

LIBERTY BRIEF

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In Defense of the Wyoming Constitution

By: Benjamin Barr

Executive Summary

What motivated the Framers of the Wyoming Constitution to put so much emphasis on guaranteeing fundamental rights? In today's culture, just mentioning a term like "fundamental rights" seems foreign. However, for the Framers, an understanding of fundamental rights was crucial to a well functioning civil society. In fact, just fifteen years after the Framers gathered to draft the Wyoming Constitution, the Librarian at the University of Wyoming authored a guide to Wyoming government and its constitution.¹ The Librarian demonstrated that citizens' rights and liberties protected under the state constitution were distinct and beyond those protected by the federal constitution.² It was also shown that Wyoming's forefathers created the state as a move away from federal micro-management of the Wyoming territory. These two impulses caused the Framers to ensure that citizens of all generations would be protected from future exercises of arbitrary power through a strict interpretation of the state constitution.

The Wyoming Constitution offers citizens of the state a noble promise: that they will retain the freedom to fulfill their own destinies in the way they best see fit. This is not a promise stemming from dependence on government programs, but one rooted in the dignity, ethics, and hard work of each citizen. In so doing, the Wyoming Framers went further than the federal constitution and protected rights that were of core importance to citizens in Wyoming. That required ensuring that government remained limited, and that economic liberty, individual rights, and private property protection would receive heightened protection. Stated more concretely, these are the rights to earn your living in a way you see fit, to manage your property according to your preferences, and be free from government nitpicking.

The bold promises contained in the Wyoming Constitution have been diminished through ignorance and forgetfulness. Instead of looking first to the protection offered under the state constitution, Wyoming judges often defer to the United States Supreme Court's interpretations of rights. This sort of judicial outsourcing, as it were, puts liberties at risk because the United States Supreme Court frequently interprets the federal constitution according to the popular ideologies of the day. And by deferring to the federal constitution and supplanting its meaning for that of the Wyoming Constitution, this practice has left the state constitution an ineffective guarantor of liberty. It need not be the case.

This White Paper offers a path back to protected liberties. It examines some of the motivating factors present in drafting the Wyoming Constitution, as well as specific rights guaranteed under it. Furthermore, it offers interpretative tools helpful in reading the document in a manner consistent with its liberty-supporting stance. Using them would help end the slow fade of limited government, individual rights, and the rule of law in Wyoming, that is, the very essence of what the Framers were so motivated to establish and protect.

Introduction

Wyoming has been subject to erosion of its cherished independence both from without and within. Since the framing of the state constitution, Wyoming citizens have witnessed the slow decay of rights guaranteed under the document. The gold standard of liberty promised to all Wyoming citizens is found in its Declaration of Rights. There, Wyoming Framers had the foresight to protect all citizens from the growth of a rampant, bureaucratic state that would ignore, and therefore encroach upon, fundamental liberties and the rule of law. Today, those distinctive guardians of liberty have been ignored, forgotten, or supplanted – leaving Wyoming citizens with a state that is steadily growing in an unchecked fashion outside the rule of law.

A state once proud of its western heritage and sovereignty must now come to terms with difficult decisions about its dedication to liberty and individual rights. It may continue to go the way of other states by ignoring the liberties protected under the state constitution. It may also overlook the menace of federal intervention which continues to remove citizens' oversight over their own property and interests and replaces it with federal statism. Or it may break from the pack, reverse this pattern of insidious passivity, and return to its own embedded wisdom contained in the Wyoming Constitution; thereby reacquainting itself with the cherished freedoms belonging to its citizenry.

Promises guaranteed to the free people of Wyoming under the state constitution should not be taken lightly. After all, the Framers of the Wyoming Constitution intended that it would be the first protector of citizens' rights and freedoms. The Wyoming Constitution includes far broader limits on the role of government than the federal constitution. These limits usually go unnoticed by branches of state government, leaving the people of Wyoming unprotected. Yet, the Wyoming Constitution's Declaration of Rights actually offers a vision common to free societies as a first maxim of liberty: that all power is inherent in the people. This first maxim is seconded by its corollary that Wyoming government operates legitimately only as it acts to secure the peace and safety of the state citizenry. Incorporating these two maxims into the way Wyoming government functions would prioritize the functioning of state government in a constitutionally sound manner, where citizens' interests would be put first and the alleged needs of government second.

The Wyoming Constitution uniquely favors liberty over competing government authority as a first preference. It reminds the people of Wyoming that however far government may encroach; citizens possess the right to abolish the government if "they may think proper."³ The document protects state citizens from overreaching government action by prohibiting excessive state debt, offering vigorous private property protection, ensuring economic liberty, and recognizing broader basic freedoms than envisioned under the federal constitution.⁴ Historical research illustrates that a prime concern motivating citizens in the Wyoming Territory to move toward statehood was emancipation from meddling federal taskmasters, as well as from oversized state government and irresponsible legislatures.⁵ It is also true that the Wyoming Constitution contains what may be called progressive elements, though its overall emphasis and structure favors limited government and a respect for fundamental rights. Throughout this paper, the term

“progressive” is used in its historical sense to connote the Progressive Era of the late 1800’s. In that sense, progressive politics placed faith in government to scientifically plan for the needs of society and deemphasized the sanctity of individual rights.⁶ While a few pieces of the Wyoming Constitution tender progressive sentiments, there is little doubt that the motivation for statehood in Wyoming was a move away from big government (found in territorial excesses) and a move toward protecting the dignity and sovereignty of individuals.

Even though scores of advocates of various ideological persuasions favor government growth, the state’s history illustrates a foundational dedication to individual liberty, not government control. Though the written promises in the Wyoming Constitution stand strong, memories have faded, liberties are enervated, and government has grown beyond its constitutionally-ordained limits. These trends may seem quite normal to generations of citizens commonly exposed to a government of seemingly first resort. This was not always so.

This White Paper sketches the historical concerns animating the Framers of the state constitution that prompted them to draft the document in a way that respected the dignity of individuals in voluntary society while limiting the size of state government. It also addresses how creeping government expansion has reduced liberties contained in the Wyoming Constitution. The paper points its attention to areas of most significant concern whereby the state judiciary has read state-specific protections out of the constitution or supplanted with its own policy preferences in lieu of the original text of the document. Lastly, it addresses how liberty-cherishing citizens and legislators can and should rein-in government expansion by returning to the first principles and boundaries established by the Wyoming Constitution and, thus, reverse the process of erosion of the very ground of our freedom.

Federalism: The Framers’ Inventive System to Protect Liberty on Two Fronts

The Framers of the Wyoming Constitution intended that the state constitution should operate as the chief defender of citizens’ liberties, because when they drafted the Wyoming Constitution, the federal bill of rights was largely not applied to the states.⁷ Understanding that the federal constitution did *not* protect citizens against abusive state actions at the time of the framing meant that the state judiciary should look *first* to the state constitution for defining the protection of individual rights before consulting the federal constitution. This is not a radical notion: the very design of federalism expects that state constitutions would be applied first. Thus, Wyoming’s own uniquely protected liberties and safeguards should be read first and foremost to offer a robust set of rights enjoyed by the people of Wyoming.⁸

Federalism matters. Consider the design of the American Republic. The federal government is one of limited and enumerated powers; state governments carry out all other permitted functions. This allows states to act as laboratories of democracy and experiment, within the rule of law, with new policies. Along with this experimentation comes the right of exit. Should any state enact laws too oppressive or injurious, citizens

and businesses may exit to a different, more liberty-valuing state. In theory, that forces states to act more efficient in taxing and spending (lest they lose their base of productive individuals and businesses). It is this sort of concomitant protection that is the real genius of federalism. But its realization rests on taking state constitutions seriously, giving effect to the constitutional preferences selected by a state's citizenry. Yet, to do so requires the fervent attention of the state judiciary to follow the plain letter of the state constitution.

State constitutions, like Wyoming's, were designed to be referenced first, not last.⁹ Each state's Framers contemplated, argued, and specifically drafted the protected liberties specific to each state. Likewise, it is clear from debate at the First Continental Congress that states fully retained their individual constitutions with specific rights and restrictions.¹⁰ Wyoming is typical in this regard. After all, it was clear that the Wyoming Framers looked to other states' constitutions as primary sources in drafting their own state constitution rather than the federal constitution. In some ways, the U.S. Supreme Court did injury to the idea that individual state constitutions protected citizens differently in different states. This happened as it gradually extended the rights protected under the Bill of Rights to the states. With this practice came a regressive reaction by state judiciaries, i.e. the tendency to rely almost solely on federal case law. Attention to state constitutions became less focused over time as courts read out the specific language and protection included in them. In 1977, United States Supreme Court Justice Brennan called attention to this trend and asked for a new age of constitutional interpretation. Justice Brennan asked that state judges take their own constitutions seriously and return to the unique language and liberties contained in them.¹¹

In the recent past, several state supreme courts have decided that a new age of state constitutionalism is in order. Following Justice Brennan's lead, state supreme court justices have set out, in many different ways, to explore whether their own constitutions should offer more robust protection for state citizens. Some of these courts have developed their own analyses to determine when their constitution offers more expansive rights than the federal counterpart. For example, Washington courts have examined the following: the text of the state constitution, preexisting state law, whether significant differences exist between state and federal constitutions, constitutional and common law history, issues of peculiar state concern, and structural differences between the state and the federal government.¹² The Wyoming Supreme Court, most recently in the mid 1990's, claimed to follow Washington's multi-part analytical test.¹³ In practice, it generally favors superimposition of the federal constitution over the chief defender of citizens' liberties – the Wyoming Constitution.¹⁴

How your Judges Interpret Constitutions Affects your Liberty

How state judges elect to interpret their state constitution affects the inalienable liberties enjoyed by free citizens. Some approaches assist government expansion, while others uphold citizens' liberties. As explained in the Federalist Papers, the American Republic included "neither a national nor a federal Constitution, but a composition of both."¹⁵ In that system, state constitutions and their specific protections are of utmost importance in

protecting citizens' rights. When state constitutions are not taken seriously, we lose what our founders referred to as a "compound republic" whereby state constitutions would play an important role in protecting citizens against government abuses.

Generally speaking, there are three approaches to interpreting a state constitution. The first approach, termed "primacy," requires that the state court look to the state constitution first and interpret it consistent with the text, structure, history, and fundamental values of that constitution.¹⁶ Because state constitutions are specific to the needs and threats faced by citizens of the state, special attention should be paid to them. Otherwise, the consent of the governed (a prime constitutional value embedded in the Wyoming Constitution) is undermined, if not eliminated. The primacy approach most closely upholds federalist values, ensuring that state constitutions are understood as chief legal guardians upholding citizens' rights.

Another approach, labeled the "interstitial" or supplemental approach, asks state courts to first examine the federal constitution, turning only to the state constitution if the federal Constitution is unclear or if something unique about the state constitution warrants divergence from the U.S. Supreme Court's interpretation of a similar clause.¹⁷

The last method of state constitutional analysis is called "lockstep," where the state court follows the U.S. Supreme Court's interpretation of similar constitutional provisions.¹⁸ This approach blatantly ignores the careful drafting of individual constitutions and favors national constitutional homogeneity over the very text of state constitutions. Naturally, this method devalues plain and independent readings of state constitutions.

Wyoming's high court has been inconsistent in its approach to interpreting liberties protected in the state constitution. Not long after the Wyoming Territory became a state, the Wyoming Supreme Court took the state constitution's interpretation quite seriously.¹⁹ When confronted with questions of a constitutional origin, the Court looked first to the Wyoming Constitution and second to other similar constitutions and their interpretation. In doing so, the Wyoming Supreme Court refused to follow sister state interpretations of near-identical constitutional provisions due to the Court's own independent obligation to faithfully read the state constitution. This early approach was consistent with the nature of a compound republic, where different state constitutions offered different protected liberties depending on the needs of the states' citizenries.

In Wyoming, a slow drift away from the original meaning of the Wyoming Constitution occurred. This practice left the state constitution to be interpreted either haphazardly or in lockstep with the federal constitution. Late in the game in the 1990's, the Wyoming Supreme Court decided the time was ripe to address the uniqueness of the state constitution. In doing so, it turned to the Washington Supreme Court and adopted a complicated six-factor test, purportedly to shed light on the meaning of the Wyoming Constitution. Unfortunately, the Wyoming Supreme Court elected to give itself a rather pliable set of criteria for determining how to interpret rights and liberties protected under the state Constitution. The effect of this malleable approach is to place fixed constitutional liberties in jeopardy and to destabilize the rule of law.

State Constitutions are oft Forgotten, but still Important

Citizens should receive a dual benefit in that their liberties and rights are secured by both the federal constitution and their own state constitutions. Since the Framers of the federal constitution believed that state and federal governments would operate to keep each other in check, ignoring one set of constitutional rights carries with it a significant price for citizens in a free Republic.

Justice Hans A. Linde, a former member of the Oregon Supreme Court and prolific writer on state constitutionalism, noted the widespread ignorance of state constitutional rights:

The future of the “new federalism” remains doubtful. There is no reason for confidence that most state courts will systematically decide what their state constitutions require, either adapting someone’s federal analysis or making their own, before deciding whether their state has violated the nation’s Constitution. Perhaps the best we can hope for is that those judges who do not abdicate their responsibility outright will put first things first when the case is properly put to them. How often and how well they do it depends on the professionalism of the younger generation of advocates in constitutional cases as well as on the professionalism of the younger generation of judges.²⁰

Within Wyoming’s justice system, much has been spoken, but little has been done, about re-discovering the fundamental principles for guiding the interpretation of the state Constitution. Justice Urbigit of the Wyoming Supreme Court explained in a scathing dissent that “Wyoming marches in lonely retreat with the federal constitution ‘lockstep’ when it does what was done in this case as an unthinking and casual surrender of its philosophic independence.”²¹ Without a doubt, state courts were designed to be the first line of defense for individual liberties in our federalist nation. Without that protection, Wyoming citizens surrender the specific liberties preserved by the Framers of the constitution. They need not.

As protectors of first resort, state judges bear a considerable duty to interpret the oft-expansive liberties distinctively protected in state constitutions. Coming from the Oregon courts once again:

While many guarantees of the state and federal constitutions have their roots in the same sources, they are embodied in different constitutions, with different ultimate interpreters, and may reflect variations in their values and purposes. They generally appeared first in state constitutions and were later added to the federal. No court is the primary interpreter of those guarantees. Under the Fourteenth Amendment, the United States Supreme Court’s construction of the federal version of those guarantees is both

authoritative for the federal system and a constitutional minimum which states must obey. Its decisions do not, however, decide the meaning of [state constitutions]. In that respect, a United States Supreme Court majority is no more binding in [a state] than is a United States Supreme Court minority, a decision of the Supreme Courts of Hawaii, California, or Georgia, or a well-reasoned law review article. Judicial opinions from other jurisdictions are helpful in interpreting [state constitutions] to the extent that their reasoning is persuasive and their background is applicable to [the state].²²

When Justice Brennan sounded his clarion call in the 1970's, pro-liberty organizations were slow to hear this message. As explained by Justice Brennan, the point is that state constitutions are a "font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."²³ It was no less than James Madison who warned that state governments would pose the greatest threat to citizens' liberties and yet it is in state constitutions that we find their most vibrant protection.²⁴ Today, state legislatures, county governments, and local governments regularly sacrifice these fundamental liberties. Given the importance of securing freedom in a compound Republic, it should behoove Wyoming judges to jealously guard the liberties protected by the state constitution.

If state constitutions truly are fonts of individual liberties, then the proverbial buck stops with the judiciary to ensure that they are protected. In Wyoming, state judges take an oath to obey and defend the state constitution. But the unfortunate trend, within Wyoming and without, is to passively adopt the United States Supreme Court's constitutional reasoning for similar cases in a lockstep manner. That intellectual passivity amounts to Wyoming's surrender of its own constitutional priorities. With this slow drift away from the truth, the Wyoming Constitution becomes superfluous and ceases to protect Wyoming citizens.

Many state courts hesitate to develop their own constitutional meaning, in part because few states have developed a strong and independent understanding of their own constitutions. Some commentators have observed an alleged nationwide "poverty of state constitutional discourse."²⁵ One study looked to the decisions of the highest courts in New York, Massachusetts, Virginia, Louisiana, California, Kansas, and New Hampshire to examine how much each state had developed its own understanding of its Constitution. The study explained that these state supreme courts often do not have a docket full of state constitutional interpretation issues. In fact, many courts were observed to express a "general unwillingness" to "engage in any kind of analysis of the state constitution at all."²⁶ Going further still, many court opinions on constitutional issues are so obscure that they, "failed entirely to specify whether certain of the parties' claim, much less its own analysis and ruling, rested on state or federal constitutional grounds, or both."²⁷

In Louisiana, for example, the law is deeply influenced by Spanish and French components. It follows the civil law as embraced in mainland Europe, rather than the British common law, and is the only state in the Republic to do so. Yet, the decisions of the Louisiana Supreme Court do not speak to these unique influences and vast differences from the federal constitution. Of course, that just reads away the specific protections designed by the Framers of the Louisiana Constitution and superimposes a federalized, generic constitutional norm in its place.

Interestingly, in observing nationwide trends, one likely cause of this pattern of interpretive obscurity is state courts' appetite for interpreting their constitutions in lockstep with the federal Constitution. If a state supreme court adopts the lockstep method of constitutional interpretation, the court may "have no particular need to distinguish clearly between the state and federal constitutions, because the two documents to a large extent have the same meaning and can thus be used interchangeably."²⁸ In short, reliance on the lockstep method of constitutional interpretation obfuscates the need for careful judicial scrutiny of specific liberties protected by the state constitution, of a state's history, and of other difficult textual analyses. This practice discourages the development of independent state constitutional meaning and assures unreflective homogeneity between state interpretations and federal precedent. This practice of lockstep interpretation waves the white flag of surrender of the rights purposefully included in a state constitution. Given its destructive impact on the intended system of dual federalism, this judicial renunciation is non-trivial.

The Framers' Design Favors Liberty and Lets Ordinary Government do its Job

It is precisely because Wyoming delegates considered their own specific needs as free citizens of a frontier state that the language adopted in its constitution should receive careful attention today. The pressures they faced were markedly different from their peers in New York or Alabama. Ignoring the specific rights and liberties that Framers of the Wyoming Constitution agreed upon retroactively diminishes their efforts toward the thoughtful application of the rule of law in this state.

On September 2, 1889, territorial governor Francis Warren called the Wyoming Constitutional Convention to order.²⁹ Quickly, nineteen committees were formed to consider such issues as individual rights, the judiciary, water rights, local government organization, and the formation of the legislature.³⁰ While accounts are available of the full convention's debates, the various committee deliberations were not officially recorded. Still, we can get a good sense of the primary concerns because of debate documents and references to sources relied on by the delegates. Wyoming convention delegates relied primarily on the constitutions found in other states, rather than the federal constitution, in drafting their own document. The delegates referenced the Colorado Constitution more than twenty times, the Pennsylvania Constitution seven times, the Montana and Illinois Constitutions five times each, and the Nebraska and Nevada Constitutions four times each.³¹ In but two instances did the Wyoming delegates refer to the federal constitution during the Wyoming Constitutional Convention debates.³² Because the historical record is clear on this point, Wyoming courts should be careful to

first examine state constitutions before relying on the federal constitution to transplant meaning to the state constitution.

The Wyoming delegates themselves offered wide regional representation from within the state with all ten counties being represented. The forty-nine delegates who attended the Convention consisted of thirty-one Republicans and eighteen Democrats.³³ Overall, political tension was limited. As noted by a Cheyenne newspaper of the day, “party lines have not been drawn during the entire convention, but political bias cropped out here and there, especially on apportionment.”³⁴ By and large, the delegates, regardless of parochial interests or ideological convictions, worked toward the creation of a state government protective of fundamental liberties and conducive to the ordinary functioning of stable governance.

The Framers Sought to Shrink Government

The result of diverse and particular Wyoming state interests being represented at the Convention is a state constitution carrying autonomous status. Based on concerns about territorial corruption and excesses, significant restraints were placed on the state legislature, which was viewed as most likely to abuse citizens’ liberty. In thirty-seven separate instances, the Wyoming Constitution limits legislative authority by prohibiting local or special laws. Going further, it bans the legislature from passing bills that would be unduly complex for the public, those “containing more than one subject, which shall be clearly expressed in its title.”³⁵ Lastly, it protects citizens against financial waste through detailed appropriations rules, prohibitions of bribery, of aid to railroads, and of vote trading and logrolling.³⁶

Regarding the executive branch, Convention delegates were also fairly suspicious of executive excess.³⁷ Unlike some other states, Wyoming delegates removed the governor’s pocket veto power – ensuring that all bills became law unless the governor affirmatively vetoed them.³⁸ Delegates also limited the governor’s authority by banning the officeholder from self-appointing himself to other posts.³⁹ Lastly, to further limit the power of the executive, delegates required that four other top state officials be elected instead of appointed through gubernatorial choice.⁴⁰ These included the secretary of state, treasurer, auditor, and superintendent of public instruction. Such an innovative approach is reflective of the autonomous status of the Wyoming Constitution.

Individual Liberties Generally Favored over Government Power

The heart of the Wyoming Constitution is found in its Declaration of Rights. While delegates to the Wyoming Convention debated and gave great consideration to the specific language contained in the Declaration, little attention is given to it today. The state judiciary often treats the rights protected in the Wyoming Constitution as moribund relics, out of step with the needs of a modern society, or as subordinative abstractions in lockstep with the federal constitution. In interpreting the state constitution, the Wyoming judiciary should revivify their understanding of the very real and exceptional liberties contained in this Declaration.

We would do well to emulate the level of sophistication and sensibilities that the Framers of the Wyoming Constitution possessed. Notably, many portions of the Declaration of Rights were taken from other state constitutions, not the federal constitution. Citizens of the State of Wyoming could have taken the easy way out and copied another state or the federal constitution nearly verbatim. They did not. Because Convention delegates took the specific pressures and requirements of governance in Wyoming seriously, they set about to draft their own language in the state constitution. The Framers incorporated these distinct protections because of their appreciation of territorial excesses, government corruption, and the importance of limited government. Since the Framers included this type of careful protection, modern judicial interpretations should not turn a blind eye to its importance, as if they could somehow free themselves from the ballast of historical context.

Historically, one of the most profound individual rights guaranteed under the Wyoming Constitution is the extension of voting rights to women. In addition, considerable debate centered about the delegates' decision to include broad equal protection guarantees prohibiting discrimination on the basis of race and sex. Other rights, drafted more broadly than their federal counterparts, include:

- Economic liberty⁴¹
- Extensive Due Process protections⁴²
- Private property protection⁴³
- Open access to state courts⁴⁴
- The right to education with parental control⁴⁵
- Humane treatment as a prisoner⁴⁶
- The right to abolish state government⁴⁷
- Church and state separation⁴⁸
- Liberty of conscience⁴⁹

One principle overarches and unites the individual rights included in the Declaration of Rights. The Convention expressly endorsed the principle that individual rights take precedence over government authority.⁵⁰ The Wyoming Framers did not just stumble upon this conclusion. Rather, it became a first, and rather radical, principle of priority. Explicit debate was held over whether the rights included in the Declaration of Rights should be narrowly or liberally construed. The Framers understood that a narrow construction would favor government authority by discounting the value of individual rights. In counter distinction, a more generous construction would value citizens' rights

above government authority. These formulations, while seemingly the stuff of abstract discussion for legal philosophers, play a crucial role when rights are decided before the courts.

Judges operate with baseline presumptions about what the gold standard of justice should be when cases are presented before them. For example, in a case where citizens complain to the court about a law that impinges upon their constitutional rights, judges have, most often, presumed that the law is harmless by deferring to the judgment of the legislature. This could, and in fact, does occur in cases of land taking, where government seizes property for some professed “public use.” Rather than start with the commonsense presumption that citizens have a natural right to possess and make use of their property as they see fit, this rule turns this principle on its head and assumes that government has the presumptive authority to seize your land because it knows best. Thus, the veritable gold standard has been devalued, giving way to government encroachment on individual liberties. Because the government’s end is assumed to be so noble or so exigent, the means used to achieve it are often deemed authoritative.

In countless areas of the law, a seeping preference in favor of government authority has invaded precedent. Yet, citizens should not face hassles just to exercise their fundamental rights. As this invasive precedent takes hold, citizens challenging government abuse will encounter increased setbacks in making their case for justice before the courts. Core liberties are placed in jeopardy, including the right to use and protect private property as one sees fit, the right to make use of livestock and animals in an economically productive way, the right to freely engage in the occupation of one’s choice, and the right to speak out during elections about political issues and candidates. To borrow a sports analogy, in any challenge to arbitrary exercises of government authority, this seeping preference makes it as if government starts its case with two extra touchdowns before the clock even starts. The result is not difficult to predict: in all but the most exceptional cases challenging government’s infringement of constitutional liberties, citizens will lose. Worse yet, recognizing “you can’t fight city hall,” citizens will simply give up before they start because of the state’s success in fatiguing them into compliance.

The historical record behind the Wyoming Constitutional Convention supports the commonsense notion that judges should first defer to the exercise of liberty, not government authority. Delegate George Smith, a Rawlins attorney, argued in support of a liberal construction, noting the importance that broad individual rights take precedence over government authority: to this the Convention agreed.⁵¹ Otherwise, government could, would, and does invent justifications for overriding the protection of individual liberties. After all, “necessity” is the “plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves.”⁵²

The significance of Convention debate over the nature of individual rights compared to government authority should not be soft-pedaled. Making the bold choice to support individual liberty over government control should have the direct consequence of deflating the mystique of the supremacy of government authority. To reiterate, in any

confrontation between government authority and individual rights, the Wyoming Constitution compels the judiciary to protect individual liberty as a first principle of priority in interpreting the Wyoming Constitution. Such clarity in the practice of this principle will guard against the tendency of government authority to meander toward authoritarianism.

Voting and Water Rights: Signposts of Uniqueness

In any society founded upon the norm that sovereignty rests with the people, the right of franchise must be taken seriously. After all, the electoral cycle is the citizens' primary tool for accountability, enabling legislators to be fired or hired. Wyoming's all-male convention strongly supported this right and promoted the advancement of female suffrage in elections. Because of this Wyoming became known as the first state to extend the franchise to women. Still, the delegates did place some restrictions on the right to vote, requiring citizens to be literate to vote, fearing that the "security of the state would be compromised if illiterates were able to cancel the votes of the literate citizens."⁵³ In this way, the Framers of the Wyoming Constitution ensured an open and fair electoral process, while securing the premise of electoral accountability.

The protection of water rights played an important role at the convention and gives us a window into the mindset at the time in terms of concerns with core principles reflected in a specific issue. Rancorous debate ensued and was later stopped when Professor Elwood Mead, a territorial engineer, submitted a report which supported full state ownership over all waters.⁵⁴ Discussion focused on how to establish a system of "prior appropriation" as the basis of water regulation, rather than the commonly established doctrine of riparian rights – the law governing most property owners' water rights in eastern states. Prior appropriation provided that while no person owned actual water, all persons had a right to use water for beneficial purposes. This involved a rights determination – "first in time, first in right" as it would be called. Thus, the first to use water acquires the right and protects that use against future users. In Wyoming, many viewed Mead's proposal of complete state ownership of water rights as extreme and unwarranted.⁵⁵ Ultimately, the state constitution reflected the adopted-centralized approach. Wyoming waters would be regulated by a state board of control, four water districts would be established, and the courts would review the functioning of this program. Wyoming's hybrid system amounted to a compromise approach – permitting some centralized regulation, while recognizing individuals' rights to use water according to the doctrine of prior appropriation. The entire process of debate illustrated the delegates' sensitivity to individual concerns and rights even while dealing with a precious limited natural resource vital to the populace as a whole.

Government Should be Accountable, Taxes Uniform and Low, and Spending Limited

Convention delegates expressed great interest in limiting taxes for citizens while ensuring state and local governments would remain solvent. To generate revenues, the delegates

created a property-based tax system, requiring uniformity as a founding principle.⁵⁶ They also designed specific limits on tax rates for the state, counties, and cities.⁵⁷ Great debate ensued over the establishment of a special tax system for coal. Some delegates explained that special taxes would stymie economic development and pointed to Colorado as an example of a state where industry was booming due to low taxation. As one delegate explained, “Shall we build a Chinese wall around Wyoming and prevent the investor from coming in to develop its resources? Why has Colorado become the great state she is? Because she has welcomed capital, she has not closed her gates, she has opened them wide, and Colorado today is a workshop.”⁵⁸ Economic liberty and preserving the inflow of capital were prime concerns of delegates at the Convention.

Most states forming constitutions after the depression of 1873 were concerned about excessive state borrowing, indebtedness, and insolvency. Wyoming was no stranger to this concern. In fact, the Wyoming Constitution reflects the delegates’ commitment to strong fiscal conservatism as is evidenced in constitutional limits on state, county, and local government indebtedness. Beyond that, government bodies could not spend funds beyond annual tax revenues – *unless approved by popular vote*. One scholar, writing in the Harvard Law Journal, has explained that the numerous historic problems associated with government debt were not “isolated instances of governmental abuse; rather, they reflect what we have come to accept as the natural workings of the legislative process.”⁵⁹ Specifically, the benefits of debt creation tend to be “concentrated in well-organized groups while its costs tend to be dispersed” across taxpayers as a whole.⁶⁰ As the Wyoming Framers understood the risks of debt, they took serious steps to limit this peril.

Debt limits as a first principle of fiscal conservatism was a popular theme for all states drafting their constitutions in the 1800’s. However, with the westward expansion of the nineteenth century came railroads, a highly expensive form of transit, and as legislatures became eager to lure industry and trade, they borrowed irresponsibly to invest in capital construction.⁶¹ As public desire and legislative yearning for modern public infrastructure kept up at a dizzying pace, states fell into financial disarray, defaulting on loans, leading to financial chaos.⁶² In fact, across the United States, nine states and several cities defaulted on bonds they had issued, sending them into bankruptcy or near insolvency. The defaulting states included Maryland, Illinois, Indiana, Michigan, Mississippi, Louisiana, Arkansas, Florida, and Pennsylvania.⁶³ For most states, recovery meant raising excise and property taxes substantially.⁶⁴ Citizens, mindful of the tax strain created by public debt, did not take well to increased debt obligations. Across the republic, voters amended state constitutions to prohibit exactly these sorts of boondoggles from happening again. As Wyoming changed from a territory into a state, its Framers took heed of the economic lesson of the day: unchecked state debt entraps citizens and assaults their independence.

When the banking collapse of 1837 arrived, the economic foundation of the nation was shaken, causing a severe depression. States hoped for federal assistance with their assumed debts, and sustained debt financing pushed several states to repudiate their debts.⁶⁵ Likewise, in the South, war-torn states borrowed heavily to recuperate from the Civil War. Come 1865, southern state assets leveled at around \$33 million, while state

debt hovered around \$112 million.⁶⁶ Faced with few other options, these affected southern states borrowed once again using debt to pay off debt. As time progressed and southerners regained control of their states, constitutions were revised or improved to include debt limits.

As financial problems worsened, states convened constitutional conventions to address the plight of debt. In New York, one legislator saw the inherent tension and risk between the operation of representative government and debt, noting: “unless some check was placed upon this dangerous power to contract debt, representative government could not long endure.”⁶⁷ People came to realize that permitting states to borrow money without limit is inherently profligate.

Wyoming was no stranger to the dangers of debt, bond financing, and corporate subsidization. In 1873 and 1874, the Union Pacific agreed to establish a rolling mill in Laramie that the city paid some \$68,000 for.⁶⁸ Union Pacific asked that the county provide warrants to it for \$18,000 and exempt taxes for some ten years.⁶⁹ Similarly, in 1877, the legislature permitted Laramie County to issue bonds in the amount of \$150,000 to aid the Colorado Central rail.⁷⁰ However, hopes were soon dashed when Colorado Central announced it would not build rail north of Cheyenne. With taxpayer-sponsored debt financing, it seems you just can’t get there from here.

Given the tumultuous experience of states in experiencing the crushing consequences of debt, the Wyoming Framers included significant protections so that future taxpayers would not be burdened by irresponsible government borrowing and spending. They included a limit on state indebtedness to one percent of the assessed value of taxable property in the state, as well as limits on county debt to two percent of local taxable property. Today, if taken seriously, the Wyoming Constitution’s debt limits would protect citizens against inordinate taxation and fiscal irresponsibility and would be very much in keeping with the concerns expressed by the convention delegates in 1889.

Families: A Key Ingredient to Success in Education

The Wyoming delegates also included a progressive requirement for “a complete and uniform system of public instruction.”⁷¹ Delegates disagreed sharply over how much power the legislature should be trusted with to disburse state funds for the schools. After prolonged debate, delegates decided that education funds would be distributed according to the population of children attending school.⁷² The delegates rejected a contentious suggestion – affording the legislature broader authority to make school funding decisions.

While public education is provided for through the Wyoming Constitution, parents retain a fundamental liberty interest in deciding the proper upbringing of their children under both the federal and state constitutions. The United States Supreme Court has long deemed the right of parents to select the care and upbringing of their children to be fundamental and worthy of the utmost strict protection.⁷³ This tradition is well protected in this nation’s constitutional history, both within Wyoming and without. More than 85 years ago, the Supreme Court held that the liberty protected by the Due Process Clause

includes the right of parents to “establish a home and bring up children” and “to control the education of their own.”⁷⁴ It is an axiom that the “child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”⁷⁵ Indeed, it is described as a cardinal constitutional value that the “custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”⁷⁶ While the Wyoming Constitution established public education as a feature of the state, we should not lose sight of the truth that parents receive considerable constitutional protection to raise and educate their children in a manner best suiting them.

Wyoming: Didn’t Care for the Feds Then, or Now

Like some other western states, Wyoming’s desire for statehood was sparked by dissatisfaction with federal intervention and mismanagement of the territory.⁷⁷ Thus, any understanding of the Wyoming Constitution should be rooted in the historical context of the state’s territorial experience with federal assistance, intervention, and manipulation. That type of dissatisfaction is not difficult to imagine today. In many ways, it is as if the State of Wyoming now experiences many of the same pressures and mismanagement that it did over a century ago. Consider, for example, the far-flung infringement of the Endangered Species Act in Wyoming. By federal fiat, government regulation favors professed protection of select species over citizens’ traditional rights to defend their own property, not to mention their right to just compensation and due process if a government seizure of property occurs. In today’s political climate, Wyoming citizens face many of the same frustrations of federal intervention as felt by the Framers of the state constitution. The Wyoming Constitution offers a way out of this ideological quicksand.

Today, federal taskmasters have invaded the realm of traditional state sovereignty through the ever-growing Endangered Species Act. Subterranean invertebrates, the silvery minnow, and red wolves are all protected at the expense of property owners. A distant, looming system creates a perverse structure where states and private citizens have less incentive to conduct their own environmental stewardship given the heavy hand of federal mismanagement. A now infamous example of this effect is found in *National Association of Home Builders v. Babbitt*.⁷⁸ There, the County of San Bernardino pursued the creation of an innovative hospital but was blocked by federal intervention under the ESA. Why? “Delhi Sands Flower-Loving” flies might be damaged. While the flies existed in but two California counties, and thus lacked some tangible interstate connection necessary for federal regulation, the court upheld federal intervention because supporting biodiversity, even if in but two counties, could affect national commerce. Be forewarned, when the Delhi Sands Flower-Loving Fly flaps its wings in Wyoming, federal taskmasters will be on site immediately to prevent construction, land use, or other commonsense activities.

As a territory, Wyoming experienced several bouts of misplaced federal intervention which prompted it to move toward statehood. The leading thought at that time was that by becoming a state, Wyoming would be able to exercise its sovereignty more powerfully

and be protected from future federal interjection. President Rutherford Hayes caused unrest by appointing inexperienced administrators, who were often politically connected. For example, local residents petitioned that territorial justice William Ware Peck be exiled to the remote northern distances of Wyoming under Hayes administration.⁷⁹ Similarly, under President Grover Cleveland, the citizens of the territory grew incensed at overarching and poorly designed federal intervention. President Cleveland adopted a policy of prohibiting fencing on public domain lands – much of Wyoming’s territorial foundation – and encouraged small farms at the expense of cattle operations.⁸⁰ To secure self-government and remove themselves from heavy-handed federal intrusion, Wyoming citizens pressed for statehood.

Understanding that Wyoming’s push for statehood was a reaction *against* federal intervention affords the confidence to assert the primacy of the Wyoming State Constitution. In fact, this reaction against control by Washington DC is fully consonant with the Bill of Rights of the U.S. Constitution. The Tenth Amendment to the United States Constitution provides that the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁸¹ Likewise, the Ninth Amendment notes that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁸² Thus, at the time of its forming, the State of Wyoming fully reserved its state-specific powers, as well as its unique liberty interests, which are guaranteed in the state constitution. Realizing that the creation of the State of Wyoming was a move *away* from federal intervention helps direct constitutional interpretation toward relying less on federal authority and more on the specific language of the Wyoming Constitution.

Expanding and Contracting Government Through Constitutional Amendments

Over time, citizens have seen fit to amend and change the Wyoming Constitution, but they have done so in contradictory ways, expanding government authority or spending power in some instances, while placing enhanced limits on other government actions. Still, the overall body of the Wyoming Constitution remains one centered in the Framers valuing and protecting individual rights. Although these examples illustrate the manner in which the Wyoming Constitution has changed, they do not override its basic liberty-favoring approach.

In several areas, Wyoming citizens have expanded government’s taxing, spending, and overall authority. Concerning education, Wyoming citizens have generally been permissive in permitting additional authority and funds to state educational bodies. Debt limits otherwise applicable to school government bodies have been increased, mill state tax levies were added and increased to support public education, and funds could be invested in corporate stocks to support public education.⁸³ Where the Wyoming convention delegates would not impose a permanent constitutionally based tax on mineral operations in the state, later legislatures did propose and pass just such a mineral severance tax amendment. In 1973, the Permanent Wyoming Mineral Trust Fund was created, with significant income dedicated to the state’s general fund.⁸⁴ As of fiscal year

2007, the Trust Fund amounted to some 3.7 billion dollars.⁸⁵ Over time, citizens have approved increased authority for government to be active in building and maintaining infrastructure. In 1915, citizens agreed to amend the state constitution so that the state could expend funds to build highways, but they would not agree to more expansive debt limits to fund such construction.⁸⁶ In 1939 and 1947, voters agreed to permit the state to expend funds to construct water projects and airport construction.⁸⁷ In 1947, citizens soundly rejected a proposal to raise city and county debt limits from 2 to 4 percent, but later approved this in 1975.⁸⁸

Citizens established an important bypass to the state legislature by establishing a way to enact laws and amend the constitution directly through the initiative and referendum process. Legislative accountability was also important and in 1971, citizens limited the legislative calendar to 40 days with a 20 day budget session in alternate years.⁸⁹

In some ways, Wyoming has remained true to the vision of its Framers in being suspicious of increasing state debt. Yet, on other fronts, citizens have been content to expand debt limits and tax rates for state education. Still, the core truths and concomitant protections espoused in the state constitution remain firm, even if amendments to the Wyoming Constitution have evinced a slow shift toward centralization in areas like education.

The Wyoming Supreme Court: Liberties Lost

Make no doubt about it: selecting judicial rules that privilege government authority at the expense of individual liberties only operate to tip the scale in favor of statist temptations. In a triumph of aspiration over substance, arbiters of justice are wont to declare that government authority is the font from which justice arises. In presuming this, one would expect a docket of cases with favorable deference to state bodies and a continued expansion of state power. Over time, the certain effect of such an approach would be to solidify government authority while lessening respect for individual rights; which is exactly what has happened.

Another set of interpretive habits seem to center in intellectual lethargy or distraction due to overloaded dockets. These habits lend themselves to a loss of respect for fixed standards in judicial matters and are conducive to an ad hoc approach, which, appropriately enough is illustrated by the Calvin and Hobbes comic series.⁹⁰ In this series, the young Calvin sets up a competition or sport, but when the *outcome* of the competition seems unfavorable, Calvin declares a new rule at any point in the game. “Calvin ball” is governed by a set of arbitrary rules declared impulsively and inconsistently by players in the game. Similarly, a legal system following Calvin ball rules would jump to and fro among different approaches to interpreting the state constitution so that the *outcome* matched the participants’ agenda. Any long-term commitment to this cartoonish approach diminishes respect for the rule of law and encourages game-like litigation favoring government-sanctioned power over liberty.

In contrast to Calvin ball, another distinctive approach is centered in the historical expectations of the Wyoming Framers. These were individuals who valued state sovereignty rooted in an understanding of federalism and who shared a dedication to protecting individual rights and private property. They also treasured economic liberty. If these were the leading norms of constitutional interpretation, one would expect a rather limited government structure and an objective commitment to the rule of law as a result. Unfortunately, the Wyoming Supreme Court's operational rules and associated habits have worked hand-in-hand with the expansion of government authority over individual liberty. And this serves as a kind of testimony to the power of such temptations.

Politicians: Pure of Heart?

Given the purposeful structure and language of the Wyoming Constitution, it is commonly assumed that the state's high court interprets the document in respect of that history and language. At a minimum, given the historical support for individual liberty over government control, it should be expected that the supremacy of individual rights over government authority would be well-established in the court's jurisprudence. It is not. Instead, more often than not, the court has steadily applied a doctrine of judicial deference and restraint to avoid confrontation with the executive and legislative branches. This is not a healthy development because the judiciary is, in effect, favoring another branch of government and the private citizen is caught in a pincer movement.

As far back as 1893 the Wyoming Supreme Court has relied on a doctrine of deference:

Before an act of the legislature is pronounced void, it should appear that there has been a clear and palpable evasion of the constitution. The judiciary ought to accord to the legislature as much purity of purpose as it claims for itself, as honest a desire to obey the constitution, and also a high capacity to judge its meaning.⁹¹

This "purity of purpose" rule is decidedly a rule in favor of creeping government authority. When citizens challenge a law that infringes on their constitutional rights, this rule provides that if the courts have any doubt about its effect that they should trust (and rule in favor of) the government, not the people. However, the Wyoming Constitution's operative rule is just the opposite – unless the government can clearly and convincingly make its case, individuals are presumed to enjoy the liberty to exercise their rights.

One need only look to the United States Supreme Court to find out the effect a similar purity of purpose rule has on liberty. In *Kelo v. City of New London*, the Court faced a challenge to a city's sweeping exercise of eminent domain authority.⁹² In 1998, Pfizer planned to build a plant and the City of New London determined that someone else other than homeowners could make better use of the land. After careful planning, a design was put in place to use eminent domain to seize nearly an entire neighborhood for private development. The Court ultimately upheld the City's eminent domain authority, noting that eminent domain required a valid "public purpose" and that the Court explained that without "exception, our cases have defined that concept broadly, reflecting our

longstanding policy of deference to legislative judgments in this field.”⁹³ That kind of deference to shortsighted political interests puts citizens’ homes, occupations, ability to speak, and countless other liberties at risk.

This “purity of purpose” rule amounts to a judicially-created stamp of approval for most acts before the courts. When the court’s comments are taken in consideration with the doctrine of liberal interpretation as debated by the state constitution’s Framers, it is hard to reconcile them. The court’s doctrine stands in contravention to the framer’s stated preference in favor of freedom. In the presence of clear rules affirming the import of individual rights in the Wyoming Constitution, preference should be given to freedom, not government control, as a first principle of constitutional interpretation. By presuming laws to be constitutional (and assemblies of politicians to be so pure) the court places a heavy burden on citizens who seek only to enjoy the liberties and rights promised to them by the state constitution. Citizens should not be forced to fight for their rights in an uphill battle against government bodies because the courts have decided to believe that government acts with pure motive.

While modern jurists put great faith in a supposed purity of the acts of the legislature, the Framers of the Wyoming and federal constitutions understood a different truth; one that was expressed in the Federalist number 51. Government is composed of men – men who often have fallen motives that lead to the abuse of individual rights. Understanding this principle should place heightened scrutiny on the supposed purity of government actions. Instead, this truth is perverted through a rule that presumes near-government-infallibility and steadily erases the primacy of individual rights. It is alarming to reflect upon how far the state as a whole has moved from the purposeful language and structure originally penned in the Wyoming Constitution.

Calvin Ball Emerges

The Wyoming Supreme Court developed a second misplaced doctrine of constitutional interpretation in the era of the Great Depression. The state constitution, it was declared, is “in a sense, a living thing, designed to meet the needs of progressive society, amid all the detail changes to which such society is subject.”⁹⁴ Stated differently, “the constitution is not lifeless, but is a flexible, living document intended to accommodate new conditions and circumstances in a changing society.”⁹⁵ Instead of reading the state constitution according to its plain text and in its historical context, the court single-handedly declared itself arbiter of what is best for a “progressive society,” sacrificing the literal protection and rule of law to the particular policy whims of the high court.

These two doctrines invented by the Wyoming Supreme Court – “purity of purpose” and the “living thing” mantra – fundamentally alter and diminish the scope of rights enjoyed by Wyoming citizens. Instead of enjoying a sea of liberty with a few defined islands of government authority, the “purity of purpose” doctrine ensures the ultimate inversion – that government authority will trump liberty any day of the week unless citizens can meet a high burden. Beyond that, once the literal rule of law was destroyed by recognizing the constitution as a “living thing,” the rights enjoyed by citizens could no longer be

expected to be applied in a uniform, objective, and consistent manner. Sadly, that erases the clear guideposts citizens should be able to depend upon when understanding the liberties secured to them under the state constitution. Enter Calvin Ball, or as the august Calvin noted, “The only permanent rule in Calvin Ball is that you can’t play it the same way twice!”

The Wyoming Supreme Court Vacillates in its Interpretations

In certain areas, the Wyoming Supreme Court has struck out on its own and given case-specific meanings to some sections of the Wyoming Constitution. For example, in terms of equal protection, the state supreme court has relied on the broader protection contained in the state document, instead of accepting federal precedent. This is a welcome development. This produced the favorable result that the state could not, pursuant to the Wyoming Constitution, treat various types of property differently for tax purposes.⁹⁶ Yet, the court has also relied on equality provisions in the state constitution to demand stringently uniform public education, without a sound basis in the constitution itself for reaching such conclusion.⁹⁷

The Wyoming high court has vacillated in other areas, at times reaching for a robust independent reading of the state constitution, only to later suggest that the federal constitution defines those same rights over and above the state document. In the area of separation of powers, for example, the Wyoming Supreme Court struck down legislative attempts to define the content of civil pleadings before the judiciary.⁹⁸ Doing so revealed a strong interpretation of the state’s specific separation of powers doctrine, prohibiting the legislature from intruding upon the inherent authority enjoyed by the Wyoming courts for setting their own procedures.

In more recent cases, the court has taken contradictory positions, suggesting that the state interpret its separation of powers doctrine in accord with the United States Supreme Court.⁹⁹ This is disconcerting given the erosion of separation of powers doctrine at the federal level. For most intents and purposes, federal treatment of the separation of powers doctrine has treated its protection in a slipshod fashion while erasing its literal application. As noted by James Madison in the Federalist Papers, the “accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”¹⁰⁰ Today, the American Republic is robust with administrative agencies at all levels which accumulate all powers legislative, executive, and judicial. Specific reference to the Wyoming Constitutional Convention and history illustrate that the Framers were specifically concerned about legislative-overreaching. In short, Wyoming’s separation of powers doctrine is especially pointed at constraining the legislature, a feature specific to this state, and unique by means of comparison to federal tradition. Thus, in one breath the Wyoming Supreme Court announces the importance of maintaining its own rigorous separation of powers doctrine, while in the next it relies on federal precedent. This sort of ambivalent and therefore unsettled approach to constitutional doctrine suggests that the Wyoming Supreme Court should revisit the standards it applies when deciding the meaning of the fundamental law of the state.

Starting to Recognize the State Constitution

In 1993, the Wyoming Supreme Court received a veritable golden platter upon which it could announce its own authentic rule of constitutional interpretation. That case was *Saldana v. State*, where the court confronted the issue of the constitutionality of the state's warrantless acquisition of records concerning telephone calls.¹⁰¹ The Court did acknowledge that both the United States and Wyoming Constitutions protected an individual against unreasonable search and seizures. But it started its analysis with the federal constitution, not the state, and bypassed the fixed law of Wyoming.

After setting out applicable federal standards, the Wyoming Supreme Court explained that the constitutional protection against unreasonable searches and seizures in the Wyoming Constitution is “virtually identical to that found in the federal constitution.”¹⁰² It went on to explain that although Wyoming might offer broader protection, “federal interpretations of the Fourth Amendment are regarded as persuasive and this court adheres to them closely absent some contrary direction from the legislature of the State of Wyoming.”¹⁰³ A question arises: Does not this tendency to make the US Supreme Court the “go to guy” subtly work to undermine the true spirit of federalism?

Where the Wyoming Supreme Court faced issues that would lessen the judiciary's internal managerial authority or would expand the authority of the judiciary, it has supported a robust reading of the state constitution. But where citizens raised constitutional issues not germane to the court's functions and prerogatives, it has usually paid heed to a convoluted six-factor, more-or-less, test to favor reading the constitution more closely in line with the federal constitution (and thus with fewer protections of fundamental liberties).

In *Saldana*, the Wyoming Supreme Court looked to the manner in which the United States Supreme Court interpreted the Tenth Amendment. It explained that states were free to provide “greater expectations of privacy for its citizens than those provided under the federal constitution” due to legislative or judicial discretion. Rather summarily, it concluded that while increased “protection could be afforded to Wyoming citizens,” the court did not perceive it appropriate to do so.¹⁰⁴ At issue in the case was whether Wyoming citizens were protected from warrantless searches of their telephone records. The majority opinion decided that the state constitution, which secures a right of privacy and places limits on search and seizures, provided no significant additional protection to Wyoming citizens. In doing so, it relied on federal precedent, judicial outsourcing once again, ignoring the truth that “state constitutions are a ‘mine of instruction for the natural history of democratic communities.’”¹⁰⁵ The consequence was to superimpose the federal protection, or lack thereof, against unreasonable search and seizures instead of emphasizing and reinforcing Wyoming's own constitutional standard. It is just this sort of intellectual lassitude that the professional bar and citizens of the state should not permit. The Wyoming Supreme Court possesses its own independent obligation to perform the required heavy lifting necessary to interpret the state constitution. After all, judges take an oath to do exactly that.

Charting its own Course: The Court's Return to the Wyoming Constitution

While a majority of the Wyoming Supreme Court agreed to seemingly disregard the unique language and history behind the Wyoming Constitution protecting against warrantless searches, two justices offered more individualized analyses. Justice Golden concurred with the result of the majority that there was no need for a warrant to search telephone records, but noted the importance of state constitutional analysis and urged Wyoming to adopt the Washington Supreme Court's test for determining state constitutional issues. After chiding Saldana for not sufficiently raising the state constitutional issue in its brief, Justice Golden explained that the appellant bears the burden of showing the court *why* it should adopt a more expansive state constitutional analysis.

Justice Golden then proposed six “non-exclusive neutral criteria” for Wyoming courts to use when deciding whether the Wyoming Constitution should be considered as offering broader rights than the United States Constitution:

1. The textual language.
2. The differences in the texts.
3. Constitutional history.
4. Preexisting state law.
5. Structural differences.
6. Matters of particular state or local concern.¹⁰⁶

Oddly, Justice Golden reprimanded the appellant that it did not use any analytical techniques to present its state constitutional argument – a requirement the court had never before demanded. Instead, the appellant's claims were deemed insufficient because, without warning, Justice Golden required that a complicated list of arguments must be advanced before the Court would consider such claims. Add to this the fact that the six factor list is “non-exclusive,” so it could morph into an eight, ten, or even twelve factor test. Of course, Justice Golden's list of constitutional interpretative steps are found nowhere in the Wyoming Constitution, but come out of an earlier Washington state case centered on the Washington State Constitution.

Justice Urbigkit took the opportunity, in a powerful dissent, to clarify exactly how Wyoming's Constitution should be interpreted. This dissent correctly noted that the majority justices did “not here honor [their] responsibility to support, obey and defend, Wyo. Const. art. 6, § 20, by joining in the present major judicial trend for state courts to independently apply guarantees of rights enunciated in the individual state constitutions, some of which predate the United States Constitution.”¹⁰⁷ In short, it makes little constitutional sense to look to the federal constitution to define the Wyoming Constitution – a document drafted primarily for the specific needs of its citizens and from the language of other *state* constitutions that preceded the federal constitution. It is worthy to recall, as noted by Justice Urbigkit:

It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse. By the end of the Revolutionary period, the concept of a Bill of Rights had been fully developed in the American system. Eleven of the 13 states (and Vermont as well) had enacted Constitutions to fill in the political gap caused by the overthrow of British authority. Eight of the Revolutionary Constitutions were prefaced by Bills of Rights, while four contained guarantees of many of the most important individual rights in the body of their texts. Included in these Revolutionary constitutional provisions were all of the rights that were to be protected in the federal Bill of Rights. By the time of the Treaty of Paris (1783) then, the American inventory of individual rights had been virtually completed and included in the different state Constitutions whether in separate Bills of Rights or the organic texts themselves.’

We need not further extend this opinion to trace to their remote origins the historical roots of state constitutional provisions. Yet we have no doubt that such inquiry would confirm our view of the matter. The federal Constitution was designed to guard the states as sovereignties against potential abuses of centralized government; state charters, however, were conceived as the first and at one time the only line of protection of the individual against the excesses of local officials.¹⁰⁸

When the Wyoming Supreme Court does not recognize that its own constitution has precedence over the federal constitution, several negative consequences come to bear. Wyoming-specific decisions will become “displaced and the Wyoming Constitution is amended by cases politically postured by the United States Supreme Court”¹⁰⁹ That is, as the United States Supreme Court vacillates in its political leanings and constitutional reasoning, the Wyoming Constitution, if tied to that reasoning, will shrink and expand according to those whims. As reasoned by Justice Urbigkit, ignoring state-specific constitutional guarantees sounds “strikingly similar to result-oriented adjudication where it is first determined how the case can suit perceptions of contemporary desires and then analysis is used to fit fact and precedential logic into some after-the-fact adjudication for a predetermined answer.”¹¹⁰ Calvin Ball, indeed.

Unsettled Jurisprudence: The Court Finds an “Impressionable” Constitution

By 1995, the Wyoming Supreme Court had another chance to address the way it would formally interpret the state constitution. At that time, four Wyoming school districts challenged the State of Wyoming’s public school finance system. Alleging that portions

of the funding law violated the Equal Protection section and Education Article of the Wyoming Constitution, the high court upheld the challenges, ruling the funding scheme unconstitutional. To do so, the court needed to decide the contours of what the state constitution protected when it guaranteed an “equal opportunity for a quality education.”¹¹¹ Determining exactly what constituted an “equal opportunity” or a “quality education” left several options available to the Court. First, it could have adopted a simple approach and decided that since the Wyoming Constitution, by its very terms, left educational responsibility and funding decisions to the Legislature, that the legislative body had plenary power over these funding choices. Viewed under the separation of powers doctrine, this option would have preserved the educational policymaking authority inherent in the state legislature as granted by the Wyoming Constitution. The Court, however, embraced a second option. It decided that the judiciary could extend its oversight to matters left to the legislature, thereby increasing its own powers.

When litigators have appealed to other state constitutions in a case before the Wyoming Supreme Court, the Court has been critical of excessive reliance on other states’ constitutions to define its own state constitutional issues. Yet, in the education funding cases, it had little difficulty relying on the Washington Constitution to settle the issue of educational rights. The Wyoming Supreme Court reasoned that constitutional provisions “imposing an affirmative mandatory duty upon the legislature are judicially enforceable in protecting individual rights, such as educational rights.”¹¹² In essence, while the Wyoming Constitution left educational funding questions to the legislature, the state supreme court had the authority to review those kinds of subjective determinations, such as “equal opportunity” or what defines a “quality education.” Going further, when the court decided that the legislature failed to act, the court reasoned it had the duty to “compel[] legislative action required by the constitution.”¹¹³ This means that although the state constitution leaves educational policy issues to the discretion of the legislature, the court could compel the legislature to do its bidding if the court viewed these choices as violative of the state constitution. To reach these results, the Wyoming Supreme Court relied on sister-state cases, effectively overruling Wyoming precedent that would have prohibited the state supreme court from blurring its judicial boundaries. This trend of judicial blurring is of concern from the perspective of limited government. As the judiciary expands its reach and invades the province of the executive or legislative branches, more important policy choices will be decided not by citizens, legislators or the governor, but by judges.

Turning to the substance of the opinion, the Wyoming Supreme Court examined the meaning of constitutional phrases at the time they were drafted, how other state constitutions interpreted educational requirements, and statements made by Wyoming Territorial Governors. While it was wholly appropriate to interpret the constitutional language at issue in light of its meaning at the time of its drafting, the court’s eagerness to rely on other states’ constitutions is puzzling. In other circumstances, the court warned litigants that other state constitutions should not simply be relied upon to define the Wyoming Constitution. Yet, when it came to the issue of state-mandated education, the court was fervent to explain the importance of education for other states, as well as to rely on federal precedent to define its import for Wyoming.

The historical record relied upon by the Wyoming Supreme Court in its series of education funding cases should not be assailed. Yet, the manner in which such history was applied to expand the reach of state-mandated education in Wyoming is problematic. It is entirely true that territorial governors spoke of the importance of education in Wyoming. For example, Territorial Governor J.A. Campbell reasoned that “in the infancy of our territory, let the fostering aid and encouragement of the government be given to every scheme for the advancement of education, and to establish as the corner stone of our embryo state the principle of universal, free, common school education.”¹¹⁴ And while the Wyoming Supreme Court previously criticized citizens who made hasty conclusions about the meaning of state constitutional provisions, in regard to the question of whether public education was a fundamental right, the court decided based on thin evidence: speeches made by territorial governors and precedent found in other states (namely, Washington and Wisconsin). Certainly, the court did a clever job cobbling together pieces of historical anecdotes to support expansive funding for state schools. Yet, it cannot credibly claim that it has adopted a steady approach to explain how state historical references or sister state cases should be treated in interpreting the state constitution. All too often, Wyoming citizens are chided for using such references, while the Court itself employs them to move policy or constitutional rulings in a certain direction.

Procedurally, a series of school funding cases were captured by the state’s judiciary. The cases continued, litigation increased, and the judiciary expanded its own control over Wyoming’s educational system in bald defiance of the state constitution’s separation of powers guarantees. The Wyoming Constitution grants no authority to the Wyoming judiciary to oversee education policy in the state. By injecting itself into a largely political controversy in Wyoming, the Court had, in essence, appointed itself Education Czar.

More recently, the Wyoming Supreme Court has hinted at a return to a stricter form of constitutional interpretation. In 2004, the Court reviewed the constitutionality of term limits. In striking term limits down, it dedicated itself to a very plain manner of constitutional interpretation. The Court reasoned that its “fundamental purpose is to ascertain the intent of the Framers.”¹¹⁵ To do so, it would look “first to the plain and unambiguous language to determine intent and if the “language is plain and unambiguous, there is no need for construction, and we presume the Framers intended what was plainly expressed.”¹¹⁶

The Court’s most recent commitment to a plain and strict interpretation of the state Constitution is commended. However, *Cathcart*, the term limits challenge, involved specific, easily understood restrictions on conditions for office. Thus, in cases involving clearly detailed constitutional limits, the Wyoming Supreme Court seems dedicated to applying the state Constitution as written. However, in areas involving state-specific liberties reserved to the people and less clearly expressed in the Constitution, the Court has been hesitant to strike out on its own in defending those freedoms. Further

constitutional challenges will help shape and test the Wyoming Supreme Court's dedication to the primacy of the state constitution.

The Wyoming Supreme Court's rulings in these matters reveal an unsettled jurisprudence about the nature of liberty, rights, and government authority as understood under the state constitution. At times, the Court is quick to support an independent and robust reading of the state constitution, but that interest seems piqued by favorable policy outcomes and where the judiciary would stand to gain expanded authority, such as in the school financing cases. At other times, the Court routinely reproves citizens for not having done the work that the court itself should have done – namely, understanding the historical significance of liberties protected by the state constitution. This pattern of unsettled jurisprudence, of ever expanding and contracting rights, of constitutional impressionability, offers little clarity to the citizens of Wyoming and even less protection for fundamental liberties secured under the Wyoming Constitution.

What's So Special About Wyoming, Anyway?

While the federal constitution establishes a floor for protected liberties, state constitutions offer a ceiling. After all, this is the way the Framers of the Republic designed it. *The Federalist* No. 51 issues the operative rule, a “compound republic” including state and federal governments would provide a “double security” for liberties.¹¹⁷ That is, decentralization of authority ensures that liberties will be more robustly secured. Yet, when state courts routinely cede the expansive liberties contained in their own constitution, our citizens promised “double security” is threatened, diminishing liberty for all. It is worthwhile to examine some of the liberties protected by the Wyoming Constitution, given that the Framers of the document sought to preserve these liberties for posterity within the state as the next sections will illustrate.

The Freedom to Work, as you see fit

Within many state constitutions rests a powerful antidote to government expansion: the guarantee of economic liberty. Making a living, picking the career of your choice, and negotiating the terms of your economic life are the stuff of economic freedom. This freedom includes the right to contract, to bargain for your rate or salary, and to otherwise make a living. This protection normally comes into play when price controls or occupational licensing is enacted. Common examples of such schemes include the government creation of cartels, where over-licensing ensures that politically connected actors keep competitors away.

Before the start of the Civil War, courts regularly protected economic liberty through state and federal constitutional due process, contracts, and takings clauses. After the Civil War and with passage of the Fourteenth Amendment, the inclusion of the Privileges and Immunities, Equal Protection, and Due Process clauses expanded the scope of economic liberties protected. In time, with the progressive policy shift of the United States Supreme Court in the 1930's, federal courts began to defer to government

economic regulations, upholding them unless it could be shown that no rational basis existed for their support.

While the federal courts conceded an important liberty, some state courts continued to protect economic liberty based on their own independent constitutions. In fact, from the early 1940's to the 1960's, state supreme courts regularly struck down state laws infringing on economic liberties. Some thirty years after the U.S. Supreme Court decided in *West Coast Hotel v. Parrish* that it would not protect economic liberties, state supreme courts routinely ignored the U.S. Supreme Court's direction in this area.¹¹⁸ But this could only be done when state judges were committed to reading their own constitutions seriously. By the 1970's, state supreme courts started to reduce or eliminate their protection of economic liberties.

To better understand what encapsulates the realm of economic liberties, it is helpful to examine some of the government-control programs stricken in the past. One perennial example is Sunday closing laws. No less than ten state supreme courts struck down Sunday closing laws because they were unreasonable and anticompetitive.¹¹⁹ Restrictions on advertising are another favorite area of local government control and regulation that have been struck down under state constitutional protections of economic liberty. Typical examples include government bans on specific occupations advertising (such as lawyers) or prohibitions on price displays. Lastly, another popular area of growing government control is occupational licensing. Some state supreme courts have wholly invalidated licensing laws while others have decided they are too restrictive because they are inherently unreasonable.

In state after state, examples of irrational and unreasonable restrictions on economic liberty exist. Consider Arizona, where the state's "Structural Pest Control Commission" prohibited aspiring gardeners and new landscapers from competing with established pest control businesses in the state. The new gardeners hoped only to spray Round-Up and other simple herbicides, but were stopped from doing so unless they obtained a government-granted license.¹²⁰ That license required 3,000 hours of training and experience over a period of five years. In that system, entrepreneurs were not allowed to get the experience working alone, but were forced to quit and work for the competition. Time and time again, unreasonable restrictions are placed on individual businessmen with an entrepreneurial dream, damaging their right to earn and make a living in the best way they see fit.

The Wyoming Constitution contains especially strong guarantees of economic liberty, specifically in Article 1, Section 22 ("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") and more generally through state due process and extensive equal protection guarantees found in Article 1, Section 6, and Article 1, Sections 2 and 3. It should be noted that, when written, the "rights of labor" represent the individual's right to compete in a free market and secure his own living ("proper rewards"). Most importantly, Article 1, Section 7 offers robust protection by noting

“Absolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.”

In the past, the Wyoming Supreme Court has shown some indication that it would interpret the state constitution strictly and protect economic liberty. For example, in *Nation v. Giant Drug Co.*, the court struck down Sunday closing laws because the state lacked the power to enact absolute, arbitrary laws.¹²¹ And in *Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne*, the court held that the Wyoming Fair Trade Act was unconstitutional because it violated state due process protections, and was beyond the police power of the State of Wyoming.¹²² In the *Bulova* case, the state prohibited certain re-sale terms in contracts, but the Court understood that citizens are at liberty to make or refrain from making contracts. By the state forcing certain terms into a contract, the very liberty of the parties entering into the contract is abridged – duties and obligations assumed voluntarily by two private persons. That type of reasoning honors a simple truth – that individuals negotiating together in a civil society may best determine the terms of their own cooperation.

The Wyoming Supreme Court’s holdings in *Giant Drug* and *Bulova* are encouraging precedent, upholding the sanctity of economic liberty. This is consistent with the Framers’ expectations that citizens would reap the economic rewards of their hard work with minimal state intervention. Yet, in more recent years, the judiciary has tended to read away the robust protection contained in the state constitution in other areas. To the degree that Wyoming jurists retain fidelity to the original meaning of the state constitution, citizens will retain control over their lives, careers, and economic affairs, as they see fit.

Wyoming Citizens Know Best

The Wyoming Constitution includes the special protection designed to permit citizens to abolish the government as necessary. Article 1, Section 1 reads: “All power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness; for the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish the government in such manner as they may think proper.” This wisdom reflects the common understanding of the nature of government in the American Republic as described by Justice Cooley in 1927:

The sovereignty resides in the people, although, by written constitutions, they have delegated the exercise of sovereign powers to several departments. The people retain in their own hands a power to control the governments they create as far as they have thought needful to do so; and the three departments are responsible to and subject to be ordered, directed, changed, or abolished by them. But this control and direction must be exercised in the legitimate mode previously agreed upon.¹²³

Like a safety valve of last resort, the clause permits citizens to abolish the State of Wyoming should it exceed its constitutional boundaries. Understandably, this provision has not received much treatment by the courts. Yet, this provision reinforces and supports another norm mentioned earlier in this paper: the liberty of Wyoming citizens is the decided preference of the Wyoming Constitution and not consolidated government authority. Of course, before citizens ever took the radical step of abolishing state government, it was the fervent expectation that free debate and criticism of government would keep the state in check and permit liberty to be exercised freely. But the fact that this special protection exists, that it was written directly into the state constitution itself, tells us how serious the Framers were about our liberty.

The Freedom to Speak Your Mind

The Wyoming Constitution affords citizens expansive free speech and association rights through Article 1, Section 20:

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.

Protected speech includes a wide array of actions we take for granted today. Advertising billboards, door-to-door canvassing, political speech, Internet websites, and pamphleteering are just a few examples of the way citizens exercise that crucial liberty – the freedom to speak your own mind without repercussion. As Madison noted, “A popular government, without popular information, or the mean of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.”¹²⁴

Recall that the Framers of the Wyoming Constitution deliberately favored liberty over government authority in drafting the document. Such preference should mean that the broad protection included in the state constitution’s free speech guarantee should be applied literally. Unfortunately, when interpreting free speech issues, the Wyoming Supreme Court will usually scurry to the United States Supreme Court to define free speech and associational rights under the state constitution.

The United States Supreme Court has long taken the view that the First Amendment, though phrased in absolute terms (“Congress shall make no law...”) does not offer absolute protection. Fighting words, obscenity, and words that may cause a “clear and present danger” are all examples of exceptions to the free speech guarantee of the First Amendment.¹²⁵ In analyzing free speech challenges, the US Supreme Court has developed a dizzying array of balancing tests that weigh professed government interests against the freedom of speech in question. That has produced a cornucopia of strange

free speech decisions, where commercial speech often receives mild protection, expletives on clothing worn in public are strongly guarded, and political speech in the midst of elections continues to receive less shelter under the federal Constitution. These opinions all sway and change according to the ideological vicissitudes of the US Supreme Court, leaving citizens in the lurch.

Wyoming courts should not apply federal free speech precedent to define the scope of protection for speech under the Wyoming Constitution. Stated differently, there is no justification for the judiciary to balance weighty government interests against individual speech rights. Where the Wyoming Constitution expressly withdraws a power from state government, the government is precluded from exercising that power entirely. If, as in the case of individual rights, the Wyoming courts have received clear instruction from the Wyoming Framers that no balancing is to occur, it is a fundamental violation of that instruction to adapt federal precedent (centered in balancing tests) to the Wyoming Constitution. At times, the Wyoming courts have done exactly this in the area of free speech.¹²⁶

When Wyoming courts fail to apply the state constitution's free speech guarantee plainly, the immeasurable liberties protected by it must retreat in the face of statist tendencies. By relying on federal precedent to define the scope of free speech in Wyoming, the Wyoming Supreme Court robs the Wyoming Constitution, and Wyoming citizens, of the special protection secured by their forebears, not to mention a vital piece of cultural inheritance. By adopting this practice, the meaning of the Wyoming Constitution's free speech and association protections ebbs with the U.S. Supreme Court's interpretation of the First Amendment. Applying the plain text of the Wyoming Constitution would restore the broad protection for that crucial liberty – the freedom to speak one's mind and freely exchange information – so desperately needed in today's political climate. Without this freedom, we find ourselves in a society bristling with sensibilities where nothing particularly interesting, offensive, or important may be expressed. As explained by John Stuart Mill, the "peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."¹²⁷ Mill would have fit right in among the Wyoming convention delegates.

The Importance of Owning and Using Your Own Land

The drafters of the Magna Carta and the Framers of the federal and Wyoming constitutions all understood that property rights form the basis of a civil society. Without firm adherence to them, no one knows who owns what, which rules apply when, and ownership would vary according to whim, preferred class, or political preference. The very necessary structured ordering for participation in society would fail. It was David Hume who explained that free enjoyment of property coupled with equal protection of the law were the "great objects for which political society was at first founded by men,

which the people have a perpetual and unalienable right to recall, and which not time, nor precedent, nor statute, nor positive institution, ought to deter them from keeping ever upmost in their thoughts and attention.”¹²⁸ Though property rights are a key to the security of a free society, they stand in peril due to government overreach in their regulation.

Article I, Section 33 of the Wyoming Constitution protects landowners by promising that “private property shall not be taken or damaged for public or private use without just compensation.” Section 33 protects Wyoming landowners against government takings of property, often found in eminent domain or condemnation actions. The easiest way to imagine a taking is when government takes the title to land. Of course, if private property protection extended only to full takings, it would be easy for the state to circumvent this protection and seize property by more devious methods. The value of private property ownership rests not just in title to the land, but in the associated rights of ownership over the land. Each landowner enjoys a bundle of rights when they purchase private property, such as: the right to sell property, to grant easements or access, to prevent trespassers, and to lease it. Any government action that limits the use of these associated rights of ownership impinges on the very notion of private property protection.

Wyoming courts have been stringent in their protection of property rights against outright takings. When government seizes a home, ranch, or business for some public use, like the creation of a highway, the state judiciary has been steadfast in ensuring that citizens’ constitutional rights remain protected.¹²⁹ On the other hand, when government acts in subtler a fashion and passes a land-use regulation that prohibits you from using your land in many ways (and, thus, only a “partial” or a “regulatory” taking), the state courts have been less strict in their protection of property rights. Left unchecked, this trend would create a perverse incentive for state government bodies to take some, but not all, of your property so they could evade constitutional restrictions.

Those citizens who have the temerity to challenge the constitutionality of government land grabs face an uphill battle to find justice. When confronted with a taking, state courts ask government bodies to show that they have exercised its eminent domain authority “in a manner most compatible with the greatest public good and the least private injury.”¹³⁰ Once that is achieved, “the burden shifts to [landowners] to show that the [government] acted in bad faith or abused its discretion as to that particular determination.”¹³¹ More concretely, after government has shown that its taking accomplishes some nebulous “public good,” citizens must then explain to government why they should still retain ownership of their land.

In the realm of regulatory takings, where government prohibits citizens from exercising full use or realizing the full value of their property, the Wyoming Supreme Court has not vigorously protected citizens.¹³² Instead, it has displaced this function onto the federal courts, adopting their precedents to explain that land use regulations are unconstitutional when they go “too far.”¹³³ In these types of cases, the Wyoming courts will conduct an analysis generally in conformity with federal standards about whether the regulation’s impact on property rights goes “too far.” In truth, the Wyoming Constitution offers no

support for a judicial policy allowing government to regulate property up until the point where it goes “too far.” The Wyoming Constitution does not permit judges to read away specific protections for private property. The protection is simple and absolute – private property may not be taken or damaged without just compensation. Where Wyoming courts have failed to obey that simple respect for property, they have failed citizens in not upholding the rule of law and protecting the sanctity of private property—a bedrock of liberty in Wyoming.

The Erosion of Liberty

Justice Louis Brandeis explained the significance of liberty and federalism in the states through his famous dissent in *New State Ice*:

There must be power in the States . . . to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs 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.¹³⁴

While the Republic stood committed to an understanding of decentralized authority with liberties flourishing throughout the states, the 1930’s brought a call for centralization. President Franklin D. Roosevelt, through the New Deal, promised security to the citizens through a laundry list of new national programs. Roosevelt’s vision was grand: federal rights to medical care, quality education, and ample earnings. While those visions were not realized at the federal level, their proponents spread to state and local governments in order to establish them.

Clint Bolick, a leading litigator and author, has explained in his book, *Leviathan*, that, today, state and local governments not only fail to protect individual liberties but also abuse them as well. As small majorities easily control local government, control is conducted “not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.”¹³⁵ That has lead Bolick, and other libertarian scholars, to realize that the threat to individual liberties is most heightened in local government, often with willing accomplices in state judiciaries. If liberty is to thrive again, it is within the halls of state judiciaries that the significant inroads must be made in restoring the rights so ardently secured to citizens in state constitutions.

Specific to Wyoming, the state offers its citizens a quiver of liberty arrows that have often gone unexamined and unused in litigation. Noted earlier, the Framers of the state constitution agreed to include a litany of specific liberties to be rigorously protected. With reference to economic liberty alone, the State of Wyoming has expanded its occupational licensing boards and commissions, including embalmers, a Barbers

Examiner division, landscape architects, child care certification, hearing aid specialists, and professional hunting guides, to name a few. Wyoming government restricts entrepreneurs by means of regulations, licensing requirements, and fees. Generally speaking, boards and commissions are the gateways to a trade or profession and are often governed by the very members of that business community. Understandably, the natural impulse is to limit, not welcome, more competition. Were the Wyoming courts to follow federal precedent, government would only need to show some rational basis for its regulation to survive constitutional scrutiny. That means that only the most oppressive schemes would be stricken as unconstitutional, thus robbing citizens of their economic liberty in most instances.

The Wyoming Constitution has something markedly different to say about the importance of the right to earn a living, to contract, and to otherwise be free from government interference in economic affairs. In Wyoming, economic liberty is a fundamental right guaranteed to the citizens, meaning government should be required to show a compelling interest for any such regulation, and require that it be narrowly tailored to achieve it in the least restrictive manner. Under this formulation, a high burden would be placed on the state government to demonstrate why, consistent with the Wyoming Constitution, such economic regulation was required. One might imagine that in cases where a tangible public harm was created that limited regulation might be permitted. In the absence of compelling reasons and a narrowly tailored regulation, free markets and economic liberty would be the operative norm, just as the Wyoming Framers intended.

Of course, the Wyoming Constitution does not limit itself just to protecting economic liberty. As illustrated in this paper, private property protection, free speech, associational rights, limited government, and restricted federal intervention are all promises assured by the document. If the Wyoming Constitution is to have meaning and be taken seriously, it must be read as it is, not as though it were the federal constitution. This sort of practice would permit the liberties included in the state Constitution to flourish and act as a bulwark against the erosion of liberty.

The Way Home: Welcoming Liberty Back

While the historical trends discussed in this White Paper may seem discouraging, the times have never been riper for Wyoming citizens to reclaim the liberties due them. The Framers of the Wyoming Constitution had clear purpose in drafting the document the way they did. The protections so carefully planned were meant to last indefinitely or, as stated in the document itself, the freedoms are “indefeasible” – they cannot be made undone. Other portions of the state constitution may be changed through the amendment process. After all, the Wyoming Framers could have simply copied another state’s constitution nearly verbatim. But in awakening to the liberties so cherished in the state constitution, the citizens’ dormant inheritance, we may revive, restore, and re-establish the supremacy of this sleeping giant.

For citizens to fully open the conduits of liberty in Wyoming, five concrete changes must be realized within the judiciary. These changes are connected with the rules, canons, or habits of constitutional interpretation. In essence, these old rules must go and two new rules must emerge.

One leading maxim of constitutional interpretation, *verba intelligi ut aliquid operantur debent* (“words should be interpreted to give them some effect”), provides that words should be interpreted to give them natural effect. In other words, even if we dislike a certain policy result, we are obliged to follow the word of the law. To do otherwise would invite the elimination of individual rights, lessen the protections of liberty, and welcome open evasion of the rule of law. A complementary maxim, *potestas stricte interpretatur*, (“power should be strictly interpreted”) provides that powers are interpreted as strictly as possible, while rights as broadly as possible. These two first principles of constitutional interpretation act as a safety valve for citizens by ensuring that the judiciary acts in a restrained manner and gives priority to liberty. Given the state’s drift away from the truth of these judicial maxims, an opportunity has been created for informed, energized citizens to invoke their fundamental constitutional rights and progressively reverse the course of slow motion statism in Wyoming.

The Wyoming Constitution and Specific Norms of Liberty

This paper has delineated the nature of liberties protected in principle in the Wyoming Constitution. Among these liberties are private property protection, economic liberty, expansive free speech rights, and a commitment to state sovereignty. Through unchecked legislative encroachment and a state judiciary hesitant to read the Wyoming Constitution strictly, these rights have gone largely dormant. This diminution was not inevitable but the result of a series of poor choices that can, in fact, be reversed. There are actions that concerned Wyoming citizens can take to reverse this mummification of their rights.

The Wyoming judiciary has been either indifferent to or at best ambivalent about interpreting the state constitution in a manner conducive to liberty. Prescriptively, the judiciary should consult the Wyoming Constitution as a document of first resort, rather than last. Wyoming’s state constitution is rich with its own special text and protections and historical vigor, all of which should be remembered, respected, and applied. Embracing the Wyoming Constitution first requires more than just acknowledging that it exists and could, might, or may offer more protection. In so many cases, this is what Wyoming courts have done on a pro forma manner, leaving it to litigants to investigate and understand the historical foundation of the state constitution. In addition, when Wyoming courts give the Wyoming Constitution specific focus, judges often rely on byzantine, multi-factor tests to determine the scope of protected liberty. Wyoming judges should return to the very text of the constitution as the central focus on analysis and application. Doing so would ensure that attenuated liberties would be replenished, even rejuvenated.

Three operative methods infect the state’s jurisprudence to the detriment of its judicial bill of health. First, Wyoming judges place the burden on citizens to conduct extensive

historical and legal research to determine why the plain text of the state constitution should offer more extensive protection than the federal constitution. They also impose a lengthy, prolix list of criteria to decide how to interpret the state constitution. This list is something of a multi-headed hydra because it remains “non-exclusive.” One day the court might consider six factors and another day twelve, when considering what must be demonstrated to protect liberty. Again, this places the burden of historical and legal proof on the party making any claim in favor of freedom, rather than having it be an internalized standard from which justice operates in the courts. Second, Wyoming judges read the state constitution as a “living” document of negotiable and transient meaning, as opposed to a stable document grounded in first principles. The “progressive” notion of treating a constitution as a living document engenders a sense of confusion and tentativeness in citizens wishing to rely on the written promises of the Wyoming Constitution. Moreover, this interpretative ambiguity serves to empower the judiciary and grant them, *sub silentio*, the power to change the Wyoming Constitution according to policy whims and popular ideological notions. This usurps their role under the doctrine of separation of powers. A third and deeply insidious habit in the Wyoming judiciary is to generally defer to putatively superior government authority, rather than uphold individual liberty. This method stands in direct opposition to what the Wyoming Framers provided for – a rich Declaration of Rights that was to be applied generously in favor of citizens and liberty, not creeping government power. By ignoring the import of the requirement to favor liberty, courts regularly rubberstamp extra-constitutional government programs. These three operative rules have a toxic effect on personal freedom in Wyoming, as each disrespects a citizen’s capacity for self-governance and replaces it with a peculiar vision of anointed, yet desiccated, bureaucratic wisdom.

As this set of interpretative rules has functioned, they have read away Wyoming State specific rights and protections included by the Framers in the Wyoming Constitution. These rules gradually coalesced over a century or more and became the conventional wisdom of the Wyoming judiciary (replacing the first principles espoused in the state constitution). They are now treated as sociological givens, but may well violate portions of the oath that justices take to obey and defend the constitution. The purpose of this White Paper is to encourage readers to question these “givens” and to work to legally change them in a manner that restores and enhances liberty in the State of Wyoming.

It is not as though citizens, when rightfully prompted, have no recourse to change the state constitution. Through the amendment process, citizens can and have produced significant modifications to government control. But those changes rest on a fundamental truth – the consent of the governed is required for any such changes to occur. In this way, the citizens remain the true agents of authority in the state and do not surrender their consent to determine the best social policies of the day. Thus, any rule that effectively changes the purport of the state constitution to match current policy and social preferences must be challenged if a coherent sense of the rule of law is to remain intact.

As indicated by debate at the Wyoming Constitutional Convention, individual rights are to be read broadly, while government authority should be interpreted narrowly. Today,

this maxim has been turned on its head, permitting government authority to grow in an unchecked fashion at the expense of individual rights. Of necessity, the judiciary must underscore that individual liberty was acknowledged as a first principle of the state constitution, and in deference to that recognition, the rights attendant to that liberty must be granted at the cost of state control, not the reverse. Implementing this simple step would tip the scales of justice in favor of citizens and the exercise of their liberty, not to government inclining to expansion of power.

Redirecting the judiciary's fidelity from the concept of a "living thing" toward interpreting rights more broadly would do much to solve the constitutional quagmire the courts find themselves in. Replacing convoluted rules with canons that embrace a plain reading of the constitution would provide Wyoming citizens with a practicable standard of justice rooted in the actual text and history of their state constitution. This would decrease the power of the state, while increasing the personal liberty of every Wyoming citizen in quite simple ways. As Albert Einstein once said, "Be as simple as possible, but not simpler." That is why a return to the plain language of the Wyoming Constitution is crucial.

Conclusion

Thomas Jefferson is said to have noted that the "course of history shows that as a government grows, liberty decreases." In consonance with this admonition, the Framers of the Wyoming Constitution boldly struck out to demarcate specific liberties for citizens of all generations. Their goal was to guard against state government growth, as well as keep federal authorities under restraint, and thereby protect expansive individual rights. But the truth of Jefferson's warning has, unfortunately, evinced itself in Wyoming, as the exclusive liberties once proudly possessed by citizens have quietly faded away. Today, a return to the first principles espoused in the Wyoming Constitution is essential to reverse this fade out of our freedoms.

The Wyoming judicial system offers, in principle, vindication of the natural rights held by Wyoming's citizens. Therefore, Wyoming jurists should return to the plain text of the Wyoming Constitution as a means of authentic constitutional interpretation. This includes interpreting the document in light of its liberty-enhancing preference, thus giving effect to the fixed rule of law. Future litigation will provide Wyoming's justice system with opportunities to reestablish liberties lost by returning to first principles of constitutional interpretation and by treating the Declaration of Rights as something other than a historical relic. This White Paper stands as an invitation to the citizens of Wyoming to participate actively in an informed manner to defend the liberties contained in the Wyoming Constitution. After all, it is within our domain of ability to invigorate them.

¹ Grace Raymond Hebard, *The Government of Wyoming* (San Francisco, California: Whitaker and Ray Co., 1904).

² See, e.g., WYO CONST. Art. I, §§ 1, 2, 7, 19-22.

³ Ibid.

⁴ Ibid. at §§ 1, 2, 7, 19-22, 30.

⁵ *Journal and Debates of the Constitutional Convention of the State of Wyoming* (1893): 520; L. Gould, *Wyoming: A Political History 1868-1896* (Yale University Press: 1968): 97.

⁶ See Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America* (New York: Free Press 2003).

⁷ The U.S. Supreme Court had only applied the takings clause of the Fifth Amendment to the states. *Chicago, B & Q Ry. Co. v. Chicago*, 166 U.S. 226 (1897). The Court began to selectively incorporate and apply the Bill of Rights to the states in cases like *Gitlow v. New York*, 268 U.S. 652 (1925), and *Fiske v. Kansas*, 274 U.S. 380 (1927).

⁸ Justice Story has explained that the “rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them; a power so repugnant to the common principles of justice and civil liberty; lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people.” *Wilkinson v. Leland*, 27 U.S. 627 (1829).

⁹ Hans A. Linde, *E Pluribus – Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 178-80 (1984).

¹⁰ Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (expanded ed. 2001): 49.

¹¹ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502-04 (1977).

¹² *State v. Gunwall*, 106 Wash. 2d 54, 60-62 (1986).

¹³ *Campbell County School Dist. v. State*, 907 P.2d 1238 (Wyo. 1995).

¹⁴ *Washakie County School District No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980), cert. denied, 449 U.S. 824 (1980); *Billis v. State*, 800 P.2d 401 (Wyo. 1990); *Saldana v. State*, 846 P.2d 604 (Wyo. 1993), followed by *O’Boyle v. State*, 117 P.3d 401 (Wyo. 2005).

¹⁵ James Madison, *Federalist* No. 39, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961).

¹⁶ Linde, *E Pluribus*, 18 Ga. L. Rev. at 178-80.

¹⁷ Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 Ariz. St. L.J. 265 (2003).

¹⁸ Sinead McLoughline, *High Court Study: Choosing a “Primacy” Approach: Chief Justice Christine M. Durham Advocating States Rights in Our Federalist System*, 65 Alb. L. Rev. 1161, 1169 (2002).

¹⁹ See *State v. True*, 184 P. 229, 231 (Wyo. 1919) (recognizing that certain powers of the Wyoming Supreme Court are “much more restricted” than other states based on a plain reading of the Wyoming Constitution); *North Laramie Land Co. v. Hoffman*, 219 P. 561, 572-73 (Wyo. 1923) (refusing to interpret provisions of the Wyoming Constitution in lockstep with the Nebraska Constitution which shares identical components due to the Court’s independent obligation to interpret the Wyoming Constitution).

²⁰ Hans A. Linde, *Does the “New Federalism” Have a Future?*, 4 Emerging Issues in State Constitutional Law 251, 261 (1991).

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- ²¹ *Saldana v. State*, 846 P.3d 604 (1993) (Urbigkit, J., dissenting).
- ²² *State v. Soriano*, 68 Or. App. 642, 684 P.2d 1220, 1222 (1984).
- ²³ Justice William Brennan, *State Constitutions and the Protection of Individual Rights*, *Harvard L. Rev.* 489, 491 (1977).
- ²⁴ James Madison, *Federalist* No. 43, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961).
- ²⁵ James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761 (1992).
- ²⁶ *Ibid.* at 779-781.
- ²⁷ *Ibid.* at 785.
- ²⁸ *Ibid.* at 789.
- ²⁹ T.A. Larson, *History of Wyoming* (University of Nebraska Press 1965): 243.
- ³⁰ *Ibid.* at 246.
- ³¹ Robert B. Keiter and Tim Newcomb, *The Wyoming State Constitution* (Greenwood Press 1993): 4.
- ³² *Ibid.*
- ³³ *Ibid.* at 5.
- ³⁴ *Ibid.*
- ³⁵ WYO CONST. Art. 3, §24.
- ³⁶ WYO CONST. Art. 3, §§27, 34, 36, 39, 42-43.
- ³⁷ Keiter and Newcomb, *The Wyoming State Constitution* at 6-7.
- ³⁸ *Ibid.* at 7.
- ³⁹ *Ibid.*
- ⁴⁰ *Ibid.*
- ⁴¹ WYO CONST. Art. 1, §22.
- ⁴² *Ibid.* at §6,
- ⁴³ *Ibid.* at §§ 6, 7, 32, 33.
- ⁴⁴ *Ibid.* at §8.
- ⁴⁵ WYO CONST. Art. 7.
- ⁴⁶ WYO CONST. Art. 1, §§ 15-16.
- ⁴⁷ *Ibid.* at §1.
- ⁴⁸ *Ibid.* at §19.
- ⁴⁹ *Ibid.* at § 18. See also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1436 (1990),(In “many of the debates in the preconstitutional period, the concepts of ‘liberty of conscience’ and ‘free exercise of religion’ were used interchangeably.”). William Penn, for example, defined “liberty of conscience” in 1670 as follows: “By Liberty of Conscience, we understand not only a meer [sic] Liberty of the Mind, in believing or disbelieving this or that Principle or Doctrine, but the Exercise of our selves in a visible Way of Worship, upon our believing it to be indispensably [sic] required at our Hands, that if we neglect it for Fear or Favour of any Mortal Man, we Sin, and incur Divine Wrath.” William Penn, *The Great Case of Liberty of Conscience* (1670), reprinted in *The Political Writings of William Penn* (Andrew R. Murphy ed., 2002): 79, 85-86 .
- ⁵⁰ *Journal* at 723-24. George Smith, a Rawlins attorney, supported a liberal construction of the Declaration of Rights, which was agreed upon by the Convention. Gordon

Bakken, a historian of state constitutionalism, has noted that this reading is consistent with the then-prevailing view that individual rights would be interpreted broadly in favor of liberty, rather than narrowly, in favor of state authority.

⁵¹ See *Journal* at 723-24.

⁵² Speech by William Pitt in the House of Commons from November 18, 1783, found in *Speeches of the Rt. Hon. Wm. Pitt in the House of Commons* (1806), vol. I.

⁵³ Robert B. Keiter and Tim Newcomb, *The Wyoming State Constitution* at 8-9.

⁵⁴ *Ibid.* at 9.

⁵⁵ *Ibid.* at 9-10.

⁵⁶ WYO CONST. Art. 1, § 28.

⁵⁷ WYO CONST. Art. 15.

⁵⁸ *Journal* at 671-73.

⁵⁹ Elizabeth S. Goodman, *Controlling Legislative Shortsightedness: the Effectiveness of Constitutional Debt Limitations*, 1991 Wis. L. Rev. 1301, 1365 (1991).

⁶⁰ *Ibid.*

⁶¹ *Ibid.* at 1306; see also Wheeler, Brian Edward, *Oklahoma Constitutional Law: Highway Robbery: In Re Oklahoma Capitol Improvement Authority: The Eulogy for Oklahoma Constitutional Debt Limitations*, 53 Okla. L. Rev. 319, 320 (2000); see also Comment, *State Aid to Industrial Development and the "Credit Clause,"* 28 Md. L. Rev. 411, 415-16 n.30 (1968) (discussing the governmental carelessness in contracting debt for capital improvement projects).

⁶² See Charles W. Goldner, Jr., *State and Local Government Fiscal Responsibility: An Integrated Approach*, 26 Wake Forest L. Rev. 925, 927-29 (1991) (discussing the fiscal upheaval created by the defaulting state governments).

⁶³ D. Roderick Kiewiet and Kristin Szakaly, *Constitutional Limitations on Indebtedness: The Case of California*, 12 J.L. & Econ. 62 (1996).

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Benjamin U. Ratchford, *American State Debts* (Duke University Press, 1941): 163.

⁶⁷ Goldner, *Fiscal Responsibility*, at 1309.

⁶⁸ T.A. Larson, *History of Wyoming* at 111.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* at 110.

⁷¹ WYO CONST. Art. 7, §1.

⁷² Robert B. Keiter and Tim Newcomb, *The Wyoming State Constitution* at 11.

⁷³ *Troxel v. Granville*, 530 U.S. 57 (2000).

⁷⁴ *Ibid.* at 66 (internal quotations and citations omitted).

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Journal* at 520.

⁷⁸ 130 F.3d 1041 (D.C. Cir. 1997), *cert denied*, 130 S. Ct. 1041 (1998).

⁷⁹ Robert B. Keiter and Tim Newcomb, *The Wyoming State Constitution* at 3.

⁸⁰ *Ibid.* at 3-4.

⁸¹ U.S. CONST. amend. X.

⁸² U.S. CONST. amend. IX.

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- ⁸³ Robert B. Keiter and Tim Newcomb, *The Wyoming State Constitution* at 16.
- ⁸⁴ WYO CONST. Art. 15, §19.
- ⁸⁵ Rita C. Meyer, Wyoming State Auditor, “A Wyoming Financial Perspective, A Report to the Citizens of Wyoming for Fiscal Year 2007,” available at: http://sao.state.wy.us/CAFR/2007_Report/07poprpt.pdf
- ⁸⁶ Robert B. Keiter and Tim Newcomb, *The Wyoming State Constitution* at 14-15.
- ⁸⁷ *Ibid.* at 16.
- ⁸⁸ *Ibid.*
- ⁸⁹ *Ibid.* at 16-18.
- ⁹⁰ http://books.google.com/books?id=3-71JFjDnAC&dq=calvin+and+hobbes&pg=PP1&ots=Faj_jkp01_&source=bn&sig=2cXOrUpm81iOgR9zjPu5LNeCB_8&hl=en&sa=X&oi=book_result&resnum=8&ct=result
- ⁹¹ *In re Board of Commissioners of Johnson County*, 4 Wyo. 133 (1893).
- ⁹² 545 U.S. 469 (2005)
- ⁹³ *Ibid.* at 481.
- ⁹⁴ *Chicago & N.W. Ry. Co. v. Hall*, 46 Wyo. 380, 391 (1933).
- ⁹⁵ *State v. McAdams*, 714 P.2d 1236, 1237 (Wyo. 1986).
- ⁹⁶ *Rocky Mountain Oil and Gas Ass’n v. State Bd. of Educ.*, 749 P.2d 221 (Wyo. 1987).
- ⁹⁷ *Washakie County School District No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980).
- ⁹⁸ *White v. Fisher*, 689 P.2d 102 (Wyo. 1984).
- ⁹⁹ *Billis v. State*, 800 P.2d 401 (Wyo. 1990); *Yeik v. Department of Revenue and Taxation*, 595 P.2d 965 (1979); *Matter of Adoption of Voss*, 550 P.2d 481, 486 (Wyo. 1976).
- ¹⁰⁰ James Madison, *Federalist* No. 47, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961).
- ¹⁰¹ 846 P.2d 604 (Wyo. 1993), *followed by O’Boyle v. State*, 117 P.3d 401 (Wyo. 2005).
- ¹⁰² *Ibid.* at 611.
- ¹⁰³ *Ibid.*
- ¹⁰⁴ *Ibid.* at 612.
- ¹⁰⁵ Robert F. Williams, Introduction, 22 Rutgers L.J. 815, 816 (1991). J. Bryce, *The American Commonwealth* (Rev. 2nd ed. 1891): 434.
- ¹⁰⁶ *Ibid.* at 621-22.
- ¹⁰⁷ *Ibid.* at 625.
- ¹⁰⁸ *Ibid.* at 626 (quoting *People v. Brisendine*, 13 Cal. 3d 528, 550 (1975)).
- ¹⁰⁹ *Ibid.* at 627.
- ¹¹⁰ *Ibid.*
- ¹¹¹ *Campbell County School Dist. v. State*, 907 P.2d 1238 (Wyo.1995) (*Campbell I*); *Campbell II*, 2001 WY 19, 19 P.3d 518; *Campbell III*, 2001 WY 90, 32 P.3d 325.
- ¹¹² 907 P.2d at 1264.
- ¹¹³ *Ibid.*
- ¹¹⁴ Governor J.A. Campbell's Address to the First Legislative Assembly of Wyoming Territory (Oct. 13, 1869), in *Wyoming Territory, Messages of the Governors: 1869-1890*, at 14.
- ¹¹⁵ *Cathcart v. Meyer*, 88 P.3d 1050, 1065 (Wyo. 2004).

¹¹⁶ *Ibid.*

¹¹⁷ James Madison, *Federalist* No. 51, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961).

¹¹⁸ *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

¹¹⁹ *See Handy Dan Imp. Ctr., Inc. v. Adams*, 633 S.W.2d 699, 702-03 (Ark. 1982); *Fair Cadillac-Oldsmobile Isuzu P'ship v. Bailey*, 640 A.2d 101, 107-08 (Conn. 1994); *Rogers v. State*, 199 A.2d 895, 897 (Del. 1964); *Moore v. Thompson*, 126 So. 2d 543, 551 (Fla. 1961); *West v. Town of Winnsboro*, 211 So. 2d 665, 672 (La. 1967); *Nation v. Giant Drug Co.*, 396 P.2d 431, 437 (Wyo. 1964).

¹²⁰ *See* Institute for Justice, *Litigation Backgrounder, Weeding Out Red Tape at Arizona's Structural Pest Control Commission* (2005), available at:

http://www.ij.org/index.php?option=com_content&task=view&id=722&Itemid=165

¹²¹ 396 P.2d 431, 437 (Wyo. 1964).

¹²² 371 P.2d 409 (Wyo. 1962).

¹²³ 1 Thomas M. Cooley, *Constitutional Limitations* 528 (Walter Carrington ed. 1927) (cited by *Cathcart*, 88 P.3d at 1066).

¹²⁴ James Madison, *from a letter to W.T. Barry*, August 4, 1822, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html>

¹²⁵ *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (clear and present danger); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Gooding v. Wilson*, 405 U.S. 518 (1972) (fighting words).

¹²⁶ *Spence v. Flynt*, 816 P.2d 771, 777 (Wyo. 1991) (noting the importance of balancing free speech guarantees); *cf. Miller v. City of Laramie*, 880 P.2d 594 (Wyo. 1994) (upholding a strict burden against government when it infringes upon fundamental constitutional rights. “Indeed, it is the rule that where the governmental action impinges on a fundamental constitutional right the usual presumption is inverted, and the presumption, sometimes characterized as heavy, is against the constitutionality of a statute or governmental action involving a right explicitly or implicitly secured by the Constitution, including a right secured by the First Amendment, such as freedom of speech or expression”).

¹²⁷ John Stuart Mill, *On Liberty* (Elizabeth Rapaport ed., Hackett Pub. Co. 1978 (1859): 18.

¹²⁸ David Hume, *The History of England* (J. M'Creery 1807): 88.

¹²⁹ *Waid v. State ex rel Dept. of Transp.*, 996 P.2d 18 (Wyo. 2000); *Miller v. Campbell County*, 901 P.2d 1107 (Wyo. 1995). *Big Piney*, 715 P.2d 557 (Wyo. 1996) (“Appellant fails to appreciate that the Commission's order represents a valid exercise of the State's police power; it does not constitute a taking under the right of eminent domain.” “[E]minent domain takes property because it is useful to the public, while the police power regulates the use of property or impairs rights in property because the free exercise of these rights is detrimental to public interest”).

¹³⁰ *Town of Wheatland*, 806 P.2d 281 (Wyo. 1991).

¹³¹ *Ibid.*

¹³² *Cheyenne Airport Bd. V. Rogers*, 707 P.2d 717 (Wyo. 1985)

¹³³ *Ibid.* (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)).

¹³⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

¹³⁵ Clint Bolick, *Leviathan: The Growth of Local Government and the Erosion of Liberty* (Stanford, California: Hoover Institution Press, 2004).