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INDEPENDENT ANALYSIS AND INTERPRETATION OF THE NEW MEXICO CONSTITUTION: IF NOT NOW, WHEN?

Linda M. Vanzi* and Mark T. Baker**

INTRODUCTION

An article published in this law review in 2018 called for action to rectify the “stark contrast” between the New Mexico Supreme Court’s “vigorous use” of the state constitution “as a shield to protect criminal defendants from illegal government actions” and its failure to treat the state constitution as a separate and distinct source of individual civil rights; one that is both independent of the United States Constitution and equally authoritative as to New Mexicans.¹ The article’s discussion of possible reasons for this difference included the absence of a state legislative enactment establishing a civil action for damages to redress the deprivation of rights guaranteed by the state constitution and the lack of incentives for private attorneys to litigate such cases—*i.e.*, state statutes comparable to federal statutes² affording a civil damages action for claimed violations of the United States Constitution and allowing for recovery of attorneys’ fees.³

The New Mexico Civil Rights Act (“NMCRA”)⁴ became law in 2021, providing a cause of action “to establish liability and recover actual damages and equitable or injunctive relief” for the “deprivation of any rights, privileges or immunities pursuant to the bill of rights of the constitution of New Mexico”;⁵

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** Shareholder, Peifer, Hanson, Mullins & Baker, P.A.; fourth generation New Mexican. Thank you to my wife and sons for supporting me in projects like this, knowing the extra work consumes time I could be with them. Thanks also to three great mentors who have shaped my career: United States District Judge Bruce D. Black (retired), John B. Pound, and Charles R. Peifer.

1. Linda M. Vanzi, Andrew G. Schultz & Melanie B. Stambaugh, *State Constitutional Litigation in New Mexico: All Shield and No Sword*, 48 N.M. L. REV. 302, 305 (2018).

2. 42 U.S.C. §§ 1983, 1988(b).

3. Vanzi et al., *supra* note 1, at 306–07 (explaining that most provisions of the New Mexico Constitution are not self-executing and that an external enactment is necessary to authorize a civil action for damages to redress violations of rights under the state constitution); *id.* at 310–14 (discussing the absence of a fee-shifting mechanism and its consequences); *see also* Carter v. City of Las Cruces, 1996-NMCA-047, ¶ 13, 121 N.M. 580, 915 P.2d 336 (“Unlike federal law, New Mexico has no statute analogous to § 1983 that would provide for damages against government entities or their officials for past violations of state statutes or the state Constitution.”).

4. New Mexico Civil Rights Act, N.M. STAT. ANN. §§ 41-4A-1 to -13 (2021).

5. N.M. STAT. ANN. § 41-4A-3(B) (2021).

prohibiting the defense of qualified immunity in NMCRA actions;⁶ and allowing courts to award reasonable attorney fees and costs to prevailing plaintiffs.⁷ Litigation under the NMCRA will require our courts to decide claims arising under the state constitution's bill of rights, including provisions that have never before been interpreted.

This article posits that the mode of analysis of state constitutional issues adopted by the New Mexico Supreme Court in *State v. Gomez*,⁸ as it has been applied in the civil context, has neither "promote[d] the development of a sound body of state constitutional jurisprudence" nor led to "consistent, predictable, and reasonable state court decision-making," as some envisioned in 1998.⁹ Instead, it has often led to essentially automatic deference to federal precedent interpreting comparable provisions of the Federal Constitution and very limited, if any, consideration of protections afforded under our state constitution. In addition, the inconsistent application of the *Gomez* requirements in civil cases has made "predictable" and "reasonable" decision-making impossible, for lawyers and lower courts alike.¹⁰ Given these issues and the new NMCRA cause of action, there is an urgent need for the New Mexico Supreme Court to reconsider the *Gomez* framework and to develop a method for analyzing state constitutional issues that recognizes the independent legal significance of state constitutions in our system of dual sovereigns and also provides clarity and guidance to litigants and judges.

This article does not attempt to prescribe the components of that independent mode of analysis and interpretation.¹¹ That important task will require the formulation of sound and principled theories by lawyers and judges who have taken the time to study, not only the New Mexico Constitution's text and related case

6. N.M. STAT. ANN. § 41-4A-4 (2021).

7. N.M. STAT. ANN. § 41-4A-5 (2021).

8. 1997-NMSC-006, 122 N.M. 777, 932 P.2d. 1.

9. Jennifer C. Juste, *Constitutional Law—The Effect of State Constitutional Interpretation on New Mexico's Civil and Criminal Procedure—State v. Gomez*, 28 N.M. L. REV. 355, 362 (1998); accord Michael B. Browde, *State v. Gomez and the Continuing Conversation Over New Mexico's State Constitutional Rights Jurisprudence*, 28 N.M. L. REV. 387, 387 (1998); Robert F. Williams, *New Mexico State Constitutional Law Comes of Age*, 28 N.M. L. REV. 379, 386 (1998).

10. This article addresses only civil cases following *Gomez*. For a broader discussion of the first twelve years following *Gomez*, see Michael B. Browde, *Gomez Redux: Procedural and Substantive Developments Twelve Years On*, 40 N.M. L. REV. 179 (2010) [hereinafter *Gomez Redux*].

11. One commentator has observed that the concept of "'state constitutional interpretation' covers a lot of ground," encompassing questions he describes as "whether" "when" and "how" to interpret a state constitutional provision. Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN. STATE L. REV. 837, 837 (2011) [hereinafter *Thoughts About State Constitutional Interpretation*]; see also Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 MD. L. REV. 309, 310 (2017) [hereinafter *Constitutional Incorporation*] (explaining that "constitutional judicial review" raises both "institutional questions" that "focus on the proper role of courts in interpreting a constitution, and seek to locate judicial decisionmakers within the larger context of democratic government" and "interpretive questions" that "go to methodology, exploring the ways in which decisionmakers either construct or discover constitutional meaning"). This article discusses the first two questions and argues that the approach adopted by the New Mexico Supreme Court in *Gomez*, for cases involving provisions of the state constitution that are identical or similar to provisions of the Federal Constitution, should be reevaluated and modified or replaced. This article does not address the separate question of what methods and principles should be used to determine the meaning of a given provision of the state constitution.

law, but also court decisions and scholarship concerning interpretation of state constitutions.¹² Instead, this article simply spotlights the need to develop an approach in which state constitutional provisions with federal analogues are not treated as “a mere row of shadows”¹³ and the central focus is on “the meaning of the state constitution itself, rather than on comparing it with, or relating it to, the Federal Constitution.”¹⁴

I. ANALYSIS OF STATE CONSTITUTIONS; THE NEW MEXICO SUPREME COURT’S ADOPTION OF THE INTERSTITIAL APPROACH

Why do we need to think carefully about process in connection with state constitutional analysis? The answer requires context, and a recent article by Professor Jack L. Landau, former Associate Justice on the Oregon Supreme Court, provides a succinct overview. To begin:

The federal Bill of Rights was patterned after existing state bills of rights. In fact, every single right listed in the Bill of Rights

12. Commentators have observed that this is an area largely neglected in legal education. See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 191, 194 (Oxford Univ. Press 2018) (discussing the need for, *inter alia*, law school courses on state constitutional law; explaining that “[s]tate court judges face a practical limit in addressing the imbalance between the role of the Federal Constitution and its state counterparts in the development of American constitutional law”; “[t]here’s not much a state court can do when it comes to vindicating the independence of its state constitution if its lawyers don’t raise the claims under its own charters”; and that “[l]awyers can’t make arguments they don’t know anything about”); Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379, 392 (1980) (“As lawyers we know very well that individual rights differ from state to state. That is what a federal system means. But even lawyers have difficulty in thinking about constitutional law as something apart from Supreme Court opinions. This is because, like the news media, the law schools have nationalized legal education, and constitutional law books deal exclusively with the opinions of the United States Supreme Court.”); Erwin Chemerinsky, *State Constitutions as the Future for Civil Rights*, 48 N.M. L. REV. 259, 266 (2018) (stating that “we need more generally to put much more emphasis and attention on state constitutions than ever before”; “[i]f we are going to have lawyers litigating under state constitutions and judges adjudicating under them, then we need to be teaching law students about state constitutional law”; and that law schools need to change, “as state constitutions are going to be the source of rights for years to come”); *but see* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 810–11 (1992) (“It is true that few law schools offer courses in the constitutional law of particular states; but it is equally true that few law schools offer courses in the contract, tort, or property law of particular states. Somehow law school graduates are able to work effectively within the state common law systems after a legal education in general principles of those areas of law, and constitutional law is no different. The real problem is not the education in state constitutional law offered by law schools, but the one offered by state courts.”).

13. *State v. Bradberry*, 522 A.2d 1380, 1389, 129 N.H. 68, 82–83 (N.H. 1986) (Souter, J., concurring specially) (“It is the need of every appellate court for the participation of the bar in the process of trying to think sensibly and comprehensively about the questions that the judicial power has been established to answer. Nowhere is the need greater than in the field of State constitutional law, where we are asked so often to confront questions that have already been decided under the National Constitution. If we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice incoherent. If we are going to steer between these extremes, we will have to insist on developed advocacy from those who bring the cases before us.”).

14. 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, 1050 (1997) (making this point in criticizing an approach to state constitutional analysis similar to the approach adopted in *Gomez*) (footnote omitted).

had already been mentioned in one of the state bills of rights that commonly prefaced state constitutions in the Revolutionary Era. In turn, after the ratification of the Bill of Rights, new state constitutions tended to borrow either from the Federal Constitution or other state founding documents. As a result of all that borrowing, there's a lot of duplication between state and federal constitutions.¹⁵

This posed no problems initially, as the United States Supreme Court held in *Barron v. City of Baltimore*¹⁶ that the federal Bill of Rights “did not apply to the states and constrained only the federal government” and state constitutions “limited only state government authority.”¹⁷ All that changed, however, after the ratification of the Fourteenth Amendment and the United States Supreme Court’s subsequent adoption of the selective-incorporation doctrine.¹⁸ Landau explains:

According to that doctrine, substantial portions of the federal Bill of Rights apply to the states through the Amendment’s Due Process Clause. That created the potential for both the state and federal constitutions to apply to state actions. In the process, it created the problem of determining whether, in any given challenge to a state action involving both state and federal constitutional rights, courts should address the state constitution before the federal, or vice versa.¹⁹

The need to address this “timing” issue did not arise immediately, as state constitutional analysis “all but disappeared” during the period of the Warren Court, when the United States Supreme Court “began to interpret the Bill of Rights more liberally than the state courts had been interpreting parallel provisions of their state constitutions.”²⁰ When the Court’s decisions became more conservative, “judges and scholars called for a reawakening of state constitutionalism as an independent source of individual rights” and “the timing question became unavoidable” after “[c]ourts around the nation began to heed that call of this ‘New Judicial Federalism.’”²¹

According to Professor Landau, “[s]tate courts came up with essentially four different answers to that timing question,” which he summarizes as follows:²²

First, some courts avoided the problem altogether by adopting what became known as the “lockstep” approach to state constitutional interpretation. According to this view, a state constitutional provision that has a counterpart in the Federal Bill

15. Hon. Jack L. Landau, “*First-Things-First*” and *Oregon State Constitutional Analysis*, 56 WILLAMETTE L. REV. 63, 65–66 (2020) (footnotes omitted).

16. See 32 U.S. 243, 247–248 (1833).

17. Landau, *supra* note 15, at 66–67 (footnotes omitted).

18. *Id.* at 67.

19. *Id.* (footnote omitted). For more on the mid-twentieth century debate over the incorporation of the Bill of Rights through the Fourteenth Amendment’s Due Process Clause, see Boldt & Friedman, *supra* note 11, at 316–33.

20. Landau, *supra* note 15, at 68.

21. *Id.* (footnotes omitted); see also Boldt & Friedman, *supra* note 11, at 334.

22. Landau, *supra* note 15, at 68.

of Rights is interpreted to mean whatever the United States Supreme Court has concluded the federal counterpart means. Because the state provision is interpreted in “lockstep” with its federal counterpart, there’s no need to worry about which provision is analyzed first. Proponents often cite the advantage of uniformity, especially in criminal law, in taking a lockstep approach to state constitutional analysis.

Second, other courts adopted an “interstitial” approach, which requires a determination of whether there is controlling federal authority on the parallel provision of the Federal Constitution. Only if federal authority doesn’t speak to the issue at hand—that is, only if there’s a gap or interstice left by federal law—will courts following this approach entertain the applicability of the state constitution.

A third approach is a variation on the second. Preferred by a few states like New Jersey and Washington, this approach allows state courts to turn to the state constitution before the Federal Constitution depending on the circumstances. This “criteria” or “factor” approach essentially presumes that federal case law construing parallel provisions of the Federal Constitution is controlling, but allows the presumption to be rebutted by significant differences in texts or by textual or historical contexts.

Finally, there’s the primacy, or first-things-first, approach. This approach abjures any notion that courts should begin their constitutional analysis by considering federal case law construing parallel provisions of the Federal Bill of Rights. Under the first-things-first approach, courts must always look first to the state constitution before considering whether a provision of the Federal Constitution provides relief. The first-things-first approach has long been the favorite of scholars, though relatively few state courts have adopted it.²³

Other commentators include the “dual-sovereignty” approach, which treats the Federal Constitution and state constitutions as independent and equivalent sources of individual rights and thus “mandates an examination of both sources in every case,” which may begin with either source.²⁴ Each of these approaches has been advocated, questioned, criticized, and otherwise discussed and debated in the literature, as has the concept of “state constitutionalism” itself.²⁵ The lockstep,

23. *Id.* at 68–71 (footnotes omitted). Boldt and Friedman describe three approaches: primacy, lockstep, and “factor,” the latter of which encompasses the interstitial and criteria approaches. *See* Boldt & Friedman, *supra* note 11, at 335–44.

24. Juste, *supra* note 9, at 360 (footnote omitted).

25. For deeper discussions, *see, e.g.*, SUTTON, *supra* note 12, at 182–90; Boldt & Friedman, *supra* note 11, at 311–16; 335–44; *Thoughts About State Constitutional Interpretation*, *supra* note 11, at 837–47; Hugh D. Spitzer, *New Life for the “Criteria Tests” in State Constitutional Jurisprudence: “Gunwall Is Dead—Long Live Gunwall!”*, 37 RUTGERS L.J. 1169, 1171–77 (2006); Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 206–19 (1998); Juste, *supra* note 9, at 357–60; Gardner, *supra* note 12, at 761–837; Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 645–52 (1987).

interstitial, and criteria approaches may roughly be characterized as “dependent” modes of analysis, in that they all consider federal precedent interpreting comparable federal constitutional provisions first and state provisions only secondarily, if at all. The primacy and dual-sovereignty approaches may roughly be characterized as “independent” analytical modes (although different in degree), in that both require consideration of state constitutional provisions.

In *State v. Gomez*, in which the defendant asserted rights under the Fourth Amendment to the Federal Constitution²⁶ and Article II, Section 10 of the state constitution,²⁷ the New Mexico Supreme Court adopted the interstitial approach to claims brought under a provision of the state constitution “that has a parallel or analogous provision in the United States Constitution.”²⁸ The court articulated the interstitial approach as follows:

Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined. *See Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1358 (1982). A state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics. *Id.* at 1359.²⁹

In *Gomez*, the New Mexico Supreme Court explained that it had, for decades, interpreted the New Mexico Constitution “in ‘lock-step’ with federal precedent interpreting the United States Constitution when parallel provisions were involved,” following federal precedent “without interpreting independently the parallel provision of the New Mexico Constitution,” whether or not “the federal constitution provided protection against deprivation of an individual right.”³⁰ The court further explained that it had previously abandoned the lock-step approach, noting its 1976 decision in *Serna v. Hodges*, which recognized that the New Mexico Supreme Court is

26. U.S. CONST. amend. IV (“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.”).

27. N.M. CONST. art. II, § 10 (“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.”).

28. 1997-NMSC-006, ¶¶ 20–22, 122 N.M. 777, 932 P.2d 1.

29. *Id.* ¶ 19, 932 P.2d. at 7 (bracketed text omitted).

30. *Id.* ¶ 16, 932 P.2d. at 6; *see, e.g.*, Juste, *supra* note 9, at 357–58 (explaining that, “where a state constitutional provision has a federal analog, lock-step jurisdictions will adopt the Supreme Court’s interpretation of the individual right in question as their own” and “[i]f a federal provision does not provide an individual with protection against a governmental intrusion, the state constitution will not be independently scrutinized”); Utter & Pitler, *supra* note 25, at 645 (describing a “lock-step or absolute harmony approach” as “a non-approach to state interpretation because it results in absolute deferential conformity with Supreme Court interpretations”) (internal quotation marks omitted); *see also* Browde, *supra* note 9, at 389 n.14.

not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution, even in construing provisions having wording that is identical, or substantially so, unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter.³¹

Gomez also cited a more recent series of criminal cases in which the New Mexico Supreme Court had taken a “tacit approach to interpretation of the New Mexico Constitution,” describing it as “interstitial, providing broader protection where we have found the federal analysis unpersuasive either because we deemed it flawed” or “because of distinctive state characteristics” or “because of undeveloped federal analogs.”³²

The *Gomez* Court noted that several other states follow the primacy approach, describing this approach as directing that “if a defendant’s rights are protected under state law, the court need not examine the federal question” and “[i]f a defendant’s rights are not protected under state law, the court must review the matter in light of the federal constitution.”³³ The court went on to frame its selection of methodology as a choice between the interstitial and primacy approaches and justified its preference for the former on two grounds: first, the interstitial model “effectively advances” the goal of “preserv[ing] national uniformity in development and application of fundamental rights guaranteed by our state and federal constitutions”;³⁴ second,

when federal protections are extensive and well-articulated, state court decisionmaking that eschews consideration of, or reliance on, federal doctrine not only will often be an inefficient route to an inevitable result, but also will lack the cogency that a reasoned reaction to the federal view could provide, particularly when

31. *Gomez*, 1997-NMSC-006, ¶ 17, 122 N.M. 777, 932 P.2d. 1 (other citation omitted) (quoting *State ex rel. Serna v. Hodges*, 1976-NMSC-033, ¶ 22, 89 N.M. 351, P.2d 787 (holding that the New Mexico death penalty statute is not unconstitutional under the Eighth Amendment of the United States Constitution or Article II, Section 13 of the New Mexico Constitution), *overruled in part on other grounds* by *State v. Rondeau*, 1976-NMSC-044, ¶ 9, 89 N.M. 408, 412, 553 P.2d 688, 692).

32. *Id.* ¶ 20, 932 P.2d. at 7 (citations omitted).

33. *Id.* ¶ 18, 932 P.2d. at 7 (quotation marks & citations omitted). For more on the primacy approach, see *Utter & Pitler*, *supra* note 25, at 647 (explaining that “primacy courts focus on the state constitution as an independent source of rights, rely on it as the fundamental law, and do not address federal constitutional issues unless the state constitution does not provide the protection sought” and that primacy courts view federal law and analysis “as no more persuasive than decisions of sister state supreme courts”) (footnote omitted); see also *Thoughts About State Constitutional Interpretation*, *supra* note 11, at 846 (attributing the “practical rationale” for the primacy approach to “the doctrine of federal jurisdiction reflected in the U.S. Supreme Court’s decision in *Michigan v. Long*, 463 U.S. 1032, 1038–39 (1983)” — *i.e.*, “[i]f a state court decision rests on clearly stated ‘independent state grounds’ that are at least as protective of individual rights as the federal Constitution, the federal courts regard themselves as lacking even jurisdiction to review such decisions”); *Browde*, *supra* note 9, at 391 n.21 (discussing primacy and *Michigan v. Long*).

34. *Gomez*, 1997-NMSC-006, ¶ 21, 932 P.2d. at 7–8 (quoting *State v. Gutierrez*, 1993-NMSC-062, ¶ 16, 116 N.M. 431, 863 P.2d 1052).

parallel federal issues have been exhaustively discussed by the United States Supreme Court and commentators.³⁵

Gomez also announced a special “[i]nterstitial approach” to preservation in cases in which “a litigant asserts protection under a New Mexico Constitutional provision that has a parallel or analogous provision in the United States Constitution.”³⁶ Where “established precedent” interprets the state constitutional provision to provide greater protection than the federal analogue, “the claim may be preserved by (1) asserting the constitutional principle that provides the protection sought under the New Mexico Constitution, and (2) showing the factual basis needed for the trial court to rule on the issue.”³⁷ Where the state provision at issue “has not been interpreted differently than its federal analog, a party also must assert in the trial court that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart and provide reasons for interpreting the state provision differently from the federal provision.”³⁸ As to the latter category, *Gomez* declined to “require litigants to address in the trial court specified criteria for departing from federal interpretation of the federal counterpart” but added that “several state courts have outlined a number of criteria that trial counsel in New Mexico might profitably consult in framing state constitutional arguments.”³⁹

II. STATE CONSTITUTIONAL ANALYSIS IN CIVIL CASES AFTER *GOMEZ*

The interstitial mode of analysis, as set forth in *Gomez*, is not itself an “independent” approach to interpretation of the state constitution but rather an “approach for determining when and how to apply [the New Mexico Constitution] independently.”⁴⁰ In his 1998 article, Professor Browde applauded *Gomez* as “groundbreaking” and stated that “the thrust” of the decision “is to reinforce New Mexico’s commitment to an independent jurisprudence of state constitutional rights.”⁴¹ But he observed that “*Gomez* interstitialism” embodies a “presumption in favor of the established federal jurisprudence, unless one of three criteria is met,”

35. *Id.* ¶ 21, 932 P.2d. at 7 (quoting *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1357 (1982)).

36. *Id.* ¶ 22, 932 P.2d. at 8.

37. *Id.*

38. *Id.* ¶ 23, 932 P.2d. at 8 (footnote & original emphasis omitted).

39. *Id.* ¶ 23, 932 P.2d at 8 n.3 (citations omitted); see also *Thoughts About State Constitutional Interpretation*, *supra* note 11, at 846–47 (describing the “criteria” approach as “a variation on” the interstitial approach and explaining that courts applying this approach “presume[] that parallel state and federal constitutional provisions are identical in meaning” and “will entertain a departure from that presumption and consider an independent interpretation of the state provision only if certain specified criteria are satisfied”). It is interesting to note that *Gomez* explicitly rejected the primacy and criteria approaches and discussed the New Mexico Supreme Court’s prior rejection of the lock-step approach, but “did not explore, nor did it even give lip service to, the advantages and disadvantages of adopting the dual-sovereignty methodology.” Juste, *supra* note 9, at 361. Professor Browde has suggested that “[m]ost state courts . . . 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.” Browde, *supra* note 9, at 392 n.22.

40. Spitzer, *supra* note 25, at 1175 n.39 (citing *Gomez*, 1997-NMSC-006, ¶ 21, 932 P.2d at 7).

41. Browde, *supra* note 9, at 388.

that “may undermine the very independent jurisprudence which it so firmly endorses.”⁴² He cautioned that “*Gomez*’ suggestion that the value of uniformity may intercede to prevent ‘deviation’ from the federal analysis raises both theoretical and practical concerns.”⁴³ And he warned that “the precise form of New Mexico interstitialism should not be taken for granted” and that “[t]here may be situations that will call for modifications of the *Gomez* approach in new and different circumstances.”⁴⁴

Since *Gomez*, New Mexico courts have declined to rely on federal precedents in criminal cases with some frequency and ruled that the state constitutional provision at issue affords greater protection than the comparable federal provision. Several criminal cases hold that Article II, Section 10 of the New Mexico Constitution provides greater protections than the United States Supreme Court has held are available under the Fourth Amendment, and *habeas* and criminal cases have interpreted the due process clause of Article II, Section 18⁴⁵ more expansively than the United States Supreme Court has interpreted the federal due process clause.^{46 47} In contrast, post-*Gomez* decisions in civil cases involving claims under the state constitution show that concerns Professor Browde raised in 1998 have materialized, as these decisions reflect an apparent presumption that the New Mexico Constitution should reach no further than federal precedent would allow. The writings of Professor Browde and others suggest that this result is not necessarily inherent in “*Gomez* interstitialism” itself. That assessment cannot be made as an empirical matter because *Gomez* has not been applied consistently in civil cases—indeed, it has been completely ignored in some cases, without explanation. What is clear is that *Gomez* has not fostered either “consistent, predictable, and reasonable

42. Browde, *supra* note 9, at 387, 409. Professor Browde further explained that the *Developments* article relied on in *Gomez* “suggests that the federal law is only a starting point.” *Id.* at 393. “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 federal rule is presumptively correct and controlling, which could easily lead litigants and future courts to fall prey to a perverse federal supremacy fallacy” a danger that persists “[e]ven though the *Gomez* court expressly rejects a formalistic ‘criteria’ approach for diverting from federal precedent.” *Id.* at 393–94 (footnotes omitted).

43. Browde, *supra* note 9, at 387–88.

44. *Id.* at 388.

45. N.M. CONST. art. II, § 18 (“No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, 1973.”).

46. The federal due process clause provides, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV.

47. See Vanzi et al., *supra* note 1, at 303–04, 304 n.16 (making this point and citing criminal cases); see also *State v. Martinez*, 2021-NMSC-002, ¶¶ 31–37, 71, 84–88, 478 P.3d 880, 906–07 (holding that defendant preserved due process argument under Article II, Section 18; the federal due process reliability standard for eyewitness identifications “is both scientifically and jurisprudentially unsound and hence flawed under our interstitial review”; and that Article II, Section 18 “affords broader due process protection than the United States Constitution in the context of admission of eyewitness identification evidence”); but see *State v. Adame*, 2020-NMSC-015, ¶¶ 21–28, 476 P.3d 872, 878–80 (holding that defendants had not shown that a flawed federal analysis or distinctive state characteristics justified a departure from federal precedent and that defendants did not have a protected interest under Article II, Section 10 in financial information voluntarily shared with their banks), *reh’g denied*.

state court decision-making” or “the development of a sound body of state constitutional jurisprudence.”⁴⁸ The following decisions will illustrate.

In 1998, the New Mexico Supreme Court decided *New Mexico Right to Choose/NARAL v. Johnson*,⁴⁹ a challenge to a regulation that restricted funding for medically necessary abortions for Medicaid-eligible women.⁵⁰ Plaintiffs brought their claims under Article II, Section 4⁵¹ and Section 18 of the state constitution.⁵² They conceded that the Federal Constitution did not protect the right they asserted and argued that the state constitution affords greater protection than federal law, an argument the court said plaintiffs had preserved.⁵³ Applying the *Gomez* interstitial approach, the court found “distinctive state characteristics that render the federal equal protection analysis inapposite with respect to Plaintiffs’ claim of gender discrimination.”⁵⁴ *NARAL*’s holding recognizing state constitutional rights broader than those available under the Federal Constitution rests on a provision with no federal counterpart—the equal rights clause of Article II, Section 18—which guarantees that “[e]quality of rights under law shall not be denied on account of the sex of any person.”⁵⁵ The *NARAL* Court emphasized that its analysis was not based on “a mere textual difference between the federal and state constitutions” but was informed by historical evidence showing that “New Mexico’s Equal Rights Amendment [w]as the culmination of a series of state constitutional amendments that reflect an evolving concept of gender equality in this state.”⁵⁶ The analysis led the court to conclude that “the Equal Rights Amendment requires a searching judicial inquiry concerning state laws that employ gender-based classifications” that “must begin from the premise that such classifications are presumptively unconstitutional, and it is the State’s burden to rebut this presumption.”⁵⁷

Having concluded that the lack of a federal counterpart to New Mexico’s equal rights guarantee rendered federal equal protection analysis inapposite,⁵⁸ the *NARAL* Court made no attempt to determine whether the equal protection clause of Article II, Section 18 affords greater protection than the analogous federal provision under the United States Supreme Court’s holding in *Harris v. McRae*.⁵⁹ *NARAL*’s

48. Juste, *supra* note 9, at 362; *see also e.g.*, Browde, *supra* note 9, at 387; Williams, *supra* note 9, at 386.

49. 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841.

50. *Id.* ¶ 1, 975 P.2d at 844.

51. N.M. CONST. art. II, § 4 (“All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.”).

52. *New Mexico Right to Choose/NARAL*, 1999-NMSC-005, ¶¶ 2–3, 8, 975 P.2d at 844, 846.

53. *Id.* ¶ 25, 975 P.2d at 850.

54. *Id.* ¶ 28, 975 P.2d at 851.

55. *Id.* ¶ 29, 975 P.2d at 851.

56. *Id.* ¶¶ 31–35, 975 P.2d at 852–53.

57. *Id.* ¶ 36, 975 P.2d at 853.

58. *Id.* ¶ 29, 975 P.2d at 851.

59. 448 U.S. 297 (1980). Professor Browde observed that, because it relied on the New Mexico Equal Rights Amendment, for which there is no federal analogue, the court “could have fairly sidestepped the *Gomez* preservation rules entirely with a clear declaration that whenever there are no ‘parallel’ federal and state constitutional provisions involved, the special preservation rules of *Gomez* do not apply.” *Gomez Redux*, *supra* note 10, at 182.

holding that the funding restriction at issue must satisfy the requirements of strict scrutiny was a clear departure from federal precedent, which subjects gender-based classifications to intermediate scrutiny.⁶⁰ However, neither this ruling nor the court's conclusion that the requirements of that standard were not met⁶¹ constitute determinations that the New Mexico Constitution affords greater rights than federal courts have held are available under an analogous federal constitutional provision, as the court's holding rests on its interpretation of a state constitutional provision with no counterpart in the national constitution.

Following *NARAL*, New Mexico appellate courts have treated the interstitial approach in civil cases as a strong cue, if not quite a mandate, to follow federal precedent. In *ACLU of N.M. v. City of Albuquerque*, the court of appeals limited its due process and equal protection analysis to the Federal Constitution, “[d]espite the possibility of an independent state constitutional ground for finding [the municipal sex-offender ordinance at issue] unconstitutional,” citing only its agreement with the district court that the ACLU had failed to show one of the three reasons set forth in *Gomez* as justifying departure from federal precedent⁶² and the statement that “[t]he burden is on the party seeking relief under the state constitution to provide reasons for interpreting the state provisions differently from the federal provisions when there is no established precedent.”⁶³

The New Mexico Supreme Court cited the *ACLU* decision's formulation of the plaintiff's burden in *Morris v. Brandenburg*.⁶⁴ There, the court held that the state constitution does not afford a mentally competent, terminally ill patient a fundamental right “to have a willing physician, consistent with accepted medical practices, prescribe a safe medication that the patient may self-administer for the purpose of peacefully ending the patient's life”; that New Mexico's criminal statute prohibiting “aid in dying” is subject only to rational-basis review; and that this standard was satisfied.⁶⁵ The court rejected the argument that aid in dying is a fundamental liberty interest protected by the due process clause of Article II, Section 18 of the state constitution, concluding that the United States Supreme Court's decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997), holding that there is no federal fundamental constitutional right to aid in dying, controls and that the petitioners did not meet their burden to demonstrate grounds to depart from *Glucksberg*.⁶⁶ The *Morris* court also rejected the argument that the “inherent rights

60. *New Mexico Right to Choose/NARAL*, 1999-NMSC-005, ¶ 37, 975 P.2d at 853–54.

61. *Id.* ¶¶ 48–54, 975 P.2d at 856–57.

62. 2006-NMCA-078, ¶ 18, 139 N.M. 761, 137 P.3d 1215 (citing *Gomez*, 1997-NMSC-006, ¶ 19).

63. *Id.* ¶ 18, 137 P.3d at 1223–1224 (citing *State v. Druktenis*, 2004-NMCA-032, ¶ 38, 135 N.M. 223, 86 P.3d 1050). As to the ACLU's argument that the ordinance violated the search and seizure proscriptions of both the Fourth Amendment and Article II, Section 10, the court agreed that “broader protections may be available under the state constitution, and that the ACLU has preserved the issue” but stated that there was no need to reach the state constitution because the court held that the challenged provision violates the Fourth Amendment. *Id.* ¶¶ 38–45, 137 P.3d 1229–1231. The court rejected summarily the ACLU's arguments that the ordinance violates state and federal prohibitions on double jeopardy, *ex post facto* laws, and cruel and unusual punishment on the ground that those provisions did not apply because the statute is not punitive. *Id.* ¶¶ 46–48, 137 P.3d at 1231.

64. 2016-NMSC-027, ¶ 19, 376 P.3d 836.

65. *Id.* ¶¶ 1–2, 52–57, 376 P.3d at 838–39, 855–57.

66. *Id.* ¶¶ 20–38, 376 P.3d at 844–50.

clause” of Article II, Section 4 of the state constitution protects aid in dying.⁶⁷ The court reasoned:

No New Mexico case provides any meaningful support to Petitioners’ claim that Article II, Section 4 establishes a fundamental right “for a terminal patient to choose a peaceful, dignified death through aid in dying.” Although Article II, Section 4 should inform our understanding of New Mexico’s equal protection guarantee and may also ultimately be a source of greater due process protections than those provided under federal law the Inherent Rights Clause has never been interpreted to be the exclusive source for a fundamental or important constitutional right, and on its own has always been subject to reasonable regulation. Therefore, Petitioners have not established a fundamental or important right to aid in dying under Article II, Section 4.⁶⁸

Despite its acknowledgment that “New Mexico courts have invoked Article II, Section 4 as a prism through which we view due process and equal protection guarantees,”⁶⁹ the court made no attempt to analyze this provision as a distinctive characteristic justifying a departure from *Glucksberg* or otherwise as a basis for interpreting the due process provision of Article II, Section 18 to provide broader protections than the federal analogue, including a right to aid in dying.⁷⁰

Other New Mexico decisions applying the interstitial approach in civil cases have rejected arguments for reading the state constitution more expansively than the Federal Constitution. When a photographer argued that the free exercise provision of Article II, Section 11⁷¹ affords broader rights than the First Amendment’s free exercise clause,⁷² the court of appeals summarily rejected the argument and the supreme court affirmed with no discussion of interstitial analysis.⁷³ When a Spanish-

67. *Id.* ¶¶ 39–51, 376 P.3d at 850–55.

68. *Id.* ¶ 51, 376 P.3d at 855 (citations omitted).

69. *Id.* ¶ 46, 376 P.3d at 853.

70. See Paola V. Jaime Saenz, Morris v. Brandenburg: *Departing from Federal Precedent to Declare Physician Assisted Suicide A Fundamental Right Under New Mexico’s Constitution*, 48 N.M. L. REV. 233, 256–58 (2018).

71. N.M. CONST. art. II, § 11 (“Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship. No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.”).

72. U.S. CONST. amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”).

73. The court of appeals stated that “no interstitial analysis or approach has been identified to support a deviation from federal First Amendment precedent addressing this issue”; the proposed interpretation “is attenuated and contrary to this Court’s precedent”; and “this Court and the Tenth Circuit have both treated Article II, Section 11 as coextensive with its federal counterpart.” *Elane Photography, LLC v. Willock*, 2012-NMCA-086, ¶¶ 32–33, 284 P.3d 428, 440–41, *aff’d*, 2013-NMSC-040, 309 P.3d 53. In a separate opinion concurring in the decision of the court of appeals, Judge Wechsler explained that he

speaking motorist argued that the due process provision of the state constitution affords the right to receive notice of license revocation proceedings in Spanish, the New Mexico Supreme Court declined to address the argument on the ground that it had not been preserved as *Gomez* requires.⁷⁴ And when Albuquerque's Guild Cinema argued that "Article II, Section 17 of the New Mexico Constitution affords free-speech rights that are greater than those declared in the First Amendment of the United States Constitution," the court of appeals concluded that it saw "no reason to depart from traditional federal jurisprudence in this area" and would "proceed with a standard First Amendment analysis."⁷⁵ The court based this conclusion on its pronouncement that none of the three *Gomez* grounds for departure applied and its statement that the court had "previously held that 'the protection of the federal and state constitutions are the same, at least with respect to content-neutral restrictions.'"⁷⁶ The court chose to rely on federal law, despite its recognition of "the problems of line-drawing that this case represents" and the lack of clarity in the federal case law concerning government regulation of adult content under the First Amendment.⁷⁷

The New Mexico Supreme Court has decided at least three post-*Gomez* civil cases without even mentioning interstitial analysis. In *Breen v. Carlsbad Municipal Schools*,⁷⁸ the court addressed claims that certain sections of New Mexico's Worker's Compensation Act violate the equal protection clauses of the state and federal constitutions because they treat workers with physical impairments differently than workers with mental impairments.⁷⁹ The court did not mention interstitial analysis but simply stated that the court will "take guidance from the Equal Protection Clause of the United States Constitution and the federal courts' interpretation of it" and will "interpret the New Mexico Constitution's Equal Protection Clause independently when appropriate."⁸⁰ The court held that the statutes at issue were subject to intermediate scrutiny under the state constitution's equal

agreed with *Elane Photography* that Article II, Section 11 may provide broader protection than the First Amendment, but that determination of the scope of that provision "remains for another day" because *Elane Photography* did not preserve an argument based on the language of the first sentence of that provision. 2012-NMCA-086, ¶¶ 52–55, 284 P.3d at 445–47. The New Mexico Supreme Court did not reference any argument under the state constitution in describing the questions presented. 2013-NMSC-040, ¶¶ 1, 11, 309 P.3d at 58–60.

74. *Maso v. N.M. Tax. & Rev. Dep't*, 2004-NMSC-028, ¶¶ 5–8, 136 N.M. 161, ¶¶ 1–3, 96 P.3d 286, 288–89. The court stated that "this case perfectly illustrates the purposes behind the *Gomez* preservation requirement" because the argument that the state constitution offers greater protections than the federal constitution was made for the first time in that court and the petitioner cited data that were not part of the record and the state disputed both the data and the proffered interpretation. *Id.* ¶ 8, 96 P.3d at 289.

75. *City of Albuquerque v. Pangaea Cinema LLC*, 2012-NMCA-075, ¶¶ 19–20, 284 P.3d 1090, 1099, *rev'd sub nom.* *State v. Pangaea Cinema LLC*, 2013-NMSC-044, 310 P.3d 604.

76. *Id.* ¶ 20, 284 P.3d at 1099 (citing *State v. Ongley*, 1994-NMCA-073, ¶ 2, 118 N.M. 431, 432, 882 P.2d 22, 23).

77. *Id.* ¶ 43, 284 P.3d at 1105.

78. 2005-NMSC-028, 138 N.M. 331, 120 P.3d 413.

79. *Id.* ¶ 1, 120 P.3d at 415.

80. *Id.* ¶ 14, 120 P.3d at 418.

protection provision and that the statutes violate that state constitutional guarantee.⁸¹ Justice Minzner's dissent contains the only reference to *Gomez*.⁸²

In *Griego v. Oliver*,⁸³ the plaintiffs brought no claims under the Federal Constitution. They argued that “New Mexico’s laws denying same-gender couples the same right to a civil marriage as that enjoyed by opposite-gender couples violates the Equal Protection Clause of Article II, Section 18” and that “the right to marry is a fundamental right and the State’s interference with the exercise of this right also violates the New Mexico Constitution.”⁸⁴ Although both provisions have federal analogues, *Griego*—like *Breen*—made no mention of either the interstitial approach or *Gomez* and analyzed the issues without first determining whether the right asserted was protected under federal precedent interpreting the parallel provisions of the Federal Constitution.⁸⁵

Griego relied on *Breen*’s equal protection analysis in holding that “New Mexico may neither constitutionally deny same-gender couples the right to marry nor deprive them of the rights, protections, and responsibilities of marriage laws, unless the proponents of the legislation—the opponents of same-gender marriage—prove that the discrimination caused by the legislation is ‘substantially related to an important government interest.’”⁸⁶ The court concluded that “same-gender and opposite-gender couples who want to marry are similarly situated”⁸⁷ and that intermediate, rather than strict, scrutiny applied because the “classification at issue is more properly analyzed as differential treatment based upon a person’s sexual orientation” rather than sex or gender⁸⁸ and because “the LGBT community is a discrete group that has been subjected to a history of purposeful discrimination, and it has not had sufficient political strength to protect itself from such discrimination.”⁸⁹ Applying that standard, the court held that “[d]enying same-gender couples the right to marry and thus depriving them and their families of the rights, protections, and responsibilities of civil marriage violates the equality demanded by the Equal Protection Clause of the New Mexico Constitution.”⁹⁰ The court stated that it need not answer the question whether the right to marry is a fundamental right requiring strict scrutiny because application of intermediate scrutiny resolved the equal protection claim in favor of petitioners.⁹¹

81. *Id.* ¶¶ 28, 50, 120 P.3d at 422–23, 427.

82. *Id.* ¶ 55, 120 P.3d at 428 (Minzner, J., dissenting).

83. *Griego v. Oliver*, 2014-NMSC-003, 316 P.3d 865.

84. *Id.* ¶ 25, 316 P.3d at 877.

85. Nothing in *Gomez* suggests that interstitial analysis may be avoided altogether in cases involving provisions of the state constitution comparable to those of the Federal Constitution. And it is difficult to see the logic of such a rule. Given that the protections of the state constitution must extend at least as far as the Federal Constitution, federal precedent concerning analogous provisions of the Federal Constitution cannot be rendered irrelevant by the expedient of asserting claims only under the state constitution.

86. *Griego*, 2014-NMSC-003, ¶ 5, 316 P.3d at 871–72 (citing *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 13, 138 N.M. 331, 120 P.3d 413).

87. *Id.* ¶ 38, 316 P.3d at 879.

88. *Id.* ¶ 41, 316 P.3d at 880.

89. *Id.* ¶ 53, 316 P.3d at 884.

90. *Id.* ¶ 68, 316 P.3d at 889.

91. *Id.* ¶ 55, 316 P.3d at 885.

Griego was a step ahead of the United States Supreme Court.⁹² And nothing in the opinion even suggests that courts cannot analyze claims under state constitutional provisions with federal analogues absent compliance with special preservation rules and satisfaction of a burden to show grounds justifying consideration of state constitutional provisions independent of federal law.

Finally, the same year it decided *Morris*, the New Mexico Supreme Court also decided *Rodriguez v. Brand West Dairy*, which struck down a statutory exclusion of farm and ranch laborers from workers' compensation coverage as a violation of rights guaranteed by the state equal protection clause.⁹³ The court held that rational basis review applied because the Workers' Compensation Act "is general social and economic legislation, and the benefits that it confers do not rise to the level of important or fundamental rights" and the petitioners had not argued that farm or ranch laborers constitute a sensitive or suspect class.⁹⁴ The court stated that New Mexico's rational basis standard is similar to the heightened rational basis test federal courts apply in limited circumstances⁹⁵ and held that the exclusion at issue failed to meet that standard.⁹⁶

As in *Breen* and *Griego*, the court's opinion made no mention of the interstitial approach or *Gomez*. As in *Breen*, only the dissent raises the point. Among other disagreements with the majority opinion, Justice Nakamura's dissenting opinion questioned why New Mexico's equal protection guarantee should grant more discretion to invalidate socioeconomic legislation than does the parallel federal constitutional provision.⁹⁷ And it observed that New Mexico's interstitial approach to determining claims brought under state constitutional provisions with federal counterparts allows the court to depart from the federal precedent "only if the federal analysis is flawed or undeveloped or if there are characteristics distinctive to New Mexico that warrant a different constitutional analysis."⁹⁸ In Justice Nakamura's view, there is "nothing distinctive or structurally different about New Mexico such that our judiciary should have a greater power to invalidate socioeconomic legislation" and no flaw in the traditional form of rational basis review used by every federal and state court (including the New Mexico Supreme Court) when considering federal constitutional challenges.⁹⁹ Justice Nakamura concluded that "our interstitial approach does not permit the majority opinion's departure from traditional rational basis review in this case."¹⁰⁰

The takeaway is this: When applied in civil cases, *Gomez* results in appellate decisions that interpret state constitutional provisions with federal

92. See generally *Obergefell v. Hodges*, 576 U.S. 644 (2015).

93. 2016-NMSC-029, ¶¶ 1–2, 17, 378 P.3d 13, 17–18, 22.

94. *Id.* ¶ 24, 378 P.3d at 24.

95. *Id.* ¶¶ 25, 27, 378 P.3d at 24–25. The United States Supreme Court has applied heightened rational basis review where a class is singled out for harm in a suspicious way, or where a party is singled out under state law for a suspicious benefit. See generally, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

96. See *Rodriguez*, ¶¶ 31–44, 378 P.3d at 27–30.

97. See *id.* ¶ 90, 378 P.3d at 43–44.

98. *Id.* ¶ 90, 378 P.3d at 43 (citing *Gomez*, 1997-NMSC-006, ¶ 20, 932 P.2d 1).

99. *Id.*

100. *Id.* ¶ 90, 378 P.3d at 43–44.

analogues in accordance with federal precedent interpreting the comparable provision of the Federal Constitution. At the same time, our appellate courts regularly interpret state constitutional provisions with federal analogues in civil cases without even mentioning *Gomez* or the interstitial approach, with these latter decisions recognizing broader protections under the state constitution than are available under federal law.

III. IT IS TIME FOR NEW MEXICO TO FORMULATE A FRAMEWORK THAT FOSTERS DEVELOPMENT OF A PRINCIPLED AND INDEPENDENT JURISPRUDENCE OF STATE CONSTITUTIONAL RIGHTS

As New Mexico appellate courts have applied it in civil cases, “*Gomez* interstitialism” has hindered the development of a principled body of state constitutional jurisprudence in at least two ways. First, the approach itself significantly restricts analysis and interpretation of state constitutional provisions by mandating deference to federal precedent interpreting comparable provisions of the Federal Constitution unless the party asserting protection under the state constitution satisfies *Gomez* preservation and substantive burdens. Second, the inconsistent application of the approach in civil cases has made predictable and principled decision-making impossible. It is difficult to identify the benefit New Mexico gets from this state of affairs.

There is no doubt that efficiency is an important consideration in judicial decision-making (as is the preservation of issues in appellate decision-making), as *Gomez* noted in choosing to adopt the interstitial approach.¹⁰¹ Nor should this article be read to advocate for a method of state constitutional analysis that prohibits any consideration of well-reasoned federal decisions concerning rights common to the Federal and New Mexico Constitutions. But there are good, even compelling, reasons to replace the current mode of analysis (if it can even be called that) with a more independent approach to claims of protection under the state constitution.

A. Independent State Constitutional Analysis Is Not a New Idea, and Its Advocates Cross Ideological Lines

The idea that judges should approach the analysis of state constitutional guarantees from a position of independence is neither new nor tied to a particular ideology or judicial philosophy. Proponents of independent state constitutional analysis have been writing on the subject for at least fifty years, and they have run the ideological gamut from the liberal Justice William Brennan, Jr. to the conservative Judge Jeffrey Sutton of the United States Court of Appeals for the Sixth Circuit.¹⁰²

Justice Brennan will forever be associated with his role as a leader of the liberal majority of the United States Supreme Court that controlled the outcome of constitutional cases during the Warren Court and the early days of the Burger Court.

101. See *supra* notes 36–40.

102. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) [hereinafter *State Constitutions*]; SUTTON, *supra* note 12.

As that Court moved to the right, however, Brennan found himself more frequently in the minority and writing in dissent.¹⁰³ In 1985—five years before his retirement from the Supreme Court—Justice Brennan gave a speech in which he emphasized his embrace of what is commonly known today as the “living constitution” approach to constitutional decision-making, which regards the constitution as a document subject to “contemporary ratification” and reads it to promote human dignity in light of societal changes over time.¹⁰⁴ Judge Sutton is a self-described textualist and originalist.¹⁰⁵ He served as one of Justice Scalia’s first law clerks on the United States Supreme Court. During the confirmation hearing for his appointment to the Sixth Circuit, senators questioned him heavily about his leadership role in the Federalist Society.¹⁰⁶ While these judges have fundamentally conflicting views of how the Federal Constitution should be read, both are ardent advocates of independent interpretation of state constitutions, and for similar reasons.

Justice Brennan

Justice Brennan succinctly captured the essence of the issue in a 1977 article in the Harvard Law Review that became one of the most widely read law review articles ever published:

The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.¹⁰⁷

This point expresses something New Mexico courts take for granted outside the context of constitutional questions: that federal decisions can be, and often are, persuasive enough in their reasoning to justify following them, but “such decisions are not mechanically applicable to state law issues, and state court judges and the

103. Rory K. Little, *Reading Justice Brennan: Is There a “Right” to Dissent?*, 50 HASTINGS L. J. 683, 686 n.13 (1999) (“Fully 352 of Justice Brennan’s 471 substantive dissents, or 75%, were filed in the last half of his Supreme Court career (1974-1990).”) (internal citation omitted).

104. See William J. Brennan, Jr., Associate Justice, U.S. Supreme Ct., *The Constitution of the United States: Contemporary Ratification*, Speech at Georgetown University (Oct. 12, 1985), in ALPHEUS T. MASON & D. GRIER STEPHENSON, JR., *AMERICAN CONSTITUTIONAL LAW* 607 (1987) [hereinafter Brennan]; see also ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 36 (1990).

105. See, e.g., We the People, *Two Federal Judges on How They Interpret the Constitution*, National Constitution Center (Oct. 10, 2019), <https://constitutioncenter.org/news-debate/podcasts/two-federal-judges-on-how-they-interpret-the-constitution> [<https://perma.cc/9TYN-NK4T>] (Sutton: “I’m very much more of a textualist and originalist. And that, you know, that grows out a little bit of the influence of Scalia for sure.”).

106. *Confirmation Hearing on Federal Appointments, Comm. on the Judiciary*, 108th Cong. (2003), <https://www.congress.gov/108/chr/shrg89324/CHRG-108shrg89324.htm> [<https://perma.cc/HE77-8G92>].

107. *State Constitutions*, *supra* note 102, at 502.

members of the bar seriously err if they so treat them.”¹⁰⁸ Where federal precedent interpreting the national Bill of Rights is not “logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees,” that precedent should not impact interpretation of parallel state constitutional provisions any more than federal decisions have controlled New Mexico standards governing, for example, pleading or summary judgment.¹⁰⁹ This is only logical, especially given that the drafters of the United States Constitution drew upon state constitutional protections in crafting the federal Bill of Rights rather than the reverse, although newer state constitutions borrowed from the federal or other state constitutions.¹¹⁰ As Justice Brennan put it: “Every believer in our concept of federalism, and I am a devout believer, must salute this development in our state courts.”¹¹¹ In a speech he gave almost a decade later, Justice Brennan emphasized that the strength of our federal system is that it provides two sources to protect civil rights, and both the state and federal constitutions must nourish the country’s efforts to achieve “[j]ustice, equal and practical . . . for all.”¹¹²

Judge Sutton

In his book *51 IMPERFECT SOLUTIONS*, Judge Sutton expands on Justice Brennan’s arguments regarding the importance of independent state constitutional analysis. From Judge Sutton’s perspective, courts should consider granting relief under their state constitutions when federal courts have refused to do so, even when construing similar or identical language in the Federal Constitution,¹¹³ because (1)

108. *Id.*

109. *Id.*; see also *Madrid v. Village of Chama*, 2012-NMCA-071, ¶ 17, 283 P.3d 871 (rejecting federal “plausibility” standard for pleading despite analogous language in Rule 1-012 NMRA and Rule 12 of the Federal Rules of Civil Procedure); *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713, 242 P.3d 280 (“New Mexico courts, unlike federal courts, view summary judgment with disfavor, preferring a trial on the merits.”).

110. *State Constitutions*, *supra* note 102, at 501–02 (“Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions. And prior to the adoption of the fourteenth amendment, these state bills of rights, independently interpreted, were the primary restraints on state action since the federal Bill of Rights had been held inapplicable.”); Landau, *supra* note 15, at 65–66. True, the New Mexico Constitution postdates adoption of the federal Bill of Rights, but the fact that the federal government borrowed from other states first does not imbue federal judges with any better insight into the appropriate interpretation of constitutional language generally or for the people of New Mexico specifically. *Cf. Juste*, *supra* note 9, at 363; Kori Nau, *Honoring the New Mexico Constitution and Its History: New Mexico’s Unique Blaine Amendment and Its Application in Moses v. Ruskowski*, 51 N.M. L. REV. 255 at 267 (2021) (discussing the history of the New Mexico Constitution and that the inclusion of certain constitutional provisions was a requirement of statehood). Moreover, as Justice Brennan’s article makes clear, precedent interpreting the reach of the federal Bill of Rights at the time of New Mexico statehood looked fundamentally different than it did during the period of the Warren Court or today. See *State Constitutions*, *supra* note 102, at 490–91. Although New Mexico adopted its constitution after the Federal Constitution was adopted, New Mexico did not permanently tie itself to federal decisions interpreting those provisions decades later in ways that may or may not be consistent with the particular circumstances and needs of our state.

111. *State Constitutions*, *supra* note 102, at 502.

112. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 553 (1986).

113. See SUTTON, *supra* note 12, at 18–19. This is exactly where the New Mexico Supreme Court started in *Hodges*.

they can; (2) “[a]s a matter of reason, there often are sound grounds for interpreting the two sets of guarantees differently”; and (3) the development of state constitutional law may facilitate the development of federal constitutional law.¹¹⁴

Judge Sutton’s first rationale is obvious, in that federal constitutional law “contains no doctrine that requires state courts to defer, absolutely or by way of a strong presumption, to the United States Supreme Court’s interpretation of the Federal Constitution when construing analogous state constitutional provisions to provide individual rights in excess of those recognized under federal law.”¹¹⁵ Judge Sutton’s second rationale is practical and rests on the realities of our federal system of dual sovereigns. State courts have more freedom to innovate and reach different conclusions regarding the scope of state constitutional rights because “[i]nnovation by one state court necessarily comes with no risks for other States and fewer risks for that State.”¹¹⁶ In contrast, every time the United States Supreme Court announces a new right and remedy, its decision impacts “fifty states, one national government, and over 320 million people.”¹¹⁷ In what he calls a “federalism discount,” Judge Sutton concludes that the challenge of imposing a single constitutional solution on the entire country at once encourages the United States Supreme Court to take a dimmer view of expanding constitutional rights.¹¹⁸

State courts also are free to allow local conditions and traditions to affect their interpretation of a constitutional guarantee and the remedies imposed to implement it. Acknowledging the obvious—that different states are, in fact, different—Judge Sutton emphasizes that “[s]tate constitutional law respects and honors these differences between and among the States by allowing interpretations of the fifty state constitutions to account for these differences in culture, geography, and history.”¹¹⁹

Moreover, it is easier to correct mistakes in state constitutional rulings than it is with federal constitutional precedent. “Not only do state court decisions cover a narrower jurisdiction and affect fewer individuals, but the people at the state level also have other remedies at their disposal: an easier constitutional amendment process and, for richer or poorer, judicial elections.”¹²⁰ Invoking an oft-quoted statement from Justice Brandeis, Judge Sutton points out that state courts, like state legislatures, have more freedom to “try novel social and economic experiments without risk to the rest of the country.”¹²¹

114. *Id.* at 16–19.

115. *Constitutional Incorporation*, *supra* note 11, at 357; *see also id.* at 312 (“It is fundamental that the federal constitution, as interpreted by the U.S. Supreme Court, provides a uniform floor throughout the United States for the recognition of those individual rights that have been incorporated through Section One of the Fourteenth Amendment.”) (footnote omitted).

116. SUTTON, *supra* note 12, at 16–17.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 18.

121. *Id.* (quoting *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); *New State Ice Co. v. Liebman*, 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.”).

As a final point on his second rationale, Judge Sutton emphasizes that there is no reason to treat the United States Supreme Court as the only source of “right” answers to difficult constitutional questions:

When difficult areas of constitutional construction arise—equal protection, free speech, free exercise, or property rights—why should we assume the U.S. Supreme Court is somehow an Oracle of Truth? And why should we impose on the members of that Court the remarkable (and what must be exhausting) burden of treating it as the only supreme court in the country capable of offering an insightful solution to a difficult problem? . . . The more difficult the constitutional question, . . . the more indeterminate the answer may be. In these settings, it may be more appropriate to tolerate fifty-one imperfect solutions rather than impose one imperfect solution on the country as a whole, particularly when imperfection may be something we have to live within a given area.¹²²

Judge Sutton’s third rationale for independent state constitutional analysis—facilitating the development of federal constitutional law—rests on the premise that having state courts decide questions first provides the United States Supreme Court with the benefit of that reasoning before adopting a uniform rule for the country as a whole.¹²³ As with other areas of the law that have been developed primarily by state courts, federal courts benefit from the debate because “they can decide whether to federalize the [constitutional] issue *after* learning the strengths and weaknesses of the competing ways of addressing the problem.”¹²⁴ Such a system has the benefit of “let[ting] the state courts be the initial innovators of constitutional doctrines if and when they wish, and allow[ing] the U.S. Supreme Court to pick and choose from the emerging options.”¹²⁵ State constitutional protections were sound enough to provide the basis for the federal Bill of Rights; why reverse the sequence when it comes to interpreting those provisions?

B. Significant Questions of Federal Constitutional Law Have Been Determined by Changes in the Composition of the United States Supreme Court

Treating independent state constitutional interpretation as the exception to a general rule that favors adherence to federal precedent might perhaps be justifiable if (contrary to the conclusions of Justice Brennan and Judge Sutton) it were true that the United States Supreme Court uniformly (or almost uniformly) selects answers to tough constitutional questions that are demonstrably correct for the country and for New Mexico. If that were so, there would be no reason for our courts to have to redo that work. But constitutional analysis does not lend itself to demonstrably “right”

122. SUTTON, *supra* note 12, at 18–19.

123. *Id.* at 19–20 (“For too long, we have lived in a top-down constitutional world, in which the U.S. Supreme Court announces a ruling, and the state supreme courts move in lockstep in construing the counterpart guarantees of their own constitutions.”).

124. *Id.* at 20.

125. *Id.*

answers; brilliant jurists fundamentally disagree about what a given constitutional provision means, what right(s) it protects, and why. And history is littered with cases in which issues of sweeping constitutional significance were decided (or, at a minimum, significantly influenced) by changes in the composition of the United States Supreme Court. Sometimes, almost everyone agrees that the decision was better because of the changed composition of that Court. But the three examples addressed below underscore that resolution of constitutional questions often rests on the simple fact that five or more justices agreed to the result, rather than because the result is demonstrably “correct.”¹²⁶

School Desegregation

The historical record suggests that the death of Chief Justice Fred M. Vinson may have transformed *Brown v. Board of Education* from a decision reaffirming *Plessy v. Ferguson* and the “separate but equal” doctrine (or a closely divided decision overturning that doctrine) into the unanimous decision we know today.¹²⁷ During their conference on the case following oral argument in December 1952, the justices did not vote and set the case for reargument during the October 1953 term.¹²⁸ But Vinson died, President Eisenhower replaced him with Chief Justice Earl Warren, and the Court issued its unanimous decision in *Brown* following reargument.¹²⁹ There is no way to know how *Brown* would have been decided if an opinion had issued following the original argument. But the justices’ notes from that conference show a deeply divided court and an uncertain outcome, with only four justices firmly in favor of overturning *Plessy* and outlawing segregation (Douglas, Black, Burton, and Minton)¹³⁰ and two others (Vinson and Reed) indicating they were inclined to find segregation constitutional and reaffirm *Plessy*.¹³¹ The remaining three justices (Jackson, Frankfurter, and Clark) appeared to be undecided.¹³² Even the justices’ personal communications following the 1952 conference regarding *Brown* indicate that the outcome was uncertain.¹³³

At Frankfurter’s suggestion, five justices voted to have the case reargued during the October 1953 term, and federal constitutional history as we know it followed.¹³⁴ Had that not occurred, *Plessy* may well have remained controlling

126. See Nick Ehli & Robert Barnes, *Kagan Says Questions of Legitimacy Risky for Supreme Court*, THE WASHINGTON POST (July 21, 2022, 6:07 PM), <https://www.washingtonpost.com/politics/2022/07/21/elena-kagan-supreme-court-legitimacy> [https://perma.cc/XPP5-7V4F] (stating that the United States Supreme Court’s “conservative supermajority was cemented when Justice Brett M. Kavanaugh took the place of the more moderate retiring Justice Anthony M. Kennedy and when the liberal Justice Ruth Bader Ginsburg was replaced by Justice Amy Coney Barrett” and quoting Justice Kagan as stating that “[p]eople are rightly suspicious if one justice leaves the court or dies and another justice takes his or her place and all of sudden the law changes on you”).

127. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, 292–312 (2004).

128. See *id.* at 294, 301.

129. See *id.* at 292–302.

130. See *id.* at 298, 301.

131. *Id.* at 298.

132. *Id.*

133. See *id.* at 300–01.

134. *Id.* at 301.

federal law that New Mexico courts would be required to follow absent a demonstration that one of the three *Gomez* exceptions applied.

School Funding

In *San Antonio Independent School District v. Rodriguez*, a 5-4 majority of the United States Supreme Court held that there is no fundamental right to education and that wealth is not a “suspect class” under the Federal Constitution.¹³⁵ As a result, challenges to the Texas system of school funding failed, along with similar school-funding challenges under federal law nationwide. *Rodriguez* was filed in federal district court in 1968, in the twilight of the Warren Court. The presiding federal district judge, however, stayed the case for two years while Texas tried to pass legislative reforms to address school-funding disparities.¹³⁶ Those efforts failed and, following the stay, a three-judge panel of district judges held the Texas funding system to be unconstitutional.¹³⁷

By the time the case reached the United States Supreme Court, the Warren Court was gone. Between 1968 and the *Rodriguez* decision in 1973, President Nixon had appointed four new justices: Chief Justice Burger replaced Chief Justice Warren; Justice Blackmun replaced Justice Fortas, Justice Powell replaced Justice Black, and Justice Rehnquist replaced Justice Harlan.¹³⁸ The new five-member majority that found no fundamental right to education and declined to treat wealth as a suspect classification comprised all Nixon appointees plus Justice Stewart.¹³⁹ With a 5-4 majority, even one justice joining the dissent would have been outcome determinative.

Reproductive Rights/The Right to Privacy

It is difficult to believe that the demise of *Roe v. Wade*¹⁴⁰ is attributable to something other than changes in the composition of the United States Supreme Court. The Court’s 6-3 decision in *Dobbs v. Jackson Women’s Health Organization*¹⁴¹ traces directly back to the Senate’s refusal to consider President Barack Obama’s nomination of Merrick Garland to fill the vacancy created by Justice Scalia’s death in 2016, its subsequent confirmations of Justices Gorsuch and Kavanaugh, and its confirmation of Justice Barrett a week before the 2020 election and just over five weeks after Justice Ruth Bader Ginsburg’s death. On the issue of abortion rights—among the most hotly debated issues the United States Supreme Court has ever addressed—the Burger Court held over 50 years ago in *Roe* that the Federal Constitution protects the right to abortion and the Rehnquist Court reaffirmed that right 19 years later in *Planned Parenthood v. Casey*.¹⁴² Now, *Dobbs*

135. 411 U.S. 1, 25, 29, 37–38 (1973).

136. SUTTON, *supra* note 12, at 25.

137. *Id.*

138. *Id.*

139. *Id.*

140. 410 U.S. 113 (1973).

141. 142 S. Ct. 2228 (2022).

142. 410 U.S. 113 (1973).

says that there is no such right and that both prior cases were wrongly decided, with different justices supporting different holdings for different reasons.

Beyond the specific issue of abortion, *Dobbs* also raises significant questions regarding how far the United States Supreme Court will go in its retrenchment of previously recognized federal constitutional rights, questions justices explicitly raised in separate opinions in the case. The *Dobbs* majority insists that its decision to overturn *Roe* will not lead to overturning decisions recognizing other rights under the Federal Constitution,¹⁴³ such as the right to obtain contraceptives recognized in *Griswold v. Connecticut*¹⁴⁴ and *Eisenstadt v. Baird*,¹⁴⁵ the right of people of different races to marry recognized in *Loving v. Virginia*,¹⁴⁶ and the rights of same-sex intimacy and marriage recognized in *Lawrence v. Texas*¹⁴⁷ and *Obergefell v. Hodges*.¹⁴⁸ Justice Thomas urged in a separate concurrence, however, that “in future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*” because “any substantive due process decision is ‘demonstrably erroneous,’” and the Court has a duty to “correct the error” those precedents established.¹⁴⁹

In dissent, Justices Breyer, Sotomayor, and Kagan rejected outright the majority’s assurances that *Dobbs* is not the precursor to more sweeping changes to federal constitutional law:

[N]o one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See *Griswold v. Connecticut*, 381 U. S. 479 (1965); *Eisenstadt v. Baird*, 405 U. S. 438 (1972). In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See *Lawrence v. Texas*, 539 U. S. 558 (2003); *Obergefell v. Hodges*, 576 U. S. 644 (2015). They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does “cast[s] doubt on precedents that do not concern abortion.” *Ante*, at 66; *cf. ante*, at 3 (THOMAS, J., concurring) (advocating the overruling of *Griswold*, *Lawrence*, and *Obergefell*). But how could that be? The lone rationale for what the majority does today is that the right

143. *Dobbs*, 142 S. Ct. at 2258, 2261 (arguing that, while precedent governing the right to autonomy and to define one’s “concept of existence” have no claim to being deeply rooted in history, abortion is different because it involves destroying “potential life”).

144. 381 U.S. 479 (1965).

145. 405 U. S. 438 (1972).

146. 388 U.S. 1 (1967).

147. 539 U. S. 558 (2003).

148. 576 U. S. 644 (2015).

149. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring in judgment); *Gamble v. United States*, 139 S. Ct. 1960, 1984–1985 (2019) (Thomas, J., concurring)).

to elect an abortion is not “deeply rooted in history”: Not until *Roe*, the majority argues, did people think abortion fell within the Constitution’s guarantee of liberty. *Ante*, at 32. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, “there was no support in American law for a constitutional right to obtain [contraceptives].” *Ante*, at 15. *So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority’s opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.*¹⁵⁰

Justice Brennan was a master of “counting to five” because majorities control United States Supreme Court decision-making.¹⁵¹ But should five votes on that Court constrain independent analysis of the meaning and scope of the New Mexico Constitution?¹⁵² The retrenchment of federal constitutional rights evidenced in *Dobbs*¹⁵³ raises a further question: Is there any basis for New Mexico courts to presume that federal precedent concerning constitutional rights is consistent with New Mexico law, history, and culture such that it makes sense to leave *Gomez* interstitialism in place—in the form originally articulated, as subsequently applied in civil cases, or at all?

C. Independent Analysis of State Constitutional Rights: If Not Now, When?

The NMCRA’s cause of action “to establish liability and recover actual damages and equitable or injunctive relief” for the “deprivation of any rights, privileges or immunities pursuant to the bill of rights of the constitution of New Mexico”¹⁵⁴ opens the door to litigation that will require our courts to decide claims arising under the state bill of rights. Of the 24 sections of the state bill of rights, seven have no parallel in the Federal Constitution, and some have not yet been interpreted by our courts at all. That includes Article II, Section 5’s guarantee that “[t]he rights, privileges and immunities, civil, political and religious guaranteed to the people of

150. *Id.* at 2319 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting) (emphasis added).

151. Rory K. Little, *Reading Justice Brennan: Is There a “Right” to Dissent?*, 50 HASTINGS L.J. 683, 685 (1999) (citing Justice David Souter, *Eulogy at the Funeral Mass of Justice Brennan*, 7 B.U. PUB. INT. L.J. 1, 2 (1998)) (“While I was with him, he might tell me some things that were true, like how to count to five.”); Kathleen M. Sullivan, *A Thousand Opinions, One Voice*, N.Y. TIMES (July 25, 1997), <https://www.nytimes.com/1997/07/25/opinion/a-thousand-opinions-one-voice.html> [<https://perma.cc/EY6K-DEME>]; Fred Woocher, *Tribute to Justice Brennan*, 31 LOY. L.A. L. REV. 749, 751 (1998).

152. It is certainly true, of course, that the examples discussed above involve circumstances that could have occurred (and undoubtedly have occurred in one form or another) in any appellate court. The point is simply that New Mexico courts should not be presumptively bound by decisions of a *different* court in interpreting the meaning and scope of the state constitution.

153. *Dobbs* is but one example this year; *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022), is another.

154. N.M. STAT. ANN. § 41-4A-3(B) (1978).

New Mexico by the Treaty of Guadalupe Hidalgo shall be preserved inviolate,”¹⁵⁵ a provision that is obviously tied to the history and people of this state. There is thus an urgent need to develop a principled mode of independent analysis that focuses “on the meaning of the state constitution itself, rather than on comparing it with, or relating it to, the Federal Constitution”¹⁵⁶ and that actually does promote “the development of a sound body of state constitutional jurisprudence” as well as “consistent, predictable, and reasonable state court decision-making.”¹⁵⁷ The enactment of the NMCRA makes this need a matter of reality, regardless of questions one might pose in the abstract about the value or legitimacy of independent state constitutional jurisprudence.

The idea that New Mexico should have a body of state constitutional jurisprudence independent of federal constitutional law pre-dates *Gomez*. As the New Mexico Supreme Court explained in a pre-*Gomez* decision concerning the state constitution’s double-jeopardy provision, “when this Court derives an interpretation of New Mexico law from a federal opinion, our decision remains the law of New Mexico even if federal doctrine should later change.”¹⁵⁸ Furthermore, the fact that the New Mexico Supreme Court has given a provision of the state constitution “the same construction and interpretation” as its counterpart in the Federal Constitution “does not mean” that the court “must embrace United States Supreme Court precedent when it changes a standard formerly adopted by this Court.”¹⁵⁹ To the contrary, the New Mexico Supreme Court “will ‘undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees.’”¹⁶⁰

The admonition of Justice Bosson in addressing the issue of preservation requirements under *Gomez* seems to us fully applicable to the issue of the constraints *Gomez* imposes on independent analysis of the state constitution:

Perhaps it is time for a new look. After all, *Gomez* is not inscribed in granite; it is not part of the state Constitution. It is merely a

155. N.M. CONST. art. II, § 5. This reference to the 1848 treaty that ended the Mexican-American War has no federal analogue. In terms of potential individual rights under the Treaty of Guadalupe Hidalgo, perhaps none is more conspicuous (and controversial) than the provision protecting land grant property rights that were conferred by previous sovereigns prior to 1848. Article VIII of the Treaty of Guadalupe Hidalgo provides: “property of every kind, now belonging to Mexicans . . . shall be inviolably respected.” Treaty of Guadalupe Hidalgo, Mex.-U.S., art. VIII, Feb. 2, 1848, 9 Stat. 922. But the Treaty did not provide a clear means by which the validity of Spanish and Mexican land grant claims were to be adjudicated in the American legal system. See MALCOLM EBRIGHT, LAND GRANTS & LAWSUITS IN NORTHERN NEW MEXICO 27–28 (2008) (explaining the history of *ad hoc* forms of land grant adjudication that took place following the ratification of the Treaty of Guadalupe Hidalgo). This has left unanswered questions concerning which property claims are within the Treaty’s protection and who has standing to pursue a claim under Section 8.

156. Robert F. Williams & Mark E. Van Der Weide, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1050 (1997) (making this point in criticizing an approach to state constitutional analysis similar to the approach adopted in *Gomez*) (footnote omitted).

157. Juste, *supra* note 9, at 362.

158. State v. Breit, 1996-NMSC-067, ¶ 27, 122 N.M. 655, 930 P.2d 792.

159. *Id.* ¶ 25, 930 P.2d at 800–01.

160. *Id.* (quoting State v. Gutierrez, 1993-NMSC-062, ¶ 32, 116 N.M. 431, 863 P.2d 1052).

means to an end. In its text, *Gomez* overturned a prior iteration of preservation under the state Constitution on which the Court of Appeals had correctly relied when it rejected the search and seizure argument for lack of preservation. *See State v. Sutton*, 112 N.M. 449, 454, 816 P.2d 518, 523 (Ct. App. 1991). Just as by 1997, *Sutton* no longer served the purposes of justice and an independent development of our state Constitution, so too we should probably take a fresh look every decade or so at whether the preservation requirements of *Gomez* continue to serve us as well.

...

We cannot allow the development of our state Constitution to be retarded by overly burdensome, hyper-technical, and impractical preservation requirements. As New Mexico's highest court, it is our duty and privilege to interpret and develop the New Mexico Constitution. In a government of dual sovereigns, it is imperative that our state Constitution develop to its full potential and protect the rights of our citizens where we deem federal law lacking. *Cf. Granville*, 2006-NMCA-098, ¶ 19 ("New Mexico courts independently analyze state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees." (Internal quotation marks and citation omitted.)). A heightened preservation requirement for the state Constitution would impede us from addressing legitimate state constitutional concerns.¹⁶¹

CONCLUSION

Gomez has hamstrung, rather than promoted, the development of a sound and predictable body of state constitutional jurisprudence in the civil context. With the enactment of the NMCRA comes the imperative for courts to develop a truly independent method of state constitutional analysis; to apply that method in a principled¹⁶² and consistent manner; and to provide clarity and guidance to litigants and lower courts.

The process of developing a modified or otherwise different mode of principled independent analysis and interpretation of the state constitution likely will take years, and may not yield a "grand unified theory"¹⁶³ applicable to every state constitutional provision with a federal analogue or in every case. More likely is disagreement among state appellate judges about the "correct" approach to state

161. *State v. Garcia*, 2009-NMSC-046, ¶¶ 56–57, 147 N.M. 134, 217 P.3d 1032 (Bosson, J., specially concurring).

162. *See Boldt & Friedman*, *supra* note 11, at 358–59 ("State supreme courts need not surrender agency by systematically deferring to the interpretation of a prior federal adjudicator in order to safeguard the state's interests in democratic governance. Exercised with prudence and with pragmatic concern for the interests of corresponding state institutional actors, the practice of state constitutional judicial review can be accomplished responsibly, even when it results in the interpretation of a state constitution that departs meaningfully from an established interpretation of federal constitutional law.").

163. *Thoughts About State Constitutional Interpretation*, *supra* note 11, at 838 (expressing the author's view that "no grand unified theory [of state constitutional] interpretation exists that is completely satisfactory"). *See also Gardner*, *supra* note 12, at 812 (arguing that "the poverty of modern state constitutional discourse" is explained by "the failure of state constitutionalism itself to provide a workable model for the contemporary practice of constitutional law and discourse on the state level").

constitutional questions, as there has been among federal judges considering questions of federal constitutional law throughout the country's history.¹⁶⁴ But, as one advocate for the development of state constitutional jurisprudence concludes, "the reward is a state legal system that takes its own constitution seriously, that is unlikely to revert anytime soon, that is there when you need it, and that will *always* be in a position to contribute to the development of American constitutional law."¹⁶⁵

164. Of course, our appellate judges have disagreed about the correct approach to other questions of state law. For a discussion of the impact on the development New Mexico law attributed to the "respectful differing views and philosophies" of two New Mexico appellate judges, see Michael B. Browde & Mario E. Occhialino, *A Model of Collegial Judicial Decision-Making: The Ransom-Montgomery Years on the New Mexico Supreme Court*, 52 N.M. L. REV. 427, 427 (2022).

165. SUTTON, *supra* note 12, at 202.