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Gomez Redux: Procedural and Substantive Developments Twelve Years On

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GOMEZ REDUX: PROCEDURAL AND SUBSTANTIVE DEVELOPMENTS TWELVE YEARS ON

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I. INTRODUCTION

In the fall of 1997, I participated in a symposium issue of this publication dedicated in part to the New Mexico Supreme Court's decision in *State v. Gomez*[1] and its importance to the development of New Mexico's independent state constitutional rights jurisprudence.[2] *Gomez* began as a fairly traditional appeal from a denial of a motion to suppress the evidence seized from a vehicle without a warrant brought under the Fourth Amendment to the U.S. Constitution[3] and the correlative search and seizure provision in article II, section 10 of the New Mexico Constitution.[4] The New Mexico Court of Appeals affirmed the conviction, ruling against Gomez's Fourth Amendment claim and refusing to consider his state constitutional claim for failure to preserve the issue for appellate review.[5]

On certiorari review, the supreme court decided that the state constitutional issue was preserved,[6] and in the process adopted its now well-entrenched "interstitial" approach to the analysis of state constitutional claims when they are raised in conjunction with "analogous" federal constitutional claims—i.e., those constitutional rights that are similarly provided in both documents.[7] Under that interstitial approach the court will determine the federal constitutional rights claim first, and will only move on to the state constitutional claim if the federal provision does not

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1. 1997-NMSC-006, 932 P.2d 1.

2. The symposium, entitled "State Constitutional Law Symposium," included the following articles focused on *Gomez*: Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology,* 28 N.M. L. REV. 199 (1998) (embracing an independent state constitutional rights jurisprudence, more broadly than in *Gomez*); Jennifer Cutcliffe Juste, Note, *The Effect of State Constitutional Interpretation on New Mexico's Civil and Criminal Procedure*—State v. Gomez, 28 N.M. L. REV. 355 (1998) (elaborating on the *Gomez* interstitial approach as applied to the search and seizure context); Robert F. Williams, *New Mexico State Constitutional Law Comes of Age,* 28 N.M. L. REV. 379 (1998) (explaining the historical significance of *Gomez*); and Michael B. Browde, State v. Gomez *and the Continuing Conversation over New Mew Mexico's State Constitutional Rights Jurisprudence*, 28 N.M. L. REV. 387 (1998) (raising some concerns about the *Gomez* analysis).

3. The relevant portion of the Fourth Amendment provides: "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

4. The relevant portion of the New Mexico search and seizure clause provides: "no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation." N.M. CONST. art. II, § 10.

5. *Gomez,* 1997-NMSC-006, ¶ 1, 932 P.2d at 3.

6. After considering the merits, the court affirmed the conviction, holding that the warrantless search did not violate either the Fourth Amendment standard with respect to such searches, or the additional protections it read into article II, section 10 of the New Mexico Constitution—under which a warrantless search will be upheld only if the state established "exigent circumstances." *Id.* ¶ 46, 932 P.2d at 13. Although the state standard provides greater privacy protection in ones automobile, the court, in *State v. Bomboy*, 2008-NMSC-029, ¶ 12, 184 P.3d 1045, 1048, made clear that in *Gomez* "we did not expressly equate an automobile with a home for search and seizure purposes."

7. Professor Williams objects to terms like "analogous," "related," or "parallel" provisions, out of a concern that such phrases may imply a subordinate status for the state constitutional provisions which may be articulated in similar terms to federal provisions. He would merely refer to them as state constitutional rights claims where there are also "potentially applicable" federal provisions. *See* Williams, *supra* note 2, at 379 n.5 (quoting Bruce Ledewitz, *The Role of Lower State Courts in Adapting State Law to Changed Federal Interpretations*, 67 TEMP. L. REV. 1003, 1004 n.5 (1994)).

afford the protection sought by the claimant.[8] The parallel state constitutional right is thus "interstitial" in that it is seen as filling a perceived gap in the protections provided by the federal provision. As articulated in *Gomez,* the interpretation of the so-called analogous state constitutional provision "may diverge from federal precedent for [one of] three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics."[9]

My earlier contribution to the symposium applauded the *Gomez* decision because a "jurisprudential approach for dealing with arguments urging the expansion of state constitutional rights beyond those recognized under the federal constitution is of importance to a mature [state] jurisprudence."[10] That earlier article expressed some concern about *Gomez*'s limited bases for state diversion from federal precedent, which, coupled with its rather strong expression of support for "uniformity" between state and federal rights,[11] created an implied presumption in favor of the federal approach.[12] The earlier article also questioned whether *Gomez* interstitialism should be followed in all instances.[13]

It is for those reasons that the prior article concluded with the observation that "[i]n the end, *Gomez* interstitialism . . . must properly remain [the subject of] a continuing conversation which matures and develops to serve us in ways which we may not yet appreciate or understand."[14]

This opportunity to continue that conversation considers some of the developments in the cases since the symposium was published. As of December, 2009, *Gomez* had been cited in eighty-one New Mexico Court of Appeals decisions, fifty-four of which were further reviewed in the New Mexico Supreme Court.[15] This article deals with the most significant of the supreme court cases, and a few cases from the court of appeals that were not subject to further review.

The focus of this article is on recent developments concerning the following aspects of *Gomez*: Part II considers whether *Gomez*'s two-part approach to raise and preserve for review a state constitutional claim brought in conjunction with a parallel federal constitutional claim[16] should be reconsidered;[17] Part III explains the contours of the substantive doctrine of interstitialism and offers some further thoughts on whether it needs to be rigidly followed in all cases; and the article concludes with some general observations about the status of *Gomez* after more than a decade of application in New Mexico's appellate courts.

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8. *Gomez*, 1997-NMSC-006, ¶ 9, 932 P.2d at 7. The "lockstep" approach, previously applied in New Mexico, was fully discussed and rejected in *Gomez. Id.* ¶¶ 16–17, 932 P.2d at 6. The "primacy" approach, also rejected in the *Gomez* court's adoption of interstitialism, is discussed in some detail in Browde, *supra* note 2, at 391 nn.21–22.

9. 1997-NMSC-006, ¶ 19, 932 P.2d at 7.

10. *See* Browde, *supra* note 2, at 387.

11. *See Gomez*, 1997-NMSC-006, ¶ 21, 932 P.2d at 7; Browde, *supra* note 2, at 399–406.

12. *See* Browde, *supra* note 2, at 392–94.

13. *See id.* at 406–09.

14. *Id.* at 409.

15. The majority of that number only reference *Gomez* for general principles of preservation, sometimes having nothing to do with analogous federal and state constitutional rights provisions.

16. The approach is explained in the text accompanying notes 20–21, *infra*.

17. Reconsideration was suggested in Justice Bosson's recent concurrence in *State v. Garcia*, 2009-NMSC-046, ¶ 50, 217 P.3d 1032, 1045 (Bosson, J., concurring), and is discussed in detail in the text accompanying notes 54–63, *infra*.

II. THE NECESSITY OF THE *GOMEZ* PRESERVATION REQUIREMENTS

Gomez came to the New Mexico Supreme Court in a posture that required the initial resolution of whether the state constitutional question had been properly preserved for appellate review.[18] In that context, the supreme court viewed its consideration of the various methods for reviewing state constitutional rights claims as a necessary precursor to its preservation analysis.[19] It was the adoption of the interstitial approach that that led the court to establish its two modes of preservation: one for when there is existing precedent for more expansive state protection,[20] and another when there is no such precedent.[21] Since *Gomez* the appellate courts have been struggling with the application of that two-part preservation approach,[22] as illustrated in the following cases.

In *State v. Sarracino*, the court was faced with what appeared to be both a federal and state due process challenge to the district court's failure to provide for a cautionary instruction regarding accomplice testimony.[23] The court swept aside the state's claim that the defendant had failed to preserve the state constitutional issue under the *Gomez* standard, holding the *Gomez* preservation rules inapposite because, although "the Fourteenth Amendment serves as a federal analog to Article II, Section 18 of the New Mexico Constitution in providing a right to due process, the federal practice on which Sarracino relied for his proposed instruction is founded in rules of procedure rather than constitutional doctrine."[24]

Because the court found the federal claim rooted in "rules of procedure rather than constitutional doctrine," it concluded "there is not an existing federal constitutional scheme from which Sarracino could urge that this Court, or the district court, depart."[25] Under these circumstances, the court reverted to traditional pres-

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18. State v. Gomez, 1997-NMSC-006, ¶ 1, 932 P.2d 1, 1.

19. *Id.* ¶¶ 14–15, 932 P.2d at 8.

20. The opinion stated:

> If established precedent construes the provision to provide more protection than its federal counterpart, the claim may be preserved by (1) asserting the constitutional principle that provides the protection sought under the New Mexico Constitution, and (2) showing the factual basis needed for the trial court to rule on the issue.

Id. ¶ 22, 932 P.2d at 8. The court viewed this requirement as no different from what is required with respect to asserting a right under the federal constitution, a federal or state statute, or a common law right—i.e., the requirement of Rule 12-216 that "litigants 'fairly invoke' a ruling by the trial court in order to raise that question on appeal." *Id.* (quoting Rule 12-216(A) NMRA).

21. The court explained:

> [When] a state constitutional right . . . has *not* been interpreted differently than its federal analog, a party also must assert *in the trial court* that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart *and* provide reasons for interpreting the state provision differently from the federal provision.

Id. ¶ 24, 932 P.2d at 8. The court concluded that Gomez was not required to meet this additional burden because "[t]here is established New Mexico law interpreting Article II, Section 10 more expansively than the Fourth Amendment." *Id.* ¶ 24, 932 P.2d at 8.

22. While the preservation issue was not the focus of this author's prior article, *see* Browde, *supra* note 2, at 393 n.26, the Cutcliffe Juste note gave considerable treatment to that issue. *See* Cutcliffe Juste, *supra* note 2, at 365–69.

23. *See* 1998-NMSC-022, ¶ 10, 964 P.2d 72, 76.

24. *Id.* ¶ 11, 964 P.2d at 77. In the court's view, Sarracino only "requested a jury instruction patterned after a federal form that specifically cautioned the jury to examine and weigh accomplice testimony 'with greater care and caution than the testimony of ordinary witnesses.'" *Id.* ¶ 8, 964 P.2d at 76.

25. *Id.* ¶ 11, 964 P.2d at 77.

ervation rules—i.e., that "by tendering his proposed instruction, Sarracino preserved the question whether New Mexico's jury instructions adequately respond to the concerns accompanying accomplice testimony, or whether New Mexico's existing practice should be changed."[26]

This may have been a narrow view of the nature of Sarracino's federal claim, because the "change" sought by Sarracino was his claim that both the federal and state constitution required a more specific instruction. The court was also comfortable in its conclusion that *Gomez* preservation rules did not apply because in prior rulings it had viewed the due process clauses of the federal and state constitutions as being based on "a similarity in underlying principles," thus providing further support for its conclusion that "there is not an existing federal constitutional scheme from which Sarracino could urge that this Court, or the district court, depart."[27]

In *New Mexico Right To Choose/NARAL v. Johnson,*[28] the court was dealing with an equal protection attack on a New Mexico Human Services Department rule restricting state funding for medically necessary abortions under the state's Medicaid program, as well as a similar claim under the New Mexico Equal Rights Amendment to article II, established in section 18 of the New Mexico Constitution.[29] Given the presence of clear U.S. Supreme Court precedent rejecting a Federal Equal Protection challenge to bans on such funding,[30] the court easily moved to the state constitutional issues in the case under *Gomez*.[31] Of course, *Gomez* was highly relevant to the extent the challenge was made under the "analogous" state equal protection clause. Given, however, that the court ultimately relied on the New Mexico Equal Rights Amendment, for which there is no federal analogue, the court could have fairly sidestepped the *Gomez* preservation rules entirely[32] with a clear declaration that whenever there are no "parallel" federal and state constitutional provisions involved, the special preservation rules of *Gomez* do not apply.

Three other post-*Gomez* cases, each dealing with the consequences of failure to meet its preservation requirement, merit some consideration. In *State v. Harbison*, the supreme court was faced with the question of whether the court of appeals had

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26. *Sarracino*, 1998-NMSC-022, ¶ 11, 964 P.2d at 77.

27. *Id.* This is but one example of the court adhering to a "lockstep" with federal constitutional mode of analysis, even if the application of that method under the state constitution might provide broader protection than under federal law. This issue is discussed in more detail in the text accompanying notes 123–129, *infra*. Applying that unified mode of constitutional analysis the *Sarracino* court resolved the defendant's state constitutional claim against him. *See id.* ¶ 12, 964 P.2d at 77.

28. 1999-NMSC-005, 975 P.2d 841. For an in-depth discussion of the federal and state issues in the case, see Linda M. Vanzi, *Freedom at Home: State Constitutions and Medicaid Funding for Abortions,* 26 N.M. L. REV. 433 (1996). *See also* Linda M. Vanzi, *Freedom at Home Revisited: The New Mexico Equal Rights Amendment After* New Mexico Right to Choose/NARAL v. Johnson, 40 N.M. L. REV. 215 (2010).

29. The New Mexico Equal Rights Amendment to section 18, added the following to that section dealing with due process and equal protection: "Equality of rights under law shall not be denied on account of the sex of any person." N.M. CONST. art. II, § 18.

30. *See* Harris v. McRae, 448 U.S. 297 (1980) (rejecting constitutional challenges to federal funding limitations which barred payment for most medically necessary abortions); Maher v. Roe, 432 U.S. 464 (1977) (sustaining a Connecticut regulation granting Medicaid benefits for childbirth but denying them for non-therapeutic medically unnecessary abortions).

31. *NARAL*, 1999-NMSC-005, ¶ 28, 975 P.2d at 851.

32. The *NARAL* court referenced *Sarracino* as "discussing preservation when there is no federal constitutional scheme from which to depart," *see* 1999-NMSC-005, ¶ 25, 975 P.2d at 850, despite the questionable substantive value of that brief discussion. *See supra* notes 23–27 and accompanying text.

"erred in 'sua sponte' applying a federal analysis and adopting the position of the United States Supreme Court . . . without conducting such an interstitial analysis."[33] The court answered the question in the negative after finding that the state issue had not been briefed and argued in the court of appeals, concluding that since the issue was abandoned "that Court was not required to conduct its own interstitial analysis."[34] The court went on to rule that "[t]he Court of Appeals properly analyzed this case under the Fourth amendment and the relevant, binding United States Supreme Court precedent."[35] Based upon this analysis, the New Mexico high court affirmed the court of appeals' decision reversing the district court's suppression of evidence.[36]

In *Breen v. Carlsbad Municipal Schools*, the preservation question was ignored entirely.[37] The *Breen* court was confronted with a state equal protection challenge to the differing treatment afforded to physical and emotional disability under the state Worker's Compensation Act. Without even a bow in the direction of the *Gomez* rules for preservation, the court applied the state equal protection clause and held that "Sections 52-1-41 and -42 of the Act violate equal protection guarantees of the New Mexico Constitution by treating mentally disabled workers differently than physically disabled workers."[38]

Justice Minzner dissented, in part, on the ground that the workers had not distinguished "the protection provided by the federal constitution from that provided by the state constitution . . . [and had not] argue[d] that they are part of a sensitive or suspect class."[39] As a result, Justice Minzner concluded, citing *Gomez,* that she "would not attempt to distinguish the equal protection guaranteed by the New Mexico Constitution from that guaranteed by the federal constitution."[40]

In *State v. Funderberg*, a case involving a police stop of a vehicle, the court was confronted with the questions of whether the stop, limited questioning of the driver, and subsequent consensual search of a vehicle were constitutionally reasonable.[41] The court reiterated the constant theme in its post-*Gomez* cases that when a defendant does not argue that the New Mexico Constitution provides any greater protection than the Federal Constitution, then "we assume without deciding that both constitutions afford equal protection to individuals against unreasonable seizures in this context, and we analyze the constitutionality of the seizure under one uniform standard."[42]

Consideration of the preservation issues dealt with or ignored in these cases runs the risk of confusing two questions. In an appeal from a district court, raise-and-preserve rules are imperative to assure, as a matter of efficiency and good practice, that all issues are first presented for resolution to the trial court, thereby

33. 2007-NMSC-016, ¶ 25, 156 P.3d 30, 38.
34. *Id.* ¶¶ 25–26, 156 P.3d at 38.
35. *Id.* ¶ 26, 156 P.3d at 38.
36. *Id.* ¶ 27, 156 P.3d at 38.
37. *See* 2005-NMSC-028, 120 P.3d 413.
38. *Id.* ¶ 2, 120 P.3d at 416.
39. *Id.* ¶ 55, 120 P.3d at 428 (Minzner, J., dissenting).
40. *Id.*
41. 2008-NMSC-026, ¶ 1, 183 P.3d 922, 924. The supreme court found no constitutional violation, reversed the court of appeals, and affirmed the district court's denial of the motion to suppress evidence. *Id.*
42. *Id.* ¶ 12, 183 P.3d at 926 (quoting State v. Ochoa, 2004-NMSC-023, ¶ 6, 93 P.3d 1286, 1288).

also avoiding sandbagging by one party or another.[43] At the appellate level, the matter raised in the trial court may be abandoned by failing to brief the question in the appellate court.[44]

At the supreme court level, however, too rigid an application of preservation/abandonment rules when state constitutional claims are involved may undermine an essential function of the supreme court—to shape the constitutional principles of the State—when an important constitutional issue is sufficiently presented in the record. Perhaps that court ought to be able to be more proactive—identifying the question in its grant of review, requesting the parties to brief the matter, inviting *amici* participation on the question where appropriate,[45] asking for supplemental briefing, and perhaps even requiring reargument when the question arises late in the proceeding.[46] Indeed, *Gomez* did mention the possible applicability of the "fundamental error" exception to the general rule of preservation.[47]

In addition, the appellate courts have recognized a further exception to the *Gomez* preservation requirement. In *State v. Garcia*, the court was confronted with the situation where "it was tacitly agreed that Defendant was seized at some point during his encounter with the officer," and the State's response to the defense motion to suppress was framed instead on whether there was "reasonable suspicion" for the seizure.[48] The district court denied the motion, and it was only in the court of appeals where the State claimed in its brief "that the district court [could] be affirmed on the alternative grounds that Defendant was never seized."[49] Defendant then raised his state constitutional claim in "*response* to the State's argument for affirmance on what amounted to right-for-any reason grounds."[50] Confronted with that procedural posture, the court held: "[W]e will not impose any preservation requirement on Defendant's response. In this context, it was not incumbent on Defendant to anticipate such a holding by the Court of Appeals and preserve

43. *See* Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked. . . ."); Madrid v. Roybal, 112 N.M. 354, 356, 815 P.2d 650, 652 (Ct. App. 1991) ("The principal purpose of the rule requiring a party to preserve error in the trial court of issues sought to be asserted on appeal is to alert the mind of the trial judge to the claimed error and to accord the trial court an opportunity to correct the matter.").

44. *E.g.*, State v. Ortiz, 90 N.M. 319, 320, 563 P.2d 113, 114 (Ct. App. 1977) (holding that issues listed in the docketing statement but not briefed on appeal are deemed abandoned).

45. *See* Amicus Curiae Brief at 1, *State v. Flores,* 2004-NMSC-021, 135 N.M. 759, 93 P.3d 1264 (No. 27,845) (involving a resident expert responding to the supreme court request for his amicus views on constitutional procedures dealing with mental retardation and the death penalty).

46. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 888 (2010) (noting that "[t]he case was reargued in this Court after the Court asked the parties to file supplemental briefs addressing [a further constitutional question].")

47. State v. Gomez, 1997-NMSC-006, ¶ 31 n.4, 932 P.2d 1, 10 ("Even if Gomez's contentions before the trial court had failed to preserve the state constitutional claim, we could nevertheless consider it because freedom from illegal search and seizure is a fundamental right."). Professor Sullivan suggests, however, that the statement may have been an exaggeration of the fundamental error doctrine, as articulated in *State v. Barber,* 2004-NMSC-019, ¶ 8, 92 P.3d 633, 635. *See* J. Thomas Sullivan, *Developing a State Constitutional Law Strategy in New Mexico Criminal Prosecutions,* 39 N.M. L. REV. 407, 416–17 (2009); *see also* State v. Cunningham, 2000-NMSC-009, ¶ 21, 998 P.2d 176, 182 (noting that fundamental error will be found only when there exist "circumstances that 'shock the conscience' or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked").

48. 2009-NMSC-046, ¶ 11, 217 P.3d 1032, 1036.

49. *Id.* ¶ 12, 217 P.3d at 1036–37.

50. *Id.* ¶ 12, 217 P.3d at 1037.

his argument when it was not at issue before the district court."[51] The *Garcia* court drew support for its ruling from the court of appeals decision in *State v. Granville*,[52] in which that court used the right-for-any-reason doctrine to allow the defendant to support his victory in the district court on a state constitutional ground not argued in the district court. As articulated in *Granville*:

> As the appellee . . . Defendant was not strictly required to preserve his arguments; we affirm if the trial court decision was right for any reason, as long as the arguments in favor of affirmance are not fact based such that it would be unfair to entertain them for the first time on appeal without notice to the appellant.[53]

Thus, *Garcia* and *Granville* establish exceptions to the *Gomez* preservation requirement when a defendant raises the state constitutional claim as a right-for-any-reason argument in support of his victory in the district court, and when it comes up in response to a right-for-any-reason argument presented by the state.

Even more fundamental concerns over the *Gomez* preservation requirements came to the fore in Justice Bosson's concurring opinion in the *Garcia* case. Justice Bosson joined the opinion of the court but wrote separately "to stimulate (hopefully) a dialogue regarding what we reasonably should continue to demand today—over twelve years after *Gomez*—to preserve a search and seizure argument under Article II, Section 10 of the New Mexico Constitution."[54] He began by restating *Gomez*'s "bifurcated framework" for the preservation of a state constitutional claim when a federal analog provision was involved, and noted that in this case the defendant satisfied the *Gomez* criteria with respect to the first standard—where established precedent construes the state clause more broadly than its federal counterpart.[55]

He then criticized the court of appeals and the State in this case for reading that *Gomez* standard "too narrowly" by focusing on whether the prior precedent dealt with the precise claim, (here what is a seizure), rather than the "treatment of the constitutional *provision* at issue."[56] Justice Bosson considered this reading too restrictive because "it could require litigants to meet the higher *Gomez* burden [applicable when there is no established precedent for an expansive construction of the relevant state constitutional provision] each time a new argument or fact pattern under search and seizure is brought before a state court."[57]

That led Justice Bosson to urge the reconsideration of the *Gomez* special requirements for preservation of state constitutional rights claims when made along

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51. *Id.* The *Garcia* court went on to consider the federal constitutional claims before dealing with the state constitutional claim, in accordance with *Gomez* interstitialism principles. *See id.* ¶¶ 23–35, 217 P.3d at 1039–42. The court ultimately reversed the conviction, and upheld the suppression motion, holding that the defendant had been seized, the seizure was without reasonable suspicion, and that the evidence against the defendant flowed from that illegal seizure. *Id.* ¶ 47, 217 P.3d at 1044.

52. 2006-NMCA-098, 142 P.3d 933.

53. *Id.* ¶ 12, 142 P.3d at 937.

54. *Garcia*, 2009-NMSC-046, ¶ 50, 217 P.3d at 1045 (Bosson, J., concurring).

55. *Id.* ¶ 54, 217 P.3d at 1045–46.

56. *Id.*

57. *Id.* ¶ 55, 217 P.3d at 1046.

with analogous federal rights claims.[58] He came to that conclusion because of his concern for the special duty of "New Mexico's highest court . . . to interpret and develop the New Mexico Constitution. In a government of dual sovereigns, it is imperative that our state Constitution develop to its full potential and protect the rights of our citizens where we deem federal law lacking."[59] Justice Bosson was concerned that "[a] heightened preservation requirement for the state Constitution would impede us from addressing legitimate state constitutional concerns."[60] Focusing more on the pressures and practicalities of trial practice, he further noted that the court "should reject any 'super preservation requirement' or highly technical construction that would, in effect, hold our state Constitution hostage to the vagaries of trial counsel competency."[61]

Finally, reminiscent of the concerns expressed by the defendant in *Gomez*,[62] he noted that "Defendant's bare citation to the Fourth Amendment, without more, adequately preserved his search and seizure claim under the United States Constitution," which led Justice Bosson to ask what may have been a rhetorical question: "Why impose a higher burden on our state litigants to invoke our own Constitution?"[63]

Justice Bosson's invitation for a continued dialog on this subject merits serious consideration. Indeed, he makes a persuasive case that the court should reconsider the special preservation rules with respect to state constitutional rights claims under *Gomez* interstitialism.

III. THE SUBSTANTIVE APPLICATION OF INTERSTITIALISM[64]

Despite its importance to preservation issues, *Gomez* interstitialism is more fundamentally concerned with the scope and application of state constitutional law, and the role of the state supreme court in shaping state substantive law. That concern finds expression in the post-*Gomez* cases, including ones that touch upon the following: the grounds for deviation from federal precedent and whether those

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58. *Id.* ¶ 56, 217 P.3d at 1046.

59. *Id.* ¶ 57, 217 P.3d at 1046.

60. *Id.*

61. *Id.* This same concern was expressed by the court in *Gomez*:

> Although we expect trial counsel to be well-advised of state constitutional law on a particular subject affecting his or her client's interests, we also recognize that the arguments a trial lawyer reasonably can be expected to articulate on an issue arising in the heat of trial are far different from what an appellate lawyer may develop after reflection, research, and substantial briefing. It is impractical to require trial counsel to develop the arguments, articulate rationale, and cite authorities that may appear in an appellate brief.

State v. Gomez, 1997-NMSC-006, ¶ 31, 932 P.2d 1, 10.

62. 1997-NMSC-006, ¶ 13, 932 P.2d at 5–6 ("Under this special rule [imposed by the court of appeals], arguments in the trial court sufficed to preserve the Fourth Amendment issue but failed to preserve the broader-protection issue. . . . Gomez argues that the requirements for preserving a state constitutional claim should be identical to those for preserving a federal constitutional claim.").

63. *Garcia*, 2009-NMSC-046, ¶ 57, 217 P.3d at 1046 (Bosson, J., concurring). Justice Bosson also thought it not a serious burden on the trial court to ask, if counsel cites the New Mexico Constitution, for counsel to address that issue and explain why he or she believes the state constitution was violated. *Id.* ¶ 62, 217 P.3d at 1047.

64. For a recent comprehensive review of the ways in which the New Mexico Supreme Court has given broader protection to constitutional rights than under the Federal Constitution in the criminal context, as well as possibilities for future development, see Sullivan, *supra* note 47.

grounds should be narrowly circumscribed, the nature and scope of the deviation, and whether the *Gomez* construct must be rigidly followed in every instance.

A. The Grounds for Deviation from Federal Precedent

While *Gomez* itself seemed to state a categorical rule that allows only three reasons for diverging from federal precedent,[65] there are portions of the opinion (albeit dealing with preservation) suggesting otherwise.[66] A greater flexibility is also supported by the court's rationale for its divergence rule—that "state court decisionmaking that eschews consideration of, or reliance on, federal doctrine . . . will lack the cogency that a reasoned reaction to the federal view could provide. . . ."[67]

That matter was explicitly addressed by Justice Baca in *State v. Paul T.*[68] *Paul T.* involved a police "pat down" of a minor, under sixteen, followed by a search of his pockets in the context of a violation of a local curfew ordinance that required that the minor be taken into custody for release to his parents.[69] The court ruled against the search on article II, section 10 grounds,[70] occasioning a dissent by Justice Baca, who thought the police officer had acted reasonably.[71]

While Justice Baca took issue with the majority's substantive resolution of the case, he began with the observation that in applying *Gomez* interstitialism, "the state court may consider various reasons for departing from federal constitutional interpretations . . . [including] the . . . non-exclusive criteria [recited in *Gomez*]."[72] Justice Baca noted that "the majority's analysis fails to properly ad-

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65. "A state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Gomez*, 1997-NMSC-006, ¶ 19, 932 P.2d 1, 7 (citing *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1359 (1982)).

While most of the cases deal with the latter two grounds for deviation, our appellate courts have not been bashful about taking issue with the U.S. Supreme Court's analysis under the applicable federal constitutional provision, although reliance on "flawed federal analysis" is often cited in conjunction with one of the other two. So, for example in *State v. Rodarte*, 2005-NMCA-141, ¶ 1, 125 P.3d 647, 647, the court held that "the greater privacy protections afforded by Article II, Section 10 . . . do not permit arrests for non-jailable offenses on the basis of probable cause alone . . . siding with the four dissenting justices of the United States Supreme Court. . . ." The court did so in part because the dissenting view in the U.S. Supreme Court's jurisprudence is "most consistent with prior New Mexico cases interpreting Article II, Section 10." *Id.* ¶ 14, 125 P.3d at 650.

66. *See Gomez*, 1997-NMSC-006, ¶ 23 & n.3, 932 P.2d at 8. In *State v. Perry*, 2009-NMCA-052, 207 P.3d 1185, the court of appeals went beyond the three *Gomez* criteria for deviation and suggested that the defendant did not show (but perhaps might have shown) "other evidence or argument to support his theory that additional state constitutional requirements [beyond technical compliance with the *Miranda* warnings] are necessary in order to preserve the right to remain silent . . . [such as] a survey of other states to determine if they have clarification requirements. . . ." *Id.* ¶ 30, 207 P.3d at 1194.

67. *Gomez*, 1997-NMSC-006, ¶ 21, 932 P.2d at 7 (quoting *The Interpretation of State Constitutional Rights, supra* note 65, at 1357).

68. 1999-NMSC-037, 993 P.2d 74.

69. *Id.* ¶ 3, 993 P.2d at 77; *see also* ALAMOGORDO, N.M., CODE OF ORDINANCES § 11-03-040 (1960).

70. *Paul T.*, 1999-NMSC-037 ¶¶ 14–15, 993 P.2d at 79.

71. *Id.* ¶ 38, 993 P.2d at 85 (Baca, J., dissenting).

72. *Id.* ¶ 35, 993 P.2d at 84. Those criteria include "1) a flawed federal analysis; 2) distinctive state characteristics; or 3) an undeveloped federal analog." *Id.* In a footnote, Justice Baca noted the additional factors for deviation suggested by Justice Handler's famous concurring opinion in *State v. Hunt,* 450 A.2d 952, 965–67 (N.J. 1982) (Handler, J., concurring). For more extensive treatment of the Handler opinion, see Sullivan, *supra* note 47, at 451–60.

dress these or any other criteria justifying its holding,"[73] which led him to conclude "it is the Court's duty to provide a principled basis for its interpretation of Article II, Section 10" because, in his view, "[a] more comprehensive treatment would aid in the development of New Mexico's state constitutional jurisprudence, help further refine the application of the interstitial approach, and provide the bar and other jurists in New Mexico with structured guidance."[74] Thus, Justice Baca made clear that reasons for deviation from federal precedent are critical to a substantive application of *Gomez* interstitialism; that there is nothing exclusive about the *Gomez* factors; and that in applying interstitialism, the only real concern is that the court "provide a principled basis" for its deviation.

Rather than focusing on these overarching purposes for deviation, a number of recent cases have adhered to the three reasons articulated in *Gomez*, and then stretched them, sometimes to the breaking point. So, for example, in a highly controversial case involving the denial of an extradition petition by the State of Ohio, the court in *Reed v. State ex rel. Ortiz* made expansive use of the *Gomez* substantive principle.[75] In defense of its conclusion that Reed was not subject to return to Ohio under the Extradition Clause of the U.S. Constitution,[76] the court concluded, based on the record before it, that Reed fled Ohio because of fear that his parole would be revoked without due process, and that he would thereafter be returned to prison where he faced the threat of bodily injury.[77] On that basis, the court ruled that "duress" negated his status as a fugitive under the Extradition Clause of Article IV.[78]

In so ruling, the court adopted an expansive view of the "structural difference" ground for deviation articulated in *Gomez*. After reading the federal law as allowing the asylum state to engage in an inquiry about what might occur in the state demanding return, the court held:

> [T]he extradition process was not meant to abrogate the New Mexico Constitution which regards "seeking and obtaining safety" as a "natural, inherent and inalienable" right. *See* N.M. CONST. art. II, § 4. . . ."In interpreting the more expansive language of Article II, Section 4, we are mindful of the more intimate relationship existing between a state government and its people, as well as the more expansive role states traditionally have played in keeping and maintaining the peace within their borders."[79]

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73. *Paul T.*, 1999-NMSC-037, ¶ 36, 993 P.2d at 84 (Baca, J., dissenting).

74. *Id.* ¶ 37, 993 P.2d at 85.

75. 1997-NMSC-055, 947 P.2d 86, *rev'd*, New Mexico *ex rel.* Ortiz v. Reed, 524 U.S. 151 (1998).

76. U.S. CONST. art. IV, § 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").

77. *See Reed*, 1997-NMSC-055, ¶¶ 26–28, 54, 947 P.2d at 92–93, 97.

78. *See id.* ¶ 107, 947 P.2d at 108. In the pithy words of Justice Franchini, writing for the court, "The focus of our analysis is whether Reed is a 'fugitive from justice' . . . [and] [t]he facts demonstrate conclusively that Ohio's conduct toward Reed was not just. Reed is thus not a fugitive from justice. Rather, he is a refugee from injustice." *Id.* ¶ 86, 947 P.2d at 103.

79. *Id.* ¶ 105, 947 P.2d at 107–08 (quoting California First Bank v. State, 111 N.M. 64, 76, 801 P.2d 646, 658 (1990)). Justice Minzner concurred in the judgment, but would have based her affirmance not on the fugitive question, which she believed expanded "the role of an asylum state beyond acceptable limits" in violation of the Supremacy Clause. *Id.* ¶ 128, 947 P.2d at 112 (Minzner, J., concurring). Justice Baca dissented on the very grounds which led the U.S. Supreme Court to reverse the New Mexico Supreme Court judgment.

Justice Franchini's opinion not only gave a broad reading to the Inherent Rights Clause of the New Mexico Constitution,[80] which knows no federal constitutional parallel,[81] but also articulated what may be an all-encompassing basis for deviation from federal precedent under *Gomez*—i.e., that the relationship between state government and its citizens is closer than the relationship that exists between the federal government and citizens. If that was sufficient to satisfy the "structural differences" prong of *Gomez* deviation in this case, then there are always grounds for deviation with respect to constitutional right claims, because, by definition, such claims seek to protect state citizens from state governmental encroachment.

The court took a similar approach in *Montoya v. Ulibarri*.[82] In that case, the court concluded that "protections afforded by the New Mexico Constitution allow a prisoner to obtain habeas relief based upon a freestanding claim of actual innocence, independent of any constitutional violation at trial . . . [because] the continued incarceration of an innocent person is contrary to both due process protections and the constitutional prohibition against cruel and unusual punishment within the New Mexico Constitution."[83]

Noting the federal law to the contrary, and finding that the petitioner had preserved the state constitutional question under the *Gomez* standard,[84] the court departed from federal precedent on two of the three *Gomez* grounds—structural differences, and distinctive state characteristics.[85] Concluding that the federal precedent refusing to entertain a freestanding claim of actual innocence in a federal habeas petition was based in part on the fact that "federal courts are not forums in which to relitigate state trials,"[86] the *Ulibarri* court reiterated the particular applicability of the essential structural difference that always adheres when federal courts and state courts are confronted with newly-expansive constitutional rights arguments:

> Rather than being concerned with principles of federalism, the New Mexico Constitution is obligated to protect our State's sovereignty. Intrinsic within state sovereignty is an interest protecting the credibility of the state judiciary. This Court has a particular interest in ensuring accuracy in criminal convictions in order to maintain credibility within the judiciary.[87]

Compare id. ¶¶ 151–56, 947 P.2d at 120–21 (Baca, J., dissenting), *with* New Mexico *ex rel.* Ortiz, 524 U.S. at 153–55.

80. N.M. CONST. art. II, § 4 ("All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness."). For a more in depth discussion of that clause, see Marshall J. Ray, *What Does the Natural Rights Clause Mean to New Mexico?,* 39 N.M. L. REV. 375 (2009).

81. Which raises the question whether *Gomez* interstitialism even applied in this instance. *See supra* notes 66–72 and accompanying text.

82. 2007-NMSC-035, 163 P.3d 476.

83. *Id.* ¶ 1, 163 P.3d at 478. The court, however, affirmed the district court denial of the petition holding that the habeas petitioner can only "obtain relief if he can establish by clear and convincing evidence that no reasonable juror would have convicted him in light of new evidence," and because "[p]etitioner has failed to meet this standard." *Id.*

84. *Id.* ¶ 18, 163 P.3d at 482.

85. *Id.* ¶ 19, 163 P.3d at 482–83.

86. *Id.* ¶ 16, 163 P.3d at 482 (quoting Herrera v. Collins, 506 U.S. 390, 401 (1993)).

87. *Id.* ¶ 21, 163 P.3d at 483 (internal citations omitted).

The "federalism" concern, articulated here and in *Reed*, relates to the often expressed reality that when federal constitutional constraints are established, those new rights apply nationwide. Such a result necessarily brings to a halt one of the key strengths in our federal system—the ability of the states to serve as "laboratories," be it in the economic sphere,[88] or with respect to individual rights.[89] Again, that reality is a constant, so if federalism values are to be a sufficient "structural difference" for *Gomez* deviation purposes, then there is very little, if anything, left to *Gomez*'s narrowly articulated grounds for deviation.

The *Ulibarri* court also recited the second *Gomez* factor—distinctive state characteristics—for departure from federal precedent, and relied for compliance with that standard on the fact that "this Court has concluded [in numerous instances] that the New Mexico Constitution provides greater rights to New Mexico defendants than those rights provided in the federal constitution."[90] That mode of analysis both overlaps with "structural differences" and, on its own, suggests a very broad principle—that the numerous instances of state constitutional deviation from federal precedent is a sufficient "distinctive state characteristic" that permits deviation in any future case.[91]

Such expansive views of "structural difference" or "distinct state characteristics" are not faithful to the *Gomez* principle of "reasoned reaction to the Federal view,"[92] or Justice Baca's formulation that the reason given be consistent with "the Court's duty to provide a principled basis" for its conclusion.[93] Both *Reed* and *Ulibarri,* however, may be read as dealing with unique matters of "structural differences." *Reed* involved a particular state constitutional provision involving the "seeking and obtaining safety"[94]—of particular relevance to his claim of asylum immunity from extradition; and *Ulibarri*, which arose in the habeas corpus context that requires federal deference to state fact-finding,[95] also presents a special state-

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

89. *See* Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 81 (1980) (holding that the Federal Constitution does not limit California's "sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution.").

90. Because of their particular relevance to the issue in the case, the court focused primarily on its more expansive interpretation of New Mexico's Due Process Clause of article II, section 18, and Cruel and Unusual Punishment Clause of article II, section 13. *Ulibarri*, 2007-NMSC-035 ¶¶ 23–24, 163 P.3d 476, 484 (citing State v. Vallejos, 1997-NMSC-040, ¶¶ 35–38, 945 P.2d 957, 967–68 (New Mexico Due Process Clause) and State v. Rueda, 1999-NMCA-033, ¶¶ 9–14, 975 P.2d 351, 353–54 (New Mexico Cruel and Unusual Punishment Clause)).

91. *See, e.g.*, State v. Cardenas-Alvarez, 2001-NMSC-017, ¶ 15, 25 P.3d 225, 231 ("The extra layer of protection from unreasonable searches and seizures involving automobiles is a distinct characteristic of New Mexico constitutional law."); State v. Ochoa, 2009-NMCA-002, ¶ 12, 206 P.3d 143, 148 ("We depart from federal constitutional law in this case [refusing to recognize a constitutional challenge to pretextual stops] because we find the federal analysis unpersuasive and incompatible with our state's distinctively protective standards for searches and seizures of automobiles.").

92. State v. Gomez, 1997-NMSC-006, ¶ 21, 932 P.2d 1, 7.

93. State v. Paul T., 1999-NMSC-037, ¶ 36, 993 P.2d 74, 85 (Baca, J., dissenting).

94. Reed v. State *ex rel.* Ortiz, 1997-NMSC-055, ¶ 103, 947 P.2d 86, 107; *see also* N.M. CONST. art. II, § 4.

95. In addition to its reliance on its sovereign need to "protect the credibility of the state judiciary," *see* text accompanying *supra* note 87, the *Ulibarri* court also relied on the "state interest in insuring accuracy and the superior ability of our state courts to make accurate factual findings." 2007-NMSC-035, ¶ 21, 163 P.3d at 483.

sovereignty related concern. In such circumstances, however, the judicial invocation of "special state circumstances" ought to avoid an overly broad statement that suggests a result-oriented, less-reasoned approach.

B. The Subject Matter of the Deviation from Federal Precedent

Related to the issues surrounding the reasons for deviation, the post-*Gomez* cases raise questions concerning to what the deviation principle applies. In the preservation context, as Justice Bosson pointed out in his *Garcia* concurrence, there has been some dispute over whether prior deviation under the first prong of *Gomez* preservation (where established precedent exists) must be with respect to the particular state constitutional clause involved, or more narrowly as that clause is sought to be applied to the particular facts of the new case.[96]

That problem is illustrated in some of the cases dealing with the substantive aspects of *Gomez*. *State v. Nunez,*[97] where the court applied *Gomez* in the double jeopardy context, is one example. The defendants had suffered the forfeiture of their vehicle by way of a default judgment in conjunction with criminal drug charges.[98] When the narcotics prosecutions were subsequently brought, the defendants argued that "because they had already been penalized by the forfeiture, double jeopardy prevented further prosecution."[99] That claim was denied, and they were convicted.[100] On appeal, the supreme court reversed.[101] In the first step of its *Gomez* interstitialism analysis, the supreme court concluded that the Federal Double Jeopardy Clause did not prevent the prosecution after the forfeiture, because the U.S. Supreme Court "in a singular reversal of its recent double-jeopardy jurisprudence," had held that "'in rem civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause,'" thereby eliminating any double-jeopardy ground for dismissing civil forfeiture cases under the U.S. Constitution.[102] Moving on to the second part of its substantive *Gomez* analysis, the court held as follows:

> [W]e justify our departure from federal constitutional doctrine because of the distinctive characteristics of New Mexico's double-jeopardy and forfeiture jurisprudence. . . . New Mexico has a time-honored precedent that has always regarded forfeiture as punitive. Moreover, the New Mexico and federal double-jeopardy protections are facially different and, recently, our double-jeopardy case law has departed from the federal standard. . . . [W]ere we to follow [the federal precedent], we would be in conflict with, and would be required to dismantle, a significant body of settled law, much of which was decided independently of federal case law.[103]

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96. *See supra* notes 54–63 and accompanying text.
97. 2000-NMSC-013, 2 P.3d 264.
98. *Id.* ¶ 1, 2 P.3d at 269.
99. *Id.* ¶ 12, 2 P.3d at 271.
100. *Id.*
101. *Id.* ¶¶ 117–18, 2 P.3d at 293. The consolidated appellate cases were heard in the first instance in the supreme court because the court of appeals certified the cases to that court pursuant to NMSA 1978, § 34-5-14(C) (1972).
102. *Nunez,* 2000-NMSC-013, ¶ 16, 2 P.3d at 272 (quoting United States v. Ursery, 518 U.S. 267, 292 (1996)).
103. *Id.* ¶ 17, 2 P.3d at 272 (footnotes and citations omitted).

Justice Serna, joined by Justice Baca in dissent, thought the majority's rationale a "misleading" application of the appropriate *Gomez* factors for diverting from federal precedent.[104] In Justice Serna's view, the prior state opinion relied on by the majority—*State ex rel. Schwartz v. Kennedy*[105]—only involved the double jeopardy protection against "multiple punishments," rather than the double jeopardy protection against a second prosecution at issue in this case.[106] Justice Serna concluded that "in respect to multiple punishments, 'our analysis is identical for both the federal and state clause,'"[107] and the *Schwartz* court reserved for another day whether "the New Mexico Double Jeopardy Clause, under circumstances other than the multiple punishment doctrine, provides greater protection than the federal clause."[108] The dissent found no suggestion "in the reported New Mexico case law that the New Mexico double jeopardy clause, in the multiple punishment context, provides further protection than that afforded by the federal clause as interpreted by relevant federal case law."[109] Thus, the majority and the dissent were essentially split over whether *Gomez* deviation should be evaluated by reference to the clause involved (the majority), or the more specific claim involving the clause (the dissent).

In addition, the subsequent cases expose a further question in this area, best illustrated by *Breen v. Carlsbad Municipal Schools*,[110] where the court again engaged in an extensive application of interstitialism. Confronted with an equal protection challenge to the differing treatment afforded to physical and emotional disability under the state Worker's Compensation Act, the court, applying the state equal protection clause, held that "Sections 52-1-41 and -42 of the Act violate equal protection guarantees of the New Mexico Constitution by treating mentally disabled workers differently than physically disabled workers."[111]

The court applied the federal mode of analysis to the equal protection challenge, as it has historically done,[112] determining whether the level of scrutiny need be strict, middle-tier, or mere rationality. The *Breen* court only implicitly acknowledged that a federal claim would fail under middle-tier analysis,[113] and then went on to independently apply middle-tier analysis under the state constitution. In doing so, and with heavy reliance on the historical underpinnings of the Americans

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104. *Id.* ¶ 140, 2 P.3d at 298 (Serna, J., dissenting).

105. 120 N.M. 619, 904 P.2d 1044 (1995).

106. *See Nunez*, 2000-NMSC-013, ¶¶ 140–41, 2 P.3d at 298 (Serna, J., dissenting). Justice Serna relied on the fact that the double jeopardy clause protects against three distinct abuses. In addition to preventing multiple punishment, it also protects against "a second prosecution for the same offense after acquittal" and "a second prosecution for the same offense after conviction." *Schwartz*, 120 N.M. at 625–26, 904 P.2d at 1050–51.

107. *Nunez*, 2000-NMSC-013, ¶ 141, 2 P.3d at 298 (Serna, J., dissenting) (quoting *Schwartz*, 120 N.M. at 625, 904 P.2d at 1050).

108. *Schwartz*, 120 N.M. at 625, 904 P.2d at 1050.

109. *Nunez*, 2000-NMSC-013, ¶ 141 (Serna, J., dissenting) (quoting Swafford v. State, 112 N.M. 3, 7 n.3, 810 P.2d 1227 (1991)).

110. 2005-NMSC-028, 120 P.3d 413.

111. *Id.* ¶ 2, 120 P.3d at 416.

112. *See, e.g.*, Richardson v. Carnegie Library Rest., Inc., 107 N.M. 688, 693, 763 P.2d 1153, 1158 (1988), *overruled on other grounds by* Trujillo v. City of Albuquerque, 1998-NMSC-031, 965 P.2d 305.

113. Without explicitly acknowledging that the U.S. Supreme Court had refused to extend middle-tier scrutiny to the mentally disabled in *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), the *Breen* court noted that in prior cases "[w]e have looked to federal case law for the basic definitions for the three-tiered approach, but we have applied those definitions to different groups and rights than the federal courts." 2005-NMSC-028, ¶ 14, 120 P.3d at 418–19.

with Disability Act,[114] and the special protections afforded the mentally disabled under New Mexico law,[115] the *Breen* court concluded "it is appropriate to apply intermediate scrutiny to classifications based on mental disability because such persons are a sensitive class,"[116] and that the sections of the Workers' Compensation Act that limit "the compensation for mentally disabled workers compared to physically disabled workers . . . violate equal protection by discriminating against the mentally disabled in violation of equal protection guarantees."[117]

Breen accepted the federal *method* of equal protection analysis, thus adopting a kind of "lock-step" approach with respect to federal constitutional analytic methodology, if not result. In this instance, it did so by first deciding whether the personal interest involved required strict scrutiny, middle-tier review, or merely rational basis review—the mode of equal protection analysis developed in federal law.[118] That same approach seems to predominate in many constitutional areas—especially those involving the open-ended clauses of due process and equal protection. So, for example, in the procedural due process area, the New Mexico Supreme Court has relied heavily on the *Mathews v. Eldridge*[119] balance, although deviating from the federal approach on how to strike that balance in a particular case.[120]

In both instances—equal protection and due process—there have been principled arguments that the federal mode of analysis is, itself, lacking in some ways. So, for example, in his famous dissent in *San Antonio Independent School District v. Rodriguez,* Justice Marshall argued that "[t]he Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization."[121] Similarly, in the due process field, Professor Mashaw has been critical of the *Mathews* balancing test as an appropriate analytical approach.[122]

That is not to say that after considered judgment on the matter the court might be disposed to adopt a particular federal analytic approach, after presentation of those issues through briefs and arguments of counsel. Until that occurs, however, the court should be mindful—when applying its interstitial approach—of the need to evaluate federal modes or methods of analyzing constitutional rights, just as it currently evaluates how those modes of analysis are applied under federal law. To assist that effort, counsel invoking interstitialism should not limit their claims to the substantive component of the rights involved, or the application of federal

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114. 2005-NMSC-028, ¶¶ 23–24, 120 P.3d at 421–22 (discussing the Americans with Disability Act).

115. *See id.* ¶ 27, 120 P.3d at 422.

116. *Id.* ¶ 28, 120 P.3d at 423.

117. *Id.* ¶ 50, 120 P.3d at 427.

118. *Id.* ¶¶ 11–19, 120 P.3d at 418–23.

119. 424 U.S. 319, 335 (1976).

120. *See* State v. Vallejos, 1997-NMSC-040, ¶¶ 35–38, 945 P.2d 957, 967–68. *But see* Scanlon v. Las Cruces Public Schools, 2007-NMCA-150, ¶ 23, 172 P.3d 185, 192 (refusing to provide greater due process protections to students subject to school disciplinary hearings under the state constitution than provided under the federal constitution).

121. 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

122. *See* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

methodology, but should also consider challenging the federal mode of constitutional analysis as well.

C. When Interstitialism Need Not Be Rigidly Followed

The earlier article, to which this piece is intended as a reprise, suggested that there may be instances when *Gomez* interstitialism ought not apply.[123] In considering that notion again, one must start with the underlying reason *Gomez* jettisoned the prior "lockstep" approach to state constitutional adjudication. As most recently put by Justice Bosson:

> As New Mexico's highest court, it is our duty and privilege to interpret and develop the New Mexico Constitution. In a government of dual sovereigns, it is imperative that our state Constitution develop to its full potential and protect the rights of our citizens where we deem federal law lacking.[124]

That solemn "duty and privilege," is taken so seriously by the court, that even when justices disagree on the application of broader protection than the federal standard, they can insist on the separation of federal and state constitutional doctrine. Thus, in his dissent in *State v. Nyce*, Justice Serna chided the majority for combining the federal and state analysis of the probable cause issue presented in that case.[125] The majority had reversed the conviction, holding that the affidavit which formed the basis of a search warrant did not establish probable cause.[126] Much of the discussion of the legal standard in the context of a search of a home intertwined the discussion of federal cases and a number of state cases, suggesting that the constitutional standards in this context are the same with respect to both constitutions.[127]

Justice Serna disagreed with the reversal of the conviction,[128] but in the process, pointed out that the court should always adhere to the *State v. Gomez* interstitial approach and clearly distinguish the state law, once the federal claim was decided against the litigant, because:

> Applying independent and adequate state law to a defendant's motion to suppress could likely create a different outcome than applying federal law (such as the application of the good faith exception to the exclusionary rule), which is why a separate analysis and conclusion regarding these two distinct approaches is important.[129]

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123. *See* Browde, *supra* note 2, at 406–09.

124. State v. Garcia, 2009-NMSC-046, ¶ 57, 217 P.3d 1032, 1046 (Bosson, J., dissenting).

125. *See* 2006-NMSC-026, ¶ 31, 137 P.3d 587, 596–97.

126. *Id.* ¶ 1, 137 P.3d at 589. The court concluded that the suspicious buying activities of the defendant:

> [D]id not give rise to probable cause to search the Cook residence. Because no other information was presented in the affidavit to confirm the officers' suspicions and establish the crucial link to the residence to be searched, the affidavit was insufficient. The warrant was therefore unconstitutionally defective, and the evidence seized as a result of the search should have been suppressed.

Id. ¶ 28, 137 P.3d at 596.

127. *See, e.g.*, *id.* ¶¶ 11–12, 137 P.3d at 591–92.

128. He would have affirmed the district court and the court of appeals because, in his view, "the affidavit presented by law enforcement satisfied the probable cause standard and . . . there was a sufficient nexus between the affidavit's allegations and the house searched." *Id.* ¶ 31, 137 P.3d at 597 (Serna, J., dissenting).

129. *Id.* ¶ 31, 137 P.3d at 596–97.

If the court in *Nyce* confused federal and state constitutional law principles, the court also has at times veered in the opposite direction, applying state constitutional analysis without finally resolving the federal constitutional claim before it. An example of this is *State v. Paul T.*, a case involving a police "pat down" of a minor, under sixteen, followed by a search of his pockets, after a violation of a local curfew ordinance that required that the minor be taken into custody for release to his parents.[130] The New Mexico Supreme Court upheld the pat down, but held the search of the minor's pockets unreasonable under the circumstances, and also not sustainable as a search incident to an arrest.[131] After reviewing the federal law and concluding that "[i]t is not clear whether [the Supreme] Court would extend [the relevant holding] to this case," the *Paul T.* court concluded:

> Because of this gap in Fourth Amendment jurisprudence, together with the possibility that the Fourth Amendment does not protect Paul in the circumstances of this case, we turn to Article II, Section 10 to resolve the issue of whether Officer Serna's emptying of Paul's pockets was lawful as analogous to a search incident to arrest.[132]

The court then ruled against the search on article II, section 10 grounds,[133] thereby suggesting that it is a sufficient ground to move to the state constitutional issue when the federal law is unclear. Indeed, the uncertainty of federal law was expressly relied on in *State v. Garcia* as sufficient grounds to proceed to consideration of the state constitutional claim.[134]

IV. CONCLUSION

As we approach the mid-point of *Gomez*'s second decade, there is no question that the interstitialism it brought us is now a maturing jurisprudence. Not surprisingly, the subsequent cases demonstrate that our appellate judges do not agree entirely on the meaning of *Gomez*, how the case should be applied, and even whether the case need be applied in all instances. The classic example is *State v. Cardenas-Alvarez,*[135] where the court split three ways. The majority found that the border search did not violate federal law, but did violate the state constitutional search and seizure standards.[136] Justice Baca concurred, but only because he believed the state constitutional standard was violated not at the site, but instead when state officials introduced the evidence seized in violation of those stan-

130. 1999-NMSC-037, ¶¶ 3–6, 993 P.2d 74, 77.

131. *Id.* ¶ 2, 993 P.2d at 77. The case was remanded to the court of appeals for "a factual determination of voluntariness" and full consideration of whether the otherwise invalid search was consented to by the child. *Id.*

132. *Id.* ¶ 12, 993 P.2d at 78–79 (citing State v. Gomez, 1997-NMSC-006, ¶¶ 19–20, 22–23, 932 P.2d 1, 7–8).

133. *Id.* ¶¶ 14–15, 993 P.2d at 79–80.

134. *See* 2009-NMSC-046, ¶ 25, 217 P.3d 1032, 1040 ("[T]here is serious uncertainty regarding whether the U.S. Supreme Court would suppress the evidence in this case under the Fourth Amendment's protections . . . because, under our interstitial analysis, we will consider preserved state constitutional claims if the defendant is not protected under the federal constitution, we now proceed to determine whether the evidence against Defendant was unlawfully acquired . . . under Article II, Section 10.").

135. 2001-NMSC-017, 25 P.3d 225.

136. *Id.* ¶¶ 7–22, 25 P.3d at 228–34.

dards.[137] Chief Justice Serna concurred, but disagreed on the federal law. He concluded that the court was not bound by the Tenth Circuit reading of the federal law, and had an obligation to interpret the federal law on its own. In his view, the federal constitutional standard was violated by the border search.[138]

As *Gomez* continues to be argued and applied, the courts will surely come to grips with whether it improperly complicates preservation, how the grounds for deviation from federal precedents will take shape, whether *Gomez* analysis extends beyond the substantive content of the constitutional right involved to the procedural mode of analysis used by the federal courts, and whether there will be circumstances where the court will find itself compelled to speak on state constitutional rights issues wholly unconstrained by the *Gomez* doctrine. Perhaps that is as it should be, especially with respect to rules that are "instruments for doing justice and not an end in themselves."[139] And so . . . may the conversation continue!

137. *See id.* ¶ 55, 25 P.3d at 248 (Baca, J., concurring).

138. *See id.* ¶¶ 57–81, 25 P.3d at 248–57. For an in-depth treatment of *Cardenas-Alvarez,* see Rebecca N. Turner, Note, *Search and Seizure Law:* State v. Cardenas-Alvarez*: The Jurisdictional Reach of State Constitutions—Applying State Search and Seizure Standards to Federal Agents,* 32 N.M. L. REV. 531 (2002).

139. State v. Gomez, 1997-NMSC-006, ¶ 30, 932 P.2d 1, 9 (internal quotation marks omitted) (quoting *Garcia v. La Farge*, 119 N.M. 532, 541, 893 P.2d 428, 437 (1995)).