

# THE WYOMING SUPREME COURT: JUDICIAL ACTIVISM IN DISGUISE? Russell L. Weaver<sup>1</sup>

Over the years, the Wyoming Supreme Court (“Court”) has handed down opinions exhibiting elements of both judicial activism and judicial restraint. These multifaceted opinions cover the spectrum of life related issues, such as abortion, wrongful life/birth claims, and fetal homicide. However, hints of judicial activism also arise in opinions tackling non-life related issues, such as school funding and automobile negligence.

## I. LIFE ISSUES

There is some evidence of the Court’s bent on life issues. Indeed, the Court addressed abortion, wrongful life, and fetal violence in several opinions. In its life related decisions, the Court appeared to abide by precedent and respect legislative measures. However, some legal scholars argue that the justices actually injected their personal views into these decisions. In the end, many of the cases are not recent enough to illuminate the current Court’s judicial activist tendencies.

### Abortion

In 1973, the same year the United States Supreme Court (“USSC”) decided *Roe v. Wade*,<sup>2</sup> the Wyoming Supreme Court handed down *Doe v. Burk*.<sup>3</sup> *Doe*, a 4-1 decision, struck down portions of Wyoming’s abortion statute, which provided in relevant part, “[w]hoever prescribes or administers to any pregnant woman, any drug, medicine, or substance with the intent to procure the miscarriage of such woman [unless] necessary to preserve her life, shall, if the woman miscarries or dies[,] be imprisoned.”<sup>4</sup> Another section of the statute stated that “every woman who shall solicit [the drug, medicine, or substance in violation of the

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2 410 U.S. 113 (1973).

3 513 P.2d 643 (Wyo. 1973).

4 *Id.* at 646.

aforementioned statutory language] shall be fined and imprisoned.”<sup>5</sup>

In striking down the Wyoming statute, the *Doe* Court relied heavily on *Roe*.<sup>6</sup> As a result, rather than evidencing an activist bent, the *Doe* decision reflected simply recognition that the Court was bound by *Roe*. The Court stated that the constitutionality of the [statute] has passed from our hands because in [*Roe v.*] *Wade*, the [C]ourt directs attention to the similarity between our statutes and the Texas statutes leaving us no room for decision.<sup>7</sup> The Court went on to say, the regulation of abortions in this state is beyond the power of the courts and is solely a matter for the legislature, which must, of course, give heed to the pronouncements of the United States Supreme Court, particularly *Roe v. Wade*.<sup>8</sup>

However, *Roe* did not rule the day in *Wyoming National Abortion Rights Action League v. Karpan*.<sup>9</sup> In *Karpan*, a pro-choice faction sought to keep a proposed abortion statute off a voting ballot. The statutory initiative provided that abortion is prohibited and [will] be criminalized.<sup>10</sup> The Court held that the case presented a justiciable controversy. The Court’s reviewability determination was contrary to the majority rule, which provides that pre-election challenges to statutory initiatives are not justifiable.<sup>11</sup> The Court recognized the “political pragmatism of the majority rule” but chose not to distinguish between “the situation in which an initiative may violate a [constitutional] command and one in which the constitutional provision, as interpreted and applied, is violated.”<sup>12</sup> Consequently, the Court, in a 3-2 decision, held that the initiative contravened *Roe*, as it made no allowance for a woman’s pre-viability decision.<sup>13</sup> The Court also examined another section of the proposed statute that precluded the appropriation of state funds for abortions with certain exceptions.<sup>14</sup> The Court approved of this provision because it was in line with USSC precedent.<sup>15</sup> Consequently, because the initiative was not

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5 *Id.*

6 *Id.* at 644.

7 *Id.*

8 *Id.* at 645.

9 881 P.2d 281 (Wyo. 1994).

10 *Id.* at 287.

11 *Id.* at 286

12 *Id.* at 287

13 *Id.* at 288.

14 *Id.*

15 *Id.*

unconstitutional, as a whole, the Court was unwilling to keep it off the ballot.<sup>16</sup> The Court maintained that a legislative measure carries with it a presumption of constitutionality.<sup>17</sup>

Indeed, Wyoming's legislative measures address many abortion issues. For example, Wyo. Stat. Ann. § 35-6-102 prohibits abortions after the fetus reaches viability, except when necessary to preserve the mother's health or life. In addition, according to Wyo. Stat. Ann. § 35-6-111, "[a]ny person other than a licensed physician who performs an abortion is guilty of a felony." Also, Wyoming statutory law places restrictions on underage abortions. Wyo. Stat. Ann. § 35-6-118, for instance, states that "[a]n abortion shall not be performed upon a minor unless at least one (1) of the minor's parents or her guardian are notified in writing at least forty-eight (48) hours before the abortion" and the parent or guardian provides written consent.

### **Wrongful Life and Birth**

When the Court addressed wrongful life and birth claims<sup>18</sup> in *Beardsley v. Wierdsma*,<sup>19</sup> the justices appeared to abide by precedent. In *Beardsley*, a group of parents sought damages, as a result of an unsuccessful sterilization process that led to pregnancy.<sup>20</sup> The Court, in a 4-1 decision, immediately rejected the wrongful life claim and stated, the vast majority of cases have refused to recognize a cause of action for wrongful life on the rationale that there is no legal right not to be born.<sup>21</sup> The Court continued to abide by case law, from a vast array of courts, when it delved into an analysis of the wrongful birth claims. The Court declined to withhold damages because, as the Court stated, we are not aware of any recent cases that deny all damages to

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<sup>16</sup> *Id.* at 289.

<sup>17</sup> *Id.* Indeed, Wyoming's legislative measures address many abortion issues. For example, Wyo. Stat. Ann. § 35-6-102 prohibits abortions after the fetus reaches viability, except when necessary to preserve the mother's health or life. In addition, according to Wyo. Stat. Ann. § 35-6-111, "[a]ny person other than a licensed physician who performs an abortion is guilty of a felony." Also, Wyoming statutory law places restrictions on underage abortions. Wyo. Stat. Ann. § 35-6-118, for instance, states that "[a]n abortion shall not be performed upon a minor unless at least one (1) of the minor's parents or her guardian are notified in writing at least forty-eight (48) hours before the abortion" and the parent or guardian provides written consent.

<sup>18</sup> A wrongful life claim is generally brought on behalf of the child on the premise that the child had a right not to be born. In contrast, a wrongful birth claim is an action, brought by the parents, to obtain pre and post birth expenses.

<sup>19</sup> 650 P.2d 288 (Wyo. 1982).

<sup>20</sup> Interestingly, on Lexis Nexis, a Michael Golden is listed as counsel for the defendants. On the present Wyoming Supreme Court, Michael Golden is a sitting justice.

<sup>21</sup> *Id.* at 289.

parents [where] negligence, causation and damages are properly proven.<sup>22</sup> The Court allowed the parents to recover medical expenses resulting from the unsuccessful sterilization procedure, hospital expenses for the birth, wages lost because of pregnancy, childbirth, or abortion, damages for pain or suffering related to the pregnancy, and cost of abortion.<sup>23</sup>

The Court found its conclusion was consistent with the vast majority of recent cases and declined to compensate the plaintiffs for child rearing costs.<sup>24</sup> When courts award such compensation, the damages are usually calculated under a benefit-rule. This rule, adopted by the Restatement, involves a determination about child rearing costs, followed by a deduction of benefits that the child bestows to the parents.<sup>25</sup> The Court rejected this rule because a child should not be viewed as a piece of property, with fact finders assessing the expense and damage incurred because of that child's life, then deducting the value of that child's life.<sup>26</sup>

However, Chief Justice Rose opined that such a view [about the benefit-rule] can only be derived from the personal sensibilities of each member of the Court.<sup>27</sup> He argued that the majority's view contravened USSC rulings mandating that questions of family size and procreation are personal decisions protected by privacy rights guaranteed by the United States Constitution.<sup>28</sup> In addition, the chief justice highlighted Wyoming legislation that has provided for state assistance in areas of family planning and birth control.<sup>29</sup>

### **Protection of the Unborn from Criminal Violence**

In *Goodman v. State*,<sup>30</sup> the defendant challenged his convictions for killing a woman and the unborn child she was carrying. He argued he was intoxicated and incapable of premeditation. The Court, in a 4-1 decision, held that a jury instruction on an intoxication defense was proper with regard to the woman's murder.<sup>31</sup> Indeed, the defendant's intoxication

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<sup>22</sup> *Id.* at 291.

<sup>23</sup> *Id.* at 292.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 291.

<sup>26</sup> *Id.* at 293.

<sup>27</sup> *Id.* at 296. (Rose, C.J., concurring).

<sup>28</sup> *Id.* at 295.

<sup>29</sup> *Id.*

<sup>30</sup> 573 P.2d 400 (Wyo. 1977). Marilyn S. Kite, a current justice on the Wyoming Supreme Court, was counsel for the state in this case.

<sup>31</sup> *Id.* At 412.

was relevant because Wyoming's first degree murder statute requires purpose and premeditated malice.<sup>32</sup> However, with regard to the unborn child, the Court examined a Wyoming statute that addresses fetal homicide. The statute reads whoever unlawfully kills an unborn child by an assault or assault and battery willfully committed upon a pregnant woman, knowing of her condition, is guilty of a felony.<sup>33</sup> The Court declined to read premeditated malice or any other requirement of specific intent into the statute.<sup>34</sup> Arguably, the Court abided by the statute's language when it concluded that there must only be a willful assault or assault and battery with knowledge of [the woman's] condition.<sup>35</sup> In an effort to challenge the majority's reasoning, Justice Raper's dissent argued that the statutory language, willfully committed, did, in fact, illustrate that scienter is basic to fetal homicide.<sup>36</sup>

Two years later, the same defendant challenged his convictions for killing the woman and her unborn child under a double jeopardy rationale.<sup>37</sup> In other words, the defendant argued that the killing of the mother and the unborn child were the same offense and that he could not be punished twice for the same act. However, after examining the statutes governing the two killings, the Court found the defendant's claim fruitless. The Court, in a 3-2 decision, held that [t]he killing of the unborn child was a crime against that unborn child and the killing of [the mother] was a crime against her.<sup>38</sup>

### **Assisted Suicide**

The Court has yet to address the subject of assisted suicide. However, legislation suggests that Wyoming disapproves of assisted suicide. For example, Wyo. Stat. Ann. § 35-22-208 states that "[n]othing in this [Resuscitation Directives] article shall be construed as condoning, authorizing, or approving euthanasia or mercy killing."

### **Healthcare Rights of Conscience**

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<sup>32</sup> *Id.* At 406.

<sup>33</sup> *Id.* at 412.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 413.

<sup>36</sup> *Id.* at 416-417.

<sup>37</sup> *Goodman v. State*, 601 P.2d 178 (Wyo. 1979).

<sup>38</sup> *Id.* at 185.

In *Karpan*, discussed *supra*, the Court held that a proposed abortion statute could be on the voting ballot. The proposed statute included a provision that stated: No person shall, in any way, be required to perform or participate in any abortion.<sup>39</sup> The *Karpan* case shed light on the Court's views about healthcare rights of conscience, because the Court did not deem this provision offensive. The provision was eventually enacted. Indeed, healthcare rights of conscience are embedded in Wyoming law. For example, Wyo. Stat. Ann. § 35-6-105 states that “[n]o cause of action shall arise against any private hospital, clinic, institution or any other private facility for refusing to perform or allow an abortion.” Research discloses no decisions or statutes that address pharmacists’ rights to refuse to dispense abortifacients.

### **Cloning**

Research discloses no decisions by the Court on the subject of cloning.

### **Destructive Embryo Research**

The Court has yet to address the subject of destructive embryo research.

As the preceding overview of Wyoming law demonstrates, the high court has appeared to abide by precedent and respect legislative measures. There is some evidence, however, that the justices have allowed personal views and public policy considerations to sway some decisions.

## **II. JUDICIAL RESTRAINT**

Often times, judges are more prone towards judicial activism when tackling life related issues. The Wyoming Supreme Court defends against such claims by declaring its devotion to judicial restraint. However, upon closer examination, some of the Court's decisions arguably sidestep precedent and legislation. For example, in *Karpan*, Justice Taylor's concurrence criticized the majority's justiciability determination. Justice Taylor noted that “the political debate would have been better served if the court had followed the majority rule [because] there is profound wisdom in the separation of powers doctrine.”<sup>40</sup> In other words, Justice Taylor believed the majority interrupted the legislative process. Moreover, in *Beardsley*, the Court sidestepped USSC precedent and legislative policy by citing broad public policy arguments.

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<sup>39</sup> *Karpan*, 881 P.2d at 295.

According to Chief Justice Rose’s concurrence, the justices were guided by their own personal views, in violation of established legal authority.<sup>41</sup> Finally, in *Goodman*, the Court declined to read a specific intent requirement into their fetal homicide statute, even though the statute pertained to an assault or battery “willfully committed.”<sup>42</sup> Justice Raper’s dissent argued that the majority misconstrued the statute. Indeed, Justice Raper maintained that “willfully is synonymous with intentional” and that “the majority [was] inconsistent in requiring a new trial for killing [the mother], but not the child.”<sup>43</sup>

The Court continued to exhibit judicial activism and assert judicial restraint in non-life related decisions. For instance, the Court maintains its school funding decisions contravene no postulate of judicial restraint.<sup>44</sup> However, the Court arguably contravened judicial restraint when it ruled on a constitutional challenge to Wyoming’s public school funding system in *Campbell County School District v. State*.<sup>45</sup> In *Campbell*, a group of school districts argued that Wyoming’s school funding system created wealth-driven and irrational, arbitrary spending disparities which were unjustified and which impinged the fundamental right of education.<sup>46</sup> The Court took this argument very seriously, recognizing that the fundamental right of education was expressly recognized by the Wyoming Constitution.<sup>47</sup>

However, the Court had to address the separation of powers problem that the case presented, including the argument that the judiciary should not determine the nature and extent of the constitutional right to a quality education.<sup>48</sup> The Court rejected that argument and maintained that although it had previously indicated that it would not encroach into the legislative field of policymaking the judiciary has the constitutional duty to declare unconstitutional that which transgresses the state constitution.<sup>49</sup> Consequently, the Court held

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40 *Karpan*, 881 P.2d at 286 (Taylor, J. concurring).

41 *Beardsley*, 650 P.2d at 296 (Rose, C.J., concurring).

42 *Goodman*, 573 P.2d at 413.

43 *Id.* at 417 (Raper, J., dissenting).

44 *State v. Campbell Co. Sch. Dist.*, 32 P.3d 325, 337 (Wyo. 2001).

45 907 P.2d 1238 (Wyo. 1995).

46 *Id.* at 1263.

47 *Id.* at 1257.

48 *Id.* at 1264.

49 *Id.*

that the entire funding system was unconstitutional because it was not based upon differences in educational costs. Upon finding the system unconstitutional, the Court instructed the legislature to design the best education system by identifying the proper educational package each Wyoming student is entitled to have [no matter where he or she lives].<sup>50</sup>

Recently, the Court defended the *Campbell* decision in *State v. Campbell County School District*.<sup>51</sup> The Court acknowledged that it was acutely aware of the criticism surrounding [decisions] regarding school financing.<sup>52</sup> However, the Court reiterated its duty to declare void all legislation that is unconstitutional.<sup>53</sup> In rendering its decision, the Court quoted Alexander Hamilton's proposition that a constitution must belong to [the judiciary] to ascertain its meaning the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.<sup>54</sup>

Chief Justice Voigt dissented, arguing the Wyoming Constitution clearly delegate[s] the establishment, maintenance and funding of Wyoming's schools to the legislature.<sup>55</sup> Indeed, Chief Justice Voigt maintained that the allocation of resources toward competing needs is a legislative, not a judicial, function and that the Court's instruction to Wyoming's lawmakers was pure and simple judicial legislation.<sup>56</sup>

In 1992, the Court once again abandoned its claimed judicial restraint. In fact, according to Justice Cardine, the Court assume[d] a position of extreme judicial activism in *Dellapenta v. Dellapenta*.<sup>57</sup> In *Dellapenta*, a mother and her two children were involved in a severe automobile accident which resulted in one child's death and the other child's injuries. The children's father sued the mother, who was driving the car, based upon negligence in the operation of a motor vehicle [and] failure to buckle the child[ren] in seat belt[s].<sup>58</sup> Initially, the Court acknowledged the possibility that the suit was barred by parental immunity. This doctrine

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<sup>50</sup> *Id.* at 1279.

<sup>51</sup> *Campbell*, 32 P.3d at 325.

<sup>52</sup> *Id.* at 331.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 332.

<sup>55</sup> *Id.* at 342 (Voigt, J., dissenting).

<sup>56</sup> *Id.* at 343.

<sup>57</sup> 838 P.2d 1153, 1159 (Wyo. 1992) (Cardine, J., dissenting).

<sup>58</sup> *Id.* at 1155.

prevents a child from suing his or her parent in order to avoid familial disharmony. The Court, in a 3-2 decision, concluded that for ordinary negligence in the operation of a motor vehicle, parental immunity is inapplicable.<sup>59</sup> In addition, after examining statistics regarding vehicle safety devices, the Court imposed a parental duty to buckle the seatbelts of minor passengers who are dependant on adult care for their well being and safety.<sup>60</sup>

At the time of the decision, a Wyoming statute prohibited the admissibility of evidence about seatbelt use in a civil action. However, the accident took place before the statute was enacted. Thus, the Court turned to sound public policy in light of the fore mentioned statistics to reach its conclusion.<sup>61</sup> Based upon this public policy, the Court could not license the disregard of known life-saving precautions through the failure to restrain children with seatbelts by encompassing this dereliction as an exception to the abrogation of parental immunity<sup>62</sup>

However, the Court's reliance on public policy did not impress the dissenters. Indeed, Chief Justice Thomas argued that, although the case was not controlled by the aforementioned statute, the rule adopted by the Court is antithetical to the statute and hardly seems consistent with a theory of liability that depends upon [children's seatbelt use].<sup>63</sup> According to Justice Thomas, the Court ended up demanding a life style adjustment for Wyoming families.<sup>64</sup> Justice Cardine also expressed his disapproval when he posed the following question: "[A]re we, as judges, constitutionally vested with the power and authority to adopt this kind of vague, incomprehensible legislation?"<sup>65</sup> Justice Cardine answered his question simply: "We know we are not, and we do a disservice to separation of powers when we do."<sup>66</sup> In the end, Justice Cardine compared the Court to a wise and old judge [that] was once asked, "Do judges make law? His response was: of course they do, I made some myself today."<sup>67</sup>

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<sup>59</sup> *Id.* at 1157.

<sup>60</sup> *Id.* at 1160.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1159.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1160.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1159.

These examples show the Court’s willingness, in certain contexts, to sidestep precedent and legislation. While the Justices employ judicial restraint in most instances, it seems that this principle may be surrendered when the Court deems it appropriate.

### **III. THE COURT**

The beginning and end of judicial activism is dependent upon a court’s composition. In Wyoming, the composition of the state Supreme Court hinges on the decisions of a judicial nominating commission. The commission selects three judicial nominees. The governor reviews the nominees and appoints a justice to serve an eight year term. The justices then “stand for retention” every eight years on the general election ballot, in order to stay on the bench. Once on the Court, a justice is elevated to the status of chief justice if the other justices select him or her for that position.

The Supreme Court is composed of five justices: Chief Justice Barton R. Voigt, Justice Marilyn S. Kite, Justice Michael Golden, Justice William U. Hill, and Justice E. James Burke. The table below provides biographical information on each justice.<sup>68</sup>

#### **Biographical information of the current members of the Wyoming Supreme Court**

<b>Member</b>	<b>Appointed by/ Year</b>	<b>Term Expires</b>	<b>Miscellaneous</b>
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<sup>68</sup> Biographical information is available at [www.findlaw.com](http://www.findlaw.com).

Barton R. Voigt	Governor Freudenthal/ 2006	2011	-Biographical information: Chief Justice, since July 2006; Bar Admissions: Wyoming, 1979; Education: University of Wyoming, College of Law, 1979 J.D., University of Wyoming, Laramie, Wyoming, 1973 M.A., Master of Arts Graduate; Teaching Assistant University of Wyoming, 1971 B.A in History; State of Wyoming District Judge 1992-2001; State of Wyoming County Judge, 1989 – 1991; Hot Springs County, County Attorney, 1983 – 1989 -Other: Born: 1949, Scotland, South Dakota
Marilyn S. Kite	Governor Gerringer/ 2000	2011	-Biographical information: Justice, since June 2000; Bar Admissions: Wyoming, 1974 Texas; 1988 U.S. Federal Court, 1974 U.S. Supreme Court, 1987; University of Wyoming, College of Law, 1974 J.D; University of Wyoming, Laramie, Wyoming, 1970 B.A., Partner with Law firm: Holland & Hart: 1979-2000; State of Wyoming-Senior Assistant; Attorney General 1974-1978; -Professional Affiliations: National Institute for Trial Advocacy Western Trial Advocacy Institute Mountain States Legal Foundation Board Member -Awards: Best Lawyers in America, Business Litigation, 1989-1990 Other: Born: 1947, Laramie, Wyoming.
Michael Golden	Governor Sullivan/ 1988	2007	-Biographical information: Justice since June 1988; University of Virginia School of Law, Charlottesville, Virginia, 1992

			<p>LL.M.; University of Wyoming, College of Law, Laramie, Wyoming, 1967; University of Wyoming, Laramie, Wyoming, 1964 B.A in History; Wyoming Supreme Court Chief Justice, 1994-1996; Williams, Porter, Day &amp; Neville, 1983-1988; Brimmer, MacPherson &amp; Golden, Private Practice, 1971 – 1983; United States Army, Judge Advocate General's Corp., Captain, 1967–1971</p> <p>-Professional Affiliations: Wyoming State Board of Law Examiners Member, 1977-1982; 1986-1988</p>
William U. Hill	Governor Gerringer/ 1998	2009	<p>-Biographical information: Justice, since July 1998; Bar Admissions, Wyoming, 1974; University of Wyoming, College of Law, Laramie, Wyoming, 1974 J.D., University of Wyoming, Laramie, Wyoming, 1970 B.A., Wyoming Supreme Court Chief Justice, until 2006 Assistant United States Attorney State of Wyoming Attorney General; Chief of Staff-Chief Counsel for Senator Wallop-Washington D.C.;</p> <p>-Professional Affiliations: State Bar Association Member</p> <p>- Other: Born: 1948, Montgomery, Alabama</p>

James Burke	Governor Freudenthal 2004	2007	<p>-Biographical information: Justice, since January 2004; Bar Admissions: Wyoming, 1977; University of Wyoming, College of Law, Laramie, Wyoming, 1977 J.D; St Joseph College, 1971 B.S.; U.S. Court of Appeals 10th Circuit; 1981 U.S. District Court District of Wyoming, 1977</p> <p>-Publications: <i>The Wrongful Death of a Child-Proving Damages, Trial Magazine</i>, February, 1983</p> <p>-Professional Affiliations: Wyoming State Bar, 1994 Chairman, Committee on Public Information and Communication; Laramie County Bar Association Member Wyoming State Bar, 1996 – Present Member; Committee on Civil Pattern Jury Instruction; Wyoming Trial Lawyers of Association, 1980 – 1981; President Wyoming Trial Lawyers Association, 1979-Present Member, Board of Directors; Western Trial Lawyers Association Member Western Trial Lawyers Association, 1985, President; Association of Trial Lawyers of America, 1989 - Present Member, Board of Governors</p> <p>- Other: Born: 1949, Wilmington, Delaware.</p>
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## CONCLUSION

As the foregoing discussion suggests, the Wyoming Supreme Court has consistently and convincingly suggested that established law is the force behind its holdings. However, the

concurring and dissenting opinions shed illumination on possible judicial activism in disguise. Unfortunately, all of Wyoming's life-related decisions are relatively old and shed little light on the current direction of the Wyoming Supreme Court or its balance between restraint and activism.