SOME THOUGHTS ON UTAH ORIGINALISM: A RESPONSE

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I. INTRODUCTION

Scholars have spilt a lot of ink debating the merits of the interpretative philosophy known as “originalism.”¹ According to this interpretive theory, generally speaking, the objective meaning of constitutional language at the time that language was ratified governs its application in subsequent cases.² Although debates over the propriety of originalism generally revolve around its application to the United States Constitution,³ it is no surprise that the debate has begun to

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² See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78–92 (2012). There are, of course, several variations on originalism including original intent originalism, original public–meaning originalism, and most recently original methods originalism. See generally JOHN O. McGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013) (providing a new normative defense of originalism and arguing that the Constitution should be interpreted according to the rules of construction and interpretation widely used at the Founding). Although many of this Article’s claims about originalism in Utah are drawn from state court language invoking “the intent of the framers,” and there are serious reasons to doubt the soundness of an approach centered on generalized notions of “intent,” there are good reasons to see these decisions as wholly consistent with the more theoretically defensible approaches to originalism like public meaning. In all events, this Article will not strive to differentiate the two. Rather, this Article will address the more over-arching questions of whether originalist methodology generally is dispositive and whether originalist methodology would permit evolutionary constitutionalism.

³ For an early and seminal critique of originalism, see H. Jefferson Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885 (1985). More recent critiques of originalism are not hard to come by. See, e.g., Cass R. Sunstein, Resist the
occupy the sphere of state constitutional law. Justice William Brennan’s famous call for state courts to enforce individual rights via state constitutions was largely the catalyst for this movement. Utah is no stranger to the debate. Recent commentary has raised two thoughtful and important questions regarding originalism as applied to the Utah Constitution. First, is originalism the dispositive method of constitutional interpretation? And second, would proper application of originalism in Utah allow for public policy considerations in determining the meaning of constitutional provisions? The answers to these questions are vital. For example, if the answer to question one is no, this would seemingly liberate the court from the burden of original meaning, allowing the Justices of the Utah Supreme Court to freely engage in policy-based decision making in constitutional questions limited only by their own sense of constraint and the effects of stare decisis. And if the answer to question two is yes, then by this account, originalism and non-originalism are in essence co-terminus, and the court is free to indulge its policy preferences without fear of illegitimacy. Importantly, this recent commentary has called for greater scholarship into “Utah originalism” to determine the answer to these important questions. This Article is a modest attempt to respond to that call by answering the first question and adding to the scholarship regarding the second.

Part I will set out the arguments that have been put forward to answer the first question—that strong originalist pronouncements by the Utah Supreme Court
may be disregarded or are at least not dispositive in constitutional questions. The Article will then respond by demonstrating that the linchpin of that view—language contained in a case called State v. Tiedemann— is at best aberrational when compared to case law that came before and after it.

Part III will then briefly address arguments that commentators have used to suggest that policy considerations are potentially a legitimate factor in Utah originalism. The three main points put forward to support this idea are (1) that Utah Supreme Court Justices were popularly elected at the state’s founding; (2) that judicial review was widely used at the Founding; and (3) that the Constitution is easier to amend than its federal counterpart. Part II will conclude that Founding-era case law suggests the opposite—the Framers likely saw themselves as bound by the general understanding of the written text at the time the text was ratified.

Part IV will then conclude by briefly suggesting the importance of originalism in Utah.

II. ORIGINALISM IS DISPOSITIVE IN UTAH

There is a fundamental question at the heart of Utah constitutional jurisprudence: whether originalism is the dispositive method of constitutional interpretation in Utah constitutional questions, or whether originalism is merely a tool that freely bends to considerations of good public policy. Some commentary concludes that despite the Utah Supreme Court’s recent, and frequent, history of invoking original meaning in constitutional questions, the court is somehow either not really committed to this method or that it does not consider originalism dispositive. One view sees any strict originalist framework for Utah constitutional questions as having been “dismantle[d].” In other words, originalism can simply be tossed aside when “policy arguments, economic and social studies, and the law of other states” provide some more desirable answer. Professor Troy Booher put forward a more moderate assertion, however, in a recent article in the Utah Bar Journal.

In his insightful article, Professor Booher claims that “[t]he Utah Supreme Court has had a tenuous relationship with originalism.” The effect of this assertion, intentionally or not, is largely the same as the effect of those who claim originalism has been dismantled—it minimizes the role of originalism to a potential point of analysis, but by no means a dispositive method of interpretation. Originalism becomes simply another tool in the bag, equally legitimate as policy analysis, either of which can be picked up or disregarded at the judge’s leisure.

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9 2007 UT 49, 162 P.3d 1106.
10 Dupaix et al., supra note 6, at 34.
11 Id. at 35.
12 Booher, supra note 6, at 22.
This view relies primarily on a curious line of cases that, at first blush, give the impression that “the Utah Supreme Court has not settled on what information it will consider when interpreting the Utah Constitution.”

In the early 1990s, the Utah Supreme Court held that in interpreting the Constitution it would look to various factors—historical evidence, text, sister-state law interpreting analogous provisions, and considerations of public policy and sociological evidence. Then, in 2006, in American Bush v. City of South Salt Lake a majority of the court expressly pulled policy considerations from the list of appropriate inquiry and cabined consideration of sister-state law to interpretations of analogous provisions contemporaneous to the ratification of the Constitution. On several occasions throughout the opinion, the court expressly noted its preference for originalism. A concurring opinion also argued at length why originalism should win out over other theories of interpreting the Constitution. The majority opinion observed:

Were we to [extend free speech protection under the Utah Constitution to nude dancing], we would not be interpreting our constitution, but substituting our own value judgment for that of the people of Utah when they drafted and ratified the constitution. It is not our place to do so. Social values and public opinion on this matter no doubt fluctuate over time, and as they do, the people of this state are free to allow nude dancing through legislative enactments or even to amend our constitution to extend protections over such activities through the democratic process.

Two Justices dissented, but a majority made a clear pronouncement about the Constitution—original meaning governed its interpretation.

The very next year, however, the court decided State v. Tiedemann. In Tiedemann, the court said that “[h]istorical arguments may be persuasive in some cases, but they do not represent a sine qua non in constitutional analysis.” In a puzzling move, the case contains not one citation to American Bush, despite an identical panel of Justices. It is from this pronouncement in Tiedemann that Professor Booher’s and others’ hypotheses find their greatest strength. According

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13 Id.
15 2006 UT 40, 140 P.3d 1235.
16 Id. ¶ 12 n.3.
17 E.g., id. ¶ 66.
18 Id. ¶¶ 73–86 (Durrant, J., concurring) (making an extended argument in favor of originalism over other methods of interpretation).
19 Id. ¶ 66 (majority opinion).
20 2007 UT 49, 162 P.3d 1106.
21 Id. ¶ 37.
to some, because of this case, strict adherence to originalism in Utah has been “dismantle[d].”

More recent developments in Utah law might appear to add weight to these contentions. Recently, the Utah Court of Appeals in State v. Hoffmann noted a tension between the holding in American Bush and the language in Tiedemann, seemingly siding with Tiedemann. For the reasons explained below, the contentions that Tiedemann somehow altered the Utah Supreme Court’s holding in American Bush are misguided.

First, Tiedemann made no mention whatsoever of American Bush. In the latter case, a majority clearly got rid of policy considerations from the tool bag of interpretation. The fact that not a single Justice made any mention of this fact in Tiedemann should counsel against placing much weight in its holding. It is well settled, and makes good sense, that if a case seemingly overrules precedent without noting so, the overruling case should be given less weight. This lessens the blow that Tiedemann strikes to the court’s relationship with originalism.

Second, Tiedemann should be read in context with the past few decades of case law—case law that shows the court is using originalism as the principal, if not dispositive, methodology in its decisions. The court has looked to original meaning in interpreting article I, section 1; article I, section 4; article I, section 10; article I, section 11; article I, section 12; article I, section 13; article I, section 15; and article IV, section 1 of the Constitution—just to name a few. Since Tiedemann, the court has expressly announced: “[i]n interpreting our constitution, our goal is to ascertain the drafters’ intent.” And more recently in Carter v. Lehi

22 Dupaix et al., supra note 6, at 34.
23 2013 UT App 290, 318 P.3d 225.
24 Id. ¶ 52 & n.8.
25 See State v. Menzies, 889 P.2d 393, 399 (Utah 1994) (overruling an earlier case because it “seem[ed] likely that [the court] did not even realize that [it was] departing from well-established Utah precedent”).
29 Ross v. Schackel, 920 P.2d 1159, 1162 (Utah 1996) (performing “[a]n examination of the cases decided by this court at or about the time of statehood” to determine whether a statute abrogated existing common law rights for purposes of the Open Courts Clause analysis).
the court expressly overruled at least three cases in order to “develop a legal framework for delineating the people’s initiative power that is consistent with the text and original meaning of article VI.” Overruling past precedent that has proved unworkable is one thing. But the fact that of all the options available to the court it unanimously chose to go the originalist path is quite telling. This recent case law strongly suggests that Tiedemann’s renunciation of history as the dispositive factor should simply be seen for what it is—anomalous.

Finally, and perhaps most importantly, reading Tiedemann as a signal about the court’s interpretive preferences is just too broad a reading of the case. The Tiedemann court discussed historical analysis only to emphasize that district courts could not dismiss a constitutional claim out of hand for not citing original meaning in the brief. The court pointed out, for example, that a litigant could argue plain-language meaning to sustain a claim. And this makes perfect sense. So long as the argument is non-frivolous and in good faith, litigants should be free to argue whatever they think is persuasive. Indeed, litigants should be able to argue that the court should make constitutional rules based on its own sense of justice and good policy. But that does not mean the court will listen or is bound to listen to those arguments. Holding that “there is [no] formula of some kind for adequate framing and briefing of state constitutional issues before district courts and this court” is a far cry from holding that historical evidence will not be the Supreme Court’s ultimate guide in Utah constitutional questions. Indeed, viewing Tiedemann as simply about briefing requirements rather than interpretive methodology is the best reading because it is the reading most consistent with prior pronouncements from the court. In State v. Wormwood, for example, the court noted that all types of arguments—from history to policy—would “meet [the court’s] briefing requirements.” And notably, to date, no Utah Court has relied on Tiedemann to reject an originalist argument in favor of a policy-based one. Put another way, no one has relied on Tiedemann for the propositions Professor Booher and others suggest it might stand for, and that’s after seven years of existence. Rather, Utah courts have relied on Tiedemann either for its requirements for adequate briefing, or for Tiedemann’s endorsement of the “primacy model” of state constitutional interpretation—a method some have argued is originalist in flavor.

35. 2012 UT 2, 269 P.3d 141.
36. Id. ¶ 4.
38. Id.
39. Id. (emphasis added).
40. 2007 UT 47, 164 P.3d 397.
41. Id. ¶ 18 (emphasis added).
The Utah Court of Appeals’ recent decision in *Hoffmann*, while purporting to recognize tension between *American Bush* and *Tiedemann* is no different. Its *holding* did not reject an originalist argument in favor of arguments driven by social science, economics, or other policy considerations. Rather, it is yet another case about briefing requirements. In *Hoffmann*, the defendant sought to overturn a district court’s decision denying the defendant’s motion to suppress drugs and drug paraphernalia.\(^{45}\) The court of appeals rejected the defendant’s Fourth Amendment claims on the merits.\(^{46}\) The defendant argued, however, that the Utah Constitution provided “a separate basis for excluding the evidence.”\(^{47}\) The state responded that the defendant failed to preserve his state constitutional claim and did not adequately brief it in the appellate court.\(^{48}\) It is after summarizing *Tiedemann*’s central holding on briefing—that “[t]he standard for briefing a state constitutional claim is admittedly flexible”—that the court of appeals went on to note tension between *Tiedemann*’s statement about historical arguments and *American Bush*’s holding.\(^{49}\) In other words, the court of appeals’ decision simultaneously made and missed the point: *Tiedemann* is about flexibility for litigants as to what they can put in a brief and count as having adequately raised an issue. That is a subject entirely distinct from whether originalism is the Utah Supreme Court’s chosen method of interpretation. Most can probably agree there should be “no magic formula” for adequately briefing an argument before Utah courts.\(^{50}\) But this fact has little to no bearing on the interpretive methodology the court should follow.

Thus, although *Tiedemann* seemingly offers strong medicine for Utah originalists, its bark is far worse than its bite. The pattern in recent times for the Utah Supreme Court is straightforward—originalism is the determinative method of constitutional interpretation. “[The court’s] goal is to ascertain the drafters’ intent.”\(^{51}\) This wave of cases treating originalism as dispositive casts doubt on the suggestion that there is a “tenuous” relationship between the court and originalism, and simply discredits the assertion that an originalist framework has been “dismantled.”

This conclusion does not, however, fully dispose of an unresolved and equally difficult question for originalists in Utah—whether policy considerations form part of a valid originalist inquiry in this state. As discussed below in Part III, although

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\(^{45}\) State v. Hoffmann, 2013 UT App 290, ¶ 1, 318 P.3d 225.

\(^{46}\) Id. ¶ 50.

\(^{47}\) Id. ¶ 51.

\(^{48}\) Id.

\(^{49}\) Id. ¶ 52 & n.8 (emphasis added).

\(^{50}\) State v. Wormwood, 2007 UT 47, ¶ 18, 164 P.3d 397.

\(^{51}\) State v. Hernandez, 2011 UT 70, ¶ 8, 268 P.3d 822 (emphasis added) (citation omitted).
this position attempts to find its roots in Utah history, it lands wide of the mark on several fronts. In other words, Utah’s framers did not embrace policy considerations as a valid method of constitutional interpretation.

III. UTAH ORIGINALISM DOES NOT EMBRACE POLICY-DRIVEN INTERPRETATIONS OF CONSTITUTIONAL LANGUAGE

In a series of thoughtful articles on originalism in Utah, Professor Booher first intimated and then made a much stronger suggestion that adhering to original meaning in Utah might authorize judges to engage in common-law-style, policy-driven decision making in constitutional cases.

In an earlier piece, Professor Booher noted that three features of Utah history make it awkward to deploy traditional arguments for originalism in the context of the Utah Constitution. First, the Utah Supreme Court was “politically accountable” due to the fact that in 1896, the Justices were popularly elected in partisan contests.52 Next, because the scope of judicial review in 1896 was understood to be much broader than it was in 1789, this too somehow lessens the burden on the Utah Supreme Court to refrain from considering policy.53 Finally, the Utah Constitution is less difficult to amend than is the U.S. Constitution.54

The article ends with a tentative conclusion: this does not prove that the common-law method is authorized by adhering to an originalist view of the Utah Constitution, but it certainly might be a possibility.55 In other words, a sophisticated view of Utah originalism must account for the possibility that because of the differing contextual and political realities surrounding the Utah Constitution, it may permit or even require judges in Utah to use policy arguments in justifying their constitutional interpretation. And while this conclusion is no doubt true, the remainder of this Article concludes that history likely forecloses that possibility.

There are several important factors that weigh heavily against the notion that Utah originalism would allow the courts to engage in policy-making via interpreting constitutional text. The very idea of a written constitution suggests otherwise.56 The text of our Constitution suggests otherwise.57 And the ideas of our Founding generation tend to repudiate this notion.

52 Booher, supra note 6, at 24.
53 Id. at 24–25.
54 Id. at 25.
55 See id.
56 See, e.g., Steven G. Calabresi, The Tradition of the Written Constitution: A Comment on Professor Lessig’s Theory of Translation, 65 FORDHAM L. REV. 1435, 1442 (1997) (“[I]t is the writteness of our constitution—the text—that explains most of the
Certainly, “[t]he power and duty of ascertaining [the Constitution’s] meaning is a judicial . . . function.” But the Framers saw judges as bound by the will of the people as expressed in the words of the Founding documents. Rather than consideration of wise policy, early Utah Supreme Court cases make frequent and dispositive appeal to the understanding of the Framers in interpreting Utah constitutional provisions. In fact, Founding-era Justices, on more than one constitutional epiphanies in our constitutional tradition and not shifting background assumptions and social contexts.” (citations omitted)).

57 See UTAH CONST. art. 23, §§ 1–2 (describing the amendment process for the Utah Constitution); White v. Welling, 57 P.2d 703, 707 (Utah 1936) (“The Constitution of Utah can be amended only in the way provided by article 23, §§ 1 and 2.”); see also Rio Algom Corp. v. San Juan Cnty., 681 P.2d 184, 195 (Utah 1984) (“[I]f the constitution is to be changed to adjust for some inequity, the people must make that change by constitutional amendment.”)

58 Wadsworth v. Santaquin City, 28 P.2d 161, 172 (Utah 1933); see also 2 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION 1498 (1896) [hereinafter CONVENTION DEBATES] (statement of Charles Varian) (“[The Justices of the Utah Supreme Court] are the expounders and protectors of this Constitution . . . .”); cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

59 See, e.g., Utah State Fair Ass’n v. Green, 249 P. 1016, 1029 (Utah 1926) (Straup, J., concurring) (“We must take the [Utah] Constitution as we find it, neither enlarging nor detracting from it.”); Gibbs v. Gibbs, 73 P. 641, 652–53 (Utah 1903) (Bartch, J., dissenting in part and concurring in part) (“While it is the province of judges to construe the Constitution, still they are equally bound with all other officers and subjects of the government to observe and obey its mandates . . . . Though judges of a court of last resort, we are yet servants, yet subjects bound absolutely by the declared will of the sovereignty.”); see also Marbury, 5 U.S. at 179–80 (“[I]t is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.”); THE FEDERALIST NO. 78 (Alexander Hamilton) (arguing that the judiciary “ought to be governed” by “[the will] of the people[.] declared in the Constitution”).

60 See, e.g., Richardson v. Treasure Hill Mining Co., 65 P. 74, 81 (Utah 1901) (discerning the “intention of the framers of the constitution, as to the application of [article XII] section 18” by looking to “their discussions upon this subject[.] in the official report of the proceedings of the constitutional convention”); State ex rel. Cunningham v. Thomas, 50 P. 615, 615 (Utah 1897) (looking to “[t]he real intent . . . of the framers of the constitution” in interpreting article XIII, sections 2 and 3 of the Utah Constitution); N. Point Consol. Irrigation Co. v. Utah & Salt Lake Canal Co., 46 P. 824, 825–26 (Utah 1896) (interpreting the appellate jurisdiction of the court and noting that “[t]he words [in the constitution] are not to be stretched beyond their fair sense, but within that range the rule of interpretation must be taken which best follows out the apparent intention of its framers”); Ritchie v. Richards, 47 P. 670, 679 (Utah 1896) (examining the “secret ballot” provision of article IV, § 8 and adopting the “ordinary meaning” of “secret” because that “view [was] in harmony with public thought and expression respecting the ballot systems at the time of and before the holding of the constitutional convention”); State v. Elliott, 44 P. 248, 250 (Utah 1896) (looking to the intent of “the framers of our constitution” to determine “the
occasion, expressly repudiated consideration of wise policy over original meaning. For example, in interpreting article XIII, section 4, a unanimous Founding-era court declared, “[w]hen we have once ascertained [the Framers’] intention[s], it is our duty to declare it whether we deem it wise or unwise, or well or ill adapted to any matters therein contained.”61 Similarly, in a case challenging the ability of the state board of equalizers to override property valuations of county assessors and county boards of equalizers, the court readily acknowledged that “assessors and county boards of equalization are in closer proximity to the property assessed, and that therefore they are better qualified and more able to judge of and estimate its value.”62 “[H]ence,” the court supposed, “the aggregate valuation of the state, as fixed by [the county assessors and boards of equalizers], should be final, and control.”63 However, the court eschewed that construction of the constitutional provisions at issue because “the framers of the constitution, in their wisdom, have decreed otherwise, and we are bound by that decree.”64 In other words, even if the language could be interpreted to produce a “wiser” result, if what the Framers understood is ascertainable—it controls.

Rather than courts creating law and wise policy through the Constitution’s text, the Founding generation saw the people of Utah as those who would solve social problems. The court itself saw the people’s remedy for contemporary social problems to be the Utah Constitution’s provisions “for frequent renewals of the legislature . . . [which placed] the positions of legislators in the hands of their constituents.”65 Indeed, this remedy was “a better remedy than any which the judiciary can provide.”66 If the people of Utah saw judges as empowered to make policy decisions in constitutional questions, certainly that would have been a better remedy than slogging out tough social issues in the state capitol. But historical evidence tends to discount that view.67

meaning attributed to the term “writ of quo warranto” in article 8, § 4 of the Utah Constitution. And originalism hung on well into the 20th century. See, e.g., Cardisco v. Davis, 64 P.2d 216, 217 (Utah 1937) (noting the broad discretionary powers “[t]he framers of the Constitution and the people who adopted it saw fit to vest” in the Board of Pardons); Salt Lake City v. Bernhagen, 189 P. 583, 584–85 (Utah 1920) (appealing to practices in effect at the ratification of the Constitution as well as the “contemplation of the framers of the Constitution” in interpreting article VIII, section 18).

62 Thomas, 50 P. at 617.
63 Id. (emphasis added).
64 Id. (emphasis added).
65 Kimball v. City of Grantsville City, 57 P. 1, 5 (Utah 1899) (emphasis added).
66 Id.
67 There is one potential but limited caveat. The Framers disagreed quite vehemently on one limited aspect of the meaning of the phrase “public use” in the Utah Constitution’s Takings Clause—whether certain private industries like mining and agriculture would nonetheless be public because of their wide-spread and indirect benefits to the public. The Framers seem to have contemplated that this—and only this—narrow question would be left to the discretion of the courts rather than being expressly declared in constitutional text.
To put it simply, the people of Utah at the time of the ratification of Utah’s Constitution did not see the Utah Supreme Court as empowered to invoke free-wielding policy decisions in constitutional cases. Rather, the people of Utah likely believed what the early court frequently pronounced: “[The] terms used in [the Utah] Constitution must be taken to mean what they meant to the minds of the voters of the state when the provision was adopted.”

This evidence largely responds to the question Professor Booher has raised. But some additional commentary is worthwhile in addressing Professor Booher’s argument that the justifications for originalism at the federal level do not work when applied to Utah. First, it is true that in 1896 the Justices were popularly elected, but the court itself noted that the best remedy for the people was through the legislature, not the judicial branch. The court did not see itself as fulfilling the same role in any sense as the other branches, despite being popularly elected in partisan contests. And as some historians have noted, while politics played a large role in the election of the early Utah Supreme Court Justices, it was large-scale national political forces “beyond their control” that determined whether they won the election or not. “A presidential election or an economic depression [was] far more instrumental in deciding their future than their record on the bench.” Thus, it seems that as a practical matter, the people themselves responded to larger political movements rather than the decisions of the Justices, and were not in any sense treating them as policy makers the way they treated legislators or the governor.

Next, it is not entirely apparent why a more robust use of judicial review is relevant to whether policy considerations are a valid part of Utah originalism. Although the court frequently used its power of judicial review, it just as frequently reminded litigants that the Constitution controlled whether a law must be struck down, not the court’s own policy judgments.

Indeed, the only time in the entire convention in which they ever say or suggest that the courts will have such a decision is in discussions over the question of whether mining and agriculture are a public use. See 2 CONVENTION DEBATES, supra note 58, at 1414, 1536, 1544, 1545. This raises an interesting, yet very unique, question about how originalism can deal with the situation where framers recognize an ambiguity in the text, recognize that there are two widely-accepted meanings to the text, and then expressly leave the choice to the courts. This question is, however, beyond the scope of this Article.

68 Tintic Standard Mining Co. v. Utah Cnty., 15 P.2d 633, 637 (Utah 1932); see also id. (“Where language used in a Constitution has at the time of its adoption a settled meaning, such construction becomes a part of the Constitution.” (emphasis added)).
70 Id.
71 For a fascinating political breakdown of Utah Supreme Court elections from 1895 through the New Deal Era, see id. at 272–73, 279–81.
72 E.g., Utah State Fair Ass’n v. Green, 249 P. 1016, 1029–30 (Utah 1926) (Straup, J., concurring) (“The Legislature may adopt any kind of policy not forbidden by the
In similar fashion, the ease with which the Constitution can be amended does not weigh in favor of policy considerations in constitutional questions. This reverses the proper order of our system of government. As the court noted when it was still popularly elected,

[w]hile it is the province of judges to construe the Constitution, still they are equally bound with all other officers and subjects of the government to observe and obey its mandates . . . . Though judges of a court of last resort, we are yet servants, yet subjects bound absolutely by the declared will of the sovereignty.73

Accordingly, the three arguments Professor Booher has put forward fall short. Despite the “political accountability” of the Utah Supreme Court, its frequent invocation of judicial review, and the ease with which the Constitution can be amended relative to the Federal Constitution, the original meaning of constitutional text at the time of the framing and ratification of our Constitution, not the ever-wise policy considerations of judges, is precisely what Utah originalism calls for.

IV. CONCLUSION

Professor Booher’s article has raised two questions. The first is whether originalism is the dispositive method of inquiry in Utah. The second is whether Utah originalism—properly understood—actually permits or even requires judges

to engage in common-law style judging when it comes to state constitutional questions. To me, it seems the answer to our first question is yes. There is little recent case law to support the idea that originalism is not dispositive in constitutional questions. The trend towards originalism has only gotten stronger and more explicit. Add to this that originalism appears to have dominated the Utah Supreme Court’s interpretive methodology at the founding. Accordingly, characterizing the relationship between the Utah Supreme Court and originalism as “tenuous” is itself a position that stands on shaky ground.

As to the second question, the answer is probably no. Though there may be some weight behind the three main arguments used to support the possibility of common-law style constitutional analysis—viz. political accountability, judicial review, and ease of amendment—further inquiry suggests that the founding generation saw the Utah Supreme Court as bound by the fixed meaning of the constitutional text. Moreover, founding-era courts frequently renounced consideration of policy in constitutional cases. This is not to say that one could not find any case law or statements from some of the Framers that leaned heavily on policy and only lightly on original meaning. Rather, on balance, historical inquiry suggests that a policy-driven mode of constitutional interpretation is unlikely to have been what the general public considered to be within “the judicial power.”

While several implications follow from this Article, a couple are worth mentioning here. First, the realization that originalism is the paramount inquiry for the court will hopefully spark further inquiry into the historical understanding of our foundational document. This is an important endeavor that scholars in our state should continue to pursue. Second, and perhaps more importantly, the court’s reliance on originalism should rivet practitioners’ attention—from criminal defense to business litigation. There is a wealth of unexplored language in our Constitution. Practitioners should flock to the Utah courts with originalist arguments for their clients. Perhaps a change in the attitude of practitioners towards originalism in day-to-day litigation can help everyone’s goal to become aligned with that of the courts”—“to ascertain the drafters’ intent.”

74 State v. Hernandez, 2011 UT 70, ¶ 8, 268 P.3d 822 (citation omitted).