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

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The jurisprudence for which we should remember Chief Justice Christine M. Durham is her insistence on the consideration and interpretation of the Utah Constitution as separate and distinct from the Federal Constitution. Chief Justice Durham pioneered the interpretation and application of the Utah Constitution. While Chief Justice Durham’s interpretations do not always prevail, she has created a vibrant platform for argument. *American Bush v. City of South Salt Lake*¹ provides the best evidence of Chief Justice Durham’s legacy.

While the Utah Supreme Court had previously interpreted the State Constitution independently in *State v. Earl*,² the Court, speaking through then-Justice Durham, invited those arguing in Utah courts to raise state constitutional claims in addition to federal constitutional claims—particularly in the criminal arena—indicating the Utah Supreme Court’s willingness to interpret the Utah Constitution independently and giving guidance on how to make such arguments with reference to *State v. Jewett*.³ *Jewett* offers a variety of sources for constitutional argument—history (legislative, social, or political), text, sibling state interpretations, policy (economic or social good), prudence, structure, ethics.⁴ After a few years, Justice Durham penned an article for the Utah Bar Journal, instructing Utah attorneys on Utah Constitutional argument.⁵ The Utah Supreme Court, through Justice Durham’s

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⁴ *Id. at 237; see also* Milo Steven Marsden, *The Utah Supreme Court and the Utah State Constitution*, 1986 UTAH L. REV. 319, 332–43 (1986) (discussing some of the sources for argument).
⁵ Christine M. Durham, *Employing the Utah Constitution in the Utah Courts*, UTAH B. J.,
majority opinion, further elucidated Utah constitutional interpretation in West v. Thomson Newspapers, explicitly embracing the primacy model for state constitutional interpretation in the defamation context. Under this approach, when a case presents a constitutional issue, the court analyzes it under the Utah Constitution, only looking to the Federal Constitution if the Utah Constitution does not resolve the issue. In the years since, the Utah Supreme Court has continued to adhere to the primacy model. Throughout this time, Justice Durham’s commitment to Utah constitutional interpretation remained a constant for a court that has experienced significant turnover. The American Bush case provides an example of the vibrancy of state constitutional debate in Utah.

In May 2001, the South Salt Lake City Council passed a new sexually oriented business ordinance. An existing company, American Bush, had operated nude dancing businesses and wanted to continue to do so. However, the new ordinance only permitted semi-nude dancing. Because the United States Supreme Court has held that the United States Constitution offers only limited free speech protection for exotic dancing and allows governments to require minimal dress on dancers, American Bush sought solely the protection of the Utah Constitution. American Bush claimed speech protection under article I, sections 1 and 15 of the Utah Constitution which provide as follows:

Nov. 1989, at 25.


7 Durham, supra note 5, at 26.

8 See Jensen v. Cunningham, 2011 UT 17, ¶¶ 46–47, 250 P.3d 465, 478 (applying the primacy model when considering the availability of damages for violation of state constitutional provisions); State v. Poole, 2010 UT 25, ¶ 11, 232 P.3d 519, 523 (acknowledging the court’s endorsement of the primacy model and interpreting the confrontation clause); State v. Tiedemann, 2007 UT 49, ¶ 33, 162 P.3d 1106, 1113 (explaining that under the primacy model, the court can interpret even identical language differently); c.f. Utah v. Robinson, 2011 UT 30, ¶ 9 n.14, 254 P.3d 183, 186 n.14 (noting that the court would not take a position as to whether the primacy or interstitial model of state constitutional law interpretation should apply).


11 Id.

12 Id.


[Article I, section 1:] All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

[Article I, section 15:] No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.\(^{14}\)

The text of these provisions differs from the United States Constitution's speech protection:

Amendment 1: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”\(^{15}\)

The district court denied American Bush's motion for summary judgment, granting South Salt Lake summary judgment instead.\(^{16}\) American Bush appealed to the Utah Supreme Court, which affirmed the district court with four separate opinions.\(^{17}\) Only five Justices sit on the Utah Supreme Court, and the court usually is unanimous in its decision-making.\(^{18}\) Justice Parrish wrote for the

\(^{14}\) Utah Const. art. I, §§ 1, 15 (emphasis added).
\(^{15}\) U.S. Const. amend. I (emphasis added).
\(^{16}\) Am. Bush, 2006 UT 40, ¶ 1, 140 P.3d at 1237–38.
\(^{17}\) Id.
majority, holding that “the provisions of the Utah Constitution that guarantee Utah citizens’ rights to ‘communicate freely their thoughts and opinions’ do not extend protection to nude dancing in sexually oriented businesses.” Justice Durrant wrote to expand on his view of “the proper method to follow when interpreting our state constitution.” Chief Justice Durham concurred in part and dissented in part, specifically explaining how she reached her opinion that the ordinance violated the Utah Constitution’s speech protections. Justice Nehring dissented, taking yet another view of the Utah Constitution’s speech protection.

This article examines the interpretations provided in each of these opinions to demonstrate the robust debate possible even where there is a “poverty of both Utah case law and scholarly analysis of the history and meaning of the freedom of speech provisions of the Utah Constitution.”

I. THE MAJORITY OPINION

Importantly, the majority begins by reaffirming the Utah Supreme Court’s adherence to the primacy model of state constitutional interpretation. By employing the primacy model the Utah case law interpreting provisions of the Utah Constitution should grow over time, providing guidance for future Utah courts. The majority sets forth the following approach for answering the question posed: first decide whether the state constitution protects nude dancing; if it does, then consider whether the ordinance interferes with the right impermissibly. As with all of the opinions, the majority first looks to the Constitution’s text.

The majority notes that while it looks first to the plain meaning of text, the dictionary definitions of the words by themselves do not suffice and should be interpreted, instead, with “historical evidence

concurring) (engaging in detailed statutory analysis). Had Justice Lee served on the Court in 2006, one can surmise this case would have generated five different opinions.

20 Id. ¶ 70, 140 P.3d at 1255 (Durrant, J., concurring).
21 Id. ¶ 110, 140 P.3d at 1264 (Durham, J., concurring in part, dissenting in part).
22 Id. ¶ 158, 140 P.3d at 1280 (Nehring, J., dissenting).
23 Id. ¶ 7, 140 P.3d at 1239.
24 Id.
25 See West v. Thomson Newspapers, 872 P.2d 999, 1006 (Utah 1994) (noting the value of the primacy approach in developing independent state doctrine and precedent).
27 Id. ¶ 10, 140 P.3d at 1239; c.f. id. ¶ 73, 140 P.3d 155–56 (Durrant, J., concurring); id. ¶ 115, 140 P.3d at 1266 (Durham, J., concurring in part, dissenting in part); id. ¶ 159, 140 P.3d at 1280 (Nehring, J., dissenter).
of the framers’ intent.” To determine the framers’ intent, the majority looks to common law, the state’s particular traditions, contemporaneous court decisions from sister states, and the interpretation of the United States Constitution at the time Utah adopted the provision at issue. The majority specifically footnotes its disdain for the consideration of policy arguments in interpreting the Utah Constitution, unless the policy arguments help the court determine the framers’ intent. The majority appears to acknowledge that the framers’ intent really functions as a proxy for the intent of the citizens who voted the constitutional provision into effect. To determine the framers’ intent with respect to article I, sections 1 and 15, the majority cites to Thomas M. Cooley’s book, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the State of the American Union (1896), which the Official Report of the Proceedings and Debates of the Convention quoted in part. The majority concludes that because the Cooley treatise states that state constitutions are “based upon the pre-existing condition of laws, rights, habits, and modes of thought” then extant . . . it is to these sources that [the court] must look to determine the proper scope of the freedom of speech.

In considering the text, the majority reads both section 1 and section 15 of article I together because they both address freedom of

28 Id. ¶¶ 10, 24, 140 P.3d at 1239, 1243. Of interest, Utah’s newest Supreme Court Justice, Justice Lee, has favored the use of dictionaries in conjunction with linguistic data from the time of enactment to interpret statutes, rejecting reliance on legislative intent where “the language and structure . . . remove any ambiguity regarding the meaning.” JMW v. TIZ (In re Baby EZ), 2011 UT 83, ¶¶88–9, 112–3, 266 P.3d 702 (2011) (Lee J. concurring).
29 Am. Bush, 2006 UT 40, ¶ 12 n.3, 140 P.3d at 1240 n.3. Worthy of note, a year later Justices Parrish and Durrant signed on to Chief Justice Durham’s majority in State v. Tiedemann, which noted that policy arguments may play a role in constitutional interpretation and that “historical arguments may be persuasive in some cases, but they do not represent a sine qua non in constitutional analysis.” 2007 UT 49, ¶ 37, 162 P.3d 1106, 1114–15.
30 Id. ¶ 12, 140 P.3d at 1240–41.
31 Id. (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 (photo reprint 1972) (1908)). The deference given to Mr. Cooley’s view of how to interpret a state constitution seems undue given just how far removed his opinions likely were from those of the citizens voting to adopt the Utah Constitution nearly thirty years after he wrote his treatise. The citizens’ votes in favor of the Constitution likely had numerous other motivations far more practical and personal than a desire to constitutionalize the common law, notably perhaps the desire to elect their own government officials and pass their own laws, something they did not have a right to do as a territory. See, e.g., Utah Becomes a State, Utah State History http://ilovehistory.utah.gov/topics/statehood/index.html (last visited May 21, 2012); see also Marsden, supra note 4, at 336 (noting the lack of debate of constitutional principles).
expression.\textsuperscript{34} The majority notes, however, that the limitation on governmental laws restricting the freedom of speech is irrelevant if nude dancing does not constitute communication.\textsuperscript{35} In interpreting what “communication” means, the majority insists that it must consider what an abuse of the right to communicate is.\textsuperscript{36} Noting that the plain language of section 15 defines criminal libel without regard for the truth of the statement, the court determines that the Utah Constitution protects less speech than the Federal Constitution, which the United States Supreme Court has interpreted to prohibit punishment for true speech regardless of the motives for such speech.\textsuperscript{37} The majority then goes into a lengthy discourse about the history of free speech and legal theory, concluding that Utah’s framers—by including the phrase “responsibility for abuse” in section 1 of the article I—intended to adopt William Blackstone’s view of freedom of speech, namely a conservative view allowing state regulation of speech.\textsuperscript{38}

As further support for its conclusion that Utah’s Constitution protects less speech than the Federal Constitution, the majority points to two proposed variations of section 15, addressing libel, defeated during Utah’s constitutional convention and concludes that the framers intended to leave regulation of speech firmly in the hands of the legislature and common law (the courts).\textsuperscript{39} The majority then demonstrates that neither the common nor the statutory law in effect at the time of enactment protected obscene speech.\textsuperscript{40} Therefore, the Utah framers did not intend to protect obscene speech in the Constitution.\textsuperscript{41} The majority also notes that the Utah legislature, shortly after adoption of the Utah Constitution, forbade “employ[ing] 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.’”\textsuperscript{42} The majority concludes, “if the people of this state ever considered nude dancing to be speech, it must have been a punishable abuse of that freedom.”\textsuperscript{43} In light of this “historical evidence,” the majority concludes the Utah Constitution’s protection

\textsuperscript{34} Am. Bush, 2006 UT 40, ¶ 18, 140 P.3d at 1241–42.
\textsuperscript{35} Id. ¶ 20, 140 P.3d at 1242.
\textsuperscript{36} Id. ¶¶ 25–26, 140 P.3d 1243–44.
\textsuperscript{37} Id. ¶¶ 27–29, 140 P.3d at 1244.
\textsuperscript{38} Id. ¶¶ 32, 40, 140 P.3d at 1245, 1248.
\textsuperscript{39} Id. ¶¶ 42–48.
\textsuperscript{40} Id. ¶ 51, 140 P.3d at 1251.
\textsuperscript{41} Id. ¶ 54, 140 P.3d at 1252.
\textsuperscript{42} Id. ¶ 55, 140 P.3d at 1252 (quoting UTAH REV. STAT. § 4244 (1898)).
\textsuperscript{43} Am. Bush, 2006 UT 40, ¶ 55, 140 P.3d at 1252.
of communication does not extend to nude dancing, thus the majority need undertake no further analysis.\textsuperscript{44}

II. JUSTICE DURRANT’S CONCURRENCE

Justice Durrant writes separately to express support for what he calls the historical approach to constitutional interpretation and expand on the flaws of what he titles the contemporary-context approach and the subjective approach to constitutional interpretation.\textsuperscript{45} Justice Durrant explains the historical approach as assigning meaning to constitutional language based on what the drafters and ratifiers of the provision intended it to mean.\textsuperscript{46} The other two approaches to constitutional interpretation he identifies as either assigning text meaning based on contemporary views and attitudes—the contemporary-context approach—or based on individual views and attitudes—the subjective approach.\textsuperscript{47} Justice Durrant eschews the contemporary-context and subjective approaches because they will produce varying results on the same facts depending either on the time period or on the interpreter.\textsuperscript{48} Justice Durrant views the outcome of the historical approach as fixed, “at least in theory,” thus providing stability to government.\textsuperscript{49}

Justice Durrant argues that judges are well suited to the historical approach because they regularly interpret text and that their goal in interpreting text “is to give effect to the intent of the texts’ creators.”\textsuperscript{50} Only a couple of paragraphs previously, however, Justice Durrant acknowledges the difficulties text can pose:

[Although a judge . . . would be nominally constrained by the text of the constitution, that constraint is drastically minimized by the reality that the unambiguous communication of ideas through the use of language is a difficult task. Given the inadequacies of the written word and the judiciary’s charged task of finding meaning in the text of the constitution, a judge operating under the subjective approach can utilize definitional flexibility to rationally read personal beliefs into the constitution.\textsuperscript{51}}

\textsuperscript{44} Id. ¶ 57, 140 P.3d at 1252.
\textsuperscript{45} Id. ¶¶ 73–74, 140 P.3d at 1255–56 (Durrant, J., concurring).
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id. ¶ 74, 140 P.3d at 1256.
\textsuperscript{49} Id. ¶¶ 74, 84, 140 P.3d at 1256, 1258–59.
\textsuperscript{50} Id. ¶ 83, 140 P.3d at 1258.
\textsuperscript{51} Id. ¶ 81, 140 P.3d at 1258.
Justice Durrant would seem to assume that a judge operating under the historical approach could not use definitional flexibility to read personal beliefs into the constitution. This assumption might be supported where the provision at issue has a well-documented historical context. However, as others have stated, legislation is like sausage, one does not want to see it being made. One can imagine the making of a constitutional provision might pose similar, if not greater, problems given the sheer number of ratifiers. Indeed Justice Nehring’s dissent, adopting the historical approach but reaching a different conclusion based on the historical information, would tend to prove this point. 52

Further, the Utah Supreme Court has noted in the context of statutory interpretation that the individual reasons a legislator may support a statute or ordinance do not inform interpretation of that statute or ordinance because they only speak to that one legislator’s view and not necessarily the views of others who voted for the legislation. 53 Thus, according to Utah precedent, courts should limit themselves to the text of statutes. 54 Where the court has before it a constitutional provision voted on by the electorate, that problem would no doubt multiply. Therefore the reported views of the framers or the judges of the period do not necessarily provide enlightenment as to the meaning of a given provision. One would think, as Justice Durrant notes, that judges are qualified to interpret constitutional text in the same way they are qualified to interpret statutory text, despite the limitations of language.

In further explaining the historical approach, Justice Durrant reinforces the majority’s view that it must look at the plain language of the Utah Constitution in light of the framers’ intent to determine what the text itself means. 55 If, after considering the framers’ intent, the language still appears ambiguous the court will “consider historical evidence regarding textual development, sister

52 See id. ¶ 88, 140 P.3d at 1259–60 (noting J. Nehring’s historical approach, determining that natural law, not Blackstonian theory, provided the basis for Utah’s constitutional protection of communication).
53 Wood v. Univ. Utah Med. Ctr., 2002 UT 134, ¶ 19, 67 P.3d 436, 444–45 (“Legislators may decide that a statute should be passed for myriad, often even different, reasons, but where the legislative purpose is expressly stated and agreed to as part of the legislation, we do not look to the views expressed by one or more legislators in floor debates, committee minutes, or elsewhere, in determining the intent of the statute.”); see also Summit Water Distrib. Co. v. Summit Cnty., 2005 UT 73, ¶ 27, 123 P.3d 437, 444–45 (“The extent to which an individual statement by a legislator is a reliable indicator of legislative intent has frequently been questioned.”).
state law, and policy arguments relied upon by the framers in the form of economic and sociological materials.” By defining “plain language” in terms of the framers’ intent, Justice Durrant provides a basis to criticize Chief Justice Durham’s dissent, which purports to be based on a plain language reading of the Utah Constitution.

III. CHIEF JUSTICE DURHAM’S DISSENT

Chief Justice Durham frames the issue before the court as first requiring a determination of whether nude dancing is communication, and if the answer is yes, second, whether the proffered justifications for the ordinance demonstrate that the law is “reasonably necessary to further . . . a legitimate legislative purpose.” The first inquiry differs from the majority’s first inquiry—whether the Utah Constitution protects nude dancing—by reducing the question to a more limited inquiry of whether nude dancing constitutes communication.

In beginning the inquiry, Chief Justice Durham notes that the Utah Constitution may provide more protection than the Federal Constitution. Unlike the majority, and Justice Durrant in particular, the Chief Justice takes the position that where the language of the Constitution is unambiguous, the court should not look to external sources to determine its meaning. In consulting the plain language, Chief Justice Durham notes that article I, section 1 of the Utah Constitution protects the right “to communicate freely,” whereas the Federal Constitution protects the right to freedom of speech. The dissent asserts that the plain meaning of “communicate” goes beyond the plain meaning of “speech” to include a “wide variety of expressive activity,” extending “beyond mere words.” Chief Justice Durham then considers history and legal precedent to determine that “[n]ude dancing performed at sexually oriented establishments is conceptually indistinguishable from nude dancing performed in musicals, ballet,
or modern dance, and therefore is communication within the meaning of the Utah Constitution.”64

The Chief Justice acknowledges the Utah Constitution also provides that while the people of Utah have the right to freely communicate, they are also “responsible for the abuse of that right” and considers what would constitute such an abuse.65 Not finding the plain language instructive, the Chief Justice looks to another clause of the Constitution, article I, section 15, to help give meaning to the abuse clause. That section explicitly contemplates criminal libel as an abuse of the right to communicate freely, for which the speaker will be held responsible.66 While the majority reads this provision to indicate the framers’ willingness to abridge the right to communicate, the dissent views the clause as the only limitation permitted by the Constitution’s text.67 In commenting on the majority’s adoption of common law at the time of enactment as setting the boundaries on free communication, the dissent states:

[T]he point of relying on history and the common law in interpreting our constitution is to inform our result, not dictate it. Such an approach is meant to provide background to the pertinent constitutional provision, but should not define it unless there are clear indicia that this is what was intended.68

Justice Durrant’s concurrence suggests that Justice Durham espouses a contemporary-context approach when interpreting the communication provisions.69 But Chief Justice Durham’s dissent does not support this allegation. Rather, the Chief Justice states what is beyond dispute: that criminal libel is the only abuse of the right to communicate specifically addressed in the Constitution and that “[t]o read any other restriction on this fundamental right into the constitution is pure speculation, always a dangerous task.”70 Thus regardless of the majority or the concurrence’s view of Chief Justice Durham’s politics, in this opinion, she adopts a conservative approach to interpretation of the plain language of the Constitution refusing to add to the plain language of the Constitution through interpretation.

Having concluded that the plain meaning of “communicate”

64 Id. ¶ 122, 140 P.3d at 1268.
65 Id. ¶ 124, 140 P.3d at 1269 (quoting UTAH CONST. art. 1, § 1).
66 Am. Bush, 2006 UT 40, ¶ 125, 140 P.3d at 1269–70.
67 Id. ¶¶ 125–27, 140 P.3d at 1269–70.
68 Id. ¶ 131, 140 P.3d at 1272.
69 Id. ¶ 93, 140 P.3d at 1260–61 (Durrant, J., concurring).
70 Id. ¶ 136, 140 P.3d at 1273 (Durham, J., concurring in part, dissenting in part).
includes nude dancing, the Chief Justice moves to the second tier of the inquiry, whether South Salt Lake’s ordinance is “reasonably necessary to further . . . a legitimate legislative purpose.”\(^{71}\) The dissent considers whether the promotion of morals constitutes a legitimate legislative purpose and concludes it does not because those who do not like it can avert their eyes.\(^{71}\) The Chief Justice states “nude dancing cannot legitimately be prohibited simply because a majority of South Salt Lake’s citizenry disapproves of the message being sent.”\(^{73}\) The dissent does not directly address the contention that nude dancing is harmful to the moral health of consumers and providers, despite their willingness to engage in the behavior, and therefore constitutes a legitimate legislative purpose.\(^{74}\) What the Chief Justice appears to think, but does not articulate, is that the promotion of morals is does not provide a legitimate governmental purpose.\(^{75}\)

Instead, the Chief Justice focuses on the “secondary effects” argument—an argument commonly made in sexually oriented business cases suggesting that such businesses cause “high crime, property devaluation, the spread of sexually transmitted diseases, and urban blight.”\(^{76}\) The Chief Justice finds the record of such effects lacking for a variety of reasons as it does not demonstrate that the addition of pasties and g-strings will prevent the purported secondary effects.\(^{77}\) The Chief Justice goes on to criticize the United States Supreme Court for having accepted such generic secondary effects.

\(^{71}\) Id. ¶ 112, 140 P.3d at 1265 (Durham, J., concurring in part, dissenting in part) (quoting Gallivan v. Walker, 2002 UT 89, ¶ 42, 54 P.3d 1069, 1086).

\(^{72}\) Am. Bush, 2006 UT 40, ¶ 145, 140 P.3d at 1276.

\(^{73}\) Id.

\(^{74}\) See id. ¶ 96, 140 P.3d at 1261 (Durrant, J., concurring); see, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 31–32 (1991) (arguing that pornography, and by extension, nude dancing creates a moral harm to society even between apparently consenting adults); CATHARINE A. MACKINNON, ONLY WORDS 71–107 (1993). Chief Justice Durham cited ONLY WORDS in her opinion in American Bush. Am. Bush, 2006 UT 40, ¶ 123, 140 P.3d at 1268–69. The record below and the briefing may not have squarely presented this argument, making addressing the argument in the opinion difficult, if not unwise.

\(^{75}\) To draw an analogy to a somewhat less controversial issue on the national scene, one might consider what the Chief Justice would think of the Stolen Valor Act. 18 U.S.C. § 704(b) (2012). The Act creates penalties for lying about one’s receipt of military honors. Assume for the sake of argument, that the lie constitutes communication/speech and that the purpose of the regulation was to punish lying because, in and of itself, lying is morally harmful to society. From Chief Justice Durham’s opinion in American Bush, one could surmise that she would find the purpose insufficient to abridge the speech absent some harm more concrete than moral harm.

\(^{76}\) Am. Bush, 2006 UT 40, ¶ 146, 140 P.3d at 1276 (Durham, J., concurring in part, dissenting in part).

\(^{77}\) Id. ¶ 148–49, 153, 140 P.3d at 1277, 1279.
effects evidence to justify sexually oriented business regulation of all sorts, highlighting yet another way in which a state may want to interpret its constitution differently from the United States Supreme Court.78

IV. JUSTICE NEHRING’S DISSERT

Justice Nehring disagrees with one of the few positions on which the other Justices agree: that the court should interpret article I, sections 1 and 15 together.79 Specifically, Justice Nehring looks to the history of the two sections and concludes they were distinct, and the court should not strive to harmonize their interpretations.80 While the majority reads sections 1 and 15 together as evidence that Utah adopted Blackstone’s view of free expression, namely that “[e]xpression was free from prior restraint, but little else,” Justice Nehring attributes section 1 to the natural rights theorists, like John Locke, and section 15, alone, to Blackstone.81 Justice Nehring points to section 1’s use of the words “inherent and inalienable” as proof that section 1’s lineage derives from natural rights and thus provides broader protection for expression than Blackstone would have.82 Justice Nehring also looks to the framers’ quotations of Thomas Cooley’s treatise, the same text quoted by the majority, as evidence of their adherence to natural rights.83 Justice Nehring then notes that in a natural rights context the requirement that a person is responsible for abuse of the right to communicate means that a person’s right to communicate includes an obligation not to injure another person, property, or a person’s good name.84 If a person abuses the right, s/he has to defend against a civil claim as provided by the Utah Constitution’s open courts clause.85

Justice Nehring attributes article I, section 15 to Utah’s plethora of newspapers at the time of the Constitution’s adoption and the widely acknowledged need for protection from libel and slander by newspapers.86 Thus, Justice Nehring concludes that the citizenry willingly accepted the Blackstonian view of limitations on communication to the extent it applied to freedom of the press, but

78 Id. ¶ 150, 140 P.3d at 1277–78.
79 Id. ¶ 148, 140 P.3d at 1278 (Nehring, J., dissenting).
80 Id. ¶¶ 158, 164, 140 P.3d at 1280–81.
81 Id. ¶¶ 166, 168–69, 140 P.3d at 1282.
82 Id. ¶¶ 168–70, 140 P.3d at 1282.
83 Id. ¶¶ 171–72, 140 P.3d at 1282–83.
84 Id. ¶ 179, 140 P.3d at 1284.
85 Id.
86 Id. ¶ 181, 140 P.3d at 1284–85.
did not intend to grant broad legislative supremacy over all communications generally. In the end, Justice Nehring thinks article I, section 1 protects nude dancing as communication. Justice Nehring, however, finds the decision regarding what governmental interests would warrant what restrictions on the right of communication challenging, and in the end appears to want to cede the decision to the federal government by remanding for review under the First Amendment of the Federal Constitution.

This suggestion would go against the primacy model and may foreshadow Justice Nehring’s opinion in Utah v. Robinson, where the Court declines to take a position on whether to employ the primacy or interstitial model of state constitutional interpretation.

V. CONCLUSION

Through American Bush, a case regarding the freedom to communicate under the Utah Constitution, where a “poverty of both Utah case law and scholarly analysis of history” exists, the Utah Supreme Court models a robust debate over state constitutional interpretation. This article demonstrates the vibrant debate currently occurring with respect to the Utah Constitution and the potential for even more points of view on its interpretation. One can place responsibility for this vibrant discussion squarely on Justice Durham. Justice Durham’s legacy will not rest on one interpretation of the Constitution. Rather her legacy will be the insistence that the state constitutions are separate and distinct from the Federal Constitution and just as important to the citizens of the state. For this, we should all be grateful.

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87 Id. ¶ 182–83, 140 P.3d at 1285.
88 Id. ¶ 194, 140 P.3d at 1287.
89 Id. ¶¶ 199–200, 202, 140 P.3d at 1287–88.