. *Id.* (internal quotation marks omitted). It is not definitive whether Governor Dunklin was referring to Missouri’s open courts clause when he said this. But his choice of words is extremely similar to the clause. *See* MO. CONST. art. 1, § 14 (“That the courts of justice shall be open to every person, and certain *remedy afforded for every injury* to person, property or character, and that right and justice shall be administered without sale, denial or delay.”) (emphasis added).

213. Lund, *supra* note 195, at 91–92.

214. *Id.*

215. *Id.*

216. *Id.*

217. “*Truth Will Prevail*,” TIMES AND SEASONS, Jul. 15, 1843, at 267, available at <http://files.restorationbranches.org/AD%201830-1844/Times%20&%20Seasons/Volume%204/Vol.%204%20No.%2017%20pp.%20257-272.pdf>.

218. CHURCH EDUCATIONAL SYSTEM, DOCTRINE AND COVENANTS: STUDENT MANUAL 344 (2001).

published in the *Doctrine and Covenants*.²¹⁹ Verse eleven of that article, mirroring the open courts clauses of the day,²²⁰ declares, “We believe that men should appeal to the civil law for redress of all wrongs and grievances, where personal abuse is inflicted or the right of property or character infringed, where such laws exist as will protect the same”²²¹ This same verse continued to be published in Mormon scriptures up through the time of statehood, and is still published today.

The denial of legal remedies for the Mormons did not end in Missouri. They were also denied legal remedies in Utah due to the federal government’s attempts to shut down polygamy.²²² For example, in one year, “the Utah Commission barred over twelve thousand Mormons from voting in Utah. This was nearly one-fourth of eligible Mormon voters.”²²³ The Mormons sued but lost. The court held that “the commission was legally powerless to exclude voters, [thus] it was not legally liable for the acts of voting officials who wrongfully obeyed” its orders.²²⁴ Utah courts also denied Mormons their due process rights and remedies when it came to the rights of public office and receiving inheritances.²²⁵

219. *Id.*

220. Open courts clauses were found in all of the states in which the Mormons resided. OHIO CONST. art. 1, § 15; MO. CONST. art. 1, § 14; ILL. CONST. art. 1, § 12. Mormon leaders also seem to have cited the Illinois open courts clause when responding to a libelous press in Nauvoo, Illinois. See LEGRAND L. BAKER, MURDER OF THE MORMON PROPHET: THE POLITICAL PRELUDE TO THE DEATH OF JOSEPH SMITH 347 n.467 (2011) (“[The Illinois open courts clause] may have been referred to during the debate.”). Dallin H. Oaks notes that the debate record citing the clause likely was an error. Dallin H. Oaks, *The Suppression of the Nauvoo Expositor*, 9 UTAH L. REV. 862, 875 n.88 (1965). However, it is likely that the clause was still referenced during the debate. Mormon leaders believed the press to be a nuisance and relied on a passage of Blackstone’s Commentaries for support. That passage states that some nuisances “require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.” *Id.* at 887 (quoting *Hart v. Mayor of Albany*, 9 Wend. 571, 609–10 (N.Y. Ct. Err. 1832)). It is conceivable that Mormon leaders saw the Illinois open courts clause as justifying Blackstone and their actions since that clause gave them the right to “certain remedy . . . promptly and without delay.” ILL. CONST. art. 8, § 12 (1818).

221. THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 134:11 (2013). Interestingly, both the Utah Constitution and *The Doctrine and Covenants* place the open courts clause in the *eleventh* section of the respective texts.

222. Firmage, *supra* note 173, at 780–88 (“[F]ederal attempts to simplify and expedite the conviction of polygamists routinely denied Mormons many of their fundamental rights.”).

223. *Id.* at 782.

224. *Id.* at 783.

225. *Id.* at 783–87.

Given this history, it is clear that Mormons understood the clause to protect remedies and due process rights. They were denied those rights in Missouri and invoked the clause as proof that they were being wronged. They would have understood the clause to carry this same meaning when, as Utahns, they adopted it into the Utah constitution. The Utah territory supreme court's recent denial of due process rights before statehood may have also motivated the clause's adoption.

C. Protection of Vested Rights

The last item that Utah's founding generation would have understood the open courts clause to protect is vested rights to remedies. For example, vested rights to remedies means that a legislature could not eliminate a plaintiff's cause of action or remedy during his pending case. At that point, the plaintiff already has a vested right that the legislature cannot interfere with. "[E]ven the most radical [modern] courts recognize that lawmakers cannot deprive plaintiffs of vested rights."²²⁶ All nineteenth-century courts recognized the same.²²⁷ Thus, Utahns would have also interpreted the open courts clause to protect vested rights.

V. CONCLUSION

The Utah Supreme Court's substantive interpretation of the open courts clause is wrong and needs correction. The court's common-law interpretation of the word "injury" lacks support. Utah history reveals Utahns ignored the common law at first and actively fought against it later. When Utahns were in control of their government, they sought to eliminate the common law entirely through both legislative action and judicial practice. And when they lost governmental control due to federal pressure, they sought to

226. Schuman, *supra* note 4, at 1208.

227. See *Negroes v. Dabbs*, 14 Tenn. 119, 137–39 (1843) (using clause to prevent the legislature from interfering in slaves' pending petition before the Chancery); *Townsend v. Townsend* 7 Tenn. 1, 14–16 (1821) (using clause to strike down statute requiring judgment creditors to either delay executing their judgments for two years or accept paper money); *Templeton v. Linn County*, 29 P. 795, 797 (Or. 1892) (noting that open courts clause only protects "[v]ested rights [which] are placed under constitutional protection, and cannot be destroyed by legislation"); *Commercial Bank of Natchez v. Chambers*, 16 Miss. 9, 9 (1847) (finding statute eliminating vested rights unconstitutional under open courts clause).

limit the common law's effects both by statute and avoidance of the judicial system. Given this history, the belief that Utahns gave a common-law interpretation to the clause is bordering on absurdity.

Equally unsupported is the court's theory of why Utah's founding generation adopted the clause—so as to prevent special interests from corrupting the legislature. First, this theory relies on a common-law interpretation of the clause which has been proven absurd for a state like Utah. Second, the state histories the court relies on for this theory show that not even those states believed the clause to have the effect the court now claims. Thus, it is unlikely that Utahns held this belief. This is especially so given Utahns different motivations for adopting a constitution.

Utahns most likely gave a procedural interpretation to the clause—interpreting “injury” to mean causes of action currently recognized at law. Such an interpretation would protect a right to access courts, due process rights, and vested rights. This interpretation is supported by America's founding history—explaining why the clause first started appearing in state constitutions. It is also supported by nineteenth-century case law and Utahns use of the clause in relation to the abuses suffered in Missouri. Given this evidence, the Utah Supreme Court should overturn *Berry* and the line of cases which follow. Only a procedural interpretation of the open courts clause accords with the clause's original meaning.

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