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Independent Interpretation of the Wyoming Constitution's Declaration of Rights: A More Open and Traditional Approach to Asserting Rights

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COMMENT

Independent Interpretation of the Wyoming Constitution’s Declaration of Rights: A More Open and Traditional Approach to Asserting Rights

*Nathan Yancheck**

The legislation now before us would probably not cause more than ordinary anxiety, or deserve greater consideration than the ordinary constitutional question, were it not for the times in which we live, the depression now existing, the unrest now prevailing, the mass of social legislation in the last few years, the wonder whither we are going, and the frequent queries whether courts are drifting merely with the tide or are rendering their decisions with that steadfast judgment as is their wont.¹

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¹ State v. Langley, 84 P.2d 767, 769 (Wyo. 1938).

I. INTRODUCTION

From the 1980s to today, the Wyoming Supreme Court has frequently expressed a willingness to interpret the Wyoming Constitution's Declaration of Rights independently from federal precedent interpreting the Federal Bill of Rights.² The goal of such interpretation has been to develop a new tradition of independent state constitutional analysis.³ Early in its history, the Wyoming Supreme Court established traditional methods of constitutional interpretation which it applied to the rights provisions within the state constitution.⁴ In doing so, the Court's rulings occasionally led to outcomes which provided greater protections than those the Federal Constitution afforded.⁵

The Wyoming Supreme Court's tradition of independent analysis diminished over time as the U.S. Supreme Court expanded civil rights protections under the Federal Constitution.⁶ However, by the 1970s, the U.S. Supreme Court began limiting its expansion of rights, and, as a result, a resurgent interest in state constitutional law took hold as more litigants began arguing for greater rights protections under their state constitutions.⁷ Initially, many state courts were skeptical of this resurgence and questioned the legitimacy of using the state constitution to deviate from federal precedent.⁸ Some of these skeptical state courts adopted the neutral criteria approach in an effort to limit state constitutional

² ROBERT B. KEITER, *THE WYOMING STATE CONSTITUTION* 31, 46–47 (G. Alan Tarr eds., 2d ed. 2017); *see also* Sheesley v. State, 2019 WY 32, ¶ 14, 437 P.3d 830, 836 (Wyo. 2019). The Declaration of Rights is Wyoming's analogue to the Federal Bill of Rights. *Compare* WYO. CONST. art. 1, *with* U.S. CONST. amends. I–X.

³ KEITER, *supra* note 2, at 46–47; *see also* Saldana v. State, 846 P.2d 604, 624 (Wyo. 1993) (Golden, J., concurring).

⁴ *See infra* notes 64–89 and accompanying text; *see also* Neely v. Wyo. Comm'n on Judicial Conduct & Ethics, 2017 WY 25, ¶¶ 41, 47–49, 390 P.3d 728, 742, 744 (Wyo. 2017) (citing Cathcart v. Meyer, 2004 WY 49, ¶ 39, 88 P.3d 1050, 1065 (Wyo. 2004)); Cathcart, 2004 WY ¶¶ 39–40, 88 P.3d at 1065–66 (discussing traditional interpretational methods as applied to the Wyoming Constitution's Declaration of Rights). *See generally* Rasmussen v. Baker, 50 P. 819 (Wyo. 1897) (discussing interpretation of the Wyoming Constitution through principles of statutory construction).

⁵ *See* State v. Peterson, 194 P. 342 (Wyo. 1920); Maki v. State, 112 P. 334 (Wyo. 1911). For example, the early Wyoming Supreme Court “adopted the equivalent to *Miranda* rights and the exclusionary rule more than fifty years before the federal judiciary followed suit.” KEITER, *supra* note 2, at 53 (citing *Maki*, 112 P. 334; *Peterson*, 194 P. 342).

⁶ *See* Vasquez v. State, 990 P.2d 476, 483–84 (Wyo. 1999) (noting the decline in Wyoming's independent search and seizure analysis between the 1920's and 1930's); KEITER, *supra* note 2, at 31 n.100.

⁷ ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 113–14 (2009); *see* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490–91 (1977).

⁸ WILLIAMS, *supra* note 7, at 138.

claims.⁹ The neutral criteria approach attempts to provide litigants with a sufficient analytical framework, based on objective neutral criteria, to convince a court to “resort” to their state constitution as a source for applying civil rights protections.¹⁰ Throughout the 1990s, the Wyoming Supreme Court debated how to address the resurgent push for independent constitutional analysis, eventually adopting the neutral criteria approach as a “precise, analytically sound” form of argument litigants can use to raise a state constitutional claim.¹¹

From its adoption of the neutral criteria approach to present day, the Wyoming Supreme Court has more actively sought to develop independent state constitutional law.¹² Despite its willingness to do so, the Court routinely rejects state constitutional claims, in part, because litigants’ briefs fail to adhere to the Court’s preferred analytical form.¹³ The Court frequently finds a litigant “has not provided ‘well founded legal reasons’ justifying resort to independent state grounds.”¹⁴ Ultimately, because of the Wyoming Supreme Court’s insistence on a precise analytical form and its use of the neutral criteria approach, it has failed to develop truly independent constitutional jurisprudence.¹⁵

This Comment reviews the Wyoming Supreme Court’s jurisprudence regarding independent constitutional interpretation of the Declaration of Rights and demonstrates why the Court has largely been unable to develop and sustain an independent constitutional jurisprudence.¹⁶ Part II provides a brief background on independent state constitutional interpretation, highlighting another state’s use of the neutral criteria approach.¹⁷ Part III examines the Wyoming Supreme Court’s history of independent constitutional analysis and its debate about interpreting the Declaration of Rights to provide greater protections than the

⁹ See *id.* at 129–130, 138 (citations omitted).

¹⁰ See *id.* at 130, 138 (citation omitted); see also *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986); *Saldana v. State*, 846 P.2d 604, 621–22 (Wyo. 1993) (Golden, J., concurring).

¹¹ WILLIAMS, *supra* note 7, at 178; see also *Vasquez*, 990 P.2d at 484; *Gronski v. State*, 910 P.2d 561, 565 (Wyo. 1996); *Saldana*, 846 P.2d at 621–22 (Golden, J., concurring). The Wyoming Supreme Court held the neutral criteria is a precise analytically sound form of argument that can justify resorting to the Wyoming Constitution. See *id.*; see also *Dworkin v. LFP, Inc.*, 839 P.2d 903, 909 (Wyo. 1992) (holding that a litigant must use a “precise, analytically sound approach” in order for the Court to address a state constitutional claim (citation omitted)).

¹² See *Sheesley v. State*, 2019 WY 32 ¶ 14, 437 P.3d 830, 836 (Wyo. 2019); *Saldana*, 846 P.2d at 622; see also *KEITER*, *supra* note 2, at 31.

¹³ See *infra* notes 174, 205, 246 and accompanying text.

¹⁴ See e.g., *Sheesley*, 2019 WY ¶ 16, 437 P.3d at 838; *Hathaway v. State*, 2017 WY 92, ¶ 14 n.1, 399 P.3d 625, 630 n.1 (Wyo. 2017); *Bear Cloud v. State*, 2014 WY 113, ¶ 14, 334 P.3d 132, 137 (Wyo. 2014).

¹⁵ See *infra* notes 296–344 and accompanying text.

¹⁶ See *infra* notes 22–393 and accompanying text.

¹⁷ See *infra* notes 22–53 and accompanying text.

Federal Constitution.¹⁸ Part IV argues the neutral criteria approach hinders the development of Wyoming's constitutional law because it elevates form over substance and results in precedents that inherently are not based on a truly independent analysis.¹⁹ Part V recommends the Court follow a more traditional approach to independent constitutional analysis and address litigants' state constitutional claims which, at a minimum, discuss the relevant text and provide some support using legitimate sources.²⁰ This Comment concludes with a call to action for judges, lawyers, and litigants to help in the development of state constitutional law.²¹

II. THE RESURGENT INTEREST IN STATE CONSTITUTIONS AND INDEPENDENT STATE CONSTITUTIONAL ANALYSIS

Originally, the U.S. Supreme Court held the Federal Bill of Rights only applied to the federal government, designating the states as the primary guarantors of individual liberties.²² The framers of various state constitutions knew this and intended to provide civil rights protections in their founding charters.²³ However, many of the early state courts did not seriously consider individual liberties, and thus neglected to enforce an important level of civil rights protections.²⁴ As a result, most states only had a limited amount of civil rights jurisprudence prior to incorporation.²⁵

¹⁸ See *infra* notes 54–295 and accompanying text.

¹⁹ See *infra* notes 296–344 and accompanying text.

²⁰ See *infra* notes 345–77 and accompanying text.

²¹ See *infra* notes 378–93 and accompanying text.

²² See *Baron v. City of Baltimore*, 32 U.S. 243, 247 (1833) (holding that the Bill of Rights only applies to the federal government and that it is up to the states to provide protections for individual rights); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 179–80 (2018); Robert B. Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 LAND & WATER L. REV. 527, 544 (1986) [hereinafter *An Essay on Wyoming Constitutional Interpretation*]; Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 636 (1987).

²³ See *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, at 544; Utter & Pitler, *supra* note 22, at 636.

²⁴ See *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, at 544; Utter & Pitler, *supra* note 22, at 663; see also Brennan, *supra* note 7, at 490–91.

²⁵ See Utter & Pitler, *supra* note 22, at 663 (“During the pre-incorporation period, few states developed a theoretical basis to build a principled civil rights jurisprudence.”). The term incorporation refers to the act of applying selective provisions within the Federal Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment. See Brennan, *supra* note 7, at 490 (discussing incorporation as “decisions of the Supreme Court of the United States [that] have returned to the fundamental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in our [F]ourteenth [A]mendment . . .”).

In the 1950s, the U.S. Supreme Court began to aggressively expand federal civil liberties protections and enforce them against the states.²⁶ This expansion of federal civil liberties protections was due, in part, to most states' failure to live up to their traditionally conceived "role as the primary protector[s] of individual libert[ies]."²⁷ During this time, civil rights law under the Federal Constitution became dominant, and state constitutional rights litigation mostly disappeared.²⁸ By the 1970s, the U.S. Supreme Court restrained its expansion of federal civil rights.²⁹ As a result, many litigants began looking again to their state constitutions to provide greater rights protections, which led to a renewed interest in state constitutional law.³⁰

Though some state courts fully embraced the resurgent interest in state constitutional law, many states were skeptical about the legitimacy of independent state constitutional analysis and the state court's divergence from federal precedent.³¹ Some academics, government officials, and judges directly opposed expanding rights outside the federal minimum.³² They argued that disagreement with the U.S. Supreme Court was not a legitimate basis for a state court judge to supplant possible federal outcomes with their own desired outcomes.³³ Some states responded by amending their constitutions to require state courts

²⁶ See Brennan, *supra* note 7, at 490–91; see also Utter & Pitler, *supra* note 22, at 636.

²⁷ See Utter & Pitler, *supra* note 22, at 636, 642 (citations omitted); see also Cutbirth v. State, 751 P.2d 1257, 1288 (Wyo. 1988) (Urbigkit, J., dissenting) ("[I]t is apparent that failure of state judicial and legislative commitment to the preservation of constitutional rights led to initial intervention of federal courts through habeas corpus in the criminal-trial process. The developments of the Frankfurter/Brennan/Warren court in relationship to denied justice in state courts were hardly accidental.").

²⁸ See Utter & Pitler, *supra* note 22, at 636.

²⁹ See Michael J. Horan, *The Wyoming Constitution: A Centennial Assessment*, 26 LAND & WATER L. REV. 13, 16 (1991); see also Brennan, *supra* note 7, at 496–98.

³⁰ See KEITER, *supra* note 2, at 45–46; Horan, *supra* note 29, at 16–17; see also Brennan, *supra* note 7, at 503 (arguing that the federal retraction of individual rights protections "constitutes a clear call to state courts to step into the breach."). The resurgent interest in state constitutional law and in arguing for greater protections under state constitutions is often called the "New Judicial Federalism." See WILLIAMS, *supra* note 7, at 113–14.

³¹ See WILLIAMS, *supra* note 7, at 119, 127; see also *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, at 564.

³² WILLIAMS, *supra* note 7, at 127; see *People v. Scott*, 593 N.E. 1328, 1348–49 (N.Y. 1992) (Bellacosa, J., dissenting) (arguing that the New York Court of Appeals "superimpose[d] its preferred view of the constitutional universe"). See generally H.C. Macgill, *Upon a Peak in Darien: Discovering the Connecticut Constitution*, 15 CONN. L. REV. 7, 9 (1982) (describing independent state constitutional analysis as "something of a cute trick . . . and not 'real' constitutional law at all"); John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L. J. 701, 721 (1998) (criticizing the New Jersey Supreme Court for granting broader rights protections to a criminal defendant who confessed to murder while in police custody).

³³ See WILLIAMS, *supra* note 7, at 127.

to follow the interpretations of parallel federal rights.³⁴ Opponents also argued state courts who independently interpreted their constitutions were “reactionary,” “unprincipled,” and “result-oriented.”³⁵ These arguments, and the amendments mandating a lock-step with federal precedent, challenge the legitimacy of independent state constitutional analysis and the ability for state courts to grant greater rights protections under their state constitutions.³⁶

Responding to skepticism, many state supreme courts adopted a neutral criteria approach to limit independent state constitutional interpretation.³⁷ The neutral criteria approach lists a series of objective criteria or factors which provide a basis for a state court to “resort” to the state’s constitution and deviate from federal precedent in granting greater rights protections.³⁸ For example, in 1986, the Washington Supreme Court adopted the neutral criteria approach in *State v. Gunwall*.³⁹ In *Gunwall*, the court addressed whether the police could obtain telephone records without a warrant.⁴⁰ The court acknowledged this case presented a similar issue to the one found in *Smith v. Maryland*, where the U.S. Supreme Court held the seizure of third party phone records did not require a warrant.⁴¹ In determining whether to deviate from *Smith*, the *Gunwall* court decided it would resort to independent constitutional analysis based on a neutral criteria approach, asserting:

³⁴ *Id.* at 128; *see also* CAL. CONST. art. I, § 7(a) (requiring California state courts to follow the federal minimum due process rights regarding pupil school assignment or transportation); FLA. CONST. art. I, § 12 (requiring Florida state courts to follow U.S. Supreme Court interpretations of the Fourth Amendment).

³⁵ *See* WILLIAMS, *supra* note 7, at 138.

³⁶ *See id.*

³⁷ *See id.* at 129–30, 138 (citation omitted); *see also*, *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986); *Saldana v. State*, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring). The call for a criteria or factor approach “can be seen as representing, in an important sense, a challenge to the legitimacy of independent state constitutionalism itself.” WILLIAMS, *supra* note 7, at 150.

³⁸ *See Gunwall*, 720 P.2d at 811; *Saldana*, 846 P.2d at 622 (Golden, J., concurring); WILLIAMS, *supra* note 7, at 137, 129–30 (describing the neutral criteria approach as a methodology in which “the state supreme court . . . sets forth a list of circumstances (criteria or factors) under which it says it will feel justified in interpreting its state constitution more broadly than the Federal Constitution.” (citation omitted)).

³⁹ *Gunwall*, 720 P.2d 808. The Washington Supreme Court’s discussion in *Gunwall* is also a good example of a “teaching opinion.” *See id.* at 811–13; *see also* WILLIAMS, *supra* note 7, at 144. These types of opinions are designed to “alert the bar and bench to the possibilities of independent state constitutional analysis and educat[e] them in the techniques of making state constitutional arguments.” *Id.* Vermont Justice Thomas L. Hayes reasoned that a teaching opinion was the most effective means of communicating the possibilities of independent state constitutional analysis because a law review “would [only] be read by nine students, nine law professors, and the janitor who was cleaning up at night at the law school.” *See id.* at 145 (citation omitted).

⁴⁰ *See Gunwall*, 720 P.2d at 809.

⁴¹ *See id.* at 814; *see also* *Smith v. Maryland*, 442 U.S. 735, 745–46 (1979).

The following *nonexclusive* neutral criteria are relevant in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.⁴²

The court further articulated, “[r]ecourse to our state constitution as an independent source for recognizing and protecting the individual rights of our citizens must spring not from pure intuition, but from a process that is at once articulable, reasonable and reasoned.”⁴³ Using this analytical form, the court found justification to disagree with the U.S. Supreme Court’s holding in *Smith* and, instead, ruled on independent state constitutional grounds.⁴⁴ Following *Gunwall*, the Washington Supreme Court used the neutral criteria approach as a means to limit state constitutional development.⁴⁵ The court limited development by rejecting claims which failed to perfectly adhere to the analytical form of the neutral criteria approach—even when litigants raised state constitutional claims in the lower courts.⁴⁶ The court’s strict insistence on analytical form ultimately hindered the development of Washington’s independent state constitutional law.⁴⁷

Despite the neutral criteria approach and its challenges to state constitutionalism, independent state constitutional analysis has become an accepted and legitimate practice.⁴⁸ In many cases, the U.S. Supreme Court has approved independent state constitutional analysis.⁴⁹ For example, in *Michigan v. Long*, the Court helped to facilitate independent state constitutional analysis by articulating

⁴² *Gunwall*, 720 P.2d at 811 (emphasis added).

⁴³ *Id.* at 813 (citing *State v. Hunt*, 450 A.2d 952, 966 (N.J. 1982) (Handler, J., concurring)).

⁴⁴ *See id.* at 814. Ultimately, the Washington Supreme Court held that third party phone records require a warrant under the Washington Constitution. *See id.* at 813–17.

⁴⁵ *See WILLIAMS, supra* note 7, at 151–54; *see also, e.g., State v. Thorne*, 921 P.2d 514 (Wash. 1996); *Richmond v. Thompson*, 922 P.2d 1343 (Wash. 1996).

⁴⁶ *WILLIAMS, supra* note 7, at 151–54; *see also Thorne*, 921 P.2d at 530, 533 (refusing to address an independent state constitutional claim for failure to perform a *Gunwall* analysis); *Richmond*, 922 P.2d at 1355 (Dolliver, J., dissenting) (criticizing the majority for requiring litigants to perform a rigid *Gunwall* analysis to raise an independent state constitutional claim).

⁴⁷ *See WILLIAMS, supra* note 7, at 152–53.

⁴⁸ *See id.* at 138.

⁴⁹ *See, e.g., Kansas v. Carr*, 136 S. Ct. 633, 641 (2016) (Scalia, J., majority) (“The state courts may experiment all they want with their own constitutions, and often do in the wake of this Court’s decisions.” (citing *Jeffery S. Sutton, San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1971–77 (2008)); *California v. Greenwood*, 486 U.S. 35, 43 (1988); *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (upholding California’s grant of greater free speech rights in privately owned shopping malls).

the “plain statement” rule.⁵⁰ This rule explains a state court need only make a plain statement in its judgment to explain that its decision is based on adequate and independent state grounds.⁵¹ In acknowledging the legitimacy of independent state constitutional analysis, other states have explicitly rejected the neutral criteria approach or lessened the rigidity of the briefing requirement.⁵² Ultimately, independent state constitutional interpretation and argument for greater rights protections will remain a legitimate feature of American federalism.⁵³

III. WYOMING’S HISTORY OF INDEPENDENT INTERPRETATION OF THE WYOMING DECLARATION OF RIGHTS

Throughout its history, the Wyoming Supreme Court has given meaning to some of the Wyoming Constitution’s provisions independent of the U.S Supreme Court’s interpretations of parallel federal provisions.⁵⁴ The Wyoming Supreme Court has also created principles for interpreting the Wyoming Constitution which it continues to apply.⁵⁵ These principles remain significant when the Court interprets the Wyoming Constitution’s Declaration of Rights.⁵⁶ After the federal courts’ retreat on civil rights expansions in the 1970s, the Wyoming Supreme Court encountered a resurgent interest in state constitutions.⁵⁷ The Court was split on how to interpret the Declaration of Rights in light of litigants’ new attempts to argue for greater rights protections than those afforded under the

⁵⁰ See *Long*, 463 U.S. at 1040–41.

⁵¹ *Id.* at 1041 (“If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.”).

⁵² See *Commonwealth v. Swinehart*, 664 A.2d 957, 961, n.6 (Pa. 1995) (“The failure of a litigant to present his state constitutional arguments in the form set forth in [a prior case] does not constitute a fatal defect, although we continue to strongly encourage use of that format.”); *State v. Tiedemann*, 2007 UT 49, ¶ 35–37, ¶ 37 n.6, 162 P.3d 1106, 1114–15, 1114 n.6 (Utah 2007) (rejecting the neutral criteria approach and a specific pleading formula for raising a state constitutional claim).

⁵³ WILLIAMS, *supra* note 7, at 133; see also SUTTON, *supra* note 22, at 174 (“While the state courts at times have played a critical role in advancing *some* constitutional rights, the question is whether there is room for them to play a greater role in the future.”).

⁵⁴ See, e.g., *Johnson v. State Hearing Exam’n’s Office*, 838 P.2d 158, 165 (Wyo. 1992); *Washakie Cty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 332 (Wyo. 1980); see also KEITER, *supra* note 2, at 29–31.

⁵⁵ KEITER, *supra* note 2, at 29; see, e.g., *Gordon v. State*, 2018 WY 32, ¶¶ 28–44, 413 P.3d 1093, 1103–06 (Wyo. 2018); *Neely v. Wyo. Comm’n on Judicial Conduct & Ethics*, 2017 WY 25, ¶¶ 40–49, 390 P.3d 728, 742–44 (Wyo. 2017); *Cathcart v. Meyer*, 2004 WY 49, ¶ 35–45, 88 P.3d at 1064–67 (Wyo. 2004).

⁵⁶ See *Neely*, 2017 WY ¶¶ 47–49, 390 P.3d at 744; KEITER, *supra* note 2, at 31.

⁵⁷ See *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, at 564; see also *Cutbirth v. State*, 751 P.2d 1257, 1286, 1288 (Wyo. 1988) (Urbigkit, J., dissenting) (arguing for the Court to independently analyze the protections afforded under the state constitution); Horan, *supra* note 29, 15–17 (discussing the retrenchment of civils rights at the federal level and bringing claims under the state constitution).

Federal Constitution.⁵⁸ Eventually, the Court settled on a form of the *Gunwall* neutral criteria approach.⁵⁹ The Court's approach did not explicitly require litigants to cover each of the neutral criteria from *Gunwall*, but instead insisted litigants use of some of the criteria in order for them to raise a principled and analytically sound claim.⁶⁰ Despite the Court's adoption of this approach and the multitude of litigants attempting to raise these claims, the Court has only undergone a truly independent analysis in a small number of cases.⁶¹ More often than not the Court declines to address independent state constitutional claims due to litigants' failure to adhere to the Court's preferred analytic form.⁶² Even though the Wyoming Supreme Court continues to insist on this rigid and limiting analytic form, it routinely expresses a willingness to independently interpret the Wyoming Constitution's Declaration of Rights.⁶³

A. *Wyoming's Early History Establishing Traditional Methods of Constitutional Interpretation*

Early in Wyoming's constitutional history, the Wyoming Supreme Court established and applied traditional principles of statutory interpretation to give meaning to the state's constitution.⁶⁴ One notable case establishing such principles is *Rasmussen v. Baker*.⁶⁵ In *Rasmussen*, the Wyoming Supreme Court interpreted the educational qualification for the right to vote found within the Wyoming Constitution.⁶⁶ The dispositive issue in the case was whether votes cast by non-English speaking citizens were legal.⁶⁷ Writing for the Court, Justice

⁵⁸ See *Saldana v. State*, 846 P.2d 604 (Wyo. 1993).

⁵⁹ See *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986); *Vasquez, v. State*, 990 P.2d 476, 484 (Wyo. 1999); WILLIAMS, *supra* note 7, at 178; *supra* notes 39–44 and accompanying text; see also *Saldana*, 846 P.2d at 622 (Golden, J., concurring); *Dworkin v. LFP, Inc.*, 839 P.2d 903, 909 (Wyo. 1992).

⁶⁰ See *O'Boyle v. State*, 2005 WY 83, ¶ 24 n.4, 117 P.3d 401, 408 n.4 (Wyo. 2005); *Vasquez*, 990 P.2d at 484; see also *Saldana*, 846 P.2d at 622 (Golden, J., concurring); *Dworkin*, 839 P.2d at 909.

⁶¹ See *infra* notes 136–295 and accompanying text.

⁶² See *infra* notes 136–295 and accompanying text.

⁶³ See, e.g., *Sheesley v. State*, 2019 WY 32, ¶ 14, 437 P.3d 830, 836 (Wyo. 2019); *Neely v. Wyo. Comm'n on Judicial Conduct & Ethics*, 2017 WY 25, ¶¶ 39–40, 390 P.3d 728, 741–42 (Wyo. 2017).

⁶⁴ See *Rasmussen v. Baker*, 50 P. 819, 821–23 (Wyo. 1897); *Bd. of Comm'rs of Converse Cty. v. Burns*, 29 P. 894, 898 (Wyo. 1892); see also KEITER, *supra* note 2, at 29–30 (noting the Wyoming Supreme Court's "strong jurisprudential tradition" in shaping the principles used to interpret the Constitution).

⁶⁵ *Rasmussen*, 50 P. 819 (Wyo. 1897).

⁶⁶ See *id.* at 820. The text of the provision states in part, "[n]o person shall have the right to vote who shall not be able to read the constitution of this state." WYO. CONST. art. 6, § 9.

⁶⁷ *Rasmussen*, 50 P. at 820. The votes "were cast for the said defendant by natives of Finland, naturalized citizens of the United States, who were not able to read the constitution of the State of Wyoming . . ." *Id.* Though the Finnish people could not read in English, they were able to read translations of the Constitution in Finnish. See *id.*

Charles Potter first established that the purpose of construing a constitutional provision is “to give effect to the intent of the people [who had] adopt[ed] it,” and the framers expressed this intent within the text of the Wyoming Constitution.⁶⁸ Furthermore, Justice Potter described the principle of plain meaning by expressing, “[i]f the language employed is plain and unambiguous, there is no room left for construction.”⁶⁹ He explained that plain meaning is defined as using words in their natural sense—the sense people adopting the Wyoming Constitution would have understood.⁷⁰ Justice Potter also asserted the Wyoming Constitution is a static instrument with a fixed meaning at the time it was adopted.⁷¹

In his analysis, Justice Potter looked to the Wyoming’s constitutional convention debates for support regarding the original intent of the voter qualification provision.⁷² Though there was strong evidence suggesting the framers intentionally omitted the words “in the English language,” Justice Potter was still skeptical that the omission changed the plain meaning of the text.⁷³ Justice Potter discussed how the convention debates are not a reliable source of information to help construe any provision within the Wyoming Constitution and stated that they are, “as a rule . . . deemed an unsafe guide.”⁷⁴ Justice Potter concluded that regardless of the framers’ original intent during the debates, the plain meaning of the words required qualified voters to be able to read the Wyoming Constitution

⁶⁸ See *id.* at 821 (internal quotation marks and citation omitted). Justice Potter also established the principles of liberal and strict constructionism saying that “[s]tatutes which confer or extend the elective franchise should be liberally construed” and that “any provision which excludes any class of citizens from the exercise of the elective franchise ought to receive a strict construction” *Id.* at 822 (citations omitted).

⁶⁹ *Id.* at 821.

⁷⁰ *Id.* at 822 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824)).

⁷¹ See *id.* at 822 (citing THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 6 (Boston, Little, Brown & Co. n.d.)). Though *Rasmussen* supports a static constitution in principle, the Wyoming Supreme Court has deviated from it in multiple cases and has frequently found a more flexible constitutional principle may apply. See *infra* notes 83–89 and accompanying text.

⁷² See *Rasmussen*, 50 P. at 823–25.

⁷³ See *id.* at 823–24. “For the very reason that it is possible that the omitted words may have been considered unnecessary, it would be clearly unsafe to impute to even a purposed omission a conclusive indication of but one intent and purpose behind it.” *Id.* at 824.

⁷⁴ *Id.* at 824. Justice Potter stated that the debates can “in a limited degree, be consulted in determining the interpretation to be given some doubtful phrase or provision” *Id.* Justice Potter also demonstrated the convention debates’ unreliability by noting that convention delegates frequently expressed concerns about “the uneducated foreign element” when drafting the voter qualification language. *Id.* at 827. However, the original intent of the voter qualification is obscured by the fact that some of the convention delegates actively campaigned to “the uneducated foreign element” expressly saying that the voter qualification provisions did *not* require an ability to read in English. See *id.* at 827–28; see also WILLIAMS, *supra* note 7, at 316–17 (discussing the use of voter intent to determine the plain meaning of state constitutional text) (citation omitted).

in the English language.⁷⁵ In the years since *Rasmussen*, Wyoming state courts have faithfully followed the traditional principles of statutory interpretation which the *Rasmussen* Court established for interpreting the Wyoming Constitution.⁷⁶

The Wyoming Supreme Court has applied these traditional principles of interpretation to the individual rights and liberties enshrined in the Declaration of Rights.⁷⁷ For example, in *State v. Boulter*, the Court found an information violated Wyoming's search and seizure provision because it was based solely on the prosecutor's "information and belief."⁷⁸ The Court examined the plain text of Article 1 Section 4 and held a prosecutor's "information and belief" was not alone sufficient to establish "probable cause supported by affidavit."⁷⁹ Similarly, in the case of *In re McDonald*, the Court determined whether a libel fine of one thousand dollars was excessive, or cruel or unusual punishment, and whether imprisonment for non-payment was imprisonment for debt.⁸⁰ The Court looked to the plain text of the Wyoming Constitution's provisions regarding the right against imprisonment for debt, cruel or unusual punishment, and excessive fines, along with supporting case law from other states.⁸¹ It found the lower court's imposed fine against the defendant had not violated these provisions.⁸²

⁷⁵ *Rasmussen*, 50 P. at 828.

⁷⁶ See *Mgmt. Council of Wyo. Legislature v. Geringer*, 953 P.2d 839, 843 (Wyo. 1998) (describing the principles articulated in *Rasmussen* as still "in vogue" and having "been followed faithfully"); see also, e.g., *Tuttle v. Lee*, 2018 WY 104, ¶ 10, 425 P.3d 998, 1000 (Wyo. 2018); *Powers v. State*, 2014 WY 15, ¶ 8, 318 P.3d 300, 303–04 (Wyo. 2014); *Cathcart v. Meyer*, 2004 WY 49, ¶ 39, 88 P.3d 1050, 1065 (Wyo. 2004).

⁷⁷ See *Neely v. Wyo. Comm'n on Judicial Conduct & Ethics*, 2017 WY 25, ¶¶ 41–43, 390 P.3d 728, 741–43 (Wyo. 2017); *Cathcart*, 2004 WY ¶ 35–45, 88 P.3d at 1064–67. Some of the traditional principles used involved interpreting the Wyoming Constitution based on the intent of the framers, and that the framer's intent is expressed in the text of the Wyoming Constitution, and that the text should be interpreted using plain meaning. See generally *Rasmussen*, 50 P. 819.

⁷⁸ See WYO. CONST. art. 1, § 4. ("The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized." (emphasis added)); *State v. Boulter*, 39 P. 883, 884 (Wyo. 1895). An "information" is a document prosecutors file in court to charge someone of a crime. See *Boulter*, 39 P. at 883. The prosecution in *Boulter* charged the defendant with first degree murder based solely on their "information and belief." See *id.* at 884.

⁷⁹ See *Boulter*, 39 P. at 884 (internal quotations omitted) (quoting WYO. CONST. art. 1, § 4); see also *In re Boulter*, 39 P. 875, 876–79 (Wyo. 1895) (discussing the right to bail under the plain text of WYO. CONST. art. 1, § 14., the history of bail under common law, supporting state case law, and then rejecting the defendant's claim that he had a right to bail after conviction); *In re Boulter*, 40 P. 520, 521–23 (Wyo. 1895) (upholding the procedure of indictment by information after bringing up the plain text of multiple sections of the Declaration of Rights along with supporting state case law).

⁸⁰ See *In re MacDonald*, 33 P. 18, 20–21 (Wyo. 1893).

⁸¹ See *id.*; see also WYO. CONST. art. 1, § 5. ("No person shall be imprisoned for debt, except in cases of fraud."); WYO. CONST. art. 1, § 14 ("Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted.").

⁸² See *In re MacDonald*, 33 P. at 20–21.

Though the traditional principles are foundational to any constitutional interpretation, the Wyoming Supreme Court has also articulated more flexible interpretive principles for construing the Wyoming Constitution.⁸³ In *Chicago & Northwestern Railway Co. v. Hall*, the Court interpreted a constitutional provision regarding the duties of the State Board of Equalization, and determined whether a local or state agency was to assess the value of a railroad tie preserving plant.⁸⁴ The defendants argued that the framers of the Wyoming Constitution did not intend the State Board of Equalization to assess tie preserving plants because they did not expressly include tie preserving plants in that constitutional provision.⁸⁵ Writing for the Court, Justice Fred Blume rejected the defendant's argument as too broad a contention.⁸⁶ He described the constitutional provision as "part of our organic law" and said, "[t]he Constitution is, in a sense, a living thing, designed to meet the needs of progressive society, amid all the detail changes to which such society is subject."⁸⁷ Using the principle of a living constitution, Justice Blume held that the constitutional provision at issue evolved to include tie preserving plants.⁸⁸ The Wyoming Supreme Court has expressed the principle of the Wyoming Constitution being a "living thing" in various cases since *Hall*.⁸⁹

B. *The Independent Constitutional Analysis of Wyoming's Declaration of Rights*

In the first several decades after Wyoming achieved statehood, the Wyoming Supreme Court analyzed the Declaration of Rights independent from federal

⁸³ See *Chicago & N.W. Ry. Co. v. Hall*, 26 P.2d 1071, 1073 (Wyo. 1933); KEITER, *supra* note 2, at 29.

⁸⁴ See *Chicago & N.W. Ry. Co.*, 26 P.2d at 1071–72.

⁸⁵ See *id.* at 1073. The constitutional language of the provision at that time stated "[t]he duties of the state board shall be as follows: to assess at their actual value the franchises, roadway, roadbed, rails and rolling stock and all other property, used in the operation of all railroads and other common carriers, except machine shops, rolling mills and hotels in this state." See *id.* at 1071 (quoting WYO. CONST. art. 15, § 10 (amended 1985) (internal quotation marks omitted)).

⁸⁶ See *id.* at 1073.

⁸⁷ *Id.*

⁸⁸ See *id.* at 1073–74 (applying the maxims of statutory construction *expressio unius est exclusio alterius* and *ejusdem generis* and conducting a more direct textual analysis of the constitutional provision to help reach the holding).

⁸⁹ See, e.g., *Mogard v. City of Laramie*, 2001 WY 88, ¶ 17 n.4, 32 P.3d 313, 318 n.4 (Wyo. 2001); *Campbell Cty Sch. Dist. v. State*, 907 P.2d 1238, 1257–58 (Wyo. 1995) (quoting *Chicago & N.W. Ry. Co.*, 26 P.2d at 1073 and *Rasmussen v. Baker*, 50 P. 819, 821 (Wyo. 1897)); *Cty. Court Judges Ass'n v. Sidi*, 752 P.2d 960, 972–73 (Wyo. 1988) (Urbigkit, J., specially concurring); *State v. McAdams*, 714 P.2d 1236, 1237 (Wyo. 1986) ("a constitution is a flexible, vital, living document, which must be interpreted in light of changing conditions of society." (citation omitted)); see also *Johnson v. State Hearing Exam'r's Office*, 838 P.2d 158, 181 (Wyo. 1992) (discussing the "penumbra of protections provided by the Wyoming Constitution").

constitutional precedent.⁹⁰ In *McDonald*, the Court considered Wyoming's cruel or unusual punishment provision and recognized McDonald's one thousand dollar fine for libel was the highest possible fine under the governing law.⁹¹ The Court speculated, "[t]he constitutional provisions aimed at cruel and unusual punishments were *probably* intended to prevent the imposition of obsolete, painful, and degrading punishments, such as the whipping post, the pillory, and such as making capital a grade of offenses like larceny, forgery, and the like."⁹² In its analysis, the Court independently adopted a rule of proportionality to govern Wyoming cruel or unusual punishment claims.⁹³ Under this rule, the Court examines a defendant's offense and determines whether the imposed punishment is proportionate to the offense committed.⁹⁴ *McDonald* therefore provided independent meaning to the cruel or unusual punishment provision in the Declaration of Rights early in Wyoming's history.⁹⁵

The Court's history of independent constitutional analysis is most apparent in the criminal procedure context.⁹⁶ In *Maki v. State*, the police arrested a criminal defendant but did not inform him that the prosecution could use any of his statements against him at trial.⁹⁷ In its analysis, the Wyoming Supreme Court interpreted the Wyoming Constitution's privilege against self-incrimination and found a general rule implied from the text itself involved the

⁹⁰ See, e.g., *State v. Boulter*, 39 P. 883, 884 (Wyo. 1895) (independently analyzing Wyoming's probable cause requirement); *In re Boulter*, 39 P. 875, 876–79 (Wyo. 1895) (independently analyzing Wyoming's right to bail provision); *In re MacDonald*, 33 P. 18, 20–21 (Wyo. 1893); see also *Vasquez v. State*, 990 P.2d 476, 483–84 (Wyo. 1999) (mentioning that the court had undergone independent analysis in the search and seizure context until the 1920s and 30s).

⁹¹ *In re MacDonald*, 33 P. at 21; see also *supra* notes 80–81 and accompanying text. Based on the facts of the case, the Court stated that the fine did “not seem to be more than commensurate with the gravity of the offense.” *In re MacDonald*, 33 P. at 21.

⁹² *In re MacDonald*, 33 P. at 21 (emphasis added). When the Court said, “cruel and unusual punishments” it was referring to multiple states' constitutional provisions and not necessarily suggesting that “cruel and unusual punishment” provisions are interpreted the same way as “cruel or unusual punishment provisions.” See *id.*

⁹³ See *id.*

⁹⁴ See *id.* (“But for the disposition of this case we may adopt the rule contended for, and then we must find, in order to declare the law unconstitutional, that the punishment provided by the law is so disproportionate to the offense as to shock the moral sense of the people.” (internal quotation marks omitted) (quoting *People v. Morris*, 45 N.W. 591, 592 (Mich. 1890)).

⁹⁵ See *id.*; WYO. CONST. art. 1, § 14 (“Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted.”).

⁹⁶ See, e.g., *State v. Peterson*, 194 P. 342 (Wyo. 1920); *Maki v. State*, 112 P. 334 (Wyo. 1911); *State v. Boulter*, 39 P. 883 (Wyo. 1895).

⁹⁷ *Maki*, 112 P. at 335. (“He was not here told that he need not make a statement or might make a statement or be sworn as a witness and that if he made a statement whether under oath or not it might be used against him if subsequently tried upon the charge for which he was then under arrest and that he could do as he pleased about the matter.”).

voluntariness of the accused's statements.⁹⁸ The Court also analyzed other states' case law on issues of voluntary statements made by criminal defendants, but never explicitly referenced federal precedent.⁹⁹ The Court held that a criminal defendant's voluntary statements were not admissible at trial unless the defendant had been "informed of his rights or warned that his evidence might thereafter be used against him" ¹⁰⁰ The *Maki* holding resulted in the Wyoming Supreme Court's adoption of a procedure equivalent to *Miranda* rights fifty-five years before the U.S. Supreme Court.¹⁰¹

Another notable criminal procedure case which exemplifies independent constitutional analysis is *State v. Peterson*.¹⁰² In *Peterson*, the Court determined whether a search warrant violated the search and seizure provisions of the Wyoming and Federal Constitutions.¹⁰³ The Court compared the state and federal constitutional provisions, postulating, "[the Wyoming] Constitution is some stronger, in that it uses 'affidavit' instead of 'oath or affirmation'; the word 'affidavit' requiring the matter to be in written form."¹⁰⁴ In its analysis, the Court discussed state and federal precedent, finding the warrant at issue was "null and void."¹⁰⁵ The Court further ordered the government to return the seized property to the defendant and "to suppress all evidence in relation [to the voided warrant]."¹⁰⁶ In so holding, the Wyoming Supreme Court independently adopted a version of the federal exclusionary rule forty-one years before the U.S. Supreme Court applied it to the states in *Mapp v. Ohio*.¹⁰⁷

⁹⁸ See *id.*; see also WYO. CONST. art. 1, § 11 ("No person shall be compelled to testify against himself in any criminal case . . .").

⁹⁹ See *Maki*, 112 P. at 335–36.

¹⁰⁰ *Id.* at 335.

¹⁰¹ See KEITER, *supra* note 2, at 53; see also *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).

¹⁰² *State v. Peterson*, 194 P. 342 (Wyo. 1920).

¹⁰³ See *id.* at 343–44.

¹⁰⁴ *Id.* at 345. Compare WYO. CONST. art. 1, § 4 ("[N]o warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.") (emphasis added), with U.S. CONST. amend. IV ("[N]o warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

¹⁰⁵ *Peterson*, 194 P. at 351.

¹⁰⁶ *Id.* at 350. The Court reasoned "if letters and private documents may be seized in violation of the constitutional safeguard and held and used in evidence against a citizen accused of a crime, then the constitutional provision is ineffectual and of no value." *Id.* at 351 (citation and quotation omitted).

¹⁰⁷ See *id.*; *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); see also KEITER, *supra* note 2, at 53. Though the Court used federal precedent as support for multiple issues in *Peterson*, on the issue of unconstitutionally seized evidence it adopted its own version of the exclusionary rule before it analyzed cases such as *Weeks v. United States*. See *Peterson*, 194 P. at 350–54. See generally *Weeks v. United States*, 232 U.S. 383 (1914) (creating the federal version of the exclusionary rule).

In 1938, the Wyoming Supreme Court decided an important procedural and substantive due process case where it discussed the limitations of the state's police power.¹⁰⁸ In *State v. Langley*, Justice Blume held an economic regulation did not violate the federal or state constitutions' due process clauses or the Wyoming Constitution's right against absolute, arbitrary power.¹⁰⁹ Particularly, in discussing Wyoming's constitutional provisions, Justice Blume independently based his analysis on the text of those provisions and a broad overview of political philosophy and history.¹¹⁰ He found the Wyoming Constitution recognizes natural rights and the framers intended that these rights "should not be unduly invaded."¹¹¹ Justice Blume further discussed how the police power of the state is not absolute, and explained that the tension between individual liberties and the power of government to abridge those liberties is a matter for the judiciary to solve.¹¹² He asserted, "[c]ourts must be, and are, whether *willingly or not*, the ultimate arbiters as to whether or not there is, in a particular case, an unwarranted invasion of [our] guaranteed rights[.]"¹¹³ *Langley* ultimately provides another example of the Court's independent analysis of the Wyoming Constitution's Declaration of Rights.¹¹⁴

Despite the Wyoming Supreme Court's early history of independent constitutional analysis of the Declaration of Rights, over time the Court chose to follow federal case law regarding parallel rights provisions in the Federal Constitution.¹¹⁵ The Court continued to follow federal case law throughout the 1960s and 1970s, which "effectively truncated further development of the Court's earlier independent constitutional jurisprudence."¹¹⁶ Following federal precedent became necessary, particularly in the search and seizure context, due to the U.S. Supreme Court's expansion of individual rights under the Fourth

¹⁰⁸ See *State v. Langley*, 84 P.2d 767 (Wyo. 1938).

¹⁰⁹ See *id.* at 768–69, 781; WYO. CONST. art. 1, § 6 ("No person shall be deprived of life, liberty or property without due process of law."); WYO. CONST. art. 1, § 7 ("Absolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."). The economic regulation at issue was a progressive anticompetition statute. See *Langley*, 84 P.2d at 768–69.

¹¹⁰ See *Langley*, 84 P.2d at 769–70 (discussing, among others, Thomas Paine's "Rights of Man" and Adam Smith's "Wealth of Nations").

¹¹¹ See *id.* at 770.

¹¹² See *id.* at 770–71.

¹¹³ *Id.* at 771 (emphasis added).

¹¹⁴ See *id.* at 770–71. Though the decision does discuss federal case law later on, it is important to remember that the Court also had to decide the case under the Fourteenth Amendment, and that the Court only used federal precedent as guidance. See *Langley*, 84 P.2d 767.

¹¹⁵ See KEITER, *supra* note 2, at 31 n.100 (citing *Vasquez v. State*, 990 P.2d 476, 483–84 (Wyo. 1999)).

¹¹⁶ KEITER, *supra* note 2, at 31 n.100.

Amendment.¹¹⁷ If state courts failed to comply with the increased protections regarding unreasonable search and seizure, the courts were at risk of the U.S. Supreme Court suppressing criminal evidence through the exclusionary rule.¹¹⁸ The U.S. Supreme Court also expanded other federal civil rights protections at this time, ensuring the work of state courts would be more about enforcing the Federal Bill of Rights rather than about independently interpreting and applying their state constitution's rights provisions.¹¹⁹ Even though the Wyoming Supreme Court followed the trend of applying federal case law, it frequently mentioned the independent role of the Wyoming Constitution in the State's jurisprudence, alluding to its willingness to independently interpret the Declaration of Rights.¹²⁰

C. The Resurgent Interest in Independent State Constitutional Analysis in Wyoming and the Wyoming Supreme Court's Adoption of the Neutral Criteria Approach

In the 1970s, the U.S. Supreme Court began to limit its expansion of federal civil rights, which caused a resurgent interest in state constitutional law as litigants began to rely on independent state constitutional analysis for greater rights protections.¹²¹ Before this resurgence, the Wyoming Supreme Court frequently acknowledged the independent role of the Wyoming Constitution.¹²² Despite this acknowledgment, the Court rarely analyzed the Declaration of Rights truly independent from the interpretations of parallel federal provisions.¹²³ If the Court did conduct an independent analysis it was often inconsistent with state precedent or relied heavily on federal precedent.¹²⁴ However, when the resurgent interest in state constitutions took hold, the Wyoming Supreme Court more fully discussed

¹¹⁷ See *Vasquez*, 990 P.2d at 483–84 (noting the practice where state courts follow federal precedent under the Fourth Amendment).

¹¹⁸ See *id.* Because early state courts failed to seriously consider civil rights protections, the U.S. Supreme Court had to do so, and its rulings often went beyond the guarantees of state constitutions. See *Utter & Pitler*, *supra* note 22, at 636, 642 (citations omitted); see also *supra* notes 22–30 and accompanying text.

¹¹⁹ See *Brennan*, *supra* note 7, at 490–93.

¹²⁰ See *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, at 550.

¹²¹ WILLIAMS, *supra* note 7, at 113–14. The resurgent interest in state constitutional law often called the New Judicial Federalism. See *supra* notes 26–31 and accompanying text.

¹²² See *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, at 550.

¹²³ *Id.* But see *Washakie Cty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 332–33 (Wyo. 1980) (finding a fundamental right to education under the Wyoming Constitution's equal protection provision thus granting greater protection than the Federal Constitution).

¹²⁴ See *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, at 550, 558. This inconsistency with state precedent and overreliance on federal precedent is still a problem today. See *infra* notes 225–39 and accompanying text.

and applied independent constitutional analysis and, in doing so, occasionally granted greater rights protections.¹²⁵

From the 1980s into the 1990s, Wyoming Supreme Court Justices Thomas Urbigkit and Michael Golden helped push for the independent interpretation of the Declaration of Rights.¹²⁶ Justice Urbigkit first called for this type of constitutional interpretation in a footnote comment within his dissent from *Duffy v. State*.¹²⁷ He said, “[t]he Wyoming Constitution should be considered and defined to provide greater protection to its citizens’ individual rights than may be afforded them under the federal constitution. Decisions should be based first upon the state constitution ‘which protects fundamental rights independently of the United States Constitution.’”¹²⁸ A year later, Justice Urbigkit expanded on this assertion in his dissent in *Cutbirth v. State*.¹²⁹ Quoting a law review, he argued:

Because state supreme courts are ultimately responsible for state law, they owe the state and the nation a duty to provide careful and thoughtful state constitutional jurisprudence. State courts can do that by independently analyzing the protections their state constitutions provide. State constitutions and bills of rights ought to be more than mere compilations of “glittering generalities.”¹³⁰

In *Black v. State*, Justice Urbigkit joined the majority with Justice Richard J. Macy, holding a pre-arrest coercive police interrogation violated the Wyoming

¹²⁵ See, e.g., *Tortolito v. State*, 901 P.2d 387, 389–90 (Wyo. 1995) (Golden, J., majority) (finding the Wyoming Constitution provides greater protection of an individual’s right to remain silent); *Saldana v. State*, 846 P.2d 604 (Wyo. 1993) (Golden, J., concurring) (Urbigkit, J., dissenting); *Johnson v. State Hearing Examr’s Office*, 838 P.2d 158, 164–165 (Wyo. 1992) (Urbigkit, J., majority) (finding the Wyoming Constitution provides greater protection under its equal protection clauses); *Dworkin v. LFP, Inc.*, 839 P.2d 903, 909–12, 920–22 (Wyo. 1992) (Golden, J., majority) (Urbigkit, J., dissenting); *Black v. State*, 820 P.2d 969, 972 (Wyo. 1991) (finding the Wyoming Constitution provides greater due process protections); *Cutbirth v. State*, 751 P.2d 1257, 1286 (Wyo. 1988) (Urbigkit, J., dissenting); *Duffy v. State*, 730 P.2d 754, 763 n.3 (Wyo. 1986) (Urbigkit, J., dissenting); *Brenner v. City of Casper*, 723 P.2d 558 (Wyo. 1986) (Macy, J., majority) (finding the Wyoming Constitution provides criminal defendants greater protection of their right to a jury trial).

¹²⁶ See *supra* note 125 and accompanying text. Justice Richard J. Macy was also a part of the push for greater protections under the Wyoming Constitution and actually issued majority opinions affecting as much. See *Brenner*, 723 P.2d at 559, 561; *Black*, 820 P.2d at 970, 972; see also *Saldana*, 846 P.2d at 621 (Macy, J., specially concurring).

¹²⁷ *Duffy*, 730 P.2d at 763 n.3 (Urbigkit, J., dissenting).

¹²⁸ *Id.* (quoting *State v. Gilmore*, 511 A.2d 1150, 1157 (N.J. 1986)).

¹²⁹ *Cutbirth*, 751 P.2d at 1286 (Urbigkit, J., dissenting).

¹³⁰ *Id.* at 1286 (quoting Steve McAllister, *Interpreting the State Constitution: A Survey and Assessment of Current Methodology*, 35 U. KAN. L. REV. 593, 623 (1987)).

Constitution's due process clause.¹³¹ Justice Macy stated, in what is essentially the entire constitutional argument, “[a] line is drawn by the due process clause of the Wyoming Constitution. We are free to grant more rights to our citizens under the Wyoming Constitution than they are entitled to have under the United States Constitution.”¹³² With this greater protection in mind, the Court held that coercive interrogation “does not comport with this state’s notions of due process” and ultimately suppressed the statements the appellant made to the police.¹³³ Justice Golden dissented in *Black*, in part due to his concern with the majority’s lack of state constitutional analysis.¹³⁴ He argued the majority had not based its state constitutional holding on a “principled analytic jurisprudence” and that it “fail[ed] to demonstrate why the state’s due process clause is more protective than its federal counterpart.”¹³⁵

A year later, Justice Golden wrote for the majority in *Dworkin v. L.F.P.*¹³⁶ This case is the first teaching opinion by the Wyoming Supreme Court regarding independent state constitutional analysis and greater rights protections.¹³⁷ In *Dworkin*, one of the main issues was whether the Declaration of Rights’ free speech provision precluded summary judgement in libel actions.¹³⁸ In analyzing Dworkin’s constitutional argument, Justice Golden held a litigant must use “a precise, analytically sound approach” to bring a state constitutional claim.¹³⁹ He insisted litigants provide the Court with arguments and briefs adhering to an analytically sound form “to ensure the future growth of this important area of law.”¹⁴⁰ Justice Golden held that Dworkin failed to properly raise the state constitutional claim because she did not present the proper constitutional

¹³¹ See *Black v. State*, 820 P.2d 969, 971–72 (Wyo. 1991).

¹³² See *id.* at 972 (citing *Washakie Cty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980)).

¹³³ See *id.*

¹³⁴ See *id.* at 975, 977. (Golden, J., dissenting). Justice Golden further mentioned “[t]he majority boldly declares that the police in their questioning of Mrs. Black crossed the line drawn by that due process clause. Declaring it is one thing, demonstrating it, quite another.” *Id.* at 977.

¹³⁵ *Id.*

¹³⁶ *Dworkin v. LFP, Inc.*, 839 P.2d 903 (Wyo. 1992).

¹³⁷ See *id.* at 920–22 (listing a series of law reviews on state constitutional interpretation, notably including Brennan, *supra* note 7, *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, Utter & Pitler, *supra* note 22, and WILLIAMS, *supra* note 7); WILLIAMS, *supra* note 7, at 146 (citing *Dworkin* as a teaching opinion); see also *supra* note 39 and accompanying text.

¹³⁸ See *Dworkin*, 839 P.2d at 906; see also WYO. CONST. art. 1, § 20.

¹³⁹ *Dworkin*, 839 P.2d at 909 (citation omitted).

¹⁴⁰ *Id.* Today the Court continues to insist that litigants adhere to the briefing and presentation rule for the Court to independently analyze state constitutional claims; the Court later established the neutral criteria approach as a way to satisfy this rule. See *infra* notes 186–97 accompanying text.

analysis or arguments.¹⁴¹ Nonetheless, the Court affirmed its goal of developing an independent state constitutional jurisprudence “through an appropriate analytical technique.”¹⁴²

In the same year the Court decided *Dworkin*, Justices Urbigkit and Golden joined the majority in *Johnson v. State Hearing Examiner's Office*.¹⁴³ In *Johnson*, the Court reviewed the constitutionality of a pair of statutes which authorized the government to suspend driver's licenses belonging to people younger than nineteen years old who violated any alcohol or drug law.¹⁴⁴ Writing for the majority, Justice Urbigkit began by stating the Court should address state claims first and avoid federal constitutional questions when legitimately possible.¹⁴⁵ He also acknowledged that state constitutions may be a source of greater civil rights protections.¹⁴⁶ In the constitutional analysis itself, Justice Urbigkit looked to multiple provisions within the Declaration of Rights, he employed principles of statutory interpretation, and he discussed Wyoming case law to support his propositions.¹⁴⁷ Justice Urbigkit's methodology in this opinion exemplifies a truly independent constitutional analysis of Wyoming's Declaration of Rights.¹⁴⁸

Justice Urbigkit's analysis in *Johnson* also demonstrates the Court's ability to grant greater rights protections under the Wyoming Constitution.¹⁴⁹ In discussing equal protection, Justice Urbigkit stated “[t]he Wyoming Constitution is construed to protect people against legal discrimination more robustly than does the federal constitution.”¹⁵⁰ Justice Urbigkit also analyzed the statutes at

¹⁴¹ *Dworkin*, 839 P.2d at 909.

¹⁴² *Id.* In a footnote, the Court mentioned that Justice Robert F. Utter of the Washington Supreme Court “[had] co-authored a particularly helpful article for the practicing lawyer on formulating and presenting a state constitutional argument.” *Id.* at 909 n.4 (citing Utter & Pitler, *supra* note 22). The Court also referenced its appendix of law reviews. *See id.*

¹⁴³ *Johnson v. State Exam'r's Office*, 838 P.2d 158 (Wyo. 1992). The Court was divided 2–2–1 with Justices Urbigkit and Golden in the majority, Justices Thomas and Cardine specially concurring, and Justice Brown dissenting. *See id.*

¹⁴⁴ *See id.* at 159–61. “[T]he statutes provide retributory punishment via driver's license suspension where the offense for which the punishment is inflicted involves neither driving nor motor vehicle use.” *Id.* at 159.

¹⁴⁵ *See id.* at 164 (citations omitted) (“If state laws violate the Wyoming Constitution, then we need not examine their relation to the federal constitution.”).

¹⁴⁶ *Id.* (citations omitted).

¹⁴⁷ *See id.* at 164–80. The minimal amount of Wyoming constitutional history in the analysis is also notable. *See id.*

¹⁴⁸ *See id.* at 159–81.

¹⁴⁹ *See id.* at 164–80.

¹⁵⁰ *Id.* at 165 (citing Washakie Cty. Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980); Nehring v. Russell, 582 P.2d 67 (Wyo. 1978)); *see also* WYO. CONST. art 1, §§ 2–3. Justice Urbigkit argued the Wyoming Constitution's equal protection provision, “even at the lowest traditional

issue under the Declaration of Rights' clauses regarding double jeopardy, cruel or unusual punishment, the humane penal code, and the uniform operation of general law.¹⁵¹ Ultimately, the Court in *Johnson* concluded the statutes at issue were unconstitutional under the "penumbra of protections provided by the Wyoming Constitution."¹⁵²

Wyoming's most significant case involving independent constitutional interpretation is *Saldana v. State*.¹⁵³ In *Saldana*, the defendant appealed his case solely based on the Wyoming Constitution's search and seizure provision.¹⁵⁴ The five members of the Wyoming Supreme Court split four ways in addressing the issue of independent constitutional interpretation.¹⁵⁵ The majority determined it was more appropriate to follow federal precedent, in part, because the Wyoming Constitution's search and seizure provision is "virtually identical" to the Fourth Amendment in the Federal Constitution.¹⁵⁶ The majority reasoned, though the federal courts' interpretations of the Fourth Amendment establish only minimum requirements, the Wyoming Supreme Court closely adheres to them unless the Wyoming State Legislature directs otherwise.¹⁵⁷ The majority then acknowledged it had the freedom to provide greater protections under the Wyoming Constitution, but ultimately held that the facts of the case did not merit any additional protections for Saldana.¹⁵⁸ Justice Macy, specially concurring,

scrutiny level, empowers courts to scrutinize classification legislation more carefully than they can under federal doctrine." *Johnson*, 838 P.2d at 165 (internal quotations omitted) (quoting *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, at 553); *see also* *Wilson v. State Office of Hearing Examiner*, 841 P.2d 90, 95–96 (Wyo. 1992) (noting that "[a]lthough in the past we have held that Wyoming's equal protection guarantee is identical to the federal protection, we recently reexamined the equal protection provision of the Wyoming Constitution and found that the Wyoming guarantee is broader than the federal protection." (citing *Johnson*, 838 P.2d at 165)).

¹⁵¹ *See Johnson*, 838 P.2d at 167–81; *see also* WYO. CONST. art. 1, § 11 ("No person shall be compelled to testify against himself in any criminal case, nor shall any person be twice put in jeopardy for the same offense."); WYO. CONST. art. 1, § 14 ("Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted."); WYO. CONST. art. 1, § 15 ("The penal code shall be framed on the humane principles of reformation and prevention."); WYO. CONST. art. 1, § 34 ("All laws of a general nature shall have a uniform operation.").

¹⁵² *See Johnson*, 839 P.2d at 181.

¹⁵³ *See Saldana v. State*, 846 P.2d 604 (Wyo. 1993); *see also* WILLIAMS, *supra* note 7, at 178 (mentioning *Saldana* and the Wyoming Supreme Court's debate "on the proper methodology to apply in cases where litigants argued for greater protection under the state constitution").

¹⁵⁴ *Saldana*, 846 P.2d at 606–07; *see also* WYO. CONST. art. 1, § 4.

¹⁵⁵ *See Saldana*, 846 P.2d at 604.

¹⁵⁶ *See id.* at 610–12. The majority specifically chose to follow the reasoning in the federal case *Smith v. Maryland*, 442 U.S. 735 (1979). *See id.* at 611. *But cf.* *State v. Gunwall*, 720 P.2d 808, 814 (Wash. 1986) (finding as an independent state constitutional matter that it was appropriate to deviate from the U.S. Supreme Court's reasoning in *Smith*).

¹⁵⁷ *See Saldana*, 846 P.2d at 611 (citations omitted).

¹⁵⁸ *See id.* at 612 (concluding "that the substantial identity of the constitutional provisions involved does not suggest, nor do we perceive it appropriate in this instance to recognize, any increased protection as being afforded by our state constitution." (citations omitted)).

appeared to reject the majority's dicta regarding independent state constitutional analysis.¹⁵⁹ He argued the Court should not "blindly follow" federal precedent interpreting the Fourth Amendment of the Federal Constitution when the Court interprets the parallel provision in the Wyoming Constitution.¹⁶⁰

Justice Golden wrote a separate concurrence, specifically to address independent state constitutional analysis.¹⁶¹ He criticized the appellant for poorly briefing the state constitutional claim and for urging the Court to adopt the reasoning in *State v. Gunwall* without appropriately undergoing a *Gunwall* analysis or using another suitable analytical technique.¹⁶² Justice Golden then recommended litigants use the *Gunwall* analytical approach when briefing state constitutional claims in Wyoming.¹⁶³ Justice Golden further expressed the Wyoming Supreme Court was open to independently interpreting the Wyoming Constitution.¹⁶⁴ He concluded by stating, "[r]ecourse to the Wyoming Constitution as an independent source for recognizing and protecting the individual rights of our citizens must spring from a process that is articulable, reasonable, and reasoned."¹⁶⁵

In a lengthy dissent, Justice Urbigkit attacked the majority's "lock-step" approach with federal law.¹⁶⁶ He argued the majority was abandoning Wyoming's heritage of independent constitutional analysis by closely adhering to federal precedent.¹⁶⁷ He further contended the failure to give substance to the Wyoming Constitution would cause it to become "displaced" and "amended" by case outcomes "politically postured by the United States Supreme Court."¹⁶⁸ Justice Urbigkit also argued for the legitimacy of independent constitutional interpretation and defended granting greater rights protections to Wyoming citizens.¹⁶⁹

¹⁵⁹ See *id.* at 621 (Macy, J., specially concurring).

¹⁶⁰ *Id.*

¹⁶¹ See *id.* (Golden, J., concurring).

¹⁶² See *id.* at 621–22 (arguing "[t]he problem is that appellant must do much more than ask; he must show" and "[t]his court may not frame and make his argument for him").

¹⁶³ See *id.* at 622, 624 (citing *Dworkin v. LFP, Inc.*, 839 P.2d 903, 909 (Wyo. 1992)); *supra* notes 42–43 and accompanying text. Justice Golden also cited two law reviews and suggested that there are "[o]ther analytical techniques." See *Saldana*, 846 P.2d at 622 n.2; see also Utter & Pitler, *supra* note 22.

¹⁶⁴ See *Saldana*, 846 P.2d at 624 (citing *Dworkin*, 839 P.2d at 909).

¹⁶⁵ *Saldana*, 846 P.2d at 624 (citing *State v. Gunwall*, 720 P.2d 808, 813 (Wash. 1986)); see also *supra* notes 42–43 and accompanying text.

¹⁶⁶ *Saldana*, 846 P.2d at 624–64 (Urbigkit, J., dissenting).

¹⁶⁷ *Id.* at 624.

¹⁶⁸ *Id.* at 627.

¹⁶⁹ See *Saldana*, 846 P.2d at 646–64. In the body of his dissent, Justice Urbigkit cited many law review articles and other publications that discussed the methods of arguing for greater rights protections, as well as a variety of other legal subjects that sought to legitimate the independent application of state constitutional rights. See *id.*

Saldana best demonstrates the independent constitutional analysis debate as it took place in Wyoming.¹⁷⁰ After the Court decided *Saldana*, the *Gunwall* neutral criteria approach became known in Wyoming as the *Saldana* factors.¹⁷¹ Many litigants soon began arguing for greater protections under the Wyoming Constitution using the *Saldana* factors or attempted to use a different approach while citing Justice Golden's concurrence in *Saldana*.¹⁷² At this time, the Wyoming Supreme Court had yet to settle on how or whether it would go about independently interpreting the Wyoming Constitution.¹⁷³

D. Arguing for Independent Constitutional Analysis and Greater Rights Protections Under the Saldana Factors

In the years after *Saldana*, the Wyoming Supreme Court mainly used the analytical framework of the *Saldana* factors as a justification to limit or decline addressing independent state constitutional arguments.¹⁷⁴ In *Guerra v. State*, the Court indicated it would undergo an independent analysis of Guerra's state constitutional claim, but only as it related to the warrant at issue in the case.¹⁷⁵ The Court mentioned Guerra's state constitutional argument was only based on the textual difference between the state and federal search and seizure provisions.¹⁷⁶ The difference between the search and seizure provisions was the Wyoming Constitution's requirement of an affidavit.¹⁷⁷ Thus, the Court reasoned it would only address the Wyoming Constitution's affidavit requirement on independent state grounds.¹⁷⁸ Then in *Gronski v. State*, Gronski argued the *Saldana* factors were not a suitable analytical technique for asserting an independent state

¹⁷⁰ See WILLIAMS, *supra* note 7, at 178 (mentioning Wyoming's debate on constitutional methodology starting with *Saldana*). The *Saldana* opinion is also another teaching opinion from the Wyoming Supreme Court. See *Saldana*, 846 P.2d 604.

¹⁷¹ See *Sheesley v. State*, 2019 WY 32, ¶ 15, 437 P.3d 830, 836–37 (Wyo. 2019) (calling the factors the *Saldana* factors); see also *Kovach v. State*, 2013 WY 46, ¶ 49, 299 P.3d 97, 112 (Wyo. 2013) (calling the factors the *O'Boyle* factors while also citing *Saldana*); *Mogard v. City of Laramie*, 2001 WY 88, ¶ 7, 32 P.3d 313, 315–16 (Wyo. 2001) (calling the factors the *Saldana* test).

¹⁷² See *infra* notes 174–85 and accompanying text.

¹⁷³ See WILLIAMS, *supra* note 7, at 178 (citations omitted); see also *infra* notes 174–85 and accompanying text.

¹⁷⁴ See, e.g., *Callaway v. State*, 954 P.2d 1365, 1370–71 (Wyo. 1998); *Gronski v. State*, 910 P.2d 561, 565 (Wyo. 1996); *Lovato v. State*, 901 P.2d 408, 413 (Wyo. 1995); *Guerra v. State*, 897 P.2d 447, 451 (Wyo. 1995).

¹⁷⁵ See *Guerra*, 897 P.2d at 451 (citing *Wilson v. State*, 874 P.2d 215, 219 (Wyo. 1994)); *Saldana v. State*, 846 P.2d 604, 621–24 (Wyo. 1993) (Golden, J., concurring). Another search and seizure issue from the case involved the good faith exception to the exclusionary rule. See *Guerra*, 897 P.2d at 456–57.

¹⁷⁶ *Guerra*, 897 P.2d at 451.

¹⁷⁷ *Id.*

¹⁷⁸ See *id.* Even though the Court stated it was ruling on independent state grounds, it heavily relied on federal precedent in its analysis. See *id.* at 451–62. The search warrant at issue in the case was held to be valid. See *id.* at 462.

constitutional claim because the historical and legal information did not exist to satisfy them.¹⁷⁹ The Court rejected this argument and declined to independently interpret the Wyoming Constitution because Gronski had not performed an adequate state constitutional analysis.¹⁸⁰

Further demonstrating *Saldana's* limiting effect, in *Lovato v. State*, the Court declined the opportunity to undergo an independent constitutional analysis because the “[a]ppellant did little more than quote the relevant Wyoming constitutional provisions and provide some general analysis of Wyoming due process law.”¹⁸¹ The Court further explained its decision to not independently analyze, stating “[a]bsent a more complete and specific analysis of the constitutional language and its history, we refuse to consider Appellant’s state constitutional arguments.”¹⁸² These cases demonstrate the Court’s uncertainty in precisely what constituted appropriate grounds for undergoing an independent state constitutional interpretation.¹⁸³ The Court simply declined to address the state constitutional claims rather than articulate what it requires for an appropriate analysis.¹⁸⁴ In doing so, the Court placed the burden of articulating a “precise, analytically sound” argument onto litigants.¹⁸⁵

By 1999, the Court settled the independent state constitutional interpretation discussion in *Vasquez v. State*.¹⁸⁶ In *Vasquez*, the Court considered whether

¹⁷⁹ See *Gronski*, 910 P.2d at 565. “In Gronski’s view, the only available analytical technique was to determine whether Wyoming values required a judicial interpretation that this provision afforded more protection than its federal counterpart.” *Id.*; see also *Almada v. State*, 994 P.2d 299, 308 (Wyo. 1999) (finding the *Gunwall* factors to be “speculative at best”).

¹⁸⁰ See *Gronski*, 910 P.2d at 565–66 (“[I]nvitations to independently interpret the state provision, unaccompanied by appropriate constitutional analysis, have been rejected.” (citing, e.g., *Saldana*, 846 P.2d at 612)). The Court also noted its “approach in the search and seizure area has usually employed the method of reading the state and federal constitutional provisions together and treating the scope of the state provision the same as the scope of the federal provision.” *Id.* at 565 (citations omitted). Overall, the Court did not clarify what an appropriate state constitutional analysis would look like. See *id.* at 565–66. The Court only concluded “[u]ntil appropriate state constitutional analysis is presented, an invitation that we should expand the rights protected by the state constitution beyond the protection provided by the federal constitution will not receive the court’s attention.” *Id.* at 566 (citing *Goetl v. State*, 842 P.2d 549, 557 (Wyo. 1992)).

¹⁸¹ See *Lovato v. State*, 901 P.2d 408, 413 (Wyo. 1995).

¹⁸² See *id.* The Court cited Justice Golden’s concurrence in *Saldana* to support its refusal to address the state constitutional claim. See *id.*

¹⁸³ See *supra* notes 174–82 and accompanying text; see also WILLIAMS, *supra* note 7, at 177–78 (discussing the debate over the neutral criteria approach and the proper methodology for arguing greater protections under state constitutions).

¹⁸⁴ See *supra* notes 174–82 and accompanying text.

¹⁸⁵ See *supra* notes 174–82 and accompanying text; see also Utter & Pitler, *supra* note 22, at 656 (mentioning that “state courts have equal responsibility for independently interpreting their state constitutions”).

¹⁸⁶ *Vasquez v. State*, 990 P.2d 476, 486 (Wyo. 1999); WILLIAMS, *supra* note 7, at 178 (noting that in 1999 Wyoming “appeared to settle on the criteria approach”).

the *Belton* rule, a federal rule which allows police officers to search a motorist's passenger compartment for weapons or destructible evidence, is valid under the Wyoming Constitution.¹⁸⁷ Justice Golden, writing for a unanimous court, adopted the “precise, analytically sound” and neutral criteria approaches he put forth in *Dworkin* and his concurrence in *Saldana*.¹⁸⁸ He then applied an independent state constitutional analysis to the Wyoming Constitution's search and seizure provision.¹⁸⁹ In his analysis, Justice Golden lamented the lack of history available regarding the framers' intent when enacting Wyoming's search and seizure provision.¹⁹⁰ However, he did acknowledge the framers intended a liberal construction of the Declaration of Rights and their “deep rooted concern for individual rights.”¹⁹¹ By looking at the Wyoming Constitution as a whole, Justice Golden also recognized it contains more rights with more specific and detailed language than the Federal Constitution.¹⁹² Ultimately, Justice Golden believed future litigants and the Wyoming Supreme Court should develop Wyoming's search and seizure provision on sound principles regardless of federal precedent.¹⁹³

Continuing his independent constitutional analysis, Justice Golden analyzed Wyoming case law regarding prior interpretations of Wyoming's search and seizure provision.¹⁹⁴ The principles articulated in these old search and seizure cases led Justice Golden to conclude the Wyoming Constitution narrowed

¹⁸⁷ See *Vasquez*, 990 P.2d. at 482; see also *New York v. Belton*, 453 U.S. 454 (1981).

¹⁸⁸ See *Vasquez*, 990 P.2d at 484–86 (“The criteria listed in *Saldana* are part of an analytically sound approach to developing our own constitutional theory concerning the rights declared in the Wyoming Constitution, and litigants need not restrict their analysis to distinguishing between the state and federal constitutions.”); see also *Mogard v. City of Laramie*, 2001 WY 88, ¶ 6, 32 P.3d 313, 315 (Wyo. 2001) (acknowledging that “*Vasquez* represents a significant step in the development of state constitutional analysis in Wyoming”); *Almada v. State*, 994 P.2d 299, 307–11 (Wyo. 1999) (discussing *Vasquez*'s use of the *Saldana* factors and subsequently applying them).

¹⁸⁹ See *Vasquez*, 990 P.2d at 483–89. “The issue of whether this Court should consider an independent interpretation of the Wyoming Constitution's search and seizure provision was answered affirmatively with instructions that a litigant must provide a precise, analytically sound approach when advancing an argument to independently interpret the state constitution.” *Id.* at 484 (citing *Dworkin v. L.F.P. Inc.*, 839 P.2d 903, 909 (Wyo. 1992)); see also *Saldana v. State*, 846 P.2d 604, 621–24 (Wyo. 1993) (Golden, J., concurring).

¹⁹⁰ See *Vasquez*, 990 P.2d at 483–85.

¹⁹¹ See *id.* at 484–85 (citation omitted).

¹⁹² *Id.* at 485.

¹⁹³ *Id.* Justice Golden also stated that no matter how sound principles are developed, “a state constitutional analysis is required unless a party desires to have an issue decided solely under the Federal Constitution.” *Id.*

¹⁹⁴ See *id.* at 486–89. Many of the analyzed cases were from the 1920s when the Wyoming Supreme Court independently interpreted the Wyoming Constitution. See *id.*; see also Kenneth DeCock & Erin Mercer, Comment, *Balancing the Scales of Justice: How Will Vasquez v. State Affect Vehicle Searches Incident to Arrest in Wyoming?*, 1 WYO. L. REV. 139, 148–52 (2001) (analyzing *Vasquez* and the older precedents to discuss the history of “reasonableness” under the Wyoming Constitution's search and search provision).

the application of the *Belton* rule.¹⁹⁵ In reaching this conclusion, he held that the Wyoming Constitution “requires a search be reasonable under all of the circumstances as determined by the [Wyoming] judiciary, in light of the historical intent of our search and seizure provision.”¹⁹⁶ In rejecting the bright-line *Belton* rule, the “reasonable under all of the circumstances” test potentially provided greater protections to criminal defendants regarding search and seizure issues than that afforded by the Federal Constitution at the time.¹⁹⁷

Soon after *Vasquez*, the Wyoming Supreme Court undertook an independent constitutional analysis in *Mogard v. City of Laramie*.¹⁹⁸ In *Mogard*, the appellant asked the Court to determine whether the Declaration of Rights’ provision guaranteeing the right to counsel gave him a right to speak to an attorney before deciding whether to submit to a blood alcohol test.¹⁹⁹ The Court explicitly applied

¹⁹⁵ See *Vasquez*, 990 P.2d at 489. Justice Golden found Wyoming’s prior independent case law did not favor bright line rules and instead preferred a reasonable under all the circumstances analysis. See *id.* at 488–89. Justice Golden also acknowledged that *Belton* contained minimal protection and provided national uniformity, however, “*Belton*’s national citizenry rationale does not apply in Wyoming.” *Id.* at 489.

¹⁹⁶ *Id.* (citing *State v. Peterson*, 194 P. 342, 345 (Wyo. 1920)).

¹⁹⁷ See *id.* at 489; see also *Arizona v. Gant*, 556 U.S. 332, 343 (2009) (limiting the reach of the *Belton* rule). Despite the Court’s creation of a more protective test in *Vasquez*, the Court still found the *Belton*-style search in the case was lawful. See *Vasquez*, 990 P.2d at 478, 489. In fact, there is likely only one case after *Vasquez* where the Wyoming Supreme Court found a search to be unreasonable through the *Vasquez* test that was, at the same time, reasonable under the federal *Belton* rule. See *Pierce v. State*, 2007 WY 182, ¶¶ 11–21, 171 P.3d 525, 530–35 (Wyo. 2007); see also *id.* ¶ 37, 171 P.3d at 539 (Hill, J., dissenting) (“*Vasquez* himself did not reap the benefit of the *Vasquez* decision, so *Pierce* is the first to be accorded the enhanced protections it provides to Wyoming citizens.”). In *Pierce*, the Court found the defendant had made an adequate constitutional analysis because the defendant cited two relevant cases, the text of the constitutional provision, and performed an analysis under the “reasonable under all the circumstances” test based on the facts of the case. See *id.* ¶ 11, 171 P.3d at 530–31 (discussing *Vasquez* and *O’Boyle v. State*, 2005 WY 95, 117 P.3d 401 (Wyo. 2005)). In all, *Pierce* represents an example of a truly independent constitutional analysis under the Wyoming Constitution. See *id.* ¶¶ 11–21, 171 P.3d at 530–35.

¹⁹⁸ See *Mogard v. City of Laramie*, 2001 WY 88, 32 P.3d 313 (Wyo. 2001). This case provides a more truly independent analysis than *Vasquez* because the Court relied significantly less on federal precedent and based its analysis on Wyoming case law, the text of the constitutional provision at issue, and other states’ case law. See *id.* ¶¶ 4–31, 32 P.3d at 315–25. The Court also decided this case solely under the Wyoming Constitution. See *id.* ¶ 2, 32 P.3d at 314.

¹⁹⁹ *Id.* ¶ 2, 32 P.3d at 314; see also WYO. CONST. art. 1, § 10 (“In all criminal prosecutions the accused shall have the right to defend in person and by counsel . . .”). The appellant raised the question solely under the Wyoming Constitution because the Court had previously ruled there is no federal constitutional right to consult with an attorney in this specific situation. See *Mogard*, ¶¶ 2–4, 32 P.3d at 314–15 (citing *Nesius v. State Dep’t of Revenue and Taxation, Motor Vehicle Div.*, 791 P.2d 939, 942–44 (Wyo. 1990)); *Wheeler v. State*, 705 P.2d 861, 863–64 (Wyo. 1985)) (“This Court has previously held that neither the Fifth nor the Sixth Amendments to the United States Constitution grants an accused a right to counsel before deciding whether to submit to chemical testing upon an arrest for DWUL.”).

each of the *Saldana* factors.²⁰⁰ The Court specifically looked to the text of the relevant constitutional provision and Wyoming's pre-existing territorial law; then the Court analyzed matters of state and local concern.²⁰¹ Based on the *Saldana* factors, the Court concluded Wyoming lacks the constitutional history to suggest the framers of the Wyoming Constitution intended to provide greater rights protections than the Federal Constitution's Sixth Amendment.²⁰² The Court also did not find any special circumstances which would warrant granting broader protection.²⁰³ Therefore, the Court found the Wyoming Constitution does not provide a defendant with the right to counsel before deciding whether to submit to chemical testing for blood alcohol.²⁰⁴

Despite cases like *Vasquez* and *Mogard*, the Wyoming Supreme Court frequently declined to address independent constitutional claims until 2005.²⁰⁵ Then, in *O'Boyle v. State*, the Court referenced *Vasquez* and the independent interpretation of Wyoming's search and seizure provision.²⁰⁶ It found a police officer conducted an unreasonable warrantless search because he had not obtained the defendant's voluntarily consent.²⁰⁷ The Court explained that O'Boyle properly raised a state constitutional claim under *Vasquez*, and thus it analyzed the state constitutional claim first.²⁰⁸ The Court began its state constitutional analysis by reiterating, "[o]ur state constitution provides protection of individual rights

²⁰⁰ See *Mogard*, ¶¶ 7–17, 32 P.3d at 315–19; WILLIAMS, *supra* note 7, at 178 (mentioning Wyoming's direct application of the neutral criteria approach in *Mogard*).

²⁰¹ See *Mogard*, ¶¶ 7–17, 32 P.3d at 315–19. The Court also referenced the Wyoming convention debates and described the appellant's use of the debates as a laudable effort. See *id.* ¶ 11, 316–317.

²⁰² *Id.* ¶ 29, 32 P.3d at 325.

²⁰³ *Id.* ¶ 30, 32 P.3d at 325.

²⁰⁴ See *id.* ¶ 31, 32 P.3d at 325.

²⁰⁵ See, e.g., *Morgan v. State*, 2004 WY 95, ¶¶ 20–21, 95 P.3d 802, 808 (Wyo. 2004) (declining to undergo an independent constitutional analysis because the defendant "simply relies on the decisions of other states in arguing for a broad interpretation of Wyoming's constitutional protections against unreasonable searches and seizures"); *Campbell v. State*, 2004 WY 106, ¶ 10 n.2, 97 P.3d 781, 784 n.2 (Wyo. 2004) (rejecting the notion that merely indicating reliance on the Wyoming Constitution is sufficient enough to undergo a state constitutional analysis).

²⁰⁶ See *O'Boyle v. State*, 2005 WY 83, ¶¶ 26–27, 117 P.3d 401, 409 (Wyo. 2005) (mentioning that "[s]ince *Vasquez*, we have not had the opportunity to consider a search and seizure claim brought specifically under article 1 § 4").

²⁰⁷ See *id.* ¶ 3, 117 P.3d at 404. Consent is an exception to the warrant requirement under the Fourth Amendment. See generally *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (discussing the rules governing the voluntariness of a consent search).

²⁰⁸ *O'Boyle*, 2005 WY ¶ 22, 117 P.3d at 408 (citing *Vasquez v. State*, 990 P.2d 476, 485 n.4 (Wyo. 1999)). "[S]tate constitutional analysis takes primacy—that is, the claim is analyzed first under our state constitution." *O'Boyle*, 2005 WY ¶ 22; 117 P.3d at 408. However, the Court did not elaborate on how O'Boyle's state constitutional analysis satisfied the "precise and analytically sound approach." See *id.* The Court only mentioned that O'Boyle satisfied the criteria for raising a state constitutional claim. See *id.*

separate and independent from the protection afforded by the U.S. Constitution.”²⁰⁹ It then discussed the non-exclusivity of the *Saldana* factors and emphasized that a litigant does not need to address each factor to raise a state constitutional claim.²¹⁰ The Court also noted the textual language, textual differences from the Federal Bill of Rights, and constitutional history factors were all of little assistance in the search and seizure context.²¹¹ It did not elaborate on why these factors were of little assistance, but only briefly mentioned that there was not enough Wyoming constitutional history to provide guidance.²¹² The Court also mentioned it has not had the opportunity to fully consider the scope of Wyoming’s search and seizure provision independent from the parallel federal provision.²¹³ In part, the Court reasoned it had not been able to consider the scope because litigants either failed to raise claims properly or failed to raise them at all.²¹⁴ Ultimately, the Court stated litigants’ failures have forced it to follow federal precedent regarding search and seizure rather than perform an independent state constitutional analysis.²¹⁵

²⁰⁹ *Id.* ¶ 23, 117 P.3d at 408. Though *O’Boyle* noted the Wyoming Constitution provides separate and independent protection, the Court had previously been inconsistent in analyzing the Wyoming Constitution independently. *See, e.g.*, *Gronski v. State*, 910 P.2d 561, 565 (Wyo. 1996); *Saldana v. State*, 846 P.2d 604 (Wyo. 1993). The Court in *O’Boyle* also reasoned by “using federal law as a guide, states may also conclude that the scope of the protection provided by their constitution is the same as and parallel to that provided by the federal constitution.” *See O’Boyle*, 2005 WY ¶ 23, 117 P.3d at 408. The Court found the result in the case to be the same under both the federal and state constitution but still reaffirmed the Wyoming Constitution’s separate and independent protection. *See id.*

²¹⁰ *See O’Boyle*, 2005 WY ¶ 24 n.4, 117 P.3d at 408–09, 408 n.4. (“While state constitutional claims need to be thoroughly briefed and discussed and the [*Saldana factors*] provide an appropriate framework, those criteria are neither compulsory nor exclusive.”).

²¹¹ *See id.* at ¶ 24, 117 P.3d at 409. These factors were of little assistance except in relation to the affidavit requirement in the Wyoming Constitution. *See id.*

²¹² *See id.*; *see also Gronski v. State*, 910 P.2d 561, 565 (Wyo. 1996) (noting the defendant’s argument that Wyoming lacks the constitutional history to satisfy the *Saldana* factors). The lack of assistance from these factors demonstrates the futility of the Court’s insistence on the neutral criteria approach in order to develop an independent constitutional jurisprudence in Wyoming. *See infra* notes 216–39, 322–41 and accompanying text.

²¹³ *O’Boyle*, 2005 WY ¶ 24, 117 P.3d at 409. The Court mentioned it only had a limited opportunity to address the “reasonable under all the circumstances” test laid out in *Vasquez*. *See id.*

²¹⁴ *See id.* at ¶ 27, 117 P.3d at 409 (listing more cases where the Court has declined to address the state constitutional claim).

²¹⁵ *Id.*; *see also Flood v. State*, 2007 WY 167, ¶ 12, 169 P.3d 538, 542–43 (Wyo. 2007) (undergoing federal Fourth Amendment analysis due to inadequate briefing on a state constitutional claim); *Cotton v. State*, 2005 WY 115, ¶ 14, 119 P.3d 931, 934 (Wyo. 2005) (noting that the Court usually declines to address state constitutional claims absent adequate briefing). *See generally* Mervin Mecklenburg, Comment, *Fixing O’Boyle v. State – Traffic Detentions Under Wyoming’s Emerging Search-and-Seizure Standard*, 7 WYO. L. REV. 69, 71, 95 (2007) (arguing the Wyoming Supreme Court’s reasonableness rule after *O’Boyle* is “a mere pale cousin to its federal counterpart” and the Court failed to create a “principled . . . body of state constitutional law” (citation omitted)).

One year after *O'Boyle*, the Wyoming Supreme Court independently analyzed another search and seizure issue under the Wyoming Constitution.²¹⁶ In *Johnson v. State*, the Court analyzed the constitutionality of police conducting inventory searches of closed containers.²¹⁷ When the Court addressed Johnson's claim for greater protection under the Wyoming Constitution, it reiterated the first three factors from *Saldana* "are of little assistance."²¹⁸ The Court then quickly analyzed the pre-existing state law factor from *Saldana* and revealed that since at least 1976 Wyoming has allowed officers to open containers during inventory searches.²¹⁹ It also stated, since Johnson failed to provide analysis regarding the structural differences between the Wyoming and Federal Constitutions, the Court would not address his state constitutional claim.²²⁰ The Court then indicated its review was limited to considering matters of state and local concern, which was the only remaining *Saldana* factor.²²¹ Under this factor, Johnson tried to argue inventory searches hurt tourism in Wyoming because tourists do not want police officers searching their rental cars if they are put into custody.²²² The Court rejected Johnson's argument and held, in the context of inventory searches, Wyoming's search and seizure provision is the "same as and parallel to" the Fourth Amendment.²²³ Therefore, the Court declined to afford greater protections under the Wyoming Constitution and chose to follow federal precedent regarding inventory searches.²²⁴

Later that same year, the Court decided *Fertig v. State*.²²⁵ In *Fertig*, the sole issue was whether pretextual stops by police violated the Wyoming Constitution's search and seizure provision.²²⁶ The Court posited it was guided by the *Saldana*

²¹⁶ See *Johnson v. State*, 2006 WY 79, 137 P.3d 903 (Wyo. 2006).

²¹⁷ *Id.* ¶ 14, 137 P.3d at 906. Inventory searches are an exception to the warrant requirement under the Fourth Amendment, so police do not need to have individualized suspicion to search through vehicles as part of a policy of routine administrative caretaking. See *id.* ¶¶ 13–17, 137 P.3d at 906–07.

²¹⁸ See *id.* ¶ 20, 137 P.3d at 908 (citing *O'Boyle* at ¶ 24, 117 P.3d at 408–09); *supra* note 211 and accompanying text. Those factors again being the textual language of the state constitutional provision, its differences from the federal parallel provision, and its constitutional history. See *id.* Other than the affidavit requirement in the Wyoming Constitution's search and seizure provision, "[n]o further discussion of those factors is necessary." *Id.* ¶ 20, 137 P.3d at 908.

²¹⁹ See *id.*

²²⁰ See *id.*

²²¹ See *id.*

²²² See *id.* ¶¶ 21–22, 137 P.3d at 908.

²²³ *Id.* ¶ 24, 137 P.3d at 908. (internal quotation marks omitted); see also *South Dakota v. Opperman*, 428 U.S. 364 (1976) (upholding the constitutionality of routine administrative searches under the Federal Constitution).

²²⁴ *Johnson*, 2006 WY ¶ 24, 137 P.3d at 908.

²²⁵ *Fertig v. State*, 2006 WY 148, 146 P.3d 492 (Wyo. 2006).

²²⁶ See *id.* ¶ 9, 146 P.3d at 495. *Fertig* conceded that pretextual stops by police were allowed under the Federal Constitution but argued that Wyoming's Constitution provides greater rights

factors while again noting the first three factors were of little assistance.²²⁷ The Court further stated the fifth factor—structural differences between the state and federal constitutions—provided no assistance.²²⁸ Therefore, under *Johnson* and *Fertig*, when litigants raise an independent state constitutional claim and argue for greater protections under the Wyoming Constitution’s search and seizure provision, only two of the six *Saldana* factors are of assistance.²²⁹ Those factors are pre-existing state law and matters of local concern.²³⁰ Though the Court acknowledged and analyzed these two remaining *Saldana* factors, its holding still followed federal precedent and the Court ultimately found pretextual stops to be constitutional.²³¹

In 2011, the Wyoming Supreme Court did not discuss the *Saldana* factors or any other independent analytical framework when it considered an issue of first impression in *Hageman v. Goshen County School District*.²³² In *Hageman*, the Court examined Wyoming’s search and seizure provision and upheld the constitutional validity of administrative searches of school students.²³³ In its analysis, the Court discussed *Vasquez* and *O’Boyle* and the “reasonable under all of the circumstances” test.²³⁴ The Court recognized it previously found Wyoming’s

protections and does not allow for these types of stops. *See id.* ¶ 12, 146 P.3d at 496. “A pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated crime for which they did not have the reasonable suspicion necessary to support a stop.” *Id.* ¶ 9, 146 P.3d at 495 (citing *United States v. Botero-Ospina*, 71 F.3d 783, 786 (10th Cir. 1995)).

²²⁷ *See id.* ¶ 16, 146 P.3d at 497 (quoting *O’Boyle v. State*, 2005 WY 83, ¶¶ 24–25, 117 P.3d 401, 408–09 (Wyo. 2005)); *supra* notes 211, 218 and accompanying text.

²²⁸ *See Fertig*, 2006 WY ¶ 16, 146 P.3d at 497 (quoting *Almada v. State*, 994 P.2d 299, 309 (1999)). Just as in *Johnson*, *O’Boyle*, and *Vasquez*, the Court’s statement in *Fertig* that these neutral criteria factors are of little assistance is based on both the lack of Wyoming Constitutional history and the minimal textual differences between the Wyoming Constitution’s Article 1 Section 4 and the Federal Constitution’s Fourth Amendment. *See id.* ¶¶ 15–16, 146 P.3d at 496–97; *supra* notes 187–93, 206–24 and accompanying text.

²²⁹ *See Fertig*, 2006 WY ¶ 16, 146 P.3d at 497.

²³⁰ *See id.*

²³¹ *See id.* ¶¶ 15–28, 146 P.3d at 497–501. The Court relied heavily on federal precedent throughout its state constitutional analysis. *See id.*; *see also* *Mecklenburg*, *supra* note 215, at 95 n.190 (criticizing the Wyoming Supreme Court’s decision in *Fertig* for overly relying on federal precedent and “offer[ing] nothing more than a general acknowledgement of Wyoming case law”). *See generally* *Whren v. United States*, 517 U.S. 806 (1996) (holding pretextual stops are constitutional under the Fourth Amendment).

²³² *See Hageman v. Goshen Cty. Sch. Dist. No. 1*, 2011 WY 91, 256 P.3d 487 (Wyo. 2011). *See generally* *Saldana v. State*, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring). The appellants in *Hageman* raised the constitutional claims solely under the Wyoming Constitution and argued for greater protections while citing *Vasquez* and *O’Boyle*. *See Hageman*, 2011 WY ¶¶ 2, 6–9, 256 P.3d at 490, 492.

²³³ *See Hageman*, 2011 WY ¶¶ 51–52, 256 P.3d at 503.

²³⁴ *See id.* ¶¶ 7–9, 256 P.3d at 492.

search and seizure provision to offer greater rights protections than the federal analogue in other cases.²³⁵ However, the Court never mentioned the *Saldana* factors and never undertook a truly independent state constitutional analysis to determine whether school students in Wyoming have greater protections in the administrative search context.²³⁶ Instead, the Court looked to federal and other states' case law as guidance.²³⁷ The Court then applied the "reasonable under all of the circumstances" test with the same degree of protection as the federal reasonableness test.²³⁸ *Hageman* demonstrates the Court's trend toward interpreting the Wyoming Constitution without fully analyzing its prior independent jurisprudence and, instead, predominantly relying on federal law.²³⁹

In 2013, the Wyoming Supreme Court again interpreted the Wyoming Constitution's search and seizure provision without analyzing the *Saldana* factors or its other recent independent jurisprudence.²⁴⁰ In *Smith v. State*, the main issue was whether the statutorily mandated procedures for acquiring a remotely communicated search warrant complied with the Wyoming Constitution's affidavit requirement.²⁴¹ Unlike in *Hageman*, the Court in *Smith* acknowledged it has to consider the greater protections under Wyoming's search and seizure provision when deciding on the issue.²⁴² The Court specified the greater protection within Wyoming's search and seizure provision is that warrant applications require an affidavit, which provides a permanent written record.²⁴³ After looking to several other states' case law, as well as federal case law, the Court held the statutory procedures for remotely communicated search warrants complied with the

²³⁵ See *id.* ¶ 8, 256 P.3d at 492.

²³⁶ See *id.* ¶¶ 6–52, 256 P.3d at 492–503.

²³⁷ See *id.*; see also *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 826 A.2d 624 (N.J. 2003).

²³⁸ See *Hageman*, 2011 WY ¶¶ 17–19, 256 P.3d at 495. The Court based its determination of reasonableness on factors derived from U.S. Supreme Court precedent and stated "[t]his list of factors is also consistent with Wyoming precedent." See *id.* ¶¶ 18–19, 256 P.3d at 495 (citing *Acton*, 515 U.S. 646; *Earls*, 536 U.S. 822).

²³⁹ See generally Juliane Gern, Case Note, *Constitutional Law – Students Shed Wyoming Constitutional Rights at the Schoolhouse Gate: the Wyoming Supreme Court Upholds a Policy of Random, Suspicionless Drug Testing of Students*; *Hageman v. Goshen County School District No. 1*, 256 P.3d 487 (Wyo. 2011), 13 WYO. L. REV. 647 (2013) (criticizing the Wyoming Supreme Court for failing to analyze the *Saldana* factors and for not granting greater rights protections to school students under the Wyoming Constitution).

²⁴⁰ See *Smith v. State*, 2013 WY 122, 311 P.3d 132 (Wyo. 2013).

²⁴¹ See *id.* ¶ 2, 311 P.3d at 134.; see also WYO. CONST. art. 1, § 4. The statutory procedures allowed law enforcement to record the telephone conversation, request a warrant, and transcribe that conversation into written form. See WYO. STAT. ANN. § 31-6-102(d) (2019).

²⁴² See *Smith*, 2013 WY ¶ 14, 311 P.3d at 136.

²⁴³ *Id.* (citing *Cordova v. State*, 2001 WY 96, ¶ 8, 33 P.3d 142, 147 (Wyo. 2001); *Vasquez v. State*, 990 P.2d 476, 483 (Wyo. 1999)).

affidavit requirement in Wyoming's search and seizure provision.²⁴⁴ Therefore, the Court declined to extend greater rights protections through Wyoming's affidavit requirement in the context of remotely communicated search warrants.²⁴⁵

Though the Wyoming Supreme Court has occasionally undergone independent constitutional analysis and granted greater rights protections, the Court has generally declined to do so, especially in contexts outside of search and seizure.²⁴⁶ In *Kovach v. State*, the appellant raised a claim under the Wyoming Constitution arguing Wyoming's due process provision imposes a greater duty on prosecutors to disclose evidence to defense counsel.²⁴⁷ The Court found *Kovach* "failed to articulate a separate and independent state constitutional basis for imposing" a greater duty on prosecutors.²⁴⁸ Even so, the Court did address the *Saldana* factors, but yet again largely dismissed each one as being unpersuasive for granting greater rights protections under the Wyoming Constitution.²⁴⁹ The Court ultimately choose to follow federal case law interpreting the due process clause under the Federal Constitution and applied it to the Wyoming prosecutors' failure to disclose evidence.²⁵⁰

Bear Cloud v. State is another example of the Wyoming Supreme Court's reluctance to undergo an independent constitutional analysis outside of the search and seizure context.²⁵¹ In *Bear Cloud*, the Court declined to address a state

²⁴⁴ See *id.* ¶¶ 15–26, 311 P.3d at 136–40.

²⁴⁵ See *id.*

²⁴⁶ See, e.g., *Bear Cloud v. State*, 2014 WY 113, ¶ 14, 334 P.3d 132, 137 (Wyo. 2014) (declining to analyze whether Wyoming's cruel or unusual punishment provision offers greater protection); *Norgaard v. State*, 2014 WY 157, ¶¶ 25–27, 339 P.3d 267, 274–75 (Wyo. 2014) (undergoing a "cursory analysis" of cruel or unusual punishment without determining whether greater protections applied (citing *Johnson v. State*, 2003 WY 9, ¶¶ 35–37, 61 P.3d 1234, 1249 (Wyo. 2003))); *Kovach v. State*, 2013 WY 46, ¶¶ 44–54, 299 P.3d 97, 111–13 (Wyo. 2013) (undergoing an independent constitutional analysis but declining to grant protections under Wyoming's due process clause); see also *Hathaway v. State*, 2017 WY 92, ¶ 14 n.1, 399 P.3d 625, 630 n.1 (Wyo. 2017) (declining to undergo independent state constitutional analysis and determine whether Wyoming's search and seizure provision offers greater protections); *State v. Deen*, 2015 WY 5, ¶ 2 n.1, 340 P.3d 1036, 1038 n.1 (Wyo. 2015) (same); *Engdahl v. State*, 2014 WY 76, ¶ 11 n.1, 327 P.3d 114, 117 n.1 (Wyo. 2014) (same).

²⁴⁷ See *Kovach*, 2013 WY ¶ 44, 299 P.3d at 111; see also WYO. CONST. art. 1, § 6 ("No person shall be deprived of life, liberty or property without due process of law.").

²⁴⁸ See *Kovach*, 2013 WY ¶ 45, 299 P.3d at 111 (quoting *O'Boyle v. State*, 2005 WY 83, ¶ 24, 117 P.3d 401, 408 (Wyo. 2005) (citing *Saldana v. State*, 846 P.2d 604, 622 (Wyo. 1993)). The Court did not indicate why *Kovach* failed to adequately raise an independent state constitutional claim. See *id.* It only asserted, without elaboration, that it applied the *Saldana* factors and concluded *Kovach* failed. See *id.*

²⁴⁹ See *id.* ¶¶ 45, 49–54, 299 P.3d at 111–13. The Court briefly analyzed each *Saldana* factor. See *id.*

²⁵⁰ See *id.* ¶¶ 46–48, 54, 299 P.3d at 111, 113.

²⁵¹ See *Bear Cloud v. State*, 2014 WY 113, ¶ 14, 334 P.3d 132, 137 (Wyo. 2014).

constitutional claim of cruel or unusual punishment.²⁵² It stated Bear Cloud’s analysis only made a “passing reference” to the Wyoming Constitution, and since this was not the proper analytic form, it chose to analyze the case under the Federal Constitution.²⁵³ The Court also quoted *Saldana* saying, “it is not the function of this court to frame appellant’s argument or draw his issues for him,” and further stated it “adopt[s]” Justice Golden’s advice in his *Saldana* concurrence that the Court will decline a state constitutional claim when a litigant does not properly brief the issue.²⁵⁴

In one rare instance outside the criminal procedure context, the Wyoming Supreme Court found an appellant properly briefed a state free exercise of religion claim.²⁵⁵ In *Neely v. Wyoming Commission on Judicial Conduct & Ethics*, a municipal judge and part-time circuit court magistrate expressed her refusal to perform same-sex marriage ceremonies in an interview with the local paper, citing sincere religious beliefs.²⁵⁶ This case presented the issue of whether Judge Neely’s pronouncement of her religious beliefs could subject her to court discipline.²⁵⁷ Writing for the majority, Justice Kate Fox recognized that Judge Neely adequately briefed her claim for independent state constitutional analysis.²⁵⁸

²⁵² *See id.*

²⁵³ *Id.* “Mr. Bear Cloud’s entire argument relating to the Wyoming Constitution consisted of: ‘Wyoming’s State Constitution can provide greater protections than [sic] the federal constitution and Wyoming does so by analyzing the two words cruel and unusual separately.’” *Id.* ¶ 14 n.4, 334 P.3d at 137 n.4 (citing *Johnson v. State*, 2003 WY 9 ¶ 35, 61 P.3d 1234, 1249 (Wyo. 2003); *Sampsel v. State*, 2001 WY ¶¶ 10–11, 17 P.3d 724, 727–28 (Wyo. 2001)).

²⁵⁴ *Id.* ¶ 14, 334 P.3d at 137 (quoting *Saldana v. State*, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring)).

²⁵⁵ *See Neely v. Wyo. Comm’n on Judicial Conduct & Ethics*, 2017 WY 25, ¶¶ 39–40, 390 P.3d 728, 741–42 (Wyo. 2017); *see also* WYO. CONST. art. 1, § 18; WYO. CONST. art. 21, § 25. The Court does not specifically mention what made Judge Neely’s independent state constitutional claim adequate. *See Neely*, 2017 WY ¶¶ 39–43, 390 P.3d at 741–43. However, the Court did discuss how Neely pointed to the text of the relevant constitutional provisions and supported her argument with the debates of the Wyoming constitutional convention. *See id.* In addition to *Neely*, the Court also found other briefs arguing for independent analysis to be appropriate around this time. *See Rodriguez v. State*, 2018 WY 134, ¶ 18, 430 P.3d 766, 770 (Wyo. 2018) (finding that the defendant “present[ed] a well-developed argument that the state constitution provides even greater protections against unreasonable searches and seizures than does the federal constitution.”); *Nicodemus v. State*, 2017 WY 34, ¶¶ 31–32, ¶ 31 n.3, 392 P.3d 408, 416, 416 n.3 (Wyo. 2017) (finding the appellant properly framed his brief on cruel or unusual punishment).

²⁵⁶ *See Neely*, 2017 WY ¶¶ 4–14, 390 P.3d at 733–35.

²⁵⁷ *Id.* ¶ 2, 390 P.3d at 732. For a full analysis of the disciplinary issues presented in *Neely*, *see* Keeley O. Cronin, Note, *Judicial Ethics – Judicial Words May Speak Softer Than Actions, But They Do Still Speak: The Code of Judicial Conduct*; *Neely v. Wyo. Comm’n on Judicial Conduct & Ethics*, 2017 WY 25, 390 P.3d 728 (Wyo. 2017), 18 WYO. L. REV. 81 (2018).

²⁵⁸ *See Neely*, 2017 WY ¶ 40, 390 P.3d at 741–42. Despite recognizing the religious liberty claim as adequately raised, Justice Fox also noted that Judge Neely had failed to adequately raise a separate free speech claim under the Wyoming Constitution. *See id.* ¶ 40 n.9, 390 P.3d at 742 n.9.

However, even though the state constitutional claim was adequately raised, Justice Fox still addressed the federal claim first.²⁵⁹ When Justice Fox performed her independent analysis, she also did not explicitly discuss the *Saldana* factors.²⁶⁰

Justice Fox began the state constitutional analysis in *Neely* by asserting that the Court follows principles of statutory interpretation when construing provisions within the Wyoming Constitution.²⁶¹ She stated the central purpose of doing so is to determine the intent of the framers.²⁶² Justice Fox then referenced Wyoming's constitutional convention debates, and mentioned other states' findings of greater protections under their own religion clauses.²⁶³ She found the Wyoming religion clauses "may offer broader protections" than the Federal Constitution, but the issue of granting greater rights protections does not apply in this case.²⁶⁴ Specifically, Justice Fox reasoned Judge Neely's religious belief and sentiment was not the focus of the State's disciplinary action against her and, therefore, the Wyoming Constitution's religion clauses do not apply.²⁶⁵ Thus, the majority of the Court held the State had not violated the Wyoming Constitution's religion clauses.²⁶⁶

After reaching the holding on the inapplicability of the Wyoming Constitution's religion clauses, Justice Fox continued to undergo a more generalized independent constitutional analysis in *Neely*.²⁶⁷ Specifically, Justice Fox examined the Wyoming Constitution's Declaration of Rights *in pari materia*.²⁶⁸ She also quoted another principle of statutory interpretation explaining the Court will not render other provisions of the Wyoming Constitution "inoperative or superfluous" by allowing one right to trump another.²⁶⁹ While applying these principles, Justice

²⁵⁹ See *Neely*, 2017 WY ¶¶ 16–17, 39–50, 390 P.3d at 735, 741–44. Sequentially, analyzing the federal claim first is inconsistent with *Vasquez's* statement that the Court should independently analyze state constitutional issues first. See *Vasquez v. State*, 990 P.2d 476, 485–86 (Wyo. 1999); see also *O'Boyle v. State*, 2005 WY 83, ¶ 22, 117 P.3d 401, 408 ("[S]tate constitutional analysis takes primacy . . ." (citation omitted)).

²⁶⁰ See *Neely*, 2017 WY ¶¶ 39–50, 390 P.3d at 741–44.

²⁶¹ *Id.* ¶ 41, 390 P.3d at 742.

²⁶² *Id.* (citing *Cathcart v. Meyer*, 2004 WY 49, ¶ 39, 88 P.3d 1050, 1065 (Wyo. 2004)).

²⁶³ See *id.* ¶¶ 43–46, 390 P.3d at 742–43 (citations omitted).

²⁶⁴ *Id.* ¶ 42, 390 P.3d at 742.

²⁶⁵ *Id.*

²⁶⁶ See *id.* ¶ 46, 390 P.3d at 743. The holding in *Neely* was split 3–2. See generally *id.*

²⁶⁷ See *id.* ¶ 47, 390 P.3d at 744.

²⁶⁸ See *id.* ("[E]very statement in the constitution must be interpreted in light of the entire document, with all portions thereof read in *pari materia*." (internal quotation marks omitted) (quoting *Cathcart v. Meyer*, 2004 WY 49, ¶ 40, 88 P.3d 1050, 1065–66 (Wyo. 2004)).

²⁶⁹ See *Neely*, at ¶ 49, 390 P.3d at 744 (quoting *Geringer v. Bebout*, 10 P.3d 514, 520 (Wyo. 2000)).

Fox emphasized the great importance the Wyoming Constitution places on equal rights by citing several provisions within the Declaration of Rights as support.²⁷⁰ Justice Fox's discussion of the Declaration of Rights within *Neely* is a good example of an independent constitutional analysis that the Wyoming Supreme Court has rarely undertaken.²⁷¹

Sheesley v. State is the most recent case where the Wyoming Supreme Court expressed a strong willingness to independently interpret the Wyoming Constitution.²⁷² In *Sheesley*, the appellant was the manager of an adult community correctional facility and she engaged in a sexual relationship with a resident.²⁷³ While reserving her right to appeal, Sheesley pled guilty to third degree sexual assault.²⁷⁴ Sheesley challenged the constitutionality of the sexual assault statute and argued it violated her substantive due process rights under the Wyoming and Federal Constitutions.²⁷⁵ Addressing the Wyoming constitutional argument, Justice Fox, writing for a unanimous court, stated that Sheesley failed to adequately brief her state constitutional claim.²⁷⁶ The Court then tried to clarify what a litigant must do to raise a claim under the Wyoming Constitution.²⁷⁷ It explained the Court subscribes to the view that state constitutions should be used as a "font of individual liberties," additional to the Federal Constitution.²⁷⁸ In this

²⁷⁰ See *Neely*, 2017 WY ¶¶ 47–48, 390 P.3d at 744; see also WYO. CONST. art. 1, § 2 ("In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are created equal."); WYO. CONST. art. 1, § 3 ("Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever . . ."); WYO. CONST. art. 1, § 6 ("No person shall be deprived of life, liberty or property without due process of law."); WYO. CONST. art. 1, § 19 ("No money of the state shall ever be given or appropriated to any sectarian or religious society or institution."); *Johnson v. State Hearing Exam'r's Office*, 838 P.2d 158, 165 (Wyo. 1992) (discussing the greater protections within Wyoming's multiple equal protection clauses).

²⁷¹ See *Neely*, 2017 WY ¶¶ 39–53, 390 P.3d at 741–46; see also *supra* notes 121–254 and accompanying text. *Neely* is also an important example of the Court applying the traditional methods of constitutional interpretation to the Wyoming Constitution, that being the principles of statutory construction. See *Neely*, 2017 WY ¶¶ 39–53, 390 P.3d at 741–46. See generally *Rasmussen v. Baker*, 50 P. 819 (Wyo. 1897).

²⁷² See *Sheesley v. State*, 2019 WY 32, 437 P.3d 830 (Wyo. 2019). *Sheesley* is also the most recent teaching opinion by the Wyoming Supreme Court educating litigants about the possibilities of raising a state constitutional claim. See *id.*; *supra* note 39 and accompanying text.

²⁷³ See *Sheesley*, 2019 WY ¶ 2, 437 P.3d at 832.

²⁷⁴ See *id.*; see also WYO. STAT. ANN. § 6-2-304(a)(viii) (2019).

²⁷⁵ See *Sheesley*, 2019 WY ¶ 1, 437 P.3d at 832.

²⁷⁶ See *id.* ¶ 13, 437 P.3d at 836. Even if the claim was found to be adequate, the Court only addressed the state constitutional claim after it fully analyzed the federal claim. See *id.* ¶¶ 12–13, 437 P.3d at 836.

²⁷⁷ See *id.* ¶ 13, 437 P.3d at 832 ("[W]e take this opportunity to clarify what is and is not required of litigants raising claims under the Wyoming Constitution.").

²⁷⁸ See *id.* ¶ 14, 437 P.3d at 832 (quoting Brennan, *supra* note 7, at 491).

discussion, the Court quoted *O'Boyle*, *Vasquez*, and *Saldana*, noting the Court has repeatedly reminded litigants of the independent protection afforded by the Wyoming Constitution.²⁷⁹ The Court then firmly stated, once again, it is willing to independently interpret the Declaration of Rights.²⁸⁰

After the Wyoming Supreme Court expressed its enthusiasm to undergo independent state constitutional interpretations, the Court proceeded to discuss the *Saldana* factors.²⁸¹ It emphasized that there is no requirement to address each *Saldana* factor and then explicitly rejected the notion that the Court requires a “rigid analytical approach” to independently interpret the Wyoming Constitution.²⁸² However, the Court does require “proper argument and briefing using a precise and analytically sound approach”²⁸³ The Court explained the purpose of the requirement “is to provide assistance, not to create obstacles to state constitutional analysis.”²⁸⁴ Additionally, though the Court does not require discussion of all the *Saldana* factors, it will likely require discussion of some of the factors, along with the proper authority to support them.²⁸⁵

After discussing the desired methodology for raising state constitutional claims, the Court primarily addressed the form rather than the substance of Sheesley’s state constitutional argument.²⁸⁶ It found the argument was “more akin to ‘a grudging parallel citation to a state constitution that seeks merely to sidestep review by the United States Supreme Court.’”²⁸⁷ The Court further mentioned Sheesley’s state constitutional argument was similar to her federal constitutional argument and that it failed to include any analysis of the *Saldana* factors.²⁸⁸ It did acknowledge Sheesley’s identification of relevant Wyoming precedent; however, the Court did not agree with Sheesley’s substantive reading of it.²⁸⁹ Overall, the

²⁷⁹ See *id.* ¶ 14, 437 P.3d at 832 (citations omitted); *O'Boyle v. State*, 2005 WY 83, 117 P.3d 401 (Wyo. 2005); *Vasquez v. State*, 990 P.2d 476 (Wyo. 1999); *Saldana v. State*, 846 P.2d 604 (Wyo. 1993).

²⁸⁰ See *Sheesley*, 2019 WY ¶ 14, 437 P.3d at 836 (quoting *Saldana*, 846 P.2d at 624 (Golden, J., concurring)).

²⁸¹ See *id.* ¶ 15, 437 P.3d at 836–37.

²⁸² See *id.*; see also *id.* ¶ 15, 437 P.3d at 837 (“Litigants need not engage in a rigid, formulaic analysis to convince us to consider independent state constitutional grounds.”).

²⁸³ *Id.* (citing *O'Boyle*, 2005 WY ¶ 22, 117 P.3d at 408).

²⁸⁴ *Id.* ¶ 15, 437 P.3d at 838.

²⁸⁵ *Id.* (citing KEITER, *supra* note 2). The Court also noted this type of analysis would be part of “[a] precise and analytically sound approach to state constitutional interpretation” *Sheesley*, 2019 WY ¶ 15, 437 P.3d at 837.

²⁸⁶ See *id.* ¶ 16, 437 P.3d at 837–38.

²⁸⁷ *Id.* ¶ 16, 437 P.3d at 837 (quoting *Saldana v. State*, 846 P.2d 604, 623 (Wyo. 1993) (Golden, J., concurring)).

²⁸⁸ *Id.*

²⁸⁹ See *id.* ¶ 16, 437 P.3d at 837–38.

Court concluded Sheesley did not provide “well founded legal reasons’ justifying resort to independent state grounds” and it would not consider substantive due process under the Wyoming Constitution in this case.²⁹⁰ The Court’s analysis in *Sheesley* ultimately demonstrates its insistence on the use of the *Saldana* factors as the proper analytic form to raise independent state constitutional claims.²⁹¹ The analysis also shows the Court’s use of the *Saldana* factors to once again decline addressing independent state constitutional claims or grant greater rights protections under the Wyoming Constitution.²⁹²

History demonstrates that the Wyoming Supreme Court has expressed its willingness to undergo independent state constitutional analysis and potentially grant litigants greater rights protections.²⁹³ However, the Court has still frequently declined to address state constitutional claims and now cites to *Sheesley*, and its discussion of analytic form, as a justification to do so.²⁹⁴ Regardless, many recent opinions have provided litigants the opportunity to raise independent state constitutional claims and have helped the Wyoming Supreme Court give independent meaning to the Wyoming Constitution.²⁹⁵

IV. THE COURT SHOULD REJECT THE FACTOR AND RIGID BRIEFING REQUIREMENT OF *SALDANA*

The Wyoming Supreme Court has largely failed to undertake and develop truly independent constitutional jurisprudence.²⁹⁶ The resurgent interest in state constitutions during the 1970s and 1980s led the Court to insist that

²⁹⁰ *Id.* ¶ 16, 437 P.3d at 838. Justice Fox also mentioned despite the outcome of this case, “[t]he scope of substantive due process protections under the Wyoming Constitution remains an open question, despite textual similarity between it and the federal constitution.” *Id.* ¶ 16 n.7, 437 P.3d at 838 n.7.

²⁹¹ *See id.* ¶¶ 13–16, 437 P.3d at 836–38.

²⁹² *See id.*; *see supra* notes 174–85, 216–31, 246–54 and accompanying text.

²⁹³ *Sheesley*, 2019 WY ¶ 14, 437 P.3d at 836; *Saldana v. State*, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring).

²⁹⁴ *See Miller v. State*, 2020 WY 30, ¶ 2 n.2, 459 P.3d 430, 432 n.2 (Wyo. 2020); *Hardman v. State*, 2020 WY 11, ¶ 33 n.10, 456 P.3d 1223, 1231 n.10 (Wyo. 2020) (finding the appellant “presented no analysis to support an independent examination of the Wyoming Constitution’s due process or confrontation provisions. Therefore, we will not apply a separate analysis inconsistent to the federal constitution.” (citing *Sheesley*, 2020 WY ¶ 16, 437 P.3d at 838; *Bear Cloud v. State*, 2014 WY 113, ¶ 14, 334 P.3d 132, 137 (Wyo. 2014)); *Dixon v. State*, 2019 WY 37, ¶ 18, 438 P.3d 216, 226 (Wyo. 2019); *Mathewson v. State*, 2019 WY 36, ¶ 18, 438 P.3d 189, 200 (Wyo. 2019) (stating the “failure to analyze any of the six non-exclusive *Saldana* criteria justifies our foregoing any independent state constitutional analysis” (quoting *Sheesley*, 2020 WY ¶¶ 15–16, 437 P.3d at 837)).

²⁹⁵ *See Sheesley*, 2019 WY at ¶¶ 13–14, 437 P.3d at 836; *see supra* note 255 and accompanying text.

²⁹⁶ *See supra* notes 126–295 and accompanying text.

litigants raise “precise, analytically sound” claims or it will refuse to independently analyze the Wyoming Constitution.²⁹⁷ In a general sense, the desire for well analyzed claims is justifiable.²⁹⁸ However, the Court has insisted on the use of a combination of the “precise and analytically sound” approach with the neutral criteria approach, which has evolved into a rigid briefing and presentation requirement that most litigants fail to meet.²⁹⁹ Since the Court settled on this combined approach in *Vasquez*, the Court has specifically fixated on the neutral criteria quoted by Justice Golden in his *Saldana* concurrence.³⁰⁰ By insisting on and applying these *Saldana* factors, the Court has created a state constitutional jurisprudence which inherently lacks truly independent analysis.³⁰¹ The lack of independent analysis is due to the neutral criteria’s relational focus on the Federal Constitution.³⁰² The Court’s fixation on the *Saldana* factors has also hindered the development of Wyoming’s independent constitutional law because it elevates analytic form over substance and creates obstacles for litigants to effectively raise independent state constitutional claims.³⁰³ Therefore, to move

²⁹⁷ See *Dworkin v. LFP, Inc.*, 839 P.2d 903, 909 (Wyo. 1992) (citation omitted); *supra* notes 121–42 and accompanying text.

²⁹⁸ See *Dworkin*, 839 P.2d at 909.

²⁹⁹ See *supra* notes 161–65, 188–97 and accompanying text; see also *Vasquez v. State*, 990 P.2d 476, 486 (Wyo. 1999); *Saldana v. State*, 846 P.2d 604, 621–24 (Wyo. 1993) (Golden, J., concurring). In other words, the only precise and analytically sound approach the Court has accepted as a means of raising an independent state constitutional claim is the neutral criteria approach. See, e.g., *Mathewson v. State*, 2019 WY 36, ¶18, 438 P.3d 189, 200 (Wyo. 2019); *Hathaway v. State*, 2017 WY 92, ¶ 14 n.1, 399 P.3d 625, 630 n.1 (Wyo. 2017); see also *Sheesley*, 2019 WY ¶ 15, 437 P.3d at 837 (holding the neutral criteria approach is part of a “precise and analytically sound” approach).

³⁰⁰ See *Vasquez*, 990 P.2d at 486; *Saldana*, 846 P.2d 604, 621–24 (Golden, J., concurring) (quoting *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986)); *supra* notes 188–97, 246–54, 272–92 and accompanying text; see also *Mogard v. City of Laramie*, 2001 WY 88, 32 P.3d 313 (Wyo. 2001) (applying directly the neutral criteria approach); WILLIAMS, *supra* note 7, at 178 (mentioning the Wyoming Supreme Court settled on the neutral criteria approach in *Vasquez*). The Court has insisted so strongly on the neutral criteria since *Saldana* that its insistence is a fixation. See *supra* notes 246–54, 272–92 and accompanying text; see also WILLIAMS, *supra* note 7, at 151–52 (discussing the Washington Supreme Court’s counterproductive fixation on the neutral criteria from *Gunwall*).

³⁰¹ See *infra* notes 305–21 and accompanying text; see also WILLIAMS, *supra* note 7, at 142; *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, at 550.

³⁰² See *infra* notes 305–21 and accompanying text; see also WILLIAMS, *supra* note 7, at 142; *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, at 550. The neutral criteria approach is also a relational or comparative approach because it centers on analyzing the differences between the Federal Constitution and a state constitution in determining whether to undergo independent constitutional analysis. See WILLIAMS, *supra* note 7, at 148.

³⁰³ See *supra* notes 174–295 and accompanying text. Though the Court in *Sheesley* directly stated the “[precise and analytically sound] requirement’s purpose is to provide assistance, not to create obstacles to state constitutional analysis[.]” in effect, the requirement *has* created obstacles to independent constitutional analysis. See *Sheesley v. State*, 2019 WY 32, ¶ 15, 437 P.3d 830, 837 (Wyo. 2019); *infra* notes 329–41 and accompanying text.

forward and develop a more truly independent constitutional jurisprudence, the Wyoming Supreme Court should reject both the *Saldana* factors and its insistence on a rigid briefing and presentation requirement.³⁰⁴

A state court's use of neutral criteria to justify deviation from federal interpretations of the Federal Constitution is a relational approach.³⁰⁵ The neutral criteria approach is relational because its focus at each step is defined by the Federal Constitution in comparison to a state constitution.³⁰⁶ The relational emphasis is evidenced by the fact the neutral criteria only allows courts to "resort" to independent state constitutional analysis.³⁰⁷ When a litigant does manage to conform to a court's preferred briefing standard and the court actually undergoes a state constitutional analysis, the focus of the court's opinion tends to be on the justifications for deviating from federal precedent rather than on "a reasoned elaboration of state constitutional doctrine."³⁰⁸ Thus, all independent analysis looks "result-oriented" and the court also appears to supplant the U.S. Supreme Court's views for its own.³⁰⁹ Therefore, a lack of independent state constitutional analysis is inherent in the neutral criteria approach.³¹⁰

In *Vasquez v. State*, Justice Golden briefly considered multiple methodologies to independent state constitutional analysis but found the only suitable methodology was for the Court to address the state constitutional claim first.³¹¹ He

³⁰⁴ See *infra* notes 305–44 and accompanying text.

³⁰⁵ See WILLIAMS, *supra* note 7, at 148.

³⁰⁶ *Id.* ("Under this approach, a state court is compelled to focus on the [U.S.] Supreme Court's decision and to explain, in terms of the identified criteria, why it is not following Supreme Court precedent." (citing Robin B. Johansen, Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 318 (1977)).

³⁰⁷ See *supra* notes 37–47, 290 and accompanying text; see also *State v. Gunwall*, 720 P.2d 808, 811–12 (Wash. 1986); *Sheesley v. State*, 2019 WY 32, ¶16, 437 P.3d 830, 838 (Wyo. 2019); WILLIAMS, *supra* note 7, at 138.

³⁰⁸ WILLIAMS, *supra* note 7, at 137; see also *supra* notes 186–254 and accompanying text.

³⁰⁹ See *O'Boyle v. State*, 2005 WY 83, ¶ 24 n.4, 117 P.3d 401, 408 n.4 (Wyo. 2005) (citation omitted); SUTTON, *supra* note 22, at 65 ("A state court does not amplify the independent nature of a state constitutional guarantee merely by taking sides on a debate about the meaning of a federal guarantee . . ."); WILLIAMS, *supra* note 7, at 150 (quoting *State v. Gunwall*, 720 P.2d 808, 813 (Wash. 1986)).

³¹⁰ See *supra* notes 186–295 and accompanying text. This is not to say the Wyoming Supreme Court should follow the lock-step approach, especially given that the Court has repeatedly stated it will not "blindly follow" federal interpretations of parallel constitutional provisions. See, e.g., *Bear Cloud v. State*, 2014 WY 113, ¶14, 334 P.3d 132, 137 (Wyo. 2014); *Saldana v. State*, 846 P.2d 604, 621 (Wyo. 1993) (Macy, J., specially concurring).

³¹¹ See *Vasquez v. State*, 990 P.2d 476, 485–86 (Wyo. 1999) (determining that independently addressing the state constitutional issue first "best suits our decision that we must further develop our own constitutional principles under the state provision by consideration of constitutional theory appropriate to this state"); see also *O'Boyle*, 2005 WY ¶ 22, 117 P.3d at 408 (expressing that when

rejected a lock-step approach, reasoning, “development of sound constitutional principles would obviously not be workable” by deciding to explicitly follow parallel federal precedents.³¹² Additionally, he rejected the methodology of deciding whether a claim first fails under the Federal Constitution before addressing a state claim.³¹³ The methodology of looking to the state constitution only after fully analyzing a claim under the Federal Constitution is also known as the “interstitial approach.”³¹⁴ Justice Golden rejected this approach because it was likely to be criticized as “result-oriented.”³¹⁵ Despite his determination that analyzing a state constitutional claim first is the appropriate methodology for Wyoming, Justice Golden still analyzed the federal claim first and largely applied the interstitial approach.³¹⁶

Many courts which use the interstitial approach have also used the neutral criteria approach as part of their methodology.³¹⁷ The Wyoming Supreme Court is no exception—the Court has often applied a mix of the interstitial and neutral criteria approaches.³¹⁸ Skeptics may criticize both approaches for being “result-

a litigant raises a state constitutional claim, the “state constitutional analysis takes primacy—that is, the claim is analyzed first under our state constitution” (citing *Vasquez*, 990 P.2d at 485 n.4); SUTTON, *supra* note 22, at 178–81 (discussing how analyzing state claims first helps state courts maintain “the rightful independence of their state constitutions” (citations omitted)).

³¹² See *Vasquez*, 990 P.2d at 485–86.

³¹³ See *id.*

³¹⁴ See *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, at 548–50; Utter & Pitler, *supra* note 22, at 648–51. The underlying premise of the interstitial approach is the presumption of validity, or presumption of correctness, regarding federal constitutional analysis under state constitutions. See WILLIAMS, *supra* note 7, at 136–38, 142 (calling this presumption the “mistaken premise”); Utter & Pitler, *supra* note 22, at 650. Critics believe the interstitial approach is result-oriented because it only seeks to determine whether the state court should supplement or amplify federal constitutional rights under the state constitution. See WILLIAMS, *supra* note 7, at 137–38; Utter & Pitler, *supra* note 22, at 648–51. Critics will always argue an approach is result-oriented when a state court makes the Federal Constitution the starting point of the analysis, regardless of what specific methodology the court uses. See *id.* at 136–37.

³¹⁵ *Vasquez*, 990 P.2d at 485–86; see Utter & Pitler, *supra* note 22, at 650–51 (discussing how the interstitial, also known as the supplemental, approach can be considered result-oriented (citations omitted)); see also SUTTON, *supra* note 22, at 181 (“By deciding the federal claim first, state courts do most what one would expect them to do least: aggrandize federal law at the expense of state law.”); *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, at 549–50 (noting the primary argument against the interstitial approach is it “impedes the development of an independent state constitutional tradition”).

³¹⁶ See *Vasquez*, 990 P.2d at 480–82, 486.

³¹⁷ See WILLIAMS, *supra* note 7, at 142; see also SUTTON, *supra* note 22, at 182 (criticizing the interstitial approach while also quoting the New Mexico Supreme Court’s neutral criteria approach (quoting *State v. Sanchez*, 2015–NMSC-018, ¶ 11, 2015 N.M. 152, 350 P.3d 1169, 1174 N.M. 2015)).

³¹⁸ *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, at 550 (observing the Wyoming Supreme Court has tended to follow the interstitial approach); see, e.g., *Sheesley v. State*, 2019 WY 32, 437 P.3d 830 (Wyo. 2019); *Neely v. Wyo. Comm’n on Judicial Conduct & Ethics*,

oriented” because, in applying these approaches, it appears the Court reaches a holding only based on its preferred result.³¹⁹ The “result-oriented” criticism is due to both approaches’ initial and overall relational focus on the Federal Constitution rather than independently analyzing the state constitution.³²⁰ Therefore, despite Justice Golden’s goal of developing sound constitutional principles for Wyoming, the Wyoming Supreme Court’s use of the neutral criteria from *Vasquez* and *Saldana* has largely only developed an interstitial methodology and not a truly independent constitutional jurisprudence.³²¹

Originally, multiple state courts adopted a neutral criteria approach as a challenge to the legitimacy of independent state constitutionalism.³²² The approach sought to guide or limit the courts, and thus constrain their ability to develop independent constitutional law.³²³ After the Washington Supreme Court adopted the neutral criteria in *State v. Gunwall*, the neutral criteria approach began to impede the development of Washington’s independent state constitutional law.³²⁴ Commentators have noted, in a number of cases over the years, the Washington Supreme Court appears to have declined to address various important state constitutional claims.³²⁵ Dissenters on the Washington Supreme Court often argued the majority’s insistence on the neutral criteria approach was elevating form over substance.³²⁶ Other justices from states which have adopted a neutral criteria approach have also criticized the elevation of form

2017 WY 25, 390 P.3d 728 (Wyo. 2017); *Kovach v. State*, 2013 WY 46, 299 P.3d 97 (Wyo. 2013); *Vasquez v. State*, 990 P.2d 476 (Wyo. 1999); *supra* notes 188–231, 255–92 and accompanying text. Throughout its jurisprudence the Wyoming Supreme Court has also followed a variety of different methodologies. *See An Essay on Wyoming Constitutional Interpretation, supra* note 22, at 542 (mentioning the methodologies taken by state courts have not been exclusive, “in most states we can readily discern evidence of [multiple] approach[es] to constitutional interpretation”).

³¹⁹ *See WILLIAMS, supra* note 7, at 137–38, 182; *Utter & Pitler, supra* note 22, at 650–51.

³²⁰ *See WILLIAMS, supra* note 7, at 137–38, 182; *Utter & Pitler, supra* note 22, at 650–51.

³²¹ *See An Essay on Wyoming Constitutional Interpretation, supra* note 22, at 549 (“The fear is that if state courts must always initially look to federal precedent, they will forever find themselves influenced by Supreme Court precedent and unable to construct a fully independent jurisprudence.”); *see also SUTTON, supra* note 22, at 182–83 (criticizing the interstitial approach for leading state courts to overly rely on federal constitutional law).

³²² *See WILLIAMS, supra* note 7, at 138; *supra* notes 31–39 and accompanying text.

³²³ *See WILLIAMS, supra* note 7, at 130, 138.

³²⁴ *See id.* at 151–54; *supra* notes 37–47 and accompanying text.

³²⁵ *See WILLIAMS, supra* note 7, at 152–53 (citation omitted).

³²⁶ *See WILLIAMS, supra* note 7, at 153–54; *see also State v. Thorne*, 921 P.2d 514, 537 (Wash. 1996) (Madsen, J., dissenting) (arguing that the majority “elevate[s] form over substance and . . . unjustly den[ies] the defendant the protections he deserves as a Washington State citizen”); *Richmond v. Thompson*, 922 P.2d 1343, 1355 (Wash. 1996) (Dolliver, J., dissenting) (“The court need not fulfill every—or any—*Gunwall* factor to justify a broader reading of a parallel state constitutional provision.” (citation omitted)).

over substance.³²⁷ Ultimately, the *Gunwall* factors have constrained state courts' ability to develop independent state constitutional law.³²⁸

Like Washington and other neutral criteria states, the Wyoming Supreme Court's fixation on the use of this analytic form has hindered Wyoming's independent constitutional analysis.³²⁹ Though the Court often says the *Saldana* factors are not exclusive and other types of constitutional arguments are acceptable if the arguments are "precise and analytically sound," the Court has rarely discussed a state constitutional claim without reference to the *Saldana* factors.³³⁰ Justice Golden, who originally advocated for the *Gunwall* factors in *Saldana* and adopted in *Vasquez*, emphasized the Court would not address most state constitutional claims without adherence to this preferred analytical form in briefs and presentations.³³¹ The Court has declined to address a multitude of state constitutional claims due to litigants' failures in briefing and in presentation, despite litigants having actually asserted state constitutional claims and having actually argued for independent state constitutional analysis.³³² However, the Wyoming Supreme Court has expressed its desire for litigants to raise more state constitutional claims in hopes of developing Wyoming's constitutional law.³³³

³²⁷ See WILLIAMS, *supra* note 7, at 154, 156–57, 162 (discussing cases where the dissent has argued the neutral criteria approach elevates form over substance); see also *State v. Hill*, 675 A.2d 866, 882–83 (Conn. 1996) (Norcott, J., dissenting) (citations omitted); Phyllis W. Beck, *Foreward: Stepping Over the Procedural Threshold in the Presentation of State Constitutional Claims*, 68 TEMP. L. REV. 1035, 1038–39 (1995) (“[A] litigant seeking to enlarge the rights of the individual, via state constitutional law, [should] be free from a technical procedure that may not always serve to advance the inquiry at hand.”).

³²⁸ See *supra* notes 45–47 and accompanying text; see also WILLIAMS, *supra* note 7, at 162 (“[T]he criteria approach seems to have taken on a ‘life of its own’ in state constitutional law cases . . . and possibly has actually been counterproductive.” (citations omitted)).

³²⁹ See *supra* notes 174–295 and accompanying text.

³³⁰ See *supra* notes 174–295 and accompanying text. If the *Saldana* factors, or the case itself, are not explicitly mentioned during the Court's constitutional discussion, the Court still tends to cite other cases that have discussed them. Thus, the *Saldana* factors almost always have an indirect presence in these cases. See, e.g., *Engdahl v. State*, 2014 WY 76, ¶ 11 n.1, 327 P.3d 114, 117 n.1 (Wyo. 2014); *Phippen v. State*, 2013 WY 30, ¶ 12, 297 P.3d 104, 108 (Wyo. 2013); *Cotton v. State*, 2005 WY 115, ¶ 14, 119 P.3d 931, 934 (Wyo. 2005).

³³¹ See *Saldana v. State*, 846 P.2d 604, 622–24 (Wyo. 1993) (Golden, J., concurring).

³³² See *supra* notes 174–85, 214, 246, 294 and accompanying text; see also e.g., *Lovato v. State*, 901 P.2d 408, 413 (Wyo. 1995) (declining the opportunity to undergo an independent constitutional analysis because the “[a]ppellant did little more than quote the relevant Wyoming constitutional provisions and provide some general analysis of Wyoming due process law. Absent a more complete and specific analysis of the constitutional language and its history, we refuse to consider Appellant's state constitutional arguments”); *Bear Cloud v. State*, 2014 WY 113, ¶ 14, 334 P.3d 132, 137 (Wyo. 2014); *Mathewson v. State*, 2019 WY 36, ¶ 18, 438 P.3d 189, 200 (Wyo. 2019).

³³³ See *Sheesley v. State*, 2019 WY 32, ¶ 14, 437 P.3d 830, 836 (Wyo. 2019); *O'Boyle v. State*, 2005 WY 83, ¶ 23, 117 P.3d 401, 408 (Wyo. 2005); *Dworkin v. LFP, Inc.*, 839 P.2d 903, 909 (Wyo. 1992).

But, because of the Court's fixation on the neutral criteria approach and a "precise and analytically sound" form, it is unlikely litigants will be able to successfully raise more independent state constitutional claims.³³⁴

In *Sheesley v. State*, Justice Fox assured litigants that the Court's requirements for raising an independent state constitutional claim are "to provide assistance, not to create obstacles to state constitutional analysis."³³⁵ But the Court's requirements have done little to assist litigants, and it is often unclear what the Court actually requires given it has rarely expounded on what a proper form of state constitutional analysis should look like under its approach.³³⁶ Despite Justice Fox's assurances, the Court has cited *Sheesley* multiple times as a justification to deny addressing state constitutional claims.³³⁷ Additionally, other state courts adopted the neutral criteria approach to constrain and limit independent state constitutional analysis.³³⁸ The *Saldana* factors, Wyoming's neutral criteria approach, have limited independent constitutional analysis by imposing a rigid analytic form of argument which the Court has elevated over substance.³³⁹ This rigid analytic form prevented Wyoming courts from addressing litigants' state constitutional claims in numerous instances.³⁴⁰ Therefore, in effect, the

³³⁴ See *infra* notes 335–41 and accompanying text.

³³⁵ See *Sheesley*, 2019 WY ¶ 15, 437 P.3d at 837.

³³⁶ See *supra* notes 136–295 and accompanying text. The Court frequently declines independent state constitutional claims without articulating why a litigant has failed to raise an independent claim and without demonstrating what an appropriate independent analysis would look like. See, e.g., *Engdahl v. State*, 2014 WY 76, ¶ 11 n.1, 327 P.3d 114, 117 n.1 (Wyo. 2014); *Bear Cloud v. State*, 2014 WY 113, ¶ 14, 334 P.3d 132, 137 (Wyo. 2014); see also *Gronski v. State*, 910 P.2d 561, 565 (Wyo. 1996) (rejecting a litigant's argument that the *Saldana* factors are not a suitable analytical technique for independent constitutional analysis under the Wyoming Constitution). Additionally, there are procedural requirements to assert independent state constitutional claims that add a layer of difficulty. See *Flood v. State*, 2007 WY 167, ¶¶ 12–13, 169 P.3d 538, 542–53 (Wyo. 2007) (discussing the need to raise an adequate independent state constitutional claim at the district court level (quoting *Custer v. State*, 2006 WY 72, ¶¶ 11–12, 135 P.3d 620, 623–24 (Wyo. 2006)); *Harvey v. Wyo. Dep't. of Transp.*, 2011 WY 72, ¶ 8, 250 P.3d 167, 171 (Wyo. 2011) (requiring an appellant argue for greater protection under the specific circumstances of their case or else the Court will decline to address the claim); *Phippen v. State*, 2013 WY 30, ¶ 12, 297 P.3d 104, 108 (Wyo. 2013) (requiring litigants to raise an adequate and separate Wyoming Constitutional claim when presenting an issue to the district court, as well as requiring an independent and supporting analysis to articulate how the Wyoming Constitution provides greater rights protections).

³³⁷ See *Sheesley*, 2019 WY ¶ 15, 437 P.3d at 836–37 (assuring litigants that the court does not require a rigid analytical approach to make it undergo independent constitutional interpretation); *supra* note 294 and accompanying text.

³³⁸ See WILLIAMS, *supra* note 7, at 138, 150; *supra* notes 31–47 and accompanying text.

³³⁹ See *supra* notes 174–295 and accompanying text; see also WILLIAMS, *supra* note 7, at 151–53 (discussing how the "rigidity and limiting effect of the criteria were predictable"); *An Essay on Wyoming Constitutional Interpretation*, *supra* note 22, at 548–50 (discussing how the interstitial methodology hinders independent state constitutional development).

³⁴⁰ See *supra* notes 174–295 and accompanying text.

Saldana factors and the “precise and analytically sound” approach have hindered Wyoming’s independent constitutional development.³⁴¹

The Wyoming Supreme Court should reject the neutral criteria approach Justice Golden provided in *Saldana* and which the Court officially adopted in *Vasquez*.³⁴² The Court’s use of these factors has narrowed the focus of the Court away from the substance of the Wyoming Constitution’s Declaration of Rights and placed more focus onto the Federal Constitution.³⁴³ Additionally, the Court’s strong insistence on a “precise and analytically sound” form only further impedes the Court’s development of Wyoming’s constitutional jurisprudence because it creates obstacles which make it unlikely for litigants to successfully raise independent state constitutional claims.³⁴⁴

V. A TRADITIONAL APPROACH TO INTERPRETATION OF THE DECLARATION OF RIGHTS

The Wyoming Supreme Court should accept state constitutional claims when litigants base their arguments for independent constitutional analysis on traditional methods of constitutional interpretation.³⁴⁵ Specifically, the Court should address a state constitutional claim if a litigant, at a minimum, includes a discussion of the relevant text of the right asserted, uses traditional principles of constitutional interpretation, and supports the discussion with legitimate sources.³⁴⁶ Early in its history, the Court independently interpreted the

³⁴¹ See *supra* notes 174–295 and accompanying text; see also WILLIAMS, *supra* note 7, at 150–53 (“[I]ndependent state constitutional analysis is lost somewhere in the ever-shifting shadow of the federal courts which are no less political and perhaps more so than our own state courts.” (quoting *State v. Gocken*, 896 P.2d 1267, 1275–81 (Wash. 1995) (Madsen, J., concurring)); *An Essay on Wyoming Constitutional Interpretation*; *supra* note 22, at 548–50.

³⁴² See *Vasquez v. State*, 990 P.2d 476, 486 (Wyo. 1999); *Saldana v. State*, 846 P.2d 604, 622 (Wyo. 1993).

³⁴³ See *Mecklenburg*, *supra* note 215, at 94–95 (criticizing the Wyoming Supreme Court in *O’Boyle* for failing to ground its independent analysis on legal doctrines derived from Wyoming case law and for focusing too much on federal law); *supra* notes 174–295, 305–21 and accompanying text; see also SUTTON, *supra* note 22, at 177 (mentioning that “exclusive (or even heavy) reliance on debates about the meaning of a federal guarantee is not apt to dignify the state constitutions as independent sources of law”).

³⁴⁴ See *supra* notes 329–41 and accompanying text.

³⁴⁵ See *supra* notes 64–120 and accompanying text; see also *State v. Tiedemann*, 2007 UT 49, ¶ 37, 162 P.3d 1106, 1114–15 (Utah 2007) (discussing traditional methods of state constitutional analysis).

³⁴⁶ Legitimate legal sources include relevant state case law, supporting case law from sister states, appropriate secondary sources like Robert B Keiter’s *The Wyoming State Constitution* (2d. edition), and reference to federal case law only for general guidance. See also *Tiedemann*, 2007 UT ¶ 37, 162 P.3d at 1114–15; *Pierce v. State*, 2007 WY 182, ¶¶ 11–13, 171 P.3d 525, 530–31 (Wyo. 2007) (accepting a state constitutional claim based on a discussion of the relevant text, case law, and analysis under an independent Wyoming constitutional standard).

Declaration of Rights using the traditional principles of statutory construction.³⁴⁷ In more recent cases, the Court has continued to discuss the Declaration of Rights using these same principles.³⁴⁸ The Court has also expressed that the Wyoming Constitution is not a static document and courts should interpret it pragmatically to meet the needs of a progressive society.³⁴⁹ These traditional principles of constitutional interpretation, along with support from recent cases and a standard which encourages substance over form, can all support the Court and litigants in developing a new tradition of independent constitutional jurisprudence.³⁵⁰

An example is *State v. Tiedemann*, where the Utah Supreme Court expounded on what is required for an independent state constitutional analysis.³⁵¹ The State asserted the defendant failed to adequately brief his state constitutional claim, citing a neutral criteria approach the Utah Supreme Court applied in a prior case.³⁵² The Utah Supreme Court determined the State's claim involved a "fundamental misconception" about state constitutional law and decided to discuss the proper approach.³⁵³

In discussing the proper approach, the Utah Supreme Court completely rejected the neutral criteria approach, "both as a briefing requirement and as a rigid analytical method."³⁵⁴ The court discussed its position regarding raising

³⁴⁷ See *Rasmussen v. Baker*, 50 P. 819 (Wyo. 1897); *In re MacDonald*, 33 P. 18, 20–21 (Wyo. 1893); *supra* notes 64–120 and accompanying text.

³⁴⁸ See *Neely v. Wyo. Comm'n on Judicial Conduct & Ethics*, 2017 WY 25, ¶ 47, 390 P.3d 728, 744 (Wyo. 2017) (quoting *Cathcart v. Meyer*, 2004 WY 49, ¶ 40, 88 P.3d 1050, 1065–66 (Wyo. 2004)).

³⁴⁹ See *KEITER*, *supra* note 2, at XXV, 29; *supra* notes 83–89 and accompanying text; *see also* *Chicago & N.W. Ry. Co. v. Hall*, 26 P.2d 1071, 1073 (Wyo. 1933).

³⁵⁰ *See also Tiedemann*, 2007 UT ¶ 32–37, 162 P.3d at 1113–15 (discussing the "proper approach to state constitutional law development"); *Pierce v. State*, 2007 WY 182, ¶¶ 11–13, 171 P.3d 525, 530–31 (Wyo. 2007) (undergoing a truly independent constitutional analysis after citing the relevant constitutional text and case law); *Johnson v. State Hearing Exam'r's Office*, 838 P.2d 158 (Wyo. 1992) (same).

³⁵¹ *See Tiedemann*, 2007 UT ¶ 32–37, 162 P.3d at 1112–15. (Durham, J., majority); *see also* *Saldana v. State*, 846 P.2d 604, 623 (Wyo. 1993) (Golden, J., concurring) (acknowledging Utah Supreme Court Justice Christine Durham as a leader in state constitutional law issues).

³⁵² *See Tiedemann*, 2007 UT ¶ 32, 162 P.3d at 1112–13 (quoting and citing *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921 n.6 (Utah 1993)).

³⁵³ *Id.* The Court asserted the independence of its state constitutional analysis stating "[t]his court, not the United States Supreme Court, has the authority and obligation to interpret Utah's constitutional guarantees Furthermore, it is part of the inherent logic of federalism that state law be interpreted independently and *prior* to consideration of federal questions." *Id.* ¶ 33, 162 P.3d at 1113 (citing Hans A. Linde, *First Things First: Rediscovering States' Bills of Rights*, 9 U. BALT. L. REV. 379, 383–84 (1980)); *see also* SUTTON, *supra* note 22, at 178–81 (agreeing with Linde's idea that courts should independently consider state claims first).

³⁵⁴ WILLIAMS, *supra* note 7, at 177; *see Tiedemann*, 2007 UT ¶ 32–37, 162 P.3d at 1112–15.

state constitutional claims and explained that mere mentions of the relevant constitutional text are not enough, but claims may be acceptable when supported by traditional methods of constitutional analysis.³⁵⁵ The court further suggested that historical arguments can be helpful in constitutional analysis, but they are not essential.³⁵⁶ Additionally, a litigant may point to flaws in the federal analysis of a parallel rights provision to help reinforce their state constitutional claim.³⁵⁷ Importantly, the court articulated an open approach to asserting state constitutional claims, saying:

[A] claimant could rely on nothing more than plain language to make an argument for a construction of a Utah provision that would be different from the interpretation the federal courts have given similar language. Independent analysis must begin with the constitutional text and rely on whatever assistance legitimate sources may provide in the interpretive process. There is no presumption that federal construction of similar language is correct.³⁵⁸

The Utah Supreme Court's standard for raising state constitutional claims is a prime example of an open standard focused on substance, not form.³⁵⁹ The Wyoming Supreme Court should adopt a similar standard for independent constitutional analysis.³⁶⁰

The Wyoming Supreme Court and litigants both possess the tools necessary for such independent state constitutional interpretation.³⁶¹ The Court long ago established several principles of statutory construction in *Rasmussen v. Baker*, which it has continuously applied to the Wyoming Constitution.³⁶² The Court also expressed more interpretive principles in cases like *Neely v. Wyoming Commission on Judicial Conduct & Ethics*, where it analyzed the Declaration of

³⁵⁵ *Tiedemann*, 2007 UT ¶ 37, 162 P.2d at 1114 (citations omitted).

³⁵⁶ *Id.*

³⁵⁷ *See id.* ¶ 37, 162 P.3d at 1114–15.

³⁵⁸ *Id.* ¶ 37, 162 P.3d at 1115.

³⁵⁹ *See id.* ¶¶ 32–37, 1112–15.

³⁶⁰ *See id.*; *supra* notes 64–114, 143–52, 262–71 and accompanying text. Wyoming does have case law applying this type of approach. *See generally* *Pierce v. State*, 2007 WY 182, 171 P.3d 525 (Wyo. 2007) (undergoing an independent constitutional analysis similar to that in *Tiedemann*); *Johnson v. State Hearing Exam'r's Office*, 838 P.2d 158 (Wyo. 1992) (same).

³⁶¹ *See supra* notes 64–114 and accompanying text; *see also* *Mecklenburg*, *supra* note 215, at 73 (stating “the history of search-and-seizure in Wyoming provides ample basis for a doctrine that is adequately grounded in state law”).

³⁶² *See supra* notes 64–76 and accompanying text. The Wyoming Supreme Court stated in more recent years it has “followed faithfully” these interpretive principles. *See* *Mgmt. Council of Wyo. Legislature v. Geringer*, 953 P.2d 839, 843 (Wyo. 1998).

Rights *in pari materia*.³⁶³ Additionally, the Wyoming Supreme Court has said the Wyoming Constitution is a living document and it has interpreted provisions within the Declaration of Rights with this principle in mind.³⁶⁴ The Court has further used the notion that natural rights are enshrined in the Wyoming Constitution as a source of authority to draw from when interpreting the Declaration of Rights.³⁶⁵ Thus, the Court has established the necessary tools to independently and adequately interpret the Wyoming Constitution.³⁶⁶

In our federal system, it is the Wyoming Supreme Court's duty to give meaning to the text of the Wyoming Constitution's Declaration of Rights and to fulfill its role as the guarantor of individual liberties.³⁶⁷ The Court's position as the final interpreter of the Wyoming Constitution, the supreme law of the state, makes the Court autonomous on issues of state constitutional law.³⁶⁸ As part of that autonomy, the Wyoming Supreme Court holds an "interpretive responsibility" when undergoing an independent state constitutional analysis.³⁶⁹ The Court's interpretive responsibility requires it to "offer[] a compelling account of the rights in question, an account that may or may not dovetail with the federal understanding."³⁷⁰ The Wyoming Supreme Court has, in many instances, refused to address a state constitutional claim, explaining how it is not the Court's

³⁶³ See *Neely v. Wyo. Comm'n on Judicial Conduct & Ethics*, 2017 WY 25, ¶ 47, 390 P.3d 728, 744 (Wyo. 2017) (quoting *Cathcart v. Meyer*, 2004 WY 49, ¶ 40, 88 P.3d 1050, 1065–66 (Wyo. 2004)).

³⁶⁴ See, e.g., *Mogard v. City of Laramie*, 2001 WY 88, ¶ 17 n.4, 32 P.3d 313, 318 n.4 (Wyo. 2001); *Johnson v. State Hearing Exam'r's Office*, 838 P.2d 158, 181 (Wyo. 1992) (discussing the "penumbra of protections provided by the Wyoming Constitution"); *State v. McAdams*, 714 P.2d 1236, 1237 (Wyo. 1986); *Chicago & N.W. Ry. Co. v. Hall*, 26 P.2d 1071, 1073 (Wyo. 1933); see also *supra* notes 106–13 and accompanying text.

³⁶⁵ See *supra* notes 108–14 and accompanying text; see also WYO. CONST. pmbli.; KEITER, *supra* note 2, at 62.

³⁶⁶ See *supra* notes 64–114, 262–71 and accompanying text.

³⁶⁷ See SUTTON, *supra* note 22 at 170 (discussing one of the virtues of federalism as "having two sets of court systems tasked with enforcing two sets of constitutional guarantees independently"); Utter & Pitler, *supra* note 22, at 643 ("When a state court fails to independently evaluate its state constitution, it deprives the people of the double security the nation's founding fathers intended to provide."); *supra* notes 22–23, 113 and accompanying text.

³⁶⁸ See WILLIAMS, *supra* note 7, at 176 (citation omitted); see also KEITER, *supra* note 2, at 109 ("The Wyoming Supreme Court has consistently recognized the U.S. Supreme Court is the final interpreter of the U.S. Constitution and that its rulings are binding on the state's courts. At the same time, the court has noted that the federal constitutional rights recognized by the U.S. Supreme Court are minimal, and it is free too enlarge upon these rights when interpreting the state constitution." (citing *Richmond v. State*, 554 P.2d 1217 (Wyo. 1976); *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717 (Wyo. 1985)).

³⁶⁹ See WILLIAMS, *supra* note 7, at 176. (citation omitted); see also Utter & Pitler, *supra* note 22, at 656 ("[S]tate courts have equal responsibility for independently interpreting their state constitutions; a textual difference simply makes it easier for a court to see its responsibility.").

³⁷⁰ WILLIAMS, *supra* note 7, at 176 (quotation and citation omitted).

function to frame and present an appellant's argument for them.³⁷¹ But it is the Court's interpretive responsibility to give meaning to the rights provisions within the Wyoming Constitution.³⁷² By declining to even address state constitutional claims because appellants do not satisfy a rigid analytic form, the Court shifts its responsibility onto litigants and thus fails to share the "equal responsibility" for independently interpreting the Wyoming Constitution.³⁷³ As Justice Blume expressed in *State v. Langley*, the "[c]ourts must be, and are, whether *willingly or not*, the ultimate arbiters as to whether or not there is, in a particular case, an unwarranted invasion of [our] guaranteed rights"³⁷⁴ Therefore, it is up to the Wyoming Supreme Court, not just litigants, to give meaning to the Declaration of Rights.³⁷⁵

The Wyoming Supreme Court should accept state constitutional claims which, at a minimum, include a discussion of the relevant text of the right the litigant has asserted, which follow traditional principles of constitutional interpretation, and which the litigant has supported with legitimate sources.³⁷⁶ Using this more open standard for asserting state constitutional claims would allow more litigants to adequately raise claims, provide the Court an opportunity to more fully develop an independent constitutional jurisprudence, and breathe more life into the Wyoming Declaration of Rights.³⁷⁷

VI. CONCLUSION

The Wyoming Supreme Court has had a "strong jurisprudential tradition."³⁷⁸ Early on, the Court established principles for interpreting the Wyoming Constitution that it still uses today.³⁷⁹ It has also analyzed the rights protections afforded to Wyoming citizens independently of federal rights protections, though in varying degrees.³⁸⁰ The Court also addressed the resurgent interest in state

³⁷¹ See *Bear Cloud v. State*, 2014 WY 113, ¶ 14, 334 P.3d 132, 137 (Wyo. 2014) (quoting *Saldana v. State*, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring)); *supra* notes 140–42, 161–65, 252–54, 272–90, 294 and accompanying text.

³⁷² See WILLIAMS, *supra* note 7, at 176 (citation omitted); *supra* notes 367–370 and accompanying text; see also Utter & Pitler, *supra* note 22, at 656.

³⁷³ See Utter & Pitler, *supra* note 22, at 656.

³⁷⁴ See *State v. Langley*, 84 P.2d 767, 771 (Wyo. 1938) (emphasis added).

³⁷⁵ See *id.*; see also Utter & Pitler, *supra* note 22, at 656.

³⁷⁶ See *State v. Tiedemann*, 2007 UT 49, ¶ 37, 162 P.3d 1106, 1115 (Utah 2007).

³⁷⁷ See *id.* ¶ 37, 162 P.3d at 1114–15; KEITER, *supra* note 2, at 29–32 (discussing the Wyoming Constitution and the history of how the Wyoming Supreme Court has given meaning to this "evolutionary document").

³⁷⁸ KEITER, *supra* note 2, at 29.

³⁷⁹ See *supra* notes 64–89 and accompanying text.

³⁸⁰ See *supra* notes 90–113 and accompanying text.

constitutional law that occurred during the 1970s and 1980s.³⁸¹ In addressing the resurgent interest in state constitutions, the Court in *Saldana* and *Vasquez* adopted a “precise, analytically sound” approach combined with a neutral criteria approach as a form of argument for litigants to use when raising independent state constitutional claims.³⁸² The Court calls this form of argument the *Saldana* factors.³⁸³ In practice, the Court has used the *Saldana* factors to limit state constitutional claims by declining to address litigants’ arguments which do not adhere to the Court’s preferred analytic form.³⁸⁴ Despite recent cases elaborating on what is required of litigants to adequately raise an independent state constitutional claim, it remains unclear what an adequate claim looks like under the Court’s current approach.³⁸⁵ Additionally, when a state constitutional claim is adequately raised, the focus of the analysis revolves around deviating from federal precedent interpreting the Federal Constitution rather than on elaborating upon a substantive analysis of the Wyoming Constitution.³⁸⁶ Because of this relational focus on the Federal Constitution, Wyoming’s jurisprudence inherently lacks truly independent constitutional analysis.³⁸⁷

The Wyoming Supreme Court should reject the *Saldana* factors and adopt a more open standard for accepting independent state constitutional claims.³⁸⁸ The Court should address a state constitutional claim under the Declaration of Rights if a litigant, at a minimum, includes a discussion of the relevant text of the right asserted, uses traditional principles of constitutional interpretation, and supports the discussion with legitimate sources.³⁸⁹ In conjunction with this new standard, the Court should analyze the state constitutional claim before it moves on to any analysis of a parallel federal right.³⁹⁰ Under this method of analysis, the Court and litigants should be able to develop a new tradition of truly independent state constitutional jurisprudence.³⁹¹ Ultimately, the duty is on judges, lawyers, and

³⁸¹ See *supra* notes 121–25 and accompanying text.

³⁸² See *Vasquez v. State*, 990 P.2d 476 (Wyo. 1999); *Saldana v. State*, 846 P.2d 604 (Wyo. 1993); *supra* notes 121–97 and accompanying text.

³⁸³ See *supra* notes 170–72 and accompanying text.

³⁸⁴ See *supra* notes 174, 205, 246, 294 and accompanying text.

³⁸⁵ See *Sheesley v. State*, 2019 WY 32, 437 P.3d 830 (Wyo. 2019); *supra* notes 205–15, 272–95 and accompanying text.

³⁸⁶ See *supra* notes 305–21 and accompanying text.

³⁸⁷ See *supra* notes 305–21 and accompanying text.

³⁸⁸ See *supra* notes 296–377 and accompanying text.

³⁸⁹ See *supra* notes 345–50, 358 and accompanying text.

³⁹⁰ See *supra* notes 208, 311–16, 345–50 and accompanying text.

³⁹¹ See *supra* notes 358, 376–77 and accompanying text.

litigants to contribute to the development of Wyoming's constitutional law.³⁹² Litigants' ability to raise more state constitutional claims, independent from the minimum protections of federal law, will give the Wyoming Supreme Court the opportunity to make the Wyoming Constitution the "font of individual liberties" the framers intended it to become.³⁹³

³⁹² See Utter & Pitler, *supra* note 22 at 677 ("Each component of a state's legal system—state bar, law schools, and judiciary—bears a measure of responsibility for breathing life into a state constitution."); see also KEITER, *supra* note 2, at XXV ("With Wyoming's small population, the public as well as the state's bar and judiciary enjoy unique opportunities to participate directly in an ongoing dialogue over the scope and meaning of the state's constitution's manifold provisions.").

³⁹³ See Brennan, *supra* note 7, at 491; *supra* notes 22–23, 345–77 and accompanying text.