No. 20170447-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

TERRY MITCHELL,

Plaintiff,

v.

RICHARD WARREN ROBERTS,

Defendant.

PLAINTIFF TERRY MITCHELL'S SUPPLEMENTAL BRIEF IN SUPPORT OF AN AFFIRMATIVE ANSWER TO QUESTIONS CERTIFIED BY THE UNITED STATES DISTRICT COURT

From the United States District Court, District of Utah,
Before Magistrate Judge Evelyn J. Furse
No. 2:16-cv-00843-EJF

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KY. REV. STAT. ANN. § 446.080 (1942) 20

MINN. STAT. § 492.21 (1941) 20

MINN. STAT. § 645.21 (2018) 20

MONT. CODE ANN. § 1-2-109 (1895) 20

N.D. CENT. CODE § 1-02-10 (2019) 20

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51 AM. JUR. 2d *Limitation of Actions* § 40 (July 2016 Update) 13

Barnett, Randy E. and Bernick, Evan D., *No Arbitrary Power: An Originalist Theory of the Due Process of Law,* 60 WM. & MARY L. REV. 1599 (2019) 15, 28

BASKIN, R. N., REMINISCENCES OF EARLY UTAH (1914) 4, 5, 6, 22

COKE, EDWARD, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (1797) 16

COOLEY, THOMAS M., A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (2d ed. 1871) 9

Corwin, Edward S., *Basic Doctrine of American Constitutional Law*, MICH. L. REV. 247 (1913–1914) 23

Corwin, Edward S., *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 460 (April 1911) 9

Davies, Mark, *The Corpus of Historical American English (COHA).* Available online at https://www.english-corpora.org/coha/ 31

DeBoer, Michael J., *The Right to Remedy by Due Course of Law—A Historical Exploration and an Appeal for Reconsideration*, 6 FAULKNER L. REV. 135 (2014) ... 31

Dias, Elisabeth, *'Mormon' No More: Faithful Reflect on Church's Move to Scrap a Moniker*, THE NEW YORK TIMES, June 29, 2019 3

Flynn, John J., *Federalism and Viable State Government—The History of Utah's Constitution*, 1966 UTAH L. REV. 316 .... 6, 7, 8

Haines, Charles G., *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures*, 2 TEX. L. REV. 257 (April 1924) 23, 26

Harrison, John, *Legislative Power and Judicial Power*, 31 CONST. COMMENTARY 295 (Summer 2016) 23

Hickman, Martin B., *Utah Constitutional Law* (1954) (unpublished Ph.D. dissertation, University of Utah) 4, 8

Hochman, Charles B., *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 HARV. L. REV. 692 (February 1960) 18

Homer, Michael W., *The Judiciary and the Common Law in Utah: A Centennial Celebration,* UTAH BAR JOURNAL, August/September 1996 6

Inglis, Laura, *Substantive Due Process: Continuation of Vested Rights*?, 52 AM. J. LEGAL HIST. 459 (2012) 11

Jones, Jarom R., *Mormonism, Originalism, and Utah's Open Courts Clause*, 2015 B.Y.U. L. REV. 811 30

Landau, Jack L., *Magna Carta Turns 800*, 75-Jun OR. ST. B. BULL 16 (2015) 16

MAXWELL, JOHN GARY, BASKIN AND THE MAKING OF MODERN UTAH (2013) 5

MORGAN, DALE L., THE STATE OF DESERET (1987) 4, 5, 7

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Smith, Brad, *Be No More Children: An Analysis of Article I, Section 4 of the Utah Constitution*, 1992 UTAH L. REV. 1431 .... 4, 5

Smith, Bryant, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231 (April 1927) .. 13

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Wake, Paul, *Fundamental Principles, Individual Rights, and Free Government: Do Utahns Remember How to be Free?*, 1996 UTAH L. REV. 661 4

WHITE, JEAN BICKMORE, CHARTER FOR STATEHOOD: THE STORY OF UTAH'S STATE CONSTITUTION (1996) 4, 5, 6, 7, 8, 11

White, Jean Bickmore, *So Bright the Dream: Economic Prosperity and the Utah Constitutional Convention*, 63-4 U. HIST. QUARTERLY 322 (Fall 1995) 19

WHITE, JEAN BICKMORE, THE UTAH STATE CONSTITUTION (1998) 4, 7

Wright, Lawrence, *Lives of the Saints*, THE NEW YORKER, January 22, 2002 5

INTRODUCTION

Defendant Richard Roberts ("Roberts") has relied on an absolute "black letter rule" that the Legislature cannot revive a claim after it has been barred by a prior statute of limitations. Roberts has never suggested *any* applicable constitutional standard.

In line with Utah caselaw since territorial times, Plaintiff Terry Mitchell ("Mitchell") has demonstrated that, if it meets the applicable due process test, a statute, such as Utah Code Ann. § 78B-2-308 ("Revival Statute"), is to be applied retroactively if (a) the subject of the statute is procedural *or* (b) the legislature has expressed its intent that the statute is to be applied retroactively, even where the statute affects substantive or "vested" rights.

Mitchell has also demonstrated that when a statute, which is not arbitrary and does not implicate a fundamental right, is challenged on due process grounds, the appropriate test to be applied is the federal and state due process rational basis test. That test is entirely consistent with the original meaning of the Due Process Clause of the Utah Constitution.

This Court has requested supplemental briefing on the following question:

> Under the Utah Constitution, does the Utah Legislature have the power to revive a claim that was barred by the previously applicable statute of limitations, and if so, what limitations, if any, does the Utah Constitution impose on that power?
>
> Specifically, we ask that the parties examine the original public meaning of the Utah Constitution. This examination should include—but need not be limited to—an analysis of the grant of legislative power found in article VI, section 1 of the Utah Constitution; the due process clause found in article I, section 7 of the Utah Constitution; and the open courts provision found in article I, section 11 of the Utah Constitution. The analysis should also address what standard or constitutional analysis Utah courts should apply in assessing whether a specific legislative enactment that explicitly purports to revive time-barred claims comports with the Utah Constitution.

Supplemental Briefing Order, Addendum, *infra* 37.

Many statutes reviving claims barred by a previously applicable statute of limitations may not survive due process scrutiny, depending on the end and means of the statute and the nature of the rights or interests implicated. However, the Utah Legislature clearly has the power to revive a claim of child sexual abuse, particularly in light of the compelling reasons stated in the Revival Statute (UTAH CODE ANN. § 78B-2-308(1)) and addressed during the legislative debates on the Revival Statute (*see* Mitchell Brief, 23–24), and because of the rational relationship between the Revival Statute and the legitimate reasons for it. Further, that legislative power is not limited by the Utah Open Courts Clause, which was intended to protect access to the courts and to preserve "remedies" for "injuries," not to preserve defenses based on a statute of limitations.

That power has been invested in the Legislature since statehood, as reflected by (1) the language of, as well as omissions from, the Utah Constitution; (2) delegates' statements during the 1895 Constitutional Convention ("Constitutional Convention"); (3) Utah caselaw before and shortly after ratification of the Utah Constitution; (4) the interpretations of state and federal constitutional provisions that served as a model in drafting Utah's Constitution; (5) the common language usage of the time; (6) the common law at the time of ratification; and (7) the commonly understood legal principles at the time.

Of course, if the Court has previously ruled on the dispositive issues, or determined the appropriate constitutional test or standard to be applied, *stare decisis* should be respected.[1]

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[1] Nowhere in his briefing before this Court, nor in his filings in federal court, has Roberts made *any* claim that this Court should overrule the numerous cases cited by Mitchell regarding (1) the rule of statutory construction to be applied in determining whether a statute is to be applied retroactively when the legislature has expressed its intent that it be

> Our commitment to *stare decisis* and resolving disputes according to the adversarial process thus counsels against discarding [precedent] and reaching for the original meaning of the due process provision.

Neese v. Utah Bd. of Pardons and Parole, 2017 UT 89, ¶ 66, 416 P.3d 663.

I. THE HISTORY OF THE TERRITORY OF UTAH DEMONSTRATES THE FOUNDING GENERATION SOUGHT A MAINSTREAM CONSTITUTION (1) WITH A DECLARATION OF RIGHTS INSPIRED BY THE BILL OF RIGHTS OF THE UNITED STATES CONSTITUTION AND (2) MODELED ON CONSTITUTIONS OF STATES PREVIOUSLY ADMITTED TO THE UNION SO STATEHOOD WOULD FINALLY BE GRANTED.

Seeking "refuge in what was then Mexican territory from religious persecution which they and their newly founded religion had successively encountered in Ohio, Missouri, and Illinois,"[2] Mormon[3] settlers "began arriving in the Great Salt Lake Valley in

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applied in such a manner and (2) the applicable due process rational basis standard to be applied in this matter. On the other hand, Mitchell has described the overwhelming precedent regarding the rule of statutory construction, in cases before and after *State v. Apotex Corp*., 2012 UT 36, 282 P.3d 66, and the well-established caselaw describing the applicable due process rational basis test to be applied.
As to *Apotex*, Mitchell has demonstrated, pursuant to *Eldridge v. Johndrow*, 2015 UT 21, ¶ 22, 345 P.3d 553, that the failure of the Court in *Apotex* to engage in any constitutional analysis and its statement of an absolute rule regarding the elimination of any "vested interest" renders *Apotex*—if it can be considered a "precedent"—(1) unpersuasive in terms of its reasoning and (2) not at all firmly "established in the law" in terms of its "age," its "[in]consistency with other legal principles," and the absence of any injustice or hardship if it were not applied, particularly since cases issued before and after *Apotex* applied the well-established two-part test of statutory construction ignored in *Apotex*. *See* Mitchell Brief, at 13, 18, 19, 20; Mitchell Resp. Brief, 18 n.13, 37, 58.

[2] *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921 (Utah 1993).

[3] Current leadership of The Church of Jesus Christ of Latter-Day Saints has announced that members should no longer call themselves "Mormons." Elisabeth Dias, *'Mormon' No More: Faithful Reflect on Church's Move to Scrap a Moniker*, THE NEW YORK TIMES, June 29, 2019, https://www.nytimes.com/2019/06/29/us/mormon-church-name-change.html. However, the term was routinely used, by members and non-members alike, during territorial and early statehood days in Utah and elsewhere. Also, since many of the sources referenced here use the term "Mormon," both for the organization and the members, that

July 1847."[4] "As early as June 1848, the leaders of the Church decided to petition Congress for statehood."[5] To assist in that endeavor, "a political arm of the Mormon church"[6] oversaw the drafting of the Deseret Constitution of 1849 "to make government in Utah parallel traditional American government."[7]

Because of the debate over the extension of slavery, statehood was rejected by Congress.[8] Territorial status was provided by the "Organic Act."[9] President Fillmore appointed several men to serve as territorial officials, including Brigham Young as Governor of the Territory of Utah and superintendent of Indian affairs.[10]

Thereafter, hostilities increased dramatically between the Mormons in the Territory of

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term is used here for the sake of consistency, with no disrespect intended toward the current church, its leadership, or its members.

[4] JEAN BICKMORE WHITE, CHARTER FOR STATEHOOD: THE STORY OF UTAH'S STATE CONSTITUTION 19 (1996) [hereinafter "WHITE, CHARTER"].

[5] Brad C. Smith, *Be No More Children: An Analysis of Article I, Section 4 of the Utah Constitution,* 1992 UTAH L. REV. 1431, 1441–42 [hereinafter "Brad Smith"]. JEAN BICKMORE WHITE, THE UTAH STATE CONSTITUTION 2 (1998) [hereinafter "WHITE, CONSTITUTION"]. "With statehood they could pick their own political leaders and make their own laws, instead of being governed by federally appointed territorial officials." Paul Wake, *Fundamental Principles, Individual Rights, and Free Government: Do Utahns Remember How to be Free?*, 1996 UTAH L. REV. 661, 673.

[6] WHITE, CONSTITUTION, *supra* note 5, at 2.

[7] Brad Smith, *supra* note 5, at 1442. "[A]n effort was made to establish a government more nearly in conformance with American traditions." DALE L. MORGAN, THE STATE OF DESERET 29 (1987) [hereinafter "MORGAN"]. "The first constitution of Deseret was not an unusual document. It bore a great resemblance to the Illinois constitution of 1818, and it served unchanged as a model for the constitutions of 1856, 1862, and 1867." Martin B. Hickman, *Utah Constitutional Law* 73 (1954) (unpublished Ph.D. dissertation, University of Utah) (on file with Marriott Library, University of Utah) [hereinafter "Hickman"].

[8] WHITE, CONSTITUTION, *supra* note 5, at 3; Brad Smith, *supra* note 5, at 1444.

[9] An Act to Establish a Territorial Government for Utah, ch. 51, § 1, 9 Stat. 453 (1850) [hereinafter "Organic Act"].

[10] R. N. BASKIN, REMINISCENCES OF EARLY UTAH 18 (1914) [hereinafter "BASKIN"].

Utah and non-Mormons (called "Gentiles"[11] by the Mormons), including members of Congress.[12] Robert N. Baskin, a Gentile who was elected mayor of Salt Lake City in 1892 and served as a Utah legislator and as Chief Justice of the Utah Supreme Court,[13] vividly described many of the reasons Gentiles, including members of Congress, were hostile toward the Mormons and their quest for statehood.[14] For instance, Brigham Young and other Mormon leaders declared absolutist political rule, claiming they were God's appointed spokesmen and that no other people or governments were to have any authority as they set about building the Kingdom of God.[15] Contrary to section 9 of the Organic Act,

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[11] "They [Mormons] divide the world's population between themselves and 'gentiles'—a category that, for Mormons, includes Jews." Lawrence Wright, *Lives of the Saints*, THE NEW YORKER, January 22, 2002. *See also* WHITE, CHARTER, *supra* note 4, at 127, n.3.

[12] Even before the Organic Act and the appointment of Brigham Young as Governor, President Zachary Taylor and many in Congress were hostile toward the Mormons. MORGAN, *supra* note 7, at 82. In July 1850, prior to the passage of the Organic Act, Almon W. Babbitt wrote from Washington, D.C., to Brigham Young: "You will learn from President Taylor's messages that he is not our friend; this I know for myself beyond a doubt. He did say before twenty members of Congress that he should veto any bill passed, state or territorial, for the Mormons,—that they were a pack of out-laws, and had been driven out of two States and were not fit for self-government." *Id.* (Citing to Almon W. Babbitt to Brigham Young, July 7, 1850, in the JOURNAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830, Church Archives, Salt Lake City, Utah).

[13] JOHN GARY MAXWELL, BASKIN AND THE MAKING OF MODERN UTAH 28 (2013).

[14] BASKIN, *supra* note 10.

[15] *Id.,* at 17–20. Baskin refers to numerous statements about the absolute power wielded by Brigham Young, including President Buchanan's statement to Congress: "Brigham Young['s] . . . power has been . . . absolute over both church and state." *Id*. at 18. Brigham Young asserted that "I LIVE above the law, and so do this people." *Id.* (emphasis in original) (citing I JOURNAL OF DISCOURSES 361). Orson Pratt, "one of the twelve apostles, and the most celebrated scholar of the Mormon church," *id*. at 19, wrote that "The Kingdom of God is an order of government established by divine authority. It is the only legal government that can exist in any part of the universe. All other governments are illegal and unauthorized." *Id*. Consistent with those proclamations, "Church and state in Utah were functionally identical." Brad Smith, *supra* note 5, at 1444.

granting the supreme and district courts with chancery and common law jurisdiction, Brigham Young declared that common law was not to be applied in Utah Territory.[16] Accordingly, the Territorial Legislature purported to abolish common law.[17] Murders of many people were attributed to Mormons and their leaders, including the Mountain Meadows Massacre.[18] Top Mormon leaders were notoriously hostile to Gentiles settling or asserting any ownership rights in property in the Territory.[19] But the greatest source of bitterness and division, and the greatest barrier to statehood for Utah, was the Mormon theocracy and the practice and doctrine of polygamy.[20]

After repeated failures of Utah to gain statehood, following ratifications of new constitutions in 1856, 1862, 1872, 1882, and 1887,[21] Mormons faced immense pressure to

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[16] Michael W. Homer, *The Judiciary and the Common Law in Utah: A Centennial Celebration,* UTAH BAR JOURNAL, August/September 1996, at 13 [hereinafter "Homer"].
[17] The "Act in Relation to the Judiciary. Sec. 1." ACTS, RESOLUTIONS AND MEMORIALS PASSED AT THE SEVERAL ANNUAL SESSIONS OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF UTAH 260–61 (Salt Lake City, Joseph Caine, 1855); BASKIN, *supra* note 10, at 6. *See also* Homer, *supra* note 16, at 13–14.
[18] BASKIN, *supra* note 10, at 9–12; 13–16; 83–149 (the massacre of one hundred thirty or more men, women, and children at Mountain Meadows, to which John D. Lee confessed); 150–55 (assassinations by the "Destroying Angels" or "Danites").
[19] Brigham Young said in a sermon at the Salt Lake City Tabernacle: "I would make a wall so thick and so high around the Territory that it would be impossible for the Gentiles to get over or through it." Heber J. Kimball stated in a sermon: "I am going to talk to you by revelation. . . . Could it help but be so when God communicates through me? . . . . The Gentiles are our enemies. They are damned forever. They are thieves and murderers; and if they don't like what I say, they can got to hell—damn them." BASKIN, *supra* note 10, at 164. Even Justice Bradley described the Mormons' "efforts to drive from the territory all who were not connected with them in communion and sympathy." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890).
[20] John J. Flynn, *Federalism and Viable State Government—The History of Utah's Constitution*, 1966 UTAH L. REV. 316 [hereinafter "Flynn"]; BASKIN, *supra* note 10, at 17–18.
[21] *See* WHITE, CHARTER, *supra* note 4, at 24–39; Flynn, *supra* note 20, at 315–34.

be more mainstream[22] so the Territory could become a state.[23] When Utah's 1895 Constitution[24] was drafted and ratified, there was "a clear desire to write provisions that [had] been accepted by Congress and had worked fairly well since their adoption."[25] The Utah Constitution of 1895 "is a patchwork of bits and pieces borrowed from other state constitutions by a gradual process of attempting to placate a hostile Congress."[26] The delegates to the Constitutional Convention "were determined to 'play it safe,' to avoid experimentation, and to copy provisions from the constitutions of other states to avoid uncertainty."[27] The risks of the constitution not being ratified or of being rejected by

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[22] MORGAN, *supra* note 7, at 105 (citing *The Daily Union Vedette*, January 25, 1965).
[23] WHITE, CHARTER, *supra* note 4, at 37. Residents of the Territory of Utah knew there was much on the line with another attempt at gaining statehood. "The greatest concern to church leaders . . . was the escheatment of Mormon church property under . . . the Edmunds-Tucker Act." *Id*. at 41. "Economic prosperity was a primary aim of all the delegates, and they knew it could only come after large investments of eastern capital. Another aim of the convention, though seldom articulated, was to improve the national image of Utah." WHITE, CONSTITUTION, *supra* note 4, at 9.
[24] Although written and ratified in 1895, the Utah Constitution is sometimes referred to as the 1896 Constitution because, pursuant to UTAH CONST. art. XXIV, § 16, it was effective when President Cleveland proclaimed Utah a state on January 4, 1896. WHITE, CHARTER, *supra* note 4, at 13 and n.26, 87.
[25] WHITE, CHARTER, *supra* note 4, at 52. *See also* Flynn, *supra* note 20, at 314 ("[M]ost sections of the Utah constitution were copied from several other state constitutions drafted in the latter part of this period."), 323 ("The convention borrowed heavily from earlier Utah constitutions and other state constitutions, particularly those of Nevada, Washington, Illinois, and New York . . . ."). The 1872 constitution of Utah, from which the 1895 constitution borrowed heavily, was modeled on the Nevada constitution, adopted upon admission of Nevada to the Union in 1864, "since it had recently passed muster with Congress." *Id.* at 317.
[26] *Id.* at 324–25.
[27] WHITE, CONSTITUTION, *supra* note 4, at 9. Martin B. Hickman notes as follows:

> [The Constitution] is borrowed directly from other state constitutions and the appeal to the authority of other states was a persuasive argument for the inclusion of a given provision. . . . The constant appeal to the authority of other states is one of the most striking impressions one gains from reading the debates. Frequent reference was

President Cleveland "were reiterated time and again by delegates trying to hold the convention to a conservative course."[28]

II. THE UTAH CONSTITUTION CREATED A LEGISLATIVE BRANCH WITH PLENARY POWER TO LEGISLATE WITHIN THE BOUNDS OF THE STATE AND FEDERAL CONSTITUTIONS.

A. The Text of Article V and Article VI, Section 1, of the 1895 Utah Constitution Reflects That the Legislative Branch Was to Possess the Power to Enact *All* Laws Not in Conflict With the Federal or Utah Constitutions.

Article VI, section 1 of the 1895 Utah Constitution[29] provided as follows:

> The Legislative power of this State shall be vested in a Senate and House of Representatives, which shall be designated The Legislature of the State of Utah.

The rights of initiative and referendum were added in 1900. UTAH CONST. art. VI, § 1(1).

Because the Legislature has *all* legislative power under the 1895 Constitution, and shares *all* legislative power with the people pursuant to the 1900 amendment to Article VI, no other branch of government can expand, diminish, or overrule legislation unless the

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> made to the constitutions of the northwest states which had been written in 1889. The Washington constitution in particular was used by the members of the convention; often sections and articles would be taken verbatim from this source."

Hickman, *supra* note 7, at 72 (citations omitted). "None of the great issues of government was seriously debated." Flynn, *supra* note 20, at 323. "The standard due-process clause (Sec. 7) caused no controversy . . . ." WHITE, CHARTER, *supra* note 4, at 61. "Many of the concepts in [the Declaration of Rights] had roots in the United States Constitution and were accepted by consensus." *Id*. at 62.

[28] WHITE, CHARTER, *supra* note 4, at 48. One notable exception was that "woman suffrage was included [in the Constitution, UTAH CONST. art. IV, § 1] in spite of the explicit argument that it would endanger the work of the convention." Hickman, *supra* note 7, at 73.

[29] The text of the 1895 Utah Constitution can be found at 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 436–67 (William F. Swindler ed. 1979) [hereinafter "SOURCES"].

Legislature—or, after 1900, the people—has acted outside of constitutional restraints.[30] To contend that there is some "vested rights" extra-constitutional restriction on legislative power is counter to, and unsupported by, the text of Article V and Article VI, section 1.[31]

B. The Common Law at the Time of Ratification of the Utah Constitution Provided That a Statute Was to Be Applied Retroactively If the Legislature Expressed Its Intention the Statute Was to Be Applied in Such a Manner.

This Court held in 1898 that "[t]he common law was in force in this state at the time of the adoption of our constitution . . . ." *Croco v. Oregon Short-Line R. Co.*, 54 P. 985, 987 (Utah 1898). "At common law the rule was that a statute is never to be construed to operate retrospectively, *unless such intention is clearly expressed in the act*." *Potter v. Ajax Min.*

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[30] The legal principles commonly understood before and during the drafting and ratification of the Utah Constitution reflect the view that state legislative power was limited only by the United States and state constitutions. *See, e.g., Thorpe v. Rutland & B.R. Co.*, 27 Vt. 140, 142–43 (1855). *See also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 173 (2d ed. 1871) ("'The law-making power of the State . . . recognizes no restraints, and is bound by none, except such as are imposed by the Constitution.'" (footnote and citation omitted)).

[31] In a famous case that must have been known to all lawyers familiar with the notions of a "vested rights" doctrine and the plenary powers of legislatures, the influential New York Court of Appeals stated in 1856, long before ratification of the Utah Constitution:

> To determine, then, the extent of the law-making power, we have only to look to the provisions of the constitution. It has, and can have, no other limit than such as is there prescribed; and the doctrine that there exists in the judiciary some vague, loose and undefined power to annul a law, because in its judgment it is 'contrary to natural equity and justice,' is in conflict with the first principles of government . . . .

Wynehamer v. People, 13 N.Y. 378, 430 (1856).

The court in *Wynehamer* decided the matter according to the Due Process Clause, holding that a state statute could not deprive owners of intoxicating liquors the right to sell them. *Id.* at 393. Numerous subsequent cases held that such a statute was a constitutional exercise of legislative power. In nearly a dozen such cases, "the decisions, save in two or three instances, are based upon views of the police power which leave the definition of that power essentially to legislative discretion." Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 460, 471 (April 1911).

Co., 57 P. 270, 273 (Utah 1899) (emphasis added). That was the common law even if "vested" or "substantive" rights were affected. *Infra,* 24–25.

The United States Supreme Court noted in 1798 that vested rights could be impaired or eliminated where appropriate:

> Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust . . . but *there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement . . . [S]uch laws may be proper or necessary, as the case may be*.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798) (Chase, J.) (emphasis added).

C. Statements Made by Delegates to the 1895 Constitutional Convention Reflect That the Legislative Branch Was to Possess Plenary Legislative Power, Subject Only to Constitutional Limitations.

Roberts has relied on an erroneous notion that there is an extra-constitutional restriction on legislative power to impact "vested rights."[32] However, consistent with the well-established law throughout the country at the time, the delegates to the 1895 Constitutional Convention repeatedly recognized that, other than restrictions in the United States and Utah Constitutions, there were *no* limits on the legislative power.

The delegates to the 1895 Constitutional Convention made clear, through a resolution, that only the Constitution limited the powers of the Legislature:

> Resolved, as the sense of this Convention, that the Constitution shall contain only the general plan and fundamental principle of the State government, together with such limitations of the powers thereof as may be deemed wise and expedient for the preservation of civil, political and religious liberty.

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[32] *See* Roberts Brief, at 5 (referring to a purported "black letter rule"), 15 ("Under Utah Law, the Legislature Lacks the Power to Revive Expired Claims"), 18, 27 ("[T]he legislature lacks the power to deprive a defendant of the 'vested right' held as the result of an expired statute of limitation.").

1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT SALT LAKE CITY TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH 212 (1898) [hereinafter "[1 or 2] PROCEEDINGS"].

Charles S. Varian,[33] a delegate to the constitutional convention, insisted that the limits on the Legislature would be *only* those set forth in the Constitution.

> The Legislature has full power to do everything in accordance with the function of government unless appropriated expressly or by implication by the Constitution, so that we simply need restraint, not grants of power, not implications of how the law should be, but simply lines of demarcation beyond which the Legislature may not go.

Id. at 397.[34] Alma Eldredge emphasized the point as follows:

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[33] "The most respected lawyer in the convention, and its recognized expert on federal and state law, was Charles S. Varian, a former United States district attorney . . . ." WHITE, CHARTER, *supra* note 4, at 50. "[Varian's] vast knowledge of constitutional and statutory law was displayed in more than a thousand speeches during the convention and . . . his independent views gained him great respect." *Id.* at 50 n.15.

[34] Delegate Varian stated: "You cannot take private property for a public use without paying for it. The second proposition is you cannot take private property for private uses at all, whether you put it in your Constitution or not." 1 PROCEEDINGS, *supra* 11, at 639. He made it clear that those rights need not be in the Utah Constitution because such takings "are absolutely in violation of the 14th amendment to the Constitution of the United States . . . ." *Id.* at 640. *See also id.* at 645. The common, informed understanding was that any notion of extra-constitutional protections for vested property rights had been long abandoned, including in New York, where the antebellum vested rights doctrine was formulated when New York's first constitution lacked a Due Process Clause. Laura Inglis, *Substantive Due Process: Continuation of Vested Rights*?, 52 AM. J. LEGAL HIST. 459, 462 (2012). The Due Process Clauses, as well as the Impairment of Contracts and Takings Clauses, of the federal and state constitutions were, long before 1895, the sole sources of authority for the courts to restrict the legislatures in their impacts on vested property rights. For instance, in the early 1800s, even Chancellor James Kent—who invoked the vested rights doctrine not to overrule, but to interpret, statutes—was adamant that "only the constitution could provide adequate grounds for judicial review." *Id.* at 464. "By the early 1840's, the mere possibility of extra-constitutional judicial review was being clearly condemned by the Supreme Court of Judicature." *Id.* at 489.

> The function of a constitution is to put restrictions upon future legislation. If this were not true, it would be wholly unnecessary to make any Constitution at all. The Legislature would have the plenary power, and indeed, the Legislature of the State would have supreme power to legislate upon all matters certainly not inhibited in the Constitution of the United States.

1 PROCEEDINGS, *supra* 11, at 246. David Evans, Jr., addressed the matter succinctly:

> As every man knows who has read the first element of constitutional law, unless the Constitution prohibits or restricts the Legislature, that the Legislature is sovereign in itself.

Id. at 615.[35]

The draft of the 1895 Utah Constitution was submitted to the people for ratification along with a message "To the People of Utah," which included the following statement:

> The legislative article, while permitting future *lawmakers to perform any needed thing*, circumscribes their powers in a way to prevent either extravagance or the misuse of legislative authority.

2 PROCEEDINGS, *supra* 11, at 1836 (emphasis added).

D. Several Utah Cases Near the Time of Ratification of the Utah Constitution Confirm That the Original Meaning of Article V and Article VI, Section 1, Was That the Legislature Has Plenary Power to Make Any Laws That Do Not Violate the State or Federal Constitutions, Including the Power to Implement Policy and to Affect Rights, Even Retroactively, If the Legislature Has Expressed Its Intention the Statute Is to Be Applied Retroactively.

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[35] The same view toward plenary legislative power was expressed by the United States Supreme Court a few years later:

> [I]t must not be forgotten that in a free representative government nothing is more fundamental than the right of the people, through their appointed servants, to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established . . . . The power of the people of the states to make and alter their laws at pleasure is the greatest security for liberty and justice . . . .

Twining v. State of New Jersey, 211 U.S. 78, 106 (1908), *overruled in part on other grounds, Malloy v. Hogan,* 378 U.S. 1 (1964).

Roberts has proceeded in this matter as if there were an extra-constitutional principle restricting the Legislature from exercising its power to retroactively eliminate the bar of a statute of limitations. In a question-begging manner,[36] Roberts maintains that since a "vested right" is involved, the Legislature has no power to affect it.[37] The notion that there are extra-constitutional restrictions on the power of the Legislature has been roundly rejected. *See* Bryant Smith, *supra* note 36, at 236 ("[T]he idea of extra-constitutional limitations on legislative acts hardly reached the dignity of law.").

Since the ratification of the Utah Constitution, to say that the Legislature is *without power* can mean only one of two things: (1) that the power has been fully granted to the federal government or (2) that the power exercised by the Legislature is prohibited by the United States or Utah Constitutions. *State v. Mason*, 78 P.2d 920, 925 (Utah 1938). *See*

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[36] The term "vested rights" is often expanded in its application far beyond any usefulness in determining whether legislation is valid. "Vested rights are indefinite terms, and of extensive signification; not unfrequently resorted to when no better argument exists, in cases neither within the reason or spirit of the principle." *People v. Morris*, 13 Wend. 325, 329 (N.Y. Sup. Ct. 1835) (Nelson, J.). "The distinction [between vested and non-vested rights] is of little use to determine the fate of a given law. If it is not a paradox to say so, a vested right is not necessarily immune to the power of retroactive legislation." Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 246 (April 1927) [hereinafter "Bryant Smith"].

[37] For instance, Roberts has relied on a non-existent extra-constitutional "black letter rule," Roberts Brief at 5, that "the legislature lacks the power to eliminate a vested right to rely on an expired statute of limitation . . . ." *id.*, at 2, citing to *State v. Apotex Corp.*, 2012 UT 36, ¶ 67, which undertook no constitutional analysis and did not even cite to a constitutional provision supporting its *dicta*—and which relied on an AMERICAN JURISPRUDENCE citation that has been materially changed in the more recent version, 51 AM. JUR. 2d *Limitation of Actions* § 40 (July 2016 Update) ("The state legislature, in some jurisdictions, has the power to amend a statute of limitations to revive a claim that was already barred under the prior limitation period, and may enact legislation that revives previously barred claims through a clear express [sic] of its intent to do so." (footnotes omitted)).

also Univ. of Utah v. Shurtleff, 2006 UT 51, ¶ 31, 144 P.3d 1109; *Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ.*, 2001 UT 2, ¶ 11, 17 P.3d 1125; *Univ. of Utah v. Bd. of Exam'rs*, 295 P.2d 348, 361 (Utah 1956); *Tribune Reporter Printing Co. v. Homer*, 169 P. 170, 172 (Utah 1917) (Thurman, J.[38]) ("The Legislature has power to determine what . . . [public policy] shall be, and in the exercise of this power it is limited only by the state and federal Constitutions."); *State v. Lewis*, 72 P. 388, 389 (Utah 1903) ("Being invested with [absolute, inherent, and plenary] power, unless [the Legislature] acts in violation of constitutional restraint, the courts have no authority to declare its enactments void, however unnecessary or unwise they may be."); *Kimball v. City of Grantsville City*, 57 P. 1, 5 (Utah 1899); *Holden v. Hardy*, 46 P. 756, 758 (Utah 1896).

The plenary power of the Legislature includes the power, with expressed legislative intent, to enact *retroactive* legislation, such as a tax on business done prior to enactment of the statute. *See Garrett Freight Lines v. State Tax Comm'n*, 135 P.2d 523, 526–27 (Utah 1943). The Legislature has the power to *retroactively* alter the substantive law or to affect vested rights if in conformance with constitutional restrictions and according to expressed legislative intent. *See, e.g.*, *Evans & Sutherland Computer Corp. v. State Tax Comm'n*, 953 P.2d 435, 437–38 (Utah 1997); *Roark v. Crabtree*, 893 P.2d 1058, 1061 (Utah 1995); *Potter v. Ajax Min. Co.*, 57 P. at 273 ("[A] statute is never to be construed to operate retrospectively, *unless such intention is clearly expressed* in the act. [A statute] expressly provides that no part of the Revised Statutes is retroactive, *unless expressly so declared*."

[38] Justice Samuel B. Thurman was a delegate at the 1895 Constitutional Convention. 2 PROCEEDINGS, *supra* 11, at 1884, 1995.

(emphasis added)). According to a Utah Supreme Court decision issued during the same year the Utah Constitution took effect, the power of the Legislature "permits the deprivation of life, liberty, or property according to law," "shield[ing] such rights from *arbitrary* power." *State v. Bates*, 47 P. 78, 79 (Utah 1896).

III. ALL RELEVANT AVAILABLE EVIDENCE DEMONSTRATES AN ORIGINAL MEANING OF THE DUE PROCESS CLAUSE OF THE UTAH CONSTITUTION THAT IS (1) IRRECONCILABLE WITH AN ABSOLUTE BLACK LETTER PROHIBITION OF LEGISLATION AFFECTING THE BAR OF A PRIOR STATUTE OF LIMITATIONS OR "VESTED RIGHTS" AND (2) ENTIRELY CONSISTENT WITH THE DUE PROCESS RATIONAL BASIS TEST, WHICH SHOULD BE APPLIED IN THIS MATTER.

An abundance of evidence reflects the original public meaning regarding Article I, section 7 of the Utah Constitution ("the Due Process Clause") in the context of the Legislature's power, through enactment of the Revival Statute, to correct what it found to be a woefully short statute of limitations that prevented victims of child sexual abuse from obtaining some semblance of justice through the civil court system. The operative legal principle, according to the public understanding, was that legislative power could not be wielded *arbitrarily* to deprive someone of life, liberty, or property. On the other hand, the Legislature *could* deprive someone of life, liberty, or property if *according to the rule of law*.[39]

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[39] The original meaning of the Utah Due Process Clause is in line with the original meaning of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *See, e.g.,* Randy E. Barnett and Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law,* 60 WM. & MARY L. REV. 1599, 1643 (2019) [hereinafter "Barnett and Bernick"] ("[T]hroughout its development, the end or 'spirit' of the concept [of due process of law] remained the same: barring '*arbitrary*' power over life, liberty, and property. . . . At all points, . . . 'the due process of law' was understood to

A. Consistent With the Due Process Rational Basis Test Adopted by This Court, the Text of the Due Process Clause in the Utah Constitution Reflects the Original Understanding That the Legislature May Enact Laws Reviving Previously Time-Barred Claims If the Legislation Is Not Arbitrary.

The Due Process Clauses in the state and federal constitutions ultimately have as their genesis the Magna Carta. *See Berry By and Through Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 674 (Utah 1985). Also referred to as "the Great Charter," *see, e.g., Jensen v. Union Pac. Ry Co.*, 21 P. 994, 995 (Utah 1889), it imposed the rule of law on King John in 1215, forcing him to accept (for a short time) that his word was not the law, and that he was subject to the law in the same manner as everyone else.[40] The origin of the Due Process Clauses of the United States Constitution is the following provision of the Magna Carta:

> No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land.

Magna Carta, ch. 29, in 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45 (1797) (quoted in *Kerry v. Din*, 135 S. Ct. 2128, 2132 (2015)). "[A]t the time of the Fifth Amendment's ratification, the words 'due process of law' were understood 'to convey the same meaning as the words "by the law of the land" ' in Magna

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denote a concept of *rule by principles* that are distinguishable from the mere will of the holders of power, and of impartial adjudication in neutral courts of law." (emphasis added) (citations omitted)).

[40] *See Browning-Ferris Industries of Vermont, Inc. v. Kelso Disposal, Inc.*, 492 U.S. 257, 271–72 (1989) ("[T]he [Magna Carta] . . . was aimed at putting limits on the power of the King, on the 'tyrannical extortions . . . with which John had oppressed his people.' " (citation omitted)); Jack L. Landau, *Magna Carta Turns 800*, 75-Jun OR. ST. B. BULL 16 (2015).

Carta." *Kerry*, 135 S. Ct. at 2132 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856)).

The Magna Carta and, hence, the Due Process Clauses do not provide that certain interests or rights *absolutely* cannot be enlarged, diminished, or eliminated by any branch of government, as contended by Roberts. Rather, they provide that certain interests "could be deprived only pursuant to 'the law of the land.' " *Id.*

There was certainly a common public understanding in 1895 of the meaning of the due process clause in Utah's Constitution. As of that time, the United States Supreme Court had described clearly the meaning of "due process of law."[41] The term did not provide any *absolute* protection for "life, liberty, or property," but, rather, provided a protection from "arbitrary" laws. The Due Process Clause was " 'intended to secure the individual from the *arbitrary exercise* of the powers of government . . . .' " *Hurtado v. People of State of Cal.*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819) (emphasis added)).[42]

Four years after the ratification of the Utah Constitution, the United States Supreme Court reiterated that due process of law did not provide any *absolute* protection for any

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[41] The delegates to the Constitutional Convention made clear that the Declaration of Rights in Article I of the Utah Constitution was generally derived from the United States Constitution, stating: "The inspiration behind the declaration of rights came from the great parent bill of rights framed by the fathers of our country." Message to the People of Utah, 2 PROCEEDINGS, *supra* 11, at 1836.

[42] Later cases emphasized that the core purpose of the due process clause was to protect against the *arbitrary* deprivations of rights. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331–32 (1986); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against *arbitrary* action of government." (emphasis added) (citation omitted)).

rights, but, rather, protected against the *arbitrary* deprivation of rights. *Dent v. West Virginia*, 129 U.S. 114, 124 (1889) ("The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen.").

Certainly, there is nothing in the Magna Carta, nor in the Due Process Clauses, preventing a legislature from reasonably determining that justice would be promoted by reviving claims for child sexual abuse that had been barred by a prior statute of limitations, particularly after the Legislature, as in this case, had determined that (1) the earlier statute of limitations had been far too short to allow an opportunity for most victims to pursue their claims and (2) the prior *prospective* legislative elimination of a statute of limitations for claims of child sexual abuse discriminated against, and left without any recourse, those victims who, at the time of the effective date of that statute, were older than 22 years of age. *See* Mitchell Brief, at 21–24.[43]

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[43] The United States Supreme Court has held that where a statute is rationally related to a legitimate objective, it is constitutionally valid "even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery v. Turner Elkhorn Min. Co.*, 428 U.S. 1, 16 (1976) ("It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.") (citations omitted). The Supreme Court has also validated retroactive statutes on the apparent ground that "it is not unconstitutional to deprive a person of a right which rests on no substantial equity." Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 HARV. L. REV. 692, 720–22 (February 1960). In this case, Roberts has admitted to subjecting Mitchell to sex acts when Mitchell was a sixteen-year-old eye-witness in a case in which Roberts was the prosecutor. The application of the Revival Statute to Mitchell's claims against Roberts clearly does not deprive him of "a right resting on substantial equity." The Supreme Court has "sustain[ed] statutes which, although retroactive in their nature, have been applied to modify a right which rests on no substantial equity," including in several cases "holding that the repeal or extension of the statute of limitations is valid as applied to revive claims which would have been barred under the original limitations period." *Id.* at 720 (citations omitted).

B. The Common Understanding of a Legislative Power to Revive Claims Previously Barred by the Expiration of an Earlier Statute of Limitations Is Apparent From (1) the Omission of a Provision in the Utah Constitution of a Prohibition Against Reviving Claims After They Are Time-Barred and (2) the Omission of a General Prohibition Against Retroactive Legislation.

Delegates to the Constitutional Convention specifically included in the Utah Constitution prohibitions against *ex post facto* criminal laws,[44] bills of attainder, and impairment of contracts. UTAH CONST. art. I, § 18. But they clearly intended *not* to include a prohibition against the legislative revival of *civil* claims previously time-barred.

"Delegates were given copies of all forty-four state constitutions, and they frequently referred to them." Jean Bickmore White, *So Bright the Dream: Economic Prosperity and the Utah Constitutional Convention*, 63-4 U. HIST. QUARTERLY 322 n.3 (Fall 1995). The Mississippi and Alabama constitutions were among the constitutions of then-existing states referenced by the delegates. *See*, *e.g.*, 2 PROCEEDINGS, at 1162, 1389, 1570. Unlike the Utah Constitution, those constitutions prohibited the revival of time-barred claims:

> The legislature shall have no power to revive any remedy which may have become barred by lapse of time, or by any statute of limitation of this State.

MISS. CONST. of 1890, art. 4, § 97.[45]

> [T]he General Assembly shall have no power to revive any right or remedy which may have become barred by lapse of time or by any statute of this State.

ALA. CONST. of 1875, art. IV, § 56.[46]

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[44] Constitutional prohibitions against *ex post facto* laws related only to criminal laws. *See, e.g., Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 399 (1798) (Chase, J. and Iredell, J., respectively). "The restraint against making any ex post facto laws was not considered, by the framers of the constitution, as extending to prohibit the depriving a citizen even of a vested right to property . . . ." *Id.* at 394 (Chase, J.).

[45] 5 SOURCES, *supra* note 29, at 405 (William F. Swindler ed. 1975).

[46] 1 SOURCES, *supra* note 29, at 113 (William F. Swindler ed. 1973).

In 1907, Oklahoma gained statehood. Unlike the Utah Constitution, the Oklahoma Constitution provides: "The Legislature shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this State."[47]

Had the delegates to the Constitutional Convention sought to prevent the revival of previously time-barred claims, they could have done so—but they did not. Reading such a provision into the Constitution would be a betrayal of the decision by delegates to omit it. *See Colosimo v. Gateway Comm. Church*, 2018 UT 26 ¶ 46, 424 P.3d 866 ("When looking at the plain language, we . . . deem all omissions to be purposeful." (internal quotation marks and citation omitted)).

Likewise, had the Utah delegates intended to *generally* bar retroactive civil laws, as they did with criminal laws through the prohibition of *ex post facto* laws, UTAH CONST. art. I, § 18, they could, and would, have followed the examples of several other states whose constitutions prohibited retroactive laws[48]—but they did not. Neither did Arizona, Hawaii, Kentucky, Louisiana, Minnesota, Montana, North Dakota, and Pennsylvania—all of which, by statute—like Utah Code Ann. § 68-3-3—permit retroactive application of substantive statutes if there is an expressed intent that the laws be applied retroactively.[49]

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[47] OKLA. CONST. art. V, § 52.

[48] *See, e.g.,* COLO. CONST. art. II, § 11; GA. CONST. of 1877, art. I, § IV, para. I; IDAHO CONST. art. XI, § 12; MASS. CONST. art. X; MO. CONST. of 1875, art. II, § 15; NEB. CONST. art. I, § 16; N.H. CONST. art. 23; N.M. CONST. art. IV, § 34; OHIO CONST. art. II, § 28; TENN. CONST. art. 1, § 20; TEX. CONST. art. 1, § 16.

[49] ARIZ. REV. STAT. § 1-244 (1996); HAW. REV. STAT. § 1-3 (2011); KY. REV. STAT. ANN. § 446.080 (1942); LA. CIV. CODE ANN. art. vi (1988); MINN. STAT. § 492.21 (1941) (current version at MINN. STAT. § 645.21 (2018)); MONT. CODE ANN. § 1-2-109 (1895); N.D. CENT. CODE § 1-02-10 (2019); 1 PA. CONS. STAT. ANN. § 1926 (1972). Several of those states' courts have made clear that, if the Legislature expresses its intention concerning retroactive

C. Constitutional Convention Delegates and Their Contemporaries Made Clear That Legislative Intent Is to Be Given Effect by the Courts; the Only Discussions About "Vested Rights" by the Delegates Concerned (1) the Protections Against the Legislative Conveyance of Real Property From One Private Party to Another, (2) the Taking of Real Property for Public Use Without Compensation, (3) the Protections Against Impairment of Contracts, and (4) Charter Rights.

Robert Baskin[50] unequivocally stated the ratification-era common understanding that the intent of the Legislature was to be given effect by the courts:

> [A] statute must be enforced by the court in accordance with the intention of the legislature. When . . . the intention is expressed by unambiguous language, the intention so expressed must prevail, and cannot be changed by extrinsic matters.
>
> > "The intention of the legislature being plainly expressed so that the act, read by itself or in connection with other statutes pertaining to the same subject, is clear, certain and unambiguous, the courts have only the simple and obvious duty of enforcing the law according to its terms." (Sutherland, State Const., 237.)

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application, statutes reviving claims that were previously time-barred by a prior statute of limitations are valid. *See, e.g., Roe v. Doe*, 581 P.2d 310, 316 (Haw. 1978) ("[A]lthough courts often repeat the rule that 'subsequent extensions of a statutory limitation will not revive a claim previously barred', the question remains one of legislative intent."); *Chance v. American Honda Motor Co., Inc.*, 635 So. 2d 177, 178 (La. 1994); *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 419 (Minn. 2002) ("[T]here can be no doubt that the legislature has the power to amend a statute of limitations to revive a claim that was already barred under the prior limitations period."); *Donaldson v. Chase Securities Corp.*, 13 N.W.2d 1, 5 (Minn. 1943) ("The bar of such statutes [of limitations] may be lifted without violating the due process clauses of either the State or Federal Constitutions."); *U.S. Home Corp. v. Zimmerman Stucco and Plaster, Inc.,* 749 N.W.2d 98, 101–02 (Minn. App. 2008); *Cosgriffe v. Cosgriffe*, 864 P.2d 776, 778 (Mont. 1993) ("Legislation repealing or extending the statute of limitations, with the effect of reviving claims previously barred, has consistently been upheld by the courts against due process."). *See also Swartz v. Borough of Carlisle*, 85 A. 847, 849 (Pa. 1912) ("[T]he Legislature has the power to legislate retrospectively on all matters, not penal, nor in violation of contracts, not expressly forbidden by the Constitution.").

[50] Robert Baskin was referred to by Delegate Varian as "now mayor of this city, a lawyer of forty years' standing, presumably acquainted with the jurisprudence of the Territory and of the United States . . . ." 1 PROCEEDINGS, *supra* 11, at 1747.

BASKIN, *supra* note 10, at 44–45.[51]

Delegates at the Constitutional Convention discussed "vested" real property rights at some length.[52] They *never* discussed any "vested rights" protection for any other rights, except for contract rights, including corporate charters in existence.[53] They never considered prohibiting the revival of claims previously time-barred by a statute of limitations, as they could have done, *supra* at 19–20, and never contemplated any protection against revival of previously time-barred claims for child sexual abuse.[54]

The limitation of the discussion at the Constitutional Convention considering "vested rights" as real property rights,[55] contract rights, and charter rights was entirely consistent

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[51] *See also Pratt v. Board of Police & Fire Comm'rs*, 49 P. 747, 749 (Utah 1897) and other cases compiled at *State v. Rasabout*, 2015 UT 72, ¶ 10 n.14, 356 P.d 1258.

[52] For instance, the debate over the Takings Clause was lengthier than for any other section of the Constitution. *See* 1 PROCEEDINGS*, supra* 11, at 326–58, 623–51.

Delegate Varian argued that private property—obviously meaning real property—could not be taken for private uses, but that private property could be, with the payment of compensation, taken for public uses for "the good of the entire community."

> The right of eminent domain is founded upon necessity. It has never been and ought never to be accorded in anywise to any individual; it is only accorded in the name of the State upon the fears and assumption that *the good of the entire community is the supreme law, and the rights of individuals must yield in order that the rights of the whole may be benefitted*.

1 PROCEEDINGS, *supra* 11, at 339. Delegate Varian further emphasized that vested rights in real property are "subject to the good of the community," which is to be determined by the Legislature. *Id.*, at 350.

[53] 2 PROCEEDINGS, *supra* 11, at 1548–51.

[54] Obviously, Delegate Thurman was not referencing any "right" under a bar of a statute of limitations relating to a child sexual abuse claim when he stated: "There is nothing more sacred than the right of property, unless it be the right to live and enjoy your liberty." 1 PROCEEDINGS, *supra* 11, at 625.

[55] One of the two property rights protections discussed at length is the protection against private property (always discussed as being *real property*) being taken for private uses. *See* comments of Delegate Varian, 1 PROCEEDINGS, *supra* 11, at 644 ("The construction and interpretation of this language of this constitutional [due process] guaranty everywhere

with the limited antebellum-era "vested rights" doctrine.

> [T]he objective of these [vested] rights remained for the most part, tangible property, property which could be taken by the power of eminent domain, hence especially real property. Still there were some exceptions to this rule. Art. I, § 10, of the United States Constitution was regarded from the outset as placing the legal fruits of one's lawful contracts in the category of vested rights. . . . [T]he *Dartmouth College* decision extended the concept to charter rights . . . .
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> * * *
>
> [O]ne [right] only, and that in but a limited sense, was protected by the doctrine of vested rights, the right namely of one who had *already* acquired some title of control over some particular piece of property, in the physical sense, to continue in that control. *All other rights, however fundamental, were subject to limitation by the legislature*, whose discretion as that of a representative body in a democratic country, was little likely to transgress the few, rather specific, provisions of the written constitution.

Edward S. Corwin, *Basic Doctrine of American Constitutional Law*, MICH. L. REV. 247, 272, 275 (1913–1914) (emphasis added) (citations omitted).[56]

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have been that you cannot, under it, take private property for private uses."), 645. The second property right protection recognized by delegates to the Constitutional Convention was described by Delegate Kimball: "[S]ince the 14th amendment to this Constitution of the United States was adopted, no state can take the property of the citizen for a public use, without compensation." *Id.*, at 642.

[56] The classic nineteenth-century doctrine of vested rights was often described in terms of the distinction between legislative and judicial power . . . . Little is left of the once basic doctrine. Congress has substantial authority to change the future legal consequences of past events. That authority extends to the consequences of many past events that created property rights.

John Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENTARY 295, 296, 307 (Summer 2016) (footnote omitted). Any concept of vested property rights was, by the time of the Constitutional Convention, subsumed by the Due Process Clause and the Impairment of Contracts Clause. *See* Charles G. Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures,* 2 TEX. L. REV. 257, 288 (April 1924) [hereinafter "Haines"] ("The doctrine of vested rights, independent of constitutional limitations, was soon to be absorbed in the phrase due process of law . . . ."); *Emblen v. Lincoln Land Co.*, 184 U.S. 660, 662 (1902) (question posed was whether one was deprived "of a vested right without due process"); *Evans v. Utah*, 21 F. Supp. 3d 1192, 1214 (D. Utah 2014) (referring to "vested marriage rights" being "protected by the federal due process clause"); *Miller v. USAA Cas. Ins. Co.,*

The informed delegates to the Constitutional Convention understood that the due process clause was not intended to *absolutely* prevent deprivations of life, liberty, or property, but, rather, to protect against *arbitrary* government action. Eleven years earlier, the United States Supreme Court explained the purpose of the Due Process Clause:

> "The provision [due process of law] was designed to protect the citizen against all *mere acts of power*, whether flowing from the legislative or executive branches of the government."

Hurtado v. People of State of Cal., 110 U.S. 516, 527 (1884) (emphasis added) (citations omitted).[57] Foretelling the due process rational basis test, Delegate Kimball quoted from the "sinking fund cases": "The United States cannot any more than a state interfere with private rights *except for legitimate governmental purposes*." *Id.* (Emphasis added.)

D. Utah Caselaw Before and Shortly After Ratification of Utah's Constitution Establishes That the Original Meaning of the Due Process Clause Allows the Retroactive Application of a Statute Affecting a Vested Right If the Legislature Expressed an Intention the Statute Is to Be Applied Retroactively and the Statute Is Not Arbitrary.

In 1888, the Supreme Court of the Territory of Utah held that an amended statute changing the term of a county treasurer's office from four years to two years would be applied only prospectively in relation to someone who had a vested right to serve two more years, but solely *because the Legislature had not expressed its intention* that it be applied

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2002 UT 6, ¶ 40, 44 P.3d 663 (holding that "extra-contractual claims are vested rights of action that are 'property right[s] protected by the due process clause.'" (alteration in original)).

[57] Even earlier, in 1819, the United States Supreme Court made clear that "the words from *Magna Charta*, incorporated into the constitution of Maryland, . . . were intended to secure the individual from the *arbitrary* exercise of the powers of government . . . ." *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819) (emphasis added).

retroactively.[58] The Court expressly stated that "[t]he legislature had the power to have said so," but it did not. *Farrell v. Pingree*, 16 P. 843, 844–45 (Utah 1888).

One year after the Utah Constitution was ratified, the Utah Supreme Court considered a claim that due process of law required a 12-person jury. The Court stated:

> [Due process] *permits the deprivation of life, liberty, or property according to law*, not otherwise. It shields such rights from *arbitrary power*.

State v. Bates, 47 P. 78, 79 (Utah 1896) (emphasis added). **The Utah Territorial Supreme Court noted that "vested rights" are protected only from *arbitrary* deprivations.** *United States v. Tithing Yard and Offices,* 34 P. 55, 58 (Utah 1893) (emphasis added) (citing COOLEY'S CONSTITUTIONAL LIMITATIONS 438 (5th ed. 1883)), *rev'd. on other grounds, Certain Real Estate Known as the "Gardo House" v. United States*, 163 U.S. 680 (1896). Those ratification-era decisions foretold the due process rational basis doctrine.[59]

In 1900, this Court considered whether a statute could revive a claim previously time-barred, holding that the Legislature's intent controlled.[60] *Ireland v. Mackintosh*, 61 P. 901, 904 (Utah 1900). *See also Goshen v. Stonington*, 4 Conn. 209, 221 (1822); *Milliken v. Sloat*, 1 Nev. 573, 577–78 (1865) ("[The power to enact retroactive legislation] exists outside of an express and positive constitutional inhibition [such as the express prohibitions against *ex post facto* laws and laws impairing contracts] . . . .").

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[58] " '[I]t is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively.' " *Farrell*, 16 P. at 845 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 456 (5th Ed. 1883)).

[59] The due process rational basis test is described *infra* at 26–30.

[60] *See* Mitchell Brief, at 13–21; Mitchell Resp. Brief, at 18–28.

E. Before Ratification of the Utah Constitution, the Interpretation of the Due Process Clauses of the Federal Constitution, Which Served as the Model for Utah's Due Process Clause, Demonstrates the Legislature Had the Power to Enact a Non-Arbitrary Statute Reviving Previously Time-Barred Claims If It Served a Legitimate Legislative Purpose.

> It is customary for all governments to provide for the protection of vested rights, *subject, however, to such disposition of these rights as the legislature may make in the public interest* and normally the question as to what inures to the public interest is for the legislature to determine finally.

Haines, *supra* note 56, at 289 (emphasis added).

The United States Supreme Court recognized in 1806 that, even if a statute applied retroactively would "divest vested rights" and appear "unreasonable" or "obviously improper," it would be applied retroactively if "it contained express words to that purpose." *United States v. Heth*, 7 U.S. (3 Cranch) 399, 414 (1806) (Cushing, J.). *See also id.* 408 (Johnson, J.) and 413 (Paterson, J.).

In 1834, the United States Supreme Court unequivocally stated:

> [I]t is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it devests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective laws generally; but only ex post facto laws . . . relat[ing] to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively.

Watson v. Mercer, 33 U.S. (8 Pet.) 88, 110 (1834).

In 1850, the Court reaffirmed the Legislature's power to enact retroactive civil laws:

> That there exists a general power in the state governments to enact retrospective or retroactive laws, is a point too well settled to admit of question at this day. The only limit upon this power in the states by the Federal Constitution . . . is the provision that these retrospective laws shall not be such as are technically *ex post facto*, or such as impair the obligation of contracts. . . .

Baltimore & S.R. Co. v. Nesbit, 51 U.S. (10 How.) 395, 401 (1850). *See also Chew Heong v. United States*, 112 U.S. 536, 559 (1884) (reiterating "uniformly" accepted rule against "giv[ing] to statutes a retrospective operation, whereby rights previously vested are injuriously affected, *unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature*." (emphasis added)); *League v. State of Texas*, 184 U.S. 156, 161 (1902).

The United States Supreme Court has more recently observed that "[s]ince the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights *unless Congress had made clear its intent*." *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994). The Court also noted that, absent a violation of a "specific provision[ ]" of the Constitution:

> . . . the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope. *Retroactivity provisions often serve entirely benign and legitimate purposes*, [including] simply to give comprehensive effect to a new law Congress considers salutary. [A] requirement that Congress first make its intention clear helps ensure that *Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness*.

Id. at 267–68 (emphasis added).

F. Consistent With the Original Meaning of the Due Process Clause, the Appropriate Test to Be Applied in This Matter Is the Well-Established Rational Basis Test.

As demonstrated *supra* at 17–18, 24–25, the Utah Due Process Clause does not provide absolute protection for deprivations of life, liberty, or property, but, rather, it provides protection against *arbitrary* exercises of government power. "[T]hroughout its development, the end or 'spirit' of the concept [of due process of law] remained the same:

barring '*arbitrary*' power over life, liberty, and property. . . ." Barnett and Bernick, *supra* note 39, at 1643.

> "Due process of law" . . . . *permits the deprivation of life, liberty, or property according to law*, not otherwise. It shields such rights from *arbitrary power*.

State v. Bates, 47 P. 78, 79 (Utah 1896).

That goal led to the creation of the rational basis test, according to which a statute will be upheld if it does not infringe on "fundamental" rights, it is rationally related to a legitimate state interest,[61] and it is neither arbitrary nor discriminatory. *See, e.g., State v. Angilau*, 2011 UT 3, ¶ 10, 245 P.3d 745; *State v. Candedo*, 2010 UT 32, ¶ 16, 232 P.3d 1008; *Tindley v. Salt Lake City Sch. Dist.*, 2005 UT 30, ¶ 29, 116 P.3d 295. The Revival Statute, particularly in light of its stated purposes and intended operation, is not arbitrary, but is directly aimed at a defined, legitimate purpose, articulated in detail by the Legislature. Mitchell Brief, at 21–24. Also, it certainly is not discriminatory,[62] inasmuch as those defendants within the coverage of the Revival Statute are now on a more equal footing with others sued for child sexual abuse for whom there is no statute of limitations.

A more rigorous test than the rational basis standard—requiring that, to meet constitutional muster, a statute must "be narrowly tailored to serve a compelling state interest," *see Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting)—is

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[61] Long ago, this Court discussed what is meant by "legitimate governmental interest" in terms of the State's police powers "to protect the health, safety, morals, or public welfare of the people or any portion of them." *State v. Mason*, 78 P.2d 920, 925 (Utah 1938).

[62] Roberts has not been discriminated against on account of any suspect classifications or in any way "objectionable under the Utah or federal constitutions." *See Candedo,* 2010 UT 32, ¶ 24; *State v. Angilau*, 2011 UT 3, ¶ 12.

applied if "fundamental" rights are violated by the statute. The analysis is usually the same under the Utah and United States Constitutions. *See, e.g., In re Adoption of J.S.*, 2014 UT 51, ¶¶ 31, 40, 41, 52, 358 P.3d 1009; *Judd v. Drezga,* 2004 UT 91, ¶ 30, 103 P.3d 135; *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923). On rare occasions, the analysis differs. *See, e.g., Wells v. Children's Aid Soc'y of Utah,* 681 P.2d 199, 206 (Utah 1984), *overruled by In re Adoption of J.S.,* 2014 UT 51, ¶ 57.

Fundamental rights have been defined as being "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934), *overruled in part on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964). In determining if a right is "fundamental," the right must be "of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ." *Powell v. State of Alabama*, 287 U.S. 45, 67 (1932). Rights are "fundamental" for purposes of due process analysis only if they are " 'deeply rooted in this Nation's history and tradition' " and " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " *Washington v. Glucksberg,* 521 U.S. 702, 720–21 (1997) (citations omitted). Among the rights held to be "fundamental" have been the specific rights guaranteed by the first eight amendments to the United States Constitution and the right to marry, the right to have children, the right to direct the education and upbringing of one's children, the right to marital privacy, and the right to bodily integrity. *Id.* (citations omitted).

Certainly, finding refuge behind the bar of a prior statute of limitations applicable to claims of child sexual abuse is not remotely within the realm of "fundamental" rights.

IV. THE ORIGINAL PUBLIC MEANING OF THE OPEN COURTS CLAUSE PROVIDED (1) PROCEDURAL PROTECTIONS OF ACCESS TO THE COURTS AND (2) SUBSTANTIVE PROTECTION OF "REMEDIES" FOR AN "INJURY."

Contrary to Roberts's expansionist view, the Open Courts Clause, UTAH CONST. art. I, § 11, has never been understood to provide substantive protections for legal *defenses*. Roberts's argument is belied by the plain text of the Constitution, the comments during the constitutional convention, the caselaw addressing other states' similar constitutional provisions, and Utah caselaw from the time of statehood until the present.

A. The Plain Text of Article I, Section 11, According to the Common Meaning of Those Words at the Time of Statehood, Provides No Substantive Protection for Legal Defenses.

Article I, section 11 of Utah's Constitution contains two separate clauses. First, as copied from Connecticut's constitution,[63] it declares "all courts shall be open" and every person "shall have remedy" "for an injury done to him." This Court has held that language provides some degree of substantive protection against legislative abrogation of causes of action, *i.e.*, "remedies" for "injuries." *Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶ 18,

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[63] The language of Article 1, section 11 read to the committee on day 20 of the constitutional proceedings was nearly identical to Connecticut's unique open courts clause. *Compare* CONN. CONST. art. 1, § 10 *with* 1 PROCEEDINGS, *supra* 11, at 304. *See also* Jarom R. Jones, *Mormonism, Originalism, and Utah's Open Courts Clause*, 2015 B.Y.U. L. REV. 811, 823 n.81 ("Utah's open courts clause was most likely copied from the Connecticut constitution."). That section was slightly amended before being adopted. 1 PROCEEDINGS, *supra* 11, at 304–06.

416 P.3d 635. But nothing in the "ordinary and natural sense"[64] of the words of the clause have to do with substantive protection of legal defenses. The historical usage of these words confirms the obvious: A "defense" was never understood to be a "remedy" for an "injury." Searches of the Corpus of Historical American English[65] for the terms "remedy," "defense," "defence," and "injury" from the beginning of 1890 through the end of 1899, as well as the collocates of "defense" and "remedy" *at any time*, reveal that the usage of those words never indicated that a legal *defense* might constitute a *remedy* for an *injury*.[66]

The history of the Open Courts Clause can be traced through the commentaries of Sir William Blackstone and Sir Edward Coke, to its origin in the second sentence of Chapter 29 of the 1225 Magna Carta. Exploration of these historical sources shows that the terms have always referred to "the remedy provided by courts for the injury one subject suffers to his property, person, or reputation as a result of the wrong-doing of another," and *not* a legal defense such as one based upon a statute of limitations.[67]

The second clause of Article I, section 11, which contains the sole reference to anything relating to a defense, provides a strictly procedural protection that "no person shall be

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[64] "[I]t must be presumed that the framers of the Constitution used the words in their ordinary and natural sense." *Gibbs v. Gibbs*, 73 P. 641, 645 (Utah 1903) (McCarty, J., concurring) (quoting another source).

[65] Corpus linguistics tools are publicly available to identify how the critical words of the Open Courts Clause were, and were not, used historically. Reference to corpus linguistics for the relevant time period appears as meaningful, if not more so, than referring to dictionaries to determine common usage of words and phrases during a particular time.

[66] *See* Mark Davies, *The Corpus of Historical American English (COHA)*, available online at https://www.english-corpora.org/coha/ (last visited September 10, 2019) (wherein each term and set of collocates can be searched).

[67] *See* Michael J. DeBoer, *The Right to Remedy by Due Course of Law—A Historical Exploration and an Appeal for Reconsideration*, 6 FAULKNER L. REV. 135, 195 (2014).

barred from prosecuting or defending" "any civil cause to which he is a party." Of course, nothing in the Revival Statute bars Roberts from "defending" the "civil cause to which he is a party." This clause is substantially similar to provisions in four other state constitutions. *See* ALA. CONST. art. I, § 10; GA. CONST. art. I, § I, ¶ XII; MICH. CONST. art. I, § 13; MISS. CONST. art. 3, § 25. Those provisions have uniformly been interpreted to provide solely *procedural* protection. *See, e.g., Brown v. Mobile Elec. Co.*, 91 So. 802, 805 (Ala. 1921); *Bloomfield v. Liggett & Myers, Inc.*, 198 S.E.2d 144, 145 (Ga. 1973); *Ann Arbor Bank v. Weber*, 61 N.W.2d 84, 86 (Mich. 1953); *French v. Sale*, 63 Miss. 386, 391 (1885).

B. Statements During Utah's Constitutional Convention Regarding the Open Courts Clause and Nineteenth Century Caselaw Addressing Other States' Open Courts Clauses Reflect That No Substantive Protection Is Provided for Legal Defenses.

During the 1895 Utah Constitutional Convention, delegates made few comments regarding the Open Courts Clause, but the comments reflect an intent to provide similar—not unique—protections as those in other states' constitutions.[68] Similarly, Utah's caselaw near the time of statehood confirms that Utah's Open Courts Clause was intended to provide similar protections as existed in other states with similar constitutional protections. *See, e.g.*, *Brown v. Wightman*, 151 P. 366, 366–67 (Utah 1915) ("This is a general provision, which in the same or similar language will be found in the constitutions of at least 28 states in the Union, ..."). Accordingly, "Nineteenth-century open courts cases from other states are instructive in discovering the original public meaning of this

[68] 1 PROCEEDINGS, *supra* 11, at 305 ("I am in favor of the section as it now stands; it is very usual in many of the constitutions." (Evans) . . . . "It is a provision that has come to us with the approval of the ages." (Maloney)).

provision . . . ." *Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶ 62, 416 P.3d 635 (Lee, A.C.J., concurring). *See also id.* ¶ 61 ("[T]o uncover the original meaning of this clause, we should treat its language as written in the language of the law—as a legal term of art." (footnotes omitted)).

At the time of Utah gaining statehood, no cases in any of the 36 other states with clauses similar to Utah's Open Courts Clause held that a "defense" was provided substantive protection against intentional legislative abrogation or alteration.[69] The conclusion that only "causes of action" were protected is supported by *Waite*, 2017 UT 86, ¶ 77 (Lee, A.C.J., concurring) (" . . . there was a general consensus in the [open courts cases decided prior to Utah's statehood] that no one had a general vested right *in the law*; only vested *causes of action* were protected." (emphasis in original)).

The caselaw of Connecticut, whose open courts clause was the reference point for Utah's Open Courts Clause, *supra* note 63, has held since at least 1859 that the Connecticut Open Courts Clause does not provide substantive protection to legal defenses. *See Grissell v. Housatonic R. Co.*, 9 A. 137 (Conn. 1886); *Mechanics' & Workingmen's Mut. Sav. Bank & Bldg. Ass'n v. Allen*, 28 Conn. 97 (1859); *Bower v. D'Onfro*, 663 A.2d 1061, 1065 (Conn. App. 1995) (The substantive protection provided for causes of action "does not apply . . . to a defense.").

[69] None of the many cases identified in the Westlaw electronic database dated 1895 or earlier listed as a citing reference for any of the 36 constitutional provisions substantially similar to Utah's Open Courts Clause—and which contain the words "defense," "defence," "defenses," or "defences"—includes any indication that legal defenses were provided any substantive protection against legislative action. *See Waite*, 2017 UT 86, ¶¶ 61 n.84, 62 n.88 (Lee, A.C.J., concurring) (describing similar research method).

C. Utah's Caselaw, from Statehood Forward, Uniformly Suggests Any Substantive Protection Provided by the Open Courts Clause Applies Only to Causes of Action, Not Defenses.

The only protection the Open Courts Clause provides for legal *defenses* is the procedural right to present them and to "have them properly adjudicated on the merits according to the facts and the law." *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 42, 44 P.3d 663 (footnote omitted). Never, from the time of statehood until the present, has that clause been understood to provide *substantive* protection of any defense. In fact, this Court has expressly rejected such an argument. *See Flowell Elec. Ass'n, Inc. v. Rhodes Pump, LLC*, 2015 UT 87, ¶ 20, n.9, 361 P.3d 91.

D. Legislation Violates the Open Courts Clause Only If It Abrogates a Remedy for an Injury and Does Not Provide a Reasonable Alternative Remedy or Is Not a Reasonable Means of Eliminating a Clear Social or Economic Evil.

> To determine whether legislation violates the Open Courts provision, we first examine whether the legislature has abrogated a cause of action. *Petersen v. Utah Labor Comm'n*, 2017 UT 87, ¶ 20, 416 P.3d 583. "If so, the legislation is invalid unless the legislature has provided an effective and reasonable alternative remedy, or the abrogation is not an arbitrary or unreasonable means for eliminating a clear social or economic evil." *Id.*

Amundsen v. Univ. of Utah, 2019 UT 49, ¶ 43, —— P.3d —— (footnote omitted).

Even if the Open Courts Clause were interpreted, contrary to all relevant authority, to provide substantive protections for legal *defenses*, the Revival Statute is plainly a reasonable means for eliminating a clear social evil. Also, Roberts can defend against the claims on the merits. *See Bower v. D'Onfro*, 663 A.2d 1061, 1065 (Conn. App. 1995) (finding that defendants' "right to defend liability" was not impaired by statute because the defendants had alternative defenses).

CONCLUSION

The Revival Statute could be unconstitutional only if (1) fundamental rights were at risk because of the statute, (2) there is no rational relationship between the statute and a legitimate state interest, or (3) it would result in the deprivation of a remedy for an injury.

The common understanding of the Utah Constitution at the time of statehood compels the conclusion that the Utah Legislature has the power to correct the denials of justice resulting from a prior statute of limitations that was too short to allow most victims of child sexual abuse to confront perpetrators and bring them to justice. Here, the Legislature first eliminated the statute of limitations for all claims of child sexual abuse *in the future*, then revived *prior* claims that had been time-barred by the earlier short statute of limitations. Making the determination that victims of child sexual abuse should be able to pursue accountability in the courts against their perpetrators, even if it takes several years for them to be able to take that step, is an appropriate and commendable exercise of the Legislature's plenary power.

The original understanding of people familiar with the common law, relevant legal principles, and the structure of republican government when the Utah Constitution was ratified was clearly that the Legislature has the capacity to enact laws, such as the Revival Statute, that it reasonably finds to be conducive to the public interest, including the public health, safety, and general welfare, particularly when no fundamental right will be violated and where there is a direct and rational connection between the statute and what the Legislature reasonably perceives to be a serious social and human evil.

Respectfully submitted this 25th day of September 2019:

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ADDENDUM

FILED
UTAH APPELLATE COURTS

JUL 10 2019

IN THE

SUPREME COURT OF THE STATE OF UTAH

TERRY MITCHELL,
Plaintiff,

v.

RICHARD WARREN ROBERTS,
Defendant.

Case No. 20170447

SUPPLEMENTAL BRIEFING ORDER

Magistrate Judge Evelyn J. Furse of the United States District Court for the District of Utah certified the following two questions to us regarding reviving time-barred claims:

1. Can the Utah Legislature expressly revive time-barred claims through a statute?

2. Specifically, does the language of Utah Code section 78B-2-308(7), expressly reviving claims for child sexual abuse that were barred by the previously applicable statute of limitations as of July 1, 2016, make unnecessary the analysis of whether the change enlarges or eliminates vested rights?

We have concluded that in order for us to fully answer this question, some focused supplemental briefing is necessary. We have never conducted an in-depth analysis under the Utah Constitution of a statute like Utah Code section 78B-2-308(7) that explicitly purports to eliminate certain accrued statute-of-limitations defenses. However, to meaningfully answer this question, we must address whether the Utah Constitution gives the legislature the power to revive time-barred claims and/or whether it limits or prohibits the legislature from reviving time-barred claims. Accordingly, we request supplemental briefing on the following question:

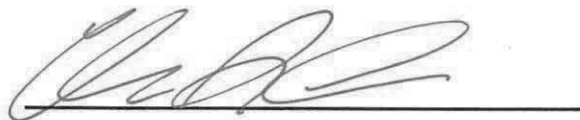
Under the Utah Constitution, does the Utah Legislature have the power to revive a claim that was barred by the previously applicable statute of limitations, and if so, what limitations, if any, does the Utah Constitution impose on that power?

Specifically, we ask that the parties examine the original public meaning of the Utah Constitution. This examination should include—but need not be limited to—an analysis of the grant of legislative power found in article VI, section 1 of the Utah Constitution; the due process clause found in article I, section 7 of the Utah Constitution; and the open courts provision found in article I, section 11 of the Utah Constitution. The analysis should also address what standard or constitutional analysis Utah courts should apply in assessing whether a specific legislative enactment that explicitly purports to revive time-barred claims comports with the Utah Constitution.

The parties must submit simultaneous briefs not to exceed thirty-five (35) pages within forty-five (45) days of the date of this Order. Reply briefs will not be permitted. Please contact the clerk of court within one week if you deem the time limit to be insufficient. We will consider one request for an extension of time. The briefs should comply with rule 27 of the Utah Rules of Appellate Procedure as to size, margins, typeface, and contents of cover, and with rule 26(b) as to the number of copies filed and served. They also may include a separate table of authorities limited to the citations provided by the supplemental analysis. Compliance with other formatting and content provisions of the appellate rules, including the binding and color cover requirements described by subparts (c) and (d) of rule 27, is not required for a supplemental brief.

FOR THE COURT on this

10th day of July, 2019:



Thomas R. Lee
Associate Chief Justice

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2019, a true and correct copy of the foregoing SUPPLEMENTAL BRIEFING ORDER was sent by electronic mail to be delivered to:

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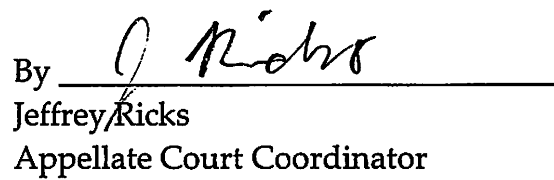
By 
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Appellate Court Coordinator

Case No. 20170447
Fed. Court No. 2:16-cv-00843-EJF

Certificate of Compliance

I hereby certify as follows:

1. This Supplemental Brief complies with the 35-page limit set by the Court in its Supplemental Briefing Order.
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, 13-point Times New Roman.
3. This brief contains no non-public information and complies with Utah R. App. P. 21(g) regarding public and non-public filings.

DATED this 25th day of September 2019.

/s/ Ross C. Anderson

Certificate of Service

I, Ross C. Anderson, certify that on September 25, 2019, an original of **PLAINTIFF TERRY MITCHELL'S SUPPLEMENTAL BRIEF IN SUPPORT OF AN AFFIRMATIVE ANSWER TO QUESTIONS CERTIFIED BY THE UNITED STATES DISTRICT COURT** and ten bound copies were filed with the Clerk of the Utah Supreme Court. Each of the following was served by email and each law office representing Defendant was served with two copies by U.S. mail, and each additional counsel was served with one copy by U.S. mail:

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