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Michael B. Browde

University of New Mexico - Main Campus

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STATE V. GOMEZ AND THE CONTINUING
CONVERSATION OVER NEW MEXICO'S STATE
CONSTITUTIONAL RIGHTS JURISPRUDENCE

MICHAEL B. BROWDE

I. INTRODUCTION

I join the chorus of my academic and practitioner colleagues in applauding the New Mexico Supreme Court's recent decision in State v. Gomez. Adoption of a general 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 jurisprudence, and Gomez is of groundbreaking proportion. As David Henderson reminds us, however, Gomez represents "a conversation in progress," and, therefore, much depends upon how the discourse among advocates, courts and commentators plays out over time.

Jennifer Cutcliffe Juste, in her case note, has laid the foundation—describing the Gomez case and enhancing our understanding of its three core issues: 1) the raising and preservation of issues involving independent state constitutional rights; 2) the Gomez "approach" in analyzing such claims, when raised in tandem with claims involving analogous federal rights; and, 3) the explanation of state constitutional search and seizure principles as applied in the Gomez context. Professor Williams explains the historic significance of Gomez, and demonstrates how Gomez, and the foundational New Mexico cases upon which it was built, place the New Mexico Supreme Court in the vanguard of those state courts which have undertaken the important task of developing an independent jurisprudence of state constitutional rights. Professor Van Cleave, using Gomez as a prime example, reviews the "when" and "how" questions involved in the independent analysis of state constitutional rights by state courts.

This article raises concerns about two aspects of the Gomez analysis, and then suggests that the seeming absolutism of the Gomez approach may not hold for all future cases. First, while the thrust of Gomez is to reinforce New Mexico's commitment to an independent jurisprudence of state constitutional rights, its presumption in favor of the established federal jurisprudence, unless one of three criteria is met, may undermine the very independent jurisprudence which it so firmly endorses. Second, Gomez' suggestion that the value of uniformity may intercede to prevent

* Professor of Law, University of New Mexico School of Law. Professor Browde thanks the many students who have joined him in the study of State Constitutional Law over the years, and whose insights have helped shape his views on the subject.


4. See Cutcliffe Juste, supra note 1, at 369-76.
5. See Williams, supra note 1, at 379.
"deviation" from the federal analysis raises both theoretical and practical concerns. Third, and finally, while an interstitial approach may now be established as the general approach in New Mexico, the precise form of New Mexico interstitialism should not be taken for granted. There may be situations that will call for modifications of the *Gomez* approach in new and different circumstances.

II. *Gomez*, FEDERAL CONSTITUTIONAL RIGHTS JURISPRUDENCE, AND GROUNDS FOR STATE CONSTITUTIONAL RIGHTS DEVIATION

*Gomez* involved the appeal of a conviction for possession of LSD (lysergic acid diethylamide), which resulted from a warrantless search of the defendant's car. Police discovered the LSD in a zippered fanny-pack found in the car. On appeal, Gomez challenged the denial of his motion to suppress, claiming that the search was unlawful, in violation of his rights under both the Fourth Amendment to the United States Constitution and article II, section 10 of the New Mexico Constitution. The New Mexico Court of Appeals affirmed the conviction, ruling against Gomez' Fourth Amendment search and seizure claim, and refusing to consider his analogous state constitutional claim on the ground that he failed to preserve it.

7. See *Gomez*, 122 N.M. at 779-80, 932 P.2d at 3-4. All subsequent factual references refer to this citation, unless otherwise indicated.

8. The Fourth Amendment provides:
The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no 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.

9. Article II, section 10 of the New Mexico Constitution provides:
The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and 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.

There are some minor differences between the Fourth Amendment and article II, section 10 of the New Mexico Constitution. For example, the New Mexico clause covers "homes" rather than "houses," compare U.S. CONST. amend. IV with N.M. CONST. art. II, § 10, and the former may be a broader term than the latter. See, e.g., *State v. Sutton*, 112 N.M. 449, 454-55, 816 P.2d 518, 523-24 (Ct. App. 1991) (suggesting in dicta that "[t]he difference in wording between the federal and state constitutions is some evidence that the state constitutional provision may be interpreted to provide broader protection than the federal").

Such arguments, however, contain an insidious negative inference that absent the difference in language there would be no justification to interpret the state constitutional provision differently from the analogous federal constitutional provision. Such an inference undermines the basic, federalism-based theory of an independent state constitutional jurisprudence. See infra notes 16-19 and accompanying text. While text is not insignificant in state constitutional analysis, merely because text differs need not lead to a conclusion that the state constitutional provision protects values which are different from those sought to be protected by the parallel federal provision. See, e.g., *American Fork City v. Crosgrove*, 701 P.2d 1069, 1072-73 (Utah 1985) (holding that the intent of the framers of the Utah self-incrimination clause was to give it the same scope it had under similar constitutional provisions, despite different language).

10. Professor Williams prefers to refer to these circumstances as involving state constitutional rights claims where there are also "potentially applicable" federal provisions. See Williams, supra note 1, at 379 (quoting Bruce Ledewitz, *The Role of Lower State Courts in Adapting State Law to Changed Federal Interpretations*, 57 TEMP. L. REV. 1003, 1004 n.5 (1994)). Williams' concern is that terms like "analogous," "related," or "parallel" may erroneously imply a subordinate status for the state constitution. See id. at 379 n.5 (quoting Ledewitz, supra, at 1004 n.5 (1994)).

The New Mexico Supreme Court granted a writ of certiorari to review "what is required to 'fairly invoke' and preserve . . . a search and seizure claim under Article II, Section 10." Although the court couched the issue presented only in terms of preservation, the court first turned to the larger jurisprudential question—the methodological approach to the resolution of parallel federal and state constitutional claims. The Gomez court's adoption of its version of an interstitial approach, which ultimately shaped the resolution of the preservation issue, necessitated this initial focus.

The Court first rejected the so-called "lock-step" approach as inconsistent with
the position asserted in *State ex rel. Serna v. Hodges*. The *Gomez* court recognized *Hodges* as establishing that the state supreme court is “the ultimate arbiter of [state] law” and that, under “our federalist system,” it is within the “inherent power [of the state] as [a] separate sovereign[,] to provide more liberty than is mandated by the United States Constitution.” The court acknowledged that at the time *Hodges* was decided, that recognition had altered no case results. It also noted the line of more recent opinions in New Mexico giving greater protection under the New Mexico Bill of Rights than under parallel federal provisions.

What is perhaps most troubling about the “lock-step” approach, is that it undermines the independent significance of state law in our federal system. See Utter & Fiter, supra, at 644. State courts are already required to adhere to federal interpretation of federal Bill of Rights provisions because of the incorporation of the federal Bill of Rights through the due process clause of the Fourteenth Amendment. Therefore, a modern state court that expressly adopts a “lock-step” interpretation of parallel bill of rights provisions, in essence reads those provisions out of the state constitution.

A proposed constitutional amendment introduced in the 1997 regular session of the New Mexico Legislature would have mandated “lock-stepism” in search and seizure cases. That provision would have added the following to article II, section 10 of the New Mexico Constitution:

In criminal cases, the rights of defendants to be free from unreasonable searches and seizures pursuant to the provisions of this section shall be construed by the courts of New Mexico in a manner consistent with the provisions of the fourth amendment to the constitution of the United States. The provisions of this section shall not be construed by the courts of New Mexico to afford greater rights to criminal defendants to be free from unreasonable searches and seizures than the rights afforded to criminal defendants pursuant to the provisions of the fourth amendment to the constitution of the United States. The provisions of this section shall not be construed by the courts of New Mexico to afford greater rights to criminal defendants who are minors to be free from unreasonable searches and seizures than the rights afforded to criminal defendants who are minors pursuant to the provisions of the fourth amendment to the constitution of the United States.

S.J. Res. 9, 43d Leg., 1st Sess., (N.M. 1997) (not adopted). It might be a surprise to some of its supporters to know that such a provision, if adopted, would in essence repeal article II, section 10.

The California Supreme Court upheld similar provisions adopted by initiative against constitutional attack. The California Constitution distinguishes between constitutional “revision” which must be accomplished by convention and ratification, and constitutional “amendment” which can be accomplished by initiative. See Cal. Const. art. XVIII, §§1-3. Because the specific “lock-step” provisions were not such far reaching alterations in the governmental structure, the California Supreme Court held that revision by convention and ratification were not required. See In re Lance W., 694 P.2d 744, 749 (Cal. 1985) (limiting scope of exclusionary rule to boundaries fixed by Fourth Amendment); People v. Frierson, 599 P.2d 587, 612 (Cal. 1979) (limiting scope of state cruel and unusual punishment provision in capital cases to boundaries of Eighth Amendment). In *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990), however, the court invalidated a much broader voter initiative which would have similarly limited the interpretation of equal protection, due process, and many of the criminal defense provisions of the state constitution. See id. at 1089. The court held this provision unconstitutional because, as a “revision” of the constitution which worked a fundamental change in the structure of government, it could only be accomplished by a constitutional convention followed by ratification. See id. at 1098.

16. 122 N.M. at 782, 932 P.2d at 6 (quoting Serna v. Hodges, 89 N.M. at 356, 552 P.2d at 792).
17. *Id.* Professor Williams notes that the strong assertion by the New Mexico Supreme Court in *Hodges* of its independent duty to interpret its own constitution predated by a year the seminal article by Justice Brennan, “which is generally credited as the beginning of the ‘New Judicial Federalism.’” Williams, supra note 1, at 382. Indeed, Professor Williams traces the roots of New Mexico independent jurisprudence back even further to its recognition in *State v. Deltenre*, 77 N.M. 497, 503, 424 P.2d 782, 786 (1966), cert. denied, 386 U.S. 976 (1967), that “even if a warrantless arrest was valid under the federal constitution, it ‘must still be tested by New Mexico standards.’” Williams, supra note 1, at 382.
19. See *id.* See also Henderson, supra note 1, N.M. BAR. J. July-Aug. 1997, at 48 n.7 (citing additional cases where the New Mexico Constitution provides greater protections than the United States Constitution).
Having expressly rejected "lock-stepism," the *Gomez* court then considered the merits of two other interpretative approaches used by courts when faced with parallel rights provisions in federal and state constitutions\(^{20}\)—the "primacy" approach\(^{21}\) and the "interstitial" approach.\(^{22}\) The court expressly adopted the

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20. See id. at 783, 932 P.2d at 7. These approaches are perhaps best described in Utter & Pitler, supra note 14, at 647-51.

21. Oregon Supreme Court Justice (and former professor) Hans Linde first articulated the "primacy" approach. See Utter & Pitler, supra note 14, at 647 (citing Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALTIMORE L. REV. 379, 383-84 (1980)). The approach is so labeled because it commands that the state court give primary consideration to the state constitutional right. See id. If that provision provides the protection sought by the party claiming the constitutional right, then the court's inquiry is over. The federal inquiry is made only if the interpretation of the state constitutional provision does not provide the party the protection being sought. The primacy approach helps to assure that the state court will develop its state constitutional rights jurisprudence. See id. By requiring focused attention on the independent content of its state constitutional rights provisions, the court thus gives emphasis to the historical federalism-based notion that state constitutions are the basic charters of individual liberties. See id.

Justice Utter acknowledges the criticism of some commentators that the classic federalism model of providing double protection for constitutional rights is outdated in light of the extensive incorporation of the federal Bill of Rights, and that the need for uniformity in some areas makes the primacy approach ill-advised. See Utter & Pitler, supra note 14, at 648 & nn.107-08. He also admits that wholesale adoption of the primacy approach might undermine the rich experiential base of information provided to the United States Supreme Court when state courts struggle with the application of the federal Bill of Rights in advance of Supreme Court resolution of unsettled questions. See id.

In those cases where the party claiming the state constitutional protection prevails, the primacy approach has the effect of immunizing the state court ruling from further review because the United States Supreme Court will not review judgments of state courts which are based on an "independent and adequate state ground." See Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."). The *Michigan v. Long* Court explained, however, that it would review a case as resting on federal law, when the state court decision "fairly appears . . . to be interwoven with the federal law," id., unless the state court "make[s] clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." Id. at 1041. As a result, the New Mexico courts regularly append a boilerplate paragraph to satisfy the *Michigan v. Long* "plain statement" requirement. See, e.g., State v. Cordova, 109 N.M. 211, 212, 784 P.2d 30, 31 n.1 (1989) ("Because our holding today is based on our interpretation of the New Mexico Constitution, we do not consider as controlling the principles announced in [the relevant U.S. Supreme Court opinion] or the other federal precedents cited in the body of this decision, albeit the reasoning of those opinions informs our result.") Professor James A. Gardner characterizes *Michigan v. Long* as giving "New Federalism... an unlikely boost from the U.S. Supreme Court." James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 775 (1992), and there has been considerable debate whether the majority's presumption in favor of review absent the required "plain statement," or Justice Stevens's opposite presumption, see Michigan v. Long, 463 U.S. at 1065-67 (Stevens, J., dissenting), is more likely to encourage the development of an independent state court jurisprudence. See generally Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985); Eric B. Schnurer, *The Inadequate and Independent "Adequate and Independent State Grounds" Doctrine*, 18 HASTINGS CONST. L.Q. 371 (1991).

22. Under the "interstitial" or "supplemental" model, the federal analysis is undertaken first, and only if the federal right does not provide the party the protection being sought does the court go on to consider the state constitutional claim. Under an interstitial approach, the parallel state constitutional right provision is viewed as filling the gaps in the protections provided by the federal provision, or raising the federal floor of protection when it is perceived as inadequate. See Robert Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1028-29 (1985). While we often think of the federal constitutional standard as the "floor" below which state constitutional standards may not fall, the fact is that federal standards may also serve as "ceilings" on the extension of state constitutional rights. See Note, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1326, 1334-35 (1982) [hereinafter Developments]. For example, the expansion of state constitutional free speech rights on private property might be limited by federally recognized property rights. See *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980) (concluding that expansion of the California free speech provision to cover leafleting at a private shopping center did not, under the circumstances, work a "taking" of the
interstitial approach for two interrelated reasons. First, the Court noted the efficiency that comes from first looking to federal law, which is often "exhaustively discussed by the United States Supreme Court and commentators." Second, the Court emphasized what it saw as its "responsibility . . . to preserve national uniformity in development and application of fundamental rights guaranteed by our state and federal constitutions," in part to assure "consistency . . . in certain areas of judicial administration." Of course, to follow either an interstitial or primacy approach necessarily determines only which constitutional provision (the federal or the state) should be analyzed first, and it concomitantly instructs counsel in terms of the proper ordering of written and oral argument. It does not necessarily speak to the further concern—whether, and under what circumstances, the state court's interpretation of its own constitutional provision (whenever it reaches that question) should deviate from the federal interpretation. Nonetheless, the Gomez court linked the interstitial approach to the deviation question declaring: "[a] state court adopting [the interstitial] approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." This conclusion represents the graveman of the case.

owner's property in violation of the federal constitution). Similarly, Sixth Amendment fair trial rights may impose a ceiling on expanded state free press rights, and the Sixth Amendment compulsory process clause may impose a ceiling on expanded state testimonial privileges. See Developments, supra at 1411-16. Therefore, the room for state constitutional elaboration is really more accurately described as filling the space between those floors and ceilings. See Lawrence Gene Sager, Forward: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law, 63 Tex. L. Rev. 959, 976 (1985).

Interstitialism implies a presumptive "primacy" to the federal right, and arguably hampers the development of state constitutional rights jurisprudence, because it renders unnecessary the consideration of those claims in the number of cases which are resolved on federal grounds in favor of the party claiming constitutional protection. Commentators have also criticized interstitialism as making needless work for the United States Supreme Court, see Massachusetts v. Upton, 466 U.S. 727, 735 (1984) (Stevens, J., concurring), as well as undermining the legitimacy of state court decisions that provide broader protections than United States Supreme Court decisions. See Linde, supra note 21, at 389-90.

The Gomez Court ignored another approach recommended by Justice Utter. Recognizing the weaknesses or drawbacks in the primacy and the interstitial approaches, Justice Utter calls for the application of a "dual-soverignty" approach, under which the state court would rule on both the federal and state claims. Utter & Piter, supra note 14, at 651-52. Of course, the dual-soverignty approach would require a state court to engage in considerable federal rights analysis under circumstances where that analysis might be considered dicta, in light of the "independent and adequate" state constitutional analysis which supports the decision. Justice Utter valiantly justifies such dual analysis as other than dictum, because it "helps the Supreme Court to evaluate the propriety of an appeal from the state decision." Utter, supra, at 1049. Most state courts, however, are not going to be cajoled into doing the double analysis as a matter of course, even though the same dual analysis is required under interstitialism whenever resolution of the federal rights claim is not dispositive.

23. Gomez, 122 N.M. at 783, 932 P.2d at 7 (quoting Developments, supra note 22, at 1357).
24. Id. at 783-84, 932 P.2d at 7-8 (quoting State v. Gutierrez, 116 N.M. 431, 436, 863 P.2d 1052, 1057 (1993) and State v. Hunt, 450 A.2d 952, 964 (N.J. 1982) (Handler, J., concurring)). The "uniformity" concern is the subject of more extended consideration in Part III of this article. See infra notes 67-107 and accompanying text.
25. Id. at 783, 932 P.2d at 7 (citing Developments, supra note 22, at 1359). The authors of Developments argue in favor of a "self-consciously interstitial view of state constitutional law, a model primarily for filling in the spaces left open by federal constitutional doctrine" under which "state courts consider a verity of factors in deciding how far to depart from federal reasoning and results." Developments, supra note 22, at 1356 (emphasis omitted). Given what they perceive to be the realistic "dominance of federal law," the authors of Developments urge that state courts "focus directly on the gap-filing potential of state constitutions," concentrating on "whether and how to criticize, amplify, or supplement this [federal] doctrine to yield more extensive constitutional
because it forms the basis of the court’s holding on what is required to raise and preserve an independent state constitutional challenge,26 as well as the structure for the court’s substantive law ruling that article II, section 10 of the New Mexico Constitution provides broader protection against warrantless searches of lawfully stopped automobiles than does the Fourth Amendment to the United States Constitution.27

In the process, however—by necessarily linking interstitialism to the deviation question—the Gomez court allows for arguments that could undermine the very independent state constitutional rights jurisprudence, which the court extolled in rejecting the “lock-step” approach. It is clear that the interstitialism contemplated by the authors of Developments only intended the deviation factors to guide the state court in weighing "the relevant considerations in the case at hand to determine whether they favor elaboration of state constitutional doctrine and to identify the factors deserving the greatest attention in that elaboration."28 Thus, that article suggests that the federal law is only a starting point. But by linking the starting point with the further idea that state law deviation from the federal precedent is only permissible if one of three circumstances exists, the Gomez court suggests that the protections” without having “to construct a complete system of fundamental rights from the ground up.” Id. at 1357-58 (footnotes omitted).

26. Having adopted Developments’ interstitial construct—which includes grounds for deviation from the federal jurisprudence as part of its structure—the Gomez court then returned to the preservation question, and established a bifurcated requirement: If there is established New Mexico precedent for diverting from the federal law then it is sufficient to preserve the point to 1) assert the constitutional principle, and 2) show a factual predicate to the claim. See Gomez, 122 N.M. at 784, 934 P.2d at 8. Those elements combined, the court suggested, are nothing more than the generally established requirement that litigants “fairly invoke” a ruling by the trial court. See id. See also N.M.R. App. P. 12-216 (explaining the appellate courts’ scope of review). If, however, there is no such New Mexico precedent, then “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.” Gomez, 122 N.M. at 784, 934 P.2d at 5.

Finding New Mexico precedent which interprets article II, section 10 of the New Mexico Constitution more expansively than the Fourth Amendment to the United States Constitution, the court concluded it was sufficient that Gomez based his motion on “exigent circumstances” and “developed the facts needed for a ruling.” Gomez, 122 N.M. at 785, 932 P.2d at 9. Exposing an element of insecurity about its preservation conclusion, however, the court made two additional findings: first, that “the trial court ruled on the issue of exigent circumstances,” id., and second, that in any event, the issue fell within the “fundamental right” exception contained in rule 12-216(B), which would have allowed the court to consider the issue even if Gomez had not properly raised and preserved it. See id. at 786 n.4, 932 P.2d at 10 n.4. For a further discussion of the preservation point, see Cutcliffe Juste, supra note 1, at 365-69.

27. After using its form of interstitialism to resolve the preservation issue, the court then took a second pass at the same factors to decide the merits of the state constitutional search and seizure question. First, the court found no violation of federal Fourth Amendment principles. See Gomez, 122 N.M. at 786-87, 932 P.2d at 10-11. Second, the court acknowledged that it had consistently “expressed a strong preference for warrants” in the past. Id. at 787, 932 P.2d at 11. It coupled this fact with its record for independently interpreting article II, section 10 to conclude that “that a warrantless search of an automobile and its contents requires a particularized showing of exigent circumstances.” Id. at 788, 932 P.2d at 12.

It is interesting that the Gomez court did not independently examine any of the three grounds for deviation, which it had articulated as part of its form of interstitialism, and relied instead on the fact that in other circumstances, and for other purposes, it had previously held that article II, section 10 would be interpreted independent of the federal interpretation of the Fourth Amendment. Perhaps, then, once deviation of any state constitutional rights provisions has been justified in one context, no further justification is necessary when a state constitutional challenge based on that provision is raised in another context.

federal rule is presumptively correct and controlling, which could easily lead litigants and future courts to fall prey to a perverse federal supremacy fallacy.29

Even though the Gomez court expressly rejects a formalistic “criteria” approach for diverting from federal precedent,30 the danger persists. Given the focus of our training in federal constitutional argument, and the greater volume and ease of accessibility to federal constitutional jurisprudence,31 the natural tendency by advocates and courts might be to slip into the easier and more comfortable pattern of treating Gomez as requiring that the federal precedent must govern the interpretation of the analogous state bill of rights provision, absent special circumstances.32

On the other hand, given the fact that the Gomez court expressly rejects a rigid “criteria approach,”33 and because at least the first two of the Gomez deviation factors are quite open ended,34 the Gomez directive should be taken for what it is:

29. As aptly described by Professor Williams, the insidious nature of the presumption of federal correctness in an approach which elevates factors for diversion from federal rulings into rigid criteria, is that it “makes the criteria themselves, and their relationship to the Supreme Court decision . . . the focus of attention . . . [As such,] they . . . distract attention from the real issue before the court: How is that state constitutional provision to be interpreted and applied to the facts of this case?” Robert F. Williams, In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication, 72 NOTRE DAME L. REV. 1015, 1027 (1997). For a review of the state experience with this “criteria” approach, and a summary of its critiques, see id. at 1026-64.

30. See Gomez, 122 N.M. at 784 n.3, 932 P.2d at 8 n.3.
We decline to follow those states that require litigants to address in the trial court specified criteria for departing from federal interpretation of the federal counterpart. However, we note that several state courts have outlined a number of criteria that trial counsel in New Mexico might profitably consult in framing state constitutional arguments. Id. (citations omitted).

31. A number of commentators have stressed that the heavy focus of law school training on federal constitutional law leads all of us to resort to federal analysis as our touchstone. See, e.g., Judith S. Kaye, Dual Constitutionalism in Practice and Principle, 61 ST. JOHN’S L. REV. 399 (1987). Similarly, the great volume and ease of accessibility of the federal jurisprudence makes it both the easy starting and end point of one’s inquiry. See Developments, supra note 22, at 1357.

32. That is what seems to have happened in New Jersey, beginning with the first articulation of the criteria approach by Justice Handler in State v. Hunt, 450 A.2d 952, 962-67 (N.J. 1982) (Handler, J., concurring). This position then became the majority view the next year in State v. Williams, 459 A.2d 641, 650-51 (N.J. 1983). Justice Handler’s de facto assumption to create a presumption in favor of United States Supreme Court doctrine. See Justice Alan B. Handler, Expanding the State Constitution, 35 RUTGERS L. REV. 197, 204, 206 & n.29 (1983). Yet, his approach seems to have devolved into a jurisprudence which maintains that “in the absence of one or more of the criteria identified, it is illegitimate for a state court to reject the reasoning or result of a Supreme Court decision in the same or similar context.” Williams, supra note 29, at 1023.

33. See Gomez, 122 N.M. at 784 n.3, 932 P.2d at 8 n.3.

34. The first factor—“a flawed federal analysis”—may be little more than a directive that in engaging in the independent state constitutional analysis, future courts must confront and deal with federal precedents in a way which is more “reasoned” than a bald statement that “we disagree.” The analysis of this factor in Developments (from which Gomez derived its interstitial formulation) seems to take this broad approach. The authors of Developments acknowledge that courts and commentators express discomfort with this factor as undermining “the supremacy of the federal Constitution,” and because it smacks of “result-oriented or unprincipled decisionmaking.” Developments, supra note 22, at 1359. The authors effectively rebut both—noting that the role of federal constitutional rights is to ensure a minimum level of protection, leaving states free, under our federal structure, to afford a further level of protection to their citizens, and also noting “that disagreement with federal argumentation can be just as principled as any other judicial reasoning . . . .” Id. at 1360. The authors thus conclude in a manner which supports a more independent approach:

The quality of a court’s reasoning is not determined by the kinds of factors that lead it away from the federal starting point. When a state court finds the federal doctrine inadequate, it has a legitimate and compelling reason to elaborate state doctrine in that area independently.

Id.
a caution to courts and counsel that in developing our own version of an independent state jurisprudence, as with the development of any jurisprudence, the articulated rules must be both reasoned and principled. Furthermore, because the court formulated the Gomez factors for deviation to determine whether the state constitutional rights claim was properly raised and preserved in the trial court, the factors need not be read as limiting future state courts in the articulation of state constitutional rights principles that deviate from those articulated in the federal context.

If the latter, more flexible view predominates, it will help to preserve the integrity of an independent state constitutional rights jurisprudence. However, the former view—that is, reading the Gomez deviation factors as mandatory limits on when New Mexico courts may deviate from federal precedents—would be extremely harmful. If such an approach were the law, it would undermine the developments of the last decade in which New Mexico has breathed life back into the long-neglected bill of rights’ provisions of its state constitution, and it could signal a slide back to the discredited “lock-stepism” of generations past.

Which path the New Mexico Supreme Court will take as the “conversation in progress” continues is perhaps hinted at by its first full-blown application of the Gomez interstitial approach. That occurred in State v. Woodruff, and the results are both troubling and reassuring from a process point of view.

In Woodruff, the court faced an appeal from a sentence entered after a jury conviction for driving while intoxicated (DWI). The district court enhanced the sentence to second offense DWI as a result of a prior conviction, and on appeal the defendant-appellant contended that it was a violation of the New Mexico

35. See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 19 (1959). "A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." Id. Some commentators also suggest that the struggle to formulate principled decisions requires generality of articulation, consistency of application, and accommodation with other principles without compromise of those principles. See PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1103-07 (1975). Insistence that the judicial enterprise should strive to achieve those goals is equally applicable to judges at the state and federal levels. As long as the state court does its best to be faithful to those goals it hardly seems fair to call the state court “unprincipled” merely because it reaches a result under the state constitution which may be different from the result reached by the Supreme Court under a similar provision of the federal constitution.

36. See Gomez, 122 N.M. at 779, 932 P.2d at 3.
Constitution to enhance his sentence on the basis of a conviction entered without representation of counsel. 38

After dispensing with a statutory claim based on the state laws under which counsel is provided to indigent defendants, 39 the court approached Woodruff's state constitutional claim by way of the Gomez path. It started first with the interstitial command to determine whether the right claimed is protected by the federal constitution. 40 It did so even though it did not appear that the defendant claimed any violation of a federal constitutional right. 41 The court found no federal violation, concluding that the Supreme Court of the United States, in Nichols v. United States, 42 permits state courts to "use an unounselled prior misdemeanor conviction to enhance a sentence under a recidivist statute, provided the uncounselled conviction did not result in a sentence of imprisonment." 43

The court then went on to consider whether Woodruff preserved his state constitutional claim under the dual approach adopted in Gomez—that is, by citing to established precedent interpreting the New Mexico constitutional provision more broadly than its federal analog, or, if no precedent exists, by articulating the reasons for a broader interpretation. 24 The first of those inquiries took the court down a rather convoluted path, which led it to conclude that there was no precedent for a broader interpretation of the state right to counsel and due process provisions. 45 With respect to the second inquiry—articulating reasons for a broader interpretation—the court reviewed the record at some length and then declared that it "need not decide the question," because "[t]he trial court itself 'fairly invoked' a ruling on the state constitutional answer to the question." 46

38. See id. at 389, 959 P.2d at 606.
39. The Woodruff court concluded that the legislature, in extending the right to counsel in misdemeanor cases, was merely responding to federal constitutional imperatives, and "we have no basis for concluding that the Legislature considered any unounselled misdemeanors too unreliable, as a matter of law, for purposes of enhancement." Id.
40. See id. at 391-92, 951 P.2d at 608-09.
41. This is troublesome because it seems to deprive litigants of their usual tactical and strategic control over which claims they wish to bring before the court. see infra notes 114-118 and accompanying text, and may expand the Gomez doctrine to control cases whenever a federal constitutional claim could have been made in conjunction with a parallel state constitutional claim.
43. Woodruff, 124 N.M. at 392, 951 P.2d at 609.
44. See id.
45. See id. The court first noted that historically it had not made a distinction between the rights protected in the right to counsel provisions of the federal and state constitutions. See id. The court then acknowledged that in State v. Watchman, 111 N.M. 727, 809 P.2d 641 ( Ct. App. 1991), the New Mexico Court of Appeals "restrict-[ed] the use of prior tribal court convictions ... on the basis of the New Mexico Constitution," see Woodruff, 124 N.M. at 393, 951 P.2d at 610, but noted that Watchman was in response to a prior Tenth Circuit opinion, and premised on prior cases which relied upon federal constitutional principles. See Woodruff, 124 N.M. at 393, 951 P.2d at 610. The court, therefore, concluded that "Watchman does not provide an independent state constitutional law basis for holding that unounselled misdemeanor convictions are unreliable as a matter of law." Id.
46. See id. at 394, 951 P.2d at 611. The tortured tour of prior precedents, and intense scrutiny of whether the defendant articulated reasons for a broader interpretation to the lower court are hardly worth the effort. Perhaps the court should return, instead, to the broader preservation message contained in Gomez—that preservation would be found whenever it could be demonstrated, as in any other case, that the standards of rule 12-216 of the New Mexico Rules of Appellate Procedure are met by "fairly invoking" the claim in a way which gives notice to both opposing counsel and the trial court. Indeed, the rather tortured analytical route taken by the Woodruff court actually served no purpose in the end because the court concluded that the trial court itself had raised and decided the state constitutional question.
Arriving at the state constitutional question, the *Woodruff* court then decided that "we have no basis for expanding the protection provided by the New Mexico Constitution beyond that provided, on these facts, by the federal constitution."47 Again, it did so by a rather tortured route, which has some troubling implications.

First, the court deviated somewhat from the *Gomez* construct and looked for guidance from the decisions of sister states.48 The court noted that Hawaii had departed from federal precedent on the theory that "[i]f an uncounseled misdemeanor conviction cannot result in imprisonment because of its unreliability in the first place, it is logically inconsistent to rely on it as a basis to enhance a prison term on a subsequent conviction,"49 and that other states had deviated as well. The court swept aside the other states as inapplicable.50 Returning to the *Gomez* construct, the *Woodruff* court listed the three *Gomez* factors—flawed federal analysis, structural differences, and distinct state characteristics—and found only the first applicable. The court dismissed the Hawaii cases as being rooted in structural differences, and found “our constitutional provisions protecting the right to counsel and the right to due process do not contain structural differences compelling departure from the United States Constitution.”51

That assertion is troublesome in three respects. First, it may mischaracterize the Hawaii cases, which appear to be based more on a different logical construct, rooted in an underlying social policy about the reliability of uncounseled convictions than

On the other hand, the *Gomez* direction to counsel is fairly straightforward—it tells counsel that when confronted with parallel federal and state constitutional rights claims, counsel needs to raise state claims independently by either citing state precedent giving broader scope to the state constitutional provision than is given to the federal, or if there is no such precedent, explain why it should be construed more broadly. That is a simple formula, not difficult to comply with.

47. *Woodruff*, 124 N.M. at 394, 951 P.2d at 611.
48. See id. Although *Gomez* does not direct the court to look to the law of sister states, that is certainly an excellent source of data and analytical tools to test for "flawed federal analysis" under the *Gomez* approach.
50. The court found those other state cases inapplicable because they relied on case law which pre-dated *Baldasar* v. *Illinois*, 446 U.S. 222 (1980), overruled by *Nichols* v. *United States*, 511 U.S. 738 (1994), whereas New Mexico cases on the collateral use of an uncounseled conviction appeared to be "compelled by the holding in *Baldasar*." *Woodruff*, 124 N.M. at 395, 951 P.2d at 612.

It is hard to see how that distinction is relevant here, under an examination of the three *Gomez* factors for deviation from the federal jurisprudence—flawed federal analysis, structural differences, or distinctive state characteristics. The fact that *Baldasar* may have driven prior New Mexico cases does not answer the question of what meaning should be given to the state constitutional provision once that federal compulsion is removed by *Nichols'* overrule of *Baldasar*. Indeed, the retrenchment of rights under the federal constitution, where the state had expanded state rights to comply with the pre-retrenchment status of federal law led earlier New Mexico Supreme Courts to carefully assess the values and utility that has come from engrafting the prior federal rule into state law, before deciding whether to follow the federal retrenchment. See State v. Cordova, 109 N.M. 211, 216, 784 P.2d 30, 35 (1989) The *Cordova* court explained how the two-pronged *Aguilar-Spinelli* test, see *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969), subsequently rejected by the United States Supreme Court in *Illinois* v. *Gates*, 462 U.S. 213 (1983), reflects "principles... firmly and deeply rooted in the fundamental precepts of [our] constitutional requirement that no warrant issue without a written showing of probable cause," *Cordova* 109 N.M. at 216, 784 P.2d at 35, and how the rigid application of the two-pronged test that prompted the United States Supreme Court to change its course in *Gates* was not present in New Mexico. See *Cordova*, 109 N.M. at 216, 784 P.2d at 35.

51. *Woodruff*, 124 N.M. at 395, 951 P.2d at 612 (emphasis added). The court properly dismissed distinctive state characteristics because "the parties have not suggested that the right to counsel has a unique importance in our state." Id. at 396, 951 P.2d at 613.
any structural differences between its constitution and the federal constitution.\textsuperscript{52} Second, the court speaks in terms of looking at structural differences to determine if they compel departure from federal precedent, thus suggesting both a strong presumption in favor of federal precedent and that deviation will only occur when absolutely necessary—the very kind of rigid “criteria” approach which the Gomez opinion seemed to eschew.\textsuperscript{53} Third, and most troublesome, is that this narrow and confined approach suggests the kind of “reactive” approach to interstitialism that the authors of Developments cautioned against,\textsuperscript{54} because it prevents the proactive, reasoned and principled development of state constitutional law doctrine.\textsuperscript{55}

Finally, however, in turning to the adequacy of the federal analysis, the Woodruff court returned to the proactive enterprise one would have hoped for after Gomez. The court recognized, first, that the federal precedents in the right to counsel field do depend on the distinction between the direct consequences of imprisonment in the first instance, as distinguished from the collateral consequences of enhancement. The Woodruff court then made clear its responsibility to “consider whether the distinction adequately protects both the state constitutional right to counsel and the state constitutional guarantee of due process.”\textsuperscript{56} In answering that question, the court first concluded that the right to counsel and due process protect the same constitutional interest here: “the right to fundamental fairness in a proceeding that results in the deprivation of liberty.”\textsuperscript{57} The court then borrowed the federal Mathews v. Eldridge\textsuperscript{58} procedural due process balancing test to determine whether Woodruff’s rights under both the right to counsel and due process provisions of the New Mexico Bill of Rights were violated.\textsuperscript{59} Applying the Mathews test,\textsuperscript{60} the court concluded that: 1) the private interest involved is to be measured by the “degree of increased penalty available for enhancement;”\textsuperscript{61} 2) although there is a risk of error in an unrepresented conviction, “there is a degree of reliability in an uncontested plea of guilty or no contest” and “a similar degree of reliability in a neutral fact-finder’s...
determination of guilt, even in the absence of counsel;" \(^{62}\) and 3) the government cost of providing additional safeguards is considerable because the practical effect of what Woodruff seeks "would be a requirement of counsel in every DWI case in order to give effect to the Legislature's intent with respect to enhancement." \(^{63}\) After analyzing these three factors, the court concluded:

On balance, the private liberty interest at stake in the use of one prior uncounseled misdemeanor conviction for the enhancement of a current DWI conviction is not sufficiently important to outweigh the relatively low risk of error of enhancement based on a mistaken conviction and the significant governmental cost of providing counsel in all misdemeanor DWI cases. \(^{64}\)

Thus, when it came to its final consideration of the essential question—whether the federal analytical construct adequately served state constitutional interests—the Woodruff court engaged in the very kind of coherent and independent \(^{65}\) analysis which Professor Williams and others would applaud, borrowing creatively from useful federal procedural due process doctrine and applying those principles to a corner of state constitutional criminal procedure law in a reasoned and principled way.

Woodruff should, therefore, both give us pause and, at the same time, some hope for the future. To the extent that the Woodruff court's resolution of the preservation issue became mired in a morass of technical consideration of the weight of prior precedent and the infinite details of the justifications put forward to the lower court for a state constitutional rule different from the federal rule, it may have strayed from Gomez' larger promise to simplify matters by requiring only that parties "fairly invoke" the state constitutional claim. \(^{66}\) Similarly, its summary rejection of Hawaii's approach through a questionable use of the "structural differences" factor suggests a mechanistic approach unworthy of the court's promise in Gomez. But the creative borrowing from federal due process law, followed by its reasoned and principled application to define the construct of state right to counsel and due process considerations, provided a welcomed enhancement of our state constitutional rights jurisprudence.

III. THE IMPORTANCE OF UNIFORMITY

Perhaps as troublesome as Gomez' apparent mandate of particularized grounds for deviation from federal precedent is its suggestion that a state court's "responsibility ... to preserve national uniformity in the development and application of fundamental rights guaranteed by our state and federal constitutions" compels interstitialism \(^{67}\) In support of this idea, the Gomez court recites the oft-quoted

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62. Id. at 398, 951 P.2d at 615.
63. Id. at 399, 951 P.2d at 616.
64. Id.
65. See id. at 394-99, 951 P.2d at 611-16.
67. Gomez, 122 N.M. at 783-84, 932 P.2d at 7-8, (quoting State v. Gutierrez, 116 N.M. 431, 436, 863 P.2d 1052, 1057 (1993)). While the quote is accurate, Gutierrez hardly emphasized a federally-mandated principle of uniformity, in spite of what the Gomez court suggests. Indeed, the quoted statement is found only in the boilerplate paragraph in Gutierrez placed there to satisfy the Michigan v. Long "plain statement" requirement that the court
concurrency of Justice Handler in *State v. Hunt*, which noted that "some consistency and uniformity between the state and federal governments in certain areas of judicial administration is desirable." As *Gomez* makes clear, however, Justice Handler only suggested that the consistency and uniformity goals support a reason why "[f]ederal precedent in areas addressed by similar provisions in our state constitutions can be meaningful and instructive." Here, with its articulation of factors which merit deviation from federal precedent, much depends on how the "consistency and uniformity" theme articulated in *Gomez* is developed in future cases.

was basing its decision on state and not federal law grounds. For a discussion of the *Michigan v. Long* requirement and its interplay with interstitialism, see *supra* note 21. Furthermore, the *Gutierrez* court referred to uniformity in its use of both federal and state authorities:

In [independently analyzing the New Mexico Constitution] we seek guidance from decisions of the United States Supreme Court... from the decisions of courts of our sister states... and from the common law. However, when... [we do so] in interpreting a New Mexico constitutional provision we do so not because we consider ourselves bound... but because we find the views expressed persuasive and because we recognize the responsibility of state courts to preserve national uniformity in development and application of fundamental rights guaranteed by our state and federal constitutions.

*State v. Gutierrez*, 116 N.M. 431, 435-36, 863 P.2d 1052, 1056 (emphasis added). Thus, in context, this quote may suggest no more than a recognition that in developing its independent state constitutional jurisprudence, the New Mexico Supreme Court is well aware of our shared values as a single nation, thus making it particularly appropriate that the court should be cognizant of—but not bound by—the shared experiences found in both federal and sister state court judgments.

While *Gutierrez* makes no explicit mention about analytical approach, it reviews federal precedent, see *id*. at 436-38, 863 P.2d at 1057-59, the history of New Mexico jurisprudence on the subject, see *id*. at 438-40, 863 P.2d at 1059-61, the intent of the framers of article II, section 10 against the backdrop of search and seizure law in the states at the time of the New Mexico Constitutional Convention, see *id*. at 440-43, 863 P.2d 1061-64, including "any case law to the contrary and the trend in legal discourse." *Id*. at 441, 863 P.2d at 1062. The court found that extensive review "inconclusive" on the role of the exclusionary rule in the New Mexico constitutional mandate against unreasonable searches and seizures, and, therefore, relied on its structural conclusion that "the people of New Mexico left to the courts the task of interpreting the language of Article II, Section 10." *Id*. at 444, 863 P.2d at 1065.

Turning to that task, the court, borrowing from analyses in both federal and state court opinions, rejected an instrumental approach—"[t]he approach we adopt today focuses not on deterrence or judicial integrity," *id*. at 446, 863 P.2d at 1067—and held that:

*Implicit in a regime of enumerated privileges and immunities that the framers intended to create rights and duties and... [because] [d]enying the government the fruits of unconstitutional conduct at trial best effectuates the constitutional proscription, [the right involved is] incompatible with any exception based on the good faith reliance of the officer..."

*Id*. at 446-47, 863 P.2d at 1067-68. Thus, *Gutierrez* represents perhaps the most cogent example of the kind of proactive, reasoned, and principled jurisprudence—based on federal and state history and precedent, a clearly articulated role for the court when history and precedent are ambiguous, and a clear articulation of the principles which will be applied by the court—which both supporters, see Williams, *supra* note 1, at 379, and critics, see Gardner, *supra* note 21, at 804, of an independent state constitutional rights jurisprudence would have state courts aspire to achieve. For a further discussion of *Gutierrez*, see Jane Cavanaugh, Note, *Refusing to "Turn the Other Cheek"—New Mexico Rejects Federal "Good Faith" Exception to the Exclusionary Rule*: *State v. Gutierrez*, 24 N.M. L. REV. 545 (1994).

68. 450 A.2d 952 (N.J. 1982).
69. 122 N.M. at 184, 932 P.2d at 8 (quoting *Hunt*, 450 A.2d at 964) (Handler, J., concurring). The Handler view became the majority view of the New Jersey Supreme Court the very next year. See Williams, *supra* note 29, at 1023.
70. 122 N.M. at 184, 932 P.2d at 8 (quoting *Hunt*, 450 A.2d at 964) (Handler, J., concurring) (emphasis added).
71. It is reassuring that there was no discussion of uniformity in the *Woodruff* court's state constitutional analysis, even though the court determined that it would not deviate from the federal precedent allowing a prior uncapitalized misdemeanor conviction to be used to enhance the penalty for a subsequent DWI conviction. *See*
If, as Justice Handler stressed, it is a basis for giving close attention to the reasoning of federal precedents, then, of course, there should be no quarrel with such an assertion. The reasoned elaboration of the Supreme Court of the United States on similar questions of federal law should mandate the closest attention of a state high court, as should the reasoned elaborations of sister state high courts. And perhaps the federal precedent can be especially helpful, where, as Gomez notes, those issues have been "exhaustively discussed by the United States Supreme Court and commentators."  

On the other hand, if courts read the "consistency and uniformity" theme—which Gomez articulated as a reason for adopting the interstitial approach—as an independent reason for not interpreting the particular state constitutional provision any broader than its federal counterpart, the results could be pernicious in the extreme. Indeed, like a cramped view of the grounds for diverting from federal precedent, Gomez' uniformity theme could lead to the destruction of the very independent state constitutional rights jurisprudence which Gomez exalts. 

The Oregon Supreme Court articulated the uniformity argument well in State v. Florence. Confronted with the United States Supreme Court decision in United States v. Robinson, which held that a search of a person under custodial arrest was not unreasonable under the Fourth Amendment, the Oregon court overturned prior precedent and adopted the Robinson rule for the following reasons: 

The law of search and seizure is badly in need of simplification for law enforcement personnel, lawyers and judges, provided, of course, that this may be done in such a manner as not to violate the constitutional rights of the individual. . . . The rule stated in United States v. Robinson is a simplification. Not adopting the rule of Robinson would add further confusion in that there would then be an "Oregon rule" and a "federal rule." Federal and state law officers frequently work together and in many instances do not know whether their efforts will result in a federal or a state prosecution or both. In these instances two different rules would cause confusion.

It is, perhaps, helpful to approach this argument, and the more general view in favor of uniform constitutional rights in our federal system, from an historical

supra notes 37-64 and accompanying text. Perhaps that demonstrates that the Gomez court was only referring to "consistency and uniformity" as a shorthand for our common heritage as a basis for giving special attention to the federal jurisprudence as "meaningful and instructive" on a similar issue under the state constitution.

72. See discussion of Gutierrez, supra note 67.
73. Gomez, 122 N.M. at 183, 932 P.2d at 7.
74. See supra Part II.
75. 527 P.2d 1202 (Or. 1994).
77. In State v. O'Neal, 444 P.2d 951, 953 (Or. 1968) (en banc), the Oregon Supreme Court had held that a search incident to arrest is justified only for the safety of the arresting officer or because it has relevance to the crime for which the accused is arrested. Florence specifically overruled that holding. See Florence, 527 P.2d at 1209. It appears, however, that since then the Oregon courts have reversed course yet again. See, e.g., State v. Caraher, 653 P.2d 942, 950 (Or. 1982) (holding that a valid custodial arrest does not alone give rise to a unique right to search under article 1, section 9 of the Oregon Constitution; the circumstances surrounding the arrest must justify such a warrantless search).
78. Florence, 527 P.2d at 1209.
79. See Gardner, supra note 21, at 823-30 (arguing that we are a single nation of people with shared, rather than diverse values); Earl Maltz, The Political Dynamic of the "New Judicial Federalism", 2 EMERGING ISSUES
perspective. One must begin, of course, with the recognition that the federal Bill of Rights, when adopted, applied only to protect individual rights against encroachment by the federal government. At the time, the states were perceived as protectors of individual liberty, rather than as a threat to those liberties—something which could not be said with confidence about the new, and not yet fully-formed central government created by the constitution.

During the first century and a half of our nation’s history, when the federal Bill of Rights did not apply against the states, diversity of rights jurisprudence was the norm. The diverse judgments of the various state high courts interpreting their individual constitutions was still developing that jurisprudence. In the process, state courts used the whole panoply of data available to them—state constitutional texts, constitutional history, English and American common law, and the sister state interpretation of their own constitutions. When, during the pre-incorporation era, federal criminal procedural rights expanded, we also became accustomed to a federal/state diversity of approach. Thus, for example, the Supreme Court’s early adoption of the exclusionary rule as a requirement of the Fourth Amendment in federal courts resulted in different standards of conduct between state and federal officials conducting similar searches and seizures. Furthermore, because the same constraints did not necessarily bind state officials, it was recognized that evidence independently obtained by state officials could be “turned over to the federal

IN STATE CONST. L. 233, 34 (1989) (arguing that the real dangers of an independent state constitutional jurisprudence is that it unjustifiably expands judicial activism further placing policy judgments beyond the control of the legislative process).

80. See Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833) (“[T]he [just compensation provision of the Fifth Amendment] is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states.”) (Marshall, C.J.).

81. See, e.g., Shirley A. Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 TEX. L. REV. 1141, 1144-47 (1985) (describing ways in which the states were the guardians of liberty in criminal cases up until the early 20th century).

82. See Barron, 32 U.S. (7 Pet.) at 250:

Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those unvaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states.

83. The passage of the Fourteenth Amendment in 1868, with its declaration that “no state shall deprive any person of . . . due process of law,” U.S. CONST. amend. XIV, § 1, drastically altered the federalism balance and made it theoretically possible for the imposition of federal Bill of Rights constraints against the states. The historical reality is, however, that it took almost another hundred years for that to occur with any real force and effect. While the Supreme Court may have recognized the principle that some of the Bill of Rights provisions might protect against state action through the Due Process Clause of the Fourteenth Amendment as early as 1908, see, e.g., Twining v. New Jersey, 211 U.S. 78 (1908), the process of selective incorporation took more than another half century. See generally Jerold H. Israel, Selective Incorporation: Revisited, 71 GEO. L.J. 253 (1982).

84. See Abrahamson, supra note 81, at 1146. Indeed, these early, pre-incorporation state constitutional law decisions prove extremely useful for modern arguments urging the expansion of state constitutional rights beyond those afforded by the federal constitution. See, e.g., George Nock, Seizing Opportunity, Searching for Theory: Article I, Section 7, 8 U. PUGET SOUND L. REV. 331, 332 n.3 (1985).

authorities on a silver platter," for use by the federal officials so long as the federal officials did not participate in the original seizure conducted in violation of federal standards.

During the incorporation era of the 1960s, when state courts were busy complying with the explosion of Warren Court rulings expanding federal constitutional rights, especially in the criminal procedure area, we began a period of unparalleled uniformity. Furthermore, because supremacy required state adherence to the new federal constitutional principles, little need existed for civil rights litigants to invoke state constitutional provisions. Thus, it is quite understandable that during that period, the federal floor of constitutional rights became the uniform and widely accepted standard.

With the shrinking of federal rights jurisprudence under the Burger and Rehnquist Courts, beginning in the 1970s, the uniformity/diversity pendulum began to swing the other way. As state courts began to rediscover their bills of rights, or perhaps more accurately, advocates began to urge state constitutional rights claims on state courts, a new era of diversity between federal and state rights jurisprudence necessarily ensued.

These rights-based historical shifts may be no different from other constitutional shifts in federal/state power and authority occurring throughout our history. For example, we have experienced shifts in the view of the legitimate scope of federal power conferred by the Commerce Clause, shifts in the scope and meaning of the substantive due process limitations on state power in the economic sphere, and

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87. See State v. Mollica, 554 A.2d 1315, 1324 (N.J. 1989) (Handler, J.) ("The essential principle underlying the development of this 'silver platter' doctrine is that protections afforded by the constitution of a sovereign entity control the actions only of the agents of that sovereign entity.")
88. See Abrahamson, supra note 81, at 1147.
89. While Professor Gardner debunks the theory that the "federalization" of constitutional rights during the 1960s led to the atrophy of state constitutional rights jurisprudence, see, Gardner, supra note 21, at 805-11, others argue to the contrary. See, e.g., A.E. Dick Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 VA. L. REV. 873, 878 (1976). Justice Abrahamson finds it telling that the American Political Science Review abandoned its section on state constitutional developments shortly after World War II. See Abrahamson, supra note 81, at 1147 n.20.
90. As Justice Handler put it in Mollica, this time "the polarity of the... process was reversed." The more lenient standards now govern federal rather than state officials. See Mollica, 554 A.2d at 1326 (the quoted phrase does not appear in the Atlantic Second Reporter but can be found under the same citation in Westlaw).
93. See, e.g., Lochner v. New York, 198 U.S. 45 (1905) (state minimum hours law for bakers subjected to careful scrutiny and held violative of liberty of contract protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution), overruled in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) ("Constitution does not speak of freedom of contract;" deference to legislative judgment; state hours and wages law not violative of due process); Dolan v. City of Tigard, 512 U.S. 374 (1994) (affording increased scrutiny to land use regulation, and holding local regulation a "takings" violative of due process).
shifts in the limitations imposed on state interference with contractual rights under the Contracts Clause.\textsuperscript{94}

The often strident complaints from disadvantaged groups alleging a fundamental subversion of the constitutional order, of course, inevitably marks each shift.\textsuperscript{95} Our experience with the recent development of an independent state constitutional rights jurisprudence may not be much different.\textsuperscript{96} It is, of course, the general, and somewhat abstract, nature of our system of constitutional federalism which allows those shifts to occur as each generation re-debates and redefines the precise contours of "Our Federalism."\textsuperscript{97} From this perspective, shifting federal-state constitutional rights jurisprudence may be nothing more than another aspect of the natural order of things.

From a non-historical perspective, the concern about "uniformity" in the expression of a constitutional rights jurisprudence is really nothing more than a renewal of the fundamental debate about the extent to which we are more a national society or one made up of separate states. That question has been legitimately debated from the inception of our nation\textsuperscript{98} to the present day,\textsuperscript{99} and will continue for


\textsuperscript{95} Doctrinal consistency is not necessarily the hallmark of the critics. For example, civil rights advocates in a given state who applaud federal intervention to protect those rights may bristle at the constraints of the Commerce Clause, which preclude their state from protecting its limited groundwater from purchase and sale out of state. See Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) (striking portion of Nebraska law precluding withdrawal of Nebraska groundwater for use out-of-state). See Michael Les Benedict, The Blessings of Liberty: A Concise History of the Constitution of the United States xx (1996) ("Throughout American history, different groups have tended to support or oppose 'broad construction' of national power, depending on whether they thought the national government or the state governments would be more likely to promote their interests.").

\textsuperscript{96} For example, in the search and seizure area state court criminal defendants, during the early 20th century, complained about the unfairness of allowing federal agents to turn over the fruits of their invalid searches under federal law for use in state prosecutions where the state exclusionary rules were not as protective of rights as the federal rules. See supra notes 85-87 and accompanying text. Now it appears to be those more concerned with the efficiency of law enforcement efforts who complain about the reordering occurring in those states which have developed state constitutional search and seizure doctrines that are now more protective of defendant rights than federal constitutional doctrine. See supra notes 75-77 and accompanying text. The original "silver platter" doctrine, of course, now operates in reverse to allow state officials in those states to turn over evidence seized in violation of their more rigid constitutional standards to federal officials who operate under less stringent federal standards. See, e.g., Barry Latzer, The New Judicial Federalism and Criminal Justice: Two Problems and a Response, 22 Rutgers L.J. 863, 869-84 (1991).

\textsuperscript{97} See Younger v. Harris, 401 U.S. 37, 44 (1971).

\textsuperscript{98} See The Federalist No. 39, at 259 (James Madison) (Penguin ed. 1987).

The proposed Constitution ... is ... neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal not national; and, finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.

\textsuperscript{99} For example, the essential debate between the majority and the dissent in the Term Limits case expressly re-debated the argument about the nature of federal and state citizenship, and which should control in that particular context. Compare U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (striking state imposed limits on federal officers as an unconstitutional state infringement on the rights of national citizens), with id. at 845 (Thomas, J., dissenting) (arguing that the right of the people to choose their representatives inheres in the people of the states).
as long as we retain our existing structure of government. In the present context, the debate plays out among those who urge that Justice Brandeis' dictum about "states as laboratories" for experimentation in the regulation of our economic and social life extends equally to the development of new arrangements of rights and liberties, so long as those experiments do not fall below the floor of federal rights and liberties guaranteed to all citizens by the federal constitution, and those who find the "states as laboratories" metaphor inappropriate in the rights field.

Whatever the academic debate, the Supreme Court has, for years, recognized the value of state constitutional elaborations as an aid to Supreme Court resolution of new constitutional rights issues. It has also encouraged states to go their own ways, even in the rights fields, when a claimed right is not wrapped in federal protective garb. Indeed, the Supreme Court explicitly recognized the validity of state constitutional rights diversity in Prune Yard Shopping Center v. Robins, and encouraged its development with its decision in Michigan v. Long. Thus, it is a settled principle of the current constitutional order that, while we are a unified nation of one people who share a common heritage—which includes shared values of personal rights and liberties—we also value the diversity we bring as different states, with different origins, different historical developments, and a certain freedom to carve out for our state communities different rights and liberties at the margins. Moreover, we value this diversity even where it causes some administrative difficulties and inefficiencies which may appear to some as anomalous for the people of a single nation.

100. 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.").
101. See, e.g., Abrahamson, supra note 81, at 1141.
102. See Gardner, supra note 21, at 823-32.
103. See, e.g., Perry v. Louisiana, 461 U.S. 961, 962 (1983) (opinion of Justice Stevens respecting denial of certiorari), in which he noted the lack of conflict in the circuits and the fact that two state courts barred the prosecutorial use of peremptory challenges to exclude members of racial and ethnic minorities, thus giving rise to "litigation addressing both procedural and substantive problems associated with judicial review of peremptory challenges." Against this backdrop, Justice Stevens concluded "it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." See id. at 963. Three years later, of course, the United States Supreme Court, in Batson v. Kentucky, 476 U.S. 79, 86 (1986), struck the practice of using peremptory challenges to exclude jurors on racial grounds, opening a new area of federal equal protection jurisprudence. See, e.g., Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991), (applying Batson to the action of private litigants in the civil context). The states have continued to develop the jurisprudence in their own independent ways. See, e.g., State v. Aragon, 109 N.M. 79, 201, 784 P.2d 16, 20 (1989) (precluding use of peremptory challenges as violating the right of a defendant to a jury which represents a fair cross-section of the population as guaranteed by article II, section 14 of the New Mexico Constitution).
104. See, e.g., Vacco v. Quill, 117 S. Ct. 2293 (1997) and Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (both holding that state laws prohibiting physician-assisted suicide did not violate the Equal Protection Clause or Due Process Clause of the Fourteenth Amendment to the United States Constitution, and expressly freeing states to decide whether to permit such laws).
105. 447 U.S. 74 (1980) (state free to define the scope of its own constitutional free speech clause so long as the state interpretation does not violate the federal constitution).
106. 463 U.S. 1032 (1983). See also supra note 21 (noting a division among scholars on whether the majority or the dissent in Long better promotes the growth of state court jurisprudence).
107. The inefficiency of "our federalism" is well recognized and inevitably raises the hackles of those who dislike the particular result which obtains as a consequence of its constraints. As but one recent example, the police officers acquitted by the California state court in the Rodney King police harassment trial charged unfairness when
To the extent, therefore, that Gomez' expression of concern about the values of uniformity are only meant to suggest that state courts and federal courts are engaged in a common enterprise of defining the parameters of constitutional rights, and should therefore be mindful and give heed to each others' rulings, it is a healthy and useful admonition. If courts extend the Gomez dictum, however, into a rule of limitation, it could undermine that which the New Mexico Supreme Court has carefully built since the first articulation of its commitment to an independent state constitutional jurisprudence.

IV. WHEN PURE GOMEZ INTERSTITIALISM MAY NOT APPLY

One might question why there needs to be a single analytical approach when both federal and state bill of rights claims are asserted in tandem with one another. We do not, for example, hear calls for a single, consistent approach when parallel federal and state statutory or common law approaches are involved. Furthermore, perhaps there are reasons why some state constitutional rights issues should merit the application of one analytical approach while others might merit quite another.

One, for example, might accept the importance of uniformity in federal and state rights jurisprudence with respect to some aspects of search and seizure law. Given the fact that federal and state officers often engage in joint investigative enterprises involving warrants and searches, perhaps the federal rights analysis should come first, and perhaps there should even be a strong presumption that the state jurisprudence should mirror the federal. In an area like free speech, however, or free exercise of religion, or in the levels of review in equal protection jurisprudence, or the scope and extent of the state action doctrine—perhaps there our system of dual-sovereignty required them to stand trial again in federal court for the same offense, this time labeled as a violation of the federal civil rights statutes. See Jim Newton & Leslie Berger, U.S. Files Civil Rights Charges Against 4 Officers in King Case Indictments, L.A. TIMES, August 6, 1992, at A1.

Of course such a result inheres in the unique system of American federalism, and unless we wish to take seriously Professor Gardner's suggestion that we alter the constitutional order and abolish the states, see Gardner, supra note 21, at 835-36, such effects and apparent anomalies are just the attendant cost, (or perhaps benefit) of living under our system. See, e.g., Martin Landau, Federalism, Redundancy and System Reliability, PUBLIS: J. FEDERALISM, 173, 187-96 (1973).

108. For example, there was no hue and cry when the New Mexico Supreme Court interpreted the relation back provision of rule 15(c) of the New Mexico Rules of Civil Procedure differently from the federal interpretation of precisely the same rule, even when the state rule was patterned after the federal rule. See Galion v. Conmaco Int'l, Inc., 99 N.M. 403, 658 P.2d 1130 (1983). Similarly, it was readily accepted without any fanfare that the prospectivity of new judicially declared state law would be determined by the New Mexico Supreme Court independent of the United States Supreme Court's new rule on the subject. See Beavers v. Johnson Controls World Servs., 118 N.M. 391, 881 P.2d 1376 (1994).

109. The judges of some state courts have failed to reach a consensus on a general analytical approach in this area. See, e.g., Immuno, A.G. v. Moor-Jankowski, 567 N.E.2d 1270, 1286 n.2 (N.Y. 1991) (Simmons, J., concurring) ("neither the Court nor its individual Judges have consistently followed any announced standards for departing from Federal law to adopt a different State rule or settled on any preferred methodology for doing so.").

110. See supra note 78 and accompanying text.

111. See Com v. New Mexico Educators Fed. Credit Union, 119 N.M. 199, 889 P.2d 234 (1994) (adopting four levels of scrutiny under the New Mexico equal protection clause).

112. The federal state action doctrine is generally understood to lack coherence, see Charles L. Black, Jr., "State Action," Equal Protection, and California's Proposition 14. 81 HARV. L. REV. 69, 95 (1967) ("The field is a conceptual disaster area . . .").
is less of a reason for uniformity, and a greater interest in the development of a wholly independent jurisprudence which might make the primacy approach more appropriate. Thus, state supreme courts may see the wisdom of not having a single jurisprudential approach to all constitutional claims when parallel federal and state constitutional claims are brought together.

Furthermore, Gomez does not compel counsel to make both a federal and a state constitutional claim whenever there are parallel provisions in both constitutions. In fact, tactical and strategic considerations come into play in a number of civil litigation situations, leading a party to raise only one even though both would be available. One might, for example, avoid a federal constitutional claim altogether to avoid removal of a case to federal court by the opposing party, or to avoid certiorari review in the United States Supreme Court. On the other hand, the availability of attorneys fees under the federal Attorneys Fees Award Act of 1976 might be so important to a litigant’s ability to fund the litigation, that a parallel state constitutional claim might be foregone to avoid the possible resolution on state constitutional grounds, for which no attorneys fees are available. There is nothing in Gomez even remotely suggesting that the court intends in any way to deprive parties and their lawyers of these tactical decisions, and therefore, there will be numerous situations where, although the potential for an interstitial approach is possible, the litigants themselves posture the case in such a way that the court is confronted with only a federal constitutional claim or only a state constitutional claim, thus avoiding the approach question altogether.

Harlan’s notable dissenting formulation in the Civil Rights Cases, 109 U.S. 3, 58-59 (1883) (Harlan J., dissenting) (would apply Fourteenth Amendment prescriptions to business entities which serve the public because they are charged with duties to the public and “are amenable in respect of their duties and functions, to government regulation”). Or a state might formulate some new state action principle to operate as a constraint on the scope of state constitutional protections. See, e.g., Sharrock v. Dell Buick-Cadillac, Inc., 379 N.E.2d 1169, 1173 (N.Y. 1978) (lack of federalism concerns, and absence of state action language in state constitution “provides a basis to apply a more flexible State involvement requirement than is currently being imposed by the Supreme Court with respect to the Federal provision.”). In those instances, resort to an analysis under federal principles first, seems particularly inappropriate.

For a discussion of how the New Mexico Supreme Court may have inadvertently undercut this principle in State v. Woodruff, 124 N.M. 388, 951 P.2d 605 (1997), see supra note 41 and accompanying text.

The recent practice of New Mexico state agencies has been to remove civil rights claims brought against them in state court, thereby depriving the plaintiffs in those cases their choice of what they perceive to be a favorable state court forum.


See Chapman v. Luna, 102 N.M. 768, 701 P.2d 367 (1985) (because court ruled county emissions program unconstitutional on state rather than federal equal protection grounds, plaintiff is not entitled to attorneys fees under 42 U.S.C. § 1988). Perhaps one of the values of the interstitial approach in the civil context is that it may avoid the dilemma of fees versus success in some cases where parallel federal and state constitutional claims are available. Since, under that approach, the court will necessarily view the federal claim first, and afford relief under that claim if at all possible, the attendant section 1988 fees will follow. Under interstitialism, the court will consider the state constitutional claim only after determination that the federal claim affords no relief. Therefore, there is no risk of sacrificing otherwise available attorneys fees in those instances.

But see supra note 41 and accompanying text (discussing how the approach in Woodruff could lead to such a deprivation of tactical choices).
Finally, there are situations where, although the Gomez approach is called for, the New Mexico Supreme Court might be persuaded not to apply it. Take for example the following scenario:

A difficult search and seizure question, unresolved under both the federal and state constitutions, confronts the New Mexico Supreme Court. The court, applying Gomez, examines the federal claim first. In so doing, the state court determines that the case presents a very close question—indeed a federal question that is really too close to call with any certainty based on United States Supreme Court precedent. Forced to the choice, however, the state supreme court finds a violation of the defendant's federal Fourth Amendment rights. Under Gomez interstitialism, having ruled for the defendant on the federal ground, the Court refuses to rule on the state constitutional claim.119

As a result of the ruling, the state petitions the United States Supreme Court for certiorari review; the writ is granted; and two years later the United States Supreme Court reverses the New Mexico Supreme Court's federal constitutional ruling, holding that the search did not violate the defendant's Fourth Amendment rights. Upon remand, of course, the defendant then asks the New Mexico Court to decide the state constitutional claim, and after another round of oral argument, and perhaps the running of another year or two, the New Mexico Supreme Court rules that the defendant either wins or losses on the state constitutional claim.120

Under these circumstances would it not be more efficient, and less costly in terms of judicial resources, for the New Mexico Supreme Court to rule on both in the first instance?121 If the defendant was going to win on state constitutional grounds anyway, was not the certiorari review a considerable waste of time?122 Similarly, if the state claim was not going to succeed, would it not have been better for all to know that in advance of the state’s petition for review, thereby cutting down on the need for further litigation on remand, and making it clear to both the State and the defendant, that all would be finally decided on the federal certiorari petition?

This scenario does not mean to suggest that interstitialism may not be appropriate under some circumstances. It merely points out that situations may arise where cogent reasons might lead a court to deviate from the interstitial model. In those instances either or both parties should feel free to urge such a deviation upon the court, and the court itself, might do so sua sponte. Indeed, doing so in appropriate circumstances would be thoroughly consistent with our understanding that

120. Such a scenario is not at all far fetched. See Robert F. Williams, State Constitutional Law: Cases and Materials 277-81 (2d ed. 1993) (discussing the Williams v. Georgia litigation, 349 U.S. 375 (1955), which presented just such a scenario).
121. Justice Linde thinks so. See State v. Kennedy, 666 P.2d 1316, 1318 (Or. 1983). Moreover, when lower state courts direct adequate and primary attention to state constitutional issues, higher state courts are more inclined to exercise discretionary review in the first instance rather than confronting such issues after remand from the United States Supreme Court. See id. at 1320.
122. Of course, review of the case by the United States Supreme Court may allow for the final resolution of a very important federal constitutional question, although there is considerable debate over when the attendant cost to the state system is worth the price, especially since it is likely that at some point the issue would have found its way to the Supreme Court in an appeal from a ruling by a federal district court.
American federalism is not entirely a binary concept, but rather more often reflects a tension in governmental authority which requires a careful, and largely ad hoc, balance of federal and state interests.

V. CONCLUSION

David Henderson rightfully described Gomez as a “Conversation in Progress,” and this article seeks to outline some of the possible contours of that conversation as it proceeds in the future. It is hoped that the Gomez form of interstitialism will not undermine or deter the continued development of New Mexico’s independent jurisprudence of state constitutional rights—either by leading advocates and future courts into the easy trap of a presumption in favor of the federal jurisprudence, or by too rigid a view of either the need or grounds for deviation from that jurisprudence.

Furthermore, there may be some comfort in the idea of uniformity of constitutional rights which comes from our common heritage and belief in individual autonomy and human dignity which underlies all American bills of rights. Nonetheless, diversity in our view of those rights at the margins is neither unhealthy nor unwarranted under “Our Federalism.” It is perfectly permissible for the states to articulate and enforce higher standards of rights and privileges for their citizens than those which inhere in us as national citizens.

Finally, Gomez interstitialism may be here to stay as a general, guiding principle, but there may be circumstances where the court will adjust it and adapt it to serve particular values. In the end, Gomez interstitialism—like all legal doctrines in this area—must properly remain a continuing conversation which matures and develops to serve us in ways which we may not yet appreciate or understand.

123. Of course, there are a few matters that are clearly placed by the federal constitution on one side of the dividing line between federal and state power. See, e.g., U.S. CONST. art. I, § 8 (listing of powers of Congress, some of which are exclusive); id. § 10 (listing powers the states are expressly prohibited from exercising).
124. Henderson, supra note 1, at 42.