Land & Water Law Review

Volume 21 | Issue 2 Article 13

1986

# An Essay on Wyoming Constitutional Interpretation

Robert B. Keiter

University of Wyoming
College of Law

LAND AND WATER
LAW REVIEW

VOLUME XXI 1986 NUMBER 2

# AN ESSAY ON WYOMING CONSTITUTIONAL INTERPRETATION

*Robert B. Keiter**

*State constitutions differ from their federal counterpart in language, intent and the circumstances of their drafting. Yet in recent decisions on the issue of standing, the Wyoming Supreme Court has relied heavily on federal precedent to interpret its own constitution. The author of this essay argues that the federal doctrine of standing has no clear analogue in the Wyoming Constitution. After analyzing several models of state constitutional interpretation, the author concludes that state supreme courts interpreting their constitutions should search for independent meaning in those documents and borrow precedent from other jurisdictions with caution.*

On December 19, 1985, the Wyoming Supreme Court decided—or rather, decided not to decide—Debra Jo Gooden's constitutional challenge to the state driving while under the influence (DWUI) statute. In *Gooden v. State of Wyoming,*[1] the court ruled that a citizen convicted under the DWUI statute lacked standing to raise the constitutional separation of powers issue posed by the statute's mandatory prosecution provision.[2] The fact that DWUI defendants cannot claim a right to plea bargain and the related separation of powers question are likely to evoke some passing interest from the state's bar and citizenry. However, the court's treat-

*Professor of Law, University of Wyoming College of Law; J.D., Northwestern University, 1972; B.A., Washington University, 1968. Member of West Virginia, Idaho and Wyoming Bars.

I am truly indebted to Richard Schneebeck whose indefatigable research assistance made this article possible. I also am grateful to my colleagues, George Rudolph and Gerry Gallivan, who commented on an earlier draft of the article, and to Bruce Hellbaum who provided me with additional research assistance.

1. 711 P.2d 405 (Wyo. 1985). *See infra* text accompanying notes 8 to 12 for a complete discussion of the case.

2. WYO. STAT. § 31-5-233(h) (1985 Cum. Supp.). *See infra* note 8 for the statute's complete text.

ment of the standing doctrine, a highly abstract jurisdictional concept that the court periodically invokes to avoid reaching the merits of cases otherwise properly before it, is not likely to arouse much interest. This is unfortunate, not because of any technical deficiencies in the court's articulation or application of its standing test; but rather because the constitutional underpinnings of the doctrine itself are questionable. It is not at all evident that a standing requirement can or should be read into the Wyoming Constitution.

State constitutional law has emerged from the murky recesses of academia and it is drawing a great deal of attention from the practicing bar, the courts and the law journals. With the Burger Court's retreat from the activist posture assumed by the Warren Court in the area of individual rights, lawyers have discovered that state constitutions afford a font of rights not otherwise protected by the federal Constitution. At the same time the state supreme courts have been willing to look independently at their state constitutions and to diverge from Supreme Court precedent in defining the rights available under their charters.[3] These courts have recognized that they can insulate their constitutional rulings from Supreme Court review if they articulate an adequate and independent state law basis for their decisions.[4] Further, the law reviews have legitimized state constitutional law as an acceptable academic discipline.[5]

State constitutional interpretation is not an easily undertaken endeavor. Volumes have been written about federal constitutional interpretation, and state constitutions can be every bit as opaque and open-ended in their language as our federal charter is. Further, the states rarely have the extensive historical sources to draw upon in divining original intent that is available respecting the origins of the federal Constitution. While the interpretations given similar provisions by the federal courts and the courts of sister states can provide guidance to a state court initially confronting an uninterpreted provision in its own constitution, caution is appropriate as unique local circumstances may well dictate a different result. In other words, state courts should not too readily inter-

3. *See, e.g.,* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241 (1971) (state property tax-based school financing scheme violates state equal protection clause); Reeves v. State, 599 P.2d 727 (Alaska 1979) (Alaska Constitution's privacy clause prohibits prosecution for marijuana possession); People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (California's constitutional guarantee against unreasonable searches and seizures permits only "pat-down" searches).

4. *See* Michigan v. Long, 463 U.S. 1032 (1983). In *Long* the Supreme Court held that if a state court's decision indicates clearly and expressly that it is based alternatively on bona fide separate, adequate and independent state law grounds, the Court will not review the case out of respect for the independence of the state court and a desire to avoid issuing advisory opinions. *Id.* at 1041, 1040. *See generally,* Roberts, *Adequate and Independent State Ground: Some Practical Considerations,* 19 LAND & WATER L. REV. 647 (1984).

5. *See, e.g.,* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977); Wilkes,*The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court,* 62 KY. L.J. 421 (1974); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873 (1976); *Symposium: The Washington Constitution,* 8 U. PUGET SOUND L. REV. 157 (1985); *Developments in the Law - The Interpretation of State Constitutional Rights,* 95 HARV. L. REV. 1324 (1982) [hereinafter cited as *Developments in the Law*].

pret their own constitutions by "borrowing" precedent from the federal and sister state courts.[6] If state constitutions are to have any independent vitality, the state courts should be prepared to stake out their own positions regardless of the conclusions reached by other courts, including the Supreme Court. Although there is evidence that the Wyoming Supreme Court has occasionally adopted this position,[7] the *Gooden* ruling suggests that the court is not fully committed to this approach.

In this essay I will raise a number of questions respecting the Wyoming Supreme Court's approach to the state constitution with the goal of promoting interest in the state constitution and a dialogue concerning state constitutional jurisprudence. I will initially explore the court's standing doctrine as elaborated in *Gooden* and its predecessor cases. Standing, as will become evident, is largely a federal constitutional construct derived from the article III "case or controversy" requirement for which there is no apparent analogue in the Wyoming Constitution. This then raises the main issue I wish to address: how should the supreme court go about interpreting the state constitution. Central to this issue is the question of when it is appropriate for the court to "borrow" its constitutional doctrine from the Supreme Court or sister state courts. I will therefore outline the borrowing, independent, and interstitial interpretation models which are available to the court. Finally, because I will argue that the court should give independent content to the state constitution, I will conclude by noting instances when the court has done so and by suggesting other provisions that may merit an independent construction.

## STANDING DOCTRINE

In *Gooden* the defendant asserted that the Wyoming DWUI statute violated the state constitution's separation of powers provision by prohibiting prosecutors from plea bargaining once an individual was charged under the statute.[8] At the trial court level Gooden raised her constitutional challenge to the statute by filing a motion to arrest judgment after she was convicted of violating the statute.[9] The trial court ruled against

---

6. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Howard, *supra* note 5, at 891-907.

7. *See, e.g.*, Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980); Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980).

8. *Gooden*, 711 P.2d 405, 408 (Wyo. 1985). The statute under which Gooden was charged states that:

> Any person charged under this section or a municipal ordinance which substantially conforms to the provisions of this section shall be prosecuted under this section or the ordinance and not under a reduced charge of dismissed unless the prosecuting attorney in open court moves or files a statement to reduce the charge or dismiss, with supporting facts, stating tht there is insufficient evidence to sustain the charge.

WYO. STAT. § 31-5-233(h) (Cum. Supp. 1985).

9. *Gooden*, 711 P.2d at 407. Gooden originally raised her constitutional defense before the county court. After losing on this constitutional issue, she appealed to the district court (where she also lost), and then to the supreme court. In its opinion the supreme court drew no distinction between these lower courts in articulating its standing doctrine. While I will

her. On appeal the Wyoming Supreme Court concluded that the trial court should not have reached the merits of Gooden's constitutional argument because she lacked standing to raise the separation of powers claim. In the court's view, Gooden could not claim a right to plea bargain; thus, she was not injured by the statute that prohibited the prosecutor from plea bargaining with her.[10]

In deciding that Gooden did not have standing to raise her separation of powers claim, the court interchangeably cited several of its own prior standing decisions[11] and several United States Supreme Court decisions.[12] The court's reliance upon its own precedent should not be troubling so long as the concept of standing can be anchored in Wyoming law. While I have some doubts about this, I have even greater doubts that federal standing doctrine can or should be transferred wholesale to Wyoming jurisprudence. I would thus like to defer discussion of Wyoming standing law for a moment while I explore federal standing doctrine and its relationship to state constitutional law.

*Federal Standing Law and the State Judiciary*

The federal law of standing has evolved during this century in the context of public law litigation and most frequently appears in actions challenging the constitutionality of governmental actions.[13] Although the concept of standing is evident in early Supreme Court decisions,[14] Professor Vining notes that the term "standing" did not come into common usage in our legal vocabulary until the 1950's.[15] In *Flast v. Cohen*,[16] a

---

likewise draw no distinction, the ensuing discussion will focus on district court jurisdiction because the district courts are the state's general jurisdiction courts and most constitutional challenges will either arise or be heard on appeal at the district court level.

10. The court noted that the record did not disclose any effort by the prosecutor or Gooden to plea bargain in this case. *Id.* at 409. Moreover, the court cited a string of federal cases for the conclusion that Gooden could not claim a right to plea bargain once she had been charged with a criminal offense. *Id.* The court's treatment of Gooden's asserted plea bargaining right raises the same constitutional interpretation questions as does the standing issue I address here. Although the federal Constitution does not assure a defendant the right to plea bargain, this does mean that a state constitutional right to plea bargain might not be recognized. *See* Petition of Padget, 678 P.2d 870 (Wyo. 1984) (relying upon separation of powers principles to hold unconstitutional a state statute authorizing a district judge to order a prosecutor to initiate criminal proceedings). *Cf.* Williams v. State, 430 N.E. 2d 759, 763 (Ind. 1982) ("Prosecutors are traditionally given a wide discretionary power to select the persons who are to be prosecuted . . . and to plea bargain with them.").

11. *Gooden*, 711 P.2d at 408-09. The cases cited included Stagner v. Wyoming State Tax Comm'n, 682 P.2d 326 (Wyo. 1984), *appeal dismissed*, 105 S.Ct. 237 (1984); Armijo v. State, 678 P.2d 864 (Wyo. 1984); Cremer v. State Bd. of Control, 675 P.2d 250 (Wyo. 1984); Alberts v. State, 642 P.2d 447 (Wyo. 1982); Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980).

12. *Gooden*, 711 P.2d at 409. The Supreme Court decisions included Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978); Warth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972).

13. C. WRIGHT, LAW OF FEDERAL COURTS 60 (4th ed. 1983).

14. *See, e.g.*, Commonwealth of Massachusetts v. Mellon, 262 U.S. 447 (1923); Texas v. Interstate Commerce Comm'n, 258 U.S. 158 (1922); Muskrat v. United States, 219 U.S. 346 (1911).

15. J. VINING, LEGAL IDENTITY 55 (1978).

16. 392 U.S. 83 (1968). *See generally* C. WRIGHT, FEDERAL COURTS 62-64 (4th Ed. 1983).

seminal standing decision, the Court undertook a comprehensive examination of the standing doctrine and explained that constitutional standing requirements were designed to insure that a party seeking judicial relief has a sufficient personal stake in the matter to insure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."[17] The Court traced standing doctrine directly to article III's "case or controversy" language and held that this requirement limited the jurisdictional authority of the federal courts.[18] The Court also suggested that the standing doctrine was linked to separation of powers concerns.[19] Thus, what emerges from *Flast* is a constitutional standing doctrine limiting federal court jurisdiction on the basis of the article III "case or controversy" provisions. This perception of the federal courts as courts of limited jurisdictional power comports with the other subject matter jurisdictional limits imposed by article III.[20]

The principle of limited federal judicial review power surfaces repeatedly in the Court's post-*Flast* standing decisions. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,[21] an establishment clause suit barely distinguishable from *Flast*, the Court rejected a claim of federal taxpayer standing and characterized federal judicial review "as a tool of last resort."[22] In *Warth v. Seldin*[23] the Court

17. *Flast*, 392 U.S. at 101. *See also* Baker v. Carr, 369 U.S. 186, 204 (1962).

18. *Flast*, 392 U.S. at 94-95, 98. The Court stated that:

> The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question in this case, the judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art placed upon federal courts by the case-and-controversy doctrine.
>
> . . .
>
> Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability. Standing has been called one of the "most amorphous [concepts] in the entire domain of public law." Some of the complexities peculiar to standing problems result because standing "serves, on occasion, as a shorthand expression for all the various elements of justiciability."

19. *Id.* at 97. Although the Court in *Flast* specifically disavows a direct connection between the separation of powers doctrine and the standing doctrine, *id.* at 100-01, neither *Flast* nor subsequent standing decisions succeed in disentangling entirely the two constitutional concepts. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 473-74 (1982).

20. *See* U.S. CONST. art. III, § 2 (limiting federal court jurisdiction to federal question cases, controversies between citizens from different states, cases in which the federal government is a party, etc.).

21. 454 U.S. 464 (1982).

22. *Id.* at 474.

23. 422 U.S. 490 (1975).

read prudential considerations into federal standing doctrine by noting that the federal courts are not always the appropriate institution to resolve public policy issues.[24] Similarly, the Court has placed limitations on federal judicial review of state governmental actions by invoking the standing doctrine and cloaking it in federalism concerns. For example, in *Los Angeles v. Lyons*[25] the Court ruled that a citizen who had been subjected to a police chokehold lacked standing to seek injunctive relief against the city's chokehold policy. The Court observed that the "principles of equity, comity and federalism" should restrain federal courts from assuming a supervisory role over local law enforcement authorities.[26] The dominant theme in these standing decisions—as well as related decisions examining the scope of federal judicial power—is that constitutional separation of powers principles, as well as federalism principles, limit the role of the federal courts.[27] In the Court's view, the federal courts were never intended to usurp legislative prerogatives and become a policymaking institution through the guise of constitutional interpretation.

The Court's narrow construction of standing principles can be explained on several different levels. At one level, the standing doctrine can be simply traced to the case or controversy requirements and understood as a constitutional mandate inferred from the explicit language of the Constitution itself.[28] At another level, standing can be seen as a reflection of the Court's perception of the proper role of the federal judiciary in our governmental structure. Federal judicial review authority has distinctly anti-democratic overtones since a single federal district court judge has the power to declare congressional and state laws supported by a majority of the polity unconstitutional.[29] Through devices such as the standing doctrine, the Court can curb perceived judicial excesses and effectively

---

24. *Id.* at 517-18. In *Warth* the Court described this prudential dimension of standing as reflecting a concern for "judicial self goverance." *Id.* The Court stated that the federal courts should not decide "generalized grievances" involving matters of "wide public significance" better addressed by other governmental institutions, particularly where individual rights were not at stake. *Id. See also* Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 222 (1974).

25. 461 U.S. 95 (1983).

26. *Id.* at 94, 98.

27. *See also* Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984) (the eleventh amendment bars state claims brought in federal court against state officials); Younger v. Harris, 401 U.S. 37, 43-44 (1971) (equity, comity, and federalism principles preclude federal courts from enjoining pending state prosecutions); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 463, 473-74 (1982).

28. Given the broader interpretation of standing evident in *Flast*, as well as some of the Court's post-*Flast* decisions granting standing in marginal cases, it is difficult to accept completely this literal interpretation theory. *See* Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978); United States v. SCRAP, 412 U.S. 669 (1973). One explanation is that in these cases the Court interpreted the standing doctrine more liberally in order to arrive at the merits and to sustain the challenged governmental policy.

29. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 473-74 (1982). *See also* P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 206 (1970); R. FUNSTON, CONSTITUTIONAL COUNTERREVOLUTION? 305, 323-24 (1979). The federal judiciary is appointed for life and "hold their Offices during good Behavior." U.S. CONST. art. III, § 1.

restrain federal judges from reviewing federal and state policies.[30] On still another level, by limiting federal court access to those cases when plaintiffs have truly been injured, the Court can be perceived as preserving limited judicial "capital"—the moral sanction of its constitutional judgment—for those cases in which judicial intervention is most clearly appropriate.[31] By not reaching out to decide constitutional issues more properly resolved by a coordinate branch or the states, the federal courts do not appear as an unwelcome intruder when they do intercede; and their judgment may have a firmer claim to legitimacy.

For our purposes, two important questions must be answered in deciding whether federal standing doctrine can or should be transposed to Wyoming constitutional law. First, does the Wyoming Constitution contain a "case or controversy" requirement limiting the jurisdiction of the state's courts in the same manner as article III limits the power of the federal courts? Second, if a tenable argument can be advanced that the state constitution places some limits on the jurisdiction of the state's courts, are there sufficient institutional similarities between the state and federal judicial systems to justify a narrow construction of the standing doctrine? In my view, it is difficult—but not impossible—to read the judicial article in the Wyoming Constitution as imposing a "case or controversy" requirement; and it is even more difficult to equate the state judicial system with the federal system institutionally.

Article 5 of the Wyoming Constitution sets forth the judicial power of the state courts. In contrast to the federal Constitution, the Wyoming Constitution separately provides for and defines the power of the state supreme court and the district courts.[32] The critical provision governing the jurisdiction of the state's district courts is section 10, which provides that "the district court shall have original jurisdiction of all causes both at law and equity and in all criminal cases. . . ."[33] Rather than speaking in terms of certain enumerated "cases or controversies," the Wyoming Constitution employs the term "causes," and it provides for jurisdiction in "*all* causes." Moreover, the state's district courts are properly regarded as courts of general jurisdiction. They are not limited in their subject matter jurisdiction as are the federal courts.

The Wyoming Supreme Court has never defined the term "all causes;" nor has it cited the judicial article when imposing a state standing require-

30. *See* Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 10 (1982).

31. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 263-75 (1980); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 51 (1978); Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 305 (1979).

32. *See* WYO. CONST., art. 5, §§ 2-3, 10. I do not address sections 2 and 3 here because they define the supreme court's jurisdiction. Since the court's standing decisions have consistently turned on the lack of standing at the district court level, section 10 is the relevant constitutional provison. Moreover, the court's appellate jurisdiction is defined in terms virtually identical to the district court's jurisdiction: appellate jurisdiction extends to "both civil and criminal causes." *Id.* § 2.

33. *Id.* § 10.

ment. In the absence of judicial construction of the "all causes" concept, we can only speculate how the court might interpret the phrase. We can do this by examining the constitutional language itself, the history surrounding adoption of the provision and related precedent. As noted above, the language of the state judicial article—"all causes in law and equity"—is more expansive in providing for jurisdiction than its federal counterpart. According to Black's Law Dictionary, the term "cause" has been interpreted more broadly than the term "case," although occasionally the two terms have been equated.[34] Whereas the term "cause" may have been derived from the technical pleading concept of a "cause of action," we no longer rely upon the cause of action concept in defining legal actions under modern pleading rules.[35] History is not particularly helpful either. The *Journal and Debates of the Wyoming Constitutional Convention* sheds no light on what the framers of the state constitution intended when they defined the district court's jurisdiction as they did in article 5.[36] Judicial precedent, however, reveals that the Wyoming Supreme Court has assumed jurisdiction over cases that would not meet federal justiciability standards.[37] This suggests that the court does not view the judicial article as restraining the jurisdiction of the state courts as narrowly as article III restrains federal court jurisdiction. Thus, although the term "cause" might be equated with the term "case," a strong argument can be advanced that the article 5 jurisdiction of the state courts should be defined more broadly than is the article III jurisdiction of the federal courts.

There are also institutional differences between the federal courts and the Wyoming courts that justify recognizing a more expansive judicial role for the state courts than is appropriate for the federal courts. Federal court judges are appointed for life and they are protected against any diminution in salary.[38] The federal judiciary is therefore insulated from political pressures. This has raised questions concerning the legitimacy of the federal judicial review process.[39] In contrast, although Wyoming judges are originally appointed, they must face the electorate at regular intervals in judicial retention elections.[40] Thus, the Wyoming judiciary

34. *See* BLACK'S LAW DICTIONARY 279 (4th ed. 1968).

35. *See* WYO. R. CIV. P. 8(e), (f). *See generally* C. WRIGHT, FEDERAL COURTS 425-48 (4th ed. 1983).

36. *See* JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING 327-339, 478-95, 514-33 (1893). Since much of the Wyoming Constitution was borrowed from other states, it might make sense to explore the historical records and judicial precedent from these states to give the term meaning. *See infra* note 85, for a list of the states whose constitutions were frequently cited during the Wyoming debates.

37. *Compare* Eastwood v. Wyoming Highway Dept., 76 Wyo. 247, 252, 301 P.2d 818, 819 (1956) (mootness is avoided if the case presents a matter of sufficient public importance) and Spriggs v. Clark, 14 P.2d 667, 668 (Wyo. 1932) (according taxpayer standing in a constitutional challenge) *with* Defunis v. Odegaard, 416 U.S. 312, 316 (1974) (federal mootness doctrine does not recognize a great public importance exception) and Frothingham v. Mellon, 262 U.S. 447 (1923) (denying taxpayer standing). *See infra* text accompanying notes 46-53.

38. U.S. CONST., art. III, § 1.

39. *See supra* text accompanying notes 29-31.

40. WYO. CONST., art. 5, § 4.

is not as politically unaccountable as are their federal counterparts. It is easier, therefore, to rebut the illegitimacy argument.[41]

Because the federal courts are limited jurisdictionally, they have no general law-making power.[42] The same cannot be said for the Wyoming courts. As courts of general jurisdiction, the state's courts have traditionally elaborated the state's common law and participated in a partnership of sorts with the state legislature in shaping the state's law.[43] Active judicial review of constitutional claims is therefore not a significant expansion of the court's general judicial function. Moreover, just as the legislature can reverse the court's common law rulings by legislation, it can also reverse the court's constitutional rulings by amendment. Since the state constitution can be amended without resort to the same supermajority requirements that govern amendment of the federal Constitution, the court's constitutional rulings are not effectively insulated from political review.[44]

This mutually reinforcing relationship between the state's judiciary and the legislature should reduce separation of powers concerns as a basis of objection to court's constitutional review function. Moreover, because state court jurisdiction is constitutionally defined, the legislature cannot control jurisdiction to the same extent that Congress controls federal court jurisdiction. This further erodes the separation of powers objection.[45] Additionally, the fact that the state judiciary and legislature are both answerable to the same sovereign should obviate any federalism-derived objection to state judicial activism—a concern that has recently influenced federal standing doctrine.[46] These institutional differences between the federal and state courts suggest that active judicial review of public law issues at the state level is not as troublesome theoretically as it is at the federal level.

*State Standing Doctrine*

Recognizing the important role that judicial review plays in resolving significant public issues, the Wyoming Supreme Court has demon-

41. *See generally Developments in the Law, supra* note 5, at 1351-53; *Project Report: Toward An Activist Role for State Bill of Rights,* 8 HARV. C.R.-C.L. L. REV. 271, 293-96 (1973) [hereinafter cited as *Project Report: Toward an Activist Role*]. Since the Wyoming Constitution mandates the district courts and provides for their jurisdiction, the state's trial court system is insulated to some degree from legislative retaliation, whereas the lower federal courts are created by Congress and are limited jurisdictionally by statute. U.S. CONST. art. III, § 1; Sheldon v. Sill, 49 U.S. (8 How.) 441, 448 (1850).

42. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

43. *See* Spera v. State of Wyoming, No. 85-160, slip op. at 2 (Wyo. Feb. 5, 1986) (Thomas, J., dissenting). *See generally Developments in the Law, supra* note 5, at 1351-53; *Project Report: Toward an Activist Role, supra* note 41, at 308.

44. *Compare* U.S. CONST. art. V *with* WYO. CONST. art. 20, §§ 1-4.

45. *See supra* note 41. *But c.f.* Gallivan, *Supreme Court Jurisdiction and the Wyoming Constitution: Justice v. Judicial Restraint,* 20 LAND & WATER L. REV. 159, 164-65 (1985) (arguing that the legislature can constitutionally control the Supreme Court's appellate jurisdiction).

46. *See supra* text accompanying notes 25-27. *See also* O'Shea v. Littleton, 414 U.S. 488, 499 (1974); Rizzo v. Goode, 423 U.S. 362, 380 (1976).

strated a willingness to deviate from federal justiciability doctrines.[47] In *Eastwood v. Wyoming Highway Department*[48] the court ruled that even though a case might be moot, it will decide the matter if it is of sufficient public importance. This ruling stands in direct contrast to federal mootness doctrine which does not recognize an "issue of great public importance" exception to article III case or controversy requirements.[49] Similarly, the Wyoming Supreme Court has stated that "standing should not be construed narrowly or restrictively."[50] This certainly represents a departure from the Supreme Court's modern interpretation of standing requirements where the doctrine has often been imposed to deny standing to virtually every conceivable plaintiff.[51] The Wyoming Supreme Court has likewise broadly construed the Uniform Declaratory Judgments Act and sanctioned actions under it that raised questions of great public importance.[52] Moreover, the court has not accepted any of the several invitations it has received in recent politically sensitive cases to read a political question doctrine into the state constitution.[53] Evidence therefore exists that the court does not subscribe fully to federal justiciability doctrines.

Over the past decade the Wyoming Supreme Court has nevertheless constructed a state standing doctrine that looks disturbingly like the federal standing doctrine and can be narrowly applied, as it was in *Gooden*, to circumscribe access to the courts. As already noted, the court has relied increasingly upon federal precedent despite significant constitutional and institutional differences between the two systems. This has not, however, always been the case. The older state precedent cited by the court in its recent standing decisions does not reflect the same attachment to con-

---

47. *See supra* note 18 for a description of the federal justiciability concept. *See also* Anderson v. Wyoming Dev. Co., 60 Wyo. 417, 465-66, 154 P.2d 318, 336 (1944); Holly Sugar Corp. v. Fritzler, 42 Wyo. 446, 463, 296 P. 206, 210 (1931).

48. 76 Wyo. 247, 301 P.2d 818 (1956).

49. DeFunis v. Odegaard, 416 U.S. 312, 316 (1974).

50. Washakie County School District No. 1 v. Herschler, 606 P.2d 310, 317 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980). In *Washakie County* the court approvingly quoted the following statement:

> In recent years there has been a marked accommodation of formerly strict procedural requirements of standing to sue and even of capacity to sue where matters relating to the "social and economic realities of the present-day organization of society" are concerned. Accordingly, we have seen a retreat from . . . formalism and rigidity. . . .

*Id.* at 317 (quoting Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal. App. 3d 117, 109 Cal. Rptr. 724, 727 (1973)) (citations omitted). *Cf.* Spriggs v. Clark, 14 P.2d 667 (1932) (recognizing taxpayer standing in the face of contradictory federal precedent).

51. *See* Warth v. Seldin, 422 U.S. 490, 520-21 (Brennan, J., dissenting). *See also* Linda R.S. v. Richard D., 410 U.S. 614, 617-18; Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 40-46 (1976).

52. WYO. STAT. § 1-37-101 to -115 (1977). *See* Brimmer v. Thomson, 521 P.2d 574, 578 (1974); Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310, 318 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980).

53. *See* Brimmer v. Thomson, 521 P.2d 574, 578(Wyo. 1974) (resolving a dispute involving the Attorney General, the Secretary of State and several state senators who wished to run for Governor); Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310, 318 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980) (overturning state property tax school financing scheme). *See generally* Baker v. Carr, 369 U.S. 186, 210 (1962).

temporaneous federal standing developments.[54] This state precedent can be roughly divided into two lines of cases. One line reflects developments under the Uniform Declaratory Judgments Act (and is arguably not relevant to constitutional standing questions), and the other reflects the court's longstanding aversion to advisory opinions. It is far from clear that either of these precedents translates into the standing doctrine that has emerged.

Standing under the Uniform Declaratory Judgments Act should probably be treated differently than it is under article 5 of the state constitution. The Uniform Declaratory Judgments Act represents a legislative determination that the state's courts should be open to "declare rights, status and other legal relations whether or not further relief is or could be claimed."[55] The legislature also provided that the Act "is to be liberally construed and administered."[56] In applying these provisions, the court has held that parties seeking relief under the Act must present a justiciable controversy in an adverserial posture; however, the court also has read an "issue of great public importance" exception into these justiciability requirements.[57] Since the Act represents a legislative determination that the doors of the state's courts should be opened widely to hear such actions, standing questions under the Act should not present separation of powers problems. The legislature has authorized judicial review; hence, the courts should not hesitate to exercise their power out of fear that they will be perceived as intruding into the legislature's domain.[58] Thus, the court is justified in liberally according standing under the Act as it has in cases such as *Brimmer v. Thompson*[59] and *Washakie County School District No. 1 v. Herschler.*[60] But this precedent then is less helpful in defining standing under article 5 because, in the absence of legislative direction, the court should perhaps address separation of powers concerns in determining whether judicial intervention is appropriate.

The Uniform Declaratory Judgments Act standing cases are nevertheless useful in understanding state constitutional standing principles.

54. *E.g., compare* Stagner v. Wyoming State Tax Comm'n, 682 P.2d 326 (Wyo. 1984), *appeal dismissed,* 105 S.Ct. 237 (1984) (citing Warth v. Seldin, 422 U.S. 490 (1975); United States v. Raines, 362 U.S. 17 (1960)) and Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980), *cert. denied,* 449 U.S. 824 (1980) (citing Sierra Club v. Morton, 405 U.S. 727 (1972); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)) *with* Brimmer v. Thomson, 521 P.2d 574 (Wyo. 1974) (citing no federal precedent to support the justiciability decision) and Walgreen Co. v. State Bd. of Equalization, 70 Wyo. 193, 246 P.2d 767 (1952) (citing no federal precedent).

55. WYO. STAT. § 1-37-102 (1977). *See generally* C. WRIGHT, FEDERAL COURTS 670-77 (4th ed. 1983); Comment, *Wyoming's Uniform Declaratory Judgments Act: Statutory and Case Law Analysis,* 16 LAND & WATER L. REV. 243 (1981).

56. WYO. STAT. § 1-37-114 (1977).

57. Brimmer v. Thomson, 521 P.2d 574, 478 (Wyo. 1974).

58. On the other hand, the court is surely prudent in suggesting that not just anyone with a theoretical dispute may bring it into court for resolution under the Act. But this is a prudence that reflects the court's concern over judicial resources and its perception of the proper judicial role; it is not a prudence attributable to the legislature. *See* Crescent Park Tenants Ass'n. v. Realty Equities Corp., 58 N.J. 98, 107, 275 A.2d 433, 437 (1971) and note 24, *supra* and accompanying text.

59. 521 P.2d 574 (Wyo. 1974).

60. 606 P.2d 310 (Wyo. 1980), *cert. denied,* 449 U.S. 824 (1980).

Because so many public law constitutional challenges invoke jurisdiction under the Act,[61] the court's interpretation of the Act is crucial in defining access to the courts in these cases. Constitutional standing is not directly in issue because the plaintiff's standing is determined according to the court's interpretation of the Act. Constitutional standing is, however, an underlying issue and would become a central issue if it were asserted that standing under the Act conflicted with article 5.[62] We already have an indication of the court's views on this question since it has recognized the "matter of great public importance" exception.[63] Surely, if article 5 rigorously limited standing in the same manner that it is restricted under federal constitutional commands, the court would not (and could not) carve out such an exception.[64] Thus, although the Uniform Declartory Judgments Act cases do not directly address the constitutional standing question, they do shed considerable light on how the court is likely to interpret that provision should the occasion arise. The cases point toward a liberal construction of the state constitutional standing provisions.

A second distinct and long-standing line of state cases reflect the principle that a party whose rights are not affected by a law cannot challenge the constitutionality of that law.[65] In *Gooden*, as well as other recent standing cases,[66] the court has invoked this principle in support of its conclusion that standing should not be granted. Although the "affected party" principle was not originally framed as part of standing doctrine,[67] the principle has understandably been transposed into standing jurisprudence

---

61. *See, e.g.,* Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980), *cert. denied,* 449 U.S. 824 (1980); Brimmer v. Thomson, 521 P.2d 574 (Wyo. 1974); Stagner v. Wyoming State Tax Comm'n, 682 P.2d 326 (Wyo. 1984), *appeal dismissed,* 105 S.Ct. 237 (1984). In all of these cases the plaintiffs sought to challenge the constitutionality of an executive or legislative policy and relied upon the Uniform Declaratory Judgments Act as the basis for securing a declaration that the challenged policy was unconstitutional.

62. In other words, the court cannot grant standing under the Uniform Declaratory Judgments Act if such standing violates the constitution; that is, the constitutional prohibition would prevail in this case.

63. Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310, 318 (Wyo. 1980), *cert. denied,* 449 U.S. 824 (1980); Brimmer v. Thomson, 521 P.2d 574, 578 (Wyo. 1974). *See supra* text accompanying notes 45-51.

64. Federal precedent holds that standing is not to be afforded under article III merely because the plaintiff raises an issue of public importance. *See* Warth v. Seldin, 422 U.S. 490, 500 (1975).

65. *See, e.g.,* Alberts v. State, 642 P.2d. 447, 452 (Wyo. 1982) and cases cited therein; Walgreen Co. v. State Bd. of Equalization, 246 P.2d 767, 769-70 (Wyo. 1952) and cases cited therein.

66. Stagner v. Wyoming State Tax Comm'n, 682 P.2d 326 (Wyo. 1984), *appeal dismissed,* 105 S.Ct. 237 (1984); Armijo v. State, 678 P.2d 864 (Wyo. 1984); Alberts v. State, 642 P.2d 447 (Wyo. 1982).

67. None of the early cases stating the "affected party" rule explicitly articulate a rationale based on principles of standing or other concepts of justiciability. Moreover, the court did not tie any of these decisions to the Wyoming Constitution. *See, e.g.,* Walgreen Co. v. State Bd. of Equalization, 70 Wyo. 193, 202, 246 P.2d 767, 770 (1952); *In re* Edelman's Estate, 68 Wyo. 30, 49, 228 P.2d 408, 415 (1951); Cuthbertson v. Union Pacific Coal Co., 50 Wyo. 441, 454, 62 P.2d 311, 315 (1936). In *Walgreen,* for example, the court cited CORPUS JURIS SECUNDUM and AMERICAN JURISPRUDENCE in support of the rule. 70 Wyo. at 202, 246 P.2d at 770. An examination of later editions of these authorities shows that their conclusions are based primarily on federal case law. *See* 59 AM. JUR. 2D *Parties* § 27 (1971); 16 AM. JUR. 2D *Constitutional Law* § 65 (1984).

since it focuses on the party's relationship to the matter in controversy—which is precisely what standing concerns itself with. As originally formulated the "affected party" principle can probably be best understood as reflecting judicial concern with avoiding premature resolution of constitutional issues.[68] To avoid issuing advisory opinions, the courts required that they be presented with a real dispute involving adversely affected parties. Thus, the "affected party" principle is consistent with principles of judicial restraint that have long guided courts in reviewing constitutional matters.

I have no quarrel with transposing the "affected party" principle into the state's standing law. The court should, however, be prepared to link this principle to some provision in the state constitution. As a matter of state constitutional law, as well as judicial prudence, it makes sense that the court might restrain itself from reviewing the constitutionality of legislative and executive actions at the behest of a citizen who simply asserts that he believes the actions are unconstitutional. This does not mean, however, that the court should encumber this basic "affected party" principle with the three part injury-in-fact test that the federal courts apply under federal standing doctrine.[69] The federal test is too easily manipulated, and it is thus inherently unworkable.[70]

---

68. *See* United States v. Raines, 362 U.S. 17, 21 (1960), in which the United States Supreme Court held that a federal court lacks jurisdiction to consider whether a statute is unconstitutional except:

> "as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. . . .

*Id.* at 21 (1960) *quoted in,* Stagner v. Wyoming State Tax Comm'n, 682 P.2d 326, 330 (Wyo. 1984), *appeal dismissed,* 105 S.Ct. 237 (1984) (citation omitted). *See also* Budd v. Bishop, 543 P.2d 368, 371 (Wyo. 1975).

69. *Compare* Gooden v. State, 711 P.2d 405 (Wyo. 1985) *with* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1979). The Court has stated a three part test to determine whether a plaintiff has standing: The plaintiff must show actual or threatened personal injury resulting from the defendant's conduct; the injury must be traceable to the challenged action; and the injury must be redressable by the court. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72, 80-81 (1979). In *Gooden,* the Wyoming Supreme Court seemingly incorporates this test into its standing doctrine by stating that "there must be a distinct and palpable injury which secondly is traceable to the challenged statute. The requirement is that the claimed injury must be redressable by a court decision." *Gooden,* 711 P.2d at 409. *But c.f.* Brennan, *supra* note 5, at 501 (1977) ("And of course state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts.").

70. *See* Duke Power Co. v. Carolina Envt'l. Study Group, 438 U.S. 59 (1979). In *Duke Power,* plaintiffs challenged the constitutionality of 42 U.S.C. § 2210(b) (1982), which limits liability in the event of a nuclear power accident. The Court found the requisite standing because asserted injuries "based on the possibility of a nuclear accident and the present apprehension generated by this future uncertainty, are sufficiently concrete to satisfy constitutional requirements." *Duke Power,* 438 U.S. at 73. The Court acknowledged the difficulty in connecting these potential injuries to the challenged action, since the plaintiffs were challenging the limitation on liability not the actual construction of the power plants. The

If the court is going to incorporate federal standing doctrine into the state "affected party" principle, it should be prepared to recognize exceptions to the principle as the federal courts do. The "affected party" doctrine really reflects basic third party standing principles.[71] Under federal law, there are occasions when an uninjured third party is granted standing to litigate constitutional claims notwithstanding the article III case or controversy requirements.[72] Given this fact, it is difficult—if not impossible—to read the Wyoming Constitution as absolutely denying third party standing when the court has otherwise interpreted article 5 more broadly than the federal courts interpret article III. Indeed, there is evidence from the Wyoming Supreme Court that it is prepared to recognize exceptions to the "affected party" principle in order to reach important constitutional issues.[73]

As a final matter, let us reexamine *Gooden* in light of the foregoing discussion. As I have explained, federal standing precedent is not useful in defining state standing doctrine because it is based on several concerns that are not relevant to the state judicial system. Similarly, since *Gooden* did not arise under the Uniform Declaratory Judgments Act, the standing cases decided under the Act—notably *Washakie County* and *Stagner v. Wyoming State Tax Commission*[74]—are also not relevant precedent for the court's ruling. This leaves us with the state standing cases based upon the "affected party" principle. As discussed, the "affected party" principle cannot be understood as an absolute standing barrier because the court has recognized the "matter of great public importance" exception.[75] It is therefore plausible to argue that Gooden should be granted standing to raise the separation of powers question because it represents a "mat-

necessary link was found in the fact that, but for the Act's protection, the plants would not have been built. *Id.* at 74-75. *See* Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273 (1980) (suggesting that the Court manipulated the standing test to reach the merits of the case). Burdening Wyoming law with such a transparent doctrine makes little sense. It would be preferable to fashion an acceptable and straightforward definition of an "affected person" and rely upon this to define state standing requirements.

71. *See* Walgreen Co. v. State Bd. of Equalization, 70 Wyo. 193, 202, 246 P.2d 767, 770 (1952); Singleton v. Wulff, 428 U.S. 106, 113-14 (1976).

72. The federal courts recognize several exceptions to the "affected party" rule. *See* Kunz v. New York, 340 U.S. 290 (1951) (first amendment overbreadth exception); Barrows v. Jackson, 346 U.S. 249, 257 (1953) (difficult for affected party to appear in court); Singleton v. Wulff, 428 U.S. 106, 116 (1976) (plurality opinion) (special relationship between the litigant and the person whose rights he seeks to assert). *See also* Rohr, *Fighting for the Rights of Others: The Troubled Law of Third Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393, 405 (1981).

73. *See, e.g.*, Armijo v. State, 678 P.2d 864, 868 (Wyo. 1984) ("With respect to standing . . . the rule is that, with the exception of challenges to statutes that broadly prohibit speech protected by the First Amendment, a party must demonstrate the matter in which his own rights are adversely affected. . . ."). *Cf.* United Pacific Insurance Co. v. Wyoming Excise Tax Div., No. 85-15, slip op. at 18 (Wyo. Jan. 24, 1986) (wherein the court recognized a "fundamental matter" exception to its rule that constitutional claims will not be considered on appeal unless raised below).

74. 678 P.2d 864 (Wyo. 1984). Cremer v. State Bd. of Control, 675 P.2d 250, 254-56 (Wyo. 1984) also is irrelevant because it was a standing decision based on an interpretation of Wyoming's water rights abandonment statute, WYO. STAT. § 41-3-401(b) (1977).

75. *See* Brimmer v. Thomson, 521 P.2d 574, 578 (Wyo. 1974) (standing); Eastwood v. Wyoming Highway Dep't., 76 Wyo. 247, 252, 301 P.2d 818, 819 (1956) (mootness).

ter of great public importance." Alternatively, one might argue that Gooden was an "affected party" by virtue of her conviction because, absent the mandatory prosecution provision, she *may* have escaped prosecution and conviction. Although Gooden may not meet the three pronged federal standing test, this does not mean that she is "unaffected" as that term might be interpreted under Wyoming law.[76] On the other hand, it is plausible to argue that the Wyoming Constitution requires a clearer showing of injury than Gooden demonstrated in the absence of any hint that the prosecutor was predisposed to plea bargain her case.[77] Thus, while I cannot ultimately conclude that the court reached the wrong result in *Gooden*, I am concerned that its reasoning does not do justice to the question of standing under Wyoming constitutional law.

Let me elaborate a bit further. My point has not been that either the concept of standing or the principle of judicial restraint are wrong and should not be reflected in Wyoming law. I am rather concerned that as these doctrines are developing they are not clearly related to the Wyoming Constitution; instead they are more closely related to federal constitutional doctrine. It is perhaps not surprising that the Wyoming Supreme Court, accustomed as it is to exercising common law powers, does not see fit to anchor its standing doctrine in the state constitution. But, if the court is going to rely upon general jurisprudential principles as the basis for such a doctrine, then it should recognize and acknowledge what it is doing. In the absence of constitutional or statutory underpinnings, the court's approach to standing law constitutes nothing other than naked judicial lawmaking. It is indeed ironic that this is the case when a fundamental premise underlying standing doctrine is judicial restraint. It therefore seems appropriate to broaden our inquiry and to examine the question of how the court might approach the state constitution in giving meaning to its various provisions.

## STATE CONSTITUTIONAL INTERPRETATION

With the increasing popularity of state constitutional arguments, the state supreme courts have provided us with numerous examples of how state constitutions might be approached.[78] The law journals have likewise

76. Gooden's conviction and incarceration have surely "affected" her. The only question then, if federal standing doctrine applies, is whether this effect can be traced to the prosecutor's behavior and, in turn, whether his behavior was influenced by the challenged statute. *Compare* Linda R.S. v. Richard D., 410 U.S. 614, 617-18 (1973) *with* Gooden v. State, 711 P.2d 405 (Wyo.1985). *But see* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1979); *supra* note 70, suggesting the manipulabilty of federal standing doctrine.

77. If this is so, then maybe Gooden's only error was a procedural one. She should have pleaded or established on the record her interest in plea bargaining or an attempt at plea bargaining. *See Gooden*, 711 P.2d 405, 409 (Wyo. 1985).

78. *See, e.g.*, State v. Ringer, 100 Wash. 2d 686, 690, 674 P.2d 1240, 1243 (1983) (state constitution prohibits all warrantless arrests, searches and seizures); Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126-29 (1981) (right to privacy examined under state constitutional provisions).

addressed the subject.[79] Three different models of constitutional interpretation have seemingly emerged from the decisions and commentary. At one extreme is the model of borrowed interpretation.[80] Under this model, the state courts look to decisions from the Supreme Court or other state courts interpreting the same or similar constitutional provisions and incorporate the reasoning and result as their own. At the other extreme is the model of independent interpretation under which the courts independently review their constitutions in giving meaning to any particular provision.[81] The independent interpretation model holds that each state constitution is unique and deserves to be given meaning by reference only to that state's constitutional language, structure and history. In between these two extremes is what has been referred to as the interstitial model which pragmatically combines the other two models to sanction independent interpretation when related precedent is unavailable, unpersuasive or inappropriate.[82]

None of these models is mutually exclusive and in most states we can readily discern evidence of each approach to constitutional interpretation. This is not necessarily bad. There are obvious advantages and disadvantages to each approach, as well as obvious instances when one approach rather than the others makes the most sense. What is important is that the courts, as well as the attorneys appearing before them, understand the choices available under these interpretive models and critically evaluate each option before saddling their state constitutions with a particular construction.

*The Borrowed Interpretation Model*

Until recently, state courts have regularly looked to United States Supreme Court constitutional precedent for assistance in interpreting their own constitutions. This is not surprising because most state constitutions contain provisions that mirror or parallel federal provisions. The state courts can be assured that in interpreting similar provisions the Supreme Court has been thoroughly briefed and has given full consideration to the competing arguments. The Court's decisions are carefully crafted and there is a certain persuasive allure to them. Moreover, the state courts

79. *See, e.g.,* Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result,* 35 S.C.L. REV. 353 (1984); Collins, *Reliance on State Constitutions: Away From a Reactionary Approach,* 9 HASTINGS CONST. L.Q. 1 (1981); *supra* notes 5-6.

80. *See Developments in the Law, supra* note 5, at 1493-96. What I have labelled the "borrowed interpretation" model encompasses what is often referred to in the literature as the "reactive" model, that is, a model that requires state supreme courts to address and "react" to Supreme Court constitutional precedent as they interpret their state's constitution. *See id.* I use the term "borrowed" to describe both this reactive interpretation model, and to expand the model to include other instances in which the state courts rely primarily upon interpretations from federal and state courts other than the Supreme Court.

81. *See* Linde, *supra* note 6, at 178; Collins, *supra* note 79, at 3-5.

82. I have borrowed the term "interstitial model" from Harvard Law Review's excellent and comprehensive piece on state constitutional law. *Developments in the Law, supra,* note 5, at 1356. *See id.* at 1356-66; *infra* text accompanying notes 111-19 (a description of the interstitial model).

are accustomed to operating in the Supreme Court's shadow by virtue of the supremacy clause mandate and the groundbreaking civil rights decisions of the Warren Court which established a plethora of standards to be implemented by the state judiciary.[83]

For several reasons, however, the state courts have wisely begun to reexamine their practice of incorporating federal constitutional doctrine into their own jurisprudence. Despite the similar language that can be found in federal and state constitutional provisions, few state constitutions can be traced directly to the federal Constitution. In fact, the Bill of Rights was modeled after similar provisions found in several of the original states' constitutions.[84] In Wyoming's case, there were only two references to the United States Constitution during the state's constitutional convention debates, whereas there were over one hundred references to other state constitutions during the debates.[85] Thus, state constitutions are as likely to reflect the language of sister state constitutions as they are to reflect federal language. Even then, as the Wyoming Constitution illustrates, the language is likely to be revised or adapted to meet local circumstances facing the framers at the time the constitution was adopted.[86]

The historical circumstances surrounding adoption of the United States Constitution are not remotely similar to the historical circumstances surrounding adoption of many states' constitutions, particularly those like Wyoming that were adopted long after the colonial era had ended.[87] It therefore makes no sense to incorporate an interpretation attributable to the original framers of the federal Constitution into a state's own constitutional jurisprudence. Similarly, in the absence of an indication that a state's constitutional framers looked to Supreme Court precedent in framing a provision, there is no reason to assume that Supreme Court doctrine influenced them during their deliberations.[88]

The Supreme Court's interpretation of the Constitution is influenced by the national impact of its decisions. The Court is charged with the

83. Some of the same observations might be made respecting federal constitutional precedent at the circuit court and district court levels, but these courts do not enjoy the same stature vis-a-vis the state supreme courts and their precedents are not controlling in state courts. Their decisions have therefore not impacted state constitutional law developments as noticeably as the Supreme Court's decisions have.

84. E. BARRETT, JR. & W. COHEN, CONSTITUTIONAL LAW 17 (7th ed. 1985).

85. R. Prien, The Background of the Wyoming Constitution 18 (August 1956) (unpublished thesis). The state constitutions most frequently cited were Colorado (over twenty references), Pennsylvania (seven references), Montana (five references), Illinois (five references), Nebraska (four references), and Nevada (four references).

86. *Id.* at 20. After comparing Wyoming's constitution to five other state constitutions cited at the state constitutional convention, the author concluded that the convention followed established precedent in drafting Wyoming's constitution. *Id.* at 31. Of a total of two hundred seventy nine provisions in the Wyoming Constitution, however, less than half could be traced with certainty to provisions in other state constitutions. *Id.* at 29.

87. The Wyoming Constitution was drafted and adopted in 1889, over one hundred years after the federal Constitution was adopted and twenty-five years after the Civil War. This same observation has even more strength with respect to those states, such as Montana and Georgia, which have recently adopted new constitutions.

88. During the Wyoming Constitutional Convention debates there were only two references to United States Supreme Court decisions. Prien, *supra* note 85, at 19 n.35.

responsibility of defining national standards applicable and workable throughout diverse regions of the country. Thus, the Court's decisions frequently reflect bright-line rules intended to be easily understood and applied by the lower courts at all levels.[89] The decisions are often couched in terms of universal norms in recognition of the diverse contexts in which they will apply. Such generality, however, is rarely appropriate at the state level where local conditions are often more homogeneous and the state supreme courts can more easily review lower court decisions.

The generality of the Supreme Court's decisions leaves considerable room for the state courts to assert themselves in construing their own constitutions. To paraphrase Justice Brandeis' hallowed words, this opportunity for state constitutional experimentation is "one of the happy incidents of the federal system."[90] Since the state courts are free to interpret their state constitutions independently, the courts may grant greater protection to their citizens than is available under the federal Constitution.[91] By assuming an active role in interpreting and protecting constitutional rights, the state courts fulfill one of their originally perceived functions in our federal system: the framers left the primary responsibility for protecting constitutional rights to the state courts.[92] Furthermore, to the extent that the state courts look to their own constitutions to protect individual rights, our citizens reap the benefit of constitutional protection at two levels—another "happy incident" of our federalism.

Similar considerations also counsel prudence when a state supreme court is tempted to incorporate the constitutional doctrine of a sister state into its jurisprudence. Before a state court "borrows" a constitutional decision from another state, it should carefully examine the language and structure of the sister state's constitution in comparison to its own and assess whether the decision is even relevant to the constitutional provision at issue. For example, it probably makes little sense for a state, such as Wyoming, which has a definitive separation of powers provision to bor-

89. *See Developments in the Law, supra* note 5, at 1348-51; *Project Report: Toward an Activist Role, supra* note 41, at 290-93.

90. Justice Brandeis' famous quote endorsing federalism and arguing for restrained Supreme Court review of state laws reads as follows:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

91. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); Cooper v. California, 386 U.S. 58, 62 (1967). Of course, this observation is tempered by the supremacy clause mandate which restrains state courts from interpreting their constitutions in a manner that conflicts with federal law. *Pruneyard Shopping Center*, 447 U.S. at 81.

92. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), wherein the Court held that the Bill of Rights was not applicable against the states. *See also Project Report: Toward an Activist Role, supra* note 41, at 275-79.

row justicability or standing doctrine from a state like Colorado, which constitutionally sanctions advisory opinions—even if the language in the two judiciary articles is similar.[93] State courts should also be sensitive to unique historical traditions that might color another state's judicial interpretation of a similar constitutional provision in that state's charter. Colorado's tradition of advisory judicial opinions cannot be squared with Wyoming's constitutional debates since the Wyoming framer's consistently expressed their desire to establish an independent supreme court.[94] Similarly, the Wyoming courts would probably be well advised not to look to California or Oregon constitutional precedent in construing the state constitution's initiative and referendum provisions. Both of those states have a long populist tradition of lawmaking through the initiative process that is not evident in Wyoming's history.[95]

On the other hand, history can direct a state court to appropriate sister state's constitutional jurisprudence. Most of the later-admitted states, as well as those which have adopted new constitutions, have looked to other state's charters in writing their own.[96] Thus, it is appropriate for state courts to examine the state's constitutional debates to determine the origins of particular provisions. From this it is often reasonable to infer that the adopting state intended to incorporate the model state's provision and probably the interpretation it had received—if any—from that state's courts. Of course, this does not mean that subsequent interpretations of the same provision by the sister state's courts should be read into the provision. These developments would be unforeseeable by the framers and might reflect distinctly different traditions or considerations than those prevailing in the adopting state today. In this limited way then, history can provide a state court with some guidance in determining which state's precedents might prove most helpful in interpreting its own constitution.

Despite the convenience of the borrowing model, the state courts are well-advised to scrutinize federal and sister state constitutional precedent carefully before succumbing to temptation and incorporating it into their state charters. At the federal and state levels we see divergent constitutional traditions, as well as considerable institutional differences between

93. *Compare* WYO. CONST. art. 2 (separation of powers required) and art. 5, § 3 (advisory opinions not authorized) *with* COLO. CONST. art. III (separation of powers) and art. VI § 3 (advisory opinions authorized). *See In re* Speakership of House of Representatives, 15 Colo. 520, 25 P.707 (1890).

94. *See* Peterson, *The Constitutional Convention of Wyoming,* 7 UNIV. WYOMING PUBLICATIONS 101, 115-119 (1940). The Wyoming framers' desire for an independent judiciary was reflected in their consistent references to the need to create a supreme court of independent judges who were adequately compensated.

95. *Compare* WYO. CONST., art. 3, § 52 *with* CALIF. CONST. art. 4, § 1, art. 18, § 1 and ORE. CONST. art. IV, § 1. Wyoming's initiative and referendum provision was added to the state constitution in 1968 and only one case has interpreted the provision since then. *See* Thomson v. Wyoming In-Stream Flow Comm., 651 P.2d 778 (Wyo. 1982). The language of the initiative provision, as well as the history surrounding its adoption, suggest that it was not perceived as a mechanism to be regularly utilized for lawmaking purposes. *See, e.g.,* WYO. CONST. art. 3, § 52(g) (imposing specified limits on the intiative and referendum process).

96. *See supra* note 85 for a list of references to other state constitutions found in the JOURNAL AND DEBATES OF THE WYOMING CONSTITUTIONAL CONVENTION (1893).

the judiciaries, which makes "borrowing" a risky proposition at best. Similarly, despite nationalizing trends evident in all areas of our society, there remain sufficient differences between the states to justify a court's conclusion that precedent from a sister state is unpersuasive in giving meaning to that state's fundamental law.

*The Independent Interpretation Model*

Recent Supreme Court decisions have fostered adoption of an independent jurisprudence at the state court level by minimizing federal intrusion into state judicial matters. The Court has procedurally limited federal court involvement in state litigation,[97] and it has established clear standards to insulate state court decisions from review.[98] At the same time, the Court's substantive retrenchment in the area of individual rights has left a vacuum which the state courts have increasingly stepped into by construing their state constitutions to provide rights not available at the national level.[99] Consequently, there are now numerous examples of state courts crafting their own constitutional jurisprudence.[100]

The obvious question is how a state court that is intent upon interpreting its constitution independently should proceed. At one level this is a relatively easy question: the court can rely upon the traditional tools of constitutional interpretation and apply them in the unique circumstances presented by the state's constitutional history. Language, history, tradition and constitutional structure can usually provide the court with the direction necessary to construe the state's constitution.[101] However, as numerous commentators have noted, open-ended constitutional provisions are not always easily defined, even with reference to these traditional interpretive devices.[102] Further, if we accept the proposition that constitutional interpretation is inevitably an evolutionary undertak-

97. *See, e.g.,* Younger v. Harris, 401 U.S. 37, 43-44 (1971) (equity, comity and federalism restrain federal courts from enjoining pending state criminal proceedings); Pennhurst State School and Hospital v. Haldermen, 465 U.S. 89, 99 (1984) (eleventh amendment prohibits federal court from hearing state claims when the state is the real party in interest).

98. Michigan v. Long, 463 U.S. 1032 (1983). *See supra* note 4.

99. *See* Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism,"* 8 U. PUGET SOUND L. REV. i, x-xi (1985).

100. *See, e.g.,* Pool v. Superior Court, 139 Ariz. 98, 108, 667 P.2d 261, 271 (1984) (applying double jeopardy provision in state constitution and stating that state courts "should not follow federal precedent blindly"); Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 45-47, 653 P.2d 970, 977-78 (1982) (gender classifications inherently suspect under state constitution); People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), *cert. denied sub nom.,* California v. Anderson, 406 U.S. 958 (1972) (invalidating capital punishment on state constitutional grounds); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (strict scrutiny applied in gender discrimination cases).

101. *See* Linde, *supra* note 6, at 181-89.

102. The most frequently cited recent works addressing the problem of interpreting open-ended constitutional provisions are those of Dean John Ely and Professor Michael Perry. *See* J. ELY, DEMOCRACY AND DISTRUST (1980); M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS (1982). *See also* P. BOBBIT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982); *Symposium: Judicial Review Versus Democracy,* 42 OHIO ST. L.J. 1 (1981); *Symposium: Constitutional Adjudication and Democratic Theory,* 56 N.Y.U.L. REV. 259 (1981).

ing,[103] the task becomes more difficult as society grows more complex and technological changes proceed at a rapid pace. Not only does this present the courts with the question of how to approach open-ended constitutional language, but it raises profound questions respecting the proper institutional role for the judiciary in a democratic governmental scheme predicated on a system of checks and balances. Today this dilemma is being examined in terms of whether interpretive or noninterpretive judicial review can be squared with our constitutional heritage.[104]

Space does not permit me to enter the interpretive-noninterpretive judicial review thicket here, but it is nevertheless important to note a couple points. The interpretivism debate is currently being played out against the backdrop of the Supreme Court's recent substantive due process decisions in the areas of contraception and abortion rights.[105] The Court's substantive due process jurisprudence raises questions respecting whether societal tradition and custom, as perceived by the courts, can or should be identified and transposed into an open-ended constitutional provision such as the due process clause.[106] The Court's decisions also raise the question of whether the Justices are actually injecting their own values into the Constitution in the guise of identifying fundamental societal values.[107] For our purposes the important issue respecting independent state constitutional interpretation is the role, if any, that either societal or judicial values should play in giving meaning to open-ended provisions which are not otherwise easily understood using the traditional tools of constitutional interpretation.

In several respects, however, this may not be as difficult a question for state constitutionalism as it is in the federal system. Major arguments against value-laden federal judicial review are the political unaccountability of the federal judiciary and the difficulty of reversing its rulings through the constitutional amendment process. In contrast, the state judiciary in most states is politically accountable through an election process and state constitutions can usually be amended without the same

103. *See* McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 324 (1819) ("This provision [the necessary and proper clause] is made in a constitution intended to endure for ages to come and consequently to be adapted to the various crises of human affairs"). *See also* Grey, *Do We Have an Unwritten Constitution*, 27 STAN. L. REV. 703, 709 (1975).

104. *See* J. ELY, *supra* note 102, at 4-5; M. PERRY, *supra* note 102, at 2-3. The terms "interpretivism" and "noninterpretivism" describe the degree to which a court is constrained to stay within the traditional bounds of constitutional interpretation and base its decisions on "an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution." J. ELY, *supra* note 102, at 2. To the extent that a court departs from such a "starting point," it is engaging in noninterpretive review, a practice which is regarded as illegitimate. M. PERRY, *supra* note 102, at 2-3.

105. Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

106. *See* Griswold v. Connecticut, 381 U.S. 513, 520 (1965) (Black, J., dissenting) (due process clause does not empower Court to invalidate legislation offending the Court's conceptions of "civilized standards of conduct" and the "collective conscience of our people"); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (limits on substantive due process come not from drawing arbitrary lines but from careful respect for the teachings of history and recognition of society's basic values).

107. J. ELY, *supra* note 102, at 44-48; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10 (1971).

supermajority requirements of the federal Constitution.[108] Because the state supreme courts are relatively close to the state citizenry, it might also be inferred that they are better able to articulate societal values than the Supreme Court which must consider the entire cultural spectrum of our pluralist society.[109] Moreover, the tradition of judicial lawmaking under the state courts' common law powers is rather firmly established.[110] Thus, noninterpretivist constitutional construction at the state court level does not pose nearly as troubling legitimacy questions as it does at the federal level.

*The Interstitial Model*

The interstitial model can be viewed as an accommodation of the other two models—one which calls upon state courts to look to federal constitutional doctrine in some cases, while they develop their own jurisprudence in others. Under the interstitial model, state courts look to Supreme Court doctrine whenever the court is called upon to interpret a state constitutional provision for which there is a federal counterpart.[111] According to the model, the state court is free to reject the federal doctrine, but the court should explain why it has chosen to diverge from the doctrine.[112] This means that the state court must react to federal doctrine before investigating its own constitutional heritage.[113] On the other hand, whenever the state constitutional issue involves a provision that is not replicated in the United States Constitution, the model provides that the state courts

---

108. *See supra* text accompanying notes 38-41.

109. This observation must be tempered with recognition of the fact that state supreme courts do not have a perfect record in forecasting a state's current morality, as recent events in Massachusetts and California illustrate. The highest courts of Massachusetts and California declared that the death penalty violated their state constitutional bans against cruel and unusual punishment. *See* District Att'y. for Suffolk Dist. v. Watson, 381 Mass. 648, 664-65, 411 N.E.2d 1274, 1283 (1980); People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied sub nom.*, California v. Anderson, 406 U.S. 958 (1972). Initiative measures were adopted in both states to reinstate the death penalty. MASS. CONST. pt. I, art. XVI; CAL. CONST. art. I, § 27 (1879, amended 1982).

110. *See supra* text accompanying note 82.

111. *See Developments in the Law, supra* note 5, at 1356-66.

112. *Id.* at 1359-62. The court's explanation can either reflect a principled reason explaining why the court believes the Supreme Court is wrong, or an independent explanation based upon state constitutional tradition. *See also* Williams, *supra* note 79, at 385-89 (setting forth various criteria state courts and commentators have suggested should first be addressed by a state court before it diverges from or rejects Supreme Court precedent). This question of whether the state courts should first react to Supreme Court precedent before articulating an independent theory of state constitutional interpretation raises another question: should the state courts initially resort to the federal or state constitution when confronted with an argument alternatively based on both sources. The commentators have split on this question. Not surprisingly, the independent interpretationists have argued that the state constitution should be examined initially, whereas the borrowers tend to view federal constitutional law as the appropriate starting point. *Compare* Linde, *supra* note 6, at 178 (state constitution reviewed first) *with* Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 758 (1972).

113. This concept of a state court reacting to Supreme Court constitutional precedent is now described as the "reactive" approach to state constitutional interpretation. *See Developments in the Law, supra* note 5, at 1362; Collins, *supra* note 79, at 3.

need not consider federal doctrines.[114] Only in this circumstance is the state court entirely free to construct its own independent jurisprudence.

The interstitial model offers the obvious advantage of establishing a framework within which state courts can rely upon the borrowing model without completely constraining their independence. Rather than selecting Supreme Court precedent on an ad hoc basis with the negative result-oriented appearance that accompanies such an approach, the courts would have a principled basis for evaluating and incorporating Supreme Court precedent into state constitutional jurisprudence.[115] This could also aid local attorneys in preparing constitutional issues because they could anticipate the relevance of Supreme Court precedent in a particular case and structure their arguments accordingly. Then, to the extent that "borrowing" is appropriate, the Court can take advantage of existing Supreme Court precedent and avoid reinventing constitutional doctrine. The same advantages that inhere in the borrowing model would similarly be achieved under this approach.[116] If "borrowing" is inappropriate, however, the model leaves the state courts free to follow their own inclinations, although they would first explain why they rejected related federal precedent.

The primary argument against a reactive state constitutional jurisprudence, such as the interstitial model, is that it impedes the development of an independent state constitutional tradition. 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. In a rather telling observation, Justice Hans Linde of the Oregon Supreme Court noted:

> But in my view, to ask when to diverge from federal doctrines is quite a different question from taking a principled view of the state's constitution; in fact, this supplemental or interstitial approach prevents a coherent development of the state's law.[117]

By relying upon Supreme Court doctrine, the state courts might find themselves unable to bring necessary stability to state constitutional law because of the changes and fluctuations that so frequently characterize

---

114. *Developments in the Law, supra* note 5, at 1365. The interstitial model also recognizes that state courts might disregard the federal constitutional precedent if the Court has "retreated" from an area, presumably leaving room for state constitutional law development. *Id.* at 1366.

115. *See* State v. Hunt, 91 N.J. 338, 368, 450 A.2d 952, 965 (1982) (Handler, J., concurring). In his *Hunt* concurrence, Justice Handler lists several criteria or standards which might justify a state court in reaching a result different from the one reached by the Supreme Court when construing a similar constitutional provision. These include: (1) textual differences in the constitutions; (2) "legislative history" of the provision indicating a broader meaning than the federal provision; (3) state law predating the Supreme Court decision; (4) differences in the structure of the federal and state constitutions; (5) subject matter of particular state or local interest; (6) particular state history or traditions; and (7) public attitudes in the state. *Id.* at 363-67, 450 A.2d at 965-67.

116. *See supra* text accompanying note 83.

117. Linde, *supra* note 6, at 178.

the Court's holdings.[118] Additional arguments against the interstitial model parallel the arguments that support the independent interpretation model and need not be repeated here.

Recognizing the advantages and disadvantages accompanying the interstitial model, one might perhaps suggest that the state courts should simply rely upon Supreme Court or sister state precedent only when it suits their purposes. At first blush this appears to provide the courts with the best of both worlds: they can draw upon developed doctrine while still articulating their own when they prefer. However, such a result-oriented jurisprudence lacks any coherence and intellectual integrity, and it could severely destabilize state constitutional law. At the very least, we should expect the state courts to articulate a generalized, principled basis to explain their reliance or lack of reliance on federal or sister state precedent.[119] The interstitial model provides the courts with a model to accomplish this, if they are predisposed to incorporate other jurisdiction's doctrines selectively. In lieu of this approach—or another principled approach to the problem—we should expect the courts to turn consistently to either the "borrowing" or independent interpretation model. This would also enable us to achieve a measure of stability and certainty in state constitutional jurisprudence.

## WYOMING CONSTITUTIONAL JURISPRUDENCE

Wyoming constitutional decisions appear to follow either the borrowing or interstitial models; there is little evidence of the independent interpretation model. The Wyoming Supreme Court has nevertheless frequently and consistently reaffirmed the independent role of the state constitution in the state's jurisprudence.[120] Recently in *Cheyenne Airport Board v. Rogers*[121] the court observed that state constitutions may provide citizens with more protections than those available under the Bill of Rights.[122] Nothwithstanding this observation, in *Cheyenne Airport Board* the court proceeded to analyze and resolve the constitutional due process and taking claims exclusively under federal constitutional precedent. In this respect the decision is not unique. Most of the court's recent constitutional decisions—particularly those involving individual rights claims based on state provisions with federal analogues—have been analyzed in terms of Supreme Court doctrine, and they have usually been decided in accordance with federal precedent. However, when presented with constitutional claims involving unique state constitutional provisions, the

118. *Compare* Amalgamated Food Employees Local Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (implying that a private shopping center constituted a public forum for first amendment purposes) *with* Hudgens v. NLRB, 424 U.S. 507 (1976) (overruling *Logan Valley* and expressly rejecting the public forum argument). *See also* Linde, *supra* note 6, at 177.

119. *See supra* notes 112, 115.

120. *See, e.g.*, Nehring v. Russell, 582 P.2d 67, 76 (Wyo. 1978); Pirie v. Kamp, 229 P.2d 927 (Wyo. 1951).

121. 707 P.2d 717 (Wyo. 1985).

122. *Id.* at 726 (citing Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1984)); Brennan, *supra* note 5.

court has looked to sister state precedent and reached results that diverge or appear to diverge from what would be expected under federal doctrine.

Space does not permit me to undertake a comprehensive survey of Wyoming constitutional law, so I will confine my observations to the court's recent handiwork in interpreting selected individual rights provisions of the state constitution. Initially, I will focus on the due process and equal protection provisions in the state constitution. A brief review of the annotations suggests that these provisions have drawn the court's attention more frequently than others. Moreover, because federal and state doctrine is well developed in these areas, the court's due process and equal protection cases illustrate clearly the sort of choices the court has confronted and made in interpreting the state constitution. I will conclude by surveying other individual rights protections within the state constitution and noting differences from federal provisions.

*State Due Process and Equal Protection Doctrine*

The due process and equal protection provisions of the Wyoming Constitution differ considerably from these provisions in the federal Constitution. The fourteenth amendment to the federal Constitution speaks simply in terms of due process and equal protection.[123] In contrast, five separate provisions in the Wyoming Constitution have been construed to provide this same protection.[124] Not only does the state constitution provide for equality in general terms,[125] it specifically guarantees "the political rights and privileges of its citizens . . . without distinction of race, color, [or] sex."[126] It also provides that "all laws of a general nature shall have a uniform operation."[127] While the state constitution employs the language of the fourteenth amendment to assure due process,[128] it also prohibits the exercise of "absolute arbitrary power over the lives, liberty and property of freemen."[129] This considerable difference in language between the state and federal provisions suggests that the state constitution might

123. U.S. CONST. amend. XIV, § 1. The fourteenth amendment provides in relevant part that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

124. WYO. CONST. art. 1, §§ 2, 3, 6, 7, 34. *See* Bowers v. Wyoming State Treasurer, 593 P.2d 182, 183-84 (Wyo. 1979); Mountain Fuel Supply Co. v. Emerson, 578 P.2d 1351, 1356 (Wyo. 1978); Washakie County School Dist. No. 1 v. Herschler, 606 P.2d 310, 332 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980); D.S. v. Department of Public Assistance & Social Serv., 607 P.2d 911, 918 (1980); Holm v. State, 404 P.2d 740, 742 (Wyo. 1965).

125. WYO. CONST. art. 1, § 2. The section provides that "in their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal."

126. *Id.* § 3. The section states that:

> Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.

127. *Id.* § 34.

128. *Id.* § 6. The section provides that "no person shall be deprived of life, liberty or property without due process of law."

129. *Id.* § 7. The provision states that "absolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

provide protections that cannot be inferred from the federal language. Indeed, on at least one recent occasion, the Wyoming Supreme Court noted the language difference as a basis for deviating from Supreme Court precedent.[130]

The Wyoming Supreme Court has generally held that the protection available under the state due process and equal protection provisions is similar to that available under the fourteenth amendment and it has adopted the federal two-tiered scrutiny analysis to review such claims. The court has consistently ruled that in most cases the state constitution's due process and equal protection provisions only impose a reasonablesness requirement on the legislature, and it has therefore applied traditional scrutiny analysis.[131] For example, in *Nickelson v. People*[132] the court upheld a statute discriminating between public water supply systems by observing that under Supreme Court precedent the statute must be sustained if any state of facts can be assumed to support the statutory distinctions.[133] This same analysis is evident in a number of other recent due process and equal protection decisions in which the court has concluded that it should adopt a deferential posture in reviewing legislative decisions.[134] Although the court only cites Wyoming precedent in several of the cases, the cited precedent still looks remarkably like contemporaneous Supreme Court precedent.[135] Thus, Supreme Court doctrine has powerfully influenced Wyoming due process and equal protection developments.

Even in this traditional scrutiny area, however, generalizations are dangerous. For example, in *Nehring v. Russell*[136] the court ruled that the state automobile guest statute violated the state equal protection provision by distinguishing between paying and nonpaying guest passengers respecting their right to sue for injuries sustained as a result of the driver's negligence. Although the Supreme Court had sustained a similar statute from federal equal protection challenge,[137] the Wyoming Supreme Court held that the state equal protection mandate required a clearer justification than that required under the fourteenth amendment. The court

130. Nehring v. Russell, 582 P.2d 67, 77 (Wyo. 1978) (Wyoming Constitution speaks of "uniform operation" rather than "equal protection"). *See infra* text accompanying notes 136-43.

131. *See, e.g.*, Mountain Fuel Supply v. Emerson, 578 P.2d 1351, 1355 (Wyo. 1978); State v. Langley, 53 Wyo. 332, 344, 84 P.2d 767, 771 (1938). *But see* Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne, 371 P.2d 409, 417 (Wyo. 1962). *See generally* G. GUNTHER, CONSTITUTIONAL LAW 472-75, (11th ed. 1985) for an explanation of traditional scrutiny.

132. 607 P.2d 904 (1980).

133. *Id.* at 910 (citing Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955); Roschen v. Ward, 279 U.S. 337 (1929)).

134. *See, e.g.*, Mountain Fuel Supply Co. v. Emerson, 578 P.2d 1351 (Wyo. 1978); U.S. Steel Corp. v. Wyoming Envtl. Quality Council, 575 P.2d 749, 753 (Wyo. 1978).

135. *E.g., compare* Miller v. Board of County Comm'rs, 79 Wyo. 502, 527-28, 337 P.2d 262, 269 (1959); State v. Langley, 53 Wyo. 322, 344, 84 P.2d 767, 771 (1938) *with* Williamson v. Lee Optical, 348 U.S. 483 (1955); and Nebbia v. New York, 291 U.S. 502 (1934).

136. 582 P.2d 67 (Wyo. 1978).

137. Silver v. Silver, 280 U.S. 117, 123 (1929).

departed from its usual deferential review standard and concluded that "any claim that the restriction of the law bears a reasonable relation to a public interest must rest not on conjecture but must be supported by something of substance."[138] The court justified this more rigorous review standard by noting the difference between the language of the fourteenth amendment and the Wyoming provision.[139] A few other noteworthy due process and equal protection decisions have similarly deviated from federal precedent,[140] but the court has failed to note the difference in constitutional language as a basis for explaining its divergence.

The court's interpretational approach in *Nehring* mirrors the approach set forth in the interstitial model. The court first examined relevant federal constitutional precedent before turning to the state constitutional issue.[141] Because the court could distinguish the state constitutional provision from the federal provision, the court concluded that it could (and should) develop its own doctrine.[142] The court's independent approach is certainly justifiable, but also a bit puzzling. The language difference the court drew upon to justify its deviation in this instance has been consistently present in prior decisions. Yet the court has failed to note this difference or, in most cases, to deviate doctrinally from Supreme Court precedent. Perhaps *Nehring* should therefore not be relied upon for any purpose other than its immediate holding. The decision does, however, provide a basis for arguing that equal protection review under the state constitution, even at the lowest traditional scrutiny level, empowers courts to scrutinize classification legislation more carefully than they can under federal doctrine.[143] If such an argument were accepted, it would establish an independent tradition in state equal protection and due process constitutional analysis.

The Supreme Court has constructed a two-tiered fourteenth amendment jurisprudence which applies strict scrutiny analysis to evaluate legislation which burdens fundamental rights or a suspect class.[144] The Wyoming Supreme Court has borrowed this two-tiered analytical structure and superimposed it on the state's due process and equal protection provisions.[145] For example, in *D.S. v. Department of Public Assistance*[146]

138. *Nehring*, 582 P.2d at 77 (citing Nation v. Giant Drug Co., 396 P.2d 431 (Wyo. 1964); Heather v. Delta Drilling Co., 533 P.2d 1211 (Wyo. 1975)).

139. *Nehring*, 582 P.2d at 77.

140. Schakel v. State, 513 P.2d 412 (Wyo. 1973); Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne, 371 P.2d 409, 417 (Wyo. 1962); Pirie v. Kamps, 68 Wyo. 83, 229 P.2d 927 (1951).

141. *See supra* text accompanying notes 111-19 for a discussion of the interstitial model.

142. *Nehring*, 582 P.2d at 76-77. In so doing the court relied upon sister state constitutional decisions after noting the similarity in the language found in the two constitutions. *Id.* at 78 n.7. Thus, while following a path independent of federal doctrine, the court still borrowed its constitutional interpretation from another jurisdiction—but only after careful comparison and consideration.

143. *See infra* text accompanying note 161 for further discussion of the *Nehring* decision.

144. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17-20 (1973); Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

145. *See* Washakie County School Dist. No. 1 v. Herschler, 606 P.310, 333 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980); Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 727 (Wyo. 1985).

146. 607 P.2d 911 (Wyo. 1980).

the court cited several Supreme Court cases to justify application of a strict scrutiny standard governing termination of parental rights proceedings.[147] The court held that under the state constitution "the right to associate with one's family is a fundamental liberty" and required that the state produce clear and unequivocal evidence of parental unfitness before terminating parental rights.[148] Shortly after this decision the Supreme Court similarly construed the fourteenth amendment due process clause and imposed an evidentiary standard of clear and convincing proof on state parental termination proceedings.[149] Thus, in this strict scrutiny area we also see a clear symmetry between state and federal analysis.

The Wyoming Supreme Court has, however, deviated from Supreme Court analysis when another provision of the state constitution can also be brought to bear on the matter at hand. The court's decision in *Washakie County School District No. 1 v. Herschler*[150] is probably the best-known example of this. In *Washakie County* the court relied upon the state constitution's equal protection provision, as well as other provisions relating to the state's public education system, to derive a fundamental interest in education which therefore meant that the state's school financing scheme was subject to strict judicial scrutiny.[151] In contrast, in *San Antonio Metropolitan School District v. Rodriguez*[152] the Supreme Court refused to apply strict scrutiny to evaluate a state school financing scheme under the fourteenth amendment, finding that education did not constitute a fundamental right for federal constitutional purposes. *Washakie County* can therefore be regarded as an instance in which the court found that unique state constitutional provisions extended greater rights to the state's citizens than they enjoyed under the federal constitution. Nevertheless, the court's two-tiered strict scrutiny analysis still tracked federal equal protection analysis.[153]

---

147. *Id.* at 918 (citing Stanley v. Illinois, 405 U.S. 645 (1972); Shapiro v. Thompson, 394 U.S. 618, 638 (1969); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17-20 (1973)).

148. *D.S.*, 607 P.2d at 918-19 (citing article 1, sections 2, 6, 7 and 36 of the Wyoming Constitution as authority for its fundamental rights determination). Interestingly, the court also cited the Declaration of Independence as a source for its conclusion that the parent-child relationship deserved strict constitutional protection. *Id.* at 919. This suggests that the Declaration of Independence is an acceptable extra-textual source which the state's courts can turn to in interpreting the state constitution. This could provide a basis for arguing that a right of privacy is protected under the Wyoming Constitution. *See infra* text accompanying notes 198-201.

149. Little v. Streater, 452 U.S. 1, 16 (1980).

150. 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980).

151. *Id.* at 333. The court cited WYO. CONST, art. 1, §§ 34 (all laws shall have uniform operation), 23 (right of citizens to opportunities for education), and WYO. CONST, art. 21, § 28 (legislature shall make laws establishing and maintaining public school systems open to all children of the state).

152. 411 U.S. 1 (1973).

153. The court also relied upon Supreme Court precedent in concluding that wealth was a suspect classification, particularly when applied to fundamental interests. *Washakie County*, 606 P.2d at 334 (citing Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966)). And, after comparing Wyoming constitutional provisions with similar California provisions, the court also borrowed heavily from that state's school financing decision, Serraro v. Priest, 5 Cal. 2d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). *Washakie County*, 606 P.2d at 332.

In *Phillips v. ABC Builders, Inc.*[154] the court relied upon the state constitution's equal protection and access to the courts provisions to strike down a ten year statute of limitations immunizing certain defendants from liability arising from their involvement in real property improvements.[155] Inasmuch as the classification at issue in *Phillips* did not involve a suspect class or fundamental right as defined under the federal Constitution, it is likely that the statute would have been sustained under traditional equal protection analysis.[156] However, Article 1, Section 8 of the Wyoming Constitution provides that the state's courts shall be open to everyone to redress injuries, and Article 3, Section 27 specifically precludes the legislature from adopting special laws limiting civil actions or granting immunities.[157] These provisions, along with the state's equal protection provisions, provided a constitutional basis for careful review of the immunity classification created by the statute. The court noted that other state courts had construed similar state constitutional provisions to prohibit statutes of limitations immunizing defined classes of defendants.[158] Thus, the court extended protection under the Wyoming Constitution to assure citizens access to the state's courts that they probably could not claim as a federal constitutional right.

*Phillips* represents an instance of independent state constitutional interpretation in which the court based its ruling on state provisions that are not duplicated in the federal Constitution. Despite the equal protection nature of the *Phillips* argument, the court did not turn to federal precedent; it focused on unique aspects of the state constitution. Although the court "borrowed" from other state courts which had confronted the same issue, it was careful to rely upon the language of the state constitution for its ruling. *Phillips* illustrates, therefore, the potential scope of constitutional protection that might be derived from the state charter without reference to federal constitutional jurisprudence. It is also plausible to

---

154. 611 P.2d 821 (1980).

155. The statute under attack in *Phillips*, WYO. STAT. § 1-3-111 (1977), provided in relevant part that:

> No action to recover damages, whether in tort, contract or otherwise, shall be brought more than ten (10) years after substantial completion of an improvement to real property, against any person performing or furnishing the design, planning, supervision, construction or supervision of construction of the improvement. . . .

156. *See, e.g.*, Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955); Ferguson v. Skrupa, 372 U.S. 726 (1963); Dandridge v. Williams, 397 U.S. 471 (1970).

157. WYO. CONST. art. 1, § 8 provides that "all courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay." WYO. CONST. art. 3, § 27 states in relevant part that:

> the legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . for limitations of civil actions . . . [or] granting to any corporation, association or individual, the right to . . . any special or exclusive privilege, immunity or franchise whatever . . . [or] relinquishing or extinguishing, in whole or part, the indebtedness, liabilities or obligation of any corporation or person to [sic] this state. . . .

*See also* WYO. CONST. art. 1, § 34.

158. *Phillips*, 611 P.2d at 825-27. The cases cited included Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973); and Kallas Millwork Corp. v. Square D Co., 6 Wis. 2d 382, 225 N.W.2d 454 (1975).

suggest that *Phillips* recognizes a fundamental right of access to the state's courts predicated upon article I, section 8 of the state constitution.[159] This would provide the state courts with constitutional authority to examine carefully any statutory or other restrictions limiting judicial redress, including the currently much-debated tort system reform proposals.[160]

The court's *Phillips* analysis might explain its equal protection ruling in *Nehring v. Russell.*[161] We have already noted that *Nehring* represented a departure from federal equal protection analysis; the court's result did not square with the traditional deference it accords the legislature under due process and equal protection principles. Although the *Nehring* court relied exclusively upon the state equal protection provision (article I, section 34), the *Phillips* access to the courts principle (article I, section 8) and the prohibition against special legislation (article 3, section 27) might also apply in *Nehring*. The effect of the state guest statute was to limit access to the courts and to immunize a certain group of persons from liability.

The court's willingness in *Phillips* to recognize the interplay between various constitutional provisions also suggests a structural argument that might be advanced to justify the *Nehring* ruling, as well as an active judicial role in reviewing the reasonableness of state legislation. The five separate state constitutional provisions that impose due process-like and equal protection-like limitations on state legislative power, read in conjunction with article 3, section 27 which specifically limits legislative power, might be construed as evidence that the Wyoming framers intended the judiciary to exercise more of a checking function over the legislature than might be inferred in the federal Constitution.[162] If such a conclusion can be squared with article 2 which mandates separation of powers, it would justify aggressive substantive due process and equal protection

159. Such an argument also might lead to different results under the state constitution than the Supreme Court reached under the due process language of the fourteenth amendment in United States v. Kras, 409 U.S. 434 (1973) (indigent has no right to waiver of filing fees necessary to obtain voluntary discharge of bankruptcy) and Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam) (indigent has no right to waiver of filing fees to obtain appellate review of termination of welfare benefits).

160. *See also* WYO. CONST. art. 3, § 27 (prohibiting the legislature from adopting special laws "for limitation of civil actions"); WYO. CONST. art. 10, § 4 (prohibiting the legislature from limiting damages recoverable in cases of personal injury or death).

161. 582 P.2d 67 (1978). *See supra* text accompanying notes 134-141 for a discussion of *Nehring*.

162. In brief, the structural argument holds that constitutional meaning for any one provision is derived from looking to the instrument as a whole. In this instance the several noted provisions are specific checks on legislative power; thus, viewing these provisions jointly we might conclude that the court need not defer to the legislature as much as the Supreme Court does under the fourteenth amendment. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4 (1971). *See generally* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). The historical evidence does not clearly support this conclusion, but it does not refute it either. The Wyoming framers were strongly committed to establishing an independent supreme court. However, they debated the need for an independent court in terms of assuring de novo review of district court decisions not legislative decisions. *See* JOURNAL AND DEBATES OF THE WYOMING CONSTITUTIONAL CONVENTION 332-336, 516 (1893).

review of state legislation which would be inappropriate under the fourteenth amendment.[163] The suggested structural argument is really only another way of arguing that the state constitution must be viewed as a whole when interpreting any one provision, and there is clear precedent supporting this proposition in Wyoming's constitutional jurisprudence.[164] Of course, this same structural argument might also be made respecting other state constitutional provisions and, thus, provide a basis for independent interpretation of additional provisions.

The court's decision in *A. v. XYZ*[165] also deserves mention because it represents an instance in which the court relied heavily upon federal equal protection doctrine despite clearly different state constitutional provisions. In *XYZ* the natural father of a child challenged the constitutionality of the state's paternity statutes. He alleged that he was denied equal protection because he was foreclosed from filing an action to establish his parental rights. He argued that he was discriminated against on the basis of his sex because the child's mother could sue him in a paternity action. The court relied upon federal equal protection sex discrimination precedent to sustain the paternity statute after applying something less than a strict scrutiny standard of review.[166] A strong argument can be made under the Wyoming Constitution, however, that sex-based classifications must be subject to strict scrutiny—or are perhaps per se unconstitutional—because the constitution specifically mandates equality between the sexes.[167] The framers of the Wyoming Constitution clearly evidenced an intention to preclude sex discrimination under the state constitution.[168] On the other hand, the fourteenth amendment does not refer to sexual equality, and it is clear that the fourteenth amendment framers did not intend to outlaw sex discrimination.

This difference in constitutional tradition, as well as the explicit language differences, suggests that the court should not have relied upon federal precedent in analyzing the equal protection claim in *XYZ*. Instead, the *XYZ* litigation was at least an opportunity for the court to apply the interstitial interpretive model as it did in the *Washakie County* case. After comparing the state and federal equal protection provisions, it would have been appropriate for the court to analyze the state provisions from an independent perspective. Although this may not have led to a different result, it certainly would have required a different approach—one that would have recognized and given meaning to the differences between the fundamental law of the state and federal constitutional jurisprudence.

---

163. *See Developments in the Law, supra* note 5, at 1465-74 for a discussion of how state supreme courts have approached the issue of substantive due process.

164. *See* Thompson v. Wyoming In-Stream Flow Comm'n, 651 P.2d 778, 782 (Wyo. 1982).

165. 641 P.2d 1222 (1981).

166. *Id.* at 1224-25 (quoting Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981), and citing Trammel v. United States, 445 U.S. 40 (1980)).

167. *See* Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 46, 653 P.2d 970, 977-78 (1982) (gender classifications inherently suspect under state constitutional provision); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (strict scrutiny applied in gender discrimination cases).

168. *See* State v. Yazzie, 67 Wyo. 256, 261-62, 218 P.2d 482, 483 (1950) (holding that women may serve as jurors and discussing the historical context of equal protection).

This admittedly small sampling of cases does not comfortably yield many general conclusions, but some observations can still be advanced respecting the court's constitutional jurisprudence. Supreme Court precedent heavily influences the court both in analysis and result. The court usually will deviate from the precedent only when clear language in the state constitution provides a firm basis for adopting a different position. Even then, as *XYZ* illustrates, the court cannot always be counted upon to give independent content to unique state constitutional language or history. There are certainly instances, such as the *Nehring* decision, in which the court has rejected federal precedent in favor of its independent reading of the state provision. But even here, there does not appear to be any coherence or consistency in the court's approach; later equal protection decisions return to the deferential federal standard of review.

This means that we do not yet have evidence of an independent constitutional tradition emerging in Wyoming's equal protection or due process jurisprudence. What evidence there is of such a tradition is still too uncertain and diffused to enable us to elaborate any enduring constitutional principles for resolving future cases. The cases do, however, clearly indicate that the court is open to state constitutional arguments. Perhaps the court can even be convinced by carefully constructed arguments to look elsewhere than Supreme Court precedent in construing our basic law. Such an approach would certainly be consistent with the independent spirit reflected in Wyoming tradition, as well as basic principles of state sovereignty.

*Observations on the Wyoming Declaration of Rights*

There are several noteworthy differences between the Wyoming Declaration of Rights and the federal Bill of Rights that merit attention. The differences suggest that the court might provide the state provisions with an independent construction notwithstanding federal doctrine. Except to clear up some additional points respecting the state due process clauses, I will not allude to provisions I have already mentioned in the previous discussion; the potential significance of these provisions should be apparent by now.[169] Also, while I will focus here on article 1 of the state constitution, it is worth recalling that I have already argued in the first section of this essay that article 5 merits an independent construction uncolored by federal justiciability doctrine. Similar arguments might be advanced respecting other sections of the state constitution.

169. In addition to the state due process provisions (article 1, sections 6 and 7), I have already discussed article 1, sections 2, 3, 8, 23 and 27. Also I will not examine the state constitutional criminal procedure protections (article 1, sections 4, 9, 10, 11, 12, and 13). It should be noted, however, that the court has generally not construed these provisions to provide protections greater than those available under the Bill of Rights. *See, e.g.*, Ortega v. State, 669 P.2d 935, 940-43 (Wyo. 1983) (warrantless search of home justified by exigent circumstances); Van Order v. State, 600 P.2d 1056, 1059 (Wyo. 1979) (blood alcohol test is admissible evidence in criminal prosecution); State v. Hiteshew, 42 Wyo. 147, 152-53, 292 P. 2, 3-4 (1930) (state constitutional restriction against unreasonable searches and seizures is comparable to fourth amendment prohibition).

The state due process provisions differ from the federal provision in two important respects. In contrast to the federal due process clause, the Wyoming Constitution has two due process-like provisions: article 1, section 6 is a straightforward due process mandate, whereas article 1, section 7 prohibits the exercise of arbitrary power. The Wyoming Supreme Court, following the lead of the United States Supreme Court, has read substantive and procedural restraints into article 1, section 6 and it has equated the substantive protection available under section 6 as comparable to that available under section 7.[170] But this effectively leaves section 7 as a provision without any independent meaning and thus violates a cardinal principle of constitutional interpretation: all language in the constitution must be given independent content.[171] This suggests that section 7 means something more in terms of the restraints imposed upon the legislature than the due process clause does, or it might plausibly mean that the due process clause assures procedural regularity while section 7 substantively restrains governmental power.

Also, the state due process clause does not have a state action requirement as the federal clause does; it restrains private as well as governmental action that might deprive an individual of life, liberty or property.[172] The state provision could therefore be construed as creating a constitutional tort that might be enforced by an action against private parties as well as governmental entities.[173] It is worth noting, however, that the court's interpretation of the procedural component of the state due process clause has generally tracked federal precedent.[174] There is no evidence that the court is inclined to give independent content to this dimension of the clause.

The Wyoming Constitution not only proscribes cruel and unusual punishment, it also requires that the penal code reflect "the humane principles of reformation and prevention." The constitution also prohibits the state from treating jailed persons with "unnecessary rigor," and it provides for the "humane treatment of prisoners."[175] The federal Constitu-

170. Nation v. Giant Drug Company, 396 P.2d 431 (Wyo. 1964). *See* G. RUDOLPH, WYOMING LOCAL GOVERNMENT LAW 126 (1985). *See also* U.S. Steel Corp. v. Wyoming Envtl. Quality Council, 575 P.2d 749, 753 (Wyo. 1978).

171. Rasmussen v. Baker, 7 Wyo. 117, 128, 50 P. 819, 822 (1897).

172. Whereas the federal provision prohibits state action against an individual or his property without affording due process, U.S. CONST., amend. XIV, the Wyoming provision provides that "no person shall be deprived of life, liberty or property without due process of law." WYO. CONST., art. 1, § 6. *But see* U.S. CONST., amend. v.

173. *C.f.* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (implying a private cause of action against federal officials for damages under the fourth amendment); Davis v. Passman, 422 U.S. 228 (1979) (implying a private cause of action against federal officials for damages under the fifth amendment).

174. *See, e.g.*, L.P. v. Natrona County Dep't of Public Assistance & Social Svcs., 679 P.2d 976, 886-88 (Wyo. 1984); White v. Board of Trustees of Western Wyoming Community College, 648 P.2d 528, 535-36 (Wyo. 1982).

175. WYO. CONST. art. 1, §§ 15, 16. Section 15 provides that "the penal code shall be framed on the humane principles of reformation and prevention." Section 16 requires that "no person arrested and confined in jail shall be treated with unnecessary rigor. The erection of safe and comfortable prisons, and inspection of prisons, and the humane treatment of prisoners shall be provided for."

tion simply prohibits cruel and unusual punishment.[176] The more explicit protection available under the state constitution can plausibly be interpreted to provide greater individual protections than the eighth amendment does. For instance, it might be argued that the "humane principles of reformation and prevention" governing the penal code prohibit or, at least more narrowly circumscribe, capital punishment than the federal Constitution does.[177] It also appears that a mistreated jail detainee or prisoner could maintain a constitutional tort action against those responsible for his mistreatment without relying upon general due process claims. Furthermore, article 1, section 16 may be construed as imposing greater obligations on government officials respecting the maintenance of the state prisons than can be read into those federal constitutional provisions that have been relied upon in prison conditions suits.

The state constitution protects the free exercise of religion and prohibits government involvement in religion just as the United States Constitution does.[178] The state provisions are, however, much more explicit and detailed than the federal language. Article 1, section 18 assures religious liberty, prohibits discrimination between sects, and provides that no one can be disqualified for public office or jury duty on the basis of their religious beliefs.[179] Only recently has the Supreme Court construed the first amendment free exercise clause to prohibit states from excluding ministers from holding public office, whereas Wyoming has apparently always assured religious persons this right.[180] The state free exercise provision would also seem to preclude prosecutors from excluding citizens from jury panels because their religious beliefs do not countenance capital punishment.[181] The Wyoming counterpart to the federal establishment clause is quite specific respecting government involvement with religion. It provides that "no money of the state shall ever be given or appropriated

176. U.S. CONST. amend VIII. The eighth amendment states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments imposed."

177. *But see* Hopkinson v. State, 632 P.2d 79 (1981); Jahnke v. State, 692 P.2d 911, 930 (Wyo. 1984); Osborn v. State, 672 P.2d 777, 797 (Wyo. 1983), *cert. denied*, 465 U.S. 1051 (1984). Of course, the practice in the state regarding capital punishment at the time the state constitution was adopted would also provide rather convincing evidence of the framer's intent. The framers apparently contemplated that the constitution's cruel and unusual punishment clause did not prohibit the punishment of death by hanging, although the brief reference to this point in the Journal might be otherwise construed. *See* JOURNAL AND DEBATES OF THE WYOMING CONSTITUTIONAL CONVENTION 719-20 (1893).

178. *Compare* WYO. CONST. art. 1, §§ 18, 19 *with* U.S. CONST. AMEND. 1.

179. WYO. CONST. art. 1, § 18 provides in full:

> The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state and no person shall be rendered incompetent to hold any office of trust or profit, or to serve as a witness or juror, because of his opinion on any matter of religious belief whatever; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.

180. *See* McDaniel v. Paty, 435 U.S. 618 (1975).

181. *See* JOURNAL AND DEBATES OF THE WYOMING CONSTITUTIONAL CONVENTION 720-21 (1893). In contrast, the Supreme Court has held that veniremen may be recused from a capital case for any reason, religious or otherwise, preventing or substantially impairing the prospective juror's ability to impose the death penalty. Wainwright v. Witt, 105 S.Ct. 844, 852 (1985).

to any sectarian or religious society or institution."[182] Whereas the Supreme Court has sanctioned state monetary support for religious schools and institutions in some instances under the first amendment, the Wyoming Constitution would appear to prohibit even these forms of limited financial aid.[183] Of course, the Wyoming provision also might be read to permit indirect financial support if the state funds are not designated for religious institutions.[184]

The Wyoming free speech protections appear both more and less protective of this right than those available under the first amendment as the Supreme Court has interpreted it. The Wyoming provision (article 1, section 20) affirmatively guarantees everyone the right to speak freely, whereas the first amendment is framed negatively as a check on Congress and, by incorporation, the states.[185] Thus, there is no state action requirement in the Wyoming Constitution, and a free speech cause of action might be maintained against a private individual or institution.[186] On the other hand, article 1, section 20 appears to provide less protection than the first amendment against libel claims.[187] Of course, after *New York Times v. Sullivan*,[188] the more protective federal interpretation of the first amendment would apply notwithstanding the Wyoming provision.

The Wyoming constitutional provision requiring that "the rights of labor shall have just protection through laws" has no federal counter-

---

182. WYO. CONST. art. 1, § 19.

183. *See* Wolman v. Walter, 433 U.S. 229. 237-38 (1977) (upholding statute permitting expenditure of state funds to purchase textbooks to be loaned to private parochial schools); Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646, 648 (1980) (upholding statute authorizing use of public funds to reimburse church sponsored schools for testing and reporting services).

184. *See* Mueller v. Allen, 463 U.S. 388, 398 (1983) (state tax deduction for expenses incurred in sending children to parochial schools does not violate establishment clause); Zorach v. Clausen, 343 U.S. 306, 315 (1952) (upholding "release time" from public school to receive off-premises religious instruction); Everson v. Board of Educ. of Ewing Township, 330 U.S. 1, 17 (1947) (state may reimburse parents for cost of transporting children to parochial schools).

185. *Compare* WYO. CONST. art. 1, § 20 *with* U.S. CONST. amend. 1. Article 1, § 20 of the Wyoming Constitution provides that:

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right; and in all trials for libel, both civil and criminal, the truth, when published with good intent and [for] justifiable ends, shall be a sufficient defense, the jury having the right to determine the facts and the law, under direction of the court.

(Bracketing supplied in original). The first amendment states in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

186. For example, a teacher fired from a private school in Wyoming might claim a free speech violation under the state constitution if she was fired for "speaking out," whereas she could not maintain a federal free speech claim under these circumstances. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 843 (1982) (denying fired teacher's first amendment claim because she was employed by a private school and could not establish state action).

187. Article 1, section 20 explicitly recognizes that "the truth, when published with good intent and [for] justifiable ends, shall be a sufficient defense." By inference this direct language suggests that the libel defense of lack of actual malice might not be recognized under the state constitution. *See* New York Times v. Sullivan, 376 U.S. 254 (1964).

188. 376 U.S. 254 (1964).

part.[189] According to the annotations in Wyoming Statutes Annotated, this provision has never been subjected to judicial interpretation. It is not too farfetched, however, to suggest that this labor provision, found as it is in the Declaration of Rights, might provide a basis for recognizing a fundamental right to work. In view of the court's willingness to recognize a fundamental interest in education, predicated in part on a similar provision directly following this labor provision, it may be possible to infer an individual interest of constitutional dimension in both public and private employment. If so, then the state constitution might provide employees with protection that is unavailable under the federal Constitution.[190] Such a construction could also provide a basis for procedural due process claims against both public and private employment termination decisions since the state due process clause does not have a state action requirement.

The state takings clause found in article 1, section 33 is practically identical to the federal fifth amendment provision which has been incorporated into the fourteenth amendment and applies against the states.[191] I have already alluded to the recent decision in *Cheyenne Airport Board v. Rogers*[192] wherein the court construed the state takings clause as identical to the federal provision. Notwithstanding the similar language in both provisions, it seems to me that a reasonable argument can be fashioned to provide private property owners greater protection under the state provision than they enjoy under the federal Constitution. In brief, the argument would rest upon the state's unique traditions respecting and protecting private property ownership, and its tradition of limiting governmental intrusions into citizen's private affairs, particularly their property interests.[193] We can find judicial precedent limiting municipal regulation of private property in *State ex rel. Newman v. City of Laramie*[194] wherein the court invalidated an ordinance "having relation to the liberty of the citizen or the rights of private property."[195] Furthermore, other state supreme courts have resolved airport zoning cases quite differently than the Wyoming court did in *Cheyenne Airport Board* by relying upon

189. WYO. CONST. art. 1, § 20. This section provides that "the rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his service and to promote the industrial welfare of the state."

190. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (holding that a fundamental right to public employment cannot be inferred from the equal protection clause). *See also* Vance v. Bradley, 440 U.S. 93, 95 (1979) (holding that a mandatory retirement provision for foreign service employees does not violate the equal protection clause).

191. *Compare* WYO. CONST. art. 1, § 33 *with* U.S. CONST. amend. V. The fifth amendment guarantee of just compensation has not been formally incorporated into the fourteenth amendment. The Supreme Court, however, has held that the fourteenth amendment due process clause provides the same safeguard against a state's taking of property without just compensation. *See* Chicago B. & Q. R.R. Co. v. Chicago, 166 U.S. 226 (1897). The Court itself cites *Chicago B. & Q.* as incorporating the taking clause into the fourteenth amendment, even though the decision does not refer to incorporation. *See* Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 159 (1980).

192. 707 P.2d 717 (Wyo. 1985). *See supra* text accompanying notes 121-22.

193. T. LARSON, HISTORY OF WYOMING 506-43 (1965).

194. 40 Wyo. 74, 275 P. 106 (1929).

195. *Id.* at 107.

their state constitutions.[196] This is not to say that *Cheyenne Airport Board* was wrongly decided. I only mean to suggest that an independent interpretation of the state constitutional provision might quite logically lead to a result other than the one which the Supreme Court would reach under the federal Constitution.

It is finally worth noting that article 1, section 36 is almost identical to the ninth amendment in the United States Constitution. Both provisions declare that the enumeration of certain rights shall not deny or impair other rights retained by the people.[197] In *Griswold v. Connecticut*[198] several Justices concluded that a right to marital privacy could be traced to the ninth amendment and, although subsequent cases have turned to the fourteenth amendment due process clause as the source of this right,[199] the Court has not repudiated the *Griswold* analysis. The Wyoming Supreme Court has yet to confront a privacy case, but the *Griswold* analysis suggests that a plausible argument recognizing individual privacy rights might be advanced based upon the article 1, section 36 provision. Alternatively, this provision, in conjunction with the state due process provisions, might be construed to provide such protection. Other state courts have recognized privacy rights based upon similar provisions in their state constitutions.[200] Also, nothing would prevent the court from interpreting article 1, section 36 to protect other unenumerated rights if they can be anchored in the state's constitutional traditions and values.[201] Of course, the court must otherwise be inclined to adopt an independent posture in defining the constitutional rights available to the state's citizens.

This discussion of the state Declaration of Rights provisions is not intended as an exhaustive analysis of these protections, nor is it intended to define conclusively the parameters of these rights. It is meant to suggest how the state protections clearly differ from the federal provisions and to note possible interpretations that appear to follow logically from these differences. It is up to the state's attorneys, as well as the courts, to develop fully these or other arguments in order to give concrete meaning to the state constitutional protections. At the very least, it should be clear by now that there is still time and considerable opportunity to establish and develop an independent state constitutional traditon.

---

196. *See, e.g.*, Ackerman v. Port of Seattle, 55 Wash. 2d 400, 348 P.2d 664 (1960); Roark v. City of Caldwell, 394 P.2d 641 (Id. 1964).

197. *Compare* U.S. CONST. amend. IX *with* WYO. CONST. art. 1, § 36. The ninth amendment provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

198. 381 U.S. 479, 484 (1965). *See also id.* at 486-92 (Goldberg, J., concurring).

199. *See* Roe v. Wade, 410 U.S. 113, 164 (1973).

200. *See, e.g., In re* J.P., 648 P.2d 1364 (Utah 1982); Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 417 N.E.2d 387 (1981); State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979). *See generally Developments in the Law, supra* note 5, at 1429-43.

201. *See supra* note 148 suggesting that the Declaration of Independence might serve as a source for defining these traditions and values.

## CONCLUSION

An inevitable tension confronts the state courts as they rediscover and develop a state constitutional tradition. This tension is reflected in the debate over the propriety of interpreting the state's constitution by borrowing from Supreme Court precedent or developing an independent jurisprudence. Given the pragmatism of the American judiciary, as well as the pervasiveness of federal constitutional law over the past decades, it is not surprising that the state courts have not rushed headlong to assert their complete independence from federal precedent. However, strong and convincing arguments—reinforced by the reemergence of federalism as a central theme in our constitutional discourse—support recent state court efforts to give independent meaning to their state's fundamental law. While this may not mean that the state courts should divorce themselves entirely from Supreme Court precedent, it at least suggests that when they incorporate federal doctrine into the state's constitution, they should articulate a principled rationale explaining why they have done so. Correspondingly, to the extent that the state courts continue to rely upon Supreme Court precedent, they also should fully understand the consequences such an approach portends for their independence.

It is apparent that the Wyoming Supreme Court has not yet developed a coherent approach to the state constitution that truly reflects an independent constitutional jurisprudence. Federal constitutional doctrine regularly surfaces in the court's opinions and often dictates the court's analysis, even in the absence of similarity between the federal and state provisions. There are, however, occasional instances when the court has diverged from federal precedent in interpreting state provisions with federal counterparts. Unfortunately, the court has not provided a clear explanation as to when it is appropriate to deviate from federal doctrine in construing the state constitution. There also are occasions when the court has independently interpreted unique provisions of the state constitution without relying upon parallel federal developments. Both of these developments bode well for the future of state constitutional law in Wyoming. If the court continues to build upon these decisions, we can expect to see the emergence of a distinct Wyoming constitutional jurisprudence.